

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD)
AND ROSEMARY M. COLLYER, GENERAL)
COUNSEL, NATIONAL LABOR RELATIONS)
BOARD,)

Petitioners,)

v.)

No. 86-594

UNITED FOOD AND COMMERCIAL)
WORKERS UNION, LOCAL 23,)
AFL-CIO)

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NATIONAL LABOR RELATIONS BOARD :
AND ROSEMARY M. COLLYER, GENERAL :
COUNSEL, NATIONAL LABOR RELATIONS :
BOARD, :
 Petitioners, :
v. : No. 86-594
UNITED FOOD AND COMMERCIAL :
WORKERS UNION, LOCAL 23, AFL-CIO, :
-----X

Washington, D.C.

Monday, October 5, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

NORTON J. COME, ESQ., Deputy Associate General Counsel, National Labor Relations Board, Washington, D.C.; on behalf of the Petitioners.

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

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We will now hear argument
4 in Cause Number 86-594, National Labor Relations Board v.
5 United Food and Commercial Workers Union.

6 Mr. Come, you may proceed when ready.

7 ORAL ARGUMENT OF NORTON J. COME, ESQ.

8 ON BEHALF OF PETITIONERS

9 MR. COME: Mr. Chief Justice, and may it please the
10 Court:

11 This case presents two questions. One, whether the
12 withdrawal of an unfair labor practice complaint by the General
13 Counsel of the National Labor Relations Board pursuant to an
14 informal settlement entered into prior to the commencement of
15 the hearing on the complaint constitutes agency action that is
16 subject to judicial review.

17 The second question is whether, assuming that the
18 GC's action is subject to judicial review, the General Counsel
19 must hold an evidentiary hearing whenever the party who file
20 the unfair labor practice charge objects to the settlement
21 agreement.

22 Now, before addressing these questions, I should like
23 to spend a few minutes outlining the statutory scheme and the
24 Board's procedures for implementing it because I think it's
25 important to understanding the resolution of the question.

1 The National Labor Relations Board confers upon the
2 National Labor Relations Board authority to prevent any person
3 from engaging in an unfair labor practice affecting commerce,
4 and it sets forth in general terms the procedure to be followed
5 in determining whether an employer or a union has engaged in an
6 unfair labor practice and the appropriate order, therefore.

7 However, Section 3(d) of the National Labor Relations
8 Act provides that the Board's General Counsel, who is a
9 statutory officer appointed by the President with the consent
10 of the Senate, shall have final authority on behalf of the
11 Board in respect to the investigation of unfair labor practice
12 charges and the issuance of complaints in respect the
13 prosecution of such complaints before the Board.

14 Now, the procedure the Board has devised attempts to
15 effectuate this separation that 3(d) makes between the Board's
16 prosecutory authority on the one hand and its adjudicatory
17 authority on the other.

18 An unfair labor practice charge case is initiated by
19 the filing of a charge. It's investigated by the Regional
20 Director, and if the investigation indicates the charge has
21 merits, --

22 QUESTION: Where does the charge come from?

23 MR. COME: Any person may file a charge. In this
24 case, it was filed by the Food and Commercial Workers Union.

25 QUESTION: You mean just any person in the United

1 States?

2 MR. COME: Yes, Your Honor.

3 QUESTION: Whether he's an employer or employee?

4 MR. COME: That is correct. Usually the charges are
5 filed by the employer or an employee or the union.

6 QUESTION: Well, this particular case is one between
7 two unions, isn't it?

8 MR. COME: Between two unions and an employer.

9 If the investigation reveals that the charge does not
10 have merit, it is either withdrawn or dismissed, in which case
11 the charging party has an appeal to the Board's General
12 Counsel. If the Regional Director concludes that it has merit,
13 he affords an opportunity for a settlement of the charge.

14 At this stage of the proceeding, the settlement is
15 usually what is called an informal settlement, which does not
16 require the entry of a Board order or a court decree. It
17 consists of a commitment by the charge party to take the
18 agreed-upon remedial action and the case is closed upon
19 compliance with that commitment. If, later, there is a failure
20 to comply, the charge, the prosecution of the charge can be
21 resumed.

22 Now, if no settlement is reached at this stage, a
23 complaint issues, and if the complaint goes to hearing, --

24 QUESTION: Does the Regional Director decide the
25 complaint solution?

1 MR. COME: The Regional Director does. He's acting
2 as the agent of the General Counsel.

3 QUESTION: He's not the Board's representative?

4 MR. COME: No, he's not the Board's representative.
5 He -- the statute, as I indicated, gives the Regional Director
6 final authority over the investigation of unfair labor practice
7 charges. The statute also gives the General Counsel
8 supervision over the employees and the regional offices, and
9 when the Regional Director is working on the unfair labor
10 practice phase of the proceeding, he is exercising the General
11 Counsel's 3(d) authority.

12 When he's working on representation cases, which lead
13 to elections, he is also working under the supervision of the
14 General Counsel, but, there, the General Counsel has been
15 delegated by the Board the authority to handle representation,
16 supervise the handling of representation cases. But with
17 respect to the complaint phase, the Regional Director is acting
18 as the agent of the General Counsel.

