

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1503

TITLE CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO.
ET AL., Petitioners V. ANNIE LEE HUDSON, ET AL.

PLACE Washington, D. C.

DATE December 2, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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CHICAGO TEACHERS UNION, LOCAL :
NO. 1, AFT, AFL-CIO, ET AL., : No. 84-1503
Petitioners :
v. :
ANNIE LEE HUDSON, ET AL. :
- - - - -x

Washington, D.C.
Monday, December 2, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:03 o'clock a.m.

APPEARANCES:
LAURENCE A. GOLD, ESQ., Washington, D.C.; on behalf
of Petitioners.
EDWIN VIEIRA, JR., ESQ., Manassas, Virginia;
on behalf of Respondent.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

LAURENCE A. GOLD, ESQ.,

on behalf of the Petitioners

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EDWIN VIEIRA, JR., ESQ.,

on behalf of the Respondents

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1 Railway Labor Act, of specifying which of the union's
2 costs are chargeable to such objectors and which are
3 not.

4 In this case, the Seventh Circuit confined
5 itself to a procedural issue, and indeed the Seventh
6 Circuit remarked in its opinion that the plaintiffs
7 below, the Respondents in this Court, had predicated
8 their challenge on procedural due process issues. The
9 Seventh Circuit ruled that a system such as the one
10 here, whereby the union calculates and, as the district
11 court's uncontested findings state, carefully documents
12 the portion of union dues that represents the -- and
13 here I quote the state statutory language -- "the cost
14 of the collective bargaining process and contract
15 administration," and provides an advance reduction from
16 regular union dues based on that calculation, and that
17 furthermore places the payments of objectors who pay in
18 this reduced amount into an interest-bearing escrow
19 account pending the objector's use of either an internal
20 review proceeding within the union which ends before an
21 arbitrator selected from a list maintained by the state
22 by the union, or through judicial review, does not
23 accord the objector due process of law.

24 In other words, the court held that, even
25 though the union makes the calculation and provides an

1 advanced reduction and backs up that advanced reduction
2 by an interest-bearing escrow account into which is
3 placed the money of objectors while they pursue their
4 challenges to the union's calculation, the objector is
5 not given due process of law.

6 Now --

7 QUESTION: Would you say the Court of Appeals
8 said that, even though the substantive result reached
9 was right, there still was a procedural component that
10 was separate from that?

11 MR. GOLD: Yes, indeed, Justice Rehnquist.
12 The Seventh Circuit said that it needn't get into the
13 substantive issue, that it could assume that the
14 calculation was correct and that not a penny of the
15 objector's money would be spent for an impermissible
16 purpose, and nonetheless there would be a constitutional
17 violation in this case.

18 QUESTION: Well, Mr. Gold, I thought that the
19 Court of Appeals did indicate, though, that some -- give
20 some opinion as to what could be included in the share
21 that the employee would have to pay?

22 MR. GOLD: The Court of Appeals noted in
23 passing that the objector's rights included not only a
24 right not to pay for political and ideological activity,
25 but also a right not to pay for any activity which is

1 not germane to --

2 QUESTION: That's pretty substantive, isn't
3 it?

4 MR. GOLD: It is substantive, but it isn't
5 presented in this case, and the court indicated as much,
6 because the state statute --

7 QUESTION: Don't you think that was just
8 gratuitous dicta?

9 MR. GOLD: I would hate to use the word
10 "gratuitous," but I certainly believe that the way the
11 Seventh Circuit approached the case, it was dictum, not
12 only because of what it --

13 QUESTION: But some arbitrator, if this
14 procedure holds, would probably follow it, wouldn't he?

15 MR. GOLD: Hopefully, the arbitrator wouldn't
16 be faced with that because the decision ought not and we
17 hope will not --

18 QUESTION: Be affirmed.

19 MR. GOLD: -- hold.

20 But the Seventh Circuit's position as it
21 articulated it is that a procedure with the safeguards
22 I've just outlined nonetheless works a deprivation of
23 the objector's liberty interest, which that court noted
24 are akin to or determined by the objector's right of
25 non-association.

1 And it is our position that that ruling of the
2 Seventh Circuit is erroneous, that it is contrary to the
3 method of approach this Court stated in Abood versus the
4 Detroit Federation of Teachers in 431 U.S., which is the
5 other public sector agency shop case in this Court, and
6 flatly contrary to what the Court had to say in Ellis
7 versus Railway Clerks, a 1984 decision, albeit one
8 arising under the Railway Labor Act.

9 In determining what due process is required in
10 this case, and as I think the Court of Appeals
11 recognized, the beginning point has to be the nature of
12 the objector's liberty interest, the nature of his right
13 of non-association. And this Court has spoken to the
14 nature of that interest and that right in the Abood
15 case.

16 And in Abood -- and this was foreshadowed in
17 earlier cases as well -- the Court defined the
18 objector's interest and his right as not being required
19 to provide compulsory subsidation of union ideological
20 and political activity not related to collective
21 bargaining.

22 And the Court has at every point phrased its
23 holdings as being that the First Amendment does limit
24 the uses to which the union can put funds obtained from
25 dissenting employees. That was the phrase used in the

1 most recent case, in the Ellis case.

2 And the Court throughout has made it plain
3 that the union shop and the agency shop concepts
4 themselves are constitutional and that, as the Court put
5 it in one of the earliest cases, that the mere
6 collection of an amount equal to or a proportion of
7 union dues does not work any unconstitutional
8 deprivation of the objector's rights, that because of
9 the weighty interests of the Government in industrial
10 peace and the governmental determination that equal
11 support of all employees in the bargaining unit of the
12 exclusive representative, insofar as the exclusive
13 representative is engaging in activities that are
14 related to or germane to its functions as an exclusive
15 representative --

16 QUESTION: Mr. Gold, may I inquire of you. I
17 suppose the Court has recognized a First Amendment
18 interest in non-members for use of their money for
19 political purposes. And normally we would approach the
20 problem by saying that there can be a burden placed on
21 them, all right. They'll have to contribute, but it
22 should be by the least burdensome method.

23 Now, would it be a less burdensome method here
24 to have an independent determination ahead of time of
25 the amount that should be withheld, as opposed to the

1 method used here, which is placing it in escrow and then
2 giving the non-member a right to challenge it later?
3 Would it be in your view possibly less burdensome if
4 there were some mechanism for an independent
5 determination ahead of time?

