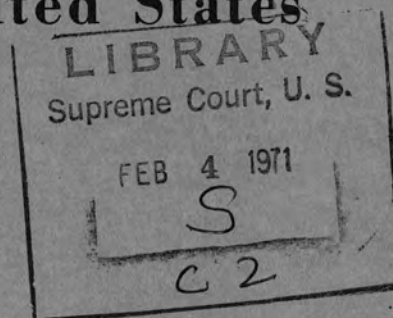


Supreme Court of the United States

OCTOBER TERM 1970



In the Matter of:

MAGNESEUM CASTING COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Docket No. 370

pt 2

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Date January 19, 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.

18

Norton J. Come, Esq., on behalf of Respondent.

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM, 1970

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4 - - - - -
5 MAGNESIUM CASTING COMPANY,

6 Petitioner

7 vs.

8 No. 370

9 NATIONAL LABOR RELATIONS BOARD

10 Respondent
11
12 - - - - -

13
14 Washington, D.C.

15 Tuesday, January 19, 1971

16 The above entitled matter came on for argument
17 at 10:00 o'clock, a.m.

18 BEFORE:

19 WARREN E. BURGER, Chief Justice
20 HUGO L. BLACK, Associate Justice
21 WILLIAM O. DOUGLAS, Associate Justice
22 JOHN M. HARLAN, Associate Justice
23 WILLIAM J. BRENNAN, JR., Associate Justice
24 POTTER STEWART, Associate Justice
25 THURGOOD MARSHALL, Associate Justice
BYRON, R. WHITE, Associate Justice
HENRY BLACKMUN, Associate Justice

1 APPEARANCES:

2 LOUIS CHANDLER, ESQ.
3 Boston, Massachusetts
4 On behalf of Petitioner

5 NORTON J. COME, ESQ.
6 Assistant General Counsel
7 National Labor Relations Board
8 Washington, D.C,
9 On behalf of Respondent

10 *****

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

2 (Resumed)

3 MR. CHIEF JUSTICE BURGER: We'll resume arguments
4 in No. 370, Magnisuin Casting Company against the National
5 Labor Relations Board. Mr. Chandler, I think you were still at
6 work when we---

7 CONTINUATION OF ARGUMENT BY

8 LOUIS CHANDLER, ESQ.

9 ON BEHALF OF PETITIONER

10 MR. LOUIS CHANDLER: Mr. Chief Justice, and may
11 it please the Court.

12 With reference to the question posed by Mr. Justice
13 White, I would like to quote Judge Kaufman in the Pepsi Cola
14 decision as to the requirements of the Courts consideration of
15 the record and the Boards findings under Section 10.

16 He states in an unfair practice proceeding: "The Board
17 cannot completely abdicate its responsibility to a regional
18 director, a functionary whose appointment is not even subject
19 to consideration by the Senate, as are those of Board members.
20 Moreover, the Boards experience is particularly relevant and
21 desirable in deciding complex issues relating to the appropriate
22 bargaining unit before the patent sanctions arising from the
23 finding of an unfair labor practice are invoked. Where the
24 choice is between two fairly conflicting views the Court must
25 defer to the Boards decision, but here the Board has not actual-

1 ly considered the questions of fact and law; the Board has
2 merely rubber stamped its decision and thus the Regional Directors
3 decision was perpetuated even though it may have been in fact
4 wrong, and we, too, would be blindly endorsing the questionable
5 result. Such deference to the Regional Director was not in-
6 tended by Congress.

7 It decided that the Board itself must rule whether the
8 litigant has committed an unfair labor practice, we see no
9 basis for thus mutilating the legislative scheme."

10 And Judge Butzer, in Clement White, said, in a case
11 which also involved the use of summary judgement, that the use
12 of summary judgement in deciding whether an employer had com-
13 mitted an unfair labor practice does not exempt the Board from
14 complying with the Administrative Procedure Act. And the Boards
15 earlier consideration of the companies request for review of
16 the Regional Directors decision does not supply the deficiency
17 for then the Board, as in the Magnesium case, simply denied the
18 request with the, and that was my interpolation, simply denied
19 the request with the observation that it raised no substantial
20 issues, warranting review.

