OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, ET AL.

CASE NO: 90-285

PLACE: Washington, D.C.

DATE: March 20, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

- X

LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC., : Petitioner : v. : No. 90-285 : NATIONAL LABOR RELATIONS BOARD, ET AL. :

- X

Washington, D.C.

Wednesday, March 20, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:10 a.m.

APPEARANCES:

MATHIAS J. DIEDERICH, ESQ., Beverly Hills, California; on behalf of the Petitioner.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent NLRB in support of the Petitioner.

DAVID A. ROSENFELD, ESQ., San Francisco, California; on behalf of the Respondent Printing Specialties.

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P R O C E E D I N G S

(11:10 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 90-285, Litton Financial Printing Division v. National Labor Relations Board.

Mr. Diederich, you may proceed whenever you are ready.

ORAL ARGUMENT OF MATHIAS J. DIEDERICH

ON BEHALF OF THE PETITIONER

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

In this case the National Labor Relations Board found that the employer in this case had violated section 8(a)(5) of the National Labor Relations Act by refusing to arbitrate 10 identical grievances filed by the union when the grievance events took place some 11 months after the expiration of the collective bargaining agreement.

Even though the Board found a violation of section 8(a)(5) because of the repudiation, it declined to order the parties to arbitrate because in its view it did not feel that the particular -- the particular grievances, which involved a layoff and a provision in the contract dealing with layoffs, arose under the contract.

And just briefly, the reasoning of the Board was that because aptitude and ability controlled the layoffs,

or order of layoffs before seniority became a factor, that the grievances did not arise under the collective bargaining agreement.

QUESTION: But wasn't it the case, isn't it the case that to the extent that seniority is claimed to be a factor, it does arise under the contract?

MR. DIEDERICH: In the Board's view, which I think is correct, seniority does not become a factor until ability and aptitude are determined. And ability and aptitude certainly do not arise under a contract because under the Board's view, relying on Nolde, it doesn't -- a grievance does not arise under a contract unless it is some right which can be accrued or is a vested right, such as wages, pension benefits, or severance pay.

QUESTION: Well, were the grievances in this case expressed solely in terms of aptitude and ability as opposed to terms of seniority on the assumption that aptitude and ability were equal?

MR. DIEDERICH: The grievances were expressed in terms of seniority.

QUESTION: Well, then why doesn't that arise under the contract?

MR. DIEDERICH: Because the contract provides that aptitude and ability are the controlling factors, and seniority never becomes a factor until you prove that, or

you are able to demonstrate --

QUESTION: Excuse me, maybe I don't, still don't understand the grievance. I thought you were saying or indicating in effect that the grievances claimed, that there were instances in which ability and aptitude were equal, and that therefore seniority ought to be determinative. Is that correct?

MR. DIEDERICH: No, I don't think the grievances mentioned aptitude and ability at all.

QUESTION: Okay, that's maybe where we -- so they were simply saying -- the grievances were simply claiming that seniority and seniority alone entitled them to some consideration they didn't get?

MR. DIEDERICH: The exact words were "out of seniority."

QUESTION: Okay.

MR. DIEDERICH: The court of appeals upheld the Board's determination that there was a violation of section 8(a)(5) because of the repudiation, the refusal to arbitrate, but the court reversed the Board's decision on the -- arising under theory that the Board had adopted and said that was unreasonable, and directed the parties to arbitrate.

Now there is in collective bargaining a constant theme that the parties are supposed to determine what goes

into a collective bargaining agreement and not the Government. And in a case like this where we have a contract that we have to look at and interpret and there is no collective bargaining history, I think it's especially important to look at the particular contract provisions that are involved and try to determine what the intent of the parties was, if it can be determined from that language.

QUESTION: Well, Mr. Diederich, had this grievance arisen during the life of the collective bargaining agreement would arbitration have been required?

MR. DIEDERICH: Yes.

QUESTION: And there certainly is a good deal of language in this Court's decision in Nolde that suggests that, similarly, arbitration would be required if it occurs after the expiration of the agreement, as here.

MR. DIEDERICH: Yes, that's true, Your Honor, but Nolde was a civil action under section 301, which is a statute, I am sure as you know, which gives unions the right to sue employees and vice-versa. And one of the reasons they can sue is to enforce a collective bargaining agreement.

That is precisely the question that I am presenting here. Is a section 301 lawsuit properly applicable to a section 8(a)(5) unfair labor practice

case, because Congress has specifically defined what is involved in a refusal to bargain. As a matter of fact it is the only unfair labor practice of which I am aware where Congress has specifically defined what the violation is.

And I simply don't believe that if you read the statute, section 8(a)(5) and its definition in section 8(d), that you can say that the employer's conduct in this case fits within the definition of that statute. You would have to shoehorn that conduct into that statute.

QUESTION: Well, I guess the Board takes the position that some of these grievances might have to be arbitrated and some not, and in this case this one should. I mean, Solicitor General will argue a position that differs from your own. Isn't that right?

MR. DIEDERICH: No, I think the Board's position was that there was a violation in the blanket repudiation of the arbitration provision. But the Board determined that the parties were not required to arbitrate. So --

QUESTION: This specific --

MR. DIEDERICH: This specific reason -- grievance. And on that point the Board and myself are on the same side, although from my standpoint that is kind of a fall-back argument. I have made more of a frontal attack on the applicability of section 8(a)(5) and section

8(d), whether they apply at all to this employer's conduct.

QUESTION: Well, suppose --

QUESTION: Or more precisely that you don't carry Nolde over, which is a 301 case, to section 8(b)(5).

MR. DIEDERICH: I didn't hear the first part of the question.

QUESTION: Your position also is that you don't carry over any doctrine from Nolde, which was a section 301 case, to 8(b)(5) when you have defined the refusal to bargain.

MR. DIEDERICH: Absolutely, because Congress has specifically defined in section 8(d) what a refusal to bar -- what the obligation to bargain entails. And if you don't meet that obligation then you have refused to bargain. So Congress, having spoken very specifically in terms of what a section 8(a)(5) violation is, I don't -- I don't believe that language in a section 301 suit, which is a suit really where you are just determining arbitrability. Now, there's a great deal of significance and there's stigma attached to being found to have committed an unfair labor practice.

