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PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

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CAPTION: CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL  
NO. 391, Petitioner V. THOMAS C. TERRY, ET AL.

CASE NO: 88-1719

PLACE: Washington, D.C.

DATE: December 6, 1989

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IN THE UNITED STATES SUPREME COURT

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CHAUFFEURS, TEAMSTERS AND :  
HELPERS, LOCAL NO. 391, :  
Petitioner :  
v. : No. 88-1719  
THOMAS C. TERRY, ET AL. :

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Washington, D.C.  
Wednesday, December 6, 1989

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:02 a.m.

APPEARANCES:

J. DAVID JAMES, ESQ., Greensboro, North Carolina; on  
behalf of the Petitioner.  
ROBERT M. ELLIOT, ESQ., Winston-Salem, North Carolina; on  
behalf of the Respondents.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-1719, Chauffeurs, Teamsters and Helpers v. Terry.

Mr. James.

ORAL ARGUMENT OF J. DAVID JAMES

ON BEHALF OF THE PETITIONER

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

The question presented in this case is whether there is a right to a jury trial in a case where an employee sues his union alleging a breach of the duty of fair representation whenever he seeks also some type of monetary damages, which in this case are the back pay.

QUESTION: It doesn't sound very interesting.

MR. JAMES: It certainly didn't draw the crowd that the first one did.

(Laughter.)

MR. JAMES: It is, however, important for not only these parties, but for the large number of cases that this raises.

We contend that there is no right to a jury trial in such a case, and we do that based upon the historical analysis that this Court has set forth we

1 should follow in Seventh Amendment questions.

2 We have to go to the Seventh Amendment because,  
3 like everybody agrees, there is no statutory right to a  
4 jury trial and so the question turns on if there is a  
5 right to a jury trial, it could be found only in the  
6 Seventh Amendment.

7 The first, and this Court has set out that  
8 that's a two-pronged test, look at the historical analog  
9 to see if this is more like an equitable or a legal  
10 action, and then turn to the more important issue, what  
11 are the types of remedies asked for in the case, the  
12 nature of those remedies and are they more legal or  
13 equitable in nature.

14 We say, turning to the first prong, that this,  
15 while not recognized in -- at the time the Constitution  
16 and the Seventh Amendment was enacted -- the duty of fair  
17 representation action was not recognized then -- that the  
18 duty of fair representation action does have its origin in  
19 the traditions of equities law trust.

20 And we have discussed that our brief -- in our  
21 briefs at some length, how the union in a duty of fair  
22 representation case is much like a trustee situation that  
23 was found prior to the enactment of the Seventh Amendment.

24 A union, like a trustee, is given discretionary  
25 power to be exercised for the benefit of certain

1 employees. In Steele v. L&N Railroad, this Court  
2 recognized that the union, like a trustee, must act on  
3 behalf of these employees non-arbitrarily, must act in  
4 good faith.

5 The relationship that we find between a union  
6 and the employees that it represents is very much like  
7 that between a trustee and beneficiaries that it  
8 represents. The union has broad discretion, just like a  
9 trustee has broad discretion.

10 The trustee, or a union, can represent employees  
11 or beneficiaries with divergent, even conflicting  
12 interests. That's unlike the lawyer/client relationship  
13 where the client controls and tells the lawyer what he has  
14 to do and can withdraw, have other counsel, if he does not  
15 like what the attorney is doing.

16 With a union, an employee cannot insist that the  
17 union take any specific action. It -- the union, like a  
18 trustee -- has discretion to decide itself what to do.  
19 And as long as it stays within the certain bounds allowed  
20 by the courts in that discretion, the employee cannot  
21 force the union, just like a beneficiary could not force a  
22 trustee to take any particular action.

23 Thus, we say that the duty of fair  
24 representation action is very similar to the trust action  
25 which was found prior to the enactment of the Seventh

1 Amendment, and it's clear that those trust actions were  
2 developed solely in equity, that they were not recognized  
3 in law courts.

4 And we say that, therefore, if you look at the  
5 nature of the duty of fair representation action, it is  
6 most like that trust analogy and it's thus equitable.

7 That's particular seen in the sort of hybrid  
8 action that we have here where a union is sued by an  
9 employee who claims that the union did not take some  
10 action properly and at the same time the employee claims  
11 the company that it -- is its employer also acted  
12 improperly.

13 That is very similar to the old trust actions  
14 where a -- an -- a beneficiary of a trust would say the  
15 trustee should have taken some action against a third  
16 party but -- and it was an abuse of its discretion, the  
17 trustee's discretion, not to take that action.

18 And, therefore, in equity courts -- not in law  
19 courts, could not do it there -- but in equity courts the  
20 beneficiary would go in and say to the court, the trustee  
21 has acted improperly in not taking this action against the  
22 third party, and the third party has acted improperly.  
23 Give me a remedy against them.

24 That is something that it is clear could not be  
25 done in law courts.

1 QUESTION: What sort of a remedy would the  
2 chancery court give in that situation?

3 MR. JAMES: In that situation it was not unusual  
4 for the equity court to give money damages as a remedy.  
5 It was -- they could give the traditional equitable  
6 remedies also, but they also gave money damages against a  
7 trustee.

