

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: TEXTRON LYCOMING RECIPROCATING ENGINE
DIVISION, AVCO CORP., Petitioner v. UNITED
AUTOMOBILE, AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA,
INTERNATIONAL UNION AND LOCAL 787

CASE NO: 97-463 C. I.
PLACE: Washington, D.C.
DATE: Monday, February 23, 1998
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IN THE SUPREME COURT OF THE UNITED STATES

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TEXTRON LYCOMING RECIPROCATING :

ENGINE DIVISION, AVCO CORP., :

Petitioner :

v. : No. 97-463

UNITED AUTOMOBILE, AEROSPACE :

AND AGRICULTURAL IMPLEMENT :

WORKERS OF AMERICA, :

INTERNATIONAL UNION AND LOCAL :

787 :

- - - - -X

Washington, D.C.

Monday, February 23, 1998

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:03 a.m.

APPEARANCES:

TIMOTHY B. DYK, ESQ., Washington, D.C.; on behalf of
the Petitioner.

STEPHEN A. YOKICH, ESQ., Washington, D.C.; on
behalf of the Respondent.

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

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 97-463, Textron Lycoming Reciprocating
5 Engine Division v. United Automobile, Aerospace and
6 Agricultural Implement Workers of America.

7 Mr. Dyk.

8 ORAL ARGUMENT OF TIMOTHY B. DYK

9 ON BEHALF OF THE PETITIONER

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

12 In 1994, the petitioner employer and the
13 respondent union in this case engaged in collective
14 bargaining required by the National Labor Relations Act
15 and by the decisions of the National Labor Relations
16 Board.

17 And the union alleges that in the course of that
18 bargaining the employer failed to supply information that
19 it was obligated to supply concerning subcontracting
20 plans, one of the questions being whether that was a
21 mandatory or permissive subject of bargaining under the
22 act.

23 And the union first brought its claim before the
24 National Labor Relations Board alleging that the employer
25 had committed an unfair labor practice by failing to

1 bargain in good faith under sections 8(a)(5) and 8(d) of
2 the act.

3 And apparently dissatisfied with the progress of
4 this complaint before the board, the union then brought an
5 identical action, making exactly the same charges, seeking
6 virtually the same relief, in Federal district court as a
7 declaratory judgment action, purportedly pursuant to
8 section 301 of the National Labor Relations Act, and the
9 board proceeding has been tentatively settled.

10 A settlement was approved by the regional
11 director last week, and the board has granted limited
12 relief, ordering that certain provisions of the contract
13 be set aside and awarding back pay but refusing to grant
14 the broad relief that the union had requested, which would
15 be invalidation of the entire contract.

16 QUESTION: May I ask a preliminary question?
17 The contract has expired?

18 MR. DYK: The contract has expired and the
19 parties are in the process of attempting to negotiate a
20 new agreement.

21 QUESTION: And there's been a strike in the
22 interim by the union?

23 MR. DYK: That is correct, Justice O'Connor.

24 QUESTION: Why isn't this whole thing moot? We
25 don't have a contract any more. There's been some limited

1 relief granted. Why should -- why is there anything left
2 for us?

3 MR. DYK: Well, we think that the matter should
4 have been resolved by the board proceedings, but as far as
5 the mootness of the court proceeding is concerned the
6 union still claims damages based on the identical facts
7 that led it to request the declaratory judgment and that
8 issue would be unaffected, in the union's view, by the
9 board's settlement.

10 QUESTION: Well, didn't the collective
11 bargaining agreement also provide for the payment of
12 survivor's benefits for a certain number of years after
13 the contract expired?

14 MR. DYK: There are a variety of issues which
15 could arise under the collective bargaining agreement
16 because, of course, the effect of that agreement wasn't
17 limited to the 3-year period of the agreement, so for all
18 of these reasons we think there's no real issue of
19 mootness in this case.

20 Rather, the issue here is whether the district
21 court had jurisdiction under section 301 and, in our view,
22 the language of section 301 is quite plain. It provides
23 for suits for violation of collective bargaining
24 agreements. There's no question here of any violation.
25 There's no allegation that the employer has committed a

1 violation of the --

2 QUESTION: But Mr. Dyk, you concede if it came
3 up defensively it would properly be a matter for the
4 court. Say the union violated the no-strike clause and
5 the union's answer to that is, this whole contract is no
6 good because it was induced by fraud.

7 MR. DYK: Well, Justice Ginsburg, yes, we do
8 agree that if there had been an alleged violation of the
9 agreement and a declaratory judgment were sought, that
10 there had been no violation, that that would be a matter
11 properly within the district court's jurisdiction. Of
12 course, all the parties agree here that in the course of
13 that proceeding the law that would be applied would be
14 board law, in other words, the good faith bargaining
15 requirements crafted by the board pursuant to the act,
16 so --

17 QUESTION: But nonetheless there's nothing about
18 the issue that identifies it as an issue only for the
19 board and never for the courts.

20 MR. DYK: That's correct, and what this Court
21 has done, as we understand it, it has said that pursuant
22 to the act, that you can have an affirmative suit that's
23 brought in the courts or an unfair labor practice charge
24 before the board that may involve defenses, defenses
25 before the board concerning contracts, defenses in the

1 courts concerning the interpretation of the act, and that
2 has been brought up in cases like Kaiser Steel.

3 But the courts have -- this Court has recognized
4 a distinction between bringing something as an affirmative
5 matter and bringing it as a defensive matter. For
6 example, in Communications Workers v. Beck, which was not
7 a case exactly like this but it involved the duty of fair
8 representation, this Court held that the employer's
9 alleged violation of 8(a)(3) of the act could be raised as
10 a defense to the claim, but that an 8(a)(3) claim could
11 not be asserted at the outset in Federal court, and
12 there's a good reason --

13 QUESTION: But Mr. Dyk, isn't it the whole
14 purpose of the Declaratory Judgment Act to enable you to
15 anticipate your defenses instead of having to wait for a
16 lawsuit by the other side?

17 Isn't the whole purpose of it to enable the
18 union, for example, in this case to come into court and
19 say, we do not intend to live up to this agreement. We're
20 going to strike, and we think we have a right to strike
21 because the agreement is invalidated by the fraud at the
22 beginning, and we want a declaratory judgment to that
23 effect. It seems to me a classical declaratory judgment
24 action.

25 MR. DYK: Justice Scalia, I think it is not a

1 classic declaratory judgment action in the sense that this
2 Court has held repeatedly in the Franchise Tax Board case,
3 in Skelly Oil and a number of others, that the Declaratory
4 Judgment Act can't expand the jurisdiction of the Federal
5 court.

6 QUESTION: It isn't a grant of jurisdiction at
7 all, is it? It's just a procedural device where a court
8 has jurisdiction.

9 MR. DYK: Correct, Mr. Chief Justice. Now, if
10 the court had jurisdiction because there had been a
11 violation of the act and there was a controversy over
12 whether there had been a violation of the act, of course
13 there would be jurisdiction under 301(c).

14 QUESTION: Of the contract. Of the contract.

15 MR. DYK: Yes, a violation of the contract, but
16 that --

17 QUESTION: That's his claim. That's what the
18 declaratory judgment claims.

19 MR. DYK: No.

20 QUESTION: The declaration judgment says the
21 other side claims that I am in violation of the contract,
22 and I say I am not.

23 MR. DYK: No, Justice Scalia. There is no claim
24 here that anybody has violated the contract. The only
25 claim is that the court --

1 QUESTION: There's never a claim that has
2 violated a declaratory judgment. It's always
3 anticipatory, right?

4 Are you saying that they just didn't use the
5 right words, that the union should have come in and said,
6 we are about to strike and we want a declaratory judgment
7 that this will not be a violation of the act.

