Supreme Court of the United States

In the Matter of:

NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. RAYTHEON COMPANY, et al., Respondents.	Docket No. 440

Place Washington, D. C.

Date February 26, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

NATIONAL LABOR RELATIONS BOARD, Petitioner	)	
vs	)	No. 440
RAYTHEON COMPANY, ET AL., Respondents	)	

The above-entitled matter came on for argument at 1:30 o'clock p.m. on Thursday, February 26,1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

RICHARD G. KLEINDIENST
Deputy Attorney General
Department of Justice
Washington, D. C.
Attorney for Petitioner

CHARLES H. RESNICK, ESQ.
General Counsel, Raytheon Company
141 Spring Street
Lexington, Massachusetts 02173
Attorney for Respondent

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 440, National Labor Relations Board against Raytheon Company.

ORAL ARGUMENT BY RICHARD KLEINDIENST, DEPUTY ATTORNEY GENERAL, ON BEHALF OF THE PETITIONER

MR. KLEINDIENST: Mr. Chief Justice, and if the Court please:

MR.CHIEF JUSTICE BURGER: Mr. Kleindienst, you may proceed.

MR.KLEINDIENST: This case comes tothe Court on certiorari tothe Court of Appeals of the Ninth Circuit. It raises a specific thatin the opinion of the Government, a very important issue as to the administration of the National Labor RElations Act; and it presents the precise question of whether on the eve of, or at or about the time of a representation election under the Act, the employer engages in unfair labor practice activity; whether such unfair labor practice activity is rendered moot and therefore not susceptible to a enforcing order from the Court of Appeals by virtue of a subsequent representation election which the union lost that came after the unfair labor practice activity.

The facts in the case, I think are likewise, rather direct and not controversial. The union in the case began its organizational activities among the employees in the Fall of

1964, on the eve of the representation election a few days before, representatives of the company engaged in conduct which subsequently, as I will outline, were determined to be in violation of the Act.

An election was held; the union lost the election. The union petitioned to have the election set aside and at the same time filed unfair labor practice, filed a complaint with the Board and charged to the Board and the Board subsequently filed its complaint.

Thereafter the Board heard evidence with respect to the alleged unfair labor practice activity and issued its order against the employer to cease and desist in the conduct.

Following the order of the Board, a second election was held. Again, which the union lost, and that election was set aside for reasons which are not material here and do not appear in this record.

After the second election the Board petitioned the Court of Appeals for the Ninth Circuit for an order enforcing its order against the Respondent company and after that petition to the Court of Appeals, a third election was held, and again the union lost the election.

But at this time there was no objection filed by the union or the employees with respect to the conduct of the election and the Board certified the election as being valid.

Q Do the records show, Mr. Kleindienst, whether

the union's vote increase, decreased; what happened in the success of elections?

A I believe my recollection of the record is that the union votes decreased.

Q Decreased?

A Yes; that the union's position became stronger in the situation that is in the record here; but that's my recollection of it. I don't believe that's material one way or another to the determination of this issue, if the Chief Justice please.

Q Well, if their total ballot decreased as each election went on it might suggest somerelationship between the company's -- the continuing impact, the continuing effect of the company's anti-union activities, would it not?

A That could possibly be it, but I think -- there are so many other factors that could occur: turnover of employees, other conduct, the issues raised in the election. I would say that you would almost have to have precise evidence of a point like that, Mr. Chief Justice, before that would be a supportable inference all by itself; and just the mere fact that the votes went up or down one way or another. That would be my opinion in this regard.

Q Does the record show, since you have already been interrupted, before you resume: does the record show the reason that the second election was set aside?

A No; and I don't believe that any inference can be gained from this record as to the fact that it was set aside. There is nothing in the record and I think it would be improper for the Government to suggest, inferentially or otherwise that that second election was set aside as a result of misconduct on the part of the Respondent company. The record doesn't show it is, Mr. JUstice, and I don't want to infer that it was a continuation of improper conduct on the part of the company.

Now, when the matter got to the Court of Appeals for the Ninth Circuit, the Respondent company brought to the attention of the court the fact that a valid subsequent election had been held and asked the court to dismiss all of the proceedings involved in the matter and asked it to reply upon its decision in the General Engineering case of 1962.

