

Supreme Court of the United States

OCTOBER TERM 1970

Supreme Court, U. S.

FEB 4 1971

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In the Matter of:

Docket No. 370

MAGNESIUM CASTING COMPANY

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

pt. 1

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Place Washington, D. C.

Date January 18, 1971

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C O N T E N T S

ORAL ARGUMENT OF:

P A G E

Louis Chandler, Esq., on behalf of Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

MAGNESIUM CASTING COMPANY,

Petitioner

vs

NATIONAL LABOR RELATIONS BOARD,

Respondent

No. 370

The above-entitled matter came on for argument at
2:40 o'clock p.m., on Monday, January 18, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

LOUIS CHANDLER, ESQ.
70 Milk Street
Boston, Massachusetts, 02109
On behalf of Petitioner

NORTON J. COME, ESQ.
Assistant General Counsel, NLRB
Washington, D. C. 20570
On behalf of Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 370: Magnesium Casting Company against the Labor Board.

Mr. Chandler, you may proceed whenever you are ready.

ORAL ARGUMENT BY LOUIS CHANDLER, ESQ.

ON BEHALF OF PETITIONER

MR. CHANDLER: Mr. Chief Justice and may it please the Court:

There seems to be a relatively simple issue here, that we have because we stated whether or not the National Labor Relations Board may enforce the decision and order in an unfair labor practice case, which is based upon evidence in a transcript that it has long considered in review and based upon conflicting testimony by witnesses, that the board or its trial examiner, neither heard nor observed.

The background of this case involves the filing of a petition for an election by the union in a so-called representation case, called an "R" case, in the parlance of the phrase, as distinguished from a C case, which is not fair labor practice --

And a hearing was held; conflicting evidence was presented and one of the questions involved, particularly, is whether or not the system foremen were supervisors. The

1 question involves some credibility because there was con-
2 flicting testimony and this question as to supervisors became
3 critical because the company had an employee that it contended
4 was a supervisor, who was acting as an agent for the union in
5 soliciting authorization cards for the union.

6 And this would change the interest of the union
7 because the board has held that the solicitation of cards by
8 an employer representative is an unfair labor practice; it is
9 coercive and it does not permit of the free choice by
10 employees of their collective bargaining agent.

11 Now, one must bear in mind that in an R case,
12 under the rules and regulations of the board and under the
13 Labor-Management Relations Act, a representation case is
14 called an investigation and the results are not called a
15 decision, but a certification and it was interesting to hear
16 the prior case where there was a certification of the results.

17 And the hearing officer, who would be noted in
18 the representation hearing on the magnesium case, said -- on
19 page 79 of the record appendix: "As we are in a nonadversary
20 proceeding, a hearing in a representation case is not subject
21 to any rules of evidence." This is in the regulations:
22 102.60. "or to the requirements of the Administrative Pro-
23 cedure Act, because there is a specific exemption to Section
24 5 of the certification of employee representatives, but not
25 as to unfair labor practice charges."

1 The hearing officer is actually one of the staff
2 in a regional office, designated by the regional director.
3 He is not appointed under the rules established for the
4 appointment of hearing officers under the Administrative Pro-
5 cedure Act, and he has no authority to make recommendations
6 finders of fact, rulers of law, or determinations of credi-
7 bility.

8 The only reason that a representation case is
9 handled in this manner is to expedite the processing of elec-
10 tions, and representation matters. And because, in 1959,
11 under the act, of the Landrum-Griffin Act, which amended the
12 Taft-Hartley Act of 1947, Section 3(b) was one of the amend-
13 ments which authorized the board to delegate its section 9
14 functions -- a section 9 function was only on representation
15 matters, as distinguished from sections that provide unfair
16 labor practice -- to delegate Section 9 functions only as to
17 its representation cases to its regional directors or retain-
18 ing discretionary powers of review.

