In the

Supreme Court of the United States

NOLDE BROTHERS, INC.,

Petitioner,

v. No. 75-1198

LOCAL NO. 358, BAKERY & CONFECTIONARY WORKERS UNION, AFL-CIO,

Respondent.

Washington, D.C.
November 9, 1976

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v.	:	No. 75-1198
LOCAL NO. 358, BAKERY & CONFECTIONARY WORKERS UNION, AFL-CIO, Respondent.	:	

Washington, D. C.,

Tuesday, November 9, 1976.

The above-entitled matter came on for argument at 2:13 o'clock p.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 PAUL STEVENS, Associate Justice

APPEARANCES:

ALLAN L. BIOFF, ESQ., Watson, Ess, Marshall & Enggas, 1006 Grand Avenue, Kansas City, Missouri 64106; on behalf of the Petitioner.

RONALD ROSENBERG, ESQ., 1828 L Street, N. W., Washington, D. C. 20036; on behalf of the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-1198, Nolde Brothers v. Local No. 358.

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

ORAL ARGUMENT OF ALLAN L. BIOFF, ESQ.,

ON BEHALF OF THE PETITIONER

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

The issue in this case is whether an employer may be required to arbitrate a dispute between the employer and a union where the dispute, that is both the events which give riss to the alleged liability and the union's claim concerning that liability all occur after the agreement to arbitrate is ended.

The facts of the case are undisputed. The employer Nolde, a manufacturer of bakery goods, maintained and operated a bakery plant in Norfolk, Virginia, and had entered into a labor agreement in July of 1970 with the respondent union which had a term extending until July 21, 1973. However, the duration clause of the labor agreement provided that after July 21, 1973, the labor agreement would remain in effect until either a new agreement was reached by the parties or either party gave written notice to the other of cancellation.

The labor agreement contained a severance pay provision. That provision in general terms stated that employees

with three or more years of continuous service with the employer would be entitled to a severance payment based upon a formula set out in the contract, upon the happening of certain contingencies, one of which was the permanent closing of the plant.

The agreement also contained a grievance arbitration procedure. In mid-May 1973, the union gave notice to the company pursuant to section 8(d) of the National Labor Relations Act of its intention to negotiate a new agreement and negotiations between the company and the union then commenced and continued for a period of some three months. No agreement was reached by the parties during this period of negotiation and on August 20, 1973, the union sent to the company a written notice of seven-day cancellation of the contract pursuant to the duration clause of the agreement. That notice was sent on August 20, 1973, which meant that the labor agreement terminated by reason of the union's notice on August 27, 1973.

The negotiators for the parties met on August 31, 1973, at which time the union rejected the company's final proposal for a new contract. At that meeting, the union advised the company that unless the company accepted the union's proposals, the union would go out on strike.

After considering the union's proposals, considering its financial position, the employer concluded that it could not survive at its Norfolk, Virginia plant in the face of a

strike, and it accordingly notified the union that effective that night, August 31, 1973, the employer was permanently closing its Norfolk, Virginia plant, and in fact on that date the employer did close permanently its Norfolk, Virginia plant and on that date it terminated the employees represented by the union.

Subsequent to the plant closing, subsequent to the termination of the employees, the union made a demand upon the company for the payment of severance pay. The employer declined to pay severance pay. The union then made a demand upon the employer to arbitrate the issue as to whether the employer was obligated to pay the severance pay. The employer declined to arbitrate. In both instances, the employer's position was that the obligation to pay severance pay and the duty to arbitrate both were extinguished or expired when the contract ended.

QUESTION: Suppose hypothetically that instead of that sequence the parties had rocked along for another year or two without a contract, as I am sure you know sometimes happens.

MR. BIOFF: Yes, sir.

QUESTION: And then after a year or a year and a half the employer closed the plant, would you say that the right to the severance pay which you now claim was vested under the written contract would be enforceable a year and a

half or two years later?

MR. BIOFF: Your Honor, are you assuming in your question that the contract had been terminated --

QUESTION: Yes.

MR. BIOFF: -- as it was?

QUESTION: Yes.

MR. BIOFF: Our position is --

QUESTION: The contract terminated but employment continued.

MR. BIOFF: Employment.

QUESTION: And the factory continued operating.

MR. BIOFF: But then was closed a year and a half or so later?

QUESTION: Yes.

MR. BIOFF: On those facts, I think we would have the same fact situation as we have in this case.

QUESTION: Five years later then it would have to be the same, wouldn't it?

