In the

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs

No. 73-370

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,

Respondent.

Washington, D. C.
March 18, 1974 and
March 19, 1974

Pages 1 thru 45

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

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD, Petitioner,	:	
v.	:	No. 73-370
FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, Respondent.	:	

Washington, D. C.
Monday, March 18, 1974

The above-entitled matter came on for argument at 2:18 o'clock p.m.

BEFORE:

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

APPEARANCES:

DANIEL M. FRIEDMAN, Esq., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; for the Petitioner.

MOZART G. RATNER, Esq., 818 18th Street, N.W., Washington, D. C. 20006; for the Respondent.

C O N T E N T S

ORAL ARGUMENT OF:	PAGE
Daniel M. Friedman, Esq., for Petitioner	3
In Rebuttal	41
Mozart G. Ratner, Esq. for Respondent	24, 32
Session of Tuesday, March 19, 1974	31

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-370, National Labor Relations Board v. Food Store Employees Union, Local 347.

Mr. Friedman?

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE PETITIONER

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

In a large number of cases, this Court has recognized the limited role that courts of appeals have in reviewing the scope of remedial orders of administrative agencies. The standard governing such review has been formulated in different ways. The Court has said that before the appellate court attempts to change the remedy, it must find that the remedy selected has no reasonable relation to the unlawful practices found, that it constitutes a patent abuse of discretion, or that the agency has not made an allowable choice of a remedy.

This principle has also been applied to ordkrs of the National Labor Relations Board, the Court having recently stated in the Gissel case that those orders are entitled to special respect.

All of those cases have been ones in which the remedy provided by the agency has been challenged because it assertedly went too far. The agency did something more than

either it was permitted to do under the statute or it was claimed was necessary to deal with the problem before the agency.

In this case, the court of appeals for the District of Columbia circuit held that the National Labor Relations Board had failed to go as far as it should have gone in providing appropriate remedies. Specifically because the Board failed to grant a union request that in addition to a number of other remedies that the Board had provided, it did not require the employer to reimburse the union for counsel fees expended, extraordinary organizational expenses it had in connection with an organizing drive result where the employer had committed serious unfair labor practices against it.

We have brought the case to this Court because we think that the standard governing the proper scope of judicial review of agency orders should be the same and must be the same whether the order is challenged as excessive or inadequate.

And, indeed, as I understand, the union has no disagreement with us. The union says, "Yes, the standard is the same, but under the standard the Board acted improperly."

Q You do not need to respond immediately to my question, but there is a question here about the status, if any, of the employer Heck's in this case. As you know, there is a motion strike their brief and so on. They were not allowed

to intervene, and then after we denied certiorari, they were allowed to intervene in the court of appeals and so on. I hope before this argument is finished there will be some little straightening of this out.

MR. FRIEDMAN: May I address that right now?

Q You may, but do not feel you have to.

MR. FRIEDMAN: I think it would be a convenient point to address right now.

Heck's was a party, of course, before the Board in all of the proceedings. When the case was before the court of appeals the first time, Heck's intervened, as it had a right to do. When the case came back to the court of appeals the second time, Heck's did not intervene, although it had a right to do so. And the case was presented to the court of appeals on the assumption by both the Board and the union that the Board had this authority. Heck's could have intervened but did not. The court of appeals apparently assumed the board had this authority but held that the Board had failed to exercise it.

It was only after the court of appeals had remanded the case to the Board to provide these remedies that Heck's then sought to intervene before the court of appeals. That was denied by the court, presumably as untimely because under the rules and application for intervention, it is required to be filed within 30 days of filing the petition to review.

Heck's then sought review in this Court on a petition for certiorari, denial of intervention.

Q Review of the denial of intervention.

MR. FRIEDMAN: Denial of intervention. That was denied. That was denied.

Following that, Heck's was permitted to intervene by the court of appeals approximately six weeks after the petition for certiorari. We have filed a supplemental memorandum in this case. It is a xeroxed document that we were unable to file unfortunately until last Friday, in which we discussed this problem at considerable length.

First of all, we think it is very dubious whether after this Court has granted the petition for certiorari the court of appeals can then grant intervention so as to permit someone to become a party to a proceeding to this Court. We think when this Court has taken the case that at least ousts the court of appeals of authority to make then someone a party.

Q Did the court of appeals say why they did this?

MR. FRIEDMAN: No, they did not, Mr. Justice.

Q After initially denying it.

MR. FRIEDMAN: After initially denying. And I point out also they denied a petition for rehearing. We do not know why.

This situation has never been raised before this

Court. It is not raised by the Board. It is not raised by the union. The union concedes it. And I am not sure exactly what status the employer believes it has in this case. On the one hand, it has now amended the caption to show itself as a respondent. On the other hand, on page 2 of its brief it asks leave to intervene.

This Court, incidentally, had denied a petition for rehearing of that in March, early this month. And it just seems to us this issue is not properly presented. This is not the way this kind of question should be litigated. The very question, the very question, that the employer seeks to raise in this case is now pending before the court of appeals in the Tiidee case, to which I shall refer. That case was argued in September.

Q That is pending before some court of appeals, the Tiidee case?

MR. FRIEDMAN: That is pending before the court of appeals for the District of Columbia circuit, the same court that decided this case, in which there is a challenge to the Board's authority.

Q Power.

MR. FRIENDMAN: Pardon?

