In the

Supreme Court of the United States

CLIFFORD E. CLAYTON, PETITIONER,	)	
V.	)	No. 80-5049
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.; and	)	
ITT GILFILLAN, ETC., PETITIONER,	)	No. 80-54
V.	)	
CLIFFORD E. CLAYTON	)	

Washington, D. C.
March 4, 1981

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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

CLIFFORD E. CLAYTON, Petitioner, v. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.; and	:	No. 80-5049
ITT GILFILLAN, ETC., Petitioner, v. CLIFFORD E. CLAYTON	:	No. 80-54

Washington, D. C.

Wednesday, March 4, 1981

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

APPEARANCES:

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EVERETT F. MEINERS, ESQ., Parker, Milliken, Clark & O'Hara, 333 South Hope Street, 27th Floor, Los Angeles, California 90071; on behalf of Petitioner ITT Gilfillan, etc.

M. JAY WHITMAN, ESQ., Associate General Counsel, UAW; 8000 East Jefferson Avenue, Detroit, Michigan 48214; on behalf of Respondents UAW and its Local 509.

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PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in Clayton v. International Union and the consolidated case. Mr. McTernan, you may proceed when you're ready.

ORAL ARGUMENT OF JOHN T. McTERNAN, ESQ.,
ON BEHALF OF PETITIONER CLAYTON IN NO. 80-5049
AND OF RESPONDENT CLAYTON IN NO. 80-54

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

This is a Section 301 action instituted by petitioner Clayton, my client, claiming that his employer, petitioner ITT, discharged him without just cause in violation of the collective agreement and that his bargaining agent, the UAW, violated its duty to represent him fairly by withdrawing his discharge grievance from the arbitration process.

Clayton's action seeks what has been called by this Court in Vaca v. Sipes judicial enforcement of his contractual rights, and to us that means either a hearing -- it means a hearing before a tribunal which can either reactivate his grievance or determine his right to reinstatement.

In the court below both the ITT and UAW asserted as affirmative defenses Clayton's failure to resort to his internal union procedures. By virtue of an order of trifurcation that issue was tried first and the district court held

that the union procedures were adequate to afford him the remedy he sought and dismiss the action against both defendants. On appeal the dismissal of the claim against the union was affirmed and the dismissal of the claim against the employer was reversed and remanded for trial.

It is true and uncontestable that Clayton did not resort in any way to his internal union procedures. He was justified in that, we contend, because to have done so would have been an utterly idle act. The UAW procedures, we submit, were inadequate as a matter of law; they were inadeqaute in the facts of this case because they could not effect a reactivation of his grievance or his reinstatement; and they were inadequate because they were incapable of rendering a decision within the four-month period allowed in Section 411(a)(4) in the first proviso.

First, as to our position that the union procedure was inadequate as a matter of law, we rely first upon principles enunciated by this Court in NLRB v. Marine Shipbuilding Workers to the effect that where the employee's complaint raises matters in the public domain and go beyond internal union procedures, the union procedures cannot be used to delay his resort to the court, to the National Labor Relations Board, for vindication of his rights under Section 8(b)(1)(a) of the amended National Labor Relations Act.

Here, too, Clayton asserts rights in the public

domain, his right to fair representation, the union's duty fairly to represent him, a duty as developed by judicial interpretation and application of Section 9(a) of the amended National Labor Relations Act. And we think that the rights involved stand on the same footing as the rights involved in NLRB against the Marine Shipbuilders. The principle that I have just tried to enunciate or elaborate was applied by the 9th Circuit in Bise v. the I.B.E.W. with a similar result.

But perhaps more fundamental than this and going to the competence of the union tribunal is the fact that we deal here with rights governed by federal law. This Court has enunciated in a number of cases -- Vaca v. Sipes, and Motorcoach Employees v. Lockridge, the automobile case, the name of it escapes me for a moment -- Humphrey v. Moore -- that there's a duty of fair representation. The claim of the breach of that duty is part and parcel of the Section 301 action, and it is controlled by federal law, and the last formulation of that in the Lockridge case was to the effect that whether the proof established the requisites of the breach of duty is a matter of federal law.

QUESTION: Well, has the Court really held that these are 301 actions? Wasn't the genesis of the Vaca v. Sipes doctrine the cases of Tunstall and Steele, years ago, under the Railway Labor Act, when there was no 301? That is, a failure to represent employees fairly and squarely.

MR. McTERNAN: But Vaca v. Sipes, Mr. Justice Stewart, went far beyond the Steele and Humphrey v. Moore, and held that where that breach exists, that is the condition precedent to the employee's right of action under 301 in the court for breach of the collective agreement.

QUESTION: Well, first of all, he has to show and prove that he was not properly represented through whatever the grievance and arbitration procedure may have been by his representative, the union organization.

MR. McTERNAN: Right.

QUESTION: And only then, after he's proved that, may he sue the employer. Is that the -- ?

MR. McTERNAN: Right. And in that --

QUESTION: And any suit against the employer would be a plain vanilla 301 action.

MR. McTERNAN: Well, but the language in Vaca v. Sipes -- there are two sections, and one I recall precisely is that the Court said in that opinion that the claim of the breach of the duty of fair representation is part and parcel of the Section 301 action. And I think that there are other opinions from this Court as well as many in the courts of appeals which say that the breach of the duty claimed is part of the Section 301 action. And as a matter of fact, it would seem to me necessary to conclude that if proving that breach is a condition precedent to going on to the claim of --

QUESTION: Well, except that the Tunstall and Steele cases were decided in the total absence of anything like 301.

MR. McTERNAN: Quite so; quite so.

QUESTION: And they were actions only against the union, were they not?

MR. McTERNAN: That's right. As I recall, that's true.

QUESTION: I don't think you're right there. They were up against both, the railroad and the brotherhood, weren't they? And wasn't the action, the complaint, that then you go to the mediation board? And the fact was the mediation board was appointed by members of the brotherhood and the employer?

MR. McTERNAN: Mr. Justice Marshall, I am unable to recall whether the employers were involved in those actions or not. Oh, excuse me, they were in Humphrey v. Moore, but in Steele I'm not sure. But the rest of what you said I accept as true, yes. That's the way I recall it.

