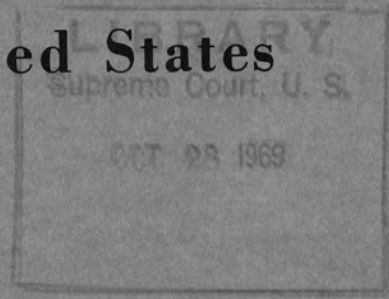


# Supreme Court of the United States

OCTOBER TERM, 1969



In the Matter of:

Docket No. 32

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

J. H. RUTTER REX MANUFACTURING  
COMPANY, INC., et al.

Respondents.

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Place Washington, D. C.

Date October 22, 1969

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C O N T E N T S

	<u>ORAL ARGUMENT OF:</u>	<u>P A G E</u>
1		
2	Arnold Ordman, Esq., on behalf of Petitioner	2
3	Henry J. Read, Esq., on behalf of Respondents	20
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

-----x  
: NATIONAL LABOR RELATIONS BOARD, :  
: :  
: Petitioner; :  
: :  
: vs. : No. 32  
: :  
: J. H. RUTTER REX MANUFACTURING :  
: COMPANY, INC., et al., :  
: :  
: Respondents. :  
: :  
-----x

Washington, D. C.  
October 22, 1969

The above-entitled matter came on for argument at  
12:32 p.m.

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:

- ARNOLD ORDMAN, Esq.  
National Labor Relations Board  
Washington, D. C. 20570  
Counsel for Petitioner
  
- HENRY J. READ, Esq.  
806 National Bank of Commerce Bldg.  
New Orleans, Louisiana 70112  
Counsel for Respondent J. H. Rutter Rex  
Manufacturing Company, Inc.

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

2 MR. CHIEF JUSTICE BURGER: No. 32, National Labor  
3 Relations Board against J. H. Rutter Rex Manufacturing Company,  
4 Inc.

5 Mr. Ordman, you may proceed whenever you are ready.

6 ARGUMENT OF ARNOLD ORDMAN, ESQ.

7 ON BEHALF OF PETITIONER

8 MR. ORDMAN: Mr. Chief Justice and may it please the  
9 Court: This case is here on a writ of certiorari to the United  
10 States Court of Appeals for the Fifth Circuit to review a judg-  
11 ment of that court which substantially abridges a back-pay  
12 order entered by the National Labor Relations Board because, as  
13 the court below saw the case, the Board had been guilty of  
14 inordinate delay in initiating the back-pay proceeding.

15 There has already been extensive litigation in this  
16 matter before the Board and before the courts.

17 The relevant events giving rise to the controversy  
18 occurred when the union engaged in a one-year strike starting  
19 in 1954. The company countered immediately with a refusal to  
20 bargain and other unfair labor practices, continuing a previous  
21 pattern of conduct to which the court below made reference in  
22 its decision here under review.

23 In August of 1957, the court below entered a decree  
24 enforcing a Board order which, among other things, directed the  
25 respondent, the Rutter Rex Company, to reinstate with back pay



1 all of the striking employees in this 1954 strike who had  
2 applied for reinstatement and to dismiss, if necessary, replace-  
3 ments who were hired subsequent to the date of the strike.

4 Pursuant to settled practice, many details about com-  
5 pliance with that decree were left for subsequent resolution.

6 In 1961, the Board, pursuant to Board order and court  
7 decree, and because of noncompliance, initiated a formal back-  
8 pay proceeding in which it found that as of June 30, 1961, the  
9 company was obligated to pay a total of about \$159,000 to 171  
10 employees who had applied for reinstatement.

11 Now, actually, four years and three months elapsed  
12 between the enforcing decree of the court below in August of  
13 1957 and November 1961 when the Board, after the initial prepara-  
14 tory work, formally initiated the back-pay proceeding.

15 The court below concluded that the Board was guilty  
16 of inordinate delay in this regard, to the prejudice of the  
17 offending company, and terminated the company's back-pay liability  
18 as of June 30, 1959, which was two years earlier than the  
19 Board's cut-off date.

20 Of course, this modification had the necessary effect  
21 of denying further back-pay relief to about one-fifth, about  
22 35, approximately, of the 171 employees, strikers, to whom the  
23 company had not even offered reinstatement as of the June 30,  
24 1961 date, so potentially they would have even more back pay  
25 coming.

1           The question presented, therefore, is whether the  
2 court below erred in penalizing aggrieved employees for alleged  
3 inordinate delay on the part of the Board which, if the Board  
4 was culpable at all, was attributable to the Board, and cer-  
5 tainly not to the aggrieved employees.

6           We think the issue can be made even more narrow.  
7 The court below finds, and respondent apparently is not con-  
8 testing, that the defense of laches or undue delay is not  
9 applicable, even if it were otherwise applicable, cannot be  
10 invoked against the Government, any of its agencies, and, of  
11 course, the National Labor Relations Board.

12           On the other hand, we of the agency do not challenge  
13 the power of a reviewing court to eliminate or modify a Board  
14 order. In a case where, for example, that Board is a patent  
15 attempt to achieve an end other than what the Act contemplates,  
16 or even as this Court said in the 7-Up case, the Board cannot  
17 apply a remedy which is worked out on the basis of experience  
18 if in the particular situation the application of that remedy  
19 would be oppressive and, therefore, not calculated to enforce  
20 the policies of the Act.

21           This, as we see it, if the Court please, is the rela-  
22 tively narrow frame of reference in which we believe the question  
23 here presented must be appraised.

24           The court below in the back-pay proceeding, as in the  
25 prior enforcement proceeding, found no evidence of the unfair

1 labor practices in which the company had engaged and recognized  
2 that the Board's typical order of reinstatement and back pay  
3 was an appropriate remedy for the unfair labor practices found.

4 But the court went on to look at the delay factor to  
5 determine whether that delay factor called for a modification  
6 or elimination of the Board's back-pay order. This contention  
7 was also made before the Board. The Board rejected it.

