OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1913

TITLE AT&T TECHNOLOGIES, INC., Petitioner V.
COMMUNICATIONS WORKERS OF AMERICA, ET AL.

PLACE Washington, D. C.

DATE January 22, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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AT&T TECHNOLOGIES, INC., :

Petitioner, :

V. : No. 84-1913

COMMUNICATIONS WORKERS OF :

AMERICA, ET AL. :

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Washington, D.C.

Wednesday, January 22, 1986

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

APPEARANCES:

REX E. LEE, ESQ., Washington, D.C.; on behalf of the petitioner.

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

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in AT&T Technologies, Incorporated, against Communications Workers of America.

Mr. Lee, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. LEE: Thank you, Mr. Chief Justice, and may it please the Court, in our view this is a simple case that requires a simple solution. The only reason the case is here is that the Court of Appeals committed an error which not even the respondents defend, and all that this Court need do and all that it should do is to reverse that error and remand the case so that the lower courts can perform the task that is properly theirs.

There is one question presented. It concerns the correctness of the Seventh Circuit's holding that there is an exception to the foundational principal that before requiring arbitration of a collective bargaining agreement, the Court must first determine whether the parties agreed to arbitrate that issue.

In the Court of Appeals' view, the exception exists where the judge in order to decide whether there has been a promise to arbitrate, would have to consider

any provision of the contract other than the arbitration clause.

The issue arose here because the petitioner laid off 79 installers at its Chicago based location. The union claims that Article 20 of the collective bargaining agreement makes these layoffs arbitrary. The company's answer is that Article 20 does not change Article 9's exclusion of all layoff decisions from issues that are to be arbitrated, and the company places particular emphasis on a prior judicial interpretation of this contract and other bargaining history.

Now, under those circumstances, were the parties in disagreement over whether there had been a promise to arbitrate? What the lower courts should have done and what both parties and all three amici agreed that the lower courts should have done was to give the parties their judgment on that issue. The issue is arbitrability, arbitrability is for the courts, and these courts should have decided it.

Had they done so, then no matter which way they decided it, this would have been in respondent's words a thoroughly uneventful case involving nothing more than the interpretation of one labor contract and eminently unworthy of review by this Court. But that is not what happened.

Both the District Court and also the Court of Appeals would have sent the case directly to the arbitrator without performing their threshold duty of deciding whether the party ever intended this issue to be arbitrated. The Seventh Circuit's view, this sidestepping of what it conceded was its normal duty, was required because of the interaction of two features of this case.

First, the parties have not clearly excluded the arbitrability issue from arbitration, and second, in order to determine arbitrability, the Court would have to consider not just the arbitration clause, Article VIII, but also two what the Court called substantive clauses, Articles IX and XX.

That decision is hopelessly inconsistent with this Court's holdings and opinions and also with the policy of encouraging arbitration. I would like to examine just briefly each part of the lower court's two-part test.

The first is that the parties have not clearly excluded the arbitrability issue from arbitration. That is just a flat misstatement of well settled law concerning who decides arbitrability. This Court said in Warrier and Gulf not only that the Court decides arbitrability, but it went further and clarified the

question of jurisdiction of the arbitrator will not be left to the arbitrator unless, and this is a quote, "the claimant bears the burden of a clear demonstration of that purpose."

The Court of Appeals ruling in this respect simply confuses the presumption of arbitrability with the question of who decides arbitrability. Warrier and Gulf deals with both of these issues. When the question is whether it is viewed as arbitrary, then the scales are weighted in favor of arbitration, but when the question is, who decides arbitrability, they are weighted in favor of the judge.

But it is the second part of the test that really demonstrates the mischief of the Court of Appeals' error. It is disputed by no one that one of the main reasons over the past quarter-century since the Trilogy arbitration has gained such widespread acceptance in the labor field and has become so successful, is that following this Courts unequivocal assurance in Warrier and Gulf that the question of arbitrability is for the courts, employers have been willing to use arbitration because they have known that where it is really important for them to exclude a management function, or some other subject from arbitration, their agreements will be honored.

They know that the scales are weighted in favor of arbitrability, but they also know that they are judicial scales, and the presumption is not an irrebuttable one. If their case for exclusion is strong enough, then a judge will keep the issue from ever going to arbitration.

Now, common sense teaches that when the courts perform this pivotal task, they must consider whatever provisions of the contract and whatever elements of bargaining history they can find that shed any light on the issue whether there has been a promise to arbitrate, as this Court clarified in American Manufacturing, and as clarified even better by Justice Brennan's concurring opinion in Warrier and Gulf and American manufacturing even more than the interpretation of a statute.