19 Surprisingly, these things, over time, have been kept
20 straight, although it may seem difficult to conceive of it.

21 But if a settlement cannot be reached, as I
22 indicated, the case -- yes, Your Honor?

23 QUESTION: There's something in the way of a case.
24 He may try then to effect settlement, is that correct?

25 MR. COME: Yes, Your Honor.

1 QUESTION: But suppose the party doesn't want to
2 engage in any settlement discussions, does he have an appeal?

3 MR. COME: At that point, he issues a complaint.

4 QUESTION: Oh. The Regional Director issues a
5 complaint.

6 MR. COME: He issues a complaint.

7 QUESTION: And the party against whom it's issued has
8 no appeal to the General Counsel before he has to answer the
9 complaint, does he?

10 MR. COME: Not normally. I mean, the procedure on
11 appeal is usually invoked where a charge is dismissed, but, as
12 I say, after a complaint issues, it may go to formal hearing,
13 but there is usually a two to three month period between the
14 issuance of the complaint and the formal hearing, and during
15 that time, there is further opportunity for settlement of the
16 case or the complaint may be withdrawn because the Regional
17 Director, in preparing for trial, finds that his evidence just
18 won't stand up.

19 Now, under the Board's rules, the Regional Director
20 can withdraw a complaint prior to hearing on his own motion.
21 This is a provision that's been in the rules, even way back in
22 the Wagner Act days.

23 Similarly, as I said, he can enter into a settlement
24 agreement. At this stage, the post-complaint stage, the
25 settlement agreements can be of two forms. You can have a

1 formal settlement, which provides for a Board order and often a
2 consent decree, and that goes on up to the Board because it
3 requires a Board order and Board approval.

4 QUESTION: These settlements are provided for by
5 regulations, aren't they?

6 MR. COME: Yes, they are, Your Honor.

7 QUESTION: And both the formal and the informal?

8 MR. COME: Yes, Your Honor. We have set forth at the
9 Appendix to our brief the Board's regulations with respect to
10 the settlement procedure.

11 QUESTION: Does it indicate how old those regulations
12 are?

13 MR. COME: Those regulations were promulgated many
14 years ago. In general form, they were in the Act from right
15 after the start of Taft-Hartley and, then about twenty-two
16 years ago, they got amplified, but, essentially, this procedure
17 has been a long-standing procedure that was worked out by the
18 Board and the General Counsel right after the enactment of
19 Taft-Hartley in an effort to make 3(d) mesh with the Board's
20 adjudicatory procedures.

21 QUESTION: That shows something of the ambivalence of
22 the whole scheme, though, doesn't it? You said that the
23 Board's regulations permit the Regional Director to dismiss the
24 complaint before any action is taken, yet you told us earlier
25 that the Regional Director was not the agent of the Board but

1 the agent of the General Counsel.

2 If that were purely the case, one would expect the
3 General Counsel to issue some regulations as to what his
4 Regional Directors can do.

5 MR. COME: Well, for housekeeping purposes, Congress
6 decided instead of setting up a separate administrator to put
7 the General Counsel in the same agency as the Board, and the
8 way these regulations work out or have worked out is that
9 although they are issued in the name of the Board, those having
10 to do with the operation of the General Counsel's phase of the
11 administration are worked out jointly with the Board and the
12 General Counsel. There is a joint committee that has worked on
13 these regulations.

14 What would happen if you got to a point where you
15 couldn't have agreement is an interesting question, but that
16 has not, fortunately, been the case.

17 Now, what we have here is not a formal settlement,
18 but an informal settlement that was worked out post-complaint.

19 QUESTION: Where there's a formal settlement, any
20 order of the Board is subject to judicial review, is it?

21 MR. COME: That is correct, Your Honor.

22 QUESTION: And the question we have here is whether
23 where there's an informal settlement, is it subject to judicial
24 review.

25 MR. COME: Yes. Informal settlement.

1 QUESTION: Do we have any other issue to decide in
2 this case?

3 MR. COME: If, only if, you decide that it is subject
4 to judicial review, would you have to reach the second question
5 as to whether or not a charging party who objects at the
6 settlement is entitled to an evidentiary hearing on its
7 objections because that is what the 3rd Circuit held and the
8 remand is for the Board to hold such an evidentiary hearing.

9 QUESTION: Mr. Come, if the case had proceeded far
10 enough to have a hearing, at that point, is there any authority
11 to settle the case and dismiss it on the part of the General
12 Counsel alone?

13 MR. COME: The General Counsel cannot do that
14 unilaterally. Once it goes to hearing, the adjudicatory process
15 is invoked and the withdrawal of the complaint or any
16 settlement agreement that's entered into would have to be with
17 the approval of the administrative law judge and an appeal lies
18 from that to the Board.

19 So that what we're really talking about here is a
20 very narrow time span, as it were. The period after issuance
21 of the complaint and prior to the opening of the hearing.

22 QUESTION: What's the difference, Mr. Come, between a
23 formal settlement and an informal settlement?

24 MR. COME: The difference is that a formal settlement
25 leads to a Board order that is enforceable in the Court of

1 Appeals, and so that if there is non-compliance with that
2 order, the Board can either proceed to get it enforced on
3 consent or, if there was a consent also to a court decree, move
4 for contempt of the order.

