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OCTOBER TERM, 1969

In the Matter of:

Docket No. 476

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SEARS, ROEBUCK AND CO.,
Petitioner

vs.

CARPET, LINOLEUM, SOFT TILE & RESILIENT FLOOR COVERING LAYERS, LOCAL UNION NO. 419, AFL-CIO
and
FRANCIS SPERANDEO, REGIONAL DIRECTOR, OF THE TWENTY-SEVENTH REGION OF THE NATIONAL LABOR RELATIONS BOARD.
Respondent.

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Place Washington, D. C.

Date March 3, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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BENHAM

1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM

3 -

4 SEARS, ROEBUCK AND CO.,

5 Petitioner

6 vs No. 476

7 CARPET, LINOLEUM, SOFT TILE &
RESILIENT FLOOR COVERING LAYERS,

8 LOCAL UNION NO. 419, AFL-CIO,

9 and

10 FRANCIS SPERANDEO, REGIONAL
DIRECTOR OF THE TWENTY-SEVENTH

11 REGION OF THE NATIONAL LABOR
RELATIONS BOARD.

12

Respondent

13 -

14

The above-entitled matter came on for argument at

15

11:48 o'clock a.m., on Tuesday, March 3, 1970.

16

BEFORE:

17

WARREN E. BURGER, Chief Justice

18 HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice

19 JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice

20 POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice

21 THURGOOD MARSHALL, Associate Justice

22 APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 476, Sears, Roebuck and Company against Carpet, Linoleum Tile, Local Union 419.

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

ORAL ARGUMENT BY GERARD C. SMETANA, ESQ.

ON BEHALF OF PETITIONER

MR. SMETANA: Mr. Chief Justice, and may it please the Court: What is involved here is a determination of the status of charging parties under Section 10(l) of the Act.

Specifically, whether they have standing to appeal, denial of temporary injunctive relief.

Section 10(l) of the Act is an extraordinary remedy. It provides, whenever it's charge that any person has engaged in an unfair labor practice, within the meaning of Section 8(b)(4) A,B, and C; and specifically here, the charging party is a neutral employer in a charge involving violations of Section 8(b)(4) B, the secondary boycott provisions of the Act.

So, the charging party is one of the persons contemplated for protection under Section 10(l). The statute then goes on to say: "The preliminary investigation of such charge shall be made forthwith and be given priority over all cases."

In this particular case, Sears, Roebuck, the Petitioner, filed a charge with the NLRB and the NLRB proceeded to make such investigation. The statute then goes on

1 to say: "If, after such investigation the officer or regional
2 attorney to whom the matter may be referred, has reasonable
3 cause to believe such charge is true, and thata complaint
4 should issue, he shall, on behalf of the Board, petition a
5 District Court for injunctive relief."

6 In this particular case, the Regional Director for
7 the NLRB in Denver, made such a finding of reasonable cause.
8 And he followed the statutory mandate and sought injunctive
9 relief in the District Court for the District of Colorado.

10 It is our position that the charging party, or a
11 neutral party, such as Sears is in this case, is the very
12 person whom Congress, when it enacted the -- not only the
13 8(b)(4) provisions, the secondary boycott provisions at the
14 time of Taft-Hartley, but also Section 10(1) the mandatory
15 requirement that the Government seek injunctive relief is
16 the party for whose benefit, in addition, of course, to the
17 public benefit, for whose benefit the relief is being sought.

18 Specifically, the issue in this case arises --

19 Q Did the statute say what theposition of those
20 charging parties would be in those proceedings?

21 A Mr. Justice, the statute says only this, with
22 respect to the role of the charging party: "Upon filing of any
23 such petition, the courts shall cause notice thereof to be
24 served upon any person involved in the charge, and such
25 person, including the charging party, shall be given an

1 opportunity to appear by counsel and present any relevant
2 testimony." That is the extent to which the statute specifi-
3 cally --

4 Q It doesn't make them a party?

5 A Your Honor?

6 Q It doesn't make them a party in terms, at
7 least.

8 A It is our position --

9 Q I know your position --

10 A "That the terms do not explicitly refer to the
11 charging party as a party, except insofar as the word 'party'
12 is used, together with charging."

13 Q But --

14 A It is our contention that we will demonstrate
15 to this Court as we believe we have in our briefs, that in
16 reading and looking to the entire scheme of the Act -- in
17 other words, the role that the charging parties play in the
18 board proceedings, because the same charge that Sears, Roebuck
19 here filed, gave rise to two proceedings. It gave rise to
20 two concurrent actions; in fact, it happens in this case, they
21 were on the same day, although they needn't have been.

22 In this particular case the Regional Director issued
23 an unfair labor practice complaint, alleging that the carpet-
24 layer's Respondent union here was violating or he had reason-
25 able cause to believe that the Respondent union was violating

1 the secondary boycott provisions of the Act, and similarly,
2 filed a petition for injunctive relief. Those two cases are
3 still verymuch alive.
4 And the Regional Director, at all times, critical to
5 our petition here, has continued to maintain that reasonable
6 belief or reasonable cause to believe that the union had
7 violated the law or was in the process of violating the law.
8 Q You said that both cases are very much alive is
9 one of the questions at issue betweenyou and your brother;
10 isn't it?
11 A Correct.
12 Q There is a controverted questionof mootness in
13 this case that arguing; is there not?
14 A There is a question, if this Court would wish
15 to hear argument on that question I certainly would, toward
16 the end of my argument, be happy to present our contentions
17 on mootness.
18 Q I think your friend is going to mention this.
19 A I am sure he is.
20 Well, essentially, on the mootness question, very
21 briefly, there are -- the major position that we will take
22 with respect to mootness is that as a matter of policy the
23 orders involved here are short-term orders. Specifically,
24 injunctive relief under Section 10(l) of the Act is the kind
25 of relief that not only expires because the dispute is

1 resolved, and so that if there is some problem with respect to
2 the correctness of the standing of parties in that proceeding
3 this Court would never have an opportunity to resolve that
4 question if it were to wait -- if it could not do so at that
5 time.

6 And so, under the doctrine of the Southern Pacific
7 Terminal case, and more recently, as this Court said last year
8 in the Moore versus Ogilvie, these are important public
9 questions that will come up again and that are not rendered
10 moot, because of the continuing effect, not only upon Sears
11 in this case and other cases, but other parties similarly
12 situated, and would escape review, but for the Mootness Doc-
13 trine; therefore the Mootness Doctrine will be set aside.

14 We also contend that the case is not factually moot.
15 We say it is not factually moot because, for a number of
16 reasons. Specifically, that as in the Bakery Drivers versus
17 Wagshal, the union here, to the extent that it has stopped
18 picketing, whatever we can infer from that, we can only infer
19 that it did stop picketing pursuant to an order of the Board,
20 and more specifically, the union maintains the correctness of
21 its position and has so argued the correctness of its position
22 January 22nd this year in the Court of Appeals for the District
23 of Columbia Circuit, maintaining that it believes and con-
24 tinues to believe that the picketing of Sears, Roebuck was
25 not violative of Section 8(b)(4).

1 So, that so long as this controversy and the under-
2 lying dispute remains, there is still the possibility that
3 the picketing will resume and that possibility would come
4 about, should the District of Columbia Circuit, where the --
5 and what happened here in the underlying case is that the
6 trial examiner and the board found the union to have violated
7 Section 8(b)(4). The union moved the District o Columbia
8 Circuit toreview that decision and the Sears, Roebuck inter-
9 vened and the board cross-petitioned for enforcement of that
10 decision.

11 And inthe event the District of Columbia Circuit
12 remands to the Board, there are a number of possibilities as
13 to what can arise in that case. Should there be a remand, it
14 is our contention that there is also then, a possibility of
15 a renewal of picketing, because there may be some question as
16 to something further the Board might have to do.

17 In any event, so far as the factual mootness, it is
18 our further contention that the language of the statute, so far
19 as the time during which the injunctive provision runs. In
20 other words, in Section 10(l). Section 10(l) states that the
21 injunction -- that the court shall grant such injunctive
22 relief, pending final adjudication of the Board.

23 So, there was another question, although it was
24 perhaps not necessary for the Court to resolve that question,
25 if it resolves the question of mootness on the Southern

1 Pacific Terminal and Moore versus Ogilvie line of cases, that
2 it is perhaps not necessary to reach the question of inter-
3 pretation of those words, pending final adjudication of the
4 Board.

5 It is our position that pending final adjudication
6 of the Board, means when the matter has finally been resolved
7 by the Board, and a settlement would be a final resolution.
8 In this case we contend it has not been finally resolved by
9 the Board, because of the possibility of the remand.

10 Because, in that situation, the Board would have to
11 do something further and we recognize the fact that there
12 was a final Board order here from which the union appeals the
13 statutory language is not clear, and we would contend that
14 that is the meaning of the words "final adjudication."

15 We have no authority other than logic and reasoning
16 to support that position.

17 Our argument -- before I pass on to the argument, I
18 should, briefly, summarize any facts that I have, in my opening
19 remarks, not alluded to.

