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SUPREME COURT, U.S.  
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# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. No. 82-2157

TITLE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION  
FUND, ET AL., Petitioners v. CENTRAL TRANSPORT, INC., ET AL

PLACE Washington, D. C.

DATE Tuesday, November 27, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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CENTRAL STATES, SOUTHEAST AND  
SOUTHWEST AREAS PENSION FUND  
FUND, ET AL.,  
Petitioners  
v.  
CENTRAL TRANSPORT, INC.,  
ET AL.  
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No. 82-2157

Washington, D.C.

Tuesday, November 27, 1984

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 1:56 p.m.

APPEARANCES:

RUSSELL N. LUPLOW, Esq., Bloomfield Hills, Michigan;  
on behalf of the Petitioners.

JOSHUA I. SCHWARTZ, Esq., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.;  
as amicus curiae supporting the Petitioners.

PATRICK A. MORAN, Esq., Birmingham, Michigan; on behalf  
of the Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Luplow, I think you may proceed whenever you're ready now.

ORAL ARGUMENT OF RUSSELL N. LUPLOW, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case is a first impression which we believe is of great national importance as it relates to the national pension policy.

The Petitioners, the Central States pension and health and welfare funds conduct random audits to verify whether contributing employers, such as Central Transport, are reporting accurately on behalf of all persons covered by applicable collective bargaining agreements.

The issue in this case before this Court is whether in conducting these audits the trustees may request access to records beyond those of employees for whom the employer admits liability. It is the trustees' claim that they have a right to a more comprehensive audit in this context under their trust agreement and under the prudent manual of ERISA.

The Sixth Circuit, in reversing the District Court, limited the trustees' audit rights to records of

1 those employees that the employer admitted were covered  
2 and only to those unless the trustees could show cause  
3 why a particular employee was omitted, in which case  
4 that person, the particular employee's records could  
5 then be audited.

6 The petitioners are health and welfare and  
7 pension funds located in Chicago. They're regulated by  
8 the Taft-Hartley Act and ERISA. They have over half a  
9 million participants and beneficiaries with over 12,000  
10 employers, and there are thousands of collective  
11 bargaining agreements that apply to the fund.

12 The respondent, Central Transport, is 16  
13 companies engaged in trucking and related industries,  
14 all parties to a collective bargaining agreement  
15 commonly referred to as the National Master Freight  
16 Agreement with the International Brotherhood of  
17 Teamsters.

18 Under the collective bargaining agreement, the  
19 Transport obligation is to remit contributions under the  
20 collective bargaining agreement on each employee who's  
21 performing work under the collective bargaining  
22 agreement. The fund's obligation, the petitioners'  
23 obligations on the pension plan, which is related to --  
24 which is governed by the ERISA in its trust agreement,  
25 is to give credits or benefits to persons on the basis

1 of covered employment for pensions as a matter of law if  
2 they perform work covered by the collective bargaining  
3 agreement. And this is the case regardless of whether  
4 or not the employer defaults on his contributions.

5 The funds, of necessity because of their  
6 scope, operate on a self-reporting system which we refer  
7 to as an honor system. The way it works simply is that  
8 the employer sends to the fund each month a list of the  
9 employees that the employer says are covered by the  
10 collective bargaining agreement, and he sends along a  
11 check for that amount.

12 The trustees, who are familiar with  
13 misreporting problems in a multi-employer setting, have  
14 enacted a trust agreement that this Court looked at in  
15 February of this year in Prosser and Schneider. And in  
16 that trust agreement, the trustees provided for an audit  
17 provision that provided in Article 3, Section 5, that  
18 the trustees shall be empowered to conduct on site  
19 audits of pertinent records of a contributing employer  
20 to verify for the accuracy of the reports. In  
21 implementing that program, the trustees conduct random  
22 audits.

23 In this particular case, in 1980 the funds  
24 start to conduct a random audit of Central Transport.  
25 The auditors, upon arriving, or shortly thereafter, at

1 Central Transport, were told by the officials of Central  
2 Transport that 60 percent of the employees of Central  
3 Transport, which was engaged primarily in the trucking  
4 industry, were not covered by the collective bargaining  
5 agreement.

6 The company then refused to produce any  
7 documentation to the fund's representatives to produce  
8 or to support its contention that those 60 percent of  
9 the employees were not covered. As to the records that  
10 they allowed us to audit, those of employees that they  
11 admitted they owed liability on, the fund determined  
12 that there were over \$268,000 in audit findings.

13 Now, to be sure, those audit findings are  
14 subject to the employer's --

15 QUESTION: What do you mean, \$268,000?

16 MR. LUPLOW: \$268,000 in audit findings, which  
17 means that a preliminary investigation by our auditors  
18 reflected that there were \$268,000 in contributions that  
19 should have been sent in that were not.

20 QUESTION: Well, that's all I wanted to know,  
21 what you were referring to.

22 MR. LUPLOW: Okay. Thank you.

23 QUESTION: Thanks.

24 MR. LUPLOW: The --

25 QUESTION: Mr. Luplow, I take it that

1 employees, covered employees are required to join the  
2 union.

3 MR. LUPLOW: No, they are not, Your Honor.  
4 They are not. They are definitely not.

5 QUESTION: They're not.

6 MR. LUPLOW: Our plan is the National Master  
7 Freight Agreement, and the plan itself does not require  
8 union membership for participation.

9 QUESTION: What limits do you think ERISA may  
10 impose on the scope or frequency of audits if your view  
11 prevails?

12 MR. LUPLOW: Your Honor, I believe that the  
13 response to that has to be found in 404 or ERISA, the  
14 prudent manual, and I believe that it would be what is  
15 prudent, prudent and reasonable in the circumstances.  
16 To audit an employer three or four times a year when in  
17 particular the prior audits indicated active reporting  
18 would be unreasonable and clearly unwarranted.

19 QUESTION: Well, is that -- is it a subject  
20 that could be covered completely by the contracts?

21 MR. LUPLOW: No, Your Honor. We believe that  
22 the fiduciary duties of ERISA are the trustees' alone.  
23 The union does not have a fiduciary duty.

24 QUESTION: No matter what the contracts may  
25 provide?

1 MR. LUPLOW: That is correct.

2 QUESTION: I see.

3 MR. LUPLOW: We are the fiduciaries  
4 exclusively under ERISA.

5 QUESTION: And that would be whether the  
6 obligations under 4 are more or less than the contract  
7 provides?

8 MR. LUPLOW: Yes, Your Honor, they are ours.

9 QUESTION: Well, doesn't ERISA say that the  
10 trustees shall proceed in accordance with the documents  
11 and instruments governing the plan insofar as it is not  
12 inconsistent with ERISA?

13 MR. LUPLOW: Yes, that is correct, Your Honor.

14 QUESTION: And you think that -- you think  
15 that it would be inconsistent with ERISA for the  
16 trustees to obey a collective bargaining contract that  
17 says expressly that the employer may only -- need only  
18 give a list of covered employees?

19 MR. LUPLOW: That's correct.

20 QUESTION: Do we have to decide that in this  
21 case?

22 MR. LUPLOW: No, Your Honor. We believe that  
23 the trust agreement, in particular, Article 3, Section  
24 5, and the trust agreement, Article 4, which is the  
25 rulemaking powers of the trustees, as well as the

1 interpretive powers of the trust agreement, as  
2 incorporated by the collective bargaining agreement in  
3 Articles 55 and 56, which the Transport and the union  
4 negotiated, which incorporated the trust agreement --  
5 they agreed to incorporate it and to ratify all actions  
6 taken or to be taken by the trustees within the scope of  
7 their authority. And Article 3, Section 5 of the trust  
8 agreement is our audit authority.

9 QUESTION: Well, if we agree with you, we  
10 never reach ERISA. I mean we just say that as a matter  
11 of contract the employer should have given you this  
12 information.

