OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1804

TITLE THOMAS WEST, Petitioner V. CONRAIL, ET AL.

PLACE Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS WEST, :

Petitioner :

v. : No. 85-1804

CONRAIL, ET AL. :

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Washington, D.C.

Wednesday, February 25, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:50 o'clock p.m.

APPEARANCES:

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on behalf of Petitioner

LAURENCE GOLD, ESQ., Washington, D.C.;

on behalf of Respondents

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C O N T E N T S

ORAL ARGUMENT OF	PAGE
PAUL ALAN LEVY, ESQ.,	
on behalf of the Petitioner	3
LAURENCE GOLD, ESQ.,	
on behalf of the Respondents	23
PAUL ALAN LEVY, ESQ.,	
on behalf of the Petitioner - rebuttal	35

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: You may proceed whenever you're ready.

ORAL ARGUMENT OF

PAUL ALAN LEVY, ESQ.

ON BEHALF OF APPELLANT

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

This is a so-called hybrid action by an employee against his union and employer, against the employer for breach of a collective bargaining and against the union for mishandling a grievance which it had the exclusive authority to prosecute.

This Court has developed the hybrid cause of action over the past 40 years in cases beginning with Steele and running through Vaca and Hines, Chosek v. Omara, Bowen v. Postal Service. But in the course of developing the cause of action, neither Congress nor this Court had developed a statute of limitations to govern hybrid actions in the course of creating the hybrid action.

Thus, in UPS v. Mitchell and DelCostello v. Teamsters, the Court grappled with the question of what was the most appropriate rule to adopt by analogy to fill this gap in federal law. Ultimately in

DelCostello, the Court made a policy judgment that, as compared to three or six-year limitation periods, which is what were at issue in Mitchell and DelCostello, or a thre month statute of limitations, also at issue in Mitchell, a six month limitation period set forth for unfair labor practice charges before the NLRB was the most appropriate and therefore should be used as the statute of limitations for DFR actions, duty of fair representation actions, in district court.

What the Court did not decide in DelCostello was what had to be done within the six month period. That is what is at issue in this case.

The case arose when Petitioner West was discharged in November of 1981. Over the course of more than two yers, Petitioner was repeatedly assured by his union representative that the union was pursuing a grievance for reinstatement and back pay. During this period of time he was represented solely by his union, and indeed his union discouraged him from consulting a lawyer on the ground that it would be a waste of money during this period.

In February 1984, West received a notice from Conrail saying that, solely as a matter of leniency, he would be reinstated. The notice did not refer to the pending union grievance and did not say that the union

had abandoned his claim for back pay.

However, in March of 1984 West determined that the union had in fact abandoned his back pay claim. Now, had West sought to institute unfair labor practice proceedings at the National Labor Relations Board, he could have gone to the NLRB on the last day of the six month limitation period.

He would have had to fill out a few blanks in an administrative form which we have set forth as the last page of our brief. The form would have been filed and served on the same day, and service would have been effective upon mailing.

Instead, West had to find a lawyer, although he had been unemployed for a period of more than two years. He had to make financial arrangements to retain the lawyer. The lawyer had to investigate his claim, draft an eleven page complaint under the strictures of Rule 11, and file suit.

QUESTION: Most of those things we can't make up for just by giving you service time as well. Do you want us to extend it beyond service time? Do you want us to add a certain number of days for finding a lawyer?

MR. LEVY: No, we do not suggest that.

QUESTION: Well, so.

MR. LEVY: But we do suggest that the things that have to be done in order to file a complaint are greater than the things --

QUESTION: Well, that's so, but the only one that's relevant here is the service time.

MR. LEVY: It is in part the only thing that is relevant, although if in fact -- one of our arguments is that if in fact the Court is going to borrow the service requirement of Section 10(b) as well as the limitations period, then the question will arise, why not borrow the other things that the board has said are all that a charging party has to do in order to file an unfair labor practice claim?