Q The Board's power to do this.

MR. FRIEDMAN: The Board's power to do it.

Q And here you concede the Board's power, do you

not?

MR. FRIEDMAN: Yes, we think the Board has that power.

Q After alL, the Board did decide the Tiidee case and it already had power.

MR. FRIEDMAN: Yes. We think the Board has that power, and the union of course agrees with us.

Q It would not be correct to call it a concession on your part that the Board has the power; it is a claim rather than a concession.

MR. FRIEDMAN: I stand corrected, Mr. Justice. It is a claim.

Q It is not an issue.

MR. FRIEDMAN: It is not an issue as far as the parties are concerned. And the suggestion by the employer that it is somehow anomalous to decide the question of whether the Board in this case properly refused to award the fees if in fact, as they claim, it has no authority at all.

We have cited in our supplemental memorndum a decision of this Court, two decisions of this Court, which we think are very close. Some years ago this Court held that a private plintiff was entitled to recover for a violation of Section 3 of the Robinson-Patman Act without deciding whether or not such a suit would lie.

About three or four years later, the question came

up, and this Court then held in the Nashville Mill case that in fact Section 3 of the Robinson-Patman Act was not one of the anti-trust laws for which a private action would lie.

So, it seems to us this is a case in which this contention that the employer has made is not properly before the Court.

Q It is certainly not subsumed under either of the questions presented by your petition.

MR. FRIEDMAN: That is correct, Mr. Justice. I do not see how our question could possibly be viewed as raising any issue with resepct to the Board's power. It is a strange thing. What the employer is doing is urging an alternative ground not for affirmance but for reversal, a ground that the parties have not raised. As far as we are concerned, it seems to us that this is not the proper context and posture in which to litigate this.

Q The respondent union I think has filed a motion to strike the brief. Have you joined in that motion?

MR. FRIEDMAN: No, we have not joined in the motion, Mr. Justice, but what we have said, spent two or three pages in the supplemental memorandum--

Q I missed that somehow or other.

MR. FRIEDMAN: Unfortunately it is not printed at the moment. But we hope it will be printed by the end of the week. It is being printed now, but we filed it because of the time

situation.

Q So, what have you done with respect to that motion?

MR. FRIEDMAN: We have done nothing in respect to that motion. We have filed a memorandum or a brief in answer to the union's brief, because we do not know how the Court is going to treat it--I'm sorry, the employer's brief. We do not know how the Court is going to treat it, but we give a number of reasons as to why we do not think the Court should consider the argument, and then very briefly just to indicate our view as to why we think the Board has that power in rather summary fashion.

Q I would suppose, Mr. Friedman, if we were going to consider it, would we not have to reset this case for oral argument? Heck is not represented here.

MR. FRIEDMAN: I would think so, Mr. Justice.

Q I do not know how that can be--unless it is subsumed in one of your questions, I do not see how, unless we granted some petition of Heck's to present the question.

MR. FRIEDMAN: No, I do not think that issue is properly before this Court.

Q We acted on the certiorari petition. Surely we are not in the case here.

MR. FRIEDMAN: Well, they had filed, Mr. Justice. At the same time that the Court granted the government's

petition for certiorari, it denied Heck's petition for certiorari to review the denial of intervention.

Q But then subsequently they were not allowed to intervene.

MR. FRIEDMAN: By the court of appeals.

Q After the court of appeals had lost jurisdiction.

MR. FRIEDMAN: That is our position.

Q We now have Heck's brief.

MR. FRIEDMAN: That the Court, Mr. Justice, this morning denied leave to file.

Q I am just saying I have it.

MR. FRIEDMAN: You have it physically with you. But we believe in light of the Court's action, that is not properly before you.

Q What is now a petition from the latest permission to intervene, the order of intervention.

MR. FRIEDMAN: No, I do not think so.

Q There was an order denying leave to file this?

MR. FRIEDMAN: No, I am sorry, Mr. Justice. It was denying the leave to the Chamber of Commerce to file a brief in support of that. The Heck's brief is before the Court.

Q And there is a motion to strike it that has neither been granted nor denied.

MR. FRIEDMAN: That is correct. That is before the Court, the motion to strike; or, apart from the motion to

strike, whether the Court will consider the merits of that. I mean the Court could, of course, keep the motion, the brief on file, but decline as we think--

Q The motion to strike is the union's motion?

MR. FRIEDMAN: Is the union's motion.

Q And you join it?

MR. FRIEDMAN: No, we are not joining it as such.

Q If we do allow it to stay in here and then reset this for rehearing and then the court of appeals changes its mind again, then what?

MR. FRIEDMAN: I do not know, Mr. Justice. It seems to me your question indicates the reason for the rule that a party has to seek timely intervention before the court of appeals. Heck's could have protected itself completely in this case had it sought timely intervention before the court of appeals.

Now, if I may, let me get to the basic issue in the case. As I said, there is no dispute over the fact that the standard is the same. And, therefore, what the case comes down to is whether in the facts of this case the Board abused its discretion, did something that was patently irrational or illegal in declining the union the additional remedies which it here sought.

Q On that you agree with Heck's.

MR. FRIEDMAN: Yes. The employer and the Board are

in agreement that the Board properly declined these additional remedies. We disagree with Heck's; we think we have the power to grant those remedies. Heck's says we do not.

