In the

Supreme Court of the United States

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,

Petitioner,

v.

FLAIR BUILDERS, INC.,

RESPONDENT.

No. 71-41

Washington, D. C.
April 10, 1972

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

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v.	:	No. 71-41
FLAIR BUILDERS, INC., Respondent.	:	

Washington, D. C.,

Monday, April 10, 1972.

The above-entitled matter came on for argument at 10:03 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

BERNARD M. BAUM, ESQ., 29 South LaSalle Street, Chicago, Illinois 60603; for the Petitioner.

J. ROBERT MURPHY, ESQ., 340 North Lake Street, Aurora, Illinois 60506; as amicus curiae.

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'll hear arguments first this morning in No. 71-41, International Union of Operating Engineers against Flair Builders.

Mr. Baum, you may proceed.

ORAL ARGUMENT OF BERNARD M. BAUM, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case involves an action brought under Section 301 of the Labor-Management Relations Act, requesting the enforcement of a demand for arbitration. The complaint, as amended, was dismissed by the district court which found that, although the company in this case was bound to the collective bargaining agreement to arbitrate labor disputes within the scope of that agreement, that it was unenforcible since the union was guilty of laches.

On appeal, the decision of the district court was affirmed, Judge Stevens dissenting.

Thereafter, the Fourth Circuit rendered a decision in which it held that laches should be a question for the arbitrator and not for the court, and specifically disagreed with the case at bar.

Accordingly, the issue which we have presented to this Court is whether, once a court has determined that a

labor dispute is arbitrable under the terms of a contract, should the issue of laches or the question of delay be determined by the arbitrator or the court.

In this regard, what occurred in this case before the district court is most pertinent to a determination of this issue.

On May 22nd, 1964, the union and the employer entered into a memorandum of agreement which bound the company and the union to a master agreement, which had been negotiated between the union and an employer association. The memorandum of agreement provided that the company would be bound to the initial master agreement and also subsequent master agreements unless they terminated at the time that the first agreement was expiring, or any subsequent agreement.

Now, the initial agreement -- the memorandum, as I said, was signed on May 22nd, 1964. The initial master agreement expired on May 31st, 1966, and thereafter, on June 1st, a new agreement came into effect, which was to expire on May 31 of 1970.

Now, in this regard again, I should note to the Court that there is no issue in this case, that the district court found that there was a binding agreement between the parties, and there was no issue on appeal regarding the binding nature of the agreement. The issue came as to the decision of the question of laches.

Now, during the course of the second agreement, or approximately on November 7th, 1968, we filed a complaint with the district court, requesting, pursuant to Section 301, stating that the employer had disregarded the agreement, had refused to pay the wages and conditions under the agreement, and, further, had refused to comply with the hiring arrangements which were under the contract.

We asked in that case for a specific performance of the agreement.

Q This involved one employee, didn't it?

MR. BAUM: Well, at that point there had only been one employee --

Q One position.

MR. BAUM: At that point. It involved an operating engineer, right.

Q One employee, one position.

MR. BAUM: Right.

Of course our contention, Your Honor, is that there were several other employees that would have been in the bargaining unit during the course of this agreement had the employer complied. And I think that's one of the very fundamental issues in the arbitration.

Now, what happened here was that the district court said: I think that the threshold issue should be determined by the arbitrator under the terms of this contract, and I

shouldn't decide it.

So we went ahead and -- this was in April of '68, where the master agreement still had 13 months to run -- and, pursuant to the court directive, made a demand on the company for arbitration of the contract issue and, in addition, made a demand for the other issues, arbitration of the other issues which had been set forth in the complaint.

The counsel for the company then filed a motion to dismiss, alleging laches as a defense. The district court then held that laches was an issue for the arbitrator and not for the court, under this Court's decision in Wiley.

Thereafter, the court ordered a hearing on the merits of the case, limited to the issue of whether or not there was a contract, the threshold question. As a matter of fact, during the course of the hearing, the district court again stated its position that the issue of laches was for the arbitrator and not for the court, and further stated that it found that a binding collective bargaining agreement was in existence.

