OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: AIR LINE PILOTS ASSOCIATION, Petitioner v. ROBERT A. MILLER, ET AL.

CASE NO: 97-428 C.1

PLACE: Washington, D.C.

DATE: Monday, March 23, 1998

PAGES: 1-55

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IN THE SUPREME COURT OF THE UNITED STATES

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AIR LINE PILOTS ASSOCIATION, :

Petitioner :

v. : No. 97-428

ROBERT A. MILLER, ET AL. :

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Washington, D.C.

Monday, March 23, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

JERRY D. ANKER, ESQ., Washington, D.C.; on behalf of the Petitioner.

RAYMOND J. LaJEUNESSE, JR., ESQ., Springfield, Virginia; on behalf of the Respondents.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 97-428, Air Line Pilots Association v. Robert Miller.

Mr. Anker, you may proceed whenever you're ready.

ORAL ARGUMENT OF JERRY D. ANKER

ON BEHALF OF THE PETITIONER

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

Section 211 of the Railway Labor Act permits unions and employers to enter into what are you called agency, shop, or similar forms of union security agreements. Under an agency shop agreement, represented employees are not required to become union members, but they are required to support the union financially through the payment of the equivalent of union dues, initiation fees, and assessments.

However, in a line of cases stretching back now more than 35 years, this Court has said that a union may not use such an agreement to require objecting nonmembers to pay for union activities that are political and ideological in nature or are otherwise unrelated to the collective bargaining function.

In 1986, in Chicago Teacher's Union v. Hudson, the Court went one step further and held that unions must provide three procedural safeguards to ensure that objectors' funds will not be spent improperly, and those safeguards are, first a notice containing an adequate explanation of how the fee is calculated, second, a reasonably prompt opportunity to challenge the fee before an impartial decisionmaker, and third, an escrow for the amounts reasonably in dispute while those challenges are pending.

The issue in this case is whether employees who wish to challenge the fee that they're being charged must present their claim to that impartial decisionmaker before bringing any kind of a lawsuit.

This case arose in November of 1991, when the Airline Pilots Association, or ALPA, as we called it, entered into an agency shop agreement with Delta Airlines, very much like the agency shop agreements ALPA has with most of the country's airlines.

Before the agreement even became effective, five Delta pilots, later joined by about 150 intervenors, filed a lawsuit to enjoin implementation of that agreement. They had many grounds for their lawsuit, but for present purposes the only one that's relevant here was the allegation that ALPA does not, or does charge objectors

improperly for activities which are outside the scope of collective bargaining.

Now, ALPA has written procedures in compliance with the Hudson decision that include an impartial decisionmaker for the purpose of resolving such disputes.

QUESTION: Mr. Anker --

MR. ANKER: Yes.

QUESTION: -- would you mind telling me as a practical matter how these fee challenges typically come up? Are they usually brought to challenge the amount of past payments, or are they typically prospective in nature? How does the union notify people --

MR. ANKER: You're talking about specifically --

QUESTION: -- of the breakdown?

MR. ANKER: -- in our case?

QUESTION: Yes. Well, the typical situation.

MR. ANKER: All right. I think, Your Honor, the procedures vary from union to union. The way it works in ALPA is the following way.

The books are closed -- we're on an annual year basis, so that the books are closed at the end of each year and then there is a general audit of the books, and in connection with that audit, or once that audit is completed, then a statement is prepared and that statement itself is also audited, setting forth the germane and

nongermane expenses, the major categories, which is essentially our Hudson notice.

At that point, any --

QUESTION: Usually there's been some prospective estimates.

MR. ANKER: That's correct.

QUESTION: So that they're not charged the full amount.

MR. ANKER: That's --

QUESTION: But then you -- it doesn't get serious until after the fact.

MR. ANKER: Let me -- if I can just finish, I think I'll -- you'll see that part of it.

QUESTION: Yes, okay.

MR. ANKER: The statement is issued. At that point, for the year in which it's issued, there is an immediate but only provisional adjustment put into place.

Then when that year is finished there is a final calculation and we actually either add charges or refund, depending on what the differences are. It's at that point that the pilot has the right to challenge that calculation.

Now, when he does that, of course, he's challenging both the retrospective one and also the provisional one for the coming year, but that's the way

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our system works. Other unions have a different system. Other unions are always running 1 year behind, and they don't go back and make the retroactive adjustment, which we do.

QUESTION: Have -- has this Court ever required a nonsignatory to a contract to submit to arbitration rather than going to court?

MR. ANKER: No, Your Honor, not to my knowledge, and I think that --

QUESTION: It's kind of a big step to do. I mean, it may --

MR. ANKER: Well, it's -- it may --

QUESTION: -- help as a practical matter, but I just -- I wondered what kind of authority there would be for that.

MR. ANKER: All right. I think that's the core of this case, and I think to call it arbitration, which in a sense it is, is also in another sense misleading, because it is really not consensual arbitration, which is what most arbitration is, although I gather there are statutes -- one of the Article III cases cited by counsel involves the FIFRA statute, which has a compulsory arbitration. I think ERISA has a compulsory arbitration that's not consensual. But in any event --

QUESTION: Of course, it is compulsory for the

union here.

MR. ANKER: That's correct. This is a --

QUESTION: I mean, we've done that half-way --

MR. ANKER: This is a special procedure. We call it arbitration because it most resembles arbitration, but what the Court called it in Hudson was an impartial decisionmaker, and I think the vision that the Court had is that these disputes should be decided by some form of private process, arbitration-like process, or at least they should be submitted to such a process before they go to court. That --

QUESTION: Is this, Mr. Anker, strictly speaking, an impartial decisionmaker? How are the people picked?

MR. ANKER: How are they picked?

QUESTION: How at the people picked for the tribunal or the --

MR. ANKER: All right --

QUESTION: -- person who would make this decision?

MR. ANKER: In our case, and I think here we follow the pattern that most unions have adopted, we use a procedure which the American Arbitration Association created.

In the wake of Hudson the American Arbitration

Association created a procedure specifically for this purpose called the arbitration rules for the impartial determination of union fees, and under those rules the union may request an arbitrator and invoke those procedures and then the AAA, from a panel that they have selected, designates an arbitrator. He's not selected by either of the disputing parties. He's designated by the American Arbitration --

QUESTION: From a panel that the AAA has selected?

