Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

Docket No. 88

GEORGE MANSEY AND LEON NUNLEY, dba LEON NUNLEY COAL COMPANY, ET AL.,
Petitioners
vs.
UNITED MINE WORKERS OF AMERICA
Respondents

Place Washington, D. C.

Date December 7, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

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GEORGE MANSBY AND LEON NUNLEY, dba LEON NUNLEY COAL COMPANY, ET AL, Petitioners	:	
vs.	:	No. 88
UNITED MINE WORKERS OF AMERICA Respondents	:	

Washington, D.C.
Monday, December 7, 1970

The above entitled matter came on for argument at 11:25 a.m.

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
HENRY BLACKMUN, Associate Justice

APPEARANCES:

JOHN A. ROWNTREE, ESQ.
Knoxville, Tennessee
on behalf of Petitioners

EDWARD BENNETT WILLIAMS, ESQ.
Washington, D.C.
on behalf of Respondents

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We'll hear arguments in No. 88, Messers Ramsey and Nunley against United Mine Workers.

Mr. Rowntree, you may procede whenever you're ready.

MR. ROWNTREE: Mr. chief Justice and may it please the Court.

The Sourhern Tennessee Coal Producers involved in this case, as Petitioners, charge that there was a conspiracy between major coal producers of the country, and the Respondent, United Mine Workers, to restrict competition and to raise prices in the coal industry.

They charge that the amendments to the National Bituminous Coal Wage Agreement were used to further the purposes of this conspiracy.

The BCOA, the Bituminous Coal Operators Association, was organized in 1950, largely through the efforts of Consolidation Coal Company, the largest coal producer. The head of Consolidation testified in this case, with respect to his competitors, that even though the competitor operated in poorer mining conditions with less productivity than Consolidation did, still you don't want him to have a lower wage scale than you if you can avoid it.

And after Consolidation organized BCOA, in 1950, BCOA proceeded to negotiate with UMW, throughout the 1950's and 1960's, amendments to the National Coal Wage Agreement of 1950.

These amendments consisted very largely of substantial flat across the board wage increases applicable to every job in the coal industry regardless of the productivity or the mechanization of the particular job.

These amendments were taken to the hundreds of other units in the industry outside of BCOA for signing. By 1958, 82% of the industry was thus organized under the national contract as thus amended.

Then, in December 1958, with the next two largest coal associations participating, BCOA negotiated the 1958 amendment which included the protective wage clause. The PWC. The coal associations demanded that UMW sign paragraph A of the Protective wage clause, set forth at page 11, of our main brief.

This says that UMW will not enter into, become a party to, or permit any agreement or understanding other than national contract terms for the duration of the national contract.

This provision was in the face of the national Contract throughout the damage period in this case.

The trial courts' opinion shows that as a matter of fact, the international union of UMW did not enter into, become a party to, or permit, any agreement or understanding other than national contract terms with any unit of the industry.

And this was true, even though the mining conditions, the productivity, the ability to use the big new mining machinery, tremendously varied across the country.

The repeated flat wage increases made rapidly increasing productivity, increasing mechanization, an absolute necessity for any company to stay alive. And from the national viewpoint, from the findings of the trial court, there occurred an industrial revolution through mechanization in the coal industry in the period 1950 - 1964.

Productivity tripled in a few short years, nearly three-fourths of the men were forced out of jobs in the industry. The court also found that by 1960 the Class One, the largest mines were rapidly regaining the dominant share of production, that they held before Wourd War II.

The court also found that if you put the whole coal industry of the country together, taking out the two largest producers, that the whole industry by 1960 was losing operating losses of millioms of dollars a year under the national contract, while the largest companies were prospering. And taking over the industry.

Now, that is the picture from the national scene. The Southern Tennessee Field was completely organized by 1950. But these flat rate increases got beyond the abilities of the southern Tennessee producers. The trial court found that since 1960 there has not been a single incident of a successful coal mining operation in southern Tennessee under the national contract. Even though the only alternatives were to sign the contract or go out of business.

Q. This is primarily because of the physical way the coal is imbedded in that field in Tennessee? That in order, in other words to make maximum and efficient utilization with the new machinery you have to have thick and rather stratified seams of coal, is that right?

A. That's correct and we say that---

Q. And those Tennessee fields they're---

A. They're uneven, they're thin---

Q. Uneven and thin.

A. And we say that the reserves of the major companies are adaptible to this big new machinery. With such fields as southern Tennessee---

Q. It's not because they're major companies, is it, or is it?

A. It;s not because they have great reserves.

Q. That's becasue of, I think, the nature of the coal fields.

A. And ideal conditions---

Q. Rather than the siae of the companies---

A. Well, the reserves of the major companies--- the reserves of the major companies on the record do hold millions of acres, billions of toms of reserves which are ideally located, such as West Kentucky Coal Company, there's a lot of proof on those reserves and why UNW invested in hem.

