

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1150

TITLE HOWARD ELLIS, ET AL., Petitioners v. BROTHERHOOD OF
RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT
HANDLERS, EXPRESS AND STATION EMPLOYEES, ET AL.

PLACE Washington, D. C.

DATE January 9, 1984

PAGES 1 thru 46



ALDERSON REPORTING

(202) 628-9300
440 FIRST STREET, N.W.

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

IN THE SUPREME COURT OF THE UNITED STATES

-----x

HOWARD ELLIS, ET AL., :

Petitioners, :

v. : No. 82-1150

BROTHERHOOD OF RAILWAY, AIRLINE :

AND STEAMSHIP CLERKS, FREIGHT :

HANDLERS, EXPRESS AND STATION :

EMPLOYEES, ET AL. :

-----x

Washington, D. C.
Monday, January 9, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:54 o'clock p.m.

APPEARANCES:

MICHAEL E. MERRILL, ESQ., San Diego, California; on behalf of the Petitioners.

LAURENCE GOLD, ESQ., Washington, D.C.; on behalf of the Respondents.

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

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
MICHAEL E. MERRILL, ESQ., on behalf of the Petitioners	3
LAURENCE GOLD, ESQ., on behalf of the Respondents	20
MICHAEL E. MERRILL, ESQ., on behalf of the Petitioners - rebuttal	40

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

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Howard Ellis against Brotherhood of Railway,
4 Airline, and Steamship Clerks, Freight Handlers, Express
5 and Station Employees, et al.

6 Mr. Merrill, I think you may proceed whenever
7 you are ready.

8 ORAL ARGUMENT OF MICHAEL E. MERRILL, ESQ.,
9 ON BEHALF OF THE PETITIONERS

10 MR. MERRILL: Mr. Chief Justice, and may it
11 please the Court, a familiar presence is in the Court
12 today, the Brotherhood of Railway and Airline Clerks.
13 It was here in Street. It was here in Allen. And it
14 now commences its thirty-third year of litigation
15 against employees whom it represents, disputing the use
16 of compulsory fees obtained from those employees.

17 The Ellis and Failes cases before the Court
18 today --

19 QUESTION: Do the other unions just defer to
20 you, or --

21 MR. MERRILL: It is sometimes not pleasant to
22 be special, Your Honor. The Ellis and Failes cases
23 present the record which has eluded this Court in the
24 past, and permit the Court to issue rulings upon these
25 vital issues: first, the extent of the union's

1 entitlement to the use of compulsory dues and fees
2 obtained from dissenting employees; second, the standard
3 of proof the union must meet to justify those charges;
4 third, the remedy for dissenting employees whose fees
5 have been or will be misspent.

6 In this case, we have a hierarchy of
7 interests, that of the petitioners, the fundamental
8 individual First Amendment rights of free speech and
9 association. Those rights have existed since the
10 Republic was founded. On the union hand, we have a
11 recently enacted statutory privilege. The union's
12 interest is a monetary interest only.

13 When those two rights are juxtaposed, it is
14 clear that the First Amendment interests of the
15 petitioners must override, absent a compelling
16 governmental necessity for giving sway to the union's
17 property interest.

18 QUESTION: Mr. Merrill, are you saying that
19 any time the individual says something that is done to
20 him violates the First Amendment and the person who is
21 violating the First Amendment or alleged to is
22 interested primarily in the financial outcome, that that
23 automatically decides the case?

24 MR. MERRILL: Justice Rehnquist, I do not make
25 that assertion. We do assert, consistent with Abocd,

1 that when a union obtaining money under the force of
2 federal statute uses that money in a way that would
3 otherwise impinge upon associational or expression
4 rights, that that must be -- must uphold -- that use
5 must meet constitutional standards of the First
6 Amendment.

7 Interpreting the statutory scheme here, the
8 Railway Labor Act, must be done from the standpoint of
9 viewing it with strict scrutiny. We must ascertain what
10 Congress sought to accomplish in passing this statute.
11 We have dependable guidance in making that journey in
12 the decisions of this Court, in the Street case, in the
13 Allen case, and in Abood.

14 In the latter case, this Court has ruled that
15 the First Amendment sweeps broadly in a context of
16 compulsory dues litigation, that it extends to encompass
17 social interests, economic and philosophical interests,
18 literary interests, and, of course, political and
19 ideological interests of employees.

20 As noted, there must be a compelling
21 justification to intrude upon those rights and those
22 interests. In addition, using established First
23 Amendment principles, the means selected by Congress to
24 accomplish the governmental purpose must impose the
25 minimum burden on plaintiff's constitutional freedoms.

1 Now, the specific Congressional purpose
2 authorized and not commanded in the 1951 amendments to
3 this statute was that of obtaining payment for specific
4 services. It was to pay a union representing employees
5 in a specific collective bargaining context for the acts
6 of the union as a negotiating agent, and for its
7 services in administering that contract, and in handling
8 and prosecuting grievances of employees arising under
9 that contract.

10 Again, we have many decisions of this Court
11 which make it plain that the procedure used to protect
12 the union's interests in this case, that of obtaining
13 money from the plaintiffs, must be drawn in such a
14 fashion so as not to sacrifice the overriding
15 constitutional interests of the petitioners.

16 As the Court analyzes this case, it is of
17 extreme importance to remember that the union wears two
18 hats. The first of those hats, which existed long prior
19 to the occurrence of the statute giving rise to this
20 controversy, is that of a voluntary fraternal
21 organization. As a fraternal organization, BRAC can do
22 anything it chooses. It can engage in ideological
23 activity, religious activity, sociological, economic,
24 political activity.

25 There is no limit other than law upon what it

1 chooses to do, and we note that this Court recognized in
2 Street that unions are inherently ideological and
3 political organizations. Surely no one would argue that
4 a private citizen can be compelled, consistent with the
5 exercise of his First Amendment rights, that one must
6 support the activities of a fraternal organization in
7 that light.