Q Under usiversal camera, is it not rather the question whether the court of appeals abused its reviewing discretion in deciding that the Board misused its authority? I mean, we review the court of appeals rather than the Board, do we not?

MR. FRIEDMAN: You review the court of appeals, Mr. Justice, but in reviewing the court of appeals, it seems to me, one has to look at the limited role the court of appeals plays in this thing; that is, whether in all of the circumstances it can besaid that the Board patently abused its discretion, that its conclusion here that these additional remedies were not necessary bore no relation to its permissible views as to what the act requires.

Unfortunately it will need a somewhat detailed discussion of the facts because this Board decision here is involved with the Board's subsequent decision in the Tiidee case. And since the court of appeals held not that the Board had improperly exercised its discretion in this case in the sense that the Board's rationale in this case was insufficient, hat was not the theory on which it held the Board was required to give these remedies, the theory was that what the Board had done in the Tiidee case somehow undermined its decision here.

So, in my presentation, I will focus mainly on what the Board did in this case, what the Board did in the Tiidee case.

The case arose out of an attempt by the union to organize a retail store operated by Heck's in Clarksburg, West Virginia. Heck's, as is customary for it, strongly resisted the union and engaged in a variety of unfair labor practices. I use the word "customarily" because Heck's is no stranger to the National Labor Relations Board. In the past few years it has been a respondent in 11 different proceedings. And the Board found in this case that this was part of a general plan by Heck's, conducted by its two principal officers, its president and vice president, to resist unionization at every stage and, as it said, to deny its employees their rights under the National Labor Relations Act.

What Heck's did has a custimary ring to it. They threatened and coerced employees who were active in the union. They conducted a non-secret poll of the employees as to who was interested in the union. They threatened that if the union got in, they would close the store. And then they refused to bargain with the union, even though, as the Board found, the union enjoyed a representation status with respect to a majority of the employees. The union had obtained cards, authorization cards, and that is the basis on which it sought to bargain with the company. This is of some significance with respect to the kind of case we have here.

Heck's asserted that it had a good faith doubt with respect to whether in fact the union represented a majority of its employees. And the examiner agreed with Heck's on this. The examiner said yes, on all the facts we think Heck's did have a good faith doubt. The Board, however, rejected that.

As a remedy for these unfair labor practices, the Board adopted what is its conventional remedy. It had a cease and desist order. It directed the employer to post the various notices in its plant, and it also directed the employer on request to bargain with the union, finding that the employer's unfair labor practices had made it impossible at that point to hold a fair election.

The court of appeals upheld the Board's findings of violation and said that the Board's order was fine as far as it went but that it did not go far enough and therefore remanded the case to the Board to reconsider in the light of the court of appeals' Tiidee opinion.

On the remand the Board granted some but not all of the remedies that the union had sought. Specifically it added these remedies. It required the employer to mail this notice which it had previously ordered posted in the plant to every employee at his or her home. It directed the employer to give the union access to company bulletin boards for a period of a year. And it also directed the employer to make available to the union the names and addresses of all the

employees and keep that list current for a year to facilitate the union's communication with its employees. The Board, however, refused to grant certain other requests that the union had made. It refused to grant an order for a companywide bargaining. It refused to order the employer to read the notices to the employees at an assemblanged, and it declined to award attorneys' fees and excess organizational expenditures.

The Board recognized that there was a probability that as a result of the employer's unfair labor practices the union probably spent more on attorneys' fees and on organizational fees than it would have found had there not been the refusal to bargain. But the Board concluded--this is on page 38a of the petition--said that it would not on balance effectuate the policies of the act to require reimbursement by the employer with respect to these items.

When the Board spoke of effectuating the policies of the act, it was referring to the statutory provision governing the Board's authority over orders. Section 10(c) of the act would give the Board power to take such affirmative action, including reinstatement of employees, with or without back pay, as will effectuate the purpose, the policies, of the act.

The basic rationale of the Board's decision in this case was that the special role of a charging party before the Board, the group, the person, who files the charges, that that

role of the charging party was such that it was not necessary to carry out the policies of the act as a general rule to provide for attorneys' fees and extra organizational expenses.

As the Board said, reading now briefly from page 39a, "It is the Board which has been given primarily initial responsibility to determine and protect the public interest in the elimination of obstructions to commerce resulting from labor disputes. Such protection of the public interest as may result from the charging parties' participation in litigation must be regarded, we believe, as incidental to its efforts to protect its own private interest. Given this statutory framework, we conclude that the public interest in allowing the charging party to recover the cost of its participation in this litigation does not override the general and well established principle that litigation expenses are ordinarily not recoverable."

The union disagrees with us what the general principle is with respect to recoverability of litigation expenses in this country. We have filed a brief we arged one way. The union argues it the other. Not infrequently lawyers disagree as to what the cases hold. But the critical thing we think about this is this was just really an additional ground the Board relied on. The critical language, we think, is the language on page 38 that on balance, because of the role of the charging party, it would not effectuate the

policies of the act to permit reimbursement.

I just might mention parenthetically in passing, since this is important, under the Board's procedures, as this Court has recognized in the Scofield case, it is the Board that has the lavering oar in conducting its proceedings. The charging party is a party. The charging party can play a greater or lesser role; but it is the Board that conducts the proceeding. It is the Board, for example, that makes the decision whether to seek enforcement of an order. The charging party cannot do that. It is the Board that has the sole authority to cite a respondent for contempt if he fails to comply with the order.

