In the

Supreme Court of the United States

Burtice A. Hines, et al.,

Petitioners,

v.

Anchor Motor Freight, Inc., et al., No. 74-1025

Respondents.

Washington, D. C.
November 12, 1975

Pages 1 thru 45

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The above-entitled matter came on for argument at 10:45 a.m.

BEFORE:

WILLIAM 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:

NIKI Z. SCHWARTZ, ESQ., Gold, Rotatori, Messerman & Hanna, 1100 Investment Plaza, Cleveland, Ohio 44114, for the petitioners.

BERNARD S. GOLDFARB, Goldfarb & Reznick, 1825 The Illuminating Building, 55 Public Square, Cleveland, Ohio 44113, for the respondents.

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 Hines against Anchor Motor Freight Company.

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

ORAL ARGUMENT OF NIKI Z. SCHWARTZ

ON BEHALF OF PETITIONERS

MR. SCHWARTZ: Thank you, your Honor.

Mr. Chief Justice, and may it please the Court: The issue in this case is whether or not eight men, eight truck drivers, discharged for dishonesty, of which they were innocent, shall be permanently deprived of their jobs, their livelihoods, and their good names because they were afforded the form without the substance of a grievance proceeding. That issue arises on these facts:

On June 5, 1967, 11 Anchor Motor Freight truck drivers were discharged for alleged dishonesty in allegedly turning in inflated motel receipts for reimbursement. In other words, the receipts were for more than they actually paid. On that day the company showed its evidence to the business agents for Teamster Local Union No. 377. That evidence, which is in the record and in the Appendix, consisted of the motel registration card and the correlative motel receipts, the registration cards showing less paid than the amount showed on the receipt. In addition, the company

presented the affidavits of the owner of the motel and the clerk of the motel attesting to these records and to the fact that the men had been given receipts for more than they actually paid. In addition, there was some corroborative things in the form of logs and sign-in sheets.

The men did not dispute that they had been in Batavia where their logs showed they were. They did not dispute that they had stayed at that motel. But they vigorously denied to their union leadership that they had paid any less than the receipt they turned in.

After a meeting between union and company officials it was agreed between them that the matter would be referred to the Joint Conference Grievance Committee in Detroit, that the men would continue working pending a decision on that.

The men were really aghast at what had happened to them, went to their union leadership, the two business agents, Angelo and Schwartz, and said, What shall we do, shall we go up there? Should you or we or somebody go up there to the motel and talk to the clerk or the owner? Should we get a lawyer? Should we do this? Should we do that?

They were advised, No, don't do anything, don't worry about it, they can't fire you, you are a sure winner, you have nothing to worry about, don't do anything. We will take care of it. And that's clear in the record.

So the men heeded that advice as "advice of knowing

what was going on," truck driver lingo, I think. And they didn't do anything, relying on the union to do something.

Well, the union didn't do anything at all, except go to the Grievance Committee and assert by raw assertion the men didn't do it, it must have been the motel clerk. No evidence to support that argument, just raw argument. The men, the majority of whom went to the Grievance Committee, were given the opportunity to state their contention that they didn't do it. The company presented all of its evidence, not insubstantial, and the grievance was upheld. The men were astounded, having been assured that everything would be all right, and they went to their union leadership and said, What do we do now? Should we get a lawyer?

They said, You might as well.

So they went and they got a lawyer, finally. The lawyer went to Batavia and he got a statement, a notarized interrogation statement, from the motel owner which said that the motel owner had no personal knowledge whatsoever of the amount actually paid and written down, that his affidavit had been based entirely on the records themselves and the word of his clerk who was his brother-in-law, but he had no first-hand knowledge.

Armed with this statement, the men and their lawyer sought a rehearing. They were given the opportunity to appear to ask for a rehearing and the union agent presented this

statement that the lawyer had obtained --the lawyer was not allowed to participate, except to be present -- read the statement of the motel owner Repicci, and the rehearing was denied, You don't get a rehearing because there is no new -- that's not new evidence, that's the same thing you argued the first time, totally overlooking the distinction between argument and evidence.

QUESTION: Why must the employer be penalized for the shortcomings of the union here, which is your men's agent, I assume?

MR. SCHWARTZ: Well, the employer -- first of all, the employer is not to be penalized if he is ordered to reinstate these men.

QUESTION: Well, he's claiming the benefit of the arbitration procedure. You say that the union didn't do a good job at the arbitration procedure. Why should that redound to the employer's disadvantage? It wasn't his problem.

MR. SCHWARTZ: The employer should not be permitted to claim the benefit of an arbitration procedure result which is based on shoddy representation where all of the evidence of innocence was not presented, it was an --

QUESTION: Aren't they bound by the acts of their own agents?

MR. SCHWARTZ: The agent was not selected by them. It was foisted upon them. The contract negotiated by the

company and the union left exclusive control of the grievance in the union, the men had no choice in that fact, and the company having vested that exclusive control over the grievance in the union is in a poor position to say, OK, now we want to reap the benefits of their abuse.

QUESTION: Why do you say the company vested that in the union? The union represents the majority of the employees. The union demanded that that be done, didn't it?

MR. SCHWARTZ: For bargaining purposes, the union is the representative of the employees. Nothing in the law requires that the union have exclusive control of the grievance proceeding. I direct your attention to footnote 10 of the opinion in Vaca v. Sipes where it points out that alternatives some contracts permit the employees to have some control over the processing of their own grievance. So that the company by its agreement vested that control in the union representative.

QUESTION: But it was the demand of the union as the agent for the employees that that provision was put in the contract, I take it.

