Supreme Court of the United States

OCTOBER TERM, 1968

In the Matter of:

Docket No. 61

NATIONAL LABOR RELATIONS BOARD

Petitioner

vs.

JOSEPH T. STRONG
a/b/a Strong Roofing and Insulating Co.,

Respondent

Place Washington, D. C.

Date December 10, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NATIONAL LABOR RELATIONS BOARD, Petitioner,	:	
vs.	:	No. 61
JOSEPH T. STRONG, d/b/a Strong Roofing and Insulating Co., Respondent.	:	

Washington, D. C.,

Tuesday, December 10, 1968.

The above-entitled case came on for oral argument before:

EARL WARREN, Chief Justice

HUGO LAFAYETTE BLACK, Associate Justice

WILLIAM ORVILLE DOUGLAS, Associate Justice

JOHN M. HARLAN, Associate Justice

WILLIAM J. BRENNAN, Associate Justice

POTTER STEWART, Associate Justice

BYRON RAYMOND WHITE, Associate Justice

ABE FORTAS, Associate Justice

THURGOOD MARSHALL, Associate Justice

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C O N T E N T S

APPEARANCES:

ERWIN GRISWOLD, ESQ.,
Solicitor General, and
HARRIS WEINSTEIN, ESQ.,
Assistant to the Solicitor General,
On behalf of the Petitioner.

WILLIAM B. CARMAN, ESQ., and
CHARLES G. BAKALY, JR., ESQ.,
433 South Spring Street,
Los Angeles, California,
On behalf of the Respondent.

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MR. CHIEF JUSTICE WARREN: No. 61, National Labor Relations Board vs. Joseph T. Strong.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Weinstein.

ORAL ARGUMENT OF HARRIS WEINSTEIN, ESQ.,

ON BEHALF OF PETITIONER

MR. WEINSTEIN: Mr. Chief Justice, may it please the Court, this is a labor case which comes to the court from a writ of certiorari of the United States Court of Appeals for the Ninth Circuit.

The sole issue goes to scope of the remedial power of the National Labor Relations Board. The exact issue is this: Once the board has found an unfair refusal to execute a labor contract, may it include in its order a provision that requires the respondent to pay past fringe benefits that it would have been required to pay if it had executed the contract in timely fashion.

The Court of Appeals said no, the board may not do this, it may not direct payments required by a lack of agreement and that the remedy is not a board order but must be by way of suit under Section 301 of the act. And this, as we pointed out in our petition and our brief, is in conflict with the views expressed in several other circuits.

The case arose in this way: The respondent, Joseph Strong, is in the roofing business in Los Angeles. In 1963,

when the series of events began, he was, as he had been for many years before, a member of a contractors association that was a multi-employer bargaining unit. He was contractually obligated to abide by the contracts of the association associated with the unions, including one that represented his employees. He was also obligated, if he was going to withdraw, to do so at least sixty days before the termination of the contract period.

The old contract, that is, the one that is old in the context of this case, was due to expire in the middle of August of 1963. Negotiations took place during the first half of that year and on August 14 the union and the contractors association reached agreement on a new four-year contract to take effect the next day, August 15th.

A year and a half before, in 1962, respondent had written a letter stating his desire to terminate this agreement, and nothing came about it. Then, on August 20, two days after -- in 1963 -- a few days after the new agreement was reached, he sent a letter to the joint industry-union grievance board expressing a wish to become a non -- to withdraw, to become a non-union member, to terminate the new contract as to him.

Although the association, the contractors association changed its status on its books and refunded a security deposit and terminated the bond that was supposed to secure his payment of fringe benefits, the union on three occasiona approached

him, beginning in October '63, and again in November and the following April, and asked him to sign the contract which he refused to do.

MR. CHIEF JUSTICE WARREN: We will recess for lunch.

(Whereupon, the Court stood in recess, to reconvene the same day.)

AFTER RECESS

MR. CHIEF JUSTICE WARREN: Mr. Weinstein, you may proceed.

MR. WEINSTEIN: Thank you, Your Honor.

If the Court please, just before the recess I had mentioned that on three occasions, in October 1963 and in 1964 the union asked that the respondent execute the contract and he refused. On the basis of these facts, the union filed unfair labor practice charges and the board upheld them and ruled that the respondent had not honored his duty as an employer.

On a petition for enforcement, the Court of Appeals upheld the substantive findings and last January this court denied respondent's petition for certiorari. So as the case stands, respondent has been adjudicated in his failing to -- and the controversy goes to the board's order.

That order is set out on pages 120 and 121 of the record. It has, in paragraph one, some cease and desist directions which are not in controversy. It directs, in paragraph 2(a), the respondent to executive and honor the agreement that was negotiated, and that was not in controversy. The issue goes to paragraph 2(b) of the order --

Q (e)?

A (b), after (a) -- which directs the respondent to pay to the appropriate source any fringe benefits provided for

in the above described contract. And also in issue would be a parallel part of the notice to employees that respondent was told to post, and this is on page 152, the third indented paragraph, and that would have said, in the notice, "we will make whole the appropriate sources for any unpaid fringe benefits provided in the above contract."

The Court of Appeals, in holding --

Q I don't quite understand -- what are the appropriate sources?

