OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: AUCIELLO IRON WORKS, INC., Petitioner v.
NATIONAL LABOR RELATIONS BOARD

CASE NO: 95-668

PLACE: Washington, D.C.

DATE: Monday, April 22, 1996

PAGES: 1-44

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -X

3 AUCIELLO IRON WORKS, INC., :

4 Petitioner :

5 v. : No. 95-668

6 NATIONAL LABOR RELATIONS BOARD :

7 -X

8 Washington, D.C.

9 Monday, April 22, 1996

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States at

12 10:02 a.m.

13 APPEARANCES:

14 JOHN D. O'REILLY, III, ESQ., Southborough, Massachusetts;

15 on behalf of the Petitioner.

16 RICHARD H. SEAMON, ESQ., Assistant to the Solicitor

17 General, Department of Justice, Washington, D.C.; on

18 behalf of the Respondent.

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1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE
3 JOHN D. O'REILLY, III, ESQ.
4 On behalf of the Petitioner 3
5 ORAL ARGUMENT OF
6 RICHARD H. SEAMON, ESQ.
7 On behalf of the Respondent 28
8 REBUTTAL ARGUMENT OF
9 JOHN D. O'REILLY, III, ESQ.
10 On behalf of the Petitioner 42

11

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1 PROCEEDINGS

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 95-668, Auciello Iron Works, Inc. v.
5 National Labor Relations Board.
6 Mr. O'Reilly, you may proceed.

7 ORAL ARGUMENT OF JOHN D. O'REILLY, III
8 ON BEHALF OF THE PETITIONER

9 MR. O'REILLY: Mr. Chief Justice, and may it
10 please the Court:
11 Some 8 years ago we started what I thought was a
12 run-of-the-mill, garden-variety type labor dispute which
13 has grown and grown, and here we are.
14 In the course of a collective bargaining
15 dispute, the -- a strike arose; picketing took place.
16 Immediately during the course of this garden-variety
17 dispute, 40 percent of the employees, the bargaining unit,
18 crossed the line, the same 40 percent which, it's a small
19 unit, that 40 percent is only 9 employees, were bad-
20 mouthing the union.
21 The employer, during the course of this 5- or
22 6-week strike, obtained the belief that because of the 40
23 percent the union did not have the tremendously strong
24 percentage of support, and it shot across the bow of the
25 union bargaining position a rather extreme shot. It

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1 beefed up its contract proposal.

2 However, the significant point, when it beefed
3 it up, it did not have, then, reason to believe that the
4 union was not a majority representative. It had every
5 reason -- in fact, the -- it would -- to believe that the
6 union still maintained its majority status, but it shot
7 this across the bow of the union, this beefed-up union
8 proposal, and at that time the negotiations are broken
9 off.

10 The very next day, the union abandoned the
11 picket line, the pickets went down, and a number of
12 extraordinary events took place over the next 3 business
13 days. Everyone -- almost everyone came back to work.

14 Of those who came back to work, a number of them
15 did the same as their predecessors, the 40 percent who
16 had come back earlier, had crossed the picket line, were
17 knocking the union, being very critical of the union.

18 In fact, four additional employees resigned from
19 the union after they came back, spoke to company
20 representatives and said, we don't need the union, I don't
21 know why we wanted a union in the first place. Three of
22 these individuals who were thus bad-mouthing the union had
23 been picketing that Friday morning. Friday afternoon they
24 were in saying to the company, ah, we never needed a union
25 here in the first place.

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1 QUESTION: Mr. -- Krischer, is it? Excuse me,
2 Mr. O'Reilly --
3 MR. O'REILLY: O'Reilly.
4 QUESTION: Are you making any claim here that
5 the union in fact lacked majority support at the time the
6 union accepted the offer?
7 MR. O'REILLY: Justice O'Connor, I have been
8 making that claim not only today but for the last 8 years.
9 I know the issue has been raised in respondent's --
10 QUESTION: Is that issue in front of us, do you
11 think, properly?
12 MR. O'REILLY: I believe it is, Your Honor,
13 particularly, I --
14 QUESTION: Did the board deal with the case in
15 that posture, or not? I somehow thought that we had
16 before us a -- the issue of whether there was a good faith
17 doubt, not whether there was in fact lack of support.
18 MR. O'REILLY: Justice O'Connor, I believe you
19 have both issues before you. The facts clearly
20 indicate -- for instance, the company's telegram that it
21 sent eventually, in response to the union's Sunday evening
22 telegram said we have reason to believe that the union no
23 longer represents a majority.
24 QUESTION: There may be any number of facts in
25 the case that are not before us. Your question presented

1 is whether an employer is bound by a union's acceptance of
2 an earlier proposal for a collective -- when at the time
3 of the union's -- the employer had a reasonable basis for
4 a good-faith doubt of the union's continued majority
5 status.
6 MR. O'REILLY: That is correct, Mr. Chief
7 Justice.
8 QUESTION: I don't see that as raising the
9 question in fact as to whether the union had lost its
10 majority status.
11 MR. O'REILLY: Well, of course, in fact that
12 was -- Mr. Chief Justice, that was raised in our original
13 answer to the complaint 8 years ago at the labor board.
14 We also used the phrase, good faith doubt, and the reason
15 we did is because it's easier for an employer to defend
16 and to prove its defense by -- through circumstantial
17 evidence of creating a good faith doubt, but we did --
18 QUESTION: Well, the issues are quite different,
19 possibly, and I wonder if we aren't bound by how the
20 question is presented in your petition for certiorari.
21 MR. O'REILLY: I think the issues may vary, but
22 I -- in this particular case I think they're so closely
23 intertwined that they can be treated as one and the same.
24 For instance, the court of appeals, who heard --
25 of the First Circuit heard this case twice, and both in