8 MR. DYK: Well, they --

9 QUESTION: Would that have been okay?

10 MR. DYK: If they said we are about to strike
11 and we'd like a declaration, that would not be this case.
12 I would think that if it got to the point of being an
13 anticipatory repudiation similar to Dowd Box --

14 QUESTION: Right.

15 MR. DYK: Yes, you could.

16 QUESTION: Okay.

17 MR. DYK: But that's not this case. There
18 are --

19 QUESTION: Okay.

20 MR. DYK: There has been no violation, no
21 alleged violation, and we suggest that when Congress said
22 suits for violation it was very clear that there had to be
23 a suit over a violation of the contract. There is no suit
24 over a violation of the contract here.

25 They were asking the district court to declare

1 that at some future time if they chose to do it they could
2 engage in a strike which otherwise might be in violation
3 of the contract, so there was no present controversy about
4 a violation or even an anticipated violation of the
5 agreement.

6 QUESTION: Can you -- can the -- suppose the
7 employer says to the union representative, if you go out
8 on strike, I will sue you for breaching this contract. He
9 says that.

10 So the union representative says, I would like a
11 declaration that you have no lawsuit. He brings the suit.
12 Can he do that in a declaratory judgment action?

13 MR. DYK: I think there are certainly some
14 circumstances where --

15 QUESTION: Well, let's say the circumstance is
16 a) my basis as union representative is I think you have to
17 have an offer and an acceptance to have a contract and
18 here there was no offer, or there was no acceptance.

19 MR. DYK: If the dispute is over a violation of
20 the agreement, yes --

21 QUESTION: No. The dispute is -- this is the
22 dispute. The employer says, if you go out on strike, I
23 will sue you. The union says, if you sue, you will lose.
24 Why? Because there is no contract. There was no offer,
25 or alternatively there was no acceptance.

1 I don't agree, says the employer. Fine, says
2 the union. I'll bring a declaratory judgment action. Can
3 they do it?

4 MR. DYK: I think under some circumstances that
5 could be brought.

6 QUESTION: What about the circumstances I just
7 mentioned?

8 MR. DYK: No, I'm suggesting, under the
9 circumstances you just mentioned, you could imagine, yes,
10 that there would be section 301 jurisdiction.

11 QUESTION: Yes, all right. If the answer to
12 that is yes, now we have exactly the same dialogue but
13 substitute for the words, offer and acceptance, the reason
14 your contract is not valid is it was obtained by fraud.

15 MR. DYK: Well, it isn't the question of what
16 the basis for the claim is.

17 QUESTION: No, the reason that you cannot sue me
18 for a breach of contract is because the contract doesn't
19 exist, and the reason it doesn't exist is because it was
20 obtained by fraud.

21 MR. DYK: Justice Breyer, I agree that there may
22 be circumstances in which something has gotten to the
23 point where there is a real dispute about whether there
24 would be a violation of the contract which possibly could
25 be brought into Federal court. This isn't that situation.

1 What this situation is, where you have an
2 exactly parallel proceeding in district court and what you
3 have is an effort in essence to bring unfair labor
4 practice charges into court rather than to bring them
5 before the board, and Congress when it enacted section 301
6 could not have possibly contemplated that.

7 Indeed, the legislative history shows quite
8 clearly that Congress was very concerned about overlapping
9 affirmative jurisdiction between the board and the courts,
10 and they said that one of the provisions of the original
11 Taft-Hartley Act would have given the board jurisdiction
12 to determine compliance with contracts.

13 QUESTION: Well, in Justice Breyer's first
14 hypothetical, could the offer and acceptance dispute have
15 been remitted to the board?

16 MR. DYK: The offer and acceptance dispute could
17 have been remitted to the board.

18 QUESTION: Why wouldn't there be concurrent
19 jurisdiction, or conflicting jurisdiction in that case
20 just as well as here?

21 MR. DYK: In some circumstances conflicting
22 jurisdiction is tolerated and will exist. The problem is
23 that if you are allowed to bring this kind of proceeding,
24 this kind of abstract proceeding before there has been a
25 real dispute about whether the contract was violated, what

1 you would be doing is to in essence say, virtually any
2 unfair labor practice charge can be framed as a
3 declaratory judgment matter to be brought into court.

4 Anything having to do with the collective
5 bargaining, the obligation to bargain in good faith could
6 be brought into court on the theory that there might be in
7 some future time a dispute about the ability to strike
8 under the contract.

9 QUESTION: Mr. Dyk, may I just ask this. You
10 say anything covers -- is it not correct, at least the
11 union says in their brief that you took the position
12 before the board that this fraud was not a mandatory
13 subject of bargaining and therefore was not subject to
14 review by the board.

15 MR. DYK: Well, that's correct, Justice Stevens,
16 and I think that's exactly why this matter belongs before
17 the board, because of course the distinction between
18 mandatory and permissive subjects of bargaining under this
19 Court's decision in First National Maintenance is a very
20 difficult line to draw, one that the board has struggled
21 with again and again over the years, and if it's a
22 mandatory subject of bargaining there is the obligation to
23 supply the information to the union, but if it is a
24 permissive subject of bargaining the obligation does not
25 exist to supply the information to the union.

1 QUESTION: Well, why do we have to decide that
2 it belongs somewhere else? All we have to decide here is
3 whether or not it fits the definition of whether this is
4 an action for violation of a contract and if it isn't
5 that, it doesn't belong in court.

6 Maybe it belongs before the board, maybe it
7 doesn't.

8 MR. DYK: That's exactly correct, Mr. Chief
9 Justice, and we suggest that --

10 QUESTION: Yes, but you have argued that the
11 better forum is the board, and that argument kind of falls
12 apart if the forum isn't there.

13 MR. DYK: No, no, but Justice Stevens, it's
14 exactly because of the difficult distinctions between
15 mandatory --

16 QUESTION: Right.

17 MR. DYK: -- and permissive subjects of
18 bargaining that this case belongs before the board. The
19 board ought to be deciding whether there was an obligation
20 to supply the information or not supply the information.
21 That turns on whether it was a mandatory or permissive
22 subject of bargaining.

23 The courts are ill-equipped to make that kind of
24 determination. That's something that --

25 QUESTION: Are you suggesting that even if it

1 was not a mandatory subject of bargaining, that the
2 company could commit fraud in the negotiation and there
3 would be no remedy for the fraud?

4 MR. DYK: No, absolutely not. I think there are
5 two separate issues here. One is misrepresentation.

6 QUESTION: Right.

7 MR. DYK: Which under Truett --

8 QUESTION: Which they alleged.

9 MR. DYK: That would apply to mandatory and
10 permissive subjects of bargaining.

11 QUESTION: Right.

12 MR. DYK: But the main part of the charge here
13 is that there was a request for information, that we
14 didn't supply the information.

15 QUESTION: Oh, okay.

16 MR. DYK: And that turns on the distinction
17 between mandatory and permissive subjects of bargaining.

18 QUESTION: But insofar as they're alleg -- their
19 claiming there was an active misrepresentation or a fraud,
20 you would agree that could be remedied by the board.

21 MR. DYK: Absolutely.

22 QUESTION: Oh, okay.

23 MR. DYK: There's no license to lie, whether
24 it's a mandatory or permissive subject of bargaining.

25 QUESTION: Mr. Dyk --

1 QUESTION: Does the board have jurisprudence
2 cases on misrepresentation and fraud?

3 MR. DYK: Yes. I mean, this Court's decision in
4 Truett Manufacturing discusses the obligation to engage in
5 honest bargaining, and the board has implemented that in a
6 large number of cases.

