ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
EDWARD J. DeBARTOLO CORP.,	)	
	)	No. 86-1461
Petitioner	)	
v.	)	
	)	
FLORIDA GULF COAST BUILDING	)	
	)	
AND CONSTRUCTION TRADES	)	
	)	
COUNSEL AND NATIONAL LABOR	)	
	)	
RELATIONS BOARD	)	

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v. : No. 86-1461

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AND CONSTRUCTION TRADES :

COUNSEL AND NATIONAL LABOR :

RELATIONS BOARD :

Washington, D.C.

Wednesday, January 20, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:47 a.m.

APPEARANCES:

LAWRENCE M. COHEN, ESQ., Chicago, Illinois; on behalf of the Petitioner.

LOUIS R. COHEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; federal respondent NLRB in support of Petitioner.

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

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P R O C E E D I N G S

(11:47 a.m.)

CHIEF JUSTICE REHNQUIST: Mr. Cohen, you may proceed whenever you're ready.

ORAL ARGUMENT OF LAWRENCE M. COHEN, ESQ.

ON BEHALF OF PETITIONER

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

The facts in this case are simple and not in dispute. High's, a building contractor, was engaged by Wilson's, a retailer, to build a department store. The department store was to be located on a shopping center owned by DeBartolo.

The union had a dispute with High's because it allegedly paid non-union or sub-standard wages. The union did not have a dispute with Wilson's. It did not have a dispute with DeBartolo, and it did not have a dispute with any of the tenant stores, approximately eighty-five tenant stores, that were located on the shopping center.

Neither DeBartolo nor the tenant stores had any relationship whatsoever with High's.

Now, the union had many ways to express its message, but it did not -- its message as to High's allegedly sub-standard wages. It did not, however, picket or place any economic pressure whatsoever on High. It did not boycott or place any economic pressure on Wilson's. It did not merely

publicize to the public the fact that High paid sub-standard wages.

Instead, the union took a different tack. For three weeks during the Christmas season, busiest time of the year, the union placed hand billers at all the entrances to the interior mall of the shopping center and urged a total consumer boycott of all the tenants of the shopping center. It only stopped when it was enjoined after the Florida courts found irrevocable injury.

In 1983, this Court heard the case and unanimously concluded that the hand billing was not protected by the publicity proviso of Section 8(b)(4) of the National Labor Relations Act, that the required producer-distributor relationship of that section had not been met.

The proviso, the Court indicated, was not intended to preclude all types of peaceful, truthful hand billing, only hand billing that met the terms of the proviso, the three terms of the proviso was to be protected. The case was then remanded.

QUESTION: Why?

MR. COHEN: For two reasons. It was remanded to determine if there was coercion within the meaning of Section 8(b)(4).

QUESTION: Whether this hand billing was coercive?

MR. COHEN: Correct, and, if so, whether it was

protected by the 1st Amendment.

The Labor Board -- first, there was no dispute, of course, that the union's objective was forbidden and that those tenants were neutral employers. The only question, of course, was whether there was coercion. The Board found there was coercion because the purpose of the union hand billing was to impose substantial economic harm on the tenant stores, and it concluded that was not unconstitutional.

The 11th Circuit, however, refused to enforce the Board's order. It held that only picketing focused exclusively on the form of the union's conduct. It held that only picketing could be coercive within the meaning of Section 8(b)(4), and that every other form, hand billing or any other form of publicity, would not be in any way coercive or prohibited by Section 8(b)(4).

The decision, we submit, is contrary to the specific language of the Act itself. The Act itself does not only talk about hand billing -- I mean, about picketing, the Act talks about any action that threatens, coerces or restrains a neutral employer.

A threat, for example, to engage in conduct to shut down the business of a secondary or to impose substantial economic harm on them, however that threat is communicated, would be prohibited by the Act.

Similarly, coercion, as this Court indicated in Tree

Fruits, whether by picketing or otherwise, is forbidden by Section 8(b)(4), and coercion, as this Court has defined it in both Safeco and Allied International, is any conduct which predictably encourages customers to boycott a secondary business or which reasonably can be expected to threaten neutral employers with ruin or substantial loss.

That's certainly what happened here, and that's what the Board found.

The only type of coercive conduct that's exempted from the statute is that which meets the three specific terms of the proviso; it has to be truthful, it has to involve a producer-distributor relationship, and it cannot induce a work stoppage. If it doesn't meet the terms of the proviso, then it is coercive within the meaning of the Act and prohibited by the Act.

The union here did not, let me repeat, did not just try and express its message. That, it was permitted to do. It could have said in any way it wanted to that High did not pay sub-standard wages. What it did impermissibly here was go a step further and add to that message the fact of trying to impose pressure, economic pressure, on the neutral tenant stores. That's where the union violated the Act.

Prior to the decision in this case, that's been the decision of not only all the lower courts and the Labor Board itself consistently from the thirty years since those

amendments to the statute were passed.

