

In the

10.3
Supreme Court of the United States

Thomas J. Walsh, Jr.,
dba Tom Walsh & Co.,

Petitioner,

v.

E. A. Schlecht, et al, as Trustees of Five
Oregon-Washington Carpenters-Employers
Trust Funds.

Respondents

No. 75-906

Washington, D. C.
November 1, 1976

Pages 1 thru 42

Duplication or copying of this transcript
by photographic, electrostatic or other
facsimile means is prohibited under the
order form agreement.

HOOVER REPORTING COMPANY, INC.

Official Reporters
Washington, D. C.

546-6666

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS J. WALSH, JR.,
dba TOM WALSH & CO.,

Petitioner,

v.

E.A. SCHLECHT, et al, as Trustees of Five
Oregon-Washington Carpenters-Employers
Trust Funds,

Respondents

No. 75-906

Washington, D. C.,

Monday, November 1, 1976

The above-entitled matter came on for argument at
10:00 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:

CARL R. NEIL, ESQ., 1331 S. W. Broadway, Portland,
Oregon 97201; on behalf of the Petitioner.

PAUL T. BAILEY, ESQ., 2308 First National Bank Tower,
Portland, Oregon 97201; on behalf of the Respondents.

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
Carl R. Neil, Esq., for the Petitioner.	3
Paul T. Bailey, Esq., for the Respondents.	19
<u>REBUTTAL ARGUMENT OF:</u>	
Carl R. Neil, Esq., for the Petitioner.	40

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 75-906, Walsh against Schlecht.

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

ORAL ARGUMENT OF CARL R. NEIL, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case involves interpretation and application of Section 302 of the Labor Management Relations Act of 1947, as amended, popularly known as the Taft-Hartley Act, in the context of payments to trust required by the terms of a subcontractor's clause in a collective bargaining agreement.

This Court is asked to review a decision of the Supreme Court of Oregon rejecting petitioner's defense that the subcontractor's clause conflicts with the requirements of Section 303(c) (5).

The question on which petitioner sought certiorari -- which was briefed and decided, among other questions, by the Supreme Court of Oregon -- is whether the subcontractor's clause, in requiring a signatory employer to make trust contributions on behalf of, or for the benefit of, employees of a non-signatory subcontractor violates the 302(c) (5) requirement that trust agreements must benefit only

employees of contributing employers.

It is apparently conceded by respondents in this court -- I read their brief so to concede implicitly -- that the subcontractor's clause thus construed, that is, to benefit -- to require contributions for the benefit of or on the behalf of the subcontractor's employees, would violate Section 302(c) (5). Instead, respondent's brief as I read it raises three arguments which were not made below and which now, apparently, are the questions to be decided by this Court. I accept this. These are valid -- they're not -- I don't agree they're valid arguments. But I think they are validly raised by the respondent.

These questions are, one, they now seek to have an interpretation of Article IV of the Collective Bargaining Agreement, the subcontractor's clause, different from that made by the court below as I read the opinion of the court below. They say that the clause should be read to merely measure contributions to the trust by the hours of work of the non-signatory subcontractors' employees, and not to require contributions for their benefit or on their behalf. That is the first argument they make.

The second is, that two of the trusts (the Apprenticeship Trust and the Vacation Trust) are 302(c) (6) trusts in purpose, and therefore not subject to the requirements of 302(c) (5) concerning beneficiaries.

Third, they say that one of the trusts, the CIAF for Construction Industry Advancement Fund Trust, is not a 302 trust at all.

Petitioner, we submit, is entitled to prevail on all of these issues as well as on the original issue. The facts giving rise to this controversy are these.

QUESTION: Mr. Neil, before you go into it: if they're right on the first argument, that's the end of the whole case, isn't it?

MR. NEIL: I believe that's right, your honor.

QUESTION: Is that a federal question at all, the construction of Article IV, or is that a matter for the Supreme Court of Oregon?

MR. NEIL: No, as I -- well, it would be to my advantage to argue it's a matter for the Supreme Court of Oregon. But I don't think it is. I think it's a federal question. I think since Lincoln v. Mills of Alabama that the construction of collective bargaining agreements in interstate commerce has been a matter of federal law. This Court might well respect the interpretation of the Supreme Court of Oregon, but I do not think it binding on this Court.

The petitioner, Mr. Walsh, is a builder of multiple family housing in Portland. He formed a limited partnership of which he became the general partner to build and operate a 56 unit apartment project in Salem, Oregon known as Oak Hill.

And this project was HUD supported, federally financed, and therefore, by agreements required by HUD, the contractor and his subcontractors was required to adhere to the provisions of the Davis-Bacon Act, principally the requirement of paying prevailing wages, including fringe benefits, either to workmen on the job or into trust.

The limited partnership subcontracted the carpentry framing work to a non-union subcontractor, Lloyd Jackson. Walsh, of course, was bound by the terms of the collective bargaining agreement with the Carpenter's Union that had this subcontractor's clause in it, in addition to requiring Walsh to pay, if he hired his own carpenters, a total of 96¢ per hour into these five trusts.

The subcontractor's clause is quoted at pages 5-6 of our brief and elsewhere in the brief, and it says in general that Walsh, as a signatory to the agreement, shall either hire and retain only union subcontractors or, if he fails to do so -- and these are the crucial words -- he shall quote be liable for these employees' wages, travel -- and then it goes on to list contributions to the five trusts.

