

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: NAOMI MARQUEZ, Petitioner v. SCREEN ACTORS
GUILD, INC., ET AL.

CASE NO: 97-1056 c-1

PLACE: Washington, D.C.

DATE: Monday, October 5, 1998

PAGES: 1-57

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY

OCT 14 1998

Supreme Court U.S.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'98 OCT 13 P4:19

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 NAOMI MARQUEZ, :

4 Petitioner :

5 v. : No. 97-1056

6 SCREEN ACTORS GUILD, INC., :

7 ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Monday, October 5, 1998

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:07 a.m.

14 APPEARANCES:

15 RAYMOND J. LaJEUNESSE, JR., ESQ., Springfield, Virginia;
16 on behalf of the Petitioner.

17 LEO GEFFNER, ESQ., Burbank, California; on behalf of the
18 Respondents.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	RAYMOND J. LaJEUNESSE, JR., ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	LEO GEFFNER, ESQ.	
7	On behalf of the Respondents	30
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (11:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 97-1056, Naomi Marquez v. Screen Actors
5 Guild.

6 Do not talk until you get out of the courtroom.
7 The Court remains in session.

8 Mr. LaJeunesse.

9 ORAL ARGUMENT OF RAYMOND J. LaJEUNESSE, JR.

10 ON BEHALF OF THE PETITIONERS

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

13 This case presents three issues under the
14 National Labor Relations Act. First, does a union breach
15 its duty of fair representation by negotiating a contract
16 that falsely tells employees they must be union members
17 and pay full dues to keep their jobs when this Court has
18 held, and the union concedes, that neither of those
19 requirements may lawfully be enforced?

20 The second question is whether the National
21 Labor Relations Board has exclusive jurisdiction over a
22 performer's claim that the Screen Actors Guild, or SAG,
23 breached its duty of fair representation by negotiating a
24 contract that misinforms performers who have been employed
25 in the motion picture industry for 30 days or more that

1 they must meet their union obligations under a union
2 security clause immediately upon hire by any employer in
3 that industry.

4 And third, is the employer a necessary party in
5 this case because the plaintiff employee is seeking
6 reformation of the misleading contract provisions?

7 I will submit the last issue on the briefs today
8 and only address the first two issues, because neither the
9 union nor the employer has opposed our arguments on the
10 third issue. Of course, I'll be glad to answer any
11 questions that the Court has throughout any of the three
12 issues.

13 The first question is whether this contract
14 breaches the duty of fair representation on its face,
15 because it says that more is required of employees as a
16 condition of employment than can lawfully be required.

17 QUESTION: Well, the contract was written in the
18 language of the statute, I gather.

19 MR. LaJEUNESSE: That is correct, Your Honor.
20 It was --

21 QUESTION: And the statute doesn't make it all
22 that clear itself, but I guess there's a judicial gloss on
23 it.

24 MR. LaJEUNESSE: That's my point, Your Honor.
25 This Court --

1 QUESTION: And why shouldn't the employee assume
2 the judicial gloss is there? I mean, why does it have to
3 be spelled out in the contract?

4 MR. LaJEUNESSE: To put it simply, Your Honor,
5 the employee is not a lawyer. A lawyer can be expected to
6 determine what the judicial gloss on the statute is,
7 but --

8 QUESTION: What other portions of the contract
9 that are very intricate have to be spelled out for the
10 employee? I mean, is that the obligation of the union, to
11 make every provision of a contract that affects the
12 employee clear to the employee? My goodness.

13 MR. LaJEUNESSE: No, Your Honor.

14 QUESTION: Well, where do we draw the line?

15 MR. LaJEUNESSE: We draw the line at the union
16 security clause, because that is the only provision of the
17 contract as to which the interests of the individual
18 employee are adverse, and as to which the union has a duty
19 to inform employees truthfully and fully as to what their
20 rights and obligations are.

21 QUESTION: Well -- go on.

22 QUESTION: NO --

23 QUESTION: Go on --

24 QUESTION: But isn't the fact that the union can
25 do so other than by putting an express gloss on the

1 contract language, or changing the language of the
2 contract, a sufficient response to the problem that you
3 raise?

4 MR. LaJEUNESSE: I don't believe so, Justice
5 Souter, because the contract is the basic law of the shop.

6 QUESTION: No, but the fact is, the employee is
7 quite un -- is far less likely to read the contract than
8 to have contact with union representatives, who have, as
9 you acknowledge, an obligation to explain, in fact, what
10 those terms mean and what the employee's real obligation
11 is, so it seems to me that you're arguing for a formality
12 which the average employee is likely, unlikely even to
13 take notice of.

14 MR. LaJEUNESSE: I don't believe that I'm
15 arguing for a formality, Your Honor. I believe that, as
16 this Court held in Beck and has held in other cases, the
17 union has a duty to act fairly with regard to all
18 employees in the bargaining unit both in negotiating the
19 contract and in enforcing it and --

20 QUESTION: What does that say with negotiating
21 the contract?

22 I wasn't aware that Beck -- if Beck said that
23 there has to be in the contract this clause that you're
24 urging there would be nothing to argue about, but my
25 understanding is that the contract not only reflects the

1 language of the statute but the NLRB's -- what it was --
2 is it Keystone Coat, or whatever it is, their model
3 clause.

4 And the NLRB still hasn't gotten around to
5 replacing that model clause, so whatever else this is, how
6 can it be a violation of the duty of fair representation
7 to keep in the contract what the NLRB and the statute say
8 is okay, as long as the union notifies anyone who doesn't
9 want to be a member that, right, you don't have to be a
10 member?

11 MR. LaJEUNESSE: There are two points to your
12 question, Your Honor.

13 First, you say that the National Labor Relations
14 Board hasn't replaced it. It's true that the board hasn't
15 replaced it, but in Electronic Worker's Local 444 in 1993,
16 more than a year before SAG negotiated this contract with
17 this employer, the board overruled the Keystone Coat
18 clause, saying that it was, in fact, ambiguous and would
19 have the effect of misleading employees.

20 And secondly, with regard to the statute itself,
21 the statute is not just what the statute says, after this
22 Court has authoritatively interpreted it and placed a
23 judicial gloss on it, which as Judge Posner and the
24 Seventh Circuit said actually inverted the meaning of the
25 statute. The employee isn't going to know what that

1 statute means. The contract would say --

2 QUESTION: Well, Mr. LaJeunesse --

3 MR. LAJEUNESSE: -- go read the statute, and
4 they'd still be misled.

5 QUESTION: Suppose -- suppose the contract had
6 been written with all the complicated things you want in
7 there, so that she would have had to come up with, what,
8 \$485 instead of \$500 to join the union, she still wouldn't
9 have gotten the job, because she didn't have the money.
10 How was she injured by the contract?

11 MR. LAJEUNESSE: Well, she was injured because
12 the casting agent in this case enforced the contract as it
13 was written, saying, you are not going to work tomorrow if
14 you don't pay the full amount demanded by the union by
15 5:00 this afternoon.

16 QUESTION: Yes, the point is, I guess -- you say
17 the correct amount would have been \$485 instead of \$500 and
18 the contract could have made that clear, but she didn't
19 have \$485 either, so she still wouldn't have gotten the
20 job. How did the contract hurt her, even if it had been
21 written as you want it written?

22 MR. LAJEUNESSE: Well, there are two answers to
23 that question, Your Honor.

24 Number 1, under this Court's Hudson decision the
25 union would have had to give her notice of the reduced

1 amount and an opportunity to object to its calculation,
2 which would have been some period of time, typically 30
3 days. By that time she would have done the job and she
4 would have been paid by the employer, and then she could
5 have paid the union.

