ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1627

TITLE LARRY SHEPARD,
Petitioner
v.
NATIONAL LABOR RELATIONS BOARD ET AL.

PLACE Washington, D. C.

DATE December 6, 1982

PAGES 1 thru 46

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IN THE SUPREME COURT OF THE UNITED STATES

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LARRY SHEPARD, :

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NATIONAL LABOR RELATIONS BOARD :

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Washington, D.C.

Monday, December 6, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:06 o'clock p.m.

APPEARANCES:

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

EDWIN S. KNEEDLER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

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 Shepard against National Labor Relations Board.

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

ORAL ARGUMENT OF ROBERT F. GORE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GORE: Mr. Chief Justice, and may it please the Court, the basic dispute in this case has been going on for 12 years. I will not review the 12 years of litigation history. It is adequately covered in the briefs. I would, however, like to highlight some key facts.

The original dispute involves the employment status of owner-operators of dump trucks who haul materials to and from construction sites. The question is whether they are independent contractors or employees. This employment status determines many things, including whether these owner-operators could be required to join or support the Teamsters Union.

In 1977, while the employment status was still being litigated, the Teamsters Union and various contractors' associations in San Diego county voluntarily entered into new master labor agreements requiring that the contractors treat these

owner-operators as employees. The Teamsters Union, through contractors, then enforced the master labor agreements, requiring that the non-union owner-operators join the Teamsters Union.

In order to stay in business, the Petitioner and other owner-operators joined the union under protest. They paid their initiation fees, monthly dues, and fringe benefit contributions. They then filed unfair labor practice charges. The original unfair labor practice charge alleged a violation of the secondary boycott prohibitions of the Act, Section 8(b)(4). At the request of the National Labor Relations Board, these charges were withdrawn, and a hot cargo violation was then alleged, a violation of Section 8(e).

Petitioner's unfair labor practice charges were consolidated with similar charges by the California Dump Truck Owners Association, and the Board issued a complaint. Almost eight months after being required to join the union, a federal court enjoined further enforcement of the hot cargo provisions, pending a determination by the Board.

After a hearing, the Administrative Law Judge found that the owner-operators were in fact independent contractors, and that the challenged provisions of the master labor agreement were a violation of Section

8(e). He issued a narrow cease and desist order, and ordered the employer associations and the union to make the owner-operators whole.

The Board affirmed the ALJ's findings --

QUESTION: The ALJ doesn't himself issue cease and desist orders, does he?

MR. GORE: Justice Rehnquist, he issues a proposed decision order, and if it is not appealed to the Board, it becomes a final order.

QUESTION: That becomes a final order?

MR. GORE: Yes. Now, the Board affirmed the ALJ's findings of facts, but refused to grant the make whole remedy. The Board gave three reasons for denying the make whole remedy. They are contained in the footnote. They consist of three sentences, 75 words. That is the only guidance we get from the Board. All the parties petitioned for review in various courts of appeals, and we had a race to the courthouse --

QUESTION: Will you identify that footnote for us, since you seem to --

MR. GORE: It is Footnote 2, Mr. Chief Justice, and it would be in the petition for certiorari. It should be on Page 17a of the petition for certiorari.

The District of Columbia Circuit enforced the

Board's order in all respects. In a similar case involving almost identical language in the Southern California master labor agreement, the Board issued a similar order. The Ninth Circuit rejected the Board's rationale for denying a make whole remedy.

The issue here is not -- The Petitioner agrees, first of all, with the National Labor Relations Board that the issue is not whether the Board has the power to grant a make whole remedy. Rather, the issue is whether the Board improperly refused to grant a make whole remedy to the victims of an illegal hot cargo agreement.

The Board's three reasons for not granting this remedy were: one, insufficient evidence in the record with respect to alleged losses directly attributable to actual coercion by the Respondents; two, a reimbursement order typically used to make whole employees to be generally overbroad and inappropriate in the context of an 8(e) violation; and finally, the Board noted that the aggrieved owner-operators, because they were engaged in business as independent contractors, could pursue a damage claim under Section 303.

QUESTION: What about that?

MR. GORE: It is our position, Justice Brennan, that they could not pursue a 303 action unless

there had been also a violation of 8(b)(4), and I think we quoted in our brief here a concurring with Justice Stewart in the Connell dissent.

QUESTION: At least you have to prove coercion.

MR. GORE: Yes, sir. It is our petition -- or it is our position that the Board misconstrued the statute and abused its discretion because each of these three reasons that it stated is flawed. Because of time constraints, I will only highlight the flaws in two of the reasons, and then I would like to discuss the third reason in some detail.

The first reason, the availability of a 303 suit, our position is adequately stated, I believe, in Pages 28 to 39 of our brief, and also in Pages 59 to 62 of the California Dump Truck brief. In a nutshell, we believe that neither the statutory language nor the legislative history support the Board's assumption that a 303 action is available for a voluntary hot cargo agreement, and secondly, the Board could not avoid its statutory responsibility because of a possible alternate forum.

At Pages 40 and 41 of the Solicitor General's brief, apparently they now concede that the Board's reliance on 303 was misplaced.