MR. ANKER: That's correct.

QUESTION: And do the dissidents have any part in selecting that?

MR. ANKER: No. Neither party has.

QUESTION: Neither party?

MR. ANKER: Neither party does, although there are, of course, provisions for challenging an arbitrator for cause if there's some ground to believe that he is biased in some way, or has some interest --

QUESTION: Mr. Anker, can I ask you a preliminary question --

MR. ANKER: Surely.

QUESTION: -- I just get out of the papers?

What are the annual dues of the pilots here? How much money are we talking about if you change it from

15 percent to 20 percent?

MR. ANKER: In the year that this case arose, which was 1992, the fees were 2.35 percent of their airline earnings. They've since been reduced to about 1.95, but in that year it was 2.35.

QUESTION: So for each member of the union it's a different dollar figure.

MR. ANKER: It's based -- it's a percentage of his earnings, right.

QUESTION: And if they made, say, $100,000 a year they would get a -- the dues would be --

MR. ANKER: $2,350.

QUESTION: I see, so that a -- and then if you reduce that, say 10 percent was in dispute, it would be a couple of hundred dollars in dispute for each person.

MR. ANKER: That's about right. That's about right, just -- for example, in this case the arbitrator found that there were some items that had been improperly allocated and should not have been charged, and we rebated those, and it came to, I think, of the order -- this is not in the record, but it's of the order of $55 on average for the individuals that were involved in this case.

QUESTION: Justice O'Connor's question was, what is the source of our authority to do this? I mean, if we think this is a good idea for national labor policy, does

that give us the authority to require people who have never consented to the arbitration to arbitrate?

MR. ANKER: Well --

QUESTION: Where do I have the power, does this Court have the power to do that?

MR. ANKER: I guess I would answer it this way, Your Honor.

We are dealing here -- all the statute says, as I indicated at the beginning, is that the union and the employer has a right to have this kind of an agreement, but the Court has found beneath the language of the statute and sort of in the underlying legislative history and the purpose of the statute, an intent by Congress that fees be used only for certain purposes and not for others, and based on the determination that there is such an intention, that that's what Congress wanted, there is a body of law which has had to be necessarily developed by this Court.

It's not that different from the body of law that has been developed surrounding the duty of fair representation, or surrounding collective bargaining agreements under section 301 of the Taft-Hartley Act.

QUESTION: Well, I think --

MR. ANKER: It's judicially made law.

Now, in Hudson --

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QUESTION: But there's almost a history or tradition that Congress sets up remedial schemes. We don't set up remedial structures.

MR. ANKER: Well, my answer would be, Your Honor, that that's exactly what the Court did in the Hudson case.

QUESTION: But --

MR. ANKER: The Court said that the union must provide this procedure. It's not an option.

QUESTION: But that was under the Due Process Clause, wasn't it?

You know, you go back to the Hanson case, where the Court says, well now, the Government has its hand on the scale here so there's some constitutional provisions involved.

MR. ANKER: Well, certainly in Hudson there were constitutional provisions, Your Honor. I don't think it was the Due Process Clause. I think it was the First Amendment.

QUESTION: Well, First Amendment.

MR. ANKER: Right, which is not, of course, a procedural provision of the Constitution. It's a substantive provision. But the Court decided that in order to protect the substantive right which the -- in that case the challengers had under the First Amendment --

QUESTION: There had to be --

MR. ANKER: There had to be these procedures. Now --

QUESTION: But now, to me it seems there is a difference here suggested by Justice Kennedy, perhaps, that there isn't any similar constitutional compulsion to set up the procedure you want to.

MR. ANKER: No, there's not a constitutional compulsion, but there is -- the same kind of a right which exists in the public sector under the First Amendment exists under the -- in the private sector under the statute, based upon --

QUESTION: Yes, but this could be invoked by the dissidents --

MR. ANKER: All right --

QUESTION: -- but I think not by the union.

MR. ANKER: -- but the union has rights here too, Your Honor, and those are the rights after all, to collect these fees and to have a functioning agency shop agreement and to have it work without excessive burdens that make it impractical.

In the Hudson opinion the Court said -- I'm not sure if I can quote it exactly, but the Court said that the object should be to ensure -- define procedures which will en -- protect the dissidents against having to

subsidize ideological activities without impairing the right of the union to have this agency shop and to obtain these funds in timely fashion and to use them in a way that they're permitted to use them.

QUESTION: May I ask --

MR. ANKER: There's a balance. Yes, Your Honor.

QUESTION: May I ask one other detail, if I may?

This opinion said in substance the union had a duty to provide this impartial -- we didn't use the word arbitrator, as I remember, just impartial person --

MR. ANKER: Correct, impartial decisionmaker.

QUESTION: -- to look at what was done.

But does that mean the union has to pay for the arbitration?

MR. ANKER: I suppose in practice it does. The way we've resolved that, Your Honor, is to say that we will pay for the arbitration unless any of the dissidents wants to share the cost for some reason and then they're certainly welcome to do that.

QUESTION: Well, why would they ever want to do that?

MR. ANKER: Well, they might want to --

(Laughter.)

MR. ANKER: We always thought they might want to do it to be more comfortable about the impartiality of

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the --

QUESTION: Oh, I see what you're saying. But in practice you do pay the arbitrator.

MR. ANKER: In practice, we do.

QUESTION: Mr. Anker, if I look at Hudson and don't go any further than that, I at least find it difficult to conclude that the provision for the neutral decisionmaker was intended to be anything but a protection for the dissidents. It was their interests that were getting litigated there, and the court mentioned the value of a speedy determination. All of that seems to take into consideration the interests of the dissidents.

However, my question to you is going to be, should we consider other interests in going beyond Hudson? Should we consider, for example, the impracticality, if that is true, of litigating every one of these issues first and last in the Federal courts?

With that in mind, I would like to know what the experience has been, if you can tell me, about what has happened after there has been arbitration. Have all of the arbitrated cases then simply been litigated de novo, all over again in the Federal courts, which I doubt, but perhaps that happened.

Is there a pattern that emerges about the relationship between the arbitration that has taken place

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in the instances that you know of and what later happens in Federal courts?

