In the

Supreme Court of the United States

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AMERICAN BROADCASTING COMPANIES, INC., ET AL.,	No. 76-1121
ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.,	No. 76-1153
NATIONAL LABOR RELATIONS BOARD,	No. 76-1162
PETITIONERS,	
V.	
WRITERS GUILD OF AMERICA, WEST, INC., ET AL.,	
RESPONDENTS.	

Washington, D. C.
December 5, 1977

Pages 1 thru 61

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AMERICAN BROADCASTING COMPANIES, INC., ET AL., Petitioners, v. WRITERS GUILD OF AMERICA, WEST, INC., ET AL., Respondents.	No. 76-1121
ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC., Petitioners, v. WRITERS GUILD OF AMERICA, WEST, INC., ET AL., Respondents.	No. 76-1153
NATIONAL LABOR RELATIONS BOARD, Petitioners, v. WRITERS GUILD OF AMERICA, WEST, INC., ET AL., Respondents.	No. 76-1162

Washington, D. C.

Monday, December 5, 1977

The above-entitled matter came on for argument at

11:07 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

NORTON J. COME, ESQ., Deputy Associate General Counsel, National Labor Relations Board, Washington, D. C.; on behalf of Petitioner, National Labor Relations Board.

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

CHARLES G. BAKALY, ESQ., 611 West Sixth Street, Los Angeles, California 90017; on behalf of Petitioner, American Broadcasting Companies, Inc., and National Broadcasting Company, Inc.

JULIUS REICH, ESQ., Reich, Adell & Crost, 1411 West Olympic Boulevard, Suite 301, Los Angeles, California 90015; on behalf of Respondents, Writers Guild of America, West, Inc.

LAURENCE GOLD, ESQ., 815 - 16th Street, N. W., Washington, D. C. 20006; on behalf of AFL-CIO, as amicus curiae.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 76-1121, American Broadcasting Companies v. Writers Guild of America, West, Inc., and No. 76-1153 and No. 76-1162.

You may proceed whenever you are ready, Mr. Come.

ORAL ARGUMENT OF NORTON J. COME, ESQ., ON BEHALF OF PETITIONER, NATIONAL LABOR RELATIONS BOARD

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

This case is here on certiorari to the Second Circuit which by a divided vote denied enforcement of the Board's order against respondent union Writers Guild of America, West.

Three petitions to review the Second Circuit's judgment were filed, one by the Board, one by the three major television broadcasting companies, and one by the Association of Motion Picture and Television Producers.

This Court granted the three petitions and consolidated them for purposes of hearing and decision. I am speaking for the Board and will be followed by counsel for the other two petitioners.

This case presents another facet of the problem which was before this Court in Florida Power, decided in 1974. There the Court held that the union does not violate 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 the purposes of collective bargaining or the adjustment of grievances by disciplining supervisor-members for crossing a picket line to perform rank and file struck work during an economic strike against the employer.

The question here is whether a different conclusion is warranted where the supervisor-members are disciplined or threatened with discipline for crossing the picket line to perform their normal supervisory duties which include grievance adjustment or collective bargaining.

Now, the relevant facts are these: Respondent Writers Guild represents for collective bargaining purposes writers who prepare scripts for motion picture and television firms and who are employed by the major television broadcasting companies and by various member firms of the Association of Motion Picture Producers. I will refer to both of them as the employers.

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, when acting as such, are supervisors as defined in section 211 of the Act, and they also represent the employers in the adjustment of grievances and in certain situations producers also represent the employers in collective bargaining.

Some producers, directors and story editors known as hyphenates, and those are the people that we are going to be concerned with in this case, have writing capabilities and are at times employed as writers to prepare scripts or perform other creative writing functions. These hyphenates are members of the Guild. The Guild represents hyphenates only when they are employed as writers, not when they are employed as producers, directors, or story editors.

Most hyphenates have personal service contracts with the employers covering their employment as producers, directors, or story editors, and indeed under these contracts they are often represented by other labor organizations. Thus, the collective bargaining agreements between the Guild and the employers provide that a person is not subject to those agreements when he is employed in a non-writing capacity, for example, as a producer, director or story editor.

The agreements further provide that producers, directors and story editors can perform certain editorial writing services known as "(A) to (H) functions" without becoming a writer subject to the agreements.

Now, in March of '73, the Guild began a strike against the employers in furtherance of their demands for new contracts covering writers. The strike continued against some employers until July of '73. A month before the strike started, the Guild distributed strike rules to all union 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 union picket lines. The strike rules also prohibited union members from working in the future with members who violated the strike rules.

The Guild, through a series of special meetings with hyphenate members and phone calls to particular hyphenates, emphasized that the strike rules would apply to hyphenates working in any capacity and that they would be subject to discipline and blacklisting if they crossed the union's picket lines.

The Guild also refused to allow any members, including hyphenates, to resign from membership before or during the strike. The employers demanded that the hyphenates continue notwithstanding the strike and the picket lines to perform their duties other than as a writer under their personal service contracts.

Many hyphenates crossed the picket lines to perform their normal supervisory and managerial functions as producers, directors, and story editors, including grievance adjustment and collective bargaining. They performed no writing work which would otherwise have been performed by the striking writers.

During and after the strike, the Guild filed internal

union charges against 31 hyphenates for crossing the picket lines; 10 hyphenates were subsequently convicted by union trial committees; they were suspended or expelled from union membership and were fined amounts ranging from $100 to $50,000. Later the union membership voted to reduce the penalties of 9 of the convicted hyphenates and proceedings against other hyphenates were held in abeyance pending the disposition of unfair labor practice charges which meanwhile were filed by the employers with the Board.

The Board, with Member Fanning dissenting, concluded that the Guild 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, and a divided Court of Appeals, agreeing with Member Fanning, denied enforcement of the Board's order.

Now, we start with Florida Power, which holds that a union's discipline of one of its members who was 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.

To 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.

Indeed, the union did not discipline those supervisors who merely performed their supervisory duties when they crossed the picket line.

The Board submits that when a supervisor member is threatened with discipline or disciplined for crossing a picket line to perform his normal supervisory or management duties, and they include grievance adjustment and collective bargaining, such discipline may adversely affect the supervisor's conduct in performing the duties as grievance adjuster or collective bargainer on behalf of the employer even though the union's motive is not to influence a particular grievance or collective bargaining decision but merely to secure adherence to its picket line.

There are two reasons for this conclusion. One is referred to or can be called the deprivation theory, and that is this, as the Administragive Law Judge, whose decision was adopted by the Board pointed out, if the hyphenates had succumbed to the Guild's threats of discipline, as many of them did, and had refused to cross the picket lines, the employers would have been deprived of their chosen representatives for the performance of management functions, including grievance adjustment or collective bargaining for the duration of the strike, no less than if the union had directly pressured the employers into removing those representatives from those duties. In short, the effect of the threat of discipline

would have been to have deprived the employers of their chosen representatives for grievance adjustment and collective bargaining.

QUESTION: Mr. Come, isn't it reasonable to infer that the picket line itself may have had that effect?

MR. COME: That is correct, Your Honor. However, where the picket line alone is in the picture and the supervisor decides that he is not going to cross that picket line, the employer is deprived of the selected representative because of the free decision of the supervisor to honor or not to honor that picket line. However, we submit that where the supervisor honors that picket line as a result of threats of union discipline, the element of restraint and coercion on the part of the union has been added, and it is up to the union to disentangle that he would not have crossed but for that restraint and coercion, and we submit that the union cannot do that.

