In the

ORIGINAL

Supreme Court of the United States

SUMMIT VALLEY INDUSTRIES, INC.,	)	
	)	
Petitioner	)	
	)	
v.	)	NO. 81-497
	)	
LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA	)	

Washington, D. C.

April 28, 1982

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

Telephone: (202) 554-2345

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Petitioner

v.

LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

No. 81-497

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Wednesday, April 28, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 a.m.

APPEARANCES:

DONALD C. ROBINSON, ESQ., Butte, Montana; on behalf of the Petitioner.

DAVIS S. PAULL, ESQ., Portland, Oregon; on behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: I think you may proceed when you're ready.

ORAL ARGUMENT OF DONALD C. ROBINSON, ESQ.,
ON BEHALF OF THE PETITIONER

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

The events giving rise to this litigation began almost ten years ago in Butte, Montana when a self-employed contractor conceived what he believed to be a better idea for the construction of homes. However, within a few months after he began his operation of a new modular home plan, his business became the victim of a secondary boycott and jurisdictional dispute picketing conducted by the respondent union.

Because of the exigent circumstances created by that activity, which I will describe in a moment, Summit Valley was forced to make expenditures of money in the form of legal fees and related expenses in order to stop the activity. Thus, the question for decision is whether the victim of an illegal secondary boycott is entitled to its attorneys' fees and related expenses of litigation which were incurred by it to successfully effect a cessation of the boycott and the resumption of

the enterprise in order to mitigate the harm caused by that activity as compensatory damages under Section 303 of the Labor Management Relations Act.

The question presented here is crucial for the small employer in the Ninth Circuit who is faced with the dilemma of either absorbing the losses caused by the boycott or absorbing the losses caused by the expenditure of his legal fees incurred to stop the boycott.

QUESTION: Mr. Robinson, did you suffer any work stoppage at all?

MR. ROBINSON: Yes. The work stoppages occurred at the homes of Summit Valley's customers when the union went to those homes and threatened the employees of contractors who were employed by the -- Summit Valley's customers to build foundations and garages and ancillary structures. And that work stoppage did occur at that point, Your Honor.

In either case, either absorbing the loss of the boycott or the legal fees, the financial resources of a new business are eaten up and the business thus becomes jeopardized. And the only alternative, at least in the Ninth Circuit, for an employer in that situation is to capitulate to the illegal union demands. Our position is that Section 303 was designed to obviate

that kind of a dilemma.

The facts relative to the dispute are, briefly, Summit Valley had a labor agreement with Butte Teamsters Local 2 which governed the terms and conditions of employment of its employees, and those employees engaged in an assembly line type of homebuilding operation. Retail customers were required to contract with local contractors to have the necessary on site footings and other ancillary structures built in order to make the homes habitable.

The Carpenters Union objected to this enterprise and boycotted, as I have just indicated, Summit Valley's customers by forcing its members to cease performing work at those homes by threatening to fine the union members, and in some cases did fine them.

Shortly thereafter, the union erected picket lines at Summit Valley's plant site itself, and as consequence, retail customers refused to cross the picket lines.

Summit Valley employed private attorneys to take necessary action to remedy that conduct that was, first, precluding customers from completing homes already sold to them, and precluding Summit Valley's acquisition of potential new customers because of the refusal of customers in the Butte, Montana area to cross

these picket lines.

Consequently, we filed an unfair labor practice charge -- charges with the NLRB, and we have detailed in our brief the outline of those protracted proceedings. Suffice it to say that we prevailed at every level of the proceedings, including the Section 10K proceeding in which the NLRB awarded the work in question to the Teamsters. The Carpenters refused to disclaim any further attempts to assert jurisdiction over that work. And, in fact, even after the NLRB had made its initial determinations, continued again to threaten -- continued its threats to picket.

QUESTION: Mr. Robinson, would you concede that the American rule normally precludes recovery of attorneys' fees as damages?

MR. ROBINSON: Yes. That is the traditional --

QUESTION: So, all right. Then what we have to do, of course, I suppose is look at the use of the word "damages" in Section 303(b), right?