8 And we've cited some cases and cited some  
9 authorities about that so that if actions of the third  
10 party were harmful to the beneficiary, caused it to lose  
11 some money, and because of running the statute of  
12 limitations or some reason that money could not be  
13 recovered from the third party, it could be recovered from  
14 the trustee. Or, it could be recovered from both.

15 But, in any case, it was a money damage  
16 recoverable in equity.

17 QUESTION: Yes, but is -- aren't those cases in  
18 which, had the trustee acted properly in the first  
19 instance, the trustee would have recovered money damages  
20 in a jury trial from the -- from the third party?

21 MR. JAMES: No, they don't -- you don't -- if  
22 the beneficiary in that situation wanted to -- thought  
23 that the trustee had not acted properly, he couldn't go to  
24 the law court. He couldn't --

25 QUESTION: The beneficiary couldn't. But I'm



1 assuming a case in which the third party caused some  
2 injury to the trust, embezzled some money or something  
3 like that, for which the trustee, suing on behalf of the  
4 trust, would have had a remedy at law. There would be  
5 such --

6 MR. JAMES: There are cases where the trust  
7 would have a remedy at law, yes.

8 QUESTION: Which would be something like -- sort  
9 of like a derivative suit where it --

10 MR. JAMES: It's not like a derivative suit.

11 QUESTION: Well, that the corporation might have  
12 a remedy at law and the shareholder in -- before the  
13 merger of law and equity, and all the rest, the  
14 shareholder could have had, you know, had an equitable  
15 proceeding which would have brought something comparable  
16 to the damages that you describe here.

17 MR. JAMES: Let me tell you why I think it's not  
18 the same.

19 QUESTION: Because I know perfectly well --

20 MR. JAMES: Is that in those shareholder  
21 derivative suits you had basically the shareholder  
22 standing in the shoes of the corporation asserting the  
23 corporation's claim.

24 Here, this is not a claim of the trustee. These  
25 are rights that the beneficiary claims it has. If -- if

1 there is a recovery, it doesn't go to the corporation,  
2 like in the shareholder's derivative action. It goes  
3 directly to the beneficiary.

4 And in those shareholder derivative actions,  
5 they came about, as this Court explained in *Ross v.*  
6 *Bernhard*, because of procedural problems that they could  
7 not be brought in the law court. And so -- but that  
8 procedural problem is not here. The law courts didn't  
9 recognize the beneficiaries' rights at all.

10 QUESTION: Well, but there is an analogy in this  
11 sense. That the member of the labor union may not  
12 directly sue the employer because of the collective  
13 bargaining agreement there. So he has to really basically  
14 -- basically has to rely on the union as the intermediary  
15 to process grievances and all of that.

16 MR. JAMES: But he doesn't stand in the shoes of  
17 the union the way he does in a shareholder's derivative  
18 suit, because in a shareholder's derivative suit he stands  
19 in the shoes and he recovers a benefit for the  
20 corporation.

21 Here, he doesn't stand in their shoes. He  
22 recovers a benefit for himself and in fact can recover it  
23 directly from the union. In a shareholder's derivative  
24 suit --

25 QUESTION: I understand.

1 MR. JAMES: -- he wasn't getting it from the  
2 corporation. That's why I think they are different.

3 And because the shareholder's derivative suit  
4 was this procedural device used by the equity courts to  
5 get to it -- that's not a procedural device here. This is  
6 just a pure equity claim against -- against -- like the  
7 equity claim like against the trustee.

8 QUESTION: Mr. James, we're not talking about  
9 any tort-like recovery here, are we? Are we only talking  
10 about giving to the union member a fixed monetary sum that  
11 would have been his but for the action of the union, or  
12 are we talking about some smart money against the union or  
13 some tort-like --

14 MR. JAMES: Well, I don't think we're talking  
15 about smart money. That goes to the second prong of the  
16 test dealing with what remedy is available. I think in  
17 this case that it is not a fixed set sum that is sought.  
18 It is a sum that the court in its discretion can decide  
19 how much or how little to give.

20 QUESTION: Well, I know, but is it -- well, but  
21 to make it really analogous to those trust actions don't  
22 you have to say that what this individual is getting is  
23 precisely what the union would have obtained had it acted  
24 -- would have obtained on his behalf had it acted  
25 properly?

1 MR. JAMES: Well, I think --

2 QUESTION: And that no element of it is -- is a  
3 sort of tortious recovery against the union.

4 MR. JAMES: Well, I think that if you look at  
5 the -- the duty of fair representation actions, they talk  
6 in terms that you are to get only a make whole relief.  
7 You are not to get something beyond what would make that  
8 employee whole. You are not to recover -- for instance,  
9 in Faust you do not recover punitive damages.

10 QUESTION: Well, what does making whole consist  
11 of? Does it consist of the -- the employee's pain and  
12 suffering, his emotional upset at not -- any of those  
13 elements ever included?

14 MR. JAMES: I would say that it does not. This  
15 Court has not specifically passed on that issue, but I  
16 would say that it does not include those.

17 QUESTION: It only consists of what he would  
18 have gotten from the employer had the union acted -- acted  
19 properly?

20 MR. JAMES: And it may include some additional  
21 damages for legal fees and things like that to make him  
22 whole. What he had to spend to get to -- to get to that  
23 position. That's what I'm talking about -- about make  
24 whole relief.