QUESTION: Mr. Diederich, there is a long, long line of authority. I mean, I thought, I had thought it was fairly well established Federal labor law that if you

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make a unilateral change in the provisions that you're obliged to abide by under a contract, you are not only in breach of contract, but you are also guilty of an unfair labor practice. And your -- the principle you have just espoused attacks that whole line of jurisprudence, doesn't it? Why would you limit it to the arbitration agreement?

MR. DIEDERICH: I don't think it does, Your Honor, because the, the landmark case for the proposition that you cite on unilateral change of working conditions is Katz, and in Katz the theory was that while there are ongoing negotiations it is destructive of the collective bargaining process for the, for an employer to make unilateral changes. In other words, you can't be negotiating about sick leave, and the next day institute unilaterally a brand new sick leave policy, because that disrupts -- excuse me -- disrupts the collective bargaining process.

In this case there were no ongoing negotiations. 11 months had elapsed without any negotiations.

QUESTION: There were none, but there should have been some. Isn't it true that under the Board's theory there should have been, because you had refused to bargain?

MR. DIEDERICH: Well --

QUESTION: Had you obeyed the law there would

have been on-going negotiations.

MR. DIEDERICH: Not entirely correct. For the first 10 months of that 11 month hiatus, the status -- the representative status of the union was in doubt, because there was a Board proceeding.

QUESTION: Right.

MR. DIEDERICH: At the end of the -- around the end of the 10 month period, the Board certified the union. At that point the company --

QUESTION: But your initial refusal to bargain was for the purpose of getting that determination, wasn't it?

MR. DIEDERICH: No.

QUESTION: Wasn't it?

MR. DIEDERICH: No, no, no, no, no. There was a petition filed by an employee seeking to decertify the union --

QUESTION: Right.

MR. DIEDERICH: -- shortly before the contract expired. That entire proceeding, from the time that petition was filed until the Board ultimately certified the union, was 10 months after contract expiration. At the end of that 10-month period when the union was certified, the company exercised its right to then challenge the validity of that Board certification in the

Ninth Circuit court of appeals. And that is how -- 1 month of the entire 11-month period was devoted to a technical refusal to bargain, which is the only method, Your Honor, by which an employer can test the validity of a Board certification.

QUESTION: Did the Board purport to rest its decision in part on Katz?

MR. DIEDERICH: No. Oh, I'm sorry. I don't think the Board did. The union argued Katz, but I don't believe the Board argued Katz, and I don't believe the Board relied on Katz.

QUESTION: But why shouldn't the Katz prohibition on unilateral changes prior to bargaining to impasse apply to arbitration?

MR. DIEDERICH: Because we have a long history saying that arbitration is consensual, and we have many Supreme Court cases saying that arbitration is consensual, and we have a statute which says that a part -- basically it says the parties should determine what goes into an agreement and not the Government.

QUESTION: Well, Katz was also during the course of bargaining.

MR. DIEDERICH: Yes.

QUESTION: It didn't cover the situation where the contract had expired.

MR. DIEDERICH: Absolutely not. There is no -- this is a case of first impression in terms of whether --

QUESTION: Do you think, then, even though there's a -- say after a contract has expired, the employer is under a duty to bargain about wages, hours, and working conditions, but he may unilaterally change the -- say, the hours of work without bargaining? He can change it, but he has to bargain --

MR. DIEDERICH: He has to bargain, yes.

QUESTION: But meanwhile he can change?

MR. DIEDERICH: He can bargain, and when, I think --

QUESTION: Well, may he, while he's bargaining may be say well, I know what -- the contract required 8 hours of work or 6 hours of work, I am going to change to 7. I know I have to bargain about it, but until we bargain the impasse, it's going to be 8 now?

MR. DIEDERICH: I don't think it's clear, Your Honor, that you have to bargain to impasse. It's clear that you, if you're going to make a change you have to bargain.

QUESTION: You agree with that?

MR. DIEDERICH: Yes.

QUESTION: Before you make the change?

MR. DIEDERICH: Yes.

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QUESTION: Was that done here?

MR. DIEDERICH: Well, you asked me about wages. You have to bargain about wages. I don't think you have to bargain about arbitration because --

QUESTION: Oh, I agree, I -- that's a different thing because your obligation to bargain to the union isn't based on the contract.

MR. DIEDERICH: No.

QUESTION: It's based on labor law.

MR. DIEDERICH: Right.

QUESTION: And so -- and certainly the duty to arbitrate isn't based on labor law. It's based on contract.

MR. DIEDERICH: True.

QUESTION: Well, wages are based on contract too, aren't they?

MR. DIEDERICH: Not after the contract expires. After the contract expires they exist by the obligation to maintain the wages that exist by operation of law.

QUESTION: On what basis? On the theory that the pre-existing contract continues unless you bargain to change it, no?

MR. DIEDERICH: No. Not on the basis that the contract continues. On the basis that they were working conditions, and as working conditions they cannot be

unilaterally altered without giving the union an opportunity to bargain.

QUESTION: What's the authority for that?

MR. DIEDERICH: The authority for that?

QUESTION: Yes.

MR. DIEDERICH: Is the Board's decision in this case.

QUESTION: Well, but you're -- I mean, surely we deserve to be cited something better than that, don't we?

QUESTION: Well, that's what Katz holds, isn't it?

MR. DIEDERICH: That's what Katz holds.

QUESTION: Katz holds in the course of bargaining the employer can't do it. It doesn't say anything about the situation when the contract has expired.

MR. DIEDERICH: Absolutely not. No case has ever come before --

QUESTION: So why do you agree that an employer can't change the conditions of bargaining -- can't change the conditions of employment after the contract has expired even though he continues to bargain about them? Why is he bound to keep them the way they were?

MR. DIEDERICH: I didn't say he couldn't change them.

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QUESTION: Well, in answer to Justice White's question, I thought you did.

MR. DIEDERICH: I misspoke. He has to give the union an opportunity to bargain over the changes. I don't think you have --

QUESTION: Before he changes them? Is that it?

MR. DIEDERICH: That's my understanding of the law.

