ORIGINAL

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PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-334

TITLE ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC. Petitioners v. CALIFORNIA STATE COUNCIL OF CARPENTERS AND CARPENTERS 46 NORTHERN COUNTIES CONFERENCE BOARD ET AL.

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BEFORE THE SUPREME COURT OF THE UNITED STATES

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., Petitioner v. CALIFORNIA STATE COUNCIL OF CARPENTERS AND CARPENTERS 46 NORTHERN COUNTIES CONFERENCE BOARD ET AL. : No. 81-334

Washington, D.C.

Tuesday, October 5, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:57 o'clock a.m.

APPEARANCES:

JAMES P. WATSON, ESQ., Los Angeles, California; on behalf of the Petitioner.

VICTOR J. VAN BOURG, ESQ., San Francisco, California; on behalf of the Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Associated General Contractors against California State Council.

You may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES P. WATSON, ESQ.,

ON BEHALF OF THE PETITIONER

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

The question before the Court in this case is whether allegations set forth in a complaint filed by two regional labor organizations states a claim for relief under Section 1 of the Sherman Act. For simplicity this morning I will refer to these two labor organizations jointly as "the union."

The union alleges generally that it has been a party for over 25 years to collective bargaining agreements with defendant Associated General Contractors of California and its members. I shall refer to the association this morning as "AGC," for short.

In paragraph 23 of its amended complaint the union charges that AGC and its members entered into a conspiracy to undermine, weaken, and destroy the collective bargaining relationship between AGC and the union by engaging in a series of acts described in

paragraph 24 of the complaint.

The union also alleges in the second count of its complaint that the same acts constituted breaches of the collective bargaining agreements between the union and AGC.

AGC filed motions to dismiss and for summary judgment in the U.S. District Court. The District Court ordered the antitrust claim dismissed, finding the union's claim was essentially a labor dispute for which the union had remedies under its collective bargaining agreement through arbitration and potentially through the NLRB.

In reversing the District Court, the Ninth Circuit Court of Appeals focused on two allegations set forth in paragraph 24 of the complaint, which the Ninth Circuit felt stated the claim authorizing the District Court to scrutinize the activity of AGC under Section 1 of the Sherman Act. Those allegations appear in subparagraphs (3) and (4) of paragraph 24.

Paragraph 24(3) alleges that AGC and its members encouraged and induced others not to sign a collective bargaining agreement with the union. Paragraph 24(4) alleges that AGC and its members encouraged, aided, and coerced persons who let construction contracts to award them to persons not

party to collective bargaining agreements with the union.

The Ninth Circuit found that these allegations stated virtually the obverse of the situation treated by the Court in Connell Construction Company v. Plumbers and Steamfitters Local 100.

In the Connell case this Court held that an agreeement between a union and a contractor with which the union had no collective bargaining relationshp was subject potentially to scrutiny under the Sherman Antitrust Act.

The Ninth Circuit apparently believed that the Connell analysis would apply in this case. We believe the Ninth Circuit is mistaken in that regard. We believe Connell is a far different decision. There are, at a minimum, the following four distinctive features about this case that did not exist in Connell:

First, here, unlike Connell, there is a collective bargaining relationship between the union and the defendants. Labor remedies are available under that collective bargaining agreement.

Second, in Connell, it was clear the union could not claim a statutory labor exemption under the Clayton and Norris-LaGuardia Acts because it was combined with a nonlabor party; namely, Connell Construction Company.

Under Allen Bradley it is clear the exemption is forfeited when a union combines with a nonunion party. Here, by contrast, only unilateral activity on the part of management is involved and alleged.

Third, in Connell it was clear that the union had the power to shut any contractor out of the market for bidding on jobs with Connell and any other similar contractor that signed such an agreement with the union simply by refusing to sign a collective bargaining agreement with that company. If there was no collective bargaining agreement, then Connell, under the terms of its agreement with the union, could not use that company as a subcontractor.

Here there is no allegation that AGC has any similar power to foreclose union companies from bidding on the construction projects of letters of construction contracts. There is, therefore, no direct market restraint of the type evident in Connell.

Finally, as this Court noted last term in Wolfe and Romero, Connell appears to be a very limited holding which applied an antitrust remedy in a situation arising under Section 8(e) of the Labor Management Reporting and Disclosure Act of 1959 and its additions to the National Labor Relations Act.

Relying on the fact that the legislative

history of the Act, passed in 1959, indicated no inclination on the part of Congress not to permit application of the antitrust laws, the Court found scrutiny of the conduct in Connell to be subject to antitrust analysis. However, the Court was clear in pointing out in that decision that the earlier labor legislation, the Taft-Hartley Act, did contain legislative statements indicating a desire not to apply the antitrust laws to the broader proscriptions contained in those acts.

In this case, the solicitor general argues that the allegations of paragraph 24(4) of the complaint state the elements of a classic boycott in the antitrust sense. We believe this reasoning is faulty.

First, it seems apparent that the solicitor general accepted the Ninth Circuit's characterization of the complaint in this case. And I feel impelled at this point to detour just for a moment to comment on that because the Ninth Circuit opinion contains some statements about what the complaint alleges which appear to me to be at variance with the contents of the complaint itself.

First, the Ninth Circuit twice states in its opinion that AGC and its members attempted to coerce letters of construction contracts to award such

contracts only to nonunion subcontractors. There is no such allegation in the complaint. The word "only" does not appear. Nor could there truthfully be such an allegation, since it would mean that AGC and its unionized members were conspiring to shut themselves out of the market entirely on construction contracts.

QUESTION: Is the complaint in any of the printed materials?

MR. WATSON: Yes, it is, Your Honor. It is in the record.

QUESTION: Pardon?

MR. WATSON: It is in the record. It is part of the record transmitted to this Court by the Ninth Circuit.

QUESTION: But is it in the printed materials?