However, at the conclusion of the hearing, the court rendered a memorandum of opinion, in which it now found: Yes, there was a binding contract, but that the union was guilty of laches in terms of its bringing the action and accordingly it was unenforcible.

Now, at the hearing, we in fact never had a specific hearing on the question of laches because of the court's

position that that was not an issue for it to determine, and in fact when the employer raised the issue at the hearing, the court attempted to limit our cross-examination of the employer -- the employer in the case, who was obviously the company's chief witness -- to five minutes. Because he had already engaged in a long colloquy with counsel for the company, pointing out that the only thing he was interested in was the terminant, the binding nature of the contract.

So that I don't feel that other than the question of the contract itself there are any other significant facts; there was some evidence, from the union's point of view, that there had been contacts, the employer denied any contacts during the term of the contract, and the court, in changing its position from the position which it had held during the hearing, from the position it had held in its memorandum, not permitting counsel's motion to dismiss under Wiley case, that he was crediting the company's testimony regarding laches, even though, frankly, we had had no hearing on laches.

Now, I think in terms of the argument in this case there are three essential considerations which the Court must make. Our position is, first, that the defense of laches clearly falls within the rationale of this Court's decision in Wiley, as particularly illustrated by what happened before the district court.

The district court initially said the threshold issue

of the contract existence was for the arbitrator. We then followed the court's admonition and demanded arbitration and, in fact, as the court indicates in its subsequent memo on the motion to dismiss, we pointed out to the court that this Court had stated that the threshold issue was in fact for the court and not the arbitrator, and subsequently did determine that threshold issue as a binding contract.

The court then said laches wasn't for the court but for the arbitrator, and then changed its position. Now, what happened? Laches is an equitable defense, obviously, at common law; it has two elements. Normally it would have the question of delay and also a question of prejudice.

There was no testimony taken on the issue of prejudice, and there was very little testimony other than the question of delay here.

Now, frankly, had the court said to us: "I am going to determine the issue of laches in this case," what we would have done is to have presented our case on the merits. Because here we had an employer with a continuing violation of the contract, that it had disregarded it since the first employee had become a member of the union. We had a situation where the employer had refused to pay the wages and working conditions and had simply ignored the contract.

So obviously we would have had to present our entire case on the merits. We would have subpoenaed the company books

and records, to determine what employees were involved. Because obviously this would relate to a defense in this kind of a case.

In other words, it would have been -- this hearing, in fact, took less than two hours. Had the court said we're going to have a hearing on the issue of laches, it would have taken two or three days.

Q Mr. Baum, as I read your petition, the only question you present is the issue of whether the question of laches is one for the court or one for the --

MR. BAUM: Right.

Q -- arbitrator. Are you going beyond that?

MR. BAUM: No, sir. No, Your Honor. I am not going beyond that at all. I'm making the point that what happens -- in the Wiley decision this Court said, set forth four reasons why they felt that issues of delay should go to the arbitrator and not to the court.

They said, first of all, it's very difficult to separate an issue of delay from the issue of merits. I'm pointing out that, frankly, had we had to go into the issue of delay, which here was called laches, it could have been called waiver, you could have called it procedural delay, we would have been required to go into a long and lengthy hearing on the merits. And the Court points out in Wiley where there is an agreement to arbitrate the issues, the federal courts should

not get into this issue, they have enough of a caseload as it is, the parties have agreed to utilize this forum and obviously this should be a decision of the arbitrator, because of the inability to separate the issue of laches from the merits of the case.

And I think that is the reason I'm making the point.

Q Would you say, Mr. Baum, that the concept of laches might be different in the context of the labor contract and labor disputes than in the law of equity generally?

MR. BAUM: I think that's true, and I think it would -- the law, obviously, in the question of common law, the law of equity, the defense of laches always relates to the facts of the particular case.

Now, in this case not only do you have to worry about the facts of the particular case, but you have a bargaining relationship to be concerned with, you have a continuing problem of violation of a bargaining relationship, because, as I pointed out to the court before, when the demand for arbitration was made, we still had 13 months to run in the contract.