6 MR. GOLD: That approach would be less
7 burdensome on the individual, but --

8 QUESTION: On the First Amendment right.

9 MR. GOLD: I don't believe that it is fair to
10 say that it would be less burdensome on the First
11 Amendment right than the escrow system, because the
12 First Amendment right is the right not to subsidize a
13 First Amendment activity with which one disagrees.
14 There is another aspect to this case, albeit one not
15 treated below, which the Respondents' brief is devoted
16 to, namely a claim that there's a burden on the
17 individual's property right, the right to uncontrolled
18 dominion of the \$16 and I think it's 84 cents per month
19 that is in issue here.

20 But I don't think that the requirement that
21 the individual paid the money into escrow can properly
22 be said to be a burden on that individual's First
23 Amendment rights. The burden comes if the individual's
24 money is appropriated to the union's activities.

25 QUESTION: Well, exactly. And so perhaps an

1 independent determination at the outset of what amount
2 ought to be withheld is the most effective way and the
3 least burdensome way of meeting that obligation.

4 MR. GOLD: It isn't -- in our view --

5 QUESTION: There would still be the question
6 of whether the individual has to pay anything while that
7 determination goes on. And if he has to pay anything,
8 what would it be? If he pays the full amount that the
9 union tells him to pay, you haven't solved a great
10 deal.

11 MR. GOLD: You've solved several different --

12 QUESTION: Not pending the decision as to how
13 much you should pay.

14 MR. GOLD: Justice White, you've solved
15 several interests. The Government's interest is that
16 everybody in the bargaining unit pay the amount required
17 by the union month-in, month-out, to meet its collective
18 bargaining and representational responsibilities. If
19 there has to be a determination before the individual
20 pays anything in --

21 QUESTION: Anything at all?

22 MR. GOLD: Yes. If that is the requirement,
23 then all the governmental interests are heavily and
24 adversely impacted during the time the determination --

25 QUESTION: And the union's interests.

1 MR. GOLD: That's right. And it is -- the
2 governmental interest is to permit the union to fulfil
3 the functions in the industrial relations system that
4 the Government has laid out.

5 So if the individual, simply by making an
6 objection, can trigger a prior hearing, then all the
7 interests on the other side of the equation are
8 sacrificed.

9 QUESTION: And you may never be able to
10 recover it, because you may not be able to go back, go
11 back and collect what you --

12 MR. GOLD: That's right, and that's why, as I
13 was going to note, in Abood the Court said that the
14 proper approach here was to prevent compulsory
15 subsidization of ideological activity by employees who
16 object thereto, while not restricting the union's
17 ability to require every employee to contribute to the
18 costs of collective bargaining activities.

19 And in furtherance --

20 QUESTION: Let me just ask at this point,
21 doesn't the escrow, which you seem to be satisfied with,
22 doesn't that also frustrate the governmental interest
23 during the period required to make the determination?

24 MR. GOLD: It does in part. In the conclusion
25 of our brief, we note that at least an approach where

1 there is a prior calculation and once there is
2 experience, an escrow of a limited amount based on the
3 experience, one that will give a cushion, while
4 permitting the union to use the money, the percentage of
5 money, that in past years had been devoted to properly
6 chargeable activities, strikes the best balance between
7 the competing First Amendment rights on both sides of
8 the equation and the Government interest.

9 QUESTION: Do you agree that the objector has
10 the constitutional right to have the determination of
11 the fair, whatever the allocation may be, at some point
12 be made by an independent decisionmaker?

13 MR. GOLD: We do.

14 QUESTION: But you take the position that that
15 could be just the state judicial system, that if you put
16 everything in escrow and then waited whatever time it
17 takes the Illinois courts to decide the case, that would
18 be --

19 MR. GOLD: Yes, that here, as in any other
20 area that I know of where someone is making a First
21 Amendment claim, if the states -- if the state provides
22 an access to the judicial system --

23 QUESTION: Say the Illinois courts take five
24 or six years to run the route of going through the
25 circuit court, the court of appeals, and all the rest,

1 and all the money sits in escrow for six years. Every
2 year you have to do this. Would that still be
3 constitutional?

4 MR. GOLD: As the district court pointed out,
5 at the beginning of the process there is going to be
6 some fair room for dispute about whether this category
7 is chargeable or another category is not. Thereafter,
8 the likelihood of the type of protracted proceeding
9 you're talking about is at least less likely.

10 But I do have to point out that if the money
11 is in escrow or if any substantial part of it is in
12 escrow, both sides are paying a price. The majority has
13 First Amendment rights, too. There are governmental
14 interests quite aside from those First Amendment rights
15 on the majority's side.

16 While the money is sitting in escrow, those
17 rights are being limited in the same way that the
18 objector's rights are.

19 QUESTION: Would you say that system would be
20 constitutionally sufficient even if the union provided
21 no internal mechanism whatsoever for review, if they
22 just off the top of their heads said, we'll take 98
23 percent this year, we won't have any review, you just
24 have to sue us in court and we'll hold all the money in
25 escrow?

1 Is there any constitutional obligation to do
2 anything except respond to litigation and hold money in
3 escrow?

4 MR. GOLD: I would think that so long as the
5 union on objection holds the money in escrow, both the
6 objector's liberty interests and the objector's property
7 interests are fairly protected.

8 Let me say in that regard that we are not
9 dealing here with the situation in which the state says
10 to the union, you can take from the individual whatever
11 amount strikes you. The state has placed a limit on
12 what the union can seek, both by saying that it cannot
13 be more than the union dues and by setting out a
14 definition of what it is, what type of costs there are
15 that the union can charge the objector for.

16 In those terms, you have the state limiting in
17 very sharp degree the area that is open to fair dispute,
18 and that area, as the district court pointed out, will
19 continue to narrow once we know more about what the
20 nature of the law is here.

21 QUESTION: Mr. Gold, at the beginning of this
22 the question that the Justice gave you said that you
23 pulled this off the top of your head, and you agreed to
24 that, do you?

25 MR. GOLD: No, I was going to finish my

1 answer, and I thank you, Justice Marshall. I was going
2 to say that, if an objector sued and was able to prove
3 that the union in Illinois made no effort to limit the
4 amount sought to that which the statute permits, namely
5 the proportionate share based on the cost of the
6 collective bargaining process and contract
7 administration -- that's the state's statutory
8 standard.

