ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

CAPTION: LYNN L. BREININGER, Petitioner v. SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 6

CASE NO: 88-124

PLACE: WASHINGTON, D.C.

DATE: October 10, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

LYNN L. BREININGER, :

Petitioner :

v. : No. 88-124

SHEET METAL WORKERS INTERNATIONAL :

ASSOCIATION LOCAL UNION NO. 6 :

Washington, D.C.

Tuesday, October 10, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 a.m.

APPEARANCES:

FRANCIS J. LANDRY, ESQ., Toledo, Ohio; on behalf of the Petitioner.

DAVID L. SHAPIRO, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting the Petitioner.

LAURENCE GOLD, ESQ., Washington, D.C.; on behalf of the Respondent.

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PROCEEDINGS

(11:00 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 88-124, Lynn L. Breininger v. Sheet Metal Workers International Association Local Union No. 6.

Mr. Landry, you may proceed whenever you are ready.

ORAL ARGUMENT OF FRANCIS J. LANDRY

ON BEHALF OF THE PETITIONER

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

This case involves a challenge by the Petitioner to a judgment of the district court in the northern district of Ohio, which was affirmed by the Sixth Circuit, dismissing a two-count complaint brought by the Petitioner against this labor union. The first count was for breach of duty of fair representation. The second count was brought under the Landrum-Griffin Act.

The district court dismissed the case on a motion for summary judgment and dismissed it on jurisdictional grounds inasmuch as because the case involved allegations that the Petitioner was discriminatorily refused job referrals on an out-of-work list, that the case was -- preempted by the National Labor Relations Board exclusive jurisdiction under San Diego Building Trades v. Garmon. The district court also held the Landrum-Griffin Act was preempted similarly under the

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Garmon doctrine.

The Sixth Circuit affirmed on the jurisdictional basis and additionally added that, because the out-of-work list was available to use by members of the union and non-members, it could not constitute discipline under Teamsters v. Leu, because non-members also could use the out-of-work list. This was an issue which was not reached by the district court.

The duty of fair representation, we believe, is certainly involved in this case. The duty developed over 40 years ago in response to a need by the individual members of the union to have redress for arbitrary union activity. In Vaca v. Sipes in 1987, this Court also embraced the duty of fair representation again, subsequent to the National Labor Relations Board recognition of the duty of fair representation as an unfair labor practice in Miranda Fuel.

The duty of fair representation is a bulwark for redress by individual union members for arbitrary union conduct, and we believe that, because there is a congressional grant of exclusive representation authority to the individual labor unions, that the constitutionality of this grant would be called into question if the individual employee, the individual member of the union, were deprived of the right to a judicial forum to redress arbitrary conduct.

Thus, we see no reason to restrict the availability of the duty of fair representation, and any remedy for redress of

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discriminatory job referrals in this context ought to be -- the jurisdiction ought to be concurrent with that of the National Labor Relations Board. Additionally, --

QUESTION: Mr. Landry, do you take the position that any action by the union that harms one of its members is actionable?

MR. LANDRY: We -- action which would --

QUESTION: It doesn't have to be discipline.

MR. LANDRY: Not under a duty of fair representation analysis. It could be any arbitrary discriminatory, bad faith, hostile conduct, whether it would be -- constitute discipline or whether it would constitute other --

QUESTION: So it isn't necessary, in your view in this case, for it to constitute disciplinary action. That's not important.

MR. LANDRY: It needn't -- no. It need not, under a duty of fair representation analysis, additionally under Landrum-Griffin analysis, it is our contention that a finding of discipline is not necessary for this case, either for the reason that the rights alleged to have been infringed by the local union under the Landrum-Griffin claim involved free speech claims under Section 101(a)(2) of the Landrum-Griffin Act. The case involved allegations that the Petitioner was soliciting pencils which were actually campaign literature, and therefore these were protected -- this activity was

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protected by Section 101(a)(2). And Section 609 of Landrum-Griffin applies to discipline for engaging in protected activities. So that is covered.

But even if it does not rise to the level of discipline, the Petitioner did plead Section 102 --

QUESTION: To violate the National Labor Relations Act, however, doesn't the action have to relate to the individuals rights as an employee? Would -- would -- would it be a violation of the duty of unfair -- duty of fair representation, for the union to send some goons over to break up the -- you know, On the Waterfront. Johnny Friendly sends over some mobsters to destroy somebody's house, having nothing to do with the employment rights of the individual. Would that be a failure of the duty of -- I mean, it may be criminal, but would that violate the National Labor Relations Act?

MR. LANDRY: With respect to the duty of fair representation act -- duty of fair representation doctrine, the cases have considered the duty of fair representation of the union to be co-extensive to its authority as a representative of the individual. So --

QUESTION: Well, as a representative vis a vis the employer. Isn't that right? I mean, the very term representation, it -- it has to relate to the employee's rights against the employer, no?

