ORIGINAL

In the

Supreme Court of the United States

FORD MOTOR COMPANY (CHICAGO STAMPING PLANT),

PETITIONER,

V.

NATIONAL LABOR RELATIONS BOARD, ET AL.,

RESPONDENTS.

No. 77-1806

Washington, D. C.
February 28, 1979

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FORD MOTOR COMPANY (Chicago Stamping Plant), Petitioner,	:	
v.	:	No. 77-1806
NATIONAL LABOR RELATIONS BOARD, ET AL., Respondents.	:	

Washington, D. C.
Wednesday, February 28, 1979

The above-entitled matter came on for argument at 1:45 o'clock, p.m.

BEFORE:

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

APPEARANCES:

THEOPHIL C. KAMMHOLZ, ESQ., 115 South LaSalle Street, Chicago, Illinois 60603, on behalf of the Petitioner.

NORTON J. COME, ESQ., Deputy Associate General Counsel, Department of Justice, Washington, D. C. 20530, on behalf of Respondent National Labor Relations Board.

JOHN A. FILLION, ESQ., General Counsel, International Union, UAW, 8000 East Jefferson Avenue, Detroit, Michigan 48214, on behalf of the Respondent UAW Local 588.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Ford Motor Company against the National Labor Relations Board.

Mr. Kammholz, you may proceed whenever you are ready.

ORAL ARGUMENT OF THEOPHIL C. KAMMHOLZ, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KAMMHOLZ: Mr. Chief Justice, and members of the Court:

The central issue in this case is whether prices of cafeteria and vending machine food provided in a manufacturing plant to employees falls within the term "wages, hours or other terms and conditions of employment," as set out in Section 8(d) of the Act.

QUESTION: Well, it is just the last of those phrases. Concededly, it is not wages. Well, there is a claimant's wages, isn't there? Concededly, it is not hours.

MR. KAMMHOLZ: Or it may be wages. The Board has raised this issue and I should like to address it.

QUESTION: Well, especially if the union demanded a subsidy. That would be, in effect, included in the additional compensation.

MR. KAMMHOLZ: Yes, sir.

The facts, essentially, are not in dispute. The Ford plant, Chicago Heights, Illinois, employs some 3,500

hourly employees.

With reference to the issue before the Court here, there are two cafeterias, five vending machine areas, known as "Coke cribs."

The providing of food is pursuant to a contract with a food vendor, ARA, and over the years the contract has been in effect the contractor has a 9% override on its cost of food, labor and related services. And in the event of a deficit, there is provision for a maximum of $52,000 cushion which Ford is obligated to pay.

There is a concurrent provision that in the event of profit this inures to Ford's benefit, but as one might anticipate there has not been a profit in recent years.

QUESTION: Mr. Kammholz, would your position here be any different if Ford, itself, were operating this cafeteria.

MR. KAMMHOLZ: No, it would be identical, Mr. Justice Blackmun.

QUESTION: You would take the position that they are not subject to collective bargaining?

MR. KAMMHOLZ: Precisely. Precisely.

QUESTION: Even though you could fix all the prices?

MR. KAMMHOLZ: Exactly.

QUESTION: Would you take the view that permitting or not permitting the food dispensing establishment was subject to collective bargaining, mandatory?

MR. KAMMHOLZ: Not in the context of this case.

One can visualize a situation, such as presented in the Weyerhaeuser case, remote location, no opportunity for employees to --

QUESTION: Lumberjacks up in the mountains.

MR. KAMMHOLZ: Lumberjacks, exactly.

But here there are any number of eating places outside the plant, granted they are utilized very infrequently.

Here, in 1976, when the underlying dispute arose, the union requested bargaining on food prices and services. The company refused. The employees engaged in a boycott, and over 50% of the union members, from the period early February to June 1976, either brown-bagged, perhaps some of them didn't eat at all, or others went to the restaurants nearby.

QUESTION: Didn't they just get 30 minutes for lunch?

MR. KAMMHOLZ: Thirty minutes for lunch, Your Honor, and two 22-minute rest periods.

QUESTION: They couldn't have gone very far.

MR. KAMMHOLZ: The nearest restaurant is 1.6 miles away.

QUESTION: Well, then, they are really captive.

MR. KAMMHOLZ: No, I would not concede that they are captive.

QUESTION: I wonder why you made reference to the presence of restaurants in the area.

MR. KAMMHOLZ: Because some employees utilize the restaurants, as the record indicates.

QUESTION: Even with a mile-plus and thirty minutes?

MR. KAMMHOLZ: Yes.

QUESTION: They could bring their lunch, too.

