In the

Supreme Court of the United States

ORIGINAL

WOELKE & ROMERO FRAMING, INC., Petitioner,	:	
v.	:	No. 80-1798
NATIONAL LABOR RELATIONS BOARD ET AL.;	:	
PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC., Petitioner,	:	
v.	:	No. 80-1808
NATIONAL LABOR RELATIONS BOARD ET AL.; AND	:	
OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., Petitioner,	:	
v.	:	No. 81-91
NATIONAL LABOR RELATIONS BOARD ET AL.	:	

Washington, D. C.

Wednesday, March 3, 1982

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ALDERSON REPORTING

400 Virginia Avenue, S.W., Washington, D. C. 20024

Telephone: (202) 554-2345

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 o'clock a.m.

APPEARANCES:

JOHN W. PRAGER, JR., ESQ., Newport Beach, California; on behalf of Petitioner in 80-1798.

LEWIS K. SCOTT, ESQ., Portland, Oregon; on behalf of Petitioners in 80-1808 and 81-91.

NORTON J. COME, Deputy Associate General Counsel, National Labor Relations Board, Washington, D.C.; on behalf of Respondent National Labor Relations Board.

LAURENCE GOLD, Washington, D.C.; on behalf of Respondent unions.

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 first this morning in Woelke and Romero Framing, Incorporated, against National Labor Relations Board, and the consolidated cases.

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

ORAL ARGUMENT OF JOHN W. PRAGER, JR., ESQ.,

ON BEHALF OF THE PETITIONER IN 80-1798

MR. PRAGER: Mr. Chief Justice, and may it please the Court, these consolidated cases are here on petitions for certiorari to the United States Court of Appeals for the Ninth Circuit. The en banc court below affirmed the Labor Board's decision that the construction unions involved in this case did not violate Section 8(b)(4)(A) of the Labor Act by picketing to obtain certain restrictive union-only subcontracting provisions which are commonly called subcontractor's clauses because both the court and the Board believed that such provisions were protected by the construction proviso to Section 8(e) of the Labor Act.

Two questions are thus presented to the Court. First, are subcontractor's clauses always valid under the construction proviso simply because they are contained in a lawful collective bargaining relationship

between the union and the employer? Second, can a union lawfully picket to obtain such clauses?

We believe the answer to both questions is no. We hope to persuade the Court that the Labor Board's decision and the court below's decision is contrary to the legislative history to Section 8(e) of the Labor Act, and contrary to the reasoning of this Court in Connell Construction, which was decided by the Court in 1975.

The facts of this case are fairly straightforward. The Petitioner, Woelke and Romero, had a collective bargaining relationship with the unions, and in 1977, as the most currently contract to which it was party was about to expire, engaged in bargaining for a successor contract. During the negotiations, the unions proposed the subcontractor clauses for Woelke and Romero to execute. Woelke and Romero refused. An impasse in bargaining developed, and in support of the union's provisions, the unions picketed various job sites to which Woelke and Romero at that time was working. Woelke filed appropriate charges with the Labor Board, and this litigation ensued.

First, I think the Court should understand what kind of subcontracting provisions these are. These are not provisions which restrict subcontracting simply

to the bargaining unit. In other words, these provisions prevail upon the employees and employers outside the bargaining unit. Thus, these provisions clearly do not say that Woelke and Romero may not subcontract work or may not subcontract work if its employees are on layoff. These provisions simply tell the employer which employers it may otherwise do business with.

They apply to the work only of the contracting union. They name the particular union with which the subcontractor must be party. They apply to all job sites of the contractor or subcontractors. They apply to all tiers of subcontracting, and they apply in futuro to all job sites without regard to the presence or absence of union members on particular job sites.

They apply to the entire geographic area covered by the collective bargaining agreement, and they simply do not do anything other than to assist the construction unions who are party to the clauses in their organizing attempt in that geographic area.

Thus, in order for a subcontractor to be eligible to compete for the contractor's work, he must agree to sign the same exact union contract to which the contractor is party, and that subcontractor's employees must designate the particular union that is mentioned in

the subcontractor clause in order for their employer to be eligible to do the work.

We believe that these kinds of clauses have serious antitrust and labor implications. Although this is not an antitrust case, the Court should recognize the breadth of the boycott that is involved. The contractor is precluded from doing work -- or the subcontractor is precluded from doing work unless he is party to that contract. The boycott extends beyond what we believe is any legitimate union purpose. The clauses seek to regulate the working conditions and the market area of the construction union involved.

As this Court noted, labor policy does not require that a union have freedom to impose direct restraints on competition among those who employ its members. We believe that that is what these clauses in effect do. Further, the labor policy implications of these clauses are that the union in effect has a broad top-down organizing tool which is contained in the union contract, which again, we believe, is contrary to the Connell decision of this Court in 1975, and contrary to the legislative intent in 1959.

In 1959, Congress passed Section 8(e) to the Labor Act. It added that section to the Act with the purpose of trying to prevent secondary boycott

agreements. In 1958, this Court in its decision in Sandor had held that regardless of whether or not a voluntary agreement contained in a collective bargaining agreement conducted a secondary boycott against other people, the union could not use coercive pressure to enforce that agreement. In 1959, in enacting Section 8(e) to the Act, Congress intended to interdict those agreements to conduct secondary boycotts.

As far as the construction industry is concerned, however, Congress granted a limited exception to construction unions. In doing so, they limited that exception to subcontracting or contracting of work at particular job sites and did not give construction unions otherwise a right to engage in organizing from the top down. By definition, top-down organizing is used by the construction unions to organize the employer rather than the employees of that employer. In other words, the union puts pressure on the employer to sign a collective bargaining agreement, notwithstanding the fact that the employer's employees may not want to be represented by the union.

That kind of top-down organizing was interdicted both by Section 8(e), as far as most other industries are concerned, but also by other Labor Act provisions, specifically Section 8(b)(7) and also by

strengthening Section 8(b)(4) of the Labor Act.

To the extent that the construction proviso to 8(e) gives the construction unions an exemption, it would be contrary to that legislative intent to permit top-down organizing by that proviso. Rather, since the construction proviso to Section 8(e) was intended in part to overrule this Court's 1951 decision in Denver Building Trades, it is clear in our judgment that the proviso to Section 8(e) only exempts those otherwise secondary provisions which would be within the prohibition to Section 8(e) which are related to the Denver Building Trades' interests.

