In the ORIGINAL

Supreme Court of the United States

KAISER STEEL CORPORATION,)
)
Petitioner,)
)
v.) NO. 80-1345
)
JULIUS MULLINS ET AL.)

Washington, D. C.

November 10, 1981

Pages 1 thru 51

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KAISER STEEL CORPORATION, :

Petitioner, :

v. : No. 80-1345

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Washington, D. C.

Tuesday, November 10, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 o'clock a. m.

APPEARANCES:

A. DOUGLAS MELAMED, ESQ., Washington, D. C.; on behalf of the Petitioner.

STEPHEN J. POLLAK, ESQ., Washington, D. C.; on behalf of the Respondents.

BARBARA E. ETKIND, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C., amicus curiae.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Kaiser Steel Corporation against Mullins.

Mr. Melamed, I think you may proceed when you are ready.

ORAL ARGUMENT OF A. DOUGLAS MELAMED, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MELAMED: Thank you, Mr. Chief Justice, and may it please the Court, this case presents one basic issue. The issue is whether a federal court will enforce a contract provision that violates the federal antitrust and labor laws and has been declared by Congress to be unenforceable and void.

Until this case, no court had ever enforced a contract provision that was alleged to be illegal without resolving the illegality defense on the merits. The courts below nevertheless made that unprecedented decision.

The basic facts that should be presumed are as follows. Since 1971, the United Mine Workers Union has insisted on including in all of its contracts a provision that would require employers to make payments payable to the UMW health and welfare fund for every ton of coal they purchase from a non-UMW producer. This provision, called the purchase of coal clause, is intended to induce UMW signatories not to purchase coal from and thus to boycott

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non-UMW producers, and to penalize companies like Kaiser Steel that choos to do business with those producers. The payments called for by the purchase of coal clause bear no relationship to the amount of labor services provided to a UMW signatory by its union employees.

The purchase of coal clause was widely understood in the industry to be of doubtful legality, and many UMW signatories, including Kaiser Steel, ignored the clause. Kaiser Steel complied with all of the lawful provisions in its collective bargaining agreements, including those provisions that required it regularly to make contributions to the UMW health and welfare funds for each ton of coal produced by Kaiser Steel and each hour worked by its UMW employees.

QUESTION: Do you contend the reporting requirement was unlawful?

MR. MELAMED: Yes. The reporting requirement was simply an effort to facilitate the unlawful purchase of coal clause and to monitor purchases by UMW signatories of non-signatories and was therefore simply an unlawful adjunct to the purchase of coal clause.

QUESTION: Well, is it the clause or the enforcement of the clause that is unlawful?

MR. MELAMED: The clause itself is unlawful. It is unlawful both under the --

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QUESTION: What if they didn't enforce it? Would there be any problem?

MR. MELAMED: Well, I think it would be -- the entering into the agreement and the making an agreement is technically a violation of law. I don't think anyone would have any injury or any damage action as a result of merely executing the contract instrument.

Kaiser Steel, as I said, refused to comply only with the purchase of coal clause which it believed to be illegal. The health and welfare fund trustees, the Respondents here, for years made no effort to enforce the purchase of coal clause, but in 1978, shortly after the 1974 agreement had expired, Respondents commenced a series of lawsuits seeking to enforce the purchase of coal clause. In this case, Respondents alleged a single cause of action, Kaiser Steel's failure to comply with the purchase of coal clause in the then expired 1974 agreement.

In defense, Kaiser Steel alleged that the purchase of coal clause Respondent sought to enforce violates both Section 80 of the Labor-Management Relations Act and Sections 1 and 2 of the Sherman Act, and is therefore unenforceable and void. Respondents moved for summary judgment, arguing that they are entitled to enforce the purchase of coal clause even if it is illegal. The district court granted their motion. A divided court of appeals

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affirmed, and by a vote of seven to four denied Kaiser Steel's suggestion for rehearing en banc.

The decisions of the lower courts rejecting Kaiser Steel's illegality defense are unprecedented. Until this case, no court had ever enforced a contract clause alleged to be illegal without resolving the illegality defense on the merits, and satisfying itself that the contract was lawful. Indeed, in case after case, this Court and lower courts have held that federal courts do not enforce illegal contract clauses, and they have so held without regard to the identity of the defendant or the identity of the plaintiff, even where, as here, the plaintiff is seeking accrued monetary obligations and the defendant has received the consideration due him under the contract.

QUESTION: Mr. Melamed, what do you think the effect of the 1980 amendments was?

MR. MELAMED: I don't think the 1981 amendments, Your Honor, have anything to do with the issue in this case. The 1981 amendments, to be sure, provide new procedural vehicles and new federal causes of action for pension fund trustees seeking to enforce obligations and contracts for employers to make contributions to pension funds, but they impose those obligations on employers only in the terms of the statute to the extent not inconsistent with law.

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The statute nowhere says when the making of payments or contracts calling for them would be consistent or inconsistent with law.

QUESTION: Does the legislative history of those amendments indicate that Congress was trying to put into place, if you will, the Benedict case.

MR. MELAMED: Well, there is no question that some Congressmen spoke and praised the Lewis v. Benedict Coal case, but I don't think that addresses our issue. The Congressmen were, to be sure, concerned that dilatory tactic by employers had obstructed collection actions, but every time they spoke of their concerns, they spoke of defenses raised by employers that were unrelated or extraneous to, in their words, the employer's promise and the plan's entitlement to the contributions.

Now, as I hope our briefs made clear, it is the law and it ought to be the law that an employer cannot defend an effort to enforce a lawful contract provision on the ground that other contract provisions or other agreements or conduct outside the contract may be unlawful. That is what Lewis v. Benedict Coal, Huge v. Long's Hauling, Kelly v. Kosuga, and the other cases on which Respondents rely are all about. They are all about extraneous, unrelated defenses. That is not what this case is about.

