No. 81-542

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF PUBLIC SERVICE RESEARCH COUNCIL AND BRIEF OF PUBLIC SERVICE RESEARCH COUNCIL AS AMICUS CURIAE

WILLIAM J. OLSON*
SMILEY, OLSON & GILMAN
1819 H Street, N.W., Suite 500
Washington, D.C. 20006
(202) 466-5100

JAMES H. WENTZEL
1819 H Street, N.W., Suite 500
Washington, D.C. 20006
(202) 466-2585

Attorneys for Public Service Research Council

**Counsel of Record*

October 16, 1981

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-542

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF PUBLIC SERVICE RESEARCH COUNCIL

The Public Service Research Council respectfully moves for leave to file the annexed brief *amicus curiae.** In support of this motion, the Council states:

Public Service Research Council is an independent national citizens' organization engaged in nonpartisan research and education concerning public service unionism and its effects upon the nation's governmental institutions and their services to all Americans. It is a voluntary association of private citizens, legislators, scholars, and

* Pursuant to Rule 36 of the Rules of this Court, Public Service Research Council requested consent from the parties to the filing of a brief *amicus curiae* in this case. Counsel for petitioners has stated that he does not object to this filing, while the Solicitor General of the United States has consented in writing. These letters of the parties have been filed with the Clerk of the Court.

commentators united by a common concern with the maintenance of limited, constitutional government. With over 900,000 members, the Council is the nation's largest citizens' organization concerned exclusively with curbing the abuses of public sector unions in the United States. Public Service Research Council's request for leave of Court to file the annexed brief as *amicus curiae* is in furtherance of its continual effort to achieve its stated goals.

Because of the Council's above stated fundamental concerns, it has been active as a friend of the court at all levels of the legal process to affect evolving concepts of law in connection with various matters in the public interest and has filed briefs *amicus curiae* in *National League of Cities, et al.* v. *Hon. Peter J. Brennan* and *State of California* v. *Hon. Peter J. Brennan,* Supreme Court of the United States, Nos. 74-878 and 74-879; *Commonwealth of Virginia* v. *The Board of Supervisors of Arlington County, et al.* and *Commonwealth of Virginia* v. *The County School Board of Arlington County, et al.,* Supreme Court of Appeals for the Commonwealth of Virginia, Nos. 18747 and 18748, 1976; and *Pacific Legal Foundation and Public Employees Service Association* v. *Edmund G. Brown, Jr., Public Employees Relations Board, and Kenneth Cory* and *People of the State of California* v. *Edmund G. Brown, Jr., State Personnel Board, and Kenneth Cory,* Court of Appeal of the State of California for the Third Appellate District, 3 Civil No. 18364 and 3 Civil No. 18412, 1979. Most recently, the Council filed briefs *amicus curiae* in *United States of America* v. *Professional Air Traffic Controllers Organization, et al.,* United States District Court for the District of Columbia, Civil Action No. 81-1805; *United States of America* v. *Professional Air Traffic Controllers Organization, et al.,* United States District Court for the Eastern District of Virginia, Civil Action No. 81-0763A; and *Air*

Transport Association of America, et al. v. *Professional Air Traffic Controllers Organization, et al.*, United States District Court for the Eastern District of New York, No. 70-C-400.

Movant believes that the positions it is advancing, particularly the arguments relating to the statutory language regarding Title VII of the Civil Service Reform Act of 1978, and its public policy arguments, will not be fully argued to the Court by the parties in the instant case. Such arguments are contrary to the positions of the Petitioners. Respondent United States could not be expected to argue certain of these matters. The underlying issues in the instant case being of vital public interest and Public Service Research Council being interested in providing additional assistance and views to this Court as *amicus curiae,* movant respectfully requests that its motion for leave to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

WILLIAM J. OLSON
SMILEY, OLSON & GILMAN
1819 H Street, N.W., Suite 500
Washington, D.C. 20006

JAMES H. WENTZEL
1819 H Street, N.W., Suite 500
Washington, D.C. 20006
Attorneys for Public Service Research Council

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-542

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF PUBLIC SERVICE RESEARCH COUNCIL AS AMICUS CURIAE

This brief *amicus curiae* on behalf of the Public Service Research Council is filed contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae.*

INTEREST OF THE AMICUS CURIAE

The interest of the Public Service Research Council is set forth in its foregoing motion for leave to file a brief as *amicus curiae.*

SUMMARY OF ARGUMENT

Petitioners argue that Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-7135, raises serious questions as to the jurisdiction of federal district courts over strike activity in the federal sector because

(1) the statute established an administrative agency (Federal Labor Relations Authority) in which exclusive jurisdiction over federal sector unfair labor practices is vested, and (2) the statute established a comprehensive administrative scheme to regulate federal sector labor-management relations, including strikes.