The court below disregarded that history and it disregarded that language. Its read of the publicity proviso, as the 7th Circuit said in Boxhorn, as simply so much blab. The publicity proviso served no useful purpose. It was a pointless gesture. It was a mere collection of idle words because if the publicity proviso, as the union now argues, was only a clarification point. The statute never covered anything but picketing to begin with and the proviso only applies to non-picketing publicity.

That is, we submit, the vice here. It's not a -- the union position is not one that is supported by the legislative history of the Act. When the Act was passed, the purpose was to prevent direct coercion of secondary employers. That's what this Court indicated in Tree Fruits.

Now, there were differences, of course, as between the House and the Senate as to how you could prevent direct coercion of secondary employers. The House said, we think it ought to be prohibited, as they explained in the joint analysis, by any conduct, whether it be picketing, leafleting, radio broadcasts, advertisements, any of that conduct would have been prohibited by the House.

The Senate did not agree. The Senate had no restrictions on secondary consumer boycotts. As a result, there was a compromise, and that compromise is embodied in the

publicity proviso to the Act. Some non-consumer -- some non-picketing consumer boycotts are allowed, but only those that meet the three terms of the proviso. Other non-picketing publicity, if it's coercive and it's not protected by the proviso, is forbidden.

It doesn't matter on how the union does it, whether it's doing by picketing, hand billing, leafleting. The only question is whether it has complied with the terms of the proviso. If it has, then it can make its appeal, even if it's coercive. If it hasn't, it can't. That's the parameters of the conflict --

QUESTION: Mr. Cohen, can I ask you this question? Assume that the union wanted to disseminate precisely the same message by using some trucks and outside the shopping center, maybe radio ads or newspaper ads, which would, of course, not be picketing, would that have been prohibited by the statute?

MR. COHEN: If the intention is to cause substantial harm to the secondary --

QUESTION: Well, it's the same intention here.

MR. COHEN: That is correct.

QUESTION: That's precisely the same because they don't want people to be going to the shopping center and buy in these stores until High gets its wages up.

QUESTION: Well, it still has to be objectively coercive.

MR. COHEN: That's correct. It has a trivial effect, for example, if it's an advertisement placed in some distant location that's --

QUESTION: No, no. I'm assuming the audience is the same. It's beamed at the people who regularly shop there by sound or something, but it's not right on the -- at the -- that still would be coercion.

MR. COHEN: In our opinion, yes, because that predictably encourages a secondary boycott, and that's the test of coercion as this Court has set it in Safeco and Allied.

QUESTION: Would it matter in this case if nobody ever paid any attention to the hand billing?

MR. COHEN: The question would come up at the outset of the hand billing. If the Labor Board could conclude, and the Labor Board, of course, is the expert tribunal, conclude that what the union is doing has the foreseeable consequences of causing loss of business to the secondary, if that's a foreseeable consequence, if that's the likelihood, and that was proven at the course of the hearing, an injunction or unfair labor practice, then that would be a coercive conduct and forbidden.

QUESTION: Were there --

MR. COHEN: The union could come in and say, well, no one paid attention, it wasn't effective, it didn't have those foreseeable consequences, then, of course, that would be

counter-evidence the Labor Board would have to assess.

QUESTION: Were there findings in this case as to what the consequences of the hand billing were?

MR. COHEN: The finding of the Board was that the union's conduct would cause substantial loss to secondary employers. Secondary employers being the neutral tenant stores and, by process, then, of course, also DeBartolo.

QUESTION: Well, Mr. Cohen, suppose we think the statute was intended to reach this kind of activity, how do you deal with Organization for a Better Austin, that case, that says even coercive hand billing is entitled to 1st Amendment protection, and what standard do we then apply?

MR. COHEN: The difference is this case arises under the Labor Act, where you have a delicate balance, to use Justice Blackmun's phrase, between the public interests, public interests in precluding this threat of labor discord on one side, public interest, as opposed to the interest in communicating the message.

In Better Austin, the opposite was not a public interest, it was a private interest of an individual business man to be free from embarrassment and ridicule.

Secondly, in Austin, what you see --

QUESTION: The language was very broad.

MR. COHEN: That's correct, but it wasn't done by a labor organization which, here, has many ways to express its

message. The union here was entitled to go out and communicate its message that High did not pay sub-standard wages. It could communicate that coercively, if it wanted to, by picketing High or boycotting Wilson's.

In Citizens for Better Austin, there was a blanket injunction which prohibited anyway of communicating that message throughout the whole town that was involved where the real estate broker had his residence. It was a blanket injunction that precluded any spread of the message. It was a situation where the only counter-balance to communicating the message was a private message on the part of the broker as opposed to the public interests we have here, which is the public interest of Section 8(b)(4), which is not to enmesh neutral employers in labor disputes of others.

That's the counter-balance here.

QUESTION: And what tests do we employ? Do we look for a compelling state interest or what?