In this case, Kaiser Steel's defense is that the

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very promise Respondents seek to enforce is itself illegal, and that the plans are therefore not entitled to the money called for by the purchase of coal clause, and that the plans are therefore not entitled to the money called for by the purchase of coal clause. Therefore, even if we could look beyond the statute which plainly on its terms, I think, leaves unresolved and for determination in accordance with the prior law, the question when contribution payments are lawful and unlawful, or consistent with law and inconsistent with law. Even if we look beyond the statute, and assume that it was intended to embody the remarks of these two or three Congressmen, it wouldn't address the issue here, because nothing that those Congressmen said or the cases to which they referred said that an employer should be obligated to comply with an illegal contract clause or the court should enforce such contract clauses.

QUESTION: Mr. Melamed, I am looking at Page 38A of the appendices to the petition of Kaiser, in which the dissenting opinion quotes from the majority opinion, saying that, "The narrow issue on appeal therefore is not whether an illegal contract clause should be enforced, but rather whether Kaiser's proffered defense of illegality should be entertained." What does that mean to you? Does that mean that a defendant can set up a defense and a court can simply say, we don't know or care whether it is a good defense or a

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bad defense, we simply won't hear it?

MR. MELAMED: I think that is what the majority held in the Court of Appeals, Justice Rehnquist. It held that we don't care, we are not going to examine the question, we are not going to consider the impact of this contract provision and its lawfulness. I don't understand, frankly, why it is that the majority thought there might be a difference between that case and a case where he couldn't look the other way, as it were, and had to acknowledge the unlawfulness of the contract.

Certainly the decided cases don't make that distinction, because in most of them where the illegality defense has been raised and the courts have refused to enforce allegedly illegal contracts, there had been no prior determination of unlawfulness and the courts having the allegation examined the lawfulness of the contract and then made the decision whether to enforce it or not.

The Court of Appeals, as I say, didn't even do that. It didn't even examine the contract clause. It simply refused to look at it at all.

QUESTION: Mr. Melamed, did your answer to Justice O'Connor, did that suggest that the 1980 amendments are inapplicable to any decision in this case?

MR. MELAMED: I believe that the ERISA amendments are inapplicable. The particular response I made to Justice

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O'Connor was whether they resolved the question of the availability of the illegality defense.

QUESTION: You mean, even assuming their applicabilty?

MR. MELAMED: That's right. There is the separate question of whether they would provide jurisdiction and the various sanctions.

QUESTION: Why do you say they are inapplicable?

MR. MELAMED: I think they are inapplicable, Justice Brennan, because I don't know of a case in which a statute that purported to create new statutory duties was imposed where the effect of that was to impose sanctions for the breach of those duties on someone whose alleged breach took place three years before the statute became effective.

QUESTION: Of course, incidentally, the plaintiffs here are really third party beneficiaries, trustees, aren't they?

MR. MELAMED: That's correct.

QUESTION: They are not parties to the so-called illegal agreement.

MR. MELAMED: Well, they are not the ones that --

QUESTION: They are third parties unofficially.

MR. MELAMED: That's correct. Judge --

QUESTION: And I guess the 1980 amendments, or do they, if applicable, they do have a bearing on what defenses

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are available when the suits by the third party beneficiary, stakeholder, whatever you want to call the trustees, are they not?

MR. MELAMED: I think not, Justice Brennan.

QUESTION: You think not?

MR. MELAMED: I think even if applicable they provide a cause of action, they would provide remedies and sanctions available to any plaintiff, including third party beneficiaries, but for the reasons I stated to Justice O'Conor, I don't believe they changed the availability of the illegality defense.

QUESTION: And that, I gather, rests on the language "not inconsistent with law"?

MR. MELAMED: That's the statutory language that I think preserves legal obstacles to enforcing illegal contracts, and as I indicated, the legislative history, I think, is not to the contrary.

QUESTION: Well, what about the legislative history of the 1980 amendments?

MR. MELAMED: As I have indicated, Justice White, I think the legislative histories spoke in general terms of the need for federal remedy, an ERISA remedy and ERISA sanctions to expedite collection actions.

QUESTION: But you don't think they considered cases precisely like this?

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MR. MELAMED: They didn't refer to any cases involving the illegality defense. Significantly, none of the Congressmen in their various statements referred to this case. The district court opinion had already been decided. They did not say, we praise the district court opinion in Kaiser Steel versus Mullins. I don't know whether they thought of it or whether it had been brought to their attention, but they did not address a single case involving the allegation that the contract provision calling for contributions to the pension funds was itself illegal, void, unenforceable.

QUESTION: The 1980 amendments were adopted within weeks, were they not, after the decision in this case?

MR. MELAMED: Yes, I believe about two weeks after the court of appeals decision last fall.

QUESTION: Yes. There was no reference at all in the legislative history of the 1980 amendments to the pendency of this case?

MR. MELAMED: None to my knowledge.

QUESTION: But they did, I gather, give a lot of attention at least to Lewis and Benedict Coal in the legislative history.

MR. MELAMED: Well, they gave it attention insofar as they said, we praise Lewis v. Benedict Coal. They did not analyze the case.

QUESTION: Did they address Kelly and Kosuga, too?

MR. MELAMED: I don't believe so, Your Honor.

Now, apart from the Solicitor General's suggestion that these new amendments to ERISA would bear upon this case, the basic rationale for affirming the court of appeals decision that is embodied in that decision and that Respondents devote the bulk of their attention to is a rationale that turns largely on the court's view of the equities between the litigants. The theories that Respondents were third party beneficiaries seeking to enforce a collective bargaining agreement by collecting contributions owed to health and welfare funds. They should be permitted to collect those contributions, the theory goes, because the rest of the terms of the agreement have been performed and Kaiser Steel has received the services of its union employees.

This theory is fatally flawed, in our view, both as a matter of equity between the litigants and as a matter of law. First, as to the equities, the critical facts stressed repeatedly in Respondent's briefs in the court of appeals decision is that this lawsuit was brought for accrued obligations after the contract had expired and Kaiser Steel had foregone its various statutory remedies. Respondents would not have been able to avoid having the lawfulness of the purchase of coal clause decided if

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appropriate litigation had been commenced at the outset of the contract period.

If Kaiser Steel or a non-UMW producer had brought a lawsuit seeking declaratory or injunctive relief, or had gone to the NLRB in 1974, as the court of appeals evidently believed it should have, or if Respondents had brought an action seeking specific performance of the purchase of coal clause and Kaiser Steel had raised the illegality defense, or had counterclaimed at that time, then Respondents' ability to enforce the purchase of coal clause would have depended upon its lawfulness.

