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In the

Supreme Court of the United States

FLORIDA POWER & LIGHT CO.,	)	No. 73-556
and	)	
NATIONAL LABOR RELATIONS BOARD,	)	No. 73-795
	)	
Petitioners,	)	
	)	
v.	)	
	)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL.,	)	
	)	
Respondents.	)	

Washington, D.C.
April 24, 1974

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IN THE SUPREME COURT OF THE UNITED STATES

FLORIDA POWER & LIGHT CO., Petitioner, v. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, 622, 759, 820, and 1263, ET AL., Respondents.	No. 73-556
NATIONAL LABOR RELATIONS BOARD, Petitioner, v. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL., Respondents.	No. 73-795

Washington, D. C.
Wednesday, April 24, 1974

The above-entitled matter came on for argument at 10:07 o'clock a.m.

BEFORE:

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:

NORTON J. COME, ESQ., Deputy Associate General Counsel, National Labor Relations Board, Washington, D. C.; for the NLRB

RAY C. MULLER, ESQ., 100 Biscayne Boulevard, N., Miami, Florida 33132; for Florida Power & Light Co., Petitioner

LAURENCE J. COHEN, ESQ., 1125 - 15th Street, N. W., Washington, D. C. 20005; for Union Respondents

LAURENCE GOLD, ESQ., 736 Bowen Building, 815 - 15th Street, N. W., Washington, D. C. 20005; for AFL-CIO, as amicus curiae

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C O N T E N T S

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P R O C E E D I N G S

MR. JUSTICE DOUGLAS: We will hear arguments in Florida Power & Light Co. v. International Brotherhood of Electrical Workers.

Mr. Come?

ORAL ARGUMENT OF NORTON J. COME, ESQ., ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

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

These cases are here on writs of certiorari to the District of Columbia Circuit which in a five-to-four en banc decision denied enforcement of the board's orders directed ag against respondent unions.

The basic question is whether a union violates section 8(b)(1)(b) of the National Labor Relations Act, which bars a union from restraining an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances, by disciplining supervisors with such duties who are union members for crossing a picket line during an economic strike against the employer and preferring work which would ordinarily have been done by the striking employees.

There are two cases here which were consolidated in the Court of Appeals, Florida Power and Illinois Bell. The facts are essentially similar, and I shall outline them briefly.

Both Illinois Bell and Florida Power are utility

companies which have collective bargaining contracts with locals of the IBEW. The bargaining unit covered by the contracts includes rank and file employees and some supervisory employees, both of whom are union members. In Florida Power, union membership was voluntary, In Illinois Bell, the contract contained a union security clause which required unit employees to become and remain members of the union to the extent of paying dues and fees.

Q Mr. Come, the case you're actually arguing here is the Florida Power & Light, is it not? Illinois Bell is not formally here?

MR. COME: The board is arguing both cases. The board's petition sort review of both the decision in Florida Power and Illinois Bell. The company, Florida Power, filed a petition which covers just Florida Power, but both cases are up here on the board's petition.

Q In other words, there was a grant in Illinois Bell --

MR. COME: There was a grant of the board's petition which covered both Illinois Bell and Florida Power. There was a grant of the company's petition in Florida Power. So both cases are up here on the board's petition.

Other supervisors at a higher level, for example district supervisor, plant supervisor, were not covered by the collective agreement. The companies, however, permitted these

supervisors to retain their union membership, and many of them did. Some of these were not active union members but held honorary withdrawal cards from their respective locals which entitled them to rejoin the locals at any time without paying an initiation fee and/or apply for pension benefits. In addition, they entitled them to union death benefits.

Members with withdrawal cards, however, remain obligated to abide by the union's rules and are subject to discipline if they do not.

Both companies were struck over new contract terms and picket lines were set up in front of the plants. The company tried to maintain operations with their supervisors. The record does not show what directions Florida Power gave to its supervisors. It does show that Illinois Bell informed its supervisors that it would like them to work but that the decision would be left to each supervisor. The union in Illinois Bell warned the supervisor members that they would be subject to discipline if they performed rank and file work during the strike.

Both supervisors in the contract unit and those outside the unit crossed the picket line and performed work including work that would normally have been performed by the rank and file striking employees. After the strike, the unions disciplined those supervisor members who had performed the rank and file work, and at Florida Power they were fined in amounts

ranging from $100 to $6,000, and many of them were also expelled from membership in their respective locals; and in Illinois Bell, the discipline consisted in most cases of $500 fines which were enforceable by court suit.

Charges were filed with the board alleging that the discipline of the supervisor members violated section 8(b)(1)(b) of the Act.

Q May I ask, was it the same union in both cases?

MR. COME: What is that, Your Honor?

Q Was it the same union in both cases?

MR. COME: They were different locals of the IBEW.

Q The same international?

MR. COME: The same international is involved in the -- they belong to the same international. The international was a party in Illinois Bell. I do not think it is a party in Florida Power.

The board found that all of the supervisors who were disciplined was at issue, were not only supervisors within the meaning of section 211 of the National Labor Relations Act, but were management representatives within the meaning of section 8(b)(1)(b), that is they had grievance adjustment and/or collective bargaining functions.

The board, with one member dissenting, held that the unions violated section 8(b)(1)(b) by disciplining those supervisors for performing the rank and file work during the strike,

and entered an appropriate remedial order, and the Court of Appeals, as I indicated at the outset, in a five-to-four decision, declined to enforce the board's orders.

Now, we start with section 8(b)(1)(b) of the Act which, as I indicated, makes it an unfair labor practice for a union to restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

Now, there is no question that this clearly prescribes direct union pressure on an employer --for example, a strike threat -- to force it to change the identity of its chosen collective bargaining or grievance adjustment representative.

Now, Oakland Mailers', cited in 1968, the board, for the first time, was confronted with the problem of whether or not section 8(b)(1)(b) would also cover the indirect pressure that results from union discipline of a supervisor member who has collective bargaining and grievance adjustment functions for the manner in which he performed those duties. And the board concluded that it did under theory that such discipline would tend to make the supervisor responsive or subservient to the union's will and thereby deprive the employer of his full allegiance, so that as a practical matter the employer would either have to replace that supervisor or, to quote the board, "face de facto non-representation by him."

Now, the court below agrees, although the union does

not, that section 8(b)(1)(b) may properly be construed to interdict such indirect pressure on the employer. As the Court of Appeals pointed out, although section 8(b)(1)(b) speaks literally in terms of coercing the selection of employer representatives, it is clear that management's right to a free selection would be hollow indeed, quoting the court, if the union could dictate the manner in which the selected representative performed his collective bargaining and grievance adjustment functions.

