In the

Supreme Court of the United States

Connell Construction Company, Inc.,)
)
Petitioner,)
)
v.)
)
Plumbers and Steamfitters Local)
Union No. 100, ets.,)
)
Respondent.)
)

No. 73-1256

Washington, D. C.
November 19, 1974

Pages 1 thru 49

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IN THE SUPREME COURT OF THE UNITED STATES

CONNELL CONSTRUCTION COMPANY, INC., Petitioner,	:	
v.	:	No. 73-1256
PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100, etc., Respondent.	:	

Washington, D. C.,

Tuesday, November 19, 1974.

The above-entitled matter came on for argument at 10:47 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:

JOSEPH F. CANTERBURY, JR., ESQ., Smith, Smith, Dunlap & Canterbury, 4050 First National Bank Building, Dallas, Texas 75202; on behalf of the Petitioner.

DAVID R. RICHARDS, ESQ., 600 West 7th Street, Austin, Texas 78701; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-1256, Connell against Plumbers and Steamfitters Local 100.

Mr. Canterbury, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOSEPH F. CANTERBURY, JR., ESQ.,

ON BEHALF OF THE PETITIONER

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

Your Honors, this case involves the antitrust issues involved in an agreement between a Plumbers Union and a general contractor in Dallas, Texas, whereby the general contractor has been coerced into an agreement that he will refuse to do business with and will boycott all subcontractors for mechanical work unless those subcontractors in turn have a collective bargaining agreement with the Union.

Your Honors, this case involves in no manner an employee-employer relationship. The petitioner in the case, Connell Construction Company, does not have and never has had a single employee represented by the respondent Union.

The district court below did not decide the anti-trust issues in the agreement, but held that the proviso to Section 8(e) of the Taft-Hartley Act protected the agreement.

The Fifth Circuit, in turn, found that the Union's

actions were antitrust exempt, but failed to decide any of the labor questions.

The Union filed for a declaratory judgment, that the agreement was protected by the construction industry proviso to Section 8(e) of the Labor Act.

I would point out, Your Honors, that the Fifth Circuit, in very strong words, admonished the National Labor Relations Act, to decide the labor issues involved in the case at the next available opportunity, which has not been done, even though the Board in this case has filed an amicus brief where they admit that the issue of the construction industry proviso to Section 8(e) of the Taft-Hartley Act has never been decided by the Board, outside of an employer-employee relationship.

The facts quickly are that Connell Construction Company is a general contractor in the construction business in Dallas, Texas.

Connell obtains its work by competitive bidding.

Connell in turn subcontracts mechanical work by competitive bidding.

Connell is involved in interstate commerce.

The mechanical portion of any construction project can equal 40 to 50 percent of the project. Indeed, on power plants, generating plants, it can equal more than that.

Mechanical construction normally includes all of

the piping, heating, ventilation, air conditioning and plumbing. In fact, in some of our very sophisticated air-conditioning systems today it even includes computers.

It includes the major portion of any construction project.

The Union, respondent, in December of 1970, sent a letter to Connell saying, "We want you to enter into an agreement with us that you will refuse to do business" -- I'm paraphrasing the agreement -- "you will not do business with any mechanical subcontractor unless they have an agreement with us, a collective bargaining agreement."

QUESTION: Did Connell have any general policy of limiting its calls for bids to non-union contractors?

MR. CANTERBURY: No, Your Honor, not at all. Mr. Chief Justice, the record shows that over the past 23 years Connell has, on a recurring basis, done business with both union and open-shop mechanical contractors.

In fact, at the time that the Union sent the letter, and the agreement, and subsequently started picketing for the agreement, Connell indeed had a union contractor who had a collective bargaining agreement with the union on the job.

Connell -- the record clearly shows that Connell up until this time did not care what the labor policy of his subcontractors was. He admittedly is in a competitive business, and he looks for competitive bids from qualified

contractors.

And when the picketing -- after Connell failed to sign the agreement, the Union commenced picketing about one of Connell's projects, where there was a union subcontractor; about 150 men on the picket line brought construction to a halt.

Connell filed an action in the State court in Texas, alleging that the agreement was violative of the antitrust laws of the State of Texas; a restraining order was issued, the case was removed to federal court, at which time Connell amended his pleadings and alleged not only the violations of the antitrust laws of Texas but also of the Sherman Act.

Your Honors, the -- as to whether or not the Union has been a party and has been cause of a violation of the Sherman Act will turn upon the extent of a union's immunity from the labor laws.

I think, if you can -- if we can look at the agreement on its face, the agreement on its face is simply an agreement between two parties: a union and a non-labor party, Connell, whereby agreement is reached that Connell will not do business with other people -- not just one sub-contractor but every mechanical contractor from Dallas to the Oklahoma border, who does not have a collective bargaining agreement with the Union, for any reason.

The Union did not seek to protect wages, working conditions. The evidence shows nothing as to what open-shop or non-union subcontractors pay their employees.

QUESTION: Mr. Canterbury, I gather it's not just a contract between an employer and the union, it's a contract between an employer and the union and the construction industry.

MR. CANTERBURY: Correct, Your Honor.

QUESTION: And there are special statutory provisions that govern contracts of that kind, aren't there?

MR. CANTERBURY: Your Honor, you're referring to the proviso to Section 8(e) of the Labor Act.

QUESTION: I think you have to deal with that, don't you?

MR. CANTERBURY: Yes. I will deal with that, Your Honor. I certainly will.

But, on the face of the agreement, on its face, it's clearly a restraint of trade. It clearly violates the Sherman Act, unless the Union is exempt.

Now, let's look as to whether or not the Union's actions are exempt. I'm well aware and we all are, of course, of the Norris-LaGuardia Act and the Clayton Act and the exemptions which they grant to unions from certain -- for certain activities, not all, from the antitrust laws.