QUESTION: Yes.

MR. DIEDERICH: But not with respect to arbitration.

QUESTION: Oh, I understand that.

MR. DIEDERICH: Because the Board has made an exception with respect to arbitration.

QUESTION: Of course it did. But if -- but the duty to maintain the existing working conditions, wages, hours, working conditions, doesn't rest on contract. It rests on the law?

MR. DIEDERICH: That's my understanding, yes.

QUESTION: Otherwise you could sue the employer for -- under 301 for breaching the contract.

MR. DIEDERICH: You could sue for breach of contract. That's right.

QUESTION: And you can't?

MR. DIEDERICH: Pardon?

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QUESTION: And you can't?

MR. DIEDERICH: Not under the contract theory. I think at that point when the contract has expired, the collective bargaining scheme leaves resolutions of disputes that arise to the parties and their economic power in their bargaining. I think that's the theory of the collective bargaining scheme.

QUESTION: Unless the dispute actually had its roots in the contract.

MR. DIEDERICH: No. No.

QUESTION: Well, what about vacation pay?

MR. DIEDERICH: Vacation pay is a vested right, and I have no quarrel with vacation pay.

QUESTION: What you're saying is the dispute has its roots in a contract.

MR. DIEDERICH: Well, yes. Yes. But not a layoff provision such as this one.

QUESTION: Thank you, Mr. Diederich. Mr. Wallace, we'll hear from you.

ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE RESPONDENT NLRB

IN SUPPORT OF THE PETITIONER

MR. WALLACE: To address preliminarily a question that has arisen, the period after contract expiration is a period of bargaining prior to agreement on

a new contract or the reaching of impasse. And that is why the Board has applied Katz to the post-expiration period, but on the rationale that the employer cannot make unilateral changes during the period of bargaining. It's only coincidental that the wages had been prescribed by the expired contract. They happened to be the prevailing wages --

QUESTION: So you say there's a duty to bargain when the contract expires, even though the employer is no longer bound by the condition, and that Katz holds that during a period of bargaining you cannot make unilateral changes?

MR. WALLACE: Precisely so. We explain that on page 10 of our reply brief and cite this Court's decision in Laborers Health and Welfare against Advanced Lightweight.

QUESTION: But if it were not during a period of bargaining, then, the employer could make unilateral changes?

MR. WALLACE: After impasse, for example.

QUESTION: And why is Katz not dispositive here? Because the bargaining had ceased, or there had been bargaining to impasse?

MR. WALLACE: No. Because Katz is an interpretation of how to interpret and apply the National

Labor Relations Act, and it upheld the Board's view that the act ordinarily bars changes in the terms and conditions of employment during the bargaining period. But the Board has also adopted the view that it would be inappropriate to apply Katz to certain terms because it would be contrary to other policies of the act, such as dues check-off, or union shop, and arbitration, because it would be very hard to reconcile with the strong statutory determination by Congress that compulsory arbitration is not to be required, that arbitration is solely a creature of contracts.

QUESTION: Well, so are the wages. Is there no strong feeling of contract that an employer shouldn't have to pay anymore than he agrees to pay, and that a worker shouldn't have to accept any less than he agrees to accept?

MR. WALLACE: It's only coincidental that the change would be a change in a contractually prescribed term. It is not a matter of carrying forward the expired contract. It is a matter of changing the existing terms and conditions of employment. That's what we try to explain on page 10 of our Reply Brief.

QUESTION: Well, I understand why an arbitration agreement isn't one of the terms and conditions of employment. If you have a dispute you have to --

MR. WALLACE: It is, it is --

QUESTION: But you just arbitrarily say we'll change some of them and we won't change other ones.

MR. WALLACE: It's not arbitrary, Mr. Justice, it -- the point is the rationale of Katz is not based on carrying the contract obligations forward. And arbitration cannot be compelled by law. Arbitration is solely a creature of contract. If the contract obligation is not being carried forward, it's inappropriate to require adherence to arbitration.

QUESTION: I hear you, but I don't understand. Everything you say could be said about wages.

MR. WALLACE: The wages are being paid. I can't really explain it more clearly than that.

In its 1987 decision in Indiana & Michigan Electric, the Board definitively set forth the principles it would follow in implementing this Court's decision in Nolde. Nolde's rationale readily led the Board to carry forward to the hiatus period, a period of bargaining between expiration of the contract and before renewal or impasse, the Board's longstanding rule that a wholesale refusal to arbitrate grievances under a contract to arbitrate would be an unfair labor practice.

QUESTION: What is the -- what did the Board base its reason for doing that on?

MR. WALLACE: Well, the rule is based on the notion that a wholesale refusal to submit grievances to arbitration is a repudiation of the bargain that was reached, and therefore an unfair labor practice.

QUESTION: What bargain, if it's expired?

MR. WALLACE: Well, that is the point of trying to apply Nolde. Nolde said that the parties are presumed to have carried -- to have an intent to have carried forward the obligation to arbitrate during this hiatus period to disputes arising under the contract. And therefore if the employer categorically repudiated its arbitration obligation during this period, taking into account the rationale of Nolde, the ordinary rule that that would be an unfair labor practice carries forward.

The more difficult question for the Board was the remedial one of how to identify whether the particular grievances asserted in the case are within the category that there is a duty to arbitrate during hiatus.

QUESTION: Namely those -- did the dispute arise under the contract.

MR. WALLACE: That's correct. And in addressing this, the Board took note that in Nolde itself, before holding that contract expiration does not necessarily extinguish the duty to arbitrate, this Court very carefully described the nature of the grievances and of

the union's contentions that it was addressing in that case. And I refer the Court specifically to page 248 of volume 430 U.S. in which the Court took pains to say that the union maintained here that the severance wages at issue were accrued or vested rights earned by employees during the term of the contract, although payable only upon termination of employment, and that the union's claim was that the parties considered the severance pay as part of the employee's compensation for services performed during the life of the agreement.

And the question --

QUESTION: Mr. Wallace, can I interrupt right there? Isn't that precisely what the union claims here? That the discharges on seniority grounds violated the contract? And the defense to that is the contract had expired and the don't. But in terms of the request for arbitration, if they are right that the contract did prohibit these discharges, why doesn't the language you read from Nolde apply squarely to this case?

