

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-2257
BILL JOHNSON'S RESTAURANTS, INC., Petitioner
TITLE v.
NATIONAL LABOR RELATIONS BOARD, ET AL.
PLACE Washington, D. C.
DATE March 29, 1983
PAGES 1 - 57



(202) 628-9300
440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -x

3 BILL JOHNSON'S RESTAURANTS, INC., :

4 Petitioner :

5 v. : No. 81-2257

6 NATIONAL LABOR RELATIONS BOARD, :

7 ET AL. :

8 - - - - -x

9 Washington, D.C.

10 Tuesday, March 29, 1983

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 1:02 o'clock p.m.

14 APPEARANCES:

15 LAWRENCE ALLEN KATZ, ESQ., Phoenix, Arizona; on
16 behalf of the Petitioner.

17 CAROLYN F. CORWIN, ESQ., Office of the Solicitor
18 General, Department of Justice, Washington, D.C.;
19 on behalf of the Respondents.

20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
LAWRENCE ALLEN KATZ, ESQ., on behalf of the Petitioner	3
CAROLYN F. CORWIN, ESQ., on behalf of the Respondent	29

1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Bill Johnson's Restaurants against National
4 Labor Relations Board.

5 Mr. Katz, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF LAWRENCE ALLEN KATZ, ESQ.,
8 ON BEHALF OF THE PETITIONER

9 MR. KATZ: Mr. Chief Justice, and may it
10 please the Court, the issue before the Court in this
11 case is the extent to which restraints should be placed
12 upon the power of the National Labor Relations Board to
13 interfere with civil proceedings instituted in state
14 court and growing out of a labor dispute.

15 The civil litigation in this case was a suit
16 filed in the Arizona Superior Court by petitioner, Bill
17 Johnson's Restaurants, against several persons who were
18 demonstrating in front of the restaurant in September,
19 1978. The suit alleged that the protesters had defamed
20 the restaurant by publishing leaflets which accused the
21 restaurant in engaging in a refusal to pay lawful
22 overtime, in sexually harassing waitresses, in
23 discharging a waitress for union activity, and
24 maintaining filthy restrooms.

25 The suit also asked for injunctive relief and

1 for damages for misconduct occurring during the
2 demonstrations. This Court has held in the past that
3 some controversies arising out of labor disputes are so
4 deeply rooted in matters of local concern and
5 responsibility that the state courts have primary
6 jurisdiction to hear and determine these controversies
7 even though they may touch on matters of federal concern
8 as well, and I refer here to suits growing out of labor
9 controversies involving defamation, involving violence,
10 involving trespass and other torts out of such labor
11 disputes where the public peace and order are
12 threatened.

13 In these cases, the state has been held to
14 have an overriding interest in the resolution of the
15 controversy. Despite this history, the National Labor
16 Relations Board has in the present case ordered the
17 restaurant to withdraw its civil suit and to compensate
18 the defendants for all expenses incurred by them in the
19 defense of the suit, including expenses incurred by them
20 in the prosecution of their counterclaims.

21 The Board does not justify its order in this
22 case by any finding that the complaint filed by the
23 restaurant on its face asked for relief barred by the
24 National Labor Relations Act. The Board does not
25 justify its order in this case by any finding that the

1 complaint filed by the restaurant was pre-empted by the
2 National Labor Relations Act, or that it raised issues
3 that were already pending before the Board.

4 Instead, the Board attempts to justify its
5 intrusion into the parties' civil litigation by a
6 finding that the restaurant's suit constituted an effort
7 to retaliate against those demonstrators who were
8 outside its premises. To reach that result, the Board
9 performed adjudicatory responsibilities that should have
10 been performed by the state court.

11 After the restaurant filed its suit, the Board
12 compelled the restaurant to demonstrate that the suit
13 had some reasonable factual basis, that it had merit.
14 Considerable evidence was presented before the Board's
15 Administrative Law Judge on the same questions that were
16 then pending in front of the state trial court. For
17 example, were the offensive statements of the
18 demonstrators true or false? Did the demonstrators
19 publish those statements knowing them to be true or
20 false? Did the demonstrators improperly obstruct or
21 interfere with the restaurant's operations?

22 QUESTION: Mr. Katz, were these --

23 MR. KATZ: Yes, Your Honor.

24 QUESTION: -- questions of federal law, state
25 law, or some of both?

1 MR. KATZ: Questions of defamation arising out
2 of a labor dispute are questions of state law. The
3 questions should have been heard and determined by the
4 state court.

5 QUESTION: Are you saying that the
6 Administrative Law Judge examined issues that were
7 concededly of state law, such as whether there was a
8 publication under the Arizona law of libel?

9 MR. KATZ: The question of whether there was a
10 publication was not at issue, but other questions
11 decided by the Administrative Law Judge, Justice
12 Rehnquist, were in fact then pending before the state
13 court. For example, were the --

14 QUESTION: A federal question could be pending
15 before the state court. I was more interested in
16 whether the Administrative Law Judge also examined
17 question that were concededly only of state law.

18 QUESTION: Did the Administrative Law Judge
19 say there wasn't anything to the suit under state law?

20 MR. KATZ: Yes, he did. Your Honor, the --

21 QUESTION: That is clearly a state law
22 question.

23 MR. KATZ: It is purely a state law question.
24 The Administrative Law Judge determined -- The
25 Administrative Law Judge determined that in fact the

1 statements on the relief work were truthful, and in fact
2 the demonstrators had not engaged in obstructions or
3 interference with restaurant property, and that in fact
4 the restaurant's lawsuit lacked a reasonable basis, and
5 his interpretation had to be one of state law, because
6 the issue was one of state law. The Board --

7 QUESTION: Mr. Katz, would you concede that
8 perhaps the National Labor Relations Board, through its
9 Administrative Law Judge, could still consider issues
10 relating to whether it's an unfair labor practice here
11 to have filed the state suit at least for purposes of
12 giving other remedial relief other than the cease and
13 desist order, for example, requiring payment of costs of
14 suit?

15 MR. KATZ: Justice O'Connor, I would say that
16 the responsibility of the National Labor Relations Board
17 in that circumstance would be to wait until the state
18 court had issued its determination on the merits of the
19 lawsuit. At that point, if the state court had failed
20 to issue sufficient relief to protect the federal rights
21 that were then at issue, or to protect the rights of
22 employees under the National Labor Relations Act, the
23 Board certainly had the opportunity to take another look
24 at the unfair labor practice charge that was in front of
25 it and to determine whether the interests of the

1 National Labor Relations Act required supplemental
2 relief to be ordered.

3 QUESTION: What do you see in the Act that
4 would affect the timing of the Board's jurisdiction in
5 that regard?

6 MR. KATZ: If I understand your question,
7 Justice O'Connor, Section 10(j) of the Act would allow
8 the National Labor Relations Board to file a petition
9 with the United States District Court in order to
10 protect the interests of the Act and the interests of
11 employees against any direct infringement that might
12 occur during the prosecution of that suit.

13 For example, if the plaintiff in such a state
14 suit engaged in discovery which the Board determined
15 might have an adverse impact on a proceeding then
16 pending before the Board, it is arguable that the Board
17 could apply under Section 10(j) to the United States
18 District Court and obtain an appropriately limited
19 injunction.

20 In this case, the Board might well have been
21 able to do that, but instead --

22 QUESTION: That's an exception to the
23 Anti-Injunction Act --

24 MR. KATZ: Yes, Your Honor. That would be an
25 exception to the Anti-Injunction Act, and this Court has

1 recognized two or three exceptions to the
2 Anti-Injunction Act in the past, and I think one of them
3 would be applicable in this case, and that is, when the
4 Board has to act in aid of its own jurisdiction.

