SC 1

In the

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

ROBERT SCRIVENER,
d/b/a AA ELECTRIC COMPANY,

Respondent.

No. 70-267

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE
JAN 18 3 28 PM '72

Washington, D. C.
January 12, 1972

Pages 1 thru 45

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD, Petitioner,	:	
v.	:	No. 70-267
ROBERT SCRIVENER, d/b/a AA ELECTRIC COMPANY, Respondent.	:	

Washington, D. C.,

Wednesday, January 12, 1972.

The above-entitled matter came on for argument at 2:22 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

WILLIAM TERRY BRAY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioner.

DONALD W. JONES, ESQ., Prewitt, Jones, Wilson & Karchmer, 110 Landmark Building, Springfield, Missouri 65806, for the Respondent.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear now 70-267, National Labor Relations Board against Scrivener.

Mr. Bray, you may proceed whenever you're ready.

ORAL ARGUMENT OF WILLIAM TERRY BRAY, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case involves a Labor Board determination of unfair labor practices against an employer under the National Labor Relations Act.

In this Court only a single issue is presented: whether the employer, by discharging certain of his employees because they had given sworn statements when meeting with a Board agent, who was investigating unfair labor practice charges against the employer, violated Section 8(a)(4) or Section 8(a)(1) of the Act by virtue of the discharges.

Q Are these independent?

MR. BRAY: Yes, they are; we consider them independent. The Board held that they were independent. And we have, all along, presented them as independent grounds for upholding the decision of the Board.

Q Do you have any preference?

MR. BRAY: Do we have any preference? We would like for the Court to find for the Board on both grounds.

Q I see.

MR. BRAY: We have no preference as to which ground, if the Court chooses to go on one or the other.

Q You mean the case equally supports either one?

MR. BRAY: We think that there are strong arguments supporting either ground. I would be reluctant to say that our arguments are more strong on one ground than the other.

Q Mr. Bray.

MR. BRAY: Yes, sir?

Q On the second ground, your brief at page 17 states that the guarantee under 8(a)(1) includes the right of employees to participate in the administrative proceedings -- the processes of the Board. I didn't see any cases cited for that proposition in your brief.

Is this just to be taken as an assertion or are there cases that support it?

MR. BRAY: No, Mr. Justice Rehnquist, the cases which we cite at page 18 of our brief make this abundantly clear; indeed, the quote at the top of page 18, on the Oil City Brass Works case, is squarely in point on this. The Court there did hold that the Section 7 guarantees of employees include the right, not only of employees to participate but to have others participate on their behalf. And that employer discrimination on account of participation in Board proceedings infringed the employees' guarantees under Section 7, and thus violated

Section 8(a)(1).

The Board in this case found that the discharges violated both Section 8(a)(4) and Section 8(a)(1). The Court of Appeals refused, however, to sustain the Board on either ground. On the Section 8(a)(4) basis, the Court relied on its earlier decision in the Ritchie case, and concluded that the Section 8(a)(4) covered only the precise matters stated in that section; that is, actually giving testimony in a formal Board hearing or filing charges with the Board.

With respect to Section 8(a)(1), the Court concluded that it could not uphold an independent violation of that section, because to do so would be implicitly to overrule its decision in the Ritchie case, and it was unwilling to do so.

We think that the Court erred on both grounds.

With respect to the factual setting, the Court of Appeals accepted, for purposes of the legal question involved, and which we have presented here, the findings of the Examiner as sustained by the Board.

While respondents have taken issue with our statement of the case, and indeed have restated the case in their brief, that essentially is a result of their view of the record evidence and what the record evidence showed. And their view of the case was not sustained by the Examiner or by the Board, and, as I say, the sufficiency of the evidence questions are not here, they were not considered by the court below. We,

instead, are relying on what the Examiner found and the Board sustained.

On that basis, the Examiner's decision is set out in full at pages 216 through 249 of the Appendix and shows that the unfair labor practices here arose out of an organizational campaign among respondent's employees during the spring of 1968.

The respondent is a sole proprietor engaged in the electrical contractor business in Springfield, Missouri.

On March 18, 1968, five of his six employees signed authorization cards for the Electrical Works Union. Respondent was notified of this the next day, and upon this notification he refused to bargain with the union, and later during the day complained to his employees about their activities.

Several days later he discharged three of the card signers and on the same day hired two new employees who were not affiliated with the union.

The next day, March 21, the union filed unfair labor practice charges regarding the discharge of the three employees on March 20th.

Subsequently the dischargees were reemployed, and were working for the company when, on April 17th, the Board field examiner called on Mr. Scrivener to discuss the charges filed against him.

That evening the field examiner met with the five

card signers to discuss the unfair labor practice charges, and received written statements from them.

The next day Mr. Scrivener questioned the four card signers who were still in his employ about their meeting with the examiner, and that afternoon he dismissed all four of them purportedly because there was not enough work for them to do.

The examiner found that this was not the real reason for the discharges and that, instead, the dismissals were because these employees had met with and given sworn written statements to the Board examiner.

He held that a discharge on this ground violated both Section 8(a)(4) and Section 8(a)(1) of the Act.

Mr. Scrivener urged that he was not subject to the jurisdiction of the Board. The evidence taken before the examiner showed that indeed Mr. Scrivener did not meet the Board's discretionary jurisdictional standard, but that it did meet the statutory standard of affecting commerce.

