In the

Supreme Court of the United States

GATEWAY COAL COMPANY,

Petitioner,

v. No. 72-782

UNITED MINE WORKERS OF AMERICA, et al.,

Respondents.

Washington, D.C.
October 15, 1973

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v.	:	No. 72-782
UNITES MINE WORKERS OF AMERICA, ET AL., Respondents	:	

Washington, D. C.

Monday, October 15, 1973

The above-entitled matter came on for the arugment at 2:00 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Assoicate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LEONARD L. SCHEINHOLTZ, ESQ., 747 Union Trust Building, Pittsburgh, Pennsylvania 15219; for the Petitioner.

JOSEPH A. YABLONSKI, ESQ., 900-15th Street, N.W., Washington, D. C. 20005; for the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-782, Gateway Coal Company against United Mine Workers.

Mr. Scheinholtz, I guess we can safely go ahead now. You may proceed.

ORAL ARGUMENT BY LEONARD L. SCHEINHOLTZ, ESQ.

ON BEHALF OF THE PETITIONER

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

The primary issue in this Case is whether a Federal Court, acting under Section 301 of the Labor Management Relations Act of 1947 as amended has the authority to order arbitration of an alleged safety dispute and to enjoin a work stoppage which gave rise to that dispute.

The Court of Appeals for the Third Circuit in a 2 to 1 decision vacated a preliminary injunction issued by the District Court for the Western District of Pennsylvania. The District Court acting on the complaint of Gateway Coal Company had issued an order directing arbitration of a dispute as to whether the Gateway Mine was rendered unsafe by reason of the presence of two foreman in the Mine, had directed that the foreman be suspended pending arbitration, and had issued an injunction preventing the Gateway employees from continuing a work stoppage in furtherance of that dispute.

The sequence of events leading to the District Court's order began on April 15th of 1971 when shortly before daylight it was reported and discovered that in one working area of the Mine there was a reduction in airflow. There was still an adequate supply of air substantially above the Federal and State minimum requirements. No one had noticed any difference in the methane level in the Mine, which was normally 2-10ths of 1 percent, substantially below the minimum requirements of Federal Law of 1 percent. Methane is detected every 20 minutes. There is a requirement of Federal Law that the operators check for methane. No one had noticed any diminution or, rather, any increase in the methane level. There are also methane monitors on the cutting machines which are to detect changes of methane, and no one had noticed any change in the methane level.

The problem was traced to a partial blockage of an intake airway, which is believed to have occurred at 4:30 a.m. This resulted in a slight short circuiting of the airflow in this working area of the Mine. Repairs were made immediately and the normal airflow was restored.

The miners who had reported to work on the first shift, which begins at 8 a.m., were held on the surface until the repairs were completed. They were told to stand-by. Howeve a number of them, approximately half the work force, left. The remainder of the work force went in at about 10:30 in the

morning. And the Mine worked without incident until the following morning when the first shift employees reported again. At that time, when those who had left the Mine, contrary to instructions, found out that they were not to receive reporting pay, they struck. They refused to arbitrate. They struck.

Subsequently, the Union requested that the Federal and State Safety Inspectors come in to inspect concerning the adequacy of the repairs. This was done on Saturday, April 17th. In the course of that inspection the Inspectors discovered that the three third shift foremen had failed to notice and detect the reduction in airflow which was caused by the fall of an overcast, which is believed to have occurred at 4:30 a.m.

Their pre-shift examination should have taken place between 5:00 a.m. and 8:00 a.m. under Federal Law.

The following day on April 18th, the Union had a special meeting. And at that meeting the Union, attended by approximately 200 of the 550 miners of the Gateway Mine -- the men voted not to work with the foremen. By this time the company, Gateway, had suspended two of the foremen. However, the third foreman it had determined not to suspend pending further investigation, because he was the one that had reported the problem. They felt that he was in a different position.

However, the company reluctently agreed to the Union's demand to suspend all three foremen. But the company President advised the District President of the UMW that when there was any basis to put the three foremen back to work, when the State clarified their certification status, that he intended to do so. At that time he believed that action would be taken to determine their certification status. Under Pennsylvania Law a foreman cannot work without being certified, and there is a procedure for revocation of certification.

There was also a possibility -- and it turned out to be actuality -- that the men would be subject to criminal misdemeanor charges.

The men returned to work on April 19th and work without incident until June 1st. In the meantime, the criminal misdemeanor charge was filed against the foremen, and on April 29th, or, rather, May 29th, the company received a letter from the Department of Environmental Resources advising the company that it did not intend to revoke the certification status of the miners or, rather, the three foremen, and that the company was at liberty to return the foremen to work.

Acting on this letter which, as I indicated, went to the Union with a copy to the company, the company reinstated the two foremen. One had retired in the mean time on June 1st. And upon the act of the company in returning the foremen to work, the Union struck, took unilateral action and struck.

Q Whatever happened to those criminal charges, Mr. Scheinholtz?

MR. SCHEINHOLTZ: About six weeks later the three foremen pleaded nolo contendere and they were finded, I believe, $200 a piece. Nothing was ever done with respect to the certification status of the active foremen, because the Department of Environmental Resources decided that the criminal processes were an adequate method of resolving the problem.

Q What is the company's position with respect to the strike? That is, the reason for it. Was it the reinstatement of the foremen or was it the earlier company position not to allow pay?

MR. SCHEINHOLTZ: The dispute had it origins in the reporting pay issue. The strike that started on April 17th started before there was any -- or, rather, on April 16th, started before there was any knowledge of any problem with respect to the foremen's logs. However, after the strike started initially over this reporting pay dispute, it was converted into a safety dispute or an alleged safety dispute by the Union.

