TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
PLASTERERS' LOCAL UNION NO. 79, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION, AFL-CIO, et al.

No. 70-63

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vs.
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No. 70-65

Washington, D. C.
October 13, 1971

Pages 1 thru 64

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

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Washington, D. C.,

Wednesday, October 13, 1971.

The above-entitled matters came on for argument at 10:05 o'clock, a.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

APPEARANCES:

NORTON J. COME, ESQ., Assistant General Counsel, for the Petitioner National Labor Relations Board.

WAYNE S. BISHOP, ESQ., Akin, Gump, Strauss, Hauer & Feld, for the Petitioners Texas State Tile & Terrazzo Co., Inc., et al.

DONALD J. CAPUANO, ESQ., 1912 Sunderland Place, N.W., for the Respondent Plasterers' Local Union No. 79.

LAURENCE GOLD, ESQ., for Building and Construction Trades Department, AFL-CIO, Amicus Curiae.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 63, National Labor Relations Board against the Plasterers' Union and No. 65, Texas State Tile & Terrazzo Company against the Plasterers' Union.

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

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF NATIONAL LABOR RELATIONS BOARD

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

This case is here on certiorari to the Court of Appeals for the District of Columbia Circuit, and it presents a question involving the interpretation of the jurisdictional dispute provisions of the National Labor Relations Act. Now, Section 8(b)(4)(D) of the National Labor Relations Act, which is set out at page 3 of the Government's brief, makes it an unfair labor practice for a labor organization to strike or threaten to strike an employer for an object of forcing him to assign work to employees in a particular labor organization or in a particular trade,craft,or class, rather than to employees in another labor organization or in another trade, craft, or class.

Now, Section 10(k) of the Act provides that whenever it is charged that any person has engaged in an unfair labor practice within the meaning of Section 8(b)(4)(D), the Board,

instead of immediately proceeding in the regular complaint, unfair labor practice fashion that it does with other unfair labor practice charges, holds that unfair 8(b)(4)(D) charge in abeyance because 10(k) states that"the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless the parties to such dispute submit to the Board satisfactory evidence that they have adjusted or agreed upon methods for the voluntary adjustment of the dispute."

Now, the Board, since 10(k) was added to the Act in 1947, has interpreted the phrase "the parties to such dispute" to include not only the competing unions but also the employer who made the work assignment. Hence, unless all three parties have agreed upon methods for the voluntary adjustment of the dispute, the Board itself must determine the dispute under Section 10(k).

The court below, by a divided vote, held that the parties to such dispute means only the competing unions, and thus, since they but not the employer were bound by a voluntary method of adjustment, the Board had no power to redetermine the dispute under Section 10(k); and the correctness of this interpretation is the issue that we have here.

Now, the underlying facts are briefly these:

The Plasterers' Union picketed two different jobs in furtherance of its demand that the work of applying a coat

of Portland cement mortar to the walls upon which tile was to be thereafter installed should be assigned to employees represented by the Plasterers rather than to those represented by the Tile Setters Union.

The first job involves an addition to a library at the University of Houston. The general contractor, Southwestern, had subcontracted the tile job to Texas State, a tile contractor employing members of the Tile Setters Union. And it subcontracted the job of installing the tile.

The Plasterers claimed the mortar work was theirs, and when that claim was rejected by Texas State, the subcontractor, they submitted the dispute to the National Joint Board for the Settlement of Jurisdictional Disputes, a tribunal established by the Building Trades Department of the AFL-CIO, and certain employer groups.

Both unions, by virtue of their affiliation with Internationals who are members of the Building Trades Department were bound by decisions of the Joint Board. But neither Texas State, the subcontractor, nor the association to which it belonged had agreed to be bound by the decisions of the Joint Board.

The Joint Board awarded the disputed work to the Plasterers, finding that the matter was governed by a 1917 agreement between the two International Unions and a 1924 decision interpreting that agreement.

Parenthetically I might point out at this point that the whole dispute arose because of the development of new bonding agents that weren't discovered until 1950.

But, nonetheless, the Joint Board awarded this work to the Plasterers, based on the 1917 agreement.

When Texas State refused to change its work assignment in accord with the Joint Board award, Plasterers commenced picketing at the jobsite to force such a change, Southwestern, the general contractor, filed charges with the Board alleging that the picketing violated Section 8(b)(4)(D) of the Act.

The second job involved the remodeling of the Rainbo Bakery. There Martini, a tile contractor, under contract with the Tile Setters Union, was assigned the job of installing the tile; Plasterers claiming the work, began picketing. Again Martini was not bound by the procedures of the Joint Board, and, accordingly, it filed unfair labor practice charges with the Board.

The Board's regional director, finding reasonable cause to believe that the charges had merit, and finding that neither of the employers, either Texas State or Martini, were bound by a voluntary method of adjustment, proceeded to a 10(k) hearing, at which both the competing unions and the employers involved presented argument and evidence -- it was a seven-day hearing -- in support of their respective positions.

The Board, on the basis of the record thus developed and in conformity with this Court's decision in CBS, which directed the Board to consider all relevant factors in determining the jurisdictional disputes, so the Board considers the collective bargaining agreements between the parties; employer,area,and industry practice; relevant skills and efficiency of operation; agreements between the two unions, and the Joint Board award; on the basis, after considering all of these factors and the evidence adduced, the Board concluded that employees represented by the Tile Setters rather than those represented by the Plasterers were entitled to the work in dispute.

In short, it came out differently than the Joint Board had, which had awarded the work to the Plasterers.

When the Plasterers refused to comply with the Board's determination of the work dispute, the Board's General Counsel at that point issued a complaint upon the 8(b)(4)(D) charge which had been held in abeyance in the expectation that the Section 10(k) determination would have settled the matter. When it didn't, under the scheme of the statute, you pick up the unfair labor practice end of the case again. Complaint was issued. It went to the Board, the Board concluded that the picketing by the Plasterers violated Section 8(b)(4)(D) and it issued a cease and desist order requiring the Plasterers to cease this activity and to post appropriate notices.

As indicated earlier, the court below refused to enforce the Board's order on the ground that the Board had no power to redetermine the dispute.

Now, as I indicated at the outset, the abstention clause in Section 10(k) comes into play when the parties to such dispute submit to the Board satisfactory evidence that they have adjusted or agreed upon methods for the voluntary adjustment of the dispute.

Now, Congress didn't define who the parties to the dispute were, and it didn't indicate whether "dispute" means the underlying jurisdictional dispute or it means the dispute and the jurisdictional strike, which has emanated from the dispute.

The court below construed the term "such dispute" to mean merely the basic work controversy, and it concluded that only the two Unions were parties to that dispute because, in the words of the court below, "the employer in a jurisdictional dispute is a neutral caught in the crossfire between the disputing unions, and unable to satisfy either; he cares not how the dispute is decided but wants merely that it be decided."

Now, we submit, therein lies the fundamental error in the court's reasoning; namely, that the employer is necessarily a neutral party to a jurisdictional dispute.

Q What is the language you've just quoted? You are

quoting from what, the CBS opinion of this Court or the Court of Appeals opinion in this case?

MR. COME: I'm quoting from the Court of Appeals opinion, Justice Stewart, at Record 375.

Q That's attached to your brief, too, isn't it? In the Appendix?

MR. COME: It's in the yellow or the buff-colored appendix; 375.

Q The court was relying on the opinion of this Court in the CBS case?