MR. BIOFF: Yes, our position would be -- our position is simply this, that under the contract the employees were not entitled to severance pay simply because there was no contract after August 27, 1973. That is not to say -- and I think that this point is at the very heart of this litigation -- that is not to say that the employees were automatically divested of a right to severance pay when the contract

terminated, because under the National Labor Relations Act when a contract ends, the terms and conditions of employment that are set forth in that contract continue in effect until such time as either the employer and the union agree to new terms and conditions of employment or the employer bargains away the existing terms and conditions of employment by bargaining with the union to an impasse.

In this case, it is unclear, the record is unclear as to exactly what happened on August 31, 1973, that is whether the union made any demand upon the employer to negotiate with the employer over the ending of severance benefits, and thus it is unclear whether there may have been a waiver by the union of its right to bargain over the elimination of the severance benefits.

But assuming that there was no waiver of that right and assuming that the employer simply unilaterally ended the severance benefits, that would be arguably a violation of section 8(a)(5) of the National Labor Relations Act, one of the remedies for which might have been the payment of the severance benefits.

The point is here the union never filed an unfair labor practice charge, it never filed a complaint with the Labor Board saying that the employer had unilaterally terminated the severance benefits.

I am not sure, Mr. Chief Justice, that answers your

question, but I think --

QUESTION: Well, I take your answer to be that, no matter how much time had elapsed, if the men kept on working and the factory is open, that when, as and if the factory was closed, severance pay under the original contract would be enforceable?

MR. BIOFF: No, sir. Assuming that the contract had been terminated, the severance pay would not be enforceable under the contract because the contract no longer existed. If a --

QUESTION: Then I did misunderstand you. I thought you said at first it would be the same whether it was three days, three weeks or three years.

MR. BIOFF: I am saying that. What I am saying is that, whether it is three days, three weeks, or three years after the termination of the contract, there is no right to severance pay under the contract because the contract no longer exists and consequently there is no right to arbitrate the question of whether or not severance pay is owing, again because there is no agreement to arbitrate, and the duty, as this Court has frequently said, to arbitrate depends upon the existence of an agreement to arbitrate.

QUESTION: I have two questions.

MR. BIOFF: Yes, sir?

QUESTION: Suppose a matter was in arbitration for

about a week and the plant closed down and the contract was gone, would that arbitration continue?

MR. BIOFF: Are you referring to an arbitration over severance pay or some other issue?

QUESTION: Anything?

MR. BIOFF: Any issue. I would think the arbitration would continue because presumably the arbitration provision under that hypothetical case had been invoked prior to the terminal date of the agreement.

QUESTION: Now, what if there was a man who claimed that he wasn't paid for the last week of work, he could maintain that under the contract, of course?

MR. BIOFF: You are assuming that the man works Monday through Friday, the contract ends on Saturday, can he then arbitrate the issue?

QUESTION: Yes.

MR. BIOFF: I think the answer to that is probably yes, that he can, but I think --

QUESTION: Under the contract?

MR. BIOFF: Yes, sir. I think the difference between that case --

QUESTION: I think you had better say that he could get it for work rather than under the contract.

MR. BIOFF: Well, no, I think there is a distinction between the case you put and the case that is at bar here, and

I think the difference is simply this: When the individual works Monday through Friday, a contract ends, the employer refuses to pay for that last week's work, I think that issue might very well be arbitrable because all of the events giving rise to the grievance that was filed occurred while the contract existed, and indeed the employer's liability for the payment of those wages came into existence during the term of the contract.

In our case, the difference is that there was no liability created for severance pay until after the contract terminated.

QUESTION: If you had severed the man on a Friday, he would have had an arbitrable case, wouldn't he?

MR. BIOFF: Let's assume a contract ends on Saturday, we had discharged the man on Friday --

QUESTION: Right.

MR. BIOFF: -- the grievance was filed on MOnday, it would be our position that that grievance is arbitrable because the event giving rise to a claimed liability occurred while the contract existed. If the man was discharged on Monday and the contract expired on Saturday, it would be our position that that discharge grievance would not be arbitrable.

Let me take this case. Now, let's assume that there is a provision in the contract that says an employee with one year or more of service may not be discharged without a prior

warning notice. And let's assume that after a -- let's assume that the contract expires on Saturday and the employer discharges the employee on Monday, but the employee has not had a prior warning notice. Now, it would be our position on those facts that that discharge is not subject to the grievance arbitration procedure simply because at the time the discharge occurred the grievance arbitration procedure no longer existed. However, that employee might very well have a claim before the National Labor Relations Board that the employer had unilaterally changed the terms and conditions of employment after the contract ended, without bargaining with the union, because the pre-existing term and condition of employment was that employees would not be discharged, that is employees with more than a year of service, would not be discharged without a prior warning notice; after the contract ends the employer discharges the employee without a prior warning notice, hence there is a change, a unilateral change in terms and conditions of employment and the employee has a case before the Labor Board under 8(a)(5).