And we propose to draw a line, a clear line, at the limitations period and not go on to the other timeliness rules, including the service rule.

In any event, the complaint was filed within the six month period, but the summons and complaint were not served until three weeks later. And so the question on which the circuits are closely divided is is the suit untimely on the ground that the service requirement in Section 10(b) should be adopted to govern the case.

Now, in arguing that it should not, we rely first on the normal rule for federal question claims, and in stating the normal rule I recognize that this

Court has not dispositively decided the question. But virtually every lower court to address the question for the past 40 years, as well as the court below, have taken the view that the normal rule is that under Rule 3 filing the complaint satisfies the statute of limitations in a federal question case in the district court.

QUESTION: That's not necessarily true in a diversity case, is it?

MR. LEVY: That's not true in a diversity case.

We rely on the existence of a normal federal rule for two reasons: First, because there is a normal federal rule, it is not necessary to look to Section 10(b), or indeed anywhere else, to fill a gap in federal law, as the Court had to do to pick a limitations period in DelCostello.

And second, because there is a rule, Respondents who seek an exception from the rule bear some sort of burden of showing that the exception is justified, and we don't think that they have shown that an exception is justified.

But even if Rule 3 does not control, we think that the better rule is that filing alone is sufficient. After all, in DelCostello the Court decided

that, given the policies and the practicalities of litigation involved, a six month period was better than a three or a six year period on the long end or a three month period on the short end.

Now, we recognize the consequence of choosing either a filing rule or a service rule is that the statute of limitations will not be exactly six months for both sides. If the Court requires service, then the plaintiff will be required to file in advance of six months; and if filing alone is sufficient, the defendant will not learn of the suit for some time after six months.

But we submit that the consequences of adopting only the filing rule are on balance more attractive or, I should say, more consistent with the policies and practicalities involved than adopting the whole package of NLRB timeliness rules.

QUESTION: Isn't one practicality that we don't want to have to fight this thing out or have circuit courts try to figure it out every time there's a new borrowing of another statute? Isn't it desirable, apart from what might be the most equitable thing in this particular case?

Isn't there some desirability of having a more or less uniform rule? And if we were to adopt a uniform

rule, wouldn't the one that seems to be current, wouldn't that be the rule of borrowing the whole thing, including the service?

MR. LEVY: Precisely, and the uniform rule, the traditional rule in the federal courts, is that filing is sufficient to satisfy the statute of limitations, rather than simply looking at each statute of limitations and then trying to discern from the rules adopted by the authority that adopted, that provides the statute of limitations, whether service or indeed something else is required.

QUESTION: But haven't we allowed -- haven't we borrowed the service rules in the past?

MR. LEVY: The only case in which a service rule has been borrowed is in the diversity context, and there the problem was that it would have been inequitable. The state provides a cause of action, the state creates a statute of limitations as a limitation on that cause of action, and to allow plaintiffs to come into federal court when they could not come into state court because, for example, service is required as a satisfaction of the statute of limitations --

QUESTION: Has a service rule been rejected in any cases?

MR. LEVY: Not of this Court, although every

Court of Appeals and other courts, or virtually every one, to consider the question has, even though a state had a service rule as part of its statute of limitations, the courts have borrowed only the limitation period and not the service rule in federal question cases.

Now, the union draws a distinction. It says if the statute of limitations itself does not say requires service, then it is appropriate not to borrow the service requirement which is contained in some other section.

And I would agree that most states, when they draft statutes of limitations, have a list of periods and then perhaps a list of tolling rules, and then another section which says this is what we mean by satisfying the statute of limitations.

But surely, if it is inappropriate to borrow the service requirement in those cases, the mere fact that the service requirement appears in the same section of the United States Code or the state code, so long as it's a borrowed section, shouldn't make any difference, we submit.

That is a distinction without a difference. And so, yes, the Court is free. The question has been reserved in the Ragan case and in the Walker case. The

Court is free to decide that service is required, that the borrowing of service is required in federal question cases.

