In the

Supreme Court of the United States

THE EMPORIUM CAPWELL CO., Petitioner, v. WESTERN ADDITION COMMUNITY ORGANIZATION, et al., Respondents	No. 73-696
NATIONAL LABOR RELATIONS BOARD, Petitioner, v. WESTERN ADDITION COMMUNITY ORIGANIZATION, et al., Respondents	No. 73-830

Washington, D. C.
October 22, 1974

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Washington, D. C.,

Tuesday, October 22, 1974.

The above-entitled matter came on for argument at 10:34 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:

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of National Labor Relations Board.

GEORGE O. BAHRS, ESQ., 555 California Street, San Francisco, California 94104; on behalf of The Emporium Capwell Company.

KENNETH HECHT, ESQ., Employment Law Center, 795 Turk Street, San Francisco, California 94102; on behalf of Respondents.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-696, Emporium Capwell Company against Western Addition Community, and the Labor Board's related petition.

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

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

With a possible limitation to which I shall refer in a moment, the question decided by the National Labor Relations Board and the Court of Appeals in this case, and presented in the Petitions for Certiorari granted by this Court, is whether, under the National Labor Relations Act, interpreted in light of Title VII of the 1964 Civil Rights Act, it is an unfair labor practice for an employer to discharge dissident employees for engaging in concerted activities designed to force the employer to bargain collectively directly with them instead of with the exclusive bargaining representative, over alleged racially discriminatory employment practices.

The company here, the petitioner in No. 73-696, is a retail department store, which is a party to a collective agreement. That agreement contains an antidiscrimination provision, set forth on page 101 of the printed Appendix, under section 21 of the collective agreement.

You will note that the antidiscrimination provision of the contract prohibits discrimination by reason of race, color, creed,national origin, age or sex.

There's a potential there for many and probably most employees in the bargaining unit, therefore, to belong to one or another minority group in those categories.

In a series of meetings held in 1968, a group of employees covered by the agreement, including Messrs. Hawkins and Hollins, the two whose discharge is the subject of the decision here, met with their union representative to discuss various dissatisfactions they had with the company, including their belief that there was racial discrimination in the company's employment practices.

At the third meeting, the union representative expressed his view that there indeed was racial discrimination and that the union was prepared to invoke the grievance procedures under the collective agreement, to remedy discrimination, in accordance with those procedures.

At that third meeting some of those in attendance said that they would prefer if the union would picket the company, they expressed dissatisfaction with the remedy that the union was proposing to pursue.

The union representative, the chief executive officer of the union, rejected this request on the ground that it would be contrary to the union's obligations under the

collective agreement to the company, and that in his view an orderly processing of grievances would have a broader and more long-lasting effect.

And on the following day, on behalf of the union, he formally requested a hearing before the Adjustment Board, which is the first step in processing the grievances. And the hearing was convened in October of that year, and it started off with presentation of evidence by the union representative, by questioning employees regarding their individual grievances.

This was interrupted by employee Hollins, one of the two who was discharged, who, acting as spokesman for Hawkins, the other one before the Court, and two others, read a prepared statement objecting to the prosecution of grievances on an individual rather than a group basis, and stating that this group of four would not speak as individuals but would speak only as a group. And he added that they wanted to talk with the president. As he put it, their main purpose was to talk to the president to try to reach an agreement with him to straighten out the problems and conditions of the store.

Then, after refusing to give testimony, the four walked out of the Adjustment Board meeting.

The grievance procedures, nonetheless, were carried forward, and resulted in promotions being secured for two

individuals as to whom grievances had been pursued.

And this part of the record is the basis for the finding of the National Labor Relations Board on page 103 of the Appendix to the Petition, that --

QUESTION: Excuse me, Mr. Wallace, which color one is that?

MR. WALLACE: This is the dark yellow one, the Appendix to the Petition.

QUESTION: Yes. Page --?

MR. WALLACE: Page 103. The finding of the Board here, it was the finding of the Hearing Examiner adopted by the Board, just below the middle of the page:

"All the evidence indicates that the Union, their duly designated bargaining representative, was endeavoring in every way available to it under the agreement to adjust any and all cases of racial discrimination brought to its attention, and in at least one and apparently two cases had brought about the desired adjustment."

And to this the Board added, in a footnote on page 55 of the same Appendix, footnote 2 of the Board's order, the Board added "that the record before us neither requires nor allows a finding ... that the Union breached its duty of fair representation."

So what the Board might have done in a case in which it had been determined, either previously or in the Board

proceedings, that the Union had breached its duty of fair representation is a question that the Board really did not reach in this case, and is the additional limitation on the question presented, that I mentioned at the outset of my argument.

QUESTION: I don't seem to have that petition, Mr. Wallace, which is certainly not your fault; I have this Petition for Certiorari. It's a different color from yours.

MR. WALLACE: Perhaps it's bound in a different color, but it could be the same petition. It's the petition of The Emporium Capwell Company. Mine happens to be this color.

QUESTION: Yes, well, then they're bound in different colors. All right.

QUESTION: What page of that petition, the darker petition?

QUESTION: 103.

MR. WALLACE: 103 is the Board's finding that the Union was endeavoring in every way available to it under the agreement to adjust any and all cases of racial discrimination brought to its attention; and then on page 55, in footnote 2, is the further statement by the Board that the record neither requires nor allows finding by the Board that the duty -- that the Union was in breach of its duty of fair representation.

QUESTION: Well, I don't find that on page 55 here.

MR. WALLACE: Well, it's in footnote 2. I'm summarizing it slightly. The second line, page 55, footnote 2 of the Board's order.

QUESTION: I see it now. Unh-hunh. Thank you.

QUESTION: So that's the qualification that you mentioned at the outset, or the limitation on the question presented?

MR. WALLACE: That is correct, Mr. Justice.

The Board really has not passed on what the result would be in a situation where there had been a finding that the Union was in breach of its duty of fair representation. And counsel for the Board really can take no position on a matter that the Board hasn't passed on. The Board was divided 3-to-2 in this case.

QUESTION: I see. I thought you were going to maybe mention the fact that you and your adversaries don't seem to agree as to what the question at issue is in this case.