1 their first decision, as well as in their second decision,
2 they treated it, notwithstanding the original issue having
3 been framed as a good faith doubt case, they treated it in
4 both decisions as a question of the employer attempting to
5 prove before the administrative law judge and before the
6 National Labor Relations Board that in fact the union had
7 lost its majority status.
8 QUESTION: And is that the board rule, that even
9 if you were to show unquestionably, never mind good faith
10 doubt, that the union no longer had majority status, that
11 the same result would ensue?
12 MR. O'REILLY: No, I think the only difference,
13 Justice Scalia, would be if we, the employer, had raised
14 and proved -- established at the trial level that we had a
15 good faith doubt, it would then be incumbent upon general
16 counsel to establish that in fact the union had maintained
17 a majority --
18 QUESTION: But I'm asking you what the board
19 rule is. Is the board rule that neither the establishment
20 of a good faith doubt, nor even the establishment of
21 actual nonmajority status will suffice to get you out of
22 the contract here?
23 MR. O'REILLY: No, as I understand the board
24 decision, they would -- decisions, they would take the
25 position that if we had established under the facts of

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1 this case actual loss of majority, or at least my friends
2 at the --
3 QUESTION: Right.
4 MR. O'REILLY: -- AFL-CIO in their amicus brief
5 said that would be enough. The board has reserved in this
6 case --
7 QUESTION: Okay.
8 MR. O'REILLY: -- its position with regard to
9 whether or not the actual loss of majority would have
10 entitled us, under the facts of this case, to send -- fire
11 back that reply telegram disavowing any further
12 obligations --
13 QUESTION: So it is a separate question, then,
14 and --
15 MR. O'REILLY: I suspect it is, but we feel the
16 result would be the same under both scenarios.
17 QUESTION: Mr. O'Reilly, would you -- my
18 understanding was that your friends at the AFL-CIO took
19 the position, but there's only one way to establish that
20 the union has lost its majority, and that is through a
21 secret ballot.
22 MR. O'REILLY: They -- Justice Ginsburg, they
23 took the same position, of course, and filed an almost
24 identical brief in the Curtin Matheson case, saying that
25 the board rule that this Court has implicitly affirmed

1 over the years, the board rule that a good faith doubt
2 entitles you to withdraw your recognition of the union,
3 they took the position in that case and in the amicus in
4 this case that that is no longer a good rule, and that the
5 only way an employer can contest the majority status of an
6 incumbent union is to file a decertification petition, and
7 I --
8 QUESTION: And they also said in their brief
9 that general counsel had recommended such a position to
10 the board.
11 MR. O'REILLY: Well --
12 QUESTION: Where does that stand, do you know?
13 MR. O'REILLY: My understanding, I've had an
14 opportunity to look into that. I contacted -- and I can
15 only reflect was I was told by the employer's counsel in
16 that case, that the -- and there is a board decision some
17 3 years ago in that case. It was on appeal to the
18 District of Columbia court of appeals, and the board then
19 requested that it be referred back to the board.
20 Counsel for the employer indicated that all argument
21 in that case was conducted a year and a half ago, and no
22 decision has come out of it.
23 QUESTION: So we may be talking about something
24 that really doesn't matter anymore. I mean, if they deep-
25 six the whole good faith doubt rule, it doesn't matter.

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1 You would have to have a --

2 MR. O'REILLY: Well, I would just suggest if you

3 look at the -- if my --

4 QUESTION: I mean, it matters to your client. I

5 don't want to say it doesn't matter to you.

6 MR. O'REILLY: But I'm not sure what the

7 likelihood is of the board adopting that particular view

8 of the scenario I just described.

9 This case was decided within the last year.

10 Oral argument in the Lee Lumber case was a year-and-a-

11 half ago. The board certainly would have had an

12 opportunity to adopt the general counsel's position in the

13 meantime and at least, certainly in this case, deny it.

14 QUESTION: But if you -- we -- you are going in

15 this case on the proposition that there's a reasonable

16 doubt rule, so that the question is, at what point can the

17 employer -- it's really a timing question. I think the

18 reasonable doubt -- I think you're agreed, are you not,

19 that if you had withdrawn the offer on the 18th or 19th on

20 the basis of your good faith doubt, there would be no

21 contract that they could accept.

22 MR. O'REILLY: There would be nothing out there

23 for them to accept, is correct.

24 QUESTION: So why can't the board say, we have

25 to draw the line some place, we're going to draw it at the

1 union's acceptance of the contract?

2 MR. O'REILLY: Well, of course, the board is
3 apparently adopting this bright line theory that it's a
4 lot easier to administer the act if we have a specific
5 date, and obviously, I don't have a problem with that
6 concept, but what I'm just saying is the specific date
7 that they have picked, the bright line rule in this case,
8 there is no logical basis for it.

9 The logical basis apparently is that sending a
10 Sunday evening telegram somehow transforms a union that
11 the employer had every reason to then believe had a good
12 faith doubt as to its majority status, somehow this
13 telegram, Sunday evening telegram, transforms that
14 apparently minority union into a majority union.

15 QUESTION: I take it that their basis is not a
16 telegram, their basis is a contract, all right.

17 MR. O'REILLY: Created --

18 QUESTION: So once the contract is created --

19 MR. O'REILLY: Created by --

20 QUESTION: -- you can't question it for the
21 period of the contract bar.

22 MR. O'REILLY: Yes.

23 QUESTION: And it doesn't -- I mean, what is
24 illogical about saying there's a contract bar, it starts
25 when the contract was created?

1 MR. O'REILLY: If --

2 QUESTION: If you have a complaint about the

3 union, make it before the contract is -- after, you're

4 barred. That's the contract bar, right.

5 MR. O'REILLY: And that's --

6 QUESTION: And that, as I understand it, is the

7 rule, and why is that illogical?

8 MR. O'REILLY: And that's their bright line

9 theory. I think the illogical argument comes into play

10 this way, Justice Breyer. We have an obligation, as an

11 employer dealing with any union, at all times to see to it

12 to investigate, to analyze what is the status of this

13 union? Is it a majority union, or is it a minority union?

