In the

Supreme Court of the United States

BUFFALO FORGE COMPANY,

Petitioner,

v. No. 75-339

UNITED STEELWORKERS OF AMERICA, AFL-CIO, et al.,

Respondents.

Washington, D. C.
March 24, 1976

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Wednesday, March 24, 1976

The above-entitled matter came on for argument at 11:28 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

JEREMY V. COHEN, ESQ., 1016 Liberty Bank Building, Buffalo, New York 14202, for the petitioner.

GEORGE H. COHEN, ESQ., Washington, D. C., 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 No. 75-339, Buffalo Forge Company against United Steelworkers of America.

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

ORAL ARGUMENT OF JEREMY V. COHEN

ON BEHALF OF PETITIONER

MR. JEREMY COHEN: Mr. Chief Justice, and may it please the Court: The issues in this case, while significant, will not, I am afraid, be as stimulating to the Court as the issues in the case argued just prior to this or in the case argued yesterday, but I will do my best.

The company is a manufacturer in Buffalo, New York, and in 1974 the Steelworkers Union was certified by the National Labor Relations Board as the exclusive bargaining agent for the company's office employees. At the same time, the union was also the exclusive bargaining agent for the company's factory workers and had been for many, many years. The factory workers had been covered by collective bargaining contracts between the Steelworkers and the company going back into the late 1940's and early 1950's. Those contracts, among other terms and conditions, contained broad no-strike clauses, two in fact, a very broad definition of what matters could be resolved through the grievance and arbitration procedure, and at the time of the instant dispute contained

provisions allowing both union and employer to use the grievance procedure to resolve items of policy or general contract interpretation issues.

In the latter part of 1974, the Steelworkers in the midst of bargaining the first contract for the office and technical workers, set up picket lines around the company's premises in the Buffalo, New York, area, and conducted a strike against the Buffalo Forge Company.

The office workers and the factory workers worked in same buildings with the offices generally being in the front and the factory area being in the back, but used common entrances. The pickets were set up at these entrances and at all other places surrounding the company's premises.

Four days later, four days after the picketing was established, the respondent Steelworkers directed the local union officers of the factory local unions to honor the office worker picket lines which the Steelworkers had established and to instruct the employees who were members of the factory workers' local unions and members of the Steelworkers to also respect those office worker picket lines.

That afternoon the company, having heard of a work stoppage plan, fired off a telegram to the Steelworkers protesting that the rumored work stoppage would be a violation of the no-strike clause contained in the factory worker contract and offered to immediately arbitrate, go to arbitration

over any issue which had caused this potential work stoppage.

That telegram was ignored and the work stoppage commenced the very next morning.

The company attempted to obtain injunctive relief under the theory of Boys Markets from the Federal district court. Its application for a temporary restraining order and preliminary injunction were denied, essentially on the theory of the Fifth Circuit decision in the Amstar case, interpreting this Court's decision in Boys Markets as having no application to any breach of contract strike save the one situation where the strike is triggered by an ongoing or live grievance between the union and employer party to the contract.

Appeal to the Second Circuit Court of Appeals resulted in affirmance of the district court's decision on essentially the same grounds that I just summarized. A strike, even if it were a breach of contract, had to be literally over or triggered by some ongoing live grievance between the contracting parties.

It is our position generally, stated at the outset, that the requested relief falls squarely in the pathway of this Court's decisions in Boys Markets and Gateway Coal, as well as those decisions, while they involved damage actions, also indicate the Court's intention and purpose of finding ways to meaningfully enforce both the no-strike clause as well as the arbitration clause in the contract.

This is not, as a matter of premise, this is not the first time this Court has considered the sympathy strike situation. The case is billed as one which is the first sympathy strike case to appear before this Court, but it is not. One week after this Court's decision in Sinclair the majority reversed the Court of Appeals in Yellow Transit System v. Teamsters, a case, very simply, which involved a union and an employer who had an ongoing collective bargaining relationship. The union advised the employers in that case that it was going to set about organizing the company's office work force.

QUESTION: The style of that case is Yellow Transit System --

MR. JEREMY COHEN: Yellow Transit System --

QUESTION: Is it in the --

MR. JEREMY COHEN: It's in the reply brief, and it is also mentioned in the respondents' brief. Yellow Transit System is mentioned on page 2 -- or page 3, excuse me -- of the reply brief and on several pages of the respondents' brief, in particular page 9 of respondents' brief.

QUESTION: Thank you. Justice Marshall points out it's Teamsters v. Yellow Transit System. That's the reason I couldn't find it.

MR. JEREMY COHEN: I'm sorry. Yes.

QUESTION: Thank you.

MR. JEREMY COHEN: The significance of that old case, since the Court will recall that the reversal was a one-word majority opinion citing the Court's decision in Sinclair, was in our view the concurring opinion, the special concurring opinion written by Judge Brennan, Justice Brennan, and in which the other dissenters in Sinclair joined, in which the concurring Justices said that the only reason they were concurring in the result was because there was no agreement between the parties to arbitrate any dispute. There was no clause in the contract providing for any terminal arbitration over any dispute between the parties.

So this is not the first sympathy strike case that has come before this Court. As you might suspect, your Honors, we have -- I have put it in a formula -- that is, if Teamsters v. Yellow Transit is to Sinclair as Monongahela, the Fourth Circuit case, is to Boys Markets, then the extension -- I'd say extension, it's just a redundancy. That is, our position in Buffalo Forge claiming that we were entitled to an injunction has the same relationship to Boys Markets as Monongahela has to Boys Markets and as we think the concurring opinion in Teamsters v. Yellow Transit has to the original Sinclair decision.

The responsents claim that only the narrow holding of this Court's decision in Boys Markets applies, and that is the continuation of the requirement that the strike must be

literally over a live grievance.

It's position, in our view, is essentially that Norris-LaGuardia is more than alive and well, it's the dominant theme of Federal regulation of labor-management relationships. We could not disagree more, and we think the decisions of this Court establish that Norris-LaGuardia does not invariably bar injunctive relief, for example, the unlawful strike. Legislative history referred to in our petition for certiorari and in our main brief indicate that it was not the intention of the Congress to bar injunctions against unlawful strikes.

