In the

Supreme Court of the United States

International Telephone And Telegraph Corporation, Communications Equipment And Systems Division,

Petitioner

v.

Local 134, International Brotherhood of Electrical Workers, AFL-CIO

Respondent.

No. 73-1313

Washington, D. C.
November 19, 1974

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IN THE SUPREME COURT OF THE UNITED STATES

INTERNATINOAL TELLPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION, Petitioner	:	
v.	:	No. 73-1313
LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Respondent.	:	

Washington, D. C.

Tuesday, November 19, 1974

The above-entitled matter came on for argument at 11:47 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:

MATTHEW E. MURRAY, ESQ., Seyfarth, Shaw, Fairweather & Geraldson, 1819 H Street, N.W., Washington, D.C. 20006, for the Petitioner.

NORTON J. COME, ESQ., Deputy Associate General Counsel, National Labor Relations Board, Washington, D.C. 20570, for Respondent NLRB, supporting Petitioner.

APPEARANCES: (Cont.)

ROBERT E. FITZGERALD, JR., ESQ., 53 West Jackson Boulevard, Chicago, Illinois 60604, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 73-1313, International Telephone and Telegraph against Local 134, International Brotherhood of Electrical Workers.

Mr. Murray, you may proceed whenever you are ready.

ORAL ARGUMENT OF MATTHEW E. MURRAY

ON BEHALF OF PETITIONER

MR. MURRAY: Mr. Chief Justice, and may it please this Honorable Court: I have agreed to divide my time with Mr. Come of the National Labor Relations Board because I felt that the Court would like to hear from the agency itself as to how it has been interpreting the question which is before us today. And that is the applicability of sections 554 and the following sections to the 10(k) hearing process in the Labor-Management Relations Act.

The facts of this case commenced in Elk Grove Village, a little town at the edge of Cook County which includes the greater Chicago area, and the municipality in Elk Grove had given ITT a contract to install all its communication equipment in the new Municipal Building.

Local 134 of the IBEW had been doing practically all installation of telephone equipment in Cook County for many years and considered this particular area its private preserve. So a strike took place. IBEW was out there pulling

cable and they found out that the ITT employees who were represented by a nationwide agreement by the Communication Workers of America, were going to do the installation, and they struck the job.

We filed an 8(b)(4)(D) charge, and after the usual 10-day period in which the Board tries to get the parties to settle the dispute, the matter, the complaint issued, and the hearing officer was appointed, the facts were gathered, everyone introduced their evidence, including the employers and the unions, and the 10(k) was adjudged by the court, was adjudged proper that the Communication Workers employed by ITT be given this work.

The other party at that point has 10 days to tell the Regional Director if they are going to abide by this decision. The 10-day period elapsed, and they informed the Regional Director that they did not intend to abide by the ruling of the Board in the 10(k) proceeding, which, of course, gave rise to the immediate filing of an 8(b)(4)(D) charge under section 10(b) and 10(c) of the Act.

The 10(b) charge, of course, is a prosecutorial proceeding by the Board, as opposed to a purely investigative proceeding under 10(k), and therefore the Board needs the general counsel, must have a prosecutor, and the hearing officer in the 10(k) proceeding whose duties it was merely to gather evidence and submit the record to the Board without

recommendation was appointed as prosecutor in the 10(b) and (c) unfair labor practice case.

Now, there was no objection made to this until the proceedings were concluded, and at that point IBEW in its brief complained that the same man who had sat in the 10(k) proceeding and heard the evidence was comingling prosecutorial with judicial functions in violation of the Administrative Procedure Act.

Now, the court both in -- the Board,of course, overruled this contention. It went up to the Seventh Circuit. They found that indeed IBEW was guilty of 8(b)(4)(D), without question, that this is precisely what the section had been enacted to prevent. But they finally said that they would not enforce the order because they felt that 10(k) was subject to 554, et cetera, the Administrative Procedure Act, and there was an illegal comingling of judicial and investigative functions -- I mean prosecutorial and investigative functions, which that Act forbids.

Now, of course, Mr. Come, I think, will concentrate generally on how the Board has treated 10(k) with reference to the Administrative Procedure Act over a long period of time. We are all familiar with the fact that the Board has always treated 10(k) as not subject to the Administrative Procedure Act, and in a series of cases it so held that this was never challenged by Congress or the courts for a period

of 25 years.

We know also that the Board has --

QUESTION: Mr. Murray, then you don't agree with Judge Murrah's observation in his opinion, and I quote: "It is apparently admitted that section 554 applies to 10(k) hearings."