Now, the trial courts opinion shows that in the period of

damage in this case, 1959 - 1964, major companies actually owned by UMW tripled their share in the principal market of southern Tennessee, the TVA market.

While the southern Tennesseefield was in utter turmoil and confusion, and down with strikes, because of the inability to comply with this national contract. After the cancellation of their contract in 1962 by the Union, with demands that they make future guaranntees of performance the southern Tennessee operators organized an association and attempted to bargain with UMW a varying set of wage scales based upon the degree of mechanization of the productivity of the various types of mines in southern Tennessee.

The UMW refused and demanded that the national contract be signed again, but this time with guarantees of performance. And the trial court found that the strike which followed was because of the inability to negotiate a contract in the field. And this strike was actually open warfare. It pervaded three counties, it went on for three years, before the trial, it was still going on at the trial of this case.

And the trial court found that"several man were killed, a great deal of violence, bloodshed and destruction of property have accompanied this strike. Much suffering, deprivation, and want have occurred. The southern Tennessee coal field remains a blighted area."

Now although the court found these facts both an the na-

tional level and on the local level, the court held the proof was insufficient to show that the course of conduct of UMW was because of conspiracy or agreement of major coal companies and their associations.

The trial court held that this Paragraph a of the Protective Wage Clause could be construed as UMW contended that it put a striaght jacket, or restraint, on UMW's bargaining freedom, only with respect to those companies that had gotten organized or had signed up under the national contract.

It held, thus, that it applied to the 82% of the industry that was under the national contract, but not applicable to the 18% that had not been organized under the contract. Not under UMW's contracts at that time.

Now, the court held that this difference made the restraint valid under anti-trust law. Beyond the express language of the contract, and the protective wage clause, the court went on to hold that the course of conduct of the international union. And the international officers in dealing with the industry in the period of 14 - 15 years was such as to show by a preponderance of evidence that there was an implied agreement with B COA that UMW would negotiate only on national contract terms with all units of the industry, not just to the 82% but to the 100%.

But the court held that the Plaintiffs had the burden of prooving this implied agreement not just by preponderance of

evidence from the Unions course of conduct but had the duty to proove it by the Clear Proofs Rule of Norris-LaGuardia section six. And there was an absence of such clear proof.

The court went on to hold that the evidence was insufficient to proove a predatory conspiracy to drive small coal companies out of the industry. The court added at the end of this conclusion that "Were it not for the clear proof rule the court might have reached different conclusions."

Now it is obvious from the trial courts opinion throughout that it was applying this clear proof rule all the way to the point of reaching final conclusions as to anti- trust violation regardless of the clarity of proof of authorization of the course of conduct of the international union and its officers over this period of 14 years, regardless of that obvious authorization.

The Clear Proof Rule was applied to that course of conduct to reach a conclusion as to whether that was a violation of law, and the trial court rejected the majority and concurring opinions of this Court in the Pennington decision of 1965, saying that neither opinion expressed a true majority rule of this Court and it added that the problems posed to the small and medium sized enterprises by the practice of national collective bargaining would appear real and substantial, however that their solution lies in the Fdderal Anti-Trust laws as now enacted by Congress is doubtful.

This was the decision just a few months after the decision of this Court remanding Pennington for trial under the anti-trust laws under similiar issues. The one point from this Courts opinions in Pennington which most impressed the trial court was derived from the second footnote of the majority opinion of Mr. Justice White.

We think the court misconstrued this footnote. Obviously the court construed this footnote to mean that the Union needs to deal in good faith bargaining only with the dominant unit of the industry and over a period of 15 years can take the resulting contracts and cram then down the throats of hundreds of other units in all sorts of varying circumstances without changing a single comma in a single contract over that whole period. Even though it means obvious repression of competition, and even though it means tragic effects on three fourths of the unions membership, while the favorite companies grow and prosper and take over the industry.

Now a three judge panel at the Court of Appeals differed with these views of the law applicable to these circumstances and thery reversed the judgements in favor of the UMW. On UMWs petition to rehaar in bank the full court reconsidered, split 4 - 4 , and reinstated the judgements.

Under the first question we raise here we contend that the lower courts were in error in holding that to be successful the Plaintiffs must show that this clearly authorized course of

conduct of the international union and its officers must be such as to show anti-trust violation, not just be a preponderance of evidence, but this clearly authorized course of conduct must be such as to show clearly, unequivocally and convincingly that anti-trust law was violated.