This was shown by evidence indicating that Mr. Scrivener purchased something in excess of $20,000 of goods in interstate commerce during 1967, and the projected sales from a single source for 1968 were in excess of $30,000.

Thus the Board -- I beg your pardon; the examiner found that statutory jurisdiction was met, and because of the nature of the discharges for having given a statement to the examiner, then the Trial Examiner concluded that public policy

required that the Board assert its statutory jurisdiction to protect participants in Board proceedings.

Because the jurisdiction would be asserted on this ground, the Examiner also went ahead to consider other unfair labor practice charges, found that those unfair labor practices had occurred, and recommended that the Board also remedy them.

The Board agreed with the Examiner that statutory jurisdiction was shown and that public policy required it to exercise jurisdiction to protect the employees who had been discharged on the ground that they had given a statement to that Board field agent.

The Board held, however, that the other unrelated unfair labor practice charges were not something over which they should assert jurisdiction on public policy grounds, and thus the Board dismissed them.

We think that the discharges here, based as they were under the facts as they come to this Court, solely on the fact that these employees met with and gave statements to a Board field agent investigating unfair labor practice charges against their employer, clearly come within the protections of Section 8(a)(4), and also within the protection of Section 8(a)(1).

We think that the court below erred on both grounds in not sustaining the Board's order.

Section 8(a)(4) bars discrimination against any

employee by his employer because he has filed charges or given testimony under the Act.

It is our submission that this provision protects not only the matters precisely stated, that is filing charges and testifying, but also the sort of in-between actions involved here, giving sworn statements to a Board agent during the course of an investigation of unfair labor practice charges that had been earlier filed.

Q Would you draw the line at sworn written statements?

MR. BRAY: That is the only thing that we need, Mr. Justice Blackmun, for purposes of our case here. The Board's position is that Section 8(a)(4) offers broad protection for any participation in a Board proceeding. That need not be decided, however, in order to sustain the holding in this case, since here the employees who were discharged had given written statements to the Examiner, and --

Q What -- pardon me, go ahead.

MR. BRAY: Pardon me.

Q Go ahead, Mr. Bray.

MR. BRAY: Our basic submission is that Section 8(a)(4) should be construed to protect this sort of activity, at the least.

Q I would find it helpful, Mr. Bray, in following up your answer to Mr. Justice Blackmun's question, if you could

tell us how you could reach that result as a matter of statutory construction. Perhaps you're just going to get to that now.

MR. BRAY: Yes, sir. I think that not only is this construction in full accord with the obvious intent of the section and the legislative history behind it, as well as with the Board's long-standing view of the section, but also substantial policy reasons.

Q But how, as a matter of English usage? I mean, is it by a broad reading of the word "testimony"?

MR. BRAY: That's precisely it, Mr. Justice. We think that testimony, in the context in which it occurs here and in the context of the development of this section itself, indicates not just testifying at a formal Board hearing but, more broadly, the giving of information to a Board agent at any time during a Board proceeding.

Q If that's the case, why do you need a separate protection for filing charges? Wouldn't just the giving of testimony be broad enough to cover filing charges, if your construction is right?

MR. BRAY: I suppose it could be, although the filing of charges is not the actual discussing of the charges after they have been filed with the Board; which, we think "testifying" covers. The proceedings from the time the charge is filed, which triggers the Board's participation in the charge, would

then be protected by Section 8(a)(4) under the testifying language.

Q These were affidavits, weren't they?

MR. BRAY: Yes, sir; they were.

Q And would they have been admissible, of themselves, without the presence of these employees as witnesses at the hearing?

MR. BRAY: It's my understanding they would not.

Q Would not?

MR. BRAY: Not necessarily with the particular witness who gave it. Perhaps some other witness could have provided the necessary basis for their introduction.

Q Or perhaps if the witnesses were unavailable for some reason?

MR. BRAY: Yes, sir.

Now, the gist --

Q You mean it's only a question of authentication?

MR. BRAY: In terms of putting in the evidence.

Q If they were offered at the hearing?

MR. BRAY: In general, the Rules of Civil Procedure govern in Board proceedings --

Q You mean the Rules of Evidence?

MR. BRAY: Yes, sir.

And it is my understanding that the affidavits would not ordinarily have been admissible into evidence as such.

Indeed, the only affidavit that was actually introduced into evidence was introduced to clarify some of the testimony given by one of the affiants, which was considerably different from his affidavit.

Q I suppose they would have been available for impeachment?

MR. BRAY: Yes, certainly they would have been. Indeed, this is standard Board procedure and Board rule, that if a witness testifies at a hearing, any statements he has given the Board are then available for cross-examination purposes.

Q Is the Board practice normally when you're contemplating an absent witness is to have a deposition along the lines provided for in the Rules of Civil Procedure?

MR. BRAY: No. It's my understanding that the Board practice is more along the lines of what happened here. The field agent obtains, in the field, a statement from the employees of what transpired with respect to the matters that he's investigating, he then puts that in writing and has the agent sign -- I beg your pardon, has the employee or whoever is giving the statement sign and swear to it before him.

And this is the only preparation in terms of having something in writing that goes on before the hearing begins.

Q But then supposing that the witness who gave the affidavit doesn't show up at the hearing, which I believe is

the question Mr. Justice Brennan asked you. Is the affidavit then admissible?

MR. BRAY: I frankly don't know. It's my understand -- of course the Board could subpoena the witness, to have him come; and it has broad powers to do this.