MR. COME: Yes, Your Honor. It purported to find support for its position in this Court's opinion in CBS, where this Court did refer to a jurisdictional dispute as a dispute between two unions. But we submit that no one would quarrel with that characterization as a general proposition. The issue in CBS was not this issue, this Court had no occasion to reach it, because in CBS none of the parties were bound by a voluntary method of adjustment; the only question was: conceding that the Board had power under Section 10(k), did it properly exercise that power when it merely rubber-stamped the employer's work assignment and did not undertake to consider all the other relevant factors.

And this Court said that the Board had to determine the dispute in the conventional way that an arbitrator would, by considering all the factors; and the Board certainly

complied with that obligation here.

Now, furthermore, in CBS you had a somewhat atypical situation in that the employer there employed both groups of employees: He employed stagehands and he employed the technicians.

In that sense -- in that kind of a situation, perhaps more so than in others, he's relatively indifferent as to which group does the work. That is not the typical case, nor is the situation here.

In the typical case, which is typified by the situation in the building construction industry, the employer's economic interests will be directly affected by the assignment of work and thus, in no meaningful sense, can he be said to be a neutral or indifferent as to its outcome. Indeed, John Dunlop, the first Chairman of the Joint Board, has stated,in a passage that we quote in our brief, the fact that some unions work exclusively as a matter of policy or custom for particular contractors tends to convert competition among contractors also into jurisdictional disputes between unions.

More accurately, the dispute is between a contractor and a union on one side against another contractor and union on the other. And this is certainly what we had in this case.

Indeed, in recognition of the employer's interest, the National Joint Board, from its inception, has included employer groups in its structure; and it has operated under

the explicit principle that an employer is not bound by its procedures unless he has specifically so agreed.

Turning to the facts here, neither Texas State nor Martini has a collective bargaining agreement with the Plasterers' Union, but both had one with the Tile Setters Union. Neither employed plasterers. An award of work to Plasterers would have required these contractors either to hire a new complement of employees, whom they believed were less skillful and whose rates were higher than those of Tile Setters, or to give up their subcontracts.

In these circumstances it can hardly be said that Texas State or Martini were neutral as to how the work assignment dispute was resolved.

Now, the court below supported its reading of the statute by relying on the fact that the employer is not bound by a Section 10(k) determination of the Board, ergo he's not a party.

Now, we submit, in the first place, that this fact doesn't lessen the employer's direct interest in the resolution of the dispute and relegate him to the status of a neutral "cares not how it is decided".

Furthermore, a Section 10(k) determination in favor of the striking union is enforcible against the employer in the sense that the union is free to bring strike pressure against him, because there is the -- there is an unrest clause

in Section 8(b)(4)(D) that excepts from the ban of 8(b)(4)(D) a strike where the employer is failing to conform to an order or certification of a board. So that if the striking union prevails in a 10(k) determination, the employer does not comply with the award and reassign the work to it, it is free to bring economic pressure on the employer.

So that in a very real sense there is pressure on the employer here to comply with the 10(k) award.

As a matter of fact, nobody is really bound in a technical sense by a 10(k) award, because even the winning union doesn't get the work in the sense that the 10(k) determination requires the employer to change his assignment. All that it does is to give him a right to bring economic pressure, as I have indicated.

Now, the third support, principal support for the court below's decision --

Q What does the 10(k) order say, by the way? I mean, what does the typical one say? Is it phrased in terms designating the bargaining representatives for the particular working man?

MR. COME: No. Well, let's look at the one here, which is set forth on page -- point 4 of the Appendix, where the Board says:

"Tile layers employed by Texas State and Martini Tile, who are represented by the Tile Setters, are entitled

to perform the work of applying the coat of Portland cement. Plasterers' Local is not entitled by means subscribed by Section 8(b)(4)(D) to force or require."

Q Well, is that the kind of an order that the unrest clause in (D) talks about? It talks about an order determining the bargaining representatives for employees performing such work. Is that a 10(k) order?

MR. COME: Yes. The General Counsel and the Board have so interpreted that as applying to a --

Q To a 10(k) order?

MR. COME: -- to a 10(k) order. Yes, Your Honor.

Q Because what they are really saying is, "Here's some work to be done, and the bargaining representative for that work is a certain union"? Is that what a 10(k) order says?

MR. COME: Well, the 10(k) order doesn't run to a particular union, because always you would get into trouble with 8(b)(2) and 8(a)(3). It goes to employees of the craft who may be represented by the particular union. It doesn't run to the particular union as such.

Q There is no -- nobody in this case disputes that unrest clause in (D) as referring to a 10(k) order?

MR. COME: Not to my knowledge, Your Honor.

Q Mr. Come.

MR. COME: Yes, Your Honor?

Q In the 10(k) proceedings --

MR. COME: Yes, Your Honor.

Q -- the employers were what, parties made so by the Board or were they intervenors?

MR. COME: They were parties of -- by the Board.

Q And yet there is no order that goes against the employers?

MR. COME: No, Your Honor, because the nature of the 10(k) proceeding is that it doesn't even go against the union, all it does is to make a declaration of who is entitled to the work and who is not entitled to strike for the work.

Q Why isn't the -- I gather the Board has always made the employer in the situation a party, has it, in the proceeding?

MR. COME: Yes, Your Honor.

Q By force of what?

Q Is it the employer who starts -- he has to file a complaint before the case is triggered, doesn't he?

MR. COME: Generally the employer has been the charging party. He doesn't have to be. It can be -- a charge may be filed by any person.

Q Here it was the employer?

MR. COME: Here it was the employer. In, I would say, oh, 90 percent of the cases it is the employer.

Q But I gather even if the employer is not the

charging party, the employer is made a party by the Board?

MR. COME: That is correct. And that flows from the general provision of the Board's rules which defines "party" as generally anyone who has an interest in the proceeding. So that the Board has, from the beginning, treated the employer as a party to a --

Q But in no case is the order different from the one that was entered in this case?

MR. COME: That is correct, Your Honor.

Q It simply designated the employees of the employers entitled to perform the work?

MR. COME: Yes, Your Honor.

Q If I may interrupt --

MR. COME: Yes, sir.

Q I know titles have very little significance, but the 10(k) title is "Hearings on jurisdictional strikes". There was never a strike here, was there?

MR. COME: There was, Your Honor, in the sense that the picketing is regarded as a strike. You had picketing by the Plasterers in both cases, to change the -- to get the work. And that would be deemed a strike. As a matter of fact, the operative part of 8(b)(4)(D) says: unfair to "engage or induce or encourage any individual to engage in a strike or a refusal in the course of his employment to work on any goods." And it --

Q In any event, you read no restrictive influence in the title?

MR. COME: No, Your Honor. Because I think that, in labor parlance, a strike and picketing are pretty synonymous.

Now, I was just going to say, in conclusion, that the court below found support for its position in the legislative history of 8(b)(4)(D) and 10(k).

Q Incidentally, may I ask --

MR. COME: Yes.

Q How long has the Board adhered to its interpretation of parties in this?

MR. COME: Since 10(k) was added to the statute in 1947.

Q And what was the first case under that?

MR. COME: The first case was a case called Westinghouse.

Q What year?

MR. COME: That was in 1949. 83 NLRB 477.

Q 1940 what?

MR. COME: 1949.

Q All right. And the Board adhered to that interpretation?

MR. COME: Yes, Your Honor. We have listed some of the cases in Footnote 6 at page 15 of our brief.

The court below, as I indicated, found support for

its position in the legislative history of 8(b)(4)(D) and 10(k).

We submit that its reliance is misplaced because, as Judge McKinnon pointed out in his dissent in the court below, Congress really did not focus upon this particular problem in the legislative history.

You will find statements in the legislative history describing a jurisdictional dispute as a dispute between two unions, which is a truism that nobody would seriously quarrel with; they have their origin in a dispute between two unions or between two employee groups, but it doesn't follow that the employer has no interest, certainly where, as must be the case before the Board can get into the act, he has been implicated by a strike or a strike threat.

