Court deals blow to US unions

A recent US Supreme Court decision may have significant implications for American workers' right to take strike action, as *Jason Moyer-Lee* reports.

The Supreme Court decision does not bode well for American trade unions

In the early morning hours of 11 August 2017, a group of drivers in the US state of Washington went on strike. The action followed the breakdown of negotiations with the employer over a new collective bargaining agreement.

The workers, who delivered concrete to customers in mixing trucks with revolving drums, returned their trucks to the company and walked off the job.

According to the employer, Glacier Northwest, a rep from the workers' Teamsters union told the workers to leave the trucks running and that "[w]e will not be dumping them or rinsing them out". The rep allegedly said that this was somebody else's problem and that "[c]onsequences are [c]onsequences".

Whether or not the Teamsters rep actually said this, the statement is undeniably true; the very essence of a strike is the withdrawal of labour.

If the company did not want to have to deal with the consequences of labour being withdrawn, it should have worked more proactively with the union to avoid the need for a strike.

But the company let the strike happen, was not prepared to deal with the consequences, had to throw out the concrete (although the trucks were not damaged), and responded by issuing disciplinary letters to drivers and suing the union for damages.

Right wing Court

The matter eventually reached the right-wing US Supreme Court which, last month – by eight votes to one – sided with the employer.

The employer's claims had been previously dismissed by a state court on the basis that it was arguable that the union's action was protected by the *National Labor Relations Act* (NLRA), federal legislation that protects union activity. But the conservative-dominated Supreme Court (see box on page 17) ruled that the NLRA "does not arguably protect" the union's conduct.

The one dissenting Supreme Court justice, liberal justice Ketanji Brown Jackson, said the Court ruling "risks erosion of the right to strike". The matter now goes back to the state court.

Mandate

The NLRA was signed into law in 1935 by president Franklin Delano Roosevelt (FDR). It was three years after the country had elected him – during the height of the Great Depression – with a mandate to take robust action to improve living standards.

"A better relationship between labor and management is the high purpose of this Act," FDR said upon signing it.

"By assuring the employees the right of collective bargaining, it fosters the development of the employment contract on a sound and equitable basis." And more equal relations between employers and workers would aid the entire depressed economy.

As the Act itself stated, the inequality of bargaining power between employees and employers "tends to aggravate recurrent business depressions, by depressing

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wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries".

Crucial to the ability of workers to leverage their power in order to achieve equitable collective bargaining arrangements, was protecting their right to strike.

Indeed, Section 7 of the Act protects employees' right to unionise, choose their own representatives, bargain collectively, and engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection". Striking is a "concerted activity".

In addition to setting out a uniform set of rights throughout the US, the law also created the National Labor Relations Board (NLRB) to administer the law.

The Board consisted of five members – including a chairman – to be appointed by the president and confirmed by the Senate. And it would sit as a de facto high court of labour, ruling on disputes between workers and unions and employers. The Board also was to have a general counsel – or chief prosecutor – who would look into complaints of labour law violations and then argue these cases before the Board.

One of the ideas behind creating the Board was that not only the letter of the law, but also its interpretation, would be the same across the country.

Limitations

To be sure, the coverage of the NLRA had its limitations. For one, in order to gain the support of racist lawmakers from the South, the Act excluded the largely Black sectors of agriculture and domestic work. Further, under the Constitution, the federal government can only legislate in certain areas, otherwise, it is up to the states to make their own laws.

In the case of the NLRA, Congress relied on the "commerce clause", which allows it to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes".

So, the Act only applied to the private sector and, within that, still excluded businesses and workers who were not involved in interstate or international commerce. Indeed, it is a supreme irony that the most important trade union rights law in the country has the express purpose of eliminating "the causes of certain substantial obstructions to the free flow of commerce".

And, after amendments to the Act several years later, it did not cover all workers but only those narrowly defined as "employees". This has left today's "gig economy" workers, such as Uber drivers, to fight for collective bargaining and union rights under sometimes unfriendly, or non-existent, state laws.

Yet despite all of these limitations, employers still fought the Act hard, even bringing a case before the Supreme Court – only a couple years after FDR signed the NLRA into law – arguing the Act was unconstitutional and should be struck down.

Obstructing policy aims

Then, like now, a right-wing Supreme Court was actively obstructing some of the president's more progressive policy aims. The Court had already struck down FDR's previous attempt at national labour law and was proving more generally to be the single biggest obstacle to his New Deal of progressive economic reforms, leading him to denounce the Court's "nine old men" and proposing to expand the court by adding younger, more liberal justices to dilute the conservative votes.

"We have," he appealed to the public, "reached the point as a Nation where we

■ THE US SUPREME COURT

The current US Supreme Court consists of six justices appointed by Republican presidents (three by Trump alone) and three appointed by Democratic presidents.

In recent years, the Court has used this new right-wing super-majority to overhaul American law and fundamental rights as we know them.

In the most notorious case of the super-majority's short tenure, they overturned the constitutional right to abortion (see *Labour Research*, September 2022, pages 9-11), thereby leaving its regulation to the states (many of which have since banned it).

The Court was less interested in states' rights when, in a separate case, it struck down New York's attempt to regulate guns, making it much more difficult for states to put reasonable limits on gun ownership.