Q I suppose that at least the ordinary, if they are going to purport to follow the rules of evidence, the ordinary exceptions to hearsay would obtain?

MR. BRAY: Precisely. And indeed, the rules specifically provide for that, for deposition, although that is not the usual procedure, as I understand it.

Q I take it, Mr. Bray, what you're saying is that the giving of statements, written or oral, to the investigative arm of the Board is incidental to the filing of charges and both incidental and preliminary to testifying in the formal hearing.

MR. BRAY: Yes, Mr. Chief Justice, it's my submission that not only is it incidental to but indeed testifying, as that word is used in Section 8(a)(4), is broad enough, in context, to include all of the proceedings before Board agents from the time the charge is filed until such time as the hearing actually gets under way.

Q I suppose the case, civil or criminal, in the Federal Courts or any other courts, where reprisals were of any kind, were inflicted upon persons for giving statements to

an investigator, private or public, would be dealt with by contempt proceedings; could be --

MR. BRAY: Certainly.

Q -- dealt with by contempt proceedings on the part of the judge, couldn't they?

MR. BRAY: Yes, sir.

Then the --

Q Mr. Bray, may I ask, on the 8(a)(4), I gather testimony then has the reach of giving evidence, doesn't it?

MR. BRAY: That's our submission. That was predecessor provision, that was the language of the predecessor provision.

Q Well, that was the old Executive Order under the National Recovery Act, wasn't it?

MR. BRAY: Precisely.

And at the time Section 8(a)(4) was enacted, and it supplanted this Executive Order, not only did Congress not indicate any intent to narrow the protections offered but the Senate memorandum quoted in our brief indicated that Section 8(a)(4) was intended as a mere reiteration of the Executive Order, and thus, it's our submission that 8(a)(4), like its predecessor, covers any giving of evidence, and certainly the giving of sworn statements such as here.

Further, this comports with the clear legislative purpose behind the section, as this Court explained that

purpose in Nash vs. Florida Industrial Commission. There the Court stated that Congress, by enacting Section 8(a)(4), has made clear that it wishes all persons with information about unfair labor practices to be completely free from any employer coercion against reporting them to the Board.

The reason that this type of protection is necessary is well stated in the John Hancock case, also cited in our brief, and from the District of Columbia Circuit.

This protection must be available in order to protect the Board's channels of information from being dried up by employer intimidation.

The basic aim was to keep free and unimpeded the channels of communication between both the Board, on the one hand, and the participants in its proceedings on the other. And to dispel any fear by the participants that by assisting the Board in its investigations they might be subjected to remployer reprisals.

Preliminary preparations, including the taking of sworn statements such as here, are every bit as essential to an effective Board proceeding as are the filing of charges and the actual giving of testimony in a formal Board hearing. And thus should be included within the scope of this section.

As I've indicated, this interpretation for which we urge is entirely consistent with the legislative history of this provision. Certainly under the Executive Order under the

National Industrial Recovery Act, this type of statement would have been protected, and Congress, when it replaced the Executive Order with Section 8(a)(4), indicated that it did not intend to change the coverage of the protection afforded.

Q Mr. Bray, your difficulty here with the Court of Appeals really goes back to the Ritchie case, doesn't it?

MR. BRAY: Certainly with respect to the Eighth Circuit, yes, sir.

Q And, if you know, do you recall whether cert was applied for in Ritchie?

MR. BRAY: It was not, to my knowledge, there is no cert history on it in the citation.

Q And you don't know why?

MR. BRAY: Other than the fact that in that case, I certainly know one reason why, and the reason, I think, is fairly apparent. In that case the Board had found that the discharge involved violated other sections of the Act, specifically Sections 8(a)(1) and 8(a)(3). The Court of Appeals had no difficulty in sustaining the order with respect to those two sections, and it held that it was reluctant to enforce Section 8(a)(4) in the circumstances of the case.

Obviously we had the same relief that we would have had, even if Section 8(a)(4) had been enforced. Thus, that was not the type of case that we needed to bring to this Court.

Here, on the other hand, the Court has refused to

give these employees any relief from what we consider to be obvious unfair labor practices. And we think, too, that the Board correctly asserted jurisdiction in this context.

Q Well, I take it, the case could not have been brought here without the Solicitor General's approval, anyway?

MR. BRAY: That's correct, yes, sir.

Q And it may be that it was sought and decided by the Solicitor General that it shouldn't have been brought here?

MR. BRAY: It may well have been denied administratively. That's right.

This view, also, is consistent with long-standing Board interpretation of Section 8(a)(4). The Board has not always invoked Section 8(a)(4), when other violations are involved, and the remedies for those other violations would be the same as the remedies under Section 8(a)(4). Indeed, we think that explains the Ogle Protective Service Company case, on which respondent relied, and in which the Board merely adopted its Examiner's finding that it would not invoke an 8(a)(4) violation, pro forma, and without considering the matter.

Where the Board has given detailed consideration to the issue, it has uniformly held that Section 8(a)(4) is violated when an employer makes discharges because of participating in Board proceedings.

The practicalities of agency action also demand this

result. A participant in a Board proceeding often does not actually file charges or testify. He may not testify because his testimony is cumulative, as happened in the Dal-Tex case; or because the case is settled or dismissed before it gets to hearing, which happens in over 90 percent of the Board's cases, according to its 35th Annual Report.

Or the situation may be as it was here: the employer discharges his employees immediately upon learning of their assistance to the Board, and before any hearing could possibly have started.