MR. ANKER: Well, I have to say, Your Honor, that my knowledge about that is fairly limited, but I think the union that has the most experience with it is the National Education Association, which has filed a brief as an amicus here, and they have informed the Court in their brief that in -- I don't remember whether they said in most, but in some large percentage of their cases their -- they do not go beyond the arbitration.

QUESTION: Well, what --

MR. ANKER: Now, I have no personal knowledge of that and I really can't take --

QUESTION: You wouldn't, I take it -- under the system you're proposing you wouldn't have the sort of deference to an arbitrator's finding that results when consensual arbitration has been in place, is that correct?

MR. ANKER: We would not have that degree of finality to the arbitration, no, Your Honor. There was an issue in the lower court here as to just what degree, if any, of deference is to be given, and the district took the view which we had urged upon it that the findings of fact of the arbitrator should be given deference under a clearly erroneous standard, but not the conclusion of law.

QUESTION: Do any of the other briefs expand on

the question that Justice Souter asked you? What happens to these things after the neutral decisionmaker reaches a judgment?

MR. ANKER: My recollection is that the only one that has anything to say about it was the National Education Association.

QUESTION: And of course, there, at least as I remember the case, the dues are a lot lower, so the amount in dispute sometimes was just pennies on these small amounts, and it might be that it's just not worth litigating, whereas here it seems to be a little more money at stake.

MR. ANKER: It's a little more money, Your Honor, but in every case the amount of money tends to be relatively small, certainly in relation to the income of the fee-payer. I think very often these are thought to be great issues of principle by the --

QUESTION: Is it typical for union dues to be calculated as a percentage of the income of the union member?

MR. ANKER: Yes, I think it is, Your Honor.

QUESTION: It is typical?

MR. ANKER: Yes. Either a percentage or sometimes a number of hours of pay. I can't tell you how many unions have that, but I think it's quite a common --

QUESTION: When the suit is brought, is it brought under 1983, or another statute that gives the prevailing party attorney's fees, if the suit goes to the Federal court?

MR. ANKER: If the suit goes to the Federal court --

QUESTION: Yes.

MR. ANKER: -- I suppose there is provision for attorney's fees, under 1983.

QUESTION: Because -- Is it 1983?

MR. ANKER: 19 -- I'm not sure I understand what you're -- if you're asking, is this case under 1983, the answer is no.

QUESTION: But the union members -- I mean, the nonunion members' case in court would be under 1983.

MR. ANKER: No, it would not, Your Honor, not in the -- well, not in the case of a private sector, because we are not a governmental entity.

QUESTION: Right.

MR. ANKER: We cannot be sued under 1983. We -- the labor organization. In the --

QUESTION: Well, then --

MR. ANKER: In the public sector the cases are brought under 1983, perhaps because they're usually brought against the State employer as well.

QUESTION: What's the basis of any sort of Federal --

MR. ANKER: Federal question jurisdiction.

QUESTION: There will be Federal question jurisdiction in a case of a private employer?

MR. ANKER: That's right, Your Honor, because the obligation here is derived from the Railway Labor Act.

QUESTION: But no attorney's -- no attorney's fees under the general Federal question jurisdiction, then?

MR. ANKER: It's general Federal question jurisdiction.

QUESTION: But that doesn't provide for attorney's fees for the prevailing party.

MR. ANKER: No, it does not. No, it does not.

QUESTION: Can you -- you might want to elaborate a little bit --

MR. ANKER: Yes.

QUESTION: -- if you'd like on the question the Chief Justice asked. Seeing this as --

MR. ANKER: On the --

QUESTION: Because it seemed to me that the real objection on the other side, what they're upset about in part is that they see the union has a right to the $2,000, but it doesn't have a right to the part of the $2,000 that

might go to nongermane expenditure, and then we decide, and this Court decides in Hudson that really the union can go and spend what it wants as long as it gives them, a dissenter a fair chance to see how much of that is being spent on nongermane things, and it says you have to have an escrow.

MR. ANKER: Correct.

QUESTION: You have to give them a list of what the expenditures were, and you have to provide for a decision by an independent decisionmaker. Having done that, you're free. Go do what you want.

All right. But then they say, well, how do we challenge it, and I think what they're worried about is that there will be imported into this area of the law the whole law of arbitration which, of course, gives a tremendous leg up to whatever the decision of the arbitrator is.

I mean, a leg up way beyond what a master or others have, and I think that was a concern, and therefore I want to be sure that you address that point.

MR. ANKER: I appreciate that, Your Honor.

Let me say first of all that we have never argued in this case that that standard, which essentially is a standard of finality and almost no review at all in the case of normal arbitration -- we have never argued

that that standard would apply.

The argument we make in this case -- and by the way, this issue is not before the Court, because the Court did not grant certiorari with respect to this issue of the standard of review, but what we argued in the lower courts was that the fact-findings of the arbitrator should be given some degree of deference, and those fact-findings would normally be the bean-counting issues, as I would describe them, exactly how much did the union spend on this or that or the other activity.

QUESTION: Well, under your theory that the procedure has to be expeditious and efficient, what would prevent a court from saying that the usual rules of presumptive correctness should not be applied?

MR. ANKER: I think I would rely on the advocacy of my adversary to make that clear, and I would not --

QUESTION: Well, but I mean, we're testing your theory. Under your theory we can do whatever is efficient, and if we think that a binding arbitration is the most efficient, then we can do that.

MR. ANKER: Well, I would just suggest, Your Honor, that that would be inconsistent with this body of law, because this is statutory law, and the Court has some jurisdiction, we don't deny that, ultimately to adjudicate the rights of the parties here, but -- and just to finish

the standard of review as we had proposed it to the lower courts, we would say that the legal issues, which really I think are the key issues here, is, for example, in our case the issue of the chargeability of our safety activity.

That's an issue of law basically, and that would be reviewable de novo, but the Court would have a package in which the facts would be at least preliminarily resolved, the issues would be defined, and the Court in quite expeditious fashion but in effective fashion could exercise its jurisdiction and define the rights of the parties properly here.

QUESTION: Mr. Anker --

MR. ANKER: Yes.

QUESTION: -- everything that you've said sounds logical, sensible, a regime that might be legislated. The problem in this case is, you start with a Court decision, not something from Congress but something from this Court, the Hudson, and then you say, well, the workers were benefited by Hudson but the Court now has to rule-make a little more so that it's even on both sides.

