ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1664

TITLE METROPOLITAN EDISON COMPANY, Petitioner
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.

PLACE Washington, D. C.

DATE January 11, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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METROPOLITAN EDISON COMPANY, :

Petitioner :

v. : No. 81-1664

NATIONAL LABOR RELATIONS BOARD, ET AL. :

- -x

Washington, D.C.

Tuesday, January 11, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:09 a.m.

APPEARANCES:

DONALD F. SILEO, ESQ., Philadelphia, Pennsylvania; on behalf of Petitioner.

NORTON J. COME, ESQ., Deputy Associate General Counsel, National Labor Relations Board, Washington, D.C.

LAURENCE J. COHEN, ESQ., Washington, D.C.
Union Local 563, IBEW

C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE BURGER: Mr. Sileo, I think you may proceed when you are ready.

ORAL ARGUMENT OF DONALD F. SILEO, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SILEO: Thank you, Mr. Chief Justice.

This case is about two union officers, David Lang and Eugene Light, who participated in an unlawful strike at Three Mile Island on August 30, 1977. The immediately apparent issue is whether petitioner was justified in relying upon two prior arbitration decisions between the parties. Those arbitration decisions imposed upon union officers greater duties than those imposed upon rank-and-file employees; namely, not only not to participate in the strike but to urge others from participating in the strike.

For breach of those duties the union officers could be disciplined more severely than the rank-and-file employees, according to the arbitration decisions. Here Lang and Light received 25 days' suspensions from employment and the others up to 10 days' suspension from employment.

I describe that issue as the immediately apparent one because there are two fundamental, far-reaching issues under federal labor law as to the

impact of this case generally throughout this country on the no-strike promises in various contracts, and virtually all contracts, as a matter of fact, and on the vitality of arbitration.

First of all, should the National Labor Relations Board be allowed to marshal all its weaponry in blatant interference with the collective bargaining process, thereby relieving the union of the full scope of its no-strike clause obligation?

If the Labor Board is successful in this, it will eviscerate what little is left of what has already been called the largely chimerical and illusory remedies that are available to an employer for violation of a no-strike clause.

That no-strike promise, as this Court well knows, is the most important promise that a union makes to the employer, particularly important, I might add, to this public utility employer, that not only operates a nuclear site but has 24 hours a day continuous service in all its operations, as is noted and acknowledged in several different places in the collective bargaining agreement.

The second vital long-range issue involved in this case is whether the National Labor Relations Board should be allowed to dangerously erode this Court's

Steelworkers Trilogy cases or whether that foundation of industrial peace will remain unshaken.

This case has generated widespread interest throughout the entire country.

QUESTION: Well, Mr. Sileo, in your petition you raise a second question that I take is independent of the arbitration problem.

MR. SILEO: That is correct, Justice Rehnquist. And that second issue is whether independent of arbitration there is a higher duty on rank-and-file employees irrespective of whether there have been arbitration decisions. Justice Rehnquist, I recognize this Court's disinclination to make decisions on the broadest possible basis. We think that our case is very strong on the point you raised as well as on the arbitration point.

We have concentrated on the arbitration point because we think we have the very strongest case in that area. But we certainly are not running away from the operation of law argument which we raise in our briefs and which the amiciae raise in their briefs; namely, that there is a duty arising out of their positions. And certainly there have been three members of the Labor Board in recent years that have adhered to that position, and there is a body of arbitral authority that

adheres to that position.

But if I may return to the thrust of the arbitration argument, the brief background with respect to this case is that in September 1980 the National Labor Relations Board handed down its decision, which was consistent with the per se Precision Castings rule, which was shortlived; namely, that disciplining union officers more severely than rank-and-file employees was in and of itself discriminatory, a violation, and they treated as irrelevant the arbitration decisions.

In November of 1981 the Third Circuit Court of Appeals rejected the per se approach of Precision Castings, but nevertheless found against petitioner, holding that in order for there to be a greater duty it must be in the precise language, those greater duties for the union officers must be in the precise language of the collective bargaining agreement document itself. And the Third Circuit discounted the arbitration decisions that petitioner had relied upon.

There have been some recent cases in this area of the law. One of them handed down by the National Labor Relations Board was Consolidation Coal. There were five Board members, at that time anyway. There are four now; there will be two new appointments within a few months. This whole area is in a state of flux as

far as the Labor Board is concerned.

Those five Board members handed down four opinions. Those opinions, I think, are fairly summarized in the Board's brief at pages 32 and 33, footnote 16. In effect, the Labor Board decision -- a majority of the members at least -- abandon the per se Precision Castings approach.

Recently, in the Fifth Circuit a court in South Central Bell agreed with the Third Circuit Court of Appeals in Metropolitan Edison.

Contrarywise, in February of 1982 the Circuit Court of Appeals in the District of Columbia in the Fournelle case, written by Judge Harry T. Edwards, who has labor expertise and recognition throughout the country. In that decision Judge Edwards found that where under similar circumstances to these there had been a prior arbitration decision, that prior arbitration decision had imposed greater duties upon union officers than rank-and-file employees, the kinds of duties that we have in this case here, those kinds of greater duties.

Under those circumstances, the Circuit Court, District of Columbia, found that the union officers might be disciplined more severely and found further that when a subsequent case arose in this general area

-- namely, involving union officers being disciplined more severely during an unlawful strike -- we had a contractual claim case. We no longer had an unfair labor practice case. We had, in the words of the court, the Labor Board "meddling in the legitimate products of the collective bargaining process."