6 In fact, she was willing, as she testified, I
7 believe at her deposition, that she would have signed an
8 agreement --

9 QUESTION: Regulatory lag would have saved her.
10 Is that --

11 MR. LaJEUNESSE: Correct, Your Honor. That's
12 the first answer.

13 And the second answer is that this contract is
14 in a -- as the union makes a big point of in its brief, in
15 a standard form contract that it uses with all employers,
16 so Marquez is going to face this problem every time she
17 goes to audition for a new job on a SAG-covered
18 production, and she --

19 QUESTION: Yes, but that's because of the 30-
20 day problem, not because of the Beck problem.

21 MR. LaJEUNESSE: Well, it's because of all of
22 the problems, Your Honor. She shouldn't have to retain an
23 attorney every time she goes to an audition.

24 QUESTION: Well, I think Justice O'Connor's
25 question was addressed to the Beck problem and saying,

1 given the fact that she could not, in fact, have satisfied
2 the obligation even if Beck had been applied in the
3 drafting of the contract, as you say it should be, where
4 is her harm? I think it was a Beck question.

5 MR. LaJEUNESSE: Well, if you focus only on the
6 Beck problem, but if you look at all of the aspects in
7 which --

8 QUESTION: Well, let's focus on the Beck
9 problem, which is what I tried to get you to do but
10 failed.

11 MR. LaJEUNESSE: Well, I think I -- I thought I
12 answered the question, that the time lag --

13 QUESTION: I didn't understand it.

14 MR. LaJEUNESSE: -- that she would have been
15 allowed under this Court's decision in Hudson to challenge
16 that calculation would have given her time to do the job.

17 QUESTION: She wouldn't have challenged it
18 unless she had reason to challenge it, I assume. You
19 mean, she would have routinely challenged it, just for the
20 heck of it, just -- I mean --

21 MR. LaJEUNESSE: Well, I suspect --

22 QUESTION: -- gaming the system that way?

23 MR. LaJEUNESSE: No. I suspect that, Your
24 Honor --

25 QUESTION: Surely she wouldn't have done that.

1 MR. LaJEUNESSE: -- by this point, when the
2 union was -- whether -- as you know, there is a question
3 in the record as to whether the union -- Ninth Circuit
4 remanded for the district court to determine a disputed
5 issue of fact as to whether the union was, in fact,
6 demanding full membership, but there's no dispute over the
7 fact that they were demanding payment of full dues without
8 saying she had a right to --

9 QUESTION: It doesn't matter.

10 MR. LaJEUNESSE: -- a reduced amount under Beck.

11 QUESTION: But she couldn't afford \$485 any more
12 than she could afford \$500 I don't see how she's hurt, and
13 I don't think it's enough to say, well, she might have
14 protested it and bought herself a month. Well, she might
15 have. She might not have.

16 MR. LaJEUNESSE: Well, I believe she has --

17 QUESTION: I mean, it seems to me it's your
18 burden to show standing.

19 MR. LaJEUNESSE: Well, Your Honor, I believe she
20 does have standing to challenge this misleading language,
21 because that contract is going to be there, facing her
22 every time she goes to audition on a new SAG-covered job,
23 and the duty of fair representation, it seems to me, is
24 not met where an employee has --

25 QUESTION: Capable of repetition and --

1 MR. LaJEUNESSE: Correct, Your Honor.

2 QUESTION: Okay.

3 MR. LaJEUNESSE: The employee -- the duty of
4 fair representation is not met where the employee has to
5 hire an attorney to try to convince casting agents who are
6 reading the language of the contract that they should
7 apply the judicial gloss and not the actual terms of the
8 contract.

9 QUESTION: I don't understand the capable of
10 repetition. She knows now because you've talked to her
11 and she's read the briefs.

12 MR. LaJEUNESSE: She knows now, Your Honor, but
13 the casting agents at the point of hire who make these
14 decisions to hire or fire don't know and they, like the
15 casting agent in this case, look to the language of the
16 contract.

17 When Ms. Marquez' talent agent on the day before
18 the job was to be performed talked to the casting agents,
19 said, we have consulting an attorney, you are demanding
20 more than the law allows, the answer from the casting
21 agent was, we have a union contract, we have to apply that
22 contract as written, if she doesn't pay --

23 QUESTION: We though that language fairly meant
24 what Beck said. How can we criticize the union for
25 including the same language? I mean, it's sort of a dog-

1 in-the-manger thing for us to do.

2 It was we who said that the language means this
3 thing. Now you want us to say no, the language doesn't
4 mean this thing, and you should have explained what it
5 really means.

6 MR. LaJEUNESSE: No, I --

7 QUESTION: I mean, maybe you should ask some
8 other court to do that, but this Court --

9 (Laughter.)

10 QUESTION: This Court says that language means
11 this, and you now want us to say no, this language really
12 doesn't mean this, and you should have explained what it
13 does mean.

14 MR. LaJEUNESSE: I'm not sure I understand your
15 question, Your Honor.

16 What I'm asking this Court to do is say that the
17 judicial gloss should be in the contracts --

18 QUESTION: Why? Why? Mr. -- Mr. --

19 MR. LaJEUNESSE: -- as well as in the statements
20 that the union makes outside the contract.

21 QUESTION: But the fact that it's judicial gloss
22 means that it is in the contract. That's what the
23 judicial gloss is.

24 MR. LaJEUNESSE: As to the parties to the
25 contract --

1 QUESTION: Right.

2 MR. LaJEUNESSE: -- Justice Stevens, but not as
3 to the man in the street, the average employee in the
4 shop, the average shop steward --

5 QUESTION: But is there any allegation that
6 anybody misled her as to what it meant? I mean, did the
7 union ever refuse to explain this, or anything like that?

8 MR. LaJEUNESSE: They have an affirmative duty
9 to explain it. You don't have to ask a question. The
10 employee doesn't have to ask the question to trigger the
11 duty of fair representation.

12 QUESTION: But did she --

13 MR. LaJEUNESSE: The duty of fair representation
14 is a positive one that the union has to perform even if
15 the employee might fortuitously discover what their rights
16 really are from some other source.

17 QUESTION: The notice question --

18 QUESTION: But where would they have -- well --

19 QUESTION: -- is a different one, isn't it? The
20 question of -- and there's been a lot of litigation on
21 that, too, and there's no doubt that the union has to give
22 fair notice and an opportunity to do all that.

23 So I go back to the question that was raised
24 earlier. Is this all the most formal objection? I mean,
25 everybody agrees on the substance of the union's

1 obligation. It must notify workers that they don't have
2 to join the union and they have to pay only for collective
3 bargaining-related things. Everybody agrees that's the
4 obligation.

5 The only question is, must they put it in the
6 contract, and I think we can all agree that most people
7 don't read the collective bargaining contracts, but they
8 will read the union's newsletter that will say it ought to
9 pay the full dues.

10 MR. LaJEUNESSE: I think it's clear from this
11 case and from other cases that the fact that the
12 misleading in the contract does result in people being
13 affirmatively misled.

14 QUESTION: Well, but --

15 MR. LaJEUNESSE: Buzenius --

16 QUESTION: By the union, or by here -- you said
17 it was the person at the employer's place.

18 MR. LaJEUNESSE: Well, in other cases it's been
19 by the union officials. In, for example, the Buzenius and
20 the Bloom cases where --

21 QUESTION: But here there was nothing -- the
22 only thing that you allege that the union did is, it
23 copied the statute into the contract. You don't allege
24 any misleading on the part of the union.

25 MR. LaJEUNESSE: But they knew when they copied

1 the language of the contract -- of the statute into the
2 contract that it could not be enforced as written.

3 What justification is there for not putting it
4 in the contract with the judicial gloss, which is very
5 simple to do?