Now during the construction, the Carpenter's Union found out, of course, that there was a non-union sub on the job and protested to Mr. Walsh who said that he was bound by the terms of the subcontract, that he could not discharge the non-union subcontractor.

But Mr. Walsh, the record shows, did cooperate in arranging for the non-union sub to meet with the union people and to negotiate as to whether they could be organized. That was unsuccessful. But it is agreed in the record that Mr. Walsh was cooperative in that respect.

QUESTION: How does that affect the central issue here?

MR. NEIL: Well, I'm trying to make the point, your honor, I guess, that my client is not hostile to unions. He insists on his rights under this clause. But I don't think that -- I think this evidence is that he is not unfriendly toward unions.

During the -- it is stipulated that the subcontractor paid his men directly. Jackson, the non-union subcontractor, paid his men directly the 96¢ per hour amount in fringe benefits, that is, an amount equal to the trust contributions that would have been required if a union subcontractor had been employed.

The Oak Hill Project was --

QUESTION: Was that part of their original employment?

MR. NEIL: Excuse me, your honor?

QUESTION: Was that under their original employment, or did that come about after the union raised this contribution question?

MR. NEIL: No. I see your question. That is a

good question. No, this was paid from the outset. The subcontractor was made aware at the beginning that this was a Davis-Bacon Act job. There are forms in evidence for his payroll, and right on the form it says: are you paying your fringes directly to your men, or are you paying them to a trust? He checked, directly to his men. And it is stipulated that he did so.

The Oak Hill project was completed in November of 1971. And a year later, these suits were brought seeking payment to the trust by Walsh of the same amount that the subcontractor had previously paid into the trust. So we say, in effect, a double payment or a second payment of the same benefits already paid to Walsh's men -- excuse me, to Jackson's men -- is being required from the principal contractor, Walsh.

QUESTION: I may have misunderstood what you say. You said, double payment to the trust?

MR. NEIL: No. We say a double payment is being required, in effect, by the contractor.

QUESTION: I see. The first payment was to the employees rather than --

MR. NEIL: Yes. The contractor had to pay a fixed price to the sub, Jackson, for the work, obviously from which Jackson paid his men the 96¢ among other things.

QUESTION: I see.

MR. NEIL: So when we say that when Walsh is required to pay this now to the trust that he has already paid the fixed price, including the fringes, once. Now he has to pay them a second time.

QUESTION: You say that is a violation of the statute?

MR. NEIL: No, I don't contend that in itself is a violation of the statute.

QUESTION: What do you contend?

MR. NEIL: Pardon me?

QUESTION: What is the question?

MR. NEIL: It violates -- the question is, if we construe Article IV of the subcontractor's clause correctly to require contributions by Walsh for the benefit of, or on behalf of, the subcontractor's employees, we say this violates Section 302(c)(5), the requirement that benefits be paid out of those trusts under 302 only for the benefit of employees of the contributing employer or of other contributing employers. Jackson is not one.

QUESTION: Well, but there are no benefits being paid out to the sub's employees.

MR. NEIL: That's true, but 302 deals not only with --

QUESTION: Then they aren't beneficiaries of the trust.

MR. NEIL: So they now say.

QUESTION: Well, are they or not?

MR. NEIL: No, I don't think they are. They're not legal beneficiaries.

QUESTION: Well, then, how is the statute violated?

MR. NEIL: The statute is violated because 302 prohibits either paying or an agreement to pay.

QUESTION: Well is there an agreement to pay?

MR. NEIL: Article IV, we say, is an agreement requiring Walsh to make contributions to the trusts for the benefit of -- and we say it would follow that it is an agreement that these men should be paid these benefits.

The strongest case, your honor, is the Vacation Trust in that respect. The testimony in the record is, that the Vacation Trust operates as an in and out payment. The employer pays into the trust the money for the vacation pay, and that sum is paid to the workmen for whose benefit it is paid plus any earnings, their pro rata share of any earnings on the sum paid into the trust.

Now --

QUESTION: Well, but, did the employees of the sub get paid out of the Vacation Trust?

MR. NEIL: There is no evidence that they did, your honor.

QUESTION: But do you contend under the agreement that they will be?

MR. NEIL: I contend that under Article IV that that is the intention. I would concede that the trust agreements themselves, which, as you will see, are much more carefully drawn documents than the collective bargaining agreement, are intended probably to restrict the beneficiaries to contributing employers, with one exception: it says in Article VIII of the principal agreements that, although the rights of the beneficiaries and everyone else to these trusts are defined -- are as defined in the trust agreements, their terms are subject to the collective bargaining agreement. So it leaves open, it seems to me, individual collective bargaining agreements to vary the terms of the trust. And we contend that's exactly what happened by Article IV of the subcontractor's clause.

We think, in effect, that the union got carried away probably in Article IV in penalizing -- and I don't -- I agree that penalizing the employer in and of itself is not unlawful. But we think the union probably got carried away in drafting Article IV in a penalty way that they were not cognizant of the requirements of Section 302(c)(5).