9 If an objector proved that, I would think that
10 he would be entitled to an injunction against the
11 collection of some or all of what was being sought. The
12 union's obligation is to seek and to certify, as it did
13 here, to the employer making the deduction no more than
14 the state permits.

15 The reason that a union that does that is not
16 violating any of the due process rights of the
17 individual, at least so long as the union's calculation
18 is backed up by a reasonable escrow --

19 QUESTION: Mr. Gold.

20 MR. GOLD: Yes.

21 QUESTION: Excuse me for interrupting, but it
22 would help me if you would clarify a response you made
23 to Justice Stevens, that you agreed that there must be
24 an independent determination of an issue that may be
25 raised by a non-union member as to the use of his or her

1 dues.

2 What is the present independent agent to which
3 the non-member could take his or her complaint?

4 MR. GOLD: The courts of the state of
5 Illinois.

6 QUESTION: But there's nothing -- well, I
7 suppose they could go to arbitration and grievance
8 procedure, but you don't suggest that's independent?

9 MR. GOLD: I'm not arguing here that the
10 union's internal system is one which can replace the
11 individual's right to go to court.

12 QUESTION: Would there be any duty to exhaust
13 that possible remedy before going to court?

14 MR. GOLD: That would seem to us to be in the
15 first instance a question of state law. There are sound
16 arguments, at least so long as the union's process is
17 expeditious -- and the district court noted here that it
18 can move in 75 days -- there are sound considerations
19 that might lead the state court to say that the case
20 will be more rationally litigated if this process has
21 been used.

22 QUESTION: Well, what if the Illinois courts
23 give the same sort of deference to an arbitrator's
24 decision that the federal courts under the Labor Act
25 do? Would that still amount to access to a judicial

1 officer for purposes of your answer?

2 MR. GOLD: I would have to say that I think a
3 substantial question would be raised if the objectors
4 could not get a de novo determination, at least on the
5 category questions, namely what categories of union
6 activity is chargeable. And we make it plain that we
7 believe that objectors do have that right.

8 The issue here is really whether the rights
9 that the objector has, given the nature of this liberty
10 interest, which is not to subsidize and which is
11 protected by the escrow feature and the right not to
12 have property taken without due process, which we think
13 is protected by the limit, the outer limit that the
14 state puts on the amount that can be taken, and which,
15 when you run through the Eldridge test, shows that there
16 is no denial of --

17 QUESTION: Of course, the state's outer limit
18 isn't much of a limit. It's 100 percent of union dues,
19 and by hypothesis some of that percentage is used for
20 non-union purposes.

21 MR. GOLD: No, I don't believe that by
22 hypothesis some of it is used for non-collective
23 bargaining purposes. Each union differs in the way it
24 approaches its task.

25 This union, for example, has a completely

1 separate voluntary fund from which it pays for all --

2 QUESTION: Oh, I see.

3 MR. GOLD: -- political activities.

4 QUESTION: Right, I see.

5 MR. GOLD: And the union has no organizing
6 expenses because it has one employer and that's the only
7 employer it deals with.

8 QUESTION: Well, Mr. Gold, how do you differ
9 with what the Court of Appeals held?

10 MR. GOLD: We differ with the Court of Appeals
11 in validating this system, which provides every
12 protection that this Court in Ellis said is required.

13 QUESTION: What did it invalidate?

14 MR. GOLD: It invalidated a system whereby the
15 union makes this initial calculation and certification
16 and provides escrow, a union escrow system. It said
17 that's not good enough.

18 QUESTION: But didn't the union just put in
19 the escrow arrangement after the case started?

20 MR. GOLD: It did indeed, but --

21 QUESTION: But did the Court of Appeals
22 invalidate that?

23 MR. GOLD: Yes.

24 QUESTION: But it didn't give it much
25 attention?

1 MR. GOLD: Well, no, it said it wasn't -- we
2 don't believe that the escrow system changes our
3 conclusion, it said. It said the escrow system was
4 insufficient because it was under the union's control
5 and the union created it.

6 QUESTION: But you don't -- you wouldn't say
7 that -- did you answer Justice Stevens that you think
8 the escrow arrangement is constitutionally required?

9 MR. GOLD: I answered Justice Stevens by
10 saying that where the union makes a prior calculation
11 that it is our judgment that some cushion has to be
12 provided to take care of the eventualities of what the
13 union is actually going to do.

14 QUESTION: Well, that may be so, but suppose
15 the union purported to establish a cushion. Do you
16 think that there has to be an escrow arrangement to make
17 it constitutional?

18 MR. GOLD: No. It seems to us that in Ellis
19 this Court said that there are two different
20 alternatives.

21 QUESTION: That's right.

22 MR. GOLD: All we're saying is that we
23 approach -- this union approached this matter in a
24 suspenders and belt style. It has both a prior
25 reduction and an escrow.

1 QUESTION: But as I understand you, maybe I'm
2 wrong, Mr. Gold, but I think you in effect have not
3 challenged the analysis of the Court of Appeals if there
4 were no escrow agreement. It seems to me you have more
5 or less assumed there must be either an independent
6 decisionmaker or an escrow if the objector's money is to
7 be used pending the determination of how much should be
8 used.

9 Say we had no escrow in this case. Would you
10 still challenge the Court of Appeals' analysis then?

11 MR. GOLD: If there were no escrow arrangement
12 and all there was was the union's initial sole
13 determination of the amount due without any background
14 of prior experience or prior decisions, we wouldn't
15 challenge the Court of Appeals' determination.

16 But this is a first -- I want to emphasize in
17 answering that this is a first, what I would call and
18 what the district court called a first year case, a case
19 where there isn't prior experience.

20 QUESTION: Well, I understand that the
21 practicality, I suppose, is because of the problem of
22 collecting from people who don't pay their share, is
23 that you have to make the 95 percent. You have to have
24 a figure that you're going to be reasonably sure you're
25 going to get your money from the objectors.

