TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
COMMUNICATIONS WORKERS OF AMERICA AND ITS LOCALS 2100, 2101, 2108 AND 2110,	)	
	)	No. 86-637
Petitioners	)	
v.	)	
	)	
HARRY E. BECK, JR., ET AL.	)	
	)	

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V. : No. 86-637
HARRY E. BECK, JR., ET AL. :

Washington, D.C.

Monday, January 11, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

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

EDWIN VIEIRA, JR., ESQ., Independent Hill, Virginia;
on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 86-637, Communication Workers of America versus Harry E. Beck.

Mr. Gold, you may proceed whenever you're ready.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.

ON BEHALF OF PETITIONERS

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

The Communication Workers of America, the petitioners in this case, are the exclusive bargaining representative of a group of employees who work for the American Telephone and Telegraph Company as it then was when this case began, and various of its subsidiaries. The plaintiffs in this case, the respondents here, are a group of individuals who work for a Bell Telephone Company in an organized bargaining unit which is covered by a Union Security provision, namely a provision requiring that an amount equal to the dues charged by the Union to its members are paid by all employees in the bargaining unit thirty days after they become employed, as a condition of continued employment.

This case began when a group of twenty employees sued to invalidate that requirement and to limit the requirement to an amount equal to what the Union pays for what can be defined in various ways but can be said to be for activities germane to

collective bargaining.

The District Court on constitutional grounds and eventually an en banc Court of Appeals by a vote of six of the Judges on different grounds held that the plaintiffs had stated a valid Federal cause of action, and that the relief prayed for should be granted.

The Second Circuit concluded to the opposite effect, holding that all of the Federal claims made by the plaintiffs, one of which is based on Section 8(a)(3) of the National Labor Relations Act, another which is based on the duty of fair representation, and the final one of which is based on the First Amendment to the Constitution, are without merit. The case is here on our petition.

The National Labor Relations Act treats with the question presented here in terms, and I'd like to begin by directing the Court to the language of Section 8(a)(3) which is set out as an appendix to our brief on the merits, the blue brief. Section 8(a)(3) of the NLRA prohibits in general terms discrimination on the basis of union membership and union activity. Section 8(a)(3) then has two provisos, the first of which in essence was in the law in 1935, and the second of which was added in 1947.

The first proviso says in effect that nothing in this subchapter or in any other statute of the United States shall preclude the type of union security agreement at issue here. And the second proviso in its second clause, the one labeled

(b), which is on page 2-a of the Appendix, says that no employer may under these provisos discharge any individual if he has reasonable grounds for believing that membership in the union was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

QUESTION: The second proviso is then a proviso to the first proviso, so to speak?

MR. GOLD: I think both provisos are provisos to the basic prohibition. I think the two provisos are intended to be read and have been read together, each one of the conditions stated in the two provisos have to be satisfied for the clause to be lawful and to impose the requirement. And as this Court has concluded in both the Schermerhorn and the General Motors cases, what the provisos under the NLRA taken together mean, at the very least -- and we're going to find out in this case whether they mean more -- but what they mean at the very least is that an individual who says I am willing to pay the initiation fee charged by the Union which is the exclusive representative, and I am willing to pay the periodic dues uniformly charged to members, cannot be dismissed from employment by the employer without violating Section 8(a)(3).

So in terms of the plain language of Section 8(a)(3), it seems to us as we have argued throughout and as the Second Circuit held, that this case is an open and shut case.

Congress did not say simply that individuals covered by a collective bargaining agreement of this kind would be required to pay undefined dues leaving an ambiguity as the respondents claim. Rather the statute imposes a clear requirement, namely, that to be lawful, these agreements can go no further than the dues and initiation fees uniformly required as a condition of acquiring or retaining membership.

QUESTION: Mr. Gold, is there no ambiguity there? Would you say that any charge is made for initiation is an initiation fee and any amount required as dues, no matter what it is devoted to, would come within this provision? I mean, suppose a union decides that it's going to provide retirement benefits for its membership, and it's going to fund these not out of payments from their paychecks, but it's going to fund it out of union dues, and this retirement is only given to union members. Now, can the union do that and charge very very high dues but the union members are willing to pay it because they can get retirement?

MR. GOLD: First of all on initiation fees, Congress did decide to regulate the amounts in part for the type of concern that you've stated. Secondly, with regard to dues, in 1947, the House proposed to regulate dues to assure that they were reasonable, they weren't too high, they were used for purposes that are called proper under the circumstances, and the Senate refused, saying there should not be such regulation.

It seems to us that putting aside the illumination

one gets from the evolution, that when you talk about the amount uniformly required to maintain your good standing membership in the organization, it's the amount uniformly required without regard to how it is thereafter used. That is the amount that each person who is a member and chooses to continue to be a member is charged.

QUESTION: But if that's what Congress intended, it could simply have said, instead of the failure of the employee to tender the periodic dues and the initiation fees uniformly required, it could have simply said the failure of the employee to tender any amount of money uniformly required as a condition of acquiring or retaining membership. Congress had to use the words, dues and fees.

