Supreme Court of the United States

OCTOBER TERM, 1968

In the Matter of:

Docket No. 273

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, AND GEORGE KOXBIEL,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL UNION, UAW,

Respondents.

Place Washington, D.C.

Date January 14, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

Russell Scofield, Lawrence Hansen, Emil Stefanec, and George Kozbiel, Petitioners,	:	
v.	:	No. 273
National Labor Relations Board and International Union, UAW, Respondents.	:	

Washington, D. C.
Tuesday, January 14, 1969

The above-entitled matter came on for argument at 10:55 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 273, Russell Scofield, et al., Petitioners, versus National Labor Relations Board, et al.

Mr. Urdan.

ORAL ARGUMENT OF JAMES URDAN, ESQ.

ON BEHALF OF PETITIONERS

MR. URDAN: Mr. Chief Justice, may it please the Court.

This is a review of a decree of the Court of Appeals for the 7th Circuit. The Court of Appeals upheld in order of the Labor Board which had dismissed unfair labor practice charges against the labor union.

The case raises the issue of whether it is an unfair labor practice under Section 8(b)(1)(A) the National Labor Relations Act, when labor union fines one of its members for exceeding a production quota, so-called ceiling, as set by the union.

Petitioners are employees of the Wisconsin Motor Corporation in Milwaukee. The subject of the ceilings was bargained from time to time.

Q But was the actual ceiling agreed upon?

A They were not agreed upon in the sense that they were a limit on the employees. The employee was free to work, free to make more than the ceiling permitted and the

employer had to pay him under the collective agreement.

There was collective bargaining over the ceiling as to the general level of the ceiling but never were the ceilings accepted in bargaining as a limit on the individual and it is the individual who is complaining here.

Q What seems to me to be the difficulty in the briefs of this argument and that is the apparent disagreement between the parties as to what the facts are. You state as No. 1 of the questions presented, referring to the ceiling, you talk about production quotas established and enforced by the union.

The government tries to persuade us that really these things while not explicitly written out on the collective bargaining agreement nonetheless, were by custom, practice and basic recognition were part and parcel of the agreement between the union and the employer. That makes for two quite different cases. I am interested in knowing which case we have before us.

A I think there is some truth in both positions. From the standpoint of the employees who are complaining here, the case we have is that a collective bargaining agreement was entered into, this union bargained it and agreed with the employer, and the collective bargaining agreement said no limit on the production or on the earnings of these men.

They could produce to their capacity, they could

claim pay for that work and they would have to be paid for that work.

That is the bargain that the union made with the employer. Now, it is true that the employer and the union bargained from time to time about the level of the ceiling because the employer recognized this as a fact of life in the plant. He recognized that the union had these ceilings. The employer recognized that it was in his interest to have these ceilings increased from time to time, and he bargained for that objective.

He tried to get the ceilings removed, not totally successfully. The union tried to get the employer to agree to the ceiling and they failed in that. The employer never agreed to put a ceiling on the earnings of these men. We have, in essence, a stand-off in the bargaining.

Neither side got what it wanted. But as far as the employees are concerned, they worked under a collective bargaining agreement that permitted them to exceed the ceiling, to earn more and to collect their pay, and the employer had to pay them. The employer could not refuse to pay them.

This is their complaint -- that the union bypassed the collective agreement in the collective bargaining process.

Q May I see if I understand this? The collective bargaining agreement established, or there was established

pursuant to the collective bargaining agreement, certain ceilings. Now, any employee who produced above this particular ceiling was entitled to additional pay; is that correct?

A The collective bargaining did not establish ceilings. The collective bargaining provided pay rates, pay ranges, and if a man worked piece work and he produced more pieces, he would be paid for whatever he produced, and that is all that is in the collective bargaining agreement.

Q Is there a flat rate, no matter how much he produced, or was there a point at which an incentive pay that is to say a greater rate of pay was used.

A Incentive pay started from the beginning but there were certain guarantees in the contract.

Q If an employee reaches a certain number of units, is he entitled to incentive pay beginning with the unit at that point?

A The pay is computed on the actual production starting with the first unit. The incentive pay follows all the way through. However, a man is guaranteed a certain rate if his production does not come up to certain minimum standards. In that sense you might say that the incentive rate starts at this point of guarantee.

Q That is to say there is a guarantee and I assume that that guarantee is equal to the per-unit rate times a certain number of units; is that right?

A The guarantee is generally in terms of an hourly rate.

Q I understand that, sir, but I am trying to get an answer to this question. Perhaps I am asking it very badly. But I have had the same difficulty with your brief as my brother Stewart.

As I understand it, there is a ceiling whether it is set forth as a ceiling or not in the collective bargaining agreement and that ceiling as I understand it from what you have now said is determined by taking the per-unit wage rage and dividing that into the guaranteed minimum wage. Then you get a certain number of units and over and above that the employee gets additional compensation per unit. Is that the way it works, or isn't it?

A I would say that is not the way it works. There is not a ceiling in the collective bargaining agreement. There is an incentive pay plan for the man is paid for the units that he produces.

The union has set a maximum on the pay that they want the man to earn. They say only produce that many units that will get you up to that pay level using the process of division as you just described it.

That is what the union says the man should do. That is the so-called ceiling. That is not reflected in the collective bargaining agreement as such. The collective

bargaining agreement establishes the rate for the unit.

Q Is that ceiling the same as the minimum guaranteed wage?

A No, it is a higher rate.

Q It is a higher rate.

A It exceeds the minimum guaranteed rate.

But there is no ceiling and there is no limit in the agreement as such. The agreement says the man is to work eight hours a day and whatever he produces, he will be paid for it.

The effect of the ceiling, looked on very clearly by the record, is that the man does not work eight hours a day. If he is any kind of worker at all he finishes his work much more quickly. There is no need to abide by the agreement to work his eight hours.

Q But you are not suggesting that the union action is a breach of contract?

A I think we are very close to this line.

Q You are not suggesting that an employee, who is also bound by the contract, who works only enough to earn the guaranteed minimum and who never attempts to earn any more is breaching the contract?

A This could be possible. This issue is not contested because the employer has not made an issue of it.

Q Are you serious?

Are you serious that any employee who does not want to earn any more than the minimum is breaching the contract?

A When you say "breaching the contract", I think we are getting at a concept of what the employer is entitled to. The employer is entitled to have the man perform a fair day's work.

Q That isn't what the contract says, is it? Can you find that in the contract anywhere?

A Not that language. However,the contract does set shifts and I think it is recognized that ---

Q Are you willing to put your case on whether or not there is a breach of contract?

A Absolutely not.

Q I wouldn't think so.

A This is not our position.

Q But you do represent the employees.

A That is correct.

Q Not the employer?

A We represent ---

Q You are here representing the employees.

A We represent the individuals. The employer has not participated or raised any complaint in this proceeding

Q It is hardly a position to say that your clients or their colleagues have violated the contract.

A Right.

Q You wouldn't suggest that your people are because you are attempting to earn incentive pay, but the employee who doesn't attempt to earn incentive pay you are suggesting might be in breach of contract?

A I am suggesting that ---

Q Would you say that 10 employees all who get together and say: "We don't want to earn any incentive pay, and let's all agree that we won't earn any incentive pay." Would you say that that isn't protected by Section 7?

A An agreement to limit production which is negotiated with an employer and which is incorporated in collective bargaining agreements is protected.

