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In the

Supreme Court of the United States

Joy A. Farmer,

Petitioner,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 25, et al.,

Defendants.

No. 75-804

Washington, D.C.
November 8, 1976

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v.		No. 75-804
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 25, et al.,	Defendants.	

Washington, D. C.,

Monday, November 8, 1976

The above-entitled matter came on for argument at 11:08 o'clock, 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 PAUL STEVENS, Associate Justice

APPEARANCES:

G. DANA HOBART, ESQ., 3006 Wilshire Boulevard, Suite 200, Los Angeles, California 90010; on behalf of the Petitioner.

LEO GEFFNER, 3053 Wilshire Boulevard, Suite 900, Los Angeles, California 90010; on behalf of the Defendants.

HORTON Y. COHE, ESQ., Deputy Associate General Counsel, Department of Justice, Washington, D.C. 20530; amicus curiae.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 804, Hill against United Brotherhood of Carpenters and Joiners of America, Local 25, and others.

Mr. Hobart, you may proceed whenever you're ready

ORAL ARGUMENT OF G. DANA HOBART, ESQ.,

ON BEHALF OF THE PETITIONER-RESPONDENT.

MR. HOBART: Thank you, your honor.

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

Petitioner is here hoping to reverse an appellate decision of California which took away from Richard T. Hill a judgement amounting to $82,500.

I think it will be helpful to the Court to have perhaps a little more of a sketch with respect to some of the facts that the evidence adduced at trial.

Richard Hill had been a member of Local 25 for a good number of years prior to the lawsuit. He had held many offices, and he had held offices with the Los Angeles District Counsel of Carpenters, with which Local 25 is affiliated.

In 1965 Mr. Hill was elected to a three term as vice president of the office.

Switch for a moment now to Mr. P.G. Daley, known affectionately among the union members as Blackie Daley.

Mr. Daley was the chief business agent of the union. For all practical purposes, he controlled the affairs of the union. He dominated the executive board and he dominated the various governing boards of the union.

When Mr. Hill became a member of the executive board, he, after some period of time, began developing a series of conflicts with Mr. Daley. He opposed Mr. Daley in many of the matters which were presented before the executive board. In retaliation for that conduct, at least at the beginning, Mr. Daley entered upon a series of vituperative acts directed toward Mr. Hill in which, in our complaint below, we alleged created intentionally severe emotional distress.

When the acrimonious situation reached its peak toward the very end of 1966, Mr. Daley threatened Mr. Hill on numerous occasions with words generally to the effect, either you go along with me in the executive board and in votes of this organization and quit criticizing me for such things as misuse of union funds -- which was one of the criticisms -- or I'm going to starve you out of this local. You will not work until you join the crowd.

Mr. Daley promised this and he carried it out. Mr. Hill, on the other hand, was not -- perhaps unfortunately -- but was not intimidated by this conduct, but continued to opposed Mr. Daley.

Now this gives rise to a series of events. Mr. Hill

was the victim of incredible ridicule in front of his peers. He would be walking and standing around the union hall with his friends. Union officials would come up to the friends and tell them, you better not be seen with Mr. Hill or you're going to get the same treatment that Mr. Hill gets. Which was, in a sense, starvation, insults, and so forth.

QUESTION: What you're telling us now, I take it, comes out of the record in the trial of the case in the state court?

MR. HOBART: It does, your honor. Yes, it is in the record. Everything I've said is in the record, and is evidence in the case. Absolutely.

At any rate, the discrimination took many forms, but the form with which we're most concerned here, I believe, is the discrimination in the hiring hall. And the Court should fully appreciate two or three concepts related to the hiring hall.

The hiring hall concept of Local 25 was something that was provided for in the labor-management agreements. The union negotiated with management to have -- and part of that management agreement was to have a hiring hall. Men signed the bottom of the list when they come from unemployment -- or from employment. Signed the bottom of the list and eventually worked their way up.

The list many times totalled 5, 10, 15 even 20 names

depending on how the economic times were.

Two important rules with respect to the hiring hall. One rule is, that if a man worked 16 hours, he is, by virtue of having accepted that employment, no longer eligible to come back to the top of the list even though there may be jobs of months duration. He must start again at the bottom. This was one of the tools that was used to discriminate against Mr. Hill.

The other, in addition to the 16 hour rule, is the refusal rule. Under the local policy of the union, you could refuse two jobs; if they were in the area that you had qualified yourself, two refusals would constitute grounds for removing you to the bottom of the list. But you had the absolute right of qualifying your own self. In other words, if Mr. Hill said, I can't handle steel form work --

QUESTION: But you're not suggesting, are you, that the hiring hall and that this form and that these regulations was illegal under the federal labor laws?

MR. HOBART: Oh, no. The hiring hall was absolutely legal.

QUESTION: -- perfectly legitimate collective bargaining agreement?

MR. HOBART: Absolutely. Absolutely. It was merely the administration of it internally within the union that we complain about.

QUESTION: Well, your adversary says and contends that the more you tie Hill's complaint against Daley into Hill's job discrimination claim, the worse off you are for federal pre-emption purposes. Do you agree with that or not?

MR. HOBART: No, your honor, I do not agree. It goes to a lot of issues which we will undoubtedly cover, and which we have covered in our brief. The --

QUESTION: In other words, I suppose you're saying that because it's done under cover of union authority, somewhat as in civil rights cases, that doesn't mean necessarily federal pre-emption.

MR. HOBART: Absolutely, your honor. The problem is, are we now relegated to ascertaining the intent of Blackie Daley at each step of the way? We say, now it is personal or it's still political. It would be impossible to ascertain that. I recognize they make the contention, but I think it's a meritless contention.

Let me summarize for a moment now what happened in the next year and a half after this conflict developed into a full bloom war between the two people.

January 9th, 1967, Mr. Hill signed the out of work list, at the bottom of the list. He'd come off of a job recently. By March 20th of 1967 he had reached page 2 on the out of work list, which for all purposes is considered high on the list. Very high, as a matter of fact.

Now, on that time, when Mr. Hill had reached this status, high status, where nopefully he would go out and get a job of some duration, he was offered a steel form job. Mr. Hill was a 52 year old man who had a herniated lumbar disc. He was deaf in one ear. He had never qualified himself for steel form work, and the testimony was, it took young men to do that. It was hard work. In fact testimony in the trial was, it was undesirable work which a good carpenter would never seek. He was not qualified for it, and not registered for it. But they offered it to him anyway. They said, here is a steel form job. He said, I can't take that. They marked it as a refusal, even though it was a permissible refusal, not markable.

But what Mr. Daley did at that point was telephone the Department of Employment. And they -- he told the Department of Employment that Mr. Hill was not eligible for his benefits which he was living off of during this period of unemployment, because he had refused a job.

QUESTION: That's unemployment compensation?

MR. HOBART: That's right, your honor. It the state department of employment.

He interfered with it. Well, they had a hearing. It delayed it something three, four, five weeks. He finally got his check because he was not qualified for the work. He did not turn down a legitimate request. But it delayed him

from getting his money on which he was depending for survival.

All right, then, your honor, 11 days later on March 21st, Mr. Daley fabricated -- we've proved in court, we've demonstrated -- he fabricated a dispatch slip that was never handed to Mr. Hill. And with that dispatch slip, he took the out of work list, wrote refused, indicating that Mr. Hill had refused the phony dispatch slip, and now Mr. Hill, he said, you have two refusals. You violated the rules. Mr. Hill goes from page 2 down to the bottom of the list.

Well, this caused Mr. Hill a great deal of anxiety. Mr. Hill was hospitalized three days later. That activity occurred about the 31st of March. On April 2nd, he went to the hospital for 10 days as a destroyed man internally. They checked him. There was nothing organically wrong with Mr. Hill. And a month later, he was back signing the out of work list. On May 1, 1967.

Now he signs, and he also attempts to solicit for himself a job, which is completely permissible under the rules of the union. The evidence is overwhelming in that respect. He goes to a project called the Simpson-Dinwiddie project. And he says to Mr. Simpson, may I have a job? Mr. Simpson says yes, I'll hire you tomorrow. We're sending in a request for four men. You'll be on that list.

And on that night, they telephone in the list to the union. And when Mr. Hill shows up the next morning expecting

to be dispatched, Mr. Daley said, go to -- and your honors know where. And you're not getting a dispatch out of here, I don't care who asked for you. And consequently Mr. Hill did not get the dispatch.

Well, two things occurred as a result of the refusal to honor the legitimate union request. One, Mr. Hill went on disability again. He was totally destroyed by this conduct which had preceeded it, and now which was capped by this.

Additionally, over this one incident --

QUESTION: Was he still an officer of the union?

MR. HOBART: Yes, your honor. He was vice president of the union.