But in doing so, it would be overruling a consistent line of precedent in all of the lower courts, and indeed it would be going contrary to the understanding that we think, given the advisory committee notes back when the rules were adopted and the rules concerning 4(j) in 1983 -- the drafters of the rule seemed to think that the logical interpretation of the rule, although they recognized that there was an open question, that the logical interpretation of a rule that says an action is commenced by the filing of the complaint, means the statute of limitations is satisfied in that context.

QUESTION: Would that line of cases be overruled if we borrowed the service requirement?

MR. LEVY: It would be all of the lower court cases, but unanimous lower court cases, unanimous understanding. But you have the power to do that.

QUESTION: Except this one.

MR. LEVY: Except this one.

QUESTION: You mean this is the only -- this is the only case that borrows the service requirement?

MR. LEVY: In a federal question case, that's

correct.

QUESTION: You're just talking about federal question?

MR. LEVY: Just in federal question cases.

QUESTION: What are your other types of federal questions, other than this particular? Are you talking about the antitrust cases and the 1983 cases?

MR. LEVY: The civil rights cases. For example, Bomar v. Keyes, Judge Hand's case in 1947, was a civil rights case.

QUESTION: And in none of those did the federal courts borrow the service requirement of any of the states?

MR. LEVY: That's correct, although the states had a service requirement, albeit it in a different section.

QUESTION: And in some they borrowed the tolling rules, but not the service requirement.

MR. LEVY: In many cases, not only lower courts but in this Court's cases, state tolling rules have been borrowed, but only after first looking to see whether there was a federal rule to govern the question.

Indeed, in the case of Chardon v. Fumero Soto, the Court first looked to see whether there was a

federal rule, and only after deciding --

QUESTION: So your basic argument is you don't borrow unless you have to.

MR. LEVY: You don't borrow unless you have to.

The difficulty with adopting the service requirement for hybrid DFR litigation is that it's wrenched out of the context of administrative practice for which it was designed and applied to federal litigation, in which it has very different effects.

QUESTION: It would be unfair for all of the cases that borrow 10(b), wouldn't it?

MR. LEVY: That's correct, for all DFR cases and hybrid cases, and I suppose it is an open question what other kinds of labor cases are covered by DelCostello and Section 10(b).

At the NLRB, after all, the filing and the service of an adminstrative charge normally take place on the same day. Service is effective on mailing, no matter when it is received by the proper person in the organization to take action on it.

In the district court, by contrast, a plaintiff has to follow various service rules after filing and obtaining summonses. Various things can go wrong in the course of seeking service, and

unfortunately they often do.

And yet, if satisfaction of the statute of limitations depends on completion of service within the limitations period, the effect is to push back by several weeks the time in which a plaintiff must file the complaint in order to be sure that his claim will be heard.

And yet, as this Court has recognized in DelCostello --

QUESTION: Why does it take so long to effect a service?

MR. LEVY: Because very often if you have an individual process server the individual process server may not be able to find the appropriate member, particularly of a labor organization, in order to effectuate service.

Now, the Court did ameliorate the problem of service by adopting the mailing rule in the 1983 amendments. But the problem with the mailing -- there are three problems with effecting service by mail.

The first is that the plaintiff under the terms of the mailing rule, Rule 4(c)(2)(C), the plaintiff cannot be sure if service has been effected properly until at least 20 days have passed, because that is how long the defendant has to return an

acknowledgment form.

QUESTION: Well, is this a suit against a union?

MR. LEVY: This is a suit against both the union and the employer.

QUESTION: Not much of a problem of finding anybody in these kinds of cases, is there?

MR. LEVY: Unfortunately, there often is.

QUESTION: I mean, don't they have offices?

MR. LEVY: They have offices, but the office employee who sits at the front desk is usually not authorized or often not authorized to accept service. Many unions take the position that only their officers can be served.