5 If there is an issue pending before the Board
6 which has also been raised before the state court, or if
7 the proceedings in the state court threaten to impact
8 directly on the proceedings before the National Labor
9 Relations Board, that, I believe, is what Congress
10 intended Section 10(j) of the National Labor Relations
11 Act to be used for, and the Board could go into the
12 District Court and petition for appropriate limited
13 injunctive relief.

14 In this case, the Board did not seek an
15 appropriate limited injunction from the District Court.
16 The Board petitioned the District Court under Section
17 10(j) for an injunction restraining the entire lawsuit
18 that had been filed in the state court.

19 QUESTION: What if the Board had limited its
20 relief to an order that court costs or legal fees be
21 paid?

22 MR. KATZ: While the state court suit was
23 still pending?

24 QUESTION: Right.

25 MR. KATZ: I think that would be an

1 unwarranted infringement on the state suit. I think any
2 remedy that would come out of the state proceeding was
3 within the original primary jurisdiction of the state
4 court, and the Board could only interfere with that
5 proceeding to the extent that there was a direct impact
6 on a matter pending then before the Board.

7 In this case, there was no such finding.

8 QUESTION: You are saying, I take it, that the
9 statute, the federal statute, 2283, I think, has not
10 expressly authorized this kind of restraint to be put on
11 the Board.

12 MR. KATZ: It has not.

13 QUESTION: What is the scope of the
14 Administrative Law Judge's inquiry to determine whether
15 there is harassment that would interfere with the
16 Board's jurisdiction?

17 MR. KATZ: I think that if the civil suit on
18 its face were to allege a cause of action barred by the
19 National Labor Relations Act, then the Administrative
20 Law Judge arguably would have authority to take action
21 and perhaps that might include even the restraint of
22 that suit. I think, for example, of the 1970 Machinists
23 case and the 1972 Textile Workers case, in which unions
24 had allegedly violated the Act by seeking to impose
25 fines on employees who had engaged in conduct that was

1 against the union constitution, but the conduct had been
2 engaged in after the employees had resigned from the
3 union.

4 Such a complaint may well state a cause of
5 action barred by the National Labor Relations Act, and
6 in those cases the Board held an unfair labor practice
7 had occurred, and the Board enjoined the state court
8 action to enforce the fines. That, of course, is not
9 our case, because the state court complaint filed in
10 this case did not allege a cause of action barred by the
11 National Labor Relations Act or pre-empted by the
12 National Labor Relations Act.

13 QUESTION: Counsel, I think you mentioned that
14 the regional director filed a petition with the Federal
15 District Court seeking to enjoin the entire state
16 action.

17 MR. KATZ: Yes, Justice Powell.

18 QUESTION: I don't think you have stated the
19 result of that.

20 MR. KATZ: The result of it was that the
21 Federal District Court refused to issue the order
22 requested by the Board.

23 QUESTION: Did the District Court file an
24 opinion? Is it in the record?

25 MR. KATZ: Excuse me, Your Honor?

1 QUESTION: Did the District Court file an
2 opinion?

3 MR. KATZ: Yes, included in our opening brief
4 as Appendix C are the findings of fact and conclusions
5 of law of the District Court. I might point out, if
6 Your Honor will refer to Exhibit B attached to our
7 brief, which is a selection from the transcript of
8 proceedings before the District Court, District Judge
9 Crane did suggest to the Board that he would be willing
10 to consider an order enjoining the respondent from
11 interfering with proceedings before the Board, but the
12 Board did not pick up on that suggestion, and did not
13 ask for any more limited injunction. Instead, it asked
14 only for the complete restraining order against the --

15 QUESTION: So what was the result, as Justice
16 Powell asked?

17 MR. KATZ: The District Court's order was
18 entered. An appeal was filed but was --

19 QUESTION: Well, did he file an opinion?

20 MR. KATZ: He did file findings of fact and
21 conclusions --

22 QUESTION: So what was his reason for denying
23 the injunction?

24 MR. KATZ: He found that there was no evidence
25 produced by the Board to indicate that the state court

1 suit lacked a reasonable basis. He found no basis for
2 determining that in fact an unfair labor practice had
3 occurred in the filing of the state suit.

4 QUESTION: Was any appeal taken from that?

5 MR. KATZ: There was an appeal initially
6 taken. That is not part of the record before the
7 Court. It was later withdrawn.

8 QUESTION: Could I ask you, how do you read
9 the National Labor Relations Board views in this case?
10 In order to make out the unfair labor practice which
11 they found, according to them, is it necessary to prove
12 not only an anti-union bias or a harassment, but also
13 that the action have no basis?

14 MR. KATZ: It is difficult to read the
15 National Labor Relations Board, because --

16 QUESTION: I know what the Administrative Law
17 Judge said, but I don't read the Board as relying on
18 that other factor at all, just a finding that the suit
19 was motivated by an anti-union bias or by retaliation.

20 MR. KATZ: I read the Board's papers filed in
21 this Court as taking the position that if the suit is
22 motivated by the desire to retaliate, it is an unfair
23 labor practice.

24 QUESTION: That is the end of it.

25 MR. KATZ: Yes, sir.

1 QUESTION: Whether the suit has any foundation
2 or not.

3 MR. KATZ: Well, although the Board is willing
4 to look at the merits of the state court suit in order
5 to determine whether it has a foundation in fact --

6 QUESTION: Well, I know, but even -- assume
7 that it does have a foundation in fact. The Board would
8 still find an unfair labor practice.

9 MR. KATZ: I think that's a fair conclusion
10 from the position the Board has taken.

11 QUESTION: I don't think that's true of what
12 the Court of Appeals said in reviewing the Board
13 though.

14 MR. KATZ: The Court of Appeals indicated that
15 even in the absence of an unlawful motivation, a suit
16 which had a coercive impact on employees might well be a
17 violation of Section 81.

18 QUESTION: I know, but they would require that
19 the suit have no basis.

20 MR. KATZ: That's not -- well, yes, I think
21 I'd have to concede that. The Court of Appeals would
22 require the suit have no basis. It is not clear the
23 Board would do that.

24 The Ninth Circuit held that the restaurants
25 also had a lawful objective on its face, and then the

1 Ninth Circuit went on to say that the proper test of the
2 legitimacy of a state cause of action is whether the
3 plaintiff has evidence to support his allegations. Now,
4 we agree with that holding, but we disagree with the
5 Ninth Circuit as to the appropriate forum in which such
6 evidence should be tested.

7 Simply put, our position is that the NLRB is
8 not entitled to adjudicate or to restrain a pending
9 state court lawsuit which has a lawful objective on its
10 face and its properly subject to state court
11 jurisdiction. I pointed out a moment ago that there
12 might be some situations in which the state court suit
13 asks for relief barred by the National Labor Relations
14 Act. In such a case, the Board might arguably have the
15 right to restraint that suit, but in so considering, the
16 Board might take into account the motive for filing the
17 suit.

18 For example, there have been a number of suits
19 where employers have sought injunctions against activity
20 that was clearly protected, such as picketing. In such
21 cases, it has been the Board's habit to evaluate the
22 motive for such suit, and if the Board determines that
23 the motive is one of good faith, the Board has typically
24 not restrained the state court suit.

25 QUESTION: Well, Mr. Katz, in this instance,

1 unless I am mistaken, your client was found by the Board
2 to have committed an unfair labor practice by
3 prosecuting the suit.

