

were not caused by the company's troubled financial condition. It relies on the fact that the lay-offs were not announced and that they took place immediately after the employees stopped work. The Board also relies on evidence of antiunion comments made by the president of the company, and disputes the company's characterization of its finances at the time of the lay-offs. This evidence is ample to support the Board's order.

There is no merit to the company's contention that the administrative law judge was biased against the company. The ALJ made careful assessments of all the facts and testimony and his conclusions are well supported by the record.

The petition of Miami Springs Properties, Inc. to set aside the Board's order is dismissed and the order of the National Labor Relations Board is ordered ENFORCED.



**UNITED STATES of America,
Plaintiff-Appellee,**

**Bay Mills Indian Community, Sault Ste.
Marie Tribe of Chippewa Indians,
Plaintiffs-Intervenors-Appellees,**

v.

**STATE OF MICHIGAN, Michigan Natural
Resources Commission and its agents,
Dr. Howard A. Tanner, Dr. Henry Von-
dett and George Dahl in their official
capacities, Defendants-Appellants,**

**Grand Traverse Area Sport Fishing Asso-
ciation, 13th Judicial Circuit Court of
the State of Michigan, Intervenor-De-
fendant-Appellant.**

Nos. 79-1414, 79-1527 and 79-1528.

United States Court of Appeals,
Sixth Circuit.
July 10, 1981.

United States brought action on its own behalf and on behalf of an Indian

community to protect the tribe's rights to fish in certain waters of the Great Lakes. The United States District Court for the Western District of Michigan, Noel P. Fox, J., in such case, 471 F.Supp. 192, and in two other cases gave judgment favoring Indian fishing rights, and appeals were taken and consolidated. The Court of Appeals, 623 F.2d 448, remanded case to district court for consideration of preemptive effect of new federal regulations. Thereafter state moved that order of remand be vacated and that the original judgment of the district court be reversed. The Court of Appeals held that until modified by district court upon remand, comprehensive rules regarding gill net fishing previously enacted by Secretary of Interior, which were withdrawn by the new Secretary of Interior, would remain in effect as the interim rules regarding gill net fishing, with district court further considering questions of necessity of state regulations and irreparable harm to fisheries within territorial jurisdiction of the state, where the Court of Appeals could not determine whether the state's new regulations met federal standards.

Ordered accordingly.

See also, D. C., 520 F.Supp. 207.

1. Indians ⇐3

Treaty-guaranteed fishing rights preserved to Indians in 1836 Treaty, including aboriginal rights to engage in gill net fishing, continued to present day as federally created and federally protected rights; however, such rights are not absolute, but would be subject to a state regulation which is a necessary conservation measure, is the least restrictive alternative method available for preserving fisheries in the Great Lakes from irreparable harm, and does not discriminatorily harm Indian fishing or favor other classes of fishermen.

2. Indians ⇐3, 6

State bears burden of persuasion to show by clear and convincing evidence that

it is highly probable that irreparable harm to fisheries within territorial jurisdiction of state will be caused by Indian fishing and that need for regulation exists; in absence of such a showing, the state may not restrict Indian treaty fishing, including gill net fishing.

3. Indians ⇌ 3

Until modified by district court upon remand, comprehensive rules regarding gill net fishing previously enacted by Secretary of Interior, which had been withdrawn by the new Secretary of Interior, would remain in effect as the interim rules regarding gill net fishing, with district court further considering questions of necessity of state regulations and irreparable harm to fisheries within territorial jurisdiction of state, where Court of Appeals was unable to determine whether state's new regulations of Indian treaty fishing met federal standards.

Frank J. Kelley, Atty. Gen. of Mich., Thomas Casey, Asst. Atty. Gen. of Mich., Robert A. Derengoski, Sol. Gen. of Mich., Lansing, Mich., for State of Michigan et al.

James A. Brady, U. S. Atty., Grand Rapids, Michigan, Edward J. Shawaker, J. Moorman, R. Klarquist, Attys., Dept. of Justice, Washington, D. C., for the U. S.

Bruce R. Greene, Native American Rights Fund, Boulder, Colo., William James, U. P. Legal Services, Sault Ste. Marie, Mich., for Bay Mills Indian Community.