QUESTION: Counsel, you emphasize the critical fact being that the liability totally matured prior to the expiration of the agreement to give rise to the duty to arbitrate, as I understand it. You say all the events supporting the claim, supporting the liability happened before the contract expired. Do I misstate --

MR. BIOFF: That is the test.

QUESTION: I stated it awkwardly.

MR. BIOFF: That is not our case. Our case is everything happened after the contract expired.

QUESTION: I understand that. But you would concede that you had a duty to arbitrate if the events occurred before the contract expired.

MR. BIOFF: Yes.

QUESTION: Well, supposing you have a vacation pay case and it is generally considered to be a vested interest in vacation pay but Christmas doesn't come until two weeks after termination of the contract, would the claim for the pro-rated share of the vacation pay be arbitrable or not? I am stating it awkwardly, but assume that the contract expires after ten months of vacation pay vested before he actually gets the vacation, could he arbitrate that?

MR. BIOFF: If I understand your hypothetical correctly, the answer is -- our answer to that would be no.

QUESTION: That is what I thought you would say.

MR. BIOFF: Yes. And I think the reason that it would not be is because that since the agreement to arbitrate had ended prior to the time that the liability for pro-rata vacation came into existence. Now, again -- and I think that the --

QUESTION: Supposing a man was fired during the

middle of a pay period. Normally you pay by the month or the week. The contract expires in the middle of a pay period, would he be due to arbitrate there?

MR. BIOFF: As to the --

QUESTION: It would be no again, I think.

MR. BIOFF: As to the hours that he worked prior to the terminal date of the contract, we would say that that gave rise to an arbitrable issue, because the employer's liability was created prior to the expiration of the contract.

QUESTION: You see, if the right to severance pay is a vested right, your liability was created at least to the extent -- to a certain extent was created --

MR. BIOFF: I think that depends, Your Honor, on what you mean by a vested right or what you mean by the --

QUESTION: Well, let's assume there is a vested right here, what duty do you have to these people? Would you have to pay them then?

MR. BIOFF: Assuming it is a vested right, if by vested right you mean --

QUESTION: That they have a right to the accrued termination pay that they have earned, even though the succeeding contract may not provide for it.

MR. BIOFF: They have a right to it so long as the employer and the union have not bargained it away during the hiatus between contracts, and therein lies the whole point in

this case.

QUESTION: Well, assume -- let me put the case a little different.

MR. BIOFF: All right.

QUESTION: Assume the contract said in words "you will earn X dollars of severance pay for so many months that you work and in circumstances shall this be bargained away, taken away, or anything else, you get it when you leave the employee for any reason whatsoever," and then you didn't pay him. Would they have a right -- they would have a clear contract right to the money, but then you disputed over the amount or something like that, would that be arbitrable?

MR. BIOFF: No. And I don't think it is a contract right to the money either, because there is no contract. The right to the money stems from the fact that the severance pay obligation becomes a term and condition of employment after the agreement ends, the employer may not unilaterally change. it doesn't stem from the contract. The terminology "accured right" and "vested right" as far as we are concerned is simply a label. The question is what do you mean by that.

If you mean by an accrued right that the employer and the union may not bargain to eliminate it, then we don't agree there is such a thing as an accrued right, because under the National Labor Relations Act the employer and the union can bargain to eliminate any right that exists under a labor

contract.

Let's take the severance pay case. Let's take our case and let's assume that instead of the employer simply notifying the union on August 31, 1973 that it was going to close the plant and it was not going to pay severance pay, assume instead that the employer had come to the union and said we are contemplating closing the plant, we are in poor financial condition, we do not want to pay severance pay, we want to negotiate with you about the severance pay, and they do negotiate.

Now, one of two things is going to happen. The union agrees to the elimination of the severance pay, and certainly the law doesn't say the employer and the union cannot agree to the elimination of it, and if they do eliminate it and the employer then closes the plant, obviously no severance pay is due. But let's assume that the union does not --

QUESTION: I am not so sure I accept your proposition that they -- could the union on behalf of the employees give the company some money? Could they just say, well, every employee will give you $100 at the end of this term in order to support this failing company?

MR. BIOFF: Could the union do that on behalf of the employees? Assuming that the employees authorized the union to do it, yes.

QUESTION: Well, just under the general right to bargain as exclusive bargaining agent, would they have the right to do that?

