In the

Supreme Court of the United States

JAMES R. MUNIZ, et al.,

Petitioners,

v.

ROY O. HOFFMAN, DIRECTOR, REGION 20, NATIONAL LABOR RELATIONS BOARD,

Respondent,

No. 73-1924

Washington, D. C.
March 24, 1975

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v.	:	
ROY O. HOFFMAN, DIRECTOR, REGION 20, NATIONAL LABOR RELATIONS BOARD, Respondent.	:	

Washington, D. C.

Monday, March 24, 1975

The above-entitled matter came on for argument at 11:07 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:

VICTOR J. VAN BOURG, ESQ., Levy, Van Bourg & Hackler, 45 Polk Street, San Francisco, California 94102, for the petitioners.

ROBERT H. BORK, ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C.,,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 arguments next in No. 73-1924, Muniz against Hoffman.

You may proceed whenever you are ready, Mr. Van Bourg.

ORAL ARGUMENT OF VICTOR J. VAN BOURG

ON BEHALF OF THE PETITIONERS

MR. VAN BOURG: Mr. Chief Justice, and may it please the Court: The question in this case, of course, is the question of jury trial in criminal contempt matters, and we have two distinct arguments, one being the constitutional argument, and one being the statutory argument.

I think the constitutional question has to be discussed first, and we will undertake to do that, because it rests upon the vague line of what is a serious offense and what is a petty offense, and the only statutory assistance we have is title 18, section 1(3), namely, the $500 provision and the 6-months imprisonment provision.

The adjudication in criminal contempt in this case leaves a great deal to be desired with respect to clarity on that point. We have a fine of $25,000, $15,000 of which is suspended, much as would be the case in civil contempt, i.e., behave yourself for a year and that $15,000 will not be reinstated, but if you misbehave, the full $15,000 will be reinstated. And the degree of misbehavior is not discussed.

There is no determination as to whether it would be the same kind of a proceeding as if we would have a motion to revoke probation.

On the imprisonment side, the individual, Muniz, is told that he is on probation for a year and it was pointed out to him that the court retains jurisdiction to impose the 6-month prison sentence or jail sentence. Again, we have some vagueness in the judge's orders.

But the critical question is whether or not this is a serious or petty offense. And I think that there is no question this was not a multicount issue insofar as the adjudication was concerned, it was treated as a single count. It is a $25,000 or $10,000 fine depending upon how you want to view it, and there is a criminal record imposed upon an individual human being who has the potential of going to prison or jail.

Now, why do we even deal with that issue when we seem to have a much more clear-cut presentation on the statutory side? I think it's very important for us to deal with that issue because we find ourselves confronted with contempts and injunctions throughout various phases of the law, and I think it's critical that we deal with the constitutional question on the jury side.

QUESTION: The individual, however, is not in a position to make the constitutional claim.

MR. VAN BOURG: Because of the nature of the adjudication, we do not appeal on the criminal side for James Muniz. We appeal only with respect to the union on the constitutional side.

QUESTION: Yes.

MR. VAN BOURG: Now, the issue here --

QUESTION: He can make the statutory argument.

MR. VAN BOURG: Yes, he makes the statutory argument. The union makes the constitutional argument and the statutory argument; Muniz, the individual, makes the statutory argument. But the understanding, the fulcrum question, the understanding of how an institution such as a labor organization operates, is what's fundamental to the whole trial of the case. The union itself did nothing. The union was held in contempt and adjudicated in criminal contempt, and the order to show cause against it as an alleged contemnor was based upon the conduct of the individual Muniz.

Now, a labor organization does not authorize its officers, the president in this case, to engage in criminal action. So all of the knowledge, all of the conduct, all of the assumed knowledge, all of the imputed conduct done by the individual is attributed to the organization without anything further being done or said or presented. So the $25,000 exposure to the union is part and parcel and cannot be connected with the adjudication with respect to the probation

and the potential of six-months jail for Muniz, the theory being, as discussed in the cases and as discussed in all of the briefs, that the union can't go to jail but its president can. So this contempt, the adjudication, is the same as it is in most cases. The union is fined, that is, will hurt their treasury, the members who made no consent whatsoever, no proof that they even knew about the conduct, their pocketbooks are going to be hurt. But the president, we are going to put him in jail or put him on probation.