6 QUESTION: The where will it end -- the where
7 will it end argument is a persuasive one for me. If I
8 start having to interpret everything in the contract so
9 that a nonlawyer can figure out what it means, you know,
10 I'll be here all night.

11 QUESTION: What will happen to the legal
12 profession. The --

13 MR. LaJEUNESSE: It will end -- it will end with
14 the union security clause, Your Honor, because that's the
15 only case in which the union has a self-interest in
16 misleading employees. All other aspects of the contract
17 are cases where the interests of the union and the
18 employees are coincident. Here they are contrary.

19 QUESTION: It might -- I think this principle
20 that you should write all these things so that people who
21 aren't lawyers can understand them may be a helpful
22 principle, but I think it might be precatory. It might
23 not be the law, all right.

24 If I think that, so that you still can have
25 terms of arts in contracts, I'm still stopped by Justice

1 O'Connor's question, and I want to be absolutely clear,
2 because it sounds to me as if your answer is, there is no
3 answer.

4 Now, I take it her question was, how was
5 Mrs. Marquez hurt, and as far as I could tell, looking
6 through this, you have lots of testimony that the reason
7 that she couldn't join in any forum is she didn't have the
8 \$500.

9 You also have testimony in the record that her
10 agents fully understood that. They understood the
11 difference between core membership and noncore membership,
12 and you have no evidence in the record to the contrary.

13 Now, if that's the state of the record, then how
14 could anybody say that this particular argument you're
15 making, the fact that she'd have to pay \$500, or \$480
16 rather than \$500, is an interesting argument, but really
17 has nothing to do with this case as far as Mrs. Marquez.

18 I take it that was Justice O'Connor's question.
19 I'm just being repetitive, but I want to be absolutely
20 certain that there is no answer to it before I think that
21 that's what you've said.

22 MR. LaJEUNESSE: Well, I had two answers to
23 Justice O'Connor's question. One was the fact that, as
24 Justice Scalia described, the bureaucratic --

25 QUESTION: Lag.

1 MR. LaJEUNESSE: -- lag would have given her an
2 opportunity to earn the money to be able to pay the
3 reduced --

4 QUESTION: Well, I know -- I -- yes.

5 MR. LaJEUNESSE: My second point was that this
6 is a contract provision that Ms. Marquez has to face every
7 time she auditions for a job on a SAG-covered production.

8 QUESTION: We can count on the fact that she's
9 going to be without 500 bucks for the rest of her life?

10 (Laughter.)

11 MR. LaJEUNESSE: No, but we -- Justice Scalia,
12 we can count on the fact that the likelihood is there that
13 casting agents will continue to rely on the misleading
14 language of the contract because they do not know the
15 judicial gloss.

16 QUESTION: No, but you have said -- I think you
17 have said in the course of your argument that the union
18 failed in the responsibility which you've characterized as
19 an affirmative responsibility to advise her about what her
20 rights were. You did say that, didn't you?

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

22 QUESTION: Okay. Number 1, you could have
23 raised that as an allegation and we'd have a very
24 different case here, wouldn't we?

25 We wouldn't be worrying about the contract

1 QUESTION: No, but what you're saying what's
2 wrong here is that the casting agent is going to give her
3 the wrong information.

4 It's going to say, you're obligated to become a
5 full member, and the answer to that is, the union has an
6 affirmative obligation to tell her that she doesn't have
7 to do that, so that isn't the answer to your answer to
8 Justice Scalia simply the recognition that the union
9 presumably, in the absence of evidence to the contrary,
10 will not refuse every single time to fulfill its
11 obligation?

12 QUESTION: Or she could just read the pleadings
13 in this lawsuit.

14 QUESTION: Do those --

15 MR. LaJEUNESSE: But I have to return to what
16 this Court held in Beck, and that is that the union has a
17 duty of fair representation both in negotiating and
18 enforcing the union security clauses to ensure that
19 employees are not misled as to their rights.

20 And what possible justification is there for
21 negotiating a contract that states the bare, misleading
22 language of a statute when there is a easily described
23 judicial gloss out there that could be put in the contract
24 and avoid all of these problems.

25 QUESTION: Well, as to the future --

1 language. We would be worrying about the union's failure
2 to perform the obligation that you say it has.

3 MR. LaJEUNESSE: Well, we did --

4 QUESTION: So you could have brought a different
5 case, couldn't you?

6 MR. LaJEUNESSE: Well, we did bring that case,
7 Your Honor, and the Ninth Circuit sent that back to the
8 district court for the district court to determine whether
9 the union failed in its duty, in its statements outside
10 the collective bargaining contract.

11 QUESTION: Okay. So that --

12 MR. LaJEUNESSE: The case here is whether -- the
13 facial language of the contract.

14 QUESTION: That may be your avenue, but doesn't
15 it also point to the problem -- to the -- your answer to
16 the standing problem, and that is, you said to Justice
17 Scalia, every time she looks for a job the casting agent
18 is going to hold up this contract.

19 But that assumes that the union is going, every
20 time when she inquires, to fail to tell her what she
21 really has to do, i.e., tell her that she can get by with
22 \$480 rather than \$500, and we can't make that assumption,
23 can we?

24 MR. LaJEUNESSE: We can't make that assumption,
25 but we know --

1 QUESTION: Well, may I ask --

2 QUESTION: -- the justification is that, a) she
3 knows what the judicial gloss is, and b) there's no
4 indication that the union won't give the same information
5 to the casting agent, so it's not likely to recur.

6 MR. LaJEUNESSE: Well, I don't -- that's an
7 assumption I think we cannot make on this record, Your
8 Honor. I -- I --

9 QUESTION: Well, is there an affirmative
10 allegation on her part that she did not know what the
11 contract meant?

12 MR. LaJEUNESSE: No. The allegation is that she
13 was not informed what her rights were. She found out --

14 QUESTION: But maybe she didn't have to be,
15 because she already knew, as far as the --

16 MR. LaJEUNESSE: No, she didn't already know,
17 Your Honor. She found out fortuitously because her talent
18 agent had had a problem in the past and referred her to an
19 attorney because the talent agent thought there was a
20 problem here.

21 But the duty of fair representation surely does
22 not put the onus on the employee. It puts it on the
23 union.

24 QUESTION: Mr. LaJeunesse, I've got a question
25 about, this duty of fair representation starts out as a

1 rather heavy concept, race discrimination by the union,
2 and now we're talking about what has to be in the contract
3 as opposed to the substance of the allegation we know, and
4 it seems to me to say this is a question of violation of a
5 duty of fair representation.

6 Instead of saying, this is arguably an unfair
7 labor practice, it should be -- go to the board and then
8 be reviewed by the courts, instead of rushing into court
9 with, this is the union's really bad act, it violated the
10 duty of fair representation, when it's -- when the piece
11 of this that we're concerned with is just what's in the
12 contract, not conduct, deceptive conduct by the union,
13 just what's in the contract.

14 MR. LaJEUNESSE: Well, that defense was raised
15 by the union in Beck, Your Honor, and this Court said in
16 Beck that the union, in negotiating the contract or
17 enforcing it, had breached the duty of fair representation
18 by requiring more than is permitted by section 8(a)(3),
19 and that because it's a duty of fair representation claim,
20 it belongs in court. It is not preempted.

21 Now, the Ninth Circuit recognized that with
22 regard to the claim that what -- that the union
23 misrepresented what Ms. Marquez' obligations were and
24 litigated that and decided that issue, and it's now before
25 this Court.

1 The Ninth Circuit, however, said that the claim
2 with regard to the 30-day employment in the industry
3 clause was preempted and subject to the board's exclusive
4 jurisdiction.

5 There is no logical reason, as Chief Judge
6 Posner of the Seventh Circuit held in Wegscheid, for
7 distinguishing between statements in the agreement and
8 statements outside the agreement.