13 MR. LUPLOW: This Court could presume so.

14 QUESTION: And then we needn't interpret ERISA  
15 at all.

16 MR. LUPLOW: That's correct. We think that  
17 there --

18 QUESTION: But if we disagree with you on the  
19 contract and agree with the court below on the contract,  
20 then we must get to this question.

21 MR. LUPLOW: That is correct, Your Honor.

22 QUESTION: May I ask one last question while  
23 you're on this subject? It's pretty difficult to amend  
24 contracts like this, is it, or is it?

25 MR. LUPLOW: Amend the trust agreement?

1 QUESTION: Yes.

2 MR. LUPLOW: Your Honor, the -- the settlers  
3 of the trust, if you will, which was established in  
4 1950, '55 --

5 QUESTION: Yes.

6 MR. LUPLOW: -- gave the amendment powers  
7 exclusively to the trustees. They passed the gauntlet  
8 to the trustees, and so the trustees have the right to  
9 amend the trust agreement when they think it's prudent  
10 to do so under the circumstances. So it is not  
11 difficult to amend the trust agreement, but in this  
12 particular case, because of the breadth and scope of the  
13 Sixth Circuit's ruling, an amendment of the trust  
14 agreement would not get the job done here, because the  
15 Sixth Circuit said, as I'll get to in a minute, if the  
16 Court please, that -- that ERISA doesn't allow you to do  
17 this the way they interpreted our contract; you can't do  
18 it. But furthermore, the -- the holding that it would  
19 be arbitrary and capricious to even attempt to do an  
20 audit of this scope. So --

21 QUESTION: But do you think they meant  
22 arbitrary and capricious under the capacity -- under the  
23 contract as it existed, or that it would have been  
24 arbitrary and capricious even if there had been an  
25 amendment to the contract that would expressly allow it?

1 MR. LUPLOW: Yes, I believe the latter, Your  
2 Honor, because they indicated that -- they talked about  
3 the cost of auditing all of the records of non --  
4 allegedly non-covered employees. The decision itself  
5 would be imprudent and a waste of fund assets to even  
6 embark on such an audit.

7 QUESTION: And the -- the intimation being  
8 that even if the authority were there, it would be an  
9 imprudent use of trust funds?

10 MR. LUPLOW: Yes, Your Honor, very definitely.

11 QUESTION: I take it that you would use  
12 accountants to do the audit spot check?

13 MR. LUPLOW: We would use and have used, Your  
14 Honor, what we call our field audit program, and it is  
15 in-house fund employees who are now trained as certified  
16 public accountants who specialize in doing audits.

17 QUESTION: Why wouldn't you be satisfied with  
18 a certificate of an independent auditor employed by the  
19 employer?

20 MR. LUPLOW: Well, employed by the --

21 QUESTION: Everybody -- every other agency in  
22 the government is satisfied with a certificate of -- the  
23 SEC is. Why are -- why do you need to do it yourself  
24 rather than let the employer hire an independent  
25 auditor, like some of these people who have filed amicus

1       briefs, to do their audit and give you a certificate?

2               MR. LUPLOW: Well, Your Honor, we are the --  
3       have ultimate fiduciary responsibility under ERISA.  
4       It's a non-delegable duty.

5               QUESTION: You say it's a prudent man who  
6       distrusts the audit of a nationally recognized firm?

7               MR. LUPLOW: Well, Your Honor, I'm not saying  
8       that the big eight accounting firms are not honorable  
9       organizations, but remember, we have over 12,000  
10      contributing employers covering a half a million  
11      participants.

12              QUESTION: Well, they might have 12,000  
13      accountants.

14              MR. LUPLOW: Well, Your Honor, they're not all  
15      Arthur Youngs or Arthur Andersons, and we have  
16      companies, a small company in Keokuk, Iowa, for example,  
17      and he may have -- he might be a small, what we fondly  
18      refer to as a mom and pop operation, and they may have  
19      10 or 15 employees and --

20              QUESTION: Maybe the answer to that question,  
21      Mr. Luplow, is to point to the very reasons that brought  
22      ERISA into being. It was a lack of confidence in how  
23      the unions were handling these matters, was it not, to a  
24      large extent?

25              MR. LUPLOW: Yes, Your Honor, but we are under

1 ERISA, 302(c)(5) and Amex Coal totally separate from the  
2 union, and we have a fiduciary duty where the union does  
3 not. And we believe that we have the right under our  
4 trust agreement, because it says the agents and  
5 representatives as designated by the trustee shall have  
6 the right to perform an on site audit.

7 And there's another practical question,  
8 Justice White, that I'd like to address from your  
9 question, and that's one of cost.

10 QUESTION: Yes.

11 MR. LUPLOW: When we -- to hire a big eight  
12 accounting firm is fine for people that can afford it.  
13 On the other hand, my --

14 QUESTION: Well, the employer could always  
15 have a choice. If he thought it was too expensive, he'd  
16 let you come in.

17 MR. LUPLOW: Well, we -- we think, Your Honor,  
18 that as suggested by the amicus brief, I believe of  
19 Deloitte Haskins & Sells, they said have Arthur Young  
20 give us a special report and objective of what they want  
21 done, and then we will do it and give the report to  
22 Arthur -- Arthur Young. Someone's going to have to pay  
23 for that, and under the trust agreement now, when we do  
24 audits of employers, the fund absorbs the cost, unless  
25 there is found to be great delinquencies and points --

1       excuse me -- points where there really are significant  
2       audit findings.

3               In any event, after the \$268 --

4               QUESTION: May I ask one question, Mr.  
5       Luplow? On the question of the trustees' power to amend  
6       the trust documents, you said they had unrestricted  
7       power of amendment. I don't find that. Maybe it's not  
8       in the papers.

9               MR. LUPLOW: It isn't, Your Honor. It was in  
10      Prosser and Schneider, and it's Article 10, which is the  
11      amendment powers. And it may not be in this particular  
12      case. It was in Prosser and Schneider.

13              QUESTION: But they can -- can they -- they  
14      can't amend the contribution obligation, can they?

15              MR. LUPLOW: Oh, no. No, Your Honor. It's --  
16      it's the contribution obligation is determined by the  
17      parties.

18              QUESTION: Under the collective bargaining  
19      agreement.

20              MR. LUPLOW: That's correct.

21              QUESTION: But the -- but the -- and the or  
22      the coverage of what kind of employee they have to  
23      contribute on, that's also defined in the basic  
24      agreement.

25              MR. LUPLOW: Yes, it is, Your Honor. And the

1 scope of our inquiry when we do an audit, and I --

2 QUESTION: But you're saying they have the  
3 power to amend the instrument -- say it was ambiguous  
4 now -- to say, lest there be any doubt about it, we have  
5 the right to audit all contributing employers, including  
6 all payroll records of people not eligible to  
7 participate. They could adopt such an amendment?

8 MR. LUPLOW: Yes, they have the power to do  
9 that, Your Honor, but --

10 QUESTION: I don't understand why they don't,  
11 then.

12 MR. LUPLOW: Well, as I tried to explain --

13 QUESTION: I understand you're say they're  
14 afraid because of what the Sixth Circuit said.

15 MR. LUPLOW: The Sixth Circuit -- we are  
16 absolutely dead in the water because -- we believe,  
17 because of the Sixth Circuit ruling, because they not  
18 only say must you have particularized costs, that it  
19 would be imprudent, it would be arbitrary and capricious  
20 to even attempt an audit of this magnitude. And that's  
21 the key point that I wanted to stress for the Court, but  
22 I see my time is flashing here, is this: the scope of  
23 our audit is a very limited inquiry. As to the  
24 allegedly non-covered employees, the employees that the  
25 employer does not admit liability to, all we want to do

1 is establish that that employee is not doing collective  
2 bargaining agreement work. That's all we want. We  
3 don't need test scores. We don't need medical records,  
4 things that are characterized as sensitive.