Our position is that the dispute as to whether the Mine was rendered unsafe by the foremen is clearly one which is subject to resolution under the Collective Bargaining Agreement between Gateway and the UMW. This Collective

Bargaining Agreement contains a very broad grievance arbitration clause. It would be difficult to write a broader grievance arbitration procedure. The contract states that the parties will submit to the settlement of local and district disputes procedures, all disputes between them as to the meaning and application of the agreement, all other local matters, and any local trouble of any kind arising at the Mine.

Q May I ask, Mr. Scheinholtz, would the fact of the pleas of non vult be relevant in any arbitration proceeding?

MR. SCHEINHOLTZ: Would that be relevant?

Q Yes.

MR. SCHEINHOLTZ: I believe that it might be relevant, yes, Justice Brennen. I think this is something which an arbitrator could and I believe in this case did take into account.

Q And would you mind stating again, what is the connection between the certification proceeding and the pleas of non vult, the nolo?

MR. SCHEINHOLTZ: The distinction is this, under Pennsylvania Law a man cannot serve as a foreman unless he is certified by the State. There is a specific period of experience he must have in the mine, there is a certain training that he must have before he can achieve certification status. There is also a procedure under Pennsylvania Law for revocation of that status and if his license to practice as a supervisor in

mine is revoked, then it is a little bit like a driver's license, he cannot drive.

Q And the certification is not revoked merely because of the pleas?

MR. SCHEINHOLTZ: No, no. That is clear in the record. There maybe times when a revocation will result from a finding of a criminal violation. But this is by no means automatic.

Q It is an independent proceeding --

MR. SCHEINHOLTZ: Completely independent proceeding. The one is in the Court, and the other is an Administrative Proceeding initially with the Department of Environmental Resources.

The District Court in enjoining the work stoppage, as I say, directed arbitration of this dispute, which was whether the Mine was rendered unsafe by reason of the presence of the foremen in the Mine. And he directed that the foremen be suspended until the arbitration was held and that if the arbitrators sustained the company's position, that the foremen be returned to work. If the arbitrator found against the company, then they would not be returned to work, which I think was a very sensible solution under the circumstances. The case was heard by an arbitrator. He found in agreement with the District Court that the dispute was arbitrable. It was the first issue that the Union presented

to them. They challenged the arbitrability. He found that it was arbitrable.

Secondly, he found that the decision of the Gateway Miners to refuse to work with the foremen was unfounded, and he also found that the Mine was not rendered unsafe by reason of the presence of the foremen in the Mine.

However, when the case got to the Court of Appeals, which was after the arbitrator's decision, the majority of the Court ruled that the dispute was not arbitrable. The conclusion of the Court was that safely disputes are sui generis, and by virtue of their being sui generis, that the ordinary presumption of arbitrability of disputes, as set forth in 203D of the Labor Management Relations Act of 1947 and as stated in Warrior & Gulf and the other cases in the Steelworkers Trilogy, did not apply to a dispute regarding safety.

The majority found support for that position, it said, in Section 502 of the Act.

Q The majority did not say that the arbitration clause did not cover this dispute. It said it was unenforceable.

MR. SCHEINHOLTZ: It said that the arbitration clause did not expressly provide unambiguously provide that safety disputes were to be arbitrated. That is the way the Court handled --

Q Would that have made any difference under the Court's

reasoning?

MR. SCHEINHOLTZ: Actually I do not believe that it would, because in Footnote 1 --

Q It is not much of a case if all you have to do is to include in the arbitration provision "including safety disuputes."

MR. SCHEINHOLTZ: Well, Your Honor, if you said that, then you would have a problem with seniority disputes. Here you have got a broad, overall, all encompassing arbitration clause.

Q I sort of had the impression that Justice Brennan indicated, the Third Circuit would have come out the same way --

MR. SCHEINHOLTZ: Yes, it would. In Footnote 1 --

Q It purported to leave the question entirely open in the Footnote. In the second paragraph of Footnote 1 on page 18A of the Petition for Writ Assertuary ? it says, "It is also unnecessary to decide whether in the unlikely clause of a contract" -- well, you know what it says.

MR. SCHEINHOLTZ: Yes. Certainly the Court did not expressly decide it. I think that it left no doubt and in view of its holding that safety disputes are sue generis by their nature, it seems likely to me in reading Footnote 1 that even if this contract had specifically provided for arbitration of safety disputes, that this majority, with

Judge Rosen dissenting, would have concluded that the promise to arbitrate safety disputes was unenforceable.

Q How can you say that when the opinion of Judge Hastey explicitely and expressly says it is unnecessary to decide that question?

MR. SCHEINHOLTZ: The very tenure of his Footnote -- in the unlikely event that a safety dispute, that the agreement to arbitrate included safety disputes -- I think that coupled with his reasoning in reaching the conclusion that he did would justify an assumption that even if this contract had specifically provided for arbitration of safety disputes, that the majority of the Third Circuit, that majority, would have ruled that promise unenforceable.

Q Did he not at any rate apply a much stricter standard in determining whether a general arbitration clause embraced a safety matter than has been customarily applied by Courts in determining whether a general clause pertains to a particular matter?

MR. SCHEINHOLTZ: Yes, I do not think there is any question. In effect, Judge Hastey created what I would call a presumption of non-arbitrability, which is exactly the antithesis of 203D and 301 as interpreted by this Court.