8 But on this phase of the case, the court below con-  
9 cluded that the delay of the Board, this four-year, or more  
10 accurately, as the court below also noted, a three-year delay,  
11 was inordinate, and that the impact of that inordinate delay  
12 was so prejudicial to the company as to warrant cutting down,  
13 and it selected what it thought was an appropriate date, with  
14 no particular reason, cutting down by two years the back-pay  
15 period for which the company was otherwise answerable.

16 By this action, as I noted before, the court corres-  
17 pondingly cut down, although it made no mention of it, the back  
18 pay to which the aggrieved employees, who were themselves inno-  
19 cent of any fault, and who were, in our view, a pivotal concern  
20 of the National Labor Relations Act, cut down their rights be-  
21 cause of the Board's alleged inordinate delay.

22 We really make three propositions here. We submit  
23 first that the court below erred in the first instance when it  
24 concluded that the Board was even guilty of inordinate delay.

25 We submit second that even assuming some degree of

1 culpability attached to the Board because of the delay, the  
2 court below erred so egregiously in its appraisal of the com-  
3 peting interests of all the parties involved, including the  
4 interests, of course, of the aggrieved employees, as to require  
5 a reversal of its holding.

6 Finally, we believe that analysis will show that what  
7 the court below did, in effect, was to say laches, or undue  
8 delay, does not apply against the Government, which is concerned  
9 with protecting public rights, but turned around and, in  
10 essence, applied that same analysis to justify the action it  
11 took.

12 Let me talk about, if I may, the Board's delay a  
13 little bit. We don't mince any words in this regard. We have  
14 acknowledged throughout these proceedings that the delay of  
15 four years and three months, or even three years, when this  
16 back-pay matter really became alive, that the elapse of time  
17 between the enforcing of the decree and the institution of the  
18 Board's initiation of back-pay proceedings is unfortunate, is  
19 regrettable, it is prejudicial to everybody concerned, to the  
20 respondent, to the beneficiaries of the decree, who go without  
21 work and without back pay through this period, and a matter  
22 about which we once said, in an earlier proceeding, we could  
23 well be red faced.

24 We might note, however, that the prejudice to the  
25 respondent in this case is a little doubtful. The respondent



1 carries the keys, I think the phrase goes, to the jail in its  
2 own pocket. If respondent had carried out its obvious statu-  
3 tory obligation to reinstate these strikers in 1955, when the  
4 strike was called off and when they applied for reinstatement,  
5 much of these proceedings, much of the back-pay travail about  
6 which the respondent complains now, would have been obviated.

7 Q What if the company had at that time good-faith  
8 and substantial issues about any particular employee or group of  
9 employees in the sense that it had what it thought was a decent  
10 ground for arguing that this employee was not entitled to back  
11 pay or reinstatement. I suppose its position would be that it  
12 is entitled to an early opportunity to litigate those issues  
13 and to reinstate at that time would, in effect, moot those  
14 questions.

15 A The court below mentioned this contention, which  
16 was raised by the respondent. In the first place, the court be-  
17 low noted that the order in the enforcing decree was so plain  
18 that, in the court's language, it could not have been misunder-  
19 stood.

20 If the respondent were still under the impression  
21 that there was something confusing about that order, that it  
22 had something, it could well have asked either the Board or the  
23 court to clarify that situation. No such move was made.

24 Q What is the usual practice in back-pay situations?  
25 Do companies and the Board normally anticipate that there will

1 be a back-pay proceeding, or some enforcement activities to  
2 work out what the action will be? The order here didn't have  
3 names.

4 Q The employer here did not have names. The ques-  
5 tion what the order required, as it frequently requires in a  
6 strike situation, as distinguished from a discharge situation,  
7 where the respondent is called upon to reinstate strikers, we  
8 cannot name the names of all the people who are on strike and  
9 the typical situation, a strike situation, is "recall all  
10 strikers."

11 Of course the company could have questions. The  
12 company could have questions and it could call upon that. We  
13 asked at the very outset for the company to furnish us a list.  
14 The company did furnish us such a list. We ourselves investi-  
15 gated the matter right at the outset. There were 600 potential  
16 strikers in this situation.

17 Within the first few months after the decree we had  
18 identified the 600 potential claimants. We had eliminated 130  
19 of them.

20 Q On what grounds?

21 A On the grounds either that they had been rein-  
22 stated, some had been reinstated before the strike was called  
23 off, some might well have not been interested in further employ-  
24 ment, some of the 130, or some may conceivably may not have been  
25 on strike. On any of these grounds, we did eliminate 130.

1 Q Would there be any ground on which the employer  
2 could refuse to reinstate any of those 600?

3 A Yes, there were a handful of 10 or 15, I believe,  
4 employees altogether who had engaged in misconduct during the  
5 strike. This would have relieved the obligation of the company  
6 to reinstate them.

7 Q That was just after litigation that that was  
8 determined.

9 A The company could have initially made this.

10 Q I suppose the company claimed that there were  
11 more than that who were disentitled.

12 A Yes.

13 Q Wasn't it entitled to an early resolution of  
14 those claims?

15 A It could, and it could have called upon, as I  
16 say, the Board or the court to clarify its position in this  
17 regard. It took no such action, indeed. When the back-pay  
18 hearing was held, in 1959 and 1960, the principal company de-  
19 fense, or one of its major defenses, is that it had no vacancies  
20 for these strikers to whom it had denied reinstatement.

21 But as the Trial Examiner's report cites in detail,  
22 in most of those cases the record showed the reason it had no  
23 vacancies is that replacements were occupying those positions.  
24 In many instances, that was the only defense the company offered  
25 in the face of an order which required that reinstatement should

1 be effected, even dismissing, if necessary, replacements.

