ORIGINAL

# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

## DKT/CASE NO.

## TITLE

| | | |
|---|---|---|
| PHILIP DEL COSTELLO, Petitioner | : | |
| v. | : | No. 81-2386 |
| INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL.; and | : | |
| | : | |
| UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, ET AL., Petitioners | : | |
| v. | : | No. 81-2408 |
| DONALD C. FLOWERS AND KING E. JONES | : | |

## PLACE Washington, D. C.

## DATE April 25, 1983

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WASHINGTON, D.C. 20001

IN THE SUPREME COURT OF THE UNITED STATES

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PHILIP DEL COSTELLO, :

Petitioner :

v. : No. 81-2386

INTERNATIONAL BROTHERHOOD OF :

TEAMSTERS, ET AL.; and :

UNITED STEELWORKERS OF AMERICA, :

AFL-CIO-CLC, ET AL., :

Petitioners :

v. : No. 81-2408

DONALD C. FLOWERS AND KING E. :

JONES :

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Washington, D.C.

Monday, April 25, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:31 p.m.

APPEARANCES:

WILLIAM H. ZINMAN, ESQ., Baltimore, Maryland; on behalf of the Petitioner in No. 81-2386.

ROBERT M. WEINBERG, ESQ., Washington, D.C.; on behalf of the Petitioners in No. 81-2408

APPEARANCES (Continued):

BERNARD S. GOLDFARB, ESQ., Cleveland, Ohio; on behalf of the Respondents in No. 81-2386.

ISAAC N. GRONER, ESQ., Washington, D.C.; on behalf of the Respondents in No. 81-2408 (appointed by this court).

C O N T E N T S

P R O C E E D I N G S

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

ORAL ARGUMENT OF WILLIAM H. ZINMAN, ESQ.

ON BEHALF OF PETITIONERS IN NO. 81-2386

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

The issue in this case is should this Court apply the Maryland arbitral statute of 30 days or the six-month statute of limitations contained in 10(b) of the National Labor Relations Act or a longer statute of limitations to this hybrid action. If, on the other hand, this Court applies the Maryland arbitral statute to this hybrid action, the next issue would be whether or not it should be applied prospectively or retrospectively in this case.

The facts in this case are as follows: Philip Del Costello, the Petitioner in this case, was employed by Anchor Motor Freight, the Respondent, as an over-the-road truck driver at the time of his termination on June 27, 1977. At that time he was also a dissident member of PROD, a national Teamsters organization and was engaged in a campaign of truck safety several months preceeding his termination.

On that date he was assigned to drive a truck

from Baltimore to Canada and during the course of his inspections he found a number of safety defects with respect to the truck. When the company insisted that he drive the truck he refused, and he was terminated on the spot.

Consistent with the company union contract, he initiated a grievance at that time which was not resolved amicably. As a result, the grievance took the form of a hearing before a committee consisting of an equal number of employer and union representatives. I believe this was in July of 1977.

At that time he was represented by his business agent who is his exclusive representative. He did not have the right to an attorney. The business agent conducted no investigation into the facts which preceded the termination, nor did the business agent introduce any evidence and particularly it failed to introduce the mechanic who supported Mr. Del Costello's position that the truck was unsafe.

The only evidence that was introduced was through a company supervisor at that time who Mr. Del Costello claimed was not even there. This was contrary to the conference rules and if that evidence was excluded, of course, the company would not have met its burden of proof.

Mr. Del Costello related to his business agent that this man was not even there. The business agent failed to object. As a result of this hearing, the committee upheld the discharge.

Subsequent to that the business agent engaged in a course of conduct which reasonably led Mr. Del Costello to believe that he had yet to exhaust his contract remedies and that the decision was not final until December of 1977. Several months thereafter, I believe it was in March of 1978, Mr. Del Costello initiated suit in the federal district court for the district of Maryland.

Several months thereafter both Respondents answered the suit. However, Local 557 never even raised the issue of limitations in its answer. While Anchor Motor Freight did raise the question of limitations it did not specify which limitation period it had mind. This was understandable at that time because the Maryland arbitral statute by its own terms is expressly inapplicable to labor disputes.

In any event, for the next 32 months during which time the parties engaged in rather extensive discovery, not one time did Anchor Motor Freight or Local 557 ever raise the question of limitations until they filed their motion for summary judgment in November

of 1980, one month after this Court granted certiorari in Mitchell. We contend that if this Court applies the arbitral limitation statute of 30 days for all intents and purposes the hybrid cause of action is destroyed.