20 In this particular case the picketing of Sears,
21 Roebuck continued for a period of ten months. The argument,
22 Your Honors, essentially falls into two or three categories.
23 Our major contention is that the scheme of the Act, as this
24 Court has considered the scheme of the Act in the Scofield
25 decisions, renders that charging parties should have the right

1 to appeal.

2 The reason for it, specifically -- what we would

3 urge under the scheme of the Act, is that charging parties

4 possess the very rights that are set forth in Section 10(1).

5 They possess those identical rights and are treated as parties

6 in the Board proceedings, and therefore, they should similarly

7 be treated as parties in a Section 10(1) proceedings

8 We will then also allude to the guidance that the

9 legislative history of the Taft-Hartley Act can give with

10 respect to the question of charging party rights.

11 When we say that we are a party, we use the word

12 "party," with three specific exceptions, so there is no mis-

13 take. We do not say we are the kind of juridical party that

14 one is outside; this is the framework of the National Labor

15 Relations Act.

16 We say: first that we do not seek injunctive relief

17 in Section 10(1), but rather we simply support that which the

18 Director has done.

19 MR. CHIEF JUSTICE BURGER: We will suspend now for

20 lunch.

21 (Whereupon, at 12:00 o'clock p.m. the argument in the

22 above-entitled matter was recessed to resume at 12:30 o'clock

23 p.m. this day)

24

25

12:35 o'clock p.m.

(After the recess the argument continued)

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Smetana.

MR. SMETANA: Thank you, Mr. Chief Justice, and may it please the Court: Just to recap for one moment with respect to how this case arises and how the appeal comes to this Court.

When the District Court for the District of Colorado denied the injunctive relief which the Regional Director had sought, it wasin that proceeding that the charging party, Sears, the Responding Union and Board all appeared by counsel and all participated, as provided in the Act.

The District Court Justice, Judge, held that there was little probability that the Board would find a violation of law and therefore denied the injunctive relief. After this decision the Regional Director continued in his belief that there was, in fact, reasonable cause to believe that a violation existed.

We had, we attempted to convince the Regional Director to seek and to appeal from the decision of the District Court. That request and those requests were without avail and as the time for filing an appeal drew near, faced with the continued picketing of Sears at its Denver locations, faced with the Director's continuing belief that there was a

1 violation and with the Director's refusal to file an appeal,
2 we, on behalf of the charging party, filed an appeal.

3 There were then motions to dismiss that appeal for
4 lack of standing by -- both by the Board and by the union.
5 There was one further intervening factor which, perhaps, has
6 some significance to some of the arguments that have been
7 raised by the counsel for the Regional Director.

8 After the appeal had been filed, the trial examiner
9 who heard the facts of the underlying case in the first in-
10 stance, came down with a favorable decision for Sears. He
11 found that there was reasonable cause to believe the secondary
12 boycott, by a section of the Act had been violated.

13 It was within a few days of that decision that we,
14 again, wrote to the General Counsel and requested two things:
15 requested first that perhaps the general counsel, since the
16 picketing was still continuing, would seek injunctive relief
17 under the Discretionary Section, Section 10(j) of the Act, and
18 admittedly, we were aware of no case which permitted, where
19 the Board had gone for injunctive relief under Section 10(j),
20 even though this was an area that was covered by 10(l), but
21 the language of the Act would lead one to believe thatit was
22 possible.

23 We asked secondly of the Board once more, that they
24 join us in the appeal. The Board responded in a few days,
25 indicating that they did not choose to file for 10(j) relief,

1 even if that was available, and furthermore, they did not seek
2 to join us in the appeal. The only reason they gave was that
3 the time for them to join us in the appeal had disappeared.
4 I think that exchange of letters only has become
5 significant and we have mentioned it in our reply brief, in
6 view of the Board's, one of the Board's contentions here,
7 the same contention they had made below, that if the charging
8 party were to be given the right of appeal and were to be
9 given party rights, subject to the limitation which I started
10 to outline before the luncheon break, that would amount to
11 the Board losing control and the Board speaks of control in a
12 number of instances.
13 There is one kind of control which the Board speaks
14 of in the case before the District Court, and there is another
15 kind of control the Board addresses itself to with respect to
16 the decision of whether or not it should appeal.
17 Now, with respect to the first kind of control, I
18 have started to say that we contend that we have rights of a
19 party, subject to three limitations. The first is that we do
20 not seek the injunctive relief; we simply support that which
21 the Board has done, and we take this position that once the
22 Regional Director has filed a petition for injunctive relief,
23 by virtue of the language in the statute, giving us the right
24 to be heard; we havethe right to support that position.
25 We relied in the 10th Circuit upon the Retail

1 Clerks' case, and we would contend that the reasoning of that
2 Court with respect to this question, is indeed sound. We
3 -- the second limitation that we would state, would afford to
4 a charging party is the fact that the charging party at no
5 time may enlarge or urge an enlargement of the position taken
6 by the Director and the petition that he filed with the
7 District Court.

8 And it is for that reason that we would distinguish
9 the decision that Justice Marshall, then Judge Marshall,
10 rendered in the Second Circuit in the McLeod case, because
11 in that case the Board and the Union had cited the McLeod
12 case as proposition for the fact that charging parties should
13 not be granted this right, because it's violative of Norris-
14 LaGuardia.

15 And, in the McLeod case, as in that whole line of
16 cases, it is clear that where the charging partyenlarges upon
17 something which the Director is seeking -- in the McLeod case
18 the charging party was urging that there was handbilling in
19 that case and the charging party was urging that they would
20 submit representation with respect to the handbilling.

21 And the Court concluded that the question of mis-
22 representation was not one of the bases upon which the Board
23 had decided to petition. And, therefore, to the extent that
24 the charging party was urging a different result, to that
25 extent there could be a violation of Norris-LaGuardia.

1 Finally, with respect -- and the Tenth Circuit in
2 this case dismissed or granted the Board and Union's motions
3 dismissed for lack of standing on essentially three grounds.
4 First, that the relief here would constitute a
5 violation of Norris-LaGuardia and they contend that the
6 reason for that is, in effect, they will be granting an injunc-
7 tive relief to a charging party.
8 Secondly, the cases we cite, we cited to them and
9 cited in our brief, the Ninth Circuit Retail Clerks' case,
10 the Tenth Circuit took the position that that case really only
11 referred to the rights of charging parties in the District
12 Court and therefore, it was not apposite or helpful to them
13 in determining whether or not we would have standing to
14 appeal and have any rights in the Courts of Appeal.
15 And, finally, the Tenth Circuit took the position
16 that the statutory language, "that the charging parties shall
17 be represented by counsel and present relevant testimony,"
18 means that and no more.
19 Now, with respect to the last, perhaps, first.
20 Whether the language means that and no more, we would then
21 turn to the first part of our argument and we would say that
22 the scheme of the Act, the fact that the charging parties, the
23 same party to -- who was before the District Court in a 10(1)
24 proceeding, also proceeds in the case before the Board; and
25 in that Board case it is true that the charging party is

1 referred to as a party.

2 But the scheme of the Act, as this Court had held in

3 Scofield, the Court looks to the overall concern and the over-

4 all concern in this Act is the protection of charging party

5 rights, and particularly here, there was even a stronger

6 protection with respect to a neutral in an 8(b)(4) situation,

7 where there is the mandatory requirement to seek relief.

8 But in the Board proceeding, the charging party par-

9 ticipates at all levels:in the investigation, in the issuance

10 of complaint and settlement, hearings, appeals, and so on.

11 Q When the Regional Director for some reason re-

12 fuses to bring a 10(1) proceeding, can you force him to?

13 A No. We would contend --

14 Q And you couldn't bring your own proceeding,

15 could you?

16 A No. We would definitely -- our position is that

17 our rights only vest after the Regional Director has made his

18 determination.

19 Q Yes.

20 A And should he change his mind then there is a

21 possibility that in a particular kind of situation he might

22 change his mind.

23 Q I suppose the clarity of the statute on that

24 point helps persuade him there; doesn't it?

25 A Yes; it does, Your Honor.

1 Q But it is not clear, you contend, on the
2 appellate -- on the standing to take an appeal?
3 A No. I would say the statute is not clear and
4 one of the Board's principal arguments is that very fact, that
5 the statute is silent.
6 We would answer that in three ways: first, that the
7 scheme of the Act, in other words, since the charging parties
8 have these rights in the Board case, they also have these
9 rights in the District Court case, and then we have cited this
10 Court to the only cases we have been able to find on trying
11 to define an appeal; Justice Marshall's decision in Marbury
12 versus Madison, and we would contend that an appeal, by its
13 very nature is not the institution of a new cause; and is
14 simply to correct that which was done below.
15 Q Supposing the District Court, at the end of the
16 hearing, the Regional Director says, "We want to withdraw the
17 whole business?" What could you do?
18 A Your Honor, if the Regional Director took that
19 position. We would follow the reasoning of the Ninth Circuit
20 decision in the Retail Clerks' case. We would take the
21 position that the -- it is still for the charging party to
22 urge to the Court of Appeals, the correctness of the Director's
23 petition.
24 Q Well, this is not the Court of Appeals; we're
25 in the trial court. And near the end of the proceedings, the

1 Director says: "We've had it; this is it."

2 A Well, this is exactly, again, the situation in

3 the Ninth Circuit Case and in that situation the Charging

4 party -- the Regional Director, which would happen fairly

5 frequently in these Board cases is that many times the Union

6 and the Director will seek to -- the union will say, "Well,

7 we'll stop picketing while we resolve the underlying dispute."

