Supreme Court of the United States

OCTOBER TERM 1970

In the Matter of:

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, ETC., ET AL.	Docket No. 76
Petitioners,	
vs.	
WILSON P. LOCKRIDGE,	
Respondent.	

Place Washington, D. C.

Date December 15, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, ETC., ET AL., Petitioners,	vs	WILSON P. LOCKRIDGE, Respondent.	No. 76

The above-entitled argument came on for argument at 1:35 o'clock p.m. on Tuesday, December 15, 1970.

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:

ISAAC N. GRONER, ESQ.
1730 K Street, N.W.
Washington, D. C. 20006
On behalf of Petitioners

JOHN L. KILCULLEN, ESQ.
Gall, Lane, Powell & Kilcullen
1250 Connecticut Avenue, N.W.
Washington, D. C 20036
On behalf of Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in Number 76, Amalgamated Association against Lockridge.

ORAL ARGUMENT BY ISAAC N. GRONER, ESQ.

ON BEHALF OF PETITIONERS

MR. CHIEF JUSTICE BURGER: Mr. Groner, you may proceed whenever you are ready.

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

In this case which is here on writ of certiorari to the Supreme Court of the State of Idaho, preemption is the issue: whether the state court had jurisdiction over the action which Respondent, Wilson P. Lockridge, filed against Petitioner unions, or whether the state courts had no jurisdiction because Congress has regulated the union conduct involved in this case under the Labor Management Relations Act.

For some years prior to 1959 the Respondent Lockridge was an interstate bus driver employed by the Greyhound Bus Company, pursuant to the checkoff clause in the collective bargaining contract between Greyhound and the Petitioner, the Local Division.

Lockridge had been maintaining his union dues payments and also his employment with the Greyhound, inasmuch as the collective bargaining agreement provided that all employees shall remain members as a condition precedent to continued

employment.

The union constitution provided that where agreements with employing companies provide that members must be in continuous good financial standing, the member in arrears one month may be suspended from membershipand removed from employment, in compliance with the terms of the agreement.

In August 1959, Lockridge and some others voluntarily revoked their checkoff arrangement. They voluntarily assumed the responsibility of maintaining their union dues payments timely, to maintain their membership in the union and also to maintain their employment.

In August 1959 and also in October 1959 the union in writing advised Lockridge of the provisions to which I have adverted, and pointed out that he had the responsibility to maintain these payments. Nevertheless, he permitted his payments to become delinquent and the union so advised the Greyhound, and in November 1959, being delinquent in his dues for the month of October, the union advised Greyhound of the delinquency and Greyhound discharged Lockridge.

Q How long after his delinquency arose for the October dues, did the union terminate him?

A The union, Your Honor, did not terminate him. The union advised the company on November 2nd, his delinquency having arisen on November 1st.

Q When did they notify him that he was out of

the union?

A They --

Q For nonpayment of dues.

A They had advised him, Your Honor, in advance that he would be out of the union if he permitted his delinquency to be in arrears more than one month, but --

Q Well, what I'm trying to get at is: how many hours or days is, was he delinquent when the axe struck?

A He was delinquent for about 48 hours.

Q Forty-eight hours.

A Yes, that is correct, Your Honor.

After having --

Q Does the union uniformly act in that way on every -- nonpayment of dues in every case? Or does this record show anything on that score?

A The record indicates three things with respect to that, Mr. Chief Juskice.

First of all, that it acted uniformly with respect to everyone who had been given these notifications and were in this precise delinquency.

But there is only one other such member and employee, named Elmer J. Day. It also shows as a finding of fact that the union had suffered delinquencies -- had permitted other people who were in arrears a comparable length of time to remain in membership and to remain in employment, but there was

nothing indicated that they had received the kind of notices which Messrs Lockridge and Day had received here.

In any event, Lockridge did not file a charge with the National Labor Relations Board alleging either that he had not been treated like others in the same situation, or making any other allegation of unfair labor practice under a Federal Act.

In September, 1960, as a resident of Idaho he instituted an action in the District Court for Boise, the Idaho District Court for Boise, against Petitioner unions and originally also against Greyhound, naming Greyhound as a party defendant and including also a count specifically directed to the just cause provision of the collective bargaining agreement and alleging that Greyhound had violated that.

Prior to any judicial action on the original complaint, however, Lockridge filed an amended complaint, which removed Greyhound as a party defendant and also removed the particular count which had been addressed to Greyhound in its action under the collective bargaining contract.

Basically, in that amended complaint there were, in essence, three counts. One: tortious interference with employment; two: violation of a contract between the union and a member, and three: conspiracy, all purporting to be stated under state law.

The union filed a motion to dismiss, including

among other things the particular ground that the subject matter of Lockridge's actions was preempted by virtue of its regulation under the Labor Management Relations Act.