MR. BIOFF: On the assumption that the union is not violating its duty of fair representation, yes. I am assuming that the union is authorized to negotiate on behalf of the membership. Certainly, Your Honor -- let's take our severance pay case. There is a severance pay provision in the contract that expired August 27, 1973. Let's assume that instead of what actually occurred here, the plant remained in operation, the parties bargained for a new contract, and the employer said in those negotiations, look, we want to eliminate the severance pay provision from the next contract, and let's further assume that the union agreed to that elimination and they entered into a contract without a severance pay provision, and the employer then closed the plant under the succeeding contract. Surely, no severance pay is due and owing under those facts.

QUESTION: I am not sure I agree.

MR. BIOFF: That would be our position, at least. It would also be our position that even assuming the union did not agree to the elimination of severance pay, the employer nevertheless could bargain to an impasse with the union for the elimination of the severance pay and then eliminate it, and the union's recourse then would be to strike.

The fundamental thing that is at the very core of this law suit, and it is a very important issue, is that the Fourth Circuit has confused two very distinct national labor policies. The first national labor policy is that when you have an existing labor agreement, the parties are encouraged to resolve their controversies and their disputes by peaceful means pursuant to a grievance arbitration procedure, and indeed that is spelled out in the Labor Management Relations Act, in section 203(d).

Incidentally, the language of 203(d) is very interesting because it says, and I quote: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

Now, that is one very important national labor policy, but there is an equally important national labor policy that comes into play when a labor contract expires and during the biatus between labor contracts, and that important labor policy is that the parties are free to bargain collectively and to utilize their respective economic strengths to obtain what they desire in those negotiations.

QUESTION: The union could only strike here because the contract had expired?

MR. BIOFF: That is correct, sir.

QUESTION: Because there was a promise not to strike in return for an agreement to arbitrate?

MR. BIOFF: That's right, sir. During the term of the contract, the union could not have struck. The union gave notice to the employer to terminate the agreement. There was only one reason that the union gave that notice and that was to free them to strike. And so what the Fourth Circuit is really doing here is the Fourth Circuit is saying the employer has a duty to arbitrate after the contract ends, even though the union has the right to strike during that period, and that is my very point. That is why the two national labor policies, which are very distinct, one that exists while the contract is in force, the other that exists during the hiatus between the contracts, is being intermingled or confused by the decision of the Fourth Circuit in this case.

QUESTION: What was the -- what rates of pay and working conditions applied during the period from August 27th to August 31st?

MR. BIOFF: Those terms and conditions that existed under the agreement.

QUESTION: Why?

MR. BIOFF: Why, sir?

QUESTION: Yes.

MR. BIOFF: Because that is what the National Labor--

QUESTION: There was no agreement. There was no agreement covering the -- according to your submission, the rates of pay or the working conditions during that period, after the agreement had been abrogated and terminated.

MR. BIOFF: That's correct, Your Honor. But under the National Labor Relations Act, as interpreted by the National Labor Relations Board, when a labor agreement terminates, the employer may not unilaterally change the terms and conditions of employment that existed under the expired labor contract until either (1) it negotiates with the union and the union agrees to some change; or (2) it negotiates with the union and they reach a bona fide impasse over an issue, at which point the employer may then unilaterally change that condition.

QUESTION: Well, then, why doesn't that principle apply here?

MR. BIOFF: It does.

QUESTION: I mean apply here to affect the severance pay and the arbitration thereof.

MR. BIOFF: Well, the point is the arbitration clause, the Labor Board has said -- and we cite the Hilton Davis case in our brief -- the arbitration clause is not a term and condition of employment.

QUESTION: I see.

MR. BIOFF: But severance pay is. So the union's

remedy here was the Labor Board, not arbitration, and that is wherein the Fourth Citcuit has committed a very serious error.

QUESTION: I see.

QUESTION: Are you conceding that it was a very unfair labor practice not to pay severance then?

MR. BIOFF: No, Judge, I am not. Your Honor, I am not conceding that.

QUESTION: It seems to me that is just exactly what you said.

MR. BIOFF: Well, perhaps I have overstated my position.

QUESTION: Maybe you had batter explain it to me.

MR. BIOFF: I would say, Your Honor, that there are -- the record isn't clear, there could conceivably have been a waiver on the part of the union of any right that it had to bargain over the issue of the elimination of severance pay.

QUESTION: During those two days?

MR. BIOFF: Conceivably such an argument could be made. Absent that kind of an argument, I would say that it is highly likely that an unfair labor practice was committed by the elimination of the severance pay.

QUESTION: Then what is the point of all of this litigation, because surely you are going to have to pay it sooner or later?

MR. BIOFF: Because the union went to the wrong forum,

because the union, instead of going to the Labor Board --

QUESTION: Couldn't you avoid all of this by simply writing them a check? How much money is involved in this case anyway?

