ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, ET AL.	)	
	)	No. 85-2079
Petitioners	)	
v.	)	
	)	
ADVANCED LIGHTWEIGHT CONCRETE COMPANY, INC.	)	

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IN THE SUPREME COURT OF THE UNITED STATES

LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, ET AL.,

Petitioners,

v. No.85-2079

ADVANCED LIGHTWEIGHT CONCRETE COMPANY, INC.

Washington, D.C.

Tuesday, November 10, 1987

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

APPEARANCES:

MICHAEL B. ROGER, ESQ., San Francisco, California; on behalf of Petitioners.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor-General, Department of Justice, Washington, D.C., as amicus curiae; in support of Petitioners.

MARK S. ROSS, ESQ., San Francisco, California; on behalf of Respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument next in No.85-2079, Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co. Mr. Roger, you may proceed whenever you are ready.

ORAL ARGUMENT BY MICHAEL B. ROGER, ESQ.

ON BEHALF OF PETITIONERS

MR. ROGER: Mr. Chief Justice, may it please the Court:

The issue in this case is whether or not pension plan fiduciaries are precluded from access to federal courts to enforce continuing obligations to pay trust fund contributions because such continuing obligations are required by the National Labor Relations Act?

The court below ruled that the language of Section 515 of ERISA, which was amended in 1980 by the Multi-Employer Pension Plan Amendment, which mandates the payment of contributions under the terms of a collectively-bargained agreement to the extent not inconsistent with law, did not allow such access, ruling in effect that, due to the "pre-emption" doctrine, the only recourse the trustees had was to the National Labor Relations Board.

This Court has previously found that federal district courts have jurisdiction to decide issues which normally arise under the National Labor Relations Act, in order to effectuate

other federal statutes, including ERISA. It did so in the Duty of Fair Representation cases, such as Vaca v. Sipes. It did so in Kaiser Steel v. Mullins, where it said that defenses arising under the National Labor Relations Act could be raised in contractual enforcement claims.

Likewise it did so in Connell Construction v. Plumbers, where it allowed the litigants to an anti-trust claim to look to the National Labor Relations Act for guidance.

It should do so in this particular case.

QUESTION: Has it ever done so in an unfair labor practices claim?

MR. ROGER: As such?

QUESTION: Yes.

MR. ROGER: As an unfair labor practice claim it has not done so.

The court below failed to read Section 515 with the same breadth we believe is required in order to give full meaning to the congressional intent of a broad and comprehensive legislative scheme embodied in ERISA and MPPAA, the purpose of which was to protect the pension benefits of many millions of workers in this country to ensure that when they came time to retire, they would have their benefits available to them.

When Congress passed ERISA in 1974, it in effect codified fiduciary obligations which arose under common law,

and it gave to fiduciaries of this plan the obligation to make sure that the monies were available for participants to receive their pensions and other benefits when it became due and owing.

Congress recognized in 1974 there were serious problems in enforcing the obligations of employers to contribute, and Congress learned unfortunately between 1974 and 1980, that what they thought they mandated in a very broad statute in 1974 just was not enough. And so, in 1980, they passed the Multi-Employer Pension Plan Amendments Act of 1980.

They did so for several reasons: First of all, they realized that because of the litigation arena out there, employers were able to use the processes to avoid paying their obligations, thus putting a great financial risk, the pension plans and other plans, that were required to receive contributions in order to pay out the benefits.

And secondly, they created a situation that would force employers that withdrew from plans to pay their fair share of withdrawal liability in circumstances where they chose to withdraw or were forced to withdraw.

Thus, we had with the passage of the Multi-Employer Pension Plan Amendments Act, the creation of two new statutory schemes: we had the creation of Section 515, which is worded in the form, "every employer who is obligated under the terms of a collectively-bargained agreement, must to the extent not inconsistent with law, meet and pay such obligations."

It also created the "Unfunded Withdrawal Liabilities Section," the obligation of employers to pay their fair share where the circumstances were an employer permanently ceased to have an obligation to make those contributions.

We are really dealing with here today, the situation where in one case Congress used words under on form, and where in another section, they used words under the other. In Section 515, the wording is, "under the terms of a collectively-bargained agreement." In Section 4212, they talk about the result of being "party to one or more agreements," or as a result of a "duty arising under labor-management relations."

We do not think the situation is inconsistent. Withdrawal liability is a special circumstance, and it requires a finding that there must be a permanent cessation of the obligation to contribute. The mere impasse in a labor-relations context, the mere failure to pay one's bills, the mere existence of a labor dispute, does not in itself create a permanent obligation or cessation of obligation, to contribute.

In Section 515, however, because of what Congress recognized was the increasing problems of employers failing to pay their bills, as it were, they used different words: they used the words, "the terms of a collectively-bargained agreement."

Now, the court below stated that those words were not

sufficient to overcome what they deemed to be the basic "pre-emption" doctrine. We suggest that that is too narrow a reading of Section 515. The "terms of a collectively-bargained agreement," does not mean "a collective bargaining agreement." It means the "source from which the terms arose;" the definition of the terms.

Now, we have a situation in the labor-management relations field -- you must remember that the Act of 1980 really deals with collective bargaining and the collective bargaining arena, not just some theoretical situation where employers --

QUESTION: I think the obligation to pay in this case arises from the labor law and not ERISA.

MR. ROGER: The initial obligation arose from the fact that Advanced Lightweight was party to a collective bargaining agreement, which it chose to terminate by giving notice to the Union, and which did not pay those contributions after the termination date of the contract before anything else happened. We are dealing with a period of time between an expiration date of a contract and that period where either a new contract was entered into, or impasse is reached.

QUESTION: And the obligation then, that the employer's obligation, if there was bargaining impasse, his obligation cease?

MR. ROGER: Once impasse is reached --

QUESTION: Yes?