5 With respect to an informal settlement, the only
6 consequence is that the prosecution of the case is stopped, and
7 if there is compliance with the commitment, the case is closed
8 on compliance. If it should subsequently it appear that there
9 is not compliance, then the settlement is withdrawn and the
10 General Counsel is free to resume the prosecution of the case.

11 QUESTION: Suppose the General Counsel changes his
12 mind after one of these informal settlements, there hasn't been
13 any violation of the informal settlement by the party with whom
14 it's made, but the General Counsel just decides it was a bad
15 idea, would anything prevent him from going ahead to
16 reinstitute the complaint?

17 MR. COME: No, I don't think so, Your Honor, because
18 he acts in the public interest here and there's no estoppel, as
19 it were, that would operate against him, but --

20 QUESTION: Has it ever happened, to your knowledge,
21 that without a violation of the informal consent agreement, the
22 General Counsel just decides --

23 MR. COME: I wouldn't say never, but if it's ever
24 happened, it's so rare that --

25 QUESTION: You don't personally know that it's ever

1 happened?

2 MR. COME: No. I mean, these settlements play a very
3 key role in the administration of the Act. The Board settles
4 over ninety-two percent of its cases, and as the Attorney
5 General's committee pointed out in its Seminole Study back in
6 1941, it's the life blood of the administrative process, and so
7 that --

8 QUESTION: Mr. Come, doesn't that ninety-two percent
9 figure cover settlements pre-complaint?

10 MR. COME: There's a substantial number pre-
11 complaint.

12 QUESTION: Are there very many of these post-
13 complaint pre-hearing settlements?

14 MR. COME: Yes, there are. There are about thirty-
15 five percent, according to the '83 statistics, that we have in
16 our brief, of which most of those are post-complaint informal
17 settlements.

18 The reason for that is that the experience has shown
19 that many times parties are not going to settle a case until
20 you get them on the courthouse steps, and, so, --

21 QUESTION: Let me ask one other question on the
22 universe we're dealing with. How often in those settlements
23 does the charging party seek review as they did here? Fairly
24 rare, isn't it?

25 MR. COME: We have not had many cases. However, that

1 is not to say that if it were established by this Court that
2 there is a right to review and that --

3 QUESTION: Well, there's been a right to review in
4 the 6th Circuit for twenty years without any cases, hasn't
5 there?

6 MR. COME: In the 3rd Circuit.

7 QUESTION: 3rd Circuit, I mean.

8 MR. COME: In the 3rd Circuit.

9 QUESTION: Twenty years, they had this rule, and
10 nobody ever used it for twenty years, isn't that right?

11 MR. COME: But as I say, the potential would be there
12 and human nature being what it is, it is not unreasonable to
13 expect that if there were not only the right to review but also
14 the right to Board review, as my brother here is urging, that a
15 party for technical reasons would play out the string here, and
16 this isn't just a labor versus management-kind of issue because
17 the employer can be in the role of the objecting party as can
18 the union, and experience has shown that in order to resolve
19 most effectively labor-management disputes, the -- it's better
20 to get things resolved quickly and with some degree of
21 certainty and that if you tack on review to an informal
22 settlement, there would be a strong disincentive to settle
23 because one of the reasons for settling is to avoid the cost
24 and also the risk of litigation.

25 QUESTION: Well, Mr. Come, in the ninety-two percent

1 of the cases settled, how many are -- what proportion are
2 informal and what proportion formal?

3 MR. COME: I would say that the vast majority are
4 informal settlements and, of those, --

5 QUESTION: When you say vast, is that half of the
6 ninety-two percent or three-quarters or what?

7 MR. COME: Well, in the 1983 statistics, which we
8 have in our brief, the formal settlements were about six-tenths
9 of a percent of the total number of settlements. So, the
10 informals are really the bulk of the settlements. Of those,
11 about sixty-five percent occur before complaint and you've got
12 about thirty-five percent remainder.

13 QUESTION: But in either event, neither is subject to
14 judicial review, is it, pre or post?

15 MR. COME: That is correct, with the possible
16 exception that an informal that is entered into after hearing,
17 where you have to get the approval of the administrative law
18 judge and the Board, those -- there have been two such cases in
19 the 7th Circuit and those have been reviewed.

20 QUESTION: But as between formal and informal
21 settlements after complaint issues, what is roughly thirty-five
22 percent of the total universe is informal, and .6 percent is
23 formal?

24 MR. COME: The .6 percent -- yes, that's about right,
25 Your Honor. Those statistics are set forth in Table 7 of the

1 1983 Annual Report, which is cited in our brief. The most
2 recent report that has been published, but, currently, the mix
3 is not to dissimilar.

4 QUESTION: Mr. Come, I don't understand what you just
5 said. You said that some informal complaints do require the
6 approval of the Board?

7 Do you still consider it an informal complaint if
8 it's entered after the hearing begins and requires the approval
9 of the ALJ and also the approval of the Board?

10 Do you still consider that an informal
11 settlement?

12 MR. COME: Yes, because it hasn't resulted in a Board
13 order in the conventional sense that --

14 QUESTION: Why isn't the approval of the Board a
15 Board order? That might well be a Board order as far as the
16 Administrative Procedure Act is concerned.

