In the

Supreme Court of the United States

AMERICAN BROADCASTING COMPANIES, INC., et al.,

Petitioners,

v.

WRITERS GUILD OF AMERICA, WEST, INC., et al.,

Respondents.

Nos. 76-1121, 76-1153 and 76-1162 (Consolidated)

Washington, D.C.
March 20, 1978

Pages 1 thru 55

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

AMERICAN BROADCASTING COMPANIES, INC., ET AL., Petitioners,	:	
v.	:	Nos. 76-1121, 76-1153 and 76-1162 (Consolidated)
WRITERS GUILD OF AMERICA, WEST, INC., ET AL., Respondents.	:	

Washington, D. C.

Monday, March 20, 1978

The above-entitled matter came on for argument at 10:05 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 P. STEVENS, Associate Justice

APPEARANCES:

NORTON J. COME, ESQ., Deputy Associate General Counsel, Department of Justice, Washington, D. C. 20530, for Petitioner NLRB.

HARRY J. KEATON, ESQ., 1800 Century Park East, Los Angeles, California 90067, for Petitioner Association of Motion Picture and Television Producers.

APPEARANCES (Cont'd):

CHARLES G. BAKALY, ESQ., 611 West Sixth Street, Los Angeles, California 90017, for Petitioner American Broadcasting Companies, Inc.

JULIUS REICH, ESQ., Reich, Adell & Crost, 501 Shatto Place, Los Angeles, California 90020, for Respondents.

LAURENCE GOLD, ESQ., 815 Sixteenth Street, N.W., Washington, D. C. 20006, for AFL-CIO as amicus curiae.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in 76-1121, American Broadcasting Companies against Writers Guild and the cases consolidated with that case.

Mr. Come.

ORAL ARGUMENT OF NORTON J. COME, ESQ.

ON BEHALF OF THE PETITIONER NLRB

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

This case presents another facet of the problem which this Court considered in Florida Power four years ago. The question is whether Section 8(b)(1)(B) of the National Labor Relations Act which makes it an unfair labor practice for a union to restrain or coerce an employer in the selection of his representatives for collective bargaining or grievance adjustment, whether a union violates this provision by threatening to discipline and disciplining supervisors who are also members of the union for crossing a picket line to perform their normal supervisory duties during the strike.

Now, the facts, very briefly, are these. Respondent, the Writers Guild, represents for collective bargaining purposes writers who prepare scripts for motion pictures and television films. The Employers also employ producers, directors and story editors to manage and carry out the production of the films. The producers, directors and story editors are

supervisors within the meaning of the Act and when engaged as such they also represent the Employers in the adjustment of grievances and the producers also represent them in some cases for collective bargaining purposes.

Some producers, directors and story editors, known as hyphenates -- and these are the people that we will be concerned with here -- have writing capabilities and are at times employed by the Employers as writers. The Guild represents the hyphenates only when they are employed as writers and not when they are employed as producers, directors or story editors. Most hyphenates have personal service contracts with the Employers when they are so engaged.

The collective bargaining agreement with the Guild provides that a person subject -- employed in a nonwriting capacity, such as a producer, writer or director, is not covered by the Agreement. The Agreement further provides that producers, directors and story editors may engage in certain editorial writing functions, called A to H functions, without becoming subject to the Agreement.

Now, in March of '73, the Guild began a strike against the Employers in furtherance of their demands for new contracts covering the writers. The strike continued against some employers until July of that year. A month before the strike started the Guild distributed strike rules to all members, including the hyphenates. In addition to prohibiting writing

for struck employers, the rules prohibited all members, regardless of the capacity in which they were working, from crossing the union picket lines. The union strike rules also prohibited union members from working in the future with members who violated the strike rules. And the Guild, through a special meeting of the hyphenates and the phone calls to particular hyphenates, emphasized that the strike rules would apply to the hyphenates working in any capacity and that they would be subject to discipline and blacklisting if they crossed the picket lines.

The Employers, on the other hand, demanded that the hyphenates continue, notwithstanding the strike and the picket lines, to perform their duties, other than as writers, under their personal service contracts. Some hyphenates crossed the picket lines to perform their normal supervisory and managerial functions as producers, directors and story editors. They performed no writing work which would otherwise have been performed by the striking writers. Many hyphenates did not go to work.

During and after the strike, the Guild filed internal charges against 31 of the hyphenates for crossing the picket line, and 10 of them were subsequently convicted and were suspended or expelled from union membership and fines ranging from $500 to $50,000 were assessed. Later the union membership voted to reduce the penalties of nine of the convicted hyphenates.

Upon charges filed by the Employers, the Board, with

Member Fanning dissenting, concluded that the Guild had violated Section 8(b)(1)(B) of the Act by disciplining and threatening to discipline the hyphenates for crossing the picket line to perform their normal supervisory duties.

Now, Florida Power holds that a union's discipline of one of its members who is a supervisory employee can constitute a violation of Section 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of and acting in his capacity as grievance adjuster or collective bargainer on behalf of the employer. The discipline in Florida Power was found not to have this effect, because the supervisors were disciplined for crossing the picket line to engage in rank and file struck work, which is neither collective bargaining or grievance adjustment, nor any activities related thereto.

We submit that a different conclusion is called for where, as here, the supervisor crosses the picket line to perform his normal supervisory duties and they include, as was true in this case, grievance adjustment and collective bargaining functions.

Now, there are two bases on which we believe we can satisfy the Florida Power test. The first is referred to as a deprivation theory and the other is a carry over theory. Turning to the deprivation theory first, we believe that the threat of discipline restrained the employers in the selection

of a representative for grievance adjustment and collective bargaining no less than if the union had engaged in a direct strike to obtain the removal of a disfavored foreman would have done. For two reasons. Insofar as the threat kept hyphenates away from work -- and it appears that about 100 of them did not go to work -- the employers were deprived of their services which included grievance adjustment and collective bargaining. Insofar as the hyphenates defied the union and went to work -- and at least 31 did because that was the number disciplined -- the employers will nonetheless have been coerced by the union's threat because the legality of a threat is not dependent upon its effectiveness, and the strike rules here were in effect for at least a month before the strike started and before the employer was able to ascertain who would or would not come to work.

Now, in the first argument of this case, the union conceded that if it had threatened to discipline the hyphenates for crossing the picket lines to perform grievance adjustment or collective bargaining functions, it would have violated Section 8(b)(1)(B), irrespective of whether the threat was effective. It contends, however, that the Board hasn't proved that the union's threats deprived the employers of their representatives for grievance adjustment or collective bargaining purposes because there is no finding, first, that the hyphenates stayed away because of the threats rather than the picket line,

and, two, there is no finding that the union intended to fine the hyphenates for performing grievance adjustment and collective bargaining functions, as distinguished from performing their other supervisory duties.

