ORIGINAL

In the

Supreme Court of the United States

DETROIT EDISON COMPANY,

PETITIONER,

V.

NATIONAL LABOR RELATIONS BOARD

RESPONDENT.

No. 77-968

Washington, D. C.
November 6, 1978

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DETROIT EDISON COMPANY, Petitioner,	:	
v.	:	No. 77-968
NATIONAL LABOR RELATIONS BOARD Respondent.	:	

Washington, D.C.
Monday, November 6, 1978

The above-entitled matter came on for argument at 11:36 o'clock, a.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
LEWIS F. POWELL,JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOHN A. McGUINN, ESQ., Farmer, Shibley, McGuinn & Flood, 1120 Connecticut Avenue, N.W., Washington, D.C. 20036; on behalf of petitioner.

NORTON J. COME, ESQ., Deputy Associate General Counsel, National Labor Relations Board, Washington, D.C. 20570; on behalf of the respondent.

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 Detroit Edison Company against National Labor Relations Board.

Mr. McGuinn, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF JOHN A. McGUINN, ESQ.,

ON BEHALF OF THE PETITIONER

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

The case before you this morning concerns the subject of employee aptitude testing and whether the duty to bargain in good faith requirement of section 885 of the act requires those increasing numbers of employers, both public and private, who use testing -- whether it requires them to turn over to unions copies of the actual test involved, the actual test sheets submitted by the applicants, and the scores achieved by the applicants linked with the name of the applicant.

In order to place this issue in its proper factual context, a few points have to be stressed.

First, the tests involved in this case -- the Minnesota Paper Form Board Test and the six-part EPSAT test -- are aptitude tests. They do not measure the acquired knowledge needed for the Detroit Edison Instrument Man.

They just test his ability to get that knowledge.

And the job involved in this case, the Instrument Man job, is one of critical importance to this company. This employee works on precision instruments, technically complex.

He, in fact, is in charge of the nervous system of the power plant.

Now, the record in this case shows that the Instrument Man test battery is highly predictive of success on the job. There is an 80 percent chance that those scoring above the 10.3 cutoff score will be successful performers on the job, and conversely, there is an 80 percent chance that those scoring below 10.3 will be unsuccessful instrument men.

QUESTION: Since this isn't a Title VII case, how does that bear on your argument here?

MR. McGUINN: It bears on the arguments of the relevance of the test items to the union. If we take it as a given that this test is a valid predicter of performance on the job, I say that the union does not need the test items themselves, Mr. Justice Rehnquist, in order to carry on the statutory function of representing the employees.

QUESTION: Whereas if the test were not predictive at all, you would feel the union had a greater right of access to it?

MR. McGUINN: Yes. I think if we had a very suspect here, yes, the test should be turned over to a psychologist

of the union's choice for him to make a determination.

QUESTION: But you wouldn't want the general disclosure?

MR. McGUINN: No, I would not want general disclosure. That ruins the validity of the test.

QUESTION: Well, does Detroit Edison object to the disclosure that was ordered by the hearing examiner here?

MR. McGUINN: No, Your Honor, it did not. The Detroit Edison Company, in fact, made that suggestion at the outset of the unfair labor practice hearing to the administrative law judge. It's exactly the suggestion that he took; that is to turn it over to the psychologist of the union's choice.

Next, I think you must understand that this company furnished the union with what Judge White -- dissenting Judge White -- found was a wealth of information on its testing program.

This included the two validation studies done on the test; some 146 sample items similar to but not identical to the items on the two tests themselves; an explanation of the battery weights and the raw scores on the tests; the raw scores achieved by the applicants on the tests; but not linking it with the name of the applicant, putting it by alphabetical designation; and offered to release the scores linked with the names of the applicants for any applicant who consented to such release; and finally, and most

importantly, we offered to disclose the test to a qualified psychologist of the union's choice.

The final factual consideration is that during the pendency of the Labor Board case, the union prosecuted grievances of the unsuccessful applicants to arbitration.

In this proceedings, the union sought copies of the same test materials that they are seeking in this case. And the arbitrator found that in view of the wealth of materials that the company did furnish, that production of the actual tests was irrelevant to his consideration of the case.

And also as a result of that proceeding, I think you should know that the arbitrator effected a compromise between the position of the union and the position of the company whereby he told the company to reconsider three applicants who scored just below the 10.3 cutoff.

And as a result of that reconsideration, the company in fact hired one of those three persons.

This then is the broad factual context in which this company was found to have violated the National Labor Relations Act.

In the classical argument of this case would start with an analysis of whether the test information was of probable relevance and usefulness to the union in carrying out its statutory duties and responsibilities under the Acme case.

But with your indulgence, I would like to leap ahead and assume for the moment and for the purposes of argument, that this information had some marginal relevance to the union's function.

Our conclusion is still the same. The test material should not be turned over to the union directly. Why?

I think we should start with the only common premise we share with the National Labor Relations Board in this case, and that is, as the Board acknowledges in footnote 25 of its brief, there is a very strong public policy in favor of preventing compromise of employment tests through dissemination.

That public policy is rooted in the common sense fair play notion that distribution of an employment aptitude test to persons who may take the test in the future destroys the validity of the tests as predicters of employee performance and places those who have not seen the test at a competitive disadvantage to those who have seen the test.

