OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: G. P. REED, Petitioner V. UNITED TRANSPORTATION UNION, ET AL.

CASE NO: 87-1031

PLACE: WASHINGTON, D.C.

DATE: November 2, 1988

PAGES: 1 thru 32

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IN THE SUPREME COURT OF THE UNITED STATES

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G. P. REED, :

Petitioner :

v. : No. 87-1031

UNITED TRANSPORTATION UNION, :

et al. :

----------x

Washington, D.C.

Wednesday, November 2, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:03 o'clock p.m.

APPEARANCES:

JOHN W. GRESHAM, ESQ., Charlotte, North Carolina; on behalf of the Petitioner.

CLINTON J. MILLER, III, ESQ., Cleveland, Ohio; on behalf of the Respondents.

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C O N T E N T S

P R O C E E D I N G S

(2:39 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1031, G. P. Reed v. United Transportation Union.

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

ORAL ARGUMENT OF JOHN W. GRESHAM

ON BEHALF OF THE PETITIONER

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

In this case the Court must determine whether it will apply its longstanding practice of borrowing the analogous State statute of limitations and apply that to a free speech claim under Title I of the LMRDA, or whether it will apply the narrow exception to that normal borrowing procedure which was described in DelCostello v. Teamsters, and in applying that exception, then select the six-months' limitation period of 10(b) of the NLRA.

The facts in this case indicate that it is a prototypical Title I claim. It is retaliation against a union member for protesting both the improper use of union funds and for opposing a dues increase in the local.

What are these facts? Well, Mr. Reed was the treasurer of his local. He discovered that the general chairman was obtaining funds that he was not entitled to. He was getting funds for the local for time for which the company had paid him. Mr. Reed demanded repayment of this money from the general chairman.

At the same time, during the same time period, he opposed the general chairman's efforts to get a dues increase in the local.

Reed went so far as to tell the auditor from the international about the general chairman's double dipping, getting union funds for work where he'd been paid by the company. What was the auditor's response? He didn't have time to think about that sort of matter.

The auditor, however, then demanded that Reed pay back funds that he had received from the local, funds that had been approved by the local after Mr. Reed had taken time from his job to perform duties for his union. The reason given: Mr. Reed had not received prior approval; that is, he had not gotten their approval prior to doing the work. The problem with that response? There had never been a prior approval requirement.

At the same time that Mr. Reed was being required to repay this money, one of the general

chairman's subordinates, the vice general chairman, went to another dissident union member, told him they could get him too, but at that point, they were just after Mr. Reed. The vice chairman also suggested that perhaps this other union member might want to withdraw from the race for national delegate where the general chairman was also running.

What did Mr. Reed do? He paid back the money as demanded. It was equal to about six months of the small stipend that he received for his usual duties as treasurer and he protested to the international president, Mr. Hardin. And Mr. Hardin denied the protest.

Mr. Reed then tried to apply the same prior approval policy to reimbursement requests by other local members. He was chastised by the international president and required to pay the money in spite of the fact there was no prior approval.

This discriminatory treatment ultimately led Mr. Reed to file this claim, and the Title I claim, we argue to this Court, is not one which necessitates departure from the longstanding practice of this Court in labor law, as the Court said in DelCostello, as otherwise of borrowing the appropriate state statute of limitations. The reason that there is no need for such

a departure is that the conditions present in DelCostello are not present in this case.

The claim in DelCostello that hybrid duty of fair representation, Section 301 claim under Taft Hartley, unlike the Title I claim, which is simply a straightforward claim, a union member suing union for violation of rights under Title I, this DFR 301 claim directly challenged the collective bargaining agreement. And the private resolution of disputes under that agreement which are at, as this Court indicated in DelCostello, at the center of the labor law policy passed by Congress in the NLRA and Taft Hartley.

Indeed, I think the hybrid DFR 301 action that was brought in DelCostello is perhaps the most direct challenge that can be made to that consensual process. What is the worker asking there? He's asking the federal court to set aside the private dispute resolution.