But what I want to emphasize in response to Mr. Justice Stewart is that the claim of breach of the duty of fair representation is coupled with the claim of breach of the collective agreement. And the employee is allowed to sue the employer in court, thus not being involved in the arbitration proceeding, only by virtue as proof that the union has breached its duty to him. So I say that if we deal here

with matters of federal law under Section 301 both with reference to the claim of the breach of duty and the claim of breach of the collective agreement, we deal with matters which are entrusted to the courts under Section 301, the statute explicitly to this effect, and only the courts can interpret and apply that law; the UAW tribunals are not competent to do so. And for the courts to delegate, if you will, that responsibility to the courts would be a violation of the principles of Lincoln Mills, and therefore I say that for all of these reasons that this UAW procedure was inadequate as a matter of law.

QUESTION: Well, do you concede, Mr. McTernan, that the liability of the employer under an action such as this is necessarily conditioned on the liability of the union also?

MR. McTERNAN: Well, it's conditioned upon proof that the Union breached its duties, and this Court has held that the employee may sue the employer alone and prove in that action the union's breach of duty, and therefore establish his right to go ahead on the merits of his breach of the collective agreement claim.

Now, when we get to damages we have another problem and as the Court said in Vaca v. Sipes, the union's liability to the employee in these cases is only for the increases, if any, and the pecuniary damage done to the employee by reason of the union's conduct, but the union cannot be held liable on

damages for the damages caused by the employer's conduct. And so the doctrine of comparative fault, if you will, is established in Vaca so as to involve an apportionment of the damages as between the employer and the union. Have I answered your question, sir?

QUESTION: Part of that, I suppose, is that if he sues the employer alone and that case went to judgment, the judgment against the employer should not include any damages that were caused by the union.

MR. McTERNAN: I would think so, yes. Well, you see, if he got a judgment against the employer, that might very well be an order of reinstatement with back pay at least up to the point where the union's conduct took over.

QUESTION: Well, not if the union was responsible for the discharge.

MR. McTERNAN: Oh, well, now, you've raised a different point.

QUESTION: It's not a different point if the union had maliciously caused the discharge. I don't know that the employer's going to be liable for back pay.

MR. McTERNAN: Mr. Justice White, this Court has been very careful to distinguish those cases in which the conduct of the employer and the conduct of the union were independent and discrete, and where each would be then liable for his proportionate share of the damage caused. But where

they act together, as was pointed out in the opinion in Czosek v. O'Mara, there you have a different problem, and there can be joint liability because they acted jointly.

QUESTION: And what if the union tells a lie to the employer about an employee and the employer discharges him?

MR. McTERNAN: This Court has affirmed in a number of cases NLRB orders where it is quite clear that the employer acted under pressure from the union, but yet the employer is responsible for its conduct. Now, the apportionment of it is a different matter and I'm not arguing that now. But I say that the employer can be liable and has --

QUESTION: Well, in those cases the employer knows that it's acting under pressure from the union. Suppose it's acting in perfectly good faith and the union just tells it a lie about -- ?

MR. McTERNAN: Then I think the apportionment rule would apply, but I don't think the employer would be relieved of his duty to reinstate the man.

QUESTION: No, no, but he certainly wouldn't be paying back pay.

MR. McTERNAN: I think that if all of the back pay losses stemmed from the union's conduct, then I would say --

QUESTION: All right, all right.

MR. McTERNAN: Yes?

QUESTION: Mr. McTernan, may I ask you a kind of a

preliminary question? If you assumed, contrary to your argument, that the union did provide a completely adequate remedy, that they had some totally impartial review situation and would give an answer within two weeks, say, would you concede or would you not that in that situation there's a duty to exhaust?

MR. McTERNAN: Well, sir, I don't think that it's consistent with Lincoln Mills for the judiciary to delegate to union tribunals the interpretation and application of federal law under Section 301; number one. And number two, I think that however detached and dignified the union tribunal is and however fast it could act, it simply is unable functionally to effect the most important aspect of the restoration of this employee's contractual rights, namely, his right to have his job back.

QUESTION: Well, supposing the collective bargaining agreement has a provision in it that if that review board found there was inadequate representation there's a duty to reopen the arbitration proceeding, and so on. I want to assume for a moment that you could conceive of an adequate remedy. I want to know whether or not you would still argue -- which I don't see why you couldn't, but I just want to know what your view is -- would you still say there's no duty to exhaust? Or does this depend on inadequacy? And if there is a duty to exhaust, what's the source of it?

MR. McTERNAN: I think that there is no unqualified duty to exhaust. I think that exhaustion which involves the union tribunal and the interpretation and application of federal law would be a miscarriage of the doctrine under Lincoln Mills. However, I can see the situation in which, if the union tribunal had the power to reactivate the grievant by finding that the union breached its duty, there might be some room there for requiring exhaustion, assuming that the time limitations could be satisfied. In that we have a problem here. In this case, Mr. Justice Stevens, there is no provision in the collective bargaining agreement for the arbitration or further processing of grievances which the union decided it had withdrawn in breach of its duty.

As a matter of fact, as I intended to say later, there is evidence in this record of an intent quite to the contrary. There was a stipulation at the trial that one, the grievance was withdrawn from arbitration. It was the end of the road so far as the contract remedies were concerned, and my colleague here advised the trial court that ITT conceded that it had no obligation whatever to reconsider the grievance even if the union found that there had been a breach of its duty.

QUESTION: But you do concede, do you not, under this agreement that the employee couldn't go directly into court? He had to first go to the union and see if the union

would press his claim to arbitration?

MR. McTERNAN: I don't concede that in this case.

QUESTION: Oh, yes; we're talking about the grievance procedure.

MR. McTERNAN: The collective bargaining agreements procedure? Is that what we're talking about?

QUESTION: Yes; the first stage.

MR. McTERNAN: Well, the grievance procedure under the collective bargaining contract provides for a three-step --

QUESTION: But did the employee ask the union to take it to arbitration?

MR. McTERNAN: Oh, yes, and as a matter of fact arbitration was requested and then withdrawn by the union.

QUESTION: Yes, but he had to do that, didn't he?

MR. McTERNAN: Oh, no question about that. He had to invoke his contract remedies.

QUESTION: Right.

MR. McTERNAN: That's very clear in all of the cases, yes. And we don't claim that he would be entitled to sidestep those at all. Of course he's required to do that. It's when he's deprived of those remedies by union conduct that breaches --

QUESTION: Well, Mr. McTernan, in prior cases, I recall, when it was suggested that if the union breached its duty, and therefore the employee shouldn't be bound

by defective grievance and arbitration procedures, I recall the arguments on behalf of the employee were that he shouldn't be sent back to arbitration either, because he would be there being represented, or at least accompanied by, or at least with a party in the picture that had shown it incapable of representing him.

