ORIGINAL

In the

Supreme Court of the United States

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL., Petitioners,	)	
VS	)	No. 78-38
LEROY FOUST, Respondent.	)	

Washington, D. C.
February 26, 1979

Pages 1 thru 36

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

IN THE SUPREME COURT OF THE UNITED STATES

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, ET AL., Petitioners, v. LEROY FOUST, Respondent.	No. 78-38

Washington, D. C.

Monday, February 26, 1979

The above-entitled matter came on for argument at 2:05 o'clock p.m.

BEFORE:

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

APPEARANCES:

LAURENCE J. COHEN, ESQ., Sherman, Dunn, Cohen & Leifer, 1125 Fifteenth Street, N.W., Washington, D. C. 20005; on behalf of the Petitioners.

TERRY W. MACKEY, ESQ., Urbigkit, Mackey & Whitehead, P.C., 1651 Carey Avenue, P. O. Box 247, Cheyenne, Wyoming 82001; 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 hearing arguments next in International Brotherhood of Electrical Workers v. Foust.

Mr. Cohen, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF LAURENCE J. COHEN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. COHEN: Thank you, Mr. Chief Justice, and may it please the Court:

This is an action for breach of the duty of fair representation under the Railway Labor Act. In the District Court, the jury found that the union had breached its duty to Mr. Foust, he was awarded compensatory damages of $40,000 and punitive damages of $75,000. The Tenth Circuit affirmed in all respects. This Court denied certiorari on two of the issues raised in our petition, whether the union had breached its duty as a matter of law and whether the award of compensatory damages was proper. The single issue on which certiorari was granted was the propriety of the punitive damage award.

The basis for the lower court's finding that the union had breached its duty to Foust was the fact that it filed a grievance on his behalf two days after the expiration of the 60-day grievance period provided in the collective bargaining agreement, and that that was the basis of the

ultimate denial of that grievance by the National Railroad Adjustment Board.

The facts underlying the filing of the grievance are basically undisputed and can be summarized briefly. Foust was an employee of the Union Pacific Railroad and he was represented by the IBEW for collective bargaining purposes. In March of 1970, he was injured on the job, he took several succeeding medical leaves of absence, the last of which expired December 22, 1970. He did not file a timely request for a further extension of his leave of absence, and on February 3, 1971, the railroad wrote to Foust and stated that he was discharged for his failure to do so and his failure to submit a required physician's statement.

Now, under this Court's decision in Elgin, Joliet & Eastern Railway v. Burley, Foust at that point had the option of proceeding on his own to file a grievance or asking that it be handled by his union or by an attorney. He chose to use the attorney who was then representing him in his personal injury claim under the Federal Employer's Liability Act, and on February 11th his attorney wrote to the railroad concerning the discharge. The letter went unanswered and he got no favorable response in two subsequent phone calls to the railroad.

On March 26th, which was the 51st day of the grievance period, the attorney wrote to the union and the union

representative Jones, and asked that the union attempt to have Foust reinstated. Jones considered the request unusual since it came not from the employee the union represented but from his attorney, so he called his superior. They discussed the matter and concluded they needed an authorization from Foust himself to proceed, and the superior prepared a letter for Jones to send to Foust. He mailed that letter to Jones, who dated and signed it, and he mailed it to Foust on April 5th. In essence, the letter said "we need a written authorization from you to handle this matter on your behalf."

He didn't wait for a response, however; on the following day, April 6th, he filed a grievance. That, however, was two days after the 60-day period. I would like to mention two other factual points.

QUESTION: He knew that, didn't he? He knew that at the time he mailed the letter?

MR. COHEN: It is not entirely clear, Mr. Justice Marshall. In his deposition, he said "I feel at that time that it was untimely." We don't deny that he should have known it was untimely.

QUESTION: Well, it would have been horrible if he knew it was untimely and then wrote a letter like that.

MR. COHEN: No. It is my understanding of the record that he did know it at that time. Foust admitted that he made no effort between February 3rd, the date of his

discharge and April 5th to contact the union personally. He also acknowledges that there was no animosity or adverse or bad relationship between them. His only complaint was that the union was late in filing his grievance.

Now, our principal position here is that punitive damages are not a proper remedy for breach of the duty of fair representation, and that is because a duty of fair representation suit is one to enforce a statutory right and the remedy for violation of that right must also be drawn from the statute.