An agreement to limit production which is not negotiated is not protected and there are numerous cases on this general subject. They are in our briefs.

Q Now, I agree with that, but here there has been negotiated with an employer a scale of pay, depending upon your effort, and I doubt if an employer could just fire an employee under the contract who didn't earn any extra pay.

A I tend to agree with that. I think the employer here has never raised this issue. I don't contend that it is a breach of contract, nor do I consider that this is, in any way, essential to the case of these petitioners.

Q Incidentally, this banking arrangement, I understand that an employee need not report everything he has earned

in a given period, but he banks it and presents it sometime later;if he produces less units he can draw on the excess that he built at an earlier time; is that correct?

A That is how the process works.

Q Well, now, doesn't that require the participation of the employer?

A The employer has accepted this as a ---

Q My question was, doesn't he participate?

A No, the employee keeps his own records of this.

Q I know, but doesn't the employer participate in that arrangement?

A I would say he does not. The employer pays ---

Q What does he do?

A He pays for the production that is reported. If the employee doesn't report it the employer generally doesn't know about it.

Q You don't regard that as participating later when he then reports the excess in some later pay period?

A The employer generally does not have records as to when the actual production took place. The employer pays as the work was reported for pay.

Q The work appears, though, whatever it may be, doesn't it, I mean to say, something suddenly appears that somebody has worked on; isn't that right?

A That is correct.

Q And are you suggesting that en employer doesn't know that anyway.

A The record is quite confused on this point but the picture that comes out is that the employer does not reconcile the pieces flowing through with the pay records.

The employer knows the banking is going on. The suggestion is made in the record that this practice benefits the company. This is not correct and the company has had very definite difficulties from this practice.

I think we are concerned here with reconciling two of the decisions of the court within the last two years. The Allis-Chalmers case, we had the question of a union fine against a member for crossing a picket line and working during a strike.

The question of whether that violated Section 8(b)(1)(A). More recently in the Marine and Shipbuilding Workers case, there was a question of expulsion of a member for having filed charges with the NLRB. In the Allis-Chalmers decision the holding was that there was not a violation of the statute. In the Marine and Shipbuilding Workers case there was a holding that the statute had been violated, both cases involving union discipline.

I think if you look at the two cases you will find two questions that the court is asking: What is the union

objective? What are they trying to accomplish? How does their objective conform with the policies of the Act?

Secondly, what is the method the union is using? Is the method one that conforms with the policies of the Act?

Looking first at the union objective, I think we have a case much closer to the Marine and Shipbuilding Workers than to Allis-Chalmer. Allis-Chalmer involved an economic strike. The union was trying to sustain and support that economic strike.

This is an activity that has the highest degree of protection under the Act.

Marine and Shipbuilding, by contrast, the union was trying to restrict the access of the employee to the processes of the board, a very important policy was being offended.

Now, here the union objective is simply to have more men on the job than the job requires. It is a matter of degree on this question of how many men it takes to do the work.

In an extreme case, where you ask for pay for men who aren't even there, we have an explicit unfair labor practice under the Act.

There are lesser forms of this type of production restriction, they are not unfair labor practices, but they are not even protected activities under the Act. If the employer sought to discipline the employees for this type of restriction the employer could. In fact the union concedes this very

point in its brief.

We have here ---

Q Are you saying that the employer could fire the employee for not trying to make overtime, is that it? Or what are you saying?

A It is not for not trying to make more pay ---

Q What is the meaning of the statement?

A A restriction on production by slow-down, similar methods, has been found to be an unprotected activity under the Act, such that the employer may lawfully discipline the employee for engaging in such an activity.

Q And in this case, applying that principle to this case, what do you say the employer could have done?

A In this case, the people who are engaging in ceiling practices to the point of not performing their work, as the records show, stopping work an hour or two early and reading magazines ---

Q Because an hour or two before the eight hours have elapsed they have completed their quota, you say that having done so the employee could be fired; is that right?

A Besides, so far as the Act is concerned, this is an unprotected activity. Now, whether the employer could enforce a discharge in this case, is a question under the collective bargaining agreement, and if the employer attempted to discipline an employee in this type of situation, he would

be faced with the defenses and arguments that he had bargained the ceiling, he had accepted the ceiling, therefore, he, this employer, could not impose discipline, but this does not flow from the Act and neither would this be a protected activity under the Act.

This would be a question of the contractual limitation on this ---

Q This is what the collective bargaining agreement provided. That is what the question would be in that kind of a case, wouldn't it?

A The collective bargaining agreement also provides restrictions on discipline. Discipline must be for just cause. This is the customary standard.

Q Actually you are saying the contrary, aren't you, that there are certain rights which the employee would have regardless of what the collective bargaining agreement provides in this situation. Is that what you said?

A If the collective bargaining agreement established the ceiling and said you cannot collect more pay no matter what you produce ---

Q No, no. Suppose the collective bargaining expressly -- in the collective bargaining agreement the employer and the union expressly agreed on a ceiling, that an employee may quit and go home and then provides for incentives for additional production thereafter, and then provides for this

banking arrangement, just exactly what is here. If that were clearly part of the collective bargaining agreement, would you still say that your clients have cause to complain?

A Very definitely. If the agreement permitted them to work for and earn more then that is what they should be permitted to do. You cannot make a bargain with an employer and then pull it away.

Q Suppose the agreement expressly says that the union -- that pursuant to union rules, employees may be prohibited from working more than enough to earn the base pay.

A I can only say that would be a very remarkable contract.

Q Well, I think that that is the argument that the board is making here, in effect. Instead of saying that it is a part of the agreement, they are saying that the employer acquisced in it.

A I think this is a point raised in the brief of the amicus here, that the question of whether the union has a rule that can be enforced should not be part of the bargaining process. The bargaining process should not get itself lost in this maze of having the employer looking into the union's disciplinary process deciding which union rules he likes and which he doesn't and which should go into the contract and which shouldn't.

This should be insulated from the collective bargaining process. The employer makes an agreement here that says the man can be paid for what he produces. That is the deal the union agreed to. These men try to produce, just as the agreement tells them they may do, and then the union fines them.

It takes away the bargain that it made itself. This is a very dangerous precedent for the collective bargaining process. The collective bargaining process is the heart of this Act.

The whole concept of the Act is that the parties should sit down, reason together, attempt to resolve their differences.

Now, when you permit the union to accomplish its objectives by fining its members, not by collective bargaining, then the whole process has been weakened.

The agreement has no meaning if the man can't take advantage of it. Certainly, we are not within the realm of internal union affairs, as that concept is used in the Allis-Chalmers case. It is no longer an internal matter when you tell the man he can't earn the money that the collective bargaining agreement provides. This is the very heart of the way you should employ a relationship.

That statute protects the union member just as much as the non-member. I think the Marine and Shipbuilding

case, of course, is an example of this. The union member has the same protection.

Congress could not make any distinction between the members and the non-members. There are many cases that have pointed this out: Radio officers and Teamsters case of 1954, setting forth this basic ground rule that a man can be a good, bad or indifferent union member. He only has to pay his dues. That is the price of admission.

There is a quote from Senator Taft which appears in the footnotes of the Allis-Chalmers decision, which reads right on the subject. Senator Taft said: "Merely to require that unions be subject to the same rules that govern employers, and they do not have the right to interfere with their coerce employees, either their own members or those outside the union," is such a clear matter, it seems to me, would be so easy to determine that I would hope we would all agree.