What are those interests? Those interests are to prevent the alleviation of the job site tension on particular job sites that may develop between union and non-union workers. But it is only those particular job sites at which union and non-union workers are working where that job site friction may develop. Therefore, unless the union has an identifiable dispute at a particular construction project where and when union and non-union workers are working side by side, there is no legitimate interest sheltered by the proviso that should give a construction union the right to engage in this kind of broad boycott.

A construction union does not need a top-down

organizing subcontracting restriction in order to alleviate that interest. It does not need to require the contractor to specify to the subcontractor which union that subcontractor's employees must designate as their bargaining representative in order to be eligible to compete for the work at that project.

Our adversaries, the Respondents in this matter, argue that the construction industry proviso had more than one purpose. They argue that Congress intended by their proviso to preserve a pattern of collective bargaining which they say existed prior to 1959.

We do not believe the legislative history or this Court's previous decision in Connell supports that argument. Rather, this Court apparently dismissed that argument in 1975, for that argument is based solely on one small reference in the legislative history by Senator, later President Kennedy, in which he said that the proviso was added to avoid serious damage to the pattern of collective bargaining. There was no further expression in the legislative history, in any of the committee reports, as to that purpose.

Completely opposite to the Labor Board's interpretation of the purpose of the proviso is the manner in which the proviso was added to Section 8(e).

QUESTION: Mr. Prager, before you get to that, can I ask you, do you dispute the suggestion by your adversaries that this type of clause was prevalent in the construction industry prior to 1959?

MR. PRAGER: We dispute that it was a pattern that this clause was in. We acknowledge that the construction unions, even as far back as 1941, had such provisions in some contracts throughout the United States, but the number of such contracts is by far very small, a few contracts. The board relies upon a study called the London Study, which was done in 1961, two years after the statute was passed, which found that some clauses did exist.

The general counsel of the NLRB, in reviewing that study in 1976, concluded that there was no pattern, that the most that could be said was that there was a mosaic of types of subcontracting restrictions. The Labor Board now argues, however, that that mosaic somehow or other has been transformed into a pattern. We disagree with that.

The Labor Board also argues that the clauses must be valid in order for construction unions to maintain the continuity of fringe benefits and to protect the job opportunities of construction workers. That may be a very laudatory goal, but it is not one

that finds any support in the legislative history to the construction proviso to Section 8(e).

If a construction union needs to protect its job opportunities, it can do so without the broad restraints involved in these kinds of subcontractor clauses. It can negotiate, for example, to preserve job opportunities, that a construction employer shall not subcontract work ever. Now, perforce, that preserves the job opportunities of the bargaining unit employees. It can negotiate a provision that says, as long as a majority of the work force of the contractor's employees are working, the employer may subcontract out work, but if that subcontracting will produce another layoff so that less than a majority of the bargaining unit would be working, subcontracting would be prohibited.

The simple fact of the matter is that broad top-down organizing clauses which name particular unions as the beneficiaries of those clauses are not necessary to preserve job opportunities. Furthermore, the work preservation test that this Court has previously adopted indicates that such kinds of work preservation goals are primary goals, goals which are not within the scope of the prohibition to Section 8(e) in any event.

If Section 8(e)'s proviso is an exception to the secondary thrust of Section 8(e) overall, then the

preservation of job opportunities can be done by provisions which are not within even the general scope of Section 8(e) of the Labor Act. In other word, the preservation of job opportunities has nothing whatsoever to do with Section 8(e) or the purpose of the proviso to that section.

QUESTION: Well, I suppose you must convince us that the Board's interpretation of the Act is just contrary to Congressional intent.

MR. PRAGER: That's correct, Justice White, and we believe that our arguments are persuasive on that point. The Board has not been --

QUESTION: It must be, then, your position must be that there is just no room in the statute for the Board's construction.

MR. PRAGER: That's correct. If we analyze --

QUESTION: Two choices are not available. There is only one. There are not two ways to construe the statute. There is only one.

MR. PRAGER: In my judgment, there is only one way to construe that particular proviso.

QUESTION: Well, you have to take that position. You have to take that position, that there is only one way. If there were two ways, I suppose you would have a problem about whether we should defer to

the choice between two reasonable constructions.

MR. PRAGER: Yes. I believe that in light of this Court's previous decisions in various labor cases, that the Court is persuaded that as long as the Board's construction of the statute is reasonable and in accord with the legislative intent, that we should -- or the Court should defer to it. We believe, however, that the legislative history clearly does not support the Board's position.

The nub of this matter is really the proper interpretation of the proviso and the legislative history behind it. We believe the Board's interpretation cannot stand.

QUESTION: Well, Mr. Prager, the literal language of the statute would appear to be in favor of the Respondent's position, would it not? You have to ask us to look behind the literal language of the statute to reach your position.

MR. PRAGER: That is correct, Justice O'Connor, but this Court has previously done so in two decisions, National Woodwork and in Connell, where the Court took the position that a thing may not be within the statute because not within the intent of its makers, notwithstanding the literal language of the statute, and relying on the Court's previous judgments along that

line, we have taken the position that the literal wording of the statute should not be read.

QUESTION: I suppose we left the question open in the Connell decision, and we now have to resolve it. Before you finish, would you address yourself briefly to the second issue? There is a concern about whether that issue was sufficiently raised at the Board level for us to address it.

MR. PRAGER: The Board has maintained the rule that a union can -- that a union can picket to obtain these clauses since the early sixties. Originally, in its decision in Colson and Stevens, the Board found that such provisions could not be obtained by picketing but could only be entered into voluntarily. When three circuits disagreed, the Board changed its rule, and it has existed that way since roughly 1964.

When this case was argued before the NLRB, counsel for one of the parties in the consolidated argument addressed the issue. At that point, there was nothing for --

QUESTION: Was it more than merely mentioned, or was it specifically raised?