2 We believe the Trial Examiner's report, which the  
3 Board adopted, and the court's own decision, the court pointed  
4 out in its opinion, that it examined this impossibility of  
5 compliance defense very carefully and it concluded in practically  
6 these precise words that it was not impossible for the company  
7 to comply, and in many respects it did not comply, indicating --

8 Q I would suppose the company could have complied  
9 by just reinstating strikers, no matter what, but what about  
10 those instances where it thought it had a good faith defense  
11 to reinstatement. The place to go wasn't the Court of Appeals.  
12 The place to go was to litigate the matter with you people,  
13 was it not?

14 A Precisely, and the company had this opportunity  
15 and it initiated no action. The only request the company made --

16 Q I thought it was waiting for you. You told them  
17 you would be in touch with them, or something.

18 A Yes. The company predicates much of its defense  
19 on a letter it wrote on November 7, 1957, about two months after  
20 the enforcing decree. It wrote the Board a letter saying, in  
21 essence, "We have complied with some of the provisions of the  
22 Board's order. Now, will you please notify us of any instances  
23 where we have not complied?"

24 The company says, on that basis, since we didn't notify  
25 them, they weren't obliged to comply any further.



1           The court below said an offending respondent which  
2 has the primary obligation can't get rid of its obligation by  
3 merely saying "You didn't tell us." The court had told them  
4 what they were obliged to do.

5           In addition, frankly, we have a situation where as of  
6 this day there are still a number -- at least as of the date  
7 of the hearing, and I believe it is still true -- there are  
8 still a number of strikers who have not been offered reinstatement  
9 whose back-pay claims, after the litigation, have been  
10 validated, and to this day not one cent of back pay has been  
11 paid on these claims which the Board and the court below validated.  
12 dated.

13           Moreover, we notified the --

14           Q     You say they have agreed they are valid and they  
15 haven't been paid? Why? On what grounds?

16           A     I presume the company must be awaiting the outcome  
17 of this proceeding, which only has to do with cutting back  
18 the back pay, not eliminating it. This Court denied certiorari  
19 on the portion of the order that was enforced.

20           Also, this company was rather familiar, as the court  
21 below said, this company was not a babe in the woods, and I  
22 think the language of the court is significant in this regard.  
23 It said, "This company is not a babe in the woods," and this  
24 principal premise on which the court below limited the back pay  
25 was on the ground that the court below felt that somehow the

1 company had been lulled into a sense, by the Board's delay,  
2 that maybe it had nothing left to do and that it had no obli-  
3 gations anymore by the Board's delay.

4 This might come with more grace, I think, with an  
5 unsophisticated employer, but this is what the court below said:

6 "The record convinces us that Rutter Rex is not a  
7 babe in the woods about to be victimized for ignorance  
8 or inadvertent ineptitude in the field of employer-employee  
9 relations as regulated by the National Labor Relations Act."

10 The order in this case, which ordered immediate rein-  
11 statement of strikers, even if they had to hire replacements  
12 who were still employed by the company, although not all strikers  
13 were replaced, the order, the court below said, just could not  
14 have been misunderstood, but as of today, that reinstatement  
15 obligation has not yet been carried out and none of the back pay  
16 has been paid.

17 As the Trial Examiner pointed out, at the time of the  
18 back-pay hearing, replacements were still working, and much of  
19 the back-pay hearing, of this long back-pay hearing, was devoted  
20 to analyzing the back pay due strikers where replacements were  
21 still working at the jobs the strikers should have had.

22 The record demonstrates, as I said before, and this  
23 is the court's language, that it wasn't impossible for the com-  
24 pany to comply, and as to many individuals it did. We think  
25 that in this situation, with this kind of sophisticated company

1 in the area of labor relations, and represented, as the court  
2 below noted, by able counsel, that they weren't lulled into  
3 any sense that they had already complied with the decree of the  
4 court below.

5 On the contrary, we believe that to affirm the court's  
6 order below would be to really reward a malingering and an in-  
7 transient refusal to comply with the Board order and a court  
8 decree at the expense of a public policy.

9 I might say, in regard to that letter, also, where  
10 the company tried to shelve its responsibility by saying a  
11 couple of months after the decree, "You tell us when we vio-  
12 lated the Act," that we routinely send a letter, and we sent a  
13 letter right after this decree to this respondent saying, "We  
14 are ready to help you comply with this order, and, incidentally,  
15 when you have complied, we will send you a letter notifying you  
16 that the compliance has been effected and the case closed."

17 Also, incidentally, in case the company had any  
18 doubts, it had just received such a letter in an earlier un-  
19 fair labor practice case where we told them, "In this case, you  
20 have complied and the case is closed."

21 We never sent a closing compliance letter.

22 Q In that case, after there has been an order of  
23 reinstatement, may there be determined in the back-pay proceed-  
24 ing whether or not a particular employee is entitled to rein-  
25 statement?

1           A     Precisely, if it is determined that a particular  
2 employee is not entitled --

3           Q     It is not merely whether he is entitled to back  
4 pay, which might turn on other considerations --

5           A     That is correct, because, for example, if he is  
6 not entitled to reinstatement, he is not entitled to any back  
7 pay.

8           Q     When you get an order "Reinstate all strikers,"  
9 what does that mean, then?

10          A     The order to "Reinstate all strikers" is to rein-  
11 state them, and strikers, incidentally, a Board order never  
12 gives back pay to people while they are strike.

13          Q     How about reinstatement? The Court of Appeals  
14 ordered reinstatement of all strikers. You mean all strikers  
15 except those that the Board would let off?

16          A     Of course, because in a given situation, as in  
17 this situation, we have problems as to whether a particular  
18 striker is entitled to reinstatement. For example, in this  
19 case there were 10 that were not reinstated because of miscon-  
20 duct.

21          Q     What about those who had taken other jobs?

22          A     Where they have, an argument can be made, and  
23 this is what the back-pay proceeding is about, where an employee  
24 has taken substantially equivalent employment, or has refused  
25 substantially --



1 Q What is the order of the Court of Appeals? It  
2 doesn't mean much if it says "Reinstate all strikers," but then  
3 the company says "Well, I am not going to reinstate these 200  
4 because I have valid defenses and I will put my defenses to the  
5 Board whenever I get a chance, if ever."