Specifically, the question of whether punitive damages are allowable in a fair representation case, we feel must be determined by the national labor policy, the best evidence of which is found under the National Labor Relations Act under which there are many more precedents than the Railway Labor Act.

QUESTION: In adjudicating this case, do you understand that we should do so on the assumption that there was a breach of duty?

MR. COHEN: I think you must, Mr. Justice White. With the denial of certiorari upon that issue for purposes of this Court, the --

QUESTION: Let me ask you another question. I don't think this is the same question. Do you think that there is open in this Court the question of whether there was a wrongful

discharge?

MR. COHEN: Let me try to answer that this way: Foust settled with the railroad both for his personal injury claim and waived any claim on wrongful discharge before this suit was filed.

QUESTION: I know, but how about the union? I would suppose that -- I will just ask you this, do you suppose -- would punitive damages ever be -- even if they were allowable in a proper case, would punitive damages be allowable if there had been no injury?

MR. COHEN: No, I think not. I think that is the very least that is clear from Vaca.

QUESTION: What I want to know is is the question of wrongful discharge open here?

MR. COHEN: We feel it is not open. We must assume that --

QUESTION: We must assume there was a wrongful discharge?

MR. COHEN: I think so. I think the union unfortunately below did not accept to the instructions that the jury should not consider that issue. We feel in a proper case, as we read this Court's decisions, both elements must be approved.

QUESTION: So we judge the case here on the assumption that there was both a wrongful discharge and a breach of duty?

MR. COHEN: I would think so, Mr. Justice White.

QUESTION: And we have to reexamine the compensatory damages as well, would we not?

MR. COHEN: If certiorari had not been denied on that, I would certainly think so.

QUESTION: And it is your position, no matter how malevolent or spiteful or deliberateful injurious the intent of the union was -- although it may not have been in this case -- even if in some other case that were proven, punitive damages can never be allowed as a matter of law?

MR. COHEN: That is our principal position, just as in a 303 action, which is also an action for a statutory tort, no matter how willful or even vicious, as this Court held in Teamsters v. Morton, only remedial sanctions are provided.

Of course, we do make the alternative argument, Mr. Justice Rehnquist, that on the record on this case, if the Court does not accept our principal position, the standard used by the Tenth Circuit is far lacking the requirements of the prevailing standard for punitive damages.

We submit that on the principal position, the federal labor policy which underlies these statutes is one of providing exclusively remedial relief. Under the National Labor Relations Act, this was established as early as the Republic Steel case we cite, where Chief Justice Hughes noted that the Act contained only remedial and not punitive relief, and he

noted that the deterrent effect of punitive action was not a sufficient justification for such sanctions.

Those principles have been reiterated through the years, in this Court, for example, in the Carpenters Local 60 case; by you, Mr. Chief Justice, when writing for the D. C. Circuit in the Ladies' Garment Workers case, which we cite at page 15.

The same result obtains under the '47 amendments to the LMRA. I just mentioned Teamsters v. Morton, which is an explicit holding; also under 301, a breach of contract action, where the leading case is the BrooksShoe decision which we cite, where Chief Judge Biggs, I think, succinctly summed up both the correct result and the reason for that result. I quote, "It is the general policy of the federal labor laws, to which the federal courts are to look for guidance in section 301 actions, to supply remedies rather than punishments."

Now, it appears to us that this Court reached the same conclusion in this very context in Vaca v. Sipes. After noting that the jury there had awarded both compensatory and punitive damages, the Court held "such damages are not recoverable from the union in circumstances of this case." The Court then went on to discuss the fact that any compensatory damages that were due if the union had breached its duty would have been attributable to the wrongful discharge by the employer.

Now, the Ninth Circuit has interpreted Vaca as we

do, as holding that punitive damages are strictly unavailable in fair representation cases.

QUESTION: That is what the language you just referred to literally means then.

MR. COHEN: Well, we offer, Mr. Justice White, two possible explanations for that language in our brief. We acknowledge that an alternative basis may be that you may not have them if there are no, almost no compensatory damages. We think the broader holding is the better reading, but I would certainly not argue with you as to --

QUESTION: Well, Vaca said that damages caused by the employer.

MR. COHEN: That is correct.

QUESTION: And a while ago you indicated that you didn't think punitive damages should be allowed if there were no damages.caused by the person against whom damages are sought.

MR. COHEN: If the issue were open here, Mr. Justice White, we would argue that the award of compensatory damages against the union was plainly improper.

QUESTION: Well, that was the situation in Vaca.

MR. COHEN: That's right.

