ORIGINAL

In the

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner

vs

LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, ET AL.,

Respondent.

C. 4

No. 76-719

Washington, D. C.
October 31, 1977

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LOCAL UNION NO. 103, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, ET AL., Respondents.	

Washington, D. C.

Monday, October 31, 1977

The above-entitled matter came on for argument at 1:11 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

NORTON J. COME, ESQ., Deputy Associate General Counsel, National Labor Relations Board, Washington, D. C. 20570, for the Petitioner.

SYDNEY L. BERGER, ESQ., 319 N.W. Seventh Street, Evansville, Indiana 47708, for the Respondents.

C O N T E N T S

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-719, NLRB against Local Union No. 103.

Mr. Come.

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on certiorari to the District of Columbia Circuit which denied enforcement of the Board's order directed to Respondent union, a local of the Ironworkers. The case involved the relationship between two provisions that were added to the National Labor Relations Act in 1959. The first, Section 8(f) which permits employers and unions in the building and construction industry to enter into agreements before employees have been hired, so-called "pre-hire agreements," and Section 8(b)(7)(c) which regulates recognitional and organizational picketing by a labor organization. And, in general terms, the question presented is whether a pre-hire agreement entered into pursuant to Section 8(f) privileges recognitional picketing by a minority union which would otherwise violate Section 8(b)(7)(c).

Now, the facts are briefly these: In May of '73, Higdon Construction Company executed a contract with Glenmore Distilleries to erect a facility in Kentucky. The contract

required Higdon to use union labor, and in order to obtain ironworkers from Respondent union it was required to sign an acceptance to the area-wide labor agreement which the union had entered into with a multi-employer association. The agreement purported to cover all employees who performed ironwork for signatory employers within the union's territorial jurisdiction. It contained no provision requiring employees hired by the employer to become union members, the union security clause, and no provision requiring the employer to check off union dues. Higdon Construction performed the Glenmore job with some of its own employees who were non-union and with some employees who were supplied by the union.

QUESTION: What did the agreement contain, Mr. Come?

MR. COME: The agreement contained provisions establishing wage rates, welfare and pension benefits and working rules for the employees. It did not have a union security clause in it or a check off provision.

QUESTION: Were there pension requirements for -- Suppose there were no union members hired on a job, would they still have to contribute to a pension plan?

MR. COME: As I read the acceptance here, you would.

QUESTION: Thank you.

QUESTION: Would the Board's position be any different if there were a union security clause in the agreement?

MR. COME: The Board's position would be different,

as indicated by the -- if the union security clause were enforced.

QUESTION: By the employer, you mean?

MR. COME: By the employer. In that situation, the Board would treat it like an ordinary collective bargaining agreement which carries with it a presumption that the union has majority status.

The Board found, and the Court of Appeals accepted that finding, that neither at the time the labor agreement was executed nor thereafter did the union claim to or in fact represent a majority of Higdon Construction's employees at the Glenmore project. Meanwhile, Higdon Contracting was formed to perform non-union iron jobs and it bid successfully on two jobs, Grace and Barmet, and began work on them with non-union labor. When Higdon refused to apply the prior agreement to these jobs, the union picketed the jobs with signs stating that Higdon Construction was in violation of the previous pre-hire agreement which was entered into at the Glenmore job. Higdon Contracting filed an 8(b)(7) charge and the Board found that violation of that provision. It preliminarily found the agreement between the union and Higdon, although it was a pre-hire agreement sanctioned by 8(f), did not privilege the picketing at the Grace job site as a means of enforcing that agreement because there was no showing that the union had ever acquired a majority under the agreement to form a full

collective bargaining relationship. The Board, in so holding, relied on its earlier decision in R. J. Smith, holding that a pre-hire agreement without proof that the union had acquired majority support thereunder, did not carry with it a presumption that the union had become the Section 9(a) or majority representative of the employees. The Court of Appeals which had set aside the Board's decision in R. J. Smith also set aside its decision here.

Now, it's established principle, under the National Labor Relations Act, that employees shall be free to select their own bargaining representative, that an employer is obligated to bargain under Section 8(a)(5) of the Act only with the representative designated by a majority of the employees in an appropriate unit, and that it is an unfair labor practice, both on the part of the employer and the union, to enter into a collective bargaining agreement when the union does not represent a majority of the employees, even though the parties may in good faith believe that they do, and even though subsequently the union may in fact acquire a majority. Section 8(b)(7)(c) provides significant additional protection for the employees' rights of free choice by prohibiting a union which is not currently certified as the bargaining representative of the employees from picketing to force the employer to recognize it as the employees' representative for more than 30 days unless a representation petition is filed.