8 So, we turn then to the second hat worn by
9 BRAC, and it is wearing that hat when it sought the
10 Congressional purpose, the Congressional permission to
11 obtain money from dissenting employees. It is the
12 collective bargaining representative hat, and when the
13 unions went to Congress in 1950 seeking permission to
14 compel the payment of dues, they stressed that they were
15 required to perform duties with respect to dissenting
16 employees.

17 They already enjoyed excellent success in
18 generating voluntary membership support. As the Court
19 noted from the legislative history, voluntary membership
20 levels of 75 to 80 percent were commonplace by the late
21 1940's. Nevertheless, the unions stated to Congress
22 that they were required to provide the duty of fair
23 representation to those who chose not to support the
24 unions, who disagreed with their policies, who wished
25 not to be a part of those organizations.

1 On the limited basis that those functions had
2 by law to be performed, Congress was persuaded to
3 authorize compulsory payment for those services only.

4 QUESTION: Weren't there closed shops in the
5 railway industry before the early fifties?

6 MR. MERRILL: There were not, Your Honor. In
7 the 1934 Act, no form of union security was permitted,
8 so it was strictly voluntary unionism from 1934 until
9 1951.

10 QUESTION: So this Act didn't follow the same
11 path as the National Labor Relations Act.

12 MR. MERRILL: That is correct, and I might
13 point out that the railway unions had never found
14 compulsory unionism to be essential to their wellbeing,
15 because at the time of the 1934 statute, only one such
16 organization had compulsory membership provisions in it.

17 So, we see that the collective bargaining
18 representative hat is that which Congress addressed in
19 the statute, and it is a confusion of those two roles
20 that BRAC urges upon this Court and successfully urged
21 upon the Ninth Circuit.

22 I point out that not only did BRAC provide a
23 limited statutory role with respect to petitioners, it
24 did so grudgingly, treating them as objectives of
25 collective bargaining. Petitioners were not entitled

1 under this union's constitution and practices to attend
2 meetings, to vote for officers, to serve as grievance
3 representatives, to vote for grievance representatives.
4 Even with respect to the fraternal activities, which
5 this union seeks to compel payment for, petitioners were
6 excluded.

7 Agency fee payers did not receive union
8 publications. They were expressly made ineligible for
9 death benefit fund participation. Only at a later time,
10 when it became apparent that the union might not be able
11 to continue collecting for those functions, after
12 plaintiff's motion for summary judgment had been filed,
13 did this union generously say, oh, well, we meant to
14 make these benefits available to all.

15 So, we see that petitioners were treated in a
16 very limited sense by BRAC, just as they were viewed by
17 Congress in a very limited sense.

18 The Ninth Circuit majority decision has
19 interpreted this statute from the perspective of a
20 financially acquisitive union, not from the perspective
21 of Congress, and not from the perspective that this
22 Court described in the Street case. If one is to read
23 the statute as did the Ninth Circuit majority, Congress'
24 objective was to maximize union power in general, and to
25 legitimize charges for any union fraternal activity

1 bearing any conceivable, arguable relationship to the
2 function of the union in the realm of collective
3 bargaining.

4 QUESTION: That is really not the test they
5 stated, is it, any conceivable, arguable relationship?

6 MR. MERRILL: Their test is stated that it is
7 anything that is done by the -- the work of the union
8 that is germane to the realm of collective bargaining, a
9 test we have not seen in any other case before or
10 since.

11 QUESTION: But it is quite a different test
12 than the one you just stated.

13 MR. MERRILL: In practice, Your Honor, I
14 believe that it is exactly the test that I stated. If
15 one looks closely at the range of activities supported
16 through the compulsory fee by BRAC, one finds no limits
17 other than partisan political activity. That is the
18 only sphere safeguarded by the trial court judgment as
19 modified by the Ninth Circuit majority.

20 If one is to take this expansive statutory
21 interpretation, it assures us that we will run roughshod
22 over constitutionally guaranteed rights, and destroy the
23 painstaking efforts of this Court to save the
24 constitutionality of the statute. Such a construction
25 also runs counter to Congress' intent, because Congress

1 did not favor unions over employers.

2 QUESTION: Well, you don't think we've decided
3 this issue before, do you?

4 MR. MERRILL: The issue before this Court has
5 not been decided other than to the extent --

6 QUESTION: We have left it open.

7 MR. MERRILL: Except to say --

8 QUESTION: These kinds of things.

9 MR. MERRILL: The antecedents of the decision
10 are certainly present in Abood, Justice White, when it
11 found that the use of dissenters' dues over their
12 objection for ideological --

13 QUESTION: Well, we couldn't have left it open
14 if it is so obvious that it is unconstitutional.

15 MR. MERRILL: I am prepared to agree.

16 QUESTION: Well, I know. We left it open.

17 MR. MERRILL: Well, certainly the issues
18 before the Court are presented on the appropriate record
19 for the first time today. As I mentioned, in 1951,
20 Congress did not enact a statute to favor unions over
21 employees, except in a very limited sense. It did not
22 favor strong unions over weak unions. It did not favor
23 unions over employers.

24 The Railway Labor Act, neither in the 1951
25 amendments nor in its other provisions, does not allow,

1 does not protect, and does not regulate union activities
2 in general.

3 QUESTION: Mr. Merrill, are you going to
4 address yourself to the so-called Paragraph 22 items one
5 by one at some point during your oral argument?

6 MR. MERRILL: Time does not permit me to
7 address them individually. I will be happy to respond
8 to any questions. If there is one or more in particular
9 that Justice Rehnquist inquires about, I would be
10 pleased to address that.

11 QUESTION: What about the annual meeting?

12 MR. MERRILL: That would be the quadrennial
13 convention, Justice White?

14 QUESTION: Yes.

15 MR. MERRILL: I can address the convention,
16 and I think my comments will apply to the other
17 Paragraph 22 activities in question. The statute was
18 intended to and must be construed to compel payment only
19 for union functions which the union must provide, which
20 the union has a duty to provide as the collective
21 bargaining representative.

22 There is nothing in the Railway Labor Act and
23 nothing in Section 211 thereof that requires the union
24 to hold a convention. It chooses to do so as a
25 fraternal organization. It does so in part because of

1 an extraneous federal statute which does require the
2 election of officers.