MR. GOLD: For a good reason, and certainly would have preferred the language you just articulated. Congress took away from unions, not only the closed shop, but also took away from unions the ability to charge as a condition of continued employment those who didn't want to be voluntary members assessments and fines and non-periodic payments of those kind.

QUESTION: But they wouldn't have been uniform anyway, so you didn't have to use.

MR. GOLD: Sure. Of course they would have been uniform.

QUESTION: Uniformly required as a condition of acquiring?

MR. GOLD: Yes. If everybody, in other words, it is normal and the language of the Railway Labor Act to which we will get in a minute is different in this regard. It is normal for unions to charge assessments in addition to dues. For example, some unions have a practice of charging each member two dollars a month to be a member. In addition, there is a once yearly charge of three dollars which is payable only once a year to fund a convention. In the language of the trade, that's an assessment, and assessments are uniform, but they are not periodic in the sense that the Statute has been understood. And therefore, an individual in a position of the objecting payors in this case cannot under the NLRA be required to pay the assessment.

QUESTION: But if you eliminated that and put it in the dues, it would be okay, which the union could do, I presume?

MR. GOLD: That's right.

QUESTION: We're not going to have any more assessments, we're just going to raise the dues three dollars a year.

MR. GOLD: If the union can, and the Landrom-Griffin Act provides that you have to get membership approval, as opposed to the situation of public bodies where the representative can act, provide that where the union goes to its members and says we want x dues and makes the case to them, and then each month or each quarter someone has to pay that,

that is dues.

QUESTION: So your answer to my question is, no matter what they use it for, including retirement benefits available only to union members, so long as they do it through dues, they can get it from the non-union members.

MR. GOLD: That's correct.

QUESTION: No matter what?

MR. GOLD: No matter what.

QUESTION: Annual party or anything at all?

MR. GOLD: Having a party?

QUESTION: Yes?

MR. GOLD: Yes. Yes. That is this statute. And that was the understanding of the time. In terms of the understanding of the time, let me also point out that at the very time Congress was dealing with this question, it passed what is the precursor of the present Federal Election Campaign Act, which applies to unions and corporations, and prohibited unions from using any portion of their dues or initiation fees or assessments for the purpose of making political expenditures and contributions in Federal elections as those terms are defined in those Acts.

So Congress understood quite well that unions use dues for a variety of purposes, and have traditionally funded their activities from dues.

QUESTION: Mr. Gold, what about Judge Murnaghan's argument that the duty of fair representation as regards these

non-union members should lead to the result for which he argued. You dealt with that only in a footnote, but really didn't address the substance in the brief of Judge Murnaghan's position.

MR. GOLD: I had hoped we had dealt with it more, but let me go back to the language of the first proviso of 8(a)(3). The proviso says that nothing in this subchapter or in any other statute of the United States shall invalidate the kinds of agreements that are permitted under this section. Our position on the duty of fair representation is the following:

That the duty of fair representation as implied from Section 9(a) and from the NLRA as a whole, to read the duty to invalidate that which Congress chose after the most careful consideration and heated debate not to invalidate would be contrary to all the theories of statutory interpretation and of elaborating the meaning and purpose of the statute of which we are aware. We do not believe that you can take the duty of fair representation and say that union activity, which Congress decided expressly to permit, is invidious or improper under a judge-made rule using the general terms of the duty.

The duty it seems to us has its metes and bounds delineated by that which Congress specifically decided in this statute to permit as a matter of Federal law, while not prohibiting the States, I would add, from reaching a contrary conclusion. At the time of the 1947 Act, twelve States made it unlawful to have any form of union security, and at the present

time, the number is 20. But it is a Federal question here.

QUESTION: But certainly the language very similar to that in 8(a)(3) is found in the Railway Labor Act, and this Court has said it just doesn't include collection of dues of that kind against non-members. And I think that's your biggest hurdle to overcome, obviously.

MR. GOLD: The Court, as Justice O'Connor just stated, does not write on a blank slate here. This is an issue which has been visited from the Hanson case on through the Hudson case most recently, both under the Railway Labor Act, and under the NLRA.

It seems to us that with regard to the NLRA, there are two critical differences that explain why this case is to be decided differently from the RLA case. First of all, as we develop at length in our brief, the starting point for legislative consideration was at the exact opposite ends of the spectrum in this Act, and in the RLA. In this Act, Congress approached the problem against a background where, as I say, except for twelve States in 1947, all forms of union security including the closed shop which required that an individual in order to get a job in the first place be a full member of the labor organization which had negotiated the agreement were lawful.

And there were many who believed that the Federal law should not invalidate even the closed shop. It was the view of the majority in Congress at that time who were operating

against the fact that the President of the United States did not agree with then and had vetoed legislation in '46, and had said he would veto it again, that union security should be regulated to some extent. And as I said, and if you'll look at the Senate report, the section dealing with union security begins with a phrase to the effect that this is a most contentious issue to which we've given the most mature consideration.