Over this one incident, Mr. Hill filed charges with the National Labor Relations Board, claiming an unfair labor practice.

QUESTION: What was the unfair practice claimed?

MR. HOBART: That the union interfered, your honor, with a -- with an attempt by an employer to hire him. I think it was an 8(b)(2) complaint under the NLRA. And the charge eventually was sustained in the NLRB.

QUESTION: I suppose potentially every instance in which he sought a job and didn't get it because of the -- what you claim to be theunauthorized conduct of your opposition -- would be an unfair labor practice?

MR. HOBART: No, your honor, we don't claim that at all. As a matter of fact --

QUESTION: Well, each time he claimed a job and was refused it unfairly, you -- wouldn't that be arguably an unfair practice?

MR. HOBART: Well, it depends on how you interpret arguably. It depends on what arguably really means, what it meant in the '59 decision in Garmon.

We -- our position is -- we think we have demonstrated in our briefs and, as your honors know full well, this issue has been explored in great detail in this case, and you've explored it before in other cases.

QUESTION: Well, now, suppose in the one instance where you went before the board, suppose you also sued in state court for an intentional infliction of emotional harm. And that's all the case was about. And the state court entertained it, and said yes, we have a cause of action like that here. Do you think you could maintain your action, and at the same time press your unfair labor practice before the board?

MR. HOBART: Your honor, a determination of that issue I do not think is essential. But to answer the question, I think the law is -- if we properly interpret Congressional intent from 1947, that the law is, yes, that action could be maintainable, in spite of the fact that all the complaints

are -- all the claims are, no, it can't, because it would be an unfair labor practice, actually or arguably.

QUESTION: No, but the question is, could you maintain both the unfair labor practice charge and the lawsuit?

QUESTION: You said, yes. Yousaid it could.

MR. HOBART: Yes. I don't know of any rule that would preclude this double path. I'm unaware of any that would say you can't do it. You probably wouldn't do it as a practical matter.

QUESTION: Well, I know, but what about arnon and that line of cases?

MR. HOBART: Well, the problem with Garmon is that --

QUESTION: You're claiming the same conduct violates the 8(b) something and also violates a state law against inflicting emoticnal harm.

MR. HOBART: As your honor is aware, the Garmon case was only considered in the context of union versus employer disputes. There was no union versus member. There was no intra-union dispute in that case. And the language of Garmon clearly indicates that there was no intent that that rule of Garmon, principle of Garmon, was intended to carry into labor or intra-union disputes. And this is where the problem has become. Your honor will recall in Garmon, the definition of arguably, which has become the term that has

caused, or inflicted, so much trouble in this field, the arguable term. It was defined there as the following: when it is clear, or may be fairly assumed -- and Mr. Justice Harlan in his concurring opinion, termed it as fairly debatable. Well, in subsequent decisions around the country have led to an abuse -- a gross abuse -- of the term arguable. Everything is arguable. Lawyers -- if no one else, lawyers can make an argument -- I can make an argument, for example, that the decision -- the judgement below affects the Washington Redskins. It's arguable that it kept somebody a couple of dollars out of his pocket so he couldn't take the airplane back to Washington, D. C., to buy the ticket. And arguably he stayed home because of that. Patently absurd, of course, but arguable.

QUESTION: Isn't the case Mr. Justice White put to you the Borden case?

MR. HOBART: No, your honor, he said the Garmon case.

QUESTION: I know. But aren't the facts he posited --

MR. HOBART: Yes.

QUESTION: -- those that were present in Borden?

MR. HOBART: That's correct. The -- what happened was, in Borden eventually the arguable concept -- this was, what, 1963 -- four years later. The arguable concept had been spilled over into the relations of members of unions in their internal conduct. It was never a part of the

Congressional intent that this kind of conduct be governed by the NRLA -- the Labor-Management Relations Act to begin with.

Yes, Borden does take the position. They say, the one incident which is similar to the one incident talked about here, but in our situation that one incident is merely one of a number of incidents. It's an isolated incident. It's been leaped upon by the other interested parties as to saying, that's the crux of the case. They come to Gonzales, for example.

So in Borden, this arguable context slopped over. It started -- it was no applied to relations that to some extent affected intra-union --

QUESTION: Was it critical to your cause of action in the state court that you prove that this conduct was not only with the intent of inflicting emotional pain and suffering, but that it was otherwise illegal under some law?

MR. HOBART: Well, your honor, it violated the general laws for California only in that the intentional infliction of severe emotional distress is a tort in California.

QUESTION: I mean, regardless of whether the conduct is otherwise legal or illegal?

MR. HOBART: Under California law?

QUESTION: Under any law.

MR. HOBART: Well, under federal law, yes.

QUESTION: Well, I know. But does California require you to prove that the conduct was illegal -- otherwise illegal under California law?

MR. HOBART: That was all. No, that was all we had to establish. Was a tort inflicted?

QUESTION: Well, I know. But what are the elements of the tort?

MR. HOBART: The conduct which was levied at Mr. Hill had to be such outrageous, egregious conduct that was beyond the bounds of what ordinary men in society should have to put up with. It was also defined in the instructions to the jury that it did not include the trivialities of life, and the regular, ordinary problems with which we're faced from time to time. But it had to be severe, and it had to be intentionally inflicted. And it had to be sustained.

QUESTION: But it didn't have to be illegal under California law?

MR. HOBART: No, it did not have to be. And otherwise it was not, other than that it violates the general concept of tort law.

QUESTION: And that is -- is a tort under California common law.

MR. HOBART: Yes, your honor, it certainly is.

QUESTION: Or statute. And I suppose there are, or might be occasions, where there's an affirmative defense, such

as a reference of a prospective employee, or something like that.

MR. HOBART: Yes. No such affirmative defense was presented in this case.

QUESTION: No.

MR. HOBART: But conceivably you could come up with something in that. But it was a general law, and not --

QUESTION: Well, under California law -- suppose the hiring hall had been administered totally legally in the sense that he -- your client got every job he should have, and didn't get every job -- any job that he should not have. But in the process of administering it that way, there was outrageous conduct that caused him emotional harm. Now you could recover in California?

MR. HOBART: Absolutely. He would have a right to a cause of action. If you took all of the job discrimination of this case and you set it aside, and you took simply the personal relationships that went on between these two men -- I say between, it was a give and take, not both ways.

QUESTION: Oh, you think it's more like an intentional and egregious libel, then?

MR. HOBART: Yes, I do think it would be similar to an intentious and egregious libel. Something like the Linn case, for example, would be along those categories where they --

QUESTION: Does the unfair labor practice provide an adequate remedy for this?

MR. HOBART: Your honor, it does not. You see, that's the problem. That really is the problem. If you assume that Congress intended at the beginning that these internal disputes were to be pre-empted through the provisions of the Labor-Management Relations Act, and were all relegated to the NLRB, you would make absolutely no progress in controlling the type of behavior that we have. I don't think there's very many union people, union leaders, who are tyrants. But I know there are some.

QUESTION: The difficulty is that an awful lot of your evidence, or at least a lot of your suspicions in this case are that the hiring hall was illegally administered.

MR. HOBART: Not illegally administered, discriminatorily administered.

QUESTION: Well, in ways that would apparently give you some basis for going before the National Labor Relations Board -- or the National Labor Practices --

MR. HOBART: Well, only on the one incident. You see, Mr. Hill --

QUESTION: I know. You only went there once. But it sounds to me like you should have gone there many other times on the same thing.

MR. HOBART: That's an interesting argument, and

it is raised by the defense in the case. But the problem is this, much of the conduct -- for example, I mentioned to you the fabrication of the dispatch slip -- that was not even known until we had rested our case. I was sitting at the bench, I was looking through all these papers, and I noticed, my God, this thing has a wrong number on it, the wrong starting number. I realized then what had happened. Because Mr. Hill had told me, he said, well, I don't know anything about that.

QUESTION: Well, Mr. Hobart, what did Mr. Daley do outside of his union activities?

MR. HOBART: Well, they never encountered each other, your honor, basically, outside of either the union or in halls and places --

QUESTION: Did he do anything that wasn't directly connected with the activities of the union?

MR. HOBART: Oh, well, everything he did -- most everything, it was not directly connected to the activities of the union, at least the legitimate activities of the union.

QUESTION: Like what?

MR. HOBART: Well, when,you call a man a son of a bitch, it seems to me that's not related to union activities.

QUESTION: Have you ever been to a union meeting?

MR. HOBART: I have, your honor. I have been for years a union member. And I represent labor unions in Los

Angeles.

QUESTION: Have you ever heard that phrase?

MR. HOBART: I beg your pardon?

QUESTION: Have you ever heard that phrase?