If a timely petition is filed then a provision is made for an expedited election, and the whole theory of 8(b)(7)(c) is to channel disputes concerning the representation status of a union from the picket line into the Board's representation procedures. The union's picketing here came squarely within 8(b)(7)(c). It had never been certified by the Board as the representative of Higdon's employees, nor had it otherwise been selected by a majority of those employees. Nevertheless, the union picketed here for more than 30 days during which time no representation petition was filed. The avowed purpose of the picketing was to compel Higdon to adhere to the pre-hire agreement executed for the Glenmore job, the necessary effect of which would have been to recognize the union as the representative of the employees at the Grace job site, even though they had never selected the union as their representative.

Now, the basic question that we come down to here is whether the 8(f) agreement removes the picketing from the reach of 8(b)(7)(c) on the theory that such agreement, by operation of law, has established the union as the Section 9(a), or majority, representative of Higdon's employees, and thus the representation question has already been resolved.

In the Board's view, an 8(f) agreement does not, without more, establish the union is the majority representative. It is merely a preliminary step that contemplates further action to establish a full bargaining relationship. Hence,

absent a showing that the union has required such majority support, the agreement is enforceable neither through a bargaining order issued under Section 8(a)(5) which obligates the employer to bargain with the majority representative nor does it insulate the picketing from 8(b)(7)(c) picketing.

Now, the Board's position rests upon the following considerations. In the first place, we start with the language of the statute which is set forth at page 3 of the Board's brief. It provides that it shall not be an unfair labor practice for employers or unions in the construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in that industry because the majority status of such labor organization has not been established under the provisions of Section 9 prior to the making of such agreement.

Now, nothing in that language suggests that it was intended to confer upon a union that is a party to a pre-hire agreement the status of a Section 9(a), or majority, representative. Congress did not in Section 8(f) or elsewhere modify Sections 8(a)(5) or 9(a). The former, as I have indicated, obligates the employer to bargain with the representative of his employees subject to the provisions of 9(a), and 9(a) defines the bargaining representative as the representative selected by the majority of the employees in an appropriate unit. Moreover, while the Board's well established

contract bar rules would preclude the Board from entertaining a representation petition during the life of an ordinary collective bargaining agreement, the last proviso of the Section 8(f) which is on page 4 of the brief provides that any agreement which would be invalid but for clause (1), which without the majority being established, shall not be a bar to a petition filed pursuant to Section 9(c) which is the provision for determining representation questions, or 9(e) which is a provision that permits employees to de-authorize a union security clause.

Now, the legislative history, we believe, confirms that Congress, in authorizing pre-hire agreements, intended to do nothing more, because of the peculiar characteristics of the building and construction industry, to relieve them from what would otherwise be a clear violation of the National Labor Relations Act. I mentioned earlier, and this Court so held in the Garment Workers case a number of years ago, that in the ordinary case an employer and a union have to have a representative complement of employees on board and the union has to represent a majority of them before you can enter into a collective bargaining agreement. This didn't work in the building and construction industry because of the short-term nature of most construction projects and the fact that the employers ordinarily lacked a steady complement of employees. It is necessary for employers to enter into regular agreements

before the job is started or the workers are hired. So 8(f) was enacted to relieve them of having to comply with what would otherwise be an impossible rule for the building and construction industry. It caused a lot of trouble under the Taft-Hartley Act in administering because it just didn't fit. But, we submit that that is as far as Congress intended to go. It did not intend to relieve unions of the responsibility of acquiring majority support under these contracts. Congress thought that in the typical case that would happen because the employer would draw from a pool of skilled craftsmen in the area who are usually or often union members; secondly, it permitted the negotiation of union security provisions which gave employees 7 days instead of the normal 30 to join the union.

QUESTION: May I interrupt you for just a minute.

If I understand you, you are saying that the 8(f) removed the legal rule that it would be an unfair labor practice for the union to enter into such an agreement, but it did not have the effect of making the union the collective bargaining agent of the employees.

MR. COME: That is correct.

QUESTION: Well, was the net result of this the creation of a valid enforceable contract or not? I gather you are saying it was not. If not, how would -- Let me get the whole thought out. How then would they determine whether the

employees could be, insist on being paid the wage rate specified in the agreement, for example, or bonuses at the end? Were these enforceable obligations or not?

MR. COME: Well, if the employer and the union abided by the agreement, and if the union acquired majority support under the agreement, they would be enforceable.

QUESTION: Now, my assumption would be that the union never gets a majority status but toward the end of the contract terms, when they finished the building, the company just decided, "Well, we've decided not to pay you that amount. We think we agreed to pay more than we should have. It's not an enforceable contract. We will give you the reasonable value of your services and that's it." Would they be free to do that?

MR. COME: Under the Board's position, if the union had not acquired majority support, if the employer failed to abide by the contract, it would not be an enforceable obligation under Section 8(a)(5) of the statute. The Board would not issue a bargaining order requiring the employer to abide by the agreement. Whether there would be a suit under 301 or some other suit for the recovery of wages under that contract for the period under which it was observed, is a question that the Board has not passed on. But, insofar as the Board is concerned --

QUESTION: Wouldn't the logical implication to your position be that no such suit could be maintained on the

contract, even though there might be some kind of a quantum meruit claim, or something like that.