MR. MURRAY: There is absolutely no basis in the record for that statement of Judge Murrah's. It's a completely false assumption. It was contended by the attorneys for Local 134, but there was never any admission of any kind. So this is the key to this case. Judge Murrah did not cite any authority or make any reference to the record in support of this observation simply because it was not there.

Now, in making this unwarranted observation and assumption, in addition to ignoring everything that the National Labor Relations Board has done in this matter, the U.S. Courts of Appeal have had occasion to examine this. The most recent decision -- well, second most recent decision, was the D.C. Circuit in Bricklayers, and in that case Judge Fahey flatly holds that 10(k) proceedings are not applicable to the Administrative Procedure Act, and in that case the issue was whether trial examiners should be used instead of hearing officers. And there is quite a distinction between a hearing officer and a trial examiner. Judge Murrah sees fit to use the word interchangeably, but they are quite different types of

animals. A hearing officer is forbidden by Board regulations from making any recommendation. His sole function is investigatory. Whereas, it is encumbent and it is required by an administrative law judge or a trial examiner that he make or recommend a decision.

QUESTION: I gather a hearing officer is not in this new category of administrative law judge?

MR. MURRAY: No, he is not. He was simply an employee of the 13th Region, and he sat and heard the case, and sent the record to the Board. That was his sole function. He did make evidentiary rulings. But there is nothing in the record to indicate that there are any improper evidentiary rulings, either in the Board decision or the Seventh Circuit decision.

So that particular thing, the prejudice is not apparent; if there was any, it certainly is not apparent in the record in any way, shape, or form.

Now, there was also a very recent case down in the Fifth Circuit, Shell Chemical, which is cited in the Board's brief, which was actually decided after our brief was filed which supports Bricklayers in every respect in this particular question. And, of course, this Court has had an opportunity to examine and to discuss this problem. Mr. Justice White, in the Plasterers case, discussed the nature of 10(k), and he emphasized the fact that no one is bound by a 10(k) decision,

not either of the unions nor the employers. Of course, the judge did say further that the 10(k) determination of the Board, which requires, incidentally, a different modicum of proof than the regular unfair labor practice case, that it nevertheless had a very strong effect on the 10(b) and (c) case which followed on the 8(b)(4).

QUESTION: Has it ever happened that a 10(k) winner loses in the unfair labor practice?

MR. MURRAY: Not to my knowledge, your Honor. But I think perhaps Mr. Come would have more information on that subject than do I.

But the most important area here is the practical results that would ensue if the 10(k) determination were to be held to be an adjudication under section 554. This would require, indeed, that you have administrative law judges rather than hearing officers. We would have to await the appointment of an administrative law judge.

Now, we must not forget that the passage of 10(k) by Congress was to expedite the settling of jurisdictional disputes.

MR. CHIEF JUSTICE BURGER: We will resume there at 1 o'clock.

(Whereupon, at 12 noon, a recess was taken until 1 p.m. the same day.)

AFTERNOON SESSION

(1:01 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Murray, you may continue.

ORAL ARGUMENT OF MATTHEW E. MURRAY

ON BEHALF OF THE PETITIONER (Continued)

MR. MURRAY: As I was saying at the recess, there was a unanimous opinion, practically, in the country for the need for legislation to quickly settle jurisdictional strikes. Congress was very much in the mood, and it certainly was their intent, the unions wanted it, the employers wanted it, and even President Truman sent a special message regarding this legislation.

But, unfortunately, it hasn't worked out as well as it was hoped. However, if this decision is allowed to stand -- we might suggest that it has been in litigation for four years at this point, and the jurisdictional dispute is still not settled.

The Board has furnished us with statistics showing that even if you had an 8(b)(2) and (3) case with a trial examiner, which would be required under the Administrative Procedure Act, that the average time elapsed before the final Board order is 374 days. So obviously, this is going to completely thwart the congressional intent if this decision is allowed to stand. The statute will have to be amended, something

will have to be done. But the fact is, as many of these 8(b)(2)'s and 8(b)(3)'s that I have participated in, I have never seen one ended inside of two years, including the appeal to the Circuit Court. You have submitted findings of fact and conclusions of law, briefs, exceptions, briefs, motion for reconsideration, more briefs, lots of time to appeal to the appellate court, more briefs, and oral arguments, and motions for rehearing with more briefs, and it is simply not, it cannot be, an expeditious way of settling this very real problem which causes so much havoc in industry. And the wording of the statute does not justify it. We are warned in the early stages of the Act that the definitions are not to be taken too seriously as defining the scope of the Act, that there may be a number of exceptions. Also, in 554 proper, we have the exception that does not apply to certification of worker representatives, which really, in the last analysis, is what 10(k) amounts to. In the case of a 9(c) proceeding, they are certifying workers for a particular plant or a particular unit. In a 10(k) proceeding they are certifying workers for a particular type of work. And by and large it's the same thing, both proceedings conducted by hearing officers without recommendation to the Board, merely vehicles to elicit evidence and transport the record to the Board.

