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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1360

TITLE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO ET AL., Petitioners V. SALLY HECHLER

PLACE Washington, D. C.

DATE January 20, 1987

PAGES 1 thru 51

(202) 628-9300
[illegible] STREET, N.W.

IN THE SUPREME COURT OF THE UNITED STATES

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INTERNATIONAL BROTHERHOOD OF :
ELECTRICAL WORKERS, AFL-CIO, :
ET AL., :
Petitioners :
v. : No. 85-1360
SALLY HECHLER :

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Washington, D.C.

Tuesday, January 20, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:43 o'clock a.m.

APPEARANCES:

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

JOEL S. PERWIN, ESQ., Miami, Fla.;
on behalf of Respondent

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: Mr. Gold, you may begin whenever you're ready.

ORAL ARGUMENT OF

LAURENCE GOLD, ESQ.

ON BEHALF OF PETITIONERS

MR. GOLD: Chief Justice Rehnquist and may it please the Court:

In January 1982, Ms. Sally Hechler was employed by the Florida Power & Light Company in a collective bargaining unit representated by the International Brotherhood of Electrical Workers and its Local 759. At that time, Florida Power & Light assigned Ms. Hechler to do particular work, and in doing that work she was injured.

Two years later, Ms. Hechler sued the IBEW and Local 759 in the Florida state courts. The unions removed and the federal district court dismissed the complaint. On appeal, the Eleventh Circuit reversed. We petitioned for certiorari and the case is now here.

Two sets of issues are presented: First, whether this case is governed by the federal labor laws; and second, if so, whether the complaint was properly dismissed.

Given the nature of the questions, we'd like to

begin by pointing the court to the complaint in this case, most particularly paragraph 4, which is on page 4 of the joint appendix, the buff-colored document. And I'd like to read that if I could. The complaint says:

"The defendants" -- which are the unions -- "and each of them, pursuant to contracts and agreements entered into by and between these said defendants and the said Florida Power, to which contracts and agreements the plaintiff was a third party beneficiary, and pursuant to the relationship by and between the said defendants and the plaintiff whereby the plaintiff Sally Hechler was a dues-paying member of said defendants, the defendants owed the plaintiff the duty to assure that the plaintiff was provided safety in her workplace and a safe workplace; and further, the plaintiff would not be required or allowed to take undue risks in the performance of her duties which were not commensurate with her training and experience, or to work in an area which was not safe as commensurate with her training and experience."

In other words, the complaint alleges that the unions owed Ms. Hechler a duty to assure that she was provided safety in her workplace and a safe workplace. And the complaint alleges that the source of that duty was first and foremost in contracts and agreements

entered into by and between the unions and Florida Power & Light, and the only agreements entered into between the unions and Florida Power & Light were a collective bargaining agreement and ancillary agreements to that collective bargaining agreement.

QUESTION: Mr. Gold, the language you did quote said too, though, that "and pursuant to the relationship by and between the said defendants."

MR. GOLD: Yes. That's why I said there are two sets of issues, Chief Justice. The first concerns whatever duties are stated in the collective agreement, and the second rests on the basis you just noted.

I would emphasize in that regard that, aside from that phrase in the complaint, as we demonstrate at length in our reply brief, this case was litigated solely on the theory that the collective bargaining agreement was the source of those duties.

That was the basis on which the district court proceeded, that was the basis on which the Court of Appeals proceeded. And we have quoted from the plaintiff's paper in response to the motion to dismiss and in the courts below focusing on the same document. So in regard to your question, I would say two things:

One, we believe that this case is about what duties, if any, were created by the collective

bargaining agreement and what law applies to those duties.

Secondly, to the extent we're wrong about that, we believe that, insofar as the plaintiff's theory is that there was a relationship between the union and the dues-paying members the union was representing in collective bargaining, that relationship too is governed by federal law, and that the federal law preempts any state law claims.

In other words, we believe that the phrase you noted is not properly part of this case any more, but we're prepared to demonstrate on the merits that even if it were it doesn't help the plaintiff.

It's common ground here, I believe, that under Florida law employers have an obligation to provide a safe workplace, but that members of -- employers have an obligation to provide their employees a safe workplace, and that negligence in that regard, to the extent that you don't have workers compensation blocking the claim, is actionable as a matter of Florida law.

So far as the complaint indicates or anybody has argued in this case or anything that we have found in this case, in researching this case, Florida law does not impose any such obligation in general on third parties. There is no general law that each citizen of

Florida must do whatever is in his power to ensure other citizens as employees a safe workplace or that membership associations generally have such an obligation.

Rather, the first theory that plaintiff alleges here is that the union's contracts and agreements with Florida Power & Light constitute an undertaking whereby the union assumes a duty to the individuals the union represents to assure safety in the workplace and a safe workplace.

And obviously, the beginning then is what does the collective bargaining agreement say and what does the collective bargaining agreement mean. And in that regard, it seems to us that this case is indistinguishable from Allis-Chalmers versus Lueck, 471 U.S. 202.

In that case, the plaintiff, an individual employed by Allis-Chalmers and represented by a different union, the UAW, brought a lawsuit alleging that Allis-Chalmers had breached a tort law obligation to pay disability benefits due under a provision of the collective bargaining agreement there in a prompt good faith manner.

The court held that that claim in essence stated a Section 301 of the Labor Management Relations

Act claim, even though it was denominated as a state law tort claim. The test as we understand it stated in Lueck is that state law rights and obligations that do not exist independently of private agreements governed by Section 301 are federal Section 301 claims.