If, as should be assumed here, it is illegal, they would not then have been able to enforce the clause. Now, this has two significant implications. For one thing, it makes clear that Respondents are not entitled to enforce the purchase of coal clause simply on the ground that this is a collective bargaining agreement, or Kaiser Steel is an employer, or Respondents were third party beneficiaries and pension fund trustees. Those facts are not enough, even on the court of appeals and Respondents' theory, to entitle Respondents to enforce this illegal contract clause.

The earlier remedies and their consequences also make clear that Respondents' claim is in effect that they should be better off because this lawsuit was commenced in 1978 than they would have been had there been litigation

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commenced by them or by anyone else in 1974.

Now, a rule that Respondents could enforce the clause if litigation were brought in 1978, but not if it were brought in 1974, would be inequitable. It is Respondents, not Kaiser Steel, who should bear responsibility for any delay in litigation. Respondents chose not to bring suit to enforce the purchase of coal clause earlier because it was their policy not to enforce the clause.

As long as Respondents continued to adhere to that policy, there was no reason for Kaiser Steel to run into court and bring needless, speculative litigation challenging the lawfulness of the purchase of coal clause, and only Respondents, of course, knew whether they were going to abandon their policy.

So, if anyone should bear the burden of delay in the commencement of this litigation, it is Respondents, and surely they should not be entitled to turn that delay into an excuse for having new legal rules that would make them better off than they would have been had there been litigation about the lawfulness of this clause at the outset of the contract periods.

Moreover, a rule that challenges to the illegality of contract provisions are waived if not raised promptly would trigger premature and often unnecessary lawsuits by a

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party seeking anticipatory relief from illegal contracts. It would cause parties fearful of losing their rights to rush to federal court to bring actions, to rush to the NLRB, and to commence litigation where forebearance might, as had been the pattern in this industry, have avoided litigation altogether.

In any event, regardless of these considerations, the court of appeals decision is erroneous as a matter of law. Both the court of appeals and Respondents recognize that a court cannot be asked to enforce illegal conduct. But, they argue, Kaiser Steel had refused to participate in the illegal boycott and now all that is at stake is the transfer of money from Kaiser Steel to the Respondents.

The gist of their argument is this. A court should not enforce the illegal purchase of coal clause where the effect might be to induce a boycott of non-UMW producers and thereby injure those producers, but Kaiser Steel may nevertheless be held responsible to pay penalties and damages for its failure to participate in precisely that unlawful boycott.

There are two basic flaws in this theory. First, it rests on a fundamental misunderstanding of both Section 80 of the Labor-Management Relations Act and the antitrust laws. Those statutes are not intended, as this theory would have it, solely to protect non-UMW producers from illegal

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boycotts. In the National Woodwork case, this Court held that the primary purpose of Section 80 is to protect employers like Kaiser Steel from being harmed by hot cargo clauses like the purchase of coal clause or by damage actions brought to enforce them. That is precisely what this case is all about.

The antitrust laws, too, are intended to protect the freedom of companies like Kaiser Steel to do business with whomever they wish without being penalized for doing so. Therefore, if the purchase of coal clause violates Section 80, or the antitrust laws, then Kaiser Steel as well as non-UMW producers is entitled to invoke the protections of those laws, and as Justice Stewart said in his dissent in the Connell case, and as Senator Goldwater said in his remarks about Section 80, Kaiser Steel is entitled simply to ignore and to refuse to comply with the illegal hot cargo clause.

Second, Respondents' theory cannot be reconciled with the case law. In case after case, which we have discussed in our briefs, the courts have held that a defendant may raise the illegality defense in an action brought to enforce an illegal contract clause, even where the plaintiff is seeking only to recover accrued obligations, and regardless whether the payment of money would itself or in and of itself be illegal conduct. No

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case is to the contrary.

QUESTION: Counsel, the Benedict case, doesn't it really rest on the theory that the court should separate an employer's obligation to contribute to a pension fund from any grievances the employer has against the union? Isn't that the fundamental thrust of the case?

MR. MELAMED: On the facts presented in Lewis v. Benedict Coal, I think that is a fair statement of the case, Your Honor, but that case was not presented with the question here, which is whether the employer's grievance is not simply with the union for some kind of a tort or ancillary contract violation, but rather whether the employer's complaint is that it is being asked to comply with a contract clause that is illegal, and --

QUESTION: Well, I grant you it didn't involve illegality, but as I read the majority opinion, it might appear that the reasoning could include this case. I just wondered how you would deal with that.

MR. MELAMED: I don't think it does. Perhaps one way to look at that is to bear in mind Respondents' concession that had there been litigation at the outset of the contract period in this case, Respondents could have enjoined as defendants in an action seeking declaratory relief or injunctive relief. That is a sound concession, but it concedes really that what is at issue here is whether

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-- is a threshold question whether Respondents are entitled to any money, whether courts should lend their aid to contract clauses of this nature.

Now, let's go back to Lewis v. Benedict Coal. If the employer there had anticipated the strike that he was upset about, gone into court to seek some kind of injunctive or declaratory relief against the union, complaining of its strike, no one would suggest that he could have joined the pension fund trustees as defendants. The issue there truly was collateral.

The issue there was whether because the employer felt he was owed some money by the union, he could use that as a set-off against money he clearly owned under a valid and lawful provision against the pension fund trustees. That is a very different case, Your Honor, because it doesn't raise the threshold question, which is, is there a valid instrument here. Are they entitled to the money? And should a court lend its aid to a contract provision that Congress has declared to be unenforceable and void?