MR. WALLACE: Well, that's why I mentioned at the outset the question that the Board and the Court of Appeals decided, and which was presented in the petitions, and what we thought was the question here.

There is some effort in some of the briefs on the other side, and there are many of them, to in effect attack the Board's findings as to the objective of the activities for which these two people were fired.

QUESTION: Or at least to ignore them. And that, the finding, the Board in that respect was accepted by the Court of Appeals?

MR. WALLACE: It was accepted very emphatically by the Court of Appeals. Well, at least explicitly, let me put it that way.

And this is in, again, the Appendix to the Petition for Certiorari, on page 24, in footnote 34.

QUESTION: What page now?

MR. WALLACE: Page 24, footnote 34, in the second sentence, the petitioners "dispute the Trial Examiner's finding that Hawkins and Hollins activities were 'no mere presentation of a grievance, but nothing short of a demand that the company bargain with the picketing employees for the entire group of minority employees'. However, we can see no reason to disturb this finding."

And the dissenting judge was even more emphatic on that point, Judge Wyzanski, on page 43 of the same Appendix. As he put it, in the fourth line there, "There could not be a plainer instance of an attempt to bargain respecting working conditions, as distinguished from an adjustment of grievances."

There are -- of course, first, we contend that there is no reason for the Court to undertake to look behind these findings supported by all three Court of Appeals judges, but there is -- what support there is, the record is rather thin

on this, all seems to us to look in this direction. Part of it, where the statement is made before the Adjustment Board, indicating that their objective was to bargain with the president about conditions at The Emporium.

And during the hearing, turning to the other Appendix now, on page 11, Mr. Hawkins, in the middle of the page, in response to the question "What were you seeking?" said, "To try to talk to the top management to get better conditions for The Emporium."

"How were you going to do this?

"Through group talk and through the president if we could talk to him."

And then when Hollins was testifying, on pages 60 and 61, he tried, on page 60, to explain why, at the Adjustment Board proceedings, they objected to taking up individual grievances rather than the case as a whole. And after he explained it in several different ways, interrogating counsel says to him, "Just to carry it one step further, it was my understanding that what you were trying to do and you didn't want a solution of the problems of individuals, you wanted some basic change that would benefit the treatment of all minority people, is that right?"

And the answer is, "That's correct."

And then on page 67, as he testified further, at the very bottom of the page, he reiterates that statement:

"I said that we didn't want to have our case taken as an individual thing as I stated before, we all wanted it taken as a whole for the entire betterment of the minority groups of black, brown, red and yellow people there at the store."

And while the exact objectives and demands are not stated anywhere with a model of clarity, there is one indication in one of the exhibits to the record, that begins on page 115 in this same Appendix, of the sort of thing that they apparently had in mind.

This was a report that was prepared by these individuals and some of those working with them on a survey that they took of the store, in between the time of the press conference and the time when they were fired, after the two picketing incidents.

And in the course of this survey on pages 116 and 117, there is a listing of sixteen high-fashion departments in which there were either all white sales personnel or only a small number of others; and then Point E, on page 117 -- well, there's Point D, "Out of the total Blacks, Filipinos, Chinese and Mexican, only 5 are Black, 3 Filipino, 3 Chinese and 1 Mexican."

E. "We demand that all of these specific racial groups be infiltrated into the areas where the commission is the highest. The second floor."

And again on page 118, "We demand selling personnel of the following Racial groups to be infiltrated into the following high commission selling areas", Radio, Tape Recorders, the whole furniture department, et cetera.

This is as specific as anything in the record about the kind of thing they had in mind in asking to see the president, in holding their press conference, which stated that they were organizing a boycott of the store because of its racist policies.

And then in picketing the store, there's some dispute about the characterization of their activity as picketing. They were acting in concert, standing at the store entrances, giving out leaflets, or urging passers-by at the store entrances not to patronize the store.

This was characterized by both the Board and the Court of Appeals as picketing, and correctly so, in our view.

Although the respondent disputes whether it was indeed picketing.

Now, the Board's finding is the essential premise for its decision here, and it simply has not reached an issue of what would be the case if this kind of coercive activity was undertaken to support a demand that the company deal with them about grievances.

The distinction between --

QUESTION: Mr. Wallace, is that issue settled out --

let's assume it was not a racial tinge to this case, that there must have been instances where individual members of a bargaining unit do picket or have picketed to support the resolution of a grievance in their behalf, or when the Union has negotiated wages and hours and working conditions, the Union as a union doesn't call or have a picket line, or doesn't strike, but individual employees do. They don't strike, but they picket on their own time. Now, is that --

MR. WALLACE: There are wildcat strikes, and in --

QUESTION: Well, it isn't a strike, just picketing.

MR. WALLACE: Many of the cases have been about wildcat strikes.

My understanding of this is that there has been really not much litigation on this, because section 9(a), which is the section at issue, which designates the rights of the exclusive representative, and then has the proviso saying that individuals, including groups of individuals, can however present their own grievances, has been taken by the Board to define rights as between the individuals and the Union, and not as defining a duty on the part of the employer to bargain with the individuals pressing the grievances.

QUESTION: So you say, outside of the context in which this case arises, it is not settled whether the activities I referred to are protected activities under 8(a)?

MR. WALLACE: That is correct.

QUESTION: Or under 7, section 7.

MR. WALLACE: My understanding is that a complaint, a charge that the employer refused to bargain with the individuals who demand it is not processed by the General Counsel as a complaint, because he doesn't regard 9(a) as imposing any duty on the employer to bargain with the individuals.

QUESTION: What if the employer fired the employee for doing what I suggested he was doing? Is that an unfair -- is that settled that that is or isn't an unfair practice?

MR. WALLACE: I don't believe that is settled. There has been litigation about wildcat strikers, in which the Circuits have split about whether the strike is --

QUESTION: I would think it might be one thing to say that the individual employees aren't entitled to bargain with the employer, but it might be another thing to say he can fire them.

MR. WALLACE: So far as I know, the Board has not passed on that issue.