We submit that these contentions don't stand up for these reasons. In the first place, since the union threatened the hyphenates with discipline if they went to work in any capacity, we submit that the burden is on them, under familiar principles of law, to disentangle the consequences for which they are chargeable from those from which they are immune. You do not have just a picket line in a strike and supervisors electing not to honor the picket line.

Secondly, as I pointed out, the union threatened the hyphenates with discipline if they went to work in any capacity. They knew that the employers had asked the hyphenates to perform their normal supervisory duties, that these included grievance adjustment and collective bargaining and that with the other employees remaining at work as they did, it was likely that they would be called upon to engage in grievance adjustment and collective bargaining. And the record shows that they, in fact, were. In these circumstances, we submit --

QUESTION: How does the record show that they were engaged in collective bargaining? Maybe I had a limited view of the definition of collective bargaining, but it seems to me that that has to do with negotiating a collective agreement.

MR. COME: Well, the record shows that the producers when they were on location were frequently called upon to enter into on-the-spot agreements to cover people that had to be hired to perform services. The producers are the only ones, on occasion, who were required to engage in collective bargaining. The others adjusted grievances, and the record does show that they did adjust grievances because they were shooting film. There was no new writing going on, but there were prepared scripts before the strike and they were being filmed. You had actors at work. You had the other people, other than writers, and there were --

QUESTION: You include grievance adjustment as part of collective bargaining? In addition to collective bargaining. It's really not part of it, is it? Under the statute, it says for the purpose of collective bargaining or the adjustment of grievances.

MR. COME: The statute does distinguish the two. I think that you could make a good argument that the concept of collective bargaining, as it is understood in labor-management relations, could in a broad sense include the day to day administration of the agreement and insofar as the adjustment of grievances under the contract is part of the day to day administration of the contract as part of the process of collective bargaining.

QUESTION: Mr. Come, if an employer refuses to

process grievances under the collective bargaining agreement, can that be the basis of an 8(b)(5) charge?

MR. COME: An 8(a)(5) charge, yes.

QUESTION: It is collective bargaining, isn't it?

MR. COME: It is. Justice Stewart is correct, however, that Congress distinguished it. In this statute, I submit, it wasn't necessary to separate the two out. Collective bargaining would have covered the whole thing.

QUESTION: In other words, if that second phrase had been omitted, it would be no different at all? That's your position?

MR. COME: That is correct.

QUESTION: Was there a collective bargaining agreement in existence? And if so, what was the strike about?

MR. COME: There were agreements covering these other people who were working during the strike, the actors and the cameramen and the others that have to be employed in producing a film. This is not a situation where you have the plant shut down and there is nobody at work. I mean supervisors really go in there to update their records, or something.

QUESTION: To keep the heat on, or something like that.

MR. COME: To keep the heat on. You had a going operation.

I would like to not cut in further into my colleague's time. Thank you.

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

Mr. Keaton.

ORAL ARGUMENT OF HARRY J. KEATON, ESQ.

ON BEHALF OF THE PETITIONER ASSOCIATION OF

MOTION PICTURE AND TELEVISION PRODUCERS

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

In the time allotted to me I would like to primarily discuss what has come to be called in this case the deprivation theory. It is basically a very straightforward and simple theory as it was described by the Administrative Law Judge in this case. It does not require consideration such as whether something might have an effect in the future, but it deals with the present, the time of the strike. The basic question is does the union's pressure on a supervisor not to work by coercion and restraint and threats and discipline, foreseeably, could it have the effect of preventing that person from working and thereby depriving the employer of the selected 8(b)(1)(B) representative, thereby coercing and interfering -- excuse me -- coercing and restraining the employer in such selection. The classical case on the subject, the Horner case, which is cited in our brief, in which there was no contract and the union instructed union members to withhold their services, the superintendent on the job was a union member and he, too, was instructed not to work. He disobeyed union orders and was

punished. The National Labor Relations Board had no difficulty finding that the employer had been coerced and restrained in the selection of the supervisor, or this 8(b)(1)(B) representative, because the foreseeable effect of what the union did would have been that he would not have worked or, alternatively, if he did work and was punished his services might not be available in the future. In that case there was no refusal by any of the employees to work, including the supervisor. The effort was manifestly unsuccessful. I am stressing that point.

Post Florida Power, we have a very similar situation. In a case involving Skippy Enterprises, now known as Wisconsin River Valley, which was affirmed from the Seventh Circuit, in that case there was a very similar situation. There were two union elections, both lost. After the election, the union said, "We will not permit any of our members to work on this job," and they told the superintendent, "You cannot work or we will punish you." He did work and they punished him. And, again, the Board held it to be an 8(b)(1)(B) and the Court affirmed on the theory that clearly here is the foreseeable deprivation of the employer of its 8(b)(1)(B) representative and, therefore, coercion and restraint in his selection.

Now, the very important point that needs to be made is this issue was not before the Court in Florida Power. Why? Because in Florida Power, first of all, at least in the Illinois Bell part of Florida Power, the supervisor was told, "If you

want to come to work, we'd love to have you come. If you don't want to come to work, you don't have to." They were not even designated as 8(b)(1)(B) representatives. They were given the option to designate themselves. In both cases, the union said, "If you come to work and perform your normal supervisory function you can do that. We will not punish you," thereby, clearly not interfering, not coercing, not restraining the employer in selection, if one accepts the view of the majority in Florida Power that struck work is not part of collective bargaining or grievance adjusting or not even related to it. Because the whole gamut of what a supervisor does could have been done without an interference on the part of the union.

The touchstone of the Florida Power case, actually, in the decision was the future. What future effect may the conduct of the union have? That is not necessarily needed here even though it is present too, because he has effected the current effect during the strike.

Now, in this case, the employer ordered the union representatives to work. They didn't give them an option. Only supervisors, only in their normal management function. And they were told, "If you do not come to work, we will discharge you and we will fine you."

The union, on the other hand, said, "You cannot work at all. No services in any capacity whatsoever, including, of course, grievance adjusting and collective bargaining."

Now, clearly, the union threats and the subsequent discipline had one purpose and one purpose only. One just has to look at what preceded the strike. Reactivation of withdrawn members, if you please, who had no loyalty or obligation to the union whatsoever, who were paying no dues and had no union benefits. They were pulled back into the union by a mandate in order to put them under the union's yoke and enable the union to force them not to work, and, thereby, prevent the employer from selecting representatives.

Now, whether or not there was collective bargaining during the strike, I submit, is not really relevant, collective bargaining in the sense of negotiating a contract. The important thing is that these people who went to work were authorized to negotiate contracts, they were designated to negotiate contracts. They were authorized and designated to settle grievances.