QUESTION: They may take that position, but that may not survive.

MR. LEVY: Under Rule 4, when you're serving an unincorporated association you have to serve a managing or general agent --

QUESTION: Well, how long do you think you yourself would take to find somebody who is authorized to accept service for this particular union?

MR. LEVY: It depends on whether that person is willing to be found, Your Honor. In this case, it is true they returned the acknowledgment form in the

appropriate manner. But there are others in which it has been difficult to effectuate service.

For example, in the Thompson case, the Eighth Circuit case on this subject, it took a month and a half. They sent a marshal to the office, the right person wasn't in the office.

QUESTION: Well, a lot of times if you really think you're going to have any problem with this you don't file your complaint until you know where you can find the guy that you're going to serve.

MR. LEVY: But the problem is --

QUESTION: And before he can run, you've got him.

MR. LEVY: But unfortunately, the problem is that you have a very short statute of limitations.

QUESTION: That's right, that's true.

MR. LEVY: And pushing back the time to file the complaint means that you may have only five months to file the complaint or perhaps even less.

QUESTION: Are these DFR cases typically brought against a local of the union as a labor defendant, rather than the national?

MR. LEVY: They can be both. Frequently both the local and sometimes a regional body and sometimes the international are joined. It depends on who is

performing the representative function with respect to the particular grievance.

QUESTION: Is there a problem of effecting service by mail on the national?

MR. LEVY: It depends on whether the national is willing to accept the service.

QUESTION: They're fairly well established organizations, aren't they? Aren't they used to getting service in the mail?

QUESTION: Don't most cities have process servers that for a bit of money will serve the right person and guarantee it? You just have to pay a little extra money. Isn't that true?

MR. LEVY: If you can find the right person at the right time. But you cannot always find the right person at the right time.

QUESTION: Aren't there people that do that? They know how to do it.

MR. LEVY: There are people who do that, and then it costs extra money to do that. But they do not necessarily find the person right away, and the problem is if you're the plaintiff and wanting to be sure that your claim is going to be heard because your complaint is going to be deemed timely, you have to make sure that you file it so that just in case you aren't able to get

service the first time --

QUESTION: Every city has one group who'll do it for the right amount of money, up to $500.

MR. LEVY: If they can find the right person, and they can't always find the right person right away.

If service is not acknowledged, even using the mailing example, then the question arises, is service effective despite the lack of acknowledgment, because if you say that you have to go -- if the Court were to say or to proceed on the assumption that, yes, there is a process server available, that is assuming that these penurious plaintiffs, people who've been unemployed until the resolution --

QUESTION: "Penurious" means miserly. You mean poor, don't you?

MR. LEVY: Poor, poor.

QUESTION: Impecunious.

MR. LEVY: Impecunious.

If they have to rely on process servers, that means they can't rely on the mail service. But if they do rely on the mail service, the question arises whether they can effectuate mail service. The question arises whether service that has been sent by Rule 4(c)(2)(C), but not acknowledged, is effective.

And unfortunately, although the Second Circuit

has adopted a rule which suggests that it is effective despite the lack of acknowledgment, other circuits have taken a disapproving view of the Second Circuit's view. And that's the Morse v. Elmira Country Club case, which is cited in defendants' briefs.

QUESTION: There are no problems at all in the administrative service?

MR. LEVY: Under the board's rules, once you pvu iu io uhe najm up uif pshbojzbtjon tibt's dhbrged, that's tif fne of it. Service is effective on mailing. Whether or not -- even if the union claims that it didn't receive it or the employer claims that it didn't receive it, service is effective on mailing once you've proved the mailing.

Now, one could ameliorate the prcblem by adopting all of the board's rules about what you have to do to have a timely unfair labor practice charge and what you have to do to have a timely complaint. You could start by adopting the mailing regulaticn, which would ameliorate the problem, we agree.

