In the

Supreme Court of the United States

UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, ET AL., PETITIONERS,	)	No. 80-289
V.	)	
NATIONAL LABOR RELATIONS BOARD ET AL.;	)	
and	)	
NATIONAL LABOR RELATIONS BOARD, PETITIONER,	)	No. 80-692
V.	)	
AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.	)	

Washington, D.C.
April 28, 1981

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ORIGINAL

C O N T E N T S

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The above-entitled matters came on for oral argument before the Supreme Court of the United States at 10:10 o'clock a.m.

APPEARANCES:

HARLON L. DALTON, ESQ., Office of the Solicitor General, U.S. Department of Justice, Washington, D.C. 20530; on behalf of the Petitioner National Labor Relations Board.

HARRISON COMBS, ESQ., 900 15th Street, N.W., Washington, D.C. 20005; on behalf of the Petitioners United Mine Workers et al.

DANIEL F. GRUENDER, ESQ., Shimmel, Hill, Bishop & Gruender, 111 West Monroe, Phoenix, Arizona 85003; on behalf of the Respondents Amax Coal Company et al.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will turn to our first case and we'll hear arguments in United Mine Workers v. the Labor Board and the consolidated case. Mr. Dalton, you may proceed whenever you're ready.

ORAL ARGUMENT OF HARLON L. DALTON, ESQ.,
ON BEHALF OF THE PETITIONER NATIONAL LABOR RELATIONS BOARD

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

This case comes to the Court on a writ of certiorari to the United States Court of Appeals for the 3rd Circuit. Two petitions were filed, one by the United Mine Workers and a second on behalf of the National Labor Relations Board. I should add that the Department of Labor, which administers ERISA, is not a party in this proceeding but concurs in the views presented by the Labor Board.

The question presented in both cases is whether a management-appointed trustee of a jointly administered Taft-Hartley trust fund is a collective bargaining agent within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act, which forbids unions from coercing employers in the selection of their collective bargaining representatives.

In practical terms, at issue in this case is whether a union may strike as part of its effort to induce an employer to contribute to a multiemployer, as distinct from a single

employer, pension, or welfare fund.

Now, although the dealings between Amax Coal Company and the union in this case were rather complex, the facts that relate to the sole issue that's before this Court are rather straightforward. Amax Coal Company mines coal. It does so primarily in the midwest and in deep shaft bituminous mines. It bargains with the UMW through the Bituminous Coal Operators Association with respect to its midwest operations.

Now, in 1972, Amax Coal Company opened its first surface strip mine in Gillette, Wyoming, called the Belle Ayr mine, and that's the subject of this litigation. Amax did not negotiate through the BCOA in connection with the Belle Ayr mine but instead entered into a separate agreement with the mine workers that was patterned on the BCOA contract. And pursuant to that independently negotiated contract Amax contributed to the union's national multiemployer pension and welfare funds.

In January of 1975, at the expiration of that Belle Ayr contract and the expiration of several other western surface mine contracts, the union struck the Belle Ayr mine and the mines of other western coal operators. The following month, in February, the union and Amax began negotiations over the Belle Ayr mine but they reached an impasse in March and in mid-March -- I think, March 17 -- Amax resumed operations at the mine under its last contract proposal. Over the course of the next year the parties engaged in sporadic negotiations but no

agreement was ever reached between them.

QUESTION: Mr. Dalton, does the Government concede that if the person in question here was a collective bargaining agent rather than a trustee, there was coercion on the part of the union?

MR. DALTON: Yes. Now, among the sticking points which led to the impasse was -- and there were several, but there's only one that's before this Court today -- was Amax's refusal to continue to contribute to the multiemployer pension and trust funds. Those funds were set up pursuant to Section 302(c)(5) of the Labor Management Relations Act, the Taft-Hartley Act, and provide for comprehensive health and retirement benefits. Those funds are administered pursuant to that section by three trustees, one appointed by the union, one appointed by management, and the third trustee to be appointed by the other two.

At the time the negotiations between Amax and the union began over the Belle Ayr mine, the trustees were already appointed, the trust funds were set up, and the trustees were engaged in the active administration of them.

Now, while acknowledging that the union's trust fund proposals were mandatory subjects of collective bargaining, Amax took the position that the management-appointed trustees were collective bargaining representatives and that therefore the union's insistence to impasse, the union's striking in an

effort to induce the company to contribute to those trust funds constituted a violation of Section 8(b)(1)(B). And that's because the trustees were already selected at the time negotiations took place. Amax filed an unfair labor charge with reference to this issue. They filed other charges but they are not before the Court.

QUESTION: Mr. Dalton, may I ask one thing?

MR. DALTON: Yes.

QUESTION: I gather the Belle Ayr mine was not part of the collective bargaining unit in connection with which the original trust fund was set up. Is that right?

MR. DALTON: That is correct. Well, the Belle Ayr mine was not; that's correct.

QUESTION: The Belle Ayr mine was not?

MR. DALTON: Right.

QUESTION: And the demand of the union was that, nevertheless, the contributions to the pension fund be made to the trustees set up under a different unit than this. Is that it?

MR. DALTON: The trustees of one of the national pension and welfare funds; yes.

QUESTION: And there's no question of the legitimacy of that demand and that it is the subject of mandatory bargaining?

MR. DALTON: Yes. No one has -- in fact, that issue

was fairly foreclosed by the opinion of this Court, I think written by you, in Allied Chemical & Alkali Workers.

QUESTION: Yes.

MR. DALTON: And the Board rejected Amax's contention and concluded that trustees are not collective bargaining representatives. The Board stated that trustees are "solely fiduciaries owing undivided loyalty to the beneficiaries" of the trust. A two-judge panel of the court of appeals reached the opposite conclusion and pro tanto refused to enforce the Board's order. In a nutshell, we submit that Congress did not intend for Taft-Hartley trustees to function as agents for either unions or employees while engaged in the administration of a trust; that trustees cannot do so without violating duties imposed upon them both by the common law and by ERISA: and that Taft-Hartley trustees do not in practice engage in collective bargaining.

Now, these arguments are laid out in our briefs, and I don't intend to elaborate on them here unless, of course, the Court wishes otherwise. Instead I propose to address my remaining time to three considerations. One, the meaning of the term "representative" as used in Section 302(c)(5). Second, the equal representation provision of that section, what it means, what it's designed to accomplish, and how. And third, some of the legal and institutional consequences of the decision below. If all goes according to plan, my colleague of this

side of the podium will address the impact of the decision below on multiemployer funds, and particularly on the funds at issue in this case.