I say that because most of these arbitration statutes were initially passed by the state legislatures to apply to commercial disputes and in commercial disputes from the arbitrator to the courts the parties are usually represented by the same counsel. And it is a matter of smoothly shifting gears from the arbitrator to the court in terms of the filing of appeal which in that instance only takes hours to possibly one day.

The situation is entirely different with a disconnected party such as Mr. Del Costello or anyone having hybrid cause of action because he does not have an attorney at the grievance procedure. He is limited, and in this case he was limited exclusively to his representative, his union representative.

Moreover, unlike the arbitral proceeding where there is an established and known record of law and fact, the facts surrounding the malpractice not only are not on the record but the business agent in most instances does everything to hide those facts. As a consequence, before the worker ever realizes that he has a cause of action, 30 days has already passed and he is

out of court.

But that is not the end of it. Who does he turn when he first realizes that he has been wronged. He has to go to a lawyer and unfortunately those most able to represent him in this field are either labor lawyers representing management or labor lawyers representing unions and due to the polorization of the labor bar he ultimately finds that he has to turn to a general practitioner such as he did in this case --

QUESTION: Mr. Zinman, when you say polarization, do you mean anything more than just conflicts of interest?

MR. ZINMAN: No, Your Honor, I am simply saying that as a practical matter particularly even in a larger city such as Baltimore lawyers who represent unions and lawyers who represent companies will not take these cases because they view the petitioner as somewhat of a pariah.

In a broad sense I suggest it might well be a self-perceived conflict of interest or rather technical conflict of interest. In any case when a general practitioner gets this kind of client he has to research a brand new law and that takes time.

After he researches the law and then familiarizes himself not only with that but with the

customs and the practices and the contracts and the constitutions and all of the other intricate matters, he then has to decide to conduct a factual investigation to determine frankly whether or not there is a prima facie case. That takes a considerable period of time. After all of that is done there is a matter of counsel fees and costs because you must have reasonable cost in this case to meet the well-dealed opponents who have no such problems.

So I submit to the Court that this is probably one of the most important reasons why it is totally unfair to apply such a short statute of limitations of even 30, 60 or 90 days. In fact to be perfectly candid, I believe that even six months under these very difficult circumstances is not enough.

The unions and companies frequently make the argument if any period of time longer than 30 days is applied it will do violence to the policy of rapid disposition of labor disputes which, of course, was the principle enunciated in the Mitchell case several years ago, and I suggest that this is not correct. It is not correct for two reasons.

First, in Mitchell this Court only had really two options. It had the option to select a three or five year statute of limitations on one hand or a 90-day

limitation on the other. It did not, as I read the case, have the option of applying the six-month arbitral limitation period contained in 10(b) as it does here.

But more important than that, I really do not believe that there is an impirical evidence to suggest that there is any danger posed to the notion of rapid disposition or more particularly the law of the shop, based upon the fact that if the statistics in the cert petition of the Steelworkers is any indication that there is any avalanche of cases now pending before the district courts. They had 110, but assuming that there is 400 cases now pending before the district courts of the United States, how does that pose as a threat to rapid resolution of labor disputes.

Moreover, I will just close -- Moreover, most of these cases that are pending involve questions of fact as to whether or not the agent properly investigated the case of whether or not he was guilty of committing an act of malice. There are very few precedential cases in the whole scope of these cases that are now pending, and given the high degree of proof that is required to prove one of these cases, I doubt very much if there is any particular threat to this policy.

So we submit to the Court that the most

appropriate statute of limitations would be 10(b). In my remaining time I would just submit that the closest analogous limitation period would be 10(b) because 10(b) in breach of duty of fair representation which was contained within the hybrid cause of action was judicially implicated from the National Labor Relations Act. As such the courts have held on many occasions that a breach of duty of fair representation is also an unfair labor practice as is the conduct of the company in many cases.

But to the extent that it is not I refer the Court to the observation of Justice Stewart that it is sufficiently similar in character so as to be encompassed by the National Labor Relations Act.

QUESTION: Mr. Zinman, to get the benefit of 10(b), however, you still have to have a towing somewhere don't you?

MR. ZINMAN: Yes. In this particular case we do.

QUESTION: So to win you have to have 10(b) plus a towing?

MR. ZINMAN: Yes, but we feel, Your Honor, that that is a factual matter to be resolved by the trier of fact. We filed an affidavit alleging those facts and, of course, neither Respondent answered. They

are asking this Court for the first time to decide facts which is really not before the Court. We assume that the Court will apply the usual rule of construction of assuming the truth or any truthful instances that arise out of our contentions.