And the conclusion of the sponsors and leaders of the Republican party in the Congress was that the closed shop should be invalidated and that the union shop which provided for dues should continue to be permitted as a matter of Federal law, but not required as a matter of Federal law. And should continue to be subject to regulation by the States. And I would like in particular we lay out a good deal of the legislative history but in terms of the sense of what that Congress believed was fair and proper under the circumstances, taking all the realities into account, I think that Senator Taft's statement, which we reproduced on page 33 of our brief, is a particularly succinct summary of the feeling at the time.

He said, "the great difference between the closed shop and the union shop is that under the union shop in the first instance, a man can get a job without joining the union or asking favors of the union. The fact that the employee will have to pay dues to the union seems to me to be much less important. The important thing is that the man will have the

job."

Now, different people can reach different conclusions about whether that went far enough. But that was the view at the time. The closed shop which gave the union authority over jobs was to be ended. The union shop which had always required an equality of sacrifice, financial sacrifice by all in the shop ought to be continued.

QUESTION: Mr. Gold, can I ask you a question that Justice Scalia's question raises in my mind.

Supposing that a District Judge held in this hypothetical example that the amount the excess part of the dues that was used to fund pensions for union members only should not really be considered dues within the meaning of the statute, and therefore enjoined collection of the excess. Would you say that such a holding was tantamount to holding the union shop unlawful.

See, you're arguing that the union shop is definitely lawful, and I'm just wondering whether that really addresses the question that Justice Scalia asked.

MR. GOLD: I think there are two questions in terms of what you've asked. The first would be, is that a fair construction of NLRA Section 8(a)(3).

QUESTION: Right.

MR. GOLD: It is our submission that it is not a fair interpretation of the Statute. I do not believe that such an interpretation is in the strict sense invalidating the union

shop in the sense of overturning, while admitting that it is being overturned. But I do believe that the task of statutory construction, in Judge Learned Hand's phrase, is to recreate the gamut of values at the time and the gamut of values at the time was to preserve that which had been in existence up through 1947, which did not permit that kind of limitations.

QUESTION: But it's conceivable -- I don't know as much history as you do in this area -- but it's conceivable that what was known in 1946 was a form of union dues which was used exclusively for things like collective bargaining, and that premiums for the benefit of the membership only and not for non-members would not be treated as union dues within the meaning of the Statute.

MR. GOLD: I can only in that regard since I'm hardly a dispassionate observer, refer you to Justice Frankfurter's dissenting opinion in Street with regard to the facts of the matter. Unions have always funded a variety of activities out of dues. Nobody understood that better than Senator Taft the reason the Corrupt Practices Act is in the NLRA is that the CIO made it its endeavor to attempt to defeat Senator Taft and they failed. There was a general understanding that these were used for a variety of purposes.

QUESTION: Including the purposes at issue in this case, Mr. Gold?

MR. GOLD: Yes.

QUESTION: So that, I'm really troubled by the

prospect that I gave you in my hypothetical, and what you're saying is that in order to decide this case, we really don't have to decide that hypothetical. We could just say that certainly anything that dues were used for in 1946 dues can be used for today.

MR. GOLD: Yes.

QUESTION: And if some particular union should come up with the kind of scheme I just described, which I take it you're not familiar with anywhere, are you?

MR. GOLD: No.

QUESTION: Retirement system funded out of dues. We can decide that case when it arises.

You'd rather have the whole loaf, I understand.

MR. GOLD: Well, it isn't rather I'd rather have the whole loaf or not. I believe that what Congress had in mind as a referent was what is uniformly charged to people to be a member of the union and that Congress has regulated how unions spend their monies other ways than this.

But I want to if I can advance to the difference between what I've just described since my time is running out and the situation in 1951. In 1951, when Congress amended the Railway Labor Act to put in similar language, the situation was that as a matter of Federal law, all forms of union security were unlawful. And Congress again made a compromise, but it was moving from the other side.

And this Court was convinced from the history of the

RLA that it was fairly possible to read the RLA as only permitting the collection of an amount of money equal to the amount expended for collective bargaining. Even more important in our view, in the RLA this Court had determined in the Hanson case that since Federal law preempted all State law which would limit union security and had created a Federal scheme that each union security provision was imbued with Federal law and was the action of the Government.

Under this Court's decisions, the most recent of which is San Francisco Arts and Athletics all you have here is a governmental permission, a permission no different than the permission given to the Olympic Committee there or permission of the kind at issue in Jackson v. Metropolitan Edison to in private parties unions and employers to reach these kinds of agreements. Thus, this is not a case in which there is any substantial constitutional issue, and that being so and given the language and the legislative history of 8(a)(3), both parts of the language of 8(a)(3), the second proviso which we've discussed, and the proviso saying notwithstanding any other law, we believe that this agreement which requires each individual in the bargaining unit to pay the same amount is indisputably lawful as a matter of Federal law.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gold.

