

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CATERPILLAR, INC., Petitioner v. INTERNATIONAL
UNION, UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA, ET AL.

CASE NO: 96-1925

PLACE: Washington, D.C.

DATE: Tuesday, January 20, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - - X
3 CATERPILLAR, INC., :
4 Petitioner :
5 v. : No. 96-1925
6 INTERNATIONAL UNION, UNITED :
7 AUTOMOBILE, AEROSPACE AND :
8 AGRICULTURAL IMPLEMENT WORKERS :
9 OF AMERICA, ET AL. :
10 - - - - - X

11 Washington, D.C.
12 Tuesday, January 20, 1998

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 1:00 p.m.

16 APPEARANCES:

17 COLUMBUS R. GANGEMI, JR., ESQ., Chicago, Illinois; on
18 behalf of the Petitioner.

19 DAVID M. SILBERMAN, ESQ., Washington, D.C.; on behalf of
20 the Respondents.

21 BETH S. BRINKMANN, ESQ., Assistant to the Solicitor
22 General, Department of Justice, Washington, D.C.; on
23 behalf of the United States, as amicus curiae,
24 supporting the Respondents.

25

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1 PROCEEDINGS

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 96-1925, Caterpillar, Inc. v. International
5 Union, United Automobile, Aerospace and Agricultural
6 Implement Workers of America.

7 Mr. Gangemi.

8 ORAL ARGUMENT OF COLUMBUS R. GANGEMI

9 ON BEHALF OF THE PETITIONER

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

12 The issue for consideration, in a nutshell, is
13 whether it is lawful for an employer and a union to agree
14 that the employer shall pay the wages of a union official,
15 or union officials, for their services as union officials,
16 where the union official used to be an employee of the
17 payor employer.

18 Our position is, is that under section 302 of
19 the Labor Management Relations Act and a fair reading of
20 the plain language of that statute, such an arrangement is
21 clearly unlawful.

22 This Court in Arroyo many years ago said that a
23 literal reading of the language of the statute does no
24 offense -- does no violence, I believe the term was -- to
25 common sense and so I believe it is useful at the

1 threshold to consider for a moment what common sense would
2 suggest is the answer to the question in light of what we
3 all know to be bedrock Federal labor policy and that is,
4 is that notwithstanding the fact that ultimately there is
5 an economic interdependence between labor and management,
6 that the relationship is to be maintained as one of
7 adversarial independence.

8 In light of that fundamental policy that has
9 been expressed by this Court on numerous occasions, from
10 insurance agents on forward, to ask the question, is it
11 lawful for an employer to pay a union official for his
12 services as a union official is to answer the question.

13 QUESTION: Well, let me ask you this,
14 Mr. Gangemi, do you think the wage payments would be
15 lawful if the employees actually worked for the employer
16 an hour a day and the rest of the time for the union?

17 MR. GANGEMI: I believe that the statute
18 provides that an employer may pay for the services of that
19 individual as an employee, but may not pay --

20 QUESTION: For the hour a day.

21 MR. GANGEMI: For the hour that he works as an
22 employee of the employer, but for the --

23 QUESTION: So on the no-docking arrangements,
24 you think a fortiori they would be invalid, where there's
25 been full pay but only part work for the employer.

1 MR. GANGEMI: No, Your Honor.

2 QUESTION: No?

3 MR. GANGEMI: I believe that to understand
4 whether or not a payment is lawful under a no-docking
5 arrangement one must go to the safe harbor language of the
6 8(a)(2) proviso of the National Labor Relations Act, which
7 is from whence the no-docking provision gets its genesis.
8 That language, that section says that notwithstanding
9 anything else, it -- an employer shall not be prohibited
10 from permitting an employee to confer with him during
11 regular hours without loss of pay.

12 QUESTION: That isn't all -- that isn't all that
13 a shop steward does, unfortunately. I mean, if you're
14 appealing to plain language, that would allow the shop
15 steward to be paid only for the time that he spends
16 conferring with the employer and not with consulting the
17 employees who have grievances, and so forth.

18 MR. GANGEMI: The board and the courts have
19 extended that language, rightly or wrongly, to include
20 conferring with each other, conferring with fellow
21 employees, in preparation for or in conjunction with
22 conferring with management.

23 QUESTION: Okay. What about a full-time shop
24 steward? He spends his full time --

25 MR. GANGEMI: If --

1 QUESTION: -- conferring with other employees
2 and with the employer.

3 MR. GANGEMI: Again, Your Honor, it depends on
4 the nature of the relationship. If a steward has ceased
5 to be an employee of the employer and instead become a
6 full-time agent, or to the extent that he is acting as an
7 officer of the union --

8 QUESTION: I don't know what you mean, to the
9 extent that he's acting as an officer. He spends his full
10 time on union work.

11 MR. GANGEMI: Your Honor, I do not think the
12 distinction is one of full-time versus part-time. I think
13 the distinction is, is he being paid for his services as a
14 union official, which is unlawful, or is he being paid for
15 his services as an employee, which is lawful.

16 QUESTION: But that's not the -- I mean, you
17 acknowledge that if he's conferring with the employer on a
18 grievance, that isn't spending his time as an employee of
19 the employer. That's spending his time as a union member,
20 isn't it, and you concede that that is payable.

21 MR. GANGEMI: Section 8, the proviso -- Your
22 Honor, the proviso to section 8(a)(2) creates, in our
23 view, a safe harbor --

24 QUESTION: And all I'm asking you --

25 MR. GANGEMI: -- which allows this type of

1 conflict.

2 QUESTION: All I'm asking you is, how wide is
3 the harbor? Is it enough that the steward does nonunion
4 work for an hour, a half-hour, 15 minutes a day?

5 MR. GANGEMI: Again, Your Honor, in our judgment
6 the distinction is not the issue -- the issue is not
7 whether the individual works full-time or part-time. If
8 you look at the statutory language, it says nothing about
9 whether someone is full-time or part-time. A full-time
10 union agent could not fall within the ambit of the 8(a)(2)
11 proviso --

12 QUESTION: Well, it depends on whether he's an
13 employee, you say --

14 MR. GANGEMI: Because he would no longer be an
15 employee.

16 QUESTION: Is it enough to make him an employee
17 that he works for the employer 15 minutes a day?

18 MR. GANGEMI: Your Honor, I do not think so. I
19 do not think that working for a few moments a day for an
20 employer --

21 QUESTION: Okay. What is the line you're
22 drawing, because I -- I frankly -- I think it's in my view
23 crucial to your case that the no-docking rules are not
24 cast aside, and the Government has really portrayed your
25 argument as an attack upon that. You say it's not an

1 attack upon that.

2 MR. GANGEMI: That's --

3 QUESTION: I want to know how much of the no-
4 docking law remains. The majority of the employee's time
5 has to be for the employer and he ceases to be an employee
6 if he's not spending most of his time for the employer as
7 opposed to the union?

8 MR. GANGEMI: I do not think that section
9 8(a)(2) proviso is a matter of the amount of time. I
10 believe, and we argue, that it is a function of the nature
11 of the activity that the representative of the union, the
12 employee, is engaging in.

13 QUESTION: He's engaging in two types of
14 activities. Some of it is for the employer, and some of
15 it is as a shop steward, which is not for the employer,
16 okay. He's doing both.