MR. McTERNAN: Yes, there is that problem, and that problem exists, it seems to me, in any reactivation case. I don't think we have to meet that problem here.

QUESTION: No.

MR. McTERNAN: But let me say that in your opinion in Vaca v. Sipes, you considered the question of whether the Court should decide the collective bargaining contract issue or whether it should be remanded for arbitration, and the Court held there, in your language, that this was a remedy for the trial court to consider in light of the circumstances of the particular case. And it seems to me that's a very sound approach to it, because I don't think it's possible to make an inflexible rule. I had hoped to save some of my time. May I desist now and resume later?

MR. CHIEF JUSTICE BURGER: Very well.

QUESTION: Mr. McTernan, before you sit down, there's been called to my attention a recent 2nd Circuit case decided about two weeks ago, Johnson v. General Motors. Are you familiar with that one at all and how it bears on this?

MR. McTERNAN: No, I'm not, Your Honor, I'm sorry. May I conserve --

QUESTION: It might be worth looking into. I'm not saying it's positive one way or the other, but I think it does bear on this issue.

MR. McTERNAN: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Meiners.

ORAL ARGUMENT OF EVERETT F. MEINERS, ESQ.,
ON BEHALF OF PETITIONER ITT GILFILLAN, ETC. IN NO. 80-54

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

I would like to initially direct my comments to the very difficult if not impossible situation which the lower court decision has left the employer in.

The employer must defend the union's good faith as a result of that decision in refusing to go to arbitration. The employer, of course, was not a party to that decision, wherein the union made the determination that there was no cause in their mind, no justification, to take that grievance that Mr. Clayton had filed and that they had initially requested arbitration. They concluded that there was no reason to take that matter to arbitration, that they could not prevail on that case. But the employer was not a party to that process. In the grievance procedure and arbitration procedure the union is the party that investigates that procedure and makes

that determination. The company did not take any action and was not involved in any manner in any determination or an attempt to convince the union not to proceed to arbitration.

QUESTION: I might have missed it, but the Union didn't give any reason for withdrawing, it just withdrew; isn't that right?

MR. MEINERS: Well, Your Honor, they did, the union steward did write a letter to the National Labor Relations Board advising them that they had investigated the case. On page 78 of the Appendix there's a copy of that letter indicating that they found no just cause, or that there was just cause for the termination, and indicating also that Mr. Clayton was a union steward and was held to a high standard of care with respect to activities of that type.

QUESTION: Mr. Meiners, as I've tried to think through this argument that the employer is in an impossible position because he doesn't know the facts, but isn't it correct that the employee has the burden, rather severe burden, of showing arbitrary conduct by the union and what it really amounts to is, you have two defenses? You still have your defense that you didn't reach the contract in the first place, and you have the additional defense that maybe he can't prove arbitrary conduct. It seems to me that's a better position than the employers are in in a lot of lawsuits.

QUESTION: Well, but not as good a position as

you're in right now, having won in the arbitration.

MR. MEINERS: Well, having there withdrawn the request for arbitration, that's correct. The problem that you have is that the unions may get to the -- or the employee may reach the underlying grievance without having to be held to the strong burden of establishing a breach of a duty of fair representation that he may have to establish with the union as party. If the union is not a party, the employee merely has to prove to them a prima facie case. And assuming that the prima facie case --

QUESTION: Yes, but it's still a tough prima facie case.

MR. MEINERS: Yes, I certainly admit that. However --

QUESTION: It's the same legal standard as if the union was a party.

MR. MEINERS: That's correct. However, there may be no one to defend against that claim. The union may no longer have, certainly has no monetary incentive in order to participate in that proceeding. The union members who made that decision are not under the control or direction of the company.

QUESTION: The argument is made in one of the amicus briefs, I don't remember which, that suppose you have a situation in which for some reason the employee elects just to sue the union and doesn't sue the employer. And there the union, in order to establish no damages, finds itself in the position

of demonstrating there was no breach of contract. So is it any further --

MR. MEINERS: I'm not sure that the underlying contract issue should be reached in that lawsuit where --

QUESTION: Well, as a matter of proving no damages it's certainly relevant.

MR. MEINERS: Well, it's certainly relevant to the issue of proving no damages, but if the employee only proves that there's been a breach of the duty of fair representation, certainly under Vaca there would be this allocation problem. But his next step then would be to establish that there has been a breach of the contract.

My personal feeling is that neither the company nor the union should be in a situation where either is required to defend the actions of the other in the discharge situation.

QUESTION: Well, they don't have to. I mean, you still have your own defense that you had no breach of contract.

MR. MEINERS: That's correct. However, that destroys the efficacy of the arbitration grievance procedure which normally is a complete block to the issue of the underlying, reaching the issue of the underlying grievance unless there's a breach of the duty of fair representation by reason of the lower court's decision in this case. It is true the prima facie case is still there but there may not be a defense or if there is a defense which the employer has to present,

he has to either subpoena or try and obtain the cooperation of the union in being able to present some kind of a defense to that case. He is not the party that has the information to present a case that shows the reason why the union did not breach its duty of fair representation.

I think this illustrates from the company's viewpoint the severe problem that we see in this type of situation. It is not a case that may occur every time by any means, but the union may for political reasons take a viewpoint that is going to remain neutral; it's not going to encourage or assist the employer in presenting a defense to the breach of the duty of fair representation.

QUESTION: Is the employer put in this position you describe every time the union declines to support the employee's claim, or even assuming for perfectly valid reasons, as you do here?

MR. MEINERS: I am sorry, I don't understand, I don't follow the full question.

QUESTION: Does this problem for the employer arise every time a union declines to carry the ball for the employee?

MR. MEINERS: Well, it arises only when there is a claim by the employee that there has been a breach of the duty of fair representation.

QUESTION: Well, I'm assuming that.

MR. MEINERS: And in that situation if the union

wants to support -- the union usually would take a position, in our view, fairly -- if the union is acting fairly and honestly, they would take a position that they're trying to defend and show why the action that they took was taken in good faith. The employer had no part in that proceeding and should not be responsible, in our view, for attempting to defend a traditional party that the employer opposes.