7 QUESTION: Mr. Dyk, you may have answered this.
8 I may have missed it. But you said there is some subjects
9 in which jurisdiction may be concurrent and some not.
10 Where do you draw the line? How do we draw the line?

11 MR. DYK: Well, the line, Justice Souter, that
12 I'm suggesting that you draw is between matters that are
13 asserted as defense, either contract defenses before the
14 board or unfair labor practice defenses in court, as
15 opposed to allowing affirmative jurisdiction. That is, to
16 bring contract issues in the first instance before the
17 board or bring unfair labor practice charges before the
18 courts.

19 QUESTION: But that does --

20 QUESTION: Mr. Dyk, what about the Mack case?
21 Do you agree that that was properly a case for the court
22 under 301? That is, an employer that said, the union says
23 we've got no contract. We say we do have a contract.
24 Court, tell us we have a contract.

25 MR. DYK: There was, if my recollection is

1 correct, a dispute about a violation in the Mack case, the
2 original -- the Third Circuit case that preceded this one
3 and yes, that probably was within -- that was probably
4 correctly decided.

5 QUESTION: What about a classic contract dispute
6 as to whether there was a meeting of the minds? I mean,
7 there's no violation of the Labor Relations Act. There's
8 not an unfair labor practice if the minds have not met.

9 MR. DYK: Well, there can be an unfair labor
10 practice under those circumstances. Refusal to execute an
11 agreement, Justice Scalia, that the parties have reached
12 can be a violation of 8(d) of the act, but yes, there --

13 QUESTION: Well, there's been no violation so
14 far. Nobody has -- nobody claims a violation, but the
15 union wants to have it clearly established that there is a
16 collective bargaining agreement.

17 MR. DYK: There may be, Justice Scalia, some
18 small number of cases in which there is no board remedy
19 available to a party in the union's situation.

20 QUESTION: And no Federal court remedy.

21 MR. DYK: And no Federal court remedy as an
22 anticipatory matter but, of course, when there is a
23 violation that can be asserted as a defense, but we don't
24 think that the existence of that small number of cases
25 should drive the decision here.

1 I mean, in the vast majority of situations there
2 is a remedy before the board, and the board is the place
3 to go.

4 QUESTION: Not in the vast majority of
5 anticipatory situations, surely.

6 MR. DYK: I think that in the vast majority of
7 anticipatory situations there is a remedy before the
8 board. If you allow people to go into court -- I'll give
9 another example, that if there is an unfair labor practice
10 alleged to occur during the performance of a contract the
11 union can claim that it has a right to strike in violation
12 of the no-strike clause -- that's Mastrow Plastics -- and
13 what the union could do under those circumstances is go
14 into court and say, we'd like a declaratory judgment that
15 we're entitled to strike because the employer engaged in
16 unfair labor practices.

17 If you're an inventive lawyer either on the
18 union's side or the employer's side you can craft a
19 declaratory judgment action that would bring a whole range
20 of unfair labor practice charges effectively before the
21 Federal courts --

22 QUESTION: Mr. --

23 MR. DYK: -- thereby bypassing the board.

24 QUESTION: An aggrieved -- either the employer
25 or the union can go into State court, can they not, under

1 the Dowd case?

2 MR. DYK: Yes.

3 QUESTION: So it isn't as if they can't get into
4 Federal court under section 301 they have no judicial
5 remedy. They can go to State court.

6 MR. DYK: Well, that's a possibility, Mr. Chief
7 Justice, and the Ninth Circuit has held that if there's no
8 unfair labor practice potential before the board you can
9 go into State court and apply State law. That is a
10 difficult question which --

11 QUESTION: Well, why is it difficult after the
12 Dowd Box case?

13 MR. DYK: It's not difficult as to whether you
14 could go into State court or not. I think the difficult
15 issue is whether you would apply State or Federal law when
16 you went into State court.

17 QUESTION: Yes, but that's something that isn't
18 involved here, certainly. At least there is some sort of
19 judicial forum in which this dispute could be resolved,
20 even though you can't get into Federal court under 301.

21 MR. DYK: But our argument, Mr. Chief Justice,
22 would mean that you could not go into State court under
23 section 301 either, because the scope of Federal
24 jurisdiction and the scope of State jurisdiction are the
25 same. Both are governed by section 301. Both require

1 suits for violation, so you could not go into State court
2 and seek a declaratory judgment under --

3 QUESTION: You think that's a result of the Dowd
4 Box case?

5 MR. DYK: I believe it is, Mr. Chief Justice.

6 QUESTION: Which means that you'd have some of
7 the law of labor contacts made by State law rather than
8 by Federal law, which is seemingly what the act envisions,
9 or what we've said the act envisions.

10 MR. DYK: Well, our position, Justice Scalia, is
11 that there isn't any room for State law here, that even if
12 you went into State court, that you would have to apply
13 Federal law, but that the State court no more than the
14 Federal court can give declaratory relief under these
15 circumstances.

16 QUESTION: So that there would be no remedy, to
17 answer the Chief Justice's first question. If you concede
18 that the State courts could not apply State law, there
19 would be no remedy.

20 MR. DYK: I have conceded that there is some
21 small class of cases in which there would be no
22 anticipatory remedy.

23 QUESTION: Anticipatory.

24 MR. DYK: But you could always assert it as a
25 defense.

1 QUESTION: And the reason for no anticipatory
2 remedy comes down simply to plain language, I take it. In
3 other words, it's not necessary to preserve board
4 jurisdiction because there are some cases in which, as you
5 say, there would be no conflict with board jurisdiction,
6 so it's a straight plain language theory, in effect that
7 the language of 301 trumps the normal rule which would
8 allow a declaratory judgment.

9 MR. DYK: Yes. We've suggested that the
10 language is very plain, and the lower court in the --

11 QUESTION: But that's all. I mean, you don't --
12 basically your argument is not an argument based upon the
13 preservation of board jurisdiction. It's an argument
14 based on the statutory text, period.

15 MR. DYK: Our section 301 argument --

16 QUESTION: Yes.

17 MR. DYK: -- is based on statutory text --

18 QUESTION: Yes.

19 MR. DYK: -- and the legislative history, but we
20 have also argued alternatively that there is Garmon
21 preemption here even if you could somehow shoe this --
22 shoe-horn this in within section 301, that the Evening
23 News exception to Garmon preemption only applies, as this
24 Court said in Lockridge, where the cause of action
25 requires a construction of the collective bargaining

1 agreement.

2 Here, no construction of the collective
3 bargaining agreement is remotely involved and therefore we
4 suggest that Garmon preemption, that is, Garmon primary
5 jurisdiction.

6 QUESTION: Are you saying that if the union
7 brought an action simply for a violation of the contract
8 and -- that there might be preemption of that sort of a
9 claim?

10 MR. DYK: We're suggesting that if the union
11 brought an action for violation of contract which did not
12 depend in any way on the interpretation of the contract,
13 which is the scope of the Smith v. Evening News exception,
14 there might not be jurisdiction under those circumstances.

15 QUESTION: Well, but the statute speaks quite
16 plainly. It says you can bring an action for violation of
17 a contract. How could there not be jurisdiction?

18 MR. DYK: Well, I think it's not, Mr. Chief
19 Justice, so much a question of "jurisdiction." It's more
20 a question of "primary jurisdiction," that under those
21 circumstances there might be jurisdiction within 301, but
22 that the primary jurisdiction doctrine might apply.
23 That's what Garmon is when you're dealing with Federal law
24 issues. But the primary jurisdiction doctrine might say
25 you should resort to the board even though the district

1 court has technical jurisdiction.