19 Now, there is no authority for the board to
20 delegate to a regional director the board's obligations to make
21 the findings that are required in unfair labor practices
22 brought under Section 10. And, as a matter of fact, to make
23 this more binding, Section 3(b) of the amendment said that
24 the board could delegate any of its other powers to a three-
25 man panel of the board.

1 The regional director, in any event, presumably,
2 after reading the record, because he wasn't present at the
3 hearing, and the sergeant says that the staff employee who
4 was assigned as a hearing officer may not make any recommenda-
5 tions. So, he wasn't able to evaluate by the appearance of
6 the witnesses or by observing or listening to a witness's
7 credibility.

8 In any event, presumably, after reading the
9 record, or after seeing these witnesses, may claim as a
10 probability against the employer's position and rule that
11 certain assistant foremen contended to be supervisors by
12 employer, were not supervisors, ~~and~~, and that another
13 assistant foreman was, in fact, a supervisor.

14 And his decision referred mainly to recordstate-
15 ments that were adverse to the employer's position and also
16 more particularly, to Mr. Scott's testimony. And he cited at
17 one point that Scott himself testified that he wasn't a
18 foreman. And yet he left out of his decision, substantial
19 testimony, not only given by the employer and the other wit-
20 nesses, but by Scott himself, in which Scott made many, many
21 statements about his supervisory functions.

22 And without the time to develop them, because
23 this isn't the forum for that. On page 88 Scott, and this is
24 in the record appendix, said he recommended a raise for
25 employees; he regularly attended supervisors' meetings,

1 page 84 and said: "I had the right to fire; if I didn't want
2 a man I would get rid of him." Page 85; page 89: "I had
3 charge of two and sometimes three employees," and he agreed
4 he was running the room(?) and had charge of the employees;
5 gave discipline to one, page 91; testimony by one foreman that
6 all assistant foremen were told they had authority to dis-
7 charge, at page 105. None of this appears in the decision of
8 the regional director, who had the transcript in front of
9 him, presumably.

10 In any event, subsequent to his decision these
11 conflicts in Scott's testimony and the contrary testimony of
12 other witnesses called to the board's attention in a motion
13 to review. And the board refused to review because it has
14 set up standards in a representation case and we can't quarrel
15 with them because the statute gives the board the authority
16 to set up these standards and gives them discretion to review
17 a representation case, saying there must be a compelling
18 reason, that it relates to board policy and that sort of
19 thing.

20 So the board refused to review the election
21 results, and the union was certified as the bargaining agent,
22 and the company position, having been that the employees were
23 coerced because of the supervisor's organizational activities
24 on behalf of the union. And under long case history the only
25 method for raising this issue was to refuse to bargain with the

1 union and a complaint was issued and this was what was done.

2 So that the employer could have a determination
3 under Section 10 of the act. There was no burden of proof,
4 incidentally on the board or its agents in a representation
5 case. It's an investigation.

6 You understand it is whether there is a question
7 of representation, but in an unfair labor practice case the
8 burden is on the general counsel to prove by a preponderance
9 of the evidence that an unfair labor practice exists. The
10 burden is not on the party(?) to disprove that there was an
11 unfair labor practice and this is the decision when the board
12 goes back through the motion to review and says: you prove to
13 us and give us all the evidence you can muster that you have
14 reason to reverse then we can override this decision.

15 Section 10 is not investigative; it is adversary
16 and it relates to the handling of these C cases. Findings of
17 violation subject the Respondent to, and the Petitioner in
18 this case, injunctive penalties, including possible contempt.
19 It requires the board to consider the evidence and to consider
20 the evidence under the rules of evidence of the U. S. District
21 Courts. These rules do not pertain in the representation case.

22 It requires that the board exercise its own in-
23 dependent judgment and under 10(c) to make its own findings
24 and conclusions on a preponderance of the evidence taken be-
25 fore it can enter a bargaining order.

1 And of course the Administrative Procedure Act is
2 applicable and this Court has so ruled in Nashville Plastics,
3 and that requires that all agency decisions include a state-
4 ment of the findings and conclusions and the reasons or basis
5 therefore on all the material issues of fact and law and
6 discretion presented on the record.