21 The Board is charged with the duty of stating the
22 reasons why the Board concluded that the facts showed a violation
23 of law, no statutory exception to this rule exists because
24 critical elements of the controversy were determined preliminar-
25 ily by the Regional Director in the representation proceedings,

1 the Board, not the Regional Director, has the responsibility of
2 deciding complaints of unfair labor practices.

3 Q How much of your case, Mr. Chandler, depends
4 upon the examination by this Court of your newly discovered ev-
5 idence claimed in its context?

6 A I think a substantial portion of it would because
7 the Regional Director based his decision substantially on the
8 evidence testimony given by the witness who subsequently stated,
9 admitted---

10 Q Would you agree that it would ordinarily take
11 a very strong showing on an issue of that kind which is pro-
12 tection of the newly discovered evidence claim to engage the
13 attention of this Court?

14 A I think the fact that he admitted that he had
15 withheld information at the hearing before the Regional Director
16 would be that kind of strong evidence.

17 Now Judge Kaufman---

18 Q Mr. Chandler, if we bring you back to the quest-
19 ion I asked as we closed last night, I didn't sense an answer
20 to it in the material that you read at length just now. Is it
21 your position that when the Board does not formally review the
22 Regional Directors determination that review is forever lost?
23 In the Court of Appeals, for example?

24 A Yes, in this sense, Mr. Justice Blackmun, the re-
25 view must, under Section 10E as it reads, and as I interpret it,

1 include a review of the board findings as well as making a deter-
2 mination based upon substantial evidence on the record, and the
3 Board findings are set forth as required in Section 10 C, re-
4 quiring a preponderance of evidence that be used by the Board
5 in making its determination so that they must be read together.

6 And in an analysis by the Bureau of National Affairs,
7 made of the Administrative Procedure Act, in 1946, they have a
8 specific reference to the exceptions to the APA, under a comment
9 in Section 5 which talks about the division of powers between
10 the functionaries like the Regional Director and the Board mem-
11 bers, even on the exceptions.

12 And one exception, if you recall, was that relating to
13 the certification of employee representatives, and in the analy-
14 sis the BNA says, with respect to the excepted matters, the
15 Senate Judiciary Committee emphasizes that administrative ag-
16 encies should not apply the exemption to such cases as tend to
17 be accusatory in form, and involve sharply controverted fac-
18 tual issues, since the prescribed exceptions are not to be
19 interpreted as precluding the statutory procedure under APA,
20 where it is required.

21 And I submit, sir, that Congress did not intend the
22 delays inherent in the Boards refusal independently to review
23 the evidence in an unfair labor practice case, so the parties
24 would feel compelled to take the cases to a circuit court, to
25 secure their first review of all the evidence presented at the

1 Regional Director level on a substantial rather than a prepon-
2 derance of evidence test, as the statute provides.

3 Q My question, I come back to it, is directed to
4 whether the issue is reviewable in the Court of Appeals.

5 A Not on a basis that the law provided for. Con-
6 gress provided that a preponderance of evidence test could be
7 applied by the Board, that's in Section 10 C.

8 The Court reviews it on the basis of substantial
9 evidence, and they're not reviewing the Boards finding, so that
10 the parties, I submit, are being deprived of their rights under
11 the Act, and also, of course, under the provisions of the An-
12 ministrative Act.

13 And Judge Kaufman, in relying---

14 Q Apparently, though, you agree that the Court of
15 Appeals will review the Regional Directors determination in
16 terms of the substantial evidence test?

17 A Yes, I agree with that. I believe that---

18 Q Because the Court did expressly that in this
19 case.

20 A Expressly, and this is what I quarrel with, be-
21 cause when Judge Kaufman states that a difficult question was
22 involved and that he was relying on the expertise of the Re-
23 gional Director, which is set forth in Record Appendix page
24 205, and states at the last page of his decision that perhaps
25 the Board ruled that it had determined in its own mind that it

1 was not a difficult question, I don't believe that parties should
2 have to rely on a judge's speculation as to the reason for the
3 Board's action.

4 The---

5 Q Was his statement that he was relying on the ex-
6 pertise of the Regional Director?

7 A On page 205 of the Record Appendix. He so in-
8 dicated, because there was no expertise of the Board involved
9 based upon all of the evidence because they refused to look
10 at the evidence. And the Pittsburgh Plate Glass, which is
11 the only case upon which the Board relies, was decided in 1941.