2 QUESTION: Well, why wouldn't you make that
3 argument --

4 QUESTION: Well, that's a strange doctrine.

5 QUESTION: -- here, that the election -- if it's
6 primary jurisdiction, they went to the board first, but I
7 don't think you're making any kind of election of remedies
8 argument that -- this union did go to the NLRB a year
9 before coming to court, right, so --

10 MR. DYK: That's correct, and the matter is
11 still pending before the board.

12 QUESTION: So why aren't you making any kind of
13 primary jurisdiction argument with respect to that?

14 MR. DYK: Well, I think in essence we are. When
15 we talk about a Garmon -- the Garmon doctrine applying
16 here, even if there's technical jurisdiction under section
17 301, what we're saying is the court should leave it to the
18 board under those circumstances, particularly when you
19 have a board proceeding pending and, most particularly,
20 when there's no construction of the contract that's
21 involved.

22 After all, that was the task assigned by
23 Congress to the Federal courts, was to construe these
24 collective bargaining agreements. There's no construction
25 of a collective bargaining agreement involved in this

1 case. The --

2 QUESTION: But if you can't have an action for a
3 declaratory judgment, which you certainly are maintaining
4 in light of the statute, and you can't have an action for
5 construction of the contract, what sort of action for
6 violation of contract can you have under section 301?

7 MR. DYK: Well, Mr. Chief Justice, we agree that
8 you can have an action to construe the contract for
9 violation of the contract that requires a construction of
10 the contract.

11 What we're suggesting is that somehow, if this
12 Court went so far as to say that a violation encompassed
13 anything relating to the contract, a position which you
14 seem to have rejected in the Franchise Tax Board case,
15 we're suggesting that if you went that far and said, oh,
16 yes, this fits within the suits for violation of contract,
17 you should still say it's within the primary jurisdiction
18 of the board.

19 QUESTION: I understand.

20 QUESTION: Do you know, is there any
21 authority -- it seemed to me there ought to be fairly
22 clear whether you could or couldn't do this, but in suits
23 that are, let's say, arising under suits, a person might
24 have a State law defense, and is there any reason that the
25 person with a State law defense cannot get a declaratory

1 judgment action on -- where he's claiming that I'm being
2 threatened by a Federal suit and if the person brings that
3 Federal suit I have a perfectly good defense and he wants
4 it litigated in a declaratory judgment action?

5 MR. DYK: There's a dispute about a Federal
6 law --

7 QUESTION: Oh, an antitrust case.

8 MR. DYK: Yes.

9 QUESTION: Some private person says, I'm going
10 to bring an antitrust case against you, and the defendant
11 says, look, I have a piece of paper here. You promised
12 not to. It's a State law contract between us.

13 I would have thought it would be settled. I
14 would have thought you could have done it. You could go
15 into a declaratory -- in court and say I want a
16 declaratory action. A person's threatening me, but he
17 hasn't brought it yet, a Federal suit. I want a
18 declaration that he has no Federal suit --

19 MR. DYK: I --

20 QUESTION: -- for the reason that I have this
21 State law defense.

22 MR. DYK: I suppose, Justice Breyer, that such a
23 suit would lie.

24 QUESTION: Yes.

25 MR. DYK: But it depends on the jurisdiction of

1 the Federal courts over the coercive suit that the other
2 party could have brought.

3 Here, there is no coercive suit that the
4 employer could have brought.

5 QUESTION: He could have brought a suit claiming
6 that the contract was being violated and if you say, well,
7 he wouldn't have, that would seem to be a question of
8 whether the declaratory judgment action is ripe or not.

9 MR. DYK: Well --

10 QUESTION: That would seem a question of
11 whether -- I mean, yes, of course you're right, if there's
12 no threat he can't bring the declaratory judgment action.

13 MR. DYK: Well, I think ripeness and the
14 question of whether there's been a violation or imminently
15 threatened violation are very similar questions, and --

16 QUESTION: Yes, exactly, so if there's no
17 imminently threatened violation, you can't be ripe. That
18 isn't the question before us.

19 MR. DYK: But that's not -- that's not the issue
20 here. There is no --

21 QUESTION: That's right.

22 MR. DYK: -- imminently threatened violation.
23 Indeed, the union did not say that if it got this
24 declaration that it would strike. It said it wanted to
25 use this declaration with respect to the contract being

1 invalid, the unfair labor practice issue, in the course of
2 negotiations.

3 This was not a situation in which the union came
4 in and threatened to strike. There could have been no
5 coercive action here by the employer, and we simply
6 suggest that under the Declaratory Judgment Act there
7 simply can't be a declaratory action, either, and that to
8 allow this would be to allow unions and employers to bring
9 all sorts of unfair labor practice charges in the courts,
10 where they don't belong, instead of the board, where
11 Congress said they should be.

12 QUESTION: Well, suppose the union said, we are
13 in imminent danger of the employer enforcing this contract
14 against us because we're going to take a specific action.
15 We're going to strike. And we want this contract declared
16 void because it was procured by fraud.

17 MR. DYK: Well, under some circumstances
18 probably a declaratory judgment like that could be
19 brought.

20 There are questions about an employer's ability
21 to sue to enjoin a threatened strike. I believe the lower
22 courts are divided about the standards there.

23 QUESTION: Well, they just want a declaration of
24 contract invalidity. Would that be violation of the
25 contract? I thought it was your position that that's not

1 a violation of the contract, that's renouncing the
2 contract, and that's different than a violation of the
3 contract.

4 MR. DYK: No, Justice Kennedy. We agree that an
5 anticipatory repudiation of the contract under standard
6 contract law is a violation of the contract, that if there
7 weren't anticipatory repudiation, that you could bring a
8 lawsuit in Federal court under section 301. The Dowd Box
9 case, the facts of the Dowd Box case seem to be similar to
10 that.

11 Mr. Chief Justice, unless there are further
12 questions, I'd like to reserve the balance.

13 QUESTION: Very well, Mr. Dyk.

14 MR. DYK: Thank you.

15 QUESTION: Mr. Yokich, we'll hear from you.

16 Perhaps, Mr. Yokich, you could tell us what your
17 view is of possible mootness in this case.

18 ORAL ARGUMENT OF STEPHEN A. YOKICH

19 ON BEHALF OF THE RESPONDENTS

20 MR. YOKICH: Our view of possible mootness is
21 that there is a fair question of mootness in this case
22 because the contract has expired, but that this is a
23 situation that is a labor case, the labor cases tend to
24 resolve themselves quickly and that therefore it's a
25 situation that's capable of repetition, evading review.

1 In that respect, we think --

2 QUESTION: Well, but you wouldn't anticipate
3 fraud in the future. I mean, it just doesn't lend itself
4 to that analysis, does it?

5 MR. YOKICH: Well, we hope that Textron would
6 not fool this Local twice, but we do think that, given the
7 fact that we have several thousand collective bargaining
8 agreements and almost a dozen with Textron, that it could
9 come up again, and that this is a case very similar to the
10 Burlington Northern case, where there was a strike that
11 was resolved by an emergency -- a presidential emergency
12 board.

13 The Court held in that case that that was a
14 situation capable of repetition, even though the parties
15 were thereafter bound to a certain term, and even though
16 the parties might not ever have that situation --

17 QUESTION: I suppose what you say is capable of
18 repetition is a claim that there's been a violation of a
19 contract, whether that qualifies. It wouldn't necessarily
20 have to be the same fraud situation.