Now, the union was in no way here relying on any appeals to the loyalty of the supervisors. Quite the contrary. It was bringing them back, drafting them, if you will. Many of them were associate members who did not have the right to vote on the strike rules and didn't vote on them. No one was allowed to resign. They were locked in. And in those circumstances they were told, "If you come to work in any capacity, we will do terrible things to you, not only now but for the future, namely, you will never be able to work again," putting maximum

pressure on these people in order to force them not to work now and thereby coercing the employer for the present as well as for the future.

The union argues here, basically, four points in defense of its position. First of all, it says that there is no 8(b)(1)(B) because its efforts were unsuccessful. A lot of people came to work, paid fines, attempted to expel, until the membership reversed them.

Secondly, that the motive of the union here was not established to prevent the performance of 8(b)(1)(B) work or, indeed, the manner of such performance.

And, thirdly, the union argues, in effect, that 8(b)(1)(B) is designed to protect the supervisor, rather than the employer, but only in the performance of collective bargaining and grievance adjusting functions.

All those premises, I would submit, are totally wrong. Beginning with the first one, success if not required. And we can cut through all the other possibilities and go straight to Florida Power because when this Court said in Florida Power that a violation can be found only if it may adversely affect the conduct of the supervisor, very obviously the Court did not say "will" affect. It said "may" affect. There does not have to be success, even in terms of Florida Power, itself. And, again in Florida Power, this Court cited disapproval -- cases where an 8(b)(1)(B) had been found when an

attempt was made to force an employer to accept only union members as supervisors. So without going beyond the decision of this Court in Florida Power, it is manifestly clear that all that's involved is attempts and not success. The number of cases in 8(b)(1)(B) involving only attempts are legion.

The union relies on an 8(a)(3) case to argue to the contrary. 8(a)(3) does not deal with coercion and restraint. It deals with discrimination, where motive is important, and a lot of other things are important that are not important under personal restraint. As to the motive in this situation, incidentally, the question here is clearly not why the union was doing it, but what the effect on the employer is. That is the issue. Is the employer being restrained and coerced? If he is, no one cares why the union did what it did.

Again, turning to the Florida Power language, the question is what the effect is, not what the motivations were. 8(b)(1)(B), contrary to what the union suggests in its supplementary brief, is not intended to protect supervisors. It is crystal clear under Section 2311 and 14 of the Act that supervisors have no Section 7 rights to protect, that protection is afforded to the employer in his selection of supervisors. And, furthermore, that protection is afforded to the employer not in the performance of the function, but in the selection of the person who will perform the function. That's the issue.

Now, as to the performance of the function, there was

an argument, there was a discussion, questions from the Court to counsel for the union in which counsel for the union conceded that if a supervisor came in with an affidavit, I believe was the language, stating, "I will do only 8(b)(1)(B) work. I will only adjust grievances and bargain collectively," then, indeed, the union could not punish him.

Well, Your Honors, looking at this realistically rather than academically, what we have here is a concession that a man who may be paid as much as $10,000 a week as a producer of a motion picture, or even more, can be brought in by an employer to sit there for a day, a week, a month or maybe a year, until a grievance arises which he has a right to adjust. No one knows when grievances occur. No one can predict. And to say that employers can bring in supervisors for the sole purpose of doing 8(b)(1)(B) work is to say that it can be made economically impossible for them to make a selection and, therefore, they have to select someone else.

To me, the situation is absolutely in no way different from the situation in California Cottage Company, 208 NLRB 994, page 1004, affirmed by the Court of Appeals for the District of Columbia, 515, Sub. Sec. 1018, in which this Court denied Cert, where a labor organization, a longshoremen's union of the Pacific Maritime Association, entered into a contract in which they said, "If any complainer has to be handled that has not been stopped by longshoremen, then we would impose a

pact on those complainers," and it was a pretty stiff pact. And the Board held and the Court affirmed that the imposition of that pact was exactly the same thing as saying, "We will not handle the complainers."

And, I submit, in the same way, in this case, one cannot say that the 8(b)(1)(B) rights of the employer to select their representatives are really protected if he has to pay the price of having someone sit all day waiting for a possible grievance.

Now, the work involved here in the last argument by the union is, of course, that some of the work here involved collective bargaining-type work. Well, the A to H functions are very clearly managerial work. First of all, the contract says they are not covered by the contract but performed by excluded personnel. And secondly, by their very nature, the decisions involved are management decisions. In this respect, the work differs importantly from the Florida Power type work for three reasons.

First of all, it clearly was not work that was struck work in the legal sense of the word, or bargaining unit work in the legal sense. But more importantly, it is managerial work. It is managerial work of any sort from which grievances flow. If someone is performing management work, that's how grievances come about. And if the person who is a manager performing these functions has grievance adjustment authority,

as all these people did, then it necessarily follows that the performance of these management functions is, quote, "grievance related," as this Court stated in Florida Power in its majority opinion.

Now, basically, 8(b)(1)(B), I would submit, is a policy determination unambiguously expressed by Congress, as Mr. Justice Stevens said in an opinion. Namely, -- and I don't mean on this subject, but on a different statute -- "Equally unambiguously expressed here that the intent is to protect the employer's right to select its management representatives free of coercion or restraint by the union." That's the issue.

And I think the only way the Court could find in favor of the Writers Guild in this case would be to, in effect, tack onto the statute a provision saying "this provision shall be inapplicable in case of a strike."

I would like to reserve my remaining time for Mr. Bakaly.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Bakaly.

ORAL ARGUMENT OF CHARLES G. BAKALY, ESQ.,
ON BEHALF OF THE PETITIONER AMERICAN BROADCASTING COMPANIES

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

I would like to make one observation concerning the deprivation theory before I talk about the adverse carry over

effect theory.

The Guild contends that the Board did not make findings that the threats were made to others than those who worked. I would like to submit that that statement is erroneous. And in the Board's decision in the petition at Appendix B-3 the Board goes on to say that it "sustains the complaints, alleged violations of Section 8(b)(1)(B) of the Act in toto." And 13(d) of the second amended complaint alleges that commencing in February through the final edition of the strike rules and in Rule 30, its blacklist rule, and by other actions it threatened numerous persons occupying the positions of the hyphenates, "that for all times in the future no member of Respondent would work with or perform services for them, if they failed to honor or otherwise support the strike described in paragraph 10 above."

That, I submit, was a finding by the Board that there were threats to hyphenates other than those who crossed the picket lines, that they would be threatened and blacklisted if they did cross the picket line and failed to honor the strike.

Now, with respect to the second theory of the Board which I would like to direct most of my time to, the adverse carry over effect theory begins with this Court's decision in Florida Power, where, as it has been said, the Court stated that the union's discipline of one of its members, a supervisory employee, can constitute a violation of 8(b)(1)(B) only when

that discipline may adversely effect the supervisor's conduct in performing the duties of or in acting in his capacity as a grievance adjuster or collective bargainer.

