ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1314

TITLE W.R.GRACE AND COMPANY , petitioner v.
LOCAL UNION NO. 759, INTERNATIONAL UNION OF THE UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA

PLACE WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

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W. R. GRACE AND COMPANY, :

Petitioner :

v. : No. 81-1314

LOCAL UNION NO. 759, :

INTERNATIONAL UNION OF THE :

UNITED RUBBER, CORK, LINOLEUM :

AND PLASTIC WORKERS OF AMERICA :

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Washington, D.C.

Monday, February 28, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:04 p.m.

APPEARANCES:

PETER G. NASH, ESQ., Washington, D.C., on behalf of Petitioner.

CARTER G. PHILLIPS, Office of the Solicitor General Department of Justice, Washington, D.C., on behalf of Amicus Curiae.

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

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will now hear argument next in W. R. Grace Company against a Local of the International Union.

Mr. Nash, you may proceed when you are ready.

ORAL ARGUMENT OF PETER G. NASH, ESQ.

ON BEHALF OF THE APPELLANT

MR. NASH: Mr. Chief Justice, may it please the Court, this case arises here on a petition for certiorari of the Fifth Circuit Court of Appeals. It involves two arbitration issues in the tension between Title VII of the Civil Rights Act of 1964 and the seniority layoff provisions of a collective bargaining agreement.

In 1973, the EEOC investigated the company's plant in Mississippi and found that there was probable cause to believe that the company had discriminated in its hiring practices on the basis of sex. In 1974, the company and the union which whom it had a collective bargaining agreement, bargained a new collective bargaining agreement. At the time, both the union and the company knew of the EEOC's findings, knew that the EEOC was seeking a conciliation agreement which might disrupt the seniority layoff provisions of the collective bargaining agreement, but nonetheless entered

into a new collective bargaining agreement, retaining --

QUESTION: Mr. Nash, you said the union had notice. Does that suggest or do you think that the union was bound by what the company agreed to with the EEOC?

MR. NASH: Not necessarily so, Your Honor, but that becomes relevant later on when we get to the argument about the court order that enjoined the company and the union, and whether or not that's a valid defense to a breach of contract action.

On December 11, 1974, the company and the EEOC entered into a conciliation agreement which changed or would change the layoff provisions of the collective bargaining agreement by providing that if there is a layoff in the plant, females must be retained in the workforce in the same percentage at the end of the layoff as they were at the beginning of the layoff. The reason for that being to protect those recently hired female employees from layoff.

On December 19, 1974, the company had a layoff of some employees. A few more were laid off in the early part of 1975. The union filed grievances contending that those layoffs violated the collective bargaining agreement because some more senior men were laid off whereas junior seniority women were retained.

The company amended and then complained in the then present law suit seeking to enjoin the union from processing those grievances to arbitration, added the Equal Employment Opportunity Commission as a defendant and sought a declaratory judgment from the court as to which should apply, the provisions of the EEOC conciliation agreement or the provisions of the collective bargaining agreement.

QUESTION: Was the intimation of the company's position that both of them could not apply?

MR. NASH: That is correct.

QUESTION: Why did the company take that position?

MR. NASH: Because --

QUESTION: The company can bind itself with the EEOC, and I should think still continue to be bound with the union.

MR. NASH: Possibly, sir, but there was a tension, and I think an admitted tension between the conciliation agreement and the collective bargaining agreement.

QUESTION: I don't see where you get the concept of tension. Employer A can make an agreement to buy 1,000 bottles from a contractor, and then he can go and make an agreement with another contractor to buy

10,000 bottles. He may not be able to use both shipments of bottles, but he is bound to both of the people that he has contracted with.

MR. NASH: That is correct, but I think we have different facts in this case, Your Honor. First of all, we are dealing with a collective bargaining agreement and an EEOC conciliation agreement, neither of which have historically by this Court been treated as standard commercial contracts.

Secondly, we have in this case an EEOC conciliation agreement which was sought by the Equal Employment Opportunity in order for the employer to come into compliance with the law.

QUESTION: Are you saying that the EEOC agreement under these circumstances binds the union?

MR. NASH: If the union had notice, as it did, of the EEOC conciliation process, and if the union --

QUESTION: You said a moment ago in answer to my question that the mere fact that the union had notice didn't result in binding the union.

MR. NASH: If the union had notice of the process, of the EEOC conciliation process, and was afforded an opportunity to participate in that process, then, yes, I am saying that the conciliation agreement between the company and the Equal Employment Opportunity

Commission may amend or change the collective bargaining agreement, but I am not saying that the union was without remedy in that case.

QUESTION: What is your authority for the position you have just stated?

MR. NASH: The authority for that position is, I think, multiple but primarily PEPSICO, Inc., versus FTC, 472 F2d --

QUESTION: I mean a case from this Court.

MR. NASH: -- 179.

QUESTION: Another case from this Court.

MR. NASH: Furthermore, I think that is consistent with what this Court held in Zipes versus TWA.

QUESTION: So Zipes is your authority from this Court?

MR. NASH: Yes. I think the one I am arguing is consistent with that. There is additional authority and that is the overriding premise underlying Title VII of the Civil Rights Act, that being that the preferred means of resolving Title VII liability is through the conciliation process with EEOC.