Daniel T. Green, Sault Ste. Marie, Mich., for Chippewa Indians.

Theodore W. Swift, William K. Fahey, Stephen O. Schultz, Foster, Swift, Collins & Coey, Lansing, Mich., for intervenor defendant-appellant Grand Traverse Area etc.

Richard B. Baxter, Hillman, Baxter & Hammond, Grand Rapids, Mich., for intervenor defendant-appellant 13th Judicial Circuit Court etc.

Peter W. Stekette, Grand Rapids, Mich., for amicus curiae Michigan United Conservation Clubs, Inc.

Before MERRITT, MARTIN and JONES, Circuit Judges.

ORDER

The procedural history of this Indian treaty fishing rights case is recited in our opinion reported at 623 F.2d 448 (6th Cir. 1980), remanding the case to the District Court to determine whether federal regulations governing gill net fishing preempt state regulation. After the remand of the case to the District Court, 471 F.Supp. 192, last summer pursuant to that opinion, the following significant steps have occurred: (1) The District Court began taking proof on the preemptive effect of the regulations of the Secretary of the Interior governing gill net fishing in the Great Lakes issued last year during the pendency of the original appeal in this case, but the District Court has not ruled as yet on the questions referred to it in our opinion. (2) The Secretary of the Interior allowed the regulations in question to expire on May 11 of this year, apparently on grounds that he and the Bureau of Indian Affairs should defer to the states in connection with the regulation of Indian treaty fishing in the Great Lakes. (3) The State of Michigan has issued emergency regulations governing gill net fishing which appear to be less protective of Indian rights than the federal regulations. (4) The State of Michigan has moved that the order of remand be vacated and that the original judgment of the District Court be reversed. (5) This Court heard reargument of the case on June 19, 1981.

In light of these events, this Court concludes as follows:

[1] 1. The treaty-guaranteed fishing rights preserved to the Indians in the 1836 Treaty, including the aboriginal rights to engage in gill net fishing, continue to the present day as federally created and federally protected rights. The protection of those rights is the solemn obligation of the federal government, and no principle of federalism requires the federal government to defer to the states in connection with the protection of those rights. The responsibility of the federal government to protect

Indian treaty rights from encroachment by state and local governments is an ancient and well-established responsibility of the national government.

2. The right of the Indians to engage in gill net fishing is not absolute, however. It is subject to a rule of reason. In the absence of federal regulation, that right is subject to the type of state regulation outlined by the Michigan Supreme Court in *People v. LeBlanc*, 399 Mich. 31, 248 N.W.2d 199 (1976), a decision which we believe accurately states the rule of reason and the principles of federal law applicable to this case. As provided in *LeBlanc*, any such state regulations restricting Indian fishing rights under the 1836 treaty, including gill net fishing, (a) must be a necessary conservation measure, (b) must be the least restrictive alternative method available for preserving fisheries in the Great Lakes from irreparable harm, and (c) must not discriminatorily harm Indian fishing or favor other classes of fishermen.

[2] 3. Thus if Indian fishing is not likely to cause irreparable harm to fisheries within the territorial jurisdiction of the State of Michigan, the state may not regulate it. The state bears the burden of persuasion to show by clear and convincing evidence that it is highly probable that irreparable harm will occur and that the need for regulation exists. In the absence of such a showing, the state may not restrict Indian treaty fishing, including gill net fishing. Since the new Secretary of the Interior has now withdrawn the regulations issued by his predecessor, the essential question is now whether these standards have been satisfied.

4. The parties have not introduced proof on this subject, and the state has not carried the burden described in the paragraph immediately preceding. Accordingly, this Court is not in position at this time to determine whether the state's new regulations meet federal standards. We therefore decline to approve and put into effect on an interim basis the more restrictive emergency regulations of Indian treaty fishing recently adopted by the State of Michigan.