MR. PRAGER: As I recall, it was mentioned. But there was nothing for us to object to. There was no Labor Board intermediate decision. There was no finding

of fact. There was no conclusion of law. There was no remedy for Woelke and Romero to have objected to prior to that point in time. In fact, it appeared to be a settled point of law before the Board. The Board had previously considered the argument in Colson and Stevens, and previously considered the argument in Centilever. For us to have raised that theory once more would have been a completely vain act, given the fact that the Board for at that point about 15 years had considered the issue settled.

We raised it before the court of appeals, knowing that the court of appeals had a contrary rule to our position, but to preserve it for Supreme Court review. If anybody can be considered to have waived this point, it seems to us that the Labor Board and the unions should be considered to have waived any objection to the consideration before this Court. They did not object to the consideration by the court of appeals, not once did they do so, and yet the court of appeals heard it twice.

QUESTION: But our cases, our cases generally have required that the issue be expressly raised before the Board, haven't they?

MR. PRAGER: We don't believe that that rule applies where the Board in the first instance is the

factfinder and decision-maker, and where the Board relies upon a previously established rule as the basis for its decision.

The right to picket to obtain the clauses in our judgment does not exist. The Board's construction of Section 8(b)(4)(A) in our judgment, as mentioned in the briefs, is inaccurate. Further, frankly, our view that you cannot picket to obtain these subcontractor clauses is consistent with the Board's rule that you cannot picket to obtain a non-mandatory subject of collective bargaining. It is only mandatory subjects of bargaining that can be obtained by virtue of picketing.

This clause, since it regulates the labor conditions of employers outside the bargaining unit, is considered to be by the Board a non-mandatory subject of bargaining. As a consequence, Section 8(b)(3) of the Act should interdict such picketing. However, the Board has created an anomaly in the law by saying, although it is a non-mandatory subject of bargaining, we believe that Section 8(b)(4)(A) gives the union the right to picket to obtain it.

We believe it is more consistent with the legislative history, with the policies announced in Sandor that an employer must be free from coercion with respect to these kinds of boycotts, and consistent with

the Board's rules concerning non-mandatory subjects of bargaining that a union cannot be heard to say that it has a right to picket to obtain the clause.

In conclusion, we believe that the Court should declare the union's conduct in this case, as well as the clauses, illegal.

Thank you.

CHIEF JUSTICE BURGER: Very well.

Mr. Scott.

ORAL ARGUMENT OF LEWIS K. SCOTT, ESQ.,

ON BEHALF OF THE PETITIONERS IN 80-1808 and 81-91

MR. SCOTT: Mr. Chief Justice, and may it please the Court, in the Connell case, the subcontractor clause prohibited the general contractor from doing business with any plumbing subcontractor that did not have a labor contract with Plumbers Local 100. Now, the general contractor, Connell Construction Company in that case, did not itself employ any plumbers at any time on any of its jobs.

This Court held in Connell that that subcontractor clause was not within the purpose of the proviso, and therefore not within the proviso.

QUESTION: Although arguably within the language.

MR. SCOTT: Exactly. Now, if Connell

Construction Company had itself employed just a couple of plumbers on just one job for just a couple of months, and if Plumbers Local 100 had put the very same subcontractor's clause in a full labor contract covering just those two plumbers, then, according to the rule of the Labor Board and of the court below, that subcontractor clause would be lawful, and it would apply at all times on all jobs of Connell Construction Company throughout the life of the contract.

Furthermore, according to the rule of the Labor Board and of the court below, Plumbers Local 100 could picket Connell Construction Company to force Connell to agree to that clause, the very same clause.

Now, the effect of that same subcontractor clause at all times on all of Connell's jobs except for just that two-month period on that one job where Connell employed the two plumbers would be indistinguishable from the effects of the subcontractor's clause in Connell. At all such times, the subcontractor clause would operate as a broad organizational weapon, organizing from the top down the subcontractor's employees by use of a secondary boycott, and at all such times without any redeeming virtue based on the close community of interests at the particular job site involved.

QUESTION: On the other hand, if the general contractor in your example had the two plumbers on some job, you would think the clause would be enforceable at that job?

MR. SCOTT: At that job, and at that job only --

QUESTION: So you are not saying it is invalid on its face.

MR. SCOTT: The clause would be invalid on its face as long --

QUESTION: Well, no, just as applied to jobs where the contractor didn't have union members working.

MR. SCOTT: No, it would be our position, Your Honor, that unless the clause itself provides that it is confined to those situations where the union has its members employed by the general contractor --

QUESTION: You mean, you wouldn't be satisfied if we agreed with you but except to say that, well, this clause is invalid insofar as, but valid otherwise?

MR. SCOTT: Well, perhaps we are dealing with niceties that in practice wouldn't matter.

QUESTION: Well, that isn't just a nicety. That is preserving the clause where it is legally applied and striking it down where it isn't.

MR. SCOTT: Certainly our essential position

is that the clause would be legal only in those situations where the general contractor, at the time --

QUESTION: Yes, all right.

MR. SCOTT: -- employed members of the union.

QUESTION: Mr. Scott, you rely rather heavily on the Connell case. What difference does it make, if any, that that came up in an antitrust context without any interpretation by the board?

MR. SCOTT: Your Honor, I would say that it doesn't make any difference. I recognize the rule of deferring to expertise of the Board. On the other hand, I submit that the essential question is the purpose of Congress, and not the literal statute, and I would suggest that under all the circumstances, as we describe in our brief, that expertise has very little play in this particular case.

The subcontractor clause in this particular case, that is, the one between Local 701 and Oregon AGC, is in substance identical to the subcontractor clause in Connell. It prohibits the general contractors from doing business with any subcontractor performing covered work that does not have a labor contract with Local 701. It applies at all times on all jobs of all the 200 AGC contractors throughout the state of Oregon and southwest Washington for the entire five-year life of

the contract, and with respect to all the jobs of all of those general contractors when they do not themselves employ members of Local 701, the effect of this clause is indistinguishable from the effect of the clause in Connell.

It operates as a broad top-down organizing weapon, by means of a broad group secondary boycott, and without any redeeming virtue based upon the close community of interests at the particular job site.

QUESTION: Wasn't the Board's view presented in Connell? It was, wasn't it?

MR. SCOTT: Your Honor --

QUESTION: In an amicus brief?

MR. SCOTT: Yes, Your Honor, it was.