Now, that's -- even though Muniz only can argue the statutory question, the fundamentals of the case, the notion of contempt in general with respect to labor organizations and their officers and their exposure is fundamentally connected.

Now, I think that it would belabor the point for us to recite the provisions of the Constitution and to review again and again the provisions of the section 1(3) of title 18 with respect to the $500 fine and the 6-month jail sentence.

QUESTION: Is the argument you make, this agency argument, any different from what it would be with a corporation and its chief executive officer?

MR. VAN BOURG: It is different in many respects, for this reason: A labor organization does have a different life, does have a different foundation, and is governed by different statutory considerations than a corporation, the critical one being that they have constitutions governing much

more precisely what can be, what cannot be done by officers, and the congressional enactment specifying the types of things that union officers and unions in general can and can't do. Of course, corporations are governed by different statutory prescriptions and proscriptions, and they, too, have by-laws and they, too, have articles of incorporation. So in a general legal sense, of course, a corporation and a union can be equated as to the type of legal person they are. But with respect to how labor unions are organized and how they are regulated by statutory enactments and indeed as to how they are treated by the courts, the practical aspects are that they are different from corporations, particularly in this kind of a situation.

QUESTION: Stockholders can, even though it may be very difficult, they can fire presidents of corporations.

MR. VAN BOURG: Yes, they can. The union membership, however, unless it has an impeachment procedure as is required under the Landrum-Griffin provisions of 1959, cannot fire the president of the union. He is elected for a specified term and he cannot be fired. Now, impeachment provisions exist, impeachment proceedings may be brought. They are rare. And it would require in this case a local union of 7,000 to 9,000 members for the unions to have knowledge of what is happening as a basis for the proceedings and to bring the impeachment proceedings.

QUESTION: How long was the president's term of office?

MR. VAN BOURG: At the time that this conduct was engaged in, it was his first term, and it was not a full term. In other words, he took over in the middle of a term.

QUESTION: How long did he have to serve for the remainder of the term?

MR. VAN BOURG: As I recall it, it was one-half or two-thirds of a three-year term. Now, my recollection is not clear on that point, but it is true, and so that the Court is aware of the fact, he was re-elected for another term subsequently. I don't want that issue to cloud any of the questions that have to be determined here, but I do think that in dealing with the question of contempt as to an organization, the Solicitor makes much of the fact that because this is a corporation that right to jury trial, in his words, "shall not be extended to a labor organization."

I don't think the question of the Constitution of the United States deals with extension of constitutional rights. The constitutional rights are there, and the thing is a little bit twisted around. It is the Solicitor who argues that that right should be taken away from the union. Now, it's true that the courts have dealt differently with respect to corporate or associate persons as opposed to humans in terms of how they have dealt with the question of jury trial. And Cheff is a

good example, of course, of that issue. Nonetheless, the constitutional issue, I think, is clear. The line has to be drawn. Lawyers who try these cases both as to corporate persons and as to individuals have to know the line between the petty offense and the serious offense. We always take the position of the $500 and the 6 months. And indeed in this case the judge in reserving jurisdiction on the adjudication of criminal contempt used the 6-months rule or measure as the basis for the jail term or the potential jail term with respect to petitioner Muniz. He did not, however, use the $500 rule in imposing the fine.

I will not say more at this time with respect to the constitutional question, again because I think it would belabor the point to go over that again. The Court obviously has all of the briefs before it. I do, however, want to discuss the statutory question with some emphasis.

We have the clear language of 3692. We have an absolute contradiction of the Ninth Circuit and our decision in the case that was rendered in the First Circuit in Union Nacional. I think that that issue thus is squarely before the Court.

Now, the thrust of the Solicitor's argument that a jury trial is not necessary in this kind of a contempt would require, and of course we agree and urge the conclusion of the decision in Nacional, would require that the plain meaning

of the statute be negated and that the Court not pay attention to the phrase "any case involving a labor dispute." There is no question but the fact situation in our case involves a labor dispute, none whatsoever. There is no question that it is the kind of a labor dispute which is either protected or prohibited or governed or regulated by Taft-Hartley as well as perhaps by other statutes. There is no question that the cause of action arises because of statutes of the United States. There is no question that the petition was sought by the Regional Director of the National Labor Relations Board pursuant to the provisions of section 10(l) of Taft-Hartley. Nacional deals with 10(j), but the authority of the Regional Director to petition for injunctive relief was specifically the same under 10(j) as it is under 10(l).