MR. WALLACE: Because Nolde was talking about rights that accrued during the pre-expiration period.

QUESTION: Well, when did their seniority accrue here?

MR. WALLACE: Well, that gets to a question of the application of the Board's rule, whether what was

involved in this case was a claim based on seniority, and the Board reasonably determined in applying its rule here to the contract provision, which is set forth at the top of page 9 of our brief, the contract provision says in case of layoffs, length of continuous service will be the determining factor if other things, such as aptitude and ability, are equal.

And in construing this, the Board reasonably determined that seniority is only a fall back criterion here and that what would have to be submitted to the arbitrator necessarily as the first question is whether aptitude and ability are equal between the more senior and the less senior person.

And that is a question to be determined with respect to aptitudes and abilities during the post-expiration period, at the time of the layoff, and with respect to the conditions at the time of the layoff, which have in this case quite dramatically changed because the employer has changed his operations. And that would mean submitting to the arbitrator the determination of a post-expiration question as the primary question.

QUESTION: Well, just generally, Mr. Wallace, wouldn't you think that if the question is whether a dispute arises under the contract, isn't that itself a issue for the arbitrator?

MR. WALLACE: The question of arbitrability under this Court's decision in AT&T Technologies against Communication Workers is a matter for the court, or in this case the Board, the decision-making tribunal to determine. The question of arbitrability under that decision is not to be relegated to the arbitrator.

QUESTION: But, suppose the argument is that the parties intended by this language in the contract to have a certain clause in the contract carry over past the normal expiration date? Now, isn't that a question for the arbitrator as to the meaning and application of that provision?

MR. WALLACE: If there were a provision capable of being interpreted that way under the Board's rule, the case -- the question would be arbitrable. But the Board's rule is one based on whether the contract rights are rights capable of accruing or vesting to some degree during the life of the contract.

QUESTION: The Board's rule purports to be an application of our decision in Nolde, and we said in Nolde specifically quoting an earlier case, the question of interpretation of the collecting bargaining agreement is a question for the arbitrator. And all you have here is a question of interpreting the collective bargaining agreement. Is it intended to apply post-agreement in this

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respect or not? Why isn't that a question for the --

MR. WALLACE: As we explain in our reply brief, there is overlap in some cases between questions on the merits in interpreting a collective agreement and the question of arbitrability which a court, or in this case the Board, nonetheless has a duty to determine even if that involves construing relevant terms of the collective bargaining agreement.

QUESTION: But Mr. Wallace, isn't the critical term of the collective bargaining agreement the term that describes the duty to arbitrate, which says there shall be arbitration if there is an allegation the contract has been breached?

MR. WALLACE: That depends on --

QUESTION: And if you say in this case they have made such an allegation, then the arbitrator could say well, they have alleged it but the contract had expired, so there is no remedy in arbitration.

MR. WALLACE: That --

QUESTION: But isn't that where we start, with the arbitration clause?

MR. WALLACE: That is dependent on whether the Board's view of how to reconcile Nolde with the act's no compulsory arbitration provision by taking the narrower reading of the category of claims that Nolde makes it

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appropriate to submit to arbitration during the post-expiration period, whether that view is proper. And the Board concluded that that view more properly reconciles the pertinent labor law considerations.

I'd like to reserve the balance of my time, if I may.

QUESTION: Very well, Mr. Wallace.

Mr. Rosenfeld, we'll hear from you.

ORAL ARGUMENT OF DAVID A. ROSENFELD

ON BEHALF OF THE RESPONDENT PRINTING SPECIALTIES

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

Justice Stevens, you were correct. The provision in this contract is an extremely broad one. It's not limited solely to questions of interpretation or application of the contract, but includes, quote, "differences that may arise between the parties hereto regarding this agreement." And surely between the union and Litton there is a very vigorous dispute or difference between them regarding this agreement.

And so that surely our dispute, which is were these layoffs in violation of the agreement, a matter that is a difference between us regarding the agreement, and surely it was arbitrable during the life of the agreement and remains a difference.

But our case is far stronger because I think I can demonstrate unequivocally that the parties, even based on the language of the contract in the Board's cases, intended that seniority would continue. And that can be seen from the following.

The Board in Uppco says that one of the things you can look at, and the Board applies a sort of an any indication test, is there any indication in the contract that the parties intended that provision would continue? Is there any indication, in the words that Justice White used, of any intent that that language would continue?

QUESTION: Well, as I understand the position of the other side, it's that that's not really the issue in this case. That they -- they conceded your clients have their seniority. The issue is not whether the seniority continues. They acknowledge it does. The question is what's the effect of the seniority upon this particular dismissal.

MR. ROSENFELD: That's right.

QUESTION: And that isn't covered.

MR. ROSENFELD: That's right. But the issue in this case that we would present to the arbitrator is whether there was any effect in the contract to be intended by the parties at some point after the contract was expired.

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QUESTION: Well, it may be, but you can't answer the question before us by simply saying it's clear that seniority was meant to continue after the agreement ended. We can give you that, and you still are left with the question of whether this is an issue that under the Board's cases must be decided by the arbitrator or not.

MR. ROSENFELD: We know under Nolde, once we make the contention that that language continues, that is the language governing the dispute continues, that whether in fact it has some effect or whether the contract has been breached is a matter for the arbitrator to determine.

QUESTION: But that was a section 301 case.

MR. ROSENFELD: That's correct. And what the Board has done in this case and in Indiana & Michigan is it has purported to apply the same --

QUESTION: It has purported to apply it.

MR. ROSENFELD: And more importantly, I think it's, it is in fact compelled to do so.

QUESTION: Why?

MR. ROSENFELD: Because in Lincoln Mills this Court 35 years ago said that interpretation of collective bargaining agreements is to be left to the usual processes of the law -- court, and it later --

QUESTION: It didn't, it didn't say it was to be left to unfair labor practice proceedings, which is what

you're in here.