Judge Edwards relied very heavily upon this Court's Steelworkers Trilogy cases, and particularly the Warrior case where this Court said that arbitration is part and parcel of the collective bargaining process, where this Court said --

QUESTION: Mr. Sileo.

MR. SILEO: Yes.

QUESTION: May I ask you on the arbitration point, the arbitration clause in the contract that was in effect said that a decision by an arbitrator shall be binding for the term of this agreement. Was that same clause in the preceding agreements at the time that the arbitrations were made?

MR. SILEO: That clause has remained the same, Justice O'Connor, throughout the life of these parties for the term of this agreement.

QUESTION: Does that have a bearing on your arbitration clause?

MR. SILEO: We think not at all, Justice

O'Connor. We think that a case of this magnitude certainly should not turn on a phrase for the term of the agreement which appears as surplusage throughout the agreement in a number of different provisions, 7.8, 7.9, 7.10, 1.5, the very recognition clause that wherein the Metropolitan Edison recognizes the union and agrees that it will not -- that it will not bargain with any other union during -- at the conclusion of the agreement.

We think that it is just surplusage. We think further that the union has in effect conceded that because in the second arbitration decision -- namely, the Seidenberg decision -- there was no challenge to the first arbitration decision on that basis, Justice O'Connor.

In the Alderfer decision about which we wrote -- namely, that decision in which the arbitrator had said that a refusal to cross a picket line was a violation of the contract -- in that decision there was a subsequent challenge, I should say, before the National Labor Relations Board, there was a stipulation that a refusal to cross the picket line, as in this case, represented an unlawful strike.

That is contrary to Board law, as a matter of fact. There is U.S. Steel and cases that have been cited in the Board's brief to that effect. And yet the

union recognized that refusal to cross a picket line in the context of these parties was a violation. Surely, the reason why it recognized it is because of the Aldefer award back in 1972 -- early '73, I should say. And it is our contention that that makes very clear that the union recognized all of these decisions as having a continuing effect.

All that -- all of the provisions of the collective bargaining agreement were for the term of the agreement. This was simply repeating that which was part and parcel of the agreement.

QUESTION: Do you think the arbitrator back in the previous arbitrations had to be interpreting the terms of the contract to decide whether the greater punishment could be issued or whether there were greater duties or whether there was a waiver?

MR. SILEO: The arbitrator interpreted the terms of the contract and took into consideration, as this Court admonished arbitratiors to do, industrial common law.

QUESTION: Because the decisions of the arbitrators in these two instances were not complete enough to let us know what the arbitrator was really basing it on?

MR. SILEO: Well, I think it is clear that the

arbitrator definitely did refer to industrial common law. However, we can presume that the arbitrator certainly took into effect 11.1, the no-strike clause. And there is no reason why we should not further presume that the arbitrator --

QUESTION: What could he have looked at other than the no-strike clause, do you think, to determine that there had been a waiver or --

MR. SILEO: Well, I -- that -- one of our points, of course, Justice O'Connor, is that he didn't have to determine there was a waiver, he determined that there was a contractual violation. Okay. There was a contractual violation.

And in making that determination, he took into account, we contend, 11.1, the no-strike clause; 12.2, the responsibility of the International; 9.4 the additional rights that union officers have under the contract; the continuous service provisions, 2.7, 6.4(a) and 6.3(a); all those continuous service provisions which underline how important it was for this employer to have such continous service. And yes, the industrial common law, as this Court said in the Steelworkers Trilogy, in Warrior, industrial common law certainly is something to be looked at.

But it is our contention, Justice O'Connor,

that the waiver issue has nothing to do with this case. It is our contention that this is a contractual claim case, barring the issue that Justice Rehnquist raised as to operation of law.

QUESTION: What is the waiver issue? I realize Justice O'Connor mentioned it. I am not sure I understand.

MR. SILEO: Well, I prefer not having to make their case in bringing up what the waiver issue is. However --

QUESTION: Could you just describe it and if --

MR. SILEO: Yes. What they're contending, Justice Rehnquist, is that at the time -- at the time Wayne Howard, the arbitrator in this case in 1973, came down with his decision and at the time of the Seidenberg decisions a couple of years later, that those decisions didn't constitute a waiver of the statutory right which the Labor Board and the unions see in this case. We see no statutory right in this case.

QUESTION: Once you sign a contract, you're bound to carry it out. I don't see that as being a waiver problem.

MR. SILEO: Okay. Well, of course, that's -- our point is that this is a contractual claim case and not a statutory right case. Our claim is that in order

to have a statutory right case, you have to have disparate discipline, and this is not disparate discipline -- I mean you have to have disparate discipline of like cases, of individuals similarly situated. We don't have similarly situated individuals. The contract was interpreted by the arbitrators as making very clear that we did not -- we do not have similarly situated individuals.

Returning to the analysis of the Fournelle decision, I think I have finished. There was a follow-up to the Fournelle decision, a case which I shall mispronounce as Szewczuga. But it involved Miller Brewing, in any event, which is easier to pronounce.

In that case the Court in no way, the Circuit Court, District of Columbia, in no way departed from the Fournelle holding. And as a matter of fact, there was no arbitration decision introduced in that case. And the Circuit Court, District of Columbia, in that case clearly demarcated its difference from the Third Circuit.

In this case this Court, consistent with its teachings, can promote the national labor policy of industrial -- of encouraging industrial peace through the collective bargaining process, including arbitration, and it can do so without infringing upon the functions of the National Labor Relations Board.