Is this strike in the Buffalo Forge case unlawful? It's our contention that by resorting to strike, given the contract terms, that by resorting to strike without first arbitrating the disputed right of the union to engage in conduct prohibited by the contract, that it violated its duty to arbitrate which it had freely given in the contract, violated its duty to arbitrate without arrogating to itself interpretation of the collective bargaining agreement, especially in this case because the dispute arose the day before the work stoppage when the union directed its local unions to respect the picket lines and the company disputed the union's right to issue such an instruction.

QUESTION: Mr. Cohen, only to understand what you just said about the issue that would have been presented to the arbitrator had there been arbitration. It would not have

been, as I understand it, whether the contract prohibited the strike, but whether assuming the contract prohibited the strike, the strike could go forward.

MR. JEREMY COHEN: It would have been --

QUESTION: What would the issue have been?

MR. JEREMY COHEN: The issue would have been, Mr. Justice Stevens, that the union's directive -- the Steelworkers' directives to their local union officials and members to honor the office workers' picket line was a violation of the no-strike clause of that contract and that the arbitrator was empowered to determine the union's disagreements with the company's position, that is, whether the orders and the ensuing work stoppage were in fact a violation of the no-strike pledges in the collecting bargaining agreement.

QUESTION: Did the Court of Appeals say that the arbitration clause did not reach this kind of a dispute?

MR. JEREMY COHEN: The Court of Appeals and the district court neither concluded that the arbitration clause went to the issue of arbitrability, the issue that I just described to Mr. Justice Stevens.

QUESTION: Well, did they --

MR. JEREMY COHEN: There was in the Court of Appeals --

QUESTION: Did they say that this kind of a dispute was not arbitrable?

MR. JEREMY COHEN: No, they said that this was not

the kind of arbitral dispute which would permit the granting of an injunction since it would not be an agent of the arbitration process. The theory espoused by the Court of Appeals was that only if the strike is triggered by a live grievance can it be said that injunction is appropriate because the union is trying to evade or avoid its obligation to arbitrate.

QUESTION: I thought if it isn't a live grievance, though it isn't arbitrabal, is it?

MR. JEREMY COHEN: Oh, very much so. In fact this Court has often --

QUESTION: Where does the arbitration clause appear in the record here.

QUESTION: It's 13A, I gather, isn't it?

MR. JEREMY COHEN: In the appendix on page 16 there is a no-strike clause and on page 17, paragraph 26 of the agreement, there is the definition of arbitrable grievance. And it is any dispute or any trouble of any kind arising in the plant.

There was in the district court's decision -- yes, Mr. Justice.

QUESTION: Is there or is there not a determination either by the district court or the Court of Appeals that article 26 does not reach, does not make arbitrable, this dispute?

MR. JEREMY COHEN: No, there is no such holding.

QUESTION: There is no such holding.

MR. JEREMY COHEN: No. There is a statement in the district court --

QUESTION: If there was such a holding, would you be here?

MR. JEREMY COHEN: No.

QUESTION: But then I gather that is an interpretation of a clause which we are not likely to review, I gather.

MR. JEREMY COHEN: No, if the Court were to decide that the arbitration clause did not cover this dispute, then no way could an injunction be an aid of the arbitration process.

QUESTION: And your position is that the Court did not decide that it did not reach this. Did it decide that it did reach this dispute?

MR. JEREMY COHEN: It did not decide that either. It decided, looking at the district court's decision --

QUESTION: We have to decided that as an initial question in here?

MR. JEREMY COHEN: No, you don't. In fact, I think in reading respondents' brief, that there is essentially an acknowledgement that the issue of the scope of a no-strike clause is arbitrable. Footnote 6, among other things, in the respondents' brief goes on at great length about the issues

of fact in law that arise under contracts such as the instant one. This is the Footnote 6 of the respondents' brief, I guess it's buff colored. And many of the decisions of this Court which we have cited in our brief applying the principles of the trilogy are to the effect that a disputed application or disputed exception to a no-strike clause is presumptively arbitrable.

QUESTION: What if the no-strike clause here had been absolutely plain on its face so that it was clear the union was breaching it by engaging in this sympathy strike? Would your case be stronger or weaker for the issuance of an injunction?

MR. JEREMY COHEN: I would say it would be stronger, your Honor.

QUESTION: Then you are saying in effect that any strike that is a breach of contract, in effect, whether it's a breach of the union's no-strike clause, can be enjoined, aren't you?

MR. JEREMY COHEN: No, I am not saying that. It's very important that the Court understand the company's position in this case. A contract which contains the most -- if we had in the Buffalo Forge contract no arbitration provisionswhatsoever, only a clause which in addition to the language already expressed said, "And furthermore, there shall be no sympathy strike whatsoever," if the injunction in this case is not an

assistance to the arbitration process by which the parties voluntarily agree that any dispute that they had, as defined in the agreement, would be resolved by arbitration without resort to 301 litigation, then there is no injunction. So we are not here asking this Court to adopt what I would regard as a very substantial expansion of Boys Markets, that a mere request of the employer given a clear no-strike pledge, all the Court has to do is make a determination whether the contract has been violated and, if so, enforce the no-strike clause. That has never, as far as I know, been the policy of this Court. It is not the policy we are asking the Court to reach on the facts of this case.

So, simple enforcement of the no-strike clause is not what's at issue, at least it's not the main issue that the petitioner is raising in this case.

QUESTION: So in answer to Mr. Justice Rehnquist's question, if the breach of the collective bargaining agreement were very, very clear, then it could not be enjoined.

QUESTION: Absent an arbitration clause.

MR. JEREMY COHEN: Absent an arbitration clause. Mr. Justice Stewart is saying that there really is no issue of fact for an arbitrator -- no decision for an arbitrator to render. It is our contention, of course, that the Court should be making no determinations of fact aside from determining whether the arbitration process is broad enough in scope to

cover the dispute between the employer and the union. Once it makes a determination that the clause certainly is broad enough, applying the presumptions of the trilogy, its business is finished. What the respondent is in effect saying to us is that we have, the union, "We have a right to strike for a while. We have a right to strike while the arbitration process that we have committed ourselves to is being administered."

QUESTION: But, Mr. Cohen, could the union defeat the injunction, then, by saying, "We concede your interpretation of the contract and therefore there is no arbitrable issue. We agree that it prohibits what we are doing, but we are going to do it anyway." Then what would you have an injunction for?