QUESTION: By General Moore?

MR. SCOTT: That's right, and it is my understanding it was presented and considered and rejected by the Court in Connell.

The Labor Board and the court below seek to distinguish Connell on the ground that there was no collective bargaining relationship between the general contractor, Connell, and the union, whereas in our case there is a collective bargaining relationship between the general contractor and the union. The error in this position is demonstrated by looking at the very tenuous

and insubstantial nature on many occasions of a collective bargaining relationship, and the very broad consequences that under the rule of the Board and the court below attached to that collective bargaining relationship.

This can best be shown, I believe, by looking at a very simple specific example. The labor contract between Local 701 and these AGC general contractors covers the operation of every conceivable kind of heavy construction equipment. Now, a particular general contractor may himself employ members of Local 701 only occasionally and for very discreet purposes. For example, a particular general contractor may employ members of Local 701 only to operate forklifts on a particular job to move lumber for just a couple of months on that one job, and only on that occasion throughout the entire five-year life of the contract.

That particular general contractor may always, historically, and in every situation subcontract out all other work that involves the operation of heavy construction equipment. He at all times subcontracts out all the excavation work that includes the operation of a shovel and a front-end loader, subcontracts out all of the underground utility work that includes the operation of a backhoe.

He always subcontracts out all of the concrete laying work that involves the operation of a concrete pump, always subcontracts out the hoisting where operation of a crane is involved, subcontracts out all of the sprinkler fitter work that involves a mobile scaffold or a forklift uses the mobile scaffold, subcontracts out all of the landscaping work involving the use of other heavy construction equipment involved, subcontracts out all of the paving work and the driveway work involving the use of graders and rollers and pavers.

Now, that general contractor does have a collective bargaining relationship with Local 701. It employed a couple of its members on a job for a month. The consequence of this, according to the Labor Board, is that the subcontractor clause is valid, and it applies at all times on all the general contractor's jobs throughout the five-year life of the contract, and that general contractor is prohibited from doing business with any subcontractor whose employees perform any of this work of operating any of that equipment unless that subcontractor has a labor contract with Local 701, and that labor contract requires all of the employees of that subcontractor performing that kind of work on any of the subcontractors' jobs throughout the life of the contract to be members of Local 701, and to

designate Local 701 as their representative.

And furthermore, according to the rule of the Board, and of the court below, Local 701 can picket this general contractor to force him to agree to this clause.

It is submitted that the legality of a union's right to top-down organize subcontractors' employees by means of a secondary boycott on all these other jobs at all these other times cannot reasonably depend on whether the general contractor employs at some time on some job one or two members some place of Local 701. Surely, that is not what Congress intended, yet that is the rule of the Board.

This Court stated in both National Woodwork and also in Connell that the construction proviso is based on the close community of interests on construction sites. That close community of interest on the construction site justifies the limited boycott which does intrude into employee and employer rights.

When Local 701's members are employed on a job site, they are a part of that close community of interests on that job site, but they are not part of the close community of interests on all the other jobs and at all other times when they are not employed. The close community of interests on the particular job site which justifies Local 701's intrusion into the employee

and the employer rights with respect to that site by means of a secondary boycott cannot justify the intrusion of Local 701 into the rights of employees and employers on other job sites where they are not a part, where the union and Local 701 are not a part of the close community of interests.

This subcontractor clause is not confined to those occasions where Local 701 is a part of the close community of interests, and therefore it is not within the purpose of the proviso, and so not within the proviso.

There can be no doubt, as this Court stated in Connell, that a major aim of Congress in 1959 was to limit top-down organizing by economic weapons, and there can be no doubt that this subcontractor clause is directly contrary to that major aim. It top-down organizes by virtue of an economic weapon, namely, the secondary boycott.

Furthermore, this clause cannot be justified by any of the special characteristics of the construction industry which Congress sought to accommodate in 1959. This coercive boycott cannot be justified by the purposes underlying Section 8(f), which permits voluntary pre-hire contracts covering the contractor's own employees, and certainly this broad

clause cannot be justified by Congress's purpose of avoiding job site friction between union and non-union workers because it is not confined to those occasions where such friction can occur.

QUESTION: Well, Mr. Scott --

MR. SCOTT: Yes, Your Honor.

QUESTION: -- suppose you found that in 1959, in the construction industry, this kind of subcontractor clause was very prevalent, was practically in every contract that was signed, and then you find that Congress exempts the construction industry in a provision from 8(e). What would you think then?

MR. SCOTT: Well, Your Honor, I would have these answers. First of all, both premises, I suggest, are wrong. First, these clauses were not prevalent --

QUESTION: I know that, but what about my question?

MR. SCOTT: Well, the direct answer to your question is that --

QUESTION: Because there is an argument that they were certainly not rare at the time.

MR. SCOTT: I believe the general counsel's analysis found 12 percent.

QUESTION: Yes.

MR. SCOTT: The issue still, Your Honor, is to

determine the purpose of Congress, and did Congress intend to preserve, if you will, that particular kind of clause. Now, it is true, Senator Kennedy spoke of avoiding serious damage, but certainly it is no serious damage to a pattern if a few clauses then existed. Now, it is true, if it could be shown that virtually every contract had such a clause in the construction industry, and that Congress did indeed intend to preserve those very clauses, certainly --

QUESTION: Well, they certainly intended to preserve something, didn't they, that otherwise might have been eliminated by 8(e)?

MR. SCOTT: Yes, Your Honor.

QUESTION: Do you think it just intended generally to preserve the status quo in the construction industry?

MR. SCOTT: No, Your Honor. If you look carefully at -- The principal reliance on that concept which is argued by the union and the Board is found in the statements of Senator Kennedy in connection with his statements --

QUESTION: Well, he was heavily involved in it.

MR. SCOTT: He was. He was the chairman of the conference committee on the Senate side. But if you look at Senator Kennedy's own statements as to what the

purpose of the exception was, he makes it very clear that he was concerned with protecting construction unions on job sites from substandard wages on those construction sites. We give the specific cites to that in our brief, and you will see from his statements he explicitly indicates that.

I will reserve the remaining time for rebuttal. Thank you.

CHIEF JUSTICE BURGER: Mr. Come.