The words in a collective bargaining agreement are not to be interpreted in a vacuum. They can only be understood against their background and as parts of the entire contract, so that properly interpreted, there is no tension between the two basic principals of Warrier and Gulf that the Court decides arbitrability and the arbitrator decides the merits.

They are parts of a single whole principle, and that whole goes to the parties' freedom of contract. The respondents contend here, as they have contended at every

stage of litigation, that what petitioner is really asking for is an interpretation of the substantive meaning of Article 20.

It is a confusing argument, but at bottom it is simply not true. What we want out of this case is a judicial ruling on whether the entire contract in light of its entire historical background excludes layoffs from arbitration.

Does this involve interpretation of the contract? Of course it does. There is simply no way that a judge can decide whether the parties have contracted for arbitration without interpreting the contract, but the judge and the arbitrator interpret for quite different purposes, and they ask quite different questions, and this brings me to what I submit is really the key to this Court's solution of this case. It is a careful distinction among three quite separate questions.

The ultimate issue in this case is whether the company could lay off the installers in Chicago when there was no lack of work in Chicago. That issue, if arbitrable, is the arbitrator's issue, and no one has attempted to litigate that in any court. There was neither evidence nor argument put forth before either the District Court or the Court of Appeals on that issue.

A second quite separate issue is whether the parties have promised to arbitrate this merits issue concerning layoffs. That was the question that was presented to the lower courts. That is the question they should have decided, and that is the question that ought to be remanded to them.

Now, a third, again quite separate question is the question presented to this Court. Can a judge in considering arbitrability consider any provisions of the contract other than the arbitration clause? And the key to this case, I submit, is for this Court simply to decide its question and then remand the case to the lower courts to decide arbitrability.

What no one at this bar is urging is that this Court should simply agree with the Seventh Circuit that the arbitrator should decide arbitrability. The respondents do, however, suggest two possible bases for affirmance of the Seventh Circuit's holding. Let me deal with each of those just very briefly.

They suggest first that the Court of Appeals really made findings which would support a holding of arbitrability, and in the alternative they suggest that the lower courts may have been using the word "arbitrability" in other than its usual sense, and that in any event this Court should excise the term

"arbitrability" from the language of Section 301 law.

Those contentions simply miss the point entirely. Whether the word "arbitrability" has one meaning or two or four is quite irrelevant. The controlling fact is that we contend that the parties have agreed that disputes over layoffs are not to be decided by an arbitrator, and this one is no different, and that is what the parties have contracted.

We think we are right on that issue. We think the language of the contract and the bargaining history squarely support us. The union, on the other hand, thinks we are wrong, and the union also relies on bargaining history. But right or wrong, we are entitled to our day in court on that issue, and to date we have not had our day in court on that issue.

QUESTION: Mr. Lee, I can't let you go through an entire argument without interrupting.

MR. LEE: I was wondering if that was going to happen, Justice Stevens. I was betting on you as the possibility.

QUESTION: I have to raise this question that your argument troubles me with. You start out with your three different issues and say the ultimate issue is whether the contract, I guess you are saying, prevents the company from laying off workers in Chicago when there

is no shortage of jobs in Chicago.

I suppose if you describe that as the ultimate issue, you are saying that there can be two views of whether the contract so permits.

MR. LEE: Exactly.

QUESTION: If there are two views of what the contract could mean, are you not conceding that the issue is arbitrable and therefore, although the Court of Appeals adopted the wrong rationale, that your opponent is right on the issue of arbitrability?

MR. LEE: No, I am really not, and so long as you carefully distinguish between that issue and what I prescribe, what I detailed as the second issue --

QUESTION: Right.

MR. LEE: -- then that really provides the answer to the case. The issue here is, the issue here is whether the Court should have decided not whether there are two possible views as to who is right on the contract, but rather whether the parties in negotiating this contract intended that that particular issue was to be arbitrated.

Let me see if this is more helpful, because I realize that this is a difficult problem, and yet I think at the end of the day it really is not difficult.

QUESTION: What I have in mind, of course, is

the language of Article VIII of the agreement, they failed to settle by negotiation. Differences arising with respect to the interpretation of the contract. It seems to me there is a difference between you and your adversary as to meaning of the contract on the ultimate issue. That is what I am --

QUESTION: See if this is helpful to you. With respect to the question of whether there was authority to lay -- whether the company did or did not have power to lay off workers at a Chicago location where there was no lack of work.

You would look at certain provisions of the contract, and you would be looking for matters in the contract that were related to that. Here, by contrast, the evidence that was put forth before the Seventh Circuit was first of all the language of Article IX which says that management functions are not to be arbitrated, and then there is the question of whether Article XX overrides that, but even more was the matter of this New York Court of Appeals judicial decision which said that under this particular contract, or at least the predecessor of it, all layoff decisions, all termination of employment decisions are non-arbitrary.