MR. WATSON: Oh. There is no printed appendix here. We made a motion to the Court to dispense with that since essentially it is --

QUESTION: It is in the appendix to the petition for certiorari, is it?

MR. WATSON: That is correct. It is Appendix E to the petition for certiorari.

QUESTION: All right.

MR. WATSON: The second matter in which we believe the Ninth Circuit has inaccurately characterized

the complaint is in asserting that the complaint claims a boycott. That word also does not appear in the complaint. But it appears three times in the Ninth Circuit's opinion.

Finally, the Ninth Circuit asserts that there is an effective lockout of union subcontractors being carried out here by AGC and AGC is attempting to totally shut out union subcontractors from work awarded by certain letters of construction contracts. Again, that allegation does not appear anywhere in the complaint.

QUESTION: From which part of the complaint were you reading, Counsel?

MR. WATSON: The part I was reading from, Your Honor, is paragraph 24, and particularly subparagraphs (3), (4), and (5). Those are the paragraphs that the Ninth Circuit focused on. They are in Appendix E to the petition.

So we believe the solicitor general has fundamentally erred in the way that it has characterized the complaint. Second, the mere fact that something which is called a "boycott" might exist does not automatically turn every situation in which such facts exist into an antitrust claim.

At the end of last term, in NAACP v. Claiborne, this Court found a noncommercial boycott not

be actionable under Mississippi law. That concedely was not a case which dealt with the Sherman Act. Rather, Mississippi's antitrust statute and common law theories of interference with contractual relations were involved.

Nevertheless, the point seems clear. It is underscored by much earlier decision of this Court in Hunt v. Crumboch, issued the same year as Allen Bradley, 1945, in which the Court, through Mr. Justice Black, made it clear that labor disputes ordinarily are not the subject of antitrust scrutiny. In that case, the labor union refused to permit anyone to join it, thereby boycotting those people who worked for a certain contractor. Despite the fact that boycott analysis would ordinarily apply to such allegations, the Court refused to find a claim under the Sherman Act.

Recently, in an opinion which is referred to with apparent approval by this Court in its Claiborne decision, State of Missouri v. National Organization of Women, the Eight Circuit extensively analyzed the legislative history of the Sherman Act and concluded that the commercial types of restraints at which the Sherman Act was directed did not include political types of activities. We believe the same type of analysis applies in this case, and it is exemplified, of course, in the statutory exemptions contained in the Clayton and

Norris-LaGuardia Acts.

The solicitor general states at page 9 of his brief that if unionized contractors do not receive least some construction contracts, perforce they have been shut out of a portion of the market. And with all respect, we believe this to be circular reasoning as well. The test is not whether unionized subcontractors receive contracts from letters of construction contracts, but whether they were at least considered for them.

Moreover, the fact that a unionized contractor may not get all contracts, may only get a portion of them, certainly does not indicate that he is being boycotted. We also believe this Court's decisions in Apex Hosiery v. Leader and Hunt v. Crumboch make it clear that labor disputes are not ordinarily grist for the antitrust mill. And taking their lead from these two decisions, many lower courts have followed that reasoning in recent years. In the J.B. Stevens case, the Prepmore case, and the Kennedy case, which are all cited in our brief, follow essentially that line of reasoning in refusing to permit labor unions to assert antitrust claims against employers and employers associations who have acted antagonistically against them, at least where there is a collective bargaining

relationship between them.

Now, the solicitor general seems to agree that some unilateral employer conduct is exempt from scrutiny under the antitrust laws. But he suggests the exemption is lost when third parties are affected. And he points out here that there are third parties in the form of letters of construction contracts and unionized contractors not members of AGC who might be affected by any activity that the multi-employer association takes. And we think there are three things wrong with this analysis:

First, the labor exemption has been applied time and time again in cases where third parties are affected. The United States v. Hutcheson, the case which applied the Norris-LaGuardia Acts, exemptions from the antitrust laws was a dispute between two unions, where, in fact, the whole dispute was fought out on the property of a third party, Anheuser-Busch.

The Jacksonville Bulk Terminals, a case decided by this Court last year, which was a protest against Soviet foreign policy, obviously affected the employer whose goods were not being loaded onto the ships by the striking union.

In Apex Hosiery there was a violent sit-down strike conducted by the union. Many parties were

directly and indirectly affected. Nevertheless, because there was a labor dispute rather than a dispute in a commercial context, this Court refused to apply the antitrust laws.

Second, it is an economic reality of life that third parties will be affected by the unilateral labor activity of both management and unions. That is inescapable. And the labor laws attempt to deal with that in many ways. Section 8(b)(4)(b) of the National Labor Relations Act. Section 303 of the Labor Management Reporting and Disclosure Act provide remedies for certain limited kinds of impermissible secondary conduct. If those remedies are inadequate, the appropriate approach is to amend the labor laws, not to try and pull off from some other branch of federal regulation into the labor context.

Third, because of the two unique mechanisms available in the construction industry, the issue of just how much any unionized third party might be affected here is very speculative.

This Court noted five years ago in the Higdon decision that a pre-hire labor agreement, which is specifically authorized in the construction industry by Section 8(f) of the National Labor Relations Act, is an agreement which may be repudiated by a construction

contractor at any time before the union demonstrates majority representation in the contractor's work force.

That means that where there has been no such demonstration, any construction contractor signed to such a pre-hire agreement can disavow the agreement and not be bound by it from that moment on.

Second, as noted in the amicus brief of the Chamber of Commerce, it is a common practice in this day and age, and one which in appropriate circumstances passes legal muster before the NLRB, for contractors to create so-called double-breasted businesses; that is, businesses which may consist of a separate corporation which is union and a separate corporation which is nonunion. If the same ownership exists of the two businesses, economic benefit flows to the ultimate owner regardless of whether contracts are performed by the union or nonunion business.

So it is not at all clear that a unionized contractor is going to be shut out of the market if an owner or letter of construction contracts says, I want this work performed nonunion. Interestingly, respondent admits this in his brief on page 49, where he states that one reason the union should bring this action is because contractors may not do so simply because they may have the option of going double-breasted.