MR. SCHWARTZ: Well, we don't know how it was demanded. The company and the union agreed to do it.

QUESTION: The company is not your men's agent and the union is.

MR. SCHWARTZ: It's not a willing agent under these

circumstances. The record is replete with a long history of conflict between the men on the one hand and the union representative and the company on the other with a lot of evidence of a very friendly relationship between the company and these union officials.

QUESTION: If you prevail here, do you think the company has a claim over and against the union?

MR. SCHWARTZ: No, I think according to Vaca v. Sipes and Czosek v. O'Mara the company's liability is for back pay, the union's liability is for the extent to which its wrongdoing increased the burden and expense of getting their jobs back and collecting.

Now, when we talk about the company's good faith, which is an argument that the company has made, I think it's necessary to set that in context. If indeed the company is entitled to any claim of good faith and based on the background, we would deny that, nevertheless, that claim could only be good up until September of 1968, as far as mitigation of the back pay claim. In September of 1968, the men, having filed application for unemployment compensation, Anchor defending them vigorously on the ground that they were fired for just cause, Anchor sent an airplane ticket to the motel for Mr. Pagano to come and testify in favor of the company against the men's BUC claim.

QUESTION: Incidentally, has he ever been prosecuted?

MR. SCHWARTZ: He has not, to my knowledge, your Honor.

QUESTION: Have your people ever filed any charges against him?

MR. SCHWARTZ: Not to my knowledge.

QUESTION: Why not?

MR. SCHWARTZ: Well, I have already been involved in a tremendous burden in this case. It would not be productive for my people to file charges against the poor motel clerk.

QUESTION: Yes, but it's a crime, isn't it?

MR. SCHWARTZ: He's admitted to three crimes in his affidavit, but it won't advance the cause of my drivers to prefer charges against him. The company is free to do that if they wish.

QUESTION: What does that answer state? The company is free to do it. Your people are the ones who were defrauded really.

MR. SCHWARTZ: In that sense my people were victims of his misconduct. But again, it produces no recompense. The plaintiffs aren't made whole by prosecuting Mr. Pagano.

QUESTION: Isn't that often true with reference to victims of crimes? You are the most injured person. Isn't that usually the person who files the criminal complaint?

MR. SCHWARTZ: Usually it is. Usually it is.

QUESTION: The fact that there is no profit in it really has nothing to do with it, does it?

MR. SCHWARTZ: Well, it's not a question of profit, it's a question of the primary concern here being getting their jobs back and clearing their good names. Prosecuting Mr. Pagano wouldn't clear their good name.

When Mr. Pagano came to Cleveland, or in Ohio, in September of 1968 to testify at the BUC hearing, he advised the company on his own that what he had told them before was a lie, that he had pocketed the money, and the company -- this was unbeknownst to the plaintiffs, by the way -- the company stating that because he changed his story he was not required to testify, silently shipped him back to Batavia, never informing the plaintiffs of this fact, never offering to reinstate them, never offering even just to clear their records so that they could get another job somewhere else and not have to report that they were out of work because of dishonesty.

So if there is any company good faith it comes to a startling, screeching halt in September of 1968. Moreover, the recent decisions of this Court, Albemarle and Rutter-Rex, make it clear that good faith is not a defense per se to a back pay claim.

QUESTION: That's a different kind of a back pay claim, isn't it?

MR. SCHWARTZ: No, I am not proceeding under title VII,

nor am I proceeding as in Rutter-Rex in an unfair labor practice action. However, both the Albemarle and the Rutter-Rex opinions drew for its reasoning on a very old case cited, Hoppock v. -- I'm sorry, I don't have the name of the -- it's in my reply brief -- Wicker v. Hoppock, 6 Wallace 94 at 99, relying on law from a breach of contract case. So I think that Rutter-Rex and Albemarle are quite relevant to this situation given the derivation of the decisions in those cases.

Now, as I indicated, there was an expensive background which if time permits I will go into, but it's in the briefs if it's not, in terms of the relationship of the company and the union and the men being malcontents as far as both were concerned.

QUESTION: They were transferred up to Lordstown from Norwood, Ohio, were they not?

MR. SCHWARTZ: That's correct, in 19 --

QUESTION: And worked in on the seniority and there was continuing resentment and bad blood, is that right?

MR. SCHWARTZ: Right. The Norwood drivers were particularly difficult from the company standpoint or unhappy from their standpoint because they were aware of the better working conditions from their standpoint at Norwood so they were unhappy at Lordstown. Whereas, the new hirees at Lordstown, not having had the better experience at

Norwood were more complacent, and for that reason there was some conflict there. And that was the genesis of the problem and there was a wildcat strike in which a number of the plaintiffs were very active and complained about lack of representation from the union and so forth.

At any rate, suit was filed in the district court in Cleveland. In 1972 the company, after discovery was completed, filed a motion for summary judgment. The motion was overruled. The case was set for trial four or five times in the following year but somehow never came up. A year later the company files a virtually identical motion for summary judgment, no new evidence, no new law, same argument, same contention. This time the union makes the same arguments, too. The international made different arguments. The court reversed itself, granted the motion for summary judgment against all defendants.

We appealed to the Sixth Circuit. The Sixth Circuit reversed with respect to Local 377 on the ground that the evidence of a breach of the duty of fair representation was sufficient for us to go to trial, but held that notwithstanding that fact and that they may well have prejudiced the reliability of the grievance result, the company was entitled to the benefit of it, the men were bound by it, and the dismissal against the company was affirmed. This was decided without a great deal of discussion, without acknowledgement

of all of the contrary authority around the country in virtually every circuit, either by holding or dicta, that a breach of the duty of fair representation entitles the palintiff to litigate his breach of contract action against the company.