Now, the court below, however, that is the majority of the court, concluded that this reasoning does not hold true whereas here a supervisor is disciplined for performing rank and file work during the strike. And the court's argument is that if a supervisor forsakes his supervisory role to do rank and file work, he is no longer acting as a management representative, and that there is a clear-cut dividing line between supervisory and non-supervisory work and, accordingly, there is no reason to believe that by being forced to take sides with the union, a supervisor will suffer from a change of attitude when after the strike he returns to his normal supervisory duties.

Now, we submit, as the dissenting judges below correctly observed, the position of the majority of the court below reflects an unrealistic view of the role of the strike in the collective bargaining process, because just as a union seeks to strengthen its hand at the bargaining table by bringing

the company's operations to a halt, so management, in order to hold out for the terms it wants, seeks to counter this pressure by keeping operations going, and the performance of rank and file work during a strike by supervisors and other management representatives is a vital part of such a company effort.

So that insofar as the supervisor is called upon by the employer to assist him in keeping the plant running, he is acting as a management representative, and to discipline him for such activity we submit the board could reasonably conclude could have a lingering effect that would affect the future performance of his supervisory duties.

Now, this reading of section 8(b)(1)(b) we submit furthers Congress' intention with respect to the status of supervisory employees under the Act. Only yesterday, this Court, in the Bell Aerospace decision, noted the fact that in 1947 Congress sought to assure employers of the undivided loyalty of their supervisors which it believed had been jeopardized by this Court's holding in Packard, that foremen were employees under the Wagner Act and constituted an appropriate unit for collective bargaining.

Congress believed that the inclusion of supervisors into organizations composed of or subservient to the men that they supervised tended to draw the line between management and labor and to upset the balance of collective bargaining. And Congress, the legislative history indicates, was concerned about

this result during a strike no less than at other times, because there is repeated reference in the legislative history to the fact that even when foremen organized in a union of their own were nonetheless in a strike situation, subservient to the rank and file unions, that the foremen's association had indeed adopted a formal policy forbidding its members when the rank and file unions sought to enter the struck plants and protect and maintain them without the concurrence of the rank and file.

Now, Congress, in an effort to restore this balance, it quoted true supervisors, from the definition of employee, and hence from the protection of the Act, and this relieved the employer of the obligation recognized in Packard to bargain collectively with the union representing its supervisors and also to insist that the supervisors under pain of discharge leave the union.

Now this insistence, however, namely that the supervisors leave the union, is not practicable in many industries, such as the construction industry, the printing industry, and the utility industry here. Where rank and file employees are highly organized, the supervisors are picked from the rank and file, and they are unwilling to give up their union membership because this would result in the forfeiture of substantial pension and other benefits; moreover, they may return to rank and file status in the future. On some jobs they may be a supervisor, on other jobs a rank and file worker.

Q I gather, although not understanding all of this, the employer may nevertheless insist, if he wants to --

MR. COME: He may nevertheless --

Q -- belong to the union and he may dismissed them indeed if they are union members?

MR. COME: He may. He may. But the practicalities are that in these industries, if he is strong enough to do that, he may not get a contract or --

Q Not only that, I gather, as you have said, so often, certainly in the telephone industry that is true, isn't it, the supervisors are drawn from the rank and file?

MR. COME: That is correct, but he might not be able to find other supervisors. So where you have this situation, and the supervisors remain union members, subjecting them to union disciplines for the performance of their supervisory functions tends to create the very conflict of loyalty and dilution of managerial authority problems which Congress sought to avoid.

Q Mr. Come, you said supervisory. They are not performing supervisory duties. Am I right?

MR. COME: We submit that during a strike, whatever the supervisor is called upon to perform, it is part of his normal supervisory or management functions, because during a strike the supervisor is called upon to help out in any way that is necessary to keep the plant going, and he --

Q So if he is sweeping the floor, he is a supervisor?

MR. COME: He will be acting in the interest of the employer --

Q And he will be working in a supervisory capacity?

MR. COME: That is correct.

Q You are just using words now, aren't you? He is actually doing the workers' job.

MR. COME: That is --

Q He is a member of the union, to protect, and by doing it he deliberately interferes with the union --

MR. COME: Well, that is --

Q -- of his own volition?

MR. COME: That is true, but he is caught between the devil and the deep blue sea because, unlike a regular employee who cannot be discharged for striking, a supervisor is a management representative and his first loyalty, at least this was Congress' intention in amending the act in '47, is supposed to be to the employer.

Q And the secondary is to the union?

MR. COME: That is correct.

Q And which the union is trying to enforce?

MR. COME: That is correct, and we submit that that upsets the balance that Congress drew in 1947.

Now, in the situation where --

Q Could the union, consistent with the act, have a rule that required one of its rank and file members who became a supervisor to leave the union? Could they say we don't want supervisors in this union, if the board's policy is that we can't discipline them?

MR. COME: Yes. Yes, they could. Yes, they could. But I think that the unions have ordinarily not done this. Now --

Q Mr. Come, you can't be serious in response to my brother Marshall's question, that he is performing supervisory duties during the strike? He is not, he is not supervising anybody, he is performing the work of the employees. But what he is doing is performing management duties -- management duties -- because, by definition, the employees are on strike and the ones left in the plant are management.

MR. COME: I think --

Q And it is to the interest of management to keep the business going, both for ordinary business reasons and also for strategic and tactical reasons in the strike.

MR. COME: I think that --

Q These are not supervisory duties, they are management duties.

MR. COME: I think that is a more accurate way of putting it, Mr. Justice Stewart. As the Seventh Circuit pointed out in the Wisconsin Electric case, which is pending here on

certiorari here, the court sustained the board, that what is supervisory duties is void during a strike situation, because what a supervisor's normal duties are when a total complement of employees is at work is totally different from what its duties may be during a strike when there are few or no employees at work, and it is at that time, whatever he is doing, he is doing as part of management. Now --

Q In other words, you are saying that fining them for doing management duties during a strike is to coerce them in their collective bargaining role later?

MR. COME: That is correct, that there is --

Q Is that the argument?

MR. COME: Yes, that there is likely to be a lingering effect or a spill-over effect, at least the employer could reasonably so fear, that an employee that is a supervisor, having been subjected to this discipline for doing management's bidding during a strike can at least feel under a sense of constraint and shade things in the union's way the next thing the confrontation arises --

Q Well, that confrontation, Mr. Come, I gather, in the case of a supervisor, is more likely to be in connection with adjustment of grievances than --

MR. COME: That is correct.

