

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1493 & 84-1509

TITLE NATIONAL LABOR RELATIONS BOARD, Petitioner V. FINANCIAL
INSTITUTION EMPLOYEES OF AMERICA, ETC., ET AL.; and
SEATTLE-FIRST NATIONAL BANK, Petitioner v. FINANCIAL
INSTITUTION EMPLOYEES OF AMERICA, ETC., ET AL.

PLACE Washington, D. C.

DATE December 4, 1985

PAGES 1 thru 40



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IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL LABOR RELATIONS BOARD, :
Petitioner, : No. 84-1493
v. :
FINANCIAL INSTITUTION EMPLOYEES :
OF AMERICA, ETC., ET AL.; :
and :
SEATTLE-FIRST NATIONAL BANK, :
Petitioner, : No. 84-1509
v. :
FINANCIAL INSTITUTION EMPLOYEES :
OF AMERICA, ETC., ET AL. :

- - - - - :
Washington, D.C.
Wednesday, December 4, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:58 o'clock a.m.

1 APPEARANCES:

2 NORTON J. COME, ESQ., Deputy Associate General Counsel,
3 National Labor Relations Board, Washington,
4 D.C.; on behalf of National Labor Relations
5 Board, Petitioner.

6 MARK A. HUTCHESON, ESQ., Seattle, Washington, on behalf
7 of Financial Seattle-First National Bank,
8 Petitioner.

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

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
NORTON J. COME, ESQ.	4
on behalf of Petitioner, National Labor Relations Board	
MARK A. HUTCHESON, ESQ.	11
on behalf of Petitioner, Seattle- First National Bank	
LAURENCE GOLD, ESQ.	20
on behalf of the Respondents	
NORTON J. COME, ESQ.	38
on behalf of Petitioner -- rebuttal	

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1 was certified as the exclusive bargaining representative
2 of a unit consisting of all of the employees of the
3 Seattle First National Bank in the State of Washington.

4 The FIEA negotiated successive collective
5 bargaining agreements with the bank, the last expiring
6 in 1977. In 1977 the FIEA Executive Council decided to
7 seek affiliation with the Retail Clerks International
8 Union and a union affiliation election was scheduled for
9 February 1978.

10 Prior to the election all bargaining unit
11 employees were informed of the proposed affiliation and
12 told that only those who were union members as of
13 January of '78 would be eligible to vote. At the time
14 of the affiliation vote about 2,600 of the 4,790 of the
15 employees in the unit were FIEA members.

16 1,206 voted for the affiliation and 774 voted
17 against. The 2,176 non-members comprising over 45
18 percent of the unit were not permitted to vote.

19 The FIEA is chartered by the International
20 Union as Financial Institution Employees of America
21 Local 1182 which is the respondent here. The local
22 filed a petition with the Board seeking amendment of the
23 outstanding certification in favor of FIEA to reflect
24 this affiliation.

25 The Board has a procedure, 102.60-V of its

1 rules, that provides the Board may amend a certification
2 in the absence of a question concerning representation.
3 The Board initially granted the amendment relying on its
4 then current view that affiliation of an independent
5 union with an international was essentially an internal
6 union matter in which non-members were not entitled to
7 vote.

8 The Board subsequently, in a case called Amoco
9 Four, reversed its earlier position and concluded that
10 affiliation because of its impact on the right of all
11 bargaining unit employees to choose their
12 representatives is not a purely internal union affair
13 and therefore that an affiliation election, if it is to
14 serve as a basis for Board amendment of the
15 certification, must be open to all union members.

16 QUESTION: Another three to two decision?

17 MR. COME: Yes, it was another three to two
18 decision, yes, Your Honor.

19 The Board's -- I might say that this is an
20 issue that has divided the Board for over 20 years, and
21 the Board has changed its mind on this issue within that
22 period several times. It is now of the view that the
23 view expressed in Amoco Four, which has been sustained
24 by the Fifth Circuit, better effectuates and is more
25 consonant with the purposes of the Act.

1 Pursuant to its decision in Amoco Four, the
2 Board which had originally amended the certification in
3 this case, reversed their decision and dismissed the
4 petition to amend the certification and the unfair labor
5 practice complaint that it issued based thereon. On
6 review to the Ninth Circuit, the Ninth Circuit set aside
7 the Board's determination, and that's why we're here.

8 To put the problem in perspective with a
9 little bit of a background, Section 9-C-1 of the Act
10 requires the Board to direct an election by secret
11 ballot and to certify the results thereof whenever it
12 finds that a question of representation has been raised,
13 as to whether the employees desire to select a union as
14 their bargaining representative or to oust or replace a
15 previously designated representative.

16 All unit employees have the right to
17 participate in a Board conducted election. Well
18 established rules and procedures ensure that employees
19 will have an opportunity to make a free choice after
20 hearing the views of all interested parties, including
21 the employer.