MR. HOBART: I've heard that phrase. But I know, your honor, that there are two ways to present the phrase. And as a matter of fact --

QUESTION: All I'm trying to get to is, it just appears to me that this began as a union matter. It ended as a union matter. And everything in between was a union matter.

MR. HOBART: That's an arguable position that I don't take any great quarrel with, your honor. The question is, so what? Isn't the question then, is, it is controlled by the Labor-Management Relations Act, or isn't it? You see, you have to go back to the LMRA to determine the intent.

QUESTION: You say, when conduct of this kind takes place under color of union authority -- under color of union authority -- and the powers are abused, there is no remedy under the labor act, and the man is left to his remedies -- the traditional remedies -- under state law.

MR. HOBART: The question states the truth, your honor. Mr. Hill's conduct regarding the NLRB incident occurred in May of 1967. The lawsuit was filed in April of 1969, two years later. So in spite of the pendency of this

case and the decision of the NLRB, it did nothing to deter Mr. Daley. It didn't interfere with his hostile conduct at all.

The problem is, Mr. Daley knows that the most the Board is going to do is say, cease and desist, Mr. Daley. Mr. Daley is not a gentleman. He was a tyrant. And he was not dissauded by the cease and desist order, which --

QUESTION: Didn't they win 2,500 bucks?

MR. HOBART: The $2,500 was for loss of earnings, and loss of earnings only. That's on of the important points of the case, your honor. In the briefs of the defense, they made a point by saying that this case is Borden because of the one incident. And then they went on to say that we tried some boots strap argument by having the jury instructed on the fact that Mr. Hill had received a $2,500 award.

Now, the fact of the matter is this: that jury did not know that there was such an award until opposing counsel, Mr. Geffner -- until Mr. Geffner gave the jury that information in the form of a question. On the reporter's transcript at page 2684, Mr. Geffner asked the following question to Mr. Hill: didn't you receive a payment from Local 25 of $2,517.27? To which Mr. Hill responded, yes.

Mr. Geffner, then, introduced into evidence a copy of the check itself. This was a tactical move on their part to try to get that jury to think that, well, Mr. Hill's

already been compensated anyway. You don't have to worry about giving him anymore.

And I even approached the bench and, in a bench conference, said, your honor, I was under the impression that this was improper. Because I thought it was prejudicial error to have that kind of information before the jury. And so when I asked for that jury instruction, it was to tell that jury that they were not going to be giving Mr. Hill something that he had already had. It was to clarify the situation of the problem that they had created.

And in their briefs, they argue like this, your honor: to nail this point home, and to get the full benefit of the Board's finding, petitioner requested and obtained an instruction informing the jury that Hill had filed a charge with the Board, that he received an award covering the wages that he would have earned, and so forth. That was to prevent error, to prevent injustice. It was not our attempt to capitalize on that, as has been pointed out.

Your honor, one important thing that we haven't covered that we should --

QUESTION: Would you have -- could you secure all the remedy you might need if you brought a suit for unfair representation, or not?

MR. HOBART: It's arguable whether you could or not, because this court has not made pronouncements on

certain of the issues that would be involved in a violation of the duty of fair representation. Yes, the case could have been presented. And basically, the facts would have been identical, under that theory. The lower court --

QUESTION: You said that suits for fair representation are not pre-empted, are they?

MR. HOBART: No, they're not.

QUESTION: Can you bring them in state court as well as federal court?

MR. HOBART: Yes, your honor, you can.

QUESTION: Is there any reason why the Superior Court of Los Angeles County, wherever this was, couldn't then have assumed jurisdiction of this case in an unfair representation case?

MR. HOBART: They could have within the confines of what the unfair representation cases around the country and federal law tells.

QUESTION: And they, in this instance, might have said, part of your damages are pain and suffering?

MR. HOBART: They could have said that, that's true.

QUESTION: It may not have stood up in the long run, but --

MR. HOBART: It may not have stood up in the long run. And under tort law, it does stand up. They may have said, there's no punitive damages, because there's an

argument that there's not, although I don't think it's a convincing argument. But they could have taken that position. And we would not have had the punitive damages in the case.

The point I wanted to get was Congressional intent. We start with the assumption, unfortunately, that Congress intended under the Labor-Management Relations Act to include intra-union disputes. I suggest to the Court that if we went back and examined it, that's not the case. This Court has on several occasions -- particularly following the enactment of the Act -- has searched for Congressional intent. And to summarize or paraphrase some of the positions of the Court, that in 1953 in Laburnum this Court said, by the LMRA Congress intended to increase the availability of state tort law. In 1954 in Russell the Court said that Congress did not deprive the Court of jurisdiction over the types of conduct involved therein. Gonzales in '58, Congress did not intend to pre-empt the protection of union members from arbitrary conduct. And then, in Garmon, as the Court knows --

QUESTION: Who are the defendants in this suit? Who were the defendants in this suit?

MR. HOBART: There were several defendants, your honor. There were three business agents, two of whom were let out of the case by the jury; one of whom, Mr. Daley, was found liable.

QUESTION: Does the judgement run against him personally?

MR. HOBART: It runs against him personally. Which is a good point --

QUESTION: Against the union also?

MR. HOBART: Against the local also, and against the district counsel.

QUESTION: Now, your unfair representation suit probably wouldn't be good against an individual, would it?

MR. HOBART: No, I don't think so. I think under the cases that that would not be an action against him. The suit went against all three of them.

In the search for Congressional intent, this Court -- well, even in Linn, the Court stated that they had not received much Congressional guidance on the issue of whether these torts -- tortious conduct is involved was within the Act or without the Act. And even in Linn where the conduct was directed to the heart of the LMRA, organizational activity was directed to the heart, this Court said, we're fashioning an exception. They added malice to the tortious exception that had been previously cut out in Garmon.

So we go two ways on this case. We suggest to you that we are within the exceptions of Garmon, that this is interest which is deeply rooted within the State of California,

or that it is of such peripheral concern to the LMRA that it should not be pre-empted to the National Labor Relations Board. Both of those exceptions are perfectly applicable if you look at it in a broad way. If you say, well, we're not going to restrict the right of redress. We're going to look at it liberally to produce justice to an aggrieved individual.

So this is tortious conduct. This is not the kind of conduct that should be pre-empted; like Linn, for example, was not pre-empted.

QUESTION: Mr. Hobart, let me address you once more. On the back pay award that the Labor Board did award your client, was that -- did that award just run against the local union, or did that run against the international?

MR. HOBART: Just against the local, your honor.

QUESTION: There was, of course, no remedy at all against Blackie individually?

MR. HOBART: No, your honor. Mr. Daley -- some of Mr. Daley's testimony that I took from that transcript impeached him in his trial testimony to show what -- how he would say both sides of an issue in order to gain advantage.

QUESTION: Mr. Hobart?

MR. HOBART: Yes, sir.

QUESTION: Before you go on, earlier in your argument, as I understood what you said responding to a

question from Mr. Justice White, your answer was, that even if there had been no discrimination in the hiring hall that the evidence in this case would support a tort action under California law.

MR. HOBART: Yes, your honor.

QUESTION Now, if that is true, and if the evidence really would sustain the validity of the statements you've made, why do you spend so much time arguing to us subtle distinctions in cases that do involve the NLRA? If you have a pure tort action, why don't you emphasize it? That's the essence of my question.

MR. HOBART: And the answer your honor, is, that the essence of the tort does not lie in the peripheral conduct. The essence in the tort --

QUESTION: May I interrupt you right there?

I think you have said earlier, and certainly the law abundantly supports the view, that there may be a personal tort without physical wrongdoing if verbal acts, verbal conduct, verbal abuse reaches a certain level wholly without regard to any hiring hall, wouldn't you have a tort under California law?

MR. HOBART: Yes, your honor, you would. But the point that I want to make is this: that tort would not have included --

QUESTION: Some of the elements you rely on, I

understand.

MR. HOBART: -- the starvation of the man. He worked 133 hours in a year and a half, because they constantly like a yo-yo rotated him up and down that out of work list. Now we can come in and say, Mr. Hill could say, well, I'm aggrieved because I'm called a son of a bitch. He could say that. But that's not the jist of his action. This man was starved to death for a year and a half. And that's why, your honor, we suggest -- we've given this issue some thought. We have a suggestion that is a better application of the law. We feel that the law has led to triumphs of procedure over substance. It's denied remedies from time to time to people who have been injured because earlier decisions of the Court can't be interpreted apparently uniformly around the country.

Mr. Kane and I have suggested and offered to the Court the alternative of the following: we've alluded to it to some extent, but we've enlarged upon it for this argument.

First, as a test: determine if the state law attempts to regulate labor relations as such. And if you decide that it does, pre-empt it. If you decide that it does not, ask the next question.