5 What we do need is, for example, we need to  
6 know as a basic tie-in document, we need to see the 941,  
7 and we need -- the IRS Form 941, and the complete  
8 payroll register of an employer. Why do we need that?  
9 Because they both have to match, because if they don't  
10 match, that means that there's possibly a ghost payroll  
11 out there, and there could be employees that are not  
12 being reported upon and being reported under the  
13 collective bargaining agreements.

14 QUESTION: Mr. Luplow, I take it you're not  
15 encouraging us to say that the trustees must conduct  
16 these audits.

17 MR. LUPLOW: No, Your Honor.

18 QUESTION: I notice you're being very careful  
19 to avoid that kind of --

20 MR. LUPLOW: No, Your Honor, we're saying --  
21 yes. It depends what's reasonable under the  
22 circumstances, because of our size and --

23 QUESTION: Is that why you're not relying on  
24 Section 1059(a)(1) in making your argument?

25 MR. LUPLOW: Yes, Your Honor. We're saying

1 that because of our particular plan, and the scope of  
2 our operation, and the multiple 12,000 employers and all  
3 of the people that we have strung out over 40 states  
4 that it is reasonable for us to do it, and besides that  
5 we have a right under the trust agreement to do it.

6 QUESTION: But I guess 1059 could be read to  
7 require employers to keep these records.

8 MR. LUPLOW: Yes, Your Honor, and that would  
9 be something that -- I'm not ducking the question. I  
10 know that the Solicitor General is going to ask that.  
11 But, yes, I agree with that.

12 And I see my time is up here, and I'd like to  
13 save five minutes for rebuttal, if that's all right.

14 CHIEF JUSTICE BURGER: Mr. Schwartz.

15 ORAL ARGUMENT OF JOSHUA I. SCHWARTZ, ESQ.,

16 AS AMICUS CURIAE

17 MR. SCHWARTZ: Thank you, Mr. Chief Justice,  
18 and may it please the Court:

19 It is the view of the United States that  
20 contrary to the decision of the court of appeals, both  
21 the employment -- Employee Retirement Income Security  
22 Act of 1974 and the particular trust agreements that  
23 underlie this case authorize petitioners' trustees to  
24 confirm by prudent auditing activities that employers  
25 participating in the pension and health and welfare

1 funds are making full contributions on behalf of all the  
2 employees for whom they're due.

3 I would like to emphasize that the Government  
4 does agree that this case could be decided exclusively  
5 on the basis of the trust agreement. We think --

6 QUESTION: Incidentally, do I -- do I gather  
7 that employees are covered even if not members of the  
8 union, if they are doing a certain kind of work which is  
9 covered by the collective bargaining agreement?

10 MR. SCHWARTZ: That's my understanding,  
11 Justice Brennan.

12 QUESTION: Even though not members of the  
13 union.

14 MR. SCHWARTZ: Yes.

15 QUESTION: And I gather -- and you want to be  
16 -- I gather the purpose of the audit is to be sure that  
17 a lot of employees not members of the union are on  
18 covered work, is that it?

19 MR. SCHWARTZ: Among other things. It's one  
20 of the reasons why the alternative proposed by the  
21 respondents of looking to the union is not adequate. We  
22 think that as a matter of law the Court's decisions  
23 establish that that wouldn't be the exclusive route  
24 anyway, but there is a good, practical reason why that's  
25 correct.

1 QUESTION: May I ask this question? Do the  
2 employers have separate and different retirement plans  
3 for the 60 percent of their employees who are not in the  
4 union?

5 MR. SCHWARTZ: Respondent so states in his  
6 brief, and that's the extent of my knowledge.

7 QUESTION: They do have.

8 MR. SCHWARTZ: That they do have other plans.

9 QUESTION: Yes. Well, is it -- is it your  
10 contention that employees --

11 MR. SCHWARTZ: We don't have any reason to  
12 doubt --

13 QUESTION: -- who are covered by other plans  
14 also have to be within the audit?

15 MR. SCHWARTZ: It is our contention that in  
16 order to ascertain that all the employees who belong  
17 within a particular plan are in fact having  
18 contributions made for them, that a selective random  
19 sample would not exclude someone merely because the  
20 employer says oh, they're in that plan, so they can't be  
21 in yours. It does not stand to reason that merely  
22 because the employer says that is so, and in fact may be  
23 so, that it's correct.

24 But a major --

25 QUESTION: If -- if -- if the employer simply

1 proved that a particular group of employees were covered  
2 by a different plan, say a plan that had been approved  
3 by ERISA.

4 MR. SCHWARTZ: If -- if -- if the employer  
5 established that particular employees were in fact doing  
6 the other kind of work that brought --

7 QUESTION: Well, -- well, my question --

8 MR. SCHWARTZ: Then -- then the audit would be  
9 done.

10 QUESTION: Well, suppose the -- there was a  
11 disagreement as to whether the work was other kind of  
12 work or not. If the employee were covered under another  
13 plan, is it the Government's position that -- that the  
14 trustees could -- could audit to determine whether or  
15 not it agreed with the type of work being done?

16 MR. SCHWARTZ: The Government's position, I  
17 think we rely on -- on the Schneider case from last  
18 term, that -- that the trustees are not bound by the  
19 separate proceedings by which two unions and an employer  
20 might resolve their disputes as to coverage.

21 The employer has -- the trustees have a right  
22 to determine -- and the focus is very factual -- what  
23 kind of work is being done. That is not to say that  
24 there is no role for deference to the other kinds of  
25 proceedings that resolve the question of which work

1 belongs in which plan. But the employee -- the trustee  
2 still has a right --

3 QUESTION: Mr. Schwartz --

4 MR. SCHWARTZ: -- to find out the facts of  
5 what kind of work an individual is doing.

6 QUESTION: Mr. Schwartz, whatever may be the  
7 procedure by which it's done, suppose there -- it's  
8 found that given work is covered under this agreement,  
9 but it's being done by non-members of the union, and the  
10 employer has provided a pension fund for those.

11 Now, may there be an audit, and if it's  
12 discovered that the work they're doing in fact, even  
13 though there's a pension fund for them, the work they're  
14 doing is covered by the collective bargaining agreement,  
15 then they must be included?

16 MR. SCHWARTZ: The -- I believe this point is  
17 actually addressed in -- in the -- in the reply brief of  
18 the petitioners and is not in our own brief. But it's  
19 my own understanding that -- that if in fact you are  
20 covered, then -- then contributions are due to be made.  
21 And it's also my understanding, although largely based  
22 on -- on -- on petitioners' argument in that reply  
23 brief, but there are procedures available to see that  
24 the employee never comes up short, and also that the  
25 employer need not make two sets of payments.

1 QUESTION: Is your answer to Justice Brennan  
2 that the Government hasn't taken a position on the  
3 question he asked you?

4 MR. SCHWARTZ: No, it -- it's -- I -- I don't  
5 think so. The audit authority would extend to those  
6 people. Is that --

7 QUESTION: So the audit authority would  
8 include people covered by another plan when obviously  
9 they wouldn't have been included under it if -- if it  
10 had not been thought they were doing work outside of the  
11 union.

12 MR. SCHWARTZ: But the question is whether  
13 that --

14 QUESTION: Yes, but --

15 MR. SCHWARTZ: Whoever thought that, thought  
16 so correctly.

17 QUESTION: Yes. So you audit all 100 percent  
18 of the employees.

19 MR. SCHWARTZ: Well, you don't audit 100  
20 percent. You audit selectively. But you need not  
21 exclude someone chosen at random simply because the  
22 employer tells you --

23 QUESTION: Who decides how many you audit?

24 MR. SCHWARTZ: Well, I think that's a question  
25 of -- of prudent professional auditing judgment, just as

1 we're not arguing that you must do an audit in every  
2 case. Accountants and auditors have professional  
3 standards as to what is a sufficient sampling -- a very  
4 small number, we're clear -- to provide assurance. And  
5 if you try a few and you get wrong -- get discrepancies,  
6 then you look at more. If you try a few and you don't  
7 get discrepancies, you don't look at more.

8 QUESTION: Are auditors competent to determine  
9 whether or not the work being done comes within a  
10 particular plan or not or under a particular union  
11 agreement or not?