22 The union that is certified becomes the
23 bargaining representative for all unit members, and is
24 under a duty to represent them fairly whether they are
25 members of the union or not members of the union, as

1 this Court has often recognized.

2 Now, after a union has been certified, it
3 often undergoes organizational changes ranging from a
4 mere name change to things that are more substantial
5 such as affiliation with an international union which is
6 what we have here. The industrial stability, in the
7 Board's view, which the Act seeks to promote, would be
8 unnecessarily disturbed if every union organizational
9 adjustment were to warrant a redetermination of the
10 bargaining representatives through a Board conducted
11 election.

12 Accordingly, the Board has established a
13 procedure, which I have referred to earlier, whereby it
14 will permit a union that has affiliated or undergone
15 some other similar organic change to step into the shoes
16 of the old union without a Board election, provided that
17 certain requirements are met.

18 First, the Board requires that there be
19 reliable evidence that the change reflects the wishes of
20 the affected employees. And what the Board --

21 QUESTION: Mr. Come, may I inquire whether
22 it's your view that the Board will similarly require
23 vote by all employees if the union adopted some
24 controversial change to its own constitution or by-laws?

25 MR. COME: That -- putting the question the

1 other way, I believe the argument is made that an
2 affiliation decision is like a --

3 QUESTION: Well, without putting it another
4 way, could you answer the question?

5 MR. COME: I was attempting, Your Honor. The
6 answer would be, it would depend upon whether the change
7 affected the representational interests of the
8 employees. Now, such things as a change in union
9 officers, procedures for authorizing strikes, contract
10 ratifications --

11 QUESTION: Or dues increases?

12 MR. COME: Or dues increases, as this Court
13 recognized in Brown and particularly in your dissenting
14 opinion, Justice White, are things that --

15 QUESTION: It's still a dissent.

16 MR. COME: Well, I think that Justice
17 O'Connor's opinion also recognized the point, are
18 matters that the union can confine to union members, but
19 when it comes to selecting the bargaining
20 representative, that right is more absolute and the way
21 you come out on this issue, and I must acknowledge that
22 reasonable people can differ as to how you are going to
23 come out here, and the question is not whether another
24 answer would be reasonable or equally reasonable but
25 whether the Board is reasonable in --

1 QUESTION: But in the Board's calculations,
2 this particular change is not one that requires a Board
3 conducted election, is it?

4 MR. COME: Well, the Board is saying that --

5 QUESTION: The Board is saying that if the
6 union is going to hold an election it should let other
7 people vote?

8 MR. COME: The Board is saying that if we are
9 going to accept a union election for amending our
10 certification, we want to be satisfied that it has been
11 conducted with -- pursuant to democratic principles that
12 at least ensure that all of the affected employees have
13 had a fair opportunity --

14 QUESTION: This isn't one of the changes --
15 this affiliation wouldn't, under the Board's criteria,
16 wouldn't precipitate a new certification election?

17 MR. COME: It may --

18 QUESTION: Well, that isn't what the Board
19 says.

20 MR. COME: Well --

21 QUESTION: They would be satisfied with a
22 union election.

23 MR. COME: I started to say that there are two
24 requirements before the Board will amend a
25 certification. The first is to be satisfied that the

1 bargaining unit has had an opportunity to say that they
2 favor the change. The second requirement is that the
3 change is not so drastic in terms of reorganizing the
4 union that the reorganized union is really a totally
5 different union from the one that was originally
6 certified.

7 That's referred to as a break in continuity.
8 If you get a break in continuity, then the Board says,
9 that presents a question that is going to have to be
10 resolved.

11 QUESTION: Through certification?

12 MR. COME: Through certification, so that
13 we're only at step one of what is a -- the inquiry that
14 the Board will make before it determines that it can use
15 the short-cut procedure or whether it's got to go
16 through the long procedure.

17 I want to save the balance of my time for
18 rebuttal, but the point that I want to leave with is
19 that, as I started to say, we submit as I'm sure my
20 colleague will flesh out, that the Board's current
21 position is a reasonable one and consonant with the
22 policies of the Act and therefore should be sustained.

23 THE CHIEF JUSTICE: Mr. Hutcheson.

24 ORAL ARGUMENT OF MARK A. HUTCHESON

25 ON BEHALF OF PETITIONER

1 SEATTLE-FIRST NATIONAL BANK

2 MR. HUTCHESON: Mr. Chief Justice, and may it
3 please the Court:

4 As we see it, the issue in this case is
5 whether the Board acted rationally when it refused to
6 certify respondent as the exclusive bargaining agent for
7 all of the employees in the bargaining unit following an
8 affiliation election in which less than 30 percent of
9 that bargaining unit voted in favor of the affiliation
10 that led to respondent becoming a new local union, what
11 is now known as United Food and Commercial Workers.