QUESTION: Except, Mr. Meiners, the real reason, as I understand the briefs, is the reason they abandoned the claim was they thought there was no merit in it.

MR. MEINERS: That's correct.

QUESTION: And you're able to prove that, if the facts are as they're described in some of the briefs, it's a fairly simple case.

MR. MEINERS: Well, that may be true, yes. We would hope so, if we were ever called upon to present that case. But the problem here is one of whether or not the union's decision not to proceed to arbitration is one which the employee at will can avoid? And whether or not the exclusivity that the union has is going to be affirmed, and what burden is going to be placed on the union for their actions as opposed to the company for their actions. We're certainly more than willing and we're willing initially to defend this matter in arbitration. But now we're six years down the road. The back pay that Mr. McTernan referred to as early

reinstatement is a situation which has a tremendous impact upon the employer at this point. Arbitration is a speedy remedy which we would normally go through and have this matter resolved in a few months' time, as opposed to getting involved --

QUESTION: You don't really have an exposure for back pay during the period that you could rely on the arbitration award, do you? I think you have a duty -- assuming he wins ultimately, you might have to reinstate, but you're not liable to back pay for the interim, I don't think.

MR. MEINERS: That's correct. Under Vaca, the allocations theory should place that burden on the company.

QUESTION: It would seem to me, just again thinking out loud, that most of the time, I would assume, when the union abandons a claim, it's probably because it doesn't think it has any merit. I assume it does that thousands of times around the country. And normally the company is perfectly able to substantiate the reasons there's no merit to the claim. I'm a little puzzled about why it's such a burden. This doesn't necessarily reach the merit of the ultimate outcome of the case.

MR. MEINERS: If you look at the practical viewpoint of presenting the defense to the breach of the duty, I think that's the -- we're skipping over the defense which has to be

presented or should be presented. Why should the employee -- I guess maybe we can get back to this -- why should the employee be able to go to arbitration and require a resolution of this issue if the union in good faith had made a determination that this is not an issue that should be resolved in arbitration?

QUESTION: Well, I thought that the employee has got the burden of proving a breach of duty, and you don't prove a breach of duty just by saying that the union failed to take it to arbitration.

MR. MEINERS: That's correct.

QUESTION: So, it's a rather -- if reasonable men could have differed about the validity of the claim, the union is going to win. And it's not just a low threshold question that the employer has got to get over.

MR. MEINER: Well, I think that for a lot of the reasons that we have indicated that this presents -- puts the union and the company in a very difficult position to attempt to present a case on behalf of a party which it had no knowledge of. For instance, we would have to, if this case were to go back down to trial or to arbitration, the company would have to commence some type of a discovery process, compulsory discovery process possibly, in order to obtain the facts which could be used to present a defense to the breach of the duty of fair representation. Certainly,

we're in possession of and would be able to present the facts with respect to the underlying grievance itself.

QUESTION: But here in the discovery, presumably, is you take a deposition of the steward and he says, I investigated the claim and I thought the company was right; that's why I abandoned it.

MR. MEINERS: Except, the union may well not be in a position that they feel that it is either politically or appropriate for them to take an active role in this. And it may be one where it is difficult for the employer to obtain the cooperation of the union in presenting their claims.

QUESTION: The real issue in these breach of duty cases, as I understand it, at least in an awful lot of them, is whether or not there was real substance in the claim that the employer breached the contract.

MR. MEINERS: Well, but then, in our view --

QUESTION: Your employer is the one that knows that. And if you can substantiate, even make a reasonable case, that you fired him for cause, like the contract required, there's not going to be any breach of duty in the union, is there?

MR. MEINERS: No. There's not going to be a breach of the duty in the union; that's correct. But the --

QUESTION: But there's also -- if one were to adopt the principle that the employee can go directly into court,

you're going to inevitably be involved in a lot of line-drawing problems. While some may be simple as Justice Stevens says, that the union simply decided there was no merit to the claim, but there could be conceivably some very complex reasons why the union decided not to process the claim.

MR. MEINERS: Yes, there could. And I think that from the employer's viewpoint, this gets back to the basic problem that we see whereby this type of a case may end up for resolution before a court and/or a jury. It is our belief that the better method to resolve this controversy would be to have a remand of the case to arbitration and for the arbitrator to review the issues and to make the ultimate decision which he should have made, should have been called upon to make. But we look at the decision of this Court in the Nolde Brothers case as possibly a basis whereby this Court can determine that there is a theory where, that the exhaustion of internal union remedies may result in the reinstatement of the grievance in the arbitration procedure. In that case, of course, the --

QUESTION: How can you get the employer back to the arbitration table when the contract time has -- when all he promised to do he's done?

MR. MEINERS: Has expired during the process of -- ?

QUESTION: How can you get him back?

MR. MEINERS: Because I believe that the Nolde

Brothers decision raises a substantial question as to whether or not because of the national labor policy that is deemed to be incorporated in the collective bargaining agreement when it is written, that -- and in that case the decision indicated that unless the agreement expressly or directly negated the possibility of the grievance in that instance -- of course the contract had expired -- I think that the same situation can be said to apply here. There's nothing in the contract which expressly provides that if there is a violation of the breach of the duty of fair representation, that the grievance cannot be reinstated in the procedure. That subject is not discussed, and based on the strong national policy which favors arbitration as a method of resolution of these disputes, we would suggest that the processing of Mr. Clayton's claims through the internal union procedures could resolve --

QUESTION: Would you say the same thing in a joint board situation where there was no arbitrator?

MR. MEINERS: Would I say the same thing in a joint board situation? Well, I think that a joint board in my mind does raise some differences because it is not the normal, independent arbitrator that --

QUESTION: They're in rather widespread use though, aren't they?

MR. MEINERS: In some areas. In construction areas they are --

QUESTION: Teamsters' areas?

MR. MEINERS: Correct. But it's not in our area, fortunately. So that, we can see a situation under your Nolde Brothers decision and looking at Vaca v. Sipes, that the employee does have a right that if there is a determination by an internal union remedy, that the employee does have the right to reinstitute the grievance and to proceed back into arbitration. And I think that one of the points that needs to be examined is the posture of the employee when he goes back to the arbitration procedures. I think that the employee should raise if -- there are a number of different cases, some cases where the union is clearly discriminating against the individual. In other cases they have merely let lapse the time limit, in a situation where they've let a time limit lapse negligently or whatever the standard is that makes that act be a breach of the duty of fair representation.