Following that, the bargaining history shows, and it is set for in the record, and indeed in the joint

appendix in this case, that the parties went into bargaining of a new contract within months after that decision came down, and the union insisted on, in effect, overruling that New York Court of Appeals decision, and they succeeded partially.

They identified three -- excuse me, four separate types of termination decisions, and in Article XXII of the contract, Article XXII of the contract makes discharges, dropping and relieving, subject to arbitration, but not layoffs.

Now, those are the kinds of issues that would be considered in connection with whether it was arbitrable. They would have nothing to do with the issue whether there was or was not a right to lay off when there was not -- very often there is a real temptation to confuse those two issues, and that is why you have a split in the circuits on this issue.

But I think at the end of the day if you ask yourself what kind of evidence is it that is really relevant to the ultimate merits issue and what kind of evidence and what kind of arguments is it that is relevant to whether the parties intended that issue to be arbitrated, they are usually quite separate.

Now, I will say that this Court did say in Warrier and Gulf that it may be necessary on occasion in

considering, in the discharge of the judge's responsibility --

QUESTION: Are you asking us in effect to overrule Warrier and Gulf?

MR. LEE: Of course not. Of course not. I am simply saying that Warrier and Gulf said that you may have to consider the merits, but what I am saying is that it will frequently be necessary. In short, the Seventh Circuit has committed an error. Really, in the final analysis I think what the respondents are asking is that this Court do the job that should have been done by the Seventh Circuit and decide the issue of arbitrability itself. We would urge that this Court not do that. It is not one of the questions presented. It hasn't been briefed, and this Court functions best when it receives the issues that come before it after those issues have gone through the refining process of lower court decisions.

QUESTION: Mr. Lee, would you care to comment on the position taken in the amicus brief filed by the National Academy of Arbitrators?

MR. LEE: Well, they of course point out first of all that what the Seventh Circuit did was a dangerous position. Then they urge basically that there are four possible different meanings of the word "arbitrability,"

and they urge that we ought no longer to use the word "arbitrability" in connection with -- meaning the jurisdiction of the arbitrators which is to be decided by the courts.

My response to that is twofold. The first is, I think it is unnecessary, quite unnecessary to the decision in this case, because regardless of whether that phrase has one meaning or three or for, the fact of the matter is, we have never had a judicial decision on whether these parties intended this dispute to be arbitrated or not.

And finally, I think it would be a bad idea and the reason it would be a bad idea is that over the years the word "arbitrability" has become a word of art. You look through this Court's decisions, every one of them since Warrier and Gulf, and it is used as meaning, the judgment that a court makes to determine whether or not the arbitrator has jurisdiction.

QUESTION: Well, I wasn't as concerned about the terminology as the substance of their position.

MR. LEE: Well, basically the substance of their position is similar to Mr. Gold's, and that is that you can interpret from some of the words that the lower court used that it perhaps did decide the arbitrability issue, and my answer to that is twofold.

The first is, I don't think there is any way that in any objective reading of the Seventh Circuit's opinion you can conclude that that court did give us the judicial judgment to which we are entitled. If that court had decided arbitrability, there would have been no reason to label its holding an exception to the general rule.

If it had decided arbitrability, then it would not have needed to make the candid confession that what it did was inconsistent with Wiley and Sons. If it had decided arbitrability, it would not have needed to say that the District Court properly eluded consideration of parole evidence.

And certainly if it had decided arbitrability it would not have ordered that the company is ordered to arbitrate the arbitrability issue. But in any event, even if I am wrong on that, certainly at the very least that question is a serious one.

The Seventh Circuit's error that everyone agrees on needs to be corrected, and the case needs to be sent back to the Seventh Circuit, and if it is correct that the Seventh Circuit remanded something that I cannot believe their opinion did, then there will be ample opportunity on that occasion for them to say so.

QUESTION: Mr. Lee, I take it you do not

disagree with the Academy's amicus brief that the decision of the jurisdiction is for the court, not the arbitrator.

MR. LEE: That is exactly right. That is correct.

QUESTION: And the court should not undertake to try to give some guidance to the arbitrator on how the merits should be decided. On that you, I am sure, agree.

MR. LEE: Yes, we do, Mr. Chief Justice.

Thank you.

CHIEF JUSTICE BURGER: Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GOLD: Mr. Chief Justice, and may it please the Court, the petitioner's claim here is that both the District Court and the Court of Appeals failed to fulfill their judicial functions in determining whether or not to order arbitration of the union's grievance in this case.