12 QUESTION: Well, wouldn't it be more --
13 perhaps more accurate, it would seem to me, to inquire
14 whether the Board's basic rule applying to all such
15 cases, if that's the situation, is irrational?

16 MR. HUTCHESON: Yes, Your Honor. That would
17 be correct. Of course, I am today most concerned about
18 my client's case, and the facts in this case.

19 QUESTION: This wasn't an ad hoc decision on
20 the part of the Board.

21 MR. HUTCHESON: That's correct.

22 QUESTION: It was pursuant to a general policy
23 applying across the board.

24 MR. HUTCHESON: Yes, sir, and that policy has
25 been upheld by both the Fifth Circuit Court of Appeals

1 and a few months ago by the Seventh Circuit.

2 QUESTION: But the -- all Board lawmaking,
3 they don't make it by regulation, do they? They make it
4 by adjudication.

5 MR. HUTCHESON: More often than not --

6 QUESTION: -- the evidence of their policy is
7 this particular adjudication?

8 MR. HUTCHESON: Yes, Your Honor, but in this
9 case again, back in 1978 when the affiliation election
10 took place involving my client's employees, the Board
11 had adjudicated the same rule in a case called Jasper
12 Seating Company and the Board -- and the union in that
13 case, the union back in 1978 in this case knew it.

14 QUESTION: Jasper was a change in the Board
15 decision, wasn't it?

16 MR. HUTCHESON: Yes.

17 QUESTION: How long had it followed a
18 different policy before Jasper?

19 MR. HUTCHESON: The Court first took a look at
20 the so-called due process, or we would prefer to call
21 it, the employee consent issue, back in 1963.

22 QUESTION: '63.

23 MR. HUTCHESON: And that was -- the North
24 Electric case was another three to two decision, Your
25 Honor.

1 QUESTION: The other way?

2 MR. HUTCHESON: That went the other way. But
3 the times have changed, and that often occurs in the
4 field of industrial relations, and the Board has come to
5 the conclusion that an affiliation effects significant
6 changes, at least significant enough to put at risk the
7 potential that employees in the bargaining unit might
8 desire not to be represented by the affiliated union
9 following affiliation.

10 QUESTION: As I recall it, we have cases in
11 which we have sustained the Board's change of position
12 based on the experience in the real world.

13 MR. HUTCHESON: Yes, Your Honor. That's
14 correct, and we submit that this is one such case.

15 The point is, back in 1977 it should not have
16 been any surprise to this particular union that the
17 Board was going to expect an all-employee vote on this
18 issue, but that union chose to ignore that requirement
19 and now seeks the benefits of a Board certification, and
20 this is even though only 25 percent of the entire
21 bargaining unit has evidenced any desire to be
22 represented by the affiliated union.

23 That, of course, is --

24 QUESTION: Mr. Hutcheson, does the
25 Labor-Management Relations Act impose any requirement

1 that union members vote on such things as a decision to
2 strike, or to have a new collective bargaining agreement?

3 MR. HUTCHESON: No, Your Honor.

4 QUESTION: By your reasoning, because maybe a
5 majority of the members wouldn't favor a decision to
6 strike, perhaps the Board under your theory could then
7 require an election, either among union members or all
8 employees?

9 MR. HUTCHESON: No, Your Honor, because --

10 QUESTION: And yet, Congress has rejected
11 that, hasn't it?

12 MR. HUTCHESON: That's correct, and so has
13 this Court.

14 QUESTION: Well, isn't it quite similar here,
15 really?

16 MR. HUTCHESON: We submit that it is not,
17 because issues such as who the officers should be, what
18 the dues should be, whether there should be a strike,
19 whether the contract should be ratified, are all
20 decisions that go to the internal operation and affairs
21 of the delegated body, namely the union.

22 But, that is the different --

23 QUESTION: What about a constitutional or
24 by-law change of the union itself?

25 MR. HUTCHESON: In the vast majority of cases,

1 such a change would not go to the very identity of the
2 organization making that change. There is one decision,
3 one issue that Congress has been very clear about,
4 reserving to the employees, and that is the original
5 designation of the bargaining agent.

6 Once the voters vote for a union, they then
7 delegate to that union all those other decisions we were
8 talking about.

9 QUESTION: Except affiliation?

10 MR. HUTCHESON: Well, except questions that go
11 to the identity of the selected organization.

12 QUESTION: But the Board seems to agree that
13 this isn't a recertification issue in this case.

14 MR. HUTCHESON: They haven't really reached
15 that point yet, Your Honor. They are still at the
16 threshold inquiry.

17 QUESTION: Statute says you can have Board
18 supervised elections when you certify or recertify?

19 MR. HUTCHESON: Well, the statute,
20 interestingly enough, Your Honor, does not address
21 amended certifications at all. There appears to be no
22 statutory --

23 QUESTION: I know, but the Board says this is
24 not a recertification.

25 MR. HUTCHESON: Yet.

1 QUESTION: And yet, it refuses to -- it
2 requires something short of a recertification?

3 MR. HUTCHESON: What the Board is saying, that
4 before we undertake the utilization of our time and
5 energy and resources to conduct what is called a
6 continuity inquiry, we want to at least first check in
7 with the employees who are affected by this and see if
8 they've had an opportunity to express themselves on the
9 point.