MR. ROBINSON: That's correct.

QUESTION: And determine whether Congress intended to use the term in the normal way that it is used or whether it had some other intention in mind, right?

MR. ROBINSON: That's correct.

QUESTION: Okay. Now, what is there in the legislative history that would lead us to the conclusion that Congress intended something other than the normal rule?

MR. ROBINSON: In Note 16 in Teamsters v. Morton, the only other case I believe that this Court has had before involving Section 303, the Court noted that Senator Taft stated that one of the primary purposes for his proposing the amendment, Section 303, was to restore to people the monies they have lost as a result of such jurisdictional and secondary boycott activity.

QUESTION: Well, did he not also say that under the Sherman Act the same question of boycott damage is subject to a suit for damages and attorneys' fees, but in this case we simply provide for the amount of actual damages.

MR. ROBINSON: That's true, Justice O'Connor. However, Senator Taft was speaking in that context to whether Congress intended to award attorneys' fees in the 303 action itself. We are not claiming or contending that such attorneys' fees were awarded in our 303 suit.

The Ninth Circuit in the Mead case, which is the only circuit that has ruled contrary to our

position, even recognized that distinction and indicated in its decision that certainly that colloquy between Senator Taft and Senator Morris did not really address the issue of whether attorneys' fees in the context that we have them here may or may not be considered as damages, or whether they would be considered as the damages or attorneys' fees. And essentially all of the circuits and even Mead recognized that that colloquy simply did not address the question presented.

QUESTION: Mr. Robinson, you didn't ask for fees in the board proceeding, did you -- the unfair labor practices proceeding?

MR. ROBINSON: No, we did not.

QUESTION: Was there a reason for that?

MR. ROBINSON: We simply felt that under Section 303 of the Act that's where our remedy lie and that we do not contend that the -- or would submit that the board has any authority to award damages to the victim of a secondary boycott either -- for any kinds of business losses; that that claim should be and properly be made in the 303 suit itself.

QUESTION: What about attorneys' fees in the proceeding itself that Justice -- before the board? You say the board has no authority to award attorneys' fees?

MR. ROBINSON: The board takes the position

that it has the authority to award attorneys' fees, and under its authority under Section 10 of the Act to effectuate violations of the Act. However, here we're dealing with a separate statute, Section 303. And the board, as this Court noted in the Juneau Spruce case --

QUESTION: Well, but to get the injunction you have to go to the board.

MR. ROBINSON: To obtain the cessation order, yes, you have to --

QUESTION: You know, you have to go to the board.

MR. ROBINSON: Yes.

QUESTION: And what about the attorneys' fees in that proceeding?

MR. ROBINSON: The --

QUESTION: Certainly the board's got authority to award them.

MR. ROBINSON: I think that that is still -- that question is still up in the air as to whether the Board has the authority to award attorneys' fees. It does, but there are some circuits --

QUESTION: Well, anyway, you didn't ask for them.

MR. ROBINSON: No, I didn't. No, we did not.

QUESTION: Do you -- do you think you could

have -- do you have a position on whether you would have satisfied the board's criteria for the award of attorneys' fees?

MR. ROBINSON: No. We are not contending that a victim of a secondary boycott should have to have superimposed upon itself an additional burden of proving that the secondary boycott was in bad faith or that it was obstinately motivated or things of that nature.

As this Court indicated I think just last week in a footnote in the Longshoremen's case --

QUESTION: I take it then you're saying if you had asked for attorneys' fees, you probably wouldn't have gotten them under the board's criteria.

MR. ROBINSON: It might have been a close case because --

QUESTION: Okay.

MR. ROBINSON: -- There are some elements in this case of bad faith, but we are not making the contention --

QUESTION: But, counselor, if you take that position, then you don't want me to believe you gave it up out of the goodness of your heart, do you? You don't want me to believe that, do you?

MR. ROBINSON: I'm sorry.

QUESTION: I said if you say that you could

have gotten it but you didn't ask for it, does that mean you gave it up out of the goodness of your heart?

MR. ROBINSON: No.