The District Judge granted that motion, relying in principal part upon this Court's decision in the Garman case. Lockridge appealed.

In 1962 the Idaho Supreme Court reversed, holding that it was confused by the preemption decisions of this Court and in particular, purporting to see confusion between the decision of this Court in the Gonzales case and the decision of this Court in the Garman case. The case was remanded for trial.

Prior to trial there was another amendment to the complaint. In all of these complaints, and of course, in particular in the second and only complaint which was the basis for the charge, all that Lockridge said was: money damages. At no time did he request the relief of restoration to union membership. He had originally sought both compensatory damages and punitive damages. But in his second amended complaint he excised the count which was addressed to punitive damages and he also cut out the prayer of a request for punitive damages.

In a preliminary ruling prior to trial, the Idaho District Court ruled that there was no ambiguity in the documents involved, in essence, holding that the contract requires that the employee remain a member, whereas the

constitution required that members must be -- the constitution referred to contracts which required that members must be in continuous good financial standing. The Court purporting to find that difference unambiguous and declining to permit the union to file an affidavit, both from their officers and from Greyhound representatives which stated that no difference was intended between teh language and no difference was intended in the interpretation and application ofthe collective bargaining agreement applicable here and other collective bargaining agreements applicable to other drivers in the same bargaining unit, which did have the continuous and good financial standing language.

The trial was devoted primarily to damages. The District Judge in Idaho held again that he believed that the matter was preempted and that the union's position in this respect had been strengthened by the decisions of this Court in Borden and in Perko.

The 1962 decision in the Idaho Supreme Court was rendered prior to the decision of this Court -- decisions of this Court in Borden and in Perko. And indeed, the Idaho Supreme Court in 1962 relied upon the state supreme court decisions in Borden and in Perko which were, of course, reversed on preemption grounds by the decisions of this Court.

The Idaho District Judge felt, however, that he was mandated to proceed by the Idaho Supreme Court decision and he

awarded damages, which, with interest, approximate $50,000 and An appeal was taken by the unions on the grounds of preemption. The decision below affirmed, by a vote of 4 to 1, both the majority and the dissenting opinions confining themselves to the issue of preemption and indeed, almost entirely to a discussion of the decisions of this Court featuring Borden and Perko.

Q Mr. Groner, may I ask you a question here., a general question. Do you accept the idea that's been expressed by several courts of appeals -- I'm not sure it's ever been articulated here -- that a union in relation to its members, is a trustee, a fiduciary and has all the duties of a fiduciary toward its members?

A Well, there is no question that unions in general have a duty of fairly representing all those in the bargaining unit. To that extent I would answer your question in the affirmative, Mr. Chief Justice.

Q Well, I'll go a little further. Do you embrace within the fiduciary duty to the extent you accept the fiduciary idea, the concept that they have a duty of fair dealing to the point of protecting him and aiding him in every way?

A No, sir. No, Your Honor.

Q You mean he's an adversary?

A In this case he comported himself as one.

He --

Q Forty-eight hours -- on a 48-hour delinquency in his dues he becomes an adversary in the instead of a beneficiary?

A Well, there are other alternatives, Your Honor, between being an outright adversary and responding to a question that the union must defend him in every way. I certainly would not accept the proposition that the duty of fair representation is so broad where it at least where there isn't presented all the factual reference which would indicate how broad you would like to extend it.

With respect to this particular case, Mr. Chief Justice, if your question was directed to it, the duty about which you inquired was never invoked by Lockridge. He had a count which sought punitive damages and he excised that and even in that count he did not purport to rely upon any duty of fair representation and the reason for that, Mr. Chief Justice, in our view, it was quite obvious he wanted no part of any Federal law. He wanted no part of any action that could possibly be felt to be based on Section 201 so as to give rise to a right of removal in the union, a right of removal to the Federal District Court, which would be acquaintedwith the act, to a Court of Appeals which had had cases under Section 8(b)(2) of the National Labor Relations Act which is directly in point.

The fiduciary duty of which Your Honor may be

thinking, if I may try to make it somewhat more precise, the duty of a union to advise the member when he is delinquent in his dues and to the extent to which he is delinquent in his dues, is a duty which has been spelled out by the National Labor Relations Board in its decisions under Section 8(b)(2) and it is precisely -- that is precisely the basis of, or one of the bases of our fundamental position that the judgment below must be reversed on preemption grounds, for two different reasons.

One is that Congress has occupied the field of this union activity.

Q Let's assume that all he had asked for in his suit was restoration of his membershipin the union. That's his sole claim.

A If that was all he asked for in the suit and if all the other circumstances indicated that the crux of the action was the membership relationship rather than the employment relationship, then the state courts would have had jurisdiction to adjudicate.

Q To sue just on a contract basis, or to entertain whatever his action was?

A No, Your Honor; no.

Q Given your supposition that the state court could have entertained it?