8 And the union will offer a stipulation and there are times

9 such as in the uniquest case here, in the Terminal Freight

10 case, where the charging party will object to that stipula-

11 tion. That is one situation where it arises.

12 We would contend that the charging party had the

13 right, as the court found in the Ninth Circuit case, to urge

14 to the court that there is, in fact, reasonable cause. Since

15 the Director found reasonable cause it is now for the court

16 to determine and the court is not simply a rubber stamp with

17 respect to what the Director has done. The court is vested

18 with jurisdiction and it must make up its mind and the statute

19 10(1) gives the party the right to be heard. It certainly

20 gives the party the right to present relevant testimony.

21 We would submit that that right to present testimony

22 does not mean "just thatand no more," because that would not

23 be a logical result. Apart from that it has worked otherwise.

24 Q Suppose Congress , given you the right to

25 bring the action; but it didn't; Congress did not.

1 A There was -- if I could -- I would turn to the
2 legislative history and I would contend two things with respect
3 to the legislative history of Taft-Hartley. I would contend
4 first, that when the Taft-Hartley Act was discussed, the
5 legislative history is silent with respect to specific
6 reference to these words of art in the statute: "The charging
7 party shall be given an opportunity to appear by counsel, and
8 to present relevant testimony.
9 Now, we submit, that first, so far as that silence
10 is concerned, just the silence alone, that that silence does
11 not necessarily militate against us. And Your Honors, in the
12 two decisions rendered this morning -- I was familiar with one,
13 because I had kept up with the briefs, particularly inthe
14 Barlow case.
15 The Court said in this, however, "Only upon a showing
16 of clear and convincing evidence of the contrary legislative
17 intent that the Court should restrict access tojudicial
18 review."
19 And the framers of Taft-Hartley, I think we have to
20 view the silence with respect to he specific language. I
21 think we have to look to the context in which the debates
22 occurred. And that context was that the debates on Taft-
23 Hartley occurred in 1948; in the Spring of '48 -- pardon me,
24 yes, in the Spring of 1948.
25 Q It was 1947.

1 A It was '47; that's right, the Spring of 1947,
2 and at that time the debates occurred in the context of the
3 Senate being concerned with President Truman again vetoing a
4 measure.

5 And it was in the 80th Congress these debates
6 occurred. Now, in our reply brief we cited the Court, called
7 the Court's attention to some of the deliberations that
8 occurred in the 79th Congress, because it is only by looking
9 to that background that we see the light in which the Congress
10 was concerned with private party rights.

11 At that time two things were clear: it was clear
12 that the Congress was concerned with protecting neutrals, and
13 the secondary boycott provisions were enacted. It was also
14 clear that what had transpired between the enactment of Norris-
15 LaGuardia and the Wagner Act, and up until that time was
16 unsatisfactory in terms of getting injunctive protection where
17 there was a neutral or where there was a wronged party.

18 Now, prior to the enactment of Taft-Hartley, the
19 Board would first have tomake a determination on the merits,
20 whether there was a violation. One of the purposes was that
21 there would be a prior determination, but that prior deter-
22 mination, as the statute finally evolved, was to be only upon
23 decision by the Regional Director whether there was a
24 violation.

25 But, im the 79th Congress, the Case Bill passed both

Houses, and that bill provided that private parties, as well as the Board, could seek injunctive relief, and it passed both Houses of Congress. President Truman vetoed that bill. And there weren't sufficient votes tooverride the veto.

Immediately at the convening of the 80th Congress, a bill almost identical to the Case Bill was introduced in the Senate, which was S. 55, and it was on that bill that hearings were held in the Senate Labor Committee. At the same time, in the House there was a bill which passed, identical to the Case Bill, again giving rights to private parties.

It became clear, however, certainly to Senator Taft that if there was going to either be no veto, and if there was going to be any legislation, there would have to be some comprise, and time was of the essence. The Government was operating the mines; the Smith-Connolly Act was going to expire in a few months, and Senator Taft is the one who was the compromiser.

And the evidence of this compromise, specifically with respect to the question of private pa-ty rights and private party rights with respect to the issuance of temporary injunctions comes from the procedures.

S. 55, as I say, was in the Senate Labor Committee. Out of that Committee came a Committee Report and a new bill. The new bill was called, in the 80th Congress, S. 1126 and so far as Section 10(l) is concerned, and so far as the rights of

charging parties are concerned, the words I referred to, they appeared for the first time in S. 1126 and subsequently have remained unchanged in the statute.

However, when it was reported out of Committee, Senator Taft, Senator Ball, Senator Dinell, and one other Senator, all indicated that they would reserve the right on the Floor of the Senate to again introduce, once more, an amendment to permit private parties to institute these rights.

Now, why was this concern? Because they were concerned that the private party was the aggrieved party; the private party was the one who should be protected, and they were concerned that perhaps the Board wouldn't afford sufficient protection. And, although Senator Taft, at the time that was reported out of Committee, still favored private party rights.

Shortly, when the debates began, on the Floor of the Senate, and we have cited this in the briefs, he changed his position and the schism came when Senator Ball was the one who introduced the amendment for private party rights, again on the Floor of the Senate.

Senator Taft, at that point said that he could not go forward; he would offer another compromise, and that if the Act was to be passed it would have to be passed without the rights of private party seeking that relief. And therefore, I say that since there was such concern with the rights of

1 private parties, the words of Section 10(1) should not be
2 read narrowly, as the Board suggests, but rather they should
3 be given broader interpretation.

4 And I would suggest --

5 Q Is there a conflict between the Circuits and
6 this issue? I mean the question you are arguing?

7 A Yes; I would say the conflict arises specific-
8 ally between the Tenth Circuit decision, here, holding these
9 words to mean exactly what they say, and --

10 Q And the Ninth?

11 A -- and the Ninth Circuit decision in the Retail
12 Clerks' case.

13 Q Well, that's a big difference.

14 A The Ninth Circuit --

15 Q I have some vague recollection that there was a
16 case in the Second Circuit, that for some reason or other
17 never reached here.

18 A Well, Your Honor, there is this, and I didn't
19 cite it, because I cited it specifically. The case in the
20 Second Circuit that I think has the most bearing on the sub-
21 ject is the McLeod versus the Business Mechanics Conference
22 case. I believe it was a 1961 case. And that was the case
23 where the decision was written by Judge Marshall, now Justice
24 Marshall.

25 And in that situation, I recited the case briefly for

1 another proposition with respect to charging party taking a
2 position not urged by the Board. The intersting thing about
3 that case is that the charging party was there at all. I
4 mean, the charging party in that proceeding, and we did not
5 intervene. The charging party in thatproceeding was there as
6 a party and the charging party argued as a party and there was
7 no -- although the Court was silent with respect to that
8 status; perhaps the question wasn't raised. But certainly,
9 inferentially, that case would seem to go along with the
10 position of the Ninth Circuit, although the Ninth Circuit came
11 much later.

12 I would call the Court's attention to another in-
13 teresting factor in the Ninth Circuit decision; and that is
14 the Ninth Circuit, in its decision set forth certainheadings,
15 and while the Tenth Circuit tries to distinguish the case with
16 respect to saying the case only stands for the proposition, that
17 that it's a question of the Court's jurisdiction, whether or
18 not injunctive relief would be granted.

19 In reality, the headings that I have reference to, and
20 it is rather unusual to see specific headings set into an
21 opinion. All of the discussion with respect to charging party
22 rights is in heading Roman Number II and it is in upper case
23 and it says: "To whom was the temporary injunction granted,"
24 and that's at 351 F 2nd, 528. We have cited the case, but have
25 not made specific reference. And the court drew a distinction

1 between on the one hand, discussing the charging party rights,
2 and on the other hand discussing the question of its own
3 authority. For, when he was talking about his own authority,
4 the heading is: "Alleged Abuse of Discretion." And, talking
5 about the fact that the Board there appealed and claimed that
6 the court had abused its discretion when it granted the injunc-
7 tion because the Board knows that the injunction had been
8 granted to the charging parties.

9 I would call the Court's attention to the Scofield
10 case, insofar as it sheds light on this question. The general
11 concept -- I think the position of the Board and the Union and
12 the Court has been that Scofield is to be read narrowly, and
13 we, of course, take the position that Scofield is more than
14 just for the proposition, the question of multiplicity of suits
15 that occurred in that context.

16 Scofield stands for the proposition that it recognizes
17 private rights. In fact, for the concept of recognition of
18 private rights, this Court cited the Ninth Circuit Retail
19 Clerks' case, which had earlier reached the same conclusion.

20 And the Court spoke in terms of general fairness.
21 The Court recognized also that the status of an amicus which
22 was not status enough.

23 I will reserve the balance of my time.

24 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Smetana.
25 Mr. Manoli.