The Act applies equally to the member and to the non-member. This is established. In this connection, I think we should look at the proviso in Section 8(b)(1)(A). I think the proviso has been badly misconstrued. I think the purpose of the proviso has been misunderstood. The proviso says that the union may establish rules with respect to acquisition and retention of membership.

This has been looked at, in the context of these fine cases, as a guarantee can control its members. This was

not the purpose of the proviso. It had nothing to do with control of members. The purpose of the proviso was to permit unions to decide who their members shall be, not to tell the member what to do, but to decide who the member shall be.

This is a concept of freedom of association. The union can decide who will participate. This traces from the debate that went on in Congress preceding the introduction of Section 8(b)(1)(A).

There was a great issue in the Congressional debate as to the close shop. There was a lot of concern about this issue, the idea that the man had to belong to the union in order to hold the job.

The choice that was presented to the Congress -- either open up the union, or open up the job, and there were strong advocates of the position that the union should be open, that every man should have the right to join the union. This issue was debated and the unions didn't like that idea, and a number of Senators, particularly from the South, did not like the idea that the union should be open, because they had segregated unions.

These very issues were debated explicitely. And so a decision was reached: "You don't have to have an open union. You don't have to let people in if you don't want to. Instead we will have the open shop or the open job, where you don't have to be a member."

Now, this was the background when Section 8(b)(1)(A) was introduced. Section 8(b)(1)(A) says you cannot coerce a member, you cannot coerce an employee in the exercise of his rights under Section 7, one of those rights being the right to participage in union activities.

Now, the opponents of the open union became very concerned again. Is this going to open up the union? Is it going to be considered restraint or coercion when we segregate or keep people out of the union?

That is why the proviso was introduced. It was to confirm this concept that the union didn't have to be open. The proviso was introduced simply to confirm the commitments that had been made in this debate on the close shop. It is not, in any sense, a grant of authority to control the actions of the members.

Rather it is to guarantee to the union that it can control its own membership and who will participate within the union. The proviso to 8(b)(1)(A) is not a grant of authority to discipline. We have also in this case a jurisdictional issue. I would like to devote a few minutes tothat.

The petition for Certiorari was filed within 90 days of the decree of the court of appeals. The question has been raised whether the 90-day period should run from the date of the opinion of the court of appeals, and an order that was entered that same day.

Reviewing the record it will be perfectly clear that the intention of the court of appeals was that the decree of April 16 was the decree in the case. The statute starts the 90-day period running from the date of entry of the judgment or decree. It doesn't say the date of the opinion. It doesn't say the date of the decision. It doesn't say the date of the resolution of the case. It says the date of entry of the judgment or decree.

After the opinion of the court on March 5, the court itself sent a proposed decree to the court, and the board in its letter to the court said: "After entry of the decree, please send us a copy." The board acknowledged that there had been no decree at that point.

Subsequently, the court entered the decree and the clerk of the court wrote to all the parties enclosing a certified copy. I quote: "Copy of the final decree entered by this court on April 16, 1968."

I think it is perfectly clear what the court intended. April 16 decree was the decree in the case, and the petition was filed within 90 days thereafter.

Q Is there any difference between the terms of the order entered as part of the court's opinion on March 5 and the decree issued on April 16?

A There is no difference in substance. There is a difference in form. The order of March 5, for example, is

entered by the clerk, the decree is signed by the judges.

The order of March 5 is, in form, tentative. It says, by its own terms, upon presentation an appropriate decree will be entered. It is, in form, a tentative order. It was entered by the clerk without any notice to the parties. The order of March 5 was not communicated to the parties, and apparently the board didn't know about it because it sent along a proposed decree some weeks later without even mentioning the prior order.

Nor does the decree mention the prior order. The rule of the court provided for entry of decrees following settlement and that is what was done here. There is also a rule of the court providing for entry of judgment on the decision day.

But the court, quite obviously by this set of circumstances, was not following that prior rule. The court was not purporting to enter its judgment. I think the cases, as set forth in our brief, establish that it is the intention of the court that must be given effect.

When did the court intend that this decree be entered? And that is perfectly clearly April 16.

MR. CHIEF JUSTICE WARREN: Mr. Come.

ORAL ARGUMENT OF NORTON J. COME, ESQ.

ON BEHALF OF RESPONDENTS

MR. COME: Mr. Chief Justice, may it please the Court.

We believe that under the Minneapolis-Honeywell decision in this Court that the petition was untimely filed, that the 90-day period runs from the date of the March 5 order.

Q You mean you didn't know about it when everyone else did?

A Well, we were not served with a copy of that order ---

Q Neither was anyone else. It doesn't make much equity.

A No, I admit that it does not make much equity.

Q You haven't raised it yet, have you?

A Yes, we did. We raised it in our opposition to Certiorari. That was one of the ---

Q You raised it in your brief here?

A Yes, we did, Your Honor. We raised it in Point 2 of our brief.

Q Isn't this standard practice, really? Have you ever heard of filing petitions within the 90 days of that order?

A Well, I think quite the contrary ---

Q Did you ever raise the point before?

A Yes, we have. We have raised it.

Q Have you ever won it?

A All I know is that we have gotten cert denied. Whether that was the reason that the petition was denied ---

Q You haven't had cert denied. You don't know what cert denied is.

A Well that is correct. There has never been an authoritative ruling on it.

Q Isn't this pretty standard practice, though, to enter an order and then a decree later?

A In some circuits, it is, in other circuits --

Q And in those circuits are you ever notified when they enter the order. Sometimes you are and some not, or what?

A I would say that sometimes we are and sometimes we are not. I know that our practice is not to take a chance. We always account our time from the date of the court's decision. We start with a copy of the court's decision and we have found some practice that some circuits, like the 7th Circuit, will enter an order or judgment the same day that they enter the decision.

Q Did you ever file a petition and then have a decree entered afterwards? If you run your practice from the date that the decision is ---

A Well, usually the decree is entered no later than 30 days after the decision.

Q But you don't remember that you have ever filed a petition and then have a decree entered, do you?

A No, I do not.

Q We have such a case here. I don't recall whether it was a board case or not.

A Well, I think that the new Federal rules of appellate procedures which have taken effect subsequent to this case purport to have a uniform provision covering this situation.

However, significantly that rule talks in terms of an order in forcing the administrative order. Hearing that it did not have, as you typically have, where there is an enforcement of the board's order or an enforcement in part, any possibility that a subsequent decree might raise a question as to the terms of the prohibition that would be entered because all that the court did hear was to affirm the board's dismissal of the complaint.

No decree that could subsequently be entered, would there be likely to be any question as to what the terms of that is going to be.

Q Under the new rule would this have been timely?

A I think that it probably would be, although ---

Q It would be timely, wouldn't it?

A I think it probably would.

Q So that the question we are talking about is to know whether it is acceptable in this case.

A That is correct, at least as I read the new rule.

Q I judge you are not inclined to present a defense in view of your jurisdictional objection?

A Well, I will rest on the presentation that I have made, Your Honor. I do think, though, that we ought to turn to the facts of this case because I think that they are very important and I think that they are somewhat unusual.

Now, on the facts of the case, as found by the board's trial examiner, the board, and as sustained by the 7th Circuit, we do not have a situation that my colleague has been appositing here.

