

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ABF FREIGHT SYSTEM, INC. Petitioners v.

NATIONAL LABOR RELATIONS BOARD

CASE NO: 92-1550

PLACE: Washington, D.C.

DATE: Wednesday, December 1, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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ABF FREIGHT SYSTEM, INC. :
Petitioners :
v. : No. 92-1550
NATIONAL LABOR RELATIONS BOARD :

Washington, D.C.
Wednesday, December 1, 1993

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The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:02 a.m.

APPEARANCES:
JOHN V. JANSONIUS, ESQ., Dallas, Texas; on behalf of
the Petitioner.
LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the Respondent.

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C O N T E N T S

	PAGE
ORAL ARGUMENT OF JOHN V. JANSONIUS, ESQ. On behalf of the Petitioner	3
ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ. On behalf of the Respondent	25
REBUTTAL ARGUMENT OF JOHN V. JANSONIUS, ESQ. On behalf of the Petitioner	43

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

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 92-1550, ABF Freight System v. National
5 Labor Relations Board. Mr. Jansonius.

6 ORAL ARGUMENT OF JOHN V. JANSONIUS

7 ON BEHALF OF THE PETITIONER

8 MR. JANSONIUS: Mr. Chief Justice and may it
9 please the Court:

10 Remedies in unfair labor practices are public
11 remedies. The issue in this case is whether an individual
12 who testifies in an unfair labor practice case under oath,
13 and who testifies untruthfully, may share in the remedy
14 that may be entered at the conclusion of that proceeding.

15 This case was filed as a consolidated case
16 involving several dockworkers who worked for ABF Freight
17 system in Albuquerque. Ironically, the only one of those
18 dockworkers to prevail in this case is Mr. Michael Manso.
19 Mr. Manso was discharged on August 17, 1989, ostensibly
20 for being late for work that day.

21 At the hearing in Albuquerque, he testified as
22 to the reason he was late for work. He said that his car
23 had broken down on the way in, that he'd had to call his
24 wife and that she came and picked him up and then took him
25 on to work, at which time he was pulled over by a highway

1 patrolman. The judge heard all that testimony, and the
2 judge concluded that Mr. Manso was lying in testifying as
3 to his reason for being late for work that day.

4 In an adversary system for resolving disputes,
5 we believe that the oath that a witness takes is
6 absolutely vital, that it's fundamental to the process.
7 The first step to correctly applying the law is to decide
8 the facts correctly in the first place, and a witness who
9 does not honor the oath makes that process much more
10 difficult for the courts and in this case for the
11 administrative law judge.

12 Perhaps more than in any other context in the
13 Federal system a correct outcome on the facts in unfair
14 labor practice cases is dependent on witnesses honoring
15 their oaths. Whether or not a complaint is even to be
16 filed in the first instance is normally decided by counsel
17 for the general counsel or by the regional offices of the
18 NLRB simply based on affidavits. Individuals who give
19 statements to the NLRB's are under oath, and their
20 statements are taken at face value for the most part, and
21 whether or not there is even going to be a case depends on
22 whether that individual is giving a true affidavit.

23 QUESTION: Do Federal courts deny people relief
24 because of perjured testimony?

25 MR. JANSONIUS: They have that discretion, Your

1 Honor. They don't necessarily do it. I'm not aware of
2 any cases where an individual who has been found to have
3 testified untruthfully to a Federal district judge has
4 been awarded relief.

5 QUESTION: They have that discretion? Can I, as
6 a judge, even though the plaintiff is entitled to judgment
7 in the case, say, "You're entitled to judgment but I'm not
8 going to give it to you because you perjured yourself
9 here." Can a Federal judge do that?

10 MR. JANSONIUS: In a particular context a
11 Federal judge might be able to do that. I'm not aware of
12 any situation --

13 QUESTION: You think he might be.

14 MR. JANSONIUS: Might be.

15 QUESTION: But he might not be, too.

16 MR. JANSONIUS: Might not be, Your Honor.

17 QUESTION: So you don't know, in other words.

18 MR. JANSONIUS: That's correct, Your Honor.

19 QUESTION: All right.

20 MR. JANSONIUS: I do know the unfair labor
21 practice, though, followed by the NLRB, and I think that
22 in the context of unfair labor practice proceedings it's
23 particularly important that the oath be honored.

24 QUESTION: What if a representative of
25 management of the employer lies under oath at the NLRB

1 proceeding? What's the rule?

2 MR. JANSONIUS: Well, the --

3 QUESTION: Even if it turns out that,
4 notwithstanding what clearly was a lie on some point, that
5 the employer is entitled to judgment?

6 MR. JANSONIUS: If I'm following, you're saying
7 what is the situation if the representative of management
8 testifies --

9 QUESTION: Yes.

10 MR. JANSONIUS: -- untruthfully --

11 QUESTION: Yes.

12 MR. JANSONIUS: -- and the company nonetheless
13 prevails in the case?

14 QUESTION: Well, under the law and the facts,
15 the company should prevail. What must be done there?
16 Must relief be denied under your rule, a per se rule?

17 MR. JANSONIUS: I think there are two
18 possibilities. Number 1, if there has been no unfair
19 labor practice, I'm not certain that the NLRB has
20 jurisdiction to do anything about it.

21 I do think that, assuming that they do have
22 jurisdiction, that they have remedial power that they
23 could craft a remedy in that situation, that they could
24 deal with it.

25 They, for instance, could make the employer post

1 a notice explaining to employees what they did in the
2 unfair labor practice proceeding. They could be perhaps
3 required to give a union representative equal time to come
4 into the plant, tell the employees, we had an unfair labor
5 practice case, we lost in that unfair labor practice case,
6 here's why, but you must know that the employer did so-
7 and-so.

8 There are a variety of remedies that I think the
9 NLRB would have in that situation, assuming it has
10 jurisdiction.

11 QUESTION: But you wouldn't suggest a per se
12 rule there?

13 MR. JANSONIUS: Well, I might, Your Honor,
14 presented with the situation. I'm not aware of that
15 situation coming before us.

16 QUESTION: Let me ask you this: did this
17 employer introduce evidence that under every circumstance,
18 if they had an employer they discovered who had lied, the
19 employer would be discharged, that that was the rule of
20 the employer?

21 MR. JANSONIUS: That specific evidence was not
22 presented, but the evidence was presented in the sense
23 that it's in our collective bargaining agreement that
24 dishonesty is grounds for immediate termination, so
25 certainly the collective bargaining representatives, or

1 the union representatives and the management
2 representatives who negotiated the contract felt that
3 dishonesty was a serious offense.