Secondly, the court relies on the fact that Senator Morse, who proposed a 10(k) provision which, as he proposed it, gave the Board the alternative of either deciding the dispute for itself or appointing an arbitrator, which was taken out in conference, indicated that he felt that this would be inducement to the unions, as it was in War Labor Board days, to settle the jurisdictional dispute themselves. If you had hanging over them the club of government determination of the dispute.

Now, we submit there's nothing inconsistent between a desire to have the two unions resolve it for themselves on the one hand and, on the other, saying that if they're not

able to resolve it by themselves, a binding or final determination can't count if it excludes the employer. Which is the problem that we have here.

Thank you, Your Honor.

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

ORAL ARGUMENT BY WAYNE S. BISHOP, ESQ.,

ON BEHALF OF THE PETITIONER, TEXAS

STATE TILE & TERRAZZO CO., INC., ET AL.

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

In the few minutes that I have here I would like to emphasize two points of statutory language, which I think are relevant to support the determination of the Board here. As Mr. Come indicated in his argument, the real question here in terms of statutory language is: what did Congress mean by who are the parties to the dispute by which the unfair labor practice arose?

It is our contention that this dispute must have arisen out of the union's disagreement with the employer's work assignment, not just the union's disagreement with another union over who is entitled to claim this work.

I think this can be illustrated by the facts in this case in the Appendix, pages 17 to 19, the factual sequence is indicated.

The factual circumstance was that the respondent

union, the Plasterers' representative sought and demanded the work in dispute here in a series of meetings over several months, after the employer had indicated that he would assign the work to the Tile Setters. The Tile Setters were employees of this employer, who were members of the Tile Setters Union; the employer had no contract with the Plasterers.

There was no picketing over these several months while the parties discussed this.

Q And as long as that was true, no unfair labor practice complaint could be filed and no 10(k) proceeding could be started?

MR. BISHOP: That's right, not until the picketing occurred. And with regard to the question --

Q Let's assume the picketing does start, then --

MR. BISHOP: I think the question is: why does the picketing start? Then that explains who the dispute is really with.

The picketing starts because the employer has given an indication to the union, or the union has some reason to believe that the employer is going to assign the work in question to the other union.

Q And in that event is not going to assign it to the picketing -- the employees' representative of the picketing union?

MR. BISHOP: That's right, Mr. Justice Brennan.

Q But if, before the employer gets to the Board with a complaint, the picketing ceases although the dispute hasn't ceased, there can be no 10(k) proceeding?

MR. BISHOP: If there is no active picketing, I don't see how an 8(b)(4)(D) charge is filed.

Q Let's assume there is picketing and a complaint is filed, and the 10(k) proceeding is started and the picketing then ceases?

MR. BISHOP: I think it would depend upon what circumstances the picketing ceases. I think what --

Q Well, the parties say that there is no unfair labor practice going on, and there can't be any 10(k) proceeding. I mean the unions say that.

MR. BISHOP: If the unions at that point indicate that they have settled the dispute, if one union issues an indication that it has disclaimed any interest in the work, then the Board, under its Safeway doctrine, will not hold a 10(k) hearing.

Q Even though the employer objects?

MR. BISHOP: That's right.

Q Let's assume the --

MR. BISHOP: I think there has to be a disclaimer at that point.

Q Well, one union disclaims it, but the employer says, "I'm sorry, the disclaiming union is the union I want

to do the work."

MR. BISHOP: Right. If that --

Q Let's assume the Tile Setters in this case had disclaimed.

MR. BISHOP: If the Tile Setters do disclaim?

Q And the employer says, "I don't want the Plasterers, I want the Tile Setters."

MR. BISHOP: Then the Board dismisses the 8(b)(4)(D).

Q Well, then, how can it mean that "parties" includes the employer?

MR. BISHOP: Because the -- well, there's an indication to the statutory language, under 8(b)(4)(D), that Congress intended under similar circumstances that there would still be an 8(b)(4)(D). That is, by a change in the language in 8(b)(4)(D), where, under the Senate bill as it was originally passed, the Senate passed language that the dispute over the work assignment has to be between the two unions involved. In conference this was changed to make it broader than the two unions involved, but also the non-union employees of the employer. Under that --

Q I suppose if one union disclaims it, what that really means is that it's refusing to do the work?

MR. BISHOP: That really means that --

Q So why would the Board ever dismiss it?

MR. BISHOP: That really means that there is no active jurisdictional dispute, because the --

Q Well, there is. The employer wants the Tile Setters to do it, and the Tile Setters refuse to do it.

MR. BISHOP: But the --

Q Why do you apply the Safeway doctrine?

MR. BISHOP: Well, there really is -- the employer, under that circumstance, has the option of assigning someone else; he's not forced to assign it to the picketing union. He may assign it to other of his own employees.

But the absence of a claim under that circumstance means no 8(b)(4)(D). What would happen, if the employer does not want the Plasterers to do the work, --

Q Do you think that's very relevant, how you define "parties" then, under 10(k)?

MR. BISHOP: Well, I think not. Because I think what happens is the employer assigns work to whomever he wishes at that time, and the Plasterers then come back again.

Q Well, then, it's a question of the way the union -- the procedure then for the union. I mean instead of coming up on these facts, unions can always abort the 10(k) by one disclaiming, if they really settle the dispute. All they have to do is add one more step to their settlement, namely, A disclaims. In this case it has no importance whatsoever.

Q That simply means that there is no dispute existing, doesn't it?

MR. BISHOP: That's right. There's no reason to file an 8(b)(4)(D) at that stage; there is no dispute --.

Q It has been filed and the employer says the dispute is not settled, "I don't want the Tile Setters" -- "I want the Tile Setters not the Plasterers."

MR. BISHOP: But if the Tile Setters don't want the work, I think there is no basis under which Congress or the Board could force the Tile Setters to take that work. And the employer then is at his option, he may assign it to another group. The Plasterers come back and pickets at that time. This group does not complain. We have our 8(b)(4)(D) and our 10(k) determination.

Q Then the power to moot the 10(k) proceeding is in the two unions?

MR. BISHOP: The power to moot the 8(b)(4)(D) also, but it does not moot it in terms of the employer ultimately. The employer can still assign the work according to his choice, and we then go back to the same proceeding again.

Q Thank you.

MR. BISHOP: But the --

Q Going back to this illustration, if the Tile Setters simply refuse to do the work by disclaimer, there isn't any power in Congress or the employer or anyone else to

make them do it, is there?

MR. BISHOP: I think not. I think this is with regard to the question Justice Brennan asked earlier, and this --

Q Then your dispute is evaporated.

MR. BISHOP: I would agree, Mr. Chief Justice, and I think the --

Q Could he fire them for refusing to do the work?

MR. BISHOP: They are employees of his, I think he possibly could, as long as there is not some discriminatory motive, or anti-union discriminatory motive, I think that would be a basis under which he could discharge employees for failing to carry out the work assignment. If they then --

Q Anyway, you do agree, then, that the unions do have power to dissolve the entire 10(k) proceeding by agreement and a disclaimer?

MR. BISHOP: Right. I agree with the Board's Safeway doctrine, but I don't think it's entirely controlling under the circumstances here. I think the language of 8(b)(4)(D) shows this. Because Senator Taft, in the conference agreement he explained to the rest of the Senate that the intention in changing the language of 8(b)(4)(D) was to permit the same statutory protection when an employer assigned work to his own non-union employees as when there was a two-union dispute over the work.

Under this circumstance it seems quite indicative that Congress meant that that would be a dispute, essentially between the union and the employer. It's not an interunion dispute, you see. They are not two quarreling unions under that circumstance.