Now, it is urged upon the Court that Congress did not intend a jury trial in a contempt proceeding to prevail because that would interfere with the orderly processing of the scheme of regulation of the Labor Management Relations Act, and we submit that that is incorrect and should not be accepted by the Court. The basis for that submission is the fact that civil contempt has to do with compliance with the order. That was even conceded by the Ninth Circuit in our case. Criminal contempt has to do with punishment, not compliance. I think that in this particular case the punishment was severe, and the appendices to the various briefs, the transcript references

wherein the district court judge discussed the penalties are clear. The counsel for the general counsel of the National Labor Relations Board urged upon the court that this was a very serious offense and urged that the union and Muniz be punished. 3692 clearly therefore would require a jury trial. And we can see no way that the plain meaning of the words and the plain meaning of the statute can be evaded or avoided. Indeed, if the Solicitor were to prevail, if the Government interpretation of 3692 were to prevail, Congress would have engaged in a nullity. The Act would have been totally void. 3692 is not a mere recodification of what previously had existed in section 11 of Norris-LaGuardia, because at the time that section 11 of Norris-LaGuardia was enacted, the broadened scope of statutory chipping of the protections against injunctive relief under Norris-LaGuardia had not yet occurred or had not occurred in as full a measure. Section 10(1) is a Taft-Hartley amendment. And the timing of the various statutory provisions is important. 3692 was a 1948 enactment. 10(1) is a 1947 enactment, so Congress knew about 10(1) at the time they enacted that provision. And there is much discussion of the 1947 Mine Workers case which dealt with the mine seizure situation. The fact situation arose in 1946, dealt with a peculiar and special problem under a statute which had not as yet been enacted as far as this case is concerned, namely, 3692.

We would respectfully submit that the decision on the statutory question of the court in the First Circuit in Union Nacional should be followed by this Court.

Thank you very much. We will reserve the balance of our time fox rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Solicitor General.

ORAL ARGUMENT OF ROBERT H. BORK ON BEHALF OF THE RESPONDENT

MR. BORK: Mr. Chief Justice, and may it please the Court: This case presents the question of the allowable social response to a situation of widespread disorder coupled with massive and egregious disrespect for a court order. The Gove mment submits that the contempt convictions of both petitioners of criminal contempt was proper and neither was entitled to a jury trial under the statute or by the Constitution.

I will return to the statutory argument in a moment, but it is rather fully set forth in our brief. We believe that Congress quite deliberately designed its statute so that the Labor Board could meet situations like this rapidly. Congress, I think quite reasonably, concluded that both rapidity and firmness are needed and that when the Labor Board is the moving party as distinct from an employer, that none of the dangers presented against which Norris-LaGuardia was

directed are present.

But as I say, I would like to return to the statutory argument in a moment. But our constitutional argument is not as fully set forth in our brief as I would like, and I would like to modify it somewhat and develop it somewhat here.

As stated in our brief our first constitutional argument is that criminal contempt hearings do not require a jury. When the penalty is against a corporation or a union, there can only be a fine, so there is no personal liberty interest at stake. Now, we continue to believe that that distinction is an important one between a fine and a loss of personal liberty and it is certainly felt to be quite important throughout our society, both in terms of the individual suffering and the degree of social disgrace inflicted.

But that distinction may not be enough by itself to be adequate to the concerns of the Constitution in this area. And while we rely upon it as part of our total submission, I wish to add other factors that I think in combination with it are sufficient to show that Local 70 was not constitutionally entitled to a jury trial.

The history of criminal contempt is well known and throughout, of course, most of the history of this Court time and again claims for jury trial as a constitutional right were rejected. Relatively recently in Bloom v. Illinois this Court required a jury trial for contempt that resulted in two years

imprisonment. Now, I stress the recentness of that decision, not in order to suggest that it is not firmly established as doctrine, but rather only to suggest that it is doctrine at the beginning of its growth and evolution rather than at the end.