Now, this conduct of the Guild, in this case, which Judge Moore in his dissent in the Second Circuit characterized as the Guild's interarum conduct, certainly would have an adverse carry over effect to supervisors in the future. Not only are the fines absolutely horrendous -- $50,000 even to somebody making $5,000 a week, is a substantial sum of money -- the threat to expel from the union is certainly substantial, but more importanly, the blacklisting threat to creative people is absolutely abhorrent.

The fact that after the strike the Guild rescinded Rule 30 really did not absolve the Guild or does the after the fact reduction of the $50,000 fine take away the fact that the threats were made and they had an effect. The Guild or any other union could blacklist in the future if this Court holds such conduct lawful. And furthermore, the role of dishonor was not rescinded at all and there is evidence that it may well have continued in effect.

Now, while the Guild argues that individual members, acting alone, may have been able to refuse to work with, as they call them, "scabs," certainly they couldn't do it in concert and they couldn't do it if the Guild suggested it or condoned it and we submit that the evidence here is certainly very

strong that that occurred.

Now, the union says well, the employer could take care of the effects of this after the strike by requiring resignations. In other words, they could require supervisors to resign after the strike and then in the future they wouldn't have the power to submit to discipline.

That really couldn't happen in this case. In the first place, the blacklist and the threat of the blacklist is still there.

QUESTION: You say the putting out of a blacklist or a list of the people unions regards as scabs is, by itself, violative of the Act?

MR. BAKALY: Yes, I think so, Your Honor. By the union?

QUESTION: Yes.

MR. BAKALY: To say you will not work with other members when your whole livelihood depends on your ability to attract the best creative people; yes, I think that's definitely coercion.

QUESTION: Well, is there any difference in the labor law between creative people and carpenters?

MR. BAKALY: I don't argue there is a difference. Here the associate producer and the director -- their value of their services is the ability to get outstanding creative people to work with them. It is not quite the same as a

carpenter or someone working with a carpenter. So I think there may well be a difference in this industry because of that situation.

But, nevertheless, the answer to the question about resignation after the strike, whether that was the remedy for the employer, the blacklist would still be there. And remember that the record is clear that the Guild had the right to prevent resignation for two years after the strike of any member.

We submit that the self-help option rule is not valid in this case because of the fact that a substantial percentage of the management people comes from the rank and file and will return to positions as writers as time passes. And as a practical matter resignation just is not going to get us the kind of producers that we need. Producers have to have the ability to work with the writers and, therefore, we feel that the self-help options are really not valid.

There is no question but what this conduct did engender fear in the supervisors and it engendered fear in those who adjusted writers' grievances, it engendered fear in those who adjusted grievances of other employees, because employees don't differentiate between the kind of union that makes the threat. One union makes the threat and they feel that any union could also make a similar threat.

The record is replete with the evidence of the effects of these threats upon individuals, and I won't go into that at

this point in time.

The carry over effect clearly restrains the selection of a supervisor, as the statute sets forth. If a union can, by threats and by fines, change the way a supervisor performs, it has, in effect, negated the employer's selection and has changed the supervisor.

In the legislative history, Senator Taft talks about Mr. X and Mr. Y. Well, let's suppose that Mr. X was a person who rigorously enforces the contract and keeps the union employees toeing the mark and Supervisor Y is very easy and very soft upon the employees. And if that employer wants Supervisor X, certainly if the union can fine Supervisor X to such an extent to turn him into Supervisor Y, a supervisor that acts better toward the union members and softer toward them, he has, in effect, changed, the union has, in effect, changed the selection of that employer from X to Y.

QUESTION: Have these fines had any such effect in changing the attitude of any supervisor toward any grievance or collective bargaining issue?

MR. BAKALY: I think that's a question for the Board to decide, Mr. Justice Stevens. The Board is the agency which Congress has equipped with expertise and with its experience it has found that this kind of conduct may adversely affect the supervisors in the way they perform their grievance adjusting and collective bargaining in the future.

QUESTION: As I understood it, it's both X and Y. One is soft and one is hard. Both cross the picket line. Then both are equally subject to the fine. Equally subject to discipline, aren't they?

MR. BAKALY: That would be correct.

QUESTION: How does the discipline tend to make Y act more like X?

MR. BAKALY: I am using a situation where both do not cross the line. That's the point that I am trying to make.

QUESTION: In other words, there is just as much deterrent on Y as there is on X, on whether he's tough or he's soft. He is equally deterred from crossing the line.

MR. BAKALY: That certainly may well be a fact, and that, of course, goes to the deprivation theory which is the first theory of Mr. Justice Stevens.

QUESTION: But you are arguing on the carry over theory.

MR. BAKALY: The point I am trying to make is that we have two separate supervisors -- take it away from the picket line for a moment -- We have two separate supervisors, or two candidates, X and Y. The employer wants X because of his characteristics. If the union can find X and turn him into somebody like Y, then they, in effect, have changed the employer's selection from X to Y. That's the point I am trying to make.

It is clear from the legislative history that this is just the kind of action that Senator Taft was talking about. But employees cannot say to their employer, "We do not like Mr. X. We will not meet Mr. X. You have to send us Mr. Y." That has been done. It would prevent their saying to the employer, "You have to fire Foreman Jones. You have to fire him or we will not go to work."

Certainly we had in this case when the Guild established this blacklist and the roll of dishoner, they were really saying, "Here is a list of foremen (Jonses) who we will not work with," --

QUESTION: Are all of them on that list X or all of them Y?

MR. BAKALY: Either one.

QUESTION: You don't know. How can you make the statement that they are all X's, or all Y's? Don't you need that to make your argument?

MR. BAKALY: I think you can assume that the people that the employer wanted to work were all X's. You can assume that.

QUESTION: And you can assume that the ones that the union put on there were all what, X's or Y's? While we are assuming. Don't you have too many assumptions here?

MR. BAKALY: I don't believe so, Mr. Justice Marshall. I think what I am using is an example of how you can turn by

fines someone into a different person. That's the point I am trying to make.

QUESTION: Was it done here?

MR. BAKALY: That is for the Board to decide. The Board decided that it may well have been done. And that is in its expertise. The agency that has this experience. It made that finding.

And we submit --

QUESTION: They supported the finding with what?

MR. BAKALY: With inferences and with their --

QUESTION: Assumptions, like you are making.

MR. BAKALY: You may call them that, Mr. Justice Marshall, but that's really what Congress intended this agency to do, was to take from their knowledge of what occurs in real every day life. And they made the decision --

QUESTION: Everybody on that list was a Y man. Every one.

MR. BAKALY: I would like to reserve, Mr. Chief Justice, the rest of my time.

QUESTION: You won't answer my question?

MR. BAKALY: Excuse me. I thought we were done.

QUESTION: I said did they assume that everyone on the list was Y?