MR. COHEN: We look to the test of whether we're regulating this type of conduct, is there a strong government interest, does the statute directly advance that strong government interest, and does it advance it no further than necessary --

QUESTION: Some commercial speech standard.

MR. COHEN: It's akin to the commercial speech. That's correct. It's analogous to the commercial speech cases.

QUESTION: Is that a standard applied in the picketing?

MR. COHEN: It's a standard that was applied in Safeco, we believe, and it's the standard that was applied in Allied, which was not a picketing case. Allied International.

QUESTION: Were there five on that constitutional holding?

MR. COHEN: In Safeco, there were six members of the Court that reached the constitutional issue.

QUESTION: And --

MR. COHEN: And found that that was constitutional.

QUESTION: -- that was constitutional.

MR. COHEN: That's correct. There were three dissents who did not reach that question because they found it was not covered by the statutes.

The key in the constitutional argument in our point, in our opinion, is that since at least 1940, this Court has said that Congress can set the permissible contact, the limits of permissible contact, that's open to industrial combatants. Where conduct is designed not to coerce and not to communicate, that has always been held to be consistently conduct which this Court can regulate -- which the Government can regulate consistent with the 1st Amendment.

In Safeco, the situation was precisely that we have here. The union was attempting to communicate to consumers a

message, don't shop or don't do business with the particular employer.

The only difference between the two cases is that case involved communication by picketing, this case involves communication by hand billing.

CHIEF JUSTICE REHNQUIST: We'll resume there at 1:00, Mr. Cohen.

(Whereupon, at 12:00 o'clock noon, the Court recessed, to reconvene at 1:00 p.m. this same day.)

AFTERNOON SESSION

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: Mr. Cohen, you may resume your argument.

MR. COHEN: Unless the Court has additional questions of me, I think this is probably an appropriate time to save the rest of my time for rebuttal and turn it over to the Government.

CHIEF JUSTICE REHNQUIST: Very well. Mr. Louis Cohen, we'll hear now from you.

ORAL ARGUMENT OF LOUIS R. COHEN, ESQ.

IN SUPPORT OF PETITIONER

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

What the union is claiming in this case is that it has a constitutional right to do exactly what Congress has forbidden, if enough shoppers in the East Lake Square Mall agree with it.

Congress said thou shalt not coerce the neutral businesses in the mall into helping in the dispute with High's, and the union's core claim is that it is constitutionally entitled to put that prohibition to a sort of shoppers' referendum, to issue an explicit call for a secondary boycott and ask the shoppers to decide that the neutral businesses should be coerced after all.

Some calls for boycott, of course, receive the highest constitutional protection. Claiborne Hardware and Citizens for a Better Austin are leading examples. But the Court has said repeatedly, including in Claiborne Hardware, that the tactics used by the combatants in a particular labor dispute are not entitled to that level of protection.

In particular, the Court said in Claiborne Hardware, secondary boycotts by labor unions may be prohibited in the interests of preventing the coerced participation of neutrals in industrial strife.

Professor Cox put it this way in his comment on Safeco, he said, "requests for immediate assistance in putting economic pressure upon one with whom the speaker is engaged in driving a private business bargain are readily distinguishable from words looking forward to political action."

QUESTION: Who is being coerced in this case by the hand billing?

MR. COHEN: The objects of the coercion in this case are the other stores in the mall who have no relation to any of the parties, either of the parties to the dispute, but who the union felt would be in a position to bring pressure on the mall owner, to bring pressure on their co-tenant, Wilson's, to bring pressure on its contractor, High's, to offer better wages and conditions to its employees.

QUESTION: That's the coercion the Board identified?

MR. COHEN: It is the coercion of the neutral stores in the mall, yes.

QUESTION: But how does that coerce in the ordinary sense of the word, other than by the persuasive power of the idea?

MR. COHEN: The coercion takes the form of asking shoppers not to patronize the neutral stores so that the neutral stores will be afraid that they will lose business, unless they become involved in somebody else's dispute and enter that dispute on the union's side.

QUESTION: So, even though the message to the shoppers from the hand bills is not coercive, the result on the neutral stores could be coercive?

MR. COHEN: Yes. There isn't any requirement of an additional level of coercion. Indeed, the shoppers may be people who are willing supporters of the union, who are merely waiting for the union to give them a signal by the hand bills or picket signs as to what they can do to help.

What the statute says is that the help that the union may not ask of them is help bringing innocent bystanders, who are merely subject to economic pressure, into the dispute to help the union win it.

QUESTION: That's the same kind of coercion that would be involved in picketing.

MR. COHEN: It is exactly, we think, the same kind of

coercion as would be involved in picketing.

QUESTION: In the same degree as well.

MR. COHEN: I think that the --

QUESTION: It's just a difference in the message to the shopper, I suppose.

MR. COHEN: I think that the effectiveness of the delivery of the message can vary in a picketing case and can vary in a hand billing case. Here, you had a hand bill distribution continuously over a three-week period during the Christmas season at all four entrances to a shopping mall.