We therefore submit that this unwarranted assumption, completely unwarranted assumption, of Judge Murrah that the

Act is applicable, should be disregarded because there is nothing in the Act, there is nothing in the record to justify it.

Now, furthermore, and lastly, no prejudice could have resulted here, as for instance in the case of Wong Yang Sung, I don't recall the exact wording of that case, where you have a prosecutor building a case and then sitting in judgment on it. Here this hearing officer could not possibly know, again contrary to one of Judge Murrah's assumptions, he could not know to whom the work would be awarded by the Board or whether there in fact would be a 10(b)(4) or a 10(b)(4)(D) file. He couldn't know that, he had no way of knowing that he would be the prosecutor, and there is just nothing to justify any exception to the procedures that were taken in this particular case.

Thank you very much for your patience, your Honors.

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

Mr. Come.

ORAL ARGUMENT OF NORTON J. COME ON BEHALF OF RESPONDENT NLRB, SUPPORTING PETITIONER

MR. COME: Mr. Chief Justice, and may it please the Court: As Mr. Murray has indicated, a 10(k) hearing, which this Court had occasion to become familiar with in the Plasterers case three years ago, is not an adversary or accusatory proceeding, like an unfair labor practice proceeding.

Its purpose is not to determine whether an unfair labor practice has been committed, but rather to obviate the need for such a determination by resolving the underlying jurisdictional dispute.

It is held, like a representation case hearing, not before an administrative law judge, but a hearing officer who is an employee of the Regional Office. And the hearing officer's function is solely to develop a full record so that the Board may determine which of two competing groups is entitled to claim the work in dispute.

The evidentiary material relates primarily to such matters as the employee skills, area employer and industry practice, collective bargaining agreements -- in short, the type of economic material or administrative material which rarely presents credibility issues. And it is for that reason that the hearing officer doesn't make any credibility determinations.

At the close of the hearing, the case is transmitted to the Board for a decision, the hearing officer prepares an analysis of the issues, but does not, as I say, make any credibility determinations,he makes no recommendations, just as in the representation procedure.

The Board makes its determination on the basis of the record developed by the hearing officer, his analysis of the record which contains no recommendation.

QUESTION: Is there oral argument on that?

MR. COME: There can be oral argument before the Board if the Board chooses to grant it.

Now, if the parties comply with the Board's 10(k) determination, the 8(b)(4)(D) charge is dismissed; you never get an unfair labor practice proceeding.

QUESTION: Does that occur in most of the cases? Or do you know?

MR. COME: Compliance happens in a fair percentage of the cases. I wouldn't say that it's most. It's not insignificant.

QUESTION: Is there any average time between the hearing and the completion of the Board proceeding?

MR. COME: Well, I think that the statistics that we have given indicate that the time between notice of hearing and Board determination in a 10(k) proceeding is about 175 days.

QUESTION: Let's assume there was compliance in only one out of 100,000 cases or a thousand. Let's assume there is hardly ever they complied. So you always have to go through the unfair labor practice proceeding anyway. Wouldn't that make some difference to you as to what should happen in this case?

MR. COME: No, it would not make any difference.

QUESTION: Because certainly you must -- no one

hardly ever upsets a 10(k) proceeding, is successful in upsetting one, is it?

MR. COME: Well, this goes to the question that Justice Blackmun asked earlier. When the 8(b)(4)(D) proceeding eventuates, if one does eventuate, the issues that are open, just as in the "R" case, the 10(k) determination is not subject to relitigation, absent newly discovered evidence. So that as a practical matter, the only issue that is open is whether or not the union that is bringing stike pressure and lost in the 10(k) is picketing for the object that 8(b)(4)(D) proscribes. Only a probable cause determination is made at the 10(k) stage. You have the typical unfair labor practice standard of a preponderance of the evidence that has to be sustained in the 8(b)(4)(D). If the union is able to show that in fact it does not have the 8(b)(4)(D) object --

QUESTION: Wait a minute. When you say the probable standard at 10(k) proceeding, at the conclusion of the 10(k) proceeding there is a decision?

MR. COME: There is a decision.