If no protection is afforded for participants in these situations, then we think it obvious that the participants will be much less willing to assist in Board proceedings and that this will impair the Board in its investigative and other statutory efforts.

Finally, several Courts of Appeals have agreed with our view of Section 8(a)(4), specifically the Fifth Circuit has twice sustained Board orders, finding Section 8(a)(4) violations, and in essentially similar contexts as that presented here.

The M & S Steel Company case, on page 16 of our brief, as well as the Dal-Tex Optical Company case on that same page, involved Section 8(a)(4) violations where the employee was discriminated against either for giving statements to a Board agent or for appearing at a Board hearing but not actually

testifying.

The cases cited at Note 11 of our brief, on page 16, indicate that other Courts of Appeals have also broadly read Section 8(a)(4) to protect participants in Board proceedings in contexts other than merely filing charges or testifying.

Finally, the subpoena powers under Section 11 support our view. As I indicated, the Board could have subpoenaed these men to give the statements which they gave the agent, had they not done so willingly. In that event, the Second Circuit has held that the Board must assert jurisdiction to protect the participants in Board proceedings. It cannot decline to assert jurisdiction in that circumstance.

Though the employees here gave the statements willingly, we think this should be encouraged, not discouraged, and that there is no sound reason for denying equal protections to the voluntary participant as to those who appear under threat of subpoena.

Turning to Section 8(a)(1), it was the Board's position, and it is our position here, that the discharges, on the grounds which the Examiner found, independently violated Section 8(a)(1). We do not think that the court below gave any significant consideration to this issue and instead brushed it off with the explanation that to uphold an independent 8(a)(1) violation would be implicitly to overrule Ritchie; even though Ritchie involved only Section 8(a)(4).

It's our position that these discharges are clearly barred by Section 8(a)(1). That section prohibits employer conduct that interferes with, restrains, or coerces employees in the exercise of rights guaranteed by Section 7.

Section 7, in turn, assures broadly that employees shall have the right to form, join, or assist labor organizations and to engage in other concerted activities for purpose of collective bargaining or other mutual aid or protection.

The Board, and various Courts of Appeals, have repeatedly held that Section 7 -- that the Section 7 guarantees include the right to participate and give information in Board proceedings, as well as the right to have others do the same, without fear of being penalized by an employer for having done so.

As I mentioned, the Oil City Brass Works case, as well as the other cases on page 18 of our brief, established this proposition.

Further, it is well-established that employer discrimination, because of participating in Board proceedings or because of doing so on behalf of others, unlawfully restrains rank-and-file employees in the free exercise of their Section 7 rights and thus violates Section 8(a)(1).

Indeed, the Fifth Circuit has gone so far as to hold that this is an 8(a)(1) violation as a matter of law.

Several Courts of Appeals cases involve quite similar

circumstances to those here. The Electro Motive Company case, at pages 18 and 19 of our brief, from the Fourth Circuit, held that an employer discharge of a Board participant for having given a Board agent a statement, precisely the circumstances here, violated Section 8(a)(1).

The Southland Paint case, from the Fifth Circuit, similarly held that the discharge of a participant, because he testified in a Board hearing and because he gave an affidavit to a Board agent, violated Section 8(a)(1).

In this latter case, the Fifth Circuit said that an affidavit given in a Board proceeding is essentially the equivalent of testifying at a Board hearing.

While both these cases involve the discharge of a supervisor, yet we think the present case is an even stronger one for invoking the protections of Section 8(a)(1).

Supervisors generally are excluded from the protections of the Act, and yet in those cases the courts found that they must be protected in order to protect the rights of the rank-and-file employees to an effective Board proceeding.

It seems to us to follow that certainly where an employee himself, who is protected by the Act, participates in a Board proceeding and then is discharged for having done so, the circumstances here, that Section 8(a)(1) has been violated because his Section 7 rights have been infringed.

The Texas Industries case, set forth at page 19 of

our brief, also supports our view of Section 8(a)(1). There, the Fifth Circuit upheld a Board finding that merely asking employees about statements they had given a Board agent and for copies of those statements violated Section 8(a)(1). We think, again, that the present case, where the employer goes much further and discharges the employees because they have done so, is even more appropriate for invoking the Section 8(a)(1) protections.

The reasons that we have stated with respect to Section 8(a)(4) also, many of those, apply to support our construction of Section 8(a)(1).

The legislative purpose of protecting all Board participants and assuring that all persons with information about unfair labor practices are free to come before the Board certainly justifies this construction.

Moreover, the practicalities of agency practice, and the fact that many participants do not actually testify or file charges, supports our construction of 8(a)(1) in order to assure these men that they will be protected from discharge for having come before the Board.

Lastly, this is, has been the consistent Board construction of Section 8(a)(1) over many years, and this is entitled to weight.

The Section 11 subpoena powers also support this view. As I've explained, the employees could have been sub-

poenaed to give these statements, and had they done so it is also clear that the Section 8(a)(1) protections are as broad as the Section 11 subpoena powers.

Q Well, aren't you really talking about a construction of Section 7 rather than 8(a)(1)?

MR. BRAY: With respect to whether the type of activity here involved is included within Section 7, yes; but we think that that's clear, there have been innumerable holdings to that effect, and we do not understand the Eighth Circuit to have denied the enforcement of our order here on the grounds that this type of activity is not protected activity under Section 7.

Q Well, what right under Section 7 do you think is violated in this?