If the employer -- if the union is stuck with this procedure, the union doesn't want to arbitrate either, let's say, but the court forced it on the union, then the court must -- and it's all the court doing this

with -- as kind of ontoward from anything that Congress has done.

MR. ANKER: Well, that's correct, Your Honor. I think that's unavoidable, but I -- my only response to that would be I don't think it's any greater an act of judicial legislation to impose on the challenger the requirement of exhaustion than it is to impose on the union the obligation to provide this procedure in the first place.

QUESTION: But with the union, Mr. Anker, there was a constitutional problem.

MR. ANKER: In that case, yes, right.

QUESTION: Yes, and there isn't here. I mean, it seems to me that's one significant distinction. In other words, the Court said there had to be an impartial reviewer of these allotments in order to protect the dissidents' First Amendment rights, but here there's no corresponding claim that if there isn't this procedure, that the dissidents are required to -- the union is going to lose any constitutional right.

MR. ANKER: No, not constitutional rights, that's correct, Your Honor, but they are rights, nonetheless. We have statutory rights that are at stake here, and the Court has created a procedure which, if exhaustion is not required, essentially doubles the burden

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on the union, because we have to defend these cases if they're brought against us both in arbitration and in Federal court, which is essentially what happened here.

This group of plaintiffs who are before this Court now preferred the judicial forum, and they brought a lawsuit, and they resisted arbitration, and if they had had their choice they would have avoided the arbitration, but we had another group of people who are not before the Court at all who requested arbitration, and we had to go forward with an arbitration regardless of what the desires were here, and that's going to happen in very many cases.

QUESTION: Yes, but the answer to that may be to, in effect to -- in effect to rethink the need for the arbitration, or the legitimacy of it.

You spoke a moment ago in response to Justice Ginsburg's question, I think, of the inevitability of there being some such arbitration scheme, but I'm not sure that I see that.

Why couldn't the Court just as well have said the interests at stake here require that cases of this sort be handled expeditiously in the Federal court so that you get a quick hearing -- I mean, the civil analogue of speedy trial -- and have one proceeding in a Federal court and get it over fast?

Is that any less inevitable, if you will, than

the scheme that we set up in Hudson?

MR. ANKER: Oh, I -- no, Your Honor, it isn't, but the Court has set up --

QUESTION: So you would be -- would you be happy to have us go in that direction and say we really did not think things through properly in Hudson, in fact it will be for the Federal court to provide the speedy hearing?

MR. ANKER: Instead of arbitration?

QUESTION: Yes.

MR. ANKER: I think that would certainly be much better than the situation with having to deal with both of them, that's correct. I don't know if we had our choice what we would choose, but we would certainly prefer to have one forum rather than two, and if there is no exhaustion requirement, then we would much prefer to have a Federal court procedure than have them both.

QUESTION: What is your experience, again, if you can tell me, with requests to have one or the other proceeding, either the arbitration or the judicial proceeding, stayed if the other one has already gotten underway?

MR. ANKER: Well, there was such a request in this case. It was denied by the Federal court.

QUESTION: Do you know across the board, again in a broader spectrum of cases --

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MR. ANKER: I don't know of any other case, Your Honor.

If I could, I'd like to reserve the balance of my time.

QUESTION: Very well, Mr. Anker.

Mr. LaJeunesse, we'll hear from you.

ORAL ARGUMENT OF RAYMOND J. LaJEUNESSE

ON BEHALF OF THE RESPONDENT

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

As is apparent from the briefs of ALPA and the amici, and from ALPA's argument here today, ALPA has no legal authority for forcing the nonmember pilots to use its unilaterally created agency fee review procedure. Neither ALPA nor either of its amici cites a single case in which this Court has required exhaustion where there was not one of two things.

QUESTION: But isn't it also true that there was no case that, before Hudson, that said there had to be an impartial decision, impartial -- what did we call it, impartial person who would verify these expenditures. Where did we get the authority to do that?

MR. LaJEUNESSE: As Chief Justice Rehnquist pointed out, that requirement is a matter of First Amendment due process, and it has to be imposed on the

union if it's going to be able to exercise its statutory privilege of collecting the service fee, which in itself infringes on the First Amendment rights --

QUESTION: No, but would not it have complied with, literally at least, with the Hudson opinion if, instead of using the American Arbitration Association, they had just said we've got all these figures here, we'll submit them to Price Waterhouse, or Young & Young, or whatever, some independent auditors and said you -- you're independent, you verify these figures and let the minority members know what you think of them. Would that have complied with Hudson, in your view?

MR. LaJEUNESSE: No, Your Honor, because --

QUESTION: Why not?

MR. LaJEUNESSE: -- ALPA selects the --

QUESTION: They have to select a person that everyone would agree is impartial.

MR. LaJEUNESSE: And Number 2, the court of appeals here held that that independent auditor does not audit the lawfulness of the allocation of the expenses between chargeable and nonchargeable. All the auditor does is check the numbers.

QUESTION: That's what this auditor does, but I'm asking whether, just starting from scratch, instead of setting up an arbitration procedure, suppose if they

thought they'd comply with the language of Hudson to just say, we'll get an independent accounting firm to verify all the figures and decide which ones are germane and which ones are not, and we'll publish it in the report and make it available to the -- to everybody, the members and the union officers. Why wouldn't that have complied with Hudson?

Of course, if the members didn't agree with it they could then have brought suit and said, well, you know, there's a violation of the First Amendment and so forth.

But I don't see anything in Hudson itself that required an arbitrator.

MR. LaJEUNESSE: I'll agree with that, Your Honor.

QUESTION: Yes.

MR. LaJEUNESSE: What I don't agree with, Justice Stevenson, is that it does not -- that Hudson did require some form of impartial decisionmaker procedure to be made available --

QUESTION: Correct, and it in effect said --

MR. LaJEUNESSE: -- primarily -- if I may --

QUESTION: It in effect said, and your cause of action would not be ripe until that has been made available for everybody to look at.

MR. LaJEUNESSE: Well, the cause of action, Your Honor, is ripe at the time the funds are taken. There's a deprivation of property at that point, and even as a matter of pure Fifth Amendment or Fourteenth Amendment due process the employee is normally entitled to a pre-taking notice and hearing.

