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IN THE

Supreme Court of the United States

October Term, 1951

No. 745

CHARLES SAWYER, Secretary of Commerce,

v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY, ET. AL.

ADDITIONAL BRIEF FOR RESPONDENT E. J. LAVINO AND COMPANY.

RANDOLPH W. CHILDS,
EDGAR S. MCKAIG,
JAMES CRAIG PEACOCK,
Counsel for Respondent Lavino.

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OPINION BELOW

The opinion of the District Court is reported at 80 W. L. R. 411.

STATEMENT

Respondent Lavino joins unreservedly in the briefs and arguments presented or to be presented by all the companies which are parties in this Court's Docket Nos. 744 and 745. If the position there advanced as to the invalidity of Executive Order 10340 prevails, then, by the same token, the preliminary injunction granted Lavino will in due course be affirmed.

But Lavino does not make steel. Nor was it a party to the long drawn out and thrice mentioned controversy on which the directives of Executive Order 10340 were expressly premised.

In Lavino's motion for a preliminary injunction the additional ground was assigned that, wholly irrespective of the validity or invalidity of the Executive Order generally, it is not by its terms applicable to Lavino, and, if construed as so applicable, it is invalid, at least to that extent. (R. 190.) This point was expressly noted by the District Court in its opinion (R. 66, 67), but that Court had no occasion to pass on it in view of its disposition of all seven cases on the common ground of the over-all invalidity of the Executive Order.

This brief is confined to that very limited aspect of Docket No. 745 which is the case in which petitioner Sawyer seeks reversal of all the preliminary injunctions. He has, however, failed to print for the convenience of this Court any of the record in the Lavino case, and because of the shortness of time this petitioner has had to assume that burden and expense.

We realize that the initial burden of passing on the additional ground in the Lavino case should not be imposed on this Court (although the power of the President to seize a plant which is outside the industry concerned and where there has been no labor controversy presents a further constitutional question comparable in importance with the one that has been accepted for review). But neither should petitioner Sawyer, even if he should prevail on the question that is here, be entitled to absolute and unrestrained freedom of action to the irreparable injury of Lavino until the latter has at least been accorded a hearing on what is to it an equally important branch of its case. Especially so when he has even failed to print the relevant portions of the record. Lavino is not within the scope of the Executive Order. And even if Lavino could be construed as within its terms the Order is to that extent invalid.

For the information of this Court a memorandum summarizing our position on those points is attached hereto as an Appendix at page 4, *infra*.

If the over-all question of common application to all seven cases had not existed, the District Court would have had to pass on this particular issue as to Lavino not being within the scope of the President's Order. If petitioner Sawyer should now prevail, it will be as if that great issue had never existed. But unless petitioner Sawyer is prevented from making any changes in respondent Lavino's terms and conditions of employment pending decision on the question of the Order's inapplicability to it, Lavino will be denied the protective maintenance of the status quo which might reasonably be assumed would have been granted to it at the time of its application to the District Court, had its own particular case not been overshadowed by the over-all question of common application to all the respondents.

It is submitted therefore that, if petitioner Sawyer should prevail on the over-all question, the Lavino case should be remanded to the appropriate lower court for decision of its own preliminary injunction question on its merits, but that pending such decision, the same restriction against interim action by petitioner Sawyer which was embodied in this Court's stay orders of May 3 should be continued in effect as to respondent Lavino.

Respectfully,

RANDOLPH W. CHILDS,
EDGAR S. MCKAIG,
JAMES CRAIG PEACOCK,
Counsel for Respondent Lavino.

APPENDIX

MEMORANDUM IN SUPPORT OF ADDITIONAL GROUND FOR PRELIMINARY INJUNCTION IN THE LAVINO CASE.

This memorandum is substantially the same as the brief and argument which would be presented to this Court if it were passing on the additional issue in this case, and which will be presented to the lower Court if that question should be remanded to it. It is made available at this time and in this way for the information of this Court in connection with Lavino's contingent request for temporary continuance of the present restriction on petitioner Sawyer's authority to alter terms and conditions of employment.