But then one would be confronted with other board timeliness rules, such as the rule that if you include one discharged individual in an unfair labor practice charge other discharged individuals discharged around the same time and in the same course of events

can be added later, because their claims relate back to the first unfair labor practice charge.

That of course is inconsistent with the practice under Rule 15(c). One might adopt the rule that all you have to file is an administrative charge, not a complaint under Rule 8. One might adopt the rule that Rule 11 doesn't apply, which obviously requires people to take longer to put together complaints.

All of these board rules, the relation back rule, the simple administrative charge, as well as the mailing regulation and the service rule, do reflect determinations about the balances between policies of enforcement and policies of repose.

All of them reflect determinations about how much ought to have to be done how soon in order to advance the balance of policies served by Section 10(b). There is no sound reason for drawing a line between the service rule and the mailing rule, between the mailing rule and any of the board's other rules. Although it would certainly ameliorate the burdens on DFR plaintiffs, it would scarcely be desirable to develop a separate set of procedures, timeliness rules, to govern the litigation of DFR cases, timeliness rules which indeed would have to be discerned from the decisions of the NLRB.

Our approach using Rule 3 instead of the service requirement of Section 10(b) has the advantage of being a clean line which avoids that slippery slope.

Now, Respondent's principal argument in favor of a service requirement is that the service requirement allows them to be certain after a six month period that their actions are no longer subject to challenge. Now, that is not strictly true because of course at the NLRB service is effective on mailing, so it is some period of time after the unfair labor practice charge is mailed that they receive notice of the challenge.

But even more important, it is often not clear when the six month period begins to run.

QUESTION: Well, the notice may never get there. You're telling me it's effective even if the notice never arrives.

MR. LEVY: It is effective. Now, in the course of the board's investigation one of the things they will do is contact the employer. So it is not likely to be more than a few weeks before they receive the information that this action is pending.

But as I understand the board's rule, so long as you prove that it was put in the mail it was effective on mailing.

Now, it is true that unfair labor practice

claims, just like any other claim, raise questions of accrual. But by the very nature of the duty of fair representation, the time of breach tends to be unclear, because what is at issue is not simply a discharge, but rather a grievance procedure and the union's failure to act or acting improperly in the course of a grievance procedure, which may linger for months or even, as this case, years, as in this case years.

Even if one or both of the union and the employer think that the grievance procedure has been brought to an end by a compromise or a failure to go forward, that fact may not have been communicated to the employee, as here.

Or indeed, intra-union remedies may be being exhausted, and this Court decided in Clayton that very often intra-union remedies will prevent the employee from suing and thus presumably toll the application of the statute of limitations.

So the union's argument and the employer's argument that the service rule allows them to be certain after a finite six month period of time that their actions will be immune from challenge seems to us to be substantially overstated.

It is true under Rule 4(j), it is possible that it will run more than six months, maybe as much as

ten months. But that is far less than the kinds of statutes of limitations with which this Court was concerned in DelCostello and Mitchell, far less than three years, far less than six years.

So in conclusion, there is no good reason not to follow the normal federal rule in federal question cases that filing the complaint satisfies the statute of limitations in a federal question case. And application of Section 10(b) service rule to federal court litigation would serve a different balance of interests than the balance of interests they were designed to serve in the administrative context.

Given that different context, given that different effect on the DFR plaintiff, who has only six months to find a lawyer and institute suit, the Court should not further shorten the time to institute suit by requiring service of process within the six month period.

And therefore, the judgment should be reversed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Levy.

We'll hear now from you, Mr. Gold.

ORAL ARGUMENT OF

LAURENCE GOLD, ESQ.

ON BEHALF OF RESPONDENTS

MR. GOLD: Thank you, Chief Justice, and may it please the Court:

As Mr. Levy has indicated, in the DelCostello case this Court held that the statute of limitations in this type of case is the statute of limitations stated in Section 10(b) of the National Labor Relations Act as amended.