12 MR. SCHWARTZ: I -- Your Honor -- Justice  
13 Powell, we think that generally there's not a problem  
14 here, because contrary to what respondents suggest, this  
15 is a basic problem of jurisdictional dispute. Our  
16 understanding is that the problem is essentially  
17 omissions, people who drop out of sight, particularly in  
18 certain industries where employment is seasonal,  
19 variable, or temporary or there's a lot of shifting  
20 between employers, and the Secretary of Labor has reason  
21 to believe that a lot of people just drop out of the  
22 system, and that there are omissions, and that therefore  
23 it is unrealistic to think of this as a back-door form  
24 of jurisdictional warfare among unions.

25 QUESTION: Do you think -- you really think

1 the auditors are better equipped to do that than the  
2 union itself?

3 MR. SCHWARTZ: Yes, because the -- it's  
4 precisely in those situations where -- where the union  
5 may well not know who was there. And in addition --

6 QUESTION: But the auditors would know better  
7 about the type of work --

8 MR. SCHWARTZ: If -- I'm trying to communicate  
9 the idea that these are relatively simple factual  
10 determinations. If you pick out a file and -- and the  
11 employment application shows 20 years of truck driving  
12 and three merit awards for safe driving, and the  
13 employer claims that this is in the book -- this person  
14 is in the bookkeepers union, I think an auditor would be  
15 qualified to say that this is a suspect determination,  
16 and to inquire further on the basis of that.

17 And I don't think that the kind of -- and it  
18 is those kind of factual things that the auditors are  
19 looking for and that they are reasonably qualified to --  
20 to engage in. And then, of course, the -- the fund  
21 trustees sit down with the -- with the employers and  
22 work out the initially determined discrepancies, and the  
23 employer, of course, has the opportunity to -- to say  
24 well, there really is an explanation for this.

25 QUESTION: Mr. -- Mr. Schwartz, you, a while

1 ago before you were questioned, you ended up saying that  
2 -- did you say that you do not agree that the case could  
3 be decided on the collective bargaining agreement?

4 MR. SCHWARTZ: No. Quite the reverse, Justice  
5 White. We do believe that it could be decided --

6 QUESTION: Only on -- only if we -- only if we  
7 agree with you on what the collective bargaining  
8 agreement means.

9 MR. SCHWARTZ: On what the trust agreements  
10 mean.

11 QUESTION: I mean trust, yes, yes.

12 MR. SCHWARTZ: Yeah. I should also point out  
13 there's a --

14 QUESTION: But if we -- if we disagree with  
15 that -- if we agree with the Court below that the trust  
16 agreement does not provide for this audit, then you must  
17 get to the statute.

18 MR. SCHWARTZ: That's right. Because the  
19 statute does rather clearly in the language that you  
20 read say except where inconsistent, and the legislative  
21 history of that language --

22 QUESTION: Well, do you -- do you -- do you --  
23 is part of your submission that the contract -- that the  
24 trust agreement does provide for the audit, or -- or  
25 have you taken a position on that?

1 MR. SCHWARTZ: We take the position in the  
2 last section of our brief that it does quite clearly  
3 provide for it. In fact, that was the basis of our  
4 suggestion when the Court initially asked for the  
5 Government's views on the case, that the case should be  
6 simply sent back in light of language in the Schneider  
7 case, which we thought read the same trust agreement the  
8 same way that we did.

9 QUESTION: If we didn't agree -- if we didn't  
10 agree with you on the contract, do you agree with your  
11 colleague on your side that the employer could not  
12 satisfy his ERISA obligations by having an independent  
13 auditor give a certificate with respect to all of his  
14 employees?

15 MR. SCHWARTZ: As I read the statute -- and I  
16 looked to Section 1020 -- Section 1023(a)(3)(A), the  
17 statute requires that an -- that the plan trustees, when  
18 filing their annual report with the Secretary, have  
19 their own independent auditor look at -- assess and test  
20 the books of the -- of the plan and make such tests as  
21 are required by generally accepted accounting standards.

22 QUESTION: Well, here's a national firm that  
23 comes into a big employer and gives a certificate, and  
24 it goes through the same procedures as the trustees  
25 would. And it would not be -- you think the statute

1 requires the trustees to reject that certificate --

2 MR. SCHWARTZ: Justice White --

3 QUESTION: And do one -- and do one of its own?

4 MR. SCHWARTZ: It's --

5 QUESTION: It doesn't sound very sensible, but  
6 maybe that's why it says --

7 MR. SCHWARTZ: It's not clear to me that it  
8 would always -- if I may answer, it's not clear to me  
9 that it would always be prudent to do that. The statute  
10 seems to place the burden on the trustees. There are a  
11 few reasons why I think that solution is not an adequate  
12 answer to the case.

13 The first is I do not read respondents as  
14 accepting that solution, although the Court, of course,  
15 would differ.

16 QUESTION: Well, that isn't what I asked.

17 MR. SCHWARTZ: The second -- the second is  
18 there is the problem of cost, and the court of appeals  
19 and respondents were very concerned about the cost of --  
20 of these procedures. And it's reasonably clear to me  
21 that the cost would be greater were the trust fund to  
22 have to bear the cost of retaining respondents'  
23 independent auditor to do this audit.

24 It's also not at all clear to me as I read  
25 Delcittle -- Deloitte's Haskins & Sells brief that this

1 offer of comity essentially among auditors is one that  
2 is available to anyone other than the independent  
3 auditor, which is Arthur Young, and not Mr. Luplow's  
4 client.

5 CHIEF JUSTICE BURGER: Your time has expired  
6 now, Mr. Schwartz.

7 MR. SCHWARTZ: Thank you, Mr. Chief Justice.

8 CHIEF JUSTICE BURGER: Mr. Moran.

9 ORAL ARGUMENT OF PATRICK A. MORAN, ESQ.,

10 ON BEHAIF OF THE RESPONDENTS

11 MR. MORAN: Mr. Chief Justice, and may it  
12 please the Court:

13 The question before the Court today is by what  
14 authority do these trustees, these Taft-Hartley funds,  
15 find the power do investigate records of employees that  
16 the union and the employer have together determined are  
17 not doing collective bargaining unit work.

18 QUESTION: How else would the public have any  
19 way of knowing whether a union or the employer hadn't by  
20 tacit agreement decided to do these people in and not  
21 comply with the provisions of the trust or of the  
22 statute?

23 MR. MORAN: I'd like to answer that question  
24 in two parts, if I may, Mr. Chief Justice.

25 First, the union we're discussing here is the

1 International Brotherhood of Teamsters, which has been  
2 extremely aggressive in its membership drives, and once  
3 they establish that a person is doing bargaining unit  
4 work and is a member, they have been extremely  
5 aggressive, Your Honor, in making sure that the  
6 employers remit all funds that are necessary in the form  
7 of compensation and payment of fringe benefits.

8 QUESTION: Some of -- some of these unions  
9 have been notable for some other factors in connection  
10 with trust funds, too, have they not?

11 MR. MORAN: I -- I don't follow the question,  
12 Your Honor.

13 QUESTION: Well, corruption in the trust funds.

14 MR. MORAN: The corruption in the trust funds  
15 of these funds, Your Honor, has been the subject of some  
16 litigation launched by the Department of Labor in the  
17 Northern District of Illinois federal court, and as a  
18 result of allegations of gross mismanagement, these very  
19 funds have given, by their consent judgment, their  
20 investment and management funds, or powers rather, to an  
21 independent investment manager.

22 I'm not aware of any allegations that deal  
23 with our client or with the Teamsters Union or locals  
24 with which we deal of any misuse of funds by that union.

25 QUESTION: I'm not addressing the particular

1       unions. I'm talking about the thrust and the purpose of  
2       this whole program in the minds of Congress. What were  
3       they trying to do?