6 A The Court of Appeals and this Court have long ago  
7 settled on the proposition that we could either, in a case of  
8 this case, with 500 potential claimants, in the initial unfair  
9 labor practice proceeding, go through the inordinate amount of  
10 detailed work to determine respective rights, or we could stop  
11 at that point and ask where our order is challenged and there  
12 is noncompliance, get an enforcing decree, because if it is not  
13 enforced, we don't have to go through all that.

14 Q What is the order that you said is so open and  
15 shut that no one could possibly misunderstand it? Is that the  
16 original order?

17 A The obligation of compliance, or the obligation  
18 of reinstatement.

19 Q No, no. The original order of the court was  
20 "Reinstate all strikers." Is that the one you are speaking of?

21 A That is the one we are speaking of.

22 Q How do you say it is open and shut if there is  
23 still to be litigated as to individual strikers whether the  
24 individual striker is or isn't entitled to reinstatement? How  
25 is that open and shut?

1           A     That is not open and shut, to the extent there  
2 are defenses.

3           Q     Isn't that what this case is all about?

4           A     No. This case is about the large bulk of the  
5 strikers, excluding those who were engaged in misconduct, as to  
6 which --

7           Q     How do you know which ones they are until it is  
8 litigated? The company says there are 100 and it turns out  
9 that there were only 10.

10          A     This is precisely what the back-pay proceeding  
11 contemplates, and the machinery is devised and this Court in  
12 the Wallace case, among other cases, said that the only alter-  
13 native would be to labor the initial unfair labor practice pro-  
14 ceeding with a long, long, involved hearing as to what the  
15 individual rights are.

16                 Therefore, the original enforcing decree contemplates  
17 that these details about the amount of back pay or the occasional  
18 case where an employee is not entitled to reinstatement, will  
19 be resolved afterwards. In other words, as I think the Second  
20 Circuit used the language, and so did the Fourth, that the  
21 enforcing decree is in the nature of an interlocutory order  
22 which contemplates further proceedings.

23          Q     What you are saying is that the employer, if he  
24 refuses to reinstate on the grounds that he has got a valid  
25 defense, he has to run the risk of having to pay back pay if

1 he is wrong.

2 A That is correct.

3 Q And it doesn't make any difference how long he  
4 has to wait for a hearing. He said, "I have a valid defense.  
5 I want an early hearing on this," and the Board waits three or  
6 four years. That is just the employer's hard luck.

7 A Your Honor, I would like to say, in the first  
8 place, if the burden must lie somewhere, we think it probably  
9 lies on the party that has violated the law.

10 Q How does he get a hearing before the Board?

11 A He could have brought a proceeding, I suspect,  
12 under -- not "I suspect"; I believe firmly -- he could have  
13 brought a proceeding under the Administrative Procedure Act,  
14 which he relies upon to expedite this matter if he felt the  
15 Board was guilty of malingering.

16 Q Sue the Board for an early hearing, is that it?

17 A Request an early hearing, precisely, and refer-  
18 ence was made to this by the court below. But we find here that  
19 this employer --

20 Q Would you have gotten around to it any sooner  
21 if he had sued you?

22 A That may be, Your Honor. I am not suggesting,  
23 I am not conceding in any sense, that the Board here was guilty  
24 of culpable delay. The record sets this forth quite completely.  
25 The fact of the matter was that this record and the public record

1 demonstrates that the Board at this time was undermanned, over-  
2 loaded with cases which, as this Court knows, the Board initiates  
3 no cases; cases brought to it; and that we had this case and we  
4 had four other compliance cases of a similar nature already  
5 pending when this decree came down.

6 Now, the court below says, I suspect by hindsight,  
7 that this was the most important case we had. I don't know  
8 what the basis of its determination, and said we should have  
9 expedited this particular case. But the fact of the matter is  
10 that at that time we were undermanned, overstaffed; frankly,  
11 we didn't want this case here, Your Honor, on the subject of  
12 delay. We don't believe in delay, and although it is an aside,  
13 I am very happy to report that as of today we have licked this  
14 very serious problem of delay, at least at the administrative  
15 level.

16 But this wasn't a matter of culpability and if not  
17 a matter of culpability, or even if we are culpable to a minor  
18 degree, then we must balance the interests affected, our public  
19 interest in protecting the policies of the Act, the interests  
20 of the employer here who, as I say, was not a babe in the woods  
21 and knew what it was doing, had great experience in unfair labor  
22 practice proceedings before the Board, and mostly the interests  
23 of the employees here, that need not be detailed to the Court.  
24 An employee without back pay and without reinstatement suffers  
25 during this long period.



1           In paralleling these interests, I believe there is  
2 not alternative -- that is an overstatement -- we believe in all  
3 candor that the Court ought to correct the error of the court  
4 below.

5           Q     Mr. Ordman, you mentioned the procedure under  
6 the Administrative Procedures Act that might have led to exped-  
7 iting this. Is that a mechanism that is used frequently or  
8 is it used at all?

9           A     This mechanism was used in one case, which I  
10 think is cited in both our brief and the respondents' brief, in  
11 a case where the Board had directed a second hearing, remanded  
12 a second hearing before the Trial Examiner. The case is Deering  
13 Milliken versus Johnston.

14           The company at that time asked for relief and asked  
15 that the hearing be stayed completely because it was unneces-  
16 sarily dragging out this proceeding, and the Court of Appeals  
17 in that case, I would say, simply gave the company in that case  
18 half the relief it asked for.

19           Q     The party who felt it was being subjected to  
20 undue delay would have a rather difficult decision, wouldn't  
21 he, trying to decide when to invoke this extraordinary procedure?