The cases that we have cited reflect the important policies that underlie the rule that courts do not enforce illegal contract clauses, all of which apply here. The rule against enforcing illegal agreements preserves the role of federal courts as enforcers of the law. Whenever a court enforces an unlawful contract provision, it undermines that

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role. Penalizing Kaiser Steel for its purchases of coal from a non-UMW producer would cause an injury that both the labor laws and the antitrust laws are intended to prevent, and enforcing the purchase of coal clause in this case would encourage other parties to include illegal contract provisions in future agreements and to carry out their illegal terms.d

QUESTION: Well, would freeing Kaiser of the obligation to make these payments mean that the pension fund would have to, in order to be solvent, or to do what it was supposed to do, have to collect higher --

MR. MELAMED: I think not, Justice White. The purchase of coal clause was not intended to fund the pension funds. Their financial plans did not depend on it. Now, those facts may be disputed. We have affidavits in support of them, and on this appeal from summary judgment we are entitled to have them presumed.

If we had complied with the clause and done what the union wanted, we would have boycotted Midcontinent Coal Company, we wouldn't have incurred any obligations under the purchase of coal clause, and the Respondents wouldn't have gotten any payments at all.

QUESTION: So you think at least we should judge this case on the grounds that this required payment was not deemed to be part of the actuarial soundness of the plan.

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MR. MELAMED: I don't think that --

QUESTION: Or to contribute to the actuarial --

MR. MELAMED: I think that fact is one that you should presume, although I don't think it is essential to our position.

QUESTION: Well, I guess this turns on what you just said, Mr. Melamed, that Kaiser could simply have discontinued buying any coal from Continental or anyone else under that purchase of coal clause.

MR. MELAMED: That's right.

QUESTION: And therefore the trustees would have gotten no payments.

QUESTION: That doesn't follow. If it didn't buy the coal there, they would have had to produce it themselves, wouldn't they? Of course, it is a different kind of coal, I realize.

MR. MELAMED: It is certainly possible that they --

QUESTION: They weren't going to curtail their operations, I don't suppose.

MR. MELAMED: It is possible that had they not purchased coal from a non-UMW producer, they would have purchased it from --

QUESTION: And then more money would have gone into the fund. Of course, more men would have worked, and there would have been more of an obligation.

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MR. MELAMED: Absolutely. That is correct.

QUESTION: What if they purchased coal from a union producer?

MR. MELAMED: Then they would not have had an obligation to make payments pursuant to the purchase of coal clause.

QUESTION: That producer would have had the obligation, I guess.

MR. MELAMED: That's correct, and he would have, of course, had more employees working longer hours.

QUESTION: Anything in this contract to prevent them from importing it if they could find an exporter who had some coal to send here?

MR. MELAMED: I think they would still have to pay the royalties.

QUESTION: Well, under the contract.

MR. MELAMED: Yes.

QUESTION: Yes.

MR. MELAMED: I would like to say --

QUESTION: There is nothing -- There is no limit on their importing?

MR. MELAMED: Not to my knowledge, no.

QUESTION: Before you sit down, Mr. Melamed, how do you distinguish Kelly and Kosuga?

MR. MELAMED: Kelly and Kosuga, I think, really

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helps us. Kelly had two contracts, the lawful sale agreement sought to be enforced, the illegal non-delivery agreement. The defendant said, the illegal non-delivery agreement gives me a defense against the lawful purchase agreement. The court said, to be sure, you wouldn't have to comply with the illegal non-delivery agreement because it is illegal and unenforceable, but you can't use that collateral wrongdoing as a defense for your obligation under the perfectly lawful sale agreement.

QUESTION: And here you suggest the difference is?

MR. MELAMED: The difference here is that we are -- it is as if the Respondents are seeking to enforce the illegal non-delivery agreement in Kelly. They have come into court. The purchase of coal clause is itself illegal, and we say that particular clause we shouldn't have to comply with. We complied with all your other clauses, your legal clauses, but not that illegal one.

CHIEF JUSTICE BURGER: Mr. Pollak?

ORAL ARGUMENT OF STEPHEN J. POLLAK, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. POLLAK: Mr. Chief Justice, and may it please the Court, I would like to address my argument to the principal issue in this suit by pension fund trustees to collect delinquent contributions required by a bargaining agreement.

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The issue is whether the court should entertain employer claims advanced for the first time after all the employee services have been provided, that the clause requiring the contributions is unlawful under the Sherman Act and as an 80 hot cargo clause. The district court held the defenses barred on summary judgment. The court of appeals affirmed, and the decision, we believe, merits affirmance in this Court on three independent grounds.

First, the Multi-Employer Pension Act of 1980, Section 306, applies to this case on the merits, and bars the defenses Kaiser seeks or sought to raise, and --

QUESTION: What defenses are permitted under the 1980 amendments?

MR. MELAMED: The 1980 amendments, Mr. Justice Brennan, look to the concern which Congress had that the health of these multi-employer plans on which millions of people depend, and it said that its object was the protection of beneficiaries. It recognized that that purpose of the statute would not be served where there was not a valid 302(C)(5) trust, and where the payment was not being made to a valid trust, therefore --

QUESTION: Is that the only defense?

MR. POLLAK: That nature of defense --

QUESTION: That it is not a valid 302(C)(5) trust?

MR. POLLAK: That is the defense which in the

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statements of the floor managers was referred to.

QUESTION: My question is, is that the only defense then available?

MR. POLLAK: Where the payment itself is unlawful, that is the only defense. Congress --

QUESTION: That is, where the payment, for example, were a bribe.

MR. POLLAK: That's correct. Congress spoke in generic terms. The clause in -- age Page 2A of the red brief, the language which Congress selected and it spelled out in its legislative history as well, the interior clause, to the extent not inconsistent with law, modifies the terms, shall make contributions.

QUESTION: And that means only something like a bribe, where the payment itself is illegal?

MR. POLLAK: That is correct, Your Honor.

QUESTION: And the payment here, you say, to the trustees is not in and of itself illegal. The only illegality relied on is that the --

MR. POLLAK: The illegality here is a matter between the union and the employer. Congress spelled out that its concern in protecting these multi-employer plans was that --

QUESTION: There is nothing illegal about the trustees receiving and applying the reciepts to the pension

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fund.

MR. POLLAK: No, there is no contention that there is, no, and Congress's concern was that multi-employer trusts, one, receive timely contributions, and two, not be involved in lengthy, complex, and costly litigations where a simple collection action --

QUESTION: Well, I gather in the 1980 statute --

MR. POLLAK: Yes, sir.

QUESTION: -- Congress might have used more explicit language than the one you rely on, not inconsistent with law.