12 And in that case, the Board made its own findings on
13 the representation case, after the Board members reviewed the
14 evidence and decided it 5 years before the enactment of the
15 Administrative Procedure Act.

16 And as a matter of fact, in 1961, the Board attempted,
17 by means of the Reorganization Plan Number 5, to get permission
18 to delegate unfair labor practice cases. And Congress rejected
19 this proposal, and the Board should not now be permitted to
20 accomplish administratively what it could not persuade Congress
21 to do.

22 A desire to expedite does not give the Board the
23 right to legislate, in a sense, the rights of the parties, or
24 to refuse to consider pertinent and vital newly discovered ev-
25 idence. The Board's so-called rule against litigation, when ap-

1 plied in this matter, is directly contrary to Section 10 C
2 of the Act, and in violation of the Administrative Procedure
3 Act.

4 I would like to call this honorable Courts attention
5 to the case of Electronis Alloys in 183, NLRB 4D, which was
6 also an unfair labor practice case that arose from a refusal
7 to bargain.

8 After the Board refused to review the Regional Dir-
9 ectors decision on an appropriate----. And the Board stated in
10 that unfair labor practice case, on a motion for summary
11 judgement, in Respondents response to the notice to show
12 cause, the Respondent contends that the Board has never in-
13 dependently reviewed the record to determine whether the Re-
14 gional Director was correct in concluding that the unit is
15 appropriate for collective bargaining purposes. We have ex-
16 amined the decision and direction of election in that case, we
17 have made an independent review of the record in that case
18 and hold that the Regional Directors findings and conclusions
19 are correct."

20 There's a footnote and they point to some findings
21 that they disagree with, that do not affect the correctness of
22 his ultimate conclusion that there is an appropriate unit and
23 said accordingly, as now all issues have been fully litigated
24 and no newly discovered or previously unavailable evidence is
25 offered, no further hearing is required. We shall, therefore,

1 grant the general counsels motion for summary judgement.

2 The Board thus acknowledges that while review of a
3 Regional Directors decision in a representation case may be
4 discretionary, independent Board review is required should the
5 representation case ripen into an unfair labor practice case.

6 And the Petitioner here is entitled to no less, if
7 the law is to be administered fairly and without discrimination.
8 And Petitioner respectfully urges that the enforcement decree
9 be vacated.

10 Thank you very much.

11 Q Thank you, Mr. Chandler, Mr. Come, you may
12 proceed.

13 ARGUMENT OF NORTON J. COME, ESQ.

14 ON BEHALF OF RESPONDENT.

15 MR. NORTON J. COME: May it please the Court, and
16 Mr. Chief Justice.

17 As this Court is aware, an employer who contests the
18 validity of a representation election conducted under Section
19 9 of the Act, including the unit determination can obtain Court
20 review of that determination only through an unfair labor pra-
21 ctice proceeding under Section 10.

22 That is, he can refuse to bargain on the grounds that
23 the certificaion is invalid, thereby triggering off an unfair
24 labor practice complaint, and if the Board ultimately finds a
25 violation of Section 8 A 5 , and issues a bargaining order,

1 he gets review of the bargaining order and of the underlying
2 certification, the record of which is before the Court of Appeal
3 by virtue of Section 9 D, under Section 10, E and F.

4 Now since early Wagner Act days, it has been es-
5 tablished that absent newly discovered evidence or other
6 circumstances, the employer is not entitled to re-litigate in
7 this Section 10 unfair labor practice proceedings, any issues
8 which were or could have been litigated or determined in the
9 prior related representation proceedings.

10 And as this Court explained in the Pittsburgh Plate
11 Glass case, in 1941, this is because the unit proceeding and the
12 complaint of unfair labor practice is now really one proceeding.

13 And thus a single trial of the representation issue
14 was enough.

15 Now until 1959, the issues in a Section 9 represen-
16 tation proceeding as well as those in a Section 9 unfair labor
17 practice proceeding were determined by the Board itself.

18 Now in that year, Congress amended Section 3 B to
19 permit the Board to delegate to its Regional Directors its
20 powers, namely the Board's powers, under Section 9, including the
21 power to determine the unit appropriate for the purposes of
22 collective bargaining, provided, however, that upon the request
23 of an interested person, the Board, and this is Congress' words,
24 may review any action of a Regional Director delegated to him.