22           A     At minimum, I submit, Your Honor, it seems to  
23 me they could have come to us and said, "What is the story?  
24 Am I really through? Don't I have to reinstate any more? Don't  
25 I have to back-pay?"

1           We didn't get this initial gesture. Of course, the  
2 company says it was our job to come to them. We want to and  
3 we do as often as we can. We were saddled by these very diffi-  
4 cult burdens, which is not only characteristic of our agency;  
5 I think it is characteristic of other agencies, and I think the  
6 courts are sometimes heavily oppressed by a laborious docket.

7           Thank you, Your Honor.

8           MR. CHIEF JUSTICE BURGER: Mr. Read?

9                           ARGUMENT OF HENRY J. READ, ESQ.

10                           ON BEHALF OF RESPONDENTS

11           MR. READ: Mr. Chief Justice, and may it please the  
12 Court: It is our position basically in this matter that further  
13 affirmative action was required by the Board.

14           The Fifth Circuit, in enforcing the Board order,  
15 specifically said that the numerous problems which the employer  
16 had in deciding who to reinstate and under what circumstances,  
17 the full text of the language is quoted in the brief -- the  
18 numerous problems were not foreclosed by the Board order or by  
19 the enforcing opinion, but were reserved for further administra-  
20 tive proceedings before the Board.

21           Promptly upon the issuance of the enforcing opinion  
22 of the Fifth Circuit, the employer submitted a report to the  
23 Board in which it gave payroll information, the job classifica-  
24 tions, operations numbers, strike lists, the names of those  
25 persons who had applied for reinstatement, and the date on which

1 they had been reinstated.

2 The company said, "If any instance of a failure to  
3 comply with this order comes to your attention, we would like to  
4 know about it because we intend to comply and we want to comply."

5 The Board did not reply to that letter and I submit  
6 that on the face of this record, the Board should not say to the  
7 Court that we should have done anything further, because the  
8 Board is on record in this proceeding, as we point out in our  
9 supplemental brief, as being of the opinion that they had no  
10 duty to advise us at all of our obligation under this indefinite  
11 order, and that it was up to us to comply literally, or to use  
12 the terms that they used before the Fifth Circuit, in haec verba.

13 Q You say "indefinite order". Where is the order?  
14 Which part of it is it that you say is indefinite?

15 A The order is indefinite in that it does not  
16 name the names of the persons to be reinstated, and in my sub-  
17 mission to the Court, requires further implementation in admin-  
18 istrative proceedings before the Board before there can be a  
19 final judgment as to what individual is entitled to be reinstated  
20 and when.

21 Q I thought you said it had ordered all of them  
22 to be reinstated.

23 A No, because the enforcing language of the court  
24 specifically reserved such questions as the availability of  
25 jobs, misconduct, the availability of the strikers, and any

1 number of specific problems which were referred to by the  
2 employer and which are specifically reserved by the court for  
3 future determination in administrative proceedings before the  
4 Board, which proceedings were not held until -- this opinion was  
5 in June of '57; they didn't file a back-pay specification until  
6 I think it was November of '61, four years and four months  
7 later.

8 Q Mr. Read, do you need any help from the Board as  
9 to available jobs?

10 A That was a very, very serious issue, Mr. Justice  
11 Marshall, for this reason: Whether we were right or wrong, it  
12 was our contention, and we presented the evidence of an indus-  
13 trial engineer to support our position, that we maintain a  
14 balanced line operation in the plant, and that the production  
15 qualifications of each operator in each step of the production  
16 line had to be in balance or all of the employees would suffer.

17 If you have one operator who is capable of only 50  
18 dozen for a stated time period, whereas the line is engineered  
19 for 100 --

20 Q Don't you have all that information in your  
21 plant?

22 A Yes, but the point I am trying to make, Mr.  
23 Justice Marshall, is that we had a legal issue in our minds as  
24 to whether or not we were obligated to prejudice the earnings  
25 of 14 operators in a 15-operator line by the fact that we had



1 an application from someone whose capabilities did not measure  
2 up to the engineering of the line.

3           Whether we were right on that or not, I say, is pre-  
4 termitted at this time because the fact is the court said speci-  
5 fically that the availability of work at various times, con-  
6 sidering the nature of these manufacturing operations, this  
7 raised questions which had to be resolved in further and future  
8 administrative proceedings before the Board.

9           Q     So rather than to have them resolved, you did  
10 nothing.

11           A     Oh, by no means, sir. We were not adamant in  
12 refusing to comply with this order. I hasten to dispel that  
13 suggestion. We complied with this order. Even the Board in  
14 its post hoc critical second-guessing of what we did conceded  
15 we complied in 70 percent of the cases they say are involved.  
16 We did not stand fast and refuse to comply. We did comply and  
17 we took people on as we could work them into these operations.

18           We had other problems. For instance, we had this  
19 problem -- and again, I am not arguing today that I am right;  
20 I am simply arguing that this was a problem from this point --  
21 that the union submitted letters in which they listed the  
22 names of strikers who wished to return. We responded and said  
23 in an orderly rebuilding process, we would ask that you send  
24 people in 20 a day so we could work them in. They wrote back  
25 and said, "We will do that."

1           They say -- and I must say it is too late to argue  
2 about the correctness of it -- that this did not invalidate the  
3 original application which they say was effective, even though  
4 they agreed to send people in. But it has cornered us, because  
5 we thought that the people who were interested in their jobs  
6 would come into the plant, as the union had said they would in  
7 their letter.

8           In many instances, the problems which the company has  
9 today resulted from the fact that persons who did not show  
10 their availability were ultimately held by the Board to have  
11 been entitled to reinstatement by virtue of the union letter  
12 of application. I refer to that not to reargue that point, but  
13 simply to demonstrate another area in which this order was in-  
14 definite and another area in which it required administrative  
15 definition by the Board, which was not forthcoming.

16           Q     May I ask you one or two questions to clarify  
17 that situation in my mind?

18           What did the Board order? What is the basis of the  
19 latest Board order about which this opinion of the court is  
20 concerned?

