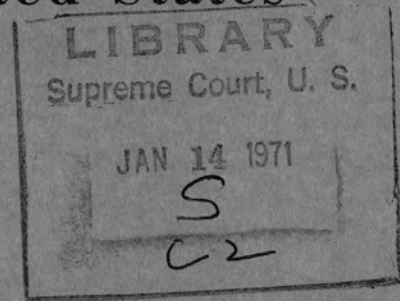


Supreme Court of the United States

OCTOBER TERM - 1970



In the Matter of:

Docket No. 123

INTERNATIONAL BROTHERHOOD OF BOILER-
MAKERS, IRON SHIPBUILDERS, BLACKSMITHS,
FORGERS, AND HELPERS, AFL-CIO,

Petitioners;

vs.

GEORGE W. HARDEMAN,

Respondents.

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Place Washington, D. C.

Date December 16, 1970

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ARGUMENT OF:

P A G E

Louis Sherman, Esq. on behalf of
Petitioners

2

Robert McDonald, Jr., Esq. on behalf
Respondents

19

1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM 1970

3 -----
4 INTERNATIONAL BROTHERHOOD OF BOILER-)
5 MAKERS, IRON SHIPBUILDERS, BLACKSMITHS,)
6 FORGERS, AND HELPERS, AFL-CIO,)

7 Petitioners;)

8 vs.)

9 GEORGE W. HARDEMAN,)

10 Respondents.)
11 -----

No. 123

12 The above-entitled matter came on for argument at
13 1:50 o'clock p.m., on Wednesday, December 16, 1970.

14 BEFORE:

15 WARREN E. BURGER, Chief Justice
16 HUGO L. BLACK, Associate Justice
17 WILLIAM O. DOUGLAS, Associate Justice
18 JOHN M. HARLAN, Associate Justice
19 WILLIAM J. BRENNAN, JR., Associate Justice
20 POTTER STEWART, Associate Justice
21 BYRON R. WHITE, Associate Justice
22 THURGOOD MARSHALL, Associate Justice
23 HARRY A. BLACKMUN, Associate Justice

24 APPEARANCES:

25 LOUIS SHERMAN, ESQ.
Washington, D.C.
On behalf of Petitioners.

ROBERT McDONALD, JR., ESQ.
Mobile, Alabama
On behalf of Respondents.

1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE BURGER: We will hear arguments in
3 Number 123: International Brotherhood of Boilermakers against
4 Hardeman.

5 Mr. Sherman, you may proceed now when you are ready.

6 ORAL ARGUMENT BY LOUIS SHERMAN, ESQ.

7 ON BEHALF OF PETITIONERS

8 MR. SHERMAN: Mr. Chief Justice and may it please the
9 Court:

10 This case is here on writ of certiorari from the
11 United States Court of Appeals for the Fifth District, to review
12 a per curiam opinion assigning the decision, judgment, jury
13 verdict, District Court, in the amount of \$152,500 in favor of
14 George Hardeman, an expelled member of the Boilermaker's union,
15 who filed the complaint in the Federal District Court, April
16 1966, under Section 102 of the Landrum-Griffin Act, alleging
17 that he had been barred from a full and fair hearing under
18 Section 101(a)5.

19 The evidence at the District Court trial was of two
20 kinds. First, the various proceedings before the union tribu-
21 nals, such as the 172-page transcript of record of the hearing
22 that was held that resulted in expulsion, which went into the
23 details of his beating up the business manager, which is the
24 principal reason for his expulsion; and, the proceedings at
25 higher levels, when the case was appealed to the president of

1 the International and the executive council of the Inter-
2 national.

3 The second evidence had to do with loss of wages,
4 which were computed on the basis of past and future. Mr.
5 Hardeman was 43 when this incident occurred in October of 1960,
6 and they figured it on the basis of mortality tables that he
7 would retire at 65, \$6,000 a year; therefore, plus some punitive
8 damages, they came out with this total figure.

9 The first part of the case has to do with the issue
10 of full and fair hearing. As set out on page two of our brief,
11 the language of Section 101(a)5 of the Landrum-Griffin Act,
12 which states that:

13 "No member of any labor will be fined, suspended,
14 expelled or otherwise disciplined except for non-payment of
15 dues, unless this member has been (a) served with written
16 specific charges, being given a reasonable time to prepare his
17 defense; (b) afforded a full and fair hearing."

18 There is no issue here on the written specific
19 charges. They were made. He was given a reasonable time to
20 prepare his defense.

21 The issue is whether he was afforded a full and fair
22 hearing. From a literal stance, there should be no question of
23 that, either, because the hearing took about 10 hours, witnesses,
24 cross-examination, the rest. We concede full and fair hearing
25 means something more than that, but there must be some evidence

1 to support the charges, and we think that the trial judge
2 erred, and the Court of Appeals erred, in a way that is very
3 important to the labor movement in finding there was no
4 evidence.

5 The essential charges had to do with the by-laws of
6 the local union, which was set forth at page four, and the
7 language of the constitution of the Boilermakers relating to
8 subordinate lodges.

9 First, as to the by-laws, they are very explicit
10 that the local could, after proper hearing, punish as warranted
11 by the offense the violation, which was defined as violence or
12 threat thereof to intimidate any official of this International
13 Brotherhood or subordinate lodge to prevent or attempt to
14 prevent him from properly discharging the duties of his office.

15 The language of the subordinate lodge constitution
16 was broader. It provided for expulsion of any member who
17 endeavors to create dissension among the members or works against
18 the interest and harmony of the Brotherhood. Now, there is no
19 question about the evidence, in my judgment, as to the by-laws.
20 We have the clear statement, not drawn by opposition witnesses
21 but by Mr. Hardeman himself in the union case. This is the
22 case before the union judges, if I might use the expression.