QUESTION: We concede we would lose in an arbitration, then what happens?

MR. JEREMY COHEN: Then you would get an injunction because the union stipulation in court is still not -- what you would be doing, of course, is enforcing a no-strike clause without any enforcement of the arbitration process.

QUESTION: Isn't arbitration also for remedy? It's not just to settle factual disputes.

MR. JEREMY COHEN: Most certainly it should be for remedy.

QUESTION: You can't concede yourself out of arbitration, can you, if the other party to the promise insists on it?

MR. JEREMY COHEN: No. In fact, Mr. Justice White, your decision in Drake Bakeries fits Buffalo Forge to a T. We have in Drake Bakeries a requirement that arbitration rather than Federal courts should have made a determination of liability as well as damages. And in the Drake Bakeries decision, you commented, speaking for the majority, that there was another case that came out of the Second Circuit in which there was as broad an arbitration clause as the one you were dealing with in Drake. And that was Markle Electric? Markle Electric. In writing so many briefs in this case, I have had to dig deeper and deeper for my own enjoyment in presenting this argument, and I had to smile when I noticed the quotation of the Markle Electric case because it was my late partner Edward Flaherty who negotiated both the original Markle Electric contract and the original Buffalo Forge contract which had identical descriptions of arbitral grievance that you will find in paragraph 26 of the current contract. So that arbitration must be used both for determination of liability and for determination of any penalties, if there are any to be paid.

QUESTION: How would the arbitration proceed here as you envision it? The union is presumably enjoined from striking, and then you go to arbitration as to whether or not they have a right to engage in the strike. What sort of remedy could the arbitrater prescribe in that situation where you are talking about a kind of conduct that has never

taken place?

MR. JEREMY COHEN: Injunction as well as damages. The Fifth Circuit, for example, in the decision involving U.S. Steel and the Mine Workers made it quite clear that if an arbitrator issued a back-to-work order as part of the arbitration process, that that court would enforce the arbitrator's award by having it confirmed at the employer's request.

QUESTION: But if the union has never gone on strike why would there be any back-to-work order? The union is enjoined from striking.

MR. JEREMY COHEN: If the injunction occurred before strike took place? I must have misunderstood the fact proposition. The problem here is that in many, many cases, Mr. Justice Rehnquist, the employer or the union is about to do something, for example, closing down a plant because of adverse economic conditions or the employer is going to change the hours of work. It is usually not a surprise to the union. There are opportunities to utilize grievance procedure, there are opportunities to attempt to resolve the matter in advance. As indicated by the facts in this case, the union is not likely to give the employer advance notice of its intentions to engage in a sympathy strike. In this case, in fact, we had only but a few hours' notice of a rumored strike plan. About all the employer was able to do was to fire off its telegram saying if

there is some problem, we are willing to arbitrate it and besides you are violating the collecting bargaining agreement.

We had to, under the circumstances, appeal to the Federal district court for expeditious relief.

QUESTION: Mr. Cohen, I am still troubled by trying to understand precisely what issue would be arbitrated if the union conceded that the no-strike clause was applicable, and then Mr. Justice White suggested maybe you would arbitrate the issue of remedy. But if you entered a Boys Market injunction pending the arbitration and everybody's at work, what issue could there be with respect to remedy? There is no issue as to liability because they have conceded the clause applied. What issue as to remedy would be presented?

MR. JEREMY COHEN: The union is not on strike at this time.

QUESTION: It has been enjoined. You have gotten the relief you asked for in this case.

MR. JEREMY COHEN: But the strike started but was stopped by the injunction?

QUESTION: Well, say, you got 24 hours notice and you ran to court and got your injunction before anybody left work.

MR. JEREMY COHEN: There would only then be the academic question whether the union's threatened conduct was a violation --

QUESTION: But they have conceded that under my hypothesis. So what is the need for an injunction in aid of arbitration?

MR. JEREMY COHEN: Upon the concession there would be none. I wouldn't see what the need would be in aid of the arbitration process.

QUESTION: Then what should a court do, vacate the injunction? And then they could go on strike. I have a terrible difficulty understanding precisely what is supposed to happen here.

MR. JEREMY COHEN: If we appeared before -- let's say we had a threatened strike, sympathy strike, and if in response to that the employer appeared before a Federal district court judge with the appropriate papers and the union appeared and said there is no issue for arbitration, we agree the employer is right, if we did strike, there would be a violation of the contract, and the looked at me and said, "Mr. Cohen, what do you want us to do?" If the union were, despite that exchange in front of the Federal district court judge, going to resume picketing a day or two later, then I imagine I would get rather expeditious relief from the Federal district court judge in view of that assurance that the union was expressing to the district court judge that there was no reason for --

QUESTION: The theory of the relief would be enjoining

a breach of contract. You are not getting an injunction in aid of arbitration. Would that not be correct?

MR. JEREMY COHEN: That would be correct.

QUESTION: So your position is that you are entitled to an injunction against the strike in breach of contract.

MR. JEREMY COHEN: No. If the union agreed that a strike would violate the contract, yet it insisted on its right to strike anyway, then I would say the court would be within its rights under the guidelines of Boys Market to issue the injunction because the union does not mean what it says if it's insisting that a strike would breach the contract, it has a right to breach the agreement, there is still a dispute between the employer and the union as to whether the no-strike clause applies to the union's threatened or actual conduct, and that should be resolved by an arbitrater and the strike situation you mentioned should be maintained while the parties expeditiously decide whether its right would be a breach of the contract and what remedy, if any, the arbitrator will allow.

If I tell you that there is no violation of a no-strike clause, yet I insist on my right to strike anyway, then there is obviously a continuing dispute between the parties about whether you can strike despite the existence of a ban against striking contained in the --

QUESTION: I take it in this case, however, that you've got here that the union says that conduct did not violate

the no-strike clause.

MR. JEREMY COHEN: The union has disputed that.

QUESTION: And still disputes it here.

MR. JEREMY COHEN: Apparently so.

QUESTION: What does this mean, 18a, the very first sentence in the district court's opinion, "The Boys Market standards do not apply to this case because there is no arbitrable grievance between the parties."

Now, is that or is it not an interpretation of section 26 as to the reach of the obligation to arbitrate?