4 MR. KATZ: Yes, Your Honor.

5 QUESTION: And you are not challenging that?
6 That is not an issue you raised in your cert petition?

7 MR. KATZ: Well, we are certainly challenging
8 that an unfair labor practice has occurred in the filing
9 of the suit, and more importantly, we are challenging
10 the process by which the Board reached its conclusion
11 that an unfair labor practice had existed. The Board --

12 QUESTION: But that issue really wasn't raised
13 in your petition, was it?

14 MR. KATZ: The only issue that I think you may
15 be referring to that is missing from the petition is a
16 challenge to the specific findings that the leaflet was
17 truthful and did not constitute defamation. We did not
18 challenge the --

19 QUESTION: I read your petition as challenging
20 the power of the Board to order you to cease and desist
21 from the state court action.

22 MR. KATZ: And the ability of the Board to
23 find that a suit filed in state court which has a lawful
24 purpose on its face and is subject to state court
25 jurisdiction is an unfair labor practice.

1 The Board now asserts the right, and it is a
2 very broad right, to conduct a threshold scrutiny of
3 litigation involving labor disputes in order to
4 determine whether the plaintiff's motivation is to use
5 an apparently lawful suit in order to retaliate against
6 the defendant for conduct protected by the National
7 Labor Relations Act.

8 We believe the Board has no such power. When
9 a civil suit has a lawful objective on its face, and is
10 subject to state court jurisdiction, the state court
11 interest is superior. We recognize that there is a
12 balancing of interests, when we are involved with a
13 labor dispute, when there are some federal rights at
14 issue, and when there are some state rights to be
15 protected, but when the suit has a lawful objective, it
16 is properly subject to state court jurisdiction, that
17 balancing test requires that the state court interest be
18 superior, and that the state court bears responsibility
19 for trial on the merits and for all appropriate relief.

20 Concern that the litigation may be motivated
21 by improper considerations should not allow the Board to
22 subject the plaintiff in the suit to an administrative
23 trial of the civil complaint in order to assess his
24 motive by evaluating the factual and the legal support
25 for his civil claims.

1 If the Board does intend to determine that the
2 weakness in a plaintiff's suit justifies an inference
3 that the suit was brought for retaliatory purposes and
4 is therefore an unfair labor practice, then the Board
5 must await the decision of the state court, and to the
6 extent that the state court fails to provide sufficient
7 relief to accommodate the interests of the National
8 Labor Relations Act, the Board still has the ability to
9 step in and to award the proper relief.

10 QUESTION: Why must the Board hold its hand?
11 Why must the Board hold his hand? Why shouldn't the --
12 if the state court can go forward, why, well and good.
13 But that is all you want, isn't it?

14 MR. KATZ: We want the state court to be able
15 to go forward --

16 QUESTION: Yes.

17 MR. KATZ: -- but without interference from
18 the Board.

19 QUESTION: Well, I know, but what -- how is it
20 interfering with your suit?

21 MR. KATZ: Well, in the Linn case, and in the
22 Farmers case --

23 QUESTION: How is it interfering with your
24 case?

25 MR. KATZ: Well, for one thing, if the

1 employer has to go forward and demonstrate the merit of
2 his suit to an Administrative Law Judge and to the
3 Board, he is doing so under the possible threat that his
4 suit is orderly drawn. That is certainly an
5 interference with the suit. He must do so without
6 pretrial confrontation of witnesses. He must do so
7 without discovery. He must do so without a civil judge,
8 and without a civil jury.

9 And if he fails carrying that burden to prove
10 his case in front of the Administrative Law Judge, then
11 he might be ordered to have his suit withdrawn and to
12 pay the other side's expenses.

13 QUESTION: Don't you think usually you could
14 get to trial in a libel case in a state court before the
15 Board would ever reach an unfair labor practice
16 complaint?

17 MR. KATZ: I would not presume that that would
18 happen in all cases, but --

19 QUESTION: Well, but a lot of them, it would,
20 wouldn't it?

21 MR. KATZ: Well, it might, but --

22 QUESTION: And what if you won in the state
23 court?

24 MR. KATZ: I am not sure that a victory in the
25 state court would be meaningful to the National Labor

1 Relations Board. In this case, Your Honor, the National
2 Labor Relations Board --

3 QUESTION: Well, it may not. You may be
4 guilty of an unfair labor practice, but you would
5 nevertheless have damages in the state court.

6 MR. KATZ: Well, I don't know that the Board
7 would not try and interfere in some way with those
8 damages. For example, the Board might rule that the
9 employer has no right to collect those damages. We don't
10 know, because this is a new area for the Board. The
11 Board has not in the past extended itself this way.

12 QUESTION: Well, do you know of any cases
13 where we have said that not only may the state court go
14 forward, but that the Board must defer to the state
15 proceedings?

16 MR. KATZ: Your Honor, I construe Linn and
17 Farmers to require that. In the Linn case, this Court
18 said --

19 QUESTION: Well, there was no issue -- I don't
20 remember we ruled that made any such ruling as that --

21 MR. KATZ: No, no such --

22 QUESTION: -- that the Board couldn't go
23 forward with its unfair labor practice.

24 MR. KATZ: No such ruling was necessary in the
25 Linn case, but I think it's a necessary corollary in the

1 Linn case. I would submit that this Court could not
2 have intended to allow state courts to have pre-emptive
3 jurisdiction to --

4 QUESTION: Pre-emptive? We didn't say it was
5 pre-emptive. You just said they weren't pre-empted.

6 MR. KATZ: All right. Let me correct that.
7 Pre-emptive is not a good word to use. I don't believe
8 this Court would have allowed the state courts to have
9 primary jurisdiction.

10 QUESTION: We didn't even say they had primary
11 jurisdiction. We just said they had jurisdiction to go
12 forward.

13 MR. KATZ: Well, all right. I stand
14 corrected. Let me say --

15 QUESTION: Well, didn't we?

16 MR. KATZ: Excuse me?

17 QUESTION: I think that's all we said. We
18 just said they were not pre-empted from going forward.

19 MR. KATZ: If the state court under Linn is
20 not pre-empted from going forward --

21 QUESTION: As a matter of fact, we said the
22 interests of the two proceedings were different.

23 MR. KATZ: Yes, but it -- I don't think it
24 would be consistent with Linn for the National Labor
25 Relations Board to have the right to make a preliminary

1 disposition of the merits of the state court suit in
2 order to decide if the state court can go forward, and
3 that's what the Board is asking here. The Board is
4 saying, even if the state court has jurisdiction under
5 Linn --

6 QUESTION: Well, I agree. That is a different
7 question. But it doesn't follow from that -- if you win
8 on that issue, it doesn't necessarily follow that the
9 Board can't go forward.

10 MR. KATZ: Well, I think --

11 QUESTION: All you would say is, the Board
12 shouldn't interfere with the state suit.

13 MR. KATZ: I think that the Board cannot
14 interfere with a pending state suit. I think the Board
15 cannot go forward because there are procedures that the
16 employer will be required to go through in the Board
17 that will adversely impact on his ability to go forward
18 in the state case.

19 QUESTION: Mr. Katz, what do you mean by the
20 Board going forward? Do you mean going forward with any
21 of the possible proceedings against the employer, or do
22 you mean just going forward in making a determination as
23 to the merits of the employer's state court suit?

24 MR. KATZ: I mean the latter. If the employer
25 were alleged to have committed a series of unfair labor

1 practices, one of which was the filing of a civil suit
2 which is alleged to be retaliatory, I would certainly
3 concede that the Board can go forward to adjudicate the
4 other unfair labor practices, and perhaps to look at the
5 entire pattern and say, this employer is engaged in a
6 course of conduct which constitutes an unfair labor
7 practice and must be stopped, but even in such
8 circumstances, the Board could not restrain the pending
9 state court suit.