There is nothing in Section 502 that deals with arbitration of safety disputes. It just does not purport to deal with that issue. And consequently there is nothing in

502 which requires the result which Judge Hastey came to. It seems clear to us that the sui generis approach of Judge Hastey certainly nullifies the ordinary presumption in favor of arbitrability and the intent of Congress that all disputes, of whatever kind, arising out of a Collective Bargaining Agreement should be resolved by peaceful means by the method that the parties chose. And in this case the parties arbitration as the terminal point or terminal procedure for resolving those disputes. I think that there is good reason for that, because a mine is not rendered anymore safe if Gateway were to have starved these people into submission. Assuming that there was a bonafide safety problem, for the sake of argument, here you have got a test of wills. If the Union goes out on strike, maybe it can force the company to change its position, but maybe it cannot.

But the point is that if it cannot, that if the Gateway had starved these people into submission, that would not have made the Mine any safer or any less safe. It would not have changed the underlying circumstances. The only way that those underlying circumstances can be corrected, if there is need for correction, is by some third party determination.

Under the Coal Mine Health and Safety Act there is a provision for on site inspection by the Federal Mine Inspectors. They make a third party determination when they decide whether there is an imminent danger which requires

withdrawal of the men from the mine.

The Labor Board under Section 502, and ultimately the Court of Appeals -- it makes a determination of the bonafidedness of a claim of abnormally dangerous conditions when 502 was brought into play. So that there are many times when third parties make these decisions, and it is the only intelligent way to approach it. Self help is not the answer.

Q Did the Court of Appeals consider what I read to be the basic argument in the Respondents' Brief, that is, the argument that the Collective Bargaining Agreement itself expressly under Subsection E of the Mine Safety Program expressly permits miners to walk out?

MR. SCHEINHOLTZ: It did in this way -- first, let me answer the question somewhat differently. First, there is no evidence that the procedures of the Mine Safety Program were ever utilized by the Gateway miners. And the District Court so held.

Q That is what you say in your reply brief.

MR. SCHEINHOLTZ: Secondly, if you read the Mine Safety Program, it does not permit as the Union contends that the miners have the right to engage in a safety strike anytime that they believe that a dangerous condition exists. That is not what the Mine Safety Program provision says.

Q I know. And you are repeating now very clearly what you say in your reply brief. My question was, Did the Court

of Appeals consider that argument?

MR. SCHEINHOLTZ: Yes.

Q Was it made to the Court of Appeals?

MR. SCHEINHOLTZ: In this context, it said that here you are faced with a general arbitration clause which is vague or general. You are faced with a specific Mine Safety Program. And consequently the Court interpreted the Mine Safety Program to mean that safety disputes were not arbitrable. But that is the very function of an arbitrator, not the Court. The function of the Court is simply to determine whether on its face the claim is subject to resolution under the Collective Bargaining Agreement. Here the District Court made that kind of analysis, ruled that the dispute over the foremen was subject to resolution on its face subject to resolution under the Grievance Arbitration Clause. And the arbitrator ruled that the dispute was arbitrable too.

In effect, what Judge Hastey did was to nullify that arbitrator's decision by interpreting the clause on the merits to preclude arbitration of all safety disputes. I think that that was improper.

Q Was that clause of the contract brought to the attention of the arbitrator?

MR. SCHEINHOLTZ: Yes, yes. As a matter of fact, in Appendix G --

Q Appendix G of what?

?

MR. SCHEINHOLTZ: To the Petition for Writ Assertoty, the umpire's award, and there is the contentions of the parties with respect to these matters are set forth in Appendix G. It would be on 43A is where the Union's contention on that subject is and also on 44A.

Essentially the same argument was made to the arbitrator as was made in this Court; that is, that the Mine Safety Program Provision operates in such a way as to preclude arbitration of safety disputes. The arbitrator decided that that was incorrect.

Q Mr. Scheinholtz, may I ask, you suggested that 502 or something under 502 might have been cognizable by the National Labor Relations Board.

MR. SCHEINHOLTZ: Yes.

Q How does that come about?

MR. SCHEINHOLTZ: It comes about -- Section 502 provides that the quitting of labor by an employee or employees in good faith because of abnormal conditions at the place of employment shall not be deemed a strike under the act.

Q Could the company have initiated an unfair labor practice proceeding?

MR. SCHIENHOLTZ: No. It comes up this way, the company discharges employees. They assert 502 as the dissents for their engaging in a refusal to work. And then they file

an 8A1, 8A3 charge, and it comes up in the 8A1, 8A3 context. At that point the Labor Board must decide as it did, for example, in Redwine Carriers, which we have cited in our brief, and other cases, whether the activity of the employees was protected under 502. If so, then the discharge and discipline violates Section 8A1 and/or 3.

Q But the company could not --

MR.SCHEINHOLTZ: No.

Q -- itself initiate it?

MR. SCHEINHOLTZ: No, it comes up the reverse way.

Q I suppose you would agree that if a factory building were burning and the foreman ordered everybody to go in the factory building and haul some machinery out, that that would not be a strike.

MR. SCHEINHOLTZ: No, we would agree with that. We would agree with that, and that is not this case.

Q I was deliberately picking an extreme case. That is probably what the provision was meant for.

MR. SCHEINHOLTZ: That is right. That is right.

Q On the other hand, if a mine was filled with gas, fumes, or arguably so filled, creating an immediate danger situation, that would be comparable to the burning building, would it not?