4 QUESTION: But as we take this case, the
5 employee was not discharged for dishonesty but for other
6 things.

7 MR. JANSONIUS: That's true.

8 QUESTION: I mean, that's how it comes to us,
9 anyway.

10 MR. JANSONIUS: That's true, and the -- I will
11 tell you that the evidence on that point was somewhat
12 equivocal, and that may be --

13 QUESTION: Yes, but I mean, we take it on that
14 basis, I guess.

15 MR. JANSONIUS: Yes, you do. Yes --

16 QUESTION: Are you prevented from discharging
17 the employee now because of the dishonesty that you
18 learned he has engaged in, that you now know he has
19 engaged in?

20 MR. JANSONIUS: I think we could, Your Honor.
21 I'm not sure how the collective bargaining agreement
22 applies in that situation, whether that would be a
23 contractual issue between ABF and its union
24 representatives.

25 QUESTION: Don't you think the Board would have

1 some problem with that?

2 MR. JANSONIUS: I'm sure they would have some
3 problem with it, but I think we would be legally justified
4 in terminating him. The contractual issue is one I'm not
5 familiar with on the procedures under the National Master.

6 QUESTION: Why isn't this case a standoff on
7 lying? The ALJ found that a couple of the employer's
8 witnesses also lied.

9 MR. JANSONIUS: Your Honor, I don't think he
10 made that finding. He did discredit some of the
11 employer's witnesses on some comments that supposedly were
12 made when Mr. Manso returned to work on one occasion. He
13 used much stronger language in characterizing Mr. Manso's
14 testimony, and I think there was a reason for that. It
15 was very clear that Mr. Manso was not just mistaken on the
16 facts or had a faulty memory. He was contriving a story
17 that was not true. I don't think --

18 QUESTION: Well, how does that differ -- there
19 were three officers who, according to Manso, said, watch
20 out, the boss is gunning for you, and they said, we never
21 said any such thing. Now, if they said that, why aren't
22 they out-and-out lying?

23 MR. JANSONIUS: Well, there could be a number of
24 explanations for it. They could simply have forgotten.
25 It could be a statement that was blown out of context. It

1 might be something that their memory of the event differs
2 from Mr. Manso's memory of the event. I don't think that
3 you can say necessarily that because a witness' testimony
4 is not credited that they're being deliberately
5 untruthful.

6 QUESTION: Mr. --

7 QUESTION: The ALJ says, "I believe Manso. He
8 said he was told the boss is gunning for you." These
9 witnesses have taken an oath that that never happened.
10 Why aren't they lying?

11 MR. JANSONIUS: Well, I don't think you can make
12 that assumption that they're lying, because the events
13 that had occurred were months in advance of that.

14 QUESTION: When the ALJ says, "I credit Manso,"
15 isn't he necessarily saying, I discredit these others?

16 MR. JANSONIUS: He is saying that. He's saying
17 that. I don't think he's saying that they have come into
18 the courtroom and deliberately given false testimony.

19 QUESTION: Mr. Jansonius, you're willing to
20 settle for a standoff, aren't you? Aren't you willing to
21 say, okay, we both lied, and neither one of us should get
22 any relief? Isn't the difference that the other liar is
23 getting relief? Your client's not getting any relief from
24 the court --

25 MR. JANSONIUS: Well --

1 QUESTION: -- so even if they are both lying,
2 all you're asking is that both liars be treated equally.
3 Neither one of them gets any relief.

4 MR. JANSONIUS: Well, that's true --

5 QUESTION: That's fair, isn't it?

6 MR. JANSONIUS: -- I would be satisfied with
7 that. I don't like the equation, though, that our
8 witnesses lied, and I don't think you can say --

9 QUESTION: Well, but there's a difference --

10 MR. JANSONIUS: -- that they were speaking for
11 the corporation.

12 QUESTION: -- in giving relief to the side
13 that's lying, and in giving relief to nobody at all.

14 QUESTION: Yes, but --

15 MR. JANSONIUS: I agree with that, and the fact
16 is that we are not contesting the total award entered by
17 the NLRB.

18 QUESTION: But your position as a matter of law,
19 as I understand it, is that even if an employee's of --
20 even if a management representative testifies blatantly
21 falsely, and in all other respects the charge should fail
22 against the employer, you wouldn't say well, you go ahead
23 and grant relief against that company because they're
24 guilty of blatant falsehoods, would you?

25 MR. JANSONIUS: I'm not sure I'm following your

1 question, Your Honor, but I don't think --

2 QUESTION: The question is whether the rule
3 you're asking for is evenhanded. In other words, just
4 assume the same kind of perjury on the other side of the
5 fence that occurred here. Would that automatically decide
6 who wins the proceeding?

7 MR. JANSONIUS: Well, it's not a liability
8 issue. We have lost the case, technically. We're not
9 contesting --

10 QUESTION: Just on the remedy.

11 MR. JANSONIUS: Just on the remedy. We are not
12 contesting at this stage, any more, the finding of an
13 unfair labor practice being committed. I would like to
14 point out, though, that --

15 QUESTION: Mr. -- you wouldn't be evenhanded?
16 You would not argue for the same rule if the employer was
17 seeking relief from the Board and the employer lied?
18 You'd say, if employers lie they can get relief, but if
19 employees lie, they cannot get relief?

20 MR. JANSONIUS: Oh, no, I'm not saying that at
21 all.

22 QUESTION: So you would treat the employer
23 evenhandedly?

24 MR. JANSONIUS: Yes.

25 QUESTION: If he were seeking relief from the

1 Board and it was shown that the employer perjured himself,
2 you wouldn't give the employer relief, either, or at least
3 not the kind of relief that's equivalent to the backpay
4 and rehiring here.

5 MR. JANSONIUS: No, I wouldn't. I think that
6 sometimes employers are charging parties in unfair labor
7 practice cases. It's not very often, but they sometimes
8 are, and if they do go in and abuse the process, I don't
9 think they should be given relief.

10 You have a little tougher issue with employers,
11 though, and it's because sometimes the -- it's not the
12 officers, directors, or the shareholders of the
13 corporation who are acting, but individuals who are
14 testifying on behalf of the company. You just do not --

15 QUESTION: Well, doesn't that point out one
16 likely difficulty if we were to adopt your rule,
17 Mr. Jansonius? It would complicate the procedures before
18 the ALJ and the Board, because you'd have a lot of what
19 you might call satellite litigation, or at least satellite
20 determinations. You know, much concentration on was this
21 particular witness lying, or was he merely mistaken, or
22 something like that?