Now section six of Norris-La Guardia by its very language expresses nearly a rule of evidence in prooving agency or authorization of acts in a labor dispute. The section has nothing to say about legal standards applicable in evaluating clearly authorized course of conduct or clearly authorized acts.

In evaluating the legality of such acts, the Act assumes that acts have been done in a labor dispute which violate the law and the statute is concerned with the proof of authorization of those acts. It has nothing to say about what legal standards are to be applied to determine whether the acts really were unlawful.

Now all the issues in this case obviously can have nothing to do with authorization of the course of conduct in bargaining with the industry over 15 years of this international union and its officers. Obviously the issues must be centered upon the legal standards applied to this course of conduct and the effects and consequences of this course of conduct over this period of time.

And neither the legislative history nor the opinions of

this Court support the conclusions and the construction below with respect to section six.

The trial court found a UMW/BCOA implicit agreement violating anti-trust policy on a preponderance of evidence and we say this finding should have resulted in judgements for these Plaintiffs.

Under question two we deal with the express language of the national contract in the Protective Wage Clause, Paragraph A set forth at page 11 of our main brief. This language was demanded by the coal associations.

It says that UMW will not enter into, become a party to, or permit any agreement or understanding other than national contract terms for the duration of the national contract.

Now the trial court went along with UMWs rather roundabout argument to restrict this restraint to the 82% of the industry that had signed up under the national contract. And the court held that made it valid since the 18% that was not organized was not included in the restraint.

Now We are contending that such a restraint as this, even if limited to the 82% of the industry, including southern Tennessee, meant that hundreds of companies would be wiped out. During the duration of the national contract without any freedom at all to bargain over modified terms, over terms that were practical and workable in the situations that were present or that might develop during the life of the contract, and that

this meant a deprivation of bargaining freedom for the duration of the national contract which was not amended again until 1964, at the end of the damage period of this case and we say it still goes on today. But this means a deprivation of bargaining freedom for great segments of the coal industry.

Companies were induced to sign national contracts for all sorts of reasons - mostly violence. But by economic pressure of sorts, also. And we say it is a rule of law that will not work - to say that the dominant companies can direct the union to keep all these companies under a contract under impractical terms. The violence and the warfare of southern Tennessee is just an example of the efforts of people to stay alive and maintain their only way of living in the face of such a rule.

And this struggle that is going on in (inaudible) coal fields as is shown by the many reported federal cases dealing with violence in this union in the period of 1959 and the 1960's. And the results could be predicted - they're obvious today, repressed competition, rising coal prices, set by an oligopoly of big energy companies.

UMW in its reply brief now says no restraint at all was put on UMW in this Paragraph A. It says now that the whole meaning of Paragraph A is included within the last clause of the last sentence of that paragraph, dealing with UMWs obligation to enforce the contract against all signators. It says now that all the presiding language that UMW will not enter into, become

a party to, or permit any agreement or understanding other than national contract terms, for the duration of the contract, all that adds nothing to the meaning of the last clause about enforcing the contract against all signators.

Now we submit that this present argument will not hold water as above reading of the clause demonstrates, to say nothing of the fact that this language was demanded by the major coal associations. UMWs brief argues that even if this paragraph did impose a restraint on UMWs bargaining freedom, still, UMW had a legal right to a uniform wage scale throughout the industry and therefore the paragraph does not express anything other than what UMW had a legal right to do, anyway.

We think the answer to that is that even if UMW did have a right to engage in this kind of bargaining with a dominant unit, and shoving the resulting contracts upon all these other units over a period of 15 years, that still it did not have a legal right to bind itself with the major coal associations and companies to pursue that policy in the industry.

Clearly this is what UMW has done to the suppression of a great segment of the coal industry.

Now, the third question is the broadest ot the three questions we raise. We assert that there should be a prima facie case of anti-trust violation from the unions courses of conduct and the effects and consequences over this period of

time of that conduct even without the undisputed proof that the coal associations were making demands upon UMW to restrain it and its bargaining policy.

NOw the lower court decisions emphasize exclusively the right, so called right of a union to have a uniform wage scale throughout an industry, and obviously the courts think this means that the union can deal in bona fide bargaining only with the dominant units and can carry out this practice of going through so called negotiations but never changing a single comma in a single contract, with a single unit of the hundreds of other units over all this period with all these varying circumstances.

And with the obvious repression of competition that was going on, like in southern Tennessee.

