In the ORIGINAL

Supreme Court of the United States

JACKSONVILLE BULK TERMINALS, INC., ET AL.

Petitioners

v. 80-1045

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION ET AL.

Washington, D. C.

Monday, January 18, 1982

Pages 1 thru 55

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:09 p.m.

APPEARANCES:

THOMAS P. GIES, ESQ., Washington, D.C.; on behalf of the Petitioners.

ERNEST L. MATHEWS, JR., ESQ., New York, N.Y.; on behalf of the Respondents.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Jacksonville Bulk Terminals against the International Longshoremen.

Mr. Gies.

ORAL ARGUMENT OF THOMAS P. GIES, ESQ.

ON BEHALF OF THE PETITIONERS

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

This case concerns the propriety of an injunction issued by the District Court pursuant to Section 301 of the Labor Management Relations Act, to restrain a work stoppage in violation of the parties' collective bargaining agreement.

The reason for this work stoppage -- the union's disapproval of Occidental's continuing trade with the Soviet Union after the invasion of Afghanistan -- is the decisive fact in this case. As I will develop this afternoon, it is the motivation for this work stoppage that makes this injunction fully warranted under Section 301, contrary to the decision of the Court of Appeals.

We submit very simply to this Court that Norris-LaGuardia does not apply in this case. The admitted objective of the union's work stoppage has concededly and always been a purely political motivation. The concern over the invasion of Afghanistan is not even remotely related to

the union's status as employees. Accordingly, that work stoppage is totally unrelated to the purposes of the Norris-LaGuardia Act.

The Court obviously has never held that Norris-LaGuardia protects purely political union work stoppages, and the cases construing Norris-LaGuardia, we submit, are clear.

QUESTION: What's the language of Norris-LaGuardia, labor disputes?

MR. GIES: Section 4 of Norris-LaGuardia, Your Honor, forbids federal courts to enter injunctions in labor disputes as defined elsewhere in that statute; and the labor dispute definition is defined broadly to include wages and terms and conditions with the purpose of assisting unions in organizing employees, and in engaging in collective bargaining, and for other mutual aid or protection.

And I submit that even under the broadest possible reading of the mutual aid and protection clause that it is clear that any effort by a union in order to be protected by Norris-LaGuardia must make some effort at improving the lot of the employees as employees; and that an objective that is purely political has absolutely no bearing under the Norris-LaGuardia Act.

QUESTION: I suppose it could reasonably be said that this would be against the interests of the employees

because it would cut down their work.

MR. GIES: Indeed, Your Honor. Not only against the interests of the employees, but the record is clear in this case that this is against the interests of the United States foreign policy. And that provides another reason why the protections of Norris-LaGuardia should not be extended to a case of this kind.

In short, it is clear under Section 301 that unless this conduct is protected by Norris-LaGuardia, there is no serious obstacle to the injunction entered by the District Court. It is only if the union can convince this Court to take what we submit to be a radical step in extending the scope of Norris-LaGuardia that there is any case here at all. If Norris-LaGuardia does not apply, the ordinary equitable principles warranting an injunction were present in this case, and the injunction properly issued.

It is not sufficient, we submit, that there be an incidental work stoppage. The objective of the union is the determinative factor for answering the question of whether or not Norris-LaGuardia applies.

There are strong policy reasons for not extending Norris-LaGuardia to cover a case like this. This Court has recognized in the Eastex case and elsewhere that there are definite limits to protected activity that unions are entitled to engage in.

The Eastex case, of course, grew out of the National Labor Relations Act, which significantly, that contains the same definition of labor dispute as does Norris-LaGuardia.

Under this Court's decision in Eastex, recognizing that purely political conduct is not protected by Section 7, we think that it is equally clear that the conduct would not be protected by the Norris-LaGuardia Act.

A second aspect of policy that we think is very critical here is the national labor policy favoring industrial peace. The major objective of Section 301, at least one of those objectives, was to permit enforcement of collective bargaining agreements containing no strike pledges. Irrespective of the motivation for the work stoppage, we submit national labor policy favors industrial peace and favors enforcement of no strike provisions in collective bargaining agreements.

I've already referred briefly to the foreign policy interference at issue in this case. The union here has demonstrated a long history of taking what the First Circuit in the Allied case called whimsical political activity. It is very likely to happen again, and the Solicitor General has agreed with our position that the Union's conduct here does indeed interfere with the conduct of American foreign policy.

Because of that and because of the other two policy reasons already articulated, it is clear --

QUESTION: I gather the Government's position is that there is a labor dispute here, isn't it?

MR. GIES: You're absolutely right, Your Honor.

QUESTION: And that the injunction with justified within the Boys Market exception?

MR. GIES: That is correct, Your Honor. And frankly, we are somewhat unclear as to the source of the Government's concern in that regard. They articulate only that Section 203(d) of Taft-Hartley governing the operation of the Federal Mediation and Conciliation Service might somehow be impacted by a decision in this case that a purely political strike is not a work stoppage. We frankly see no reason why the FMCS should get involved in trying to mediate the Russian invasion of Afghanistan, and see no negative impact, more important, on federal labor policy if the definition of labor dispute were clarified to exclude purely political conduct.

QUESTION: Well, what would be the consequences for our decision in Buffalo Forge if we were to follow your advice?

MR. GIES: Your Honor, I think that the Court need not reach Buffalo Forge and that it would have no impact on Buffalo Forge, if the Court takes the narrow approach here

and holds that this is not a labor dispute.

QUESTION: Do you rely on any one particular case from this Court as holding this is not a labor dispute?

MR. GIES: The question has never come up directly, Your Honor, as far as I know. I rely very heavily on every case that the Court has decided under Norris-LaGuardia, none of which extend the protections of the Act to purely political conduct.

And I submit, Your Honor, to reach the exception of Norris-LaGuardia unless the Act applies in the first instance. And that is our position.

QUESTION: But if you lose that first point, then what about Justice Rehnquist's question?

MR. GIES: If we lose the first point, Your Honor, then obviously the Court must face again the difficult question of when does a labor injunction issue, assuming the applicability of the Norris-LaGuardia Act. We submit here again that Buffalo Forge is easily distinguishable from this case, and that even if the Court were to extend Norris-LaGuardia to include this kind of dispute, that there is sound reason why injunctive relief was proper under Boys Markets in this case.

QUESTION: What are the distinguishing features?

MR. GIES: There are two principal distinctions, Your Honor, that I would make between this case and Buffalo

Forge. The first and most important is that this conduct is not statutorily protected. It is purely political conduct and not protected by Section 7 of the National Labor Relations Act.