So that even if there might be some question of delay which might affect the ultimate decision of the arbitrator, there certainly could be no question of delay as it related to the final 13 months of the collective bargaining agreement.

Now, I think the second consideration in this case would be the effect on the federal courts if we were to get

into a situation where courts are going to start determining questions of delay. Every time a party to a collective bargaining agreement wanted to disrupt that relationship, the simplest thing they could do would be to start raising these defenses.

Obviously, the purpose of arbitration, at least in labor-management, and I would assume in commercial matters, is that there is a forum which can expedite the hearing and that the parties have this kind of relationship. It's the manner which they choose.

And if we start raising defenses, whether it be waiver or estoppel, or we call it procedural delay, or we call it laches, it's still delay, any way, we're going to start delaying the process of arbitration; and any party that wants to delay the process of arbitration can do it simply by raising these types of defenses.

I think this Court, in its decisions starting with Textile Workers, going through the Steelworkers Trilogy, going through the recent decision in Boys Markets, and going through all of these cases is the theory that where the parties have agreed and they are going to arbitrate the case, we don't want that kind of issue in the federal court, that should be determined by an arbitrator. And that is exactly what we are talking about in this particular case.

Now, the third element, I think, that the Court must

seriously look at is the question of the quid pro quo. I noted in reading this Court's decision in the Boys Markets case, that one of the points which the Court made was that the reason that they thought that an injunction should issue and that Sinclair should be overruled was the fact that the employer would have to have an effective system of making arbitration work, and that damages were not always the answer.

And it pointed out that where there is an agreement to arbitrate, and then you permit a strike, you are delegating the need for the employer to enter into an agreement which provides for arbitration, because you are saying that the arbitration procedure is meaningless. Now, let's turn that around and let's put the foot in the other shoe from the union's point of view.

The union basically has a right to strike. That is an economic weapon. That is the weapon it utilizes. Now, when you take that weapon and you say to the union: Give that weapon up during the term of the contract, we want industrial peace. But we will substitute for that the process of arbitration.

And then you make that process one that is ineffective just as in the case of Boys Markets, on the employer's side, where you turn it around to the union's side, it makes it ineffective. Obviously, I think, the quid pro quo for no strike is arbitrartion, it is not litigation in the federal

courts.

Now, in addition, if I might return the court for a moment to the issues raised, the considerations in Wiley. This Court pointed out in Wiley that in addition to the problem of separating the merit from the procedural issue we had a question of delay. This case is over three years old. It has not yet come before the arbitrator.

This Court raised the question in Wiley of the cost. As I pointed out in the brief, that I think this case so appropriately supports this Court's rationale in Wiley, counsel for the company advised this Court, after it had granted certiorari, that the company didn't have money to prepare a brief in this case, and we pointed out that could have happened just as well to the union and the company because here the company says they don't have enough money to take this case to the highest court; we didn't raise the defense of laches, either.

But the cost factor can work either way. And as the Court pointed out in Wiley, this is correct. This is exactly what happened in this case.

Now, in addition, the Court in Wiley also talked about the question of duplication of effort. Had the district court followed through on its original decision that laches was for the arbitrator and not for the court, then counsel for the company could have easily raised the issue of delay before

the arbitrator, irrespective of what we call it: whether we call it laches, whether we call it estoppel, whether we call it waiver.

Obviously, I think that this particular case falls clearly within the four corners of this Court's decision in Wiley. Arbitration, frankly, is a process which, if it does not work or does not operate, really serves no purpose.

Now, getting back for a moment to the question of the no-strike provision in this contract, it is interesting to note that under the terms of this particular contract the union had a right to strike if the employer did not pay the wages and did not pay the fringe benefits. We could have proceeded under arbitration or we could have struck. Yet we chose not to strike the employer in this particular case and we chose to go the route of arbitration and not create any kind of an industrial tie-up, so that I think the facts of this particular contract, the facts of this particular case, show that not only did we have a broad arbitration clause, but as to some of the issues raised in arbitration we could have used the right to strike, we had an option, but rather we chose arbitration because we did not want to, in any way, affect the relationship.