And, therefore, it seems to us, that this case is a very different case from the typical situation in which attorneys' fees have been awarded. This is not a case in which attorneys' fees have to be awarded in order to encourage people to conduct litigation where that litigation is an important element of implementing the statutory programs and policies.

This is not a case in which, as a result of a litigant's activities, benefit has been conferred upon a group, and it seemed unfair that the members of that group should not compensate the man who brought the suit. I mean, in the Cole case there what you had was the particular employer had brought a suit in order to vindicate his right to free speech in

opposition to the union. The Court held that attorneys' fees were properly payable by the union in that case because in vindicating his right of free speech, he was also vindicating the rights of free speech of all the members of the union and therefore that all the members of the union benefited from his endeavors.

Here obviously all the members of the union benefited from the union's activities, but it is the members of the union who should pay for that. Certainly the employer in this case cannot be deemed the beneficiary of the litigation the union conducted in this case. The union and the employer were at odds.

When the case came back to the court of appeals the second time, the court of appeals did not hold, as I have indicated in any way that it disagreed with the Board's general premise that ordinarily because of the nature of Board proceedings, that counsel fees and organizational expenses should not be awarded. What it said was, it thought the Board's rationale in this case had been undercut by its decision in the Tiidee case and that the Board now in effect has conceded that as long as an employer--let me read the precise language that the court of appeals used, because I think it indicates the essence of its holding in this case. What the court said was--

Q Where are you reading now?

MR. FRIEDMAN: I am reading from page 10a of the first appendix to the petition. Unfortunately in this case the various documents divided up among a number of different places.

What the court said just before paragraph number two on 10a is, "So, it would appear that the Board has now recognized that employers who follow a pattern of resisting union organization and who prevent and unduly burden the processes of the Board and the courts should be obliged at the very least to respond in terms of making good the legal expenses to which they have put the charging parties and the Board. We hold that the case before us is an appropriate one for according such relief."

We think in this holding the Board has completely misinterpreted the Board's decision in Tiidee. Tiidee was another case similar to this one. An employer who resisted union organization demands, who refused to bargain. The Board entered the conventional remedy. The court of appeals remanded the case to the Board primarily to consider what is called a make-whole remedy--that is, the claim of the union that the relief should include not only cease and desist, et cetera, et cetera, but also to pay to the employees the Board thinks they would have gotten had there been a contract. That was the main issue that was litigated in the Tiidee case.

Q There was a different panel on the court, was

there not?

MR. FRIEDMAN: Yes. The Tiidee panel were Judges Leventhal, Robinson, and MacKinnon. This panel were Judges Leventhal, Bazelon, and McGowan, and McGowan wrote the opinion.

In the Tiidee case, after this lengthy discussion, the court almost at the end of its opinion added a footnote--I am sorry, the end of the discussion in the Tiidee opinion. It said that the Board should recnsider on the remand other lesser remedies beside the make-whole. And one of the things it said, "...should consider alternate remedies such as an award to the union for excess organization costs caused by the company's behavior or for the costs of having to litigate a frivolous case"--court's words--"frivolous case or for a combination of these."

Earlier in its opinion at page 1249 at 426 Federal 2nd, the court said, "The present posture of the Board encourages frivolous litigation, not only before the Board but before the courts," that is, the present posture of the Board in not doing anything more than add the conventional remedies.

In its Tiidee opinion the Board specifically granted attorneys' fees because this was frivolous litigation. That is what it said. I refer to pages 35 and 36 of the appendix, the brown volume. The Board said, "Normally, as the Board recently noted, litigation expenses are not recoverable by the chargining party in Board proceedings even though the public

interest is served when the charging party protects its private interests before the Board," citing its decision in this very case.

And it went on to say, "We agree with the court, however, that frivolous litigation such as this is clearly unwarranted." But then it went on to say the statutory policy of insuring rights of the employees is not encouraged further when there is frivolous litigation.

Then it said, "In order to discourage future frivolous litigation"--page 36 of the appendix--and to serve the policies of the act, we decided to audit.

Three times in its discussions, pages 35 to 36 of the appendix, in its Tiidee opinion, it refers to frivolous litigation. When it came to excess organizational expenses, what the Board said was, "We are not going to award them because as we view this case there were no excess organizational expenses. The union in two months won an election, 19 to 6, and it did not incur any excess organizational expenditures." The court of appeals interpeted that ruling as somehow indicating that the Board had abandoned its rationale in Heck's. Somehow, because the Board had not said in Heck's case--I am sorry--because the Board had not said in the Tiidee case while we generally do not award these things, we do not have to reach the case to see whether there is an exception here, where there was frivolous litigation, because in this situation

no excess expenditures obtain.

It seems to us there are two basic points I would like to make about what the Board did in this case. First, we think the Board was preeminently reasonable in light of the statutory scheme in concluding that as a general rule attorneys' fees and litigation expenses should not be accorded as part of the remedy for unfair labor practices. That we think as a general rule is properly promulgated.

We also think it acted reasonably in creating the exception it did in Tiidee for frivolous litigation. Frivolous litigation stands on a very different footing from litigation in which, although there are substantial questions to be litigated, nevertheless ultimately it is held that the defendant has not prevailed. In this case, although the Board found that the employer had no good faith doubt about the union's majority status, the employer's contention had sufficient substance that the trial examiner went the other way.

