ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1574

TITLE LOCAL 926, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO ET AL. Appellants v. ROBERT C. JONES

PLACE Washington, D. C.

DATE December 1, 1982

PAGES 1 thru 44

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IN THE SUPREME COURT OF THE UNITED STATES

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LOCAL 926, INTERNATIONAL UNION OF :

OPERATING ENGINEERS, AFL-CIO ET AL., :

Appellants, :

v. : No. 81-1574

ROBERT C. JONES :

- -x

Washington, D.C.

Wednesday, December 1, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:12 o'clock a.m.

APPEARANCES:

LAURENCE GOLD, ESQ., Washington, D.C., on behalf of the Appellants.

ELINOR HADLEY STILLMAN, ESQ., National Labor Relations Board, Washington, D.C.; on behalf of NLRB as amicus curiae.

ROBERT F. GORE, ESQ., Springfield, Virginia; on behalf of the Appellee.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Local 926, International Union of Operating Engineers, AFL-CIO, against Jones.

Mr. Gold, you may proceed whenever you are ready.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. GOLD: Thank you, Mr. Chief Justice, and may it please the Court, the procedural history of this case is set out at Pages 2 through 6 of our brief, the blue brief, and I will very briefly summarize that history.

This matter began when Mr. Jones filed a charge with the Atlanta Regional Office of the National Labor Relations Board against Local 926 of the Operating Engineers. The language of the charge is set out at Pages 2 and 3 of our brief. The allegation is that the union violated Sections 8(b)(1)(A) and 8(b)(1)(B) of the National Labor Relations Act as amended, the sections prohibiting certain forms of restraint and coercion.

The regional director investigated that charge and issued a letter opinion stating that he would not file a complaint --

QUESTION: Mr. Gold, is it possible to tell

from that letter whether or not he took his action on the basis of no evidence, or that it was the type of thing that the board didn't go into?

MR. GOLD: It appears to us from the language he used that he found the evidence insufficient to find that the union had caused the discharge, that he found the evidence insufficient to find that the union had restrained or coerced the employer, that he found that the union had participated in discussions with the employer concerning who should be a supervisor on this job, and all of these questions are of the very essence of Section 8(b)(1), and what is designedly left unregulated and is permitted by Section 8(b)(1) so that it would be our view that he was not taking the position, this is none of our business, but rather, was taking the position that this was not the type of activity which warranted the issuance of a complaint.

QUESTION: Was review available to Jones, of course?

MR. GOLD: Yes, Your Honor. The next point I was going to make is that the board, as this Court has recognized, has adopted a very rigorous internal system of determining when to exercise prosecutorial discretion on behalf of charging parties, and that includes not only an investigation and determination at the regional

level, but a review at the national level. The last line of the regional director's decision here is that Form NLRB 4938, Procedure for Filing an Appeal, is attached. The appeal period expires at the close of business on August 1, 1978, and no appeal was taken.

QUESTION: Does he have any other relief than that?

MR. GOLD: The -- I think the short answer under the decisions is no. The courts of appeals are uniform that there is no jurisdiction in the courts to review the general counsel's exercise of his authority to institute complaints any more than there is to review a United States Attorney's determination not to prosecute an alleged crime.

Rather than going to the NLRB general counsel, the -- Mr. Jones went to the state courts of Georgia. He filed a lawsuit alleging that the union had violated the Georgia law prohibiting tortious interference with employment relations. The complaint which begins by alleging that he had been a union member and had dropped his union membership, and goes on to allege this interference with employment relationships, is set out at Pages 4 and 5 of our brief.

He also sued the employer, and in addition he alleged a violation of the Georgia right to work law.

All parties moved to dismiss the complaint on the ground that this is the type of matter within the exclusive jurisdiction of the National Labor Relations Board under the Garmon Rule articulated by this Court. The trial court agreed. The Georgia appellate court took the view, as those courts have taken in the past, that the tort of interference with employment relations is not pre-empted either for supervisors or for employees in that state.

The union invoked both this Court's appellate jurisdiction and the certiorari jurisdiction, and the court in setting the case for plenary consideration reserved the question of jurisdiction.

I unfortunately from my own standpoint have to be very brief indeed on the question of appellate jurisdiction. We have confessed in our papers that there is no appellate jurisdiction. We reviewed this matter after the court's order, and that is our view, and we felt it our obligation to state it straightforwardly.

We do believe that this case is properly here on certiorari. It is our substantive position that the Georgia court's rule is squarely contrary to the rule stated by this Court in the Borden and Perko cases in 373 U.S. The argument made by respondents is that we

haven't shown a sufficient conflict between Georgia law and this Court's law to warrant certiorari. We do not understand how we could show a clearer conflict.

Perko, like this case, is a case in which a supervisor alleged that a union interfered with his employee -- employment relationship. The only difference between that case and this case is that Mr. Perko didn't even start down the road of exhausting Labor Board procedures, but rather went directly to court. Tort claimed in that case and the tort claimed in this case are the same. The union's conduct in both cases is the same, and this Court, as we fully developed in our brief in Perko, held that the tort of interference with employment relations in situations of this kind is pre-emptive.