MR. LANDRY: We believe it -- yes, it -- it would, but it could go beyond that as far as the unions negotiation, collective bargaining agreement, the administration of the collective bargaining agreement --

QUESTION: All of which relate to what the individual employee gets from the employer. No? Do you know any case that doesn't in -- like jobs, like salary, like working conditions and so forth. Do you know any case that doesn't involve the employee's relation to his employer?

MR. LANDRY: As long --

QUESTION: Or prospective employer.

MR. LANDRY: Yes. However, rights, the Landrum-Griffin Act claims, go beyond that analysis. And --

QUESTION: Right.

MR. LANDRY: -- basically deal with the internal, the member's rights against his own union. So, therefore, we believe that the free speech claims, under your analysis, if the union would send out someone to physically harm a union member, that would fall under an infringement of Title I of the Landrum-Griffin Act, the Bill of Rights, and would therefore be actionable as an infringement. Now, whether that would constitute discipline or not would be -- is very -- difficult --

QUESTION: Mr. Landry, you have been asked a couple of questions about the duty of fair representation claim, and

each time you have answered them by talking about your other claim. Are you abandoning your duty of fair representation claim?

MR. LANDRY: No, we are not abandoning it. We're -- I'm trying to --

QUESTION: But are you agreeing with Justice Scalia that it just doesn't apply in a case like this?

MR. LANDRY: We believe it does apply in a case like this, because this contract, or this out-of-work referral system, was established by the collective bargaining agreement, where and in the collective bargaining agreement, Article 5 of that agreement, places a duty upon the -- places a contractual obligation on the union to furnish workers upon request by the employer. And the employer, if he -- can submit letters of request to the union, and after 48 hours period, if the union is unable to furnish sufficient workers in order to fulfill the employer's need, then the -- at that point, the employer can go out and fill his needs with other --

QUESTION: So the union's actions depends on who gets a job, who's referred. They will refer --

MR. LANDRY: In effect, the union can -- has control over who can --

QUESTION: Exactly.

MR. LANDRY: -- get the job in this particular case.

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So that they are -- they are administering this --

QUESTION: And who will be permitted to enter into an employment relationship with the employer.

MR. LANDRY: That's correct. In --

QUESTION: Just in case you are in any confusion, my problem is not whether the duty of fair representation applies to this. I -- I think it does. My problem is whether the disciplinary provision applies to this.

MR. LANDRY: Yes, and I --

QUESTION: Are you going to address that one? You -- you -- you said the word discipline could be narrower. Why isn't it narrower? Why doesn't it relate only to taking away rights that are distinctive to the union employee, his rights as a union member, as opposed to his rights as an employee, whether he is a union member or not.

MR. LANDRY: The purpose, Justice Scalia, for the enactment of the Landrum-Griffin Act in the '50s, was concern that the -- that there were intra-union problems that were not being addressed by the National Labor Relations Act. And the will -- the purpose of this is to ensure that there is an overriding analysis that unions are democratically governed within themselves and responsive to the will of the majority of the union. Now, the -- there were -- there were -- was concern in Congress over abuses and deprivation of livelihood which were taking place in the '50s, and the Landrum-Griffin

Act was enacted in response to those concerns. And there is legislative history in the brief of the amicus -- of the amici curiae indicating remarks made by Senator McClellan and Senator Kennedy highlighting this particular fact.

Discipline, the concept of what would constitute discipline, it is our contention, can also involve employment rights in this particular case because the -- we have basically a job referral system through a hiring hall system. And the union -- the -- the whole purpose of the hiring hall is to control who, and refer members to jobs. Okay, now, the --

QUESTION: Not just union members. Everybody. Right? I mean, any employee?

MR. LANDRY: That is correct. We understand that, we would concede that theoretically, in theory, that a non-employee, a non-member, could make use of the, of this job referral system. However --

QUESTION: Well, how is depriving of that a union discipline, any more than, you know, you speak of the bar disciplining one of its members. That doesn't mean sending up some -- somebody out to smash his house, and it doesn't -- it doesn't mean prosecuting him criminally. It means depriving him of some of his unique, distinctive advantages as a member of the bar. Why doesn't union discipline mean the same thing?

MR. LANDRY: Because we would submit that the ability

to use job referrals and to use the union -- the hiring halls, which is really a clearing house for information, would -- is a distinct membership and advantage -- sorry, distinct advantage of being a member in the union. And basically what the union --

QUESTION: Excuse me. I thought a non-union member was entitled to the same thing.

MR. LANDRY: Yes, he is. But --

QUESTION: Well, then, it is not distinctive to the union.

MR. LANDRY: But it's -- it's a feature, and it's an important feature of union membership to be able to use -- make use of this hiring hall.

QUESTION: It's also an important feature of non-union membership. It's like breathing in and out.