Now we say that this emphasis on a uniform wage scale really gives no right whatsoever, no recognition, no reconciliation to rights of the hundreds of other units. Not only under anti-trust law, but under national labor policy and national employment policy. The lower court decisions subordinate, obviously, the anti-trust law in this case, allowing this iron-bound, unfair uniformity policy to wreak economic devastation over a three county area for three years to say nothing about the effects nationally. The lower court decisions frustrate the most basis purposes of national labor policy, making it obviously impossible for hundreds of employers to

deal in any freedom at all with their employees about terms and conditions where they are situated, making the conflict and turmoil and finally open warfare down in Tennessee absolutely necessary. The very things which the national labor statutes were passed to avoid - the conflict, the turmoil.

The lower court decisions ignore completely the National Employment Act which Act was passed six years after the Apex decision. The National Employment Act says that our national employment policy shall be such so as to promote the free enterprise system - the free competitive enterprise system - and it says that our national employment policy shall be such so as to promote those conditions which afford maximum employment.

Now this policy is obviously frustrated by the lower court decisions which require that these hundreds of other companies stick to the demands of the UMW/BCOA unit. That they fire great masses of their employees, and substitute heavy machinery, or be destroyed. Go out of business.

Now the Joint Economic Committee of Congress has spoken out strongly in recent years about this very kind of anti-competitive and anti-job rule making policy, but we say that the principal answer to the present reliance upon a so called uniform wage scale throughout an industry is that Paragraph A was demanded by the major coal associations and the court found on a preponderance of evidence that this was intended to be

applied, not just to the 82% of the industry but to the 100% of the industry.

Now, we don't think that the multi-employer bargaining rules cut across this case at all. This Court said in Volkswagen vs. Federal Maritime Commission 390US that the kind of multi-employer bargaining that conforms with national labor policy is free collective bargaining by representatives of the parties own unfettered choice. Now we say that that will not encompass this practice of binding together hundreds of units of an industry under one national contract an all sorts of situations, getting them under there mostly by violence, and then allowing the dominant companies to direct the union. NOw keep all these companies under this contract regardless of the practicality of the terms for the duration of our national contract.

Now this is just one way to squeeze competition out of an industry but this is the way it was done in the coal industry, and for these reasons we ask this Corrt to reverse the judgements below and direct on the remand on these cases that the findings of the trial court on this record establish a violation of anti-trust law. Thank you.

Q Thank you, Mr. ROwatree. Mr. Williams.

ARGUMENT OF EDWARD BENNET WILLIAMS, ESQ.

ON BEHALF OF RESPONDENT

MR. WILLIAMS: Thank you, Mr. Chief Justice, and may it

please the Court.

The Petitioners in the case at bar have taken the teaching of Pennington against the Mine Workers decided by this Court in 1965 and they have made it the predicate for two contentions which they have asserted throughout the life of this litigation.

The teaching on which they rely is that where a union enters into a contract with a milti-employer bargaining unit for a wage scale and then agrees to impose that wage scale on the rest of the industry, that the union loses its anti-trust exemption.

Now they make two contentions, if the Court please, based upon that teaching. They say, first of all, that when the respondent union entered into its contract with the Bituminous Coal Owners Association in 1958 and specifically entered into what is called the Protective Wage Clause, that they lost their anti-trust exemption.

Secondly, they say, even if the Protective Wage Clause doesn't mean what we say it means, and what nine judges below found it did not mean, even so, say they in the disjunctive, notwithstanding that, there was a clandestine, surreptitious, under-the-table tacit agreement between the respondent union and the Bituminous Coal Owners Association whereby the respondent union agreed to do just that, namely, impose the national wage scale on the whole coal industry.

Now, I would like to adress the attention of the Court, first of all, to the first contention, namely, the contention that Petitioners make with respect to the Protective Wage Clause of the 1958 agreement.

The trial court found and all eight judges of the Sixth Circuit found, notwithsaanding their four to four split on other issues that the Protective Wage Clause meant no such thing as Petitioners contend for.

The judges below found that all the Protective Wage Cluase did, in the 1958 agreement, was to bind the respondent union not to enter into any more favorable side-deal with the signatories to that contract and that it never had, not was it ever intended to have application to any members of the industry who were not signatories thereto.

Thi Sixth Circuit said this: "Plaintiff sought to persuade the District Court and now seeks to persuade us that this language [namely Paragraph A] taken in the historic context of the bargaining relationship constitutes an express undertaking by defendant to impose the UMW/BCOA wage scale on all non-signatory coal operators. We simply do not find language to support this contention."