The first theory is the conspiracy theory. It's

been held, from Allen Bradley and numerous cases since then, that if a union conspires with a non-labor group or source to restrain trade, then they're just like anyone else, they're just like two businessmen if they enter into an agreement to restrain trade, if the union enters into a conspiracy.

Your Honor, the conspiracy in this case is twofold, and I must step back into the facts at one important point.

Prior to the time that the union came to Connell, they entered into a multi-employer agreement with the largest unionized mechanical contractors in the Dallas area.

That agreement contained a favored-nations clause which prohibited the union from giving any employer any better terms or conditions than was contained in the multi-employer group, in that contract.

The business agent, at the trial of the case, testified -- I asked him: Suppose Connell wanted to do business with a subcontractor, a mechanical contractor, who was not a party to your collective bargaining agreement, could that mechanical contractor come in and negotiate one?

The business agent said: No, he can only sign our established agreement.

That's the only agreement someone can sign.

Now, the Union, since this case was argued at the Fifth Circuit, the Union has dropped its favored-nations

clause from its master agreement. I submit that the facts are still the same, that the union only has one form of collective bargaining agreement; that's the master area agreement.

Now, who are the benefactors of this conspiracy? Connell is a conspirator, he's an unwilling conspirator, clearly unwilling; but the benefactors are the mechanical contractors who were a party to the Union's collective bargaining agreement, the master area agreement.

If Connell is restricted, and Connell is just one contractor of meaning in the area, if general contractors are restricted from subcontracting out work to open-shop mechanicals, of course the union mechanicals are the benefectors.

I believe that indeed a conspiracy by the Union, first making this agreement with the unionized contractors and then coming to Connell and insisting that Connell place all those with whom he does business under the same agreement, that that is a conspiracy. Connell is a link. Connell and other general contractors are the method in which it's transmitted.

But even beyond that, Connell, even though he doesn't get a bit of benefit, and although he's an unwilling conspirator, he's a non-labor party. And the agreement clearly restrains trade outside of any employer-employee

relationship.

I believe that the -- even if there is no conspiracy, we must look to see whether or not the Union and whether or not this agreement fosters a legitimate union interest.

Thic Court's decision in Jewell Tea clearly held that even if there is no conspiracy and if a labor-management agreement involves restraints of trade, the inquiry does not stop with conspiracy. You look at the agreement, you look at the effects, and you compare it with national labor policy.

Indeed, Your Honors, from as far back as the Danbury Hatters case, Hutcheson, Apex, Allen Bradley, every labor antitrust case which has come before this Court, the agreement that is found in restraint of trade has been compared against national labor policy, and I think that's what must be done in this case.

The agreement must be compared against the national labor policy, which is primarily found in the Taft-Hartley Act.

Even harder, and one that I accept, is the Norris-LaGuardia Act. I believe comparing the agreement with the Norris-LaGuardia Act itself shows that this type of an agreement is not legitimate labor activity. The Norris-LaGuardia Act talks in terms of fostering collective bargaining,

fostering the rights of employees.

The Taft-Hartley Act in '47, the entire preamble of the Act is to foster collective bargaining and for employees to be free to choose their own representatives.

The Act does not favor unionism nor non-unionism, it doesn't favor unions or employers; the Act favors the rights of the employees to select.

Let's look at what this agreement and what the effects of it do to, first, Connell: The Union has no dispute with Connell. The letter they sent to Connell seeking this agreement said: We don't want to represent a single one of your employees.

They have no dispute whatsoever with Connell.

Their dispute, alleged dispute, is with open-shop mechanical contractors, which Connell didn't have at the time this whole -- all of this picketing started.

When they went to picket the project, Connell being a neutral employer -- that was a clearcut secondary boycott. Clearly.

Further, he's being enmeshed in a dispute that is not his. And that's what the whole purpose, one of the main purposes of our Labor Act has been, is to protect neutral employers.

Let's look at the Section 7 rights of the employees of mechanical construction firms with whom Connell must boycott.

Where do their rights lie? Section 7 of the Taft-Hartley Act says they've got the right to choose their own representatives, to bargain collectively through representatives of their own choosing, to engage in protected activities, or to refrain from union activities.

Let's look at these employees. What rights do they have? They have none at all. As this type of an agreement that is involved in this case becomes broader and broader, they have no choice, their employer must sign up with the respondent union or go out of business.

It doesn't make any difference if they voted for another union, if they voted against the union, or if they just don't want to belong to a union; they don't have a thing to say about it. Because the local union controls the construction market. Either you sign up with them or you don't get work.

Because if the general contractors who award the work are unable to subcontract, then they get no work. Those rights are obliterated.

Section 9 of the Act gives the employees the right to an election. They have no rights to an election.

I submit, and it's set forth in our brief, Your Honor, that if you compare this agreement to the Labor Act, you will find that indeed it is violative of numerous provisions of the Act, and against its main purposes, to foster collective

bargaining.

Let's look at that and go back: Is this a legitimate union interest?

Is it a legitimate union interest outside of the employer-employee relationship to enforce a boycott of the proportions which is involved in this case?

I submit that it's not. There is no way this agreement when compared with the Taft-Hartley Act can measure up to be legitimate.

Now, it is always -- anything that a union does for its members, or that benefits its members, I'm sure they will categorize as a legitimate union interest.

I submit, let's look at how they achieve it. The Taft-Hartley Act gives them ample ways to organize subcontractors, mechanical contractors. They can go out and try to organize them, they can hold an election, let the employees decide.

But it's this type of activity which goes right to the source of the work, the general contractor, and says: You refuse to do business with anybody that doesn't have an agreement with us. Then it's become a clearcut restraint of trade beyond any -- no way, I think, we could find any legitimate union interest in it.

Your Honors, the agrement also -- it's not limited to any particular project, it has no limitation whatsoever.

It's forever future, on any construction project in which the general contractor is involved on.

Now, I would like to direct your attention to the union's sole defense to this case, and that is Section 8(e) of the National Labor Relations Act.