QUESTION: If the employer conciliates with the EEOC, he can repudiate any inconsistent agreements he has made?

MR. NASH: Not to the extent that it forecloses the union from having a remedy, Your Honor. Indeed, the union does have a remedy in that case. The remedy either is to participate in the conciliation process and agree or, failing that, to bring an action against the Equal Employment Opportunity Commission and the employer seeking to stay any conciliation agreement it believes is not necessary and not appropriate to remedy Title VII violations.

That remedy, I think, is available to the union and we are not contending that in such a law suit that either the employer or the EEOC can say, no, no, our agreement covers this and you, union, have no cause of action. Indeed, they would have that cause of action.

QUESTION: How would that cause of action be decided? What standard of law would govern it?

MR. NASH: It would be similar to a proceeding in a Title VII now where there is a consent decree, a reasonableness proceeding or a fairness proceeding in which it is determined whether or not the conciliation agreement entered into is in fact reasonable and fair, whether it meets the requirements of Title VII without unduly impinging upon the rights of the majority employees presently in the workforce.

As I say, the employer and the EEOC entered into this conciliation agreement. The union, in fact, brought grievances. The employer went into court and sought a declaratory judgment from the court as to which should apply, the conciliation agreement or the collective bargaining agreement.

The court, in November 1976 -- 1975, came down with a decision holding that the conciliation agreement applies and ordering both the company and the union to abide by the terms of the conciliation agreement and not to abide by the terms of the collective bargaining agreement.

Subsequently, in 1976 --

QUESTION: Was that an injunction?

MR. NASH: The court, I believe, interpreted it as an injunction, Your Honor. The same judge heard this case, which is now before this Court, and stated in his opinion there that had the parties not complied with that order, he would have found them in contempt, and that certainly is the way in which at least the company construed that order.

In 1976, as I say, there was a layoff and there were more grievances filed. In January 1978, the Fifth Circuit Court of Appeals reversed the injunction order that had been issued -- or the order that had been

issued by the District Court back in 1975. The Fifth Circuit did on the grounds, basically, of this Court's Teamster decision holding that you can't disrupt otherwise valid seniority provisions in the collective bargaining agreement in order to remedy Title VII violations.

Immediately after the Fifth Circuit's decision, the company reinstated all of the senior men who were laid off to junior women, and the cases then went to arbitration pursuant to the statement of the Fifth Circuit Court of Appeals ordering the parties to arbitrate the company's breach of the seniority provisions of the collective bargaining agreement.

The first arbitration involved a layoff which had occurred in 1976, after the District Court's order. Arbitrator Sabella in that case said that the company didn't violate the collective bargaining agreement, it had done exactly what the court had ordered it to do, and as a consequence the company should not be liable for back-pay for the employee involved in that case.

A second case was brought before Abitrator Barrett involving three --

QUESTION: Has any remedy been worked out for Mr. Jowers at all?

MR. NASH: No.

QUESTION: He is not working for Grace anymore?

MR. NASH: I don't know whether he is or not. All of these employees were returned to work immediately upon the Fifth Circuit's decision reversing the District Court's case. There is nothing in the record. I am assuming that if he is not working for Grace, it is for some reason other than this case.

All of the senior males were immediately returned to work, and there is no contention here that the company continued to "violate the collective bargaining agreement" after the District Court's order was reversed. All the men were in fact brought back. But there has been no award of back-pay for Mr. Jowers.

The second arbitrator, Mr. Barrett, was confronted by the union's contention in that arbitration that he did not have to follow the Sabella award because the Sabella award was considering or considered different factual circumstances.

The union contended in that arbitration that Sabella had dealt with a bumping. Indeed, Mr. Jowers, rather than having been laid out of the workforce, had merely been bumped from his job down to a lower job, and then ultimately laid off. Whereas the three subsequent cases that were now being argued before Mr. Barrett

involved actual layoffs of senior males from the workforce.

The union contended that these involved different situations, different fact situations, and therefore arbitrator Barrett was not bound by the earlier award of Mr. Sabella.

The arbitrator in that case, arbitrator Barrett, found that in fact the cases involved exactly the same issues. He found, however, that Mr. Sabella had exceeded his jurisdiction and authority by not referring to the collective bargaining agreement, but by merely finding that it wasn't fair to hold the company liable because it did what a court said it ought to do. Mr. Barrett ordered back-pay for all of the employees affected by that layoff during the pendency of the court order.

I think it is important to note at this point that the case was tried before arbitrator Barrett and has been tried all the way through the courts as if all of the layoffs here were involved with the court order -- followed the court order rather than before the court order.

Indeed, the company raised the distinction between layoffs under the conciliation agreement pre-court order and layoffs that occurred after the

court order in the District Court on the initial motions for summary judgment, but noted at that time that the parties had not arbitrated the case based on those distinctions.

The union never picked up on the distinction, nor did the District Court, nor did the Fifth Circuit. As a consequence, the case we submit comes before you as if all of these layoffs occurred following the court order.