QUESTION: And it doesn't say there is probable cause to believe that this union or that union gets the work.

MR. COME: There is a probable cause standard only on whether or not the union engaged in the kind of strike pressure for the object which you need to trigger the 10(k) determination.

QUESTION: I agree with you, we need a probable cause standard as to whether to start a 10(k) proceeding.

MR. COME: You are quite right that in terms of the determination of who is entitled to the work, that is not put in --

QUESTION: No, it isn't, and it's preponderance, isn't it? When the Board sits down to decide which one is entitled in the 10(k) proceeding, it's preponderance.

MR. COME: That is correct. The Board does that on the basis of its own analysis of the record and not on the basis of any recommendation by the hearing officer. But it's exactly the same as it is with the representation case.

Now, if the Board should issue an 8(b)(4)(D) order, the losing union can take that to the Court of Appeals and get review of not only the 8(b)(4)(D) order but also of the 10(k) determination and he may be able to get the 10(k) determination set aside by the Court of Appeals. That just happened in the Ninth Circuit.

QUESTION: It would be the same reviewing standard, is there substantial evidence to support the conclusion.

MR. COME: I believe that that is so.

QUESTION: Yes.

MR. COME: But the problem is whether or not we have an adjudication within the meaning of the APA. And the problem that arises is that -- and I am referring the Court to section

554 of the Administrative Procedure Act, which is at page 41 of the Board's brief, the gray one here. It says, "This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." And then you have a list of six exceptions, the sixth being the certification of worker representatives.

Now, we submit that the 10(k) determination is not an adjudication within the meaning of 554, and if it isn't within 554, then everything else follows -- the remaining provisions of the APA are not applicable. We submit that it's not within 554 for at least three reasons:

In the first place, it is not an adjudication because an adjudication is defined as agency process for the formulation of an order, and order means the whole or part of a final disposition of an agency in a matter other than rule-making. We submit that a 10(k) determination is not a final disposition of the matter which invoked the Board's processes. A matter that invoked the Board's processes was the 8(b)(4)(D) charge. That is not resolved by the 10(k) proceeding. You may never get an 8(b)(4)(D) proceeding. At least you don't know that at the time that the 10(k) determination is made.

Secondly, we submit that even if it were an adjudication within the meaning of the APA, it is not an adjudication required by statute to be determined on the record

after opportunity for an agency hearing. Although the statute does require, if the Board is to make the determination, that it shall have a hearing, it does not go on and specify the nature of that hearing. And under this Court's decision in the Florida Railway case and Allegheny-Ludlum, which was cited in our brief, the Court has made plain that Congress was using the term "to determine on the record, after opportunity for hearing," specifically for the purpose of screening out those situations where there was a hearing requirement, but not a formal hearing requirement. And I might say that the word "hearing" is only an alternative if the parties are unable by some private means of adjustment to work out the jurisdictional dispute, and certainly that doesn't have to be a record type hearing.

And thirdly, we say, that if we fail on those two counts, we believe that it is possible to read the 10(k) proceeding as falling within the "R" case exception (6) certification of worker representatives.

QUESTION: That is a term of "R", though, isn't it?

MR. COME: That is a term of "R"; however, it occurred to me on looking over the statute the other evening, and I know arguments thought of on the eve of an argument are such that -- an 8(b)(4)(D) on page 31 of our brief, there is an "unless" clause in there that proscribes forcing or requiring an assignment of work and so on, "unless such

employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work." And the Board has interpreted that and this Court notes that in a footnote in Plasterers as permitting it to dismiss the 8(b)(4)(D) charge where it runs in favor of the striking union and the employer has not complied with it. So I think that this "unless" clause gives some support to what I would conceive would otherwise be a --

QUESTION: You wouldn't rely only on that, would you?

MR. COME: No, I would not, your Honor. I think that our best argument is the prior two that I have made.

And I might just say before I sit down that this has been a contemporaneous interpretation of the Board that was enunciated shortly after 10(k) was added to the Act in 1949 and it has consistently been repeated by the Board. So we do not have a case here of the Board changing its position.

Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Fitzgerald.

ORAL ARGUMENT OF ROBERT E. FITZGERALD, JR.

ON BEHALF OF THE RESPONDENT

MR. FITZGERALD: Mr. Chief Justice, and may it please the Court: Before I begin the prepared part of my argument, I must point out that we do disagree with Mr. Come that the 10(k) hearing is the same as the representation case hearing, and I should initially note that these two types of

hearings are differentiated by the fact that one is provided for in section 9 of the Labor Management Relations Act handling representation matters, and the 10(k) proceeding is provided for in section 10 of the statute, having to do with unfair labor practice matters primarily.