What we do have here is a collective bargaining agreement, the operative part of which is set out at Page 46 of the record. It simply provides that jobs, arranged from Paragraph 90, Section 1, shall be so priced as a result of a time study, that the average competent operator working at a reasonable pace will earn not less than the machine rate of his assigned task.

If you look at the bottom of Page 47, you see that piecework classification, they set a figure called a machine rate, or Grade 1, and the contract goes on. There are five different classifications with different machine rates.

The day rate is a lower rate that is paid under certain circumstances and is not irrelevant. But, roughly, what this machine rate represents is this: It reports a determination on the basis of time studies of the number of

pieces of work that an average operator would turn out in an hour after adjustment of such factors as picking up and cleaning tools and personal needs.

Now, this is all that the contract established. It doesn't have a provision that my opponent has been referring to that an employee can be paid for turning out as much as he pleases or that he has to give over and above the machine rate here in order to fulfill his obligation to work an eight-hour day.

Now, by taking ---

Q Is there an obligation to work an eight-hour day?

A Well, there is another provision in the contract that says that the work shift is from a certain hour to a certain hour and that encompasses ---

Q So that an employee, when he has earned his machine rate still must stay on the job ---

A He still must stay on the job and the record shows that they do stay on the job, that the time that is available is spent usually ir preparing the machines for the next day's work, that, although there has been occasionally some problem with too much talking or card playing or other things of that sort that whenever the company has promulgated rules to cut that out it has stopped and that the union stewards have cooperated in cutting out any of those diversions.

In addition to that the allowances that have been worked into for fatigue and rest and so on in establishing the machinery, the evidence in the record shows it allows for the equivalent of about 48 minutes, which the employee is free to take during the course of the time.

So if he prefers to take that at the end of the eight-hour shift, there is nothing in the contract that would prevent him from doing so.

Now, as this Court is well aware, unions have traditionally been opposed to incentive pay systems, not primarily for the featherbedding reasons that my opponent has indicated, but for the perfectly legitimate reason that they have feared that this could result in employees working themselves out of jobs.

Q This may be so but they signed the collective bargaining agreement with the plan in it, didn't they?

A That is correct. I am going to come to that in a moment after establishing, which apparently do not have to waiver that you cannot say that a limitation on incentive earnings is something that is illegal on its face or horrendous It serves a very legitimate interest of a labor union and of its members and I might add as Justice White pointed out that these employees here were long standing members of the union -- one of them has been a member for at least 17 years and has been a union steward throughout most of this period, although

there was a union security arrangement in this case,like the union security arrangement in Allis-Chalmers, it gave the employee the option of either becoming full-fledged union members or paying only a service fee and all of the four plaintiffs here, insofar as the records show, opted to become full-fledged union members and have been so for many years.

Now, since at least 1944 the union here has, by membership rule, placed a ceiling on the amount above the minimum or the machine rate which an employee-member may claim as current earnings. Now, at time of the hearing the ceilings were about $.40 to $.50 an hour above the machine rate as shown at Page 50 of the record, the comparison between the machine rate and the ceiling rate.

Now, it is important to emphasize, that the rule, as it has been consistently interpreted and applied does not preclude the employee from producing in excess of the ceiling, and if he does, the extra production physically enters the flow of company operation.

The rule merely requires an employee to forego demanding immediate compensation under the banking procedure, that Justice Brennan referred to, for a later time when the receipt of the earnings would be less likely to disrupt employee morale and working conditions.

Q What is that?

A Well, for example ---

Q I mean, doesn't the employee have to not work a day in order to ---

A No. There are times when the employee's machine is down due to a breakdown and other shortage of material or something of that sort.

Q Now, how does the employee usually collect this bank money?

A Now, in those circumstances under the contract the company would be obligated,even though he was not turning out any production, either at the machine rate or at the lower day rate -- under these ceiling banking systems the employee can draw on the earnings that he has accumulated in there and be paid at the ceiling rate, and the company has cooperated by paying him at such a rate.

Moreover, it has furnished the production card to the union so that the union can periodically check compliance with the ceiling and, furthermore, it pays the union steward for the time that they spend in checking the cards, so that this ceiling system as it operates in this plant, could not possibly operate without a substantial amount of employer cooperation and acquiescense and,indeed, that was the finding of the board and the trial examiner in the court below.

Now, I want to get to the question of the collective bargaining. The ceiling rule, to be sure, was unilateral in origin, if we go back to 1944, or even to 1938 actually when

it first started as a gentleman's agreement among the union members.

However, since then it has been regularly the subject of collective bargaining between the employer and the union when the contracts have come up for negotiation, indeed, petitioners can see that Page 3 of their brief, that the ceiling has been the subject of collective bargaining.

I refer you to the findings of the trial examiner on Page 68 of the record, which sets forth the way the typical negotiation works.

"Among the subjects embraced by the contract negotiations is the setting of the ceiling rate."

And skipping down a bit further.

"And so in the typical negotiations the employer begins by asking the union to agree to eliminate the ceiling, and as the second alternative proposes a raise in the ceiling. As an inducement, thereof, it may offer a concession, a form of a raise and a guarantee hourly machine rate, and the raise in turn conditions the extent to which the union will agree to raise the ceiling."

And the trial examiner concludes at the bottom of Page 69: "The status thus achieved by the ceiling program is the product of hard bargaining." And this is reflected even in some of the written agreements that the parties have concluded. For instance, the 1953 contract, which is not

reprinted here but is in General Counsel's Exhibit 17, provided specifically that the previous agreement be modified to increase the ceilings a total of $.13 per hour.

In the 1956 strike-settlement agreement which is set forth in the record, at Page 49, at the bottom, it says the ceilings on earnings is to be raised $.10 per hour above the general increase of an earlier date.

Q Referring to the incentive system here, suppose that all you had was a collective bargaining agreement providing for that every employee shall work an eight-hour day at such-and-such and get paid such-and-such an amount and then the union made,what is commonly sometimes referred to as a featherbedding rule, saying nobody shall produce more than so many die-castings or whatever it is, and then an employee violates that the union sues to collect a fine, what about that?

In other words is your position totally dependent here on the fact that this is a piecework and incentive system within an eight-day framework -- eight-hour day -- framework. Suppose it was just an eight-hour day collective bargaining agreement?

A I think I would have a much tougher case, but I think that you could read Allis-Chalmers,which I think is what we come down to, as standing for the proposition that so long as the union discipline is confined to fines or expulsion that did not affect job rights that that was not

within the reach of 8(b)(1)(A).

I think that I have an easier case here because of the hypothetical that you have given me presents a problem of where the union rule would be going counter, as I understand the hypothetical, to the collective agreement of the parties.

The question is whether that policy is ---

Q If you would concede, at least for purposes of this discussion, that if the collective bargaining agreement provides for only a certain rate of pay for an eight-hour day, then it gets to be a little difficult, doesn't it, to distinguish that case from this situation; that is to say, here, you have it.

If you assume that this contract does provide for an eight-hour day and if you would assume, as I take it your opponent asked you to, that the eight-hour day provision carries with it the implied obligation to work as productively as reasonably possible during those eight hours.

Then you get into a difficulty of distinguishing those two cases and I take it that what you bring to play then to distinguish those two cases is the fact that this is kind of a half-this and half-that contract; it is half an eight-hour day contract and half a piecework contract which provides for a level of acceptable production and then for incentive pay over that.