MR. BIOFF: I am really not sure, I think around $15,000. But the point is, Your Honor, when the union went to the Federal District Court and then when the union went to the Fourth Circuit, it created some law that is extremely detrimental to the principles of labor law that those of us that practice in the field rely on, and so this case involves not money but principle, a very important one, I might add.

The other points that I would like to make before closing about the Fourth Circuit's decision is that obviously it rewrites the contract, the party's contract. The labor agreement, in the duration clause, says that upon -- after July 21, 1973, that either party, upon seven days written notice, could terminate the agreement. I think it said could terminate this agreement.

Now, this agreement means every provision in the agreement, not some of them, but all of them.

QUESTION: Let's assume that the contract had said expressly in the arbitration clause and this arbitration clause shall apply to the settlement of any rights accrued prior to the expiration of this contract, and that it is perfectly clear that they intended to arbitrate any dispute over an accrued

right, even though the dispute arose after the termination of the contract?

MR. BIOFF: I would have no problem with that.

QUESTION: You would have no problem. Now, isn't it possible to read the Court of Appeals' opinion as just reading the contract that way?

MR. BIOFF: Yes, that is the way they read it.

QUESTION: Yes, and so it is an interpretation, and how should we disagree with their interpretation of a collective bargaining contract? It isn't a great issue of law, is it?

MR. BIOFF: Yes, it is a very great issue of law, because they didn't just --

QUESTION: How they construe some words of the contract?

MR. BIOFF: It wasn't a matter, Your Honor, of simply construing or interpreting, it was a matter of rewriting.

QUESTION: Well, I assume you say no it isn't possible to read their opinion that way, you are saying that they concluded there is a duty to arbitrate on policy grounds or some other reason other than the terms of the contract.

MR. BIOFF: That would be my conclusion and that is the way I would read the decision, because you can't read this contract and conclude that the arbitration agreement did not end on August 27, 1973.

QUESTION: Well, there are some words in the Court of Appeals opinion that indicate that as they understood the contract, it was just a promise to arbitrate even after the contract was over, about a right that was arguably vested, as we might call it, before the contract was over, and the issue was whether it was vested or not. Now, that is a --

MR. BIOFF: Well, I think the way I read the Fourth Circuit's opinion -- and I suppose it can be read different ways by different people -- but the way I read it, it says that the court agrees that the agreement to arbitrate ended when the contract terminated, but the court's rationale is that there are certain rights under a labor agreement which they call accrued rights which flow from the contract and hence even though the agreement to arbitrate has ended, those rights are nevertheless subject to arbitration because they flow from the contract. I don't read the court's opinion as saying --

QUESTION: And they say that this Court did the same thing in Wiley and in the Piano case.

MR. BIOFF: Well, let's take the Piano case.

QUESTION: It is a tough case for you, isn't it?

MR. BIOFF: Wiley is tougher. I don't have too much trouble with the Piano case because in the Piano case, the plant closed, the employees were terminated, the demand to rehire them at the new plant in French Lick, Indiana was made, and the refusal by the employer to agree to the rehiring,

all of those facts occurred before the contract ended. The only thing that occurred afterward was the fact that they didn't rehire people in French Lick. In other words, Your Honor, the Piano case would be analogous to our case --

QUESTION: I know, but the dispute arose at a time when on the face of it the contract had expired, including the agreement to arbitrate.

MR. BIOFF: It depends on, I think --

QUESTION: Isn't that right or not?

MR. BIOFF: Well, I would not put it that way because I would say that the dispute arose in that case before the contract ended.

QUESTION: Well, at the time of the refusal to hire

MR. BIOFF: The contract had ended.

QUESTION: The contract had ended. And it was at that time that arbitration was demanded.

MR. BIOFF: That's correct.

QUESTION: And at that time, on the face of it, there was no duty to arbitrate because the contract had expired.

MR. BIOFF: If you read Piano Workers that way --

QUESTION: It is a tough case.

MR. BIOFF: -- it is a tough case for us, that's correct. I think our case would be analogous to Piano Workers if the facts in our case were that prior to August 27, 1973, that is prior to the ending date of the contract, the company

had closed the plant, the company had terminated the employees, the union had made a demand for severance pay, the contract then ends, the company then refuses to pay the severance pay.

QUESTION: You are just going to pass on Wiley?

MR. BIOFF: Well, Your Honor, Wiley of course can be distinguished in some ways from our situation, again --

QUESTION: A different name?

MR. BIOFF: No. In Wiley, Your Honor, the operative facts, the events over which the dispute arose did occur before the contract ended. Wiley and Inter-Science merged before the agreement ended, some four months before it ended. Wiley refused to honor any of the provisions of the Inter-Science contract before the contract ended. The union filed grievances over all of the provisions of the contract before the contract ended. Wiley refused to process those grievances before the contract ended and the suit to compel arbitration under section 301 occurred before the contract ended. So in that sense, the case is quite different from ours. Where the case gives us trouble is the Court's language about accrued rights that the union relies on very strongly here.

