

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,  
Petitioner V. JOSEPH E. O'NEILL, ET AL.

CASE NO: 89-1493

PLACE: Washington, D.C.

DATE: January 14, 1991

PAGES: 1 - 45

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

**LIBRARY**  
SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

-----X  
AIR LINE PILOTS ASSOCIATION, :  
INTERNATIONAL, :  
Petitioner :  
v. : No. 89-1493  
JOSEPH E. O'NEILL, ET AL. :

-----X  
Washington, D.C.  
Monday, January 14, 1991

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:03 a.m.

APPEARANCES:  
LAURENCE GOLD, ESQ., Washington, D.C.; on behalf of the  
Petitioner.  
MARTY HARPER, ESQ., Phoenix, Arizona; on behalf  
of the Respondents.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	LAURENCE GOLD, ESQ.	
4	On behalf of the Petitioner	3
5	MARTY HARPER, ESQ.	
6	On behalf of the Respondents	18
7	REBUTTAL ARGUMENT OF	
8	LAURENCE GOLD, ESQ.	
9	On behalf of the Petitioner	42
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 PROCEEDINGS

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in No. 89-1493, the Air Line Pilots  
5 Association, International v. Joseph O'Neill.

6 Mr. Gold.

7 ORAL ARGUMENT OF LAURENCE GOLD

8 ON BEHALF OF THE PETITIONER

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

11 This case concerns the duty of fair  
12 representation this Court has implied from the Railway  
13 Labor Act and the National Labor Relations Act. In  
14 particular it concerns the end of a long and bitter strike  
15 well-chronicled in the press between the Air Line Pilots  
16 Association and Continental Airlines and its Chief  
17 Executive, Mr. Lorenzo.

18 The strike began in '83 after -- 1983 after  
19 Continental went into bankruptcy and abrogated the  
20 collective bargaining agreement between the parties. And  
21 the events here concern the situation in August,  
22 September, and October of 1985. At that point, the union  
23 was faced with the following facts of life. One, despite  
24 substantial expense and unstinting effort, the union had  
25 failed to significantly affect Continental's business.

1 Secondly, Continental at that point had 1,600 working  
2 pilots, either permanent replacements or crossovers, and  
3 there were 1,000 strikers.

4 Third, Continental, in recognition of that, had  
5 withdrawn recognition of the union. Fourth, Continental  
6 had put out what was called its 85-5 vacancy bid which  
7 would have tied up all the most desirable jobs in the air  
8 line, the captain and first officer jobs, for the  
9 foreseeable future. And finally, insofar as strikers had  
10 bid for those jobs, Continental had sued to invalidate  
11 those bids as fraudulent.

12 Against that background, the union, after  
13 internal meetings and discussions, authorized the  
14 negotiation of the a settlement. As matters turned out,  
15 given the difficulties to only be expected in such a  
16 bitter strike and with such a large company, the  
17 settlement proceeded under the auspices of the bankruptcy  
18 court, which had jurisdiction over Continental at that  
19 point. After very intensive efforts, a long, complex  
20 document emerged called the Order and Award which is in  
21 the joint appendix.

22 QUESTION: Call the what award? The Order  
23 and --

24 MR. GOLD: Order and Award. Yes. It was issued  
25 as an order of the bankruptcy court. It's undisputed that

1 all but two of its terms were negotiated between the  
2 parties, but it was under the auspices of the court.  
3 Court had attempted as part of the reorganization as far  
4 back as July to get the parties to settle this dispute,  
5 because it was an obstacle to reorganization. And finally  
6 it was in this October period that the union came forward.

7  
8 The court had also indicated that it wanted, if  
9 it was going to put its efforts into it, to have  
10 authorized representatives and to have a binding  
11 conclusion to the matter. And that, too, was very much in  
12 the union's interest as the negotiators saw it, because of  
13 the grave distrust between the parties. It was a  
14 substantial matter to the union that whatever was  
15 concluded would be enforceable, because, as I say, the  
16 level of distrust between Mr. Lorenzo and ALPA was  
17 substantial at the time.

18 In late October this agreement as embodied in  
19 the Order and Award was reached, and thereafter this  
20 lawsuit followed. The lawsuit was brought by a class of  
21 striking pilots alleging that the union, in taking the  
22 course that it did, had violated the statutory duty of  
23 fair representation.

24 After 18 months of --

25 QUESTION: (Inaudible) statutory.

1 MR. GOLD: Yes. And we acknowledge that and we  
2 acknowledge the bite of the duty in terms of its  
3 obligations of honesty and good faith. Those -- those  
4 aspects --

5 QUESTION: But not arbitrariness?

6 MR. GOLD: Not arbitrariness in the sense that  
7 the court of appeals understood arbitrariness.

8 The district court, after extensive discovery  
9 and on the union's motion for summary judgment, concluded  
10 that there's nothing to indicate that the union made any  
11 choice other than on the best deal that the union thought  
12 it could construct and on that view of the standard to be  
13 applied determined that summary judgment was appropriate.

14 On appeal, the court of appeals disagreed on two  
15 grounds. First, the court of appeals took the position  
16 that the duty of fair representation goes not only to the  
17 union's bona fides, but also provides for judicial review  
18 of the substance of the union's action. As the court put  
19 it, union actions must be based on relevant, permissible  
20 factors and must be a rational result of such factors, as  
21 rational was determined either by a judge or a jury.

22 And the court of appeals determined that a  
23 finder of fact could find that the agreement put members  
24 in a substantially worse position than if no settlement  
25 had been made and the strike had been abandoned and

1 individuals had made unconditional offers to return.

2 In addition, the court --

3 QUESTION: But would you think that that was  
4 within the district court's finding that the union got the  
5 best deal it could?

6 MR. GOLD: Yes.

7 QUESTION: Including no deal, in effect -- just  
8 abandoning the strike? Is that clear? I'm not sure.

9 MR. GOLD: The -- well, we believe that the  
10 court of appeals' opinions said that the union proceeded  
11 on an honest, good-faith determination that this was the  
12 best way to proceed and that that satisfied the standard.  
13 The court of appeals, on the other hand as we understand  
14 it, and this is the line of demarkation, said that the  
15 court of -- the trier of fact should have determined  
16 whether this deal was good enough when compared with what  
17 would have happened hypothetically in the event that the  
18 union had made an unconditional offer to return to work.