By saying that, it seems to me the Respondent has admitted there is a very real question here about the way the Ninth Circuit approached this case. The Ninth Circuit said, we must have an antitrust claim here because third parties are affected and the union can recover its incidental damages. The union says, one reason we should be permitted to do that is because the party against whom the antitrust conspiracy is aimed may not be damaged at all.

We also believe this case is not properly maintainable as an antitrust case because the result it seeks is not consonant with the purpose of the antitrust laws. In Brunswick Corporation v. Pueblo Bowl-O-Mat this Court held that antitrust laws are designed to protect competition, not competitors.

In this case the union seeks to collect damages stemming from a decline in its power to effectively represent carpenters occasioned by AGC's encouragement of the proliferation of open-shop contracting. In other words, as in Pueblo Bowl-O-Mat, the plaintiff wants nonunion competitors out of the market in order to preserve the market for unionized businesses, unionized carpenters, and ultimately to the benefit of the union itself.

Again as the amici have pointed out, there is

much to be said in terms of preserving competition for permitting a market where both union and nonunion contractors compete for construction contracts.

I will not take the time because of the limitations of this argument to discuss the application of the statutory labor exemption. That point is briefed in detail in both my brief and the brief of the respondent. And the legislative history is set forth there.

I will note, however, that last term, in Jacksonville Bulk Terminals this Court held again as it has in the past that the term "labor dispute" as it is used in the Norris-LaGuardia Act has a naturally broad meaning and may apply to disputes where third parties are involved and may even apply to disputes where motives other than the economic motive are involved.

QUESTION: Mr. Watson, somewhere in your dissertation are you going to comment on Blue Shield against McCready?

MR. WATSON: I am just coming to that, Your Honor. I am glad you ask that question.

Finally, we have the question of standing in this case, and the related questions of jurisprudential doctrines developed by this Court and lower courts regarding who should be permitted to maintain an

antitrust action under the language of Section 4 of the Clayton Act.

Last term, in Blue Shield of Virginia v. McCready this Court addressed the standing issue under Section 4. In granting standing to an injured consumer who had been denied reimbursement of her billings by a psychologist for psychological services, the Court appeared to emphasize three factors.

One was the need to identify those who possess standing by using proximate cause analysis similar to that used in tort law. Second, the Court made specific note of the ascertainability of damages. In McCready it was quite clear that the plaintiff was damaged. It was very easy to figure out what the damages were. She had the unpaid bill, and it showed right on the bill how much it was.

Third, the Court indicated, as it had previously in Reiter v. Sonotone that there was a specific congressional intent to vindicate consumer rights under the antitrust laws. None of these factors are present in this case. This is concedely not --

QUESTION: Now, you have not covered this argument in the supplemental brief?

MR. WATSON: Yes, I have. But I did want to comment on it because of Your Honor's comment on

McCready. This is not a consumers case. Damages here, we believe, are highly speculative. They grow out of the assumption that unionized workers will drop out of their labor union if they are hired by an open-shop contractor. And incidentally, it is an unfair labor practice for an open shop --

QUESTION: Let me go back to my question. Have you filed a supplemental brief here?

MR. WATSON: Yes, I have.

QUESTION: Covering McCready?

MR. WATSON: Yes, I have. It's yellow in color, Your Honor. It should be in your packet. It was filed more than a week ago.

QUESTION: That does not necessarily mean we will get it.

QUESTION: Oh, I see why I did not find it. It is out of alphabetical order in your index.

MR. WATSON: My apologies to the Court.

QUESTION: It is not your fault. It is your printer's fault.

MR. WATSON: If I may just backtrack for a moment. The damages here are far more speculative than they are in McCready. The damage assumption rests on the presumption that the union will lose revenues, lost dues, because members will drop out if they are hired by

open-shop contractors or work shifts for the open-shop sector of the market.

First, it is by no means clear that open-shop contractors will refuse to hire unionized workers. In fact, it is an unfair labor practice for them to inquire about the union affiliation of their workers.

Second, it is by no means clear that a unionized carpenter who goes to work for an open-shop contractor will not maintain his union membership. Work in the construction indusry is seasonal. He may well want to go back to work for a unionized contractor on the next job he gets. So it is a matter of speculation to assume because open-shop contractors get some jobs, that there is going to be any massive shift of carpenters away from union affiliation.

Finally, I should note that the proximate cause analysis, which the Court adverted to in the McCready case, would have to be applied in this case in a much more attenuated fashion. The union is three or four steps, at a minimum, removed from the situs of the damage. In McCready it was very clear that the consumer herself was extremely directly damaged, and she could not get her medical bill paid.

Multi-employer collective bargaining has been recognized by this Court, most recently in Charles

Bonanno Linen but also in Buffalo Linen, to serve a very real purpose.

If the concerted acts of a multi-employer association and its members in formulating labor policies -- and those policies by definition will always in some sense be antagonistic to those of the union -- can be subject to antitrust analysis every time the union is unhappy with those situations, then a remedy unanticipated by Congress when it set up the labor laws will be injected in a very delicate area.

There are sensible reasons why unionized contractors, including those who want to remain unionized, would want to encourage a certain amount of work to go to open-shop contractors, even if it means they lose that work.

QUESTION: Mr. Watson, your reasoning along this line may be quite persuasive. But is that not something that ordinarily would be developed by evidence, evidence of proximate cause? Is it not difficult to say just on the basis of the complaint what evidence might be adduced pro and con as to how attenuative this effect was?

MR. WATSON: I think Your Honor is correct in the ordinary situation. Certainly, attenuation is something which can lead to factual questions that need

developed. And that is why in the case I have taken the position first that under Apex the Court ought to decide whether there is an antitrust case here at all.