I believe, Your Honor, my time is up.

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

Mr. Rosenberg, would you like to finish this case tonight and get back to wherever it is you are going?

MR. ROSENBERG: I live in Washington, Your Honor.

MR. CHIEF JUSTICE BURGER: Then it is your friend's problem, not yours.

Go ahead.

ORAL ARGUMENT OF RONALD ROSENBERG, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I think that the issues here are very clearly drawn by the questions that have come from the Court. Essentially what we have is a proposition advanced by the petitioner in this case that is extremely detrimental to the national labor policy to have contractual rights vindicated in the contractual forum, that in some way, using the arbitral forum that this contract provided, vioates the national labor policy. That argument is, of course, absurd.

It does not give full credit to this contract between the parties. It does not give full credit to the presumption of arbitrability that this Court has many times declared. It pays no attention whatsoever to the repeated decisions of this Court, most particularly the Wiley and Piano Workers cases, Your Honor, and Wiley is indeed directly on point.

QUESTION: You agree with the language in Wiley as applied to this case that the question of arbitrability is one for the court to decide?

MR. ROSENBERG: Certainly, Your Honor. And just for

the moment, if I may, the Fourth Circuit did discuss the question of the arbitrator's own duty upon remand. That issue is not before this Court. The dissenter in the Fourth Circuit indicated that there was a procedural arbitrability question, and that question is not presented in the cert petition or argued here. The question here is exclusive arbitrability qua none. And I think that Wiley and Piano Workers are directly in point.

The one point in Wiley that is never discussed either in this argument or in the briefs by the petitioner is that element of Wiley that specifically refers to the question about the accrual of rights for the realization thereafter. And in Wiley the law suit was essentially a declaratory judgment brought --

QUESTION: But do you say that any time at least arguably a right has accrued under a labor contract, the arbitration clause will provide the termination of the contract unless there is some specific provision against it?

MR. ROSENBERG: Yes, Your Honor, and that --

QUESTION: And do you think that is Wiley?

MR. ROSENBERG: I think that is Wiley. I think that is the Steel Workers trilogy, I think that is Piano Workers.

QUESTION: Well, I don't know about Steel Workers. What about the rule that in order to force an employer or a union to arbitrate there has to be a promise to arbitrate?

MR. ROSENBERG: Here there is unquestionably a promise to arbitrate.

QUESTION: I know, but where did the -- you have to find that the promise was intended to apply after the termination of the contract in which the promise is included.

MR. ROSENBERG: There is no indication whatsoever that it was not intended to apply to all contractual disputes. We have here --

QUESTION: You are missing my point. My point is where do you get the notion that a month after a contract has expired that a right that is accrued prior to the termination of the contract has to be arbitrated?

MR. ROSENBERG: From the very language of the arbitration clause and from the presumption of arbitrability.

QUESTION: I know, but the contract has expired, those words are now gone.

MR. ROSENBERG: The contract has not expired in its totality. If rights survive under that contract --

QUESTION: If, the question is if there is a right to arbitrate, that is the question.

MR. ROSENBERG: The question, Your Honor, is whether there is a right to severance pay --

QUESTION: Oh, you can do that --

MR. ROSENBERG: -- and if there is a right to severance pay --

QUESTION: -- you can do that in a 301 suit.

MR. ROSENBERG: -- if there is a right to severance pay, a vested right to severance pay, then the proper forum for the resolution of such a dispute is arbitration and not a court.

QUESTION: I understand about your position, but in order to sustain it you have got to show that there was a promise to arbitrate.

MR. ROSENBERG: There was unquestionably a promise to arbitrate in the broadest imaginable language, and my opponent has characterized its agreement to arbitrate as admittedly broad. It contains no exclusion.

QUESTION: But the promise has expired.

MR. ROSENBERG: The promise has expired no more than the right to vested severance pay or vested earned wages. The hypotheticals that were presented to my opponent during his argument made clear that there are obviously rights which are an accrued or earned right nature which survive the normal expiration of the agreement.

QUESTION: I could agree wholly with that without also agreeing that any disputes about those rights have to be arbitrated.

MR. ROSENBERG: But if you look to the arbitration clause, this arbitration clause does not remove any contractual dispute from arbitration. If there is to be a dispute about

that substantive right, it must be determined by an arbitrator and not by a court, otherwise we would have the ludicrous situation in which there would be forum shopping as between courts and arbitrators, depending upon the fortuity of the date of termination. We assert rights that are based upon this contract.