I note at the outset that the term "representative" is not a term of art. It has no fixed meaning within the National Labor Relations Act or the Labor Management Relations Act and as this Court unanimously observed in United States v. Ryan, one Justice not participating, the terms "representative" and "collective bargaining representative" are not synonymous.

Amax argues that representative refers to persons who advance the interests of the parties that appoint them. That construction however, as we demonstrate in our brief, is flatly inconsistent with Section 302's requirement that contributions be held in trust and that they be held in trust for the sole and exclusive benefit of trust beneficiaries.

QUESTION: Let's assume that, of course, a trustee represents no one except the interests of the trust. I take it you agree that that's so?

MR. DALTON: Absolutely; yes.

QUESTION: But in a sense, does not -- is not each of the trustees, one appointed by the union and one by the employer, a representative in a limited sense?

MR. DALTON: Yes, Mr. Chief Justice, but it's our position that they represent those parties, that the limitations of that representation are such that in any instance in which

the interests of the parties to the collective bargaining agreement might possibly conflict with the interests of the beneficiaries, then the former must recede, and therefore it's inappropriate to consider them as collective bargaining representatives because the latter owe an undivided duty of loyalty to the parties that they represent.

It's our position, it's the common law, that trustees must eschew the interests of third parties, that they owe a sole primary exclusive obligation to trust beneficiaries. That's also -- ERISA has codified the common law and has essentially made those principles matters of federal statute, and therefore the most that can be said of the term representative as used in this Section 302(c)(5) is that it means, in effect, designee; refers to the fact that trustees are appointed by unions and employers.

So the next question is, to what end? What is the purpose of the appointment of trustees by employers? And in particular, what is the purpose of the equal participation rule, that for every trustee appointed by a union there must be a trustee appointed by an employer?

Now, it is common ground that this equal participation rule was one of a set of strictures. The requirement that contributions be made into a formal trust is another, set up by Taft-Hartley to deter unions and union officials from misusing and misappropriating pension and welfare funds.

However, there's a serious division among the parties with respect to how that's to be achieved. It's our position that by their mere presence employer-appointed trustees serve to check potential pension abuses. Furthermore, by participating in the actual workings, administration of the trust, trustees are in a position to discover and ferret out abuses and to take whatever steps are appropriate, including the commencing of lawsuits for breach of fiduciary responsibilities.

Thirdly, because they are equal in number to the union-appointed trustees, the management trustees are in the position to block any efforts by their colleagues to advance the union's interest.

None of these steps requires the slightest deviation from the exclusive obligation, exclusive duty of loyalty that trustees, management-appointed and union-appointed alike, owe to the beneficiaries of the trust. In marked contrast, the 3rd Circuit conception of how this watchdog provision is to operate is premised on the trustees' exhibiting at best divided loyalties. The court of appeals stated that the trustees of a Taft-Hartley trust are "expected to advance the interests" of the appointed parties.

The court took the position that this advancing of private party interest or third-party interest was "essential to the operation of Section 302(c)(5), and that the clash of party interests creates "a distilling process which would provide

safeguards against trust fund corruption."

Now, whether or not this approach would root out corruption, we submit that it would have the inevitable collateral consequence of undermining orderly administration of trust and of fostering pursuits and interests that are alien to, or in any event, not congruent with the interest of trust beneficiaries. This ongoing collective bargaining within the administration of the trust, as the court of appeals termed it, would lead to frequent stalemates, broken either by resort to arbitrators, compulsory arbitration, which I might notice are contrary to the way we normally think of collective bargaining, or impasses broken by horse trading in which concessions on trust issues might well be exchanged for concessions on non-trust issues.

Now, that compromise or subordination of the interest of trust beneficiaries is but one of the consequences of the decision below. In addition, the introduction of collective bargaining considerations into the day-to-day administration of trust would have the effect of injecting the National Labor Relations Board into the routine matters of trust administration. Whenever a disappointed party, be it a beneficiary of the trust or a trustee, concluded that one of the trustees had failed to engage in good faith collective bargaining, then that person would be entitled to file with the National Labor Relations Board an unfair labor practices charge.

And so, contrary to the scheme that was set up by Congress in which Section 302 of Taft-Hartley is reserved to the courts, the National Labor Relations Board would assume jurisdiction over the administration of trust funds.

QUESTION: Mr. Dalton, may I ask you a question?

MR. DALTON: Yes.

QUESTION: I remember reading somewhere in the briefs that the trustees of this fund had the power to set the royalty rates on salvage coal --

MR. DALTON: Yes.

QUESTION: Which I gather is a method of determining how much is contributed to the trust funds by the employers?

MR. DALTON: With respect solely to refuse or salvage coal.

QUESTION: To the extent that they have the power to determine the level of contributions by the employers, are they not determining a matter which would normally be subject to collective bargaining?

MR. DALTON: Yes, but they would do that by virtue of the agreement of the parties during collective bargaining. In other words, that provision which --

QUESTION: Well, supposing the collective bargaining agreement had an open-ended provision saying the trustees shall determine from month to month how much the employer shall contribute to the fund. Would they then be representatives within

the meaning of the Act?

MR. DALTON: I would submit not. That's obviously a more difficult case than that presented here in which every one of the rates of contribution in the collective bargaining agreement would be set in the contract, except for refuse or --

QUESTION: Royalties on the salvage coal. But why -- you say it's not significant that that's limited to salvage coal? You're saying, even if they had an open-ended power to fix the contribution rate, they'd still not be representatives?

MR. DALTON: They still would not be collective bargaining representatives, so they would indeed obviously be engaged in the setting of those rates.

QUESTION: Well, what if they were to determine the hours of work on which royalties would be paid or the --

MR. DALTON: Well, then we begin --

QUESTION: At what point do they become representatives?

MR. DALTON: That's -- at that point I begin to worry because at that point, and maybe even at some point prior to that, they're engaged in brokering the relationship between employers and employees, which is one of the hallmarks of collective --

QUESTION: It seems to me they're doing that as even with the smaller item of royalty rates on salvage coal.

MR. DALTON: Except that one of the other hallmarks

of collective bargaining representatives is that, is that what they are negotiating around is the contract. I take it that in your hypothetical the trustees would be making those judgments in connection with administering the trust instrument, or at least the trust funds.

QUESTION: Well, if the trust instrument gave them the power to adjust -- to make a term of the collective bargaining agreement, which in effect it does when it says, how much money shall be contributed to the fund? That's normally in the agreement rather than in the trust instrument. They are getting -- it seems to me they're getting bargaining power.