The Congress must have meant, under that circumstance, that the Board would be a party to a 10(k) hearing because there would be -- a 10(k) hearing would not have much relevance to a reasonable determination if only the one union was there presenting their position; the unrepresented, the non-union employees would not have a power under their own resources to represent themselves. The employer would be the party there in the 10(k) hearing representing the work assignment.

We think this is a very strong indication of intent on the part of Congress to make the employer a party to the dispute.

I would like to make one comment with regard to the question that Justice Brennan was asking about with regard to the Board not binding the employer in the 10(k) award. I think this ties in entirely with the entire scope of the Act, whereby Congress has intentionally kept the NLRB and the government out of the substantive terms and conditions of employment.

I think this is further indication, what Congress did in 10(k), they could have given the Board authority to

issue a 10(k) order which would have bound the employer and the union. That would have made a compulsory arbitration or determination. But Congress decided not to do that. They bound neither party. All they did was restrict what circumstance you could have to picket over this.

This ties in entirely with Congress' entire approach to the Act --

Q Just a moment, Mr. Bishop. The issue before us, as I understand it, is whether the Board should have abstained under the abstention provision, isn't it?

MR. BISHOP: That's right.

Q So the questions that Mr. Justice White is putting to you I suppose don't go to that, do they?

Actually, whether or not the proceeding is aborted, whether or not it's terminated, whatever the case may be, the issue we have to decide is whether the Board properly initiated the proceeding in the first instance. Isn't that right?

MR. BISHOP: When it went to the Labor Board.

Q That's right.

MR. BISHOP: Yes.

Q But if the unions in settling the dispute had said -- had also said "And Union A disclaims" there would have been no basis for instituting the 10(k) proceedings.

MR. BISHOP: That's right. Or the 8(b)(4)(D) charge.

In that regard, Justice White, I think it's important that some of the cases that are cited in the --

Q Well, would it ever damage one of the unions to -- if they really settled the dispute -- to also disclaim? Why wouldn't the union against whom the settlement operates always be willing to disclaim, if there's really a settlement?

MR. BISHOP: Through the Joint Board procedures?

Q If they are bound by it and there's nothing they can do about it, if they've agreed to it, and it's really settled, how would it ever damage the union to just go ahead and say "We disclaim"?

MR. BISHOP: If they disclaim the work and the work is assigned to the other union, you say the losing union, under a 10(k)?

Q Well, if there's a settlement, the unions settle between themselves who is going to get the work; is that right?

While the union that isn't going to get the work, I would think would always be willing to disclaim, and abort any possibility of an unfair labor practice proceeding or a 10(k) proceeding.

MR. BISHOP: Well, the union who did not get the work under that circumstance, if he does not adhere to their settlement, for reasons of his own, then has the opportunity, if the case does go to the NLRB, of having the Board decide

that he's entitled to the work.

Q What that means, then, is that the case really isn't settled. I mean it hasn't really been settled between the unions.

MR. BISHOP: It has not been ultimately settled. Right. I think that's more a problem of the voluntary settlement procedure having provisions for enforcement of their decisions, among those parties. It doesn't really relate to the Board's opinion.

Q I don't know, Mr. Bishop, I still don't understand why you don't answer Mr. Justice White, whatever may be the case that is settled. That isn't what we have here. What we have here is whether the Board properly proceeded in the facts of this case or whether the abstention clause --

MR. BISHOP: I'm sorry.

Q -- precluded the Board from moving. Isn't that all we have?

MR. BISHOP: Yes, I'm sorry, Mr. Justice Brennan, I thought I had done that. I have no quarrel with the Safeway decision at all. I think it's in the absence of active claims for the work, the Board does not proceed on an 8(b)(4)(D) or a 10(k) charge.

Q In this connection, Mr. Bishop, what was the practical result as to this job in Houston, or these jobs? Who did the work down there?

MR. BISHOP: The practical result was that the Tile Setters, who were the -- or the employees represented by the Tile Setters did the work. They were the employees of the contractor, and they received the assignment of the NLRB.

Q Well, does this tie in to Justice White's comment, then, that there really wasn't a settlement between the two unions?

MR. BISHOP: There was not a binding settlement between the two unions.

Q Despite what the Joint Board --

MR. BISHOP: The Joint Board issued its determination, but one of the unions did not follow the Joint Board's determination.

My time has expired.

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

Mr. Capuano.

ORAL ARGUMENT OF DONALD J. CAPUANO, ESQ.,

ON BEHALF OF PLASTERERS' LOCAL UNION NO. 79

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

The Board, in its argument, right at the conclusion, mentioned, in answer to a question, 23 years of NLRB precedent which is involved in this case.

It is certainly true that this decision, or the Board's position in this issue has been followed for 23 years.

However, I think it's fair to state that there is more reasoned analysis in the decision of the Court of Appeals, which is on review here, than there is in the sum total of every case the NLRB has decided this issue in 23 years. The NLRB simply has refused to analyze its position, the legislative history, this Court's decision in CBS, simply, as one of the petitioners states in his brief, couches its decisions in statutory terms, always denying the voluntary adjustment procedure any credibility when the two unions or the two labor groups are bound.

Q Well, isn't it correct that the courts have historically allowed the Board, with its presumed expert experience, wide latitude in dealing with the practical aspects of these things?

MR. CAPUANO: I think, Mr. Chief Justice, the courts have allowed the Board wide latitude in dealing with practicalities. But I think what we're dealing with here is policy, policy that Congress set down in Section 10(k), and therefore the Board does not have the latitude it would if it was simply applying a mechanical doctrine.

Q Well, as a practical matter, then, I take it you disagree with the statement of the Court of Appeals that the employer is just an innocent bystander who doesn't care one way or the other about the outcome of the jurisdictional dispute?

MR. CAPUANO: No, I agree with that statement because I believe what Judge Leventhal was stating there is what the legislative history reflects, and that is that this section of the Act, and has this Court has said, in fact the whole dominant theme throughout Section 8(b), 8(b)(4) is to protect neutral employers.

Just last term, as a matter of fact, in the Local 825 Operating Engineers' case, at 400 U.S., this Court again reiterated what it said in National Woodwork, and we believe it was actually affirming, reaffirming what it said in CBS. The protection of this section of the Act, 10(k) and 8(b)(4), is to protect an employer's neutral interest.

Now, Judge Leventhal recognized, and we certainly have conceded in our brief, that there are employers who have preferences. Of course there are, no one would deny that. And Judge Leventhal recognized it.

But the Act, this particular section of the Act, or these two sections, were not designed to protect that preference. They were only designed to protect the neutrality of that employer when he's caught between the two warring unions.

Now, he may also have a preference, but he can support that preference once the 10(k) decision is decided, or the two unions agree voluntarily, then one union goes back to deal with the employer, and at that point, under the whole structure of the Act, his economic interest can be protected

by self-help. And we believe that's exactly what Judge Leventhal was saying, and that is exactly the intent of the whole Act.

Q But in this case the Plasterers weren't working there at all.

MR. CAPUANO: Oh, yes, Justice Marshall, the Plasterers were working there for a plastering contractor. They were on that job. In fact --

Q They were on that job?

MR. CAPUANO: They were the ones who put the scratch coat, which is the preliminary coat, on the wall, after while the Tile Setters came and put their float coat on.

Q They were regular employees of the contractor?

MR. CAPUANO: Well now, they weren't regular employees of the tile setting contractor, they were regular employees of the plastering contractor, who also had a sub -- yes -- who also had a sub- --

Q Then they weren't employees of the tile setting contractor?

MR. CAPUANO: No, sir. That is correct.