QUESTION: And then you made the statement --

MR. COHEN: In effect, we made --

QUESTION: -- the statement that no punitive damages

in the circumstances of this case.

QUESTION: Because there were no damages in the circumstances of this case.

MR. COHEN: That's right. We think that Vaca can be read even more broadly, yes, and the Ninth Circuit has read it that way. Obviously, of course, we point out that the matter is open.

As far as the Railway Labor Act itself, probably the most thorough analysis of its structure was provided by the Third Circuit in the Deboles case which we cite at pages 12, 13, 24 and 25 of our brief, in which after examining the precedents under the National Labor Relations Act and the structure of the Railway Labor Act, the Court concluded, "There is no intention that the Railway Labor Act deviates from this general pattern of remedies under the NLRA, at least with respect to union misconduct."

The same conclusion had been reached in another Railway Labor Act case many years earlier in Judge Caleb Wright's decision in Brady v. TWA. We think it is significant, in looking at the Railway Labor Act, that under the provisions of section 2, Tenth, the criminal sanctions which are provided for willful carrier violations of five specified paragraphs do not encompass the duties which are declared in paragraphs First and Second from which this Court has said the duty of fair representation arises.

We feel if the test is the national labor policy, that the conclusion must be reached that punitive damages are not allowable for any breach of the duty of fair representation or wrongful discharge.

QUESTION: I have a little difficulty with that position. Perhaps the difficulty stems from my own lack of understanding. To me, those acts place the employee and the union on one side of the fence and the employer on the other, and when the Court has interpreted to say they are remedial and you can only get so much out of the employer by virtue of the -- but when you are talking about a union which is basically supposed to be representing the employee, it doesn't seem to me to be that you would necessarily have the same limits as you would in the remedies against the employer if there is almost a fiduciary obligation involved.

MR. COHEN: Well, we think again, though, Mr. Justice Rehnquist, that you have to look to the scheme of the statutes, and even when Congress amended the Act in '47 to provide union unfair labor practices, it made no change in its remedial policy. And this Court's decision in Carpenters Local 60, in 1961, was a case where a remedy which this Court held punitive was imposed on a union based on its action vis-a-vis the employees it represented, and this Court held the dues reimbursement remedy in that case was punitive and could not stand.

QUESTION: Well, does it necessarily follow because a union can't be punished for a vil ation of a practice made unfair by the Act of 1947, that an employee or employer can't be punished for the act of the '35 violation, that a union representing an employee in processing a grievance can't -- is likewise limited in the damage that can be awarded?

MR. COHEN: We think that conclusion does follow, Mr. Justice Rehnquist, because the entire statutory scheme is one of deliberately providing only remedial relief, and in that case where the courts have implied the duty of fair representation, we think it would be a quantum leap for the courts to provide something far beyond anything contemplated by the Congress anywhere in this related group of statutes.

We think the same approach or the same result obtains under a different approach in more general statutory approach which we suggest and which we draw from Judge Parker's decision for the Fourth Circuit in Mine Workers v. Patton. We cite that in some detail in our brief.

We also in our reply brief cite the Phelps Dodge case, where this Court held that even in the flagrant case of a deliberately discriminatory refusal to hire based on union membership, a violation that is both willful and one that runs to the heart of the Act, no more than a "may call" order was appropriate.

We think under either the specific or the more

general standard that we advance, the conclusion should be reached that neither employers nor unions in these wrongful discharge duty or fair representation cases should be subject to the threat of punitive damages.

Now, if the Court does not accept that basic position that punitive damages are never available in fair representation cases, we think that the filing of the Foust grievance two days out of time is not illegally sufficient basis to support the award in this case, and that is because the prevailing requirement, as we understand it, for an award of punitive damages is some showing of malice or willful or outrageous misconduct as opposed to a showing of negligence.

QUESTION: Is there any record of the grievance being filed out of time and having been considered in this particular shop?

MR. COHEN: I am not sure I understand what you mean by considered.

QUESTION: Well, suppose fifty times before the grievance filed two days later had been considered, that would be one thing. If it was uniformly never considered, wouldn't that be enough?

MR. COHEN: I don't think there is any such showing here, and --

QUESTION: One way or the other?

MR. COHEN: One way or the other. To the extent

that it is relevant, Jones, the first level representative, testified that in his three years in that position he had handled seven or eight grievances, each had come directly from the employee involved, there was no indication that there was any problem of timeliness, and he then went on to state that it was because this case was different that he took the time to check with his superior and the letters went back and forth.