"The italicized portions of the disputed agreement clearly indicate that it is expressly limited in its effect to the signatories thereto." That was the finding of all judges in the courts below and, if the Court please, it has been the

finding of every court which has had occassion to pass upon the meaning of this language and indeed, it is the only reasonable conclustion that any court could come to from reading Paragraph A which is set out at page 15 of our brief, the Respondents brief, because it clearly applies to employees who are covered by the contract.

Q Mr. Williams, as you read the Clause, would the Union have sacrificed or forfeited its anti-trust immunity if that meaning of the clause is correct?

A If that, if what Petitioners contend for, Mr. Justice White---

Q Your contention---

A ---were correct, if their meaning - if what they say Paragraph A means is correct, than under Pennington the union would have lost its anti-trust immunity.

Q But under yo reading of the clause, and under your reading of Pennington I suppose you would argue that the union has not sacrificed its immunity.

A Exactly. Under my meaning of the clause and under the reading of the Clause of all judges below, the Union would not have sacrificed its anti-trust exemption.

Q And is that the same argement as saying, well, it might have sacrifided its immunity but it hasn't violated the anti-trust laws?

A No, sir. I'm saying, Mr. Justice White---

Q Because even if it sacrificed its immunity you still have the job of prooving the Union violated the anti-trust laws.

A Oh, yes. The fact taat it's no longer exempt under the anti-trust laws as I read Pennington does not make the act which rendered it non-exempt a per se violation.

Q That's right.

A Yes,sir. Now the down-side position of the Petitioners in this case is that while failing in that contention as all courts have found we did, nonetheless, there was a tacit agreement not expressed in writing, a tacit, under-the-table agreement between the Bituminous Coal Owners Association and the respondent Union, that the Union would, in fact, impose the terms of that national agreement on the non-signatory members of the industry.

Now the trial court found that there was no such tacit agreement. The Petitioners contend that the trial court applied the wrong standard of proof in arriving at that finding and so it becomes necesaary for us to see what instructions the trial judge gave himself in this non-jury case in arriving at the finding that no such clandestine conspiracy existed between the Mine Workers and the Bituminous Coal Owners Association.

We contend, if the Court please, that section six means this: it means that when a Union is a defendant in a case arrising out of a labor dispute, or when an employer is a defendant

in a case arising out of a labot dispute that before it can be held vicariously liable for the acts of its agents or officers, clear proof must be shown that it authorized such acts or ratified them once it became knowledgeable concern.

(Whereupon, argument in the above entitled matter was recessed at 12:00 noon, to be further argued at 1:00 p.m. the same day.)

AFTERNOON SESSION

1:00 p.m.

MR. CHIEF JUSTICE BURGER: Mr. Williams, you may continue, you were on section six as we stopped for lunch.

ARGUMENT BY EDWARD BENNET WILLIAMS ON BEHALF OF UNITED MINE WORKERS OF AMERICA

(RESUMED)

MR. WILLIAMS: Mr. Chidf Justice, amd may it please the Court, before recess I was saying that the trial judge understood clearly what Section Six meant, and understood clearly what the burden of proof was in this case, and I was about to explicate on that by showing, both from evidence extrinsic to the opinion below and intrinsic within the opinion below, we can see that the trial judge knew precisely what the rule of law was with respect to the burden of proof.

Within just a number of weeks after this case was tried before the trial judge without a jury, the same trial judge tried a case involving the same issues, factually and legally, with a jury. That case is reported at 4:15, Febuary second, at page 1192, Tenesee Consolidated Coal Company against the Mine Workers.

Q. What volume was that?

A. Four Sixteen, Febuary second, Mr. Justice Black.

Q. I'm sorry about that, in your brief, I'd forgotten. Did you have a citation of it in your brief?

A. Eleven ninety two. Yes, I did, Mr. Justice Stewart. Now in that case, there is set out in , the instructions that Judge Wilson gave to the jury with respect to Section Six of Norris-La Guardia, with respect to the burden of proof in a case of this type and those instructions appear on pages 22-24 in our brief, the brief of the Respondent..

And there, it is laid out with absolute clarity what the respective burdens of the Plaintiff are. He says there is one issue in this case in which the Plaintiffs have the heavier burden of proof than I have just described. That is whether the defendant actually participated in or authorized or ratified actions which violated the Sherman Act. Later he says on every other issue in the case the Plaintiffs are required merely to preponderate, to show by a preponderance of the evidence that their contentions are correct. He says labor organizations are relieved under the law of liability for damages, or imputation of guilt, or lawless acts done in labor disputes by officers or agents, unless there is clear proof that the organization charged with the responsibility participated in, gave authorization for or ratified such acts after they became knowledgeable with respect to the acts. In other words, the trial judge showed that he understood precisely what the law was, at that time. Now what do the Petitioners say with respect to that?