Moreover, as the Board added by the citation of its earlier decisions in Hammond Publishers and Triangle Publications, insofar as those hyphenates who defied the union and were disciplined or concerned, there is a reasonable likelihood that the discipline would have a carryover effect and affect the future performance of grievance adjustment and collective bargaining functions because here, unlike the performance of rank and file struck work which was involved in Florida Power, the duties which the supervisors were performing

were similar to the functions that they would be performing absent the strike.

I don't want to cut in any further into my colleagues' time. They will develop these theories in further detail.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Keaton.

ORAL ARGUMENT OF HARRY J. KEATON, ESQ., ON BEHALF OF PETITIONER, ASSOCIATION OF MOTION PICTURE AND TELEVISION PRODUCERS, INC.

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

In the time allotted to me, I would like to cover primarily two contentions in this case, the first one being the contention of the Guild, the respondent herein, that in some ways the work done by the hypenates, whatever you might call it, and they do not call it strike work in their brief, they call it rank and file work, without using the work strike, that in some ways that work puts the work on a par with the work that this Court held in Florida Power to be of a nature that section 8(b)(1)(B) should not apply.

The second point that I would like to address myself to is what Mr. Come referred to as the deprivation theory in somewhat more detail.

As to the first point, the three-point argument being made by the Guild at this point, it comes down to this: Number

one, while there conceivably is no evidence in the record that any writing of scripts was done by any of the people who were disciplined, they might have done writing; number two, that the (A) through (H) functions are to be construed as bargaining unit type writing; and, number three, that even if the (A) through (H) functions are not bargaining unit writing, they are not managerial functions and that therefore the performance of such functions is not akin to grievance related type work and therefore the supervisors could be disciplined.

Now, taking the first point, merely as to whether or not they might have done the writing, the fact of the matter is that the Guild very well knew or at least very well could find out whether they were writing. There were 15 strike rules in this case which provided specifically prohibition against writing. Not one of them was invoked by the Guild, not a single one.

One of those rules, Rule 8, is very significant because it specified that any writer, in order to protect himself -- and that includes, of course, rank and file writers -- to protect himself against future charges should file with the Guild his scripts that he had completed at the time of the strike in order to make quite sure that he would be able to prove that he had not written during the strike.

Respondents's Exhibit 6, which is not in the printed transcript, which is a multicolored script, it is in the

record, will illustrate to the Court that it is very easy to tell from a script when the final script was written and when the changes were made, and therefore it would have been quite easy for the Guild to tell whether or not such work was done.

Now, turning to (a) through (H), the Guild analogizes in (A) through (H) to the Shelton Construction Company case, the Shelton Pipeline case, where an 8(b) representative was held not immune from discipline because was operating equipment which he had also operated at times when there was a labor shortage. But that case is precisely the opposite from this case, because in that collective bargaining agreement, operating equipment was covered by the contract by so many words, and then contract said in the case of an emergency or for purposes of training, a supervisor may operate the equipment, not so for (A) through (H). The contract specifically states in section 1(b)(1)(A) and in 1(c)(1)(A) that the performance of (A) through (H) functions by producers, directors or story supervisors shall not be covered by this agreement and shall not cause them to become writers hereunder.

So what you really have is not collective bargaining unit work that may be done by supervisors but work that is not covered by the contract which if you perform it does not make you a bargaining employee but which conceivably at times could be performed by bargaining unit employees.

But now comes the most important point, namely the

argument that (A) through (H) supposedly is not managerial. Let's examine what (A) through (H) is and, if the Court please, I will give examples of it. Some of them are in the record and some are just common sense.

The first (A) says cutting for time. Now, what does that mean? It means deleting a portion of a movie or a television play in order to make it shorter in order to accommodate the time for the screen. That is certainly a management decision.

(B) is bridging. That means tying up two pieces of the movie, if you will, due to the elimination of the intervening piece. (C) is a change in technical or stage direction -- need I say more, direction. (D) is the assignment of lines to existing characters due to cast changes. The writers don't make those assignments, managers do.

(E) are changes for legal clearances, done by executives at the request of the legal department, according to the transcript, the testimony of Mr. Mittleman, pages 1307 through page 1311, and Association Exhibit 9.

Now, the casual minor adjustments in dialogue covered under (F), and then there was an example given: Medical terminology used by a writer which happens to be erroneous, so they call a doctor, the doctor says the diagnosis is all wrong, and they change the name of the illness from one to another, again done by management.

(G) are changes necessitated by unforeseen events. An example is in the transcript at page 204 to 205. What happened was that they had to change the names of streets from New York City to Los Angeles. And (H), finally, by its own language is clearly managerial work, it is instructions, directions or suggestions, oral or written, to a writer.

All of this work is about as managerial as it can be, and the interesting distinction is that if you take a look at the lowest level of bargaining unit work, namely the so-called rewrite, that is carefully defined in the agreement and you can get motion picture credit for doing a rewrite. You can do all the (A) through (H) in the world without getting any motion picture credit, there is no credit for that. But on a rewrite there sure is credit, pages 239, 240b and c.

Now, the Writers Guild contends here as a last resort on this issue that --

QUESTION: Could I ask one question about the (A) through (H). You say it is all clearly managerial.

MR. KEATON: Yes, sir.

QUESTION: And you have described it. Is it also not true that it is all clearly managerial work that has nothing to do with the selection of an agent to do any grievance or collective bargaining?

MR. KEATON: That is not entirely correct, Your Honor. We are not relying on the (A) through (H) functions as

establishing the 8(b)(1)(B) capacities of these supervisors. But any one of the steps taken in (A) through (H) that I described to you might very well lead to a grievance and indeed a grievance of a writer because most of them involve scripts.

To illustrate, Your Honor, if I may, writers have the privilege in fact a contractual right to watch the screening of the final cut of a movie and if at that time the writer finds that the picture did not come out the way he hoped it would, he may very well raise a grievance with the associate producer who made the cuts on the picture and may say to him, "I don't like the way you did this ending, you deleted a hundred feet of footage that I had in there which was my beautiful idea, and now it is a sad ending instead of a happy one."

QUESTION: Mr. Keaton, that is a very, very broad implication in your answer to my brother's question. Any action of any foreman anytime, anywhere in any industry can lead to a grievance on the part of the employee, and is that the test?

MR. KEATON: No, Your Honor, that would not be the test. But if the person who is making the decision also has the authority to adjust that grievance, that would be the test.

QUESTION: He doesn't get that authority pursuant to (A) through (H), does he?

MR. KEATON: No, sir, he does not. He does it by

virtue of his position.

QUESTION: And he adjusts the grievance which he creates by his own --

MR. KEATON: He might. He might very well. And I might also say that the physical change of a movie cutting, for instance, might occur because the editor has made the cut, who is a person who is not a hyphenate. There are no hyphenate editors in this case.

Now, to turn briefly to the deprivation theory, if I may, I think that the Guild -- first of all, I think we should dispose of an item, if it is of concern at all here, namely the contention of both the Guild and the amicus that there was in some way nothing that could be brought before this Court on the deprivation theory because it was not part of the Board's decision.