ORAL ARGUMENT BY DOMINICK L. MANOLI,

ASSISTANT GENERAL COUNSEL, NLRB

MR. MANOLI: Mr. Chief Justice, and may it please the Court: I should like to discuss first, the standing question and after I have dealt with that standing question I should like to address myself to the mootness question. And before I go into a discussion of our particular problems, I'll answer very quickly Mr. Justice Harlan's question.

There is no conflict among the Circuits on the question of the right of a charging party in a 10(l) proceedings to appeal an adverse decision.

If my memory serves me right, there have only been three instances in which a charging party sought to appeal, independently from the Regional Director, from an adverse decision in the District Court. This is one of them; the other case was inthe Fifth Circuit, which was found to be mooted by the fact that the Board had issued its decision and the third case is another Sears case in the Fifth Circuit, which the Court has also found to be mooted.

And I'm told -- I was told yesterday, that that is presently pending on a petition for reconsideration or rehearing.

The other case --

Q It is pending before the Court of Appeals for the Third Circuit.

1 A Yes.

2 Q On the petition for rehearing.

3 A Right; yes. The other case that Mr. Justice
4 Harlan may have had in mind was the General Electric case.
5 That involved 10(j) the discretionary provision and it did not
6 involve the question of standing.

7 Q It was the Third Circuit that I was thinking of
8 and you have refreshed my recollection.

9 Q And in the General Electric case what did this
10 Court hold? In the 10(j) case.

11 A There was no questionof standing in that case,
12 Your Honor. We had gotten -- the Board had gotten an
13 injunction in that case, and the companytook an appeal to the
14 Second Circuit.

15 Q In an unfair labor practice situation, the
16 charging party who loses before the Board, may appeal; may it
17 not?

18 A Yes, under Section 10(f) of the Act it is -- if
19 it's aggrieved by the Board's final order, it may, of course,
20 seek review in the Court of Appeals.

21 Q Yes. If the Board enters an order in the -- at
22 the request of a charging party and then seeks enforcement in
23 the Court of Appeals and loses, can the charging party, to
24 intervene, bring cert up here?

25 A Well, I think you decided that question in

1 Scofield, Your Honor.

2 Q Yes.

3 A In Scofield that is part --

4 Q Even though the Board doesn't want to press it

5 any farther?

6 A That's right. In Scofield this Court held that

7 both the successful charging party as well as the successful

8 charged party, had the right to intervene in the Court of

9 Appeals and to take the case up to this Court.

10 Q But the laws -- if the Board enters an order as

11 requested by the charging party, but the Board doesn't want

12 to seek enforcement --

13 A I think that that's exclusively up to the Board.

14 Q The charging party may not seek enforcement in

15 the Court of Appeals?

16 A No, sir; only the Board may bring an action to

17 enforce its orders.

18 Now, a party which has lost before the Board may bring

19 a petition to you. If the Board's adverse decision has an

20 aggrieved party. That may be either the charging party who

21 didn't succeed before the Board, or it may be, of course, the

22 charged party, who lost before the Board.

23 Q Yes.

24 Q Now, in this Ninth Circuit Retail Clerks, it

25 appears that the Regional -- that the Regional office

1 initiated a proceeding for injunction in 10(j).

2 A 10(1).

3 Q 10(1); I beg your pardon. Then reached some sort

4 of a compromise agreement with the union. The District Court,

5 nevertheless, went on at the behest of the charging party and

6 granted the injunction.

7 A Yes, sir.

8 Q The Regional Director then appealed, although he

9 had been the original plaintiff, he appealed from a decision

10 which had gone inhis favor as original plaintiff.

11 A Yes.

12 Q And the relief he had originally asked for, and

13 the appellee in that case was the charging party; is that

14 right? How did the appellee get in the case? As a party in

15 the Court of Appeals? The appellee is the Food Employers'

16 Council, Incorporated, and I assume that's the charging party.

17 A That was corrected, Your Honor, and inthe

18 Henderson case, which has recently come down out of the Ninth

19 Circuit --

20 Q No, no; I meant about this case.

21 A Yes, sir; I know.

22 Q The specific question: How did the appellee --

23 the appellee was the charging party here and therefore was a

24 party in the Court of Appeals, I gather, but as an appellee,

25 not an appellant.

1 A The --

2 Q The Board itself, apparently made him an

3 appellee.

4 A In -- I've forgotten at the moment -- the Food

5 Employers Council there was named as appellee --

6 Q And I assume that council was the charging party.

7 A Council was the charging --

8 Q So the Board, the Regional Director of the Board,

9 when it took its appeal, made the charging party a party to the

10 litigation in the Court of Appeals; did it not?

11 A The name threw me off, Your Honor. In that

12 particular case it was not the Regional Director who took up

13 the appeal, it was the Retail Clerks, which took an appeal.

14 The Retail Clerks were the --

15 Q Well, that's not the way Judge Barlum's opinion

16 begins begins in the very first sentence. This is an appeal

17 by the Regional Director of the NLRB, and various locals of the

18 Retail Clerks, from a District Court order granting a temporary

19 injunction, pursuant to a petition by the Regional Director,

20 and so on.

21 A Well, my recollection was that it was the unio

22 who appealed in that case and that we went in there to defend

23 our own position. And whatever may be said of that case, Your

24 Honor, I do want to call attention to the latest decision of

25 the Court of Appeals for the Ninth Circuit, in which they say--

1 in which they said that "although the quetsion of the charging
2 party standing to an appeal was broached in the Retail Clerks
3 case, they nevertheless have now concluded that the charging
4 party does not have the status of a party, of a full party
5 with the right of appeal and they have lined up with the Tenth
6 Circuit in this particular case.

7 Now, if I may get back now for a moment to develop
8 my argument with respect to the contentions of the petitioner.

9 The Petitioner's case that a charging party in a 10(1)
10 proceedings is entitled to appeal from an adverse decision of
11 the District Court, independently of the Regional Director, it
12 seems to me, rests essentially upon the predicate that a
13 charging party with certain qualficiations that the Petitioner
14 here had indicated, has the status of a full party in those
15 proceedings.

16 Now, it seems to us that that predicate, that predi-
17 cate misconceives the statutory scheme and also fails to
18 accord proper worth to the legislative history that gave birth
19 to Section 10(1).

20 In our view under the statute a charging party plays
21 a subordinate role in a 10(1) proceeding in the District Court.
22 Congress vested upon the charging party the limited role of
23 assisting and aiding in the course of the prosecution of the
24 case by the Regional Director, but that it is the Regional
25 Director who retains control, not only over the initiation

1 in the proceedings in the District Court, but also he retains
2 control of the litigation at all states, both the trial stage
3 as well as the appellate stage.
4 Now, Section 10(l) represents one of the many com-
5 promises that are to be found in this statute and as in the
6 case of other Labor Act compromises which have engaged the
7 attention of this Court, the meaning of Section 10(l) and the
8 role which a charging party was to play in the proceedings can
9 only be fully determined by going back to the legislative
10 history.
11 I think it is now wholly amiss to say that in a case
12 like this a page of legislative history does outweigh the book
13 of logic. Section 10(l) became a part of the Act, as Mr.
14 Smetana has indicated, in 1947 when Congress adopted the Taft-
15 Hartley Amendments, including the restrictions against
16 secondary boycotts and strikes over jurisdictional disputes.
17 In the course of that debate Congress took note of the
18 fact that the administrative unfair labor practice proceedings
19 before the Board were unduly and unavoidedly time-consuming.
20 And for that reason it was felt that a speedier remedy was
21 required in the public interest, rather than a Board order or
22 a court decision enforcing the Board order.
23 The debate over the need and the means for achieving
24 this kind of speedy relief, particularly in the area of secondary
25 boycotts and jurisdictional disputes.

1 The Senate Labor Committee had reported a bill which
2 contained a provision virtually identical with Section 10(l)
3 of the statute now. Senators Ball, joined particularly by
4 Senator Taft, Senator Donnell and also by Senator Wherry of
5 Nebraska -- I should have added also, Senator -- I did say
6 Senator Donnell.

7 They were critical of the Section 10(l) provision
8 which was contained in the Senate Bill, the bill that had been
9 reported by the Senate Committee, because they felt that it was
10 inadequate, wholly inadquate, to give an employer who was
11 involved in a secondary dispute, or was involved in a juris-
12 dictional dispute, the kind of speedy relief, the kind of
13 relief that they thought he was entitled to.

14 They were critical of the Senate Committee Bill,
15 because Senators Ball, Taft and Donnell said, in their supple-
16 mental views and their supplemental views to the Senate Labor
17 Committee's report. As they said there: "It depends upon the
18 decision of the Board as to whether any action shall bé taken
19 and the conduct of the proceedings will be entirely in the
20 hands of the Board attorneys instead of attorneys of the in-
21 jured party.

22 Q Were they addressing themselves to the initiation
23 at this point?

24 A No; Your Honor. I think that when you look at
25 our legislative history, that the fight was much deeper than

1 that. It was not merely a question of who was going to
2 initiate this thing, but who was going to have control, not
3 only over the initiation of the case, but of a prosecution of
4 the particular case.

5 Q Well, but, do you suggest that the grant of
6 standing to the employer at the appellate stage, for review
7 only, would take control of the case away from the Board?