9 QUESTION: It's -- that's exactly -- just what
10 Justice Ginsburg asked is what I find a very difficult
11 question, and why I'm -- that's just what you're about --
12 let me flag specifically the language in Beck.

13 Just after the sentence you said, they go on to
14 say, employees, of course, may not circumvent the primary
15 jurisdiction of the NLRB simply by casting statutory
16 claims as violations of the union's duty of fair
17 representation.

18 And what I was having difficulty with in
19 thinking of that second issue in this case is, how do you
20 distinguish where that sentence does or doesn't apply?

21 I mean, after all, any claim that the union has
22 violated the labor act, you could find some employee to go
23 in and say, they violated the labor act and, moreover, it
24 violates the duty of unfair representation. There would
25 be no primary jurisdiction left.

1 MR. LaJEUNESSE: I don't --

2 QUESTION: Once we accept that, then what can
3 the employee complain about? How do we draw that line?

4 There's no brief here by the board. I'm having
5 trouble understanding how to draw that line between when
6 you can and when you cannot, as an employee, assert in an
7 unfair labor -- you see the problem?

8 MR. LaJEUNESSE: I see the problem you're
9 posing --

10 QUESTION: All right. What's the answer? Thank
11 you.

12 MR. LaJEUNESSE: -- but I think the problem is
13 not as great as you believe it is, Your Honor.

14 The -- there is no problem, because the Court so
15 held in Beck, and the union concedes this, that where --
16 in its brief on page 43, I believe it is, that -- I think
17 it's page 43. Yes, it is -- that the duty of fair
18 representation is breached when the union misleads
19 employees about their rights under a union security
20 clause.

21 QUESTION: I'm talking -- I'm thinking about the
22 30-day problem.

23 MR. LaJEUNESSE: And they argue, well, if the
24 employee is misled about what their obligations are,
25 that's a breach of the duty of fair representation and

1 properly belongs in court, but somehow, if the union
2 misleads the employee about when their obligations begin,
3 that's not a breach --

4 QUESTION: No, no, it wasn't misleading. I'm
5 thinking of the particular claim, too, which I thought was
6 not a claim of misleading, but rather the claim that you
7 have to join after 30 days cannot be interpreted by the
8 guild as a claim that you have to join after 30 days of
9 work in the screen industry even if those 30 days took
10 place over a 2-year period for 30 different employers.

11 Now, I think your claim there was that that
12 violates the language, or the -- violates 8(a)(3).

13 MR. LaJEUNESSE: Well, our claim was, stated in
14 the complaint, stated in our motion for summary judgment,
15 argued in the Ninth Circuit, that the union breached the
16 duty of fair representation by misrepresenting when her
17 obligations lawfully began.

18 QUESTION: Well, the --

19 MR. LaJEUNESSE: It was a claim --

20 QUESTION: The contract refers to employment in
21 the industry, and you say the statute makes it clear it's
22 employment for that employer.

23 MR. LaJEUNESSE: Right, because the --

24 QUESTION: So that you say, as to the 30-day
25 thing, there was a clear violation of the statutory

1 requirement.

2 MR. LaJEUNESSE: Well, so is there under Beck.
3 It's -- there's a clear violation of the statute --

4 QUESTION: Well, we've dealt with that. Let's
5 not get back into Beck. Let's talk about the 30-day.

6 Now, as to the 30-day thing, who has
7 jurisdiction to decide that?

8 MR. LaJEUNESSE: Well, the courts and the board.

9 QUESTION: You think both.

10 MR. LaJEUNESSE: Both have jurisdiction.

11 QUESTION: And the Ninth Circuit thought no,
12 that it was primary jurisdiction of the board, I --

13 MR. LaJEUNESSE: The Ninth Circuit thought no
14 with regard to the question of, did the union mislead her
15 as to when her obligations began, but it said yes as to
16 what her obligations are, and I don't see any logical
17 distinction between the two claims.

18 Either both should be before the board, or both
19 should be before the courts under the duty of fair
20 representation, and this Court has already held in Beck
21 that claims concerning the what can be brought in court
22 and are not subject to the board's exclusive jurisdiction.

23 There's no reason, as the Seventh Circuit said,
24 to distinguish between claims of misrepresentation outside
25 the contract and those inside the contract.

1 In fact, here, the court below determined the
2 question of misrepresentation within the contract with
3 regard to the what, but not the when, and there --

4 QUESTION: Why isn't the when just a question of
5 incorrect interpretation of the legal requirement?

6 There's an argument that the law means 30 days,
7 particular employer, 30 days in the industry. That's an
8 argument about what the legal requirement is. Why does
9 that also become a violation of the duty of fair
10 representation?

11 MR. LaJEUNESSE: Well, it was also in Beck an
12 argument over what does section 8(a)(3) provide, and the
13 court said that the employee was stating a claim for
14 breach of duty of fair representation, and you have --

15 QUESTION: Well, the question is, what can you
16 turn -- what unfair labor practice can't you turn into
17 violation of the duty of fair representation, and it's

18 MR. LaJEUNESSE: I don't think you can --

19 QUESTION: -- hard for me to see what the line
20 is between them.

21 MR. LaJEUNESSE: You can't turn most of them
22 into breaches of the duty of fair representation, but you
23 can in the context of the union security clause because of
24 this affirmative duty the union has of informing employees
25 truthfully and honestly of what their rights and

1 obligations are.

2 QUESTION: Any -- let me sort of restate Justice
3 Ginsburg's question a little more narrowly.

4 Can you tell us any statutory obligations of the
5 union with regard to employees as opposed to rights and
6 obligations vis-a-vis the employer that cannot be recast
7 as a breach of the duty of fair representation?

8 MR. LaJEUNESSE: I don't follow your question,
9 Justice Scalia.

10 QUESTION: Can you think of any of the statutory
11 obligations of the union with respect to the members of
12 the union that could not be cast as a claimed failure of
13 the duty of fair representation?

14 MR. LaJEUNESSE: Your Honor, I have to look at
15 the specifics of a particular claim.

16 QUESTION: Well, just give me an example.

17 MR. LaJEUNESSE: But I --

18 QUESTION: Give me an example of one that
19 wouldn't be a duty of -- breach of the duty of fair
20 representation, obligation of the union towards its
21 members, or towards employees of the employer under the
22 statute, the union violates it, and yet it is not a breach
23 of the duty of fair representation.

24 What -- just give me one example, and I'll be
25 happy.

1 MR. LaJEUNESSE: The only duties that the union
2 has toward the nonmembers are the duty -- or, is the duty
3 of fair representation.

4 That's why I don't know how you get outside
5 that. The union has an obligation to represent the --

6 QUESTION: Oh, it has an obligation to represent
7 their causes fairly, given its other interests in
8 grievances and so forth. That would be a duty, the
9 violation --

10 MR. LaJEUNESSE: And if in performing those
11 duties the union acts arbitrarily, discriminatorily, or in
12 bad faith --

13 QUESTION: Right.

14 MR. LaJEUNESSE: -- then it has -- there is a
15 claim for a breach of duty of fair representation, and --

16 QUESTION: So you think, as I do, that any
17 breach of the union's duty towards its members or towards
18 other employees of the shop that it represents is a breach
19 of the duty of fair representation.

20 MR. LaJEUNESSE: And that's what this Court has
21 held, and it's justiciable in court, and not preempted by
22 the board's exclusive jurisdiction.