Beginning with Textile Workers versus Lincoln Mills, this Court has held that all claims that it denominated as claims resting on a collective bargaining agreement are governed by a uniform set of federal common law rules derived from the national labor policy, and that that was Congress' intent in passing Section 301.

QUESTION: Mr. Gold, do you characterize this as a fair representation claim?

MR. GOLD: We think that the true gravamen of the complaint here, when you go through the collective bargaining agreement, is that the union did not undertake any threshold duties to run the Florida Power & Light Company or to make job assignments, and that the plaintiff's real complaint here is that the union failed to properly police the collective bargaining agreement.

In that sense, Your Honor, we do believe that when all is said and done, the claim here, as was true in Vaca versus Sipes, is a claim that the union failed in its representational capacity.

QUESTION: They should have grieved and they didn't.

MR. GOLD: That's -- the plaintiff here never filed a grievance.

QUESTION: This is what bothers me, because your brief does characterize it as a fair representation claim. And yet, I don't know of any case in which this kind of situation has surfaced in that capacity.

MR. GOLD: Your Honor, if I could, it seems to me that in that, in the sense you are referring to, Vaca was precisely the same kind of case. In Vaca what happened was that an individual was adjudged by the company to be unfit to continue work. He had a medical examination, they told him he had a heart problem. And he complained that the union hadn't done enough to put him back to work and brought a duty of fair representation case against the union, claiming that the union's position didn't advance his job-related interests in a proper fashion.

What is at the bottom when you go through the collective bargaining agreement here is that there are various provisions providing that the company will make assignments setting standards concerning the extent to which the company is to take into account training and safety considerations in making assignments.

The claim here is that Ms. Hechler, who was assigned to job A on a particular day and injured that very day, shouldn't have been assigned to that job and that the union should have done something about the assignment.

The union did not assign her to the work, nor did the company consult with the union prior to making the assignment. So it is the claim --

QUESTION: That the union should have objected to her assignment, that's the claim?

MR. GOLD: That is the essence of the claim. Now, the plaintiffs are not admitting that that is the essence of the claim, and that's why I begin by saying that the threshold question here is who determines what this collective bargaining agreement means and by what law is the meaning of the collective bargaining agreement to be determined.

And we believe that under Lincoln Mills and all the cases through Lueck, whether the plaintiff denominates her threshold claim, the one that rests on contracts and agreements between the company and the union, as a contract suit, a tort suit, a state suit, or a federal suit, in reality it is under this Court's decisions and under Congress' enactment of Section 301 a claim based on the collective bargaining agreement, one

whose validity has to be tested against the promises made in the collective bargaining agreement read --

QUESTION: Mr. Gold, what if the Respondent here says, my claim has an independent source in Florida law just by virtue of the relationship these people had with one another; we're not relying on -- she's not relying on any particular provision in the collective bargaining agreement?

MR. GOLD: Well, insofar -- our answer to that, Chief Justice, is that insofar as the plaintiff's claim is that the relationship is the relationship between a company and a union which is the exclusive collective bargaining representative, that claim is a federal claim, however it is denominated; that the relationship, that relationship, has two components:

Component number one is, where the parties have reached a collective bargaining agreement, the promises exchanged in the collective bargaining agreement fairly read against a background of federal common law. The second relationship is this triangular relationship between the company, the union, and the individuals who are employed under the collective bargaining agreement, and as to that relationship we believe that it is the federal common law, expressed in the duty of fair representation, which is the sole measure, that the

states cannot change that body of federal law either by subtracting from it or adding to it.

CHIEF JUSTICE REHNQUIST: We'll resume there at 1:00 o'clock, Mr. Gold.

(Whereupon, at 12:00 noon, oral argument in the above-entitled case was recessed, to reconvene at 1:00 p.m. the same day.)

AFTERNOON SESSION

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: You may resume where you left off, Mr. Gold, or any other place if you want to.

ORAL ARGUMENT OF

LAURENCE GOLD, ESQ.

ON BEHALF OF PETITIONERS

MR. GOLD: Thank you, Chief Justice.

Before lunch we were discussing the point that the plaintiff's primary claim and, as I noted to the Chief Justice, the only claim she pressed in the Court of Appeals and in her brief in opposition to certiorari in this Court is that under the collective bargaining agreement between the Florida Power & Light Company and the unions in this case, the unions have a duty to assure employees covered by that agreement a safe workplace, and that the union had breached that duty and in doing so the plaintiff's claim is that the union had breached a common law obligation imposed by the tort law of the state of Florida.

Our first response to that claim is that under this Court's decision in Allis-Chalmers versus Lueck, the plaintiff's claim is perforce one which arises under Section 301 of the Labor Management Relations Act,

because it depends on the collective bargaining agreement and is governed not by state law but by the uniform federal common law of collective bargaining agreements stated in Section 301.

I noted that, and I'd like to develop a bit more, that under the National Labor Relations Act and the Labor Managment Relations Act, Congress has created a system of free collective bargaining, and Congress enacted Section 301 as a component part of the free collective bargaining system to provide the means by which the meaning and effect of collective bargaining agreements would be determined.

The federal interests that Congress determined were paramount are the interests in uniformity and predictability. A collective bargaining agreement should mean the same thing in Florida that it means in Georgia. Many collective bargaining agreements are national in scope.