QUESTION: I didn't think so.

MR. ROBINSON: We did not feel that that was the appropriate place --

QUESTION: That's right.

MR. ROBINSON: -- Justice Marshall --

QUESTION: That's what I thought.

MR. ROBINSON: -- To make that claim.

QUESTION: That's what I thought.

MR. ROBINSON: At the trial the union stipulated that $13,604 was the amount that Summit Valley had incurred in legal expenses and related costs in the prosecution of the NLRB proceedings. The district court made two significant findings that are pertinent to note here.

First, it was necessary to the survival of Summit Valley as a business to prevent the union from engaging in these activities. And, secondly, that by reason of the continued threats on the part of the union, it was necessary to employ attorneys from the time of commencement of the picketing until the NLRB and related proceedings were concluded. And that Summit Valley had in fact incurred, reasonably incurred $13,604

in such expenses to stop the union's violations of the Act. However, the Court felt constrained to follow the Ninth Circuit decision in Mead v. Retail Clerks, which was decided in 1975 and which is essentially the only -- which is the case that is actually for review by this Court and which creates the conflict between it and five other circuits which hold to the contrary.

The rule prevailing in five of the six circuit Courts of Appeals does allow a recovery of attorneys' fees and expenses in this context because they're incurred in a prior NLRB proceedings to obtain and secure a cessation of the illegal activity and to mitigate the continuing accrual of injuries caused by those activities.

Now, we describe these expenses in a shorthand way in our brief and may refer to them here as preemptive legal expenses. They're described as preemptive because they are damages directly following from the wrong itself. They are not incurred to adjudicate the legality or illegality of a prior wrong or injury no longer occurring but to obtain a remedy against ongoing injury that is not only illegal but which is intentionally designed and calculated solely for the purpose of causing injury.

The Eighth Circuit has reasoned that they are

preemptive legal expenses because they, in effect, take the place of other compensable damages which would continue to be suffered and which would be assessed but for the attorneys' successful efforts in obtaining a cessation of the illegal conduct. Thus, they are viewed for what the really are, and that is nothing more than a very necessary business expense incurred in the exigencies of circumstances, and directly and foreseeably imposed upon an employer by the union in order to alleviate its illegal conduct.

QUESTION: Well, are there analogs of that situation in the area of general law? What about someone who goes to court to get an injunction to stop illegal conduct, say in the field of torts or contracts. Do you think in a state which follows the American rule that person could get an award of attorneys' fees because he was trying to stop illegal conduct?

MR. ROBINSON: Justice Rehnquist, the general concept that we are talking about here, as expressed by the prevailing rule of the circuits in 303 actions, has had an historical application to a limited class of cases arising under state common law such as false arrest cases, malicious prosecution cases, indemnity cases and like kinds of cases.

These cases are considered to be historically consistent with the American rule, but at the same time they have a limited application to cases where the illegal activity creates a uniquely compelling need to employ the attorneys, and where there's a direct connection between the injury and the attorneys' fees.

In that connection, it's worthy to note, I think, that the application of this Section 303 kind of a rule has not found any application beyond it to the injunction kinds of cases that you're talking about. The numbers of cases decided by five of these circuit Courts of Appeals, we cannot find any cases that apply that in a nonlabor law context, and that may be --

QUESTION: Well, why should it be peculiar to labor law if it's in the context of this general rule in America that you don't recover attorneys' fees as an incident of your damages in the action itself? Surely there are torts outside the field of labor law that one could argue are just as uniquely compelling, I think was your language, as a secondary boycott.

MR. ROBINSON: Well --

QUESTION: Well, are you limiting your argument because you have a secondary boycott in a labor case and not an ordinary civil action?

MR. ROBINSON: The rule that we are urging for

adoption by this Court is, of course, limited to the unique circumstance of the federal labor law. And perhaps it is limited because we have I think here some unique mechanisms which trigger cease and desist remedies, and the nature of the conduct with which we're dealing and the injury with which we're dealing, the fact that it is inherently injurious -- in fact, that's it's only purpose is to cause injury, unlike other torts which even though it may be intentional, may not necessarily be intended solely to cause injury.