MR. SCHEINHOLTZ: It would if in fact this were true. Under those circumstances you would have something far

different from what we had here. And I think that is the problem here, is that the Court of Appeals constructed a subjective test rather than an objective test in interpreting 502. That is one of the basic problems with this case. They said that if these men believe that a safety hazard exists, that belief is unreviewable by Court. And that is not what 502 says. That is not the way any other Court of Appeals has ever interpreted Section 502. That is not the way the Labor Board has interpreted 502, and I think the Labor Board's interpretation of the statute is entitled to considerable deference.

Q Would you argue that wholly aside from the arbitration provision this strike was enjoinable by reason of the Union's failure to follow the safety provisions of the contract?

MR. SCHEINHOLTZ: No.

Q They did not, did they?

MR. SCHEINHOLTZ: They did not utilize the Mine Safety Program Provisions.

Q And they did strike?

MR. SCHEINHOLTZ: They did strike. And we say that even if the dispute was over the foremen -- and, as I indicated, there is at least a serious question as to whether it was.

Q The safety provision would say you may be ordered off the job in the area where the dangerous safety condition exists.

MR. SCHEINHOLTZ: Only in the unsafe area.

Q And that all employees walked off.

MR. SCHEINHOLTZ: All employees, both above and below ground --

Q Where these two foremen had no authority whatsoever.

MR. SCHEINHOLTZ: Absolutely not. They struck from the coal tipple to the preparation plant, both of which were above ground.

Q Tell me why you would not make that argument about the enjoinability of this strike?

MR. SCHEINHOLTZ: Because we do not have to. We have a far stronger ground.

Q But part of the case against you is that the provision against the arbitration should not apply because there is another provision in the contract governing the situation.

MR. SCHEINHOLTZ: If you look at it in that light, we would have an additional basis for our position. But the other basis is so clear that we did not feel we had to fall back on that position.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Yablonski?

ORAL ARGUMENT OF JOSEPH A. YABLONSKI, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I am somewhat appalled that Counsel has indicated to this Court precisely what he thinks about Norris-La Guardia. Throughout 25 minutes of argument Counsel has failed to even mention the words Norris-La Guardia Act. The question before this Court is whether your decision in Boys Markets should be extended to cover a safety dispute at a coal mine.

This Court carved out in the words of Mr. Justice Brennan a very limited exception to the Norris-La Guardia Act. Counsel has failed to even mention the words Norris-La Guardia Act, the basic charter, the Magna Carta of American Labor.

What we have in this case is the coal industry, particularly the Gateway Mine. Not once in Counsel's argument has he mentioned the fact that Gateway Mine is classified by the United States Bureau of Mines as an especially hazardous coal mine.

Not once has he mentioned the fact that at that mine there is liberated daily 4 million cubic feet of deadly methane gas.

Nor does Counsel mention that at the Gateway Mine it is one of the largest underground mining complexes in the United States. That the failure of these foremen interrupted the airflow to the five face area of that mine.

Counsel has said here that there are regular requirements in the five face area, regular ventilation requirements or 28,000 cubic feet per minute at the last open

cross cut. The Federal minimum ventilation standard is 9,000 cubic feet per minute. And the State minimum standard is 6,000 cubic feet. It gives Your Honors some idea of the gassy nature of this mine. The Federal Bureau of Mines was requiring them to pump three times the minimum amount of air into that section.

The law requires -- the 1969 Coal Mine Health and Safety Act -- requires foremen that are working on the shift to protect the safety of the men coming into the mine, to make a pre-shift examination. That inspection must be carried out within three hours prior to the commencement of that shift.

Q Is that done, Mr. Yablonski, with equipment or is that done with --

MR. YABLONSKI: That is with an anomometer, Your Honor.

That inspection should have been conducted on April 15th between the hours of 5:00 a.m. and 8:00 a.m. These foremen purportedly made that test, and logged into their log books 28,000 cubic feet.

The record in this case conclusively demonstrates that this overcast fell around 4:00 a.m. in the morning. Counsel would now seem to be arguing here, contesting that matter. He did not argue it in the District Court, because there was a water gauge on the main fan of that mine. And

when that resistance was created when that overcast fell, it showed up on that water gauge.

It is conclusively established in this record that that overcast fell and that it fell before the foremen were required to make their pre-shift examination, including the testing for ventilation.

Counsel has not said that the Boys Markets case decided by this Court involved an economic dispute. The question before this Court, as you recall was whether or not supervisors were performing bargaining unit work by stocking shelves in a supermarket in California. I submit to Your Honors that that is not the case here.

The case here involves coal miners -- in the words of Judge Hastey, "Men in an industry which is dangerous at best." This mine classified by the Federal Bureau of Mines is especially hazardous. Counsel does not say that in the Boys Marketsccase it was admitted before this Court that the grievance should have been submitted to arbitration. Here is there is a very serious dispute that has started in the District Court and still exists here, that safety disputes are not arbitrable under the 1968 Coal Wage Agreement.

Q In what status does this case come here? Has there been a final decision in the case?

MR. YABLONSKI: Preliminary injunction entered by the District Court, Your Honor.

Q An affirmance?

MR. YABLONSKI: A reversal.

Q A reversal, yes.

MR. YABLONSKI: A reversal by the United States Court of Appeals for the Third Circuit.

Q So, you were defending the preliminary injunction?

MR. YABLONSKI: No, we were not defending, Your Honor, --

Q Did not the preliminary injunction forbid these forement to go back to work?

MR. YABLONSKI: It also ordered us, Your Honor, to submit the matter to arbitration.

Q And it was in fact arbitrated?

MR. YABLONSKI: Yes, it was.

Q In the meantime?

MR. YABLONSKI: It was arbitrated.

Q But without the foremen being at work?

MR. YABLONSKI: The foremen were not at work. The foremen were returned to work.

Q After reversal?