MR. BRAY: The right of employees, the general right of employees to engage in concerted activity is, or includes the right to invoke and have an effective Board proceeding to protect those rights. This has been held in all of the cases cited in our brief, and we think it's well established. That right is infringed when a participant in a Board proceeding is discharged because of having done so.

As I say, Judge Reeves for the Fifth Circuit concluded that a discharge on this ground violated Section 8(a)(1) rights as a matter of law.

Had these employees --

Q Well, Section (4) then is just redundant, is that it?

MR. BRAY: Well, it's redundant if you accept my construction of Section 8(a)(4), but there's no problem there because it's clearly established that the same activity can violate one or all of the sections of the Act. It need not violate just one.

Had these employees been subpoenaed, as I say, it is clear that they would have been protected.

Further, the mere fact that these employees appeared voluntary rather than pursuant to a subpoena is not any ground for denying them similar protection. And, indeed, the Fourth Circuit, in the Electro Motive Company case, showed that this had to be so because the effect on protected rights is precisely the same, whether or not the participant has been subpoenaed; and the court in that case held that it did not make any difference whether or not a subpoena had been issued.

Q Does it violate concerted activity if you had only one employee involved here rather than four?

MR. BRAY: If we had one employee involved and he was engaged in union activities, yes, we would argue that this was a protected right under Section 7.

In other words, I think --

Q That's concerted activity?

MR. BRAY: I think that -- getting into, if I may,

the language of Section 8(a)(1) -- it could be within a number of the protections of Section 8(a)(1), it need not be just in the concerted activity --

Q 8(a)(1)? In 8(a)(1)? It's not 8(a)(1).

MR. BRAY: I beg your pardon, Section 7.

Q Section 7.

MR. BRAY: It could be within a number of the provisions of Section 7.

Q Well, which one? Which ones?

MR. BRAY: Let me --

Q Well, never mind; that's all right.

MR. BRAY: I'm sorry, I don't have the language of the section here.

Q Well, it's in your brief, anyway?

MR. BRAY: Yes, sir.

MR. CHIEF JUSTICE BURGER: I think your time is up, Mr. Bray.

MR. BRAY: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Jones.

Now, on background, just let me ask you the following questions first: Isn't it reasonably inherent part of the whole adversary process to interrogate witnesses before they're called into an adversary proceeding?

ORAL ARGUMENT OF DONALD W. JONES, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. JONES: I think that would be true, Your Honor. However, this case -- I want to emphasize at the outset, this case has some very unusual features, which made it unlikely that any statements would be taken in this case from any employees.

Q How does the Board function, or how do employees get the cases to the Board if any impediments are put in the way of having them freely give statements to government agents who come and call on them?

MR. JONES: Uh --

Q How can the Board function?

MR. JONES: Well, for one thing, the Board has foreseen this difficulty, I think, and they have -- and the Congress has, as well, in connection with the Administrative Procedure Act, which has some provisions that make all, certain government records available to the public information. They have exempted these statements by the Board, the Congress has, and the Administrative Procedure Act, and Congress has said these statements may be held strictly confidential; they are exempted from the public information provisions of the Board.

So all statements taken by the Board in investigations are held to be strictly confidential, by law, and they cannot be -- the contents of those statements or the fact of

their taking cannot be --

Q Yes, but what has that got to do with the need to interrogate witnesses before you call them?

You don't -- lawyers don't customarily bring witnesses into a tribunal if they don't know what they're going to say, do they?

MR. JONES: That's true, Your Honor. However, now, these statements that we're talking about are taken at a stage of the proceeding which is before any complaint has been issued. And now as to --

Q It's to determine whether a complaint should issue, isn't it?

MR. JONES: Right. Right. However, in our case, Your Honor, if I may go back to the facts of this case momentarily, in this case the facts are this:

The charge was filed, containing a claim of 8(a)(1), 8(a)(3), and 8(a)(5), I believe, originally.

Q Yes.

MR. JONES: Immediately upon getting this charge, the company counsel, who was myself, wrote a letter to the Regional Director and informed the Regional Director of the Board that this company did not meet the Board's jurisdictional standards. He did not meet the $50,000 requirement for jurisdiction. And we offered at that time to show our books and records to the NLRB, so that they could see that they had

no jurisdiction over this company. At the same time the company sent the three employees then involved, who had allegedly, according to those original charges, been laid off, sent them a letter saying, "You have not been laid off; you are free to work here as usual, as long as work is available. This is a misunderstanding."

We sent a copy of that to the Board. The employees came back to work.

Now, about a month later, the Labor Board agent came down to my office -- this is shown in the record -- and we had a meeting, to go over the books and records of the company to see if, in fact, the Board had jurisdiction.

Now, contrary to what is said by petitioner's brief, there is no evidence in the record that we discussed the merits of the charges at that time. And in fact we did not, we discussed merely the fact of whether there was jurisdiction.

Now, we had no idea the Board was going to take any statements from any of our employees at that time. There is no requirement that the Board do so. We think the Board had no reason to take any statements from the employees, if they had no jurisdiction over the company at that stage.

Now, at that stage, then, anything prior to that time is no longer a claim to be a violation before this Court, because the Labor Board itself, after the hearing, declined to assert jurisdiction on anything up to that date.

Now, later, the next day, according to the evidence, the next day, after the company representative and I met with the Labor Board investigator in my office and went over our financial records, which show, as according to -- as everyone now admits, that the Board did not have jurisdiction at that point, it was outside,this company was too small to meet the Board's jurisdictional standards.