17 MR. COME: Well, I think that it is, and that's why
18 we've -- those have been reviewed.

19 QUESTION: But you say it just doesn't result in any
20 command by the Board, the violation of which you --

21 MR. COME: That is correct, Your Honor.

22 I'd like to reserve the balance of my time.

23 CHIEF JUSTICE REHNQUIST: Very well, Mr. Come.

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

25

1 ORAL ARGUMENT OF LAURENCE GOLD

2 ON BEHALF OF THE RESPONDENT

3 MR. GOLD: Mr. Chief Justice and may it please the
4 Court:

5 As Mr. Come has indicated, the issue here is the
6 reviewability of the settlement that was made over the
7 opposition of the Union which was the charging party, the Food
8 and Commercial Workers Union.

9 The same issue would be presented whether the
10 charging party were a union or an employer. The system works
11 the same way whomever has filed the charge.

12 It's our view that what Congress intended in 1947 was
13 to provide that settlements that are entered into post-
14 complaint are to be presented to the Board itself and that the
15 requirement is across-the-board whether or not the settlement
16 is labelled informal or formal.

17 QUESTION: Well, Mr. Gold, the statute certainly
18 doesn't expressly make that clear.

19 MR. GOLD: No. The --

20 QUESTION: Is this not a case where some difference
21 to the interpretation of the statute by the agency is due?

22 MR. GOLD: In this instance, Your Honor, we do think
23 that the statute pushes very hard in the direction of the
24 position we take and that this is what the understanding was at
25 the time. It's very difficult to understand exactly how it is

1 that the Board has come to the conclusion it has.

2 Originally, right after the enactment of Taft-
3 Hartley, the position we urged was the position that was
4 followed by the Board. One year later, without any
5 explanation, the Board changed its view and that --

6 QUESTION: It's been consistent since then?

7 MR. GOLD: Yes, it has been consistent since then,
8 but --

9 QUESTION: Well, do you think that's an unreasonable
10 interpretation of this language of the statute?

11 MR. GOLD: I think that it's an interpretation of the
12 statute which cuts very deeply against the statutory provisions
13 and, moreover, as the discussion thus far has indicated, it is
14 an interpretation of a statute which has resulted in a number
15 of lines being drawn, none of which seems to have much in the
16 way of logic.

17 First of all, there's a line between an informal
18 settlement and a formal settlement, but an informal settlement
19 is what the General Counsel says it is and the formal
20 settlement is what the General Counsel says that is.

21 Formal settlements do not necessarily create any
22 enforceable rights in court. So, that's line number one, which
23 this system creates. Line number two is that --

24 QUESTION: Excuse me. Why do you -- I didn't -- I
25 don't follow that. I thought that the General Counsel calls a

1 formal settlement only something that results in a Board order
2 in the sense of a command to the parties, and that he considers
3 those Board orders that merely approve the dismissal of the
4 complaint to be not formal settlements but informal
5 settlements.

6 It's a question of terminology, but I understand his
7 use of terminology to be as I just described it.

8 MR. GOLD: That isn't the way it works. There are
9 really three kinds of settlements. They're informal
10 settlements which the General Counsel enters into on his or her
11 own hook. They're formal settlements that don't provide for
12 court enforcement, which are presented to the Board, and it
13 results in a Board order, and then --

14 QUESTION: He calls them informal settlements, I
15 think. They do not produce a Board order.

16 MR. GOLD: They produce a Board order, it would seem
17 to me, in the sense that under 10(f), it's certainly an order
18 of the Board and nobody would protest that it's not reviewable.

19 On the other hand, the order does not provide for
20 court enforcement if there's back sliding --

21 QUESTION: All right.

22 MR. GOLD: -- by the Respondent.

23 QUESTION: You call those formal settlements and you
24 think he calls them that, too?

25 MR. GOLD: Yes. That is my understanding, but, at any

1 rate, then there is another kind of settlement, a settlement in
2 which the Board demands that you consent to court enforcement
3 in a contempt-like action, as if you had been through the whole
4 proceeding.

5 And all I'm saying is that this system, which has
6 grown like topsy, divides these up according, more or less, at
7 least between informal settlement, kind number one, and
8 informal settlement, kind number two, according to the General
9 Counsel's whim.

10 Next, there is the rule that if the matter goes to
11 hearing, then there has to be the kind of presentment to the
12 Board which we think Congress intended for all post-complaint
13 cases. Thus, insofar as this is an administrative system which
14 has grown up without much scrutiny, without much judicial
15 consideration, and relatively little Board consideration, it
16 was neither the original understanding nor is it an
17 understanding --

18 QUESTION: Mr. Gold, is anything judicially
19 reviewable that does not involve a Board order?

20 MR. GOLD: As we read 10(e) and 10(f), you need a
21 Board order, but --

22 QUESTION: Yes. Well, then, if that's so, in these
23 informal settlements, is there any Board order?

24 MR. GOLD: The language of the statute --

25 QUESTION: No. Is there?

1 MR. GOLD: We think so.

2 QUESTION: And what is it?

3 MR. GOLD: The language of the statute says that
4 orders of the Board are reviewable in court or at least certain
5 kinds of orders of the Board are reviewable in court. It also
6 says under Section 3(d) that the General Counsel acts on behalf
7 of the Board.