His basis and to get to court and to avoid the requirements of exhaustion and the way the court would normally look at the arbitration, what must he do? He must show that the union has failed to properly represent him. Not only that, he must show that the arbitrator made the wrong decision and, in fact, he was entitled to relief. He has a very heavy incentive to

sue both, the union and the employer, for otherwise he will not collect his full measure of damages.

As this Court indicated in DelCostello, the -- it spoke to its concern because there was no doubt that there was an unquestioned impact by the hybrid DFR 301 action on the consensual and private dispute resolutions process, and I think that it was that fact that drove the Court to apply the exception which it did in DelCostello.

This Title I claim, however, does not involve a work place dispute as did DelCostello, DelCostello being that situation where Mr. DelCostello had been terminated from his job. The other plaintiffs in DelCostello had varying disputes over the work place, layoffs, poor job assignments. It does not implicate the collective bargaining agreement. The employer is not a party.

Rather, the claim is very straightforward. The union member asserts that the union has violated his rights under the union members' bill of rights, Title I of the LMRDA. This bill of rights was promulgated because of policy considerations present in neither the NLRA nor the LMRDA. Congress, at the time of the passage of Title I, had become aware that some unions were acting in a very autocratic fashion and, indeed,

some unions were corrupt.

Congress was casting for a way to deal with these problems. One would have been far more direct government interference, but Senator McClellan rejected that approach when he put forward the labor union members' bill of rights. His approach was by granting union members the rights of free speech, of assembly, of due process, of participation in elections, of the vote, that by applying the very model which had worked so well for this country in the relationship between citizen and government to the relationship between union member and union, that the democratic process itself would correct the abuses which Congress had found.

I think you can see how wide Congress sought to sweep and that it applied Title I not just to unions that are governed by the NLRA or unions that are governed by the Railway Labor Act but, indeed, to all unions, even the agricultural unions which are not subject to the other federal labor policies.

At the time of the passage of the LMRDA, commentators realized that this democratic process which Congress sought to establish was a fragile one. As Archibald Cox recognized in his article in the Michigan Law Review, most men are reluctant to risk the cost incurred in vindicating those intangible rights that

were set out in Title I, and those who sued under Title I ran, in Mr. Cox' words, enormous risk for they were going up against the power, the entrenched power of the union.

But as this Court has noted in Hall v. Cole, the principal beneficiary of these Title I actions is not the individual union member, it is the union membership as a whole, it is the general public interest that labor unions in this country be run democratically. Indeed, as Justice Marshall in rejecting a six-months' limitation in a case involving similar rights asserted against the government noted, these are the very claims which belong in court. They do not or should not be curtailed by a short statute of limitation.

Secondly, what about the practicalities of the litigation because that again was a factor which concerned this Court in DelCostello and again drove it away from the usual practice? I think the practicalities of this litigation indicate that there is a need for the longer state statute of limitations, the analogous statute in this case being the personal injury statute in North Carolina.

QUESTION: And how long is that, Mr. Gresham?

MR. GRESHAM: That is three years under

GS1-51-5. It is a general statute of limitation for personal injury.

That -- that longer state statute of limitations is the more appropriate vehicle, again quoting the language in DelCostello, for this bit of interstitial lawmaking. As both Archibald Cox recognized in his article and Judge Coffen recognized in his decision in Doty v. Sewall where he applied the normal practice and rejected any exception, there are good reasons for a union member who has suffered internal union harassment not to come forward immediately. After all, he still has his job.

This is not a work place dispute. It's a dispute over his rights in the union. Maybe if the union member keeps quiet, the problem will go away, or maybe someone else will step forward. After all, I think the union member must always keep in mind those in power, as Judge Coffen indicated, do have long memories.

Yet, if the union membership as a whole and the public interest is to be served, the union member must step forward, and when he does, what must he do? He must in most cases find and pay a lawyer. And what must the lawyer do? The lawyer must investigate. The lawyer -- the lawyer must ensure himself that the facts are there sufficient to meet any challenge under Rule 11

and file his complaint.