And the parties, if they are going to do what Congress wished, which is to create their own system within the limits of the law that meets their particular situations, should know that if they include a particular provision in their agreements it will mean -- it will be given a meaning that is consistent with and derived from the common law of contracts based on the

national labor policy.

QUESTION: Mr. Gold, is it clear that there is no conceivable state cause of action that could have come within this complaint that would be based neither on the collective bargaining agreement nor union the union's duty of fair representation?

What if the state said that all unions have an obligation to assure that their members are adequately trained for the jobs that they do?

MR. GOLD: First, Justice Scalia, it's this complaint, and we're saying that nothing pleaded in paragraph 4 of this complaint goes that far.

Secondly, it would be our view that the states could not impose that kind of obligation, at least insofar as the union was a collective bargaining representative, that that would conflict with the body of --

QUESTION: Why? That has to do with the direct obligation between the union and its members. It doesn't require the employer to be brought into the loop at all.

MR. GOLD: Well, insofar as the state imposes a general obligation on unions and membership associations, including the AAA, to train people, that may be one thing. But what I was visualizing is that a

state then uses that law to provide that a union which does not stop an employer from hiring somebody who's untrained --

QUESTION: That gets into fair representation.

MR. GOLD: That's right, and that's what this case --

QUESTION: And your point here is that the only thing alleged in the complaint has to be some claim that the union should have gotten the employer to do something?

MR. GOLD: That's right.

QUESTION: Not that the union itself should have done something.

MR. GOLD: That's right. If there was a claim that in essence the state of Florida was changing the basic common law on volunteers and so on and that unions had some general obligation to provide training or do good, I don't know where we would be.

But the practicalities are that here what happened was that the employer hired Ms. Hechler and the employer assigned Ms. Hechler, and she was injured doing the work the employer had assigned. And the allegation is not that the union had some general duty to train; it was a duty to provide her with a safe workplace.

And the only status the union had to provide

her with a safe workplace, since it was not the employer itself, was in its relations with the employer, and the only relationship the union had with the employer was as an exclusive bargaining relationship.

And what we argue is that under Lueck, insofar as the union and the employer consummated that relationship under a collective bargaining agreement, the meaning and effect of the agreement ought to be determined under Section 301 by federal law. And we don't say what the agreement means.

We don't say that there are no implied obligations under the agreement. We just say that that is a federal question, and we say that insofar as it is alleged that the union, because of the union-member relationship, has an obligation to provide members with a safe workplace, insofar as the union is acting as collective bargaining representative, that obligation is to be measured by the duty of fair representation.

QUESTION: Mr. Gold, just how much notice did Ms. Hechler have before she was assigned to that job?

MR. GOLD: So far as --

QUESTION: The record doesn't show, does it?

MR. GOLD: It doesn't show, Your Honor. All we know is that she was assigned and on the very day she was assigned she was injured.

QUESTION: Well, when was the union first notified that she had been assigned to that job?

MR. GOLD: After she was injured, and that obviously in terms of the union's situation, the union's ability to do anything about it, was all after the fact. And as I mentioned in response to a question of Justice White's, Ms. Hechler never even filed a grievance about the assignment.

So what we have here is a situation where the employer acted. The union is in the picture because it has representational responsibilities and because it negotiated an agreement with the employer.

QUESTION: But certainly, some areas of the union-employee relationship, union-member, are subject to state law, aren't they? The earlier Allis-Chalmers case and so forth.

MR. GOLD: Absolutely. I mean, insofar as the union undertakes to do things outside of its representational capacity, that presents issues that are entirely separate. We noted in the brief, and we just have no doubt that there are many other examples, that to the extent that the union has a union hall and provides a place to meet and so on, if it doesn't have proper facilities, if the floor isn't even and so on, and somebody is there for a union meeting and gets hurt,

the union is subject to suit.

But our claim is here that, insofar as you get to providing safe workplaces for employees employed by others, the union's only role is as a representative, somebody who negotiates agreements. And we say that under Lueck what the agreement means and what its effect is is to be determined by federal law, and that insofar as it's alleged that there is a relationship and that creates the duty, that that is to be evaluated under the duty of fair representation.

And we go on to say and at this point reach the ultimate issue in the case that under this federal law what the plaintiff is complaining about at bottom is that the union didn't meet its representational responsibilities, and that therefore the district court was right in determining that the six month statute of limitations for such claims applies here and properly dismissed this case, brought two years after the event.

But that's the ultimate substantive issue. Our basic obligation is to show that insofar as the plaintiff rests on the collective bargaining agreement, either what it does say or what Florida might wish it to say or what Florida might wish to imply into it, that claim is perforce a Section 301 claim.

And insofar as the plaintiff says --

QUESTION: Incidentally, Mr. Gold, the Court of Appeals did not pass on the statute of limitations issue, am I correct in that?

MR. GOLD: The Court of Appeals held that the claim was truly a state law tort claim, not preempted, and therefore it didn't reach any other issues.

QUESTION: And therefore, if we should decide in your favor here we could kick that issue back to the Court of Appeals.

MR. GOLD: Oh, absolutely. And we noted that, at the beginning of the discussion of that one substantive issue, that there were two choices open to the Court, and that so that you had all the considerations before you we would brief them. But it is absolutely correct that for the purposes of the question raised by the certiorari petition, the threshold question and the only question that need be decided is whether federal law controls.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gold.

Mr. Perwin.

ORAL ARGUMENT OF

JOEL S. PERWIN, ESQ.