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF THE RESPONDENT

NATIONAL LABOR RELATIONS BOARD

MR. COME: Mr. Chief Justice and may it please the Court, Section 8(e), which was added to the Act in 1959, outlaws so-called hot cargo or secondary boycott agreements. The construction industry to Section 8(e) states, however, that nothing in this Subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of construction.

Now, as has been pointed out previously, read literally, the proviso's exemption for secondary subcontracting agreements plainly encompasses the agreements here since they relate to the contracting of

construction site work. Normally, that should end the matter. However, in Connell, this Court indicated that the proviso may not be applied literally where to do so would be to frustrate Congress's purpose. Therefore, let us turn to the legislative history and see that far from frustrating Congress's purpose, to interpret the proviso as the Board has done here as privileging the type of subcontracting clauses that we have here when entered into in the collective bargaining relationship, effectuates rather than frustrates Congress's purpose.

The Court may recall that Section 8(b)(4)(A) of the 1947 Act outlawed strike pressure against a neutral employer to force him to cease doing business with an employer with whom the union had a primary dispute. This left certain loopholes in the Act's regulation of secondary boycotts, and as this Court recognized in Sandor, that although it was no defense to an unfair labor practice charge under 8(b)(4)(A) that the struck employer had agreed in advance to boycott a disfavored product, the mere execution of such a contract or its voluntary observance by the employer did not violate Section 8(b)(4)(A).

This was regarded as a loophole, and the Landrum-Griffin bill, which passed the House, plugged this loophole completely. It added a new provision

which is the equivalent of the main body of the current Section 8(e) that made it unlawful for any labor organization and any employer to enter into an agreement whereby the employer agreed to cease doing business with any other person.

Moreover, Section 8(b)(4)(A) was amended also to prescribe strike pressure, to force an employer to agree to such a boycott agreement because, as Representative Griffin explained in a passage that is quoted in our brief, although under existing law it was unlawful to strike to force a secondary employer to cease handling certain products or to cease doing business with some other person, the law, and I am quoting, "does not prohibit the same kind of activity to force such employers to sign contracts or agreements not to handle or transport goods coming from a source characterized by the union as unfair."

And indeed, in Sandor, one of the reasons why the Court held that the agreement was no defense to strike pressure to enforce the agreement was that the agreement itself might have been the result of strike pressure. So, these two loopholes, pressure to get an agreement and the agreement itself, were sought to be plugged in the Landrum-Griffin bill.

Now, there is little doubt that had the

Landrum-Griffin bill been enacted it would have interdicted the clauses that we have here as well as strike pressure to get those clauses.

When the House and Senate bills were referred to the conference committee, and incidentally, the Senate bill only banned hot cargo agreements in the trucking industry, the Senate conferees, led by Senator Kennedy, who was the chairman of the conference committee, insisted on exemptions from the ban on secondary agreements for the garment industry and for agreements relating to work to be done at the site of a construction project. The conference agreed to these changes.

Senator Kennedy, in his contemporaneous report to the Senate on the result of the conference, pointed out that the qualification for construction site subcontracting agreements, like the garment industry proviso, was necessary to avoid serious damage to the pattern of collective bargaining in the industry, and he went on to say that the construction industry proviso is intended to preserve the state of the law with respect to the validity of agreements relating to the contracting of work to be done at the site of the construction project. Agreements by which a contractor in the construction industry promises not to subcontract

work on a construction site to a non-union contractor appear to be legal today. They will not be unlawful under Section 8(e).

And this is not the only reference to an intent by the construction industry proviso to preserve the status quo in the industry. You find exactly the same statement in the House conference report. They don't talk about the pattern of collective bargaining in the industry, but they do make the point that these agreements in the construction industry appear to be lawful today, and the purpose of the proviso is to preserve that status quo.

QUESTION: Well, there is no evidence in any of those statements that they are talking expressly or particularly about this particular kind of an agreement.

MR. COME: That is so. However, there is --

QUESTION: Well --

MR. COME: There is --

QUESTION: Well, you don't have any where they mention this particular kind of an agreement?

MR. COME: We do not have it in this statement. However, there is very clear evidence in the legislative history that agreements -- that Congress was aware of such agreements, and was indeed asked to outlaw them. The clearest evidence of that, which is set out

on Pages 16 and 17 of the Board's brief, is the hearings before the House Labor Committee, which was presided over by Representative Landrum, in which you had representatives of an independent union and of a contractor in the construction industry complaining that under existing laws, employers and unions could lawfully enter into union signatory subcontracting clauses, and that because of these agreements, employers whose employees had selected another union were denied any opportunity to compete for construction jobs.

The specific contract which was called to the Court's attention was the one involved in the Musser case before the Board and the D. C. Court of Appeals.

QUESTION: And so what is your point, Mr. Come? So that was in the hearings. Then what?

MR. COME: That was in the hearings as a result of pointing out, and the clause involved was essentially similar to the one that we have here. It was described as a clause --

QUESTION: Well, so there was a clause like that in existence. There might have been a lot of them. So then what?

MR. COME: What happened then was that Representatives Landrum and Griffin came up with a proposal that would have outlawed these clauses. It

would have outlawed all forms of secondary agreements, including these clauses. It went to the conference committee, and the Senate conferees would not buy it, because they felt that it would --

QUESTION: Yes, but except for the proviso, the construction industry proviso, 8(e) would have banned these, wouldn't it?

MR. COME: Yes, it would have.

QUESTION: Well, so the question is, why did they make the exception?

MR. COME: They made the --

QUESTION: And how broadly did they want to make the exception?

MR. COME: Well, they said that they made the exception to preserve the pattern of bargaining in the construction industry, and to maintain the status quo in that industry, and as is evidenced by the Musser case plus the London Study, subcontracting clauses of this type were part of the pattern of collective bargaining in the construction industry.

QUESTION: Well, your argument would certainly indicate that the Court was wrong in its view of this legislative history in Connell.

MR. COME: Well, Your Honor, the Court did not finally resolve its view as to the legislative history --

QUESTION: How did the Board construe this proviso before Connell? Did it ever?

