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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1924

TITLE NATIONAL LABOR RELATIONS BOARD, Petitioner V.
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340

PLACE Washington, D. C.

DATE February 25, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD, :

Petitioner :

v. : No. 85-1924

INTERNATIONAL BROTHERHOOD OF :

ELECTRICAL WORKERS, LOCAL 340 :

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 12:59 o'clock p.m.

APPEARANCES:

JERROLD J. GANZFRIED, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

LAURENCE J. COHEN, ESQ., Washington, D.C.; on behalf of the Respondent.

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CONTENTS

ORAL ARGUMENT OF	PAGE
JERROLD J. GANZFRIED, ESQ.	
On behalf of the Petitioner	3
LAURENCE J. COHEN, ESQ.	
On behalf of the Respondent	26

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We will hear argument first this afternoon in 85-1924, National Labor Relations Board versus IBEW.

Mr. Ganzfried, you may proceed whenever you are ready.

ORAL ARGUMENT OF JERROLD J. GANZFRIED

ON BEHALF OF THE PETITIONER

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

This case presents a question of statutory construction under the National Labor Relations Act. The Board concluded that the respondent union violated Section 8(b)(1)(B) which prohibits a union from restraining or coercing an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

The Ninth Circuit denied enforcement to that order even though it acknowledged that the union's action may constitute prohibited conduct. In our view, that recognition by the court should have ended the case and the Board's order should have been enforced.

Instead, in reliance on a theory that was entirely of its own creation, a theory that even the

respondent now disavows, the court of appeals rejected the Board's interpretation of the Act. It then compounded that error by rejecting the Board's findings of fact that would have required enforcement even under that court's legal theory.

After briefly reviewing the facts, I will like to explain why the Board's interpretation of 8(b)(1)(B) is reasonable and should be upheld, and I would also like to explain why the various limitations on Section 8(b)(1)(B) advanced in the theories of the district court and by respondent should be rejected.

This case arose out of a dispute between the respondent union and numerous electrical contractors in the Sacramento, California area involving the composition of a multi-employer bargaining unit. For some 40 years the respondent had a collective bargaining agreement with the Sacramento chapter of the National Electrical Contractors Association or NICA, as it is called, which is an organization that represented some 55 employers in the industry, in negotiating and administering collective bargaining agreements.

The last of those agreements expired on May 31st, 1981, and two weeks later the union struck all NICA members. The strike continued for some three months until September 15, 1981, when the union sent a

disclaimer of interest in representing the employees of the Association's members in the multi-employer bargaining unit previously established.

The union did not, however, disclaim interest in representing the employees of NICA members in a different bargaining unit or in single employer bargaining units. Rather, it filed separate petitions seeking to represent in single employer units the employees of some 17 NICA members, and as respondent's official testified in this case, the union's strategy was that, "Ultimately, down the road, it was our hope that everybody would be back under an agreement."

NICA, however, signed a bargaining agreement with a different union, the National Association of Independent Unions, or NAIU, and the two employers involved in this case, the Royal Electric Company and Harold E. Nutter, Incorporated, adopted that new agreement.

Some months later respondent restrained and coerced those two employers in the selection of their 8(b)(1)(B) representatives. Internal union charges were brought against union members employed as supervisors by Royal and Nutter.

Those charges were brought under provisions of the union constitution that subject a member to

penalties for "causing economic harm to other union members" and for "working for an employer whose position is adverse or detrimental to the union." Two supervisors were found guilty of those charges and fined $6,000 and $8,200 respectively.

The National Labor Relations Board found that the union's conduct coerced the disfavored employers in the selection of their representatives for Section 8(b)(1)(B) purposes, and therefore that the imposition of those fines constituted an unfair labor practice.

In reaching that conclusion, the Board applied the test that this Court set forth both in Florida Power and in ABC versus Writers Guild; namely, whether the union's action may adversely affect the employer in the selection of his representatives.

Section 8(b)(1)(B) was designed to preserve an employer's unfettered right to select supervisory personnel for two specific functions: grievance adjustment and collective bargaining. The section preserves that employer right by removing from the arsenal of labor unions a particular economic weapon. That weapon is the union's ability to restrain or coerce an employer in the selection of its representatives for the two stated functions.

Just as the statutory language focuses on the

restraint on the employer, the Board and this Court have focused on the potential impact of union conduct on employers. Specifically, in ABC versus Writers Guild, the Court described how such union discipline as we have here can restrain an employer's exercise of rights preserved under that section.