The court, in a pro curiam decision, did deny the Respondent company's motions to dismiss all the proceedings.

And I think it's significant to point out here that they did not determine on the merits, when it had it before it, as a matter of fact, based upon their record considered as a whole, and the law, whether in fact the Responent company was guilty of committing the unfair labor practices. They just threw the whole thing out on the grounds that thematter had become moot and no longer of any import as a result of the third subsequent valid election.

The Board petitioned for certiorari, raising three fundamental questions. One, it presented a very clear, precise conflict between the decisionof the Ninth Circuit on the one hand and the Seventh Circuit in almost identical cases. The decision of the Ninth Circuit in Raytheon in this case and General Engineering conflictsin the opinion of the Government with clearly enunciated opinions of this Court dealing generally and broadly in this field.

Then finally, it presented a good question of policy with respect to the effectuation of the policies and the administration of the National Labor Relations Act.

The Respondents' argument in the case seems to be essentially predicated upon the statement that since Section 10(e) of the Act confers upon the Court of Appeals to review decisions of the National Labor Relations Board, thatthat expression is a broad one and that the Court below properly exercised its broad discretion in dismissing this case on the grounds of mootness.

As a preface to my argument, and if the Court will grant me permission, I would like to direct the close attention to a case that was not cited in the Government's brief, nor in briefs filed by the REspondent company.

I called Mr. Resnick Monday, when the case came to my attention and indicated my desire to do so, and I believe that he will say, without objection, that I may. The reason thatit

was not cited, it's a decision of Mr. Justice Marshall, which was written on December 15th of this term of the Court and it was handed down after the briefs on behalf of the Government were filed.

And that's your case: NLRB versus Rutter-Rex. The reason why we filed is that the Supreme Court, this Court, very clearly and concisely said what it had said before, and that is to say that the remedial powers that the National Labor Relations Board are broad, is a broad discretionary power and they are subject to but limited review.

And I think that this case, this recent decision of this Court in the opinion of the Government, is practically dispositive of the Respondent company here. Because the only way that Respondent company can get to this point is to say that Section 10(e) confers upon the Courts of Appeals very broad discretionary powers in the review orders of the National Labor RElations Board.

I think the best example of that is the decision of this Court in National Labor Relations Board versus Mexia Textile which was handed down by this Court in 1949. In that case the issue was whether or not the Board could go to the Court of Appeals to enforce its orders even if the Respondent employer had voluntarily complied with the order of the Board. And the issue is raised to the Court of Appeals that: "There is no reason for you to consider this matter any longer. The

Board said that we eng ge in illegal activity and conduct. We agreed with it; we have complied with it, so why have an order of the Board enforcing the conduct that was already complied with, or corrected?"

This Court, I think, correctly held that since this kind of conduct can be continuing in nature, the mere showing of compliance, voluntary or not, by the employer in any one given point of time, would not be a bar to the Board's right to get an enforcement, however, so that it would have available to it, a contempt citation and order in the event the employer came along subsequent to its voluntary compliance and engaged in similar conduct.

I think also under decisions of this Court, which go to the whole question of mootness, bring to bear the essential problem that's involved in this case.

As this Court has held in the United States versus W. T. Grant Company, you should not dismiss a case on the grounds of mootness until only there is a reasonable expectation that there will never be a recurrence of the wrong again. If there is a strong burden imposed upon the wrongdoer to come forward and show that, regardless of our intent and the circumstances, it is likely that the conduct will not occur again.

And I think again, as this Court has held in Walling versus Reuter, this is true, so that the courts or the administrative boards and agencies can always have in its hip pocket,

so to speak, the arrow to its bow of a contempt citation issued by a court in the event the wrongdoer commits the wrong again.

And then, finally, of course, just from the standpoint of public policy in the administration of the Act, and I think it's this point that the Court should be primarily concerned about, because if you take the Respondent's argument just at first blush, he would make the Court believe, I think that there is something integral and indigenous about Section 8 of the Act, dealing with unfair labor practice conduct on the one hand, and Section 9 of the Act, which deals with representation elections. Section 7 of the Act guarantees to employees the right to engage in concerted activities for their mutual aid and protection.