QUESTION: Mr. Gold, as between you and Ms. Stillman, have you divided up the responsibility for talking about the particular sections of the Act and whether conduct was pre-empted?

MR. GOLD: Yes. I have four or five more minutes. I was going to develop why under the scheme of the Act as a whole this tort is pre-empted. Ms. Stillman was going to develop what the Labor Board's --

QUESTION: Let me know when you are ready for questions.

MR. GOLD: Any time, Your Honor.

QUESTION: Okay.

MR. GOLD: Ms. Stillman was going to develop what the exact nature of the Labor Board's regulation, scheme of regulation is in this area, because one prong of our argument is that this is an area where there is a substantial body of Labor Board regulation, and therefore even if one assumes that we look only at the arguably prohibited aspect of Garman, this is, as Perko holds, an area where the particular system of procedures, rules, and remedies stated in the Labor Act pre-empts state law.

QUESTION: Well, I will ask you, and you tell me if I should ask Mrs. Stillman rather than you.

Why does this conduct violate the 8(b)(1)(A), making it unfair labor practice for a union to coerce employees in the exercise of the rights guaranteed in Section 7, when the individual was a supervisor?

MR. GOLD: Well, the 8(b)(1) has two parts. The Labor Board takes the view that where, and this is particularly true in the construction industry, you have people who move back and forth between supervisory and employee status, union restraint or coercion of an employer based on the union or non-union status of a supervisor violates the employee's rights, because for

the same kind of demonstration effect this Court relied on in cases like American Broadcasting Company versus Writers' Guild.

QUESTION: Are there two different lines for that Board rule, one being if it can happen to him, it can happen to me, that type of thing? Hasn't the Board just retreated from that aspect in the Parker Robb decision?

MR. GOLD: Not from that aspect so far as we can tell, because they cited and reaffirmed Taladiga Cotton, which this Court relied on in Perko, and which is part and parcel --

QUESTION: But the reason they withdrew at least a little in Parker Robb, isn't it the feeling that they were really putting an end run around the exemption of supervisors in the Act if they went further?

MR. GOLD: We can hardly say that we want the Board to push further and further into this area, but the discussion we are having certainly demonstrates that this is arguably prohibited.

QUESTION: Yes, certainly arguably, but do you think that your best case is on arguably, that if we were to take it on ourselves to decide, is this in fact prohibited, and we came to the conclusion, no, it is not in fact prohibited, that you would then have to rely on

the arguably prohibited aspect?

MR. GOLD: Well, our view is, and this is the one point I do want to stress before I allow Ms. Stillman her time, that in the area of the extent to which unions can have an impact on supervisors' employment rights, the logic of the entire Act is, as shown by the use of the words "restraint" and "coercion" and by the whole theme of the 1947 debates on the status of supervisors, is that employers should have very substantial protections in being able to make whatever judgments they want on how they treat supervisors.

As I am sure you are well aware, under the Beasley case, the employer cannot be held under a state right to work law for firing somebody for joining a union or refusing to join a union if that person is a supervisor, as just one example of the great freedom that employers have.

Given the logic of that situation, we believe that a union certainly can in the interests of its own members ask an employer not to have a certain person as a supervisor and not to have him do certain supervisory tasks, and if that is true, certainly to the extent a union is not engaging in restraint and coercion and is limiting itself to such activity, the area is either arguably protected or designedly left unregulated.

And thus, even if it were to be plainly and unequivocally established and taken as established that the union did not violate 8(b)(1), it would not preclude the conclusion that a Georgia determination that the union committed this tort works the greatest possible interference with the federal scheme, namely, a state interdiction of that which Congress allowed to happen, and which in its very extensive -- which in Congress's very extensive consideration of how to regulate union-management relations with regard to supervisors, it did not make an unfair labor practice.

QUESTION: Well, as you see it, then, there are three bright squares in this area. One is the actually prohibited. The other is the arguably prohibited, and the other is the designedly left free.

MR. GOLD: Yes, and whenever a state tort action focuses on precisely the same facts and circumstances that the board would consider in determining which of those boxes to put alleged conduct, then the state action is pre-empted.

QUESTION: Well, of course, does that fully explain our Sears decision? There the board would have taken into consideration the same facts had they been brought to its attention by another party.

MR. GOLD: In Sears, there was an added factor

which is not here, namely, the consideration that there was no way to secure the -- a board determination or a general counsel's determination. There was no unfair labor practice which the individual could invoke. Here, the critical inquiry, has the union restrained, restrained or coerced, or has it not, is as open to this supervisor as it is to any employee and any 8(a)(1) or 8(a)(3) or 8(b)(1) or 8(b)(2). The door is open. There has never been a case that I know of, and there would be nothing left of the doctrine, I would suggest, if in that situation where the door to the general counsel is open, it was nonetheless held that the state courts were also an alternative forum.