The Facts

Lavino is not a producer of steel

E. J. Lavino and Company ("Lavino"), a Delaware corporation, is engaged in the sale of manganese and chrome ores, ferro manganese and refractories. It also manufactures basic refractories and ferro manganese. It does not manufacture or fabricate steel or steel products (Affidavits of Andrew Leith and George B. Gold, R. 192, 200).

Three of Lavino's plants are involved in the seizure. One is a basic refractories plant at Plymouth Meeting, Pennsylvania. It produces refractories, which are used for lining furnaces, and it has many customers outside the steel industry. For example, basic refractories are sold not only to steel prducers but to producers of power, cement, paper, nickel and copper. (Leith, Gold, R. 192, 201). It has two other plants, one at Sheridan, Pennsylvania, and one at Lynchburg, Virginia, which produce ferro manganese. The products of all of Lavino's plants are standard products and are not made to meet the specifications of particular customers. (Leith, Gold, R. 192, 201).

The principal competitors of Lavino, outside of two steel producers in the case of ferro manganese, are not in the steel industry, and their hourly workers are not represented by the Steelworkers. (Gold, R. 201).

The job titles or classifications of Lavino's hourly workers are different from the job classifications of the steel producers. Attached to Mr. Gold's affidavit is a tabulation with respect to each of Lavino's plants at Plymouth Meeting, Pennsylvania, Sheridan, Pennsylvania, and Lynchburg, Virginia. The tabulation shows: (a) job titles, (b) the wage rate for each job, and (c) the number of employees in each job. The content of the jobs shown in the schedule attached to Mr. Gold's affidavit is not the same as the content of jobs in the steel industry, except as to a limited number of jobs in the blast furnace operations of Lavino conducted at its plants at Sheridan, Pennsylvania, and Lynchburg, Virginia, and as to the latter jobs there are variations in the job content. (Gold, R. 203-206).

The terms of any new collective bargaining agreements between Lavino and the Steelworkers must take into consideration conditions in Lavino's industry, including wage rates and other terms of employment prevailing in the plants of its competitors. For example, the wage rates and other terms of employment in its basic refractories plant at Plymouth Meeting cannot be founded on the terms of any collective agreement bargaining which may be reached in the basic steel industry. (Gold, R. 201-202).

Lavino is not a party to the labor controversy between the steel producers and the Steelworkers.

Historically Lavino has never been called upon to participate in collective bargaining with the Steelworkers in conjunction with the steel producers. Its bargaining has been conducted on a single plant basis. Its contract with the Steelworkers expires not December 31st, as in the case of steel producers, but January 31st. (Affidavit of Andrew Leith, R. 193-194).

It was not until March 21, 1952, (the day following the filing of the report of the Wage Stabilization Board, with its accompanying recommendations) that Philip Murray sent Lavino a telegram stating that he was ready to engage in collective bargaining negotiations with Lavino, and that the chairman of his bargaining committee would get in touch with Lavino. He never did so. (Leith, R. 194).

As of April 4, 1952, the local union in Lavino's Plymouth Meeting plant posted a notice as follows:

> "Contract negotiations between E. J. Lavino and Company and Local Union #3216 will commence Tuesday or Wednesday of next week. In the event a strike takes place in the Basic Steel Industry on April 8th, employees of E. J. Lavino and Company will not be involved." (Leith, R. 195.)

On April 7, 1952, however, Lavino received from Philip Murray three identical letters, which he had written on April 4th, stating that a strike would be called at Lavino's three plants at 12 o'clock April 8th. Lavino has never refused to participate in collective bargaining negotiations with the Steelworkers. (Leith, R. 195.)