The Union has taken the position that Section 8(e), which was enacted in '59 to outlaw hot cargo agreements, protects this agreement.

Your Honors, when the Act was amended in '59, it came about because, really, of two reasons. I think that we must trace very quickly the history and what brought about 8(e).

We first go to two cases, Denver Building Trades, this Court decided in 1954, which clearly distinguished between the general contractor and the subcontractor as separate employers at the construction project.

This type of an agreement obliterates that decision. If a union can radiate these disputes from -- with a particular subcontractor and say, No, we've got a dispute with the contractor. We've got a primary dispute.

All it takes is changing the wording on their picket sign and Denver Building Trades is gone.

That's what happened in this case.

Okay. Then we must go to the Sand Door case, decided by this Court in 1958. In Sand Door it was held that a hot

cargo clause was no defense to a secondary boycott. But the Court stated that if an employer and a union, it voluntarily agreed to a boycott, that it's not a violation of the secondary boycott ban if it's free of coercion, if it's voluntary.

That decision is what led to the enactment of 8(e), to the Taft-Hartley Act. Congress wanted to overrule that loophole, which they considered loophole, in the Sand Door decision of this Court.

Now, when the amendments went in in '59 they were hotly contested. Some Congressmen and Senators wanted to outlaw hot cargo agreements in all industries and introduced bills to that effect.

On the other hand, a group wanted to overrule Denver Building Trades, and they wanted to wipe out all prohibitions against secondary picketing at the site of construction.

The bills that were designed to overrule Building Trades, Denver Building Trades, were rejected by both Houses of Congress. The bills passed by the Senate and the House contain no special rules for the construction industry. The bills went to conference. And out of the conference report we find that a proviso was added for the construction industry.

The proviso to Section 8(e); Section 8(e) outlawing all hot cargo agreements, for proviso for agreements at the site of construction. And on the face of the proviso one would

believe that, well, it could cover any agreement at the site of construction.

Your Honors, when you read that legislative history, it's set forth in our briefs, and I believe I've read every page of it. the legislative history overwhelmingly shows that Congress intended several things about the proviso:

One, that it only apply to voluntary agreements, not coercive agreements. When Senator Kennedy reported back to the Senate from a conference report, he said that the proviso to 8(e) is not intended to change the law with repsect to picketing at a construction site. That Denver Building Trades is still good law. That Sand Door is good law. That the proviso was to preserve the status quo. In other words, what was legal to a construction industry union prior to '59 remained legal.

They came out with nothing more.

And what -- all they had which was brought out in Sandor was the right to enter into a voluntary boycott agreement.

Congressman Barden reported back to the House, said it just preserves the status quo.

That legislative history indicates to me, and I believe it will to you, that it envisioned an employer-employee relationship, not agreements made outside of the employer-employee relationship.

Congress never in their wildest dreams would have figured that we could do so. That would have wiped out for the construction industry, which is what this agreement does, all of the secondary boycott bans, all of the employee rights under Section 7. It runs contrary to the whole Act.

They meant an employer-employee relationship.

QUESTION: Mr. Canterbury, when you say --

MR. CANTERBURY: Yes, Mr. Justice --

QUESTION: -- when you say they meant an employer-employee relationship, do I understand you to mean that it was intended that under the proviso, the first proviso of Section 8(e), that such an agreement would be exempt from the language of 8(e) only if the union that was making the agreement was the bargaining representative of employees with the contractor with whom it was making the agreement?

MR. CANTERBURY: That's exactly what I mean, Your Honor.

QUESTION: Is that what you mean?

MR. CANTERBURY: Exactly.

QUESTION: Unh-hunh.

MR. CANTERBURY: Only, and another thing, too, when we go back and we really look at the antitrust implications, 8(e) grants no exemption from antitrust. The proviso simply says that it shall not be a violation of this clause 8(e).

Congress -- and let's look at the other exemption,

just for comparison, with the garment industry exemption. There was another exemption from the hot cargo clause in the garment industry, the second proviso in 8(e). In that one they say: for purpose of this Section 8(e) and 8(b)(4) -- the secondary boycott bans -- the garment industry, and so forth, is exempt.

The construction industry was not exempted from the secondary boycott bans.

Your Honors, there is no case, and the Fifth Circuit -- there's not much in that majority opinion I do agree with, but I do agree with this -- that there is no case ever been decided on the extent of 8(e), the priviso, outside of the employer-employee relationship.

The National Labor Relations Board has admitted, Footnote 10, page 9 of their brief in this case, -- I'm glad they filed that brief, because I had read so many of their cases looking for it, and I never did -- that the NLRB has never decided the issue.

And I would be less than candid with this Court if I didn't tell you, and I'm sure you've read it in the briefs, that the General Counsel of the NLRB, for reasons known only to himself, refuses to issue a complaint. I don't know why he won't.

The Fifth Circuit pleaded with him, for the Board to decide this question. The Labor question. I think that

you must decide it in order to properly decide the antitrust questions. We must compare the agreement with national labor policy. And when it's compared --

QUESTION: Well, the General Counsel has said why he doesn't file complaints, hasn't he?

MR. CANTERBURY: Yes, Mr. Justice Brennan. He said -- he has given his reasons.

QUESTION: He says that 8(e) was intended to preserve the status quo in the construction industry; that's what he says.

MR. CANTERBURY: Correct, Your Honor, but what the -- let me just address myself to that quickly. What the General Counsel, which is his opinion --

QUESTION: But what you said earlier -- perhaps I misunderstood you -- I thought you said the General Counsel has never explained why he won't issue complaints in this case.

MR. CANTERBURY: Oh, I beg your pardon. I didn't mean to imply that, Your Honor. He's explained his reasons. But I'm glad you raised that, I would like to address that.

His reasons, he says, is because it would preserve the status quo. I agree with that. It was to preserve the status quo.

What was the pattern of collective bargaining prior to 1959 amendments?

I have found three cases where unions tried to obtain

the agreement outside of the employer-employee relationship prior to '59. And only three.