QUESTION: Well, what about building a spite fence in the common law of torts? That's the same thing, isn't it? The only purpose for doing it is to cause injury.

MR. ROBINSON: I'm not certain. It would, of course, depend on the common law of the state. I do know that historically for -- going back to treatises in the early part of this century, commentators have noted that, yes, that in certain kinds of cases involving maliciousness or involving intentional injury and where the act is designed solely to injure, then perhaps this kind of concept, considering attorneys' fees not qua attorneys' fees but as damages, has been legitimately recognized.

We believe that the adoption of the prevailing

rule would enhance the purposes and goals of the federal labor law. And as Justice O'Connor noted, the question here is to decide where the analysis must begin. We submit that it begins with the statute and the policies and purposes of the statute itself and not with the concept of the American rule.

In addition to the restoration and make whole remedy of which I spoke, referencing Senator Taft's comments, also Senator Taft, as we noted extensively in our briefs, repeatedly and pointedly referred to the deterrent effect that Section 303 was designed to achieve.

And Congress did something unique when it -- in trying to foster and promote these two goals when it created the damage remedy itself, because that damage remedy applies only to a secondary boycott and jurisdictional dispute violation. Congress did not see fit to provide private parties with damage remedies in any other violation of the law.

We submit that that bespeaks a compelling congressional urgency to insure that these goals were in fact achieved. And awarding these preemptive legal expenses as an item of compensatory damages satisfies both of these objectives. It provides a deterrent to the union that might be motivated to boycott a new

employer when the union suspects that the employer might succumb to the illegal demands because of pragmatic financial considerations. It obviously enhances the ability of the employer to take the dispute out of the streets and place it in the legal forum. And by raising the stakes of the outcome of the NLRB litigation it promotes settlements and thus fosters an overriding policy of achieving industrial peace. And it will --

QUESTION: Mr. Robinson.

MR. ROBINSON: Yes.

QUESTION: Do you know whether there have been any proposals in the Congress to specifically provide for this?

MR. ROBINSON: For --

QUESTION: Does this expressly include attorneys' fees as damages since the enactment of 303?

MR. ROBINSON: To provide -- in the 303 action or in our context?

QUESTION: In your context. Have there been any proposals in the Congress?

MR. ROBINSON: Not that I know of. Of course, if Congress was reviewing the case law, they would probably decide that -- in five of the six circuits those damages are awardable in this context, so Congress might be very well satisfied that they are being awarded

in most circuits.

This Court has viewed the considerations of what remedies are available under Section 303 by reference to the Act itself and consistent with its policies and purposes. And in the punitive damages cases both in Section 303 and 301 this Court has said that even though common law or state law remedies such as punitive damages are clearly available, those remedies where over and above the make whole principle and policies expressed in the Act. Consequently, or conversely, the common law principles from which the American rule are derived should not be imposed to preclude remedies that would satisfy the total restoration of losses principle which underlies the congressional purpose.

The amicus AFL-CIO and the respondent union make no demonstration or attempt to demonstrate how the balance of the union/employer interests would be significantly altered or affected if this rule were adopted. Indeed, they cannot make such a showing because the attorneys' fees that we're talking about here by their very nature precluded the assessment of far greater damages to which the union would have been liable had attorneys' fees not been incurred. So, thus, the benefit inures to the union as well as it does to

the employer if this rule is adopted.

However, we do find some common ground with the AFL-CIO in its amicus brief when it notes that the First Circuit's approach is persuasive. The First Circuit has closely attempted to distinguish between attorney's fees incurred to obtain a cessation of ongoing injury as distinguished from attorneys' fees incurred to adjudicate liability after the fact. And that distinction we have not hesitated to embrace.

And since the AFL-CIO characterizes this approach as persuasive, we believe that that distinction accommodates both the Section 303 and the American rule because it allows recovery when legal expenses flow directly and foreseeably from ongoing wrong, but at the same time recognizes that legal expenses incurred after the injury has ceased are incurred as a result of the litigant's decision to litigate and not as a result of the need to obtain a cessation of the conduct.