MR. LANDRY: How -- however, for example, I think in the real -- operation of the real world, employers lean heavily on the use of these hiring halls, and in order -- in depriving a union member of the use of a hiring hall, what you're telling that union member is that the only way you are going to come back here, if it is for a reason that, under -- if it is for a protected reason, as we have here, you are telling that union member that look, either you recant your position opposing our union leadership, or leave the union.

QUESTION: Well, may -- maybe -- I -- I -- no doubt

it's a failure of a duty of fair representation to deprive any member, union or not, of that -- of that feature, but every time the word discipline is used in the statute, the word discipline that you are relying upon, it -- it's part of a whole series of words. It says no member may be fined, suspended, expelled or otherwise disciplined. That -- that means, to me, internal, internal sanctions relating to union membership, not something totally external.

MR. LANDRY: But the statute, Section 609, does refer to other -- otherwise discipline as well.

QUESTION: Yes, but it's in a series of words, and it's standard statutory construction that -- that one word in another series is -- is colored by those other words. And the only other words put in there are all internal stuff: fined, expelled, suspended or otherwise disciplined. I --

MR. LANDRY: However --

QUESTION: I find it very strange to think that that means anything except something pertaining to your status qua union member.

MR. LANDRY: However, this union out of work referral list is administered by the officials of the union, and when -- for -- when you have facts as we have in this case, that the -- that the Petitioner opposed the then-in-power union leadership, and -- and when the leadership, under color of their -- their -- of the union's authority, or under color of

their authority as leaders in the union, seek to deprive a union member of this right to obtain referrals under that system, then they are affecting his -- they are using their authority as union leaders to affect his rights as a member that he would otherwise have.

QUESTION: But I would suppose that would be the case if the -- if the union officers inflicted any harm upon the member, by reason of its dissatisfaction with the members particular position.

MR. LANDRY: We believe there might be a line to be drawn in -- in that area, and it is a very difficult one to draw. The use of -- the deprivation of jobs basically is forcing that union member to choose between protected rights or the loss -- or the fear of the loss of job opportunities, or job reprisals. At some point, again, there would have to be a penalty, some sort of penalty which would be involved. At some point, if there is clearly unauthorized activity, for example, physical abuse, we believe that that might fall under infringement if it was for protective activity; it may not fall under the term discipline.

However, it appears that discipline such as -- such as restricting union member from the use of job referrals is a traditional form of discipline which is used in some cases. For example, 90-day benching, which means taking them off the list for 90 days, is commonly used.

QUESTION: How about breaking his leg? I mean, the Johnny Friendly example again. The union -- union leader sends over a mobster to break his leg for opposing the union leadership. Is that discipline?

MR. LANDRY: That -- that, we believe, may constitute an infringement of rights. It may not be discipline because it is not a traditional type of --

QUESTION: So, there are infringements of rights that are not discipline, and -- and -- and some things, some protections of the union members' rights under Title XXIX have to be guaranteed in other ways than under this -- the LMRA.

MR. LANDRY: Which we believe would be guaranteed under -- if it were for protected activities, some sort of reprisal infringement, that would be covered under 101(a)(2), made -- made actionable through 102, free speech.

QUESTION: Well, how? 102 says have been infringed by violation of this Title. Any persons whose rights secured by this Title have been infringed by violation of this Title. Breaking his leg would not be a violation of this Title, would it?

MR. LANDRY: If his free speech rights were violated. It -- it -- but the point is it would be an infringement --

QUESTION: You're -- you're not reading the full provision. It says any person whose rights secured by this Title are infringed by a violation of this Title. Now, the

rights -- you say the rights are secured, right, but they have to be infringed by a violation. And breaking someone's leg is not a violation of this Title, as far as I know. Unless you think that it that it's discipline.

MR. LANDRY: We don't -- we -- we believe that might be stretching the concept of discipline too far, if it is not a traditional form of discipline of some sort.

QUESTION: But if you don't stretch it all the way then your -- then your strongest argument for stretching it at all is gone, that somehow this section has to be self contained and every possible infringement of the right of the union member has to be punishable under this Title and nowhere else. It seems to me you are acknowledging that there are some that are not punishable under this Title.

MR. LANDRY: Well, it -- if we are going to use the word discipline as a way of distinguishing activity, perhaps the Court could make infringements -- make any of this activity actionable as an infringement under 101(a)(2) and 102, or actionable under 102.

QUESTION: Mr. Landry, may I ask you a question about your duty of fair representation claim? Your opponent says in your count 1 you don't allege any intentional misuse of the hiring system. Do you agree with that reading of your complaint? In other words, does your count 1 -- would your, the theory of count 1 apply even to a negligent,

maladministration?

MR. LANDRY: We believe that in the concept of negligence under the decisions of the courts would not be enough to constitute a duty of fair representation. However, we have alleged arbitrary discriminatory conduct without --

QUESTION: So, are you saying that part of your allegation in count 1 is intentional discrimination against your client?