QUESTION: Well, it certainly -- it's passed on it in this case.

MR. WALLACE: Well, it doesn't regard this case as a case of --

QUESTION: This was a case of -- this is a case of picketing to gain bargaining rights, according to the Board.

MR. WALLACE: That's right. Rather than to get the

employer to talk about individual grievances.

So it doesn't regard the issue as having been presented in this case.

QUESTION: And it's the latter case that is argued by your brothers on the other side, including a good many amici, and including, indeed, the exclusive collective bargaining agent in this case; isn't that right?

MR. WALLACE: That is correct. However, the A.F. of L.-C.I.O, to which it belongs, has filed an amicus brief, addressing the case as we see it.

QUESTION: Right. I know that.

MR. WALLACE: And coming out at the other side.

Well, all of this leads to a summary of the reasons why we believe the Board's decision was the correct one in this case.

In the first place, the principle that would support the right to engage in this demand for bargaining is a principle of fragmentation. These individuals are self-designated, they hold no credentials indicating the authorization by the people they purport to represent, to bargain for them. There would be nothing to stop any number of other individuals from coming forward and saying that they, too, want to bargain on behalf of this same group of employees, or portions of them; nor would there be any reason why the same principle should not apply to other groups who have

statutory or contractual protection against discrimination. Such as women, the elderly, et cetera.

QUESTION: Well, Mr. Wallace, could you tell me again -- I probably missed it -- why, in the Board's view, the effort of individual employees to bargain with the employer over a grievance and to support their effort by picketing is not within the exception to 9(a)?

MR. WALLACE: Well, that -- that's --

QUESTION: Let's assume individual employees are picketing to have the employer address their grievance in a particular way, and the Union is also grieving with the employer. Now, why aren't the employees privileged to do that?

MR. WALLACE: Well, they are privileged under 9(a) to meet with the employer, --

QUESTION: Yes.

MR. WALLACE: -- to try to adjust their grievance with him.

QUESTION: Yes.

MR. WALLACE: That doesn't, under the proviso to 9(a), derogate from the authority of the Union. But the Board has never regarded 9(a) as imposing a duty on the employer to meet with them, and the cases tend to regard the picketing like they regard the wildcat strike, and the question is being whether --

QUESTION: But the employer --

MR. WALLACE: -- or not it's in support of what the Union is trying to accomplish.

QUESTION: -- the employer may not be guilty of a refusal to bargain if he refuses to bargain, but how about being guilty of an unfair practice if he fires the employee for exercising what is a privilege under 9(a)?

MR. WALLACE: Well, there's no question but what they have a right under 9(a) to do the meeting with the employer, if he will meet with them.

QUESTION: Well, what did the employer --

MR. WALLACE: And that doesn't take away anything that the Union gets in section 9.

QUESTION: So what did the employer fire these people for here? Something beyond what's guaranteed to them in 9(a).

MR. WALLACE: Completely.

QUESTION: Which is what?

MR. WALLACE: Well, you see, 9(a) is limited to presenting grievances, and the Board found that this wasn't an effort to present grievances; this was an effort to bargain about --

QUESTION: About what?

MR. WALLACE: -- conditions throughout the store, on behalf of all minority people. And obviously to bargain about things that will affect others as well.

QUESTION: If these people had wanted just to bargain with him about their own status?

MR. WALLACE: That would be a different case, which the Board has not passed on.

QUESTION: Even if it affected other employees?

MR. WALLACE: Even if it affected other employees, the case would be presented in quite a different context.

If they were claiming that they were denied a promotion, or that they were -- that the restroom on their floor was not maintained in working order, these things could affect other employees, but they would be individualized grievances about something denied to these individuals. They would not be purporting to be acting in a representative capacity on behalf of a large number of others who haven't authorized them as a bargaining representative to negotiate about matters that don't affect them, the negotiators themselves individually, or anyone who's authorized them to speak for them.

They are seeking to bargain in a representative capacity about conditions throughout the store, about who should be selling high-priced ladies' coats, and that sort of thing, which has nothing to do with any grievance that any of them has.

And this is the difference between the bargaining and adjustment of grievances. The line is sometimes a difficult

one, but we don't think it's a difficult one in this case.

QUESTION: You think that when the Board has applied its experience and resolved this, that that settles it pretty much?

MR. WALLACE: Well, of course the Board is very experienced in this kind of fact-finding. This is one of the areas of their specialization and expertise, and here their findings were upheld by all three Court of Appeals judges and they are supported by the record in the portions to which I have referred. And in our view the Court of Appeals underestimated here in seeking to in some way accommodate the normal outcome under the National Labor Relations Act with what it regarded as the policies of Title VII, underestimated the very real potential for interference with the role of the bargaining agent in authorizing others to speak for portions of the people covered, in talking about what remedies should be adopted, even if there's agreement between the bargaining representative and the dissidents, that discrimination exists.

QUESTION: Well, Mr. Wallace, under 9(a) that -- it really means nothing, does it, that the management does not want to discuss it, 9(a) means nothing.

MR. WALLACE: Well, that's something that, so far as I know, the Board hasn't passed on, and that leaves me in a position where I can't make a commitment on behalf of the

Board.

QUESTION: So if the employees tell management, We want to discuss this; and management says, We don't want to discuss it; there is no means available for the employee to do anything?

MR. WALLACE: Well, I think their usual recourse is to get the Union to do it on their behalf, because the employer has to discuss things with the Union. That's their --

QUESTION: Well, I understand 9(a) to be when the Union won't do it.

MR. WALLACE: Well, sometimes the Union is willing to do it.

QUESTION: Well, if the Union isn't willing to do it, and management isn't willing to talk to him, the employee is just out.

MR. WALLACE: The Board has not decided that, and I can't really answer the question. That's still an open question.

QUESTION: Well, I can see the difficulty in thinking that Congress would put 9(a) in there and end up with not giving him any relief at all.