Such discipline, the Court said, may adversely affect a supervisor's willingness to perform grievance adjustment or collective bargaining duties, that is, his willingness to serve in that capacity in the first place, or the discipline may affect the manner in which the supervisor performs those tasks.

QUESTION: In ABC there was a strike situation, wasn't there?

MR. GANZFRIED: ABC -- the fines in ABC arose in the midst of a strike, that's correct.

QUESTION: And there was none here?

MR. GANZFRIED: There had been a strike. The strike had ended by the time the fines were imposed here.

QUESTION: Mr. Ganzfried, Section 8(b)(1)(A) --

MR. GANZFRIED: Yes.

QUESTION: Saves out a union's right to impose discipline on its members, and you read this subsection (B) as an exception to that, some way?

MR. GANZFRIED: Well, the proviso in

subsection (A) is not part of subsection (B). It does not qualify subsection (B).

I might add that even with that proviso in mind, the union's right to enforce its own rules ends when the enforcement of those rules impairs a statutory labor policy, and here the enforcement of a rule impairs the statutory labor policy set forth in 8(b)(1)(B), namely, the preservation of the employer's right to select his representatives.

QUESTION: Preservation of it by providing him with a larger pool of people from among whom to select?

MR. GANZFRIED: Specifically protecting him from restraint or coercion in making his selection.

QUESTION: How is he being coerced? He is not -- it's not that he's made a selection and that's -- and somehow he is directly being coerced to change that selection; it's just that the union is saying to its members generally, you won't be in the pool that the employer can select from.

MR. GANZFRIED: Well, this case is not to present a question of a pool. In this case we have two employers who have selected two representatives, Mr. Choate and Mr. Schoux, and the union stepped in and said Mr. Schoux -- in effect Mr. Schoux and Mr. Choate must go.

They effected that by imposing fines on Mr. Schoux and Mr. Choate, substantial fines that clearly would have the effect of compelling them to leave their employment.

QUESTION: Is that crucial, that they already had the jobs as supervisors? It would be a violation just as much for an agency simply to say, nobody who is a union member can apply for a job as a supervisor.

Wouldn't that be a violation too?

MR. GANZFRIED: It could well be. The point I am making --

QUESTION: Please don't tell me that's not this case. I know it's not this case. But wouldn't that be a violation?

MR. GANZFRIED: If what the union did constituted restraint or coercion.

QUESTION: To be sure. I am asking you whether, under the Board's theory, it would constitute restraint or coercion of the employer, simply to tell your union members, we don't want you working for this type of an employer in any job, including as a supervisory job.

MR. GANZFRIED: In the absence of any -- simply a statement, a precatory statement by the union --

QUESTION: No, no, not precatory. You'll be

punished if you do it.

MR. GANZFRIED: Then it would be a violation.

QUESTION: Okay.

MR. GANZFRIED: In ABC the Court referred to two potential effects. That is --

QUESTION: You are coercing the employer by limiting the pool from which he can select.

MR. GANZFRIED: That's right.

QUESTION: That's a mild form of --

MR. GANZFRIED: This Court did say in ABC that either of the two effects that I described, that is, the willingness to serve or the manner in which the supervisor performs his functions, constitutes restraint and coercion under the Act.

In this case there is not dispute that the supervisor members, Mr. Choate and Mr. Schoux, were representatives of their employers for the purposes stated in Section 8(b)(1)(B), and the court of appeals agreed with the Board that the union's conduct could have the effect on the employers that the section was designed to prevent.

After all, $6,000 and $8,000 fines are mighty coercive. And the parties in this case don't dispute that conclusion, although there is suggestion in the amicus brief by the AFL-CIO that union discipline can

never violate the section. That is a suggestion that would overturn two decades of jurisprudence under the Act, and it would require this Court to overrule its holding in ABC.

Ultimately, that's a suggestion that should go to Congress, and I would note that Congress has expressed no displeasure with the Board's long-settled interpretation of the statute that we are presenting here.

It is our submission that when it has been determined that the disciplined employees fit within the terms of 8(b)(1)(B) and the union conduct may deprive the employer of that supervisor's services, then the inquiry is at an end and the violation has been established.