[3] 5. The United States and the Indian tribes represent to the Court that the tribes have adopted and will carefully enforce as a regime of tribal self-regulation the comprehensive rules regarding gill net fishing previously enacted by the Secretary of the Interior which were allowed to expire on May 11, 1981. Until modified by the District Court upon remand, the comprehensive rules regarding gill net fishing previously enacted by the Secretary of Interior and referred to in our opinion reported at 623 F.2d 448 (6th Cir. 1980) and our order of July 16, 1980, will remain in effect as the interim rules regarding gill net fishing. The District Court may modify these rules on an interim basis under Rule 65, Federal Rules of Civil Procedure.

6. The remand opinion and orders of this Court dated May 28, 1980, and July 16, 1980, remain in effect except as modified by this order. The District Court shall consider and decide in accordance with the principles outlined herein and in *People v. LeBlanc*, 399 Mich. 31, 248 N.W.2d 199 (1976), the questions of necessity and irreparable harm. Only upon a finding of necessity, irreparable harm and the absence of effective Indian tribal self-regulation should the District Court sanction and permit state regulation of gill net fishing. If the District Court should find after hearing evidence that state regulation and control of Indian treaty fishing is necessary to preserve the fish of Lake Michigan as a resource, then the District Court should sanction state regulation. In that event, the District Court should permit those state regulations necessary to prevent irreparable harm as heretofore stated.

7. With respect to state court jurisdiction over cases involving Indian treaty fishing, we agree with the arguments and position of the United States presented on June 19, 1981. While these questions concerning Indian treaty rights and the degree of permissible state regulation are pending in this Court and in the District Court, it is improper under the supremacy clause of the United States Constitution for the state courts to make orders inconsistent with

those of the federal courts. Thus, the District Court's injunctions in cases Nos. 79-1527 and 79-1528 continue to be appropriate. Those orders were issued by the District Court in aid of its jurisdiction to determine the rights of the parties under treaties of the United States. The state cases were brought after the federal case was pending and under consideration, and the orders of the state courts in those cases had the effect of interfering with and obstructing the orderly adjudication of the federal questions in the District Court. The doctrine of abstention therefore does not apply.

Accordingly, the remand order of this court embodied in our opinion reported at 623 F.2d 448 (6th Cir. 1980) is continued in effect as modified by this order.



**NATIONAL LABOR RELATIONS
BOARD, Petitioner,**

v.

**ARROW MOLDED PLASTICS,
INC., Respondent.**

No. 79-1550.

United States Court of Appeals,
Sixth Circuit.

July 13, 1981.

The National Labor Relations Board sought enforcement of bargaining order. The Court of Appeals, Nathaniel R. Jones, Circuit Judge, held that: (1) employer interfered with employees' exercise of their right to freely select union representation by improperly soliciting grievances before representation election, by making certain promises and granting benefits, and by withholding benefits and threatening employees; (2) employer violated the Act by its maintenance of an unlawfully broad no-distribution rule during organizational cam-

paign; and (3) the Board's decision to issue a bargaining order was not supported by substantial evidence on record as a whole.

Application granted in part and denied in part.

1. Labor Relations ⇐366, 367, 393

Employer interfered with employees' exercise of their right to freely select union representation by improperly soliciting grievances before representation election, by making certain promises and granting benefits, and by withholding benefits and threatening employees. National Labor Relations Act, 8(a)(1) as amended 29 U.S.C.A. § 158(a)(1).

2. Labor Relations ⇐367, 393

Though employer's free speech right to communicate its views to its employees cannot be infringed upon by union or by the National Labor Relations Board, such right to free speech is not absolute; threats of reprisal or force or promise of benefit do not constitute protected speech within meaning of the National Labor Relations Act. National Labor Relations Act, 8(c) as amended 29 U.S.C.A. § 158(c).

3. Labor Relations ⇐366

Grievance solicitation during preelection period is not a per se violation of the National Labor Relations Act; it is an unfair labor practice, however, to solicit employee grievances where the solicitation is accompanied by employer's express or implied suggestion that the grievance will be resolved or acted upon only if the employees reject union representation. National Labor Relations Act, § 8(a)(1) as amended 29 U.S.C.A. § 158(a)(1).

4. Labor Relations ⇐386

A company rule which precludes solicitation and distribution of union literature at any time, including during nonworking hours in nonworking areas, is presumptively unreasonable. National Labor Relations Act, § 7 as amended 29 U.S.C.A. § 157.