3 QUESTION: Part of your response to Justice
4 White suggests to me that you view our previous cases in
5 the Railway Labor Act as saying that the union has to
6 justify any charges it makes to your members, rather
7 than saying that your members must make some sort of a
8 showing to avoid paying what is otherwise the normal
9 agency fee.

10 MR. MERRILL: I believe that I agree with the
11 gist of Justice Rehnquist's remarks. The requirement
12 remains that dissenting employees voice an objection to
13 the payment of compulsory dues and fees, and they did in
14 this case. Each petitioner registered a specific
15 written objection to the use of any dues and fees, but
16 particularly for anything other than direct collective
17 bargaining expenses with Western Airlines.

18 QUESTION: What about social activities? Now,
19 I can see your point that they probably have virtually
20 nothing to do with collective bargaining activities, but
21 I can't for the life of me think why they involve any
22 First Amendment considerations either, so it seems to me
23 there the question is pretty clear. On whom do you put
24 the burden of the argument, so to speak.

25 MR. MERRILL: Well, certainly the Court in

1 Abcod recognized that the First Amendment freedoms
2 encompass union social activities. It is the functioning
3 of a fraternal --

4 QUESTION: In Abcod, how did it recognize
5 that?

6 MR. MERRILL: It recognized that when it
7 listed -- when it rejected the union argument that only
8 political and ideological activities of the union were
9 safeguarded by the First Amendment, and the Court said,
10 we have never held that the First Amendment does not
11 also cover social, literary, artistic, philosophical,
12 and religious activity.

13 QUESTION: Well, you think the Court in Abcod
14 meant that the First Amendment covers a dance in the
15 union hall?

16 MR. MERRILL: I certainly do. To the extent
17 that the statute authorizes this union to establish a
18 fraternal organization which undertakes activities of a
19 fellowship nature and a direct association of persons
20 which is not favored, which is opposed by petitioners, I
21 think that the First Amendment certainly does encompass
22 that type of activity.

23 QUESTION: Just how would you go about
24 connecting up the First Amendment with what you say are
25 your clients' rights here?

1 MR. MERRILL: I would do that by saying, as
2 the Court did in Street, when it placed a strained
3 construction, according to one Justice, upon the
4 statute, and it said only those duties under the Railway
5 Labor Act can be the subject of charges. There is no
6 duty of an exclusive bargaining representative to hold
7 the dance --

8 QUESTION: Okay. That is a permissible
9 argument from the point of view that Congress intended
10 only very narrow things to be permissible under the
11 agency fee, but you are saying that there is a First
12 Amendment argument in support of that exemption, that
13 somehow your clients' First Amendment rights are
14 impinged on when they are required to put a part of
15 their agency fee to support a band at a union hall
16 dance, and I can't for the life of me see how any case
17 we have ever decided supports that proposition.

18 MR. MERRILL: I believe that the antecedents
19 of that proposition are present in Abood when it said
20 that there must be a governmental necessity for the
21 extraction of the fees.

22 QUESTION: That isn't necessarily a
23 constitutional argument. You could win your case
24 without even mentioning the Constitution. I mean,
25 logically you could. It would be a question of

1 statutory interpretation.

2 MR. MERRILL: That is true.

3 QUESTION: You could say that in order to
4 justify any fee, you must show -- somebody must show
5 that Congress anticipated that the non-union employees
6 could be charged this much to cover these things.

7 MR. MERRILL: That is correct.

8 QUESTION: And it wouldn't have to be anything
9 to do with the Constitution.

10 MR. MERRILL: We can win the case, but we
11 cannot obtain the appropriate remedy, because the use
12 of these dissenters' fees has been expended on
13 activities of the union which violate their First
14 Amendment rights, so the remedy cannot --

15 QUESTION: Does it violate their rights in the
16 sense that they pay for it but they are not permitted to
17 take part? Is that your thesis?

18 MR. MERRILL: It is not. That is not my
19 thesis. It is incidental that they were excluded from
20 those things. It is that they may not be forced to
21 support them under any circumstances.

22 QUESTION: What if the statute didn't
23 contemplate your clients being charged for these kinds
24 of things? Why couldn't they have a remedy for it? The
25 union extracts from them something that the statute does

1 not authorize. Now, what is -- why do you need the help
2 of the First Amendment?

3 MR. MERRILL: Because the use by the union
4 inflicts more than a monetary injury. There is the
5 intangible injury to constitutional rights which cannot
6 be unspent, if the Court will. If the union extracts --

7 QUESTION: Well, what kind of a remedy do you
8 want?

9 MR. MERRILL: We want --

10 QUESTION: Do you want somebody to be whipped,
11 or what?

12 (General laughter.)

13 MR. MERRILL: Given the history of
14 intransigence of this union and its approach to the
15 plaintiff's clients --

16 QUESTION: What do you want? What kind of a
17 remedy do you want?

18 MR. MERRILL: We would like --

19 QUESTION: Let's assume you get your money
20 back because of a statutory violation. Then what do you
21 want?

22 MR. MERRILL: We would like to have the Ninth
23 Circuit's delineation of chargeable activities set
24 aside --

25 QUESTION: Well, you could do that under the

1 statute if you are --

2 MR. MERRILL: That is correct.

3 QUESTION: Then what?

4 MR. MERRILL: The case is to be remanded to
5 the trial court, and in the trial court BRAC should be
6 required to prove for the first time its costs of
7 collective bargaining with Western Airlines, and to
8 prove those costs by clear and convincing evidence.

9 QUESTION: So what you want is some remedy for
10 the future, some clear, sharp remedy for the future.

11 MR. MERRILL: We can only have a remedy for
12 the future. Of course, petitioners would be entitled to
13 their damages for amounts paid in the past, in
14 accordance with the proof to be shown at trial.

15 QUESTION: Well, I don't know why you couldn't
16 get all that under the statute, if you are right in your
17 construction of the statute.

18 MR. MERRILL: Well, in addition, we would
19 request that this Court instruct the District Court to
20 enter a judgment declaring that the union's rebate
21 procedure is constitutionally inadequate.