MR. COME: Before Connell, the Board had -- had not construed it in a manner differently. As a matter of fact, the general counsel, believing that even the clause in Connell was protected by the construction industry proviso, did not issue a complaint in that --

QUESTION: So the Board's construction of the Act was rejected in Connell.

MR. COME: No, Your Honor, it was -- it was not in --

QUESTION: Well, the Board's construction of the Act with respect to the kind of a contract involved in Connell was rejected.

MR. COME: That is correct. The Board did not take a position on that in this Court in Connell, although the --

QUESTION: Well, I understand that, but you did have a position on it.

MR. COME: The Board had never addressed it in the kind of a situation that you had in Connell. The difference between Connell and this case is that there, the union sought a bare subcontracting clause --

QUESTION: Yes.

MR. COME: -- outside of a collective

bargaining relationship.

QUESTION: Yes.

MR. COME: That was not the conventional type of situation. The general counsel in refusing to issue a complaint with respect to that sort of a clause thought that it would be governed by the same sort of history and interpretation that would govern the conventional situation --

QUESTION: But the Board itself had never taken a position. Is that it?

MR. COME: The Board had never had occasion to take a position, because the general counsel had never issued a complaint on that.

QUESTION: Yes.

MR. COME: And the Board pointed that out to this Court in Connell. It also said that it was unnecessary to decide whether this was covered by 8(e) or not because in the Board's view, even if it were violative of 8(e), it didn't follow that antitrust sanctions --

QUESTION: Yes.

MR. COME: -- could be applied, that the remedies under the Labor Act were the sole remedies.

QUESTION: Mr. Come, how frequently were clauses of the kind involved in this case utilized in

the industry prior to 1959?

MR. COME: I don't know if I can give a statistical count. The London Study notes, after studying over 1,000 some odd contracts with subcontracting clauses that the single most frequent requirement found in more than 50 major contracts called for the subcontractor to comply with all the terms and conditions of the prime employer's agreement. So --

QUESTION: But he didn't have to be unionized in that provision.

MR. COME: Oh, yes --

QUESTION: That is just a --

MR. COME: Well, the terms of these contracts require you to recognize the union, to draw your manpower from the union's hiring hall, and so on.

QUESTION: Okay.

MR. COME: And some of them even specifically require you to sign the union contract.

Now, the -- the difference between Connell and this case was --

QUESTION: Is your answer, then --

MR. COME: Yes.

QUESTION: -- in 50 instances out of 1,000? I didn't understand the response, I guess.

MR. COME: They studied, I believe it was

about 1,000 contracts. Not all of them were limited to the -- oh, in the footnote on Page 15 of our brief, we state that of the more than 700,000 construction workers working under 155 construction contracts examined in the London Study, there were 50 -- 50 of these contracts had subcontracting clauses of this type. I got the bigger figure because that study also dealt with subcontracting clauses in other industries.

QUESTION: Do you think that can be properly characterized as a pattern, 50 out of 1,000?

MR. COME: Well, 50, I said, out of 155. I think that it certainly shows that it was part of the pattern, and the Musser case, which was specifically called to Congress's attention, was clearly a clause of this type, and indeed, the committee was advised that the Board and the court of appeals of the District of Columbia had just held that there was nothing unlawful about such a clause under the 1947 Labor Act, so this is not something that you can say Congress was completely unaware of or that it is a new kind of tactic such as you had in Connell, where the union in an effort to get away from the regulation that 8(b)(7) imposed on organizational picketing structured its activity so that they were seeking a subcontracting clause without undertaking to represent any of the contractors'

employees.

That is totally different from the typical situation which we have in this case, where the union in seeking a subcontracting clause is seeking it as part of a completed collective bargaining agreement that governs the terms and conditions of employment of the contractor's employees, and it is because of the vital interest that this subcontracting clause has given the short term duration of jobs in the construction industry and the floating pool of workers that the unions of a particular contractor requires clauses of this sort in order to assure a continuity in their negotiated contract benefits.

And this is what Congress was concerned about in enacting the proviso to Section 8(e). Thank you, Your Honor.

QUESTION: You referred to a D.C. circuit case. You didn't mention the name of it.

MR. COME: Musser. It is cited in our brief, Your Honor. Let me just give you the citation.

QUESTION: Thank you. I just --

MR. COME: It is in Footnote 16, Page 17 of the Board brief, Northern California Chapter, AGC.

QUESTION: Very well.

MR. COME: Thank you, Your Honor.

CHIEF JUSTICE BURGER: Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.,

ON BEHALF OF THE RESPONDENT UNIONS

MR. GOLD: Mr. Chief Justice, and may it please the Court, Mr. Come has already described and set out the language of Section 8(e) and the language of the proviso thereto. I wish to begin by stressing the fact that the proviso is not one stated in general terms, but one which deals specifically with the contracting and subcontracting of work at a job site. Obviously, the very language shows a quite particularized intent to take out of the overall prohibition of Section 8(e) a particular type of agreement.

Moreover, in response to Justice White's question, we believe that Senator Kennedy's statement describing the proviso deals again in quite specific terms. He said, in part, and it is quoted at Page 11 of our brief, the red brief, "Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a non-union contractor appear to be legal today."

QUESTION: Well, Mr. Gold, suppose the union and the employer are negotiating their contract, and the union wants one of these provisions. Now, do you suppose if -- What interest would the union have in

telling the employer, and by the way, we expect this clause to apply to any site even though none of our members are on that site?

MR. GOLD: Well, the union's interests are dictated by the nature of the industry. We point out, and the passages are quoted at Page 19 of our brief, that Congress at the same time it was considering Landrum-Griffin, whose main thrust was concerned with regulating internal union affairs, also had under advisement the provision which became Section 8(f) of the law, and which deals with so-called pre-hire agreements.

And in their study of the industry, they noted the following major points. One is that the occasional nature of the employment relationship makes this industry markedly different from manufacturing. An individual employee typically works for many employers. Moreover, a substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union.

Now, in terms of the union's interests, it is slightly different on behalf of those employees than the interest of an industrial union dealing with a particular employer. The union knows that the employer is going to in all likelihood during the term of the

contract discontinue particular work and move on to other work.