Q -- in collective bargaining?

MR. COME: That is correct. Now, collective bargaining

includes the interpretation of the contract as far as --

Q Yes, but subsection (b) speaks of coercion for the purposes of collective bargaining or the adjustment of grievances.

MR. COME: Yes, the adjustment of grievances would be the more --

Q The more likely one, wouldn't it?

MR. COME: -- the more likely, yes, that is correct.

Q Mr. Come, you have to take this position in order to bring yourself within the meaning of the statute, don't you?

MR. COME: That is correct, Your Honor.

Q And am I correct that the board took exactly the opposite position until 1968?

MR. COME: No, Your Honor, that is not the way I read the board's history. The board, to my -- to the best of my research, was not presented with any cases involving this type of indirect pressure on the employer that flows from union discipline until 1968. I think that what happened is, after this Court decided Allis-Chalmers in 1967, the board began to get a flurry of cases involving union discipline of various types, so that the reason that this doctrine is late in evolving is not for the reason that has been present in many of the cases that I have recently argued before this Court, that the board has changed its mind three or four times over the course of

history.

I think that in this situation, the problem just did not arise.

Q But it is new?

MR. COME: It is new. Yes, Your Honor, it is new. Now, the point --

Q Now, trying to get back to this section again, Mr. Come --

MR. COME: Yes.

Q -- I gather -- do you parse this restrainer course, one, an employer in the selection of his representatives for the purposes of collective bargaining; or, two, an employer and the selection of his representatives for the purposes of the adjustment of grievances as two separate --

MR. COME: Yes, Your Honor, they are in the disjunctive. They are in the disjunctive.

Now, in a situation where the employer is not able to insist successfully that his supervisors leave the union, you have a very big gap in effectuating Congress' objective with respect to supervisors, unless you read, interpret 8(b)(1)(b) as the board has done. Now, to be sure, the legislative history of 8(b)(1)(b) contains no indication that the provision was going to be so interpreted. We submit that this is because Congress focused on the most obvious forms of union impairment of the employer's selection of his representative, namely the

direct form of pressure, and in these circumstances we have the familiar problem of asking which choice is it more likely that Congress would have made had it been presented with this precise problem, and we submit that the board was reasonable in view of Congress' clear-cut intention to insure the employers of the undivided loyalty of its supervisors, that it would have sanctioned, the interpretation of 8(b)(1)(b), that the board has employed in these cases.

I would like to save the balance of my time.

MR. JUSTICE DOUGLAS: Mr. Muller?

ORAL ARGUMENT OF RAY C. MULLER, ESQ., ON BEHALF OF FLORIDA POWER & LIGHT CO., PETITIONER

MR. MULLER: Justice Douglas, and may it please the Court: I am Ray Muller, for the petitioner, Florida Power & Light, in this matter.

Mr. Come has reviewed the facts and reviewed the law. I will try to not cover the ground he has covered. There is, however, an area of this problem that I would like to underline. Specifically, as a management representative, it is difficult for me to accept the distinction made by the Court of Appeals and by the union, and to some extent by the board, that there is a difference between so-called rank and file work and management work, and that that distinction can be a predicate for finding unlawful fines or lawful fines.

As a little background, this case came before the

Labor Board following a complaint by its regional director on a written stipulation of the parties as to issues and facts. The stipulated issue before the board was whether or not the unions lawfully fined supervisors who had crossed picket lines and continued to work for the company; no distinction in the original stipulation. Thereafter, the board, in its decision, obliquely inserted the rank and file versus management work issue by finding that the supervisory fines had been imposed for working, performing work behind the picket line and "including bargaining unit work" -- and that the fines were illegal.

So the board initially inserted that distinction. Thereafter, the Court of Appeals picked up that distinction. The Court of Appeals refined it further and said that if the individual supervisor was engaged in management work, he was immune from union discipline; if rank and file, he could be disciplined.

The unions apparently agree with that position. Our petition to this Court for certiorari also framed -- the petitioner, Florida Power & Light -- also framed the issue and confined it to work for the company behind the picket line. We made no distinction between management work and so-called rank and file work.

The unions, in their brief, agree that congressional policy reflects an intent that employers be assured the undivided loyalty of their supervisors. If that is true, what does

"undivided loaylty" mean? It must mean doing what is in the best interest of management, the employer. In a strike situation, which is of course apparent that undivided loyalty requires a supervisor to do whatever work is necessary. He is management. Realistically, in a strike situation, no distinction is made between rank and file work, supervisory work and management work. There is work there and it must be done.

To conclude that lawfulness or unlawfulness of a supervisory fine shall be controlled by the type of work the supervisor may be performing behind a picket line would create an entirely unrealistic situation, an unworkable situation. Consider, this Florida Power -- I'm sorry -- the Florida Power & Light strike that we are talking about lasted in excess of thirty days. Currently we went through another strike that lasted in excess of sixty days. Consider the supervisor. If we are to use a distinction "management work" versus "rank and file work," we have the question, during a sixty-day strike, did he spent one day doing management work, five days doing rank and file work? Was it an hour? Does this particular supervisor have as his usual duties the working with a crew doing manual labor?

Q One thing he wasn't doing, he wasn't supervising, because he didn't have anybody to supervise. Am I right?

MR. MULLER: He had no one to supervise but he was --

Q So he couldn't be doing supervisory work?

MR. MULLER: He was performing a management function. He was performing a management function.

Q Other than supervising?

MR. MULLER: Other than supervising, that is right. We submit that the distinction between management work, which the Court of Appeals says is immune from discipline, and rank and file work, which the Court of Appeals says is not immune from discipline, is a distinction without substance.

Q What did Florida Light & Power tell its supervisors when the strike began?

MR. MULLER: Mr. Justice White, it was left to their discretion whether it would come in or not. That does not appear in the record but, as a matter of fact, was left to their discretion.

Q It is in the record in the Bell case, I take it?

MR. MULLER: Yes.

Q Well, now, you said to your supervisors, you may come in or stay away?

MR. MULLER: That's right.

Q If you want to honor the picket line or obey a union rule, go ahead?

MR. MULLER: They were encouraged to come in, but there was no compulsion put on the supervisors to come in -- come in or you will be fired, that type of thing. They were encouraged to come in.

Q So you left it up to them?

MR. MULLER: Yes.

Q If you want to obey the union rules, go ahead and obey it?

MR. MULLER: Not particularly in the union rule sense, more in the sense if you feel a loyalty sense, or for any reason you don't want to come in sense.

Q But if the union has got a membership rule that you don't cross a picket line during a strike, you left it up to the supervisors as to whether to obey that rule?