QUESTION: Can't you strip it down even further, Mr. Nash. Isn't the basic issue here whether arbitrator Barrett's award should be enforced under the enterprise doctrine?

MR. NASH: No, I don't believe so, Your Honor. The parties have conceded throughout this litigation, up until the brief on the merits in this Court, that if in fact the Sabella award is "enforceable," then in fact the Barrett award must fail. That is the agreement, and the understanding of the parties, so I think you must look to the Sabella award.

QUESTION: But that concession is really partly one of fact and partly one of law, isn't it? Certainly, if there is a concession as a fact, the parties are bound by it. I don't think parties'

concessions of law bind this Court or any other court.

MR. NASH: I would respectfully disagree to a certain extent. First of all, I do believe that it is a concession of fact. Secondly, even if it is a concession of law, I believe that it is too late to change your legal concession after you have already tried the case before the District Court, the Fifth Circuit, in your op. cert memorandum to this court, and none ultimately say, Your Honors, we have got a whole different ballgame, we have got a whole different argument.

Indeed, what we have here is the union -- The union filed the first motion for summary judgment in this case in the District Court. It contended in there that the Barrett award cannot stand because the Sabella arbitration award has to fall. It has to fall, number one -- Barrett is not required to follow Sabella for two reasons.

Number one, Sabella decided a different issue, therefore, Barrett doesn't have to decide that issue. Secondly, Sabella went beyond his jurisdiction and authority, therefore, his award is void. The union asked the District Court to determine whether or not, as a matter of law under legal precedent, that award would have been "enforceable," and contended that it was not.

As a consequence, the Barrett award did not -- Barrett did not have to follow that award.

The union started the law suit not in any way by saying that there was any deference due to Mr. Barrett. But indeed started the whole argument and the whole law suit on the basis that if the Sabella award stands, Barrett must fall. If the Sabella award does not stand, then Barrett must be approved and must be enforced.

That is the way in which the litigation has gone, all the way up until the filing of the briefs on the merits in this Court. The whole issue has been was the Sabella award "enforceable." In no instance --

QUESTION: Mr. Nash, there does seem to be language in the brief that was filed by the union in the Court of Appeals that, although not crystal clear, would seem to be contrary to your position and would indicate there was not a waiver of the issue on the Barrett/Sabella award question. Certainly language in their brief which I have examined would indicate that it wasn't waived.

MR. NASH: I think an examination of that language will not indicate that the union at any time argued that any deference was due to Mr. Barrett's award. Indeed, the reason for that language, if we are

talking about the same, is that the company had argued in the District Court and again in the Fifth Circuit that even Barrett couldn't determine as a procedural matter whether or not the Sabella award was valid initially because the union had never brought a law suit to set aside the Sabella award in a timely manner. Accordingly, everybody was foreclosed from contesting whether or not the Sabella award was valid.

I believe the language you'll find in the union's brief in the Fifth Circuit says, no, that is not true. We are not foreclosed because we didn't bring a law suit in time. Indeed, we could give this issue to Barrett to make a determination, but, but that determination is not binding upon the court.

Ultimately, the Barrett award or whatever Barrett had to say would be determined in the courts based upon whether or not the courts, using court precedent, would have enforced the Sabella award.

Yes, I think the language might be susceptible to the question you pose, except for the fact that that was clearly in response to a totally different argument not present in this Court.

At no time did the union ever argue that Barrett's award was due any deference by the court. It was a flat-out argument that the court must decide

whether the Sabella award is valid, and on that decision rides or falls the decision on whether or not to enforce the Barrett award.

I would like to, if the Court please, save the remainder of my time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS, ESQ.,

ON BEHALF OF AMICUS CURIAE

MR. PHILLIPS: Mr. Chief Justice, and may it please the Court. Initially, I note that the government will only address the third issue presented in the petition for writ of certiorari because that is the only issue in which the government has a particular interest.

We do note that the resolution of the third issue is itself contingent on the proper disposition of the first two questions. If the Court decides either of the first two issues in favor of the petitioner, then there will be no reason to address the issue of special concern to Equal Employment Opportunity Commission in this case.

The Commission is the Federal agency vested with the primary duty under Title VII to eliminate discrimination in the workplace. In performing this

mission, Congress expressly obliged the Commission to attempt in the first instance to conciliate employment discrimination disputes in order to resolve them, if at all possible, without having to resort to judicial proceedings. Through this informal conciliation process, the Commission every year resolves literally hundreds of cases, in some years even thousands of cases, without having to consume a single second of judicial time.

Conciliation is thus properly regarded both by Congress and the Commission as the most appropriate means of resolving employment discrimination disputes. Indeed, it is central to the Commission's ability to perform its mission, given the large number of Title VII cases that come before the Commission and the relatively limited resources the Commission has to dispose of those cases.

The Commission submits that it is central to its ability to conciliate disputes that collective bargaining agreements that conflict with arguable requirements of Title VII must be set aside, and that the conciliation agreement that is reached must be given a place of preeminence. Thus, to the extent that an arbitrator grants the union compensation for breach of a collective bargaining agreement caused by the employer's

reliance on a reasonable conciliation agreement, that award must be vacated on review by a Federal court.