4               MR. MORAN: Congress was trying to pass in  
5       ERISA, Your Honor, to make sure that if an employer  
6       gives fringe benefit funds to his employees, that all  
7       employees would be eligible to participate in that  
8       fund. But Congress did not say to the employers that if  
9       you employ or have more than one fund, each of your  
10      employees must be a participant in each of your funds.  
11      Not at all. Congress allowed certain discriminations,  
12      certain characteristics of employment that would allow  
13      one employee to be a member of one pension fund and  
14      another employee of the same employer to be a member of  
15      a different pension fund.

16             The complement of employers -- of employees,  
17      rather, that Central Transport has is made up of three  
18      broad categories. The first are those who are members  
19      of the Teamsters Union who operate within the  
20      jurisdiction of the Central States fund and are  
21      participants in that fund. The second are members of  
22      the Teamsters Union that operate in a different  
23      geographic area of the country and are participants in a  
24      different Taft-Hartley fund. Also within that second  
25      group are members of other unions like the International

1 Association of Machinists, which have a separate  
2 Taft-Hartley plan. And finally, there are those  
3 employees who are not members of any union who can  
4 qualify, if they meet the definition of ERISA  
5 participant, to be a participant in the  
6 employer-sponsored pension fund that is maintained by  
7 Central Transport.

8 Justice O'Connor asked a question earlier,  
9 followed up by Mr. Justice Brennan: Must a person be a  
10 member of the union to be a participant in these funds?  
11 And I think the answer was given that no, these funds  
12 represent a broad spectrum of participants, and not all  
13 participants have to be members of the union. But  
14 that's not the facts in this case.

15 Central Transport is a closed shop. To do a  
16 bargaining unit work in Central Transport, you must be a  
17 member of the Teamsters Union within 30 days. That's  
18 covered quite clearly in the collective bargaining  
19 agreement. That's the deal.

20 QUESTION: But it is true under ERISA  
21 generally that you could have people who were not union  
22 members, but nevertheless employees participating in  
23 plan.

24 MR. MORAN: In a plan. That is absolutely  
25 correct.

1 QUESTION: Right. And for that reason, as we  
2 interpret ERISA, it's logical that we couldn't rely on  
3 the union's efforts to see to it that contributions are  
4 made to everyone, because the union wouldn't have a lot  
5 of interest in someone who wasn't a union member,  
6 presumably. And yet, the -- the fund and the safety of  
7 the fund's investments to cover potential eventual  
8 retirements would depend on collecting for everyone  
9 who's in fact a participant.

10 MR. MORAN: The question or the comment, if I  
11 may, Your Honor, points to a difficulty in this Court  
12 attempting to make a broad sweep of authority to  
13 Taft-Hartley trustees in general. In the case at bar,  
14 to be a participant in the Central States fund, the  
15 employee of Central Transport must be a member of the  
16 union.

17 QUESTION: But is that with respect to every  
18 single -- is that true of every single employer who's  
19 covered by this collective bargaining agreement?

20 MR. MORAN: I am told by the funds that that  
21 is not true because they operate in right-to-work states.

22 QUESTION: Well, then, you -- you're just  
23 representing one company, aren't you?

24 MR. MORAN: That's -- I am representing a  
25 group of 16 companies that all operate in the same

1 geographic area.

2 QUESTION: And that -- and that group all are  
3 closed shops.

4 MR. MORAN: Absolutely.

5 QUESTION: But that is not true of -- of a lot  
6 of the other participants or companies that contribute  
7 to the fund?

8 MR. MORAN: I am told that that is not true by  
9 the petitioners, Your Honor.

10 QUESTION: But nevertheless, you -- your case,  
11 the only thing that's before us are 16 closed shop  
12 companies.

13 MR. MORAN: That is correct.

14 QUESTION: But in interpreting ERISA, if we  
15 get that far in the case, we would have to be careful  
16 about our rationale in view of the fact that it might  
17 include employees who aren't union members, isn't that  
18 so?

19 MR. MORAN: That's absolutely correct, Justice  
20 O'Connor. And that's the very reason that this Court  
21 should not embark upon attempting to find implied in  
22 ERISA that which is not there. If Congress wished to  
23 give a power to the trustees, Congress knows how to  
24 express its purpose.

25 Section 1104 of Code -- of Title 29, which

1 sets forth the duties and obligations of these trustees,  
2 has no mention of the power to audit nonparticipants.

3 QUESTION: Why do you suppose Section 1059  
4 requires the employer to maintain records for all  
5 employees, not only plan participants?

6 MR. MORAN: Because, Justice O'Connor, 1059 is  
7 dealing with the ERISA definition of employee, which is  
8 found at 1002(6).

9 QUESTION: Well, it deals with a requirement  
10 that the employer maintain records, and that indicates  
11 to me maybe a broader concern than you are expressing.

12 MR. MORAN: If I may, Your Honor, within the  
13 definition of employee as stated by ERISA are several  
14 components. The employees of Central Transport who can  
15 qualify for participation in this plan are only one  
16 portion of that total component of employee definition.  
17 And we agree full well that the definition of employee  
18 in ERISA is much broader than the definition of employee  
19 in the collective bargaining agreement, and therein lies  
20 our controversy.

21 QUESTION: May I ask, Mr. Moran, I'm getting a  
22 little confused. These are all closed shops, all 16 of  
23 the companies you represent today?

24 MR. MORAN: That's correct, Your Honor.

25 QUESTION: Well, surely the trustees may audit

1 the records of all of those employees, may it not?

2 MR. MORAN: The trustees may audit the records  
3 of all employees who are members of the union and are --

4 QUESTION: Who are covered by the closed shop.

5 MR. MORAN: Yes, sir. Who are doing  
6 bargaining unit work.

7 QUESTION: Yes. Well, then, what other  
8 employees are there?

9 MR. MORAN: If I may --

10 QUESTION: Yes.

11 MR. MORAN: -- Central Transport has a number  
12 of different employee groups. Some of them are  
13 Teamsters, and some of those Teamsters operate in a  
14 geographic area represented by these funds. Some of  
15 them are Teamsters and do not operate in a geographic  
16 area represented by these funds.

17 Just taking those two components, these  
18 trustees clearly have the right to review the records of  
19 Teamsters who are operating within their geographic  
20 area, and they have done so, and they did so for 60  
21 days. But they don't have the right to review the  
22 records of employees who are not a member of the  
23 Teamsters Union and are not within this geographic area.

24 QUESTION: Well, but what puzzled me was if it  
25 were a closed shop, I thought it covered everybody, but

1 it doesn't.

2 MR. MORAN: No, it does not. In fact, therein  
3 lies the rub in this case. If the trustees are correct  
4 that they have a power that is found not only in the  
5 collective bargaining agreement but in ERISA, implied in  
6 ERISA, to see the records of all employees, then the  
7 trustees of every pension plan to which Central  
8 Transport makes contributions have a concomitant right.  
9 And this is not an imagined danger.

10 QUESTION: You'd never be able to get to your  
11 own books, would you?

12 MR. MORAN: Absolutely not, Justice White.  
13 They'd be gone all the time. And this is not an  
14 imagined problem. We have received a demand from the  
15 New York State Teamsters Fund, an entirely different  
16 fund than the fund that's here today, demanding the  
17 exact same records in Quad States Leasing, one of the  
18 defendant companies. And when we told them they weren't  
19 entitled to those records, they weren't even limited  
20 geographically, they said by letter to us then the  
21 result is we will kick you and all of your participants  
22 out of our fund.

23 They're using -- they're using their very  
24 participants in -- in pawns for self-aggrandizement and  
25 increase in their own size. That's not intended by

1 ERISA.

2 QUESTION: Mr. Moran, suppose we disagree with  
3 the Sixth Circuit holding. Aren't other forms of  
4 protective orders available to an employer to provide  
5 some protection such as the kind of protective order  
6 that was issued by the district court in that Central  
7 States case attached to the petition appendix?