The second reason given by the Board is insufficient evidence of losses directly attributable to actual coercion. As to the non-union owner-operators, using Terra Trucking as a broker, the Board's reason is incorrect. The Board affirmed the ALJ's findings of fact, and he had found in the record that the union sent a letter demanding that the broker not employ the non-union owner-operators until the union cleared them. He also held that Terra Trucking told these non-union owner-operators to either join the union or he would cease using their services. He gave them five days in which to do it.

The ALJ also found that Shepard and others joined as a result of the union letter, and that Shepard joined the union under protest. The ALJ pointed out that the owner-operators had two choices, become an employee, and therefore a union member, against their will, or go out of business. And the ALJ also found that union membership resulted from the hot cargo provisions that had been enforced by both the employers and the union.

Given these undisputed findings of fact, the Board's stated reason is incorrect, and I believe an additional reason here is the Ninth Circuit in a similar case. It held that when an unlawful collective

bargaining agreement is itself coercive, there is no logical reason for denying a reimbursement order because there is no technical violation of 8(b)(4).

In both instances, if you focus on the victim, he has lost the same thing, and been compelled to do the same thing.

QUESTION: Mr. Gore, this is a minor point, but is reimbursement being sought by Mr. Shepard for the contribution to union benefit funds as well as for initiation fees and union dues?

MR. GORE: Only for one of the three funds, Justice O'Connor. There are three funds, vacation and health and welfare. He did get his vacation money back from that. He could have, if he had had an injury, maybe get health and welfare. The pension fund, we would maintain would be --

QUESTION: And was there any evidence in the record that the operators contributed to the benefit funds as a result of the illegal provision in the master labor agreement?

MR. GORE: It was never really pursued. However, I believe, on Page 43 of the ALJ's decision, he specifically finds the contractor associations, and their findings of -- they alleged it as a defense, and the ALJ found that it was not a defense, the fact that

previously he had signed a short -- a leasing agreement that authorized the broker to deduct these. So the ALJ specifically found that it was because of the master labor agreement.

That brings me to the third stated reason that the Board --

QUESTION: Before you leave the second, I am just a little bit unsure about one part of it. Are you saying that there was coercion, or there was causal connection between what the union did and the harm to your client?

MR. GORE: We believe that there was coercion. The contract itself --

QUESTION: If you are saying there was coercion, then also there would have been a 303 remedy, wouldn't there?

MR. GORE: If there was coercion -- you mean an 8(b)(4) remedy?

QUESTION: No, 303.

MR. GORE: Yes, I believe, if we could prove coercion enough to satisfy a coercive secondary boycott, we could have proceeded under 303.

QUESTION: And you are saying a fair reading of the ALJ's findings are that you have proved -- that has been proved.

MR. GORE: Yes, Justice Stevens. We looked at it at the time, and what we had here, you can find coercion. I think there is a Board case called Sheraton-Kauai, where you can prove actual direct coercion or it can be inferred from the enforcement of the union security agreement.

What we had here was an inference of coercion, and whether we could take that into federal court and get a damage suit, it didn't seem cost effective, and it was close whether we would be there, whereas if we came in under 8(e) it was inexpensive, it was rapid, and we thought we would get our remedy. It turned out --

QUESTION: You say --

MR. GORE: Excuse me.

QUESTION: Are you finished?

MR. GORE: Yes, sir.

QUESTION: You say you established coercion by inference. Did the trier of fact draw that inference?

MR. GORE: His statement of facts as he specifically says is that Shepard and the others joined as a result of the union letter, and that union membership resulted from the hot cargo provision, and this letter from the union to the broker, and then the broker told everybody, join the union or we will cease doing business with you.

QUESTION: What about the causal connection?

MR. GORE: Yes, sir. They joined the next day and filed unlabor practice charges.

QUESTION: Do you think that statement establishes both?

MR. GORE: Yes, sir. The union sent a letter to the broker and said, execute the contract we've got. The broker told them, join the union within five days or I will cease doing business with you. They called for legal assistance. We paid the money under protest, and we filed charges. So we worked now and grieved later, because the alternative was to go out of business, which was unacceptable to the client.

The third reason the Board gives, and we find is a major problem, is the Board's sweeping policy statement, the second reason. It says that reimbursement orders typically used to make whole employees are generally overbroad and inappropriate to remedy 8(e) violations. This policy statement, without any discussion of the underlying rationale, is erroneous for many reasons.

One, it misconstrues the remedial system Congress established to handle secondary activity. It improperly links Section 8(e), the voluntary hot cargo provision, with Section 8(b)(4) of coercive secondary

boycott, it improperly conditions a make whole remedy on the employment status of the victim. If you are an employee, you get a remedy. If you are an independent contractor, no remedy.

It ignores analogous Board precedents. There are some cases that are almost identically on point. Santini Brothers is identical except there, there was a one-day strike before the employer told the independent contractors that he was not going to use their services. It also --

QUESTION: Are you saying, Mr. Gore, that the Board must order reimbursement or make whole in a situation like this just categorically, or that it abused its discretion in not doing so here?

MR. GORE: I believe it abused its discretion, and my final point on this would point that out, but I do not believe that the Board has to order a make whole remedy any time there is a simple 8(e) violation. Under the facts of this case, we believe that the Board abused its discretion in not doing it, and its stated reasons show that it misconstrued the statute.