Q So would the subcontractor have an interest in protecting his own employees --

MR. CAPUANO: Yes, sir, he has an interest --

Q -- outside, with the local?

MR. CAPUANO: He has the interest, but Congress --

Q But that's not sufficient, then?

MR. CAPUANO: No. I say that Congress said in the 10(k) proceeding that isn't where his interest was going to be protected. His interest was going to be protected after the two unions had settled between themselves this dispute, and then one union would go back and deal with the employer. I mean, his interest is being protected in this manner, just as if his tile setter employees, during the course of that job, said they wanted 20 cents an hour more.

Q I just think, in view of this, that the employer -- the last thing he'd want would be one more union to deal with. Am I right?

MR. CAPUANO: That may very well be the case, yes, but that is not the interest that Congress said should be protected. Because, you see, Justice Marshall, if Congress had wanted to give him that sort of protection, they would have drafted 10(k) so that he was bound by the decision.

As it stands now, under Section 10(k), the employer can demand a Board hearing, he can demand a Board hearing -- I mean a Board order which is going to bind the union, but which then the employer can completely ignore.

Now, we think if Congress wanted to do what you suggested, they would have said, "All right, Mr. Employer, you are now going to be bound by this 10(k) award." But Congress was not about to adopt any form of compulsory arbitration

binding the employer and the union in the Act.

Now, we think that the language of Section 10(k) supports our position very clearly. The last sentence states, and we have quoted it in our brief on page 8 -- and our brief is the red one -- "Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

Well, as I just indicated, the employer doesn't have to comply with the decision at all. If the two unions involved comply, the charge is going to be dismissed, the employer can go on making the assignment as he pleases.

Now, clearly, if the employer doesn't have to comply, certainly the words "parties to the dispute" in that last sentence cannot include the employer.

The first sentence also uses the same phrase, "parties to such dispute". There again, if in the last sentence it means only the disputing unions are labor groups, we submit it cannot mean anything differently in the first sentence. But, more importantly, the first sentence, with regard to the word "dispute", states -- and we have this quote at page 10 of our brief -- "The Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen."

Now, the Board, in its brief and argument, has said, well, the dispute there means a jurisdictional strike.

Well, we submit the dispute cannot mean the jurisdictional strike; that the jurisdictional strike is the unfair labor practice. And if you made a substitution of terms in that very sentence, it would read that the Board is empowered and directed to hear and determine the dispute out of which such strike arose. The strike is the unfair labor practice.

And I think a short analogy would be in a discriminatory discharge case. That's an unfair labor practice. The discriminatory discharge itself is the unfair labor practice. The unfair labor practice doesn't arise out of the discriminatory discharge, and we simply cannot understand the basis of the Board's argument that the strike equals a dispute.

We also believe that this Court, in CBS, answered that question, and in answering that question it was a necessary predicate to the Court's decision in CBS. Because -- I think I should go back a little bit prior to CBS, to recall just what the Board was doing.

For 13 years the Board, when it held a Section 10(k) case, was simply determining the validity of the jurisdictional strike. The Board would state in its decision whether the striking union was entitled to the work because of an outstanding Board order, certification, or collective bargaining agreement. If it wasn't, then the employer's assignment was affirmed every time.

Therefore, the Board was equating the dispute that it had to determine with the validity of the jurisdictional strike.

When the case came to this Court, Justice Black, writing for the unanimous Court, very clearly and necessarily determined what the word "dispute" means in 10(k). And if I may quote him -- and this is at the bottom of page 14 of our brief:

"And the clause 'the dispute out of which such unfair labor practice shall have arisen' can have no other meaning except a jurisdictional dispute under Section 8(b)(4)(D) which is a dispute between two or more groups of employees over which is entitled to do certain work for an employer."

Now, we submit --

Q It doesn't say that's the only thing it is. That is a statement of an obvious truth, that the dispute is what you have just read. But it doesn't say that that's all it is, that that's the only way you can have a dispute, does it?

MR. CAPUANO: I believe, Mr. Chief Justice, that the way it is written, referring specifically to the clause in Section 10(k), that he's clearly talking about the use of the term in 10(k).

Now, of course, in another situation not involved

with 10(k), dispute may mean something else. But this is why we believe that this question, as to what dispute means in 10(k), has been settled, because the Court there was specifically referring to 10(k).

With regard to the voluntary adjustment or abstention provision of 10(k), this Court in CBS also made reference to it and explained that the Board, in the case before the Court then, had to hold a 10(k) hearing because -- and I'm paraphrasing the Court -- because the two unions, the Technicians and the Stagehands, were not able to settle their dispute.

The Court stated -- and again this is quoted on page 14 of our brief -- "Section 10(k) offers strong inducements to quarrelling unions to settle their differences by directing dismissal of unfair labor practice charges upon voluntary adjustment of jurisdictional disputes." Close quote.

The Court of Appeals here recognized that once it is determined what dispute is covered by Section 10(k), the parties to the dispute, for the purposes of the abstention provision, necessarily means the two disputing labor groups or unions. It can have no other meaning.

Now, we rely, of course, as I've stated, on CBS, and we submit that this Court, in CBS, relied upon the legislative history of this Act and the thrust of the Act. The Court went into the legislative history rather thoroughly,

and, while we don't think a reanalysis is necessary here, I think briefly I would like to say a few words about the legislative history.

The House bill that was introduced in 1947 did not contain any provision similar to Section 10(k). Section 10(k) was introduced in the Senate by Senator Morse. Fortunately, in this particular situation, we have a very clear statement as to where the idea for Section 10(k) developed.

Senator Morse explained in the legislative history that while he was a member of the War Labor Board, one night a very serious jurisdictional dispute occurred between two unions, which resulted in a work stoppage. Senator Morse stated that the War Labor Board called the unions together and they told them to get the men back to work or, if they didn't, the War Labor Board was going to appoint an arbitrator to settle the dispute.

Now, the only fair reading from this point of the legislative history is that the two unions got together and settled the dispute. Because there is somewhat of a gap there, Senator Morse simply goes on to say the men went back to work.

But I think the only fair reading is that they got together, settled the dispute, and the men went back to work.

But, in any event, Senator Morse then went on to explain that he decided the War Labor Board ought to have a policy, to avoid these situations in the future. So he proposed

a resolution which became that policy, which said to the two unions involved: You have 24 hours to settle the jurisdictional dispute without economic action; and if you don't, we are going to appoint an arbitrator to settle it for you, and it's going to be binding on you.

And, as he explained, he wanted to get the same incentive into the Act; and that's why he proposed Section 10(k), which was adopted almost completely the way he proposed it. There is only one deletion and that is that Senator Morse proposed that if the two unions or -- excuse me -- if the parties, in the language of the statute, could not agree upon a settlement of the dispute the Board could hear the dispute itself or the Board could appoint an arbitrator to hear it.

The provision allowing the Board to appoint an arbitrator was deleted. It was deleted without comment in the conference.

But we submit that we had a very clear statement from Senator Morse as to what the reason for Section 10(k) was for being put into the Act, or being proposed. Other legislators, Senator Murray for example, also echoed his hopes that this provision, Section 10(k), would encourage unions to set up machinery to settle jurisdictional disputes themselves before governmental action was necessary.

In effect, then, Congress established a scheme for the settlement of jurisdictional disputes, which resulted in

work stoppages, which we think is clearly discerned from the statute and the legislative history.

It's got four steps.

First, there's a jurisdictional dispute between two unions, which results in a work stoppage. Congress said that work stoppage is going to be halted by a 10-hour injunction. § 10(ℓ)

Second step: Congress proposed 10(k). It said in Section 10(k) we're going to have an opportunity for the two unions to get together and resolve their dispute. The abstention provision.