MR. WALLACE: Well, it's certainly a possible reading of 9(a), because it's quite possible that the Union is trying to adjust grievances in one way and that some dissident employees want them adjusted in another way, and

we'll start engaging in coercive tactics on the employer that are contrary to what the Union is seeking to accomplish in the grievance proceeding, and that could be very damaging to the employer, such as urging shoppers on a Saturday not to patronize the employer's store. And 9(a) doesn't necessarily mean that Congress meant to sanction that activity and to protect those employees from being discharged if they insisted on doing that.

It does mean that they have a right to talk with the employer about it, if the employer is willing to make the adjustments with them, and that that is a proviso to the exclusive authority the Union otherwise had.

QUESTION: But if the employer talks to the dissident union member, facing facts, wouldn't the employer be in trouble with the Union?

MR. WALLACE: I think that varies with the situation.

In any event, my time has expired here. I do want to refer the Court to the legislative history of Title VII and to the other remedies available, as well as to the fact that nothing in Title VII purports to speak to collective bargaining rights or to the question of picketing, to which there is no reference in the legislative history of Section 704(a).

Thank you.

QUESTION: Mr. Wallace, before you sit down, am I

correct in understanding your argument as to 8(b)(7(A) was not raised below?

MR. WALLACE: Well, it was not raised below, it was nothing relied upon by the Board. The Board did not find a violation here of 8(b)(7)(A). We're pointing out that the facts show a violation of 8(b)(7)(A) and therefore that the Board's interpretation of Section 7 is not protecting this activity, is really the only permissible interpretation under the Act, because Section 7 wouldn't protect something that violates 8(b)(7)(A).

We're not saying that the case should be upheld on the theory that it was a violation of 8(b)(7)(A), that is not a ground that the Board relied upon or that the Board found. But it's in the picture, it's certainly relevant to construing the meaning of the other provisions of the Act. And I don't think the Court can ignore it.

Thank you.

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

Mr. Bahrs.

ORAL ARGUMENT OF GEORGE O. BAHRS, ESQ.,

ON BEHALF OF THE EMPORIUM CAPWELL COMPANY

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

I'm not going to repeat or elaborate upon the argument of counsel for the Board. I would like, in the limited

time available to me, to point out some of the difficulties and some of the unanswerable questions that have been raised by the decision below.

When parties undertake to bargain collectively, they must first understand clearly what employees are under discussion; and, secondly, who in fact represents those employees.

This requires the answer to three questions:

No. 1, what is the appropriate unit?

No. 2, who are the eligible voters?

And No. 3, what representative do they choose?

Now, merely because this case involves bargaining with respect to racial or minority problems does not eliminate those questions.

In fact, it makes them even more difficult.

We know that Hawkins and Hollins, in this case, purported to represent all minorities, yellow, red, black and brown. They made no mention of persons discriminated against on the grounds of sex or religion, as specified in Title VII. And that raises the question as to what is the appropriate unit for purposes of bargaining in this case.

Should it be the entire group of minority employees? Or should the employer be required to bargain by each color?

Further, should the colors be divided into nationalities?

Section 9(b) of the Labor Management Relations Act declares that the Board shall decide in each case whether, in order to assure employees the fullest freedom and exercising the rights guaranteed by the Act, the unit shall be the employer, the craft unit, the plant unit, or subdivision thereof.

There is no mention of race or color or minority. And that's a pretty good argument that Congress did not intend that there should be collective bargaining along racial or minority lines.

The point is that the Congress declared that the Board shall decide this question in each case, and it shall decide it so as to provide the employees with the maximum freedom of exercising the rights guaranteed them under the statute.

There is no way in which a decision could be obtained in this case, because any petition to the Board would be rejected on the ground that the employer had already recognized a representative and had a contract with him.

It is not up to the employer to decide what shall be the appropriate unit.

The next question is: Who are the eligible voters? Whether we take the unit by color, by race, there must be a decision as to what persons belong in each group. And in these days of inter-racial marriages and mixed parentages, there are extremely difficult and complex problems in determining what

race or color a person belongs to. There is no machinery provided for a determination of the question of the eligibility list of voters that the employer can safely rely upon in order to undertake bargaining.

Finally, there is no method provided for taking a vote of the employees to decide on what representative they wish to have represent them.

It would be folly for the employer in this case to assume that Hawkins and Hollins represented the entire minority group, or even the blacks employed in the store.

The Trial Examiner pointed out that when the Adjustment Board hearing took place, there were four men who walked out of the Adjustment Board hearing and joined the picket line. After the employer issued its warning against the picketing and leafletting, two of the employees dissisted and there were only Hawkins and Hollins left. Not a very impressive presentation to convince the employer that they represented any substantial number of minority employees.

The record also shows that in the meeting that the Union held with the minority employees, representatives of the EEOC and the State FEPC urged the minority employees to go along with the Union, that it was in their best interest. And we believe the employer was entitled to express sufficient doubts about bargaining with Hawkins and Hollins to refuse to do so.

Assuming that we waive all of the difficulties raised by those procedural questions, we have the problem of what the employer is supposed to do in order to try to comply with the opinion of the court below.

And, if the Court please, this is the first case to my knowledge where any employer has been directed to recognize two collective bargaining representatives representing the same employees at the same time. That's not easy to do.

The Court suggested that -- well, I'd like to read some of the language of the Court -- "We cannot agree that any inconvenience" --

QUESTION: Where are you reading from, Mr. Bahrs?

MR. BAHRS: I'm sorry. It's our -- the petition for certiorari on page 29.

"We cannot agree that any inconvenience which the Company might experience in being required to bargain with the minority here while still participating in the grievance procedures justifies withdrawing section 7 protection from these concerted activities."

Now, aside from the problem of dealing with two bargaining representatives at the same time, the notion of carrying out the grievance procedures is a futility, because of the fact that the principal witnesses walked out and refused to participate.

When it comes to bargaining with the representatives

of the minority, I would refer the Court to what is said in its opinion in Alexander v. Gardner-Denver. In that case the Court held that an arbitration under a collective bargaining agreement did not bar an action in court to correct racial discrimination. But when it came to the subject of bargaining, on the subject of discrimination, this is what the Court said:

Title VII strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII.

That is a statement by the unanimous Court.

Now, Hawkins and Hollins were picketing the employer, to compel the employer to bargain with him concerning racial discrimination.