Therefore, the denial in this instance does not effectuate the policies of the Act.

The other reason why this policy statement is wrong is, it allows the wrongdoer to keep the money.

The victims here, the independent contractors, did nothing wrong. They worked now and grieved, and yet they had to pay money in order to stay in business. This denial of a make whole remedy allows the union to keep the profit.

QUESTION: Do you know of any case in which the Board has issued a make whole remedy in an 8(e) case?

MR. GORE: In a solely 8(e) case, Justice White, we couldn't find one. We looked very hard. We found some --

QUESTION: So for all practical purposes they have a per se rule that in 8(e) cases you don't make whole, period.

MR. GORE: That is what their sweeping statement says, and that is where -- I think my final point is that it provides -- that sweeping statement provides an incentive --

QUESTION: You say they should have discretion, and they say they have none.

MR. GORE: Yes, sir. That's true.

QUESTION: Is that what you are saying?

MR. GORE: I am saying they have discretion to make -- to grant a make whole remedy in the appropriate circumstances.

QUESTION: And they say they haven't any.

MR. GORE: I don't think they stated -- I wish they had stated that, but I don't believe honestly I could construe it that way. They said that it's generally overbroad and inappropriate. So they may have reserved for some other time.

QUESTION: But you have never found a case where they have granted it?

MR. GORE: No, sir. The Santini Brothers case is almost identical to this case. There, the trucking line, independent contractors, Teamsters Union, the Teamsters approached the owner of the trucking line and said, we want your independent contractors to join the union. He said, I am not going to make them join. There was a one-day strike. He said, I understand the problem now, they will join the union. They did. Filed 8(e) charges, 8(b)(4) charges, because there was coercion, and in that context the Board gave a remedy.

So, in effect, if you look at it from the victim's eyes, the owner-operators, the independent contractors, the same thing happened to them. The only difference is that the owner of the trucking line had a one-day strike.

QUESTION: Didn't you -- Did you initially file 8(b)(4) charges, too?

MR. GORE: Yes, sir, we filed 8(b)(4) charges and they were withdrawn.

QUESTION: Why did you withdraw them?

MR. GORE: That is not in the record. I can't address the issue.

QUESTION: Well, all right, but anyway, you withdrew them.

MR. GORE: Yes, sir, at the request --

QUESTION: And it became just purely an 8(e) case.

MR. GORE: Yes, at the request of --

QUESTION: Although the ALJ, you say, found what would be necessary to be an 8(b)(4).

MR. GORE: Actually, I believe if we had filed for a grant -- would be tried in 8(b)(4), but not formally.

QUESTION: Yes.

MR. GORE: And the court of appeals, I think correctly, refused to grant us one.

This denial of a make whole remedy also fails to put the parties back in the position they were before the unfair labor practice. And most importantly, I think, is, it provides an incentive for unions and employers to violate the Act. They cannot lose in this circumstance. They draft a contract provision just like

this, and the owner-operator has to join the union to stay in business. Now, here is his dilemma. If he pays the money and it turns out he is an employee, the union keeps the money. If he wins, he is not an employee, he is an independent contractor. Under the Board's theory, the union still keeps the money. It is a heads I win, tails you lose situation.

QUESTION: Can I ask you, for an 8(b)(4), the coercion that is required is coercing the employer not to do business, isn't it?

MR. GORE: Yes, sir.

QUESTION: That is the kind of coercion you are talking about. Here, the kind of coercion you say the ALJ found and that was proved, you think, is coercion on the independent operators to join the union. That is a different kettle of fish, isn't it?

MR. GORE: What we have, under Section 8(e), it makes it -- again, we filed under 8(e).

QUESTION: That's a -- 8(e) is a voluntary agreement.

MR. GORE: Yes, sir, and the contractor associtions for San Diego and the union entered into a voluntary agreement to cease doing business with people under certain circumstances. The broker here had joined into that agreement.

QUESTION: Well, you could still then -- There could still be coercion on the independent operators to join the union. You say if you don't -- we have agreed that unless you join the union, you are out of business.

MR. GORE: Yes, sir.

QUESTION: And you could say, that is coercion, but that wouldn't make it -- that wouldn't -- coercion on them wouldn't make it an 8(b)(4).

MR. GORE: That's true. The secondary boycott activity, it makes it over here secondary boycotts, and it is a union unfair labor practice where they coerce an employer to do things.

QUESTION: Yes, but this is different.

MR. GORE: At this end of the spectrum --

QUESTION: This is a different coercion.

MR. GORE: -- we have an 8(e) violation, where the union and the employer agree that we will injure the third party. Now, we think that the Board's analysis here improperly links the remedy of 8(b) and 8(b)(4) as I was trying to point out. Here, we have secondary -- coercive secondary activity. It violates 8(b)(4) and a 303 remedy also lies.

After Congress passed 8(b)(4), the Teamsters Union began negotiating voluntary agreements, where we

will have the same result, but we won't twist your arm. And this Court in 1958 in the Sandor case held that that did not violate the proscriptions of 8(b)(4). The next year, Congress amended the Act and put in 8(e) and made both of them unlawful under the Act. They are both unfair labor practices, and as the dissent in Connell points out, I believe, Congress intended that the full panoply of NLRB remedies be available for this.