MR. ROSENFELD: That's right. And 20 years later in C&C Plywood, when the question was before this Court could the Board even interpret a collective bargaining agreement in the course of adjudicating an unfair labor practice, what this Court said was yes, the Board could interpret it, not because it's interpreting the agreement and resolving those questions, but in adjudicating the unfair labor practice.

So what the Board has purported to do in this case is recognizing that it is subservient to this Court's interpretations of contracts under section 301, it has said we will apply the Nolde standards. The Board has an obligation under this Court's rules to apply, in interpreting contracts, the Nolde standards or to apply this Court's standards in interpreting Section 301.

This Court also said that in Strong Roofing where it said that -- that was a Board case once again where the issue was the interpretation of the contract, and this Court said that the usual manner in which contracts are interpreted is not by the Board, but by arbitration of the courts.

QUESTION: And not by the Board in unfair labor practice proceedings.

MR. ROSENFELD: That's correct. And all that

the Board --

QUESTION: Which is what you have here.

MR. ROSENFELD: And that's what we're trying to resist. We don't want -- when this case arose the union did not go to court to compel arbitration, because we were before the Board in other unfair labor practices. We did not ask the Board to interpret the layoff provision of the contract. We did not ask the Board to determine whether these layoffs violated --

QUESTION: Well, why didn't you? You would have -- you could have gone to court under Nolde, certainly.

MR. ROSENFELD: We could have. We could have at that time gone to court to compel arbitration.

QUESTION: Why didn't you?

MR. ROSENFELD: Because at the same time that this was occurring this employer was committing a number of other unfair labor practices in refusing to arbitrate, and we saw it as an efficient method of getting the whole problem resolved of this employer's refusal to bargain by filing an 8(a)(5) charge, which was sustained. And part of the 8(a)(5) refusal to bargain was the employer's repudiation of its obligation to arbitrate.

So that we saw that as an alternative means. And the Board agreed with us. The Board ultimately agreed that the employer had repudiated the arbitration

provision. And then the Board said, contrary to Nolde, looking at the seniority clause, we don't find this specific dispute to be arbitrable.

Let me explain how the Board -- how the courts tell us we're supposed to do that. What this Court said in AT&T Tech. You look at the arbitration provision. That's the first thing. How broad is it? Does it cover the dispute? And surely the arbitration provision, that is differences between the parties regarding this agreement, is broad enough to cover the dispute.

What is the next step then under this Court's Warrior & Gulf, Nolde, and AT&T Tech cases? The next step is to search within the agreement for some expressed exclusion or other forceful evidence that that particular dispute is not to be arbitrated. In AT&T Tech there was an express exclusion. The contract had an exclusion for certain management rights which the parties agreed were not subject to arbitration. Warrior & Gulf had an ambiguous exclusion clause.

But you can find no such exclusion clause in this case. There is nothing that Litton ever sought to exclude from arbitration. Absent an exclusion clause, the only thing left for Litton to assert or the Board to assert would prevent arbitration is some forceful expression. The words from AT&T Tech are an express

exclusion or other forceful expression of the parties' intent to exclude a particular dispute.

And there the irony of the case is that the Board concedes that had the contract simply talked about seniority without aptitude and ability, it would be arbitrable. What the Board is trying to convince you is that the words "aptitude" and "ability" are tantamount to an express exclusion from arbitration.

Their argument amounts to a contention that because the parties included those words, somehow they did not intend to arbitrate this dispute, because the Board concedes that absent those words it would be arbitrable. And that's not either an express exclusion or any forceful expression on the part of the parties to exclude this dispute.

QUESTION: Well, you don't -- you certainly don't, aren't arguing, you don't need to argue that every, an arbitration clause always survives the termination of the contract?

MR. ROSENFELD: No. And in fact, part of the -- one of the concerns that I think that is inherent in this case is when does the employer's obligation to arbitrate end. Justice White, had Litton been concerned about it when this contract was initially written, he could have come to the union, as some employers do, and say we don't

want to have to arbitrate grievances after the contract, so let's put an express exclusion that says any grievance which arises after the contract or which is filed after the contract shall not be arbitrable. Which of course then leaves the union free to go to court. And that's what Groves v. Ring Screw tells us. Another --

QUESTION: If it's, if it's suit was based on the contract.

MR. ROSENFELD: That's right.

QUESTION: Even though the contract formally had expired you would still, to bring a 301 suit you would have to say what we're suing about is nevertheless governed by the expired contract.

MR. ROSENFELD: That's right. And what -- for example, we could go -- this is what -- in Nolde Brothers, the dissent, in which Chief Justice Rehnquist joined, said explicitly that it was clear that in Nolde the union could have gone to court or the individuals could have gone to court to bring a suit to collect their severance pay. Now I think we probably -- we could not have gone to court in this case directly to sue over the seniority because we were barred because we had agreed to arbitrate those disputes. That was our exclusive remedy.

QUESTION: Could you have gone to court to compel arbitration?

MR. ROSENFELD: Yes. I think clearly we could have gone to court and claimed --

QUESTION: You probably, certainly could have stated a cause of action in your complaint, but you might not have won.

MR. ROSENFELD: We could have stated a claim, and I think I could have convinced a district court, had we chosen that route, an alternative route, that the arbitration clause was broad enough, there was no expressed exclusion, and that under Nolde we had at least an entitlement to get to the arbitrator.

QUESTION: But you would have to nevertheless convince the court that your cause of action really goes back to the contract, even though it's expired.

MR. ROSENFELD: That's right. And --

QUESTION: I guess in that respect, Mr. Rosenfeld, you are in a different situation with respect to the arbitration clause than you are with respect to the other continuing terms and conditions. That is to say if the employer didn't pay the wages that he had previously been paying and was obliged to pay under the contract, you couldn't sue him for breach of contract once the contract had expired. Your only remedy for the wages would be an unfair labor practice proceeding, wouldn't it?

MR. ROSENFELD: No, for the following reason.

QUESTION: No? Why not?

MR. ROSENFELD: That in order for us to prevail in court we have to allege that there is some understanding or agreement between the parties that that provision over which we're suing continues. For example --

QUESTION: Are you answering my question about the wages?

MR. ROSENFELD: Yes.

QUESTION: Suppose the -- all right.