8 We don't believe, for example, if the General Counsel
9 entered into something called a formal settlement and didn't
10 use the right processes, we think that that would be reviewable
11 in court. We don't think that this kind of --

12 QUESTION: Even though there exists no formal Board
13 order?

14 MR. GOLD: Yes. But a General Counsel order having
15 all the substance of the Board order, we believe, is judicially
16 reviewable under 10(e) and 10(f) --

17 QUESTION: Mr. Gold, if you were right in your
18 interpretation, then, presumably, even an order withdrawing,
19 deciding not to file a complaint in the first instance, would
20 be a final order by the Board.

21 MR. GOLD: No. I don't believe that.

22 QUESTION: I mean, I just think your logic would
23 carry you to a very peculiar place.

24 MR. GOLD: Well, there --

25 QUESTION: For every action that the General Counsel

1 takes is automatically a final order of the Board by your
2 reading of the statute, then even his decision not to file a
3 complaint would be reviewable.

4 MR. GOLD: No, we don't think that that's what the
5 statute says, Your Honor. If I could, Section 10(f) says that
6 "any person aggrieved by a final order of the Board granting or
7 denying in whole or in part the relief sought may obtain a
8 review of such order in any Circuit Court of Appeals."

9 The understanding of that language --

10 QUESTION: But if you apply the APA to this, under
11 your reading, of Section 153(d), anything the General Counsel
12 did becomes a final order of the Board.

13 MR. GOLD: There's an exception in the APA for
14 matters left to agency discretion. My point about 10(e) and
15 10(f) and the understanding pre-1947 as well as post-1947 is
16 that the reference to a final order of the Board granting or
17 denying in whole or in part the relief sought is the relief
18 sought in the complaint, not the relief that the individual
19 comes to the agency and asks to be embodied in a complaint.

20 The request of somebody to have a complaint issued
21 and the refusal to do so was not reviewable prior to 1947, and
22 we don't believe that it's reviewable now. The language was
23 the same in this instance pre-1947 and post-1947.

24 So, we think that the logic of the statute, both
25 before 1947 and after, is that there is a line that Congress

1 drew. They're informal proceedings in which the individual
2 comes to the agency, says I have a charge of a violation which
3 has merit, please create a formal proceeding by issuing a
4 complaint, and the situation after the complaint issues, in
5 which there is a formal proceeding.

6 We think that those formal proceedings, as is true in
7 a variety of formal proceedings, were intended to be terminated
8 only with the approval of the adjudicatory agency. In other
9 words, we think that the filing of the complaint and we believe
10 that this was Congress' understanding, clear understanding,
11 that the filing of the complaint was like the filing of a
12 complaint in court and answer after which you can only withdraw
13 the case with judicial approval or the filing of a criminal
14 case in court which reaches a certain procedure which, again,
15 can only be settled or withdrawn with the approval of the
16 tribunal.

17 QUESTION: Mr. Gold, if you take the language of
18 10(f) literally, the review should be directly in the Court of
19 Appeals.

20 MR. GOLD: Yes, and that is what we did here.

21 QUESTION: And where then does the authority for the
22 evidentiary hearing come?

23 MR. GOLD: Well, we had -- we are making a procedural
24 complaint. So, it is that we did not get the procedure we were
25 due in the agency. I take it --

1 QUESTION: So that your position -- just so I'm
2 clear, is it if a General Counsel dismisses a complaint and
3 they say it's not reviewable before the Board, you say your
4 remedy is to go directly to the Court of Appeals?

5 MR. GOLD: Yes. We are saying that whether the
6 General Counsel issues something called an order finding the
7 Respondent in violation without going through the procedures
8 and the Respondent says wait a minute and seeks review of that
9 or whether the General Counsel goes the other way, that where
10 there is a settlement issue, that the procedure we are due
11 under the statute is a hearing on the settlement, if there
12 isn't an amicable agreement, in this three-party --

13 QUESTION: Hearing before whom?

14 MR. GOLD: -- lawsuit -- a hearing before an
15 administrative law judge and the Board. In other words, that we
16 --

17 QUESTION: But you don't say that hearing is
18 commanded by 10(f)?

19 MR. GOLD: No, no. We're saying that that -- the --

20 QUESTION: What statutory provision commands that
21 hearing?

22 MR. GOLD: Right. Seems to us that 10(a) and 10(b)
23 demand that. There's an internal system for handling
24 complaints, and we're saying that part of that internal system
25 within the agency for handling complaints is that once the

1 complaint issues, the statute contemplates that the Board will
2 determine what happens to the case and the Board has all the
3 options as an agency that any other agency has or that a court
4 has.

5 QUESTION: Well, supposing that's true, what issues
6 are there in the evidentiary hearing that you say you have a
7 right to? Is that just what the charging party wants to
8 litigate?

9 MR. GOLD: Yes. It would be the -- in our view, it is
10 the same kind of hearing that a district court would conduct.

11 QUESTION: Well, a district court ordinarily doesn't
12 conduct any hearing if the parties stipulate to a settlement.

13 MR. GOLD: But here one party doesn't. Obviously, if
14 all the parties stipulate to the settlement, it's like a
15 summary judgment case. The proposition that there has to be a
16 hearing doesn't make any sense, but, here, a party, namely the
17 charging party, --

18 QUESTION: The charging party.

19 MR. GOLD: -- doesn't agree and that's why --

20 QUESTION: So, what, then, are the issues?

21 MR. GOLD: The issues are it would seem to us the
22 same kind of issues that a district court has to --

23 QUESTION: Okay. What are those issues?

24 MR. GOLD: Whether it is fit and proper for the
25 settlement to be entered into, whether it carries out the

1 intent of the Act, whether there have been irregularities.