MR. ROGER: -- and the definition of "impasse" is up in the air -- and impasse is reached, the obligation --

QUESTION: But up until then, he owes the money?

MR. ROGER: Absolutely.

MR. ROGER: Well, then it is an unfair labor practice only, is it not? After the contract has expired?

MR. ROGER: It was clearly up until Section 515 of ERISA, an unfair labor practice, enforceable before the National Labor Relations Board. But we must point out, Chief Justice, that the interpretation given in Section 8(a)(5) and 8(d) is one this Court gave in NLRB v. Katz. It said that, in order to effectuate the purpose of the National Labor Relations Act, we hold, "we must hold that employer whose contract expired must continue in full force and effect the terms and conditions of employment, including the payment of trust fund contributions."

QUESTION: So the obligation after he terminates is an obligation pursuant to the terms of the contract? The obligation after he terminates and before he is bargained to impasse? That obligation is pursuant to the terms of the contract, but it is not a contractual obligation -- it is an obligation under the labor laws?

MR. ROGER: That is correct, Your Honor. The obligation does not necessarily require the existence of a

collective bargaining agreement to become extant.

QUESTION: The agreement is done; it is gone -- it is terminated?

MR. ROGER: The agreement is terminated, right. But the obligation continues. And this is not a situation that we are dealing --

QUESTION: Well, does not the obligation continue as you described it, as a continuing obligation, or is it a new obligation that arises?

MR. ROGER: I believe that it is a continuing obligation under the labor laws, Your Honor. I believe that it is a contractual --

QUESTION: One is a contractual obligation; the other is a labor law obligation, and you say that they are continuing?

MR. ROGER: When one negotiates a collective bargaining agreement in today's economy, one does so in the context of the laws which we know exist, and I must point out that the Multi-Employer Pension Plan Amendments Act specifically deals with obligations which initially rise pursuant to collective bargaining and the collective bargaining process. Knowing that that is the arena of this "war" as it were, parties to collective bargaining know that the mere expiration date of their contract does not end their obligations. Those obligations continue under law. Now that

law happens to be interpretations of the National Labor --

QUESTION: Would it not at least be theoretically possible that during the period between the giving of the notice saying, "I intend to terminate my relations with the Union at the end of the contract period," that some bargaining went on as to the possibility of renewal, and before the date arises, they reach an impasse and find out they will not be able to continue. That could happen.

MR. ROGER: Well, that not only could happen, Your Honor, it is a situation which exactly does happen, and actually, under Section 8(d) of the Act, Congress by statute, said that, "when you give your notice 60 days prior to the expiration date of the contract, you must statutorily maintain all terms and conditions in effect for at least a 60-day term, or the expiration date of the contract, whichever occurs later."

Now, the situation that we have before us may include that. But it does not necessarily preclude the other situation where employers and unions representing employees have contracts expire by virtue of their dates, have given notice that they intend to have a new contract negotiated, go through the process of negotiating contracts, sometimes for many, many months, and then negotiate a new contract, all the time the employers are continuing to contribute into the trust funds because the obligation has continued; the participants and the

workers and beneficiaries are entitled to their benefits; and then when the impasse is reached where a new contract is then arrived at, the definition of what the term "collectively bargained agreement" under Section 515 becomes applicable.

Conceivably, the impasse will say, "there will be no further trust fund contributions." Another alternative may be there will be a different form of trust fund contributions, or a different date upon which they may be due.

But until that point in time arises, trustees, the fiduciaries, who are not in any position to know, because they are not direct participants in the collective bargaining process -- indeed, in the plans that are before the Court today, you are dealing with many thousands of employers over a very large geographic area, and there is no reason to assume ore even to hope to assume, that the trustees will have any idea that the parties to the contract have either given notice of a desire to terminate or have the contract expire, or have engaged in collective bargaining --

QUESTION: Well, are you not suggesting, then, that the Plaintiffs in this litigation are probably the worst people in the world to litigate the issue of whether collective bargaining has reached an impasse?

MR. ROGER: They may be in the position, as you suggest, of not being able to determine an impasse, but we suggest a district court has the full power to determine an

impasse, that in fact, under the Multi-Employer Pension Plan Amendments Act, Congress said that it is up to the federal district court to determine that in those circumstances where they must assess withdrawal liabilities.

QUESTION: Yes, but they do it in an adversary proceeding, in which the complaining party does not know much about the issue, according to your description.

MR. ROGER: Well, in the withdrawal liability situation in fact, Justice, they must attempt to arbitrate that issue before it ever gets before a district court. It is only when one of the parties, specifically the withdrawing employer, refuses to participate in the arbitration process, that the trustees are then forced to go into district court to enforce that obligation.

QUESTION: That may be true. The withdrawal liability situation is a little different, because it is not an unfair labor practices situation.

But in the cases we are dealing with, you are suggesting that the trustees have to initiate this litigation even though they really do not know the facts or much about the legal issues that may be dispositive.

MR. ROGER: It is entirely possible and in many cases probable the trustees must institute litigation to collect on contributions they believe to be due and owing because of the passage of time. Trustees in a situation such as the facts

before this case, and admittedly we are on a very minimal record in this case because it went up on Summary Judgment -- the contract expired on June 16, 1983. The trustees would not even be in a position to know until approximately a month later whether or not that employer has allowed the contract to expire; has simply decided to pay his bill that month; or whether or not that employer in fact paid through the balance of the month of June, because the bills are paid monthly -- trustees do not know until that bill is not paid or a report is not made.

Now, the trustees are not in a position to act as a collective party. This Court has said on many occasions, trustees of multi-employer plans are not the parties to the contract; are not responsible, and should not allow parties to the contract to determine their responsibilities.

Rather, Congress has mandated under Section 404(a) that the trustees have the responsibilities to ensure that these funds flow in in order to ensure that the benefits will be available when these persons have to have them.