MR. POLLAK: Well, Your Honor, the Congress language, we think, is clear enough in light of the legislative history in which the managers --

QUESTION: Well, that is it. You have to give it a gloss, provided by the legislative history, don't you?

MR. POLLAK: Well, Mr. Justice Brennan, we do think that the language itself in which Congress inserted the term "shall, to the extent not inconsistent with law, make such contributions" --

QUESTION: Yes, but they might have said, "shall, as long as the payment itself is not illegal", or something like that, instead of "not inconsistent with law".

MR. POLLAK: That's right. You will find that language, Mr. Justice Brennan, in the views of the committee

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in the 1979 committee print of the Senate on S. 209, at Page 44, and this statute had the meaning which we contend it has from the time of the report of the Senate Committee on the 1979 bill in November, 1979, through the floor debates in which the sponsors of the legislation stated it clearly.

QUESTION: What of Mr. Melamed's argument that in any event the 1980 statute was not adopted until weeks after the decision in this case below, and therefore it is inapplicable?

MR. POLLAK: Well, the 1980 statute was adopted on September 26th, nine days after the court of appeals opinion, and we contend --

QUESTION: It was only nine days?

MR. POLLAK: Nine days, Your Honor, and we contend that on this court's landmark decision reviewing the jurisprudence, Bradley versus Richmond, that the statute clearly is intended to apply to pending cases. The rule is that a statute or a court applies the law in effect on the time of its decision unless either the statutory language itself or the legislative history or a manifest injustice looks the other way.

Now, we contend here that looking at Bradley, that this case fits precisely within those rubrics, and we would also contend, Mr. Justice, that the language which Congress adopted statutorily in Section 306(A) says, whoever is

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obligated, so we suggest that on this day, November 10, Kaiser is obligated under this contract, and that it fits directly within the statutory language.

QUESTION: It is obligated to --

QUESTION: Mr. Pollak --

QUESTION: Go ahead.

QUESTION: Can't we really examine, though, whether the 1980 amendments impose new and anticipated obligations on Kaiser, and therefore we wouldn't apply those amendments? That is a concern, and I would like you to address yourself to that.

MR. POLLAK: I would be pleased to do that, Madame Justice. The statute does not impose new and unanticipated obligations. Indeed, in the legislative history at several points the sponsors as well as the committee print states the statute clarifies existing law, and also the Bradley decision would, we believe, make clear that the obligation that is being discussed here is the obligation provided by the collective bargaining agreement which always existed. There is no vested right in Kaiser to plead an illegality defense, a pleading by a party that claims it participated as a signer of an unlawful contract.

That pleading of the illegality is only permitted when it serves a public purpose, and the public purpose clearly is arbitrated by the United States Congress. The

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United States Congress said that there is no public purpose in being able to plead an illegality defense of this nature to a claim of trustees for contributions required by a collective bargaining agreement.

So, in brief, we believe there is no new or unanticipated obligation, and secondly, there is no vested right that Kaiser possessed to plead this defense. Indeed, there is in the McNair versus Knott decision of the Supreme Court a very pertinent holding which said that a party to an unlawful contract has no right to plead the illegality, and Congress may change it during the pendency of the contract or after, and the plea may not be raised.

QUESTION: Is that something of a reflection of the doctrine of in pari delicto?

MR. POLLAK: Well, there is no in pari delicto of the trustees, Mr. Chief Justice, and one of the --

QUESTION: Two contracting parties, you say, agreed to what is now asserted to be an illegal contract.

MR. POLLAK: The language which is at the concluding page or second to concluding page of Mr. Justice Brennan's opinion in Kelly v. Kosuga says that it is an unusual sort of private Attorney General that would be enforcing an unlawful contract.

QUESTION: You suggest that doesn't reach a third party beneficiary the same way it would one of the original

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parties in equal --

MR. POLLAK: Well, we suggest, Mr. Chief Justice, there are three independent grounds, the 1980 Act being one ground, our second ground being Benedict, and a third ground, independent of the other two, being the Kelly v. Kosuga decision of this Court in 1959, and the exclusive jurisdiction of the NLRB under Garner and Garvin over unfair labor practice matters, and in Benedict and in Kelly v. Kosuga, there were considerations there that the pension trustees, not in Kosuga, but in Benedict, that the pension trustees should not be precluded by employer-union disputes, and we do consider that that motivated the United States Congress in passing the 1980 Act which we contend is here applicable.

QUESTION: Mr. Pollak?

MR. POLLAK: Yes?

QUESTION: I realize that there is a nine-day difference between the time of the court of appeals decision and the Act. Which came first?

MR. POLLAK: The court of appeals decision occurred first. The Act was passed nine days later.

QUESTION: So then your Northcross argument basically is that even if the court of appeals was wrong when it decided the case, we should affirm it because the law has been changed since then?

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MR. POLLAK: That is an independent ground on which we rely and the Solicitor General relies. That is correct. The purpose of the United States Congress embodied in the statute should be applied by this Court. It is the law in effect at this time.

QUESTION: Even though it wasn't in effect at the time the court of appeals decided it?

MR. POLLAK: That is exactly correct. We believe that the court of appeals decision, Mr. Justice Rehnquist, is sound and is supported by Benedict and independently supported by Kelly v. Kosuga and the exclusive jurisdiction doctrine, yes. These claims of Kaiser were not cognizable at the time they were urged by Kaiser, after all the employee services --

QUESTION: Mr. Pollak, just so I can understand your position about the 1980 Act, suppose now that Kaiser went to the labor board and after proceedings there this clause was declared to be an illegal hot cargo clause.

MR. POLLAK: Yes.

QUESTION: Would then Kaiser have to nevertheless honor it from then on?

MR. POLLAK: Well, Mr. Justice White, this --

QUESTION: Can you answer it yes or no, or not?

MR. POLLAK: Kaiser would have to honor a contract after the board had held --

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QUESTION: Would it have to honor this promise that it made in the collective bargaining contract?

MR. POLLAK: Yes, in the 1974 contract. It may not after this --

QUESTION: Even though the board has declared it to be an unfair labor practice and a hot cargo clause?