MR. DALTON: Well, a third distinction between bargaining parties and trustees is that when the former reach impasse, they're entitled to -- at least, if we're talking about issues that are mandatory bargaining issues, they're entitled to resort to their economic weapons, strike, lockout, et cetera, whereas under Section 302(c)(5), when trustees reach an impasse, either that impasse is broken by neutral trustees, if such exist, or the trustees are entitled to themselves appoint a compulsory arbitrator or to ask the district court to do so. And I take it, under your hypothetical, that if the trustees were -- to accept the trustees are empowered to set royalty rates for salvage coal, any disputes would be resolved by compulsory arbitration, and that's a different mechanism, at least, than this typical collective bargaining.

QUESTION: But the employer here doesn't want his royalty rate set by either the trustees selected by the employees or or by the compulsory arbitrator selected by them. In either event, is not that person doing something that the employer would like to have his own representative have a voice in? Isn't that the problem?

MR. DALTON: Well, I just have a couple of responses. At the point that the trustees would be reappointed, Amax at least theoretically could have a voice in selecting the employer trustees.

QUESTION: Well, Mr. Dalton, didn't Amax, as to its membership on the multibargaining unit, did have a voice in the selection of this trustee?

MR. DALTON: In fact, Amax -- yes -- that's precisely -- Amax -- Number one, Amax did select these trustees in connection with this deep shaft bituminous mine --

QUESTION: Then your argument is, not that this is not a representative, but he's not being compelled to take a representative he didn't have a voice in selecting. That's a different argument.

QUESTION: I thought you had conceded that there was coercion?

MR. DALTON: I did concede that there was coercion, but not for all time. The point that I began to make in response to Justice Stevens' question was that the 51 percent, employers

representing 51 percent of the contributions are entitled to select the employer-appointed trustees, so there might come a time in which Amax could ally with other employers and select a trustee. Second --

QUESTION: Well, Mr. Dalton, am I wrong? I thought that Amax did have a voice in the selection of this particular trustee through BCOA, did it not?

MR. DALTON: That is absolutely correct. That is absolutely correct.

QUESTION: If that's your argument --

QUESTION: Well, of course, it would turn out to be exactly the same, whether or not that was correct, wouldn't it?

QUESTION: That's right.

MR. DALTON: Yes, it would. Moreover, we note that --

QUESTION: The trustee is not a collective bargaining representative.

MR. DALTON: Yes. Moreover, we note that Amax did not have to agree to this particular provision or any other provision of the union's proposal in the course of this collective bargaining, as we stress in our reply brief. The duty to bargain is not an obligation to agree.

I will reserve the balance of my time for rebuttal.

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

ORAL ARGUMENT OF HARRISON COMBS, ESQ.,

ON BEHALF OF PETITIONERS UNITED MINE WORKERS ET AL.

MR. COMBS: Mr. Chief Justice; may it please the Court:

It is our position that the 3rd Circuit's decision holding that a management-appointed trustee is a collective bargaining representative jeopardizes collective bargaining relationship between the employer and employee in the coal industry. And further, that if this is upheld, that it could lead to the extinction of multitrust funds in the coal industry.

I think it's just a bit ironic that this situation grew out of a strike in the coal industry in 1947 in which John L. Lewis was demanding, among other things, that the operators contribute to the union certain amounts based upon the royalty of coal produced for the purpose of health and retirement funds to the union. The Congress, the sponsors of 302(c), stated that there was a danger that if these contributions were paid to the union, to John Lewis, at that time, as they were saying, that they could be diverted, and that they could lead to war chests on the part of the union for purposes other than payment to beneficiaries and participants in these funds.

Therefore, the Congress in enacting 302(c) insulated these contributions from the control of the union by the method of providing that, in the first place, under the contract, that the funds would have to be the subject of a written agreement in the contract on which they were going to pay, and for what purposes they were going to be used. The Congress further specified in 302(c) the benefits that could be paid from these

funds. It provided an equal balance of the trustees to be administered by the employer, the operator, and the union, by having a representative on the board of trustees. This has been in effect for the past 31 years. To my knowledge it has not been challenged on this basis that the 3rd Circuit has adopted in this case by any court in this country.

The Labor Board's opinion and the opinion of the Secretary of Labor and the opinion of the Solicitor on behalf of the National Labor Relations Board in my opinion is very correct. To my mind, if the trustee is a bargaining representative of the appointing employer or union, that would lead to the administration of these funds by the National Labor Relations Board to unfair labor practices, which I think has been in one court, at least, in the District of Columbia, that a claimant for benefits under the fund took the position that the union had not fairly represented him as a trustee of the fund and therefore that he was wrongfully denied a pension that he should have been delivered. That case is cited in our brief in Miniard v. Lewis.

The court rejected that argument and he said, no. The court said, no, that these trustees had the fiduciary obligation to represent the beneficiaries and the participants. And that was a sole obligation on their part. And I might point out to this Court that the argument between the beneficiary or the claimant, was between the trustees and not between an employer,

as would be the case of adjusting a grievance.

QUESTION: Do you disagree, Mr. Combs, with the proposition that on occasion under certain contracts the management trustee could be pulled in one direction and the union trustee in another over a question as to the administration of the trust?

MR. COMBS: Yes. I'll agree that that could occur, Mr. Justice Rehnquist, but it would be in the context these trustees would be bound by the trust agreement that's required under 302(c), and they would have to adjust as a fiduciary, they would have to adjust the disputes between them based upon their obligation that's specified in the trust agreement.

QUESTION: And if that would go to court or to arbitration or -- ?

MR. COMBS: Well, under the way that these trust agreements, it does not go to arbitration, it's a final judgment of the trustees on the eligibility that's specified in the trust agreements of that kind.

QUESTION: But supposing that we're talking about the price of salvage coal or the amount, as Justice Stevens asked Mr. Dalton, and the two trustees disagree on that, how is that answered?

MR. COMBS: That would be answered by the third trustee as provided for in Section 302(c). The two trustees, appointed by the employer and the union, have the right to

select the third trustee, and the third trustee, that's a balancing under the Act itself. So that is my point, that under ERISA, which is encouraging multibargaining -- there's a preamble in that -- and the common law of trust administration, that these trustees, even in the salvage coal that Mr. Justice Stevens asked about, that that is an administrative problem. It's refuse, it's a slate dump, and the trustees are authorized because it's just a question of determining how much coal, related to regular coal mining, may be in that slate dump. Now, if there's a disagreement between the two trustees or the three trustees -- and I might say this, that the neutral trustee, supposedly neutral, whatever he is, he gets ahold of these things too. It's an administrative act. It certainly isn't bargaining.

QUESTION: Would you say the same thing if the entire trust were financed by royalties; I don't know whether it is or not -- ?

MR. COMBS: It's partly, both.