MR. ROSENFELD: For example, if I were to go to court on that theory, and wages is perhaps the most difficult because it doesn't sound like wages accrues. Wages do to some extent accrue. For example, this contract has a wage progression, and says if you work 3 months you get a certain wage, 6 months it increases. And I can argue, I think, that the parties intended as part of their agreement that once you have accrued a certain level of competence --

QUESTION: Well, you're changing the facts now. Just throw that out. Here's a contract that expired. The wages were $100 a day. And 6 months from then the employer unilaterally changes it to $90.

MR. ROSENFELD: We could not sue over the unilateral change there.

QUESTION: Of course not, you couldn't. But you could -- well, next week he does. You can -- you could certainly complain, make an unfair labor practice charge that he unilaterally changed the -- without bargaining.

MR. ROSENFELD: That's right.

QUESTION: But you couldn't sue on the contract?

MR. ROSENFELD: If we could prove that the --

QUESTION: Well, I know, but you don't have to prove something besides the fact that he unilaterally changed it.

MR. ROSENFELD: Absolutely. We have to prove that there was some agreement between the parties --

QUESTION: Exactly.

MR. ROSENFELD: -- that that wage rate -- some agreement that that wage rate would continue in --

QUESTION: But you have to prove that for the arbitration clause, too, don't you?

MR. ROSENFELD: That's right. And that, for example --

QUESTION: I mean, you have to show the arbitration clause would intend to continue. So you're saying if you can show that the wages were intended to continue, just as you can show that the arbitration clause was, you'd be in the same boat with respect to wages as you are with respect to arbitration.

MR. ROSENFELD: And it's our preference, of course, to make those arguments to the arbitrator rather than the district court. And what we would, for example --

QUESTION: Yes, but it is true, isn't it, let me just get sort of a simple point out of the back of my head. You can allege that the discharge 10 months later violated the agreement, and then presumably the court can hold yes, you're entitled to have that arbitrated because you have alleged that it violates the agreement.

But it would still remain possible for the arbitrator to say well, yes, they're claiming it arises out of the agreement, therefore I have jurisdiction to arbitrate, but I don't see how in the world something that happened 10 months later arose out of the agreement. Therefore you lose on the merits. That could happen, couldn't it?

MR. ROSENFELD: It could happen. Surely in many cases where unions would bring grievances after the contract has expired an arbitrator would more than likely deny those grievances and say that in some cases the union is correct that that concept of that clause continues, and, Justice Stevens, in other cases we would lose. In this particular case I think I can demonstrate in a moment that I think we'd have a strong contention before the

arbitrator that this layoff provision, this seniority provision would continue.

QUESTION: Of course we don't have to decide that, I don't think, do we?

MR. ROSENFELD: Well, not only do you have to not only decide it, I in some sense should not be pressing the argument because I'd be rather making that argument to the arbitrator and letting him hear the bargaining history, letting the arbitrator hear the law of the shop, letting him hear and look at the language of the contract, and apply his special expertise or her special expertise to those questions.

But my opponent, sitting across the arbitration table, may well convince the arbitrator that the union is incorrect and that that seniority provision did not continue.

QUESTION: So what do you do about the notion that courts are to decide the, whether an issue is arbitrable?

MR. ROSENFELD: What you do is the process that this Court set in Warrior & Gulf, what this Court said in Nolde and AT&T Tech. You look at the breadth of the arbitration clause. You do nothing different in the Nolde situation, Justice White, than you do in --

QUESTION: I know, but the court still has to

come down and say we looked at this arbitration clause and we -- the court has to say either it reaches this dispute or it doesn't.

MR. ROSENFELD: That's right. And that's what, what Your Honor said in AT&T.

QUESTION: And did the Board do any more than that in this case? It looked at the arbitration clause, it looked at everything in sight, and said this particular issue isn't arbitrable.

MR. ROSENFELD: What the Board said --

QUESTION: Isn't that what it said?

MR. ROSENFELD: Yes.

QUESTION: Yes. Well, so we have to review that and decide whether the Board was wrong or right in saying it was not arbitrable.

MR. ROSENFELD: That's right. What you have to apply in making that decision, I submit, is what this Court has done since 1960 in Warrior & Gulf, which is to say not look at the merits --

QUESTION: So there's nothing wrong with what, with the kind of decision the Board made. You just say they were wrong?

MR. ROSENFELD: No. We say they are wrong because the way they went about the analysis, the way they came to the process of making that determination, is

directly contrary to --

QUESTION: You ought to be satisfied if we just said they were wrong.

(Laughter.)

MR. ROSENFELD: I'd be satisfied, but -- but that's what the Ninth Circuit did. The Ninth Circuit said they're wrong because seniority, they say the Board has already told us in Uppco and United Chrome, survives, and the Ninth Circuit said that they saw no difference between seniority in this case and in the other two cases and therefore it was arbitrable.

QUESTION: Do we owe any deference to the Board?

MR. ROSENFELD: We don't in this case because we're dealing with a question of contract interpretation of the right to arbitrate, and those doctrines come from section 301. And even the Board concedes that, because the Board bases its decision on Indiana & Michigan, and in this case upon the question of the contract.

QUESTION: Those are not questions then even that are primarily for the arbitrator? They're for a court?

MR. ROSENFELD: In determining arbitrability they are for the court.

QUESTION: The Board works with these contracts all the time. We give deference to the interpretation, or

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at least the D.C. Circuit does, I know, and it may be based on our cases, to the interpretation of power contracts, for example, by the Federal Energy Regulatory Commission. And you don't think we should give any deference to the Board's interpretation of it?

MR. ROSENFELD: No. For another reason --

QUESTION: No -- not even respect, you wouldn't say?

MR. ROSENFELD: Well, actually I think what the D.C. -- I suppose some respect. But what the D.C. Circuit actually does in the IBEW case that we have cited is that --

QUESTION: Well, we shouldn't presume they're wrong, anyway.

MR. ROSENFELD: No.

QUESTION: Will you answer me this. Suppose you have a contract that has a wage system that's just like the Federal salary level. You're entitled to a step increase every year. Do you know -- what would the Board do if, if the contract comes to an end and the employer continues to pay everybody what they were getting before the contract ended, but stops giving them the step increases?