CHIEF JUSTICE BURGER: Mrs. Stillman.

ORAL ARGUMENT OF ELINOR HADLEY STILLMAN, ESQ.,

ON BEHALF OF THE NLRB AS AMICUS CURIAE

MS. STILLMAN: Mr. Chief Justice, and may it please the Court, it is the board's position that the trial court judge in this case did exactly the right thing in finding that the complaint, the state action was pre-empted in dismissing the complaint, because, as he said, I am being asked to take a second look at the same matter that the board has looked at here, and in fact has resolved in manners displeasing to the plaintiff.

We have explained in our brief -- We addressed our brief mainly to the complaint allegation, which was, there is malicious interference with contract here because the union coerced and intimidated the company into firing him. That is what the complaint said, and that seemed to be the theory in the motion to dismiss or affirm.

They are now saying, well, we don't have to show coercion and intimidation of the employer. We can win in the Georgia court if we just show simple interference, just knowingly procured breach of contract, and that they say is not a matter for the board or not a matter with which the board is concerned.

QUESTION: Well, the superior court dismissed the employer, didn't they --

MS. STILLMAN: Yes.

QUESTION: -- saying that under any theory, you couldn't hold the employer liable.

MS. STILLMAN: He is totally free to do what -- and that raises the interesting question, Justice Rehnquist, of what happens if an employer wanting to make a decision about a supervisor calls in the union and asks for the union's advice. Is the employer inducing the union to induce a breach of contract then

if he decides to follow the suggestions of the union agent?

QUESTION: Well, I suppose other than whatever prohibitions may be placed on it by conficting federal law, Georgia is free to fashion its tort law --

MS. STILLMAN: Yes, yes, yes.

QUESTION: -- and malicious interference --

MS. STILLMAN: But it does seem to us that elements critical to the Georgia tort are also resolved by the board in considering 8(b)(1)(A) and 8(b)(1)(B) and in fact were resolved by the regional director in this case, and I would like here -- first let me say our brief addresses mainly 8(b)(1)(B), because it is quite clear that when the regional director said, this union did not coerce the company, that they should not be able to go over to the state court then and say that they coerced the company.

But the regional director also said, as Mr. Gold pointed out, the union did not cause the discharge.

QUESTION: Are you saying that -- so supposing that the regional director were to make a finding, a mistaken finding as it turned out, in an area which wasn't even -- which wasn't designedly left free, wasn't in fact prohibited, and wasn't arguably prohibited, but

he was just sticking his nose into things that the board really wouldn't have authorized him to go ahead with, and he made a finding on some facts that were never appealed.

MS. STILLMAN: Well, that is not present here, because the finding that he did make is relevant to this case.

QUESTION: Yes.

MS. STILLMAN: I suppose if he was on a complete frolic and detour --

QUESTION: So it isn't a type of res judicata or collateral estoppel charge, is it?

MS. STILLMAN: Well, that's -- but that's embodied to some extent in, I think, the policy reasons here. I would like, Justice Rehnquist, to touch a little more on what you were exploring with Mr. Gold concerning the board's theory of violations of 8(b)(1)(A) in the construction of this -- because that is very relevant to this case, and we didn't emphasize this much in our brief because we thought their theory was intimidation and coercion of the employer.

The board has held -- now, I am not talking at first with respect to a supervisory position. I am talking now with respect to, let's say, an employee job. The board has held that when a union has a hiring

hall, when the union has control over jobs out there, and employees have to come through the hiring hall to get jobs, it is, of course, perfectly proper for the union, if it is running its hiring hall properly, non-arbitrarily, to have that kind of control, but if a business agent takes action with respect to somebody's job opportunity on some arbitrary basis -- let's say he's very hostile to the man, he says, you have been speaking out in union meetings in a way that I don't like, and you're not going to -- I'm going to put you down at the bottom of the list, and you're not going to be treated as fairly as other people -- well, the board says this is an 8(b)(1)(A), because this is intimidating that man in his right to be not a docile union member if he doesn't want to. He has a Section 7 right not to have to toe the line, not to have to curry the favor of the business agent. And so that is an 8(b)(1)(A).

Now, what happens -- Now, of course, supervisors ordinarily wouldn't have that right, because they don't enjoy rights under Section 7. They are excluded from the definition of employee. But what happens in the construction industry is, you have workers coming through these hiring halls, and they may on one job get a referral out to a foreman's job, on the next -- that job finishes. Typically these jobs don't

last forever. They may be short-term. He comes back to the hall for another referral. The next time there may be no foreman's job. He may take a job as an employee, as a worker.

QUESTION: That wouldn't be true as to Mr. Jones, at least in the facts here. He was moving from a supervisory position to another supervisory position.

MS. STILLMAN: Your Honor, we are going on the complaint here, and I don't know what those facts might be. In fact, the deposition, if you want to get into that, although I don't think that is a reviewable record here, said that in the past he had taken employee jobs, and there is no -- certainly no -- it can't be argued that he wouldn't be dependent on the union in the future for employee jobs.