This flows from -- and the courts that have so held do so in large part looking at Vaca.

Now, the rule the Sixth Circuit sets up facilitates the easy end run around Vaca. You don't have to not process the grievance, you just do it perfunctorily. You go through the motions, and then it's all final and binding and everything's fine. It makes no difference how good the procedure or the substance is, as long as you go through the motions, it's final and binding.

Secondly, this case is really more within Vaca than it would appear for the reason we are talking about a joint grievance proceeding rather than an arbitration. And a joint grievance proceeding is a proceeding in which there are an equal number of union and company representatives, and if the union people vote for the union guy and the company people vote for the company guy, it deadlocks and they go to the next layer, and so on and so forth.

Now, what that means is that there is no way that the men can lose their grievance at this stage without some union representatives voting against them. So that is really

tantamount to a decision by the union not to process the grievance any further, similar, not identical, but similar to what the Court was discussing in Vaca v. Sipes.

QUESTION: I suppose it would be possible to draw a distinction between those cases where the grievance isn't presented at all and the employer's defense is exhaustion rather than preclusion by operation of the grievance procedure.

MR. SCHWARTZ: It is possible to distinguish between those two?

QUESTION: Uh-huh.

MR. SCHWARTZ: Yes, it is.

QUESTION: And Vaca was of the former type, wasn't it?

MR. SCHWARTZ: Well, Vaca was a case which went to the third or fourth lawyer when they decided not to process it any further.

QUESTION: It didn't go any farther.

MR. SCHWARTZ: That's right.

QUESTION: And the employer would claim a failure to exhaust.

MR. SCHWARTZ:: Correct.

QUESTION: Here all the steps were gone through.

MR. SCHWARTZ: Well, but the --

QUESTION: I know, but they were purportedly gone through.

MR. SCHWARTZ: Yes.

QUESTION: How about Czosek?

MR. SCHWARTZ: In Czosek the situation was one with the Railway Adjustment Board in a situation where the plaintiff had a right to press his own grievance. He wasn't limited to going to the company.

QUESTION: That might be even still a different case.

MR. SCHWARTZ: That's a very different case, yes.

QUESTION: Here the employer's defense wasn't failure to exhaust but that you were bound by the result of the arbitration procedure.

MR. SCHWARTZ: That's right. That was his defense.

QUESTION: And those are two quite different things, aren't they?

MR. SCHWARTZ: They are two quite different things but they tend to merge when you look at a joint grievance proceeding which is in reality a decision by the union not to push the matter any further. There is no neutral arbitrator who makes the decision --

QUESTION: But you are not suggesting some collusion between the employer and the union here, are you?

MR. SCHWARTZ: Well, there is some suggestion of that from the beginning. I don't think I have to prove that in order to prevail.

QUESTION: Are you claiming that this whole business

was worked out between the employer and the union?

MR. SCHWARTZ: I am claiming that there is a substantial likelihood of that.

QUESTION: There is no allegation of that -- you didn't allege that in your complaint.

MR. SCHWARTZ: It's alleged in the complaint, but --

QUESTION: It is?

MR. SCHWARTZ: -- it's proved only inferentially and circumstantially. There is no direct evidence of that.

QUESTION: I thought your case was that you didn't get the proper representation on the part of the union and under that circumstance you can't let the employer out because there is no case even against the union unless there has been a wrongful discharge, and that in this circumstance with the kind of allegations that you have made, which focus on the union representation, as I understand it, not as anything involving the employer, the employer is not free until that issue is tried out to rely on the arbitration provision, whatever it may be. Isn't that what you are claiming?

MR. SCHWARTZ: That is my basic fundamental argument. But we also advance the contention that this didn't happen in a vacuum, that one of the reasons that the 377 representative sabotaged the grievance was because they had a very friendly relationship in which they were provided with cars and --

QUESTION: Well, let me understand that. Do we or do

we not have a case here where what you are charging is collusion between employer and union?

MR. SCHWARTZ: That is a secondary claim, your Honor, but that's not the basic.

QUESTION: Well, it would be a very different case for me. It would be an easy one if you were charging collusion between employer and union.

MR. SCHWARTZ: Well, we have charged that. I think that the case is stronger in terms of the evidence, in terms of the fact that the union in bad faith misrepresented these men because they, along with the company, wanted to get rid of them because they were troublemakers..

QUESTION: Where in your brief do you treat the concept of collusion between the employer and the union?

MR. SCHWARTZ: It's treated in the --

QUESTION: In these terms that you are now arguing.

MR. SCHWARTZ: Well, it's treated first of all in the statement of facts setting forth on page 8 in very succinct form the background showing a friendly relationship between the union officials and the company, a hostile attitude on the part of the company and the union toward these men.

QUESTION: Is there something wrong with the idea of having a friendly relationship between the company and the union?

MR. SCHWARTZ: Yes, your Honor, when that friendly

relationship includes the company furnishing the union officials with cars, arranging for automobile purchase bargains for them, hiring their relatives, there is something wrong with that.

QUESTION: You will have to show what that produces, then. Where do you say this produced collusion and conspiracy or whatever terms you want to apply to it?

MR. SCHWARTZ: Well, in --

QUESTION: I thought your claim was that it was unfair to bind employees to the results of a grievance procedure when their representatives didn't fairly present their case for them.

MR. SCHWARTZ: That is one -- can't I make two claims, your Honor?

QUESTION: Of course you can, but where do you make the collusion claim?