8 A Yes, Your Honor; I think it would, because at
9 that point the Regional Director who has initiated the case,
10 may conclude, for various reasons and I will come to those
11 later, may conclude that there is really no longer appropriate
12 to continue to press at the appellate stage for an injunction
13 on the basis of the kind of record that was made in the court
14 below, on the basis of what kind of issues were involved there.

15 If the Regional Director decides not to go up, but the
16 charging party may go up, the charging party has really taken
17 control of the litigation.

18 Q Well --

19 A And the litigation --

20 Q That would be true if the Board drops out; if the
21 Board refuses to go ahead, I could understand your [illegible]
22 that the private party has taken over, but would that not be
23 something of a signal to the court if standing were granted to
24 the private parties to go ahead and the Board did not appear or
25 take part? It certainly wouldn't strengthen the private party's

1 case at the appellate level; would it?

2 A Well, perhaps not, but if, as I say, the
3 Regional Director decides that on the basis of whatever record
4 has been made before the District Court, on the basis of the
5 kind of issue that is involved here. He must still continue
6 to press the complaint before the Board, either with the ex-
7 pectation that a better record may be made before the Board
8 or that the Board may see the facts differently than the
9 District Court did, because the District Court decision is not
10 binding upon the Board on the merits. But, at that point,
11 however, the Regional Director has made a decision that it is
12 no longer appropriate to press for an injunction at the appell-
13 ate stage.

14 The statute requires the Regional Director, whenever
15 he has reasonable cause to believe that the charges have merit,
16 he is required to go into the District Court to seek an injunc-
17 tion, but the statute does not require a Regional Director to
18 appeal from an adverse decision of the District Court.

19 Now, if you permit the charging party to say, "Well,
20 we will independently take an appeal, despite the failure of
21 the Regional Director to take an appeal, in effect, what you
22 have done, you have transformed what is a Government litigation
23 into a private lawsuit and indeed, the petitioner in its brief,
24 almost virtually concedes at that point that it becomes a
25 private lawsuit.

1 Now, to be sure, the Petitioner is arguing that it
2 is confined to the theory of the case originally advanced by
3 the Regional Director, that it's confined also to the kind of
4 relief that the Regional Director is asking, but I suggest,
5 Your Honor, that once the Regional Director is out of the
6 picture and the charging party is permitted to go ahead and
7 take an appeal, that then it really has become a private piece
8 of litigation rather than government litigation, and the
9 Congress did not intend to permit that.
10 Q How far does your argument go, Mr. Manoli? Now,
11 what Congress did provide in 10(1) was that if the Regional
12 Director thought there was reasonable cause to believe that
13 the unfair labor charge was correct, it had an absolute duty
14 to -- first of all, it had a duty to give priority to this
15 kind of a charge.
16 A Yes, sir.
17 Q And, having given priority, and finding a reason-
18 able cause to believe in the truth of the charge, he had an
19 absolute duty to go into a Federal District Cou t and file a
20 petition for an injunction. And you would say, I suppose, in
21 your argument, that ten minutes later it could say, "Well, we
22 want now to dismiss the injunction." That would hardly comport
23 with the obvious will of Congress; would it?
24 A Well, Your Honor, let me take one case. Let's
25 assume that when the charges are filed, the investigation

1 has been made, the Regional Director shows that there is
2 reasonable cause to believe that the charges have merit, and
3 that a complaint should issue; yes. He is mandated by the
4 statute here to go into the District Court to seek an injunc-
5 tion.

6 Now, on the basis of the development in the District
7 Court, he may conclude that there is no longer any merit to the
8 unfair labor practice charges, and that there is no longer any
9 basis for injunctive relief.

10 In other words, with that kind of a record having
11 been made in the District Court, he may, as I say, conclude
12 that he's got no case at all any more and Congress did not
13 require him to stick with a case willy nilly, nor does Congress
14 require him to take an appeal from an adverse decision of a --

15 Q You say that all that Congress required was that
16 he file a petition, and that ten minutes later he could say,
17 "I now want to dismiss it with prejudice?"

18 A Yes, that's -- if he concludes --

19 Q Do you think that comports with what the
20 Congress said in 10(1)?

21 A Your Honors, I think it does. Let's say that he
22 filed a petition now and ten minutes after he's filed the
23 petition a piece of evidence which was critical to his case,
24 it suddenly is exposed; it isn't there any more and the piece
25 of evidence was critical to his case. He is free to withdraw.

1 He is free to withdraw because he's got not case any more on
2 the merits. He won't issue a complaint; there is no reasonable
3 cause to issue a comlaint to go to the Board and, having no
4 reasonable cause to issue a complaint, or least he could
5 withdraw the complaint if that were tohappen. Then there is
6 no basis any more for an injunctive relief by the District
7 Court.

8 Q Well, there couldn't have been much of a pre-
9 liminary investigation.

10 A It's a rare case, Your Honor, where that will
11 happen; it's a rare case, indeed, where that will happen, but
12 I am addressing myself to the question of could he withdraw it
13 ten minutes later.

14 Q It's a hypothetical answer.

15 Q The ten-minute rule might sound more realistic
16 if it was a month rule.

17 A Yes.

18 Q Have you finished up your legislative history?
19 I interrupted what you started to say.

20 A I think I can safely say I know of no case where
21 ten minutes after we file a petition for an injunction we
22 withdrew it.

23 Well, if I may go on a little bit more with this
24 legislative history. I think it's important, this legislative
25 history, and I can only touch the highlights of it to indicate

1 what the scope of the debate and the intensiveness of the de-
2 bate as to who was to be in charge of this particular litiga-
3 tion.

4 And Senator Donnell, on the Floor, as I have already
5 read from the supplemental views of Senators Taft and Ball.
6 Senator Donnell, on the Floor of the Senate, said he saw no
7 reason under heaven why the decision toseek injunctive relief
8 and control of the litigation should be exclusively vested in
9 a Board representative, rather than the injured party.

10 And Senator Wherry added: "The party" -- I want to
11 quote this -- "should not have to depend upon the judgment of
12 some bureaucrat in whom is lodged the power to determine when
13 such a course should be followed."

14 And again, they strongly urged to Senator Donnell
15 that the injured party should have, and I want to quote this
16 once more: "should have the right to control its own litiga-
17 tion, to hire its own lawyer, to take such steps as it deems
18 proper and to go into such court as it deems proper to proceed
19 in."

20 Now, to achieve this purpose, Senator Ball introduced
21 his amendment, and under his amendment, he introduced the
22 amendment on the Floor of the Senate -- under his amendment
23 the -- a party who was suffering from a secondary boycott, or
24 jurisdictional dispute rights, would have the right to
25 independently go into the District Court and obtain injunctive

1 relief. That proposal encountered strong opposition.

2 Some members of the opposition were unwilling to

3 permit injunctions, whether at the request of private parties

4 or at the request of the government. But the opposition was

5 suddenly, and might say, vehemently opposed to any provision

6 that would permit a private party to go and seek an injunctive

7 relief in this type of case because they feared a revival,

8 a resurrection of some of the evils that had led to Norris-

9 LaGuardia.

10 They were willing to relax the restrictions of Norris-

11 LaGuardia only if the exclusive authority to initiate and to

12 control the litigation of a 10(1) proceeding was vested in the

13 Board.

14 Now, the difference between the two groups was taken

15 care of, was resolved through a compromise that Senator Taft

16 proposed. As a substitute for the Ball amendment, which would

17 have given a private party the right to go independently into

18 a District Court and get an injunction; as a substitute for

19 that, Senator Taft proposed what is now Section 303 of the Act.

20 And Section 303 of the Act permits an injured party

21 to go into a court in order to get damages. The Ball amend-

22 ment was overwhelmingly defeated by a vote of something like

23 62 to 28, and Section 10(1), of course, was retained in its

24 present form.

25 And Senator Taft, after the Conference Committee had

1 approved Section 10(l) and Section 303 provisions of the statute
2 to explain that compromise, Senator Taft said that under his
3 proposal the compromise which had been accepted, the injured
4 party was given "simply a right of suit for damages," caused
5 by secondary boycotts or jurisdictional dispute, but that in
6 such cases, and again I want to quote: "The injunction can be
7 obtained only through the National Labor Relations Board.
8 Now, I think what emerges from this legislative history
9 is that Congress agreed to a narrow exception to the Norris-
10 LaGuardia, which vested exclusive jurisdiction in the Board or
11 the Regional Director (I use the terms interchangably) which
12 vested exclusive control in the Board, not only the initiation,
13 but the control of the litigation at all stages.
14 The private party, the injured party was given simply
15 the right to sue for damages and in Section 10(l) Congress has
16 assigned a subordinate role to the charging party of merely
17 aiding and assisting in the conduct of the 10(l) proceedings
18 by the Regional Director, but it was the Regional Director who
19 remained in control.
20 As I said earlier, the fight between the proponents
21 of the BAll Amendment and those who opposed it, was not simply
22 a fight over who was going to have control over the initiation
23 of the proceeding; the fight went much deeper. The fight was:
24 who would be in control of that kind of litigation, the injured
25 or the Board? And Congress answered that question firmly in

1 favor of the Board and I believe that it's action indicates
2 that Congress withheld from the charging party the status of a
3 party.