25 Now pursuant to this authorization, the Board has

1 delegated its powers to determine representation issues to
2 its Regional Directors.

3 The procedures, in brief, are as follows, and they
4 are set forth in more detail in our brief. When a petition is
5 filed with the Regional Director, and an investigation shows that
6 it appears to have merit, the Regional Director sets that down
7 for hearing before a Hearing Officer.

8 On the basis of the record developed at the hearing,
9 and I might say that an examination of the Appendix here shows
10 that there was a very full hearing before the Hearing Officer
11 with plenty of opportunity on the part of the employer to
12 cross examine the witnesses including Scott on his duties.

13 And after this record is completed, it goes to the
14 Regional director who determines on the basis of the record, the
15 unit appropriate for purposes of collective bargaining and
16 directs an election or makes other disposition in the matter,

17 The Board's rules further provide the Regional Director
18 shall set forth his findings conclusions and order or direction
19 which he has done in this case, indeed, the Court of Appeals
20 found that the Regional Directors decision was as full and com-
21 plete as any he had reviewed, where the Board itself had written
22 the opinion. It was a very complete decision by the Regional
23 Director.

24 The Board's rules provide that the decision of the Re-
25 gional Director shall be final unless a request for review is

1 filed with the Board. Then the rules regarding review set forth
2 a number of grounds upon which review may be granted by the
3 Board or the Regional Director if he thinks that the issue is
4 an important one that should be decided by the Board, he has
5 authority to transfer it forthwith to the Board.

6 Now where he has not done that, and he did not do
7 that here, a party after the director has decided the case can
8 obtain review if he persuades the Board that his case falls
9 within one of the four categories that are set forth in the
10 Boards rules.

11 That there was a substantial question of law pre-
12 sented, that procedural error was committed, that there was a
13 departure from Board policy, or, and that's what's involved in
14 this case, that the Regional Directors decision on a factual
15 issue is clearly erroneous on the record and such error pre-
16 judicially affects the rights of a party.

17 The Boards rules further provide that any request for
18 a review must be a self-contained document enabling the Board
19 to review on the basis of its contents and that with respect to
20 ground two, which is the factual error ground or any other ground
21 where appropriate, said request must contain a summary of all
22 evidence or all rulings bearing on the issues together with
23 page citationssfrom the transcript and a summary of argument.

24 And Petitioner fully availed itself of its right
25 under this rule to file with the Board a very detailed request

1 for review which starts at page 117 of the record and goes to
2 page 127 of the record, setting forth in very specific detail
3 the respects in which the Regional Director erred, with re-
4 cord references as to evidence that he allegedly overlooked
5 to the duties of Scott as well as the other two individuals
6 whose status was in question, and also a very detailed legal
7 argument as to the applicable legal principles and controlling
8 Board decisions that the Regional Director allegedly over-
9 ruled. Overlooked.

10 The Board's rules further provide that the, that an
11 opposition may be filed to a request for review, although it's
12 not reprinted in the record, I find in examining the original
13 record that the petitioning union also filed a document with
14 the Board in opposition to the request for review which again
15 contained a very detailed recital of the record evidence, sup-
16 porting the Regional Director's ruling.

17 and the Board had these two documents before it, as
18 well as the decision of the Regional Director, and on the basis
19 of that decided that no issue warranting review was provided.
20 And that kind of a situation as the Court of Appeals pointed out
21 in its opinion, it cannot be said that the Board, in deciding
22 that no issue was presented, merely rubber stamped the Regional
23 Director. You had as focus a presentation of the issues as you
24 could possibly have had, had the Board reviewed the record de
25 novo.

1 Q Mr. Come, would your case be different if you
2 had been just a rubber stamp? Are you suggesting that it's es-
3 sential that the Board at some point review the Regional Dir-
4 ector?

5 A No, I'm not saying that, but I'm just saying that
6 under the procedure that the Board has devised for implementing
7 the 3B delegation, there is a very real opportunity provided to
8 a party requesting review to catch the Boards eye if there is
9 any glaring error on the part of the Regional Director.