That Board altogether too frequently takes a parochial view of its own functions. It was admonished not to do so in a different context, albeit a different context, but in a language that is landmark language of this Court in Southern Steamship. It was told to accommodate itself.

In this case, we submit, the Labor Board should accommodate itself to arbitration. In this case, we submit that there is -- because there is a contractual claim rather than an unfair labor practice issue, that makes inapposite respondent's reliance upon authority which, in turn, cites this Court's decisions in Acme, Strong, C&C Plywood, and Carey.

As a matter of fact, those holdings do not govern this situation, and there is language in those holdings which we have cited at page 29 of our principal brief and pages 8 and 9 of our reply brief, which are helpful to us in this particular case.

The contractual claim here was settled in May of 1973 when Wayne Howard, the first arbitrator, came down with his decision imposing greater duties upon union officers.

That remained the law of the parties, the law of that shop, unless reversed in negotiations or by a subsequent arbitrator. Not only was it not reversed by

a subsequent arbitrator, it was reaffirmed by a subsequent arbitrator. It was also reaffirmed by the union in various ways. The very same two union officers involved in this dispute four years before had involvement in another unfair labor practice strike. In October of 1973 Lang and Light participated in an unlawful strike. They were disciplined more severely at that time, just as they were disciplined four years later in this case.

For their increased discipline, they did not grieve. They sat on the union executive committee. In the capacity of the union executive committee's members, they were the ones entrusted, according to Lang's testimony, they were the ones entrusted with the responsibility of determining whether or not they should grieve their own cases and other cases.

Lang testified at the Joint Appendix, the brown one, at page 92 that they took into the grievance machinery and arbitration cases they liked, quote, liked. They didn't take their own cases. As long ago as October of 1973 they recognized that they were bound by the May '73 arbitration award. They took other cases. In December of 1974 there was yet another unlawful strike. Following that unlawful strike, in which union officers were disciplined more severely,

there was an arbitration hearing in September of 1975 before Arbitrator Jacob Seidenberg.

At the time of that hearing there was no challenge by the union to the fact of the duties. The only challenge was as to whether the particular union officers had fulfilled their duties. And Arbitrator Seidenberg found that in a couple of instances they had fulfilled their Howard duties -- although he did not use the word "Howard duties," clearly he was talking about the same duties -- and as a matter of fact, found that the union was correct in those instances. In the other instance involving union officer participating in the unlawful strike, the arbitrator Seidenberg, the second arbitrator, rubber-stamped the first arbitrator, Wayne Howard.

Now, it's -- it's our contention that those facts, the prior involvement of Lang and Light, their recognizing the Howard decision, the subsequent arbitration and the facts leading up to that, the fact that the union didn't challenge in the arbitration decision, that was further rubber-stamping the original decision. There were two renegotiations. There was no attempt made during those renegotiations to change the Howard decision.

As a matter of fact, the Seidenberg decision

occurred before the second of the negotiations, and arising from the second negotiations the contract was signed on behalf of this union by the very same two individuals, Lang and Light.

And we submit that when they signed that contract including that no-strike clause, they were signing and rubber-stamping the Howard decision which they themselves had had a party in in October of '73 by not challenging those duties that were imposed.

We have said that in this case it would -- this case could dangerously erode the Steelworkers Trilogy. And the reason why we say that is because if respondents prevail in this case, it would mean that arbitration is not what this Court said it was: the terminal point of disagreement. Indeed, it would allow the union a second bite at the apple.

The union could take advantage of -- and I mean not to impugn the Labor Board, but it is certainly not unknown for them to change their policies, and if I may use the word, there is some waffling that has gone on in many areas of law, including this, because as I am sure you are familiar from reading the briefs in this area of the law, prior to 1977, Justice Rehnquist's question about whether or not it was necessary to have the arbitration decision in order for us to prevail. In

effect, that was the question that was asked, or whether there was a second issue.

At that time, prior to 1977, the National Labor Relations Board had held that it was not necessary to have an arbitration decision or duties spelled out. As a matter of fact, it was sufficient that there were union officers and greater -- and greater duties were presumed and greater penalties could be imposed. And in spite of the Board's attempt to say that that was not the clear rule of the National Labor Relations Board before 1977. Indeed it was.

In any event, there has been waffling by the Board on many issues, and there certainly would be -- certainly could be in the future. A party can come in and collaterally attack -- and that is what is being done here -- collaterally attack decisions of the parties, arbitration decisions that are four years old, and by collaterally attacking those decisions, have them set aside because the Board's position has changed. And by having them set aside, that would cause the party that had prevailed in those arbitration decisions to have been deprived of its bargain, a bargain that it may well have relied upon as here, as here as part of its no-strike obligation and in other contexts as part of some other obligation. And they may have made

concessions during the course of negotiations based upon that.

They may well have made withdrawals of demands based upon what they regarded as settled arbitral construction. Instead, the Labor Board's changing fancy can be taken advantage of by an opportunistic party which would cause that settled arbitral construction to be set aside and which would further cause the windfall to the opportunistic party which this Court in its separate concurring and dissenting opinion in Magnovox sought to avoid.

The Labor Board, by collaterally attacking settled arbitral construction of the contract, violated Congress' dual admonitions at section 203(d) of the Act that final adjustment of grievance disputes is desirable by a method agreed upon by the parties and to avoid industrial strife.

Their approach can only result in causing industrial strife. They are attempting to straitjacket us -- and when I say "us," I mean management in general and Metropolitan Edison in this case -- in inapplicable statutory rights and in phantom waiver rights.