21 MR. YOKICH: But -- well, that is true also, Mr.
22 Chief Justice. As we indicate in our brief, these
23 contract formation issues come in many different forms.
24 You could have a situation where there was no meeting of
25 the minds, where there wasn't offer and acceptance, all of

1 those types of situations could be repeated also, and
2 bring this case back before the courts and in such a time
3 frame as to make it impossible for this Court to resolve
4 the issue.

5 QUESTION: Mr. Yokich, do I have to struggle
6 with that? Why isn't the fact that there are benefits
7 under this contract that must continue to be provided
8 after the term of the contract has ended, why --

9 MR. YOKICH: Well, I think that's a fair
10 argument and --

11 QUESTION: I know it's an argument. Why isn't
12 it right?

13 (Laughter.)

14 QUESTION: Why isn't it right?

15 MR. YOKICH: Well, I --

16 QUESTION: What's the argument on the other
17 side? Let's put it that way.

18 MR. YOKICH: I have --

19 QUESTION: Somebody ought to give us the
20 argument on the other side, if there is any.

21 MR. YOKICH: Well, you'll have to find somebody
22 different than me to do it. That's --

23 QUESTION: But you think it's a good argument.

24 MR. YOKICH: I think it's a decent argument.

25 QUESTION: Mr. Dyk --

1 QUESTION: Is it a correct argument? I don't
2 care whether it's obscene or not.

3 (Laughter.)

4 MR. YOKICH: Yes. As I say, there are lots of
5 implications to it, because it turns on the nature of the
6 right in this particular contract what the bargaining
7 history is, et cetera, et cetera, all of the factual
8 questions that you have to answer in a case like Litton,
9 and that's why I'm not prepared at this time to say
10 absolutely positively this contract's created a vested
11 right.

12 QUESTION: Well, Mr. Dyk's point was that you
13 got a damage action going down below anyway, and it's the
14 damage action which would be affected by this and
15 therefore that's why there's no mootness here. Is that
16 correct?

17 MR. YOKICH: Well, that's what we indicate in
18 footnote 4 of our brief and --

19 QUESTION: You agree.

20 MR. YOKICH: -- that is why this case as a
21 whole is not moot.

22 QUESTION: You agree.

23 MR. YOKICH: Yes.

24 QUESTION: So why do you bother with the capable
25 of repetition yet evasive of review if you've got a

1 concrete thing like damages that you say survive?

2 MR. YOKICH: I -- what I'm -- the reason why I
3 bother with it is just that I'm trying to cover all the
4 bases. You could draw a distinction between --

5 QUESTION: So you wouldn't put that as the
6 number 1 reason that it isn't moot.

7 MR. YOKICH: No. My number 1 reason that the
8 case is not moot is set out in footnote 4 of our brief,
9 which is that there's this live damage claim.

10 QUESTION: What about something -- you said that
11 the determination here will inevitably impact on the
12 bargaining that's currently going on, that you need to
13 know whether the old contract was no good, and you said
14 that will surely affect how it's bargaining now, and I
15 thought, well, how? How will this information about the
16 old contract have an impact on the bargaining for the new
17 contract?

18 MR. YOKICH: Well, that's an argument that I
19 would rank after repetition evading review, and I would
20 just that when you bargain a new contract you typically
21 bargain from the baseline of the old contract, and if
22 there's a provision in that contract that for some reason
23 doesn't apply because of fraud, you can make an argument
24 that you would have less moral ability or more moral
25 ability at the bargaining table to say we don't have to

1 bargain about that, or we should bargain from zero instead
2 of the old language.

3 QUESTION: But here you're saying the whole
4 contract is no good, so I just don't understand how that
5 declaration would affect bargaining of a new contract.

6 MR. YOKICH: I think there is a potential impact
7 of that declaration. I think Mr. Dyk's argument about the
8 vested rights, I think the point about the fraud, and I
9 think about the capable of repetition evading review are
10 all stronger arguments.

11 Since Lincoln Mills v. -- since Textile Workers
12 v. Lincoln Mills this Court has held that section 301
13 gives the responsibility to the Federal courts to fashion
14 a body of law for the enforcement of collective bargaining
15 agreements.

16 In the Lincoln Mills case, the Court rejected a
17 literal reading of the statute. It rejected a reading
18 that the statute was jurisdictional and instead found that
19 the statute created the power to develop a whole body of
20 cases with respect to the enforcement of contracts.

21 In addition in Lincoln Mills, the Court held
22 that the statute gave the Federal courts a wide choice of
23 remedies, remedies such as specific performance in that
24 specific case and, in addition to that, remedies such as
25 declaratory judgments.

1 In Lincoln Mills, for example, specific
2 performance was a remedy that you can't find in the
3 language of section 301 and is one that's really been
4 traditionally disfavored in terms of agreements to
5 arbitrate and disfavored in terms of employment law.

6 QUESTION: Are you saying that Lincoln Mills
7 broadened the jurisdictional grant beyond the language
8 that Congress had chosen?

9 MR. YOKICH: I'm not saying --

10 QUESTION: That's what we're talking about here.

11 MR. YOKICH: Well, I would say that -- well,
12 Lincoln Mills' reading of the jurisdictional grant was a
13 fair one based upon that language.

14 QUESTION: Well, are you -- what -- beyond suits
15 for violation of contracts, which is the statutory
16 language, do you think Lincoln Mills said other things are
17 included in that jurisdictional grant, too? I wouldn't
18 have read it that way.

19 MR. YOKICH: Well, I think Lincoln Mills said
20 that the phrase, for violation of contracts, is a broad
21 enough phrase so that the courts have the responsibility
22 to develop a complete body of law with respect to the
23 enforcement of collective bargaining agreements.

24 QUESTION: Well, with respect to the provision
25 of remedies for a violation.

1 QUESTION: Yes.

2 QUESTION: That's what was involved in Lincoln
3 Mills. The question was, are you going to provide this
4 equitable remedy for a violation? How does Lincoln Mills
5 take you beyond the for violation language?

6 MR. YOKICH: Well, I think what Lincoln Mills
7 says is that when we have issues that deal with what the
8 rights and the duties are created by the collective
9 bargaining agreement, that the Federal courts are
10 authorized to adjudicate those rights and duties.

11 I think the phrase, for violation of, can
12 argu -- should be read as giving the Federal courts
13 general jurisdiction over the law of collective bargaining
14 agreements --

15 QUESTION: How would you rate that, as a decent
16 argument, or --

17 (Laughter.)

18 QUESTION: -- a good argument?

19 MR. YOKICH: Well, I'd rank it way up there on
20 top.

21 QUESTION: PG? PG, General, or --

22 (Laughter.)

23 MR. YOKICH: And I suppose that the -- what it
24 comes down to on our view in terms of looking at the
25 language of the statute that's involved is what you use

1 the -- what the word for, the preposition involves.

2 We think the word for is susceptible of a broad
3 enough meaning, that being concerning or related to, which
4 you can find in the dictionary, in the definition for for,
5 that the Court has considerable latitude to resolve issues
6 that go to the heart of the enforcement of a collective
7 bargaining agreement.

8 QUESTION: Considering the Court's latitude,
9 suppose you're right that theoretically there is a 301
10 suit here. Suppose a district judge then said, well, this
11 union went to the board first, and I have to apply board
12 law, so I'm going to say, prior proceeding pending, and
13 wait until the board acts. Would that be a proper
14 response to your claim?

15 MR. YOKICH: I think it would be a proper
16 response to some claims. If the complaint was wholly
17 based upon an alleged unfair labor practice I think that
18 might be a proper response.

19 I don't think that's the case in our situation,
20 because I think if you compare the theory of our case
21 versus the board's theory of their complaint, they're
22 different cases.