Second, if the Court decides there is an antitrust case, then it should decide whether the statutory exemption applies. And only third, if it decides the first two questions, the first in the affirmative and the second in the negative, need it even get to the standing issue.

QUESTION: If we do get to the standing issue, which I take it is what the present part of your argument is addressed to, do we not have some difficulty simply speculating as to what evidence on proximate cause introduced personally to the complaint if it went to trial would prove?

MR. WATSON: Well, I think in this case the chain is so long and attenuated, that it would be difficult for me to concede that. I do not think there is any way here the union can recover from the problem it would have. There is just too many separate links in the chain for the union to possibly show itself as directly injured. It may not be injured at all.

And given that circumstance, it seems to me it is within the Court's province to say we do not want to put the parties to the expense of attempting to litigate

this. If I understand the Court's holding in Illinois Brick correctly, the holding amounts to a concern by this Court over whether the expenses of litigation of attenuated chains of proof are going to outweight any possible benefit either to the litigants or the public. And it seems to me that is the problem here.

That is why in cases such as this and McCready, which was also a pleadings case, it seems to me that if it is clear from the pleadings that the chain of causation is hopelessly attenuated, that it is within the Court's province to find that the party does not possess the requisite either standing or be within that other magical realm which is nonstanding, which is referred to in Illinois Brick of persons who cannot appropriately bring these actions.

QUESTION: Mr. Watson, may I ask you a question. You suggest that the first issue we should address is whether there is an antitrust violation and postpone consideration of standing until we have answered that question.

MR. WATSON: Yes.

QUESTION: Now, in your argument on the antitrust violation, are you relying primarily on the fact that the pleading is not sufficiently specific because it just says coerce, or are you contending that

if all of the members of the association did, in fact, agree that none of them would do business with a nonunion contractor, that that agreement would not violate the antitrust laws?

MR. WATSON: Well, the latter point is not alleged in the complaint but --

QUESTION: Well, that is what I am asking you. Are you basically making an argument directed at the way in which the pleading is framed, or are you questioning what I just --

MR. WATSON: I am specifically not contending that the problem is that the pleading is not specific enough. It seems to me under the McClain case that this Court has --

QUESTION: Well, let me rephrase my question. Supposing that the pleading specifically said, all of the members of the association have agreed wih one another in writing that none of them will do business with nonunion contractors or subcontractors. Would that state an antitrust violation?

MR. WATSON: None of them would do business with nonunion? No, I think --

QUESTION: With union. I stated it backwards.

MR. WATSON: With union.

QUESTION: Yes.

MR. WATSON: No, I think it would not, under the doctrines that I have enunciated. It might give rise to labor law violations. There might be problems arising. The union has alleged, remember, the second count of the complaint --

QUESTION: But even if the complainant excluded the words "boycott" in so many words, you would still say that is not the kind of boycott which the Sherman Act is --

MR. WATSON: That is exactly right. I would still say that this is essentially a labor dispute and that a multi-employer association and its members have to have the power to formulate some type of unified labor policy. And in fact, the Norris-LaGuardia Act says, in so many words, that it shall not be an enjoinable act to encourage or induce or suggest to others that they not deal with a specific other party.

So, yes, I would think that is clearly a labor dispute.

QUESTION: What would be the steps to bring it before the Labor Board?

MR. WATSON: Well, there are several different kinds, depending on which of the allegations in the complaint one is focusing on The so-called double-breasted businesses are frequently attacked by

the union as a refusal to bargain under Section 8(a)(5) of the National Labor Relations Act.

QUESTION: In other words, they might single out one employer and go after him on a refusal to bargain because of the agreement he had made that was postulated by Justice Stevens?

MR. WATSON: That is right. And there are even broader remedies under the labor agreement itself. As this Court knows from the Steel Workers Trilogy, when you have a collective bargaining relationship, there is an implied covenant of good faith and fair dealings. And a unified action by the members of the multi-employer bargaining unit to subvert that covenant of good faith, I think, is clearly arbitrable, and perhaps the subject of a 301 suit as well.

And there are lower court cases that have held as much, where a 301 suit has been brought and there is no specific violation of any specific point in the labor contract, but as in Lucas Flour, in reading the labor contract, one can say, this employer has not really kept good faith with the union.

So there are both contractual and board remedies, we believe. Thank you.

CHIEF JUSTICE BURGER: Mr. Van Bourg.

ORAL ARGUMENT OF VICTOR J. VAN BOURG, ESQ.,

ON BEHALF OF RESPONDENT

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

I guess we have to start with the basic premise of whether or not this an antitrust case or a labor case. That was addressed by the Court below. It treated the case as an antitrust case and not as a labor case. And the reason that it treated --

QUESTION: I am not sure -- if I may interrupt you --

MR. VAN BOURG: Surely.

QUESTION: -- would you agree with your friend that if a hypothetical situation developed by Justice Stevens were posed, that one employer could be proceeded against in the Labor Board?

MR. VAN BOURG: No very readily, Your Honor. My colleague said --

QUESTION: I am not talking about the difficulty of proof. I am just talking about a jurisdictional matter.

MR. VAN BOURG: As an 8(a)(5), as an 8(a)(5), assuming that the contractor has entered into a collective bargaining relationship with the union and then seeks to avoid the collective bargaining relationship by developing a sham entity or a

double-breast, as we refer to it, and that we file a charge under Section 8(a)(5) to allege, in essence, an attempt to run away from an agreement, a runaway shop.

As a theoretical matter, yes, that could be done on a contractor-by-contractor basis. As a practical matter, it simply is not done because the board has said that that is really not a remedy for a double-breast.

And in essence, if one deals with the reality of the work place, what happens is that a contractor, particularly when viewed in the context of this Court's decision in Higdon changes his name or its name for every job, sometimes changes his name or entity or style of doing business on various sections of the same job and joins an association, becomes signatory to the contract, the day after the contract is signed, moves over to the so-called open-shop division of that association and becomes free of the collective bargaining agreement because of the notion, specifically discussed by this Court in Connell, that there is a statutory scheme that there should be no top-down organizing.