I would like to reserve the balance of my time if I may.

CHIEF JUSTICE BURGER: Mr. Come.

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Union officers Light and Lang engaged in the same unauthorized refusal to work as did the company's other employees, yet they received suspensions of 29 days, were warned that they would be discharged the next time, while the other employees received only 5 to 10-day suspensions.

The notices issued to Lang and Light made clear that they had received the enhanced discipline because they were union officers. It is the Board's position that such a disciplinary standard constitutes disparate treatment that forseeably discourages employees from engaging in the protected activity of assisting the union by serving as union officers.

QUESTION: What is the Board's view about the posture of the union leaders in terms of whether rank-and-file should follow their directions; for example, when they say don't go on a strike? Is there any Board law on that?

MR. COME: Well, it only comes up insofar as you have a question of whether there was any discrimination that the Board can remedy. Now, I want

to make --

QUESTION: Well, isn't it --

MR. COME: -- it perfectly clear that the Board's position is not to say that union officers enjoy any right to engage in unprotected strikes. The Board's position permits the employer to discipline a union officer for engaging in an unauthorized work stoppage to the same extent that any other employee could be disciplined.

Secondly, if there is evidence that the union officer actively led the strike or instigated it, the Board's position would permit more severe discipline. There is no such finding in this case. The Court of Appeals sustained the Board's finding that Light and Lang did not actively lead this strike nor call it. As a matter of fact, they made every effort to stop the strike, and they were ultimately successful in getting the picket line removed so that the men could return to work. So we do not have a case --

QUESTION: But they didn't carry out the request that management made to them as the manner -- as the manner in which management wanted that done.

MR. COME: They did -- they did not immediately return to work, that is correct.

QUESTION: Did the Board --

MR. COME: And for that, they could have been disciplined just like the rank-and-file employees.

QUESTION: Okay. But what the company wants to do here is discipline them more than --

MR. COME: Yes.

QUESTION: -- the rank-and-file.

MR. COME: Well, we submit, Your Honor, that --

QUESTION: I am going to ask you a question, Mr. Come --

MR. COME: Surely.

QUESTION: -- if you will slow down a minute and wait for me. Does the Board make any distinction between an act of management in disciplining union leaders which is intended as a subterfuge by management to simply get at the union leaders and penalize them for being union leaders on the one hand, and an effort by management to treat union leaders as being more responsible than rank-and-file for the strike because they are union leaders and you expect that of someone who is the head of an organization?

MR. COME: Well, of course, your first situation, if you could prove bad motive, you would have the classic violation of 8(a)(3).

QUESTION: But assume you don't prove that, though?

MR. COME: You can't prove bad motive, it is the Board's position, absent the effect of a contract which might impose higher responsibilities on union officers, and that is the second issue in this case. The mere act of disciplining a union leader or officer who did not actively instigate or lead the strike is discrimination which has the forseeable effect of discouraging the protected activity of serving in union office. As a matter of fact, it is inherently destructive of that right.

I might say that the four Courts of Appeals that have considered this naked proposition have agreed with the court -- or the Board. The most recent decision is by Judge Gee, writing for the Fifth Circuit in South Central Bell. And the reason for it is this, Your Honor. Unauthorized work stoppages, whether they are an expression of resentments in the plant or as here, the result of the employee's aversion to crossing another union's picket line, often do not begin under the leadership of a union officer. This is shown by the facts of this case.

Following the August 4 work stoppage, President Lang told the members at a meeting that the International had said that under the contract they were obligated to cross the picket line.

QUESTION: Was Lang an employee?

MR. COME: Lang was an employee. He was also an elected official.

QUESTION: Did he participate in the strike?

MR. COME: He did not cross the picket line.

QUESTION: You don't think that is a signal to other employees that it is perfectly all right to strike?

MR. COME: Not in the circumstances where he made it plain that --

QUESTION: Well, they didn't -- he didn't cross the picket line and anybody --

MR. COME: He didn't --

QUESTION: -- anybody else could say, well, here's the union boss not going to work, he is observing the picket line, why shouldn't I?

MR. COME: Well, he --

QUESTION: Isn't that leadership?

MR. COME: It is not, in the view of the Board and of the Courts of Appeals, sufficient to --

QUESTION: Has the Board actually addressed straight that issue?

MR. COME: Yes, Your Honor, it has. And the four Courts of Appeals have agreed with it.

QUESTION: And it is an issue in this case.

MR. COME: It is. It is the issue in this

case.

QUESTION: Isn't it an essential ingredient of the whole industrial picture that the Board wants and unions want members to follow the leader?

MR. COME: But in a wildcat strike the union officer may well believe that he will be most effective with the men or women in getting the unauthorized strikes ended if he does not cross that picket line but instead devotes his energies, as Lang and Light did here, to removing the picket line.

As the Seventh Circuit pointed out in Heist, for the union officer to take the additional step of crossing that line is often suicidal because he completely depreciates any credibility that he had with the men by being a scab. And this is what Lang and Light were told at the union meeting on August 4th where they urged the men in the future not to respect the picket line.

It is for that reason that the mere naked act of a union officer in doing nothing more than not crossing the picket line has been held by the Board and the Courts that have reviewed it as not constituting sufficient action to justify disparate punishment. The only such disparate punishment is not likely to end the wildcat strike and can only have the forseeable effect

of discouraging employees from wanting to serve as union officers.

QUESTION: But, Mr. Come --

MR. COME: As a matter of fact --

QUESTION: Mr. Come.

MR. COME: Yes, sir.