MR. SCHWARTZ: The collusion claim is secondary because concededly it's evidentiarily not as strong as I think the other proposition is. It's advanced generally in Part III of the brief and Part IV dealing with the risks of collusion and unfair representation in the joint grievance proceeding. And all of this is said in the context of the relationship between the company and the union.

QUESTION: Mr. Schwartz, our grant of certiorari here was limited, was it not? It was limited to --

MR. SCHWARTZ: To the question stated.

QUESTION: And certainly in the question stated as shown on page 4 of your brief, I don't see where there is anything raised about collusion.

MR. SCHWARTZ: Well, your Honor, in stating --

QUESTION: Do you see anything in that question presented that suggests any issue of collusion?

MR. SCHWARTZ: The statement on the --

QUESTION: Do you or do you not?

MR. SCHWARTZ: No. The statement on its face does not include collusion. It alludes to a breach of fair representation which if one looks at the facts that underlie the breach of fair representation, there is a collusion argument there.

But I don't rest on that. I don't have to show collusion in order to prevail. That's not the basis of my argument. The claim of the company here is that, well, if you have a gripe, get your relief from the union, they caused the harm here. Relief against the union is insufficient. The union can't give them back their jobs. The union can't even clear their records or give them a good name so they can get another job somewhere else. At best the union could --

QUESTION: Well a suit against the union could go a long ways to producing the results you have just described, indicating them in terms of getting a new job --

MR. SCHWARTZ: It can never undo the fact that they

are permanently discharged from the Anchor Motor Freight Company for dishonesty, your Honor.

Now, Anchor says it's unfair because of its good faith. Well, Anchor discharged the plaintiffs, the union didn't discharge the plaintiffs. Anchor gave total control over the grievance handling to the union. The plaintiffs didn't do that.

QUESTION: You say that there was not prima facie evidence supporting a discharge?

MR. SCHWARTZ: No, I don't. At the initial time the company had prima facie evidence. But there was overwhelming evidence of innocence, in fact, in light of the evidence subsequently gathered, there is no evidence of guilt that's left.

The company, having discharged the men, is not and cannot be penalized by reinstating them if, as the evidence indicates, the men are innocent of the wrongdoing with which they were charged. Then, indeed, the company should be delighted to have back eight highly experienced -- six now, two are deceased -- six highly experienced truck drivers who have been cleared. But that's not the company's opinion, attitude, and that calls into question the handling of the Pagano thing, calls into question their good faith from the very inception. Their conduct with Pagano on the Bureau of Unemployment Compensation hearing was, as has been argued by a

more eminent advocate recently, a kind of a 13th stroke of a clock that calls into question the first 12 strokes and causes question ab initio about the company's good faith.

For all of these reasons we would urge that the Court reverse the decision of the Sixth Circuit in favor of Anchor Motor Freight and remand the case finally for trial in Cleveland -- this is a summary judgment proceeding so far -- and I would reserve the remainder of my time.

Thank you.

QUESTION: Mr. Schwartz, if you prevail and the case is retried, I take it the company's best line of defense would be that there was -- you would sue the union and the company both.

MR. SCHWARTZ: They've been sued together.

QUESTION: Right.

MR. SCHWARTZ: Not retried, however, your Honor. There has never been a trial.

QUESTION: I understand that. You are here on summary judgment motion, but at trial, you would have the union as defendant and you would have to prove that there had been a breach of its duty fairly to represent the petitioners.

MR. SCHWARTZ: Correct.

QUESTION: And if you prevailed on that issue, then you would reach the second issue which is the --

MR. SCHWARTZ: Wrongful discharge.

QUESTION: Which is whether or not the discharge was wrongful.

MR. SCHWARTZ: Right. That's correct. And I have to make the threshold issue first before we reach the wrongful discharge.

QUESTION: Yes.

MR. CHIEF JUSTICE BURGER. Very well.

Mr. Goldfarb.

ORAL ARGUMENT OF BERNARD S. GOLDFARB

ON BEHALF OF THE RESPONDENTS

MR. GOLDFARB: Mr. Chief Justice, and may it please the Court: I think this case has to be looked at in the greater context of labor-management relations. We have to look at it from the standpoint of the congressional mandate to amicably settle disputes between employers and unions. We have to look at it from the derivative rights of employees under labor agreements. We have to look at it from the union's statutory duty to represent, and we also have to look at it from the employer's standpoint and what are his rights.

Now, in order to correct any misapprehensions that the petitioners have, no employer vests anything in a union, particularly control of a grievance machinery. These are bargained for, negotiated, and resolved at the bargaining table, approved by union membership in the same agreement that establishes their wages, holiday, vacation, and pension. And

it's almost inconceivable how they can accept the benefits of that agreement and reject the grievance machinery.

In this particular case the men were accused of falsifying their expense sheets by turning in inflated motel receipts over and above what they actually paid for their lodgings while they were on the road. Affidavits of the motel clerk and the owner specifically stated that the men requested these receipts. Even in the deposition, and it's in the record, where one witness recants and says that he lied, he says that this is a normal practice of the motels in the area to give inflated receipts to drivers in order to get business.

But in any event, the case that went before the Grievance Committee, the same type of committee that was approved by this Court in Humphrey v. Moore, the same type of committee that's negotiated and approved by the membership, that committee had before it the men who were involved, the affidavits of the motel clerk and the motel owner; the records, the receipts, and the hearing took several hours, and all the men had an opportunity to talk, and all the issues of credibility of the witnesses, the motel clerk, and the owner were in issue before that arbitral body.