This common sense fair play notion has been incorporated in the standards for educational and pscyhological tests and manuals published by the American Psychological Association, which in turn has been incorporated into the EEOC guidelines on testing; and now, since the filing of our brief, joint agency guidelines on testing.

The standard I5 of the APA standards states that

for tests other than achievement tests, prior knowledge of the test items can destroy validity.

And standard J2 of those same standards states that test scores should be reported only to those qualified to interpret them.

And the EEOC guidelines expressly require safeguards to protect the security of test scores.

This Court, on three recent occasions -- the Griggs case, the Albemarle case, and the Washington v. Davis case -- has held that the EEOC guidelines are entitled to great deference and should be regarded as expressing the will of Congress.

This Court, in the Albemarle case, specifically approved the EEOC's reliance on the APA standards I just mentioned.

Common sense fair play concepts behind employment test security was recently underlined by the 2nd Circuit in the Kirkland case, where that court struck down a district court ruling which would have provided that any new employment test would be reviewed by the plaintiffs.

The Board itself, prior to this case, acknowledged this common sense fair play concept when its general counsel in 1960 refused to even issue a complaint in which the union sought to review employment aptitude tests.

The Board's general counsel at that time referred

to the quote, unique character of the tests and held that advance inspections would permit the contents of the tests to be widely disseminated, thus impairing the usefulness of the tests.

Now the Board's sole answer to this admitted strong public policy was to invent what they called a restriction, a hortatory statement that the union was not to copy the test or to disseminate, and was to return them to the company after the arbitration proceeding.

No restriction at all was placed on the dissemination of the test scores linked with the name of the applicant. This could presumably be printed in the Detroit Free Press.

QUESTION: But that wouldn't compromise the test?

MR. McGUINN: No, it would not compromise the test. It would compromise the validity, as seen by the EEOC. The EEOC says that the test scores should not be distributed.

You see, it leads to a situation where somebody who scores 12.5 on this is then compared to somebody who scored 12.3 on it; there is no reason -- as the arbitrator said, this test is good because it doesn't compare somebody's score with that of somebody else's score. It is just reported in terms of, not recommended or accepted.

QUESTION: I'm puzzled by your reliance on the EEOC guidelines as compared to the Board's action here. Because as I recall the EEOC is not charged by law with making

interpretative -- with actual filling in blanks in the statute.

And the Board, I've always assumed, had more authority in its adjudicatory function than EEOC did.

MR. McGUINN: Well, my reliance on the EEOC guidelines, Your Honor, is the reliance that this Court placed on those guidelines --

QUESTION: Yes, but we've never said that the EEOC power is equivalent to a board or an agency that has power to issue regulations.

QUESTION: And we refused to follow them in Gilbert v. General Electric.

MR. McGUINN: Well, that's correct. But I can only say what the Board did in the Albemarle case and the Washington v. Davis case, and they said, these guidelines were entitled to, quote, great deference, end quote, should be regarded as expressing the will of Congress.

Those are the Court's words.

So I think that when I'm placed in the position of the Detroit Edison Company, where I have to follow Title VII as well as follow the National Labor Relations Board, you put me into an impossible situation when you say, give me the tests and the test scores.

As I said, no restriction at all was placed on the dissemination of the test scores linked to the name of the applicant.

Now the Board seems --

QUESTION: But there was on the tests?

MR. McGUINN: Yes.

QUESTION: And then do you say that we -- that that restriction does not satisfy you?

MR. McGUINN: Yes. Like dissenting Judge White on the Court of Appeals, I can only suggest to you that the board's position is really naive in the real world in which we find ourselves.

It is really naive because, once the materials have been given to the union, the company has lost control over them. And it places on the company the admittedly new and very difficult burden of policing and enforcing that restriction.

Second, as organizations properly responsive to their members desires, without the professional standards and responsibilities of professional psychologists, unions are in a uniquely poor position to prevent dissemination of materials.

The real world of today, with the ubiquitous copying machine which everyone has, requires extraordinary measures of security to prevent widespread dissemination.

These are not measures ordinarily used or available to labor organizations.

QUESTION: But you think you could rely, though, on the union's --

MR. McGUINN: Psychologist?

QUESTION: -- psychologist?

MR. McGUINN: Yes. That psychologist is under a professional responsibility not to divulge tests and test scores linked to the name of the applicant.

Yes. We're taking a risk -- a very large risk. But it's a risk that strikes the proper kind of balance.

QUESTION: But you think we must assume the union would disobey an order?

MR. McGUINN: No, I don't think you have to make that assumption. I think we're talking more here about inadvertent disclosure, the kind of thing where the desk is put on somebody's desk, and somebody picks it up, and it's in a drawer without proper safeguards.

I think that's the kind of situation we're really talking to here as opposed to the intentional business.

However, I think we would be a little naive if we didn't realize that this record shows a decades-long hostility by this union to the entire concept of promotion other than promotion by seniority. In other words, hostility to testing.

Like dissenting Judge White, I can only wonder why the union, after being given a wealth of materials on the testing program, still wants copies of the actual tests and the actual test sheets.

QUESTION: Mr. McGuinn?

MR. McGUINN: Yes, sir.

QUESTION: I missed something.

Why is the psychiatrist important to see this?

MR. McGUINN: The psychologist -- the importance of the psychologist to this, Mr. Justice Marshall, is that what we have here is an aptitude exam. In other words, it is not a test of what is required of the Instrument Man.