17 MR. GANGEMI: The analysis would be --

18 QUESTION: And your answer is?

19 MR. GANGEMI: My answer is, is that you go to
20 the statutory language --

21 QUESTION: Right.

22 MR. GANGEMI: And under 302(c)(1) he cannot be
23 paid for his services as a union representative. He may
24 be paid for his services as an employee of the employer in
25 a dual capacity situation, unless -- unless --

1 QUESTION: Yes?

2 MR. GANGEMI: You then go to section 8(a)(2) and
3 if the nature of the activity falls within the ambit of
4 8(a)(2), then Congress has allowed a safe harbor for that
5 conduct.

6 QUESTION: Even if all his time is spent on
7 that?

8 MR. GANGEMI: Even if all his time is spent on
9 that, if it falls within the ambit of section 8(a)(2).

10 So, for example, Your Honor --

11 QUESTION: Yes, I must say you're not being
12 helpful to me on -- really on my main -- on my main
13 concern. You're saying it depends on whether he's really
14 an employee of the employer or an employee of the union.
15 I have no idea how to answer that question.

16 MR. GANGEMI: Well, Your Honor, I --

17 QUESTION: He's spending all his time as a shop
18 steward and you say you cannot tell me whether that makes
19 him an employee of the employer or of the union.

20 MR. GANGEMI: If an individual is spending all
21 of his time and has ceased to -- has ceased to engage in
22 activity on behalf of the employer, he is --

23 QUESTION: Okay.

24 MR. GANGEMI: -- no longer controlled by the
25 employer and doesn't meet the control test.

1 QUESTION: Good, and the next question is 15
2 minutes. He works 15 minutes.

3 MR. GANGEMI: To the extent that he works 15
4 minutes for the employer --

5 QUESTION: He is an employee.

6 MR. GANGEMI: He is an employee for those 15
7 minutes.

8 QUESTION: And will the no-docking provision
9 apply to all the rest of his time?

10 MR. GANGEMI: Not in my judgment, because with
11 regard to the remainder of that day, what you're positing
12 here is a situation where you have a dual capacity
13 employee. He is a agent of the union, similar to the case
14 in Town & Country, and he is an agent of the employer.
15 He's an employee of the employer.

16 In that situation, 302(c)(1) is clear. It sets
17 up a dichotomy. It says that it is lawful to pay a union
18 official to be an employee of the employer but it is not
19 lawful to pay a employee of the employer to be a union
20 official with the very limited proviso that if you can fit
21 the conduct, if you can fit the nature of the activity,
22 regardless of how many hours, Justice Scalia, within the
23 confines -- and they're very narrow confines. The harbor
24 of 8(a)(2) is very narrow.

25 QUESTION: Can you be concrete, then, about what

1 is this conduct, because you seem to be dividing it up not
2 on the basis of number of hours, but conduct, and let me
3 give you a specific example. Let's take the job of
4 grievance settlor, and instead of giving it to one person
5 who's called the chairman to do it full-time, it's given
6 to two shop stewards, each one working 4 hours a day at
7 that job and 4 hours a day at the plant job.

8 Is that arrangement -- shop steward works 4
9 hours at the plant, 4 hours settling grievances, two of
10 them, so it adds up to a total of 8 hours a day, are those
11 two shop stewards legitimately within the no-docking
12 exception that you derive from section 8(a)?

13 MR. GANGEMI: Well, those were the facts in the
14 BASF case, where an individual was a part-time, albeit
15 regular union official. He was not just representing his
16 fellow employees on an as-needed basis in connection with
17 particular grievances. He was performing regular
18 representational functions, albeit 4 hours a day.

19 The provision in the contract said that the
20 employer could pay for reasonable time spent in
21 representation of employees up to 4 hours a day, and what
22 BASF was complaining about, as I understood the facts, is
23 that this had become de rigueur, that every day, day-in
24 and day-out, this was -- this individual had become a
25 regular, albeit part-time union official, and the BASF

1 felt that under the terms of that -- and I agree with BASF
2 in this regard. I disagree with the Second Circuit in
3 this regard, that under -- that where that individual has
4 ceased to be a shop steward merely conferring with the
5 employer considering grievances on an as-needed basis, and
6 thus fits neatly within the ambit of the 8(a)(2) proviso,
7 when the representation becomes a regular full -- part-
8 time, albeit part-time representation --

9 QUESTION: Well, that's where --

10 MR. GANGEMI: -- then it's prohibited to pay
11 that individual.

12 QUESTION: That's where I'm not following your
13 argument, because we're talking about parties bargaining
14 for a contract, so I'd like to know the contract term for
15 which the union and the employer can bargain, the no-
16 docking contract term --

17 MR. GANGEMI: I under --

18 QUESTION: -- that you would say is legitimate,
19 and you can't do it on the basis of, well, when it
20 becomes --

21 MR. GANGEMI: I think this case gives a perfect
22 example and I direct the Court's attention to pages 4 and
23 5 of our reply brief, where we reproduce the two
24 provisions. One of them is a no-docking provision in the
25 labor contract that we do not think is at issue and we

1 think it is perfectly lawful under the 8(a)(2) proviso and
2 the other one is 4.6, which we do not believe is a no-
3 docking provision and we do not believe is lawful.

4 The 2.2 says, Your Honor, stewards may --

5 QUESTION: Where are you reading from,
6 Mr. Gangemi?

7 MR. GANGEMI: I am reading from pages 4 and 5 of
8 the reply brief.

9 QUESTION: Whereabouts on page 4?

10 MR. GANGEMI: Well, also I can direct your
11 attention, Your Honor --

12 QUESTION: Well, you've refer -- if you'd just
13 tell us where in the reply --

14 MR. GANGEMI: It's the middle.

15 QUESTION: The middle of page 4. Go ahead,
16 rather than -- well, we'll find it.

17 MR. GANGEMI: I had that in my notes.

18 I am reading now from the middle of page 4, the
19 quotation.

20 QUESTION: Thank you.

21 MR. GANGEMI: In short, that says -- and that's
22 a no-docking provision, 2.2 of the local agreement.
23 Stewards may, without loss in pay for regularly scheduled
24 hours, discuss a grievance with the aggrieved employer,
25 provided the aggrieved employ --

1 QUESTION: Employee, not employer.

2 MR. GANGEMI: With the aggrieved employee. I'm
3 sorry, Your Honor. Provided the aggrieved employee first
4 informs his immediate supervisor and also with the
5 employee's supervisor and, if the grievance is not
6 satisfactorily settled, with the plant grievance
7 committeeman. That is a classic no-docking clause.

8 QUESTION: And you concede that that's okay.

9 MR. GANGEMI: Absolutely, Your Honor.

10 QUESTION: Even though I assume a particular
11 steward might spend his entire time doing that.

12 MR. GANGEMI: On a given day, Your Honor, it
13 might be the case that he would spend a full day --

14 QUESTION: There's no exclusion if he spent his
15 whole year doing that. I mean, maybe the union wants to
16 economize on stewards, so it only has one steward for the
17 whole plant.

18 MR. GANGEMI: Shop stewards have regular jobs
19 and regular job duties. Shop stewards have a regular
20 function that they perform in the factory which they come
21 off of and they return to upon the completion of their
22 task.

23 For example, if the 2.2 provision doesn't ring
24 true to Your Honor in terms of the distinction, take a
25 look at the 1950 Department of Labor sample that is cited

1 in appellee's brief, or respondent's brief, I should say,
2 as a sample of a classic no-docking clause. I read --

3 QUESTION: Where is this?

4 MR. GANGEMI: It is in the --

5 QUESTION: Do they quote it, or do they just
6 cite it?

7 MR. GANGEMI: They just cite it.

8 QUESTION: Oh, okay.

9 MR. GANGEMI: So I do not have it, but I am
10 reading from the 1950 BLS bulletin. Quote, It is
11 understood -- this is a sample clause that the Government
12 is giving as an example of the no-docking provision.