So that creates even an additional policy reason why, in this particular case, delay is an issue for the arbitrator and not for the court.

Q Mr. Baum, I understand that the first breach is alleged to have occurred in 1966.

MR. BAUM: That is right.

Q Then why did the union wait three years before commencing arbitration proceedings?

MR. BAUM: I think that the fact, what little facts there are, Mr. Justice Powell, in this case, was the fact that we waited until we had a concrete situation on which to move. Our position is that for the years 1964 through 1966, the work was subcontracted to a subcontractor, which obviously would be an issue in the arbitration; that in 1967 there was a tremendous turnover of people. However, in 1968, we found the operator, he joined the union and, I think as the record reflects, we filed an action before the National Labor Relations Board which was successfully concluded, as well as the Wage and Hour against the employer, and we looked for a concrete situation.

This was a continuing violation, and we were waiting until we had a type of a concrete situation.

Now, I might also add this: that, irrespective of the question of even what happened between 1966 and '68, which, frankly, I think is a question of fact on the merits, we don't have all the merits and all the facts before us, there can be no question that from the time that we filed the notice of arbitration, that being from 1968 until the conclusion of the

contract there could be no issue of delay, it might be, frankly, that an arbitrator might take the position that because we waited for those years there might not be any remedial thing that he could do in terms of back pay, but obviously that would have to come out in terms of all the facts in this case. And we don't have all the facts in this case before us, and that really creates the problem.

I might ask the Chief Justice if I could reserve five minutes for rebuttal.

MR. CHIEF JUSTICE BURGER: You may, Mr. Baum.

Mr. Murphy.

ORAL ARGUMENT OF J. ROBERT MURPHY, ESQ.,

AS AMICUS CURIAE, IN SUPPORT OF JUDGMENT BELOW

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

I think that as we have suggested in our brief on this appeal, the inclination of the petitioner, the union, has been actually to define the issue of this case in a broader sense than they purport to be defining it.

It is true that we would differ with them substantially on their interpretation of the activities and proceedings in the court below. We find no place in the actual proceedings in the trial court where the union was in any way prejudiced or surprised by what happened. But in their brief they constantly reiterate that the trial court found that

the parties were bound by an agreement to arbitrate. The trial court never so found.

An examination of each one of the orders entered by the trial court, whether on the initial motion to dismiss against the original complaint, which, by the way, was not seeking arbitration and was filed by the union for a completely different purpose, but on that motion order on the motion to dismiss the amended complaint and on the final order of the trial court there has not been a finding of fact that could be considered final and binding, that the parties were ever bound.

It would be accurate to say that the trial court indicated that there was an agreement signed, yes; but, whether or not it was binding at the time of the action was the threshold question which had to be determined by the trial court and which was determined by the trial court on the facts as it heard it adversely to the union.

Now, on a narrow approach to this case we would think that this would be adequate and fully supported by the decisions of this Court in Wiley v. Livingston, in the Lincoln Mills case, the Steelworkers Trilogy, and the entire series of cases which have set up the distinction between those matters which an arbitrator will be considered to have jurisdiction to decide and those matters involving the threshold question which the trial court, under Section 301, will have the right to decide.

But the union in this case is not restricting itself to this narrow issue. It seems to us that they are going further and basically asking, under the guise of limiting their argument to the question of who gets to decide whether laches is a defense, but they are going further and suggesting that this Court should recommend to trial courts, in the incidence of 301 cases, that they should have nothing but a cursory inquiry into whether or not there is or is not a binding contract.

Q I take it you agree, counsel, that it's the general policy of the courts to encourage arbitration in this area, would you not?

MR. MURPHY: I would agree with that, Your Honor, yes. But in so agreeing I would have to point out that in all of the cases from the Lincoln Mills through the Steelworkers and so on there has never been any question but what the trial court in 301 cases must, as a matter of judicial responsibility, find that there is a binding agreement before it can order arbitration.