And in order to evaluate that claim, it seems to me one has to in a bit more detail than petitioners do and with a closer attention to the nature of the case determine what under this Court's precedence the lower courts were required to do.

We do not, and we have made it plain, agree with every word the Seventh Circuit used in stating its

views, but this is not the high court of linguistic purity, and the question is whether in substance the Court of Appeals got it right.

QUESTION: You are concerned, I take it, only with the result, not how they got there.

MR. GOLD: Well, we are concerned that we are able to demonstrate to you that they did get to the right place, and obviously, given the function of this Court, we are concerned to be of what aid we can in assuring that both the result and the words are right here.

QUESTION: What you mean, I guess, is, it is a harmless error case.

MR. GOLD: We think that the Court of Appeals made this in some ways harder than it really is, and we think it would be unfortunate if that led to radically expanding the role of the courts in this error, but in the final analysis we think that what the Court of Appeals did and equally as important what the District Court did is exactly what they should have done under the Steelworkers Trilogy, given the nature of the agreement here and the nature of the contentions that both sides have made.

QUESTION: I take it, Mr. Gold, you feel that there is less here than meets the eye.

MR. GOLD: Yes, yes. We do. We do indeed.

And it is a wonderful illustration.

QUESTION: Which is sort of the position of your adversary.

MR. GOLD: That's right, and if we could only agree on the fact that the substance of this dispute ought to move on to arbitration, there would be great harmony here.

What the case does illustrate is that in the labor area particularly when company counsel is as able as company counsel is here, a matter can be stretched from 1982 to 1986 by determining how many angels will dance on the head of the word "arbitrability" when these layoff questions could have been decided by 1983.

With all those preliminaries and kind words for the former Solicitor General, on Page 9 of our brief, the red brief, we set out Article VIII of the contract, and Article VIII is entitled to arbitration, and it says if the national union and the company fail to settle by negotiation any differences arising with respect to the interpretation of this contract or the performance of an obligation hereunder, such differences shall, provided that such dispute is not excluded from arbitration by other provisions of this contract, and provided that the grievance procedures as to such disputes have been exhausted, be referred upon written demand of either

party to an impartial arbitrator mutually agreed to by both parties.

This is what is called a standard form broad arbitration clause. Exactly the kind that was before the Court in the Steelworkers Trilogy. By its term, any difference between the parties is subject to arbitration, and there is a proviso that there are provisions in the contract which exclude disputes which would otherwise be subject to arbitration.

And we note some express exclusions, none of which the company relies on here. Rather, in its answer, and at least until the reply brief to this Court, the company put it money on Article IX of the agreement, which we set out at Page 11 of our brief with different emphasis than in the company's brief, but otherwise word for word as it is in the contract, and that provision in its pertinent parts says that the union recognizes the right of the company subject to the limitations contained in the provisions of this contract but otherwise not subject to the provisions of the arbitration clause to exercise the functions of managing the business which involve, among other things, the termination of employment.

Now, the underlying claim by the union here is that Article XX of the agreement which we had set out

earlier in our brief and is also set out in the joint appendix which provides that when lack of work necessitates layoffs there will be layoffs in a certain way is a limitation on what management can do in managing a business.

The provision requires that there be a lack of work at a particular place for management to be able to lay people off, and so the union's grievance here is predicated on Article XX, substantive provision which on its face can be read to limit what management does, and it is our view that that being so, Article IX cannot possibly be read as an express exclusion from the broad arbitration provision of Article VIII.

QUESTION: Mr. Gold, was your case argued this way before the Seventh Circuit?

MR. LEE: Yes.

QUESTION: And was your opponent's case argued the same way before the Seventh Circuit?

MR. LEE: I am sure that we will do this to each other, but the company's case has been argued in different ways. The company's case as stated in its answer and elaborated in its briefs rests on Article IX.

QUESTION: But, you know, if the company's argument was presented in those terms to the Seventh Circuit, your argument was presented in the terms you

have just presented to us. I dare say both of you were astounded to get the Seventh Circuit's opinion.

MR. GOLD: I couldn't have been astounded because I wasn't participating at that point.

(General laughter.)

MR. GOLD: But it is very difficult for us to understand why the Court of Appeals elucidated its reasons in this way.

QUESTION: You are saying the agreement -- the court should have said this issue was arbitrable and the company is saying the court should have said this issue is not arbitrable? The Court of Appeals doesn't say either one.

MR. GOLD: It depends -- we didn't say that the Court of Appeals should have said that the issue is arbitrable. I do agree with counsel for the company that this camelion-like word "arbitrable" which is something like what first year law students in civil procedure learn about the word "jurisdiction" is part of the problem.