MR. COME: I think that that would be the logical implication.

QUESTION: Well, that's not much of a contract in the normal sense of that word, even in the sense of a collective bargaining contract, if it is not binding on anybody. That's not an agreement and it's not a contract, is it?

MR. COME: I think, Your Honor, that that is the plight here, that in the Board's view this pre-hire agreement is not a thorough contract. It gives the union the right to enter into the agreement but it takes subsequent action to mature that into a full collective bargaining arrangement.

QUESTION: Really, in your submission, all 8(f) does is exempt the employer and the union from charges of an unfair labor practice.

MR. COME: That is correct.

QUESTION: That's the extent of what it does.

MR. COME: That is correct, Your Honor.

QUESTION: Well, if the contract is no good, why do you need 8(f)?

MR. COME: You need 8(f) because the mere entering into the contract would have been illegal without 8(f) and --

QUESTION: So the contract cannot be enforced by either side?

MR. COME: It can be if the union has acquired the majority support --

QUESTION: That's always true.

QUESTION: Why do you need 8(f) if it's just, as I understand, a piece of paper signed that has no binding effect on anybody?

MR. COME: You need 8(f) to give that --

QUESTION: That's an agreement?

MR. COME: -- initial period to acquire a majority. Even under the Court of Appeals' position, the agreement doesn't have much more effect because the Court of Appeals agrees, and I do not understand my brother to disagree, that the entry into the agreement does not relieve the union of the necessity to acquire a majority support under it. So that, if the employer were to file a petition, or the employees or a union, and the union that entered into that contract was found to have a minority status that contract would be unenforceable and come to an end.

QUESTION: Mr. Come, on the hypothetical my brother Stevens posed to you, that is the breaches of the wage provision of the 8(f) contract, doesn't Lion Dry Goods suggest that would be enforceable in the court under 301?

MR. COME: Lion Dry Goods, Your Honor, -- and we have addressed ourselves to that more fully in our reply brief -- holds that the strike settlement agreement, that there is

jurisdiction under Section 301 to entertain a suit on a strike settlement agreement, notwithstanding the fact that the union does not purport to represent a majority of the employees.

QUESTION: Wasn't the holding -- it is some while since I read it -- Wasn't the holding in Lion Dry Goods that the strike settlement agreement was enforceable under 301? Wasn't that the holding?

MR. COME: The holding was -- As I read the holding -- And, of course, Your Honor wrote it so he probably is more --

QUESTION: My recollection is -- I don't know why we would have written a decision if we didn't hold that the strike settlement agreement was enforceable.

MR. COME: Well, the precise holding was that there was jurisdiction, that jurisdiction was not defeated merely because it was not a typical --

QUESTION: Jurisdiction into what? To decide that it wasn't enforceable?

MR. COME: Jurisdiction to entertain suit.

QUESTION: Which does not mean that the plaintiff would have won.

MR. COME: It does not mean that the plaintiff would have won. Similarly, even though the Court in reaching that conclusion pointed to 8(f) as another form of minority agreement --

QUESTION: Incidentally, I am reading from your own

brief as to Lion Dry Goods: "the Court indicated its view that the strike settlement agreement in that case would be enforceable." You cite 369 U.S. at 27.

MR. COME: But we go on to point out that it does not indicate under what circumstances it would be, and we submit that there are circumstances under which an 8(f) agreement would be enforceable clearly had the union acquired a majority support under --

QUESTION: That's not because of the initial 8(f) agreement, that's because of subsequent developments.

MR. COME: Yes, but without 8(f), that agreement would have been illegal to begin with.

QUESTION: It would have been an unfair labor practice. Yes. You've told us that. That's correct, obviously.

MR. COME: Similarly, there are circumstances under which, even under the Court of Appeals' position, the 8(f) agreement would not be enforceable.

QUESTION: That's explicitly covered by the second proviso under 8(f), isn't it?

MR. COME: That gets to the question as to whether that is the only way in which Congress visualized --

QUESTION: And that's really the nub of the controversy between you and your brother, isn't it?

MR. COME: That is correct, Your Honor.

QUESTION: As I understand your brief.

MR. COME: Yes.

QUESTION: Would an agreement which, on its face, said that it is unenforceable by either side, be an unfair labor practice?

MR. COME: I really can't imagine --

QUESTION: I can imagine. It's what you've got here now. That's what you've got here now.

MR. COME: Well, we submit that without 8(f) --

QUESTION: You don't need 8(f), do you?

MR. COME: Well, you do, but -- I would like to reserve the balance of my time, if I may.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Berger.

ORAL ARGUMENT OF SYDNEY L. BERGER, ESQ.,

FOR THE RESPONDENTS

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

First of all, I would respectfully call to your attention there are important facts in the record omitted in the opening statement.