A That is correct. I would say that ---

Q I don't want to lead you or suggest things to you, I am just trying to find out readily how you would distinguish those two cases because to my mind that is the nub of the problem.

A Well, I think you are quite right, Your Honor, in saying that our principal line of defense here is that the facts of this case show that this is not a case where what the union is doing here is going contrary to the collective bargaining agreement.

Q Well, in responding to that question, you don't think the question between the union and the employee would remain the same in those two cases? For instance, if this was a straight eight-hour day and the union put a ceiling on it, it may be that every employee would get tired if he lived up to the union rule.

A Well, I said that in order to ---

Q Here you say, and your position is, that the rule if the employee obeys it isn't a breach of contract and that the employee couldn't get fired for it, but would that change the legal position of the union vis-a-vis the member?

A I don't think it would if you read Allis-Chalmers as broadly as I was suggesting that it could be read, namely, that 8(b)(1)(A) does not reach the union when it imposes reasonable discipline and by hypothesis would ---

Q And the union might be in breach of contract

in an eight-hour day case, itself with a rule like this.

A It might. As I say, if you read Allis-Chalmers as holding that 8(b)(1)(A) does not reach reasonable union discipline for violation of a membership rule that is not ultravires or invalid on its face, then, I think, we come up with the same conclusion in the hypothetical that Justice Fortas has given me as I am coming out here.

I don't think, however, that it is necessary to answer that question for this case because on the findings of the board and the examiner and the court of appeals I think that we have a much easier case because on those findings what the union rule here is not in conflict with the collective bargaining agreement.

This is one of those situations which a Crofessor and Dean Shulman referred to in their writing when they have said that in the ideal arrangement you have everything spelled out neatly in the collective bargaining agreement.

But more often than not the area of joint control is not that neatly spelled out. You get an agreement which is not clear. It represents a truce, but as Professor Cox has said: "The armistice line is nowhere on the map."

You have to spell that out from the total situation here and if you look at what has been going on in this plant, for at least 17 years, you find, as the trial examiner, or as the board, summed up on Page 128 of the record when it said:

"The company, as a practical matter, has accepted the ceilings as an integral part of the modus operandi, and has recognized the ceilings as forming an important element of its negotiated wage structure."

That is what we have in this case.

Q May I ask you a question?

A Yes, Your Honor.

Q I want to be clear about the real issue. You say "a reasonable discipline."

A Yes, Your Honor.

Q Do I understand that here what has been done is that workers have worked, they workers the number of hours they were supposed to have worked. They did, didn't they?

A Yes, Your Honor.

Q They produced than more than a minimum, more than was supposed to be produced in taking pay for. And that they are being fired from union membership for that? Is that the reasonable discipline that is indicated?

Removed from membership, I don't mean fired, that which amounts to the same thing.

A They were fined,as in Allis-Chalmers,and the union has brought a suit in the Wisconsin court which is pending to collect the fine.

Now, I realize that ---

Q Well, does that not get down to -- I am not

saying it does or doesn't -- does that not get down to this: That they are required not to produce as much as they can during the time they work on the penalty that if they do produce as much as they can, and they take the pay for it, that the union can remove them from membership?

A Well, I think with this qualification -- they can produce as much as they want. The way the rule operates is that they can't claim immediate payment. They have to defer the payment by the banking arrangement which the company cooperates with.

The extra production goes into the company's line of production.

Q Why would the company want to do that?

A Well, the company did that as a result of bargaining with the union. The company wanted to eliminate this banking arrangement. It wanted ---

Q If they did,it wouldn't make a contract.

A That is correct. The union got a quid pro quo for raising the ceiling and the company got a quid pro quo in that the company agreed to raise the hourly minimum and the union in turn gave the company a quid pro quo by agreeing to raise the ceiling.

Q Isn't that susceptible to being called an arrangement, or whatever it is, to induce the employee to hold up his work and not give as much for his job as he would?

A But the union could do that, Your Honor, to the extent of bargaining with the employer for just a straight hourly rate.

Q But then there is a question of whether you should be allowed to bargain with the employer, that,in a way, would force the employer to pay for,what I think is referred to as,featherbedding.

A Well, the record does not bear out his contention that there was featherbedding.

Q Well, I will forget that word. It sounds like -- there has always been an inclination, as I understand it, by the unions not to want their fast men, the men that can produce a lot, do a lot in a short time, in the old days, pick more cotton than their brothers, not to want them to do that and get paid for it but they want to have an organization where they can hold them back and make them take the average man's base.

A But the union could go to the extent as they did with half the employees in this plant, which are not involved in this case, and put them on a straight hourly rate, and that ---

Q But they avoided that, didn't they, simply by putting it on a piece rate and accomplishing the same purpose by the ---

A They weren't able to get the whole,

but neither was the company, as the President of the company pointed out in some of his testimony in the record. That is the very essence of collective bargaining.

Q What they are really bargaining about is whether the employee would do all he could or just what degree of his ability he could carry on.

A Well, of course, the union has to represent the group, Your Honor, and they have to think of the older workers, maintaining the differentials and things of that sort.

MR. CHIEF JUSTICE WARREN: We will recess, now.

(Whereupon, at 12:00 p.m. the Court recessed, to reconvene at 12:35 p.m. the same day.)

(The argument in the above-entitled matter resumed at 12:35 p.m.)

MR. CHIEF JUSTICE WARREN: Mr. Silard.

ORAL ARGUMENT OF JOHN SILARD, ESQ.

ON BEHALF OF RESPONDENTS

MR. SILARD: Mr. Chief Justice, members of the Court: Justice Fortas asked an interesting question: Whether a union by by-law could say to the member: "Violate your contract," and if it did so Justice White says the union may be violating the contract and Justice Fortas asks whether the union may not also be violating Section 8(b)(1).

We say probably, given a case where the union contracts a certain requirement under the contract, such as the eight-hour day in an ordinary hourly rated plant. Then the next day they put in a by-law when the contract goes into effect that says notwithstanding -- never mind the contract -- no member of this union shall work more than seven hours.

We are tempted to say that that would be a violation of 8(b)(3) by means of fines against the member. In other words, we take this view that while Congress protected the relationship of the member and the union from intrusion by the labor board.

It is the internal disputes of the kind Allis-Chalmers and this case involve. If, by membership control, a union sought to violate the rights of others that the statute protects, for instance, the rights of neutrals under 8(b)(4),

by requiring a member to engage in a secondary boycott, which is described in Page 31 of our brief.

We think that that goes too far, that the exemption of Section 8(b)(1) of union discipline cannot go so far as to permit union discipline to become a means for violating other rights that the statute protects.

Q The employees here, though, are beneficiaries to this contract or parties to it, and they do have a contractual right against the employer to take advantage of the incentive plan and to be paid and to collect their money then.

A If this were ---

Q And when they work and say pay me, the employer must pay them. And that right, this union by-law certainly ---

A Right -- no, I wouldn't say right, Your Honor. I would say wrong on two counts.

If this were the case of a union by by-law requiring a member not to live up to this contract we say that two distinctions in this case, and I want to emphasize that quite two simple reasons why, this by-law is not the order of the Homebuilders case.