And I think that this guarantee in Section 7 of the Act, encompasses several portions of the balance of the Act. One of them, of course, is the representation election. Employees under this Act, have a right to, in a free environment, the Board has said, I think, many times in the past, ideally, under the laboratory conditions that the Board would like to see exist, to organize among themselves, to designate a union as their collective bargaining agent, to have a representation election whereby such a bargaining agent can be certified.

But this right that is conferred upon employees in terms of self-organization, is a distinct, separate right under

the Act in terms of its policies. Then the prohibitions that are contained in Section 8 of the Act, that deal with unfair labor practice activities.

One of the reasons why you have Section 8 of the Act, is to give the Board and the courts a machinery by which you can create these so-called "laboratory conditions," so that employees can make a free choice with respect tothe selection of their collective bargaining agent.

And for an employer to come along as the Respondent Company has in this case, to say that: Well, really, they have had two or three shots at this election and they lost it, and what we might have done with respect to the first one,should be rendered moot, I think begs the question, because all you have to do, then, is to permit employers to engage in this kind of conduct and the union could have 3, 4, 5 or 6 elections and the courts would really never have a means by which to stop the illegal activity and conduct.

Q Would you, Mr. Attorney General, you seem to agree that if a court determined there was no really substantial chance of the conduct ever being repeated that it could be dismissed as moot?

A Yes. The Jones and Laughlin steel case in 1936 --

Q So, this is really what it amounts to is sort of a fact-bound case, then here. You just want us to disagree

with the judgment of the Court of Appeals that this conduct is not contrary to their thinking, really might occur again.

A I don't think the Court of Appeals really went into that question, Mr. Justice.

Q Do you think they applied the wrong standard?

A I don't believe they applied any standard at all. If they had been aware of the Mexia case of this Court, when it came down to the General Engineering case in 1962, I don't think they would ever have arrived at that result.

Q What you're saying is that we should vacate the judgment and have it reconsidered under the right standards?

A Yes, sir. In my opinion what should be done is to vacate the act of the Court of Appeals, send it back to it, have it determine the unfair labor practice on the merits, the record considered as a whole and as a matter of law, and then if the Court of Appeals, which I wouldn't expect it to do, came forth with an erroneous application of the law or exercise of its discretionary powers, you would have something before this Court that would have some substance and merit.

Q But, I suppose that certain unfair labor practice could be so tied to a particular election like, for example, in the first election they had a poll watcher; something that they shouldn't have and there was a complaint about it.

A Mr. Justice, that raises a good point, because not all conduct that the Board looks at as being improper

conduct at the time of election constitutes an unfair labor practice.

Q I agree.

A Like we have the 24 hour rule here.

Q And also, I suppose there is some kind of conduct in connection with an election that no reasonable man would think would ever be repeated.

A Right. As a matter of fact, I think the Respondent company neglected to point out the fact that in the three forms of illegal conduct in this case, that is to say, interrogating the employees and the illegal speech that this company also initiated a new grievance procedure which the Court held was unfair labor practice conduct. This new grievance procedure is a continuing procedure, presumably, although the record doesn't show, it exists today.

So that as our reports held, in the Second, Fourth and Seventh Circuits, these unions might want to come back at some other time to attempt to organize the employees. They have the right. Indeed, in this case the inference is strong that they will want to because they have tried it three times already and if you have in the environmental factors that exist at this particular plant, conduct of a continuing nature which the Board has said is unfair labor practice conduct in violation of Section 8(a)(1) and Section 7 of the Act, then I think in terms of effectuating the policies of the National Labor

Relations Act, that these employees are not going to be able to decide the choice of their collective bargaining representatives in a free environment.

And that's the essential policy of the Act that's involved here. If, to be sure that the National RElations Board is being given the weapon that the statute contemplated, that is to say, a contempt citation from the Courts of Appeals so that employers will be restrained from engaging in a continuing form of conduct in order that at least with respect to this aspect of the Act, the employees will be able to choose their collective bargainig agent in an environment free of coercion and inducements and benefits or threats or promises.

Q Of course, Section 10(e) of the Act does give to the Courts of Appeals a very great deal of discretion as to what they shall do in response to an enforcement proceedings.

A Yes.