22 QUESTION: Mr. Merrill, since the respondent
23 union was decertified in 1980, why is the issue
24 concerning the rebate plan not moot?

25 MR. MERRILL: The issue is assuredly not

1 moot. No proof was presented as to union expenditures
2 after December 1st -- I'm sorry, December 31st, 1977.
3 The union collected full dues following that date until
4 late July, 1980, which was following the trial and
5 following the judgment.

6 So there is unquestionably a period of time
7 during which the only supposed remedy is the operation
8 of the dues rebate procedure prescribed by the union,
9 and I point out that it is a rebate procedure. In the
10 AFL-CIO's brief, the terminology is used for the first
11 time that it's a dues deduction procedure. It is not.
12 It is a rebate procedure.

13 QUESTION: Well, don't you have a statute of
14 limitations problem? Ten years?

15 MR. MERRILL: I believe that there is no
16 statute of limitations problem at this time.

17 QUESTION: Well, you said you wanted a
18 rebate. That means money, doesn't it?

19 MR. MERRILL: The damages claim was brought
20 virtually contemporaneously with the extraction of the
21 funds.

22 QUESTION: Back into 1970?

23 MR. MERRILL: It was brought -- the cases were
24 first filed in March, 1973.

25 QUESTION: Well, it would be all right then.

1 QUESTION: Mr. Merrill, was there any issue in
2 the District Court as to what portion of the publication
3 expenses were chargeable to the dissenters?

4 MR. MERRILL: In the motion for summary
5 judgment which led to the Paragraph 22 ruling, we
6 pointed out that not all publication expenses were per
7 se deemed to be non-chargeable. But the union never
8 attempted at any point to establish the amounts of money
9 attributed to publications which were claimed to be
10 collective bargaining expenditures. That is the simple
11 reason for the inclusion of publications, that and the
12 fact that the trial court had an extensive stack of
13 union publications to review, and they are indeed, as
14 this Court may know from its review of the record,
15 overwhelmingly political and ideological.

16 QUESTION: Mr. Merrill, was the union
17 decertified entirely?

18 MR. MERRILL: It was.

19 QUESTION: It is now not the collective
20 bargaining agency for any Western employees?

21 MR. MERRILL: I believe that to be true. It
22 is certainly not the collective bargaining
23 representative for any of the craft or class which
24 included petitioners. That decertification occurred
25 post-judgment, and of course the union could be

1 recertified if it were to conduct another campaign and
2 be voted in by a majority of the employees there.

3 If I may, Mr. Chief Justice, I will reserve
4 the remainder of my time for rebuttal.

5 CHIEF JUSTICE BURGER: Very well.

6 Mr. Gold.

7 ORAL ARGUMENT OF LAURENCE GOLD, ESQ.,

8 ON BEHALF OF THE RESPONDENTS

9 MR. GOLD: May it please the Court, I think it
10 would be helpful in light of the discussion to this
11 point to state our understanding of the holdings of this
12 Court on this issue to this point and our understanding
13 of the issues that those holdings leave open.

14 The issue presented here has been before the
15 Court in one form or another four times, in the Hansen
16 case, the Street case, the Allen case, and the Abood
17 case. Those cases in our judgment establish one point
18 in favor of the petitioners. That point is the
19 following, and I would like to quote the Court's opinion
20 in Abood at 431 U.S. 234.

21 "The appellants argue that they fall within
22 the protection of certain cases because they have been
23 prohibited not from actively associating, but rather
24 from refusing to associate. They specifically argued
25 that they may constitutionally prevent the union

1 spending of a part of their required service fees to
2 contribute to political candidates and to express
3 political views unrelated to its duties as exclusive
4 bargaining representative. We have concluded that this
5 argument is a meritorious one."

6 Thus, what has been established to the
7 objecting employee's or petitioner's benefit to this
8 point by the cases decided by this Court is that on
9 statutory grounds under the Railway Labor Act and on
10 constitutional grounds with regard to public employees,
11 unions may not spend exacted fees for contributions to
12 political candidates and to express political views
13 unrelated to the union's duties as exclusive bargaining
14 representative. Nothing more has been established in
15 the cases to the petitioners' benefit.

16 Of equal importance, it seems to us, the
17 Hansen Court upheld the constitutionality of the union
18 shop as such, and that holding was reaffirmed again in
19 Street and in Allen and in Abood, and while Mr. Merrill
20 says that the Ninth Circuit created a new standard for
21 determining the scope of the union shop and of required
22 payments to unions, again, I beg your indulgence to
23 quote two short passages from Hansen which are set out
24 at Pages 23 and 24 of our brief, the red brief, and
25 appear in the original 351 U.S. at 234, I believe, and

1 238 1st.

2 The Court in the Hansen opinion said the
3 following: "The financial support required relates
4 therefore to the work of the union in the realm of
5 collective bargaining." That is exactly the phrase
6 decried by Mr. Merrill as no standard at all. And the
7 Court continued, "No more precise allocation of union
8 overhead to individual members seems to us to be
9 necessary."

10 Then, on 238, the Court stated its holding:
11 "We hold that the requirement for financial support of
12 the collective bargaining agency by all who receive the
13 benefits of its work is within the power of Congress
14 under the commerce clause and does not violate either
15 the First or the Fifth Amendment."

16 Now, to this point, the Court has not stated
17 what is encompassed in the area germane to collective
18 bargaining or germane to the work of the union in the
19 realm of collective bargaining, nor has it defined in
20 particular terms what it is that is political activity
21 or political or ideological activity unrelated to
22 collective bargaining, and the phrase "unrelated to
23 collective bargaining," a conditioning of the protection
24 accorded to petitioners herefore, would hardly have been
25 necessary if every political and every ideological act

1 of the union was unconstitutional if support under the
2 union shop.

3 And this case, we believe, is a case which on
4 certain basic categories of union expenses, particularly
5 the expenses of national unions, does present the
6 occasion for the Court to answer that question, and to
7 draw or at least to begin the job of drawing that line.