Our claim is and always has been that under the standard set out by this Court in the Steelworkers Trilogy an order to arbitrate should have issued. We say that for two different reasons, one of which rests on the American manufacturing part of the Steelworkers Trilogy

and the other, and the more directly relevant in my view, on the Warrier and Gulf case.

What we are saying particularly based on Warrier and Gulf is that the court's function when you have a broad arbitration clause of this kind is to determine whether there is some clear exclusion of the union's grievance as the union frames its grievance from arbitration.

QUESTION: But that wasn't what the Court of Appeals said, and that wasn't its reasoning either.

MR. GOLD: I wish that I could be more certain of what the Court of Appeals' reasoning was, because there are portions of the opinion which indicate that it went through -- the Court of Appeals went through every correct element of the analysis, but I agree with you that the language of the opinion, by talking about leaving arbitrability to the arbitrator and so on makes this a harder case than a case which arose 25 years after Warrier and Gulf should be, and we are not asking the Court in any way, shape, or form to add to that unfortunate confusion.

QUESTION: Are you really just arguing that you want an affirmance on a different ground?

MR. GOLD: What we are arguing is that we want an affirmance on the ground of the --

QUESTION: Any ground you can get.

MR. GOLD: On any ground we can get.

(General laughter.)

MR. GOLD: But we are arguing that we are entitled to an affirmance of the order. We think we are entitled to an affirmance on the ground stated by the District Court, and we are not at all clear that the Court of Appeals rationale or even its reading of the District Court's opinion is the most sensible and straightforward one. There is a footnote in the Court of Appeals' opinion -- I think it is Footnote 4 in the petition, Page 3A of the certiorari petition. Although there is some ambiguity as to whether the District Court ordered arbitration of the dispute itself or arbitration of the arbitrability issue, we think the latter is the fair reading of the order. I don't think it is the fair reading at all. I don't understand how this happened.

QUESTION: Of course, if an arbitrator was to live up to the Court of Appeals' judgment, he would first have to consider arbitrability.

MR. GOLD: But --

QUESTION: Wouldn't he, under the judgment?

MR. GOLD: Yes.

QUESTION: All right.

MR. GOLD: But arbitrators always have, and the

arbitrator as we point out --

QUESTION: Well, I know, but only after a court has said it is arbitrable.

MR. GOLD: Only after a court --

QUESTION: And the court never said that.

MR. GOLD: That is right.

QUESTION: So you would be asking for a different judgment.

MR. GOLD: I guess if, as is contrary to all my experience, I was to get exactly what I wanted, I would ask that the following portion of the Court of Appeals judgment be affirmed. The order of the District Court is therefore affirmed.

QUESTION: Where are you reading?

MR. GOLD: And then there is a semicolon which goes on to say the company is ordered to arbitrate the arbitrability issue. You can read that as adding something or taking something away. I am not quite clear. But the District Court --

QUESTION: Do you have any quarrel with the District Court's statement of it?

MR. GOLD: No.

QUESTION: If they had affirmed on the District Court's opinion, everyone -- perhaps not Mr. Lee, but at least we would have a clearer set of reasons, wouldn't

we?

MR. GOLD: Yes, I agree with that entirely, Chief Justice, and we would have a clearer body of law exactly where it stood, I think, before the Court of Appeals -- the Court of Appeals added these words. I do want to pursue the point that Justice White made, though, because it is something that we discuss as the final point in our brief.

It is a fact that Warrier and Gulf creates a presumption, and it says that the courts in these kinds of complex cases where arbitrability is one side of the coin and the merits of the other side of the coin, and the parties, really, by the way they have written the agreement, have made questions of arbitration and questions of the merits turn on many of the same considerations are not to be trapped into using scarce judicial resources to determine whether or not the union's grievance at the bottom is meritorious, but rather the test is whether or not it can be said with positive assurance that this whole dispute should not be decided by an arbitrator.

That is in the final -- the very phrasing of the test indicates that is not a final determination, and in Warrier and Gulf on remand to the arbitrator the arbitrator made, for want of a better term, an

arbitrability determination. He assured himself that not only could it not be said with positive assurance that the matter was excluded, but really that the parties wanted him to answer the merits question, and only then did he go on to decide the merits question.

QUESTION: What would you say, Mr. Gold, about a district judge in the first instance being confronted with a demand for arbitration under a contract and the district judge says this is facially, obviously frivolous, nonsense, and I am not going to order an arbitration? Could he do that?