A Now, these are set out in the contract, in the contract itself, which is in the record, Mr. Justice Stewart, I think on page 66, and it sets up several funds that to which payment or payments are to be made. There is a health and welfare trust. There is an apprentice trust. There are two other funds. There is a roofers' fund. And these are amounts measured by the hours for each employee that was supposed to be paid to provide for a variety of fringe benefits. The basic one is the health and welfare fund and the roofers' fund. And the order, in talking to the appropriate sources, referred to whatever each particular items had been paid if the contract had been executed in timely fashion.

Under this paragraph of the order, it is beyond the board's power. The Court of Appeals analysis was, if I understand it, that the unfair labor practice was not the failure to pay these amounts but was, instead, just a refusal to

execute the contract, and it said that the order was -- and I am quoting from their opinion -- "an order to require him to carry out provisions of the contract, and it is beyond the power of the board."

Now, the Court of Appeals ruled that if an order of the board directs payment of something required by a contract, what else the circumstances, the board doesn't have power to do that. The only recourse to the union or its membership would be a suit against the employer, under Section 301 of the act.

Now, then, at the time we filed our brief here, I believe there have been running cases on this or related matters, and this was the only one that found the board without power. There since has been another case, I would like to call to the Court's attention, in the Fourth Circuit. It is called NLRB vs. Beverage Air Company.

Q Beverage what?

A Air.

Q A-i-r?

A A-i-r. And it is reported at, '69 National Labor Relations Reference Manual, at page 2369. And like several other cases in the Fourth Circuit, in all the other cases but this one, it allows enforcement of the order such as we have before the Board in this case.

Q At page 1329?

A 2369.

Q 2369?

A Yes.

Q Is that a board decision or is that a court decision there?

A That is a decision of the Fourth Circuit enforcing a decision of the board.

Q The Fourth Circuit?

A The Fourth Circuit. Part of the order that is to be enforced is essentially similar to paragraph 2(b) of the order here.

Q So presumably in due course that will be reported in the Federal Supplement?

A I would presume so.

Now, in the final analysis, the resolution of this case depends upon the construction that is placed upon section 10(c) of the act, that tells the board what to do once it finds an unfair labor practice and is the source of the board's remedial authority.

Now, since -- this tells the board to do two things. First, to answer a cease and desist order which is here, and then it tells the board to take such affirmative action, including reinstatement of employees, with or without back pay, as will effectuate the policies of this act.

Now, one of the line of cases, going back to the inception

of the Wagner Act, this Court has looked at this language and it has considered what it allowed the board to do. And perhaps the most recent summary of the authorities is in the Fiberboard decision, 379 U.S. But the thrust of it is simple, the board is directed to take affirmative action, and that action should be whatever is needed to restore things to what they would have been without the unfair labor practice, and that asserts two functions.

First, it restores the bargaining process. It lets it operate as it would have without the unfair activity. Second, it takes the profit out of this. It takes away any hope of gain through refusing to bargain. It deters the particular respondent and other people from illegal conduct and encourages them to voluntarily perform their duties under the act.

Now, we would think that under this analysis, there is an extremely strong case for our position here without looking further.

The board has an affirmative duty to provide relief, to restore the status quo and to the violation. The cases, the other cases that have been reported in the Court of Appeals on this subject show that basically that there are two patterns, either as in this case the employer has refused to execute a contract that has been negotiated by him or on his behalf. And the board, among other things, says to the employers, "Pay whatever you would have had to pay if you executed the

contract in a timely fashion."

Q Does the respondent concede that there was unfair practice?

A As of this moment, yes. I think this was litigated on --

Q What specifically is the unfair practice, refusing to sign the contract or to bargain about fringe benefits, or both?

A No, it is refusing to sign the contract. There is no -- the other line of cases --

Q Why is that an unfair practice?

A Refusing to sign a contract?

Q Yes.

A The duties I think have been interpreted as requiring that once a contract is bargained for and --

Q By arrangements? In a multi-employer bargaining unit?

A Yes. I think the authorities are set out in the examiner's opinion here, where we are speaking of --

Q You say that issue is not here?

A It is not.

Q And why is it not here?

A I don't think there has ever been any dispute about refusing to sign --

Q I thought you said something earlier, Mr. Weinstein,

that that issue had been resolved by the denial here, in some other case or what?

A Mr. Justice White asked me if it was conceded here that there had been an unfair labor practice, which I took to mean is the respondent still arguing that he didn't violate the act. And --

Q But that issue has never been attempted -- nobody has attempted to bring that issue here?

A Well, his defenses were first -- to this unfair practice was not offered in six months of the violation of the act. The union, by its conduct, had waived its right to have Mr. Strong sign the agreement. I think those are basically the issues that were presented in the petition for certiorari a year ago.

Q He tried to bring it here and we refused service, is that it?

A Yes, Mr. Justice, last January.

Q And then how did this get back to the Court of Appeals?

A No, our time for petitioner was not the same as the respondent's because we had filed a petition for rehearing in the Court of Appeals.

Q Oh, I see.

A And our petition for certiorari was therefore not due until, I believe, in April, and that is when we filed.

Q If he had signed the contract and then refused to pay the fringe benefits and refused to talk about it, I suppose it would be an unfair practice, too?