MR. LANDRY: We believe a fair reading of that would indicate it's intentional. But we believe that arbitrary conduct should be enough to rise to duty of fair representation -- breach of a duty of fair representation. Now, arbitrary is something more than negligence; it is a perfunctoriness which --

QUESTION: But is not necessarily intentional. Do you, --

MR. LANDRY: Not necessarily.

QUESTION: -- you do not -- you agree that you -- your position is that you don't have to allege that it was intentional.

MR. LANDRY: That is correct.

QUESTION: Okay.

QUESTION: Can -- can we rule in -- in your favor based on Section 102 when you didn't plead it? Let -- let's assume that we say that this is not discipline. Then what happens to

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the case?

MR. LANDRY: I believe that we have pleaded facts in the -- in the second claim for relief sufficient to give a basis for ruling that this is an infringement. We have also pleaded Section 102 of the Landrum-Griffin Act, that's 29 United States Code 412, which is in there, which makes any violation of any Title I right actionable. And that, plus the fact that we have a free speech problem in this case, we believe that although we've not specifically enumerated the 101(a)(2) free speech section, that the facts actually have been pleaded under a fair reading of the complaint. And considering that this is a very preliminary -- this was a preliminary stage. The -- basically the district court ruled on the jurisdiction aspect and never really reached the discipline aspect, that therefore the Court could rule in our favor on that -- on that rationale.

I wish to reserve the remaining time for rebuttal, if I may.

QUESTION: Thank you, Mr. Landry. Mr. Shapiro, we'll hear now from you.

ORAL ARGUMENT OF DAVID L. SHAPIRO

AS AMICUS CURIAE, SUPPORTING PETITIONER

MR. SHAPIRO: Thank you, Mr. Chief Justice, and may it please the Court:

In the brief time available to us, I would like to

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focus on count 1 of the complaint, in which the Petitioner alleges that the union breached its duty of fair representation to the Petitioner by arbitrarily and discriminatorily refusing to refer him to employment through the union hiring hall. The courts below held that this claim fell within the exclusive primary jurisdiction of the National Labor Relations Board, and for that reason, the count had to be dismissed.

We contend, with Petitioner, that that decision was in error for essentially three interrelated reasons. First, the duty of fair representation itself. The duty of the exclusive representative to behave fairly in representing all members of the bargaining unit is a duty that is of fundamental importance in the administration of the federal labor laws.

Second, this Court has recognized in a number of cases that the federal courts have served and need to continue to serve as primary guardians of that duty. And finally, there is no basis in the law or in sound policy for any exception for this particular case from the judicial enforceability of the duty of fair representation, either because the case involves a hiring (inaudible) or for any other reason.

First, with respect to the fundamental importance of the duty of fair representation, it's true that that duty is not expressed in explicit terms in either the Railway Labor Act or the National Labor Relations Act, but this Court has

said that the duty is implied in the strongest possible sense. It is implied, this Court said in the Emporium case, from the very nature of the union's right of exclusive representation when it is chosen by a majority. Or, as this Court said in the Foust case, it is inseparable from that duty.

The reason for that, we think, is clear. When these statutes, the Railway Labor Act and the NLRA, were enacted they operated to take away from minorities and from the individual the ability they previously had to bargain for themselves with the employer. From now on a union that was chosen by the majority had the exclusive right to bargain for all the employees in the unit. If the employees themselves were not left with some relative duty imposed on the union, serious questions of fairness would be presented. And indeed, since the union's authority was conferred by Congress, those questions might rise to issues of equal protection or due process.

It's partly for that reason, we believe, that this Court has recognized, the Czosek case is a very good example, that the federal courts are the primary guardians of -- of this very important duty. For one thing, the duty itself was first recognized by this Court in the Steele case. It has been continued to be developed, refined, articulated by this Court and by the lower federal courts.

Secondly, as this Court said in Vaca against Sipes, the

enforceability of this basic duty should not be left to the unreviewable discretion of the general counsel of the Labor Board, and indeed should not turn on the Labor Board's decision, which it is wholly authorized to make in the allocation of its resources, not to exercise its jurisdiction below a certain monetary threshold. The mere fact that an employee may be working in a business that does not meet that particular monetary threshold should not be that he is deprived of the ability to enforce his right of fair representation.

Moreover, and I think this goes perhaps to a question asked earlier by Justice O'Connor, the scope of the duty of fair representation, protecting as it does against all arbitrary treatment in the employment relationship, may well be broader than the ability of the Board to enforce certain obligations that are created by the unfair labor practice provisions of the National Labor Relations Act.

The union has argued very forcefully in its brief for the proposition that some forms of arbitrary treatment do not fall under the unfair labor practice provisions of the act. The Labor Board, of course, disagrees with that position. The government disagrees with that position. But if it's correct it strengthens the position we are taking here, because the effect of it would be to leave essentially unenforced the guides of arbitrary treatment that may fall outside the

particular scope of the Labor Board's responsibility.