MR. KAMMHOLZ: Or they could bring their lunch, which very many did.

And during the boycott, presumably, nearly all of them did, because the boycott was indulged in by more than 50% of the employees.

A complaint -- a charge was filed with the National Labor Relations Board upon Ford's refusal to bargain about prices and services. A hearing was had and the Administrative Law Judge found that factually and legally this case was in the context of four other cases which have addressed this issue of food prices.

In each of the four other cases, the National Labor Relations Board had gone one way, had held that food prices were a mandatory subject of bargaining and in each case the Court of Appeals reversed, twice in the Fourth Circuit, once in the First Circuit in the Food Machinery case, and a prior decision in the Seventh Circuit in the Ladish case.

In each instance, the court held that food prices

properly were not within the meaning of "other terms and conditions of employment," but rather were remote from what could be viewed as the mainstream of the relationship employer-employee.

In support of that view, may I say that over the years this Court in one case, the Allied Chemical Workers case, circuits in other cases and, indeed, the Board have made these distinctions between mandatory and non-mandatory subjects of bargaining.

It is perfectly clear, for instance, that wages, whether incentive or straight hourly, overtime, seniority, holiday pay, vacation pay, clearly relate to terms and conditions of employment, or indeed wages or hours.

On the other hand, the decided cases hold that such matters as insurance benefits for retired employees, a code of ethics for employees, coupled with penalty provisions, the right to a strike vote before a strike may be called, a performance bond required of the union not to engage in conduct contrary to the contract during its term, likewise, not a mandatory subject of bargaining.

Now, clearly, Your Honors, what we are dealing with here is a drawing of the line. What properly is encompassed by the requirement of the statute?

Mr. Justice Stewart, in your concurrence in the Fibreboard case, stated very explicitly that the Act is

restrictive and it does not contemplate unlimited bargaining.

Indeed, the legislative history supports this view rather clearly, and this is articulated in your concurring opinion, the views of the Board and the unions to the contrary.

When we are talking about food prices, we are talking about one element of the cost of living, along with housing, transportation, clothing. The National Agreement between Ford and the United Auto Workers over the years has and now contains a cost-of-living provision. So that food prices, on the basis of COLA, cost of living adjustment, are already bargained. And what we are talking about here, really, would be another bite at the apple.

The underlying purpose of the Act as set out in its preamble is to promote and maintain industrial peace. To require bargaining over food prices would really not encourage industrial peace. Indeed, the UAW in its brief, very candidly and openly asserts that "the Act contemplates combat."

This, of course, is obviated by the ruling -- if this Court will pursue the rulings of the circuits prior to the Seventh Circuit decision in this case, that -- and I use the phrase with some hesitation, but this is what the Court said in the Westinghouse case in the Fourth Circuit: "This is dealing with trivialities in terms of the employment relationship. Granted food is essential for life, but we consume it not as employees, but as people."

QUESTION: Mr. Kammholz, supposing a company or an employer had a rule requiring employees to eat in the company cafeteria. Would the existence or non-existence of such a rule be a mandatory subject of argument?

MR. KAMMHOLZ: No, I think not.

To use the logging jack camp example, it would make not only complete sense there, but really would become an integral part of the job.

QUESTION: It would relate back to the Weyerhaeuser case. If the lumberjacks didn't eat the very hearty food which lumber companies normally provide for them, productivity would probably go down.

MR. KAMMHOLZ: Ultimately. But that's not our case. There, because of the circumstances --

QUESTION: I was pursuing Mr. Justice Stevens' suggestion. In some circumstances, as you are aware, with the Weyerhaeuser case, there being no other place to eat, up in the mountains, cutting trees down, the company provides the food and they want to provide food that will produce a lot of energy, that in turn will produce a lot of logs. Isn't that the theory behind it?

MR. KAMMHOLZ: Yes, I think the theory, Mr. Chief Justice Burger, goes one step beyond. And that is in order to have employees at all in this logging camp, there must be some provision for food.

But here again this is outside the mainstream of American industrial life and is the exception and not the rule.

QUESTION: Is the period of time for lunch a bargaining point?

MR. KAMMHOLZ: A period of time for lunch is. This is within the context of hours of employment.

QUESTION: So lunch is not trivial, is it?

MR. KAMMHOLZ: No, I didn't say it was trivial.

QUESTION: I thought you did. I misunderstood you.

MR. KAMMHOLZ: The Fourth Circuit did.

QUESTION: Imagine if you told someone in the Army or the Navy the kind of food they had to eat was a trivial condition of employment. They might not agree.

MR. KAMMHOLZ: Probably so, but that same person wouldn't have much choice.