QUESTION: Even the Board agrees that particular contractual provisions could do it, and all the management here is contending is that an arbitrator's construction of a contract should also permit it. Now, ought the Board to get where it concedes that a particular type of contract can produce the result? Is it really the province of the Board to get into the business of interpreting contracts?

MR. COME: Well, that brings us to the second issue in this case and -- which I now will turn to.

This Court has recognized in the Acme case and in Carey against Westinghouse and under similar circumstances in Alexander versus Gardner-Denver which involved Title VII, that the relationship of an arbitrator to the courts, which is what the Trilogy deals with, is quite different from the relationship of the Board to the arbitral process. The Board -- the arbitrator's task is to interpret the contract. And in interpreting the contract, he can rely on most

anything. He just has to get it somehow from the essence of the contract. He doesn't even have to give reasons. And a court will usually sustain him because he is an expert on the law of the shop.

QUESTION: Well, Mr. Come, wouldn't the court also sustain usually the next arbitrator who decided the issue exactly contrary to the first arbitrator?

MR. COME: They might.

QUESTION: Well, I mean one arbitrator isn't bound by another, is he?

MR. COME: Well, that is correct, but --

QUESTION: And a court would probably sustain them both.

MR. COME: The point, though, is that the Board's job is to interpret the statute, and section 10(a) provides that the Board's power shall not be affected by any other method of -- or agreement or adjustment.

Now, the Board, of course, has discretion to defer to an arbitrator's decision. And it has indicated in the Spielberg case and subsequently the standards under which it will defer to an arbitrator's interpretation of the contract in a situation where there is a congruence between statutory and contractual rights.

But among the conditions that must be met for such deferral in the Board's judgment, and the courts have tended to agree with these standards, is that the arbitrator must have decided not only the contract issue but the statutory issue and to have done so in a way that is not repugnant to the Act.

Now, one of the fundamental principles in the statute that the Board has enunciated and has been accepted by the courts over many years is that if a statutory right can be waived in a collective bargaining agreement by the parties -- and there are some statutory rights, like the right to strike, that can be waived, and there are others that are so fundamental to the employee, like the right to unseat the incumbent bargaining agent that the court was faced with in Magnovox, that cannot be waived, and as this Court indicated in Alexander v. Gardner-Denver the right to be free of racial discrimination -- if you do have a right that can be waived, it has to be done by clear and unmistakable language in the collective bargaining agreement, generally.

Now, the Board and the Court, Judge Gee, who had a similar problem in South Central Bell, sustained the Board's view the the kind of contract language that you had here and the kind of arbitrator's decisions of

the contract that you had here would not be sufficient to constitute a clear and unmistakable waiver --

QUESTION: Well, before you get to the waiver issue, I presume you have to have some finding of a violation of the provision. Does the Board interpret the section 8(a)(3) where it terms about discrimination in regard to higher tenure of employment to mean that any difference in treatment at all between union officials and union rank-and-file by management is a violation of that section and therefore you must get to the waiver question?

MR. COME: Well, I wouldn't go so far as to say that any disparate treatment, but certainly disparate discipline for doing the same refusal to work here would violate 8(a)(3) because it is based upon -- the sole difference is based upon holding union office, I mean the reason for the enhanced punishment. And that has the tendency to discourage engaging in that protected activity. So you have to have a discrimination that is based upon union or protected activity that would have -- that would be inherently destructive of that right.

QUESTION: But it is not at all based on bad motive or on --

MR. COME: No, it is not based on bad motive.

But the court indicated in Erie Resistor and again in Great Dane that you can have violations of section 8(a)(3) that are not based on bad motive where you can find that the result of the discrimination is to be inherently destructive of a section 7 right. And that is what is the case here for the reasons that I tried to indicate earlier would be true of disciplining a union officer more severely for engaging in an unprotected strike solely because he is a union officer, without -- if you don't have a contract that would permit such enhanced discipline.

Now, the question is whether this -- the Board was reasonable in concluding that this contract, even with the gloss put on it by the arbitrators, was not sufficient to show that the parties -- and the parties we're talking about, the union, which is the one that would be waiving the right of its employees to be free of such enhanced discipline and for becoming a union officer, consciously agreed to permit such enhanced discipline. Now the --

QUESTION: But before you get to that question you have the question of whether the Board was warranted in finding there was an 8(a)(3) violation at all.

MR. COME: That is correct, Your Honor. And I tried to address that at the outset and to point out

that four Courts of Appeals, including most recently the Fifth Circuit, have agreed with the Board that absent a contract waiver or a contract clause permitting such enhanced discipline, there would be a violation of section 8(a)(3).

QUESTION: And that is your argument?

MR. COME: That is our argument.

QUESTION: That four Courts of Appeals have agreed with the Board?

MR. COME: No, it is not -- well, I tried to explain to Your Honor the reason why the Board's position is a reasonable one.

QUESTION: Mr. Come, would you agree that, as I follow the argument, your opponent says we should decide the case narrowly just by looking at the arbitration awards, but if I understand your presentation, we really have to decide both issues because you say that we can't evaluate the arbitration issue without first deciding whether there would be a discriminatory act by a disparate discipline. So we really have to decide both issues, under your view?

MR. COME: I think that is correct, Your Honor, because it's because if it is a statutory right and a statutory violation --

QUESTION: Then you get a higher standard of

waiver is what you're saying?

MR. COME: That is correct.

QUESTION: Yes.