We say that our interpretation of Article IV, that is --

QUESTION: Well, let's assume the -- let's assume that Article IV was perfectly clear, that the -- that the employer would be required to pay into the trust an amount

of money measured by the -- not only his own employees but the sub's employees, even if the sub was not organized and unionized. And let's assume that it expressly said that this is an order to encourage contractors to employ union subcontractors. And so it's perfectly clear the intention was to make him pay twice if he used a non-union -- would that violate the statute?

MR. NEIL: No, it would not, your honor, though you're positing an agreement of the type of Kreindler, of Budget Dress, of Greenstein, all of which are cited by the other side. And it involved contracts in the garment industry which said exactly that.

QUESTION: Well, the question is, of course, I suppose, whether that kind of a payment is an authorized payment by an employer on behalf of the union.

MR. NEIL: Yes, I think it is. The --

QUESTION: And you think the statute would authorize that kind of a double payment?

MR. NEIL: Well, I don't know as it authorizes it, but I don't think it prohibits it.

QUESTION: Well, you know, it isn't a forbidden one. You say it isn't the kind that's -- it isn't a forbidden payment on behalf of a union.

MR. NEIL: So these three cases held, and I haven't challenged those. Because the requirement that we are

proceeding on says that you may not require payments to a trust for the benefit of people other than employees of contributing employers.

QUESTION: Then it is clear, from what you said before, that you think these employees can never get any benefits.

MR. NEIL: No. Yes, they -- it's not true they can never get any benefits. If they in the future were to become -- well, I won't say the future. If they in the past had worked for a contributing employer, a signatory employer, they could have qualified as an employee of a contributing employer by past employment for a signatory employer. Therefore, contributions made by Walsh here for those employees, even though their present employment is by a non-signatory employer, might not be unlawful under 302(c)(5). And that point is harped on in the brief by respondent.

However, there is no evidence in this record that the employees ever did work for any signatory employer prior to this. Respondents say, well, people in the construction industry move around from employer to employer, from job to job. That's quite true. But it is rare, I submit, that people in the construction industry move from union employers to non-union employers and vice versa. You're either one or the other, you're -- in this industry. You're a workman

in a union membership. Or you're a workman for a non-union employer. And I submit it to be very unlikely, even though the record does not speak to this, that these workmen of Jackson's would ever have been employees of a union employer prior to this time. It's conceivable but unlikely, I say.

QUESTION: On the theory of the Section IV of the contract, that this was for the benefit of the employees, you think the employees could maintain an action in equity to impress that money with a constructive trust?

MR. NEIL: Possibly. It's clear that they could not maintain an action against the trust for trust benefits. That's what Moglia out of the 2nd Circuit holds; then an illegal payment to the trust does not create a right of the beneficiary or intended beneficiary to sue the trust for benefits. So probably, to answer your question, Mr. Chief Justice, no, because these employees in this case already received payment of these benefits. So if they were to do that they would, in effect, be seeking a double payment. The correct procedure, I would think, is that we're following, which is to set up a defense to the contributions when sued for, or, possibly, we could sue to get them back if we had paid them.

QUESTION: Well under -- that suit would be under Oregon law presumably, the hypothetical case I suggested.

But if the Supreme Court of Oregon had no difficulty assessing, in effect -- determining that double payments were appropriate, is there anything in the law of the equity doctrine of Oregon that would preclude having the employees get double benefit?

MR. NEIL: Apparently not, because Oregon ruled on a matter of equitable law in this case and rejected our arguments along those lines.

The rationale of the Oregon Supreme Court's opinion is that it does not accept the Moglia case, at least as I read it. It is saying that even though you accept our construction of Article IV, that is, that the contributions are required for the benefit of Jackson's employees, that does not violate 302(c)(5).

QUESTION: Moglia is very distinguishable on its facts.

MR. NEIL: Moglia is not factually important.

QUESTION: Because there the employer didn't sign the agreement.

MR. NEIL: It is the rationale of Moglia, I think, that we feel is applicable to this case, your honor.

QUESTION: Well, I think you have to stretch it a little.

MR. NEIL: Well, in any event, the Oregon Supreme Court seemed to think that Moglia -- the language of Moglia

on which we rely was not to be followed.

QUESTION: Is this a multi-employer bargaining unit?

MR. NEIL: The bargaining unit is. The petitioner is not a member of that multi-employer association. He signed a memorandum agreement which binds him to observe the multi-employer agreement.

QUESTION: And is the multi-employer agreement otherwise fairly general in the market?

MR. NEIL: I don't understand your question.

QUESTION: Well, does it cover most of the contractors in the --

MR. NEIL: Oh, I see. Yes, it covers, I would say, all of the union contractors in the area. How many non-union contractors --

QUESTION: Well, it's in effect -- it's an agreement, whoever signed the multi-employer and whoever agreed on the side to observe it, it's a general agreement, in effect, that we'll only employ unionized subcontractors?

MR. NEIL: Yes.

QUESTION: Well, at least -- at least it's going to cost you if you don't.

MR. NEIL: That's the way it works, yes.

QUESTION: I must confess, I don't understand the relevance of Moglia at all. Because that case, as I remember

it, just dealt with whether or not the employees can receive benefits. It didn't have anything to do with contributions, did it?

MR. NEIL: Well, the rationale of the Court in Moglia says that -- lays down a principle which we quote in our brief that -- one of the reasons they say why the person seeking a pension there, as I recall it, cannot obtain one is because his or her employer never paid into the trust at all, or excuse me, they did pay into the trust, but under -- without a written agreement. Therefore the contributions into the trust were illegal. And that's why it had to be put to one side. And the Court goes on to make statements to the effect that only employees of employers who are lawfully contributing to the trust may receive benefits. So it seems to me the rationale relied on by Moglia is applicable.