23 Our case goes to the entire contract and is
24 based upon the common law of fraud. The board's case is
25 really a little bit different than that. The board argues

1 that it was a mandatory subject and that the parties did
2 not bargain in good faith over that mandatory subject, and
3 that the subcontracted clause that would let the board --
4 that would let the employer proceed on that subject was
5 procured by fraud, and so the fraud really comes in, in
6 the board's theory at least, in the tail end of the case
7 as opposed to being the heart of the refusal-to-bargain
8 complaint.

9 QUESTION: May I just interrupt you with a
10 question there? Do you agree with your opponent that, if
11 it is not a mandatory subject of bargaining, but there was
12 nevertheless active fraud in the negotiation on the
13 nonmandatory issue, that the board could remedy that as a
14 failure to bargain in good faith?

15 MR. YOKICH: It's hard for me to see that, Your
16 Honor. If it's a permissive subject --

17 QUESTION: Let's assume it's permissive, and
18 that there's active fraud in misleading the union and the
19 board would be powerless to remedy that. That's your
20 view.

21 MR. YOKICH: If it's a permissive subject their
22 duty is to supply information --

23 QUESTION: I know there's no duty to disclose.
24 I'm assuming there's no duty to disclose, but there
25 nevertheless is an active misrepresentation.

1 MR. YOKICH: I don't know of any board cases
2 that give --

3 QUESTION: He said there were a lot of them.
4 That's what puzzles me.

5 MR. YOKICH: I don't know of any board cases
6 that give relief in that situation, and --

7 QUESTION: Are there any board cases saying they
8 have no power to give relief in such situation?

9 MR. YOKICH: Well, the closest the board has --
10 the relief that we seek in this case is to be able to
11 declare the entire contract unenforceable.

12 QUESTION: I understand.

13 MR. YOKICH: And I don't know of any board cases
14 that deal with that exact situation, and that say that you
15 can award that kind of relief.

16 QUESTION: And you think, in representing the
17 union, the board would not have the power to declare a
18 contract void on the theory that the -- there was no
19 bargaining in good faith because of fraud such as I've
20 described?

21 MR. YOKICH: Well, representing the union, the
22 best I could do is predict that that would be a very tough
23 case before the board. There aren't any cases that I
24 could supply to the board to support that.

25 QUESTION: The petitioner's brief makes that

1 statement that the NLRB could, as a remedy for an unfair
2 labor practice, invalidate the contract.

3 MR. YOKICH: Well, the cases the petitioner's
4 brief relies on, first of all they all deal with mandatory
5 subjects where the employer had an obligation to bargain
6 about them.

7 Second, if you look at the most recent case, the
8 Waymouth case, it speaks of a particular commitment that
9 was made in a contract that has -- that was held not to be
10 binding upon the union.

11 It was a case where the union said, if you move
12 to another site this contract's not going to cover us
13 representing the people at the other site. The employer
14 misled the union about where it was moving to, and the
15 board said, well, you can't enforce that specific term of
16 the contract, and again that's very much consistent with
17 the board's theory in this case, which goes to a specific
18 term of the contract rather than the enforceability of the
19 entire agreement.

20 QUESTION: You read the statute as if it were to
21 say, suits respecting contracts.

22 MR. YOKICH: I -- not only do I read the statute
23 that way, but I think that that is the thrust of the
24 board's precedent from Lincoln Mills onwards.

25 QUESTION: What authority does the board have to

1 construe a grant of jurisdiction of the Federal courts?

2 MR. YOKICH: The NLRB?

3 QUESTION: Yes.

4 MR. YOKICH: I think it has very little
5 authority to construe the grant of jurisdiction for --

6 QUESTION: So, then, why is it important that
7 the board may have construed it that way?

8 MR. YOKICH: If I said that --

9 QUESTION: You misspoke. I think you meant the
10 courts --

11 QUESTION: Oh.

12 MR. YOKICH: That's correct. I misspoke.

13 QUESTION: You mean this Court, when you --

14 MR. YOKICH: I think that the entire thrust of
15 this Court's cases is to give section 301 a broad reading.

16 QUESTION: Well, I've just been rereading
17 Textile Workers and I must say I don't agree with your
18 characterization of that. It seems to me the Court said,
19 jurisdiction is jurisdiction, and they went on to say that
20 with section (b) there was a grant of Federal -- an
21 additional grant to Federal courts to develop a case law,
22 just as you say.

23 MR. YOKICH: Mm-hmm.

24 QUESTION: But I don't see anything expansive in
25 there about the jurisdictional ground.

1 MR. YOKICH: Well --

2 QUESTION: Maybe you could refer me to specific
3 language.

4 MR. YOKICH: The -- I think that the expansive
5 nature of the jurisdictional grant comes as you develop
6 the other cases that deal with section 301.

7 QUESTION: That would be strange, really, if you
8 have a limited jurisdictional grant and then construed to
9 authorize development of substantive law in cases within
10 that jurisdictional grant, and then the substantive law
11 doctrines enlarged the jurisdictional grant.

12 MR. YOKICH: I'm not trying to argue that,
13 Mr. Chief Justice. What I'm trying to say is that I think
14 that the courts in Lincoln Mills read the language, did
15 not apply it literally to just give them jurisdiction,
16 applied -- read the language to give them the authority to
17 develop a whole body of contract law, and our argument is
18 that our claim in this case that a part of the inducement,
19 like other contract formation claims, fits within the
20 whole body of contract law.

21 QUESTION: Are there cases in the arbitration
22 area where the contract says suits for violation of this
23 agreement shall be arbitrated, and then the question is
24 whether or not the agreement is void?

25 MR. YOKICH: There are arbitration cases where

1 this is put in as a defense to the enforcement of a
2 specific term of the contract. I'm not aware of any
3 arbitration cases that throw out a whole contract because
4 of a claim of voidance of this kind.

5 QUESTION: Well, my question was whether or not
6 there are cases going to the scope of the arbitrator's
7 authority. One party says the contract says suits for
8 violation of this agreement are arbitrated, and the issue
9 is whether or not there's fraud, and the party who's
10 trying to defend says, oh, well, the arbitrator can't
11 consider this because this goes to the whole contract and
12 this is not a violation of the contract.

13 MR. YOKICH: There are -- let me divide that
14 into two parts. There are Federal court cases that deal
15 with enforcements of agreements to arbitrate that deal
16 with the issue of, can that agreement be enforced due to
17 the fraud, and quite honestly there's a mish-mash of the
18 cases. They go different ways.

19 There are cases, for example, in the Fifth
20 Circuit that say that if an issue of fraud is raised, then
21 that's something the court has to determine before it can
22 order the case to arbitration and that, of course, is, one
23 thing that would happen were this case to go back down is
24 that the district court would have to consider the
25 company's additional defense that this case has to be

1 arbitrated. That was reserved in the court of appeals
2 decision and is something that would be currently before
3 the district court.

4 QUESTION: What do you say about what I take it
5 is the declaratory judgment theory?

6 Suppose Mr. Dyk were to say, yes, of course, you
7 can bring that kind of claim as a declaratory judgment to
8 get the contract declared void because that's a possible
9 defense that you'd have if the employer were to sue you,
10 but that isn't the theory that was argued below and
11 anyway, if it were, you'd lose because you have to have
12 some kind of threat that the employer really would sue
13 you, and here there was none.