I think Mr. Come has correctly noted that the primary issue before the Court, based upon the Seventh Circuit Court of Appeals decision which states very clearly that the Administrative Procedure Act, particularly section 554, does apply to the Labor Board's 10(k) hearings, he has noted correctly that the basic question is whether the Board's 10(k) hearing is an adjudication within the meaning of the Administrative Procedure Act.

I think necessarily we must then look at and analyze the two statutes themselves as well as the related sections of both of those statutes.

QUESTION: I gather you don't support the Court of Appeals statement that it is apparently admitted that 554 applies to 10(k) hearings.

MR. FITZGERALD: I am sorry, Judge, your --

QUESTION: The Court of Appeals stated, as Justice Blackmun pointed out earlier, it is apparently admitted that 554 applies to 10(k) hearings. It is not admitted?

MR. FITZGERALD: I don't believe the Labor Board admits that --

QUESTION: Whoever did in this case?

MR. FITZGERALD: Well, that was our basic contention, and --

QUESTION: No, that's your contention. This says it's admitted.

MR. FITZGERALD: I think the Court, as I read its decisions, said that it assumed that the Board would follow the provisions of the Administrative Procedure Act based primarily upon the rationale of the --

QUESTION: That's not my question. Who admitted it? The word is, "It is admitted."

MR. FITZGERALD: I don't believe it was ever admitted on the record, your Honor. You are correct in that.

But I think that the basic question of whether 554 does in reality apply to the 10(k) hearings, particularly in light of this Court's decision in the Plasterers case, must be viewed in light of what the purpose of the Administrative Procedure Act was designed to do. And as the Court of Appeals noted and as was explained very fully in the Wong case, the whole purpose of the Administrative Procedure Act was to set down the outer limits within which the administrative agencies could operate and particularly to prevent the comingling of functions, particularly the prosecutorial function with the adjudicative function. And in so setting out in the Administrative Procedure Act, section 554 was

specifically designed and in its subsection (d) in the second paragraph, specifically prevented comingling of these functions.

Now, the Seventh Circuit Court of Appeals found that there was no exception to be granted to the Labor Board in its 10(k) hearings from the application of section 554 of the Administrative Procedure Act. And there I might note that in the Labor-Management Relations Act Congress has stated that the Labor Board, in the performance of its functions under the Labor-Management Relations Act, must provide and follow rules in conformity with the Administrative Procedure Act. And that may be the source of the Seventh Circuit and Judge Murrah's comment about it is conceded that 554 applies.

But in any event, I think if we look at section 551 as well as section 554, the Court of Appeals decision that the 10(k) hearing is an adjudication within the meaning of section 554 is a valid conclusion, and further, that no exception lies, particularly because the 10(k) hearing is not the same as a representation case.

I think that the language of 551 of the Administrative Procedure Act has been passed upon numerous times by this Court. We cited the Wyman-Gordon case in which this Court said, through Mr. Justice Black, that a representation case meets the criteria of section 551 of the Administrative Procedure Act. This rationale has been affirmed by this Court as late as Mr. Justice Powell's decision in the Bell Aerospace

case, as I believe referred to also in other decisions, including Florida East Coast.

So that it's clear that the Labor Board proceedings are within the ambit of the Administrative Procedure Act as adjudications, particularly under section 551.

Then the critical question becomes: Is there anything in section 554 that would take the Labor Board proceedings, particularly the 10(k) proceedings, out from under the application of section 554? And I submit that the Court of Appeals clearly found, and correctly found, that the 10(k) proceedings is up to the agency review which becomes the final part of the Board order, as Mr. Justice White clearly analyzed in the Plasterers case. The 10(k) proceeding is an integral part of the procedure which the Board has provided within the ambit of section 10 of the statute. In other words, section 10 of the statute provides that the Labor Board can pursue the unfair labor practice matters and under section 10(k) specifically can hear and should hear and determine unfair labor practice matters in the jurisdictional dispute area and should decide and award the work in question to one of the two competing unions. This rationale of the Plasterers case, of course, picked up and adopted the CBS decision in which the Board was admonished to make a determination in jurisdictional dispute matters and, under section 10(k), to award the work to one of the competing unions.

But I think that when we look at the Plasterers decision, we have to see if there is anything in there, in that decision,which would make the 10(k) proceedings other than an integral part of the unfair labor practice under section 8(b)(4)(D). The Court of Appeals, Mr. Justice Murrah, found that this was an integral part of the Board's final order, which is the unfair labor practice decision in the 8(b)(4)(D) case.