14 Obviously, if it's a minority union, does not represent a

15 majority of employees, it's illegal under the statute for

16 us to --

17 QUESTION: Is that right, even though it's been

18 certified? Can you be subjected to liability for dealing

19 with a properly certified union?

20 MR. O'REILLY: Yes, Your Honor, at least beyond

21 the -- this is -- the certification in this case, and of

22 course, none of the employees who were involved in that

23 certification process are still employed by the company,

24 but the certification in that case was in the 1970's, as I

25 recall, so you have -- you could deal with -- the board

1 principle is that once it's certified there is an
2 irrebuttable presumption no matter what happens to the
3 majority status for a 1-year period.
4 QUESTION: For 1 year.
5 MR. O'REILLY: So even though you know, as a
6 matter of moral certainty, that the union has lost its
7 majority status during that year, not only is it not
8 illegal to deal with them, you have to deal with them.
9 QUESTION: But that gets us back to Justice
10 Breyer's question that I don't think you fully answered.
11 The point was, why not make the contract bar rule become
12 effective upon the acceptance of a contract? We know when
13 contracts are accepted, we know when they're not. Why not
14 make that the bright line rule?
15 MR. O'REILLY: We suggest, Justice Kennedy, that
16 the employer should have an opportunity, when it is coming
17 across a crescendo of events that happened in this case
18 during this 3-day period, should have an opportunity to
19 analyze, review those events, to see whether in fact it is
20 dealing with a majority or a minority union, and in this
21 case we suggest that it didn't have.
22 QUESTION: But you could have done that by
23 withdrawing your offer. You could have sent them a
24 telegram just as readily as they sent you one.
25 MR. O'REILLY: In view of the board's decision

1 in this case, Your Honor --

2 QUESTION: You wish you had done it.

3 MR. O'REILLY: I would -- I certainly wish I had

4 done it --

5 QUESTION: No, but I mean, you could --

6 MR. O'REILLY: -- and now the world knows that

7 that's probably the best way to do it, but unfortunately

8 that does not advance productive negotiations, where any

9 time you have a question in your own mind --

10 QUESTION: Well, when the point comes that

11 you're questioning the union's continuing capacity as a

12 representative, there's going to be a certain chill upon

13 the proceedings anyway.

14 MR. O'REILLY: Absolutely.

15 QUESTION: You've got to accept that, and I

16 don't see that the chill is going to be any greater by

17 withdrawing the offer on that ground than it is by doing

18 what you want to do.

19 MR. O'REILLY: Well, I'll just take two of the

20 major events, if I may, Your Honor, that led to the

21 employees eventually creating in its own mind the good

22 faith doubt.

23 Seven union supporters, including the union

24 steward, the employer received that information on Friday

25 afternoon, that hearsay information that these seven are

1 employed elsewhere, and aren't coming back. Now, they
2 should have an opportunity to review that. Have -- was
3 that decision made out of anger? Are they going to be
4 back next Wednesday, maybe, the next week? They should
5 have some time to look into that.
6 The other information was that --
7 QUESTION: May I just interrupt with one
8 question to be sure I understand correctly? If you did
9 review it thoroughly and concluded -- and assume the facts
10 are that, even though you had your doubts, that there
11 still was majority support for the union, why is it all
12 unfair?
13 If the other had happened, if you had been able
14 to prove there was not, your doubt was correct, even
15 though they'd accepted the offer you could get out of it,
16 couldn't you?
17 MR. O'REILLY: That's correct, Your Honor, as
18 long as we move quicker than they do. If --
19 QUESTION: Yes, but even if you didn't move
20 quickly enough, if your doubts had been substantiated by
21 your thorough investigation on Monday and Tuesday, you
22 still would have been protected.
23 MR. O'REILLY: If -- we would have been
24 protected only if we had withdrawn the offer or withdrawn
25 recognition.

1 QUESTION: Or if you could prove they did not
2 have a majority.
3 MR. O'REILLY: Our position is, we would be --
4 if at the time of that telegram, and we had the
5 opportunity to conduct this investigation, even though we
6 had not won that race to the telegraph office, we would be
7 protected, and that's our position in this case, Justice
8 Stevens, that the mere fact that they send a telegram
9 before we have an opportunity to fire off our
10 withdrawal -- and I'd ask the Court to bear in mind that
11 this was Thanksgiving week, it was a 3-day week, and
12 Sunday of week -- we couldn't fire it back, obviously,
13 that evening. Who are we going to send --
14 QUESTION: I'm not sure --
15 QUESTION: We don't know, Mr. O'Reilly, do we,
16 whether the board takes the position that if, in fact,
17 there was not majority support at the time that you tried
18 to withdraw your offer the contract bar rule would apply.
19 We don't -- do we know the board's position on that?
20 MR. O'REILLY: We know the board is not taking a
21 position on that, Justice Scalia. They have expressly
22 reserved --
23 QUESTION: Right, so --
24 MR. O'REILLY: -- on that issue, even though the
25 court of appeals said --

1 QUESTION: -- I think your answer to Justice
2 Stevens' question has to be, we really don't know, the
3 board's going to tell us some day.
4 QUESTION: But in this case, just so I have it
5 clear in my own mind, did they make a factual
6 determination one way or another as to whether there
7 really was a majority or not?
8 MR. O'REILLY: They did not, Justice Stevens.
9 QUESTION: They did not.
10 MR. O'REILLY: There was no evidence
11 submitted --
12 QUESTION: There was no finding one way or the
13 other.
14 MR. O'REILLY: That is correct. In fact, there
15 was no evidence at all submitted by the general counsel
16 to --
17 QUESTION: Or by you.
18 MR. O'REILLY: -- to attempt to support that
19 there was no -- that there was a majority status. Our
20 evidence was that we had --
21 QUESTION: You had a good faith doubt, I
22 understand that, but did you also try to prove that there
23 was on fact no majority.
24 MR. O'REILLY: Yes, and we explained that.
25 QUESTION: And was there a finding on that

1 point?