MR. MULLER: Your Honor, it is a difficult situation. This Court has currently before it a case --

Q But you did leave it up to them?

MR. MULLER: Yes.

Q And so that you were not being deprived of anything that you insisted on by the union's action against the supervisors? If the supervisor -- if the union had said no to the supervisor, we are going to fine you if you keep this up and he had stayed away, you wouldn't have said anything?

MR. MULLER: Mr. Justice White --

Q You didn't file the unfair labor practice charge, did you?

MR. MULLER: We did, yes.

Q You did?

MR. MULLER: The company.

Q Why?

MR. MULLER: So as to free our supervisors and the company really from this coercion, if you like. The section we are talking about --

Q Well, there isn't much coercion if you said stay away if you want to.

MR. MULLER: Well, I am simplifying it, just as you are simplying it to me. This section does not protect the rights of supervisors, the section we are dealing with, of course, is protection of management.

Q That's right.

MR. MULLER: Right. May I digress a minute for your question?

Q You go ahead. I have got all I need.

MR. MULLER: All right. I may say this, that we are in a right-to-work state, in Florida. This Court presently has before it a case, I believe it is called Beasley v. Food Fair, where a court in Carolina held it a violation of the state right-to-work law to discharge supervisors. It is not an easy decision to tell an employer discharge your supervisors if they won't come to work.

We submit to you that management is entitled to the undivided loyalty of its supervisors. If the supervisor cannot or will not do all in the best interest of management because of the union sanctions or the threat of union sanctions, the

employer is restrained in the use and the selection of that representative, and we submit the imposition of those union sanctions violates section 8(b)(1)(b) of the Act.

Thank you.

MR. JUSTICE DOUGLAS: Mr. Cohen:

ORAL ARGUMENT OF LAURENCE J. COHEN, ESQ.,

ON BEHALF OF THE UNION RESPONDENTS

MR. COHEN: Mr. Justice Douglas, and may it please the Court:

Mr. Come has spoken of the practicalities, he has said the effects of these cases as a practical matter. We submit that what these cases involve is not a practical matter but a statutory matter. We view the controlling question here as one of congressional intentions; specifically, is there anything in either the language of section 8(b)(1)(b) or its legislative history that shows that Congress ever contemplated that it would be a violation of that section for a union to fine its members who are supervisors, with the consent of the employer, for engaging in strike breaking.

The language of the section, as Mr. Justice Brennan has pointed out, is quite clear, it is unambiguous, it is narrow. The Senate report, which we have cited at page 15 of our brief, the blue brief, also shows that Congress intended no greater reach for that section than its words connote. It speaks of forcing employers in or out of employer associations,

and it says also "this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances."

The remarks of Senators Taft and Ellender, which we have cited on page 16 of our brief, again show that that is all that Congress had in mind in section 8(b)(1)(b). In fact, in prefacing his description of 8(b)(1)(b), Senator Taft said that the section was not "perhaps of tremendous importance." There is simply nothing that the board can point to to show that Congress was thinking of the discipline of supervisors who are permitted to remain union members whenit enacted 8(b)(1)(b).

Nor is there anything in the legislative history of that section which deals with this divided loyalty question. It was obviously very much in the mind of Congress at that time and Congress spoke through section 2(3), 2(11), and 14(a). But we think the significant point is what they did. Congress did not create an unfair labor practice; rather, there were two what we might call extreme positions advanced at the time.

One group said the foreman or supervisor should have a chance to remain in their own unions, perhaps in not employee unions but in their own unions. Another group said it should be outlawed completely. And the compromise that was struck said it is up to the employer to decide what he wants to let

them do.

They were removed from the definition of employee in section 2(3), they were stripped of their rights under the Act, and they were allowed to remain union members only at the suffrance of their employer. But there is absolutely nothing to which the other side can point which shows that Congress intended to make it an unfair labor practice if the supervisors were to remain in the union, or once they were allowed to remain and were subject to the same union rules as other members, that it would be a violation of section 8(b)(1)(b) --

Q Well, I gather that really what you are saying is that (b), the emphasis ought to be on the word "selection" --

MR. COHEN: That is what we think Congress intended.

Q -- but it went no further than to say that a union could not dictate to the employer whom it should have as the head of the personnel department, or as a foreman or vice president, or president, or anything else.

MR. COHEN: We think that is precisely what Congress had in mind and all that it had in mind. Now, we are confronted with that argument when we are here. Well, what about the effect of this so-called evolution of cases since Oakland Mailers in 1968? Of course, we note, as this Court observed yesterday in its Bell Aerospace decision, once again, that it is always significant to look at what the board has done for twenty or twenty-five years in assessing the meaning of the

statute. However, we also recognize that no court of appeals has accepted the argument to date, that even the Oakland Mailers doctrine steps beyond 8(b)(1)(b) because it affects more than the selection, the identity question.

But as the court below held, even if 8(b)(1)(b) is read more broadly, as the board has read it in Oakland Mailers, it still has to have some relationship to the performance of an 8(b)(1)(b) function, which is either collective bargaining or grievance adjustment; or, at the very least, what the board has in a second step stretched it to, to include the performance of some supervisory duties as they are defined in section 2(11).

You see, the board has proceeded gradually --

Q You would say that -- make the same argument about a fine imposed by the union for a supervisor in the process of handling a grievance, construing the contract in a certain way?

MR. COHEN: Our principal position here does not, Mr. Justice White. We do believe that the Oakland Mailers doctrine actually stepped beyond the intention of Congress, and if that is so, and if the Court should so decide, then, yes, even that would be outside of the reach of 8(b)(1)(b). But we take a narrower position here, as did the court below, that even if Oakland Mailers is correct in saying that any time the employer is engaged in an 8(b)(1)(b) function, collective

bargaining or grievance adjustment, or a supervisory duty, then the union may not touch him. We are willing to go that far, even though we think that is beyond the intent of Congress.

Q Did Congress leave no latitude for for the board to construe that language, in your opinion?

MR. COHEN: We believe, Mr. Justice Rehnquist, that Congress intended to read the board completely out of the picture. Now, let me explain that. Congress deprived the supervisor both of his status as an employee and of any rights under the Act. In the words of Senator Taft, they were "generally restored to the basis which they enjoyed before the passage of the Wagner Act."

It was clear from the debates that Congress was concerned that the board was lending its processes to the organization of supervisors, and it not only read the supervisor out of the protection of the Act, but it read the board out of the picture. It said we are going to leave this to the employer, he can strike an agreement with the union at the bargaining table if he wants to permit them to retain union membership, but he doesn't have to. And in that sense, the only thing that Congress did was to give the employer the leeway to decide, and we believe it intended to keep the board out of the business of regulating supervisory activities or the relationship of the union to its supervisors.