10 You see, there are two -- this issue --

11 QUESTION: Where does it get us authority to
12 do that?

13 MR. HUTCHESON: In Sections 1, 7 and 9 in the
14 Act where Congress has clearly delegated to the Board
15 the duty and responsibility to insure that employees
16 have full freedom of association and the ability to
17 choose representatives of their choice, and it also has
18 the --

19 QUESTION: So, you derive it from the
20 certification section?

21 MR. HUTCHESON: Yes, and the Board has
22 certainly a legitimate interest in policing its own
23 certification procedures and insuring that they are not
24 undermined or circumvented by having affiliated
25 organizations --

1 QUESTION: Sort of a prophylactic rule?

2 MR. HUTCHESON: It's very much so, Your
3 Honor. We would agree that this is a prophylactic
4 measure, and if unions comply with it, which it is
5 simple to do, then we may never have to reach that
6 continuity inquiry because the Board recognizes that
7 this issue should be looked at through two sets of eyes,
8 the employees' eyes and the Board's eyes, and what
9 counts most is what the employees want.

10 The Act was passed, after all, to protect the
11 interests of employees, not unions. The Board says,
12 certainly we need to take a look too and determine
13 whether in our opinion there have been sufficient
14 substantial changes to justify a Board conducted
15 election, but we may in our opinion believe that a
16 particular affiliation is not very substantial, but
17 employees involved who are affected in the bargaining
18 unit may have completely different ideas.

19 So, Your Honor, particularly in a case where
20 over 30 percent -- I mean, over 60 percent of the
21 bargaining unit either voted against affiliation or
22 never had any opportunity to express themselves on the
23 issue at all, that the Board's rule, especially applied
24 to the facts of this case, is rational and is consistent
25 with the act, and it is entitled to deference.

1 What we cannot understand is, why not let the
2 employees vote? What harm would be done?

3 QUESTION: On that theory the Board could do
4 almost anything that was reasonable, or even --

5 MR. HUTCHESON: It's certainly rational and
6 consistent with the Act to grant to employees the right
7 to make sure that their representative, should they want
8 one, is selected by them. We also submit, Your Honor,
9 that the Board's rule and its position in this case is
10 consistent with another significant objective of the Act
11 which is to promote industrial stability.

12 Any time a party goes to the bargaining table,
13 it is very important that the other party on the other
14 side of the table has no doubt as to that agent's
15 authority to represent its principal. In this case the
16 principals are the employees, and in fact the agent is
17 the principal for even those minority of employees who
18 may not have voted for the union at the outset because
19 of the doctrine of exclusive representation.

20 And, if there is any doubt or uncertainty as
21 to the representative capacity of the union at the
22 bargaining table, then there is smaller odds than
23 normally would exist that an agreement can be
24 effectively reached. In fact, in this case my client
25 has every reason to really question whether Respondent

1 truly represents a majority of the employees, and in
2 fact may wonder whether it even should or can
3 legitimately enter into an agreement when there is such
4 a reason for questioning.

5 The Board's rule, unlike the court below's
6 decision, does much more to promote industrial stability
7 by removing --

8 QUESTION: So, would you have been arguing
9 bevore '78 or '77 that the Board's rule --

10 MR. HUCHESON: I would --

11 QUESTION: Sounds as though you would,
12 although I think on your own, based on your own
13 argument, you'd have to say either construction of the
14 Act is --

15 MR. HUTCHESON: I think I'd have to admit,
16 Your Honor, that having thoughtfully applied its view of
17 the law to the facts in any given case, that either
18 approach could be rational, and we believe that the
19 Board's current rule in this issue is rational.

20 THE CHIEF JUSTICE: Mr. Gold.

21 ORAL ARGUMENT OF LAURENCE GOLD, ESQ.

22 ON BEHALF OF THE RESPONDENTS

23 MR. GOLD: Mr. Chief Justice, and may it
24 please the Court:

25 I think it would be helpful at the outset to

1 note two aspects of this case. First of all, the
2 Board's present rule applies only where there is a
3 change in the organizational structure of a certified
4 bargaining representative that in the Board's judgment
5 is not sufficient to destroy the continuity of the
6 selected representative.

7 This is not a situation in which the Board has
8 determined that organization "A" no longer exists and
9 that organization "B" has come into being. Rather, the
10 Board's premise and the very reason it has determined
11 that its representation procedures as stated in Section
12 9 of the Act are not applicable is that there is one
13 organization and only one organization, an organization
14 which has stood the test of a representation election
15 and which continues.