2 MR. O'REILLY: No.

3 QUESTION: I see.

4 MR. O'REILLY: No, there was no finding. The
5 administrative law judge as well as the board said, it's
6 immaterial, we don't have to get into that because at the
7 time the company had an acceptance, therefore the rest of
8 the evidence that was -- and this was a 3-day hearing,
9 most of which dealt with our evidence that we had the
10 basis for a good faith doubt, but the administrative law
11 judge and the board said all of that is immaterial because
12 there was an offer-acceptance and Sunday evening you had a
13 contract, so it's too late to --

14 QUESTION: Well, the way you describe it, it
15 sounds as though at least the administrative law judge's
16 ruling was that even though you had been able to prove
17 that there was no majority support, it was irrelevant, and
18 yet I understood you to say the board took no position if
19 you could prove that fact.

20 MR. O'REILLY: The board in its petition, in its
21 brief to this Court has expressly reserved and said that
22 that might be a different consideration but we're not
23 going to get into that, because we feel a good faith doubt
24 case, which they claim this is, is different from a actual
25 loss of majority case, so they are hypothesizing saying it

1 might be different, but they are not expressly taking that
2 position.
3 QUESTION: Well, what's the effect of that case
4 from this Court in '61, the International Ladies' Garment
5 Workers Union case, where presumably we held it was an
6 unfair labor practice for an employer to enter a
7 collective bargaining agreement with a union that in fact
8 lacks majority support? Is that good law as far as you
9 know?
10 MR. O'REILLY: I think it's excellent law,
11 Justice O'Connor.
12 QUESTION: So do you think it's open to the
13 board to alter that rule or not?
14 MR. O'REILLY: We would suggest it is not, and I
15 would remind the Court, as I am sure we do not have to,
16 that in that case there was an unknowing violation. The
17 employer was under the false impression at the time of
18 entering the agreement it felt the union in fact was a
19 majority union.
20 When it was established that -- after the fact
21 that it was not, the court said, that contract that you
22 thought was a contract with a majority union is illegal.
23 QUESTION: Mr. --
24 QUESTION: Well, they felt it was an unfair
25 labor practice.

1 MR. O'REILLY: That's correct, and the ironic
2 aspect of this case is, I find it difficult to reconcile
3 the logic of the ILG which says it's an unfair labor
4 practice even unknowingly to enter into a contract with a
5 minority union, but the --
6 QUESTION: Mr. O'Reilly, is there something
7 different in a union that has never been certified by the
8 board, which I take it was the ILGWU case, where there's a
9 concern that maybe it's a sweetheart union, and here,
10 where the board was -- the union was certified and had a
11 long-term bargaining relationship with the company?
12 MR. O'REILLY: There is a possible, or a
13 definite argument, certainly during the 1 year after the
14 certification, that there was a legitimate recognition,
15 but the certification in this case goes back at least a
16 generation, so I think the mere fact that they were
17 certified --
18 QUESTION: But the employer at any point could
19 have asked for a new election.
20 MR. O'REILLY: That's correct, Your Honor.
21 QUESTION: Instead of renewing the contract.
22 MR. O'REILLY: That's -- that's --
23 QUESTION: Well then, why -- is -- are you
24 saying the contract bar rule is unlawful?
25 MR. O'REILLY: No, Your Honor. No.

1 QUESTION: Well, the contract bar rule has to
2 start somewhere.
3 MR. O'REILLY: It's -- has --
4 QUESTION: So -- and I take it it's up to the
5 board, basically, to say where it starts.
6 MR. O'REILLY: But a contract bar rule would
7 never be based upon an agreement that in turn is an unfair
8 labor practice.
9 When an employer enters into an agreement with a
10 union not maintaining majority status, that contract would
11 not legitimately serve as the basis for a contract bar, so
12 we're saying that if you adopt a contract bar rule by
13 analogy in this case, we are saying that when that
14 telegram was fired off, the union more than likely knew,
15 and we definitely knew, that they didn't maintain a
16 majority status.
17 QUESTION: But even if they've lost their
18 majority status during the time of the contract, and
19 different people, people come in and say, look, we
20 represent the workers now, junk that, you can't do
21 anything about it.
22 MR. O'REILLY: That's correct.
23 QUESTION: So that principle has to start some
24 place, so I want to see what's wrong, what's illogical
25 about starting it?

1 MR. O'REILLY: I think you have to focus on when
2 was the collective bargaining agreement that serves as the
3 basis for the -- what was the basis of the offer and
4 acceptance? What was the status of the parties as of that
5 offer and acceptance that created that contract?
6 We're saying in this case if the status of the
7 union as of the date of that purported acceptance was that
8 the union did not maintain a majority status, there cannot
9 be a contract, and the implications of a legitimate
10 contract do not flow.
11 A legitimate contract, of course, creates for
12 the -- if it's a 3-year or less contract, for the balance
13 of that collective bargaining there is an irrebuttable
14 presumption that the union, notwithstanding its actual
15 status over the 3 years, there is an irrebuttable
16 presumption that it is maintaining its majority status so
17 as to encourage the parties to deal with each other.
18 We do not have that premise, namely a legitimate
19 majority status, at the time of the inception of this, or
20 conception, I guess, of this agreement.
21 QUESTION: Have employers ever appended to their
22 offer clause that says, if you accept this offer,
23 execution of the contract will be subject to our
24 determining within 7 days that you continue to have a
25 majority status?