QUESTION: I suppose you would concede to the arbitration clause if the arbitration clause said that this promised arbitration shall not apply after the termination of the contract, then you wouldn't be making this argument?

MR. ROSENBERG: Certainly, Your Honor,

QUESTION: Your client is not in a position to raise much question about fortuity since it was the one that gave notice of termination.

MR. ROSENBERG: But if that had been in the hypothetical situation, Your Honor, if it had occurred some other way, the question still is as to whether or not this arbitration clause is in any way limited.

QUESTION: Well --

MR. ROSENBERG: Justice White has shown that it could have been eliminated. Given the presumption of arbitrability as announced by this Court in the Steel Workers trilogy, there must be arbitration unless it can be said -- and this is the Court's language -- with positive assurance that there is no interpretation possible under which there is to be no

arbitration.

QUESTION: Well, that wasn't in the contextof an expired contract. That was in the context of what issues under a currently administered contract are arbitrable.

MR. ROSENBERG: Well, Your Honor, there is of course the question in Wiley and then in Piano Workers that Justice White pointed out. In Wiley, the rights to be arbitrated were rights subsequent to the expiration of the agreement. Justice Harlan, for a unanimous Court, in Wiley, very specifically dealt with the rights occurring I believe it was after January 1, 1962, which was the expiration date of the contract.

QUESTION: Counsel, were you bound to arbitrate? Suppose when you made the demand for severance pay the employer said let's arbitrate, would you have been bound?

MR. ROSENBERG: Yes.

QUESTION: After the termination of the contract?

MR. ROSENBERG: Yes.

QUESTION: And therefore your strike was in breach of the agreement?

MR. ROSENBERG: There was no strike here, Your Honor, because the plant was closed prior to any strike. But such a strike --

QUESTION: You gave notice, didn't you?

MR. ROSENBERG: We gave notice, but --

QUESTION: You gave notice that you were going to

strike?

MR. ROSENBERG: We gave notice, but I think the facts --

QUESTION: Now, let's assume that you had struck, would it --

MR. ROSENBERG: Subsequently?

QUESTION: No, let's assume that the moment that you gave notice you were going to strike --

MR. ROSENBERG: We struck at a time that we had no notion that the plant was to be closed. The strike that would have occurred in such a circumstance would not have anything to do with severance pay.

QUESTION: But the strike during the termination of the contract would have been forbidden by the contract.

MR. ROSENBERG: A strike for severance pay would have been forbidden by the contract. Here, the --

QUESTION: Well, you have no strike clause.

MR. ROSENBERG: Pardon me?

QUESTION: You had a no strike clause in the contract.

MR. ROSENBERG: Yes, but a no strike clause --

QUESTION: And it was expressed in return for a promise to arbitrate.

MR. ROSENBERG: The no strike clause was in return for a promise to arbitrate contractual issues. What we are dealing with here is a contractual claim. The severance

pay is a contractual claim. Everything stems from the fact that our claim for severance pay sounds in contract, is governed by the contract, and this Court's decisions make clear that where there is such a claim, then necessarily there must be arbitration unless, as Your Honor has pointed out, there is an expressed exclusion.

QUESTION: Well, if you were bound to arbitrate and the arbitration clause was still in existence, you had no business giving notice to strike.

MR. ROSENBERG: We gave that notice prior to the time that the employer indicated any intention of a plant closing. The issue of severance pay was not before anyone because so far as we understood the plant was to remain open forever.

QUESTION: Was there a contract when you gave the notice to strike?

MR. ROSENBERG: There was a contract -- we had given notice that the contract was to be out of effect following the time that we would be -- pardon me, shortly prior to the time that we intended to strike. We never struck. We gave notice in order to strike for new conditions. We had at no point ever indicated an intention or desire to strike for only contractual conditions. We weren't even aware that we had a contractual problem. We had no notice that there was a severance pay question.

QUESTION: You didn't give notice of any intent to

strike over an arbitrable issue, did you?

MR. ROSENBERG: Of course not, because we knew of no arbitrable issue. We were bargaining for prospective conditions. The only time that we dealt with retroactive conditions was after the employer suddenly advised us that the contract -- that he was closing the plant, and sometime subsequent to that denied us the right to severance pay. He in fact paid vacation pay. And some of your questions by Your Honor and by Justice Marshall dealt with the question of vacation pay, and in this Court the petitioner is now saying it had no vacation pay obligation but yet it went right ahead and paid them, and vacation pay is indistinguishable from severance pay, and certainly as regards the arbitrability of a claim for severance pay, a claim that is based upon the contract itself.

QUESTION: Do I understand it, at the time you gave the notice of intention to strike --

MR. ROSENBERG: Right.