Now, in the footnotes of the Steelworkers case, Mr. Justice Douglas's opinion specifically pointed out that if it were alleged that there was a contract which in effect said that the arbitrator should decide his own jurisdiction, that he would require that the party so alleging has the burden of saying that.

So that there has never really been more than what you could call a presumption of arbitrability, resulting from the Steelworkers lines of cases. And we can accept that presumption, but in so accepting it, Your Honor, we do not mean to suggest that the Court does not have its own preliminary and primary obligation.

Q Well, assuming that the parties were bound by a collective bargaining contract, and that it did have an arbitration clause in it, that's the way the case comes to us, it seems to me the arbitration clause here was an all-disputes clause, wasn't it?

MR. MURPHY: I would have to admit that that is what it appears to be, Your Honor, --

Q So we're not dealing with an arbitration clause that limits the arbitrator to the interpretation, the application of the -- [inaudible; overlapping voices].

MR. MURPHY: No, we are not, Your Honor.

Q What you're saying is that in this specific case the parties, the employer didn't have to arbitrate because of laches. It wasn't that -- assuming there was a valid collective bargaining contract, it wasn't that something had happened to terminate the contract, or the general application of the arbitration clause?

MR. MURPHY: No, Your Honor, it does not involve the interpretation of the arbitration clause, because we are

departing from --

Q Or its on-going binding character. It's just in this particular dispute.

MR. MURPHY: It's exactly the on-going binding character that we have challenged, and that in this particular case --

Q Well, that isn't the issue in this Court, is it, whether the contract as a whole and the arbitration clause is binding on the employer. That's not the issue here, is it?

MR. MURPHY: We see that as the issue, Your Honor, and we have seen that as the issue from the first time that we filed a pleading in this case.

Q Well, you're perhaps entitled to support the judgment on any ground that's available to you, but that would require some factual determinations here in this Court.

MR. MURPHY: Not in this Court, Your Honor, we don't feel it would; yes, require factual determinations in the trial court. But we can see very little difference between this situation and a situation that might be presented if the parties had torn up the contract.

Q Well, let's just, for the moment, narrow this matter down. Let's assume for the moment that there is no dispute whatsoever, that both parties had signed and were bound by the contract, and that the arbitration clause in the contract was an all-disputes clause. Now, let's start from that

premise, for a moment.

MR. MURPHY: Yes, Your Honor.

Q Now, how about laches? When, in a specific case, the claim is that the arbitration clause is inoperative because the union has been guilty of laches, and it's an all-disputes clause. Now, here's a dispute between the parties as to whether or not the arbitration clause covers this dispute.

Now, that's the narrow issue in the case -- at least it's one of them.

MR. MURPHY: If there were the issue of this case, Your Honor, I would concede that the question of laches in that instance was a matter for the arbitrator, and I don't think that you would find any different indication in the opinion below. But that is not the situation in this case.

Excuse me, Your Honor.

Q What relief did the plaintiff ask for, in going into the trial court?

MR. MURPHY: When he went into the trial court, he was asking for many-thousand dollars damage, and for a direction I believe, that the employer be required to comply with the contract, in which particular manner he did not specify, and it was only in the amended complaint when he finally suggested that arbitration was the remedy that he was after.

Q Well, taking the amended complaint, which certainly we must take now -- I'm sure you agree?

MR. MURPHY: Yes, we will, Your Honor.

Q Wasn't that a suit in equity for specific performance of an arbitration clause?

MR. MURPHY: Yes, it was, Your Honor.

Q But you suggest that in that specific -- that effort to get specific enforcement, the claim of waiver or laches is not part of the total controversy?

MR. MURPHY: Oh, I suggest that it is a part of the total controversy, but it's the part of the total controversy that must be decided by the court.

Q Then what is the purpose of the arbitration clause, an all-disputes clause, if the court is to reach in and decide some and leave others for the arbitration?