QUESTION: So they have to assume all the time, you are saying, that there has not been bargaining to an impasse and bring suit, is that it?

MR. ROGER: They must assume until somebody tells them specifically that the parties to the contract that, (a) there is an impasse, and (b) that -- a new contract has been

arrived at.

Unfortunately, however, we have a very broad spectrum between that phrase, "new contract" and "impasse." Ironically, in the time cases which are cited in the Respondent's brief, we have -- are almost two, two-and-a-half year periods between the cessation of the obligation of the contributions to termination of the expiration date of the contract, coupled with the question whether or not there had been a withdrawal for purposes of assessment of withdrawal capability, and we had the courts saying to us, "the mere fact that there was a strike for almost two and a half years, no contributions coming in for almost two and a half years, and no abandonment of the strike, does not mean that there has been a permanent withdrawal or cessation of the obligation to contribute -- indeed, an impasse in itself is not a permanent cessation of the obligation.

QUESTION: Mr. Roger, what would be your position if a charge had been filed, if the general counsel -- did not the general counsel turn down --

MR. ROGER: In one of these particular cases, Your Honor, the general counsel turned down a charge filed by one of the unions over a failure to give information.

QUESTION: Suppose that the only charge that was involved here was not turned down by the general counsel, but it was filed, and there was a proceeding that was underway -- do you think that the federal court at your behest should

undertake to --

QUESTION: In that circumstance, Justice, we know that the National Labor Relations Board by its own rules and by-laws is limited in the kinds of remedies that it can give. Whether or not a federal district court under those circumstances --

QUESTION: I know, but there is --

MR. ROGER: -- should postpone --

QUESTION: But it is the business of the Labor Board to decide whether there has been bargaining in the impasse.

MR. ROGER: it is the decision of the Labor Board to make a determination as to whether an impasse has been reached.

QUESTION: Exactly -- exactly. And suppose that Labor Board had decided that there had been a bargaining impasse?

MR. ROGER: If the Board had made a finding of fact that an impasse was reached and that the trustees had a --

QUESTION: Would that bind the federal court?

MR. ROGER: The federal court generally will defer to the board.

QUESTION: I did not ask you that. Do you think legally it would be bound -- legally?

MR. ROGER: If we are dealing with a contribution obligation, as opposed to a withdrawal liability, I think the federal court would have to defer to a finding -- a finding by

the National Labor Relations Board. As opposed to a general counsel determination that there is no -- case.

QUESTION: I take it that the so-called "pre-emption" doctrine in here is just -- the business of interfering with the Labor Board's exclusive jurisdiction to decide unfair labor practices?

MR. ROGER: That is it exactly, Mr. Justice.

QUESTION: And the general counsel in one of these cases turned down a charge?

MR. ROGER: Over the -- not over the failure to make contributions -- they turned down a charge over a different issue: they turned down a charge over a failure to give information that the Union had requested in order to collectively bargain.

QUESTION: The Union has never asked -- never complained to the Board about these contributions?

MR. ROGER: This has not been filed by the Union, nor had the trustees filed the charge, Your Honor.

QUESTION: What if they had? Could you?

MR. ROGER: Could I as a human individual? Yes. Could the trustees have done so? yes. Whether the trustees should be required to do so is really the issue, because the remedies the Board allows are not the same remedies that ERISA allows. We do not get the mandatory --

QUESTION: That may be so, but the -- what you have

to find out is whether there has been a bargaining impasse.

MR. ROGER: Not necessarily. We have to find out whether a contract is expired, or are we in that position during which the bargaining process may have to continue, and as I suggest to the Justice, that process may go on for many, many, many months or years.

QUESTION: I know, but the Board may say that if there is an impasse.

MR. ROGER: They may ultimately decide there is an impasse somewhere down the road. What we are concerned about, however, is what do we do in the mean time? In every other circumstance where an employer is required --

QUESTION: What can the Board do for -- suppose there has been a charge filed that you have not maintained the terms of the contract and you have not bargained at impasse? But suppose the Board agrees that there has been no impasse, and now we have to remedy your failure to live up to the same wages, or pay the same wages or pay the same contributions? What can they do? Can they not order the --

MR. ROGER: The Board clearly has a restriction, and has in fact ordered employers to pay trust fund contributions.

However, the Board does not have the power within it, at least as it determines, nor does it have the requirement that they must assume, or assert, that obligation. The general counsel has that authority not to proceed; the general counsel

has the authority to proceed in part; the general counsel has the authority to settle the case for less than the full amount of the obligation.

QUESTION: I would think that the trustees would be in much better shape, it seems to me, if they actually asked the general counsel to file a charge and he said, "no." And you can conclude from that that the Board just is not worried about its jurisdiction in this case.

MR. ROGER: And highly likely, the Board may choose not to assert its jurisdiction in this case.

QUESTION: In which event it would be -- you would have a better case.

MR. ROGER: And the situation we are then confronted with, Your Honor, is the fact that in all circumstances where an employer has an obligation under whatever source to make these contributions, the federal district courts have jurisdiction for a claim made by the trustees to get the payment of those contributions -- save an except that on situation between the time of the expiration of the contract and prior to an impasse or a new contract being reached.

We submit that, under the broad scope of what Congress intended in ERISA and MPPAA, to make the trustees, or preclude the trustees, from being able to seek federal district court relief -- under that circumstance, is a narrow misreading of the law, and for those reasons we think the court below

should be reversed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rogers.

We will hear now from you, Mr. Wallace.

ORAL ARGUMENT BY LAWRENCE G. WALLACE, ESQ.

AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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

I would like first, if I may, to differ with an answer that was given to the Chief Justice of the first case that we cite on page 11 of our brief. IBT Local # 20 v. Morton is a case in which this Court upheld federal court jurisdiction when authorized by Congress in another statute to determine an unfair labor practice question, and the same determination was later upheld in a case not cited in any of the briefs, of five or six years ago, called Allied Lines v. Longshoremens Union, which was also a question of a violation of 8(b)(4) of the National Labor Relations Act, a damages suit for secondary activity in violation of the National Labor Relations Act. It was when the Longshoremen were refusing to unload cargo from Russia as a protest against what was going on in Afghanistan.

The second point I would like to make in supporting the position we have taken in a brief signed by general counsel of the Labor Board, as well as the Solicitor General, and the Department of Labor, is that it is quite clear on the face of the very provision at issue that -- and it is set forth toward

the end of the appendices to the Petition for Certiorari, page D-18, the provision at issue is toward the top of page D-18, in the Appendix, that Congress did not on the face of this provision reserve to the National Labor Relations Board exclusive authority to determine whether a violation of the National Labor Relations Act has given rise to continuing viability to make contributions, because if the terms of the contribution plan were to specify that the employer is obligated to continue making his contributions as long as he has a duty under the contract itself, or under any law referring to the contract, to make those payments, then there could be no doubt on the face of the statute that there would be authority to sue.

QUESTION: But that is just rewriting the contract. It would also be clear if they said, "you have to keep going until 1999." It would be a different contract.

MR WALLACE: This would not rewrite the collective bargaining agreement; it would be that the plan itself -- and the plan could be drafted or meant to be drafted --

QUESTION: Well, either by the agreement of the plan. You could also have a plan that says you have to keep paying until 1999.

MR WALLACE: That is correct, Mr. Justice.

QUESTION: But that is not our case.

MR WALLACE: It is not our case, but it is -- our

case is whether there is some reason to think that Congress did not authorize the trustees to sue for obligations to make payments under the term of the contract after the contract has expired. The obligation will exist to abide by the terms of the contract as a matter of law.

QUESTION: As a matter of -- not statutory law, though. In theory is it not true that the NLRB could decide that it is not an unfair labor practice to refuse to continue the prior agreement in effect?

MR WALLACE: It could, but the law would have to --

QUESTION: So the arguments that are made in Mr. Roger's brief, particularly about how important it was to the Congress that these funds get this money and what-not, you are really asserting that, though it was so important, Congress left it to NLRB regulations?

MR WALLACE: Well, it has -- had been established at the time. these amendments were adopted that there is a continuing obligation to abide by terms of the collective bargaining agreement after the agreement has expired --

QUESTION: In fact, not even regulations, because the NLRB does not have many regulations: I am sure they do not have a reg on this. It is just NLRB decisional law, right?

MR WALLACE: That is correct.

QUESTION: Which could be changed?

MR. WALLACE: Which could be changed. And if --

QUESTION: Congress left that all -- was content to do that under ERISA?

MR. WALLACE: Well, in applying provisions of the National Labor Relations Act, a district court applying this decision in Morton would conform its jurisprudence to the jurisprudence that has been developed by the Labor Board and by any amendment of the National Labor Relations Act that Congress might adopt.

QUESTION: That may be but it is hard to argue that this was you know, as the argument has been made this was a matter of supreme importance to the Congress. It is purely, you know, accidental that the NLRB does it this way, as far as ERISA is concerned.

MR. WALLACE: But what was of great importance to the Congress is that the trustees have a discrete, effective, unambiguous, efficacious remedy, as they said, that would not be cluttered up with other issues, and the defenses that were pointed to as ones that had undesirably burdened the pre-existing remedy were defenses raising other issues under the collective bargaining agreement, raising other questions of unfair labor practices, which would be very apt to be lumped into any unfair labor practice complaint the trustees would have to take to the Board, and the general counsel would have unreviewable discretion whether to press the claim and how to settle the claim, and other issues might get much higher

priority in a settlement than the trustees' desire to collect arrearages and back payments, which may seem more remote from the immediate interests of the parties to a labor dispute, and the settlement might look toward preserving labor peace and keeping people employed at the moment, which is a high priority of the National Labor Relations Act.

You would wind up with a species of the very evil that Congress had focused on in adopting the 1980 Amendments, even though they did not specifically focus on the obligation that applies under the National Labor Relations Act after the expiration date of the contract.

But this is something very familiar in the law -- there are obligations under leases after the expiration date. They still flow from the terms of the lease. And it is a commonplace thing for people to go on working and businesses to go on in business after the expiration date of a collective bargaining agreement -- while bargaining goes on, sometimes rather sporadically.

What Congress was particularly concerned about was to separate out the ability of the trustees to have an efficient remedy to keep these plans funded, to separate it out from extraneous distracting other aspects of disputes between the parties to collective bargaining agreements, and these disputes tend to burgeon once someone takes one aspect of the labor dispute to the Board.

The Board is not itself in a position to assume the burdens of a collection agency in exercising its discretion with respect to what cases to carry forward and how to settle the cases. Its priorities are directed toward the maintaining of labor peace and the keeping of the country productive.

QUESTION: Well, all the general counsel has to do is turn down complaints, and then I would think a federal case could go ahead.

MR. WALLACE: We certainly agree with that, Mr. Justice.

QUESTION: You just do not think that the general counsel ought to be bothered about it?

MR. WALLACE: Well, we think that Congress has provided for jurisdiction to enforce an obligation under the terms of the collective bargaining agreement, and that obligation is imposed by law. It does not have to be federal contract law as such, after the contract has expired; it happens to be the National Labor Relations Act. But that could be considered a term implied by law about the contract itself.

QUESTION: When has -- the labor relations law says that "the contract has expired -- but it has not?"

MR. WALLACE: Well, that is implied by law, term of the contract.

QUESTION: Well it is just until impasse the contract is still in force.