MR. BAKALY: No. No, they did not, sir.

MR. CHIEF JUSTICE BURGER: Mr. Reich.

ORAL ARGUMENT OF JULIUS REICH, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

In our view, there are two things that were clearly stated in Florida Power which this Court said to the Board it has to consider and which the Board has not considered. And in not considering it, the Board was able to come up with the result with which it has come up. Those two things are that, first, employers have an option, an unfettered option, to have their supervisors withdraw their membership in unions, not joint unions, thereby resolving what was said in 1947, the conflict of loyalties possibility, where a supervisor has loyalties to the union and to the employer.

And the second point was that Section 8(b)(1)(B) was designed to protect employers in two discreet functions, collective bargaining and adjustment of grievances.

Now, in order for the Board to find a violation in this case, it has had to ignore the Court's rationale and ignore the legislative history.

QUESTION: Suppose an employer orders an employee to come to work and to perform grievance functions. He says, "Please come to work. I've got some grievances to be settled. Will you please come and settle them for me." And the employee crosses the picket line and is fined. And he has crossed the

picket line to perform those duties and performs them and is fined for it.

Now, is that a violation?

MR. REICH: That's a violation.

QUESTION: If he says, "Please come to work," generally, and part of his duties happen to be settling grievances and he does settle them, and the employee is then fined by the union; what about that?

MR. REICH: That may or may not be a violation under these circumstances.

In Oakland Mailers, the Board took the position that a supervisor who is disciplined for the manner in which he adjusts grievances, the manner in which he carries out his supervisory functions, that the union violates the Act by restraining and coercing the employer through such discipline. Under Oakland Mailers, that would be a violation. It would be a violation if the union restrained and if the union disciplined the supervisor for the manner or because he adjusted grievances.

This decision goes beyond Oakland Mailers because the Board takes the position that it is not necessary to show that the supervisor had any grievance functions when he crossed the line. As an example of that, I cite you to the case of the story editors. The story editors in our case only supervised writers. This was a successful strike, there were no writers to supervise. There was no grievance to adjust. There was no

bargaining for the story editors to do. Despite that, the Board proceeds on the theory that so long as he has the authority, whether used or not, to adjust grievances or to engage in collective bargaining, there is a violation.

And we understand the law to be that the Board must come up with evidence that the union disciplined the supervisor because of the manner of his performance of his 8(b)(1)(B) functions or because he performed 8(b)(1)(B) functions.

QUESTION: So if an employer says to an employee, "Please come to work. I may have some grievances to be settled. Come over here and sit around and if there are any I want you to settle them." And he goes and no grievances, and he comes home and he's fined.

What about that?

MR. REICH: I would say no fine. I would say that discipline in that case would violate the Act.

QUESTION: Are you saying that the Board's ruling can be set aside here, as was done by the Court of Appeals and leave open Mailers good law?

MR. REICH: That's right. I don't think that this ruling has anything to do with Oakland Mailers because the Board in this case went beyond Oakland Mailers.

QUESTION: Florida Power and Light did not overrule Oakland Mailers, did it?

MR. REICH: No, I am not suggesting that it did.

I am not suggesting that this Court even has to get to Oakland Mailers. I am suggesting that, under the theory expressed by the Board, it has gone beyond Oakland Mailers.

The carry over theory which the Board expresses says that because a supervisor will be deterred by the discipline on this occasion from crossing the picket line in future strikes, the discipline is a violation of the Act. And I read that on page 17 of the Board's brief and at page 7, Note 5, of the Board's reply brief.

That simply ignores what this Court took eight pages to stress in Florida Power, namely, that the employer can avoid this carry over effect in a future strike by requiring that the supervisor withdraw his membership from the union or by not having permitted him to be a member in the first place.

QUESTION: There is a difference in this case. These employees were told very unambiguously before the strike began that they could not resign during the course of a strike and that is a substantial difference in fact between this case and Florida Power and Light and Illinois Bell and the other; isn't it?

MR. REICH: You are right, Your Honor, it is a difference. While I would argue, first of all, I would point out that Mr. Bakaly was incorrect when he said that the rule was that you couldn't resign for two years. Not that it makes a substantial amount of difference, but the rule was that you

couldn't resign for six months after negotiations. And that was at page 579 of the Appendix.

The rule was that you could resign prior to entering into negotiations. So that the employer had the option before the strike started, before the negotiations started. I acknowledge that this case is a little bit more difficult because of that, but that doesn't make any difference to the Board's theory because it found a violation on this same theory in other cases, one which is presently before this Court on a petition for certiorari, the Hammond case, regardless of the fact that there was not that restraint of resignation.

What it comes down to, as both Mr. Bakaly and Mr. Keaton argued, is that it is too onerous for us to require our supervisor members to withdraw from membership in the union. And, in fact, the Board found in this case that it was a substantial benefit to the employers to have their supervisors members of the union.

But that's not the line that this Court should draw, that's the line that Congress drew when Congress said that the option is with the employers, and if it is too onerous then the employers have to petition Congress or they have to give something up. They have to give something up in terms of negotiating something in the agreement or, as they did in this case, what they did was to tell the supervisors, "We will reimburse you for any fines you are required to pay, and we will provide

a lawyer for your defense." And that's what happened.

Our view is that in Oakland Mailers the Board found a violation by union discipline for the manner in which the supervisors carried out their supervisory duties.

In the present set of cases, the Board says that it doesn't matter how the supervisor carries out his supervisory duties, and it doesn't matter whether he, in fact, does any supervisory duties. In this case, we have what we've described in our supplemental brief as non-struck rank and file work, that's the A to H work, but that's not an issue so far as the Board is concerned. Any discipline for any reason, other than performing 50% rank and file struck work, is in the Board's view violation.

And that, it seems to us, overlooks the second major point that this Court stressed in Florida Power, namely, that there is a distinct difference between 8(b)(1)(B) functions -- the two things, collective bargaining and grievance adjustment -- and those functions that are normal supervisory functions that are contained in Section 211 of the Act.

The Board simply obliterates the distinction between them and doesn't even allude to that distinction in this Court's decision. In this case, a violation was found despite, as I said, the fact that there was scant evidence of any 8(b)(1)(B) functions by anybody and no evidence of any 8(b)(1)(B) functions, at least with respect to story editors.

As an afterthought, in the Board's supplemental brief, they state that the employers were restrained and coerced because in the interim, between the time that the union announced its strike rules and the time that the supervisors came to work, the employers didn't know whether they would have supervisors at work, and therefore their production expectations were up in the air.

I think it is sufficient to point that the Board's argument to that effect was not supported by a citation to the record or by a citation to a Board finding, because there was none.

With respect to the threats, the Board based its findings of violation on the conclusion that since the discipline is a violation, the threat is a violation. And if that is the Board's theory, then the same arguments that are made with respect to the discipline, are also applicable to the threats.