8 Aren't there other forms of protection besides  
9 the kind of holding that the Sixth Circuit imposed here?

10 MR. MORAN: Certainly our federal courts  
11 could, on a case by case basis, issue protective orders  
12 as the Justice suggests; but I don't want it to go  
13 unmentioned that the attempt of the funds to indicate  
14 that they are just asking for a reasonable amount of  
15 records that are directed to particular employees should  
16 go unnoted.

17 For instance, they have asked for all freight  
18 bills, delivery receipts and bills of lading. Now,  
19 these are three documents that are produced by a  
20 trucking company for every piece of freight they haul.  
21 Central Transport has 60,000 a week of each of those  
22 three, or 180,000 per week. They asked for equipment  
23 control requests; that's 35,000 a week. Activity  
24 reports, that's 35,000 a week. Employee records.

25 Now, just on those four things, 267,000 pieces

1 of paper a week times 52 weeks are 13,900,000 pieces of  
2 paper per year over a six-year period -- now, times six  
3 for their statute of limitations -- and that we have to  
4 prepare, maintain and produce for every trustee of every  
5 Taft-Hartley to which we contribute.

6 QUESTION: Mr. Moran, let me see if I get  
7 this. If you had, say, Machinists, a contract doing --  
8 covering Machinists work, and you had a pension,  
9 Machinists pension plan, your concern is that the  
10 Machinists will want to examine every job of every  
11 Teamsters employee to see whether in fact he's doing  
12 Teamsters work.

13 MR. MORAN: That's absolutely correct.

14 QUESTION: And -- and that's what you say the  
15 Teamsters are trying to do. They want to examine every  
16 Machinist's jobs to see whether in fact he's doing  
17 Teamsters work.

18 MR. MORAN: They even ask for every  
19 secretarial job. They even ask for the president's  
20 records of the company. It's absurd. The New York  
21 State Teamsters --

22 QUESTION: -- want to see your lawyer's record  
23 in this.

24 MR. MORAN: Fortunately, I'm not in-house  
25 counsel.

1 QUESTION: Now, the requests aren't coming  
2 from the union. I understood they were coming from the  
3 trustees at the pension plans, not the unions.

4 MR. MORAN: That's correct. They're coming  
5 from trustees of the pension plans. And to give an  
6 example to the Court, in response to Mr. Justice  
7 Brennan's notation, New York State Teamsters represent  
8 100 of our total complement of 9,000 employees, and  
9 they've asked for the records of all 9,000 employees.

10 Now, with --

11 QUESTION: For six years? I mean they've  
12 asked for every piece of paper generated in the  
13 companies for six years, is that what you're telling me?

14 MR. MORAN: The New York State Teamsters have  
15 asked for every employee record, every personnel record  
16 that we have for their particular audit period, and they  
17 noted that if they find deficiencies, they'll ask for  
18 the entire six years. Now, that's just 9,000 employees  
19 we have today. We have an attrition rate of 15 percent,  
20 so double the number. Now we have 18,000 records --

21 QUESTION: Mr. Moran, let me interrupt, if I  
22 may. Again, you said the New York Teamsters. You meant  
23 the trustees of that fund, do you not?

24 MR. MORAN: If I said that, I misspoke.  
25 That's correct.

1 QUESTION: And the reason I -- I focus on  
2 that, am I correct in -- in noting that the Teamsters  
3 Union has not participated in this litigation at any  
4 stage, as an amicus brief or anything?

5 MR. MORAN: That is correct.

6 QUESTION: They say it's your problem, and do  
7 whatever you want. They've not shown their interest one  
8 way or another.

9 MR. MORAN: I am totally unaware of what their  
10 position is, totally unaware.

11 QUESTION: Well, how do you propose to -- to  
12 -- I take it you say that the employer's word should be  
13 taken as final?

14 MR. MORAN: Absolutely not, Justice -- Justice  
15 White.

16 QUESTION: Well, what -- what should he  
17 furnish to the trustees?

18 MR. MORAN: First, to place my comments in  
19 context, it is not a unilateral determination by the  
20 employer. The union first determines who's doing  
21 bargaining unit work and prepares a list which is sent  
22 to the employer.

23 QUESTION: And in your -- and in your case you  
24 say that -- you say that the only people who are covered  
25 by this particular plan are members of the Teamsters

1 Union?

2 MR. MORAN: That is correct.

3 QUESTION: And the -- so the -- and the union,  
4 therefore, has a list of its own members.

5 MR. MORAN: A union has a list of its own  
6 members. They send us the list. We, the employer, add  
7 to that list any employees who have been hired within  
8 the last 30-day period --

9 QUESTION: Thirty days.

10 MR. MORAN: -- and delete from that list any  
11 employees who have terminated.

12 QUESTION: Your 15 percent attrition.

13 MR. MORAN: That's the 15 percent attrition.  
14 That list is placed upon a form for the trustees, and  
15 those names, along with the check, goes into them like  
16 clockwork every 30 days. If someone is left out, the  
17 union will know it within 30 days. It is not a  
18 unilateral determination.

19 But I haven't answered the question of the  
20 Court yet. What we wish to prevent is a fishing  
21 expedition by funds across the country in all of our  
22 records, because that will result in such a cost to  
23 employers that the purposes, the lofty objectives of  
24 ERISA that Congress set forth, will be totally lost by  
25 cost.

1 QUESTION: Well, it probably -- we probably  
2 should only decide the case we've got before us and not  
3 talk about a lot of other cases that may have different  
4 facts. It may be that in some -- some other areas there  
5 won't -- there won't be closed shops.

6 MR. MORAN: That's correct. The case before  
7 us, Your Honor, has -- has many protections for an  
8 employees not --

9 QUESTION: You have 16 -- you've got 16  
10 companies, all closed shops.

11 MR. MORAN: That is correct. The case in --  
12 in front of the Court today has very little chance that  
13 someone will be left out intentionally. The union will  
14 monitor their employment and make sure that -- that this  
15 person is part of the union and receives all of his  
16 union benefits.

17 And besides, we're not talking just about  
18 pensions here. We're talking about health and welfare.  
19 And you don't go very far in today's society without  
20 finding out if you have medical coverage. The knowledge  
21 of the shop is such that the man in machine number one  
22 or truck number one knows very well if he doesn't get  
23 the same benefits as the benefit at machine number two  
24 or truck number two.

25 QUESTION: Mr. Moran, what -- that prompts

1 this question. Supposing somebody or his wife or  
2 somebody thinks he ought to be covered, and the union  
3 says no, and the company says no, and they go to the  
4 trustee and say they're just not contributing on my  
5 behalf, and I belong in this -- this unit. And the  
6 trustee says well, we'll investigate.

7 What kind of an investigation, under your  
8 view, could the trustees make on such a set of facts?

9 QUESTION: Well, excuse me. I was just -- in  
10 the course of answering his question, do you support the  
11 court of appeals decision with respect to an individual  
12 employee in which there's reasonable grounds to believe  
13 or something, and then you have to furnish his records?

14 MR. MORAN: Absolutely, Your Honor. I'll  
15 address Justice White first, if I may.

16 QUESTION: Well, that answers Justice  
17 Stevens. It may, anyway.

18 MR. MORAN: Fine.

19 Justice Stevens, the answer to your question  
20 would be within the definition of reasonable cause, or  
21 whatever this Court might wish to call this sort of a  
22 balancing, if an employee would come to the trustee and  
23 say I think I'm doing bargaining unit work, and the  
24 union won't find out for me, and I don't think I have  
25 the money to go to federal court, will you help me out,

1 the trustee then should have reasonable cause to come  
2 forward and see these records, and the employer no  
3 longer has the concern of giving --

4 QUESTION: But then as soon -- as soon as you  
5 admit that, what about this case again where they allege  
6 that in doing a proper audit they found a half a dozen  
7 cases that suggested to them there was some  
8 underreporting?

9 MR. MORAN: I have no problem with these  
10 trustees seeing the records of employees for which --  
11 for whom they have reasonable cause to suspect are doing  
12 bargaining unit work and have been left out of this  
13 fund. Our concern is that we may face liability to  
14 employees if we give out their confidential records,  
15 their personnel records with their wages and work  
16 history, without their authority to do so.