Step three: If the two unions or labor groups can't resolve their dispute themselves, then the NLRB is going to have to make a binding determination of that dispute in the 10(k) hearing.

Step No. 4: Out of the voluntary mechanism, or out of the 10(k) hearing before the Board, one union will prevail. One union will go back and deal with the employer, will negotiate. Each will be able to use their own economic weapons at that point. Congress was not imposing substantive terms on either the unions or the employer. Congress recognized that what it wanted to do was to protect the neutral employer, the employer caught in the middle, the helpless victim between the two warring unions. The legislative history, beginning even with the House statements and the House report, all show that Congress was concerned about the neutral

employer, the innocent victim of the warring unions, the helpless victim caught between these two unions. And, as Justice Black said in CBS, the employer who is caught between the Devil and the Deep Blue.

That was the interest that Congress was trying to protect. That was its policy. Of course the employers may have a preference, but Congress did not grant, in Section 10(k) or 8(b)(4), protection of an employer's economic interest. Congress reserved that issue to the normal prophesies of collective bargaining.

And we submit that what the Board is trying to do here is establish its own policy as to the relative economic strength between an employer and a union dealing over a work assignment controversy.

But we submit the Board doesn't have that right when Congress has laid down that policy.

Now --

Q Well, the Board can't compel the employer, though.

MR. CAPUANO: That's --

Q Even if it settles the 10(k), even if the Board's power is upheld in this case.

MR. CAPUANO: That's precisely one of our main arguments in support of our position, that the Board is not carrying out its duty simply for that reason, that the Board

cannot force the employer to do anything. And this employer can ignore the voluntary procedure that the two unions have entered into. They can agree to the Joint Board or some other procedure. The employer --

Q But there wouldn't be a problem here if one of the unions were to obey the Joint Board.

MR. CAPUANO: Mr. Justice White, the policy or the rule that the Board is following here is discouraging unions, it's discouraging employers from joining into these groups.

Q Well, isn't it correct that if the Tile Setters would disclaim the work, the whole proceeding would be aborted?

MR. CAPUANO: Under the Board's Safeway doctrine, yes, sir, that is correct.

Q Well, then, why doesn't the Tile Setters do it?

MR. CAPUANO: Because of the policy that the NLRB is following, that we're trying to get reversed in this case.

Q I know, but the Tile Setters, what they're saying is that "we did have a voluntary way of settling our dispute through the Joint Board, but we just won't comply."

MR. CAPUANO: They said they won't comply because the employer isn't bound, and that we know that if the employer isn't bound, the NLRB --

Q I don't care for whatever reason it is, the employer is never bound, whether there is a hearing or not. And so I don't know what kind of an argument that is.

MR. CAPUANO: Well, the argument runs like this: We won't comply because the employer isn't bound. We know that if the employer isn't bound to the voluntary adjustment, the NLRB will hold a 10(k) hearing.

Q Then the employer still won't be bound.

MR. CAPUANO: No. But we have a second bite at the apple to get the work.

Q But, nonetheless, the union is not complying with the Joint Board determination.

MR. CAPUANO: Absolutely.

Q And if it did, and disclaimed, there would be no 8(b)(4)(D) and no 10(k) proceeding.

MR. CAPUANO: That's correct.

Q Now, so what we really have here is a situation where not only the employer has not agreed to the settlement, but one of the unions has not.

MR. CAPUANO: Only as a result of the Board's policy, yes, sir.

Q Now, wait a minute, if the union -- if one of the unions, if the Tile Setters really would comply with the Joint Board determination, there would be no dispute here.

MR. CAPUANO: That's correct.

Q The fact is that they will not disclaim, they are still claiming the work, and so they -- there just isn't any voluntary adjustment yet.

MR. CAPUANO: Yes, but --

Q Even between the unions.

MR. CAPUANO: No, sir. We believe there was a voluntary adjustment when they agreed to the Joint Board and decision was issued, they are only refusing to comply because they know they can get another --

Q But they are refusing to comply, and are still claiming the work?

MR. CAPUANO: Yes, sir. But I think it goes somewhat in a circle. If the Board was not following the policy or rule which is in issue here, there would simply be no reason for the Tile Setters not to comply because they would know that the NLRB --

Q Oh, yes, there would still be. They could still refuse to comply, and they could still strike. They could still picket.

MR. CAPUANO: Not if they lost, as they did before the Joint Board. They could not. That's the point I'm making.

Q Why couldn't they?

MR. CAPUANO: Because the NLRB would then seek an injunction against them, presuming a charge is filed against them.

In other words, once they know that they can't get a second bite at the apple before the NLRB --

Q What would be their unfair labor practice?

MR. CAPUANO: Striking to force the change in the assignment of work, contrary to a Board order.

Q Well, it wouldn't be contrary to a Board order.

MR. CAPUANO: Yes, because the Board order was to the Plasterers. In other words, the employer --

Q I don't mean -- I mean the Joint Board, let's assume the Joint Board -- the Joint Board gave it to the Plasterers, right?

MR. CAPUANO: Yes, sir.

Q Now, the Tile Setters didn't comply.

MR. CAPUANO: That's correct.

Q Now, if the Board gives it to the Plasterers --

MR. CAPUANO: You mean the NLRB?

Q NLRB?

MR. CAPUANO: Yes.

Q -- gives it to the Plasterers, then the Tile Setters are bound.

MR. CAPUANO: Yes, they're bound in the sense that if they struck --

Q They would be in an 8(b)(4)(D)?

MR. CAPUANO: Yes, sir; that's correct.

And the only reason they are refusing to be bound by this Joint Board is that they know they can get a second bit of the apple. The employer refuses to be bound by the voluntary mechanism because he knows that he can wait to see

how the voluntary adjustment will work out. If his preference isn't sustained there, then he knows he can demand a 10(k) hearing before the NLRB; and if his preference isn't sustained there, he can completely ignore both proceedings and go his own way.

Q Now, really what you're saying is that -- of course, for this proviso to be applicable, you have to assume there's been a settlement or a method for settlement.

MR. CAPUANO: You mean the abstention provision?

Q Yes.

MR. CAPUANO: No, the abstention provision comes into effect if the parties have agreed --

Q Well, if the Board has satisfactory evidence that they have adjusted, or agreed upon methods for a voluntary adjustment of the dispute.

MR. CAPUANO: That's right. Then the Board won't hold a 10(k). The Board will dismiss the charge when there's been compliance with the adjustment.

But, as Judge Leventhal pointed out, stability is maintained because during this period a 10(l) injunction is in effect, which is obtained by the Board as soon as the 8(b)(4)(D) charge is filed. So the whole scheme of the statute --

Q But you're saying what the Board must do is to recognize the fact that there has been a voluntary adjustment

here in the sense that the Joint Board has determined the dispute?

MR. CAPUANO: Yes, sir; that's correct.

Q And that the Board must recognize that one union is bound by it -- I mean that both unions are bound by it?

MR. CAPUANO: Yes; right, Mr. Justice White. That's correct.

Q But both unions, I gather, are not bound by it?

MR. CAPUANO: Well, both unions are affiliates to the Building and Construction Trades Department.

Q But what I don't quite understand, as I gather your argument, is agreed upon methods for the voluntary adjustment. Certainly they've agreed upon a method.

MR. CAPUANO: That's correct.

Q And the dispute has been submitted to the Joint Board and it's decided it, and the loser refuses to be bound. Is that what that means that --

MR. CAPUANO: He refuses --

Q -- that satisfies him?

MR. CAPUANO: He refuses to --

Q For whatever reason he does. Is his position satisfied merely because they've agreed upon a method?