The operation of the Ninth Circuit rule produces some anomalous results. The cost of security guards to protect the property during illegal picketing apparently is compensable, but the fees of the attorneys to remove the pickets and eliminate the need for security guards and their costs and additional overhead are not compensable.

QUESTION: Well, that's no more anomalous than being able to recover your medical expenses in a court action but not being able to recover your attorneys' fees, is it? I mean the American rule does produce some anomalous results.

MR. ROBINSON: Well, I think the distinction, though, is that the doctor's bill was incurred directly as a result of the wrong, but the attorneys' fees, at least as the rationale of the American rule goes, flow from the decision of the litigant to litigate his injury, and that is the distinction made with the American rule rationale. But here --

QUESTION: Well, can't you say just as surely that your client's incurring of attorneys' fees flowed from his decision to contest the secondary boycott?

MR. ROBINSON: He really did not have the luxury of making or attempting to decide whether he should incur attorneys' fees or not. He really had no choice.

QUESTION: Are you analogizing that to self-defense, that you're entitled to use whatever means are at your disposal reasonably to protect yourself?

MR. ROBINSON: I had not thought of that analogy in that sort of terms but --

QUESTION: You wouldn't reject it, though.

MR. ROBINSON: Pardon me?

QUESTION: You wouldn't reject it, though.

MR. ROBINSON: No. The attorneys' fees were compelling in that the victim did not have the luxury -- well, first let me go back and say that some commentators say that the American rule has derived from the fact that the litigant and the attorneys sit down and make a contract to decide how the fees are going to be established and paid; and that the rationale, or one commentator says the rationale of the American rule is that it is not proper to then have the other litigant come in and superimpose upon that contract.

The point I'm making is that in this context our client does not have the opportunity or the luxury to sit down and make that kind of a calculated decision. The need for attorneys' fees and to obtain the efforts of attorneys was absolutely imminent.

We contend that the rule prevailing not only is consistent with the federal labor law policy but enhances and facilitates it by vindicating the victim's rights and restoring him truly to a status quo and made whole position. The rule prevailing does not offend the American rule because preemptive legal expenses are in this context truly damages. The mere fact that these expenses are labeled attorneys' fees should not obscure

the issue.

We therefore urge this Court to reverse the Ninth Circuit and hold that preemptive legal expenses are in fact compensable damages under Section 303 of the Act when they do obtain a cessation of illegal secondary boycotts.

I'll reserve five minutes.

CHIEF JUSTICE BURGER: Mr. Paull.

ORAL ARGUMENT OF DAVID S. PAULL, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Let me begin by emphasizing that this case in a truly fundamental sense is first and foremost a pure matter of statutory construction. The basic issue here is what did Congress mean when it utilized the legal term "damages" in the enactment of Section 303.

As this Court has stated so often, the starting point in the construing of a statute must be with the very language of the statute itself. And in, of course, Section 303 the operative language, the language that we need to construe is that phrase "damages by him sustained."

Now, the lessons learned from this Court indicates that when Congress employs a term, a legal

term of art such as "damages," the use of that term evokes an entire tradition of meaning as expressed by the decisional law applicable to that term. And absent clear indications to the contrary, we know from the cases of this Court that Congress intends for that language to be construed in the context of that tradition.

Now, Judge Browning of the Ninth Circuit Court of Appeals demonstrated his understanding of that legal tradition surrounding the term "damages" when he ruled in Mead's Market v. Retail Clerks that attorneys' fees incurred in a prior litigation may not be recovered in a subsequent suit between the same parties; and specifically in Mead's market that a Section 303 plaintiff cannot recover his attorneys' fees incurred in prior related proceedings.

Judge Brown cited with approval the Illinois case of Ritter v. Ritter which is directly on point and which I think describes better than any other case the legal tradition that we are looking for in attempting to construe the term "damages."