In taking this position, the Commission appreciates the importance to the national labor policy both of collective bargaining agreements in general and of arbitrations. But what is equally obvious is the importance of the national policy under Title VII of eliminating discrimination in the workplace and of remedying completely the effects of discrimination.

Both policies govern employment relationships. Obviously, they have overlapping coverage. In some instances they conflict. In six circumstances where the Title VII requirements and the collective bargaining agreement conflict, this Court has made clear that the requirements of Title VII must prevail.

In the Emporium Capwell decision, the Court expressly stated that when the agreement of the union and the employer conflict with the law, even though that law is found by means of the conciliation efforts of the Commission, the agreement between the employer and the union must be set aside.

Our submission is that that ruling or that statement must apply just as much in the process of a conciliation agreement based on a reasonable

determination of what the law requires at the time of the conciliation as it would if this issue were finally settled by this Court.

In our view, in following reasonable conciliation agreements in disregard of the collective bargaining agreements, the best balance is the relevant interest at stake in these kinds of cases. The result is proper primarily because it encourages settlements with employers that otherwise might be deterred. In addition, the process of following the conciliation agreements serves as a significant prod to the union to have it involved in the conciliation process. Third, the expectations of the incumbent employees are adequately --

QUESTION: Mr. Phillips, may I interrupt you right there. You talk about the interest in getting the union involved in the conciliation process. What if they called up the union and said, "We'd like you to attend the final meeting on the conciliation agreement." If you asked them directly to get involved, and the union representative came over and said, "Well, that's fine, except I think our contract is lawful and we want to defend it in the Court of Appeals. So we refuse to agree to any change in it." Then, notwithstanding that, they entered into the agreement

they did. Do you think you would have as strong a case?

MR. PHILLIPS: Maybe not as strong a case, although I don't think those facts differ -- I mean, I don't think that we would set aside the conciliation agreement simply because the union declines to participate in the process.

QUESTION: Even though, as I understand it, the conciliation agreement is founded on a mistake of law.

MR. PHILLIPS: Yes.

QUESTION: It is founded on the assumption that the seniority provisions were unlawful, which of course turned out to be incorrect.

MR. PHILLIPS: It is true that this Court's decision in Teamsters cast some doubt on the conciliation agreement, although it is still an open question whether the kind of relief granted in the conciliation agreement might otherwise have been permissible as a remedy for any kind of hiring discrimination.

QUESTION: But the violation, as I understand it, insofar as the sex discrimination charge is concerned, strictly was on the basis that the seniority provisions were unlawful, isn't that right?

MR. PHILLIPS: Yes, that is true, that is true, although again there was a finding of reasonable cause to believe there had been hiring discrimination, and then whether or not in the circumstances of this particular case, where you have immediate layoffs, it might well have been regarded at that time as a basis for modifying the layoff procedures, that is all.

QUESTION: Is it the EEOC policy in a three-cornered situation like this just to ignore the third party, the union, or to get them involved in the situation?

MR. PHILLIPS: No, Your Honor, the EEOC's compliance manual expressly provides that notice should be given to the union at any time it appears that provisions in the collective bargaining agreement may conflict with proposed conciliation efforts. The union is invited routinely to come in and participate.

QUESTION: But if there was a violation here, the union would have been guilty of a violation as well as the employer?

MR. PHILLIPS: I am sorry.

QUESTION: If the premise for the agreement, namely, illegality, if that was correct, the union would also have been guilty of a violation, would it not?

MR. PHILLIPS: Of Title VII?

QUESTION: Yes.

MR. PHILLIPS: Presumably, although there was no charge against the union, so it would have been difficult -- They would not have been within the proceeding itself since they had not been charged with violating Title VII, although it does seem that there is a concert of action of sorts that leads to the result that there are no women in the production units at the Southbridge plant.

We suggest that the relevant interests of the various parties at stake, in this case we submit, leads to the conclusion that the conciliation agreement ought to be followed. We have already discussed the union's interest in this case, in having them participate in the negotiation process.

I think it is also important to realize that the incumbent employees' interests in this case are not violated by virtue of following the conciliation agreement in most instances because, as in this case, the original award in this case followed at that point the judicial decree, but presumably might very well have followed the conciliation agreement itself as a reasonable statement of what the law required.

This collective bargaining agreement contains an illegality clause in it, and thus the reasonable

expectations of the employees must be that their collective bargaining rights must give way if Federal law otherwise requires. Accordingly, by following the conciliation agreement no real violence is ofttimes done to the arbitral process at all.

On the other hand, by following the arbitral process, the employer is completely deprived of any opportunity for some sort of a safe harbor that has been called into question by the EEOC's action in asking them to agree to a particular agreement and, in turn, it will serve as, I think, a clear deterrent in most future cases for any employer to agree to any form of conciliation agreement that requires modification of the collective bargaining agreement. That result, we submit, is just unwarranted in this context.

The Federal policy of high settlement of Title VII suits should be the controlling factor in this case. Since the decision of the Fifth Circuit disregards the conciliation agreement for all intents and purposes, and uphold the second award strictly on the basis of the collective bargaining agreement, we submit that that decision must be reversed.

Are there any questions?