We have set forth a number of cases, including this Court's decision only last term in Carey v. Piphus, which seems to require, as we suggest, a showing of some sort of malicious intention or deliberate violence or oppression. I won't go into all of those here. They are set out in our brief, as is Dean Prosser's work.

In fact, the court below seemed to be aware that it was using a lesser standard than some of the other courts, including those on which it purported to rely, but it didn't explain why its lesser standard might be correct.

Now, when it looked at the facts here, the Tenth Circuit noted, "The time available to the union was limited," and it was limited because Foust's prior attorney used up 52 of the 60 days available. But the court nevertheless faulted the union for engaging in what it called needless correspondence back and forth during the remaining eight days, and for insisting on an authorization from Foust.

So at most and in the Tenth Circuit's own view, the union was guilty of negligence or an error of law or of judgment which does not even approach the kind of malicious or willful misconduct which is required to support a punitive damage award.

I would like to add a final word in that regard. This Court's last statement on the duty of fair representation was in Hines v. Anchor Motor Freight, and one of the points made there was that a mere error of judgment was not sufficient to find a breach of a duty. Well, we may not argue that here, but I would submit that if it is not adequate to find a breach of the duty -- and that is in essence what happened here -- a fortiori is not sufficient to support an award of punitive damages.

On either of the bases, therefore, we think the judgment of awarding punitive damages should be reversed. And unless the Court has further questions, I will save my remaining time.

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

Mr. Mackey.

ORAL ARGUMENT OF TERRY W. MACKEY, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. MACKEY: Thank you, Mr. Chief Justice, and may it please the Court:

The beginning point of the argument was Vaca v.

Sipes' statement "we hold that such damages are not recoverable from the union in the circumstances of this case." That case, in the next paragraph, goes on to say, "The appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach."

We rely in our brief on Textile Workers v. Lincoln Mills, a case decided in 1957, and in that case they went into the statutory history of the Labor-Management Relations Act, and admittedly the Actshere, the Railway Labor Act and the LMRA, are very similar in their approaches to the solving of union problems.

But Lincoln Mills, like Vaca, leaves it almost to an ad hoc approach to each case for the District Courts. There is no guidance one suspects in later cases unless you can take such cases as Harrison v. United Transportation Union, a case in which certiorari was denied in 1976 in this Court, in which it was stated by the Fourth Circuit Court of Appeals that unless punitive damages are available an employee may lack the strong legal remedy necessary to protect his rights against a union, which is either maliciously or in utter disregard of his rights, denied him fair representation.

To say that this Court then, when it denied cert, did not have that issue before it to consider is one that I cannot say was raised in the petition for certiorari, but I can say it was certainly an issue in the case and appears to

have been decided by this Court at that time.

It would seem then that if in fact it is an ad hoc approach that we must take, you must examine in each case, to quote Vaca, the circumstances of the case.

The union has always glossed over the real relationship between Mr. Foust and the defendant in the court below. The problems between Mr. Foust, as the record reflects in each and every instance, is that in April of 1970, Mr. Foust contacted Mr. Jones, whose deposition was referred to in prior argument. Mr. Foust received no response to that and indeed subsequently contacted Mr. Jones again in November through his counsel, Mr. Moriarity, who was then representing him in the matter of his personal injury case with the railroad, asking why some action had not been taken on the 1970 written letter, which is in the record, to Mr. Jones. No action had occurred on that.

On September 8th, meanwhile, the union was conferring among itself. Mr. Wisniski, the other defendant, and Mr. Jones in fact were writing letters to each other about what to do about Mr. Foust. Neither of them contacted Mr. Foust until December 8th, however, and then Mr. Jones and Mr. Foust had a telephone conversation in which Mr. Foust alleged that Mr. Jones told him that the union would do nothing for Mr. Foust because he had retained counsel in his FELA case and therefore he could take his counsel and do as he would with

his contract relationship with the railroad.

That is a dispute fact before the Court, but taking the rule of the evidence most favorable to the prevailing party, that seems to be an appropriate fact.