We think this is one of those cases where what the court of appeals has really done is it has attempted to determine what in fact would be appropriate in this kind of situation, what would be appropriate relief, to effectuate the polities of the act. That is a decision, with all due respect to the court of appeals, that Congress has committed to the expert opinion of the Board and not to the courts, and we

think the court of appeals in this case went beyond the proper scope of its relief.

Thank you.

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

Mr. Ratner.

ORAL ARGUMENT OF MOZART G. RATNER, ESQ.,

ON BEHALF OF THE RESPONDENT

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

This case presents in our view two rather separate questions. One is as to the validity of the court's holding that the Board acted arbitrarily in not awarding organizational expenses in this case. And the second is the Board acted arbitrarily in refusing to award legal fees in this case.

There is no question here, contrary to my friend Mr. Friedman's setting of the question, about what the Board should hold as a general rule with respect to legal fees. At least it as a general rule is meant to cover cases where you do not have a persistent aggravated offender, one whose unfair labor practices are brazen and who is in fact a multiple recidivist.

The law has ways of taking care of treating litigants of--violators--of that kind. And it is the same way, as it turns out that deals with litigants who present frivolous defenses.

MR. CHIEF JUSTICE BURGER: Mr. Ratner, is it not inherent in the doctrine that Mr. Friedman discussed at the close of his argument that this is one of the very delicate matters that the Board deals with and the only way to avoid 11 different rules on it is to let the Board have virtually final authority in determining such remedies.

MR. RATNER: I submit, Mr. Chief Justice, that that principle has no application in this case. What the court of appeals in effect did was to hold that the Board had acted arbitrarily, unreasonably, and drawn a distinction where there is no material difference in relevant results between what they said about the benefits and organizational expenses to effectuate the policies of the act in Tiidee and what they said were their reasons for denying organizational expenses in Tiidee, none of which bore remotely on the organizational expenses related solely to counsel fees.

The reason given in Heck's for the denial of counsel fees were the same as the reasons given for the denial of organizational expenses. They are relevant on the question of counsel fees. They are irrelevant to the question of organizational expenses, and the court of appeals so held.

It was not that the Board was being arbitrary when it distinguished aggravated and persistent violators from those who present frivolous defenses, even though there may not be even as brazen violations as those of a persistent recidivist.

We think that unless the scope of judicial review afforded by the Administrative Procedure Act will be narrowed beyond toleration, that the court of appeals must be allowed at least to set aside administrative inaction or action when it correctly finds that the action or inaction is arbitrary in the sense that I have used that term, which means irrational, not materially related an supported by the reasoning given and distinctions without relevant differences. This is, I submit,Your Honor, what the test should be in this case. Was the court of appeals correct in holding that the Board in effect was arbitrary here?

There are two respects in which this case is unique. One, it is a case of a multiple recidivist whose brazen violations,in the Board's own words, are companywide aggravated, and pervasive. The Board found that Heck's had a labor policy which was opposed to the policies of the act. And, as a result of that policy, within a relatively short time, between 1965 and 1970, Heck's was involved in unfair labor practice litigation 11 times.

During that period, as it happened, the court of appeals of the Fourth Circuit was holding that the Board could not get a bargaining order on authorization cards. It was in the light of that holding that the Board and the trial examiner treated one or two of these Heck's violation cases. One or two of the cases actually came to this Court in Gissel

as a companion case. And, of course, the judgment below was reversed.

I just wanted to add, the reason the Board reversed the trial examiner's determination that there was no refusal to bargain in bad faith was not because it differed with him on the facts but because of its view that Heck's was totally unconcerned with whether the union had a majority or not. It would not bargain no matter what the situation was; because of its background and history of unfair labor practices, it would have refused to bargain in any event. It simply demanded an election to gain an additional time to undermine the union. And when it had done that, of course, it brought with it litigation.

The strategy that Heck's used was to transfer, discharge, or close the store; it threatened to do those things if the union got in, to engage in excessive interrogation, coercive interviews, and illegal polls. When the union requested recognition, Heck's would step up its campaign. It routinely refused to look at authorization cards that the union tendered in support of its request, demanded an election to gain time within which to undermine the union further, and thereby forced the union and the general counsel to litigate to establish that the union had an uncoerced majority when it had requested recognition.

The Board treats frivolous litigation as if somehow

the litigation had been initiated by the employer. That is not true, of course. The employer is the respondent in these cases. The only way to see that is to see that the employer is willing to submit to litigation even though he has not got a plausible defense, no matter how blatant his violations are, in the hope, like Mr. McCorbett, that something will turn up. And if he is able to attack the union's card showing, why that lets him free off the hook, because if the union does not have a valid majority of uncoerced cards, it does not have a right. But that is not why he acted illegally. All of his illegal action was devoted to destroying the support for the union, whether or not they had a majority. So that why really is happening here is that the employer is using, is provoking, the litigation, provoking the union and compelling it to resort to litigation, it and the board, to resort to to litigation. And then he goes along, hopes he wins, does not care how long it takes--in fact, prolongs it as long as possible to ward off the evil day. And then when the evil day arrives, probably find the union totally impotent to engage in bargaining.