QUESTION: Was this on motion for summary judgment?

MR. ZINMAN: Pardon?

QUESTION: Was this on motion for summary judgment?

MR. ZINMAN: Yes, sir. It was on motion for summary judgment, and that is the posture of the case at the present time so that all this Court would do obviously is return the case to the district court on remand if it found in our favor.

Finally, I would just conclude by stating that we feel also that if the Court does decide that the arbitral limitations is applicable that we suggest that it should be held prospectively rather than retrospectively because there was a reasonable reliance and the best evidence of our reasonable reliance is the conduct of the Respondents in not raising this question of limitations for 32 months.

Thank you.

CHIEF JUSTICE BURGER: Mr. Weinberg.

ORAL ARGUMENT OF ROBERT M. WEINBERG, ESQ.

ON BEHALF OF THE PETITIONERS IN NO. 81-2408

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

I am here on behalf of the Petitioner Steelworkers Union in the Flowers case. I can state the facts of Flowers very simply. The Plaintiffs in this case, Respondents here, had a grievance over work assignment. They took their grievance to the union. The union processed the grievance through all four steps of the grievance process and then took the case to arbitation.

The arbitrator ruled against the union. Eleven months later this suit was brought. It is a hybrid section 301 breach duty of fair representation suit against both the company and the union.

Both defendants moved to dismiss on statute of limitations grounds. After some ups and downs through the courts, the court below dismissed the case against the employer holding that after Mitchell the 90-day New York statute of limitations governing suits to vacate arbitration awards apply.

As to the case against the union, however, the court below ruled that the New York statute of limitations, a three-year statute governing non-medical

malpractice actions, governed. We challenge --

QUESTION: In your case it is just the union that is here --

MR. WEINBERG: Just the union.

QUESTION: -- not the employer.

MR. WEINBERG: That is correct.

We challenge the decision below on two grounds. First we urge that the six-month period in section 10(b) of the National Labor Relations Act be the statute to govern duty of fair representation suits against unions.

Second, in the alternative if state law governs we would urge that the 90-day New York statute governing suits to vacate arbitration awards be applied in the case against the union as it was in the case against the employer. Let me take our primary position, the 10(b) issue, first.

The starting point, we believe, is that this duty of fair representation cause of action is a federal cause of action. It is a creature of a federal statute. It was implied from section 9 of the National Labor Relations Act, the section that confers exclusive bargaining status upon majority unions.

The question of what statute of limitations governs a federal statute is a federal question to be

determined by construing that statute. Generally, where Congress enacts an express cause of action but does not provide a statute of limitations, it is a fair inference that Congress intended that a state limitations period would apply. That is so because in the normal case one presumes that Congress intended there be some limitations period and the state law in most cases provides the most likely if not the only source for such a statute.

But we submit that in that case that inference makes no sense. As both Justice Stevens and Justice Stewart in their respective opinions in Mitchell, the Congress in 1947 when it enacted the NLRA was not aware that this Court would come along later and imply a judicial duty of fair representation cause of action.

In that circumstance, the silence of Congress on the statute of limitations question cannot signify an intent that state law apply. It cannot signify an intent that any particular statute of limitations apply.

QUESTION: Well, Mr. Weinberg, do you think the silence of the Congress in the many other kinds of federal causes of action where state statutes have been implied was taken to mean that state law was intended by Congress? That was really the only place to turn.

MR. WEINBERG: I think it is both of those.

Well, what happened is I think you had -- In the outset I think the question was what is the statute of limitations and the only place to turn was state law. Over time I think you had that factor combined with the factor that this Court had been consistently saying state statutes of limitations should govern and, therefore, when Congress did not put a statute in there that added weight to that inference.

But you cannot have an inference if Congress was not aware at the time it was creating the cause of action. That is the circumstance we find ourselves in here, and it seems to us that in that circumstance what you have got to do is you have got to go back to the Act and look at the structure and policy of the Act, the Act that gives rise to the cause of action.

It is our view that when you do that here you get substantial guidance on this question because in section 10(b) of that very Act Congress expressly adopted a limitations period that strikes a balance between the very same complex of employee, employer, and union rights that is involved in the judicial duty of fair representation action.

As this Court found in Machinists, 10(b) reflects Congress' judgment as to the proper balance between the interests of employees and the overriding

interest of the Act and industrial peace. In the Court's word the objective of 10(b) was stability of bargaining relationships.