Does the application of the state law have a substantial practical effect on the federal regulatory scheme?

And your honor, if you answer that question in the affirmative, pre-empt it.

But if you say no, that it doesn't, then let the state law of general applicability be applied, because that is the only way there will be effective redress for the injury.

QUESTION: Are you suggesting that that test is easy to apply?

MR. HOBART: I'm suggesting, your honor, that it is probably easier than the arguably test and the crux test.

QUESTION: How about substantial practical effect on labor affairs, the second prong of your test? That sounds to me like it could bristle with difficulties.

MR. HOBART: Well, you probably could. That's why we included the word practical. It was to get away from the technical arguments of a lawyer arguing arguably. That's been the problem we've been faced with. And that's the problem the lower courts have been faced with. Everything is arguable. Now, maybe substantial is a word that would have some debate, and perhaps practical.

But that really is the test, isn't it, to determine whether this does or doesn't interfere with federal policy? The federal labor scheme. How could allowing California to redress this injury to Mr. Hill affect the federal regulatory

scheme? It can't. They say, well, large damages might be awarded. But as this Court said in Linn and elsewhere, that's what we have trial judges for. That's what you have appellate judges for, to determine whether the jury went haywire on a given issue. Were not going to destroy the labor movement. As the Court in Linn said, labor has grown up. Why should labor be execpt? Charitable organizations aren't exempt. Small businesses aren't exempt. Who is exempt? No one except labor organizations, if you apply the crux and arguable test.

QUESTION: Now, in your brief, you suggested that the test, or at least a test better than the Garner and Garmon test, is the one suggested by Morton; and is the one you're now orally presenting --

MR. HOBART: Yes, your honor.

QUESTION: -- do you think equivalent to that?

MR. HOBART: I think it is.

QUESTION: Or is it a third test?

MR. HOBART: No, it embellishes upon it. But that's the source of the idea, is the Morton case.

QUESTION. But what you're now telling us orally is a little different than the Morton test? Isn't it?

MR. HOBART: Yes, it is a little bit different. Yes, I thought I had made that point clear. I did not mean to say I was re-iterating what was in the brief. We have

attempted to elaborate onit. Because we can see problems that the Court is going to see. We're trying to fashion something that will be of help to the Court, and help to the lower courts, and increase justice.

Keep in mind, the one problem with the NLRB is that if a matter is arguably an unfair labor practice, think of that vast no man's land that exists. And no case in the world could illustrate it better than your decision in Lockridge in 1971, I believe. You recall in Lockridge the Greyhound Bus driver had been terminated from his employment at the behest of the union because he was behind in his dues.

Mr. Lockridge filed a lawsuit, claimed various things, and got a judgement. When it came up to this Court, and this Court said, no, that's arguably pre-empted. And the judgement was taken from him.

Mr. Lockridge's colleague, Elmer Day, and this is a footnote in that case, Elmer Day says, I'm not going to file with the Court first. I know you're supposed to go to the NLRB. And he filed with the NLRB. But they declined to accept the case. And so he said, now I can go tothe court. So he went to the court. He got a judgement. Because he had been aggrieved. And the Oregon Court took it away, claimingthat it was arguably pre-empted.

QUESTION: And before the board, if general counsel

declines to take the complaint, that's the end of it, isn't it?

MR. HOBART: That's the end of it. So you see you have two men who competent juries, properly charged, took the position that they had been aggrieved. And they gave damages to both of them. They went different routes -- the only routes available to them under the law. They went both routes, and in both routes, they ended up with nothing.

QUESTION: Well, if that's what Congress intended, they should have ended up with nothing.

MR. HOBART: Of course, I couldn't agree more. But that's not what Congress intended, your honor.

QUESTION: Well, you're going against a fair number of cases that said it did intend that.

MR. HOBART: Your honor, I cited, for example, Laburnam, Linn, Garmon --

QUESTION: Yes, but those were in the pre-Garmon era.

QUESTION: Not Linn.

QUESTION: Linn wasn't. But Laburnam and Lockridge were.

MR. HOBART: Linn is not -- even in Lockridge, your honor, this Court said that they couldn't find any express direction from Garmon -- from Congress. And -- how about additional things? The fact that the LMRDA was passed in

1959, the Landrum-Griffin Act, had savings clauses. It said, we're not going to take away any of the rights that union men have in their disputes or whatever. We're not going to take away any rights that they have in state or federal law. When they passed that Act, they gave them certain other rights under that Act, as we've pointed out in that brief.

Now, what did Congress think the law was at that point? This shows you Congressional intent, I believe. At that point, when Garmon was decided -- I think like three days before Congress enacted the Landrum-Griffin bill, Congress knew that the principle of Garmon was limited to union-management disputes. They had no reason to think that Gonzales was going to subsequently be emasculated. They thought that Gonzales was the law. They also thought that Laburnum was the law and Russell was the law. That's what the position was of Congress at that time. They said, we don't want to do anything to interfere with those rights. And so when later Courts began to assume that Congress intended, under the LMRA, that any -- this internal union dispute is pre-empted, I respectfully submit, your honor, it's an erroneous conclusion based upon Congressional intent. This Court has never made that conclusion. The best that this Court has never done to that side of theissue is to say, we can't find any evidence of Congressional intent

regarding that.

Your honor, if I may, if there are questions, I will answer them. I'd like to reserve, if I may, whatever remaining time I might have for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Hobart.

MR. HOBART: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Geffner.

ORAL ARGUMENT OF LEO GEFFNER, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. GEFFNER: Mr. Chief Justice, if it please the Court:

I'd like to start out by apprising the Court that the basis of this lawsuit that was filed by Mr. Hill and that was tried in the state court before a jury was pure and simple a hiring hall case.

The other element --

QUESTION: Would you admit there were a few embellishments added?

MR. GEFFNER: Yes, I would, your honor. There were some verbal arguments. Mr. Daley and Mr. Hill were political allies, and they ran against each other on different slates for union office. It turned out both of them were defeated in 1960 for different offices. They were poker playing buddies. They had lots of arguments. But from the beginning motions were made before the

trial judge, from the very beginning of the case, from the beginning of the opening argument of counsel, to the introduction of the first evidence, the first witness and the first exhibit,that the testimony and evidence should be limited to exchanges that would constitute the tort in California of intentional infliction of mental distress, and not have this jury try a hiring hall case. And that the dispatching procedures, and the rules and regulations of the union, and how it was governed, and how it was administered and whether there was discriminatory or non-discriminatory, not only against Mr. Hill, but other carpenters that were involved, should be excluded from the jury.

The trial court denied these motions continuously throughout the trial. And over the objections of myself, Mr. Hobart introduced not only the complete hiring hall system, but also introduced originally the fact that Mr. Hill had gone to the National Labor Relations Board on one very large construction project in Los Angeles, the Dinwiddie-Gibpson job, and that he had obtained a request from the superintendent, but that Mr. Daley had not honored that request and had not referred him to that job.

QUESTION: But was it necessary for the jury — there was a jury, is that right?

MR. GEFFNER: Yes, there was.

QUESTION: Was it necessary for the jury, in

bringing in a verdict, find that any actions of the union or of its representatives were illegal under any law? Or that -- was it necessary to find that the hiring hall had been improperly administered?

MR. GEFFNER: Your honor, it's difficult to know exactly what the jury would have done if there had been proper instructions and if the case had been tried under the common law tort.

QUESTION: I know, but how about the instructions? Did the instructions require it to find, one way or another, that the union had maladministered the hiring hall?

MR. GEFFNER: Yes, there was a specific instruction that was given by the trial court.

QUESTION: Where is that, do you know?

MR. GEFFNER: Yes, your honor. That is -- in our appendix, it's page 50-61.

QUESTION: Which volume is that?

MR. GEFFNER: That's volume I.

QUESTION: Page 61, you say?

MR. GEFFNER: Yes. No, I'm sorry, it's page 61, your honor. The instructions requested by the defendants were -- are at page 60 and 61, where we requested the trial judge to instruct the jury, they're not to try the hiring hall procedure.

QUESTION: Yes, but where is the instruction --

MR. GEFFNER: 41.

QUESTION: The form of these instructions just says, requested instruction. It does not, on its face, indicate whether the judge gave it or not. Does the fact that it's in here indicate that the judge gave it, or just that it was requested?

MR. GEFFNER: The defendants requested instruction on page 60 and 61? Or page 41?

QUESTION: We're back to 41.

MR. GEFFNER: 41 was the actual instruction given, your honor. That is the -- special instruction requested by the plaintiff, and given by the trial judge.

QUESTION: Where is the instruction that says that you thought the jury must find that the union had not administered the hiring hall in accordance with the applicable law?