MR. COME: Now, the arbitrator's decision --

QUESTION: Mr. Come, I suppose it's hard to figure out how you could discipline the union as distinguished from its leadership in a case like this. But I suppose you'd make the same arguments, you couldn't discipline the union either?

MR. COME: Well, I think --

QUESTION: If there is some back pay involved somehow or other, it might --

MR. COME: Well, this Court held in Complete Auto Transit, I believe, that you cannot hit the union for damages absent a showing that they were --

QUESTION: Well, that's absent a showing. I just --

MR. COME: Yes.

QUESTION: -- would it be a showing enough if the union as a union didn't take some affirmative steps?

MR. COME: No, it would not be.

QUESTION: Yes.

MR. COME: I have to turn it over to my colleague, Mr. Cohen. But I just want to say that the arbitrator's decisions, as the Court will see on reading

them, are -- point to no-contract language. There is none here. You have just the general no-strike clause. And the Board believes that that is insufficient to measure up to the clear and unmistakable waiver that would be required for waiving a statutory right. Thank you.

CHIEF JUSTICE BURGER: Mr. Cohen.

ORAL ARGUMENT OF LAURENCE J. COHEN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. COHEN: Thank you, Mr. Chief Justice.

QUESTION: On the point that was being addressed at the close of your colleague's argument, I take it to mean that if the contract provided that greater discipline could be given to officers than rank-and-file members in a situation like this, that it could be done. Is that --

MR. COHEN: I think that question, Mr. Chief Justice, goes to the heart of the case here. The union's position proceeds on a two-step analysis. The Board's does not. Our --

QUESTION: But let me --

MR. COHEN: -- our initial position is that the right to protect employee union officials from employment discipline for the manner in which they exercise their office may not be waived. The Board says

the Court need not reach that issue here.

If you put that aside, if the Court disagrees with us -- and I will probably address that after lunch -- if that right may be waived, then the question is exactly that: what does the contract provide?

QUESTION: If the contract -- assuming that a contract provides it, just exactly that, how does it help the basic argument that the Board has been making that this discourages people from becoming union leaders if there is some way in which union leaders can be disciplined more than rank-and-file members?

MR. COHEN: It might indeed have that effect, but they would have consciously given up that right to be free from discipline, to have placed that additional burden on themselves in the bargaining process.

QUESTION: You don't think the acceptance of union leadership imposes that obligation, an obligation to lead in trying to avoid illegal strikes?

MR. COHEN: Not at all. We think they -- you begin here with a statutory right to be free from discrimination.

QUESTION: When you say "not at all," do you mean there is no obligation on a union leader to try to enforce the union's contract obligations?

MR. COHEN: In this context, we submit that

there is no such responsibility inherent in union office itself. I agree with you that if the right may be waived, the contract may spell out those rights and responsibilities.

And by way of contrast and by way of example, the Fifth Circuit in its South Central Bell decision looked to an earlier Third Circuit decision in Gould where the parties very specifically provided if there is a work stoppage, the union official shall do this, this, this, and this. They said that is an assumption of responsibilities.

On the other end of the spectrum, they said, lies Metropolitan Edison where you have nothing more than a general or neutral no-strike clause; therefore, the contract imposes no such responsibilities.

QUESTION: But did I understand you, Mr. Cohen, to say that you are going to argue perhaps after lunch that such a clause is in any event not enforceable?

MR. COHEN: That is the union -- is not the statutory right of the union official --

QUESTION: No, I --

MR. COHEN: May not be waived --

QUESTION: -- if you have a clause in the contract that said you may impose on union leaders greater discipline, are you going to argue that that is

an unenforceable clause?

MR. COHEN: No.

QUESTION: What are you going to argue?

MR. COHEN: No, I am not.

QUESTION: What are you going to argue?

MR. COHEN: I am going to argue that the statutory right of the union officials who are employees to be free from employment discrimination may not be waived by contract. In fact, maybe I should do that right now in response to your question, Justice Brennan.

QUESTION: It sounds to me as though that adds up to the same thing. But you go ahead.

MR. COHEN: Well, I view it, Mr. Chief Justice, as I say, the first of two steps. Most -- most -- all of the courts below have said that the right may be waived. We think they have come to that conclusion by not analyzing what this Court -- the distinction this Court drew in Mastro Plastics on the one hand and on Magnovox and Gardner-Denver on the other.

And the difference is between collective rights, the right to strike in Mastro which may be waived, and the -- as basic associational rights which were involved in Magnovox, which this Court held could not be waived.

And as the Board said in a leading case which

was cited by the Third Circuit below and by most of the other circuits that have dealt with this issue, General Motors Corp., the holding of union office is the essence of protected union activities.

The Court then drew the same distinction again in Gardner-Denver, which arose in the Title VII case, where Justice Powell speaking for a unanimous court, distinguished between collective rights of employees to strike and an individual employee's right to be free from employment discrimination. Under Title VII, of course, it's race or sex discrimination. But here there is another specifically prohibited form of employment discrimination, that based on union activity, to wit, the holding of union office and the exercise of union responsibilities.

Now let me address a question that Justice White asked, was there a signal here? I would like to remind the Court of the context in which this case arose. The signal was precisely the opposite, the administrative law judge found, and the Court of Appeals agreed, in effect, that the leaders virtually -- Lang and Light -- begged the employees before this incident on several occasions, you have a responsibility to cross the picket line of another union and go to work.

The employees at two union meetings shouted

them down, said that anyone who went through a picket line, especially an officer, was a scab, that the officers lost control of the meeting. And if there was a signal, Justice White, all along it was: Go to work, you have a duty to do so. And there is support in the record.