In the court below, in the District Court of Appeals, in its reply brief, the Guild argued exactly the opposite. At page 4 of their brief, the Guild stated, just as it did, the Board's brief writers, the association seeks to justify the decision below in this case on the basis of the rationale of labor-decided Board decisions. There was only one basis upon which a violation was found here, namely that the Guild's discipline kept the employers from utilizing the services of 8(b)(1)(B) supervisors during the strike, not as a subsequent decision in other cases, they rationalized that the discipline

would carry over to the supervisor's future 8(b)(1)(B) functions.

The Guild is now arguing exactly the opposite in this Court, that this was not the basis of the Board's decision and only the future function was the basis. The answer, of course, is both wrong.

Now, in terms of the question of whether or not the statute was violated here, I don't think we have to get involved with such things as Oakland Mailers, because what we really have is a rather simple proposition. We have people who were told, unlike in Florida Power, if you come to work in any capacity, including of course 8(b)(1)(B) capacities, we will fine you, we will discipline you, we will expel you, and you can't resign. All of those things were said.

And to answer further the question that Mr. Justice Stevens asked of Mr. Come, I don't think that a union can fall back on what might well be a legal picket line if at the same time the picket line is up it is threatening people and coercing people and telling them if you do cross our picket line, we will punish you, any more than this Court would hold it legal that if a union has gone to an employer and said to him, we would like you to cease dealing with another employer, that the picket line that was subsequently established would in some way be immunized because the employer may have acted because of the union's voluntary request rather than the illegal secondary

boycott line under 8(b)(4)(B). I think their analogy is very much the same.

Now, what you really have here is very simple. The union in effect is saying you must not use these supervisors, it means we eliminate the supervisors, they cannot be designated. If they cannot be designated, you have a clear violation of the statute itself and you have the violation just as surely as if the union had put up a picket line to prevent the hiring of a supervisor or the use of a designated representative of the employer for purposes of collective bargaining. It is precisely the case that Congress was talking about in the legislative history, where Senator Taft, I believe, said don't send us Mr. Y or Mr. X -- Mr. Y is being excluded in this case.

Now, the union would argue that he could resign. In fact, the AFL-CIO does. That is not so, they were not allowed to resign, in effect they were reactivated. In the decisions of this Court, even under 8(b)(1)(A) -- and I recognize that 8(b)(1)(A) is not applicable because the supervisors are not protected -- but the decisions of this Court under 8(b)(1)(A) themselves indicate very clearly that even there discipline would not be lawful if there is not any right to resign at some point.

Since I must reserve a little time for rebuttal for Mr. Come, I would like to conclude on a couple of points.

By reactivating and keeping the supervisors captive

members, in effect the employers were given two choices, either don't use the supervisors during the strike, in other words do not designate them as 8(b)(1)(B) representatives -- and there was plenty of work going on, the record is full of it, scripts were being written, scripts were available, scrips had been finished, lots of them in the record, and no other union was on strike -- either do not use them during the strike or if you do, we are going to expel them, fine them and punish them, and you will never be able to use them again because nobody will work with them, and you can't produce something without the writers. Those were the choices given, in effect, to management.

And the other point I wanted to make is that the only way that the decision of the Court of Appeals can be sustained is if this Court were to add to the statutes the provision that this section shall be inapplicable in the event of a strike.

Thank you.

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

Mr. Bakaly.

ORAL ARGUMENT OF CHARLES G. BAKALY, ESQ., ON BEHALF OF PETITIONER, AMERICAN BROADCASTING COMPANIES, INC., AND NATIONAL BROADCASTING CO., INC.

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

I would like to say one thing about the (A) to (H). It is clear that (A) to (H) was not struck work. Struck work is work which would have been done by the bargaining unit employees but for the strike. The (A) to (H) work is never done by the employees. It is done only by the producers, the associate producers, and the story consultants, and so forth. So that it is clear that (A) to (H) could not be struck work.

I would like to talk for a moment about --

QUESTION: But isn't it equally clear that it is not itself either collective bargaining or the processing of grievances?

MR. BAKALY: Well, I would agree with that --

QUESTION: Not in and of itself?

MR. BAKALY: Well, I would agree with what Mr. Keaton said about that, but the authority for agreements handling and collective bargaining is in the record apart from (A) to (H).

QUESTION: But (A) to (H) activities, bridging or amending to meet the legal department's objections, or cutting or whatever is not collective bargaining or the processing of grievances in and of itself?

MR. BAKALY: In and of itself, I would agree with that.

QUESTION: All right.

MR. BAKALY: Now let me talk about the adverse carry-over theory of the Board for liability of the union in this

case, and that theory started with Florida Power. In Florida Power, the Court said that union discipline of one of its members who is a supervisor employee can constitute a violation of 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in the performance of the duties of and acting in his capacity as grievance adjuster or collective bargainer on behalf of the employer.

Now, that is where we start, and in this case we have tremendous conduct on the part of the Guild, which Judge Moore and the Second Circuit characterized as in terrorem conduct to adversely affect the supervisors in the future. Not only are we talking about the fines of up to $50,000 or the threats, or the refusal to accept resignations, but, more importantly, the blacklisting. And to understand the effect of that on an associate producer or a producer whose whole livelihood is because he gets the right creative people to work with him, that if he wants a writer to work for him in the future in another production and he understands that because of what he does now, that writer is not going to work for him, that blacklisting threat has a tremendous effect upon the producer in the future. It has an effect upon the director. It has an effect upon all of these hyphenates, and to say that this type of conduct does not engender fear in that supervisor so that in the future when that union or any other union says to him to do something that the union wants, he is going to think

that if he doesn't do what the union wants, he is going to have that same kind of punishment again.

This adverse effect certainly affects supervisors who in fact are just writers, and we have evidence of some of the supervisors adjust writers grievances, it would affect supervisors who adjust grievances of other employers like directors, because people don't just think about one union and what it does. What one union can do, another union can do. And if the Writer's Guild can cause writers not to work with an associate producer, then the directors guild can cause directors not to work with an associate producer, and the director is very much concerned with that.

There is one bit of testimony in the record that just cries out. Mr. Crichton, who was talking with Mr. Furia, the leader of the Writers Guild and the President of the Writers Guild, and Crichton is saying, "I told him finally that if push came to shove, I would rather be thrown out of the Writers Guild than the Directors Guild, since I felt my future was really more with the Directors Guild." And he explained that it wasn't that simple, that "if I were expelled from the Writers Guild, I couldn't work as a director in the future, work solely as a director because members of the Writers Guild could not work as directors for me, as a director, if I have been thrown out of the Writers Guild." That kind of threat has to have an adverse effect in the future.

And that adverse effect, that carryover effect does pertain to the selection of a representative for grievance handling and for collective bargaining. It is not just a question of identity, as the Guild would have us believe.

What an employer wants, he wants a supervisor who will do what he says, he wants a supervisor that will be tough with the union perhaps, if that is the way that particular employer wants. Well, if the union by this kind of discipline and threats can change that supervisor from a tough supervisor to a supervisor that agrees with the union, then they are in effect changing the identity. Employers don't really care whether a supervisor has black hair or red hair, they don't care about that. They care how he is going to perform with the union, and if by the threats you change that --

QUESTION: Did the Court reject this theory in Florida Poweror not?

MR. BAKALY: The Court of Appeals -- the Court in Florida Power, no, I don't believe the --

QUESTION: The carryover theory?