QUESTION: Well, that means the employees of the subcontractor in this case could not legally obtain benefits from this trust. That's what that means.

MR. NEIL: I agree. That's true, and I think I --

QUESTION: Then if that's true, then as a matter of law it would seem to follow that the contributions could not have been for their benefit. It seems to me that defeats your position right --

MR. NEIL: Well, it doesn't seem to me that way, your honor, because 302(c) prohibits agreements to make

illegal contributions as well as illegal contributions. It does not just prohibit trusts that violate the statute. It also prohibits any kind of agreement to make an illegal payment, or to make -- require an illegal contribution.

QUESTION: But the legality of the payment turns on for whose benefit it is, and by a matter of law under Moglia it can't be for the benefit of the employees of the sub, as I read it.

MR. NEIL: But the testimony indicates, your honor, I submit, that that isn't what the parties thought; that the people who enforced this agreement on a day to day basis thought that these subcontractor's employees could benefit. And they thought that they were announcing a principle that non-union people aren't disqualified by that mere fact from being beneficiaries. And that is true. But I don't think that conclusion follows at all. Because it seems to me there was every attempt in the lower court, in the evidence, to make these people beneficiaries.

QUESTION: Does the record tell us whether the general ever had any employees for whom it made contributions?

MR. NEIL: It does not. But I would concede that he has had at times employees for which he must make contributions. He didn't happen to have at the time of this job. He subcontracted the work.

QUESTION: But over the -- from time to time he has.

MR. NEIL: But at other times, he has had.

I'd like to save the rest of my time, Mr. Chief Justice, for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Bailey.

ORAL ARGUMENT OF PAUL T. BAILEY, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

We're here representing these trust funds, and -- as contrasted to reference to unions from time to time. Because these are jointly administered trust funds, four of them are. And in that respect I refer to the Health and Welfare, Pension, Apprenticeship, Vacation. The fifth fund, the Construction Industry Advancement Fund, is an employer-administered fund, employer trustee, and therefore should not be used in connection with 302 at all. It's not a Taft-Hartley fund. So reference to that should not be a reference to the other funds which are jointly administered.

These trustees are authorized and directed both by the trust agreement and now by federal law to enforce the trust agreements and to force collections of contributions that are provided for in those trust agreements. And that's what this action was initiated for.

We are really not in a great deal of difference or contravention of what counsel for petitioner has stated here.

particularly in view of the law. Because we do agree that if these trust agreements do permit contributions to be received for the benefit of a non-signatory employer's employees, that that would violate the 302 provisions of (c) (5).

QUESTION: Were these payments for the exclusive benefit of employees of such an employer?

MR. BAILEY: Yes. I say that because --

QUESTION: Spell that out for me, will you?

MR. BAILEY: The contract that is spelled out in the labor agreement establishes the trust agreements in each of these instances. And that's set up in the working agreement. In the trust agreements themselves they were very careful in the drafting of it to provide that they do particularly do precisely what the Act and the law says that they should do.

Section 2, Article II of -- I'm first speaking of the Health and Welfare which is in plaintiff's exhibit #4 and recited in our brief -- that section provides that the purpose of the Health and Welfare contributions and the funds established there shall be for the benefit of employees of the individual employer. And it goes on and says other things.

The definition of employee is spelled out in Article I of the agreement. Article I of each of these agreements

provide that the employee, whether union or non-union, is a -- defined of any employee, whether union or non-union, of an individual employer. And then it goes forward and says, what's an individual employer by definition. That's set out in Article I, Section 5 of the trust agreement. There is provides that the employer -- it defines an individual employer as an employer who is required by the collective bargaining agreement to make contributions to the fund.*

Now, in the face of that, that's precisely what we say that the Act also requires, that contributions coming in must be used for the benefit of the employees of the contributing employer. If there's testimony in this record contrary to that, or if somebody attempts to do contrary to that, they both violate the law, they also violate the trust --

QUESTION: Where do you find the obligation to -- what promise are you enforcing here?

MR. BAILEY: Promise?

QUESTION: Yes.

MR. BAILEY: If I understand your question --

QUESTION: Are you suing for contributions?

MR. BAILEY: Yes, we're suing for contributions.

QUESTION: And where do you find the promise to pay?

MR. BAILEY: The promise to pay is set forth initially in the working agreement. And it's spelled out in

the working agreement. And that is also contained in plaintiff's Exhibit #4 in this record.

QUESTION: But it's not in the trust agreement?

MR. BAILEY: No, it's --

QUESTION: The trust agreement just tells you what to do with the funds when you get it?

MR. BAILEY: Right, correct.

QUESTION: And it also requires you to sue for whatever payments that are due to the fund?

MR. BAILEY: Right.

QUESTION: So where is the promise?

MR. BAILEY: The promise comes from the working agreement, and the working agreement --

QUESTION: The collective bargaining agreement.

MR. BAILEY: The collective bargaining agreement, right. And the collective bargaining agreement spells out frankly in the Articles XVII, XVIII, XIX, XX and XXI, for each of the five trusts, precisely that the trusts will be established. They also spell out that the contributing employer shall pay certain, specific sums of money to each of these trusts.

