ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-2150

TITLE JIM McNEFF, INC., Petitioners
v.
FRANK L. TODD, ET AL.

PLACE Washington, D. C.

DATE January 17, 1983

PAGES 1 thru 50

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IN THE SUPREME COURT OF THE UNITED STATES

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JIM McNEFF, INC., :

Petitioners :

v. : No. 81-2150

FRANK L. TODD, ET AL. :

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Washington, D.C.

Monday, January 17, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:41 a.m.

APPEARANCES:

JAMES T. WINKLER, ESQ., Long Beach; on behalf of the Petitioner.

WAYNE JETT, ESQ., Los Angeles, California; on behalf of the Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Winkler, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES T. WINKLER, ESQ.

ON BEHALF OF PETITIONER, JIM McNEFF, INC.

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

This case is before the Court pursuant to writ of certiorari pursuant to 28 U.S.C. Section 1254. Respondents, the Operating Engineers Trust Fund, filed a Complaint for fringe benefit collection pursuant to Section 301 of the Labor Management Relations Act.

The District Court on cross motion for summary judgment granted motion for summary judgment for respondents. The Court of Appeals for the Ninth Circuit affirmed. The Court of Appeals for the Ninth Circuit in this decision passed on the issue of the enforceability of minority pre-hire agreeements and noted in its decision the conflicting decisions of the various circuits and that adopted what it called to be a middle ground between the decisions of the Eighth and Tenth and the -- on one hand which state that 301 actions are different than unfair labor practice actions and the conflicting opinion of the Fifth Circuit which adopted the NRLB position that the minority pre-hire agreements

are unenforceable unless the union represents the majority of the employees.

The Ninth Circuit adopted what it called a middle ground, that there has to be a notice of repudiation; until then minority agreements are fully enforceable and that the issue of coercion in obtaining the pre-hire agreements is not applicable until that notice of repudiation.

Now, the department interpretation in this case involves an interpretation of Section 8(f) of the Act and this Court's decision in Higdon. Higdon involved an unfair labor practice matter, and therefore it is important to try and figure out what effect an unfair labor practice context will have in a Section 301 litigation.

And in view of that, it is important to look at this Court's decision in Howard Johnson, which said that the basic policies in an unfair labor practice context cannot be ignored in a Section 301 case.

In Howard Johnson it involved a Burns successorship issue -- excuse me, it involved an attempt by a union to apply the contract of a predecessor to a successor, and then Burns was not allowed in the Section 8(a)(5) context. This was again attempted in the 301 context in Howard Johnson, and this Court would not

allow that.

Now, in order to understand the Board's position in Section 8(a)(5), you have to go back to the Board's position in R.J. Smith. The Board's case -- the case of R.J. Smith was commented extensively by -- upon extensively by this Court in Higdon. In R.J. Smith it involved an employer which had not complied with the pre-hire agreement.

According to the administrative law judge before the Board, the administrative law judge said that there's -- noncompliance had been concealed from the union. And that's a very important point.

Despite this active nonconmpliance by the union, the Board reviewed legislative history and decided that because there was no majority status, that the contract was unenforceable.

And it is important to note that it did review legislative history and in the -- in its interpretation of Section 8(f) of the Act. It noted that there are certain provisions that -- there are certain exceptions in Section 8(f) that Congress intended to allow -- excuse me -- Congress intended to allow for employers to have a steady access of -- a steady supply of workmen from the labor organization and to -- excuse me -- the provisions that Congress wanted to allow in enacting

Section 8(f), it wanted to allow employers to have two benefits.

One was to give the employers an opportunity to have workmen provided by the union. Because employers often go from job site to job site in the construction industry, they don't necessarily have their stable complement of employees.

And secondly, pre-hire agreements would allow employers the opportunity to make bids based on a predetermined cost.

Now, because of these two benefits, Congress allowed pre-hire agreements to be not unlawful under Section 8(a) and 8(b) of the National Labor Relations Act. But the Board noted that the Section 8(f) language itself showed the limits of its effect, and it noted the proviso to Section 8(f) which stated that an election may be called upon by any -- by anybody and it would not despite the existence of the contract.

Now, normally, elections cannot be obtained when there is an existence of a contract in the -- in any -- excuse me -- in any other industry.

Now, it is very important to note that right after noting this intent of the proviso, the Board then stated that, and I quote, "Thus, the proviso constitutes a statutory safeguard against just the sort of

irresponsibly imposed minority union representation which this record reveals."

That's a very important quote. I didn't put that in my brief or the reply brief.

The Board then went on and said, because you can file an election petition, it would be inconsistent with this purpose to not allow an examination of majority status in the litigation of refusal to bargain in cases where the employer is refusing to comply with the agreement.

So the old issue in R.J. Smith was the retroactive application -- was the retroactive enforcement of a collective bargaining agreement, the pre-hire agreement. As a matter of fact, the general counsel of the Board argued that you couldn't look back beyond 6 months, the statute 10(b), statute of limitations, because of this Court's decision in Bryant and the usual presumption of majority status that it can only -- usual presumption of majority status in collective bargaining agreement can only be attacked within the last 6 months by filing a charge with the Labor Board showing that it was obtained unlawfully because it was a minority union.

But the Board said that doesn't matter here, because it's not unlawful to enter into an 8(f)

agreement. Therefore, we can go back beyond the 6 months and look back, way back to the beginning of the agreement to find out when it was, what kind of an agreement it was, and whether or not there is a majority status to support it.

So the entire purpose of the R.J. Smith decision was to look back and see whether or not it could be retroactively applied.