MR. BAKALY: No. In fact, I believe that that is where the theory was originated, from the language that I said, Mr. Justice White. You were in the dissent in that case, but the majority did definitely state that when the discipline may adversely affect -- they are talking about the future there, and that is the carryover effect. That was not rejected by the

Court in Florida Power.

Finally, one of the arguments that is relied on a great deal by the Guild is the argument that after Florida Power, the loyalty of a supervisor-member to his employer is irrelevant and without merit. And that language comes from the Court that says that it -- it is a statement in Florida Power about loyalty not being a part of the remedy that Congress intended for the solution of the conflict or this problem.

Assuring loyalty is really one of the only purposes for 8(b)(1)(B). Why else would the Court put in 8(b)? Why would the legislature put in 8(b)(1)(B)? It is perfectly logical to have grievance handlers as the most senior person. Why not let collective bargaining decide that?

Well, the reason has to be, as I said earlier, that one of the things that an employer wants other than competence and an articulate supervisor, but he wants one that is loyal to him, he wants one that will do what he wants done in the handling of grievances in the collective bargaining.

So loyalty is still a part of 8(b)(1)(B). Now, the respondents say that the only solution is to keep supervisors out of the union. That solution really proves too much, as the Court again said. There are instances, there are instances where a supervisor does -- where a union does violate 8(b)(1)-(B) by adversely affecting the supervisor's conduct. So the

Court in Florida Power recognizes that there can be a situation where a supervisor-member is disciplined and that that adversely affects his conduct.

We submit that this is that case, that with this kind of in terrorem conduct, as Judge Moore said, certainly these supervisors would be adversely affected and these employers would be deprived of their grievance handlers and collective bargainers.

I will reserve the rest of my time for Mr. Come on rebuttal. Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Reich.

ORAL ARGUMENT OF JULIUS REICH, ESQ., ON BEHALF OF RESPONDENTS, WRITERS GUILD OF AMERICA, WEST, INC., ET AL.

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

From this Court's statement in Florida Power that the conduct in a case called Oakland Mailers was at the outer periphery of what the Labor Board could proscribe, or may be at the outer periphery of what the Labor Board could prohibit, it --

QUESTION: We just assume that it was --

MR. REICH: That's right.

QUESTION: We said we may assume without deciding.

MR. REICH: That's right. It may have been at the

outer periphery.

QUESTION: It may have been within the outer periphery.

MR. REICH: It may have been within. But from the fact that this Court said that it may be within the outer periphery, the Labor Board has drawn the conclusion that it was approved by this Court, not that it was questionable.

QUESTION: Well, it was permissible for the Board to conclude within the meaning of that language that it was within it.

MR. REICH: But what it has done from that, Mr. Bakaly said that we have to start with Florida Power. What the Board has done is ended with Florida Power. What they have done is they have taken Florida Power and limited it to its exact facts and that is all. They have taken a statement which says that supervisors may be disciplined for performing struck work and ended it there, without any regard to this Court's rationale to the decision, without any regard to the legislative history, without any regard to the statutory language, and all of that went to show that 8(b)(1)(B) has a specific purpose. It was directed at curbing union interference with the selection by an employer of his representative for purposes of collective bargaining or adjusting of grievances.

Now, this Court made an extensive survey of the

legislative history in Florida Power, and the Board neither in this case nor in any other cases that followed Florida Power has gone to the legislative history to see where Florida Power should leave. In fact, what this Court said and what the legislative history showed is that while employers may have certain expectations from their supervisors, unions too have certain expectations from their members, despite the fact that those members may also be supervisors. And in order to give the employers some relief from this conflict of loyalties, to help the employers to resolve this clash of expectations, Congress in 1947 simply took supervisors out from under the provisions of the Act by section 23 and also absolved employers from the necessity to deal with supervisors or their representatives bargaining for them.

QUESTION: And conferred upon the employers the absolute right to hire supervisors who were not union members and not to hire supervisors who are union members, isn't that correct?

MR. REICH: That's right. The employers thus have at this point the ability to make their own decision to have their supervisors not be members of the union and thus not subject to that discipline.

Now, the Board has come up with two theories in support of the decision in this case. One of them is the deprivation theory, which the Board -- in which the Board says that

if a supervisor has 8(b)(1)(B) functions, that is has the right to bargain collectively or the right to adjust grievances, then it is sufficient if the union deprives the employer of the services of that supervisor regardless of the fact that the supervisor is not performing 8(b)(1)(B) functions while he is at work.

Now, with respect to those who were actually disciplined in this case, those were exactly the people who worked. The employers were not deprived of the services of those persons, so they clearly were not restrained and coerced in the designation of those people who worked.

The Board, to overcome that in its reply brief says, yes, but they may be afraid in the next strike to work and the employers will be restrained and coerced in the designation of their supervisors in the next strike, and therefore it is a violation of the Act.

Well, the clear answer is that they can ask those supervisors to resign before the next strike comes up.

QUESTION: Mr. Reich, is it fair to say that the argument you are now making really, you are not helped much more in it by Florida Power & Light than your opponents? You are saying that Florida Power & Light went off on a fairly narrow ground and you want to get back to a broader ground?

MR. REICH: I think that is correct, Your Honor. I think that the Court in Florida -- I think that the language

in Florida Power is helpful to our position, and the position is that we have done nothing to interfere with the selection of the representatives for the purposes of collective bargaining, and there is nothing in any of either of the two Board theories which establishes that there would be a violation in this case.

QUESTION: But what about Mr. Bakaly's point that if this man wants to progress up the ladder he is in trouble in the future?

MR. REICH: Well, that man whom Mr. Bakaly mentioned Mr. Crichton, is one of the people who is working, so evidently the thra ts didn't affect him. And in the Appendix at A296, Crichton was one of the persons who was charged with a violation of the Act which indicates that he in fact did work. I assume that that is the point that you are getting at, that is that --

QUESTION: The point is that if he doesn't participate here to the full extent that the Guild wants him to, then if he is promoted to another job, he still can't hold that job because the members of the Guild below him won't work with him. I thought that was his point.

MR. REICH: Okay. You are talking about the blacklist, the --

QUESTION: I assume so.

MR. REICH: Okay. Well, that is inherent in any

situation where an employee becomes a scab. Fellow employees may not wish to work with him. That --

QUESTION: Well, why is that disconnected from the right to employ him in a better job?

MR. REICH: Well, it has no connection. First of all, the rule was rescinded during the strike, so that there was no such mandatory rule. An announcement was made that people can deal with him as they wish, just as in any strike situation, if a person crosses the picket line, they suffer perhaps the enmity of their fellow workers. But if that is discipline, then this Court has held in cases dealing with the reasonableness of discipline by unions, that that is a matter for state court concern. They certainly could have gone to a state court and get a declaration that that discipline should be erased from the record. So we are not really concerned at this point with the reasonableness of the discipline.

And if it is not a violation of the Act to begin with, we don't have to get into this question of whether or not the discipline was reasonable or unreasonable.

QUESTION: Mr. Reich, could I go back to a point you made a moment ago. If I understood your argument correctly, you said that the discipline may have been ineffective because some of the people went to work anyway and may presumably have gone ahead and done their collective bargaining functions, ergo there could be no violation. I find that argument, unless I

missed something, I find that totally unpersuasive. Supposing they blatantly said we will fine you $50,000 if you go into this plant and adjust a grievance or engage in collective bargaining, and the fellow went ahead and did it anyway, he wasn't deterred. It would be a plain violation, wouldn't it?