QUESTION: If we assume it all was and the trustees had the power to decide what the royalty rate on coal would be, would it be $5 or $10 a ton, they would determine the entire economic burden on the employers of the fund?

QUESTION: I think that assumption would have to take into consideration that many of these operators don't agree to any such thing as that. The bargaining --

QUESTION: If you're right, then that's a matter of collective bargaining.

MR. COMBS: Well, it is a matter of collective bargaining but --

QUESTION: And I take it the point on the royalty coal is that that's a relatively small item in the total picture?

MR. COMBS: Yes.

QUESTION: If it were a big item, it would clearly be a subject that would be bargained out, wouldn't it?

MR. COMBS: Yes. But I might point out, Mr. Justice Stevens, what happened in this particular case. This trust fund was set up in 1974. It was in operation. It was in compliance with 302(c). Now, Amax said, look, we've got a better deal for our people than you've got in that fund. We'll give them more benefits. That's their strenuous argument. It's a strange argument that the employer'd be arguing that what I'm offering is better than what the union is asking for, but that was it. Both of them were placed on the table, they bargained that out, Amax would not agree to it. They never did agree to it. They broke the strike, and they still haven't agreed to it. That's collective bargaining. Now --

QUESTION: Does the record -- oh, excuse me, go ahead.

MR. COMBS: Sure. To follow your point hypothetically to its total conclusion, I think that if they agreed to that and set it up in conformance to the Act, that the trustees would

have fiduciary obligation to bargain that they have to carry out, and I don't think that any of the courts have said that if it's set up in conformity with 302(c), that because it's been set up prior to new operators coming in, that that is in violation of the Act.

Now, I might point out this, that this multiemployer fund, the BCOA had about 160 companies at this time, we have over 2,000 independent companies that bargain to go into that, and we are constantly having them coming in and going out in this industry. And to set up a forum that would be total at the beginning of the contract, it just wouldn't be practical. Because we've got new companies coming in and we don't get these kind of arguments, and what we're saying, that these funds are balanced, that they were paid under 302(c), and that these trustees -- sorry, but my time is up.

QUESTION: Let me ask you one question before you sit down, if I may. Does the record tell us whether there have ever been any disagreements on the royalty rate on the salvage coal which have had to be referred either to the arbitrator or perhaps back to the parties for clarification?

MR. COMBS: I might say this for the information, Mr. Justice Stevens, of you and the Court: I am a trustee. To my knowledge there's been no dispute. There's a formula that was adopted years ago with the trustees and they still follow that. It has to do with BTUs and stuff of that character, and

it's related to whether, to how many BTUs in there. They take that average of BTUs in the industry, and it's just a salvage proposition.

QUESTION: And I take it it's a formula that's well known to the parties and their agreement may in effect be interpreted as having accepted that as a proper approach -- ?

MR. COMBS: That is correct. To my knowledge, it's been in there for many years.

QUESTION: I see. Thank you.

MR. COMBS: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Gruender.

ORAL ARGUMENT OF DANIEL F. GRUENDER, ESQ.,

ON BEHALF OF THE RESPONDENTS AMAX COAL COMPANY, ET AL.

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

This case and the section of the statute, Section 8(b)(1)(B) has been before this court before. This particular case involves several key concepts in the whole system of our free collective bargaining system. But one of the first ones is -- which is contained in Section 9(a) of the Act -- and it's emphasized, of course, in the Pittsburgh Plate Glass decision, that the purpose of the Act is to assure to employees the fullest freedom of the exercise of their rights to collective bargaining, unit by unit.

Belle Ayr mine is a separate unit, always has been a

separate unit, never been part of the Bituminous Coal Operators Association.

Another key concept in our free collective bargaining system is that the parties' representatives will be free, that they'll be dependent, that one party cannot be compelled to have accepted or forced on him a representative whose interests he feels are adverse or for whom they cannot act in even a fair way. There are interplay of many other concepts in the labor-management area that enter into this case, the duty of fair representation, we're talking about fiduciary duties. There are many statutes involved and I know that you've got a lot of them laid out before you and you can come to judgment yourself on them. I would like to --

QUESTION: Mr. Gruender, may I ask a moment, am I right that you do have representative in multibargaining set-up through BCOA of which, as I understand it, your client's a member?

MR. GRUENDER: A separate bargaining unit as to Amax Coal --

QUESTION: I know, but --

MR. GRUENDER: -- is a member of the Bituminous Coal Operators Association.

QUESTION: But the fact is, the fact is that you did have a voice in the selection of the trustee through BCOA, did you not?

MR. GRUENDER: I did not. My client may have.

QUESTION: Your client did. Well, it did, not

"may have."

QUESTION: Well, somebody did.

MR. GRUENDER: Well, the way it -- somebody was a representative of the Bituminous Coal Operator's Association. Whether they were represented --

QUESTION: Of which your client was a member.

MR. GRUENDER: Whether they were at the time that they joined the BCOA or not, I don't know that. I really don't. The BCOA trustees were preselected and designated. I don't know if they were preselected and designated at the time Amax became a member of the BCOA. That's not a matter of the record in this case, sir.

QUESTION: No, but the fact is that your client is a member of BCOA?

MR. GRUENDER: My client, Amax Coal Company, is. The Belle Ayr unit --

QUESTION: And that there is a trust fund of which one of the trustees was selected by BCOA?

MR. GRUENDER: Well, I'm sure that the trustee was selected by BCOA. I don't know whether our client was a member at that time or not, and the record doesn't disclose that.

QUESTION: Well, now, assume with me for a moment that it was, and it had a voice in the selection.

MR. GRUENDER: Yes, sir?

QUESTION: Even if you're right --

MR. GRUENDER: Even if I'm right?

QUESTION: Even if you're right that the trustee selected by BCOA also is a collective bargaining agent, then you do have a collective bargaining agent administering the fund, don't you?

MR. GRUENDER: Well, no, because the Act dictates and guarantees to the parties unit-by-unit bargaining. There is no -- and it contravenes the requirements of the Act and the whole policies of collective bargaining for one unit to be able to force on another unit a representative or participation in a multiemployer trust that is basically the product of multi-employer bargaining. In the particular case involved with Belle Ayr, Belle Ayr was contesting, that unit was resisting an effort to be forced into another bargaining unit for whatever, for lack of a better description, was entitled, the Peabody Group, which was another separate multiemployer bargaining unit. That strike commenced at Belle Ayr. The Board found -- this is undisputed in the record. It's not an issue before you, but it is a fact. Since the other parties have gone into some of the preliminary facts, I suppose there's no harm in shedding light on this part of it.