8 In doing so, we would begin by stressing the
9 following point. Both of the courts below, the District
10 Court and the Court of Appeals, concluded that the union
11 for the years in question here, 1975 and forward, has
12 met its obligations stated in Street and Allen and Abood
13 to identify and to free objecting employees from any
14 obligation to support the union's political and
15 ideological activity unrelated to collective bargaining.

16 The District Court's findings to this effect
17 are set out in our brief at Pages 9 to 10, again, the
18 red brief, in full. We would also call the Court's
19 attention to the joint appendix, Pages 345 to 358 and
20 421 to 459, which are the trial -- which are portions of
21 the trial proceedings and the union's internal documents
22 establishing the system of identification and of
23 deduction.

24 It provides that all direct and indirect
25 partisan political expenditures are not charged to an

1 objecting employee. All direct and indirect legislative
2 lobbying expenditures are not charged to an objecting
3 employee. All dues to affiliated organizations, such as
4 the AFL-CIO and the Canadian Labor Congress, are not
5 charged to objecting employees, and all contributions to
6 other organizations, such as the Red Cross, the NAACP,
7 and other organizations in the examples given in the
8 union's internal documents are not charged to objecting
9 employees, and the union has gone to the extent of
10 requiring a detailed contemporaneous accounting of time
11 and effort that goes into these activities.

12 We believe that the District Court was not
13 only right in this, but that the union has gone well
14 beyond the requirements of law in this area of defining
15 political and ideological activity.

16 QUESTION: You haven't mentioned the social
17 particularly.

18 MR. GOLD: No, Your Honor, because the union
19 defends its right to charge for social activity as that
20 term is used here. As the Court of Appeals points out,
21 the social activities are activities either open to
22 members or anyone else who comes in connection with
23 meetings or open to the union's employees, and are a
24 normal expense of the same kind that any organization
25 undertakes --

1 QUESTION: What about chartering a steamer on
2 the Mississippi for \$5,000 the week before the union
3 elections? Where do you think that falls?

4 MR. GOLD: If it were chartered by one
5 candidate or the other, it would be --

6 QUESTION: No, the union, the union is paying
7 the bill.

8 MR. GOLD: It would be -- and the union paid
9 the bill, it would be a violation of the Landrum-Griffin
10 Act, but putting that aside, we believe first of all,
11 and I will turn to this -- I will turn to this by way of
12 responding to your question, we believe first of all
13 that the statute contemplates at least normal union
14 expenditures for such social expenditures, and that as
15 Justice Rehnquist said, we cannot understand an argument
16 based on the Constitution insofar as limits on the
17 statute are concerned.

18 QUESTION: Mr. Gold, my recollection is that
19 Abood expressly left open the question as to social
20 activities of the union.

21 MR. GOLD: It did indeed, Your Honor. And I
22 believe that the question is entirely open. We are
23 arguing here that on analysis, as a matter of statutory
24 interpretation, such expenditures are within the area
25 permitted to be charged. At least the kinds of

1 expenditures which are on the record here, which as the
2 Court of Appeals noted are de minimis and are part and
3 parcel of the union's activities either in connection
4 with collective bargaining or union meetings and the
5 like. We simply don't have any expenditures, we want to
6 make it plain, of the kind that the Chief Justice was
7 interrogating me about.

8 QUESTION: I suppose they are de minimis, but
9 if you did have that boat chartered to go down the
10 river, would non-union members be invited to go also?

11 MR. GOLD: The union's position in this case
12 is that objecting employees cannot be charged for
13 activities that are closed to them.

14 QUESTION: So they could go if they wished to?

15 MR. GOLD: Yes.

16 QUESTION: They may not be welcome.

17 MR. GOLD: No, they are welcome.

18 (General laughter.)

19 QUESTION: What about the quadrennial meeting?

20 MR. GOLD: The quadrennial meeting, Justice
21 White, was one of the expenses that the proponents of
22 the union security provision said expressly would be
23 covered by the union's security provision. The language
24 of the statute was changed to assure --

25 QUESTION: That is one of the activities,

1 though, that is not open to --

2 MR. GOLD: Well, it is not open to anyone who
3 isn't elected. One point I ought to make in terms of my
4 response to that question is that under the statute that
5 Congress wrote, no employee can both be barred from the
6 union under equal and objective standards of admission
7 and charged under the union shop, so what you have is
8 individuals who make a judgment that they do not want to
9 participate in the union.

10 What Congress was doing in the union shop
11 provision was taking away the economic incentive to opt
12 out in that way. Congress was saying, if the union will
13 permit you in, and if the union represents you, then you
14 have to bear your proportionate share of the costs, and
15 Congress added a proviso that said, if the union won't
16 let you in in the first place, then you can't be
17 charged.

18 QUESTION: Well, non-members can't vote at
19 this point.

20 MR. GOLD: No, but they can be members. The
21 choice --

22 QUESTION: They can be members, but if they
23 aren't members, they nevertheless can be charged --

24 MR. GOLD: That's --

25 QUESTION: -- even though they can't take part

1 in it.

2 MR. GOLD: Even though they have made the
3 choice not to --

4 QUESTION: So it is different from the river
5 boat. This is one activity that they can be charged for
6 but they cannot participate --

7 MR. GOLD: That's correct.

8 QUESTION: They are not even eligible for the
9 election.

10 MR. GOLD: They are not eligible to engage in
11 the political life of the union if they choose --

12 QUESTION: So in general you think that
13 employees can be charged the expenses that a union finds
14 necessary for it to stay in existence as a union, wholly
15 aside from whether they do any collective bargaining.