2 QUESTION: It's a review of the General Counsel's
3 exercise of his discretion.

4 MR. GOLD: In the -- the only reason I'm afraid of
5 that statement, Chief Justice, is that it says you said "his
6 discretion". We don't believe that in that regard he has a
7 discretion, any more -- that he has an unfettered discretion.
8 Let me put it that way. Obviously, there is a discretion in
9 that the General Counsel's views are going to weigh very
10 heavily with the hearing, just the way the prosecutor's views
11 or the plaintiff's views are going to weigh very heavily with
12 the court.

13 QUESTION: You said here one of the parties hasn't
14 agreed to the settlement. Did the -- the charging party isn't
15 necessarily or automatically a party to the complaint hearing.
16 Doesn't he have to give an order to intervene? What is this?
17 See, I just don't -- what is this?

18 MR. GOLD: Yes. The statute and the rules contemplate
19 that the charging party is a party to the proceeding.

20 QUESTION: Even without a special order of
21 intervention?

22 MR. GOLD: Yes.

23 QUESTION: He's automatically a party. I see.

24 QUESTION: Mr. Gold, I'd like to ask a question. It
25 relates to Justice Stevens' question earlier about whether this

1 belongs in the district court or the Court of Appeals.

2 You're reading 10(f), any person aggrieved by a final
3 order of the Board, as meaning any order of the Board, any
4 final order of the Board.

5 MR. GOLD: Any order finally disposing of a
6 complaint.

7 QUESTION: Finally disposing of a complaint.

8 MR. GOLD: Yes. In other words, we don't -- prior to
9 1947, and correctly in our judgment, the actions of the agency
10 when it was a unitary agency with regard to whether a complaint
11 was issued, has never been regarded as reviewable.

12 We think that the intent of 10(f) was correctly
13 captured in those decisions.

14 QUESTION: Well, I don't see that. That's sort of a
15 middle ground. I can see how 10(f) might be read to mean any
16 order whatever, which would produce a very strange result.
17 You'd have review in the Court of Appeals where there's no
18 record below. So, you would really want to use the usual
19 district court review rather than the Court of Appeals. That's
20 one extreme.

21 It seems to me that the alternative to that is
22 regarding 10(f) as referring to the order described in 10(c),
23 which is very clear. It says in 10(c) that after a complaint's
24 filed, if, upon the preponderance of the testimony, the Board
25 shall be of the opinion that any person named has engaged or --

1 MR. GOLD: Yes.

2 QUESTION: -- is engaging in an unfair labor
3 practice, the Board shall state its findings of fact and shall
4 issue and shall cause to be served on such person an order in
5 one direction or the other. That's the order, it seems to me,
6 that 10(f) refers to. And that is not the kind of order at
7 issue here.

8 MR. GOLD: It's partially the kind of order because
9 you have -- in part, it is that kind of order, and what we're
10 -- I guess what we're struggling with is what happens in this
11 class of case.

12 The defendant comes in and says I am prepared not to
13 fight on issues 1, 2, 3 and 4, if you enter an order which
14 doesn't carry any court consequence.

15 QUESTION: But 10(c) only says an order requiring
16 such person to cease and desist from such unfair labor
17 practice. That's the kind of order it's referring to.

18 MR. GOLD: Well, the order --

19 QUESTION: The whole section is entitled Prevention
20 of Unfair Labor Practices. It sets forth the whole structure.
21 In (c) it says what kind of an order the Board shall issue and
22 then in (f) it says any person aggrieved by an order of the
23 Board. It seems to me it's obviously referring to the same
24 order that's described in (c).

25 MR. GOLD: Well, in those terms, an order -- there's

1 more of 10(c). An order saying that there is no unfair labor
2 practice wouldn't be reviewable, but, obviously, both 10(c) and
3 the logic of the situation indicate that an order saying that
4 there's a violation, an order saying that there's not a
5 violation, are reviewable.

6 Now, what about an order saying that the Respondent
7 will consent to an order which doesn't carry a contempt
8 sanction, saying that he will not do certain things which would
9 be an unfair labor practice and the individual who brought the
10 charge and who has a recognized status says that's not enough?

11 QUESTION: It may be reviewable but not under 10(f).

12 MR. GOLD: Well, if we --

13 QUESTION: If it's reviewable, it would be under the
14 APA, which means it would go into district court, which is
15 where it should be if there hasn't been any formal proceeding.
16 You need a record to be made.

17 MR. GOLD: Perhaps it's where it should be if you're
18 fighting about the substance of the settlement, but if the
19 claim is that the General Counsel has run around the procedure
20 entirely, so -- and has taken an action which is in reality an
21 action which we believe is an action which can only be taken by
22 the Board, it seemed to us that the logic of the situation was
23 that kind of law question, when, as well, and ostensibly to the
24 Court of Appeals.