So even if we want to deal with the reality of what this Court dealt with in Connell, the answer, Your Honor, to the question posed was that there is no

practical remedy under 8(a)(5). That is why it is essential that this Court understand the distinction posed by the Court below in treating this as an antitrust case and not as a labor case in my standing here before you and arguing this to be an antitrust case and not a labor case when I would dearly love to argue with you concerning the policy questions of Connell.

But for purposes of this case, it has to be accepted and understood that we are dealing indeed with the obverse of Connell. This is not a labor case. The only way in which petitioner can prevail is to place this case in the context of a labor case and have this Court agree that it is a labor case and not an antitrust case.

So let's look at the two beacon lights which this Court focused in Connell. Number one, it said, even though counsel states that it is to be narrowly construed -- that is, Connell -- this Court states that there must be a stranger relationship. Local 100 signed an agreement with Connell after putting economic pressure on Connell at a time when it thought that it was protected by Section 8(e) of the act in doing what it did.

But assuming it was not, assuming the conduct was proscribed by Section 8(b)(4), regulated by

Taft-Hartley, subject to the filing of a charge under Section 8(b)(4), subject after a hearing before the board to a collateral estoppal argument in a damage action under Section 3, subject to a 303 action for what it did, what Local 100 did, notwithstanding a regulatory statutory scheme, notwithstanding a statutory provision that says that you can get damages for such conduct, which is 8(b)(4), secondary-boycott conduct, notwithstanding the fact that after the passage of Norris-LaGuardia, Congress gave United States District Courts the authority under Section 10(1) for that same conduct, to obtain an injunction against the proscribed conduct, pendente lite.

So a full and comprehensive scheme of regulation damages and injunctive relief, this Court still held that even though it was clear-cut 8(b)(4), 10(1), 303 action, we shine the light on, the beacon on, the fact that in addition to being proscribed by Taft-Hartley, you Local 100 committed a violation of antitrust, subjecting you to treble damages.

Standing was not even argued in that case. It was assumed. And it was assumed because of a built-in prejudice in the kind of plaintiff we have: if it is an employer, the damages are assumed not to be speculative; if it is a union, it is assumed to be speculative.

What was the second beacon light of this Court in Connell? It was, in fact, that the action, the conduct of Local 100 was designed to prohibit the employment of nonunion contractors, which this Court stated was exclusionary on a nondiscriminatory basis and, therefore, anticompetitive, i.e., if you have two nonunion contractors and one of them is efficient and one of them is inefficient, and you exclude them both, including the efficient one, this Court stated that that nondiscriminate exclusion regardless of efficiency, which incidentally was outside the record of that case, constituted the second beacon light.

QUESTION: Do you feel this is kind of a rehearing of the Connell case?

MR. VAN BOURG: Absolutely not. I stand here arguing in support of the Ninth Circuit decision and, therefore, in support of your decision in Connell, and asking that reality focus on exactly the obverse. What do we have in this case? We have a stranger relationship.

The question was asked, and counsel stated that all of the parties are reachable under the National Labor Relations Act. That is absolutely not correct. The owner of land, the major industrialist, the member of the Roundtable who determines that there should be a

"union-free environment," says that when I build my plant, when I build my refinery, when I build my chemical factory, you contractor will be nonunion and you will see to it that you and your other contractors who do work on this project will be nonunion, and we form a tripartite conspiracy.

A tripartite conspiracy to do what? Again, the Connell beacon light shines and finds what? To exclude on a nondiscriminate basis, regardless of efficiency or nonefficiency, all of those contractors who have a union contract.

If you could find that it was an antitrust case in Connell because of those two beacon lights, stranger and nondiscriminate exclusion, you cannot avoid the conclusion here, because without regard to whether the contractor is the single lowest bidder, the single most efficient contractor on the whole project, because he has or it has a collective bargaining relationship with the union, it is therefore excluded under what we have alleged in the complaint.

QUESTION: But wouldn't these people be entitled to assume, at least for purposes of putting together a policy, that generally your bids from union contractors are going to be higher than your bids from nonunion contractors, and therefore it is not a

nondiscriminate exclusion?

MR. VAN BOURG: I do not think so. Number one, Your Honor, I think you would have to presume the facts to be tried at a trial. We are here on the pleadings and the facts pleaded therefore have to be assumed to be correct.

But quite the contrary happens everyday in the real world; that is, that the union contractor, precisely because he has highly skilled workers, they are more efficient. They may get a higher hourly wage rate than a nonunion contractor, but he will do the job cheaper and he will do it more efficently.

And day by day all over the country, particularly in our area, the low bidder in the field of contractors, union and nonunion, are union contractors. So that assumption, in all due respect, Your Honor, is not one that can be assumed as a matter of law, as a matter of fact, or as a matter of reality.

Now, to continue with the aspect of why we feel Connell requires a decision in our favor in this case, and why the Ninth Circuit used Connell as the sole basis of its decision, is that this Court did something brand-new in a sense in Connell.

Previously -- and this directly contradicts petitioner's attempt to make it into a labor case --

previously, at least since 1947, since the Taft-Hartley Amendments, the proviso requiring federal preemption, which was decided by this Court in Garman, Guss and Fairlong, and Garner, was specifically held to apply to antitrust cases.

This Court's decision in Teamsters v. Oliver dealt with the Ohio antitrust statute. This Court held that Taft-Hartley preempts any remedy, injunctive or by way of damages in an antitrust action in that case. In Connell you specifically dealt with that issue.

You referred to Oliver, as I recall, in the text towards the end of the decision and also in a footnote, and stated, very simply, that it is true that in the antitrust statute alleged in Connell, if we can recall, that case was originally filed under the Texas antitrust statute, was removed to the United States District Court.