The Board's brief goes on to state the deprivation theory. And in our view, the deprivation theory requires, at a minimum, that at least under Oakland Mailers that there be evidence that a person was restrained and coerced, a person was disciplined for the manner in which he performed his supervisory functions, a finding which was not made and which was deemed not relevant to the Board's theory.

Thank you. I would like to reserve any remaining

time for Mr. Gold.

MR. CHIEF JUSTICE BURGER: Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.,

ON BEHALF OF AFL-CIO, AS AMICUS CURIAE

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

In the time I have, I would like to begin by outlining the Board's various approaches to Section 8(b)(1)(B), to stating the defects in those approaches as we see them, and finally to suggesting what we consider to be the proper reading of that provision.

For the first twenty years after this provision which had received the support of both the Majority and the Minority in the Senate -- one of the very few provisions in Taft-Hartley to do so -- was enacted, the Board took the position, consistent with the language and legislative history, that if a union applied economic pressure directly against an employer to get him to change his collective bargaining or grievance handling representative, that was a violation of the law. And we take no issue at all whatever with that reading of the statute.

As the Court described the change in the Board's thinking in the Oakland Mailers case, the Board moved on to the proposition that disciplinary action against an individual, a supervisor member, for the way he performs his grievance

handling or supervisory -- I am sorry, grievance handling or --

QUESTION: 8(b)(1)(B) says nothing about supervisors.

MR. GOLD: That's why I corrected myself, Mr. Justice Stewart.

QUESTION: Or supervisory functions.

MR. GOLD: We agree with that point entirely.

What I meant to say was that in Oakland Mailers the Board said that discipline of supervisor members for the way they performed grievance handling or collective bargaining functions violates the Act, as well as economic pressure directly on the employer. And, while I would turn to that holding, I think it suffices to say here that at least the Board's approach to that point had the virtue of confining itself to the subject that Congress had indicated it wished regulated, namely, the selection of grievance handling and collective bargaining representatives.

QUESTION: A representative for the purpose of collective bargaining or the adjustment of grievances may or may not be a supervisor, in fact. If so, it is relatively coincidental.

MR. GOLD: That's right. And in the normal collective bargaining situation, the one that Congress was most particularly concerned about, he will not be a supervisor.

Then the Board took what we regard as the quantum step in this progression and stated the rule that Section

8(b)(1)(B) is a general prohibition of union discipline of supervisor members for their conduct in the course of representing the interests of the employer. That's the Board's language.

And that theory came to this Court in the Florida Power and Light case because the Board said that doing rank and file struck work during a strike was conduct in the course of representing the interests of the employer and discipline of that type by the union was, therefore, a violation of Section 8(b)(1)(B).

This Court rejected both the theory as applied in that case and, we most strenuously argue, rejected the reasoning as well.

Since Florida Power and Light, the sum total of the Board's recognition of this Court's decision and its reasoning in Florida Power and Light is to say that 8(b)(1)(B) is a general prohibition of union discipline of supervisor members, except for members who spend a minimal amount of time performing supervisory duties. For everybody else, even if the individual performs struck work, the pre-Florida Power and Light rule continues to represent the Board's thinking.

So, not only has the Board ignored the reasoning of this Court's opinion in that case, but we would submit it has even narrowed the holding, because there can be instances in which a union disciplines a member for performing struck work

and in which the Board will say that the discipline is unlawful, namely, a situation in which he also performs more than a minimal amount of supervisory activity.

So, even in that situation, we say the Board has given very little credence to this Court's approach to the problem.

We think the defects in the Board's thinking, since Oakland Mailers, can be summed up as follows. First, and most importantly, the Board destroys another interest recognized by Congress in 1947. The interest that it destroys is the union's right to discipline members, which by and large was left untouched by Congress in 1947 and, as a historic fact -- and this Court has noted this fact -- Congress very well understood in 1947 that unions disciplined their members. There is nothing left of that right under the Board's theory, as regards the supervisory members.

We don't think that the Board has the authority to view the statute as a one-value statute and to say that the interests protected in Section 8(b)(1)(B), that of selecting a representative to engage in grievance handling or collective bargaining, is so important that all other interests must be denied and that there must be a broad prophylactic rule which prohibits discipline, no matter what its purpose and no matter whether or not it is intended to affect the protected interests.

QUESTION: Would you agree that if the union fines

one of these hyphenates here for performing at all a grievance adjustment that there would be a violation?

MR. GOLD: Yes, Your Honor, I do.

QUESTION: And that if he went to work and part of his work was grievance adjustment, but the other part wasn't, that it, nevertheless, wasn't rank and file work, so to speak, and the union fined him for whatever he did, would there be a violation?

MR. GOLD: Our view on that is that at that point the question becomes the union's purpose and the Board would have to make findings of fact. In the union's supplemental brief, it refers to this Court's opinion in the American Ship case.

QUESTION: But didn't the union there take the position that you can't go to work without being fined, no matter what you have got to do at the work?

MR. GOLD: I don't think that the union took that position. The matter simply wasn't --

QUESTION: Suppose it did. I thought the union in the hearing -- I thought the lawyer representing the union took the position that it didn't make any difference what the purpose of the person going to work was, it was the same.

MR. GOLD: Well, that simply wasn't my understanding. I don't believe that that's the case here.

QUESTION: Here is the Administrative Law Judge.

"It was stipulated at the hearing in this matter that counsel for Respondent who participated in the disciplinary hearing instituted by Respondent would testify that he took the position at such hearing that the hyphenates charged are subject to discipline for crossing Respondent's picket line, without regard to whether they crossed the picket line for the purpose of performing bargaining services."

Let's assume the union said, "We don't care what you are going to work for. You may or you may not be performing collective bargaining work, but even if you are you are going to be fined."

MR. GOLD: I think at that point the union is taking a terrible chance, at the least. If they, in fact, perform collective bargaining or grievance handling functions --

QUESTION: Here is the Administrative Law Judge making a point, "It is clear that it has been found that the normal performance of the hyphenates' primary function involves the adjustment of employee grievances."

Now, do you accept that or not?

MR. GOLD: I accept that, but the problem with that point in this case is that it isn't responseive to the issue, because we think the question is whether they performed such activities during the strike, and if so whether the union disciplined them for doing that as opposed to performing other activities.

QUESTION: But if a threat succeeds they will never show up, and presumably whether or not there is that sort of work to be done they will not be there to do it.

MR. GOLD: In the situation of a threat, it may well be that the proper rule is that the union has to more carefully state its intent than was done here. For example, if there are people who perform both grievance handling work and other work for the employer, it might be that the proper rule is that the union must say, "We will discipline people who cross our picket line and perform non-8(b)(1)(B) work." I wouldn't argue that that is a rule that the Board could not reach. All I say at this point is that the Board is nowhere near having thought through the problem to that extent, because it is still taking the position that whatever the individual does after he crosses the picket line and whatever the union's purpose, there is a violation as long as that person sometimes handles a grievance. And that, we believe, is absolutely wrong.