25 We argue, as an alternative, that the APA gives us a

1 right to test this question of whether Congress intended that
2 the Board must be given an opportunity to pass on these
3 proposed settlements. If that argument is right, then it would
4 lead to, at least in the future, a review in the district
5 courts rather than under 10(f), and we certainly think for the
6 reasons we give, that a total failure of an agency to follow
7 the procedure contemplated in the statute ought to lead to APA
8 review and that it's senseless to send us back to the district
9 court --

10 QUESTION: Mr. Gold, if the Government is right, I
11 take it that the Board itself could not prohibit the General
12 Counsel from entering into informal settlements.

13 MR. GOLD: That's right. I mean, unless the Board --
14 unless the Government's position here is that they can do
15 whatever they want, it seems to me that where we actually are
16 is that the General Counsel has the trump card. If he enters
17 into --

18 QUESTION: Why shouldn't that be the same trump card
19 if the proceeding has started, if the hearing has started?

20 MR. GOLD: That's what's a total mystery to us and it
21 may be that if you rule for the Board here, the Board will
22 greatly regret having joined hands with the General Counsel.

23 QUESTION: Mr. Gold, take the stage of the proceeding
24 where the General Counsel issued a complaint but the charge
25 party has issued no response. Now, you say a settlement even

1 at that stage requires -- you're entitled to a hearing and it
2 is reviewable. Now, that's not like your district court
3 proceeding at all, it seems to me.

4 That's where the plaintiff has filed a complaint, the
5 defendant hasn't filed an answer, and that's dismissable at the
6 will of the plaintiff in the district court.

7 MR. GOLD: That is the rule in the district court,
8 but our argument here is that the statute draws a different
9 line. Obviously, it could draw that line, --

10 QUESTION: But you were arguing before that you had
11 the same kind of hearing that a district court would have. I
12 thought you meant that the proceedings were analogous; they're
13 really not analogous.

14 MR. GOLD: I'm saying that the issues to be presented
15 to the tribunal in this kind of a three-party situation are
16 analogous to the issues on whether or not to approve a
17 settlement in a normal district court case brought by a
18 plaintiff after answer in a class action case brought after the
19 class is certified, which is very close, because that, too, is
20 one where you have a representative rather than just one party
21 on the plaintiff's side.

22 QUESTION: Those district court case examples have
23 gone considerably further than just the filing of a complaint,
24 which is all we have here.

25 MR. GOLD: That's true, but it is also true that the

1 mere filing of a complaint is a less painstaking process than
2 in a civil case than the filing of a complaint by this public
3 agency after quite an elaborate system for trying to separate
4 the wheat from the chaff.

5 I want to take advantage of the rest of my time to
6 emphasize the following point. In 1947, the general
7 understanding, and, indeed, while there are quibbles from the
8 Board, we think that the only possible understanding from the
9 written materials was that the Board itself passed on
10 settlements, post-complaint.

11 QUESTION: Formal or informal or whatever?

12 MR. GOLD: Formal or informal or whatever, and that
13 the overall thrust of the 1947 amendments were to provide a
14 higher level of procedures, open procedures, by disinterested
15 decision-makers and less staff determination than had been true
16 prior to 1947.

17 We believe it turns this statute absolutely upside
18 down to say that one piece of Congress' effort to reach a
19 higher due process stage in the adjudication of unfair labor
20 practice cases, namely the creation of an independent General
21 Counsel, worked without anybody saying so to limit the right of
22 the charging party to get either an administrative law judge
23 or, if you go to that point, the Board's determination, a more
24 disinterested determination on whether the settlement really
25 effectuates the policies of the Act and protects the interests

1 of --

2 QUESTION: Mr. Gold, the due process concerns that
3 motivated Taft-Hartley weren't basically concerns about
4 fairness to the charging party, were they?

5 MR. GOLD: Oh, I think they were, Your Honor, because
6 as the Court has remarked in other circumstances, what was
7 sauce for the goose became sauce for the gander because Taft-
8 Hartley for the first time created charging party rights in
9 employers against unions, and Senator Taft and his colleagues
10 were very solicitous of the rights and interests of that new
11 class of charging parties.

12 Certainly, there was nothing that anybody said or
13 anything that was indicated which would cut back into that.
14 The reason for creating the General Counsel was to keep the
15 Board out of something that was considered not to be a proper
16 adjudicatory function, namely the issuance of complaints, the
17 determination to go forward, but it is a proper adjudicatory
18 function as we've indicated and has always been understood to
19 be such for the tribunal before whom the proceeding is pending
20 at a certain stage to say whether or not a settlement should be
21 accepted.

22 QUESTION: You think they've just been making a
23 mistake for thirty years, forty years?

24 MR. GOLD: It's been a mistake which --

25 QUESTION: This whole --

1 MR. GOLD: Well, first of all, --

2 QUESTION: -- practice has been going on for a long
3 time.

4 MR. GOLD: But without judicial approval. The D.C.
5 Circuit and the 3rd Circuit have said this is wrong and the
6 Board just has continued to chug along as if that hasn't
7 happened. So, the situation is one because I don't think there
8 are that many charging parties who relish the proposition of
9 challenging their champion's determination, the situation is
10 one in which there hasn't been sufficient motive, but as I say,
11 before '47, what we're saying is Congress' intent was so far as
12 everything shows the practice.