It is important to recognize, I think, that categories of contempts are very different. The offenses are very different and the punishments are very different. With respect to some, such as the one involved here where personal liberty is not at stake and where I will suggest that the rationale of the Bloom opinion does not quite fit, it should be constitutionally permissible to retain the efficacy of contempt proceedings in their historical form, that is, without a jury trial. Bloom, I think, rested upon two propositions. The first was that considerations which make a right to jury trial fundamental for serious crimes are not substantially different from those that apply to serious contempts. And the second was that the argument for jury trial is either more compelling in contempt cases because contemptuous conduct often strikes at the most vulnerable and human qualities of a judge's temperament.

The burden of my argument will be to show that there are kinds of contempts that bring into play considerations not present where statutory crimes are involved, and some of these considerations are peculiar to certain contempts. Some

of the arguments I will make distinguish all contempts from all crimes. Bloom v. Illinois said that was not enough. But I think when we add to that that some contempts are different from other contempts, we are entitled to look at these differences cumulatively and say that in certain categories of contempts a jury trial may not be required -- is not indeed required.

QUESTION: And certain categories of defendants also? In other words, is your argument, your constitutional argument, such that it would lead to the conclusion that a corporation is never entitled to a jury trial in a criminal contempt, because a corporation by definition cannot be put in prison?

MR. BORK: I think, Mr. Justice Stewart, that I would say that perhaps only in combination with the additional factor that I wish to mention. One can imagine fines so large that perhaps they would be oppressive, but with these additional factors present as safeguards, I think it resulted in this case no jury trial was required. I am going to suggest --

QUESTION: A corporation or a labor union.

MR. BORK: Yes. And I am going to suggest that we are indeed, I trust, at the beginning of an evolutionary development along this area, and I cannot for that reason make tight line distinctions. I think there are a variety of

factors to weigh. I think they all point toward the constitutionality of what took place here. But these factors which I am going to discuss are intended to respond affirmatively to the rationale of Bloom v. Illinois and thereby meet its rationale.

The first factor I will discuss distinguishes all contempts from all crimes, and I think, as I say, we are all entitled to consider it as well as the special factors. And that is simply that the penalty in a contempt case is subject to judicial review, while the sentence in a criminal case currently is not. And that seems to me a very distinct and important difference. It's a fundamental safeguard in contempts guarding against passionate or prejudiced tribunals, and that's not yet available to criminal defendants.

The remainder of the factors I will mention distinguish between kinds of criminal contempts as well as between contempts and crimes.

QUESTION: But if a State statute or Federal statute specified the punishment for contempt.

MR. BORK: If it specified the punishment for contempt, then I suppose we would have to take the --

QUESTION: Even within some limits. I mean, although there was a range of discretion, we would still have the traditional rule of nonreviewability, then, I suppose.

MR. BORK: I suppose not, but here we have a reviewable

fine, and I think in cases where we do have a reviewable fine, we certainly have a fundamental safeguard not available in a criminal case which suggests less need for the jury trial.

The second consideration I want to mention is that this case presents the kind of criminal contempt conviction that can be effectively reviewed on a written record. It does not turn upon attitude or tone of voice or bearing toward a judge in a courtroom which is impossible perhaps to recapture on a written record.

Third, the offense to be enjoined and hence to be punished for violation of a court order is not some vague category like disrespectful behavior, but is instead a statutorily defined unfair labor practice, a secondary boycott, and its application to this particular case is made quite clear by the order which is served upon the petitioner, served upon the labor union, Local 21, and which petitioner had to violate before any sanction became possible. Petitioner thus had much more advance warning of what conduct was proscribed for him before he could be punished for violation of that order.

The problem of the human and vulnerable qualities of the judicial temperament mentioned in Bloom hardly arises here because the conduct was not disrespect to or criticism of a judge. Rule 42 of the criminal rules that makes particularized judgments of the kind we are talking about here,

and that of course is what I am seeking.

There is one other difference between contempts and crimes that I find highly relevant. Our legal order throughout its range places greater importance upon the effectiveness of court orders than it does upon the effectiveness of criminal statutes. If a man deliberately violates a statute under the claim that it's unconstitutional, should he establish the unconstitutionality, he will go free. But should the same man knowingly violate a court order under the same claim even if he establishes it's unconstitutionality, he may be punished. Our legal order has always placed greater emphasis upon the court order and its sanctity.