A That might depend upon the circumstances, Mr. Justice White. For example, one --

Q But here you say his refusal to sign the contract --

A Yes, and what is the consequence of that? The other line of cases I think fall in the category of just refusing to pay after the contract is executed. For example, in the Scam case, which I think was in the Seventh Circuit, the employer had unilaterally amended the health program and refused to bargain with it. And there the amendment itself to the health program, a unilateral amendment without bargaining, was both a violation of the contract and a refusal to bargain. But in either instance, whether the case is like that one or this one, the board has entered an order requiring that the employees be made whole that what they have been deprived of. Certainly, in this case, while the payment, the mere refusal to pay the fringe benefits might not have been an unfair labor practice if the contract had been signed. The fact that these weren't paid, as a consequence of the unfair practice --

Q You say he might have been able to refuse to pay but not --

A Well --

Q He might have been about, without committing an unfair

practice to refuse to perform his contract but it is an unfair practice to refuse to sign the contract?

A I think it is certainly an unfair practice to refuse to sign. Now, whether a refusal to pay is itself is an unfair practice depends. For example, if he hadn't paid because he was bankrupt, I imagine that wouldn't be an unfair practice.

Q I suppose, though, if it were an unfair practice to refuse to pay, simply, it might make more -- the remedy question might be easier and clearer?

A I think the Court of Appeals analysis would fall apart because they relied in part on the fact that that in itself on this record was an unfair practice that was found.

Q Incidentally, could the -- I gather these fringe benefits are payable in these funds, what, jointly administered by unions and so forth?

A I could --

Q Maybe that is unimportant, but could a law suit under 301 be maintained for these unpaid fringe benefits?

A I have a problem with that. Certainly --

Q Is that the grounds in the Court of Appeals --

A I think it is the implication of what they say. Suppose before the board's action here a suit had been brought under 301? I assume that the defense would have said there was no contract. Now, if the court had found there was a contract, then I imagine they could have directed payment of

the fringe benefits. Now, what the respondent is saying here is that there must be a two-step proceeding. First, you go to the board to determine whether there is a contract. If the board says there was a contract and orders its execution, while that execution is retroactively valid, the board can't order payment of the benefits, then you have got to go to arbitration or to a 301 suit, and it is this analysis that we are saying it simply doesn't --

Q Well, it doesn't hurt your case if he could, does it?

A No. No.

Q Even if he could bring one under 301, you would still be making the argument you are?

A The basis of our case is that there is a contract.

Q Yes. Incidentally, has he since signed the contract in response to the cease and desist order?

A I am not sure. I don't think that he would yet be in contempt if he hasn't since the order is still subject to litigation. I don't know whether he has or not.

Well, the reasons, the basis for the views of the Court of Appeals analysis I think are two-fold, and they find their root in legilative action. One is section 301, which confers jurisdiction on the courts. The other is that Congress declines to make breach of a contract by itself an unfair labor practice. These are pretty weak but the inference the Court of Appeals drew is directly refuted by the act because

Section 10(a) of the act says that the board's power under the unfair labor practices shall not be affected by any other means of adjustment or prevention that has been established by agreement, law or otherwise.

And the interesting thing is that Congress doesn't seem to give any thought that there was any possibility that it was the best thing for the jurisdiction to act in a case like this. It did express some concern that Section 301 could be limited to situations where there was no unfair labor practice, and the committee report recognized that possibility and expressly says that when there are two remedies, one before the board and one before the courts, they are cumulative and not mutually exclusive.

Now, this Court also, I would say, is not writing on a slate. If my count is correct, this is the seventh time in seven years the court has had occasion to comment on this particular problem. The first three cases involved the problems that were predicted by the Congress, are the courts in some manner preempted. One case, Lucas, questions, are our state courts preempted of jurisdiction by section 301 without regard to the board?

The next two cases, Smith vs. Evening News, 371 U.S., Carey vs. Westinghouse, 375 U.S., the question was whether the board had exclusive jurisdiction to the derogation of the courts when they were both an unfair practice and a violation

of contract. Now, the issue was not before the court in those cases, but in each of the opinions the court took care to say that it was not suggesting that the board was without jurisdiction and expressly said in each instance that there were dual remedies available.

The next two cases were companion cases, in 385 U.S., the C & C Plywood case and the Acme Industrial case, and in each of those the contention was that the board was without jurisdiction in matters that could be adjudicated before the courts in a 301 suit. And in each instance this argument was rejected.

And then in the Great Dane case, later in the same term, a similar argument had been made in the Court of Appeals but was dropped when this case reached this Court. But the Court's opinion again points out that the fact that there is jurisdiction in the courts under 301 does not deprive the board's jurisdiction.

Now, suppose that these cases could be distinguished from the C & C and Plywood and Acme Industrial on the ground that those cases involve the subject matter of the labor board; in this case is involved the hard grant authority where it is subject is a matter of jurisdiction is not. But we would suggest that this case is an easier one in finding the board's jurisdiction. In those instances, the problem was that there were matters in dispute that might have been resolved through litigation in the courts. Here the disputed matters, at least

as the contentions have been framed, are not things that are ordinarily decided in the courts in Section 301 suits. The contract has been used simply as an instrument of the remedy. It is just the same, I would think, that if the board, in ordering back pay, used an hourly rate established by the contract, as so many are today.