The next item is that the railroad then became involved with Mr. Foust and there were two pieces of correspondence resulting in the February 3rd letter discharging Mr. Foust. That letter purportedly by the union to be only a relationship dealing with a relationship between Mr. Foust and the railroad, was the termination letter with copies sent to Mr. Wisniski, the other defendant in the case. Consequently, Mr. Wisniski -- and the record reflects this -- thereupon two days later -- Mr. Foust was discharged on February 3rd, and two days later, on February 5th, Mr. Wisniski again wrote to Mr. Jones, saying please send me all that you have on this matter. Promptly thereafter, Mr. Jones responded to Mr. Wisniski by sending him a copy of a leave of absence form, and that was all that he had in his records, Mr. Jones had in his records relating to that.

Again, the union had no correspondence with Mr. Foust directly. Subsequently, Mr. Moriarity thereafter, the attorney for Mr. Foust, in an attempt, believing that the discharge was so patently wrongful on its face it could simply be resolved by confrontation with the railroad, wrote to the officer who had signed the discharge letter. He

received no response. Again, these matters are in the record. He received no response. He called that same officer, and that officer said, well, this is a matter for the union to take up.

Mr. Moriarity then, on March 26th -- and that letter is set out in a footnote in the opinion of the Tenth Circuit -- Mr. Moriarity then wrote to Mr. Jones of the union. That was either the 51st or 52nd day. The record says 51, and there is argument that it may have been the 52nd day, but in any event we know that that letter was received -- it was mailed on the 26th of March, and that was taking the date most favorable to the jnion, even the 52nd day, and received in Rawlins, where Mr. Jones was, on the 27th, the 53rd day.

Mr. Jones promptly called Mr. Wisniski, the other defendant, and he said now what do I do, and Mr. Wisniski promptly wrote the letter set forth of the 5th of April, one day too late, saying -- he typed that letter and he sent it to Mr. Jones, and he said to Mr. Jones, "Now, you mail that to Mr. Foust, saying we are not going to recognize his request for us to handle his grievance."

The simple fact was, that was done on March 30th. The first correspondence relating to Mr. Foust's grievance was March 30th, the 55th day, plenty of time in which to obtain the necessary form, which was a very simple letter saying -- it was a letter addressed to Mr. H. M. Robertson,

it is in the appendix to the brief, and it says, "We have a grievance on behalf of Mr. Foust, that he was wrongfully discharged, and we will send you the details." And so that was a simple proposition.

All of this took place, again, between Mr. Wisniski and Mr. Jones of the union, without contact with Mr. Foust. Then, again referring to the relationship between Mr. Foust and the union, at that point the letter of the 5th from Mr. Wisniski to Mr. Jones says, "You had better send this letter, the one saying we are not going to represent you, to Mr. Foust so we don't get into litigation." Then promptly thereafter Mr. Jones sends the notice of grievance to the railroad, and shortly thereafter, on the 9th of April, sends an explanatory letter to Mr. Foust, the first writing of explanation by the union from April 17, 1970, to April 9, 1971, by the union to Mr. Foust. That is the relationship that existed.

In fact, the letter of grievance -- I refer to it as the letter of grievance -- the letter to the carrier, the railroad, is in the record twice. It bears two handwritten dates, each written by Mr. Jones, both of them unfortunately late, but one of them later than the other. The ultimate decision was that the letter of the 6th, the grievance letter of the 6th was the appropriate one. There is another identical letter in the record with a handwritten date that shows

it was mailed on the 8th.

The inferences that may be drawn from that are that the relationship between Mr. Foust and his union was not quite as simple as the union might want it to be or might conclude it to be on the basis of those facts. There had been prior conduct between the union and Mr. Foust that would indicate, according to the trial court's instruction, one of the necessary requirements, a wreckless, wanton disregard of the rights of Mr. Foust, or oppressive conduct on the part of the union as defined by the trial court, and the trial court --

QUESTION: Mr. Mackey --

MR. MACKEY: Yes, sir, Mr. Justice Marshall.

QUESTION: -- as to all of that that has transpired, before the letter was written, the late letter, could your client have recovered damages?

MR. MACKEY: For his --

QUESTION: From the union.

MR. MACKEY: From the union?

QUESTION: Yes.

MR. MACKEY: No, sir. If they had filed within time?

QUESTION: Yes.

MR. MACKEY: No. If they had filed in time, you would have no --

QUESTION: Well, what is all of that good for?

MR. MACKEY: I beg your pardon, sir?

QUESTION: What is all of that good for us in this case?

MR. MACKEY: The question is punitive damages. The question is, therefore, what is --

QUESTION: Could he have sued for any kind of damages? He couldn't have sued for that.

MR. MACKEY: If --

QUESTION: The way these unions operate back and forth, you can't go to court every day on those, can you?