I submit that that is a correct statement of the law and that the Plasterers analysis of the Labor Board procedure fully warrants the application of the principle that the Administrative Procedure Act, section 554, must apply.

Now, the Board, as I said earlier, takes the position that the representation case is the same as the 10(k) hearing. We submit that this is not the same proceedings because the object of the two hearings is entirely different. In the representation case, section 9 of the statute gives the Board authority to conduct elections, and in the course of that authority to conduct elections, has the right to hold hearings in which to determine the correct and appropriate bargaining unit which should be the subject of the election.

However, in section 10(k) of the instrument and section 10 of the Labor-Management Relations Act, an entirely different problem is approached, that of unfair labor practices. An integral part of section 10 is the 10(k)

proceeding by which Congress said to the Labor Board, You must hear and determine the jurisdictional dispute which underlies the unfair labor practice proceeding. So that when the Board decides the 10(k) aspect, the jurisdictional question, that decision is--of course, it is termed a decision and determination of dispute--that decision is then picked up and absorbed into the subsequent unfair labor practice proceeding, should there be an unfair labor practice proceeding, on the 8(b)(4)(D) question. So that within the definition section of the Administrative Procedure Act, section 551, clearly the 10(k) proceeding is a part of the final order which the Board does come down with in the unfair labor practice matter.

So in other words, we have an absorption of the 10(k) decision into the unfair labor practice decision and under the Board's own rules, we find that the 10(k) matter is an integral part of the final order of the unfair labor practice matter.

So we submit that the Court of Appeals was correct when it found that section 554 does apply to 10(k) hearings because the 10(k) hearing is a part of the agency process leading to its final order.

The arguments presented primarily in the briefs by the Labor Board and ITT is that the detrimental effects will flow from affirming the decision of the Seventh Circuit Court

of Appeals. We submit that these arguments as to detrimental effect are not valid.

The first and basic argument is that there will be a necessity for judicial review of section 10(k) determinations if the Seventh Circuit opinion is affirmed. In other words, if the 10(k) decision is found to be an adjudication under the Administrative Procedure Act, necessarily judicial review must follow.

We submit that this conclusion is not warranted and that the Seventh Circuit recognized clearly that the 10(k) proceeding is only the first step leading to the final order of the Labor Board which is the ultimate unfair labor practice determination. So that the Board's own rules and regulations prescribe what is a final and therefore reviewable order under the provisions of the Labor-Management Relations Act. In other words, section 10(e) and 10(f) gave to the Labor Board -- excuse me, under section 10(f) gave to a party aggrieved the privilege of appealing to the Court of Appeals from a final order. Likewise, in section 10(e) the Labor Board may petition for enforcement.

The question of what is a final order within the ambit of section 10(f) was left to the Board because that section is silent as to the definition of a final order. Therefore, under the basic concept and principle that exhaustion of administrative remedies must be followed by any

litigant before an administrative agency, Local 134 and any other litigant before the Labor Board must look at and follow the Labor Board's rules if they are not overruled by higher authority, particularly this Court.

There has been no decision by this Court that the section 10(k) hearing is a final and appealable order of the Labor Board. I think in reading the Plasterers case we see very clearly that the two-step procedure, in other words, the 10(k) hearing and the subsequent unfair labor practice hearing and decision are really two parts of one process designed -- and certainly a clear part of the scheme that section 10 of the statute sets out. The Labor Board itself has determined that no appeal shall be had from any 10(k) determination.

Now, the decision in the Shell case was cited to this Court. If I might point out, that case presents an entirely different question because in that case the Labor Board dismissed the 10(k) notice of hearing, or in other words said, "We are making no decision and finding no basis for awarding the work to either of the competing unions."

The Court of Appeals in the Shell case concluded that this was not a final order, and therefore was not reviewable under section 10 of the statute. I might point out to the Court that this is exactly contrary to the decision of the Ninth Circuit in a waterways terminal case where the Ninth Circuit held that the dismissal of a 10(k) notice of

hearing is in fact a final order and therefore an appealable order from the Labor Board.

I should note also for the Court that there is a petition for certiorari filed in the Shell case so that that issue may be presented to this Court -- or is presented to the Court, and may be ruled upon later.

Now, the second area that has been argued as the basis for overturning the Seventh Circuit decision is that necessarily an administrative law judge will have to be appointed to hear the section 10(k) hearings if the Seventh Circuit decision holding that the 10(k) hearing is an adjudication is allowed to stand.