Now, in order to --

QUESTION: Are you -- then, it requires the employer that you're suing here to pay an amount measured by the number of employees that he has and that any subcontractor has?

MR. BAILEY: Well, the -- you say the number of employees. Precisely, it's on the hours that each of these employees work.

QUESTION: Yes, all right.

MR. BAILEY: And if he happens to subcontract away those hours to some employer who is not also a signatory, then the employer in this case, Walsh the petitioner, has also agreed there that he will contribute, in order to maintain the integrity of that fund, he will contribute a sum that will equal the amount that he would have paid had they been his employees.

QUESTION: Even though the employees he's paying, that his contribution is measured by, will never benefit?

MR. BAILEY: That's what the law says. We didn't set that. Congress established that.

QUESTION: Well, I know. But the fact is that you're requiring those payments even though they wouldn't be necessary to maintain the integrity of the fund. Because the people -- those particular employees -- could never benefit.

MR. BAILEY: Well, I wouldn't say that they could never benefit. They couldn't benefit -- we state that they couldn't benefit from the particular contributions made at that time. As counsel stated here on an earlier question from the Court, that if these employees were -- employees

are eligible, employers or contributing employers either before or after this period, that wouldn't -- by working for a non-contributing employer here doesn't disqualify them.

QUESTION: I know. But the fact is, you're suing for some funds to go into the trust that can never be -- can never -- or right now, anyway, cannot benefit the employees by whose hours they are measured.

MR. BAILEY: Yes, I think that's correct. I think we're also, in certain instances, these trust funds sue employers for monies that are in excess, as an example, the benefit schedule that's established.

QUESTION: So they're really not for the benefit -- they're really not necessary to maintain the integrity of the trust?

MR. BAILEY: The actuarial determination of the trust --

QUESTION: Because they just aren't -- because there's some people whose hours measure these contributions just can never benefit.

MR. BAILEY: Well, we have pointed out --

QUESTION: Well, isn't that true or not?

MR. BAILEY: Well, I don't say that it is true on the basis that --

QUESTION: Well, do you deny it's true?

MR. BAILEY: Well, I say, Mr. Justice, that the basis of the actuarial determination of these funds is

premised on the dollars paid in that go specifically to benefits. They also are actuarial determinations on the amount of overfall -- that's money that comes in over the amount that's necessary to pay for contributions. And some of these people never benefit at all. Because they don't --

QUESTION: Well, what you're saying, then, is that you have to sue to collect on behalf on money -- or wages -- paid to some employees who can themselves never benefit in order to make the fund actuarially sound for those employees who can benefit.

MR. BAILEY: That's correct. The --

QUESTION: Just a small point, Mr. Bailey. Strictly speaking, the trustees brought suit as third party beneficiaries of the labor contract, is that correct?

MR. BAILEY: That's correct. And that's their obligation on both the trust funds, they said, and also ERISA.

We are submitting that -- and argue that the defense raised by petitioner herein was the defense that he raised initially below; but also he's arguing that the language of Article IV of the trust agreement has to be determined to be on the behalf of or for the benefits of these people. We think that strains it. We think that certainly attempts to modify the trust agreement which in itself provides that the monies coming into the trust shall be used only for the benefit of individual employers -- employees who are

signed up.

We ask -- and he has used the phraseology in his briefing -- petitioner has -- we ask that if a person was going to look for benefits under these funds, he must really look to the trust agreement, and not to the working agreement. Because the working agreement only spells out what monies will go into the trust.

We submit that the trust agreement, in and of itself, is an agreement that is legal, complies with the statutes, that there is no record -- no evidence and no proof shown by petitioner whose obligation it is to make that showing here -- that any employee has received benefits in violation of the law or the trust agreement.

QUESTION: Mr. Bailey --

MR. BAILEY: Yes.

QUESTION: -- do you think the construction of the trust agreement is a matter of state law or federal law?

MR. BAILEY: Well, I would assume that because it is a document drafted in state law, it would be a matter of construction of state law unless there is a federal question that could properly operate on. Here we think the construction-- and that's where we think we're down to; we're not disagreeing with petitioner on the law of the case, and that's the 302 law, but we do say that the construction of that particular paragraph, or that particular contract, is a matter of state

law.

QUESTION: And the Oregon Supreme Court has construed it.

MR. BAILEY: Yes. Yes, that's what we say.

A comment I would make -- an additional comment, if I may --

QUESTION: You wouldn't question that if the contract violated section 302 that it would fall, would you?

MR. BAILEY: I would have to agree with that, that if that's the connotation given to it. We submit that it's a strained effort that the petitioner is making here to say that Article IV does provide for benefits, we think --

QUESTION: Aren't there decisions in this court that say that the construction of a collective bargaining agreement in this kind of a law suit is a matter of federal law? Lucas Flower and Dowd Box and some of those?

MR. BAILEY: Well, it could well be that there is some aspect of it. Here we're talking about the construction of this statute.

QUESTION: No, we're talking about the construction --

MR. BAILEY: I'm sorry.

QUESTION: -- of the collective bargaining agreement. That was the question as I understood it.

MR. BAILEY: Yes.

QUESTION: Well, more specifically, we're talking

about the construction of a trust agreement.