10 Once the state court suit had run its course,
11 and informed by the decision and the findings in the
12 state court, the Board might then decide to supplement
13 the relief it had provided by a further order enjoining
14 the commencement perhaps of subsequent state court
15 proceedings which might be a part of that same pattern
16 and practice of coercive conduct.

17 QUESTION: What if the action of the Board was
18 initiated before the state court suit, on allegations of
19 unfair labor practice, and then it develops that the
20 suit is filed and they expand the case? You say they
21 have to stop?

22 MR. KATZ: No, Your Honor. The Board's
23 authority to find an unfair labor practice based on a
24 threat to file a lawsuit is not challenged here, nor is
25 the Board's authority to enjoin an employer's intention

1 to commence something if there is sufficient substantial
2 evidence to indicate that the employee is going to
3 engage in some conduct, including perhaps a suit which
4 would be a violation of the National Labor Relations
5 Act, but of course that is not this case. Our case is
6 one in which a state court --

7 QUESTION: Your position would be that if what
8 had happened here was that Bill Johnson's had threatened
9 a lawsuit, that the National Labor Relations Board could
10 go ahead and process a complaint.

11 MR. KATZ: That is correct, Justice O'Connor.

12 QUESTION: But if the suit is filed by Bill
13 Johnson's, then it must stop what it is doing.

14 MR. KATZ: That is not only my contention,
15 Justice O'Connor. It is what the Board has held for
16 many, many years. One year before our civil suit was
17 filed, the Board decided the case of Essie Nichols
18 Marcey, in 1977, cited in our papers. In that case, the
19 employer had threatened to file a lawsuit and the
20 employer had filed a lawsuit. The Board found the
21 threat to file the lawsuit to be an unfair labor
22 practice. The Board found that the filing of the
23 lawsuit itself was not an unfair labor practice. We
24 agree with that decision.

25 QUESTION: Mr. Katz, do you know what the

1 first case decided by the Board was in which the
2 conducting of a state lawsuit was found to be an unfair
3 labor practice?

4 MR. KATZ: The first case that comes to mind,
5 Your Honor, is the 1960 case, I believe it is, of Clyde
6 Taylor, although I remember the Clyde Taylor overruled a
7 case called W.T. Carter, which may have been on the same
8 issue. The W.T. Carter case and the Clyde Taylor case
9 are, of course, opposites. In Clyde Taylor there was a
10 finding that the employer had as part of a bad faith
11 effort to stop a union campaign filed a civil suit.
12 Nevertheless, the Board in that 1960 case, adopting the
13 dissent in W.T. Carter, decided many years before, held
14 that even -- without specifically saying so, the Court
15 held that even the bad faith motive which it had found
16 would not deprive the employer of the right to file a
17 civil action in court, because the right of an
18 individual to go to court, to seek judicial protection
19 of his claims, was too important to be declared an
20 unfair labor practice.

21 What the Board has done in the 23 years since
22 Clyde Taylor is really reverse itself almost
23 completely. We --

24 QUESTION: If I understand -- let me see if I
25 understand your argument. First your argument is that

1 Congress has not expressly or otherwise authorized any
2 interference by the federal courts with a state court
3 proceeding of this kind. That is Number One. Number
4 Two, and that they have not shown that it was necessary
5 to protect the jurisdiction of the Labor Board, which is
6 the second leg of the statute. Is that your position?

7 MR. KATZ: Let me correct, Mr. Chief Justice,
8 if I may. Congress has provided some circumstances by
9 statute in which the Board may seek to protect federal
10 interests even when there is a pending state court
11 proceeding.

12 QUESTION: That is the second leg that I just
13 postulated to you. If it interferes with the
14 jurisdiction and functioning of the Labor Board, then
15 they can enjoin the state action.

16 MR. KATZ: No, I would not say that. If
17 the --

18 QUESTION: Well, that is what the statute
19 says. I am just relying on the statute, which I would
20 assume for your case you ought to be relying on.

21 MR. KATZ: Well, I don't read the statute,
22 Your Honor, as saying that the Board has the right to
23 enjoin a state court proceeding --

24 QUESTION: If it interferes with the Labor
25 Board's --

1 MR. KATZ: I'm sorry. I misunderstand. If
2 the state court proceeding directly interferes --

3 QUESTION: Yes.

4 MR. KATZ: -- with the National Labor
5 Relations Board in the performance of its functions,
6 yes. Then it does have the right to enjoin that
7 proceeding.

8 QUESTION: And you say it does not interfere
9 with it here, and on the other leg of the statute, it is
10 not an interference which has been expressly authorized
11 by Congress. The statute is expressly authorized by an
12 Act of Congress. This is not such a suit, you say, this
13 interference. This federal injunction has never been
14 expressly authorized by Congress.

15 MR. KATZ: Not where the Board has to try and
16 adjudicate the state court action in order to determine
17 what the underlying motive is for the proceeding. There
18 is no allegation in this case that the state court
19 action on its face interferes with the National Labor
20 Relations Act or interferes with the National Labor
21 Relations Board.

22 We recognize that the Board has some expertise
23 in evaluating an employer's motivation for suit, and
24 some interest in the prevention of retaliatory suits,
25 but we submit that an employer's request for judicial

1 relief stands on a different footing from any other kind
2 of conduct that might be coercive or directly
3 interfering with employee rights.

4 QUESTION: You don't consider a civil suit for
5 damages coercive?

6 MR. KATZ: I think all suits are coercive,
7 Your Honor.

8 QUESTION: I thought so.

9 MR. KATZ: And I think plaintiffs in all civil
10 suits, especially in suits arising out of labor
11 disputes, are likely to bear some ill will toward the
12 defendants.

13 QUESTION: But in this setting it must be
14 coercive in a specific way under the federal statute,
15 that is, coercive in the way that it interferes with the
16 exercise of the union's guaranteed rights.

17 MR. KATZ: In order for the suit to be
18 coercive in such a manner that the National Labor
19 Relations Board can intervene, the suit has to ask for
20 relief which is a violation of the National Labor
21 Relations Act, or the suit has to include some
22 procedure, for example, a specific abuse of process
23 which interferes with the conduct of the National Labor
24 Relations Board or with the National Labor Relations
25 Act.

1 Your Honor, I think I would like to reserve a
2 minute or two for rebuttal.

3 CHIEF JUSTICE BURGER: Ms. Corwin.

4 QUESTION: Ms. Corwin, I am sure you will make
5 it clear as to what the Board's position is as to
6 whether or not as a matter of labor law, national labor
7 law, the Board must find not only that the suit is
8 retaliatory or harassing or in bad faith, but also that
9 the state suit has no basis in fact in order to make out
10 the unfair labor practice.

11 ORAL ARGUMENT OF CAROLYN F. CORWIN, ESQ.,

12 ON BEHALF OF THE RESPONDENTS

13 MS. CORWIN: Mr. Chief Justice, and may it
14 please the Court, Justice White, the response to that is
15 that the issue before the Board in an unfair labor
16 practice proceeding is whether there has been a
17 violation of the National Labor Relations Act, whether
18 there has, for example, been a coercive interference
19 with protection of rights, employee rights under Section
20 7.

21 QUESTION: Yes.

22 MS. CORWIN: The issue that the Board
23 considers in a situation like this one, in which the
24 allegation is that the bringing, the filing and
25 prosecution of the civil suit itself is coercive

1 conduct, and is thus an unfair labor practice, is
2 essentially the motivation of the employer --

3 QUESTION: Right.

4 MS. CORWIN: -- to the -- there are a number
5 of different sorts of evidence that can be used.

6 QUESTION: So that if he wouldn't have -- so
7 that if he has the unlawful motivation, that's -- the
8 unfair labor practice is complete at that point.