25 The Respondents argue that Beacon Theatres and

1 Dairy Queen and Ross v. Bernhard do say that these are  
2 legal issues, ultimate legal issues and that, therefore,  
3 this is a legal case. I'd say that those cases do not say  
4 that.

5 They say that if there are purely legal claims  
6 that are being raised, then you cannot be denied your  
7 right to jury trial. But we're --

8 QUESTION: So, to prevail you really have to  
9 show that none of the claims in the case are triable by  
10 jury under the Seventh Amendment?

11 MR. JAMES: I believe that's correct, Your  
12 Honor. If they are legal claims triable to a jury, then -  
13 - that those would -- there would be a right to a jury  
14 trial under the Seventh Amendment for those. But we  
15 assert they are not, these legal claims.

16 Of course, there's the two prongs. The first  
17 prong would be not as important as the remedy section, but  
18 we think that under that first prong that these claims are  
19 purely equitable claims. They were recognized only in the  
20 equity courts and not legal claims at all.

21 There are some factual inquiries that are found  
22 both in legal courts and equitable courts. But when this  
23 issue is raised in the equitable court, the equitable  
24 court passed on those factual inquiries as the -- factor -  
25 - finders of fact. And it was because the claim was

1 purely an equitable claim that it had to do that.

2 Therefore, because we think those are purely  
3 equitable issues, we do believe that the first prong of  
4 the test, that the nature of the claim shows that there is  
5 no right to a jury trial.

6 Which leads us, then, to the second prong of the  
7 test which, of course, this Court has said is the more  
8 important, which is the nature of the remedies.

9 The only remedy sought here, which the  
10 plaintiffs claim is legal rather than equitable, is the  
11 back pay remedy. There was a claim made for punitive  
12 damages, emotional distress damages, but that was  
13 dismissed by the trial court. Those claims are not in  
14 this -- found that those were not appropriate in duty of  
15 fair representation cases, and that is consistent with the  
16 decisions of this Court and other courts.

17 QUESTION: (Inaudible) suit solely against the  
18 employer? Suppose there was a breach of duty by the union  
19 and the employee thinks that the employer breached the  
20 contract but I don't want to sue the union, I'm just going  
21 to sue the employer. And if he can prove a breach of duty  
22 by the union, the employer must respond.

23 MR. JAMES: That's correct. I don't think the  
24 issues are --

25 QUESTION: Then -- then --

1 MR. JAMES: -- are any different in that  
2 situation.

3 QUESTION: So you think that no jury trial then  
4 either?

5 MR. JAMES: No jury trial there either.

6 QUESTION: Because of the -- because you have to  
7 prove a breach of trust first?

8 MR. JAMES: You have to show the same breach of  
9 duty in that case that you do if you're suing the union.  
10 The issues are identical in both cases.

11 QUESTION: Well, I -- I thought in trust law  
12 that if the -- if the -- if the beneficiary thinks the  
13 trustee hasn't acted properly and hasn't collected  
14 something from some third party he asks the trustee to sue  
15 and the trustee doesn't -- says no, and he goes and sues  
16 the third party directly.

17 MR. JAMES: I believe he can.

18 QUESTION: Yes, but he gets a jury trial.

19 MR. JAMES: No. That -- that is not my  
20 understanding. If he is a beneficiary and he is suing  
21 claiming that there is a relationship between the trustee  
22 and this third party and the trustee isn't doing what he  
23 wants, he cannot go into the law courts and bring that.  
24 He could only go into the equity courts and bring that  
25 action. That's my understanding as it was back --

1 QUESTION: And you say the same thing applies  
2 here, therefore, even if he sued the employer alone?

3 MR. JAMES: Yes, I believe it does. I believe  
4 since the issues that he would have to prove in both the  
5 suit against the company or against the union, or both,  
6 are the same, then the same rules would apply across the  
7 board.

8 The plain -- the respondents in this case argue  
9 that the back pay is always legal. That is, upon a proof  
10 of a breach of the duty that there is an automatic and  
11 mandatory requirement that they receive this back pay.

12 We say that that's just not true, that there is  
13 a discretionary element. When they cite in their brief a  
14 quote that generally at equity, money judgments were  
15 allowed only when ancillary to traditional equity relief,  
16 we say, while that's generally true, it's not always true,  
17 and we've given you the specific example in the trust  
18 situation where money damages were recovered.

19 And that was recognized by this Court, I think,  
20 in Curtis v. Loether where it says that just because it's  
21 monetary damages you don't say that that always makes it  
22 legal relief.

23 So you have to look beyond the fact that it's  
24 money damages and look at those money damages and the  
25 nature of those damages to make this determination.



1           And on that the issue is, is there discretion in  
2           awarding these monetary damages or is there not? If  
3           there's no discretion, then it's a legal type relief. If  
4           there is discretion, it's equitable.

5           I think the respondents in their brief concede  
6           that that's the line, that that's the test to be followed.  
7           And if you follow that test, you find that these -- there  
8           is this discretionary element and thus these are equitable  
9           type remedies.

10           I think that most clearly can be seen by  
11           comparing the duty of fair representation remedies with  
12           those found -- found in Title VII. When you find Title  
13           VII, you find that those remedies are based upon the NLRA,  
14           the National Labor Relations Act, that there is a  
15           discretionary element in this damages.