What the union is concerned about, given the normal pattern of this industry in which subcontracting is prevalent is that the organized group of workers who are really attached to the union rather than to any particular employer continue to have opportunities to do the work that the union is negotiating about. If not, it is like trying to hold onto quicksilver without putting it in a container, because of the capitalization of these employers, because of the fact that work begins and ends frequently.

If you don't preserve the work in general terms for this group of union employees, your collective bargaining agreement is going to have little or no value for those employees. Now, to be sure, one answer would be to say to the employer, that is it, no more subcontract. Given this industry, that just hasn't been the pattern.

Rather, the union's desire has been to make sure that whether that already organized employer does the work or not or whether somebody else does the work, its members, who are in -- coming out of the hiring hall along with other people who may want to go through the hiring hall, get the work. Without this kind of clause,

unless you ban subcontrating, which would be completely against the whole grain and pattern of the way the industry has grown up, and the unions just haven't had an interest in disrupting that pattern, the collective agreement becomes of little or no worth.

That is why unions seek this kind of protection, and that is why, incidentally, as the very language at least of the opinion in Connell suggests, it is rational to posit a difference between situations in which the agreement is part of a collective bargaining arrangement and the situation in Connell where the agreement was designably outside of any collective bargaining arrangement in the hope of getting through a hole that that union had hoped had been created between Section 8(e) and Section 8(b)(7), which banned certain kinds of organizational picketing.

In other words, in this situation, the union is seeking to advance the interests of those who have already made a free choice, a choice to join the union and to work under union contracts. It cannot do it in an effective way except by banning subcontracting, which would be contrary to the whole tenor of the industry --

QUESTION: Well, is your suggestion then that it is just a -- you didn't even need the proviso?

MR. GOLD: No, it is not, because in this

instance --

QUESTION: That sounds like a primary --

MR. GOLD: There is a -- there is a -- there is an interest relating to a primary group of employees, but they are not considered primary and never have been in the strict labor relation terms of the primary-secondary dichotomy. If you, for example, seek an agreement concerning subcontracting of a kind the employees have not done in the past, or if you deal with work being done by other unions, that is secondary, in the strict legal terms.

QUESTION: Well, this would certainly -- this kind of a clause, if it were in force, would certainly keep the employer from subcontracting to a subcontractor who is organized by some other union.

MR. GOLD: Yes, that's correct, and given the craft nature of the unions here, they have a very great interest in that. The structure of the -- the structure of bargaining here reflects the division of the industry into general and subcontractors. The division of the labor side of the industry into various craft units and the overall fact that because of the structure on the employer side and because of the nature of construction you have hundreds of jobs starting and beginning all the time, and you have a practice whereby an individual who

gets the work on the employer side may or may not keep it. He is less likely to keep it than not.

QUESTION: Are there a fair number of unions who supply laborers both to general contractors and to subcontractors?

MR. GOLD: It depends. The answer is that there are such unions. The operating engineers and the carpenters, the two unions that are involved here, are most likely to do that, because general contractors as the Woelke case shows -- Woelke is a sub who does specialty framing work. General contractors use carpenters, or they may decide to use subcontractors. General contractors, as the argument on the other side indicates, may do certain kinds of heavy machinery operations themselves, and may decide not to do work of that kind. The same thing is true with laborers, electricians, a variety of these crafts can work either for general or subs.

Also, when you get down to the sub level, Woelke can give away part of the work it has, and may well do so, depending on how onerous it finds its collective agreement, how loosely the agreement binds it, and so on. So you have general subs, sub subs, subs under that.

This is a very complicated series of

interlocking relationships, and when you look at the debate concerning the Denver Building case, which was certainly one element of the consideration in 1959, Congress was well aware that you had these complex relationships leading to the construction of a single overall piece of construction, whether it be a building, a factory, a highway, and that there was an interrelation between these different generals and subs or people who were primary and secondary contractors, whatever you are going to call them.

And part of the disquiet about the Denver Building case, and certainly a major drive was not simply union and non-union people don't work very well on a single job together, but also with this very problem that we are discussing, that if you organize a general contractor, or you organize a subcontractor, given the prevalence of contracting out in this industry, and given the nature of these companies, which form, reform, create joint ventures, and so on, the unions on the other side may well have nothing other than a piece of paper when they are all done.

QUESTION: Well, unless they have a few subcontractors organized.

MR. GOLD: You can organize a subcontractor --

QUESTION: There are major subcontractors in

almost every market.

MR. GOLD: Yes, but the problem is that the subcontractor can do precisely the same thing, Justice White. You may have him organized, and then he and a few other people create a new sub. You don't necessarily have him organize unless you have this kind of clause, and that is why they are signed. It is because of the protean nature both of the types of arrangements which employers make between themselves and because of the equally various ways that employers choose to organize their business that you have great problems from the union side in organizing the industry.

It is in that way this industry is very similar to the garment industry, which was the only other one which received any exemption from Section 8(e). It is the same variety of business arrangements which make it very difficult to maintain the situation of the already organized people who are a group of people basically in competition with other people working -- looking for the same work.

The top-down organizing situation which is described is quite likely to be a misnomer. What you really have are ten people and five jobs. Five of them are organized, and five of them are unorganized. And the question is, by getting an agreement with somebody,

can you hold onto those five jobs or are you going to find out that all you have is the promise of those jobs, but as soon as the construction starts you find out that somebody else is the employer, and those five unorganized people are doing the work.

Now, Congress could say that you cannot use this tool to maintain your situation. Our point of -- our point in this argument is that Congress did not say so. The language does not say so. The explanations do not say so. And the explanations in this instance are authoritative and specific, as I started to say in responding to Justice White's question.

Congress focused on the contracting and subcontracting on the site. It did so in a way which preserves the right to enter into subcontracting agreements. It did so against a background, to take up a point again that Mr. Come made, where one bargaining structure that was prevalent, and as the London Study showed, probably the most prevalent type of structure, was to require that subcontractors assume agreements when they take a subcontract, and no one has ever found the kind of contract that the Petitioners say is the only kind that is legal, an agreement confined to a particular job site where there are both union and non-union people.

Never in the history of collective bargaining -- they have all sorts of resources, and they have been busy looking. Nobody ever signed that kind of agreement. It would be impossible, and I think we are in a better position to say this than what they are trying to foist on us, it would be impossible in our view to effectively police and enforce such an agreement. It would do nothing concerning the fact that the people who are covered, the organized pool of workers, might lose the work.