The major issue in that strike that commenced was the strike by the union, the United Mine Workers, to compel Amax to participate in the Peabody Group. Now the reason that Amax did not participate in the Peabody Group, multiemployer bargaining,

was because the Peabody Group would not listen, was not willing to entertain an alternative pension proposal which Amax knew would be cheaper for itself, half the cost, essentially, of what the Mine Workers' plan was, better benefits, and with the same or better affordability; on that basis. And that was one of them. There were other areas where the bargaining group was adverse, or at loggerheads, or adverse to the interests of Amax.

And incidentally, that's a key point in bargaining, too. I think that what the Government and what the union have totally ignored here, and it's not brought on the record, is that bargaining is a matter of compromise, that the process of collective bargaining as we see it is not black and white. When the parties -- negotiation is defined, collective bargaining is defined in Section 8(d) of the Act; it involves a negotiated agreement or any question arising thereunder. That's where you get the grievance and arbitration, adjustment of grievances provision of our national labor laws. For example --

QUESTION: When the unions struck to demand that Amax join the multiemployer group, didn't the NLRB file an unfair labor practices charge against them?

MR. GRUENDER: Well, the employer filed an unfair labor practice charge and the National Labor Relations Board issued a complaint. Eventually that complaint was found to be meritorious by the Board and the court of appeals that the union struck to force Amax into that "Peabody Group" or other

multiemployer unit. Now, let me give you a hypothesis that you might want to compare, because it's keyed to the understanding of what collective bargaining is, and you must make a determination on that issue, and if you are to determine if an 8(b)(1)(B) representative and a trust representative or an employer's representative on the trust, is engaged in collective bargaining. We must understand the process.

The process of collective bargaining can be roughly divided into two basic categories. One, where you're negotiating to obtain an agreement or to fashion an agreement. Once that agreement is fashioned, collective bargaining does not end. As a matter of fact, you then get into the grievance and arbitration process which has been sometimes called the administration of the collective bargaining agreement.

The collective bargaining representatives continue and in a multiemployer type of bargaining situation the employer, quite often there'll be what we call joint grievance procedures. That is to say, the employer representative, the union representative, will sit on a grievance panel, and one of the employers who is a member of that bargaining unit, multiemployer bargaining unit, will come in, he's been violating the agreement. The management representative and the union representative may be sitting in judgment on a management representative, and sometimes the management representative votes against the other management representative. And vice versa, for the union.

The process of collective bargaining, that's the adjustment of grievances, has been undisputedly and uniformly, where a multi-employer bargaining situation arises and the employer objects to joint resolution of grievances by a multiemployer group and says, look, they aren't collective bargaining representatives, they're adjusting grievances concerning the interpretation, application, and meaning of this agreement. We don't want them to do that, and says, we're not going to do that. The Board will automatically find them to be 8(b)(1)(B) representatives and not force the employer to accept joint resolution of grievance committees. On the other hand, the process of administering a trust, once it's negotiated -- and that's done at the table, negotiating the trust, in this case some of it's done by the trustees, as Justice Stevens has pointed out, or pointed out other sections of the trust, where they actually engage in negotiations or creation of provisions of the so-called contract or agreement.

But once that trust -- or, it's just like a collective bargaining agreement, and as a matter of fact, this trust is incorporated word for word into the agreement. The trustees are authorized, specifically, under the agreement, to interpret, apply, and adjust, and settle its terms. Literally do what the collective bargaining representatives do with grievances.

Well, anyway, once that occurs, the normal collective bargaining process of settling disputes that arise concerning

the meaning and application or the interpretation of a question arising under an agreement is what? It's normally through the grievance and arbitration procedure culminating in the compulsory arbitration. That's so commonplace in our lexicon of labor law that everybody just accepts it.

The very same process occurs on a trust fund. When the -- and remember the statutory choice is deliberate here. Congress was aware of compromise being an essential ingredient of collective bargaining. Congress had many options available to set up trust funds. They chose the compromise between labor and management and they also chose the same collective bargaining methods of adjustment that they foster in that Act.

For example, they said, instead of just establishing a separate organization we're going to -- in order to make sure the union does what's right, we're going to subject them to the conflict that occurs sometimes between labor and management. That's the best way to insure to employees the best deal. I'll get into that in just a minute because it's very crucial, it seems to me, to understand the advantage to the employees. In other words, I believe one of the myths here is that people are thinking that the sole benefit of the employees will never be taken care of by the employer or the union, and that for some reason the employer is always trying to undermine the union or the employees and vice versa. That's not true.

The key factor with most employers is, once the

agreement is made, is to make sure it's enforced, and that the beneficiaries of the agreement get the best of it. And there are quite often reasonable men disagreeing over what is the best way to do it, are both looking out for the best interests of the beneficiaries.

Insisting that employees get paid the highest wages in our country is not always good for the employees, as they sometimes find themselves priced out of the market and gone. So an employer who resists what appears to be a liberal wage demand may in fact be benefiting the rest of the beneficiaries, the employees,in helping save the business. The same thing is true for an unwarranted claim on a trust. If an employer representative resisted, or a union, he may be in fact preventing a wage, the assets or corpus of the trust, for other beneficiaries. The interests of all, sometimes, are not necessarily served by making a liberal interpretation of the fund so that it pays out things without regard to what were the basic assumptions when it was started.

QUESTION: Now, Mr. Dalton, earlier, in response to questions, conceded that the conduct here constituted coercion. Is what you're telling us that coercion may never appropriately be applied to a trustee, that the very concept of a trust and a trusteeship is incompatible with being subject to coercion from anyone on any subject?

MR. GRUENDER: No, sir. I believe that just as in the

instance where -- and I think the law is, that just as in the instance where a union cannot strike to compel an employer to agree to joint grievance arbitration procedures or joint, in a multiemployer bargaining context, that same reason exists to justify that he cannot be struck or coerced to select as a trustee someone who he would not have an opportunity to have confidence and trust in.

Now, once the distinction -- there's a distinction you've got to make, because they're polevaulting over, the Government, the union -- once an employer agrees to engage in multiemployer bargaining, he doesn't have a right to say, then, if we'd have joined the BCOA -- I don't have a right to then say the president of BCOA will be myself, or my law associate here or somebody else. I don't have a right to select who that representative is. But once I commit to the joint bargaining, once an employer commits to a multiemployer trust, and the cases are legion on that, he doesn't have a right to stand above all others and select who the trustees are going to be. But, just like in the situations of the joint grievance procedure -- the Teamsters are the most familiar kind of thing, tripartite kind of a joint grievance procedure -- once an employer says, I'm not going to agree to joint bargaining, then it completely defies the whole federal policy and it subverts it, of unit by unit bargaining, to say to him that he has to then put up with multiemployer trusts. Remember, multiemployer trusts do not exist

outside of multiemployer bargaining. They are a creature of it. The issue, the cardinal issue in this case before the parties was, will I be compelled to be bound by a bargaining group, which does not represent their interests?