14 MR. YOKICH: Well, I think that your reaction to
15 Mr. Dyk's argument that this is really a ripeness argument
16 is the correct way to analyze that problem, and I --

17 QUESTION: And then he said you'd lose, though,
18 on that.

19 MR. YOKICH: And I don't think I'd lose on the
20 ripeness point, and that's for two reasons. First of all,
21 I think that all of the -- that a decision on what we
22 plead can be determined by historical facts. Either the
23 fraud occurred or it didn't. It depends on who said what
24 to whom when, and because there is no other event that
25 really has to happen to determine whether the fraud

1 occurred, I don't -- I think this is a situation that is
2 eminently ripe for judicial resolution.

3 QUESTION: But that's not how it goes with
4 declaratory judgments. The question is, how imminent is
5 it that you are going to be hurt by what happened? It's
6 not, does anything more have to happen.

7 MR. YOKICH: I think that that goes to the issue
8 of whether a judgment would fix the legal rights of the
9 parties, and I think that a judgment would fix the legal
10 rights of the parties, because --

11 QUESTION: But that doesn't sound -- I mean, you
12 can think of any kind of contract. Think of a landlord
13 and tenant. They want to settle what the contract means,
14 and so they bring this suit and the court will tell them
15 and they can go on. Declaratory -- there has to be,
16 especially in the Federal courts, a case or controversy,
17 so you can't just have this iffy, something happened then,
18 and it may ripen into an adversary concept later.

19 MR. YOKICH: Well, I think that the parties in
20 this case are in an adversary contest. We say there was
21 fraud, they say there wasn't any fraud. We say the
22 contract's not enforceable, they say the contract is
23 enforceable, and I think the fact that we didn't write
24 them a letter before we filed the lawsuit, that we let the
25 lawsuit be our indication that we thought the contract

1 could be rescinded, I think that's sufficient to put us in
2 a posture where we are adverse and where the decree could
3 be meaningful.

4 If the decree did issue, if the court were to
5 hold this contract could be rescinded, then what would
6 happen was that the parties would say, boy, we'd better go
7 back to the bargaining table and try to remedy this
8 problem, and so the decree that the court would issue
9 would give concrete legal guidance to the parties.

10 QUESTION: You don't -- you're not going so far
11 as to contradict, however, the assertion that you have not
12 threatened to violate the contract? Have you positively
13 threatened to violate the contract?

14 MR. YOKICH: We -- I don't think I --

15 QUESTION: The alleged contract, I suppose I
16 should say.

17 MR. YOKICH: Right. The only place where we
18 have said that we think the contract is void is in the two
19 legal proceedings, in the legal proceeding before the NLRB
20 and in the legal proceeding before the district court.
21 We've not otherwise made that threat.

22 QUESTION: I have understood your position to be
23 that you do not need to allege a threatened violation of
24 the contract in order to establish the jurisdiction you
25 seek in this case.

1 MR. YOKICH: That is our --
2 QUESTION: I really think that's your position.
3 MR. YOKICH: We don't -- I don't think we have
4 to go that far.
5 QUESTION: In other words, this case doesn't
6 turn on an estimate of probabilities of how much
7 likelihood there was of a strike. You think basically you
8 should just go in cold and say, we want to know whether
9 we're bound by the contract or not.
10 MR. YOKICH: On an issue of this nature --
11 QUESTION: Yes.
12 MR. YOKICH: -- where it's solely determined
13 by --
14 QUESTION: Set aside the entire contract.
15 MR. YOKICH: -- historical fact, I would say
16 yes.
17 QUESTION: Well, what if you have a landlord-
18 tenant dispute, and say a Maryland lawyer is renting an
19 apartment from a Virginia lawyer, and they've signed a
20 lease, and right after they sign the lease the Virginia
21 lawyer sues the Maryland lawyer in Federal district court
22 and says, we just want to -- I want to know whether this
23 is a binding contract or not, and the Maryland lawyer
24 says, I do, too, and we'll just avoid future disputes. Is
25 that justiciable?

1 MR. YOKICH: I don't think it's justiciable
2 absent some claim that the contract was not binding and
3 absent all of the facts necessary for a court
4 determination on that claim existing, and so just a naked
5 claim, we want to know whether it's enforceable, is not
6 enough.

7 If there was a claim that there was no meeting
8 of the minds, or that the figure in the contract for rent
9 was the wrong figure, I think that is justiciable.

10 QUESTION: Yes, but the distinction here is, I
11 don't think there's any doubt that if the statute clearly
12 covered your case there would be Article III jurisdiction.
13 Having an interest in knowing whether there's a good
14 contract is sufficient to give you standing. The question
15 is whether it comes within the scope of this particular
16 statute.

17 MR. YOKICH: I think that's right, and that's
18 why I think it's important that when you construe the word
19 for, that you construe it as meaning concerning, and that
20 when you look at what are the issues the Federal courts
21 have looked at with respect to concerning, you see the
22 whole --

23 QUESTION: It seems to me if you construe the
24 word for as meaning concerning that doesn't get over the
25 principal hurdle as to whether there's a violation.

1 MR. YOKICH: Well, I -- what we're asking for is
2 a declaration that the contract's not enforceable, that if
3 we commit a breach, that it's not a violation, and I would
4 argue to the Court that we've done all we need to do to
5 indicate to the other side that we think that there's a
6 substantial issue that we disagree with them on with
7 respect to whether or not we can violate the contract.

8 QUESTION: You agree, don't you, Mr. Yokich,
9 that the Declaratory Judgment Act doesn't expand any
10 jurisdiction. It just applies where there is
11 jurisdiction.

12 MR. YOKICH: That's correct, Your Honor, and
13 it's a procedural device that let's a person who expects
14 that they will be a defendant get into court first to get
15 a declaration so that they don't have to risk the
16 consequences of a breach.

17 In this type of situation, I think where you
18 have very large consequences from a breach, where you have
19 an impact on the employer if there's a strike, where you
20 have an impact on the union, and where you could have
21 very, very substantial impacts on the membership of the
22 union, it's entirely appropriate to not put the union to
23 the point where it has to say, this is void or we're going
24 on strike tomorrow.

25 QUESTION: Do you think you could have gone into

1 State court?

2 MR. YOKICH: No.

3 QUESTION: Why not?

4 MR. YOKICH: Because our view of section 301 is
5 that it creates a complete jurisprudence of section 301.

6 QUESTION: Well, what do you do with the Dowd
7 Box case?

8 MR. YOKICH: Well, I -- let me step back for a
9 second. We could have gone into State court, but it would
10 have been under section 301 and it would have been limited
11 to whatever this Court would hold --

12 QUESTION: Well, why would it have been under
13 section 301?

14 MR. YOKICH: Excuse me?

15 QUESTION: I say, why would it have been "under
16 section 301" when section 301 is a grant of jurisdiction
17 for Federal courts?

18 MR. YOKICH: Well, what the Court held in AVCO
19 was that a State court breach of contract claim was
20 something that arose under section 301 and was therefore
21 removable, and as a consequence, if you go into State
22 court on a breach of contract claim it's going to be
23 determined by the same standards that this Court uses
24 under section 301.

25 QUESTION: Well, but if it isn't covered by

1 section 301, it's not removable, I would suppose.

2 MR. YOKICH: Well, and I think that reading Dowd
3 Box and AVCO together means that if it relates to a
4 collective bargaining agreement, that you use the Federal
5 law under section 301. You can use it in either Federal
6 or State court, but if one party wants to remove, then
7 you're in Federal court.

8 QUESTION: Even though there's no 301
9 jurisdiction?

10 MR. YOKICH: Well, in the case -- you see, and I
11 guess that --

12 QUESTION: That would have to rank as one of --

13 MR. YOKICH: --that goes to the point that
14 they're making in this case.

15 QUESTION: One of the less plausible arguments,
16 it seems to me.

17 QUESTION: Of course, you're going to have to
18 discuss sooner or later whether one reason you couldn't go
19 into State court would be because of Garmon preemption,
20 which at least they say applies here, too.