Now, as I pointed out in my brief, the D.C. Circuit denied enforcement and adopted the theory that respondents argue in their brief that you have to actually file for a petition for an election and until that point in time the contract is enforceable.

The Board did not take the petition for certiorari at that time. It waited until the Higdon case. And it's important to note in the Higdon case it sort of reached the issue in the backdoor manner. Higdon was an 8(b)(7)(c) matter involving unlawful picketing for recognition.

And it's important to note that the issue of minority status is not at all involved in the issues, the basic element to an 8(b)(c) violation. An 8(b)(c) violation is made up of basically picketing for an unreasonable period of time not to exceed 30 days where the object is recognitional and there has been no

petition filed for an election with the National Labor Relations Board.

That has nothing to do with the minority status of a union. The issue only comes into effect in an affirmative defense if the Board has said that the literal terms of 8(b)(7)(c) do not apply in a situation where the union is not seeking initial recognition. In other words, if it already has a contract or a bargaining history, then it can -- then it can picket for recognition beyond 30 days.

However, the Board said that they will not allow that affirmative defense where the recognition is not based on majority status. Therefore, the issue of majority versus minority status was joined in that case. And the Board relied on its R.J. Smith decisions and its decisions under section 8(a)(5) of the act. And the D.C. Circuit again reversed, and that's how it came before this Court.

And as is shown by the petition and briefs to the Court by the Board, this Court passed not only on the 8(b)(7) issue but it, in order to reach that issue, it had to go back and pass on the Board's position in Section 8(a)(5), and it commented on the Board's decision in R.J. Smith. And it also commented on and passed favorably upon the Board's decision that minority

pre-hire agreements are not enforceable unless the union obtains majority support.

Now, the Board rule is basically that, when a union obtains majority, the pre-hire agreement is enforceable. Until then it is not. And you have to look both at the R.J. Smith decision and also look to the Board's brief to find out the reasons for its policy. Basically, it limits the purposes of the statute -- excuse me, it limits the adaptation of the statute to its purposes.

In other words, once an employer obtains union members from the union hiring hall, the skilled pool of employees, then the union will normally obtain majority status, and the agreement is therefore enforceable. In situations where they do not obtain that -- do not use that pool and the union does not obtain majority status, then the agreement is not enforceable.

Now, it is very important to look at the basic reasons behind the Board's decision. This Court and the Board has said that the voluntary compliance of Section 8(f) agreements, of minority Section 8(f) agreements, is not itself unlawful and has said it's all right.

Now, the reasons for that is not that the voluntary compliance of the pre-hire agreement is itself good for employees. It is important to note that the

voluntary compliance of minority pre-hire agreements is in itself inconsistent with employee rights. It's just because of this accommodation to the particular needs of the construction industry that it has allowed this exception. And that is why the Board said in R.J. Smith that the record revealed an irresponsibly imposed minority representation.

Now, you might wonder why did the Board say that when there is no specific findings that any employee was disadvantaged by that.

QUESTION: Mr. Winkler, I think in your briefs you didn't deal with the Section 306(a) of the Multi-Employer Pension Plan Amendments, Plan Amendments Act of 1980. Are you going to treat it in your oral argument?

MR. WINKLER: Yes, I am, Your Honor. I also did respond to that in my reply brief.

QUESTION: I guess I didn't notice that. I am sorry.

MR. WINKLER: Okay. It's about the last four or five pages of the reply brief.

QUESTION: May I just ask one question here?

MR. WINKLER: Yes, sir.

QUESTION: If I understand you correctly, the enforceabilty of the agreement depends on whether or not

there was in fact a majority status.

MR. WINKLER: That is correct.

QUESTION: And when, in your view, is it appropriate for that determination to be made? Is it your view that the employer can just wait until the union sues to, in this case, to collect the pension obligations, just wait until they sue and then you have a trial of whether there is majority status?

MR. WINKLER: That is correct. Under the Board's position, yes.

QUESTION: Would you say that if the -- if the company had in fact made the payments and then realized that the union never acquired majority status, that it could sue for a refund?

MR. WINKLER: I don't believe so. Just because the Board and the courts say that voluntary compliance is all right. In other words, they haven't violated any law and they have complied. And the Board has also said they can unilaterally make changes. They can apply some and not to others. In fact, in R.J. Smith for a certain period of time it did make payments in the trust fund on a few of the union employees, but those employees were still the minority.

There are several things to note about your situation that may seem inequitable at first blush that

employers can wait until that point in time. But often, as the Board noted in Higdon, an employer engages in two job sites at the same time, one using the pre-hire agreement and one not. And under the Ninth Circuit's notice of repudiation rule, it's really an all-or-nothing situation. I have many clients that engage in that type of activity.

QUESTION: Would it also be true that the employer could pay below the union scale as long as nobody complained about it and then later on the employees might say, well, you signed the pre-hire agreement which -- well, in this case I take it there was an undertaking to pay according to the union scale. Would that obligation also be unenforceable, in your view?

MR. WINKLER: That is correct.

QUESTION: Yes.

MR. WINKLER: The entire agreement is unenforceable in the Board's position.

QUESTION: It's just a matter of voluntary, unless the employer voluntarily elects to do --

MR. WINKLER: That's right.

QUESTION: -- what he said he would.

MR. WINKLER: And it's because that it is inconsistent with employee rights just to in effect

recognize a minority union. And it is only enforceable up to a point in time.

It is important to note that the position taken by respondents and the position taken by the court below would in effect reverse the Board's R.J. Smith decision. The Board's R.J. Smith decision would not be enforced under either interpretation, because there is no notice of repudiation and there is no election result.