And all three of those cases held it was illegal. They're cited at page 38 of my Brief on the Merits, Your Honor, the blue one. That was Texas Industries, Inc., Bangor Building Trades, and Selby-Battersby Company.

Now, the Fifth Circuit -- I think this is very important -- they saw the issue, too, they saw that whether or not they had been in practice prior to '59 would help guide as to what Congress was doing, and they directed all parties, including the Union, the AFL-CIO Building Trades Department, all amicus to file supplemental briefs pointing out any source showing the collective bargaining pattern in the construction industry prior to '59.

Your Honors, not one agreement, not one type was shown to the Fifth Circuit, and, indeed, Justice Clark in his dissent stated that they were not even able to show one, not one, much less a pattern.

I'd like to reserve the rest of my time for rebuttal, Your Honor.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Richards.

ORAL ARGUMENT OF DAVID R. RICHARDS, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I would for a moment like to define what we think to be the issue and a relatively nolle issue before the Court.

The plaintiff's complaint alleges only Sherman Act and State law violations; no contention was made under the National Labor Relations Act under either Sections 301 or 303 in the trial court. And in the trial court the only claim was, as it's characterized in the Fifth Circuit opinion, that Connell complained because the contract that was extracted from Connell restricted its freedom to do business; that is, his freedom to choose non-union subcontractors to perform his mechanical work.

And, as I understand it, that's the issue today.

This contract, which is in evidence, stands alone, it's not in any way -- or it's stripped of any allegations of union-employer conspiracy. The testimony at the trial court, the findings there and the findings in the Fifth Circuit characterize it as no allegation, no evidence of union-employer conspiracy beyond that which Connell is unhappy about; that is, his becoming an unwilling conspirator to what he deems to be an unlawful purpose on the part of the union.

QUESTION: Do you mean by that,Mr. Richards, that

there's no Allen Bradley context?

MR. RICHARDS: No Allen Bradley at all.

I take it this case is -- the contract stands alone, unlike Allen Bradley, where it stood as part of a much broader conspiracy involving both the product market as well as the labor market.

QUESTION: There's no allegation, in other words, in the complaint that the union employers and the union have conspired to gang up on Connell?

MR. RICHARDS: None at all.

In fact, Connell's president or one of Connell's witnesses, on cross-examination, disclaimed any such contention. And that's where it stands.

QUESTION: It's purely a complaint by Connell of this agreement that was foisted on him by the Union?

MR. RICHARDS: That's as I understand it. That's all.

That's all that was addressed in the trial court. I will say that as the case got further along, the issue was raised at the Circuit Court level about the most-favored nations clause, but I don't think -- realistically, it's not in the case, Connell does not claim any injury by virtue of the one-time existence of that clause. The clause now no longer exists.

This is a case in which the only relief sought was

declaratory and injunctive. Hence, I suppose, to the extent that even if it were in the case at some time, it has become, I suspect -- I would say, moot.

QUESTION: Declaratory and injunctive, Mr. Richards, you mean by that --

MR. RICHARDS: No damage claim.

QUESTION: No damage claim. Just to enjoin enforcement of the contract?

MR. RICHARDS: Yes, Your Honor. And to enjoin, I believe, attempts to secure it and enforce it. Yes, Your Honor.

We think -- well, let me add one other factual --

QUESTION: Excuse me; I'm sorry.

MR. RICHARDS: Excuse me, sir.

QUESTION: This case originally began in the State court?

MR. RICHARDS: An injunction against the picketing in the State court --

QUESTION: Under the State antitrust law, and then you --

MR. RICHARDS: Claim was filed --

QUESTION: -- and then you moved it to the federal court --

MR. RICHARDS: Yes, Your Honor.

QUESTION: -- and then the federal court declined to

send it back to the State court; and then the complaint was amended to add a count of federal antitrust laws; is that it?

MR. RICHARDS: Yes, Your Honor, with one or -- and Connell, at the point, the case was not remanded --

QUESTION: Unh-hunh.

MR. RICHARDS: -- then under protest entered the proffered agreement and then amended his complaint to attack the agreement which he was then a party to.

Do I make myself clear?

QUESTION: Well --

MR. RICHARDS: I'm trying to say is that finally, when -- well, as a practical matter, when he saw the case was not going back to the State court, Connell entered the agreement.

QUESTION: Entered the agreement?

MR. RICHARDS: Entered the agreement, then challenged it under -- amended the complaint to challenge it under the Sherman Act.

The agreement, by the way, had a ten-day cancellation clause on the part of either party. So it's been -- Connell has had the power ever since, on ten days' notice, to cancel the agreement.

QUESTION: Well, of course, his claim is he was coerced into the agreement.

MR. RICHARDS: Clearly -- he's clearly coerced into

the agreement. I mean we don't -- we're not --

QUESTION: If he's right, I suppose he'd be coerced into not presuming it; isn't that right?

MR. RICHARDS: Well, I -- clearly, he was coerced into the agreement, there's no question of that.

QUESTION: Well, if he had terminated it without any coercion, he would be back where he was at the beginning.

MR. RICHARDS: Of course. Exactly.

My point is not -- we would be back where we were, at no agreement, and be in dispute --

QUESTION: They'd be immobilized as far as dealing with anyone, unless your union approved them.

MR. RICHARDS: Well, we would be back where we were, and perhaps in the midst of a dispute; that's correct. That's exactly right.

QUESTION: Well, is there any inaccuracy in my --

MR. RICHARDS: No, no. No. And I didn't mean to imply that there was. I simply meant: that's right, we'd be back where we were before, with the union demanding an agreement, threatening to picket for it, and Connell resisting the agreement.

QUESTION: And if they did picket, their whole operation would be immobilized.

MR. RICHARDS: Yes, that certainly would have an effect on their operations; there's no question of that. Or

there would be a very strong likelihood.

Well, of course, that's part of Connell's problem.