Petitioners make these arguments even though (1) there is no statutory provision in Title VII which specifically vests exclusive jurisdiction in the Federal Labor Relations Authority over federal sector strike activity, and, indeed, the statutory language indicates just the opposite; (2) the legislative history relating to Title VII demonstrates that Congress did not intend that exclusive jurisdiction over federal sector strike activity vest with the Federal Labor Relations Authority; and (3) a separate and independent federal statute, 5 U.S.C. § 7311,[1] prohibits federal employee strike activity and permits the Government, in order to enforce that statute, to seek an injunction against such strike activity directly through a suit initiated by the Department of Justice, invoking the general grant of jurisdiction in 28 U.S.C. §1345.[2]

---

[1] 5 U.S.C. § 7311 provides in part:

> An individual may not accept or hold a position in the Government of the United States . . . if he — . . .
>
> (3) participates in a strike, or asserts the right to strike, against the Government of the United States. . . .

[2] 28 U.S.C. §1345 provides:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. Title VII Of The Civil Service Reform Act Did Not Repeal Or Vitiate 5 U.S.C. § 7311

Section 7311 of Title 5, United States Code, is the latest in a series of statutes through which Congress has prohibited strikes by federal employees and mandated the termination of striking federal employees. This provision appeared initially as a rider to an appropriation statute, the Third Deficiency Appropriation Act of 1946, Pub. L. No. 79-521, 60 Stat. 571. Thereafter, the provision was included in all regular, deficiency, and supplemental appropriation acts, with only three exceptions, until 1955. In 1947 a similar provision was enacted as part of the Labor Management Relations Act (Taft Hartley Act), Pub. L. No. 80-101, 61 Stat. 136, and again in 1949, Pub. L. No. 81-171, 63 Stat. 408.

In 1955, Congress consolidated the antistrike provisions of the appropriations acts, Housing Act, and Taft Hartley Act, into a single, permanent statute by enacting Pub. L. No. 84-330, 69 Stat. 624. The current version of the antistrike statute is the result of the 1966 codification of Title 5, Pub. L. No. 89-554, 80 Stat. 378.

In contrast, Title VII of the Civil Service Reform Act of 1978 was designed to provide for a permanent, statutory framework for labor-management relations in the public sector, a matter which theretofore had been covered by Executive Order. There is no express provision of Title VII which alters the effect of 5 U.S.C. § 7311 or vests exclusive jurisdiction with the Federal Labor Relations Authority over federal sector strike activity.

The two statutes in question here, Title VII and 5 U.S.C. § 7311, were thus designed to accomplish different purposes. Section 7311 was designed to protect the public by prohibiting and punishing federal sector strike activity, and allowing its swift judicial termination, while Title VII was designed to establish the ground rules for public sector labor relations. At no time in the Congress' consideration of Title VII did it demonstrate an intent to allow labor-management guidelines to repeal or vitiate the purpose and effect of the protection of the public contained in 5 U.S.C. § 7311.

Moreover, Congress, by specifically incorporating by reference 5 U.S.C. § 7311 into the definition contained in Section 701 of Title VII, 5 U.S.C. § 7103(a)(2),[3] further demonstrated an intent not to vest exclusive jurisdiction with the Federal Labor Relations Authority over strike activity in the federal sector, for this incorporation evinces a knowledge and awareness by Congress of the ramifications and viability of that independent federal statute, and reflects an intent not to preempt that statute with the provisions of Title VII.