MR. YABLONSKI: No, they were returned to work, Your Honor, after the arbitrator ruled that they could be returned to work.

Q Because that is what the injunction --

MR. YABLONSKI: That is what Judge McCune's decision

permitted.

Q You were ordered to go to arbitration by the District Court?

MR. YABLONSKI: We were ordered to go to arbitration by the District Court.

Q You went to arbitration without at that point challenging the validity of the order upon you to go to arbitration?

MR. YABLONSKI: Your Honor, we had Judge McCune's order in the Court of Appeals at that time.

Q But you did not get a stay?

MR. YABLONSKI: We did not get a stay.

Q That is the problem.

Q Did you ask for it?

MR. YABLONSKI: Yes, we did.

Q In what way?

MR. YABLONSKI: We asked for a stay, I believe, Your Honor, after the umpire's decision came down. We sought in the alternative before Judge McCune.

Q I gather that what your basic argument is is that this is not an arbitrable dispute because the contract itself did not make it arbitrable?

MR. YABLONSKI: Precisely, Your Honor.

Q And yet you did go to arbitration. Why?

MR. YABLONSKI: We went to arbitration, Your Honor,

because Judge McCune required us to arbitrate within 60 days this issue. We did not want to go to arbitration.

Q Why did you not take his order on appeal?

MR. YABLONSKI: We did appeal Judge McCune's order.

Q You did not get a stay?

MR. YABLONSKI: We asked for a stay after the arbitrator had ruled, Your Honor. We sought a stay of the return of the men, of the foremen, to the mine; or, in lieu thereof, we sought a five million dollar bond.

Q Yet nevertheless appealing the basic determination --

MR. YABLONSKI: We contested throughout, Your Honor, that safety disputes were not arbitrable. We resisted the submission of these matters to arbitration.

Q When you say safety disputes were not arbitrable, you do not mean vel non; you mean under this agreement they were not?

MR. YABLONSKI: Under this agreement, precisely. Your Honor has hit the nail precisely on the head. What is involved here is a construction of the 1968 Agreement.

Q You have already taken the position that this is a contract case; it is not a 502 case in anyway?

MR. YABLONSKI: Precisely. And the record in this case on this score is rather clear. The President of our District Four testified that safety disputes had not been

arbitrated under the '68 Wage Agreement. The company's own President, Gateway's own President, testified that Gateway had never arbitrated a case. He could not speak for the rest of the coal industry, but he testified that Gateway had never arbitrated a safety case.

The record in this case, the evidence presented to the District Court, I think rather conclusively establishes that.

Q The original general agreement with the industry, did you get back into the history of that?

MR. YABLONSKI: I have not yet, Your Honor.

Q I mean, in the record?

MR. YABLONSKI: No, we did not. We believe with respect to the Petitioner's contention that these matters are not in the record. We believe that they are in the public record and they maybe observed by this Court.

The Centralia hearings, which were conducted in 1947 -- incidentally, those hearing were being conducted in the House and the Senate at the very same time that both the House and the Senate were considering Taft-Hartley.

Q Mr Yablonski, before you get into that, let me ask you one more question about this stay and District Court order business.

Did the District Court's injunction order you to do anything more than arbitrate?

MR. YABLONSKI: It ordered us to submit the matter to arbitration and ordered the strike terminated, Your Honor.

Q Well, then, why do you wait to seek a stay in the Court of Appeals until you have actually gone to arbitration? I mean, is not that aspect pretty well mute by then?

MR. YABLONSKI: At that particular point in time the foremen had not been returned to work. We did not have, at least in my view at that point, the kind of persusive argument that we could make after the foremen were ordered back. A Court might say you are premature in coming in here and asking for a stay. We do not know that an arbitrator might say that the mine will be rendered unsafe. We waited until the arbitrator's award came down and the foremen were to go to work. Then we felt we had a right issue to take before a Court and to ask for a stay.

Q And you were refused?

MR. YABLONSKI: We sought it and we were denied it.

Q By the Court of Appeals?

MR. YABLONSKI: Your Honor, I honestly cannot say that we applied to the Court of Appeals. If I am not mistaken, I believe we did. I can recall arguing the matter before the District Court.

Q The Court of Appeals agreed with you.

MR. YABLONSKI: The Court of Appeals agreed with us and we sought before the Third Circuit, Your Honor,

expeditious oral argument under the Norris-La Guardia Act, and it was granted.

Q But you do not know whether you asked them before that for a stay?

MR. YABLONSKI: No, I cannot recall, Your Honor, whether in this record we had asked the Court of Appeals for a stay.

Q I gather the complete record is here, Mr. Yablonski, if even if not printed?

MR. YABLONSKI: I would assume that it is, Your Honor.

Q Mr. Yablonski, one other question. I, of course, do not know your Pennsylvania system. But is there anything out of line between the continued certification of the foremen and their being subject to criminal charges and ultimately pleading nolo?

MR. YABLONSKI: There is no dove-tailing of these procedures. I think Counsel for the Petitioner has indicated, Mr. Justice Blackmum, that one is an administrative proceeding and the other is a regular routine criminal proceeding.

Q But does it surprise you that they can go off in different directions this way?

MR. YABLONSKI: Well, Your Honor, nothing surprises me after I had Petitioner's President on the stand in terms of the administrative procedure. Petitioner's President

conceded under cross-examination that he had spoken with the man who was responsible for conducting decertification proceedings and had informed him that Gateway was suffering a foremen shortage. All of this predated the letter that was sent to Gateway saying, "You can send these foremen back to work."