19 QUESTION: The best way to proceed taking into  
20 account what? Is there a wade into that, the damage to  
21 the power of the union that would have occurred from  
22 unconditionally giving in after a long strike and bitter  
23 strike?

24 MR. GOLD: The --

25 QUESTION: Is that part of the factor that the



1 union was allowed to take into account?

2 MR. GOLD: As we understand the court of  
3 appeals' decision, the host of uncertainties and the  
4 nature of the factors that are to -- I'm sorry, the role  
5 of the host of uncertainties that the union and the  
6 striking pilots faced and the calculus of factors that are  
7 to be taken into account are both disregarded. We don't  
8 know from reading the court of appeals' opinion what goes  
9 into this calculus. And that is one of our prime  
10 concerns.

11 QUESTION: Well, what do you think for purposes  
12 of a good-faith test which you are urging? Do you take  
13 into account for good faith the fact that the union was  
14 looking to its national power and how that would be eroded  
15 by losing a strike of this sort that had gone on for 2  
16 years and was so bitter? Or is good faith to be  
17 determined solely on the basis of what was good for the  
18 members of this bargaining unit?

19 MR. GOLD: Well, it seems to us that if we reach  
20 that point, and there does not seem in this case to be any  
21 evidence opposing that conundrum, that the union is  
22 entitled to take into account the -- the total situation  
23 of the pilots. After all, these are people following or  
24 calling with a skill, and we certainly would believe that  
25 if --

1 QUESTION: To sacrifice the members of this  
2 bargaining --

3 MR. GOLD: Well --

4 QUESTION: -- unit for the benefit of members of  
5 other bargaining units.

6 MR. GOLD: With all deference, that isn't what I  
7 said.

8 QUESTION: Well, no, I'm -- well, it's the way I  
9 would put it. Are they and --

10 MR. GOLD: No, I --

11 QUESTION: I mean, it's like the word sacrifice.  
12 It's not necessarily a bad thing. The union has the  
13 interest of many bargaining units nationally. It might  
14 well intelligently decide that we could get a better deal  
15 from the employer of this bargaining unit by throwing in  
16 the towel on unconditionally giving up the strike, but  
17 that would impair our position nationwide and other  
18 bargaining units would be hurt. Now, can they take into  
19 account other bargaining units in the deal that they make  
20 or must their -- all their actions be for the best  
21 interest of the single bargaining unit at issue?

22 MR. GOLD: I think the union can take into  
23 account the total labor market situation. What I started  
24 to say is that if the union determines that tossing in the  
25 towel would undermine its situation -- would undermine the

1 total situation facing pilots overall, including the  
2 striking pilots, who have a calling, have a skill, and  
3 will only get on in the labor market for that calling and  
4 skill what the union is able to do, that would be a  
5 legitimate consideration.

6 Now where one would come out if the union was  
7 firmly of the view that it would advance the situation of  
8 A and B somewhere else while harming these people, I find  
9 a much more difficult question. But I do think that, in a  
10 world in which you have competition in the product and  
11 service markets for the union be forced to look only at  
12 the situation of the particular unit, as if it was a  
13 discrete entity, when in fact it isn't, would be to --  
14 wouldn't be to further the notion the court of appeals  
15 had, mainly a rationality standard. It would be to  
16 require the union to proceed in a way that is irrational.

17 I think we're very, very far from that on  
18 anything in this case. The negotiators proceeded who were  
19 out of this system's board, this master executive counsel.  
20 The Continental system appeared to proceed and took their  
21 view as they were trying to get the best deal that they  
22 could get, not the best deal for -- in a different and  
23 wider perspective.

24 It's our view that the court of appeals erred in  
25 subjecting this agreement to this kind of substantive

1 scrutiny. We believe that the duty of fair  
2 representation, as the Court said in Steele, is a duty to  
3 act in behalf of all those for whom it acts without  
4 hostile, namely irrelevant or invidious, discrimination  
5 against them.

6 QUESTION: Mr. Gold, the court of appeals used  
7 the word "arbitrary." Do you say that the -- that  
8 arbitrary has no place in the test or that they simply  
9 misunderstood the meaning of the word arbitrary?

10 MR. GOLD: We believe that they misunderstood  
11 the meaning of the word arbitrary. As we detail in our  
12 brief starting on page 14, the court has used different  
13 formulations to delineate the scope of the duty of fair  
14 representation, and the court has used the word arbitrary  
15 in doing so. We believe that the fairest reading of all  
16 the cases is that arbitrary in that sense means hostile  
17 action against an individual or a subgroup of the  
18 bargaining force.

19 In other words, the union generally processes  
20 grievances by doing certain preliminary steps. An  
21 individual shows that without any justification, any  
22 reason, the union doesn't do those things for him and he  
23 is harmed. We would think that that is arbitrary and that  
24 it adds something to the concept of discriminatory,  
25 because discrimination, certainly as it was used in

1 Steele, has a notion of a class-based wrong.

2 So what we would suggest is that this test is a  
3 test of good faith and honesty of purpose as the Court  
4 said in Ford Motor and that what arbitrary means is that  
5 discrimination, which is either class based or is simply  
6 inexplicable and harmful, is a wrong.

7 QUESTION: Well, Mr. Gold, that was going to be  
8 my question. Suppose the union commits what in other  
9 circumstances, say, in the legal profession, would be  
10 malpractice. It misses a grievance deadline. But it's in  
11 very good faith. It -- now is there liability there?

12 MR. GOLD: No, the essence of our argument is  
13 that this duty doesn't create a liability for honest  
14 mistakes, so --

15 QUESTION: So we're talking here about a  
16 standard that applies across the board, administration of  
17 the contract, grievances, routine procedures, as well as  
18 the more complex context of conducting bargaining?

19 MR. GOLD: Well, we make three different  
20 arguments in support of our position that the court of  
21 appeals was wrong here. The first is the one you've just  
22 stated. The second is that at the very least this test of  
23 honesty and good purpose ought to apply in the most  
24 complex situations, namely the negotiation of agreements  
25 or the renegotiation of agreements even if it doesn't

1 apply in what are arguably simpler cases involving  
2 grievance handling.