A Oh, yes. And could have granted the relief

of restoration to union membership.

Q But if he said, "I also want, by the way, not only restoration, but I would like some damages for my lost wages which I lost because I didn't have my membership. I was wrongfully deprived of my membership." Now, if he adds that prayer in his complaint is he out of court right then?

A I do not think that I can answer your question directly, Mr. Justice White, because it would depend upon many other factors. It depends, as this Court said in Borden and Perko, upon a decision as to what the crux of the action is, and that would depend upon what he sought in his action, what he said in his complaint, as well as perhaps upon other things.

Q Well, he says: I was wrongfully terminated from membership in the union and I want my membership back and I want damages for lost wages.

A The damages for lost wages, were the wages, of course, that would relate to employment. The state court would have no jurisdiction to grant it.

Q In any circumstances?

A Under any circumstances. Yes, Your Honor.

The only issue would be whether the state court would have any jurisdiction in the premisis if, in the initial analysis the conclusion were reached, as it must be in this case, in our view, that the nub of the action is the employment

relationship, then the state court would have no jurisdiction. But, in any event, their jurisdiction would be limited to granting relief under the, under that part of the action which did not impinge upon Federal Law, or that part of the relief which the National Labor Relations Board could not give.

Q And you would give the same answer if he had already gone to the general counsel and filed the complaint and the general counsel had rejected it and then he said, "Well, I must get a hearing someplace. I'm going to go to court."

You would say he couldn't go to court then, either?

A Yes, Your Honor, I would say that he could not, and that this Court has made clear in its decisions that the action or inaction of the board does not provide an exception to a preemption principle. In this case, of course, as Your Honor is aware, he did not go to the National Labor Relations Board. Also, Your Honor, there must be an assumption of regularity with respect to the general counsel. The general counsel presumably would issue a complaint if the facts which he submitted would indicate that there had been a violation of the act. And under the facts as he states them there would have been a violation of Section 8(b)(2) and Section 8(b)(1) --

Q If he had alleged discriminatory conduct amounting to what he alleged was a -- breached the duty of fair representation, he couldhave stayed in court?

A If he had done so?

If he had done so, yes; he could have stayed in court but he could not have stayed in the state court because that would have given rise to our right to remove and to our right to appeal to the Ninth Circuit and in our view, that would haveled to a far different consideration of the case and it would have led to a far different result. It is precisely because these state courts are not acquainted with labor cases and had no experience with the Labor Relations Act, that we find ourselves as petitioners here, in our view. But, in any event he did not do that and this was a deliberate election.

Q Well, Mr. Groner, what difference do punitive damages make, if any?

A I'm sorry, I didn't understand --

Q What difference does it make that he also asked for punitive damages. That is not necessary at all in your case, is it?

A Well, he originally asked for but then withdrew it and I quote that partly by way of a history of the case, but also by way of lending some color to what we say is a deliberate election not to allege any breach of fiduciary duty and there is no such issue in the case. He did not allege it; indeed he did not ask for punitive damages; the District Court found that petitioners acted out of an honest interpretation of what their legal rights were and the court below also found that this was an honest misunderstanding with respect to the

legal documents involved and there had been no discrimination, Mr. Justice White, in the invidious sense of deliberately an individual matter.

Under the findings here the union acted in good faith, but the issue of good faith was never fairly litigated because he never alleged it and it was never tried.

Q Well, what was the basis for the amount of damages? He wasn't out of work that long. Is that just back pay?

A No. Lockridge was discharged in November 2, 1959 so that by the time --

Q Well, what I'm trying to get at is that's the same thing he would have gotten if the, in the law if he had agreed to it and had given him back wages?

A Right. It is the back wages, yes, but the back pay would not have been such a large amount because he would have to file the charge within six months and presumably the board, however slowly it may run in some cases, it would have discharged of this case prior to the 11 years which have elapsed on its way to this Court.

Q Mr. Groner, assume that it did not go to any Federal Court, pursuant to your efforts, would the Federal Court have been obliged, notwithstanding the preemption doctrine, or consistent with the preemption doctrine, to apply basic rules of equity that were prevailing in the state where

the problem originated?

A Well, I don't see how that would have been done. We couldn't remove, Mr. Chief Justice. Only if the plaintiff had stated the complaint under Federal Law. The plaintiff is in charge of the claim he states. If he had stated a claim -- only if he had stated a claim under Federal Law could we have removed.

If he had stated a claim under Federal Law it would have been decided under Federal Law. It presumably would have been a Section 301 claim and the Federal Law with respect to that is, under many decisions of this Court, a law that the judges pronounced as a matter of Federal Law which is made pursuant to Section 301. It is not based in any part upon the law of equity of a particular state.

Q Do you think the equitable rule or doctrines would have no application to the relations between the union and its members?

A In some other -- I'm sorry?