1 MR. O'REILLY: I have not encountered that type
2 of situation, but this decision, if it is upheld, might
3 encourage the type of appendage to an offer. Again --
4 QUESTION: There would be no bar in labor law
5 from appending such a clause to an offer.
6 MR. O'REILLY: I think the labor board might
7 have a problem with that. It's one thing to append
8 something such as this contract is only valid for X days,
9 or sundown tonight the offer is withdrawn, but to put
10 something like that onto it might cause some problems at
11 the labor board.
12 QUESTION: With respect to the board, they did
13 this twice because the First Circuit said the first time
14 it wasn't good enough. What deference, if any, do we owe
15 to the board's drawing this line where it did and
16 explaining it?
17 MR. O'REILLY: I think the deference that this
18 Court traditionally gives to labor board decisions is not
19 applicable here. You always -- the Court has always
20 conditioned it, we will defer to the board as long as the
21 board's ruling is rational and consistent with the act.
22 Our position, of course, is, here it's not rational
23 because it's --
24 QUESTION: And there, you're taking on the First
25 Circuit, too, which decided it was rational.

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1 MR. O'REILLY: The -- well, not in the presence
2 of some people in this Court that we are going to call the
3 First Circuit irrational, but they --
4 QUESTION: From time to time.
5 (Laughter.)
6 MR. O'REILLY: They did determine, without
7 saying why, really -- of course, they sent it back, you
8 will recall, in the first instance saying that the board's
9 decision really didn't say anything, that cited a few
10 cases having nothing to do with this factual situation,
11 and then after the board finally -- and the Court did
12 create a rather impossible task for the board.
13 It said, all right, take this irrational result
14 and give us a rational basis for it, and I don't blame the
15 board for taking -- and even though the court said do this
16 expeditiously, I don't blame the board for taking 2-1/2
17 years to come up with an attempt to rationalize what I
18 think is an irrational result.
19 QUESTION: Did the board give you an opportunity
20 to prove that in fact there was no majority status?
21 MR. O'REILLY: Yes, Your Honor, we had a 3-day
22 hearing before the administrative law judge.
23 QUESTION: And did they make a finding that you
24 couldn't -- that you hadn't proved it?
25 MR. O'REILLY: No. Their finding was that all

1 of the evidence we presented -- this is both the
2 administrative law judge as well as the board itself.
3 All of the evidence we had presented over this
4 3-day period was immaterial in view of the fact that there
5 was a contract and therefore -- we could have all of the
6 evidence, people swearing on Bibles that they didn't want
7 this union there, that's immaterial because there was a
8 contract.
9 QUESTION: I find it difficult to understand how
10 it can possibly be said that the question of whether
11 actual nonmajority status would suffice to avoid the
12 contract bar rule is not in this case. How could it
13 possibly be said that it's not in this case?
14 MR. O'REILLY: Well, my position, of course, it
15 is in this case, notwithstanding perhaps inartful phrasing
16 of mine in the petition for certiorari.
17 QUESTION: Apart from the question presented,
18 may I ask you where in the papers before us is there
19 either a pleading or an argument by you or your client
20 that there was, in fact, no majority status? Do the
21 papers anywhere show that you made that argument and
22 preserved it in a pleading?
23 MR. O'REILLY: Yes, Your Honor.
24 QUESTION: And where?
25 MR. O'REILLY: In the two decisions of the court

1 of appeals. If I may, on page 3a, this is the second
2 decision of the court of appeals, appendix 3a, where the
3 court described the scenario as follows.
4 QUESTION: 3a, you say?
5 MR. O'REILLY: 3a of the --
6 QUESTION: The white brief?
7 MR. O'REILLY: No, of the -- I'm sorry, yes, of
8 the petition.
9 QUESTION: Petition, okay.
10 MR. O'REILLY: And the court of appeals said the
11 board thus refused to allow the company to present
12 evidence --
13 QUESTION: Where on page 3a are you reading
14 from, Mr. O'Reilly?
15 QUESTION: The middle of the page.
16 QUESTION: I think I see --
17 MR. O'REILLY: Yes.
18 QUESTION: The middle of the page. Go ahead.
19 MR. O'REILLY: Thank you, Mr. Chief -- the board
20 thus refused to allow the company to present evidence that
21 the union in fact lacked majority support at the time it
22 accepted the company's outstanding offer. Almost
23 identical comments are made by the court of appeals in the
24 earlier decision --
25 QUESTION: Yes, but the preceding sentence says

1 that the board affirmed the ALJ's refusal to consider the
2 company's defense that at the time the union accepted the
3 company's contract proposal, the company entertained a
4 good faith doubt.
5 MR. O'REILLY: Yes.
6 QUESTION: So it describes your defense as one
7 that they -- that you entertained a good faith doubt.
8 MR. O'REILLY: That's correct, Your Honor.
9 QUESTION: And you're saying there was an
10 additional defense.
11 MR. O'REILLY: It was -- we used the same
12 evidence to --
13 QUESTION: I know. I realize you have the same
14 evidence, but is there some pleading that you filed in
15 which you said one of your defenses is they in fact did
16 not have majority status?
17 MR. O'REILLY: I would have to ask leave of the
18 Court to stray from the record. I had -- in view of
19 the -- when I saw in the respondent's brief the question
20 being raised that we had not raised this below, I pointed
21 out to brother counsel there were seven separate
22 provisions in our brief to the administrative law judge,
23 same separate seven provisions in our brief to the
24 board --
25 QUESTION: Forgetting the briefs for a minute,

1 how about your pleading?

2 MR. O'REILLY: No, in the pleading, Your Honor,

3 our response said only we had a good faith doubt. This

4 was filed at the time of the original complaint, but in

5 our briefs to the board, in our briefs to the First

6 Circuit, as well as the First Circuit's opinion, they

7 refer to the loss of majority status.

8 QUESTION: So you say you raised it to the

9 board, then.

10 MR. O'REILLY: In our briefs, Your Honor, but

11 not in our answer, expressly.

12 QUESTION: And did the board refuse to consider

13 it because you hadn't raised it in your answer?

14 MR. O'REILLY: The board's position was that the

15 evidence, whether it purported to go to a good faith doubt

16 or to a lack of majority status was immaterial in view of

17 the contract having been formed.