3 And third, we argue that the court of appeals  
4 was certainly wrong in terms of the way it understood  
5 whatever duty of adequate representation that exists, that  
6 instead of looking at the matter in terms of the practical  
7 and legal uncertainties at the time, looking at the  
8 situation that actually faced the union, and looking also  
9 at the fact that the ultimate agreement provided for  
10 benefits for the striking employees such as severance pay,  
11 recall in seniority order, and so on that were not legally  
12 required, that this was not an agreement which was -- is  
13 challengeable even under a duty of care.

14 QUESTION: Well, I -- on duty of care, you'll  
15 recall from the Rawson case where the union allegedly  
16 negligently contributed to the death of mine workers, we  
17 said that the union could not be sued under State law.  
18 And now you're saying there's a broad immunity based on a  
19 good-faith standard under Federal law. I know of --

20 MR. GOLD: Well, basically --

21 QUESTION: I know of no parallel in all of the  
22 law, other than for sovereign immunity, which gives an  
23 immunity that tests -- is that extensive.

24 MR. GOLD: The -- as we understand Rawson,  
25 Justice Kennedy, the Court also said that a negligence

1 claim would not be actionable under the duty of fair  
2 representation. It was not simply that it would not be -  
3 - there would be an actionable State law claim. So that  
4 the standard is certainly, from what we know from this  
5 Court's cases, higher than negligence. But our --

6 QUESTION: Mr. Gold, I had really thought that  
7 our cases had spoken in terms of a reasonableness  
8 component to the arbitrary standard here and that you  
9 would have us read that out of the standard and limit it  
10 to negotiations or actions taken in bad faith or with  
11 hostility. Now, do you really find support in our case  
12 law for that kind of a limitation, or don't we find that  
13 the arbitrary component of Vaca against Sipes' standard  
14 imports some degree of reasonableness inquiry?

15 MR. GOLD: Well, if I can, there are two things  
16 I'd like to say about that. First of all, as we attempt  
17 to develop in our reply brief, the wide range of  
18 reasonableness language is in Ford Motor Company -- this  
19 is at pages 2 to 4 of our reply brief. And the context  
20 there was to determine whether a distinction between  
21 veterans or nonveterans was a distinction which was  
22 invidious and irrelevant or relevant to the union's task.  
23 So the reasonableness was in setting up the  
24 classifications.

25 As we point out, the Court did not go on to see

1 whether veterans got too much seniority or too little; and  
2 we certainly acknowledge that, in terms of drawing  
3 distinctions, there is a reasonableness component.

4 The second point I would like to make is that  
5 the Lockridge case which is the last case which fully  
6 explores the nature of this duty, like Steele, which was  
7 the first case, talks entirely in terms of honesty and  
8 good faith.

9 In terms of why there should be such a duty, if  
10 I could in -- given Justice Kennedy's question, we believe  
11 that the answer is that this is a statutory duty, and it  
12 comes out of a statute whose overriding function was to  
13 take judges and juries out of the substance of labor  
14 relations and to put those tasks into the hands the  
15 parties. We discuss and cite the H.K. Porter case and  
16 Senator Walsh's famous statement there that the act takes  
17 the parties to the negotiating table and leaves them  
18 there.

19 To have judges and juries saying this deal is  
20 not good enough, even though it was honest, even though it  
21 was based on a fair judgment of the circumstances and that  
22 you had to do it a different way is to get --

23 QUESTION: You don't suggest that fairness has  
24 any part of it, do you?

25 MR. GOLD: Well, fairness in the sense of --



1 QUESTION: Is it (inaudible) --

2 MR. GOLD: -- a duty of loyalty, fairness in the  
3 sense of --

4 QUESTION: I know, but you sounded like you were  
5 saying substantively it was fair.

6 MR. GOLD: You mean --

7 QUESTION: The terms agreed upon were fair.

8 MR. GOLD: We believe that we can meet --

9 QUESTION: I know, but you don't --

10 MR. GOLD: -- that standard, but we're --

11 QUESTION: You mean judges are supposed to  
12 decide whether they were fair or not?

13 MR. GOLD: Well, no. We are arguing that that  
14 is precisely what labor relations is not about. There are  
15 a lot of mean, unfair deals out there when you take into  
16 account that the company had the power and the union had  
17 less.

18 QUESTION: Oh, it -- you don't really -- you've  
19 been living -- the unions have been living with this Vaca  
20 standard for a long time, and I have noticed in all the  
21 cases that come around here that you've been really hurt  
22 very much by that element in it. I had thought the judges  
23 thought about arbitrariness that no fool in his right mind  
24 would ever have agreed to this. This is completely  
25 irrational.

1           Now, that's a -- that's a -- that isn't looking  
2 over the shoulders of the union or really second guessing  
3 you.

4           MR. GOLD: Well, that is -- that is certainly  
5 not the view -- the view you just stated is certainly not  
6 the view of Vaca that the Fifth Circuit in embraced in  
7 this case.

8           QUESTION: That may be. But haven't you been  
9 living with the arbitrariness standard interpreted in that  
10 way for a long time?

11           MR. GOLD: We have been living with a regime  
12 which is going to end with this case one way or another in  
13 which different courts have taken different views. The  
14 Seventh Circuit, for example, has consistently taken the  
15 view that I have just outlined. Other courts have been  
16 back and forth, some distinguishing between negotiation  
17 and some not. I do want to emphasize that --

18           QUESTION: Does the Seventh Circuit go right  
19 across the board with this test?

20           MR. GOLD: It had up until the Thomas case, when  
21 it appeared to draw a distinction between negotiation and  
22 nonnegotiation.

23           QUESTION: Well, that's the last case, isn't it?

24           MR. GOLD: I --

25           QUESTION: In the Seventh Circuit?

1 MR. GOLD: I believe there is subsequent case  
2 which could be fairly read to go back the other way, but  
3 I'm not positive.

4 I'd like to, if I could, save a moment or two  
5 for rebuttal.

6 QUESTION: Very well, Mr. Gold.

7 Mr. Harper, we'll hear now from you.

8 ORAL ARGUMENT OF MARTY HARPER

9 ON BEHALF OF THE RESPONDENTS

10 MR. HARPER: Mr. Chief Justice, and may it  
11 please the Court:

12 We are here on a court of appeals reversal of  
13 summary judgment, and in analyzing this case, we cannot  
14 overlook that fact. The Fifth Circuit Court of Appeals,  
15 in reversing the district court, correctly applied the  
16 summary judgment standards of the Fifth Circuit and of  
17 this Court.