Despite the union's contention in this case, we do not read the National Labor Relations Act, the Taft-Hartley amendments of 1947, which created new union unfair labor practices, as in any sense authorizing or licensing unions to engage in broader forms of arbitrary discrimination of the kind that this Court so vigorously condemned only three years earlier in the Steele case.

That, then, leaves the question, we believe, whether there can or should be some exception to this general availability of a judicial forum for this kind of case. We believe that there should not. In the first place, the enforceability of this duty is not limited to cases in which the plaintiff is also bringing a 301 claim for breach of contract against the employer. This Court has made that clear in a number of cases, starting as early as Lockridge, almost 20 years ago, and as recently as Communications Workers, only two years ago, that the duty of fair representation extends beyond the hybrid action to cases involving the negotiation, the administration of collective agreements. And, indeed, in Lockridge the Court pointed out that the duty need not be bottomed on a collective agreement at all.

Nor do we believe that there is any justification for excepting hiring hall cases from the scope of enforcement of this duty.

QUESTION: Mr. Shapiro, may I -- may I ask -- am I correct that it doesn't make any difference, as far as this Claimant is concerned, if we uphold the LMRDA claim, so long as we uphold the NLRA claim. Is -- is there any reason why he needs both?

MR. SHAPIRO: Yes, there may be, Your Honor, because the --

QUESTION: What is that?

MR. SHAPIRO: The allegations of the LMRDA claim may well turn on the allegation in count 2, that the reason why he was denied the use of the hiring hall was because he engaged in political activity in support of those who did not win the election. Certainly to make out a free speech claim under the Bill of Rights, that allegation has to be borne out.

QUESTION: Right.

MR. SHAPIRO: And it may also be --

QUESTION: Well, that means he has to go beyond the NLRA claim in order to make out the --

MR. SHAPIRO: Correct. The NLRA --

QUESTION: So, if the NLRA claim is upheld, he has gotten everything that -- he can't get further relief in addition because of the -- of the LMRDA claim, right?

MR. SHAPIRO: Oh, I see. I believe that may well be true, if he can make out all the elements that are necessary to recovery on count 1. Then that, I think, probably fairly

embraces the claim that is made under count 2. The -- the converse is not true. He may be able to sustain his claim under count 1, but not under count 2.

As I was saying, I don't believe there is any basis for an exception simply because this case involves a hiring hall. In the first place, many claims of breach of duty of fair representation that involve hiring halls are accompanied by claims that there has been a breach of contract under 301; they are hybrid claims. This case involves a hybrid claim in another sense, that is that the claim for breach of duty is coupled with a very closely related claim under the LMRDA.

Finally, it would be strange indeed to say to an employee you may pursue a fair representation claim with respect to matters of promotion, transfer, even discharge, but not with the basic right of employment through a union hiring hall. Union hiring halls serve very valuable functions in the administration of the employment system in this country. But they are capable of very substantial abuse. I see my time is up.

QUESTION: Thank you, Mr. Shapiro.

We'll hear now from you, Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD

ON BEHALF OF THE RESPONDENT

MR. GOLD: Thank you, Mr. Chief Justice. I wish to proceed undaunted by Justice Scalia's statement to talk about

the duty of fair representation claim and to seek to convince the Court that that claim, as the lower courts have stated, is -- is badly founded.

I think that it is most helpful to begin by noting what Congress has done with regard to hiring halls. This is not a subject as to -- which has escaped legislative attention. And no matter how this case comes out, and no matter what the duty of fair representation is determined to encompass, individuals like Mr. Breininger who claim, at least in the second breath, that they have been harmed in job opportunities, either because they are non-members or because they are "bad union members" will continue to have an unfair labor practice case which they will be able to bring under Section 8(b)(2) of the National Labor Relations Act. And that's no mere happenstance.

The most contentious issue, in 1947 when Congress was considering a question of how unions which are parties to collective bargaining relationships should be regulated, was the subject of the closed shop, the requirement that to be hired you had to be a union member, and most particularly, the closed shop in connection with the hiring hall. That debate was of the dimension of the debate we are having today over the scope of the capital gains tax. It was an issue that was fought out in public and not in private, that gripped the national attention, that caused rallies, vetoes and the like.

And Congress came to a conclusion on -- on that issue. And the conclusion was that where unions have an active role in the hiring process they should be subject to the same norms as employers, same NLRA norms as employers who are engaged in the hiring process. And as the language of Section 8(b)(2) makes plain, that is the gravamen of the 8(b)(2) offense, and Congress was operating against the background of well settled law that an employer in making a hiring decision violated the NLRA if and only if he acted on the basis of the union considerations.

It seems to us that the essence of the matter in terms of what the statute tells us in terms is the following. That if an employer and a union bargain in a way which ends up in the employer doing the hiring, under the NLRA there is a violation if and only if the employer refuses hire on the basis of union considerations. And if the employer and the union bargain in a way which provides that an outside agency, a third party, an employment agency, makes the hiring decision, the same rule obtains.