Q And we both know that Courts of Appeals, like other courts, are overburdened with a great deal of work and, I gather, it's youradversary position that while it's almost one of confession and avoidance, while perhaps "moot" is the wrong word here, nonetheless, Section 10(e) does not absolutely require the Court of Appeals to give full consideration on the merits to every single enforcement proceedings, and here in this particular case there is simply good reason for them to exercise the flexibility conferred on the Courts of Appeals by

Section 10(e) to simply wash this case out.

A I respectfully disagree with that, Mr. Justice. I'd like to quote from your recent decision. I believe that you dissented in this decision, but the majority of the Court said this in the Rutter-Rex case --

Q No; I joined the opinion of the Court.

A Did you?

Q Yes.

A This Court has stated that "The remedial power of the Board is a broad, discretionary one, subject to limited judicial review. And let me just indicate the facts of that case.

That was a back-pay case where the Court of Appeals wanted to cut off part of the back-pay award because the Board had been derelict in its duties to promptly process it, and Mr. Justice Marshall, I think, appropriately pointed out that this Act is for the benefit of employees and not for the benefit of the Board or an employer with respect to back-pay orders.

But, that was a back-pay order. What this company, this Respondent company wants you to do is to completely eliminate, you know, a Section 8 remedy of the Act, because of the intervention of a Section 9 proceeding. And if you ever got down to the point, it seems to me, in the administration of this law, where an employer or a union, because it now applies in terms of this illegal activity, to both; if they could ever

excuse their unfair labor practice activity because they were involved in the representation election,then I think you are in an area where the Congress itself, should go back and re-examine the whole thing from the standpoint of policy, as to what the Act was supposed to do.

Q Mr.Attorney General, if, in effect, there is only an open-end injunction, which is what this amounts to, it gives the court continuing contempt powers, there ought to be some pretty clear guidelines as to how to define this continuing impact; is that not so?

A Well, it pretty well polices itself, Mr. Chief Justice. What these orders usually provide is that the employer will post a notice for 60 days. After that they can take it down and then the conduct that is usually described by a Board order is usually pretty precise relating to specific events, times and circumstances and as time goes by, I think it would be pretty difficult to go back to the Court of Appeals and try to artifically extend other conducts under a contempt citation. As you know, the courts are very reluctant to exercise their power and their discretion in a contempt situations.

And in the years of practice that I had in this area I can never recall a contempt case going to the Court of Appeals where it was claimed that they exercised that authority without regard to the specific conduct that was subject to the Board's orders.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Resnick.

ORAL ARGUMENT BY CHARLES H. RESNICK, ESQ.

ON BEHALF OF RESPONDENT

MR. RESNICK: Mr. Chief Justice and may it please the Court: At the outset, I would like to respond to a question which theChief Justice asked at the beginning of my brother's argument.

In the three elections the progression of voting was indeed, more favorable to the union in each case. I don't know whether that has any major significance.

Q More favorable?

A More favorable. The results of the election are set out in full at page 40 of the appendix, and based on a percentage, the absolute numbers vary, of course, with the employment, but on a percentage, they showed a gradual increase.

We see the --

Q Well, perhaps the Attorney General was correct, that you can't giveit much weight one way or the other, but it would seem to me, as a practical matter, if you would give it any weight, to any degree, it would be that whatever the conduct of the employer it isn't depressing the union's vote-getting ability.

A I fully concur with that, Your Honor. We don't set much store by the results, but to the extent that it has

any impact that would be it. We see the issue somewhat differently than the Deputy Attorney General. This Court was asked to decide only the rather narrow issue, of whether on the peculiar facts and circumstances of this case, the discretion and authority vested in the Court of Appeals by the National Labor Relations Act, was properly exercised.

We don't seek any broad ruling of mootness, only that the exercise is appropriate in this case. The question of where Raytheon's conduct was protected by the First Amendment to the Constitution of Section 8(c) of the Act, is not before you. Neither is the question of whether Raytheon's preelection conduct did or did not constitute unfair labor practice.

However, in order to decide the issue which is presented, some background of how the history of case appeared to the Court of Appeals, is essential, so I would like to go into the facts a little more in detail than the Attorney General.

As the record stood before the Court of Appeals, Raytheon was an employer of approximately 40,000 people, with plants in a number of locations throughout the country. Employees at a number of plants, including two in California, were represented by unions and there had never been a strike by Raytheon employees.

Approximately 19 petitions for election had been filed at Raytheon plants during the period between 1960 and 1966.