Therefore --

QUESTION: In other words, they're experts in the testing business.

MR. McGUINN: The psychologists are the experts in the testing business.

QUESTION: -- other than psychologists.

MR. McGUINN: Pardon?

QUESTION: There's some experts that are not psychologists.

MR. McGUINN: Well, that's correct too, Your Honor.

QUESTION: Yes.

MR. McGUINN: But I think --

QUESTION: But these are testers. These psychologists are experts in the testing field.

MR. McGUINN: Yes.

QUESTION: That's what you were looking for?

MR. McGUINN: That's right. That's right.

QUESTION: Thank you.

QUESTION: I can fully understand why the expertise of a psychologist would be an important ingredient in the devising of these test batteries. But I should think any schoolboy could mark the papers, so to speak, couldn't he?

MR. McGUINN: Yes, the marking of the papers is basically a clerical function.

QUESTION: Exactly. I suppose there are multiple choice questions --

MR. McGUINN: There are multiple choice questions.

QUESTION: -- or true and false, something like that.

MR. McGUINN: You can see the samples in the appendix as a matter of fact.

QUESTION: I mean, a machine could almost do it.

MR. McGUINN: Yes. In this case, a machine doesn't do it, it's done by --

QUESTION: But any literate layman could do it?

MR. McGUINN: That's correct. And we have people within the psychology unit who do actually grade these tests.

QUESTION: But you don't need a psychologist's expertise to grade them, do you?

MR. McGUINN: No, you do not. As it happens, the record in this case shows they do have expertise, but that is not necessary, obviously, to grade a multiple choice test.

QUESTION: Mr. McGuinn, in the Griggs case -- and

I don't mean to belabor this point unduly -- where you in your brief quoted as saying that EEOC guidelines are to be regarded as expressing the will of Congress. And you have a page citation to Griggs at 401 U.S. 434.

There is a sentence on page 434 that says, since the Act and its legislative history supports the commission's constructions, this affords good reasons to treat the guidelines as expressing the will of Congress.

I take it you would want your brief qualified in the same way?

MR. McGUINN: Of course.

I think the next problem we have -- I have -- with the restriction is that there is a built-in ambiguity about this restriction, about just what individuals comprise the union to whom I'm supposed to give over these materials.

As I showed in my brief, this could be a very few people or it could be a very large number of people. The Board's order, or its restriction, does not make it clear who it is to run to.

And all of those persons who would be seeing these materials are also employees of the company who would be in a position to take the test themselves in the future.

And the Board is clearly off the mark when it suggests that we, the company, could extract a pledge from these union officials that they would never take the test in the

future.

I can think of no clearer violation of section 8(a)(1) and (3) of the Act to tell the union officials they must forego promotional opportunities because of their membership and activities in regard to a labor union.

Fifth, even if the company were able to detect a violation of the restriction, you would have no independent remedy. You would have to rely upon the Board's general counsel to seek contempt proceedings in the Court of Appeals.

And it's very difficult for me to consider how a union can be held in contempt when the basic order runs against the company and not the union, and the union wasn't even a party to the proceedings in the Court of Appeals.

And sixth, even if the union were found liable in contempt for a violation of the restriction, there is no adequate remedy, since this company's testing program will have been gutted, and it would take years to make another revalidation study.

And seventh, if this Court were to affirm the decision of the 6th Circuit on the basis of the judicial protective order and the sanction of contempt for its violations, what will happen next when unions generally seek such information from other employers?

Must employers, in order to obtain this judicial contempt protection, refuse again to disclose the information?

Go through a meaningless Board proceeding; a meaningless Court of Appeals proceeding; just to get the judicial contempt sanction protection.

Literally, that's the only way that another employer down the road is going to be able to do it. And yet that makes no common sense at all.

And the only other alternative would be for the employer to extract a contractual commitment against disseminating the material from the union. And the only remedy for a violation of that is an ordinary breach of contract suit.

Thus, it is apparent that even this chimera of judicial contempt sanction protection will extend no further than the case in front of you today, if it's accepted by this Court.

Let me now leap backward for a moment and talk about the threshold question of whether the testing materials involved had any probable relevance or usefulness to the union under this Court's decision in Acme Industrial Company.

And here we have to distinguish between the tests and test sheets on the one hand, and the test scores linked with the name of the applicant on the other.

Going first to the tests, consider first the wealth of material that the union was given about the testing program, including the validation studies themselves, including

the sample questions given to the union.

Next, consider that the three professional industrial psychologists who testified in either the arbitration case or the Board hearing, each concluded that a review of the test itself would not be helpful in determining whether the particular test was valid.

QUESTION: Mr. McGuinn, to get back for a moment --

MR. McGUINN: Yes.

QUESTION: -- to what you just told us. Do you concede that 8(a)(5) required the company to give what it did give, the so-called wealth of material?

MR. McGUINN: Yes, Your Honor.

QUESTION: You do?

MR. McGUINN: Yes.

QUESTION: And therefore you do --

MR. McGUINN: We think that that was a valid way of responding to the union's request for information. We didn't have to respond to it in exactly the way the union wanted to get it.

We gave what we considered to be the most relevant information, and that is the validation studies themselves.

QUESTION: And you do concede that 8(a)(5) required you to do as much as you did?

MR. McGUINN: Turn over the validation studies, yes.