The respondents do cite a couple of cases in support of their position that -- they contend that the Board supports their position, and they cite one 8(b)(7) case and they cite also another representation case.

I responded to both of those cases in my reply brief. But it is important to note that respondents did not go to the very issue, the enforceability of pre-hire agreements, which are contained in Section 8(a)(5) cases. In my reply brief I cited 13 NLRB Section 8(a)(5) cases in response to the position cited by respondents.

Now, I noted that the position taken by respondents the -- would in effect reverse the R.J. Smith decision, would in effect reverse the Ruttmann decision, would reverse certain parts of the Corrugated Structures decision and other decisions by the Board.

There are also some -- one point to be

considered is that employees do not necessarily have any detriment by the position taken by the petitioner herein or by the Board. In R.J. Smith, of course, the Board said as a matter of law, employees receive a certain detriment because of court enforcement and Board enforcement of the decision.

Also, in the Ruttmann decision, which was a companion to the R.J. Smith and also noted by this Court, the employees actually receive higher wages and higher fringe benefits rather than under the pre-hire agreement of the other union. Also, in the --

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

MR. WINKLER: Thank you, Your Honor.

(Whereupon, at 12:00 noon, the hearing in the above-entitled matter was recessed, to reconvene at 1:00 p.m. this same day.)

AFTERNOON SESSION

(1:00 p.m.)

CHIEF JUSTICE BURGER: You may resume, Counsel.

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

Just a few more points I would like to make. I keep on referring to the Board's R.J. Smith decision because it is the basis of the Board's policy and it sets out the Board's policy in total. It is very important to note that not only did respondent not rely on Section 8(a)(5) cases in its brief, it did not even cite in its entire brief the R.J. Smith decision. It is completely avoiding the Board's position on these matters.

Now, this Court in Higdon also pointed out the very issue of the enforceability of minority agreements in 301 litigation which was raised in the AFL-CIO brief and by the Board in its reply brief. And this Court in Higdon stated that 301 -- in 301 litigation minority status may be litigated just as it is in an --

QUESTION: Mr. Winkler, you know, it's correct about your opponent, but, you know, the government cited the R.J. Smith case. They found it distinguishable.

MR. WINKLER: I am sorry?

QUESTION: The Solicitor General cited the

R.J. Smith case and seems to think it's distinguishable.

MR. WINKLER: I disagree. I don't see how it can be, because the -- okay -- they went in the R.J. Smith decision, they went all the way back and found that there was no enforceable agreement, and also they --it was not -- excuse me, there is no notice of repudiation in R.J. Smith.

The government distinction is very simple. It simply says that that was an unfair labor practice proceeding and this is a 301 litigation. And that I think was discussed and resolved in the Higdon decision itself. And also, it goes right back to the Howard Johnson case that says the basic policies in an unfair labor practice case should not be -- should also be controlling in a 301 case.

Now, the entire line of cases along there, Howard Johnson, were really ignored by the government in its case. It just gave a blanket statement. The two are completely separate. And I think that if you look at my reply brief, you will see that the entire history from Lincoln Mill and Howard Johnson on up to Higdon itself says you just cannot ignore the basic policies in unfair labor practice context.

Now the litmus test to be applied here is the basic polices. And if you look at those Board cases I

cite in my reply brief, all 13 of them, you will find that in those cases where the statutory policies were intendedly applied, the contract was enforced. When the employer went to the union hall and got union employees, the contract was enforced. And when it was -- the employer used non-union employees on non-union job sites, the contract was not enforced because that's against public policy.

You should also look, I believe, at the Board's Land Equipment case, which I cited in my reply brief. Respondents also were involved in that case. The Trust Funds intervened in the Board proceedings. Now, in that case the idea of voidability -- a repudiation rule was brought up before the Board, and the Board again rejected it specifically. And the Board did find majority status in that case. The union did -- excuse me, the employer did go to the union hall, got employees, and the employers are bound to honor the agreement.

However, it is only bound to honor the agreement that to a point in time when the union first obtained majority status. The Board disagreed with the administrative law judge in that case, which gave it retroactive enforcement even before that period of time.

Now, that case was enforced by the Ninth

Circuit Court of Appeals, and I didn't cite the Ninth Circuit decision. It was just a memorandum opinion at 649 F.2d 867.

So what you have here is the Ninth Circuit in an unfair-practice context enforcing this contract back to the point in time when they had majority but not before. But in the 301 context the same court would enforce that contract all the way back to the beginning because there was no notice of repudiation.

Now, getting to the issue of the Trust Funds involved in this case, whether or not under Section 306(a) there is some special reason that they shouldn't be bound to the same rules by the NLRB.

Let me just point out one case I cited in my brief, the District Court case of Sorrenton pointed out in the minority agreement, it's really for the employees to decide whether they want the contract and that inclcudes trust fund benefits. And the court would be second-guessing those wishes of the employees if they in fact gave them trust fund benefits or put the -- put the entire contract into effect.

And it pointed out also that trust fund payments to benefit -- to employees is not necessarily a benefit to them, it may take away from the ability of the employer to give other --

QUESTION: Mr. Winkler, 306(a), the language there is collectively bargained agreement. Now, is there a difference between a collectively bargained agreement and a collective bargaining agreement?

MR. WINKLER: I notice the distinction in the language there. I don't know exactly what they're talking about there. I notice in -- in Higdon itself, this Court was careful to use the term "pre-hire agreement" --

QUESTION: Well, clearly enough, a pre-hire agreement is not yet a collective bargaining agreement. But may it not be a collectively bargained agreement?