1 MR. GOLD: Well, that's right. The
2 governmental interests here are that if you don't -- and
3 the union interests are -- that if you don't get the
4 money month-in, month-out, in the same way you're
5 getting it from members, A, all the friction created by
6 the free rider syndrome, which is what the Government is
7 seeking to alleviate, continues month-in and month-out;
8 and secondly, all the costs of collection are increased
9 enormously, particularly if the individual leaves or if
10 you have to sue to get a big chunk of money way after
11 the fact.

12 QUESTION: All of which -- I don't mean to
13 retrace ground, but all of which comes back to a
14 question Justice O'Connor asked earlier. Not only might
15 it be in the objector's interest, but it may also be in
16 the union's interest to have an independent audit or
17 whatever you want to call it as early as possible.

18 MR. GOLD: Well, I don't think that anybody
19 looking at this from the union perspective is interested
20 in delay. The question is whether the individual can
21 say I object and by doing so set a train in motion
22 whereby he doesn't pay at all for weeks, months, or
23 years.

24 And we say nothing in the Constitution, no
25 interest that the individual has, can possibly justify

1 that.

2 CHIEF JUSTICE BURGER: Mr. Vieira.

3 ORAL ARGUMENT OF EDWIN VIEIRA, JR.

4 ON BEHALF OF RESPONDENTS

5 MR. VIEIRA: Thank you, Mr. Chief Justice, and
6 may it please the Court:

7 I came here and I remain somewhat perplexed in
8 attempting to determine for myself what the utility is
9 of viewing this case as a First Amendment case that
10 involves the uses of fees that a union is collecting.
11 We're not dealing at this stage with uses, except in an
12 abstract definitional sense that they are entitled to
13 money only that will be eventually used for collective
14 bargaining.

15 And no money here has been used because, as
16 Justice White suggested a moment ago, during the course
17 of litigation the union introduced an escrow procedure
18 where it segregated the moneys in a separate account.
19 So all of this First Amendment analysis and discussion
20 of Abood and such cases seemed to me to be beside the
21 point.

22 QUESTION: Well, the Court of Appeals didn't
23 think it was beside the point.

24 MR. VIEIRA: Well, I think the Court of
25 Appeals has --

1 QUESTION: Well, are you defending the Court
2 of Appeals' opinion or not?

3 MR. VIEIRA: Yes, Your Honor. But I think
4 they --

5 QUESTION: Are you?

6 MR. VIEIRA: Yes, Your Honor. They've
7 needlessly complicated this problem, and let me explain
8 why. I'll take a minute to explain why.

9 QUESTION: Do you defend needless
10 complications?

11 MR. VIEIRA: Well, I wasn't responsible for
12 writing the opinion.

13 QUESTION: Sometimes judges talk too much?

14 MR. VIEIRA: Well, it seems to me this case
15 could have been approached simply by saying, money is
16 being taken for legitimate purpose; is the procedure
17 involved in the taking constitutional?

18 What does the Seventh Circuit tell us? It
19 says, well, there's a liberty interest involved in the
20 taking of this money because the money will be used by a
21 union and therefore it arguably infringes freedom of
22 association to take it, but that liberty interest is not
23 unconstitutionally infringed, per Aboud.

24 Fine. You can deprive a person of liberty and
25 of property and even of his life, if you give him due

1 process of law. That's the question: Is this money
2 that eventually causes a justifiable infringement on
3 freedom of association being taken with due process of
4 law?

5 And I think the very simple answer -- and
6 that's why I'm perplexed -- the very simple answer is
7 there is no constitutional procedure in this case.
8 There's no procedure that meets any standard, it seems
9 to me, that this Court has ever suggested is applicable,
10 except in some extraordinary emergency situations, which
11 we do not have here.

12 QUESTION: Even if -- and I take it then we
13 should just -- you suggest we just analyze it as a
14 property case?

15 MR. VIEIRA: Well, I think you can do that
16 without ever getting into any --

17 QUESTION: Well, you say the First Amendment
18 issues are all beside the point, so it's a property
19 case.

20 QUESTION: Well, then you certainly don't need
21 a neutral decisionmaker to make the decisions if it's
22 just a property case, I would think.

23 MR. VIEIRA: Well, I think you need the
24 neutral decisionmaker. You need the governmental
25 decisionmaker to justify the taking. It's the

1 Government that's taking his money.

2 It's the Board of Education that's deducting
3 these fees from the salaries of the employees simply on
4 the say-so of the union. And I think before that step
5 is taken, some decisionmaker has to have some type of
6 factual presentation at least at the level of probable
7 cause, at least at the level of rationality, to suggest
8 that this figure that's being given has some connection
9 with the reality of the collective bargaining activities
10 of the union.

11 Now, in the first year, I agree with Mr. Gold,
12 it's a more difficult problem because we don't know
13 precisely what the union is doing. In fact, in this
14 case we don't know anything about what the union is
15 doing.

16 QUESTION: Well, Mr. Vieira, I have a
17 difficult time understanding how there could be a due
18 process issue here that's independent of the First
19 Amendment concern. And it would certainly seem to me
20 that whatever procedures are required for determining
21 the amount to be withheld are required by the First
22 Amendment itself and not the due process clause.

23 I really don't understand your analysis at
24 all.

25 MR. VIEIRA: Well, the First Amendment comes

1 into this, Justice O'Connor, if we look at the use.
2 That is, we obviously want to prevent the union from
3 getting control of the money to expend that money until
4 we determine that that money will be spent only on First
5 Amendment allowed activity.

6 We never want the union to obtain control of
7 any money --

8 QUESTION: That's the whole underlying purpose
9 of the protections in the scheme that we're reviewing.
10 So it's a little hard to separate it out.

11 MR. VIEIRA: But what I'm saying is I don't
12 think that that question would be relevant to the taking
13 issue. That is, if this money were being taken to pay
14 some other debt that these people owed the union, not a
15 payment that implicated associational interests, we'd
16 still be worried about the collection procedure. We're
17 going to be worried about this collection procedure in
18 any kind of a creditor-debtor framework.

19 There's a secondary problem that not only are
20 we worried about the initial taking, but we're also
21 worried about the transfer to the union. Now, what I'm
22 saying in this case is the union has precluded any
23 difficulty with the use question through an escrow, and
24 I think a procedure -- and now we're talking about a
25 procedure that the state will have to devise. I don't

1 think it's for this Court to tell us what that procedure
2 should be in every permutation and combination.