MR. CAPUANO: Yes, sir, it is. The Board, in many cases, has held that the Joint Board is a method for the settling of disputes.

Q It isn't very effective, then, is it?

MR. CAPUANO: It would be effective but for the rule of the Board in this case, Mr. Chief Justice; because then there would simply be no reason for a union not to comply, because it knew it was not going to get its second bite at the apple with the NLRB. And with the record of the NLRB, we submit that the losing union before the voluntary procedure many times is encouraged to seek the second hearing before the NLRB, where perhaps the employer's preference would be upheld.

Thank you.

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

Mr. Gold.

ORAL ARGUMENT BY LAURENCE GOLD, ESQ.,

ON BEHALF OF AFL-CIO, AS AMICUS CURIAE

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

In light of the excellence of the opinion below, which sets out all the affirmative points upon which --

Q It's always easy to say that when you've won, isn't it?

[Laughter.]

MR. GOLD: Yes. Well, there are times, although --

Q If you had lost you wouldn't feel that way about it.

MR. GOLD: Well, there are times, Mr. Justice

Brennan, when an advocate is upset about the way he's won below, he's been brought up here and he has the feeling that, due to certain deficiences in the opinion below, he wants to duck it.

But I want to make it most emphatically clear that we are not in that position this time. It's a happy exception.

And we do most heavily rely on the opinion below which shows that all of the accepted indicia of ascertaining Congressional intent, the language and structure of the particular provision, the over-all structure of the Act, the legislative history, and this Court's precedents, all support our position.

Q All of which overrides 23 years of administrative interpretation.

MR. GOLD: We do believe so. Thirteen years --

Q It's been a long time since that's happened, hasn't it?

MR. GOLD: Well, it's been ten years. Last time it took 13 -- last time it was the unanimous opinion of this Court which overruled 13 years of administrative action, which the Board claimed had amalgamated its reading --

Q What case was that?

MR. GOLD: CBS, sir.

Q What's your view of why this abstention provision is triggered here? Where a union has apparently agreed

upon the method for settlement, then repudiates its entire undertaking, and still insists on having the work. Why, then, is this abstention provision triggered, when not even one of the unions wants -- when one of the unions hasn't agreed on the assignment?

MR. GOLD: As we read the statute, Mr. Justice White, -- and the language is on page 3 of the Board's brief; I guess that's what we've all been referring to --

Q Yes.

MR. GOLD: -- the Board is instructed to defer when it receives satisfactory evidence that they, the parties, have adjusted or agreed upon methods for voluntary adjustment of the dispute.

The statute doesn't merely say that there has to be an adjustment which leads to a disclaimer. That is one situation, and that's the situation which the Board recognizes --

Q Well, I agree, but apparently one of the unions has not only repudiated his agreement to abide by the adjustment, but have repudicated the method of adjustment.

MR. GOLD: No, they haven't repudiated the method, they have said that in light -- they have the work in their hands, and they say they are not going to disclaim and leave it alone at this time.

Q Well, "we're still going to claim the work, regardless of the method that we previously agreed on", which

seems to me a repudiation of the entire procedure.

MR. GOLD: Well, I don't think so, because -- it may be repudiation, but it's one that's correctable in light of -- we believe in light of Section 301, which applies to agreements between unions. But what you have is --

Q You mean the Joint Board -- a determination pursuant to the agreement to submit to the Joint Board would be enforcible under 301?

MR. GOLD: Yes, I believe so. As an arbitral award, there is a Seventh Circuit decision involving a Textile Workers --

Q Has that been tried?

MR. GOLD: Yes.

Q An agreement between two unions?

MR. GOLD: Yes. There are decisions holding that agreements between unions to submit this type of dispute to arbitration are enforcible or --

Q Well, why isn't that kind of an issue, then, -- why isn't that kind of an issue a proper one for the -- for enforcement?

I mean, I have the end result of such enforcement proceedings, the disclaimer.

MR. GOLD: Well, it would be. But you have problems of -- well, he would be, it would be a judicially required disclaimer; but what you have is, as long as the Board continues

on its policy of not recognizing the award, you have a practical point. The union which prevailed before the Joint Board is barred from using economic force; therefore, --

Q Tell me, if the union that prevailed may resort to 301, that's the only party to the agreement that could resort to 301, isn't it?

MR. GOLD: Yes. I think so. The party that prevailed would be --

Q In this instance only the Plasterers then could resort to 301?

MR. GOLD: That's correct. The only one with an interest could.

Q But the employer couldn't?

MR. GOLD: No, because he wouldn't be a party.

Now, there are situations in which employers are a part of the mechanism, and, as Judge Leventhal pointed out in his decision, where that happens then everybody is in, and the whole matter is resolved.

But this statute, in 10(k), is only designed to regulate the use of economic force in situations where there has been a dispute which has ripened into a jurisdictional strike. At that point, under Section 10(l), the Board comes along and gets an injunction. It then holds the 10(k) hearing. At the 10(k) hearing it determines which union is to be allowed to use economic force.

That is what the statute does. It is drawing out the interunion dispute and, as Mr. Capuano put it, stating which party will come back, will be allowed to use economic force. That is the only effect.

And that's why we think the government's argument that 10(k) is meant to settle jurisdictional strikes is wrong. It is not. That's exactly the argument that was made in CBS, that because the employer isn't affected by the 10(k) award they have to give the work to the union that the employer wants to give it to. But that is not the point of the statute.

This part of the statute, as all the other parts, are consistent with what this Court has emphasized, from insurance agents through American Ship and, most recently, in H. K. Porter, that where you have an economic issue the parties are to work that out. And therefore Congress, in line with the whole scheme of 8(b)(4)(D), as you point out, Mr. Justice Brennan, in National Woodwork, only protects employers in the position of neutrals.

We're not arguing here that the employer doesn't have a preference. As a matter of fact, this isn't a fact question. We recognize that employers may have a preference as a matter of fact; but the only thing that has been protected is their interest in being free of the conflicting claims of disputing unions. Their only --

Q In other words, the question before us; isn't it?

MR. GOLD: Well, as I said, Mr. Capuano has tried to spell out our affirmative arguments and, as I say, we think they have also been spelled out fully by the court below. I'm saying that we believe that every one of these indicia points to the fact that employers in the positions of neutrals, that the interest in neutrality or the interest in being free of competing claims, is the only one protected.

And, as I say, we rely on the language of Section 10(k), which would be nonsensical, since it talks about compliance with the award if parties included employer, it is shown by the whole structure of 10(k) which only deals with the use of economic force. It's shown by the whole structure of the Act, which says that,except when the employer is in the position of a neutral, economic matters between he and unions are to be settled by the parties through economic force.

And it's shown by the legislative history, which is indicated in page 16 of our brief, where every comment made indicated that Congress was focusing on the situation of an employer who's a helpless victim, who's caught between unions.

And there isn't a single indication, and we believe you would need the strongest indication, in light of the whole structure of the Act, there's not a single indication that this was a provision to pull the economic chestnuts out of the fire of an employer who had a particular preference.

Q Mr. Gold, on that I gather your whole argument

really comes down, for all the reasons you've suggested, that in this case there was a method agreed upon.

MR. GOLD: Yes.

Q And that's if there exists an agreed-upon method; and that ends the case.

MR. GOLD: Yes.

Q And that whether or not the method is in fact employed -- suppose it's not employed at all?

MR. GOLD: No. I think that the parties have to --

Q They at least have to employ it; is that it?

MR. GOLD: Well, you have to give satisfactory evidence that they have adjusted or agreed upon method.

Q All right. It's an agreed-upon method, but it must be at least employed by --

MR. GOLD: Yes, I think somebody would have to make a claim and get a -- in the process of getting a decision.