23 MR. JANSONIUS: I don't think you would, You
24 Honor. We're not asking the administrative law judges to
25 change the way they go about deciding cases. They -- they

1 are normally very judicious. They normally refrain from
2 making those strong determinations.

3 QUESTION: Well, what's wrong with saying this
4 answer on the part of the employee, that that -- even if
5 it's a bad answer, it's good enough for a bad charge,
6 because if the lateness is a phony excuse, if the employer
7 wants to get rid of this employee because he's been pro-
8 union, and then the employer makes up as the reason the
9 lateness, why shouldn't the employee -- I'm going to try
10 to save my neck for this bad charge. I'm going to give an
11 answer that will help me stay.

12 Why should -- why shouldn't -- the Board's
13 position is, we have to be sensitive and situation-
14 specific in our analysis of this. Why should you come and
15 say, "Board, you must defend your honor and anytime
16 anybody lies to you, no relief."

17 MR. JANSONIUS: Well, the employee has a choice
18 to make. They can go in and tell the truth, or they can
19 go in and tell a lie. I think --

20 QUESTION: No, but it's a question of, are --
21 the authority we can exercise over the Board. Even
22 assuming, for the moment, that the rule you suggest has
23 some merit to it, don't you have to tell us that the Board
24 is arbitrary in not adopting that rule?

25 MR. JANSONIUS: I don't think we have to prove

1 arbitrariness, although I think it exists here.

2 QUESTION: Well, how else can we reverse the
3 Board's determination?

4 MR. JANSONIUS: Well, under the statute, I guess
5 the issue is whether awarding relief, reinstatement and
6 backpay to somebody who has deliberately given false
7 testimony will effectuate the purposes of the act.

8 QUESTION: Well, isn't the legal proposition
9 that you're putting forth that the National Labor
10 Relations Board is arbitrary if it fails to adopt a rule
11 that refuses relief to any employee who lies -- lies, I
12 suppose, on a material matter?

13 MR. JANSONIUS: Yes. I believe that it is an
14 arbitrary position, if not just an erroneous as a matter
15 of law position, for the NLRB to state that someone who
16 abuses the process by coming in and giving false testimony
17 is entitled to backpay and reinstatement, and that doing
18 that will effectuate the purposes of the act.

19 I don't see how the Board can make that case
20 that putting somebody back to work, giving them backpay in
21 this situation, is going to effectuate the purposes of the
22 act, and I think that is why the Congress assigned this
23 Court with supervisory responsibility over the Board.

24 There have been many instances over the years
25 where this Court looked at NLRB remedies and made the

1 conclusion that what the NLRB did perhaps ran afoul or
2 interfered with other Federal policies and corrected the
3 Board on the remedy that it entered, and this is one of
4 those situations where I believe that is appropriate.

5 I think it's particularly appropriate in the
6 NLRB context, just because of the nature of the
7 proceedings themselves. We have very few safeguards for
8 truth in unfair labor practice proceedings. The oath is
9 perhaps one of them.

10 The Board serves as prosecutor, they serve as
11 judge, they serve as jury, they hear the first level of
12 appeal, there's no discovery, there's no way for an
13 employer like ABF to know in advance of a hearing what the
14 Government's evidence is going to be, who the witnesses
15 are going to be, what they're going to say. You can't
16 even get statements from individuals who have given
17 affidavits to the National Labor Relations Board until
18 they actually take the stand at the hearing, and even then
19 only after they've testified.

20 QUESTION: Mr. Jansonius, this would be a rather
21 sweeping proposition if the Court were to accept it. How
22 many other agencies are there like the NLRB who deal with
23 the truthfulness of what witnesses say? Are you
24 suggesting that every Federal agency must take the
25 position that one who doesn't tell the whole truth and

1 nothing but the truth doesn't get individual relief?

2 MR. JANSONIUS: Your Honor, I can't answer the
3 first part of your question, how many other agencies there
4 are. I'm very familiar with the National Labor Relations
5 Board, and in proceedings like this, if there are other
6 agencies that have a similar adjudicatory process, I think
7 the rules should apply to them. There are very few
8 safeguards for truth in unfair labor practice proceedings,
9 and the oath in this context is particularly important.

10 An employer, or a union --

11 QUESTION: But you're not familiar with any such
12 rule that a trial -- say trial judge is having a bench
13 trial and doesn't believe some of the things the plaintiff
14 says, that that judge must then deny relief to the
15 plaintiff?

16 MR. JANSONIUS: No. In the civil litigation
17 system I'm not aware of any rule with that effect. I do
18 think it's the practical reality of litigation in the
19 Federal district courts that individuals whose testimony
20 is discredited on material points don't prevail.

21 QUESTION: What about courts of equity,
22 Mr. Jansonius? Do you think a court of equity which has
23 various forms of relief available couldn't say, we're
24 going to give one form of relief rather than another
25 because you affronted the court by perjuring yourself?

1 MR. JANSONIUS: Yes, I think --

2 QUESTION: Do you think a court of equity would
3 do that?

4 MR. JANSONIUS: I think a court of equity would
5 be in a position to craft a remedy that's appropriate in
6 this case. I think the Board --

7 QUESTION: How many other Federal agencies are
8 there besides the Labor Board that have such a variety of
9 remedies, varieties of forms of relief that they can give
10 in a particular proceeding? I mean, it's not like the
11 usual litigation where you find for the plaintiff and give
12 him his damages or you don't. The Board has a lot of
13 varieties of relief it can give. Are there are a lot of
14 other Federal agencies that are in that situation?

15 MR. JANSONIUS: Your Honor, I wish I could
16 answer that. I just don't know. I do know that the NLRB
17 has very broad discretion and it can craft remedies.

18 QUESTION: And I thought that your point was
19 that the Board used to do it the way that you now suggest,
20 and it didn't seem to slow down the proceedings very much.

21 MR. JANSONIUS: No, I don't think it slowed down
22 proceedings at all, and I do think at one point in time
23 the Board had pretty much the attitude that I'm advocating
24 they should take now, that one who has given false
25 testimony is not going to be given a share of the public

1 remedy.

2 QUESTION: And it's also saying that that is a
3 matter of law -- maybe if the Board decided how it wanted
4 to proceed, that would be one thing, but you say -- what
5 compels the Board to take that view?