7 Now, when the board's trial examiner issued an
8 order to show cause after general counsel filed a motion for
9 summary judgment under the unfair practice case, the employer
10 objected on the basis that the evidence of supervisory status,
11 all of the evidence, should be reviewed by the board or by the
12 trial examiner designated under the rules of the Administrative
13 Procedure Act.

14 And incidentally, just about the time of the issu-
15 ance of this order to show cause on a motion for summary
16 judgment, the employer, Petitioner, learned that the witness
17 Scott, some of whose testimony had been excepted from the
18 transcript by the regional director relied upon, had admitted
19 after the representation hearing that he had been less than
20 truthful and had withheld information at the representation
21 hearing.

22 The employer called this to the attention --

23 Q How did that develop --

24 A Beg pardon, sir?

25 Q How did that develop, Mr. Chandler?

1 A It developed because the assistant foreman
2 told --

3 Q I mean how did it get in the record?

4 A How did it get in the record? The Petitioner,
5 Respondent employer at that time, made a motion stating that
6 the witness Scott admittedly had withheld information and
7 requested a reopening of the record, without getting into the
8 details of what the information was.

9 There was some concern in these rather emotionally
10 charged situations as to pressures being brought on witnesses
11 who might subsequently testify and give names --

12 Q What did the examiner do about it?

13 A The examiner said that this doesn't mean
14 anything to me. He said, "You haven't said anything that
15 would, it stated in the brief or rather in the record appendix --

16 Q Well, don't stop your argument now --

17 A We'll find it in the meantime and we'll come
18 back.

19 Thank you, sir.

20 The -- we asked the opportunity to present facts
21 on the issue. And the trial examiner refused to take evidence
22 or to review the record and he therefore could make no inde-
23 pendent findings of fact or on credibility and he merely
24 affirmed the regional director's decision on the basis that
25 the board had refused to review.

1 The employer filed the exceptions that are re-
2 quired under the act and the board in a short one-page decision
3 really rubber-stamped the trial examiner's decision who, in
4 turn, rubber-stamped the regional director's decision and
5 the First Circuit Court who ordered enforcement of the bar-
6 gaining order, admitted that the issue was a difficult one. He
7 used the term "There are gradations of authority and it is
8 a difficult decision," but that they were deferring to the
9 board's expertise.

10 It's interesting, too, because they should have
11 deferred to the board's expertise, but the board's expertise
12 wasn't involved here, because the board had neglected to
13 perform the duties that were required of it under Section 10.
14 It was the regional director who had made some kind of a
15 determination based upon a reading of the transcript.

16 "The portion on request for permission to adduce
17 the evidence, the only construction that I can make of
18 Respondent's reply"-- this is the trial examiner talking --
19 "that it viewed Scott's admission as newly discovered evidence.

20 However --

21 Q Where are you reading?

22 A I'm reading on page 164. "Respondent furnishes
23 no support for his contention, other than offering to prove in
24 a full hearing that Scott had supervisory authority and did
25 various acts consistent thereto. And he goes on: "And to what

1 extent such evidence is new is impossible to determine other
2 than Scott's admission which presumably came after the
3 hearing and of which we know nothing."

4 Well, I would ask the trial examiner how could
5 he know anything about it if we knew nothing about it until
6 after the hearing and how could he learn anything about it
7 unless, since it was newly discovered evidence, he would give
8 us the opportunity to present it.

9 Q Do you think the regional director is
10 violating Section 3(b) or the board is, by permitting another
11 person in his office to hear the evidence and he, himself,
12 just passing on a --

13 A No, I don't. The act provides that it be a
14 hearing officer or staff employee. But it also provides that
15 he may make no recommendations and that the regional director
16 will make the decision. But the important aspect of this is
17 it's really investigatory and it results in -- certification
18 and it contemplates that ultimately. The intent of Congress
19 is that a charge will be filed and at least this expedites the
20 representation area of the proceeding so that the election
21 can be gotten over with.