MR. JEREMY COHEN: It is not an interpretation of paragraph 26. It is a literal interpretation of this Court's decision in Boys Market that there was no arbitrable grievance --

QUESTION: That's preceding that, though, Mr. Cohen, because properly stated, I thought, at 17a, the third thing the court must find that both parties are contractually bound to arbitrate the underlying grievance that caused the strike, which is what Boys Market said. And I don't know why that first sentence is not to be read as an interpretation of 26 that this dispute is not made arbitrable by paragraph 26, isn't it?

MR. JEREMY COHEN: I think a fair reading of the complete opinion as well as the Court of Appeals' decision shows us that the district court and the Court of Appeals did not

find that there was no arbitrable dispute, but that there was no arbitrable dispute which would support an injunction.

QUESTION: Isn't the key word "grievance"? He doesn't say there is no arbitrable dispute. They said there is no grievance under the collective bargaining agreement subject to arbitration. That distinguishes it from Boys Market. Is that the meaning of that first sentence?

MR. JEREMY COHEN: I believe that's the meaning of that sentence. I know that the respondent has argued that that is a finding of fact. But if that is a finding of fact, it flies in the face of every decision, whether it's a damage action or an injunction action issued by this Court, and it is not a proper interpretation of what the district court or the Court of Appeals have decided.

I would like at this time to reserve whatever few moments I have left.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Cohen.

ORAL ARGUMENT OF GEORGE H. COHEN ON
BEHALF OF RESPONDENTS

MR. GEORGE COHEN: Mr. Chief Justice, and may it please the Court: It is the respondent union's position that no Boys Market injunction is proper here for two separate and distinct reasons:

Number one, this was not a strike over an arbitrable

grievance.

And, number two, --

QUESTION: You mean it's outside the reach of paragraph 26?

MR. GEORGE COHEN: Mr. Justice Brennan, what we mean by that is the dispute between the United Steelworkers of America and the Buffalo Forge Company which led to the sympathy strike had nothing to do with any term or condition of employment which was subject to the grievance arbitration machinery of section 26.

QUESTION: Is that answering me? There is no dispute here that is within the reach of the arbitration?

MR. GEORGE COHEN: Well, I will say yes to that, but I don't want to mislead the Court. Down the line the question of whether or not the strike itself, albeit not over an arbitrable grievance, creates an independent arbitrable grievance, the answer to the latter question is yes under the no-strike provisions of the contract. A grievance ultimately is presented which is available to the arbitrator, but we want to emphasize that the company while invoking the pro-arbitration policy of section 301 never even invoked the arbitration procedure. They never even filed a grievance alleging that the strike itself -- and here what we are talking about is the legality of the strike itself -- was in fact a breach of the no-strike clause.

We don't think that's the touchstone. The touchstone we maintain is that one has to go back and look at the threshold question.

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

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

AFTERNOON SESSION

(1 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Cohen, you may resume.

ORAL ARGUMENT OF GEORGE H. COHEN ON

BEHALF OF RESPONDENTS (CONTINUED)

MR. GEORGE COHEN: Mr. Chief Justice, the case here before us follows in our analysis strictly along the lines of the Boys Market decision of this Court. In Boys Market the parties had entered into a collective bargaining agreement which included a provision that the adjustment of all grievances, all disputes concerning the meaning, application, or interpretation of a collecting bargaining agreement would be resolved through final and binding arbitration.

In the face of that particular --

QUESTION: Suppose under a contract the employer had some objection to what the union is doing, like it striking when it shouldn't be striking in violation of the no-strike clause, and suppose on the face of the arbitration clause it says -- it just covers all disputes or at least it covers all disputes about the interpretation of the contract. The union says, "We are striking, but it's not the kind of a strike that is covered by the clause." The employer says, "Yes, it is," and they have a dispute over the meaning of the no-strike clause. How does that ever get to arbitration? Can the employer request arbitration?

MR. GEORGE COHEN: Once again, Mr. Justice White, it depends on the language of the contract. In this contract, for example, it's clear that the employer had a right to file a grievance claiming that the union strike was a breach of the no-strike clause.

QUESTION: With whom would he file it?

MR. GEORGE COHEN: With whom?

QUESTION: He would file it with the union.

MR. GEORGE COHEN: He would file it with the union, that's right.

QUESTION: You would call that a grievance.

MR. GEORGE COHEN: We call that a grievance. And then the procedure which would then be triggered would follow up to and including final and binding arbitration. In any event, in Boys Markets, the employer contracted out certain work which the union maintained constituted a breach of the collective bargaining agreement, because it was work which the union claimed under the contract belonged to employees in the bargaining unit. The union didn't file a grievance, the union didn't follow the grievance arbitration machinery; instead, went out on strike in support of its position that that work had to be reassigned to the employees in the bargaining unit.

In the face of that strike, the employer sought an injunction. And this Court was confronted with the possible

dilemma of on the one hand a Norris-LaGuardia seemingly absolute ban on enjoining any strikes and on the other hand the pro-arbitration policy as set forth in section 301 of the Taft-Harley amendments. And this Court concluded that it was possible to accommodate those two competing and conflicting policies by writing a very narrow and limited intrusion upon the Norris-LaGuardia ban. And that intrusion was predicated on the assumption that it was necessary to have an injunction where the vindication of the arbitration policy was at stake. More particularly, for example, in Boys Market what this meant was essentially that if the union had succeeded in bringing to bear enough economic pressure on the employer so that the employer so that the employer would capitulate and give in to the union's demand by reassigning the work. The consequence of that action by the union would have been to undermine the entire arbitration process, said this Court in Boys Market because in essence it would have taken away the jurisdiction of the arbitrator and transferred it into the industrial warfare that the whole policy and procedure of section 301 was designed to avoid.

So, said this Court, we will, in order to vindicate section 301, set forth certain very specific requirements, and those requirements, of course, the petitioner has referred to as being literal requirements. We submit they are both literal and they also capture the very underlying purpose and

intent of Boys Market, namely, that although there is no general Federal anti-strike policy and therefore Norris-LaGuardia should prevail, said this Court in Boys Market, even where there is a breach of a private contract unless it can be shown that some additional compelling public consideration is present.

Now, that additional compelling public consideration was present, said this Court in Boys Market, because the strike was designed to undermine, and indeed was undermining, arbitration, and the Court determined it would vindicate arbitration by doing two things -- one, compelling the parties to in effect go back to arbitration, and, two, enjoining the strike at that time.