Buffalo Forge, on the other hand, involved the right of employees to refuse to cross a picket line -- one of the most fundamental of union rights, very clearly protected activity. And the Court there necessarily had to grapple with the competing tensions of statutorily protected conduct on one hand, and the statutorily protected right of the employer to enforce this no strike clause.

QUESTION: You mean, this is on the assumption that Norris-LaGuardia applies.

MR. GIES: Correct.

QUESTION: And then you would say an injunction could issue whenever you find that something falls outside of Section 7, even if there's a labor dispute.

MR. GIES: Correct, Your Honor, because the objective and the motivation of the union's conduct is still relevant, even if Norris-LaGuardia would apply --

QUESTION: Well, this point has nothing to do with Buffalo Forge either.

MR. GIES: It distinguishes this case from Buffalo Forge in our view, Your Honor.

QUESTION: Go ahead.

MR. GIES: Now, the second reason that this case is very different from Buffalo Forge is the nature of the work stoppage and what motivated it in the first place. Buffalo Forge --

QUESTION: May I go back for a moment, because I want to be sure I understand your first distinction. You say the conduct of whom is not statutorily protected?

MR. GIES: The conduct of the striking employees.

QUESTION: Because this is a right to strike -- because their motive was political. I see.

MR. GIES: Correct, Your Honor.

QUESTION: Whereas in Buffalo Forge the sympathy strike was statutorily protected.

MR. GIES: And the question here is whether or not it was waived.

QUESTION: That was about wages, hours, and working conditions.

MR. GIES: Correct, Your Honor. Correct. And so the question in Buffalo Forge was once statutorily protected, was it then waived by the no strike clause in the contract. Here, on the other hand, we submit it's not protected in the first instance.

Now, the second distinction I think goes to the nature of the work stoppage. The union refused to handle Soviet cargo in this case. The work stoppage grew out of an

affirmative act of the employer of these particular employees; that is, the decision to continue trading in Soviet cargo after the invasion of Afghanistan. As such, this work stoppage is entirely confined within this employment relationship. Buffalo Forge, on the other hand, involved a sympathy strike in support of other employees, not within that collective bargaining relationship that the employer sought to force through an injunction.

It's understandable in that kind of a case that the Court might indeed conclude that the arbitrator could not resolve the underlying dispute, because the underlying dispute was the complaint of another group of employees against that employer. Here, there is no other group of employees. Here, the only issue between the employer and the union is whether or not we can force these employees to handle Russian cargo.

Now, as we have argued, that raises a very distinct question of arbitrability under the contracts management rights clause.

QUESTION: So you do agree with the United States position then.

MR. GIES: Indeed, we do.

QUESTION: That there really is an underlying arbitrable dispute, namely the breadth of the management rights clause.

MR. GIES: Your Honor, our position is that even if the Court were to find this to be protected by Norris-LaGuardia, that the Solicitor General and our position both are correct, that it is enjoinable under Boys Markets. It is an underlying arbitrable dispute.

It's a shame in some ways --

QUESTION: Well, if it is protected by Norris-LaGuardia, then isn't your position and the Government's the same?

MR. GIES: Yes. The only difference is there's some indication that the Solicitor General relies on a different provision in the collective bargaining agreement than do we. Our view is that's not a major difference.

QUESTION: It makes it an arbitrable dispute.

MR. GIES: Exactly, exactly. So we do reach the same point. They say that --

QUESTION: Has your client yet gone to arbitration?

MR. GIES: We have not, Your Honor.

QUESTION: Is there a reason for that?

MR. GIES: Several reasons, Your Honor, the first of which is that we think it's just as incumbent upon the union to proceed to arbitration in a case like this as it is for us. And I submit that the reason why there's been no arbitration in this case is because the union already lost that issue in New Orleans and didn't want to lose it again

here in Jacksonville.

Moreover, as a matter of fact, soon after this injunction was issued, the presidential embargo was extended to cover the product at issue in this case; and practically speaking, at that point there wasn't any immediate need to seek arbitration.

We have remained and still remain willing to arbitrate the question of the violation of the no strike clause at any time and always have.

QUESTION: Well, that isn't what you claim is the arbitrable dispute, though, for purposes of distinguishing Boys Market.

MR. GIES: The arbitrable dispute is the question of whether or not the union had the right to refuse to handle the cargo, not just the question of violation of the no strike clause.

QUESTION: If the judgment in the other case is affirmed is your problem solved?

MR. GIES: You mean the Allied case, Your Honor? Indeed not. It depends, I think, a great deal --

QUESTION: There there would be an opportunity to enjoin a secondary boycott.

MR. GIES: It would depend upon the theory that the Court would use to affirm the board.

QUESTION: Well, what about the --

MR. GIES: Leaving that question aside for a minute --

QUESTION: Well, what about the theory of the court below?

MR. GIES: The theory of the court below in the First Circuit would permit an injunction by the NLRB.

QUESTION: Yes. And would that solve your problem?

MR. GIES: Not as well, Your Honor. It's much more effective for us to enforce our own no strike clause ourselves rather than have to rely on the National Labor Relations Board to seek a 10(1) injunction.

QUESTION: But it would be declared to be an unfair labor practice.

MR. GIES: It could be declared to be an unfair labor practice.

QUESTION: Well, it was, wasn't it?

MR. GIES: It was in the First Circuit. You're absolutely right, Your Honor.

Now, we would submit, though, that given the unusual nature of the Allied case -- and there are different theories there as to what the secondary boycott was or was not -- that it may be difficult to find, depending upon the theory used by the Court, to find a neutral party that one could claim was being coerced so that secondary boycott relief under Section 8(b)(4) was permissible.

But that question aside, Justice White, you're absolutely right.

QUESTION: Well, you're refusing to handle cargo, and that cargo comes from somewhere.

MR. GIES: Correct.

QUESTION: Some neutral.

MR. GIES: Correct. And I think that if the Court -- and I hope the Court does affirm the Allied case -- that it makes it very, very clear that there always is a neutral party affected by this kind of boycott, and that 8(b)(4) ought to be read as broadly as possible to keep unions from engaging in this kind of conduct.

QUESTION: In your view there's no difference which way the cargo is moving, in or out.

MR. GIES: Indeed not. We are the only party of this boycott that's been affected both ways, to my knowledge. We both export and import. The problem was with the importation. We do not have the contract with the longshoremen union. We rely on stevedoring companies there to conduct those kinds of operations. We much prefer to be able to sue on our own contract in Section 301 and be able to get injunctive relief.

QUESTION: Perhaps I misunderstood you. Did you say that the extension of the embargo in any event prevents you from handling this cargo, without regard to the

activities of the union?