I suppose, if we follow through the Court of Appeals analysis to its logical completion, the board can no longer order back pay because back pay is based on a rate established in the contract. There is nothing in controversy here on what the contract means in terms of the fringe benefits. They are set up in numerical -- there is just a calculation to be made. And all the reasons alluded to in these court opinions, in C & C and in Acme, it would seem to require the same result here.

For example, in Acme, the court discussed the difficulties that would arise from having two proceedings, and matters of that sort. There is no reason to put the union or its members to a duality of proceedings. There is no reason to think that the board is devoid of jurisdiction to act to cure a violation of this kind.

I think there is one other point that requires brief mention. Much of the respondent's brief on its merits is devoted to an argument that with grievance and arbitration provisions of this particular contract, they forbid the board's action. As I understand it, they are saying that whenever there is an

arbitration and grievance procedure, the board can't make any order that could have been entered by an arbitrator.

Well, first, I think this is the first mention of arbitration in this case. I am familiar with no request for arbitration, no suggestion that this matter could have been arbitrated, and I would assume from the way the arbitration clause is worded that they think the arbitrator could speak to the existence of the contract.

All of this is to be a question because I think the Court again has devoted its attention, both in the case of Carey vs. Westinghouse and the Acme Industrial case -- each time the Court has had occasion to discuss the interrelationship between arbitration and the board's activities -- in Carey the claim was that the board's jurisdiction is through arbitration; in Acme the claim was the presence of an arbitration clause forbid the board to act. Each time the Court held that there was a duality of jurisdiction and pointed out that the reasons that it applies the Steelworkers trilogy to require the courts to defer arbitration do apply in court proceedings.

No doubt the board here could have, if the matter warranted, sent them in direct arbitration. It could have referred it to arbitration, but there is absolutely no reason why it had to withhold its hand and instead rely on some other internal part of the process.

MR. CHIEF JUSTICE WARREN: Mr. Bakaly.

ORAL ARGUMENT OF CHARLES G. BAKALY, JR., ESQ.,

ON BEHALF OF RESPONDENT

MR. BAKALY: Mr. Chief Justice, may it please the Court, at the outset I would like to emphasize four questions of fact to keep in mind.

First, Mr. Strong was bound by the industry contract as a matter of law at the time it was negotiated, in August of 1963. The bylaws of the association so provided, the board's brief, at page 2, concedes, and the record, page 35, sets out the bylaws.

Under Wiley vs. Livingston, in this Court's decision, a Section 301 action to compel arbitration would certainly have been proper. In Wiley, you recall, the Court held and found that an arbitrator was not a part of this contract. Its predecessor company was a party and this court held that he arbitrated. Furthermore, the failure to pay fringe benefits was not alleged as an unfair practice, either by the court or found by the board or the Court of Appeals. The order finally is to pay appropriate -- to the appropriate source any fringe benefits provided for in the above described contract.

We feel that this case presents for the first time a contract between the National Labor Policy, referring arbitration, and the position of the labor board, that it has the power to decide whether it is a breach of the contract by a failure to pay fringe benefits.

Q Is that the gist of your argument?

A Yes, sir, it is. That is basically our argument. A similar conflict, of course, has been resolved by this Court, a conflict between courts and arbitrators has been resolved by this Court in the now famous trilogy wherein the policy was set that it is for the arbitrator to decide whether a bargaining agreement is or not a part of the contract in a common law sense. It is a code of conduct, that the arbitrator should be freed to apply provisions that may or may not exist.

The same reasons apply to keep a court out of such disputes and to keep a board out of such disputes. As this Court said, the ablest judge should not be expected to render experience and competence to bear upon the determination of a grievance; similarly, the labor board, just as a court, does not have the competence. The labor board has been given, by Congress, competence in its field to determine whether an act has been violated. It has not, we submit.

In all due respect, given the labor board competence to decide breaches of contract, the labor board, interestingly enough, in several very recent cases, we submit respectfully, has demonstrated that it is not so competent.

In Adams Dairy -- these cases we have not cited in our brief -- they are labor board cases -- but in a series of labor board cases, commencing with Adams Dairy, including C & S Industries, the labor board has said if a contract is

silent about a particular provision, then the employers or the union, whoever it may be, is not bound to arbitrate or the board can interpret that meaning any way it wants. That is in strict disagreement with the decisions of this Court in the trilogy, that when a contract is silent on an arbitrator, it might well imply that a restriction or a right on the conduct of the parties to do so.

A leading case, the Moyer case in this court, was a sub-contracting case. Yet in Adams Dairy, the Labor Board held that you shouldn't have to go to arbitration because the only thing the arbitrator could do was interpret the contract under its provisions. To me this shows that the labor board is not cognizant of the trilogy that the arbitrator has more power than just to interpret the contract. He has the power to regulate parts from --

Q Suppose in thise case the labor board -- the respondents in this case, in addition to refusing to sign the contract, fires all the employees? Could the board, in finding that was an unfair labor practice, order them restored?

A The employees restored, yes.

Q They could have?

A They could order the employees be reinstated.

Q With back pay?

A And order them back pay, and that is specifically provided by the statute.

Q Well, why couldn't the fringe benefits go with it, then?

A Well, that is a very hard question in this case, Mr. Chief Justice.

Q I know, it is bothering me.