16 Secondly, this is not a situation in which the
17 union's interest is to secure from the Board some
18 official recognition of its affiliation or its name
19 change. This is a situation in which the issue is
20 whether or not the employer as the Act states is to be
21 required to continue to recognize a continuing
22 organization which has been selected by the employees.

23 The scheme of the Act is not one which
24 provides for regular and periodic tests of employee
25 sentiment whenever the employer wishes to have that

1 test. Rather, the system is that where a union claims
2 to be the representative of a group of presently
3 unrepresented employees, the union can seek a Board
4 election or the employer, if the union asks the employer
5 to recognize the organization, can seek a Board election
6 and the Board, using public resources, thereupon
7 conducts an election.

8 That election's effects continue in force
9 unless one of two circumstances obtains. The first
10 circumstance is that a group of the represented
11 employees go to the Labor Board as they have a right to
12 do under Section 9-C-1-A and say, we do not wish to be
13 represented by this organization, and if certain
14 requisites, a sufficient number of employees, less than
15 the majority, I would add, make such a request then the
16 Board will hold what is called a decertification
17 election and the employees at that point can of their
18 own initiative and volition reject the continuing
19 effects of this first publicly held Board election.

20 Or, secondly, the Board has held that where an
21 employer has objective evidence that a majority no
22 longer support the organization that was selected, the
23 employer can precipitate a test of either -- of the
24 correctness of its view or another election by refusing
25 to bargain.

1 QUESTION: Well, you say, Mr. Gold, you're
2 saying what the system is and intimating that what the
3 Board has done now is contrary to what the system is.
4 And yet, what you're saying the system is, itself
5 evolved by Board decision --

6 MR. GOLD: No, I don't agree that any of the
7 points about the system that I've stated evolved by
8 Board decision. Obviously there's been Board
9 elaboration but each of the points I've made are those
10 stated in the Act.

11 There is a Section 9 and there is a Section
12 9-C-1 and the system for determining what the
13 prerequisites are for the employer having to recognize
14 the union are stated there.

15 QUESTION: What about the contract bar rule?

16 MR. GOLD: Well, that is Board evolved, and
17 there is no question here, either concerning a rule the
18 Board has issued or in this particular case, about the
19 contract bar.

20 The contract bar rule applies only where the
21 employees seek a redetermination..

22 QUESTION: Well, let me ask you this.

23 MR. GOLD: Yes.

24 QUESTION: I have a feeling from reading the
25 opinion of the majority of the court of appeals that

1 they were saying, this is not rational because there are
2 other Board decisions that cut the other way, and to me
3 that doesn't make much sense because the Board can
4 always modify, and if you're just talking about
5 modifying one Board decision by another it's hard to say
6 that it's irrational.

7 You're not arguing that point?

8 MR. GOLD: No, I don't believe that that is
9 the test of irrationality. I do believe that the
10 Board's decision here is irrational in the most basic
11 sense and in these terms. Its premise is based on two
12 irreconcilable propositions.

13 Proposition No. 1 is that there is one
14 organization which continues. Proposition No. 2 is that
15 an affiliation decision concerns the selection of a new
16 representative and that the Board either on a
17 prophylactic basis or some other basis they want to make
18 up can therefore regulate that decision.

19 And in strict terms of logic, or not even very
20 strict terms, in the most basic terms of logic, you
21 can't have both that premise and that conclusion.

22 QUESTION: Mr. Gold, you have to show, don't
23 you, that this rule is contrary to the Act?

24 MR. GOLD: I think I have to show one of two
25 things as I understand the law in this Court. I have to

1 show either that the decision is irrational and
2 unreasoned or that it is contrary to the Act.

3 In a case like Metropolitan Life, in --

4 QUESTION: So, your submission is not that
5 this is contrary to the Act?

6 MR. GOLD: It's both.

7 QUESTION: It is? Are you going to argue that
8 the Act --

9 MR. GOLD: Yes. I had started to argue why I
10 thought it was inconsistent with the Act but Justice
11 Rehnquist very fairly asked whether I was arguing that
12 the decision is irrational without getting into any of
13 the larger questions.

14 We do argue, and we emphasize that in our
15 judgment this decision is irrational in this basic
16 sense, that its premises are mutually inconsistent, and
17 therefore at the very least the matter has to go back to
18 the Board.

19 I would like to in that respect attempt to
20 elaborate a bit on the questions that Justice O'Connor
21 raised because the Board, while saying that there is one
22 organization here which has continuity, has based its
23 right to regulate on two propositions. The first is
24 that even though there's one entity and it has been
25 selected and it continues, affiliation decisions

1 involve, quote, "the selection of a bargaining
2 representative," of a new bargaining representative.

3 That, as I attempted to say to Justice
4 Rehnquist, seems to us to be totally irrational. You
5 can't say those two things at the same time.