Q Except that a union could not pressure the

employer to replace one supervisor with another presumably?

MR. COHEN: On that there is absolutely no question, that is correct.

Q And that puts the board right into it because 8(b)(1)(b) creates an unfair labor practice which is for the board to handle.

MR. COHEN: Which is a very narrowly defined unfair labor practice. But we are taking the principal position here -- and I am certainly willing to argue on that basis -- that the board may prohibit under 8(b)(1)(b) the imposition of union rules on supervisors when they are functioning as supervisors or as a management agent. But as the court below held, to say that the performance of rank and file work in the course of a strike is somehow an 8(b)(1)(b) duty or a 2(11) function, is like saying black is white.

Q 8(b)(1)(b) doesn't use the word "supervisors" at all?

MR. COHEN: It does not.

Q It is representatives, isn't it?

MR. COHEN: Representative for two purposes, collective bargaining and grievance adjustment.

Q And isn't a strike part of collective bargaining?

MR. COHEN: Under Insurance Agents, it is true that a strike is part of the collective bargaining process, but that is not enough, we submit, to read this activity into 8(b)(1)(b).

A strike is part of the collective bargaining process, obviously a supervisor who returns to work aids the employer, but so does a rank and file employee who decides "I need the money, I am going back to work."

Q Supposing you have a -- supposs in an employee strike you had a group of rank and file employees who crossed the picket line and then the supervisor crossed the picket line to supervise them, would you feel that made this a different case?

MR. COHEN: It is a completely different case and, as a matter of fact, that situation was presented in Illinois Bell. At page 286 of the Appendix, union representative Cunningham was asked what about supervisors who were charged with violating the union's constitution but who, it turns out, only performed supervisory duties? And the answer was the charges were dropped against those members.

You see, the situation is not quite as simple as the Seventh Circuit would have it appear. Often during a strike, there are employees working. Some of the regular employees may decide to continue working or return to work. Replacements may be hired. In a case such as Illinois Bell, where the employer is part of a larger system, employees are brought in from other locations in that system. So that often there are employees to supervise. At least in Illinois Bell, some of those employees were supervised and a supervisor member who did

only that was simply not disciplined. So we definitely draw that distinction.

Q On what basis do you draw that distinction?

MR. COHEN: Because when a supervisor is in fact directing the work force, doing what he normally does, he is performing at the very least a supervisory duty as that is defined in 2(11).

Q Well, then, you do accept --

MR. COHEN: Oakland Mailers?

Q Yes.

MR. COHEN: Very reluctantly. I think it is wrong, Mr. Justice White --

Q Well, I know, but --

MR. COHEN: -- but the union has not succeeded in convincing any court of that, so I am loath to try and convince this Court when we can succeed on a narrower ground.

Q But the only way you accept it is by saying that the union would be influencing rather than replacing him if they fined him?

MR. COHEN: To use the board's word, it would be "interfering" with --

Q Yes.

MR. COHEN: -- the right of the employer to have this loyalty, which we do not believe fits within 8(b)(1)(b) at all, but if it does, it certainly fits no further than that.

Basically what the board and Florida Power argue here, we submit, is a policy question, and we submit in return that what is involved here is not whether the policy which underlies these decisions is a good one or a bad one, or what they law should be, but whether it was in fact what Congress intended. We submit that both the language of 8(b)(1)(b), its legislative history, and even the legislative history of 2(3), 2(11) and 14(a) show no support for the board's position that Congress made this specific Act an unfair labor practice under 8(b)(1)(b), and we think on that basis alone the court below should be affirmed.

But there is an additional reason: The effect of the board's expansive reading of 8(b)(1)(b) here is to intrude directly into the area of regulation of economic weapons. That flies in the face of section 13 of the Act, it is contrary to what this Court has told the board on past occasions, particularly in Insurance Agents and in the Curtis Brothers case, Drivers Local Union 639, where the board similarly tried to expand 8(b)(1)(a), and the Court, in an opinion by Mr. Justice Brennan, said you may not do that, we have to stick with what Congress enacted, even if the board thinks it is a better system. It relied on section 13, it relied on Mr. Justice Frankfurter's admonition, which is certainly pertinent here, that the Act was very much the result of conflicting pressures and of compromise and that expansive readings are not to be given to sections,

even if their language is ambiguous, and we submit 8(b)(1)(b) does not have ambiguous language to begin with.

Now, the economic weapon, of course, that would be diminished here is the same weapon that was involved in Allis-Chalmers. As this Court said in Allis-Chalmers, at pages 181 and 182, the economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and the power to fine or expel strike breakers is essential if the union is to be an effective bargaining agent. Of course, those principles were reaffirmed last term in the Boeing decision, and as the court below concluded in all relevant respects, the Allis-Chalmers decision is indistinguishable from the facts of this case.

The union's interest is just as valid, it is just as great. The employee has the economic weapon of trying to use his supervisors as strike breakers. The union has its right, if they are members, to discipline them for doing so.

Finally, I would like to say this, that the employer in this case says first of all we are caught in the middle and we say to that, you are not at all caught in the middle, you have an absolute right under the Act to say to your supervisors "get out of the union, you may not stay in the union," and to say to the union, "these supervisors are now beyond your control."

And it is interesting to note, although it is not in

the record, it occurred since the record in this case, that during the last Florida Power & Light strike, this past winter, the company directed all of its supervisors to resign from the union and, in fact, they did so. So the employer has, so to speak, the ultimate weapon in that respect, simply by exercising the option open to it, which was the precise remedy which Congress gave it in 14(a).

And I think it is also instructive to note what happened in the Illinois Bell case following this strike. At footnote 31 of our brief, which is at page 61, we point out that in 1971 -- the strike was in 1968 -- the parties again sat down at the bargaining table and the employer specifically waived its right to make any effort whatever to force the supervisors out of the union, and it did so for a very practical reason, it got a very substantive and substantial concession from the union concerning the jurisdictional claims of the union. That we submit was the process which Congress intended, that the parties would work out with the employer having the ultimate say, what the status of his supervisors would be.

In these cases, for varying reasons, the employers decided to let their supervisors remain in the union. In the Illinois Bell case, as I note, we can point to something specific: They got benefits in exchange for it. They bargained it out. But it is an impermissible jump to go from there to say that when the employer nevertheless says they can stay in

the union and, of course, as members are subject to union control, that it suddenly becomes a violation of this narrowly drawn section if the union follows its traditional practice, which this Court noted in Allis-Chalmers existed long before Taft-Hartley, of discipling them for the basic violation of strike breaking.