What the board says about people in the construction industry is, these men are dependent on the union hiring hall to get jobs, and when the union agent interferes -- interferes even by just asking the employer, not necessarily coercing the employer, demonstrates to the workman, I can interfere with your job, he intimidates that workman in his status of, and here I am using a phrase of Judge Roaney's in the Local 725 decision, which enforced the board's order in Local 725 Plumbers, Judge Roaney said, it interferes with the

status of that man as a once and future employee.

Now, that was arguably -- that violation was presented arguably to the regional director when this man came to the regional office, and what the regional director said in his letter was not, I am dismissing the 8(b)(1)(A) charge because I find that you never were an employee. He said the union didn't cause your discharge.

That is relevant to the finding of an 8(b)(1)(A), and if the union didn't cause the discharge, if the business agent didn't cause the discharge, there can't be any coercion of the man. And that's what he said here. And it seems anomalous to us that this person should be then able, that the appellee should then be able to go to the Georgia court and say, I want you to find a malicious interference with contract because the union did cause my discharge.

And it is a very tricky area. If there was not an 8(b)(1)(A) here, if this is in the -- then we get into the Teamsters against Morton -- Congress focused upon the did not prescribe area, and you are confronted then with the anomaly that the man, if he says the union coerced the employer, he goes to the board and gets an injunctive remedy, and if the union didn't do that, he goes to the state court and gets punitive damages.

Now, that doesn't seem a very rational aspect of any scheme Congress could have had in mind.

QUESTION: May I ask you one question, Ms. Stillman? Supposing we had a case, and I recognize in your view we don't, which did not involve the construction industry or a person who was a past or future employee, but a clear supervisor, and no argument about it, and that therefore there was no Section 7 right involved. What would your view be in that case?

MS. STILLMAN: It's --

QUESTION: What would the board's view be?

MS. STILLMAN: I am reluctant to commit the board, but I would say that this particular rationale I have given you for the construction industry --

QUESTION: That wouldn't apply.

MS. STILLMAN: -- the board has not applied that theory outside the construction industry, so far as I know. They are talking here -- But I think they would apply it anywhere where you had a situation where the union -- where those fluctuations of status in the union, the union's show of power in one area would tend to intimidate him as an employee.

QUESTION: What I understand you to be saying is, you would not contend for pre-emption if the theory of the charge were an interference with the employer's

right to select his supervisors for his own bargaining representatives.

MS. STILLMAN: Excuse me? I am not --

QUESTION: Your theory would not apply if the theory of the -- of the charge before the labor board had been based on a claim that there was an interference with the employer's right to pick his own bargaining --

MS. STILLMAN: Yes, the 8(b)(1)(A) theory would not apply.

QUESTION: Yes.

MS. STILLMAN: 8(b)(1)(B) would still be active here, and the whole problem of whether there is a Congressional scheme that is being unbalanced by what the state court is doing. But, yes, this particular 8(b)(1)(A) theory that I have outlined to you --

QUESTION: Would not fit.

MS. STILLMAN: -- would not.

QUESTION: And if -- but you would still claim there was -- say there was pre-emption in the hypothetical that I posed, and I think Justice Rehnquist has --

MS. STILLMAN: I think on these other -- I think on these other grounds that we've discussed, yes, there would be. As I think has been demonstrated here, this is a very complicated area, and the line between

what Congress may have intended to permit and what the board can reasonably in applying the scheme prohibit is just very close, and to let the state court into this with the punitive damage remedy just does not seem in accord with this Court's pre-emption decisions.

QUESTION: Suppose the plaintiff were the vice president of the company, and the union had gotten him fired. Would there be pre-emption?

MS. STILLMAN: Vice president. That is not this type of person. That is not the type of person that had been involved in the board's construction industry cases, and probably that person -- if the union had no leverage over that person, and that person had no dependence on the union, this 8(b)(1)(A), or no possibility of dependence on the union, this 8(b)(1)(A) theory I am outlining to you probably would not apply, but 8(b)(1)(B) would certainly still apply, and as I say, these other considerations would.

QUESTION: There couldn't be pre-emption in an area where there was no jurisdiction at all, could there? Would the board have any jurisdiction over the vice president? Make it the president of the company, to make it a little clearer.

MS. STILLMAN: Excuse me. Well, there wouldn't be on the arguably prohibited, arguably

protected area, but this Court has said in Teamsters against Morton and IAM against Wisconsin Employment Relations Commission that sometimes you have a very finely developed Congressional scheme which can be disturbed even if it isn't arguably --

CHIEF JUSTICE BURGER: Mr. Gore?