QUESTION: How deep does this go, Mr. Ganzfried? Could a union violate this section by disciplining simply a run of the mine member, an employee? If the employer says, well, I was thinking about maybe picking him for a supervisor sometime --

MR. GANZFRIED: If the union disciplines him for working for -- the union may be free to discipline a journeyman for working for a particular employer, a non-union employer. It can't discipline someone because that person serves as a supervisor for such an employer.

QUESTION: So, working for an employer as a journeyman, the union may discipline; working for an employer as a supervisor, a union may not discipline?

MR. GANZFRIED: That's right. This section reaches the -- takes that economic weapon out of the union's hands in the context of supervisors performing the 8(b)(1)(B) function.

QUESTION: But, Mr. Ganzfried, if there is no ongoing collective bargaining agreement or relationship between the employer and the union, how is the employer threatened in the integrity of the grievance adjustment bargaining process by this action?

MR. GANZFRIED: He is restrained in his selection of the person he will have performing that function, and that is what the statute protects.

QUESTION: But he doesn't have any relationship with this union at all, then. It's just--

MR. GANZFRIED: He may not have a collective bargaining agreement with the union.

QUESTION: What I am suggesting is, maybe there is some sense in requiring a representational nexus.

MR. GANZFRIED: One answer to that is, well, in fact there is an adversity relationship between the union and the employer. That is, the union disciplined

these people because they worked for employers whose positions were adverse and detrimental to the union.

The adversity is established by the basis for the union's discipline. In fact, this dispute arose in a context that is very similar to the kinds of industrial contexts that Congress was considering when it passed this section; namely, a dispute as to what will constitute the -- who will be a member of the multi-employer bargaining unit. It was an ongoing struggle.

While the strike that had started --

QUESTION: Well, it sounds like you are arguing, there is in fact a representational nexus here, rather than arguing that a representational nexus is not what we ought to hang the decision on.

MR. GANZFRIED: Well, there is a representational nexus here and in fact the Board found that as a matter of fact. It is not necessary to our view of a section, because, for the reasons the union points out in its brief, in order for a union to fulfill its purposes, one necessary goal is to represent as many as possible, if possible, all of the employees in an industry in a geographic area.

In this context, the unions and the employers will be in an adverse relationship. Now, it's not

necessary to define the nature of that adversity as being representational or something else.

A union could, without any representational nexus or without any present representational intent, decide that company "A" has a foreman that a lot of the employees don't like. Company "A" is nonunion, and the union, without representing the employees, just pickets or makes threats aimed at having foreman "A" out.

Now, it may turn out that as a result of that, the employees out of gratitude may turn to the union. The point is, the employer's right to select his representative has been restrained and that's the way the statute was written.

QUESTION: But the representative would be doing the employer's work with another union?

MR. GANZFRIED: With another union?

QUESTION: Yes.

MR. GANZFRIED: As in ABC, the grievance --

QUESTION: Suppose there were two employers here. One, after this reorganization, one of the employers in the unit didn't sign the agreement; as a matter of fact, he wasn't represented by the union at all. And the other employer was the employer in this case, and the union fined supervisors in both companies.

The only thing is that the supervisors in the

one company had no representational function whatsoever. I suppose the union could make them quit, just like they could make non-supervisors quit.

MR. GANZFRIED: If the supervisor in the non-union -- and by that I mean no union employer performs the functions described in that section, grievance adjustment, and the union imposes that --

QUESTION: So, it doesn't make any difference whether there is a union involved or not?

MR. GANZFRIED: That's right, as long as the supervisor is performing the designated functions.

QUESTION: Well, there are a lot of supervisors who don't.

MR. GANZFRIED: Then they are not covered.

QUESTION: And so they --

MR. GANZFRIED: If they are fined for performing other functions.

QUESTION: But you don't think it makes any difference that the representational activities involved here are between the -- and respecting another union, a different union?

MR. GANZFRIED: No. It may make this case, perhaps, an easier case but it's not essential to our theory of the case. The employer's right has been restrained, and that is what the statute speaks to.

The statute doesn't have in it a limitation that this can occur only with respect to employers who have a collective bargaining relationship --

QUESTION: You want a strict reading of the statute; that is what you are urging on us?

MR. GANZFRIED: The conduct here comes within the language of the statute and that's the way the Board has interpreted it, and it's a reasonable interpretation.

QUESTION: Well, if you want to interpret the statute strictly, I don't know that the employer is being coerced here. Doesn't it strike you as strange that we have -- that Congress would create a system in which a union can say to its members, you can't work for this employer but you can, of course, become a supervisor and bargain for that employer.