3 It's for the state also to devise a procedure
4 whereby the union does not obtain possession, is not
5 allowed to use that money, until there's a final
6 determination that precludes First Amendment
7 violations.

8 But what I'm getting at here is, at this stage
9 of the case we have a procedural due process problem
10 pure and simple because the taking is effective without
11 any submission to any governmental agency of a rational
12 basis that the figure the union gives has some
13 connection with its real collective bargaining costs.

14 What they do is they take the union dues, an
15 arbitrary figure, no necessary connection with the
16 collective bargaining there, they subtract what they
17 admit they're not entitled to have, and they say: Aha,
18 the answer is collective bargaining costs. That's not
19 rational on its face.

20 QUESTION: You, I take it you are saying that
21 you must have a prior hearing or some prior
22 participation in the procedure before they could take a
23 nickel?

24 MR. VIEIRA: I think there has to be some
25 pre-taking process. Now, we use the word "hearing."

1 That word is used in the brief, but I think it's used in
2 an extensive sense.

3 QUESTION: I suppose you would say that, until
4 that -- until you have exhausted all of your rights,
5 they can't take a nickel. If you wanted to take it to
6 court, you could keep them from taking a nickel from you
7 until the court procedures are through?

8 MR. VIEIRA: No, in theory not necessarily,
9 Your Honor.

10 QUESTION: Well, not necessarily. I would
11 suppose that that must be the logical bottom line for
12 you.

13 MR. VIEIRA: No, I don't think so, Your
14 Honor. I mean, look at a case --

15 QUESTION: Well, they have some internal union
16 procedures in which non-consenting employees can
17 participate and those procedures are exhausted, and you
18 just disagree wholly with whatever the decision is.

19 MR. VIEIRA: Oh, I don't think these employees
20 can be required to exhaust any internal union procedures
21 whatsoever. I don't think the union procedures have
22 anything to do with this case.

23 The union is coming to the Government saying:
24 Take these people's property, we have a claim of right
25 to it; we're not going to tell you the factual basis for

1 that claim; we're going to give you some non-rational
2 facts over here that have nothing whatsoever to do with
3 the final figures.

4 QUESTION: Well, then you say that you should
5 be able to go to court and have, pending trial, you
6 should have an injunction against collecting any money?

7 MR. VIEIRA: Well, I don't think in this case
8 that it's the burden on the employee to have to initiate
9 a court suit. I think that the procedure that should be
10 followed in broad outline is that the union should be
11 required to come to some agency of the state -- not
12 saying it's a court; it could be an administrative
13 agency, a labor board, what have you; we just don't have
14 a procedure down there in Illinois -- come to some
15 agency of the state with some certifiable facts as to
16 what the collective bargaining costs are.

17 At that stage, if that agency determines as a
18 factual matter that there's a need for these collections
19 prior to a final judicial determination, prior to the
20 exhaustion of all of the legal remedies, fine. We don't
21 have any determination of that at this stage. We don't
22 have any submission of any rational --

23 QUESTION: And until that agency decided, they
24 couldn't collect anything?

25 MR. VIEIRA: That's right. But I think that

1 that could be done relatively quickly. Certainly in
2 later years it could be, after that agency had had some
3 experience dealing with this particular union or other
4 particular unions as to what their cost structure was,
5 their organizational structure was.

6 QUESTION: You're really opposed to paying
7 dues at all, aren't you?

8 MR. VIEIRA: Excuse me, Your Honor?

9 QUESTION: Your clients are really opposed to
10 paying dues at all?

11 MR. VIEIRA: Well, I don't know particularly
12 what the personal preference of my clients are, but
13 they're required to pay these dues under Aboud to the
14 extent that the dues meet collective bargaining costs.

15 QUESTION: Well, you said that the union
16 should have to go to court before collecting any dues?

17 MR. VIEIRA: Who should have to go, Your
18 Honor?

19 QUESTION: The union.

20 MR. VIEIRA: Oh, no, no. The union should
21 have to come to some governmental agent.

22 QUESTION: In order to collect dues?

23 MR. VIEIRA: In order to begin this collection
24 process.

25 QUESTION: What's that?

1 MR. VIEIRA: In order to begin this collection
2 process, yes, they should have to --

3 QUESTION: In order to collect all dues? All
4 dues or some dues?

5 MR. VIEIRA: To collect the fee to which
6 they're entitled under this statute. They don't have to
7 go to an agency to collect dues from their own members.

8 QUESTION: That's what I thought you were
9 saying.

10 MR. VIEIRA: No, not from their own members,
11 only from their non-members.

12 QUESTION: Mr. Vieira, supposing they went to
13 the state legislature in springfield and said, we have
14 an expense -- a free rider problem, we have an expense
15 of representing non-members as well as members, and we
16 can demonstrate to the legislature that substantially
17 all of the dues is required for this duty, an amount
18 roughly equal to that, and the legislature, say it made
19 an express finding -- they didn't here -- that we think
20 generally speaking the dues is a fair summary of what
21 the costs are involved, so we'll make an initial payment
22 of dues, and that's just your contribution, subject to
23 some right to recoup if it's misspent in some way.

24 Why can't the state legislature be the very
25 agency that you're saying has to play a part in that?

1 MR. VIEIRA: Because I think that brings you
2 into Justice O'Connor's problem. I don't think the
3 legislature can preclude discussion of the First
4 Amendment question. I don't think a legislature can
5 determine --

6 QUESTION: Well, now you go back to the First
7 Amendment, and they say, yes, that's exactly right, and
8 we'll hold the money in escrow until we resolve the
9 First Amendment issues. And supposing they, instead of
10 having an internal procedure, they agree to an audit by
11 Price Waterhouse or some independent auditing firm who
12 is acceptable to your clients.

13 MR. VIEIRA: Who's the "they," Your Honor?

14 QUESTION: The union, the union agreed with
15 your clients that they would do it, and then they would
16 refund the parts that --

17 MR. VIEIRA: Well, I'm not sure what the
18 statute is that you're proposing. The legislature
19 passes a statute --

20 QUESTION: The statute's already been passed.
21 It's on the books.

22 MR. VIEIRA: The statute says that the
23 employer and the union can agree to an agency fee, the
24 outer limit of which will be the dues. It doesn't say
25 that the dues will be --

1 QUESTION: But doesn't that represent a
2 legislative finding that substantially all of the dues
3 probably are required for this purpose?