That being the case, it seems to me desirable that the superior effectiveness of court orders be preserved for some kinds of situations. Otherwise, monetary sanctions that are available may be wholly ineffective to prevent massive and egregious violations of court orders in precisely those cases where they are most needed and also to prevent the destruction of rights and property of persons in the community.

When a court order is directed to a large organization with widespread support in the community, it is entirely possible that juries will not convict. In such situations there may be hung juries, either because of sympathy with the law violators or because of fear of reprisal in that community. And if the court is limited to imposing only very small fines

without a jury trial, the fines are likely to be imperceptible to the organization and the orders will deter little or nothing.

There may be arguments, I think, for the jury's power to nullify criminal statutes or it may be that that is just a byproduct of our system and can't be helped. But I don't think nullification by jury ought to be permitted here. It's certainly not appropriate in a context like this one, given the factors I have mentioned, that is, the greater importance of court orders, the fact that personal liberty is not at hazard, and the safeguards available here that would not be available in a criminal prosecution under a statute.

Thus, I think it results that if the Bloom decision is applied according to its rationale, no jury trial was required in the contempt proceedings here. I think that's perhaps all that needs to be said with respect to this case. Perhaps I should add that what I am envisaging in applying the Bloom decision according to its rationale and according to these factors that must be weighed as they occur or do not occur, is that we would enter upon a classical common law development of doctrine in this area claiming these considerations I have mentioned in various contexts, perhaps identifying other considerations.

Now that, I think, is not an objection to the Government's position. I think it's rather its strength because the process I described results in applying the

Constitution sensitively according to the policies that compete within the Constitution in this field, and I think that's better than applying the flat rule that sacrifices important interests for nothing more than instant certainty.

QUESTION: Mr. Solicitor General, would your argument be the same if Mr. Muniz had been sentenced to one year in prison without probation? I gather it would, wouldn't it?

MR. BORK: No, it would not, Mr. Justice Stewart. I am talking now -- Muniz has not raised the Constitution issue.

QUESTION: I know.

MR. BORK: And we are accepting for this purpose the distinction between imprisonment and fine.

QUESTION: Imprisonment beyond 6 months at least.

MR. BORK: That's right. So that I would not be arguing that no jury trial was required if Mr. Muniz was sentenced to more than 6 months.

QUESTION: You would not.

MR. BORK: I would not be arguing that.

QUESTION: Is part of your argument, General Bork, based on the proposition that a fine is a less worrisome type of sanction than imprisonment?

MR. BORK: I think that that is part of it. I don't know that that would be an adequate line of demarcation all by itself because of the possibility of very heavy fines.

QUESTION: Well, why is it any good at all, as a matter of fact, when you look at the Seventh Amendment that requires a trial by jury for civil action where $20 or more is involved and compare it with a jury trial provision in connection with a criminal case. It seems like the framers thought that the taking of money was probably just as serious a sanction as putting someone in jail.

MR. BORK: I doubt that that would be the reason, Mr. Justice Rehnquist, for the Seventh Amendment. But in any case we now allow the taking of money in large amounts without jury trial. Our brief discusses many administrative procedures by which corporations, collectivities like this one, are assessed very large sums without the possibility of jury trials. I don't think that's unconstitutional. And I think our society does feel that there is a difference between imprisonment and fine.

QUESTION: What's our society's feeling got to do with the meaning of the Constitution?

MR. BORK: Well, it's one way of asking ourselves how much injury is inflicted upon a person. Now, this Court has said that for historical reasons it will distinguish between a 6-month prison term and a 6-month-and-one-day prison term in terms of jury trials. And I suppose it is thereby drawing a line because a line has to be drawn, but the longer the imprisonment becomes, the more suffering it inflicts

and the more social disgrace it inflicts because of society's feeling about it. And I am merely suggesting to you that there is a distinction in degree in our perceptions, in society's feeling and indeed in the individual suffering when the penalty is a fine rather than imprisonment.

But in any event, I think these other factors, I suggest, also argue in the same direction.

QUESTION: Mr. Solicitor General, I gather none of these factors argues, does it?

MR. BORK: I beg your pardon?

QUESTION: Do these factors, singly or in combination, suggest unconstitutionality in a statute which requires jury trial?

MR. BORK: Not a bit. Not a bit, Mr. Justice Brennan. But in the absence of a statute, I am suggesting that they constitute, but I don't think there was a statute here that required a jury trial.