And prior to the case before you, no objections had been filed as to Raytheon's preelection conduct in any of those; and of course, no elections had been set aside.

On January 4, 1965, the IUE filed a petition with the Board for a representation election to be held in a unit of production and maintenance employees at Raytheon's Mountain View, California plant. Subsequently the International Brotherhood of Electrical Workers expressed interest in the proceeding and an election was agreed upon for February 4, 1965.

On February 2, two days before the election, Robert Hennemuth, Raytheon's Vice President of Industrial Relations, delivered an address to eight groups of employees. The Speeches were substantially identical in conduct, emphasizing the importance of voting, explaining how the collective bargaining process works, making a comparison of wages and fringe benefits with other Raytheon plants and with other companies and requesting employee support.

Inthese speeches, in a response to questions from the audience, Hennemuth repeatedly emphasized that the election was to be a free election in, as he put it, "the good old American tradition." He stated repeatedly that he could not and would not promise any benefits or make any threats of reprisal. He pointed out that, and I quote: "We don't know how any of you voted anyway, so don't worry about it."

The speeches were followed by question periods

in which Hennemuth attempted to answer employee inquiries from the floor. The questions and answers were characterized by good nature give and take. The transcript shows that six and seven interruptions by laughter on a given page.

Q What? Laughter?

A Laughter from the audience.

About a week prior to the election a Raytheon foreman named Krest, allegedly questioned one employee in the course of discussions regarding her transfer, as to why she wanted a union.

Now, the Hennemuth speeches, and the so-called Krest-Alvarado conversations formed the sole basis for the Board's subsequent unfair labor practice charges. The election was duly held on February 4, two days after the Hennemuth speeches, and a majority of employees voted neither union.

The IUE filed a petition to set aside the election under unfair labor practice charges. Now, after hearing by the trial examiner, the Board set aside the election and found that Raytheon had committed certain unfair labor practices from which it was ordered to cease and desist.

The Board's findings were based, as I said earlier, upon alleged improprieties in the Hennemuth speeches and the conversation between the first-line foreman and one employee.

A second election was held bythe Board on June 23, 1967, as the Attorney General has said and was subsequently set

aside on the grounds not apparent from the record. On February 8, 1968 the Board petitioned the Court of Appeals for the Ninth Circuit for enforcement of its unfair labor practice order.

Subsequently, on November 1, 1968, while the Board's petition for enforcement was pending, a third election was held in which employees again rejected representation by the IUE.

Then, on November 12, the Board's regional director certified the results of the third election. After the Board filed a petition for enforcement, the IUE filed a petition in the same court to review the portion of the Board's order dismissing the IUE's motion to amend the complaint.

Briefs on the merits were filed in the Court of Appeals by all parties, and at the oral argument at the Court of Appeals on January 7th, the Board argued its position for enforcement fully on the merits. The IUE argued in support of the Board's petition, fully on the merits.

Following these arguments, Raytheon's counsel called the attention of the Court to its prior decision in General Engineering as to the fact that a certified election had been held since the filing of the Board's petition. He then completed his argument on the merits.

The Court of Appeals agreed to consider on the basis of its earlier decision, a motion to dismiss which Raytheon had filed. Memoranda in opposition were filed by the Board and by the IUE and appear inthe appendix.

The Court of Appeals on the authority of its earlier decision in General Engineering granted Raytheon's motion and entered a judgment dismissing both the petition to enforce and the IUE's petition for review.

Q How recent was that earlier decision in General Engineering?

A General Engineering was decided in 1962, Your Honor.

Q So, it was well-known long before this case arose.

A Yes, Your Honor.

Q I just wondered why this situation didn't develop until the course of the oral argument on the merits.

A That's a good question, Your Honor. My brother tells me that in his research immediately prior to the oral argument he ran onto the General Engineering case and felt obligated to call it to the attention of the Court of Appeals. Otherwise, it probably would have been handled in a different manner.

The decision of the Court of Appeals in the case of Brown necessarily requires a careful examination of the decision in General Engineering on which it is based. That case arose on a petition by the Board for enforcement of a court order encompassing preelection conduct, reinstatement of two unlawfully-discharged employees and reinstatement of a sixervospr

found to have been discharged in violation of Section 8(a)(1). The Court did not dismiss the entire proceeding as moot. On the contrary, it considered in detail whether the discharge of the two employees violated Section 8(a)(3), and ruled that the discharge of the supervisor violated Section 8(a)(1).