16           This Court has held that there is that  
17           discretionary element.

18           QUESTION: I suppose that in a suit against the  
19           union alone to prove a breach you don't have to prove that  
20           the employer breached a contract. You just have to prove  
21           that the --

22           MR. JAMES: In this particular kind of duty of  
23           fair representation case you certainly do have to prove  
24           that the employer --

25           QUESTION: Well, yeah, you're --

1 MR. JAMES: -- had breached the contract.

2 QUESTION: -- going to have to prove -- you're  
3 going to have to prove the employer breached it in order  
4 to get -- to get any --

5 MR. JAMES: Relief.

6 QUESTION: -- to get the damages -- to get back  
7 pay --

8 MR. JAMES: That's correct.

9 QUESTION: -- or whatever you want to call it.

10 MR. JAMES: That's correct.

11 QUESTION: But you can prove the duty, breach of  
12 the duty, without proving the breach by the employer.

13 MR. JAMES: My understanding of the breach --

14 QUESTION: Because if -- but if it's -- but if  
15 it's a -- if it's a case that should be then taken to  
16 arbitration, the union -- and the union doesn't take it,  
17 the union's breached its duty, whether you -- whether it  
18 turns out that an arbitrator would have held for the  
19 employee or not.

20 MR. JAMES: Well, my reading of the cases says  
21 that you have to prove both of those things in this sort  
22 of situation before --

23 QUESTION: Well, you can --

24 MR. JAMES: -- you could recover.

25 QUESTION: Well, you're going to have to prove

1 the breach by the employer to get --

2 MR. JAMES: Relief.

3 QUESTION: -- to get the kind of relief you  
4 want.

5 MR. JAMES: That's correct.

6 Back, just a minute, to the Title VII where this  
7 Court has held that those Title VII remedies are  
8 discretionary because they're based on the NLRA, and under  
9 the National Labor Relations Act remedies are  
10 discretionary.

11 In Phelps Dodge, this Court has said that  
12 they're not to be mechanically complied with, but are  
13 entrusted to the discretion of the NLRB.

14 Likewise, the duty of fair representation  
15 remedies are derived from the National Labor Relations  
16 Act. This Court has held that the remedies in duty of  
17 fair representation cases must effectuate the policies  
18 under the Labor Act, just like in Title VII. The remedies  
19 in Title VII are make whole remedies. That's what you  
20 talked about in Albermarle Paper. Here they're make whole  
21 remedies.

22 QUESTION: Well, really, this kind of hybrid  
23 action isn't based on the National Labor Relations Act the  
24 same way that the ADA -- the ADEA is. I mean, it  
25 patterned after it -- by statute.

1 MR. JAMES: Well, you talk in Faust, though,  
2 that the remedial policy -- the remedies given under --  
3 for duty of fair representation breaches -- must  
4 effectuate the policies espoused by the Act. And I think  
5 that that, sort of by implication, does the same thing you  
6 found in Title VII.

7 QUESTION: But all we held in Faust was that no  
8 punitive damages, wasn't it?

9 MR. JAMES: Yes, but in getting to that position  
10 you did talk about how the remedial policies -- remedies  
11 available for DFR, duty of fair representation cases, must  
12 be such that effectuate the policies underlying the Act.  
13 And you found that punitive damages did not effectuate  
14 those policies in that case.

15 QUESTION: But we certainly didn't find that  
16 ordinary damages would not?

17 MR. JAMES: It wasn't presented in that case.  
18 No, Judge, it has not.

19 The --

20 QUESTION: Can you give me an example of -- of  
21 where discretion would be exercised not to -- not to give  
22 a --

23 MR. JAMES: Well, there's a -- there's a case  
24 cited in our brief called Navigation -- American  
25 Navigation, or something like that. It's an NLRB case.

1 And in that case, they found that the employer had  
2 violated -- had committed an unfair labor practice but did  
3 not award back pay remedies to the employee because the  
4 employee in the midst of the compliance proceedings had  
5 lied, had said, well, we didn't work here or did work  
6 here. Had lied about what money it had earned.

7 And so the board said, we're going to exercise  
8 our discretion. We're going to deny you back pay relief  
9 in that situation.

10 QUESTION: And you think that in a -- in a duty  
11 of fair representation case you could similarly not -- not  
12 award any relief against -- against the union on the basis  
13 of --

14 MR. JAMES: I believe that's true. If you look  
15 at our brief, we talk at length about how the parties in  
16 these agreements really negotiate for a decision by an  
17 arbitrator and give an arbitrator wide discretion as to  
18 what relief is given.

19 It is not at all unusual for an employee who is  
20 discharged to go to arbitration and be found that the  
21 company has improperly discharged it. But then be placed  
22 back at work without back pay. It is not at all unusual  
23 to have that sort of remedy come in an arbitration  
24 proceeding.

25 If the idea is to make whole the employee, not

1 give him a windfall, then I think that you have to look at  
2 what were the possible remedies he could get in an  
3 arbitrator's decision but for this DFR breach. And if  
4 that's true, then there is this wide range of discretion  
5 given to arbitrators that I think carries over into the  
6 DFR area as well.