9 MS. CORWIN: The unlawful motivation is the
10 central focus of the inquiry. The Board has recognized
11 that the filing of a civil suit for the purpose of
12 retaliation has an inherently coercive effect, and to
13 that extent effect is part of the calculus, but the
14 Board's essential inquiry in a charge like this is, what
15 is the employer's motivation.

16 QUESTION: Right, and if they find that his
17 motivation is anti-union or whatever it takes to make an
18 unfair labor practice, it could be that the unfair labor
19 practice would be found even if, even if on any
20 objective basis the lawsuit had -- wasn't frivolous, or
21 that it had a foundation in fact.

22 MS. CORWIN: Well, I think that the Board
23 frequently considers many different sorts of evidence.

24 QUESTION: I know, and I would suppose it
25 would consider whether or not the suit had a foundation

1 in fact, but even if they found that it had a foundation
2 in fact, it could be an unfair labor practice. That's
3 the way I read your brief.

4 MS. CORWIN: I think that is conceivable, but
5 I think the Board looks at many different sorts of
6 evidence, including whether the suit has a reasonable
7 basis in fact.

8 QUESTION: I know that. I agree.

9 QUESTION: What if the Administrative Law
10 Judge made the finding of fact that the employer bore
11 extreme animus and anti-union sentiment against the
12 employees in filing this suit, and made a second finding
13 of fact that the suit was not pre-empted under any
14 federal doctrine, was well grounded in state law, and
15 would in all probability succeed, and that goes to the
16 Board? Would they say that is an unfair labor practice?

17 MS. CORWIN: Well, I have to say that I don't
18 think there has been a case like that before the Board.
19 It is certainly not this case, in which there were a lot
20 of different kinds --

21 QUESTION: Well, under your brief, the answer
22 would be yes, it would be an unfair labor practice.

23 MS. CORWIN: I -- my answer to that is that a
24 case like that has not arisen. I think it is an open
25 question before the Board.

1 QUESTION: Maybe this is it.

2 (General laughter.)

3 QUESTION: Maybe this is the case.

4 MS. CORWIN: Well, I think in this case you
5 have many different sorts of evidence that the Board
6 found. You have the statements of the employer's
7 supervisors to get even with the employees.

8 + QUESTION: Well, let's concede all the
9 anti-union animus there is, but what if there's -- what
10 if this case is well grounded in fact?

11 MS. CORWIN: I --

12 QUESTION: And state law.

13 QUESTION: And state law.

14 MS. CORWIN: I am simply reluctant to commit
15 the Board at this point to that sort of hypothetical.
16 It seems to me that --

17 QUESTION: I thought you had in your brief
18 already.

19 MS. CORWIN: It seems to me that what the
20 Board does in this area is an accommodation. The Clyde
21 Taylor rule, which is still in full effect, requires the
22 Board -- the Board has made the judgment that it must
23 accommodate the interest to litigate with the concern
24 for rights under the Act, and I think that the Board may
25 never be faced with the hypothetical you suggest. It

1 may just not be very likely. It is not clear that the
2 general counsel would ever bring such a complaint before
3 the Board. I am simply --

4 QUESTION: Well, it brought a complaint -- he
5 pursued a complaint when the District judge, the United
6 States District judge had said that the state court suit
7 was not frivolous, and it had a basis in fact.

8 MS. CORWIN: I think the District --

9 QUESTION: And the general counsel decided not
10 to pursue that in the court system, but to take it to
11 the Board, and he did.

12 MS. CORWIN: Yes. That's correct, and that is
13 the normal procedure of an unfair labor practice
14 proceeding. In this case, I think there was an initial
15 effort to get temporary relief, and --

16 QUESTION: Well, it failed. And it failed.

17 MS. CORWIN: That's correct. The District
18 judge was --

19 QUESTION: And it found it right on the point
20 of whether there was a decent basis for the suit.

21 MS. CORWIN: I think that that was not the
22 only point in the District Judge's mind. I think the
23 transcript to which Mr. Katz referred --

24 QUESTION: Well, that was one of them.

25 MS. CORWIN: Well, I think the transcript

1 reflects that the District judge was quite reluctant to
2 step in at that point. The District judge had before it
3 the affidavits, but did not have the four days of
4 administrative hearings that the Administrative Law
5 Judge of the Board had, and was quite reluctant to step
6 in and order the suit to be stopped.

7 QUESTION: Ms. Corwin, how many Administrative
8 Law Judges are there for the National Labor Relations
9 Board, just an order of magnitude?

10 MS. CORWIN: I'm sorry, I don't know the order
11 of magnitude. I think co-counsel has indicated that
12 there are approximately 100, but I myself have not --

13 QUESTION: Are each of them grounded, say, in
14 the libel law of all the 50 states?

15 MS. CORWIN: Indeed not, and that is not what
16 the Administrative Law Judge attempts to do in a case
17 like that. The issue before the Board is not the merits
18 of the state court claim. The issue before the Board is
19 the motive of the employer in bringing a suit like this.

20 QUESTION: Well, but then we are right back to
21 the hypothetical that Justice White put to you, and it
22 doesn't seem to me -- I realize you prefer not to answer
23 the question, and certainly there may be good reasons
24 for it, but if you are now going to again stress motive
25 rather than the merit of the suit, it seems to me you do

1 have to face up to the hypothetical.

2 What if -- there is no question that all 100
3 Administrative Law Judges would have found anti-union
4 animus, and yet any objective lawyer viewing the merits
5 of the state court suit would have said it is grounded
6 in fact and will probably succeed.

7 MS. CORWIN: Well, I don't want to try to
8 evade the question. The concern is that this is an area
9 in which the Board has attempted to accommodate
10 interests, and I hesitate to commit the Board before it
11 faces a case of the sort that you are describing.

12 QUESTION: Well, your earlier answer to me was
13 that the 100 Administrative Law Judges don't have to be
14 grounded in state law because all they look at is
15 animus.

16 MS. CORWIN: No. No, I must go further to
17 explain. They look at a number of different types of
18 evidence, all for the purpose of determining whether or
19 not the suit is motivated for a protected activity or
20 anti-union animus. There are many different sorts of
21 evidence, and one that employers frequently urge and in
22 fact which this employer urged is that the
23 Administrative Law Judge take a look to see whether
24 there is a reasonable basis in fact for the suit.

25 Here, the employer -- the petitioner urged at

1 the Administrative Law Judge stage that it had a
2 reasonable basis for the suit, and the general counsel
3 responded with evidence on that point. The finding of
4 the Administrative Law Judge was not addressed to the
5 merits of that claim. It was not the same sort of
6 inquiry as the state court.

7 QUESTION: Well, but was it addressed to a
8 reasonable basis of the suit?

9 MS. CORWIN: It was addressed to the
10 reasonable basis of the suit as one indication of the
11 motive of the employer.

12 QUESTION: Well, then, to the judge, to that
13 -- to the extent he made that sort of a finding, would
14 have to know something about the law of the state.

15 MS. CORWIN: I think that the judge may need
16 to know something about whether a particular statement
17 is true or false. I think perhaps the broad outlines
18 most Administrative Law Judges would be familiar with.