13 From '47 to --

14 QUESTION: Mr. Gold, that practice was a Board-
15 created practice.

16 MR. GOLD: Yes.

17 QUESTION: And what you're arguing here is that
18 somehow Congress intended to freeze that practice and the only
19 thing you can point to as being a freezing of that practice is
20 10(f), right?

21 MR. GOLD: No. 10 -- I think that practice was one
22 which the agency created but which was one which the statute
23 has always intended because it seems to us that Section 10(b),
24 which has always been there, contemplates that once the
25 complaint issues, the matter will be determined by the Board.

1 QUESTION: But what I'm saying is if I don't read
2 10(f) as applying to this kind of an order, the only thing that
3 applies to this order is the Administrative Procedure Act, and
4 there's no intent there to freeze the agency into a particular
5 administrative scheme that existed in 1947.

6 MR. GOLD: I guess the way we view this case, Justice
7 Scalia, that two aspects to the judicial review question.

8 Aspect Number 1 is what did Congress intend with
9 regard to the procedures within the agency, and then Question
10 Number 2, which we think depends on the resolution of Question
11 Number 1, is if the agency doesn't proceed in that way, does
12 the party disadvantaged have a right to have a court say that
13 you have followed an improper procedure.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gold.

15 Your time has expired.

16 Mr. Come, do you have anything in rebuttal? You have
17 five minutes.

18 ORAL ARGUMENT OF NORTON J. COME, ESQ.

19 ON BEHALF OF PETITIONER - REBUTTAL

20 MR. COME: Just a couple of points, Your Honor.

21 In the first place, Congress' basic intention in
22 enacting 3(d) was to separate the Board's prosecutorial
23 authority from its adjudicatory authority. At the time of the
24 '47 amendments, the Board had delegated some of its
25 prosecutorial authority, but it had retained some aspects of

1 it.

2 We submit it is clearly unreasonable to conclude that
3 Congress intended to freeze the situation which would have left
4 prosecutorial authority that the Board was continuing to
5 exercise still with the Board.

6 So, the point that Congress intended to freeze the
7 situation pre '47 just doesn't stand up.

8 QUESTION: Mr. Come, could the Board require informal
9 settlements by the General Counsel to be reviewed by the Board?

10 MR. COME: Not, we believe, certainly prior to the
11 issuance of the complaint, and --

12 QUESTION: Well, what about in this very case?

13 MR. COME: -- post-complaint, I think that the Board
14 could not go back to the point of the issuance of the complaint
15 without doing violence to 3(d) because 3(d) talks about the
16 General Counsel's final authority, extending not only to the
17 investigation of charges and the issuance of complaints, but
18 with respect to the prosecution of such complaints before the
19 Board.

20 So, you have to allow some room post-complaint for
21 the General Counsel's final authority to operate in.

22 QUESTION: So, your answer is no, the Board could not
23 require him to get the approval of the Board for informal
24 settlements after the complaint is issued?

25 MR. COME: At least up until before the hearing

1 opens.

2 QUESTION: Well, what -- why wouldn't that same rule
3 apply to post-hearing while the hearing is going on? What if
4 the General Counsel wants to settle?

5 MR. COME: Well, --

6 QUESTION: I take it you agree then that the Board
7 has to agree.

8 MR. COME: -- no. At that point, I think that the
9 adjudicatory process has commenced and that the Board as the
10 adjudicator has the inherent authority of all adjudicatory
11 bodies to regulate the order of proceedings once the
12 adjudicatory phase has opened, and barring any restriction in
13 the statute, which there is none here, the Board was reasonable
14 in drawing the line at the opening of the hearing.

15 Now, my last point is that with respect to --

16 QUESTION: You mean the Board and the General Counsel
17 was reasonable?

18 MR. COME: That is correct, Your Honor.

19 QUESTION: Just to settle terminology, do you
20 consider that a formal settlement or an informal settlement,
21 where all the Board approves is a dismissal of the complaint,
22 no order from the Board?

23 MR. COME: I would regard that as an informal
24 settlement. The formal settlement requires a Board order that
25 requires a party to do something.

1 Now, whether that order provides for enforcement by a
2 Court of Appeals or not does not deprive it of being a formal
3 settlement because since the order -- the parties have
4 consented to the order, the Board can go into the Court of
5 Appeals and get automatic enforcement of that order because
6 under 10(e) the respondent has waived his right to contest the
7 order and we have done that.

8 My last point is that we read 10(f) the way you have
9 suggested, Judge Scalia, as the type of order that is referred
10 to is a 10(c) order, and that is made even plainer when you
11 look at 10(e), which is the provision for the Board --

12 CHIEF JUSTICE REHNQUIST: Your time --

13 MR. COME: -- to go for enforcement.

14 CHIEF JUSTICE REHNQUIST: Mr. Come, your time has
15 expired.

16 MR. COME: Right.

17 CHIEF JUSTICE REHNQUIST: The case is submitted.

18 (Whereupon, at 11:05 o'clock a.m., the case in the
19 above-entitled matter was submitted.)

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C E R T I F I C A T E

Heritage Reporting Corporation hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

National Labor Relations Board and
Rosemary M. Collyer, General Counsel, No. 86-594
National Labor Relations Board, v.
United Food and Commercial Workers
Union, Local 23, AFL-CIO

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