Now, Ritter really made three main points. First of all it said that the amount of cost, not the damages flowing from the wrong but the amount of costs in pursuing a suit and the nature of those costs are set

by the legislature, in this particular case Congress. It established that the wrongful acts or the alleged wrongful acts of the defendant create no separate liability, no independent tort for the responsibility of attorneys' fees, unless, of course, the wrongful act forced the plaintiff into litigation with some third party, which of course is not the case here.

Finally, the Ritter court explained very well the rationale which is behind the American rule, and cited over 20 cases which was in accord with its view. And as of 1943 when the Ritter court made its decision it had found no law, no law to the contrary; and one of those cases it cited was that Flanders v. Tweed case, a very old 1872 case which also involved attorneys' fees for a prior proceeding.

And since it stated its rationale so clearly and since that rationale is so important to this argument, I would just briefly like to read from page 13 of the amicus brief where part of this is set forth.

"Under our jurisprudence the defendant may present any defense to such an action that he may have or that he may deem expedient, and in so doing he will not be subjecting himself to a second suit by plaintiff based on the wrongful conduct of the defendant in causing the plaintaiff to sue him or in defending the

action. The rule is the same even though the wrongful conduct of the defendant is willful, intentional, malicious or fraudulent."

Now, of course, there are exceptions to that rationale, and they are in fact the exceptions to the rule. When the defense proffered not the conduct involved, not the wrongful conduct, but when the defense itself is in bad faith or vexatious, that is an exception to the rule. The common benefit theory, which we mention in our brief, and the collateral litigation theory, these are exceptions to the rule. But the rationale in every other case has been deemed to be applicable, and it is submitted on the authorities listed in our brief, and specifically in Ritter and Mead, that the ordinary, common meaning of the word "damages" as it appeared to Congress in 1947 when the legislation was enacted, the legal tradition which Congress intended us to draw on when it employed the term "damages" does not include attorneys' fees incurred in a prior proceeding before or involving the National Labor Relations Board in a case arising under Section 8(b)(4).

QUESTION: Mr. Paull, I guess there are four other circuits that disagree, however.

MR. PAULL: That's true, Your Honor. And of

course I hasten to point out that this Court has often ignored the majority of circuits, and especially in Alyeska when the private attorneys general theory was subscribed to by so many circuits and this Court overruled the theory.

But I think the point is that we have to look to the rationale provided by those cases and match it against the rationale for the American rule. The only theory offered really is that of the Eighth Circuit which says that the damages are like compensatory damages in that they stop further harm and that they are more like a business expense than attorneys' fees, and that provides the basis for granting.

But there are all kinds of policy reasons against that. Before I get to them I would like to point out that first we must look to the statutory language; and I don't think that any of those courts have done so. Certainly Senator Taft, then Senator Taft, was aware of 10L and 10K and the right of the charging party to participate in an unfair labor practice proceeding.

There's no language to support the type of award requested here. There's no kind of legislative history that can be cited to support what really is in terms of the American rule a novel theory of damages

which the petitioner now urges upon this Court. And I say novel because it departs so drastically from this long tradition of law that we have.

We've examined the policy arguments made by the petitioner with respect to his argument, and we have met those arguments in our brief. We say only first -- first of all, I think the policy arguments which he made are easily met. All these objectives are met whether or not attorneys' fees is part of Section 303.

But our first position is and must be that before this matter can be examined in the light of any kind of national labor policy, this Court first must determine whether or not the question is even open or even lends itself to such an analysis. And it is our firm viewpoint that in view of the language of the statute and the legislative history and the rules of statutory construction that the question of federal labor policy as it relates to petitioner's claim is just clearly foreclosed as a method of resolving this case.

And I think to some degree the petitioner would want this Court to place labor law on another planet than earth, and I don't think that that can be done. I think that these rules of statutory construction must be observed and that the rationale which underlies the American rule is important enough to

be preserved in all cases.

And in two of this Court's recent cases the Court has forced the very legal tradition of which I was speaking surrounding the term of "damages," and I'm speaking now of F.D. Rich and Fleishman which is cited in our briefs.

In F.D. Rich and Fleishman this Court emphasized that the make whole argument, which is really the argument the petitioner is making, when grounded on policy of something else other than the express statutory language must yield to the countervailing considerations that are set forth in F.D. Rich and also referred to in Ritter.