19 QUESTION: The broad outlines of what?

20 MS. CORWIN: Of the state -- of the components
21 of libel law, for example, the truth or falsity of a
22 statement.

23 QUESTION: Are you suggesting that libel law
24 is uniform throughout the 50 states?

25 MS. CORWIN: I'm not suggesting that, but I'm

1 suggesting that the inquiry of the Administrative Law
2 Judge is very limited, and to the extent there is an
3 examination of this reasonable basis concept, it is
4 confined to the sorts of questions like, is the
5 statement true or false, is there any indication that
6 there was malice. It is really a very --

7 QUESTION: Well, how do you know when malice
8 is necessary, without turning to the state law?

9 MS. CORWIN: Well, I think that if one gets
10 into the sort of questions that require further legal
11 analysis or further inquiry into state law, I simply
12 don't think that's the sort of thing the Administrative
13 Law Judge is going to do. It is a very basic inquiry.

14 QUESTION: But, Ms. Corwin, in his own
15 findings he did conclude that the respondent did not
16 have a reasonable basis for filing his lawsuit. In two
17 or three places, he says something similar to that. So
18 he had to make that inquiry before he made that
19 finding.

20 MS. CORWIN: Well, I think the inquiry of
21 whether there is a reasonable basis for the lawsuit is
22 not the same inquiry as who is going to prevail under
23 the particular state law, and how the merits --

24 QUESTION: It is a little hard for me to
25 understand a lawsuit that has no reasonable basis

1 succeeding.

2 MS. CORWIN: Well, I think in this case, for
3 example, you had the employer state that it had a
4 reasonable basis for the lawsuit because on the face of
5 it it simply -- it simply stated state law claims, and
6 that was the end of that, and you had the employer
7 saying, I filed the lawsuit because I felt that I was
8 personally attacked for filthy restrooms and unwarranted
9 sexual advances.

10 QUESTION: And the Administrative Law Judge
11 looked at the facts and said those attacks were true.

12 MS. CORWIN: That's correct.

13 QUESTION: I mean, you can't say he didn't
14 look at the merits of the case, then.

15 MS. CORWIN: Well, he looked at some very
16 basic facts of the case.

17 QUESTION: They go farther than motive. They
18 go -- I mean, maybe he is right. I am not reaching that
19 question. But I don't know how you can argue that he
20 didn't look at the merits of the lawsuit, either.

21 MS. CORWIN: No, I don't argue that he didn't
22 look at the merits. I suggest he did not have the task
23 of deciding the merits, and in fact what he did in this
24 case was to see whether the employer had presented any
25 evidence that might support some sort of a reasonable

1 basis for bringing the suit.

2 QUESTION: Well, is it your position that what
3 the Board has to do is to simply find whether the
4 employer had reasonable grounds for believing that the
5 alleged facts he is relying on occurred? Or what?

6 MS. CORWIN: Well, I think that is one
7 possibility. I think it depends on what the employer
8 suggests. The employer could come forward and say, I
9 thought such and such was true because people informed
10 me of X or Y.

11 QUESTION: Well, but what's the Board's
12 standard in these cases? That is what I think we are
13 concerned about.

14 MS. CORWIN: Well, again, I would have to
15 reiterate that the Board is concerned with what the
16 employer's motive is. The Board inquiry in an unfair
17 labor practice proceeding is what sort of intent did an
18 employer have, what sort of effect does the conduct
19 have. Is this --

20 QUESTION: Well, is the determination of
21 whether the lawsuit has a reasonable basis in fact just
22 a means of assessing whether it was filed for a
23 retaliatory purpose?

24 MS. CORWIN: Yes. It is an indicator.

25 QUESTION: And that is all?

1 MS. CORWIN: It is an indication among many of
2 what the employer's motive was, whether it was for the
3 purpose of coercing employees in the exercise of their
4 protected activity.

5 QUESTION: Well, it now sounds like you have
6 answered the question you were very reluctant to answer
7 a while ago, if you answered yes to Justice O'Connor's
8 question, that it is only relevant to determination of
9 motive, and it is not an independent factor required to
10 -- for the finding of an unfair labor practice.

11 MS. CORWIN: That is correct, and I didn't
12 mean to --

13 QUESTION: What is correct? That it is not an
14 independent factor? Is that it?

15 MS. CORWIN: That's -- it only goes to the
16 question of motive, of the employer's motive.

17 QUESTION: Well, so you have answered the
18 question.

19 QUESTION: Yes, and you really answered it
20 yes, it seems to me. If the basic inquiry is motive,
21 bad motive, and lack of merit of the suit is simply an
22 element that goes to make up bad motive, now, am I
23 faithfully following you?

24 MS. CORWIN: Yes, that's correct.

25 QUESTION: Then a conclusion of bad motive is

1 enough even though it were decided that the lawsuit had
2 merit.

3 MS. CORWIN: My reluctance to address that
4 is ---

5 QUESTION: You have just expressed absolutely
6 no reluctance. You said it is only relevant to
7 determining motive.

8 MS. CORWIN: It is certainly relevant to
9 determining motive, but my concern is that I don't know
10 how the Board would weigh the evidence in a suit such as
11 the one that you suggest. I think it is certainly
12 correct to say that the reasonable basis inquiry goes to
13 motive. It is simply that I don't know whether there
14 would ever be a case in which that was the only evidence
15 of intent. I think it is far more likely that you are
16 going to have what you have in this situation, in which
17 you have evidence of the employer making statements
18 ahead of time, a week ahead of time, that petitioner
19 would get even with these employees, and particularly
20 with Mrs. Helton, one of the waitresses who had filed a
21 charge with the Board.

22 QUESTION: Ms. Corwin?

23 MS. CORWIN: Yes.

24 QUESTION: We are not giving you much of an
25 opportunity to argue your case, but I have a couple of

1 questions. Do you agree that the complaint in the state
2 court on its face alleged an action of malicious libel?

3 MS. CORWIN: We have not questioned that. I
4 think I can say that we would accept that.

5 QUESTION: And the end result of the Board's
6 decision that was enforced by the Court of Appeals for
7 the Ninth Circuit is to enjoin the prosecution of that
8 suit, is it not?

9 MS. CORWIN: That is correct. At least to
10 enforce the Court's cease and desist order requiring
11 dismissal of that suit.

12 QUESTION: Yes. So the effect of all of it is
13 that the libel suit cannot go forward in the state
14 court, so that the Labor Board where a federal court
15 enforces its order may enjoin a libel suit bona fide on
16 its face?

17 MS. CORWIN: That is the result only after the
18 Board has found that the filing and prosecution of the
19 suit is an unfair labor practice because it was for the
20 purpose of harassing the employees for the exercise of
21 their protected rights. Only after finding a violation
22 of the federal statute, the federal labor laws, does the
23 Board then identify an unfair labor practice and provide
24 a remedy for that. In this case, the remedy is
25 dismissal of the civil suit and reimbursement of legal

1 expenses.

2 QUESTION: Which in effect decides the issue
3 of malice in a libel suit, doesn't it? In effect?

4 MS. CORWIN: It decides whether the employer
5 has violated the federal statute. That is the inquiry
6 of the Board.

7 QUESTION: May I ask you one other question?
8 Could both of these cases have gone forward
9 simultaneously at the same time, the state suit and the
10 proceeding before the Administrative Law Judge?

11 MS. CORWIN: In fact, yes, that is what
12 occurred in this case.

13 QUESTION: Well, was a state suit prosecuted
14 while the labor proceeding was going on?

15 MS. CORWIN: Yes, that's correct. The state
16 suit was prosecuted through several stages. On the day
17 that the complaint was filed, the temporary restraining
18 order was issued.