As Congressman Eldon Rudd (R-Ariz.) stated on the House floor when introducing his amendment which inserted the Section 7103(a)(2)(v) provision into the Title VII legislation:

> By adding this exclusion, we will remove any doubt about the intent of this Congress and this legislation with regard to strikes by Federal employees. The effect of this amendment is straightforward. An employee who strikes is no longer eligible to work for the Federal Government. *Such a person would no*

---

[3] Five U.S.C. § 7103(a)(2)(v) states, in part: ". . . 'employee' . . . does not include . . . any person who participates in a strike in violation of section 7311 of this title."

> *longer enjoy the protections and benefits of this legislation. This provision is consistent with the penalties already contained in title 5 of the United States Code. It is, in fact, more lenient than the provisions of title 18, which allows fines and imprisonment for strikers.* [124 Cong. Rec. H9640 (daily ed. Sept. 13, 1978) (remarks of Rep. Rudd) (emphasis added).]

Immediately after being offered, this amendment was accepted without further debate.

II. The Legislative History Of Title VII Demonstrates That Congress Did Not Intend To Vest Exclusive Jurisdiction With The Federal Labor Relations Authority Over Federal Sector Strike Activity

It is apparent from the legislative history of Title VII that Congress was well aware of the existence and applicability of 5 U.S.C. § 7311, and the ramifications of that statute on striking federal employees and labor organizations of employees who violate its provisions. Indeed, this legislative history demonstrates that Congress did not intend to vest exclusive jurisdiction over federal sector strike activity with the Federal Labor Relations Authority.

During the Congressional debate on Title VII, this very issue was addressed in the following colloquy between Congressman William D. Ford (D-Mich.) and Congressman John N. Erlenborn (R-Ill.):

> Mr. Ford: . . . *That statute* [5 U.S.C. § 7311] *is not affected by this law at all, or by this bill, rather, so the act of striking will continue to be a violation of federal law.*
>
> The difference is that *this bill* for the first time *will add on top of that* a specific procedure available to the Government to go after a labor organization which advocates strike activity by making that an unfair labor practice reachable in the same way that any other unfair labor practice committed by the union or its

> representatives is reached by the statute, *so that, in fact, we did not affect the existing law on strikes. We add a remedy for the Government* in the case of someone advocating an illegal strike. . . .
>
> Mr. Erlenborn: Mr. Chairman, let me understand this. Is the gentleman suggesting that this bill, being a later enactment, would not be considered to be a repeal of the current law . . .?
>
> Mr. Ford: If the gentleman will yield further, Mr. Chairman, title 18 of the United States Code 1918 provides criminal penalties against strikes in violation of 5 United States Code. Five United States Code prohibits the strike. Title 18 makes participating in the illegal strike a crime. *Neither of these titles is affected by any of the provisions in this act.*
>
> Mr. Erlenborn: I thank the gentleman for his contribution. [124 Cong. Rec. H9455 (daily ed. Sept. 11, 1978) (emphasis added).]

As pointed out by petitioners, it seems apparent from the legislative history that Congress intended to model the Federal Labor Relations Authority after the National Labor Relations Board. Equally apparent, but not pointed out by petitioners, is that Congress was well aware of the important differences between the role of government in private sector strike activity and its role in federal sector strike activity. Most significant among these differences is that strike activity is clearly illegal in the federal sector; it is not illegal in the private sector. Limiting district court jurisdiction in federal sector strikes should not be effected unless clear, specific Congressional language and intent to do so can be demonstrated. This has not been done.

III. Public Policy Dictates That The Government Not Be Required To Depend Solely On The Provisions Of Title VII With Respect To Federal Sector Strike Activity

Strike actions by federal employees are always against the public interest. This is precisely their purpose. Indeed, the ultimate objective of such concerted actions is to disrupt the orderly and efficient delivery of vital federal services. By causing damage through such disruption to the government and citizens who rely on these employees, striking workers attempt to coerce the government and the public to accede to their demands. Such actions constitute an attempted intimidation of the American people. By their very nature, these strikes are intended to cause undue hardship and damage to the public.

As the recent strike by federal air traffic controllers so persuasively demonstrates, a nationwide strike by federal workers can be so devastating that it severely limits the ability of the government, as well as the private sector, to operate and function.