MR. WINKLER: Oh, I would say not.

QUESTION: Why not?

MR. WINKLER: The idea of collectively --

QUESTION: Why not?

MR. WINKLER: -- collectively bargained assumes that the -

QUESTION: Well, if they sat down and bargained, even though it was a minority pre-hire agreement, isn't that --

MR. WINKLER: That'd be --

QUESTION: -- collectively bargained even if it's not a collective bargaining agreement?

MR. WINKLER: The idea of collective

bargaining assumes the idea that they're acting as the agent of the employees, as the collective bargaining agent for those employees.

QUESTION: Well, do you think Congressmen -- Congress chose that language, "collectively bargained agreement," purposely to indicate maybe a distinction?

MR. WINKLER: I do not believe that they did. I notice in the original Senate version they also had the words "collectively bargained." I believe they also said -- made a reference to a "collective bargain agreement" in 308(a). And that's pointed out in my reply brief.

But I would note that the Sorrenson decision has some practical effect in the Board's DeAngelo and Kahn decision, which is also cited in my reply brief. The only issue in DeAngelo and Kahn are really the trust fund payments. The employer voluntarily complied with the agreeement on one job site, but then on another job site it gave what it would have been the trust fund payments, it gave that extra amount to the employees in additional take-home pay. It was a federally funded project, and therefore, under the Davis-Bacon Act they had to pay a certain amount, and that amount was the same as the overall union contract.

So the employees actually got a greater

take-home pay under that arrangement. So it's not like the employees necessarily -- it's basically for the employees to decide what they want, and if they have not chosen the union, the union contracts do not apply.

QUESTION: What is necessary for the employer to escape the pre-hire agreement under the judgment that you are attacking.

MR. WINKLER: Basically, if the -- if the unions -- if it is not established that the union represents the majority of the employees, then the contract is not enforceable.

QUESTION: I know that is your -- that is your view. But what, under the decision below, what is necessary for the employer to escape?

MR. WINKLER: They have to, in effect, give a notice of repudiation.

QUESTION: And that notice of repudiation cannot be just a refusal to abide by the contract?

MR. WINKLER: Basically, if they say not. They say it can be an open and notorious, and that would, in effect, give notice. But they have said that that did not occur here.

QUESTION: But even if it were -- even if a refusal to comply was a notice as to the future, it wouldn't be effective to negate obligations accrued up

to that time.

MR. WINKLER: That's true.

QUESTION: And your -- your view is that nothing in the contract is binding on the employer until there's a majority representation.

MR. WINKLER: That's true. That's my view. That's also the Board's view. What we have here is basically --

QUESTION: Well, the Board -- I don't know how you can say it's the Board's view when the general counsel is on this brief for the government.

MR. WINKLER: Well, the general counsel and the Board --

QUESTION: Are not one and the same.

MR. WINKLER: -- are not one and the same. I don't mean that lightly. I mean I do not believe that is an accurate representation of the Board.

QUESTION: Well, we have recognized that for some purposes, have we not? I mean Congress has recognized that.

MR. WINKLER: That's true. That's right in the statute. And I do not think that it's an accurate representation of the Board. I might add, if you compare the brief of the general counsel -- excuse me, of the government in this case with the brief of the

Board given in Higdon, they do not match at all. They are totally inconsistent, and they are totally contrary to each other.

QUESTION: But if the counsel or the Board makes a representation to this Court in a case of this kind, you suggest that that carries no weight?

MR. WINKLER: Oh, it should be given some weight, but then again I think you should take a look at the Board decisions itself.

QUESTION: Is this a case where his independence is directly involved, counsel's independence?

MR. WINKLER: I can't say that. I don't think that he's speaking for the Board.

QUESTION: Well, this is an amicus case. I suppose if the Board were a party --

MR. WINKLER: That's right.

QUESTION: -- to this case, and then there's a brief filed on its behalf, you should be able to assume that it represents the Board's view, shouldn't you?

MR. WINKLER: Well --

QUESTION: But that isn't the case here.

MR. WINKLER: In Higdon the brief was on behalf of the National Labor Relations Board.

QUESTION: This is the brief of the United

States.

MR. WINKLER: I know. But in Higdon the brief was --

QUESTION: And not the Board.

MR. WINKLER: -- filed on behalf of the National Labor Relations Board.

QUESTION: It was the brief of a party in Higdon, wasn't it?

MR. WINKLER: That's correct. And you might as well take the Higdon brief and, you know, change the caption and sign my name to it. I mean I am just adopting exactly what the Board is saying all the way through.

QUESTION: Did the Board prevail in Higdon?

MR. WINKLER: Yes, it did. Yes, it did.

I might point out that under 306(a), I pointed out a few things in my -- in my reply argument. One thing I would especially like the Court to look at is that in -- I believe that the issue raised was also resolved by Kaiser where this Court said that defenses, labor law defenses, are not implicitly repealed. And I think that settles the matter.

Also, in this matter you might take a look -- this is really probably not even a defense. There's a question whether or not this is even a defense here if

the entire agreement is not enforceable.

Also, I think the initial premise, and I request you to take a good look at my reply brief on this, the initial premise was that the legislative history in the Committee Print was to 301(a). It was to 301(a) and to (b).

And the entire section taken together shows that what they were trying to do was set up a statutory right and to give -- so that you can give certain remedies. And it's set forth in (b) all the remedies that you can give. You've got attorney's fees, you have liquidated damages, you have extra interest rates. It's really quite a penalty.