ORAL ARGUMENT OF ROBERT F. GORE, ESQ.,

ON BEHALF OF THE APPELLEE

MR. GORE: Mr. Chief Justice, may it please the Court, I would like to address myself very briefly to the jurisdictional issue. The real question is, is this case important enough to warrant a review by this Court on the merits. It is plaintiff's position that it is not. It is our position that the Georgia court of appeals, after carefully reviewing this Court's prior pre-emption holdings, properly decided the case.

It held that this case fit within one of the exceptions to the pre-emption doctrine. In fact, in the exceptions laid down in the Garmon case itself, it held that because he was a supervisor, the plaintiff was a supervisor, it was only of peripheral concern to the Act, and that the issue was deeply seated in local feelings -- there is a citizen of Georgia who has been deprived of his right to work -- and that there was little likelihood of interference with the federal labor

laws because the federal agency had already had a look at it, and it went on to hold that there were different causes of action in the state and federal forums.

It did not create a new exception to the pre-emption document. It found a limited fact situation where a supervisor who has pursued his derivative federal remedy and was unsuccessful could then file a state court lawsuit. It doesn't open the floodgates to a lot of state court actions, and the bottom line is that the Georgia court of appeals properly applied the law and reached the proper decision.

This case does not merit review.

QUESTION: I would suppose you would argue that even if the Georgia court might be wrong, it nevertheless only erroneously applied settled principles.

MR. GORE: I believe that is correct.

QUESTION: And that we don't usually -- just take cases to correct error.

MR. GORE: I believe that is correct, Justice White. I think that the court of appeals decision is a little broad in some areas where they pulled some phrases out of various places that could have been tightened up, but I don't think that is appropriate for this Court.

I would -- Now, turning to the merits of the case, it is not the plaintiff's position that this case began with his unfair labor practice charges. It began when the union interfered with his contract of employment as a supervisor. Now, the union defendants and the NLRB, they contend that the Perko case, which is almost identical with this case, controls this case. We agree.

We disagree, however, on what Perko stands for. I think we would all agree that the supervisor must initially take his claim to the federal agency, the NLRB, not because he is protected by the federal Act, because he is not protected by the federal Act, but he must go to the federal agency to avoid any potential conflict between the federal and state laws.

QUESTION: Well, that is sort of a strange doctrine of exhaustion of remedies, that you have to exhaust your federal remedies before you can go to the state courts.

MR. GORE: Well, yes, Justice Rehnquist, it is a strange doctrine, but it flows from the federal labor policy that they don't want two forums, a federal and a state forum, looking at the same facts where there are potential conflicting decisions. Now, we don't believe there is a potential here any more because the federal

agency dropped out. The federal interests dropped out. But our position is --

QUESTION: Well, to say that the federal agency dropped out and the federal interests dropped out are really two different things. I mean, I would think if you were obligated to go to the board in the first place, that the board and the national labor policy have some interest, if the board decides that the evidence doesn't support the making of a charge, but if the evidence had supported the making of a charge, we would bring one, that they have some interest in having the matter left alone by other entities.

MR. GORE: Well, the federal interest that is involved here is the protection of certain persons under the Act, namely, employees. They are protected by Section 8(b)(1)(A). And employers. They are protected by 8(b)(1)(B). Now, if there is no evidence or insufficient evidence to show that these people who are protected by the Act, if their rights have not been violated, federal jurisdiction no longer exists.

QUESTION: Well, unions are protected by the Act, too.

MR. GORE: Yes, sir, but not in -- we are talking here of a union unfair labor practice, so I have limited it to that --

QUESTION: Oh, I see. This context.

MR. GORE: Yes.

QUESTION: Well, do you think -- Suppose a state had a labor law. Maybe it does. And suppose it almost mirrors the federal Act. And once -- And the board or the general counsel refuses to issue a complaint. So the complaint is then filed with the state board.

MR. GORE: If they are mirror Acts of each other, he can't -- the supervisor in that instance --

QUESTION: Why not? Why not? The federal interest has been satisfied.

MR. GORE: Well, does the state act protect supervisors, I guess would be the real criterion. If the state act goes further, then it would be --

QUESTION: Well, no, but then your -- I don't want to get off on the supervisor ground, because that isn't the ground the general counsel dealt with. He said there is no evidence that the union has caused the discharge, and then the -- then the employee or the supervisor, whatever he is, files with the state board and says that the general counsel didn't really know what he was talking about. Let's really have a hearing here and go at it. And the state board goes ahead.

MR. GORE: I think the state board --

QUESTION: Why not? Why not? The federal interest has been exhausted, you say.

MR. GORE: Yes, sir, but the state law would be precluded there by Section 14(a).

QUESTION: Why? Why?

MR. GORE: Because of Section 14(a) of the Act.

QUESTION: Why? Why is that?

MR. GORE: 14(a) says that no national or local law relating to collective bargaining will make supervisors to be treated as employees.

QUESTION: Well, I know. That is a different ground. Now you are moving to the supervisor ground. Suppose he wasn't a supervisor at all, and the same thing happened. He went to the board. The board said no, no evidence. And then he goes to the state board, and the state board says, there is plenty of evidence here. He couldn't do that, could he?