QUESTION: I take it you must be urging that even though the employer need not bargain, needn't say a word to the picketing group, that because it need not bargain, that the employer may fire those who are picketing.

MR. BAHRS: No. I'm not saying that. If the Court --

QUESTION: Well, what would be your -- what untenable position would the employer be in if he needn't

bargain at all, but he couldn't fire pickets?

MR. BAHRS: Well, the pickets were fired primarily because of a violation of the Jefferson Standard case. In other words, while they are on the payroll of the employer, deliberately attempting to damage and injure the business of the employer.

This Court has declared that the principle of loyalty of an employee demands that if he's going to try to fight with the employer, he ought to get off the payroll. And that's what these men did not do.

QUESTION: Or go through the union?

MR. BAHRS: Or do it through the union, yes, Your Honor.

QUESTION: So this case would be different if the people had gone on strike and left the payroll?

MR. BAHRS: Your Honor, we're in the middle of a contract. There were some questions asked earlier about picketing or bargaining. It's my understanding of the law that the purpose of collective bargaining is to have a contract where you settle all questions. You don't bargain during the middle of a contract.

Thank you.

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

Mr. Hecht.

ORAL ARGUMENT OF KENNETH HECHT, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

Before starting on my own presentation, I'd like to respond briefly to some of the points that preceding counsel have made, and some of the questions which have been asked by the Court.

Let me take them in reverse order.

I think it's clear that the Jefferson Standard question is not here before the Court at this time. That was the issue upon which the Court of Appeals remanded to the Board to determine whether there had been such a display of disloyalty that the employees ought not be rehired.

But the Court recognized that the Trial Examiner, who wrote the decision which the Board adopted, while he had made extensive findings of fact, had declined to rule on the issue. And on that basis the Court of Appeals refused to rule on it, either.

I think it's not been raised in the Petition for Certiorari, and is not before the Court at this time.

I trust from our briefs that it's clear that we're not here advocating collective bargaining according to race. Quite the opposite.

It's the purpose of our position to encourage

unions and management to be more responsive to the problems of minorities, and to solve those problems within the framework of collective bargaining.

The courts have said, we think it's correct that there cannot be strong concerted union activity so long as the employees are divided.

That would be the case if the union had no responsibility, if the employer had no responsibility. We think what we're urging upon the Court is a method by which minorities can be accommodated, by which statutes can be accommodated, so that industrial peace will continue.

QUESTION: Would you be making these same arguments, Mr. Hecht, if the whole episode had involved two women who were picketing against alleged discrimination against women?

MR. HECHT: If the women engaged in their concerted activities on a good-faith belief, which the Court found, if the women had attempted to go through the union -- for seven months Hollins and Hawkins tried very hard to use the processes which the union controlled, that is to say, the grievance process; it proved to be a futile attempt. And at that point, reluctantly, Hollins and Hawkins, with the advice of the union that what they intended to do was not unlawful, did not violate the terms of the contract, abandoned the union.

If the women had the strong statistical support for their claims, that we knew it was a good-faith claim, then I

think the answer is yes, we would make exactly the same -- it's exactly the same --

QUESTION: Then your argument would probably be the same if we had hypothetically suggested Catholics, Catholic employees as a group, or any other identifiable group.

MR. HECHT: Mr. Justice Burger, if all of the facts which I listed before were present, if there were discrimination and good-faith belief that the employer was discriminating on the basis of race, for instance, or religion, as you've suggested, yes, our answer would be the same. We think that's what the law requires.

I think it important to remind the Court that this case involves a discharge, it does not involve a refusal to bargain. No one has made that charge. It's really not before the Court.

What is before the Court is the employer's ability to fire these two employees for having engaged in the concerted activity in which they engaged.

QUESTION: You think that it's the Title VII factor that makes the difference? Absent Title VII, absent the racial dimension to the case, the discharge would have been proper under Jefferson Standard?

MR. HECHT: No, not at all, Your Honor. We have not argued the Jefferson Standard issue in our brief to this

Court, because we didn't believe it was appropriate.

QUESTION: Well, you say you don't rely on Title VII at all?

MR. HECHT: No, I did not say that. We think that Title VII --

QUESTION: You think Title VII makes the difference or not?

MR. HECHT: No, it does not make the difference. It makes it crystal-clear.

But we have argued in the brief that the National Labor Relations Act itself prohibits discrimination in employment, and protects concerted activity of employees.

QUESTION: Well, that's absent section -- Title VII, isn't it?

MR. HECHT: Absolutely, Your Honor.

QUESTION: But it's not absent the racial factor?

MR. HECHT: It is not absent the racial factor.

QUESTION: Absent the racial factor, would a discharge for picketing by a minority, where there is or isn't an exclusive bargaining agent, is a discharge for picketing an unfair practice?

MR. HECHT: Let me try to break the question down for a minute, if I can.

In this case we have alleged that what the employees have done was to seek parity. That is to say, they have sought

what the contract as well as statute requires. There is a nondiscrimination clause in the contract. The employees here sought to implement that provision. That was their purpose.

We have also argued that picketing is not involved here. While the Board and the Court did draw the conclusion that the employees had picketed, and there's no sense trying to hide that, the facts also show that what the employees did was to distribute handbills. There's no sense hiding that, either.

We believe it is appropriate for this Court to look at the facts and to draw the proper legal conclusion based on those facts. And the facts are simply not in dispute.

There is no factual allegation in the record, there's no suggestion that these employees moved with signs or placards.

The Court has found that picketing is very different from leafletting, that there is an element often of coercion, stated or unstated, to picketing. But that's not present here.

The employees were stationary. They distributed pieces of paper with printing on them.

QUESTION: Were they stationary in the doorway?

MR. HECHT: They were not stationed in the doorway, Your Honor, they were stationed near the doorway. But the

record is also clear that there was no harassment, no violence, no incitement to violence, no obstruction of customers. There wasn't even --

QUESTION: Well, there could be -- there could be harassment by just standing in the doorway.