21 MR. YOKICH: Well, our position on that is that
22 their analysis of section 301 doesn't really do a very
23 good job of explaining how that would work, and that's
24 because presumably if you went into State court you'd be
25 governed by State rules of procedure, and you could have a

1 State Declaratory Judgment Act that was broader or
2 narrower than the Federal Declaratory Judgment Act in
3 terms of what types of violations you could bring before
4 the court.

5 And if that's the case, if section 301 is less
6 than complete in terms of the jurisdiction it gives the
7 courts over issues of contract enforceability, you have a
8 situation where you could have State court actions that
9 are entirely undermining the principle of uniformity under
10 section 301.

11 Now, if -- and you know, their argument doesn't
12 account for many different things. It doesn't account for
13 what happens if it's a permissive subject and the board
14 concededly has no authority whatsoever, Garmon preemption
15 couldn't apply in that case, and it also doesn't account
16 for the fact that there are some contract formation issues
17 that might not get you in front of the board.

18 QUESTION: Well, maybe Congress wasn't perfect.

19 QUESTION: Garmon talks about arguably, you
20 know, and from what you both said to me, I think it's at
21 least arguable the board could fashion a remedy for fraud
22 in the inducement of a contract on a permissive subject of
23 bargaining.

24 MR. YOKICH: Well, and our position on that is
25 that so long as the court can find section 301

1 jurisdiction we would continue to live in this world where
2 we have concurrent remedies.

3 QUESTION: So your argument does lead to the end
4 result that there would be many, many more cases of
5 overlap of board jurisdiction and court jurisdiction than
6 has been thought up to now.

7 MR. YOKICH: I don't think so, Your Honor, and
8 that's because we've had declaratory judgments in the
9 Federal courts in labor cases for over -- for almost 40
10 years now. The first reported case that I can find is the
11 Black and Clawson case in 1962, and --

12 QUESTION: I'm not talking about declaratory
13 judgment cases. I'm talking about parallel proceedings.

14 I mean, you made a complaint to the regional
15 council first, right?

16 MR. YOKICH: To the regional director, yes.

17 QUESTION: One whole year, so couldn't what you
18 have done be replicated by many other unions in this
19 situation, that is, go to the board, they're moving too
20 slowly, come to court?

21 MR. YOKICH: Well, if you look at the circuits
22 where the courts have acknowledged that lawsuits like this
23 one can go forward, I don't think you can find any
24 evidence that there are dozens and dozens and dozens of
25 cases where the parties are exercising both --

1 QUESTION: How many cases are there like this
2 one that said the union, on what would be a defense, can
3 come in and get a 301 --

4 MR. YOKICH: Well, the Tenth in McNalley, the
5 Ninth in Rozay's and in Wilson, the First has hinted at
6 that in a recent case, but the Seventh would almost
7 certainly say it.

8 The Third would, and the Second Circuit would
9 also say it, too, under Black and Clawson and Kozera and
10 Messenger, which means I think in the majority of places
11 we already have the potential that they're talking about,
12 and it's hard to identify a great number of cases going
13 into the court that deal with these types of issues.

14 QUESTION: Why wouldn't the employers do the
15 same, though? If -- why hasn't it happened whenever an
16 employer faces a weak union that isn't going to strike, it
17 sues to have the whole collective bargaining contract set
18 aside as invalid?

19 MR. YOKICH: Well --

20 QUESTION: And they had all these things run
21 right into Federal court, and they're deciding the
22 validity of all the collective bargaining agreements?

23 MR. YOKICH: Well, again, in terms of the
24 affirmative -- in terms of employers doing this I think
25 the same analysis applies, because I think we've had

1 concurrent jurisdiction over these types of contract
2 formation issues for many years in many places, and we
3 haven't seen this. I guess --

4 QUESTION: That isn't something that bothers
5 you, or the board --

6 MR. YOKICH: Well, it doesn't bother me in this
7 case.

8 QUESTION: No -- well -- what -- as a labor
9 lawyer --

10 MR. YOKICH: It might bother me in Mack Trucks,
11 but --

12 QUESTION: -- does it bother you that if you win
13 in this case I guess the employers would have a perfectly
14 valid legal right to challenge whatever collective
15 bargaining agreement they felt was invalid as a matter of
16 contract law?

17 MR. YOKICH: Well, I think that because --

18 QUESTION: Then you go into the court, not the
19 board.

20 MR. YOKICH: -- in most places that's already
21 possible. We've accepted the, sort of the run of the
22 courts in that, and as a consequence we want to establish
23 the proposition that it can be used affirmatively as well,
24 and that is what we're trying to do here.

25 I think the best answer to this argument is in

1 the Third Circuit where the decision in Mack Trucks came
2 down 10 years ago, where it's a decision that's pretty
3 closely on point and correctly decided, and where you
4 really don't see a lot of these cases arising.

5 One case came up recently called the Beverly
6 case, and the Third Circuit didn't have any problem in
7 saying, in that case, because all the --

8 QUESTION: Thank you, Mr. Yokich. Your time has
9 expired.

10 Mr. Dyk, you have 3 minutes remaining.

11 REBUTTAL ARGUMENT OF TIMOTHY B. DYK

12 ON BEHALF OF THE PETITIONER

13 MR. DYK: Just briefly, Mr. Chief Justice, if
14 you look at the complaint that was filed in this case,
15 which is pages 16 to 19 of the joint appendix, and
16 particularly to paragraphs 5 through 10, which are the
17 operative paragraphs, you can see quite clearly that the
18 theory of this complaint is a failure to supply
19 information in response to the union's request.

20 This is at the heart of the board's expertise
21 and the board's jurisdiction, determining when there is an
22 obligation on the part of the employer to supply
23 information to the union.

24 The union has admitted in its brief that board
25 law must apply to this proceeding, so we suggest that in

1 terms of the substantive rules, there's an exact parallel
2 here between the complaint theory and the board theory,
3 and Justice Stevens, I don't know of a lot of cases where
4 the board has addressed misrepresentations in the context
5 of permissive bargaining, but there's no reason as a
6 matter of theory that that shouldn't be the case.

7 And if one looks at the brief filed by the
8 United States here, the United States does not suggest
9 that there's any gap in the jurisdiction of the board with
10 respect to this particular case. They make very clear
11 that the board can invalidate contracts, make employees
12 whole -- there's an absolute identity of the theories that
13 can be brought before the board and the relief that can be
14 gotten from the board, and the board was set up by
15 Congress to determine what relief should be granted under
16 these circumstances.

17 Sometimes it will be invalidation of the whole
18 contract or, as here, a part of the contract, and it's
19 that kind of discretion, that kind of expertise which the
20 board has and the courts don't have and is a primary
21 reason why this Court should not permit the Federal courts
22 to, in essence, adjudicate unfair labor practices that
23 otherwise would come before the board.

24 QUESTION: Can the board award damages, which is
25 one of the things they sought here?

1 MR. DYK: Oh, yes. In fact, the board
2 settlement awarded back pay damages and the United States
3 in its brief acknowledged that the board can award these
4 kinds of damages.

5 Thank you.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Dyk.

7 The case is submitted.

8 (Whereupon, at 11:00 a.m., the case in the
9 above-entitled matter was submitted.)

CERTIFICATION

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The United States in the Matter of:

TEXTRON LYCOMING RECIPROCATING ENGINE DIVISION, AVCO CORP.,
Petitioner v. UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA, INTERNATIONAL UNION AND LOCAL
787

CASE NO: 97-463

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

BY Don Mari Fedirico-----

(REPORTER)