MR. GIES: I'm not sure I understand your question.

QUESTION: I thought you said earlier something about the extension of the embargo barred you from handling this stuff anyway.

MR. GIES: The extension of the embargo in 1980 did so. President Reagan lifted that embargo this year.

QUESTION: I see.

MR. GIES: So we are once again shipping both ways, both exporting and importing.

QUESTION: I see. I misunderstood you. I didn't get that.

MR. GIES: I apologize for that.

QUESTION: Mr. Gies, let me go back for a moment. You and the Government have a little different theory on what the underlying arbitrable dispute may be. Taking your version, under your version who would initiate the arbitration proceeding?

MR. GIES: Under the collective bargaining agreement it is a little unclear, frankly, as to who takes the first step in initiating the grievance. Typically, the employee and/or the union would have the right to process the grievance.

QUESTION: Well, take either hypothesis. Say your view is that then you might initiate. What would you

claim? You would say that the management prerogative clause should be construed to allow us to assign work involving these particular shipments to you.

MR. GIES: That is correct.

QUESTION: And suppose the union answers that we agree. There's nothing to arbitrate because we agree with your interpretation of that clause. The only thing we disagree with you about is your reading of the no strike clause. Would you still say that Buffalo Forge is distinguishable?

MR. GIES: That would be an independent arbitrable question, and whether or not --

QUESTION: You mean the interpretation of the no strike clause.

MR. GIES: Yes, sir.

QUESTION: Well, but then how do you distinguish Buffalo Forge?

MR. GIES: You get to the fact that if the only arbitrable question is the interpretation of the no strike clause, you cannot distinguish Buffalo Forge.

QUESTION: Well, then you have to take the position that you may issue an injunction pending the arbitration.

MR. GIES: Correct. And our position ultimately would be even if this Court finds that the only dispute in

this case is the application of the no strike clause, that a pre-arbitration injunction is still proper.

QUESTION: And would you say that in connection with any violation of any provision of the collective bargaining contract?

MR. GIES: Well, I think as Buffalo Forge has been interpreted --

QUESTION: Could you enter a pre-arbitration injunction over an allegedly illegal firing?

MR. GIES: There have been cases that have done that from the union's perspective, Your Honor.

QUESTION: Well, yes, but not consistent with Norris-LaGuardia, would you suggest?

MR. GIES: I wouldn't think so, Your Honor. Of course, we rely on Buffalo Forge to defend those kinds of cases.

The Court need not go so far as to overrule Buffalo Forge. I think it is clear that there is a very, very important policy --

QUESTION: Well, why not?

MR. GIES: Well, for two reasons: one, that Norris-LaGuardia --

QUESTION: Of course, I was on the other side of Buffalo Forge, as you know, but I'd be interested, why not? Why wouldn't we have to?

MR. GIES: Well, for the first reason that we don't think Norris-LaGuardia applies in the first instance. And for the second reason, even if it does that under Boys Markets a pre-arbitration injunction was fully warranted under Boys Markets.

But even if the Court finds, in response to Justice Stevens' question, that the only contractual issue here is the no strike clause, then I submit that there are differences, again based on the motivation of the union's conduct, that would not require overruling Buffalo Forge but would permit the injunction in this case. And that reason again gets back to the motivation of the union's conduct.

The motivation here is purely political. There is no competing tension between two aspects of national labor policy. Moreover, to the extent that intervening case law and interpretation of Buffalo Forge has caused the confusion that it has, we submit that that provides an additional reason for not extending Buffalo Forge to the facts of this case.

There's no real question in our mind that the availability of other remedies to combat a work stoppage of this kind has been curtailed. The availability of the damages remedy has been cut back by this Court's decision in both Carbon Fuel and Complete Auto Transit.

The availability of a discipline remedy --

QUESTION: It's been cut back, but how does it affect the damage remedy against this particular union?

MR. GIES: We haven't gotten that far in the case yet, Your Honor.

QUESTION: I mean, certainly not being able to collect from the employees, you wouldn't have to do that in this case.

MR. GIES: What we would have to do in this case is litigate the question as to whether or not we could pursue damages against the local and/or the international. And I --

QUESTION: They both accept responsibility for the stoppage, as I understand the facts.

MR. GIES: Indeed not. One of the reasons for the union's motion to dismiss in the District Court was they were not a party to the collective bargaining agreement.

QUESTION: Oh, I'm sorry. I'm sorry.

MR. GIES: So the union has not only denied a violation of the no strike clause, but the international has tried to contend they're not even a party to the case. Now, of course they've abandoned that argument by the time it's gotten here.

We submit that damages, not only is it questionable under the Court's decisions, whether or not it's efficacious. It's clear to me that pursuing either

damages or discipline of employees does nothing to promote industrial harmony and does everything in fact to exacerbate industrial strife, which we submit is totally contrary to the purposes of national labor policy.

In fact, we think that this is probably the most ironic kind of no strike clause violation that the Court could ever see. In the typical case the union strikes because of something the employer does. The employer, as in Boys Markets, assigns supervisors to do what the union considers to be bargaining unit work. The union has a defense. They claim that the company has violated the contract warranting them to strike.

In this case if you believe the union, the employer here had absolutely nothing to do with it. They claim their dispute is solely with the Soviet Union. And if you believe that argument, here we have a situation where an employer had absolutely nothing to do with causing the breach of the no strike clause in the first instance, and he cannot obtain an injunction, whereas if he had done something to precipitate it in the first place, he could obtain an injunction. And our view is that that again is inconsistent with the goals of national labor policy.

The concern about Buffalo Forge to the effect that there might be usurpation of the arbitrator in the event that a pre-arbitration injunction were issued in this case

we think mischaracterizes the real concern of what federal courts do.

In every Boys Markets case we submit a federal court has to examine two questions. The court must look first to see whether or not the strike does indeed violate the no strike clause, because if the no strike clause excepts from its prohibition certain kinds of conduct, then there is obviously nothing to enjoin in the first instance.

Secondly, of course, the court in a Boys Markets situation must look to see whether or not there is an independent underlying dispute, as has been interpreted in Buffalo Forge.

In neither situation does the court's initial interpretation of the collective bargaining agreement usurp the arbitrator. It is merely that initial determination of arbitrability that the Court has required federal courts to take since the Steelworkers trilogy. And in our view, allowing a pre-arbitration injunction in this case would in no way either cause an influx of cases into the federal courts or amount to a usurpation of the arbitration function.