That very same tension exists in the duty of fair representation context, the tension between individual rights and the functioning of the private system of decision making that the NLRA was intended to foster. As this Court recognized in Mitchell, the grievance arbitration process is a critical part of that private decision making system. Unlike in the commercial context where arbitration is a substitute for litigation, in the labor context arbitration serves as a continuing process by which the law of the shop is developed.

The duty of fair representation action is a challenge to a decision arrived at through that process, a decision that the parties to that process, the union and the employer, are perfectly prepared to live by. The thrust of duty of fair representation action is that that system of decision making malfunctions. As long as the duty of fair representation suit may be brought, the parties cannot regard the matter as finally settled, and they cannot rely on it in their future dealings with one another.

The Court expressed this point in Mitchell and

if I may quote from the Court's opinion, "This sytem with its heavy emphasis on grievance, arbitration and the law of the shop could easily become unworkable if a decision which is given meaning and content to the terms of an agreement that even effected subsequent modifications of the agreement could certainly be called into question as much as six years later." The Court went on to point to the "undesirability of the results of the grievance and arbitral process being suspended in limbo for long periods."

The six-month period in 10(b) was intended to provide a definitive end to just such situations of uncertainty. It is our view in sum as to the 10(b) issue that the duty of fair representation is an intrical part of the complex of employee, union, and employer rights embodied in the national labor policy.

QUESTION: So you would think 10(b) should govern not only against the union but against the employer?

MR. WEINBERG: We do, Your Honor. We don't think necessarily that 10(b) applies against the union necessarily compels that answer but we do believe that is the correct answer. We do so for the following reason.

The reason we say it is a different question

is you have got to get at it -- You obviously do not have an action arising under the National Labor Relations Act against the employer. You have got a 301 action and you have got in 301 a provision where Congress enacted a cause of action and did not expressly enact a statute of limitations.

However, we believe that the Hoosier Cardinal decision provides ample reason and justification for saying that in the case against the employer as well as the case against the union these consensual processes of private decision making are implicated. The Court in Hoosier seems to have left room for saying that when a 301 cause of action does possibly threaten those processes that some other source in state law might be looked to. In this case we think 10(b) in that context also.

QUESTION: Of course, your opposition thinks that Hoosier is authority for just the opposite.

MR. WEINBERG: There is no question that Hoosier is authority for the proposition -- It seems to me you got hysteric when you got a 301 action with Hoosier. With respect to the case against the union, we do not consider that a 301 action. At the very least the cause of action is implied not from 301 but from section 9 of the NLRA.

QUESTION: What do you think the action was in Humphrey?

MR. WEINBERG: Well, Humphrey cited Tunstall which said the action -- Excuse me in Humphrey --

QUESTION: Did you not say Humphrey said was a 301?

MR. WEINBERG: No, excuse me. I was mixing up. The action was --

QUESTION: The employer was in that case?

MR. WEINBERG: Yes.

The cause of action against the union was derived where it has always been derived from and that is the National Labor Relations Act. I believe the Court was saying in Humphrey that the claim -- that there was a breach of contract in that case. In fact, it was a claim that both the employer and the union had breached the contract.

QUESTION: The employer was a party?

MR. WEINBERG: Was a 301 claim. I do not think it was saying that the duty of fair representation claim was a 301 claim, certainly not that it was derived from 301 as opposed to the National Labor Relations Act.

In sum, on the 10(b) we think the balance struck by Congress in 1947 in enacting 10(b) is the one that best effectuates Congress' intent here when dealing

with the conflicts of interest not the varying laws of 50 states, none of which was devised with this particular set of interest in mind.

If the Court please, I will reserve the rest of my time.

CHIEF JUSTICE BURGER: Mr. Goldfarb.

ORAL ARGUMENT OF BERNARD S. GOLDFARB, ESQ.

ON BEHALF OF THE RESPONDENT IN NO. 81-2386

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

If we were discussing this problem in an academic nature, the 10(b) feature might be a valid discussion, but we are discussing it in a legal nature on appeal from a district court to a court of appeals and we are here on legal questions. We cannot waive out of existence the fact that we are governed by Hoosier Cardinal, that we are governed by Mitchell and that we are governed by the Rules of Decision Act.

The Rules of Decision Act compel us to go to state law, the most analogous arbitration statute and if we do that that then becomes federal law. It does not erase the federal question. The Rules of Decision Act require the courts by virture of an act of Court to go to state law and find what may be required or provided in civil actions in state law and apply it to the

federal cause of action in a federal court.