CHIEF JUSTICE BURGER: Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. NASH: Mr. Chief Justice, and may it please the Court. As we understand this matter at this juncture, there are four questions before the Court.

The first we will label the arbitration clause question. The second, what Mr. Nash has stated as the concession question. Third concerns the District Court order, and the last the EEOC conciliation agreement. I intend, if that is permissible, to address those question in that order.

With regard to the substance of the question concerning the arbitration award, this is a case by the company to overturn a particular arbitration award, the award rendered by arbitrator Barrett and called the Barrett award.

Arbitrator Barrett was faced with a threshold issue in considering the grievances filed with him, which is quite common, namely, what deference if any is to be accorded to a prior arbitrator's award in dealing with the same aspects of the contract.

Arbitrator Barrett determined not to follow the prior award, the so-called Sabella award, which had never been taken to court and was a preexisting determination concerning the meaning of the contract. He did so after quite a painstaking and thorough

evaluation of the prior award. He did so by erecting that is a far higher standard than arbitrators normally follow in determining whether or not to follow a prior award.

He determined not to follow the prior award. He came to the conclusion that his obligation in deciding what the express terms of the agreement meant compelled him to look at the agreement to look at the agreement itself and not to handle the matter as arbitraror Sabella had done. His actions, as I say, were in accord with the normal way arbitrators handle this matter and, if anything, more favorable, far more favorable to the company than is the norm.

In addition, the lower court law is uniform that there is no requirement of law, no Section 301 requirement of arbitral stare decisis. The parties can bargain about that as they bargain about other matters.

After arbitrator Barrett issued his award, the company was dissatisfied with it, and as is its right, went to court to overturn that award.

We believe that the proper question here, the analytic question that ought to be faced is what standard is the Barrett award insofar as Barrett refused to follow the earlier Sabella award to be judged by. It is our submission that the standard is the one stated in

this Court's Enterprise case. Did arbitrator Barrett, in fulfiling his obligation, issue an award that draws its essence from the collective bargaining agreement and did he decide -- did he interpret the contract since the arbitrator is charged with --

QUESTION: Mr. Gold, you say that it is understood, but I don't know how. Arbitrator No. 2, does he ignore No. 1, or does he read it in cases to decide?

MR. GOLD: What arbitrator Barrett did here, and what most arbitrators do, is to say that presumptively the prior arbitration award is to be followed, but there is a certain threshold past which an arbitrator is not required to go. Different arbitrators state that different ways. It may turn on the particular language of the agreement.

Arbitrators are uniform in believing that at least, absent extraordinary contract language, there is no rigid rule of stare decisis. Indeed, I need not cite the cases to this Court that say that even in the judicial system, stare decisis is not an invariable and overriding rule.

What arbitrator Barrett did was to give the greatest weight and attention to the Sabella award, and he said -- If I may, he said, "In my heart --

QUESTION: He did not ignore it.

MR. GOLD: He said, "In my heart I cannot believe that this award is correct. I do not believe that I would be fulfilling my commission if I followed it. Therefore, I do not do so, and I decide this matter on the agreement, on its language, and on the facts of the case." His opinion is set out in the Joint Appendix, and it is, I think you will agree, a very thorough and reasoned effort to come to grips with the issue.

The next question is, what does a court, faced with the Barrett award, supposed to do.

QUESTION: Mr. Gold, before you get to the court stage, is there any established doctrine under 301 and arbitrations as to what public law limitations there may be on an arbitrator's award?

Supposing you have the Southern Steamship case versus NLRB, but instead of before the NLRB, it is before an arbitrator and the arbitrator orders a shipping employer to reinstate mutineers. Would that be judged by exactly the same standard, simply purely contractual as any other award?

MR. GOLD: The answer to that varies at different stages of the proceeding. Many arbitrators follow the premise that the public law is the public

law, and the contract is the contract, and they are only charged as private law --

QUESTION: Never the twain shall meet?

MR. GOLD: Right.

Private and law enforcement officials to interpret the contract, that is what the parties bargain for. They want an interpretation of the contract. The law is perfectly well settled, however, that if an arbitration award is contrary to public law, the courts will set it aside. So that is why I say that it depends at different stages.

We have noted in our brief, and there is simply no room, I think, either in theory or in terms of this Court's precedents, that an arbitration award that is contrary to Title VII is no good. The question we have here posed by the government is whether an arbitration award that accords with Title VII somehow is subordinate to the EEOC on what Title VII might and ought to be. On that we most definitely part company with the agency. But in terms of the question you raised, there is discord and division at the arbitral stage, but none at all at the judicial stage, or in this Court's precedents.

As I started to say, we believe that the proper approach in evaluating what arbitrator Barrett

did with regard to the Sabella award is stated in Enterprise Wheel. Did the second arbitrator, the arbitrator, whose award the Plaintiff seeks to satisfy, draw the essence of his award from the contract?

If the answer to that question is, yes, we believe the proceeding is at an end. We suggest that if that rule is not the rule, Enterprise Wheel would be severely cut back to the detriment of the arbitration system and to the detriment of the contract system -- I mean the judicial system, for it is a very rare situation in which there has only been one arbitration that can even be said to arguably touch on an issue of contract interpretation.