23 I see my time has expired. Thank you, Your
24 Honor.

25 QUESTION: Thank you, Mr. LaJeunesse.

1 Mr. Geffner, we'll hear from you.

2 ORAL ARGUMENT OF LEO GEFNER

3 ON BEHALF OF THE RESPONDENTS

4 MR. GEFNER: Mr. Chief Justice, and may it
5 please the Court:

6 I would like to pick up my argument in response
7 to Justice Ginsburg's question having to do with the
8 burden or the obligation of the duty of fair
9 representation, which started out as we know in the racial
10 discrimination that led into Vaca v. Sipes, involving
11 individuals, and into the O'Neill case, where the Court
12 addressed the question of what is a duty in the
13 negotiations of a collective bargaining agreement, which
14 is the issue in the Beck aspect of this case.

15 The factual determinations as to whether there
16 was a violation of the duty of fair representation
17 regarding notice to her, or information to her, has all
18 been remanded to the district court. The district court
19 on summary judgment found that there was no violation
20 based on the depositions in the discovery procedures, and
21 had granted summary judgment.

22 QUESTION: This is after the remand from the
23 Ninth Circuit?

24 MR. GEFNER: No. No, Your Honor.

25 QUESTION: Before?

1 MR. GEFNER: Before, yes. The Ninth Circuit
2 felt there were some factual issues that should be
3 resolved by the trial court, the district court, prior to
4 looking at a summary judgment. At least, there was a
5 number of facts to justify a summary judgment.

6 The test in negotiating the contract in terms of
7 the duty of fair representation is a very heavy one. The
8 O'Neill case very clearly stated, and the language is very
9 strong, that not only does the union action have to be
10 arbitrary, but in light of the factual and legal language
11 at the time of the union's action, the union's behavior is
12 so far outside the range of reasonableness so as to become
13 irrational conduct.

14 QUESTION: That was the case in Beck?

15 MR. GEFNER: This is the O'Neill case, Your
16 Honor.

17 QUESTION: No, no, but I mean, you think that
18 that description is a fair description of what happened in
19 Beck?

20 MR. GEFNER: Not at all, Your Honor.

21 QUESTION: No.

22 MR. GEFNER: No, of course not.

23 QUESTION: That was held to be a breach of the
24 duty of the union's duty of fair representation.

25 MR. GEFNER: That, Your Honor, I don't think

1 the -- the Beck case held, in my opinion that the duty of
2 fair representation was violated in terms of outside of a
3 statute.

4 8(a)(3) was used as a defense by the union,
5 which was rejected by the court, and the court said that
6 the duty was violated because it was a basic principle
7 that it's a violation to collect dues from a employee
8 under a union security clause that went for political
9 ideological --

10 QUESTION: Even when the statute says -- even
11 when the statute says you can require people to be members
12 of the union?

13 MR. GEFNER: Well, there was a vigorous defense
14 in the Beck case, as Your Honor well knows, yes.

15 QUESTION: But I'm just saying --

16 MR. GEFNER: That case --

17 QUESTION: -- your description of what our case
18 law says is necessary --

19 MR. GEFNER: Yes.

20 QUESTION: -- for a duty of -- violation of a
21 duty of unfair representation is simply not accurate, when
22 you -- when you take account of Beck, as you must.

23 MR. GEFNER: Well, Your Honor, Beck did not
24 address itself to the negotiations or the language or the
25 contract. In fact, we would argue that the Beck case

1 implied that the contract was valid, and that it was the
2 implementation in terms of the collection of excessive
3 amount of dues was where the violation occurred, and that
4 has to do with the implementation of the clause, the
5 security clause, not as to the language, not as to the
6 negotiations.

7 That is where this burden that this describes
8 comes into play, and we would argue that if you take this
9 standard of irrationality, or beyond the range of
10 reasonableness, then how can it be unreasonable, how can
11 it be irrational for the union to negotiate a clause that
12 is traces and tracks almost word for word the statute of
13 8(a)(3)?

14 QUESTION: Well, it didn't track the statute on
15 the 30-day provision, did it?

16 MR. GEFNER: That is a different question --

17 QUESTION: Yes.

18 MR. GEFNER: -- Justice O'Connor. I believe
19 that is a different question. That -- unless you want me
20 to address that part of the case, but I would --

21 QUESTION: It's that part of the case that I'm
22 finding the most difficult part, because I don't know what
23 the -- you, in your brief, take an opposite position, and
24 it seems like a very important question, about when and
25 under what circumstances a simple statement of a worker

1 that the union has violated its duty of fair
2 representation gets that worker into court, where what is
3 alleged is that the collective bargaining agreement has a
4 term in it that violates section 8(a)(3).

5 MR. GEFNER: Yes.

6 QUESTION: It's not a claim -- it's saying that
7 there -- and that's what they're arguing there, isn't it?

8 MR. GEFNER: Yes.

9 QUESTION: All right. Well --

10 MR. GEFNER: Right.

11 QUESTION: -- what's the standard --

12 MR. GEFNER: Well --

13 QUESTION: -- that seems to by and large say
14 that the worker gets into court simply by saying, violates
15 the duty of fair representation, but there's a sentence
16 that I read that suggests that under some circumstances
17 you can't get into court because to do so would destroy
18 Garmon. It would destroy the primary jurisdiction cases.

19 Now, what I'm lacking is the standard to
20 distinguish the first from the second.

21 MR. GEFNER: Well, I --

22 QUESTION: And it seems important -- maybe it
23 isn't for some reason, and I'm not an expert on labor law.

24 MR. GEFNER: Well, I think it's very important,
25 Your Honor, and the standard is a very difficult one, but

1 the Beck case, as you may recall, a theory of the
2 plaintiff in the Beck case was based on three reasons, one
3 that there was a violation of 8(a)(3) and 8(b)(2) and
4 therefore, per se, then there was a violation of the duty
5 of fair representation.

6 And second was that there was a constitutional
7 question, and third that there was a pure and simple duty
8 of fair representation that had to do with how the union
9 collected its dues and whether it collected excess amount
10 of dues over objections of an employee for political
11 purposes.

12 The Court very clearly -- in fact, I think this
13 was a unanimous opinion where the centrists also agreed
14 with this part of the Beck case that the claim as to the
15 constitutional issue was not to be decided, it was put
16 aside, that clearly the Beck Court said that the issue of
17 being an unfair labor practice, and that in itself, a
18 violation of 8(a)(3), 8(b)(2), made it a violation of the
19 duty of fair representation, was not the law and was not
20 the basis for the Court to proceed to find that there was
21 a violation.

22 QUESTION: In Beck, in that part of Beck --

23 MR. GEFFNER: That part --

24 QUESTION: -- the lawyer had characterized the
25 claim --

1 MR. GEFFNER: Yes.

2 QUESTION: -- as a violation of 8(a)(3) and fair
3 labor practice.

4 In this case, the lawyer has characterized the
5 claim, though a similar kind of claim, as a violation of
6 the duty of fair representation.

7 MR. GEFFNER: Well --

8 QUESTION: It comes right into that heading in
9 the complaint.

10 MR. GEFFNER: Well, then I think, Your Honor, we
11 get into the question, can the primary jurisdiction of the
12 board be totally destroyed in this area, which it would
13 do, because the argument then would be, any violation --

14 QUESTION: That's why I'm asking you for a
15 standard that distinguishes the sheep from the goats.

16 MR. GEFFNER: Well, I would contend, Your Honor,
17 that you have to look back to Lockridge, which discussed
18 this issue in very great detail, and Judge Harlan had a
19 great discussion of how you find the standard. It's a
20 difficult one to find, but I think that the basis, as we
21 would contend, would be that when it's a primary
22 jurisdiction it has to do with a clear and -- violation of
23 the statute.

24 Here it's clear they're saying that it's a
25 violation of 8(a)(3), 8(b)(2), because we didn't allow the

1 base period of 30 days. That is or is not a violation of
2 8(a)(3) and 8(b)(2).

3 It has nothing, really, to do with any
4 representations, any misrepresentations, any hostility,
5 any other factors, bad faith, that goes into -- to make up
6 the duty of fair representation. All the standards of
7 fair representation are not present.