7 And because you have that wide range of  
8 discretion which is applicable not only to the  
9 arbitrator's decision, not only applicable for the board,  
10 but also by the courts in the duty of fair representation  
11 area, the remedy, the nature of the remedy, is an  
12 equitable remedy and not a legal remedy.

13 When you take that prong, the stronger of the  
14 two prongs, and it clearly says that the remedies are  
15 equitable, and attach it to the first prong which says  
16 that the nature of the action was basically an equitable -  
17 - like an equitable -- not exactly the same, but like the  
18 old trust action -- then I conclude that the action here,  
19 the duty of fair representation action in this sort of  
20 hybrid situation, is an equitable action, does not call  
21 for a jury trial under the Seventh Amendment, and that the  
22 district court was incorrect below when they denied our  
23 motion to strike their jury trial demand.

24 QUESTION: May I ask one question, Mr. James?

25 I'm just not -- just to show my ignorance. But,

1 just as a general practice in this kind of litigation,  
2 have there been a fair number of jury trials or -- are  
3 these cases often tried to juries?

4 MR. JAMES: I think it would be fair to say  
5 there often have been jury trials in these areas in the  
6 past.

7 QUESTION: Thank you.

8 MR. JAMES: And, as you would see from the cases  
9 cited, it's slowly building through the circuit. Some say  
10 yes, some say no.

11 QUESTION: There are different -- different  
12 views among the circuits.

13 MR. JAMES: That's right.

14 QUESTION: Yeah.

15 MR. JAMES: If you have no further questions,  
16 I'll just reserve the remainder of my time.

17 Thank you.

18 QUESTION: Thank you, Mr. James.

19 Mr. Elliot, we'll hear now from you.

20 ORAL ARGUMENT OF ROBERT M. ELLIOT

21 ON BEHALF OF THE RESPONDENTS

22 MR. ELLIOT: Thank you, Mr. Chief Justice. May  
23 it please the Court:

24 The question in this case is whether there are  
25 legal issues and remedies involved in this case which must

1 be tried before a jury. If there are, this Court has said  
2 in its past decisions, that the Seventh Amendment applies  
3 and that my clients, or respondents, are entitled to a  
4 jury trial.

5 Now, in response -- or in his argument, the  
6 petitioner states, or tries to wrap the entire action in a  
7 trust cloak, so to speak, and tries to say that because  
8 this action has some resemblance to a trust, that that  
9 analogy should pervade the entire analysis and go off over  
10 to the second prong of the Ross test. And, therefore,  
11 since there maybe some resemblance to a trust, that the  
12 remedy sought in this case should be considered trust  
13 remedy.

14 We contend that that analogy does not fit for a  
15 number of reasons. It's important to remember at the  
16 outset that in this case are talking at this point in time  
17 about an action against the union alone.

18 The company is bankrupt and we have an action  
19 against the union saying that the union breached its duty  
20 of fair representation and as a result, a direct result of  
21 that breach, we have lost the opportunity to earn wages.  
22 Compensatory -- traditional compensatory monetary relief.

23 In -- I would like to begin with --

24 QUESTION: How much are you going to ask for?  
25 How are you going to measure your damages?



1 MR. ELLIOT: Our damage will be -- damages will  
2 be measured by what these respondents would have made in -  
3 - in their wages if they --

4 QUESTION: Back pay. Essentially back pay.

5 MR. ELLIOT: -- if they had been successful in  
6 arbitration. Yes, sir.

7 QUESTION: But no -- no other damages and no  
8 punitive damages?

9 MR. ELLIOT: At this point there are no other  
10 damages involved. There are some moving expenses which  
11 may classify as compensatory relief as well.

12 QUESTION: If the employer had not been bankrupt  
13 and had still been in the suit, would our analytic problem  
14 here today be the same?

15 MR. ELLIOT: I think the answer should be the  
16 same. But perhaps it's not quite as clear. In a case  
17 against the union, this more clearly can be analogized to  
18 a legal malpractice case because we have no company to pay  
19 the damages and we're going against the union, and that's  
20 where the focus is.

21 QUESTION: Well, why wouldn't -- if the employer  
22 were here, why wouldn't it just be a breach of contract  
23 case?

24 MR. ELLIOT: Well, that -- one side of the Vaca  
25 standards would be satisfied by a breach of contract

1 issue. And there is clearly a legal issue there. The --

2 QUESTION: I'm not sure how it changes just  
3 because the employer is either here or not here.

4 MR. ELLIOT: The only way it changes -- I don't  
5 think it really changes the constitutional analysis. But  
6 it does change the analogy to some extent because since we  
7 are suing the union only in this case at this point in  
8 time as a representative, then it's more analogous to a  
9 legal malpractice case where you are suing the lawyer for  
10 failing to represent you before a court or an arbitration  
11 panel.

12 And our damages all flow in this case, at this  
13 point in time, from the breach of the union agent in  
14 failing to represent us. And since we are not suing the  
15 company at this time, our damages are not flowing from the  
16 actual breach of contract.

17 I would like to set out some of the facts before  
18 I get too far along. But before I do so, I think it's  
19 important to keep in mind, especially in considering this  
20 trust analogy, the various roles that a union plays as an  
21 agent of its members.

22 It's not always in this, quote, "trustee's  
23 discretionary role." Obviously, as a negotiator in  
24 negotiating a collective bargaining agreement, a union is  
25 playing a role that requires expertise and requires a

1 great deal of discretion in considering all aspects of the  
2 labor management relationship.