They did not bother to make it subject to a 303 suit, but you have to prove -- Congress set up a scheme, a remedial system across the board, handling both voluntary and coercive.

QUESTION: Well, when you say Congress set up a remedial scheme, you are not suggesting that the Board has all the powers of a common law court after law and equity --

MR. GORE: I do not at all. Section 10(c), the Board cannot grant many things that a common law court could do. However, in Section 10(c), it stated that the Board shall issue a cease and desist order, and then gave it broad discretion to fathom -- or fashion affirmative actions that would effectuate the policies of the Act.

QUESTION: And presumably to decline to fashion some policies that it thought wouldn't

effectuate --

MR. GORE: They do have broad discretion. There is no denying they have broad discretion. We think under the facts of this case, if you look at it through the victim's eyes, the distinctions that they make that between Section 8(e) and 8(b)(4), whether you need actual coercion, they link 8(e) and 8(b)(4). To get a remedy under 8(e), a voluntary agreement, which we have, you have to also prove 8(b)(4). Congress did not intend that. They made 8(e) an unfair labor practice.

We would also like to -- the Board in its decision also references Local 60 of the Carpenters Union, where this Court held that granting a make whole remedy or a reimbursement order against a union would be punitive. However, there is a catch phrase in it. It goes on to say that reimbursement orders would be punitive unless there is evidence that their membership was induced or obtained in violation of the Act.

We maintain that the Petitioner's membership in this union was certainly induced or obtained in violation of the Act, and that any make whole remedy would certainly not be punitive on the union.

Unless there are any further questions, I would like to reserve the rest of my time.

CHIEF JUSTICE BURGER: Mr. Kneedler.

ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. KNEEDLER: Thank you, Mr. Chief Justice, and may it please the Court, this Court has long recognized that Section 10(c) of the National Labor Relations Act vests the Board with broad discretion to fashion the remedy for an unfair labor practice that it believes is appropriate to effectuate the policies of the Act. The question before the Court in this case is not whether the remedy selected by the Board from the range of remedies available to it was in a court's view the proper remedy to select, but rather, whether the remedy chosen by the Board was within the range of remedies available to it, or, put another way, whether it abused its discretion.

We agree with the Petitioner in this case that Section 303 of the Labor Management Relations Act does not afford a remedy to someone who is injured by a bare 8(e) violation, that is, by the existence and implementation of an agreement that was entered into in violation of Section 8(e).

QUESTION: What if the -- What if it is proved satisfactorily that the agreement causes the kind of -- an independent businessman to join the union?

MR. KNEEDLER: Mr. Justice White, unless the

union resorted to conduct that would independently violate Section 8(b)(4), either to force the employer to sign the agreement in the first instance or after it was signed to force the employer to abide by it, of course, in that situation there would be a damage remedy under Section 303. That is what Congress intended.

QUESTION: Yes, a coercion on the employee or the independent contractor employee is irrelevant --

MR. KNEEDLER: That's right. Section 8(b)(4) is part of the secondary activity provisions of the Act, and it looks to the -- excuse me -- presence or absence of coercion on, in this case, the --

QUESTION: The coercion might -- exercised against these independent operators might violate some other provision, but it wouldn't violate 8(b)(4).

MR. KNEEDLER: That's correct, and if I could just make one additional point on that, the decision of the Administrative Law Judge only says on Page 43a of the Appendix to the Petition for Certiorari, says that the -- it having been found that the union and the associations enforced provisions of the MLA requiring owner-operators to make payments to the union of dues, initiation fees, assessments, and contributions to trust funds in violation of Section 8(e), it would then -- the ALJ would then recommend an order of the refunds.

That may well establish causation, at least for the particular -- at least for Mr. Shepard.

QUESTION: Or even coercion.

MR. KNEEDLER: Coercion perhaps in some other sense, but the type of coercion to which Section 8(b)(4) speaks, it would not, and in fact this Court's decisions in Servett and Teamsters versus Morton make that unmistakably clear.

There, the Court said that the mere request by a union to an employer to cease doing business with another person does not violate Section 8(b)(4), and in this instance, when the union sent a letter to the employer, what happened is, the union called the employer's attention to the fact that there were several independent contractors who were not union members, and requested that the broker, Terra Trucking Company, cease using the services of those owner-operators, but that is precisely the sort of request that this Court said in Servett and Teamsters versus Morton is not coercive for purposes of Section 8(b)(4).

But quite aside from that, if Petitioner disagreed with that proposition in that there was in fact 8(b)(4) coercion in this case, he was, of course, free to file the remedy that Congress contemplated in those circumstances, a suit under Section 303 of the Act

to recover damages for injuries sustained as a result of a Section 8(b)(4) violation, and the fact that the Board did not in this case find a Setion 8(b)(4) violation would not preclude Mr. Shepard or any other owner-operator from establishing such a violation in a separate Section 303 proceeding.

And indeed, we think that although we agree with Petitioner that there is not a damage remedy available under Section 303 for a bare 8(e) violation, which is all the Board found here, Petitioner draws precisely the wrong conclusion from that fact. When Congress amended the Act in 1959 to outlaw hot cargo agreements for the first time, it also amended Section 8(b)(4) to bar union coercion to force the employer to enter into such an agreement.