8 This pure and simple was a violation of the 30
9 days permissible or not permissible. It's as simple as
10 that, and the NLRB, when that case comes before it as some
11 future time will decide. They'll say no, the union was
12 wrong, they didn't apply the statute correctly, it's
13 therefore an unfair labor practice and there's a remedy
14 available to Ms. Marquez or any other employee that files
15 the charge.

16 QUESTION: Are you saying --

17 MR. GEFNER: Or they may say --

18 QUESTION: Excuse me, Mr. Geffner. Are you
19 saying that the line should be drawn depending on whether
20 the violation is clear or not?

21 MR. GEFNER: No. I think if the violation is
22 clear then obviously the labor board has the authority and
23 the jurisdiction to, under primary jurisdiction to grant
24 relief.

25 QUESTION: Okay, but it's not clear --

1 MR. GEFFNER: Or even a clear violation --

2 QUESTION: Are you saying that in cases in which
3 it is not clear, that's when there is this different
4 jurisdictional option, and they can come into court under
5 unfair labor?

6 MR. GEFFNER: Well, if it's not clear --

7 QUESTION: Unfair representation.

8 MR. GEFFNER: If it's not clear, then I believe
9 that it's standard that the courts would have to look, as
10 to whether it was primary jurisdiction with the labor
11 board, not only to the pleadings, which obviously can be
12 clothed and colored any way the plaintiff wishes to color
13 it, is that, is there interpretation -- and assuming it's
14 not clear.

15 Now, you take the 30-day clause here --

16 QUESTION: No, but I don't -- I want to hear
17 you, but I want to stick to my question for a minute. I
18 take it your answer is, no, I am not saying that we decide
19 whether something must be brought as an unfair labor
20 practice before the board depending upon whether the
21 statutory violation is clear or merely arguable. That's
22 not to the line that you're suggesting.

23 MR. GEFFNER: No, I'm not.

24 QUESTION: If you're not saying that, what are
25 you saying?

1 QUESTION: Yes, what is the line?

2 MR. GEFNER: Well, I'm saying that if there's a
3 clear violation of the statute, 8(a)(3) or 8(b)(2), then
4 the board has the primary authority to issue a complaint,
5 to hold a hearing, and to find --

6 QUESTION: Well, but that sounds like you're
7 simply retracting what you said a moment ago. I thought
8 in answer to Justice Souter's question you said the
9 distinction was not between whether the violation was
10 clear or not clear. Now you're saying that if it's clear
11 it goes to the board.

12 MR. GEFNER: Well --

13 QUESTION: That doesn't make any sense.

14 MR. GEFNER: Well, maybe I misspoke. I
15 intended to answer the question that if it's clear or not
16 clear, it does not deprive the board of labor of primary
17 jurisdiction, because --

18 QUESTION: So lack of clarity has nothing to do
19 with it, is that right?

20 MR. GEFNER: Well, no. I think lack of clarity
21 is an important issue, because -- and I want to use our
22 case as an example, because 30 days -- and the statute
23 says 30 days. It's not clear which 30 days we're talking
24 about.

25 Now, this is an issue that should be decided

1 under the labor act by the NLRB under the primary
2 jurisdiction because they are the body with the expertise
3 to look at the entire industry, the motion picture
4 industry, the hiring practices, the issue of a multi-
5 employer bargaining unit, where it's permissible under
6 board cases that you can work for different employers and
7 tack on grace periods, and that goes to the intent of the
8 parties where they have a multi-employer bargaining unit.

9 These are all questions for the expertise of the
10 administrative agency of the NLRB. These are not really
11 questions for the court to decide --

12 QUESTION: How do we know the difference?

13 MR. GEFNER: -- under a duty of fair
14 representation standard.

15 QUESTION: How can you -- how do we tell the
16 difference between the ones which are cases for the
17 expertise of the board, and therefore must go first to the
18 board, from ones that can be brought into court? You
19 haven't told us.

20 MR. GEFNER: Well, I'm not sure I can give a
21 broad standard for every case.

22 QUESTION: Well, could you give a narrow
23 standard?

24 (Laughter.)

25 MR. GEFNER: Well, I'll try.

1 QUESTION: Make us an offer, Mr. Geffner.

2 (Laughter.)

3 MR. GEFFNER: All right, Your Honor. I -- are
4 we bargaining now, Your Honor?

5 (Laughter.)

6 MR. GEFFNER: I think this case presents the
7 perfect example of what we're talking about. It's a
8 narrow issue, and that is that the pleading seems to mix
9 up duty of fair representation as a violation of 8(a)(3),
10 8(b)(2). It's a question of how the complaint is worded.

11 When you cut through the substance of it, the
12 substance of it is, there has to be a finding, and this
13 should be done by the labor board first, and of course
14 reviewed by the courts, is that when the parties
15 negotiated this contract that said 30 days, did they
16 violate 8(a)(3) and 8(b)(2)?

17 Now the NLRB has to look at a numerous number of
18 factors. They have to look at the industry, they have to
19 look at employment practices, as I said earlier the multi-
20 employer unit question -- that is not a function of the
21 board -- of the courts to decide as an initial matter
22 under the guise of a duty of fair representation claim.
23 This belongs to the expertise of the labor board.

24 QUESTION: But why shouldn't it be --

25 MR. GEFFNER: That's why Congress set them up.

1 QUESTION: On the other question, too, why
2 shouldn't the board say whether it belongs in the contract
3 as opposed to --

4 MR. GEFFNER: It usually finds that that case,
5 Your Honor --

6 QUESTION: Suppose, for example, the board had
7 said, we're doing away with our old learning. We're
8 adopting what Chairman Gould had suggested that we adopt
9 as the new model clause, and then the union doesn't use
10 the new model clause, it uses the one that it's been using
11 from the beginning of the Taft-Hartley.

12 If that were the case, then wouldn't there be a
13 violation of the duty of fair representation?

14 MR. GEFFNER: Well, there certainly would be a
15 violation of -- it would be an unfair labor practice case.

16 QUESTION: Yes, but the question could all -- as
17 I understood Mr. LaJeunesse, there's no question that the
18 board has jurisdiction. He's not arguing for exclusive
19 court jurisdiction. He's saying that they both would have
20 jurisdiction.

21 You're saying that at least with respect to the
22 30 days only the board has jurisdiction.

23 MR. GEFFNER: Well, primary jurisdiction, Your
24 Honor, yes.

25 QUESTION: Yes. Yes. With review --

1 MR. GEFNER: Yes, correct.

2 QUESTION: -- in the court of appeals, not in a
3 district court.

4 MR. GEFNER: Correct.

5 QUESTION: But I -- the question is, are they
6 all both, as Justice Scalia suggested, whenever employees
7 are affected, then it's a choice to go directly to court,
8 or go to the NLRB?

9 MR. GEFNER: Well, of course, in the context of
10 the factual situation of Beck, which was really decided
11 essentially that there's a separate duty of fair
12 representation not to collect excess dues, that could have
13 been an unfair labor practice and the board would have
14 jurisdiction.

15 The Beck case said that under that theory, that
16 there was jurisdiction on a violation of the duty of fair
17 representation. I don't think we can quarrel with that
18 finding of Beck. It did say that.

19 But that had to do with what -- with the
20 enforcement, with collection and how dues were collected,
21 and what manner in terms of excess amount of dues. That's
22 where the duty arose in terms of the court jurisdiction on
23 a DFR, duty of fair representation complaint. The
24 board --

25 QUESTION: Mr. Geffner --

1 MR. GEFFNER: The board could have concurrent
2 jurisdiction as well.

3 QUESTION: -- could a line be drawn this way,
4 that by recognizing that the decision in Beck, the
5 construction of the statute that the Court announced in
6 Beck was at least driven by a concern over First Amendment
7 issues.