Q Is it controlled exclusively by the statute?

A It is -- in any lawsuit, Your Honor, no; they vary. In some lawsuits for some purposes where the considerations which you advert to would be most relevant and, indeed decisive.

In this lawsuit under the allegations made in the complaint, under the meets and bounds of the case as drawn in

the complaint, in the trial and in the consideration by all parties and both courts, there is no room for such considerations.

In any event, Mr. Chief Justice, we had been discussing matters which are related more to the merits than to the issue of jurisdiction. In our view all we would have here is an issue of jurisdiction as to whether a state courts could exercise any jurisdiction under the decisions of this Court and in particular, Borden and Perko. And under the prescriptions of the Congress which, in Sections 8(b)(2) and 7 and some of the others, have covered all cases involving union conduct of requesting or obtaining an employee's discharge by advising the employer that he has been delinquent in his dues.

Congress has made all such activities, either protected or considered and therefore Congress has occupied the field and therefore Congress -- and therefore the union conduct involved here is, arguably, either an unfair labor practice or protected activity and --

Q I suppose it's difficult to talk that abstractedly, but let's assume that this matter had gone to the board and the board had decided that there was no unfair labor practice here. Now, is it your position that therefore, the employee would have no remedy against the union under his contract with the union just because the board found out that whatever the union did didn't amount to an unfair labor

practice?

A Well, I don't know as it would be therefor, but with respect to the union conduct directed to his employment relationship; yes, there would be no remedy. Congress has carved this out and put it beyond the state domain.

Now, had he brought a suit solely to restoring his union membership, that would have been a different matter if the crux of that action had been the membership relationship rather than the employment relationship.

Q You mean that would be within the jurisdiction of the state courts, and not subject to preemption?

A Under Borden and Perko, Your Honor, as we understand it, the test is what the crux of the action is and if the crux of the action ia the employment relationship, yes the state court has jurisdiction.

Q What if it's membership in the union; is that exclusively Federal, in your view?

A No, Your Honor. If it's solely and exclusively membership in the union, that would be a matter over which the state courts could exercise jurisdiction if it involved the membership relationship.

Q Then why doesn't the -- Mr. Justice White's point, why doesn't the suit for damages for wrongful termination from the membership and therefore, the employment, fall in the same slot?

A It does not, Your Honor, because, with respect to the employment aspects of it Congress has litigated and in the Congressional litigation Congress covered all such cases. Now, in covering all such cases, Congress provided that the National Labor Relations Act shall be the determining law and provided that the National Labor Relations Board shall be the tribunal. These cases are repeatedly handled by the National Labor Relations Board. There are many cases of alleged violation of Section 8(b)(2) and 8(b)(1)(a).

This is the way cases like this are handled. The one other than this of which you are aware, is the Day case, where the Oregon Supreme Court held that it had no jurisdiction on the basis of preemption and this Court denied the petition for certiorari.

If there are no other questions I would like to reserve whatever balance I have, and perhaps even could request a minute or two more for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Kilcullen, you may proceed.

ORAL ARGUMENT BY JOHN L. KILCULLEN, ESQ.

ON BEHALF OF RESPONDENT

MR. KILCULLEN: Mr. Chief Justice and Members of the Court:

There is no question that Respondent Lockridge here sustained a substantial injury. He has had his case in court

now for more than ten years; he was out of work entirely for almost four years of those ten years. In order to find another job he had to move to a different part of the state to take a job at a much lower rate of pay than he had been earning with Greyhound.

Now only has his earning level been reduced, he has also lost all of the benefits: retirement, medical coverage, burial benefits and other rights he would have enjoyed if he had not been unlawfully suspended from union membership.

This is all because he was two days late in paying $6.50 in union dues.

Q Mr. Kilcullen, let me ask you there, because you are repeating what Mr. Groner said. Under the union constitution, wasn't he delinquent on the 15th of October? So that it was a half month, plus two days?

A That's correct, Your Honor. Under the -- but the union's right to suspend him from membership, or the union's suspension from membership was taken on the basis that he was two days past the 30 days allowed,under their contention. Actually the union constitution said that a man may not be suspended from membership unless he is delinquent in dues unles --

Q In this case --

A -- if his dues are in arrears -- and where a member allows his arrears in dues, fines and assessments to run

into the second month before paying same shall be debarred from benefit.

Q But then he's suspended at the end of the second month, which would be November 30th.

A That would be November 30th, yes, sir.

If Lockridge is denied a remedy for these, for the wrongs he has sustained, there will be a grave injustice. He is a man of limited education, without qualifications to do much else than drive a bus and he has a physical disability which limits his employment opportunity.

Now, the union argues that the remedy given him by the state court cannot stand because he filed the wrong form of pleading. They say that if he filed a complaint asking only for restoration of his union membership the case would have been within the jurisdiction of the state court as an internal union matter.