6 MR. JANSONIUS: Your Honor, what compels the
7 Board to take that view is I believe, number 1, starting
8 with section 1 of the act which sets out the purposes, I
9 don't see that reinstating someone with backpay and giving
10 them money damages or reinstatement is going to effectuate
11 any of the purposes set out in section 1 of the act. I
12 believe section 10(c) of the act makes some remedies
13 nondiscretionary with the Board and makes it clear that
14 they have to enter some forms of --

15 QUESTION: You're taking us out of the equity
16 mold into the strict law mold.

17 MR. JANSONIUS: Yes. I think what really
18 separates this case from the standard unfair labor
19 practice case where the discretion has been accorded the
20 Board to mold the remedies under section 10(c) with very
21 little review is the fact that we do have other policies
22 that come into play here.

23 Typically, the NLRB is deciding strictly labor
24 disputes that don't have ramifications that go outside the
25 National Labor Relations Act where the Federal policies

1 are impacted. This one does, and that's why I think it's
2 appropriate for the Court here to take a hand in directing
3 the Board and supervising it, and what remedies are to be
4 entered in this rather narrow context.

5 But there's no provision in the statute that
6 directly addresses it, and I can't imagine that Congress
7 really thought of this situation -- what's going to happen
8 with a charging party who comes in and lies, and what
9 should the Board do then?

10 Congress was concerned when it considered the
11 National Labor Relations Act about the lack of safeguards
12 for truth. When the bill was originally considered in the
13 Senate, it specifically provided that the rules of
14 evidence were not to apply. That was the subject of some
15 debate in Congress, and there was a lot of testimony that
16 this was -- before the Congress at the time that this was
17 not a good policy, that the rules of evidence should be
18 applied.

19 And after debating the issue, Congress did a
20 turnaround and made section 10 -- put in section 10(b)
21 that the Federal Rules of Evidence were to be applied
22 insofar as practicable in unfair labor practice
23 proceedings, and I think that indicated that Congress had
24 some concern with the lack of safeguards for truth in the
25 unfair labor practice context, and did what they could to

1 see that the oath was made a part of the process.

2 Your Honors, through its brief, the Solicitor
3 General has argued that the NLRB, that its order in this
4 case does effectuate the purposes of the act. ABF would
5 submit to this Court that the Government's attorneys are
6 putting words in the mouth of the NLRB. There is no
7 finding in the NLRB's decision and order that reinstating
8 Mr. Manso with backpay will effectuate the purposes of the
9 act, and there certainly is no explanation in the Board's
10 decision and order about how reinstating a witness who has
11 given false testimony is going to effectuate the purposes
12 of the act.

13 QUESTION: But there was deference to the
14 Board's judgment --

15 MR. JANSONIUS: I --

16 QUESTION: -- expert judgment in handling these
17 labor problems.

18 MR. JANSONIUS: Generally there is deference to
19 the Board's expertise in handling labor disputes and
20 taking actions that will prevent labor strife.

21 I don't think this is a context where the Board
22 has shown that it has an expertise in the subject matter
23 at issue, and I don't think that the Board's decision and
24 order gives any explanation for the Court that would
25 enable you to say that they were acting properly to

1 effectuate the purposes of the act. There simply isn't
2 any discussion in the decision and order about how giving
3 a remedy to somebody who has given false testimony is
4 going to effectuate the purposes of the act.

5 ABF would urge the Court that, as a strict
6 proposition, that reinstating someone, giving someone
7 backpay in this context will not effectuate the purposes
8 of the act. There's a few points I'd like to make in that
9 regard.

10 First, as I said in my opening comment, getting
11 at the true facts of the case is the first step to
12 correctly applying the law. If a witness is not going to
13 honor the oath, that's going to interfere with the NLRB's
14 and any other agency's ability to get at the true facts
15 and to correctly apply the law, so just from a very broad
16 proposition, a witness who is not telling the truth is
17 undermining an agency's ability to enforce and protect the
18 purposes of the statute.

19 There are other reasons as well why I believe
20 that the Board's order in this case cannot possibly
21 effectuate the purposes of the act. First of all, I think
22 it's just common sense that putting someone like Mr. Manso
23 back to work is going to be saddling ABF with a
24 contractual relationship with someone who it has very good
25 grounds not to trust, and there's certainly going to be a

1 loss of respect between the employer and employee, and I
2 don't think that a working relationship with someone who
3 has taken advantage of the system and the employer the way
4 Mr. Manso has could be said to do anything to reduce labor
5 strife or to promote the free flow of commerce.

6 I think that the act, the purposes of the act
7 are frustrated in this context by encouraging false
8 claims. The NLRB is going to look like a very friendly
9 forum to charging parties -- and it should be a receptive
10 forum, I'm not saying that, otherwise -- but it's going to
11 look like a system where the Government can be taken
12 advantage of, and I don't think that effectuates the
13 purposes of the act.

14 I think the remedy that the Board has ordered in
15 this case undermines ABF's collectively bargained
16 agreements procedure. Mr. Manso went through the
17 agreements procedure. A three -- or six-member panel
18 equally composed of labor and management concluded that he
19 should not be put back to work, concluded that he was not
20 entitled to backpay.

21 Given what's happened, I think that the
22 Grievance Committee that ABF has negotiated with the local
23 union of the Teamsters is going to look like a less
24 receptive forum, and there's going to be more tendency to
25 try and sidestep the grievance procedure knowing that the

1 NLRB is going to be more forgiving of those who try to
2 take advantage of the system.

3 For all those reasons, I think that the Board's
4 order in this case, or in any similar context, is not
5 effectuating the purposes of the act, and again I would
6 say that I think that the NLRB needs to be reminded that
7 it does not apply the act in a vacuum.

8 This Court has said several times that other
9 considerations have to be taken into account when crafting
10 unfair labor practice remedies. It did so in Sure-Tan, it
11 did so in Detroit Edison, it did so in Lechmere, it's done
12 so in other cases.

13 And the NLRB in this case did apply the act in a
14 vacuum, it did take a very narrow reading of public
15 policy, and looked strictly at the National Labor
16 Relations Act instead of taking other concerns into
17 account which we believe that they are compelled to do,
18 and we believe that this Court as the supervisor over the
19 NLRB should make it clear to them that they've got to take
20 the oath seriously, that it is a public policy that it be
21 honored, and that should be made a stronger part of the
22 National Labor Relations Act.