Now, I can't explain why the court didn't make the requirement a pre-taking hearing. Apparently the court felt that the union should get possession of the money and hold it in escrow so that it can later spend that portion which goes to the lawfully chargeable activities.

QUESTION: We did require a hearing, though.

MR. LaJEUNESSE: That's correct, Justice Scalia.

QUESTION: You don't accept that a Price, Waterhouse review and then just a statement issued by Price, Waterhouse saying we have audited all of this and these statements are correct, that that would suffice.

MR. LaJEUNESSE: No, I don't, Justice Scalia, because that's not a hearing.

QUESTION: Under the language of our opinion --

MR. LaJEUNESSE: That's not a hearing.

QUESTION: -- it did require it.

MR. LaJEUNESSE: It's not an absolute --

QUESTION: I didn't think that was the point. I

thought the point was simply whether, of course that your client has a cause of action, but is -- the judge isn't going to decide this matter until, for example, the union's had an opportunity to do certain things, such as present your client with a piece of paper that says how the money's spent. You agree with that, I take it.

MR. LaJEUNESSE: Hudson requires that.

QUESTION: If they do it in a timely way.

MR. LaJEUNESSE: Hudson requires that that --

QUESTION: Fine, and it also --

MR. LaJEUNESSE: -- be done before the money is collected.

QUESTION: Exactly, and then Hudson also requires that the union should have a shot -- I mean, they have to run their union, and they can't have five people going to five differing courts which could -- or five different decisionmakers all putting them under different, you know, conflicting obligations. Who knows what's going to happen.

So Hudson says you can go to an independent decisionmaker first, and I took it that that was Justice Stevens' question. Should the court act before they go to an independent person and say, independent person, look at this and give us your opinion. You know, it may be things will work out. It may be that all the dissidents won't

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have to spend their money to hire a lawyer to go to Federal court, but if they want to afterwards, let them do it.

Now, I mean, what's wrong with that?

MR. LaJEUNESSE: What's wrong with that, Your Honor, is that the individual employee has a cause of action which has been given to him by Congress, and this Court has never, never held that exhaustion is required where there is not one of two situations, one, either an agreement to arbitrate, or a statutory administrative scheme involving deference to another branch of Government, and that is not this case.

QUESTION: This, I think -- and I'm curious about your view of this, and that's why I was pushing it -- is not classical arbitration. I take it that they're prepared to give you the district judge who would afterwards look at how this arbitrator decides the matter and review everything de novo as to whether or not the factual thing gives rise to a nongermane or germaneness.

Now, that begins to sound like Price, Waterhouse. What the arbitrator is doing is deciding what the facts were, and we give him such deference as is due, the power to persuade but not the power to control, something like that, and then the judge decides it de novo.

Now, from the point of view -- not your individual clients but as a person experienced in this area, wouldn't such a thing be better as dissidents -- I mean, wouldn't dissidents prefer such a thing, rather than have to go to Federal court, because they won't even give you that, you know. If you have a Federal court judge, and only a Federal court judge, they'll say fine, so be it.

So what's your view on -- do you see -- I'm being a little elliptical for --

MR. LaJEUNESSE: I'm not quite sure I --

QUESTION: I'm saying, that they're trying to say that within this statute, give us a chance before the judge goes ahead to do certain things that might resolve this in order to prevent us the union from being placed under potentially conflicting obligations. That's a practical way of working this out.

It doesn't really hurt your clients because they can go in after the court if they don't like it, and they're better off than if we don't give it to them, and when they go into court later on they'll have a judge do this de novo, you know, on the law, and he'll give such weight to factual matters as you might give to an accounting firm, knowing that they know more about it than you.

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MR. LaJEUNESSE: Justice Breyer --

QUESTION: That's what I took out of this, and maybe I'm being -- you don't have to answer if you don't want to, but I mean, I'm trying to --

MR. LaJEUNESSE: Justice Breyer, my clients --

QUESTION: Yes.

MR. LaJEUNESSE: And the typical dissident in the case where I have represented clients, and I've represented dissidents in many places, including the Lehnert case which this Court decided.

The typical dissident wants to obtain a judicial determination of his constitutional, in this case also rights under the statute, in which he has an opportunity for discovery, which is denied in this arbitration process, in which he has a determination by an Article III judge qualified to determine what speech and association he can be compelled to support, he wants a truly adversary hearing where he has discovery in which he can vet the potential evidence in advance of the hearing, as the Sixth Circuit held in the Bromley case. That's crucial to these cases.

QUESTION: Does the American Association -- American Arbitration Association which Mr. Anker says has set up these -- do they require that members of those panels be trained in the law?

MR. LaJEUNESSE: I don't know the answer to that question, Your Honor, but I can answer one question, and that is, if you look at the law review article by Mr. Malin, who was -- one of his articles was cited by ALPA in one of its amici.

I cite another one on the post Gilmer arbitration, and Mr. Malin points out in that article that the arbitrators have to receive recommendations from four employers and four unions to get on the panel to be selected in these cases.

My clients have no say over whether it's AAA or somebody else who picks the arbitrator and they have no say in the selection of the so-called arbitrator.

The essence of arbitration --

QUESTION: Mr. LeJeunesse, you're essentially saying as far as you're concerned your clients, thanks but no thanks to Hudson, that -- I mean, you really didn't want any of this. You'd rather just go straight into Federal court?

MR. LaJEUNESSE: Clients, nonmembers who are lucky enough to have an attorney represent them are going to say no thanks to this particular arbitration procedure, or this particular decisionmaking process.

Hudson -- put Hudson in context. Hudson was a case, a public sector case decided under section 1983

where this Court had already decided that you could not be required to exhaust even a State administrative remedy, and Hudson imposed -- after all, in Hudson it was the State who was ultimately compelling the employees to pay the agency fee. It was under a State statute, and an agreement with a public employer.

Hudson placed the primary burden on the State to establish this alternative procedure, and that was only 4 years after this Court's decision in Patsy saying that you can't be required to exhaust a State administrative remedy, and so therefore I find it inconceivable to think that the Court in Hudson could have been supposing that the nonmembers could have been compelled to utilize this procedure.

This procedure is made available --

QUESTION: You can't say it's inconceivable when Justice White and Chief Justice Burger both said that's what it meant. They at least conceived of it.

MR. LaJEUNESSE: They conceived of it, that's correct.