QUESTION: Mr. Cohen, I asked your Petitioner's counsel whether the issue would be the same as a matter of statutory construction if the communication was in a different form, say a radio or sound truck or something like that, and he said it would be the same statutory issue.

Do you agree it would be the same constitutional issue, that it would still violate the command of Congress and it's still equally coercive if it is not at the front of the door but, rather, at the front of the shopping mall, as I say, by sound rather than by hand billing or a newspaper ad, something like that?

MR. COHEN: We think it is the same constitutional issue. There are differences between hand billing and other methods of distribution and picketing, but this case doesn't differ in any constitutional-irrelevant respect from, for

example, Safeco.

QUESTION: So, you would say it's correct to judge this case as really a pure speech case in which the prohibition is justified entirely on the basis of the message and the audience that's involved?

MR. COHEN: I think it is a case of regulation of tactics which are, by their nature, expressive tactics in a labor dispute. I think the question is whether this is one of the, to quote the Court going all the way back to Thornhill, "one of the permissible limits on the conduct of the disputants in a particular labor dispute".

QUESTION: And you say it's proper for us to judge the case, even though there's absolutely no element of physical concern by the people receiving the hand billing? It isn't that there are very large individuals who strike fear into the heart of those. If that isn't involve, it would be just the same as if it were very small harmless-looking people doing it?

MR. COHEN: I think it should be judged on the assumption that this was an effective communication with a message. I think in that respect, it doesn't differ from Safeco. Picketing does present some problems that warrant regulation, but the Court has made it very clear more than once that regulation of picketing as such must be content-neutral.

If it's constitutional to regulate particular picketing, solely because it conveys a message, do not shop at

neutral stores, when that's used as an expressive tactic in a labor dispute, that's got to be because it's constitutional to regulate that message however it is effectively delivered.

QUESTION: The picketers usually carry the message anyway.

MR. COHEN: The picketer carries a message.

QUESTION: I mean, something that you can read, not just his conduct carrying the message, but there's signs and manners and -- I suppose.

MR. COHEN: Yes. One difference is that the message, do not shop, may not be on the picket sign. The presence of the picketer may imply that message, but, of course, that message was explicit here.

Let me put it a different way in terms of Safeco. I think Safeco would have been easy on the statutory question and it wouldn't have divided this Court six to three on that question if there had been disorder or if there had been a violation of a neutral time, place and manner restriction or if there had been physical or psychological barring of the doors or, indeed, if there had been signalling to other union members.

The Court found the conduct of the Safeco pickets unlawful because, and I'm quoting the Court, "they were trying to persuade the customers of the secondary employer to cease trading with him".

QUESTION: Mr. Cohen, suppose Congress is concerned about the trade imbalance and it makes it unlawful to picket in order to make somebody cease doing business with a foreign country, and you have a labor union that pickets the same mall, say this mall is selling products of South Africa or you pick your country, the Soviet Union or whatever, could the Government enforce that prohibition?

MR. COHEN: Well, in the labor context where what you had was not picketing but other signalling to union members --

QUESTION: Well, they do the same thing. They just hand bill. They say please don't patronize this mall, this mall sells products of South Africa. Congress has passed a law that says you can't do that, you can't coerce somebody not to carry the products of a foreign country.

MR. COHEN: I think probably, I think probably not.

QUESTION: What's the --

MR. COHEN: Probably Congress cannot do that.

QUESTION: Why?

MR. COHEN: Because that is raising an issue of public importance on which there is a fully-protected constitutional right to speak, but --

QUESTION: He wasn't watching. I think you could have gotten away with the end of that sentence.

MR. COHEN: I tried that once.

CHIEF JUSTICE REHNQUIST: Even Homer nodded.

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

MR. GOLD: That might have been discretion rather than valor.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.

ON BEHALF OF THE RESPONDENT

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

I wish to begin by recharacterizing what the union's message is in this case from what DeBartolo's counsel said it was.

The union's message is set out in full in the appendix to the red brief, and the message is not simply that High's, the construction company, pays sub-standard wages; it is that there are a series of relations here between the tenants, the mall owner, Wilson's Department Store, and High's. The relationships are set out, and then the union argues that those relationships, insofar as they support giving business to High's to do the construction, is contrary to some important social interests, buying power of people, community interests in adequate demand along Keansian lines, although there's no citation of that in the hand bill, and argues that given this set of relationships, the mall tenants and the mall owner are blame-worthy insofar as they are supporting what High's is doing and how it's treating its employees, and on the basis of that argument, the union asks people to make their judgment,

please don't patronize, and to show their disapproval of these arrangements.

The facts are fairly set out. The message is temperate. There was no picketing or patrolling. No misconduct of any kind. And the way that the Board would read the statute at the present time, although it has never so read it before the remand and the decision in this case, is that that message can be obliterated from the face of this country.

Unions may not make that argument to members of the general public who owe the union no fealty and they may not do it no matter what method of communication is used and how the point is made.