Ten (b) is an administrative provision in the National Labor Act that begins the procedure for the National Labor Relations Board. You are beginning a process with 10(b) whereas with the arbitration that we are talking about here we are concluding a process under a labor contract between a union and an employer.

If we were to compare this on a same parallel track, we would have to regard the beginning of the grievance with the beginning of the initiation of a problem with the National Labor Relations Board and run those two parallel to the time of the arbitration hearing to the time of a hearing before an administrative law judge with the Labor Board and then determine what time elements apply from those two equal hearings.

In other words, you cannot reach over and take 10(b) that begins a process and apply that to an arbitration wherein a process is ended. As a matter of fact, if you want to be analogous to the National Labor Relations Board in an appeal from an administrative law judge to the full Board, they only give you 20 days.

We cannot agree with the statement of facts made by counsel for Del Costello. I am not going to belabor them here because they are set out in detail in

the briefs, but I want to point one thing out to this Court and that is that the arbitration statute in Maryland is exempted from applying to labor management contracts specifically by Maryland Rule of Practice E2 wherein it is provided in any such case the provisions of the Maryland Arbitration Act concerning such proceedings shall be applicable. In there they refer to court proceedings.

The courts specifically refer that the Arbitration Act will apply. The employer does not get his rights from the implied provisions of the National Labor Relations Act. If you want to imply anything and if you imply that the conduct of arbitrary or unreasonable union conduct towards an employee is implied from the Act, you have to weigh that against what the Act specifically says. The employer is not part of that implication, but the employer is inextricably interdependent with the union when these cases come before the district court.

They are like love and marriage. They go hand in hand. It is probably the only time that they have anything in common and that is to preserve the arbitral process in the labor agreement.

If there is any unfair representation, that representation would occur either before or during the

arbitral hearing. If there is an appeal to a district court, it is an appeal from that arbitration that we are talking about.

The union's conduct is not indepedent of the employer, and it can't be predicated upon an indepedent action. It is all in one lawsuit. As a result, one statute of limitations ought to apply to the two of them.

Then they raise the question of whether it is prospective only or prospective and retrospective. All law is prospective and retrospective unless this Court says otherwise. In Northern Pipeline it saw fit to make the law prospective because of the havoc that would be created in the event the law was retrospective.

But in Mitchell it did not see any need for that. It said nothing about the law being prospective only, and as a result, it is also applied retrospectively unless the Chevron criteria applied, a clean break with the past, no foreshadowing of what is to come. Nobody can claim there was not any foreshadowing in Mitchell after reading Hines plus a multiple of lower court decisions that existed long before Hines that applied a local arbitration statute.

This business about not being able to get a lawyer or that the lawyers are polarized in Baltimore, none of this is a matter of record. None of it appears

in this case.

These are subjective things that courts cannot concern themselves with. We have to concern ourselves with the reality of the situation and what the law consists of. The law says you must refer to the appropriate analogous state statute and if you have one that provides for a limitation on arbitrations and arbitration is what we are dealing with, then you must invoke that statute.

If you invoke that statute in order to be completely fair and to conclude this arbitral process somewhere along the line you must apply it equal to the employer and to the union.

CHIEF JUSTICE BURGER: Mr. Groner.

ORAL ARGUMENT OF ISAAC N. GRONER, ESQ.

ON BEHALF OF THE RESPONDENTS IN NO. 81-2408

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

Respondents Flower and Jones are before the Court to request affirmance of the judgment below which held that the appropriate statute of limitations was that applicable to non-medical malpractice. That judgment should be affirmed essentially for two reasons.

One, the substance and purpose of the duty of fair representation clearly makes the most analogous

state statute of limitations that applicable to legal malpractice, and secondly, that the decisions of this Court and the law that has been established with respect to statutes of limitations would require that the statute of limitation to be applied in a duty of fair representation case against the union be the most analogous state statute of limitations.

With respect to the substance and purpose of the duty of fair representation from the beginning of its statement in the Steel case throughout every discussion of it, that duty has consisted of a correlative duty which arises from the right of the union to represent all of the employees in the bargaining unit, and the correlative duty is to represent each and all of the employees without discrimination, to represent them fairly.