23 Unless there are other questions I'll reserve my
24 time.

25 QUESTION: Very well, Mr. Jansonius. Mr.

1 Wallace, we'll hear from you.

2 ORAL ARGUMENT OF LAWRENCE G. WALLACE

3 ON BEHALF OF THE RESPONDENT

4 MR. WALLACE: Thank you, Mr. Chief Justice, and
5 may it please the Court:

6 Under the limited grant of certiorari in this
7 case, the question presented is a legal question about the
8 Board's remedial authority, and as petitioner recognizes,
9 that remedial authority is a creature of statute. It's
10 set forth in section 10(c) of the National Labor Relations
11 Act, which is reproduced in full in the appendix to the
12 certiorari petition, the white-covered certiorari
13 petition, at page C-5 toward the very end of the appendix
14 to the petition.

15 It's a rather lengthy provision, but there are
16 two discrete portions of it that have relevance here. The
17 first is at about ten lines down in the middle of the
18 sentence, beginning close to the beginning of the line,
19 "After the Board has found that there's an unfair labor
20 practice it ordinarily issues a cease and desist order,
21 and it's authorized then, and to take such affirmative
22 action, including reinstatement of employees with or
23 without backpay, as --"

24 QUESTION: Where are you reading, please?

25 MR. WALLACE: I am about ten lines down on page

1 C-5.

2 QUESTION: Thank you.

3 MR. WALLACE: About ten lines down within
4 subsection (c): "The Board is authorized to take such
5 affirmative action, including reinstatement of employees
6 with or without backpay, as will effectuate the policies
7 of this act."

8 And then about twelve lines from the bottom of
9 this provision there is a sentence that begins, just past
10 the middle of the line, that says, "No order of the Board
11 shall require the reinstatement of any individual as an
12 employee who has been suspended or discharged or the
13 payment to him of any backpay if such individual was
14 suspended or discharged for cause."

15 Except for that provision, one searches in vain
16 for an express limitation in the statute on the Board's
17 remedial authority in ordering reinstatement or backpay in
18 accordance with the Board's judgment of what will
19 effectuate the policies of the act, and in this case there
20 was a determination made by the Board -- on page B-21 of
21 the appendix to the petition -- that this was not a
22 discharge for cause, that the cause given was a pretext
23 for discrimination.

24 That finding was upheld by the court of
25 appeals -- on pages A-14 to A-18 of the appendix to the

1 petition -- and that question is not at issue here under
2 the Court's limited grant of jurisdiction.

3 So the only express limitation in the statute
4 that the courts obviously would have to consider enforcing
5 against the Board in limiting its remedial authority is
6 not applicable here, and the question becomes, as Justice
7 Kennedy very aptly phrased it in his question, whether the
8 Board was arbitrary in -- has been arbitrary in the
9 standards it has adopted in determining when reinstatement
10 and backpay will effectuate the policies of the act.

11 QUESTION: Or an abuse of discretion --
12 arbitrary, capricious, an abuse of discretion or otherwise
13 not in accordance with law, as the APA says, and the
14 contention here is that it's an abuse of discretion, I
15 gather, substantially.

16 MR. WALLACE: Well, the Court has formulated it
17 in numerous ways, many of which we collected in our brief.
18 The first decision of this Court dealing specifically with
19 the question of reinstatement was the 1941 decision,
20 written by Justice Frankfurter for the Court in the Phelps
21 Dodge case, and we have set out a relevant quotation from
22 that on the very last page of our brief, in which the
23 Court upheld in that case the Board's authority to order
24 reinstatement as a remedy for employees who had found
25 other employment and were not entitled to backpay.

1 The Court emphasized that because the relation
2 of remedy to policy, which is the statutory criterion, is
3 peculiarly a matter for administrative competence, courts
4 must not enter the allowable area of the Board's
5 discretion and must guard against the danger of sliding
6 unconsciously from the narrow confines of law into the
7 more spacious domain of policy.

8 QUESTION: Mr. Wallace, is there any doubt that
9 the lie told here in this legal proceeding, of which this
10 is the last stage, the court of appeals being the
11 intermediate stage -- is there any doubt that it was
12 perjury, a felony under Federal law? There's no real
13 doubt about that, that it was material to the proceeding.

14 MR. WALLACE: Well, it was found to be
15 purposeful --

16 QUESTION: And material to the proceeding.

17 MR. WALLACE: -- by the administrative law
18 judge, and the Board expressed no disagreement with that.

19 QUESTION: Well, I find it -- to my mind it is.
20 I just don't think there's much of a doubt about it, and
21 with that in mind, I am just astounded -- I never thought
22 I would read a Justice Department brief in those
23 circumstances which says a lie, uttered by an employee
24 trapped in these somewhat unusual circumstances may be
25 reasonably be characterized as less deserving of sanction

1 than a lie given by an employee who has not endured a
2 similar history of mistreatment by the employer, and the
3 employee's adherence to his story before the ALJ -- the
4 felony -- though unjustifiable -- felonies are
5 unjustifiable -- is understandable.

6 Will this be posted, require to be posted in the
7 employee's place of employment when this -- when this
8 perjurer is compelled to be rehired so that everyone who
9 goes to NLRB proceedings will understand how understanding
10 the Board and the Justice Department is of perjury in NLRB
11 proceedings?

12 MR. WALLACE: Well, Mr. Justice, we certainly
13 would not disclaim the authority to prosecute for perjury
14 in this case or any other, and we have collected cases in
15 our brief in which the Board has referred matters to the
16 Justice Department for prosecution -- this is on page --
17 footnote 19 on page 27 of our brief -- when there has been
18 perjury in proceedings before the Board, and as there are
19 remedies for perjury which do not require distortion of
20 the Board's remedial authority in deciding what the
21 appropriate remedy is for a proven unfair labor practice.

22 QUESTION: The Justice Department also says in
23 its brief that "the Board, however, has discretion in
24 determining how best to protect its integrity while
25 effectuating the policies of the act."

1 What about the courts' integrity, who ultimately
2 permit the enforcement of these orders? Do you think it's
3 no imposition upon the integrity of the courts who must
4 accept the factfinding proceedings held by the NLRB?

5 MR. WALLACE: Well, something of that flavor
6 comes through in the Precision Window opinion, which said
7 that the Board is not entitled -- the Board is barred from
8 awarding reinstatement or backpay to -- in favor of a
9 charging party who has lied in the proceedings before the
10 Board.

11 I would mention, however, that the court did not
12 take the position that it was barred from upholding the
13 Board's entry of a cease and desist order.

14 The question ultimately has to be whether the
15 Board acted beyond its authority. That is all the court
16 is being asked to determine when the question before the
17 reviewing court is whether to enforce the Board's order.