19 QUESTION: Yes, and some depositions were
20 taken.

21 MS. CORWIN: That's correct. Some depositions
22 were taken.

23 QUESTION: It never went to actual trial, did
24 it?

25 MS. CORWIN: It did not go to trial. There

1 was a preliminary injunction stage at which the court
2 denied a preliminary injunction to the employer and
3 vacated the temporary restraining order. There were
4 cross-motions for summary judgment, and that occurred
5 after the Administrative Law Judge hearing but before
6 the final decision came out from the Administrative Law
7 Judge.

8 QUESTION: Suppose it had gone to trial and a
9 verdict and judgment entered on it for the plaintiff
10 before the Labor Board acted. Would it have been
11 obligated to respect that, or what would have happened
12 then?

13 MS. CORWIN: Well, I think the Board's
14 reaction to that development, had it occurred, which it
15 did not in this case, but had it occurred, I think would
16 depend on the circumstances in which that judgment were
17 entered. If it were, for example, a default judgment
18 because the waitresses here couldn't afford to hire a
19 lawyer and to pursue the suit to that extent, I don't
20 think the Board would feel constrained by any default
21 judgment, for example.

22 If it were a judgment on the merits, I think
23 again it would depend on what the Board could identify
24 in the decision as relevant to its inquiry into motive.
25 I think obviously the Board would think twice about what

1 a state court had found on the merits, but again, it's
2 conceivable that a trial court would err in the state
3 and that the employee wouldn't have the money to pursue
4 an appeal. The waitresses in this case may not be able
5 to pursue this sort of litigation through to the state
6 Supreme Court, and again the Board might consider a
7 situation like that.

8 QUESTION: If there were a final judgment in
9 the state court, do you think the Board would defer to
10 it?

11 MS. CORWIN: Again, I would have to say that
12 it would depend on the circumstances --

13 QUESTION: Just on the libel issue. That is
14 all that is involved in the state court.

15 MS. CORWIN: Well, in this case, there were
16 two causes of action. One was a business interference
17 claim which was dismissed by the state court. The libel
18 action is still alive. But again, I suggest it would
19 really depend on the circumstances. I think the Board
20 might well take something like that into account if it
21 were convinced that the waitresses had been able to be
22 represented by good legal counsel that pursued their
23 claims and that in fact the determination was an
24 appropriate one in light of the procedural circumstances
25 here.

1 QUESTION: Ms. Corwin, would you agree that
2 your theory as you have given it to us in response to
3 Justice White's questions is quite different from the
4 theory of the Court of Appeals, which did rely squarely
5 on the absence of any reasonable basis in fact, and on
6 that finding?

7 MS. CORWIN: Well, I think the Court of
8 Appeals relied not only on the lack of reasonable basis
9 in fact, but I think it recognized that there were other
10 indications, other significant indications, such as the
11 statement about getting even, the statement by a --

12 QUESTION: There is additional evidence of
13 improper motive, but I think it was critical to their
14 holding that there was a finding that has not been
15 challenged, as I understand it, in the cert petition,
16 that there was no reasonable basis in fact, which is
17 quite different from your theory. Your theory, as I
18 understand it, is that if there is improper motive, no
19 matter how good the lawsuit is, there is still an unfair
20 labor practice.

21 MS. CORWIN: I have tried to suggest that the
22 reasonable basis inquiry is simply an element of the
23 conclusion as to whether the --

24 QUESTION: I understand. I don't want -- you
25 don't have to repeat that, but all I'm suggesting,

1 that's a very different theory than the Court of Appeals
2 theory.

3 MS. CORWIN: Well, I think the Court of
4 Appeals spent considerable time on the reasonable basis
5 point, but I think it, too, recognized that it goes to
6 whether the motive of the employer is one that violates
7 the federal labor laws.

8 QUESTION: Well, if we agree with you on that,
9 that that is what the -- it seems to me we really ought
10 to remand to the Court of Appeals, because I thought
11 they had relied on -- I agree with Justice Stevens, they
12 had relied on the lack of reasonable basis as an
13 independent required element in the proof of the unfair
14 labor practice.

15 MS. CORWIN: Well, I think that the Court of
16 Appeals recognized that that was a significant --

17 QUESTION: In which event they may have
18 violated Chainery for affirming on a ground that you say
19 the Board doesn't use.

20 MS. CORWIN: I don't read the Court of Appeals
21 decision that way. It seems to me that the Court of
22 Appeals did refer to the other sorts of evidence that
23 the get even evidence, the circumstances of the lawsuit.

24 QUESTION: Well, what do we do if we read it
25 that way, in your view? Then what action should this

1 Court take, assuming we read it as saying there has to
2 be a finding of no reasonable basis in fact?

3 QUESTION: They really weren't entitled to
4 affirm on that basis, were they?

5 MS. CORWIN: I simply don't read them as
6 having affirmed on that basis.

7 QUESTION: All right.

8 MS. CORWIN: It seems to me that they had a
9 lot of things in mind, and that obviously the discussion
10 of the evidence took up more room in the opinion than
11 the statements about the get even and the circumstances
12 of the suit. I don't know what to respond about a
13 remand, because I simply think -- I think the Court of
14 Appeals can be read to use reasonable basis as an
15 indication of whether there was in fact a motive or not.

16 QUESTION: Ms. Corwin, Ms. Corwin, you -- I
17 don't know whether you were up here for the argument in
18 the Wright-Line case.

19 MS. CORWIN: Yes.

20 QUESTION: And there, the Board eschewed any
21 suggestion that the unfair labor practice was complete
22 upon proof of motivation, that if the employer could
23 come back and prove that a non-discriminatory or a
24 non-biased ground would have caused him to discharge the
25 person anyway, it wasn't an unfair labor practice at

1 all. Why shouldn't the -- in this case, the employer be
2 permitted to come back and say, I had a reasonable basis
3 for the lawsuit and I would have filed it anyway --

4 MS. CORWIN: Well --

5 QUESTION: -- even if I had an anti-union
6 bias.

7 MS. CORWIN: In fact, I think that's what the
8 employer tried to do in this case.

9 QUESTION: I know. He may have. But on your
10 position, he wouldn't -- it would be irrelevant. The
11 Board would say to him, don't waste our time. Once the
12 motivation is proved, the case is over.

13 MS. CORWIN: Indeed not. I think the Board
14 considers carefully the employer's reasonable basis
15 argument that the Board considers that this can be
16 something that might tend to countervail other evidence
17 of motive. I think that the analogy perhaps to the
18 issue you are raising in the transportation management,
19 the Wright-Line test, is that this might be analogized
20 to a pretext case in which only one motive was found.
21 It is not a dual motive case here.

22 The Administrative Law Judge found that the
23 reason for filing the suit was to retaliate against Mrs.
24 Helton for filing her charge, her initial charge, and to
25 harass the employees for having engaged in their

1 protected activity, and it concluded that there was no
2 other motive.

3 QUESTION: Well, if it were found that the
4 lawsuit was well grounded in fact, and in state law, it
5 would be difficult to say, wouldn't it, that part of the
6 motive of filing the lawsuit was to vindicate the
7 employer's reputation?

8 MS. CORWIN: Well, that is part of my
9 reluctance in responding to your hypothetical, because I
10 think the --

11 QUESTION: Well, you have responded well
12 enough.

13 MS. CORWIN: In a case like that, I think the
14 general counsel might hesitate, and think that the
15 evidence was close, and that the motivation was not as
16 clear as it was in a case such as this one. In this
17 sort of case, I think petitioner's view takes you to the
18 conclusion that a particular sort of coercive conduct
19 that may be analogous to other sorts of coercive conduct
20 that employers use, that that -- the particular form of
21 conduct that this employer chose somehow ought to be
22 immunized from the coverage of the federal labor laws.