QUESTION: So you're suing on a promise that's in a collective bargaining agreement --

MR. BAILEY: Yes.

QUESTION: -- not a trust fund.

MR. BAILEY: That's correct. But the defense that's been raised to our suit on a promise is the defense that these are contributions that would benefit people who are --

QUESTION: The question is, whether in the light of 302, this promise in the collective bargaining agreement is enforceable.

MR. BAILEY: Well --

QUESTION: Which in turn turns on whether they're beneficiaries within the meaning of the trust agreement.

MR. BAILEY: That's correct.

QUESTION: So ultimately the construction question is one of the trust instrument rather than the collective bargaining agreement.

MR. BAILEY: That's what we've maintained all the way, that you have to go to the trust agreement to find out what --

QUESTION: -- the petitioner's claim is that they intended, they agreed, to make contributions on behalf of employees of an employer who was not making a contribution.

MR. BAILEY: All right. May I address myself to --

QUESTION: Well, that's his claim, isn't it?

MR. BAILEY: Yes, that's his claim.

QUESTION: So it's a question about construing that collective bargaining agreement.

MR. BAILEY: I understand that, yes. But to reach that, and to make that contention, petitioner has to -- and I would think, wrongfully -- has to act or use the language of 302(c)(6) as encompassing 302(c)(5) of the Act. The Act itself spells out that under 302(c)(5) it must be for the exclusive benefit of contributing employers' employees. When the Congress enacted amendment by 302(c)(6), it added such things as vacation, apprenticeship and things of that nature which are involved here, and did spell out in 302(c)(6) that the provisions of 302(c)(5)(B) would likewise be the ones that would apply. And that's the provisions that sets up the trust agreement program. It did not specifically set up the requirement that it be for the exclusive benefit of employees.

Additionally, when counsel in his -- or petitioner has referred to that all five funds should be treated the same, and using the language of Article IV to say so, he is saying there that the construction industry advancement fund is also one that goes to the benefit of employees. We say that that's a strange interpretation of Article IV to get to that point, basically because there are no specific

benefits to employees of -- at all under the Apprenticeship and Training, nor are there any benefits that go to anybody in the Construction Industry Advancement Fund. Both of those could not be for the benefit of any of these employees.

Thus, he has to strain the language in order to reach the results that he's urging that the language in Article IV does say what he says it is, and that is, that it's for the benefit of employees.

QUESTION: If there were no Article IV in that collective bargaining contract, there wouldn't be any case here, would there?

MR. BAILEY: That's correct.

QUESTION: Well, then the genesis of everything in this case springs from a collective bargaining agreement.

MR. BAILEY: That's right. We're suing on that. But his -- and we're saying that in effect his defense has to rest on the fact that the benefit payments for employees would benefit employees of a non-contributor. And we both agree that that is unlawful at least as far as the 302(c)(5) says.

QUESTION: Well, neither the general contractor nor the subcontractor were in perfidy with the trust agreement in any way, were they?

MR. BAILEY: They were this way, because in the agreement that the general contractor Walsh, your petitioner,

executed he agreed to adopt the terms of the trust agreement. That's a part of his agreement. So he did adopt that. Now, the subcontractor was not signatory at all, so he did not.

We say that basically this whole case has dropped down to one -- or, what do the words, for these employees contributions, mean? That's the language of the Article IV. And we think that it does not -- we submit it, that it does not mean what the petitioner has indicated here, or urged on this Court, or on the court below. Because we do spell out here that it could not mean that, particularly when you get down to Apprenticeship and the CIAF fund.

QUESTION: Would you agree, Mr. Bailey, that the Oregon Supreme Court construed and interpreted the meaning in the way suggested by Mr. Neil, and nonetheless decided in your favor? As I understand it now, you're submitting to us that if that construction is correct, then it's an illegal payment.

MR. BAILEY: If that does say that. But we say that it doesn't. But let me go back to answer your question, Mr. Justice Stewart, that the Oregon Supreme Court, in its opinion, spelled out that, first, the urging before that Oregon Supreme Court was mostly Moglia, and the teachings of Moglia. And that was the urging there was that Moglia says that you had to have an agreement in writing before you could become -- you could have benefits. The Oregon

Supreme Court said, well, Moglia doesn't apply here because Walsh does have an agreement. Therefore it couldn't operate.

Then they came on this petition here, saying that, well, look: because these people can't benefit, and there is indication that they might benefit, then it's in violation -- Article IV is in violation of 302.

We say that the trust agreement, which is the way you determine how you're going to have benefits, that trust agreement precludes that interpretation.

QUESTION: But the Oregon Supreme Court seemed to interpret the documents here as though the employees of the sub were beneficiaries of the trust agreement.

MR. BAILEY: Well, if --

QUESTION: Do you agree with that?

MR. BAILEY: Well, I'm not totally in agreement with it, because the arguments --

QUESTION: Well, it's not all that clear. And I just wondered if --

MR. BAILEY: Right, correct. It's not that clear, because the Oregon Court said it didn't really have to reach that, because in the teachings of the Kreindler v. Clarise cases, and the Budget Dress, that an agreement that provided the contractor sign an agreement to pay for his own employees plus contractor employees under certain circumstances was all right, because --

QUESTION: But you agree now, as I understand you -- and you tell me if I misunderstand you -- that -- you would agree that the Oregon Supreme Court did have to reach that, and that indeed is the dispositive issue in this case, isn't it? Whether or not the employees of the sub were beneficiaries of the trust agreement.