18 QUESTION: Or whether it was an abuse of
19 discretion in granting this remedy --

20 MR. WALLACE: This particular rem --

21 QUESTION: -- in light of the other remedies
22 that were available.

23 MR. WALLACE: Whether the remedy should have
24 been a more limited one.

25 QUESTION: To this particular individual who had

1 perjured himself in the course of the court's proceeding.

2 MR. WALLACE: Well, as the Board recognized in
3 the same Phelps Dodge case back in 1941 with respect to
4 reinstatement, and as this Court has emphasized in that
5 case and in the Golden State case much more recently,
6 there is a public dimension to this relief. This is not
7 relief just for an individual.

8 The reinstatement remedy in particular, as the
9 Board emphasized in Phelps Dodge, is one that reassures
10 other present and future employees of the same employer
11 that discrimination based on antiunion animus or protected
12 conduct under the act will be remedied.

13 QUESTION: There is also a public dimension, is
14 there not, Mr. Wallace, to being understanding of perjury
15 in the course of NLRB proceedings. Does that have no
16 public dimension, either?

17 MR. WALLACE: There are many credibility
18 determinations to be made in Labor Board proceedings. It
19 is not always clear, as this Court's opinion last term in
20 St. Mary's Honor Center very eloquently and emphatically
21 pointed out, that every determination that the credibility
22 of one witness rather than another is to be upheld means
23 that the witness whose credibility is not being honored
24 has -- is a liar or a perjurer, has deliberately told a
25 lie rather than misreclected something or was confused

1 about something.

2 QUESTION: But in this case, isn't it true that
3 the ALJ stated that the person lied?

4 MR. WALLACE: In this case it happened to be an
5 easy determination because this particular story had
6 earlier been told to the employer and the employer had
7 investigated it and disproved it. It happened to be
8 something that could easily be determined in this
9 particular case.

10 But my point is a point that you yourself made
11 in a question earlier, Mr. Chief Justice, that if it
12 becomes a legally dispositive question whether a rejection
13 of a witness' testimony is based on a determination that
14 that witness was deliberately lying, then the other party
15 in the case can ask the Board to make that
16 determination --

17 QUESTION: Why?

18 MR. WALLACE: -- in every case.

19 QUESTION: Why so? Why couldn't we just say
20 that when the Board does make that determination, when the
21 Board says for all the world to see, this plaintiff is a
22 perjurer, the Board shall not then go on to say, and we're
23 going to require the company to give him his job back --
24 without requiring the Board to make that determination,
25 but if it makes the determination and announces publicly

1 that the person seeking relief is a perjurer, why is it
2 unreasonable to say, it's an abuse of discretion, to then
3 go on and say, and we're going to give him relief?

4 MR. WALLACE: Well, since there was no -- it has
5 a gratuity in the determination of the case to have made
6 that pronouncement, or if it's a legally important
7 determination, others could ask that it be determined in
8 other cases.

9 QUESTION: I don't think so, but it's a question
10 of whether it fulfills the purposes of the act. Once that
11 announcement has been made on the record, whether it
12 fulfills the purpose of the act then to reinstate the
13 person in his employment, who then can strut around and
14 say, yes, I lied in my proceeding -- didn't hurt me a bit.
15 I got reinstated. I got my money back. Does that fulfil
16 the purpose of the act?

17 MR. WALLACE: Well, the Board is quite conscious
18 of the need to protect the integrity of its processes, and
19 as the Lear-Siegler case which we discussed at some
20 length, demonstrates, it has on occasion, using its
21 standards, tolled backpay when there has been misconduct
22 in the Board proceeding.

23 QUESTION: In this case, Mr. Wallace, the Board
24 didn't make any finding that this particular individual
25 had lied, as I recall. As you point out, the

1 administrative law judge made it --

2 MR. WALLACE: Precisely so.

3 QUESTION: -- and the Board simply didn't deal
4 with the question.

5 MR. WALLACE: Precisely so, because the Board
6 did not consider it determinative of what the appropriate
7 remedy should be.

8 QUESTION: Well, in Lear-Siegler the Board was
9 upset that an employee that -- had manipulated a witness,
10 and the Board was very protective of its own turf, saying
11 that you've interfered with out processes, but in Owens
12 Illinois the Board awarded reinstatement to a line
13 employee because the employer had not demonstrated that
14 the employee was unfit, so it seems to me that you give
15 very little consideration to the injury that the employer
16 faces when the employer has to mount the burden of proving
17 perjury, which the employer in this case did.

18 MR. WALLACE: The Board does make a distinction
19 between backpay and reinstatement. It will toll backpay
20 if there has been misconduct or misuse of its proceedings
21 as a means of protecting the integrity of its proceedings,
22 but it explained in Lear-Siegler that that is not in
23 itself a sufficient reason to deny reinstatement of an
24 employee as a remedy for an unfair labor practice because
25 of the importance of reinstatement to protecting the

1 rights of coworkers.

2 What they are aware of is not what happened at
3 the Board proceeding. What they are aware of is that
4 somebody was discharged for exercising his rights under
5 the act, but the Board says in Lear-Siegler that
6 reinstatement will be denied if the misconduct renders the
7 employee unfit for further employment.

8 QUESTION: Well, what if the employer's rule is
9 that any employee who commits a felony is not eligible for
10 continued employment with us, and perjury is a felony.
11 That's our rule. Now, does the Board take that into
12 account?

13 MR. WALLACE: That would be part of what the
14 employer could show in showing that the particular
15 employee was unfit. I do want to caution that there has
16 been no conviction of a felony in this case. What the
17 administrative law judge found would, if proven in a
18 perjury prosecution --

19 QUESTION: No, my question didn't --

20 MR. WALLACE: -- in accordance with the proper
21 procedural --

22 QUESTION: -- didn't refer to convictions. It
23 said felons, people who commit felonies will no longer be
24 employees of ours, and here we have a finding of perjury,
25 in effect.

1 MR. WALLACE: Under the Board's practice, that
2 is -- that would be relevant to a showing by the employer
3 that the employee was unfit because of his misconduct in
4 the Board proceedings for reinstatement. No such showing
5 was made in this case. The grant of certiorari is limited
6 to the question of whether the Board is automatically
7 disabled from ordering backpay and reinstatement, its
8 normal remedies for an unlawful termination --

9 QUESTION: If an employee --

10 MR. WALLACE: -- if an employee lied
11 purposefully.

12 QUESTION: If there were an applicant for
13 employment with the Department of Justice and it was known
14 that he committed the felony of perjury, would you say,
15 oh, well, we have to counsel that there's been no
16 conviction here, if all conceded that there had been a
17 felony committed?