QUESTION: -- there was no contractual arbitrable issue to which your promise not to strike applied?

MR. ROSENBERG: Of course not.

QUESTION: That didn't arise until the severance pay issue arose --

MR. ROSENBERG: That did not --

QUESTION: -- and that couldn't arise until the plant was shut down?

MR. ROSENBERG: We said we are going to strike you in order to get a higher wage. The company said, well, we can't afford that, sorry, we are going to close our plant. Then we said a week later, you closed the plant, now pay us the money you owe us under our contract, so that the timing makes absolutely clear that any threatened strike had nothing whatsoever to do with it.

QUESTION: I want to be clear. You answered to my Brother White that at the time you gave the notice you were going to strike, there existed no arbitrable issue, no contractual issue for arbitration, to which the promise not to strike applies.

MR. ROSENBERG: Precisely right, Your Honor.

QUESTION: Am I correct in understanding that the contractual issue with respect to severance pay is simply whether or not the obligation is a vested right or not, is that --

MR. ROSENBERG: Yes, however phrased, whether vested, earned or accrued or whatever it is, whatever the phrasing. And I think the Fourth Circuit stated it very well. The nature of the right of severance pay is something that is determined by the parties, by their intention. The question of who is to determine the parties' intention has been answered repeatedly, and where there is, as here, a broad arbitration clause, that question as to the intent of the parties is to

be answered by the arbitrator. If not, we would have a situation in which the very series of hypotheticals that were presented would all be matters for the already overburdened federal courts. I think Your Honor asked a question about wages.

It is very easy to say yes, we will pay the wages that were due in the final week. But what is there is a dispute over those wages? In that circumstances, would there not then be a federal suit for $25, a difference between a claim of wages for $75 and $100. I think it is clear that beyond any question that that matter is one for arbitration rather than the courts, and that is what we are discussing here, because our claim is contractual in nature. If not resolved by the arbitrator, it must be resolved by the courts. And if to be resolved by the courts, it would inundate an already overburdened federal judiciary.

QUESTION: What do you say about his argument that all you had to do is go to the Labor Board and file an unfair labor practice charge and you would have been paid?

MR. ROSENBERG: We don't go to the Labor Board to enforce contract claims, Your Honor. We have a contract, we wanted him to live up to his contract. The Labor Board is not the place to enforce contractual claims. Section 301 is the place to enforce contractual claims.

QUESTION: He says that by refusing to pay you, they

changed the terms and conditions of the employment unilaterally and thereby committed an unfair labor practice and all you had to do is file a charge and, as I understand him, they desperately search for a defense and then pay you.

MR. ROSENBERG: I doubt if they would have said that if we had filed an unfair labor practice charge. Whether or not they would have said that there was no impasse is something else again. It is very easy in this Court to say that they had not bargained to impasse on the issue. They might have had an entirely different position before the National Labor Relations Board.

We are perfectly prepared to submit our contract claim to the contractually provided method for adjustment. Why should we go to the Labor Board to deal with an issue of entirely different dimension? That would be ludicrous. We have a contract, we want it enforced and we want it enforced in the way that the contract itself provides. We have a contract with an admittedly broad, to use the company's phrase, arbitration clause, a clause that the Court of Appeals referred to as all-encompassing.

So unlike the hypothetical presented by Mr. Justice White, we don't have an arbitration clause that is in any way limited; we rather have one that is as broad as can be. And given that clause and given this Court's decisions saying that there can be no denial of arbitration in such a

circumstance, unless one can say that no interpretation is available, it is clear that the Fourth Circuit's interpretation of this arbitration clause in this contract as permitting arbitration is one that must be given credence.

QUESTION: How long does this arbitration clause survive the termination of the contract?

MR. ROSENBERG: For so long as contract claims can be made, in the same sense that a suit for severance pay in a court of law could be made sometime later or the same way that a suit for a pension might come at sometime substantially subsequent to the normal expiration of the contract. If such a claim regarding pension came up, it would obviously be a contract claim to be contractually resolved, and similarly a claim for severance pay based upon a contract must be contractually resolved, even though it might come up somtime subsequent, significantly subsequent in time.

We don't have that issue here. The demand for arbitration followed immediately upon the notification that the plant was closed and the denial of the severance pay.

I think I have used all but my opponent's rebuttal time.

MR. CHIEF JUSTICE BURGER: No, your opponent has no time.

MR. ROSENBERG: Oh, he has no time and, that being so, we will pass any further time, Your Honor, and end the case

now, unless there are further questions.

MR. CHIEF JUSTICE BURGER: I hear none. Thank you, gentlemen. The case is submitted.

[Whereupon, at 3:00 o'clock p.m., the case in the above-entitled matter was submitted.]

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