13 It is understood that stewards and grievance
14 committeemen are employed by the company to perform full-
15 time production and maintenance work, but it is further
16 understood and agreed that they may take time off during
17 their regular working hours and be paid at their regular
18 rate of pay to perform -- and then it lists investigate
19 and present grievances, attend meetings for the discussion
20 of matters arising out of the application of the
21 agreement. It's an example of what a no-docking provision
22 is.

23 Now, Justice Scalia, this may be a matter --
24 ultimately a matter of degree, but matters of degree are
25 as real in the law as matters of qualitative distinction.

1 I believe that that type of provision is qualitatively
2 different from the 4.6 that is at issue here wherein the
3 employer and the company -- the employer and the union
4 agree that the chairman shall conduct his business from
5 the local union office, he shall be considered on leave of
6 absence, and he will be paid by the company for his
7 regular shift hours.

8 However, the company shall not pay for time
9 spent, and then it lists a couple of exceptions,
10 activities not directly related to the functions of his
11 office. In other words, this individual is not a regular
12 worker in the plant, not a real employee, to use your
13 terminology.

14 QUESTION: Can they negotiate legitimately for
15 any retention of any benefits for someone selected from
16 among the employees to do this job for a term? For
17 example, how about retaining the right to return to work,
18 the seniority provision -- are there any benefits
19 connected with employment that are retained, or can be
20 bargained for to be retained?

21 MR. GANGEMI: I believe -- it depends on what
22 you mean by the word retain, Your Honor, but I believe
23 that one can retain the rights that have already accrued
24 to that person while they were an employee.

25 For example, the pension that has been earned to

1 the date that he ceases to be an employee and becomes a
2 union agent. He can retain them, and he can draw down on
3 them. He can be paid out --

4 QUESTION: But not accrue any more.

5 MR. GANGEMI: He cannot accrue any more.

6 Seniority, or the right of seniority it seems to
7 me is nothing more than holding the place in the queue.
8 It is not a payment of money or a thing of value to a
9 union official.

10 QUESTION: You pay him when he goes --

11 MR. GANGEMI: It is only of value if the union
12 official comes back and becomes again at some point in the
13 future an employee.

14 QUESTION: You pay him when he goes on vacation.

15 MR. GANGEMI: Excuse me?

16 QUESTION: You pay him when he goes on vacation.

17 MR. GANGEMI: In this case?

18 QUESTION: I mean, employees are paid all the
19 time when they go on vacation.

20 MR. GANGEMI: Ah --

21 QUESTION: And if they're hurt, they get
22 compensation.

23 MR. GANGEMI: This is the --

24 QUESTION: And if they're permanently crippled
25 they get compensation and their health benefits continue,

1 and all kinds of things continue. What's the difference
2 between that and this same person who works for both
3 taking a year off to handle grievances? What is the
4 difference? I'm not saying there isn't one.

5 MR. GANGEMI: I will -- I will --

6 QUESTION: I just want to know the implications
7 there.

8 MR. GANGEMI: It's an important question and the
9 bottom line is, is that this is the argument that there
10 are various types of contingent benefits for -- that are
11 paid to an employee for time not worked.

12 QUESTION: To put all the cards out, so to
13 speak, I mean, you're willing to let them do that when
14 it's 15 minutes as a shop steward talking to the immediate
15 supervisor. You're willing to let that happen when it's a
16 plant committeeman, a grievance committeeman, I take it,
17 talking to his counterpart the -- slightly higher up in
18 the employer's hierarchy. I don't know if you're willing
19 to do it when he's actually even higher up and talks to --
20 but it seems like sometimes you're willing to see it that
21 way, sometimes not.

22 MR. GANGEMI: Well --

23 QUESTION: But go back to the first.

24 MR. GANGEMI: Let me go back to the first one
25 for a moment. The difference between other paid time off

1 provisions and this one is, simply speaking, the statute.
2 There is no statute that prohibits an employer from paying
3 someone to go on sabbatical. There is no statute that
4 prohibits an employer for paying someone to go on
5 political --

6 QUESTION: In each instance, I'm assuming there
7 is a person who has a dual capacity. That is, he works
8 for the employer, but he's also a union rep.

9 MR. GANGEMI: Well, or he -- or in this case he
10 used to work for the employer.

11 QUESTION: Yes, so the statute applies. The
12 question would be, is the payment by reason of his
13 employer service? Is it by reason of, those are the key
14 words, by reason of and if it's not, of course, I get --

15 MR. GANGEMI: Well, and the phrase by reason of,
16 Your Honor, is nothing more than a prepositional phrase.
17 The important issue is what is the object that that
18 prepositional phrase takes, and the object, reading the
19 literal language, is service as an employee, or his
20 service as an employee of the employer.

21 QUESTION: Well, let me ask you this. Can it be
22 said that the employer derives any benefit from the work
23 done by the employee for the union?

24 MR. GANGEMI: I do not believe, and I believe
25 the court below recognized, that there is anything but a

1 theoretical benefit that the employer derives from these
2 individuals. These individuals work --

3 QUESTION: It's enough to be by reason of.

4 MR. GANGEMI: Pardon?

5 QUESTION: The benefit, theoretical though it
6 may be, is on your view, I take it, enough to qualify as a
7 payment by reason of.

8 MR. GANGEMI: I thought Her Honor's question
9 went to a benefit that the employer receives from a
10 grievance administration.

11 QUESTION: I asked whether the employer could be
12 said to receive any benefit from the work done by the
13 employee for the union.

14 MR. GANGEMI: In our judgment that's -- in
15 theory that may be the case, but it is irrelevant if it is
16 the case. The individual -- and it was found by the
17 district court and it was confirmed by the appellate
18 court -- is working solely and exclusively for the benefit
19 of the union.

20 Now, that there may be some indirect tangential
21 benefit to the employer, theoretical or otherwise, does
22 not mean that that person is working for the benefit of
23 the employer. Likewise, that individual is not subject to
24 the control of the employer and the record is clear below
25 that everyone who has looked at this situation, the

1 district court, the appellate court, and the
2 administrative law judge, found that these individuals are
3 no longer employees of the employer and have become
4 employees of the union by virtue of the classic test for
5 that, control and benefit.

6 QUESTION: Yes, but to the extent that the
7 employee is being paid on a no-docking scheme the same
8 argument can be made with respect to the period covered by
9 the no-docking rule, can't it?

10 I mean, it seems to me that your -- I understand
11 your argument, but I don't see why your argument, if we
12 accept it, does not force us to say that the no-docking
13 rule is prohibited.

14 MR. GANGEMI: Because, Your Honor, Congress has
15 dealt with that for you.

16 Let us assume for the sake of argument that
17 that -- it has created a safe harbor.

18 QUESTION: Well, it hasn't done so in terms of
19 plain language. I mean, it really hasn't. So I don't
20 know how the argument flows.

21 MR. GANGEMI: Well, Your Honor, I mean, we
22 may -- we may disagree with regard to the plain language.
23 I think 8(a)(2) has very plain language.

24 But in passing a -- but if you do not think the
25 language is plain and you wish to go to the legislative

1 history, then go to the legislative history and you will
2 find that in 1935 it was proposed that the language have
3 within it an exception allowing employers to pay, quote,
4 local union representatives and

5 QUESTION: I was -- I just want to go back, can
6 I, to my question, because I think if you answer it
7 directly you will get a conceptual distinction that will
8 help you. I'm not -- but I'm thinking of an employee, and
9 the employee is a union representative as well, so when
10 the employer writes a check he is paying money to a
11 representative of one of his employees, all right, so he
12 fits in the statute and it also happens to be his
13 employee, all right? He's a representative of the union.
14 He's also his employee.