MR. POLLAK: That is correct, after the services have been provided.

QUESTION: So you say that -- well, how about the future?

MR. POLLAK: Well, the future --

QUESTION: How about from the date of the labor board's decision, from then on?

MR. POLLAK: Yes.

QUESTION: What about that?

MR. POLLAK: We believe that in that event, the employer's remedies lie against the union. They do not lie, as we read Congress's statute, against the trustees.

QUESTION: Well, so would they have to make the payments to the -- continue to make the payments to the pension fund?

MR. POLLAK: Well, the question isn't here, but we think if it were that you would -- you should hold that he has to make the payments, yes. He made the contract. Congress said that promises --

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QUESTION: So you are saying that what Congress really did is to amend the labor law and the antitrust law in the 1980 Act by saying that -- of course, we know that hot cargo clauses are illegal, but if an employer has put one in the contract and agreed to it, he nevertheless has to honor it? Is that it?

MR. POLLAK: We are saying essentially that Congress had a concern for multi-employer pension plans, and it wished disputes between unions and employers to be thrashed out between them.

QUESTION: Well, it has been thrashed out before the labor board, betweent the union and the employer --

MR. POLLAK: Yes.

QUESTION: -- and the labor board has decided the contract is illegal.

MR. POLLAK: That is correct, and we believe that the --

QUESTION: And you say the board really then should dismiss the case is the first place, because it would be just a waste of time to adjudicate it.

MR. POLLAK: No, it would not -- it would not be a waste of time, Your Honor, because the board may frame, under Section 10(C) of the NLRA, it may frame remedies respecting the unlawful act by the union.

QUESTION: But it could not order the parties to

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quit honoring that promise.

MR. POLLAK: Well, the -

QUESTION: You say, because Congress has now told it not to.

MR. POLLAK: We think the -- particularly after a ruling of that nature, the employer would be justified in rejecting the proposed clause asked for by the union, and if the union struck, the employer could sue for damages under Section 303.

QUESTION: But the existing contract he must abide by until it expires?

MR. POLLAK: Well, the existing contract that is in front of the court is a contract that began in 1974 and concluded in 1977, so the facts don't present, but if he was in the middle of a contract, we feel constrained by what we read to have been done by the Congress, that the remedies would be against the union, not against the trust.

QUESTION: Do I understand, Mr. Pollak, that the current contract does not have this purchase clause in it?

MR. POLLAK: The current contract, the 1981 contract does have a purchase of coal clause in it. It began in 1981 and it runs through 1984. Yes, sir.

QUESTION: But there was a hiatus between 1978 and 1981?

MR. POLLAK: No, there was another contract

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there. These are contracts for three year terms, Mr. Justice Brennan.

QUESTION: So they have all had this purchase of coal clause?

MR. POLLAK: Since 1974, a clause in this particular form has been in the contract which requires the employers to pay a royalty on each ton of coal handled, whether produced or purchased, and that clause continues in the contract today.

Now, the -- I want to say a word about Bradley which, in addition to the 1980 Act, we believe, is an independent ground for the decision, and I would add that the Congress, the sponsors, both sponsors of the 1980 Act and the floor debates in support of their statement that they were only clarifying the law, cited the Benedict case, cited the Long's Hauling Third Circuit case, and cited a further case, each of which announces and rests on the principles which we urge here.

QUESTION: Well, Congress is worried about the soundness or the liquidity of the pension plan.

MR. POLLAK: That is correct, Mr. Justice White.

QUESTION: And wanted to have remedies against liquid employers, but what if this employer obeyed the contract by just quitting purchasing outside coal?

MR. POLLAK: Well, there is no --

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QUESTION: It wouldn't affect -- there wouldn't be any money going into the pension fund.

MR. POLLAK: Well, the contract provides that the employer pays the same royalty essentially on each ton that it handles, and if the employer goes out of business, it doesn't pay royalties; if the employer purchases coal, it pays a royalty if the royalty hasn't already been paid. If it produces coal, it pays a royalty. As the bench stated in the colloquy with my brother opponent, the likely inference is that if Kaiser does not purchase coal, it produces it. In any event, the assertion and many of the facts as Mr. Melamed stated, are disputed here, they will -- raised by the employer on a motion the employer made for summary judgment on its 80 claim, a motion which was denied by the court and has not been brought to this Court, those facts are disputed, and they --

QUESTION: Isn't it clear, Mr. Pollak, that the benefits for the people who are going to get the money out of the fund in due course are not -- the potential liability for benefits is not increased in the slightest by the purchase of outside coal, is it?

MR. POLLAK: The potential liability --

QUESTION: Liability to the people who are going to get the money out of the fund eventually, the workmen.

MR. POLLAK: No, that is correct.

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QUESTION: Their benefits are measured by their period of service, and --

MR. POLLAK: That's correct. The liability --

QUESTION: -- the company has paid into the fund for all of their service, so that if they buy outside, that doesn't increase the liabilities to them. If they pay on that coal, it increases the assets of the fund, but without any corresponding increase in liabilities.

MR. POLLAK: The liabilities of the fund continue, and the concern of those who manage the fund and the union is to have funding provisions in the collective bargaining.

QUESTION: But basically the funding is computed, is it not, on the basis of how many hours worked on the tonnage on which royalties have been paid. That is the basic measure of the actuarial soundness of the plan, isn't it?

MR. POLLAK: No, the basic actuarial measure, as Mr. Melamed said, is apparently disputed, but there is no dispute that the provisions that are in the contract call for the same royalty on each ton --

QUESTION: Well, I understand, but it is clear that the purchase of outside coal does not increase the liabilities of the fund in this --

MR. POLLAK: That is clear. Those liabilities exist. Now, the -- I wanted to say that the foundation

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stone of the Benedict case is that the trustees of the pension fund should not have to meet in a collection action defenses which the employer wishes to raise against the union, or which flow essentially toward union misconduct. That is what we believe is present here. The employer's concern here is with misconduct ont the part of the union in inserting this particular clause in this particular contract.

I want to say a word on the independent grounds, the third independent grounds on which we rely, the Kelly v. Kosuga case. That case, which is urged to be a case in which there is a divisible contract, we believe, was decided by this Court as an indivisible contract, the illegality of which was the prime assertion of the buyer of the onions. The Court held the buyer liable to pay the price for the services delivered.