Connell is caught up in the peculiarities of the construction industry. Connell employs unionized iron workers, laborers, carpenters, chooses to, from time to time, subcontract non-union portions of his work, mechanical contracting, he subcontracts, as the testimony is, sometimes union, sometimes non-union.

But if he were an entire non-union contractor, of course, the threat of Local 100 to picket for its sub-contractor agreement would be no threat at all, because the picketing would be ignored by Connell's own employees.

The problem Connell has is that some of his employees opt to --

QUESTION: Well, he might have problems on the site if he --

MR. RICHARDS: Well, if there were other contractors at the site who --

QUESTION: -- were union.

MR. RICHARDS: But what I'm saying is, the problem is, as I see it, that Connell is caught up in the construction industry problems of common site and the reluctance or the willingness of other employees at the site to honor a picket line, or, that is, not work on a job where there's a dispute.

QUESTION: Well, is there in this case any claim

that Connell is contracting out, farming out work which could be done within his own establishment?

MR. RICHARDS: That was not the contention, no.

QUESTION: Yes.

MR. RICHARDS: Well, to say it the other way, there are general contractors who do on occasion some of their own mechanical contracting work, but that is not the pattern in the industry and Connell was not one of those.

QUESTION: Well, Mr. Richards, the fact of life is that if he brought a non-union subcontractor on the site, the whole project would shut down. That's the fact of life, isn't it?

MR. RICHARDS: Well, the fact of life is that in the past if non-union subcontractors appeared at the project, Local 100 would picket the non-union subcontractor and that would frequently shut down the project.

QUESTION; Shut it down.

MR. RICHARDS: That's exactly right.

This agreement is addressed to the future, to avoid just that problem by trying to extract a promise from Connell that in the future --

QUESTION: He would use only union contractors.

MR. RICHARDS: Exactly.

QUESTION: Sure.

QUESTION: Not only union contractors, but contractors

with this union.

Or am I mistaken about that?

MR. RICHARDS: Well, that's correct. This union. But there is one other fact of life, I guess, in the construction industry, that is the trade, craft lines which, as far as I'm aware, this is the only union that claims jurisdiction in the Dallas area for performing plumbing and steamfitting work.

This is just the nature of the beast. There is no competitive union.

QUESTION: Like under this -- [inaudible]

MR. RICHARDS: No, there's no competing union vying for this representation, because that's the nature of the industry.

QUESTION: Would it make any difference if there were?

MR. RICHARDS: Well, it would make some difference, for instance, to the Labor Board; I don't think it would make any difference in an antitrust context, I mean, which is what we're here with.

The -- we say several things in our defense. We first, of course, say that this is simply not an antitrust case, that it's to be judged within the framework of the labor statute.

We do say that the agreement we seek is protected

by the proviso to 8(e), the construction industry proviso; and we understand, and I think that everyone seems to concede, that if -- I'm not sure now, but I have thought that everyone conceded that if Congress had in fact authorized the agreement that we obtained, that that would be -- at least in this context -- a complete defense to the antitrust contention, because the agreement stands alone unembellished with any other broader conspiracy.

QUESTION: Do I understand, Mr. Richards, that really what -- you say this is something exclusively for the cognizance of the National Labor Relations Board.

MR. RICHARDS: Well, we have said --

QUESTION: That the dispute is. And that if --

MR. RICHARDS: We said --

QUESTION: Well, hear me out --

MR. RICHARDS: Excuse me.

QUESTION: -- and that if the -- if it is arguably that that precludes any antitrust or any other, and if the Board were to find that in some respects you were not protected by the proviso, then the Board has to pursue its remedies which are, as I recall it, --

MR. RICHARDS: Injunctive relief.

QUESTION: -- injunction, or you have -- or Connell has a 303 action for damages.

MR. RICHARDS: We do say that this dispute is totally

enveloped by the provisions of Section 8(b)(4)(A) of the Act which precludes -- either protects it or prohibits it.

There has been -- and I did want to say -- Connell urged that there had been no Labor Board decision on the point; a case was just decided last week, which I don't have -- I want to call to the Court's attention and seek permission to do whatever is necessary to formally tender it. It's another Los Angeles Building and Construction Trades Council case, which comes -- which has been the source of most of the litigation in the field. 214 NLRB No. 86, released on November 7th.

Here --

MR. CHIEF JUSTICE BURGER: Perhaps if --

MR. RICHARDS: What would be the proper thing?

MR. CHIEF JUSTICE BURGER: -- you wish to draw that to our attention, it would be to ask, leave copies with the Clerk and with your friend.

MR. RICHARDS: All right.

MR. CHIEF JUSTICE BURGER: Because I suspect, November 7th, it wouldn't be available in the services yet.

MR. RICHARDS: No, it's not yet in the services. I should reproduce sufficient copies. May I do that and leave them with your Clerk?

MR. CHIEF JUSTICE BURGER: Yes.

MR. RICHARDS: The L.A. Building Trades case

is another one of the variants in the construction industry. Here the contractor, the general contractor, had really become purely a broker. The facts are he had no employees at all, of any kind, no collective bargaining contract of any kind, and never had had any.

What he did, this particular general contractor, was simply acquire the general contract and then subcontract all the site work.

He was picketed for the standard L.A. Building Trade Agreement, which has been the subject of much litigation in the field. The Board finds no violation, noting specifically that when L.A. Building Trades demanded the standard form subcontracting agreement and the general contractor refused, that they then became involved in a primary -- in a labor dispute, which is a primary labor dispute, because in the process of proceeding to picket for their standard agreement, the complaint issued, and now the NLRB has dismissed the complaint; no violation.

As I say, it simply points up again the kind of patterns that exist in this industry and why, I suppose, Congress did choose to create special provisions for it.

I want to make at least another point or two with respect to the proviso, and specifically counsel's contention that somehow we are indirectly overruling Denver Building Trades.