15 Now, that person is disabled and so health
16 benefits, vacation benefits, money checks flow to that
17 person who is the representative of the employee for many
18 years into the future. That's fine, isn't it? That is
19 not, in your view, money paid by reason of.

20 That is money paid by reason of. All right.

21 MR. GANGEMI: Exactly.

22 QUESTION: Now tell me why that is money paid by
23 reason of, why the docking is -- no-docking is money paid
24 by reason of, but the payment to the man who takes the
25 year off to be the grievance committee chairman is not

1 money paid by reason of. If you could explain that very
2 clearly, I think I would understand how you're trying to
3 make the distinction.

4 MR. GANGEMI: Your Honor, the money paid to a
5 former employee who is -- again, let's say had a workplace
6 injury and is on disability and is entitled, by virtue of
7 his disability, to compensation, can be paid that
8 compensation notwithstanding the fact that he has now
9 become a union official, because it was -- he was entitled
10 to it by virtue of, by reason of his service as an
11 employee of the employer.

12 QUESTION: Just like the grievance committee
13 chairman is here.

14 MR. GANGEMI: For his services as an employee of
15 the employer?

16 QUESTION: Yes. That's why the employ -- the
17 employer would never pay him if he weren't also an
18 employee of the employer.

19 MR. GANGEMI: Pay him for what?

20 QUESTION: For all the things he's done in the
21 past to earn this year to go up and --

22 MR. GANGEMI: I --

23 QUESTION: All right. Now, I'm not -- I'm not
24 taking the position. I want to see what your response is.

25 MR. GANGEMI: My response is, is the district

1 court's response, Your Honor. The record here is devoid
2 of any evidence that the chairman's wages for services
3 rendered are for services rendered while he was employed
4 at Caterpillar, appendix petition 61.

5 The Third Circuit, the chairman does nothing for
6 Caterpillar. The payments at issue here do not relate
7 back to these former employee services on the shop floor,
8 page 8 of the petition -- appendix to the petition. It is
9 difficult to, indeed, to comprehend how years and even
10 decades of paid union leave can realistically be thought
11 of as compensation for time spent on the factory floor.
12 It's even --

13 QUESTION: On the difficulty -- on the
14 difficulty of comprehending that, you were about to say if
15 the statute is ambiguous, and legislative history, does it
16 count for anything that for decades in the industry, it
17 appeared, this kind of arrangement was accepted.

18 For -- one of the startling things about this
19 case is that you are coming forward and now saying that
20 for nearly 20 years your client has been engaged in a
21 felonious course.

22 MR. GANGEMI: Well, first of all, Your Honor, it
23 is not a wide industry practice. There is no evidence
24 here that it is widespread in anything but the auto
25 industry, number 1.

1 QUESTION: But this particular employer has been
2 doing it for nearly 20 years, right?

3 MR. GANGEMI: This particular employer entered
4 into this arrangement in 1973 under threat of strike and
5 has had it for five or six contract terms, that's correct,
6 Your Honor, but I think --

7 QUESTION: There must have been some kind of
8 judgment that it was legal.

9 MR. GANGEMI: I think that's an untoward
10 assumption, that -- or an unjustified assumption, I should
11 say, Your Honor.

12 It is very easy to be lulled into a belief that,
13 you know, if you pay a part-timer, or if you pay a shop
14 steward, you should be able to pay a regular union rep,
15 too. That's easy to fall into that, to be lulled into
16 that sense that there is no difference when in fact there
17 is.

18 And then one day you wake up and the union is
19 demanding that full-time union agents be paid full-time
20 pay at 54 hours a week, at top rates and shift premiums,
21 because it's time they got a raise.

22 QUESTION: I guess we should --

23 MR. GANGEMI: These are slippery slopes, Your
24 Honor and I don't think that the fact that we have slid
25 down it necessitates that we stay at the bottom.

1 QUESTION: I guess we should not reject virtue
2 even if it comes late. Is that your argument here?

3 (Laughter.)

4 MR. GANGEMI: Virtue is virtue, Your Honor.

5 I would like to -- with the Court's permission
6 I'd like to reserve the balance of my time for rebuttal.

7 QUESTION: Very well, Mr. Gangemi.

8 Mr. Silberman, we'll hear from you.

9 ORAL ARGUMENT OF DAVID M. SILBERMAN

10 ON BEHALF OF THE RESPONDENTS

11 MR. SILBERMAN: Thank you, Mr. Chief Justice,
12 and may it please the Court:

13 Discussion to this point I think has made quite
14 clear that there is no principle basis for distinguishing
15 a collective bargaining agreement that provides an
16 employee who assumes a union position part time off to
17 perform those duties from one that provides full time off,
18 and --

19 QUESTION: Well, one principle I think has been
20 suggested. It didn't get very far in the argument here
21 but at least, as I understand it, this principle was
22 suggested, that in fact the language in, what is it,
23 (c)(1) was in fact added in an effort to in effect
24 equalize the position of those who are working for an
25 affiliated union and an unaffiliated union.

1 But the point was to allow, how ill-defined it
2 may have been, some no-docking practice for all of them.
3 Whatever that means, and however facially inconsistent
4 that might be with the general prohibition, it was at
5 least something less than 100 percent of one's time and a
6 payment of 100 percent of one's salary for that time and
7 that, at least on the basis of legislative intent, in
8 construing an ill-drafted statute we should recognize the
9 basic distinction between no docking for some work and
10 full payment for no work for the employer. What about
11 that distinction?

12 MR. SILBERMAN: Well, Justice Souter, first, as
13 a historical matter, at the time the statute was enacted
14 there was as much evidence of no -- of payment of the type
15 we had here, where it was recognized that an employee
16 would have full time off to perform certain union
17 functions, representational functions, as part-time
18 positions.

19 QUESTION: Can I find that in the record?

20 MR. SILBERMAN: You can find that in our brief.
21 We cite the -- we would begin by reviewing the 1941 Ford
22 contract with the UAW --

23 QUESTION: Yes.

24 MR. SILBERMAN: -- which is the agreement. We
25 quote that, which expressly provides that a full-time

1 position --

2 QUESTION: You're talking about this industry.
3 You're not talking about economy-wide. You're talking
4 about the automotive industry.

5 MR. SILBERMAN: It was -- the automotive
6 industry -- historically, Justice Scalia, it was -- the
7 industrial unions began in the automotive industry, so
8 this was certainly the lead industry.

9 QUESTION: Yes.

10 MR. SILBERMAN: And this was specific -- this
11 industry's practice was specifically called to the
12 attention of the 1947 Congress, both the Ford contract,
13 which was a de jure full-time contract and the Chrysler
14 contract which, as we explained in our brief, was de facto
15 full time in that employees were given as much time as
16 they needed and, in fact, the chief steward spent full
17 time.

18 QUESTION: What is the significance of having
19 these practices "called to the attention" of the 1947
20 Congress?

21 MR. SILBERMAN: Well, Chief Justice Rehnquist, I
22 was -- I thought I understood Justice Souter to be
23 suggesting that a distinction could be drawn between part
24 time and full time based on historical practice, and that
25 you could understand the statute as only going as far as

1 history had taken it, and I'm suggesting that that doesn't
2 provide a basis for distinction.

3 Obviously, the ultimate answer to the question
4 here is going to turn on the language and structure of
5 this statute as informed by its history.

6 QUESTION: You can draw a distinction based on
7 the language of the statute. I mean, it has to -- are
8 your people employees or former employees, in your view?