We submit, and have argued in part IV of our brief that this conclusion does not necessarily follow. There are a number of reasons why that conclusion does not follow. Initially, the argument was made by Local 134 to the Seventh Circuit that the provisions of the Administrative Procedure Act, section 556 and 557, which prescribe and require the administrative law judge be appointed, should apply to this case.

Shortly prior to the argument in the Seventh Circuit Court of Appeals, the Court of Appeals for the District of Columbia decided the Bricklayers case. In the Bricklayers case the Court of Appeals found that the 10(k) hearings need not have an administrative law judge appointed

to hear those matters. The Seventh Circuit, though, interestingly enough, did not rule upon the contention of Local 134 that an administrative law judge must be appointed to hear 10(k) matters. So that we have in the decision of the Seventh Circuit no finding, no order that an administrative law judge be appointed. On that basis, we feel that by affirming the decision of the Seventh Circuit, there is no requirement placed upon the Board that it hold its future 10(k) hearings by appointing an administrative law judge.

Secondly, we submit that section 554 of the Administrative Procedure Act is divisible and not necessarily an integral part of section 556 and 557. In other words, the nature of those various sections is sufficiently different so that they need not be considered as one complete entity. There is reference in section 554, as in section 553, of the Administrative Procedure Act to the hearing requirements of sections 556 and 557. However, in subsection (d), particularly the second paragraph which prohibits the comingling of functions, there is no reference to section 556. There is, I will submit, an oblique reference to section 557, but it is our position that it does not necessarily follow from the Seventh Circuit decision that section 556 and section 557 must apply to all Labor Board 10(k) hearings.

I believe that this Court's opinion, through Mr. Justice Rehnquist, in the Florida East Coast Railway case

recognizes the general principle that -- and in that case it was section 553, the rule-making section, the principle was recognized that it is not necessarily correct or true that sections 556 and 557 must apply when the provisions of section 553 apply to an administrative agency hearing.

We submit likewise that it is not necessarily true, particularly under the posture of the case that has come up to this Court from the Seventh Circuit and the nature of the decision that sections 556 and 557 must be applied to the Labor Board 10(k) hearings.

I think that in this regard also we should notice and note the fact that the Labor Board itself by its own rules has promulgated the rule that in 10(k) hearings administrative law judges need not be appointed. And as we argue in our brief in greater detail, we believe that the principle of exhaustion of administrative remedies applies here also. In other words, as long as the Labor Board's rule is not in and of itself violative of other provisions of the Federal statute, such as the comingling of functions is, but as long as there is no apparent obvious violation of the Federal statute, then the Labor Board rulesmust be followed and we must, as any litigant before any agency, must exhaust the remedies, must follow the rules prescribed by that agency for the respective type of matter that comes before the agency. In this case the Labor Board says, it rules that the

10(k) hearing will be heard not by an administrative law judge, but rather by one of its other employees. We submit that there is no conflict between the Seventh Circuit decision and the Labor Board's rules as they now stand which do not require the administrative law judge.

Finally, I think that the argument that the Board has made in its brief, as Mr. Come has noted here today, that it has consistently followed the practice set out in its rule of appointing one of its employees other than an administrative law judge to hear the section 10(k) hearings and that this is, as Mr. Come says, entitled to great weight, and there is no change in policy, I think should not be given as much deference as Mr. Come would have it because this Court in the CBS case noted to the Board that for many years it had consistently -- the Labor Board, that is, has consistently not decided which of the two competing unions in section 10(k) hearings would be entitled to do the work in question. And in the CBS case this Court very clearly said to the Labor Board, "You have not been doing the function which Congress has said you must perform here, that is, decide and award the work." So that the fact that the Labor Board has proceeded in this manner for many years while it is of some weight, I think is not of persuasive weight. And I may point out to the Court this: The Board has never contended that it consistently or even in any case has had the same employee performing the function of

hearing the 10(k) jurisdictional dispute matter and then serving as prosecutor in the subsequent unfair labor practice matter. In other words, as the Board's brief sets out rather clearly, this is a rare, if ever, occurrence.

And I think that leads us to our final argument that there is really no injury or harm to the Labor Board by the decision of the Seventh Circuit Court of Appeals. In other words, the Board is required under the Seventh Circuit decision to not comingle prosecutorial with adjudicative functions, and specifically is prevented from appointing the same employee to the role of hearing officer in a 10(k) hearing as it has perform the prosecutorial role in the subsequent unfair labor practice case.

The Labor Board --

QUESTION: Mr. Fitzgerald, has it demonstrated any prejudice in this case?