MR. MACKEY: No, sir. If I understand your question --

QUESTION: When a guy tells you what you can do with a paper, you can't carry that to court.

MR. MACKEY: I need to ask you, sir, if I understand your question correctly, if the union had filed in time would Mr. Foust have had a cause for action.

QUESTION: Yes, sir.

MR. MACKEY: If the union had filed in time, Mr. Foust would have no cause for action.

QUESTION: And he certainly couldn't have gotten punitive.

MR. MACKEY: No, sir. The question of --

QUESTION: Was it ever determined by anybody that there had been a wrongful discharge? That wasn't submitted to the jury, was it?

MR. MACKEY: No, sir, it was not. In fact, the instructions --

QUESTION: In fact, they kept it from them.

MR. MACKEY: The instructions were to the contrary, at the request of the union.

QUESTION: Well, what do you think about -- I am just curious -- about recovering from a union substantial damages, particularly punitive damages, without a determination that there had been a wrongful discharge?

MR. MACKEY: I feel that Mr. Foust should have had the benefit of the determination of the wrongfulness of his discharge. I think we have to assume, though -- and there is an exhibit dealing with that in the record --

QUESTION: Well, Mr. Foust, suppose there had been determined in this case that there hadn't been a wrongful discharge but nevertheless a breach of duty by the union, what would have been the damages?

MR. MACKEY: The damages would have been minimal, as suggested by counsel. Defendant's Exhibit Y, which is the report of the Second Division of the Railroad Board of Adjustment, which although not a complete determination on the merits, says -- it starts out by saying, first of all, "This grievance was filed untimely" --

QUESTION: Untimely.

MR. MACKEY: -- "but there is a subantial question

of the justice in this decision because of the merits." And so it would seem to indicate that -- that was the union's exhibit -- it would seem to indicate that there was a meritorious claim here, although there was no determination of that. And that is the only exhibit in the record that would refer to that.

QUESTION: But apparently there was never any objection in this case at all to the instruction of keeping that issue from the jury as to the wrongfulness of the discharge?

MR. MACKEY: No, sir.

I cannot accept the premise that a union would never be entitled to have punitive damages assessed against it. I misstated that. I mean to say that I cannot accept the premise that a union somehow is isolated and may conduct itself in a vacuum without fear of retribution in the appropriate case, and that is all punitive damages are, is a retributive attempt by a civil plaintiff to deter a defendant from subsequent conduct of the same kind.

There is nothing in the history of the Acts in question here to indicate that such an approach is possible. Indeed, in Textile Workers v. Lincoln Mills, at page 195, I believe it is -- no, excuse me, at page 455, they were discussing the -- the Court there is discussing the legislative history, and Mr. Varden, of Congress, made the statement, "Mr.

Chairman, I take this time for the purpose of asking the Chairman a question. And in asking the question, I want it understood that it is intended to make a part of the record that may hereafter be referred to as history of the legislation. It is my understanding that section 302, the section dealing with equal responsibility under collective bargaining contracts in strike actions and proceedings in District Court, contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable as might be appropriate in the circumstances. In other words, proceedings could, for example, be brought by the employers, the labor organizations or interested individual employees under the Declaratory Judgment Act in order to secure declarations from the court of legal rights under the contract.

"Mr. Hartley: The interpretation the gentleman has just given of that section is absolutely correct."

So the legislative history would indicate that in relationships between the employee and his union, nothing was to be changed. All of the rights and remedies granted under the common law of this country would remain available, and indeed other statutory remedies, such as the Uniform Declaratory Judgment Act in state court or as the federal statues have adopted it would be available.

So that would seem to belie the position that at any

time Congress ever attempted to immunize labor unions from the kinds of damages necessary to deter conduct under appropriate cases.

QUESTION: Well, Mr. Mackey, is your theory that the punitive damages can be awarded you under the state law of Wyoming and that Congress has not forbidden it in the Labor Act, or that your claim arises for any sort of damages against the union, arises out of the Labor Act?

MR. MACKEY: Our claim, because of the way it was phrase, is what is referred to as a statutory tort under the Federal Labor Act itself. Now, this Court has decided in previous cases that had it come up under a state cause of action -- and I guess now you are beginning to pick names, how are you going to characterize this. For instance --

QUESTION: I think it is more important than picking names. I had understood that your claim was based on a federal statutory claim such as I understood Vaca v. Sipes to be.

MR. MACKEY: Yes, sir.