MR. BAILEY: I don't think the Oregon Supreme Court actually reached that --

QUESTION: But isn't that the dispositive issue in this case?

MR. BAILEY: That's the dispositive issue --

QUESTION: You and your brother agree on that, as I understand it.

MR. BAILEY: Yes.

QUESTION: And you agree as to what the law is, as I understand it.

MR. BAILEY: Yes.

QUESTION: You differ only as to what the precise situation is in this case, isn't that it?

MR. BAILEY: Right. And that there is no showing that there has been anybody that has not been entitled to receive benefits that has ever received them.

QUESTION: Yes, but -- I gather my brother Stewart asked you if it were plain on the face of the documents that the employer and the union actually agreed, and intended, to

have these payments made for the benefit of a non-union subcontractor, would you agree -- I understand your answer that that would be an illegal contract.

MR. BAILEY: That that portion would, yes, I would agree with that. Because that's what it said.

QUESTION: And you also agree, I take it, that basically you're dealing with a prohibition that is across the board. And then there are exceptions to it. And I presume the burden is on he who wants to bring himself within an exception.

MR. BAILEY: That's what we say, that he has to show that we actually did pay out -- the trust actually paid out some money to somebody they shouldn't have.

QUESTION: No, no, no, I think it's the agreement. The agreement. What's the construction in the collective bargaining agreement? If the parties said in so many words we -- I, the contractor, promise to pay on behalf of, and for the benefit of, the employees of non-union subcontractors certain amounts of money, I take it you agree that would be an illegal promise.

MR. BAILEY: If he said that, yes.

QUESTION: Do you concede that the basic language of 302 that is meant here, that it was a payment to a representative of any of his employees?

MR. BAILEY: Well, we concede certainly that the

trusts are such representatives, because they are established as a Taft-Hartley trust. We accept that. We accept that.

QUESTION: Well, then, you have to bring yourself within one of the exceptions, don't you?

MR. BAILEY: Well, I'm saying -- I wanted to qualify my answer to you, Mr. Justice.

QUESTION: Go ahead.

MR. BAILEY: The qualification is that, of course, the CIAF is not such a Taft-Hartley trust.

QUESTION: That is one out of the five.

MR. BAILEY: One out of the five, yes. Right, right. Now to bring ourselves within the exceptions, the exceptions are, of course, that the trust fund -- and we're talking about the exceptions of (c) (5) -- the trust funds must be such that they do not make contributions to -- or benefits to persons other than the employees of a contributing employer.

QUESTION: The traditional statute construction is that the burden would be on you to bring yourself within the exception, is it not?

MR. BAILEY: Well, counsel has never challenged the validity of the trust fund. At no time has he done that. There has never been any challenge as to whether these trust funds are lawful.

QUESTION: Mr. Bailey, may I ask you a question?

MR. BAILEY: Yes.

QUESTION: First of all, is the entire trust agreement in the record?

MR. BAILEY: No -- yes, sir, the trust agreements are in the record, yes.

QUESTION: And is it correct that an employee, in order to be entitled to benefits, must work a certain number of years or something like that? Is there a period that must elapse before his rights vest?

MR. BAILEY: That's on the pension.

QUESTION: On the pension?

MR. BAILEY: Right. On the pension he must have 12 credits. And that means 12 years of employment of certain hours per year.

QUESTION: So with respect to such an employee, there might be contributions made for him for five years, and then he might decide to get out of carpentry and go into some other industry. He would never be a beneficiary of that trust, then?

MR. BAILEY: That's right, under --

QUESTION: Now is that also true of, say, the other trusts?

MR. BAILEY: The Health and Welfare runs on a shorter period of time. And that runs on our quarters, saying that you receive the credit of 250 hours in a period

of three months.

QUESTION: Then such a man could, perhaps, work 200 hours, and contributions be made on account of those 200 hours, but he never would get any benefit from that?

MR. BAILEY: That's correct.

QUESTION: Now is that same principle applicable to all of the trusts?

MR. BAILEY: All right. The balance of the trust is on the Health -- or excuse me on the Vacation, for those who are eligible under it. The dollars that come in on Health -- on the Vacation are allocable to an individual, and they are also added to by earnings of the trust and the disposition is made on a pro rata basis based on the amount of money that comes in.

QUESTION: But is there immediate vesting for -- in the Vacation Trust as soon as a man works for a few hours?

MR. BAILEY: If he is an employee --

QUESTION: If he's a covered employee?

MR. BAILEY: Right.

QUESTION: Yes.

MR. BAILEY: Right. Immediately vested. Now, if you'd want the other two trusts you asked about.

QUESTION: Yes.

MR. BAILEY: On the Apprenticeship and Training, of course, there's no -- there's no benefit that applies to

an employee, because the employee himself, he's working, you see. He's a contractor -- I mean, he's a journeyman, and he's on the job. So he's not taking the benefit.

QUESTION: The beneficiary is somebody entirely different.

MR. BAILEY: Yeah, he's not around.

QUESTION: Right.

MR. BAILEY: And on the Construction Industry Advancement, there's no beneficiaries of that except the general public or what you will because it promotes the industry.