In this case it wasn't even for the benefit of the employees, if that's the touchstone of collective bargaining.

What are the things they say about, what are some of the myths about multiemployer trusts? They say they're cheaper for the employers. They say they're better benefits. They also say that they're more portable. There's less liability for the employers. None of those are true today. Amax --

QUESTION: Mr. Gruender, may I interrupt just a second?

MR. GRUENDER: Yes, sir.

QUESTION: It doesn't seem to me that the issue is whether it's appropriate to bargain over whether you can join a multiemployer trust. You would object to the trust even if you had, even if you could appoint the employer trustee, it seems to me.

MR. GRUENDER: You mean on the basis that it wasn't as good? That was the thing that moved them to that point, but also the interests of BCOA trustees as opposed to the interests of the employees at Belle Ayr were adverse. There was no way that the Belle Ayr, that the BCOA trustees could act in the best interests of the Belle Ayr employees.

QUESTION: But that's a reason why you don't want to

participate in the multiemployer trust.

MR. GRUENDER: Yes, sir.

QUESTION: And that's totally independent of who the trustee is.

MR. GRUENDER: Yes, sir.

QUESTION: And -- but it is true, is it not, that there are many multiemployer trusts in which one employer is not necessarily a member of the employer association that is primarily responsible for the particular trust?

MR. GRUENDER: Where he agrees to participate -- and the cases on that are clear -- once you agree to participate in multiemployer bargaining, you have a right to come in and designate who the representative --

QUESTION: Some of your argument sounds as though you're arguing that, well, that you shouldn't be forced to participate in this multiemployer trust. Well, no one suggests you have to.

MR. GRUENDER: Well, on the contrary --

QUESTION: You just want to avoid the strike to make you.

MR. GRUENDER: No, no. There are permissive subjects --

QUESTION: You could just bargain to impasse and then see who can win.

MR. GRUENDER: The issue before this Court is, are

these people collective bargaining representatives or not?

QUESTION: I know, I know.

MR. GRUENDER: And if, in fact -- and they say that -- 30 percent of our compensation package in this country today is fringe benefits -- and if they say, and we all agree, that fringes, fringe benefit funds are mandatory subjects of bargaining, and so are wages, hours, and other terms and conditions of employment, which are handled by joint grievance representatives at a joint grievance procedure under a multiemployer trust. But it is very clear that the law does not permit the union to strike to force the employer to select as his representative to be bound by the representatives in a joint grievance procedure. But, on the other hand, the issue here is --

QUESTION: I understand what the issue is -- I know what the issue is --

MR. GRUENDER: What's the difference?

QUESTION: But nobody claims that you have to do it. I mean, all you --

MR. GRUENDER: Yes. They claim that the union is entitled to strike the employer to force him to be bound by the representative of a multiemployer trust --

QUESTION: You don't have to accede, though. Nothing in the law says that even if -- nothing says you have to agree, just because somebody strikes.

MR. GRUENDER: No, but there is a provision in the law

that it is not right for a union to strike to compel someone to select as their representative --

QUESTION: I understand.

MR. GRUENDER: -- someone who cannot --

QUESTION: I understand. If you win, you don't have to bargain to impasse. That's what you're saying.

MR. GRUENDER: No, that is -- the point is not, whether you win. If it's a matter of winning or losing, as you so aptly have pointed out, our client has stood their ground. The question is whether or not it encourages bargaining. There are other employers who are not as, perhaps as resolute as our client, and were able to persevere in the pressure that they were subjected to. The question is if what the trustees do is essentially the same thing in administering the terms, adjusting the grievances under the trust agreement, or as Justice Stevens has pointed out, in fact setting a contribution level, what collective bargaining representatives do, why is it fair to say that they cannot strike to force you to accept the BCOA representatives as your grievance representatives, but it is okay to be bound by another bargaining unit's representatives who also do the same thing for something that accounts for only 30 percent of the wage package?

So, what we're saying is that -- what we're really saying in our argument is that the duties of collective bargaining representative and the duties of trust fund representative

-- remember to look at the language in the statute. This is not just by chance they're called employer representatives, employee representatives; and as a matter of fact, instead of it's calling a third person as an arbiter, he's called the neutral. The parties recognize the conflict inherent.

Incidentally, in a multiemployer bargaining --

QUESTION: You haven't mentioned ERISA at all.

MR. GRUENDER: Well, in ERISA it merely reemphasizes what in fact the common law was with respect to 302(c) trusts before and codifies them. And it also recognizes the fact of life that practically all of the trustees, most of them, in a multiemployer situation are in fact the collective bargaining representatives, so that's fine, there's no problem with that. And that there is nothing inconsistent with a person being a fiduciary and a bargaining representative. As a matter of fact, under other statutes they have to to be, the union has to be. What's the duty of fair representation -- ?

QUESTION: You can wear two hats, but as mentioned in the brief, you can't wear them both at once.

MR. GRUENDER: The day has gone when we can look at a union representative as some big monster who's only interested in union goals.

QUESTION: The trustee has duties both under the common law or equity --

MR. GRUENDER: So do collective bargaining

representatives.

QUESTION: And under the statute now enacted by Congress called ERISA. And under ERISA there are fiduciary duties.

MR. GRUENDER: Well, he had them before, sir.

QUESTION: And they're not collective bargaining duties --

MR. GRUENDER: Well, they are collective bargaining duties, in our opinion.

QUESTION: Imposed by ERISA?

MR. GRUENDER: Well, ERISA doesn't impose collective bargaining duties.

QUESTION: No.

MR. GRUENDER: The National Labor Relations Act defines collective bargaining duties and the provision of the National Labor Relations Act is 302(c)(5). Now, Nedd v. Mine Workers clearly stated that ERISA did nothing more than codify what 302(c)(5) and the common law of trusts provided prior to that --

QUESTION: Or equity.

MR. GRUENDER: So, our point is that the conflict that they say exists between employer and union representatives, I think one of the points the briefs makes, I think, that the employer might have to make a judgment about another employer and there'd be a conflict of interest. That happens all the time in collective bargaining, that an employer passes judgment

on another employer, particularly, only, in multiemployer bargaining. There's nothing inconsistent with that at all.