That's a very strange result.

MR. GANZFRIED: Well, what Congress is doing --

QUESTION: And that is the situation we have, right?

MR. GANZFRIED: It's taking union interference -- it's protecting the employer from union interference with the supervisors who are coming -- who are in interface with journeymen, rank and file, the subordinate employees.

QUESTION: May I ask -- I'm not sure I

remember your answer to the earlier question. As I understand it, the discipline here was not because he's a supervisor but rather because he was an employee of a company with which the union had no relationship?

MR. GANZFRIED: The discipline was because he was working for an employer who was adverse and detrimental -- whose position was adverse and detrimental.

QUESTION: It wasn't critical that he was a supervisor, from the union's rationale for imposing the discipline?

MR. GANZFRIED: Well, we don't inquire into that particular rationale.

QUESTION: And then it's the question that I think the Chief Justice asked you this and I'm not sure I got the answer, supposing he had not been a supervisor but merely among a group of employees who was eligible for promotion at some future date, and they in effect said, you can't work for that employer; we'll fine you if you do.

Would that violate the statute?

MR. GANZFRIED: Our position on that is that it wouldn't.

QUESTION: It would not? Now, what's the difference? I just want to be sure I understand, why --

MR. GANZFRIED: The difference is that the statute protects the employer from having the union come in and say, we don't like foreman Smith.

QUESTION: No, but the section says, "in the selection of." It doesn't use the word "selection" of--

MR. GANZFRIED: Yes.

QUESTION: And wouldn't that affect the --

MR. GANZFRIED: In the selection of --

QUESTION: It would affect the pool from which the employer could make its selection. I'm not quite clear why that's different, because both cases reduce the pool from which the employer can make the selection.

MR. GANZFRIED: In both cases it reduced the pool.

QUESTION: Well, in the one case it insists that somebody who has been selected be removed.

MR. GANZFRIED: That's right. Now, if we're going to --

QUESTION: So, it isn't a matter of selection, but --

MR. GANZFRIED: Well, it is the selection. He's been selected and he's out. That is clear and direct restraint. I think we are now talking about a hypothetical in which the union has, by threats or coercion of some sort, indicated that it doesn't want

its members working for Nutter or Royal at all.

To the extent that that --

QUESTION: It's not threats or coercion. It's a union rule. That's a very common union rule, I understand.

MR. GANZFRIED: It's a union rule.

QUESTION: And it's a very common one, isn't it?

MR. GANZFRIED: And it's enforceable with respect to non-8(b)(1)(B) supervisors. But Congress has taken that particular weapon of imposing a restraint with respect to those supervisors, out of the union's hands.

QUESTION: Once they are in, certainly. And what if they have sort of been -- but before they're in it's okay so long as they haven't been made a supervisor with bargaining responsibility yet, the union rule could be applied and they could be fined, right?

MR. GANZFRIED: If they are fined simply for working for a non-union employer and the work that they do is journeyman work --

QUESTION: And I've got --

MR. GANZFRIED: And it's not an 8(b)(1)(B) situation.

QUESTION: And I presume we have middle

situations somewhere, where they don't have the job yet but they have been offered the job by the employer and then the union chooses to --

MR. GANZFRIED: And the union comes along and says, don't take the job?

QUESTION: No, the union says, you are -- just by working for this employer, which is what was the case here. The union didn't discipline these people for taking the bargaining jobs.

They disciplined them for violating the union rule against working as an employee, right?

MR. GANZFRIED: For working for someone whose position is adverse and detrimental to the union, and for causing economic harm to union members. That was the stated basis for the union discipline.

QUESTION: You mean, they would not have been dismissed had they not had supervisory bargaining responsibilities? They wouldn't have been fined by the union?

MR. GANZFRIED: Perhaps the union would have fined them, perhaps not.

QUESTION: I thought the union rule was a general rule that you don't work for a non-union employer.

MR. GANZFRIED: The union rule in terms is

even more general than that. You don't work for anyone who is adverse and detrimental to the union.

QUESTION: Okay. Were there any other union members who are working for this employer who were not supervisors?

MR. GANZFRIED: In the earlier stages of this case, there was another employee, Mr. Miller, and he is discussed in the Administrative Law Judge's decision. It was determined that he was a supervisor, but at the job site for which he was being disciplined, he was not working as a supervisor. He was working as a journeyman and it was found that that did not violate 8(b)(1)(B).