3 QUESTION: That's all very true, but the only --  
4 the only element of the union's role at issue in this  
5 case is its -- is its obligation fairly to represent its  
6 employees.

7 MR. ELLIOT: That's my point, Your Honor. My  
8 point is that in this case we're not talking about a great  
9 discretionary duty. We're talking about an absolute duty  
10 to these union members to represent them on a grievance,  
11 which is a duty much more akin to the duty of a lawyer  
12 than it is to the duty of a trustee. The facts bear this  
13 out.

14 The essence of our case is discrimination. The  
15 change of operation procedure was designed to allow my  
16 clients the right to follow their work to Winston-Salem.  
17 At the time they followed their work they were supposed to  
18 have some seniority preferences because they were  
19 following their work, theoretically.

20 The order of recalls and layoffs after that were  
21 in direct violation of that procedure which had been  
22 devised by the collective bargaining procedure. At that  
23 time we have alleged that the union, in direct  
24 discrimination or blatant discrimination against my  
25 clients, sided with the locals, the local inactive people

1 who had been off the board, to try to bring them back on  
2 the board, at which time they would dovetail in my  
3 clients' seniority.

4 QUESTION: What is the -- what is the board, Mr.  
5 Elliot?

6 MR. ELLIOT: The -- the active employment. The  
7 active board in this case would be the list of truck  
8 drivers who were actually getting calls.

9 According to the change of operations procedure,  
10 my clients were supposed to have seniority over the people  
11 who were actively working -- I mean, over the people who  
12 were not actively working, regardless of their continuous  
13 company seniority when they came in.

14 We have contended that the union in this case  
15 discriminated, that they sided with the locals to try to  
16 get the locals back on the board -- the active employment  
17 -- so that they would all dovetail and my clients would  
18 lose their rights.

19 That was the first aspect of our case, and  
20 everything -- flowed from there. Then the first decision  
21 was decided, which decided exactly that. The order of  
22 recalls had been a violation, and a clear violation, of  
23 the change of operations procedure in the contract even  
24 though the union -- the union had gone along with that --  
25 that interpretation and that order of recall. And the

1 grievance committee found it was a clear violation.

2 A week later the union and the company got  
3 together and decided that we are going to do exactly what  
4 the decision said, we're calling back the -- the foreign  
5 drivers -- my clients who were laid off in direct  
6 violation of the agreement. We'll call them back --  
7 that's 30 drivers -- and we're going to lay off the 30  
8 local drivers who had not been active.

9 QUESTION: What's this got to do with the issue  
10 we've got to --

11 MR. ELLIOT: Well, Your Honor, the point I'm  
12 trying to get to is -- is that at that point in time the  
13 union played a role as lawyer. It accepted a grievance  
14 that this was a subterfuge and that this was a  
15 circumvention of the decision. And from then on, it took  
16 that grievance to the grievance committee and we say acted  
17 perfunctorily in representing our clients on that  
18 grievance because --

19 QUESTION: Sometimes the trustee has to play a  
20 role as lawyer -- I mean, when he has a claim on behalf of  
21 the trust against someone that he fails to prosecute,  
22 either by prosecuting it himself if he's a lawyer, or  
23 hiring a lawyer, you have a cause of action against the  
24 trustee, but it's purely an equitable cause of action.

25 MR. ELLIOT: I think in that case the trustee

1 would have to get a lawyer, and the trustee would not be  
2 acting in the role of the lawyer but in the role of a  
3 client.

4 QUESTION: Well, that may well be, but you'd  
5 still -- the decision of whether to prosecute or not is a  
6 decision of the trustee and he'd be -- he'd be suable in  
7 equity.

8 MR. ELLIOT: That -- that is --

9 QUESTION: If the lawyer did a bad job in  
10 prosecuting this suit, I guess that -- you might have a  
11 malpractice action against him, although I'm not sure that  
12 that wouldn't have to be brought in equity too.

13 But the problem here is not that he was a bad  
14 lawyer. The problem is he didn't bring a lawsuit.

15 MR. ELLIOT: He did bring the lawsuit, Your  
16 Honor. He -- he filed a grievance on my clients' behalf,  
17 that the actions of the company and the union a week after  
18 the first decision was a subterfuge. And that's the words  
19 that are used. It had circumvented the decision because  
20 it had just turned everything right where it was before  
21 the decision applied. At that time he filed the  
22 grievance.

23 QUESTION: The employer was entitled, under his  
24 contract, the collective bargaining contract, the employer  
25 was entitled to rely on the decision of the arbitrator or

1 the arbitrating -- whoever it was that decided the  
2 grievance -- unless the union breached its duty.

3 And if the union breached its duty, then the  
4 employer could not rely on his -- could not rely on the  
5 board's decision. Isn't that right?

6 MR. ELLIOT: Yes, sir.

7 QUESTION: Now, you say that that a -- if you're  
8 going to set aside a contract, isn't that sort of an  
9 equitable action?