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

ORAL ARGUMENT OF EDWIN VIEIRA, JR., ESQ.

ON BEHALF OF RESPONDENTS

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

The argument we've just heard from Mr. Gold is very interesting as a matter of policy considerations, but I believe it's somewhat anachronistic as a matter of law. As Mr. Gold himself said, we are not writing on a clean slate. We are not back in 1947 or 1948, interpreting Section 8(a)(3) as if we've never heard anything about it before from the Courts or even from Congress.

Forty years have passed, a number of decisions have been rendered by this Court and there was an amendment of the Railway Labor Act in 1951 to give us an equivalent provision in Section 211. And all of this material I believe, and we have argued, tends rather strongly, if not compellingly, to put to one side the policy judgments that Mr. Gold is urging, and to come to something of a different conclusion.

Now, if you'll look at the statute, Mr. Gold says, well, the plain language makes it an open and shut case. Of course, according to his theory, the plain language of the statute would allow full-fledged membership in a labor organization to be required by an employer and a labor organization under Section 8(a)(3).

Well, very early on in the history of Taft-Hartley Act interpretation, this Court in Radio Officers Union case in

the early 50s, the Court said in fact that wasn't the situation. The purpose of putting in the amendments to 8(a)(3) was not to allow the type of full fledged membership control that I think would be required by Mr. Gold's interpretation, but to force employees to pay a monetary sum to the union. Monetary sum for what purpose? I get back then to the question of dues and fees, the purpose of dues and fees.

Obviously, we can't interpret this statute in the hyper-literalistic way that Mr. Gold suggests, because the Court hasn't interpreted the statute that way. The language of 8(a)(3) talks about dues and fees uniformly required as a condition of membership. What kind of membership are we talking about here?

Pattern Makers' case, a couple of years ago, this Court referred to voluntary unionism as the thrust of the National Labor Relations Act. An employee could not be required to become a full-fledged member of the union and he could resign if he had become a member of the union voluntarily. He could not be forced into membership through an 8(a)(3) agreement.

What can an employee be forced into with respect to a union with respect to an 8(a)(3)-type agreement? It is the status of accepting the union as the employees' exclusive representative. An 8(a)(3) agreement can be negotiated only by a Section 9(a) labor organization.

What is a Section 9(a) labor organization? It is an

organization that has been certified by the NLRB as the majority representative for the purpose of collective bargaining, grievance adjustment, and administration of collective bargaining agreements, and no other purpose. That's what Section 9(a) says.

And that's what Section 8(d) tells us about collective bargaining where it defines it rather specifically. So we're talking about what I would think, and certainly suggest, is a very tightly woven set of provisions. Collective bargaining and the majority representatives through 9(a). Section 8(a)(3) agreements when a 9(a) labor organization has become the representative of the employees.

And decisions of this Court saying that the membership requirement so called is a requirement solely directed towards compulsory payment of dues and fees. Now, this makes rather operationally good sense. An employee who is not a union member and who cannot be required to be a union member lawfully nevertheless can be required to pay dues and fees to the labor organization that has been selected, ostensibly in this case by others because we're talking about a non-member, by others, to represent him for the purpose of collective bargaining.

And from that seems to follow very nicely, at least as an equitable judgment, that the dues and fees should be limited to the costs that that union incurs in performing that service. Now, once again, the statute sets up a mutual system

of liabilities and rights.

QUESTION: Strange way to say that, isn't it? I mean to say dues and initiation fees if what you're talking about is the costs of collective bargaining?

MR. VIEIRA: Well, Justice Scalia, they said that in the Railway Labor Act in 1951. Congress retrospectively --

QUESTION: It's strange there, too.

MR. VIEIRA: Your Honor, this Court has held in Street, in Allen, and in Ellis that that somewhat strange, at least as we're using the term now, use of terminology leads to the conclusion in Section (2)(4) that only collective bargaining costs can be charged. In fact, the question that you raised to Mr. Gold about the retirement benefit program of the types that were union, I recall in Ellis there was not a retirement program, but there was a death benefit program. And I think the Court said that if that death benefit program inured only to the benefit of union members, it couldn't be charged.

So we had a situation there where unions, at least in that case it was the Brotherhood of Railway Clerks, did in fact set up out of dues payments a similar type of benefit situation which it did not extend to the non-member.

Let's put ourselves in the position of Senator Taft. Does anyone here today really believe that if we had Senator Taft in this room, and we said, Senator, did you write Section 8(a)(3) and then (2)(4) of the Railway Labor Act, and really

intend that a union that had been selected as the majority representative of dissenting employees could collect any amount of money from those employees for any purpose whatsoever as long as the voluntarily union members agree, does anyone in this room really think he would say, yes?

QUESTION: I think he might have. He might well have said, it's the best I could do.

QUESTION: Mr. Gold is nodding his head.