QUESTION: Were there any members that the union didn't discipline that were working for that employer?

MR. GANZFRIED: I don't know that the record indicates.

QUESTION: Okay. They just didn't select out supervisors to discipline?

MR. GANZFRIED: But they selected particular employers as the disfavored employers.

QUESTION: And the Board's position is that they can do that with respect to normal employees but they cannot do that with respect to supervisors?

MR. GANZFRIED: They can have a rule that says

you can only work for employers that have a contract with this union. If they want --

QUESTION: Unless that rule happens to apply to somebody who is doing bargaining --

MR. GANZFRIED: When they seek to enforce that rule against someone who is in an 8(b)(1)(B) capacity, it's a violation of 8(b)(1)(B).

QUESTION: So he, in effect, he immunizes himself from that rule by accepting a supervisory job with bargaining responsibilities?

MR. GANZFRIED: Well, he -- the employer is entitled to the protection. The other way, looking at it from the other side --

QUESTION: Well, has the Board ever explained or said why shouldn't -- why the -- if the employee doesn't like it he can get out of the union?

MR. GANZFRIED: Has it explained why that --

QUESTION: Why shouldn't the employee just get out of the union?

MR. GANZFRIED: The employee could. It doesn't undo the violation.

QUESTION: I know, but when he takes the job, he quits the union.

MR. GANZFRIED: If when he takes the job he quits the union?

QUESTION: Yes.

MR. GANZFRIED: The union has no ability to discipline him any more.

QUESTION: Well, right. Why should that be the --

MR. GANZFRIED: Now, if it tries to restrain or coerce him in some other way --

QUESTION: Why shouldn't that be a resolution in this case?

MR. GANZFRIED: To allow him to quit, for the union to say, because he can quit we can't coerce him?

QUESTION: Well, yes. Say that the union can coerce him as long as he insists on being a supervisor and a member of the union at the same time.

MR. GANZFRIED: Well, it's an argument that the Court expressly rejected in the ABC versus Writers Guild case.

QUESTION: Well, isn't the Board's reasoning, at least in part, that in something like the construction industry a fellow may be a supervisor on one job and a journeyman or ordinary laborer on the next, and so he is really giving up livelihood if he leaves the union?

MR. GANZFRIED: He may well. There may well be additional benefits that continue -- like Mr. Miller,

exactly.

QUESTION: Well, it isn't just supervisor. It isn't going from supervisor to employee. It has to be a supervisor who has bargaining responsibilities, grievance responsibilities, right?

MR. GANZFRIED: That's right.

QUESTION: That's generally a distinctive character. You don't go in and out of that from job to job.

MR. GANZFRIED: Well, in some industries you do, and as the record shows with respect to Mr. Miller in this case he did. On one job site he was not a supervisor and on another one he was.

QUESTION: May I ask you -- supervisor with bargaining functions --

MR. GANZFRIED: Supervisor with bargaining functions, and --

QUESTION: With these functions?

MR. GANZFRIED: Yes, and he was found to perform these functions on one job site. It was not the job site for which he was subject to the discipline on the job site, and when he was disciplined he was found to be working as a journeyman.

QUESTION: May I ask you the converse of Justice White's question, I take it from your position

that the union could not have expelled him from the union either, because that would have been a form of ciscipline and he might have lost some pension benefits and the like?

MR. GANZFRIED: There have been cases in which the Board has found that expelling a member for --

QUESTION: As discipline? Just say, they use that as --

MR. GANZFRIED: They expel him --

QUESTION: That would equally be an unfair labor practice? Am I right, that would equally be an unfair labor practice?

MR. GANZFRIED: That's right. The Board has found that.

Our brief explains why the various limitations that the Court wanted to import into the statute, namely the representational intent, our brief indicates why that should be rejected as it does the limitation that the union in this case wants to bring into the statute, namely that it should be limited only to a union trying to influence the way a supervisor performs his functions but it shouldn't cover a union trying to prevent a person from taking that position in the first place or of forcing him out of a position that he has already taken.

I don't want to repeat what we had in the brief. What I do want to say, though, is that when all is said and done in the case, the fact remains that the Board has not done anything new here, that it hasn't been doing in interpreting this section, for 20 years.

This case is in all material respects identical to the A. S. Horner case decided by the Board in 1968, enforced by the Tenth Circuit in 1972, and noted by this Court in ABC versus Writers Guild as falling close to the original rationale of Section 8(b)(1)(B) which was to permit the employer to keep the bargaining representative of his own choosing.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ganzfried.