MR. REICH: Well --

QUESTION: How can you test it, by whether the man is in fact deterred by the coercion or not? The test has to be whether there is coercion, doesn't it?

MR. REICH: Okay. That goes to the second theory of the board, the carryover theory.

QUESTION: I thought we were talking about the deprivation theory.

MR. REICH: That's right, as far as --

QUESTION: But the argument has no merit with respect to the deprivation theory?

MR. REICH: As far as the deprivation theory, the supervisor is there. Now, if --

QUESTION: Well, what is your answer to my question?

MR. REICH: If the threat of a fine against -- well, first of all, my answer is that I would concede that a person who is going in, who crosses a picket line for the purpose of adjusting grievances, a representative who goes in to perform those functions that are listed in 8(b)(1)(B) may not be disciplined by the union. It is restraint and coercion on the

employer to deprive --

QUESTION: Even though he in fact goes in and performs those tasks, even though unsuccessful?

MR. REICH: Even though the threat is unsuccessful?

QUESTION: Yes.

MR. REICH: Yes, I would say --

QUESTION: So we cannot measure the violation by the success or lack of success of the coercion?

MR. REICH: Well, I am only repeating what the Board theory is. The Board takes the position in its reply brief that while the threat of discipline didn't deter these people who actually went in and performed their services and therefore the deterrence theory doesn't apply in this strike as to them, the Board takes the position that in the next strike they will be deterred from going across the picket line, and that is how the deterrent theory comes into play.

QUESTION: Well, not only the next strike but just in the future?

MR. REICH: Yes.

QUESTION: In the ordinary course of their conducting their collective bargaining and adjustment of grievance functions, duties.

MR. REICH: Well, now, that goes to the carryover theory.

QUESTION: All right.

MR. REICH: Okay.

QUESTION: Well, I still don't understand what your response is to the Board's argument. You have identified the Board's argument and you have said, well, they really went to work but then you have admitted that is not a response. What is your response to their deprivation theory?

MR. REICH: I'm sorry. If they are at work, regardless of the threat of fine, it would be my position that the employer has not been restrained and coerced under the deprivation theory. The employer -- the Board may have a good argument if a supervisor is told that he will be disciplined for performing 8(b)(1)(B) functions, the Board may have a good argument to show that he will be restrained and coerced, the employer will be restrained and coerced with respect to this supervisor.

QUESTION: Would this be another way of stating your theory, that on the deprivation theory the Board should have made a finding that somebody was in fact deprived from going to work, that there is an absence of a critical finding? Is that really what you are arguing?

MR. REICH: There was no finding that anybody went to work -- excuse me. There was sufficient evidence that people did go to work despite the threat and that they adjusted grievances while they were there. We have examples of stunt people and actors whose grievances were adjusted.

QUESTION: Conversely, there is no finding that but for the discipline, somebody additionally would have gone to work and adjusted some grievances he never adjusted?

MR. REICH: There is no such finding.

QUESTION: Is that your real argument, that they didn't prove the deprivation?

MR. REICH: But one point that I want to make is that if a particular individual would have crossed the picket line for the purpose either wholly or primarily of adjusting grievances and collective bargaining, then it would be a violation in our view if the threats kept him from going across the line. But we don't have any such case here. There is no finding and there is no evidence to that effect.

QUESTION: In other words, in short, your short answer to the deprivation argument is that there was no deprivation, period?

MR. REICH: That's right. Thank you, Your Honor.

The Board says though that the threat may have kept people out and that that is a violation. There was no evidence in this case of anybody who was being asked to go across for the purpose either in whole or primarily of performing 8(b)(1)(B) functions, and the Board's position, the Board's answer to that is that so long as the employer invests its representative with 8(b)(1)(B) functions, any work that the representative does, any supervisory work, any work short of

doing rank and file struck work, any work that the employee would have done would be work which, according to the Board, if as a result of a threat, the supervisor refrains from crossing a picket line to perform his normal supervisory functions, the employer, without more, is deprvied of the representative he has selected for collective bargaining or grievance adjustment purposes.

Now, what this does is to simply make a shambles of what this Court carefully told the Board it should distinguish, the distinction between section 211 functions, which are supervisory functions, and section 8(b)(1)(B) functions, which are representative functions. There is a difference between a representative, as that word is used in section 8(b)(1)(B), and a supervisor, and the Board simply meshes them.

Now, Congress could have simply said in 8(b)(1)(B) that the union shall not restrain and coerce an employer in the selection of his supervisor, and then the Board's theory would make sense, but it didn't do that. It specifically said a representative, a representative for only two purposes, and this Court recognized that in Footnote 21 of the decision in Florida Power. It made it clear that there is a distinction between the two, and there is only one function, that of adjusting grievances, which overlaps between section 211 and section 8(b)(1)(B).

And the Board's argument proves too much. There

would be no basis upon which, if the Court accepted the Board's argument that somebody with 8(b)(1)(B) functions could go to work -- if someone with 8(b)(1)(B) functions went to work and part of his work was that of doing rank and file struck work, the Board would have to say in those circumstances that the union can't discipline him because -- and can't keep him from going to work because a person with authority to adjust grievances is being kept out of the plant, and that would apply in the Florida Power situation, just as it would apply in our situation.

We have a case of the tail wagging the dog here. The result is what the Board says is that all the employer has to do is designate a person as its representative and that person can freely go through the picket line and disavow his obligations to his union, despite the fact that he never adjusts a grievance. We had an example at page 132 of the Appendix, for example, of a person who was asked, one of these supervisors who was asked do you adjust grievances, and he said "I have the authority." Well, can you give me an example? And he said, "Well, I can't think of one, in the last few years we've not had any disagreements." But that person would be entitled to protection under the Board's theory, just as well as somebody who is there for the specific purpose of adjusting grievances.

QUESTION: You do not claim, do you, that the work

performed by these supervisors who did cross the picket line during the strike was struck work, you claim that it was rank and file work, is that it? It wasn't limited to struck work as was the work in Florida Power, is that fair to say?

MR. REICH: Well, if by struck work you mean work which would have been performed by --

QUESTION: By other people, not by these people.

MR. REICH: There was work of the type that might have been performed, we don't know. For example -- well, I have given examples in the brief of the types of work, polishing a script, for example, that is considered to be (A) through (H) and which is done equally by writers as well as these hyphenates or supervisors.

QUESTION: So some of it was struck work and some of it was not, but it was not confined to struck work, some of it was done that wouldn't have been done except by these people?

MR. REICH: They were doing normal producer work, normal director work.

QUESTION: How do you categorize the changing of the script which either omits a substantial part or changes the thrust of a substantial part? Do you regard that as managerial or part of the writing function?

MR. REICH: It is writing but --

QUESTION: Well, of course, it is writing but that doesn't exclude a management decision, does it?

MR. REICH: No, but a writer can do that also. A writer can --

MR. CHIEF JUSTICE BURGER: Well, we can pursue that at 1:00 o'clock.

[Whereupon, at 12:00 o'clock noon, the Court was recessed until 1:00 o'clock p.m.]

AFTERNOON SESSION - 1:00 O'CLOCK

MR. CHIEF JUSTICE BURGER: I should say that Justice Brennan is unavoidably detained and will be absent for part of these arguments but he will participate on the basis of arguments, brief and tape recording of the oral argument.