MR. MURPHY: The question of laches in this particular case, Your Honor, goes to the binding force of the contract. And I cannot concede in any way that there was, at the time that this case reached the court, in any way a binding contract; because, under the circumstances, there was no longer a binding contract. It is only by a misinterpretation of the facts that counsel for the union can possibly say that there was a binding contract or that the court below found one.

Q Mr. Murphy.

MR. MURPHY: Yes, Your Honor.

Q On page 149 of the Appendix, as I read Judge Decker's opinion, at the top of the page there, he says:

"Accordingly, I have determined that defendant was bound by the memorandum agreement to arbitrate labor disputes within the limits of the arbitration clause."

In order to sustain this contention that you've just been making, you have to urge the overturning of the district court's finding on that point, don't you?

MR. MURPHY: I would have to say that that clause in Judge Decker's opinion was a part, a finding of fact, if you will, Your Honor, yes, but it was not his ultimate holding. He was not saying that "I hold that somebody who has once been bound is no longer bound", except that he came to the conclusion that it just wasn't a binding contract any more.

He may have used the words, and he did use the words that Your Honor has quoted; that is correct.

May I, Your Honors, make one additional reflection concerning what we are saying here. And that is that while it would possibly have been permissible to take the contrary approach in the trial court, and to say that since there once was a contract that was signed, we're going to leave everything that ever happened after that to the arbitrator, it seems equally clear to me that,in view of the decision of this Court in Boys Markets, that that approach is no longer permissible.

And I say this for what I feel are important policy reasons. In the Boys Markets case it was being the relief which was being sought was basically an injunction against a

strike. The impression that this Court gives in the Boys Markets opinion is that where an anti-strike injunction is being sought the function of the trial court under Section 301 is to take an active part in the investigation of this threshold question, as to whether there is or is not a binding contract and a binding arbitration clause a part of it, and it would seem to us that if that is the approach to be taken under the Boys Markets decision, it is impossible to rationalize a waiver, a more cursive approach in a case where it is not being -- where an injunction is not being sought but where only relief that is being sought is in the type of arbitration that is being sought by the plaintiff's amended complaint here.

We can see no reason why there should be any distinction in the importance that the trial court is to give to that preliminary investigation of the threshold question.

So it would be our feeling that, as a result of the Boys Markets decision, this Court must avoid enunciating a double standard which might possibly work an inequity between the parties. If there is to be one standard when an injunction is sought, and a contrary and less stringent standard when all that is being sought is arbitration, it seems to us that there is no way to put these together and avoid confusion in the trial courts or even to make an exorable arrangement between the parties.

What if both types of relief are being sought in the

same proceeding? And, after all, in the injunction situation, which you are directly confronted with in the Boys Markets case, we are ordered, the trial courts are ordered to direct the employer to arbitrate at the same time.

Now, in those situations are we to make one standard of inquiry into whether or not there is a binding contract and then later, in the same case, make a different standard of inquiry?

Q Well, your point must be that the Court of Appeals decision on laches was that laches and delay had terminated the entire contract, it just isn't that there had been too much delay in this case to force arbitration. There was no longer a binding contract of any kind?

MR. MURPHY: That would be the effect of the decision of the Court of Appeals --

Q But is that your position?

MR. MURPHY: Yes, Your Honor.

Q Whereas, if you -- you a while ago conceded that if it were only a question of laches and the applicability of the arbitration clause in this specific instance, conceding that the contract, in the arbitration clause, continued generally --

MR. MURPHY: Yes.

Q -- you had conceded that then laches would be a question for the arbitrator under an all-disputes clause?

MR. MURPHY: That's correct, Your Honor.

Q But where laches, you say, as the Court of Appeal used it, went to the validity and the existence of the entire contract --

MR. MURPHY: Exactly, Your Honor.

Q -- then laches has to be for the court.

MR. MURPHY: Right. That is our position, and, by the way, that was the position of the Fourth Circuit in the Tobacco Workers case, on which petitioner relies. They made a specific distinction between the type of laches that would go to the matters, as they said, which are to be decided by the court and the type of laches which go to the matters to be decided by the arbitrator. So, if that is the distinction of the Fourth Circuit, as we pointed out in our brief, we think the Fourth Circuit would have decided this particular case exactly the way our Seventh Circuit decided it.