Given that ex parte communication between Gateway and the Administrative Agency, Your Honor, nothing would surprise me.

Q Mr. Yablonski, when you appeared before the arbitrator, did you make something in the nature of a special appearance protesting contact --

MR. YABLONSKI: Your Honor, I did not appear. No counsel can appear. And it is very unfortunate that under our arbitration system, which Judge McCune ruled -- we believe incorrectly so -- counsel are not permitted to appear at any stage of the arbitration process.

Q The umpire maybe a counsel, I guess.

MR. YABLONSKI: Yes, the umpire or arbitrator can be counsel.

Q Did the Union make a record of proceeding under protest, challenging the contract?

MR. YABLONSKI: Yes, I think at the very outset of those proceedings the Union contested it. Counsel says that the arbitrator found. I think in reality what the arbitrator

did was simply follow Judge McCune's decision. The arbitrator's decision is before you, it is before this Court. It is before this Court despite the fact that Counsel sought to submit it to the Court of Appeals. The Court of Appeals struck it from the record.

Q I gather that what we have here in Appendix G is the arbitrator's -- at least beginning at page 40 -- is that the arbitrator's opinion?

MR. YABLONSKI: That is correct, Your Honor.

Q I notice at page 44A under the subhead Safety, it starts out, "The Union's position in this hearing and also in Federal Court is that Safety is not an arbitrable issue." Is that what --

MR. YABLONSKI: Yes, Your Honor, and I think the next sentence indicates that he was fairly following Judge McCune's order submitting this matter.

Q Whatever, this indicates that the Union did protest that it was not arbitrable.

MR. YABLONSKI: Yes, it did. I would also direct Your Honor's attention to page 38A of the Appendix submitted at the time the briefs were submitted, and it is in the little brown book. Page 38A, the Petitioner sought when it was a party before the Court of Appeals to submit the arbitrator's decision. And as a supplemental Appendix, page 38A reveals that the Court of Appeals, an order signed by Judge Kalodner

struck from the record the arbitrator's decision. It nonetheless appears in the Appendix to the Petition.

Q Do the Petitioners make the argument that even if it was not in the record there, it was in the Public Record?

MR. YABLONSKI: No, I do not believe that this opinion was ever published anywhere, Your Honor.

A question was raised, Mr. Justice Blackmun, regarding this being a serious safety case, that this was in reality a reporting pay case. This was adopted by Judge Rosen, in all candor; and it is repeated here by the Petitioner and by amici in support, in support of the Petitioner's position. In point of fact, Counsel has admitted that the reporting pay dispute occurred on April 16th. The strike which resulted in the commencement of this litigation occurred a month and a half later. It appears to me that if there is a red herring in this case, if there is a pretext being argued by any party, it is not by the Respondents but by the Petitioner. The Petitioner has dragged in this reporting pay.

In the Appendix in this case the complaint at page 7 of the Appendix in paragraph 10 in the Complaint, the Petitioner when it filed its complaint in Court said, "The employee members of the defendants have notified Plaintiff that the illegal work stoppage occurred because defendant Local No. 6330 had passed a resolution that its employee members would not work with certain assistant mine foremen

designated and assigned by Plaintiff to act as supervisors at Gateway."

In their own verified complaint they stated exactly what we are asserting right now. They seemed to have abandoned it.

In addition to this disjointed time frame that they present to Your Honors, all of a sudden a work stoppage occurred a month and a half later after the reporting pay dispute occurred and coincidentally exactly at the same time these foremen were returned to their position; they would have Your Honors believe that they lost their holiday pay. The company reinstated these foremen on the day following a holiday, a day the coal miners were required to work if they were to collect their holiday pay. They would have you believe that the miners forfeited their entire holiday pay, forfeited two weeks work following that, some $296,000 in lost wages because of a dispute involving perhaps a hundred men over four hours reporting pay.

I repeat if there is a red herring, if there is a pretext in this case, we are not asserting it. They is the Petitioner that is asserting it.

Basically, what is involved here is the construction of the 1968 Agreement. The relevant provisions begin at page 10 of the Appendix. The settlement of local and district disputes appears at page 13. It is a broad grievance procedure.

We do not deny that. The Petitioner would appear to assert that if there are no limitations appearing in the settlement of local and district disputes, then there are none. And that is where we differ.

Petitioner acknowledges the fact that National disputes are carved out in another section of this agreement and are outside the grievance procedure. That appears at page 15A. What we are submitting is that mine safety disputes are carved out and made a separate part, separate procedure.

Under the Bituminous Coal Wage Agreement, two committees are recognized at the mines.

Q May I ask you, Mr. Yablonski, that which carves it out, safety matters, are they the provisions at page 12A and 13A?

MR. YABLONSKI: Yes, Your Honor, they begin at page 10A, the Mine Safety Program, a rather comprehensive program, and runs to the middle part of 13A.

Q And that all precedes the provision on settlement of local and district disputes in the text of the contract?

MR. YABLONSKI: Yes, I believe it does, Your Honor.

Q Of course, as you said it is awfully broad language, is it not, at 13A, "...or should any local trouble of any kind arise at the mine."

MR. YABLONSKI: We acknowledge that, Your Honor. We say that looking at the agreement, looking at the

establishment of two separate committees at the mine, you will note in the settlement of local and district disputes at the second step of the grievance procedure, the dispute is between the mine management and the mine committee, referred to as the pit committee at many mines. The pit committee or the mine committee handles grievances. The safety committee handles safety. When this agreement was set up at the local union level, grievances were handled by the mine committee, safety disputes were handled by the safety committee.