18 In addition, in analyzing the union's conduct,  
19 the Fifth Circuit court of appeals applied the three-  
20 prong standard set forth in *Vaca v. Sipes*, which has been  
21 around and the unions have been dealing with for 24 years.  
22 What the union wants to do today is to convince the Court  
23 to change the law so that it can avoid liability to 1,400  
24 striking pilots who remained out on strike for 2 years.

25 In essence, what the union wants is a standard

1 of conduct that is based upon subjective hostility. In  
2 other words, they want to be immune from having their  
3 substantive decisions reviewed at all.

4 It should not come as any surprise to the Court  
5 --

6 QUESTION: What do you think the word  
7 "arbitrary" suggests to courts of appeals? Is -- are they  
8 supposed just to say, well, the union is guilty or is  
9 liable because we wouldn't have done what they did?

10 MR. HARPER: Your Honor, I don't think it's that  
11 complicated at all.

12 QUESTION: (Inaudible) not answering my question  
13 --

14 MR. HARPER: What arbitrary means I believe,  
15 Your Honor, is simply the question as to whether a  
16 reasoned decision was needed and whether a reasoned  
17 decision was made. And in deciding that, what needs --

18 QUESTION: The court is permitted to say, well,  
19 we wouldn't have done it this way because we don't think  
20 it was reasonable?

21 MR. HARPER: Absolutely not, Your Honor. And  
22 second-guessing is not what the court --

23 QUESTION: What are they -- what should they say  
24 then?

25 MR. HARPER: They should look at the decision,

1 Your Honor, and try to find out and look at what the  
2 relevant factors were that the union officials considered  
3 in making a decision and then determine if the decision  
4 was based upon an in fact consideration of those factors.  
5 And if in fact the judgment or conduct is not based upon a  
6 reasoned consideration of relevant union factors, then the  
7 conduct is arbitrary. But this --

8 QUESTION: How's that any different than  
9 negligence?

10 MR. HARPER: It's a higher standard, Your Honor,  
11 than negligence.

12 QUESTION: Well, you say so. But how do you  
13 distinguish between a negligently conducted negotiation  
14 and an arbitrary one?

15 MR. HARPER: You have to look at the factors,  
16 Your Honor, that went into the conduct that the union  
17 followed and look at the actual circumstances that were  
18 taken into consideration which were going to be numerous,  
19 and then balance to see if the decision was made based  
20 upon a rational consideration of those factors.

21 QUESTION: Because --

22 MR. HARPER: That's a higher standard than  
23 simply breaching the -- breaching a duty or a negligence.

24 QUESTION: Well, it may not have a community  
25 standard of care component. I suppose that's the only

1 difference. I find it very, very difficult to distinguish  
2 the two.

3 MR. HARPER: Those are difficult items to  
4 distinguish, Your Honor, and what we are dealing with is a  
5 continuum of arbitrariness, and there comes a point in  
6 time like in the Rawson case where this Court has decided  
7 that an allegation based upon pure negligence is not  
8 sufficient to staying a breach of duty of fair  
9 representation. But an allegation based upon conduct that  
10 is more serious than that, not taking into consideration  
11 relevant factors, and then moving off and making the  
12 decision that's not based upon those factors, it's  
13 arbitrary, Your Honor.

14 QUESTION: Mr. Harper, would you standard  
15 require detailed examination of how the union officials  
16 went about reaching this agreement? You say it has to  
17 have -- they have to must have considered all the factors.  
18 That opens up, I presume, just, you know, what went on at  
19 the meetings of the officials who were given the  
20 responsibility for trying to settle the thing.

21 MR. HARPER: Mr. Chief Justice, it would require  
22 the plaintiffs in this type of situation to identify as  
23 best they can through discovery and the trial the factors  
24 that were actually in fact considered by the union  
25 negotiators or the union officials when they made a

1 decision and then would have to go step further to  
2 demonstrate whether or not the decision was based upon a  
3 consideration of those factors.

4 In this case, what has happened, Your Honor, is  
5 many of the arguments that have been advanced here to  
6 justify what the union did are post hoc arguments of  
7 counsel.

8 QUESTION: What if a court reviewing the union's  
9 conduct feels, yes, the union considers all -- considered  
10 all the factors that it said it was going to consider.  
11 But in the view of the court there was a factor that it  
12 should have considered but didn't.

13 MR. HARPER: Your Honor, the court does not  
14 substitute as judgment for that and if you go back to the  
15 case here, the O'Neill case, and look at the basis upon  
16 which the Fifth Circuit rendered its opinion, which is the  
17 Tedford opinion, you will find exactly that sort of  
18 analysis in the Tedford opinion. In the Tedford opinion,  
19 there are a couple of judgments that the union officials  
20 could have made. The court of appeals went out of its way  
21 to say we are not going to select whether or not it was  
22 correct for the union to do one or the other. All we're  
23 going to do is to analyze that the decision that was made  
24 -- to ensure it was based upon relevant factors and that  
25 the judgment was based upon relevant factors. If it is,

1 it would be arbitrary.

2 QUESTION: And if a court says we see a factor  
3 we think the union should have considered. The union  
4 didn't purport to consider it, it didn't consider it, that  
5 would allow it to set aside the decision?

6 MR. HARPER: Not necessarily, Your Honor.

7 QUESTION: But it's a possibility?

8 MR. HARPER: The trier of fact may find that in  
9 the totality of the circumstances, the union didn't act  
10 rationally or reasonably in going about the decision that  
11 it made. Take into consideration factors as evidence that  
12 the union officials might not have considered which would  
13 support the conclusion by the trier of fact that the  
14 conduct was arbitrary.

15 QUESTION: But of course if you say the union  
16 didn't act reasonably, that isn't far from a negligence  
17 standard, is it?

18 MR. HARPER: Under some circumstances, Your  
19 Honor, in this area it -- the line starts to fuzz. Well,  
20 we do not believe --

21 QUESTION: Well, you could -- could you live  
22 with a standard that says that the court should ask if any  
23 rational union negotiator could possibly have come to this  
24 conclusion?

25 MR. HARPER: We're not --



1           QUESTION: Which is certainly more a -- that's a  
2 -- that gives them a lot more room than insisting that  
3 they have to be reasonable.