All you have to do is not give the work to the already organized people, and then the whole clause disappears on you. What was present at the time, what the House, having been advised, sought to outlaw, and what the Senate said it would not accept the outlawing of was this type of subcontracting agreement.

We are not here to quarrel in any way with the Connell case that, taking everything into account, agreements which are entered into outside of a collective relationship, where you don't have the interests which I have outlined, were not intended to be covered. It is one thing to say that even though Congress was quite specific, it didn't intend to legitimize something which had never been seen before, but it is another thing to say that it intended, even

though it used words which state the contrary, and even though the authoritative explanation is to the contary, to outlaw this type of clause.

QUESTION: Mr. Gold, what is the meaning of this language in the footnote on Page 15 of the government's brief, "and although the terms of these provisions vary, the most common required contractors to agree to subcontract work only to subcontractors who would apply all the 'terms and conditions' of the master agreement?"

MR. GOLD: When you look at those contracts, what it shows is that the subcontractor had to take the whole clause, including the recognition clause, where it is legal, the union security clause, the union hiring hall referral clause, and so on.

QUESTION: Would he have to sign an agreement, or not?

MR. GOLD: Yes.

QUESTION: He would have to sign the --

MR. GOLD: Yes.

QUESTION: -- sign the agreement. Well, so what you are suggesting is that by far the most common kind of subcontractor clause, or practically the only kind is the kind that would cover this particular case.

MR. GOLD: Yes. Not -- I would be unfair if I

said almost the only one. It was the most prevalent that the sole scientific study found. It was the kind that was complained of to the House. The one thing that is for sure is that nobody ever saw what the Petitioners claim is the sole thing that Congress intended to preserve, and it is only coincidental that their construct of what Congress intended to preserve doesn't meet the interests of the organized employees on the other side, and is probably unenforceable. That just happens to be where their construct comes out.

So, the way I would conclude is that there are situations in which the language points one way and the explanations, either in terms of stating the nature of the problem or in terms of explaining what the language, the statutory langauge means, point in opposite directions. Here, while there isn't a great deal of legislative history, on this particular point, it is very, very precise.

Congress doesn't have to be long-winded about it. This happened in the conference. The Senate insisted on its position. Senator Kennedy explained its position. That is the sole authoritative statement. Nobody said to Senator Kennedy, wait a minute, that isn't what this means. Nobody disputed what he said, and what he said is that agreements of this type are

entirely lawful.

And that is perfectly consistent --

CHIEF JUSTICE BURGER: Your time has expired now, Mr. Gold.

MR. GOLD: Thank you.

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

ORAL ARGUMENT OF LEWIS K. SCOTT, ESQ.,
ON BEHALF OF THE PETITIONERS IN 80-1808 and 81-91

MR. SCOTT: Yes, Your Honor, I do.

I hope to cover three points very briefly. First, how frequent were these kind of clauses in 1959? There are just two studies that suggest that. First, the London Study, which was not made for this purpose and which the general counsel found inconclusive because it does not distinguish between signatory clauses and other kinds of clauses. Secondly, the general counsel's own study, which showed that only 12 percent of the clauses in 1959 included signatory clauses of any kind. I must flatly disagree with the statement of Mr. Gold in response to the Court. Secondly --

QUESTION: Well, do you also disagree with what he said that no one has ever found an agreement that on its face is the kind that you suggest would be legal?

MR. SCOTT: Well, Your Honor, of course, an agreement of this kind was not required until after the Act was passed, so there would have been no reason for it. This distinction, growing out of the proviso, only came about after the proviso was enacted.

Second, with respect to what was Congress's awareness in 1959, there are only two places in the entire Congressional Record that suggest an awareness of this particular kind of a clause, and on both of those occasions it was explicitly stated that it was intended that such clauses be illegal, and I refer to our brief on that point. I believe it is our reply brief, Page 8.

Thirdly, with respect to the statements of Senator Kennedy --

QUESTION: Was that before or after the proviso was put into the hopper, the statement that it should be illegal?

MR. SCOTT: They were both before the proviso --

QUESTION: So, I mean, there was general prohibition of all this sort of thing.

MR. SCOTT: Excuse me, Your Honor.

QUESTION: At that time, there was an intent to prohibit all this sort of thing without focusing on the construction industry.

MR. SCOTT: On -- There were attempts both ways --

QUESTION: I mean, making them illegal was part of making all hot cargo clauses and the like illegal.

MR. SCOTT: That is true, Your Honor, but going to my third point, which I believe takes up the point you are making, and that is, with respect to the statements of Senator Kennedy, upon which they rely, first of all, it has already been noted by the Court that argument proves too much, because the clause in Connell by the same logic would have been unlawful and not within the purpose of the proviso.

Secondly, Senator Kennedy's statement that clauses such as this appear to be legal at that time was technically accurate, but it is misleading. The only law at that time on this point of any significance was this Court's Sandor case. Now, this Court in Sandor did indicate that a secondary employer could voluntarily not do business with a primary employer, and yet could put that voluntarism on paper, but the reasoning of this Court in Sandor made it very clear that the union could not force that contractor, the primary or the primary employer -- pardon me, the secondary employer to boycott the primary employer, nor could it picket the secondary

employer in order to enforce that agreement, nor was that agreement even enforceable in court, because, according to the language and the logic of Justice Frankfurter, that secondary employer at the time he made his decision whether to boycott or not boycott the primary employer had to be unfettered from anything contained in an agreement or otherwise.

And finally, with respect to Senator Kennedy's own intentions, I submit they are clear, that his intention was not to legalize this kind of clause. He stated that the reason he believed a proviso was necessary to the hot cargo prohibitions was, it seems that a union ought to be able to ask a friendly concern to stop dealing with a company which will not observe fair labor standards, and that is Senator Kennedy's own specific statement as to why this exception was needed. That is at Two Legislative History, 1708, on August 20, 1959.

Thank you.

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

(Whereupon, at 11:30 o'clock a.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:

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No. 80-1798
No. 80-1808
No. 81-91

Received
3/10/82
3 P.M.