The point is made in the Board's brief that there is industrial practice concerning bargaining about food prices.

This simply is not so. The Board alludes to a case. The fact of the matter is,despite searches on both sides in this case,we've been able to come up with no contracts which so provide. I have never seen one in my experience.

This is, again, not embracing the term "trivial," but it's a matter outside the mainstream of the workplace, the work station. And if price of food is to be bargainable,

then why not the price of gasoline or a discount toward price of gasoline in order to get to the workplace.

Or, bargaining about work clothes, which certainly are essential.

QUESTION: Well, it might be if Ford supplied them and insisted that their supplies be used. That wouldn't shock me.

MR. KAMMHOLZ: Uniforms?

QUESTION: Yes.

MR. KAMMHOLZ: This then might well become a matter of wages, but it does not mean that it is a compulsory subject of bargaining under the National Labor Relations Act, Your Honor.

The Act does not contemplate, as Mr. Justice Stewart noted in Fibreboard, that there must be bargaining about anything that either side elects to bargain about.

That wasn't the intent of the Congress at all.

The effect of Section 8(d) is to, in effect, align the power of the Federal Government, under this statute, on the side of the bargaining agent who has the right to bargain on a mandatory subject. In other words, economic strikers have rights under the law.

And, again, as I noted, this simply was not contemplated by the Congress. Moreoever, over the many years, this has not been industrial practice.

QUESTION: Mr. Kammholz, would you help me a little bit on the practical aspect of this. Assume we were to hold it was a mandatory subject. Would that mean that every time they change the price of coffee they would have to give you a notice -- you'd have to give the union notice and they would have a right to --

MR. KAMMHOLZ: And they would have a right to bargain. They would have the right to bargain, Your Honor.

QUESTION: Suppose they lowered the price.

MR. KAMMHOLZ: Yes, an unlikely possibility, Your Honor.

This is the problem, the fragmentizing, the injection of a very complex area. Really loading the gun on one side and not on the other.

The Seventh Circuit, without record support, stated that brown-bagging was not a viable alternative.

Well, here again, the record simply does not support that conclusion, as evidenced by the boycott, when over 50% of the union members did it from early February until June.

QUESTION: They didn't do it during the summer, I bet.

MR. KAMMHOLZ: Well, Your Honor, our Chicago summers aren't much different from winters.

QUESTION: Well, they are pretty hot for leaving food in a locker, aren't they?

MR. KAMMHOLZ: May I address this point?

There is provision in the locker-room area, ventillated area for the storing of lunches. Lunches may not be eaten there, but they may be eaten and are eaten in the cafeteria areas, which are air-conditioned.

QUESTION: Is the storage area refrigerated?

MR. KAMMHOLZ: The storage area is not. This is the locker area.

QUESTION: If someone wanted to bring in a quart of milk, or something, he couldn't do it in the summer?

MR. KAMMHOLZ: Well, Your Honor, we address this in our reply brief and I think it is a significant point.

Under modern practices, there is a laundry list of food -- this is the Appendix of our reply brief -- of food no refrigeration needed. Indeed, the venerable --

QUESTION: I suppose you don't even have to eat, if you really want to go that far.

MR. KAMMHOLZ: And many did not during the boycott. And it was probably better for them, on occasion, not to.

In the Fannie Farmer Cook Book, this statement is made: "For lunchboxes and picnics, frozen sandwiches thaw completely in about four hours and taste fresher, even though made days or weeks before than sandwiches made the same day which have not been refrigerated."

Similarly, from Woman's Day from September 27, 1978,

here is this statement: "Packing lunch can be a real inflation fighter and lots of fun, too."

QUESTION: There is also good medical authority that says if you let mayonnaise food set out over four and one-half hours you are in trouble. I would take them before I would take Fannie Farmer.

MR. KAMMHOLZ: Well, Your Honor, I must confess when you spread it on that way I have no real response.

We have not dealt with the subject of food services. Indeed, neither the Board nor the Court dealt with food services and what is encompassed by that term.

Does it mean margarine versus butter? Does it mean special facilities? Without belaboring the point, the problem area here is identical with the problem area on food prices. It opens a Pandora's box of problems, far transcending the lunchbox, as such.

As a second --

QUESTION: Does Ford supply the space to the franchise to the restaurant operator at no cost?

MR. KAMMHOLZ: At no cost.

QUESTION: Anything else, besides the space?

MR. KAMMHOLZ: Most of the equipment. Basically, the contractor provides food help, runs the operation, its a total 9% --

QUESTION: The refrigerator and all of that, belongs to Ford?