You may proceed, counsel.

MR. REICH: Your Honor, I was asked as we departed whether the (A) through (H) work was managerial work or rank and file work. In our view, it is immaterial, it is not relevant which it was. The fact is that it was not 8(b)(1)(B) work and the unions are prohibited by section 8(b)(1)(B) only from disciplining persons in the performance of 8(b)(1)(B) work.

We concede that a supervisor may not be disciplined for the performance of 8(b)(1)(B) work and the question is whether the threat of discipline in this case --

QUESTION: By that do you mean to include hyphenated supervisors?

MR. REICH: Any supervisor who is called upon to do 8(b)(1)(B) work, a hyphenate or a story editor or anyone. The supervisors were thratened with discipline for crossing the picket line, and the question arises as to whether or not that threat kept the employer from having present persons with 8(b)(1)(B) functions.

Our reading of the threat to discipline persons if

they crossed the picket line, in light of the minimal amount of 8(b)(1)(B) work that they had to perform, the example that I gave of somebody who said that it had been years since he could think of an 8(b)(1)(B) function that he performed, the impact on a person who receives a threat is not that he is going to be disciplined for performing 8(b)(1)(B) duties but that he is going to be disciplined for crossing the picket line for performing non-8(b)(1)(B) duties, and there is no finding here in this record that anyone was threatened for the performance of or because he did perform 8(b)(1)(B) duties.

To conclude, the networks in this case, both in their opening brief and their reply brief, made no secret of what the case is about. What they are trying to do is to get this Court to give to them an advantage that they were unable to secure through Congress, and that the Court should not do.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ., ON BEHALF OF THE AFL-CIO, AS AMICUS CURIAE

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

In Florida Power & Light, Mr. Justice Stewart noted that the Board's view of section 8(b)(1)(B) had evolved to the point that it served as a "general prohibition of a union's disciplining supervisor-members for their conduct in the course

of representing the interests of their employer." I suggest that, as Mr. Come made quite clear, the Board has continued to hue to that view with one exception. They now say that in a situation in which the supervisor-member performs a substantial amount of rank and file work, some of which is struck work, that the union can discipline the supervisor.

We suggest that that analysis is no more responsive to the statute and its legislative history than the Board position taken before this Court the last time this question was here because, as Mr. Reich indicated at the end of his argument, it is our position that assuming that Oakland Mailers is correct, namely assuming that the section doesn't simply protect employers against strikes against them but protects supervisors against discipline for performing certain functions for the employer, section 8(b)(1)(B) is given the full scope that it can possibly be given so long as it is a violation for the union to discipline the supervisor for performing 8(b)(1)(B) functions or because of the way he performs those 8(b)(1)(B) functions, but that the union has a privilege which Congress did not choose to take away of disciplining supervisor-members for performing any non-8(b)(1)(B) functions.

We think that the line is that so long as the cause is the way the supervisor performs his 8(b)(1)(B) function, assuming as I said that Oakland Mailers is correctly decided, the union commits a violation, but that if the union's

discipline is based on the way the supervisor performs other other supervisory duties or rank and file duties or the fact that he crosses a picket line and thereby tends to undermine the strike, that is outside the prohibition of this unfair labor practice. At that point, the employer's option, again to quote from Florida Power & Light, is to force the supervisor to resign from the union, thereby protecting his interest, and we think that the source of this understanding is basically on three different facets of the Act and its legislative history.

First of all, section 8(b)(1)(B) is far narrower than section 211. Section 8(b)(1)(B) protects employers and the selection of grievance handlers and negotiators, whereas section 211 defines supervisors far more broadly. Both sections came into the law at the same time. If Congress wanted to prohibit unions from disciplining supervisors, it would have written 8(b)(1)(B) to say that it is unlawful for a union either to discipline supervisors or unlawful for a union to restrain or coerce an employer in the choice of his supervisor. It simply said neither of those things.

Secondly, the legislative history indicates that this provision created no stir in what was otherwise, as this Court again has noted time and again, one of the most hard-fought legislative conflicts of the post-war period, because of the assurance of its sponsors that it had a narrow scope

and that scope basically was to perfect the collective bargaining process by assuring that the union was not on both sides of the table in both selecting its own representatives and selecting or having a voice in the selection of the employer representatives.

The more difficult and controversial issue of whether to restrict the right of supervisors to be union members was solved through section 14 and 2(11) and 2(3) in favor of giving the employer a privilege to keep supervisors out of unions, to fire supervisors who join unions and to refuse to bargain with unions about supervisory units, even where the union had majority support in the union, thereby reversing the decision in the Packard Motor Company case.

It is not surprising, I would contend, that the sponsors of 2(3), 2(11) and 14 did not choose to give supervisor-members protection in law against discipline as supervisors because they were at the same time stripping those supervisor-members of all legal protection vis-a-vis the employer. I think that we, of course, have differed with many aspects of Taft-Hartley, but Senator Taft was not the type of man who would carry water on both shoulders at least that blatantly.

QUESTION: What if a member of the union who was a supervisor crossed the picket line and does non-rank and file work and the employer asks him or designates him to do

grievance adjustment and he says, no, I won't do it, I would be fired, and the employer says, well, I guess I must get somebody else, and he says, yes, you must get somebody else? Now, would your argument still go?

MR. GOLD: Yes. In other words, we -- may I ask a question about that, because under our position we couldn't discipline him for handling the grievance; if it occurred the other way, we could discipline him, in other words he goes to work and the employer says --

QUESTION: But he says, no, I will not do it because I am --

MR. GOLD: I would be subject to discipline.

QUESTION: -- subject to discipline.

MR. GOLD: I will not do supervisory functions or I will not do rank and file work.

QUESTION: I will not do collective bargaining agreements proceedings, I will not handle any grievances because I can be --

MR. GOLD: Because I would be disciplined?

QUESTION: Yes.

MR. GOLD: If the union disciplined him for handling the grievance, that would be a violation of 8(b)(1)(B).

QUESTION: But that is not quite my Brother White's question.

MR. GOLD: Well, that is why I asked, because I am

not sure I understood it. Our position is that a supervisor-member crosses a picket line, he does work what we call section 2(11) work, but it isn't handling a grievance. Our position is the union can discipline.

QUESTION: Well, he crosses the picket line and he does supervisory work when the employer -- and then he tells the employer, by the way, I have been doing grievance work for you but I am not going to do any more or I will get fined.

MR. GOLD: Well, the union can't fine him in our view for handling the grievance. It could fine him for doing the supervisory work other than handling grievances.

QUESTION: Now, Mr. Gold, I don't remember and I don't have before me your briefs in Florida Power & Light, that is, the respondents brief, but it is asserted in one or more of these briefs that you took the position in that case that supervisors who crossed picket lines to perform 2(11) work could not legally be fined by the union?

MR. GOLD: We did not take that position. I have gone back over the AFL-CIO brief and we simply didn't even address it. In the union's brief, the IEW's brief, they argued first that Oakland Mailers itself was wrong --

QUESTION: Yes.

MR. GOLD: -- but even assuming that it was right, the union could fine those individuals who crossed the picket line and did rank and file work, they limited their argument

that way because under their internal union rules they did not choose to discipline supervisors who did not do struck work, so that was the only issue they posed.