The government -- thank you, Your Honor.

CHIEF JUSTICE BURGER: Mr. Jett.

ORAL ARGUMENT OF WAYNE JETT, ESQ.,
ON BEHALF OF THE RESPONDENT, FRANK L. TODD, ET AL.

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

Petitioner McNeff has argued from the viewpoint that because a breach of a Section 8(f) agreement before majority status is achieved is not a violation of Section 8(a)(5) of the National Labor Relations Act, that that breach then cannot be remedied by a suit brought under Section 301.

However, we have shown in our briefs that Section 8(a)(5) cases and all unfair labor practice cases are government litigation pursued by the government at government expense to enforce rights and duties that are created by statute under the Act.

By comparison, private rights and duties that are created by private agreement have been left to enforcement according to the normal processes of the courts under Section 301 litigation.

That is a tandem system of handling labor disputes that has served the country well since 1947 when Section 301 was enacted.

There is no reversal involved of any Section 8(a)(5) case in enforcing the contract rights in a judicial action. Those Section 8(a)(5) cases would be exactly as valid with the enforcement of contract rights in this Section 301 action as they are presently; namely, the government would not issue a Complaint and would pursue litigation as a matter of public policy to enforce a contract when majority status is not shown.

We have shown in our brief at least two clear similar circumstances in which -- one of which this Court has recognized in the Iron Workers case. For example, Section 8(e) agreements, the hot-cargo clauses, are not enforceable by picketing, just as the minority

agreement in Iron Workers was not enforceable by picketing because of the limitations of Section 8(b)(7). However, those hot-cargo clauses are clearly enforceable by judicial action.

In addition, we have also shown the Pittsburgh Plate Glass decision of this Court, in which it clearly recognizes the established rule of law that nonmandatory subjects of agreement may be included in collective bargaining agreements, and when they are, they are judicially enforceable. However, they are not enforceable by government litigation under Section 8(a)(5) cases. And that is what Pittsburgh Plate Glass held.

QUESTION: Well, what happens in a -- outside the construction industry when -- when an employer purports to recognize a minority union and execute a contract with that union?

MR. JETT: It is an unfair labor practice, Your Honor.

QUESTION: Well, is it enforceable in a 301 action?

MR. JETT: Your Honor, it would not be, because --

QUESTION: Why not? Why not?

MR. JETT: Because --

QUESTION: Give me your argument.

MR. JETT: According to our argument, we would agree with this Court's decision in Carey versus Westinghouse Electric. This Court has said that if there is an unfair labor practice involved in the execution of a labor agreement, the superior authority of the Board can be invoked at any time in order to hold the --

QUESTION: Well, that may be the authority of the Board, but what about the -- what about a 301 case?

MR. JETT: Well, Your Honor, as far as an unfair labor practice involved in a 301 case in the situation you're talking about, if there is an allegation of an unfair labor practice, it must be submitted to the Board in the form of a charge.

Now, such a case has just been litigated in --

QUESTION: Wel, suppose that an employer signs -- outside the construction industry, signs a contract with a minority union and perhaps everybody promising to pay a certain wage, and one day he just lowers the wage unilaterally, and then he gets sued in a 301 action for -- for the contract wage.

MR. JETT: Your Honor, as a matter of fact, that exact circumstance --

QUESTION: What happens?

MR. JETT: -- has just been litigated in the Ninth Circuit.

QUESTION: What happens?

MR. JETT: It's the Glazers case that was cited in our brief. And what happened is the Court said -- and analyzed Iron Workers in doing so, analyzed the issues largely before this Court. What happened was they said if there is an unfair labor practice involved, it is to be presented to the Board.

QUESTION: But the employees couldn't sue under those circumstances, a 301 action?

MR. JETT: They could sue, yes, Your Honor. And as a matter of fact --

QUESTION: Well, could they collect? Could they collect the promised price?

MR. JETT: The -- the Iron Workers -- the Glazers case enforces the contract and says it does so because the unfair labor practice must be kept under the primary jurisdiction of the Board and that otherwise that would require litigation of the intent of the unfair labor practice statutes in Section 301 cases, and the Ninth Circuit in the Glazers versus Custom Model case declined to do that. And I -- as a matter of fact, the --

QUESTION: So Glazers -- your case is a

fortiori from the Glazers case?

MR. JETT: It certainly is highly consistent with our case. It adopts the same arguments that we have made. It simply is a situation which is outside the construction industry. And I think it is a more clear representation of the Ninth Circuit's view as to whether employee representational issues -- in other words, the litigation of majority status -- can be litigated before the courts in Section 301 cases as opposed to before the Board.

And the Ninth Circuit clearly came down in a well-reasoned opinion there that came out after -- well, it had not been officially reported as yet at the time of our brief, but we cited it, and it has been, of course, officially reported. But they followed the same analysis essentially that we did in analyzing the references to litigation of majority status in Iron Workers and said that that was not by any means a holding, it was not a 301 case that was litigated in Iron Workers, it simply was a matter of turning aside an invalid union argument made in the Iron Workers case. Now --

QUESTION: Well, what's the -- under 301 what would be the theory of -- that the employer would use if he's sued, just like in this case, and he came back and

said, well, I sent you notice last week that I am repudiating the contract? And what does -- what's the 301 theory on that?

MR. JETT: Your Honor, we have argued that repudiation is not a proper defense. We -- we have argued that there is no right of repudiation.

QUESTION: You are different from the Board then?

MR. JETT: We are different from the government's brief in that respect.

QUESTION: You don't think that's a Board brief, either, eh?