4           MR. HARPER: Your Honor, all we are are -- our  
5 position is that all we need to have is an obligation upon  
6 these union officials to consider relevant facts and make  
7 a decision based upon those.

8           QUESTION: Well, if a union -- if the court  
9 thinks a -- that there are factors a union -- they think  
10 the union didn't consider, shouldn't they also ask, well,  
11 would any rational person -- could any rational person  
12 have put those factors aside?

13           MR. HARPER: That's a relevant consideration  
14 when you evaluate at the trial level the conduct of the  
15 union. In this case, for example, the record does --  
16 shows or demonstrates that during the critical negotiation  
17 the individuals who made the decision did not consider an  
18 unconditional offer to return to work as a viable  
19 alternative before they decided to settle with Continental  
20 under the terms and conditions that they did. That is  
21 evidence of arbitrary conduct, we (inaudible).

22           QUESTION: Mr. Harper, the word arbitrary is not  
23 a -- really a new one for us. We've been using it for  
24 half a century to review agency action under the  
25 Administrative Procedure Act. I think Mr. Gold has

1 probably asked us to use it a number of times in that  
2 context -- arbitrary, capricious, and abusive discretion,  
3 or otherwise not in according to the law. Do you think  
4 that its meaning here in reviewing union action is about  
5 the same as its meaning in reviewing agency action under  
6 the Administrative Procedure Act?

7 MR. HARPER: I think it's very close to that,  
8 Your Honor. In those types of considerations, you look  
9 at, if, for example, an agent -- head of an agency has  
10 changed a policy and in order to have that act  
11 substantiated, there has to be some explanation, for  
12 example, as to why that policy was changed. That's  
13 fundamentally the same sort of analysis that we think is  
14 appropriate here.

15 QUESTION: And a court may think it's wrong but  
16 still not think that it's arbitrary.

17 MR. HARPER: Absolutely, Your Honor --

18 QUESTION: I see.

19 MR. HARPER: -- if in fact the decision has  
20 considered relevant factors. It may be wrong. It may be  
21 atrocious, as the district court said here. It may be  
22 beyond what is reasonable as the chief negotiator said  
23 here. It may have -- if it's wrong and the process is  
24 intact, then the conduct would still be considered to be  
25 nonarbitrary, and as a result there's no liability

1 associated with it.

2 QUESTION: Do you think the Fifth Circuit was  
3 true to that position?

4 MR. HARPER: I think it absolutely was, Your  
5 Honor. What they did was on summary judgment look at the  
6 record, which the trial court never did, and determine,  
7 based upon the review, that there were substantial facts  
8 in dispute --

9 QUESTION: There was a triable issue of fact  
10 about arbitrariness.

11 MR. HARPER: And --

12 QUESTION: And about discrimination.

13 MR. HARPER: And discriminatory. And all they  
14 did is leave it for the trial court to decide, based upon  
15 an appropriate standard, whether the conduct by the union  
16 breached the duty of fair representation. That's all the  
17 Fifth Circuit did.

18 QUESTION: Whether there was enough evidence in  
19 the record that somebody could have concluded that it was  
20 arbitrary, defined in the right way.

21 MR. HARPER: That's correct and we haven't  
22 gotten there yet, Your Honor. This is on summary  
23 judgment, and I think that the Fifth Circuit did exactly  
24 the right thing in leaving the ultimate issues as to  
25 whether or not this was a breach of the duty fair

1 representation until trial.

2 QUESTION: Mr. Harper, is there a genuine issue  
3 of material fact here as to whether the union acted in bad  
4 faith?

5 MR. HARPER: Your Evidence, there's evidence in  
6 the record and inferences that can be drawn from the  
7 evidence in the record at this particular time that in  
8 fact the union did act in bad faith. And also that they  
9 acted in a discriminatory manner and in an arbitrary  
10 manner, and all of those items are included or --

11 QUESTION: Did the Fifth Circuit review the  
12 evidence with an eye toward the bad-faith allegation?

13 MR. HARPER: It does not appear from the record,  
14 Your Honor, that the court did that, but I don't think  
15 that the Fifth Circuit Court of Appeal purported to look  
16 at all of the items of conduct that this union engaged in  
17 and to make a conclusive decision on all elements at the  
18 summary judgment level.

19 QUESTION: Mr. Harper, may I ask you two  
20 questions? First, is it your position that if the record  
21 showed that the union did consider what -- which would be  
22 better, the settlement or a surrender, an outright return  
23 to work, they considered it, but they came to an erroneous  
24 conclusion on the issue, you would lose?

25 MR. HARPER: If that was the only judgment, Your

1 Honor, that was involved in this case, then the answer  
2 would be yes.

3 QUESTION: So it's not critical for us to decide  
4 whether this was a worse deal than a return to --

5 MR. HARPER: Absolutely not.

6 QUESTION: But it is critical to decide whether  
7 they considered it. And is it your position on that that  
8 the record is absolutely clear based on admissions by the  
9 union that they didn't or a total absence of evidence of  
10 any discussion of it?

11 MR. HARPER: Your Honor, based upon the record  
12 as we developed it through deposition testimony and  
13 through the gleaning of notes and records that the  
14 negotiators that we were entitled to depose, they did not  
15 consider at that critical point in time the unconditional  
16 offer to return to work.

17 I'd like to point out to the Court --

18 QUESTION: But I'm asking you do you say that  
19 because there's a failure of -- in absence of any evidence  
20 showing they did discuss it or is there evidence of an  
21 admission that they did not discuss it? Which is it?

22 MR. HARPER: There's evidence of the admission  
23 that they did not consider it at this point -- at the  
24 point in time.

25 QUESTION: I see. Do you refer to that evidence

1 in your brief?

2 MR. HARPER: Yes, we do, Your Honor, through the  
3 attachments, and it's probably set forth in a little bit  
4 more detail in connection with a motion for  
5 reconsideration.

6 QUESTION: And I'd like to point out for the  
7 Justice that, you know, our discovery got stopped along  
8 the way. So the discovery at this particular point in  
9 time is far from being completed. We focused only on the  
10 pilot negotiators who made the decision or were involved  
11 in the decision at the end to settle the strike.

12 QUESTION: I thought the burden of the argument  
13 in your brief was that the settlement was much worse than  
14 a return to surrender, but you don't really rely on that?