One, there is a history of an 8-year collective bargaining relationship between this employer and our client, Local 103 of the Ironworkers. Two, the record is undisputed that this employer formed a new company solely, quote, "to get

around the contract." As a result of that, the Administrative Law Judge found, the NLRB found that the employer was guilty of chicanery, of subterfuge, of sham, and the District Judge, the United States District Judge in Owensboro, to whom the Board went for an injunction, where all they had to prove was that the Regional Director had reasonable cause to believe we committed an unfair --

QUESTION: But your position would be the same if there hadn't been any chicanery or subterfuge.

MR. BERGER: Mr. Justice White, I would say yes and no. I would say yes, our position would be the same as far as statutory interpretation is concerned.

QUESTION: And as far as your right to picket to enforce this contract.

MR. BERGER: Yes.

QUESTION: And what's involved here is statutory in construction, period. And we can just assume that this is the same employer even though there was a change of corporate form. And that's conceded now, isn't it? We assume that this was the same employer on all three.

MR. BERGER: Yes, sir.

QUESTION: That's really all that's involved.

MR. BERGER: May I respectfully suggest this to the Court: that this is not only a court of law but a court of justice and it says on the proscenium as I came in the

steps with awe, and came into this chamber, "With equal justice under the law." And I suggest that if the Board's position is upheld and if the Court finds that this employer who was guilty of chicanery,and all of that,and subterfuge and sham was right and that our client was wrong an injustice has been done. I think that is a factor --

QUESTION: The Labor Board which has the first obligation in these matters didn't decide the case on that basis. Is it in the case at all?

MR. BERGER: You are correct, Mr. Justice White. It is not in the decision of the Labor Board.

QUESTION: And we haven't any basis for deciding the case on another ground, have we?

MR. BERGER: Except that the record is undisputed and the Administrative Law Judge used that as a basis for his disagreement.

QUESTION: I know, but the Board didn't.

MR. BERGER: That is right, Mr. Justice.

QUESTION: All that language has to do with is whether or not this was a different employer, and you won on that. Okay, this is the same employer. You've won that point.

MR. BERGER: Okay, thank you, Mr. Justice Stewart. I will now move from that premise.

QUESTION: It's a useful footnote in your brief.

MR. BERGER: Thank you, Mr. Justice Rehnquist.

In any event, the record also shows that the only purpose of the picketing was to require the employer to honor its contract with the local union, and the record finally is undisputed that this contract covered all of the employer's employees and all of the job sites. Now, this is important --

QUESTION: May I ask you if the contract, as you understand it, calls for the company to bargain with the union? Was the picketing intended to put pressure on the employer to bargain with the union as the bargaining agent for the employees or just to enforce the wage provisions and other provisions?

MR. BERGER: Just to enforce the wage provisions and to honor the contract.

QUESTION: And he wouldn't have needed to bargain with the union at all to do that.

MR. BERGER: That is right. All he had to do was live up to his contract.

QUESTION: What about an arbitration provision? In other words, were agreements and arbitration in this pre-hire agreement, or not?

MR. BERGER: I don't recall that, but it wouldn't have mattered because the employer would not have honored any grievance, Mr. Justice White. He just said, "I'm not complying with the contract because this other company that I've formed is not --"

QUESTION: I understand that, but if there were

grievance and arbitration provisions in the contract, I suppose the union men would have been in the position of acting as the collective bargaining agent in administering the contract?

MR. BERGER: Correct, sir.

QUESTION: But that wasn't involved here you don't think?

MR. BERGER: I don't think so, sir.

Now, the Board's interpretation of this agreement is, in effect, an attempt to rewrite the statute. Because what the Board says Section 8(f) means is that a contract is not a contract until the employer establishes -- excuse me -- until the union establishes its majority at each job site. Now, if Congress had wanted the union to do that, if Congress had intended that an 8(f) contract is valid only when the union establishes a majority, it would have said so. The Act is silent on that. Furthermore, the legislative history that they speak about was mentioned by the Court of Appeals four years ago in the Local 150 case, when they said, "We can find no sanction in the language, history or policy" -- history meaning legislative history -- "of Section 8(f) to permit an employer to abrogate unilaterally a validly executed pre-hire agreement or to permit an employer to commit what is otherwise an unfair labor practice even though at that time the union has not obtained majority status."

Now, the question is suggested in the Board's briefs

that,what about the employee's wishes, and that? Well, the proviso takes care of that because the proviso says that unlike a normal contract where you can't have an election because of the contract bar, any time, at any time after an 8(f) contract is signed the employees, if they feel the union is not representing them and they don't want the union, the employer, if he feels that this is not a union which represents a majority of his employees or any other union, can come in and get an election and there would be no --

QUESTION: Excuse me. The practical consequence of the decision one way or the other is just which side has to petition for an election?