ON BEHALF OF PETITIONERS

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

The central question in this case is whether state common law actions regarding the safety of the workplace, at least when they implicate a union's obligation regarding the safety of the workplace, should be cut short at the threshold by employing the federal labor law preemption doctrine as a vehicle for imposing absolute immunity upon unions from liability under state law.

The union can sustain its burden of demonstrating the propriety of such a sweeping preemptive effect only if it can show that prosecution of Sally Hechler's state action, no matter what it looks like, and whether it embraces federal questions or state questions, will tangibly, immediately, and palpably threaten some important federal interest.

That may be a substantive threat in the risk that the state system will employ a body of law that's inconsistent with the federal substantive law, which the labor laws would apply in a different context. It may be a procedural threat in that even if it employs federal issues on federal law and federal questions, the state system may do so in a manner which circumvents important dispute resolution procedures which are favored by the federal system.

But either in procedure or substance, one way

or the other, the union has to demonstrate a tangible threat to an important federal interest. Throughout the course of this litigation, the union has invoked two separate theories of preemption in order to demonstrate that threat, and they really ought to be kept separate.

It has invoked the doctrine of 301 preemption, the complete preemption doctrine.

QUESTION: What if an employer allegely breaches a contract and the union sues the employer for breach of contract in state court under state contract law? Do you think the state may apply its laws?

MR. PERWIN: No, Your Honor, I do not.

QUESTION: Well, what federal interest is threatened there?

MR. PERWIN: There is no federal interest threatened because the action would have to be brought in federal court under Section 301.

QUESTION: No, it wouldn't. No, it wouldn't. State courts may entertain 301 actions. They just have to apply a federal law.

MR. PERWIN: Of course. There is no federal interest threatened because, regardless of the forum --

QUESTION: All right, there's no federal interest threatened, but nevertheless federal law governs that suit?

MR. PERWIN: Yes, Your Honor.

QUESTION: Well, that's the claim in this case.

MR. PERWIN: Yes, Your Honor.

QUESTION: Well, then, where do you -- how can you say that there must be some federal interest threatened?

MR. PERWIN: Because the union's position is not simply that the action is permissible in state courts under state law so long as the state court applies federal law on questions of contract interpretation. That's our position.

The union's position is that the state court can't even do that, that the most that a state court could do is --

QUESTION: I thought the only issue was whether federal law governs.

MR. PERWIN: No, Your Honor. No, Your Honor. Our contention --

QUESTION: Well, what if it were? Would you agree, federal law governs, or not?

MR. PERWIN: Of course. We have agreed throughout.

QUESTION: That federal law governs?

MR. PERWIN: On questions of contract

interpretation regarding the collective bargaining agreement.

QUESTION: Well, how about your lawsuit?

MR. PERWIN: Our lawsuit embraces two alternative theories of liability. One is based on the language of the collective bargaining agreement, and clearly federal law would govern that question. The other is based on the relationship between Sally Hechler and her union, which is extrinsic to the collective bargaining agreement. We say state law governs that question.

QUESTION: Even though -- is that a different sort of claim than the fair representation claim?

MR. PERWIN: We believe that it is, Your Honor.

QUESTION: In what respect?

MR. PERWIN: Well, our position is that neither this court nor any other federal court has ever extended the fair representation doctrine to the pre-grievance procedure, to the pre-grievance posture in which we are claiming that the union had a common law obligation to Sally Hechler.

This Court has said, for example in Vaca versus Sipes, which is the case which really articulates the fair representation doctrine, this Court has said that a

union has a duty of fair representation when it is performing a statutory representative function. And the Court was specific about what that meant.

It said that that means negotiation of collective bargaining contracts and the handling of the grievance procedure.

QUESTION: Well, the negotiation is certainly pre-grievance.

MR. PERWIN: Yes, but this was post-negotiation. This was a period of time in which the contract had been created, but no grievance had been filed. This was, as was suggested, a relationship between Sally Hechler and her union.

And this Court has never said that a union has a duty of fair representation --

QUESTION: But the union didn't owe that duty except by virtue of there being a collective bargaining contract.

MR. PERWIN: I disagree, Your Honor. The duty of fair representation has been held to be implicit in the scheme of the federal labor laws.

QUESTION: Well, what business would the union have if it wasn't the exclusive bargaining representation for this employer?

MR. PERWIN: Certainly the contract creates the

duty of fair -- the existence of the contract creates the duty of fair representation. But the obligation as it's been defined by this Court seems to be inherent in the penumbras of the labor laws and not to depend upon any explicit assumption of a contractual obligation to fairly represent a union.

The question then, with respect to what we've done, is that we've shifted the discussion to this issue of machinist's preemption, by which the union claims that, even if our lawsuit is based solely on state law principles, it is preempted because the federal labor laws have occupied this field.

QUESTION: Mr. Perwin, we didn't say in Allis-Chalmers that the suit could go forward under state law so long as whenever any issue of contractual interpretation came up the state court would resolve that issue. Rather, we said the whole bad faith issue, the whole claim, was to be governed by federal law.

Now, why isn't that the parallel here? You want us to sort of just tell the state courts, whenever you have to get into the contract, decide it on federal standards. That's not what we did in Allis-Chalmers. We said the whole thing, since contractual interpretation is so inextricably intertwined with it, the whole thing becomes a matter of federal law.

MR. PERWIN: I would respectfully disagree, Your Honor.

QUESTION: We didn't say that? We said it.