15 MR. HARPER: No, we don't, Your Honor.

16 QUESTION: I see.

17 MR. HARPER: But in fact it is. And again it  
18 would be evidence at trial.

19 QUESTION: But we don't have to resolve that in  
20 order to decide this case.

21 MR. HARPER: Not at this -- not at this level,  
22 Your Honor. Not at all.

23 QUESTION: Mr. Harper, are you saying that in  
24 affirming the result below as you want us to do, we could  
25 do so consistently with your position and still repudiate

1 the second of the factors which the court of appeals  
2 considered? In other words, could you get where you want  
3 to go and in fact are you arguing that you should get  
4 where you want to go by having us hold that the court of  
5 appeals was correct in saying that a non-arbitrary  
6 decision must be based on relevant factors, but repudiate  
7 that second part of the test in which the court of appeals  
8 was saying that it must also be a rational result of  
9 considering those factors? Do you want to jettison point  
10 2 and still win?

11 MR. HARPER: We are not claiming and our  
12 position is that we have to focus on the result. What our  
13 -- what our argument is and it must be a rational  
14 consideration of those factors and the judgment based upon  
15 that --

16 QUESTION: But if --

17 MR. HARPER: -- and the result is only evidence,  
18 Your Honor, of the conduct that the union negotiators  
19 engaged in.

20 QUESTION: Well, then I guess I'm having the  
21 same trouble then that I think has been expressed earlier  
22 in this argument. You apparently want us to go beyond or  
23 want courts to go beyond a finding that the appropriate  
24 factors were considered. You want us -- you want the  
25 courts to intrude to some degree into a -- an assessment

1 of the results achieved by considering those factors,  
2 don't you?

3 MR. HARPER: Yes, Your Honor.

4 QUESTION: And are you satisfied -- going back  
5 to Justice White's question, would you be satisfied if the  
6 Court stopped at saying this is one possible result within  
7 the realm of reasonableness so that if that test were  
8 satisfied, that would be the extent of the Court's  
9 scrutiny?

10 MR. HARPER: And if it's one possible result  
11 based upon a -- the analysis that we have urged the Court,  
12 and if the -- that determination then is that it's  
13 nonarbitrary because of the process that went through,  
14 then the results would be okay.

15 QUESTION: But that involves more than just  
16 considering all the factors. There are certain boundary  
17 beyond which your consideration, even if you've considered  
18 them all, your conclusion is just arbitrary. I mean, a  
19 man comes up to you and puts a gun to your head and says,  
20 your money and -- your money or your life, and you  
21 consider it very carefully and you say my life.

22 (Laughter.)

23 QUESTION: I mean, that's -- that's ridiculous,  
24 isn't it? Just because you've considered that --

25 MR. HARPER: The two choice, Your Honor.



1                   QUESTION: Yes. Can't you reach a conclusion  
2 that is nonetheless arbitrary even if you've considered  
3 both?

4                   MR. HARPER: That -- you can, Your Honor, and  
5 that's why I think that there's more to it in the duty of  
6 fair representation, because there are -- in contexts like  
7 this, there are a number of things that the union  
8 negotiators are going to take into consideration in  
9 arriving at the conclusion that they arrive at. As long  
10 as those factors are relevant factors and the basis is --  
11 the decision is based on that.

12                   QUESTION: Can I ask you the same question I  
13 asked Mr. Gold? Is one of the relevant union factors --  
14 are all the relevant union factors only factors that  
15 relate to this bargaining unit, or can the union in effect  
16 say, well, this result may be better for this bargaining  
17 unit but we have other fish to fry?

18                   MR. HARPER: The union, Your Honor, has a duty  
19 to represent under the Railway Labor Act the members of  
20 this craft or class, and their conduct has to be a -- on  
21 behalf and the benefit for the craft or class. So for the  
22 most part --

23                   QUESTION: But that's not just the bargaining  
24 unit. That craft or class in other bargaining units as  
25 well, no?

1           MR. HARPER: In this case, Your Honor, the craft  
2 or class were the Continental pilots at Continental Air  
3 Lines.

4           QUESTION: Not pilots at large in other airlines  
5 as well?

6           MR. HARPER: And what the problem is, Your Honor  
7 --

8           QUESTION: Well, I --

9           MR. HARPER: -- if you go beyond the class or  
10 craft, you're --

11           QUESTION: Let's make it clear what I'm asking  
12 you. Suppose the union says it will be better for this  
13 bargaining unit, but we will just get clobbered in later  
14 negotiations with other airlines. Our other pilots will  
15 be harmed if we simply, after a 2 years' worth of a bitter  
16 strike, throw in the towel. Net -- given all the pilots  
17 that we have to represent, it's better for all of them  
18 that this bargaining unit may not do as well, but we come  
19 to a negotiated end to the strike rather than simply  
20 abandoning it. Is that -- is that a reasonable decision?

21           MR. HARPER: It may not be, Your Honor, because  
22 the problem with that is that that craft or class becomes  
23 a minority group within a larger class, and they run the  
24 risk, if they don't have this broad duty of fair  
25 representation, of being treated very badly in a

1 discriminatory and arbitrary way by the union.

2 QUESTION: So you say the reasonable factors  
3 that can be taken into account are only factors relating  
4 to the particular bargaining unit to which the  
5 negotiations pertain?

6 MR. HARPER: And what benefits them and what the  
7 union needs to do on their behalf in the context of that  
8 particular representation.

9 QUESTION: The union cannot make a sort of  
10 command decision, saying we realize we're not doing very  
11 well by the Continental pilots and we could do better, but  
12 the long-run interest of the airline pilots we represent  
13 with all the other airlines would be served by this deal  
14 that doesn't do very well for Continental?

15 MR. HARPER: Those are considerations that the  
16 union might take into consideration, Your Honor, with  
17 respect to representing the craft or class --

18 QUESTION: Well, but it's --

19 MR. HARPER: -- but they can't override.

20 QUESTION: I think you can give a better -- give  
21 a yes or no answer to something like that. It seems to me  
22 you're quite nebulous on the point, unless you intend to  
23 be nebulous.

24 MR. HARPER: I don't intend to be nebulous at  
25 all, Mr. Chief Justice. The -- in this case the union

1 should have taken into consideration only those factors  
2 that benefit this craft or class.