MR.KAMMHOLZ: All belongs to Ford, yes.

Well, finally, with respect to services, I have noted in addition to the problem that is inherent in the price problem, there is the additional problem of vagueness of the Board's and the Court's order. What are "services"? If Ford doesn't comply, should there be an order that this is a mandatory subject of bargaining? It is subject to contempt for violation of an order directing bargaining about "food services."

Thank you.

QUESTION: As I read the opinion of the Seventh Circuit, this case was decided by it on the basis of the facts and circumstances presented in the particular case. The questions, as stated in the briefs for all of the counsel to parties here, seem to me to be posed -- the questions seem to be posed in a different way.

Is the argument that we are hearing here today directed to the facts and circumstances of this case, or is it an argument directed to whether or not the prices of food served in an in-house cafeteria always are the subject of mandatory bargaining?

MR. KAMMHOLZ: The question here is posited on the Board's finding that this case is within the factual and the legal contexts of the earlier decisions. In other words, the factual finding was that, indeed, it was not different, despite what the Seventh Circuit said about it.

QUESTION: Well, the arguments seem to me to be addressed to whether or not in any and all circumstances, whatever they may be, that the prices of food in an in-house cafeteria are the subject of mandatory bargaining.

Is that your understanding?

Regardless of the facts and circumstances.

MR. KAMMHOLZ: Yes, because the facts and circumstances in the cases that have come up earlier are no different than this case. Now that excludes the situation to which the Chief Justice alluded.

QUESTION: I would have thought that the facts and circumstances could vary considerably, and apparently the Court of Appeals for the Seventh Circuit thought so. It went into considerable detail as to the facts and compared them with other cases, produced charts at the end of its opinion, itemizing all sorts of facts.

MR. KAMMHOLZ: I respectfully suggest that the Seventh Circuit arrived at its decision and then wrote an opinion to follow the result.

For instance, the factors to which it alluded: influence over prices -- Court of Appeals said that Ford retains influence over cafeteria and vending machine prices.

But this was the situation in McCalls in the Fourth Circuit. The Court of Appeals has the possibility of profit.

QUESTION: Mr. Kammolz, I share Justice Powell's

inquiry, and perhaps I should ask Mr. Come this question, but I gather that your opponents are not here defending The Seventh Circuit ppinion.

MR. KAMMHOLZ: I think they are defending it on the very broad base. They are defending the result, but I certainly don't read their brief to go along with a theory expressed by the Seventh Circuit in its briefs.

MR. KAMMHOLZ: No, Your Honor, they do not.

And finally, I should note further that the amici go beyond the Seventh Circuit and take the position, despite the Fibreboard concurrence of Mr. Justice Stewart, that there should be bargaining about all matters, beyond prices, beyond food services, as I understand their position any matter which either party desires to bargain about.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Come.

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF THE RESPONDENT NLRB

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

With reference to Justice Blackmun's question, the Board's decision rests on alternative grounds. The Board's basic position is that --

QUESTION: The Board's or the Court of Appeals?

MR. COME: The Court of Appeals' decision rests on

the second alternative of the Board's decision. The Board's basic position, which is set out at A-23 of the Petition. It is the position that the Board has consistently maintained for over thirteen years, namely, that the services provided and the prices at which the food services are provided and in-plant facilities, such as cafeterias and vending machines, are terms and conditions of employment within the meaning of 8(d), and thus, within the area of mandatory bargaining.

The Board in Footnote 11 of its decision went on to set forth the alternative ground that, in any event, these matters were bargainable on the facts of this case, which the Board sets out there.

The Seventh Circuit sustained the Board on the alternative ground.

As far as the board is concerned, we would prefer to win the case on the broader ground.

question: It is the broader generic question that was set down as the question presented in the company's certiorari petition.

MR. COME: That is correct.

QUESTION: That may be the answer to it; as suggested in the questions of my brothers Blackmun and Powell, it is sometimes yes sometimes no.

MR. COME: Well, that may well be, and I would call the Court's attention to the fact that the Ford opposed

certiorari on the ground that on the facts of this case, it was not necessary to reach the broader question.

Certiorari, however, was granted, notwithstanding our opposition, and now that we are here, as I say, we would prefer to get the area cleared up. However, if we can only win the case on the narrower ground, well, we will take it on that ground. Because the Board had both grounds for its decision.

QUESTION: Isn't it the Board's position, Mr. Come, that if a plant has no eating facilities in it, but the union wants the plant to put in eating facilities, that is the subject of mandatory bargaining?