10 Q Well, I don't suppose the Board reviews every
11 case it thinks is wrongly decided.

12 A Well, if it satisfies one of the vriteria for
13 granting review---

14 Q Well, again I'll ask you, do you think that there
15 would be error in this case if the Board had never looked at
16 a scrap of what was before---

17 A No, I do not, because I think 3B permits the
18 Board to delegate the authority to the Regional Director.

19 However, 3B says that any party, subject to the right
20 of any party to request a Board to review the case, so I think
21 that there has to be an opportunity to request the Board to---

22 Q Well, sure, well, that's available---

23 A Yes.

24 Q But your case really doesn't depend on how much
25 the Board looked at the Regional Directors determination, does

1 it?

2 A No, it does not, but I just want to---

3 Q You might be in trouble if it did.

4 A Well, I'm not suggesting that there was a de
5 novo or plenary review. However, I wanted to point out that
6 this petition to review procedure, on the other hand, is a
7 meaningful one, and it's not a mere rubber stamping of the Re-
8 gional Director.

9 But to get back to the Boards rules. The Boards
10 rules finally provide that denial of a request for a review
11 shall constitute an affirmance of the Regional Directors action,
12 which shall also preclude re-litigating any such issues in
13 any related subsequent unfair labor practice proceeding.

14 So that the issue that we really come down to, here,
15 is whether or not this procedure is valid and authorized by
16 Section 3B of this statute, or put more specifically, whether
17 the Board may properly apply the settled principle barring
18 re-litigation in a subsequent related unfair labor practice
19 proceeding of issues determinigg the representation proceeding
20 where it has delegated this authority to the Regional Director
21 and pursuant to the 3B delegation and as declined to review
22 his determination or whether, as Petitioners contend, and as
23 the Second Circuit held in Pepsi Cola, the Board is required
24 before basing an unfair labor practice finding on this
25 representation determination of the directors to make a new and

1 de nove full review of the record.

2 I might say that the Second Circuit itself seems to
3 have backed down substantially from Pepsi Cola in two decisions
4 subsequent to Pepsi Cola, which are cited in our brief, Olsen
5 Bodies, and Baliss Trucking, apparently they are now holding
6 that the Pepsi Cola requirement for de novo review applies only
7 to situations where you have, as they put it, a difficult mixed
8 question of law and fact.

9 So the substantial amount of substance has been taken
10 out of Pepsi Cola by the Second Circuit itself.

11 Well, our position is basically that both the language
12 of Section 3B and its legislative history support the validity
13 of the Boards delegation procedure. On its face, 3B, as I have
14 just outlined to the Court indicates a Congressional purpose
15 to endow the Regional Director with all the powers which the
16 Board previously had in the Section 9 proceeding, subject to such
17 review as the Board might provide.

18 Now since the Boards powers in a Section 9 proceeding
19 previously meant that you were, the Board was not required to
20 re-examine in the unfair labor practice proceeding issues that
21 were determined in the our case, if you put the Regional Dir-
22 irector in the shoes of the Board, it should follow, we submit
23 that there is no right to have a Board re-determination of the
24 issue determinedd by the Regional Director in the unfair labor
25 practice proceeding add some newly discovered evidence.

1 Q Do you think in the present case, the action of
2 the review passes muster under the Baliss and Olsen Body cases
3 in the Second Circuit?

4 A I don't know whether the Second Circuit would
5 regard the type of issue that we have here as being the diffi-
6 cult question of mixed law and fact, that would require the
7 Board to review the record de novo.

8 The Court of Appeals in this case had great doubt in
9 knowing how to apply that standard. What you had in Pepsi
10 Cola was the question as to whether or not certain employees
11 were independent contractors or not.

12 The question that you have here---

13 Q ---a question quite like---

14 A It's a question quite like---

15 Q ---like a supervisory question.

16 A It is a question quite like the supervisor quest-
17 ion, and therefore I would be inclined to say that the Second
18 Circuit would regard this case as controlled by Pepsi Cola,
19 rather than by Baliss and Olsen.

20 Q And you would not pass muster under Pepsi Cola.

21 A That is my opinion, that we probably would not.
22 However---

23 Q I've had some difficulty trying to read these
24 later cases as ammodification of the Pepsi Cola case, rather
25 than merely a treatment of a different problem, a different kind

1 of problem within the framework of Pepsi Cola. I notice that
2 Judges Lombard, Kaufman, and Smith, two of the three of them
3 were on all of the panels.