8 And, therefore, could we say that if, in fact,
9 the argument that is brought is an argument which
10 depends -- which would -- if it's a statutory
11 interpretation argument, that would depend on, or turn on
12 a concern over constitutional issues, perhaps avoiding
13 constitutional issues, that that would be an appropriate
14 case to bring in the first instance in a court under fair
15 representation because that's not the labor board's
16 principle subject of expertness, whereas if the
17 interpretive issue does not have constitutional
18 implications, you ought to start with the board under
19 unfair labor practice?

20 MR. GEFFNER: Well --

21 QUESTION: Is that a way we could draw the line?

22 MR. GEFFNER: I think that would be a very good
23 way, a rational way to draw the line. I think applying
24 Beck that's exactly what would happen in Beck.

25 QUESTION: But then I think you'd have

1 Mr. LaJeunesse back in court in this case saying that
2 there are perhaps constitutional implications here.

3 Now, perhaps they wouldn't be very strong ones,
4 but I think that would underestimate the ability of
5 lawyers to cast their claims --

6 (Laughter.)

7 QUESTION: -- in constitutional terms.

8 MR. GEFNER: I'm not sure of that, Your Honor,
9 but the problem in terms of avoiding constitutional
10 issues, which of course Beck said it was not involved in
11 the Beck case, but I think I agree with Justice Souter
12 that in referring back to the Street case and the Railway
13 Labor Act, which Beck was based on, that there were at
14 least in the background somewhere some constitutional
15 issues about collecting money from people over their
16 objections for political activities.

17 But beyond that, it seems to me that the
18 constitutional questions really are not faced in this
19 area, because any doubt -- any doubt, even if you want to
20 raise it to the dignity of a constitutional question, is
21 resolved by the point that was made, I believe, by Justice
22 Ginsburg, and that is, the union is required, and there's
23 a very clear body of law that has developed in the last
24 few years by the NLRB and also by the courts in
25 California Saw & Knife and the Paramax case, that there's

1 an affirmative obligation for the union to notify every
2 person that's subject to the union security clause of
3 their Beck rights.

4 In fact, they go even further. They have to
5 advise them of numerous rights that flow from the Beck
6 decision. That is an obligation that goes beyond anything
7 that a contract might do, as I believe one of the Justices
8 pointed out, because that obligation that the board, the
9 labor board is now imposing has to be shown that the
10 individual received that notice.

11 Whether through a newspaper, or whether through
12 a mailer, or whether through an application form, whatever
13 vehicle is used, that notice has to be given, and that's
14 where any constitutional question of somebody being
15 deprived of their property against their objections for
16 political reasons is clearly avoided and clearly remedied.

17 QUESTION: Well, counsel, the judge of Scanlon
18 didn't rely on the Constitution, though. He seemed to
19 draw a distinction between a claim where the main claim
20 does not depend on a violation of 8(a)(2) or 8(a)(3) and a
21 claim that it only collaterally would involve --

22 MR. GEFFNER: And as I say, clearly, yes, I
23 agree with Scanlon --

24 QUESTION: I was going to ask you if you walk
25 away from them or you endorse the --

1 MR. GEFNER: I agree 100 percent with the Ninth
2 Circuit. i was responding, I believe to Justice Souter's
3 question, or to Justice Scalia's question that perhaps in
4 the background when the Court decided the Beck case there
5 was some concern of a constitutional question, but it
6 didn't involve political activities and collecting dues
7 for political activities.

8 And the Beck case clearly tagged on to the
9 Street case, which is a Railway Labor Act case, which did
10 involve a constitutional issue because of the statute
11 being drafted and written separately and differently from
12 the Taft-Hartley Act, which the Beck case didn't -- it did
13 not involve the constitutional issue.

14 But I simply agree with Justice Scalia that
15 somehow you could look up in the sky and pick that issue
16 out of there.

17 But clearly the holding of the Beck case was not
18 on constitutional questions. The Court was very clear
19 that that basis for relief, that was urged by the
20 petitioners in that case, was not the grounds for the Beck
21 decision.

22 QUESTION: So how do you think about it as a
23 labor lawyer?

24 I mean, I take it this is the only case in which
25 this issue has arisen. I couldn't find any other.

1 There's one case this one way, and dictum by Judge Posner
2 the other, so we haven't had a problem of labor lawyers
3 representing workers running in and recharacterizing NLRA
4 claims as unfair discrimination claims. That hasn't
5 happened, so there must be some line in a practicing
6 lawyer's mind, otherwise we perhaps face dozens of these
7 recharacterizations.

8 MR. GEFFNER: Well --

9 QUESTION: What is it in your mind? What is it
10 that leads you -- I'm just still driving for the standard.

11 MR. GEFFNER: Well --

12 QUESTION: You must have one there
13 subconsciously.

14 MR. GEFFNER: Well, I -- I'm not so sure I'm so
15 wise as to have one, but my thinking would be, Your Honor,
16 that the standard that would be applied, that may be a
17 difficult one, is that -- would be one, is the claim of
18 the duty of fair representation really something that's
19 separate from a pure statutory violation, that there's
20 some -- because the duty of fair representation was really
21 a judicially declared requirement coming out of the early
22 cases on racial discrimination through *Vaca v. Sipes*.

23 Of course, the labor board isn't dealing with
24 these kinds of issues. Courts must deal with them,
25 because the -- a union is the exclusive representative,

1 and there should be some protection for an individual
2 against the majority on some kind of abusive or bad faith
3 action, so it is a judicially imposed requirements on the
4 union, not a statutory one as such. I think that is
5 probably part of the one standard that I would suggest.

6 The other I would suggest is the one I said
7 earlier, and that is, is it the kind of an issue --
8 getting beyond the pleadings, is it the kind of issue that
9 really is, it requires the expertise of the administrative
10 agency?

11 Is this the kind of an issue that really the
12 court shouldn't be dealing with, certainly not on the
13 first impression? Maybe on a petition to review, or to
14 enforce, but as a first impression -- and that's why I
15 emphasize the 30-day case as a perfect example, because we
16 don't know.

17 The board hasn't really ruled on this 30-day
18 clause, and there's so many factors. It involves
19 industrial relations. It involves the motion picture
20 industry. It involves how you employ, how you involve
21 freelance employment.

22 QUESTION: What if the board had ruled on this
23 clause, Mr. Geffner? Then could an employer in Mrs.
24 Marquez' situation bring an action in court?

25 MR. GEFFNER: An employer, Your Honor?

1 QUESTION: An employee.

2 QUESTION: I'm sorry, an employee, yes.

3 MR. GEFNER: I'm sorry. No, I think that case
4 there would be a clear violation of 8(a)(3) and 8(b)(2).
5 Her remedy would be to run down to the labor board and
6 file a charge.

7 QUESTION: So if the board's ruled on it you
8 have to go to the labor board, and if the board hasn't
9 ruled on it you have to go to the labor board?

10 MR. GEFNER: Well, I can't categorically say
11 that would be the case, because there could be situations
12 that it could be both, as --

13 QUESTION: What would be those situations?

14 MR. GEFNER: Well, I think the Beck case is an
15 example where the --

16 QUESTION: What besides Beck?

17 MR. GEFNER: What besides the Beck?

18 QUESTION: Yes.

19 MR. GEFNER: Well, I -- on a duty of fair
20 representation there could be some abusive action against
21 the -- by a union against an employee that the board had
22 jurisdiction, where it's a violation of the employee's
23 section 7 rights.

24 It would be unfair labor practice, but it also
25 might be a tortious action against the individual, or it

1 could be some kind of group action where there's a
2 violation of either the common law, or of the broad,
3 broader definition of the duty of fair representation.
4 That's -- it could be a situation of that kind, you know.