That is different from the situation in DelCostello. The DelCostello plaintiff, Mr. DelCostello, had already lost his job. He had already lost his arbitration. He was casting about for one more forum which might bring him relief and might get him back his job and his wages.

Additionally I would note that there were practicalities in the DelCostello litigation after the case was filed. It's a problem of the two different actions with the two different conceptual underpinnings. In the issue of damages, as this Court has noted, one collects damages from the union only to the extent that the union has created damages over and above the actions of the employer.

If you apply the short statute of limitations in DelCostello, the 90-day arbitration period, to the action against the employer, you've truncated the damages. If you apply the long statute, the two-year statute of limitations that this Court found was the most analogous statute to the -- for the duty of fair representation claim, you again run head on into the problems of the effect and interference that that long statute of limitations would have on the private dispute resolution process that is at the heart of the

collective bargaining agreement, again, not something that you have in this case.

And the difference, the difference in the conceptual underpinnings of these two statutes, brings me to a third point. In DelCostello there was simply no good state analogy. The Court thought perhaps after wrestling with the issue in Mitchell, 90 days, the very short statute of limitations for arbitration in most states -- some states had 60. I think some had perhaps a bit more -- was not sufficient. It did not allow the union members sufficient time to come forward if you did have a legitimate grievance.

And the two-year malpractice statute had no -- no connection at all with the action against the employer. And again, if it were implied -- if it were applied, it would again cause that disturbance with the underlying collective bargaining.

I would note that that interference is set forth in the NLRA and in the Taft Hartley Act. And in the DelCostello case, those were the acts which gave Mr. DelCostello his claim, the act or the action inferred against the union in this Court and the duty of fair representation and the specific statutory right under Section 301. Those statutes brought forward the problem, the labor policies that were being interfered

with, at the same time that they granted the right. There is no such problem with the analogous three-year statute of limitations here.

This Court's analogies I think in Wilson and Goodman in selecting the general personal injury statute for the federal rights which again are the rights of a citizen, those intangible rights to vote, to participate in the elections, for due process -- this Court quoted, as had the Fourth Circuit in a pre-DelCostello decision in which they also applied the three-year personal injury statute to Title I actions -- quoted -- and I think the Court's word -- the persuasive analogy of Kent v. Alman, that indeed actions such of this are personal rights and that violations of those create a personal injury such that the appropriate statute is the general personal injury limitations period.

We note that although this Court was faced in DelCostello with the lack of a viable state statute of limitations, the potential for the direct interference with the collective bargaining process and the private dispute resolution thereunder and the practicalities of the litigation involved, it still was hesitant to move away from its traditional policy and only did so because it had a good analogy, Section 10(b) of the NLRA.

In this case, I do not think the Court has to

reach the issue of is there a limitation other than the appropriate state statute of limitations for the factors I've set out. But should the Court -- should the Court look to see if Section 10(b) is analogous, I think the Court will find that that close analogy -- clearly a closer analogy is I believe the language of the Court in setting out its standards in DelCostello -- is not present here.

First of all, what did the Court find with regard to the DFR hybrid action and the unfair labor practice statute of limitations? They found, if they took the NLRB's position, a complete overlap of those claims. The Court said, not -- not yet ready to decide that point, we at least understand that there is a substantial overlap. Yet, with the Title I claim, which involves the internal union procedures used to violate the rights of the union member, both the NLRB and this Court have consistently held that those internal union procedures and that discipline, no matter what the motive, is excluded from the reach of the unfair labor practice.

As recently as Pattern Makers' I think in 1985, this Court reaffirmed that the union in its internal procedures was not subject to an unfair labor practice. Indeed, the amicus for the respondent, the

AFL-CIO in that case, argued that that exception reached so broadly that the NLRB could not reach the situation where the union tried to discipline members that resigned.

I would note that that position is entirely opposite from the one that the AFL-CIO takes in its amicus brief here today where they talk of the substantial overlap of the two claims. Indeed, I think a shift of that major proportion is such as to make the argument of the AFL-CIO what they term in their brief "content-free."