MR. GORE: No, sir, but in Georgia, with the same facts here, you've made him an employee now.

QUESTION: Yes.

MR. GORE: And the union has interfered here. When the union --

QUESTION: Arguably they've interfered, but the board has decided he didn't.

MR. GORE: But it would have never gotten to the board because of the state right to work law. What would happen, when management and the union got together and agreed that they would do away with this job because he was non-union, they reached an agreement, and that was --

QUESTION: Well, yes, but the -- but the board has rejected the charge, said the union had nothing to do with getting him fired.

MR. GORE: But that's not the board's area where it should be looking. It should be looking at protected persons. The supervisor is not protected.

QUESTION: Well, all right. You go ahead.

MR. GORE: Well, it is the plaintiff's position that the fundamental issue in this case is not whether pre-emption took place, but whether an unfair labor practice proceeding is a supervisor's exclusive forum to seek relief from union interference. It is the plaintiff's position that if the NLRB finds that the union's actions did not violate the rights of persons protected by the federal law, employees or employers, then the supervisor is free to pursue his private cause of action in state court.

This is true for two reasons. The first, Congress, when it removed federal protections from

supervisors, did not intend to give the unions license to violate supervisors' rights to employment contracts. And secondly, the causes of action in the state and federal forums would be different.

Now, when the Act was amended in 1947, Congress added Section 14(a) in direct response to an NLRB holding that supervisors were employees. 14(a) takes supervisors out from under the protections of the Act. The question, we believe, is, what did Congress intend? Congress intended that employers were to have the -- could require complete supervisor loyalty. They were not required to retain a supervisor who had divided loyalties.

However, neither the statutory language or the legislative history of Section 14(a) support the proposition that supervisors lost all their common law rights. They lost certain rights vis-a-vis their employer, but they did not lose all their rights against other parties. It is respectfully submitted that Congress did not intend to give unions or any other party a license to interfere with a supervisor's employment contract. Supervisors retain their common law rights.

However, to accommodate federal labor law policy, these common law rights are held in abeyance.

Now, the second reason that we believe the unfair labor practice proceedings are not exclusive is because there is different causes of action. Now, both forums deal with the same facts. They both deal with the same union conduct. But their focus is entirely different. There are different elements of proof. Now, the federal law protects employees and employers, and the federal inquiry before the board was, did the union conduct restrain or coerce employees.

The plaintiff had no evidence that the employees had been coerced. In fact, there is no evidence in the record that the employees even knew he was there. And the plaintiff had no direct evidence that the union conduct had restrained or coerced his employers. In his statement to the board when specifically asked whether he had any direct evidence, he said he believed the union had coerced the employer, but he did not have any direct evidence.

The employer, when queried by the board, said, we were not coerced. Therefore, the federal inquiry, whether employees had been coerced or employers had been coerced, was no longer there. The NLRB no longer had jurisdiction. There was no federal cause of action. And the regional director properly dismissed the plaintiff's charges.

Now, the fact is, the plaintiff was still without a job, but that was irrelevant to the federal inquiry. Now, the regional director did say the union didn't cause it, but there was no hearing. His look at the facts said the union didn't cause your discharge. There had been no hearing on it, no discovery, anything that the plaintiff could pursue. But that was irrelevant to the regional director's decision. His decision was that there is no evidence or insufficient evidence to support the theory that the employer was coerced.

QUESTION: Are you suggesting that had the regional director investigated further, he would have uncovered evidence?

MR. GORE: We have pursued it further in the state court, and we haven't come up with any further evidence, so the answer I don't believe is no -- I believe is no.

QUESTION: Well, then, what did you do, just file a complaint and figure that you might come up with some evidence later, and you haven't come up with it?

MR. GORE: Well, in taking the depositions, which are not in the record, of some of the management officials, they vehemently denied that they were coerced. Now, we --

QUESTION: You don't have to prove coercion, do you?

MR. GORE: No, we don't have to prove coercion in the state plan.

QUESTION: But it was necessary to prove that in the federal --

MR. GORE: Yes, sir.

QUESTION: But you don't have to prove coercion. You can still win without proving it.

MR. GORE: Exactly right, and that brings us to Paragraph 6 in our complaint. We used the term "coercion," but when we are back at the state trial court, I don't believe we are going to be able to prove coercion.

QUESTION: But Georgia malicious interference doesn't require coercion.

MR. GORE: No, sir. It has four elements. It has the contract of employment. We have to prove, which I believe we can very easily, that the union defendants knew of this contract. I think that is fairly obvious from the regional director's letter. That the union defendants intentionally interfered with the contract. And that the employer terminated the contract, damaging the plaintiff. That is what we have to prove there.

Now, we overpleaded it because we put in

coercion in the state cause of action, but whether employees or employers were coerced is irrelevant to our private cause of action.

Now, I would like very briefly to review the Sears decision, because in one portion of that decision there was a discussion about different causes of action or the different inquiries.