MR. WALLACE: The same as a lease extended by terms that are implied by law; that is an obligation of law. In one sense it could be argued that no contract terms themselves impose obligations; the obligations are imposed by the law of contracts: whether there is an enforceable obligation to abide by any term of a contract.

QUESTION: Mr. Wallace, if we agree with you, could the employer write himself out of this holding by writing in the collective bargaining agreement and negotiating with the Union a provision that says, "in the event the contract is terminated, just as the obligation to pay salaries shall terminate, while the workers are not working, so also will the obligation to make contributions to ERISA?"

MR. WALLACE: Not because we think Congress conferred a right of the trustees to go to federal court, to enforce obligations imposed by law to make payments under the terms of the contract.

QUESTION: But -- there would be no obligation under the terms of the contract, so even if the National Labor Relations Board does continue the contract, the contract would not continue under those terms.

MR. WALLACE: I do not know the answer to that. We have not focused on that question. I rather doubt that that could be accomplished.

QUESTION: Thank you, Mr. Wallace.

We will hear now from you, Mr. Ross.

ORAL ARGUMENT BY MARK S. ROSS, ESQ.

ON BEHALF OF RESPONDENTS

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

The issue presented here is whether an employer's failure to contribute to a trust fund after the expiration of a collective bargaining agreement, an alleged violation of Section 8(a)(5), is actionable under ERISA 515, or whether such alleged violations fall within the exclusive jurisdiction of the National Labor Relations Act?

Violation of Section 8(a)(5) is an unfair labor practice falling within the primary jurisdiction of the NLRB. And it is axiomatic that courts are without jurisdiction over such violations. I say it is axiomatic because there have been a few rare exceptions in which this Court has permitted courts to deal with labor law issues, but generally speaking, those have been in two very discrete situations -- one in which there was express statutory authority for the federal court to do so, such as Section 303 of the Labor Management Relations Act, which was an issue in the Mortons case, or where it was a collateral issue and was necessary to do so in order to decide issues arising under other federal statutes.

QUESTION: Well, what about in this situation, if the general counsel declines to pursue the matter?

MR. ROSS: I am sorry, Your Honor?

QUESTION: What about a case like this one, if the general counsel declines to pursue the matter for the NLRB? Should there be no federal cause of action, then, by the trustees?

MR. ROSS: I cannot speak to whether there should be. I do not believe that 515 creates such a prospect.

QUESTION: You do not think even under the circumstances that a suit could be filed in federal court?

MR. ROSS: I do not believe so, Your Honor, and the reason for that is, that the general counsel presumably would want to dismiss the charge or refuse to issue a complaint on that charge because the general counsel found that the charge was without any basis in fact or there was insufficient evidence to support the charge, would be an administrative determination that the prosecutorial body charged with enforcing the National Labor Relations Act found that there was no violation of the Act. And if there is no violation of the Act, it follows that there would be no obligation to continue contributions within the meaning of Section 8(a)(5).

QUESTION: Well, I suppose that the general counsel's discretion goes beyond that, though. There may be some element of prosecutorial discretion there, but it does not go to the merits.

MR. ROSS: Well, Your Honor, I would grant you that

there are some rare occasions where that prosecutorial discretion does exist, but they are highly -- they are rare. And highly infrequent --

QUESTION: And if you are right, then the employer would just get a complete windfall?

MR. ROSS: Well, I cannot actually think of an instance in which that prosecutorial discretion would exist except in that limited instance where the employer was not so large or substantial as to satisfy the administrative requirements for exercise of the Board's jurisdiction. Other than that, the only thing that I can think of that would prompt the general counsel to refuse to issue a complaint would be a decision by the investigative branch of the general counsel that there was not sufficient evidence to support the charge, and that would be the administrative determination that the employer did not violate Section 8(a)(5), and that there was no violation of the Act, and therefore there would be no obligation to continue the contributions to the trust fund.

I was remarking before that the other instance in which the Court has allowed the district courts to decide labor law issues dealt with the instance where you had a collateral federal labor issue arising out of the context of enforcement of an independent federal statute. That was what happened in the Connell case. Of course, here that is not what we are dealing with. What we are dealing with here is a claim that is

granted solely upon a Section 8(a)(5) violation. The Solicitor-General and the trust funds all agree that this entire claim is predicated on Section 8(a)(5) and the way that that statute is enforced by and interpreted by the National Labor Relations Board. Therefore, what we are dealing with here is an issue of federal labor law that is core to the issue before the Court, and we are not dealing here with collateral federal labor issues. The federal labor issues in this case are indeed core in this case.

Now, of course,that analysis changes if Section 515 was intended to weed Section 8(a)(5) type claims or if Congress intended Section 515 to give trust funds license to go into federal court and litigate unfair labor practices. We do not believe that Congress intended 515 to reach that result, and we say that because contrary to the trust funds, nothing in the plain wording of Section 515 even remotely suggests that 515 was intended 8(a)(5) or to invade the NLRB's jurisdiction. Section 515 speaks solely of an employer's obligation to make contributions in accordance with the terms and conditions of a collectively bargained agreement. It speaks solely in terms of collective bargaining agreements and contractual obligations.

It is understandable that Section 515 speaks only of contractual terms, since by the enactment of 515 and its companion Section 502(g)(2) Congress sought to give effect to an employer's contractual promise to continue ERISA funds, or

to a contractual promise to continue ERISA funds, or to a contractual promise to contribute ERISA funds and to eliminate --

QUESTION: How does an employer know he is living up to his 8(a)(5) obligation to continue the terms of an agreement?

MR. ROSS: Well, aside from consulting a good labor lawyer, Your Honor --

QUESTION: Like you?

MR. ROSS: I believe that he would have to --

QUESTION: Is he not supposed -- is his obligation not measured by what the contractual terms were at least?

MR. ROSS: No, Your Honor, they are not.