You can construe a contract in many different ways. Look at the four corners of the agreement. Look at the inter-relationship of the provisions. Directing your attention to the bottom of page 12A of the Appendix, it talkes about what can occur if the safety committee declares an imminent danger to exist in a section of the mine or in the entire mine.

"If the safety committee in closing down an unsafe area acts arbitrarily and capriciously, members of such committee maybe removed from the committee. Grievances that may arise as a result of a request for removal of a member of the safety committee under this section shall be handled in accordance with the provisions providing for settlement of disputes."

We submit that the parties including that last sentence in there, meant to say that everything else, impliedly, everything else in the mine safety program that precedes that,

is exempt and outside of the arbitration provisions.

Q Who is it that removes members of the committee who act arbitrarily and capriciously?

MR. YABLONSKI: The local union. The company requests that that be done.

Q But if the union refuses it, then it goes to arbitration?

MR. YABLONSKI: Yes.

Q And the issue at stake then is whether the committee acted arbitrarily or capriciously?

MR. YABLONSKI: Right, for which they may only be removed from their office.

Q But do these provisions contemplate that in addition to carrying out the procedures of the Mine Safety Provisions -- should the union also strike while these provisions are going on?

MR. YABLONSKI: I think the contract, Your Honor, contemplates a work stoppage.

Q I thought these provisions themselves say only if the mine committee determines that a section of the mine is unsafe will employees be removed from that section?

MR. YABLONSKI: That is right.

Q Or should the union before that determination is made walk out?

MR. YABLONSKI: No, Your Honor. And that is a

question that Counsel has raised, and I am happy you raised it. Here we did comply with the provisions of the Safety Procedure. We requested an inspection to be made of that mine by Federal and State Mine Inspectors. The Mine Safety Committee men accompanied them on that trip. They reported to the local union the grievous violations that had been committed, the logging of improper entries, the falsification of entries by these foremen. The supported a resolution brought before the entire membership that they would not work with these foremen. And all of this was communicated through management.

Q Did the Mine Safety Committee act?

MR. YABLONSKI: Yes, Your Honor, the Mine Safety Committee did act.

Q What did it say?

MR. YABLONSKI: It made the tour. It reported to the membership of the local union. And the local union, in the words of Judge Hastey, acting as a committee of the whole, declared that none of its members --

Q Did it do this, Mr. Yablonski, in those special instances where the committee believes an immediate danger exists and the committee recommends that management remove all mine workers from the unsafe area, the operator is required to follow the recommendations of the committee?

MR. YABLONSKI: It did with the local union as a

buffer between the committee and the mine operator. It added that.

Q And this is the basic language upon which you rely?

MR. YABLONSKI: Yes, it is, precisely, Your Honor.

Q That sentence that was read by my Brother Brennan?

MR. YABLONSKI: Yes, it is.

Q I take it before the arbitrator you said that whether not the committee acted arbitrarily was an issued opened to arbitration. I take it that is what the arbitrator said: "The Union states that it feels the only issue which can be arbitrated in this hearing is whether or not the Safety Committee acted arbitrarily and capriciously."

MR. YABLONSKI: That is the only thing under the contract --

Q Your position, nevertheless, is that even though the management challenges the action of the Committee and claims it is arbitrary and capricious and therefore the issue becomes arbitrable, you claim that the Union may strike pending that determination of whether the Safety Committee acted arbitrarily or capriciously?

MR. YABLONSKI: There is nothing, Your Honor, in the contract or anywhere else that --

Q What about Boys Markets?

MR. YABLONSKI: That is precisely the question, Your Honor.

Q That issue of arbitrariness or capriciously of the Committee is arbitrable?

MR. YABLONSKI: Yes, it is.

Q And pending that arbitration, you claim that Boys Markets does not prevent a strike?

MR. YABLONSKI: What I am claiming, Your Honor, is that pending that decision, the contract gives these men that right.

Q As I remember it, some years now, Mr. Yablonski, I wrote Benedict Coal, and I think, as I recall it, the National Agreement had no strike provision in it at all, did it? And we divided equally, as I remember it. I think Justice Stewart then was Judge Stewart, as I recall it, on the Sixth Circuit.

Q Yes, because I had written Benedict Coal before Justice Brennan wrote Benedict Coal. I had done it as a Circuit Judge.

MR. YABLONSKI: And Mr. Chief Justice Burger wrote the dissent in the District of Columbia case. Your Honor, that was one of the questions that was before both the District Court and the Court of Appeals. The Court of Appeals never reached that question. There exists a conflict in the Circuits today. The Third Circuit never passed upon it, never saw fit to pass upon it.

Q Do you think that when there is a promise to arbitrate,

does it make any difference whether the contract has a no strike clause in it?

MR. YABLONSKI: We raised and litigated the question.

Q Did not Boys Markets sort of settle that?

MR. YABLONSKI: Your Honor, in Boys Markets there was an express no strike clause. Here there is none.

Q We also held before -- was it Lucas Flour or Dowd Box -- that it did not make any difference in Lucas Flour.

MR. YABLONSKI: The issue, Your Honor, in interpreting the 1968 Agreement is that there is -- there exists a split in the Circuits. We do not believe that that is a question before this Court. We think that it is a contract question.

Q Do you think it is a Norris-La Guardia question?

MR. YABLONSKI: Yes, we do, Your Honor, because this Court said in Boys Markets -- Mr. Justice Brennen's language was that you created, you carved out a very limited exception.

Judge Hastey's decision is supported by Section 502 in terms of public policy. It is supported by the 1969 Federal Coal Mine Health and Safety Act. It is supported by the Occupational Health and Safety Act of 1970. It is supported by the common law of the shop that has emanated in arbitration after arbitration since seminal decision of Harry Schulman in the Ford Motor Company Case as far back

as 1944.