MR. GOLD: That would be the, to take us back to the Cutler Hammer case and where matters stood before the Steelworker Trilogy, and where, at least until the reply brief in this Court, the company was trying to take us in this case, because the company's ultimate argument is, and it has to be given the language of Article IX of the contract, has to be that there is no limitation contained in the provisions of this contract on the ability to make layoffs.

But the union's claim is that there is a limitation, and the union says where the limitation is. The union's claim is that the limitation is in Article XX, and that claim may be right and it may be wrong. There are people in the union, as some of the documents

show, who are little weak-kneed about this grievance, but that doesn't mean that it makes a particle of sense in terms of the national labor policy, in terms of industrial peace, or in terms of judicial resources to have the courts look into precisely the same question in the same depth as the arbitrator is going to have to do, and that is why the Warrier and Gulf approach is the proper one, and that brings me back to where I began.

The complaint here is that the company didn't get its day in court. That depends what the legal standard is. The company did get its day in court because on the face of this contract, and there is only one other point I want to cover, and with regard to this early New York Court of Appeals case --

QUESTION: Before you get to that, Mr. Gold, I am not sure you really responded to my question.

MR. GOLD: Oh, I apologize.

QUESTION: Now let's bring us up into 1986, long after the Trilogy. The district judge looks at it and says this is utterly frivolous nonsense, and I am not going to bother anybody. Can he do that, or must he let the arbitrator decide that?

MR. GOLD: I believe that he must under this Court's decisions and in light of Section 203(b) which makes arbitration the preferred means of settling this

dispute had the arbitrator decide it.

QUESTION: And the terms of the contract.

MR. GOLD: And the terms of the contract. Have the arbitrator decide it. That is what the arbitrators are for. Unions are not perfect in determining what is a good grievance and a bad grievance. The whole theory of the system, as the court explained, is to have these matters determined by the arbitrator, whether or not the union has a meritorious claim, as long as, as in this case, there is a standard broad arbitration clause, and the company cannot demonstrate, as they are required to do by the language of this contract, that there is any exclusion of this kind of Article XX claim from the provisions of the arbitration clause.

Now, the company would read a case called In Re Western Electric Company, which is a 1951 and '52 case in the New York courts as precluding the arbitration of the grievance here. First, let me say that the only opinion in In Re Western Electric Company is a four-paragraph, very short paragraph opinion by the trial judge.

Both the Appellate Division in New York and the Court of Appeals in New York issued orders without decisions, and what is printed in the joint appendix is reporters' notes of the arguments of the parties rather than any decision of an Appellate Court.

QUESTION: Mr. Gold, if we bought your argument, we wouldn't be affirming the Court of Appeals, we would be modifying his judgment to some extent.

MR. GOLD: I would say that at the very least you would be clarifying, and I think in all honesty you would be modifying.

QUESTION: You would be striking out that one --

MR. GOLD: Yes.

QUESTION: -- provision that directed the arbitrator to decide arbitrability.

MR. GOLD: Right.

QUESTION: Now, you didn't cross-petition. Do you think you are entitled to make this argument just as a respondent?

MR. GOLD: Yes, I believe that --

QUESTION: Because it does change the judgment. You are getting more than you got.

MR. GOLD: Justice White, we have no -- we are not getting a thing more than we had before in terms of what arbitrators -- arbitrators do. If the Court of Appeals was ordering the arbitrator to do something that arbitrators did not do, it would seem to me that we would have a problem along the lines you --

QUESTION: On that theory then you shouldn't modify the judgment at all.

MR. GOLD: But that is why --

QUESTION: I know, you went through this a while ago. I guess I didn't --

MR. GOLD: No, but that --

QUESTION: I just wanted you to play it over again.

(General laughter.)

MR. GOLD: No, but that is why I was doing more than -- I hope I was doing more than being unresponsive or playing games and try and answer your question. As we elaborate in the brief, we are not quite certain what the Court of Appeals meant when it said that the arbitrator is to decide arbitrability.

We do know this much. What the Court of Appeals should have done is go through the analysis it did go through --

QUESTION: That you have just gone through.

MR. GOLD: Right, and say the grievance is ordered arbitrated. We don't think that the Court of Appeals did any harm.

QUESTION: If it had gone through this routine that you say it should have, either way it would have come out, the case probably wouldn't be here.

MR. GOLD: I believe that --

QUESTION: Well, may I ask --

QUESTION: So why should we sit to go through this routine now? Because it is here, I guess.

MR. GOLD: I didn't get a vote on the certiorari.

(General laughter.)

QUESTION: Well, Mr. Gold, I take it the last sentence of Judge Grady's order is entirely satisfactory to you, isn't it?

MR. GOLD: Yes.