18 MR. WALLACE: Well, we certainly would take it
19 seriously in the Department of Justice.

20 QUESTION: Isn't the employer entitled to take
21 it just as seriously in his workplace?

22 MR. WALLACE: The Board's rule is that lying or
23 committing a felony can be just cause for discharge. That
24 was not the cause for discharge in this case, and if Manso
25 or anyone else were to engage in that kind of misconduct

1 on the job in the future and the employer wanted to
2 terminate him for that reason, the employer could do so,
3 and it would be a termination for cause.

4 All the act prohibits is discrimination for
5 exercising the rights protected by the act, which is what
6 was found to have been done here, and the remedial
7 question is all in a context of what has been proven in
8 proper proceedings, which is not a felony but an unfair
9 labor practice by the employer, and whether the Board
10 should apply its normal remedies for the unfair labor
11 practice.

12 There were statements made by both sides in this
13 proceeding that the Board determined to have been false.
14 The Board had no occasion to -- even the ALJ had no
15 occasion to decide whether the three supervisors
16 testifying on behalf of the employee -- of the employer
17 had been purposefully lying, although the circumstances of
18 rejecting the credibility of their testimony would suggest
19 that it's quite probable that they were.

20 So it's quite probable that several felonies
21 were committed by persons on both sides here. It just
22 happens that it was a little more obvious -- there was
23 something transparently foolish about the charging party's
24 testimony here, because it had already been disproven on a
25 prior occasion.

1 QUESTION: The difference is that the Board is
2 not giving any relief to the other liar. I'm not asking
3 that the Board go around punishing liars. I'm just asking
4 that it not give relief --

5 MR. WALLACE: Well, it's not giving relief, but
6 they're --

7 QUESTION: -- to liars. Is that too much to
8 ask?

9 MR. WALLACE: But if the normal backpay and
10 reinstatement remedy is denied, then the employer is
11 benefiting from the outcome of the proceeding in a way
12 that other employers who engage in the same unlawful
13 conduct would not benefit -- a distinct monetary benefit
14 in comparison with his competitor down the street, for
15 example.

16 QUESTION: Mr. Wallace, I don't -- do you
17 contend that the Board did not accept the district judge's
18 finding that this story was a fabrication?

19 The Board's opinion refers to Manso's story --
20 the respondent checked his story and ascertained it was
21 largely a fabrication, and later in the Board's opinion it
22 refers to "Manso's false explanation." This is the same
23 explanation he gave before the administrative law judge,
24 isn't it?

25 MR. WALLACE: Well, it recited this and --

1 QUESTION: And accepts it.

2 MR. WALLACE: -- it took no exception to it. It
3 didn't treat --

4 QUESTION: Is that referring to the sworn
5 testimony, or the explanation to the employer, when he
6 said he was late for work, and he gave a phony reason for
7 being late for work?

8 MR. WALLACE: He really just repeated the same
9 story.

10 QUESTION: It was one and the same.

11 MR. WALLACE: I think you're right, Justice
12 Stevens, that as it was referred to in recounting the
13 earlier facts, it was referring to the earlier version of
14 the story. The story was essentially the same in both
15 places.

16 QUESTION: Mr. Wallace, there's nothing in this
17 record that tells us how the employer in this institution
18 has treated people who don't tell the truth other -- no
19 routine practice. It couldn't fire, but don't necess --
20 we don't know whether they do or they don't, whether this
21 is one of a kind, or --

22 MR. WALLACE: That is correct, Justice Ginsburg.
23 The employer would have had an opportunity in the Board
24 proceedings, of which it did not avail itself, to show
25 that under the Board's established approach, the Owens

1 Illinois/Lear-Siegler approach, this employee was not
2 entitled to the remedies because he was unfit under the
3 employer's criteria, under criteria that would be applied
4 not in a discriminatory fashion only against somebody who
5 tried to exercise rights under the act, but to any
6 employee.

7 QUESTION: Mr. Wallace, can I ask you, I take it
8 you would agree that this is a Chevron-type case. You
9 rely on Chevron, to some extent, don't you?

10 MR. WALLACE: Yes, Mr. Justice --

11 QUESTION: Would you agree that the discretion
12 of the Board is broad enough so that you could adopt the
13 rule of the other side advocates, that any employer -- any
14 employee who was found to have perjured himself in a board
15 proceeding shall never get the remedy of reinstatement?

16 MR. WALLACE: Well, I think so, and we think
17 so --

18 QUESTION: Do you think you could go further and
19 say that any employee who lies about the reason he was
20 late for work shall never be reinstated?

21 MR. WALLACE: The Board would be acting beyond
22 its authority if it were an arbitrary effort to effectuate
23 the policies of the act, or if it were inconsistent with
24 the way the Board normally handles these cases and the
25 Board is not announcing a reasoned change in its approach

1 to the cases as a general matter but is just arbitrarily
2 singling someone out.

3 That was really what I was trying to get at at
4 the outset by looking at the statute. Except for the one
5 prohibition in the statute on ordering backpay or
6 reinstatement of an employee who has been discharged for
7 cause, the question of prophylactic rules is a question
8 left to the Board's discretion in effectuating the
9 policies of the act under the general conferral of
10 authority to --

11 QUESTION: Well, given that discretion, is the
12 answer to Justice Stevens' question that yes, the Board
13 could go that far and adopt that strong a rule?

14 MR. WALLACE: Well, it could, if its rationale
15 were that the rule were needed to effectuate the policies
16 of the act, which do require that the Board hearings be
17 conducted with accurate testimony before it and that can
18 rely on sworn statements and the rest of it, but the Board
19 has taken a more balanced approach.

20 There are other purposes of the act to be
21 effectuated as well, and the remedies that it has adopted,
22 just as the remedies that it has adopted in cases of
23 concealment of outside earnings, are balanced so that
24 there is still a disincentive for the employer to engage
25 in unfair labor practices along with a disincentive for

1 the employee to conceal outside earnings, because the
2 employee is denied part of the backpay but the employer
3 still has to pay part of the backpay.

4 QUESTION: Mr. Wallace, isn't a perjury
5 indictment for everyone -- I mean, it's such a massive
6 sanction. Nobody's going to prosecute Manso for this
7 perjury, even though it's been found by the administrative
8 law judge. I mean --

9 MR. WALLACE: Well it --

10 QUESTION: -- it's available, but it's just not
11 usable, isn't that right?

12 MR. WALLACE: Well, it was a transparent dog-
13 ate-my-homework kind of lie. It was rather tangential to
14 the issues before --

15 QUESTION: As it turned out.

16 MR. WALLACE: As it turned doubt.

17 QUESTION: It didn't seem so at the time. It
18 looked quite central when the lie was made.

19 MR. WALLACE: That's correct. It's not the sort
20 of case that the Board is likely to refer to the
21 Department of Justice for a perjury prosecution,
22 obviously.