QUESTION: How was the credibility of the people that filed an affidavit assessed?

MR. GOLDFARB: Because the drivers denied --

QUESTION: You said the credibility of all of the

people including the motel clerk.

MR. GOLDFARB: That's right.

QUESTION: You didn't really mean that, did you? He didn't testify, did he?

MR. GOLDFARB: They had an affidavit of his.

QUESTION: How does that go to credibility?

MR. GOLDFARB: Because the drivers denied the applicacy of that affidavit. The drivers said that that motel clerk was not telling the truth in that affidavit.

QUESTION: And the committee decided that the credibility laid with the man who made an affidavit against the man who testified.

MR. GOLDFARB: Obviously, the arbitral body accepted the affidavit over and above what the drivers said, the notarized affidavit. So the credibility, at least from our standpoint, was an issue.

In any event, after the arbitral body decided the case in favor of the company, a lawyer was hired who went to Batavia, New York, and interviewed the motel owner, Mr. Repecci, and all his affidavit said was that he knew no more about this case than his brother-in-law the motel clerk witness Pagano said. And armed with that affidavit they returned to the Grievance Committee and requested a rehearing. And the Grievance Committee reconvenes, examines the affidavit of Repecci for purposes of rehearing, and comes to the conclusion

that there really isn't any new evidence in this case. And, accordingly, finds again for the company.

Following this, the men go to the Labor Board and file a charge with the Labor Board, which is rejected. They appeal that rejection, and it's rejected again. And they reappeal that and it's rejected again.

And in the chronology of events, witness Pagano then says to a representative of Anchor, "I wasn't telling the truth," about a year and a half later after all the arbitration process is exhausted he says, "I wasn't telling the truth in my previous affidavit."

Now, according to the petitioners, at that point they state in their brief that right then and there ipso facto the arbitral award is vitiated, there is no longer any evidence of any dishonesty, and the men should automatically be reinstated. We submit to this Court that these arbitration awards have some legal applicacy.

QUESTION: May I ask, Mr. Goldfarb, you refer to this as an arbitration award, not perhaps inaccurately. It was an award of a joint Grievance Committee. Had the committee under the collective bargaining agreement , had the committee not been able to decide the merits of this grievance, where would the grievance have gone?

MR. GOLDFARB: It would have gone to a higher level, the National Grievance Committee, made up of an equal number of

employer's and union representatives --

QUESTION: And if there had been no decision --

MR. GOLDFARB: If there had been no decision there, it would have gone to a third arbitral process made up of three people with a neutral on the final board.

QUESTION: Which would have been the first truly true arbitration in the technical sense.

MR. GOLDFARB: In the technical sense, yes.

QUESTION: Mr. Goldfarb, I take it, then, that your position that we should not assume here for the purposes of the present posture of the case that the discharges were wrongful and in violation of the bargaining agreement.

MR. GOLDFARB: Our position is that the discharges were not wrongful, that there has been a determination that they can't conceivably be wrongful at this stage of the game. There is no evidence of any misconduct on the part of the employer, nobody has accused the employer. Whatever they say about collusion was rejected in the district court and rejected in the court of appeals as there not even being a suspicion of it. There was no evidence of any collusion.

QUESTION: Maybe that isn't the exact question I asked. Is it conceded today or not that these people were the victims of the dishonesty of Mr. Pagano?

MR. GOLDFARB: No, it is not conceded.

QUESTION: Not conceded.

MR. GOLDFARB: Not conceded, your Honor.

QUESTION: But certainly the court of appeals decided the case on the assumption that the employer should be dismissed even if there had been a wrongful discharge.

MR. GOLDFARB: Correct, your Honor.

QUESTION: And because of refusing summary judgment against the union, left those issues in the case.

MR. GOLDFARB: For the simple reason that they are two different types of wrong.

QUESTION: All right. But nevertheless, as the case comes to us, the issue is whether the employers should be dismissed even if he wrongfully discharged them.

MR. GOLDFARB: Correct. Now, there are two distinct individual wrongs; one arises out of a breach of a statutory duty, the unfair representation, and a wrongful discharge arises out of a breach of contract.

Now, this is precisely where we are at. According to the petitioners, they feel that if there was an unfair representation charged, they automatically have the right to relitigate the wrongful discharge. We disagree with that. We disagree with that, because if that's true, under the present state of the court of appeals opinion where an allegation of bad faith is not amenable to summary judgment and must be litigated and what petitioners say if they make that allegation they have a right to review the claim of wrongful discharge,

that completely destroys the position of this Court in the finality of arbitration or in the finality of any kind of grievance machinery. It just won't exist, it would be non-existent.

QUESTION: What do you do with the Vaca case?

MR. GOLDFARB: The Vaca case is distinguishable.

QUESTION: Maybe Vaca is wrong, but doesn't it read on this issue?

MR. GOLDFARB: I don't think it does. Vaca does not read on this issue because Vaca did not have the employer involved, Vaca did not go to any final arbitration, Vaca did not -- the heart of Vaca does not concern itself with finality of arbitral or grievance machinery. And that's what we are really concerned with here.

QUESTION: You are saying that Vaca is limited to just exhaustion.

MR. GOLDFARB: Vaca is limited to exhaustion plus the fact that the union is under no compulsion or duty to pursue a grievance to the final stage of arbitration.

QUESTION: Well, that's Vaca, too.

MR. GOLDFARB: That's Vaca.

QUESTION: That's Vaca, also, but --

MR. GOLDFARB: But that isn't this case. This case was pursued. This case was pursued through the grievance machinery and a conclusion was arrived at, an untainted

conclusion.