The vice with the way the lower courts have interpreted Buffalo Forge is, very frankly, the notion of coterminous application of the no strike clause in the arbitration provision. It must be remembered that the genesis of the quid pro quo coterminous application theory

was this Court's decisions in Gateway Coal and Lucas Flour. Both of those cases involved implied, not express, no strike clauses. And while it may make sense there, and probably does make sense there, to imply a no strike clause only as broad as the arbitration provision, where you have an express no strike clause that on its face obligates the union not to strike for any reason whatsoever, that is beyond arbitrable questions, that it is imperative that the Court analyze, as admonished in Gateway Coal, that provision separately and distinct from the arbitration provision.

Here, of course, in this case the arbitration provision is also very broad. It is not limited to grievances over terms and conditions of the contract, but it covers all matters under dispute.

QUESTION: Do you think the court below would have said there could be no injunction issued issue if the arbitrator determines that the no strike clause has been violated and says so, and then the union continues to strike? Can't you enforce the arbitration provision?

MR. GIES: And that's exactly what happened in this case, Your Honor, in New Orleans.

QUESTION: So what you're really talking about is an injunction pending arbitration.

MR. GIES: Absolutely, Your Honor. Absolutely, Your Honor. And our view is, very frankly, that there's no

reason why we're not entitled to the most effective remedy. And there's no reason, in our view, why those boats should have sat in the harbor in Jacksonville five minutes.

QUESTION: But you normally don't have an injunction pending arbitration. You certainly do afterwards. In most claims of violation of 301 that are arbitrable you have an arbitration, but you don't join the employer from firing.

MR. GIES: Indeed not.

QUESTION: He fires and then reinstatement awaits the arbitration.

MR. GIES: That is absolutely correct, and we would see no reason to change that policy when it comes up in this case.

QUESTION: Yes, you would in -- when the promise is not to strike, do you say you may have an injunction any time that it's alleged that the no strike clause has been violated?

MR. GIES: We don't think the Court need go that far.

QUESTION: Well, what's your position?

MR. GIES: Our position is that where the conduct is either political, and therefore not entitled to statutory protection, or where it is beyond the employer's control -- and those are two very different things -- that in both

those situations the mere allegation of a violation of the no strike clause will support the pre-arbitration --

QUESTION: Or at least making out the normal grounds for an injunction.

MR. GIES: Correct. Again, assuming all the other requisites of Boys Markets have been met.

QUESTION: But if the dispute is political and not with the employer, that seems to me is a stronger reason for saying it's not a labor dispute than it is for getting an exception to an exception.

MR. GIES: That is our first argument, Your Honor. We agree.

I will save the remaining time for rebuttal.

Thank you very much.

CHIEF JUSTICE BURGER: Mr. Mathews.

ORAL ARGUMENT OF ERNEST L. MATHEWS, JR., ESQ.

ON BEHALF OF THE RESPONDENTS

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

At the very start I would like to make clear that the dispute in this case is not over Occidental's choice of a customer. I don't know why but of all the parties that have been involved in the litigation involving this activity by the union Occidental seems to think that it is the center of the universe and that our quarrel is with it.

Now, whether that is because they closely identify with the Soviet Union or they just have a Ptolemy complex I don't know. But every court --

QUESTION: Well, would this be any different if, for example, on the West Coast or anywhere you had the union refusing to handle airplanes to Taiwan, for example?

MR. MATHEWS: It would depend, Your Honor. I would say --

QUESTION: It would be the same?

MR. MATHEWS: It would be the same if the union's motivation was the same; that is to say, if the union simply said I'm not going to handle airplanes to Taiwan, that's one thing. Where the union says I will not handle airplanes to a certain country where that country is engaged in an act of international barbarism, that's quite another thing. It's not simply well, we like this country; we don't like that country.

QUESTION: Well, is one less or different in some way in a political sense?

MR. MATHEWS: Yes. I think it's very different.

QUESTION: How?

MR. MATHEWS: Because what inspired the union's activity in this case was something that really affronted the conscience of the entire world. It was the invasion of Afghanistan. It was not simply that Russia is an inimical

country, that it has a communist system, or it does things we don't like. It was a transcendent act, something that not only shocked the union but shocked the President of the United States, shocked people all over the world.

QUESTION: Any different from the shock that came from what's happened in Poland?

MR. MATHEWS: No, Your Honor. And I suppose this Court knows -- well, it has been called to your attention -- that the ILA has now ceased handling goods going to Poland. I think it's a slightly different thing because in Poland we do have a labor dispute. The barbarism there is breaking a strike with bayonets and tanks.

QUESTION: But the Afghanistan was political.

MR. MATHEWS: It was. Political and conscientious.

QUESTION: So there's no argument about that.

MR. MATHEWS: There's no argument about that. We would agree with Occidental that the underlying dispute in this case is a political dispute, is not a labor dispute, is not even in domestic American commerce. Where we disagree is that that underlying dispute is not the subject of Occidental's lawsuit. Occidental is suing on its contract. It is an employer suing the union that represents its employees to enforce a provision to provide labor. And if that is not a labor dispute, I really don't know what is. I don't think I have to belabor the point. If you don't see

it, then --

QUESTION: Well, you have to belabor it with me, because it seems to me you've got to get it within the language of the statute. And what statutory language do you think covers this dispute in Section 4 of the Norris-LaGuardia Act?

MR. MATHEWS: Well, the Norris-LaGuardia Act forbids the federal courts or removes their jurisdiction from granting an injunction in cases arising out of or involving labor disputes.

QUESTION: And then they define labor dispute in another section of the statute.

MR. MATHEWS: Yes, yes.

QUESTION: But they don't --

MR. MATHEWS: This case arises out of a dispute: does our no strike clause require us to give labor. It's the basic thing about --

QUESTION: But you make this argument without reference to the statutory language is all I'm suggesting.

MR. MATHEWS: Well, the --

QUESTION: The definition of a labor dispute in the Norris-LaGuardia --

MR. MATHEWS: Is wages, hours, conditions.

QUESTION: What has this got to do -- it has nothing to do with terms or conditions of employment, does

it?

MR. MATHEWS: Yes. It is a term and condition of an employment contract, of a collective bargaining agreement. That is what they are suing on, one of the conditions, one of the terms of their labor contract.

QUESTION: You mean the no strike clause.

MR. MATHEWS: Yes. They try to bring in a few others but --

QUESTION: It's a promise to work.

MR. MATHEWS: Yes. In effect, a no strike clause is an affirmative promise to work. What they're seeking is specific performance of a promise to provide labor. I'd say that's a labor dispute. That's a term and condition of labor. We will supply labor in, as Occidental says, in all circumstances.

QUESTION: Well, how is that different from any time that you have a refusal to work, a strike, whatever the motivation may be; it's always a refusal to furnish labor, is it not?