It amended Section 10(l), which provides mandatory preliminary injunctive relief in the case of secondary activity, and provided that the general counsel must seek an injunction where there is cause to believe that there is secondary activity.

Congress amended Section 10(l) to require the general counsel to seek such an injunction in cases involving Section 8(e) violations, but significantly, Congress did not amend Section 303, the damage provision of the statute, to provide a cause of action for damages

or monetary relief for a bare Section 8(e) violation.

QUESTION: Of course, one could affirm the judgment below and rule basically in the Board's favor without coming to any conclusion as to whether an 8(e) violation might be remediable under 303.

MR. KNEEDLER: That's correct, Mr. Justice Rehnquist, but -- and we are not saying by the same token that the failure of Congress to provide a damage remedy under Section 303 forecloses the Board itself from awarding a reimbursement in an unfair labor practice proceeding. The question of whether the Board has the power to order such relief for an 8(e) violation --

QUESTION: Didn't the Board rely on -- or did it? Did I misunderstand? Didn't the Board in part rely on the availability of a 303 action for its refusal to make whole, here?

MR. KNEEDLER: It did.

QUESTION: And you say that is wrong.

MR. KNEEDLER: No. I don't say that it's wrong, no. What I -- All I am saying is that that establishes the reasonableness of the Board's general approach to these cases, which I think would -- I can't speak for what the Board would do in any particular case, but looking at the facts of this case, an 8(e)

violation without some additional aggravating circumstance, at least, would not, at least in this case, did not cause the Board to issue or order additional relief.

But that doesn't mean that, for instance, if there was additional action on behalf of the employer and union in another case, that the Board may not consider whether it would be appropriate to order reimbursement. For example, if, notwithstanding a Board cease and desist order, the union and employer go back and once again enter into precisely or virtually identical 8(e) violation, then there would be time enough for the Board to consider whether some additional reimbursement remedy would be appropriate, since the union and employer would have by that point revealed that they were not going to abide by the Board's cease and desist order.

But in this case, there was no reason -- no aggravating circumstances for the Board -- to give the Board reason to believe that a reimbursement order was necessary to create that sort of disincentive, and in fact one of the chief reasons for this is that there was the ongoing litigation over the question, as counsel for Petitioner has pointed out, over the question of whether these owner-operators were even independent contractors.

If they were employees, then the application of the master labor agreement to them and the -- including the union security provisions to them would have been lawful, and the union's efforts to enforce that requirement in the master labor agreement would have been lawful.

QUESTION: Mr. Kneedler --

MR. KNEEDLER: Yes.

QUESTION: -- Mr. Gore told us that the 8(b)(4) charges were withdrawn. Would you care to comment on --

MR. KNEEDLER: Well, my understanding --

QUESTION: -- the significance of that, if any?

MR. KNEEDLER: Excuse me?

QUESTION: Comment on the significance of that, if any, in your view?

MR. KNEEDLER: Well, the original charge filed by Mr. Shepard was based on or alleged what amounted to an 8(b)(4) violation, alleging, incidentally, not that the union was coercing Mr. Shepard, but consistent with the secondary aspect of Section 8(b)(4), alleged that the union was coercing Terra, the broker, by virtue of the existence of the agreement.

But as I understand the Board's practice or the general counsel's practice, if he chooses not to

file a complaint based on a charge that is filed with him because he believes, for example, that the evidence would not support the charge of an unfair labor practice, in this case a charge of an 8(b)(4) violation, he will give the charging party an opportunity to withdraw the charge, and file a complaint based on those violations that the general counsel does believe are present.

So, my understanding of what happened in this case is that the general counsel gave Petitioner an opportunity to withdraw his charge, and refile alleging a violation of Section 8(e). If the charging party doesn't withdraw his charge in that fashion, he has a right of appeal to the general counsel's office here in Washington to seek to have the general counsel file a complaint, but in this case, in lieu of doing that, as I understand what happened, Mr. Shepard withdrew the charge

But apparently it was the general counsel's view that this case only warranted going forward on the basis of the evidence presented under Section 8(e).

As I mentioned, the special statutory scheme that Congress fashioned in the area of secondary activity and its meticulous attention to those circumstances in which it would afford various remedies

we think establishes that Congress's withholding of a damage remedy for a bare 8(b) violation was deliberate.

Just to reiterate for a moment, Congress added Section 8(e) in the Act in '59, provided the mandatory preliminary injunctive remedy in 1959, but did not amend Section 303 to provide an automatic damage remedy for the individual, and we think that Congress evidently concluded that an 8(b)(4) violation involving coercion was an unfair labor practice of a different order in Section 8(e), and that it was not necessary in order to effectuate the policies of the Act to provide a damage remedy on the basis of a bare 8(e) violation, and we think that --

QUESTION: Why would you draw the difference between -- The person against whom the secondary pressure is applied is these owner-operators. Now, if the -- you think they should get -- be made whole, and should be able to recover if the union pressured the employer into not doing business with them, or if they pressured them to sign the 8(e), or to live up to it, I take it. Then you would say that is an 8(b)(4).