Because there are apparently two different kinds of laches, as Your Honor has pointed out. One which goes to the heart of the matter.

We think also that, going back to the position of the Boys Markets decision, it is necessary to have a uniform standard of inquiry for the court to avoid the rather embarrassing and inequitable situation which could arise where there are matters that are obviously somewhat outside the scope of arbitration and to avoid these cases where the

arbitrator's decision or award might even end up in what the court would consider matters of illegality.

Let us suppose that the trial court has ordered arbitration after a cursory inquiry as to whether or not there is a binding arbitration clause and the arbitrator, in turn, decides that he has no jurisdiction? Now, that might be only a matter of slight import in the ordinary case, but if you're in a case where you're also asking for an injunction against the strike, what you have ended up with is giving the employer an anti-strike injunction and not giving the union the arbitration that it wants. Which could be a very damaging case for the union, and I would think that counsel representing the union would almost be on our side in this interpretation of the Boys Markets decision.

Q Well, if he saw the case the way you do, why, I am sure he would be.

MR. MURPHY: [Laughing] Yes, Your Honor.

I believe that I can sum up my position, and I hope that I have made myself clear as to my understanding of the effect of the decisions below by saying that in our viewpoint the decisions below are well within the scope of the prior labor law that this Court has fashioned since the Lincoln Mills decision. The purpose of the Court in fashioning this labor law has been constantly reiterated by saying that the aim is to promote industrial peace; the aim, yes, to promote

industrial peace through the use of the arbitration process as a central institution in that promotion of industrial peace, but never, never at the expense of saying that the arbitration process is self-operating. It won't operate. An arbitration award could hardly be valid or worthwhile if it could not be enforced by the Court.

Since the Boys Markets decision, it seems to us that unless this Court is to suggest to the trial court that they should vary the principle according to the remedy that is being sought, it is necessary to require of the trial court in any case under Section 301 that the court take an active position in arriving at the decision as to the threshold question. It must actively investigate whether there is a binding contract, it must actively investigate whether or not that binding contract is still binding at the time of incidence in the court, and actively investigate the scope of the arbitration clause.

If there is no active investigation, there will be contradictory opinions, there will be confusion in the trial court, we will achieve one thing that the Boys Markets desired, the opinion the Boys Markets seem to have desired, and that was to reinforce the remaining use of state courts in Section 301 cases, and it would be that possible reinforcement from a uniform standard, which we are suggesting, that would be our answer to the suggestion that perhaps we're giving the federal court too much to do, that we're adding to their workload.

We feel that if a uniform standard is to be promoted by the decision in the case before the bar today, that that uniform standard will reinforce the availability of the conventional State court remedies as was said in the Boys Markets case, that should be reinforced so that those State court remedies which Congress apparently desired to keep available will be available.

Q Mr. Murphy, you certainly stated correctly that the objective of arbitration clauses is to promote industrial peace. That's the objective, though, isn't it, and it is not the means, the function of an arbitration clause to provide a simple and a speedy solution?

MR. MURPHY: Yes, it is aimed at this, Your Honor.

Q Now, does the approach taken in this case there's suggest that/any very speedy solution to this controversy?

MR. MURPHY: Looking at the facts of this case, Your Honor, the speedy solution of arbitration was available to this union five years before it first suggested that speedy solution. There was not an on-going employer-union relationship which ought to be the minimum condition for effective collective bargaining, and the arbitration which is a part of it. This situation was one where there was no relationship between these parties, and if we consider that as a part of the facts, which it obviously was on the proofs of both parties in the trial court, it would be impossible to say that to order

arbitration in this matter, when they finally asked for it, would have contributed in any way to industrial peace. That is the reason we have suggested in our brief that a part of speedy resolution of disputes should certainly be the availability of the judicial part of the relief. But it would hardly have been up to the employer to go and suggest it when he had no union on the horizon for a period of five years after the memorandum of agreement was signed.