QUESTION: I know, but your emphasis I thought had the sound of separation of powers, these being judicial orders and --

MR. BORK: Well, there may be occasions, Mr. Justice Brennan, which I think we need not reach here, in which Congress purportedly deprived the court of any ability to function as a court, such a statute might be unconstitutional. But I don't think we are discussing that range of considerations

in this case and I trust we never will have to discuss that range of considerations. But it is useful to mention Congress because the evolution I am discussing need not be entirely judicial. It's appropriate that Congress have its attention refocused upon this problem and that we have legislative judgments set into the process as we move toward a resolution of this issue.

Now, our alternative submission on the constitutional issue is quite fully developed in our brief. I will merely touch upon it. It is that a $10,000 fine imposed upon a large organization like this one is obviously not so substantial as to make the offense more than petty. The reliance upon 18 U.S.C. 13 about petty offenses I think is misplaced. That statute was passed about 1930 with totally different things in mind, was not addressed to contempt. And furthermore I don't think that statute makes it possible to equate 6 months imprisonment with $500 fine, particularly in view of the fact that it goes on to say "or both". So that we would be left with the peculiar logic or proposition that you could impose 6 months plus $500, but not 6 months plus one day or $501 separately.

I think realism has to have its claim in this field of constitutional law, and it appears there are at least 13,000 people who paid dues to Local 70 or paid fees to Local 70. And when we look at what that means, it comes out,

this fine comes out to about 80 cents per person, per head. And if the law is to correspond to reality in making distinctions about what is severe and what is petty or serious and petty, that factor I think has to be taken into account. Indeed, I think it's dispositive.

I would like now to turn to the argument about the statute because I think there are two issues there, and the first one is whether or not there was a distinction after Taft-Hartley between cases where private employers sought an injunction and start contempt and cases where the Labor Board did. And I think there was. Norris-LaGuardia ruled the first, and Taft-Hartley and Wagner Act the second. And I think there was no jury trial requirement there.

The second issue, then, is did the enactment of 18 U.S.C. 3692 suddenly wipe out the distinction thus laboriously made. And I will not rehearse the entire history of these statutes as they came into effect. But let me say only this: The evidence that just before 3692 was passed that there was no requirement in the law that a Board order like this one, a Board petition for an injunction which was violated, followed by criminal contempt like this one, required a jury trial is this: The Norris-LaGuardia Act of 1932 in itself expressly applied only to cases arising under this Act. The United Mine Workers case shows that there were cases which did not arise under Norris-LaGuardia. Furthermore, the Wagner Act of 1935

in section 10(h) explicitly made every section of Norris-LaGuardia inapplicable, including specifically the jury trial section of Norris-LaGuardia to court orders obtained by the Board. At the end of section 10(h) it cites every section of Norris-LaGuardia as made inapplicable, including section 111, which is the jury trial provision. So there is no doubt that after the Wagner Act Board orders are not governed by the jury trial requirements of the Norris-LaGuardia Act.

Now, the Taft-Hartley Act in '47 not only retained 10(h) which governs 10(l) as well as 10(j) --

QUESTION: Does that include a suggestion that Congress was asserting there should be no jury trial in those situations?

MR. BORK: Yes, Mr. Justice White, I am saying that it is quite plain from the evidence I am summarizing, beginning with the arising out of language in Norris-LaGuardia, arising under this Act, going on to the explicit statement in 10(h) of the Wagner Act that all of the provisions of the Norris-LaGuardia Act, including section 111, don't apply to that section, which shows that the jury trial requirement was lifted. I am saying in addition that 10(l) when it was enacted as part of the Taft-Hartley Act speaks of power to enjoin notwithstanding any other provision of law, but perhaps more importantly left 10(h) standing. And we discuss in our brief the fact that Senator Ball tried to amend section 10(l) saying that as

presently written, it completely lifted the Norris-LaGuardia jury trial requirement,and he would put it back in in part. The Ball amendment was rejected.