MR. MATHEWS: That is true. And I would say that --

QUESTION: Doesn't that render the language of Norris-LaGuardia simply meaningless?

MR. MATHEWS: No. Because --

QUESTION: As well as the arbitration clause

becomes meaningless, does it not?

MR. MATHEWS: Well, the language of Norris-LaGuardia in the light of the arbitration clause is the next segment of this case; that is, the Boys Market-Buffalo Forge analysis. Whether or not the case here involves a labor dispute is the first part of it. Now, we have to get under Norris-LaGuardia before we see whether it falls under an exception.

We say that an action -- and the Solicitor General, who in all other respects this afternoon you will find is on the other side of the table, agrees with us. It is a labor dispute. It's the meaning of a labor contract and a no strike clause.

QUESTION: Well, would you say the same thing if there were no no strike clause in the contract?

MR. MATHEWS: If there were no no strike clause in the contract, Occidental would not be here today. They'd have no standing to sue.

QUESTION: Well, that may be, but -- well, there may not have been an obstacle to their suing unless the Norris-LaGuardia Act applies. That's my point.

MR. MATHEWS: They would have no lawsuit. They're suing to enforce the no strike --

QUESTION: That may be. Would there, in your judgment, be a labor dispute between the parties here if

there were no no strike clause in the contract, or does your labor dispute depend entirely on the fact that it involves that term of the contract?

MR. MATHEWS: Well, I would have to answer that in a qualified way, Justive Stevens. It would have to be -- they might manufacture some other clause and say we have labor dispute with you about some other clause of the contract.

QUESTION: No. Say they don't sue you under a contract; they merely sue you under some kind of common law tort theory or something like that.

MR. MATHEWS: Oh, then, no. Then I would --

QUESTION: Would the Norris-LaGuardia Act be an objection to the entering of an injunction in such a case?

MR. MATHEWS: If it were not on the contract, no, I couldn't say it was.

QUESTION: So the labor dispute, in your view, turns entirely on the presence of a no strike clause in the contract.

MR. MATHEWS: Well, I'd have to be a little broader. It turns on the fact that they are suing on their labor contract on a promise, an alleged promise to perform labor. If they were suing in tort and not in contract, then I couldn't say that labor --

QUESTION: So it's not the strike but rather it's

the fact that it's a contract case.

MR. MATHEWS: Yes. A labor contract.

QUESTION: I think that's not the Government's theory.

MR. MATHEWS: It's a 301 case, and that is the only way they have federal jurisdiction if this is a labor contract.

QUESTION: Are you saying this is a labor dispute that is not arbitrable?

MR. MATHEWS: Yes. Well, no. The resulting dispute is or may be arbitrable. Now we get into the Buffalo Forge case. The underlying dispute, the thing that the union struck over was the Soviet action in Afghanistan. We had no dispute with Occidental. Our attitude is the longshoremen do not wish to give their services to the aggressors while the aggression is going on. It is a moral, conscientious choice just not to have anything to do with these people, something akin to Toscanini refusing to perform in Germany or Italy while there were fascist dictatorships there. But even worse because it was triggered by, you know, not simply a disagreement with what the Soviet Union is but by a real act of terrorism.

That underlying dispute is not a labor dispute. It is not arbitrable under the contract with JBT, and it is also really not the subject of this lawsuit. Buffalo Forge

--

Well, before we get to Buffalo Forge we have to talk about Boys Market. Norris-LaGuardia does not permit specific performance of labor contracts. It bars federal courts from granting injunctions, including mandatory injunctions, in cases involving labor disputes.

This Court --

QUESTION: Exception for arbitration clause.

MR. MATHEWS: And that is what Boys Market held. But except for labor arbitration clauses. Those clauses can be specifically enforced under the Boys Market doctrine. The question is, though, or what the purpose, the thrust of Boys Market is, not to grant specific performance of any other clause of the contract willy-nilly, but to promote the federal policy favoring arbitration. It is in aid of arbitration, not in aid of stopping strikes, of keeping people from being involved in management rights or anything else. Boys Market is tied very closely to arbitration. So that this Court in Buffalo Forge held that if the underlying dispute, if the thing over which the union is striking cannot be resolved by arbitration, then Boys Market doesn't apply; because all you would be doing by granting an injunction would be enforcing some substantive provision of the contract other than the arbitration clause.

But the Court also recognized that even though the

underlying dispute cannot be arbitrated, the union's action in response to that dispute could violate a broad no strike clause, and that's where the no strike clause. If you had a narrow no strike clause, let us say as we did in the case in the Northern District of New York, which is, I think, attached to one of the papers before the Court, the no strike clause merely said the union won't strike while arbitration is going on. But once you find there can't be any arbitration going on over the invasion of Afghanistan, the no strike clause is never triggered, and the District Court very quickly dismissed the case.

But where you have a broad --

QUESTION: The arbitration point is not about Afghanistan; it's whether or not you can strike.

MR. MATHEWS: That's right. That is the second condition.

QUESTION: But you just said it was about Afghanistan.

MR. MATHEWS: No. There can't be any arbitration about Afghanistan.

QUESTION: Well, I should think so. But it can be arbitrated as to whether a man works or not, or whether a man follows his contract or not, or whether he commits a tort or not.

MR. MATHEWS: Well, I'm not sure we could have

arbitration on whether he commits a tort, but --

QUESTION: Well, arbitrate whatever's in the contract.

MR. MATHEWS: Yes. What this contract requires. The arbitrator could rule on whether or not striking over a non-arbitrable issue violates the --

QUESTION: But you weren't interested.

MR. MATHEWS: -- No strike clause.

QUESTION: You weren't interested in arbitration. Are you interested now?

MR. MATHEWS: No, we're not interested in it.

QUESTION: I didn't think so.

MR. MATHEWS: They're the plaintiff. They're the ones who are claiming we're violating the no strike clause. We take the position --

QUESTION: No. I'm talking about arbitration. You're not interested in arbitration now, are you?

MR. MATHEWS: Not really, because we don't think we're violating the contract. We take the position that our promise not to strike is coterminous with the agreement to arbitrate. It is the quid pro quo, one before the other. The union gives up its economic weapon, striking, if its grievances can be resolved by the method of arbitration. And this phrase "quid pro quo," which my friend objects to, appears, I think, in every case involving arbitration

clause. I'm amazed. It's a leitmotif of Wagnerian dimensions. Always when you mention arbitration clause, no strike clause, the balance is quid pro quo.