His mistake, they say, was that he asked for damages for loss of his employment, and that this changed the whole focus of the case to one for interference with his employment relationship. The Union thus seeks to make the question of jurisdiction turn on the form of the pleadings rather than on the substance. This, of course, would take us back to the old common law rules of common law pleading with all the hair-splitting distinctions between different forms of action. Whereas, under current practice it's the substance that counts,

rather than the form.

The critical act which gave rise to this case was the suspension of Respondent's membership in the union. The loss of his job and the loss of his income was a result of that act.

The suit which he brought in the Idaho Court was predicated on that act. The money damages he claimed were simply the measure of the injury he sustained because of that act.

For purposes of comparison, let us take the situation in which an individual is unlawfully arrested and detained in jail, and as a consequence he loses his job. He brings suit against the person responsible for the unlawful arrest and he claims money damages for the loss of his employment. The wrongful act on which such a suit is based is the false arrest, and not the result of interference with his employment.

If the false arrest had not taken place there would not have been any interference with his employment, or consequent damages to him for loss of earnings.

So, in the present case, the wrongful conduct upon which this suit is based is the unlawful suspension from union membership. Without this there would be no cause of action.

The issue to which the Idaho Court addressed itself wasthe propriety of the union's action in suspending Respondent from membership and it carefully reviewed and followed the

decision of this Court in Gonzales in fashioning a remedy. They pointed out that under Idaho law a union constitution constitutes a contract between the union and its members and that the wrongful cancellation of Respondent's union membership was a breach of contract for which the union is answerable in the state court.

The trial judge stated in his memorandum opinion, and this is found in Appendix 55: "I do not have jurisdiction over his employer-employee relationship in this action. It is my opinion that at most I can restore him to his union membership as of the date of his wrongful termination. In this I am attempting to follow Gonzales as I see it."

The Idaho Supreme Court similarly concluded that the trial court had authority to correct the breach of contract by ordering Respondent restored to membership and that in line with Gonzales, it had authority to fill out the remedy by awarding damages for his loss of earnings.

The Petitioners' attempt to distinguish this case from Gonzales is really an exercise in semantics. The situationhere is in all respects parallel to Gonzales. In that case the employee brought suit in the California court claiming to have been wrongfully expelled from the union in violation of his rights under the union constitution and he asked for damages for the resulting loss of his employment.

The California Court entered judgment, ordering his

reinstatement and awarded damages for the lost earnings. When the case was reviewed by this Court the union presented the same preemption argument that the Petitioner is now advancing. They asserted that the resulting termination of Respondent's employment involved discrimination in violation of Section 8(b)(2) of the Taft-Hartley Act and was therefore a matter within the exclusive jurisdiction of the labor board.

This Court held that the National Labor Relations Act does not undertake to protect union members as their rights -- in their rights as members, from arbitrary conduct by unions and union officers, and therefore the state court has the power to grant the remedy of reinstatement.

Q Now, what were you citing there?

A This is in Gonzales, Mr. Chief Justice. The Court held that the Labor Act does not undertake to protect union members in their rights as members from arbitrary conduct by the union officers, and the state court therefore had jurisdiction.

The Court went on to say that the state court had the power to fill out this remedy by an award of damages for loss of wages and suffering the damage from this breach of contract. It pointed out, and I quote: "No radiation of the Taft-Hartley Act requires us to mutilate the comprehensive relief of equity in such a situation."

The facts in this case are so closely akin to those

presented in Gonzales it is most difficult to see how this case could be decided in any other manner. The Borden and Perko cases involve substantially different factual situations than the present case.

One involved a hiring hall referral system under which the union refused to refer a man for a job and the other involved discharge of a foreman for assigning work to another trade.

Neither of those cases involve wrongful suspension of union membership and neither affected the vitality of the Gonzales decision.

It was not necessary in any event, for the Idaho Supreme Court to rely exclusively on Gonzales in deciding the question of state versus NLRB jurisdiction. On the basis of the pleadings the court could have found that Respondent has stated a proper cause of action under Section 301 of the Taft-Hartley Act, which authorizes suits for violation of collective bargaining contracts between employees and unions.

It was clear from the facts alleged in the complaint and found by the court that Respondent's discharge from his employment at a time when he was still legally and rightfully a member of the union was a breach of the existing collective contract between the union and Greyhound.

This Court has held in a series of cases, including Smith versus Evening News, 371 US, Humphrey versus Moore, in

375 US, and Vaca versus Sipes in 386 US, that an employee discharged without cause may sue the employer or the union under Section 301 in either or state courts, notwithstanding that the discharge also involves an unfair labor practice under the Taft-Hartley Act.

In the Evening News case an employee of a newspaper brought suit in a Michigan court asserting discriminatory action by his employer in violation of a collective bargaining agreement. The discrimination focused on employment during a strike, allowing nonunion employees to report for work and paying them, even though there was no work available, but denying a similar privilege to the plaintiff.