To be certain, a slowdown or strike action by air traffic controllers, even for just a short period of time, could be extremely disruptive to private and commercial interests, the public, and the orderly movement of the mail and other time sensitive shipments traveling in intrastate and interstate commerce. Moreover, such an action seems particularly callous when viewed in light of the possibility of human tragedy in the nation's skies. As the Court stated in *Air Transport Association of America* v. *Professional Air Traffic Controllers Organization,* 453 F. Supp. 1287 (E.D.N.Y. 1978), in focusing on the fact that the victims of such strike actions are members of the public:

> In addition to the essential public services which the defendants provide, they are, I am sure, mindful of

> the fact that they have the lives of many thousands of people in their hands on each and every one of their working days. The Court does not even wish to entertain the notion at this time that one would wilfully trifle with such awesome responsibility in such a way as might possibly jeopardize the lives of one or more members of the innocent traveling public. [453 F. Supp. at 1294.]

The responsibilities of air traffic controllers include the direction and control of aircraft traffic in the vicinity of airports and along airways to provide adequate and safe separation between aircraft, including clearance and instructions with respect to entry into and navigation through control areas, landings and take-offs, and otherwise promoting the safe operation of aircraft and airports. *See, Delta* v. *United States,* 561 F.2d 381 (1st Cir. 1977).

Because of the great potential for damage and disruption, Congress and the courts have consistently recognized the unfair burden on the public of strikes by federal employees, and have declared that such actions are against public policy. Severe sanctions are provided to protect the public against such intimidation.[4] The reason for Congressional prohibition of such strikes was reiterated during the Congressional debate on Title VII:

> The primary reason for Government services is to supply the public with certain essentials of life which cannot reasonably be supplied by the average citizen

---

[4] 18 U.S.C. §1918 contains criminal penalties for the violation of the prohibitions of 5 U.S.C. § 7311:

> Whoever violates the provision of section 7311 of title 5 . . . shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both.

> himself, or to him by private enterprise. . . . Because these services are essential to the health, welfare and safety of the public, . . . it becomes intolerable that they be interrupted. [124 Cong. Rec. H9651 (daily ed. Sept. 13, 1978) (remarks of Rep. Rousselot).]

Consequently, unlike the other unfair labor practices set forth in Title VII, federal sector strike actions must be dealt with swiftly and firmly in order to protect the public and ensure an effective and efficient government. This is possible if the government can continue to proceed under 5 U.S.C. §7311 as it has in the past. It will not be possible, however, if the government must proceed against such strike activity *solely* pursuant to the timely and burdensome provisions of Title VII. As the Circuit Court below so adequately stated:

> . . . as a matter of policy *the United States must have the option to seek immediate injunctive relief from the district court* to avoid the emergency that a paralyzing strike at O'Hare Airport would likely create. The magnitude of harm to our national economy and to the security of air travelers that a strike might cause are valid reasons for the United States to avoid, if it chooses, seeking temporary relief through the FLRA procedures. Those procedures could be both lengthy and abortive. First, an investigation must be undertaken; upon its completion, the General Counsel must decide whether to issue a complaint against the offending party. Once these steps have been completed, the General Counsel may seek a temporary restraining order in the district court. His decision about whether to go to court is not only unilateral, but, of greater importance, is unreviewable. [Citation omitted.] An internal slowdown or strike by air traffic controllers at O'Hare Airport is too fraught with dire consequences to the public to confine the United States to the procedures as set out in the FLRA. Policy considerations dictate that

> the Government be able to consider whether more prompt relief can be afforded by an alternative procedure. [107 LRRM at 3061 (emphasis added).]

The fact that the size, structure, and cumbersome procedures of the FLRA make it ill-equipped to protect the public interest in strike situations demonstrates further that the FLRA was never intended to serve the function petitioners would have it serve.

CONCLUSION

There is no conflict among the circuit courts on the questions presented in this case. Nor has the Court below departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. It has provided a very well-reasoned opinion on the issues presented. For these reasons and the foregoing reasons presented in this brief, the Council submits that the writ should be denied.

Respectfully submitted,

WILLIAM J. OLSON
SMILEY, OLSON & GILMAN
1819 H Street, N.W., Suite 500
Washington, D.C. 20006

JAMES H. WENTZEL
1819 H Street, N.W., Suite 500
Washington, D.C. 20006
Attorneys for Public Service Research Council