QUESTION: Well, those are the facts of that case.

MR. GOLD: Yes. The facts of that case were that the union fined people for doing struck work.

QUESTION: Right.

MR. GOLD: But --

QUESTION: All right. But it is asserted in the present case in the briefs that the position is taken by each one of the respondents in that case that the unions could not permissibly discipline those who crossed picket lines in order to perform what you called 2(11) work, i.e., just general supervisory work, foremen's work?

MR. GOLD: Well, all I can say is that, first of all, in support of that statement they quote a portion of the transcript in oral argument of counsel for the union, and he said assuming that Oakland Mailers is correct, unions can fine individuals for performing struck work. I don't regard that as a concession. Secondly, I have gone over our brief and what they do is tax us for saying that by arguing the issue presented by that case, namely whether unions can discipline supervisors for doing struck work, we were taking the opposite position on 2(11).

QUESTION: Well, lawyers are lawyers, and that was a

different case --

MR. GOLD: Well --

QUESTION: -- and you were trying to win that case and now you are trying to win this one.

MR. GOLD: Right, and we believe that the theory of your opinion in Florida Power & Light supports our attempt to win this case, but we do not argue that we have already won this case by reason of that opinion. We are arguing that the rationale, particularly the point made in your opinion that 8(b)(1)(B) is narrower than 2(11) and that the overall problem of assuring that supervisors are loyal in performing non-8(b)(1)(B) functions supports our view here.

If I may, since it being to our interests, I am going to quote you extensively, I would like to point out that the --

QUESTION: Well, that was a court opinion?

MR. GOLD: Yes.

QUESTION: The court opinion, it wasn't a separate opinion.

MR. GOLD: I want to quote another court opinion that you also were the author of, that is all I want to say. We think that the 8(b)(1)(B) situation here is very much like the 8(a)(3) case presented in American Ship Building. There, as here, you have a situation where Congress left something to employers, namely the right to discipline even union members

so long as the basis for the discipline was not their union activity; and, on the other hand, Congress in 8(a)(3) made it unlawful to discipline a union member for union activities, and the Board of course read 8(a)(3) to create a prophylactic rule that an employer could never lock out, and the theory of that court opinion was that where Congress leaves the privilege on the one hand and creates a prohibition on the other, the Board can prohibit activity motivated wrongfully but can't prohibit all activity which has an adverse effect on the ground that that is necessary. And I would suggest that here too, if Oakland Mailers is correct, the Board has moved to protect the supervisor in performing 8(b)(1)(B) functions to assure that a union cannot discipline the supervisor for the way he performs that function or for the fact that he is performing, to go the next step and say it is necessary or else employers will believe -- I mean that supervisors will believe that they can be disciplined for 8(b)(1)(B) functions to assure that they are not disciplined for anything we believe is impermissible because we think that cuts into the privilege that Congress left, which was to fine or otherwise discipline supervisor-members for activities other than 8(b)(1)(B) functions, and that is why we believe that both the so-called carryover theory and the deprivation theory are unsound. The Board has a direct method of protecting supervisor-members who are disciplined for performing 8(b)(1)(B) activities, and that

is to make it an unfair labor practice to so discipline them, to say that in order to protect them, you must go one step further and assure that they can't be disciplined for anything seems to us to disregard the limitations that Congress observed when they wrote the section and to go back to the general view that the Board has espoused all along, making only the narrowest adjustment for Florida Power & Light, namely --

QUESTION: Well, assume a supervisor has been performing bargaining functions along with his supervisory duties and a strike comes along and he is a member of the union and the union says don't cross the picket line and he says I really ought to, I have a lot of work to do, and they say, well, we will fine you, so he stays away, and the employer calls him up and says, I've got a lot of bargaining for you to do over here, and he says, awfully sorry, I decline, you had better get somebody else, you still would say that there is no unfair labor practice?

MR. GOLD: No, I wouldn't.

QUESTION: What?

MR. GOLD: I would not.

QUESTION: Oh, you would not? So --

MR. GOLD: I apologist. Please go ahead.

QUESTION: Well, if he has been performing the bargaining duties and the union wants to fine him for going to work, there is an unfair labor practice?

MR. GOLD: That's right. If he comes to the union or the employer comes to the union and says this man is going to perform --

QUESTION: He is going to do his usual job, he is going to do supervisory duties, he is going to do his bargaining.

MR. GOLD: The union can fine him for doing the supervisory duties.

QUESTION: But they can't -- he just says I will come to work but I will only do my bargaining.

MR. GOLD: That's right. That is where the adjustment --

QUESTION: Well, the employer says I can't pay you for that, if you come to work or not, so I -- he is going to have to get somebody else one way or another.

MR. GOLD: Well, he may have to get somebody else, but that would be his choice because of the fact that the union can exert discipline on the supervisor for doing non-8(b)(1)(B) work; it will not be because the union has transgressed the limitation. In terms of the hypothetical you pose, if there is a situation in which the employer says to his supervisor, I've got struck work that has to be done during this strike, and if you won't come here and do it in addition to doing the adjustment of grievances or bargaining, I am going to fire you, and the supervisor says I won't do

that because I will be fined by the union, we think the minimum that Florida Power & Light means is that the union hasn't committed a violation, and we don't think that 2(11) work is any different for struck work --

QUESTION: But in either event, if the employer said well just come and do your bargaining --

MR. GOLD: It would be a violation for the union to fine the man.

QUESTION: Aren't we in a rather unreal situation in this? Who is he going to do any bargaining or agreements procedure with? The employees are on strike, they aren't there.

MR. GOLD: I think that in the real world the employer arguments and the Board arguments are most unlikely. But all I am saying is that in --

QUESTION: You are hypothesizing a strike, when the ordinary employees are not there. There is nobody to file a grievance, is there?

MR. GOLD: I would --

QUESTION: There is only one union on strike.

MR. GOLD: I would think it is very rare. I can think of some situations. One, suppose an employer gets strike breakers. Now, it is unlikely that he will handle their grievances, but he may. In that situation, if he wants to have his trusted supervisor handle those grievances, we think we would violate the law in --

QUESTION: Suppose there has been a grievance with another union?

MR. GOLD: Or in this case there were grievances with other unions, and those are possibilities, remote possibilities. We are not arguing that all --

QUESTION: Well, this just happens to be in this case, that's all.

MR. GOLD: But they did not fine, so far as anything the Board has said, people were not fined for performing those functions and duties. The Board said it was illegal for --

QUESTION: But if any supervisor had stayed away because of the fine, he would no longer be available to do any bargaining for the employer.

MR. GOLD: That poses the question of fact that Mr. Reich was arguing and responding to the Chief Justice's question. It may be that the union's threat here can be read as going beyond what it could properly do. We don't think that that is a fair reading under the circumstances, but that may be, but that doesn't justify the Board's theory because the Board finds that it is an unfair labor practice to discipline somebody who doesn't touch a grievance, and that we say is beyond the pale. That is what the Board was not given the right to do. We don't believe that supervisors got carte blanche from union discipline when they are union members. We think that they got protection for these collective bargaining

related functions and nothing else.

QUESTION: What is your position, Mr. Gold, as to the burden of proof? Supposing that a supervisor simply goes across the picket line, the union disciplines him, does he have to show that after he went across the picket line he was doing contract adjustment or grievance work?