If the courts, either in this proceeding or generally, are called upon to say, in general, interpreting the contract is for the arbitrator, but it is for us on a de novo theory to determine whether the arbitrator correctly interpreted the final and binding clause which is no more or less a part of the agreement than any other. I can guarantee you that all the cases that used to come up to court on the theory that the Enterprise standard had not been met, that the arbitrator had failed to draw the essence of his award from the contract, will now come to the courts on a new theory to take advantage of the broader and more

generous scope of judicial review, namely, that the award is inconsistent with the prior award, or that the arbitrator misinterpreted his obligations under the final and binding section of the contract.

We believe that that would be directly contrary to Congress's intent in Sections 203(d) and 301, and to the sound administration of this system of law.

Now we come to the supposed default of the union which would preclude a consideration of the argument I have just made, an argument, I would note, that is nowhere answered on its merits in the reply brief of the company, a very thorough and able reply brief.

To go back to the starting point. This law suit is not a law suit by the union. This is a law suit by the company, brought by the company to set aside an arbitration award. The company had a theory. The company came into court and said: There is arbitration award No. 1, the Sabella award, and arbitration No. 2, the Barrett award. Unless arbitration award No. 1 is not in the refined terms used here, not subject to being overturned in court, then arbitration award No. 2 is no good. That was the essence of the company's theory.

The union's brief, which the Court, of course,

asked us for a copy of and which all parties have, dealt with that argument in two parts. Part No. 1, looking at page 11 of the union's Court of Appeals brief is headed: "Arbitrator Sabella's award is clearly void and unenforceable, and entitled to no binding effect on subsequent arbitrations between the parties as a result of Arbitrator Sabella exceeding his contractual authority."

The next argument is: "Arbitrator Barrett acted within his jurisdictional authority in determining the effect of Arbitrator Sabella's earlier award."

I would be less than candid, and also I don't bear the burden of having had to deal with this case under the time schedules and exigencies of lower court deadlines, if I did not squarely admit that the link between argument one and argument two is not made with complete precision. I am afraid that in the Eye of God I won't be able to link those with absolute precision either.

QUESTION: Does footnote 21 at the bottom of page 15 in your brief indicate counsel has been penalized for his failings in that regard?

MR. GOLD: Counsel, to my understanding, has gone on to greater and better things. He is now representing companies.

(General laughter.)

MR. GOLD: Not as a reward in any way for his misconduct in representing us.

The problem in terms of the link between argument one and argument two is what standard should arbitrator Barrett's award be judged by. We have endeavored here in our brief and on argument to state that standard with as much exactness as we can. That was not done in the Court of Appeals.

It simply was not done, but we do not believe that a Defendant by taking on the arguments made by a Plaintiff and dealing with them in turn, and by failing to spell out the precise standard -- the precise interrelation between his answers to the different portions of the Plaintiff's argument ought to be said to have conceded anything.

We believe as well, in terms of the proper approach to this Court, that those who are defending a judgment have the right, and it may well be the duty, to state the principles of law which best accord with the statutory materials and this Court's precedents.

It is often true, and it is part of the system we believe, that as a case moves through the successive stages that due process provides for and that Congress has provided for, arguments become sharper and cleaner.

It would be a terrible endictment of those who have the opportunity to present cases at a higher level if they didn't try to learn from what has gone before.

We don't believe that there was any concession of fact here. We don't believe there was concession of law here. But if we are wrong, and if the union failed to sharpen up the issue by saying that the real question here is: Should arbitrator Barrett's award be judged, insofar as it deals with the final and binding clause, be judged de novo, or should it be judged on an Enterprise standard? We do not believe that that is a concession which prevents this Court in developing the law from developing it according to sound principle or prevents us from arguing the matter in a way which is sound and rational, and may help in that process.

In preparing for the argument after reading the reply brief, we came across a case which I'd just like to note, called Orloff versus Willoughby, 345 U.S. 83. It is an opinion from the Court by Justice Jackson and let me just --

QUESTION: The parties have changed position as nimbly as if they were dancing a quadrille.

MR. GOLD: Thank you, Mr. Justice Rehnquist. But the Respondents after that dance were permitted to argue the case on its merits, and the Respondents

prevailed there. We hope we will be given that opportunity and we hope that we succeed as well as the government did in that case. We think that what is said there is the proper approach to appellate litigation.

QUESTION: The Teamsters are relying on the right to dance a quadrille?

MR. GOLD: I apologize, sir.

QUESTION: I say, the Teamsters Union -- Is this the Teamsters case? No, it is not the Teamsters. I was saying, were the Teamsters wanting to dance the quadrille?

MR. GOLD: It would be an interesting sight. These are the Rubber Workers, and we hope that they do as well.

QUESTION: I see.

MR. GOLD: The third of the questions that I have listed concerns the effect of the District Court's order on companies' contract liabilities.

The company argues that the proper rule is that once the District Court entered its order, the company could not be held liable for contract damages. Like the first of the questions presented, we believe that that was a contract question for arbitrator Barrett to decide.