9 MR. SILBERMAN: They are employees, Justice
10 Stevens.

11 QUESTION: The ones who work full time at the
12 union get no pay -- do no services whatsoever for the
13 company for 5 years in a row. They're employees of the
14 company.

15 MR. SILBERMAN: They -- although we would say
16 nothing turns on that in terms of interpreting this
17 statute, we think the correct analytic answer is that they
18 are employees, and they are employees for the same reason
19 that an employee who is on leave to take an educational --
20 pursue a college education or is on sabbatical, that the
21 statute defines employee for the purpose of 302 it's the
22 same definition as for the purpose of NRA.

23 The labor board law since 1935 on has been very
24 clear that an employee who is on leave, as long as he
25 still has some right to return and hasn't severed all

1 employment ties, continues to have the status as an
2 employee. He can't be discriminated against, et cetera.

3 So we think if anything turned on it these
4 people are employees, but since the statute here is
5 written in the disjunctive and allows payments either to
6 employees --

7 QUESTION: Yes.

8 MR. SILBERMAN: -- or to current employees, I --
9

10 QUESTION: But your theory is there, your theory
11 is they are current employees even though the company has
12 no control over their --

13 MR. SILBERMAN: That's right. We would not say
14 they are currently rendering service to the employer as an
15 employee, but if the question is, do they have the status
16 of an employee, you would answer that in the affirmative.
17 But as I say, whether they are employees or former
18 employees, we turn to this statutory language and the
19 statutory structure to understand the structure --

20 QUESTION: But the point wouldn't be whether
21 they're an employee. What is crucial is whether these --
22 whether the company is paying them as compensation for his
23 service as an employee, and do you think that the money
24 that the company is paying while he's on leave is
25 compensation for his service as an employee?

1 MR. SILBERMAN: I would say, Justice -- the
2 statute is compensation for or by reason of his service as
3 an employee.

4 QUESTION: Oh. You say, you think it's by
5 reason of his service as an employee?

6 MR. SILBERMAN: I think it is at the very least
7 that. Compensation --

8 QUESTION: If everybody got paid leave to do
9 whatever they want, then I would agree with you, but this
10 is a -- but that is not the rule here. I assume everybody
11 in this company can't just go off on leave and continue to
12 draw his pay.

13 MR. SILBERMAN: That's --

14 QUESTION: This fellow gets his pay only because
15 he's working for the union.

16 MR. SILBERMAN: Well --

17 QUESTION: How can you say that he's being
18 compensated by reason of his service as an employee.

19 MR. SILBERMAN: Well, he's not getting pay only
20 because he's working for the union. There are two
21 preconditions, Justice Scalia. The first is, of course,
22 that he has -- he is an employee, has rendered service as
23 an employee, and then this is a form of contingent leave.
24 He's -- as an employee the employees are entitled to paid
25 leave under certain contingencies.

1 As Justice Breyer pointed out, if they become
2 disabled, if they're called for military services and, in
3 this case, if they assume a union position they are
4 entitled to a paid leave, and we would say that that
5 payment is payment by reason of service as an employee
6 just as, in the Bingler case in the tax context, this
7 Court had no trouble saying that an employee who was on
8 full-time leave to pursue a degree, and he's drawing pay
9 from his employer, was getting that pay by reason of his
10 service as an employee.

11 QUESTION: No, but what that boils down to
12 saying is, he gets it simply because the only people they
13 have contracted to pay it to are those who have the status
14 of employee and therefore the entire issue becomes one of
15 whether the employer has, in fact, recognized this as
16 something it would like or is willing to do to an
17 employee, and that's the substance of it.

18 MR. SILBERMAN: I think, Justice Souter, that is
19 essentially right, subject to --

20 QUESTION: Then there's nothing left of the
21 prohibition.

22 QUESTION: No, I think that's -- I don't think
23 that is fair. There's nothing -- the prohibition, the
24 broad prohibition is a prohibition on payments of money to
25 union officials. It was an antibribery prohibition.

1 There is in -- we do think that 302(c)(1) is a
2 very broad exception and we suggest to the Court that it
3 be contrasted with the exceptions stated in subsections
4 (c)(4) and (c)(5). (c)(4) deals with withholding of union
5 dues and Congress there laid down a very specific set of
6 rules and subrules as to when, under what circumstances
7 those kinds of payments should be lawful and when they
8 should be unlawful.

9 QUESTION: But it seems to me -- you talk about
10 a broad exception, and if the collective bargaining
11 agreement provided -- it listed all the people who have
12 ever had a job with the union, the president of the union
13 on down, and said they all should be employed in the
14 company from January 1 to January 3. Thereafter, they
15 should be put on leave and remain on leave as long as they
16 want to stay and do everything -- and as long as they do
17 something for the union that has helped in the collective
18 bargaining negotiations the exception would apply.

19 MR. SILBERMAN: I think not quite -- I would not
20 take it that far, Justice Stevens. In Arroyo this Court
21 made clear that there is a point at which a payment which
22 in form satisfies one of the exceptions, satisfies part of
23 (c), subsection (c), nonetheless can be illegal, if it's a
24 sham, if it's really an attempt -- if it's really an
25 attempt not to further a legitimate purpose but to line

1 the pockets of particular union representatives, and if
2 what you're positing is a collective bargaining agreement
3 which they know --

4 QUESTION: Not to line their pockets, just pay
5 them enough so they'd be a little more friendly during
6 collective bargaining negotiations.

7 MR. SILBERMAN: Well, I -- if what you're
8 positing is an agreement -- a negotiation in which they --
9 in which what is said is that Jones is going to get some
10 additional money, we want to keep Jones happy, I think
11 that would fall outside of -- that would fall within the
12 sham exception. It would fall outside section (c)(1).
13 That is not --

14 QUESTION: It seems to me this program wants to
15 make a lot of union officials happy.

16 MR. SILBERMAN: I don't think that's quite
17 accurate, Justice Stevens. When the union comes to the
18 bargaining table it's not bargaining for pay for any
19 particular individuals.

20 QUESTION: Isn't this demand for 54 hours wages,
21 isn't that pay for the union officials?

22 MR. SILBERMAN: It is pay for particular
23 positions, not for particular -- to be filled --

24 QUESTION: Particular union positions.

25 MR. SILBERMAN: Union positions to be filled not

1 necessarily by the individuals who are negotiating, to be
2 filled by people -- to be filled by union -- the people
3 elected by the employees.

4 QUESTION: Yes, but it doesn't really matter
5 because they're not getting this money for being union
6 officials. They're getting this money because they used
7 to be employees, so we shouldn't be so suspicious about
8 it. They're not really getting the money for being union
9 officials. They're getting it because they used to be
10 company employees. That's why they want the raise. I
11 don't understand that.

12 It seems to me that if the statute meant what
13 you want it to mean, it would -- instead of having that
14 exception in (c)(1) it would be easier to say in (a)(1) to
15 any representative of any of his employees who are
16 employed in an industry affecting commerce except such
17 representatives as are former employees of the employer
18 himself. That would have done the trick. We wouldn't
19 have all this argument. It would be a lot clearer.

20 MR. SILBERMAN: That may well have been a
21 clearer way to write the statute, Justice Scalia. It
22 would not have, however, allowed for the possibility --
23 Congress clearly wanted -- the difference in language as
24 it now stands is that a situation in which an employer
25 makes a side deal with one of -- somebody who used to be

1 one of his employees having nothing to do with the fact
2 that he is -- is or was an employee -- he says, look, you
3 come to the negotiating table with me. Here's some money.