MR. GEFFNER: Well, your honor, there's no such instruction that is that explicit. What the instruction is, on page 41, is informing the jury that there had been a complaint with the National Labor Relations Board involving a job dispatch in the Dinwiddie-Simpson job --

QUESTION: Well, that's hardly responsive to my question. So that your answer to my question is that, no, there was no instruction that required the union -- the jury to find that the hiring hall had been improperly

administered?

MR. GEFFNER: Well, except for that special instruction on page 41. But your honor, the entire trial encompassed the hiring hall procedures of Local 25.

QUESTION: But there was nothing that would have required the jury to find what the Board found in this one incident?

MR. GEFFNER: Well, no, except that the plaintiff introduced the testimony that was held beforer the National Labor Relations Board, the deposition of the superintendent on the Dinwiddie-Simpson job.

QUESTION: Well, that might be very relevant to a state court action.

MR. GEFFNER: Well, your honor, if that's the case, then Borden and Perko would not be applicable. And it seems to us, your honor, that the way this case was tried, and the fact that it was a hiring hall dispatching procedure trial brings it clearly within 8(b)(2) of the National Labor Relations Act --

QUESTION: Do you think Linn is still a good law?

MR. GEFFNER: Yes, I do, your honor.

QUESTION: Now, dont you suppose in a case like that it might be very relevant to show what kind of damage you might have received from a gross libel to introduce what happened to you in seeking jobs?

MR. GEFFNER: Your honor, the basic distinction with Linn is that the Court first has to make a finding that the definition in Linn did not constitute an unfair labor practice as such, and was not in the intent or the compass of Congress to regulate that activity. That defamation as far as the Labor Board was concerned, had to be coercive as far as it affected organizing or a union election campaign.

After the Court made that determination, that it was not within the scope of federal regulation, or center -- or the crux of central -- of federal regulation. Then the Court said, a defamation within a labor dispute would be peripheral. But then the Court went further -- this Court went further and still didn't apply the state common law of defamation. This Court then applied a new federal standard of defamation, and held that the state court, even though not pre-empted, had to make findings of intentional acts as to malice, as to injury, which is not the state tort of defamation, and went on to caution the trial court that on punitive damages that there has to be a very careful regulation because heavy punitive damages could injure unions, small unions and small employers, so that it cuts both ways.

QUESTION: What if the California court in this case had conformed to all those Linn safeguards? That is, instructed that intent was required, then had followed

the cautionary approach to punitive damages? Wouldn't there be a remarkable similarity between this case and Linn?

MR. GEFFNER: No, because this case, the entire case, characterization of the case must be that it was within the full scope of federal regulation. This was the time of the hiring hall.

QUESTION: Well, no, now wait a minute, wait a minute, counsel. Some of the acts proved, as I understand -- one of them was a battery, was it not?

MR. GEFFNER: No. There was no instructions given to any battery.

QUESTION: No, I don't mean about instructions. But wasn't there evidence that there was a battery in the case?

MR. GEFFNER: Well, there was --

QUESTION: I mean a tort of battery, not an automobile.

MR. GEFFNER: Instruction, your honor.

QUESTION: No, of battery.

MR. GEFFNER: The question was, was there instruction on the battery?

QUESTION: No, was there evidence pending to show a battery?

MR. GEFFNER: There was one instance of Mr. Daley and Mr. Hill pushing each other in front of a door. And

they made a suggestion, let's go outside and fight. And they pick up that invitation.

QUESTION: Well, supposing the complaint had simply sought damages for the battery, and not gone into anything else in the Superior Court of Los Angeles County. Would you contend that it was pre-empted?

MR. GEFFNER: No, your honor. Assault and battery, which is the nature of violence under Laburnum, is a matter for state regulation. It's not in the compass of the full scope of federal regulation having to do with employment discrimination. We have assault and battery suits all the time involving union people and member s and non-members.

QUESTION: If that's the case, why isn't your proper remedy in the Superior Court to ask that evidence be stricken that goes outside of that, and on appeal, to ask that any part of the recovery that goes beyond that, if that were all -- if you were right in conceding only that was recoverable -- be taken away, rather than saying there's complete pre-emption.

MR. GEFFNER: Well, your honor, that request was made before the trial court, that the evidence regarding employment discrimination should not be presented to the jury, that it should be limited to items such as you referred to of a possible type of a shuffling or a battering or abuse and so forth, and the jury could make findings on those elements alone, which would be the common law tort.

QUESTION: Is it your theory, Mr. Geffner --

MR. HOBART: But, the trial court did not do that.

QUESTION: Is it your theory that anything done by a business agent under color of the authority of the union is pre-empted?

MR. HOBART: No, your honor. This was a pure and simple common law tort of assault -- or battery. It was done by a union official. The normal California common law would apply. And also the tort of intentional infliction of mental distress would apply, as long as it didn't involve employment discrimination, such as this case which tried the hiring hall of Local 25. This is within the expertise of the National Labor Relations Board.

QUESTION: Let's take a hypothetical that goes beyond this somewhat. That the evidence in a case to a state court and jury would show that over a period of years the business agent and others in the union hierarchy systematically conspired and succeeded in keeping a member of the union from employment and from benefits of union membership. You say that that being done under color of the authority of the union, that's pre-empted, and his only remedy is an unfair labor practice claim?

MR. HOBART: Well, your honor, that presumes that there's a finding that there was discrimination, which is the heart of the case, because each of these items of conduct

complained of by Mr. Hill, outside of the verbal discussions and that area, involved job dispatching. Now, either that conduct was clearly prohibited by the Act under 8(c)(2), under Radio Officers case, and the Labor Board can then provide a full remedy, including orders, back pay, even imposition of a trusteeship on the local union's hiring hall; or, if it's not, then the union's conduct was clearly permitted as a valid hiring hall which is allowed by Congress, as this Court has held in Teamsters 357 and by Congress in enacting 8(f). When Congress enacted 8(f) in 1959, they said that a non-discriminatory hiring hall by a building construction trades union was lawful , and could not constitute the basis of an unfair labor practice.

QUESTION: Then what you're necessarily saying is, that the conduct of Daley shown by this record in the state courts is permissible conduct.

MR. MORRIS: Well, the jury -- the jury, after reading all of this mountain of evidence on how this hiring hall operates as against virtually hundreds of carpenters, concluded that it was discriminatory, gave Mr. Hill $7,500 in compensatory damages, and then punished the union by giving 175,000 punitive damages.

Now, the NLRB could very well have found that, say, out of these dozen or so incidents that six were prohibited, were discriminatory, and grant the relief, and could have

found that six were permitted and protected activity by the union in operating a non-discriminatory hiring hall. The jury, in effect, took away this right of the NLRB, which is the body that Congress gave this responsibility to to determine whether there is discriminatory operation of a hiring hall.

The jury made this determination, which Congress did not intend a jury to make.

QUESTION: Mr. Geffner, does the NLRA provide for mental pain and anguish?

MR. GEFFNER: Well, your honor, I don't know if the Board's ever really ruled in that area where it's been taken on appeal. They normally take the position --

QUESTION: That's what worries me. This case is a tort for specific common law rights. And I assume that that is not covered by NLRA.

MR. GEFFNER: Well, it's true, your honor. But also in Garmon there was a finding on mental distress, that is, in Borden, rather.

QUESTION: Borden.

MR. GEFFNER: And the cases are filled with situations where the claim of mental distress. Now, if you separate employment discrimination fromthe other conduct which would constitute the part of the tort, Congress provides the remedy here, your honor.

QUESTION: Wouldn't you agree that nothing in the NLRA stops union people from cursing? Or you'll have to change a whole lot of unions.

MR. GEFFNER: Your honor, I would say that is a daily occurrence in the operation of any union function, including a hiring hall -- cursing. And if that was the basis of Mr. Hill's case, and we didn't get involved in the hiring procedures --

QUESTION: No, the basis is -- they usually talk about nights you starved him. You deprived him of employment.

MR. GEFFNER: Well, your honor --

QUESTION: I mean Daley did.

MR. GEFFNER: Yes. Well, that was the finding of the jury, but the Labor Board may have found a totally opposite result. And they are the expert body to make this determination.

QUESTION: But the Labor Board had found, in that kind of discrimination, they were fully equipped to order back pay, to compensate for that injury, weren't they?

MR. GEFFNER: Yes. And much further than that, Justice Stewart, as the NLRB points out in their amicus brief, their remedies are very broad. They can impose a virtual trusteeship on a local union's hiring hall, which they have done.

QUESTION: Well, then, that would have been preventive, assume hypothetically, from future discrimination

to this plaintiff.

MR. GEFFNER: Right, except Mr. Hill could have gone in from the first day. Mr. Hobart claims these two rules of 16 hours and going to the bottom of the list. He could have gone the first day to the Labor Board, and each instance have filed a charge.