We will hear now from you, Mr. Cohen.

ORAL ARGUMENT OF LAURENCE J. COHEN, ESQ.

ON BEHALF OF THE RESPONDENT

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

In view of the questions thus far, I would like to begin my argument by emphasizing the nature of the union rule in this case, because it is at the heart of the case.

This rule of the IBW, which goes back to its founding in 1891, prohibits members from working for

employers who are adverse to its interest, in this case by paying wages and working conditions less than those negotiated by the union.

The force of the rule, which was common in 1947 as we note in the brief and is common today is directed to and falls upon the union members, whatever their job classification may be. It in essence requires their loyalty by not making themselves available to those employers who would undercut the conditions which the union has achieved, and in this case, I might add, it's clear that the rule long predated the employment, or probably even the existence of Messrs. Choate and Schoux.

I would like to respond at this point, Justice Scalia, to your question about the pool. I disagree completely with Mr. Ganzfried in that, if this situation had come up as follows: Mr. Choate goes to his union office and says, "There's a job open for me at XYZ Electric, they are non-union but I need the money, is there a problem if I go to work for them?"

And the union agent says, "Absolutely. Look at these provisions in the constitution. If you take that job it will be a violation. I personally will bring charges against you. The last supervisor who worked for a non-union employer was fined $5,000."

And Mr. Choate thinks about it and decides that he's not going to work. I think it is simply inconceivable that that has restrained any employer in his rights under Section 8(b)(1)(B).

I think, as you were pointing out, it may restrain or coerce Mr. Choate but that is not what Section 8(b)(1)(B) is all about. The rule here is simply the --

QUESTION: Otherwise, though --

MR. COHEN: I beg your pardon.

QUESTION: We have said otherwise. I mean, we have fallen into that hole already, if you consider it a hole.

MR. COHEN: I don't, but I understand. This case is the other side, of course, of the hypothetical I have just mentioned, and we think the rule should be no different if, having deliberately breached the rule, he is then disciplined for that breach of the rule.

This Court, in fact in several cases which we have cited has noted that these rules are not only legitimate but serve a vital interest to the union, namely the elimination of wage competition. I would point out that in ABC where the Court did uphold the Board's decision, it specifically referred to the Board's decision in that case as reaching, and I quote,

"the outer boundaries" of section 8(b)(1)(B) as established in Florida Power. That's at page 430.

Here, we think it is clear that the Board has gone beyond those boundaries in reaching out to this rule which does no more than limit the pool. As Justice O'Connor pointed out, there is no collective bargaining relationship between Nutter and Royal and the union. There are no dealings between the parties, and the ongoing collective bargaining relationship was precisely the situation which Senators Taft and Ellender spoke to in the debates -- we have set those forth in some detail in the --

QUESTION: Mr. Cohen, what do you do with the language in note 37 in ABC case, which deals with the discipline of supervisors not involved in bargaining or grievance adjustment with the union?

MR. COHEN: Well, the particular phrase which the Board seizes on in footnote 37 is the employer's choice of a grievance representative with respect to employees represented by other unions. At first glance it may seem that that's the situation we have here.

We submit, however, that that statement was made in the context of an existing collective bargaining relationship because the Writers Guild did represent what has become known as the "Hyphenates" in that case.

Therefore, there was a potential for an interference with an existing collective bargaining relationship.

Here, there is no such relationship. There is no potential interference with it. And that is the difference we see between this case and ABC.

QUESTION: Well, I guess the language could be read more broadly.

MR. COHEN: It could be, but the Court seemed to be directing it toward the situation it had before it, where there were several unions and some of the "Hyphenates" in question were not represented by the Writers Guild.

Certainly, the Court did not address the situation we have here where the union imposing the discipline has no contact whatsoever with the employers.

QUESTION: Well, does it make a difference that the union is trying to have a collective bargaining agreement by forcing this employer into the multi-employer --

MR. COHEN: I don't think it would, as we understand the decisions of this Court. But the short answer is, that situation just did not occur here.

As far as the Administrative Law Judge went, was to say that the discipline imposed in November and December of 1982 was intended to force the breakup of a

multi-employer unit, the old unit, back in September of 1981. But apart from the illogic of that, we have another ally.