CHIEF JUSTICE BURGER: Ms. Ekind?

ORAL ARGUMENT OF BARBARA E. ETKIND, ESQ.,

AMICUS CURIAE

MS. ETKIND: Thank you, Mr. Chief Justice, and may it please the Court, but enacting the Multi-Employer Pension Plan Amendments Act of 1980, and particularly Section 306(A) of it, Congress expressed its overriding concern for the economic soundness of multi-employer pension and welfare plans. It is our position that in doing so, Congress made the policy decision to accord a higher priority to

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curtailing interference with the collection of prescribed contributions than to incrementally furthering the ends of the antitrust and labor laws by one particular means, that of permitting contracting parties to defend against suits brought to enforce their contract on the ground of those contracts' illegality under the antitrust or labor laws.

Under the amendments, if payments are due a contract -- are due under a contract to a fund, those payments are protected without any need to look beyond the contract to see whether the fund really depends on a payment of those contributions.

That is all part of the fluctuating Congress's intent of facilitating the collection of contributions due these funds, and not cluttering up the collection process with other issues.

QUESTION: What about the language "unless otherwise contrary to law"?

MS. ETKIND: Well, we believe that that language does take a gloss from the legislative history. In both Houses of Congress, the floor managers of the bill that was to become the 1980 amendments delivered carefully prepared and coordinated statements that were drawn largely from a committee print that explicitly purported to represent the views of the Senate Committee on Labor and Human Resources. The statements decried the fact that simple collection

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actions brought by plan trustees had been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contribution.

QUESTION: But we are faced with an enacted statutory clause here, which I would assume would take precedence over committee prints or floor debate.

MS. ETKIND: Of course, that is right, but the legislators zeroed in on a specific standard which sheds light on the meaning of that specific statutory language. The standard they zeroed in on was that "Federal pension law must permit trustees of plans to recover delinquent contributions efficiaciously and without regard to issues which might arise under labor-management relations law other than 29 USC 186."

Now, it is our contention that Congress's explicit intent to protect the financial integrity of multi-employer pension plan funds by insulating them from defenses other than those based on Section 186 sheds substantial light on the meaning of Section 306(A) of the amendments.

QUESTION: Would you also take the position that Mr. Pollak did that even if the NLRB had determined during the course of a contract that the purchase of coal clause is illegal, that nevertheless the trustees would be entitled to collect those payments under that illegal provision?

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MS. ETKIND: I would not take the exact same approach. I think the National Labor Relations Board has broad remedial powers, and it would be up to the board to fashion what kind of remedy it believed was justified in this case. And then it would be up to the court of appeals to review that remedy in an --

QUESTION: Including, you mean, a remedy that Kaiser should not have to pay trustees?

MS. ETKIND: Well, I would assume that the kind of --

QUESTION: Could the board's remedy go that far?

MS. ETKIND: I -- I doubt that it could, because I think its remedy would be more like saying -- it could require the payments -- it could require them to not make payments into the fund. It still -- I am sorry. It still could require payments into the fund, but not require, of course, the enforcement of a hot cargo clause if that is wht it found the clause to be.

QUESTION: I don't follow that.

MS. ETKIND: I am sorry. Maybe I --

QUESTION: Why is it they could not, as part of the remedy, find it a hot cargo clause and therefore an unfair labor practice?

MS. ETKIND: I am sorry. They could do that. I assume that would not be the way it would be effectuated,

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but I think they could --

QUESTION: They could order Kaiser not to make any further payments under the clause. Is that right?

MS. ETKIND: I think they would have the --

QUESTION: Despite what you say Congress said in thue 1980 At.

MS. ETKIND: Well, the board could do that, but then it would be subject to review by the court of appeals

QUESTION: Well, you mean the board could make an error. Is that what you mean?

MS. ETKIND: Yes.

(General laughter.)

MS. ETKIND: Because our reading of the --

QUESTION: Would you say the court of appeals should set that kind of an order aside?

MS. ETKIND: Yes, I do, under the 1980 amendments.

QUESTION: Just because you think that Congress really in a way amended the labor laws.

MS. ETKIND: Yes. Yes, I do.

QUESTION: Well, the board in reality couldn't order Kaiser not to make any further payments into the fund, because the court of appeals would have to set it aside?

MS. ETKIND: Because I believe that by the statutory language of 306(A), that implicitly repealed the unenforceable and void language of Section 8(E). The gloss

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that I think the legislative history brings to the language of Section 306(A) is that the legislative history refers to 29 USC 186 as the only possible defense. Now, the outstanding feature of 186 is that it declares unlawful the very making of a payment itself. That is, the simple passage of money from an employer to a representative of its employees, except in very narrowly circumscribed situations, and similarly, Section 306(A) can be construed, and we submit in view of Congress's policy of curtailing interference with the collection of contractually prescribed contributions should be construed so as to eliminate all defenses to collection actions for delinquent contributions except those based on unlawfulness in the very making of the contribution itself.

The language of Section 306(A) easily bears this reading of it, since Congress inserted the words "to the extent not inconsistent with law", so as to modify the verb phrase, "every employer shall make such contributions". By contrast, Congress did not provide that --

QUESTION: Ms. Etkind, let me interrupt you a minute. Supposing you had an agreement, a term in the collective bargaining agreement that was just manifestly unlawful, that required the employer, say, to charge prices above a ceiling price, or to agree to a price with its competitors or something, and then provided that 50 percent

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of the overcharge as a result of such illegal agreement shall be deposited in the fund. Would you say that -- they would still have to deposit the -- enforce such an agreement.

MS. ETKIND: Yes, I would believe so, and then bring an action.

QUESTION: No matter how obvious the illegality?

MS. ETKIND: I think that is right, because what Congress's intent --

QUESTION: Do you think the legislative history supports that reading?

MS. ETKIND: Yes. Yes, I do. The legislators were very -- the main thrust of the legislation was to protect the integrity of the funds, to protect the working people who are dependent on those funds, and setting aside for a moment the question of whether or not those funds should in fact be added to or not. Meanwhile, the people should go on being able to get the retirement and welfare funds they were dependent upon.