The Board has recognized all that. In its decision in Tiidee, its supplemental opinion in Tiidee, following a remand from the court of appeals, the Board had this to say--and, oh yes, before I get to that, I should mention that when Mr. Friedman says that the court's decision in Tiidee related only to frivolous litigation, he omits the fact that the

remand in Heck's itself was predicated not on the frivolity of the defense but on the persistent and aggravated bad faith conduct which the Board itself had found. So, there can be no justification whatever for claiming that the Board could properly have believed that all the court of appeals meant was that it should award counsel fees in cases of frivolous litigation and not where there are aggravated and persistent violations of the Board in Heck's. That distinction just simply will not wash on the basis of the Heck's remand itself.

The Board accepted the remand in the Heck's case. As we understand it, that means that they were content to attempt to follow what the court had told them to do. And one of the things that the court had told them it had to do was to consider, at least, some of the alternative remedies, including excess organizational expenses and counsel fees, that had been requested by other parties, including the union in the Heck's case, as an alternative to the so-called make-whole remedy.

On page 33 of the appendix is the Board's explanation in its supplemental opinion in Tiidee of what it thought the remand meant. The Board believes--they consider "While we find it would be counter-productive to grant the union's request for a remand for the trial examiner, the Board believes that the alternative remedies provided hereinafter would undo some of the baneful effects pointed out by the court as having resulted from

respondent's clear and flagrant violation of the law." No, that has nothing to do with the frivolity of the defense or the frivolity of the litigation. These are the effects that flow from respondent's clear and flagrant violation of the law. Indeed, that is how a union basically loses its support among the employees, though the exception always proves the rule; it won the case in the election in Tiidee, but it lost in Heck's, and that is the most common experience that union's have.

Where you have clear and flagrant aggravated violations of the law such as the respondent engaged in in this case, you are going to inevitably have as a result the loss of support for the union by the employees, whether loss of their support either from complete support to majority or from a majority to a minority.

To continue with the Board's statement: "These remedies will, for one, aid the union in rebuilding its strength so that it may bargain effectively with the respondent and also by requiring the respondent to pay some of the Board's litigation costs occasioned by this misconduct, similar brazen refusals will be discouraged."

MR. CHIEF JUSTICE BURGER: We will resume at this point in the morning at 10:00 o'clock.

[Whereupon, at 3:00 o'clock p.m., the Court was adjourned until the following day, Tuesday, March 19, 1974 at 10:00 o'clock a.m.]

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD, Petitioner,	:	
v.	:	No. 73-370
FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, Respondent.	:	

Washington, D. C.
Tuesday, March 19, 1974

The above-entitled matter came on for argument at 10:06 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:

DANIEL M. FRIEDMAN, Esq., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; for the Petitioner.

MOZART G. RATNER, Esq., 818 18th Street, N.W., Washington, D. C. 20006; for the Respondent.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in No. 73-370. Mr. Ratner, you have 18 minutes remaining.

ORAL ARGUMENT OF MOZART G. RATNER, ESQ.,

ON BEHALF OF THE RESPONEENT

MR. RATNER: Thank you, Your Honor. Mr. Chief Justice, may it please the Court:

The Labor Board contends that the court of appeals usurped the Board's function of determining in the first instance what remedies are necessary to effectuate the act, the policies of the act, and that they thereby infringed upon the Board's prerogative.

We say no. We say that the court did not reach the question in this case as to whether the withholding of remedies frustrated rather than effectuated the policies of the act.

What it did do was merely to hold that the Board's rationale for denying organizational expenses and counsel fees in the Heck's case could not reasonably be reconciled with the Board's supplemental decision in Tiidee and with the purported distinction of Heck's in that Tiidee opinion.

If the court below is correct in its analysis of those opinions, then the court was entitled, we believe, to reverse the Board for its error of law, namely, its arbitrary departure from its own rule. Unless the court of appeals is

not empowered to require the Board to follow the principles the Board says it follows, then the court below should be sustained.

If a divergence arises between courts of appeal on the question whether in any given set of circumstances the Board is in fact following its own precepts, that difference, as all the cases of conflict, are for this Court to resolve ultimately.

To show that the court of appeals was merely holding the Board to its own guidelines, I quoted from the supplemental decision in Tiidee at page 33. That portion which indicates that the Board recognized the award of counsel fees and organizational expenses among other measures was both within its powers and necessary to--and I quote the Board--"undo some of the baneful effects pointed out by the court of appeals in Tiidee."

What were the baneful effects pointed out by the court of appeals in Tiidee? There the court of appeals explained that in refusal to bargain cases, to award merely the Board's normal remedies, operated counterproductively to effectuating the policies of the act, inasmuch as they enabled the wrongdoer to retain the fruits of his wrongdoings and left uncompensated and unremedied the injuries which the employer's wrongful conduct had imposed upon the union and its employee beneficiaries.

Both of those are the essential elements that in

order properly to effectuate the policies of the act must contain, as this Court has held.

In the Tiidee opinion the Board explained that it had the power to enter these remedies; it assumed that it had the power to enter these remedies. It assumed that and said that beyond this we do not think we can go. We cannot go to the make-whole remedy, but we could do this. And then at page 35 of the appendix, the portion that was quoted by the court of appeals in its opinion, the Board explained that it was denying organizational expenses in Tiidee because, and I quote, "We find no nexus between the employer's unlawful conduct here under examination and the union's pre-election organizational expenses, and accordingly we shall not award them to the union."