23 It's not the kind of pervasive, deliberate lying
24 that is more likely to give rise to that, and just as the
25 Board has to deal with unfitness for further employment

1 in -- because of threats made to a supervisor, a threat to
2 kill him, it's not easy always to sort out the hyperbole
3 of the heat of the moment from what is a serious threat to
4 someone's life that may be a felony if made.

5 As Justice Frankfurter said for this Court many
6 years ago, the language of the picket line is not the
7 language of the parlor. The niceties that prevail in the
8 courtroom are not always the ways of blue collar
9 witnesses.

10 QUESTION: But at least preserve the apparent
11 integrity of the system of justice by not announcing that
12 you are making an award to a perjurer. Isn't that a very
13 sensible rule? Don't make a finding of perjury and then
14 give an award to the individual.

15 MR. WALLACE: I think that it's a rule that
16 would be within --

17 QUESTION: I think the Board could live with
18 that, don't you?

19 MR. WALLACE: It is a rule that would be within
20 the Board's discretion under the provisions of the act.

21 QUESTION: Thank you, Mr. Wallace.

22 Mr. Jansonius, you have 4 minutes remaining.

23 REBUTTAL ARGUMENT OF JOHN V. JANSONIUS

24 ON BEHALF OF THE PETITIONER

25 MR. JANSONIUS: Just a quick comment on Chevron,

1 and I realize I'm speaking to the author of the opinion
2 and a justice who has written Law Review articles on it,
3 so I'll try to be quick.

4 QUESTION: And one who has reversed on it.

5 MR. JANSONIUS: And that, too.

6 QUESTION: And the three don't agree with one
7 another as to what it means, so --

8 MR. JANSONIUS: My point on Chevron is that I'm
9 not sure that -- at least I wouldn't want to take for
10 granted that Chevron analysis applies. I think that was a
11 different situation. It involved a very complex
12 regulatory scheme, it involved a set of regulations that
13 clearly were within technical expertise of the
14 administrative agency, and it involved a situation where
15 the --

16 QUESTION: Don't you think the Board is supposed
17 to have some technical expertise on how the labor market
18 works?

19 MR. JANSONIUS: On how the labor market works.
20 I don't think they've shown that they have any expertise
21 on how the administration of justice works, and that's
22 really what we see this case as being, but that was a
23 complex regulatory scheme where the agency involved had
24 very carefully evaluated the regulations in question and
25 explained why it was doing what it was doing.

1 That's not the situation here, and I guess I
2 throw that out only to say that I wouldn't take for
3 granted that Chevron analysis applies, but even under
4 Chevron analysis I think that the decision of the Tenth
5 Circuit to enforce the NLRB's order was clearly incorrect.

6 Mr. Wallace stated that Judge Maloney's finding
7 about the lie was gratuitous. It wasn't gratuitous at
8 all. To those of us who were in the courtroom,
9 particularly those of us who heard all the evidence, it
10 was very clear what Mr. Manso was doing. He was trying to
11 misuse the system for personal gain. It was a very clear
12 attempt to shape the outcome of the case, and that's why
13 Judge Maloney felt compelled to use strong language.

14 Your Honors, Congress assigned to the Federal
15 courts the power and the responsibility to enforce or not
16 to enforce --

17 QUESTION: May I just ask one question on that?

18 MR. JANSONIUS: Yes.

19 QUESTION: When you were before the Labor Board
20 as opposed to the ALJ, did you ask the Labor Board to
21 adopt the rule you're asking this Court to adopt?

22 MR. JANSONIUS: Ask the ALJ?

23 QUESTION: No, no -- before the Labor Board, in
24 review of the ALJ's proceeding.

25 MR. JANSONIUS: Yes, we did.

1 QUESTION: You asked the Labor Board --

2 MR. JANSONIUS: We most certainly did, and put
3 it in our brief -- but Congress did assign to the Federal
4 courts the responsibility to enforce or not to enforce
5 decisions by the National Labor Relations Board. Congress
6 also assigned to this Court the responsibility for
7 drafting rules of evidence, and those rules of evidence
8 are now statutory. None of those rules of evidence has a
9 longer lineage, none of them is more uniformly applied,
10 none of them is less discretionary than the rule that --

11 QUESTION: We have to apply the same rule to a
12 district court, then, you say.

13 MR. JANSONIUS: Exactly.

14 QUESTION: Anybody who doesn't tell the truth
15 under oath is not entitled to monetary remedy?

16 MR. JANSONIUS: No, I'm not saying that, Your
17 Honor. I think that the NLRB process is certainly
18 peculiar enough that this Court can write an opinion
19 that's narrow to the context we're dealing with.

20 QUESTION: In other words, it's more serious to
21 lie to an ALJ than to a district judge.

22 MR. JANSONIUS: No, I think it's equally serious
23 as to both, but I think the importance of having a rule
24 enforcing the oath is particularly important in this
25 context. When I'm in civil court --

1 QUESTION: You would say it for district judges,
2 I assume, if district judges had discretion in whether to
3 give relief or not.

4 MR. JANSONIUS: Well, I think that's true. I
5 think that --

6 QUESTION: And what's different about the Board
7 here is that the relief is discretionary. They don't have
8 to give this relief.

9 MR. JANSONIUS: The --

10 QUESTION: They could find the employer guilty
11 and give some other kind of relief or, indeed, no relief
12 at all, I suppose.

13 MR. JANSONIUS: Certainly. The difference that
14 I believe exists is just in the process itself.

15 When we're in civil court we have great means to
16 find out the true facts of the case, to get at the bottom
17 of what happened, and to know before we go into the
18 courtroom who's likely to tell the truth, who's not likely
19 to tell the truth, and how do we get to the bottom of the
20 true facts of the case. We don't have that in --

21 CHIEF JUSTICE REHNQUIST: Thank you,
22 Mr. Jansonius. The case is submitted.

23 (Whereupon, at 12:02 p.m., the case in the
24 above-entitled matter is submitted.)

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:

ABF FREIGHT SYSTEM V. NATIONAL LABOR RELATIONS BOARD

CASE 92-1550

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

BY Ann Marie Federico

(REPORTER)

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