The question of when a court order is, for

want of a better term, the basis of a claim of impossibility of performance which relieves one of paying damages for a contract breach is not a de novo one. The general law is that such an order provides an impossibility defense only if the party claiming that defense has not been at any fault in securing the order.

The company plainly can't satisfy that standard here. The original suit was brought by the company. The company amended its original complaint to allege that the conciliation agreement was superior to the collective agreement. I skipped a step. The company entered into the conciliation agreement after the collective agreement. The company amended its complaint to say that the conciliation agreement was superior. The company aligned itself with the EEOC, when the EEOC sought an order to prevent execution of the collective agreement and to prevent the arbitration. The company, like the union, sought no stay of the District Court order that was eventually entered.

Certainly, in terms of the equitable standard used in general, the company cannot invoke that defense as arbitrator Barrett concluded. Moreover, this agreement has an express savings clause which provides

that the agreement is not enforceable if contrary to law and, as matters have turned out, this agreement is not contrary to law. The collective agreement is not contrary to law.

That being true, and against the background stated, again we believe that judged as it ought to be judged under the Enterprise standard, what arbitrator Barrett concluded, namely, that the company should not be relieved of its contract liability is correct.

The company argues here that collective agreements are not commercial agreements. We could not agree more, but nothing comes of that in our view that is any help to the company because in this Court's cases, and most particularly the Carbon Fuel case in 444 U.S., the Court has made it plain that Congress's point in enacting Section 301, and indeed the point overall of the national labor policy, is to provide for stability through free collective bargaining and to provide that agreements once reached are to be followed.

So long as they are lawful, they are to be followed without administrative intervention, without executive intervention, and without judicial intervention. We would think that the general contract rule, which embodies a good deal of wisdom in itself, applies with a vengeance in the situation of collective

bargaining agreements.

QUESTION: How do you respond to the S.G.'s position that, surely, you should not be freed from having the requirements of Title VII imposed?

MR. GOLD: That, Justice O'Connor, turns me to the last of what I have labeled the four questions which concerns the effect of the conciliation agreement.

First of all, as I attempted to state at an earlier point in answering Justice Rehnquist's question, we have no doubt that any collective agreement that is contrary to Title VII simply cannot be enforced. If the company, having taken the gamble it did against the background of the law, had been proved right, this agreement would not have been -- the collective agreement would not have been subject to enforcement. Arbitrator Barrett's award would have been subject to having been overturned as contrary to Title VII.

QUESTION: That would be true even if there had been no conciliation agreement.

MR. GOLD: Absolutely. But we believe that it strains Title VII far past the breaking point to say that the EEOC, which Congress did not give the power to adjudicate claims or to enter orders -- I just was looking for words of Alexander versus Gardner Denver -- the Commission cannot adjudicate claims or impose

administrative sanctions.

It would be extraordinarily surprising and wholly irrational to conclude that the EEOC can nonetheless enter into a conciliation agreement with A by which B's rights -- contract rights are destroyed, and to say that that conciliation agreement, even though it can't stand the test of being placed against the law in a court, is superior to the collective bargaining agreement.

We think that not only did Congress not grant any such broad powers to the Commission, but as this Court has noted and most recently in the California Brewers case, again in 444 U.S., Title VII was drafted against the background of the national labor policy. As the Court said there, "It does not behoove the courts to second guess the processes of collective bargaining." Certainly this agency was not given the power to second guess those processes. It was given the power to take people into court if they could not arrange a conciliation and to demonstrate that what they had was wrong.

Only after that is done, only after the courts have made the findings of fact necessary, is there room for a binding court order which denies somebody a contract right or a right derived from any other

source.

In concluding, I would like to address the point that somehow that view will end the conciliation system with regard to situations involving collective bargaining agreements. There is no substance to that because this is not a zero-sum game where only the employer is at jeopardy.

If the union was presented with the conciliation here, and it took the view that the agreement, the collective bargaining agreement was lawful and it wanted to stick with it --

QUESTION: Suppose, Mr. Gold, that instead of joining in that conciliation agreement, the employer had said, "I want to protect my flanks," and takes it to court. Then they went into court. Let's take one hypothesis. First, the employer put in their defense, and then the decree was entered. What about that?

MR. GOLD: Well, in the situations of that kind, Your Honor, what I understand the law to be is that the courts have ample power in determining who has -- who bears the liabilities stemming from an unlawful collective agreement, to impose those liabilities on whoever is at fault. If an employer either said, "We want to change this contract," or said, "We want to enter into a conciliation agreement," the union is put

at great jeopardy if it does not agree to do so.

So the imperatives for the union to enter into the conciliation process in many cases are precisely the same as the imperatives that drive anyone into conciliation, a desire to bring one's situation into conformity with law, a desire to avoid the cost of litigation, costs which most unions are not in as good a position as most companies to deal with, and a desire to safeguard against potential liabilities.

QUESTION: Let me change that hypothetical just a little. Instead of simply putting in no evidence, the employer had stipulated that the conciliation agreement could be the basis for a judgment of the court, in other words, a stipulated judgment. So that the only difference from this situation that we have is that the conciliation agreement would have been ratified.

MR. GOLD: I see, Your Honor. I apologize. I missed the point of your first hypothetical and I apologize.