Given the portion of the supplemental opinion that I quoted yesterday, page 33, the court below was entirely entitled, we believe, to treat this explanation as to the reason organizational expenses were not being accorded in Tiidee as a tacit admission that if there had been such a nexus, the Board would have ordered reimbursement of the excess organizing expenses.

In Heck's the Board conceded the nexus between the employer's unfair labor practice and the excess organizational expenses. It noted, as Mr. Friedman said yesterday, that probably these things had occurred. The only reason the Board

gave for denying recovery was that the charging party's allegedly subordinate role in unfair labor practice litigation made it inappropriate. But that factor is simply irrelevant to whether the employer should be required to reimburse a victim, the union, and its members or supporters for excess organizing expenses resulting from the employer's unfair labor practices.

Those excess costs are borne by all of the employee supporters of the union as such. They are the victims of the employer's unfair labor practices, and they must be made whole if possible. Otherwise they suffer an injury which is uncompensated, and the employees in the bargaining unit are further injured, not merely by having to have ultimately their dues and assessments increased but by the fact that these are organizing expenses which the union would otherwise have been able to use for negotiators and for experts in producing a better collective bargaining contract.

If the charging party's role were relevant to the question of whether excess organizational fees should be reimbursed, then the Board could not make an award of excess organizational expenses to a union in any case, because the union's role in all cases is, according to the Board, subordinate. But that is not the reasoning that the Board purported to follow in its Tiidee opinion. So, we know that excess organizational expenses should fairly be reimbursed.

We are not going to do it here because there is no nexus; the union suffered no loss as a result of the employer's activity. Since the Board found there was a nexus in the Heck's case, then its explanation does not wash, and its denial of fees is arbitrary, capricious, and illegal.

As to the legal fees, the only reasons that the Board offered for denying recovery in this case are the allegedly subordinate role of the charging party and the assumed common law rule. By awarding counsel fees in Tiidee to both the union and the Board's counsel, the Board demonstrated that its conception of the role of the charging party to the issue was absolutely irrelevant; if the charging party's role is subordinate and the general counsel's role is superior, then, as the court perceived in Tiidee, the way to take care of the problem is to award counsel fees against the employer to both for having unnecessarily imposed a burden of litigation on both. And, consequently, as a result of that the Board can no longer in this case rely upon that reasoning to sustain its denial of litigation expenses in the Heck's case.

Nevertheless, treating it as a matter of res integra, the Board's conception of the role of the charging party in an unfair labor practice litigation simply does not square with this Court's view of the matter as expressed in Scofield. In Scofield the Board recognized that the statute itself carries

with it the germ of protection of private interests. And it also recognizes that when the charging party acts effectively to protect those private interests, it is necessarily also effectuating the public interest in enforcement of public rights which the statute establishes. If that is so--and we submit that cannot be denied--if that is so, then the charging party's counsel in a Labor Board proceeding acts as private attorney general in the same vital sense that others do in statutes which this Court has held to imply private rights of action, where the brunt of the litigation is borne by the private party but with the blessings of the government agency and usually with the support of the government agency when the case comes to this Court for the private counsel seeking fees, and I speak particularly of cases like Mills v. Auto-Lite.

The Board did not see this. It took a dog in the manger view here, unlike the attitude that most administrative agencies take when private parties are acting surely perhaps exclusively in their own private interest but in fact in a manner which benefits the public interest in escapium. The Court should welcome and not reject their support.

The Court should reward their success and make the litigation of these matters a concern of capable private counsel. And the way to do that is of course, as the Court has said, to award attorneys' fees, particularly to them.

Q Is the question, Mr. Ratner, so much whether

some consideration should be given to these items as to whether that should be done in the court of appeals or in the Board?

MR. RATNER: Your Honor, as I started by saying, this is not a question res integra. The court of appeals read what the Board said in its supplemental decision in Heck's. And the Board in Heck's specifically says, as I read yesterday afternoon, that an award of counsel fees--the Board says--an award of counsel fees will tend to discourage brazen violations of the act. And they said they had the power to do this and they would do this. And in Heck's in fact they did do this. The only distinction that they drew between wilful defenders who have no substantial or debatable defense and wilful offenders who present a debatable offense, and the Board thought that distinction was controlling.

We say that that distinction is arbitrary and unreasonable and therefore an error of law.

Q Mr. Ratner, you have used a term twice which I have seen in books but I do not know what it means: "Res integra." What does it mean.

MR. RATNER: That is an initial proposition, I think, as if the Court were sitting without a Board opinion before it and saying, What do you think it would do?

We say that the Board's distinction between frivolous defenses and wilful violators who happen to catch hold of a debatable defense is erroneous because it rests

in part upon this misconception of the role of the charging party and because the Board in drawing it demonstrated that it was in fact relying upon what it thought the common law rule was as to the awarding of attorneys' fees in cases of bad faith, wilful, persistent, offenses; despite the fact that there may be a debatable offense.

Insofar as the Board thought it was following--and its opinion indicates that it was, and I did not hear Mr. Friedman yesterday deny that--the language, I think, makes it too clear--thought it was following the common law rule, its posture is the same in this case as the SEC's was in the Chenery case where the SEC purported to follow what it erroneously conceived to be the common law.

This Court reversed, holding that the SEC was not bound fo follow the common law but that if it was going to follow it, it had better know what it was doing. And in that case the SEC did not correctly perceive what the common law was.