I hope I'm not going around the periphery of Your Honor's question, but I'm trying to say that while everyone realizes and hopes that arbitration will continue as an effective part of the collective bargaining process, that in some cases, and this one is an unusual one, we would have to concede, in some cases arbitration will not contribute to that; and the ordering of arbitration in some cases, as was pointed out in Wiley v. Livingston, would be imposing upon the parties something which they have not agreed to.

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

Mr. Baum, do you have anything further?

REBUTTAL ARGUMENT OF BERNARD M. BAUM, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BAUM: Mr. Chief Justice, just a couple of comments that I wish to address to the Court.

I think Mr. Justice Rehnquist was correct when he noted the decision of the district court at page 149 of the

abstract, holding that there was a contract but that the question was of laches.

I would also suggest to the Court that they examine page 93 of the abstract, where the court, during the hearing, specifically stated that he held that the agreement came into existence and held that there was an agreement.

I would further suggest to the Court that they examine page 156 of the abstract, being the Court of Appeals' decision in this case, in which they say their issue is the question of whether a party to a collective bargaining agrement, which contains an arbitration clause, may be so dilatory in making the existence of a vaguely delineated dispute known to the other party that a court is justified in refusing to compel the submission.

The point is, you can't get to the issue of laches unless you first have a contract. Because why would you want to reach the issue of laches unless you first have a contract? If you have no binding contract, there is no issue to reach. And I think that counsel is incorrect --

Q What would you say if the claim made by an employer in resisting arbitration was that we have orally rescinded the contract? There is no contract, no arbitration clause any more. Wouldn't the court have to determine, as the threshold question, whether there is a contract and an arbitration clause?

MR. BAUM: The Court has to determine whether there exists an agreement, obviously. Whether the parties have entered into a written agreement. Of course, they'd probably get into, like in this case, we have an entire agreement of the parties clause, which says there can be no oral agrdements or understandings. So that here the written agreement is the binding agreement.

But obviously you have to decide that question. You can't get to the issue -- why get to the issue of laches, if you don't have a contract in the first place? You say you don't have a contract, we've nothing to arbitrate. You have nothing to enforce.

Q Isn't that the district judge's approach here, though? He said, "I can go along on this being an arbitrable question if you have got a contract." But we're talking about a matter which goes to the very present existence of the contract.

So that was --

MR. BAUM: Well, he says, as Justice Rehnquist referred "According,I have determined that defendant was bound by the memorandum agreement to arbitrate labor disputes within the limits of the arbitration clause."

And then he says, However, I'm not going to enforce this provision becasue I believe that the union was guilty of laches here.

This becomes a very complicated situation because, moreover, this wasn't an industrial case, this is a construction union, and the limited facts in the record show this is on construction sites, several sections, this is the major issue which would have to be determined in this case. What kind of relationship? This isn't where you have a steward every day in a plant, this is construction, there are several counties, there are several sites, business agents are going around, there isn't this kind of a situation that you'd have in an industrial plant; obviously an arbitrator is going to determine these kinds of questions because that was one of the issues we would have had to get into if the court in fact had held a hearing on laches here. We'd have to do it before an arbitrator. And obviously it becomes part of the merits.

Moreover, I would point out to the Court one final thing, counsel says that the Tobacco Workers case says that there are different kinds of laches. I would suggest, and I think a reading of the Tobacco Workers case directly says, We disagree with the Seventh Circuit, we think -- they say the Flair Builders case, as far as the Fourth Circuit is concerned, is wrong. They say the issue should have been for the arbitrator and not for the court. And there is no question, they don't delineate as to different kinds of laches, that laches is the way, it's waiver, it's procedural delay. I submit that there is no difference, and I submit

that if this Court is going to permit these kinds of issues to be decided by the courts rather than the arbitrator, where you have an all-disputes arbitration clause, what you're going to get into is more litigation and undermine the arbitration process.

Thank you.

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

Thank you, Mr. Murphy.

The case is submitted.

[Whereupon, at 10:53 o'clock, a.m., the case was submitted.]

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