QUESTION: What are they?

MR. ROSS: They were measured by what the status quo was at the time of the contract's expiration occurred.

QUESTION: Right, right.

MR. ROSS: And the status quo was not necessarily synonymous with what the contract provides. What I mean by that is that there are a number of provisions commonly present in the collective bargaining units that expire with the contract's expiration, and an employer is free to discontinue because they are not deemed to be terms and conditions of employment within the meaning of --

QUESTION: What about wages?

MR. ROSS: Wages are supposed to remain --

QUESTION: And how does an employer know he is living up to his obligation? Is his obligation not measured by the terms of the collective bargaining contract?

MR. ROSS: I do not believe it is. I think his obligations are met by what a status quo is at the time a contract expires, and the contract is an element of what that status quo is.

QUESTION: All right, how about wages? Is he not supposed to continue the wages that the collective bargaining contract calls for at the date of expiration?

MR. ROSS: As Section 8(a)(5) has been interpreted by the National Labor Relations Board, he is obliged to maintain the status quo until his bargaining obligation is satisfied.

QUESTION: What is the status quo?

MR. ROSS: The status quo is -- are the terms --

QUESTION: On wages, on wages.

MR. ROSS: I am sorry?

QUESTION: What is the status quo on wages?

MR. ROSS: The status quo on wages would be that which the employer is paying at the time the contract expired.

QUESTION: What he is paying and he is paying the wages that the collective bargaining contract requires him to pay?

MR. ROSS: If he has honored the contract that

presumably is so, Your Honor. However, I --

QUESTION: If I understand your answer correctly, your response to the question that I asked Mr. Wallace, that is, whether an employer can write himself out of this problem by simply reciting in the collective bargaining that once the agreement terminates, his obligation to continue to make ERISA payments terminate. Your answer to that would be that he could not do that because what measures his obligation under the labor laws is not the terms of the collective bargaining agreement but what was being done at the time the agreement terminated, and at the time it terminated, regardless of what the agreement says will be the case later, at the time it terminated he was making those ERISA payments.

MR. ROSS: I believe, Your Honor, that the collective bargaining agreement made provision for the cessation of those contributions at the contract's expiration. The contract provided that the obligation will cease when this contract expires. I believe that the employer would be allowed to terminate those contributions.

QUESTION: That is inconsistent with what you have just said, that the measure is the status quo.

MR. ROSS: That may appear to be so, Your Honor, but the status quo is measured by what the terms and conditions of employment are after the contract expires. If you read Section 8(d) of the NAtional Labor Relations Act, you will see that it

speaks in terms of what the duty to bargain is, and that duty to bargain applies not to the terms and conditions of the collectively bargained agreement in the words of 515.

Instead it speaks to the terms and conditions of employment. Now, that is an important distinction that the Board has to keep in mind, because the terms and conditions of employment are those things which exist within the work place when the parties are obliged to bargain.

for example, as was mentioned before: if the contract expires, the employer, as interpreted by the National Labor Relations Act may unilaterally terminate certain things which derive solely from contracts, such things as a Union-security clause, or dues check-off, or arbitration.

On the other hand, the contract will often --

QUESTION: But the duty to make contributions is a term and condition of employment, is it not?

MR. ROSS: It is certainly been interpreted as such, Your Honor, if the contract, in response to the question of Justice Scalia, if the contract specifically authorizes the employer to cease these contributions, the employer has satisfied his duty to bargain because he has obtained the Union's agreement that the obligation will be coterminous with the expiration of the contract.

I think one important point that the Justices should consider in order to understand what I mean by the status quo

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QUESTION: Before you go any further, he could say the same thing about wages, then? He could just write into the agreement the wages I have agreed to pay will terminate at the termination of this agreement.

MR. ROSS: Well, if the collective bargaining agreement has been drafted to say that the employer's obligation to pay these wages, will cease at the expiration of the contract, and the employer is authorized to implement those changes which he deems appropriate after the expiration, I would agree with you. But that is not what we are talking about.

QUESTION: Would the National Labor Relations Board agree with me?

MR. ROSS: You would have to ask them, but I believe that they would.

I might add also -- and this is one important point that I think has to be given careful thought by the Court so you understand what I mean by "status quo." There will be a number of things which qualify as terms and conditions of employment, even though those terms and conditions of employment appear nowhere in the collective bargaining agreement. This is the law of the shop that this Court has so often spoken of. And these are things which exist independent of the contract and which represent the status of the work

place during the contract term and the status of the work place after the contract expires. So, for instance, if the --

QUESTION: You never said contributions to a pension plan was part of the common law of shop.

MR. ROSS: No, I suspect they would look at you like you were out of your mind. Certainly a pension contribution is something that will be specifically mandated. But I think in order for the Court to understand what I mean by 'status quo," the Court should recognize that there will be many things that are extra-contractual that the employer must maintain. And that is why I say that it is the status quo which the NLRB gives effect to, and not the contract. And I think that is the fallacy which is fundamental to the arguments raised by the Petitioner, and why the Solicitor-General 0--

QUESTION: But the measure of the contribution is determined by reference to that --

MR. ROSS: I am sorry, Your Honor?

QUESTION: The amount and measure of the employer's duty to contribute to the plans seems to be measured by the terms of the collective bargaining agreement that has expired.

MR. ROSS: Certainly to the extent that it has --

QUESTION: That is the point of reference, certainly.

MR. ROSS: Well, I think as the Ninth Circuit said, it serves as the parameter for the employer's obligation, or it is a parameter of the lawyer's obligation, but it ceases to

survive as an operative document, and what happens in this instance is that the NLRB and its enforcement of the National Labor Relations Act has concluded that employers must maintain the status quo while the bargaining obligation is being satisfied. The theory being that the employer is free to make unilateral changes while that process is in progress, he or she emasculates the collective bargaining process, and certainly that is a -- theory which this Court adopted and endorsed in the NLRB v. Katz case.