That provision says that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board and the service of a copy thereof upon the person against whom such charge is made.

In the words of Walker versus Armco, a diversity case arising in a different context, to be sure, of this Court in 446 U.S., this language seems to us to plainly be a statement of a substantive decision by the legislature that actual service on the defendants is an integral part of the several policies served by the statute.

There are various kinds of statutes of limitations, and this appears to us to be an example of one in which the tolling rule is one which not only rests on filing, but also on providing notice, that repose is served in that way.

QUESTION: Mr. Gold, would it make any difference if the service requirement were in a separate statute?

MR. GOLD: Given the entirely federal nature of this case, my view, our view on that, is that the answer is no. It seems to me that the question you raise runs some of the variations on the question of what the interplay is between Rule 3 and various kinds of statutes of limitation.

And, contrary to Mr. Levy, we don't believe that there is a normal rule on that issue. There is an open question in this Court, which the Court has never treated with and which in Walker was specifically preserved, as to what the normal rule ought to be. We know the following things, and I think only the following things, in approaching that question.

First of all, we know that Rule 3 governs the dates from which -- governs the date from which various timing requirements of the federal rules begin. That's what this Court held in Ragan and that is what the Court reaffirmed in Walker versus Armco.

We also know that Rule 3 is not intended to toll a state statute of limitations in a diversity case. At that point, our certain knowledge ends because, as I've said, at least so far as any of us are

aware through our researches and so far as the Court indicated in Walker, when you reach federal question cases this Court hasn't spoken.

QUESTION: Mr. Gold, it is true, is it not, that there was a wealth of litigation under the treble damage provision of the antitrust laws, as well as 1983, where you had to borrow a state statute of limitations? And in none of those cases did anybody ever argue -- or at least I don't remember it -- that the state service requirement applied.

MR. GOLD: Well, those cases, it seems to us --

QUESTION: They of course don't have the same language that 10(b) has.

MR. GOLD: Yes. The point is, as far as we're concerned, that those are -- those were cases where the borrowed statute of limitations says that a cause of action must be brought, begun, filed, commenced, and don't tell you what those words mean. In that situation, there's no other source of law other than Rule 3.

QUESTION: Well, except that some of those state statutes had been construed by state courts to require service within the limitation period, and that's just as though those words would have been written into

the statute.

MR. GOLD: Well, in those terms I'm not sure what the right answer ought to be. This is not the first area, if your recollection is correct and I feel that your knowledge of antitrust law is almost always greater than mine --

QUESTION: Not where unions are concerned.

(Laughter.)

MR. GOLD: That may be, but only because I've had a more painful experience in here.

But that wouldn't be the first time where this Court in borrowing borrows the statutory material, but not all the determinations in state law that go with it. Indeed, in Wilson versus Garcia New Mexico in the 1983 context had made a ruling on tolling and this Court said that it was -- that ruling was on a basically federal question.

But certainly --

QUESTION: The same principle applies, that whether it's in the statute or by judicial interpretation or whether it's in another statute, if you don't take it along it means you are not applying precisely what the borrowed statute of limitations would do.

And doesn't that amount to a judgment that,

look, it doesn't have to be that precise? We're borrowing anyway; if it were that important that it be that precise, Congress would have specified it. So what we do is, you know, pick the six months or two years or whatever it is, and use our normal federal rules for deciding when the complaint's filed.

MR. GOLD: If there were a normal federal rule and if it were plain that in these borrowing situations that normal federal rule applies I would agree with what you're saying. But in the diversity context, which as I indicate is the one thing we know in Walker, and in general in discussing the borrowing process, the Court has said that it isn't -- that the point of the matter is, rather than engaging in judicial creativity to draw on, because these matters are necessarily arbitrary to some extent, you're saying thus far and no further and how long the period of repose, the period of non-repose ought to be, that you're going to look not only to a sum of days, but also to the tolling rules generally.