If the Court has no questions, Mr. Gold will proceed with his argument.

MR. JUSTICE DOUGLAS: Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ., ON BEHALF OF THE AFL-CIO, AS AMICUS CURIAE

MR. GOLD: Thank you, Mr. Justice Douglas, and may it please the Court:

Obviously, this case has a substantial importance of its own, in light of the added strength it will either give to the employer or will not. But our interest, my interest on behalf of the AFL-CIO is both that and another, and that is that in this case the board is operating on the premise that where there is a policy which has been embodied in the Act in some respects, the board can create an unfair labor practice.

Here the policy that the board finds in the Act and which we don't dispute and, of course, which this Court discoursed on at length in yesterday's opinion in Bell Aerospace, is the policy in favor of undivided loyalty of supervisors. And in order to effectuate that policy, the board would read

8(b)(1)(b) in an extremely expansive way.

Now, this is not the first time that the board has made this type of leap from policy to the expansion of an unfair labor practice section. I think it is worth nothing that at the time the 1947 amendments were being debated, the House came in with what was in essence a laundry list of union unfair labor practices. The Senate, in the words of the Senate report, reduced those to five defined unfair labor practices. And the reason that the evolution was as it was was the fact that the case bill which was the predecessor of the 47 amendments had been vetoed and Senator Taft was very conscious of the fact that he faced another veto and had to get out a bill which would have a broad enough constituency to get two-thirds plus one.

All these points have been made, and most forcefully, in our judgment, in Insurance Agents and again in the Drivers Local case, in 362 U.S. In Insurance Agents, the union tactic there at issue was the slow-down strike, and there can be no doubt after this Court's reaction to tactics like the sit-down strike and other such tactics, that the policy of the Act does not favor that type of union economic whip. The board responded by reading into 8(b)(3), which requires that there be bargaining in good-faith, an unfair labor practice reaching that tactic, and this Court responded by reversing the board.

And I think it is very much in point to note one facet of that opinion which is quoted on pages 15 and 16 of our brief,

which is the buff colored brief. Mr. Justice Brennan was responding to the argument that since the activity was unprotected, it was proper to make it an unfair labor practice. And he said there is little logic in assuming that because Congress was willing to allow employers to use self-help against union tactics, if they were willing to face the economic consequences of its use. It also impliedly declared these tactics unlawful as a matter of federal law. Our problem remains that of construing section 8(b)(3)'s terms, and we do not see how the availability of self-help to the employer has anything to do with the matter.

And I think when we turn to the policy of undivided loyalty of supervisors, we find that once again Congress met the issue, the issue posed by the Packard case, by giving the employer a right of self-help. Section 2(3), 2(11) and 14(a), where this matter was discussed and debated, do not create any employer rights. As Mr. Cohen has indicated, what they do is create a privilege in the employer that he does not have to deal with unions as to his supervisors and that he does not have to bargain collectively with supervisors as to their terms and conditions of employment, and that the board cannot make his refusal to treat supervisors as employees as an unfair labor practice, and all this to restore the situation before the Wagner Act. And we agree that the employer was thereby given a privilege to require supervisors not to join unions,

require them to resign their membership without being subject to any unfair labor practice charges himself.

But also in the first portion of section 14 it recognizes that employers had a right -- I don't want to use that word here -- a privilege to allow their supervisors to remain in the union or to deal with a union about supervisory employees and that was the solution to the conflict of interest problem that Congress envisaged.

Then let's turn to 8(b)(1)(b). In one respect, Congress was willing to go further than give the employer self-help, said that in selecting his representatives for collective bargaining and griegance handling fucntions, he could not be subjected to strikes.

First of all, the main function of that provision was to deal with multi-employer bargaining, and even there it was comprimised because the House barred multi-employer bargaining, and again the Senate solution was to accord both the -- in this case, both the employers and the union the privilege of continuing it, but to say that neither could force the other into that context.

And the secondary purpose of this was to prevent union from exerting pressure on employers to select their representative. Mr. Cohen has talked about the importance of the word "select." I would like to talk about the added importance of the word "representative."

If Congress had really been focusing on the conflict of interest problem that it focused on in 2(3), 2(11) and 14(a), one would have thought that it would have used the same term in section 8(b)(1)(b) rather than pick out two specific subject matter areas, because, as the Court of Appeals pointed out, the board's interpretation means that some supervisors, that the employer is assured through the board's processes, the loyalty of some supervisors, but not as to others. It seems to us, in light of that, it is more logical to assume that what Congress was intending was to assure that the employer would be able to speak through someone who is really his own choice, just as the union, in sections 7 and 9, is assured that it will speak through a representative of its own choice. But to move that over into a completely different area, namely whether the employer can act through certain agents in getting work done, rank and file work, as opposed to supervisory work or having grievances settled or collective bargaining done through his own people, is quite a leap, a leap which is extremely difficult we think to secure from the language.

When I perform a service in fixing a machine for an employer, it is very difficult to say that I am acting as his representative. I may be part of management or whatever, but I am not acting as his representative for collective bargaining or the settlement of grievances. I am acting as his agent in performing that type of work.

If that isn't true, it would mean that any employee who comes back and does the rank and file work during the strike thereby ipso facto becomes a management representative under the board's theory.

Q Would this position that you just stated now lead you to disagree with Oakland Mailers?

MR. GOLD: The position that I am stating now does not require a disagreement with Oakland Mailers. Insofar as we are talking about the meaning of the word "representative," representative for collective bargaining and grievance settling, it leaves open the question of whether the board could say that it was empowered to prevent unions from disciplining individuals because they had interpreted the agreement in a way which was inconsistent with the members' interest or had bargained in a particularly hard way or had pressed a grievance in a particularly hard way.

We are not here asking that Oakland Mailers be reversed. It may be that it should be reversed, but that isn't the issue here, as we see it. In the opening of our brief, we quoted the Chief Justice's remarks in one of the obscenity cases last year, that the fact that there has been an evolution doesn't mean that the final step is right if it was one that never would have been contemplated in the first place. We are at the far end of the spectrum here, and we are simply asking this Court at this time to hold that the board has made a mistake at

this point.

Now, obviously, the reasoning that is implied will have an effect on the earlier steps in the evolution, but the reasoning that I am arguing for now would not require an overruling of Oakland Mailers.

Q Of course, it strikes me that that one possible difficulty with your position is if you read the language very narrowly and say that the board has virtually no power to expand on it, that leaves you way back before Oakland Mailers. That may be a perfectly tenable position. But if you say the board has some power to expand on it and can go as far as Oakland Mailers, it seems to me it is rather hard to say why they shouldn't go the last step.