I think we went one step further when we gave them

sample copies of the -- of items that were similar to but not the same as items on the test itself. I think that was a very helpful thing.

I don't know whether that was, strictly speaking, required by the Act. I think the validation studies were.

In answer to these three professional industrial psychologists, the union produced no witness whatsoever who was a professional psychologist, and the Board produced none.

So that evidence is uncontroverted on this record.

Another potent consideration on the issue of relevancy, in my opinion, is the fact that the arbitrator himself concluded that a review of the tests would prove nothing, and that the union's case was in no way damaged by lack of access to the tests.

Of course this Court has on many occasions held that arbitration is the preferred method of solving labor relations disputes. That was done in this case, and it was done without the necessity of the production of the tests.

QUESTION: Mr. McGuinn, just to follow up on Justice Stewart's question: Supposing there had been no arbitration at all, and the union just made a demand out of the blue for possible future use in connection with possible arbitration.

Would you have had an 8(a)(5) obligation to comply?

MR. McGUINN: Without an actual case or controversy, in other words?

QUESTION: Correct.

MR. McGUINN: I think that this would have to be in conjunction with a real live case. I just don't think these academic inquiries sent to a company in large --

QUESTION: But once the arbitration proceeding was over, did not the inquiry become academic?

MR. McGUINN: Well it is not, strictly speaking, academic now. Because the arbitrator, pursuant to the agreement of both parties, said that the arbitration proceeding could be reinstituted if the testing materials were, in fact, ordered to be produced by a court.

QUESTION: But didn't he conclude that they were unnecessary for his decision?

MR. McGUINN: That's right. I don't think that the arbitrator is really going to change his mind if this Court should determine that the tests should be made public.

QUESTION: I'm just a little puzzled as to whether we should decide the case on the theory that they're needed for this particular arbitration, which may be reopened, or that they're needed in sort of a generaway for future use in bargaining, whatever may arise.

Sort of -- yes, that's right, to police compliance with the agreement in the future.

I'm just having a little trouble identifying what the standard of reference is we're supposed to judge

the case by.

MR. McGUINN: That's an interesting point, whether an academic inquiry that comes in out of the blue, we would like to see XYZ material concerning your testing program, whether that would lead to an 8(a)(5) kind of answer.

I tend to -- this company believes in disclosing as much as possible to the employees. And I think that the answer to your question for this company, would be -- yes, we would be happy to disclose --

QUESTION: Well, I think I'm asking for a clarification of your answer to Justice Stewart.

Was your answer predicated on relationship to the arbitration --

MR. McGUINN: Yes.

QUESTION: It was?

Mr. McGUINN: Yes, it was.

QUESTION: Well, suppose after a grievance has been processed, arbitrated, the union just files an unfair labor practice claim that in the course of the arbitration the employer committed an unfair labor practice.

Now, that's a perfectly -- the Board has jurisdiction to hear that, I think.

MR. McGUINN: But my question would be, what is the request now relevant to? The arbitration --

QUESTION: The request had -- what they want

adjudicated is that the employer did commit an unfair labor practice.

MR. McGUINN: Well, in order to commit an unfair labor practice, we would have had to --

QUESTION: Well, I know. But the proceeding -- it seems to me the request was made in the course of a -- and refuted in the course of a grievance procedure. And at that time the union felt the employer was committing an unfair labor practice.

And eventually, they took it to the Board.

MR. McGUINN: Apparently, the premise of your hypothetical was that the arbitration proceeding is now over.

MR. CHIEF JUSTICE BURGER: We'll resume there at 1:00 o'clock, Mr. McGuinn.

MR. McGUINN: All right. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. McGuinn, you may resume.

ORAL ARGUMENT OF JOHN A. McGUINN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. McGUINN: Yes, Your Honor.

I would like to answer the question pending at the break, I believe from Mr. Justice White and Mr. Justice Stewart.

As I understand the question, is whether the company is under a legal obligation to provide the union information of the type provided by the company in this case, even if there is no pending specific grievance.

And the answer to that is that once the union has made a showing of probable relevance and usefulness, whether that request is broadly framed or tied into a particular grievance, the obligation attaches to disclose materials such as the validation study.

And the reason for this is that we concede that the testing program does affect wages and other conditions of employment.

QUESTION: That wasn't my question.

Mr. McGUINN: Maybe you could repeat your question.

MR. CHIEF JUSTICE BURGER: Well, an hour has

elapsed. Let Mr. Justice White try it again.

QUESTION: Well, suppose in an election, in a union election campaign, the employer threatens some workers. If you vote, I'll fire you, or something.

In any event, the election is over, the union wins, and the union files an unfair labor practice charge that the employer committed an unfair labor practice.

Will it just be dismissed because the election is over?

MR. McGUINN: No, it will not, Your Honor.

And the same is true here. Once the grievance is resolved in arbitration and the union files an unfair labor practice to seek the information --

QUESTION: They don't want the information. They just want a judgment that you committed an unfair practice during the arbitration.

MR. McGUINN: Yes. It would not be moot, just because the arbitration was concluded.

Does that answer your question?

QUESTION: Yes, it does.

MR. McGUINN: I would like to reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Come.

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The adminitrative law judge whose findings were adopted by the Board found that the information requested by the union, the test questions and the actual test papers and scores of the employee-applicants for the Instrument Man jobs were potentially relevant to the processing of the grievances which had bee filed by the employees who had been denied jobs for failing to attain the cutoff score on the tests.