QUESTION: I'm a little puzzled by your seeming to merge, maybe you didn't intend to merge the functions of the collective bargaining representative and the functions of the trustee. Now, it's true that a collective bargaining representative has a fiduciary obligation, but he owes that obligation just to one side, would you not agree?

MR. GRUENDER: No, I do not agree at all. For example --

QUESTION: Wait a minute, wait a minute. Don't you think a collective bargaining representative of the union owes his obligation to the union and not to the employer?

MR. GRUENDER: At what point? After an agreement is reached or thereafter? Once it's reached he holds an obligation to make sure the terms and provisions of that agreement are carried out.

QUESTION: I'm talking about reaching the agreement. In coming to the agreement all of his obligations and duties are to the people he represents just as an advocate in this Court owes the obligations to to his client and to the Court. Now, on the other hand, a trustee of the fund owes his obligation to the totality, does he not? Not just to the person who designated him but to the fund itself and the purposes of the fund?

MR. GRUENDER: A BCOA collective bargaining representative has the same obligation to all of the members of the association -- the union, to all the members of the union -- as he would if he were a trustee. Now, as far as the exclusivity, is the collective bargaining representative like a lawyer? I don't think so. The law is much more complex on that.

QUESTION: Well, certainly, the Chief Justice is correct that in the collective bargaining process itself, before the agreement is reached, or alternatively in the processing of a grievance under the agreement, a collective bargaining representative owes his exclusive and undivided loyalty to either the union or the employer? The person he represents.

MR. GRUENDER: Before an agreement is reached?

QUESTION: The association or person whose agent he is.

MR. GRUENDER: Subject to the law --

QUESTION: Like any agent?

MR. GRUENDER: Subject to all the requirements of the National Labor Relations Act, some of which impose obligations on the employer's representative to watch out for the interests of the employers. That's -- black and white.

QUESTION: Can a collective bargaining representative as defined in the National Labor Relations Act sit on a grievance panel, administering a collective bargaining agreement?

MR. GRUENDER: Can a collective bargaining

representative?

QUESTION: Yes.

MR. GRUENDER: Yes.

QUESTION: Well, then, in that case I take it he might well have occasion, as you have pointed out, to vote against -- if he's the management representative, he might nonetheless vote against one of his fellow managers.

MR. GRUENDER: In the multiemployer situation they do it every day.

QUESTION: But he is not then acting as collective bargaining agent.

MR. GRUENDER: I beg your pardon, sir, he is.

QUESTION: He can wear two hats but he can't wear them both at once, as we said earlier.

MR. GRUENDER: Well, I don't agree with that, sir. When a management representative sits on a joint grievance panel and an employer comes before him, another employer, a competitor, as a matter of fact, comes before him and he has to now decide, did this man fire this man unlawfully or did he not, many times employer representatives have voted, based on the facts, they become like -- unions and management in those situations become like umpires and they vote, well, yeah, we believe he violated the contract, he fired him without just cause, or he didn't pay him the right wages on the thing, and he'll vote against the management person. That happens every

day in collective bargaining. They are collective bargaining representatives and nobody questions it. And they are doing what they believe to be their duty, to carry out the terms of the agreement. As a matter of fact, once the parties reach agreement, to say that the union doesn't have any conflict among its members is to ignore reality. Sometimes the employees are fighting and the poor union would like to have the employer decide the question instead of being involved with a conflict between their members: who gets which job? Let's say these trustees are sitting there and there's $10 to spend for new benefits. Half of the membership want a dental plan; another one wants vision; another one wants major medical; and another one wants additional maternity. And the union business agent would rather have a management man make that decision. He doesn't want to go back to the union hall and listen to the union people complain about how he didn't do a thing. In other words, they have conflicts.

QUESTION: I've been listening very carefully to what you say and I read your brief, but you know my problem? The Government in its brief very carefully points out legislative history which says you are wrong. And neither in your brief nor today have you pointed to one piece of legislative history that helps you. Am I right?

MR. GRUENDER: Well, the legislative history, in my opinion, we didn't address that because I don't think the

legislative history is dispositive, or I don't believe it's that conclusive. I think it --

QUESTION: Isn't it helpful?

MR. GRUENDER: I think it suggests certain things but you've seen legislatures come and go, Your Honor.

QUESTION: It's really not helpful to you.

MR. GRUENDER: That's not it; really. I don't believe it's helpful to them. I don't think it says what they think it means. I don't think that something dropped out of a passage in Congress is that significant, particularly in the context of this particular legislation and the specific statutory language that was used. The section of the Act, 501(3) that says, the term "representative" as used consistently throughout the Act; the definition of "section" in Section 2; the clear delineation of the employer and employee representatives have a specific meaning, at least to employer and employee representatives; and the use of the term "neutral." Now, that means that somebody has a flavor to them, or a bias, if you will. Now, what I mean to say, and one of the myths here, is that -- and I've pointed it out, it's not in the suit -- they say that the destruction of multiemployer trusts will come about as a result of this.

All we can say is that that's just simply not true. For example, if this particular union wished to maintain the same program, it could have gone to the bargaining table and

insisted that the employer put up a duplicate fund, not with the same, with the representatives, but with the employers' representatives, and could have offered reciprocity to give them the portability, it could have offered the same benefits, and could have struck for that and there would have been no violation of the law, in our opinion.

If, on the other hand, they insisted on forcing him into another bargaining unit, a bargaining unit which in fact has a long history -- I need not cite authority for it -- of disruptions, labor disputes, which have caused problems with those funds -- that not only does an injustice to the Belle Ayr employees, who had nothing to do with those disputes and disruptions and could do nothing to prevent them through the grievance or arbitration procedure or any other way, it just does violence to the whole procedure of bargaining unit by unit.

No destruction of collective bargaining is going to come about as a result of this position. As a matter of fact, multiemployer trusts will stand or fall on their ability to provide to the employees whom they cover, and to the employers that they serve, what they hold themselves out to do, which is better benefits at less cost, with the same amount of portability. That, frankly, they have had a lot of favored treatment in law. Forty-year amortization schedules as opposed to 30, no -- very seldom are they covered with termination insurance. So they've had a little different set of rules to play

with and, frankly, many of the employers have been able to develop better programs for their employees at less cost. Now, there is no reason in God's world that I can see or in the National Labor Relations Act or reason or logic to require employers to be subjected to demands that they have representatives determining those fringe benefits, or be compelled to accept the strike, or take a strike, on an issue like that when those people stand almost on the same footing, in terms of function, from the standpoint of the labor laws, as an 8(b)(1)(B) representative who is adjusting the grievances concerning the provisions of the collective bargaining agreement.