MR. GOLD: Well, I think the reason they can't go the last step is the argument that I started off with, and that is that whatever power the board may have to interpret and expand a provision, it can't interpret or expand provisions into an interdictional prohibition of the use of a lawful economic weapon during a strike unless there is a specific warrant in the legislative history, because this was the most sensitive area of the whole statute, and the very point of Insurance Agents and Curtis Brothers is the point I am just making, the point that is embodied in section 13, and therefore we need not take the position that there is no room for expansion. We simply take the position here that there is no room for an

expansion whereby the board would interfere with the use of this economic weapons, when there is no indication that Congress intended to create a right in the employer to use anyone, whether they are labor, suprvisory employees or representatives or anyone else to break a strike. Now, that doesn't mean that the board can't go from the word "select" to a broader term in order to safeguard the employer's interest in being able to speak through a representative of his own choosing. That simply leaves that open.

What I am concentrating on here is the use of the word "representative," and the use of the -- of the misuse, in our judgment, of the word "representative, and the misuse in the way which strikes from the union's hands an otherwise permissible economic weapon in support of a lawful economic strike, because 8(b)(1)(b) at its broadest, no matter how you read "select," would you seem to interdict union economic weapons that are improper, and the impropriety of the use of economic weapons as justed by the object. If the object is to prevent the employer from choosing his own collective bargaining or grievance handling representatives, then that is the area that the section --

Q Putting it the other way, Mr. Gold, what you are saying is, I gather, that Oakland Mailers has nothing whatever to do with an effect upon the right to strike?

MR. GOLD: That is right.

Q And in this instance it has very much to do with it and therefore it runs afoul of the Insurance Agents?

MR. GOLD: That's right, in section --

Q And therefore you ought not give an expansive reading to 8(b)(1)(b) on that account?

MR. GOLD: That's right, or to expand it to that degree. Now, whether there are -- it can be expanded in other areas where the admonitions contained --

Q Well, whether it may be expanded in any area where it doesn't adversely affect the right to strike --

MR. GOLD: Is another question.

Q -- is another question?

MR. GOLD: Right. And because the determinants are different and the determinants of congressional action were different. And again, concentrating on the meaning of employer's representative --

Q May I interrupt, while I have you interrupted?

MR. GOLD: Yes.

Q Now, what do you say that this kind of discipline -- no, giving it the more expansive reading, in this situation does adversely affect the right to strike?

MR. GOLD: Well, the right to strike --

Q Incidentally, this all comes out of the guarantee of section 13?

MR. GOLD: Right.

Q Yes.

MR. GOLD: The adverse effect here is that, as the Court recognized in Allis-Chalmers, the use of union discipline over members is an important ingredient in terms of the effectiveness of the union to strike. That is the use of discipline is an economic weapon in support of the strike.

Q Even though it is post-strike usually?

MR. GOLD: Right.

Q In fact, I gather here these fines were levied after the strikes were all over, weren't they?

MR. GOLD: As is normally the case, the use of a power of that kind is intended to influence conduct, and the very fact that it is there is an ingredient in the strike. If it was known that that could not be done, the strike would not have that supportive weapon and, as I understand it, that was your reasoning in Allis-Chalmers and the reasoning of course in the Boeing case. So certainly, both sides view the role that the supervisor will play in doing rank and file work as an economic weapon. The employer wants to use his supervisor just as he wants to use those rank and file people who are willing to come back to work to break the strike. Insofar as it is done by using rank and file work, the union in this case is claiming that it has a countervailing weapon, just as it would for employees, namely threatening them with discipline as members.

Q Has the board indicated that the union could or could not expel the supervisor for crossing the line?

MR. GOLD: My understanding is that we cannot even expel him.

Q Oh, really?

MR. GOLD: Both of them involved in this case, yes.

Q Is that both expressly involved in the case?

MR. GOLD: In Florida Power & Light, they were expulsion.

Q As well as fines?

MR. GOLD: So not only has the board arrived in a situation in which this weapon to support the union to strike is struck from its hands, but it has also forced the union to keep these people in.

Q I thought Mr. Come indicated that as a general policy at least a union could insist that supervisors get out of the union when they become supervisors?

MR. GOLD: Well, I take it that the distinction he would make would be that, while as a general policy they can, they can't do it as a disciplinary act.

Q And that if they were going to really -- if they are really serious about it, they would have to expel everybody, all the supervisors, not just the ones who crossed the picket line?

MR. GOLD: Yes. I am saying that can or cannot have

a disciplinary connotation, depending on the time it is employed, the circumstances, what is said and so on, and I certainly can see that distinction.

I started to get back to the point, the meaning of the word "representative," to make the point that section 8(b)(1)(b) reaches people that would never be thought to have been a problem or covered by 2(3), 2(11) and 14(a). Many of the early cases involved union attempts to have the employer replace the attorney he is using to bargain his collective agreement. Now, I don't think that Congress really, when it was treating the undivided loyalty problem in 2(3), 2(11) and 14(a), had any idea that it was getting into that. I think that there is every indication that it looked at the two different sections or the two different complexes of sections, 2(3), 2(11) and 14(a) on the one hand, and 8(b)(1)(b) as very different, and addressed to different problems, and we tried to indicate the lines, the clearest line that we see.

I would like to just tick off certain indicia that we think support our view that 8(b)(1)(b) cannot be stretched over to the area of union discipline of supervisors who do rank and file work.

First of all, we have Senator Taft getting up on the floor and saying that this section is not perhaps of great importance. Given the bite over the status of supervisors, and given the meticulous care with which the use of economic weapons

is treated in section 8(b)(4) and elsewhere, we do not think that it is appropriate, if we are going to try to recreate the gamut of values which were present at the time to answer the question that Congress perhaps didn't focus on explicitly, to use Mr. Come's words, to attribute to Senator Taft and the other proponents of the bill a diversionary action whereby they appear to only create a privilege in the employer in 2(3), 2(11) and 14(a), and then bring the board back into the whole area and not just for one very limited proposition through section 8(b)(1)(b).

Secondly, I think it is perfectly plain that everyone who was active in the formation of the 1947 amendments knew that unions disciplined members, including supervisory members, when they break strikes.

Q Did 8(b)(1)(b) come chronologically after 2(3), 2(11) and 14(a)?