The argument here is that if the employer and the union bargain and the determination is made that the union will have an active role in the hiring process, there is a different standard, as Justice Stevens indicated, that the standard would be the one drawn from the duty of fair representation and would be -- would stretch beyond alleged wrongs based on

union consideration to claims that the union didn't have specific -- sufficiently specific rules, which would not be a violation for the employer, that the union had rules which it didn't follow, to the detriment of people who were union members and were close to the administration, and so on.

QUESTION: Mr. Gold, am I correct in understanding that the other side of that coin is that you would agree that if the allegations in count 2 were included in count 1, namely that the unfair use of the -- alleged unfair use of the hiring clause -- hiring hall, was for retaliation against some kind of activity, that would allege a violation of the duty of fair representation?

MR. GOLD: No. We are arguing that that would allege a good unfair labor practice claim. And the question here is whether that kind of unfair labor practice claim, which under normal rules would go only to the National Labor Relations Board, also states a good claim of a breach of the duty of fair representation.

To go back to what I said about the employer. If an individual walks into court and says the employer is -- refused to hire me because I am a union member, and he has the facts to demonstrate that, he cannot go to court. He must go to the Labor Board.

QUESTION: But what you're saying is that if the allegations in count 1 were made in a charge before the Labor

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Board, the Labor Board would properly deny jurisdiction.

MR. GOLD: No, the Labor Board would properly find that an unfair labor practice had been committed, and give the individual the remedy.

QUESTION: Even if it were not for retaliatory reasons. That is what I am saying. Count 1, as I understand your --

MR. GOLD: No, I apologize. I thought you were still talking about your hypothetical.

QUESTION: No, no. As presently drafted, count 1 would not create -- would not allege facts justifying Labor Board jurisdiction.

MR. GOLD: Correct.

QUESTION: If they included the allegations in count 2 in count 1, then the Labor Board, under your view, would have jurisdiction and, therefore, the Court would not, because it's --

MR. GOLD: Right. That is our argument in -- in a nutshell. That whoever is making the active hiring decision under the National Labor Relations Act is subject to a unitary regime, a unitary standard and a unitary procedure. Now, this is in no way to deny that there is also a duty of fair representation which applies in at least two other situations, neither of which Congress focused on in 1947 in the same way it focused on the party with the act of hiring role.

In one situation, as Mr. Shapiro stated, when a union

negotiates with the employer on the -- for a collective bargaining agreement, it is bound by a duty of fair representation under this Court's decision. That's an implied claim and an implied judicial cause of action which has been created out of the act. Obviously, that is not a situation in which the union is standing in the same position as the employer, in the same way as we have where the union is taking an active role in the hiring process and has, in -- in essence, supplanted the employer. It is acting on behalf of the individuals to set rules that the employer will follow.

And it is also settled that where the union is the party which administers a grievance and arbitration system vis a vis the employer, that the union is bound by the duty of fair representation, and that duty, for intensely practical reasons and other reasons, as the Court said in Vaca, is subject to suit in court.

QUESTION: May I ask another question to be sure I understand your theory?

MR. GOLD: Yup.

QUESTION: Supposing the union, for a non-union related reason, said they would apply -- use the hiring hall procedure only to recommend white applicants and not recommend any black applicants. That, I understand, would not constitute an 8(b)(2) violation because it had nothing to do with union status. And under your view it also would not constitute a

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breach of the duty of fair representation.

MR. GOLD: That's correct. It would constitute a blatant violation of Title VII of the Civil Rights Act of 1964, which, at the labor movements behest, covers not only employer discrimination but union discrimination.

QUESTION: Right.

MR. GOLD: And the point that is inherent in your question is one that we have to face up to, because we are saying that in that situation there would be no NLRA-based claim, even though in other situations, the two I've mentioned, in negotiating collective bargaining agreements and in administering grievance and arbitration systems, the union would be subject to both an NLRA claim and a Title VII claim. And --

QUESTION: Tell me again, I guess I am a little slow on this, tell -- tell me why the -- neither -- neither an unfair labor practice nor a duty of fair representation claim would lie, in that situation.

MR. GOLD: In the situation that Justice Stevens --

QUESTION: Yes. Yes. Right, right.

MR. GOLD: -- hypothesized.

QUESTION: ULP would not lie because --

MR. GOLD: Because Section 8(b)(2) covers situations in which the union causes or attempts to cause a violation of Section 8(a)(3). Section 8(a)(3) prohibits discrimination

which encourages or discourages union membership, and this Court, in a series of cases, has said that you have to show that there was a union consideration that is on the base. The easy way of looking at it is if an employer said I will only hire white people, would he be subject to an 8(a)(3) claim. The answer is no. He would be subject to a Title VII claim.