A The reason, first of all, goes to the fact if they were discharged, they would have done so with anti-union ends. I do think that there could be a distinction between the employer acting on an anti-union -- and the employer acting mistakenly but in good terms. But here this employer has the honest belief that he had withdrawn from the association. He had not done so, but he was not engaged in trying to destroy the union. On that set of facts, I would not say that the board could not, as a question of power, order fringe benefits. That is not this case, and I would say the quation of policy, a board should not order fringe benefits even in that case. The board should reash the first level of has an act been violated and then, as the court have asked them to do, leave to an arbitrator to decide what the provisions are, what they should -- what the employer should do and what the union should do, an internal question.

In your question, Mr. Chief Justice, to reinstate the employees and then an arbitrator decide the fringe benefits. To me the question of policy of the board to -- is to effectuate policies of the act and have the parties decide, through a

system of arbitration under --

Q What was the unfair labor practice here?

A We are charged with refusing to sign the contract, the --

Q Which is a violation of what?

A Section 8(d). It is AA-5 but it is also 8(d) of the act, specifically states that failure to sign the contract that has been agreed to, and it was agreed to before that they were a member of this association and it was agreed to. Under 8(d) of the act the employer --

Q You did not sign the contract -- excuse me.

Q Your argument, then, doesn't rely at all on whether or not there was an action under 301 available to the union?

A Well, as I said --

Q I have understood so far your emphasis has been that there was a contract. The bylaws of this association made it so, even though they hadn't signed it, that the circumstances, the arbitration provisions were in force and this is only a dispute over the articles in the arbitration clause. That is as I understand your argument.

A That is correct, and the union could have brought a 301 --

Q You rely on that also?

A We are relying on that, but --

Q Yes.

A The court said there are going to be problems, though, the fact that there is concurrent jurisdiction and this is not -- we are accepting that. We are not suggesting, Smith vs. Evening News, that to be overruled by any means. There is contract jurisdiction in the case.

Q It is between --

A It is between arbitration and the labor board, or a court to compel arbitration. The arguments against --

Q Why doesn't the idea of Evening News answer this question?

A Well, Evening News merely recited that a section 301 action would not -- it did not decide the question of the power of the labor board to interpret the contract. And Congress had before it and subsequently passed a proposal that the labor board be used to determine only unfair labor practices. Congress refused to pass the other portion of the statute and we think that is evidence of a congressional purpose in not giving the labor board jurisdiction in matters like this, where they have to get into -- get to the items that they -- they don't have to go into this. It is not just a question of calculating benefits. They are going to have to interpret this thing, and that is for an arbitrator, we submit. Let's get to the arguments of the board. This is not the work of the board.

We read in Enterprise case, which is one of the trilogy,

the case in which the collective bargaining agreement had expired. The agreements in the dispute had arose and this employer was obligated to arbitrate today, obligated to arbitrate now, on the question of fringe benefits. And the only reason the employer has not yet signed the agreement is because he offered to and the regional director said why don't you wait until the Supreme Court decides and then we will give him the compliance.

Q Does the record --

A The employer agreed to sign and will sign. Yes, sir?

Q Does the record show a dispute as to the fringe benefits, not as to whether they should be paid but as to how they should be paid?

A This matter of course that the employer was found obligated to the contract had never arisen. This is the employer's first offense and now --

Q I understand that.

A Right now, under the --

Q But as I recall all that had to be done is to calculate the hours that each of the prospective employees worked, is that right?

A No, sir, that is not correct. Let me first of all -- on page 62 and 63 of the record, there is a list of the fringe benefits. They might be subject to calculation, although it is fairly complicated point in the bargain agreement,

as I am sure you realize. But on page 71, in the first place, it lists a series of penalties that will happen to an employer if he does not pay the fringe benefits. Then it says, in paragraph(f), the contractor may be absolved of any or all of the foregoing liabilities if he satisfies the trustees that he has failed to pay these contributions or to report because of an honest mistake in these contributions, clerical error or other. Now, the lower court couldn't decide whether under these circumstances the employer could not activate his powers because of an honest a mistake, that he was obligated to pay, the labor board should not decide this, the arbitrator ought to decide that. An arbitrator might well decide here for the employer.

Q Well, the first thing that has to be done on this, as I read it, is that it has to be submitted to the trustees.

A Correct.

Q And the trustees -- I don't know, what is the setup here? Are the trustees appointed by both the union and management?

A Yes.

Q Is this an industry-wide collective bargaining agreement?

A Yes.

Q So there are some trustees representing the union and some trustees representing the management throughout the

industry, or at least part of the industry covered by this agreement. So what they would do, under the board order, I take it, is it goes to the trustees and the employer would say well, we will calculate that this is "X" and here is what we ower you and if the union disagreed it would say no. It would say to the trustees, we think the company owes us more.

A I don't think that is what the board has in mind at all, Mr. Justice. The board has in mind going to the compliance officer in the National Labor Relations Board, and let him again decide whether we have a good-faith --

Q If that is what it says -- I assume that the board order was phrased in the pecular way it is, is to provide for payment to the trustees and the submission of the matter to the trustees, as if it had been made under the bargaining agreement originally.

Would you mind telling us -- I have forgotten the exact language of the board order, that they shall pay the fringe benefits to what?

A Pay to the appropriate source any fringe benefits provided for in the above contract.