MR. GOLD: I think that the union would have to have a basis for believing that he was doing work other than grievance adjustment, but I think that under the normal rule that the party in possession of the facts ought to have the burden of going forward. I would think that there ought to be some burden on him to show that he didn't do anything other than handle grievances and bargain.

QUESTION: So the union can impose a flat rule of discipline for crossing a picket line and he has got to at least come up with something or the Board has to before they can show an unfair labor practice?

MR. GOLD: That would seem to me to be the most logical burden of proof. In other words, in a situation -- and it would seem to me that it would be something like Green v. McDonnell-Douglas, where under Title 7 circumstances you go back and forth, if the supervisor came up to the picket line and said I am crossing solely to do bargaining unit or grievance handling, the union might be -- it might be fair to say that the union has to show something that he didn't keep

his word or be in the soup. On the other hand, if he just goes in and comes up against a background where he has never done solely the handling of grievances and says good-by, fellows, I am going through this line, then it would seem to me proper for the union to discipline him for doing it and for him to have to show in a defense that he restricted his work to grievance handling and bargaining.

QUESTION: What if he came to the picket line with an affidavit reciting in detail that the employer had called him and had a series of grievances and bargaining problems to deal with, that he was going into the plant and crossing the line for that purpose and only that purpose, where is the burden of proof now?

MR. GOLD: On the union.

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

Mr. Come, you have some time left.

ORAL ARGUMENT OF NORTON J. COME, ESQ., ON BEHALF OF PETITIONER, NATIONAL LABOR RELATIONS BOARD -- REBUTTAL

MR. COME: First of all, with respect to Florida Power, at pages 30 and 31 of the transcript of the oral argument, this question was put to union counsel: Suppose in an employee strike you had a group of rank and file employees who crossed the picket line and then the supervisor crossed the picket line to supervise them, would you feel that this made

this a different case? Answer, it is a completely different case. On what basis do you draw that distinction? Answer, because when a supervisor is in fact directing the work force, doing what he normally does, he is performing at the very least a supervisory duty as that is defined in section 2(11).

QUESTION: Who was answering?

MR. COME: Mr. Cohen, the counsel for the union.

QUESTION: Well, we have said that agencies may be penalized in the weight that we give their interpretation for taking an inconsistent position. I have never heard that rule applied to private entities.

MR. COME: Well --

QUESTION: Particularly when his answer is inconsistent with the position here, and that was a different case from the facts of Florida Power & Light.

MR. COME: I am not intending to get away from it or any collateral estopple, I just wanted to make it perfectly clear that insofar as the decision in Florida Power was concerned, the Court did not have before it the question --

QUESTION: The facts of this case.

MR. COME: -- the facts of this case, and indeed it was specifically left out of the case on the submission. Okay.

I think in terms of the policy that went behind Florida Power, it also made a big difference that only rank and file work was involved because to deprive the union of the

right to discipline people for performing that truly cut at the heart of the union's strike weapon, and in view of Insurance Agents and Curtis and section 13, this Court has made it clear that absent clear indication from Congress that it intends to so limit, it is not going to do that.

I think that when you get to the performance of supervisory work, as you had here, the balance is a different one, and I think that there is that policy difference.

But getting to the last argument that my brother made, that the burden is on the supervisor or the Board to show that the supervisor was not in fact performing grievance adjustment or collective bargaining work is not only an unreal situation, but it is not required by the statute, because the statute proscribes restraining and coercing the employer in the selection of his representative for grievance adjustment and collective bargaining.

We submit that when the employer selects a supervisor with those powers and directs him to come to work in a situation where there is a potential for exercising those powers, it is as much an interference with the employer selection if you deprive him of the representative's authority, whether he in fact is called upon on a particular day to adjust grievances or not, becuase in the real world there is no way of knowing exactly when a grievance is going to arise or a collective bargaining situation is going to arise. And

certainly a supervisor does not cease to become any less the management's selected representative for that purpose due to the forfuities at a particular hour and on a particular day he didn't have a grievance to adjust.

QUESTION: And during that whole time he could be doing struck work?

MR. COME: But the fact is that he was not doing struck work in this case, there is no indication, no evidence whatsoever. As a matter of fact --

QUESTION: Well, I didn't understand that you were limiting yourself to this case, in that broad statement you made of the right of a employer. Are you talking about this employer?

MR. COME: Well, I am talking about this employer and other employers similarly situated.

QUESTION: Well, could this employer require them to do struck work or not?

MR. COME: If he required them to do struck work, then you get into a situation as to whether the struck work that was being required was minimal or substantial under the Board's rules. If it was no more than he would normally do absent a strike -- in some of these situations, you have supervisors that do a minimal amount of rank and file work as well as their supervisory duties -- if it is no more than that, under the Board's view, it would have the same result

as you had here. If they were asking him to do more than they would normally do but for the strike, then you would have a Florida Power situation. I think this case is an easy case because there was no history of the supervisors doing any bargaining unit struck work, and there was no requirement that they perform any. As a matter of fact, the employers made it perfectly clear that they would not require them to do any writing that was covered by the bargaining agreement. They were only required to perform their normal functions as producers, directors, and story editors.

QUESTION: Any (A) to (H) work?

MR. COME: It included some (A) to (H) work, but the finding of the Administrative Law Judge, which was affirmed by the Board, is that (A) to (H) work was not bargaining agreement work; it was not struck work. Whatever you may call it, it was not struck bargaining agreement work.

QUESTION: Mr. Come, do you think the grievance is the performance of the supervisory duties day to day, which means that the supervisor is representing the employer in the administration of the contract? I mean, wholly aside from whether at any phase of the grievance procedure he is the employer's representative.

MR. COME: I think that that argument has validity. I don't think we need to go that far in this case, because under the findings of the Administrative Law Judge and the

Board, it was perfectly clear that each one of these hyphenates had grievance adjustment functions and they were exercised during the strike because this is not a situation where the strike shut down the plant. You had operations; they were filming these films. To be sure, there was no new writing of scripts, but they were proceeding to direct and photograph and develop what was in process, and you had other employees at work whose grievances were being adjusted.

QUESTION: Are you saying this distinguishes it from Florida Power?

MR. COME: I think it does, your Honor. It distinguishes it from Florida Power, because in Florida Power you at least found a submission. The supervisors there were disciplined because they went across the picket line to perform rank-and-file struck work that they would not have been performing but for the strike.

QUESTION: And the employer found that those who crossed the line to do supervisory work weren't fined.

MR. COME: They were not disciplined. Yes, your Honor.

QUESTION: Mr. Gold seemed to concede that if the employee represented at the picket line to the pickets that he was going to perform only these managerial functions, then he could not be disciplined.

MR. COME: Well, I heard him, and I think as I read

his brief, that is inconsistent with the position that they have taken up to now, because their basic position has been the one that Member Fleming took in dissent on the Board, namely, that in order to establish a violation of 8(b)(1)(B) under Florida Power, you would have to show that the discipline was meted out for the manner in which they performed the grievance adjustment or collective bargaining function. And the position of the Board majority and the position that I am urging here is that under Florida Power you can affect the employer's selection of his representative for these purposes merely by threatening to discipline supervisors if they cross the picket line to perform their supervisory duties where they include these functions, and it doesn't have to be for the manner in which they perform any particular grievance adjustment or collective bargaining matter.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:28 p.m., the oral argument in the above-entitled matter was concluded.)