And thus under the principles of Acme Industrial, the company violated its bargaining obligation in refusing to furnish this information to the union.

Now before the Board, the company did not accept the administrative law judge's finding that the test questions or the test battery and the test papers were relevant to the processing of the pending grievance.

Indeed, it urged the Board to adopt that part of the administrative law judge's recommended order which provided that the tests and test papers be turned over to a psychologist selected by the union who in turn would make them available to the union and let it use them to the extent necessary for the processing of the grievances.

The company accepted only to the administrative

law judge's finding that the union needed to link the employees' names to the test scores.

In these circumstances, we submit that under section 10(e) of the Act, which precludes judicial review of contentions that were not raised before the Board, judicial review of the question of the relevance of the test battery and the test papers is foreclosed.

Normally, the companies avoid this foreclosure by arguing, as it does in its brief, that it had no practical reason to challenge the ALJ's order because it had earlier offered voluntarily to turn over this information to appease the union.

The union's cross-exceptions put the company on notice that the portion of the order which it was willing to accept was subject to re-examination by the Board.

And we submit that if the company had any question as to the relevancy of that information, that was the time it should have urged that at least as an alternative contention before the Board.

Accordingly, as we see it, and as the court below saw it, the basic question really presented here is whether the Board reasonably exercised the broad remedial authority that it has under section 10(e) of the Act --

QUESTION: Mr. Come?

MR. COME: Yes, sir.

QUESTION: Did the company before the Board take the position that the administrative law judge's order was correct?

MR. COME: Well, at two places in its exceptions, which we have lodged with the clerk, they urge -- and the word urge is theirs -- the Board to adopt that part of the administrative law judge's recommended order.

They accepted only to his recommendations insofar as it required that the test scores linked to employee names be turned over.

QUESTION: But they had no reason to accept to his proviso that it be turned over only to a psychologist, since that favored them rather than disfavored them.

MR. COME: That is their argument. However --

QUESTION: Well, it's not only their argument, but it's rather self-evident, isn't it?

MR. COME: However, when the union cross-excepted to that part of the order, it is our contention that that put the company on notice that they would -- might lose even that part of the order, and therefore, in order to protect themselves, they should have raised with the Board at least the alternative contention that we don't think that we committed any unfair labor practice here to begin with.

But they never raised that before the Board, nor did they do so in their petition for a reconsideration after

the Board came down with its decision.

Now, as I say the basic question as we see it is whether the Board was reasonable in ordering the company to furnish to the union directly, rather than to a union-selected psychologist, these test materials where the Board order includes protective provisions to maintain the test's security.

Now, the purposes for which the union intended to use the test materials did not necessarily require the aid of a qualified psychologist. The union was not challenging the company's showing that there was a high statistical probability that those applicants who did well on the test would do well in the Instrument Man job;for that presumably you might need a trained psychologist.

Rather, the union was attempting to show that the tests were nevertheless unfair to certain applicants who although they did poorly on the tests nonetheless had the ability to perform the job.

The company acknowledges in its brief that those scoring less than 10.3, which was its cutoff point, had at least a 20 percent chance of becoming successful as Instrument Man -- men. And the union was attempting to show that some of the low scorers were in this category.

For example, the vocabulary sample of the section of the sample test -- and these weren't the exact questions, because the company only submitted a partial sample -- asked

for definitions of words like "homage," "diabolic," "imbue," and "droll."

Now --

QUESTION: They didn't ask -- didn't really ask for definitions, but they were multiple choice questions.

MR. COME: That is correct.

QUESTION: Yes.

MR. COME: They wanted to know if you could recognize what those words meant.

QUESTION: Or what they did not mean.

MR. COME: Or what they did not mean.

QUESTION: In a multiple choice test, you don't need to know the meaning of all the words.

MR. COME: Well, it helps if you do.

QUESTION: Well, yes it does. But if you know the range, you're in.

MR. COME: Yes.

Now, if the union could show, for example, that the Instrument Man job did not require a knowledge of such items, and that employee Smith, for example, who had past experience in other jobs that were very closely related to the Instrument Man job, or he had gotten uniformly high marks, scored less than 10.3 simply because he missed these kinds of questions, rather than those that were more job-related, it would have a substantial basis for arguing to the arbitrator that Smith

should not have been disqualified for the job merely because he failed to meet the 10.3 cutoff score.

QUESTION: Well, it seems to me that that's a fundamentally inconsistent position that you describe the union as taking.

If the union begins by conceding the validity and reliability of these tests, which are after all aptitude tests, not proficiency tests, and aptitude tests are presumably devised by people who know what they're doing, and the union by conceding their validity and reliability concedes as much, then how possibly is it consistent for the union to take the position: Yes, but in some cases they're invalid and unreliable. And where do you stop when you do that?

The company concedes, and the experts concede, that they're 80 percent more or less reliable. Those under 10.3 20 percent of them might be a good Instrument Man.

MR. COME: Well --

QUESTION: That's all concede, but that's true of any aptitude test, unless you get a 100 percent correlation factor.

MR. COME: But under the contract which was negotiated, in which the union as the representative of the employees has a duty to see that it is fairly administered --

QUESTION: Which requires for promotion by seniority at the Monroe plant, except --

MR. COME: Except where there are head and shoulder differences among the applicants.