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

(Whereupon, at 12:00 noon, the Court recessed, to reconvene at 1:00 p.m. this same day.)

AFTERNOON SESSION

(1:00 p.m.)

CHIEF JUSTICE BURGER: You may continue, Mr. Cohen.

MR. COHEN: Mr. Chief Justice, in my remaining time I would like to make several points which arose this morning.

First the company contends that affirmance of the decision below would undermine the Steelworkers Trilogy. I submit that the Board's right to review contract language in order to determine statutory rights under the National Labor Relations Act first are different from the contractual issues which arbitrators resolve under the Trilogy, and second, the Board's authority to make those determinations has been expressly upheld in what I will call a quartet of later cases; specifically, C&C Plywood, Acme, Strong, and Gardner-Denver.

After a thoroughgoing discussion of that issue in Acme, the Court had this sentence which I think sums up my point perfectly: "To view the Steelworkers decisions as automatically requiring the Board in this case to defer to the primary determination of an arbitrator is to overlook important distinction between those cases and this one. That is at 385 U.S. 437.

Now, I think it is important to recall that a person who serves as an employee and a union official has two sets of duties. As an employee, certainly he has obligations to the employer. As a union official, he has duties running only to the union and the union members -- unless, of course, he waives the right as an employee to be free of employer discipline for the manner in which he exercises his official functions in the union. And that gets us to the question of what does constitute an adequate waiver.

That question had its genesis in Mastro Plastics, where this Court required an explicit waiver of statutory rights. Since then the circuit courts and the Board have phrased it in terms of a clear and unmistakable waiver. We submit that no such waiver can be found in this case.

There is no language in the agreement that imposes specific duties on union officials. The general or neutral no-strike clause is not sufficient. It wouldn't suffice under Mastro, and both the D.C. Circuit and Fifth Circuit have held it inadequate in these circumstnces. The Howard and Seidenberg arbitration awards are not sufficient because they did not even purport to decide any statutory issues. And as Justice O'Connor pointed out, they really didn't deal with any

specific provisions in the contract itself.

In fact, if everything else the company said were correct, its argument would still fail, we believe, because of the language of section 9.2 paragraph 4 in the agreement, which is the arbitration provision, which states that arbitration decisions shall be "binding for the term of this agreement."

We think that was clearly a term of limitation on the precedential effect of awards that are issued. The company throughout its two briefs cites the Elkouri text, which is the leading arbitration text. There is an additional sentence which is not found in the company briefs: "The parties are free in any case to stipulate as to what precedential role a forthcoming award shall play." That is at 379 of the Elkouri book. That is precisely what they have done here.

Now, Justice O'Connor, contrary to my distinguished colleague, I would argue that the phrase in the agreement is not surplusage. He says it occurs throughout the agreement. In fact, their brief cites only five instances in an agreement of almost 60 pages where it is found.

With the exception of the no-strike clause, none of the provisions in the agreement which Mr. Sileo cited earlier were in fact mentioned by arbitrators

Howard or Seidenberg.

And finally the -- well, I made that point already.

The other point I would like to make is that unions and employers alike agree about the destructiveness of wildcat strikes. Where we differ is on the question of whether disparate discipline of union officials helps that problem or exacerbates it. We think it exacerbates it.

Although I differ in some respects from some of Justice Powell's concurring opinion in Complete Auto Transit, I think he summed up the problem in this one sentence in a wildcat situation: "Worker recalcitrance sometimes is directed at the incumbent union leadership as much as at company management." 451 U.S. at 422. Thank you very much.

CHIEF JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Sileo?

MR. SILEO: Yes, I do.

CHIEF JUSTICE BURGER: You have seven minutes remaining.

ORAL ARGUMENT OF DONALD F. SILEO, ESQ.,
ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. SILEO: First of all, with respect to the facts in this case, I think it important to note that

contrary to the Heist situation, which was quoted or referred to by Mr. Cohen, the union officers in this case made no effort whatsoever during the strike to be of any help. As a matter of fact, contrarywise, they refused to cross the picket line in spite of being told to do so repeatedly, in spite of being told that they would be in big trouble.

And at one point union officer Lang contemptuously said, listen, if we cross this picket line of the operating engineers and next year we have our own picket line during negotiations, well, they'll cross our picket line. And I submit to you that that shows a contemptuous disregard of their duties.

Throughout the strike there was no effort made to be of help. Prior to the strike, the fact that they spoke to the rank-and-file membership and they sought to have the rank-and-file members cooperate in the event there would be a similar incident to that which occurred on October 4th, where there was a refusal to cross a picket line, their efforts prior to August 30th, if anything, demonstrate that the union officers recognized they had a duty.

They recognized that duty, and they fulfilled that duty prior to the strike. But that was days before the strike. And then when they were met with -- when

they were rebuffed, instead of seeking perhaps union sanctions or seeking some kind of creative way to avoid what they foresaw, they just treated it as inevitable.

And when the strike occurred, they reacted as if their primary concern was their internal union political situation instead of the no-strike clause which they had signed, which was far and away the most important aspect of their responsibility.

As far as the analysis that was suggested by Justice Rehnquist, which was to the effect that we first have to decide whether there has been a violation, we decided there has been a violation of section 8(a)(3) if we have similarly situated individuals treated differently. That's what happened in Erie Resistor, that's what happened in Great Dane Trailer: similarly situated individuals treated differently. And that's why, having treated them differently in those cases, that was discrimination.