23 I think it may be just as well to read it literally.
24 He was unhappy about the way the business manager was adminis-
25 tering the referral system as far as his own particular

1 problems were concerned. Like some other people, he was think-
2 ing of a quick instrument of change, violence.

3 So, he is sitting there in the union hall, and this
4 is his language, on page 25: "I tried to make up my mind what
5 to do, whether to sue the local or Wise (who is the business
6 manager), or beat Hell out of Wise, and then I made up my mind."

7 That would seem to be pretty good evidence of viola-
8 tion of the by-law. The District Judge in his charge to the
9 jury, which is set forth in our appendage ---

10 Q What did he do?

11 A He did exactly what he had in mind, which was
12 to beat the business manager.

13 Q He did what?

14 A Beat the business manager, physically assaulted
15 him. He didn't choose the more peaceful method of suing or
16 going to the joint referral committee which existed for com-
17 plaints of the sort he had in mind. He beat him until he got
18 some kind of statement that satisfied him that Wise wouldn't
19 jump him any more on the list. That was the issue between them.

20 Now, when it got to the District Court -- of course,
21 if you get the time relations straight, the incidents occurred
22 in 1960 and this case was before the Federal District Court in
23 1968, I suppose, when this trial took place. Complaint was
24 filed in 1966.

25 If I may be indulged, I would like to read a statement

1 in the charge, which is in our appendix, page 37. This is the
2 Federal District Court:

3 "Now, there may be, and I am not ruling on it one way
4 or the other, but I will say this, that there is evidence in
5 here which might support a finding of guilty under Section 1 of
6 Article 12, the subordinate lodge by-laws. The trial body said,
7 'We find him guilty; we recommend that he be expelled.' They
8 didn't say 'We find him guilty under either one section or the
9 other.'

10 "They said they found him guilty, and inasmuch as
11 nothing here would support a conviction under this section, I
12 think the verdict cannot stand on his being convicted of
13 penalty, which was expelling him, and I think inasmuch as there
14 is no evidence which would support a finding of guilty under
15 this, that the finding of the board was erroneous and cannot
16 stand in that respect."

17 Now, that is all they charged him with were those two
18 sections and there is nothing in this record that would justify
19 finding him guilty under those sections. Well, the use of the
20 phrase "those sections" sounds like he's talking about both
21 sections. It is very difficult to understand. All of it is
22 about the fight.

23 "I am telling you as a matter of law that under the
24 proof the findings which resulted in his being expelled cannot
25 legally stand and therefore he was wrongfully expelled."

1 Now, the second issue before the union tribunal was
2 the question of the violation of the subordinate lodge consti-
3 tution dealing with dissension and working against the interest
4 and harmony of the lodge. We think that in terms of the normal
5 relationships between the courts and union tribunals, that union
6 tribunals ought to be permitted to function in accordance with
7 the realities of life, recognizing that they are not literate
8 and skilled lawyers.

9 There must be some recognition of whether they have
10 done justice in the real sense, or whether they have engaged
11 in handling a trumped-up case, or something of that sort. There
12 is nothing trumped-up about this case. Counsel for Mr. Hardeman
13 admits in his brief that he should have been disciplined. He
14 stops at the question about the punishment.

15 But, this question of dissension and working against
16 the interest and harmony of the lodge, the local trial board
17 found him guilty on that account. Those are general words, but
18 we think it was reasonable for the board to define dissension
19 and harmony the way they did. We think that the process of
20 reasonable inference is available to administrative tribunals
21 and therefore it certainly should be available to working people
22 who are trying to work out their problems of maintaining the
23 integrity of their institutions.

24 What could be more calculated to cause dissension
25 than a fist fight. Now, this wasn't just a fist fight between

1 two boilermakers, it was a fist fight in which one boilermaker
2 assaulted the business manager, who is not a very important
3 fellow in this world but ---

4 Q What happened to the other charge? The
5 intimidation?

6 A Well, he was found guilty as charged, which
7 meant that he was found guilty on both counts by the local body.

8 Q Well, do you defend this, or do you attack this
9 only on the basis of stirring up trouble at the union?

10 A No, I defend it on both counts. I consider that
11 there was adequate evidence -- there certainly was some
12 evidence. I feel, as a matter of fact, under the most strict
13 rules there was definite evidence.

14 Q You need to prevail on only one of them. You
15 don't have to win on both, do you?

16 A That is correct, Your Honor. We have cited
17 Burke vs. Boilermakers, which pointed out that it is sort of
18 silly to expect unions to say "Guilty as charged on Count 1;
19 Guilty as charged on Count 2."

20 Q Well, wasn't that guilty of dissension or guilty
21 on that other charge of intimidation. If there is evidence on
22 either, I gather your position is you were?

23 A That is correct, because the language of the
24 by-law is this broad that it permits the punishment of one by
25 the offense and, therefore, expulsion, which Congress recognizes

1 is a legitimate punishment. They recognize it in the Landrum-
2 Griffin Act; they recognize it in the Taft-Hartley Act.

3 Certainly, even if the one on dissension fell out,
4 then the punishment should have been upheld.

5 Your Honor, this presents a more serious question on
6 granting an award which seemed inconsistent to our system of
7 trying to repair injuries if injuries have been received.
8 Because under this award, as you can see from the amounts in-
9 volved, the plaintiff by not seeking reinstatement, he didn't
10 seek reinstatement in this case, has managed to create pecuniary
11 result in which he acquires an estate with interest even com-
12 puted at a low rate, which would take care of his salary. It
13 is just inconsistent with the whole thing.