Upon consideration, it granted in part, enforcement of the Board's order. As to the portion of the order dealing with the representation case only, the court held that the cease and desist order had been mooted by the issuance of the certification of the results of an election held subsequent to the order under review.

On these facts, the rule of law should be derived from the decision of the Court below, and from its prior decision in General Engineering is that where alleged unfair labor practices relate solely to an election proceeding, the Court of Appeals may -- doesn't have to -- may dismiss a petition for enforcement of an order relating only to those practices.

Orders entered by the Board are not self-enforcing. Nor is the Board authorized to levy fines or penalties for failure to comply. Congress did not grant it this power. Instead, Section 10(e) of the Act provides that the Board shall have the power to petition Courts of Appeals for the enforcement of its orders, and that the Board shall file a record of the proceedings in the Court.

The Court of Appeals, not the Board, is then given the power to grant temporary relief and the power to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside all or in part, the order of the Board.

Congress had considered and rejected the possibility of placing more enforcement authority in the Board and less in the Court of Appeals. The study of the legislative history of Section 10(e) shows that such statutes as the Packers and Stockyards Act and the Interstate Commerce Act with the mandatory provisions for injunctive orders, were considered before the adoption of Section 10(e).

Instead of following the provisions of those statutes the draftsmen followed the enforcement provisions of Section 11 of the Clayton Act and Section 5 of the Federal Trade Commission Act, which required the Board to seek enforcement from the Courts of Appeals. And the Courts of Appeals in turn, were not required to, but were given the power to enforce.

It is noted at page 10 of Raytheon's brief, a specific amendment by the House of Representatives was adopted at a late stage of the legislative proceedings to change the words in what is now Section 10(e) from: "shall make and enter a decree," so as to read, "Shall have the power to make and enter a decree."

It seems clear that Congress intended -- the Court of Appeals to act, not as a rubber stamp for the Board's orders,

but to issue such orders as the Court of Appeals, on evaluation of the case felt appropriate. Necessarily included within that power was the power to dismiss Board petitions.

As this Court said in Hecht versus Bowles, "A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances."

The difference in language alone would distinguish this case from Wirtz versus the Glass Blower's Association cited in the Attorney General's brief. There, as this Court took pains to point out, the Labor Management Reporting and Disclosure Act of 1969 left no room for choice, but required that the Court shall declare the election void and direct a new election.

The Court of Appeals acted within the proper bounds of discretion in this case. As its judgment discloses, the case had come on to be heard on the transcript of the record from the Board. On the basis of that record and the argument of counsel, it must have been clear to the Court that it was not dealing with deep-rooted hard-core facts. On the contrary, it was dealing with inferences derived from speeches properly characterized by the trial examiner as made, and I quote, "without rancor" good-humored give and take in a question and answer period.

The Court of Appeals thought and did conclude that the offenses were so superficial and so intertwined with the

election proceeding that enforcement was not justified.

Now, the Attorney General called to your attention, properly, your decision in Rutter-Rex. The situation in Rutter-Rex was entirely different. There the Court of Appeals was dealing with an employer who had already, in an earlier case, orders to comply wtih the Board's order. It was the second time up when the Court of Appeals decided tomodify the Board's order with respect to back pay. The case involved one of the most serious offenses under the Act, an unfair labor practice strike, and the arbitration to reinstate with back pay.

In reversing the court below, this Court discussed in detail the nature of back-pay orders and the burden of who should bear the lost pay: the employee or the employer, notwithstanding the Board's delinquency.

But I submit that our case is entirely different. There is no back-pay order, only the initial consideration of whether an order for enforcement should issue at all.

Certainly this Court did not intend in Rutter-Rex to overrule its prior decisions in Universal Camera or in Brown Food. There the question of the limitation of review was thoroughly discussed and it's clear that does not mean the same thing as no review.

The power to enforce, modify or set aside Board orders was given by Congress to the Courts of Appeals. No standard was set or prescribed by the Congress as to when it

must and when it may decline to exercise such power. Such decisions were left to the discretion of the Courts of Appeals, subject, of course, to review by this Court.