In addition to that, there has been a consistent course of practice and understanding by the Board and by all kinds of people, including most courts up until quite recently, 25 years, in which everybody read this statutory scheme as protecting against labor injunctions brought by employers. That, after all, was the evil at which Norris-LaGuardia was aimed. And after the Labor Board came into effect, that evil was no longer necessary to be guarded against. Congress laid down the guidelines of what could be done and what could not be done, and the Labor Board was expected to operate fairly within those guidelines. Hence, the relaxation of Norris-LaGuardia safeguards when the Labor Board was involved.

But given those factors, I don't think there can be any doubt that just prior to the enactment of 3692 Labor Board-sought injunctions did not require jury trials for criminal contempt proceedings.

Now, the main argument petitioners urge is 3692, in the year following Taft-Hartley, right after Congress had made the distinction, obliterated every trace of the distinction and did it without a word of debate in Congress, Senator Taft clearly not being exercised. Not a word of debate in Congress or comment or even notation that it had been done. I think

that's simply not credible, and until recently, for over 25 years no court thought it was credible. And certainly the people who recodified title 18 to bring section 11 of the Norris-LaGuardia Act into title 18 do not seem to have noticed that they were making any sweeping change in the law, because all of the revisers' notes go extensively into noting and explaining changes in substantive law. Nothing of the sort is found with respect to 3692. I think it is utterly implausible to argue that a major change in the nation's labor policy was made in that way. And therefore, I think it should take extraordinarily plain and indeed compelling language to reach petitioners' result. And the language of 3692 does not meet that test.

The language is not so plain that one can afford to ignore its legal context. We know it was taken directly from Norris-LaGuardia. And the revisers must have thought it entirely natural to refer to the same subject matter in the terms that Norris-LaGuardia employs, that is a case involving or growing out of a labor dispute. That's Norris-LaGuardia language and that context suggests they thought they were transplanting laws, not suddenly swallowing up distinctions made in the Wagner Act and in the Taft-Hartley Act.

QUESTION: The substitution, the substituted language is much broader, though, isn't it, than section 11 initially? Section 11 was just cases arising under this Act,

meaning Norris-LaGuardia, wasn't it?

MR. BORK: They repealed -- for this purpose they repealed section 11 and picked it up and put it over in title 18 and it can no longer be cases arising under this Act.

QUESTION: That's right. But the substitution "arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute." That's the new language, isn't it, substitute language.

MR. BORK: So that the new language, Mr. Justice Brennan, is a case involving or growing out of a labor dispute, which is Norris-LaGuardia language.

QUESTION: You think that is what limits it.

MR. BORK: I think it has to. For one thing, you get a distinction that doesn't make much sense if you read the statute the way the petitioners do. That is this: Not all labor disputes -- labor disputes and unfair labor practices are not coterminus terms. You can have an unfair labor practice quite clearly without a labor dispute. The reading here is that any case which is not a labor dispute but there is an unfair labor practice, you can get an injunction and a trial for criminal contempt without a jury. But if it also involves a labor dispute, you can't. I don't think that makes -- that's a difference that doesn't make a great deal of sense.

The reading we give 3692 says that you get a jury

trial when an employer is trying to get an injunction and try you for contempt, but not when the Labor Board does. And that's a distinction that makes policy sense. And in fact the distinction that the 80th Congress which passed Taft-Hartley made the year before. And it was also the 80th Congress that voted in 3692, which is another reason why it's impossible to believe that the 80th Congress didn't even mention the change they were making.

But in our brief we point to the fact that Representative Seller who had been chairman of the committee considering this title 18 some 10 years later rather heatedly denied that he had made the jury trial provision applicable to Taft-Hartley in 3692.

I think I should raise one warning signal. Petitioners' argument proceeds upon a flat, mechanical, and rather simplistic reading of language which has context and growth and has meaning. If that method of reading 3692 were accepted, this Court would then very shortly be faced with the claim that by the same kind of reading of the plain language, no civil contempts require jury trials, because this language doesn't distinguish between civil and criminal contempts. If you read it without context, that's what happens. Furthermore, it would turn out that no matter how small the fine, $1 fine requires a jury trial for contempt of a court order if you accept this flat mode of reading the statute, which I say is

totally foreign to its history and to its context.

So I suggest that the statute should not be read that mechanically and without regard to context or evidence, so that major congressional policies are destroyed on no basis than what can be called a rather simplistic semanticism, and we ask that the judgment of the Court of Appeals be affirmed.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Van Bourg?