MR. CHIEF JUSTICE BURGER: We'll resume there at 1:00 o'clock, counsel.

[Whereupon, the Court recessed at 12:00 o'clock p.m., to reconvene at 1:00 o'clock, p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Geffner, you may resume your argument.

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

I'd like to start this part of the argument by against stressing that the jury under its instructions gave a general verdict, after this tremendous volume of evidence regarding the operation of the hiring hall, and so therefore we canassume that the jury made some findings regarding the administration of Local 25's hiring hall, whether it was discriminatory or non-discriminatory.

QUESTION: Well, why may we assume that?

MR. GEFFNER: Well, because we asked -- for two reasons, Mr. Justice White. One is that a quick review of the record, without getting into detail in the case, indicated

that the bulk of the case, the mountain of evidence, went to the hiring hall procedures. Not only is it Mr. Hill, but as to the entire operation regarding virtually hundreds and hundreds of carpenters that were utilizing the hiring hall.

Secondly, we had requested throughout the trial, and also requested specific instructions which are contained in Volume I of the Appendix, at pages 60 and 61, asking the judge to give an instruction that they were not to make findings regarding whether the hiring hall was discriminatory or not, that that was a matter not within their expertise province; and to limit their findings on what would have been the non-hiring hall incidents, that would not involve job discrimination.

QUESTION: Well, let's assume the instruction had been given. Would you be here?

MR. GEFFNER: Would I be here?

87 QUESTION: Yes. Let's assume there had been some special verdicts required, and some affirmation by the jury that they had made no such findings.

MR. GEFFNER: I think that would again turn, Justice White, on what was the actual crux of the case itself.

QUESTION: How in the world do you go about finding out what was the crux of the case?

MR. GEFFNER: Well, I think you have to go in terms

of what is contained as far as the Board is concerned as implying 8(a)(3) involving employer discrimination, and 8(b)(2), which would involve union discrimination. And I think there that the Radio Operators case made it very clear that the Board is charged with the responsibility as to whether there is union discrimination of employment, whether it's a union member, a non-union member, a good member, or a bad member.

Therefore, if the Board has the primary responsibility, under 8(c)(2), and particularly with some of the guidelines set out by Congress in 1959 in 8(f) to determine the operation of a hiring hall, then we'd have to look, I believe, to whether the jury infringed on that function of the Board so as to create a conflict as to the jury finding that there was prohibited activities, where the Board may or may not have so found.

QUESTION: Suppose for a moment that it did. Take an unfair competition case that's filed in the Superior Court of Los Angeles County, and there's also evidence that would make out an antitrust violation. Now, you can't bring a private antitrust violation into a state court. But if the jury gets some of that information before it, even if there were instructions on an antitrust theory, your remedy is to go to the California Court of Appeal, or the Supreme Court of California, ask them to reverse it and send it back for a

new trial. Your whole case doesn't turn into a pumpkin just because you've got some bad evidence.

MR. GEFFNER: Well, it's not just a question of bad evidence, Mr. Justice Rehnquist, it's a case of the entire case having to do with --

QUESTION: Well, but the battery--you concede it was actionable.

MR. GEFFNER: Well, the Court of Appeals in California, in reviewin g the testimony, reviewing the evidence, found very clearly that the -- again using the phrase the crux of the action, the characterization of the action, had to do with job discrimination and employment discrimination which was covered by 8(b)(2).

So I think your question leads me to another point, and that is that the question of Morton applying here in terms of the state applying a additional or a conflicting remedy to what Congress has intended to apply. Now, going back to the beginning of the Wagner Act in 8(a)(3), Congress intended to charge the Board with responsibilities regarding union discrimination and employment. And this Court held very early, in Republic Steel, that punitive damages was not a proper scheme for the Board to apply in terms of punishing an employer who engages in discrimination in employment for union activities under 8(a)(3).

QUESTION: Yes, but that might be because that was

within the orbit of state court tort matters?

MR. GEFFNER: Well, I think it's clear from that -- following from Morton -- Republic Steel had to do with the employer discrimination and Board remedies. Morton which followed in the 60's -- or 1970, I believe it was -- Morton held that where Congress has regulated an area of labor-management or union-member or disputes, I think it's clear under 8(b)(2) , and I think it's clear under the Radio
512-3 Officers that it's the center of the Board of Administration's regulation of union hiring halls.

Now in Morton Congress had provided a 303 remedy for unions engaging in secondary activities as a violation of 8(b)(4). The state has provided an additional remedy providing for punitive damages, which I think is very close to your question, for a violation of state tort laws that had to do with interference in terms of secondary activities by a union.

And this Court held very clearly that where the central focus of Congressional regulation was give to the Board, having to do with job discrimination and employment discrimination, whether it's employer on one side or union on the other side. That that is a matter for the particular expertise of the Board under their administrative procedures.

And if Congress said the remedy was -- as it did in 303 -- to be compensatory damages, then the state

couldn't superimpose an additional remedy of punitive damages, because the obvious conflicts would then exist. If the Boat could find certain conduct was valid or invalid, provide its remedy, and yet a state court could come in and award tremendous punitive damages that could be criminal in nature, could virtually bankrupt an employer or a union, and then what is left of the Board's regulation? Very little. It's all then left up to the state in terms of how it's going to punish a union or an employer.

QUESTION: Let me see if I understand your argument, Mr. Geffner. Is it that if the conduct complained of is within the general framework of a business agent's activity, hiring hall, union meetings, or what not, then it's pre-empted?

MR. GEFFNER: No, your honor. I want to make that very clear. There's conduct that can be performed by a union official, just as there can be conduct performed by an employer or representative, a superintendent or a foreman. If it's not within the scope of the regulations of the Board, if it doesn't relate to union discrimination in jobs and employment, if it's conduct that is not within the scope of the Board's regulation, then it's not pre-empted.

QUESTION: Well, do you suggest that this record does not show abuse of union power, malicious use of union power to the detriment of this petitioner?

MR. GEFFNER: Your honor, what this record shows

is that the hiring hall was tried in its totality by a jury. And we don't know --

QUESTION: Well, I don't know that that answers my question.

MR. GEFFNER: Well, we don't know whether the conduct --

QUESTION: Let me put it another way, then. Do you say that all of the conduct that's shown by this record is protected conduct?

MR. GEFFNER: No, no. If there'd been an isolation of the items that didn't involve the hiring hall operation, the administration of the hiring hall, which Mr. Hill could have gone to the NLRB on the first day, and could have gone for each incident that came up, gone to the Board, asked for relief, the Board gave him relief, in one case where he went. He went a second time, he dropped his charge. He could have gone each time, the Board could have issued broad orders, they could have imposed a trusteeship, they could have virtually run the hiring hall, if they so found job discrimination of such a magnitude.

QUESTION: Do you argue that the Board is capable of dealing with all of the abuses of the union power that occur in this country?

MR. GEFFNER: Well, your honor, this is not a question of union power as such. This is a question of job employment

discrimination which has been regulated by Congress. We're not claiming a blanket immunity for anyone that is a union officer or a union business agent, such as a -- I'm sure there would be no such contention for an employer representative.

But this cuts both ways, because the Board has just endless number of cases involving 8(a)(3) violations where there have been job discrimination by an employer, where the Board has provided the exclusive remedy, where there have been claims of mental distress. There's been a claims for punitive damage. The Board has been dealing with these problems since the days of the Wagner Act. Now, in 1947, Congress said, Board, you now deal with employment discrimination having to do with union discrimination by unions in 8(b)(2). And it's clear that within that regulation, within the scope of 8(b)(2), is non-discriminatory or not. And to say that all these -- that this conduct occured in terms of a hiring hall is assuming that the jury was right in its findings.

The Board may have easily, in their deliberations, through their expert administrative field investigations and so forth, have found that Mr. Hill, as the testimony was ample to justify, was rejected by employers, wouldn't take certain jobs, was not discriminated in certain areas. These are matters that the Court can not assume that the NLRB

would find was discriminatory.

QUESTION: But even if we assume that the NLRB would have found in each one of these episodes there was discrimination nonetheless, your argument would be the same, wouldn't it?

MR. GEFFNER: There's a remedy.

QUESTION: Your argument would be precisely the same, your argument of pre-emption.

MR. GEFFNER: Yes, that's correct. That's why it's not arguable. It's either prohibited, or it is protected. It's not an arguable case, either way. Because the Board can and does provide a broad, sweeping remedy having to do with job discrimination, whether it's 8(a)(3) with the employers, or whether it's 8(b)(2) with the unions.

QUESTION: Now, it's conceded that there's a lot of evidence here of conduct that was not subject to Board control.

MR. GEFFNER: Yes, there was some conduct.