17 QUESTION: Well, what if they should find  
18 that, say, there were a dozen employees that were  
19 casual, some would work for short periods of time and so  
20 forth, and they identify a problem in a particular area  
21 of the company, that you hire certain people on short  
22 runs or something like that. Would they be able to look  
23 at the records pertaining to that narrower group of  
24 employees?

25 MR. MORAN: If the trustees attempt to

1       redefine the collective bargaining unit, I believe they  
2       have invaded the province of the union. If instead they  
3       say we have these particular people, and by cur  
4       description of what they do, we think they are part of  
5       the union, then if there's reasonable cause to say that,  
6       there's no reason they shouldn't see those records.

7               The Schneider case or Prosser case last term  
8       said trustees -- in fact, these very trustees -- you  
9       have the right to come to federal court, and now they're  
10      here. But when they're here, they -- they come with the  
11      same rights and obligations of any litigant, and those  
12      obligations are very few, but they're well defined.  
13      They must --

14             QUESTION: Well, Mr. Moran, the whole nature  
15      of an audit by an accountant, though, is not something  
16      that's done on the basis of reasonable cause normally.  
17      It's something that an accountant will go in and look at  
18      to determine after looking at it whether there's a  
19      problem. And I -- I just wonder whether this Sixth  
20      Circuit requirement can legitimately be found on the  
21      basis of either the statute or the trust agreement here.

22             MR. MORAN: It is not --

23             QUESTION: And whether we don't have to look  
24      to something else.

25             MR. MORAN: With all respect, Your Honor, it

1 is not for these respondents, the employer, to justify  
2 why the trustees should not have power. It is for the  
3 trustees to say wherein their power lies.

4 QUESTION: Well, let's talk about that a  
5 minute. The trust agreement provides that the trustees  
6 may interpret its terms and that the parties are bound  
7 by that interpretation if it's made in good faith. And  
8 if the trustees of a trust say under the terms of the  
9 trust we think it gives us the right to make the audit,  
10 why aren't you bound?

11 MR. MORAN: The trustees have the right to  
12 determine within the confines of the trust agreement on  
13 matters of simple administration, trust administration.  
14 But to say that the trustees have a carte blanche to  
15 bootstrap coverage to anyone they want is not what's  
16 intended.

17 We certainly -- the employers certainly did  
18 not give to the trustees the right to determine who are  
19 participants any more than we gave them the right --

20 QUESTION: Certainly not, but what they're  
21 asking, of course, is not that at all, but the right to  
22 look at the records to make sure that those people who  
23 are obviously covered have the contributions made to  
24 fund the coverage.

25 MR. MORAN: Yes, Your Honor, but other

1 trustees say they have the same duty. And in the New  
2 York State Teamsters example, if these trustees, Central  
3 States, assert that they represent as a participant,  
4 they have as a participant targeted employee Jane Doe,  
5 and New York State says wait, Jane Doe is a member of  
6 our fund, the New York State Teamsters trustees have the  
7 same concomitant duty to try and keep Jane Doe in their  
8 fund as these trustees have to try and wrest her away.  
9 And we end up with litigation of trustee against trustee  
10 besides.

11 There are collective bargaining agreements by  
12 which the employer, Central Transport, makes its  
13 contribution, and we can see that the union's not here  
14 today. And just because a trustee proves that a  
15 targeted employee should be in the Central States fund  
16 doesn't mean that the New York State Teamsters Union --  
17 not the fund but the union -- is going to agree that  
18 that person is no longer part of their bargaining unit,  
19 and the symmetry of the collective bargaining agreement  
20 with the Taft-Hartley plan is completely destroyed. We  
21 can have an employee who receives wages under a  
22 collective bargaining agreement and fringe benefit  
23 contributions under a second collective bargaining  
24 agreement, and to the employee this could be disastrous.

25 For instance, let us assume an employer with

1 two sets of employees, one under union A and one under  
2 union B, and union A provides for total benefits per  
3 week of \$110, as does union B. But union A divides them  
4 differently: \$80 goes to wages, \$30 to fringe benefit  
5 contributions. The union A employees get \$100 of wages  
6 and \$10 of fringe benefit contributions.

7 Now the trustees start their fight, and the  
8 poor pawn of the employee can end up receiving \$80 in  
9 wages under union A and \$10 in contributions of fringe  
10 benefits under plan B for \$90. And he says what  
11 happened to me? I'm still driving a truck. That's all  
12 he ever did.

13 That's not intended by ERISA, and the problem  
14 is putting in context the definition of employee and  
15 ERISA, which is what raised the initial question in the  
16 Court's mind. We admit that ERISA's definition of  
17 employee is much broader than -- excuse me -- than the  
18 definition in the collective bargaining agreement, and  
19 it's meant to be.

20 If the Court finds that these trustees and all  
21 Taft-Hartley trustees have a power that's found in the  
22 law, some place in the law, although ERISA does not  
23 expressly give it to them, then they've had it at least  
24 since 1975 -- not since they've concocted their theory,  
25 because ERISA's fiduciary standards became active in

1 1975, and before that -- these are Taft-Hartley funds.  
2 Taft-Hartley's been around since 1947. And isn't it  
3 strange that in 1947's hearings in Congress, in 1974's  
4 hearings for the ERISA, in the hearings for the Welfare  
5 Pension Plan Disclosure Act that preceded ERISA, and in  
6 the Multi-Employer Pension Plan Amendments Act in 1980,  
7 Congress never said these trustees have the power they  
8 say Congress intended?

9 I would think that a more reasonable  
10 resolution of that puzzlement is that Congress simply  
11 did not intend to give them this power.

12 Justice White asked the question why couldn't  
13 an employer use his own auditor, own independent  
14 certified public accountant to issue a report. Mr.  
15 Luplow responded that it would be too costly. But the  
16 employer funds the cost of the audit that the funds want  
17 to do, so the answer that it's too costly is -- simply  
18 doesn't hold water.

19 QUESTION: Well, you don't -- you don't think  
20 it's even necessary to furnish such a certificate?

21 MR. MORAN: From -- from --

22 QUESTION: You think the -- you think the  
23 union in -- in these 16 companies, the union list with  
24 the additions and subtractions that the employer makes  
25 is all the employer has to do.

1 MR. MORAN: That's absolutely correct. I  
2 started to answer an earlier question from this side of  
3 the bench -- I believe Mr. Justice Stevens -- concerning  
4 how do you find these -- these participants. I think  
5 that was the theme at least of the question, if not the  
6 words.

7 A participant can go to the trustee and say  
8 I'd like you to make an investigation, and the trustee  
9 then doesn't have to come to federal court. If he has  
10 reasonable cause, we'll give him the records. If we  
11 disagree --

12 QUESTION: What makes you think -- what makes  
13 -- where do you find the authority of the trustee to  
14 insist on looking at records of an individual that you  
15 would agree there's reasonable cause to believe that  
16 there should be an investigation? Does ERISA put that  
17 duty on you in that case?

18 MR. MORAN: Absolutely not.

19 QUESTION: Does the collective bargaining unit  
20 put that duty on you?

21 MR. MORAN: Absolutely no.

22 QUESTION: Well, so -- so you -- so you really  
23 don't defend the decision of the court of appeals. I  
24 don't know where the court of appeals found that  
25 authority either. It didn't say, did it?

1 MR. MORAN: No. The court of appeals had to  
2 find that authority in an implication in ERISA, in an  
3 implication in the collective bargaining --

4 QUESTION: And you disagree with that.

5 MR. MORAN: I disagree that the federal court  
6 should be extending a federal common law in an area such  
7 --

8 QUESTION: All right. So you disagree with  
9 that, so you do not defend that part of the court of  
10 appeals opinion, even though you'll comply with it. As  
11 a matter of law you don't really defend that.