QUESTION: But the -- I take it the submission is that even if you could win under the state cause of action by just proving causation --

MR. GORE: Yes, sir.

QUESTION: -- rather than coercion --

MR. GORE: Yes, sir.

QUESTION: -- that the federal law pre-empts that because a union should be free to cause a discharge by non-coercive means? Is that --

MR. GORE: No, sir, we do not believe that this is protected activity. What we believe to be the case is that this was a private vendetta by a union official, and he used his union position to block the employment rights of the plaintiff. There is nothing in this record regarding the employee concerns that the plaintiff was going to be a supervisor. The employees didn't even know the plaintiff was going to be a supervisor.

There is evidence, however, that the defendant Archer, the union official, objected to the plaintiff's employment because four years earlier, after he and the plaintiff had had a dispute over a job, the plaintiff abandoned the union and went to work for a non-union contractor.

Now, the federal law does not protect private vendettas or union blacklisting. Now, the defendant union urges that employees have a protected right to complain about who is a supervisor. In the abstract, that may very well be true, but this is not the case here. The employees didn't even know that the plaintiff was going to be their supervisor. This is strictly a private vendetta. It is not protected activity. And it is a state tort, and properly belongs in the state tort.

During the questioning there were some questions regarding the plaintiff's failure to appeal the dismissal of the unfair labor practice charge. Perko requires that the plaintiff initially pursue his relief under the National Labor Relations Act. The plaintiff did. He presented his evidence to the regional director. He had no evidence that the employees had been coerced. He believed that the employer had been coerced. He had no direct evidence.

The employer said, I was not coerced.

So, since there was no employee coercion, no employer coercion, there was no federal jurisdiction.

QUESTION: Yes, but the general counsel did say that there was no causation. Not only there was no coercion, but no causation.

MR. GORE: There had been no hearing on that, Justice White.

QUESTION: Well, there may not have been, but that is what he said.

MR. GORE: But it -- I don't think that is essential to --

QUESTION: Well, suppose he had issued a complaint and the board had itself -- there had been a hearing, and the board had decided that there was no causation whatsoever.

MR. GORE: We are out of court.

QUESTION: Why?

MR. GORE: Because we have had our look at the federal law. We have had a hearing on the merits. And I think that --

QUESTION: Well, I know, but the federal -- all they had to find in the federal proceeding was that there was no coercion, and that is the --

MR. GORE: I think if we had a hearing on the

merits, and we took it up to the board, and took it to the court of appeals --

QUESTION: Well, is that because of pre-emption, or because of some notion of res judicata?

MR. GORE: I think it would be more of res judicata. We have had our day in court.

QUESTION: Administrative res judicata?

MR. GORE: Well, we would have certainly appealed it on up, but yes, sir. And it is our position that the plaintiff, because the regional director was correct in dismissing the complaint, was not required to appeal on up to the board.

I would like to address just a moment to the construction industry argument that is being urged by the NLRB. This is not a construction industry case in regards to the plaintiff. He was a supervisor. True, he worked in the construction industry. He had been a supervisor for almost three years with another employer. Georgia Power went over and hired him away from another employer to come in as a high level supervisor. The discussions they had was, it was going to be an eight to ten-year job. There was no written contract of employment, but it was a long-term employment.

The collective bargaining agreement between Georgia Power and the construction trades specifically

provides that they have the absolute right to hire who they want as supervisors, and that supervisors don't have to go through the hiring hall.

So, the discussion here, they are trying to bring it over into a construction industry scenario when it doesn't really belong there as to this plaintiff. This is a long-term supervisor who was going to be there for a long time but for the union's interference.

In summary, it is our position that the --

QUESTION: Well, then you really are getting the evidence, aren't you?

MR. GORE: I think we are arguing the facts, Mr. Chief Justice. In the record, it shows that they talked in terms of an eight to ten-year employment record, and we have the collective bargaining agreement in the record down at the trial court, that the employer has the absolute right to hire who it wants, and that the supervisors are not to go through the hiring hall. So, as to this supervisor, the plaintiff, I don't believe it is a construction industry case.

True, the people who may work under him are going to be going in and out of the hiring hall.

In summary, we believe the decision of the Georgia court of appeals does not merit review by this Court. They correctly applied this Court's prior

holdings, and they correctly decided the case. However, should the Court decide to review the case on the merits, I would like to draw attention to one sentence in the Lockridge dissent.

"Where persons with otherwise justiciable claims cannot obtain a hearing under the law, the law is subject to close scrutiny to discover the circumstances compelling such a result."

Now, when the Court closely scrutinizes this law, it will find that Congress did not intend to strip supervisors of their common law rights to seek redress from -- for intentional torts, and that after a supervisor is unsuccessful in obtaining relief under a derivative federal cause of action, he can pursue his own private cause of action in the state courts.