As stated in the verified complaint and the affidavit of Andrew Leith, Lavino was not a party to the controversy which was referred by the President of the United States to the Wage Stabilization Board on December 22, 1951. (R. 193.)[1] No collective bargaining negotiations have taken

[1] It was not until April 23, 1952, on the eve of the oral argument before Judge David A. Pine on Lavino's application for a preliminary injunction, that Lavino's counsel was advised by an attorney in the Department of Justice that on December 29, 1951, the President wrote a letter to the Chairman of the Wage Stabilization Board giving a list of employers stated to have a labor controversy pending between them and the Steelworkers. No copy of this letter was ever sent or communicated to Lavino by the President, the Wage Stabilization Board, the Steelworkers, or anyone else. Lavino had no knowledge of the existence of this letter, received no notice of proceedings before the Wage Stabilization Board, and did not participate, or have an opportunity to participate, in any of such proceedings.

place between Lavino and any representatives of the Steelworkers regarding terms and conditions of employment under a new collective bargaining agreement. (Leith, R. 195.)

ARGUMENT

I. Irrespective of its validity or invalidity with respect to the other plaintiffs in the District Court, Executive Order 10340 is not by its terms applicable to Lavino, and if construed as so applicable, it is invalid at least to that extent.

Executive Order 10340 contains the two recitals which follow.

> "Whereas a controversy has arisen between certain companies in the United States producing and fabricating steel and the elements thereof, and certain of their workers represented by the United Steelworkers of America, CIO, regarding terms and conditions of employment; and
>
> "Whereas the controversy has not been settled through the process of collective bargaining or through the efforts of the Government, including those of the Wage Stabilization Board, to which the controversy was referred on December 22, 1951, pursuant to Executive Order 10233, and as a strike has been called * * *." (R. 5, 6.)[2]

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[2] That Lavino was not a party to the controversy on which the President's Order was based, *and* that its limited area of relations with the Steelworkers has not yet reached the point which could be characterized even as a difference of opinion let alone a controversy, is dramatically confirmed by the happenings of the past few days. On May 1, 1952, Lavino received from H. Charles Ford, representing the Steelworkers, a letter, dated April 30, 1952, advising Lavino that the Steelworkers desired "to commence contract negotiations with" Lavino "on the basis of the recommendations of the Wage Stabilization Board in the basic steel dispute," The letter requested a conference at an early date, "with the purpose of concluding a single agreement covering all the properties where the employees are represented by the United Steelworkers of America." Lavino replied under date of May 2, 1952, stating that it had already advised the Steelworkers of Lavino's willingness to negotiate a new contract on a separate basis for each

As appears in our statement of facts Lavino does not produce or fabricate steel. It is not a part of the steel industry. At the utmost it might be said to be a supplier to steel companies, and there are many suppliers, some of whom have contracts with the Steelworkers, whose plants were not seized. These suppliers are proprietors of plants producing ball bearings, lime, silica brick products, etc.

As stated above, no controversy had arisen between Lavino and the Steelworkers on December 22, 1951, and indeed it was not until March 21, 1952, that the Steelworkers even suggested starting collective bargaining negotiations with respect to new contracts to replace the contracts which expired on January 31, 1952.

While as pointed out in footnote (1) above, it was disclosed to Lavino on the eve of the argument before Judge David A. Pine on Lavino's application for a preliminary injunction that the President included Lavino's name in a letter, dated December 29, 1951, to the Chairman of the Wage Stabilization Board as a company which had a labor controversy with the Steelworkers, no such controversy existed, and Lavino had no knowledge of the President's letter. It could therefore have no legal effect upon Lavino.

(a) *The Executive Order should not be construed to authorize the defendant to seize Lavino's plants.*

As Executive Order 10340 was bottomed on the existence of a controversy between certain steel producers and Steelworkers, and as no such controversy existed in the case of Lavino, Executive Order 10340 cannot be construed as applicable to Lavino, and therefore the defendant, who was given authority to take possession of such plants as he deemed necessary, was not justified in taking possession of Lavino's plants.

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plant. Lavino renewed its offer to meet with the Steelworkers' representative on an individual plant basis and stated the name of the attorney who would represent Lavino in negotiations for a new contract.