Q All right. But you stop short, that's as far as you would go. Then it's resorted to, and the Joint Board decides it, and the losing union repudiates the agreement; and you say that's immaterial. Nevertheless, as far as the statute is concerned, the Board has no jurisdiction.

MR. GOLD: Right. And of course at that point there is a method of assuring -- the statute provides methods. Again, as Judge Leventhal points out, the statute provides a method of assuring that the employer will not be caught between

those two unions. The losing union can be subjected to the judicial -- can be brought to a judicial tribunal to correct its -- the error of its ways.

Q The Board's answer is that there is another party, the employer; but if the Board, even if the employer is a party, dismisses the proceeding and there's a disclaimer, I would think you would say -- which you do, I take it -- that when there's a binding method agreed upon, the Board should recognize that it is binding on the parties and it should be therefore equivalent to a disclaimer.

MR. GOLD: Right.

Our argument, very simply, is that when the Board --

Q Even if the employer is a party, I mean.

MR. GOLD: Right. We're saying that where the Board, under its so-called Safeway doctrine, dismisses on a disclaimer, it's giving effect to the language "the parties have adjusted". And we're saying what they're failing to do here --

Q Yes, and then you wind up by saying that it's not for the Board -- for the cease and desist order that brings the repudiating union in line, it's some other method of enforcement.

MR. GOLD: Right. Right.

Q Under 301 or, I take it, a State proceeding or something?

MR. GOLD: Well, I think it would be 301. But I would point out that the Board plays a role, and they admit it in Footnote 21. What happens is, if you have a repudiating union, that union cannot utilize economic force, because the Board treats its order of dismissing the proceeding, or quashing the hearing, as a Board order, and treats the losing union as if it had lost before it. And if that losing union ever tries to use economic force, it will get a 10(l) injunction against it.

Q Well, it would have to be a new proceeding, though, wouldn't it?

MR. GOLD: No. There would be an 8(b)(4)(D) charge against that union, the losing union.

Q Another charge?

MR. GOLD: Yes.

Q Well, why is that? They wouldn't be striking contrary to an order if it's just a dismissal on the grounds that there is no longer the basis for a 10(k) proceeding.

MR. GOLD: Well, as I say, the Board takes the position, and I think it has to because the whole purpose of the statute would be undermined, that the dismissal is the equivalent of an order; and that somebody who -- a union which strikes after a dismissal on the ground that there has been a settlement is striking contrary to a Board order.

Because the whole purpose, as Senator Morse explained

it, as we note in the introductory section of our brief, the whole problem here, prior to 10(k), was that there were union methods of settlement which Congress wanted to encourage, but which didn't work where a union had a great deal to lose. They would defy the tribunal. That was before 301, as well, since this was in 1947.

Q Has there ever been a 301 proceeding to enforce one union --

MR. GOLD: There are some 301 proceedings pending, as I --

Q Has any one come to decision?

MR. GOLD: I'm not aware that any has come to decision. I would point out, as I indicated, that on the -- in the brief in opposition, the case of United Textile Workers versus Textile Union of America, 258 Fed 2d 743, is cited; and that is the case holding that an arbitration to decide if a dispute between two unionts is enforcible under 301.

But, as I started -- just to conclude the thought I was on: The whole theory of the statute would be undermined if an order quashing the hearing was not an order for the purposes of 8(b)(4)(D), because, as I started to say, you had unions which wouldn't comply because it hurt too much. Then they would try to use economic force. And the whole purpose of 10(k) is to put a final spur into -- is to give an impetus

to compliance by taking away the right of the losing union to use economic force.

And once that's taken away, that union is in very --

Q Well, when there's a disclaimer and the Safeway doctrine is applicable and the proceeding dismissed, is that dismissal order the -- would the dismissal order be a basis for a charge, if the union repudiated the disclaimer?

MR. GOLD: Yes, Your Honor. That is the law cited under Footnote 21 of the Board's brief.

And I would just note again in conclusion that the striking thing about the Board's presentation is that it makes no affirmative argument. It doesn't point to a single basis in the statute. Every argument is based on the notion that the employer has an economic interest.

And our answer to that is: that was not a protected interest, so far as Congress was concerned.

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

You have four minutes left for rebuttal, Mr. Come.

REBUTTAL ARGUMENT BY NORTON J. COME, ESQ.,

ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

MR. COME: Thank you, Your Honor.

I think that when all is said on the other side we come back to what, in our view, is really the central question here; namely, whether or not, in view of the vital interest that the employer has in the resolution of a

jurisdictional dispute, plus the fact that Congress was interested in having these disputes settled in the public interest, it is reasonable to assume that Congress, although it was perfectly willing to encourage the unions to try to adjust these matters short of economic pressure, intended that when you got down to the nitty-gritty of being unable to resolve the matter, and having pulled in the employer through economic pressure, Congress could have intended that there would be a binding settlement that would exclude the interests of the employer.

After all, certainly it seems rational to believe that if there is going to be a final and binding resolution, it's going to be --

Q But it isn't binding on the employer.

MR. COME: Well, it's binding for all practical purposes, because the employer is not long going to stand up under the economic pressure of a picket line or a strike. Where there is weighty compulsion on him to comply with the award.

Q Do you agree, Mr. Come, that these Joint Board awards are enforcible under 301?

MR. COME: I think that that's an open question, Your Honor. I think that -- there's one case that's cited where they tried to enforce it against the employer, and the court refused to do it on the ground that since he was not a

party, it could not be enforced against him.

There are a couple of cases in the lower courts that have enforced it against the two unions. But what does that mean? That still doesn't compel the employer to reassign the work.

Whereas, under our setup, he would be subjected to economic pressure --

Q Well, one of the suggestions is that the Board is the more efficient remedy.

MR. COME: Well --

Q It doesn't say that there aren't other remedies.

MR. COME: No. That is correct, sir.

Q If Congress intended that they ought to resort to other remedies, I suppose they could.

MR. COME: Well, I think that's the basic problem, and I think that you don't get any answer to this from the legislative history, because, as is often the case, the problem that comes up is one that wasn't directly focused on. So you have to bring to bear, we believe, the realities of the situation. And the big reality here is the employer's economic interest in the matter, and certainly it's a form book rule of law that you don't make -- I don't want to use the word "binding", because this isn't binding in the technical sense -- but you don't make a substantial decision that is

going to affect the interest of a party, at least in the way that the employer's interest is affected here by being subjected to a picket line, what I do point out of at least letting him be hurt.

Furthermore, since this is to be settled -- I'll be finished in a moment, Your Honor -- in the public interest, you want a proceeding that's going to insure that it will bring out all factors, including factors of economy and efficiency of operation. And when the employer --

Q I couldn't agree with you more, but if Congress legislated otherwise, I suppose it's for Congress to put it in order.

MR. COME: That is correct, Your Honor. But, as I say, one of the tools that we believe has to be brought to bear here is the economic realities of the situation, which, we submit, Congress could not have been blind to.

Thank you.

Q Well, your basic organization or superficial level of the matter of statutory construction is simply that the parties to such dispute includes, or may include, the employer.

MR. COME: That is correct, sir.

Q And Congress did legislate, just the way you said it did.

MR. COME: That is correct; and that is, even if you

interpret "dispute" as the court below interpreted it. It is not central to our argument that dispute has to be the dispute over the jurisdictional strike.

We think that --

Q Right.

MR. COME: -- because even if it's only a dispute over the work assignment, the employer is a party to that, at least at the point where he isn't willing to go along, which he certainly wasn't willing to do in this case.

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

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:37 o'clock, a.m., the case in the above-entitled matter was submitted.]