21           A     The Board order, if memory serves me, was to  
22 reinstate immediately upon application all strikers and to pay  
23 them back pay within five days of application.

24           Q     All right. What happened then? Is that the order  
25 that is before us?

1 A That is the order that is before us.

2 Q That is the order of the court.

3 A Yes, but it was enforced, Mr. Justice Black, in  
4 the language to which I earlier referred, in which the enforcing  
5 court specifically reserved for future determination the defenses  
6 of the employer.

7 Q Mr. Read, that decree I can't find anywhere in  
8 the record. Is it here? The only decree of the Court of  
9 Appeals I can find is the 1968 decree in these two volumes.  
10 Should it be here?

11 Q I have the opinion of the Court of Appeals, but  
12 we are looking for a decree.

13 Q The 1957 decree. That does not seem to be  
14 included.

15 A We are looking for the 1957 decree in the Fifth  
16 Circuit.

17 MR. ORDMAN: At the top of page 959 is the relevant  
18 part of the court below's order.

19 Q Is that from the opinion or the decree?

20 MR. ORDMAN: The decree.

21 Q The decree. There you cite the decree of August  
22 19, 1957. This is just an excerpt from it.

23 MR. ORDMAN: An excerpt from it.

24 Q But the decree itself, the complete decree,  
25 nowhere appears in print.

1 MR. ORDMAN: No, it does not.

2 Q Would you mind telling me what defense you set  
3 up to the Board's order to reinstate and pay back pay?

4 A When the Board ultimately, in the fall of 1961,  
5 filed a back-pay specification, we filed an answer in which we  
6 asserted numerous defenses.

7 Q What is the main one involved here?

8 A We asserted the misconduct defense. That was  
9 one. We asserted a --

10 Q You mean on the part of the employees.

11 A The strikers.

12 Q What is the main defense that you set up, which  
13 the court sustained, which deprived these people of the right  
14 to get their back pay?

15 A Mr. Justice Black, these employees have not been  
16 deprived of back pay. We are under an order, which is not under  
17 review, to pay back pay which is going to amount to well over  
18 \$100,000.

19 Q What is your contention with reference to what  
20 the order of the court below did?

21 A In this case?

22 Q Yes.

23 A We say that the court below properly modified  
24 the Board back-pay order because of the inordinate delay of  
25 the Board.



1 Q Modified it in what way?

2 A It modified it by inserting a cut-off date.

3 Q A cut-off of the statute of limitations?

4 A No, sir.

5 Q In effect, a statute of limitations?

6 A Well, sir, that is a matter of argument.

7 Q I say is it? Is that what they have done?

8 A No, sir. They said this, if I may --

9 Q I understood -- perhaps I am wrong -- but I  
10 thought they had held that they were barred because of inordi-  
11 nate delay.

12 A We argued to the court, and the court, if I may  
13 put it this way, seemed to see --

14 Q Sustained your argument.

15 A -- the correctness of the argument that under  
16 the opinion of this Court in NLRB versus Brown, which is the  
17 decision that they refer to, that it is the proper function of  
18 the reviewing court to look at a remedial order of the Board  
19 and consider its fairness and balance the conflicting interests,  
20 and it evidently felt and said that this employer, having sub-  
21 mitted the information that it did about its compliance program,  
22 and the Board, not only having taken no action to file specifica-  
23 tions for four years and four months, but furthermore to have  
24 offered no help, no cooperation, and made no attempt to work  
25 out an amicable settlement of this case prior to the day they

1 filed the specification --

2 Q I understand all that, but what did they decide  
3 with reference to these people getting their money?

4 A They said that the back-pay order of the Board  
5 would be modified, but the Fifth Circuit said that the back-pay  
6 order of the court would be modified by inserting a cut-off  
7 date.

8 Q Of what date?

9 A I think it is June of '59.

10 Q June of '59.

11 A Yes, about five years of back pay.

12 Q And from then on they couldn't get anything.

13 A Yes, sir; but that is --

14 Q Is that really the basis of the dispute between  
15 you?

16 A Yes, sir; that is correct. But on that point --  
17 and this is an aside which I feel I must insert here -- Mr.  
18 Ordman made a reference to the fact that there are employees  
19 who have not been paid their back pay as of this date, and the  
20 reason for that is that the litigation isn't over, and the  
21 Fifth Circuit remanded the case to the Board to fix back pay  
22 and we don't know how much to pay.

23 Q How many have you paid?

24 A We haven't paid any.

25 Q You haven't paid any.

1           A     No, because they never have told us how much to  
2 pay. And secondly, Mr. Ordman makes a statement which I must  
3 take issue with when he says there are people who have not been  
4 reinstated. This same mistake was made by counsel for the  
5 union before the Fifth Circuit Court of Appeals, and in post  
6 argument correspondence, which I trust is in the record, we  
7 showed that everyone, with the exception of three persons, have  
8 been offered reinstatement or had been disqualified.

9           Q     You say none of them have been paid. Have any  
10 of them submitted a claim to you for payment for back pay?

11          A     No, sir; other than in the back-pay proceeding.  
12 There is an order of the Board which is not final in my judg-  
13 ment, because the Fifth Circuit has refused to enforce it and  
14 has remanded it to the Board for final fixing of the amounts due  
15 under that portion of the order which was enforced.

16          Q     Have any of these employees filed with you a  
17 claim for back payment? That is all I want to know.

18          A     No, sir. If I understand your question, the  
19 answer is in the negative.

20          Q     Is that quite right, Mr. Read? When they  
21 appear in the back-pay proceeding and say "I am owed this, that  
22 or the other thing," isn't that a submission to you?

23          A     Of course, if that is the intent of the question,  
24 Mr. Justice Brennan, I answer it in the affirmative, but I was  
25 having trouble understanding the question as intending to refer

1 to a claim submitted to the company personally. There have  
2 been no claims asserted other than those asserted by the Board  
3 in the back-pay proceeding.