This company, as a result of being too small to meet the Board's jurisdictional standards, this company could not get access to the Board's processes to protect it from an illegal secondary boycott, which the Union started out against the company on March 15, 1968, at a time when the Union representative involved in this case admits he did not represent a single employee of this employer.

So when that March 15, 1968, picketing started, at an apartment house project where my client had some men working, my client could not go to the Labor Board and say, "Please help us stop this secondary boycott, because it violates Section 8(b)(4)", because the Labor Board's jurisdictional standards published said, "No, no, I'm sorry, Mr. Scrivener, you're too small for us to protect; we haven't got time to protect you."

So, later, when the Union came and said, now, as the evidence shows on the 8(a)(5) allegation, when the Union came and presented cards to the company and said, "Now, we've signed up the majority of your people, we want to bargain with you",

even though the Supreme Court of the United States has said, in Gissell Packing Company just a few years ago, that an employer has an absolute right to an election under 9(c)(1)(B) under the Act before they have to bargain, this company, my client, could not get an election under the Labor Board, because the Board has published standards saying, "No, Robert Scrivener, you're too small; we haven't got time to give you an election. We haven't got time to let you have access to our processes."

So then the Union come along, and this Union in this town, this particular Union in this town, has a standard form agreement, that the only kind of agreement they will sign is a standard form agreement, which has been negotiated at the national level by the National Electrical Contractors Association and the International Electrical Union.

So when they presented this contract to my client and said, "Now, you sign this by 6:00 o'clock tonight or else", as shown by the record, and that contract is an exhibit in the Appendix, even though that type of demand, especially when the contract contains unlawful, nonmandatory subjects of bargaining, and would -- and acceding to that demand would require my client to delegate away his bargaining responsibilities to another association in violation of his rights under the law, and even though this has been declared unlawful by the Board, my client could not file a charge with the Board because he's too small to protect.

So, now the Board has -- the general counsel's office of the Board has attempted to use 8(a)(4) to prosecute my client as a device when they have no jurisdiction to protect him or to prosecute him under their own published standards.

Now, I want to go to the events that brought about this layoff, and I'd like to clarify this. We hear talk about discharges; there is no evidence of any discharges on April 18, 1968. There was an economic layoff on that date. On April 18, 1968, which was a day or two after -- I think the record shows it was the next day after the Labor Board had taken the statements from the men the night before, at the Union Hall.

Those statements were taken without notice to us, we werenot present, we had no right to be present; they were confidential, we had no notice of it, no knowledge of it.

The next morning, the evidence shows that two of the employees and Mr. Scrivener had some conversation, it was an isolated, neighborly conversation that people in the Ozarks customarily have in a small company like this. It's not clear, completely clear who started the conversation, whether the employee started it or whether Mr. Scrivener started it.

Our version is that the employee came up to Mr. Scrivener and said, "Hey, Bob, we talked to the Labor Board man last night."

Q Mr. Jones.

MR. JONES: Yes, sir?

Q What did the Trial Examiner find?

MR. JONES: The Trial Examiner used words similar to what the petitioner uses here, they say that Mr. Scrivener questioned the employee.

We submit that the record is completely opposite to that finding. Now, we have preserved our argument that there is no substantial evidence to support the findings of the Trial Examiner at every stage of the proceedings. We urged that to the Board in our exceptions, which are in detail in the Appendix; we urged that to the Eighth Circuit Court of Appeals in our brief, parts of which we made an Appendix to our brief in opposition to certiorari in this Court, so that they are here in this Court --

Q Well, is there any evidence that they were fired?

MR. JONES: That they were fired?

Q Yes, sir.

MR. JONES: No, Your Honor, there was not.

Q No evidence?

MR. JONES: No. Here is the situation on that.

Q No evidence?

MR. JONES: There was no evidence they were fired. The evidence was that they were laid off on a Thursday afternoon; April 18th happened to occur on a Thursday afternoon. There is absolutely no evidence they were fired. They were laid off, at

that time.

Q What's the difference in your contract, in the operation of your plant, between laid off and fired?

MR. JONES: Well, the layoffs have a reasonably expectancy of recall. And Mr. Scrivener told them, as shown by the record as found by the Trial examiner, that it was a Thursday afternoon, when the men came back that afternoon, after having had this brief conversation with two of them about "Hey, Bob, we talked to the Labor Board man last night," and Mr. Scrivener said, "That old boy sure won't tell you much, will he?" This was the employee's testimony. Mr. Scrivener didn't remember this.

And he testified that he had no knowledge of the fact that they'd even given statements at the time he laid them off on April 18th.

Q Well, you're now arguing, Mr. Jones, the weight of the evidence. Assume for a moment -- for the moment -- that they were terminated because they gave statements to the Labor Board investigator. Do you maintain that the Eighth Circuit reached the correct decision on that assumption?

MR. JONES: Yes, Your Honor, I do. Now, here is --

Q That's the legal question involved here.

MR. JONES: Yes, the legal question -- if we were to assume -- what you're really asking, I think, is: Does the law as now written -- does the law as now written require an

interpretation of 8(a)(1) or 8(a)(4), that an employer that went out and said, "Now, you son of a gun, you gave a statement to the Labor Board, and you're fired." Now would that be a violation of 8(a)(1) or 8(a)(4)?