We have another Board decision arising out of these precise facts and that is the Arden Electric case which is cited in our brief and which issued a year after this decision of the Board. In that case, the Board found that NICA, and I quote, "agreed to the dissolution" of the multi-employer unit, and even more pointedly noted that the unit, "was dissolved by the parties' consent to the disclaimer," in 1981.

As the Ninth Circuit pointed out, it simply seems inconceivable that fines against two individuals in November and December of 1982 could have been for the purpose of forcing the breakup of a unit in September 1981 which the parties had dissolved consensually.

One of the anomalies of this Board decision is that if it stands, a union could discipline rank and file members but not supervisor members for the same breach of the same union rule. Another court -- I'm sorry.

QUESTION: This decision, if it stands, that is an anomaly of ABC if it stands, isn't it?

MR. COHEN: Except that it is anomaly of ABC, as it stands in the context of some sort of bargaining

relationship. This would carry that anomaly one step further.

Mr. Chief Justice, I would like to respond to a question you raised. You asked if the discipline, whether it's a fine or even expulsion, would result in a loss of livelihood. Under the Act, it is clear that it would not and lawfully could not.

Even if someone is expelled from the union, is no longer a member of the union, he must be referred to jobs -- I'm referring to the construction industry now with its hiring halls -- without discrimination. That is the lesson of this Court's decision almost 30 years ago in Teamsters Local 357.

So, even expulsion would not result in a loss of working opportunities.

QUESTION: Because a hiring hall in the construction industry must refer a non-union member on equally as favorable a basis as a union member?

MR. COHEN: Precisely, and when they do not, the Board is very quick to discipline them for that.

QUESTION: What's the advantage of belonging to a union, then?

MR. COHEN: We think primarily in the obtaining of higher benefits and better working conditions.

QUESTION: Well, but if the free riders or the non-union get the same thing --

MR. COHEN: I agree with you, that that is a very strong argument against free riders. But we were unable to convince the Congress in 1965 to repeal 14-B. Until we do, we are left with that injustice.

If I may, I would like to address briefly the legislative history.

QUESTION: You can charge them for your services.

MR. COHEN: They can be charged, although not to an extent of dues for use of a hiring hall, that is true.

We have set forth in some detail in our brief the legislative history of 8(b)(1)(B), and the one thing that it shows clearly is that Congress, and particularly the principal sponsors, envisioned it as a narrow provision which was aimed at two specific evils: forcing an employer to get rid of a particular supervisor who was deemed objectionable to the union because of the way in which he had performed his managerial services, or forcing employers into or out of multi-employer units.

As I have mentioned, this rule does neither. It simply seeks to prevent the erosion of the union's

negotiated standards by requiring that its members not make themselves available to work for those employers who would undercut those standards.

All of the examples used in the legislative history clearly make sense only in the context of a collective bargaining relationship. As Mr. Taft said, we do not like Mr. "X" and you must get rid of him. Senator Ellender said, so and so is too strict with the union; get rid of him.

It's virtually impossible that they believed that this section dealt with the situation we have here where there is no bargaining relationship whatsoever. In a different setting this Court seemed to accept the limited scope of 8(b)(1)(B) and that was in the 1981 case of Labor Board versus Amax Coal which dealt with the interplay between Section 8(b)(1)(B) and the duties of trustees under Section 302 Trusts.

The Court's opinion there, which reflected the views of eight Justices, described Congress's intent under 8(b)(1)(B) as preventing unions "from forcing employers to join multi-employer units or to dictate the identity of those who would represent employers," et cetera, and we did not read Justice Stevens' dissent to take issue with that aspect of the majority opinion.

The Board's decision here clearly goes beyond

Oakland Mailers on which ABC rests, and we think past the breaking point. It is important to recall that in Oakland Mailers the Board focused on the right of an employer to have "control over its representatives" and it noted with particularity, and I quote again, "The underlying question was the interpretation of the collective bargaining agreement between the parties."

There can't be any such question, and no issue of divided loyalties here because there is no collective bargaining relationship. Returning briefly to anomalies, another that we see here is that the Board's decision would grant supervisors a preferred status in unions because only they would be entitled to the benefits of membership without being held accountable for breaching the duties of union rules. But that's exactly -- I'm sorry.

QUESTION: All supervisors?

MR. COHEN: All supervisors who are members of the union. They would be free from the strictures of the union rules.

QUESTION: Maybe I don't know the business well enough, but I thought it's just supervisors who have bargaining or grievance responsibilities. Is that almost always all supervisors?