4 Q That is the conventional way to do it, isn't it?

5 A Correct.

6 Q Mr. Read, of the 150-odd people employed, would  
7 there not be one of that 150 that you know you should pay?

8 A We have no objection to paying.

9 Q Why haven't you paid any of them?

10 A Mr. Justice Marshall, we have absolutely no  
11 objection.

12 Q But you haven't.

13 A I considered tendering the amount which I  
14 thought was due, but I decided against it, and my client was  
15 perfectly willing to do it, and is willing to do it today, of  
16 course, but I decided it was premature until such time as the  
17 Board tells us how much that is. There is absolutely no reluc-  
18 tance on the part of this company to pay the back pay that is  
19 not under review.

20 Q Have you ever tried to pay any of it?

21 A No.

22 Q And there is no reluctance?

23 A There is absolutely no reluctance on the part of  
24 the company, and I say that without any qualification at all.  
25 There is no reluctance on the part of this company.



1 Q How much you owe any person has never been deter-  
2 mined yet, has it?

3 A No, sir; that is my point.

4 Q The Board still has to set the amounts that you  
5 have to pay them.

6 A That is my appreciation of the status of the case.

7 Q Mr. Read, let's assume that a company, after a  
8 general order like this in the Court of Appeals, feels that it  
9 has some good-faith defenses in connection with any number of  
10 these strikers, and it says, "I want to litigate this for the  
11 Board," and it can do that, I take it. Those matters were re-  
12 served, under this order.

13 A Yes.

14 Q So it can litigate it. I suppose you would agree  
15 that if you lose in connection with Employee A, let us say, and  
16 your defense is rejected, and you are then ordered to reinstate  
17 him, I suppose you would agree you have to give him back pay.

18 A I agree with that.

19 Q So this case really boils down to whether or not  
20 you can be ordered to give back pay if the proceeding where you  
21 litigate the validity of your defenses happens to occur four  
22 years instead of two years or one year after the general order  
23 of the Court of Appeals.

24 You don't object right now, I gather, to the part of  
25 the Court of Appeals order that says you have to pay them for

1 two years.

2 A Oh, no, sir. That is not at issue here at all.

3 Q So it is just the other two-year back-pay order.

4 A That is correct.

5 Q So it is a question of where the incidence of  
6 delay must fall -- on the employees or on the company.

7 A That is the case in a nutshell.

8 This delay issue first was injected into the case when  
9 we tried to enjoin the back-pay hearing at the time that it was  
10 filed in 1961. The Board went into the Fifth Circuit at that  
11 time, and it didn't deny that the delay occurred. It admitted  
12 the delay occurred, and as the court said, it admitted an inordi-  
13 nate or unreasonable delay had occurred.

14 But it said to the court, "Don't enjoin us from hold-  
15 ing a back-pay hearing, because we can take delay into considera-  
16 tion and we can protect the company's interest; and further, no  
17 matter what we do, our decision with regard to delay will ulti-  
18 mately be reviewed by the Fifth Circuit."

19 Then when the case proceeds under the back-pay speci-  
20 fication, the Board doesn't make any reduction on the grounds of  
21 delay. In fact, the Board decision doesn't say a word about  
22 delay and the Trial Examiner said that he didn't consider --  
23 let me give you that exact language because I do believe it is  
24 important.

25 Referring to delay, the Examiner, having ultimately

1 ruled --

2 Q Where are you reading from?

3 A I am reading from page 55 of the Joint Appendix.

4 The Examiner, having ultimately ruled that none of  
5 these issues were properly before him for disposition, in accor-  
6 dance with this ruling having refused, absent the proffer of  
7 evidence of wrong or unlawful conduct on the part of the general  
8 counsel, which was not forthcoming, to permit the parties fully  
9 to develop the facts, regarding delay, I interpret that.

10 When the Fifth Circuit then, when the company complains  
11 about the fact that the Board didn't take delay into considera-  
12 tion, the Board comes into the Fifth Circuit and takes diametric-  
13 ally opposed positions. It says at that time, in this proceed-  
14 ing that we are reviewing here now, that no unreasonable delay  
15 occurred, if it did it is up to us, in our discretion to assess  
16 it, it is up to us to decide what, if anything, to do about it,  
17 and the limited judicial appellate procedure available to you  
18 doesn't accord the Fifth Circuit the right to do anything about  
19 it.

20 It says furthermore, even if the Fifth Circuit had  
21 the right to review decisions in the delay area, it cannot do it  
22 because if it does, it is applying the doctrine of laches to  
23 defeat a public right.

24 I submit to the Court that this position on the part  
25 of the Board is wrong in a number of very serious ways. In

1 the first place, I do not accept the fact that the statutory  
2 scheme, whether we be talking about the National Labor Relations  
3 Act or whether we are talking about the Administrative Procedure  
4 Act, contemplates according an administrative agency the right  
5 to judge itself fully, finally, and without review.

6 It may have the right in certain areas of expertise  
7 in which it is assumed that they have expert knowledge to judge  
8 the actions of litigants before it, but it has no expertise  
9 when it comes to judging its own derelictions. I say the Board  
10 is wrong about that.

11 Secondly, on the question of laches, the principal  
12 case relied upon by the Board is Electric Vacuum Cleaner, a  
13 decision of this Court. Although it doesn't appear in the deci-  
14 sion here and it doesn't appear in the Circuit Court decision  
15 in Electric Vacuum Cleaner, I would like to call the Court's  
16 attention to the proceedings before the Board which I found --  
17 they are not in my brief, but I found them in Volume 101 of the  
18 transcripts of records and copies of briefs for the October  
19 Term, 1941, I think it is Docket No. 588. I found the Board  
20 proceeding in that case.