QUESTION: Whether it's made at the entrance to the mall or whether it's a full-page ad in the morning paper?

MR. GOLD: That is correct. The union is completely silenced. This is a restraint, a prior restraint on all forms of making this -- of communicating this message, this argument, to any member of the public under any circumstance.

QUESTION: What if it wasn't? What if it just related to the mall? You'd still be making this same argument?

MR. GOLD: Well, we believe, based on the decisions of this Court that if the statute was directed at leafleting, in other words, if Congress said that the streets are closed to unions that want to communicate this message with this viewpoint, that would be unlawful because leafleting has always

been regarded by this Court from Schneider v. State on as a form of pure speech.

My only point, Justice White, is that I don't have to carry that burden. The argument here is that this message, because it may have an adverse effect on these store owners, if members of the public are persuaded by it, is subject to total ban, and that is the situation we find ourselves in. That is why we are in the dock, because we have made this argument to members of the general public, and I wish to emphasize in that regard that in contrast to the standards secondary boycott cases, if I can call them that, that have come to this Court before, this is a situation in which the message is directed at people who have a total absolute right, a freedom may be more accurate, to act on the message without violating any law.

Congress has not required and has never required, I don't know of any legislature that has ever required, anyone to shop at a store whose policies that person finds unpleasant, wrongful, in any way. So, this --

QUESTION: But that's not unusual, Mr. Gold. Let's take an antitrust case in which a bunch of distributors ban together and go to the manufacturer and they say, we want you to cut off this other distributor because he's selling at too low prices. Now, there are those who think that would be in violation of the Sherman Act.

The manufacturer is entitled to cut off any

distributor he wants to. So, he's entitled to get that kind of information, that kind of urging from the distributors, and, yet, it is made unlawful for the distributors to induce him to do that.

Now, why is that any different from what's at issue here? I mean, the principle that you can't forbid someone from inducing somebody else to do something that he's perfectly entitled to do is -- it doesn't prove your case.

MR. GOLD: Well, it seems to me that insofar as Congress regulates the underlying actions, you have a different case. That has been the rule and that's why I used it in terms of the secondary boycott cases. Secondary strikes, strikes by a group of workers against a neutral employer are banned, and to that extent, if you seek to induce them to engage in unlawful activity, that is prohibited, but I don't know of any law which limits the right of individuals acting as individual consumers, acting as individuals, --

QUESTION: Well, if you limit it to consumer, I can't think of a parallel, but it seems to me what I've just given you is a precise parallel.

The manufacturer is entitled, if he wishes, to cut off a distributor, but if a bunch of distributors get together to induce him to do that, that inducing of him can be made unlawful. It's the same thing here. The customer is entitled not to shop at the mall. That's up to the customer, but the

Congress has said the union cannot induce the customer to do that.

I don't know any principle in the law, in other words, that you can't make it unlawful to try to induce somebody to do something which he has a legal right to do.

MR. GOLD: I really am hard-pressed. I'm not clear enough on the antitrust law whether the combination, except insofar as it's a combination directed at other distributors who are in competition, insofar as it simply made a reasoned argument even to a manufacturer, has ever been made unlawful.

I do not know of any case in this Court in terms of the 1st Amendment which has provided that a message advising people of facts and circumstances, individuals of facts and circumstances, on which they have the right to act, has been successfully banned, even though you're not asking for unlawful activity. Indeed, --

QUESTION: Doesn't it depend on the purpose of it? Can't you make it bad depending on the purpose? Let's assume someone comes up to the people in the mall and says, I'm selling protection. For a certain payment a month, I will not tell the customers what a filthy place you have here, that there are cockroaches and unsanitary conditions in your restaurant.

MR. GOLD: Well, I don't --

QUESTION: If you pay me $30 a month, I won't tell

them. Now, --

MR. GOLD: I don't know of any state that doesn't have a blackmail law.

QUESTION: Right, and one can do that, even though the customers are entitled to know how dirty the place is and you have a 1st Amendment right to tell the customers how dirty the place is. It can be made unlawful if you tell them that for a certain purpose or if you threaten to tell them that for a certain purpose.

MR. GOLD: Well, I'm just not certain of that, and there's no social purpose of the 1st Amendment which is furthered by non-communication in exchange for money, but if the 1st Amendment doesn't protect your communication at least when you're not talking about commercial speech, not in the Posados controversy that, you know, the Puerto Rican gambling case that the Court had two years ago, I don't know of any case which says that a communication advising people of the facts and making an argument to them and asking them to do something which they have a lawful right to do and which is not banned in any way would withstand constitutional muster.

Certainly, the 1st Amendment would be a far narrower protection of the right for people to argue and persuade on basic matters if it reaches activity which is argument and persuasion directed at entirely lawful ends.

QUESTION: You don't think there's any difference

between a union who's got a labor dispute with some tenant in the mall doing this hand billing than, say, some community group that's just a do-good community group saying we just don't like people to pay sub-standard wages, so they take out a big ad in the paper, they can do that? You say the union -- there's no difference between them and the union?