I want to submit to this Court very briefly. They went back to the Grievance Committee when they took the statement of witness Repecci, but when witness Pagano says that he didn't make a rightful affidavit, they don't go back to the Grievance Committee. It would seem to me at that point they should have returned to the committee and said, "Here, we have more new evidence. We would like to get another hearing." They don't do that any more.

QUESTION: But you are suggesting that the employer can say to the employee, "Well, I fired you illegally perhaps, but even if I did, you have no remedy because I have a contractual right to rely on the grievance procedure, and even though the union didn't really represent you well there or even though the union will be found to have unfairly represented you in bad faith, I still have the defense of the contract."

MR. GOLDFARB: Not quite.

QUESTION: How do you differ from that?

MR. GOLDFARB: Merely by saying this to you, that we are under no obligation to accept the second statement of the witness to be true because --

QUESTION: I understand that.

MR. GOLDFARB: If that's so, then we never come to a final conclusion.

QUESTION: I know, but the question is whether you should stay in the case until it's decided whether or not there was a wrongful discharge.

MR. GOLDFARB: I don't believe so because the very issue, the very issue, the very same issue that they want to litigate in the Federal district court is the very same issue that went before the Grievance Committee.

QUESTION: So you do say, yes, even if it were determined one way or another, you have a right to rely on your contractual --

MR. GOLDFARB: Precisely. We have been concluded. We are all done, because if we are not and they have a right to take us back on the present state of the opinion of the court of appeals which says you have a right to litigate that then Federal district courts become nothing but reviewing bodies for arbitrators --

QUESTION: You are saying that it's a contradiction in terms to say that there was a wrongful discharge because it's already been determined finally that there was not.

MR. GOLDFARB: Correct, your Honor. Absolutely. Otherwise it has no -- the machinery that we negotiate has no applicacy, they are meaningless things if allegations can cause them to be reviewed in the Federal courts.

QUESTION: Even though the employer later said, well, based on this evidence, it's perfectly clear that it was the

motel employee that pocketed the money rather than the employees. The evidence shows it. Here are his bank accounts, here is everything, and here is his confession.

MR. GOLDFARB: But that's extralegal. If that were so --

QUESTION: It wouldn't be extralegal.

MR. GOLDFARB: I know, but isn't there an affirmative duty on the part of the grievant to go back to the committee that --

QUESTION: You are saying that even though there was a wrongful discharge on the actual facts, you have the right to rely on the grievance procedure.

MR. GOLDFARB: Correct, your Honor.

QUESTION: OK.

MR. GOLDFARB: And if the grievant feels that he was unjustly treated, then he ought to go back to the committee that made the award and ask to be reheard or file a petition to vacate the award rather than to have a trial de novo on the same set of facts.

QUESTION: In what year was this grievance heard?

MR. GOLDFARB: In 1967.

QUESTION: Is there a procedure for what you suggest?

MR. GOLDFARB: Yes, there is. They followed it once and asked for a rehearing on new evidence. There is a procedure.

QUESTION: With no limitation, not time limitation?

MR. GOLDFARB: No time limitation. There was no time limitation imposed on him the first time. There would be no time limitation imposed on him the second time.

We wanted to submit that in order to give some stability to arbitral awards, or grievance machinery awards, that traditional grounds ought to be utilized for setting them aside in courts -- fraud, collusion, something that taints the machinery. And we don't want to be so heartless either to say that the derivative right of the employee if he isn't fairly represented, then he shouldn't have some right in that machinery to say something affirmatively that I don't feel I am being represented properly. So at least the employers and the committees are put on notice.

But I don't think he has the right, with all the rights he has, to sit back and accept the benefit of a grievance machinery and then when he gets an unfavorable decision, to holler "foul."

QUESTION: Do you think it makes any difference if an employee has any access to the machinery himself?

MR. GOLDFARB: No, I don't think it makes any difference.

QUESTION: So that in this case the employee may not himself invoke these procedures.

MR. GOLDFARB: I don't know of anything --

QUESTION: In the .. business it is typical they may not do that, isn't it?

MR. GOLDFARB: Well, I don't know of any situation where they'd be prevented from doing it. I know of nothing in the contract that would prevent an individual -- as a matter of fact, they do invoke it by filing the grievance.

QUESTION: They file the grievance, but let's assume that the employer rejects it at the first level. Now, isn't it only the union that may --

MR. GOLDFARB: The union files it with the committee.

QUESTION: Isn't it only the union that may do that?

MR. GOLDFARB: I don't know of anything in the contract that would prevent the man --

QUESTION: Do you know of any instance when --

MR. GOLDFARB: No, I know of none. I know of none. But let's assume it was frustrated. Let's assume the union didn't file the grievance and there had been no adjudication before a committee. Now I say we have got a different situation. The man is entitled to be heard and tried on the merits --

QUESTION: At least the employer then knows there hasn't been exhaustion.

MR. GOLDFARB: Precisely. We know where we stand, we know what risks we are exposed to, and we know that we are taking a chance until that man has his grievance resolved.

But until that happens, we should be put on some kind of notice that we are going to be exposed to some kind of jeopardy. And if the man himself doesn't affirmatively take some action, we never know what our liability is under this contract. There is no stability, we don't have any ground rules, we don't have any way of relying on the good faith collective bargaining.

Now, I want to talk just briefly about remedies. The petitioners seem to feel that if the employer is not kept in this case, for no other reason whatsoever, the men cannot get a favorable remedy. Now, that would be a unique proposition to keep a party in a case because of not liability, but simply because of collectibility. And unless there is some nexus to some wrongdoing, some collusion, some tain in the machinery where there is a legal basis for keeping the employer in litigation, collectibility in and of itself certainly cannot be the basis for keeping an employer in as a party defendant to a lawsuit.