The state court refused to entertain the suit, holding that the discrimination was an unfair labor practice within the exclusive jurisdiction of the NLRB under the Garman rule.

This Court reversed, holding that the action arose under Section 301 and was not preempted. The Court said, and I quote: "In Lucas Flour(?) as well as in Atkinson the Court expressly refused to apply the preemption doctrine of the Garman case and we likewise reject that doctrine here where the alleged conduct of the employer not only arguably, but concededly is an unfair labor practice within the jurisdiction of the Labor Board. The authority of the board to deal with an unfair labor practice which also violates a collective

bargaining agreement, is not displaced by Section 301 but it is not exclusive and does not destroy the jurisdiction of the Court in suits under 301."

In Vaca against Sipes, again this Court noted that under this section, that is 301, the courts have jurisdiction over suits to enforce collective bargaining agreements even though the conduct of the employer which is challenged as a breach of contract, is also arguably an unfair labor practice within the jurisdiction of the labor board.

Q Well, it is the theory of your brother, Mr. Groner, as I understood him that had that kind of a lawsuit been brought in the state court the defendant could have removed to the Federal Court; do you agree with that?

A He could have, Mr. Justice Stewart, but he could also have removed it as it was here. There was sufficient grounds for removal in the case as filed in the Idaho Court under the pleadings as filed. There was a diversity of citizenship --

Q There was a diversity?

A Yes, sir; there was diversity.

Q Well, I didn't understand Mr. Groner to be relying on diversity, but rather on Federal questions.

A I say he could have removed on whatever grounds was available and diversity was available to him.

Q Well, do you think in the absence of diversity

of citizenship either a failure to represent complaint on the one hand, or this sort of a complaint on the other, would state a case that was removable to the Federal Courts by Defendant in the absence of diversity?

A I think it would be removable; yes, sir.

Q Both of them?

A But I think the failure to remove did not prejudice the Petitioner here for the reason that Petitioner had the opportunity to remove the case as it was.

Q Yes, well, if it was removable?

A Right.

Now, the union argues --

Q This Petitioner also complained that he didn't have the --

A I am sorry?

Q The Petitioner also complained that he didn't have a chance to argue the case before the NLRB, not just the Federal Court.

A WEll, the Respondent here did not file a charge with the labor board because his co-worker, Day, filed a charge with the labor board and the labor board refused to entertain it. So it obviously would have been futile for him to file with the labor board.

Now, we don't know on what grounds the labor board refused to take the case or to assume jurisdiction. It might

very well be that the labor board viewed this as an internal, strictly an internal union matter, which was within the state court jurisdiction. And they just said, "We won't handle it." That left him with noplace to go.

Now, the Petitioners really can't complain that they didn't have any opportunity to appear before the labor board in this respect. They had all of the opportunities here to present whatever defenses were available to establish that their conduct was not unlawful or improper or prejudicial, or discriminatory --

Q But do you agree that this is strictly a matter between Lockridge and the union?

A This is the -- the source of this action, the thing that caused the injury was his suspension from the union. That is the first cause.

Q In the language of Perko that was principally, if not entirely on the union's action with respect to the member's efforts to obtain employment. That's the language of Perko; is it not?

A That's correct. Now, Perko did not involve suspension from the union, now.

Q Well, I know, but --

A Perko was never suspended from the union. He simply couldn't get a job because the union put him on some kind of a black list.

Q WEll, you had one of the bases for the holding of this Court to where it is entirely or at least principally a matter between the man and the union, you first go to the NLRB?

A No, I beg your pardon; it is just -- I would say the reverse; that where the principal point is between the man and the union the labor board has no jurisdiction. This -- in Gonzales this Court held very clearly that the Congress did not attempt to regulate the relationship between a member and his union in the Taft-Hartley Act. They left that for the states to regulate.

And this is exactly the posture --

Q Well, the language -- do you dispute this language that's quoted here in the Government's brief? On page 11 at the top of the page.

A No; I don't dispute that. This --

Q That's what I just quoted to you.

A This was the distinction that I believe this Court was making in Perko and Borden between Perko and Borden on the one hand and Gonzales on the other. Perko and Borden dealt primarily with the employee's, the member's efforts to obtain employment, whereas Gonzales involved his unlawful suspension from the union; that is the internal union relationship and the consequences of that act; the consequences being his loss of employment.

In other words, it's a two-step proposition. The first thing the union does is suspend him from membership and then subsequently, or rather the consequence is he loses his job.

Q Well, if the union gave him back his membership, wouldn't he have his job?

A Yes, he would have.

Q So the union is in it in the beginning and at the end of it?

A That's correct.

Q And the company's not in it at all.

A Well, he could have sued the company under 301. The company --

Q He sued the company and then dropped the company.