As I understand the procedural situation in cases of that kind, in any such case the union at the least would be a Rule 19 Defendant and be entitled to argue for and to defend the legality of the contract. I was envisioning a situation in which both parties

recognized that they had an unlawful contract.

Clearly, what is the essence of our concern about the last of the arguments the company makes is that it is designed to either force the union to attack a conciliation agreement to get into court, or to deny a union, which believes that its collective bargaining agreement is lawful which has the contract rights of those who are covered by the agreement to defend, any opportunity to defend them.

We don't believe that Title VII denies unions that opportunity or takes away contract rights in that way, and we would have the gravest due process doubts of the validity of any statute which had the effect of taking these contract rights away through an agreement between the government and A.

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

MR. NASH: Yes, I do, Your Honor, just a couple of things.

REBUTTAL ARGUMENT OF PETER G. NASH, ESQ.,
ON BEHALF OF THE PETITIONER

MR. NASH: The hypothetical you posed at the end is basically what happened in this case. The company indeed went into court here, but the union and the EEOC joined -- filed cross-motions for summary

judgment, and it is they that litigated whether or not the collective bargaining agreement was valid under Title VII.

The court determined that, no, it was not valid under Title VII, and an order issued ordering both the employer and the union to comply with the conciliation agreement, not with the collective bargaining agreement. The substance of this thing is that there was in fact a court order.

QUESTION: I thought I had made my hypothetical slightly different from what occurred here. I must have been mistaken.

MR. NASH: I misunderstood, then, too.

QUESTION: Is my hypothetical precisely what was done here?

MR. NASH: I guess I am saying that it is analogous.

QUESTION: In its effect, it is the same, is that what you are saying?

MR. NASH: Correct. The only difference is that this court order ultimately was reversed on appeal by the Fifth Circuit.

The question then is, is the employer or the union in this case, for they too were enjoined, to be excused from breaching the collective bargaining

agreement in complying with the court order during the time that the court order was in effect. We contend that, indeed, they were. People have to abide by court orders unless and until they are set aside.

In fact, in this case, had the employer gone to the union and said, "We don't want to comply with that court order. Would you agree with us?" The union could not have agreed to go back to the collective bargaining agreement because they were enjoined by the order as much as was the employer.

QUESTION: Wasn't the injunction simply an injunction against arbitration, and wasn't that injunction obeyed by the parties?

MR. NASH: It was an injunction against that, but, no, it went further, Your Honor. It said --

QUESTION: What more did the injunction say?

MR. NASH: It said that the parties are to abide by the conciliation agreement, not by the collective bargaining agreement.

QUESTION: That was part of the injunction?

MR. NASH: That is my understanding, yes. That is my recollection.

Furthermore, I believe that the union cannot argue that it was the "company's fault" that this order issued. They state two bases for that. Number one,

that the company entered into the conciliation agreement, but there is no indication in this case that that in fact was what resulted in the court order.

There was a fully litigated case between the EEOC and the union as to whether or not there had been a violation of Title VII of the Civil Rights Act. Ultimately, the court found, yes, the District Court, and said that the remedy for that would be a conciliation agreement, but there is no indication that in fact the court would not have come up with some remedy in any event in that litigation. It merely had the conciliation agreement to turn to, a conciliation agreement which, by the way, was relatively moderate and, indeed, might have protected more senior men than did the conciliation agreement.

QUESTION: Let me ask you a question about your court order argument. Supposing that there was a case in which A was order to pay B $100,000. C was a party in the case and said: You really owe me the money, not to B. C appeals and gets a reversal. In the meantime the money has been paid to B. Are you arguing that B can keep the money?

MR. NASH: I don't think so, but I don't see the relationship.

QUESTION: I don't see how that case is

different from yours.

MR. NASH: Because in this case what the court said was, "This agreement between you, Mr. Union, and you, Mr. Employer is illegal."

QUESTION: In my case, it's based on a contract, an argument about what a contract means.

MR. NASH: In this, the court said: "That is illegal. I am telling you, don't abide by it, abide by this instead." It told both parties to do that.

QUESTION: Right.

MR. NASH: I think that that is the distinction between our cases.

QUESTION: Those are the arguments that were made in my hypothetical, and as a result the judge said, "Pay the money to B." Then C says, "No, the money is mine." As I understand it, you say that B can keep the money. I am afraid that I don't follow that.

QUESTION: Okay.

MR. NASH: Let me go one step further on the fault argument and that is that in this case the union further argues that the fault is that the employer indeed discriminated against the females, and accordingly the employer cannot get out from under its collective bargaining agreement. Yet, the union argues that any valid, finely enforceable court order saying

that there has been a violation of Title VII takes precedence over collective bargaining agreement, but there is no valid, finely enforceable Title VII order that isn't based upon the company's discrimination.

As a consequence, the union argues too much that, indeed, the company's prior discrimination cannot be a basis for saying that the employer is relieved from complying with the court order which changes that seniority system.

Thank you.

CHIEF JUSTICE BURGER: Okay, gentlemen, the case submitted.

(Whereupon, at 2:02 p.m., the case 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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