14 But, more than that, what is involved here is the
15 question of whether unions can be responsible. I beg your
16 indulgence to read from a decision of the Fourth Circuit Court
17 of Appeals rendered by Judge Soboloff. The same system of
18 justice that was involved in the case of Hoff is the system
19 upon which the responsibility of the union rests in terms, for
20 example, of handling wildcat strikers.

21 That's not just a figment of my imagination. The
22 Parks case is an illustration of what happens when a union tries
23 to assert its powers to maintain the validity of peaceful
24 institutions, in that case the maintenance of a council of
25 industrial relations which has maintained peace in the electrical

1 contracting industry for 50 years. Judge Soboloff said:

2 "By the judicial application of ad hoc stands in the
3 pursuit of what is called democracy in union government, we
4 have succeeded only in introducing not democracy but chaos.
5 This would not only tend to disintegrate the labor movement
6 but be responsible for generating serious implications for
7 employers, and others as well."

8 That is one of the serious problems facing the labor
9 movement today, that when the internationals are asked to
10 assert their powers to maintain responsibility, such as
11 suppressing a jurisdictional strike, that the cry comes back,
12 "How are you going to protect us against cases like Hardeman?
13 How are you going to make sure we are going to do the job to
14 satisfy courts?"

15 Of course, we can tell them, as lawyers, that reason-
16 able standards, reasonable risks, should be taken, as they were
17 in the Parks case. In cases of this sort, which has been
18 smashed aside, I think complete abandonment of the proper rules
19 of review and the substitution of the court's views, are the
20 sort of thing that are preventing us from doing what should be
21 done not only in the interest of the labor movement but also
22 of others in the collective bargaining relationship.

23 Q Is the issue that you've got a money judgment
24 against the union?

25 A Yes, sir.

1 Q How much?

2 A \$152,500 for one expelled member.

3 In the Parks case, we were dealing with 1,000 people.
4 In the case of Barriman vs. Nevada which is at 85 Pacific 2nd
5 250, there were 41 wildcat strikers involved.

6 Q Would you raise your voice a little, counsel?
7 It is a little hard for us to hear you.

8 Mr. Sherman, let me ask you a question, may I?
9 Suppose that the evidence here were to justify or would qualify
10 only under Article 12 of the local's by-laws, but not under
11 Article 13. Would expulsion be justified?

12 A Yes, Your Honor.

13 Q And you would say this because why?

14 A Because the blow of the fist is the thing that
15 was intended to be suppressed, and that was because in working
16 out the allocation of jobs, resort to violence on the part of
17 those who are concerned with the administration of the referral
18 system ought to be a very serious matter.

19 Q Well, Article 13 provides specifically for
20 expulsion, but Article 12 does not. It provides only for ---

21 A Punishment as warranted by the offense.

22 Q Yes, and why doesn't the article go further
23 then?

24 A Beg your pardon?

25 Q Why doesn't Article 12 go further?

1 A Do you mean ---

2 Q Why doesn't it also provide for expulsion?

3 A Well, I think that it depends upon the circum-
4 stances in the case. It is very hard for a court at any level
5 to appreciate what was going on in Local Lodge 112 at the time.

6 Q Well, your theory must be, then, that the
7 language "as warranted by the offense" necessarily includes
8 expulsion?

9 A Yes. It might be a fine, it might be suspen-
10 sion, it might be expulsion. As a matter of fact, here they
11 expelled him indefinitely. It's a little hard to understand
12 what they meant by that, but there was no effort made on his
13 part to secure reinstatement.

14 Q And therefore, your argument must be to the
15 effect that conviction, so to speak, under either article
16 justifies expulsion and hence the general verdict, if I may call
17 it that, tied in with the evidence?

18 A That is correct.

19 Q All right.

20 A But, essentially, what it amounts to is that
21 you leave in the hands of the people involved -- now, under this
22 constitution, the local union, the brothers themselves, voted
23 for expulsion. They had a trial committee that considered the
24 evidence and made a report, and then the local committee voted
25 him guilty and it voted expulsion. So, therefore, there was a

1 concerted determination by the people involved.

2 Q Would you say this is somewhat like a situation
3 where a man is convicted in a criminal case on two counts, each
4 of which has a five-year penalty, but he is given two five-year
5 sentences to run concurrently, and this situation is somewhat
6 analagous to that?

7 A That is correct, and as a matter of fact in
8 Burke vs. Boilermakers, which is a per curiam affirmance by
9 the Ninth Circuit, exactly that is what happened. They had a
10 series of charges on which, when one fell out, the Court said
11 there was no evidence on one but upheld the punishment because
12 it had been proved on the others.

13 We have cited the criminal law as of the reason for
14 the position that was taken.

15 I would like to take just a few minutes ---

16 Q May I ask you one question? How much of the
17 damages awarded was labeled compensatory and how much punitive?

18 A The best I can ascertain, \$130,000 was labeled
19 as compensatory, and \$20,000 was labeled as punitive. It was
20 not labeled, but the presentation of the position by the
21 attorney for the complainant was that he was 43 years old and
22 he would retire at 65, and the number of years times the salary
23 would come out that figure, so we deduced that as the division
24 between compensatory and punitive. Of course, if he had been
25 20 years old and planned to work until 70, it would have been a

1 larger judgment.

2 Q Is that the present value of the amount he
3 would have recovered had he remained employed?

4 A Well ---

5 Q Computed on that basis, or just computed on
6 the basis of so much per year?

7 A It was computed on the basis of so much per
8 year because although they recognized the principle of
9 mitigation of damages, for some reason or other the evidence
10 before the jury showed that he was living on \$300 a year, and
11 even though full employment was coming up, they didn't pay any
12 attention to that. But, I don't want to bespeak the jury.