A Yes, because -- well, Your Honor, that was before Smith versus Evening News. That was back in 1960 and this Court had not, at that point, developed quite clearly the 301 concept. And that was the reason why he dropped his suit against the company.

But, today there is no question that he could sustain a suit against the company under 301. This Court has said in Smith versus Evening News and Humphrey versus Moore and Vaca versus Sipes and a whole series of other cases, that a man who is improperly discharged may sue the company or the union or

both, alleging a breach of the collective bargaining agreement. And he can maintain that suit in the state courts or the Federal Courts, notwithstanding that the conduct complained of is also an unfair labor practice under the Taft-Hartley Act.

Q Regardless of that, if the case gets to us it's obviously an action of a complaint by an employee against his own labor union, period. There's nothing more in it.

A That's the way this case is here; right.

Now, he can sue the union under 301; he doesn't have to join the employer and the complaint makes out the case for jurisdiction under 301. It alleges facts sufficient to support a breach of contract between the union and the company, and Greyhound.

Now, in Humphrey versus Moore, the same question was presented: the plaintiff in that case had alleged 301 as a jurisdictional basis for his suit and the union then argued, as the union argues here, that he didn't, because he didn't specifically allege 301 he couldn't raise it subsequently. But this Court held that it was not necessary to specifically allege 301, that if the complaint stated the cause of action under 301, whether or not it involved an unfair labor practice under the National Labor Relations Act, and said even if it is or arguably it may be an unfair labor practice.

The complaint here alleged that Moore's discharge was a violation of the contract and was therefore within the

cognizance of state and Federal Courts, citing Smith versus Evening News.

Now, the trial court here in this case, found that there was -- that the discharge of Respondent was contrary to the terms of the contract between Greyhound and the union. That's on page A-60 of the appendix. So, there was, in effect, a finding that there was a violation of the contract. The union had every opportunity to defend itself on that point, on that question and they cannot now complain that they didn't have a chance to remove, because they did have a chance to remove.

In addition to the section, to a Section 301 violation, the complaint in the present case also said on its face: a violation of the union's duty of fair representation. The compalint alleged and the trial court found a -- A-60, Appendix 61, that notwithstanding the provisions of the union constitution relative to timely paying of dues, it had been the custom and practice of the union over a period of many years to permit members to be in arrears of their dues without being suspended, even though the arrearage exceeded 60 days. But, Respondent and his fellow-worker Day were the only members ever suspended for this reason and that the union's purpose was to punish them for their refusal to continue their checkoff authorizations.

Q They refused to do what?

A For their refusal to continue the checkoff. They had revoked their checkoff and the union didnt like it and they said, "We're going to punish you," and this is what the court found, that this was the means by which they punished them.

Now, this, we say is an invidious violation of the rights of the employee; it's discriminatory; it's arbitrary and obviously a breach of the duty of fair representation.

Q You haven't spoken at all, Mr. Kilcullen, nor have you cited the cases, as far as I can see, three or four of them, that have referred to the fiduciary duty of the union toward every one of its members; some authorities equating it to the duty of a conventional trustee toward the beneficiary of a trust.

A Well, this doctrine originated, Mr. Chief Justice, I believe, with the Steel and Tunstall cases and it has evolved through the years and has been most recently reaffirmed by this Court in a series of cases: Vaca versus Sipes being one and the most recent thing: Czocak(?) versus O'Mara, 397 US, a decision handed down this year by this Court.

This -- I'm not sure that I understand the difference between the fiduciary concept and the duty of fair representation concept. I would say they are essentially the same.

Q I have always thought, and the authorities who write about them, seem to think that a fiduciary is much

broader, much more pervasive than the duty of fair representation.

A It could be; it may be, but I believe that the duty of fair representation is a strong enough concept to cover this situation. It's obviously quite clear from the facts as stated and as found that the union singled this man out; singled him and Day out. They let everybody else get in arrears with union dues and they didn't do anything about it. In fact, there was testimony that the financial secretary of the union made it a practice to pay up the union dues of those who were in arrears.

In this case they fired the man, or had him fired even before he was notified. On the second of November they sent the news to him; he didn't receive it until sometime later and they also the same day, obtained his discharge. Now, he immediately, upon receipt of the notice, he tried to pay up his dues and he repeatedly proffered his dues several times and the union just refused to take them.

He appealed to the union president and asked him to take the money and the union president wouldn't take his money. And because of that, because of $6.50 he has been deprived of a job for ten years, which we think is an outrageous consequence of such a minor infration of a union rule.

Q What's the reason for the long delay in the case getting up here?

A Well, Your Honor, at the first, at the trial court it was first dismissed on the preemption doctrine. The plaintiff had to appeal to the Supreme Court of Idaho; the Supreme Court reinstated the case and it went back for trial, and after trial it went back up to the Supreme Court of Idaho, which sustained the trial court finding of damages. Various delays in between, none of which, to my knowledge, were the fault of the Respondent here.