MR. COME: I think the logic of the Board's position would carry you there, although the Board has not had occasion to address that question and that might present questions of capital investment that might get into the reservation expressed in the concurrent opinion in Fibreboard. We don't have that here. We do have an in-plant facility that Ford has elected to provide for many, many years. It has done so --

QUESTION: That is an indirect subsidy in itself, isn't it?

MR. COME: That is correct, Your Honor.

QUESTION: If your position is correct, the Board's position is correct, the union then could make a demand, not only for all the subsidy indirectly involved in providing the

space and all the equipment, but in addition 50% of the cost. No reason why they couldn't require that to be bargained. And if they could require it to be bargained, they could go on strike to force the employer to pay half of the cost of food; could they not?

MR. COME: Well, I --

QUESTION: Any doubt about that?

MR. COME: I think we have to take this on a step by step basis. I think the term "conditions of employment" is a broad term. Congress entrusted to the Board in the first instance the task of giving content to it. It is not unlimited in the sense that you cannot obliterate the distinction between mandatory and permissive bargaining subjects, which the Board and this Court has recognized.

On the other hand, there may be an area, as the conurring opinion in Fibreboard recognizes, where decisions going to the core of entrepreneurial control, might not be within the area of mandatory bargaining.

QUESTION: Even though they do affect anybody's definition of conditions of employment.

MR. COME: That is correct, but we submit that we are a long way from that in this case, because --

QUESTION: Don't you think we have an obligation when this kind of an issue is presented to see where the proposals on one side or the other will carry us?

MR. COME: Well, I think that you do, Your Honor, and I would like to show you that you are not carried that far on what we have in this case.

QUESTION: You haven't -- At least I didn't hear you yet answer my question. The union demands not only provision for the space for the refrigerators and the stoves and the implements and the chairs and the tables, also, in addition to that, 50% of the cost of the food, so that the employees can have lunch for half-price, as it were.

MR. COME: Well, I think it is difficult for me to tell you how the Board is going to answer that question, because they haven't had it. But, conceptually, I don't --

QUESTION: Well, if you can -- if they must bargain the price of the lunch, is there any escape from bargaining exactly what I have hypothesized to you?

MR. COME: Well, look at -- I think there is no question that everyone will agree that the physical dimensions of the employees' working environment are mandatory bargaining subjects, what one's hours are to be, the amount of work that is expected, what periods of relief are available, what safety practices are observed.

Now, Petitioner acknowledges that temperature and the quality of plant air and restroom privileges are part of the physical dimensions of the working environment.

Now, we submit that food availability during the

working day is no less a part of the physical dimensions of the employees' working environment, because if an employee has to work a full eight-hour day without stopping to eat, he's not going to be able to physically perform his job.

QUESTION: Mr. Come, let me go back to the Board's basic position. Suppose that in this plant there were just two vending machines.

Is there any de minimis exception to the Board's position? If Ford wanted to take the coffee out of those machines and replace it with milk, is that bargainable?

MR. COME: I think there is a de minimis concept. I am not prepared to say that that would be within the de minimis area, because I think that Congress made the judgment that it is to be left to the parties to determine what is significant and what is not significant, once you get something that is of vital concern to the employees as part of their working environment. Because, otherwise, you are on the shoal of having the Government, both the Board and the courts, sit in judgment on what is significant and what is not significant.

Industrial experience has shown that many things that might, to a layman, appear to be trivial have given rise to industrial unrest.

Now, let me tell you what Ford has done here. They have not only provided this facility and greatly subsidized it, they've got a provision --

QUESTION: Now, you are arguing facts again. And I am trying to stay with the Board's basic, broad, initial position.

Maybe you are suggesting we should do as the Seventh Circuit did and decide this case on the facts.

MR. COME: Well, I think that the facts are important in showing that, as a matter of industrial experience, it would not be a radical thing to hold that this type of arrangement is a bargainable matter.

Ford has bargained with the union since 1967 about the services to be provided in its in-plant facility. Since 1967, the local agreement between Ford and the union has contained specific provisions concerning vending machine and cafeteria services, such as the --

QUESTION: That's no conclusive evidence, however, that that was a mandatory subject of bargaining.

MR. COME: No, I agree with you that that is not, but again, excepting my promise that food availability is part of the physical conditions of the working environment.

QUESTION: Assume that's so, is price part of availability, in your view?

MR. COME: We submit that price is an integral part of the subject of food services.

QUESTION: That comes very close to wages. It is a

fringe benefit.

Let's say the demand were for free lunches, free food, which for sure I would include half-price food. That's close to a wage demand, isn't it, a fringe benefit so closely related to compensation that I would suppose that would clearly be a subject of compulsory bargaining; wouldn't it?