An amendment to the complaint stated a claim under the Sherman Act. This Court held that Taft-Hartley preempts the field with respect to the state law, does not preempt with respect to the federal law, and required this Court to balance the competing interests between the Sherman and Clayton Antitrust Acts and the Labor Management Relations Act of 1947, as amended.

And I specifically state it that way and characterize it that way because the Connell conduct would have been lawful and fully protected by Section 7 of the Waggoner Act, still Section 7 of the Labor Management Relations Act because Section 8(b), declaring the conduct of secondary boycott and indeed the type of conduct as we had in Hutchinson a jurisdictional dispute, was protected activity or at least not prohibited until 1947; that is, the for the twelve-year period between 1935 and 1947.

So we have a situation where this Court decided in Connell that we will balance the competing interests between the antitrust laws of the United States and the labor laws of the United States. And therefore, it cannot be escaped that the reasonable conclusion is here that if those competing interests are to be balanced, both sides of the coin must receive the equal balance.

If a union can be a defendant in a treble-damage action in an antitrust setting and context, and if you deny the relief the Ninth Circuit gave to us in this case, you are saying, defendant you shall be but never a plaintiff because you are a union.

Now, many such distinctions are made, and throughout the decisions of this Court and the lower

courts --

QUESTION: Mr. Van Bourg, suppose I agree with you that a union may be a plaintiff in the sense that it has standing. I suppose that I suppose that. What difference it might still be at the damages stage of the proof of whether you can prove damage?

MR. VAN BOURG: All right, now we get to the standing issue--

QUESTION: Yes.

MR. VAN BOURG: -- which I really feel is the crux of the case.

QUESTION: Yes.

MR. VAN BOURG: Having overcome, if I can, for purposes of argument, the antitrust portion --

QUESTION: Yes.

MR. VAN BOURG: -- the antitrust context of the matter. Again, counsel argues and the government argues in their brief, the government says, statutory exemption does not protect the petitioner, nonstatutory exemption does not protect petitioner, the issue of the labor laws preempting this particular subject matter does not protect petitioner.

The government says, yes, they have stated a cause of action and a claim for antitrust. They did mischaracterize our pleadings. Then the government

states, very simply, that the reason we do not have standing is because the damages are speculative and because they are remote. And counsel and respondent -- petitioners argue very heavily that there are several links in the chain between the direct proximate causation and the damages.

My response, Your Honor, is to -- again, because when arguing statutes very often one forgets the exact text -- Section 4 of the Clayton Act says any person -- the union is a person -- who shall be injured in his business or property -- I suppose we better change that to "its or his or hers" -- by reason of anything forbidden in the antitrust laws -- we have already gone over the bridge that this is an antitrust case -- may sue, therefore, in any District Court in which the defendant resides or is found or has an agent, without respect to the amount in controversy. Statutory language for a specific reason.

Now, I do not have to stand here and say that this union, which represents in excess of 110,000 members, has a speculative damage claim. Do we have to play fairy tales to understand that the statistics of the country are that only 20 percent of the work force is unionized and that if this kind of a conspiracy succeeds and has absolutely no practical remedial force

against it, that it would be less than 20 percent, and in the construction industry, which is a target, that the union will be damaged directly? And not just dues; this is not a cash register issue. But that is direct; that is not many links in the chain.

QUESTION: MayI ask about the one link in the chain? What about employees of a union contractor or subcontractor, would they have standing?

MR. VAN BOURG: I think employees might have standing. We deliberately, I must state, in the original galley of our brief, we dealt with the case that dealt with the hiring hall issue. We deliberately decided not to use that case here in this context because this is not a derivative action. We do not want to fall in the trap of Hawaii v. Chevron. We do not want to fall in the trap of Illinois Brick.

QUESTION: No; but is it not true that, just focusing on one union employer for the moment, is it not true that the impact on the union is less direct than the impact on the employees who pay the union dues?

MR. VAN BOURG: I am not so sure that I could say that it is less, less direct. But let's say for a moment that it is less direct. That was the damage to the worker. What is the damage to the worker if he no longer can find a job with a union contractor because

the conspiracy has been successful and has made all contractors nonunion?

QUESTION: Well, I would say both.

MR. VAN BOURG: He would have lower wages.

QUESTION: Or no wages at all, possibly.

MR. VAN BOURG: Or no wages at all. No job. Certainly nobody agreed to use the hiring halls so we would have to have a tougher time getting a job. But that would be his damage.

QUESTION: That is right.

MR. VAN BOURG: The union has its own damages and institution. Not every institution --

QUESTION: But the union could not be damaged unless its members were first damaged.

MR. VAN BOURG: I would say that if we again take a look at the text of the Clayton Act and deal with the absolutely --

QUESTION: Well, I understand they are covered literally. There is no doubt about that.

MR. VAN BOURG: That is right. If we deal with the basic concepts --

QUESTION: And so are the employees and so are the customers and the suppliers.

MR. VAN BOURG: Well, but what about the contract, Your Honor? We have held dearly since the

framing of the Constitution that one of the sacred property rights of the Nation is to permit its citizens freely to enter into contractual obligations and conspiracies which either affect or destroy those contractual relationships directly injure the contractual parties.

The union has a direct first-step injury if this conspiracy succeeds. The laws of the United States are that under the grievance procedure the worker does not own the grievance, the union owns the grievance. The union is the collective bargaining party, is the owner of the contract. The worker is the beneficiary. And there all of a sudden McCready comes down.

If McCready can be granted standing to protect the psychologists --

QUESTION: I must confess I am puzzled. You say the union owns the contract?

MR. VAN BOURG: Yes. The union --

QUESTION: I thought it was an agent for its members.

MR. VAN BOURG: As the collective bargaining agent for the employees --

QUESTION: Oh.

MR. VAN BOURG: -- the grievance is owned by the union, not by the worker.

QUESTION: Owned? But what does that mean?

MR. VAN BOURG: That means --

QUESTION: Do you mean that if there is a dollar recovery, the union can pocket it?