QUESTION: That ought to be enforceable somewhere, that obligation. And it is discretionary whether it will be enforced by the NLRB, the general counsel has some discretion, and so that is the difficulty.

MR. ROSS: I can understand your concern with that, although I think you have to look at the exercise of that discretion within the context of the National Labor Relations Act in the scheme created by Congress when it passed that law. It recognized that the general counsel is going to exercise discretion in reviewing unfair labor practice charges in deciding which should and which should not be taken into complaint.

QUESTION: I do not know why the Court should worry about the Labor Board?

MR. ROSS: I think the Court should worry about it in that instance because the prosecutorial officer of the NLRB has

concluded that it will not effectuate the policies of the National Labor Relations Act to prosecute. And the obligation under 8(a)(5) is an obligation which exists for the purpose of fostering collective bargaining and for the purpose of effectuating the policy of that law.

QUESTION: In any event here I take it that the general counsel did not turn down a complaint based on the failure to pay these contributions.

MR. ROSS: That is correct, Your Honor. Neither the labor unions involved nor the trust funds filed unfair labor practice charges in this case, and indeed I do not think it comes as any small coincidence that the trust fund suits filed in this case were filed exactly one day after the NLRB's statute of limitations expired, such that I am sure that it would be argument later that it would be impossible to invoke the jurisdiction of the NLRB because the statute had run.

QUESTION: If the Court goes ahead, can that same issue of -- well, what I am -- is there a situation in which a court can decide the unfair labor practice matter and then the same issue come before the Board? Can that ever happen?

MR. ROSS: It has happened, Your Honor. In that instance --

QUESTION: And the Board is bound by the court's decision, I presume?

MR. ROSS: As a matter of fact, I believe there is

some caselaw that says that the NLRB's determination would ultimately be determinative of the labor law issue. I apologize because the name of the case escapes me, but I know that there is a Supreme Court decision dealing with this, where you had a companion federal court case and an NLRB case progressing concurrently. Both of them ended up before the Court and the Court said that the NLRB's determination would be determinative of the issue.

I believe that the NLRB's findings were to issue a complaint in this case would be collateral estoppel, and that collateral estoppel would attach to findings made by the NLRB were it to have gone on this matter; I do not believe that there would be a similar result were the court to hear this, because I believe the NLRB would have exclusive jurisdiction over it and the court's findings would be in excess of its authority.

QUESTION: Mr. Ross, will you state for me, because I am a little fuzzy on it, what is your legal defense to paying these contributions? Why you contend you are not liable for the contributions for the period since the expiration of the contract?

MR. ROSS: Yes, Your Honor, we do.

QUESTION: And what is the reason for that position?

MR. ROSS: Well, there are a number of reasons, Your Honor. First of all, we believe that, based on the peculiar

facts in this case, there may not be a necessity for an impasse, and that indeed, the unions waive whatever right they had to bargain with us, and we are therefore free to implement changes, in addition to which, assuming that the unions can be found ever to have done anything in furtherance of their bargaining interest, we believe that we would be able to establish the existence of an impasse.

Lastly, and I think that this is an important point, and that is, we believe that the duty to bargain under Section 8(d) is a mutual obligation. And that is an obligation that attaches not only to the employer but it is a duty that attached to the labor organization.

Now, in this instance, we clearly sent a letter to the trial -- to the labor unions and said, "we want to bargain with you." We clearly said that, "we will not adhere to the terms of the collective bargaining agreement that is going to expire on June 15 after it expires. Please bargain with us."

They did not. They failed to bargain. And we feel that constitutes a breach of their duty to bargain, and I think that it speaks -- that it is just the kind of thing that this Court recognized in the Katz case, where it said that there may be some instances --

QUESTION: The bottom line is, you contend that it is not really before -- it is really a matter of National Labor Relations law -- there is no duty to make contributions. Are

your employees continuing to earn benefits under this plan? Are you continuing to work in a way that will make them eligible for larger benefits than they -- they were not?

MR. ROSS: I do not know, Your Honor. I cannot answer the question -- I do not think the case has been fully developed enough to really deal with that issue; I do not know of any instance in which the employees have asserted that they are; I just do not know the answer to that.

But I might add that, if it turns out that the employers were free, or permitted under the facts of this case, to cease making these contributions, certainly the employees could not claim any increased rights or benefits by virtue of the fact that the employer exercised its legitimate rights under the National Labor Relations Act and ceased making payments. So, while I understand that it is a question that is of some concern to the Court, I am not sure that it is a question that should really affect the Court's consideration.

I was commenting before on the unions' -- what we consider to be the unions' failure to bargain in this case, and I would like to refer the Court to the Katz decision, and most specifically to page 748 of that case, where Justice Brennan recognized that there may be circumstances in which the Board could or should accept its excusing or justifying an employer's unilateral action. Now, while we cannot know what those circumstances would be, we believe that the facts in this

particular case, the fact that the Union basically sat on its rights and did nothing to come to the bargaining table, was a breach of its duty to bargain, and when you think about it, it makes perfectly good sense from a labor policy standpoint because an employer's ability to make unilateral changes in that instance actually furthers the collective bargaining process.

If an employer is locked in perpetuity, into maintaining the status quo because its bargaining partner will not come to the bargaining table, what better force to get that Union's attention than to be able to make these unilateral changes, such that the Union has something to lose?

And in this recessionary economy, or the economy where you find employers are negotiating.

QUESTION: I do not quite know whether there is an impasse --

MR. ROSS: Well, Your Honor, I am not sure --

QUESTION: Or to decide when they, after they have consulted with a labor lawyer?

MR. ROSS: Presumably they will know when they do that, but I believe that there are a variety of issues here that are labor law issues that really belong with the Board, and not with the district court, and that these issues should be decided by the Board.