QUESTION: Right. Let me ask one other question to be sure I have it in mind. Assume there were an employee of the general contractor in the past. He had been in the union, perhaps took a withdrawal, and was not working for the general during the period involved in this lawsuit. And then he later -- but he worked for a subcontractor -- worked for the sub, the non-union sub, then later got back into the union. I take it he would not get credit toward vesting for the period he worked for the non-union employer.

MR. BAILEY: He would not get credit for that period, because those funds do not attache themselves to -- other than an employee or covered employer.

QUESTION: Right. I understand.

QUESTION: Now, I want to -- in the Oregon -- or

in the states. Is it Oregon?

MR. BAILEY: Yes, it's Oregon.

QUESTION: Yes. The Oregon Supreme Court describes this contract as saying, in this case the requirement of the written contract was satisfied in that the defendant had a written contract with the union which required that he make contributions to the trust fund for his own employees; and also specifically provided that in the event he engaged a subcontractor to do any work covered by the agreement, he would be liable for payment into the various trust funds for the employees of such subcontractors.

MR. BAILEY: Yes, that's what it says.

QUESTION: Now, is that an interpretation of the contract, that they were agreeing to make payments on behalf of, and for the benefit of, the employees of any subcontractor?

MR. BAILEY: I, of course, cannot say precisely what the Supreme Court of Oregon had in its mind.

QUESTION: Well, it sounds that way. It sounds more like that way than any other way, doesn't it?

MR. BAILEY: Yes. It uses the word, for. But if it was applicable to the --

QUESTION: Well, what does for mean?

MR. BAILEY: Well, it could be for the hours that these employees. That's generally what the reference means, because the word, for these employees, under Article IV, could

apply to benefits to those people, as we've just demonstrated, for the Apprenticeship and the Vacation -- or the CIAF.

QUESTION: You think that -- what you're really saying is that these people knew what they were doing. They were not making an illegal contract.

MR. BAILEY: That's what I'm saying, yes. That the intent of the labor agreement was to produce money for the -- to support the trust fund. The intent and purpose of the trust funds is to say what to do with that money. And that's what we're saying is, that you have to look -- if you're going to get benefits, you have to look at the trust fund for that purpose; that the only real purpose of the contract, the labor agreement, was to supply the money. And that was the method in which it was supplied.

If I may, in closing, state that we emphasize that there was, despite any testimony otherwise and any testimony in this record that is in contravention of the requirements both of the law and the trust agreements, that in those circumstances, the -- it must comply with the law. And that there is no proof in this record that any individual has received any benefits who is not entitled to them under the law. And we think that that was a matter of proof that the petitioner had to make. And we say that the decision of the Oregon Supreme Court should be affirmed..

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

Mr. Neil, do you have anything further?

REBUTTAL ARGUMENT OF CARL R. NEIL, ESQ.,

ON BEHALF OF THE PETITIONER

MR. NEIL: I have two or three points, Mr. Chief Justice. Mr. Justice White extracted the concession from counsel that the payments required under counsel's theory of the case for a non-union signatory employee are not necessary to the integrity of the trust fund. That's an important point, I think, because argument is made otherwise in the brief of the respondent.

There is no evidence in this record of any actuarial assumptions of any of the trust funds. Furthermore, the texts on pensions and pension planning cited by respondent do not disclose that any such actuarial assumptions are made. There are a lot of actuarial assumptions made, but they're all made on how many covered employees are there, how many hours are they going to work, this kind of thing. They do not make the kind of actuarial assumptions that says there's going to be so much penalty contributions, or so many contributions that aren't related to particular employees.

QUESTION: Well, really, that's no business of the statute or of this court, is it?

MR. NEIL: I don't think so, but the argument --

QUESTION: The actuarial soundness of the trust fund, is it?

MR. NEIL: I agree. But counsel made the point

that the actuaries -- counsel suggests that the actuaries might have assumed that there's going to be a certain level of penalty contributions made into the trust, and that may be necessary for the soundness of the trust. I'm saying that's not the case.

Mr. Justice Rehnquist raised the question, I think, first of whether state law might control trust instructions. The Oregon Supreme Court's opinion does not directly construe the trust agreement except by implication in its comments on Article IV. And if it can be said to have construed the trust agreement by its comments on Article IV, it construed them in our favor.

In addition to the point made by Mr. Justice White about the Oregon Supreme Court's opinion, I draw your attention to page 34 of the appendix to our brief, another portion of the Oregon Supreme Court's opinion, in the first full paragraph, where they are stating the question as presented to the Oregon Supreme Court on this issue. And they say, defendant's first contention on cross appeal is that the subcontractor's clause of the labor agreement violates 29 U.S.C. §186 -- that's 302 -- to the extent that it may be applied to require defendant to make contributions to union trust funds quote for the benefit of employees other than his own as pleaded in defendant's fifth affirmative defense.

I suggest that's further evidence that they thought they were deciding the case below on the basis of the construction that Article IV did require contributions for Jackson's employees.

QUESTION: Did the district -- did the higher court construe it that way?

MR. NEIL: It's hard to tell, your honor. This issue in the trial court was decided on demur. And the trial judge rendered no opinion in his decision on demur.

QUESTION: I see.

MR. NEIL: Thank you very much.

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

[Whereupon, at 10:51 o'clock, a.m., the case in the above-entitled matter was submitted.]