MR. COME: Yes, it would, Your Honor, and that's why it doesn't make too much -- It isn't too rational to try to separate this thing out, because you have various gradations of it. And it depends upon the conditions -- It depends upon the bargain that the parties are able to work out. You have the whole spectrum from where there would be a subsidy, in terms of the cost of the food, to where it's no more than what you would have to pay elsewhere, but nonetheless it is an important benefit because you've got a plant here that is a quarter-mile square, out in the outlying limits of Chicago, you've got a lunch-hour that's thirty minutes, you've got breaks that are twenty-two minutes. They are not permitted to leave the plant property during the breaks, and even if they were during the lunch-hour, they couldn't feasibly do it because it takes 10 or 15 minutes to go from your work station to the parking lot to get your car out, and then you've got to drive it out and go through a single-file gate and then drive a couple of miles down to hope to get into one of these cafeteria fast-food places that are also serving a lot of other

industrial plants in the same area.

I mean why has the company gone to the expense of providing this substantial facility if they did not regard it as a very important part of the physical well-being of the worker while he was on the job?

QUESTION: How did they manage during the boycott? Did they carry their food?

MR. COME: They either carried their food or they did not eat.

QUESTION: Or they went out, isn't that what the record says?

MR. COME: According to the record, the finding is that 12 out of 3,600 employees left the plant at lunch.

But they had to call off the boycott once the summer came because there were no refrigeration facilities for storing the food which had to be kept in the locker rooms.

But even if, assuming that brown-bagging is an alternative, we submit that the Act gives the employees and their union representatives the right to try to better that alternative. And obviously, if you can get wholesome food at reasonable prices at the place of work, that is better than having to -- as I explained -- run somewhere off the plant premises, or even, in many cases, bringing your own lunch.

QUESTION: I take it, Mr. Come, you would say that if a plant has no food facilities at all, and just relies on

the restaurants in the area, that if the union wants to bargain about putting in a facility it would be a bargainable subject.

MR. COME: I think it would be, subject of course to the question as to how much of a capital investment that would require, and whether that would then bring you --

QUESTION: That's just part of the bargaining. But you would think that the employer could not refuse to talk about it, is that it?

MR. COME: Well, if it is a mandatory bargaining subject, he could not refuse to talk about it.

QUESTION: Under your position, I take it, it would be he would have to bargain about it.

MR. COME: I think that the logic of the position that I am urging would lead to that result.

QUESTION: Surely you would have to bargain about it if there was a facility and the employer decided it was a real bummer and wanted to close it down.

MR. COME: I think so.

QUESTION: Mr. Come, does the IBM have to negotiate on the country club it has up there at Connecticut.

MR. COME: IBM, on the country club?

QUESTION: Yes, for its employees up there in Upstate New York or Connecticut.

MR. COME: We have had cases where hunting lodge privileges have been accorded to employees, and if it has been

accorded over enough years, so that it has become part of the emoluments of the employment relationship, bargaining obligation has been found. I think that the farther you get away from the plant, though, the more tenuous it becomes and --

QUESTION: How do you protect against what Justice Stevens talked about, they raise the price of coffee a nickel? How do you stop that from being a grievance?

MR. COME: Well, the Board's order here --

QUESTION: Don't you agree that you couldn't cover the whole working of it?

MR. COME: No.

QUESTION: Well, how could you restrict it, that's what I want to know?

MR. COME: First of all, the Board's order here, unlike the typical order, as entered in one of these bargaining cases, does not require a company to bargain before the price increase is made effective. It is obligated to bargain only if it is -- once it is put into effect and if the union so requests.

So, presumably, de minimis matters are not going to be raised. But beyond that, the ingenuity of the parties is such that they can take care of that in the collective bargaining agreements that are negotiated. They could provide that -- they could put a cap on raises --

QUESTION: What if you've got more than one union?

MR. COME: Well, if you have more than one union, Your Honor, the problem is no different than the problem that you have with respect to a lot of other benefits, like pensions. The Seventh Circuit dealt with that problem in the Inland Steel case, where one of the company's basic arguments was pensions shouldn't be bargained about because the steelworkers, the union represents only one bargaining unit. We've got seven or eight other unions here.

The Seventh Circuit said that this is something that the parties can work out in collective bargaining. It is not a reason for denying the benefits of the Act to employees just because they happen to be in a plant where there are multiple bargaining units.

The parties in practice negotiate things like that jointly with all unions.

I have confidence that they would be able to work that out here.

QUESTION: Mr. Come, before you sit down, I take it that the Board doesn't rest its position on the relationship of food prices to wages. It is working conditions, right?