Additionally, the policy considerations of Section 10(b), as this Court noted in DelCostello, were specifically attuned to that balance which the Court was trying to find in DelCostello, the balance between the worker, the worker with the work place dispute, trying to assert his claim and the need for speedy resolution. The Court found that that was what Section 10(b) was attuned to and that that's what was at issue in DelCostello.

That is not what is at issue in this case. There is no work place dispute. There is no dispute over the collective bargaining agreement. There is no effort to set aside that private resolution of the dispute.

Thus, Section 10(b) is simply not an appropriate analogy for this case. Even if the Court were to determine that given the practicalities of the litigation, given the federal policies, given the available limitations, it had to look elsewhere, it is not a clearly more appropriate statute of limitations. Rather, it is an action by a member of a private organization to protect his federally protected rights and to ensure that his organization functions democratically.

DelCostello in some way does apply to this case. It applies in its directive that the prior practice of borrowing state statute of limitations is to continue in labor law as elsewhere unless the stringent conditions of DelCostello have been met. They have not been met here, and the three-year statute of North Carolina is to apply.

I will reserve my additional time for response, if I may.

QUESTION: Thank you, Mr. Gresham.

Mr. Miller, we'll hear now from you.

ORAL ARGUMENT OF CLINTON J. MILLER, III

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

The rights sued upon that are at issue in this

case today do not arise out of the federal Constitution, nor do they arise out of the civil rights laws. Rather, they arise out of a clearly stated continuum of the national labor policy in federal statutory labor law.

The facts have not been established in this case to the degree that my opponent has discussed them today. For instance, there is much dispute with respect to the characterization of the conduct of both the Plaintiff in this litigation, the Petitioner here, as well as the general chairman. Moreover, the --

QUESTION: Was this case tried?

MR. MILLER: No, Your Honor. It was dismissed on summary judgment.

QUESTION: (Inaudible) a statute of limitations?

MR. MILLER: That is correct, Your Honor.

Additionally, the Title V claim that the Plaintiff brought in the district court below was dismissed as procedurally defective. When the matter was granted interlocutory review on the DelCostello statute of limitations question, there was no cross-appeal with regard to the Title V claim that had been dismissed by the district court.

QUESTION: So, then we assume that the allegations set forth in the complaint are true.

MR. MILLER: That is correct, Your Honor. The only reason that I mentioned it was that the -- there were counter-affidavits that were filed in opposition to the motion for summary judgment. But I recognize, Your Honor, everything must be construed in favor of my opponent since we were the moving party with regard to limitations grounds.

The Petitioner, as well as the United States, and the other amici supporting the Petitioner's position, would have this Court narrowly construe its decision in DelCostello out of existence by failing to give effect to all that was said in that decision and by cutting too finely the language chosen to be analyzed.

In DelCostello, while this Court noted the general rule that in the absence of a specific statute of limitations in federal statutory law, it is not to be assumed that Congress intended that there be no statute of limitations, but rather to borrow from some other source, usually state law. It further noted that state legislatures do not devise their statutory statutes of limitations with -- with national interests in mind.

In so doing, this Court noted that United Auto Workers v. Hoosier Cardinal, the bench mark that we're using here for the normal rule of application of a state statute of limitations, involved a straight Section 301

LMR claim by a union, not a member, against an employer that did not at all involve arbitration.

In those circumstances, it's hardly surprising that the ordinary state statute of limitations with regard to contracts was applied. We learned later that the reason the six-year oral contract statute was applied was because this Court felt the 15-year written statute of limitations on written contracts did not provide sufficiently for the rapid resolution of labor disputes. Labor disputes were spoken of generically.

DelCostello did, in fact, involve a hybrid suit, that is, a suit by the member against his employer for breach of the contract and a suit against his union for breach of the duty of fair representation implied in the law owing to the exclusive representative status that the organization has.

This Court found that, obviously, those claims were inextricably interdependent because of its previous decisions in Vaca v. Sipes and Hines v. Anchor Motor Freight for that reason, deciding that there could not be one statute applicable to the employer without a comparable statute being applicable to the union in the case if the party were to be afforded complete relief.