MR. FITZGERALD: I think the prejudice in this case, your Honor, Mr. Justice Blackmun, is that at the 10(k) hearing, the employee who was the hearing officer made rulings on evidence. One of his basic rulings was that the union was not entitled to pursue evidence by means of a subpoena as to the execution of the original contract between the company and the other union in this case. And, consequently, Local 134 was precluded from presenting evidence in support of one of its major contentions, namely, that the collective bargaining

agreement between the company and the other union was not valid.

Now, this ruling made by the hearing officer was unfortunately of such magnitude that it not only took away one of our major contentions, but then when the Labor Board decided the determination of the dispute, the Labor Board's primary criteria was that there was a collective bargaining agreement between the employer and the other union.

Now, we submit that the Labor Board's reliance upon that contract after precluding our seeking evidence,as part of our position was that the contract was not valid, took away a very substantial part of our argument. And I might note that one of the questions, although not decided by the Seventh Circuit, but which we argued to the Seventh Circuit, was that there is a clear decision of the Sixth Circuit, the Dayton Motels case, which holds that the Labor Board should not close its eyes to relevant evidence merely because it may be beyond the Labor Board's time period of the six-month section 10(b) requirement.

QUESTION: Might not the same thing have happened with another hearing officer?

MR. FITZGERALD: It may well have, your Honor. I don't know.

QUESTION: Then how do you demonstrate prejudice? By what measure?

MR. FITZGERALD: I think the fact that subsequently

the same man who made the ruling on the admissibility of the evidence then prosecuted the case in the unfair labor practice hearing, and, of course, part of the unfair labor practice hearing was the validity of the Labor Board determination of the dispute.

But this comingled the two hearings -- the comingling of the function, I suppose, is a more appropriate way to state it, was psychologically improper. And the Seventh Circuit, I think, the nub or the basis of its decision was that the intent of section 554 is to prevent this psychological dilemma to be presented to administrative agency employees.

QUESTION: I can grant that and since I think what seems to be improper -- but aren't you, isn't your position one of penalizing the litigant through the sins of the Board?

MR. FITZGERALD: Well, I believe, your Honor, that our basic position is that we should have been allowed to pursue that evidence and present our full case in the 10(k) hearing, but we were prevented from doing that, and as I understand the Seventh Circuit decision, that is the basis and the exact application of the Wong case that the Court found applicable to the 10(k) hearings. I think the significant part of the Seventh Circuit decision is that it picked up and applied the rationale of the Wong case to the

Board's 10(k) hearing.

QUESTION: Wouldn't your case for prejudice be stronger if you had a prosecutor in the 10(k) hearing then be the judge in the 8(b)(4)(D) rather than vice versa, the way you had it?

MR. FITZGERALD: I think the court well recognized that this was the Board's primary contention, the Seventh Circuit Court of Appeals recognized that this was the Board's primary contention and found the psychological prohibitions which the Wong case and the Administrative Procedure Act in section 554 set out to be persuasive. And I submit that they are.

QUESTION: Let me ask you one other question about that. Once you find this proceeding subject to 554, can you think of any reasonable way to find that it isn't also subject to 556 and would require decision by a hearing examiner?

MR. FITZGERALD: Well, I think our basic position there is that the language of section 554, particularly in section (e), paragraph (2), which is the exact language which prevents the comingling of functions, makes no reference to section 556. As I say, there is an oblique reference to section 557, but we submit that that language of section 554 subparagraph (d), second paragraph, is divisible. In other words, it talks about there shall be no comingling of functions between an employee engaged in the prosecutorial

investigative functions with the decision-making functions, but it divides the decision-making into three different categoris: The recommended decision, which I submit would be a section 556 type of -- more appropriately a section 566 type of decision. And then agency process under section 557. We believe that those are divisible, and as we understand the Labor Board rule, this is a decision of the Board, decision and determination of election, and therefore it falls within the decision category, and we think that these are divisible.

QUESTION: Both section (c) of section 554, which is the provision which would carry it over to 556, and subsection (d) that you are talking about are general provisions that say that things subject to section 554 shall be governed in that manner. I have not been aware of any construction that could have said that it's subject to 554(d) but not subject to 554(c).

MR. FITZGERALD: But I submit that our position is that these are divisible because subsection (c) and subsection (d) provide for different types of -- or prevent the agency from engaging in different types of functions.

Now, that appears to have been the construction that the Seventh Circuit Court of Appeals gave to the 10(k) proceeding in this case because it did not come down with any decision to the effect that administrative law judges must be assigned in section 10(k) hearings.

Thank you.

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

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:49 p.m., the oral argument in the above-entitled matter was concluded.)