In the Steel case the analogy was made to a legislature. It was held that the right to represent all the employees in the bargaining unit was analogous to the right of the legislature to pass laws which were applicable to all the citizens and that if there were no duty that that right be exercised in a fair way, constitutional questions might even arise so that we are concerned in the duty of fair representation with questions of fair treatment that may rise to the stature

of constitutional questions.

What we have and what the Court has repeatedly held is that the supreme and basic value in a duty of fair representation is protection for the individual. It is to ensure that the individual employee will not be the victim of unfair treatment, that the duty of fair representation was not only established in the first place, but has consistently been recognized and enforced by this Court.

It is a representational duty. In speaking of representational duties and in asking what is the appropriate analogy to a representational duty we would suggest that the immediate answer that occurs is that of the relationship between an attorney and a client.

QUESTION: Mr. Groner, how well off is an employee in New York, say, where this case arose going to be if the statute of limitations against the employer is 30 days and the statute of limitations against the union is two years. Is generally the action against the union worth pursuing even if the statute has run against the employer?

MR. GRONER: The statute for the arbitration would be 90 days in New York, but the answer is yes, Your Honor. Presumably we would be concerned with cases where no action was brought within the 90 days so that

we have a situation -- As a practical matter, we may have a situation where to enforce the same statute of limitations against the union as has been enforced against the employer would be to deprive that individual employee of any opportunity to gain redress from what he will have to prove has been an arbitrary action by his union and represent him in the arbitration case.

QUESTION: So he is going to have to prove his cause of action against the union he is going to have to prove there was a breach of contract, I suppose, by the employer.

MR. GRONER: He would have to prove that there was a breach of contract by the employer. In other words, just as in a legal malpractice action, you have two elements of the cause of action.

One, you must prove misconduct by the attorney. Secondly, you must to prove damages in effect you must prove that the misconduct by the attorney altered the result. That is to say you would have won the case but for the misconduct of the attorney.

Similarly in the case against the union, you must prove not only the misconduct but that the misconduct in effect made a difference. That is to say that barring the misconduct --

QUESTION: I am not sure if there was not a

breach of conduct by the employer there may not have been any breach by the union at all.

MR. GRONER: The breach by the union in terms of presenting the employee's grievance --

QUESTION: The union just did not underrepresent him if there was no breach at all.

MR. GRONER: The question is did the underrepresentation make it possible that there be a conclusion that there was no breach and in the action against the union the employee plaintiff would prove as the plaintiff's allege in this case that had the case been investigated and presented within the duty of fair representation, the arbitration award would have been. But there had been a violation of the contract, the kind of holding that Your Honors just a few months ago in the Bowen case pointed out that the decision there where the case was not taken to the jury the assessment of damages against the union was predicated upon the proposition that had the union taken the case to arbitration there would have been proof that the employer breached the agreement in that case. In that case it was an unfair discharge. In this case it is a question of a job assignment and ultimately lay off and termination.

So that the very point of the duty of unfair practice responsibility and action is to demonstrate

that with proper representation by the union the plaintiff's grievance would have been vindicated. It would have been carried forward successfully. Where it has been carried to arbitration that the award would have favored the union.

This analogy of having to prove that you would have won had there been proper conduct is not the only point of similarity between the attorney-client relationship and the employee-union relationship. The essence of the duty of fair representation is precisely that the individual is in a uniquely vulnerable position. He is being represented by someone who has a special status under the law, in the attorney case by state law, in the federal case by section 9(a) or by analogous provisions of the Labor Act.

QUESTION: Well, Mr. Groner, I am not sure you answered Justice Rehnquist. I probably interupted before you could, but what damages could you get against the union in New York now if the action against the employer is barred?

MR. GRONER: We would get the damages --

QUESTION: Could you collect from the union all the damages that you might have collected against the employer if the action against the employer was not barred?

MR. GRONER: There might be questions of apportionment that would arise, but essentially, yes.

QUESTION: But the employer is out of the case entirely.

MR. GRONER: Essentially, yes. You would be able to recover from the union the damages that flowed from the fact that it did not --

QUESTION: What would that be, though? What would that be because the case did go to arbitration and there has not been any -- The union's breach has not delayed resolution of the case by arbitration. The arbitration decision has been had. Now what damages could you get against the union. What would be the allocation if you won against the union?

MR. GRONER: The damages that flow from the fact in our view that the arbitration decision was incorrect --

QUESTION: Yes.

MR. GRONER: -- and, therefore, the damages that would flow would be the damages that would follow had the award --

QUESTION: What would be those damages?

MR. GRONER: The damages would be the back pay --

QUESTION: You cannot get it from the employer.