QUESTION: But your General Counsel at the hearing apparently took the other extreme position, judging from the colloquy that Justice White read.

MR. GOLD: Let me just say that I am here arguing for the AFL-CIO, not this particular union and even if I were arguing for the union maybe I would feel free to disagree, but I certainly do disagree arguing for the client I am arguing for.

QUESTION: I don't doubt you have the authority to do

it.

MR. GOLD: I'm not sure what my authority would be, representing a particular union. But at any rate, our view is that the Board has to find that the individual who is disciplined actually performed grievance handling or collective bargaining work, and that the union fined him or otherwise penalized him for doing so. And that means in a situation in which somebody crosses a picket line and performs only grievance handling or collective bargaining work and the union fines him, the General Counsel would have a relatively easy case, the Board's General Counsel would have a relatively easy case to prove.

Where somebody crosses a picket line and performs some grievance handling work and some other work, then you would have the classic case that you always have under Section 8(a)(3) of the Act which prohibits employer discipline of employees for engaging in union activities, that normally arises.

And, as I was about to say when Mr. Justice White asked me the question that began this discussion, in the union's supplemental brief they refer to the American Ship case and it does seem to us that that's helpful in putting this section in perspective. In 1935, Congress said to employers "You can't discipline employees for engaging in protected activities," but didn't prohibit employers from disciplining people for breaking shop rules.

The Board has never, and we believe it is plain it could not, say that because employees will suspect that when a union activist is disciplined for breaking a shop's rule they will -- everybody in the plant will fear discipline, that the employers have lost their right to discipline people for breaking shop rules.

And, because employees both engage in union activity and to earn a living continue to work for an employer and are subject to his rules, the Board in an 8(a)(3) case must show not only that the person who was fired or otherwise disciplined was engaged in protected activity, but also that the employer's purpose was to punish him for doing that.

QUESTION: The thing that brought on these proceedings was the fine, I take it, after a proceeding within the union.

MR. GOLD: Yes.

QUESTION: What's the union's burden before it can fine a person who crosses a picket line? The union's position, apparently, in those hearings, was, "We don't care what you cross the picket line for, we are going to fine you." That is what the record shows. Is the union free to do that? Doesn't it have some burden to bear to show that it wasn't -- what its purpose was? They seem to take the position that it doesn't make any difference whether you cross the picket line to adjust grievances or not. You are going to be fined.

MR. GOLD: Well, the situation the union found itself in here, as I understand it, is that these people, disciplined people, did not appear at the trial, is that correct? Yes, most did not. So the union is left with the situation that if people are not at the --

QUESTION: I just give you the Administrative Law Judge's -- the second time that he said it in his opinion -- "It was stipulated that Respondent's counsel during the disciplinary hearings was not concerned with what work the hyphenates did when working during the strike."

MR. GOLD: If I may -- It may have been the Respondent's argument before the Administrative -- that may have been the Respondent's argument before the Administrative Law Judge.

QUESTION: This is a description of what the union's position was during the disciplinary hearings inside the union.

MR. GOLD: My view on that is if the union goes forward in that way and the people actually performed grievance handling activity, I think that the General Counsel, by proving both the performance and the union's disinterest has proved bad motive.

But let's take another case. Suppose the union fines a particular individual for working for the employer and it turns out that he didn't do any Section 8(b)(1)(B) work for

that employer. I don't see how the union has committed any violation at all. Certainly, if an employer disciplines somebody for breaking a shop rule and it turns out that that employee was not engaged in any protected activity, he hasn't violated 8(a)(3).

QUESTION: But the union fines him and says, "You crossed the picket line. We don't care what you did. You could have been engaged exclusively in collective bargaining, but we are fining you. And we are not going to make any record about what you did or didn't do, but you are fined."

MR. GOLD: As I say, in that situation, if the individual, in fact, performed Section 8(b)(1)(B) activity it would be my view that he may -- that the union might well in that situation commit a violation.

QUESTION: Well, then, how about this finding of the Administrative Law Judge that the duties of these hyphenates did include collective bargaining and adjustment of grievances?

MR. GOLD: As I attempted to say before, that's a general statement of what their overall job description includes. As Mr. Reich has pointed out, at least one group of the disciplined individuals here were the story writers who could not have performed grievance handling or collective bargaining functions during the strike because they didn't engage in collective bargaining and because there were no

writers there to supervise and handle grievances. So the Board doesn't care at all whether or not the individuals performed Section 8(b)(1)(B) functions. It finds a violation on the general theory that no matter what the union fines people for, what its interest is, what its motive is and what they've done during the strike, it is illegal because it may have some effect on their, on the way that they will carry out their collective bargaining or grievance handling functions in the future.

And what we say is that's just like saying that whenever an employer disciplines somebody for breaking a shop rule that's a violation of 8(a)(3) on the grounds that employees may in the future fear to engage in protected activity, and whether or not that individual actually broke the shop rule and the employer was motivated by the breach of the rule.

The many ways -- and the Board has had 40-odd years of experience -- in proving what motive is in these situations where people are sometimes engaged in protected activity and sometimes engaged in unprotected activity, and you don't solve the problem by taking away in the one instance the employer's right to discipline which he had prior to 1935 or to take away from the union completely its right to discipline these supervisor members which unions had prior to 1947 and which there is no indication that Congress intended to take away.

QUESTION: Mr. Gold, do you agree that some of the hyphenates refrained from crossing the picket line in response

to the union's prohibition?

MR. GOLD: Your Honor, in regard to that, we agree with the statement made in the union's supplemental brief that it might well have been within the Board's province to find that as a fact if it had inquired into the issue. But it did not attempt to do so and all we can say is that if that issue were to go back to the Board for it to make a determination of whether the threat had that effect and it found that it did and there was substantial evidence to support it, we would not say that the Board hadn't shown a violation to that extent.

QUESTION: Wouldn't the Board, in your submission, also have to find that had they crossed the picket lines these hyphenates would have performed 8(b)(1)(B) functions?

MR. GOLD: Yes. I apologize. What I meant is would have proved a case as to those people who would have performed 8(b)(1)(B) functions during the strike. In other words, if the union threatened the story writers who had no 8(b)(1)(B) functions to perform, and concededly so as far as the record shows, we don't think there would be a violation. But if a union threatened somebody who -- to use an example that Mr. Justice White has given -- if the union was to say to somebody who walked up to a picket line and said, "I've been called in to adjust grievances," and the union says, "If you do so, we will fine you," in that situation we would agree--

QUESTION: Let's take this situation. Let's assume

there were only, say, half a dozen hyphenates and all of them in response to union's rule and their instructions not to cross the line, refrained from doing so. At that point, no one could be sure, I suppose, whether or not there would be any need for a grievance adjustment. Suppose the record was silent as to whether or not such a need actually arose. Would there be an 8(b)(1)(B) violation there?