So, in this case we say the Board purported to follow the common law rule and it simply did not understand what the common law of counsel fees was. That is not particularly surprising, because the award of counsel fees is not an area in which the Board is expert. It had never done it before. That happens to be the peculiar expertise of the judiciary, which in time immemorial in its equity practice, has developed

the award of counsel fees as a measure of making whole the aggrieved victim of outrageous misconduct and not allowing the perpetrator of that kind of wrongdoing to escape.

So that we are not in the area of Board expertise, and that aspect of the protection that the Board would normally be entitled to does not apply here.

Speaking of both organizational expenses and counsel fees, the Board said at page 5 of its supplemental brief which Your Honors have before you--it was filed on March 15th: "Such an award helps assure the employees that the union which they have chosen as their representative will have the same resources to represent their interests as it would have absent the employer's unfair labor practice.

"Starting with this as the Board's premise, we submit that the court of appeals properly held that nothing in the Board's rationale in this case or in Tiidee warranted denial of counsel fees and organizing expenses in Heck's."

Q Mr. Ratner, did you say the Board has filed a supplemental brief?

MR. RATNER: Yes, Your Honor. The Board filed a supplemental brief on the 15th, directed predominantly to the Heck's brief and the reason it should not be considered by this Court. I cannot explain why the government, having made all the arguments in favor of striking the briefs does not ask that it be stricken.

Q Is that the brown brief?

MR. RATNER: No, no.

Q Some of us do not have it, but the Clerk will be getting it for us.

MR. RATNER: As I said, since the government has made all the arguments in favor of striking, I cannot understand their reluctance to take the final step. But in any event the brief is a highly meritorious one.

The supplemental decision in Tiidee: The Board has not merely power but a duty to enter orders which effectuate the policies of the act. This has been true ever since National Licorice in 309 US and Phelps Dodge in 313 US. That duty must be judicially enforceable.

If the Court finds that the failure to grant a remedy defeats rather than effectuates the policy of the act, that encouraging or rewarding instead of discouraging violations, it is the Court's prerogative, we believe, and duty to reverse.

If there are no further questions, I am finished.

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

Mr. Friedman, do you have anything further?

REBUTTAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FRIEDMAN: Yes, Mr. Chief Justice. There is just only one or two related points I would like to make. I

think in considering the propriety of what the Board did in this case, it is important to recognize that the Board did not just focus on whether or not to award cousel fees and organizational expenses. In addition to the normal remedies that the Board usually provides in this type of case, the Board provided additional remedies here on the remand as a result of its evaluation of the employer's conduct. That is, in addition to the normal cease and desist order and the posting of notices here in order to aid the union, the Board required that the employer send the notices out to each employee at his home, required that the employer give the union access to company bulletin boards for a year, and required that the employer finally give the union a list of the names and addresses of the employees so that the union would be able to make contact more easily with the employees.

And then it went on to say that those remedies were given it did not feel as a general rule it should give the additional remedy of organizational expenses and counsel fees because in the light of the nature of the charging party's limited role, this case is not one in which that additional remedy, in addition to what the Board had already given, was necessary to effectuate the policies of the act. The Board did refer to the American rule, the general rule, that ordinarily in the absence of statute or contract, attorneys' fees are not awarded, and that is a rule which this Court has recognized,

including the two most recent cases dealing with counsel fees, but that was not the touchstone of the Board's decision. The touchstone of the Board's decision as set forth on page 38a was that it was not necessary to effectuate the policies of the act, the statutory standard for determining remedies. It was not necessary to effectuate the policies of the act to give this extraordinary remedy in addition to the remedies already given.

When the Board came to the Tiidee case, the Tiidee case was a very special case. There what you had was frivolous litigation. Let me just indicate in a minute or so exactly what happened in Tiidee, because I think that puts the frivolous aspect of the litigation in context.

In Tiidee the employer had agreed to have a consent election. He was not fighting the election. He had a consent election, and he agreed to abide by the results of the election. Then after the union had won the election overwhelming by a vote of 19 to 6, the employer refused to abide by the election, saying that the regional director in approving the election had acted arbitrarily and capriciously and that in addition to that the regional director had denied a due process of law.

The court of appeals characterized that as a frivolous contention. In forcing the union to litigate, they said that was frivolous litigation. That was the basis upon

which the court of appeals remanded the Tiidee case to the Board. And when the Board got back the Tiidee case, it looked at it and said, "Yes, where there is frivolous litigation there is a strong public interest in not permitting such litigation to clog the Board's processes and the court's processes. That is frivolous litigation. But there is a great distinction and a valid one which we think the Board was justified in drawing between frivolous litigation, where there is no basis at all for the claim made, and litigation which is conducted with an arguable case even though ultimately--ultimately--the party asserting the defense loses. That is a very different thing.

The policy considerations that justify and led the Board to conclude an exception should be made in the case of frivolous litigation do not carry over, we believe, to litigation conducted in good faith, even though the company loses and even though that was a persistent violator.

And we believe that the Board acted well within its discretion in declining to extend the general rule that it had announced in this case, in Heck's, beyond the limited exception for frivolous litigation.

We therefore think the court of appeals misinterpreted what the Board had done and that really the court of appeals itself is attempting to decide what it believed the effectuation of the policies of the act required. And that, we submit, is not the proper function of the court of appeals. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman. Thank you, Mr. Ratner. The case is submitted.

[Whereupon, at 10:28 o'clock a.m. the case was submitted.]

- - -