QUESTION: And you would just like us just to do that, and that is the end of the case. Is that it?

MR. GOLD: Yes.

QUESTION: I take the essence of your argument to be that the Seventh Circuit was right for perhaps the wrong reasons, or not --

MR. GOLD: Right.

QUESTION: -- for all the right reasons.

MR. GOLD: Not all the right reasons.

QUESTION: Well, before --

MR. GOLD: Yes.

QUESTION: Before I leave you, that sentence was affirmed by the Court of Appeals.

MR. GOLD: That is correct, and that is why I am in a quandary on how to answer Justice White's --

QUESTION: What does Judge --

QUESTION: Defendant is ordered to arbitrate the grievance, period.

MR. GOLD: Is what the District Judge said.

QUESTION: Well, I know. Yes.

MR. GOLD: Then the Court of Appeals comes along and says --

QUESTION: The Court of Appeals said the arbitrator has got to do something else.

MR. GOLD: No, but first it said two things. It says the order of the District Court is therefore affirmed.

QUESTION: Right.

MR. GOLD: Semicolon.

QUESTION: Yes.

MR. GOLD: The company is ordered to arbitrate the arbitrability issue.

QUESTION: Yes.

MR. GOLD: Now, certainly we would have been happy and perhaps the Court would have been happy and the clerk would have been happier if -- in terms of managing the docket if that material after the --

QUESTION: Mr. Gold, can I take you back for a moment to the Western Electric case? You were telling us that it is not a very impressive body of judicial opinion. But as I understand your opponent's use of it,

he is not so much talking about it as a legal authority but rather as sort of a factual interpretation of the identical provision in the agreement that is at issue here.

And my question to you is, do you think it is permissible in doing what a judge is supposed to do on a case like this to go beyond the four corners of the agreement and look at bargaining history and factual matters such as that?

MR. GOLD: The court in Warrior and Gulf said that if the party resisting arbitration can make a -- I wanted to use the exact words -- a specific collective bargaining agreement may exclude contracting out from the grievance procedure or a written collateral agreement may make clear that contracting out was not a matter for arbitration, and then I will skip something. In the absence of any express provision excluding a particular grievance, we think only the most forceful evidence of the purpose to exclude can prevail.

Now, the court doesn't say what the most forceful evidence is, but we would argue that it doesn't make a scintilla of sense to have what happened here happen in this type of proceeding, and I do think that the answer is in an agreement of this kind which says except as excluded in the contract for the parties to get

into 10,000 pages --

QUESTION: What if this agreement turned out to be the case on all fours as far as the factual pattern, you know, moving people from one place to another, and there was another letter that said this is the way we have always interpreted this particular article for the last 20 years throughout the country and the union agreed. Could they put that kind of evidence before the judge?

MR. GOLD: Yes. I really don't --

QUESTION: I know you don't think it's this kind of evidence. I am not suggesting that.

MR. GOLD: Yes. Well, I think it would be formalism of a high degree to say that the only thing you can look at are the words of the agreement, but the common sense of the matter is that what the court seems to have had in mind in Warrier and Gulf is that it be a clear, plain exclusion. The kind of side agreement you talk about is a clear, plain exclusion.

The problem from the company's standpoint with this earlier arbitration and the subsequent bargaining history is this. It was a different article of the contract. The dispute in In Re Western Electric and the New York courts pertained to Article XXII, which had to do with disciplinary actions by the company, and the

method of the trial judge in New York was to evaluate whether there was anything in Article XXII which the union was relying on which provided a basis for a meritorious grievance.

So, his method is exact -- and he relied on Cutler Hammer. His method was to make the judicial inquiry, which this Court says that under Section 301 one is not to make, and the subsequent bargaining history had to do with changes in Article XXII. The company chose what to put in from that bargaining history in the joint appendix, and it is wholly opaque, so the court below was right, we think, in saying that insofar as this evidence does anything, it goes to the merits of the union's Article XX complaint in a proper post-Steelworkers Trilogy situation. That is a question for the arbitrator. We are not going to bother about it. And we do not think that it tips the scale.

So I do think that when you put aside the choice of words and get to the substance of what the District Court did and the Court of Appeals did, the company made all the arguments it had about Article IX, about the underlying New York case, put in all this material about bargaining history, and the plain fact of the matter is that after it was done, the District Court and the Court of Appeals were correct, under this Court's

test, unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, the matter should go to arbitration. That is where this case is. It would be a help to the labor bar and to the Court in the future to clarify that the courts have that limited function.

On the other hand, to do what the petitioners ask is to invite the courts deeply into the kinds of amorphous opaque showings that the company made here, and to assure that these matters which should go to arbitration instead turn into a waste of judicial time.