But review of what, whether there was an abuse of discretion. The test, as was stated in Pittsb urgh Steamship, is not whether you would make thesame decision as the Court of Appeals made, were the case before you in the first instance, but whether the judgment of the Court of Appeals constitutes an abuse. Abuse has not been shown in this case and the judgment should, therefore, be affirmed.

Policy arguments directed to the proposition that Raytheon if not ordered to cease and desist, might engage in further conduct violating the act, substitutes speculation for facts.

At the time the case was heard, almost four years have gone by and no other unfair labor practices have been charged, much less filed. Why shouldthe Court of Appeals be required to delve deeply into the record to decide the difficult questions of statutory interpretation, constitutional questions to which they relate, when the evils against which enforcement is sought do not exist?

This Court has consistently stated that the Federal Courts do not have jurisdiction to resolve academic questions, particularly those involved in constitutional issues. While the Board may contend that it is seeking an order to prevent

unlawful conduct in the future, this case can properly be, when the conduct sought to be enjoined is as conjectural as it is in this case.

Cases cited by the Board from other circuits are not at variance with the position for which we contend. Those courts have exercised their discretion to grant enforcement on substantially different facts. Whether thisCourt might have decided our case differently is not the question. The question is whether they have the discretion.

Indeed, the Ninth Circuit which decided our case, has followed Mexia and, as we cite in our brief, at page 25, the same panel of judges, at least two of them, decided subsequently the Rippee case in which it elected to follow Mexia. So it has not, automatically, elected to moot every case in which there has been a subsequent election of compliance.

Q Mr. Resnick, what is the consequence of holding an issue moot in a situation like this? Does the Board adjudication stand?

A No, Your Honor; there is no enforcement granted

Q Well, no enforcement, but the Board has issued a final order.

A I suppose the order would no longer stand. You are right, Your Honor.

Q And the finding of an unfair labor practice in connection with therepresentation proceeding would stand.

A I believe it would, Your Honor.

Q That's not the way we ordinarily dispose of something that's moot. Ordinarily we wipe the slate clean, don't we?

A We don't view this as the classical case of mootness, Your Honor, but only as mootness being a shorthand term here for the Court deciding that the case was of so little remaining significance that --

Q It would not be enforced, that is?

A Right.

Q But anyway, in this case, the adjudication stood. The Board's adjudication stood. It was not vacated?

A It was not reversed. No, Your Honor.

Q You haven't yet made an argument that Courts have to be very careful about having a prior restraint on certain amendments, the exercise of First Amendment rights in speaking to their employees.

A Your Honor, I feel very strongly and we argued that position strenuously to the Court of Appeals below. We didn't feel that that issue was before you here, but only the question of how the Court of Appeals properly exercises its discretion, but in this case, we think it's quite germane that the First Amendment issue certainly had to be considered by the Court of Appeals and they could take that into account when determining whether there was enough to this case to justify

such a consideration.

We seek no broad of law, mooting every case in which a certified election is held and indeed, we are sure that is not the law. We seek only the concurrence of this Court in the proposition that the Court of Appeals on the facts of our particular case, had and did not abuse the discretion to dismiss the Board's enforcement petition.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Resnick.

Mr. Attorney General, you have about nine minutes left if you wish to use it.

MR. KLEINDIENST: I won't burden the Court with more than just a couple of minutes, if the Chief Justice please.

REBUTTAL ARGUMENT BY RICHARD G. KLEINDIENST,
DEPUTY ATTORNEY GENERAL, ON BEHALF OF THE
THE PETITIONER

MR. KLEINDIENST: I'd like to begin at the end and respond to the question raised by the Chief Justice. Section 8(c) of the Act confers upon employers and employees free speech rights and there is a means by which you can determine whetheror not your First Amendment rights under the Constitution have been adequately protected under that section.

But I don't think that the Respondent company here can pull itself up by its bootstraps with respect to the position it takes in this case, because, although I was not

present when this case was argued before the Court of Appeals, I have argued several such cases. I don't know what they were thinking about or what the judges at the Court of Appeals were thinking about, but I do know what the record says, with respect to this whole question of mootness.