QUESTION: You think there is no undermining of the arbitration clause here even in a symbolic sense?

MR. GEORGE COHEN: Mr. Chief Justice, that is clearly our position. Our position, and I think if you focus on the contract --

QUESTION: That's because you say there is nothing to arbitrate.

MR. GEORGE COHEN: No, that's not so. What we are saying is basically as follows: That as contrasted from Boys Market where the strike was in fact designed to obtain capitulation over an arbitrable grievance,over a term of condition of employment about which the parties were disputing

and which the parties had agreed to submit to an arbitrator for his final and binding decision. That's Boys Market.

Now, as contrasted from the situation here, the union was out on strike, there was no dispute between the union and the employer as to any term or condition of employment for any of the production and maintenance employees. There was nothing the employer could do, unlike in Boys Market, which would constitute a concession that would have resolved that problem --

QUESTION: But, Mr. Cohen, I take it the parties could have written -- could have written -- a provision for arbitration which would have reached this very situation, could they not?

MR. GEORGE COHEN: I imagine that is possible.

QUESTION: Hasn't it been done? There have been cases --

MR. GEORGE COHEN: No, I don't think they -- I think what they have written --

QUESTION: Not every arbitration clause is limited to matters of interpretation and application of the collective bargaining agreement.

MR. GEORGE COHEN: That is correct. Some go beyond that.

QUESTION: Way beyond that.

MR. GEORGE COHEN: Gateway Coal where we talked about

local trouble at the plant as well as that.

The problem is, though, Mr. Justice Brennan, that when you are striking in a sympathy strike situation --

QUESTION: Well, anyway what you say, whatever may have been the case, these parties did not agree to an arbitration clause which reached this matter of a sympathy strike.

MR. GEORGE COHEN: That is correct. And this was not a strike over an arbitrable grievance, and the district court --

QUESTION: But you do agree that whether or not the union's conduct violated the no-strike clause was arbitrable under this concept.

MR. GEORGE COHEN: As far as we are concerned, that has been a red herring in a sense.

QUESTION: Anyway you agree that that's so.

MR. GEORGE COHEN: We clearly agree that, and we agree that if the company had filed a grievance, they were clearly entitled to arbitration on the question of whether or not the no-strike clause had been breached.

QUESTION: And if you had filed -- if the grievance had been filed and the employer had said, "And by the way, while this grievance is pending for decision, you must not strike," you would say, "We are going to strike until and unless the arbitrator tells us not to.

MR. GEORGE COHEN: Correct. We would say that, and

our support would be the Norris-LaGuardia Act, Mr. Justice White. The key court evil that Norris-LaGuardia was designed to get rid of was the enjoining of what might be lawful strikes, and this is the exact type --

QUESTION: Does an arbitrator normally have any power to control conduct pending arbitration?

MR. GEORGE COHEN: Well --

QUESTION: Like a court would.

MR. GEORGE COHEN: Normally not. But it even goes further than that. Let's look, for example, at Boys Market. In Boys Markets, when this Court ordered the parties in effect, by remanding to the district court, to send that dispute as to contracting-out to arbitration, and at the same time enjoining the strike, the Court didn't go on to say, "And by the way, Mr. Employer, reinstate the status quo, turn that work back and give it back to the employees."

QUESTION: If an employer discharges someone and there is a grievance filed over it and it goes to arbitration, pending arbitration the fellow stays fired, unless the employer voluntarily puts him back to work.

MR. GEORGE COHEN: That's right. And, of course, that's not only arbitration law, that's really basically consistent with the whole industrial relations reality, which is to say the employer acts and the union reacts and management has certain prerogatives, and that's how it functions.

QUESTION: Mr. Cohen, to pursue Justice White's question about the scope of arbitration clauses, could you have a valid arbitration clause that provided that if any strike or lockout occurred during the pendency of the arbitration, the arbitration board could impose and assess a fine of $1,000 a day on the offending party, would that be enforceable?

MR. GEORGE COHEN: I would -- of course, Mr. Chief Justice, that problem is clearly not here before us.

QUESTION: No. We are just probing.

MR. GEORGE COHEN: I would say that the parties have the opportunity. This Court, for example, has held you can waive your right to strike. We acknowledge if you have a clear and unequivocal waiver of a sympathy strike, if you do that, I think the parties could in their collective bargaining relationship reach agreements which would constitute all kinds of waivers that might give protection to either one or both of the parties beyond that which the law would otherwise entitle them to.

QUESTION: One other question: Was the union undertaking to exercise economic coercion on the employer?

MR. GEORGE COHEN: Absolutely. I don't think there is any --

QUESTION: No doubt about that at all.

MR. GEORGE COHEN: No. But I think --

QUESTION: You say it wasn't for their own benefit.

MR. GEORGE COHEN: I would like to couch it in these terms: The union was engaged in what is protected strike activity under the National Labor Relations Act, unless and until there is a clear and unequivocal waiver as contained in the no-strike clause. And there is a very substantial question insofar as the merits are concerned here as to whether or not this language, just this general statement that there will be no strike, in fact would constitute a waiver of that basic fundamental protected right.

QUESTION: How did you answer Mr. Justice White when he asked you if the meaning of that clause was open to arbitration? I think he asked you that question.

MR. GEORGE COHEN: I said that, of course, it was open to arbitration right here, your Honor. In other words, let's suppose that this company not only invoked the name of arbitration, as they are doing before this Court, but they actually filed a grievance. They had an absolute right to file a grievance contending that strike was in breach of the no-strike clause.

QUESTION: The strike would go in the meantime, however.

MR. GEORGE COHEN: The strike would go on in the meantime. And unless and until a strike is in fact declared unlawful, then we say that the core purpose of Norris-LaGuardia demands that no injunction issue unless and until

that has been determined.

QUESTION: Then there would be a purpose in arbitration if that were the issue raised.

MR. GEORGE COHEN: Well, if you are not striking -- I think you have to keep coming back to the threshold question: Are you striking over an arbitrable grievance? If the answer to that question is no, and we submit that is the situation here, the answer to that question is no, there is therefore nothing to vindicate in terms of the arbitration policy. The union wasn't trying to extract any --

QUESTION: How do you separate that from the fact of the strike when you concede the right to arbitrate the question of their right to strike?