13 Q I understand, I just was curious ---

14 A I would like to spend a minute or two on the
15 question that is sometimes labeled preemption. Assuming that
16 we are not right about the first part of the case, but we
17 strongly feel we are, there are very strong public reasons for
18 establishing a rule of review which will permit the union
19 tribunals to function.

20 I don't think the word "preemption" is quite descrip-
21 tive of our problem here. We have a case in which the Federal
22 Congress has adopted a statute, and certainly there is no con-
23 stitutional bar to the Federal Government adopting a statute,
24 the Congress adopting a statute, through which they would give
25 a duplicate remedy on the so-called refusal to refer.

1 There is a lot of evidence in the case, exclusive
2 referral system, non-exclusive referral system, loss of wages
3 and the rest of it. It was sort of a junior NLRB proceeding.
4 The question is whether Congress intended by Section 102 to
5 establish a duplicate remedy.

6 We think that as a matter of statutory construction
7 that it did not so intend. We recognize that if you take a
8 dictionary and use the words "appropriate relief" and chase it
9 down to the end of the scope of that term you may come out with
10 the answer that, "Yep, they did intend it." But, I think it
11 is something like Amazon Cotton Mills.

12 The plaintiffs in that case back in '48 tried to
13 find a basis to maintain injunction suits against picketing
14 because the language of the statutes provided that unions could
15 be sued for the first time. The court said, "Well, this is
16 sort of ridiculous, Congress entrusted that function to the
17 National Labor Relations Board, a centralized agency with
18 procedures for complaint, trial examiner hearings, and a
19 centralized agency to make decisions. It didn't mean to
20 transfer the functions to 200 or more local tribunals with
21 general jurisdiction.

22 Q But you don't find any of this on the face of
23 101(a)5, do you?

24 A No, I think we are looking at 102.

25 Q Well, even looking at 102, do you find that on

1 the face of 102?

2 A I think, on the face of 102, it looks like just
3 appropriate relief.

4 Q I gather your argument is to the effect of what
5 102 says is, this is available to you unless you want to go
6 to the National Labor Relations Board. Is that what you are
7 saying?

8 A No, what I am saying is that Congress could
9 have written the statute in such a way as to establish a
10 duplicate remedy, but it did not do so.

11 Q And therefore, that is my point. Therefore,
12 you say there is no action under 101(a)5, and what you have to
13 do is go to the National Labor Relations Board.

14 A I'm sorry, that is correct, unless he had
15 sought restoration of union membership. If he had sought
16 restoration of union membership, then he would have been in the
17 right place.

18 Q What remedy could he get before the board?

19 A Well, he could get the same remedy that any
20 other union member could get if there had been a refusal to
21 refer him because of trouble with the union. Radio Officer's
22 Union case.

23 He could get the same remedy that any non-union person
24 could get.

25 Q Damages?

1 A Back pay and reinstatement to his job.

2 Q But not damages?

3 A Yes, well it would be damages in the sense of
4 back pay.

5 In addition, I think that some of the trouble on this
6 point arises from the words "appropriate relief (including
7 injunctions." We checked back over the legislative history
8 referred to it on roman numeral VII, cited, Second Volume of
9 Legislative History 1102.

10 You have to know a little bit about the background
11 of this legislation to realize that first there was the
12 McClellan Amendment, the Bill of Rights, which came up on the
13 floor, passed by a very narrow vote, and then as is evidenced
14 by McClellan's own testimony, the labor movement got involved
15 and helped to draft the Kiekel substitute, which was intended
16 to cut down the scope of the McClellan Amendment.

17 So, we look at the McClellan Amendment, and that
18 provides a comparable provision ---

19 Q Where is it? Where are you reading from?

20 A I'm reading from a copy. I regret to say that
21 we haven't ordered it in the brief.

22 Q Then you are not reading from the brief?

23 A No. We cited it in the brief at page seven.
24 I'll just take one minute on it. The Secretary of Labor was
25 the one who was to enforce that, and he used the same words,

1 appropriate relief but without limitation injunctions to
2 restrain any such violations in talking plans of this title.

3 We submit that McClellan certainly did not have in
4 mind, and Congress didn't have in mind in drafting that bill,
5 passing that bill, that the Secretary of Labor would have a
6 duplicate function in administering the National Labor Rela-
7 tions Act. Therefore, it's a fortiori, that when it was
8 provided for by private action, intended to cut down the scope
9 of the McClellan Amendment, that there was no such intention.

10 Q Thank you, Mr. Sherman.

11 Mr. McDonald, let me see if at the outset if I have
12 a proper understanding of the Court of Appeal's opinion.

13 The Court of Appeals said that when the member of
14 the union beat up one of the leaders, this was not a violation
15 of the clause, this was not creating dissension among members
16 and not working against the interests and harmony of the
17 International Brotherhood. That is in effect what the Court
18 of Appeals says, is it not?

19 MR. McDONALD: Yes, sir.

20 Q And that is what you have to sustain here, that
21 this punch in the nose, beating, however you describe it, did
22 not violate either one or both of those two clauses I just
23 read.

24 MR. McDONALD: Yes, sir.

25 Q That will call for some explanation from me, so

1 I hope that sometime in your argument you will dwell on it, a
2 little bit anyway.

3 MR. McDONALD: Yes, sir.

4 ORAL ARGUMENT BY ROBERT McDONALD, JR., ESQ.

5 ON BEHALF OF RESPONDENTS

6 MR. McDONALD: Mr. Chief Justice Burger, Members of
7 the Court:

8 This is the first appearance I have made before this
9 honorable Court and I might say it is an honor to appear here.
10 It is the high point of my career.

11 This case is here on two issues that you granted
12 certiorari on: the issue of standard of review applied by the
13 Court of Appeals and the District Court, and the issue of
14 preemption.