It says this, and it's on page 48 of the appendix, and it's a per curiam statement by three judges: "During oral argument in this Court, counsel for Raytheon made a suggestion of mootness," and then the court went on to read the five motions. And then the Court said: "Accordingly, on the authority of General Engineering, Raytheon's motions are granted. The proceedings are dismissed."

In General Engineering, Inc., it goes solely on the question of mootness, and Mr. Justice Stewart raised the question: "Well, how long has this General Engineering case been around?" It was decided in 1962, Mr. Justice, but in 1963 the Seventh Circuit and in 1965 the Fourth Circuit, being aware of the General Engineering case, refused to follow it and followed a different result and, as a matter of fact, relied upon the Second Circuit's decision in Clark Brothers in 1947 and I honestly believe that if the Ninth Circuit had had before it the Mexia Textile case, and the Clark Brothers case, they wouldn't have arrived at the results that they did in General Engineering.

With respect to the question raised by Mr. Justice

White and Mr. Justice Brennan on what happens when you declear it moot. What you have is a naked, ineffectual statement by the National Labor RElations Board that an employer is engaged in unfair labor practice conduct, but you can't do anything about it. And I think that further complicates this situation, because you would again have the total environment beclouded by a statement by the National Labor Relations Board that this company had engaged in illegal conduct and yet, if in fact, it had, there couldn't be an order of the court to make them cut it out and if it hadn't, I think this company would be under the burden always of being accused of this type of conduct.

Q It would have some effect, would it not, Mr. Attorney General, in the sense -- I'm speaking now of the existence of the determination of an unfair labor practice, that if a new complaint were issued at a later time and the conduct were a similar conduct, the Board certainly would have his eye on the prior determination --

A I think what it would do, instead, Mr. Chief Justice, would run right up to the Court of Appeals and say, "You gave us an order, ordering these people not to do this and they have done it and we want you to hold them guilty of contempt.

Q Well, I'm going on the assumption that there would be no continuing effect. The Ninth Circuit's judgment was left standing and you had no enforcement order, there would

still be some impact on the unfair labor practice determination itself; would there not?

A Well, that might have some impact on the Board's decision. Then you would get into problems of whether or not improper inferences or illegal inferences are brought as a result of prior conduct.

I think the best way to clean the case up, really, and get rid of this principle of law that inadvertently came out of the Ninth Circuit, and it doesn't square itself with the policy of this Court or the decisions of other circuits, is to send it back there and ask them to find out whether, in fact, this company engaged in unfair labor practice activities. If they didn't then dismiss the whole kit and kaboodle and if they did, then make them susceptible to a consent citation.

Q Well, that seems to me to be rather inconsistent with what you said earlier that we seemed to concede that if the Court of Appeals had made the determination that there wasn't any substantial chance of any recurrence of this conduct that it could have properly refused enforcement.

A No. If you interpreted my remarks as saying that, Mr. Justice, I think you misunderstood me. I said that there is conceivably some fact situation where they could. I don't believe they exist in this kind of a case. And if you got that impression from my remarks --

Q Well, I certainly did. You mean the -- a court

can find and it could be conceded by the union that, well, there's really no meaningful chance that that conduct will ever recur?

A I can --

Q And then, but nevertheless, we insist that you adjudicate this unfair labor practice, which will take you a lot of time and energy and then if you agree with the Board you must then enter a cease and desist order.

A Oh, I agree with you on that, Mr. Justice, but I do not agree that this is that kind of a case.

Q Well, I know, but that's another point. Why should we -- you apparently think there is some standard by which the mootness or nonenforceability should be judged. And at the very least you claim the Court of Appeals didn't apply it.

A Right.

Q And if there is that kind of a standard that didn't apply, why shouldn't that have the job, not us, of first applying the standard?

A Well, I think this Court has applied the standard generally, and I think the Ninth Circuit has misapplied it. I don't believe that this record shows that there's no reasonable expectation under any circumstances that this conduct --

Q I know, but why shouldn't the Court of Appeals have that job as they do in the first instance under the right

standard?

A I fully agree with that.

Q If they did it under the wrong standard. I'm not saying they did it under the wrong standard.

A Well, I fully agree; I just think they did it under the wrong standard here. I fully agree with that, Mr. Justice.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General. Thank you for your submissions. The case is submitted.

(Whereupon, at 2:30 o'clock p.m. the argument in the above-entitled matter was concluded)