MR. HECHT: Well, the people who were distributing the leaflets were harassed, they were called named by the customers who came in; but they did not, in turn, harass the employees, simply by standing there.

QUESTION: Well, what do you say about Mr. Bahrs' point that what you want are two unions, representing the exact same group of employees?

MR.HECHT: It's one of the reasons why we have urged upon the Court to find -- the conclusion of law, rather, that the employees were engaged in furthering a grievance. They were seeking that which the contract promised them.

If there were bargaining, there would be problems. An employer can't be asked to recognize, for the purposes of collective bargaining, more than one unit -- more than one union, I'm sorry. The statute makes that very clear.

But the statute also makes it clear that employees, whether individually or in combination, and Section 9(a) talks about groups of employees who may have grievances, have every right under the statute, quite apart from the racial issue, to pursue that grievance. That's what the employees did here.

QUESTION: Can they strike?

MR. HECHT: No, I don't believe they can strike under this contract in this case. There is a no-strike provision. There is no provision in the contract that prohibits picketing, much less distribution of leaflets, which the contract couldn't do. The contract couldn't waive that.

QUESTION: The answer is they couldn't strike.

MR. HECHT: The contract does say they couldn't strike.

QUESTION: So that the second union, I just don't understand what -- this group wouldn't be a union at all?

MR. HECHT: The group is not a union. There is no case that I have found, and I have looked very hard, --

QUESTION: You don't want a union.

MR. HECHT: These employees?

QUESTION: Yes.

MR. HECHT: No, they don't want a union, they want to work through their own union. They tried that for seven months. Now what they're trying to do is to have the employer implement the contract provision which their union gained for them, but hasn't really implemented itself.

QUESTION: They want the employer to give them what their own union wouldn't give them.

MR. HECHT: I'm sorry; I didn't hear you.

QUESTION: You want the employer to give them what

their own union wouldn't give them.

MR. HECHT: It's only the employer which could give them this which they asked for, which was nondiscrimination in employment.

QUESTION: What's the union for?

MR. HECHT: But the union had a duty to help them to get it from the employer.

QUESTION: Couldn't the union make a grievance of this?

MR. HECHT: Well, the union of course had a duty to make a grievance, and it's the specific finding of the Court of Appeals that the union did not discharge --

QUESTION: But you really want the employer --

MR. HECHT: I'm sorry?

QUESTION: You want the employer to do the union's work.

MR. HECHT: No, no, not at all. We would like the union to do its -- to do the union's work. And that's, I think, at the heart of --

QUESTION: But you didn't pass out leaflets about the union, did you?

MR. HECHT: No, because there was --

QUESTION: You passed out leaflets about the employer.

MR. HECHT: Yes. There was little conflict between the employees and the union. The employees didn't try to

undermine or replace the union, and the union recognized that as its appearance here before this Court, I think, is clearly --

QUESTION: But my whole point is that in your view this is the only way that the minority members of the union can get what they're entitled to. That's your point, isn't it?

MR. HECHT: It ought not be, Your Honor, but it proved to be in this case. And the employees waited seven months to make that decision.

QUESTION: Mr. Hecht, you were drawing a distinction, as I understood it, between picketing and handing out leaflets. If you agreed that there had been picketing in this case, with all of the other facts and circumstances being identical, would your position be different?

MR. HECHT: Section 8(b)(7) of the statute, of the National Labor Relations Act, which is the operative section with regard to picketing, has three requirements, Your Honor.

One, that there be picketing.

Two, that the picketing be performed by a labor union, which Hollins and Hawkins certainly were not.

Third, that what they sought was recognition. They certainly didn't seek recognition. They were trying to prosecute a grievance. They did not ever suggest that they were interested in accouterments of collective bargaining.

They were not looking toward an on-going relationship with the employer that would include formal terms and conditions of employment. They were there for one purpose only, to implement their statutory and their contractual right to nondiscrimination in employment.

8(b)(7)(A) does not apply under any circumstances.

QUESTION: I understand that is your position, but if you assumed or agreed, for example, that they were picketing, would that make the case different, in your view?

MR. HECHT: No, it would not.

QUESTION: Would not.

MR. HECHT: In fact, the Board and the Court found that there was picketing, --

QUESTION: That was my understanding.

MR. HECHT: -- but that made no difference to the resolution.

QUESTION: Yes.

QUESTION: You're really arguing a case that isn't here, a case that well might be here if the findings had been different. But the findings of the Trial Examiner, accepted by the Board and accepted then unanimously by the three members of the Court of Appeals, were that your clients were attempting to bargain.

MR. HECHT: Yes.

Now, I think that those are not findings so much as

conclusions of law, which this Court has the authority and often exercises the authority to correct.

But I need to make it clear that we don't apologize for the Court of Appeals decision. We find that we're altogether able to support that in every way.

What we do think is that it's analytically clear to call what happened prosecution of a grievance and distribution of leaflets.

And we think that that more clearly reflects the facts in the record, but we certainly don't mean to suggest to the Court that it's necessary to find either of those things in order to support the result that the District of Columbia Circuit reached.

I wanted to mention just a few facts.

In November 1968, Tom Hollins and Jim Hawkins,[sic] two black stock clerks at The Emporium, were fired because, as their warning notices and as their termination slips said, they twice have distributed leaflets to the public protesting their employer's racially discriminatory employment practices.

This is the only reason for discharge mentioned either in the preliminary warnings or in the discharge slips themselves.

No one disputes that the employees' concerted activity was an effort to vindicate their statutory and contractual rights to nondiscrimination, rights, as this Court

has said, of the highest priority; nor that their conduct was peaceful. There was no violence, no obstruction, they were on a public sidewalk, there was no harassment of customers, no disparagement of goods and services, no appeal to the employees, no work stoppage, no strike. They leafletted twice on Saturdays, on their own time.

No one disputes that the concerted activities were based on a good-faith belief. In fact, it was the union's official position that discrimination was being practiced at The Emporium.

No one disputes that for seven months Hollins and Hawkins tried to work through the union, that they undertook their own efforts only when it became clear that they could not succeed in a realistic remedy for racial discrimination by following the union's processes, and the union advised them that they were free as individuals to do what they intended to do.