MR. BERGER: But it is much more than that in its implication, Mr. Justice Rehnquist because our interpretation, the correct interpretation, is the contract is valid until an election is held at which the union loses. If the union loses and is no longer a majority represented, then the contract is then terminated and no longer effective. But until then, it is a valid contract. The Board construed sophistry in trying to say it is a contract and it is not a contract,and the union has to go in to petition for an election means you don't have a contract. Everybody signs a document in good faith. The employer agrees to pay certain wages and working conditions and then it can just say, "I don't have to, because you haven't proved to the union that you have a contract."

QUESTION: Of course, when you say, "Everybody signs a contract in good faith," your typical construction industry contractor signs one of those agreements at a time when he may have no employees at all.

MR. BERGER: That's right, Mr. Justice Rehnquist, and the legislative history which is relied on says that's the purpose of it. And, reading from the Senate Committee on Labor and Welfare report, which both sides concede is the authoritative document, and it is set out at pages -- many places -- but in the Board's brief at pages 20 and 21, says that "such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated. The practice of signing such agreements for future employment is not entirely consistent with Wagner Act rulings."

And then they said that exclusive contracts can lawfully be concluded only if a lot of people sign. They said there is a reason why it has to be different in the construction industry. One is that the employer has to know his labor costs; two, he has to have available a supply of skilled craftsmen, and therefore the history shows that the purpose of the labor contract is to legitimatize the practice of a union and employer signing a contract for three years, as was done in this case and is done throughout the country, two or three years or one year, to assure a supply of skilled craftsmen, to give stability in the industry --

QUESTION: I doubt if there is much argument about the purpose, Mr. Berger. Tell me, it is a fact here the employer did not seek an election, is that right?

MR. BERGER: That is right, Mr. Justice Powell.

QUESTION: Do you know why?

MR. BERGER: The records are silent on that. I can theorize but the record is silent. The employees also did not seek an election.

QUESTION: And, of course, you know why they didn't, I suppose.

MR. BERGER: I don't know why. I can guess, but I am sure Your Honor is able to do that better than I. But the point is it is undisputed they had the right to do that at any time. Instead of tearing up the contract, in effect, they could have used the remedy which Congress gave them to do so.

The Board points out that it is worried about top-down organizing. Yet, the Board says that if in this contract there was a union security provision which would have required employees on the job to join the union after 8 days, which is permitted under the Act, then the union would have a presumption of majority status.

QUESTION: That is if the employer enforced it. The Board says that would be true if the employer enforced the union security provision.

MR. BERGER: Yes, sir. But the point is, Mr. Justice

Stewart, that I want to make to the Court is that this would encourage unions to force employees to join rather than give them a chance to assert their wishes in an election which is freely held as provided in the proviso to Section 8(f).

The Board's interpretation, aside from its inconsistency and illogicality, has several very bad effects. They are shown by the fact that they cite in their reply brief, for example, this Lee Cee case which the Board just handed down. Now, in the Lee Cee case, you had a similar situation of an employer who had formed another corporation and disregarded a union collective bargaining agreement who insisted if you wanted to keep working for him the employees would have to drop out of the union. This was a blatant unfair labor practice and the Board so ruled. But yet the Board said that despite that the agreement which the employer had signed which he violated was not binding on the union because the union didn't prove that it represented a majority of the employees at each particular site. But the employer's unfair labor practice prevented the union from getting a majority of the employees. And that's what the Court of Appeals correctly pointed out in 1973 in the Local 150 Operating Engineers case.

QUESTION: I take it it wouldn't satisfy you if this Court were to hold that your pre-hire is enforceable in the courts but not by picketing.

MR. BERGER: Well, you say -- It is not for my

satisfaction to be a factor, Mr. Justice White, but if you mean --

QUESTION: Legally, would you find that tenable at all?

MR. BERGER: Well, if the Court so rules, it is not only tenable, it is the law. But before the Court has so ruled, it is my position that the First Amendment is still a very viable thing. It is still very important in this country and picketing is still the exercise of a First Amendment right.

QUESTION: So you think this isn't just a statutory question?

MR. BERGER: It is, but I was trying to answer, Mr. Justice White, your question as to a possible ruling by the Court. I would prefer the Court say that the contract is enforceable by picketing because the First Amendment says you have a right to picket and tell people about facts. And the Taft-Hartley Act itself says so.

QUESTION: Well, I'll put it this way: Would your aims -- Could you achieve your aims through legal action rather than by picketing?

MR. BERGER: We could, but the problem, Your Honor, is that this is a small union and if they have to go to court and legally enforce every violation you are going to over-burden the courts which, Mr. Chief Justice has already pointed

out are greatly over-burdened in their work. You are going to encourage delay in litigious processes. And if it is legal to have such a contract, and if an employer breaks such a contract, and it is an enforceable contract, why can't the union just have a man, and only one man, peacefully picket with a sign saying the company violates the agreement?

QUESTION: May I ask you once more: Do you think you would have been entitled to picket if you had asked the employer to recognize the union as the collective bargaining agent and the employer had said, "No, I will not, but of course I will pay the wages that the agreement calls for"?