MR. KNEEDLER: Right.

QUESTION: Now, however, in this case, you say because it is only an 8(e) violation, namely, no pressure on the employer, the owner-operators who would

be in exactly the same position as if the employer was pressured, they have suffered the same injury, shouldn't have the same remedy that they would have had if the employer had been pressured.

MR. KNEEDLER: Well, under -- depending on -- two remedies. Under Section 303, we think it is perfectly clear that they do not have a remedy because Section 303 expressly refers to Section 8(e).

QUESTION: Yes. Yes.

MR. KNEEDLER: With respect to Section 10(c), in order to -- the general remedial provision for the Board to award relief, the important point to recognize there is that Section 10(c) is not a replication of a private damage action such as 303. This Court made clear in Automobile Workers versus Russell that Congress did not establish in Section 10(c) a comprehensive scheme for compensating victims of wrongful conduct, that Section 10(c) was instead -- the affirmative action that the Board can award under Section 10(c) is incidental to its power --

QUESTION: So if both the employer and the union want to damage these people together, and they both agree to it, there is no injury, but if only the union wants to damage him and pressures the employer into it, there is injury, there is a compensable

injury?

MR. KNEEDLER: Well, again, under Section 303, that is the distinction that Congress has drawn, and what we are saying is that at the very least, it cannot be an abuse of discretion for the Board to draw a parallel judgment in its administration of the administrative unfair labor practice proceedings. If Congress determined that a Section 8(e) violation was a violation of a different order, then the Board, looking to the absence of the 8(b) coercion, could draw the same conclusion.

This Court said in Gissel Packing Company that one of the purposes of giving the Board discretion to fashion the appropriate remedy was to permit it to tailor its remedy to unfair labor practices of varying intensity, as the Court put it, and I think that in determining the intensity of an unfair labor practice, it is not necessary for the Board to look only to the resulting impact on the owner-operators in this case. It is equally appropriate for the Board to look at the nature of the conduct of those who committed the unfair labor practice.

And this is so for a very important reason. As I was mentioning earlier, Section 10(c) does not, when the Board awards affirmative action under Section

10(c), this is not a redress for a private wrong in the manner of a lawsuit under Section 303 of the Act. It instead vindicates the public right in stopping unfair labor practices, and in restoring industrial peace and the free flow of commerce. So --

QUESTION: Mr. Kneedler --

MR. KNEEDLER: Yes?

QUESTION: -- it isn't really clear, though, is it, why the Board denied the relief here? It isn't clear whether the Board was relying on its general discretion here. It may have articulated some reasons that are all erroneous.

MR. KNEEDLER: Well, the Board did say that -- well, it said several things. It did refer to the existence of a remedy under Section 303 of the Act.

QUESTION: You seem to agree that that was probably erroneous.

MR. KNEEDLER: No, I don't concede that that was erroneous. What I -- The point I was -- in fact, to the contrary. As I have described, under Section 303 of the Act, Congress made a judgment that monetary relief need not be available in a district court suit to someone who is injured by a bare 8(e) violation, and as I was --

QUESTION: What sort of relief was the Board

talking about being -- when the Board said as one of its reasons for not granting the relief Petitioners here sought, that relief is available in the district court under 303, what kind of relief was the Board thinking of?

MR. KNEEDLER: No, it was -- as I interpret the Board's order, its point was that Congress has dealt with several, but one being that when you have third parties who are injured by a union's secondary activity, Congress provided a separate forum for a person to recover for a union's secondary -- unlawful secondary activities.

Now, it may be that because of the lines Congress drew, that there is no remedy for a bare 8(e) violation, but that --

QUESTION: Well, you do agree with that?

MR. KNEEDLER: I do agree with that, but I draw the opposite conclusion from that than Petitioner does, because Congress's foreclosing of a damage remedy for the individual demonstrates that Congress did not believe that monetary relief was necessary as a rule to effectuate the policies of the Act, and the Board has simply made a parallel judgment in administering the separate administrative proceedings under Section 10(c).

And the reason why I think that is especially

important is that the -- in some -- the purpose of the Board's remedial scheme is to eliminate obstacles to the restoring of industrial peace and to stop and prevent unfair labor practices. In some situations, again, as the Court noted in Gissel, it may be appropriate just to issue a cease and desist order, if the Board is satisfied that that would be sufficient to effectuate the policies of the Act, because, for example, there may be no reason to believe that the violation will recur.

In other circumstances, though, the Board may believe that some further measures may be necessary, perhaps because of -- in situations involving unfair labor practice affecting employees, that the -- that there may be certain lingering consequences of an unfair labor practice, that it is not enough to simply issue a cease and desist order, that the Board may have to go further.

And this is the point that the Court made in the Carpenters Local 60 case that counsel for Petitioner cited. In Carpenters Local 60, it is true that the Court reversed the reimbursement remedy there because it found that there was not even a consequence of a violation, that none of the union -- none of the employees involved there had joined the union because of the closed shop arrangement.

But the Court didn't stop there. It pointed out, quoting the earlier decision in Consolidated Edison, that the power of the Board to award affirmative relief is the power to eliminate consequences of violation where those consequences would thwart the accomplishment of the Act's purposes. So, just because there may be a consequence of the violation that may remain, it does not mean that that consequence will thwart the policies of the Act.