MR. VAN BOURG: No, no. What that means is that the union and the worker may have a competing interest in processing the grievance.

QUESTION: And the union has ability to ask --

MR. VAN BOURG: The Westinghouse case --

QUESTION: -- for good faith in representing the worker.

MR. VAN BOURG: That's correct. This course is open --

QUESTION: It does not own the claim. I certainly cannot understand that.

MR. VAN BOURG: Well, let me put it in another context. The worker has a right to self-representation, but not in an adverse position to the union, because a worker cannot cut his own deal because that would destroy the wages, hours, and condition, which are owned collectively -- that is why we call it a collective bargaining agreement -- by all of the employees in the collective bargaining unit.

That is why there must be a distinction made between the interests of the institution, direct injury

to the institution, versus the direct injury to the member. The member may have a separate and distinct and sometimes competing interest with respect to the union.

QUESTION: You don't need the owning of the grievance to win your lawsuit, do you?

MR. VAN BOURG: No.

QUESTION: Because I just wondered, when you get back pay, the union doesn't get it; the worker gets it.

MR. VAN BOURG: The worker gets it, vindicating the collect -- although the worker gets it in his pocket, it vindicates the collective bargaining agreement for all the other workers.

QUESTION: Well, you can't spend that, but you can spend the money that's in your pocket. I just don't think you need it.

MR. VAN BOURG: I agree, Your Honor, but I was answering the question.

I would like to go one point further and talk about McCready. Let's take the context of this case and remember where it came from, because it started in 1975. This is the second 1975 case you have this morning.

In 19 -- this case was filed before Connell. During its pendency before the United States District Court Connell came down. We were asked to brief Connell. The district judge then found that Connell was inapplicable. It was appealed on that ground to the

Ninth Circuit. It's as much a mystery to me as to everybody else why it took so long to proceed, but it did. It was eventually calendared and heard, and a petition for rehearing was filed, and the decision on rehearing clarifies the opinion.

And what we are here arguing is is that there is a direct opposite, that there are two faces to the coin; that if Connell stands, which it must because no one in this case has asked that it be reversed, and no one in this case has tackled the policy arguments of Connell. We did not raise Higdon; counsel raised Higdon. Higdon and Connell taken together with the 1959 amendments to Taft-Hartley -- that is, Title VII of the Landram-Griffin Act -- place us in a totally different position from that in which we have been before as labor organizations. If we can be sued and pay out of our treasury when the Connell beacon shines on us, but we have no standing because we have no property or the link in the chain is too remote for us, therefore, to be plaintiffs, and we can never on the exact observe, on the exact reverse, on the exact same fact situation, but here the contractors are the defendants, and we're the plaintiffs versus the Connell situation.

If we do not have a remedy, you have not carried forward the purpose which you stated you were

carrying forward in Connell. You justified Connell -- Connell was a departure -- you justified Connell on the basis that you were balancing the interests between labor laws and antitrust laws in that area where they meshed and where the ground was soft. Therefore, if you are balancing, you must balance equally.

QUESTION: Is it your -- is it the thrust of the complaint the way you construe it -- and this is your own complaint -- that the object of the alleged conspiracy was really not so much to -- against the union contractors but against the union?

MR. VAN BOURG: That's how I must interpret the complaint because that's how the Ninth Circuit interpreted the complaint. In applying its target set -- test, it stated the union was the target, it was aimed at and was hit. And the way in which the union was the target and was aimed at and was hit was through a conspiracy to restrain trade on a non-discriminate basis to make it clear that if you have a contractual relationship with a union you will not work on these projects. And it is absolutely incorrect to say that this happened in a labor context.

QUESTION: But you didn't, for example, suffer any competitive injury. I don't suppose the customer did in McCready either.

MR. VAN BOURG: I would say that McCready is right on point. And to say that McCready didn't suffer a competitive injury and we didn't suffer a competitive injury I think is not exactly on point, although because I'm seeking --

QUESTION: Well, McCready --

MR. VAN BOURG: -- The support of McCready I would have to say yes.

QUESTION: Well, McCready, the --

MR. VAN BOURG: Certainly no competitive interest. But what is the derivative benefit of the McCready case? The derivative benefit -- again, the practical reality in which this Court's decision will be applied in Blue Shield-McCready will be that Blue Shield will incorporate the clinical psychologist as part of its benefit plan without it being blessed first by a psychiatrist.

QUESTION: I'm not so sure your parallel to Connell is as precise as you would make it. Going back to the case, that case didn't start out as a complaint for antitrust damages under the federal antitrust laws. It started out as a state court action, and the union defended on the grounds of preemption by labor law. So that the case doesn't speak at all to the extent to which a contractor could recover against the union if he

had sued under the antitrust law.

MR. VAN BOURG: Your Honor, I stated precisely that. I stated that in Connell the suit was filed first alleging a violation of the state antitrust law, the same as was the case in Oliver. It was then removed to the United States District Court, and the plaintiff amended his complaint to add a cause of action of a violation of Sherman.

QUESTION: But you used Connell talking about your union having to respond in damages under the antitrust laws, and of course, Connell doesn't say that in so many words. All it says was there was no preemption of state law in that case because the antitrust exemption to the labor laws didn't apply.

MR. VAN BOURG: Well, Your Honor, in all due respect I think Connell says that what Local 100 did in that case, notwithstanding it being cognizable by Section 8(b)(4), Section 10(L), and Section 303 of Taft-Hartley was also cognizable by the antitrust laws and was remanded back to the United States District Court for further findings.

QUESTION: But to determine whether there was preemption or not.

MR. VAN BOURG: I don't think so, Your Honor. That's not how I read Connell, and I don't think that

that's how it's read generally. Connell is read generally in the labor bar and in the antitrust bar as subjecting a stranger union, stranger union, Beacon 1, to antitrust liability for conduct otherwise either arguably protected or prohibited -- that's the language of Garman, of this Court -- subjecting it to antitrust liability if it is a stranger, and we have strangers here, and if it its ultimate conduct is to nondiscriminately exclude without regard to efficiency or other reasonable criteria a group of employers from the market -- precisely the case that we have here.