MR. GOLD: Yes, the evolution was that the case bill treated the Packard problem in terms of status. The House bill treated the supervisory issue in terms of status, and there was no 8(b)(1)(b) probably because they barred multi-employer bargaining completely and, as the Senate report indicates, really the major function of 8(b)(1)(b) was to deal with the multi-employer bargaining problem and not at all in this area, which has grown and over-shadowed the other completely since 1968.

As I started to say, it was understood in Congress that unions exercise this type of disciplinary power, both over members and supervisors. Mr. Justice Brennan has noted the congressional understanding as to members and the legislative history of 14(a), where they talk about in the House report, where they talk about the fact that unions use their influence to have organized supervisors not work during strikes. This indicates that they understood that this wasn't something that was only done against rank and file members, but it was done against supervisory members as well. The union treates, by and large, it has treated the supervisory member as being just as much subject to --

Q In the legislative history, they use some Jones & Laughlin Mine example --

MR. GOLD: That's right.

Q -- supervisors which used to leave the mine or something?

MR. GOLD: Right, and they quoted -- we quoted it in our brief, if I can find it -- I'm sorry, I can't find it right now -- I apologize, I don't want to waste any time -- but we quoted a passage from the House report where they comment on the fact that the rank and file union -- I mean the supervisory union at Ford entered into an agreement whereby its people would not work during a rank and file strike. They understood that unions were going to use their force, what force they had,

to keep supervisors from doing this work. And nevertheless, as we say, the only explicit indication that they wish to deal with the conflict of interest problem was to give the employer a privilege. Starting from the Packard case, they viewed it as a matter of status and deprived the supervisors of the protections of the Act, gave the employer a privilege, but did not indicate that supervisory members would have any special status as members of the union, immune from discipline or that the board was to be brought back into this whole area rather than to protect the right of the employer to speak through his own representative in section 8(b)(1)(b).

Q Well, the union of course, explicitly, under section 13, has the right to strike, but surely the employer has the right to use self-help and to do whatever he can to keep the business running during a strike, isn't he?

MR. GOLD: Yes, I think that --

Q And indeed has the right of certain circumstances to lock out, such as American Shipbuilding?

MR. GOLD: That is correct, as you stated in American Shipbuilding and Brown Food.

Q It seems to me that, really, this part of your argument is almost questioned begging. That is the issue here, isn't it?

MR. GOLD: Well, no, we don't think it is question begging because there is nothing that we are arguing for that

deprives the employer of any power. He has the power to order the supervisors to work, to order them to quit the union in order to -- so that he will be sure they are not subject to any countervailing pressure. The union has the attractiveness of keeping union membership and what other discipline, and there is a tug-of-war and it is no different than the tug-of-war that goes on as to the employee during the strike. In many ways, this is a harsh process, but this is what Congress decreed. An employee can be disciplined if he crosses a picket line. He can be permanently replaced if he doesn't. And both sides have economic weapons.

But what the board is trying to do is enhance the employer's economic weapon by depriving the union of its, rather than according with what Congress would have seemed to have done, which is to give both sides certain powers and privileges but not to create any federal rights or any federal prohibitions in this area when we are dealing with supervisors working during the strike. And with all deference, I don't think it is question begging, I think that what we have in this area is the whole sensitive subject of the extent to which these five carefully limited, at that time, five carefully limited union unfair labor practices can be expanded so that an economic weapon which Congress seems to have understood is there, namely the right to discipline supervisor members, is taken from the union in favor of a policy which was effectuated in another way,

not effectuated by creating a federal right, not effectuated so far as we believe from anything in the language or legislative history by creating a federal prohibition in 8(b)(1)(b).

We do not argue with the fact that the employer has privileges here and that he can do what he can given the practical situation to keep his business running. That is one of the things that is allowed under the Act. But the union can do what it can, except insofar as Congress specifically said no, to make its strike effective.

Q And what this case is about is what can the union do?

MR. GOLD: That's right, and we are saying that there is nothing specific here that you have to take the word "select" and take the word "representative" and take all that the silence that we think here is pregnant with meaning, and take it into -- and turn all thatinto a section which says that a union cannot discipline a supervisor member who acts as an employer's agent, not as his representative, and goes in and does struck work. And we think that that is stretching the language and ignoring the legislative history to a point which cannot be done given the background of this Act, and given the admonition contained in section 13 which has been given flesh and force in cases such as Insurance Agents, the Drivers case, and in American Shipbuilding, and in H. K. Porter. This is not a principle which cuts just one way.

MR. JUSTICE DOUGLAS: The time of the case is about expired. Do you have a few things to say, Mr. Come?

REBUTTAL ARGUMENT OF NORTON J. COME, ESQ.,
ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

MR. COME: I just have one or two brief comments.

Q Are you going to cover the Insurance Agents --

MR. COME: Yes, that is what I intended to address myself to.

We believe that there is no impairment of the right to strike in the impermissible sense or, to use Mr. Justice Stewart's point, that is the issue here.

In Allis-Chalmers, what you had was the right of the union to discipline employee movers for breaking a strike. There is no question that the right to maintain the solidarity of employee members is very vital to the right to strike. However, what you have here is the discipline of supervisor members and supervisory personnel have not traditionally been picket line allies of the rank and file; rather, as the dissent in Packard noted, in industrial conflicts, they are allied with management.

So therefore, in reading 8(b)(1)(b) the way the board has in this case, you are not impairing the union's interest to the same extent as you would had you read 8(b)(1)(a) to prohibit them from fining or disciplining employee strike breakers.

On the other hand, to fail to read 8(b)(1)(b) as the board has done here would substantially impair the employer's interest, which Congress clearly intended to protect, namely of insuring the undivided loyalty of his supervisors during a strike no less than at any other time.

Now, I think that the union's concession that 8(b)(1)(b) can be read to encompass the Oakland Mailers situation carries us a long way along the road to sustaining the board's position because it shows that Congress did not, as the union argues in much of its brief, and as the court below, the majority, argues in much of its opinion, intend to leave the employer only with the option of insisting that his supervisors get out of the union, and if they didn't get out of the union, that he then had to accept divided loyalty, because if Oakland Mailers is correct, the employer is protected against union discipline which interferes with the performance of that supervisor's management functions. And the question that we then come down to is whether or not the board is reasonable in concluding that the performance of rank and file work during a strike is a proper function that management can require of its supervisors and whether disciplining them for the performance of that function is likely to have a spillover effect that is going to impair that supervisor's performance of grievance adjustment and other duties.

We submit that the board was reasonable in so

concluding, even though another conclusion might have been equally reasonable, and therefore the board should be sustained in these case.

Thank you.

MR. JUSTICE DOUGLAS: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:32 o'clock a.m., the case was submitted.]

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