The first reason is that the men are doing a fair day's work even within this ceiling and, therefore, has never said and does not now say that there is any idleness in this plant by virtue of these ceilings.

The second reason is that even if there were an issue after a fair day's work, this employer has contracted for 16 years and consecutive agreements with the union as to the level of the ceiling.

If the ceiling is too low to permit a man to do a fair day's work, then the employer is a party to the ceiling because he has agreed over and over again as to what the ceiling will be.

Q Conceeding that, though, there still is the fact that the union by-law does interfere with the contractual rights of the employee against the employer.

A Let us say it this way. The union by-law -- I will say it impinges upon the contract by the employer, but may I say this: Allis-Chalmers did too. Nothing could more directly impinge upon the right of the union as to Allis-Chalmers under the contract than the rule that says you shall not work at all.

So that to say that a union by-law touches upon an area of employment rights ---

Q That isn't what I am saying. I didn't attach any consequences to it, I just wanted to know doesn't this union by-law interfere at the point it becomes operative with the vested right that the employee has against the employer.

He has worked above the ceiling. He is entitled to be paid and he can demand the money from the employer and the

union says you may not collect.

A No, Your Honor, I said that if there are breach of contract suits brought by the employer here to test the question ---

Q I don't suggest that there is any breach of contract ---

A I would say that under this contract the employer as a matter of successive contracts has agreed to ---

Q This isn't the point I am making. You are just not ---

A I am not getting the idea.

Q We are just not communicating.

A I don't think there is a vested right by a union member in this plant to work over the union ceiling because we think the employer has agreed that no union member shall ---

Q That isn't what I said. I said that let's assume he does work over the ceiling and he earns some money, and the employer owes it to him and ---

A Oh, he may collect it as a matter of contract, of course.

Q He may not, though, without breaking the union by-law.

A He may risk breaking the union by-law as these gentlemen have done, but as a matter of contractual rights he

has a right to collect all that he earns by production and, of course ---

Q But these union members collected their money and they worked over the ceiling asking the employer to be paid now, they were paid, as they were entitled to be as far as the employer was concerned, and the union fines them for it.

A That is right.

May I say then, to this Court, that the ultimate question seems to have to be: What is the guiding principle to Allis-Chalmers and Marine Workers.

We say there are two tests to be made in a case of this kind, because we say that Section 8(c)(1) now does not restrict the union from enforcing by discipline a membership rule not plainly ultravires unless the ruling makes an employer's rights protected elsewhere in the statute.

Before I get into the law may set this Court's attention to Footnote 5 on Page 9 of our brief, because this fair day's work issue was bargained out between the two sides very recently.

In the middle of Footnote 5 on Page 9 we have the minutes of the negotiations in 1965 when, after contractual negotiations the ceilings were again raised, at the employer's insistence. Interestingly, in these minutes, the following is reflected: The union said the ceiling is good for the union and for the company;if they were removed we would have

confusion. The union said the ceiling are 40 to 50 cents an hour above the timing rate that the average rate, which is considered day's work, if maintained. Todd, that is the company president, read figures that he claimed shows that the spread between the timing rate and the ceilings has gradually diminished.

In other words, here are the parties bargaining precisely on this question. Is this ceiling set at a level where a fair day's work is no longer being maintained. The company is saying this is what has happened. The union is saying it hasn't and they resolved it by increasing the ceilings three cents per hour.

So that the very issue as to a fair day's work as to against slow-down has been bargained by these parties and the result has been compromise.

We say, therefore, the very hard case that Justice Fortas put, of a union ruler requiring a man to violate a contract is simply not before this Court in a double sense that this particular arrangement in existence since 1944 has won acquiscence, acceptance and agreement from the employer as it applies to union members and that in any event even if it had not won that acquiescence the scheme as it operates is not a production limiting slow-down scheme.

Men are doing a fair day's work under it. To say that this is featherbedding because a man can't use the

absolute maximum incentive to produce the absolute last piece, is to say that hourly wages is featherbedding. Because it is perfectly clear that under hourly wages, that five out of six industrial employees are now employed under hourly wages, not under incentive; under hourly wages there is no incentive for the man to work his head off, or work himself to death to earn a living.

Now, is that featherbedding? We don't think so. Therefore, to say that a reasonable ceiling on what incentive pay shall be earned is no more featherbedding or slow-down or make an hourly rate a slow-down.

I am sorry, Your Honor, I shouldn't have interrupted you.

Q Oh, that is all right. Mr. Silard, that is not quite it, I think, because my question to you is whether, let us take a case of a collective bargaining agreement that provides for an eight-hour day, and then I posed a question of what would be the result if the union sought to enforce a rule, a union rule, saying that in those eight hours you may produce only X number of units?

A And those units would be less than a fair day's production, is that what you are saying?

Q All right, take it both ways.

A Well, if it is not less than a fair day's production I don't see that there is any infringement upon the

employer's ---

Q Well, in this case, then, what your point is is that the situation is salvaged because the company and the union agreed that ceiling here defines a fair day's output.

A Well both agreed to the ceiling, itself, whether it is fair or not and because the ceiling is, in fact, a fair day's output.

Q Because of agreement you don't want us to find that it is a fair day's output, do you? You are not asking us to do that.

A No issue in this case says that it isn't a fair day's output. It is clear that it is a fair day's output.

Q All right.

Now, take the case that I put to you and let's suppose that there is an eight-hour day and let's suppose that the union says that you may produce only five units.

A Which is not a fair day's work.

Q Let's suppose that is not a fair day's work.

A All right, we would concede, as in Homebuilders and we do in our brief, that you probably have an 8(b)(c) in the sense that here is a union rule due to some interest in the promulgating and, nonetheless, so infringes on the employer's rights, that the union has an obligation to sit down and bargain that rule out with the employer, and if it refuses to do so, and, in effect, changes the conditions of work,

unilaterally, that you would have a violation of 8(b)(3) and 8(b)(1).

Q Yes, I understand. Let me give you case No. 2, Mr. Silard. Let's suppose that this is a fair average, the record shows this is a fair average but the company says that about one-half of our men could produce more than this if they weren't restricted by this arbitrary union rule, what about that?

A Well, first of all, the company, if it had not contractually agreed to the system could discipline a man who wasn't produce enough, they could discharge him or ---

Q Well, what you are really basing this on -- that is what I really want to get clear from you, if this is your point, what you are really saying is that your case depends upon company agreement or acquiescence.

A And the fact that even if there hadn't ever been bargaining between them there is not anything in the record to suggest that this earning ceiling is a featherbedding, slow-down, not less than fair day's work rule.

In other words, this is an earning ceiling here, not a production ceiling. There is nothing on the record or apart from acquiescence that this is some species of slow-down rule which would come under the Homebuilders. It is an earning ceiling ---

Q I have gone as far as I can, I think, in my

questioning of you because I wanted to know crisply and shortly whether your position depends upon company agreement or company acquiescence, or is independent of it.

A That takes me home, but even if you didn't have it, this record shows nothing of the kind of slow-down or less than a fair day's work and since all the unions is saying is don't collect your pay, it doesn't say don't do your work, we wouldn't have an intrusion on the employer's rights in any event but ---

Q If that is not the purpose of such an agreement, what is?