16 MR. GOLD: No, the --

17 QUESTION: I mean, if you decide whether these
18 expenses are remotely connected to collective
19 bargaining?

20 MR. GOLD: No, I --

21 QUESTION: Other than through the fact that
22 the union has to spend this kind of money to even stay
23 in existence.

24 MR. GOLD: Well, Congress took a very
25 practical judgment.

1 QUESTION: Well, Mr. Gold, wasn't that all
2 wrapped up in the so-called free rider concept?

3 MR. GOLD: Yes --

4 QUESTION: What are the limitations on that?

5 MR. GOLD: To us, the limitations on the free
6 rider concept are the limitations the court stated in
7 Hansen, and stated again in Street, and stated again in
8 Allen and Abood. The record, and I don't want to say
9 who has to establish it, because that's a separate
10 question of by what standard, the record has to show
11 that the union activities are germane to its role as an
12 exclusive bargaining representative, and we have on
13 certain items, we have Congress's judgment on what
14 Congress believed was germane or not, and in one of
15 those specific enlightenments, Congress -- it is plain
16 from the legislative history that Congress believed that
17 the expenses of a union to govern itself, a union which
18 has been selected as a collective bargaining
19 representative to govern itself, and to continue its
20 activities, is an expense that would be covered by the
21 union shop provision.

22 QUESTION: So how often does a union have a
23 meeting? I suppose it differs.

24 MR. GOLD: Different unions --

25 QUESTION: They may have them every month, and

1 the expenses of doing that -- and I suppose unions pay
2 the expenses of having their own elections.

3 MR. GOLD: Yes, Your --

4 QUESTION: And all of those expenses you say
5 Congress specifically anticipated could be allocated in
6 part to non-members.

7 MR. GOLD: That's right, and Congress made
8 that judgment, as Justice Brennan has stated. Congress
9 was seeking to eliminate the problem of the free rider,
10 and certain representations were made to Congress about
11 what the nature of that problem was. The nature of the
12 problem was that individuals at that point could choose
13 not to become members, and then not to pay the costs of
14 the union.

15 The union, on the other hand, could not
16 discriminate against those individuals in employment,
17 could not get preferences by reason of other
18 Congressional enactments, could not have those
19 individuals removed from the job, nor could the union
20 negotiate terms and conditions of employment which were
21 less beneficial to those employees.

22 QUESTION: What about death benefits?

23 MR. GOLD: Death benefits are a substitute for
24 and a part of the collective bargaining system. Some
25 unions go to the employer and they sit down at the

1 collective bargaining table and they say, we want you to
2 provide each individual a \$200 benefit or \$500 mortuary
3 benefit to help defray the costs of a funeral. Other
4 unions have historically bargained for an extra two or
5 three cents in the individual's pocket, and also
6 provided out of dues that death benefit.

7 QUESTION: So these death benefits apply to
8 everyone, not just union members.

9 MR. GOLD: They have to, we believe, to be
10 chargeable to the objecting employee. In other words,
11 the political life of the union, someone either is in or
12 he's out, but for --

13 QUESTION: Why isn't that a discrete benefit,
14 that if somebody who is not a union member objects to
15 being covered could be left out and not charged for it?
16 It just doesn't make sense.

17 MR. GOLD: It is discrete in the sense that
18 you can, and I would say in contrast to governance
19 expenses, to expenses of internal communication and so
20 on, imagine a union which is a functioning national
21 union and that meets Congress's purpose in enacting the
22 union shop, which was to provide for self-adjustment of
23 disputes between two well organized forces. You can
24 imagine a union which did not provide death benefits,
25 and that would be able to function as a union in that

1 system .

2 On the other hand, we do know again from the
3 give and take in the legislative process that Congress
4 was specifically told that certain unions provide a
5 death benefit system rather than negotiating for the
6 death benefits directly with the employer, and that
7 Congress indicated an intent to include death benefits.

8 Finally, it seems --

9 QUESTION: Well, certainly not by any very
10 clear language, Mr. Gold.

11 MR. GOLD: Justice O'Connor, in those terms,
12 the language is extraordinarily clear, because it
13 requires the payment of dues by everyone, whether or not
14 they are a member, and it was against a background where
15 Congress was very fully advised of how unions were going
16 to use that money.

17 So, if this were not a case which arises
18 against the background it does, and the only issue this
19 morning was who wins under the clear language, I think
20 we would be in a very strong position, but we do see
21 this case as one where the indications are that Congress
22 intended to include death benefits, and that there is
23 sound reason for believing that the provision of death
24 benefits is part of the union's activity in dealing with
25 the wages, hours, and terms and conditions of employment

1 of workers. It is one of several ways it could be done,
2 and we believe that it is in that sense germane to
3 collective bargaining.

4 Secondly, here, as opposed to the situation
5 where you are talking about union political activity,
6 there simply does not seem to us to be any
7 constitutional counterweight on the other side. We find
8 ourselves with one strong point for us and one point
9 which is weaker. One, in no sense is this integral to
10 collective bargaining as internal governance and
11 communication and organize. Secondly, it nonetheless
12 seems germane to collective bargaining. The legislative
13 history indicates that Congress intended it to be
14 included in the union shop obligation, and the
15 petitioners are bereft of a constitutional argument in
16 this regard in our judgment. So --

17 QUESTION: Well, Mr. Gold, is there some item
18 that you can imagine other than the direct support of
19 candidates or paying for literature or other kinds of
20 support for purely political activity? Is there any
21 kind of a union expenditure that you would say couldn't
22 be charged to non-members?

23 MR. GOLD: Well, we say --

24 QUESTION: Can you think of one on your
25 position, or is it just that bright line, politics -- if

1 it is politics, no; anything else, yes?

2 MR. GOLD: No, there is a -- we recognize the
3 cases to this point as stating a second limitation.
4 There's politics and there's also ideological activity
5 unrelated to collective bargaining.

6 QUESTION: Name one.

7 MR. GOLD: Forwarding a program in favor of
8 the Equal Rights Amendment.

9 QUESTION: Get out the vote drive.

10 MR. GOLD: Activities of that kind. And
11 unions do engage in such activities, and as we
12 understand the Court's cases to this point, it is
13 already established that we can charge for that.

14 QUESTION: What if the union runs a -- likes
15 to make money on the side, so it has got some money, and
16 it goes into the real estate business, or it goes into
17 the insurance business, and it needs to -- and it uses
18 the dues in part to pay the expenses of a losing
19 business venture?

20 MR. GOLD: I would think that is not germane
21 to collective bargaining.

22 QUESTION: Yes. So it is just not politics.

23 MR. GOLD: Well, it is -- we know that it is
24 politics, and we know that it is ideological activity
25 unrelated. We are not contesting that. With -- Aside

1 from that, what we are arguing is that the test is
2 germane to collective bargaining, and not everything
3 unions do are germane to collective bargaining.