And the Board can conclude that it is not necessary for that reason to go ahead and order affirmative relief. This Court said in Auto Workers versus Russell that the power to award reimbursement, even the affirmative action that is expressly mentioned in the Act, back pay, doesn't flow automatically from the finding of a violation and injury.

The Board must first be convinced that the awarding of the affirmative action, in that case back pay, would effectuate the policies of the Act. And we submit that where the Board is not convinced that going further than the cease and desist order, going beyond the cease and desist order to restrain future violations, where the Board is convinced that nothing more is necessary or appropriate, that that is precisely the sort of discretionary decision that was submitted,

that the Congress conferred on the Board.

And this Court has repeatedly said that the Board's exercise of its discretion under Section 10(c) to fashion an appropriate remedy is subject to very narrow judicial review, and in fact in Virginia Electric Power Company, one of the earlier cases decided under the Act, the Court phrased the test in terms of -- by stating, the Board's order should stand "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."

Now, that language, we submit, reflects a broad deference on the part of the Court to the decisions by the National Labor Relations Board.

In this case, there is an additional factor that is present. This isn't a case like VEPCO, or the typical case that has come to this Court, or even the courts of appeals, regarding the Board's remedial powers. This is not a case in which it is asserted that the Board has gone too far, and this Court has had occasion to consider what the power of the Board is.

Here, the allegation is, or the assertion is that the Board's order did not go far enough in the submission of Petitioner, and in those sort of circumstances where the assertion is that the Board has

not gone far enough, we submit that the party challenging the Board's order should be required to show, as the D.C. circuit has said in several of their decisions, that the remedy the Board did order will be so ineffective to enforce the policies of the Act as to be insufficient as a matter of law, or that, in other words, the Board has abandoned any exercise of its discretion, and it has in fact done nothing to effectuate the policies of the Act.

Well, in this case, it cannot be said that the cease and desist order will be so ineffective to accomplish the Act's purposes as to be insufficient as a matter of law. We think that is plainly not so. First of all, we think, as I explained before, that the Board's decision draws powerful support from the judgment Congress itself made, that monetary relief does not have to follow, and secondly, that by enacting Section 303, Congress made a judgment that third parties who in effect stand outside the triangle of the usual employer-employee-union relationship, that their remedies generally should be in a Section 303 action in federal district court. They shouldn't -- The Board was thought to be an inappropriate forum ordinarily for adjudicating the consequences of parties' unfair labor practices.

The Board called attention to the existence of the Section 303 remedy in this case, and we think that, too, supports the Board's decision not to go further here.

QUESTION: What does the Board do, or do you know, in an 8(b)(4) -- suppose the owner-operators here had filed an 8(b)(4) and proved it?

MR. KNEEDLER: Well --

QUESTION: And it had been adjudicated, an 8(b)(4) violation. Could the Board have made them whole?

MR. KNEEDLER: Yes, in fact --

QUESTION: And would they?

MR. KNEEDLER: The Santini Brothers decision that we cite in our brief is precisely that situation.

QUESTION: And generally they do in that case?

MR. KNEEDLER: Well, it has not come up that often, but Santini Brothers --

QUESTION: But that is monetary relief.

MR. KNEEDLER: That is monetary relief, but it also contains the element of coercion in the 8(b)(4) violation, which is consistent with Congress's judgment in 303. Again, the parallel is complete. Where there is the 8(b)(4) violation that would give rise to a damage remedy in court, the Board under Santini Brothers

has gone ahead and ordered the reimbursement remedy.

That is not to say that the Board would find it appropriate to enter into a full compensatory scheme under Section 10(c), because as we explain in our brief, the legislative history of Section 303 makes it clear that Congress did not believe in general that the Board was the appropriate forum for third parties to litigate the damages that they have suffered as a result of the union's activities.

And so, for instance, in this case, if an owner-operator, instead of joining the union, decided -- resisted and lost work as a result, that is precisely the sort of consequential damages, lost profits and what not, that Congress assigned to the courts, not to the Board. And so it is clear that it would be inappropriate for the Board to depart on a broad scale to establish those sorts of remedies.

But in the Santini Brothers case, the remedy was limited. Even though this lost profits sort of relief was sought, the Board simply awarded a reimbursement remedy against the union, but the Board found 8(b)(4) violations in the facts of Santini Brothers. But there is no case where the Board has on the basis of a bare 8(e) violation awarded relief.

For the reasons that I have explained, then,

we think that the statutory scheme does not contemplate that the Board must go ahead and award the reimbursement remedy that was requested in this case. In addition, the facts of this case do not suggest that the Board should depart from the practice suggested by Congress's enactment of Section 303.

There was no showing of extensive violations or injury as a result of the existence of the 8(e) violation. We have evidence in the record only pertaining to two brokers, and the circumstances surrounding joining the union only as to Terra. Petitioner himself signed a subhall agreement when he first came to work for -- first went to work through his broker, in which he agreed to have union fringe benefits deducted from his checks, and there is no indication that he resisted that or protested that. It was only when he also had to pay the union dues and fees that he resisted.