QUESTION: Mr. Goldfarb, I don't understand that to be your brother's submission. It is, rather, that the damage to these employees/resulted from the failure of statutory that representation on the part of their agent was their wrongful discharge and that only the employer can repair that damage because only the employer can reinstate them. That's the simple submission, as I understand it, not about collectibility.

MR. GOLDFARB: Well, to address myself to that

particular question --

QUESTION: That was my understanding of it.

MR. GOLDFARB: Perhaps I didn't understand the question.

QUESTION: My question was, do you think you are fairly paraphrasing your brother's position, because I thought you weren't as I understood it.

MR. GOLDFARB: I think I am. He said, if I understood him correctly, and I think he takes the position in his brief that unless the employer is kept in this case without regard to what happened before, the men would be without a remedy.

QUESTION: Because they could not be reinstated. Only the employer could reinstate them.

MR. GOLDFARB: Correct.

QUESTION: That's self-evident, is it not?

MR. GOLDFARB: And the bench addressed the question that he could get a remedy from the union.

QUESTION: But not reinstatement.

MR. GOLDFARB: But not reinstatement, that's correct.

QUESTION: And it was wrongful discharge of which they complained. And the remedy for wrongful discharge is reinstatement.

MR. GOLDFARB: Yes, but the posture of this case before this Court is that the wrongful discharge has been

adjudicated and there is some finality. And the way --

QUESTION: They are not asking for back pay? Are they asking for back pay here?

MR. GOLDFARB: Originally in their complaint they asked for back pay.

QUESTION: Well, if the employer is in the district court, he is certainly exposed to a very, very large back pay award.

MR. GOLDFARB: Correct.

QUESTION: Apart from reinstatement.

MR. GOLDFARB: That's correct, Mr. Chief Justice. But the union can also satisfy a back pay award in money damages.

QUESTION: Right. And they can satisfy a claim measured by the loss, the value of the failure to get reinstatement, even though that's very difficult to evaluate.

MR. GOLDFARB: It wouldn't be unique because it's done in wrongful death cases, it's done in all kinds of cases where you have to project earnings into the future. The union in and of itself could satisfy any kind of a money claim.

QUESTION: As I understood, Mr. Goldfarb, your colleague's position is that these employees have no cause of action against the union for failure to give adequate representation in a discharge case unless, in fact there has been a wrongful discharge, and that therefore you have to

keep the employer in on the issue of whether or not there has been a wrongful discharge before he has any cause of action at all for failure to give proper representation against the union.

Now, then he goes on, as I understand him, or so he answered me earlier, as I understood him, to argue that in this instance you can't rely on the arbitration award because that award was not the product of a proper representation on the part of the union.

MR. GOLDFARB: We say --

QUESTION: I know what you say, but that's his position.

MR. GOLDFARB: That's his position.

QUESTION: As Mr. Justice Stewart was suggesting to you earlier, your characterization of his position doesn't seem quite accurate.

MR. GOLDFARB: That's the reading I got of it, but in any event, this case boils down to a very simple proposition that once there has been an adjudication in the machinery and the employer is free from any wrong, he shouldn't be exposed to the jeopardy of going through any kind of litigation if the union was guilty of unfair representation.

QUESTION: But the duty of fair representation is a statutory duty, isn't it?

MR. GOLDFARB: That's right.

QUESTION: And your opponent's argument is that the finality attached to the grievance procedure shouldn't obtain in full force unless the statutory duty has been satisfied, that the assumption on which finality is based is that the statutory obligations have been satisfied.

MR. GOLDFARB: What inherent evils there would be in that type of situation. How easy it would be for a union to be guilty of unfair representation and take a chance on the arbitration decision; if they won, it would be fine, if they lost, the unions could holler "foul," that we didn't fairly represent this man, we want another trial. Why should the employer be infected with what the union fails to do in its statutory duty?

QUESTION: Are there some cases that have gone with you on this matter?

MR. GOLDFARB: No, this is a case, from my stabdpoint, of first significance.

QUESTION: There are cases against you, though, aren't there?

MR. GOLDFARB: Not -- your Honor, I respectfully submit to you, sir, there are not any cases against me where there has been an arbitration.

QUESTION: Where there has been exhaustion.

MR. GOLDFARB: When there has been exhaustion. There are plenty of cases that philosophically discuss the question,

like Vaca does, assuming there was a wrongful discharge and a failure to represent and then they go on and talk about apportionment--assuming a wrongful discharge. Our posture here today is without the assumption, we are dealing with the reality of an adjudication. And so as a result we say we have got a case of some significance here where the Court has an opportunity to delineate some employer rights.

QUESTION: You are quite right, Mr. Goldfarb, this Court's cases, way back to the Steelworkers Trilogy, have put very special emphasis on the values in labor relations of the arbitration procedures, and I expect what you are concerned with as an employer's representative is that those procedures may not mean as much as you used to believe they did if we are going to say that you can't interpose them as a defense in the circumstances alleged here.

MR. GOLDFARB: That's precisely it, Mr. Justice Brennan, precisely. And so we would like to submit this case that we would frankly like to see the district court's decision reinstated.

QUESTION: What if the arbitrator's decision itself was subject to review on one of the very few grounds it is subject to review, say, for fraud or something?

MR. GOLDFARB: I think we would be in an entirely different situation. I think they would be entitled to review the entire matter.