The question before the Court, then, we would say, is whether this lawful concerted activity somhoe is deprived of the protection of the National Labor Relations Act because it may have threatened or harmed union-management relations.

And the Court of Appeals for the District of Columbia held that the activities were protected, the discharges were prohibited, that the activities, which the Court characterized as attempts to bargain, constituted such limited interference

with section 9(a) exclusivity principles that because of the employees' purpose in vindicating their important rights, the employees remain entitled to the protection of the Act.

QUESTION: Do you -- I take it you are defending the Court of Appeals --

MR. HECHT: Absolutely.

QUESTION: -- judgment and its opinion?

MR. HECHT: Yes.

QUESTION: Right down the line.

MR. HECHT: Yes.

QUESTION: Although you have some supplemental arguments, --

MR. HECHT: We have arguments we've been pushing through --

QUESTION: -- I take it, then, you agree that there would still be open, the Jefferson Standard question before the Board?

MR. HECHT: Yes.

QUESTION: And that if it were found, which it wasn't found by the Board, although the Trial Examiner apparently discussed it -- if it were found that this is the kind of picketing that would justify discharge under Jefferson Standard, you would have no objection?

MR. HECHT: I'd have great objection, I'd have good reason --

QUESTION: Well, then, you're not supporting -- you're not supporting the Court of Appeals opinion, then. Because the opinion left that open.

MR. HECHT: That's right.

And I think that was the appropriate thing for the Court to do, and I believe on remand that the Board has before it the question of the Jefferson Standard issue.

QUESTION: And the Court of Appeals, as I read it, said that if the finding was made of the discharges for that reason, the case is over?

MR. HECHT: I don't think the Court of Appeals reached that, but it was implicit, I think, in what the Court said in --

QUESTION: And you support that?

MR. HECHT: Yes, I do.

QUESTION: And what do you understand, then, the claim is as to why the employees were fired?

MR. HECHT: I believe the employees were fired here because they, on two Saturdays, distributed leaflets.

QUESTION: Well, what was the -- but normally you have to be fired for some cause.

MR. HECHT: Some cause.

QUESTION: And what cause was asserted? You just handed out leaflets in the front of my store?

MR. HECHT: Yes, that's all that is stated on the face of the warning notice or the discharge slip. And it was in

response to those that the union immediately filed grievances.

QUESTION: Without any -- without any assertion or finding that it was a sign of disloyalty, or something like that?

MR. HECHT: No. There is suggestion that there is disloyalty. Absolutely.

QUESTION: Didn't they put it directly on the Jefferson Standard kind of conduct?

MR. HECHT: Yes.

QUESTION: Well, but the Board --

MR. HECHT: They didn't mention Jefferson Standard on the slip.

QUESTION: But the Board sustained the discharge without making any Jefferson Standard findings.

MR. HECHT: I think they believed they didn't have to. I think the Trial Examiner found it a duplicate question.

QUESTION: Well, what was the Board's justification for the finding?

MR. HECHT: Their justification was that the employees again were intent upon bargaining, separate bargaining --

QUESTION: Right.

MR. HECHT: -- and that this so undermined the union, disrupted the union-management relationship, that by virtue

of the principles inherent in Section 9(a) of the Act, they simply were engaging in prohibited activity.

QUESTION: Well, then, you -- my real reason in asking was, you would agree then that Section 7 of the Labor Law does not protect this activity if it were Jefferson Standard type activity?

MR. HECHT: I believe Jefferson Standard so holds.

QUESTION: And that it wouldn't even go -- it's the -- the objection is to an alleged racial discrimination?

MR. HECHT: I don't think that the racial element in the case would --

QUESTION: And even in the light of Title VII?

MR. HECHT: Yes.

QUESTION: Okay.

MR. HECHT: We have discussed already, and I see no reason to go over it, why we think the employees were engaged in protest activity, why we think that the employees were engaged in the presentation of a grievance, that they were not bargaining.

But even if it is bargaining, as the lower courts concluded and I have mentioned before, we fully support the Court's opinion.

Hawkins and Hollins are still protected, because here on the facts, Hawkins and Hollins first went to the union, they tried to work through the union and with the union for seven

months. In think Gardner-Denver, the case that my opposing attorney has suggested to the Court, brought to the Court, indicates that these kinds of informal resolutions of racial problems is always a preferred method, where it can work. If you can go to the union, the union can bring it to the employer, if you can effect the remedy, good.

Employees abandon the union only when the futility of their staying with the union became clear, and when the union had told them that they were free to undertake the individual action that they intended to take.

QUESTION: You have already answered, I think, Mr. Justice Powell, saying your position would be the same if they had in fact picketed instead of handing out leaflets. So that what you're saying, I take it, is that when members of the union, any members of the union, are not satisfied with the union's result for them and for their claims, then they may engage in typical collective bargaining type of protest, that is union picketing, the same kind of technique the union uses to enforce?

MR. HECHT: No, I think it's clear that the employees normally cannot do that in s labor-management situation. First of all, because of the special characteristics of picketing, secondly, because during the period of a contract or --

QUESTION: You say the special characteristics of

picketing, but you say this case would be no different if they had picketed instead of handing out leaflets, didn't you?

MR. HECHT: The major point of difference, I think, would be that under a regular kind of problem that the employees had, section 9(a) has made it clear that their recourse is to try -- is to try to work first through the union, their exclusive bargaining agent; then to go to the employer with the grievance if that proved necessary.

Now, the employer has no duty to meet -- that was one question that came up earlier. It's clear under section 9(a) that the employer has no duty to meet with the employees. But he can if he wishes. And if he cares to make an adjustment that is consistent with the collective bargaining agreement, then he's got to call the union in to be present at that adjustment.

It's another reason -- if I can divert for just this point -- it's another reason why we think it's better analytically to see this as a grievance, because then there's a very practical method of working out minority problems. Minority members, if they find that the union has not been as responsive as is necessary, may go to the employer. If the employer wants to deal with them, then all he's got to do is follow the procedure under section 9(a) and call in the union, to be present, or hopefully before that, and help to negotiate the adjustment that the contract requires, and that the law

requires.