REBUTTAL ARGUMENT OF VICTOR J. VAN BOURG

ON BEHALF OF PETITIONERS

MR. VAN BOURG: Mr. Chief Justice, just if I can for a moment, I believe I have a few minutes left.

MR. CHIEF JUSTICE BURGER: Yes, you do.

MR. VAN BOURG: I think that it is inappropriate to state, as the Solicitor has stated, that if the Court were to adopt the posture taken by the First Circuit in Union Nacional, that you would be making a major change in the nation's labor policy. The nation's labor policy is first enunciated in 1932 in enacting Norris-LaGuardia, saying courts do not interfere with the peaceful processing of labor disputes between labor and management. And then in 1935 by enacting the Wagner Act, and then in the mass of amendments of 1947 and Taft-Hartley, at no time did Congress set a labor policy dealing with the question of jury trials in criminal contempts.

The Code of Criminal Procedure, the Constitution of

the United States, the question of jury trial was not conceived as part of a national labor policy at any time by the Congress of the United States. They didn't presume that the Wagner Act or Taft-Hartley trenched upon notions of jury trial. And I am troubled by the fact that the Solicitor General is arguing against the concept and the notion of a jury trial on the constitutional side using the arguments that have been traditionally used that juries cannot see these things clearly, they may have sympathy toward the accused or they may be frightened of the accused.

The context of this case arises in a metropolitan area of some 4 million people in the San Francisco Bay area. I don't think that we have that kind of evidence that the juries would be so blind to the facts. And this is precisely the kind of case in which a jury trial is necessary because the judge may have been unable to determine the facts that had to be determined to protect the accused.

Why do I say that? The Solicitor glosses over the fact. He says that the petitioner in his argument before this Court, he argues that the petitioners had notice of the injunction and its provisions by service on Local 21. Local 21 is the Typographical union, one of the alleged contemnors. Local 70 is in the Teamsters union, is a Teamsters affiliate, totally separate from the Typographical union. But why is that important? Why should that fact even be argued or

pointed out? It's because the whole process of a 10(1) injunction is started by the filing of an unfair labor practice charge by a person, individual, or employer or another labor organization. After the charge is filed, the Regional Director, if he has reasonably concluded that an unfair labor practice may have been committed and determines to issue a complaint before the National Labor Relations Board, may seek a petition under section 10(1) against the labor organization against whom the charge was filed. It is that determination, subjective and factual determination, that is made by the Regional Director that starts the process of petitioning the district court for an injunction under section 10(1).

In this case there was no unfair labor practice charge filed against Local 70. There was no unfair labor practice charge filed against James Muniz. There was no intention to issue a complaint against them at the time of this trial. There was no 10(1) injunction sought against Muniz or Local 70. They were not parties to the charge. They were not parties to the injunctive proceedings. They were given no notice of the injunction. And at the time of the contempt trial and at the time of the adjudication, both civil and criminal, the Board still had not made them parties and they had never been served, and counsel for the general counsel when he argued the case conceded that they had never been served with the underlying papers. And yet the conditions precedent to the

determination that someone is guilty of criminal contempt is the finding of knowledge, notice, and intent to deliberately avoid or violate the injunction.

QUESTION: We did grant here, did we not, to exclude question one which raises --

MR. VAN BOURG: Yes.

QUESTION: So that's not before us.

MR. VAN BOURG: No, it is not. I think, however, that the arguments on the social policy of the country require that if an argument is made that this is not the kind of a case which would require a jury trial, I submit it is precisely the kind of a case where there are factual questions to be determined, i.e., notice, knowledge, intent to violate. And I would like to just conclude by one other item.

It is true that the Labor Board is expected, as are all Government agencies expected, to act fairly in the seeking of injunctions and enforcing them. If the civil contempt procedure is designed to vindicate the court's order and to show its compliance and the jury question in a civil contempt matter is not before the Court, and if the criminal contempt procedure is designed to punish rather than to vindicate and seek compliance of the court's order, then it makes no sense to give either a restricted constitutional determination of the right to a jury trial, which after all is fundamental in this society if we are talking about societal views, nor a restrictive

meaning other than the plain meaning of the statute under section 3692.

Thank you very much, Mr. Chief Justice.

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

[Whereupon, at 11:55 a.m., the oral argument in the above-entitled matter was concluded.]