QUESTION: Mr. Gore, could I ask you this before the break? Suppose a union goes to an employer and says, I am not coercing you at all, but I just request, do me a good favor and fire this joker, and the employer says, fine, I am always willing to do a favor for the union. The employee then -- Has the union committed an unfair labor practice against the employee?

MR. GORE: Was this a supervisor?

QUESTION: No.

MR. GORE: And this was an employee?

QUESTION: Yes.

MR. GORE: Yes, I believe it has.

QUESTION: Because he has coerced him, hasn't he?

MR. GORE: He has -- He has requested that the employer discriminate based on some irrelevant -- well, not irrelevant --

QUESTION: So what is the -- what is the unfair labor practice?

MR. GORE: That the union has approached the employer and asked him to discriminate against an employee.

QUESTION: And if it is found that the union actually did that, there is an unfair labor practice.

MR. GORE: Yes, sir.

QUESTION: But 8(b)(1)(A), if I am reading my bench memo right, says it is to coerce employees in the exercise of their rights guaranteed in Section 7. Now, the example Justice White gave, I would think it may be coercion, but why is it coercing an employee in their exercise of a right given by Section 7, if the union just says, you know, the union steward just says, this guy ran into my car the other day and I don't like him?

MR. GORE: That would not be an unfair labor

practice there. I was under possibly the mistaken impression that you were talking about his union affiliation and status.

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

(Whereupon, at 12:00 o'clock p.m., the Court was recessed, to reconvene at 1:01 o'clock p.m. of the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.,

ON BEHALF OF THE APPELLANTS - REBUTTAL

MR. GOLD: Mr. Chief Justice, it is our view that the respondent's argument simply ignores the fact that Congress in 1947 did not only give employers wide areas of freedom with regard to the hire and fire of supervisors, but that Congress also in Section 8(b)(1) regulated union conduct to a substantial extent with regard to what unions can and cannot do in interfering with such employment relations.

QUESTION: What if an employee -- what if a supervisor has an agreement like the respondent here apparently was contemplating with the employer for a term of years' employment and that sort of thing, and the employer breaches it. Can the supervisor go into the state court and sue the employer without being defended against on the ground that Congress intended to have employers -- give freedom of action to employers against supervisors?

MR. GOLD: My understanding from this Court's decision in Beasley is that the answer is that he cannot go into state court against --

QUESTION: That is preposterous.

MR. GOLD: -- the employer.

QUESTION: Don't you think it's preposterous, putting Beasley to one side?

MR. GOLD: We certainly didn't lobby to take supervisors out from under the Act. Congress's view was that employers should have faithful agents and shouldn't be bound by any restrictions. That is why the state right to work laws, even though 14(b) normally gives them precedence, don't take precedent. Obviously, that was the view of the Georgia courts here, because the empty seat is the seat of the employer, and our basic view is that when Congress came to regulating unions, it said, unions may not restrain and coerce employers in that freedom, but it used those limited words, and it did it against the background of an overall system of labor relations where unions can discuss employee concerns with employers, and that it cannot be.

It would be in terms of absurdities or paradoxes far greater if the union by exercising that which Congress designedly left unregulated, namely, its right to go in and say to the employer, it is not good labor relations to have this man supervising these employees, opens itself to a state tort action with damages and punitive damages, whereas if it restrains and coerces the employer, you go through the labor board

proceeding.

As the Court said in Garmon, Congress regulated areas of activity or conduct. One of the areas of activity or conduct was this interplay concerning -- between employers and unions that represent those employers, employees, the job tenure of supervisors. Perko was right when it was decided. This case is indistinguishable from Perko. And neither Congress nor this Court has changed the rules.

QUESTION: Mr. Gold, was it necessary for the general counsel to find that the union did not cause the discharge as well as that the union did not coerce the employer?

MR. GOLD: Only in one narrow sense. It was probably necessary to make that finding in order not to issue an 8(b)(1)(A) --

QUESTION: Exactly.

MR. GOLD: -- complaint, but it is irrelevant in our view on the pre-emption question.

QUESTION: Coercion.

MR. GOLD: Well, on the pre-emption question as well, because it is our view that whether, as in Perko, the individual never goes to the labor board or as in this case, he does go to the labor board, the fact that the labor board determines not to go forward

doesn't open the union to a state court proceeding which in all --

QUESTION: Is it an unfair labor practice for the union to go around to the employer and convince him non-coercively to discharge an employee, not a supervisor?

MR. GOLD: An employee? The board law is that it is an unfair labor practice if the union is acting for irrational reasons.

QUESTION: I suppose the board takes the position that a breach of the duty to represent fairly is an unfair labor practice.

MR. GOLD: That is right.

QUESTION: Yes.

MR. GOLD: And the board carries that same irrational reason line over into supervisors under 8(b)(1)(A).

QUESTION: Yes.

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

(Whereupon, at 1:06 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

LOCAL 926, INTERNATIONAL UNION OF OPERATING ENGINNERS, AFL-CIO ET AL. Appellants v. ROBERT C. JONES #81-1574

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