MR. BERGER: Absent the contract in this case, of course not. That would be recognitional picketing and you can't --

QUESTION: With the contract, would you say he had to recognize you as the collective bargaining agent?

MR. BERGER: With all due respect, Mr. Justice White, I say he had already recognized the union.

QUESTION: So the answer is yes?

MR. BERGER: Yes, sir.

QUESTION: Well, the picketing would accomplish your result in about a week, probably, but the litigation might take a long time.

MR. BERGER: That's right, Your Honor.

QUESTION: Maybe not even a week of picketing would

the employer withstand.

MR. BERGER: You are taking an arbitrary time and certainly economic pressure -- and if I read your question, Mr. Chief Justice Burger, correctly, about withstanding, a union is entitled to bring a certain kind of economic pressure where picketing is legal.

QUESTION: I wasn't questioning that. I was just trying to get at what your alternatives -- which alternative you would prefer.

MR. BERGER: I would prefer the picketing for the reasons Your Honor stated.

QUESTION: Mr. Berger, let me follow up on Justice White's question because I am not completely sure I understand your answer. He was asking, if I followed your dialogue correctly, whether it was possible that the contract might be a valid enforceable contract, but nevertheless you might have violated Section 8(b)(7) by picketing to enforce it, just reading 8(b)(7) in a very literal way. How do you get around the literal language of 8(b)(7)? Why doesn't the language apply to your situation?

MR. BERGER: Because, Your Honor, the Board has consistently ruled in the Oil Field Research cases and in other cases and the Court of Appeals ruled that where picketing has been conducted by a union who already signed a contract it is not recognitional picketing because recognitional picketing

only applies to the initial attempt for the union to gain that recognition. We cite, at page 11 of our brief, the Dallas case and I quote from the Court of Appeals language there in 1968, that the Board itself there, "The Board correctly points out that Section 8(b)(7)(A) is aimed only at a labor organization's picketing to gain recognition for the first time, not picketing designed to retain its representative status."

So, under the Board's own prior decisions, and we cite them in our brief, the Bay Counties case, the Sullivan Electric Company case, the Board has previously and repeatedly ruled and the Court of Appeals has ruled that picketing, such as that in the case at bar, even arguendo, it was for collective bargaining purposes, was not within the prohibition of 8(b)(7)(A).

QUESTION: Let me ask the opposite of the question. If your argument is valid, wouldn't it equally be valid even if the contract is invalid, if they are not seeking to get their first recognition they are seeking merely to maintain a recognition they had, even though the status before wasn't as a party to a valid contract they still were doing something lawful. Is the validity of the contract of controlling importance, is what I am trying to figure out.

MR. BERGER: It is a very sharp question, Mr. Justice Stevens, and I am not sure how to answer that because it would appear to me, in the first place, that it

could be argued that once the employer breaches the contract and it is no longer controlling, there is a termination of the recognition of the union. And if the union then pickets, if the contract is invalid, the union was then picketing to get recognitional status for the first time. If the contract was invalid, the union was not recognized, because the union could not be recognized by a contract unless it is a valid contract. So, therefore, I would say that the validity of the contract is controlling in that case, but I have not thought that through. That's my initial reaction.

So, therefore, my point there is that the Board's interpretation encourages employers to discriminate against union members to make people drop union membership as a condition of employment in order to prevent the union from getting a majority status and, thereby, saying we can avoid binding effect of a contract.

QUESTION: 8(b)(7) and 8(f) were enacted as part of the same bill in 1959, were they not?

MR. BERGER: I believe so, Your Honor, Mr. Justice Stewart, but I am not positive.

QUESTION: They certainly look in quite different directions, don't they?

MR. BERGER: Right, sir.

QUESTION: They were enacted by the same Congress at the same time.

MR. BERGER: Right, sir. And the only consistent explanation of that, we submit to the Court, is the explanation that we, in our brief -- that 8(f) carves out an exception to the usual rules, the 9(a) rule, the 8(b)(7) rule --

QUESTION: It clearly carves out an exception, and the question in this case, I suppose, is how big is the exception or what is the scope of the exception?

MR. BERGER: Right, sir.

QUESTION: It clearly carves out an exception.

MR. BERGER: Yes, sir.

As opposition, that is, the Court of Appeals said, the two Courts of Appeals, Third Circuit and District of Columbia, that it would be an exercise in futility and it can't conceive that Congress would go on to say that an 8(f) contract, with a minority, so to speak, union, before the union has achieved its majority, it's legal and yet it can't be enforced.

QUESTION: Could I ask you: Does the record show what conduct of the employer the union claimed was in breach of the contract and which provoked the picketing?

MR. BERGER: The employer refused to pay the wages and wage scale and make contributions to the welfare and pension funds that the employer had agreed to pay in its contract.

QUESTION: So, it wasn't the refusal to bargain?