They say in their reply brief to our brief, at page 10 that the judge changed his mind with respect to the burden of

proof, that after extensive argument, he became convinced that he was wrong.

Q. What page are you on, on this---

A. I'm now on page 10 of the Petitioners' Reply to the Brief of Respondent, Mr. Chief Justice.

Q. Thank you.

A. They say that he changed his views, and they say that, if the Court please, with no record reference, and indeed no record support. For if they were right, with respect to the contention that the trial judge had undergone a change of mind, with respect to what the true burden of proof was, I suggest to the Court that this case neither would have been here, nor should it have been here, because remedy was easily available to the Petitioners to ask for a remand from the Sixth Circuit of this case back to the trial court for purposes of filing a motion under Rule 60b to correct the judgement for an error of law.

And that's precisely what the Petitioners would have done if the trial jusge had changed his mind with respect to the burden. But indeed they did not do that and indeed they could not do that, because the transcript of record shows in Tenesee Consolidated v. the United Mine Workwrs, and this Court may take judicial notice of it as a record from the Sixth Circuit Court of Appeals, that the trial judge did not change his mind at all. That in fact, there was no extensive argument to persuade him

to a different point of view, and at pages 30-54 of that transcript of record, the trial judge announced that he would instruct the jury in all respects on the law as he had found the law in Ramsey.

Now,---

Q. Mr. Williams.

A. Yes, Your Honor.

Q. Is it your view that the Section Six standard, whatever it is, extends to all elements of the Anti-Trust defense -- the Anti-Trust plan?

A. No. It's my view, if the Court please, that Section Six applies to the issue as to whether the Union is liable for any allegedly innocent acts or agreements. In order for the Union to agree, it is necessary that it act vicariously through its officers or agents. On every issue of vicarious liability, Norris-La Guardia requires that there be clear proof that the Union either authorized such conduct or that it ratified it after it bacame knowledgeable concerning it.

Q. Now as to your generalization, Mr. Williams, is that any different from corporate activity? I'm not now talking about the burden of proof.

A. A It's no different, Mr. Chief Justice, because Section Six applies both to employer organizationa and labor organizations in labor disputes. Only in labor disputes. And that's our contention here. That there was a charge. It was

charged that the Union entered into an illicit, clandestine agreement. Now, it would have to do so vicariously through the acts of its officers or agents and there was no showing, within the meaning of Section Six, that there was clear proof that any such condict was authorized or ratified.

Now, what did the Petitioners do in lieu of the course that I have just suggested, they would have followed, if they were right about what Judge Wilson held on the burden of proof in this case? They went to the Sixth Circuit Court of Appeals and they siezed upon a couple of sentences in a fifty-two page opinion, and they tried to convince the Court of Appeall that Judge Wilson had misunderstood the law on burden of pooof.

Let's look at a sentence that they have siezed upon as "illustrating" so they contend, that Judge Wilson did not understand the appropriate burden. They say Judge Wilson said having concluded that the Protective Wage Clause does not constitute an express commitment on the part of the UMW to the BCOA not to bargain with any other coal operator upon any terms tther than a national contract, this dowa not conclude the issue of whether the UMW did, in fact, though not expressly, so contract. Were this case being tried upon the usual preponderance of evidence rule, the Court would conclude the UMW did so impliedly agree. However, the standard of proof where a labor union is involved is clear proof as required by Section Six, the standard from the argument of persuasion. The trial

judge was, they're saying, since a labor union is the defendant, since the contention is that the labor union entered into an illicit agreement, and since the union can enter into such an agreement only vicariously, through its agents or officers or members, then of course the standard of proof is clear. It must be that the Petitioners must carry the day by a clear standard of proof to show that the Mine Workers Union did in fact ratify or authorize such conduct.

Again, they siezed upon some language, did not the clear evidence rule apply, the Court might have reached a different decision on certain issues. The other issue upon which the court might have reached a different conclusion is the issue concerning violence in the coal fields. This Court said in Gibbs against the Mine Workers in 1966, that the clear proof standard applied when there was an effort by a Plaintiff to impute responsibility for violent acts to the parent union, because Section Six applies, so that all of the language of the trial judges is entirely constant with the appropriate interpretation of Section Six. There isn't anything in the fifty-two page opinion that is at war with the appropoiate and proper standard of proof as delineated in Section Six of NOrris-La Guardia.

In fact, I suggest to the Court that Judge Wilsons' instructions in Tennessee Consolidated Coal against ths Mine Workers, and in his holding in Ramsey against the Mine Workers fanned out like a beacon in a fog of confusion, with respect to

this issue on burden of proof.