QUESTION: Would you agree that after the letter that was written, Appendix page 78, that he hasn't got a very enthusiastic advocate in the arbitration proceeding?

MR. MEINERS: Yes, that's correct, I would agree with that.

QUESTION: He'd have to go out and get his own counsel.

MR. MEINERS: I think that one of the possibilities is that the employee may obtain his own counsel in an appropriate case. I think that this is a matter which should be

raised before the internal union remedy, before the PRB in this instance, to determine that maybe there is an internal discrimination against him, and he needs additional protection.

QUESTION: Anything in union regulations or the contract that limits his right to get independent counsel in the arbitration?

MR. MEINERS: In the arbitration? Normally, in an arbitration he would not have that right.

QUESTION: Normally -- not here. Under this contract?

MR. MEINERS: Under this contract the employee does not have a right, normally, to have a separate independent counsel. This is a matter that when the grievance is presented at the arbitration the union of course is the exclusive agent and the only party that's authorized to have a counsel at that meeting.

QUESTION: But here his advocate has in effect entered a guilty plea. Has he not?

MR. MEINERS: It may be -- yes, that's correct.

QUESTION: That would go before the arbitration board, wouldn't it?

MR. MEINERS: I'm sorry? That letter? It may, and it may be a reason, a justification, in this type of situation for the employee to have separate independent

counsel.

QUESTION: Of course, you agree that the predicate to getting back to the arbitration table or getting to the contract claim at all is contingent on proving the breach of duty by the union?

MR. MEINERS: That's correct.

QUESTION: Which, in the first instance, if you don't require them to -- or, in any event, is going to have to be decided by a court.

MR. MEINERS: Well, I don't believe that's true that in any event it would have to be decided by a court. I think that that is the ultimate --

QUESTION: It's true that the National Labor Relations board has held in Miranda Fuel or some case that that's an unfair labor practice, too, a breach of duty by the unions?

MR. MEINERS: Yes, that's correct. That's a separate unfair labor practice.

QUESTION: If there's a suit filed against the employer and the union claiming the union breached its duty and therefore the employer breached the contract, the courts -- before there'll be a recovery against the employer there's got to be proof a breach of duty by the union.

MR. MEINERS: That's correct.

QUESTION: Well, then, if that's going to have to be tried out, an awful lot of the facts in the case are going

to be there.

MR. MEINERS: Well, that's true, but the court is not required to reach the ultimate issue of whether or not there was a breach of the contract. The court only has to make a determination that it is reasonable to conclude that there may have been a breach in that the union's action was arbitrary, capricious, and was a breach of the duty of fair representation standard. The court is not required to reach that issue. But I'd like to --

QUESTION: I don't understand that, I just don't understand that. If I were an employer I would think that there would have to be proof of a finding by the court that the union breached its duty before the employer would ever have to face the contract provisions.

MR. MEINERS: Yes, I agree with that. Yes.

QUESTION: Well, then, this has to be tried out in a court, and an awful lot of the facts and the circumstances will already be there on the table.

MR. MEINERS: Yes, that is correct.

QUESTION: But the breach of duty concept is a fairly flexible one, is it not? That the union is considered to have a great deal of discretion as to what claims to press and what not, and what trade-offs to make in the administration of the contract?

MR. MEINERS: Yes. The union, of course, has a

broad range of authority here and is only held to a very stringent standard, and it is generally authorized, of course, under Vaca v. Sipes to be the exclusive agent and to represent the employees in all of their cases, and to make determinations if sometimes the case that the employee is wanting to pursue through arbitration is not justified, and even though it might sacrifice some rights of his for the entire unit, that the approach taken by the union is the correct approach. So that the union does have a broad authority in that type of determination.

MR. CHIEF JUSTICE BURGER: Well, your time has expired now, Mr. Meiners.

MR. MEINERS: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Whitman.

ORAL ARGUMENT OF M. JAY WHITMAN, ESQ.,

ON BEHALF OF RESPONDENT UAW AND LOCAL 509 IN NO. 80-5049

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

The union's approach and concerns and perspectives here are quite different from those of either Mr. Clayton or ITT. To begin with let's be clear about what this Court does and does not have to decide in this matter. The union, particularly the UAW, is not interested in getting into the business of judging federal rights. We are not enfranchised by Article III. The Court needn't in the situation presented

here reconsider or revisit Vaca or Maddox or Hines or any of these issues. This is a case where Mr. Clayton made no attempt at all, where he was told he was a steward, the remedies were facially adequate.

There are really only three logically possible sorts of case that can arise. One is this case, the no-attempt case, where no attempt was made. The second is the case alluded, sort of case, category of case alluded to by Mr. Justice Stevens, where an attempt is made but the contractual provisions are fashioned in a way so that the grievance and arbitration procedures are perpetually open to the possibility that the union through internal review might reverse itself and order its agents to reinstitute the matter into the grievance procedure and hence to arbitration. That's the case, for example, in the General Motors, Ford, Chrysler --

QUESTION: How could you do that in this case, in the light of this letter? How could you reverse your position in the light of this letter?

MR. WHITMAN: Mr. Justice Marshall, the answer is that that letter was written by an international representative --

QUESTION: On behalf of you.

MR. WHITMAN: -- who is one of our line troops and is subject as the agent of a corporation is subject to the

board of directors. Our position is simply that Mr. Clayton should have asked the store manager before he brought suit.

QUESTION: But that's not what this said. This man says he hasn't got a suit.

MR. WHITMAN: That's right.

QUESTION: That's what he says. You could reverse that in the light of this? You can't eat it. It's going to be there.

MR. WHITMAN: That takes us to the third set of cases, Your Honor. If that problem arose in the General Motors system, it would go back into the arbitration procedure. Or if it arose in General Electric, where there are no time limits, it could be refiled without any trouble. Or it could arise in a contract where an individual can decide to go to arbitration or not, that the union has no exclusive right to make that decision. You are quite right; that is not this case. This is a no-attempt case.

The third sort of case is a case where the attempt is made but if the contract procedures in the regular course of their operations were allowed to function, the grievance and arbitration procedure would close. Those are the sorts of cases where there is a dispute as to whether or not the matter is arbitrable.