Q All right, suppose they used the phrase "the appropriate source" just to mean the trustees under the collective bargaining agreement? Am I wrong about that?

A As far as the appropriate source under the direction of the compliance officer of the board, I don't believe they

are going to permit the trustees to appoint an arbitrator to relieve us of the payment of any of the benefits, if they find for example that --

Q Benefits are not payable to the individual employee directly, are they?

A Oh, not, it is payable --

Q It goes to the trustee?

A To the appropriate source, to the trust fund.

Q To the trustee.

A The trust fund.

Q The trustee?

A Right. But there --

Q And the order does not fix the amount?

A I'm sorry, sir?

Q The order does not fix the amount?

A The order says in accordance with the agreement.

Q So that has to be determined later by somebody?

A That's right, I am sure.

Q And we haven't reached that point yet?

A I think we have, if I know the practice. I never heard anyone other than the board compliance officer having anything to do with disputes as to the meaning of the board order to have a back pay proceeding. This is another policy reason why when we suggest that there ought to be a law. This is not the end to this matter. There are going to be disputes

here. I think we are going to have to have some experts in this field. If we don't agree with the compliance officer, it will --

Q Suppose he were to fix it and you filed a protest, who would determine that?

A Back pay?

Q Yes.

A Well, the board might -- my practice has been that a trial examiner would determine it or the labor board would determine it.

Q Would you demand an arbitration under the agreement?

A I don't think so, not as long as this board --

Q If there is disagreement over the amount?

A As long as this order is in effect, it is within the jurisdiction of the board and the compliance practices of the board.

Q Well, they have taken the place -- the trustee there has taken the place of the worker, hasn't he?

A Taken the place --

Q As far as getting the pay is concerned, the trustee is taking the place of the worker?

A That is correct.

Q And suppose that a dispute between the company and the worker as to how much was owed for back pay, would you have a right to have that tried by an arbitrator?

A I don't --

Q I think you would have to have it tried by the board. And is that the position that --

A That position is my understanding, Mr. Justice Black, and they --

Q I didn't hear --

A -- and they can speak to that -- but that is my understanding, that it is to be the board in any wage case, as Mr. Chief Justice Warren mentioned, or a discharge or grievance activity case, and you have a dispute by the board as to how much you owe that person, that dispute is settled in a back pay hearing by the labor board and you then have another case. Now that is why we say right now is the time to not enforce this portion of the order at this time but leave the parties to enforce it either themselves or let the parties get together and agree how much is due and resolve this whole thing.

Q What do you expect to get by it?

A Well, what we expect --

Q How is it --

A -- to get from the arbitrator is just this kind of effort, Mr. Justice Black, this is a small employer. He felt he could not compete and meet the union wage scale, that is exactly the story and he tried to get out of the union and he probably wouldn't have gotten -- he wouldn't have obtained it if he had been paid all of the conditions, and so forth. Now,

we think that is a factor that an arbitrator would take into consideration, that --

Q Do you think an arbitrator would let you get off for less than the fringe benefits?

A It might well be, because these employees are not union and --

Q Is he allowed to use equitable principles that way?

A Yes, sir. Yes, sir. As I stated, an arbitrator can look into production, productivity. He can look into all sorts of things that a board can't. That is the purpose of the trilogy and the purpose of it, was to permit an arbitrator in the rules of common law, in the rules of the shop, and so forth, to arrive at the decision of the court, where the labor board would not arrive at it. And this is what we think -- this is our whole argument here. This man would not have owed these fringe benefits if he had gotten a trial and the only reason he got the work to put on roofs was because he didn't have to pay these fringe benefits.

Q You mean he got them at a lower price --

A That's right.

Q -- and now an arbitrator might say under all the circumstances he thought he was out from under the agreement and therefore he ought not to have to pay more than the fringe benefits less taxes?

A That's right, this penalty -- he shouldn't have to

pay it. He is an honest fellow. He isn't out to try and destroy the union. It was a mother and father operation, a wife and --

Q Well, cannot, under these compliance proceedings in the board, cannot the board make a similar determination?

A I have never known it. I have never known the board compliance proceeding to do anything but determine the matter -- the board can speak for itself, but --

Q Well, I mean certainly on back pay orders, the adjustments to back pay, depending on whether or not the respective employees have tried to get other work and that sort of thing, so they are not unfamiliar with adjustments of that sort.

A But it is normally done in the context of a back pay hearing, where --

Q But my --

A -- not an arbitrator --

Q -- my question really was in a back pay hearing might not be a determination of the amount due in the way of fringe benefits which might take into account some of the things that you think an arbitrator would?

A I don't have that confidence in the board, Mr. Justice. In these cases, like I just read, Adams Dairy, they said they would look at the agreement and say if the collective bargaining agreement does not contain a subcontracting clause, then there is nothing to arbitrate. That is directly contrary

to the decision in the trilogy, directly contrary to it. The labor board, in all due respect, is competent in determining what an unfair work practice is, but it has very little competence in recent cases in what a breach of contract is in this area.

Excuse me, sir?

Q No, I just asked you what it was you said -- very little contact, you say?

A Has very little competence in interpreting -- competence in interpreting collective bargaining --

Q Are you talking about the man who was trying to shift himself from a judge to a jury in order to appeal to the equitable interests of the jury?