4 MR. VIEIRA: No, I think it represents a
5 legislative finding that it would be rather ridiculous
6 for the union to claim that it was spending more money
7 on non-members than it was spending on members, in the
8 extreme case.

9 QUESTION: Well, supposing they had preceded
10 the statute with a legislative finding at the committee
11 hearings that said, we find, based on testimony before
12 the legislature, that most of the dues -- that dues
13 fairly represents an approximation of what's needed for
14 this purpose.

15 MR. VIEIRA: 100 percent of the dues? Not
16 mostly, 100 percent of the dues?

17 QUESTION: Yes, or 95 percent. In the range
18 of 80 to 90 percent is required.

19 MR. VIEIRA: Every union, every year?

20 QUESTION: Yes.

21 MR. VIEIRA: Well, I'd say that would be
22 non-rational. I'd say you have a big First Amendment
23 problem there. That kind of a statute couldn't possibly
24 stand up.

25 QUESTION: Well, supposing after five or six

1 years of the sort of hearings that you propose, in each
2 of which it has come out that, in one year it was 89,
3 the other year it was 91, the next year it was 90, so
4 that you have a five or six-year experience that shows
5 you're within a range of 90 percent, varying by only one
6 or two percent, then could the legislature enact the
7 sort of statute that Justice Stevens says?

8 MR. VIEIRA: Well, it could, and I think that
9 that statute would still be subject to judicial
10 challenge on the facts.

11 QUESTION: Well, what sort of challenge? Was
12 there evidence to support the conclusion that 90 percent
13 is a fair --

14 MR. VIEIRA: Well, in the particular year, for
15 instance. It could be in a particular year they didn't
16 spend 90 percent. Now, if you put that scenario into a
17 procedural context, I can imagine a situation where,
18 after three or four years, whatever this agency is that
19 makes the initial determination had seen these figures
20 -- 89 percent, 90 percent, 91 percent, coming every year
21 -- there would be really no problem in it more or less
22 mechanically allowing these collections of say 88
23 percent after some experience has been developed.

24 QUESTION: And why couldn't the legislature
25 make the same judgment as the agency did?

1 MR. VIEIRA: Well, I don't know how a
2 legislature can make a judgment about the future. Are
3 you going to hold a legislative hearing every hearing
4 every year to determine what the union does?

5 QUESTION: No, but they can make the judgment
6 that there's no reason that we think the future will be
7 any different than the past, so there'll be at least a
8 presumption that the same amount will obtain.

9 MR. VIEIRA: All right. Well, I'm willing to
10 live with the presumption concept.

11 QUESTION: Well, a presumption which would
12 entitle the union to deduct that amount of dues.

13 MR. VIEIRA: And put it where, in escrow?

14 QUESTION: Put it in escrow.

15 MR. VIEIRA: All right. Well, when we see
16 that kind of a statute passed we can discuss it. But
17 that's not what we have here.

18 QUESTION: I thought we just were
19 discussing --

20 MR. VIEIRA: No, no. I was saying if we had
21 that type of a statute we would have a First Amendment
22 problem if they let the union have that money. There's
23 no question about that.

24 I don't think that the legislature can
25 foreclose the challenge to how the union is spending the

1 money. You're now posing the question, if the
2 legislature says X percent of a union's dues is
3 presumptively going to be the collective bargaining
4 cost, subject to being held and to being challenged on
5 the facts of a particular year, would that escrow be
6 legitimate?

7 Well, I think if you have a legislative
8 determination based on their finding of a necessity for
9 that kind of a procedure, that is the taking of the
10 money, it might very well be. The problem I have with
11 it is that if you look at cases that this Court has
12 decided in the procedural area, there tends to be a
13 great deal more factual basis for the necessity of
14 getting the taking into operation than we have in this
15 case.

16 What are we talking about here? We're talking
17 about 160-something dollars a year. I cannot see that
18 the union is going to suffer some great financial
19 detriment by these moneys being deferred to some time in
20 the future because they're not collected.

21 In this particular case, the moneys are
22 collected and put in escrow. The union never seems them
23 until when, five years from now, ten years from now.
24 How long do you think the judiciary is going to deal
25 with this question in the state of Illinois before those

1 escrowed moneys finally come into the possession of the
2 union?

3 Besides, from the union's point of view, if
4 they have such a good case, if these fees that they are
5 charging actually represent their costs, they should
6 have no problem borrowing this small amount of money and
7 then charging the interest on that to the agency
8 fee-payers as a legitimate cost of collective
9 bargaining.

10 I just see no problem on their side. Now, the
11 employee's problem is always the same: Are they
12 entitled, as a matter of constitutional law, to the
13 interim possession and use of their own wages, absent
14 some very strong governmental interest in taking that
15 money out of their possession and putting it in a
16 segregated account?

17 QUESTION: Well, the odds are, though, that
18 the amount the union wants to collect, well, almost all
19 of it or at least a majority of it they will be entitled
20 to in the long run.

21 MR. VIEIRA: Oh, even they question that, Your
22 Honor. There's a footnote in their brief where they
23 admit that as a matter of state law and federal
24 constitutional law the parameters of these collective
25 bargaining charges are all up in the air. We're talking

1 about years and years of litigation when we go to that
2 question, as to what's a legitimate collective
3 bargaining cost under the Illinois statute, what's a
4 legitimate collective bargaining cost under the federal
5 Constitution.

6 I don't believe for one instant that the
7 majority of these moneys are going to end up in the
8 union's possession.

9 QUESTION: Well, let's assume that that would
10 be the case.

11 MR. VIEIRA: Okay.

12 QUESTION: Let's assume that there's a
13 perfectly legitimate basis for saying that 75 percent,
14 80, 90 percent of it's going to end up in the union's
15 hands.

16 MR. VIEIRA: Okay.

17 QUESTION: All I'm suggesting is that the
18 burden on the individual employee is not very
19 substantial, either.

20 MR. VIEIRA: Well, in this particular case the
21 burden on the individual --

22 QUESTION: He's going to have to pay 75 cents
23 out of every dollar anyway.

24 MR. VIEIRA: Your Honor, in this particular
25 case the burden on the employee to determine for himself

1 whether or not these fees are accurate is wholly
2 disproportionate to the amount of money. The union is
3 saying, we're going to take \$164 from you and if you
4 want to challenge this bring a court suit.