10 MR. ELLIOT: Your Honor, we're not trying to set  
11 aside anything in this case. We're suing the union  
12 directly for --

13 QUESTION: Well, I know.

14 MR. ELLIOT: -- for its breach.

15 QUESTION: Yeah, yeah. I know. I know. But  
16 the employer -- to stick the employer, you've got to prove  
17 a breach by the union and you say that -- that the union's  
18 duty is -- should not be analogized at all to a trust  
19 operation, to a trustee. It should be analogized to a --  
20 to a --

21 MR. ELLIOT: Lawyer.

22 QUESTION: -- to a lawyer.

23 MR. ELLIOT: In that respect. Now, you know --  
24 and there are other -- there are certainly other  
25 characteristics of this action which are not so close to a

1 lawyer, and I'm not denying that. But I'm just saying  
2 that's probably the best common law analog to the case in  
3 its posture before the Court at this time.

4 But there are several other reasons the trust  
5 analogy does not fit. Trust, as I understand it, was  
6 created by the courts of equity because courts of law did  
7 not recognize the distinction between legal and beneficial  
8 title.

9 Therefore, beneficiaries -- beneficiaries had no  
10 rights before courts of law and the re -- courts of equity  
11 recognized rights -- that there was no adequate remedy at  
12 law. So these trusts -- beneficiaries had to go to courts  
13 of equity.

14 There's no property in this case. And that was  
15 it -- an absolute essential element of a trust, that there  
16 be a corpus.

17 Now, the petitioner tries to argue that the  
18 contract rights was property in this case. But I'd  
19 contend that the only thing about this case that resembles  
20 the trust relationship is the relationship itself. And  
21 that relationship is recognized and was recognized at law  
22 just as well as it was at equity.

23 It's -- it's the confidential relationship  
24 between these parties. It's no different from the  
25 relationship between the director in the corporation in



1 Ross -- there's no difference between that relationship  
2 and the relationship we have here.

3 And if the only thing that resembles a trust is  
4 the relationship which was also recognized at law, the  
5 trust analogy loses -- loses its force, its persuasive  
6 force.

7 That relationship, as this Court found in Ross,  
8 could be the focus of an illegal action. In Ross the  
9 case -- the legal issues that were found were negligence  
10 and breach of contract by a director who owed a fiduciary  
11 duty to his corporation. Another issue was breach of  
12 fiduciary duty.

13 So, the union membership -- the union member  
14 relationship in this case does not magically convert this  
15 action to a trust action any more than the director's  
16 relationship did in Ross. Even beyond the derivative  
17 stockholder standing issue, the relationship itself is the  
18 same.

19 Going to the second part of the Ross test, the  
20 nature of relief, in this Court's -- it's clear that this  
21 Court has recognized on a number of occasions that,  
22 generally speaking, monetary relief is traditional legal  
23 relief because there was an adequate remedy at law. And  
24 that's what we have here in DFR actions.

25 But more importantly, when this Court has been

1 -- has decided cases involving statutory rights to a jury  
2 trial, the Court has looked at statutory intent on the  
3 specific statute at issue, such as Title VII or the ADEA  
4 in the Lorillard case.

5 We contend that in deciding the issue in this  
6 case there is no statutory intent because it's a judicial  
7 action. But this Court should look at the judicial common  
8 law, the federal common law which has evolved over the  
9 years in DFR actions.

10 And that -- the number of decisions decided by  
11 this Court in the DFR -- 301 DFR area indicates that this  
12 -- that monetary damages is a form of legal relief.

13 Even the Steele case said that. The Steele  
14 decision, while saying it was a grant of power to act on  
15 behalf of another -- which inferred some relationship not  
16 necessarily trust, Steele also said that the full range of  
17 judicial remedies should be available to a victim of the  
18 breach of duty of fair representation, including  
19 injunction and damages.

20 The Vaca court underscored that in talking about  
21 the compensation principle. The Faust court, while  
22 striking punitive damages, again emphasized the  
23 compensation principle and the very distinction between  
24 this kind of action and the action before the NLRB on an  
25 unfair labor practice. That this type of action that's

1 involved is focused on the individual, the private right  
2 of the individual.

3 And I believe this Court underscored that  
4 principle once again in its decision yesterday in the  
5 Breininger case, that there are two different types of  
6 actions, two different sets -- at least, to some extent,  
7 two different sets of policies and two different sets of  
8 rules because one was created or implied -- or one was  
9 recognized by the board according to a statute and the  
10 other was recognized by this Court and implied --  
11 developed by this Court.

12 And in the Faust case I think it becomes even  
13 clearer in the concurring opinion by Justice Blackmun.  
14 Justice Blackmun stated, along with three other members of  
15 this Court, that punitive damages -- there should be no  
16 per se rule against punitive damages because Steele  
17 recognized the full range of judicial remedies. And that  
18 should include punitive damages.

19 Now, this Court, as a matter of federal labor  
20 policy, the majority decided to strike punitive damages at  
21 least in that kind of action. But the fact remains that  
22 while limiting the range of remedies, this Court has  
23 always at least implicitly recognized that we're dealing  
24 with legal relief.

25 And for that reason, this case is very

1 distinguishable from the Title VII case and the cases  
2 under the NLRA.

3 The last point I'd like to make on the second  
4 part of the Ross test is that the other theories on which  
5 back pay in various types of actions has been found to be  
6 equitable relief has to do -- is whether it's  
7 restitutionary, whether it's ancillary to or incidental to  
8 equitable relief or whether specific performance.