A I was about to say, Your Honor, is clear in its history. This rule was adopted in 1944 just before the War Labor Board put incentive rates into effect in machinery manufacturing and the membership said: "If the War Labor Board puts an incentive rate here"-- now, we in this union have always hated incentive rates -- "If that happens here", the men said, "we are going to put upon ourselves in this union the restriction, a reasonable restriction, that 10 or 20 percent above those rates is what we are going to stop drawing our pay.

"Otherwise, we are going to work ourselves out of a job, work ourselves into a situation into which older men who have been here for 20 and 30 years in this company are just going to be outworked by an eager beaver who can do a fantastic performance, with great skill, at the capacity of a man 18 or

20 years old and the paycheck is dangling before him to make him do that."

I watched the superbowl game here the other day and $7,500 made each of those young Jet players play very well. Well, the fact is that these men are working ---

Q The Jet players got $15,000.

A Well, the incentive was $7,500 for the winner, and all I am saying is that the incentive of the extra pay for the one who works tougher, the incentive for the younger man to beat the older, the experienced quarterback.

Q Do you think that is the reason they won?

A Well, I think it is part of the reason. I hate to say it, these are professional players, Your Honor. Often it looks like college ball,but I think there is something to the money, too.

Q You sound like a Colt fan.

A Well, the point I am trying to make, Your Honor, is not that -- it is precisely this, these men are working day after day, week after week, year after year, they can't afford to be playing the Superbowl every hour of their working lives.

It is just to wearing on these men. The older ones can't keep this up.

By the way, the precision work taking great skill, taking 10 thousandths of an inch tolerance, so to ask a man

who has been there 25 years to go home with half the paycheck or a quarter of the paycheck for somebody else when there is going to be no limit on the incentive, is asking him to work constantly under the tolerance of the strain of too great a competitive pressure and that is what the rule is about, Justice White, this a ---

Q Slow down a little.

Now, if I can interrupt you just one second, I know it bothers you. It seems to me you have admitted that that is the purpose by talking -- and I don't mean to say that makes your position wrong -- by saying that the older men might have to work more than they would have had to work otherwise.

A And I say, Your Honor, that they will earn half as much as the younger man.

Q All right, well you are doing it protectively. I want you to defend that position instead of saying that that is not the reason.

A Oh, I do defend it. I say it is not right to have to have the men put in a speed-up situation ---

Q I mean to have you defend it legally.

A Well, I defend it legally on this basis, Your Honor. We think the National Labor Relations Act, Section 8(b)(1) permits the union to have rules not plainly ultravires where there is a legitimate union interest on the line.

To say there is no legitimate union interest in

this situation of putting an upper limit on piece rate, is really to say that there is no legitimate union interest in the negotiation of hourly wages and yet five out of six workers work on hourly wages.

That is, the unions have found incentive schemes, if they are not regarded or checked by any upper limits, to be corrosive of the internal relationships within the union, to lead to speed-ups, to lay-offs and to demoralization, now that is a legitimate union interest.

The board, the examiner, the courts of law all find it to be a legitimate union interest, which goes further, I think, than Allis-Chalmers required this Court to go in looking at this union rule from the point of view of its ultravires side of the rule.

We say a rule that is not plainly ultravires in the sense that it impinges on some personal civil liberty or right, but within the area of the union's legitimate judgments about the interests of men.

It is clearly protected under Section 8(b)(1)(A) from labor board intrusion, unless, and I want to come back to the unless, unless the rule is being used as a means of subverting the other rights protected by the Act, such as Sections 8(b)(2), 8(b)(3), or 8(b)(4).

I want to point out to this Court that there is no proviso to Section 8(b)(2), 8(b)(3) or 8(b)(4) such as a

proviso for Section 8(b)(1), and that Marine Workers in our opinion is essentially demonstrative of only the fact that the limits of exemption Congress afforded to union, to applying non-ultravires rules to their members by membership discipline are reached.

When you come to an intrusion by such discipline upon some other person's protective right under the Act, the neutral under 8(b)(4), the employer under 8(b)(3) others under 8(b)(2).

I see my time is about to expire and I want to make one point to this Court because we lost track of it. That is the point that we are not here in front of this Court saying "Either there is no" -- we are not saying this because there is no relief for injustices and arbitrariness in this entire area.

As I said to the Court, in Allis-Chalmers, the common law courts have traditionally been available; this Court, in Gonzales, said it is in the common law courts that you go if union rules are being arbitrarily applied and you get back in the union if you are wrongfully thrown out.

The question is this: Not whether there shall be relief somewhere, because the case has been pending in eight years in Wisconsin and we just lost it last year -- it is in our brief -- on the merits of collecting this fine, so there is plenty of remedy in the State courts; the question is, shall the labor board get into this thicket, into what

Professor Cox called the "dismal swamp of 8(b)(1) litigation" of this kind.

We say that the most important reason not to tamper with a Congressional decision in 1947 and 1959, to leave this outside the province of the labor board, is that the labor board has been entrusted with the function of being the principal arbitrator between management and union.

Now, if that principal arbitration function, that function of being the mediator, the man in between the two contending sides, if, in addition, by rewriting of 1947 history, the labor board also now becomes the policeman of intraunion conduct, then its credibility, its acceptance of the union's side of this nation's forces, will be impaired.

There is nobody less well situated to become the policeman of intraunion judgments and disputes of this kind. One man says: "I like this union rule" and the other says: "I don't like it". Wisdom was requested by Congress when it said: "It is precisely the labor board which is the mediator between the two contending sides which shall not go in there and become the policeman of union discipline and union rule."

We think great political wisdom is requested in that judgment, and that seems to be the paramount reason why this Court should leave the matters and disputes of this kind in the common law court, that is precisely why the labor board is the last body that Congress would have wanted in and never

put them into this business.

It wanted justice for everybody in deciding, is this a good rule, a bad rule or a reasonable rule or an unreasonable rule, sociably desirable rule or not.

Do we agree with the majority of 98 percent of the men at this plant who have always voted for this rule. That is precisely why it was not for the labor board, and we believe that it had better be left where this Court said, in Gonzales, it was left to the common law courts where a man who is improperly disciplined can get relief and if the rule upon which he is punished is an arbitrary rule, the common law courts will not enforce it.

As in Gonzales they will put him back in the union if he is expelled, they will give him back his damages if he has had any damages.

The issue is keeping some clear lines of jurisdiction. For the present time we submit our rights and we come back, therefore, to the following rule which we need in all respects. A rule not ultravires -- the union rule not plainly ultravires -- does not violate Section 8(b)(1) when it is enforced by reasonable discipline on the member ---

Q Is that because it is not restrainted coercion or because it is a proviso?

A This Court says because it is not restrainted coercion. Now, if Chalmers didn't reach the proviso he would

say you would get the same result under a fair reading of the proviso, which, in turn, speaks only of membership expulsion, but he speaks the same general intention this Court found in 8(b)(1)'s language, that this whole area was left by Congress outside the labor board's concern and jurisdiction.

We don't care whether you get there by the restraint of coerce line or the proviso line ---

Q Which route are you taking to get there?

A I would say in a case that came before the Court, I have always felt the proviso was probably such a clear expression of Congress' statement that this whole area was left outside the board's jurisdiction, that I would rest on the proviso rather than on the reconstruction of restraint of coerce, however ---

Q Your brief is not couched on that.

A Our brief is necessary between the two points of Allis-Chalmers emphasis which is both on the restraint of coerce and on the proviso.

Q Oh, Mr. Silard.

A Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Urdan.

REBUTTAL ARGUMENT OF JAMES URDAN, ESQ.

ON BEHALF OF PETITIONERS

MR. URDAN: I would like to comment first on the last two points made by counsel for the union.

The union position is that Section 8(b)(1)(A) is violated when you also violate Section 8(b)(2), (3) or (4) or (5) or (6).

We cannot accept this reading of the statute. 8(b)(1)(A) has a purpose of its own, and it has been found to be violated without also involving other sections, of Section 8(b).

The suggestion that the employees have a remedy in the common law courts is perhaps generous but not very helpful. Wisconsin courts have said that the union fine is collectable. They have said this on the basis of the Allis-Chalmers decision.

They have also said that even a contrary State policy can't be enforced. They say because of the Allis-Chalmers rationale we can't even apply our own Wisconsin law. We have to permit collection of the fine.

These employees are not going to get much relief from the Wisconsin Supreme Court. The contention is made that this is a reasonable rule. I think the record shows that it is not a reasonable rule. The employees do not put in a normal working day.

Until the company is tempted to impose some restrictions there was card-playing, reading a magazine; it didn't look like an industrial plant. The president of the company testified at the hearing that he was ashamed -- the president was ashamed -- to take visitors into the plant after

lunch, because the men aren't working.

You get these unreasonable results when you permit unreasonable coercion. That is precisely why coercion is outlawed by Congress. When you permit coercion the union doesn't have to worry about whether it is a reasonable rule or not.

They just go ahead and enforce it. Union says that its legitimate interests are involved, and certainly there is a legitimate interest involved in negotiating work loads and matters of this sort, but the question of the legitimate interest includes the method that is used to obtain the objectives just because it is a worthy objective does not permit an impermissible method. And this method is coercive.

Q Why is it important to the employer if he really thinks doing only the machine rate is not a decent day's work? Do you suggest that he negotiate a different level of what a satisfactory day's work is and put it in the collective bargaining agreement with the union.

A This would be the proper way for the employer to proceed. We do not come here speaking for the employer. We speak for the men who are working under a contract that doesn't say that. The contract says they will be paid for the work they produce and union is trying to prevent them from doing this.

You are perfectly correct that the employer has his

remedy in collective bargaining. These employees do not. Now, the union tells us that the rule here is not a production restriction, as such.

They cite various text writers who tell reasons why incentive pay is objectionable. These texts -- they are interesting -- but that isn't what the union witnesses said at the hearing. One of the founders of the union and a man who was intimately involved in the creation of the ceiling testified at the hearing. This is at Page 45 of the Appendix.

We wanted to see that this labor state keep as many fellows working as we possibly could, and we know if we put this thing on there it would provide for at least a few more fellows to stay at work.

He says the fellows are for this feeling because it provides jobs and then he went on. He was asked what would happen if they took the ceiling off. He didn't say there would be jealousy. He didn't say the older workers would be prejudiced. He didn't recite any of these reasons.

He says if the ceiling were taken off it would mean a lot of jobs. That is what the union was trying to accomplish, having more men at work than were required.

Now, the union doesn't need this power. This is not like the Allis-Chalmers case where you have no way to prevent a man from going to work during a strike. In the Allis-Chalmers case there is no contract in existence. The

union has no effective remedy. They have no way of stopping a man.

Sometimes they try to stop him physically. Other than that there is no way to accomplish their objective. That is not true here.

Q In the Allis-Chalmers, the employer invites the workers back and will take them back and pay them if they come back to work. An employee says: "I want to come to work. And if he does, the union fines him. Do you think that is different.

A I might say, first, we certainly don't agree with the Allis-Chalmers decision. I think the dissenting opinion makes considerably more sense to us on our side.

Q And furthermore in Allis-Chalmers if the employee obeyed the rule and stayed away, it might very well be that he wouldn't have a job because he might be permanently replaced.

A That is exactly right. I think this is a great evil of the Allis-Chalmers and a great evil of the union position here, that it puts the employee in the middle.

Union brief says, "Should an employee refuse to produce a fair day's work under a union pay ceiling the union is free to discipline or discharge the worker."

Q Yes, but given Allis-Chalmers, what about this case? Aren't you really in some difficulty?

A There are two very important distinctions from the Allis-Chalmers case. The first: The purpose of the union rule, what is it that the union is trying to accomplish?

Secondly: Does the method used by the union conform with the statutory policy?

In the Allis-Chalmers case the strike was considered to be so important the union had no other method other than violence for accomplishing its objective. Here the union has no such need. It can accomplish its objective by collective bargaining and that is precisely what the Act envisioned. This is how the union should resolve questions of pay and production loads.

Mr. Scofield is no a young man, he is not an eager beaver. I wish he were here in the courtroom so that you might see him. He is a man in his 50's. He does not work harder than other people. He does not take other than normal breaks.

The only thing he really does that is any different is to work the full working day. That is really all he does different. For the union to advance these various other justifications to the rule is really beside the point here.

I think something should be said about the voluntary membership concept. This is an area where there is a great divergence between theory and practice. Voluntary membership sounds fine in the law review article. In the inudstrial

plant membership is not quite so voluntary as you might think.

Tremendous pressures of every kind for people to join the union -- and once they are in, tremendous pressures to stay in.

Mr. Scofield, for example, attempted to resign in 1959 over this very issue. He didn't like the production ceiling. He tried to resign. He turned in his union card. The union wouldn't take it. He was summoned and there was a discussion with, I believe, 11 members of the union ---

Q Is that established in the record?

A No, it is not.

I am merely trying to illustrate that the voluntary membership question is a matter of a practical problem. It should not be approached in a theoretical way and I think that Congress recognized this.

The legislative hearings brought out this type of problem. Many people are union members, not because they like it, but because of the pressures in their work situation. Furthermore, they are required to pay dues to this union, whether they want to or not and they are represented by this union, whether they want the union or not.

This the law provides. So the voluntariness, I think, is really not a truth characterization and that is precisely why Congress extended these benefits to union members the same as non-members. Congress knew that the member needed

this protection. That is precisely what the debate reveals.

I would like to say one word about the effect about this type of rule or sanction on the democratic process within the union.

The union, in formulating its bargaining position, ordinarily would have to take cognizance of the views of all the members. Even where a majority has one opinion, a legislative type of body must also consider the minority opinion, and the minority opinions have influence. Where you have voluntary unionism, where you have voluntary adherence to union rules then the union has some pressure to accommodate competing viewpoints within the union.

Where you permit the union to impose fines, you lose that all-important element of giving these men a voice in what goes on. What happens is the union leadership can impose the fine, the suppress descent, they suppress the right of the individual. They don't have to worry what he thinks anymore.

Consequently, the opinion, or the role of these men in establishing the union policy is simply suppressed. The union member needs protection from his organization just the same as the man in the police station needs protection from the police, or the other decisions of this Court which have highlighted the conflict, the difficult position the individual is in when he is faced by what is really an

overwhelming organization.

The employee needs protection from coercion. He needs protection from coercion from the employer. He needs protection from coercion by his union. Here the union has coerced him by the fine and the fine is collectable in court. Under the law of the sState where this occurred, the employee is going to be defenseless against this collection. His rights under the statute have been infringed and he should be granted relief.

(Whereupon, at 1:10 p.m. the hearing in the above-entitled matter was concluded.)