4 A Except in Olsen. In Olsen you had a different
5 panel, Judge Smith was the only one common to the, who sat on
6 Pepsi Cola.

7 You had Judge Friendly and Judge---

8 Q Judge Smith and Judge Fienberg.

9 A Oh yes, Judge Smith and Judge Fienberg who were
10 not on Pepsi Cola, and judge Friendly in his opinion in Olsen
11 speaking for himself and Judge Fienberg, because Judge Smith
12 specially concurred on that point indicated that he had grave
13 misgivings as to the validity of Pepsi Cola, but then he went
14 on to find Pepsi Cola distinguishable on the ground that the
15 issue there was not as important or as difficult as the one
16 in Pepsi Cola.

17 But in any event, our position is that neither the
18 language of the statute, nor the legislative history permits,
19 or warrants the kind of distinction that the Second Circuit
20 is now drawing. We think that the, it was Congress' intention
21 to permit the Board to delegate final authority subject to this
22 limited right of review by the Board, of all representation is-
23 sues, particularly, including those involving a determination o
24 of an appropriate unit, whether it be a supervisory question or
25 an independent contractor question or plant clerical question,

1 as you had in Olsen Body.

2 For the simple reason that the basic Congressional
3 objective, as is in enacting 3B delegation as is succinctly
4 pointed out by Senator Goldwater, in a quotation that we have
5 on Page 18 of our brief, who was on the House-Senate Conference
6 Committee, was to expedite final disposition of cases by the
7 Board, by turning over part of its case load to its Regional
8 Directors for final determination.

9 And then he goes on to say, that they've empowered
10 the Regional Director to act in all respects as the Board
11 itself would act.

12 Now you don't---

13 Q What--how does the Board speak?---in an unfair
14 labor practice?

15 A In an unfair labor practice case, if there are
16 exceptions, to the trial examiners findings, the Board will
17 take the case up and review the record itself with respect to
18 those matters that are acceptable to them.

19 Q What's the standard that the Board applies to
20 that?

21 A It would apply the predominance of the evidence
22 standard.

23 Q Preponderance?

24 A Preponderance.

25 Q Now I gather in this case the trial examiners'

1 findings included the Regional Directors findings, did it not,
2 on the representation issue?

3 A Yes, sir.

4 Q And what is the difference? I suppose an ex-
5 ception was taken to those findings. In the trial examiners
6 findings in the unfair labor practice case. Now what's the
7 standard that the Board applies to that exception?

8 A Well, the Board did not regard---the trial
9 examiner made no findings here, he---

10 Q Well doesn't he incorporate---

11 A He granted a motion for summary judgement and
12 since the---

13 Q Yes, but when he files his findings in these
14 cases do they not include the findings in the representation
15 cases?

16 A Yes,,but the Board does not re-review the---

17 Q That's what I wanted to get.

18 A Review the---

19 Q So that even though they're in the trial ex-
20 aminers findings, to this extent at least, what you've told
21 us, the applicaiton of preposderance of the evidence rules
22 does not apply.

23 A That is correct, but it would not have applied--

24 Q Before 3B?

25 A It would not have applied---

1 Q Well, before 3B, of course, it was the Board
2 that made it, wasn't it?

3 A That is correct.

4 Q And in that circumstance, of course, you wouldn't
5 expect the Board to go back over it again.

6 A That is---

7 Q But I just wanted to be clear, now. They apply
8 the same rule to the Regional Directors findings that they used
9 to apply to their own which they don't review them at all.

10 A That is correct. That is correct.

11 Q Just from curiosity, did you say the Board, in
12 reviewing the trial examiners findings really makes it a pre-
13 ponderance of the evidence determination---

14 A Well, they---

15 Q Themselves, or is isn't merely an erroneous
16 standard or a substantial evidence test?

17 A Well, it's more than substantial evidence. Now
18 as to the difference between clearly erroneous and pre-
19 ponderance of the evidence I think we could get into a nice
20 philosophical---

21 Q They actually say to themselves, would we have
22 made the same findings the trial examiner made---

23 A Except with regard to credibility. They usually
24 will not disturb a trial examiners credibility determination.
25 I might say that in this case there were no credibility issues

1 because the only important issue on which there was a conflict
2 in the evidence as to whether or not Scott had followed the
3 discipline of an employee, the Regional Director assumed the
4 validity, accepted as true the companies version that he did,
5 on one occasion, threaten to fire this man, but found that that,
6 but even assuming that that were true, that one incident was
7 sporadic and not---so that it did not overcome the other evi-
8 dence showing a non-supervisory authority.