QUESTION: So it was not inconceivable.

MR. LaJEUNESSE: That's correct, Justice Stevens.

(Laughter.)

MR. LaJEUNESSE: But I -- but the majority did

not agree with them, because the majority did not adopt --

QUESTION: They didn't say one way or the other.

QUESTION: The majority said nothing at all about that --

MR. LaJEUNESSE: Well, I think the majority suggested the contrary at several points in its decision. In footnote 20 the Court presumed that ordinary judicial remedies remain available. In footnote 16 in Hudson the Court said that the nonmember's burden is simply the obligation to make his objection known, citing the earlier --

QUESTION: What we said in footnote 20 was that we reject the union's suggestion that the availability of ordinary judicial remedies is sufficient, and this was -- we were insisting that the -- we were imposing obligations on the union, and the union lost that case 100 percent.

MR. LaJEUNESSE: That's correct, Justice Stevens, and what the Court was doing there, as the Chief Justice has suggested, was providing a shield for the protection of employee rights, not giving the union a sword to take another right away from the employee, which is the right of immediate access to the Federal courts guaranteed to them by Article III of the Constitution and the right to redress of grievances under First Amendment --

QUESTION: May I ask you this question. Supposing you prevail with -- because of the right to access to the courts, do you think the district judge having such a case could say, I think I'll stay proceedings until I see what happens in the arbitration?

MR. LaJEUNESSE: No, I don't believe so, Your Honor. That would be -- it would be exhaustion by using another term.

QUESTION: How does Article III give anybody access to courts?

MR. LaJEUNESSE: Article III says that where Congress has granted jurisdiction to the courts the litigation has a right to bring his case into court.

QUESTION: Well, I'd be interested in seeing exactly what provision of Article III you're quoting, because I've looked at it often and I --

MR. LaJEUNESSE: I was referring, Your Honor, to what this Court said --

QUESTION: Well, I'm not talking about what this Court said. I'm talking about what does Article III say.

MR. LaJEUNESSE: Article III places the determination of Federal causes of action in Article III judges, and this Court has held that that means that a litigant has a right to have his Federal cause of action determined by an Article III judge, and those --

QUESTION: But not in reliance on Article III.

MR. LaJEUNESSE: Yes, Your Honor. Grande Financial S.A. v. Nordberg, 492 U.S. 33, which we quote on page 23 of our brief, the Court says, if a statutory right is not closely intertwined with a Federal regulatory program -- in other words, the administrative scheme, which we don't have here -- Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court, end quote.

QUESTION: Well, that's not saying that it's -- Article III requires that. We have said many things -- times that certain things are required to be adjudicated by Article III courts, but not simply because Article III says what it does.

We're -- obviously you and I are both perhaps straying from the central theme of the case --

MR. LaJEUNESSE: Certainly, Your Honor --

QUESTION: -- so let's get back to it.

MR. LaJEUNESSE: -- and the central theme of the case --

QUESTION: While we're in that mode --

QUESTION: I think maybe the Due Process Clause requires it to be determined by an Article III court. You wouldn't care whether it's the Due Process Clause or

Article III --

QUESTION: Yes, but isn't the question here not whether it must be determined, but rather, when it must be determined, because I guess everybody agrees that after the arbitration you get all the discovery you want. You get everything you want. It's just a question of whether you can get it while the arbitration is --

MR. LaJEUNESSE: That's correct, Justice Stevens.

QUESTION: -- still going on.

MR. LaJEUNESSE: But as this Court said in both Patsy and later in Felder v. Casey the court does not have discretion to simply require exhaustion out of questions of practicality or judicial efficiency.

QUESTION: I notice the --

MR. LaJEUNESSE: It has to be consistent with congressional intent.

QUESTION: I notice the one -- I've been trying to think of an example of compelled arbitration without statutory authority. I notice that the Northern District of California for some years has had a mandatory arbitration requirement before you can proceed with your civil action. It's nonbinding. That's the only one I can think of.

MR. LaJEUNESSE: I'm not familiar with that,

Your Honor.

QUESTION: Is -- imagine on this early dispute resolution, which is common now, but the -- suppose that the union -- what I want to try to find out is how you do you think this is going to work?

Imagine a union with 5,000 members and 500 dissidents, and the dissidents range from the people who really are angry, you know, at being part of this to the ones who sort of don't care, and a lot of the ones who don't care, you know, would like to have a simple way to resolve this, but some of the ones who really do care want to fight to the last ditch.

All right, on your theory of how the statute is supposed to work out, how does it work out? I mean, the union will think well, some of the people might -- you know, these things are often close. The courts will decide one way. The arbitrators will decide another way on many close questions.

Perhaps they're intertwined, so that the reasonableness of a relationship between germane -- you know, between objective and expenditure depends on, and then we can imagine all kinds of intertwined things.

On your theory of what Congress meant to do, how was that to work out?

MR. LaJEUNESSE: Justice Breyer, your example

points out the need for both systems. That is, the impartial decisionmaker required by Hudson as a matter of First Amendment due process and the ability of the individual who has an attorney and really wants a judicial determination to go to court first.

That individual is only going to be delayed by the exhaustion requirement, but you have to have the impartial decisionmaker, a simpler, less formal procedure available for the nonmember who can't afford to hire an attorney, and -- plus --

QUESTION: All right.

MR. LaJEUNESSE: -- give him due process.

QUESTION: So they say, we can tell you how this works out perfectly. Give us a reasonable time to set up our impartial decisionmaker and let ones who are hell-bent on court go there, but only after our impartial decisionmaker has decided, and that will prevent inconsistencies, and that's probably what Congress meant.

On the other hand, if you take your theme, which is the ones that are hell-bent for court go there first, we're going to get conflicting decisions. We won't know how to plan our expenditures, and it will be a mess.

Now, I take it that that's their argument, so how -- what do you say about that?

MR. LaJEUNESSE: It's an argument that doesn't

hold water, Your Honor, because in any event there are going to be conflicting decisions from different courts, different arbitrations. This union has employees, airline pilots throughout the entire Nation. Some may bring a case in one Federal district court, others in another.

QUESTION: Well, can the multidistrict litigation scheme solve that? I'm not quite sure how that works.

MR. LaJEUNESSE: Yes, it could, Your Honor.