So that is what we know in terms of what the Court has done. And what I am saying is that where the borrowed statute of limitations doesn't give you any information from the legislature, applying Rule 3 simply doesn't create a conflict with anything.

QUESTION: We do borrow that along with the

statute of limitations, but there's nothing to replace it with. I mean, you've got to get tolling rules from somewhere, too. You don't have a Rule 3 that sets forth the tolling rule.

You do have a Rule 3 that sets forth, we think or it's argued, a rule for when an action is commenced.

MR. GOLD: It is a rule for when an action is commenced, but the very point of Ragan and Walker is that, while it tells you when the action is commenced, it doesn't tell you when the statute of limitations is tolled.

That was the precise point of the analysis in Ragan and the precise point of the analysis in Walker. And the question here really is whether in a borrowing situation this kind of tolling, tolling where the legislature says we want these people to have actual notice, is different from other kinds of tolling rules.

I just find it hard, given the assigned rationale of Rule 3, which it tells you certain things about the date from which other time requirements in the flow of litigation mean, to say that it is a rule which ought to override a more specific legislative judgment in either an applicable or a borrowed statute of limitations.

On the other hand, the point I was trying to

make when I was discussing the matter with Justice Stevens is that it does make sense where all the legislature has told you is that the plaintiff must bring, begin, file, or commence a lawsuit within a certain period of time, to say if he comes into federal court we'll say filing the complaint is bringing, beginning, filing, and commencing.

There is no conflict. You're not running against the grain of any legislative judgment in such an instance.

And interestingly enough, at least as we understand their presentation, the plaintiffs concede that if you have a federal statute of limitation which is applicable to a certain cause of action in terms and requires with regard to tolling service in terms, that federal statute overrides Rule 3.

That's what we think we have here. We have an implied federal cause of action coming out of the National Labor Relations Act and the Railroad Labor Act. This Court has said that the statute of -- the implied cause of action to sue the union for breaching its duty of fair representation.

QUESTION: What about against the employer?

MR. GOLD: It's an express cause of action.

QUESTION: Yes.

MR. GOLD: So they're both --

QUESTION: Same statute of limitations?

MR. GOLD: Correct. And we're saying that the Court has said to that complex of an express and an implied cause of action that there is a federal statute of limitations which Congress has devised and which applies in this situation.

So as far as we're concerned, Congress is the lawgiver in both regards, and the Court says that these two pieces fit together, and that is what DelCostello says, and this borrowed federal statute of limitations is, we submit, in form the kind of statute of limitations which embodies the substantive judgment of actual notice.

And it seems to us that to say that if Congress had added to 301 in so many words a requirement of actual notice, then Rule 3 wouldn't apply, but since it is this process of drawing implications from the totality of what Congress has done that applies here, that Rule 3 does override it doesn't make any sense.

The point is that Rule 3 can help you where the legislature hasn't told you anything very much, but that its basic purpose is not to state the tolling rule or the form of notice that tolls a statute of limitation, but to set up a sequence of various time

limits if you have a proper and timely cause of action.

And just in our judgment, given the basic theory of borrowing statute of limitations, which is that, instead of engaging, in this Court's words in Johnson versus Railway Express, in judicial creativity, but rather to look to what the legislature has done and to try to follow the lines that the legislature has indicated, that it makes sense to distinguish between a statute of limitations which is applicable in terms and the statute of limitations where it is a federal statute of limitations that this Court determines is the one that is intended to apply.

Now, there are a variety, it seems to us, of federal question cases, and I simply want to note that we have touched on several of them thus far, but there are other kinds as well, where the Court determines to borrow a state statute of limitations.

There may be situations -- and indeed, the case that the Petitioners put heaviest reliance on, Bomar versus Keyes, which is a Learned Hand opinion in the Second Circuit, is an example of this. There may be situations where there's a statute, a state statute of limitations which is borrowed, and there is also a state procedural rule passed to govern the state courts. And the Second Circuit said you weren't going to borrow that

state procedural rule.