15 Q Where was it tried?

16 A It was tried in Mobile, Alabama, before Judge
17 Daniel Thomas, Mr. Justice Black.

18 To understand the standard of review, I might recite
19 the facts, as Chief Justice Burger pointed out. The union trial
20 board found Mr. Hardeman, as well as Mr. Braswell, because we
21 are also reviewing the Braswell opinion here, guilty of two
22 charges, Article 12, Section 1 and Article 13, Section 1.

23 Now, what they had done, in effect, was to charge
24 them with those two charges. The trial board came back and
25 said, "We find you guilty as charged." Now, we came into court

1 alleging in our complaint that we had been denied a full and
2 fair hearing because the evidence did not support a finding of
3 guilt, or was there any evidence to support a finding of guilt
4 under Article 13, Section 1.

5 Our position was this: that Mr. Hardeman, as well as
6 Mr. Braswell, were in the same position as a man on trial in
7 a criminal case with a two-count indictment, one count charging
8 him with a simple assault, the second count charging him with
9 rape, there being evidence of a simple assault but no evidence
10 of any sexual contact, but the jury coming in and finding him
11 guilty as charged. Well, guilty as charged necessarily includes
12 the rape count, and that's what happened here.

13 Now, we had two counts, or two charges, against Mr.
14 Hardeman and Mr. Braswell in this case, and the first charge
15 was -- well, one which stated that through the use of force or
16 violence that Hardeman tried to restrain, force or intimidate
17 an official of the Brotherhood. The second charge -- inciden-
18 tally there is no punishment set forth there, it is open.
19 Apparently, the punishment can be administered according to the
20 offense.

21 The second charge was Article 13, Section 1, of the
22 International constitution, which points out that any member
23 who creates dissension among the members or who seeks to create
24 a dissolution of the Brotherhood or a division of parts -- in
25 essence, it describes someone who is trying to dissolve the

1 union as an organization. And, that article says that anyone
2 who is guilty of this will be suspended -- will be, not
3 suspended, but expelled from the Brotherhood.

4 Now, it doesn't leave any question. There is no
5 lesser penalty. It's just like a State statute that says if
6 you commit first-degree murder you will be sentenced for life
7 or your life will be taken from you. That is what Article 13
8 does. It's a much more serious penalty.

9 Now, when he was found guilty, when these men were
10 found guilty, the expulsion vote that Mr. Sherman mentioned
11 was really superfluous. They didn't need -- if they hadn't
12 done it, or if they had voted not to expell them, they would
13 have still been expelled by virtue of the fact they were found
14 guilty under Article 13, Section 1.

15 It should be noted these gentlemen took necessary
16 appeals in the union, and in doing so they were necessarily
17 prejudiced in their defense because they had to presume they
18 were found guilty of both, and so, by doing this, they had to
19 be found guilty of both.

20 Q Do you think the situation would be any differ-
21 ent if instead of saying "guilty as charged," they said we
22 two brothers guilty and then recited the original charge?

23 A Mr. Chief Justice Burger, I do think it would
24 have been different.

25 Q Tell me how.

1 A I think this. If they had found the members
2 guilty of Article 12, Section 1, they could have said, "For a
3 penalty, we will fine you \$100 each," or "We will suspend you
4 for six months." Or they could have said, "For a penalty, we
5 will leave it up to a vote of the Brotherhood."

6 And when it came before the Brotherhood, when a
7 motion for expulsion was offered, the Brotherhood would have
8 said, "Well, no, let's vote against this because it is too
9 harsh." As it was, when the motion for expulsion was offered
10 the Brotherhood knew they had been found guilty of a section
11 demanding expulsion, so why not go ahead and vote for it?

12 Q Mr. Sherman, just to that second point of
13 expulsion, am I correct that Mr. Hardeman testified that he was
14 sitting there quite worried about how the officers were
15 ruining the local and everything, and he concluded that some-
16 thing had to be done and therefore concluded that he had to
17 punch this man?

18 A Mr. Justice Marshall, that is correct.

19 Q Well, isn't that dissension?

20 A No, sir, that ---

21 Q Well, isn't it mild disapproval?

22 A Sir?

23 Q Is it mild disapproval?

24 A It would not be dissension within the meaning
25 of Article 13-1. To say it would would be -- if you be guilty

1 of dissension under 13-1 in doing that, well, then, you could
2 also say that someone who is presumptive enough when election
3 comes around to run against the business agent in the election,
4 to run for his job, now this man is certainly creating more
5 dissension in the union and causing a division of difference of
6 opinion there.

7 Q But that's legal, isn't it?

8 Q Suppose he punched the business manager once a
9 meeting?

10 A Well ---

11 Q You know, the one-_____ rule, you know?

12 A Yes, sir. My understanding, of course this was
13 not made an issue of the case, but my understanding is that
14 among the boilermakers, that it is not uncommon for a business
15 agent to be punched. Of course, that is shocking, because we
16 don't carry on business that way.

17 Q Maybe I should take judicial notice of that ---

18 A Yes, sir. But, nonetheless, the members could
19 have taken, if they found them guilty only of Article 12 and
20 it were up to the members to decide the punishment, they could
21 have found, decided a punishment that would have been consistent
22 with the offense in the context of the way they carried on
23 business. But, having found them guilty under 13-1, then they
24 had no choice but to vote for expulsion because the men were
25 expelled anyway by virtue of the fact they were found guilty.

1 The constitution demanded it.

2 Q Did he ask for some sort of a special verdict
3 at the hearing? Did he ask if they differed with those
4 particulars in any way?