To construe Executive Order 10340 as authorizing the seizure of Lavino's plants is to assume the existence of facts which simply do not exist. It is to assume, contrary to fact, that Lavino is a steel producer and that Lavino was a party to a controversy with the Steelworkers which was referred to and considered by the Wage Stabilization Board.

But Lavino's position is not based merely on technical grounds.

In the event that this Court should sustain defendant Sawyer's seizure of the plants of the steel producers, his declared policy is to increase the wages and other terms of employment of the hourly workers. This action would put Lavino at an unfair disadvantage with respect to its competitors in the basic refractories field and in the ferro manganese field, which do not have collective bargaining agreements with the Steelworkers.

Moreover, in the event that the Government affords price relief to the steel producers, to offset wage increases, such relief will not benefit Lavino. Lavino is not selling steel or steel products, and obviously any increase in price ceilings of steel or steel products would not benefit Lavino. Moreover, some of the most important ingredients which go into Lavino's products, for example manganese, are imported from foreign countries, and are therefore not subject to price control. Lavino's need for price relief requires entirely separate treatment from any relief granted to the steel producers.

(b) *Even if Executive Order 10340 can be construed as requiring the seizure of Lavino's plants, Executive Order 10340 would not be valid as applied to Lavino.*

Whatever the powers of the President of the United States may be to seize a plant in a given industry where employer and employees have exhausted the possibilities of arriving at a collective bargaining agreement, and where they cannot reach an agreement even after their disputes

have been submitted to a national board by Presidential order,—the President does not have the power to seize a plant of an employer, not a part of such industry, where no such negotiations have taken place and where no national board has passed upon the issues between the employer and his employees.

Our review of the cases involved in plant seizure by the President, even in time of war and under statutory authority from Congress, reveals no instance in which the President of the United States has purported to seize a plant where no preliminary negotiations between employer and employees, and no national board's recommendations on a controversy, have preceded such seizure. Even the Government's counsel may hesitate to deny that the President's power of seizure must be predicated upon the existence of facts supporting the seizure, and that the President cannot by fiat create facts which are non-existent.

Certainly the mere fact that Lavino's hourly workers are represented by the Steelworkers cannot validate a seizure which is otherwise invalid. As pointed out at page 8 of this memorandum, there are numerous suppliers to the steel producers, some of whose employees are represented by the Steelworkers, whose plants have not been seized. Lavino, as well as these other suppliers, has the right of bargaining negotiations with the Steelworkers, separate and apart from the nationwide negotiations between the steel producers and the Steelworkers.

II. The termination of the preliminary injunction would cause irreparable injury to Lavino.

It is unnecessary to repeat the statement of facts contained in this memorandum and in Lavino's supporting affidavits. In the event that the defendant should put into effect any changes in wage rates, Lavino would suffer irreparable harm in that—

(a) *These wage rates would be unsuited to Lavino's industry.*

The facts as to the difference of operations in Lavino's industry as compared with those of the steel producing industry, the defference in job classifications, and the fact that Lavino has not participated in nationwide bargaining negotiations with the Steelworkers in conjunction with the steel producers, have been referred to above at pages 4-7.

(b) *These wage rates would be most unfair to Lavino.*

As pointed out above, the principal competitors of Lavino, outside of two steel producers in the case of ferro manganese, are not in the steel industry and their hourly workers are not represented by the Steelworkers. In consequence, a change in wage rates would put Lavino at a great disadvantage with respect to its competitors.

(c) *No price relief granted to the steel producers, to offset wage increases, would give relief to Lavino.*

This point is discussed in this memorandum at page 9 above.

III. In the event that this court should reverse the order of the District Court in the Suits of the other plaintiffs, below.

(a) Lavino's suit should be remanded to the District Court with direction to hear Lavino's case on the merits.

(b) The stay of proceedings should continue and the defendant should be restrained from making any changes in terms and conditions of employment of Lavino's employees, pending the entry of a final decree in Lavino's suit.