MR. VIEIRA: Mr. Gold agrees that he comes to this not in a position of objectivity.

QUESTION: Mr. Gold's position is that it's better than what the pre-existing situation was where you could be compelled to pay the full dues and also be compelled to be a full-fledged union member.

MR. VIEIRA: Well that's an interesting question as to what was required under Section 8(a)(3). We have rather a question begging interpretation from Mr. Gold, because I don't recall any decision of this Court, certainly, that ever held that 8(a)(3) would have validated the type of thing that CWA has required in this case. In fact, I recall in the Jones and Laughlin decision in 1937, that in fact, it was held that employers could continue to deal with individual employees, notwithstanding the existence of majority representative in the unit.

So we probably have a situation that was quite a bit closer to common law under that Jones and Laughlin

interpretation. So I'm not so sure that we can simply take it for granted that 8(a)(3) would have been interpreted to allow at least what Mr. Gold is suggesting CWA is demanding in this case. In fact, if you took that position, you'd come rather rapidly to an interesting constitutional question, perhaps deeper and murkier than the one we have here.

Let me address that for one moment, because Mr. Gold makes the argument that the interpretation of Section (2)(4) of the Railway Labor Act was somehow impelled by a constitutional consideration which he finds in pre-emption under Hanson. As I recall, Mr. Justice Brennan's opinion said that it was not merely a fairly plausible interpretation, but a quite reasonable interpretation of Section (2)(4) that limited dues, fees, and in that particular statute, assessments to the costs of collective bargaining. So if that interpretation was reasonable in the RLA context, I don't see why the same language is not capable of that interpretation in the National Labor Relations context, especially when you go back and look at the statements that were made by Senator Taft as well as others that they were attempting to do in the 1951 Amendment to the RLA, essentially the same thing they had done in the '47 Amendment, or at least put the Railway Labor Act unions in the same position, as the National Labor Relations Act unions.

And what was the burden of the testimony that had been given by the Rail Union leaders to Congress cited and quoted. In the Street opinion, it was we need these monies to

pay the costs of the exclusive representational services that we are required by law to provide to the non-union member. And there's the balance in the system. The unions are required by law, once they obtain exclusive representational status, to provide certain benefits to non-union employees within those bargaining units.

What benefits are those? The benefits of collective bargaining. That's what they can't withhold. They don't have to provide political representation. They don't have to provide social representation. They don't have to provide union-only retirement funds. They have to provide collective bargaining representation. That the employee must accept, and he can demand.

And because he can demand it from the union, Congress believed it only fair that he could be required by the union to pay some commensurate cost. And what is the argument, then, that makes --

QUESTION: That makes a lot of sense and the States can do that under the current law, if they want to, can't they. Whereas under the Railway Labor Act, that eminently sensible disposition could not be required by any State, could it? Unless the Federal law required it, nothing could require it. Whereas here, it makes sense, as you say, but the States can do it, if they want.

MR. VIEIRA: Well, that's true.

QUESTION: And that's a big difference between this

and the Railway Labor Act.

MR. VIEIRA: Well, it's a big difference in the sense that the States have the ability to interfere in this Act, and therefore we don't have a primary jurisdiction problem that we might have otherwise, but I'm not sure it's so important in terms of the effect between the employee and the union, for instance, in a State like California, which doesn't have such a provision, doesn't have a Right to Work law.

California was the source of the Ellis case. I think on CWA's interpretation that pre-emption somehow has the controlling force over whether the statute should be interpreted to limit dues and fees to collective bargaining costs, one would seriously question whether the statute would have been interpreted that way in a California case. I mean, why doesn't the statutory interpretation change under the Railway Labor Act depending on whether you're in a right to work or a non-right to work State?

That brings us back to this Hanson point that Mr. Gold made. I don't think the statutory construction in Street depends upon the exclusive reading of Hanson that Hanson was a preemption case. Hanson talks about preemption because that was the argument raised by the Nebraska Supreme Court, the exclusive argument, I take it the Nebraska Supreme Court raised was they had to decide that case because there was Federal preemption.

Hanson talks about Federal preemption and Mr. Justice

Douglas goes on in his typically terse way and gives two or three other bases. He cites Shelly v. Cramer and he cites something that's much more important, he cites Steele v. Louisville & Nashville Railroad. Mr. Gold didn't mention Steele v. Louisville & Nashville Railroad. Maybe he will when he gets back up.

That has to be the key to the entire State action problem. You go back to Steele v. Louisville & Nashville Railroad, the Court was very concerned there that a union with exclusive representational status could use that status through collective bargaining to discriminate against non-union employees. In that case, it was a racial situation.

QUESTION: In cooperation with the employer.

MR. VIEIRA: Absolutely. It was just the kind of case theoretically that we have here, cooperation between the union and the employer to do something to the non-union employee. In that case, it was a racial discrimination case.