18 If I may reserve the balance of my time,

19 Mr. Chief Justice.

20 QUESTION: Very well, Mr. O'Reilly.

21 Mr. Seamon, we'll hear from you.

22 ORAL ARGUMENT OF RICHARD H. SEAMON

23 ON BEHALF OF THE RESPONDENT

24 MR. SEAMON: Mr. Chief Justice, and may it

25 please the Court. The narrow issue before this Court is

1 the reasonableness of a rule of the National Labor
2 Relations Board that concerns the timing of an employer's
3 assertion of a good faith doubt a union's majority status.
4 QUESTION: Well, what would the situation be,
5 Mr. Seamon, if, in fact, there were no majority support at
6 the time the union tried to accept the offer?
7 MR. SEAMON: Justice O'Connor, the board has not
8 addressed that issue, and it reserves it in this case. It
9 would obviously present very different considerations in
10 light of decisions such as Ladies' Garment Workers, but we
11 emphasize that at issue in this case is only a claim of a
12 good faith doubt of majority status.
13 QUESTION: Well, is it possible that if in fact
14 there was no majority support that it would be an unfair
15 labor practice for the employer to enter the contract?
16 MR. SEAMON: It is possible but I would
17 emphasize that one important difference to which Justice
18 Ginsburg alluded between the present context and Garment
19 Workers is that Garment Workers involved a voluntarily
20 recognized union, whereas the present case involves a
21 union that was certified by the board.
22 QUESTION: Was there anything in the opinion
23 that made it turn on that, do you know?
24 MR. SEAMON: The board framed its rule in terms
25 of a previously certified union, and its prior decision in

1 the same context called Belcon also dealt with a
2 previously certified union.
3 QUESTION: And is it your position that the
4 pleadings in this case did not raise the in fact lack of
5 support issue?
6 MR. SEAMON: Emphatically so. In fact, at every
7 stage of the proceeding where petitioner had an
8 opportunity to make a claim of an actual loss of majority
9 support, it failed to do so. In its answer to the general
10 counsel's complaint of an unfair labor charge, it
11 specifically asserted a good faith doubt, but did not
12 assert a loss of --
13 QUESTION: But in its briefs below, it tried to
14 present that issue?
15 MR. SEAMON: No, that is also inaccurate, in our
16 view. In the objections to the ALJ's decision, the
17 petitioner only complained about the ALJ's finding
18 regarding its failure to establish a good faith doubt, and
19 I would refer the Court to the petition appendix, the
20 white brief, at page 85a, in which the board, in
21 delivering its first decision in this case, stated, we
22 agree with the ALJ that under established board precedent,
23 once --
24 QUESTION: Where on the page are you reading
25 from, Mr. Seamon?

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1 MR. SEAMON: I'm reading from the beginning of
2 footnote 85, on page 85a.
3 QUESTION: Okay.
4 MR. SEAMON: We agree with the judge that, under
5 established board precedent, once the board finds that the
6 parties have reached a binding collective bargaining
7 agreement, it is unnecessary to consider the issue of a
8 respondent's alleged good faith doubt of the union's
9 majority status.
10 I would also refer the Court to page 54a of this
11 same filing, which is from the board's second supplemental
12 opinion in this case. On page 55a, the very last sentence
13 in the footnote states, we further emphasize that the case
14 before us does not involve allegations of an actual loss
15 of majority status.
16 QUESTION: And this is the board's opinion, 65a.
17 MR. SEAMON: This is the board's supplemental
18 decision in this case.
19 QUESTION: Well, I suppose the only way we
20 really know that the -- correct me if I'm wrong, that we
21 know in a legal sense that the board -- that the union
22 doesn't have majority status is that there's been a
23 certification, or decertification petition and an
24 election, and it seems to me the employer is being put in
25 a very difficult position here where it makes the quite

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1 careful, measured statement that it has good faith doubt,
2 which is a term of art in the labor law, and then you
3 fault him for not saying that he knew. It really amounts
4 to a very trivial difference, it seems to me.
5 MR. SEAMON: Well, one of the reasons that the
6 board has developed the good faith doubt rule is the
7 recognition that it can be difficult, in the absence of a
8 decertification, to prove an actual loss of majority
9 status.
10 QUESTION: And it seems to me that the employer
11 acted quite consistently with the dictates of the labor
12 board and the dictates of the labor law in that regard.
13 MR. SEAMON: The labor law permitted it to
14 assert a good faith doubt, but it also required it to take
15 other steps to either withdraw its offer and then assert
16 the good faith doubt to petition for an election before
17 the new agreement was entered into by the union's
18 acceptance of its offer.
19 And it shouldn't be lost sight of that the
20 employees themselves had an opportunity to file a petition
21 for decertification during the window period from 60 to 90
22 days before the collective bargaining agreement expired
23 and again after the agreement expired and before a new one
24 was entered into.
25 QUESTION: But isn't the force of your argument

1 somewhat undercut by the fact that the board is reserving
2 the question of what the result should be if, in fact, the
3 claim was and was proven that there had been a loss of
4 majority support?
5 Because one of your arguments is there is need
6 to have a bright line rule for the sake of stability and
7 industrial peace once a contract has been formed, but now
8 I understand the board is saying, well, we reserve the
9 question whether there is such a need if it can be shown
10 that the union actually had lost majority support.
11 So if -- it seems to me that the practical
12 effect of that is going to be that so long as that
13 question is reserved, that any employer with a good faith
14 doubt is going to make in good faith a claim that in fact
15 majority support was withdrawn --
16 MR. SEAMON: I --
17 QUESTION: -- and there goes the whole need for
18 the bright line -- or the whole justification based on a
19 bright line argument.
20 MR. SEAMON: I acknowledge, Justice Souter, that
21 one of the difficulties that would arise from creating a
22 different rule for claims of actual loss of majority
23 status from the rule that applies to good faith doubt
24 claims is that employers would be tempted to circumvent it
25 by a mere point of pleading, to say not only did I have a