12 MR. MORAN: That is a correct statement.

13 QUESTION: That is a -- is a correct statement.

14 MR. MORAN: That is a correct statement. I  
15 agree with you that I don't think that a reasonable  
16 cause standard is necessary in this case, because I  
17 don't think there is a power under the contract, I don't  
18 think there's a power under ERISA, and I don't think  
19 this Court should give -- should extend federal common  
20 law because it's simply not needed.

21 QUESTION: No, but I would think the trustees,  
22 if they had probable cause to believe they were not  
23 contributing on somebody, they could file a lawsuit  
24 against the company and say pay your contribution and  
25 get discovery.

1 MR. MORAN: That's correct. And not only  
2 that, Your Honor, they can start a grievance. Last term  
3 this Court heard the Schneider case or Frosser case, if  
4 you will, on this very collective bargaining agreement;  
5 but that agreement has been amended. At the time of the  
6 Schneider case, argument with counsel and bench  
7 concerned what would happen if the trustees have the  
8 right to start a grievance, arbitration machinery, and  
9 they do.

10 Attached as an appendix to our brief on the  
11 merits is a change in that collective bargaining  
12 agreement. As a matter of fact, that change had been  
13 made before the question was addressed to the Court last  
14 term. Be that as it may, the trustees have the right to  
15 start a grievance. They have the right --

16 QUESTION: Who do they start -- who do they  
17 have a grievance with?

18 MR. MORAN: I beg your pardon?

19 QUESTION: Do they have a grievance with the  
20 employer?

21 MR. MORAN: They would have a grievance with  
22 the employer, and if the union had nothing to represent  
23 an employee as -- as was the fear expressed by bench,  
24 they would have a grievance against the employer.

25 QUESTION: So where does the grievance end

1 up? Does that -- do they have to use the collective  
2 bargaining agreement machinery?

3 MR. MORAN: It says they should.

4 QUESTION: To the joint board? Is there a  
5 joint board?

6 MR. MORAN: Yes. To a joint committee.

7 QUESTION: Uh-huh.

8 MR. MORAN: They can also come to federal  
9 court. It was decided in Schneider they can do so. But  
10 when they come to federal court, they come with the same  
11 rules as every litigant, and that's the Federal Rules of  
12 Civil Procedure. And they do not give the right to a  
13 federal litigant for discovery prior to stating a cause  
14 of action. They have to state a cause of action that  
15 they have a reason to believe that these records are  
16 sitting out there. Once they do so, they're litigants.

17 Thank you.

18 CHIEF JUSTICE BURGER: Do you have anything  
19 further, Mr. Luplow?

20 ORAL ARGUMENT OF RUSSELL N. LUPLOW, ESQ.,

21 ON BEHALF OF THE PETITIONERS -- REBUTTAL

22 MR. LUPLOW: Mr. Chief Justice, if it please  
23 the Court:

24 First off, I'd like to correct Mr. Moran. The  
25 contract in Prosser and Schneider that was before this

1 Court was not the same contract in this case. It was  
2 the Greater Moving and Storage collective bargaining  
3 agreement of St. Louis, and that's a fact that's in the  
4 appendix and is part of the record.

5 The contract in this case is the National  
6 Master Freight. They're totally different contracts.

7 QUESTION: Does it -- do the -- do the  
8 trustees have -- have authority to --

9 MR. LUPLOW: They have authority under the  
10 National Master Freight Agreement. They have access to  
11 the contract. They have not as of this date --

12 QUESTION: Well, do you have -- you may start  
13 a grievance.

14 MR. LUPLOW: We -- we have the right to do  
15 that under the contract.

16 QUESTION: And demand arbitration if your  
17 grievance is rejected.

18 MR. LUPLOW: Yes, Your Honor, if -- if -- if  
19 the trustees accept to do that. It has not presented  
20 itself yet. The trustees cannot be forced to do that  
21 because it's --

22 QUESTION: Sure. You can just come into court.

23 MR. LUPLOW: Yes, that's correct.

24 Your Honor, there was a couple of things that  
25 I would like to say. Number one, the bottom line is the

1 Transport is saying you have to take our word for it,  
2 absent reasonable cause, because that's what the Sixth  
3 Circuit said. The adequate protections that you have is  
4 the union.

5 Well, as this Court examined in Prosser and  
6 Schneider, the union may not be reliable in this  
7 context. Why? Because the buck doesn't stop with them;  
8 it stops with us. And the fact of the matter is that  
9 our interests do not always converge.

10 We have fiduciary responsibilities. They  
11 don't have any responsibility to retirees and their  
12 families; we do. And as I said at the top of my  
13 argument, that under ERISA and under the law as  
14 interpreted by the Department of Labor, that if an  
15 employee performs work in a collective bargaining  
16 agreement, the fund is liable to provide him with  
17 pension credits regardless of whether or not that  
18 employer ever paid us a nickel.

19 Now, Congress made us the fiduciaries and gave  
20 us the responsibility to maintain, preserve and protect  
21 the assets of that fund, and we submit to this Court  
22 that not only ERISA but our trust agreements does not  
23 require us to simply take someone's word for it.

24 QUESTION: But, Mr. Luplow --

25 MR. LUPLOW: Now, as a practical matter --

1 QUESTION: -- isn't it a practical matter that  
2 the union also has the fiduciary obligation to be sure  
3 the employees are included within the beneficiaries?

4 MR. LUPLOW: They don't have a fiduciary, Your  
5 Honcr. They have a duty of fair representation.

6 QUESTION: Well, it's pretty close to the same  
7 thing.

8 MR. LUPLOW: Well, I -- I really don't think  
9 it's quite that close, Your Honor.

10 QUESTION: At least they have a duty.

11 MR. LUPLOW: They have a duty, but --

12 QUESTION: They can get sued in court for  
13 breaking it.

14 MR. LUPLOW: Pardon?

15 QUESTION: They can get sued in court for  
16 breaking it.

17 MR. LUPLOW: Sure, but they also have the  
18 Barrentine-Arkansas-Best rationale if they want to act  
19 on the pejoratarian principles. They are not committing  
20 a breach of duty of fair representation. And there can  
21 be practical situations --

22 QUESTION: You mean if they -- if they -- if  
23 they fail to -- knowingly fail to include some people in  
24 the list that was submitted that they would not be  
25 committing a breach of duty?

1 MR. LUPLOW: They -- yes, they could be  
2 committing a breach of the duty of fair representation.

3 QUESTION: It seems to me they have every  
4 incentive to do it, too, because they get dues out of  
5 these people when they join their union.

6 MR. LUPLOW: Well, Your Honor, as a practical  
7 matter, the union's not in an informational position to  
8 always know this. Everyone seems to think that they  
9 are, but the fact of the matter is that they're not. As  
10 we pointed out in a footnote in our brief --

11 QUESTION: Well, if they're doing their job,  
12 they know what's going on.

13 MR. LUPLOW: If they're doing their job, but  
14 they don't always do their job, Your Honor. And we're  
15 talking about a huge fund here with a lot of local --

16 QUESTION: Can I ask you a question? What --  
17 what brought this case on at this late date? I  
18 shouldn't say late date, but what brought this case on  
19 -- your experience with omitted employees in closed shop  
20 companies or what?

21 MR. LUPLOW: Yes, Your Honor. We have a  
22 situation where we go out and do an audit, and this is  
23 the second case where an employer has said you cannot  
24 see records, only those that we concede are covered.

25 QUESTION: But I'm asking you, have you had

1 some experience where in closed shop situations the  
2 information you get is unreliable?

3 MR. LUPLOW: Yes, Your Honor, we have. For  
4 example, we had a footnoted case -- not the case, but we  
5 footnoted -- over \$300,000 on casuals' contributions  
6 were not reported.

7 And may I say --

8 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
9 The case is submitted.

10 (Whereupon, at 2:58 p.m., the case in the  
11 above-entitled matter was submitted.)  
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CERTIFICATION

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

No. 82-2157- CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL.,  
PETITIONERS V. CENTRAL TRANSPORT, INC. , ET AL.

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

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