MR. COME: It is conditions of employment.

QUESTION: So, even if we thought it really was part of wages, or sort of a fringe benefit, we couldn't affirm on that basis. We would either have to agree with the Board, or not.

MR. COME: Well, in the Weyerhaeuser case, which was the --

QUESTION: I know, but wouldn't we have a little chainery problem? I mean a large chainery problem.

MR. COME: Well, you might have a small chainery problem, because if you read the Board decisions in this area, beginning with Weyerhaeuser, where they squarely put it on both conditions of employment and wages, and in the Ladish case, which was the one before this case, although they bore down heavily on conditions of employment, they also, in their opinion, indicated, that it was the equivalent of a tax-free subsidy.

The opinion can be read as at least not completely being oblivious to the fact that there is a wage element.

QUESTION: But not here?

MR. COME: Well, they relied on all the other cases as their basis for the decision here. The Board cited Ladish and the earlier cases. Again, we have the problem of how clearly they have to articulate it.

QUESTION: But the Court of Appeals didn't?

MR. COME: The Court of Appeals relied on the conditions of employment, but we think that is broad enough to cover this because it is a catchall that speaks in terms of "or other terms and conditions of employment." And this has an economic benefit to it, even though it might not be

technically wages. It would still be enough to make it a condition of employment. As a matter of fact --

QUESTION: Wages and hours are a condition of employment, as the use of the word "other" makes clear.

MR. COME: That is correct. And I might say, too, that the legislative history which Petitioner overlooks, but which is referred to in our brief and in the amicus brief, indicates that Congress clearly visualized that conditions of employment would be a broader term than just merely working conditions, because the Senate bill which was the genesis of 8(d) as originally proposed, talked in terms of working conditions. Senator Wagner, who was still around at that time, expressed great concern that that would take out of the area of mandatory bargaining a lot of things that should be in there, so it would change the conditions of employment.

MR. CHIEF JUSTICE BURGER: Mr. Fillion.

ORAL ARGUMENT OF JOHN A. FILLION, ESQ.,

ON BEHALF OF THE RESPONDENT UAW Local 588

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

Your Honors, I would like to focus briefly on a matter that, while it figured predominantly and prominently in the briefs, has not been discussed much here today. But I think it is a very key part of this case.

I am referring to the really radical exaggeration

that Ford is giving the vital effects test in this case. And in doing so it is urging the Board and ultimately the courts to get heavily into the matter of regulating the terms, that is the substantive terms, of collective bargaining agreements. Moreover, it is violating the fairly clear standards that this Court has already articulated as to how to judge whether or not a bargaining proposal is a term and condition of employment.

This Court -- or rather the Congress -- in a statute which has been explicated over and over by this Court, has made it very clear that the Labor Board is not to get into the matter of sitting in judgment of the substantive terms of collective bargaining agreements. That is, the Board is not to mix into what goes into and what stays out of collective bargaining agreements.

QUESTION: Well, except for subject matter areas.

MR. FILLION: I am sorry, Your Honor?

QUESTION: Well, that's what this case is about. The Board and the courts do have a job of saying what subject matter areas are subject to compulsory collective bargaining.

MR. FILLION: This Court has laid down, as its basic rule, those proposals, or terms and conditions of employment, which are within the employee-employer relationship.

Then you, Mr. Justice Stewart, in your concurring decision in Fibreboard, went on to say that there is a way of identifying those proposals that are most obviously terms and

conditions of employment and they are the ones that are the physical dimensions of the job environment.

I would submit that those are the two clear principles that this Court has laid down in judging this matter of what is a term or condition of employment.

Now, what Ford --

QUESTION: That concurring opinion, was a concurring opinion. It wasn't the Court laying down anything. It was just an essay on behalf of three members of the Court.

MR. FILLION: Correct, Your Honor.

Now, the Court has also indicated in Pittsburgh Plate Glass that there is a very narrow area within which the vital effect test can be applied, but it is a very narrow area. When the proposal deals with individuals outside the employer-employee relationship, then vital effect becomes relevant.

Ford wants you and wants the Board to go 'way beyond that and say vital effect applies not only when the individuals involved are outside the employee-employer relationship, vital effect applies and is the standard even where the individuals involved and even where the subject matter is well within the employer-employee relationship.

In other words, Ford wants you to apply the vital effect test wall-to-wall and cover the entire gamut of Section 8(d) with it. Moreover, even with respect to the physical

environment test, by which we are to identify those subjects that are most obviously terms and conditions of employment, Ford says, "Disregard that. Even if we assume that something is a part of the physical environment, it makes no difference. The vital effect test is what applies."