MR. GRONER: In the duty of fair representation case you would get that from the union in the same sense that Bowen held that it could recover from the union.

QUESTION: Because the employer is out of the case at the end of 90 days, you think everything you could have collected from the employer could now be collected from the union under the existing cases?

MR. GRONER: I am not -- The answer is yes but --

QUESTION: You could get all of the back pay from the union?

MR. GRONER: While I answer yes, I submit to Your Honors that that is not an essential answer to the issue that is before this Court. The issue before this Court is what should be the statute of limitations for an action against the union whether the action against the union should also be barred in the 90-day period that Mitchell held that in New York it should be barred as against the employer. The statute of limitations should not be the same, Your Honor, because the elements of the claim against the union, the relief requested against the union are not the same.

QUESTION: Do you think the Rules of Decision Act preclude application of 10(b)?

MR. GRONER: I do not think that this Court is precluded from adopting any statute --

QUESTION: Why not? The suggestion has been made that the statute forbids, the Rules of Decision Act forbids our resort to 10(b).

MR. GRONER: There is nothing in my view that would preclude this Court from interpreting that statute or any other in some other way. I would urge Your Honors that while you have the power that the power ought to be exercised in accordance with the law and justice, and I would urge Your Honors that the consistent interpretation of the Rules of Decision Act has precisely been that in terms of statutes of limitations when there are federal rights and it comes to deciding what statute of limitations should be employed to the enforcement of that right that the appropriate state statute should be applied.

QUESTION: Well, then the -- Any reservation in Mitchell was beside the point. Reserving the question about 10(b) should not have been reserved at all. It has already been -- Under your view the Rules of Decision Act would give only one answer to that question that was left open, namely that 10(b) is not available at all.

MR. GRONER: Precisely, Your Honor, yes

indeed, and not only the Rules in Decision Act but every decision of this Court including Mitchell which itself applied a state statute centering on Hoosier which in its text did discuss whether or not Congress intended that the 10(b) statute of limitations should be applied.

For those reasons, the decision should be that the most analogous state statute should be applied and in the case against the union the most analogous state statute in our view is that which is directed to legal malpractice. To hold that 10(b) should apply, Your Honors, would be to make a judgment that is contrary to every pertinent decision of this Court and is also contrary to the purpose and the function of the duty of fair representation.

The duty of fair representation is not implied alone or even in principle measure in our view from section 9(a). Section 9(a) is what creates the right in the union to represent all the employees in the bargaining unit, but it does not state what correlative duty flows from that right. That correlative duty is based upon basic notions of justice embedded in the common law as to all kinds of representational relationships.

It is a principle of justice that goes beyond attorney-client or employee-union, that those who take

upon themselves the task of representing others must perform that task with due regard for the rights of others and above all they must not prejudice the rights of others. They must realize that they are in a position of greater knowledge. They must realize that they are in a position of higher responsibility.

They must realize the utter dependence under the circumstances that those they are representing are looking to them for. They are in a sense helpless in the situation. The individuals do not have the knowledge. They do not have the experience. They do not have the training.

What is involved here is a special representational relationship and justice as embedded in historic notions of fairness in the law says that the representative must be held accountable and that that duty to be held accountable to the individual is correlative. It is as extensive as the right to represent all of the employees in the bargaining unit.

In Hoosier in the Hoosier Cardinal case the Court was confronted by a statute of limitations problem. Now, the precise issue in the Hoosier Cardinal case was one of a suit by a union to enforce a collective bargaining contract.

We submit that the rationale of that case is

directly applicable to the issue of 10(b) for the Court said we are urged judicially to invent a statute of limitations. But the Court said when the Congress came to establishing an unfair labor practice and creating and defining an administrative procedure for that unfair labor practice it defined a statute of limitations of six months, but when it came to section 301 it did not establish a statute of limitations. That contrast this Court explained in Hoosier, that contrast meant that when an action is based upon section 301 the appropriate state statute of limitations should be applied.

This Court held that it was a matter of congressional intention and that it was demonstrated by the contrast between the lack of statute in 301 and the presence of a definite statute of limitations in the National Labor Relations Act that Congress did not mean for that to be applied in the other. Rather Congress intended that the state statute of limitations should apply.

Congress as we point out in our brief put in different titles, different subchapters of the United States Code when it was codified. The National Labor Relations Act and the section 301 and the six-month statute of limitations had not been applied to section 302 statutes, section 303 claims, nor has it been

applied to causes of action which Congress created in further defining the national labor policy of the United States creating causes of action that are very close to in ultimate purpose of protecting the individuals to the duty of fair representation.