Now, I can address, if I will, all those cases, but I would like to stress that the issues that have been

discussed earlier, many of the issues are issues which arise only on that third set of cases, which is not this case. This is a case where no attempt was made of any sort. And so the Court really needn't get into those areas, particularly on this sort of a record.

QUESTION: Mr. Whitman, will you help me out on one rather simple point, I guess? What's the source of the duty of the employee to make an attempt?

MR. WHITMAN: The source of the duty, Your Honor, is the discretion of the federal judiciary in Article III. It's an inherent discretion of the district court to stay its hand until the controversy is ripe, consistent with federal policy and consistent with Republic Steel v. Maddox, to see that individuals are told that they ought to ask the store manager, they ought to give the union a fair opportunity to take a crack at this. Now, if the fair opportunity comes to ground, if it's futile, I mean, if he's told, as was the case in Glover, that this is not for blacks, that's a different matter. But the federal courts ought to have the discretion and ought to apply it as a routine matter consistent with Maddox to hold their hand, at least for that period.

QUESTION: Well, is the conclusion that the federal judge should reach -- now, it's a kind of the federal judge is both the lawmaker and the decider under your view -- that if there's no attempt whatsoever to get the union to review

the decision, that ipso facto establishes an inability to prove a breach of the duty of fair representation. Then it would necessarily follow, it seems to me, that the employer would be entitled to the benefit of that holding. Would you agree with that at all?

MR. WHITMAN: I would agree that if the man is told to go file his appeal and he does, and it comes to an end, then he ought to be able to resume his litigation.

QUESTION: No, but suppose he won't do it?

MR. WHITMAN: Well, then, that's a strike on him.

QUESTION: And then what happens as to the suit against the employer? Dismiss it?

MR. WHITMAN: Well, what happens to the suit against the employer? Well, typically, if -- I presume he'd then proceed against the employer.

QUESTION: How? He has to, without being able to prove the breach of duty by the union, he can't proceed.

MR. WHITMAN: No, the question is whether he is not able to prevail against the union because he didn't attempt the internal procedures and didn't give that opportunity to the union.

QUESTION: You think this holding, this exhaustion, just protects the union, and that he could still be free to prove your breach of duty in his suit against the employer?

MR. WHITMAN: I don't see any logical impediment to

that possibility, Your Honor.

QUESTION: How about the Steelworkers' trilogy? The idea of keeping this whole kind of dispute out of the federal courts as much as possible?

MR. WHITMAN: The better result would be for the trial bench not to rush into putting the employer in the sort of dilemma of nonfinality which was presented in the Hines v. Anchor Motor Freight. But it may come to the point that the employer simply will not -- that the union reverses itself and the employer refuses to reentertain the grievance, or insist on the contractual remedies. The employer, at that point, it seems to me, has chosen litigation over arbitration.

Now, the employer may not do that. The contractual provision, like the General Motors or General Electric provisions, might require him to put it back in, in which case the problem will go away.

QUESTION: Does the employee have the same choice as the employer to choose litigation over arbitration?

MR. WHITMAN: Your Honor, all that's required to decide this case is to decide that federal district courts have the discretion as a routine matter to require the attempt. There was no attempt here. Whether or not, if an attempt were made, and what follows from that is --

QUESTION: Well, what would an attempt have involved, Mr. Whitman, in this case?

MR. WHITMAN: A letter to Douglas Fraser.

QUESTION: That's all?

MR. WHITMAN: That's all.

QUESTION: The President of the UAW?

MR. WHITMAN: Yes, Your Honor.

QUESTION; And does he then act on it, or is there some --

MR. WHITMAN: He processes it -- well, it is typically presented to the International Executive Board which sits in panels of three, and they go out to the location and they have a hearing and they make the report --

QUESTION: Nothing of this nature goes to the general convention, annual convention, or anything?

MR. WHITMAN: The step above that, by analogy to the appeal to the stockholders in a corporate case, is to one of two places, at the option of the appellant. One is to the Convention Appeals Committee, which originated as a standing committee of the convention. It's a body of delegates, elected delegates, rank and file, selected by lot, that meets every six months and decides that. Or alternatively, the man can go to the Public Review Board and tell his problems to Dean St. Antoinne and Robin Fleming and gentlemen of that sort. The choice is the appellant's.

QUESTION: What I'm trying to get at, initially, the first step would have to be a letter to Mr. Fraser?

MR. WHITMAN: Yes.

QUESTION: And then some proceeding occurs, and his claim is rejected at that level?

MR. WHITMAN: Yes.

QUESTION: Then he has to go to one or the other of two other levels, does he, or whatever it may be?

MR. WHITMAN: No, it's the final level. He has a choice of which one.

QUESTION: But the second one is what, about six months or more, you suggested, to get to the appeals -- convention?

MR. WHITMAN: It depends on the case. As I mentioned in the brief, if you have a 30-day time limit and he files on day two rather than on day thirty it's faster. But we have competing values here. In the UAW system, for example, we've been very careful to insert due process and protections at each stage.

Of course, as the Court well knows, any time you insert due process there is the prospect of litigants generating delay. If you insist on a complete record being sent from the local union, one has to write a letter to the local union and get the record and be sure it's complete, and so on. The same thing is true if counsel is allowed, as is the case here --

QUESTION: Does the union permit counsel in this

sort of thing?

MR. WHITMAN: Yes, Your Honor. No question about that. So, it's not as -- timing of these matters is not as simple as it would appear. There are these competing values and values which, I suggest -- which would ruin a case when attempts have been made, and it was a question of the timing. It's best left to the discretion of the trial bench; I mean, the trial bench is quite able to recognize the situation when the man is being --

QUESTION: Well, I gather you do suggest that the employee says, no, I don't want to take that year and a half to do all this, I want to go ahead with my lawsuit. What the trial judge then has to permit him to do is still establish, if he can in the suit against the employer, as I heard you, that there had been a breach of the duty of representation?

MR. WHITMAN: An employer could be -- yes, Your Honor.

QUESTION: No, I say, you do suggest that the employee who refuses to go through that recourse in part nevertheless may still prove, in the suit against the employer --

MR. WHITMAN: Yes.

QUESTION: The breach of the duty of representation?

MR. WHITMAN: Yes, Your Honor. And if he does prove that, then he has a right under the contract.

QUESTION: So, to that extent, failure to exhaust

does not deny him a right to go ahead with his lawsuit, at least against the employer?

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

QUESTION: Then he doesn't have to name the union as a party?