As we understand what Congress did in the two provisos that were carved out of 8(e), the garment industry proviso and the building trades proviso: in the garment industry proviso -- well, I should say it the other way. The Denver Building Trades rationale was preserved in the building trades proviso, that is, because agreements of this nature cannot be enforced by coercion; that is, by picketing, strikes, or threats of strikes.

An agreement such as we have with Connell can only be enforced by judicial action, by going to court, suing to enforce it.

Whereas, in the garment industry -- I guess because, again, a recognition of peculiarities there -- the garment workers were given the right to enforce their, in effect, no subcontracting agreements by coercion. That is, we cite in our brief a recent decision of the Second Circuit, by Judge Friendly, on facts which are indistinguishable as far as the garment industry -- the same pattern.

That is, the garment union goes to a manufacturer and says: We want an agreement with you that you will not subcontract any of your work to anybody but unionized garment manufacturers; we don't want a recognition for any of your employees, don't want to bargain for them.

Judge Friendly finds it within the proviso protected; the Board has now found it within the proviso as protected.

QUESTION: I thought this -- you said a moment ago that there was no doubt of the coercion involved here as against Connell in the --

MR. RICHARDS: In the initial obtaining of the agreement, I meant to say.

QUESTION: Well, what was -- what form was it?

MR. RICHARDS: It took the form of picketing, by Local 100, to secure this agreement.

QUESTION: But then I thought you said a minute ago -- perhaps I misunderstood you -- that 8(e) doesn't allow that sort of thing.

MR. RICHARDS: Well, I'm sorry, the distinction is, -- for better or worse, the distinction is that such agreements may be obtained by coercion but may not be enforced by coercion in the building trades industry; in the garment industry they may be both obtained and enforced.

Now, I should go on to say that this Court has not said that; that's what each of the Circuit Courts have said, that have dealt with the question: that coercion to obtain the construction industry agreement is protected; to enforce it is not.

QUESTION: And you said to seek to enforce it is by whom? Brought by whom?

MR. RICHARDS: Well, if -- Local 100 in this instance wanted to enforce this agreement, I suppose they would

have to file suit under 301, in either a State or federal court, to secure injunctive relief, to compel --

QUESTION: And that's to be distinguished from an NLRB suit, where there's been a violation found, where there's been no protection.

MR. RICHARDS: Exactly, Your Honor.

QUESTION: Protection of a proviso. Is that it?

MR. RICHARDS: Exactly, Your Honor.

If the conduct here of Local 100 violated the National Labor Relations Act, obviously the power is in the Board, under 10(1) to secure injunction swiftly and promptly against the picketing.

QUESTION: And in that circumstance, Connell would have a 303 action; is that it?

MR. RICHARDS: And Connell would have a 303 damage action for any injuries he suffered as a consequence.

QUESTION: But if it violated the National Labor Relations Act, it would also lose its defense under the antitrust statute, wouldn't it?

MR. RICHARDS: I wouldn't think so. I mean, I don't even -- no, I do not think so. I don't think the parallel is there. In fact, it's our view --

QUESTION: That the exclusive remedy is --

MR. RICHARDS: Well, I'm not sure I want to say the -- I do want to say that clearly in our view the

determination of a Sherman Act violation doesn't turn upon whether or not it's protected or prohibited by Taft-Hartley. Specifically, certainly that's true with respect to secondary boycott provisions, which Congress adopted in 1947 after extensive debate on whether to reinstitute antitrust remedies for secondary boycotts, after specifically -- well, we've set the history out rather at length in our brief.

But finally on the floor of the Senate, Senator Taft announces that he is abandoning his effort to reinstitute Sherman Act remedies for antitrust violations -- for secondary boycott violations; but, rather, as a compromise on the floor of the Senate, inserting or going to offer Section 303.

QUESTION: Well, I want to get your position clear about this, Mr. Richards.

If this is NLRB premise as to whether the proviso protects this particular, --

MR. RICHARDS: Right.

QUESTION: -- and the Board were to conclude that it did not, do you suggest that the sanctions of antitrust may still be available, or that either the Board's sanction of injunction, coupled with the 303 sanction of the employer for damages, is the exclusive remedy in this action?

MR. RICHARDS: I'm sorry, I must have misspoke myself. Under the facts in this case, exclusive remedy is that which Congress created in '47, I presume, and that's the

10(1) injunction at the instance of the Labor Board, and the 303 damage action --

QUESTION: And intended thereby to exclude any anti-trust actions?

MR. RICHARDS: That's the clear message, it seems to me, in the congressional history of the statute. That seems inescapable.

QUESTION: Well, you say, then, if there's any remedy under the National Labor Relations Act against the union for its conduct, the fact that such a remedy exists under the National Labor Relations Act precludes a remedy under the Antitrust Act, across the board?

MR. RICHARDS: On the facts in this case, yes.

QUESTION: Well, but I'm not interested in the facts of this case.

MR. RICHARDS: Well, what I'm trying to say, is that it's conceivable to me that if you were dealing with this as one part of a broad or over-all Allen Bradley kind of conspiracy, you would have the kind of case in which there could perhaps involve antitrust actions, but this is not what we're dealing with.

We're dealing with this as a naked agreement, standing alone; and, yes, I think the NLRB remedies of injunctive relief and damages, actual damages, is exclusive if there is a violation here.

QUESTION: But you don't take that position categorically with respect to any conceivable violation, do you?

MR. RICHARDS: No, of course not, as to any conceivable violation, I do not.

And this is the position asserted, I think, by the Solicitor in support of --

QUESTION: You don't -- then, if the union had agreed with the multi-employer bargaining unit to attempt to use its best efforts to get these kinds of agreements from non-unionized general contractors, you might have a little tougher case here, I suppose.

MR. RICHARDS: Well, if there was -- if this case was embellished with any claim of a conspiracy or predatory purpose, that would be a different case. It is not the case.

QUESTION: Well, of course, everything might be different. What would be the result under the --

MR. RICHARDS: Well, I suppose --

QUESTION: -- under the antitrust law?