MR. GEORGE COHEN: Because basically we are talking about two distinct problems. One problem is when you strike --

QUESTION: I understand your position. You want to make them two distinct problems. What I am probing at is how are they two distinct problems?

MR. GEORGE COHEN: Let's go back or a second to the Boys Market analysis. Your insistence was that in order to reach an appropriate accommodation that would not intrude improperly on Norris-LaGuardia, you had to make sure that the strike itself was over an arbitrable grievance. If it is not over an arbitrable grievance, then you are not vindicating arbitration, and you are left with one thing and one thing only,

the question of whether or not the employer is entitled to specific enforcement of the collective bargaining agreement no-strike commitment,to which the answer to that, of course, is Norris-LaGuardia precludes that, an effort was made to repeal Norris-LaGuardia in section 301 of Taft-Hartley and it was rejected. So that you have to address in each one of these instances a threshold question, is that a strike over an arbitrable grievance, which could -- in other words, if the union had committed itself to resolve a particular problem through that process, then enjoining the strike is not an independent basis; the injunction just follows naturally from the separate public concern about making the arbitration policy work.

You don't have that here, we maintain. There is nothing here to be vindicated. If the employer had filed a grievance, there is nothing to suggest that that grievance would not have been processed through the arbitration. The employer acknowledges that, in a sense. The employer's petition and all of its briefs have said, What we want is an injunction pending arbitration. We know we have committed ourselves to arbitrate that issue; we think in the interim we are entitled to injunction, even though, of course, the strike still may be lawful.

On the one hand, they take as a given that the strike is unlawful, but on the other hand they acknowledge they

have to go to arbitration and get a result from an arbitrator before they are in a position --

QUESTION: Mr. Cohen, would I be correct in suggesting that the arbitration trilogy all had as a basic underpinning that rather than resorting to strikes and other economic combat weapons, the notion was we should encourage arbitration so that production will continue while these grievances are resolved in arbitration. Would that be right?

MR. GEORGE COHEN: That would be right if we focus on --

QUESTION: That would be right.

MR. GEORGE COHEN: Yes.

QUESTION: Now, when you get around to Boys Market, assuming we had a situation here in which you have conceded, as I understand it, the employer had made a grievance of this --

MR. GEORGE COHEN: No, I say he could have.

QUESTION: That's what I said. Suppose he had, then you say it would be arbitrable under the clause. Nevertheless, you suggest that Norris-LaGuardia prohibits an injunction in this situation against the strike because the very issue to be decided in arbitration is whether the strike is a violation of the agreement. That makes the underpinning of the Steelworker Trilogy meaningless in this situation, doesn't it?

MR. GEORGE COHEN: I don't think so.

QUESTION: Because you are going right on with interrupted production -- that's what the effect of the strike

is -- while arbitration is going on and all you wind up with, the strike they say is lawful or unlawful, and if the arbitrator decides it's unlawful, as I understand you, there would be nothing that the employer could do about it at that juncture. He couldn't get an injunction even then if you wanted to continue it, could he?

MR. GEORGE COHEN: We go back to --

QUESTION: Could he? Suppose you continue the strike.

MR. GEORGE COHEN: Right.

QUESTION: The arbitration is completed and the arbiter concludes it was a violation of the contract, he can't review that. Can the employer at that juncture get an injunction?

MR. GEORGE COHEN: If the strike itself is over an arbitrable grievance, there is no question that the Boys Market rationale would apply a fortiori and in fact an injunction would be proper.

QUESTION: Why isn't this -- the hypothetical I put to you is, this very thing is a strike over an arbitrable grievance.

MR. GEORGE COHEN: Well, no --

QUESTION: Because the employer has made it such by filing a grievance?

MR. GEORGE COHEN: No. The strike itself is creating a grievance. There was no dispute as to any meaning or

interpretation or application of the kind of --

QUESTION: No, but the .. creates the grievance, of course, just as the strike created the grievance.

MR. GEORGE COHEN: The strike created the grievance, but the strike itself wasn't over an arbitrable grievance, and there is nothing that needs to be vindicated here.

QUESTION: That's the very issue, isn't it?

MR. GEORGE COHEN: No, I don't think so. I think the petitioner has acknowledged that read literally, at least, this is not a strike over an arbitrable grievance. What the petitioner is arguing is that one should expand --

QUESTION: And yet the grievance created by the strike could have been made arbitrable.

MR. GEORGE COHEN: Could have been made arbitrable.

QUESTION: And if continued it's not going to strike over an arbitrable grievance after it has been made arbitrable?

MR. GEORGE COHEN: There could come a circumstance.

No, I don't think if you just had a nonarbitrable grievance -- let's suppose you had excluded from the arbitration provision a certain kind of a dispute, a contracting out dispute and there was a no-strike clause, and you went to arbitration -- well, first of all, the union went out on strike in those circumstances, it would not be an arbitrable grievance, although it might constitute a breach of the no-strike clause. There are a number of variables that you can have as

to whether or not the actual strike itself is over an arbitrable grievance. But the crucial aspect is that the Boys Market decision focused on that essential prerequisite because absent that, the separate purpose, vindication of arbitration was not present.

QUESTION: But arbitration as a means of continuing production doesn't accomplish that in this case you suggest.

MR. GEORGE COHEN: Well, the whole trilogy, now the whole purpose of the trilogy was to give an impetus to the agreements reached by the parties as to how --

QUESTION: For the reason that that was a method of continuing production.

MR. GEORGE COHEN: That's right. But if they didn't reach an agreement -- in other words, there is nothing in the trilogy that suggests, although arbitration is the preferred method, that the parties are precluded from agreeing certain subjects will not be subject to arbitration.

QUESTION: Of course not. That's the whole point, but the hypothetical I put to you was on the premise that this very strike could have been made a grievance by the employer. And then it would have had to go to arbitration. And yet you are suggesting that while arbitration -- and you would then have to participate in it, nevertheless, you could continue striking.

MR. GEORGE COHEN: I am saying --

QUESTION: So notwithstanding the arbitration there is an interruption of production.