MR. GOLD: No. I think the label of being a union doesn't deprive us of our constitutional and civil rights. I mean, there's an argument here suggesting that even though we're engaged in activity which, on its face, is perfectly appropriate because we're a union and otherwise regulated, that the regulation is somehow all right. That just hasn't been the trend in this Court's cases, and even --

QUESTION: Do you think, Mr. Gold, that Safeco and decisions like that rest at bottom on the understanding that in the labor law context, unions have been given certain powers and corresponding duties and the same with employers in that context and that has somehow changed the standard a little bit under which we view some of these regulations? How else can you justify Safeco?

MR. GOLD: As the losing advocate in Safeco, I --

QUESTION: Let's hear a good argument for Safeco.

MR. GOLD: I'm not about to try it, but I would hate to redouble my losses.

From day one, and this was the understanding at the

time that Congress acted in 1959, the jurisprudence in this Court has been that picketing is different from leafleting, taking out advertisements and so on, and that that has been the law in general.

Now, the opinions and we've reviewed the opinions, obviously we can only reproduce the Court's words, are replete with discussions of picketing. If I can, back in Hughes v. Superior Court, which is the fountain head of these cases, the Court said while picketing is a mode of communication, it is inseparably something more indifferent. Industrial picketing is more than free speech. Publication in the newspaper or by distribution circulars may convey the same information or make the same charge as do those patrolling a picket line, but the very purpose of the picket line is to exert influences and it produces consequences different from other modes of communication.

QUESTION: Did Gibboney involve picketing?

MR. GOLD: Gibboney was a case which involved picketing in part, but it also involved secondary strikes under union discipline. We don't deny and it's been a long time since we've had much of an argument that there's a constitutional right to strike, but that isn't what we're talking about here.

The question is similar to one that could have been asked, it seems to me, in the Central Hudson line of cases. One

of the Central Hudson issues was whether institutional advertising, talking about the desirability of nuclear power, was tree free speech to be judged on true free speech bases or not. The answer wasn't this utility is regulated and therefore the regulatory authority can do whatever it chooses as a quid pro quo. The understanding was that the real question, and this is the point, too, of Colautti, that the real question is what does free speech demand. What are the interests of the listeners? What is the interests of the society?

The Court said in Colautti, to say that a corporation can't speak was to ask the wrong question. The real question was what was the 1st Amendment about. Was the message one which deserved to be heard which was part of the continuing dialogue by which we build this country.

QUESTION: Isn't part of the question involved here whether this is commercial speech or not?

MR. GOLD: Yes. Yes, indeed. Although the arguments on the other side fall one step short of this, and this is the issue that the Court was so conscious of in the Ohralik case in 436 U.S. and In Re Primus; namely whether we are going to have not only the paradox of first picketing being said to be different from leafleting and newspaper advertising and then gobble it up, but also whether we're going to have another paradox, namely the overruling of Valentine v. Chrestensen, leading to the conclusion that commercial speech is not limited

to offers to buy and sell of a commercial kind, but is going to start to chew up other aspects of what has historically been part of the 1st Amendment.

After all, the lead case with regard to the 1st Amendment and all of this is Thornhill v. Alabama, and although Thornhill v. Alabama has not survived as a picketing case, it certainly has survived as Colautti shows and as other cases show in terms of what we understand to be the generous confines of the 1st Amendment.

Whether the issue is one raised by a community group, saying that, as Justice Scalia's example suggests, that someone is running his business in a way which is contrary to the interests of the society by investing in South Africa or by moving facilities overseas or whether the argument is that the employers in general have moved to such a strong position in the society that they're hurting the society by not providing adequate health and safety, by violating the rights of women or minorities, whatever the issue is, it seems to us that those issues have always been understood to be part of a public dialogue.

A particular dispute, whether it is the dispute that generated Thomas v. Collins, whether a union leader could go to Texas and make a speech asking people to join the union, which was held to be true free speech, or Thornhill, where there was a dispute as to a particular factory, those are the nuclei

around which public debate is fashioned.

QUESTION: Mr. Gold, if a standard approaching that used in commercial speech cases were applied here, would your client lose?

MR. GOLD: I don't know whether this interest that is asserted ought to suffice even in that context.

I'd like to take it in two parts. First of all, in Organizations for a Better Austin, as you raised, if this is a case which, like that case, is to be judged under the standards applied to speech generally, it seems to us that protecting these neutrals, these secondary employers and their right to have any business relationships they want, without anybody knowing about it, and without being able to make their own judgments about whether that's good or bad, is plainly not a sufficient interest.

And I want to point out that it was not simply -- the state was not simply protecting a particular business man there as Mr. Cohen was suggesting. It was protecting a basic right of privacy, though the leafleting, the demonstrating in that case was taken to the individual's home and his home territory, and as the Court noted in Carey v. Brown and this is going to be a debate that continues this term from the cert grants, the question of whether the privacy interests in neighborhoods and homes is sufficient to limit expressive conducts.