QUESTION: Mr. Gold --

QUESTION: When you say that the labor bar, a help to the labor bar, wouldn't that be a help to everybody?

MR. GOLD: Yes. Yes, indeed.

QUESTION: Mr. Gold, could I ask you a question?

MR. GOLD: Yes.

QUESTION: I take it no mandate has been issued by the Court of Appeals here. I think it has been stayed, according to the --

MR. GOLD: Yes, my colleague says that that is correct.

QUESTION: Sometimes a mandate is a little different from the final words of the Court of Appeals opinion. And I wonder what would have happened if the Court of Appeals had entered a judgment and mandate, but we don't know, do we?

MR. GOLD: No. I am advised that there was no formal separate mandate on that issue. When I said the labor bar, Chief Justice, I meant parties on both sides of these disputes --

QUESTION: Of good will.

MR. GOLD: -- not just union counsel.

QUESTION: Very well.

(General laughter.)

CHIEF JUSTICE BURGER: Mr. Lee, do you have anything further?

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. LEE: Very briefly, Mr. Chief Justice.

The strongest statement that can be made in favor of Mr. Gold's position before reforming or whatever it is that he wants to do with this opinion, is that it is uncertain what the Court of Appeals did and what the Court of Appeals said.

QUESTION: If the --

QUESTION: Or what it would do.

MR. LEE: Or what it would do if it had the case.

QUESTION: If it were possible to take an appeal directly from the District Court here, would you have undertaken to bring the case here?

MR. LEE: Well, what we are entitled to, of course, Mr. Chief Justice, is in any event an Appellate Court review of what the District Court did.

QUESTION: Well, let's suppose the Court of Appeals, then, to shorten it, said we adopt the opinion of the District Court.

MR. LEE: Yes, we would have, Mr. Chief Justice, because I disagree as the Seventh Circuit disagrees with Mr. Gold's reading of the District Court's opinion.

Now, at the very least what you have is eight pages worth of opinion that is going to go into the Federal Reporter and has some very bad law in it, and that is the reason that this Court granted certiorari.

QUESTION: Mr. Gold doesn't defend it.

MR. LEE: That's right, and Mr. Gold doesn't defend it. Now, under those circumstances, it is obvious --

QUESTION: Or at least lukewarm.

MR. LEE: Well, and when you get a lukewarm

defense, you know that he doesn't really defend it.

QUESTION: He is defending the result.

MR. LEE: That is correct. Under those circumstances, the Seventh Circuit's opinion just has to be reversed, and so it has to go back.

QUESTION: We don't reverse opinions.

MR. LEE: That's correct, the judgment has to be reversed, and under those circumstances the Seventh Circuit is going to have the opportunity on remand to say what it really meant and to write a very fine order that will do just exactly the right thing.

Now, the second point is, it simply is not correct that the Seventh Circuit got to the right place by the wrong route, even if you could ignore the harm that it did along the process of going through the route. We are entitled, and everyone in this courtroom agrees that we are entitled to a judicial judgment, and we have not had it.

The Court of Appeals in clearest possible English language says the District Court properly avoided consideration of the extensive parole evidence regarding bargaining history. In our view, Justice Stevens, the real upshot of that Court of Appeals opinion, and particularly the bargaining history that came after it, and I won't review it, it is there in the joint appendix,

is tantamount to the very thing, the very hypothetical that you are mentioning, that this really is that separate side collateral agreement, that this is what we meant all along.

QUESTION: But you would agree, would you not, that the bargaining history ought to relate to the question whether the dispute is arbitrable rather than the merits of the dispute?

MR. LEE: Exactly, and there is not one word, not one word in that bargaining history that pertains to whether the company does or does not have the right to layoff when there is no lack of work in Chicago. It has nothing to do with that. So that maybe we are right. Maybe we are wrong. But our view as to the significance of that bargaining history is that it is this collateral agreement. It is the separate letter that says this is the way we have always understood it, and we are entitled to our day in court on that issue.

I started out by saying it is a simple case. It has now been even more simplified. The choices are either reverse the Court of Appeals or rewrite its opinion in the event you select --

QUESTION: And reform its judgment.

MR. LEE: -- and reform its judgment, and in the event that you elect to rewrite its opinion, I have a

number of suggestions as to how that could be done.

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

(Whereupon, at 2:50 o'clock p.m., the case in the above-entitled matter was submitted.)

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:

#84-1913 - AT&T TECHNOLOGIES, INC., Petitioner V. COMMUNICATIONS WORKERS OF AMERICAN, ET AL.

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

BY Paul A. Richardson

(REPORTER)