And we are saying that in this one situation where the party that bargained things out and the employer said you will stand in my shoes in the hiring decision, that Congress decided that the rules would be the same. Now, in other situations where the union is not standing in the employer's shoes, is not taking the employer's active role in making hiring decisions, we can't make this equation between what employers can do under 8(a)(3) and what unions can do as exclusive representatives.

In that situation, in those situations, in part for a reason that Mr. Shapiro gave and which comes from Vaca, because the union stands in the way of the employee acting against the -- vindicating legal rights against the employer, the union is bound by a duty of fair representation. There is no analogy to what the employer does. The union stands between the employee with a grievance about what the employer is doing and his -- and the employer. And therefore, there is a duty of fair representation.

QUESTION: But when the union takes over the employers

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prerogatives, there's nobody to be represented to, except the union itself.

MR. GOLD: That's -- yeah, I mean, it is the -- it is the union, it would be -- it is certainly possible, but it would be paradoxical for Congress to say that, whereas in 1946 the individual had no right against the employer for his direct action in refusing to hire, if the employer and the union reach an agreement which -- which says the union will act for me from now on, there ought to be a new norm. Nothing has been taken away from the employee in that situation. After all, where the union is bargaining with the employer over what the -- the contract terms will be, it can be said, as Vaca says, that the employees have lost something.

Where the union is dealing with a grievance and the individual says I have a contract right vis a vis the employer, and the union is the only means through which I can vindicate that, through the grievance arbitration system, and the union acts arbitrarily, in those situations you have the union acting in a representative capacity in a way which can be said to disadvantage the individual in his ability to vindicate his legal rights. But here --

QUESTION: Mr. Gold, isn't -- isn't there a fundamental difference, where the employer refuses to hire somebody, he is not standing in a -- in a -- in a trust relationship to that individual that he refuses to hire. Where the union refuses

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to hire -- to hire somebody, the union has specifically been -- been approved by Congress as someone who is supposed to represent employees, who has a special relationship of care and -- and -- and representation for them. So to say, you know, the employer can get away with it, so the union should be able to get away with it too without violating the labor laws, is -- it's not persuasive.

MR. GOLD: To say that the union has a trust relationship --

QUESTION: But that's its job, isn't it?

MR. GOLD: Well, but it's the job -- it indicates the nature of the job we're about here. The -- what is inherent in the National Labor Relations Act, which should be vindicated by this implied cause of action. I -- I think we -- we ought to be quite frank about the parameters of the debate. You can read the whole National Labor Relations Act and you'll never find a duty of fair representation. You can read the whole act and you're never going to find a basis for 1337 judicial jurisdiction.

QUESTION: Well, that was the -- the union -- unions have argued that way long ago.

MR. GOLD: Well --

QUESTION: And lost.

MR. GOLD: The question is, and I admit to making this one of my subspecialties, whether we continue to lose out to

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infinity, it -- it -- it seems to us that, as Chief Justice Burger said in United States v. 12 200-Foot Reels of Tape, one of my favorite decisions, that the jested of possibilities of taking one step at a time shouldn't be pressed beyond where reason takes you. And it seems to us that in determining how far the Court ought to go in defining what's within the duty of fair representation, that's what -- that -- that's what the discussion is about. What are -- what is the scope of -- of this --

QUESTION: But this -- this union was certified, wasn't it?

MR. GOLD: Oh, this union was certified exclusive representative --

QUESTION: And it purported -- it purported to contract on -- in a representative capacity.

MR. GOLD: And I think its contracts --

QUESTION: And the only reason that an employer made this deal with the union was because it was the represent --

MR. GOLD: Yeah, certainly one -- one possibility is to say that despite whatever lessons we can grasp from the particulars of 1940 -- of what happened in 1947, 8(b)(2) and so on, that anything that flows out of union exclusive bargaining relationships should be covered by the duty. And that is, in essence, the position for which the United States argues here.

Our counterargument is that the Court, in implying norms and in implying judicial causes of action, ought to draw those norms and causes of action out of the entirety of the statutory materials which form the base of the implications.

QUESTION: Well, her's -- here's -- you think here that -- on this -- that -- these -- this kind of discrimination, alleged discrimination in administering the hiring hall, wouldn't be an unfair labor practice either.

MR. GOLD: Yes, we're --

QUESTION: You think the Board has gone too far in -- saying what is an unfair labor practice, and the courts may be in danger of going too far on the duty of fair representation.

MR. GOLD: Well, it would sanction the -- the matter. In other words, we believe that the right rule concerning 8(a)(3) and 8(b)(2) is the rule this Court stated in Local 357 Teamsters. And that is they have to show union-based discrimination. The Board is --

QUESTION: Well, you might be right about the unfair labor practice and wrong about the duty of fair representation.