MR. ROSENFELD: Yes.

QUESTION: Would the Board consider that to be

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an unfair labor practice?

MR. ROSENFELD: Yes. The Board -- if --

QUESTION: It would?

MR. ROSENFELD: Yes. The Board has traditionally taken the position that if the employer regularly gives wage increases, and Mr. Chief Justice, this arises both in the Katz situation where the employer has a regular system of giving wage increases prior to the completion of negotiations, the employer has to continue that same system in effect. And then when the parties reach an --

QUESTION: Even though it == even though there is no contractual requirement at that point that would be enforced?

MR. ROSENFELD: Right. Because for example for the employers to say that during negotiations I will give no regular wage increases, although I had historically done it, is to undermine the bargaining process.

QUESTION: So it is treated like arbitration. The theory is that that was what was anticipated in the contract. Is that the theory of it?

MR. ROSENFELD: That -- not anticipated, no. It's that for the employer to change conditions before the contract has expired -- I'm sorry, to change conditions unilaterally before the parties have reached an agreement

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is to undermine the bargaining process because, for example, if the employer stops giving regularly scheduled wage increases, then the union has to bargain it back in.

QUESTION: So it follows from Katz, but not Nolde?

MR. ROSENFELD: The unilateral change doctrine follows from Katz, but it is reinforced by Nolde, because what this Court said in Nolde is that once you have arbitration in the contract there is a presumption that it continues in effect after the contract expired.

And that presumption of continuation of arbitration is -- it reinforces the Board's position that all terms and conditions which are mandatory subjects of bargaining continue after the contract has expired until certain things happen, primarily an impasse in negotiations is reached, at which point the employer is free to change conditions consistent with its bargaining posture.

In this case Litton comes to this Court in a very bad position, because there was in fact an election among the employees who voted in favor of the union. It was a close vote, but that vote occurred 3 months before the contract was terminated. And Litton had a legal choice at that point. It could have said litigate or it could have said negotiate. It chose to litigate and it

lost 8 or 9 months later. When it lost and the Board said that the union had won the election finally, Litton had another choice. It could litigate or it could violate the law. It chose to refuse to bargain. The Board found that refusal to bargain unlawful. And while it was breaking the law, refusing to bargain, it then laid these people off.

QUESTION: You don't say that under Katz you treat the promise to arbitrate as part of the conditions of employment, do you?

MR. ROSENFELD: Yes, I do.

QUESTION: You do? You mean that just because, automatically then you can't, the employer can't get out of arbitrating any dispute prior to impasse? He can't get out of arbitrating any dispute that arises?

MR. ROSENFELD: That's right. That's our theory.

QUESTION: Well, that isn't the Board's theory.

MR. ROSENFELD: The Board, the Board comes --

QUESTION: That isn't -- I thought the, I thought that the labor law says after the contract expires you don't make a unilateral change --

MR. ROSENFELD: That's right.

QUESTION: -- in wages, hours, and working conditions.

MR. ROSENFELD: And the Board said --

QUESTION: But labor also -- the labor law also says that you don't imply promise to arbitrate. Once the contract is over there's no longer a promise to arbitrate.

MR. ROSENFELD: The Board doesn't take that position. The Board takes the position --

QUESTION: I'm talking about Katz now.

MR. ROSENFELD: But Katz says that all mandatory subjects of bargaining remain in effect but cannot be unilaterally reputed by the employer or unilaterally changed by the employer.

The question is whether --

QUESTION: Well, on that basis the case -- this case is over, isn't it?

MR. ROSENFELD: Yes. That's my theory, Your Honor.

QUESTION: Katz covers arbitration in that language?

MR. ROSENFELD: Katz was not a case involving arbitration.

QUESTION: I know it wasn't.

MR. ROSENFELD: No. Katz was a case involving changes in other -- in other conditions of employment. This Court has not yet decided the question, the precise question of whether Katz encompasses arbitration. But

Katz encompasses all conditions, and the Board's theory in Indiana & Michigan was that arbitration also could not be unilaterally changed as long as there was a consensual basis --

QUESTION: But there are other forces in the labor law besides the idea of no unilateral changes during bargaining, and one of them is no compulsory arbitration.

MR. ROSENFELD: That's right. But when Congress said there would be no compulsory arbitration, what Congress said was that the law does not compel Litton or any other employer to agree to arbitration.

But what the Board -- what we think that Katz now says is that once you have agreed to some kind of arbitration, however expansive it is or however limited it is, once you agreed to it in the contract you cannot simply walk away from it at the expiration of the agreement.

QUESTION: Well, the -- it seems to me the Board in deciding this case has squarely rejected your notion about Katz.

MR. ROSENFELD: I don't believe they have. But I think the Board --

QUESTION: Well, it must have. Under your theory of Katz, until there has been bargaining to the impasse you have to arbitrate every dispute that arises.

Period. And the Board has just now said that's not so.

MR. ROSENFELD: But the Board has said surely that some disputes are arbitrable once the contract has expired under Katz.

QUESTION: I know, but you say all of them are.

MR. ROSENFELD: That's right.

QUESTION: You say that we should hold either all or none are?

MR. ROSENFELD: What we say is that you should hold that the obligation to arbitrate, once the contract has expired, is congruent with the obligation to arbitrate during the life of the agreement, unless the parties have agreed to some other system, which the parties under our system of collective bargaining agreement, they're -- entitled to do. The parties could well agree that certain things would not be arbitrated during the life of the agreement. For example, parties can agree that jurisdiction is not arbitrable or that wages are not arbitrable.

QUESTION: And for what period of time does this obligation last?

MR. ROSENFELD: It lasts either for the time that the parties have said in their own bargaining process --

QUESTION: Well, absent -- suppose they have

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said nothing about it, as here?

MR. ROSENFELD: Or it lasts until the employer takes action, and this is almost exclusively in the employer's control, until the employer takes action to propose that there be no further arbitration, bargains to an impasse, at which point there is no further obligation. For example in this case --

QUESTION: Mr. Rosenfeld, can an employer do the same for wages? Can he bargain that these step increases that you're entitled to under this contract only continue as long as the contract is in effect, and once the contract is over no more step increases?