MR. RICHARDS: Well, I suppose --

QUESTION: Even though it might be perfectly vulnerable under the labor law?

Let's assume that it was, and that a 10(l) injunction could issue and a 303 suit could be sustained. Now, what

about antitrust liability?

MR. RICHARDS: Well, I cannot exclude the possibility that a fact situation could exist that involved this agreement along with other aspects, which would give rise to an antitrust violation. Because, it seems to me, that would -- I can't exclude the universe.

But I do say that this kind of contract, contemplated by Congress to be either lawful under 8(e) or unlawful, carries with it, by congressional mandate, the sole remedy for a violation there. And that the violation of 8(b)(4)(A) does not give rise to a Sherman Act corollary violation.

I think Congress specifically went the other direction in '47, and I think they reaffirmed it in '59, when the same debates were again at hand, about reinstitution of the Sherman Act violations for certain kinds of secondary boycotts.

QUESTION: Mr. Richards, would you have an antitrust problem here if the favored-nation clause were in the case?

MR. RICHARDS: Well, my own view of it is Connell would not be in a position to complain about it. I think a mechanical contractor in Dallas who said, I would like to compete, I can't compete because of what's been extracted from me as a consequence of a promise to others; that kind of case might very well present it -- it might very well raise

no problems, it would seem to me.

But that person has not come to court, and there's no facts suggesting that that's present in this case.

QUESTION: Mr. Richards, --

MR. RICHARDS: Yes, sir?

QUESTION: -- there were actually two contracts involved in this case, weren't there? The contract initially between the Union and the members of the Association that engaged in the multi-employer contract with the Union, and the second contract was the coerced one with Connell.

Do you perceive that the contractors who were participants in the multi-employer contract derived a benefit from that contract, pursuant to which the Union agreed that, in effect, that it would go out and make the type of contract that it actually made with Connell, which minimized or perhaps eliminated the non-union competition that these contractors otherwise would have been subjected to?

MR. RICHARDS: Well, first, there is no evidence of that in this record. I think the benefit that was derived, if any has been derived -- and I'm not sure that any has at this point -- would have been to increase the work opportunities of members of Local Union 100, and to preserve their wages from being eroded by non-union competition in the Dallas area. That's the benefit --

QUESTION: That's a benefit to the Union, --

MR. RICHARDS: That's the direct benefit, and that's what we're dealing with here.

I'm going to talk -- well, actually, this is -- and I would say, No, I do not see any significant or even, as I see it, potential benefit. If you were to follow the argument of Connell, they say if we're successful, that means that all the contractors will be union contractors. And of course that's what we obviously want. We want everybody to be a union contractor.

If we were forbidden -- if we were foreclosing from that status any mechanical contractor, that might present a different kind of problem, but we're not doing that, we're actively, in fact, trying to organize the one non-union contractor whose name crept into this case: Texas Distributors.

We've not been successful in doing it. If he is feeling pinched by this agreement, we welcome him with open arms, and he can compete on the same basis as all the other contractors; that is, not undercutting our union wages and conditions.

QUESTION: I see your -- I see the Union's interest very clearly. I was directing my question to whether or not there isn't a contractors' interest also, to eliminate competitor contractors who are not unionized.

MR. RICHARDS: Well, --

QUESTION: That is to --

MR. RICHARDS: -- there is no suggestion that we were trying to create a monopoly for that favored group in this record, and that was not the nature of the contention.

The -- I suppose I would be foolish to say that it's not conceivable that there was some spin-off benefits. There's no reason to make that argument.

To me the argument is, it's a direct benefit for us: one, that we are -- it's our reason for being; that is, to protect the wages of our members and to increase their work opportunities. And we're perfectly prepared to welcome any non-union contractor who wants to share in giving his employees those benefits.

I wanted to say one other thing, it seems, about the nature of the argument made by -- the antitrust argument made by Connell. And that is, it seems to me what they really are trying to do is to resurrect the primary-secondary dichotomy as an antitrust determinate.

For one thing, their brief, reply brief, says specifically that it's the absence of the employer-employee relationship between Local 100 and Connell that gives rise to the antitrust complications; but that's precisely what we did away with, I assume, in Norris-LaGuardia, and what this Court has said each time since then, or at least certainly since Hutcheson, that is no longer relevant to the antitrust

determination.

The interest of Local 100 is clear. Connell is the person who makes the decision about whether its members are going to get work or not. They can organize and organize; as long as general contractors won't contract with unionized mechanical contractors, they have no work.

And, as I say, putting back in focus, for me at least, their argument, Connell's argument is a redefinition of the term "labor dispute" in Norris-LaGuardia and a redefinition of the term "labor dispute" which is identical in the Labor Act, to insist, once again, that there must be a proximate relationship between the disputants of employer-employee.

That's essentially what they're saying to us.

And stated on the other side of it, I can see -- the Chamber of Commerce has filed a brief here in support of Connell, in which it says it would be perfectly lawful for the Carpenters Union to enter a contract with Connell saying that Connell would not subcontract any work of any kind, plumber's work, electrician's work, to any but union contractors. And that that would be protected.

Well now, I -- but I fail to see any significant difference in terms of the anticompetitive effect, if you were looking at it from a Sherman Act point of view, of that agreement which they concede to be lawful, and ours which

they attack.

In fact, I think ours is really more relevant to the needs of the people involved; that is, the Plumbers Local is looking for its members' jobs and wages, and yet the agreements that they would concede to be lawful seem to me to have just as much, if not more, danger of anticompetitive effect.

It is not accurate to state that in 1959 Congress decided that it would be unlawful for 8(e) agreements to be obtained by coercion. Quite the contrary -- and we didn't cite in our brief, although we should have -- the post-legislative history by Senator Goldwater is explicit: that this question of coercion to obtain construction industry agreements was one that Congress left unresolved intentionally in adopting 8(e).

The courts, the five Circuits, I believe, now that have faced the question, as well as the Labor Board, have uniformly said that picketing to obtain such agreements is lawful in the construction industry.