1 good faith doubt, but I also believe that the union in
2 fact lost majority status, and that may, in fact, be a
3 consideration that the board could validly take into
4 account if and when in the future it addresses the
5 question of whether the rule should be different.
6 QUESTION: But it is --
7 QUESTION: But that's a question for the board,
8 because isn't there some doubt as to what extent the
9 Government can bind an employee to be represented by a
10 union that in fact does not occupy majority status?
11 MR. SEAMON: It is a very serious question for
12 the reasons elaborated in the Ladies' Garment Workers
13 decision. Again, there are differences between that
14 decision and this one, but obviously --
15 QUESTION: So you're saying that the need for
16 the bright line is still there, but there just may be a
17 circumstance in which, need or no need, we simply cannot
18 have the benefit of it?
19 MR. SEAMON: That is right, and again, quite
20 apart from the employer's temptation to plead an actual
21 loss of majority status, it is perfectly logical for the
22 board's rule to operate upon the acceptance of the
23 petitioner's outstanding contract offer. In this case --
24 QUESTION: No, but -- may I interrupt you,
25 though? That would not be the case -- the board is

1 reserving the question, as I understand it, whether any
2 bright line rule would operate upon acceptance if it can
3 be shown that at the time of acceptance majority status
4 had been lost, isn't that correct?
5 MR. SEAMON: Yes, that's correct.
6 QUESTION: Yes, okay.
7 MR. SEAMON: That's correct.
8 QUESTION: But that reservation also would be
9 overtaken if the general counsel's Lee Lumber proposal is
10 adopted.
11 MR. SEAMON: Yes, that's also correct.
12 QUESTION: And do you -- can you give us any
13 representation of where that proceeding stands?
14 MR. SEAMON: Yes. My brother at the bar
15 correctly stated the posture of the case right now. It is
16 under submission before the board following oral argument,
17 which occurred about a year ago, but I would say it's far
18 from clear whether the board is going to address the
19 general counsel's argument that the good faith doubt rule
20 should be abandoned. That is not the primary argument in
21 that particular case, and the general counsel emphasizes
22 that the board doesn't need to address it at all.
23 QUESTION: What is the gestation period for a
24 proceeding like this?
25 MR. SEAMON: I'm uncertain of the answer to

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1 that.

2 QUESTION: Maybe they should think about

3 rulemaking down there at the NL --

4 (Laughter.)

5 MR. SEAMON: Of course, they do from time to

6 time. I recognize that the AFL --

7 QUESTION: Think about it from time to time, are

8 you saying?

9 (Laughter.)

10 MR. SEAMON: I recognize the AFL-CIO takes the

11 position that the pendency of Lee Lumber renders the grant

12 of cert improvident. We -- in our judgment, again, it is

13 so unclear whether the -- how the board is going to rule

14 and whether it's going to rule that that alone doesn't

15 weigh against the grant, but by the same token, of course,

16 we wouldn't oppose dismissal on those grounds.

17 QUESTION: The acceptance was a logical point

18 for cutting off consideration of claims of good faith

19 doubt, because it was that point in this case that ended

20 the strike and restored productivity at the plant, and

21 from the point of view of the National Labor Relations

22 Act, that is an event of central importance.

23 More generally, when unions accept contract

24 offers from employers, that marks a fundamental alteration

25 in the relationship between the parties. After that

1 point, it is reasonable for the board to require the
2 parties to accept the results of the process and get back
3 to the productive enterprise in which they both have such
4 an important interest.
5 I would also suggest that in any event it is not
6 necessary for the Court in this case to decide whether, in
7 lieu of a bright line, the board should have adopted a
8 rule that would require it to determine in every case
9 whether the employer had a reasonable opportunity to
10 investigate and to voice its good faith doubt, because
11 petitioner did have such an opportunity.
12 Most or all of the evidence on which it premised
13 its good faith doubt was received 6 days before the union
14 accepted petitioner's contract offer, and has arisen
15 earlier in the argument.
16 At any time, petitioner had the option of
17 withdrawing its offer. It also could have petitioned for
18 an election. It didn't take any of these options, nor did
19 it break off negotiations and take its offer off the
20 table.
21 QUESTION: It may ultimately be for the board to
22 balance, but the rule that it's adopted almost encourages
23 employers to continue making allegations as to good faith
24 doubts and disrupting the bargaining process. It seems to
25 me much more sensible to do it post hoc.

1 MR. SEAMON: Well, in many ways the most
2 sensible approach, and the approach that is preferred for
3 purposes of the statute, is for the employer to file a
4 petition for an election, assuming that the employees
5 themselves have not availed themselves of that right.
6 This Court recognized that in Brooks, and it
7 also recognized that the reason for that is that we can
8 justifiably be concerned about employer's attempts to
9 vindicate the rights of employees, especially when the
10 employees themselves have ample opportunity to assert
11 those rights. The Court in Brooks said, in fact, that
12 allowing employees to assert the rights of employees was
13 not conducive to industrial peace, it is inimical to it.
14 QUESTION: But Mr. Seamon, wouldn't that be a
15 burden for a small company like this? There's only 23
16 employees. Wouldn't it be an expense? They've got to
17 hire a lawyer to petition the board for an election.
18 MR. SEAMON: It is not necessarily a
19 particularly elaborate procedure, and in this case, of
20 course, the litigation that ensued was quite as
21 extraordinary as it would have been had -- as it might
22 have been had the employer taken the preferred route and
23 filed the petition for an election in the first place.
24 And it also bears emphasizing that the board's
25 rule does not permanently foreclose an employer from

1 asserting its good faith doubt. Instead, if the employer
2 fails to raise the doubt before an employer has accepted
3 the offer, the employer simply has to bid his time during
4 the contract term. When the contract expires, it again
5 has an opportunity to assert its good faith doubt.
6 QUESTION: Do the board rules permit this
7 particular employer to go back and raise the other half of
8 the claim, or has it lost -- have they lost that?
9 I mean, I take it initially they thought there
10 was just going to be one rule, actual good faith the same,
11 and then they found out there wasn't. There's a
12 division -- good faith, they lose, actual, we haven't
13 decided.
14 MR. SEAMON: Well --
15 QUESTION: Do the board rules permit them to go
16 back now, or not?
17 MR. SEAMON: I'm not certain of the answer to
18 that question, but I would suggest that there's a very
19 good argument that they've waived the argument to the
20 extent that the board made it quite clear in both of its
21 decisions that it considered this case as presenting only
22 a good faith doubt, and petitioner could have sought
23 reconsideration of the board's decision on the grounds
24 that the board had overlooked one of its claims, but it
25 failed to do so.