Here we don't have similarly situated individuals. We have rank-and-file employees juxtaposed against union officers. We say they are not similarly situated, for two reasons: number one, because as union officers they inherently have a greater responsibility. As union officers they -- and stewards -- they have a responsibility to lead.

This Court recognized those leadership qualities in the Weingarten case, an entirely different -- in an entirely different context, but where you encouraged that if the rank-and-file employee wants a union officer or a steward present, he should have that steward present.

Why should we presume that the union officer or the steward at the picket line is going to be so ineffectual? There is no reason for us to presume that from a factual standpoint at all. So we say --

QUESTION: Do you want the stewards to go out and break up the picket line?

MR. SILEO: I beg your pardon?

QUESTION: Do you want the stewards to break up the picket line?

MR. SILEO: Just -- in this situation, Justice Marshall, we had the picket line already established. That picket line was another union's picket line. Okay. The union officers' only effort was to remove that picket line. We say that we didn't hire them as mediators, thank you. If anything, by attempting to remove the picket line, they were rubberstamping that they had no duty to cross it.

Now, if what you mean is in a context where the principal union --

QUESTION: I think you and I know what I mean.

MR. SILEO: Well, okay. If what we mean is given a situation where the union that is involved sets up a picket line, do the union officers have a duty to break up the picket line? Not a stranger union, but another union. We believe that, number one, they have a duty not to participate in that picket line; and number two, to make clear to the other employees that they shouldn't participate in that picket line.

QUESTION: Do you think they must cross the line?

MR. SILEO: Yes. Yes. It's our position that they must cross the line.

QUESTION: That is, that they must, in your view, say this line is -- does not really exist as a matter of law because it's an illegal line, it is not a picket line under labor law?

MR. SILEO: That's correct. That's --

QUESTION: And therefore, they should lead the union, you say, by crossing that -- quote -- line.

MR. SILEO: Absolutely. That is our position. They should lead the union under those situations.

QUESTION: They don't have to go out and use force to break it up?

MR. SILEO: No, they don't have to use force.

QUESTION: You're not saying at all --

MR. SILEO: Nobody is suggesting -- nobody is suggesting that they use force to break it up. But they ought clearly by their actions signal their disagreement with that line.

If I may move on to --

QUESTION: Well, before you move on --

MR. SILEO: -- the second point --

QUESTION: -- you would say they have to cross the line even if it's a legal line by another union.

MR. SILEO: Yes, certainly.

QUESTION: Yes.

MR. SILEO: Oh, certainly, we would say that.

QUESTION: Yes.

MR. SILEO: Absolutely. That's -- if it's in violation as stipulated here, Justice Stevens. If it's a violation --

QUESTION: Well, it's the failure to cross is the violation, not necessarily the picket line. This is a failure -- it's the refusal to cross the picket line --

MR. SILEO: That's correct.

QUESTION: -- that's the violation.

MR. SILEO: In this context --

QUESTION: Even though the picket line itself

is a perfectly lawful labor activity.

MR. SILEO: Right.

QUESTION: Yes.

MR. SILEO: Because in this context there had been an arbitration decision, not either of the two that are the principal ones in this case, but the Aldefer decision where it had been held that the refusal to cross a picket line was unlawful.

QUESTION: What kind of a line do we have here, now just to get that straight?

MR. SILEO: We have a stranger picket line. We have another union that established a picket line.

QUESTION: It was a legal line, though.

MR. SILEO: It was a legal, insofar as we are concerned, we can treat it as if it were legal.

QUESTION: But it was a line that if they didn't cross, it was in breach of contract.

MR. SILEO: That's correct. That's correct. That's clearly the case. Now, that's the reason why we -- that's one reason why we say similarly situated, because it was inherent in their position.

The other reason why we say that the union officers were not similarly situated is, very simply, because by contract the Board and five circuits now hold that you can impose greater duties on union officers, or

we say it was imposed by the arbitration awards. That was part and parcel of the collective bargaining agreement. They were in place 4-1/2 years. The Spielberg analysis --

QUESTION: Yes, but wouldn't another arbitrator be perfectly free to disregard that?

MR. SILEO: Justice White, you make my point better than I could make it, because yes, he can. But it was the parties who bargained for that second arbitrator to perhaps disagree with the first arbitrator.

QUESTION: Yes, I know, but the parties are also operating under the federal law, and if a second arbitrator can disregard the first and interpret the contract as not waiving, or whatever you want to call it, waiving the rights of union officers, why shouldn't the National Labor Relations Board be able to do that?

MR. SILEO: Well, Justice White, it is my position, it is our position, that the party -- if a second arbitrator reverses the first arbitrator, it was his judgment that was bargained for by the parties. If, on the other hand --

QUESTION: What should the Board do?

MR. SILEO: -- this case supposes --

QUESTION: What should the Board do if two arbitrators disagree as to what the contract means?

MR. SILEO: If two arbitrators disagree as to what the contract, and if it is a matter that is presently under consideration, unlike this situation, we don't have here this typical Spielberg situation which the Board would rely upon. We have a situation where the arbitration awards were already in place, they were part of the contract.

QUESTION: Okay.

MR. SILEO: The posture in which the Board becomes involved is after the arbitration award.

QUESTION: And the contract had been renewed two or three times --

MR. SILEO: That's --

QUESTION: -- after these arbitration decisions?

MR. SILEO: That's correct. That's correct.

QUESTION: Two or three times --

MR. SILEO: I am sorry.

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

(Whereupon, at 1:12 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:
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BOARD, ET AL. # 81-1664

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BY Pirie Hammond

(REPORTER)