MR. JETT: Your Honor, it is to the extent that it represents the government's views. However, I must note that, as the Court has already mentioned, that this is not a case that has had the benefit of being litigated through the Board's processes so that the Board itself has had the benefit of a full record and having briefs and arguments made before the Board and developed it on the basis of its expertise.

QUESTION: Well, is it once you've signed the pre-hire agreement, once the employer signs, under your view, he is permanently stuck with it?

MR. JETT: Not at all, Your Honor. As a matter of fact --

QUESTION: When is he not subject to suit in the 301 action?

MR. JETT: The agreement, according to our argument, is that he would not be bound to the agreement after the Board certifies a union election result that the union has lost. That is exactly the same treatment --

QUESTION: So the employer, before he can get out of the agreement, he has to -- he has to precipitate a representation election?

MR. JETT: An election has to be precipitated, we'll put it that way.

QUESTION: And he has to win?

MR. JETT: The employer may do it. As the Iron Workers decision says, when this Court referred to the fact that the agreement was voidable, the precise means and the only means that this Court referred to was the fillng of a petition under the proviso. And that filing of a petition, as we have shown in our brief, keeps all employee representation issues -- the determination of appropriate bargaining unit, the determination of eligibility of voters -- all of those aspects are kept before the Board.

QUESTION: So it changes the burden, the pre-hire changes the burden with respect -- it changes

the normal rules with respect to how a -- how majority status is to be determined?

MR. JETT: Your Honor, it does not. As a matter of fact, it -- in order to pursue our argument, it keeps it exactly where it has been since 301 was enacted; and that is, all employee representation issues are determined by the Board in exactly the same way that they always have. And that's an awfully important aspect.

QUESTION: Well, I know, but you -- the employer, unless there is some solid evidence of majority representation, an employer isn't normally required to act like the union is the majority representative. And if he says, look, you've had plenty of time to get -- to get -- to get yourself organized and you aren't, and I am repudiating the pre-hire agreement right now because you just don't represent the -- the employers.

MR. JETT: Well, Your Honor --

QUESTION: Or the employees. And you say, well, no, the pre-hire is going to force him to go to the Board.

MR. JETT: Your Honor, what --

QUESTION: In order to prove that the union isn't the majority representative.

MR. JETT: What it would force him to do, require him to do is to do what he agreed to do; that is, perform according to the agreement until there is an expression of self-determination by the employees in which they vote out the union.

QUESTION: So you -- so you do say that pre-hire does change the --

MR. JETT: Yes, Your Honor, it does. It does to this extent: As this Court recognized in Iron Workers, 8(f) specifically was intended as an exception to the general requirement of the law that there be majority status before a contract can be signed.

And let me, if I might, look specifically at the objectives of Congress when they enacted Section 8(f). I believe there are four clear objectives that can be identified. The first one is that the employers in the construction industry needed the ability to sign binding contracts that would establish firmly their wage rates that could then be used by them in preparing bids that would be entered into competitive bidding for construction projects.

When those bids are accepted, the employer is bound contractually to perform by them, and he needs reliable labor costs. Otherwise, he is substantially at risk.

Secondly, to the same extent, it is very common in the construction industry that time is of the essence in performing a construction contract once he gets the winning bid. Therefore, he needs a ready source of labor that he can call on immediately in order to perform the contract. It's not common at all for the way construction projects develop and bids are won, the employer normally cannot afford to keep a full staff of workmen on his staff and on his payroll. He must have a source of workmen. And he needs that on a reliable, a contractually reliable basis.

Now, from the union standpoint, there were also two objectives. The unions needed to have some approach to stabilize working conditions in their geographic areas over a period of years. And the legislative history clearly recognizes that they had been doing that by the practices of signing agreements applicable to geographic areas over 1, 2, or 3 years.

I would cite the legislative history, since it has been questioned in the reply brief, pages 423 to 25, pages 451 and 52, page 759 and 777.

Clearly, it was the intent of Congress to validate the practice of signing binding contracts that would stabilize working conditions within an area so that the union and the employer would not have to bid on

a project or to bargain on a project-by-project basis after the employees got out on the site where there could be disruption of work at the job site.

And fourth, the fourth objective is also a union objective. Congress recognized that because of the high mobility and the short -- shortness of jobs in the construction industry, that the construction unions did need certain organizing mechanisms that were out of the ordinary for other industries. One of those, they recognized that the unions needed an exclusive hiring hall to refer their workmen out, and they also recognized a need for the 7-day union security clause. Both of those objectives, both of those mechanisms are expressed precisely in the wording of Section 8(f).

Now, I refer to those objectives in some detail because they must be examined to recognize that every one of those four objectives of Congress requires a binding contract in order to achieve it. Congress looked at the existing law at that time and said that, well, they've got to have a binding contract in order to achieve those objectives; right now they have to show majority status before they can sign that.

Now, if they were -- if we were to follow that approach, we would have to be ready for the NLRB to conduct elections and every bargaining unit from the

construction industry. And clearly, the legislative history says at several places it's not feasible in the construction industry to contemplate having elections in every unit in order to certify the union as the bargaining agent.

They said, therefore, because of that, the unfeasibility of elections in every unit and because we need these four objectives under the circumstances of the construction industry to be met, we are authorizing the pre-hire agreement, we are validating the practices that have been used by the unions, and we are doing it by enacting Section 8(f).

QUESTION: Well, you would force the -- you would force the employer before the Board in any case where he seriously doubted the -- the majority status of the union.