22 And if there are issues they would be raised in a
23 complaint case I say that the board violated the act by
24 adopting the regional director's decision and applying it in
25 the C case without an independent evaluation of facts.

1 Q You don't think that the regional director's
2 determination is entitled to the same finality as a board
3 determination of representation?

4 A If it's not appealed --

5 Q Let's assume the board had reviewed the
6 regional director's representation determination and had
7 reviewed it and determined it and then the company refused
8 and there was an unfair labor practice proceeding filed. The
9 board wouldn't have to rehear the unfair labor practice --
10 the representation issue; would it?

11 A If there has been an independent review by
12 the board --

13 Q So your answer is "no"?

14 A The answer is: I would expect to comply with
15 the board's determination in that case unless there was newly
16 discovered evidence.

17 Q And so you say -- but you say the regional
18 director's determination is not entitled to the same finality
19 as the board's is on a representation issue?

20 A That is right, because there hasn't been an
21 independent review that applies to the --

22 Q Section 3(b) says that the regional director
23 is the board.

24 A Only for representation cases.

25 Q Well, I'm --

1 A But not when it comes to unfair labor prac-
2 tices.

3 Q Well, he's made that determination, though,
4 and if the board had made the representation determination it
5 wouldn't have to do it again in the unfair labor practice
6 case?

7 A But they would have examined the entire
8 record; that's my point.

9 Q Well, I know, but --

10 A They refused to examine the record.

11 Q But the section says the regional director
12 is the board for this purpose.

13 A Only for the purpose of representation but
14 not for charge cases. If you have a complaint case the board
15 must look at all of the evidence. They shifted the burden.
16 In the motion for review when we said to the employer and they
17 say to any party filing a motion for review: "You prove to
18 us by compelling reasons that the regional director is wrong,"
19 they shifted the burden that is on them to show by a pre-
20 ponderance of the evidence that an unfair labor practice
21 charge has been committed.

22 There is a difference in the burden that is
23 required between a representation and a charge.

24 Q And the discretion of the board not to take
25 representation cases doesn't mean very much if they are going

1 to have to take them and decide them on the unfair labor
2 practice --

3 A Fifty percent of those they took in the
4 House records that were available from the board, they
5 reversed the regional director.

6 Q Well, that may be, but they didn't take this
7 case.

8 A And they didn't take this case and they didn't
9 look at the evidence and I submit, sir, that the -- Section
10 10 of the act requires that in an unfair labor practice case
11 they must look at the record and that the trial examiner is --
12 I mean, the regional director is not the board for unfair
13 labor practice purposes; in representation cases: yes; to
14 process up through to the time of the election.

15 Q Well, you may well be right. I was just
16 curious to know why Section 3(b) didn't make the regional
17 director determination as final as the board's.

18 A As a matter of fact, in the short time remain-
19 ing today I'd like to quote Judge Kaufman's statement in the
20 Pepsi-Cola case in the Second Circuit where he says that the
21 board procedure for review under 102.67, which is exactly what
22 we are talking about, is even more cursory than certiorari,
23 since the petition for review must be the self-containing do-
24 cument, cut adrift from the record.

25 In certiorari the record is certified to the higher

1 court for examination and for consideration with the petition
2 and the shift of responsibility is improper because there is
3 no preponderance of evidence required.

4 Q Are you saying here that there is no possi-
5 bility of review anywhere of the regional director's determina-
6 tion if the board chooses not to make it?

7 A That's right, sir.

8 Q That's what you're saying?

9 Q Well, there is always court review. The
10 Court of Appeals can review the substantial evidence behind
11 the regional director's --

12 A Not behind -- this is what we were going to
13 get to.

14 MR. CHIEF JUSTICE BURGER: We will get to that in
15 the morning.

16 (Whereupon, at 3:00 o'clock p.m. the argument in
17 the above-entitled matter was recessed to be resumed at 10:00
18 o'clock a.m. on Tuesday, January 19, 1971)