QUESTION: Even though you had a contractual right to rely on the grievance procedure?

MR. GOLDFARB: Right. Because fraud, collusion goes to the very heart, deals with both parties, there is nothing in the lateral about it, I think if we had a fraud situation here, we would have an entirely different case.

QUESTION: I guess our cases have always said that without exception to the finality of arbitration --

MR. GOLDFARB: Correct. There isn't any question about it. I think if we stay with the traditional grounds of fraud, collusion, to upset the arbitration process, we would greatly strengthen the collective bargaining positions of unions and employers throughout this country. We would have some certainty, we would have some finality in our dealing.

QUESTION: I suppose you would say it is also a different case if in the complaint it were alleged that the union and the employer were in cahoots.

QUESTION: That's collusion.

MR. GOLDFARB: I don't think there is any question about that either, because that takes two, it's bilateral then. But where one party is innocent, I don't think we should be prejudiced.

QUESTION: Doesn't this case allege that?

MR. GOLDFARB: No.

QUESTION: It didn't?

MR. GOLDFARB: No.

QUESTION: The question presented certainly doesn't put that to this Court.

If you have collusion between the union and the employer, almost by definition you have the sort of fraud that would be included in the grounds for reviewing arbitration.

MR. GOLDFARB: There would be no question about it. I think if both were parties to any kind of wrong that would taint the machinery, there isn't a doubt in my mind that there would be no validity to the arbitral process. But where there is no taint to the machinery and where, for example, in this case the court of appeals merely suggested that bad faith ought to be litigated and not be handled by summary judgment and vindicated the employer's position and gave finality to the arbitral process, I think if this Court would return the case to the status of the district court, we would avoid a multiplicity of actions in trying these cases before arbitration boards and then trying them again before labor boards and then trying them again before district courts.

QUESTION: Well, the district court granted summary judgment against all the parties, didn't it?

MR. GOLDFARB: Yes.

QUESTION: And the court of appeals reversed it as to one and no review was sought of that, was it?

MR. GOLDFARB: No, your Honor.

QUESTION: So we are without power to do what you ask us to do.

QUESTION: Is the effect of the district court's action now affirmed -- or the court of appeals' action remanding the case for trial on the merits as against the union any more or less than a declaration that they may have an action against the union for failure to represent them properly?

MR. GOLDFARB: I think the present posture of the case is precisely that, that they have an action against the union for any damages they may have suffered, regardless of what it may be.

QUESTION: Just as they would have against a lawyer for malpractice.

MR. GOLDFARB: Malpractice, and just as they would have against anybody for any tort that caused them any damage.

We would like to stand submitted on our briefs and argument.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Schwartz?

REBUTTAL ARGUMENT OF NIKI Z. SCHWARTZ ON BEHALF OF THE PETITIONERS

MR. SCHWARTZ: Yes, Mr. Chief Justice. Thank you.

I think it's important to point out that the action against the employer here is a breach of contract action, not

a tort action, not a criminal action. There is no requirement of proof of mens rea or evil intent in a breach of contract action, and on that basis the employer either breached the contract or he didn't, irrespective of whether he was in good faith or not in good faith. To say that the discharge was not wrongful because it's been adjudicated in a grievance proceeding is simply to pull himself up by his own bootstraps. That's the very issue here, is how much are we going to attribute to this grievance proceeding in which a grossly deficient representation in bad faith resulted in a total lack of exculpatory evidence.

QUESTION: Was this 1967 when the grievance procedure was held?

MR. SCHWARTZ: Yes, it was.

QUESTION: Do you suggest that it will not undermine grievance and arbitration processes in the area of employer and labor relations if 8 years later you can still be reexamining what appeared to be a final award at the time?

MR. SCHWARTZ: It is only 8 years later, your Honor, because of all the proceedings in the courts below.

QUESTION: Whatever the reasons, it's 8 years later.

MR. SCHWARTZ: It is 8 years later.

QUESTION: Which has greatly enhanced any possible claims here involved.

MR. SCHWARTZ: Except since 1968 the company has been

on notice that Mr. Pagano has admitted to his own wrongdoing and the men were innocent. I contend that to permit us to proceed against the union and the company here will not undermine the grievance procedures, contractual grievance procedures as this Court sets forth in the Trilogy. A distinction has to be made between cases such as the Trilogy where you have a union against a company where there are not independent individuals, where the issues are such that the union is together and the company is together and they are litigating against each other.

This is a situation of a third party, and there is a lot of discussion in Vaca dealing with the inherent --

QUESTION: I am sure it's not beyond the realm of practicalities that employees who lose arbitration awards thereafter may find a reason for saying that they weren't properly represented by the union in the grievance procedure, is it?

MR. SCHWARTZ: It is also not beyond the realm of practicality --

QUESTION: I know, but isn't that so? If that's so, I suppose this then adds something -- so far, at least, is the case -- that is, uncertainties of the finality of arbitration awards.

MR. SCHWARTZ: Except the Sixth Circuit did not say that the mere allegation of bad faith and misrepresentation entitles us to litigate. There is a substantial amount of

evidence of both of those things. So it's not a free ticket into court. It's a very difficult struggle, and if you pursue the cases in Law Review literature since Vaca, you will see that it's a very uphill struggle and not one to be lightly undertaken.

QUESTION: Nobody says you stay in court just by alleging there was a mistake.

MR. SCHWARTZ: That's right.

QUESTION: It would be bad faith.

MR. SCHWARTZ: That's right.

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

[Whereupon, at 11:45 a.m., the arguments in the above-entitled matter were concluded.]