QUESTION: So that would eliminate the conflict, at least among courts, wouldn't it?

MR. LaJEUNESSE: But in either event you're going to have a decision by an arbitrator and then a decision by the court, whether it's sequential or --

QUESTION: If the court reviews the arbitrator the court has the last word. If they're going on simultaneously, or the arbitrator comes later, or you don't know, interspersed, then you can get I suppose a fairly good mess. That's -- and if we're trying to figure out what Congress intended, can't we assume they wanted not a mess, rather than a mess?

MR. LaJEUNESSE: No, I don't think so, Your Honor. I think you have to look at -- you have to look at the cause of action involved here. In the public sector it's a cause of action under 42 U.S.C. section 1983, and

this Court held in Patsy and later in Felder that based on legislative history that the congressional intent was that these statutes for the paramount protection of individual rights were intended by Congress to be in the courts in the first instance.

Because the parallel situation under the duty of fair representation, which is the basis of the cause of action here. The duty of fair representation was adopted by this Court in 1944 in Steel to protect individual employees from unions abusing their power of exclusive representation. In fact, it was adopted by the Court to avoid having to declare the statute unconstitutional.

QUESTION: Well, I suppose Hudson was probably beyond the contemplation of Congress. I mean, it was a constitutional decision. It wasn't based on the idea that this is what Congress would have wanted, so that once we get beyond what Congress would have wanted it's hard to say, when you try to see what possible remedies exist post Hudson, to translate that into what Congress would have wanted. We're pretty far away already from congressional intent.

MR. LaJEUNESSE: Two questions, Your Honor. One, in Steel the Court said, we have to assume that Congress intended to impose the duty of fair representation on unions, because if we don't make that

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assumption the statute is probably unconstitutional.

The Court then said, there's no remedy provided under the Railway Labor Act, which is the statute in this case, for vindication of an employee's rights where he's accusing the union of breach of the duty of fair representation.

Later, in Vaca and Breininger the Court held that employees have the right to take that cause of action for breach of duty of fair representation directly to the Federal courts because the purpose of the statute, paramount purpose of the statute is the protection of individual rights, just as it is under section 1983, that the nonmember -- that the employee under the National Labor Relations Act doesn't have to go before the National Labor Relations Board first.

QUESTION: Mr. -- is it clear to begin with that Hudson applies in your situation, where it is not the State --

MR. LaJEUNESSE: Yes, it is clear.

QUESTION: -- that is depriving these workers of their First Amendment rights?

MR. LaJEUNESSE: It's clear in this case for two reasons, Justice Scalia, first because this Court held in Hanson in 1956 that the Railway Labor Act authorization of agency shop agreements is governmental action, Federal

governmental action, and so constitutional limitations do apply, and --

QUESTION: Well, but so then the Federal Government should set up the arbitration scheme.

I mean, what Hudson said was that the person responsible for the First Amendment violation, what would otherwise be a First Amendment violation, had to set up an arbitration scheme.

If you're telling me in this case, since it involves a private employer, the person responsible for it is the Federal Congress, by having adopted the National Labor Relations Act that enables these dues to be charged, then let the Federal Government set up an arbitration scheme.

MR. LaJEUNESSE: You're making one of the points that I wanted to make, Your Honor, is that ALPA's in the wrong place. It is asking this Court to construct a remedy scheme that Congress has not constructed. It should be addressing the practical concerns that it's raising to Congress, not to this Court --

QUESTION: Yes, but isn't that --

MR. LaJEUNESSE: -- which doesn't have the discretion to impose exhaustion simply as a matter of practicalities unless it is consistent with congressional intent, and there are two aspects in which this

requirement is inconsistent with congressional intent.

One is the point I was making with regard to the duty of fair representation. That is, that this Court has already held that Congress intended that these cases be considered in the courts in the first instance, because the paramount purpose of the duty is to protect individual rights.

And the second is that beginning with Hanson this Court has said that the only incident of union membership that can be imposed on the nonmember is the payment of the cost of collective bargaining, and here you're imposing on the nonmember an additional incident of union membership, exhaustion of a union remedy.

QUESTION: Mr. LeJeunesse, one of the things that you said about why you don't like this, you said there's no discovery, and I was trying to understand what the complaint is that you come to court with when you don't have any arbitration in the picture. You just say, we don't think they drew the line in the right place. Do you have to be at all specific?

Do you have to say, well, we think that their expenditure for, say, safety lobbying is no good, or do you just say, we challenge the whole thing, and then we can discover?

MR. LaJEUNESSE: That's correct, Your Honor.

This Court held both in the Railway Labor Act cases back in the sixties, Street and Allen, and later in Abood, that the nonmember need only state a general objection and then the union is put to its burden of proof, and in Allen --

QUESTION: Wait, wait. In general -- he has to have a basis for that general objection. You just can't come in and say, I object.

MR. LaJEUNESSE: That --

QUESTION: Don't you have to plead that you have reason to believe that the union is expending --

MR. LaJEUNESSE: How is the nonmember to have reason? The nonmember doesn't have the facts.

QUESTION: Well, he does under Hudson.

MR. LaJEUNESSE: They're solely in the possession of the union.

QUESTION: He does under Hudson.

QUESTION: See, that's the very point of -- the point. Until a member has the facts, he doesn't know whether he should spend the money to hire a lawyer and bring a lawsuit, and one of the points of Hudson was, we put the burden, as you say, squarely on the union to assemble the facts, but not only its own version of the facts, but also those of an independent verifying that version.

And if they've done that, presumably then the

employee has a basis for judging whether or not he's been short-changed, and if he has, he's free to sue.

You see, the difference between this arbitration and all others is the member is not bound by the arbitration in any way. He hasn't agreed to anything, so he's totally free to sue once he gets the facts. The question is whether we should ask him to wait till he gets the facts before he sues.

MR. LaJEUNESSE: I return Your Honor to the principle that this Court has followed consistently, which is that you cannot just as a matter of judicial discretion require exhaustion unless --

QUESTION: But it's not exhaustion. The opinion itself says he need not exhaust. There's no requirement of exhaustion on the member, as you put it correctly. All he has to do is complain and he has his cause of action. He can sue. He doesn't like the arbitration. He starts from scratch. He at least has the facts before he files his complaint. That's all we held.