QUESTION: But your last few sentences of argument made me think that you were urging that this was sort of a common law type of thing that Congress simply hadn't pre-empted.

MR. MACKEY: No. I am suggesting that -- and the purpose of that last quote was to suggest that in drafting

the legislation referred to and relied upon by appellant in this case, they have misconstrued the legislative history. The legislative history did not intend to remove those civil remedies that would have existed had the Act never been adopted. And perhaps I am not making myself clear on that, but --

QUESTION: Had the Act never been adopted, you wouldn't have had any cause of action.

MR. MACKEY: There would have been no statutory tort, which brings me to the next point, that is -- again, now, picking names. There are almost identical cases involving state courts, arising in state courts. By the way, Vaca v. Sipes arose in a state court action, but the Laburnum case and the Russell case, cited in our briefs, and most recently Farmer v. United Brotherhood of Carpenters, a case decided in this Court in 1977, where the cause of action, almost identical to the one which Mr. Foust has, was characterized as an outrageous conduct case, a tort, a state tort of outrageous conduct.

Now, had Mr. Foust perhaps chosen to characterize those same set of facts set forth in his complaint as an outrageous conduct kind of case, then perhaps we would be here under a different set of facts, and that is the question of whether or not we would be under Wyoming state law remedies, and under Wyoming state law remedies punitive damages would

be available under those circumstances. But here we are talking about characterizing it.

It is the same set of facts, whether you call it outrageous conduct on the part of the union or whether you call it a statutory tort. I mean, the statute does not say that if the labor union fails to represent Mr. Foust, then there is a cause of action. These cases have all come up, beginning with Elgin and Jolliet, cited by counsel for the appellant, on the basis of an implied duty of fair representation, not written into the statute at all but indeed arising by virtue of the fact that Congress took away from Mr. Foust his right to bargain with his employer and gave that right to the union.

QUESTION: So it is a state implied right?

MR. MACKEY: I beg your pardon, sir?

QUESTION: Does he have a state implied right under common law?

MR. MACKEY: He would have a cause of action under the facts of this case similar to that --

QUESTION: Would he have a state implied right under a union contract? He wouldn't have that under common law, would he?

MR. MACKEY: Oh, no.

QUESTION: I didn't think he would.

MR. MACKEY: The right here is one that this Court

has created, and consequently this Court has left us in the position of adopting those cases like Vaca v. Sipes in trying to sort it out, and again we come back to what appears to be almost ad hoc an approach for the District Courts. And the problem that I have in that is that I do not believe that that is what the subsequent cases would take us to, although that is what the brief of appellant begins to lead us to. And it seems to me that if you adopt the position of Laburnum and Construction Workers, United Construction Workers v. Laburnum, and the Russell case, International Union of United Automobile Workers v. Russell, where punitive damages were totally allowed by the Court, the same is true in Carpenters, and again we find the language and the facts of the existence of the punitive damages in Harrison v. UTU.

Harrison v. UTU is in fact a duty of fair representation case as they are characterized out of the implied right created by statute, also known as the statutory tort. And so consequently, it seems to me that we have plenty of authority and that the real question here is not whether the Tenth Circuit Court of Appeals in its opinion went far enough, it relied upon the kinds of cases that are set forth in the brief, but whether or not the District Court, in giving the instruction that it gave on the question of punitive damages, was acting lawfully and in accordance with the law as it was then constituted based upon the cases we have cited.

The record, I believe, justifies an award of punitive damages in this case. I do not believe that there is any reason to believe, based upon the cases that go before that labor unions were ever immunized to the extent that they might conduct themselves in any way they see fit without fear of the usual remedies available, and consequently we feel that the case was tried appropriately and that the Tenth Cirtuit Court opinion is appropriate and correct and we would ask the Court to affirm.

Thank you.

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

ORAL ARGUMENT OF LAURENCE J. COHEN, ESQ.,
ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. COHEN: Briefly, Mr. Chief Justice, I would like to comment on two factual aspects. My opponent has referred to the matter of the 1970 grievance which Mr. Foust attempted to file.

Let me say at the outset that I think it has no bearing whatever on the late filing of the discharge claim. But I would like to clarify the record. What is revealed is that after his injury in March of 1970, Mr. Foust was withheld for several days from work by the company's doctor and he felt he should have been paid for those days. He sent a written grievance to the union, dated June 17, 1970. At that

time, he did it by himself.