I'm not certain I have answered your question.

QUESTION: Well, you've enlightened me somewhat on your view.

MR. HECHT: But perhaps not on the question you had in mind.

QUESTION: Mr. Hecht, --

MR. HECHT: Yes, sir?

QUESTION: -- what is your position as to what the record shows about exactly why these employees did abandon the union?

MR. HECHT: I think the record's clear from the testimony of Hollins and Hawkins themselves, that they abandoned the union principally because, after waiting seven months, the union insisted upon handling the problem as if there were a series, seriatim of individual grievances which should be adjusted individually. And Hollins and Hawkins were scared to death that what would happen was that there would be some token individual adjustments; and, in fact, that's exactly what happened. There was at least one, perhaps two adjustments of promotion on behalf of minority employees, and that was 1968, and not a single thing has happened since.

QUESTION: Would the grievance procedures in the contract have permitted the type of group resolution that Hollins and Hawkins wanted?

MR. HECHT: There's nothing in the contract that would tend to prevent that kind of group presentation, and the law specifically permits it. Section 9(a) speaks of grievances presented by individuals or groups of individuals. So I don't think the contract could attempt to prohibit that even if it wanted to; it would be unlawful.

QUESTION: But that's presented directly to the employer by 9(a), isn't it?

MR. HECHT: I'm sorry?

QUESTION: You say that the law permits presentation by employees or groups of employees, --

MR. HECHT: That's right.

QUESTION: -- I was curious as to whether, under the grievance procedure in the collective bargaining contract, that the type of group resolution would be permissible that Hollins and Hawkins wanted.

MR. HECHT: Mr. Justice Rehnquist, I believe the contract is silent on that. I'm unaware of anything in the contract that states one way or the other.

QUESTION: How about the law? Assuming absence of anything in the contract, when you begin doing that, isn't that -- then you're no longer processing a grievance, you're trying to change the collective bargaining agreement, aren't you?

MR. HECHT: No, the collective bargaining agreement --

QUESTION: Which provides that -- for a term, and it

hadn't expired here.

MR. HECHT: -- provides for a term that there shall be no discrimination in employment. That's what Hollins and Hawkins wanted. They didn't want more than the whites, they didn't want more than any other racial or ethnic minority or sexual minority; all they wanted was parity. They wanted what the contract provided.

That's why it was a grievance. They wanted to implement a term of the contract, as well as to implement a statutory right.

QUESTION: Well, what sort of a group did they -- a group processing of this so-called grievance did they want? Everybody who was non-white, Indians, Mexicans, Mexican-Americans or Mexicans?

MR. HECHT: Yes. The question went not so much to processing as it did to remedy. That Hollins and Hawkins wanted a remedy that would establish equal employment opportunity for all minorities, racial, ethnic and sexual.

QUESTION: They were talking about only the employees presently employed, then employed, though, weren't they?

MR. HECHT: Yes.

QUESTION: They were not talking about hiring?

MR. HECHT: Oh, no.

QUESTION: No.

MR. HECHT: No, it was nondiscrimination in employ-

ment of those who were present at The Emporium.

QUESTION: Right.

MR. HECHT: Most of the record testimony, which has to do with what the employees did, how they ascertained as a good-faith belief that there was discrimination, really goes to the placement of individuals throughout the store and to their promotions.

QUESTION: Unh-hunh.

MR. HECHT: I think it's silent as to hiring.

Although there is statistical information in the record that the hiring was not so good, either.

If there are no more questions -- thank you very much.

QUESTION: I'll ask a minor one.

I'm frank to say I'm disturbed by the standard that the majority of the Court of Appeals established, when it speaks of the first resort to the union and then failure to remedy the discrimination, and I quote now, "to the fullest extent possible by the most expedient and efficacious means."

What does that mean? And how can it be implemented?

MR. HECHT: Let me be frank to say that at first I was troubled by that standard, too. And I'd like to offer the following observations on it, if I can.

I think the standard attempts to go a little bit farther than the Court has gone in its duty of fair representation cases. Duty of fair representation, as we have indicated

in our brief, always requires a showing of malice.

The union here was not malicious, they simply weren't effective. I think the Court is -- the court below is suggesting that that kind of inactivity, of ineffectiveness, of disinterest may be enough to permit employees to try to go it without the union.

The Board administers phrases and standards of that amorphousness all the time, Your Honor. They administer standards such as duty to bargain, duty to bargain in good faith; these are very difficult. Duty of fair representation. These are very difficult as words alone to administer, but that's what an administrative agency does.

As this Court has said in a case involving jurisdictional disputes, soon after that section of the statute became implemented, the difficulty of administering a standard is not a reason for the Board not to accept the jurisdiction to administer the standard. It may be difficult, but doesn't give them an excuse to avoid it.

Finally, may I point out that recently, in a case that we cited several times in our brief, a case of the Labor Board's, called Bekins, Bekins Moving, the Board showed that it was willing to get into the very difficult area of race discrimination when the question came up: Should a union be certified after it had won an election? But the employer alleged that the union was practicing discrimination.

That's not easy, either, and the Board said that, they said it's a difficult test that we have set for ourselves, but we're going to take it on a case-by-case basis, and we're going to do it, because we think the Constitution requires that.

I don't think that the test that the Court of Appeals has suggested here is any more difficult than those which the Board has voluntarily, over a period of time, administered.

Thank you very much.

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

Mr. Wallace, do you have anything further? You have only one minute.

REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

MR. WALLACE: Well, with respect to the standard, I'll just say that the word "remedying" and what constitutes the proper remedy for an agreed-upon discrimination is itself subject to great dispute, let alone by the most efficacious, ineffective means; and we regard this as not only putting the Board into a very difficult role of trying to second-guess the discretion exercised by the bargaining representative, but also putting the bargaining representative into a role of deciding, rather than what it thinks is the best way to proceed, deciding what it thinks the Board will think is the way that it should proceed to remedy something.

Which is very troublesome in the standard adopted.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:48 o'clock, a.m., the case in the above-entitled matter was submitted.]

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