9 As Justice Marshall I think stated in Curtis,  
10 for the same reason restitution was not an appropriate  
11 theory in that case, it's not in this case. This -- this  
12 -- we're not trying to discourage the company or the union  
13 from any kind of unjust enrichment. We're not trying to  
14 follow money. We're trying to seek compensation for what  
15 we've lost.

16 In conclusion, we contend that these individuals  
17 who've alleged that their union sold them out in effect,  
18 and discriminated against them in favor of the other  
19 members, have a right to a jury trial on this case which  
20 presents legal issues and monetary relief.

21 QUESTION: Could you -- you mentioned at the  
22 outset that part of your claim includes moving expenses.

23 MR. ELLIOT: Yes, sir.

24 QUESTION: What -- what do they consist of?

25 MR. ELLIOT: According to the change of

1 operations procedure, Justice Scalia, our clients were  
2 moved into Winston-Salem. The company picked up some of  
3 those expenses but our client picked up the rest of them  
4 in moving their family and reestablishing themselves in a  
5 new location.

6 QUESTION: But they would have been moved  
7 anyway. I mean, how can you get both the wages and the  
8 moving expenses? Aren't the two inconsistent? If you  
9 would have gotten the wages, you would have incurred the  
10 moving expenses.

11 MR. ELLIOT: Well, that -- that's correct.  
12 There is -- there is some inconsistency there. We have  
13 asked for those expenses. At this point -- you know, even  
14 in view of the district court's ruling on our other  
15 compensatory relief, those claims are still viable.

16 Thank you.

17 QUESTION: Thank you, Mr. Elliot.

18 Mr. James, you have six minutes remaining.

19 REBUTTAL ARGUMENT OF J. DAVID JAMES

20 ON BEHALF OF THE PETITIONER

21 MR. JAMES: We did not seek to have that claim  
22 for moving expenses struck at the same time we did  
23 emotional distress damages and punitive damages. In  
24 hindsight, we should have. It was just one of those  
25 things. We never could understand that claim, and we

1 always thought it was inconsistent. They never said it  
2 once before, and so we didn't make that motion at that  
3 time.

4 But I think he's right, it is inconsistent.  
5 I've never understood. There's no contract breach about  
6 that. They got what the contract was -- required about  
7 the moving expenses, and so I've always ignored that in  
8 this case.

9 I do want to say that we think that the trust  
10 analogy is much more apt than the legal malpractice  
11 analogy principally because of the discretion given the  
12 union to act on behalf of these employees.

13 An attorney does not have that discretion. It --  
14 an attorney cannot represent conflicting views. A union  
15 does do that all the time and so did a trustee who had  
16 beneficiaries with conflicting interests, directly  
17 conflicting.

18 And that's why we say that the trust analogy is  
19 more apt in this case than is that legal malpractice  
20 action. In fact, a union doesn't have any duty to file  
21 the grievance.

22 If it files it, it doesn't have to take it to  
23 arbitration. it can even refuse to take something to  
24 arbitration because it's too costly if in its exercise of  
25 discretion yet in good faith determines that for the best

1 interests of everyone in that group this grievance should  
2 not be taken to arbitration.

3 An attorney doesn't have that. He can't make  
4 that choice. He's specifically prohibited from making  
5 that --

6 QUESTION: Well, an attorney's duty is the  
7 standard of care.

8 MR. JAMES: That's correct.

9 QUESTION: But the trustee has a similar duty.  
10 He really wears two hats.

11 MR. JAMES: The trustee's duty is somewhat  
12 different than -- than the -- than the attorney's. I've  
13 seen someplace -- some people call it the standard of  
14 conduct rather than the standard of care. That doesn't  
15 help me a whole lot to understand the difference.

16 But with a trustee and with a union, they have  
17 this discretion -- discretion of whether they should bring  
18 this claim or not. If a client comes to an attorney and  
19 employs an attorney and says, I want you to bring this  
20 claim, and the attorney just doesn't, well, he breaches  
21 his standard of care. He can't make that decision.

22 The union can make that decision. The trustee  
23 can make that decision. That's why we think that analogy  
24 is more apt.

25 It's also -- the rights of the employee in this

1 case are not equal to simple contract rights against the  
2 employer. The employee must rely upon the union, like a  
3 beneficiary must rely upon the trustee. And the rights  
4 the employees have are like the rights beneficiaries have.  
5 That is, they come from this trust relationship.

6 All of that leads us to conclude that this is  
7 more analogous to the trust situation.

8 Finally, just one point. In talking about  
9 whether the -- he mentioned in Ross how there was a claim  
10 of a breach of fiduciary duty there. This Court  
11 specifically reserved the question and did not say that --  
12 whether that had a right to a jury trial on that issue or  
13 not.

14 The only issues in Ross that it found it -- was  
15 a right to a jury trial were the clearly legal issues.  
16 And as we've said, these are not those clearly legal  
17 issues.

18 Thank you very much.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Elliot.

20 The case is submitted.

21 (Whereupon, at 11:48 a.m., the case in the  
22 above-entitled matter was submitted.)

23

24

25



**CERTIFICATION**

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

NO. 88-1719 - CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL NO. 391, Petitioner

V. THOMAS C. TERRY, ET AL.

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

BY Alan Friedman

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