Now I said earlier, ---

Q. Counsel.

A. Yes, sir.

Q. If I understand the argument you're now making, you're implying that the, all eight members of the Court of Appeals misunderstood what the issue was.

A. I think, Your Honor, that there was a very, very serious lack of clarity with respect to the positions that were asserted.

Q. In both cases?

A. Yes, six, I do.

Q. Because as I understand -- opinion, he relys on the phrase --

A. And that's why I say, Mr. Justice Stewart, that the trial judges opinion is entirely accurate here. It was entirely accurate in the case of Barn, entirely accurate in the cases immediately following, and that demonstrates that he understood the burden of proof entirely correctly.

Q. He understood it, and you understood it, but the Court of Appeals didn't?

A. Right. I think that's correct. Now let's look at the opinion of Judge Wilson in the Court below.

The Petitioners made four subsidiary allegations. They make four subsidiary allegations to proove circumstantially

that there wea an illicit conspiracy. They say, first of all, that the Petitioners insistence upon a national, uniform wage policy began in 1950 and this was the basis for inferring the incipiency of the conspiracy with the Bituminous Coal Owners' Association. The trial judge found, I quote, " No evidence of this." He found affirmatively, quote, "That is was clear from all the evidence that the national uniformity in wage policy of the Respondent Union began in 1890." And that it was no basis for an inference that there was an illicit conspiracy began in 1950. They say secondly, that the tranquility and the serenity of collective bargaining in the post-1950period in the coal industry is a basis for infering that there was a conspiratorial relationship between the Respondent union and the Mine Workers when that is juxtaposed to the turbulence and turmoil of the pre-1950 period.

And here the trial judge made a finding, I think, that goes to the very heart of the case. He said that the United Mine Workers negotiated the 1950 Coal Wage Agreement with spokesmen for the major coal producers of the nation and then has uniformly sought to impose the same agreement upon all the rest of the industry might reasonably lead to the inference that the Mine Workers had agreed with the major operators that it would impose the national agreement upon the rest of the industry, and equally reasonable inferences that the Union was but following the pattern of industry-wide bargaining established

since prior to the turn of the century, in electing to negotiate the agreement with spokesmen of the major coal producers and was but following its historic policy of national uniformity of labor standards in seeking to impose the national agreement upon the rest of the industry.

Again, they contend that there was predatory pricing in the TVA market on the part of two coal companies in which the respondent union had an interest. A financial interest. The trial judge, in an exhaustive analysis of the pricing history in the TVA market over a period of years, found not only was there no predatory pricing, by the two companies in which the union had an interest, but that at all times the two companies were merely attempting to meet competition rather than to lead the market downward.

On each of these subsidiary issues, the trial judge was applying the preponderance of the evidence standard and he was finding that the Plaintiffs below had failed to satisfy this standard of proof.

Finally, if the Court please, there was a charge that there was turbulence and turmoil in the southeastern Tennessee coal fields during the relevant period, that there was violence and that this was describable to the mine workers. In this instance, once again, the trial judge made this finding. He said that the United Mine Workers activities in recent years in the southeastern Tennessee coal field can be explained equally as

well as being unilateral action in pursuing its own interests and policies as they can be explained by infering that the UMW was acting in furtherance of a conspiracy. With respect to the issue of violence, it was the same violence that was averred before this Court in Gibbs against the Mine Workers in 1966, and he implied the standard of proof mandated by this Court in that case and he found that there was no evidence whatsoever to support an inference that the Respondent union was responsible for it, and in that instance the clear proof standard applied.

Q. Mr. Williams, when the trial judge hinted, for want of a better word, that if he'd been applying a conventional preponderance rule that he might have arrived at some different conclusions, what area do you say he was directing himself to?

A. I think that there were two issues, clearly, Mr. Chief Justice, in which the clear standard of proof applied. One issue was whether or not the mine workers union was responsible for violence which was averred in 1960 and in 1962 in the southeastern Tennessee coal fields. The trial judge said that the clear standard of proof applies here because the doctrine of respondeat superior is applicable. And where the doctrine of respondeat superior is applicable, then I have to apply a standard of clear proof. He also said, if the Court please, that if, at one point, you were deciding whether the Union was responsible for any agreement that might have been

made, although he never found that such an agreement was made, if he were to decide that the Union was responsible for any illicit anti-trust agreement made with the BCOA he would have to apply the clear standard of proof. Because once again, the doctrine of respondeat superior would be applciable. And where that is applicable, before a Union or an employer can be held in a labor dispute, Congress has mandated under Section Six that clear proof is necessary on that issue.