5 How much do you think it's going to cost to
6 bring a court suit to determine the validity of these
7 fees, when the union has all of the evidence, has
8 presented none of the evidence, when it's all a matter
9 of statutory interpretation, constitutional
10 interpretation?

11 How many people are going to bring a court
12 suit in the Illinois courts to contest \$164?

13 QUESTION: May I ask this question --

14 QUESTION: Well, somebody did.

15 QUESTION: I'm sorry.

16 Would you have the same constitutional
17 objection if the procedure were one that the union
18 financed an audit by an independent arbitrator? You
19 didn't have the selection procedure now. Say you had an
20 independent decisionmaker and the cost was entirely
21 borne by the union and they had some kind of procedure
22 where they could get a decision in three months or
23 something.

24 I should think the audit could be done in a
25 reasonable period of time if it were done by an

1 independent auditor. What would be the constitutional
2 objection to such a procedure?

3 MR. VIEIRA: The money having been collected
4 before the determination was made?

5 QUESTION: It would be in escrow until
6 whatever it would take to complete the audit, and then
7 they divide it up, whatever the auditor said. You'd
8 always have a chance to litigate later on, I suppose,
9 whether --

10 MR. VIEIRA: Your Honor, at this stage I'm not
11 interested in litigating. All I'm saying is, before
12 they're allowed to take the money they have to present
13 to someone some rational facts.

14 QUESTION: Well, assume for the moment that
15 they did present to the legislature a fairly strong
16 showing that a substantial percentage of the money would
17 be used for collective bargaining. And they say,
18 pending the decision by an independent decisionmaker
19 what percentage is appropriate, we'll collect it so
20 we're sure we'll get it, that these people won't lose
21 their jobs or die or something and they have trouble
22 collecting.

23 And we'll put it in escrow and leave it there
24 for 90 days while a decision is made, and then we'll
25 divide it up. What would be the constitutional

1 objection to that?

2 MR. VIEIRA: Assuming that the legislature
3 makes that finding, based on its determination of the
4 need for this collection and escrowing of the moneys, I
5 guess we'd have to live with it.

6 QUESTION: Well, you would concede that the
7 auditor could do it just by himself, wouldn't you? He
8 wouldn't have to talk to you about it. He wouldn't have
9 to have a hearing. There wouldn't be any procedures.
10 The auditor just decides.

11 MR. VIEIRA: Well, Your Honor, we have the
12 great difficulty here that, as the union itself
13 admits --

14 QUESTION: Take Justice Stevens' example.
15 Would you say that there would have to be a -- the
16 auditor would have to take your input to it and have a
17 hearing, with witnesses?

18 MR. VIEIRA: Well, let's not say witnesses.
19 The problem I have with Justice Stevens' suggestion is,
20 until the statutory and constitutional questions of the
21 definition of collective bargaining services have been
22 settled at least in large part, what is this auditor
23 going to do?

24 Is he going to make legal determinations? Is
25 he going to look at a list of union activities and say,

1 yes, this one is inside of Abood, no, that one's outside
2 of Abood? And then what's the value of that type of
3 determination?

4 QUESTION: Well, let's suppose that the union
5 said, look, we're going to have a procedure here where
6 we're going to end up with an arbitrator, an independent
7 arbitrator, as to how much the employee should pay, and
8 pending that decision he doesn't have to pay anything.
9 And then the arbitrator decides.

10 Is that all right?

11 MR. VIEIRA: And that figure they bring to the
12 board. Well now, that's getting to what I was
13 suggesting.

14 QUESTION: Well, I know, but the Court of
15 Appeals for the Seventh Circuit doesn't seem to accept
16 that system.

17 MR. VIEIRA: No, Your Honor, I think --

18 QUESTION: Because it's under the control of
19 the testimony.

20 MR. VIEIRA: Well now, wait a minute. That's
21 after the collections, the determination after the
22 collections of the validity of the uses of the money.
23 I'm talking about the pre-collection. If the union came
24 to the board and said, we had our own --

25 QUESTION: I would think the due process

1 employee of the Court of Appeals --

2 MR. VIEIRA: Excuse me?

3 QUESTION: The due process theory of the Court
4 of Appeals would apply whether the money is collected
5 before or after.

6 MR. VIEIRA: No, I don't think so, Your Honor,
7 because when the union comes --

8 QUESTION: Well, that's all right. You've
9 answered my question. If that's what the Court of
10 Appeals said, you don't defend it, I take it?

11 MR. VIEIRA: Well, it's not directed towards
12 this question. I think when the union comes to the
13 state agency, the board, let's say, and what it has as
14 the evidence for its fee request is some sort of
15 determination made by an independent accounting firm or
16 arbitrator or whatever you want to call this, now,
17 that's some probative evidence.

18 Whether it rises to the level of what I would
19 call probable cause is another question, and you have to
20 look at the evidence. But that isn't what happened
21 here. The independent determination, the basis for this
22 claim, was not made before the taking. It was made
23 after the taking, or to be made after the taking,
24 because actually no one went through that internal union
25 procedure.

1 I'm not saying that the union can't generate
2 these figures initially. I'm saying that it should
3 generate the figures initially. It should be required
4 to take it to some responsible official in the state and
5 justify this with some minimal level of factual and
6 legal basis, and then that agency can say, all right,
7 now we're going to collect this money, and maybe then it
8 can be put into escrow, so we don't have the problem
9 Justice O'Connor discussed of impermissible uses.

10 But first let's have some rational basis for
11 this thing. We have no procedure now. We have a union
12 coming to a Government official and saying, we want
13 those people's property and we're really not going to
14 tell you why, because as they say and admit at every
15 level in this litigation, they calculate the fee by
16 subtracting an arbitrary number from an arbitrary
17 number. And if that doesn't come up with an arbitrary
18 number, I'm not too good at arithmetic.

19 They simply have not documented the actual
20 services they've performed or the costs of those
21 services. Now, I don't think that's a great deal of
22 documentation, really. If they've done these things,
23 they have a record of it. If they plan to do them, they
24 have a proposed budget.