QUESTION: Mr. Gruender, you haven't really argued this, but I've just been reflecting on your argument a little bit. Supposing you represented BCOA instead of just one operator and the union said to BCOA, we want you to designate John L. Lewis, Jr., as the employer trustee on the fund. Under your view, that's essentially -- and then they struck on that.

MR. GRUENDER: They struck the BCOA?

QUESTION: Yes.

MR. GRUENDER: And I represent the BCOA?

QUESTION: You say that BCOA, just say, I want to pick my own representative, and they say, no, no, we want John L. Lewis, Jr., or somebody like that.

MR. GRUENDER: The union did that?

QUESTION: The union did it. If the union did that,

under their view of the law, he would not be a representative and that would be a perfectly proper strike, wouldn't it?

MR. GRUENDER: That's their view of the law. I think they're dead wrong. I think the law doesn't support that kind of a demand. I think that when you understand what the trustees do, that there is nothing inconsistent between having fiduciary obligations and being a collective bargaining representative, and ERISA said so. And incidentally, in Vaca v. Sipes, the Miranda case, demonstrate that collective bargaining representatives literally are living by fiduciary standards. They have to. And the employer likewise. Times are changing. There is nothing inconsistent with them having both types of functions and acting in the best interests of the beneficiaries in the process, and the best interests of the beneficiaries of the process might be fighting the union on a particular claim which may not have merit, and that may be the best interests of the beneficiaries because it would avoid a wasting of the assets, a destruction of the actual assumptions, for example, on which the trust was based, so that the rest of the beneficiaries would have a benefit.

But the Board's error, in our opinion, is best evidenced, and the union's error is the same, is they confuse the thing. Look at Footnote 12 on page 20 of their brief, where they state that -- they mix up the fact that fringes are a mandatory subject and they said, well, since the trustee representative

is involved in that, that's a mandatory subject too. That's just like saying, wages, hours, and working conditions are a mandatory subject and the collective bargaining representative who determines the wages and hours and working conditions is the same.

I draw your attention to a case which I did not --

MR. CHIEF JUSTICE BURGER: Your time has expired now. If you'll just mention the case, briefly.

MR. GRUENDER: The case is Sinai Hospital. Incidentally, I heard a comment here about a reply brief. I never received a reply brief from the Government.

MR. CHIEF JUSTICE BURGER: Would you see the Clerk about that? I think there is one.

MR. GRUENDER: I have not received it, so I am unable to answer you. I have seen a reply brief from the union and I've hit most of their arguments.

QUESTION: There are two. There are two of them.

MR. GRUENDER: I have not seen the Government's brief. If there is a reply brief from them, that's news to me.

ORAL ARGUMENT OF HARLON L. DALTON, ESQ.,

ON BEHALF OF THE PETITIONER

NATIONAL LABOR RELATIONS BOARD -- REBUTTAL

MR. DALTON: I just have three quick points, actually four. With respect to the reply brief, I take it it was served

in the ordinary course and I can't really say more than that.

QUESTION: It's dated April 21, filed in the Clerk's Office. Is that in time?

MR. DALTON: Yes. It was one week before today. Mr. Chief Justice, I just want to clarify my concession with respect to coercion. That concession is limited to the acknowledgement that striking to induce an employer to contribute to a pension fund where the trustees have already been selected, that that strike is in a sense coercion, but certainly I'm not conceding that that's a violation of Section 8(b)(1)(B) or that in this case the union was attempting to coerce Amax to participate in multiemployer bargaining. That confusion of multiemployer bargaining and participation in a multiemployer trust fund, I think, is something that --

QUESTION: Mr. Dalton, would you respond to the question I put to your opponent --

MR. DALTON: Yes.

QUESTION: A moment or two ago? Could the union strike against an association and say, we want you to designate Mr. X as the employer trustee on the pension fund?

MR. DALTON: No, I think not.

QUESTION: Why not?

MR. DALTON: For two reasons. First, in my mind, that trustee, that suggested trustee by the union could well be characterized as a union trustee and would thus violate the

balancing of employer-appointed and union-designated trustees required by Section 302(c)(5).

QUESTION: No, if they -- what they'd do is say we want the employer to select a trustee from the following list, but the employer can make the selection and he will be the employer trustee.

QUESTION: That wouldn't be a mandatory subject of bargaining.

MR. DALTON: That's my second point. Yes, that would be a permissive subject and therefore the employer would not be obligated.

QUESTION: Would it violate the provision that prohibits the union from trying to designate the employer's collective bargaining representative?

MR. DALTON: I'm sorry?

QUESTION: This case arises as a violation of whatever statute it is that says the union cannot try to coerce the employer into selecting a representative.

MR. DALTON: Yes.

QUESTION: Now, would he be a representative for purposes of that section?

MR. DALTON: No, he wouldn't but nevertheless the union's demand would not be a mandatory subject for collective --

QUESTION: Well, it wouldn't be mandatory, it would be permissive. It isn't even permissive if the man is a

representative.

MR. DALTON: Well, my point clearly is the man is not a representative for purposes of Section 8(b)(1)(B) so then the question is, as it is here, assuming that the trustees are not collective bargaining representatives, then the question is, whether or not the union demand is a mandatory or permissive subject of collective bargaining. If mandatory, then the employer must take its part. If not, then the employer need not.

QUESTION: The union could say, to avoid your suggestion that he would become a union representative, say the union just said, we will not, we insist that you do not appoint Mr. X, the man you had before. He's been a pest in all our negotiations; we don't want him on the trust fund. They could do that, though?

MR. DALTON: My position is that the union could make that request or demand, but the employer --

QUESTION: Without violating this statute?

MR. DALTON: Without violating Section 8(b)(1)(B); that the employer need not accept it and that the union would not be entitled under the Act to bargain to impasse or strike over that issue. That's the distinction.

I have one other response, which is to your earlier question about salvage rates, though I wonder why I want to climb back in that pit. But, to the extent that trustees are

authorized to determine royalty rates, they must do so in the interest of the beneficiaries of the trust and not in order to advance the interests of either the employer or the union.

QUESTION: You mean they always take the highest possible rate?

MR. DALTON: If that's in the interest of the beneficiaries of the trust.

QUESTION: Well, it surely would be. I think you shouldn't have climbed back into that pit.

MR. DALTON: I've got the red light. I'm going to sit down. Thank you.

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

(Whereupon, at 11:14 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

NO. 80-289
UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854, ET AL.
V.
NATIONAL LABOR RELATIONS BOARD ET AL.

&

NO. 80-692
NATIONAL LABOR RELATIONS BOARD
V.
AMAX COAL COMPANY, A DIVISION OF AMAX, INC., ET AL.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Bill J. Cohen