3 QUESTION: Well, okay, but answer a hypothetical  
4 question. The union decides that the proposed deal we're  
5 about to enter into with the -- for the Continental pilots  
6 is not the best we could do for them, but if we don't take  
7 this, we are going to greatly harm pilots with American,  
8 United, all the other airlines we -- so we're going to  
9 have to sacrifice a little bit of the interest of the  
10 Continental pilots in order to help all of the pilots we  
11 represent. Can it do that?

12 MR. HARPER: Not to the detriment of the craft  
13 or class that they're representing, Your Honor.

14 QUESTION: Well, but that doesn't -- I think you  
15 could answer the question yes or no and then explain if  
16 you want to. By hypothesis it is to the detriment of the  
17 Continental pilots.

18 MR. HARPER: And then that conduct, Your Honor,  
19 could be made. It could be bad faith, it could be  
20 discriminatory, and it could be arbitrary in the way that  
21 they go about making that decision. Because they're  
22 putting motives and events that are beyond what is on --  
23 in the best interest of the craft or class in these  
24 negotiations, and that is a breach of the duty of fair  
25 representation.

1 QUESTION: You say it could be arbitrary, but is  
2 it as a matter of law arbitrary when they rely on the  
3 factors the Chief Justice described?

4 MR. HARPER: I would say no, Your Honor.

5 QUESTION: It's not arbitrary?

6 MR. HARPER: Let me -- it would -- I'm sorry --  
7 if they put the national interest above?

8 QUESTION: Yes.

9 MR. HARPER: It would be arbitrary conduct.

10 QUESTION: As a matter of law in every case?

11 MR. HARPER: Uh --

12 QUESTION: Counsel, do you -- do you think the  
13 court of appeals applied the test they set down in the  
14 Tedford case?

15 MR. HARPER: Yes, I do, Your Honor.

16 QUESTION: Well, that test is a three-part test  
17 that says to be nonarbitrary the decision must be based  
18 upon relevant, permissible union factors; second, a  
19 rational result of the consideration of these factors; and  
20 three, and inclusive of a fair and impartial consideration  
21 of the interests of all employees. So do you think that -  
22 - you think a court has to get to the issue of fairness  
23 with respect to the various groups of employees?

24 MR. HARPER: In some regard they have to --

25 QUESTION: Well, this is -- what the Tedford

1 test is, and that's what the court of appeals applied so  
2 they have a free wheeling -- they can just decide whether  
3 it's fair or not, is that it? Non-arbitrary?

4 MR. HARPER: No. It's part of the three-step  
5 procedure and analysis that the Tedford court requires,  
6 and in this case the results are evident, Your Honor, that  
7 the conduct was arbitrary because it was worse than an  
8 unconditional offer to return to work.

9 QUESTION: Well, literally, this test means that  
10 the union -- even if the union took -- considered all  
11 relevant factors and gave rational consideration to it,  
12 nevertheless, they might be unfair, an unfair result.

13 MR. HARPER: In this case, the result -- I don't  
14 know if it's unfair, Your Honor, but it has been  
15 characterized by the chief pilot negotiator as beyond what  
16 was reasonable, has been characterized by him as  
17 bastardizing forever the seniority system, and has been  
18 characterized by the district court as being atrocious.  
19 Now if that's the same as being unfair, then those are the  
20 ways it has been characterized.

21 QUESTION: I take it you have a right to jury  
22 trial under that Terry case?

23 MR. HARPER: Yes, Your Honor, as a result of the  
24 Terry opinion.

25 QUESTION: Then reasoning backwards, I suppose

1 it helps your position that we have to have a standard  
2 that manageable for the jury.

3 MR. HARPER: Absolutely. There has to be a way  
4 --

5 QUESTION: It's backwards reasoning, but I think  
6 perhaps we're compelled to engage in it.

7 MR. HARPER: And that's all that -- what  
8 happens, Your Honor, in cases like suits against  
9 fiduciaries, trustees, officers and directors of a  
10 corporation, or governmental agents, you have to be able  
11 to describe for the jury or the trier of fact where the  
12 conduct crosses the line. And that's why I submit --

13 QUESTION: I don't know that a jury could  
14 manageably consider an APA-type -- Administrative  
15 Procedure Act-type of standard as to whether or not they -  
16 - the unit acted rationally. I don't know if the jury is  
17 capable of doing that.

18 MR. HARPER: Justice Kennedy, the jury is  
19 capable though of making key decisions in antitrust,  
20 securities, breach of contract suits, and Justice Stevens  
21 has mentioned just last term that the reality of the  
22 employment relations are typical grist for a jury  
23 judgment. So, in fact, it is our position that, given the  
24 correct instructions of law by the court, that it is  
25 perfectly -- a jury is perfectly capable of judging the

1 conduct engaged in by a union.

2 I'm getting close to the end. One thing I would  
3 like to point out here that we have not talked about --

4 QUESTION: Mr. Harper, before you do that, let  
5 me get -- this relates to what the Chief Justice was  
6 asking you about. All of your clients are union members  
7 in this case, isn't that right?

8 MR. HARPER: That's correct, Your Honor.

9 QUESTION: Now, I can understand why a non-  
10 union member might have a cause for feeling aggrieved if  
11 the union didn't take it into account, exclusively the  
12 interest of his bargaining unit. But all your union  
13 members join this union knowing it was an industrywide  
14 union that, you know, one for all and all for one. They  
15 get some benefits from joining an industrywide union.  
16 They could have had a union just for that shop, couldn't  
17 they?

18 MR. HARPER: That's correct.

19 QUESTION: Just a special union for Continental.  
20 But they chose to join ALPA in order to have the benefit  
21 of an industrywide union. Now doesn't there go along with  
22 that the understanding that the union's going to bargain  
23 in the interest of the whole industry, not -- not in the  
24 interest of just this bargaining unit?

25 MR. HARPER: They're going to bargain on behalf



1 of the craft, Your Honor, and that the craft's interest  
2 has to come ahead of the national interest of the --

3 QUESTION: But they have obligations -- they  
4 have obligations to these other units as well, don't they?

5 MR. HARPER: Absolutely.

6 QUESTION: Can they settle this one to the  
7 detriment of the other ones?

8 MR. HARPER: No, Your Honor, they cannot do  
9 that.

10 QUESTION: They can't do that and yet they can't  
11 take it into account either.

12 MR. HARPER: I'm sorry. I misunderstood your --  
13 they can't settle it to the disadvantage of this  
14 particular craft, Your Honor.