MR. GEORGE COHEN: I am saying that at that stage, with a final and binding arbitration award, once again a court would be faced with balancing the competing policies of the Norris-LaGuardia Act on the one hand and 301 on the other hand --

QUESTION: Yes, but the whole idea of Boys Market is production continues while arbitration goes on. And what youare saying is production, in this situation, does not have to continue, the strike can go on while arbitration proceeds, and you don't think the employer has any right to enjoin it. He has to wait until the arbitrator finds in his favor that the strike is illegal.

MR. GEORGE COHEN: In this instance, that is clear. In this instance --

QUESTION: That's your position.

MR. GEORGE COHEN: In this instance, as far as we are concerned, you have got two deficiencies, not only don't you have a strike over an arbitrable grievance, but you haven't even got a finding that the strike itself is in breach of contract, and at that stage, then you are runing headlong into the Norris-LaGuardia problem of curing the evil that was there, namely, you may be enjoining what is a lawful strike.

QUESTION: Yes, but you don't have that. The courts below said even if's -- didn't they say even if this is in

breach of contract?

MR. GEORGE COHEN: No. Mr. Justice White, my understanding is that the courts below didn't reach that question.

QUESTION: All right. So that we must assume that they would come out the same way even if there had been a breach of contract.

MR. GEORGE COHEN: I think that's correct. Of course, under an --

QUESTION: So we should judge this case on the assumption this was in breach of contract.

MR. GEORGE COHEN: No. I am not saying that. Of course, I think there is a very serious question as to whether or not this case --

QUESTION: It may be that the courts below said they would come out -- I think they said they would have come out the same way even if the strike was in breach of contract.

MR. GEORGE COHEN: That's the correct legal analysis that they would come out the same way. All I am suggesting is the fact that they didn't, and the fact that there is a substantial question as to whether or not there is a breach at all is a separate, independent argument we have in support of the proposition that no injunction should issue. Because what you are talking about here is a situation where we have a protected sympathy strike unless and until there is a clear and unequivocal waiver.

The circuits that have looked at that question, for example, in the Seventh Circuit, we cited the Gary Hobart case and the Hyster case, have looked for very clear and unmistakable language, and in some instances had said the general language of a no-strike clause does not suffice to bring it within the waiver doctrine, and they look to the bargaining history of the parties to ascertain whether or not when they have reached an agreement that there would be no strike, that the union had in effect agreed that it was foregoing protected NLRA rights --

QUESTION: Mr. Cohen, didn't both cases turn on the scope of the arbitration clause rather than the scope of the no-strike clause? I think you will find they did.

MR. GEORGE COHEN: Well, actually Gary Hobart was an unfair labor practice posture, and Hyster came up in the posture of the injunction.

QUESTION: Let me ask another question. I think I understand your position, but I want to be sure. If the matter had been submitted to arbitration while the strike was pending and while the arbitration was still in process, the union had said to the company, "The men will stay out on strike unless you withdraw the arbitration," then I would assume you would say it would be appropriate to issue an injunction.

MR. GEORGE COHEN: Yes, we would, because then we have a strike on an arbitrable grievance, and then we have the

interference that Boys Market was designed to avoid in that kind of an accommodation.

QUESTION: Now, supposing instead of that you had let the arbitration process run to a conclusion, there had been an award against you, could you then have kept your men out without there being an injunction?

MR. GEORGE COHEN: If there --

QUESTION: If you had let the arbitration process run its course and an award had been entered saying the company was correct, the no-strike clause applied, would an injunction then have been permissible?

MR. GEORGE COHEN: Well, once again at that stage I think the court would have to enter into this balancing process between the Norris-LaGuardia on the one hand and --

QUESTION: But how would you say they should come out? I understand they have to.

MR. GEORGE COHEN: We don't have any strong position in that regard. The Fifth Circuit is the only circuit that has looked at that problem, and the Fifth Circuit has recently concluded that they would find that injunction would be appropriate in that situation. It's the only court that I know that has looked at that question.

We think it's something that --

QUESTION: Why wouldn't it just be another enforceable arbitration award?

MR. GEORGE COHEN: Well, once again the enforceable arbitration award doesn't -- that doesn't answer the question of enjoining a strike which has a Norris-LaGuardia overtone to it, even though in fact that is what is happening, and that would be the argument, of course, against the proposition --

QUESTION: On that basis you would say in the Boys Market case you could enjoin the strike until the arbitration was over but you couldn't afterwards.

MR. GEORGE COHEN: No, we are not saying that at all, Mr. Justice White.

QUESTION: It sounds like it.

MR. GEORGE COHEN: No. My exchange with Mr. Justice Stevens was that as long as you have a strike over an arbitrable grievance and in fact that strike is in breach, then Boys Market applies, an injunction can issue. A fortiori if not only did you send them to arbitration, but the arbitrator ruled against the union and the union kept striking, Boys Market likewise would apply.

I was objecting --

QUESTION: What sense is there to arbitrate the legality of a strike then and then say whatever the arbitrator says the union can strike?

MR. GEORGE COHEN: I didn't say that.

QUESTION: It sounds like it. It sounds like you don't want to take a position on it anyway.

MR. GEORGE COHEN: No. What I said was if you have a situation where the strike itself was not over an arbitrable grievance but that eventually you get an arbitration award and the question is if the union in the face of that arbitration award continues to strike, then I am saying the Court is called upon to make an independent analysis, and it's different than Boys Market to the extent that you never had a strike over an underlying grievance. That's the difference.

Now, whether or not that should tip the balance and allow the strike to continue, all I am saying is --

QUESTION: Of course, you have an easy -- it seems to me like to the extent you have an easy case, you have even got an easier one or a less hard one, however you want to put it, because the employer here, even if he had a right to arbitrate, didn't go to arbitration.

MR. GEORGE COHEN: That's correct.

QUESTION: He wanted to get the legality of the strike adjudicated or get the strike stopped in court without ever filing -- even if he could have got an injunction if he had filed, he didn't file.

MR. GEORGE COHEN: That's correct. And we said our basic proposition was in the name of invoking arbitration --

QUESTION: You should move to dismiss for want of exhausting the arbitration process.

MR. GEORGE COHEN: Well, we haven't contemplated that.

QUESTION: No, but if you prevail on that ground here, then we never reach the thing you and I have been talking about.