All of these, we believe support Judge Hastey's conclusion that safety disputes are sui generis.

In conclusion, in dealing with Norris-La Guardia, Your Honors, and Boys Markets, this Court said in Boys Markets that you did not -- I am quoting -- undermine the vitality of Norris-La Guardia. You said that it was not every strike over an arbitrable matter that was necessarily enjoinable.

Given the nature of the contract involved herein, the nature of the dispute, the relevant public policy and common law of the shop, the ordering of injunctive relief here by the District Court collides with the most fundamental of equity principles. If injunctive relief is appropriate in a case such as this, then surely the class of disputes falling outside of the ambit of Boys Markets is infinitesimal, and Norris-La Guardia is truly a dead letter during the contract term. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Scheinholtz, you have a few minutes left.

REBUTTAL ARGUMENT OF LEONARD L. SCHEINHOLTS, ESQ.

MR. SCHEINHOLTZ: May it please the Court:

I would like to take up several statements that Mr. Yablonski made. First, his reference to the fact that Mr. Kegel, the President of Gateway, testified that he did not recall any arbitration over safety with respect to Gateway.

That in itself is meaningless because Mr. Kegel also testified that he believe that there had been safety disputes arbitrated under this agreement with other companies and in fact the brief submitted amicus curiae by the Bituminous Coal Operators Association at page 15 to 16 states that at least 40 cases have been submitted to arbitration under the 1968 Agreement in the three years preceding this case.

Secondly, I do not even read the Respondents brief as saying that safety disputes are not arbitrable. What they say in their brief is that they have the choice, that they have the right to either submit them to arbitration or elect to strike. That is not what Mr. Yablonski --

Q As I understood Mr. Yablonski in answer to my Brother White -- and this is 43A -- he agreed with what the umpire said here, namely, that although the company has not made any charge against the safety committee -- and I gather you did not --

MR. SCHEINHOLTZ: That is right.

Q -- the Union states that it feels the only issue that can be arbitrated in this hearing is whether or not the safety committee acted arbitrarily and capriciously.

MR. SCHEINHOLTZ: They made that claim, and it was rejected by the arbitrator. He ruled that other kinds of safety disputes may be arbitrated. In essence there argument,

as Mr. Yablonski states, he says that by virtue of the fact that the Mine Safety Program states that the removal of the Mine Safety Committee can be subject to arbitration and that this impliedly excludes all other types of safety disputes. It does not say that.

Q Let us assume for the moment that the regular arbitration clause in the contract does not reach safety disputes; just assume that for the moment. Then the only other grounds for arbitration is the safety clauses itself, which are limited to deciding whether the safety committee acted arbitrarily and capriciously.

MR. SCHEINHOLTZ: I do not agree with that. The mere fact that the Mine Safety Program says that this type of dispute may be submitted to arbitration does not necessarily rule out the fact that other disputes regarding safety may be submitted to arbitration.

Q Yes, but under another provision, not this one.

MR. SCHEINHOLTZ: Even this provision does not provide for arbitration. It refers the parties to the settlement of local and district disputes procedure for arbitration.

In other words, the Mine Safety Program provision contains no provision specifically dealing with arbitration.

Q But it refers you to another provision.

MR. SCHEINHOLTZ: To the settlement, to the regular

grievance arbitration procedure.

Q Only on one issue.

MR. SCHEINHOLTZ: No, it just says that that kind of dispute may be submitted to arbitration.

Q That is right, and that is the only reference with respect to that issue.

MR. SCHEINHOLTZ: I do not think that that means necessarily that all others are not subject to arbitration. In any event, that is a question concerning the interpretation and application of the agreement that the arbitrator is in a position to determine. He determined that against the Union.

Finally, I would like to mention the fact that Mr. Yablonski says that Judge McCune ruled --

Q Is that an issue we have to decide?

MR. SCHEINHOLTZ: I do not think you have to decide it, because the arbitrator has already decided it.

Q Even if there had not in fact been an arbitration in this case, I am sure your position would be that that is for an arbitrator to decide, not for the Court.

MR. SCHEINHOLTZ: That is right. That is exactly right. That is my position.

Q The provisions under the Mine Safety Clauses for arbitration were not triggered because the company did not challenge the safety committee?

MR. SCHEINHOLTZ: No, before you ever get to that point, the Union has to invoke the Mine Safety Procedures, which it never invoked. They had never made the request to management for withdrawal of the men or any of those things. The only way you get to the terminal point of the Mine Safety Program is if they invoke the procedure. They are in a position of relying upon a procedure that they never invoked.

One other thing that I would like to mention is the fact that there was no ruling here by Judge McCune that Counsel could not be present in this arbitration.

There is a specific provision in the settlement of local district disputes procedure that specifies that. That is right in the Grievance Arbitration Clause. I do not know how it got there, but it is there.

Finally, the reason the arbitration award was stricken was became in point of time it happened to come down after the record had been transmitted to the Court of Appeals as we stated in Footnote 12 to our reply brief. In a companion or related case, the United States Steel Corporation versus UMW, in point of time the arbitration award came down before the record was transmitted to the Court of Appeals, and it is part of the record in that case.

And finally, obviously the Court must have considered the arbitration award material to this proceeding because it placed great emphasis on it in its decision and it is a part

of this case.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Scheinholtz. Thank you, Mr. Yablonski.

The case is submitted.

(Whereupon, at 3:00 o'clock p.m., the case was submitted.)