So we agreed not to strike where we could get satisfaction by arbitration, but we did not agree not to strike where the employer cannot redress our grievance, where the arbitrator cannot redress our grievance, and where the result is that mechanistically we simply have to go on servicing these butchers in a situation that is morally unconscienable for our men.

QUESTION: Mr. Mathews, on the quid pro quo point, do you suppose that lawyers could possibly draft in the next negotiation an agreement by which the union would be bound not to strike in a situation like this?

MR. MATHEWS: That could be drafted, it could be bargained for, yes.

QUESTION: But it would not be enforceable.k

MR. MATHEWS: That's not --

QUESTION: Could you draft an -- I should have said -- obviously you could draft it. Could you draft an enforceable no strike clause that would cover something, some dispute that was not arbitrable such as this particular dispute with Russia? I guess the answer is no.

QUESTION: Well, you don't say this no strike clause isn't enforceable.

MR. MATHEWS: Oh, no, I don't.

QUESTION: You just say you can't issue an injunction pending arbitration.

MR. MATHEWS: Pending arbitration. And it may not be --

QUESTION: And as soon as it's arbitrated and decided that you've violated it, you're going to have to stop.

MR. MATHEWS: Absolutely. And we have elsewhere. If the arbitrator rules that we are violating it.

QUESTION: Let me make my question more clear. Justice White is absolutely right, of course. But could you draft a clause that would be judicially enforceable by injunction?

QUESTION: After the --

QUESTION: Now we know what the problem is, and the mangaement comes to you and says we don't want this to happen again. And you say it's all right, if you give us an extra dollar an hour, why, we'll agree, we will not strike in this precise situation pending arbitration.

I guess you're going to say that there's no way that you can make such a provision to be judicially enforceable, is there?

MR. MATHEWS: Well, Your Honor, I'll tell you, I've spent some hours drafting the opposite, what would

happen if this Court goes the other way, and putting in a provision, as I say, hey, look, this no strike clause is no broader than --

QUESTION: No. I understand that.

MR. MATHEWS: And I've really never even thought if we yielded whether that could be --

QUESTION: It's not inconceivable that management would be interested in such a clause.

MR. MATHEWS: No, it's certainly not.

QUESTION: And that they might be able to offer you enough economic incentive so that you might find it attractive; but it's something the law just doesn't provide for, I guess.

QUESTION: But if it's a Norris-LaGuardia jurisdictional and the parties don't waive, you can't create jursidiction, I guess, to issue an injunction.

MR. MATHEWS: They might, or we might --

QUESTION: You could say well, we waive the protections of Norris-LaGuardia.

MR. MATHEWS: Right. Or agree --

QUESTION: In effect in your contract. But would that give the Court jursidiction?

MR. MATHEWS: I don't know. I don't know if we can waive a right that Congress gives us. Congress takes the jurisdiction away --

QUESTION: Well, if it's really jurisdictional, the parties can't create it by waiver.

MR. MATHEWS: No. We might waive removing it to federal court and let them sue in the state courts where Norris-LaGuardia doesn't apply or something like that. But as a practical -- it's one that never occurred to me, Your Honor.

Going back for a moment, though, to that quid pro quo theory and the coterminous theory, that is not an outlandish theory. That is the position of the National Labor Relations Board. It's the position of the Third Circuit. It's the position of the First Circuit. And I believe the Sixth Circuit takes another view.

But because the union only gives up its economic right when it receives another forum where it can get redress, the courts and the board have found that they are coterminous. Now, they are only coterminous as a rule of construction, and the parties can come forward and show evidence that the real intent of the contracting parties was something else. What controls is the intent of the contracting parties to the no strike clause.

In this case, the no strike clause, and in all these Russian cases, there is a history. In 1964 the union did a similar thing over the Cuban missile crisis. There have been other instances. And I think the employers are

pretty well aware that the union has taken the position that it is free under its no strike clause to do this. When the arbitrator tells us differently, we obey and go back to work.

QUESTION: Mr. Mathews, would you have a different situation if the union concluded that it did not approve of the politics of the management of the employer? Let's say you have a political campaign going on, and the president of the company makes a contribution that the union disagrees with. The union goes out. You have a precisely comparable situation, don't you?

MR. MATHEWS: No. I don't think so, Your Honor.

QUESTION: What is the difference? What is the difference between one political strike and another one?

MR. MATHEWS: Well, again, I'm uncomfortable, although I have used the word up and down the East Coast with this idea of a political strike. I don't want the Court to have the idea that it's a political strike in the same sense as we had in England in the early part of this century. We are trying to affect the policies of the United States.

QUESTION: Is it limited to foreign policy?

MR. MATHEWS: This particular one is limited to Russian --

QUESTION: No, but you would give your view.

MR. MATHEWS: In our view? Well, I can only go

with what this dispute is, and in fact, the ones that the ILA has been involved in have always been foreign matters: the harboring of Cuban missiles, the invasion of Afghanistan, the labor policies in Poland.

QUESTION: But the legal arguments --

MR. MATHEWS: I think that's a very different ballgame from saying we don't --

QUESTION: But your legal arguments are precisely the same as in Justice Powell's case, it seems to me. Aren't your legal arguments precisely applicable to Justice Powell's hypothetical? It's a labor dispute because it's a strike, you've got a no strike clause, and it's over a non-arbitrable dispute. That's the whole ballgame, isn't it?

MR. MATHEWS: It is a dispute with the union. Yeah, I guess I would have to --

QUESTION: I mean the only significance of the word "political" is that it's non-labor.

MR. MATHEWS: Yes, I would agree.

QUESTION: Non-arbitrable, rather. It's broader than this. It's non-arbitrable.

MR. MATHEWS: Right. That it's non-arbitrable.

QUESTION: Yes.

MR. MATHEWS: That is really the meaning of Buffalo Forge. It's not what the dispute is. It's that it can't be settled by arbitration.

QUESTION: That's right.

QUESTION: Well, you could always obtain the same result of Buffalo Forge by drafting the kind of a clause that you've been working so hard at drafting.

MR. MATHEWS: Yes. Well, but then negotiating it.

QUESTION: We promise not to strike if the dispute involved is arbitrable.

MR. MATHEWS: That's right. Yes. Always, in all of this whole line of cases the parties, if they can get each other to agree at the bargaining table, can really go around any decision except --

QUESTION: But arbitration clauses have gotten broader and broader, too, haven't they?

MR. MATHEWS: Yes, they have.

QUESTION: They're no longer confined just to the terms and conditions of the contract. A lot of them are any and all disputes between employers and employees.

MR. MATHEWS: Yes. But that is, of course, what the arbitrator has got to decide. Is this -- he has two decisions. First he's got to decide is the strike over a non-arbitrable dispute, an arbitrable question. Then he has to decide is it a violation of the no strike clause.