MR. ROSENFELD: Yes.

QUESTION: And then, and then he wouldn't be guilty of an unfair labor practice, if he --

MR. ROSENFELD: That's right. What the Board says is that the parties are free in their collective bargaining, and this is our system of bargaining. They're free to negotiate virtually anything they want. For example, there are Board cases where the contract provides for a certain level of pension contribution, and then the employer simply stops those pension contributions at the end of the contract. And the Board has said the employer is free to do so provided the contract clearly and unmistakably provides the employer that right.

QUESTION: What if it says clearly and unmistakably I can give any wages I want once the contract ends? Once the contract ends all bets are off and I can reduce wages from $100 to $90.

MR. ROSENFELD: The Board says that if that waiver is clear and unmistakable, that if --

QUESTION: No unfair labor practice?

MR. ROSENFELD: Your Honor?

QUESTION: No unfair labor practice?

MR. ROSENFELD: No unfair labor practice. Because the Board respects the bargaining process and the language of the contract.

Now the Board is wary of finding those clear and explicit waivers, but there are some few cases where unions and employers have agreed that once the contract has expired the employer can make certain unilateral changes. For example, the common area where it occurs is in cost of living increases. The union recognizes that COLA's may not be applicable after the contract.

There are cases where -- for example this contract illustrates it. There is an explicit provision that provides that the health and welfare -- I'm sorry, the pension contribution -- the health and welfare contribution amount lasts until 9 months after the contract expires. It says that the level of contribution

will be $55 until July of 1988, which was some 9 months after the initial contract had expired. So the parties dealt with that problem of defining what their obligation would be. And then they later changed the amount of pension contribution and increased it just a month before the contract had expired, obviously I think anticipating that when the contract had expired they would bargain from that level.

Now the parties could well have said that with the expiration of the contract the employer will cease contributing to the union's trust fund, because the parties had contemplated that with the next agreement they would substitute a new health and welfare or pension program.

QUESTION: Mr. Rosenfeld, can you argue in this case, does it help your case to say that the Board is inconsistent in ordering steps one and two of the grievance process, but not the arbitration process?

MR. ROSENFELD: It's not only inconsistent, Your Honor, it puts the union at a severe disadvantage because presumably during that period when we have to go through steps 1 and 2, we can't take economic action, while the Board says theoretically we can at some other point, and that process could be dragged out for some period of time. But more importantly, going through steps 1 and 2 in this

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case is a useless exercise because all we do is go to the employer and if he rejects it, that's the end of it.

And even Chairman Dotson in his dissent in Indiana & Michigan said that it's like truncating this well-crafted grievance and arbitration procedure to say that there is some obligation to go through the first part of it but not the last part.

QUESTION: I can't see how the Board or the Government can defend the order to go through grievance steps 1 and 2, and not arbitration.

MR. ROSENFELD: It also creates another severe anomaly, which is that there are many grievance procedures which provide for joint adjustment boards. The Gateway Coal case gives a very good example where there are five intermediate -- five initial steps, and then a joint adjustment board composed of union officials from another union and mine officials from another mine. And we don't know whether the Board is telling us that that step, which is like arbitration for some purposes and unlike arbitration for other purposes, is governed by this doctrine. And yet that -- and then that mineworker contract provides that there's finally a step, which is at that joint board, which is very common to contracts but not here, the final step is arbitration before a neutral party who renders a binding decision.

QUESTION: I take it you would then say that the no-strike clause continues all the way?

MR. ROSENFELD: Yes, and the Board has said that in 1978 in Goya Foods. And once again, Chief Justice Rehnquist, when you dissented in Nolde you did for one strong -- there were two reasons, but the primary reason was because of this note of the strike problem. And a year later the Board in Goya Foods said that we will imply the continued obligation not to strike over arbitrable grievances, and we accept that. We recognize that we can't.

And in this case this is what the union did. The union filed a grievance asserting that the layoffs were unjust. We asked for the benefit of our bargain, which was to go to the arbitrator and have the arbitrator make the determination whether those grievances violated the agreement. The employer refused.

We didn't want to make the arguments about the language of the contract to the Board, and I surely don't want to make those arguments to this Court. Because what the Board tells us and what this Court has told us since Warrior & Gulf is that those arguments as to the meaning of the layoff clause, the meaning of seniority, and whether the parties intended that language to continue, those are arguments to be made to the arbitrator and not

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to the court and not to the Board.

Thank you.

QUESTION: Thank you, Mr. Rosenfeld.

Mr. Wallace, do you have rebuttal? You have 2 minutes remaining.

REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE RESPONDENT NLRB

IN SUPPORT OF THE PETITIONER

MR. WALLACE: On page 58 in Indiana & Michigan the Board specifically said that it has concluded that Katz should not apply to post-expiration withdrawal from arbitration. And that is a matter that goes to the Board's core expertise in interpreting and applying the act itself that the union is taking issue with. We have mentioned in our reply brief some of the pitfalls of extending Katz to this area, and we think the Board's determination there is entitled to deference.

In -- we disagree also that if the Board, in reading the arbitration provisions, concludes that a matter would have been arbitrable before expiration, that necessarily means the Board has to conclude that it would be arbitrable after expiration. If any claim invoking a provision of the contract were arbitrable, that would mean if an employee was hired after the contract expired and then discharged several months later, still during the

hiatus period, his discharge would be arbitrable, even though he never worked under the contract while it was in effect.

QUESTION: Well, what's the rationale for implied -- for requiring the grievance process then? How could the Board require half and not all?

MR. WALLACE: Because the Board concluded that the requirement -- carrying forward the requirement of submitting decision-making authority to an outsider goes beyond a process of bargaining by the employer under the preliminary grievance procedures, and goes to the point of inconsistency with the congressional prohibition of compulsory arbitration, when the arbitration can no longer be called a creature of contract. The earlier steps --

CHIEF JUSTICE REHNQUIST: Thank you. I think you have answered the question, Mr. Wallace.

The case is submitted.

(Whereupon, at 12:09 p.m., the case in the above-entitled matter was submitted.)

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