25 And I don't see why they can't do the same

1 thing that's been required in Sniadach, Fuentes, North
2 Georgia Finishing, Mitchell versus W.T. Grant -- some
3 kind of factual evidence presented to a neutral
4 government official.

5 I don't think it has to be a judicial,
6 full-blown judicial evidentiary hearing. It probably
7 doesn't even have to be a full-blown administrative
8 evidentiary hearing. But it has to be something more
9 than nothing. It has to be something more than a naked
10 demand for the money, backed up by a bluff, because
11 that's what we have here.

12 It has to be a rational calculation on paper.
13 Look at it and see that it's rational, that you could
14 get from A through B to C. And we have no check in this
15 present case against erroneous determinations
16 whatsoever. The check comes after the fact, either
17 before the union's internal arbitrator or in some
18 protracted judicial proceedings. Heaven knows how long
19 they'll take and how complicated and how expensive.

20 QUESTION: Mr. Vieira, you use the term
21 "irrational." Don't you have a check of a kind because
22 at least you have the union membership agreeing to pay
23 certain dues periodically? And presumably they're not
24 just throwing their money away. They must think they
25 get something for their dues.

1 MR. VIEIRA: But it's not necessarily
2 collective bargaining they're paying for, Your Honor.

3 QUESTION: Well, presumably a significant part
4 of it must be, because isn't that the principal function
5 that a union performs for its membership?

6 MR. VIEIRA: I have no idea what the principal
7 function this union performs.

8 QUESTION: Don't you have any idea what they
9 do? Is that a total secret? I mean, this is a fairly
10 well-known union. They're in the newspapers a lot.

11 MR. VIEIRA: Well, for instance, Your
12 Honor --

13 QUESTION: They do represent the teachers of
14 Chicago.

15 MR. VIEIRA: Sure. If we want to speculate,
16 because none of this is in the record, some of this
17 money, a significant amount of this money goes to the
18 national level of this union, the American Federation of
19 Teachers.

20 I'm pretty sure the American Federation of
21 Teachers doesn't do much collective bargaining in
22 Chicago. I think they have national concerns, maybe
23 even international concerns.

24 QUESTION: What proportion of it goes to the
25 national? Is that in the record?

1 MR. VIEIRA: Yes, it is, but it escapes me
2 now.

3 QUESTION: It's in the record?

4 MR. VIEIRA: A little more than one-third, I
5 believe. Mr. Gold might have that figure. It's a
6 sizable amount of money.

7 And again, I don't think the amount of money
8 -- well, let's look at the Carey case. What did you say
9 in the Carey case? There's an absolute right to
10 procedural due process. It doesn't make any difference
11 whether you win or lose, ultimately. You have absolute
12 right to procedural due process. That's all we're
13 asking for here.

14 Before they take the money, at some stage the
15 government receives some factual basis for saying the
16 figure is reasonable. Afterwards, there can be an
17 argument about exactly how much.

18 QUESTION: Could it be a school official?

19 MR. VIEIRA: Well, I suppose abstractly it
20 could be, Your Honor. But I really don't like that
21 idea. They don't have any expertise in these matters.
22 You're putting a burden on those people that they're
23 really not capable of meeting.

24 QUESTION: Well, I would think the school
25 board which bargains with the union might have as good

1 at least a way of getting knowledge as any other
2 governmental agency.

3 MR. VIEIRA: That's right. I think if you put
4 it that way, if you look at the activities of the union
5 that are done in conjunction with the school board,
6 there you would have a case in which the government
7 official who was reviewing the request actually had its
8 own independent knowledge of the facts. And that might
9 be workable with respect to the activities of the union
10 in the local.

11 I'm not so sure of the extent that that would
12 be workable with respect to the activities that the
13 union conducts at the state and national level that the
14 local charges for. That's the only reason I have a
15 problem with it. There are some levels of activity of
16 the union in which there is no interaction with the
17 board.

18 If we were talking about a local union only or
19 the local proportion of the dues, which I imagine is the
20 largest proportion of the Chicago Teachers Union section
21 of this in any event, it might very well be possible for
22 the state to work out a system.

23 But we don't have the state. And to be honest
24 with you, Your Honors, I'm not asking you to give us a
25 system. It's the state of Illinois' problem. The only

1 thing I'm asking for here is first a determination that
2 there has to be some injection of fact and review by a
3 government official before the taking, and secondly --

4 QUESTION: Do you think that the Court of
5 Appeals held that?

6 MR. VIEIRA: Yes, I think that they sent this
7 thing back, they threw it in the lap of the board and
8 they said: You work out a procedure, you work out a
9 procedure.

10 QUESTION: I didn't think they said that there
11 had to be a procedure before any money could be taken
12 from them, did they?

13 MR. VIEIRA: Well, they left it rather open.
14 In fact, I think that they may have been telling the
15 board, too, that they had to make almost a final
16 determination of the figure.

17 QUESTION: Well, you're asking for an
18 affirmance on a ground that perhaps goes beyond what the
19 Court of Appeals decided.

20 MR. VIEIRA: Well, I think it's a lesser
21 included. I'm not going to require the board to make
22 the final determinations on the size of the fee. I'm
23 saying that the agency that does the checking off, the
24 agency that does the deducting, has to have something
25 before it beyond just a naked demand.

1 After that, if you go into an administrative
2 agency, which I think is the way these things will end
3 up, the state of Illinois will fashion some sort of an
4 administrative procedure for handling this. And
5 probably that's the way it will end up ultimately, that
6 the union will have to come to that agency, present its
7 facts, the agency will certify it, and the checkoffs
8 will be made.

9 But they'll have the facts on the record, and
10 if there's some gross problem with the facts presented
11 by the union then the dissenting employee can put his
12 challenge on the record with the agency at that point,
13 right at the beginning. Otherwise, this thing will go
14 along rather mechanically, any challenges to be brought
15 up later on.

16 Our problem here is that we're at the initial
17 step in the whole procedure. We have no rational
18 involvement by the state other than the seizure of the
19 money.

20 CHIEF JUSTICE BURGER: Thank you, gentlemen.
21 The case is submitted.

22 (Whereupon, at 11:03 a.m., oral argument in
23 the above-entitled matter was submitted.)

24 * * *

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:

#84-1503 - CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL-CIO, ET AL.,
Petitioners V. ANNIE LEE HUDSON, 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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