23 QUESTION: Ms. Corwin, is there anything in
24 the legislative history of the National Labor Relations
25 Act that would indicate Congress thought about the

1 possibility that an employer or union prosecution of a
2 state court suit could constitute an unfair labor
3 practice?

4 MS. CORWIN: I am not aware of anything in the
5 legislative history. I think one can look to the plain
6 terms of the statute and in a case such as the
7 retaliatory suit we have here, one can say, it fits
8 fairly clearly within the language of the statute, in
9 that it's intended to interfere with the exercise of
10 protected rights, it's intended to discriminate against
11 the employee for the invocation of the processes of the
12 Board, so I think our starting point is, it comes within
13 the language of the statute.

14 Now, this Court has on several occasions
15 indicated that the Board has considerable discretion to
16 identify unfair labor practices. They are not
17 enumerated in the Act.

18 QUESTION: Well, my question was whether there
19 was anything in the legislative history, and I thought
20 perhaps you --

21 MS. CORWIN: Yes, and the answer to that is
22 no. I think here we can look to the plain language of
23 the statute, and this kind of conduct falls pretty
24 clearly within it.

25 QUESTION: When was the first time after 1935

1 that the Board entered an order such as this requiring
2 the cessation of a state court lawsuit?

3 MS. CORWIN: Well, I think Mr. Katz referred
4 to the Carter suit, which was quite early on. I don't
5 have the date. It must be around 1950 or so. There
6 have been a series of suits involving various factual
7 situations, and --

8 QUESTION: I am more interested in the
9 chronology of it. So, for the first 15 years after the
10 enactment of the Wagner Act, there were no such orders
11 entered by the Board?

12 MS. CORWIN: I am simply unaware of any. I
13 suspect that there were not, but I really don't know.
14 The rule that the Board follows and has followed since
15 1960 is the one referred to as the Clyde Taylor rule,
16 and that is that the general practice of the Board is to
17 not find an unfair labor practice in the case of good
18 faith litigation. That is the general rule, and that
19 continues to be applied today.

20 However, the Board has recognized that in a
21 case like this, when you have employees who are just
22 faced with the devastating effect of a retaliatory suit,
23 a suit for half a million dollars in punitive damages,
24 that that can provide such a coercive effect that at
25 least in the case where you have clear proof of

1 retaliation, that the suit was brought for the purpose
2 of harassment, that here you have an unfair labor
3 practice, here you have to step apart from the general
4 rule of Clyde Taylor and conclude that this sort of
5 retaliatory suit is an unfair labor practice. I think --

6 QUESTION: Is there any way to accommodate the
7 parallel interests here short of ordering a cease and
8 desist of the state suit?

9 MS. CORWIN: Well --

10 QUESTION: Is there any middle ground or other
11 means of accommodating these interests?

12 MS. CORWIN: Well, to some extent, they have
13 been accommodated already in the general rule that good
14 faith litigation will not be the basis for an unfair
15 labor practice.

16 In the narrow class of cases we are talking
17 about here, where the Board has found that the suit is
18 brought for the purpose of harassment, it doesn't seem
19 to me that you can vindicate the federal right, that you
20 can protect the employee rights that the Act guarantees
21 and that you can deter the sort of coercive employer
22 conduct you have here without issuing a cease and desist
23 order as you would against any unfair labor practice,
24 telling the employer to stop.

25 And I think that there simply isn't another

1 remedy that is going to be very effective.

2 QUESTION: You don't think payment of fees and
3 expenses and letting the state court determine the
4 merits of the action would be an accommodation?

5 MS. CORWIN: Well, I think reimbursement of
6 legal expenses may get you part of the way there, but it
7 doesn't do anything to solve the question of the
8 employees, these waitresses, who are forced to engage
9 legal counsel, to pay out a lot of expenses on things
10 like depositions and trials and so on. That is the sort
11 of coercive conduct the Act was designed to deter and to
12 prevent, and to provide a remedy for.

13 It doesn't seem to me that one can provide
14 that sort of remedy by simply saying, all right, we will
15 let this unfair labor practice proceed. That is simply
16 not the sort of remedy that Congress intended in the
17 case of coercive conduct of a particularly devastating
18 type like the suit you have here.

19 QUESTION: Of course, I wonder if the suit can
20 really be characterized as that devastating if it is
21 frivolous on its face.

22 MS. CORWIN: Well, I think that the -- what
23 occurred in this case is an example of what can happen.
24 Even with a suit like that, the employees were notified
25 on Monday morning that a temporary restraining order

1 hearing would be held at noon. They attended that.
2 They had an order entered against them. They were
3 served with a complaint for half a million dollars. And
4 the employer sought to take their depositions beginning
5 the following Wednesday, two days later.

6 I think you have to do a lot of sorting out --

7 QUESTION: But the bottom line is that once
8 they've got their side presented to the state court
9 judge, he found no significant merit to the complaint,
10 and the risks, it seems to me, were minimal after that
11 point.

12 MS. CORWIN: Well, I -- that's --

13 QUESTION: True, they had damned them, and the
14 complaint is for a lot of money, but you know, there are
15 a lot of complaints like that that don't have any merit
16 to them.

17 MS. CORWIN: Well, I think that is true for
18 part of the litigation here. The libel claim is still
19 pending. The state court --

20 QUESTION: But there is no basis in fact for
21 it. We have such a finding that everybody agrees is
22 true. So, I mean, what is the jeopardy?

23 MS. CORWIN: Well, I --

24 QUESTION: I mean, we have to assume there is
25 no merit to the suit, I believe, in analyzing the case.

1 MS. CORWIN: Well, I think for purposes of
2 federal law you do. I am not sure that the state court
3 is required by federal law to defer to the Board's
4 finding.

5 QUESTION: They sure are. They can't go
6 forward with the case.

7 MS. CORWIN: I'm sorry?

8 QUESTION: They certainly must follow that --
9 the case is over in the state court, isn't it?

10 MS. CORWIN: No, it is not.

11 QUESTION: Oh, I misunderstood.

12 QUESTION: It is pending.

13 MS. CORWIN: My understanding is, it has been
14 held in abeyance. That is, the libel portion of the
15 suit has been held in abeyance --

16 QUESTION: Oh, I see. Right.

17 MS. CORWIN: -- pending the outcome --

18 QUESTION: Well, didn't the state court deny a
19 motion for summary judgment on the libel aspects?

20 MS. CORWIN: Yes.

21 QUESTION: And isn't that waiting to go to
22 trial?

23 MS. CORWIN: Yes, that is correct.

24 CHIEF JUSTICE BURGER: Do you have anything
25 further, Mr. Katz?

1 MR. KATZ: I have nothing further to add, Your
2 Honor.

3 CHIEF JUSTICE BURGER: Fine. Very well.

4 Thank you, counsel. The case is submitted.

5 (Whereupon, at 2:01 o'clock p.m., the case in
6 the above-entitled matter was submitted.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

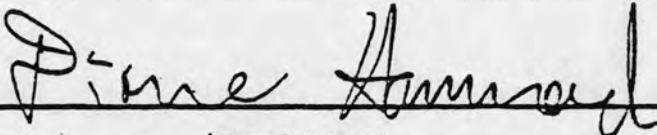
25

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: Bill Johnson's Restaurants, Inc., Petitioner
v. National Labor Relations Board, et al. No. 81-2257

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in dark ink, appearing to read "Peter H. Hammond", is written over a horizontal line.

(REPORTER)

RECEIVED
SUPREME COURT U.S.
MARSHALS OFFICE

983 APR 5 AM 9 24