4 QUESTION: For example, Mr. Gold, I take it
5 the purchase of an automobile with a local's funds for
6 the use by the president and union business would be
7 germane, would it? Suppose it was a Rolls Royce.

8 MR. GOLD: I -- One of the issues before
9 Congress by -- created by the opponents was that there
10 ought to be a system of limiting union expenditures
11 within the proper area. Congress didn't agree with
12 that. After all, unions have to go and get dues from
13 their members. Very few members are willing to pay for
14 Rolls Royces, and in that sense it seems to me that
15 Congress made both a proper --

16 QUESTION: What if it were bought over the
17 objection of a single non-union member, and it was a
18 Rolls Royce? You say he should lose?

19 MR. GOLD: I am forced to say that under the
20 statute he loses, and that he doesn't have any possible
21 constitutional argument. Now, whether Congress was wise
22 in that regard --

23 QUESTION: Mr. Gold, wouldn't he at least have
24 the same argument that a member might have to
25 extravagant use of union funds to take river boat --

1 MR. GOLD: Oh, yes, there's Title 5 of the
2 Landrum-Griffin Act, which provides that union officers
3 must hold union money as a fiduciary, and --

4 QUESTION: So he would be a fiduciary in the
5 same sense that a member would in that kind of
6 challenge?

7 MR. GOLD: Congress didn't write the statute
8 to give people who choose not to be members that cause
9 of action, but the cause of action is there if Justice
10 Brennan's example is changed in one respect, that the
11 union does it over the objection of one union member.
12 Congress has provided a cause of action. Congress could
13 provide a cause of action to everyone who is represented
14 if Congress chooses to do so.

15 QUESTION: Well, you acknowledge that a
16 non-member would have a cause of action if they gave
17 money to a political party?

18 MR. GOLD: Yes.

19 QUESTION: Why wouldn't they have precisely
20 the same cause of action for wasting union funds?

21 MR. GOLD: They could in theory, and Congress
22 could provide it to them, but my argument, Justice
23 Stevens, is that the statute doesn't give it to them,
24 and Congress is not constitutionally compelled to give
25 it to them. Congress to this point has given two

1 different remedies, depending on membership status. I
2 would like to --

3 QUESTION: Mr. Gold, may I interrupt?

4 MR. GOLD: Yes.

5 QUESTION: With respect to the publications of
6 the union, am I right that the union does not charge for
7 the contents of publications that relate to political
8 activities?

9 MR. GOLD: That is correct, Your Honor.

10 QUESTION: I think your brief states that.

11 MR. GOLD: That is correct, Your Honor.

12 While --

13 QUESTION: How does the union go about making
14 the accounting judgment as to what the cost of political
15 activities of --

16 MR. GOLD: By the process of counting lines
17 and dividing the cost of the publication, and if --

18 QUESTION: It is a mechanical process?

19 MR. GOLD: Yes. If the article is an article
20 to get out and vote for the union's endorsed candidate,
21 the union counts the lines of -- devoted to that versus
22 the lines in the total issue and divides the total
23 cost. That is what this union does and what the lower
24 courts approved.

25 QUESTION: A minor question, but how do you

1 deal with advertisements, just -- where there are no
2 lines?

3 MR. GOLD: I am not positive what is true
4 here, but most union publications either do not accept
5 advertisements or have a rule like Layman versus Shaker
6 Heights, and they don't take ideological advertisements,
7 one or the other.

8 In whatever time remains to me, I do want to
9 stress the point that what Congress was doing in
10 adopting the union shop was not, as Mr. Merrill says,
11 providing a system whereby the unions would provide a
12 certain narrow service and then bill people in the union
13 unit. Rather, Congress understood, and everything in
14 the legislative history shows that Congress understood
15 that the free rider problem was the refusal of objecting
16 members after the majority had selected a representative
17 to support, in George Harrison's words, the primary
18 union spokesman, the collective bargaining agency from
19 whose existence and activities they derive great
20 benefit.

21 QUESTION: Mr. Gold, let me ask you one -- Do
22 you think there is a rebate issue left in this case?

23 MR. GOLD: No, Your Honor. We argue that
24 there is no rebate issue left, not for the reason that
25 Justice O'Connor gave, which I must say I just hadn't

1 thought of, but because the District Court in this case
2 didn't simply approve the union's rebate plan. The
3 District Court required that based on Year 1, the union
4 deduct --

5 QUESTION: It's a deduction, yes.

6 MR. GOLD: -- deduct from the next year --

7 QUESTION: Probably inexact.

8 MR. GOLD: It has to be inexact, because one
9 can never foretell the future, but the point is that the
10 union cannot simply take the money and use it. The
11 union must under the District Court's order after it
12 figures, say, the 1975 rebate, which was 4.68 percent,
13 must deduct for 1976 4.68 and then make up any
14 difference.

15 QUESTION: Well, the union didn't -- Assume
16 you lose on these items. You don't object independently
17 to the District Court's way of solving the problem?

18 MR. GOLD: No, Your Honor, we do not, and we
19 did not appeal from that part of the order. We do not
20 object.

21 QUESTION: Well, Mr. Gold, the Court of
22 Appeals said that judgment would be entered in favor of
23 respondents. Now, did that vacate the District Court
24 modification of the rebate plan?

25 MR. GOLD: No. We didn't appeal from that

1 aspect. The District Court -- In other words, the
2 District Court ruled that insofar as we had provided an
3 internal system for segregating, allocating, and
4 accounting for political and ideological activities, we
5 had met our obligations, and then added this additional
6 condition. We didn't appeal from that. And we accept
7 that part of the District Court's opinion, and we told
8 the Court of Appeals we didn't think that was in the
9 case. We are saying that here, and we are ready to
10 abide by that, because we think what the District Court
11 did in that regard was correct.