QUESTION: But you allege that there's a lot of conduct proved that was also subject to Board control. And it's the presence of that evidence that pre-empted the --

MR. GEFFNER: It was not so much a question of the evidence, Justice White, but it was the volume of the evidence, it was the overwhelming amount of evidence --

QUESTION: That may be so, but you certainly --

MR. GEFFNER: -- that raised the hiring hall procedures.

QUESTION: But the issue of violation of the hiring hall regulations was never submitted to the jury. But there was evidence, evidence of conduct in the administration of the hiring hall.

MR. GEFFNER: Yes.

QUESTION: That you claim the Board had exclusive jurisdiction over?

MR. GEFFNER: Yes, your honor. In fact, it was the plaintiff at the beginning of the case, and that's why we presented this appendix, who said, we are going to show you how this hiring hall is being operated in a discriminatory manner.

And then it was the plaintiff who then brought in various rules of the hiring hall, and it was the plaintiff who then --

QUESTION: Yes, but the complaint also alleged that during the same period, the defendants repeatedly threatened plaintiff with actual or de facto expulsion from the union in retaliation for his political activities, and further threatened to deprive plaintiff of his ability to earn a living as a carpenter.

Now, suppose the evidence centered solely around that allegation. You wouldn't be here, I take it.

MR. GEFFNER: If it was a matter of an expulsion case, your honor, then we'd have a problem in dealing with Title I of the Landrum-Griffin Act which Congress has --

QUESTION: But there wasn't -- but the evidence wasn't limited to that, was it?

MR. GEFFNER: It was not limited to that. In fact there was no evidence of expulsion. All the evidence related to the first part of that same paragraph, your honor, where it says they controlled the job dispatching procedures. And that plaintiff would be and was given inferior assignment and he bypassed the work assignment. That's precisely what the Board regulates.

QUESTION: Could I ask you what I asked your adversary about the -- an unfair representation suit?

MR. GEFFNER: Yes, your honor, that is not --

QUESTION: Now, I suppose that this hiring hall was part of the administration of the collective bargaining contract?

MR. GEFFNER: Yes, it was.

QUESTION: And that if there was a failure to represent this man fairly, I suppose he might have a suit.

MR. GEFFNER: Well, your honor, that is not this case.

QUESTION: That kind of a suit wouldn't have been subject to a pre-emption?

MR. GEFFNER: No, but that suit would have been tried, your honor, as a matter of federal law --

QUESTION: Yes.

MR. GEFFNER: -- under duty of fair representation as decided by this Court in Vaca v. Sipes and Humphrey v. Moore, and it would have been determined, if it applied at all, by the standards established by this Court under federal standards --

QUESTION: Even if the conduct might have been an unfair labor practice?

MR. GEFFNER: Well, Vaca v. Sipes certainly held that it was not pre-empted. So I certainly wouldn't contend that it could be pre-empted. The point is that this was not a duty of unfair -- duty of fair representation case. It was not pleaded, it was not tried. There were no instructions to that effect. There was no federal law applied at all.

QUESTION: I understand that it wasn't. But I'm just wondering if there was some remedy provided by federal law aside from the Board.

MR. GEFFNER: Well, there would be possibly a duty of fair representation. If there had been an actual expulsion, possibly there would have been a Title I situation. But that is simply not this situation here. And what this Court will do when it's faced with that situation between a duty of fair representation, where there is an application

of federal law which is not pre-empted and a hiring hall situation, I think that's a problem.

QUESTION: Are you suggesting that everything -- if everything that was alleged here was true by the plaintiff, that it would not be a duty to fairly represent?

MR. GEFFNER: No, I'm not claiming that at all, your honor. I think that under the Vaca v. Sipes, applying federal law, that very possibly there could have been a matter for federal law to apply. Because there obviously is two remedies under duty of fair representation, because Vaca v. Sipes very clearly said that. So I don't --

QUESTION: A major element in Mr. Hill's complaint was that he was denied employment by activities, as you said -- hiring hall. Let's assume there was only one activity. Let's assume that Mr. Daley, as president of the union, on union stationery, wrote a letter to every contractor and every subcontractor in the Los Angeles area saying that Mr. Hill was a convicted thief and not eligible for employment by virtue of this criminal record. Let's assume that was false. Assume no other evidence of discrimination. It resulted in --

MR. GEFFNER: On those facts, your honor, I think we'd come under Linn, and under federal standards that have been applied by this Court in labor-management relationships as to Linn applying for defamation would apply.

If we were just limited to a defamatory statement that was false, that there was intentional and actual malice --

QUESTION: Even though --

MR. GEFFNER: -- and limited damages.

QUESTION: -- even though the purpose of it was to deny job opportunities for Mr. Hill?

MR. GEFFNER: Well, I think the job opportunity, the dispatching end of it, in terms of being applicable, would be within the Board's scheme of regulation. But I think there would be splits between the two. So I think calling someone a criminal, and it being false, under the common law it would be defamatory.

QUESTION: So you think in that case there would have been relief both under the Board and in the state courts of California?

MR. GEFFNER: Well, I think under state law of California -- again, I think we have to apply the Linn standards as to what is defamation. If we did so, then very likely there would be a common law tort of defamation as qualified by the federal court.

If the Board found that there was intent to discriminate, and in violation of 8(b)(2), then the Board obviously would proceed under an 8(b)(2) violation.

QUESTION: Let's suppose in brother Powell's example damages would include loss of employment.

MR. GEFFNER: With the Board?

QUESTION: No, no, in a state law tort action. And the measure of damages would include loss of a job.

MR. GEFFNER: If there was such -- if there was proof.

QUESTION: He assumes it was proof.

MR. GEFFNER: I think the normal damages would flow, yes, that would flow in a normal defamation case, except as qualified by this Court in cautioning the trial courts not to allow heavy punitive damages to penalize a small employer or a union where feelings of local juries involving unions and employers may be such that it would still infringe on the federal labor policy.

QUESTION: Mr. Geffner, would it not also be true that in a defamation action that the truth or falsity of the defamation could turn on the nature of the hiring hall practices? In other words, there could be a false statement made about a man that would true or false depending upon what kind of practices were followed. And would it not therefore also be true that evidence relating to hiring hall practices would be admissible if the tort action was a proper action.

MR. GEFFNER: Well, to what extent the hiring hall could be introduced as background or as part of the basis for the defamation, I think would have to be -- I think Mr. Justice Rehnquist asked a similar question. I

think that's something that would have to be determined from the facts of the case.

QUESTION: You don't argue for a broad rule that the mere fact that the conduct is subject to Board prohibition or protection would make the evidence always inadmissible? You --

MR. GEFFNER: No, no, I'm not.

QUESTION: Your instruction is pretty close to that, but you don't really ask for that?

MR. GEFFNER: I'm arguing, where the crux of the case, where the jury is able to find that a hiring hall was discriminatory or non-discriminatory, where that is where the case was tried, and where the Board has provided remedy, where 8(b)(2) applies where Congress has stated, that is where it belongs with unions and with employers, under 8(a)(3), that' that is when it becomes pre-emptive.

MR. CHIEF JUSTICE BURGER: Mr. Come.

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

605 AMICUS CURIAE

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

The Court below found that the crux of the cause of action which went to the jury concerned Hill's employment relations. And although there was an allegation of expulsion in count #2, there was no evidence of any expulsion from

union membership.

That finding, we submit, is amply supported in view of not only the allegations of the complaint, but Hill's attorney's opening statement to the jury in which he made it perfectly clear on several occasions that in order to understand the cause of action, you'd have to understand how the hiring hall operated.

QUESTION: Do you disagree with that? That that was necessary?

MR. COME: It was necessary on the -- on the cause of action, the gravamen of it as found by the state court, namely, a case of hiring hall discrimination.

To be sure, there were other elements in the evidence, but the principal proof and gravamen of the cause of action was hiring hall discrimination.

Now, in Garmon, in Borden, and most recently in Lockridge, this Court has wrestled with the problem of when are you going to find pre-emption. And the key to the test that finally involved, is the type of conduct that the state court lays hold of. Is it -- is the crux or the gravamen of the conduct the kind of conduct that Congress has made a principal concern of the Board's. And if it has, the Court has found it pre-empted; it has phrased the test in various ways, whether it is arguably prohibited, or arguably protected. Or as in Morton, whether it can be

said that the Congress intended to occupy the field with respect to that type of conduct. So whether we take petitioner's test, or we take the Garmon-Lockridge test, the question as we see it that has to be answered here is whether or not the Court below was right -- and we submit that it was -- in concluding that taking this case as it was tried and went to the jury. The jury was required -- or could have made a judgement with respect to conduct that is central to the Board's concern, and could have evaluated that conduct differently.