QUESTION: Do you agree with Mr. Come that, although he was not willing to respond that 50% subsidy for the food was bargainable, he quickly seized on the idea that free food would be bargainable. Do you think free food --

MR. FILLION: I think free food is bargainable. I think 50% is bargainable. As a matter of fact, Mr. Chief Justice, I think this is a good illustration of the way in which we might handle the problem that was raised by Mr. Justice Stevens, that is, how do you handle something like food prices that are fluctuating all the time?

There are a number of ways.

QUESTION: You don't have to worry about it, if the employer pays all of it? It's no bargaining problem.

MR. FILLION: Well, one thing we may do at the bargaining table would be to say we propose that if there are price increases in the future the employer will pay half the price increase.

QUESTION: You are also going to want to bargain about what's going into the menu?

MR. FILLION: That's something that fluctuates

radically, too, but there are a lot of things --

QUESTION: It won't be any good to keep the price the same and let them give you a half a scoop of ice cream.

MR. FILLION: Well, maybe what we will want to do is what we do in practically every collective bargaining agreement we have, and that is negotiate that into the grievance procedure. Like other things that fluctuate radically and rapidly, like --

QUESTION: In all seriousness, it is inherent in your position that you can bargain about the menu as well as the price, isn't it?

MR. FILLION: Yes, quite correct, Your Honor. But probably we would institutionalize that. Probably we would put it into the grievance procedure. If a price change comes along, or a menu change, or a quantity change, we wouldn't say, "Let's bargain now." We would file a grievance, the grievance would go to the first step, the second step, maybe to arbitration. Maybe some fortunate arbitrator would have the question to resolve of: Is there enough mashed potatoes or is there enough gravy?

But it would be institutionalized and it wouldn't be something that would be picky and get in the way of the parties and absorb a lot of time.

QUESTION: I think the Board's orders in these areas, anyway, if they were ever upheld, which they haven't

until now, I suppose they say that the employer doesn't have to bargain before he puts in any changes. He just puts them in and if the union wants to bargain they ask.

MR. FILLION: That's correct, Your Honor.

QUESTION: That is sort of like a grievance procedure.

MR. FILLION: Exactly.

A grievance procedure, classically, is the company acts, the union reacts, and that's exactly the way this would be.

QUESTION: The claim is always that there has been a violation of the bargaining agreement. That's what a grievance is.

MR. FILLION: Right.

Now, we would have negotiated into the collective bargaining agreement, as we have now in this local agreement provision. They would probably deal with a little more institutionalization of these things, but there would be rights and duties in that collective bargaining agreement that would be negotiated as a result of Ford's having to bargain with us. And if there are violations of that kind of a contractual provision, we would then take it through the grievance procedure.

QUESTION: Under the Board's orders, I take it, if the employer raised the price of milk, or something else, and he just put it in, like he would be entitled to do under the

Board's order, and the union said, "Let's bargain," and the employer says, "Okay, let's bargain."

They sat down and they didn't reach any agreement. The employer doesn't have to agree with them.

MR. FILLION: Absolutely right, Your Honor.

QUESTION: They can have a strike, maybe, but --

MR. FILLION: In the absence of a provision in the contract on the price of milk, or regulating the price of milk, but absent anything in the contract on that, we would bargain to an impasse and the Board would go ahead and raise the price of milk --

QUESTION: It has already been raised. Under the Board's order, it would have already been raised.

MR. FILLION: That's correct.

QUESTION: Wouldn't you also tell them not to use lettuce?

MR. FILLION: Yes, we could,under our rights, raise quantity, quality, selection, the whole gamut.

QUESTION: But if it was focused just on lettuce, would that be a secondary boycott?

MR. FILLION: Sorry, Your Honor, I missed your original allusion.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Kammholz?

REBUTTAL ORAL ARGUMENT OF THEOPHIL C. KAMMHOLZ, ESQ.,

ON BEHALF OF THE PETITIONER

MR. KAMMHOLZ: Very briefly, Mr. Chief Justice and members of the Court:

I think the bottom line on the position which learned counsel for the UAW has articulated here -- what he is talking about and what they are asking for is a recipe for industrial unrest.

In essence, bargaining on cost-of-living embraces, as I noted earlier, food prices, as well as other matters. It seems to me, as history has demonstrated in the collective bargaining arena, that satisfactorily solves the problem.

To now expand the concept to include prices, services, would be doing a disservice, I suggest, to the intent of the Congress, to the working and living relationship amongst the parties.

Thank you, very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:41 o'clock, p.m., the case was submitted.)