MR. WHITMAN: This Court held in Vaca, as I read it, that he doesn't. In Vaca, in fact, there was a separate piece of litigation pending at the trial court level. Vaca was only brought against the union. This can, it can occur in the reverse situation, or it can occur, and it most commonly does, these days, in the Ford v. Huffman context where both are sued.

QUESTION: Dr. Whitman, then, these upper levels of the union appellate process, if I may call it that, that you've described, is the employee very often successful after defeats in the lower levels?

MR. WHITMAN: Well, Your Honor, yes, he often is. In fact, it's ironic that his percentage of success is greater before the Convention Appeals Committee and the delegates than it is before the Public Review Board. They more frequently reverse the International Executive Board. If I had to say as a rule of thumb, of the dozen cases that come up every six months, the national department or part of the union is probably knocked down in at least one, perhaps two of those cases, in recent times. While this, of course, isn't

in the record, some years ago I did a count of the Public Review Board decisions that reversed, and it struck me that the percentage was roughly equivalent to the percentage of trial court decisions that are reversed by this Court, if you compare it to the percentage of cases on which there is a petition for certiorari. The difference is that the Public Review Board can't deny cert. It has to take them all.

QUESTION: But there are thousands of grievances.

MR. WHITMAN: Your Honor, there are very many thousands of grievances. In the General Motors system alone, if my memory serves, there are something like a quarter of a million grievances filed every year.

QUESTION: In this particular company, it shows on this one, doesn't it, that there are 4,000 already -- what is it? -- this number is 24,060, the number of this grievance. So it meant that before then, there were 24,000 that were denied. This is a lot for one company, isn't it?

MR. WHITMAN: I don't know, but it's conceivable, Your Honor.

QUESTION: It is?

MR. WHITMAN: There is a lot of controversy, and there are a lot of meritorious and, I must say, frivolous grievances in the industrial system. But that brings us back to the need for a delicacy in this area. I mean, the duty of fair representation was created by this Court to preserve the

delicate balance between individual rights and the collective interest, and to maintain that. And that's what Vaca and Steele and all those cases hold, and that this is not an area, for that very reason, for sweeping and per se rules, for taking discretion from the district bench and saying that never in any situation must there ever even an attempt be made.

The only thing the Court needs to decide here is whether in the attempt case, the union should be given a fair opportunity? Now, practically speaking, a couple of things are going to happen. Given a man, or woman, the grievant, is going to be flatly wrong about his claim under the contract and the union is going to be able to convince him he's wrong and he'll forget about it and go away, well, he won't forget about it; he'll litigate, frivolous though it may be. And if that happens, it happens. There's no -- I mean, I'm not going to stand here and say that this procedure is going to warranty the federal judiciary against having to see frivolous grievances --

QUESTION: Mr. Whitman, to the extent that's a valid argument, and it's quite persuasive, it should be available to the employer as well.

MR. WHITMAN: Yes, and for that reason, I think, in the appropriate case the district court would be well advised to say to the employer, wouldn't it be nice if at least on an

ad hoc basis you are willing to accept this back into the grievance and arbitration case, should the union reverse itself, or hold its hand to see what happens. But it's a frequent practice in the trial bench now that what the Court does is, it enters a stay of the proceedings and tells the fellow to go off and take an appeal, and then sees what happens. The problem is that Mr. McTernan's position would remove even that authority. It's a broad position. What it really is, is going back to Mr. Justice Black's dissent in Republic Steel v. Maddox, which as you know --

QUESTION: It also goes back behind the J. I. Case case, in effect, doesn't it, where the Court said that under collective bargaining you can't have an individual employee contracting separately with the company?

MR. WHITMAN: True. It goes back that far. But the proposition is a simple one that's being urged by Mr. Clayton, that a fellow ought to be able to get a lawyer and sue, now, without attempting, without pausing, without asking the higher-ups in the union, without seeing if they remedy his complaint. Even if the grievant is not wronged by this claim, there may be a greater wrong, a wrong to the collective interest. And the union and the individual ought to have a chance to address that and see if the man can't be convinced that the union and the rest of his workers will be worse off.

It's like cross-examination. You're very often in

a position where you don't ask a question because you may be worse off asking it and having the answer than never having asked it at all. And that's often the case with grievance and arbitration cases. I mean, if we arbitrate a weak case, the employer may find himself armed with an invulnerable precedent for the unceremonious discharge of arguably similar cases. And that's where this balance of collective and individual interest is important, and it's a scant price to suggest that a man must at least attempt.

QUESTION: Doesn't it pervade all of the labor law of the last 40 years, more or less, that there should be exhaustion of all these intermediate efforts before getting into the judicial process? Isn't that the whole concept of it?

MR. WHITMAN: Yes, Your Honor, and it's the concept for very practical reasons. We are dealing with an integrated complex industrial system that has wide varieties in contract language and approaches of employers, and internal union procedures, and this matter oughtn't to be decided by a get-a-lawyer-and-sue approach. The unions of the country ought to be told that they ought to undertake procedures to get their house in order, and the employers ought to be told that they should adopt and consider situations like the General Motors and General Electric approach that puts it back into the --

QUESTION: Well, Mr. Whitman, I don't understand

your suggestion in that if the employee refuses to exhaust, that means he can't proceed against the union, but nevertheless he may proceed against the employer. Why should he?

MR. WHITMAN: If he refuses to --

QUESTION: If he -- well, I gather your position is if the -- he made no attempt, is what you said.

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

QUESTION: And having made no attempt, he has no further course of action against the unions. Then, why, nevertheless, does he have a cause of action against the employer? Why should he, if the union is to be off, because he doesn't exhaust against the union? Why shouldn't the employer also be?

QUESTION: Because if he -- it may be decided in the exhaustion, if he does exhaust; the union may decide and he may even agree that the union didn't breach its duty at all.

MR. WHITMAN: And the problem may go away.

QUESTION: Well, it won't go away if you say that he can proceed against the employer, meanwhile. Your position is that he doesn't even need to stay the action against the employer. He just can go right ahead. And if in the union procedures it's decided that as between the union and this man the union did all that it was supposed to do, why shouldn't the employer be able to take advantage of that?

MR. WHITMAN: The prudent course would be to hold the procedures against the employer and in that effort to see what happened, because it's really premature --

QUESTION: All right, let's assume you do, and the union turns him down, and decides that we didn't breach a duty at all and we're not going to go back to arbitration. That is all, we just --

MR. WHITMAN: Then both the union and the employer will proceed with the suit.