The Court took one look at that and said, this union has been empowered by Congress with a quasi-legislative status. And if some limitation is not put on the exercise of power pursuant to that status to prevent this type of discrimination, arbitrary, discriminatory or in bad faith, is the rubric, the jargon, constitutional questions would arise. Not constitutional questions about the status of the representative. That was obvious and clear. Constitutional questions as to the validity of transferring that kind of power

to a labor organization.

Now, the structure of the National Labor Relations Act, and the structure --

QUESTION: Yes, but that doesn't mean that everything the union does is required by law.

MR. VIEIRA: Excuse me?

QUESTION: Well, that doesn't mean that the union is always in the status of exercising official power.

MR. VIEIRA: Only when it's exercising its 9(a) power. And the problem of the 9(a) power exercise has been solved in essence by the duty of fair representation, that is, the quid pro quo then again for the union to have this quasi-legislative power was that it would exercise it within the bounds of the duty of fair representation. So we don't have the horror that Mr. Gold raises in his brief.

QUESTION: What's Steele got to do with this particular case about the right of the union to charge dues equal to the dues charged union members?

MR. VIEIRA: The union cannot make -0-

QUESTION: Why is that a State action?

MR. VIEIRA: The union cannot make a Section 8(a)(3) agreement unless it is a 9(a) representative, so says the statute. The 9(a) representational status is the infusion of governmental action. That is what gives the union its quasi-legislative power over these employees. Otherwise, it would have no power over them at all. It couldn't require them to

pay dues, it couldn't require them to accept and terms and conditions of employment it might make with an employer.

QUESTION: I suppose if the union didn't negotiate this kind of an agreement, and just didn't charge the non-members anything, I suppose the union could be sued by its members saying you're not fairly representing us. You're just not collecting from the people you're serving. And that also would be official action, I take it?

MR. VIEIRA: Well, it would be an interesting situation for the voluntary union members to sue their own union.

QUESTION: It might be very interesting, but not unheard of. They do it all the time. At least those kind of cases seem to seep into this Court every now and then.

MR. VIEIRA: So the question you're positing would be would governmental action be infused in an internal union decision because the union is exercising some powers as a 9(a) representative. And I take it we have the case in which some members of the union were black and some members of the union were white, and the union hierarchy made a collective bargaining agreement which discriminated against all blacks in the bargaining unit, would some of those union members be entitled to sue that union in a duty of fair representation case or a quasi-constitutional case. And the answer is, yes. If they didn't use EEOC or some other equivalent, the answer is, yes.

If the union is exercising its 9(a) authority in an invalid way, the answer is, yes.

QUESTION: Because they're violating the equal protection clause, they are in effect the government of a government action?

MR. VIEIRA: Well, we go back to the duty of fair representation. What Steele did was to say all of those constitutional questions which might arise in the invidious use of this 9(a) status will be lumped together and treated by this thing we call the DFR. That's the solution to the constitutional problem. We're not going to have a constitutional conundrum come up every time a union negotiates some provision of a collective bargaining agreement.

QUESTION: What was involved with Steele was only the cooperation of the Brotherhood and the Railroad in refusing to promote negro firemen, period. That was all that was in that case.

MR. VIEIRA: Well, they created the duty of fair representation in that case.

QUESTION: They did?

MR. VIEIRA: Oh, yes.

QUESTION: I thought the statute did.

MR. VIEIRA: Well, let me put it this way. They found it in the statute.

QUESTION: It was always there, wasn't it?

MR. VIEIRA: Well, if they found it there, it must

have been there.

QUESTION: Right, right.

MR. VIEIRA: At the time that Congress created the statute.

QUESTION: Exactly.

MR. VIEIRA: The impetus for finding it, the light by which they found it was the recognition that if they couldn't find it, they had another problem.

QUESTION: Well, you don't have any mediation board here, do you?

MR. VIEIRA: Excuse me, sir?

QUESTION: You don't have the mediation board involved in this case, do you?

MR. VIEIRA: Well, we didn't have it there.

QUESTION: You didn't.

MR. VIEIRA: Yes. Their problem was that there wasn't a judicial remedy for what had happened for the discrimination.

QUESTION: Wasn't that case, didn't that case say that the members of the mediation board cooperated with the Brotherhood in discriminating against the negro firemen, period.

MR. VIEIRA: Forming the original discriminatory agreement, yes. They wouldn't hear any --

QUESTION: So you don't have the mediation board here, do you? Isn't that the difference between the two cases?

MR. VIEIRA: No, I don't think so.

QUESTION: One's the railroad and the mediation board, and this is a non-railroad and no mediation board.

MR. VIEIRA: Well, the Court in Steele came back to powers of the union. I think the problem that you're discussing was that if they hadn't created a judicial remedy, there would have been no remedy available for this discrimination. That was the difficulty. If there hadn't been a judicial forum, it couldn't have been redressed at all.