So, that was not a small interest, but going on, if

the test here is the test of Central Hudson, we don't believe that this is narrowly limited. Even in Central Hudson, the complete ban did not stand up to scrutiny under that test, and we don't believe that saying that this message is obliterated so long as it's forwarded by union is obliterated from this society, is one that can possibly be justified by this supposed interest in industrial peace.

We're not disrupting industrial peace in any sense other than telling people facts which they have a right to know which they either will believe or won't believe, will find convincing or won't find convincing, and will either act on or not.

I don't think that any of this, if I may, would come as any great surprise to the 1959 Congress because the point that given the nature of the discussion with my colleagues I jumped over and very improperly is that it is our position that the Board has misread this statute.

The constitutional background is critical to making that argument. So, I also started as I did in part for that reason, but in the first DeBartolo case, and in the Bishop of Chicago case, the Court has made it plain that there is a presumption that when Congress uses words which could be applied to expressive conduct, that language is to be read narrowly if it is at all possible to do so.

Indeed, in Bishop of Chicago, the Court said that

there had to be an affirmative indication of legislative history. The Congress focused on the particular expressive activity and decided to prohibit it.

Certainly, as this Court has made plain many times in the Labor Act context, the words "threaten", "restrain" and "coerce" are not words with a single definite meaning, and, in reality, what this case comes down to insofar as the Board makes a statutory argument, aside from the fact that it started from a totally erroneous premise and didn't grant us the presumption that the Court stated, is to say that the fact that there is not only threaten and restrain and coerce in the statute, but there is this publicity proviso which, as the Court said in terms, is more limited than the situation here, creates a negative inference and shows that Congress intended in using the words "threaten", "restrain" and "coerce" to reach this kind of reasoned non-picketing appeal to consumers.

The language of publicity proviso, among other places, is set out at page 23 of our brief.

I want to note two points about the language. First of all, it's in the form saying that nothing contained in the overall section shall be construed to prohibit a particular kind of picketing. That language was added in conference in a situation where the House had a bill which prohibited threatening, restraining and coercing and the Senate had no provision.

Opponents of the House language had claimed that it might reach pure speech activity. No proponent of the language had ever so claimed. At that point, the conference ensued.

Now, it seems to us that there are two fair ways of understanding what happened in that conference. I was not there. None of the legislators have both kissed and told. What one is that the House conferees said to the Senate, what is it that you're afraid of, what do you think we have up our sleeve, and the Senate conferees said, we believe that this language could reach not only picketing, which we all agree is subject to a greater degree of regulation, both in the labor and non-labor context since Hughes v. Superior Court was not a case involving a union, but would also reach other forms of expressive activity in the example that President Eisenhower had given in his speech, which was an example involving a producer-distributor relationship, and that the House people said, we don't intend to do that, and we'll show you we don't intend to do that. You're afraid we're going to do that. We will state in so many words we have no intention of doing that because we really do not.

Another way --

QUESTION: That's the explanation. Why would they limit the proviso to situations in which there's a primary dispute with an employer whose products are being distributed by another employer?

MR. GOLD: My point is that was the only example ever raised in the debates, even insofar as the debates talked about picketing.

QUESTION: But if the reason for including it is to show we don't mean speech to be covered, they wouldn't have put in there distributed by another. They would have just put in just shall be construed to prohibit publicity other than picketing period.

MR. GOLD: Justice Scalia, I'm not arguing that they -- the issue was either posed or answered in those general terms. There was a debate going on. There had been only one example used. Certainly, the way you are reading it is the other fair way of reading the language, that there was a different discussion than the one I just indicated, namely a discussion which said there are other situations than the one than President Eisenhower mentioned and those situations, we do intend to prohibit other forms of communication.

In other words, that this really was done with malice aforethought to narrow the provision.

My point is that there are two ways of seeing it against the background of the overall debate. Normally, that would not be of any help to someone attacking a Board decision reading the language the other way, but we're not in the normal situation. That is my point.

The presumption is that unless you can show an

affirmative indication of Congress to reach the activity in question, then you're to read the statute narrowly so as not to limit the expressive activity, and I wish to conclude by saying not only are there these different ways of reading both the general prohibition and the proviso against the background of constitutional doubts requires a narrow construction, I do wish to point out that when the parties left the conference, the manager on the House side of the Landry-Griffin Bill, Representative Griffin, and Senator Kennedy was the manager on the Senate side, went back to their colleagues and explained what they had done, the language --

CHIEF JUSTICE REHNQUIST: Mr. Gold, your time has expired.

Mr. Lawrence Cohen, you have seven minutes remaining.

ORAL ARGUMENT OF LAWRENCE M. COHEN, ESQ.

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. COHEN: Let me be clear at the outset exactly what it is the message that's being limited in this case.

The union is not being limited in articulating the facts of its dispute with High. It's not being limited in any way from asking for customers or the public to aid it in its dispute with High.