MR. PERWIN: I don't believe you did. I believe what the Court said in Allis-Chalmers -- and I'm looking at page 218 of the Lawyer's Edition -- is that since the extent of either duty, the duties alleged in the complaint, ultimately depends on the terms of the agreement between the parties, both are tightly bound with questions of contract interpretation that must be left to federal law.

Questions of contract interpretation --

QUESTION: Are tightly bound to. It didn't say only questions of contract interpretation are left to federal law. It said everything that is tightly bound to questions of contract interpretation.

MR. PERWIN: I agree, Your Honor. And our position then would be that --

QUESTION: But that's not your position. Your position is only the questions of contract interpretation are left to federal law.

MR. PERWIN: I would submit that the panoply of state law issues which are inherent in this complaint are not tightly bound to contract interpretation. I would freely admit that questions of what the contract

means must be decided under federal law.

I see nothing in Allis-Chalmers, nor in the policies that underlie Section 301, which suggests that any federal interest is offended if there are other state law issues which are adjudicated in the context of that interpretation under federal law.

The best case for that is the Kuser-Cardinal decision in 1966, which permits in a certain kind of 301 action the federal courts to borrow state statutes of limitation, which raises the possibility that there may be 50 different state statutes implicated in a given case.

And this Court expressly addressed the contention that Congress required uniformity with respect to statutes of limitations, and rejected that contention on the ground that Congress called for uniformity in decisionmaking only regarding the interpretation of contract terms. That's where you need certainty. That's where you need uniform federal law.

But you hardly needed it with respect to statutes of limitations, because a diversity of decisionmaking under statutes of limitations did not implicate that concern with substantive uniformity regarding contract interpretation.

I submit that the Kuser-Cardinal decision is

directly analogous on this point. We are perfectly willing to interpret the collective bargaining agreement under federal law. We think that state courts are perfectly capable of doing that and, as has been pointed out, are required to do that by virtue of their concurrent jurisdiction under Section 301. We have no quarrel with that proposition.

But we see no value to be served under the labor laws by forbidding states to engraft upon that interpretation under the federal statute a set of rules which inhere in the common law, because there is no federal interest that is offended by doing so.

The state -- the judge in the state court is charging the jury under federal law. It is then applying very traditional state common law precepts to the adjudication of the union's duty under the collective bargaining agreement.

We have consistently challenged the union to tell us what in the federal system gets hurt by doing that, what federal interest is implicated. And the union has consistently responded by reading what is admittedly dictum in the Allis-Chalmers versus Lueck decision, which suggests in general that whenever there is an issue of contract interpretation then the whole thing becomes a 301 case and no other.

We submit that such dictum is unnecessary to the decision in Allis-Chalmers. What happened in Allis-Chalmers is that the Court held that the substantive law to be applied was federal. But we submit that that conclusion did not merit the relief that was ordered in Allis-Chalmers.

The relief, which was of course that the state action was totally precluded, was warranted only because the adjudication of the state action would circumvent important grievance procedures, and to do that would offend the policy of the labor laws.

Therefore, the adjudication even of a federal issue in state court would have offended other issues of concern under the labor law, and that's why Allis-Chalmers forbade the action, not because there was a federal question in it. State courts enforce federal law all the time.

And the union has the burden of proving that allowing a state court to do so in this case would offend some important policy of the federal labor laws. It has not sustained that burden. And therefore we submit that if you look at the chunk of our complaint that concerns federal law, there is no warrant for preemption under Allis-Chalmers.

As a backup position on that one case, before I

turn to the Machinists argument again, we submit that even if we are remanded to a claim under Section 301 in state or federal court and no other, that it should not be held to be time barred under the DelCostello opinion.

It should not be subject to a six month statute of limitations. DelCostello adopted the six month statute, borrowing the statute which exists relative to charges of unfair labor practices, because, just like charges of unfair labor practices, these hybrid 301 fair representation cases involve a challenge to a dispute resolution procedure.

They don't involve some de novo review of the propriety of the conduct in question. They involve a more broadly based challenge to the integrity of a dispute resolution process. And therefore the analogy was apt.

But if Sally Hechler is required to pursue a 301 claim in this case and no other, her claim is not analogous to a challenge to a dispute resolution procedure, because she had no grievance to exhaust relative to the union's obligation. And therefore her claim would be far more like the claim in Kuser-Cardinal, which was a contract claim against the employer in the absence of any requirement of exhausting

grievance procedures.

QUESTION: What would be the elements of her claim here as you see it if she were proceeding under 301?

MR. PERWIN: She would say -- well, if she were forced to proceed under 301, she would say that the union had a contractual obligation by virtue of its participation in the safety council which was set up by the collective bargaining agreement to make sure that she was not assigned to a job for which she was improperly trained, that the union breached the contract, and that under ordinary principles of contract law that particular contract provision was adopted in contemplation of personal injury should it be breached, and therefore ordinary contract damages should reach those personal injuries.

And I'm talking about the whole ball of wax, pain and suffering and the rest, because all were contemplated by the parties when they prescribed a contractual term which dealt specifically with the physical safety of workers, and that's the claim: The union breached a contractual obligation, she was a third party beneficiary of the contract.

We submit that such a claim should not be governed by a six month statute of limitations because

to do so would stretch the reasoning of DelCostello beyond the four corners of that decision and because Kuser-Cardinal is a far more analysis.

Let me shift then to the second.

QUESTION: You do expect us to resolve the statute of limitations point here?