4 Q Well, Mr. Manoli, you keep emphasizing control
5 of the litigation, as though litigation were just one indivi-
6 sible component. [illegible] instances where this Court and other
7 courts have granted standing to seek review where standing in
8 the first instance, or intervention was denied; is that not so?

9 A Yes, that may well be, Your Honor, but --

10 Q So that control of the litigation concept doesn't
11 answer all the questions, quite; does it?

12 A Well, it answers them when you take into account
13 what it was that the -- what I'll call the proponents of
14 Section 10(1) sought to accomplish when they adopted Section
15 10(f) and opposed the Ball amendment. They were fearful to
16 give the charging party any kind of an independent right to
17 press forward toseek an injunction or to press for an injunc-
18 tion. And as I said earlier, if the Regional Director concludes
19 afterthe has carried out the mandated duty of going into a
20 District Court, that in the face of that adverse decision, and
21 because of other considerations I'll spell out in a moment, to
22 conclude that it's no longer appropriate to seek injunctive, or
23 to press for injunctive relief, then the charging party has
24 taken charge of that litigation and it seems to me that that
25 kind of control that Congress was talking about would have

1 excluded, would exclude the charging party from going on up-
2 stairs and seeking to press for injunctive relief.
3 Q Was this language of 10(1) that you say gives
4 the charging party a subordinate position, was that part of the
5 so-called Taft compromise?
6 A That was already, Your Honor --
7 Q Was already in the bill?
8 A In the Senate Bill. It was in the Bill reported
9 by the Senate Committee; yes, that was already in there. As a
10 matter of fact, I might add that the House had passed a bill
11 which permitted both the government or the private party to
12 seek injunctive relief, but that fell by the wayside, because
13 eventually the Conference Committee agreed with the SEnate that
14 Section 10(1) would be adopted.
15 Q Well, the thrust of your argument now is quite
16 in conflict with what was decided in the Retail Clerks' case
17 inthe Ninth Circuit -- the broad thrust of your present
18 argument.
19 A Your Honor, I must confess I am a little bit
20 taken by surprise by your question that we will --
21 Q I'm not talking about the appeal now.
22 A Let me read from Retail Clerks.
23 Q Which case?
24 A The Retail Clerks' case in the Ninth Circuit.
25 Q Read the very first sentence of Judge Barlum's

1 opinion. I don't have it in front of me.

2 A This is an appeal by the Director and various

3 local of the Retail Clerks --

4 Q Can you raise your voice a little, counsel?

5 A I didn't mean to hide it. "This is an appeal by

6 the Regional Director of the Board and various locals of the

7 Retail Clerks from a District Court order granting a temporary

8 injunction pursuant to a petition by the Regional Director."

9 Now, on Page 528, it says: "The Appellant petitioned

10 this Court for a stay of the injunction," and I take it the

11 Appellants must have meant both us and the Retail Clerks.

12 "This petition was denied, but we granted an expedited hearing."

13 By this same order this Court denied the charging

14 parties in the Board proceedings permission to intervene as

15 Appellees, but granted them permission to appear as amicus

16 curiae.

17 Q Well, look at the caption of the case; who is the

18 Appellee? As I say, I don't have it in front of me, but I

19 am going from memory.

20 A The caption is: "Retail Clerks Appellants, and

21 Ralph E. Kennedy, Regional Director --

22 Q Appellees.

23 A Appellants.

24 Q Who is the Appellee?

25 A It says "Appellant" here on the, at the top of

1 the case. "Retail Clerks, various other locals, Appellants, and Ralph Kennedy, Regional Director, for and on behalf of the Labor Board, Appellants."

Q Don't you have any Appellee in the case?

A "Versus Food Employers Council, Appellees."

Q Appellees, the party at the Court of Appeals.

A Food Employers Council; yes, that was a charging party. That was Appellees. And the Court says, with respect to the answers, "by the same order this Court denied the charging parties in the Board proceedings permission to intervene as Appellees, but granted them permission to appear as amicus curiae.

Q Yes, well, we can both look at those books, but my question wasn't directed to that at all. It was directed to, and, if I understand the basic thrust of your present argument, i.e., that the Regional Director of the Board is given absolute control of the litigation from first to last. That's what is quite contrary to the decision of the Ninth Circuit in the Retail Clerks' case.

Am I mistaken my understanding of your argument?

A That is our argument, and to the extent that it may be in conflict with the Retail Clerks, I will call attention once more to the Henderson case which the Court has decided within the last few months, which is cited in our brief, where they line up with the decision of the Court of Appeals in

1 this particular case.

2 Q Yes; on the right to appeal; but we are talking

3 about the right to control here.

4 A On the right toappeal, but I think those are the

5 underlying considerations, as to why they don't have the right

6 to appeal.

7 Well, I did promise at the beginning to -- I haven't

8 covered all of the considerations, but I think I've made clear

9 the heart of our argument with respect to this power to appeal.

10 I did indicate earlier that I would say something

11 about the mootness question, and before I sit down I shall

12 address myself to that question. I see my light is flashing

13 and I don't want to deprive my brother of any time, and un-

14 less the Court is willing to give me a few more minutes, I

15 will sit down.

16 Q Was that your red light? I was reading.

17 A That was my red light, Your Honor.

18 Q Five minutes.

19 A May I have a few minutes, sir, so I can talk

20 about the mootness?

21 Q You may; go ahead.

22 A All right. Thank you.

23 The statute provides that a District Court may grant

24 such injunctive relief as it deems just and proper, pending the

25 Board's final adjudication with respect to the matter.

1 Whether or not this case is moot depends upon what do we mean
2 by "pending final adjudication of the matter by the Board."
3 The Board --
4 Q Based on what did you say?
5 A What does that phrase mean, that the District
6 Court has the authority to grant interlocutory, injunctive
7 relief, pending the final adjudication of the matter by the
8 Board.
9 The Board has issued its decision and final order in
10 this case, and we say that that decision and final order of the
11 Board is the final adjudication of this case within the meaning
12 of Section 10(1).
13 And with the issuance of the Board decision, which I
14 say constitutes its final adjudication, the power of the
15 District Court to grant any kind of an injunctive relief in
16 this case is at an end.
17 Now, the union has, in fact, stopped its picketing.
18 As I said, the Board's decision and order is presently pending
19 on review in the Court of Appeals. If the union should resume
20 its picketing in defiance of the Board's order, the Board is
21 empowered under Section 10(e) and (f) to go to the Court of
22 Appeals and ask for such temporary relief as may be appropriate
23 in the circumstances.
24 It's not mandated, but it's empowered to do so, and
25 presumably, if thereis a violation of the Board's order in this

1 case, the Board should not take very long in seeking to get
2 some temporary injunctive relief from the Court of Appeals.
3 Now, the argument is being made in this case here that
4 final adjudication by the Board -- and I will be through in
5 just a few minutes, Mr. Chief Justice -- the argument is being
6 made in this case here that final adjudication by the Board
7 does not mean the decision of the Board in a particular case,
8 but that the case is not finally adjudicated until it's run
9 it's entire course before the Board, as well as the court.
10 Now, I may briefly answer their argument by saying
11 that the statute does not say "final adjudication by the
12 reviewing court," it says "final adjudication by the Board."
13 I think the case is moot and I may say that I have
14 mixed feelings about our mootness question, having come this
15 far, becausewhile I think that our argument on the mootness is
16 strong, at the same time I would like to have an answer from
17 the Court as to the standing of the charging parties in these
18 cases.
19 Q You'd like to have it resolved if we resolve it
20 the right way?
21 A Either way, Your Honor; either way.
22 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Manoli.
23 Mr. Barr.
24 ORAL ARGUMENT BY DAVID S. BARR, ESQ.
25 ON BEHALF OF RESPONDENTS

1 MR. BARR: Mr. Chief Justice, and may it please the
2 Court: Mr. Justice Stewart, the Food Employers Council case
3 insofar as its decision is concerned, is not in conflict with
4 the position we take in this case.
5 The decision was that despite the fact that the
6 Regional Director might have preferred a settlement, and
7 thereby a dismissal of the petition, he could not tie the
8 hand of the District Court insofar as the discretion of that
9 Court is concerned in fashioning a remedy.
10 That is not in conflict with the position we take.
11 The dictum in Food Employers Council is in conflict with the
12 position we take and the dictum was eliminated, for all intents
13 and purposes, in the Henderson case which Mr. Manoli referred
14 to, where they denied the right to intervene.
15 The statute, if it please the Court, is not silent
16 on the question of the role of the charging party, and in fact,
17 the language includes more than just the rights of the charging
18 party, but the role of all other persons involved in the
19 charge.
20 It says: "Upon the filing of any such petition, the
21 Court shall cause notice thereof to be served upon anyone
22 involved in the charge and such person, including the charging
23 party, shall be given an opportunity to appear by counsel and
24 present any relevant testimony.
25 So that means that what we're talking about in this

1 case is not only the appeal rights, the independent appeal
2 rights of the charging party, but we're also talking about the
3 independent rights of all the primary and secondary employers
4 in every secondary boycott case.
5 For example, in this case, Joe and Eddie's Carpet
6 Service, if Sears is allowed to appeal, would also be allowed
7 to independently appeal and so would, under this language,
8 every other primary and secondary employer involved, under
9 Section 10(l) because of its language.
10 So, it's important to realize that we're talking here
11 about more than just the charging party role; we're talking
12 about these other persons' roles, as well.
13 The language "to appear by counsel and present
14 any relevant testimony" is language of limitation.
15 Q Well, Mr. Barr, all of that argument is addressed
16 to the litigation in the first stage and we're, more or less
17 beyond that; aren't we? We're talking about standing on
18 appeal now; standing for review.
19 A Yes. I'm talking precisely, Mr. Chief Justice,
20 about standing to appeal, standing to appeal when the REgional
21 Director refuses todo so.
22 If the language "shall be given an opportunity to
23 appear by counsel, and present any relevant testimony," gives
24 the right of appeal.
25 Q Is that the language that you would use when you

1 are talking about an appellate review? Isn't that the language
2 you would use when you are talking about the first phases of
3 the litigation? There is no evidence presented at any
4 appellate level?