MR. COHEN: For the purpose of this argument,

I will accept that because to explain it more fully would probably take an hour. The Board doesn't really hew to that line. The Board has developed something which it calls a reservoir doctrine in which, basically it says, totally without warrant, I think, that any supervisor is an 8(b)(1)(B) supervisor because he is in that group from which grievance adjustors and bargaining representatives are naturally to be drawn.

So, while I agree with you, there should be such a distinction, I do not read the Board cases as having a real distinction.

QUESTION: Well, wouldn't there have been some distinction between supervisors and run-of-the-mine people under the Taft-Ellender colloquy? I mean, there were a few people, certainly, that the union could not discipline. Or do you think that Taft and Ellender thought that union discipline was not the method by which the employer would be coerced?

MR. COHEN: Frankly, I think that is precisely the case, although when I say that I have to recognize that I have ABC standing in front of us.

QUESTION: And you also have a statute which, the Board has always had power to, you know, interpret in a fairly substantive way.

MR. COHEN: However, with this particular

provision for 20 years it interpreted it in a narrow manner which was faithful to congressional intent and legislative history, until the Oakland Mailers case in '68. That is when it started its broadening of the scope of 8(b)(1)(B).

It finally culminated before this Court in ABC in which the Court, and I'll use the phrase, said that the Board -- there were intimations both in Florida Power and in ABC that the Board had stretched it pretty far. In Florida Power the stretching was not permitted because it had to do with supervisors performing rank-and-file work behind a picket line.

In ABC it was countenanced, but with the caveat, as I have mentioned, that the Court said, you have reached the outer boundaries and we think, given the lack of any relationship between the union and these two particular employers, that they have certainly passed that boundary in this case.

QUESTION: Labor Board versus Amax?

MR. COHEN: Yes.

QUESTION: Is that in your brief?

MR. COHEN: No. It is not, Your Honor, and it is one of those things that, when you prepare for your oral argument you see something you wish you had put in the brief.

QUESTION: Why don't you tell me --

MR. COHEN: Let me give you the citation for it.

QUESTION: All right.

MR. COHEN: It's 453 U.S. 322, and the quote I read is at page 335.

QUESTION: Thank you.

MR. COHEN: I'd like to point out one of the rather strange things about the Board decision here, is that it appears to us to fly in the face of a much earlier Board decision which we have cited in our brief, as has the Board: National Association of Letter Carriers.

That was decided after ABC, and it cited ABC, and the Board there held that a union rule that denied membership status to persons who accepted jobs as temporary supervisors was not unlawful which is, I think, essentially what we have here.

The Board's reasoning is quite similar to our argument in our brief. This is a quote. This is from footnote 29 of the Board's decision. "The fact that the Postal Service may have fewer letter carriers who are willing to serve as temporary supervisors as a result of the amendment to the union's constitution in no way affects the Postal Service's selection of which" --

that's the Board's emphasis -- "of which letter carriers will serve as --

QUESTION: The government here was saying that the union could discipline any of its members who are not supervisors if they insisted on working for this employer?

MR. COHEN: The Board does concede that. But what the Board --

QUESTION: That's this case --

MR. COHEN: I'm sorry.

QUESTION: That's the case you are talking about, almost.

MR. COHEN: No, the case we are talking about is where the union stripped membership rights from those people --

QUESTION: They stripped the membership rights?

MR. COHEN: They denied -- there were two issues in the case. First, denial of membership.

QUESTION: You mean, entry?

MR. COHEN: No -- all right. Let me back up.

QUESTION: Were they already members?

MR. COHEN: The union dealt with the Postal Service. It has as its members the employee of the Postal Service. It imposed a new rule in its constitution that said, you members, you employees of

the Postal Service may not become temporary supervisors. If you do, you lose your membership and you lose your benefits under that membership.

QUESTION: These people are already members?

MR. COHEN: Already members, as with us, banned from taking jobs as supervisors, as our rule does with respect to those employers who are adverse to our interests by having lower wage standards.

We see no principal distinction between the two rules, that of Letter Carriers and that here, or their effects. And for these reasons, we ask that the Court affirm the Ninth Circuit's denial of enforcement to the Board's order.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cohen.

The case is submitted.

(Whereupon, at 2:40 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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#85-1924 - NATIONAL LABOR RELATIONS BOARD, Petitioner V.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 340

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BY Paul A. Richardson

(REPORTER)