QUESTION: Right.

MR. COME: Now, the test was a statistical measure of trying to --

QUESTION: Of measuring a head and shoulder difference.

MR. COME: Yes, but --

QUESTION: Which the union concedes is valid and reliable.

MR. COME: But they are not conceding that the test will be 100 percent accurate, nor is the company conceding that the test is 100 percent accurate.

QUESTION: Well, you're asking for a perfect test, and that's impossible.

MR. COME: But therein lies the basis for a grievance. Even the arbitrator, on the basis of the fragmentary materials that he had, found that there were at least three employees --

QUESTION: Who were between 9.3 and 10.3.

MR. COME: -- who should have been re-examined --

QUESTION: And the company hired one of them.

MR. COME: And on re-examining them, the company found that the qualification of at least one of them was sufficient to override his low score on the test.

QUESTION: Well --

MR. COME: Now, the union as the statutory

representative of the employees, we submit, had a statutory obligation, indeed, a duty to fairly represent these employees; to insure that any employee who had the qualifications for the job would at least have an opportunity to be considered even though he happened to be a poor tester --

QUESTION: Well, why don't you just throw out the test?

MR. COME: No --

QUESTION: I don't see that that's at all a consistent position.

How can one concede the reliability and validity of a test and then say, yet it doesn't show anything; there are a lot of people who get below 10.3 who are in fact qualified.

That is saying the test is unreliable and invalid.

QUESTION: Excuse me: What more could the company do than re-examine the three that were raised and when they make a judgment, it isn't a judgment necessarily that they were wrong the first time, but that they're willing on a marginal case to take a chance.

Does it mean any more than that?

MR. COME: I submit that all that the validity of the test shows is that it has a statistical probability. There are still going to be employees who it could be shown are capable of performing the job notwithstanding their performance on the test.

QUESTION: Well, we know in the testing field generally that that's true. There are people who pass bar examinations who will never make lawyers, and there are people who fail who might make pretty good lawyers.

MR. COME: But the point that I'm making is, because our basic position is that the company is not conceding -- has not accepted the union's right to this information -- is merely to show why the Board, in framing the kind of order that it framed, did not require the union to go to the expense of necessarily hiring a union psychologist.

The use that the union wanted to make of the test didn't require that. An intelligent [illegible], someone with familiarity with the operations of a powerplant, an engineer, might have been more help to the union than would have been a profession psychologist.

QUESTION: Mr. Come? Can I get something straight.

You gave an example of the vocabulary multiple-choice question and said that might not have anything to do with the job.

I understood you to imply that the union would have access not only to the form of the tests, the actual battery, but to the answers of particular employees.

Now, that isn't right, is it? Don't they just get the scores of the employees and the form of the test?

MR. COME: I think that they need to know the names

of the employees and link them to the scores --

QUESTION: But they would not know which questions they missed and which they got correct, would they?

The employees. I may misunderstand the record, and that's really -- the material that must be disclosed, does it include the actual tests that the employees took, or merely their scores and a master copy of the test?

MR. COME: No, the actual test papers itself.

QUESTION: Oh, I see. I misunderstood. Pardon me.

MR. COME: So that the union could have -- without the whole picture, you would not know whether X scored low because he missed the physical science and mathematical questions that were germane to the Instrument Man job or not.

You also would not be able to know whether there was any systematic bias in these tests.

QUESTION: Well, I can see how the union could take that position if it hadn't conceded that the tests were relevant.

If it said that the employer is using this test as a ringer to really promote its own favorite sons or daughter; but the union as I take it has conceded that the tests do have a bearing and are permissible to use.

And the government, in its brief, says so.

MR. COME: But as the administrative law judge

pointed out in his report on page 47A of the Appendix to the position -- to the petition: There is a difference between the statistical validity of the tests and the purpose for which the union -- this information was relevant under the National Labor Relations Act.

As the examiner, as the law judge pointed out, and I don't want to read all of it, statistical and related data which are available to the union are sufficient to prove the validity of the psychological tests for the purpose used.

The statistics may indeed tend to show that the tests are valid to serve the employer's purpose, and they may serve to identify those employees likely to do well on the job.

However, the statistics do not serve to inform the employees or their representatives whether the tests are truly job-related or contain objectionable distortions; whether in sum , they tend to undercut respondent's contract commitment to promote by seniority where there is no significant difference.

And we submit that there is a crucial difference between the principal validity of the test and whether or not anindividual employee nonetheless has a substantial basis for grieving --

QUESTION: Well, Mr. Come, once you conceded -- once everyone agrees, as they apparently do here, that these

tests are valid, they have an objective purpose and they're fulfilling that purpose, is this fundamentally different from any line-drawing process in which in many decisions this Court has said, when there's a line-drawing process, it will inevitably include some people who should be excluded, and exclude some people who should be included.

Now that happens here, does it not?

MR. COME: Yes, that does happen with respect to decisions of this Court, and also with respect to drawing legislation.

But I submit however that processing individual employee difference -- grievances under a collective bargaining agreement allows for more than just the general line. That's the purpose of having a grievance procedure, and the right of individual employees to file grievances.

QUESTION: Well, then the employer might as well --

MR. COME: The individual has a right, under these procedures, we submit, to show that his case should not be covered by --

QUESTION: Well, if you're going to allow individual appeals in each case, which is what this amounts to, then why not just scrap the whole testing process, let the employer make his management decisions, let the unions -- if a grievance on anyone that he does -- they don't like?