Now, that brings us, I supposed, to the primary jurisdiction question with the National Labor Relations Board, which the Court asked us to address, and no one has addressed it here. I think that's a very simple question, because Congress has already determined that these 8(a)(3) agreements are not within the primary jurisdiction of the Board. That's what 14(d) seems to tell us. Let the States do it if they want. Let State courts become involved, State legislatures, State administrative agencies, for that matter.

It's not exclusively a question of the NLRB. So we do have a judicial approach but it was a judicial approach that was created in Steele or found in Steele, the duty of fair representation approach. And it solves all the possible constitutional difficulties because if a union is exercising its 9(a) authority within the boundaries of the duty of fair representation, there is no further constitutional inquiry.

QUESTION: Under more recent cases, is just

governmental permission to engage in a course of conduct, does that make the person who engages in that conduct, is he wielding official power?

MR. VIEIRA: Well, it's not simply governmental permission. There's governmental permission for the employer and the union --

QUESTION: Well, the government says, you may extract these membership fees from non-members if you want to, but you don't have to. Go ahead if you want to. That's what the Act said, isn't it?

MR. VIEIRA: Well, they have disabled the non-union employee from doing anything about that. He had a previous set of rights prior to the Wagner Act that would have enabled him to take certain kinds of action directly or with the employer. Most of these agreements --

QUESTION: So it's only because of the position the union has a collective bargaining agency that permits negotiating anything on behalf of a non-union member.

MR. VIEIRA: True. But it's putting the union in the position of being the coercive elected bargaining representative of these employees, and completely disabling them from taking any route to their employer --

QUESTION: So if you decide to do it, you can do it over the objections of the non-member because we say so, because the law says so.

MR. VIEIRA: That's right. And we have stripped the

non-member of any rights that he may have previously had. Let's recall that. Allis Chalmers and Vacca, he's been stripped of the previously existing rights, Allis Chalmers, he's been stripped of his previously existing remedies, Vacca. Now, I don't know what governmental action means if it doesn't mean a situation where someone has been stripped of his rights and remedies. If that's not governmental action, what the heck is it?

QUESTION: Which of our cases comes closest to agreeing with you on this?

MR. VIEIRA: In terms of whether 9(a) is governmental action?

QUESTION: Yes.

MR. VIEIRA: Steele.

QUESTION: But how about the Railway Labor Act cases? Do any of them come close to this?

MR. VIEIRA: Well, Street in terms of the interpretation of the language of (2)(4), the exact parallel language to 8(a)(3).

QUESTION: Well, Street was really a statutory case, I guess.

MR. VIEIRA: Even better for us.

QUESTION: Well, I know, but a statutory case really doesn't --

MR. VIEIRA: I agree wholeheartedly with the opinion that that was a reasonable construction of the statute. And

it's just as a reasonable here. The language is the same. The only difference in the Railway Labor Act is the word "assessment" and in Hanson, Mr. Justice Douglas said, well, if assessments are used for improper purposes, they'll be treated the same way as dues and fees.

QUESTION: Well, I know, but if it's a statutory case, whether it's State action or not really doesn't make any difference.

MR. VIEIRA: Excellent. If it's a statutory case, we forget about State action. We have presented to us from CWA, a very insistent argument that this is not a statutory case, to which I say, fine, we'll do the constitutional side of the argument. You can have one side of the record or the other, it goes both ways. But it can be treated very simply as consistent with a whole line of things. We're not simply talking about the Railway Labor Act, public sector collective bargaining. In Abood, this Court looked at the precedents under both the National Labor Relations Act and the Railway Labor Act, and then said, we have a consistent pattern here. Exclusive representation, these fees being paid for the cost of collective bargaining.

So we had a coherent labor relations structure seen in Abood, and now we have a discordant note being put in by CWA saying, well, let's go back to 1947 and remake everything. It's 1988. I don't think it can be remade. It can't be remade without creating quite an anomaly. Certainly in the

Administration law, here you have a union that represents employees in the public sector, it represents employees under the National Labor Relations Act, it represents employees under the Railway Labor Act. You can have employees represented by CWA working within a block of each other under the public sector acts and the Railway Labor Act. They're being charged only dues and fees for collective bargaining costs.

Across the street, employees performing the same functions are being charged anything CWA wants to charge on the same language in these statutes. Is this a sensible way to run a railroad? I don't think it's a sensible way to run national labor policy.

I think the simple answer to this case has been the course of history in the past 40 years. Whatever might have been a reading of the 1947 Act in 1947 or 1948, we've gone beyond that. This Court has gone beyond it.

QUESTION: Well, now, but that doesn't make much sense as a matter of statutory construction to say that whatever Congress may have intended when it passed this in 1948, it's too late for us to do anything about because we've already made so many mistakes in the past.

MR. VIEIRA: Well, number one, I don't think that you've made a mistake. As I say, I think the interpretation of the Statute given in Street was perfectly reasonable. And number two, there has been a tremendous amount of reliance on these interpretations. If you're going to go back now and say,

oh, we were wrong, if you want to say you were wrong, I can't stop you. If you want to go back and say, we were wrong, you open up not only some interesting statutory questions, but you open up some very deep and dark constitutional waters in these cases.