So there were two issues clearly before us where that doctrine was applicable, and I suggest that he found that entirely properly. And on all other issues he applied the approproate standard, namely the preponderance of the evidence standard. And an analysis of his findings, beginning at, I believe, pages 141, Jim sorry, pages 149-158a of Volume One of the record which is his opinion, and which is the overview of all the facts shows that he clearly understood what the burdens were.

Now the Petitioners criticise us and chastise us for departmentalizing and dismembering and fragmenting and --- this opinion, saying you have to take the overview. You have to look at the whole panorama of facts. This is what the trial judge said on that. There remains to be accomplished an evaluation of the full record upon the trial of this case. When viewed as a whole, rather than when viewed in segments, as has thusfar been necessary. Having taken a look at the individual figures

one by one, it's now the duty of the Court to look at the panorama. And this is what he says, as he looks at the panorama. While many inferences favorable to the Plaintiffs contentions can reasonably be drawn from the evidence, in every instance a no less equally reasonable inference can be drawn to the contrary. In other words, at best, be found the evidence which does not even satisfy the preponderance of the evidence standard.

So I suggest, if the Court please thet the judgement of the trial judge was reached entirely in accordance with the appropriate standards of proof and that it should be affirmed, for that reason.

Q. Thank you, Mr. Williams. Mr. Rountree, you have about three and a half minutes left.

A. Thank you, Mr. Chief Justice.

FURTHER ARGUMENT BY JOHN A. ROWNTREE, ESQ.

ON BEHALF OF UNITED MINE WORKERS

Counsel says that the Court gave a complete overview at the end of this case, however, he pronounced the Continental Ore rule about having to judge the whole case as a complete picture, but he did proceed again to dismember the whole case. And in this dismemberment and the overview, be never looked at this provective wage clause again. And you can't interpret tiis protective wage clause, particularly paragraph A without looking at the whole picture of this case.

We ask the Court to read it. Paragraph A particularly. I think it's stretching construction beyond reason to hold that it's limited to the 82% of the industry. In the first place, and we say that even if it is confined to the 82% of the industry, still, it is going to mean, inevitably that hundreds of companies are going to be deprived of any right to suevive in this industry.

Now, the application of the clear proof--

Q. Now, no one has to belong to the employer union.

A. No, sir.

Q. Well, anyone who doesn't want to sign the agreement that's negotiated for the union doesn't need to be a member of the union.

A. That's correct, Your Honor, and you could belong to BCOA or not. Take the Illinois Cooperatives Association. One of the three largest associations. They sought freedom from BCOA, according to this record, for many years, and finally went into it.

Q. How many cases have been tried in which the Union has been sued for damages of a positive action like this?

A. Your Honor, I think it's about five cases. Now the first two were first Pennington. We brought that here. Then there was the second Pennington, where we lost without a jury. And clearly that court applied this clear proof rule all the way to proving predatory intent.

Q. I say, has any judge construed the protective wage clause as itself showing an agreement between the union and the unit to impose these wage standards on outside--

A. The two judges who considered it were Judge Taylor in second Pennington. He held we had to proove predatory intent by clear proof, to win. And the second judge was Judge Wilson in this case. And that's all. Now two juries have held to the contrary. That the protective wage clause was intended to be applied to the total industry as obviously it was. And this was a restraint of the economic freedom of the whole industry. This clause says that union will not make any change in any of these units. That' it's got the contract---

Q. Is it your position that if the protective wage clause is construed to require the union to impose the wage standards on outsiders that the Plaintiff has made out a violation of the Anti-Trust Laws or only that the unions' exemption is forfeited?

A. We say that is should be a per se violation, Your Honor. Regaldless of purpose or effect, as Your Honor said in Pennington. This must be a per se violation. The employer has got no right to tell the Union what it can do---

Q. ---violations of the Anti-Trust laws, was.

A. I beg your pardon?

Q. Pennington didn't deal with what a violation of the Anti-Trust law was, did it? It just dealt with when the exemption

applied?

A. Your Honor says that such an agreement, that is, an agreement to apply a certain wage terms in other units, violates anti-trust policy regardless of purpose or effect. And we say that should be the law. It has got to be the law. The dominant units can't tell the Union how to conduct itself in these other bargaining units. And we say---

Q. This is interesting, you may complete your argument.

A. That the law cannot allow the dominant unit to keep all the other bargaining units under the same terms for the duration of the understanding between the dominant unit and the Union. In other words, this national contract still goes on today. And if the other units can't change therr terms, during the continuation of the national contract, we never will have any competition in this indusrry. It's practically gone today.

Q. Thank you, Mr. Rowntree, thank you Mr. Williams. Your case is submitted.