5 The O'Neill case set the standard of the duty of
6 fair representation. In that case, the specifics involved
7 the negotiations of a contract and the settlement
8 agreement. The Court found that the union didn't violate
9 that standard, but it could have gone the other way, and
10 there you would have had a case where there had been a
11 violation of the duty of fair representation, and very
12 likely would be an unfair labor practice, possibly, under
13 a violation of section VII, or possibly even a failure to
14 bargain. There could be numerous areas of the Taft-
15 Hartley Act that could be urged as an unfair labor
16 practice.

17 So there are situations where there's a
18 crossover, and where you draw the line, I think all we can
19 do is what Beck said, and what Lockridge said, where Judge
20 Harlan discussed this, and I suggest --

21 QUESTION: What do you say --

22 MR. GEFFNER: And I suggest the two standards
23 that --

24 QUESTION: What would you say --

25 MR. GEFFNER: -- that we would follow.

1 QUESTION: What is the remedy, just -- if by
2 coincidence, I read -- I was reading the record. It
3 sounds as if what Ms. Marquez was actually upset about, at
4 least originally, was, she said to the union, take the
5 \$500 out of my first paycheck, please. I don't have the
6 money on me. I just don't have it, and the union, instead
7 of saying, okay, said no.

8 Now, that seems, given her side of it, that that
9 wasn't very reasonable, and suppose that she's right about
10 that, what kind of remedy would the law permit?

11 MR. GEFFNER: Well, it -- she could have filed a
12 charge with the labor board as a violation of 8(a)(3) and
13 8(b)(2). The board would then have the jurisdiction to
14 give the remedy to her, which would have been back pay for
15 losing the 1 day's work. That would probably be a fairly
16 complete remedy.

17 I suppose you could argue that because she was
18 badly treated as an individual, it was bad faith in her
19 treatment outside of the statute, that the union then
20 created a hostile and arbitrary action. There might be a
21 DF, duty of fair representation.

22 But those are the issues that relate really to
23 the kind of issues that notice goes to, and information
24 goes to, and that's what we're dealing with here, and that
25 is where the labor board has set up an elaborate system of

1 notice requirements which takes care of any problems that
2 might be coming out of any misunderstanding of the
3 contract language, which she -- we're back to the main
4 issue of the case, or at least the Beck issue in the case.

5 QUESTION: The board can award damages against
6 the union measured by back -- by lost pay?

7 MR. GEFFNER: It can award lost pay, yes, mm-
8 hmm.

9 QUESTION: Against the union?

10 MR. GEFFNER: Against the union, yes, mm-hmm.
11 That would be the remedy if the union violated 8(a)(3) and
12 8(b)(2). That would be -- the traditional remedy is the
13 back pay remedy, yes.

14 QUESTION: Mm-hmm.

15 QUESTION: Mr. Geffner --

16 MR. GEFFNER: Yes.

17 QUESTION: -- at some stage the SG told us that
18 this matter was before the board, this matter being
19 whether the Beck language must be in the contract clause
20 and not simply in a notice that the union separately gives
21 to workers. Is it before the board?

22 MR. GEFFNER: No, Your Honor. That's not my
23 understanding of the law. The board at this point, you
24 may recall, in 1958 in the Keystone Cloth case said that
25 membership in good standing is the model clause.

1 QUESTION: Yes, but we've been told that that
2 was --

3 MR. GEFNER: It's moved ahead, yes.

4 QUESTION: -- rejected by the board.

5 MR. GEFNER: After the Beck case and the
6 Paramax case the board said that the clause is now
7 ambiguous, but not facially invalid. Now they say it's
8 ambiguous, but before they said it was not ambiguous, and
9 they said the ambiguity is cleared up and remedied by
10 these outside notices that have to be given to the
11 individuals, so that clarifies the ambiguity.

12 Now, the D.C. circuit reversed the board and
13 said no, that -- the clause is not ambiguous, the clause
14 is facially valid, and reversed the board on that issue,
15 and now the board is wrestling with the consequences of
16 that for that decision, and there's some dissention in the
17 board itself, actually, on that issue right now, but cases
18 on record -- cases on record, the Paramax case says very
19 clearly that's ambiguous, that's their position, but not
20 facially invalid.

21 And that's been, as I said, has been reversed by
22 the D.C. Circuit in saying that it was facially valid, and
23 all the notices were adequate to protect the individual
24 against any misunderstanding.

25 In the few moments, I'd like to just stress one

1 point here in terms of the drastic remedy that the
2 petitioners are asking in this case, to declare a
3 collective bargaining agreement clause invalid, and the
4 petitioner and I believe the Eighth Circuit if you follow
5 their argument seem to think that the union has the right
6 to unilaterally just modify a collective bargaining
7 agreement and just simply change it to make it clearer,
8 just by some -- just miracle, some wave of the hand.

9 It's not the reality of labor relations. If the
10 clauses are declared invalid then the union has to
11 renegotiate with the employer. Clauses that have been in
12 effect now for 50 years contained in thousands of
13 contracts in this country, the union would have to go back
14 to each employer and renegotiate the contract, and that
15 raises all kinds of questions.

16 That means that if the employer doesn't agree,
17 can the union now strike to obtain a modified clause? Can
18 the employer lock out the union?

19 QUESTION: Why wouldn't the employer agree?

20 MR. GEFNER: I beg your pardon, Your Honor?

21 QUESTION: Why would not the employer agree to
22 making the clause less favorable to the union?

23 MR. GEFNER: Well, Your Honor, the reality of
24 collective --

25 QUESTION: I mean, I can see the union not

1 agreeing to it, but why would the employer not --

2 MR. GEFNER: Because, Your Honor, the nature of
3 collective bargaining is that everything in a contract is
4 the subject of a bargain, subject to negotiations. I
5 don't find many employers, nor do I find many unions who
6 agree to something without getting something in return for
7 it, and that's the reality of collective bargaining.

8 QUESTION: It wouldn't take much to find an
9 absence of good faith bargaining if an employer does not
10 let --

11 MR. GEFNER: No, Your Honor --

12 QUESTION: -- the union modify that clause in a
13 way that favors the employer.

14 MR. GEFNER: Your Honor, the law is clear that
15 the employer can refuse a union security clause to
16 impasse. That's a mandatory subject of bargaining. The
17 union -- the employer does not have to agree to any union
18 security clause.

19 QUESTION: Bargain in good faith, and it
20 wouldn't take me very long to find that that's pretty bad
21 faith bargaining, if the union wants to give him a better
22 deal than he now has and he doesn't want it.

23 MR. GEFNER: I -- it would be a very serious
24 question, Your Honor, that in terms of the consequences,
25 when you're trying to renegotiate the contracts -- maybe

1 some employers would take that position. Maybe some would
2 not. We don't know, and that goes back to what happens.

3 Those are the consequences of declaring a clause
4 invalid, and that goes back to the original intent of
5 Senator Taft and the Senate and the Congress in enacting
6 the Taft-Hartley Act and authorizing the union security
7 clause.

8 They said they wanted to foreclose and close out
9 the closed shop. They allowed the union shop, under
10 limited circumstances, and it's spelled out in the
11 statute.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
13 Geffner.

14 MR. GEFFNER: Thank you, Your Honor.

15 CHIEF JUSTICE REHNQUIST: The case is submitted.

16 (Whereupon, at 12:07 p.m., the case in the
17 above-entitled matter was submitted.)

18
19
20
21
22
23
24
25

CERTIFICATION

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

The United States in the Matter of:

NAOMI MARQUEZ, Petitioner v. SCREEN ACTORS GUILD, INC., ET AL.
CASE NO: 97-1056

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

BY Donna Marie Federico-----

(REPORTER)