There are a couple of other points I would like to

touch upon: the trust funds' complaint that if they are forced to go to the NLRB they will not receive the statutory relief provided to them under Section 502(g)(2), because the Board, they say, "does not have the remedial power." Or has only remedial powers, and does not have the authority to grant 502-like relief.

Now, in our brief, we show the Court that there are a number of NLRB decisions in which, if not 502 relief, at least the functional equivalent, or at least something very similar to 502 relief, have been granted.

Besides the remedies appropriate to Section 515 and 502 collection actions -- and that is what they are: collection actions -- may not be appropriate for matters of federal labor law and policy. The ERISA actions are intended to enforce contractual promises to pay, and it is appropriate that Congress provided for stiff penalties against employers who breach their promises to pay. These are penalties which discourage contests over what are clear-cut contractual obligations.

On the other hand, federal labor policy and issues arising under the National Labor Relations Act are not nearly so clear-cut or simple as mere contractual promises and the breaches of those promises. And I say that because they typically involve a struggle between labor and management and a delicate balancing of their competing interests in a matter

that will effectuate federal labor policy. That is what the NLRB is supposed to do. That is what the genesis of the Katz case is, and I believe that is what should be an overriding consideration.

Mandatory punitive remedies in ERISA will chill the rights of employers to assert these legitimate interests under the National Labor Relations Act, and upset the delicate balance of power struck by Congress and the NLRB through its interpretation of the National Labor Relations Act.

Under these circumstances we believe that it is understandable why Congress limited Section 515 to contractual claims and left Section 8(a)(5), including asserted continuations of trust funds, to the NLRB.

We also want to point out that, contrary to the trust fund, the finding of plans -- I am sorry -- that the finding of plans -- that contrary to the trust funds, the finding -- I am sorry -- the funding, of funds will not be endangered by submitting Section 8(a)(5) disputes to the NLRB. I venture to say that 99 percent of the contributions paid to the trust funds are made pursuant to an employer's contractual promise to pay. And it follows therefore that the overwhelming majority of actions brought by the trust funds under 515 and 502 involve an employer's breach of a contractual promise and do not involve 8(a)(5) obligations.

Giving such claims to the NLRB where they belong will

have only a de minimis effect on the plans, while giving full effect to the NLRA and the scheme devised by Congress in passing the National Labor Relations Act.

QUESTION: You have not mentioned all of the fact that the Board is not the least bit worried bout interference with its jurisdiction?

MR. ROSS: Well, Your Honor, I believe, based on some Dissents that I have read recently issued by the Board by certain members of the Board, that certain members of the Board would like not to deal with these problems, but I believe that the statute mandates that they do so, and that they are obliged to fulfill their statutory obligations. And so they must do so, and 515 does not alter that result.

The trust funds' complaints about the funding in an 8(a)(5) complaint are also speculative and premature because funds must be entitled to monies before they can claim that they are going to be underfunded. Now by that, I mean that the entitlement to these funds is predicated upon a finding that the employers' actions violate section 8(a)(5). If there is no 8(a)(5) violation, then the employer is under no obligation to pay under the National Labor Relations Act, and the plans lose nothing.

In the final analysis, it is false to portray this case as the Petitioners did, as a case in which the employer obviously owes money, and that an adverse decision here will

prevent the trust funds from collecting. The employer does not "obviously" owe money. That is for the NLRB to decide. Further, an adverse decision here will not mean that the trust funds can never collect money; all it means is that they will be required to go to the NLRB where this case should have been brought in the first place.

QUESTION: Has the Board taken the position, or the general counsel for the Board taken the position that the NLRB will not entertain these matters?

MR. ROSS: No, Your Honor, they have not. I just know of one member who has said that he would prefer not to have to deal with these cases.

QUESTION: As far as we know, they will entertain an unfair labor practice complaint, if indeed the Union chooses to go that route?

MR. ROSS: Or if the trust funds choose to go that route, for that matter, even. Anybody can file an unfair labor practice charge. Any person can, and if you look at the statutory definition of the National Labor Relations Act for a person, they specifically include trustees, so it is clear by the wording of the statute, that Congress contemplated that trustees would be able to implement the NLRB's process. You should give effect to that.

The Petitioners and the Solicitor-General raise all of their arguments on policies which emanate, they say, from

ERISA, which was intended the ensure the fiscal health of plans. Now no one can deny -- it is like saying you hate apple pie and motherhood to say that this is not an important end. We agree that this is an important end.

However, we do not believe that that implementing or enacting of Section 515, Congress intended to reach this far. This is a case of statutory interpretation where Congress has already determined what the policy is: Congress appreciated the difference between contractual obligations imposed purely by federal labor law, and in 515 it confines itself to obligations imposed by contract, leaving 8(a)(5) violations and remedies flowing therefrom to be decided by the NLRB contrary to the trust funds. This is not a gap of continuity in ERISA's continuity scheme, but rather a recognition that contractual obligations and legal obligations are two entirely different opportunities emanating from two entirely different statutes intending to achieve two different but often complimentary, purposes.

Sending 8(a)(5) cases to the Board will adequately protect the plans' interest while at the same time effectuate Congress' intent to pass the National Labor Relations Act. Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you very much, Mr. Ross. The case is submitted.

[Whereupon at 2:57 p.m. the case in the above

entitled matter was submitted.]

REPORTER'S CERTIFICATE

DOCKET NUMBER: 85-2079

CASE TITLE: LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, ET AL v. ADVANCED LIGHTWEIGHT CONCRETE COMPANY, INC.

HEARING DATE: November 10, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the SUPREME COURT OF THE UNITED STATES, and that this is a true and accurate transcript of the case.

Date: November 17, 1987

Margaret Daly

Official Reporter

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