4 That's still illegal under the statute as
5 drafted. It would not be illegal under the statute you
6 posit, so that the structure that's -- that Congress did
7 seize upon does allow for the possibility that if payments
8 are made that are -- where the employment status is an
9 irrelevancy, it's a convenience, but it's an artifice,
10 those could be condemned.

11 QUESTION: Why can't you use those words to
12 apply to this very situation? Isn't the former employment
13 status just a convenience for the people who the union
14 wants to run the union affairs?

15 MR. SILBERMAN: I don't think so at all, Justice
16 Stevens. I think in part the employer would not have done
17 this but for the fact these are employees.

18 What this -- what this practice is about, and 60
19 years of experience tells us, this practice is about
20 trying to create a system of workplace representation
21 where people who come from the plant, who know the plant
22 and know the players, know the practices, will be able to
23 step into positions of workplace representation.

24 It's not irrelevant that they were -- that they
25 served as employees or serve as employees. It's central

1 to this -- what this system was about.

2 QUESTION: Of course, they can do the best
3 negotiating, too, as the -- I don't understand that
4 argument. I really don't. It seems to me that's --
5 you're just describing what makes a good union negotiator,
6 or a good union arbitrator, experience in the plant and
7 experience in the company, but -- and you're saying that
8 the company shall pay for all of this.

9 MR. SILBERMAN: Saying that this is what -- how
10 this system evolved, and it was very well-evolved at the
11 time the statute was written, that there is no evidence at
12 all that there was -- that anybody in Congress thought the
13 system as it has evolved, which was no different than it
14 is today, was corrupt, was illicit, should be
15 criminalized.

16 QUESTION: May I ask you another fact question I
17 didn't find in the briefs? Are these full-time union
18 people paid -- is their entire compensation derived from
19 the company or is part of it supplemented by the union?

20 MR. SILBERMAN: Insofar -- these, quote, full-
21 time people are not --

22 QUESTION: The most senior people in the union
23 that we're talking about.

24 MR. SILBERMAN: Right. They are not entitled to
25 pay for certain kinds -- they're only entitled to pay from

1 the company for performing the duties --

2 QUESTION: No, my question is, do they get their
3 entire income from the company or is their company pay
4 supplemented by the union?

5 MR. SILBERMAN: And I -- there's not -- what I
6 want to say is that there are times when they are --
7 they're only paid for certain functions, and when they
8 stop doing those functions --

9 QUESTION: It would help me if you'd answer that
10 yes, no, or sometimes.

11 MR. SILBERMAN: I'm --

12 QUESTION: Answer the question and then explain.

13 QUESTION: Yes.

14 MR. SILBERMAN: I'm not -- I suppose, as -- if
15 those are the two choices, the answer is they're
16 supplemented from the company.

17 QUESTION: You have three choices, yes, no, or
18 sometimes.

19 MR. SILBERMAN: Sometimes, then.

20 (Laughter.)

21 MR. SILBERMAN: In the sense that there are
22 certain functions for which they are not paid by the
23 company. They are paid for those functions by the union.
24 It's not the case, and why I was -- I didn't mean to be
25 quibbling, but it's not the case that for the functions

1 they are paid for the company but the union provides pay
2 on top of that, so --

3 QUESTION: What are those functions for which
4 the union pays --

5 MR. SILBERMAN: The contract says that they are
6 not entitled to pay from the company for negotiations, for
7 time spent in any meeting outside of the union office, and
8 for any other activity unrelated to the duties of their
9 office.

10 QUESTION: All right. Now --

11 MR. SILBERMAN: If the --

12 QUESTION: -- when you talk about office, are
13 they office -- are they officers by reason of the union
14 charter?

15 MR. SILBERMAN: They are -- I believe the answer
16 to that question is no, Justice Kennedy. It -- the record
17 is not entirely clear, but I believe the answer to that is
18 no.

19 QUESTION: Mr. Silberman, what about retirement
20 pay? When these senior officers retire as union
21 officials, have they accumulated company retirement pay as
22 well during the period that they're serving as union
23 officials, so their retirement pay also comes from the
24 company rather than from the union?

25 MR. SILBERMAN: If we are talking about the

1 grievance chairman, these employees elected to this full-
2 time position --

3 QUESTION: Right.

4 MR. SILBERMAN: For the 3 years that he serves
5 in that office --

6 QUESTION: Right.

7 MR. SILBERMAN: -- he continues to accrue credit
8 in the company's pension plan, so that yes, if he were to
9 continue, he would be -- he's earning pension credits for
10 those years.

11 QUESTION: What do you say -- I take it the
12 question is not -- the word is payable, not compensation.
13 There is money -- is the question is, is this money
14 payable by reason of his service as an employee to the
15 employer, all right.

16 Now, you've heard the petitioner say, just look
17 at the record. There are specific findings, which he
18 began to list, which said that this money wasn't payable
19 by reason of his former service, and so what is your
20 response to that, that why is this money payable by reason
21 of his service?

22 What, in other words, just as every -- we were
23 asking the petitioner, I would ask you, what clearly, or
24 what line, or what conceptual line distinguishes those
25 payments, in your view, that are by reason of his former

1 service from those that are not, and what do you do about
2 the district court, having found that these were not?

3 MR. SILBERMAN: First, Justice Breyer, I don't
4 believe there are any district court findings that bear on
5 the subject at all. We have some legal conclusions, and
6 this is essentially a legal question we're discussing.

7 And I -- our answer is that we understand the
8 phrase compensation for or by reason of service to cover
9 any payment that is made to someone who is or has been an
10 employee of the employer, and that is a payment that is
11 provided in return for services that were provided to the
12 employer.

13 QUESTION: All right. Now, here they say this
14 is not in return for services that were provided to the
15 employer. This is in return for services that are being
16 provided to the union, and what is your response to that?

17 MR. SILBERMAN: My response, Justice Breyer, is
18 no, that is not the case, that these are -- it is true
19 that one of the conditions to receive these payments is
20 that you must perform these services as a union
21 representative, just as in an educational leave situation
22 one of the conditions to receive that money is that you
23 must be going to school full-time.

24 But that doesn't mean that it's not also by
25 reason of the fact that you are an employee, for

1 precisely, I believe, the reason you indicated in your
2 earlier question, that this is only paid to employees and
3 is paid as part of service to an employee, and I would say
4 that if there are any questions about the language, and
5 certainly one thing that I think has to be clear 60
6 years -- 40 -- 50 years after the statute was enacted it
7 can hardly be said that this language plainly and
8 unmistakably condemns a practice that nobody has thought
9 was illegal for 50 years.

10 If there's any doubt about what the language
11 means --

12 QUESTION: Well, nobody. The court of appeals
13 though it was illegal till they changed their mind, didn't
14 they?

15 MR. SILBERMAN: There was -- there were -- the
16 Trailways court held that a particular kind of agreement,
17 not necessarily this agreement, there are a number of
18 courts the other way -- certainly the parties to
19 collective bargaining have been negotiating these things
20 for 50 years without anybody thinking that there was a
21 legal problem.

22 QUESTION: But on the other side of that
23 argument is a principle that exceptions to a statutory
24 provision are to be construed narrowly.

25 MR. SILBERMAN: Justice Rehnquist, I'm not sure

1 that that -- whether that principle necessarily applies to
2 a criminal statute. I think it's particularly inapt here
3 for two reasons.

4 The first is, as I was saying earlier, we have
5 some exceptions to this statute that are crafted in a way
6 to indicate that Congress was making the kinds of
7 legislative and policy judgments that Congress makes in
8 treating with this -- with the subjects of welfare funds
9 and the subject of dues check off in that way.