The union representatives, conferring among themselves, concluded that this was not a question of interpretation of the contract but grew out of the injury claim which had to be handled with an entirely separate department of the railroad outside of the collective bargaining agreement or under the Federal Employer's Liability Act.

In terms of whether Mr. Jones contacted Mr. Foust, the record shows that he contacted him on two occasions by telephone. In his April 9, 1971, letter to Foust, he refers to the June 17, '70 grievance and notes that "I stated to you by telephone at that time that there are no provisions by agreement -- by the agreement for filing claims due to medical reasons or injuries." And he suggested that this had to be pursued under the FELA. That is at page 14a of respondent's brief.

In Mr. Moriarity's -- that is Mr. Foust's prior attorney -- letter to Jones of November 19, 1970 -- I'm sorry, it is the January 11, 1971 letter -- he refers to an additional phone call between them on December 8th. The only points I wish to make on this are that the matter was not ignored and that the union representatives concluded as a matter of substance that it related to a matter outside of the collective bargaining agreement.

QUESTION: Mr. Cohen, I notice on page 7 of the

appendix, where the amended complaint is set out, that paragraph one of the complaint is phrased in terms of diversity jurisdiction --

MR. COHEN: That is correct.

QUESTION: -- rather than federal question jurisdiction. Do you think that a person in Mr. Foust's position would have a right to sue under diversity jurisdiction in state courts for a common law type of breach of fiduciary obligation?

MR. COHEN: I would not think so. I think this is a federal question type of jurisdiction. As far as the Farmer case --

QUESTION: Did the District Court recite on what grounds it thought it had jurisdiction or not?

MR. COHEN: No, it did not.

QUESTION: I guess you don't --

MR. COHEN: That question really was not raised anywhere below.

My only comment on what I think is a completely untable comparison with Farmer is to say that if one reads the rather outrageous facts in that case against the failure by two days to file a grievance on time here, the disparate of the two cases is quickly apparent.

QUESTION: Well, now, wasn't Farmer a state tort cause of action?

MR. COHEN: Yes, it was.

QUESTION: The question was whether it was pre-empted by the labor --

MR. COHEN: Yes, that is correct. It has no relevance here whatever. I was slightly offended at the comparison that this case is just like Farmer. It is radically different.

Mr. Justice Rehnquist, I would like to add one further comment to the question you raised before by pointing out that in a sense section 8(b)(2) of the National Labor Relations Act likewise imposes a fiduciary duty on unions vis-a-vis its members, and yet the same universally accepted rule under the NLRA that punitive damages are not available would obtain, and we go from there to the fact that under 303 as held in Morton and under 301 as held in Howard Johnston, the remedial principles of the NLRA extend to the LMRA as well.

QUESTION: Your sections are too much -- I am still at the "Dear Sir" and "Brother" stage of my knowledge of labor law.

MR. COHEN: All right. I hope we can take it as given that under the National Labor Relations Act as such, the '35 Act, that only remedial relief is available. In 1947, Congress amended that Act through the Labor-Management Relations Act and it provided some new -- first of all, it

provided a new set of union unfair labor praftices, including 8(b)(2) that they may not ask for the discrimination of employee against employees on the basis of membership, and it also added the 303 statutory tort, where there has been a breach of the -- or there has been a secondary boycott or jurisdictional strike, the employer has that additional remedy, but under Teamsters v. Morton only remedial relief is available, and also an independent breach of contract action, and that is 301.

The only other point I would make is that we think it is incongruous to suggest that a plaintiff in such a case as --

QUESTION: What about the 301 law, is it clear that there are no punitive damages ever allowed?

MR. COHEN: We think so. There have been one or two District Courts which at the motion stage have said we won't rule it out.

QUESTION: This is against employers?

MR. COHEN: It could be against either. Brooks Shoe, interestingly enough, was a union suit against an employer, but it works the other way as well.

QUESTION: And no punitive damages against employers?

MR. COHEN: I am not aware of any actual award of punitive damages in any 301 case.

QUESTION: Well, has it been raised and rejected or

not?

MR. COHEN: It has -- well, it has been expressly rejected by the Third Circuit in the Brooks Shoe decision that we cite. Two District Courts at the motions stage have said we are not prepared to say they can never be awarded, but there was no decision on the merits of that question.

Our final point is that we think it would be incongruous to allow a plaintiff in these cases to recover more from his union in this situation than if the union had filed a grievance and he would have been entitled to against the employer itself.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:52 o'clock p.m., the case in the above-entitled matter was submitted.)

- - -