5 A No. The statute, I admit, does not say precisely
6 "there shall be no right of appeal," but --

7 Q Well, now while I have you interrupted for a
8 minute --

9 A -- but it is less than language which would have
10 given them party status. Congress did not say that charging
11 parties shall be a party in the 10(1) litigation, even though,
12 in that very same section, Mr. Chief Justice, in the third
13 proviso, the labor organization in 10(1) is expressly referred
14 to as a party litigant.

15 Q Well, now, you haven't had a chance, really, to
16 digest the opinions that Mr. Justice Douglas read this morning
17 in connection with the Data Processing case or the Barlow case.
18 I suspect you glanced over them. In both of those cases there
19 was nothing in the statute that gave any more aid and comfort
20 to the idea of appellate review relief than there is here.
21 Would you agree to that? Or do you think there might be a
22 little bit more?

23 A Unfortunately, the decision was read this morning
24 has not been read by me, and so I cannot compare the facts in
25 that case to this one, but I would like to say --

1 Q We won't take advantage of you, then.

2 A I'm very sorry about that. I would like to say

3 that quite apart from what may be said in those decisions, I

4 don't know if you had in those decisions the limiting language

5 that you have here with regard to simply the right to present

6 relevant, to appear by counsel and present relevant testimony,

7 when viewed in light of the fact that Congress used the word

8 "party," and knew how to use it, not only in this same section

9 but in Sections 10(c) and (e) and particuarly in light of the

10 statutory scheme, whereby the Board only is empowered to seek

11 injunctions under Section 10(l), to institute injunction

12 proceedings under 10(j), to seek interim relief in the Courts

13 of Appeals under 10(e) and (f) and even under 10(f), Mr.

14 Chief Justice, where the aggrieved party is the party that

15 appeals, the interim relief can be afforded to the Board and

16 not to the party that appeals.

17 So that not only the language, but the statutory

18 scheme is evidence that Congress intended those words to limit

19 the role of a charging party, as well as the other persons in-

20 volved in the charge.

21 And, of course, the legislative history, as far as we

22 are concerned, is absolutely compelling, because both Senator

23 Ellender, a strong supporter of S. 1126, and Senator Taft, its

24 chief sponsor, had to rise and make statements to the effect

25 that they strongly feared what would happen if private

1 litigants were given access to the injunctive process. What
2 would happen to the remainder of the legislation? They would
3 thought they would lose it, and so they had to give up the
4 notion that control of the litigation could be vested in the
5 private litigants.

6 And there was no question in the debates of the Ball
7 Amendment that what they were talking about was not just the
8 right to inistiate a suit, but as Mr. Manoli correctly pointed
9 out, the right to control the litigation.

10 And what evolved from the legislative process, after
11 lengthy and very emotional debates on this very point, not on
12 the point of appeal, from the point of the role of charging
13 parties, was essentially a compromise, just as in much of the
14 other labor legislation that we have on the books. But, it's
15 important tounderstand the nature of that compromise.

16 The compromise was not ambiguous language, leaving it
17 up to the courts for interpretation. The compromise was that
18 there would be a Section 303 rights on the part of employers
19 to sue unions for damages in the event of secondary boycotts.
20 That the proponents of the bill would also have the benefit of
21 a mandatory injunction under Section 10(1). It wasn't dis-
22 cretionary.

23 And, incidentally, unions don't have a similar right
24 to the right given employers under Section 303. Unions don't
25 have the benefit of any mandatory injunction as employers do

1 under Section 10(l). And in return for that, in return for
2 those protections, the proponents of the strong bill had to
3 give up the notion that private litigants could control
4 Section 10(l) litigation. And that limiting language was
5 fashioned as a part of that compromise.
6 Q I suppose your argument is somewhat similar to
7 an argument you are making, where a man charges another with a
8 crime by an affidavit where it's authorized, but he does not
9 have control of the litigation? The prosecutor of the state
10 has it.
11 A That's correct, Mr. Justice. We're talking about
12 the prosecutorial functions of the Regional Director of the
13 Board. WE submit that it's strange credulity to believe that
14 the fight in the Congress was simply over who initiates these
15 proceedings.
16 Q But wasn't that what all the emotion was about
17 that you spoke of, emotional debate? Do you find something
18 in there in the legislative history.
19 A Yes. I would like to quote, if I may, Mr. Chief
20 Justice, from page 27 of our brief. This is the debate in-
21 volving the Ball Amendment, and it was a colloquy between Mr.
22 Ball and Senator Donnell, who supported his amendment.
23 Senator Donnell poses a hypothetical. He says: "Under
24 S. 1126, if the representative of the National Labor Relations
25 Board shall decide that the proceedings shall be filed, control

1 of the litigation is exclusively vested in the representative
2 of the National Labor Relations Board, rather than the person
3 who claims to have been injured; is not that correct?"

4 Q What does that have to say about the review-
5 ability aspects?

6 A I conceded, Mr. Chief Justice, and I do again,
7 there is no legislative history that specifically says:
8 "Charging parties shall not have the right to appeal if the
9 Regional Director refuses to do so.

10 Therefore, the question has to be answered by looking
11 at the language of the section, by looking at the scheme of
12 the statute and by looking at expressions like these, which
13 indicate what Congress probably intended with regard to the
14 issue before this Court.

15 And this is the exercise we are going through right
16 now. Senator Wherry --

17 Q Why can't you look at the section that says the
18 parties who are aggrieved bythe decision can appeal? Why
19 doesn't the Administrative Procedure Act have something to do
20 with it?

21 A Because all of these other statutes do not have
22 the Norris-LaGuardia flavor and background that the enactment
23 of Section 10 had. Each section has to be looked at in light
24 of its own particular purposes, as this Court has stated.

25 Q Do you deny that the, that Sears was a party?

1 It was a party of some kind; wasn't it?

2 A It was not a party in a 10(1) litigation. I

3 deny that it was a party in the 10(1) litigation.

4 Q Well, it was permitted to appear and present

5 its own witnesses.

6 A Yes; it was permitted to appear and present

7 relevant testimony.

8 Q And to cross-examine?

9 A We would suppose that they would have the right

10 to cross-examine. I think that's implied in the grant stated

11 by the language of the Act.

12 Q But they do, habitually, as a matter of practice;

13 don't they?

14 A Pardon me?

15 Q They are allowed to do it as a matter of practice,

16 consistently.

17 A They are allowed -- well, I don't know if the

18 word "consistently" is correct. I thinkthat usually their

19 role in 10(1) litigation is very limited, as it wasin this

20 case.

21 Q Well, say that the Regional Director appealed

22 in this case, would the charging party be permitted to inter-

23 vene? Would it already be a party? As are cases that say it

24 cannot intervene?

25 A Yes. All the cases that rule on that issue have

1 said it cannot intervene; every single case that has rules on
2 that subject.

3 Q Do you think that is consistent with the case
4 here in the Court. I

5 A I think it's perfectly consistent with the cases
6 here; absolutely. And, in fact, some of those very cases which
7 have denied the right to intervene under Section 10(l) have
8 recognized the force of Scofield, but have distinguished it,
9 and they have distinguished it on very valid grounds, as we
10 pointed out in our brief, and as they pointed out in their
11 decisions, as Professor Moore distinguishes Scofield, when it
12 comes to Section 10(l) litigation.

13 As the Ninth Circuit in Henderson distinguished
14 Scofield when it comes to 10(l) litigation.

15 Q What about the 10(j) respect, which is the
16 discretionary section?

17 A The holding that I'm familiar with has denied the
18 right of a charging party, and that was Reynolds versus
19 Marlene Industries. The union charging party in the 10(j) was
20 denied the right to intervene in that case.

21 Q Has he got a right to appear in a subordinate
22 position?

23 A I believe he does and I believe he should.

24 Q I'm just looking at the appendix. In 10(l) it's
25 spelled out, at least part of it is spelled out, but the

1 charging party shall be given an opportunity to appear by
2 counsel and present any relevant testimony is in the text of
3 10(l). It does not seem to be an equivalent provision or
4 sentence in 10(j).