MR. GEORGE COHEN: Well, I don't know what the company's position was insofar as the failure to file a grievance. It appeared to us that they were waiting for the union to file a grievance requesting some advisory opinion from an arbitrator as to the legality of our going out on strike. That appeared to me what counsel was saying to the Court this morning in the face of the whole structure and system of arbitration, which, of course, is not how it functions.

QUESTION: Well, the complaint filed in this case asked the Court to order both parties to go properly to arbitration. Look at page 10, paragraph (b).

MR. GEORGE COHEN: Yes, Mr. Justice Stewart. If you will notice, however, that refers back to a problem that in fact never got before the court.

If you look at paragraph 13 of the complaint, at page 6, you will see what happened. What happened, Mr. Justice Stewart, is essentially this: The petitioner recognized that he was coming in for an injunction in circumstances that couldn't satisfy Boys Market. They couldn't satisfy Boys Market because the union strike wasn't over an arbitrable grievance. So the employer tried to create an arbitrable grievance by saying there was some activity going on at the plant which was in fact arbitrable under the contract and that the union was

actually striking over that arbitrable dispute. It involved the question of whether truck drivers should handle a certain kind of work. That is referred to in paragraphs -- particularly paragraph -- I think I told you the right paragraphs of the complaint.

What happened in district court, though, was the court found that the sole underlying cause of this strike was the sympathy action of the union and that there was no evidence to support the company's assertion that the underlying cause of the strike was in fact an arbitrable grievance which would have triggered Boys Market.

Now, that finding of fact by the district court was never appealed to the circuit and stands --

QUESTION: Is that the first sentence I pointed out to Mr. Cohen in the district court opinion, page 18a or something? Was not a strike over an arbitrable grievance.

MR. GEORGE COHEN: No, I still don't think that is what was being referred to, Mr. Justice Brennan. That was referring to the core question of do you have a strike over an arbitrable grievance.

QUESTION: How do you define "arbitrable grievance"? You concede there was an arbitrable dispute, do you not?

MR. GEORGE COHEN: Yes. The strike -- the question of the legality of the strike --

QUESTION: Whether or not this strike was covered by

the no-strike clause, you concede was an arbitrable dispute.

MR. GEORGE COHEN: Absolutely.

QUESTION: And the Court here says there is no arbitrable grievance between the parties.

MR. GEORGE COHEN: No, I am sorry. That has to be read in the context of the question of whether the underlying cause of the strike was an arbitrable grievance. That is what the Court was addressing itself to. They had taken as a given the proposition that there was an arbitrable grievance down the line. They were focusing on --

QUESTION: Arbitrable dispute, I would say.

MR. GEORGE COHEN: -- what was the strike over. They were focusing on what was the strike over. And the strike was a sympathy strike which had nothing to do with any dispute between the parties as to the terms or conditions of employment of the production and maintenance employees.

QUESTION: And that would be a grievance as contrasted with a dispute.

MR. GEORGE COHEN: Well, it would be a grievance, but it would not be an arbitrable grievance under the language of the agreement.

MR. CHIEF JUSTICE BURGER: Mr. Cohen, you have about three minutes left.

REBUTTAL ARGUMENT OF JEREMY V. COHEN

ON BEHALF OF PETITIONER

QUESTION: Why didn't you make a grievance of this, Mr. Cohen?

MR. JEREMY COHEN: Your Honor, there is some nonsense that is being discussed with this point about whether the employer ever precipitated the filing of a grievance. As I mentioned in opening argument, as soon as the employer learned of some kind of a strike plan, it immediately fired off a telegram to the union,which is in the joint appendix, complaining about the report and offering to go to arbitration over any dispute which it caused --

QUESTION: Is that in the appendix?

MR. JEREMY COHEN: On page 14 --

QUESTION: That isn't exactly responsive, I don't think. You said to the union, "If you have any grievance with me, let's arbitrate." That is what you have said, that's what your complaint says, that you said you were completely willing at any time to arbitrate any grievance the union had with you.

But if they were striking, if they weren't crossing a picket line, you had a grievance with them, didn't you?

MR. JEREMY COHEN: Yes.

QUESTION: Did you ever ask them to arbitrate that grievance? That particular grievance? Not some other grievance, that grievance.

MR. JEREMY COHEN: We thought we had in the telegram as well as when we came before the district judge and immediately announced our position was twofold -- one, we thought the strike had been caused because of this dispute involving truckdriving assignments, and also using the line of cases that I will identify as the Monongahela type of case, felt that "over a grievance" should not be interpreted literally, that so long as the strike involved an arbitrable matter, then --

QUESTION: What do you usually do, when you send somebody a letter or communicate with them and say, "I have a grievance with you," and you get no response whatsoever, to exhaust the contractual remedies? You ask them to --

MR. JEREMY COHEN: You could go into court and ask --

QUESTION: -- to invoke the arbitration. Or if there is an established board, you file it with the board. If there isn't, you ask the other party to name -- whatever you have to do to set up the arbitration panel.

MR. JEREMY COHEN: That's true. In Monongahela --

QUESTION: Those steps weren't followed here.

MR. JEREMY COHEN: Yes, but there are cases where the employer has -- well, I'm trying to answer this quickly because it is obviously bothering the Justices.

First, the employer need not have any right under the contract to require the union to arbitrate. That is, even if the employer has no right to compel the union to arbitrate the

issue of a no-strike breach, we should be entitled, the employer should be entitled, to get an injunction simply because the union has a right to have the matter arbitrated, and I am referring to the Monongahela line of cases where the employer had no right to go to arbitration --

QUESTION: That is has no right to initiate it.

MR. JEREMY COHEN: Has no right to initiate it. And the question of who has the right to initiate it is irrelevant, we contend. It's a question of whether under the contract there is an arbitrable dispute.

Now, if I could make one comment about an issue that is obviously troubling several of the Justices --

QUESTION: Make it very brief.

MR. JEREMY COHEN: I will.

If in Boys Market the union had said to the employer and the Court, not only do we have no right to compel the employer to have bargaining employees stock the shelves versus vendors' employees, we agree that if we struck for that result, it would be a violation of the contract.

Now, if that issue had been presented to the Court in Boys Market where the union strike was simply to force the employer to exercise discretion on behalf of the bargaining unit, I suggest that you would have still made the same decision in Boys Market that you eventually did.

MR. CHIEF JUSTICE BURGER: Very well.

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:35 p.m., oral argument in the above-entitled matter was concluded.)