Q Mr. Kilcullen, does the record bear out what you just said that the union paid up the delinquency of other members?

A There is atestimony in the record to that effect, Your Honor,and I think the court adverted to it.

Q Well, why was this necessary if they were on the checkoff system?

A This was, I guess, before the checkoff was instituted --

Q Was that some time ago, then?

A That was prior, prior to the time this suit arose; yes, Your Honor.

Q Were these the only two who abandoned the checkoff?

A There were others; there were others. There was a movement, apparently at that time to cancel the checkoff. There was a petition being circulated and these two men signed

it and they were the two that got caught because they neglected to pay their dues within the time that the union felt that they were required to pay. But, again, the constitution of the union, in fact, gave them 60 days to pay. They couldn't be suspended unless they were in arrears for 60 days.

I have one final point, I believe, to make here. In summary, there are a number of exceptions to the -- I'm sorry; there is one further point.

Section 83 of the union constitution, which appears on page 87 of the appendix, clearly points out that no member shall be allowed to injure the interest of a fellow member by undermining him in place, wages or in any willful act bywhich the reputation or employment of any member may be injured.

Now, notwithstanding that provision of the constitution,the union clearly did interfere with his employment by unlawfully suspending him and violated the duty of fair representation.

In summary: there are a number of exceptions to the Garman rule which would sustain jurisdiction of the state court in this case.

The first is the exception stated in Garman and Gonzales where the activity regulated is of merely peripheral concern to the Labor Management Act, namely: internal union matters.

The second is jurisdiction under Section 301 to

entertain a suit for breach of the collective bargaining contract. And the third is a breach of duty, the union's duty of fair representation.

The fact that the -- my time is up.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kilcullen.

REBUTTAL ARGUMENT BY ISAAC N. GRONER, ESQ.

ON BEHALF OF PETITIONERS

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

Q (Inaudible) . . . . for full restoration of union membership. And you asked, I gather, that the judgment be set aside in toto. I notice, apparently while the plaintiff didn't seek those remedies, that's the way the paragraph starts, yet I gather Idaho law is that he's entitled to all the relief warranted by the evidence.

Now, would preemption reach the direction for full restoration of union membership?

A Yes, it would, for the reason that I will come to, but we have alternative positions. We say yes, it covers the whole judgment, but if it does not cover the whole judgment, it leaves only that and strikes the --

Q I thought you conceded in your argument in chief that an action for total restoration of full union membership is a state law action between the member and the union.

A I don't --

Q Which would be maintainable in a state court, wouldn't it?

A If that was all there was to it; yes, Mr. Justice Brennan.

Q But when you asked for that in the state court and also damages, then the state court had jurisdiction as to both remedies?

A When you have a claim which involves an employment relationship and presumably when you mention the word "damages," you are, I assume, referring to damages measured by wages. If they were measured by something else --

Q This is damages for loss of earnings.

A This is damages, in this case, measured directly by wages without any question; yes. Then the court would have no jurisdiction to reward that.

And we say that the state court would have no jurisdiction in this case because under this Court's decisions in Borden and Perko and under -- but the fundamental thrusts, the question at the outset, is whether the crux of the case involves the employment relationshipor the membership relationship.

Q I know your time is limited, but why isn't this to say the law of Idaho is that we disregard the pleadings; we look just at the evidence and the evidence indicates that this is an action, among other things, for restoration of union

membership and therefore we are going to enter an order for restoration of union membership. How can this court do anything about that question of state law?

A Because it is not a question of state law, Mr. Justice Brennan; it is a question --

Q You mean that how you look at it, this is only remedy for an action, the thrust of which was directed at the employment relationship and not at the membership --

A Beyond any question. Mr. Kilcullen cannot have it both ways. He cannot advise the Court that he deliberately took out the breach of contract -- because he knew that was what the law was at that time and then come here today and say, "Oh, there was breach of contract." He took it out and took it out deliberately. He wanted to focus on state law. He wanted to focus on state law because he knew and has known all the time that he can come away with a judgment in this case of any kind only if this Court turns its back on Borden and Perko. Only if this Court regards the regulation -- and every type of human conduct which involves requesting a discharge under a union security clause. He's known that all the time and we submit to Your Honors, that because Congress has occupied the field and because this certainly, and not arguably, is either an unfair labor practice or protected activity, the judgment in its entirety should be reversed.

But, if it is not to be reversed for whatever

reason in its entirety, only the portion, Mr. Justice Brennan, that you referred to and may be left standing and the aspect of damages, which in this case beyond any doubt is based upon employment, must be stricken.

Are there any other questions?

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kilcullen. The case is submitted.

(Whereupon, at 2:00 o'clock p.m. the hearing in the above-entitled matter was concluded)