5 A No, sir, but I do not think that -- of course,
6 that wasn't an issue in the case either. But, I don't think ---

7 Q Well, it is. He didn't ask for what you're
8 asking for now. That might have a lot to do whether he was
9 entitled to it or whether he waived it.

10 A Well, sir, that was not within the procedure of
11 the union remedy.

12 Q That didn't stop you from asking for it,
13 because you're asking for it now.

14 Q Mr. McDonald, I think he may have gotten it
15 without asking for it. On page 57 of the record in the letter
16 to Mr. Hardeman, it says that the only explanation for the
17 expulsion penalty is Article 13.

18 A I did not notice that, Mr. Justice White, but
19 apparently it is.

20 Q Well, they certainly refer to it in the letter
21 explaining what happened when his case was affirmed in the
22 union, they refer to the fact that there were two charges
23 and the fact that he was found guilty of the charges. Then it
24 just says that Article 13 carries an expulsion.

25 A Yes, sir. Let me say this in regard to that

1 standard of review. The standard of review is set forth by
2 Congress in Section 101(a)5 or 29 U.S.C. 411-5c, as requiring
3 that the members have a full and fair hearing. All of these
4 Circuit Courts of Appeal, and they admit this in their brief,
5 have held that in order to have a full and fair hearing there
6 must be some evidence to support the charge.

7 We contended that in this particular case there was
8 not some evidence to support the charge, and their brief ---

9 Q Either one?

10 A Sir?

11 Q Either one? Either charge?

12 A No, sir, some evidence particularly as to
13 Article 13, Section 1, because that is the ---

14 Q Which is which one?

15 A The automatic expulsion.

16 Q I mean, which is the charge there? What's the
17 charge against them under that?

18 A The charge is that he created dissension among
19 the membership to create a division of division of funds. It's
20 on page 63 of the appendix.

21 Q Or work against the interest and harmony of the
22 Brotherhood.

23 A Of the International Brotherhood, yes, sir.

24 Q If you will permit me to say so, I do not
25 frankly at all understand what you are offering as a defense.

1 As I understand it the charge was one man came down from his
2 office into a hallway, or something, and another one assaulted
3 him and beat him up. Is that right?

4 A Yes, sir.

5 Q Are you defending on the ground that he didn't
6 assault him and beat him up?

7 A No, sir. What you have stated -- may I, Mr.
8 Justice Black let me go further, what you have stated was part
9 of the charge. That was the particular, really, the evidence.

10 Q That was the essential thing charged against
11 him, wasn't it?

12 A Yes, sir, but in doing that they said that
13 this act, itself, is a violation of Section 13-1, which carries
14 with it an automatic expulsion.

15 Q Well, why do you say it is not a violation?
16 Why is not that a violation of 13-1?

17 A Because this was a personal thing between Mr.
18 Hardeman and the business agent, Mr. Justice Brennan. It
19 wasn't a blow aimed at dissolving the union. Hardeman's
20 motivation was not to attack the union as an organizational
21 structure.

22 Q No, but this _____ reads that if any
23 member who endeavors to create dissension. You can stop right
24 there. To beat up the business agent, that's not an endeavor
25 or could not be found to be an endeavor to create dissension ---

1 A No, sir, I submit it's not, because I submit in
2 interpreting this section you cannot stop right there.

3 Q Well, the next paragraph ---

4 A Sir?

5 Q Now, I drop to the next paragraph, "or who
6 works against the interests and harmony of the Brotherhood
7 or of any _____ subordinate lodge. To beat up the
8 business manager of the subordinate lodge is not to work
9 against the interests and harmony of that lodge?

10 A No, sir, because that is a personal thing and
11 this prohibits an attack against the organization itself, the
12 organizational structure.

13 Q Isn't the top authority in the union the lodge
14 itself? Didn't he appeal to the lodge?

15 A No, Mr. Justice White, the trial was in the
16 lodge, the local lodge. An appeal went to the executive
17 council of the International and then to the executive
18 president.

19 Q There were 61 votes in the lodge against 36
20 who thought that this was a violation of Section 13, and the
21 top appellant authority in construing the constitution within
22 the lodge thought it was a violation of 13.

23 A Mr. Justice White, I ---

24 Q Aren't those actions worth some consideration?

25 A I don't think that is the case. As I recall,

1 what was submitted to the lodge was not to determine. The
2 lodge did not hear the evidence, or review the transcript. All
3 that was submitted to the lodge was a motion to the effect that

4 ---

5 Q _____ look at page 56 in exhibit
6 two.

7 A Mr. Justice Brennan, pardon me, sir, you are
8 in the appendix. Page 56 ---

9 Q Exhibit 2 has a heading, to the left of the
10 column, 61 for and 36 against. To the right of that, the
11 parties guilty as charged, 61 were sustained, 36 were against.
12 Now, what was that ---

13 A On the basis that a motion was offered to the
14 membership saying, "We have found, the trial board has heard
15 the evidence and having heard the evidence they find him
16 guilty. We move that the finding of the trial board be
17 accepted." Now, that was done at a local meeting without
18 hearing the evidence, or anything. That was still on a local
19 lodge level.

20 Q Without knowing anything, you say nobody knew
21 anything about it; still, they could get up 61 to 36 votes?

22 A Yes, sir. The only thing, Mr. Justice White,
23 the only thing they knew about it was discussion around the
24 hall.

25 Q Does the record show what was presented to the

1 lodge when that vote was taken or before that vote was taken?

2 A Mr. Justice Brennan, I believe it does. I
3 think it shows that a motion was offered. It certainly does
4 not show that any evidence or any research of the transcript
5 was taken, because what happened in this case was the appeal
6 was made to the executive council a trial de novo and retried
7 the issues, the executive council being appointed, the executive
8 council of the International union, and then ---

9 Q What did they hold?

10 A They held the same thing as the -- of guilty as
11 charged in accepting the finding of the trial board.

12 Q Did that end it, so far as they were concerned?

13 A No, sir. Then, to further exhaust their
14 remedies, they took an appeal to the International president of
15 the union.