MR. COME: Well, because the test is a tool; it's

a valuable tool. But it is not the be-all and the end-all.

Now, with respect to the Board's order here, it -- the argument is made that, well, it looks only after the interests of the union; it does not protect other important interests, namely, the company's interest in maintaining test security.

Now, we think the answer to that is, as the Court of Appeals in enforcing the Board's order stated, is that the restrictions on use of the materials and the obligation to return them to the company, which the court enforced -- in other words, the protective order -- adequately protects the company's interest in test security.

Now, the Board's order accords the union the right to see and study the tests and to use the tests and information contained therein to the extent necessary to process and arbitrate the grievances.

However, the union is directed not to copy the tests or otherwise use them for the purpose of exposing the tests or the questions to employees who in the past or why may in the future take these tests; or to anyone other than the arbitrator.

And after the conclusion of the arbitration proceeding, the union is required to return all copies to the company.

QUESTION: What about the scores, individual scores?

MR. COME: Well, as we read the terms fo the

protective order, which are set forth on page 55A, when the Board of the --

QUESTION: Which --

MR. COME: Of the Appendix, in the remedy section.

QUESTION: That's the Appendix to the Petition.

MR. COME: Appendix to the petition.

Said the respondent is directed to supply copies of the battery of tests administered to the employee-applicants, including the actual test papers of the applicants.

And then in -- the word "tests" is used thereafter.

As we read it, we believe that the Board was using the administrative law judge using the word, tests, in the generic sense to include not only the battery of tests, namely, the test questions, but also the actual test papers.

QUESTION: So you -- and any information off the test papers, I take it?

MR. COME: Yes, Your Honor.

QUESTION: I mean, you think it would violate this order if somebody said, John Jones got a minus 61?

MR. COME: Well, I think that that would -- that it would, because the union shall -- except in connection with the arbitration.

QUESTION: Yes. So any information off the papers would be likewise --

MR. COME: As I interpret the order.

Now, some argue --

QUESTION: How does the union interpret it?

Or do you know?

MR. COME: Well -- I don't know how they interpret it, but I'd be surprised if they didn't interpret it any differently.

I think that that's a fair reading of the way these words are used. I'm not saying that the terms of the protective order could not be improved upon, with the benefit of hindsight.

But these are similar to the kind of protective orders that --

QUESTION: Well, the case isn't over yet.

MR. COME: No, the case is not over. The case is not over..

I was going to say that the federal courts quite regularly enter protective orders of this sort in ordering disclosure of sensitive information under the federal discovery rules.

Now, and the union would be subject to a contempt citation were it to violate the terms of this protective order. Now, just as an individual bound by a protective order in a discovery proceeding.

QUESTION: That would be at the behest of the Board, wouldn't it?

MR. COME: That would be at the behest of the Board. But there's no --

QUESTION: The general counsel? The general counsel?

MR. COME: The Board must bring the contempt proceedings.

QUESTION: And the company has to ask them and then they have to respond?

MR. COME: That is correct. But there is no reason to assume that the Board, which is interested in seeing that its orders as enforced by the Court of Appeals are not flaunted, would not be very alert to checking any contempt here.

QUESTION: Well, the union wasn't -- the object of the -- put it this way: The union wasn't a party in the Board proceeding or in the Court of Appeals.

MR. COME: Well --

QUESTION: And the order didn't run against the union.

MR. COME: Well --

QUESTION: Did it?

MR. COME: I submit that the --

QUESTION: Did it? As a matter of fact?

MR. COME: Well, it did not run against it, except insofar as the terms on the --

QUESTION: It's the condition of the turnover to the

union.

MR. COME: That is correct.

QUESTION: If I were representing the unions, and somebody cited me in contempt, I think I'd have a very good case.

MR. COME: But I don't think that you'd prevail for this reason, Your Honor: The union was a party to the Board proceeding and actively participated in the litigation over its rights --

QUESTION: It was the charging party.

MR. COME: -- that is correct -- to obtain the test materials and the conditions under which they could be obtained.

Now, it had a right to go to the Court of Appeals if it objected to those conditions. Instead, it did not do so. It elected to permit the Board to enforce the order with these conditions in the Court of Appeals.

In these circumstances, we submit that the union is a stop to challenge the restrictions on the use of the materials, and if it were to accept the test materials under the terms of the Board's order, as enforced by the Court of Appeals, it would be bound by those restrictions, and subject to a contempt citation.

Beyond that, I wish to point out that there are important institutional reasons why it cannot be assumed, as the company does, that the union would be breaching the

security of these test materials.

The union has had a bargaining relationship with this company for over 28 years. It has been certified in about 28 bargaining units. It would certainly be very, very short-sighted on its part were it to jeopardize its longstanding relationship and its continuing relationship with this company to misuse these test materials.

Moreover, it would jeopardize its position with the employees --

QUESTION: But it has had an historic resistance to tests too, hasn't it?

MR. COME: Well, I think all that --

QUESTION: Rather than seniority.

MR. COME: Well, all that the record shows on that is that it attempted to obtain in the contract a provision it would make seniority the sole governance of promotion.

But having lost on that, there is no basis for assuming that it's going to go around and broadcast these test materials.