12 QUESTION: Mr. Merrill, do you have anything
13 further? You have seven minutes remaining.

14 ORAL ARGUMENT OF MICHAEL E. MERRILL, ESQ.

15 ON BEHALF OF THE PETITIONERS - REBUTTAL

16 MR. MERRILL: May it please the Court, I would
17 point out with great emphasis that Congress was not
18 importuned by the unions because -- to grant a privilege
19 to obtain moneys from dissenting employees because of
20 its fraternal activities. It complained of free riders
21 in the collective bargaining sense. It did not complain
22 that they were free riders because of its fraternal
23 organization.

24 And the authority for the petitioners' point
25 of view is contained in the Street decision at Page 757,

1 when it is stated that it is abundantly clear that
2 Congress did not abandon the policy of full freedom of
3 choice embodied in the 1934 Act, but rather made inroads
4 on it for the limited purpose of eliminating the
5 problems caused by the free rider.

6 Now, it is without question, we submit, that
7 Congress could not command private citizens to belong to
8 a privately administered welfare program, which is what
9 the BRAC death benefits program is described as by BRAC
10 officers, a welfare program.

11 Furthermore, we can establish that the union
12 was a free rider on the petitioners in this case, not
13 the converse. The petitioners in the Ellis case were
14 charged 100 percent of voluntary dues, and were told
15 they were ineligible for death benefits, ineligible for
16 publications, ineligible for the collective bargaining
17 activities for which payment was extracted and for which
18 payment is still sought.

19 So, if there is an equity at work in the --

20 QUESTION: Mr. Merrill, let me just be sure I
21 understand. Do you now contend that the death benefit
22 and the publications are administered in a
23 discriminatory fashion?

24 MR. MERRILL: Not presently. It was following
25 our filing of the motion for summary judgment that the

1 union modified its policy. However, it is questionable
2 as to what the modification consisted of, because the
3 1975 quadrennial convention that followed this
4 particular issue having come up in the trial court again
5 specifically raised agency fee payer eligiblity for
6 death benefit, and they were again found to be
7 ineligible. It was a contrary --

8 QUESTION: But you are not now challenging
9 it? I mean, you say maybe you should have challenged
10 it, is what I gather you are saying.

11 MR. MERRILL: Well, it truly wasn't important,
12 because we contend that --

13 QUESTION: I mean, it seems to me it is a very
14 great difference between an issue as to whether death
15 benefits can be charged when they are administered in a
16 non-discriminatory neutral fashion, and all you have to
17 do is be an employee on the one hand, whereas one that
18 said you have to be a union member would raise quite a
19 different question.

20 MR. MERRILL: It is our primary position that
21 the death benefits program is not chargeable.
22 Incidentally, we have pointed out --

23 QUESTION: Even if neutral?

24 MR. MERRILL: That's correct.

25 QUESTION: And it is neutral, isn't it?

1 MR. MERRILL: It is presently neutral.

2 QUESTION: Yes.

3 MR. MERRILL: And I might point out, Justice
4 Stevens, in response to your question about waste, as to
5 whether or not a petitioner could file a claim under
6 Title 5 of Landrum-Griffin, Mr. Gold misinterpreted the
7 statute. Non-members of a labor organization have no
8 standing to file such a claim. Now --

9 QUESTION: I think that's exactly what he
10 said.

11 MR. MERRILL: Then I misunderstood him. No
12 one has commented at any length about organizing, but we
13 see that as one of the most fundamental injuries worked
14 upon plaintiffs as having had their wages extracted for
15 use in that totally ideological program of the union.
16 Here we have the marketing of the union as a fraternal
17 organization and as a collective bargaining
18 representative when the petitioners don't want to be
19 represented by this union. Why ought they to pay for
20 this union to foist itself off on other groups of
21 employees? The harder question comes when we look at
22 the full gamut of organizing expenses, rating expenses,
23 which are present in the record in this case, and the
24 Constitution say that petitioners who do not wish to be
25 represented by this union ought to be made to pay for

1 this union to weaken and then oust another union, which
2 was attempted in this case, and the amounts of money are
3 most significant.

4 QUESTION: How does that hurt the individual
5 that puts the money up?

6 MR. MERRILL: Well, it takes his funds and
7 expends them --

8 QUESTION: It is paying for his political
9 beliefs, doesn't it?

10 MR. MERRILL: Well, it certainly --

11 QUESTION: Isn't that about all it does?

12 MR. MERRILL: It is a sweeping ideological
13 intrusion. If he does not believe in being represented
14 by BRAC, it can scarcely be imagined that he ought to
15 pay for them to force themselves on other groups of
16 employees, which is what organizing has accomplished.

17 QUESTION: And that hurts him?

18 MR. MERRILL: It hurts him very deeply, as the
19 records in this case --

20 QUESTION: It hurts him --

21 MR. MERRILL: -- point out. It hurts him in
22 the pocket. Over \$100,000 was spent in three years, and
23 they did not produce one new member by the union's own
24 admission.

25 Now, I might point out that contrary to what --

1 QUESTION: Well, it would be even worse if
2 they had, I gather.

3 (General laughter.)

4 QUESTION: From your point of view.

5 MR. MERRILL: The point is --

6 (General laughter.)

7 MR. MERRILL: -- that he is swept up
8 financially and ideologically if he is forced to pay for
9 union organizing activity, whether it be a rate or
10 straight out organizing.

11 Thank you very much.

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

14 (Whereupon, at 2:03 o'clock p.m., the case in
15 the above-entitled matter was submitted.)

16

17

18

19

20

21

22

23

24

25

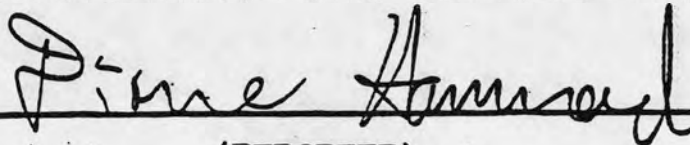
CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-1150-HOWARD ELLIS, ET AL., Petitioners v. BROTHERHOOD OF RAILWAY AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, ET AL.

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

BY

A handwritten signature in cursive script, appearing to read "P. H. Howard", written over a horizontal line.

(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'84 JAN 16 P4:06