MR. BERGER: No, there was nothing to bargain,

Mr. Justice White. The bargaining was accomplished when the contract was signed. But, on the other hand, I suppose it can be argued that when an employer breaches a contract it is refusing to bargain. I have no strong opinion on it.

QUESTION: Who were the beneficiaries of the pension plan?

MR. BERGER: All of the employees, including the non-union employees.

QUESTION: Will you comment on one other practical aspect I don't really understand here. It occurs to me that these contracts are of short duration in time because the jobs are completed relatively quickly. Is it a practical solution for any of the interested parties to go for an election? Because even if it takes a couple of weeks maybe the job will be completed. Is this why nobody ever seeks the election? Contracts don't take long enough to perform. And, isn't then perhaps the real question: Who may you hire when you start the job? Rather than what remedy may be available after a couple of weeks have gone by.

MR. BERGER: There were several questions there. If I may answer them. Some of these jobs are of short duration, but if the question is: Who may you hire when you start? If an employer doesn't want to hire union members, or doesn't want to pay the wages and working conditions that have been developed protecting employees over the years, he doesn't have to sign the

collective bargaining agreement with the union. Or, even if you have an employer there now -- Some of the jobs last for a long time. There are several going on in our area now where they are constructing power houses, and that, which lasted two and three years. The reason nobody bothers with an election is that the union represents a majority of the employees. The employer and the union agreed on the wages, hours and working conditions and everybody is happy about it. It's arm's-length bargaining.

The Senate report, the committee report, again points out that these contracts, themselves, are for a long period because that gives stability in the construction industry. If a new contract had to be signed for every particular job, it would lead to endless negotiations, and so forth.

I don't know if that answers your question.

QUESTION: One other thing that occurs to me. It helps me. I find this a very puzzling case. One other problem, I suppose, is that in order to get the first job signed up, he's got to sign an area-wide agreement, and then the problem arises in the subsequent jobs when he -- but he can't do it on simply a job by job basis when the union represents the whole territory like that.

MR. BERGER: Mr. Justice Stevens, the employer does not have to sign an area-wide agreement. There are many project agreements that are signed. In some of the cases which

are cited in the brief, there were project agreements signed, rather than area-wide agreements. So whether an employer signs an area-wide agreement depends on whether he is going to be in the business in that area over a long period of time. It depends on the facts.

Another problem with the Board's position, as I say, is not only that it could and does encourage unfair labor practices, as shown by this case, by the Local 150 case and by the Dee Cee, that's D-e-e C-e-e, case cited by the Board, is the fact, too, that it would create -- it would open a pandora's box as far as administration, under the Act. And it would require an employer who signs an agreement with an employee -- The employer says you don't have a majority. The union says, "We do have a majority." If the union files -- Does it have to file an unfair labor practice? Does it have to file for an election? The Act is silent on all that, whereas the Act gives the explicit remedy that any time the employer or the employee feels that the union is not representing a majority of the employees they can petition for the election.

QUESTION: This isn't something new on the part of the Board, is it?

MR. BERGER: Mr. Justice White, what do you mean by "This is not something new"?

QUESTION: Well, I mean this isn't some new and novel interpretation of the Act by the Board.

MR. BERGER: As far as Section 8(f) is concerned, it is.

QUESTION: Haven't they ever held this before?

MR. BERGER: Yes, in R.J.Smith.

QUESTION: I mean, has it ever been held to the contrary? I mean, has this been the Board's consistent position as far as you can tell?

MR. BERGER: No, it has not been the Board's consistent position. As we point out in our brief, as the amicus brief points out, in Oil Field Research and in other cases, the Board has held that an 8(f) contract is a valid contract, even though the union did not establish its majority position. There is no consistent --

QUESTION: Apparently, the Board feels that either construction is consistent with the Act.

MR. BERGER: And I submit, Mr. Justice White, the Board is grievously wrong on that.

QUESTION: Didn't the Board distinguish the peculiar circumstances in Oil Field Research from the ordinary construction?

MR. BERGER: They do, but I don't think their distinction is valid, Mr. Justice Rehnquist. Their distinction of Oil Field Maintenance they say in their reply brief, that case has been expressly limited by the Board to its particular circumstances. There is no Board case that has that language.

They said there that the Board has declined to extend that decision to the kind of 8(f) agreements involved in this case. That's misleading. The 8(f) agreement in this case is the same as the 8(f) agreement in Oil Field Maintenance Company case.

QUESTION: Well, I suppose this case is a prime example of the Board's refusal to extend Oil Field, since the Board came out the way it did.

MR. BERGER: Well, Mr. Justice Rehnquist, the argument would then be over-extended. I would say it is an instance of the Board refusing to follow Oil Field, not extend it, because it is directly contradictory. So I don't regard that as extension. But, aside from that, it's this Court's function, we respectfully submit, to construe the Act. And the Board has been wrong five times. It was wrong in R. J. Smith. It was wrong in Local 150 of the Operating Engineers. It was wrong in the Dee Cee case, in construing 8(f) of the Act to make it a nullity. What good is a contract, if it is not enforceable? I mean, you are dealing with people, people who work for a living, and I would hate to go out and talk to my client, guys who are ironworkers, who put up buildings and work with their hands for a living and say, "Look, your business agent signed a contract with this employer but the contract isn't worth the paper it is written on, as long as the employer doesn't want to enforce it."