MR. JETT: Your Honor, in order to present a question of employee representation, it is all -- has always been the requirement that that question of representation be presented to the Board. The cases are replete that the Board is the administrative tribunal that has the expertise to make that decision.

And let me say this about the prospect of a transfer wholesale of the employee representation issues in the construction industry from the Board, where it's

been for the last 25 years, into the courts. The courts simply do not have the capacity to continue absorbing the additional doses of litigation that they're getting. The litigation arena is too crowded already. And under such a ruling, under 301 cases, both the state and the federal courts would then be involved in litigating majority status issues.

It's doubly troublesome to contemplate moving employee representation issues from the Board to the courts for this reason. If anything, the litigation burden on the courts would indicate that legislatively those burdens should be moved from the courts to administrative tribunals. And yet we would have thousands and thousands of employee representation issues. In effect, every enforcement of a pre-hire agreement would be litigated in the courts rather than the Board.

QUESTION: Well, Mr. Jett, even if we affirm the Ninth Circuit here, it would have the effect of moving a lot to the courts, wouldn't it, unless your view were adopted in the process?

MR. JETT: Your Honor, that is correct. To adopt the Ninth Circuit's view, it would result in moving majority status to the courts. That was stated in dictum views because even under the Ninth Circuit's

view holding for us, there was no repudiation here. But that is why we are pointing out it's so -- it's such an important aspect of this case that the proper legal structure for deciding the case is set, because if it is -- if courts are led to believe that those issues of majority status of an appropriate bargaining unit, all of those things that go into determining majority status, it's by no means just a situation of checking the payroll and determining who is a union member.

QUESTION: How do you respond to Mr. Winkler's position, though, that the Board itself has viewed these agreements as unenforceable?

MR. JETT: Your Honor, they -- the Board has not reviewed -- viewed them as unenforceable under 301. The Board has never decided that issue. It wouldn't be called upon. That's what's before this Court.

It is unenforceable from the standpoint that the government will not pursue litigation at government expense under Section 8(a)(5) to enforce that agreement. So that -- that would stand completely. And as a matter of fact, I would like to point out in regard to the ERISA Amendment that basically the same government attitude toward the enforcement of these private rights is maintained in ERISA, because while the ERISA Amendment creates the statutory right or

obligation to perform the contract, there is also a part of that amendment that says the Secretary of Labor will not initiate litigation to enforce that contract.

And so basically, it is simply a situation that the Board has said and ERISA has said that the government is not going to expend its agency resources to enforce this as a matter of public policy. However, under the ERISA Amendment, they did add the provision that entitles the private trustees to recover their costs of pursuing that litigation.

So in that respect of what the ERISA Amendment did is simply add the statutory obligation that 8(a)(5) doesn't provide for performance here, it adds the statutory obligation but again it leaves the litigation in private hands just as it was under 301.

QUESTION: Incidentally, what do you suggest is the reason that that ERISA Amendment speaks for the collectively bargained agreement rather than a collective bargaining agreement?

MR. JETT: Your Honor, I believe that it is common usage in ERISA to speak in that terminology as opposed to collective bargaining agreement. It --

QUESTION: In other words, this is a different thing than a collective bargaining agreement?

MR. JETT: I believe that ERISA, while it

intended collectively bargained agreement to apply broadly to these kinds of agreements, I believe they were not concerning themselves with the intricacies of unfair labor practice law in terms of recognizing the policies of the Board in any detail. But I believe that at the very minimum what has to be said about the legislative history of the ERISA Amendment is that with the citation of the Overhead Door case that expressed disapproval of Overhead Door and McDowell, both of them being clearly 8(f) cases in which majority status was raised, the minimum that can be said is that Congress intended that that statutory obligation in Section 515 applies to 8(f) agreements. They viewed those agreements --

QUESTION: That they may be collectively bargained even if not collective bargaining agreements?

MR. JETT: Correct, Your Honor, although I would say this. I don't believe the history of Section 8(f) indicates that a pre-hire agreement is not a collective bargaining agreement. I believe that the decision of this Court in Iron Workers was -- was specific and express in saying that -- that the collective bargaining agreement does not move to the status of a Section 9 representative which would entitle it to enforcement under Section 8(a)(5). But it didn't

say that -- that this is not a collective bargaining agreement. In my estimation, clearly it's a collective bargaining agreement. It sets wages and working conditions for employees on whose behalf the union bargained.

QUESTION: Isn't one of the requirements for a collective bargaining agreement that the union has to represent the employees?

MR. JETT: Your Honor, it is, except in 8(f) cases. And what Congress intended to do in 8(f) was enable both employers and unions to step into the vacuum that exists before a project is actually manned.

QUESTION: Well, does 8(f) shed light on whether the -- one of the requirements of a collective bargaining agreement is that the union represent the employees?

MR. JETT: Your Honor, I believe that Section 8(f) specifically contemplates agreements and binding agreements in which it expressly is with a minority union. That's specifically and expressly what 8(f) intends, that you be able to enter into binding agreements when it is conceded that the union is a minority union. That's what it says on its face.

And the only -- the only point that Congress saw fit to protect was that enabling employers and

unions to step into this vacuum and deal with binding contracts on the basis that met the needs of both parties was the proviso -- they didn't want the employers and the unions to stick the employees with something that the employees didn't want.

And as a matter of fact, in looking at the legislative history on the purpose of the proviso, the clearest explanation I find of exactly what Congress had in mind and what was bothering it on the proviso appears in the -- in the Committee Print of the Senate Subcommittee on Labor that was published right at the time the Joint Conference adopted the Senate version of Section 8(f). And that proviso, or that explanation on a section-by-section basis explains the proviso with a more limited purpose even than what we have discusssd so far.