MR. PERWIN: Your Honor, I have argued the point on the merits, just as have the union. I think it would be just as appropriate to remand the case to the Court of Appeals, which the union suggests is a viable option, and let the Court of Appeals consider that question first.

Now we move from the issue of -- from the question of whether there are federal issues in our complaint to the question of whether a complaint based on purely state law obligations would be preempted under the Machinist's theory because it is the duty of fair representation that occupies this field, this field of pre-grievance relationships.

And I can't stress too strongly -- first of all, we haven't abandoned that in the slightest. If there's something ironic about the claim that we would be held to have abandoned a theory which is admitted to be explicitly pleaded in the one pleading which we have had a chance to file in this case, which was our

complaint -- the case was removed and then dismissed after we filed that pleading, and this theory is explicit in that complaint.

In addition, we submit that it is inherent in the circuit court's opinion in this case. The circuit court certainly had no trouble recognizing that we were embracing state and federal law claims. It said at page 794 of volume 772 that, though the contract may be of use in defining the scope of the duty owed, liability will turn on basic negligence principles as developed by state law.

The circuit -- the Court of Appeals certainly understood that, while a contract may be of use in defining the duty, it certainly wasn't the exclusive source of that duty.

And of course, in our response to the cert petition we said the same thing. We said on page 4 that Hechler's claim is that the unions were negligent in the performance of a contractual obligation. We didn't limit that claim to the collective bargaining contract. And we submit that there is a contractual obligation that runs directly between a union and its members.

QUESTION: Well, when you say someone is negligent in performing a contractual obligation, does that make them any more reprehensible or more liable

than if they breach a contractual obligation although they weren't negligent in breaching it?

MR. PERWIN: I don't believe it makes them any more reprehensible, Your Honor, but it is a different cause of action. I can be negligent in the performance of a contractual obligation even if I don't breach the contract. On the other hand, I can breach the contract and be liable for contract damages even if I am not negligent in the course of my breach.

The duty may be prescribed by the contract, but the cause of action plays itself out in a different way. So no, we don't see anything, one is more reprehensible than the other. We simply submit that the state system is permitted to adjudicate the cause of action based entirely upon a relationship which it might impose, so long as Congress hasn't occupied the field.

QUESTION: Well, just because they call it a tort, do we have to call it a tort?

MR. PERWIN: Your Honor, I don't mean to be facetious, but I don't care what we call it as long as --

QUESTION: Well, we do, because if it is essentially related to federal contractual obligations that by any other name would still be a suit for breach of a federal contract.

MR. PERWIN: But I would disagree, because the claim would not be based on the federal contract. It would be based on common law obligations which exist independent of that contract. It may be, for example, that the state of Florida would recognize that membership in a union imports certain obligations.

Or it may be that the relationship between Sally Hechler and her union as it evolved gave rise to certain common law duties. And I can't stress too strongly that I'm not talking about duties that inhere only in the grievance process.

QUESTION: Mr. Perwin, the question -- I guess maybe this is repeating what Justice Scalia said, but would you agree that the question of how one characterizes a claim that is some marginally federal and marginally state is a federal question?

MR. PERWIN: Yes, of course. In the context of deciding --

QUESTION: So we have to decide whether to characterize it as tort, contract, good faith, whatever it might be?

MR. PERWIN: Yes, of course, because the question of preemption is a federal question, and that depends on how one characterizes --

QUESTION: Well, can I ask, suppose there were

two people that had been assigned to the same job and both had been hurt, and one was a member of the union and one wasn't. Now, would you say that they would be treated differently under your theory?

MR. PERWIN: Yes, sir.

QUESTION: And the one who wasn't a member of the union would be out of court and the member would be in, under state law, is that it?

MR. PERWIN: Yes, sir, because if you're not a member of the union you can hardly sue the union on the basis of a relationship which inheres in the membership relationship.

But when somebody chooses to join --

QUESTION: I thought you were arguing that the state is perfectly free, whenever there's a collective bargaining contract entered into, to attach to the union's duty some additional obligations that the duty of fair representation under federal law wouldn't entail.

On that theory, both of these people would be covered under your theory.

MR. PERWIN: I'm sorry, I thought Your Honor's hypothetical presumed that the first worker was not a member of the union.

QUESTION: I do.

MR. PERWIN: Well, I don't understand how if you're not a member --

QUESTION: Well, the union represents all people in the bargaining unit.

MR. PERWIN: Yes, but we are -- we are seeking to apply state law on the basis of membership in the union.

QUESTION: That's your only claim?

MR. PERWIN: Well, that's our state claim.

QUESTION: All right, but that's your only claim under state law?

MR. PERWIN: Yes, sir.

QUESTION: You are not saying, then, that the state is free to attach an additional duty of fair -- some other obligation to the duty of fair representation generally?

MR. PERWIN: No, Your Honor.

QUESTION: You made two in your complaint. You relied upon the union member-union relationship, and you also relied upon the fact that you were a third party beneficiary of the collective bargaining agreement.

MR. PERWIN: Yes, sir.

QUESTION: So you really have two theories. You're now talking about the second one.

MR. PERWIN: Not at the moment.

QUESTION: I mean the former.

MR. PERWIN: I'm not talking about the third party beneficiary theory at the moment, right. I'm just saying that to the extent that a member or non-member, to the extent that a member or non-member, Your Honor, relies upon the collective bargaining agreement, then they are invoking a source of duty which must be adjudicated under federal law.