And I'm saying that what happened in Street was a perfectly reasonable interpretation of the statute that fits what I think is the primary intention that you can read out of the structure of the Act. Make the employee who is not a member pay for the services he receives from the union, and we know that the statute limits the services that can be forced on that employee to the 9(a) representational services that the union performs as a collective bargaining agent. So it all works operationally, it follows Street, Allen, Ellis, the public sector cases.

QUESTION: Mr. Vieira, could you talk about how practically feasible that is? The union contends that it's a real knotty problem to separate out from union dues that portion that is part of the collective bargaining function. That seems to me to make a lot of sense?

This tends to be a litigious field, anyway, and you can litigate from now 'til doomsday over what particular portion of the union dues goes to collective bargaining.

MR. VIEIRA: Not if they keep their books straight. I think the record in this case shows that what happened with this particular union was it was not keeping its books in a

manner that allowed it to make these segregations, whereas CWA, itself, now tells us that it has a new system in this case that will allow it to do that, and it is solving this knotty problem in the public sector.

It certainly has to do it in the public sector, it certainly has to do it under the Railway Labor Act. Why can't it take those same books and records and apply them to the National Labor Relations Act?

I don't see the difficulty.

Well, it's living up to Abood, it's living up to Street.

QUESTION: Yes.

MR. VIEIRA: And I think as soon as this Court rules that it has to live up to Beck, it will do the same thing here.

Thank you, Your Honor.

QUESTION: Well, what happens if an employer refuses to collect this fair fee from non-members and says, I won't fire -- I know that John Jones isn't paying, but I won't fire him. Is he committing an unfair labor practice?

MR. VIEIRA: Well, he's arguably committing an unfair labor practice, but under those two provisos in 8(a)(3), if he's correct, if the union has not in fact charged John Jones.

QUESTION: Yes, but there's no argument but what the union wants to collect from him is fair. The employer just says, sorry, I don't believe in this law.

MR. VIEIRA: All right. So we're taking the case

where there's no question of the legality of the fee?

QUESTION: Exactly.

MR. VIEIRA: It's the employer has violated.

QUESTION: So he is required to collect.

MR. VIEIRA: Oh, yes. That's our problem here. He's required -- we accept that -- he's required to collect.

QUESTION: And that's only by virtue of the coercive nature of the Federal law?

MR. VIEIRA: Well, he has a collective bargaining agreement he made with the union that was imposed on him through a 9(a) representational arrangement.

QUESTION: Yes.

MR. VIEIRA: Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Vieira.

Mr. Gold, you have three minutes remaining for rebuttal.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.

ON BEHALF OF PETITIONERS - REBUTTAL

MR. GOLD: Thank you, Your Honor.

In terms of the parallel between these statutes, it seems to me is rational to say that because under the NLRA, you have the right to strike, that ought to be read into public sector law where it doesn't fit, or because you have the secondary boycott under the RLA without regard to what Congress did in 1947, NLRA unions ought to have the right to a secondary boycott.

The point of the matter is that these statutes are related to each other, but they're not identical to each other.

Second, the reference that Mr. Vieira makes to Section 9(a), the fact that only a 9(a) union can make a union security agreement that's lawful under Federal law that isn't prohibited by Federal law again is a total red herring. That language was in the '35 Act at which time unions had the right to secure as a matter of Federal law, a closed shop, and you had to be a full member, you were subject, if you were discharged by the union for any arbitrary reason, could also be discharged from your employment. And that's what Congress wanted to stop.

Third, as Justice Marshall pointed out, it is not the law in this Court that everything an NLRA union does in negotiating a collective agreement is State action. If it were, then Webber would have had to have been decided the other way. The fact of the matter is, unions, like public utilities, like the Olympic Committee, are a bundle of rights and powers, but insofar as the Government has no close nexus with the private decisionmaking, this State action cases make it absolutely plain that the union is a private party and that --

QUESTION: But how do you reconcile that with Street and Hanson?

MR. GOLD: Well, on Street and Hanson, let me refer you back to the materials. In Hanson, at pages 231 and 232 of 351 U.S., the Court said, the Supreme Court of Nebraska took

the view that justiciable questions under the First and Fifth Amendments were presented since Congress by the union shop provision sought to strike down inconsistent laws in 17 States. The Supreme Court of Nebraska said such action on the part of Congress is a necessary part of every union shop contract. We agree.

And then in Street, the portion of the opinion which introduces the constitutional element of the case is entitled "The Hanson Decision." So the difference between these two statutes, which we think is determinative with regard to whether you look at this through a constitutional lens is the preemption of State law in the Railway Labor Act, and the lack of preemption here.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gold.

The case is submitted.

(Whereupon, at 10:57 a.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

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I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States and that this is a true and accurate transcript of the case.

Date: 1/11/88

Margaret Daly
Official Reporter

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