For giving a written statement. I say it would not be a violation of 8(a)(1) or 8(a)(4). Definitely it would not be a violation of 8(a)(4), which, on the point of giving testimony, because the meaning of the word "testimony", and I think that meaning is clear.

Now, however, if the purpose of the employer was to discourage unionism in doing that, it would be a violation of 8(a)(3). It would be a violation of 8(a)(3) because --

Q Well, that evidence, would you have much difficulty supporting conclusions that that was an interference of union activities?

MR. JONES: The Trial Examiner so found. The Trial Examiner found that that violates 8(a)(3).

Now, we appealed that decision to the Labor Board, with our exceptions. We presented these arguments concerning the fact that the Labor Board had no jurisdiction under its own jurisdictional standards, and the Labor Board did not review the findings of fact on 8(a)(3), but they did decline to assert jurisdiction on 8(a)(3), on the grounds that it would not be fair for them to prosecute my client under 8(a)(3) when they -- when he was outside their jurisdiction, under their

published standards, which were authorized by Congress under Section 14(c)(1) of the Act.

Congress, when they enacted the Labor Act, they gave the Labor Board power consistent with the commerce clause, all the power they had on businesses affecting commerce. But they also, at a later time, enacted Section 14(c)(1), which gave the Board authority to decline to assert jurisdiction over a certain class or category of employers.

The Labor Board has exercised that power, and has promulgated jurisdictional standards, declining to exercise jurisdiction over a class or category of employers which, in the nonretail trade, the nonretail industries is $50,000 annually. My client is a small employer, he does not meet that, and therefore the Labor Board threw out the 8(a)(3), the 8(a)(1), and the 8(a)(5).

The Labor Board, at page 275 of the Appendix --

Q Now, again, Mr. Jones, I'm looking at the petition for certiorari here. Petition was sought and granted to determine whether the discharge of an employee because he's given a written statement to the Board during an investigation is a violation of 8(a)(1) and (4). Now, do we need to go into any other matters? Or should we spend any time on any other matters?

MR. JONES: Your Honor, I think it's very important for this Court to consider this case on the facts of this case.

Now --

Q Well, we'll consider them, and we'll hear argument within the framework of the --

MR. JONES: All right.

Q -- question presented by the petition and by the write; but there's no use in spending time beyond that.

MR. JONES: Yes.

Let me go to the Board's decision in this case --

Q There was no cross-petition here on whether or not the company is in commerce?

MR. JONES: No, Your Honor.

Q And the Court of Appeals is against you, and the Board is against you on that?

MR. JONES: No. Your Honor, here is my position on that, and I think that I am correct on this:

In the Eighth Circuit we had roughly six arguments, which had been preserved at all stages. Those arguments were: lack of statutory jurisdiction. We claim that the Board did not even prove statutory jurisdiction.

Q Well, whatever you have there, there's only one question here, isn't there?

MR. JONES: Well, --

Q To come back to.

MR. JONES: I see what Your Honor is referring to. The point is, in my opinion, if the Court -- I want to make this

clear, that if the Court were to decide against me, I don't think this would mean an outright reversal, because the other five points we urged in the Eighth Circuit have never been considered. The Eighth Circuit decided for us on one of the six points.

Q They also said that you were marginally under the Act.

MR. JONES: Yes. And --

Q They didn't say you were marginally out from under the Act.

[Laughter.]

MR. JONES: They did say that. They did not review the substantial evidence question.

Q Right.

MR. JONES: They did not review the constitutional question as to whether or not it's due process of law or a violation of the Administrative Procedure Act to prosecute an employer who's too small to protect under their jurisdictional standards; to use their jurisdictional standards in an arbitrary and capricious and discriminatory manner to prosecute an employer who's too small to protect. They didn't decide that.

And, in fact, while I'm mentioning that point, the Peterson case of the Second Circuit Court of Appeals is precedent, squarely on the point in my position on that point.

Because that is --

Q Well, you simply say that here you can support the judgment of the Court of Appeals on any ground that would support it?

MR. JONES: I think that that is proper, that if the Court of Appeals in the Eighth Circuit was correct on any grounds, I would like to have this Court sustain it on that grounds alone. But I do want to hasten to --

Q Well, yet, I thought you said they passed it on only one ground?

MR. JONES: They passed on only one ground.

Q Our normal practice would be if we disagree with you on the point that's here, it would be remanded to the Court of Appeals for the other grounds.

MR. JONES: All right.

Well, I'll go on to the 8(a)(4).

Now, there is no issue here, in my judgment, on 8(a)(1). I want to make that clear. There is no issue here on 8(a)(1). I refer to the Board's decision at page 275 of the Appendix.

"In these circumstances, we find that equal and effective administration of the policies of the Act require us to limit our exercise of jurisdiction to remedying the Section 8(a)(4) violations."

The Board did not assert jurisdiction on 8(a)(1).

The Board asserted jurisdiction only on 8(a)(4).

And I also disagree that 8(a)(1) was ever involved in this case on any basis related to the 8(a)(4) issue, other than as a derivative issue. 8(a)(1) was always considered derivative. The Board's decision makes that clear. This is standard practice. I pointed this out in my brief in opposition to certiorari.

Q Well, I take it, then, that really, as the Chief Justice suggests, we ought to get to this 8(a)(4) and, if we decide against you, say to the Court of Appeals: Now, you decide the other questions.

Is that right?

MR. JONES: I think that would be proper.

Q You've got just about ten minutes left to cover that.

MR. JONES: All right. Thank you, Your Honor.