Both the Eight Circuit and the petitioner take the position that attorneys' fees in obtaining a cessation of picketing are analogous to these elements of compensatory damages and therefore recoverable.

And this I think, Justice O'Connor, specifically answers -- more specifically answers your question -- but first of all, that this argument is specifically rejected in Rich and Fleishman which teach that of the two considerations, the rationale for the American rule must win out, except, of course, when Congress expressly states otherwise. And when it has intended attorneys' fees to be covered for a certain

situation, it has in the past had no difficulty in phrasing that in its statutes.

QUESTION: Mr. Paull, if the American rule is that strict, do you think there's some problem with the board's authority to award attorneys' fee under the Tiidee doctrine?

MR. PAULL: I think there may be. I think there may well be a problem under those circumstances. Of course, that's not involved in this case.

I think the rationale for the rule, the protection of the right of the plaintiff to sue without incurring attorney's fees from the other side, the protection of the defendant's right to assert a defense without incurring attorneys' fees on the other side, I don't know, of course, but I feel that that may present a problem.

I think the facts of Fleishman are particularly compelling in this instance. Petitioner seeks to distinguish Fleishman because the fees sought in that case were at a prior stage of the same proceeding. First of all, I think there is an irresistable analogy between the injunctive proceeding in Fleishman and the 10L type of proceeding which we have in this case in the ULP proceeding, the unfair labor practice proceeding.

It's especially true in this case when the ULP decision, the unfair labor practice decision, was used as collaterally estopping the issue of liability in the Section 303 action. What could be indicative of a closer relationship between the two proceedings?

Certainly if the union had prevailed in the unfair labor practice, which it certainly could have, or in the injunction proceeding, it could not under any theory, under any stretch of the imagination recovered its attorneys' fees against the employer. It would be particularly pernicious in this instance, I think, to allow such an item of damage to the employer under these circumstances.

Petitioner seeks to distinguish Fleishman and the rational of the American rule on the grounds that the union's conduct was deliberate, that it was extrajudicial; it did not invoke the court process. This cannot affect the applicability of the rationale of the American rule. The question of wrongful conduct after all is not decided until after a case is determined, not beforehand. And if that would be true, the plaintiff's right to sue in any given case would be elevated or be superior to the defendant's right to assert a defense, which just isn't the American rule, unless, of course, that defense is in bad faith. But

there is certainly a well-established exception for that.

QUESTION: Well, I'm not sure I follow your track there, why this affects the plaintiff, as you put it.

MR. PAULL: Well --

QUESTION: I should think -- perhaps I'm just misconstruing what you said -- that if we were trying to move toward the English rule -- I'm not suggesting we -- what the Court's going to do -- but if we were trying to move toward the English rule and away from the old American rule, we'd say that putting costs on -- more costs on the plaintiff who loses, if he loses, will tend to discourage irresponsible litigation.

Would you agree with that as a general proposition?

MR. PAULL: Yes. Of course that's true. But what I'm saying in this case, if you reverse the American rule, I imagine it would certainly apply to the plaintiffs, too.

QUESTION: And on the contrary, when a plaintiff brings a suit and is vindicated in his right, the English rule would suggest that he isn't made whole unless he gets his legal expenses back.

MR. PAULL: Yes, that's true. So I guess in that sense it doesn't -- it doesn't -- the two rights

aren't elevated as long as they were treated equally because -- as long as the attorneys' fees were given to the prevailing party, but that would have to be done.

I guess my basic point is that the defendants in this case had a right to assert a defense. The defense, that they are picketing, their wrongful activity, as it turned out to be wrongful, was for a lawful object, for a lawful work preservation clause, and not for an object which violates 8(b)(4). And under the rule it had every right to assert that, and I think really that this is what the American rule is all about.

Finally, the petitioner claims that the American rule has no application to those attorneys' fees which he deems truly compensatory. And I'm not exactly sure what this means except -- if it means what I think it does, this type of an analysis would totally swallow the American rule.