21 The Board has done in that case precisely what it says  
22 the Fifth Circuit cannot do in this one. This is how that case  
23 came about:

24 In the Electric Vacuum Cleaner case, the Board issued  
25 a complaint and then 13 months later it issued a finding of

1 some sort. The company complained about the fact that there  
2 was a 13-month delay, and it also complained about the fact  
3 that the Board hadn't issued an intermediate report, which  
4 procedurally it was supposed to have done.

5 The company filed a petition for review under Section  
6 10(f) of the Labor Act, just as we have done here, and the Board  
7 seeing what was developing, withdrew its order, which the com-  
8 pany sought to review, and then moved to dismiss the petition  
9 to review because there was nothing to review.

10 Some time later, I think it was -- well, I don't  
11 remember the exact date -- but it was some time later on that  
12 the Board then issued a new order, and because of what its  
13 Secretary said in that record was an administrative error on  
14 the part of the Board, and because of what the company claimed  
15 was undue delay, the Board excluded from the back-pay period a  
16 9-month period, exactly in the same fashion as the Fifth Cir-  
17 cuit has done in this case.

18 That position which the Board took in Electric Vacuum  
19 Cleaner in the Board proceeding was consistent with the position  
20 which the Board took in the injunction case in the Fifth Circuit  
21 because at that time there was no talk whatsoever about the  
22 inability of the Board to take its own delays into consideration  
23 in fashioning a back-pay order.

24 In substance, we say that the Board should not be per-  
25 mitted to issue orders which require further definition, and then



1 wait an inordinate length of time before initiating the admin-  
2 istrative procedure which is required to define the company's  
3 obligation, and then second-guess the company on what it did in  
4 its reinstatement program in the meantime. That is our basic  
5 complaint in this case.

6 I started to make a reference to something I consider  
7 important and I would like to say it briefly because it is not  
8 in my brief, and that is, I want to make a reference to Section  
9 101.16 of the Board's rules, which provide that after a Board  
10 order directing payment of back pay has been issued, or after  
11 enforcement of such order by a court decree, if informal efforts  
12 to dispose of the matter prove unsuccessful, the Regional  
13 Director is then authorized, at his discretion, to issue a back-  
14 pay specification.

15 I consider that significant because they made no  
16 effort to work this out with us at all. They simply went in  
17 and filed this specification seeking \$342,000 in November of  
18 1961, four years and four months after the opinion of the Fifth  
19 Circuit enforcing the decree of reinstatement with the reserva-  
20 tions which I have referred to, and the Compliance Officer for  
21 the Board testified at the hearing that he knew that our letter  
22 was in the record asking to be advised of any deviation from  
23 the obligations of compliance, we were on record as wanting to  
24 comply, and he did not make any effort to discuss with us an  
25 informal resolution of all of the problems which had to be

1 resolved before there could be a clear definition of what the  
2 Board order required.

3 Q Have you any approximation of what amount  
4 of money is involved here?

5 A Yes, sir. Originally, the specification sought  
6 \$342,000. In the hearing, we eliminated 45 people in the hear-  
7 ing before the Examiner and before the court, so that is 45  
8 people that we were right about.

9 The court order reduced the amount to approximately  
10 \$162,000. The order of the Fifth Circuit reduced it to about  
11 \$90,000 or \$95,000, but there is interest running since 1964,  
12 so that I make a rough approximation of the company's obligation,  
13 if it wins this case, is still somewhere in the neighborhood  
14 of \$140,000. That is if we win this case.

15 Now, if we lose this case, what the Board intends to  
16 do is go back and file another specification and try to exact  
17 back pay from 1961 to date, I presume.

18 Q You contended before the court, I gather from  
19 its opinion, that you didn't owe them anything.

20 A We contended that for this reason, and we lost  
21 on this point, but if I may be permitted to say so, I still  
22 think I am right.

23 Q Lawyers usually do.

24 A Well, this was the point, Justice Black. The  
25 Board order said to reinstate immediately upon application.

1 I took the position that this was prospective in nature; that  
2 we couldn't reinstate immediately somebody who had applied a  
3 year before the Board order. So we took the position in the  
4 Fifth Circuit, in an attempt to win the case completely, that  
5 we were only responsible to reinstate those people who applied  
6 prospectively or after the date of the order, but we lost on  
7 that, unfortunately, but that is the basis of the contention  
8 that I made at that juncture that we didn't owe them anything.  
9 It was on the basis of the interpretation of order, which I  
10 think has some relevance here, as well, because it is another  
11 indefinite aspect of the order.

12 Q What is the actual difference between you now?

13 A The difference between --

14 Q Financial, in money.

15 A Leaving out interest, it is a difference, if you  
16 don't hold me to too accurate a figure, of \$162,000 as compared  
17 to about \$95,000.

18 Q About \$95,000, and that is all the difference?

19 A That is all the difference.

20 Q What led the Board to cut down the Trial Examiner's  
21 award?

22 A We won a lot of the cases, Justice White, on  
23 the very issues that were contemplated by the Fifth Circuit in  
24 its enforcing language, since we won some misconduct cases.

25 Q So the Trial Examiner ordered something like

1 \$300,000?

2 A No, no. The specification claimed \$342,000. The  
3 Trial Examiner ordered about \$162,000.

4 Q I see. And then what happened? What did the  
5 Board give you?

6 A The Board made some minor adjustment, which is  
7 insignificant, but then when we got to the Fifth Circuit, the  
8 Fifth Circuit eliminated a few more of the cases and also put  
9 a cut-off date, which cuts it down to about \$95,000.

10 I know my time is about up. I would like to say just  
11 one word about --

12 MR. CHIEF JUSTICE BURGER: Your time is up.

13 MR. READ: My time is up. I am sorry.

14 MR. CHIEF JUSTICE BURGER: Mr. Ordman, your time is  
15 up, too.

16 The case is submitted, and we thank you for your  
17 submission, gentlemen.

18 (Whereupon, at 1:32 p.m. the argument in the above-  
19 entitled matter was concluded.)

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