9 Now I just want to, in closing, say one word about
10 this motion to ---newly discovered evidence.

11 Now the Respondent could have gotten a hearing in
12 the unfair labor practice case if in response to the order to
13 show cause it was able to come forward with evidence that was
14 in fact newly discovered.

15 Now obviously in view of the---

16 Q Will you stop right there, Mr. Come, please?

17 A Yes.

18 Q If they had come forward with this, then there
19 would have been a redetermination in the first instance by
20 the trial examiner of the representation case?

21 A Had they come forward with newly discovered
22 evidence, the trial examiner would have held a hearing with
23 respect to the issue that was newly discovered, and in the
24 light of that evidence he would have reconsidered the Regional
25 Directors determination and then it would have gone up to the

1 Board.

2 Q To the Board.

3 A However, what happened here was that Petitioners
4 claim of newly discovered evidence was a bare naked allegation
5 that Scott had allegedly withheld information as to his full
6 supervisory duties with no indication whatsoever as to what it
7 was that he withheld, and then as the trial examiner found, and
8 as Petitioners offer of proof shows, which is in the record,
9 Petitioner, when it listed what it was going to show at this
10 hearing, ticked off factors as to Scotts power to discipline,
11 his power to recommend raised, and so on, a list of 10 items
12 all of which had been gone into very thoroughly in the re-
13 presentation case and which was subject to cross examination
14 by Petitioner.

15 So that the Trial examiner found that in those cir-
16 cumstances, the claim that there was newly discovered evidence
17 here was merely a sham in an effort to attempt to re-litigate
18 the very same issues that had been gone into extensively in
19 the representation case, and the Court of Appeals sustained
20 that finding.

21 So we submit that in those circumstances there cer-
22 tainly was no substantial issue that merits attention by this
23 Court on the question of whether there was newly discovered
24 evidence that would have warranted a hearing in this case.

25 Q Are you suggesting that this case, then, does

1 not present the issue of the conflict between and among the
2 circuits, Pepsi Cola vis a vis the other cases?

3 A No, I am not, Your Honor, I am merely suggesting
4 that the conflict has been muted somewhat by the Second Circuit
5 subsequent decisions in---subsequent to Pepsi Cola, but I
6 think on the type of issue that we have here, we still have
7 that conflict.

8 And I submit that the view of the First Circuit which
9 has been adopted by the Tenth Circuit, is the correct one, and
10 the one that is the most consonant with Congress' objective in
11 enacting the amendment 3B, because the practical point of the
12 matter is I think, as Mr. Justice White pointed out yesterday,
13 if you are going to require the Board, when a representation
14 determination ends up in an unfair labor practice proceeding,
15 and potentially any certification case can do that because
16 that's the only way the employer can get review, to review the
17 record fully at that stage, you are not making the Regional
18 Directors' determination final as Congress intended to do, sub-
19 ject to merely discretionary review by the Board, and you are
20 robbing the Arpege delegation of the timesaving that Congress
21 intended to get from permitting the Board to do that, because
22 whatever time is saved at the Arpege stage is going to be dis-
23 sipated at the --- stage, and we have statistics in our brief
24 which show that it's rather dramatic, that under the Arpege
25 delegation, and when the Regional Director is permitted to decide

1 these things himself, the time from filing of a petition to
2 direction of election is in the neighborhood of 48 days.

3 Whereas, if it goes to the Board , it is about 245
4 days, and you would just be substantially sapping the Arcase
5 delegation of the value that Congress has sought to achieve
6 and it is not necessary, we submit, to protect the fundamental
7 rights of respondents the Board proceedings as is amply shown
8 by the record in this case.

9 Thank you, Your Honor.

10 Q Thank you, Mr. Come, your time is consumed,
11 Mr. Chandler, the case is submitted.

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13 (Whereupon at 10:55 am, argument in the above
14 matter was concluded.)

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