I think petitioner is trying to make a distinction here between attorneys' fees in the action itself on hand and attorneys' fees in some preliminary prior action, saying that attorneys' fees incurred in the preliminary actions to stop the wrongful conduct is truly compensatory and that attorneys' fees incurred in the later action would be those covered by statute.

And what I need to say to that is that the

distinction cannot rest on that type of a theory. There would be nothing left of the rule. It's as important for the American rule to apply in prior proceedings, prior related proceedings between the two parties, as it is in the main action itself, because in those prior proceedings it's as important to assert those defenses or to promote the assertion of those defenses as it is in any other action. And the right to defend is chilled regardless of the stage of the litigation. I think in the final analysis it's not the stage of the litigation that can determine whether or not attorneys' fees are truly compensatory. In the final analysis it must be what Congress said it should be, what Congress said it should be in terms of being truly compensatory.

We believe that Congress has made such a statement here when it employed the use of the term "damages" in its ordinary and common meaning in the enactment of Section 303.

Thank you.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Robinson?

ORAL ARGUMENT OF DONALD C. ROBINSON, ESQ.,
ON BEHALF OF THE PETITIONER -- Rebuttal

MR. ROBINSON: Very briefly.

If the rule that we urge for adoption here and

which has been followed by five of the circuits for 21 years would swallow the American rule, I think we would see substantial evidence of that in the case law in the federal and state courts using these 303 actions to invite distinctions and further exception to the American rule.

I think the courts have properly recognized that it is not an exception to the American rule at all and that it does not offend the American rule; but the American rule simply doesn't come into play because we're talking about attorneys' fees as damages, not as attorneys' fees.

The rationale of the American rule which the respondent union argues so heavily should be applied to this context, as Mr. Chief Justice Burger has indicated, the rationale most often stated and stated by this Court in Alyeska and other decisions is that it would chill the accessibility of poor individuals, chill the accessibility to bring otherwise meritorious claims to court, and that's the rationale for the rule.

But I would offer that here it was the victim of the activity that needed to have its ability to have accessibility to the courts enhanced and encouraged. And indeed, it was the respondent union against whom these damages are to be assessed and should be assessed

that resorted to conduct extrajudicial and clearly demonstrated its rejection of the legal process.

The union in its argument this morning again invites this Court, as it does in its brief, to avoid an analysis of the purposes and goals of the federal labor law. We would invite this Court's attention, as we did in our briefs, to Hall v. Cole where the Court said that in vindication of a federal -- important federal labor law rights this Court must look to the policies and purposes of the Act, and did allow a union member to obtain his attorneys' fees, not in the limited context that we're talking about but all of his attorneys' fees, to vindicate his rights under the Act.

QUESTION: Wasn't that a common fund?

MR. ROBINSON: That was --

QUESTION: He had succeeded in obtaining an award of damages or a monetary award of some sort for the benefit of the union, and he was entitled to take his fees out of that award.

MR. ROBINSON: That's true, Justice Rehnquist. That was the ultimate rationale. But this Court early involving the statutory construction itself, Section 102 of the Bill of Rights provided a statute remedy that was very analogous to the one we have in 303, a very general one. And this Court -- the union in

Hall v. Cole urged this Court to follow the rational of Fleishman which counsel argues here today, and this Court in its statutory construction of Fleishman distinguished it from the general kind of remedy available under 102 and the kind that would be analogous under Section 303.

The union acknowledges to this Court in response to the question that the board's authority under the Tiidee Products doctrine to award attorneys' fees is questionable, but yet wants and urges this Court to send victims of secondary boycotts to the board to obtain the remedy that the board may not clearly have of the authority to give.

We believe that the common law and the basic principles of damages truly recognizes with a common sense and fair approach that attorneys' fees in this kind of a context should be considered as compensatory damages, are properly viewed as compensatory damages because they are simply like any other business expense incurred as a result of the illegal activity.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:45 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:

Summit Valley Industries, Inc., Petitioner v. Local 112, United Brotherhood of Carpenters and Joiners of America No. 81-497

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

BY Reene Hammond