It says this: Agreements permitted by this section may not operate as a bar to a petition for an election sought by a union not party to such agreements. You look at the legislative history in light of that explanation, and what Congress was really worrying about when it added the proviso is they -- and the legislative history shows clearly they were concerned about sweetheart contracts between corrupt employers and paper unions.

I cite the the Committee statement of the legislative history at page 967. And the paper union/sweetheart contract motive is shown in the legislative history at page 425 and at pages 992 and 994.

So under that circumstance, what they were really protecting against is -- is the employees getting stuck with a sweet deal that benefited the employer and the union but not the employees.

Now, the argument has been made that the employees are disadvantaged --

QUESTION: Well, isn't it true, Mr. Jett, that the -- according to your position, it really doesn't make any difference for the purposes of this case where this majority status issue is to be litigated or even whether it is to be. Until it is, you say the contract's enforceable?

MR. JETT: Yes, Your Honor.

QUESTION: So you don't -- it's -- it's -- all you have to say is that the majority status has never been determined and you're suing for back pay, so to speak.

MR. JETT: In terms of this contract -- or this case, it is clear that there was neither repudiation under the Ninth Circuit view or a determination of majority status until after the period

that was enforced in the contract. And clearly, we would prevail on that basis. But once again, it is most important --

QUESTION: But you would like to go on prevailing on the same contract?

MR. JETT: It is most important that the right reasons be given for that prevailing; otherwise, the wrong reasons will undoubtedly lead to erroneous decisions in future cases. And certainly, the decision we believe of the Ninth Circuit, at least the dictum on handling majority status in the courts, would certainly lead to very erroneous decisions -- that is, the litigation of majority status in the courts. Now --

QUESTION: Well, I don't -- I don't know. I don't know whether the court would be necessarily obligated to hear the issue rather than defer to the Board and tell the parties to take it to the Board as a matter of primary jurisdiction.

MR. JETT: Your Honor, as a matter of fact, that is an extremely important point here and one actually that the petitioner has taken both sides of. If you look at the opening brief of the petitioner here, they've argued that it was improper -- or that the District Court should have deferred to the Board, and argues quite extensively that that should be done. They

are now arguing essentially that, yes, it ought to be litigated in the -- in the courts.

Now, we believe that if the Court were to take the view that, yes, the agreements are void ab initio, if you -- if you don't prove majority status and they're a nullity from the beginning, it would certainly be better to defer to the Board for a determination of majority status than to litigate in the courts.

QUESTION: Mr. Jett, you don't -- I don't think you're going to -- you're going to say that every time you sued on a pre-hire agreement and the employer said -- said, sorry, but I am repudiating right now, you're not going to wage a losing battle, you're not going to litigate forever when you know you don't have majority status. And I am -- I wouldn't think the employer, if there is any doubt about it, or if there is substantial doubt about it, is going to litigate forever either.

MR. JETT: Well, Your Honor, of course, our -- our trustees, the parties respondent here --

QUESTION: Yes.

MR. JETT: -- are in the position of attempting to enforce the fringe benefit rights, and are in the position that in order to -- if -- if the Ninth Circuit were to be taken at face value on the dictum,

would be in the position of having to come up with union majority status proved to see whether it could be proved to the court's satisfaction that that was established before repudiation.

We would not be in the position, of course, of going beyond what evidence is available. But at the same time, we would have the prospect of needing to enforce contract rights that have accrued to the employees involved.

Now, I would like to --

QUESTION: Well, you certainly would agree, I suppose, that if the employer took it to the Board, the question of majority status to the Board, and he won, that you haven't got any contract rights?

MR. JETT: Your Honor, if we --

QUESTION: From -- from at least the prospective.

MR. JETT: From that date forward, yes, Your Honor. And we have shown that. As a matter of fact, in my letter citing the two additional cases that was presented to the Court today, I would like to refer to the Board's policy in that matter in non-construction industry cases. In a non-construction industry circumstance, when a petition is filed and goes to election and the contract basically is still in effect,

the Board's clear policy is that the contract remains in effect to the date of Board certification of election results.

QUESTION: And if there is unilateral change, it's an unfair labor practice, is that it?

MR. JETT: That is correct, Your Honor. That is correct. But as far as -- and I might refer to that. That's the Trico Products case that I cited today. It goes in some detail into the Board policy, that to create a hiatus or instability simply on the filing of the petition would be adverse to the policies of the act because the employees would be unsure of what their rights are until the time of actual certification.

QUESTION: But that's in a case where the union had been at one time certified as the majority representative?

MR. JETT: Not necessarily so, Your Honor. It would be in a situation in which at least there had been recognition of majority status, because, as I said, that's a non-construction industry case. And that would not necessarily be a Board certification.

In other words, a petition can be filed at a certain window of time during which the contract does not present a bar, and when the Board then proceeds to an election the Board says that its clear policy is to

maintain the status quo of the agreement until the time that the election results are actually certified.

Now, I would like to deal with two concepts that I think have -- have come round to the argument that is made by petitioner in this case. I think it's most important to deal with the concepts of repudiation and voluntariness, in order to clarify the way in which they have been intermixed.

Repudiation is the concept that the Board has developed under 8(a)(5) cases in which the employer can breach the contract --

CHIEF JUSTICE BURGER: Your time has expired. We will take that on the briefs, Counsel.

MR. JETT: Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:42 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:
JIM McNEFF, INC., Petitioners v. FRANK L. TODD, ET AL. #81-2150

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