1 QUESTION: These events took place in 1988, so
2 it may be a little late to go back and argue about the
3 thing, I suppose.
4 MR. SEAMON: That's right, and I believe the
5 petitioner in this case had ample opportunity.
6 It was quite clear -- it's been clear since the
7 Celanese Corporation decision in 1951 -- that there are
8 two separate claims that can be used to justify refusal to
9 bargain. One is a good faith doubt, the other is an
10 actual loss of majority status, so petitioner -- the
11 clarity of the board's precedent can't be blamed for
12 petitioner's failure to raise both claims if it thought
13 both were grounded in the facts.
14 QUESTION: The board's rule serves the interest
15 in repose for the most part by drawing a bright line after
16 which the parties are required to accept the results of
17 the negotiation process, and it also prevents sand-
18 bagging, which can occur where an employer decides that it
19 is going to keep its doubts regarding the union's majority
20 status to itself during the negotiation process and raise
21 them after an agreement has been concluded if it decides
22 in hindsight that the agreement is not to its liking.
23 We're not suggesting that that was operative
24 here, and that it is a very real concern in the general
25 run of cases.

1 QUESTION: Do we have -- refer to Judge
2 Campbell's opinion on page 2a of the petition. The second
3 time around he says, several years ago the National Labor
4 Relations Board petitioned this court for enforcement of
5 an order and we retain jurisdiction. The board has now at
6 long last responded.
7 Did the board ever offer any explanation for the
8 years it took in this case to reply to the Second -- the
9 First Circuit's request?
10 MR. SEAMON: It did not. However, the second
11 board decision was a decision by the full board, and
12 obviously, in general those take longer to issue than
13 decisions --
14 QUESTION: Years longer?
15 MR. SEAMON: -- of the four panels, and I would
16 suggest the other consideration may well have been that
17 the First Circuit outlined a number of very specific
18 concerns that it wanted the board to address in full on
19 remand, but there's no specific explanation --
20 QUESTION: What's at stake here as of this
21 point? What does the enforcement order provide?
22 MR. SEAMON: The enforcement order is --
23 includes a usual cease and desist provision, and it also
24 requires petitioner to enter into a contract based on the
25 agreement that was formed when the union accepted

1 petitioner's contract.
2 QUESTION: But will that mean back pay, or what?
3 MR. SEAMON: That will mean that the employees
4 should be entitled to the benefits of all of the wage and
5 conditions provisions of the original contract.
6 If the Court has no further questions, that
7 concludes my --
8 QUESTION: Let me just ask one other.
9 MR. SEAMON: Yes.
10 QUESTION: What was the term of the original
11 contract?
12 MR. SEAMON: Three years.
13 QUESTION: And that 3 years, of course, has long
14 expired.
15 MR. SEAMON: That's right, and I suppose since
16 the employer has never honored the agreement it is still
17 open for it to be required to do so.
18 QUESTION: Thank you, Mr. Seamon.
19 Mr. O'Reilly, you have 2 minutes remaining.
20 REBUTTAL ARGUMENT OF JOHN D. O'REILLY, III
21 ON BEHALF OF THE PETITIONER
22 MR. O'REILLY: Thank you, Mr. Chief Justice.
23 I do want to emphasize the manner in which the
24 First Circuit dealt with this case, and it dealt with it
25 on the basis of being a loss of majority case.

1 If I may just briefly, in addition to the
2 reference at page 3a, the Court makes identical references
3 on pages 80a, 82a, and in the specific order of remand to
4 the board at page 83a it continuously refers to the issue
5 as being a loss of majority, and it is easy to somehow
6 distinguish, or sometimes confuse the distinguishing
7 factors.
8 In fact, in this case there is a reference to
9 the Chicago Tribune, the Seventh Circuit case. That was a
10 clear loss of majority case. In the board's brief before
11 this Court it says that has nothing to do with that, that
12 was a loss of majority case, and this is a good faith
13 doubt case.
14 Yet if -- I direct the Court's attention to the
15 board's own decision in this Auciello case. How does it
16 refer to -- on seven different pages of the board's
17 decision in this case, it refers to the Chicago Tribune
18 case as being a good faith doubt. It continuously says
19 the employer raised its good faith doubt.
20 So sometimes the distinction between the two is
21 not as clear as we would like it to be, so I think we have
22 adequately raised the actual loss of majority in this
23 case.
24 Notwithstanding the fact it was not expressly
25 raised in the answer to the board, it was raised a number

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1 of times in the briefs, and that's how the court of
2 appeals addressed it. It remanded it to the board to deal
3 with an actual loss of majority scenario, and the board
4 can't pick and choose, I would submit.
5 While -- even though the First Circuit told us
6 to do it, number 1, quickly, we are not going to do that.
7 It had told us to deal with the actual loss of majority
8 case. It can't dictate that. That's up to the court of
9 appeals, and I think the issue is a live one before this
10 Court. Certainly -- thank you.
11 CHIEF JUSTICE REHNQUIST: Thank you,
12 Mr. O'Reilly.
13 The case is submitted.
14 (Whereupon, at 11:50 a.m., the case in the
15 above-entitled matter was submitted.)
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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:

AUCIELLO IRON WORKS, INC., Petitioner v. NATIONAL LABOR RELATIONS BOARD
CASE NO: 95-668

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

BY Ann Mari Federico

(REPORTER)