A This is the system that we are under, Mr. Justice, where you have a contract that has a mandatory arbitration clause. We are under the system -- and I guess there have been very few times that an employee has stood before this Court and contended for equitability. But we are here and we are so contending, because we are accepting the principle that we shouldn't have to have to proceed to two proceedings and we have another proceeding. As I say --

Q Let me ask this question: Suppose these fringe benefits, the amount of these fringe benefits was just a mathematical question of so many man-days, would your argument be the same?

A Well, no, it wouldn't, because an arbitrator still would be able to say that, as I mentioned, under these circumstances I am going to say that equity dictates that the employer not have to pay, even though it was strictly calculated. You see, before the trilogy --

Q Your argument would be the same, then, wouldn't it, as now?

A Yes, it would be the same.

Q I thought you said no?

A Excuse me, it would be the same as it is now.

Q It would be the same.

A Yes.

Q You mean that you think an arbitrator could completely excuse you from anything at all?

A Yes, sir. This Court has so held. This Court, in knocking down the Cutler-Handler doctrine, which said you couldn't arbitrate a dispute if the language was clear and unambiguous -- this Court knocked that doctrine down, and correctly so, even though the language is clear --

Q Isn't the language pretty clear?

A The parties have contracted -- even though the language is clear and unambiguous, the parties have contracted to have an arbitrator to decide.

Q To have an arbitrator to decide the equity of it?

A Yes, sir.

Q Just kind of review it?

A Yes, sir.

Q Upset the agreement?

A That's right, that's entirely possible, Justice Black, entirely possible in the labor contract, entirely possible. And yet, it is not clear here. Let me say --

Q Do I understand that originally you took the position that the respondent didn't have to sign the contract because he didn't recognize it was binding?

A That is right, that position is correct.

Q And then nothing was done until this action went into the NLRB?

A That is correct.

Q Then it was found that it was -- that there was a contract?

A That is correct.

Q Now you shift your position and say you want to operate under the contract, which you still haven't signed?

A Well, now, we --

Q Is that right?

A We offered to sign the contract. Somebody will have to decide, there is a serious question here that has to be --

Q The fact that you didn't sign it is the reason that the NLRB took jurisdiction, now you want to oust them from their jurisdiction?

A It is up --

Q Is that correct?

A That is correct. But it up to the union, Justice Marshall. They could have filed a grievance and they could have gone to arbitration and they could have compelled us to do so. We had, as I said earlier, the labor board can decide here the threshold question, was there an unfair practice by refusing to sign this contract. That has to be the crux of the case for all practical purposes. This type of proceedings is nothing new to this Court. That is where -- that is what I meant by this trilogy --

Q Well, I gather essentially your argument of the law is that the board simply has no authority or power -- whatever word you want to use -- to enter the kind of order they did here as to fringe benefits?

A Right.

Q Is that right?

A Yes.

Q And this is on the ground that this is a contract matter and that section dealing with sanctions has to be interpreted that this is not authorizing a sanction which goes to the interpretation of the agreement itself, that that must either be a matter for the arbitrator, because there is an arbitration provision here, or in any event for the courts if there was no arbitration provision.

A Well, that --

Q You would have the proceeding divided up into two parts, the board to determine one part and an arbitrator the other?

A There is nothing in the case about that, but that is correct. There is nothing unusual about that. That is what happens if an employer contends that a dispute is not subject to arbitration under the agreement. The court first determines whether it is and if it determines that it is, you enter and have an arbitration. There is nothing unusual about that. We are going to have that here, Mr. Justice Black, because I am sure there is going to be a back pay hearing in this case, because there are questions in this collective bargaining agreement as to meaning and intent. It says there are certain penalties for the nonpayment of health and welfare benefits, yet it says a contractor may be absolved if he is in good faith. Now, somebody is going to have to determine whether he has to pay those penalties or not. There are provisions here about hours of work. That may well be a fringe benefit. I don't know what a fringe benefit, and I am sure that you can make a good argument that hours of work is a fringe benefit. What about work that has to be done outside of regular working hours for the protection of life or property? The labor board can decide that in a back pay hearing?

Q I take it you will be very happy if the labor board

says that what it means is that you have to pay whatever is to be determined and that the determination is to be made pursuant to the contract, including if and to the extent available of arbitration? You would be happy then?

A If the labor board permits the arbitrator to determine this, yes, sir.

Q Now, apart from what the arbitrator will determine on the part of your construction of the trilogy, or what you call the trilogy, if the board says that our opinion, our order means that you have to pay what you are obligated to pay under the contract, and that is to be determined in accordance with the provisions of the contract? I don't know whether it will or not, but if it says that I take it you will be very happy with it?

A I think that is what the law means. There is no misunderstanding, in that arbitration we would contend that even though it says 7 cents an hour to health and welfare because of these equitable considerations, we shouldn't have to pay anything.

Q I know you will say that and the arbitrator may or may not allow it, and if he does agree with you, the Court may or may not overrule it.

A I would be very surprised, Mr. Justice Fortas, if the Court overruled an arbitrator, if he ruled in our favor we wouldn't have to pay it, that is it.

Q Just because of what Justice Douglas wrote in the trilogy?