QUESTION: Even if they were getting it by robbing banks, holding up people and all, they still put the money in the fund?

(General laughter.)

MS. ETKIND: But then that could be remedied in a subsequent action, but meanwhile, not to enjoin the payment to the beneficiaries.

QUESTION: Let me try a more gentile, civilized hypothetical. Suppose that seven manufacturers of certain products all agreed that they would fix prices, clearly unlawful, but they agreed that if anyone broke ranks, the one who broke ranks would have to pay a certain contribution to the pension funds of all the others who remained loyal to the price-fixing agreement. Enforceable?

MS. ETKIND: The statutory language is "any employer who is obligated to make funds under a multi-employer plan or collective bargaining agreement."

QUESTION: Well, I am giving you a different hypothetical.

MS. ETKIND: Well, I am not sure that --

QUESTION: On a clearly illegal contract that calls for a certain payment for those who break the price fixing agreement.

MS. ETKIND: Well, I don't think that Section 306(A) would extend to that, because that is not the type of -- that is not an agreement made in the context of the collective bargaining --

QUESTION: But the statute covers plans as well as collective bargaining agreements. It is not limited to collective bargaining agreements.

MS. ETKIND: No, either in a plan or a collective bargaining agreement.

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QUESTION: And the Chief Justice described a plan to you.

MS. ETKIND: I am sorry. A multi-employer pension plan were you referring to?

QUESTION: Just exactly as I put it. Seven companies all make the same product. They have a nice private agreement they are going to fix prices, and in the agreement, written out, they say anybody who breaks ranks is going to have to pay on some measured proportion that amount to the pension funds of the other people who are loyal to the price-fixing agreement.

MS. ETKIND: If that were part of a multi-employer pension plan, or part of a collective bargaining agreement, then I think those payments would have to be made, and then the legality of that challenge in another action.

QUESTION: It wouldn't do any good to challenge it. You would still have to pay it by the terms of the contract.

MS. ETKIND: That is right.

QUESTION: Before you sit down, what is your answer to the argument that because the statute wasn't enacted until nine days after the decision below, the statute is inapplicable in this case?

MS. ETKIND: The statute is applicable in this case. The statute by its very terms applies retroactively,

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by the words, it shall apply to everyone who is obligated on the date of enactment, and also, there is no manifest injustice. There is no injustice to holding the parties to the terms of their own contracts.

QUESTION: Is this to say you also rely on Bradley?

MS. ETKIND: Yes, I do.

QUESTION: Is the position of the Solicitor General dependent solely on the applicability of 306?

MS. ETKIND: We don't address that prior to the enactment of the 1980 amendments.

QUESTION: You rely solely on 306?

MS. ETKIND: Yes.

CHIEF JUSTICE BURGER: We will resume and conclude your rebuttal at 1:00 o'clock, counsel.

(Whereupon, at 12:00 o'clock p.m., the Court was recessed, to reconvene at 1:00 o'clock p.m. of the same day.)

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AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Melamed, you have about four minutes remaining for rebuttal.

ORAL ARGUMENT OF A. DOUGLAS MELAMED, ESQ.,

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. MELAMED: Thank you, Mr. Chief Justice, and may it please the Court, I think the colloquy between the Court and counsel for the Solicitor General at the close of the argument really draws into very sharp focus the difficulties that the Solicitor General and Respondents have in defending their construction of the new amendments to the ERISA statute.

In that colloquy, it was pointed out that even in so clear a case as a price-fixing conspiracy among employers, where they promised to enforce deviations from that conspiracy by paying damages to a pension fund on the Solicitor General's construction of the new amendments, the courts would be powerless to refuse to enforce the promise, would have to award damages, and thus lend their aid to the unlawful conspiracy.

QUESTION: Well, I take it the argument was that Congress intended to amend the labor laws and the antitrust laws.

MR. MELAMED: That is precisely the point, Justice White.

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QUESTION: And they are relying on the legislative history to support that argument.

MR. MELAMED: That is correct, but the point is that the breadth of the --

QUESTION: An implied repeal.

MR. MELAMED: It is an implied repeal not only of the labor laws and the antitrust laws, but of countless other statutes that one could imagine one might wish to enforce by penal or damage provisions payable to third party beneficiaries or pension fund trustees. It would open a gaping loophole in the enforcement of countless federal statutes. It would leave federal courts powerless to prevent violations of law, and it would have these effects notwithstanding the fact that the statutory language purports on its face to preserve the defense that the conduct and the contract is inconsistent with law and that the paltry legislative history is addressed to the very different question, the question illustrated in Huge v. Long's Hauling of an employer's effort to resist compliance with a perfectly lawful contract clause by going to some other illegality unrelated to the clause sought to be enforced.

There remains one matter that I did not have an opportunity to address in my opening remarks, and that is the lower court's holding that the district court did not

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even have jurisdiction to decide whether the purchase of coal clause is an illegal hot cargo clause. Now, this matter has been discussed at length in our brief.

In essence, our position is as follows. Section 80 of the Labor Management Relations Act provides without qualification that all hot cargo clauses are unenforceable and void. There is nothing in the legislative history of that section or in any other legal authority of which we are aware to suggest that Congress meant something different from that, that Congress meant that only some hot cargo clauses are unenforceable and void.

Certainly there is nothing in that statute or in the new statute to suggest that Congress might have intended, as the Solicitor General suggested, that the NLRB would be powerless even when it found a hot cargo clause to enjoin its continued compliance or to issue a cease and desist order.

Moreover, there is ample authority for the proposition that courts have inherent authority to decide whether contract clauses they are asked to enforce are lawful and that federal courts may decide labor law issues in cases where they arise, in cases in which they arise that are properly before the court on other grounds.

It is simply unthinkable that a federal court should be required to enforce a contract without even having

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the power to decide whether the contract is lawful and valid and thus whether it creates any enforceable rights.

If Your Honors have no questions, I am prepared to end my argument.

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

(Whereupon, at 1:04 o'clock p.m., the case in the above-entitled matter was submitted.)

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CERTIFICATION

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

BY Sharon Roper Connelly

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