MR. LaJEUNESSE: Your Honor, he doesn't have the facts, because the notice that the -- Hudson requires --

QUESTION: He has the union's version of the facts verified by an independent appraisal. Now, whether that -- he doesn't have to accept it, but he at least has that much, and then he decides whether --

MR. LaJEUNESSE: I'm not sure I understand you, Justice Stevens. You're saying the employee merely states an objection, the union holds its arbitration ex parte, and then the employee can go to court. I don't see the purpose of that.

QUESTION: How does it work when a union official complains that the employer -- not -- sorry, when an employee thinks the employer is trying to censor him or something, or he thinks that the employer should have given him an excuse -- it's related to his religion or something.

I mean, there can be thousands of grievances. Don't people have to go through the grievance procedure?

MR. LaJEUNESSE: But they've agreed to go through the grievance procedure. The union is their agent for purposes of their --

QUESTION: Oh, I see.

MR. LaJEUNESSE: -- relationship with their employer. It is not their agent for purposes of their dispute with itself, and those cases, Justice Breyer, also are cases in which -- they're simple contract grievance arbitration cases in which both parties know most of the underlying facts.

Here we're talking about $68 million in union expenditures. The pilot doesn't have a basis to make a

detailed complaint.

All he's required to do by this Court's decisions, beginning with Allen in the sixties, is state a general objection to the use of his money for purposes other than collective bargaining, then he's entitled to discovery in court to find out what underlies the union's calculations, and the union has the burden of proving its case.

That doesn't happen in these arbitration proceedings, the ones that occurred here. Discovery was denied to the pilots. They were not given the opportunity -- they could not compel the testimony of union witnesses. Without discovery, they couldn't effectively cross-examine. They couldn't narrow the issues, because they didn't know the underlying facts.

And in conclusion, I would say that the court of appeals correctly held that the pilots were not obliged to proceed first through ALPA's review procedure because there is no legal basis --

QUESTION: May I ask one other question, though? The -- in the arbitration proceeding that's all cost-free for the -- they don't have to participate if they don't want to, and they won't be bound, but once you start discovery, then you have to pay your own share of the cost, don't you?

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MR. LaJEUNESSE: Yes, Justice Stevens.

QUESTION: Yes.

MR. LaJEUNESSE: And I'm talking here about the pilots who have an attorney, who want to go to court to get a judicial determination with an Article III judge in a proceeding where they have the right to discovery, where they can compel the production of witnesses, where the proceeding is truly adversary and they can get that judicial determination of their -- what we're talking about here after all is Federal statutory and constitutional rights.

QUESTION: It really is an extraordinary claim, that you just come into the court and say, I think they drew the line in the wrong place. I'm not going to tell you anything about which expenses, we just say we want to have full discovery.

And I think that the notion of the arbitration is that it would put certain limits, because the -- whether it's -- some kind of deference to the arbitrator's findings, and you don't want to have any findings, as I understand your position.

MR. LaJEUNESSE: Justice Ginsburg, it's a truly extraordinary statutory privilege that the unions have to compel nonmembers to pay these dues, and this Court held in Hudson that First Amendment due process and fundamental

fairness, which means it's also a matter of the duty of fair representation, require the union to make available a procedure which is a shield to protect the employee's rights.

QUESTION: Thank you, Mr. LaJeunesse.

Mr. Anker, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF JERRY D. ANKER

ON BEHALF OF THE PETITIONER

MR. ANKER: Thank you, Mr. Chief Justice. I think I have three quick points I would like to make.

First of all, there's been a lot of discussion by Mr. LeJeunesse about the intent of the statute, and I think it's clear to say that the statute simply sheds no light whatsoever on the question that's before us, and that's not unusual. Very often these exhaustion questions are not resolved by any statute, and certainly this one doesn't have anything whatsoever to say on the subject.

Now, when the statute is silent, what this Court has said -- and I think this is really the ultimate answer to the questions that were asked of me earlier by Justice Ginsburg and others, where does the authority come from to require this exhaustion, this Court has said on several different occasions that exhaustion of an administrative remedy or an arbitration remedy, as in Hudson, as in Republic Steel v. Maddox is a matter of judicial

discretion.

QUESTION: But one was -- certainly Republic Steel was consensual, was it not?

MR. ANKER: Well, Your Honor, one could say that on the facts of Republic Steel, but the interesting thing about the case is, when you read it, that was not the principal reliance of the Court at all. The Court spoke about several different policy considerations.

QUESTION: Yes, but another -- it seems another defect in your suggestion is that this is not a remedy. The arbitration doesn't bind the union -- I mean, bind the member in the slightest. He -- it may change the calculation, but it's certainly not a remedy.

MR. ANKER: Well, I agree it doesn't bind him, Your Honor --

QUESTION: Which most remedies do.

MR. ANKER: It's maybe just simply a semantic issue between us, but it's a remedy in the sense that it's a way in which he might get what he's looking for. He might get the adjudication of the issue in his favor, and that would resolve the problem for him, or her, and that's why I would consider it a remedy.

But if the Court doesn't like that word, I think it's still analogous to a remedy in a typical exhaustion case such that the normal judicial discretion would apply.

QUESTION: What's another typical exhaustion case that you're talking about, Mr. Anker, other than Maddox?

MR. ANKER: Well, any kind of an exhaustion of administrative remedies.

QUESTION: But those are governmental remedies.

MR. ANKER: They are governmental remedies, but they're nonjudicial remedies, and even where the statute doesn't require --

QUESTION: But the typical reason for exhausting judicial administrative remedies is to get the view of the administrator. In other words, the Government policy maker might rule in your favor. But we have never done that with a private organization.

MR. ANKER: Well, I think, Your Honor, you're making two points. Let me take the first one first.

One of the reasons is the reason relating to the governmental decisionmaker, but the cases have stated several reasons. Other reasons are efficiency, reasons of avoiding controversy in court if it's possible to do so. It isn't -- that isn't the only reason for exhaustion of administrative remedies.

Now, I'm not sure I can come up immediately with another example, other than Maddox, of an exhaustion of a private remedy, but Maddox is certainly a case of one, and

it's one in which -- actually the plaintiff in that case, the individual never consented. The consent is only kind of a constructive consent, because of the fact that he is represented by the union.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Anker.

The case is submitted.

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

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BY Ann Marie Federico

(REPORTER)