The Court noted that these difficulties cannot be tolerated in the Court's view where there is a

federal statute that is designed to accommodate similar interests. And that's the key here. Has Congress spoken clearly enough with respect to Landrum Griffin Title I rights? We submit that it has.

In DelCostello, it was very important to this Court that the National Labor Relations Board has consistently found all breaches of the duty of fair representation to constitute unfair labor practices, thus triggering the operation of Section 10(b) with regard to any charge filed with the general counsel at the Board.

However, the Petitioner, as well as the amici on that side of argument, totally ignore in their briefing the fact that the National Labor Relations Board has taken a consistent view, not always agreed to by the AF of L-CIO, that any union coercion constitutes the basis for an appropriate 8(b)(1)(A) charge. There is ample precedent for the National Labor Relations Board having so held, and even as late as 1985.

This Court in DelCostello noted that this Court itself has never passed upon the validity of that Board policy, that is, that all breaches of the duty of fair representation are unfair labor practices. Nonetheless, that wasn't important to this Court because the family resemblance was there. We submit that since

the Board also has found any form of union coercion that would be comparable to a Landrum Griffin Title I charge to also constitute an unfair labor practice, it also bears a family resemblance, thus triggering the application of Section 10(b).

QUESTION: (Inaudible) material in this record then to file an unfair labor practice charge?

MR. MILLER: Yes, Justice White, if the Plaintiff had reduced to writing his allegations that he made --

QUESTION: Yes.

MR. MILLER: -- then he could have filed an unfair labor practice charge with the general counsel.

QUESTION: And he would have had to do it in six months?

MR. MILLER: That is correct, Justice White. He would have had to have filed it within six months.

QUESTION: And if he also sued, you say they both should have been dismissed on statute of limitations grounds.

MR. MILLER: That is correct, Justice White, and that raises the important point. If he couldn't file it as an unfair labor practice charge, why should he -- as the National Labor Relations Board clearly holds that he can under its precedent, why should he be

permitted to go to court?

The facts of this case are -- are truly peculiar on this point, Justice White, in that --

QUESTION: Because he -- you concede he could have gone to court if he had filed it on time.

MR. MILLER: That is --

QUESTION: So, there wasn't exclusive -- there is not exclusive jurisdiction.

MR. MILLER: No, Justice White, I am not intimating that there is. I -- I'm merely noting that just as the Board has consistently held that all breaches of a duty of fair representation are unfair labor practices, although most of that ends up in litigation, so too it has consistently held that any form of union coercion with regard to Landrum Griffin rights or the exercise thereof are also unfair labor practices, thus triggering the application of 10(b).

In this case, the very --

QUESTION: But if a union wants to file a breach of duty case against the union, it has to do so in six months?

MR. MILLER: I'm sorry, Justice White? If a member?

QUESTION: If a union member wants to sue a union for breach of its duty of fair representation --

MR. MILLER: Yes, Justice White.

QUESTION: -- he can go right to court.

MR. MILLER: That is correct, Justice White.

QUESTION: And he must do it in six months?

MR. MILLER: He must do it within six months from the date of accrual.

Many of the defects that are discussed here today by the Petitioner are satisfied in the accrual analysis. For instance, an action has been consistently held by the circuits to accrue only when a member knows or in the exercise of reasonable diligence should know of the acts constituting a claim of breach of the duty. With respect to investigation, that won't occur until adequate investigation and knowledge is present.

In this case the counsel sitting at this table for Petitioner wrote a letter to the president of the union -- this is in the record -- stating that since the organization had not adjusted matters satisfactorily to his -- to his client, that he had advised his client to sue within six weeks, stating that -- that suit -- that he had recommended to his client to sue by September 15, 1983. Yet, this -- this counsel and Mr. Reed waited nearly two years after the sending of that letter.

This case doesn't present a very good one for retention of counsel as a factor to be considered

because counsel was already retained. The action did not accrue until the counsel wrote a second letter to the organization noting his dissatisfaction with the resolution of the matter with the organization itself.