6 Secondly, the Board says, but even if this
7 isn't a question concerning the selection of a new
8 bargaining representative or a different bargaining
9 representative, it is a decision that, quote,
10 "significantly affects the union's representation of the
11 bargaining unit."

12 That in our judgment is not open to attack on
13 the ground that it is inconsistent with the Board's
14 major premise, namely that there is continuity. But
15 it's inconsistent with the background I was attempting
16 to spell out.

17 The National Labor Relations Board is an
18 extremely important agency which has a central role in
19 labor-management relations. But Congress in its wisdom
20 has not given the Labor Board the authority to regulate
21 everything having to do with labor-management relations.

22 Rather, Congress has made the judgment, and we
23 spell this out in detail in part 2 of our brief, and
24 this Court has grappled with this issue a number of
25 times, that once the representative is selected, the

1 members will control the organization and that you have
2 to be a member to have the rights within the
3 organization to control its destiny.

4 The union cannot force you, as this Court said
5 last term, even once you've joined, to stay in the
6 union. The union cannot do anything once it is selected
7 as the representative to imperil your job rights or to
8 otherwise interfere with your rights as an employee, but
9 the individual who chooses not to join and be an active
10 member does not have a voice in the union.

11 That being so, and given the nature of
12 organizations, the proposition that the Labor Board can
13 give non-members a voice on any union decision that,
14 quote, "significantly affects the union's representation
15 of the bargaining unit," destroys the logic of the Act.

16 The union is going to be faced with one
17 decision after another. Who will be the officers? You
18 might have had someone in as an officer in the first
19 term of the union's existence who believed that the best
20 way to approach the employer was to get along with him.

21 That individual may run for union office and
22 be defeated by someone else who takes a completely
23 different view of how the union ought to approach the
24 employer, far more militantly.

25 Certainly that is a decision that

1 significantly affects the union's representation of the
2 bargaining unit, or I could use any of the other
3 examples that have already been raised. The union
4 changes its constitution to permit the Executive Board
5 to call a strike rather than have a membership vote, or
6 the other way around, or the union determines to
7 organize a new bargaining unit which will change the
8 balance of power within the union with regard to all the
9 further internal decisions.

10 QUESTION: On that point, Mr. Gold, the Board
11 has to decide basically how broadly to define a
12 particular bargaining unit, for instance whether craft
13 and unskilled workers are involved, and that's a Board
14 decision. And yet, in a globe-type election the Board
15 can conduct elections of employees, going to that issue.

16 Is that similar to this?

17 MR. GOLD: I don't think so, Your Honor.

18 QUESTION: That isn't expressly authorized in
19 the statute. So, how do you distinguish that?

20 MR. GOLD: That is part of -- the Board has
21 taken that action as part of its method for running
22 representation elections. Whether it's subject to
23 attack in those terms is a different question.

24 QUESTION: Well, can it make the same argument
25 here, that's part of our overall assistance in deciding

1 whether to call a recertification election?

2 MR. GOLD: I don't believe so. I take it that
3 we would have a completely different case if the Board
4 were to determine that whenever a certain change occurs,
5 the union will no longer be regarded as the organization
6 that was selected and there will be a second
7 representation election.

8 Then the Board would be acting within its
9 jurisdiction, and the question here would be whether or
10 not its determination were right or wrong. It seems to
11 me you'd have many of the same problems in such an
12 instance in terms of Congress's determination to leave
13 the conduct of the organization to itself, because you
14 would get into the question, suppose the Board were to
15 say it would be regarded as the organization that was
16 selected and there will be a second representation
17 election.

18 Then the Board would be acting within its
19 jurisdiction, and the question here would be whether or
20 not its determination were right or wrong. It seems to
21 me you'd have many of the same problems in such an
22 instance in terms of Congress's determination to leave
23 the conduct of the organization to itself because you
24 would get into the question, suppose the Board were to
25 say that every time there is an election that as

1 mandated by the Landrum-Griffin Act which requires
2 periodic election of officers, that changes the
3 organization and the employer can refuse to bargain.

4 That's what we're really talking about here.
5 When can the employer, rather than the employees, end
6 the effect of this first representation election? There
7 is no question raised by this case concerning the right
8 of the employees, if they don't like the way the union
9 and its members are evolving the organization, to go to
10 the Labor Board.

11 Justice Rehnquist asked about the contract bar
12 rule. Well, that just isn't present here. What the
13 Board does to the contract bar rule, when employees can
14 secure a second Board election, is not at issue here.

15 It's the employer, even though he didn't have
16 any evidence of employee dissatisfaction with this
17 change, who said, I know better. I know that this is a
18 new organization, that it doesn't have majority support,
19 even if there's no evidence of that among what the
20 employees are doing, and I am going to refuse to bargain.