5 A Yes; and I really have no explanation for that.
6 It might be an oversight; it might have been an oversight in
7 the process of legislating. I believe, frankly, that Section
8 10(j) sort of came along after everything else, and I don't
9 think they were as careful with the language of Section 10(j)
10 as they were with the language of Section 10(l). As I say,
11 the law has not been completely developed under Section 10(j).
12 The only case I know of is this Reynolds versus Marlene
13 Industries, where they denied the right to intervene in a 10(j)
14 proceeding.

15 Q Today it is not very often utilized; is it?

16 A It's utilized very rarely. We would like to see
17 it utilized more often, but unfortunately, it's not.

18 I want to, before sitting down, make one comment about
19 mootness. The Counsel for Sears argued that this case ourhgt
20 not to be dismissed as moot, because under the Southern
21 Pacific Terminal line of decisions, this Court has held that
22 a case ought not to be dismissed as moot where otherwise the
23 issue could never reach this Court.

24 There are two answers that we'd like to present to
25 this: First of all, it is very possible for this same issue to

appear before this Court in a proper case, because many Board cases are very lengthy; many Board cases go over two years. Whether it's because the issue is complicatdd, or because in a 10 case, for example, you might have two or three weeks of hearing, the fact remains that there are many lengthy Board decisions, Board cases.

And therefore, it is very possible for this issue to come here in a proper case at a later time.

Secondly --

Q The Board order isn't final yet; is it?

A The Board order is final, Mr. Justice. It was issued on June 20th --

Q Wasn't it appealed?

A It was appealed.

Q Has that appeal been disposed of?

A It was appealed only because it was final, by the way. Under Section 10(f) it could not have been appealed if it were not final.

Q Is it in effect? I mean, what if the Court of Appeals reverses the --

A The decision is in effect.

Q What if the Court of Appeals reverses the Board?

A If the Court of Appeals reverses the Board, well that --

Q Very final it says in that sense.

1 A Well, it's a final adjudication of the Board;
2 it's not a final adjudication of the case, but the language of
3 Section 10(1) is final adjudication of the Board, not final
4 adjudication of the case.
5 Q Is it an appeal or just a petition for enforce-
6 ment of the Board's adjudication?
7 A It's an appeal that we filed, Mr. Justice, for
8 review; for review. Yes, Your Honor. And the Board cross-
9 applied for enforcement, so that both the petition for review
10 and the cross-application are before the District of Columbia
11 Court of Appeals, but I want to say that the second answer to
12 the mootness argument is that that was not the issue in
13 Southern Pacific Terminal.
14 MR. CHIEF JUSTICE BURGER: Mr. Barr, your time, in-
15 cluding your additional three minutes is up, unless you want to
16 just finish that sentence.
17 A All right, I'll just finish that sentence.
18 The issue in those cases was not whether the issue
19 could come before this Court at some future time or not. The
20 issue was whether this Court ought to dismiss the case as moot
21 when the effect of an order that was issued by an agency or
22 a court, still continues despite its technical expiration.
23 In other words, there was still an order that was,
24 even though technically expired, was influencing and coercing
25 the conduct of the parties. That's not this case and this is

1 case is moot.

2 Thank you.

3 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Barr.

4 Mr. Smetana, you have 11 minutes. We'll enlarge that

5 a little if you need it, but there is no compulsion on your

6 part to use it.

7 MR. BARR: Thank you, Your Honor.

8 REBUTTAL ARGUMENT BY GERARD C. SMETANA, ESQ.

9 ON BEHALF OF PETITIONER

10 MR. BARR: I should first like to point out in

11 response to union counsel's argument, unions also are bene-

12 ficiaries under Section 10(1). They, in a number of cases --

13 in an 8(e) situation where there is a hot cargo case, which

14 was the Ninth Circuit Retail Clerks' case, it was the union

15 who was the charging party and it was the union who was seeking

16 to appeal, so that unions in those situations, as well as in

17 8(b)(4)(a) situations where they attempt to enforce or coer-

18 cively enforce illegal 8(e) contracts and also in 8(b)(4)D the

19 construction industry jurisdictional cases, the union is a

20 charging party in them.

21 Secondly, so far as the cases have decided appeallate

22 review, union counsel suggests that they have all given the

23 charging party amicus status. I would suggest, Your Honor,

24 that this is the first case where the issue has arisen where

25 the -- where it involves a charging party as an Appellant and

1 there is considerable difference, because in the Retail
2 Clerks' case, although the charging party was relegated to
3 amicus status. I refer that I have to refer the Court back to
4 the appendix to our reply brief on the, in opposition to the
5 position for cert. That's supplemental appendix A-43. And
6 that appendix reflects the fact that the charging party, which
7 was only granted amicus status, however, presented oral
8 argument and presented briefs, and in fact, in the context of
9 the case, were the only ones to present that position.

10 Conversely, in our situatior, if we are not granted
11 party statuts we would be precluded from appealing from the
12 denial of injunctive relief. If the Board's argument on con-
13 trol is to hold, I would submit the Board's argument on control
14 is wholly without reason, primarily because the Board is
15 suggesting that it could be in the position of, on the one hand
16 having found reasonable cause where it was mandatorily required
17 to proceed with the Act; on the other hand, still maintaining
18 that reasonable cause, still going forward with the underlying
19 case, but suddenly deciding that for some reason there might be
20 something that in appearing in the 10(1) situation, might in-
21 terfere with the ultimate victory in the underlying case.

22 I would submit that if that if that is their fear,
23 fine; let the chips fall where they will and the Board, perhaps
24 will have to pull out of the underlying case. But, so long as
25 they maintain reasonable cause, so long as they don't change

1 their mind about the underlying case, I don't know whether
2 they have a mandatory obligation to go forward, but certainly
3 they cannot take the position that they must have control.
4 They have the control; they can change their mind on reasonable
5 cause. That is the only kind of control.

6 And I would submit, in analyzing the question of con-
7 trol, we must look to the kind of control the Board has urged
8 even in the court below. The Board would say, as the 10th
9 Circuit has said, "the language of 10(1) means that and no
10 more."

11 But, conversely, again looking at the scheme of the
12 Act, the Board in charge case, the charging party has many
13 rights that interfere with the Board's control. The Board,
14 for example, cannot withdraw its complaint in the Board case,
15 once having gone to hearing, without giving the charging party
16 rights.

17 The Board cannot settle the Board case, once having
18 gone to complaint, without the charging party being heard.
19 These are the kinds -- and I'm saying that that scheme of the
20 Act is also transposed to the language of being heard, being the
21 fact that it's the same charging party.

22 I would further the answer to the Norris-LaGuardia
23 argument. Mr. Manoli gave us a number of quotes both from his
24 argument and from his brief, with respect to the fears. Well
25 the persons who were annunciating the fears at that time,

they were annunciating the fears that the passage of Taft-Hartley would return us to Norris-LaGuardia and the very fears that they were concerned about was the fear that anyone, be it the Board or private parties would seek injunctive relief before the merits were decided.

And I would submit that the Congress acted very wisely in giving, in entrusting the Board with the responsibility of seeking that relief. As we have pointed out in our reply brief on page 9, footnote 6 -- footnote 3, pardon me. The Board's record is excellent.

Taking 1967 as a typical year and the only reason we took 1967 is because we wanted to see what happened to all those 10(1) cases where the Board went to final order. In other words, there were 69 cases in that year; there were many other 10(1) -- they had issued on 165 and there were almost 1500, 1800 charges under the Sections.

But the significant fact is that in those cases where they went to final order, injunctive relief was either granted or denied and the ultimate Board litigation, only one case was there a cause to find that the Regional Director's original cause, original basis for reasonable cause was in error.

So, I would submit that the Board -- that the persons of the charge party has not been generally disadvantaged in terms of the REgional Director not being sustained in his finding of reasonable cause, and I submit that the finding of

1 reasonable cause is a central issue and so long as the
2 Regional Director maintains that reasonable cause, he cannot
3 say that he does not have control, because that is the
4 element of control.
5 Simply, so far as the Henderson case, which counsel
6 have both cited, I would say that it is not very convincing.
7 The Ninth Circuit inthe Retail Clerks' case went to great
8 length to try to analyze the question. The Henderson case
9 was simply a summary discussion and really only addressed it-
10 self to the question of amicus or intervention status at the
11 appellate level and that is consistent, first of all, with
12 the RetailClerks' case, with respect to that question, and
13 I would submit that there is, however, a more fundamental
14 question when we are appellants, because in order toappeal we
15 must be considered a party.
16 And as I have said, a party minus the right to seek,
17 a party minus the right to urge, are the positions not consis-
18 tent with the original position. And, perhaps, as Moore
19 suggests, perhaps there is some third animal in the law which
20 could come out of this case, something less than a fully party,
21 because we can't do all those other things, but yet someone
22 having the rights of a party and someone -- and where the
23 rights of an amicus are not sufficient, as the Court has said
24 in Scofield.
25 Thank you.

1 MR. CHIEF JUSTICE BURGER: Thank you; you have not
2 used your three minutes. The case is submitted.
3 (Whereupon, at 1:52 o'clock p.m. the argument in the
4 above-entitled matter was concluded)
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