10 These are much more categorical exceptions which
11 bespeak an effort to pull the entire area outside of the
12 ambit of this criminal statute and leave it for treatment
13 under other law.

14 The second critical point here is that we have
15 very clear legislative history. These provisions, these
16 practices were called to Congress' attention.

17 QUESTION: I'm really not impressed by that
18 legislative history. Here Congress is making substantial
19 revisions in the labor laws, and I -- and you say these
20 practices were called to its attention. So what?

21 MR. SILBERMAN: Well, Justice Rehnquist, let me
22 try to impress you in the following two respects. First,
23 that we know that this -- in 1947 those who were making
24 these changes were not at all shy about saying this
25 practice that's going on today in collective bargaining is

1 illegal, it's illegitimate, we're trying to change it, and
2 they made that very clear about a number of types of
3 collective bargaining agreements. They said nothing to
4 suggest that this practice was something they were trying
5 to reach.

6 Perhaps even more important, at the very same
7 time that Congress did that, they enacted the changes to
8 section 10(c) of the National Labor Relations Act to
9 provide essentially a rule of equality whose purpose, the
10 legislative history tells us, was precisely to allow
11 company unions the same privilege that unions like the UAW
12 already enjoyed under the law to negotiate for lost time
13 arrangements of this sort.

14 QUESTION: May I ask you just one factual
15 question before your time runs out? Most of what I notice
16 in your brief and the Government brief seem clearly to
17 refer to no-docking arrangements. What is the most
18 persuasive and clearest example you can point me to in
19 that legislative materials where the full-time people were
20 also being treated the same?

21 MR. SILBERMAN: The 194 --

22 QUESTION: Full-time for the union, I mean.

23 MR. SILBERMAN: The 1941 Ford-UAW agreement
24 which we quote in our brief expressly provides for full-
25 time people. It is the subject of a colloquy between

1 Senator Ball and former -- Gerald Reilly, who was a member
2 of the National Labor Relations Board, in 1947.

3 The Chrysler agreement in practice provided for
4 full-time union people. It was the --

5 QUESTION: So that colloquy is the strongest
6 example for the --

7 MR. SILBERMAN: It's the strongest example,
8 Justice Stevens, of this being called to Congress'
9 attention. The absence of any congressional response and
10 the 10(c) changes, it seems to me, altogether are what
11 establish the legislative intent not to proscribe these
12 kinds of practices.

13 QUESTION: Thank you, Mr. Silberman.

14 Ms. Brinkmann, we'll hear from you.

15 ORAL ARGUMENT OF BETH S. BRINKMANN

16 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

17 SUPPORTING THE RESPONDENTS

18 MS. BRINKMANN: Mr. Chief Justice, and may it
19 please the Court:

20 I'd like to first address the relationship
21 between section 302(c)(1) and section 8(a)(2). The
22 payments by reason of service as an employee that are
23 excepted from the criminal provision of 302(a) are not
24 limited to the section 8(a)(2) proviso of the National
25 Labor Relations Act.

1 When the board has upheld no-docking practices,
2 it's not because the board has held that it fits inside
3 that proviso. It's because the board has held that it
4 doesn't violate the general prohibition or unfair labor
5 practices of 8(a)(2).

6 QUESTION: No, but they're current payments to
7 current employees for services being performed currently,
8 but the by-reason-of language would naturally be read to
9 preserve the pension benefits of people who work for the
10 union later and then get their pension benefits.

11 So you're right about the language with respect
12 to the part-time people, but I'm not so sure you're right
13 about it with regard to the full-time people.

14 MS. BRINKMANN: Well, Your Honor, we think that
15 there is a three-step inquiry here that demonstrates that
16 they are by reason of. First of all, these are payments
17 that were bargained for in a collective bargaining
18 agreement that defines terms of payment. Second of all,
19 it is a but-for causation.

20 QUESTION: What's the fact that it's in a
21 collective bargaining agreement got to do with it?

22 MS. BRINKMANN: Because it talks about payments
23 for services, Your Honor, and the quintessential location
24 where one looks in a labor environment to find out what
25 services and payment are due is in the collective

1 bargaining agreement.

2 The second thing is that --

3 QUESTION: You don't think the statute really
4 meant that you can get around the prohibition --

5 QUESTION: By putting in an agreement.

6 QUESTION: -- against paying employees of the
7 union by simply saying I'm really paying them as my
8 employees --

9 MS. BRINKMANN: No, we don't, Your Honor, and
10 that is a necessary predicate. It's certainly an
11 indication that it's by reason of. It's --

12 QUESTION: Well, it certainly has to be in the
13 agreement.

14 MS. BRINKMANN: Yes.

15 QUESTION: But I don't know that the agreement
16 solves anything.

17 MS. BRINKMANN: Another -- well, there are two.
18 Another thing is that it's a but-for cause. Union
19 officers who may be involved in the grievance process who
20 are not employees or former employees are not paid this.

21 The third step is the close nexus between the
22 grievance chairman's prior service as an employee and the
23 payments he's getting, in this case for adjusting
24 grievances.

25 The grievance system that's structured in this

1 industrial setting is a four-step process. At each step
2 the employee with the complaint is represented by another
3 employee from that production unit, the steward at the
4 first level, then a committeeman, and then the grievance
5 chairman.

6 It is because of that service as an employee, as
7 a production worker, that these people both in the no-
8 docking situation and in this situation --

9 QUESTION: This only applies to grievance
10 chairmen? It wouldn't apply to other union officials?

11 MS. BRINKMANN: It would be a very different
12 inquiry in different circumstances, Your Honor. We think
13 this is a clear case not only because of this close --
14 because of this close nexus we do think that.

15 QUESTION: Oh, but what about that, because that
16 seems an awfully good question. The -- suppose this was
17 the same circumstance, what the employer was paying for
18 was an employee who became the chief negotiator for the
19 union, okay, to write all the collective bargaining
20 agreements.

21 MS. BRINKMANN: Mm-hmm. That --

22 QUESTION: I mean, what about that?

23 MS. BRINKMANN: We certainly think that closer
24 inquiry would have to be looked at, Your Honor.

25 QUESTION: But when you say close inquiry, I

1 mean, that's -- then you see, that's what I'm -- doesn't
2 that make you a bit nervous that the employer is paying
3 for someone who's spending his full time, for example,
4 being the union's chief negotiator in the collective
5 bargaining contract?

6 MS. BRINKMANN: Well, Your Honor, there is the
7 section 8(a)(2) proviso that prohibits domination
8 interference. This is a criminal prohibition, and when we
9 look to enforce this --

10 QUESTION: Suppose they happen to pay a million
11 dollars for doing it? Is it just -- is that --

12 MS. BRINKMANN: Those are several things -- no.
13 Those are several things -- we prosecute sham
14 compensation, corrupt transaction --

15 QUESTION: Well, if, in fact, you were to
16 prevail here, would that reasoning that allows you to
17 prevail also permit the employer to pay for a full-time
18 employee who is the negotiator for the union in respect to
19 the collective bargaining agreement?

20 MS. BRINKMANN: It's certainly one -- we would
21 be looking at that. One thing that we would look at, for
22 example, is industry acceptance of whether or not that is
23 something that an employer bargains to pay for, which in
24 the grievance context the answer is yes.

25 QUESTION: In other words --

1 MS. BRINKMANN: I'm --

2 QUESTION: -- you're saying that the nature of

3 the activity here is one you -- it's the nature of the

4 activity, the grievance, the nature of that activity,

5 grievance, working out of grievances that makes the

6 difference --

7 MS. BRINKMANN: It certainly --

8 QUESTION: -- that makes this clear?

9 MS. BRINKMANN: It certainly makes it clear in

10 this case.