21 And that's why this is, quite simply, a dagger
22 at our heart because unions can't stand still. These
23 changes are the natural -- are a natural part of life,
24 and if the Labor Board can create an extra statutory
25 procedure of this kind and say, you have to do this kind

1 of change in this way of the employer can stop
2 bargaining, have to elect your officers in a certain
3 way, if you're going to make an affiliation decision you
4 have to have votes bargaining unit by bargaining unit --

5 QUESTION: Mr. Gold, in practical terms what
6 the union came to the Board for was to change its name,
7 change the name of the certified union, and the Board
8 said, no, we won't. Is that right?

9 MR. GOLD: That was the form of it, but it was
10 against a --

11 QUESTION: Yes, they said, unless you have an
12 election we won't change your name? So, suppose the
13 union just doesn't have an election and -- can it retain
14 its old name?

15 MR. GOLD: It can.

16 QUESTION: On the certification?

17 MR. GOLD: It can, and in many cases, and this
18 is why I say, the practical issue here is whether the
19 Board can go outside its statutory jurisdiction and give
20 the employer a basis of refusing to bargain.

21 What happened here --

22 QUESTION: I know, but the employer -- did the
23 Board say they won't change their name and therefore
24 said that the employer doesn't have to bargain?

25 MR. GOLD: Yes. That's what happened here.

1 The employer --

2 QUESTION: But if the union comes to them and
3 says, look, we're the same old union, here's our name,
4 now bargain with us. Would the employer have to do it?

5 MR. GOLD: Not under the present Board rule.

6 QUESTION: Because, as a legal matter you are
7 now part of a larger unit?

8 MR. GOLD: Yes, because the Board says that
9 even though being part of a larger unit doesn't change
10 you, the employer can say, "I don't want to deal with
11 you."

12 QUESTION: So, what's involved here is a duty
13 to bargain issue?

14 MR. GOLD: Yes, absolutely. It -- the reason
15 unions go and ask for these changes of certification is
16 not that they care that these words are added. It is
17 that the Board holds that even though this change isn't
18 a change in the representative, and even though the
19 change doesn't create any objective indicia, that the
20 employees no longer wish to be represented by the union,
21 and even though no employee comes to the Board and says,
22 we want a decertification election, this change is
23 enough to permit --

24 QUESTION: In this case the Board has not said
25 that, the result of this is, if you don't hold your own

1 election we will?

2 MR. GOLD: Correct. Or it said, we won't hold
3 any election.

4 QUESTION: And it just says that the employer
5 just needn't bargain?

6 MR. GOLD: Correct. And it's --

7 QUESTION: And it's your position, if I
8 understand you correctly, is that when the paper is
9 filed saying, I want to change our name, it's at that
10 point the Board should make the continuity determination?

11 MR. GOLD: Yes.

12 QUESTION: That which would then determine
13 whether or not to hold a decertification election?

14 MR. GOLD: It would determine --

15 QUESTION: Either it is or it is not the same
16 organization?

17 MR. GOLD: Yes. The employees may never seek
18 a decertification, but --

19 QUESTION: Well, suppose they decide there's
20 really more than a name change here, it's a fundamental
21 change, it's too important to just approve, then what do
22 they do?

23 QUESTION: Election?

24 QUESTION: Then they would require election,
25 or would they?

1 MR. GOLD: No, they would simply at that point
2 dismiss the union's request to amend the certification,
3 but under the law at that point the employer would know
4 that he can say, you are a new organization, you have
5 never received a vote from the entire unit making you
6 the exclusive representative and therefore I don't have
7 to deal.

8 QUESTION: So, then the union would have to
9 petition for an election?

10 MR. GOLD: That's right, and putting aside the
11 question that I was discussing with Justice O'Connor,
12 whether the Board can say that any old change destroys
13 the effect of this first election, at least that way we
14 would be within the statutory framework.

15 Here the Board is trying to go in two
16 directions at once and that is why we say that this is a
17 failure at the first level, a failure of reasoned
18 decision making and a failure by which the Board moves
19 into an area that Congress simply did not give it.

20 The Board can hold representation elections.
21 It has the authority, if an employer says that
22 particular change is such that he won't bargain to
23 determine when there is a new organization, but to say
24 there is one organization and we are going to regulate
25 how that organization evolves is something that we

1 believe the Act does not permit the Board to do.

2 I'd like to emphasize two points about the
3 reason that these are differences of substance. The
4 Board determination that the union has to conduct its
5 affairs in a particular way may have absolutely nothing
6 to do with any fair evaluation of the type of events
7 which will cause a change of employee sentiment.

8 I certainly don't know of anything, the Board
9 hasn't attempted to tell us anything, about how
10 employees will react to a dues increase versus how they
11 will react to a change in affiliation versus how they
12 will react to a change in the constitution of the
13 union. In all our democratic affairs we understand that
14 there are people who can and normally do have a
15 commitment to the process which is greater than their
16 commitment to any particular issue.

17 You can have the hardest-fought political
18 campaign in this country and a vote of 51 or 50.2,
19 whatever President Kennedy won by, to 49.9, and that
20 doesn't mean that after the election that the 49 percent
21 reject our system of government.