MR. GOLD: Our view on that, Mr. Justice Powell, would be that part of the General Counsel's case would be to show that the employer had grievance handling or collective bargaining activities that he wanted performed, that he asked these people to do. I think that's the first point in his case.

QUESTION: Would it not be arguable, though, that management was entitled to have at least some of its representatives there to deal with situations that perhaps are unforeseeable that might arise?

MR. GOLD: I would say that in a situation in which the employer says, "I want you to come to work to perform grievance handling functions or collective bargaining functions as they arise," and the union threatened to fine the individuals who obeyed that order, that you would have an unlawful threat. But if the employer said, "I want you to come to work and do whatever I tell you to do," then, it is our view, that the union would violate the law only if the individuals actually did one of these two 8(b)(1)(B) functions and nothing else,

or that they did these -- they performed these 8(b)(1)(B) functions, as well as other activity, and the union was motivated by their performance of 8(b)(1)(B) functions to discipline them.

That's the line we draw. If they do only 8(b)(1)(B) functions, we concede the union can neither threaten them nor actually discipline them. If they perform both protected and unprotected activity, then we say the situation presented here is the same as the classical 8(a)(3) case, and the General Counsel to prove a violation must show that the union was motivated by a desire to punish them for performing the 8(b)(1)(B) functions or for the way they performed them.

We believe that that protects the employer's interest to select anyone he wants to perform 8(b)(1)(B) functions, and protects the union's right to discipline members for breaching the union's rules against working during a strike. It gives each part of this overall spectrum precisely what, as well as one can judge, Congress believed ought to be given to the employer and to the union. And it destroys nothing of substance of either side.

Now, it is argued on the employer's side that they don't very much like what Congress gave them, because what would really benefit them would be the right to have individuals handle both grievances and collective bargaining and perform other supervisory functions, and have those individuals immune

from discipline, because it is inconvenient or expensive to them to have somebody only adjust grievances or only engage in collective bargaining. They would like to combine these various functions in one person and assure that that individual cannot be disciplined for anything he does.

Our view on that is that there are many things we would like as well that the statute doesn't provide us and that there is no way that we can see in reading the statute which would give the employers what they want without destroying entirely this other interest which Congress recognized in 1947.

QUESTION: Mr. Gold, maybe I misunderstood you. I thought you said that if a supervisor performed 100% 8(b)(1)(B) work he would be immune from discipline. I think you conceded that.

MR. GOLD: Yes.

QUESTION: Suppose he didn't pay his union dues, couldn't he be disciplined for that?

MR. GOLD: He would be immune from discipline for his conduct as an employer representative. I don't know of any case in which --

QUESTION: Is he just immune from discipline while performing 8(b)(1)(B) work? I mean, as I say, he didn't pay his dues or some other neutral requirement, he would be like any other supervisor, wouldn't he?

MR. GOLD: I would think so. I've never even seen a

complaint issued which said that supervisor members, even when they handled grievances, are immune from the normal legal requirements. Our view is that what Congress said was that if you credit Oakland Mailers, that we can't go after them for performing 8(b)(1)(B) functions or the way they perform 8(b)(1)(B) functions, and what the Board is saying is that we can't do anything to them ever because of the supposed carry over or deprivation effect, and that is the difference --

QUESTION: The effect is on the employer. 8(b)(1)(B) is directed exclusively to coercion of the employer. It doesn't have anything to do with the freedom of any employees, supervisory or otherwise. It has to do with coercion upon the employer.

MR. GOLD: That's right. And it is one thing to say that the employer is coerced where you deprive him of somebody who is carrying out the grievance handling function, which is the Oakland Mailers step, and is at least a step from the plain meaning of the statute. But it is quite another thing to say that if your ostensible purpose is far removed, you also commit a violation.

Just in the minute I have I would say that the Board's theory in this regard, that no matter what your matter for disciplining the supervisor member is, you commit an 8(b)(1)(B) violation. It is the same type of theory presented to this Court in Teamsters Union versus Labor Board and Labor Board

v. News Syndicate, the hiring hall cases, where they said that any union involvement in the hiring process, through its own representative, was per se a violation because the people subjected to that system would fear that the union would act improperly. And this Court in those cases said no it is like 8(a)(3) and the Board must prove its case.

Thank you, very much.

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

Mr. Come, you have about four minutes left.

REBUTTAL ORAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF THE PETITIONER NLRB

MR. COME: I would just like to dwell on one point.

As was pointed out earlier, we are not dealing here with Section 8(a)(3) which proscribes discrimination encourage or discourage union membership, where it is well settled that ordinarily motive is a crucial agreement.

We are dealing here with 8(b)(1)(B) which proscribes restraint and coercion of the employer and it is equally well settled there the test is normally the reasonable tendency of the conduct.

Now, the union here, as I understand its position, concedes that if the union threatens a supervisor for going to work to perform grievance adjustment and collective bargaining functions, that would be a violation of 8(b)(1)(B), even if the threats were not effective. The employer would be restrained

and coerced by such a threat.

They say, however, that there was no finding here that the union intended to discipline them for performing grievance adjustment and collective bargaining functions.

There are two answers to that contention. In the first place, on this record, they cannot be heard to make such an argument, because in view of the trial examiner's findings that Mr. Justice White alluded to, the union made it quite clear that they were indifferent to whatever work it was that the hyphenates performed. They were going to be disciplined for that. And where a union expresses its threat that broadly in a circumstance where the individuals involved are cloaked with collective bargaining and grievance adjustment functions, this must be deemed to have intended to affect their collective bargaining and grievance adjustment functions.

Beyond that, we submit that it is irrelevant whether the union intended to discipline the hyphenates for performing only grievance adjustment and collective bargaining functions, because in the real world the employer doesn't select a representative just for grievance adjustment or collective bargaining functions. These are only part of the representative's total functions. And a union assurance that a representative can go in to perform collective bargaining, assuming that you have a representative, as you have here, who is armed with those functions, as well as others, if he can only go in to

perform those, if he performs any of his other functions, he is going to be fined, is going to restrain the employer no less than if they merely said, "You can't go in there and perform collective bargaining and grievance adjustment functions," because no employer is likely to hire only a half management representative.

Therefore, we submit that you have to look at the reasonable tendency of the union's conduct. And on the facts here the Board properly concluded that the reasonable tendency of it was to restrain the employer in the selection of his representative for 8(b)(1)(B) functions.

Thank you.

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

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:34 o'clock, a.m., the case in the above-entitled matter was submitted.)