11 QUESTION: And why does it make it clear?

12 MS. BRINKMANN: Because it's not a sham.

13 Because it's not some kind of corrupt transaction. The

14 questions that would raise suspicion, for example, is

15 incommensurate pay, the kind of situation that occurred in

16 the Phillips case in the Eleventh Circuit, retroactive

17 negotiating, secret deals. Those are the kinds of factors

18 that --

19 QUESTION: No, but --

20 MS. BRINKMANN: -- look at as criminal --

21 QUESTION: -- for a whole different section of

22 the shop, I mean, a section of the shop he never worked

23 in, would that be a different situation?

24 MS. BRINKMANN: I think that in this case it

25 would not be so unrelated. You'd have to again look at

1 industry practice. These are longstanding --

2 QUESTION: I don't really see why negotiating
3 the contract is unrelated, either. As long as they --
4 he's worked for the company for 3 or 4 days, then he
5 becomes a full-time negotiator and he gets paid regular
6 wages by the company and maybe they're supplemented a
7 little by the union, and it's all out in the open.

8 It's -- I agree with you, it's got to be all out
9 in the open, but does that make it comply with the
10 statute?

11 MS. BRINKMANN: Well, the relationship to the
12 services to the employee is not as clear, Your Honor. The
13 grievance adjustment process is part of the production --

14 QUESTION: Oh, I understand your policy reasons
15 for saying grievance -- it's important that the grievors
16 be paid, but in terms of the language of the statute, I
17 don't see the distinction between the grievance person and
18 the negotiator.

19 MS. BRINKMANN: We think --

20 QUESTION: In terms of the language of the
21 statute.

22 MS. BRINKMANN: When you're interpreting the
23 words by reason of, Your Honor, we think that it is
24 something more than a but-for clause.

25 QUESTION: Well, it's much easier to negotiate

1 with somebody who knows the business, familiar with the
2 history, all of the informal rules that have developed
3 over the years, than it is with a total stranger who just
4 happens to be a lawyer or something like that.

5 MS. BRINKMANN: The fact is, Your Honor,
6 experience shows that there's far less reason to believe
7 that that is by reason of their service. In this case,
8 there's every reason to believe it.

9 QUESTION: Is there anything in that that --
10 just on that particular point that you're -- in thinking
11 about that, I'm thinking of grievances itself as being in
12 a modern unionized context the very heart of the
13 production process.

14 MS. BRINKMANN: Yes, Your Honor.

15 QUESTION: Well, I -- but I don't want to
16 just -- I knew you would agree with that, but I --

17 (Laughter.)

18 QUESTION: But I mean, I want to -- I'd like you
19 to say a little bit more.

20 As I think of the distinction, but is there
21 anything in case law, or anything that I, you know, that
22 would suggest that, or support it, or --

23 MS. BRINKMANN: Well, Your Honor, certainly not
24 only is it because of production, I think it's also
25 because it's just so part and parcel of the no-docking

1 provision that the courts have all upheld --

2 QUESTION: We'd have to say that the grievance
3 process is part of the production process in a way that
4 the negotiating process is not part of the production
5 process, or a line to be drawn in that way. Is that a
6 satisfactory thing from your point of view?

7 MS. BRINKMANN: We certainly think that in a
8 criminal prosecution one would still have to look at the
9 industry accepted practices and all, but I think that
10 certainly is an indication that it may not be by reason
11 of.

12 To the contrary, another example --

13 QUESTION: If we agreed with you, how would we
14 come out in this case? Did the contractual provision
15 limit it just to --

16 MS. BRINKMANN: Yes.

17 QUESTION: Just to grievance --

18 MS. BRINKMANN: No, to activities directly
19 related to its office, and its office was defined in
20 conjunction with the grievance system.

21 And this is a declaratory judgment action, Your
22 Honor, to -- so it's looking forward to declare whether or
23 not these are per se invalid and petitioner's not entitled
24 to that judgment.

25 QUESTION: The Government was taking the

1 position below that further facts needed to be developed
2 and then there was kind of a shift up here. Can you
3 explain, are there further facts?

4 MS. BRINKMANN: Your Honor, when we looked at
5 the case on Caterpillar petitioner had not requested a
6 remand at that point, and we don't -- we believe that
7 those would be additional factors that could be looked
8 into to see if there was some kind of sham compensation or
9 corrupt transaction.

10 We don't think that there is evidence in this
11 record of that, but it could be appropriate to remand it,
12 Your Honor, for the lower courts to --

13 QUESTION: So if this chairman was spending part
14 of his time negotiating the bargaining contract, would
15 that come out from under what you think is permissible?

16 MS. BRINKMANN: My understanding of the
17 collective bargaining agreement is that was not to be paid
18 for.

19 The terms of the collective bargaining agreement
20 omitted paying for negotiation of vacation, things that
21 were not directly related to its office, so the way in
22 which this case comes to the court, I believe it's a
23 declaratory judgment action, that payments under that
24 collective bargaining agreement are per se a violation of
25 302(c).

1 QUESTION: It seems to me that your reference to
2 the collective bargaining agreement and the inclusion of
3 the compensation in part of those negotiations cuts
4 against you as much as for you.

5 I should have thought that the very purpose of
6 this statute was to eliminate this from the collective
7 bargaining context so that the union could not make
8 demands that its officials be compensated.

9 MS. BRINKMANN: Your Honor --

10 QUESTION: It seems to me that works very much
11 against you. The whole purpose of this is to take this
12 out of the collective bargaining context.

13 MS. BRINKMANN: Your Honor, we don't believe so.
14 Again, there is this -- 302(c) was enacted against this
15 whole backdrop of the National Labor Relations Act which
16 had already been enacted and was amended at the same time,
17 and now provides for unfair labor practices civil
18 penalties, not criminal sanctions.

19 302(a) is a broad criminal prohibition against
20 employers paying union officials.

21 302(c)(1) is the first exception, carving out an
22 exception recognizing that employers and employees have a
23 different relationship.

24 QUESTION: Thank you, Ms. Brinkmann.

25 Mr. Gangemi, you have a minute remaining.

1 REBUTTAL ARGUMENT OF COLUMBUS R. GANGEMI
2 ON BEHALF OF THE PETITIONER

3 MR. GANGEMI: The bottom line, both respondent
4 and the United States conflate the concept of service with
5 the concept of the status of a prior employee. The
6 statute allows the employer to pay for the services of an
7 individual as an employee. It does not allow the company
8 and the union to agree to pay someone to be a union
9 official because of their former status as an employee of
10 the employer.

11 The statute sets up a clear dichotomy. You can
12 pay a union official to be an employee, but you cannot pay
13 an employee to be a union official, and it makes a mockery
14 of that dichotomy for the company and the union to -- or
15 for the union to argue here that you can override that
16 dichotomy by declaring one to be the other, by declaring
17 service as an employ -- service as a union official to be
18 and payment for it to be a benefit for having been an
19 employee of the employer in the past.

20 It collapses, or conflates those two very
21 distinct concepts which the statute recognized, that you
22 could have a dual capacity employee.

23 CHIEF JUSTICE REHNQUIST: Thank you,
24 Mr. Gangemi. The case is submitted.

25 (Whereupon, at 2:00 p.m., the case in the above-

entitled matter was submitted.)

CERTIFICATION

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

The United States in the Matter of:

CATERPILLAR, INC., Petitioner v. INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA, ET AL.
CASE NO: 96-1925

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

BY Donna Marie Federico-----

(REPORTER)