22 What the change means is a very complex
23 inquiry and there's just no need in this situation,
24 given the way Congress structured the Act, to look to
25 the kinds of issues the Board is trying to inject itself

1 into as proxies. The employees have the right, if they
2 don't like the way the union and its members are
3 evolving the organization, to go to the Labor Board and
4 say, we want a decertification election.

5 What's really at issue here, and what cuts to
6 the heart of the Act, is that the Board is creating a
7 new procedure outside that, and most important, by doing
8 so giving the employer the -- rather than the employees.

9 The employer doesn't have to show anything
10 objective that shows that the employees, after
11 evaluating this change, want to get rid of this
12 continuing entity, under the Board law.

13 QUESTION: I suppose that you must argue then
14 that -- suppose the union held this kind of an election
15 and the majority voted against the affiliation. I
16 suppose you would say the Board still isn't -- shouldn't
17 be permitted to let the employer refuse to bargain? It
18 either should be a decertification election or nothing?

19 MR. GOLD: That's correct. It should either
20 be a decertification election or changes in the way the
21 employees are reacting to the union.

22 QUESTION: Yes, exactly, but as long as it
23 says that this affiliation isn't really very
24 fundamental, not in itself enough to hold an election?

25 MR. GOLD: That's correct.

1 QUESTION: I guess for the same reason, Mr.
2 Gold, you'd argue that this certainly doesn't fall
3 within the category of a change to adapt to changing
4 patterns of industrial life?

5 MR. GOLD: No. Indeed, the one constant in
6 industrial life in this country, and the one thing that
7 Congress was very, very well aware of when it came to
8 look at the Act in '47, has been the conflict between
9 differing groups of unions.

10 There was an AFL and there was a CIO. The
11 early cases concern unions bouncing back and forth.

12 QUESTION: Incidentally, Mr. Gold, may some
13 unions change affiliation as they attempted here,
14 without any vote of their membership?

15 MR. GOLD: Yes, there are many unions --

16 QUESTION: Well, does that require a
17 constitutional provision in the union constitution?

18 MR. GOLD: Yes. Most unions deal with this
19 question, one of the most basic ones so far as the
20 evolution of the organization is concerned, in their
21 constitution and normally when you get national
22 organizations you don't have every member voting, as you
23 will notice, and you can't.

24 We wouldn't be able to do it, as you will
25 notice. This organization affiliated --

1 QUESTION: So, this is by action of the Board
2 of Trustees of the union?

3 MR. GOLD: Right, but only after the
4 membership has agreed in the constitution.

5 Thank you very much.

6 THE CHIEF JUSTICE: Mr. Come.

7 ORAL ARGUMENT OF NORTON J. COME, ESQ.

8 ON BEHALF OF THE PETITIONER -- REBUTTAL

9 MR. COME: The inconsistency that Mr. Gold has
10 posed is illusory in the sense that as I pointed out
11 earlier, the Board has not made a continuity
12 determination in this case yet. It says that under its
13 position, it will not reach that lengthy determination
14 unless there is first some evidence that the affected
15 employees want the change.

16 The question is whether the Board has
17 authority and is reasonable in imposing that threshold
18 requirement. We submit that it can do so under the
19 statute as an incident of its general authority to
20 police its certifications.

21 As the cases pointed out in footnote 11 of the
22 Board's brief on page 17 show, there are a variety of
23 other situations in which the Board, even though it is
24 not specifically spelled out in the statute but as an
25 incident of administering Section 9-A and B of the

1 statute, will conduct elections and inquiries to
2 determine whether or not its certification should be
3 revoked or amended or modified.

4 It may do so to clarify the scope of a
5 bargaining unit, as Justice O'Connor has pointed out.
6 It may do so as in the Hughes Tool case, to revoke a
7 certification where it finds that the union has been
8 guilty of practicing racial discrimination.

9 Here, similarly, it is the Board, we submit,
10 has the discretion and the power to determine the
11 circumstances under which it is going to amend the
12 certification and change the designation of the
13 certified bargaining representative. The union that was
14 certified here was an independent union. The employees
15 at this installation had only recently in a Board
16 election voted against affiliation with an international
17 union before the independent was certified.

18 The union then comes back and asks for the
19 amendment. We submit that the Board was reasonable in
20 imposing this threshold, democratic requirement for
21 amending the certification.

22 Thank you.

23 THE CHIEF JUSTICE: Thank you, gentlemen. The
24 case is submitted.

25 (Whereupon, at 11:54 o'clock a.m., the case in

1 the 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:

#84-1493-NATIONAL LABOR RELATIONS BOARD, Petitioner v. FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, ETC., ET AL; AND

#84-1509-SEATTLE-FIRST NATIONAL BANK, Petitioner, v. FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, ETC., ET AL.

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

BY Paul A. Richardson

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