15 QUESTION: They could if they had a multi-  
16 employer bargaining unit, but they do not.

17 MR. HARPER: We do not have that here, Your  
18 Honor. This is the master executive counsel for only the  
19 craft of pilots at Continental Air Lines.

20 And, Justice Scalia, one -- I think what  
21 demonstrates where there is a real problem here with these  
22 pilots being represented by their union is in the super-  
23 seniority aspects of it. Because there the union did go  
24 beyond what was in the best interest of their pilots and  
25 they gave away to the non-striking pilots future vacancies

1 to the detriment, the serious detriment, of the pilots who  
2 have been out on strike for 2 years. And that's why we  
3 have to look at this thing as conduct that breaches the  
4 arbitrary standard, the discriminatory standard, and the  
5 bad-faith standard. And that has been the standard that  
6 this Court has articulated for 24 years, and we think it  
7 ought to be the standard that applies here.

8 We ask this Court, with the Solicitor, to hold  
9 that the union leadership add full-scale responsibilities  
10 to its members. We ask you to decide, as the Fifth  
11 Circuit did, that there was enough evidence in the record  
12 to show that the union defaulted on these responsibilities  
13 so that a trier of fact is entitled to pass upon that  
14 question. We ask this Court to conclude that the -- no  
15 union leadership is above the law, immune to the law, or  
16 should be permitted to be indifferent to the law. The Air  
17 Line Pilots Association is not immune from its  
18 responsibilities which goes with that control.

19 QUESTION: Could I ask you -- do you read the  
20 court of appeals' opinion as saying that the -- that  
21 there's evidence of discrimination as an independent  
22 reason for reversing the district court?

23 MR. HARPER: Absolutely, Your Honor. Towards  
24 the end of the opinion, on the second or third page from  
25 the end, the court of appeals addresses that specifically

1 and says that there's substantial evidence in the record  
2 to suggest that the union acted in a discriminatory way,  
3 and it's left up to the trial for -- the point in time for  
4 the union is to answer why it did.

5 QUESTION: What do you think discrimination  
6 means in that sense? Is it -- it's intentional  
7 discrimination? Invidious discrimination or hostile or  
8 what is it?

9 MR. HARPER: It's conduct that is not based upon  
10 the best interest of the unit and disadvantages an  
11 individual or a group within the unit. It can't be based  
12 upon irrelevant considerations like race, when the DFR  
13 first started back in Steele. And we think that the  
14 decision here on the super-seniority issue to give up the  
15 future spaces to the non-strikers is a fundamental right  
16 that these strikers had upon the return to work, and  
17 without any justification, and if in fact justification is  
18 even permitted, these -- this union acted  
19 discriminatorially towards these pilots by giving those  
20 away.

21 Thank you.

22 QUESTION: Thank you, Mr. Harper.

23 Mr. Gold, do you have rebuttal? You have 3  
24 minutes.

25 REBUTTAL ARGUMENT OF LAURENCE GOLD

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ON BEHALF OF THE PETITIONER

MR. GOLD: Thank you, Chief Justice.

It seems to me that the last point Mr. Harper made is very important in terms of understanding what the court of appeals did and what arbitrary means. The whole discussion in the court of appeals and here is that the strikers were entitled to these so-called 85-5 bids. There was no case law at the time on the status of vacancy bids and when a position is filled and when it isn't in the complexities of the bargaining unit. The court of appeals made that decision as if the union knew what the law was. The court of appeals made it for it after the fact at the point where the negotiators could not.

QUESTION: Is this on the discrimination point?

MR. GOLD: It is on both the arbitrariness of the settlement and on the discrimination point. With regard to the discrimination point, the court of appeals relied on a very expansive reading of Erie Resistor, which this Court later rejected in the IFA case just last year. So, this would --

QUESTION: What case last year, Mr. Gold?

MR. GOLD: Trans World Air Lines v. Flight Attendants. I think it's 489 U.S.

QUESTION: But what did the district court assume on that point? Mustn't the district court have

1 assumed that the union was uncertain as to what involved?

2 MR. GOLD: Yes.

3 QUESTION: Well, is it entitled to do that on a  
4 motion for summary judgment?

5 MR. GOLD: I don't think it assumed it. There  
6 were 1,600 pages of deposition records or the motion for  
7 summary judgment showing that the union was proceeding on  
8 the basis that this wasn't locked up, that it was dealing  
9 with a hostile employer, and that making a deal was the  
10 best course. That was his finding viewed that that was  
11 indisputed. But --

12 QUESTION: But that was controverted, wasn't it?  
13 And wasn't -- among the things controverted, wasn't the  
14 certainty of the law one of the controverted matters?

15 MR. GOLD: But are we going to be in a position  
16 where the certainty of the law is to depend on whether a  
17 jury says that a single district court decision somewhere  
18 else makes the law certain? I don't think that at all the  
19 court -- the district court was right in terms of  
20 understanding that there was uncertainty, and the union  
21 was proceeding on the basis of uncertainty.

22 QUESTION: Whether there's uncertainty is not  
23 the issue. On your theory, the issue is whether the union  
24 itself was uncertain. That -- that's a good faith --

25 MR. GOLD: Well, that was not disputed. The

1 only dispute -- the court of appeals decided that it was  
2 certain, not that the union was not uncertain. By the  
3 same token, we're having a discussion here, and Mr. Harper  
4 insists on having a discussion, whether this deal was  
5 better or worse than an unconditional return to work. The  
6 master executive counsel voted against an unconditional  
7 return to work before the negotiators went to negotiate.  
8 And that's simply part of the problem of having --

9 QUESTION: I think you've answered the question.

10 MR. GOLD: Okay.

11 CHIEF JUSTICE REHNQUIST: The case is submitted.

12 (Whereupon, at 11:03 a.m., the case in the  
13 above-entitled matter was submitted.)

14

15

16

17

18

19

20

21

22

23

24

25

**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. 89-1493 - AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,  
-----  
Petitioner V. JOSEPH E. O'NEILL, ET AL.  
-----

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

BY *Robertus Antel*  
(REPORTER)

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

'91 JAN 22 P1:54