Now, on the 8(a)(4), we contend that when 8(a)(4) says -- well, first of all, let me make this point:

When we're considering 8(a)(4), we're only considering the portion of 8(a)(4) referring to testimony under the Act. There is no claim here that any of the employees involved gave any chargesunder the Act. They gave testimony -- the question is whether or not the statements they gave was testimony. And so we're not concerned with any whether or not 8(a)(4) is violated in regard to charges. This is only state-

ments, or whether the statements are testimony.

We contend that the word "testimony" as used by Congress is one that has been long understood by lawyers, legislators and courts. We cite several cases of general application on the use of that word.

Congress obviously knew what the word "testimony" meant when they used it in the statute. Congress used that word. They didn't use the word "statements"; they didn't use a word of broader application; they used a technical legal term, "testimony".

And we contend that the statute, on its face, is clear and unambiguous and that it should be so read, and that the Eighth Circuit's interpretation of it is just exactly what Congress wrote.

Q Was the purpose to insure that the employee would have a right to give his information to the NLRB? Was that the main purpose, and that he should not be punished for it?

MR. JONES: The -- I think the purpose was exactly what Congress -- I have to rely on finding the purpose of Congress upon exactly what they said. I think the purpose, at least it appears to me, that when Congress wrote 8(a)(4), they said that employees need protection in two cases, in two situations: one, where they file a charge and directly confront their employer, we don't want them to be fired or

discriminated against because they filed a charge. That issue is not here.

Two, where they give testimony in a Board hearing. Now, before a -- and if you look at the whole Act together, under a Board hearing when the charge is filed and they investigate it and then a complaint is issued, and notice of hearing; at the hearing the employer has a right to appear and cross-examine the witnesses, including any employees who give testimony. The employer has a right to cross-examine.

Q Well, before you get to that, then how, under the sun, does the Board get its charges if it doesn't talk to the employees?

MR. JONES: That is true. This -- it's not set forth in the statute how the Board goes about their investigation.

Q Well, how could it?

MR. JONES: There are rules to --

Q Well, how could the Board find out if its employees had a grievance?

MR. JONES: Well, it's clear under the law, as this Court held in Nash vs. Industrial Commission of Florida, and in other cases, it's clear under the law and under the statute that the Board itself cannot initiate a charge, which, incidentally, that's another point --

Q That's not what I'm talking about. Well, how would they ever know about it?

MR. JONES: A charge has to be filed by some person. Then the Board investigates as they deem necessary.

Q Well, I guess I'm back to the Chief Justice's original point: When you're talking to your witness beforehand, he's not protected?

MR. JONES: Oh, I do think he's protected. I never did get around to making that point. I think there is ample protection. Congress has provided a criminal penalty, which is ample protection.

Now, if you say an employer says to an employee, "I'm going to fire you because you gave a statement to the Labor Board," well, if his purpose is violative of 8(a)(3), then that's a protection.

However, if you say his purpose --

Q Well, how about if the employer says, "You were talking to the Labor Board man last night", and then ten minutes later he says to him, "And, oh, by the way, I'm short of business and I'll have to lay you off." That's not protected?

MR. JONES: All right. On Section 12 of the Act, Congress provided a criminal penalty for anyone interfering with Board processes, or the performance of the duties of the Labor Board investigator or agent or any Board member, and there's criminal penalties there. This provides ample protection.

So, merely to construct 8(a)(4) as Congress wrote it --

Q That's ample protection for the employee?

MR. JONES: I think it would be. I certainly think it would be ill-advised for an employer to do anything to an employee that would be interfering with a Board agent's powers, if it was subjecting him to a $5,000 penalty.

Q Well,is there a little difference in the standard of proof in a criminal prosecution than a hearing before NLRB?

MR. JONES: Yes, there is, obviously, and --

Q Well, let's -- well, why is this rule in there about the testimony point?

MR. JONES: Well, I think it's very --

Q Because you don't need the testimony provision, if you've got the criminal provision.

MR. JONES: Congress has provided -- I think Congress saw that an employee who appeared in open court against his employer, when his employer was setting there and listening to every word, and cross-examining, the employer was present, I think that is what Congress meant to protect.

Now, it's --

Q Well, in talking to his witness out in the hall, he wasn't protected?

MR. JONES: Well, if the employee had given testimony, he's protected for -- against any discrimination for that

testimony which the employer heard. I don't think Congress meant to say that an employer could be held guilty of discriminating against an employee for something an employee said in a secret statement about which the employer has no knowledge.

Now, there -- how could an -- in all these 8(a)(4) cases, and I include the ones cited by the petitioner, and I believe in every one of them that I can recall at least, there may be one or two exceptions that I don't recall; but in every one that I recall, when the Board finds an 8(a)(4) violation, they find it on the basis that there was some adverse testimony to the employer.

Now, we don't -- now, in this record, there is only one statement in the evidence, that of Don Cockrum. The other three men said they gave statements to the Labor Board investigator; they didn't say they were written and sworn. There is no evidence that the other three gave written and sworn statements.

How could this employer know whether the statements given were helpful or harmful? How could he be motivated to discriminate against the employees if he didn't know what they had said or anything? And I think Congress -- I think Congress never, never even considered that 8(a)(4) might be possibly used to put an employer in a situation that this one is in.

MR. CHIEF JUSTICE BURGER: I think we have your point, Counsel.

MR. JONES: Thank you.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 3:22 o'clock, p.m., the case was submitted.]

- - -