The only message that is being limited is a message that says injure neutral parties who have no connection whatsoever with this dispute. Don't shop at the center.

That's the only message that's limited, and that type of message being limited is similar to acts of limitation in the labor context and in many other ways.

For example, an employer, although he may have a free specch right in other contexts to make predictions about unionization, can't under Gissel say to his employees, I think if you vote for a union, you're going to have to close this plant. That would be impermissible. And that's the same type of restriction which other members of the public, other community organizations, other people unconnected with that labor campaign, are perfectly free to make.

So, there is a difference that this comes up in the context of a labor dispute, because the Labor Act sets the permissible limitations of the combatants in that labor dispute, and it tells the union, you can predict and you can indicate the facts of the case --

QUESTION: You think, I take it, or do you, you say the full-page ad in the morning paper reproducing this hand bill would also be bad?

MR. COHEN: I would say --

QUESTION: That would be also illegal under the --

MR. COHEN: If the forcseeable consequences of that advertisement --

QUESTION: What if the Board found that it was coercive, just as coercive as hand bills?

MR. COHEN: Then, it would be impermissible.

QUESTION: And then it would be just as constitutional --

MR. COHEN: Because what's impermissible is not to say we have a dispute with High or High pays sub-standard wages. That's never been held impermissible. What's impermissible is that they add to that the fact, don't shop at the center.

QUESTION: Then, you don't think it's --

MR. COHEN: Because however they communicated it, if that's --

QUESTION: You don't think the place that this took place, where this occurred, is really very significant?

MR. COHEN: That's correct. What's significant is whether the union effectively put pressure on a neutral party to the dispute, whether it enlarged the labor dispute, whether it widened industrial strike.

I think that's illustrated by Safeco because the only difference between Safeco and this case is picketing. Safeco tried -- went to neutral customers and it said please don't shop here. They were not coerced. They had free reason of choice. The only difference was that they, instead of handing out a hand bill that said that, they carried a picket sign that said it or wore a placard.

QUESTION: But that is a distinction under our

constitutional cases.

MR. COHEN: That is --

QUESTION: Picketing is always thought to be speech plus or something more.

MR. COHEN: Let me indicate that in many contexts, it may be. If you're talking about a manufacturing plant and the union puts up a picket sign, Teamster drivers coming into that plant see the sign, whether it's stuck in a snow bank or it's on a car, and they turn away. It's union discipline. That's a signal effect.

But in the case of consumer picketing, as occurred in Safeco, and consumer hand billing here, there is no difference. They're not relying on the fact that union discipline is going to turn people away.

QUESTION: But there are non-union members who won't cross a picket line.

MR. COHEN: There are going -- here, if they make a choice of not shopping at the center, whether it's because of the picket sign or hand billing, they are going to do it not because they're fearful of union discipline, they're going to do it because they have made a reasoned decision and that reasoned -- it's not -- if a customer, whether he's a union member or whatever beliefs, decides I don't want to shop at East Lake Square Mall, it's not because, as he would in a single picketing case, he's fearful that the union is going to

discipline him if he does anything. The union doesn't know who's shopping at the center. People are going to go in and shop at the center either because they disagree with the union or they're going to refuse to shop because they agree with the union, and how that message is communicated to them, whether it's by a picket sign, a sound truck, an advertisement, or a hand bill, is immaterial.

The effect in each case is harm the neutral, and embroil the neutral in the dispute, and that's what Section 8(b)(4) was designed to preclude. Whether -- not how the union did it, but what the union was intending to do. This is the purpose and that purpose is equally communicated by an individual standing up in front of the shopping center holding a sign or wearing a placard that says please don't shop here or somebody handing out a hand bill which individuals can read and decipher and think about and then go ahead and go in.

QUESTION: Or somebody who is -- somebody who has a union sign on them then handing out a hand bill, too.

MR. COHEN: That's correct. Picketing and hand billing, and the important point is that that's what Congress forbid. When it came out of the conference committee, and there was a publicity proviso, Congress said you can only engage in picketing and publicity other than picketing if you meet these three conditions, and the only way Mr. Gold's other argument is fairly possible, which is the standard of Catholic Bishop, is

if you disregard the expressed language of the proviso and simply dismiss it as so much legislative blab, and that's what I think the Court should not do. It should pay attention to the language. It should limit non-publicity picketing in only those cases which don't meet the proviso.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cohen.

The case is submitted.

We'll hear argument next in Number 87-65, United States against Providence Journal Company.

(Whereupon, at 1:45 o'clock p.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-1461

CASE TITLE: Edward J. DeBartolo Corp. v. Florida Gulf Coast Construction Trades Council and National Labor Relations Board

HEARING DATE: Wednesday, January 20, 1988

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.

Date: 1/20/88

Margaret Daly

Official Reporter

HERITAGE REPORTING CORPORATION
1220 L Street, N.W.
Washington, D.C. 20005