And it seems to us that that's different from this situation, because a state legislature is acting to regulate its court system. It isn't acting to regulate the federal system.

I note that simply to say that it seems to us that the state, barring of state statutes of limitation may raise different questions than this.

QUESTION: Well, that's true, it enacts those filing rules to govern its courts. But it also enacts the limitation period having in mind that the way that that period will be applied is --

MR. GOLD: It may or it may not, Justice Scalia. At that point you do have a situation, and I'm plain to say that on that issue I'm agnostic. I'm only pointing out that it's different from the situation we have here in a manner of degree.

And this Court hasn't spoken to it. I'm simply saying that Judge Hand's resolution of the issue may be right, and he had a habit of being right. But it is different from this situation. Here we have in our view one lawgiver, Congress, which created, passed this statute, created an express cause of action, and this Court has determined intended an implied cause of action, and Congress, which passed a statute of

limitations which applies.

And at least in that kind of borrowing, our position is that where the legislative judgment on when the period of repose begins has an actual service element to it, that comes in the package as one of the tolling rules that fits.

Mr. Levy talked about a number of hypotheticals about how service would and could be effectuated. I only want to point out two things: A labor union that its members can't find is soon going to be decertified; and second, we note in our brief that the question of whether Rule 4, which of course was treated very differently in terms of this complex of issues in diversity cases than Rule 3 was in Hannah versus Plumber and Walker versus Armco, whether it is Rule 4 which tells you how to make service or whether it is the Labor Board's mailing is good enough rule is a question that is of relatively small moment and it's not presented here.

The Petitioner was late whichever way you cut it as long as service within the six months was required.

Unless there are any other questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gold.

MR. GOLD: Thank you.

CHIEF JUSTICE REHNQUIST: Mr. Levy, you have three minutes remaining.

REBUTTAL ARGUMENT OF

PAUL ALAN LEVY, ESQ.

ON BEHALF OF PETITIONER

MR. LEVY: First, we agree, as Mr. Gold said, that if Congress decided that Section 10(b) should apply to cases of this kind, we would lose. Congress does of course have the power to override the federal rules. But Congress has not said that Section 10(b) should apply to cases of this kind, or indeed to any kind of judicial litigation.

This is a court-created cause of action and the court, because there was no --

QUESTION: Not against the employer.

MR. LEVY: Not against the employer. It is a court-created cause of action against the union. It is a Congress-created cause of action against the employer. But of course, Section 10(b) doesn't apply at all. There is no unfair labor practice for violating a collective bargaining agreement.

Because there is no statute of limitations, the court had to look for analogies, and it decided that the limitations period in Section 10(b) was the most

appropriate analogy. But to say that because it is Congress, that it created Section 10(b), makes no difference as opposed to the situation in which it was a state legislature which created a borrowed cause of action, because in neither case has the legislative body made a judgment about whether the statute of limitations ought to apply to this kind of case.

Second, if you do, if the Court does borrow Section 10(b)'s service requirement, what it is doing, we submit, is pushing back the time to file complaints, back towards the three month period which this Court decided in DelCostello was not enough. And thus, we submit the Court would be undermining the vital bulwark to protect union members against arbitrary action by their unions.

Finally, if the court does decide to borrow Section 10(b)'s service requirement, we would urge the Court to make it clear that it is borrowing all of Section 10(b), because even if the question is not directly presented in this case it is presented in other pending cases, including at least one of the cert petitions which is pending the disposition of this case presumably. And I refer there to the Ellisaldi versus Machinists, TWA versus Ellisaldi case, in which the complaint was mailed on the last day of the statute of

limitations.

If the Court has no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Levy.

The case is submitted.

(Whereupon, at 2:40 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:

#85-1804 - THOMAS WEST, Petitioner V. CONRAIL, ET AL.

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BY Paul A. Richardson

(REPORTER)