QUESTION: I beg your pardon?

MR. WHITMAN: If the man goes to the union and the union says, you're wrong, and you won't believe you're wrong --

QUESTION: Then the suit goes forward against both?

MR. WHITMAN: As I say, I can't warranty against frivolous litigation or litigation where the union isn't willing to cure a fault in --

QUESTION: Then, I really don't understand, Mr. Whitman, why you can take the position, if he refuses to proceed to exhaust, that lets the union off but not also the employer?

MR. WHITMAN: Well, Your Honor, I suppose the answer is that it will depend on the factual setting and the employer's attitude and what the union will and won't do, and that is best left to the trial bench in their discretion, because situations vary.

QUESTION: Of course, here, the trial judge thought they should both do likewise, is the way it looks.

MR. WHITMAN: Yes, Your Honor, they did. Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. McTernan.

ORAL ARGUMENT OF JOHN T. McTERNAN, ESQ.,

ON BEHALF OF PETITIONER CLAYTON IN NO. 80-5049

AND OF RESPONDENT CLAYTON IN NO. 80-54 -- REBUTTAL

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

Mr. Justice Stevens, as I understand it, the duty to exhaust is a requirement which derives from the first proviso of 411(a)(4). But whether the requirement will be imposed is a matter of judicial discretion. In the trial court that requirement was imposed on the ground that the union remedy could afford this man money as a complete answer to his entire problem. And we take the position, I think it's correct, and it follows the policy laid down in Chambers and other cases which we cite, that he may not be required to resort to a remedy that cannot give him the relief he seeks. And to require him to take money in place of what I concede to be a unique job is certainly to deny him the relief he seeks. This man had 8-1/2 years' seniority; he was a black worker, in a market area where the black rate of unemployment is twice that of whites, and he's thrown out and lost his

8-1/2 years and he can never regain it. He has to have, it seems to me, a right to get at reinstatement.

Now, so far, Mr. Chief Justice, as the tradition of exhausting all of these things before resort to court is concerned, I submit to you that exhaustion cannot be imposed arbitrarily and as an empty procedure. What can he get out of going to the store manager, as Mr. Whitman put it? He can get from the store manager at best an admission that the store manager was wrong. And what does that get him? It gets him possibly damages from the union sometime, after the liability of the employer is decided, but he still has to go to court to get his reinstatement rights determined.

QUESTION: Mr. McTernan, suppose we agree with you about exhaustion, is one of your questions here also that the union should not have been dismissed from the suit?

MR. McTERNAN: Yes, sir, that's our point; that is our position.

QUESTION: And why is that?

MR. McTERNAN: Our position is that the union procedures were inadequate as a matter of law --

QUESTION: And so you're just entitled to sue them, that's all.

MR. McTERNAN: Correct. And this is not simply a matter of jump to a lawyer and sue, it's a question of going to a tribunal where you have a chance of getting what you're

seeking.

QUESTION: And if you're going to have to prove a breach of representation, you want the union there as a party so you have the advantages of working against the defendant, all the remedies against the defendant?

MR. McTERNAN: Exactly.

QUESTION: Discovery and other things?

MR. McTERNAN: Exactly. And if we were to proceed against the employer alone, as the Court of Appeals said to do, and we should win in the trial court, then we'd have to go back and sue the union again for its share of the damamges.

QUESTION: But I suppose there is some great advantage to having them as an opponent in the lawsuit rather than as a third-party witness?

MR. McTERNAN: Indeed it is, because then we have the right to discovery under the civil rules.

I would like to close with just one observation about the ease of these union remedies. It isn't simply a matter of writing a letter to Douglas Fraser. It's a matter of first going to the union local and having that considered, and then going to the International Executive Board through Mr. Fraser.

QUESTION: How much time does all this take, Mr. McTernan?

MR. McTERNAN: Well, 45 days -- the local union

must decide in 45 days. The International Executive Board is required to use its best efforts to decide in 60 days, and of course each time there has to be a step to get the appeal filed farther up. The union president, Mr. Fraser, has unfettered discretion to take a case over and decide it himself whenever he thinks it's appropriate, and he is under no time restraint. The top level, the Public Review Board of the Constitutional Committee is under no time restraint.

And in that connection, Mr. Justice Brennan, I'd point out to you that the counsel for the PRB has said that this appeal structure is designed to produce an effective decision in approximately nine months to approximately 12 months.

QUESTION: This case has been over four years, hasn't it?

MR. McTERNAN: This case has been over five years, sir. And may I point out to you that there are a couple of judicial experiences with this time thing. In Ruzicka, which is cited very much in my opponent's brief, the employee had gone 27 months fruitlessly without a remedy under the UAW procedure. And in the Maxwell case we cite to you, the employee had gone 17 months fruitlessly without a remedy. And I say that, here, Clayton, had he resorted to this remedy, no matter what time it took, it would have been fruitless

because he couldn't have got the relief he needs, and that is reinstatement.

QUESTION: Had he gone back for arbitration, how do we know but it might have been settled a long time ago?

MR. McTERNAN: Well, he had hoped, sir -- sir, he had no way of going back to arbitration. The union withdrew the case from arbitration and that was the end of the road. He had to --

QUESTION: It was conceded, unless you disagree with it -- that makes it quite different -- that he could get outside counsel and go to arbitration.

MR. McTERNAN: Oh, I think what that was addressed to was this, if there were arbitration after this litigation, he might be able to get --

QUESTION: Not after? Before he started his lawsuit in the district court, are you saying he could not have had arbitration with his own private counsel?

MR. McTERNAN: Mr. Chief Justice, at that point he could have had no arbitration either with the union representing him or with private counsel representing him. The grievance was over with, dead, and done, and that's stipulated to by all the parties at trial.

QUESTION: Because of the provisions of the collective bargaining contract.

MR. McTERNAN: Exactly. Exactly.

QUESTION: The procedure was exhausted.

MR. McTERNAN: Exactly. Thank you.

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

(Whereupon, at 11:15 o'clock a.m., the case in the above-entitled case 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. 80-5049
CLIFFORD E. CLAYTON
V.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.
&
No. 80-54
ITT GILFILLAN, ETC.
V.
CLIFFORD E. CLAYTON

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

BY: Bill T. Gibson