It may be adjudicated in the context of a state action or a federal action. But with respect to the purely state source of duty, we're saying that it inheres in the membership relationship, and that --

QUESTION: So that the state can say, can impose a duty of non-negligent performance of a contract?

MR. PERWIN: Yes, if the state --

QUESTION: That isn't closely enough tied to the contract to be governed by federal law?

MR. PERWIN: No, because it's -- the contract which we're speaking of here is the contract between the union and the member, not the contract that the union negotiates with the company.

You see, the member is a member of the union, and that gives rise to a relationship which exists independent of the employer. The worker may also be a

third party beneficiary of the contract which the union has negotiated with the employer, but the worker is also a member of the union.

And in addition, it may be that the union, Your Honor, has assumed certain responsibilities. And it may be that the union by informal practices has operated to screen the assignments. They're clearly assignments that are at the discretion of the employer, but it may be that the union by informal processes has undertaken to educate the worker about his rights under the collective bargaining agreement.

Sally Hechler was an apprentice. She didn't know that she had a right to refuse this job. She had probably never seen the collective bargaining agreement.

We may be able to prove that typically or traditionally the union had undertaken a common law duty to educate its members regarding their rights to refuse an unsafe job assignment. We're not talking about prosecuting grievances.

QUESTION: That doesn't come within your complaint. I agree that that one might get you there, but your complaint is not directed at anything that the union could have provided immediately to the plaintiff, but it is directed to the union failing to prevent the

employer from sending this worker into that location.

The theory you just spun out sounds good, but it seems to me not admissible under the complaint.

MR. PERWIN: I disagree, because one way of doing that is to make sure that the union knows what her rights her.

QUESTION: But read the complaint. Read the paragraph of your complaint, and you tell me how that comes within it.

MR. PERWIN: I only need one word, and that's "relationship." The relationship between Hechler and the union, that's in the complaint. And the union had never challenged, never challenged that complaint on the basis that it was unclear.

They never asked us for a bill of particulars. They didn't want to know what the complaint meant. They undertook the burden of demonstrating that no matter what the complaint means, no matter what theory it might embrace, it is preempted by federal law. That was their obligation. They were the moving party in this case.

We submit that our invocation of the relationship between Sally Hechler and her union is broad enough to encompass everything that might have happened in the course of that relationship, including undertakings which the union might have voluntarily

assumed --

QUESTION: Well, you could, I suppose, prove under that that there was a secret guarantee by the union to all of its members that we will make sure you don't ever get assigned to dangerous work. That's what you're going to prove under that kind of vague allegation.

MR. PERWIN: Well, I don't know how secret it needs to be.

QUESTION: Well, but I mean, your scope of proof under that is broad enough to cover anything you can conceive of as part of a relationship.

MR. PERWIN: Exactly.

QUESTION: And our pleading rules are pretty liberal, but I'm not sure they're that liberal.

MR. PERWIN: Well, if the problem is with the specificity of our pleading, then I would suggest that we be asked to file a more artfully drawn complaint.

QUESTION: Well, it isn't with what you didn't say; it's with what you did say. The only thing you're complaining about is that pursuant to the contracts and agreements and pursuant to the relationship, the defendant owed plaintiff the duty to assure that plaintiff was provided safety in her workplace.

MR. PERWIN: Right.

QUESTION: That could only be done through the employer. That couldn't have been provided directly.

MR. PERWIN: Not necessarily. Or even if, Your Honor --

QUESTION: And a safe workplace, and further, the plaintiff would not be required or allowed to take undue risks. Again, that could only be done through the employer.

MR. PERWIN: Well, first of all, even if it could only be done through the employer, it may be done through the employer through informal processes that do not require invocation of the collective bargaining agreement.

It may have been that this union had undertaken to advise its employees about the safety of the assignments and said to the employer: You know, we've got an apprentice here; she shouldn't be in this sub-station; she's in trouble; and the employer said: Oh, you're right; I'm sorry; we made a mistake; we never should have assigned her there. That's the end of it.

You're not talking about a grievance procedure; you're talking about the settlement of problems before they happen.

QUESTION: And that duty to deal with the employer would not be -- would not come within the

collective bargaining agreement, and is a whole separate obligation that the union, and set of relationships, that the union has with the employer that's separate and apart from the collective bargaining agreement?

MR. PERWIN: That's what we would hope to prove --

QUESTION: And that's going to vary from one state to another?

MR. PERWIN: That's what we would hope to prove if we are given the chance. Now, we've never litigated this question of duty. We came up here on the issue of preemption. But if given the chance, that's what we would prove.

And the question is, does that, does the assertion of such a duty so intimately implicate the duty of fair representation that it can fairly be said that Congress intended to occupy this field?

QUESTION: Mr. Perwin --

MR. PERWIN: Yes, Your Honor.

QUESTION: -- along that same line, you can't be allowed to take a bad job, a dangerous job, right? Allowed, A-l-l-o-w-e-d.

MR. PERWIN: Right, yes, sir.

QUESTION: How do you stop her from taking a job?

MR. PERWIN: Well, one thing you can do is you can advise them that they have a right to refuse. Another thing you can do --

QUESTION: How do you stop them from taking it if they want to take it? You say they had the right to do it. How can the union exert that right?

MR. PERWIN: I don't think the union can stop it. But I do think that --

QUESTION: Well, why do you allege it?