QUESTION: All 8(f) says is that it shall not be an unfair labor practice for an employer to do this. It's the Government's submission that that is its purpose, just to exempt the employer from a charge of engaging in an unfair labor practice.

MR. BERGER: But, Mr. Justice Stewart, the language in the committee report indicates that the purpose of that is to legitimatize and sanction and encourage, encourage the reaching of collective bargaining agreements in the construction industry --

QUESTION: There is no argument about what the legislative history says or what the purpose of this is.

MR. BERGER: But, as I submit, that's all the Act had to say -- what it says. I mean you have a contract or you don't have a contract.

QUESTION: Well, you have an unfair labor practice or don't you have an unfair labor practice? That's what 8(f) is directed to, by its terms.

MR. BERGER: But, we submit that that question depends on whether you have a valid contract or not.

Therefore, we submit that in this particular case the only reasonable interpretation of Section 8(f) is to provide that when the Congress --

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Comes, do you have anything further?

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

ON BEHALF OF THE PETITIONER

MR. COME: I just have one point, Your Honor.

I would like to close by calling the Court's attention again to the Garment Workers case in 366 U.S. 731. That was the case that held that it was an unfair labor practice for an employer and a union to enter into a contract where the union did not have a majority, even though the parties in good faith believed that they did, and that shortly thereafter the union did acquire a majority. And the Court, not only so held, but it went on to find that since that contract was an unfair labor practice to enter into it, it was not even enforceable with respect to the members of the union only.

We submit that you have to look at what Congress did against the backdrop of the Garment Workers case.

QUESTION: How would it derogate the interests that you think support your side of the case to hold the substantive provisions of the contract rather than the recognition provisions or the bargaining provisions to be enforceable in a 301 suit? As long as the union didn't purport to be representing all the employees or demand that it be recognized as such, why not permit the wage provision, for example, to be enforceable in the 301 suit?

MR. COME: Offhand, I don't see too much of a

problem with that, but you do get to the point where how much of the contract is being enforced. And if you get to enforcing beyond that, then you run into the problem of recognition.

QUESTION: Well, the union, apparently, was complaining here about his failure to live up to the wage and the welfare and pension agreements.

MR. COME: Well, Your Honor, as we read the record, the union is complaining about more than that. They wanted the whole contract applied. And, as a matter of fact, filed a refusal to bargain charge with the Board when the employer took the position that this project was a different project and he had no obligation to recognize the union on that project. So, this is a recognition dispute, whatever may be the answer in one where recognition is not sought.

The other point that I wish to make is that the second proviso to 9(f) provides a means by which the contract can be brought to an end, namely, petitioning for an election. And the question is whether that is the only means. There again, we submit that the answer is afforded by looking at the scheme of the Act. And the scheme of the Act is that traditionally there have been two ways by which an employer can withdraw recognition from a union. He can either do that by filing a petition under Section 9 of the Act, which is explicit, or he can take his chances in an unfair labor practice proceeding. That is not specifically set forth in

the Act. We submit that Congress did not intend to take away that avenue from the employer, which is what happened in this case.

QUESTION: Mr. Come, how often would a situation like we have in this case arise, as a matter of fact? Very rarely, wouldn't it? Wouldn't normally an 8(f) contract be complied with by both sides and wouldn't it normally be assumed that the employees represented were a majority of the union that had made an 8(f) bargain in advance?

MR. COME: I think that that is the normal situation. That's what Congress contemplated would happen. And the question is: How do you take care of the sport case? And there you have to balance 8(f) against 8(b)(7)(c). As Your Honor pointed out, the same Congress enacted it. They look in different directions.

We submit that the Board made a reasonable accommodation here in the balance that it struck for the sport or atypical case.

QUESTION: You mean that in the building industry it is normal for building contractors to prefer not to use non-union labor?

MR. COME: Your Honor, I think that what has happened is that there are several different parts of the building and construction industry. There is residential construction where, as I understand it, it is not uncommon to

use non-union labor because they can't compete by using union labor. In big construction, commercial construction, that's more unionized. As a result of that, you've had the practice of these double-breasted corporations being set up in the building and construction industry where they operate union on the big jobs and non-union on the small jobs. And this is really the problem in this case. And there is nothing unlawful under the Act in setting up these different --

QUESTION: So, if we rule with you on this then we will see more of that?

MR. COME: Well, whether you will or not, I don't know the answer to that, Your Honor, because, as I pointed out to Mr. Justice Stewart, the typical case is not this one.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:11 o'clock, p.m., the case in the above-entitled matter was submitted.)