Historically, this record contains testimony from the Los Angeles Building and Construction Trades. The L.A. Building Trades has sought and obtained agreements of this kind, much like the one that I referred to in the current Board case, back before Taft-Hartley.

That was the pattern. The Building Trades Council

is not a bargaining agent. The bargaining agents are the various craft unions.

And yet, building trades agreements of this kind predate Taft-Hartley, that's the record evidence in this case. The L.A. Building Trades agreement has been before the NLRB in a number of cases. Church's Fried Chicken?, which we cite in our brief, and the most recent case which I've just mentioned to you.

Looking back at old antitrust doctrines, frankly, I can't see the difference between this case and the Teamsters, Milk Drivers, Lake Valley.

In Lake Valley, the dairy drivers think they're being threatened by a system of vending milk in Chicago, so they're going to put pressure on retail outlets and say, "Don't buy", by picketing, threats and coercion, "Don't buy any longer from these dairies".

When they acquiesce, they take the pressure off. And that's been -- no antitrust.

A Second Circuit case of Levering and Garrigues, which was here at one point in the Supreme Court, where the Iron Workers Union in New York, threatened by what was called the Iron League, a non-union, open-shop iron worker erection companies, went to owners, general contractors, architects, threatened labor difficulties if they did not agree not to use non-union iron working firms in the future.

And this is just what -- this is the typical pattern that has emerged in this industry, one which has been traditionally thought to be exempt from antitrust, which Congress, we think, in specifically addressing itself to the problems of this industry, in '47 and in '59, made the conscious choice that: what is evil here, we are going to define with precision.

And it did define with precision, as well as the -- the evil as well as the remedy, specifically rejecting the arguments that antitrust action should somehow be employed here to remedy the secondary boycotts, which were -- took place in the construction industry.

QUESTION: Well, you -- I take it your position is, however, that even if there was no exemption from -- no construction industry exemption here, that you'd be making much the same argument?

MR. RICHARDS: I would make -- I would make the argument that this agreement does not violate antitrust, even in the absence of --

QUESTION: You say that this is within the labor -- the antitrust exemption?

MR. RICHARDS: Exactly. Of course. Because it's addressed to the immediate concern of a local union and their interest in preserving jobs and preserving their wages.

And, irrespective of the presence of the 8(e) pro-

viso, that it would be within the exemption.

I'm simply saying that the presence of the 8(e) proviso makes it unnecessary, I think, to reach the question.

QUESTION: Because, after all, Congress didn't say in the proviso, or anywhere in the Act, that anything that doesn't violate the labor law is exempt from antitrust liability.

MR. RICHARDS: They did not way that --

QUESTION: So you have to get to the other question of whether it's within the labor exemption, don't you?

MR. RICHARDS: I do think Congress -- we would say that the legislative history shows that Congress consciously chose a specific remedy for this kind of action, and said, We're rejecting antitrust, we're rejecting injunctions at the instance of private parties, we're giving it to the Board, we're rejecting treble damages, we're giving only compensatory damages --

QUESTION: Those are inferences you're arguing from the legislative history.

MR. RICHARDS: Well, I think -- sure -- they're inescapable --

QUESTION: It didn't say so, did it?

MR. RICHARDS: Yes, it --?

QUESTION: It didn't say so, did it?

MR. RICHARDS: It didn't say so precisely.

QUESTION: No. I think not.

MR. RICHARDS: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

You have four minutes left, Mr. Canterbury.

REBUTTAL ARGUMENT OF JOSEPH F. CANTERBURY, JR.,ESQ.,

ON BEHALF OF THE PETITIONER

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

Mr. Richards suggesting that there's plenty available remedies pursuant to the National Labor Relations Act is like giving Connell snow in winter. It's well known that the General Counsel will not issue a complaint, and NLRB couldn't decide it if they wanted to.

No way they can decide the question, because the General Counsel won't let them.

So, you know, going to the Board is a useless act, and as I said in my brief I might as well file in a wastebasket.

Now, let's look at what is this agreement addressed to.

Mr. Richards says the agreement is addressed to benefit union members directly.

The effect of the agreement is not to benefit members, union members directly; if it was, let them take actions against those who employ their members.

The effect of the agreement is to drive sub-contractors or manufacturers who furnish and install products at the construction site out of the market, unless they'll come into line with Local 100. That's the effect of the agreement.

If it were addressed to the immediate employer-employee relationship, they may well have a point, but it's not.

Connell, if his carpenters should enter into a collective bargaining agreement -- which he has one with the Carpenters -- they've got their work to protect. And if they make limitations on subbing out their work, and if he gives it up in collective bargaining, for whatever scale of value he puts on it, that's rising out of the collective bargaining process. There's something to trade back and forth, in employer-employee negotiations, which the whole Labor Act is designed to foster.

Stepping outside of the employer-employee relationship, with a 50-cent piece of cardboard and a picket sign, either the contractor signs up and agrees to assist the union to drive all other -- all open-shop mechanical contractors out of the market, or else the general contractor goes broke.

Of course, he can't resist it for long.

So, Your Honors, I believe that when we really

look at the effect of the agreement, let's look at who are they addressing it to. They're not addressing it to those that employ their members. They're going without that, and going outside of that source, to lock up this market.

Now, I don't care whether we call it a conspiracy -- and I don't believe you do, either -- there's, you know, there's a lot of secrecy here in the term "conspiracy". Let's just call it a contract. Let's look at the contract.

A written contract. Connell will not do business with anybody that doesn't have an agreement with us.

Call it a combination. We've got a labor party and a non-labor party combining. Or a conspiracy -- I don't believe the semantics make that much difference.

I think we have a clearcut contract in restraint of trade. I believe there is no immunity when you take and compare the effects of the agreement with national labor policy.

Thank you, Your Honors.

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

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:46 o'clock, a.m., the case in the above-entitled matter was submitted.]