QUESTION: Well, it depends on how you put the question, doesn't it? If the question is whether there is any basis for the strike, why isn't that subject to

arbitration, in a legal basis?

MR. MATHEWS: Well, because we are not -- because what is subject to arbitration -- well, it may be subject to arbitration under the no strike clause; but it's not subject to arbitration in the sense that it can be resolved by the arbitrator.

QUESTION: Well, it could be resolved if the arbitrator came out in your favor.

MR. MATHEWS: No. That doesn't resolve our underlying dispute, unless he is --

QUESTION: Well, what you're suggesting really is that if it's an arbitration that you aren't sure to win, then it's --

MR. MATHEWS: No, no. It's an arbitration that we're sure to lose. I mean, we can lose. He can say, you know, you've got to go back to work, but he can never say to the Russians get out of Afghanistan. That's the issue we are not working over.

QUESTION: Well, but then you come down to the question can you stop working on that kind of an issue under the contract and the law.

MR. MATHEWS: Our no strike clause. Well, and basically under the contract. I think certainly if the contract did provide a kind of clause that said the no strike clause only applies to arbitrable issues, we'd be

home free under a 301 suit. Whether we'd be home free under a secondary boycott charge is the next chapter in this afternoon's work.

QUESTION: Well, if the arbitrator said you're violating your no strike clause, you can be stopped then from striking.

MR. MATHEWS: Oh, yes. We have been. As I say, in New Orleans the arbitrator did so rule.

QUESTION: And then the employer can, if you don't stop, can enforce the arbitration in the courts.

MR. MATHEWS: Certainly. And did in the companion case with Jacksonville Bulk in the general New Orleans Steamship Association case. It was a post-arbitration award.

QUESTION: What was the rationale of the New Orleans arbitrator in response to your argument that the dispute with Russia is something he can't resolve?

MR. MATHEWS: Well, Your Honor, he -- of course, I was not a party to the arbitration proceeding, and he just didn't give a ground.

QUESTION: Well, that isn't what he arbitrated. He arbitrated on whether you violated your no strike clause.

MR. MATHEWS: That's right. He said that you promised not to strike.

QUESTION: But you must have argued to him that the scope of the no strike clause was limited to arbitrable

disputes. You must have argued that. And what did he say? I know you didn't, but --

MR. MATHEWS: The international was not involved. It was only the New Orleans local that --

QUESTION: But that must have been the submission of the arbitrator, that the no strike clause was no broader than the arbitration clause.

MR. MATHEWS: I really don't know, Your Honor.

QUESTION: Well, whatever the submission, its holding was that the no strike clause --

MR. MATHEWS: Yes. His holding was, and he didn't order -- in other arbitrations that we have been involved in that certainly is the position we take, and we cite the position of the board and of the Third Circuit and so forth, and we cite the history. I mean we have had other experiences totally unrelated to the political realm.

When the prospect of containerization first emerged, this new technology, there was a general agreement between management and labor that this was not part of the contract that we had on the books on that time, it was not arbitrable, and we could strike over it. Now the contract specifically provides that containerization is not an arbitrable item, but when it first emerged -- I mean there is history and there is evidence that you can give the arbitrator.

But the point is it's the arbitrator who has to decide, and under Buffalo Forge there can be no preliminary injunction until he does decide; because as this case points out, once you get that preliminary injunction, management really has no desire to arbitrate. Justice Marshall suggested we didn't. Well, we are the defendants, you might say, in that --

QUESTION: Well, all of us who have dealt with injunctions realize that the rule is once you get a preliminary injunction, you take off for the faraway places.

MR. MATHEWS: Right.

QUESTION: Well, we recognize that.

MR. MATHEWS: And of course, that's exactly what Occidental or JBT did in this case.

QUESTION: But I still -- I can't see whether you've answered Justice Powell yet, I'm sorry to say. I was worried about the same thing. I mean, the union for any political reason can strike.

MR. MATHEWS: Yes, I would have to agree, to be candid. If it is not arbitrable under the contract, you can --

QUESTION: I didn't say that. I said any political strike.

MR. MATHEWS: Which would not be arbitrable.

QUESTION: Yes. Because it makes --

MR. MATHEWS: Well, I think the key is not that it's a political strike but that it's not arbitrable, and I would have to agree, yes, I suppose if a union did that. But, you remember, you have the great safety valve --

QUESTION: A union can strike because the dogcatcher who was just elected wasn't a fit person to hold public office?

MR. MATHEWS: Conceivably he could, Your Honor.

QUESTION: They could tie up the Port of New York.

MR. MATHEWS: But you have, as I say --

QUESTION: Am I right?

MR. MATHEWS: -- The safety factor is that the --

QUESTION: Am I right?

MR. MATHEWS: -- Union members have to eat. I mean it's unlikely that they're going to strike over the dogcatcher.

QUESTION: And they can get relief under Norris-LaGuardia.

MR. MATHEWS: I missed --

QUESTION: They're protected by it.

MR. MATHEWS: They're protected by Norris-LaGuardia, yes.

These things, any of these strikes are very rare in the history of American jurisprudence. There have only been a few. And the ones that you've had have really been

over real blockbuster issues. You had it over South Africa's racial policies. You had it over the Cuban missile crisis. You have it over the invasion of Afghanistan. Now you have it over Poland. These aren't dogcatchers. These aren't that we don't like --

QUESTION: Yes, but you can expand that to Egypt and Israel and Taiwan and countless other political issues, can't you?

MR. MATHEWS: You could, you could. But it is not the nature --

QUESTION: Well, then is there a public policy aspect to this?

MR. MATHEWS: No, I don't think so, Your Honor. I think this case turns very squarely on the will of Congress in Norris-LaGuardia to take the federal courts out of the injunction business. And this Court, sticking to its guns, to what it said in Buffalo Forge --

QUESTION: Well, at least until a violation of a contract has been proven.

MR. MATHEWS: Yes. Buffalo Forge. Once you prove the violation, of course then we go back to work. This policy argument -- and you will hear policy arguments all this afternoon -- has an awful reminiscent ring. Peace at any price. But, you know, how far do you go? Do you really invade the province of Congress and carve out an exception

to Norris-LaGuardia, because that's what this right of control argument that Occidental urges is nothing more than new legislation, isn't it?

QUESTION: To make your point you have to start with a premise whether this is or is not a labor dispute. I thought you conceded this was not a labor dispute.

MR. MATHEWS: I say a suit to enforce the no strike clause is the labor dispute par excellence. The 301 suit, absolutely. The underlying dispute over which we struck is not a labor dispute.