Moreover, the factors with regard to practicalities of litigation that are mentioned by the Petitioner were also considered by this Court in DelCostello, the very same factors. It was for that reason -- that -- that is the presence of the very factors that we're talking about today -- that this Court chose to apply the six months from Section 10(b) of the LMRA rather than the shorter arbitration statutes from the states. With regard to those litigation factors, this Court determined that was just insufficient time.

We would submit that therefore the presence of the factors that are mentioned by the Petitioner have already been considered by this Court and have already been determined to be fully served by applying Section 10(b) of the Act.

This Court also observed in DelCostello that it was not only the private settlements under the labor laws that were at issue, but also the formation of the agreement which is too little recognized by the Petitioner and amici on that side. Collective

bargaining consists of negotiating the agreement and administering that agreement.

As the court below and as the Third Circuit noted in the Steelworkers case, which is the principal case for the pro-Costello -- DelCostello view here, if internal problems are permitted to fester too long, union officials become overly concerned with regard to their political struggles and that detracts from their ability to deal with management.

In other words, whether a breach of either Landrum Griffin or the duty of fair representation occurs internally or externally, the effect is the same. Both have been held by the National Labor Relations Board to constitute unfair labor practice charges. There is no reason to treat them differently.

Indeed, the rights that are protected by Landrum Griffin are the very same rights that are at the core of the federal labor laws, the Section 7 rights that were granted by the Wagner Act. In -- in Taft Hartley, the Congress acted to ensure that those rights, the rights to engage in concerted activity, were not taken away by unduly harassing tactics by unions, added a whole class of unfair labor practice charges in Section 8(b).

In 1959 with Landrum Griffin, the Congress

again was concerned that the rights that were so granted and so insulated from harassment by Taft Hartley would not be driven by undemocratic processes, but we're still talking about the rights to collective -- to collectively bargain. We're not talking about constitutional rights.

As this Court soundly noted in Steelworkers v. Sadlowski, the bill of rights in Landrum Griffin are not coextensive with First Amendment rights because the offering of the bill of rights by Senator McClellan on the floor was modified by virtually unanimous adoption of a floor amendment which permitted the union reasonable regulation of those rights.

This Court does not permit reasonable regulation of First Amendment rights. And in that regard --

QUESTION: How -- how does that bear on the statute of limitations issue? Are you suggesting that constitutional rights, because they're at the top of one hierarchy, must have the longest statute of limitations?

MR. MILLER: Not at all, Mr. Chief Justice. I'm merely suggesting that constitutional rights will be handled differently because there's an appropriate state statute. In other words, this Court has determined with regard to, for instance, the civil rights acts, 1983 and

1981, that those are more in the nature of personal injury, and the Constitution is at the core of the enforcement of those rights.

My point here is that one can't leap to the conclusion that just because the statute says bill of rights, that that automatically makes it civil rights. These are labor law rights, federal statutory labor law rights. And this Court has consistently made that clear. By quoting Professor Cox that Landrum Griffin being a product of political compromise, one can't absolutely apply every word, but must realize the context in which it arose. This Court has consistently done that and has recognized that those rights are not coextensive with the First Amendment.

Again, it just bolsters the argument that the organization has here that this class of rights are labor law rights. They all relate back to the right to bargain collectively. They all were an attempt to assure democratic processes within the union so that bargaining collectively meant something. The union can't, by its reasonable regulation, take away or detract from those rights.

If it does, it perforce commits an unfair labor practice and it should dealt with appropriately but within a relatively short span of time because the

rapid resolution of labor disputes of any character, internal or external, are at the core of the national labor policy whether they deal with private settlements or whether they deal with the formation of agreements initially.

Some lower courts prior to this Court's decision in Plumbers', as observed by the AFL-CIO in this case, felt that one had to analyze the propriety of a Section 301 action to enforce a union constitution. This Court had little difficulty in holding that Section 301 was available as a remedy for a violation of a union constitution.

For the same reason that this Court found Section 301 available to remedy a violation of a union constitution, we suggest that Section 10(b) amply supports an appropriate limitations period for enforcement of the rights here. It should be a consistent right. It should be the same time period for all violations, and it should be Section 10(b) because that governs unfair labor practice charges, and the National Labor Relations Board has consistently held violation of Landrum Griffin Title I bill of rights claims are susceptible to being filed as unfair labor practice charges.