So, even though Mr. Shepard is not seeking a refund of fringe benefits to certain trust funds, as we are told now, he still benefitted during that period from having been working under a collective bargaining agreement secured by the union that in fact provided those fringe benefit plans.

Another factor present here is the one I have

mentioned before, that there was ongoing litigation, and indeed the Board itself had held that these persons were not independent contractors, but were employees, and it was not until after this agreement was entered into that the Ninth Circuit changed its view on that subject, and even then the Board denies -- It does not have to acquiesce in that decision. It was still -- It was not until later that the Board changed its view and said that these were independent contractors.

So, the Board could legitimately take into account that the fact that the status of the owner-operators was uncertain, and indeed there was case law supporting that they were employees, that it was not necessary to award a reimbursement remedy to deter future violations. It could instead conclude that once this legal question was cleared up, that the union and the employer would abide by the result the Board reached and that the courts have reached.

And then, finally, with respect to the distinction between the award of reimbursement to an employee and the award of reimbursement to someone who stands outside the employment relationship, in this case, an independent contractor, we think there is a big difference.

Employees have Section 7 rights, the right to

freedom of association or to refrain from that, to select a collective bargaining agent or not, and this Board -- or this Court in Virginia Electric Power and subsequent cases has recognized that when the company or the union takes action that might impact upon the Section 7 rights, that it may be necessary to refund or reimburse the employees for their dues, so that the dues will not continue to maintain a company-dominated union or a closed shop in order to undo the consequences so the employees will feel free to engage in Section 7 activities in the future.

That doesn't apply necessarily to independent contractors. They do not work in the close confines of an employee-employer relationship with the union being present. They are independent businessmen, and in this case, in fact, the record shows that most of the independent contractors worked through a number of brokers, with a number of contractors. They go from day to day to different sites. There is no reason to think that independent businessmen like that need the same sort of protection in the form of a reimbursement remedy as employees do with respect to Section 7 rights.

And we think that this in part explains the difference that Congress drew when it did not provide a damage remedy for bare 8(e) violations for third parties

such as independent contractors or other employers with whom the primary -- or with whom the employer might cease doing business. Congress decided that reimbursement was appropriate only in the case of aggravated coercion by the union.

Thank you, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Gore?

ORAL ARGUMENT OF ROBERT F. GORE, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. GORE: Just a few comments, Mr. Chief Justice.

I have an ethical problem. The question that you posed to both of us regarding why we withdrew the charges, Mr. Kneedler is not privy, I don't believe, to why the charges were withdrawn. He has correctly stated the Board's position, but it is not in the record, and the reason the charges were withdrawn are not before the Court, and it is not the reason that he was --

QUESTION: I was asking him only the significance of it, if any, not the reasons why --

MR. GORE: He correctly stated what the Board quite often does, but it is not in the record why it was done in this case.

Justice O'Connor, your question as to what the

Board order means, I think that is one of the reasons this case should be remanded. The Board's reasons is in a footnote, three sentences, 75 words. Now, two years later, two levels of appeal later, I don't know how many, too many lawyers, I guess, would be the answer, those words are -- we still don't know what this Board order means.

QUESTION: Well, did the court of appeals for the Ninth Circuit remand the case to the Board? Is that the joint Council of Teamsters case?

MR. GORE: Yes, sir, and I think it is presently pending on cert. What it did is, it ordered the Board to make whole remedy or to show cause why it would not effectuate --

QUESTION: Under 8(e).

MR. GORE: Yes, sir.

QUESTION: And the Board -- what action did the Board take?

MR. GORE: I believe it is sitting here, Number 802-3. It is up here.

QUESTION: Oh, I see. Oh, I see. I see. It has never gone back on remand.

MR. GORE: No, sir. It's --

QUESTION: So the Board has never had a chance to give more than three lines.

MR. GORE: Exactly. There were -- The distinction that was being made here that independent contractors shouldn't get a remedy, reimbursement orders have been given to employers. Recently there is case law that the employer may have to make whole unions for excess -- for expenses, for frivolous litigation. Employees have certainly gotten reimbursement orders. Now all of a sudden the policy is that because you are an independent contractor, I would think that an independent contractor could also be an employer, but he can't get a reimbursement order.

I don't think Congress intended that when they made Section 8(e) an unfair labor practice.

Also, there was a discussion that the independent contractor benefitted by this contract. The law provides him the right to set his own contract. He did get some benefits, but he was compelled both to take the benefits and the burdens. He had to pay initiation fees, dues. He was subject to union discipline, had a dispute broken out. And so I think the benefits argument has been rejected in many instances, and I don't think it is a good argument that they are making.

The primary purpose of this Act is to protect the public interest and the policies of the Act by mitigating the effects of that violation and preventing

future violation. The Board's order does not accomplish either of these functions, nor does the Board's terse statement of its reasons for denying a make whole remedy survive close analysis.

This case should be remanded to the Board for further proceedings. Thank you.

CHIEF JUSTICE BURGER: Very well. The case is submitted.

(Whereupon, at 2:01 o'clock 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:

LARRY SHEPARD, Petitioner v. NATIONAL LABOR RELATIONS BOARD ET AL

81-1627

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BY _____

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