MR. GOLD: Well, but the point is that if we're right about the unfair labor practice, and this Court extends the duty of fair representation to the point of covering arbitrary action which would not be an employer or a union unfair labor practice, then Congress certainly labored in vain, and the

implied cause of action goes well beyond the specifics of the particular determination that Congress made. In other words --

QUESTION: The reason this is not an unfair labor practice, Mr. Gold, is because the union's actions was not directed to discriminating in favor of or against a persons membership in a union.

MR. GOLD: Correct. Yes. And, there's no allegation that in -- in count 1. I -- I -- I think in part it's a recognition that there are some problems with the allegation that there was retaliation for union activity here, but in part it was that the complaint would look like, walk like and smell like an 8(b)(2) if the statement was that the union should incur NLRA liability in a judicial forum for discriminating on the basis of union conduct. 'Cause at that point, all you would have to do is look at 8(b)(2), look at its legislative history and know that Congress specifically determined that that kind of claim on a particular standard ought to go to the Labor Board.

QUESTION: Mr. Gold, I might, I -- I -- I might agree with you as an original matter, but isn't that water over the dam? Haven't we -- didn't we create duty of fair representation when -- when the Board itself had not yet determined that there existed any such thing which could be an unfair labor practice.

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MR. GOLD: What is water over the dam, as far as we are concerned, is that there is a duty of fair representation. And that it applies in situations in which the union is acting in a way that no employer does. But there is no case, and therefore no water and no dam, that states what the limit of the duty of fair representation is. And we're arguing that this ought to be a limit, that when you look at the whole statute which you are elaborating through a process of implication, that it is a mistake to -- to define the duty of fair representation so broadly that it duplicates the particular coverage that Congress intended with regard to the regulation of hiring decisions under the NLRA, and indeed overpowers the rule that Congress, after the most contentious debate, arrived at with regard to when a hiring decision is a violation of Title VII as opposed to -- I mean, of the National Labor Relations Act as opposed to a violation of some other claim.

What is at issue here is both the proper tribunal for determining the validity of NLRA hiring decisions, which, overwhelmingly before this late-blooming theory, have been handled by the National Labor Relations Board. And --

QUESTION: Mr. Gold, I take it, by virtue of your focus exclusively on the NLRA aspect of the argument, that you are not so concerned then about the fact that there may be a statutory cause of action under LMRDA.

MR. GOLD: I wanted to, glancing up at the clock, turn to that. We are equally concerned, but we just feel much better armored against the Landrum-Griffin claim here because of the nature of the claim that was actually made, the nature of the question that --

QUESTION: Do you think there is a Section 102 claim made on the face of the complaint?

MR. GOLD: No. The complaint -- let me just say something very quickly about the structure of the Landrum-Griffin Act. The Landrum-Griffin Act has a provision, Section 101(a)(2), which safeguards member free speech. It has another provision in Section 101(a)(5) which prevents discipline without due process, or the imposition of union penalties without due process, hearing and so on. Section 102 gives individuals a cause of action for a breach of either 101(a)(2), the free speech provision, or 101(a)(5), and Section 609, as this Court said in Finnegan v. Leu, which has been referred to here, in essence replicates, and for the purposes of this case, is parallel to Section 102.

The only claim made in the complaint, the only question raised in the petition for certiorari, concerns Section 101(a)(5), the due process provision, and Section 609. There is no reference to Section 101(a)(2). It was never raised; it's not here. And this Court quite clearly held, in Finnegan v. Leu, that retaliatory actions that affect a union members

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rights or status as a member of the union are all that is covered by Section 101(a)(5) and Section 609.

So we think the lower court was plainly correct on this Court's precedence with regard to the Landrum-Griffin claim. To say that a job referral out of a non exclusive hiring hall is an incident of membership, when the union can't limit the use of the hiring hall only to members, and doesn't purport to, is no more sensible than to say that discharge from a union position, an appointed union position, is discipline. And the Court squarely, of course, has rejected the latter of those two propositions.

I want to say something, too, about the practicalities of this. What really is affected here is whether you have to go through a due process system in administering a hiring hall. The theory of the Petitioner in this case is that any union decision, A is referred rather than B, is a form of discipline to B. And therefore, that you have to serve a charge on B for not having worked as long as A, or for any other claim. I want to make it plain that nothing we ask this Court to say or do implicates the question of whether somebody who pleads 101(a)(2) states and says that one of the ways that the union retaliated against him for exercising free speech is job related, doesn't have a good claim -- cause of action. That is just not here. That's a question for the future. It was never pled; it was never litigated.

So, in sum, we say that insofar as the Petitioner here claims that the union acted against him based on the fact that he was a "antagonistic" or bad union member, somebody who the leadership was against, has an unfair labor practice claim under the NLRA --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gold.

The case is submitted.

(Whereupon, at 12:00 noon, the case in the above-entitled matter was submitted.)

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No. 88-124 - LYNN L. BREININGER, Petitioner V. SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 6

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

BY Lyona M. Mayo

(REPORTER)