But the point is, we picked the quarrel with the Soviet Union; then along comes the employer and picks a quarrel with us. They are two separate and distinct disputes. Buffalo Forge is just crystal clear on that. The original unarbitrable dispute generates another dispute with the employer where he says hey, your action over the non-arbitrable is violating our no strike clause.

And just a word more. Whether you call it no strike clause, management rights clause, work assignment clause, you're saying the same thing. We're still not striking over that. We're striking over Afghanistan. So now they're saying your striking over Afghanistan violates our right to assign work to whom we want. They made that pitch in Buffalo Forge in a lower court. They didn't have the gall to bring it all the way up to this Court as

Occidental does, but it was a pitch: hey, this is a work assignment case, a routine thing that is arbitrated every day. No, it is not that. In a work assignment case the arbitrator can solve the problem. The particular guy who doesn't want to work on Saturday or Sunday, when he gets Monday he's happy.

The arbitrator can do all he wants, he's not going to make the union happy. The Soviet Union is still in Afghanistan. We are still being asked to be a vital link. Maybe just a little nail that goes into the horseshoe and the whole thing, but we don't want to participate in that. It's too horrible a business, as we don't with the Polish. But to call it management rights, work assignment as the Solicitor General, is just putting another label on it. That's not what we are striking over. We are striking over Afghanistan. Any other result is not an underlying -- any other dispute is not an underlying dispute. It's a dispute that results from the union's action once taken, not something that the union's action was taken because of.

QUESTION: What if this were involving shipments to someone in Hawaii, parts to a big plant that is non-union; in fact, the big plant in Hawaii is affirmatively anti-union. And you say you're not going to handle anything that's going to help this non-union, anti-union company in Hawaii.

Now, you haven't got quite a political question there, have you?

MR. MATHEWS: No. You don't have a political question at all.

QUESTION: Would you refuse to handle that goods?

MR. MATHEWS: Well, I think then you're getting back into the ordinary mill and grist of labor law. I don't know whether it violates your particular contract or not. It would depend on what your contract says.

QUESTION: Let's say it's the same contract you've got here. The effect of it is the union's trying to impose its view of a particular problem on the employer with whom it has contracted to refrain from striking.

MR. MATHEWS: I would say that if it is not arbitrable under the contract it simply -- well, I mean look, that refusal to handle would be in the nature of a sympathy strike in Buffalo Forge, wouldn't it? I mean that's really what they were doing. There they wouldn't cross a picket line; here they won't handle the goods. But both is out of sympathy for the employees in the other thing. And yes, I think that Buffalo Forge would apply, and that there could be no pre-arbitration injunctive relief. But the arbitrator would do --

QUESTION: You're taking a good deal of the quid away from the idea of having no strike contracts.

MR. MATHEWS: No, I don't, if you keep in mind that the no strike pledge was given only because we could get relief from the arbitrator. If we could get management to sit down and arbitrate that, and the arbitrator could say to them hey, look, you can't deal with those people because of their labor policies. If there was some chance of success in the non-economic forum, then we would say yes, go ahead, let's arbitrate it. But what management is asking here is hey, you can't strike and you can't get any relief from arbitration; you know, just grin and bear it.

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

ORAL ARGUMENT OF THOMAS P. GIES, ESQ.

ON BEHALF OF PETITIONERS -- Rebuttal

MR. GIES: Just briefly, Your Honor.

In response to Justice Marshall's question about the dogcatcher and the blockbuster issues, Mr. Mathews ignores the fact that this union this past year conducted a one-day work stoppage over the death of the Irish Republican Army prisoner Bobby Sands. And I think that that points out the possibility for what we've called random whimsical political action that indeed makes this a very, very serious problem.

Second, in response to Justice White's question, our view is that the existence or not of a remedy under

Section 303 or Section 10(1) for the National Labor Relations Board should have no impact on the existence of a remedy under Section 301. They are independent points. This Court's decision in William Arnold versus the Carpenters indicates that it's a separate theory that we are entitled --

QUESTION: Well, if there were not an arbitration clause in this contract could you enforce the -- could you get an injunction pending outcome of a 301 suit?

MR. GIES: Assuming Norris-LaGuardia applies under Buffalo Forge, no.

QUESTION: Not under Buffalo Forge. I said assuming on arbitration clause in the contract.

MR. GIES: And the answer is that if there was no -- if the union was not --

QUESTION: That there was a no strike clause but no arbitration clause.

MR. GIES: And both Boys Markets and Buffalo Forge would require that the dispute be arbitrable, and if it were not arbitrable, then we would not be entitled to an injunction.

QUESTION: So just the fact that there was a violation of the no strike clause wouldn't give you the right to a pre-suit injunction.

MR. GIES: That is correct, Your Honor.

In response to Justice Powell's question, it is very conceivable that domestic political disputes may indeed arise, and that raises the point of who has control over the situation. If a union strikes to protest a political contribution made by the employer, the employer in theory could resolve that dispute by giving the money to some other candidate more in the interest of the union. That to me would be something that is even less a problem than we have in this case; because here again if you believe the union, the employer can do absolutely nothing about the underlying cause of the strike.

Finally, I would mention one point that is showing the difficulty that the lower courts have had applying Buffalo Forge. We could easily have converted this work stoppage to an arbitrable situation -- and by arbitrable I mean a pre-arbitration injunction -- under Buffalo Forge and Boys Market. Had we discharged the employees and the question then became whether or not we had the right to do so, that would clearly raise a separate arbitrable question as the courts have interpreted Buffalo Forge and Boys Markets.

It seems to me that that shows that Buffalo Forge should not be extended to apply to a case like this.

QUESTION: But you couldn't enjoin the strike.

MR. GIES: We might enjoin the strike --

QUESTION: Well, you wouldn't be enjoining the strike then. You would have -- what would you do?

MR. GIES: The Sixth Circuit held in Complete Auto Transit --

QUESTION: The strike wouldn't be over firing the employees.

MR. GIES: That's precisely what the Sixth Circuit found in Complete Auto Transit, Your Honor; that the purpose of the strike was transformed from a non-arbitrable reason to an arbitrable reason. And the question there became and this would include strikers.

QUESTION: Well, then you could get an injunction.

MR. GIES: And then they were able to get a pre-arbitration injunction. To permit an employer to do that I submit is inconsistent with national labor policy and does nothing to further industrial peace. This Court should take the opportunity to reaffirm the validity of no strike clauses.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:08 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

JACKSONVILLE BULK TERMINALS, INC. ET AL. v. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION ET AL. #80-1045

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

BY Sharon Ryan Connelly