MR. PERWIN: Well, to the extent that we allege that the union had an obligation to stop it and had the power to stop it, then that part of our complaint is overbroad. But I do think that the union could have taken a number of steps to prevent the accident, and that the union had an obligation.

When Sally Hechler signed on with this union, she gave up a lot of rights under the labor laws, and she sacrificed her individual rights to the collectivity in certain respects. To the extent that the labor laws --

QUESTION: The Wagner Act, while you're at it?

MR. PERWIN: No, Judge, I don't think that's going to be the impact, because I don't think that the relationship which we're talking about is governed by the labor laws.

This Court has never imposed a duty of fair representation at this pre-grievance stage of the union-worker relationship, and we submit that there is no federal duty in this area. This Court has never imposed such a duty.

To the contrary, this Court said in Vaca versus Sipes that it's only a statutory representational function that invokes that duty. This Court, in Chief Rehnquist's opinion in 1973, decided the NLRB versus Boeing decision, which said that state law can govern union fines against their workers for returning to work in violation of local contract law, that is the agreement between the union and worker.

Now, that clearly implicates the union's representational function. The union is performing a representational role when it does that. But there was no thought that such an action would be preempted by the duty of fair representation, because the duty of fair representation governs the formation of the collective bargaining agreement and the enforcement of that agreement through grievance procedures.

It does not reach this pre-grievance relationship. In that area, we submit that Congress has not occupied the field and that Congress certainly did not intend that the states be forbidden to occupy the

field.

Rather, they have an obligation or at least the power to prescribe common law duties of due care with respect to the membership relationship between a worker and a union. And to that extent, our complaint is based on state law and is not preempted by the Machinists theory. And of course, therefore we'd be governed by a state statute of limitations.

QUESTION: May I ask, Mr. Perwin, if we get all the way through this, what is your view of the law of Florida? Do you contend that as a matter of Florida law every union has a duty to make sure that its members are not assigned to work in a dangerous place?

MR. PERWIN: That would be our position as a consequence of membership. There are also other --

QUESTION: And that this is a general rule of Florida law?

MR. PERWIN: Yes, sir.

QUESTION: And what is the strongest Florida case that you have identifying this rule?

MR. PERWIN: I do not have a Florida case which deals with the worker-union relationship. The only cases I can cite for you are the cases which state the common law principle that a duty of care arises in the context of a relationship.

Our backup position if the state court should reject that theory is that in the context of this particular relationship the union assumed certain obligations. If we can't prove that, we're going to lose.

If we can prove that, the adjudication of our cause of action does not pose a tangible threat to the federal labor law scheme, and that's what the union has failed to show. So whether or complaint embraces federal questions or whether it embraces state law questions on the issue of duty, in neither event does its litigation threaten a federal interest. That's the key to preemption. That's the union's omission.

QUESTION: Let me ask you one other question. Do you think there's enough of a federal claim in this litigation to make the removal proper?

MR. PERWIN: I do not, Your Honor. I believe that removal requires more, in this Court's recent opinions, than the mere presence of a federal question as a part of the plaintiff's case. The Court said that in the Merrell Dow case, the Franchise Tax Board case, and as early as 1934 in the Moore versus Chesapeake case, in which you did have a state action embracing a federal question, just like here.

QUESTION: Did you oppose removal below?

MR. PERWIN: We did not file a motion to remand. But when the union --

QUESTION: Therefore you did not oppose it.

MR. PERWIN: We opposed it in the context of our opposition on the merits and the motion to dismiss under the statute of limitations. We said in that context that the case should never have been removed and ought to be remanded, so that the state court could consider the motion to dismiss.

QUESTION: Don't you have to file a motion to remand within a certain period of time? You did when I was practicing.

MR. PERWIN: The cases which I have seen have suggested that the federal court has a continuing obligation to assess its jurisdiction, and that at any appropriate time that the issue is called to its attention at which removal remains appropriate, because the other side, for example, hasn't invoked the aid of the federal court, that the case can be -- the matter can be raised properly.

I am not certain of that, Your Honor. That is my understanding.

We would suggest that the case was improvidently removed and, for example, on the Machinists issue, that it might really be appropriate

for the state court to take a look at that, because that's a purely defensive preemption doctrine.

We would respectfully submit that the judgment of the circuit court, the decision of the circuit court, the Court of Appeals, should be affirmed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Perwin.

Mr. Gold, you have one minute remaining.

REBUTTAL ARGUMENT OF

LAURENCE GOLD, ESQ.,

ON BEHALF OF PETITIONERS

MR. GOLD: The plaintiff stresses that we haven't met our burden to show how there would be an adverse effect on the collective bargaining system by providing state obligations on how the union fills its representational function could be engrafted on, to use its term, onto federal law.

First of all let me note, as Justice White indicated, that under the plaintiff's theory, despite the fact that the duty of fair representation is to assure that the union treats members and non-members the same insofar as it engages in representational activity, the plaintiff would conclude otherwise.

Second, insofar as the states would take different views, some more liberal and some more strict,

on what a union is supposed to do in dealing with an employer in all the ways that were suggested -- screening vacancies and so on -- it would be the states which would call the tune on how the collective bargaining system works.

That is precisely contrary to all the preemption decisions of this Court and most certainly fulfils our burden.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gold.

The case is submitted.

(Whereupon, at 1:41 p.m., oral argument in the above-entitled case 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:

85-1360 - INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL.

Petitioners V. SALLY HECHLER

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

BY Paul A. Richardson

(REPORTER)