QUESTION: Let me ask one more question, if I may, about the specific conspiracy that you've alleged in --

MR. VAN BOURG: Yes

QUESTION: -- Your complaint. Your defendants here, as I understand it, are an association of general contractors.

MR. VAN BOURG: Yes.

QUESTION: And you do not allege, as I read the complaint, that the members of the association has refused to do business with union subcontractors. You rather have alleged that they have encouraged landowners and builders and so forth to employ nonunion contractors.

Do I read it correctly?

MR. VAN BOURG: Your Honor, we have alleged that they have entered into a conspiracy with owners, with general contractors, with their own membership, because remember, the AGC, and we allege in the complaint, has both union and an open shop division. In the context of that it is part of its general program to see to it that notwithstanding the existence of a collective bargaining agreement, that those contractors with collective bargaining agreements do not work because its own membership has a significant nonunion branch and can easily simply opt over. And this is a step in that process.

QUESTION: Would you describe what your opponent referred to as the double-breasted situation in the complaint? I didn't catch that.

MR. VAN BOURG: Well, as I understand what he was arguing was that that was subject to an 8(a)(5) remedy.

QUESTION: Well, just answer my question. Is that part of your complaint, a description of that kind of situation?

MR. VAN BOURG: Yes. We have described -- in part of our complaint we have mentioned that part and parcel of the action -- we alleged many other things in addition to antitrust violations -- was the attempt to

avoid the contract by the development of what is lawfully permitted under the so-called double-breasted --

QUESTION: The government seems to focus and everyone seems to focus on subparagraph 3 and 4 of paragraph 24 of the complaint. Do you agree that's the crux of -- those are the critical paragraphs?

MR. VAN BOURG: Well, Your Honor --

QUESTION: What about --

MR. VAN BOURG: -- We drafted the whole complaint, and I think paragraph 3, 4, 5 and 6 --

QUESTION: In 5 you speak directly about members of the association being coerced.

MR. VAN BOURG: That's correct. They opened an open shop division. It was in the context of this. I'm looking for that portion of the index which has section -- paragraph 24.

Your Honor, I think that the complaint --

QUESTION: Page 6 -- 16 in the Appendix.

MR. VAN BOURG: All right. The actual language is on page 18: "advocated, induced, coerced, encouraged and aided members of the AGC of California, non-members of AGC of California, and memorandum contractors to enter into subcontracting agreements with subcontractors who are not signatories to any collective bargaining agreements with the plaintiffs in each of

them."

And I think it's important that at this stage the sufficiency of the complaint is I don't think a viable argument. I think we have to deal with the guts of the issue which is the standing issue.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Watson?

MR. WATSON: Just one.

CHIEF JUSTICE BURGER: You have four minutes remaining.

ORAL ARGUMENT OF JAMES P. WATSON, ESQ.,
ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. WATSON: Thank you. Or really I should say two things.

First, if I might just briefly, counsel had indicated that there was no adequate remedy under the labor laws for the kind of double-breasted problem that occurs when a contractor opens an open shop and maintains a union shop business at the same time. In fact, there is a whole string of NRLB cases on this subject. They are on pages 66 and 67 of the record transmitted to this Court by the U.S. Court of Appeals, cases such as Shultz Painting, which is at 202 NLRB No. 23; Milo Express at 212 NLRB No. 57, and so forth.

Second, in the time remaining let me comment

on Connell because it seems to me that the whole thrust of the plaintiff's contention here is that Connell mandates this kind of action.

First, as I pointed out in my opening argument, there was a mechanism in Connell which is absent here, and that was the power of the union to literally lock contractors out of the market with Connell and any other stranger contractor it could get to sign one of these agreements with it that they would not subcontract to anyone not party to an agreement with the union.

Here there is no allegation in the complaint, no mechanism alleged that would lead to any inference that AGC has such a power.

Second, the Court specifically emphasized in Connell that it was engaging in a rather narrow exception to the general rule about preemption by the labor laws of antitrust claims. Specifically, the Court relied on the fact that when Section 8(E) was enacted in 1959 there was no legislative history to indicate that Congress wanted 8(E) violations not to be redressed under the antitrust laws.

The Court made specific reference at that time to the fact that the opposite was the case with regard to the Taft-Hartley Act. Now, it seems to me as

discussed in my opening argument Connell is clearly distinguishable.

Finally, finally in Connell the Court says in a footnote that where a party has two consistent remedies under federal law, he may have a choice of remedies. Now, whether the Court in fact in Connell considered whether the remedies were consistent or not, it is clear here, I think, for the reasons set forth in my brief by no stretch of the imagination are the remedies consistent between arbitration grievance processing, NLRB grievance processing -- both of which are basically make whole type remedies -- and the type of remedy which would be available in an antitrust action where treble damages and attorneys' fees would come down on the heads of all the losing defendants. So for those reasons I don't think Connell creates authority for this kind of action.

Finally, I would urge the Court to read the complaint carefully. We are here only to test the allegations of this complaint, not matters outside the complaint. And there have been some statements made in counsel's argument, specifically statements about conspiracies with letters of contracts as opposed to conspiracies among the membership to encourage and induce letters of contracts which do not appear in the

complaint.

I am not contending that it would not be possible for Mr. Van Bourg or his clients to concoct some kind of potential antitrust theory. What I do contend is that this complaint by its words does not state an antitrust claim. It is purely and simply a labor grievance.

I thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted. We will hear arguments in the next case at 1:00.

(Whereupon, at 11:58 a.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:

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC. vs. CALIFORNIA STATE COUNCIL OF CARPENTERS AND CARPENTERS 46 NORTHERN COUNTIES CONFERENCE BOARD ET AL --#81-334

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

BY Pirie Hammond

(REPORTER)