Now --

QUESTION: Mr. Come, can I just interrupt right there?

MR. COME: Yes, your honor.

QUESTION: Supposing on precisely the same record we have here the Court of Appeals of California had said the crux of this case as we understand it is whether the elements of the common law torts are present, namely, was the conduct outrageous, was it intentional, was it sustained. And all this other evidence of hiring hall practice is merely tends to prove one of those three elements of the tort. If they had said those three elements were the crux of the case would we then have a different result?

MR. COME: On this record, I don't think you would have had a different result, because the court's classification

of the conduct is a federal question. And you'd have to look to see what was the proof that was -- what the allegations or the complaint were, what the proof was that was adduced, what the instructions were that went to the jury.

And if you look at all of those things, I submit, that had the California court classified it differently, it would have had to be reversed under -- unless this Court is prepared to over-rule a long history of pre-emption cases that start with Garmon in '59, go through Borden in '63, and culminate with Lockridge in '71.

And since pre-emption is not a matter of constitutional principal, but of imputed statutory intent, I submit that the Court would not absent a compelling reason, which we submit have not been shown in this case, want to overrule that long line of precedents.

QUESTION: Mr. Come, if the characterization of the crux of the action is a federal question, then does it not conversely follow that we're not bound by the Court of Appeals characterization as primarily involving hiring hall, but we have a duty independently to decide whether that's the proper description of the character of the case?

MR. COME: I would say that that is so. However, I believe that your -- that it is entitled to -- the federal appeals characterization is entitled to a considerable

weight.

But in this case I go beyond that and say that it is supported by all of the factors in the record that I have alluded to.

QUESTION: Mr. Come, in reciting a long line of precedents which you said would have to be overruled, I notice you didn't mentioned the pre-Garmon cases of this Court: Garner and Laburnum and Russell. Are you suggesting that Garmon itself represented a change of direction?

MR. COME: No, I do not, your honor. I think that Garner is in the -- in the main stream. As this Court pointed out in --

QUESTION: Well, do you think there are any cases pre-Garmon that are not in the mainstream? How about Gonzales?

MR. COME: Well, Gonzales was preserved by Garmon. We think that this is not a --

QUESTION: It was preserved by Lockridge too, wasn't it?

MR. COME: It was preserved by Lockridge.

QUESTION: And you don't question Gonzales?

MR. COME: I am not questioning Gonzales. I think that the difference between Gonzales and this case is that Gonzales -- the thrust of the cause of action there was wrongful expulsion from the union. I think that to say that

union member relations are different from union-management relations is an oversimplification, because with respect to part of the field of union-member relations, Congress did enter it with the National Labor Relations Act. It did so insofar as it involved union control over the job. It at the same time -- it preserved from the Board's point of view that part of union member relations that involve internal union affairs. There was a body of state law that governed that. And Congress, in '47, left that to state law. In '59, with Landrum-Griffin, it sought to add to the body of state law by providing some federal remedies. But that was the purely internal area. At the same time that it did that, it recognized the continuing validity of pre-emption with respect to that part of the field that was entrusted to the Board.

Because, although it considered at that time overruling this Court's decision in Guss, which created a no-man's land, it made only that very narrow insert into the pre-emption doctrine by enacting 14(c)(1), but left the pre-emption doctrine untouched with respect to the remainder of the field.

So therefore, I think it is very important to keep our own light on what this lawsuit is about. And not what other lawsuits could have-- could be in the future, or what plaintiff could have made this lawsuit.

And I think the fact that it is tried on a tort theory rather than on a labor relations theory only compounds the danger of interfering with the federal regulatory scheme. Because, at least the labor relations principle has been applied. There could have been some possibility that the state court might have evaluated this hiring hall under the same substantive principle as the Board would have used.

That would have been bad enough because of the possibility of conflicting fact findings and conficting remedies. But where the jury was left to general tort theory which had no standard other than what the jury would determine was outrageous, a possibility existed -- I'm not saying whether this motivated the jury or not, but we can't speculate when they're left at sea like this -- that they could have found that even to the operation of a valid hiring hall which committed this exclusive control over referrals to employment to a union was outrageous, despite that fact that this Court, in Local 357, had indicated that a hiring hall run by neutral criteria was perfectly lawful under the Act.

QUESTION: Well, Borden was tried on a contract theory too, wasn't it? That didn't seem to save it.

MR. COME: It did not save it. And I submit, your honor, nor is this case saved by the fact it was tried

on a tort theory.

QUESTION: You said at the outset, Mr. Come, that no aspect of constitutional law is involved here. But surely the supremacy clause is what is involved, isn't it? That's what always involved in federal pre-emption.

MR. COME: That is correct. But that is at the background after you decide the statutory question.

QUESTION: But it's only because of the supremacy clause that you have to decide it in favor of the federal government after you've determined the scope of the pre-emption, isn't that correct?

MR. COME: That is correct. But the question of determining the scope of pre-emption is a statutory matter, it's a matter of imputing an intent to Congress, and it is often true in this pre-emption area, Congress rarely speaks with --

QUESTION: Explicitly.

MR. COME: -- with explicitness, and you haveto infer it from the scheme of the regulation and the pattern of the regulation. And if there's one thing that the Board has gotten into with both feet, it's a long list of cases, as the Appendix of the Board's brief shows, it is job discrimination, particularly in the operation of union referrals and union hiring halls. And therefore, we believe that unless this Court is prepared to overrule

Garmon, and Lockridge and Borden, and we submit there's no reason for doing so that's been advanced in this case, the judgement below should be affirmed.

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

Do you have anything further, Mr. Hobart?

REBUTTAL ARGUMENT OF G. DANA HOBART, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. HOBART: Very briefly, your honor. A couple of comments were made that I think should be of -- have some comment to them.

They say that this case is not pre-empted actually. Your honor, in the case of Garmon, Garmon made the following statement, which I quote verbatim: redress for arbitrary, bad faith, fraudulent -- I said I was quoting it verbatim, that's not quite right. I have included from several places the type of conduct. But it is a true and correct paraphrasing.

Redress for arbitrary, bad faith, fraudulent, deceitful or other dishonest conduct does not conflict with federal labor policy or is at most tolerably slight.

In Hardeman, the Court will remember that the business agent got hit in the nose because he wouldn't dispatch a member -- or a couple of men, apparently -- to a job where they had been requested by an employer. The union claimed pre-emption in that case, too. Arguably an

unfair labor practice, they said. The Court expressly held, that is not an unfair labor practice.

Go to -- quickly to Gonzales. Well, theYsay Gonzales is no good because this is not an expulsion case. May it please this Court, the worst penalty that could be imposed is not to make it an expulsion case. By keeping Mr. Hill in the union, the wiser dictatorial type tyrant says, I can keep this out of the courts, I can keep it in the NLRB. I won't expel Mr. Hill, I'll just knife him to death as a member, and perhaps with a smile on my face.

Is the physical effect of Hardeman, which is not pre-empted because he got hit in the nose, any different because Mr. Hill didn't get hit in the stomach, but nevertheless suffered enduring and long-standing pain? Those are distinctions without differences.

And what it boils down to is what I was complaining about at the beginning. It provides for triumphs of procedure, not redress of the actual harm.

Your honor, the trial of this case was not a trial of the hiring hall practices, not the legalities. We had to show where the discrimination occurred. They used the hiring hall as the vehicle to impose upon Mr. Hill this discrimination. We had to show simply two easy issues to the jury: one, what the rules were; and two, were they fairly applied. That's all. That doesn't require

expertise of the National Labor Relations Board. Not at all.

QUESTION: What rules were? Didn't you say you had to show two relevant and simple things to the jury? One, what the rules were. Now, what rules are you taking about?

MR. HOBART: The hiring hall rules. They came in the form of a collective bargaining agreement, admitted without objection. They came in the form of a hiring hall procedures set forth by the union, which, even in the preamble to that says, pursuant to the collective bargaining agreement, these are the rules. And in them it says, you hire on a non-discriminatory basis following the list. That's what it said.

I'm somewhat distressed that the NLRB is here on an opposite side. We are trying, as I see it, to protect union members, whatever the number may be, few or great, who occasionally may be subjected to this type of tyranny. We don't want to put the NLRB out of business. We want to expand the ability to redress these wrongs. And the AFL-CIO has told this Court, your honor, in their amicus brief, that they represent 14 million people. I would suggest to your honor, that they represent the leadership of labor organization. Mr. Hill, who is now departed -- Mr. Hill, your honor, represents the 14 million people. There is no doubt about that in my mind or heart.

Thank you, your honor.

MR. CHIEF JUSTICE BURGER: Thank you gentlemen.

The case is submitted.

[Whereupon, at 1:33 o'clock, p.m., the case in the above-entitled matter was submitted.]