It represents even the employees who scored high on this test. And these tests should be thrown out and their promotions --

QUESTION: No, no. Not this unit of the union, which is only the Monroe plant, isn't it?

MR. COME: Well, it does represent the Monroe plant

QUESTION: Yes, but -- and only -- and then all the people who got these jobs were from other plants.

MR. COME: But when they came into this bargaining unit, they'd be represented by this unit -- union. The union must represent fairly all the employees in the bargaining unit.

QUESTION: Well, to the extent that the arbitrator throws out the company's decision to promote someone who did well on the test scores, they too are union members, are they not?

MR. COME: That is correct.

QUESTION: Mr. Come, will you clarify something for me?

Earlier in your argument I understood you to cite as an example of why the union wanted these tests that it might be able to prove that one of the applicants for this Instrument Man B had performed that identical function or a function very similar to it somewhere else very efficiently.

If that is so, in what way would the tests assist the union? Why can't it prove that anyway without having possession of the tests and the scores?

MR. COME: Well, I think the test would assist it in this sense: You start with the fact that the tests do have a statistical validity.

QUESTION: Let's assume that --

MR. COME: And I think that the union, rather than just willy-nilly attempting to show that the employee was capable of doing the job, wanted also to see what were the types of questions that he missed on the test.

Now, if you could show that Smith missed the kinds of questions that I was using for illustration purposes, but did very well on all the matematical and physical science questions that were more germane to the Instrument Man job, it would have a better case before the arbitrator than if it merely had a situation where it could have been that the reason that Smith did poorly was because he missed the mathematical questions and the physical science questions.

I think that the type of questions that the employee missed would be very relevant to the union and helpful to it in prosecuting -- in persuading the arbitrator that notwithstanding the showing on the test, the employment should be --

QUESTION: If Smith had been an Instrument Man B at another utility plant, and had received the highest rating for his performance, and let's assume further that he was the lowest man on these test scores, I don't understand how it would make any difference in the union's effort to prove that he was competent to do the job, head and shoulders above everybody else, because he'd already proved it.

MR. COME: Well, these men were not instrument -- formerly instrument men, so you had to take analogous job

skills. And in making that showing, I submit that where he fell down on the test would be helpful in that regard.

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Come.

Thank you.

Mr. McGuinn, do you have anything further?

REBUTTAL ARGUMENT OF JOHN A. McGUINN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. McGUINN: Yes, Your Honor, I do want to answer the contention made that we somehow lost our right to challenge the relevance of these materials by the lack of filing an exception to the finding of relevance in the Board proceedings.

Mr. Come is factually correct; no exception was filed to that portion of the decision of the administrative law judge.

The reason that no exception was filed was the obvious one that the administrative law judge had adopted a recommendation made by the company at the outset of the unfair labor practice hearing. The company did this expressly, quote, to appease the union, end quote, not as a confession of the relevance of the materials.

What earthly reason would the company have for filing an exception to that portion of a decision it deemed favorable to it s own interests? To file an exception in those circumstances, in my opinion, would have been an

indication of bad faith, a withdrawal from a proposal that we made to the union at the outset of the hearing.

I think it's most important in this context to remember that this is a labor relations case and that in labor relations, each party often makes concessions to the other in order to appease them.

That's how the system works.

QUESTION: Mr. McGuinn.

MR. McGUINN: Yes.

QUESTION: Let me go back to this: Why could -- you made an offer and they turned it down. Why can't you withdraw it later?

MR. McGUINN: Because I think that we made an offer to the administrative law judge as well as to the union --

QUESTION: Right.

MR. McGUINN: -- and the administrative law judge was a part of this process too. And I just think it would be undercutting the commitment, if you will, that we gave to the administrative law judge that this is something that we could live with.

QUESTION: Well, I don't understand why. You just say, although -- we're so happy with the result, we want to preserve our record in case we lose; we take an exception.

Isn't that done all the time?

MR. McGUINN: Well, I think that's taking a very

technical and mechanistic approach to --

QUESTION: But it would preserve your argument here today if you'd done that, wouldn't it?

QUESTION: That's right.

MR. McGUINN: I think the argument is preserved here today.

QUESTION: It would have been unambiguously preserved without necessarily ruffling his feelings in any way, wouldn't it?

MR. McGUINN: Well, I just think it would be a most unfortunate result for industrial relations necessarily if efforts made by one party to appease the other party were later translated into a finesse of the appeasor's legal rights; and that's what I think has happened here.

QUESTION: Well, 10(e) certainly provides that you can lose your legal rights in certain circumstances, doesn't it?

MR. McGUINN: It does, your Honor. I'm not arguing with that.

I'm telling you, this is a labor relations case, and some consideration ought to be given to that fact.

QUESTION: Well, I thought 10(e) was in the National Labor Relations Act, which dealt with labor relations.

MR. McGUINN: That is correct. That is correct.

But I am attempting to sensitize you to the fact

that in labor relations sometimes we make concessions to appease another party. And I don't think that we ought to be penalized for making concessions like that.

QUESTION: You're not bound by that statute the same way people in other branches of the law are?

MR. McGUINN: No, we are bound by the statute. We are bound by the statute.

If there are no other questions, I'll rest.

MR. CHIEF JUSTICE BURGER: Thank you gentlemen.

The case is submitted.

[Whereupon, at 1:37 o'clock, p.m., the case was submitted.]