16 Q What did he do?

17 A He examined the transcript of the executive
18 council hearing and of the local lodge hearing.

19 Q What conclusion did he reach?

20 A He reached the same conclusion not to disturb
21 the finding.

22 Q Was that the end of it, so far as the lodge was
23 concerned?

24 A That was the end of it as far as the whole union
25 was concerned.

1 Q Why did he not attack that in court, that
2 proceeding, rather than sue for damages? If his effort was to
3 get back to the lodge and prove this ---

4 A The reason he did not ---

5 Q If the question was wrong, why not go to court?

6 A Well, the reason for it, Mr. Justice Black, was
7 because the real solution, this particular boilermaker was in
8 the construction trade and as he expressed it, to get back into
9 the union forcibly was no solution, because on construction
10 jobs it was not uncommon that accidents happened and people
11 were hurt or killed. This was a rough group, and he feared
12 that if they were forced to take him back, that his days might
13 be numbered. Now, further ---

14 Q Well, he didn't want to get back.

15 A Sir?

16 Q He didn't want to get back, then. Well, how
17 can he get damages for not getting back?

18 A He can get damages under Section 412, Title 29,
19 Section 412 of the Landrum-Griffin Act, which says that any
20 person whose rights secured by the -- any provision of the
21 chapter may bring a civil action, which is commonly construed
22 to mean either damages or anything not criminal or admiralty,
23 there, for such relief as may be appropriate.

24 Q Without going to court to see whether his
25 expulsion was right or wrong?

1 A Yes, sir, that's what the Act says.

2 Q Did this Court here try that question?

3 A Sir?

4 Q As to whether he had been properly expelled?

5 A No, sir.

6 Q That's never been tried, at all, then, has it?

7 A That is an issue in this case because the whole
8 heart of this damage suit is that the complaint says that we
9 were improperly expelled because we did not have a full and
10 fair hearing, and therefore we are seeking the approximate
11 damages.

12 Q You didn't have a full one, because you didn't
13 go and ask for a judicial review, if you didn't have it.

14 A Well, we had a ---

15 Q I don't understand how you attacked this
16 expulsion without attacking it directly in court.

17 A We did, in this particular case.

18 Q Yes, we did for another case, but you say you
19 didn't try it out in the courts.

20 A Yes, sir, we did, and I'm sorry I misunderstood
21 you.

22 Q Did you get all the evidence to show that he
23 was improperly expelled?

24 A Yes, sir.

25 Q Or did you just submit this technical argument

1 here about the two charges?

2 A That, Mr. Justice Black, the two charges was
3 the basis of our -- him being found guilty of a charge which
4 there was no evidence to support it was the basis of our theory
5 -- of our evidence in court that he was not given a full and
6 fair hearing. Because, he was in the same position as a man
7 on trial under a two-count indictment, and the evidence
8 conforming to one count but not conforming to the other, and
9 the jury comes back and saying, "We find him guilty as charged."

10 Q Well, then, to pursue your analogy, I go back
11 to what I suggested before. What if in that criminal case he
12 had only received the penalty for one of the two crimes and
13 the penalties were penalties which could be the same? Don't
14 the courts constantly affirm convictions down that if they
15 don't need to reach the question they don't need to survive it?

16 A No, sir, because ---

17 Q I think if you'll look at the books you'll
18 find they do it a great deal. If he is guilty of one, they
19 don't reach the other.

20 A Well, the point here, Mr. Justice Burger, is
21 that if he is guilty of one, you're saying here that he could
22 get the same punishment under both charges, but on the other
23 hand, too, he could get a lesser punishment under the charge
24 if he weren't found guilty for the charge for which there is
25 no evidence.

1 Q Well, from the Court of Appeals opinion, see if
2 this is the heart of the case. Court of Appeals said the
3 District Court found as a matter of law that there was no
4 evidence to support a finding of guilt under Article 13 of
5 the constitution. That's the one that deals with endeavoring
6 to create dissension or working against the interest of
7 harmony.

8 Now, if that, if the Court of Appeals is wrong in
9 saying there is no evidence to support that, then the case was
10 wrongly decided, wasn't it?

11 A That is true, but the Court of Appeals reviewed
12 all of the transcripts and the evidence that was taken on this
13 matter.

14 Q I don't see how they could reach a conclusion,
15 myself, you may explain it to me. What happened here, when
16 the officer was attacked, beaten up, and they go ahead and
17 try him, how they can say that that didn't create dissension
18 among the brethren, so to speak.

19 A Well, I ---

20 Q Mr. McDonald, let me add to this, and I think
21 it turns the spot to Justice White's question. Whose function
22 is it to interpret Article 13 of the constitution? You say it
23 means what you have said it means.

24 A Yes, sir.

25 Q But whose function is it to interpret that? Is

1 it the union's function?

2 A It should be the plain meaning of the partic-
3 ular charge, because included in Section 101(a)5a is the
4 requirement that the member be given specific charges. Now,
5 if Congress is going to demand that he be given specific charges,
6 they ought to demand specific proof. It would not be a fair
7 hearing.

8 There are many things that the question of full and
9 fair hearing is a broad term.

10 Q Well, it's perfectly obvious that the Members
11 of the Court are disturbed about how you reached the result
12 that beating up the business agent didn't create dissension
13 among the members or work against the interests and harmony of
14 the Brotherhood. You say it didn't because it means something
15 else. I'm asking you who says it means something else?