A Or what this Court said. There are some other provisions, but the labor board is going to in this case interpret this collective bargaining provision, we think that that is for the arbitrator to do, and it will be orderly procedure. There is not going to be any unreasonable petition. The policy of the act, as counsel here said, also has a section, Section 203(d), that where adjustments are never agreed upon by the parties, is hereby declared to be a desirable method for settlement through grievance disputes. And this amendment erases all questions whether the labor board should decide or a court concurrent jurisdiction. Once the labor board decides there is a contract, and then there is application of all of the contract, including grievances and arbitrations.

MR. CHIEF JUSTICE WARREN: Mr. Weinstein?

FURTHER ARGUMENT OF HARRIS WEINSTEIN, ESQ.,

ON BEHALF OF PETITIONER

MR. WEINSTEIN: Mr. Chief Justice, if the Court pleases, I would simply suggest that all the arguments that have been advanced in this Court about arbitration, which were not advanced in the labor -- before the labor board or in the Court of Appeals, are all disposed of by Mr. Justice Douglas' opinion for the Court in Carey vs. Westinghouse, where the Court discusses at considerable length the relationship between

arbitration and board proceedings. It makes clear that these are alternatives available to the complaining party and goes so far as to say that in the event of conflict, the board's ruling would of course take precedence.

Now, as that opinion points out, the board may and has in a variety of occasions deferred or invoked arbitration if the circumstances seem appropriate and the employees ask for it in a timely and proper way with reasonable grounds for doing it. But that has to be done in a timely way before the board. It has nothing to do with the board's power, and that is the only issue here. The board can, if it wishes to use arbitration, if a dispute develops in calculating what is due under this order here, the court can, if it wishes, go to the trustees under this agreement and call them in. It can invoke arbitration and --

Q Let me see if I understand you. What you are saying is that the way this agreement would work would be that the company would be required to -- let me withdraw that. What you said -- I don't understand how this agreement would work. The board says you must pay whatever we impose under the contract. The company says all right, here is the way we calculate it and we owe $25, under the contract, and we will pay that to the trustees. And if there is no objection to that, that ends the matter, correct?

A Yes, sir.

Q Then they say that to the board. They will report to the board, to the compliance officer, that they will pay $25 to the trustees. But suppose the union comes in then and says that isn't correct, they owe $2,500? And now what happens? There are two possibilities: One is that the determination of that amount would be made by the contract machinery; the other possibility is that the board itself would undertake to determine the amount which means that it would have to construe the collective bargaining agreement. Now, what is the board's position?

A Mr. Justice Fortas, the board's position is that it has the option. If there is a dispute, the board would hold a proceeding to resolve the dispute, just as though it would hold a proceeding to determine whether there has been an unfair practice.

Q You are saying --

A No, the board --

Q -- that the board has the option because the board has issued an order? The question is what does the order mean? Does it order these people to pay pursuant to the contract? If you have ordered them to pay pursuant to the contract, the next question is whether that is to be determined in accordance with the machinery provided by the contract, or has the board displaced that machinery of the contract? Well, those are the questions and they are right here right now, in

my judgment.

A I think the fair answer to that is because there was no suggestion before that anything other than a mathematical computation was required. The board, in writing its order, did consider whether pursuant to the contract incorporated submission to the trustees, what I call the escape clause of the agreement. And it seems to me that if that contention is really going to be brought in, that there are so-called equitable grounds that would require a lesser payment than the mathematical computation calls for. The burden would be on the employer would go in to the board and request an elaboration of its order. It seems to me that the board has the authority to do it either way, and in this case what has been brought into oral argument here is a matter that was not brought to the board itself in a timely fashion.

Q Well, maybe that is your answer. Maybe your answer is that we ought not to consider the question of how the amounts are to be computed because it wasn't raised below.

A It wasn't raised below, but --

Q The board hasn't considered it, but if on the other hand you are giving us what we should take as an official answer from the board, that is to say that the board can determine how these amounts are tried to be computed, the board can determine that the contract machinery will be used or won't be used. Is that your position -- the latter is your

position, then I confess I have some problems.

A I think I would start by saying that because in the ordinary course of board proceedings, disputes over computation would be resolved after the order becomes final, but the issue isn't before the Court. I would suggest, though, that if the Court were going to decide that issue against the board, it would require considerable backtracking on the analysis in the Carey opinion and the Acme opinion. It would require what we would suggest is an inconsistency with Section 10(a) of the act, which says that the --

Q Let me say -- I hate to take your time here, but let me see if I can put it this way: The question here is does the board have the power under the act to order the payment of fringe benefits provided for in the contract. The objection is, as I understand it, that that would amount to the board interpretation and enforcement of a contract. Now, you tell me that the board has merely ordered payments to be made in the amount to be determined in accordance with the contract, by contract machinery. That gives this question one particular cast. Yet, on the other hand you tell me that the board has in effect -- the board is in effect going to supplant the machinery provided in the contract insofar as the determination of the amounts owed are concerned. They, to my mind, they give this legal problem we have before us a very different cast.

A I would think that as the case is framed, and because of the way the arguments have been made earlier, what you have stated as your second reading of the issue isn't in the case.

Q Is not?

A Is not. Now, I think that the -- again, I would refer the Court to matters discussed in the Carey decision which show the way the board decides whether to submit to the contract here.

Thank you.

(Whereupon, the case in the above-entitled matter was concluded.)

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