When it passed the Labor Management Relations Act in 1959 and when in 1970 it passed the Postal Reform Act, it established rights upon which it imposed no statutes of limitations. This Court has many times pointed out the difference between the public responsibilities of the National Labor Relations Board and the private interest of individual plaintiffs in these duties of fair representation action.

This Court has held that the paramount value in terms of duty of fair representation is protection of the rights of individual employees. A distinction has been drawn between the responsibilities to serve the public purposes and the right of the individual to bring a law suit according to the traditional law to have available to him as Steel said traditional forms of legal redress.

This Court has held that even claims of insubstantial values ought to be protected because it was such a paramount purpose that individuals should be protected from abuse from unfair treatment by their

exclusive bargaining representative. Now, in Hoosier you could have said that the cause of action was likewise based upon the National Labor Relations Act because how did the union get the opportunity and get the right to speak for all of the employees and to bring that action to enforce the contract.

It got it by virtue of its status under section 9(a), the right to represent all employees and sign the contract, and it got the right to bring that action under section 301 which under the decisions of this Court, of course, endowed courts with substantive rights, the right to declare substantive law and is not merely a procedural statute.

Likewise here the claim is a claim that is based upon long standing legal principles of individuals not to be unfairly treated by their representatives, and that right not to be represented by the individuals is not a right that is derived from section 9(a). It is a right of substantive law that is part of the 301 grant of power by Congress and part of the rights that ought to be taken into account in determining the appropriate statute of limitations.

There has been some talk about the party's ability to rely on the decision here, and the rule of the law of the shop. If these parties wanted to rely on

the arbitrator's award as much as they imply to this Court that they do, they could obviously have written the substance of the award into their contract.

We believe that the judgment below should be affirmed.

Thank you, Your Honors.

CHIEF JUSTICE BURGER: Mr. Weinberg, you have five minutes remaining.

ORAL ARGUMENT OF ROBERT M. WEINBERG, ESQ.
ON BEHALF OF THE PETITIONERS IN NO. 81-2408 - REBUTTAL

MR. WEINBERG: Thank you, Your Honor. I do not think I am going to take that much. I just have two quick points.

First, Hoosier was a straight breach of contract action under section 301. It was not an action derived from the National Labor Relations Act as this one is. I do not think in the circumstances of this case that it is fair to say that what we are asking for is judicial inventiveness and that what the other side is asking for is something other than that.

What we are saying is when you look at this statute and you look at the complex of interest involved, Congress adopted a statute of limitations to apply to that complex of interest. It is not judicial inventiveness to say let's apply that statute rather

than the statutes of 50 states all of which are different none of which was devised to apply to this set of interest.

Let me make one point --

QUESTION: I take it you are saying that we are not permitted by the statute to look to state law in this situation?

MR. WEINBERG: Well, permitted would be a very strong word, Justice Rehnquist.

QUESTION: I think that is the bottom line of your argument.

MR. WEINBERG: If we properly understand --

QUESTION: If Congress provided a statute of limitations for the complex of interest --

MR. WEINBERG: No, we are not saying, I want to be very clear on this, that Congress expressly provided this statute of limitations for this kind of law suit because as I indicated at the outset we --

QUESTION: Just by analogy then.

MR. WEINBERG: Okay. What we are saying is that looking at the statute and the statute of limitations that was adopted we think that what Congress was trying to achieve there is what it would have tried to achieve here. The same complex of interest is involved.

Let me make one point on the state law issue where it is our position that if we get to the issue, the arbitration statute should apply. The Court in Mitchell said the malpractice analogy was inappropriate in that case because the arbitrator's award stood between the plaintiffs and the remedy they sought.

That is true as well in the case of the union. As counsel for Respondents indicated, they have to prove that there was a breach of contract and the remedy they seek, a remedy under Bowen, is a remedy of back wages which flows from a breach of contract. Just as in the case against the employer, it is necessary here if they want to make out their claim to prove that the contract was breached which means you have got to show that the arbitrator's decision was erroneous.

Thank you, Your Honor.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:30 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:

Philip Del Costello, Petitioner V. International Brotherhood of Teamsters, et al.; and United Steelworkers of America, AFL-CIO, CLC, et al., petitioners V. Donald C. Flowers and King E. Jones

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

Nos's 81-2386 & 81-2408

BY _____

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