16 A Your Honor, I think, Mr. Justice Blackmun, when
17 you read the article together in its context, it becomes obvious
18 -- of course, maybe it doesn't -- but it becomes obvious to me
19 and apparently to the Justices who have reviewed this, that this
20 article prohibits some attack against the organizational
21 structure, itself, in that we're not saying here that Hardeman
22 should not have been disciplined, that a court should just
23 decide within the plain meaning of the ordinary meaning of a
24 particular section.

25 Q There is a question, Mr. McDonald, whether the

1 court can have anything to do with what it means, whether or
2 not ---

3 A Your Honor, I think that Congress has issued
4 a mandate that the Court do it, because Congress has said that
5 no member shall be expelled without a full and fair hearing,
6 and in order to fulfill the wishes of Congress in 101(a)5c,
7 you've got to ---

8 Q ---

9 A Mr. Justice Brennan, let me say this in regard
10 to that. All of the courts of appeal, and Mr. Sherman admits
11 it in his brief, have ruled that in order to have a full and
12 fair hearing there must be some evidence to support the
13 charge.

14 Q ---

15 A No, sir, because I submit it's not, because
16 if you're going to say, "Look and see if there is some evidence,"
17 we've got to interpret the charge to see if there is some
18 evidence. Otherwise, we'd be in the position of trying to
19 decide an embezzlement case from the facts without looking to
20 see the ruling embezzlement statute.

21 The issue is two different sides of the same coin,
22 or looking through the same window from opposite sides.

23 Q If anybody is to interpret it, isn't the NLRB
24 better able to do it than the Court?

25 A No, sir, Mr. Justice Harlan, because the courts

1 of course have more training in this type of thing, the use of
2 words and interpreting the meaning of words, and because
3 Congress gave the mandate to the courts in Title 29, Section
4 412, saying that any person whose rights are infringed upon
5 in this area shall have recourse in the Federal District Court,
6 which brings us to the second area, the preemption argument,
7 which I have a -- would like to say just a few things about.

8 In regard to the preemption issue, which is the
9 second issue that this comes into here, we have to understand
10 the reason for preemption is that what the courts have said in
11 preemption is that Congress has carved out this area for the
12 NLRB to operate in, and therefore they kept the State Courts
13 from operating in that sphere.

14 Now, in this area, the preemption does not apply
15 because Congress in 29-412, says he can bring a civil action
16 for such relief as may be appropriate. Now, in our complaint,
17 and our proof shows, that the wrong was done and we said as
18 approximate results of this wrong this man lost wages for this
19 time, and if approximate results is not appropriate relief
20 there can be no appropriate relief. Appropriate relief is a
21 little looser than approximate results in damages and approxi-
22 mate causes and things approximately caused.

23 Gentlemen, this is an important case. I don't have
24 to tell you that, or I wouldn't be here. Hardeman is a man;
25 his problems are held by every member of the labor movement

1 in this country. And, the whole purpose of our labor laws is
2 to protect the individual rights and the individual working
3 man, and this decision, this case, as long as it stands, will
4 protect every working individual in the United States from
5 such wrongful expulsion as Hardeman suffered.

6 I think it is necessary. It is a good decision, and
7 on behalf of Mr. Hardeman, my client, and on behalf of the
8 members of labor unions in this country, I hope you will affirm
9 the decision with a strong opinion to protect them in the
10 future.

11 Q Mr. McDonald, I have one last detail. Do you
12 feel that entering into the amount of this verdict was anything
13 having to do with the hiring hall practices?

14 A No, Mr. Justice Blackmun, I don't. What we
15 did is we presented the evidence here showing that Hardeman
16 showed his income tax returns that he made so much before his
17 expulsion, and then afterwards we showed that he could not get
18 jobs, get work as a boilermaker even though he made every effort
19 to, and then we showed his income tax return showing the earn-
20 ings he had made for several years after the expulsion. The
21 difference then showed it.

22 He was a man who was 43 years of age, who had spent
23 his life acquiring a trade, which is a technical trade just like
24 my trade of practicing law is something that I acquired, and
25 then all of a sudden it was taken away from him. What could he

1 do at 43? He wasn't able to adapt to find something of equal
2 value to him.

3 Q Conceding then that anything having to do with
4 a hiring law aspect is clearly for the Board, I take it you are
5 saying that there is no element of damage in this result that
6 is attributable to the hiring hall phase of this controversy,
7 and what was done in the hiring hall?

8 A No, sir, it was the ---

9 Q Damage I understood you just now to say, and
10 I'm merely asking as a corollary to that whether you are con-
11 ceding that anything having to do with the hiring hall is for
12 the Labor Board and not for the Court?

13 A No, Your Honor, I'm not, because the -- we're
14 relying on the Act to getting jurisdiction to the Court.

15 Thank you very much, gentlemen.

16 Q Thank you, Mr. McDonald.

17 Do you have anything further, Mr. Sherman?

18 A Yes, I have one small point, and that is to
19 call the attention of the Court to Defendant's Exhibit No. 3,
20 page 61, which is the out-of-work card of the union. You will
21 notice that the rules for the administration of the hiring hall
22 are set forth that call for re-registration each month. There
23 was one entry on March 8, 1961, where he was apparently sent out
24 for a job where he lasted for five days.

25 He made another entry in April, 1961, and the issue

1 really was whether his name continued on the list as a legal
2 matter because it had been on once, or whether the union rule
3 prevailed that if you didn't re-register each month, which is
4 a normally accepted rule with the Board, that he wasn't eligible
5 for further referrals.

6 Q Thank you Mr. Sherman.

7 Thank you, Mr. McDonald.

8 The case is submitted.

9 (Whereupon, at 2:50 o'clock p.m. the argument in
10 the above-entitled case was concluded.)
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