Whether these rights can be characterized as

economic or as civil, the point is that they're part of the fabric of federal statutory labor law which is intended to protect the fundamental statutory right to act collectively. That demands quick resolution so that the collective bargaining relationship remains stable. It doesn't have to deal with private settlements. It deals with the formation and maintenance of the agreement itself.

Overall an application of Section 10(b) as the appropriate statute of limitations in this case will support the federal labor law policy of quick resolution of labor disputes. The application of the three-year North Carolina personal injury statute will not promote that interest and is not related thereto, it being at most related to civil rights or constitutional rights actions which are not at issue here. These are labor rights. These rights simply cannot be divorced from the statutory background in which they arise.

The federal statute of limitations is obviously more appropriate. The federal policy at stake is clear. The practicalities of litigation are no different in this matter than they are in actions for breach of the duty of fair representation. This Court chose Section 10(b) in DelCostello. It should choose it here mandating affirmance of the decision below.

Thank you very much.

QUESTION: Thank you, Mr. Miller.

Mr. Gresham, you have 10 minutes remaining.

REBUTTAL ARGUMENT OF JOHN W. GRESHAM

MR. GRESHAM: I think the most important point that I would make on rebuttal is the great disagreement I have with Mr. Miller's contention with the question from Justice White that this would constitute an unfair labor practice that Mr. Reed could have, in fact, gone to the Board. I think this Court's law and cases -- I think the very recent decision of the Third Circuit in NLRB v. Local 139 which said that the 8(b)(1)(A) should not be interpreted so literally as to make it a unfair labor practice to enforce compliance with internal rules and policy is precisely what is at fact here.

The government in its brief makes exactly the same point. There is very, very little overlap between the Title I claim and the unfair labor practice claim.

The year after Title I was passed in its 25th annual report, the Board itself said we don't reach these disputes, these internal union matters, even if there is a bad motive. For -- for the union to now argue essentially, as I understand it, that Title I really wasn't needed, that -- that Senator McClellan's bill was simply to in somehow reinforce rights that were

already granted, I think would make a mockery of the legislative history of Title I.

QUESTION: Wouldn't you think there are some things that broadly are matters of internal union business that are unfair labor practices?

MR. GRESHAM: There are and I have been able to identify two areas where the Board has taken those. One is where they beat the fellow up. The second is where they try to discipline because he has gone to the Board or he has gone to the Department of Labor before. They protect their jurisdiction.

QUESTION: Well, and are -- and are those -- are those suable on without going to the Board?

MR. GRESHAM: They would be suable on as a Title I claim, yes.

QUESTION: Yes, exactly.

And even in those circumstances you think the six months should not apply?

MR. GRESHAM: That is correct because there is such a minute overlap between the two. We don't have to reach that in this case because I think it -- it is clear that this type of discipline simply would not constitute an unfair labor practice under any of this Court's decision, under the recent Third Circuit decision, under the Board's own language.

The proviso -- I did not hear Respondent mention that all the proviso that is -- that is included in 8(b)(1)(A) which is that it does not reach these mechanisms. And I think that -- that keeps this from being an analogy.

And I think the important point there is that when this Court looked in DelCostello to see whether 10(b) should apply, I think the terms this Court used was "substantial overlap." I would -- I would submit to this Court that at most in this case there is a very minimal overlap.

I think as -- as -- as the Solicitor General indicated in his brief, these actions vindicate important public rights.

There is no basis for this Court to depart from its usual practice. None of the problems noted in DelCostello are present here. There is no interference, direct interference -- and I believe again that is the language of this Court in DelCostello -- with the collective bargaining agreement. Therefore, the usual practice is the practice that is available here.

Thank you.

QUESTION: Thank you, Mr. Gresham.

(Whereupon, at 2:43 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-1031 - G. P. REED, Petitioner V. UNITED TRANSPORTATION UNION, ET AL

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

(REPORTER)