The Court has further struck down a number of Covid regulations and made it much more difficult for the federal government to protect the environment.

And as the Democrat-appointed justices put it in one dissenting opinion, "no one should be confident that this majority is done with its work".

must take action to save the Constitution from the Court and the Court from itself". Surprisingly, however, the Court changed its tune in 1937 and upheld the NLRA as constitutional.

As the Board's first chairman was to later write: "It gives one a good feeling to be held legitimate by the United States Supreme Court, to know, after all, that one has not been presiding over a kangaroo court."

Although the NLRA survived the challenge to its legitimacy, its interpretation was still plagued by doubts for another 22 years. The Constitution makes federal law supreme over state law, but it was not always clear to what extent state laws could still regulate labour relations, even indirectly.

"Pre-emption occurs when federal law supersedes or displaces an otherwise valid state law," explains Mark Gaston Pearce, a former NLRB chairman and now executive director of the Workers' Rights Institute at Georgetown University Law Center in Washington DC.

"The issue of pre-emption is not unique to labour law – it often arises in the voting rights context, food and drug regulation, medical devices, and more."

Federal v state laws

Indeed, the issue of when the federal government can legislate on a particular matter, and to what extent that legislation can pre-empt state laws, has been at the heart of American politics and society since the country's founding.

Slaveholders and segregationists, for example, often deployed constitutional arguments to defend their nefarious interests. But in the context of labour relations, the Supreme Court largely settled the matter in a 1959 case known as *Garmon*.

The case held that – as Gaston Pearce puts it – in the absence of "a compelling state interest, the NLRA preempts state power to regulate activities it protects, prohibits, or arguably protects or prohibits". In other words, if an employer sues a union in state court over something connected to a strike, as long as the union can argue that the issue is covered by the NLRA, the matter gets booted out of state court and goes to the National Labor Relations Board.

So, what does this all mean for the Teamsters drivers and their concrete trucks? Well, the issue turns on whether or not the workers' actions – in returning the trucks with concrete still in them – are arguably protected by the NLRA.

Intentional damage

The employer sued them under state law and in state court, arguing that they had timed their strike to intentionally damage employer property; that this was not arguably protected by the NLRA; and that therefore the court should proceed to hear the case.

Indeed, the employer doesn't like its chances making this sort of argument before the Board.

As Glacier Northwest company lawyer Noel Fransisco – previously president Trump's Solicitor General – put it in his oral arguments: "You know, frankly, we'd prefer not to be before an administrative agency where the agency is the judge, jury, and executioner. We prefer to be in a court system where we have a--a--a neutral judge and the potential for a jury."

The matter went all the way to Washington state's Supreme Court, which unanimously found for the union, holding it could be argued that the union's actions were protected by the NLRA, and it therefore dismissed the case.

The employer appealed that decision to the US Supreme Court and asked that Court to send the issue back to the state courts where they can duke it out, and – if the employer wins – the company could get a hefty payout.

Although courts have interpreted the NLRA so as to require employees to take reasonable precautions to avoid imminent damage to employer property, e.g. turn the stove off before you walk out of the kitchen, this interpretation has not gone so far as to make unions liable for perishable products going bad.

In fact, in past cases, the Board held that strikes by milk truck drivers and cheese factory workers were protected even though the dairy products might go bad after the workers walked out. But the Supreme Court dismissed these comparisons as "swinging at a straw man".

Different

This case was different, the Court claimed, because the workers showed up to work "pretending" they were going to deliver the concrete, "prompted the creation" of the concrete, and then left the trucks in danger when they walked off. In other words, they had the audacity to start work and then stop it.

But as Justice Jackson, the Court's sole dissenter in the case, pointed out: "Workers are not indentured servants, bound to continue laboring until any planned work stoppage would be as painless as possible for their master."

And, as anyone who knows what a strike is understands, the entire point is to exert economic pressure on the employer. If the strike did not cause the employer to lose money, it would not have become the single most effective tool in the history of labour.

Complexities

Although what's at issue is the basic right to strike, this case is riddled with technical complexities. And we still don't know what will ultimately happen in the dispute over the lost concrete or even who will decide the matter.

The entire case before the Supreme Court was argued on the facts as alleged by the company, rather than on the reality of what actually happened.

When the matter goes back to the state courts, they may decide that the union actually did try to protect employer property, put the case on hold, and let the NLRB deal with it.

Because of all this complexity, union opinion has been divided on the decision's meaning. Teamsters president Sean O'Brien dismissed the judgment of the "political hacks at the Supreme Court" as "throwing out long-standing precedent and legislating from the bench".

Meanwhile, Mary Kay Henry, the president of the SEIU – another large American union – said: "We are pleased that today's decision ... doesn't change labor law and leaves the right to strike intact."

More anti-union lawsuits?

With today's reactionary Supreme Court, it's easy to see anything short of a complete gutting of the right to strike as a victory. But Gaston Pearce, the former NLRB chairman, worries that the decision will lead to more state court lawsuits against unions in retaliation for strikes.

"The threat of such litigation is likely to coercively inhibit activity protected by the law," he says. "This will particularly inhibit the conduct of smaller unions with limited resources."

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