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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, Petitioner v. THARON RAWSON,
ETC., ET AL.

CASE NO: 89-322

PLACE: Washington, D.C.

DATE: March 26, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STEELWORKERS OF AMERICA, :
4 AFL-CIO-CLC, :
5 Petitioner :
6 v. : No. 89-322
7 THARON RAWSON, ETC., ET AL. :
8 -----x

9 Washington, D.C.

10 Monday, March 26, 1990

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:03 a.m.

14 APPEARANCES:

15 GEORGE H. COHEN, ESQ., Washington, D.C.; on behalf of the
16 Petitioner.

17 KENNETH B. HOWARD, ESQ., Coeur d'Alene, Idaho; on behalf
18 of

19 the Respondent.
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1 detected in the course of a reasonable inspection.

2 The issue presented in this Court is whether the
3 Idaho state tort law is preempted by the Federal duty of
4 fair representation which governs the union in the conduct
5 of its functions in administering and enforcing a
6 collective bargaining agreement.

7 We bring to this Court a case that has gone through
8 summary judgment, extensive discovery and a spectrum of
9 undisputed facts.

10 Insofar as the collective bargaining agreement is
11 concerned, that agreement, as I stated, makes clear that
12 the union has these two particular roles in accompanying
13 the state mine and the company inspector. The contract
14 begins by referring to the fact that the company will
15 continue to assume its responsibility to provide a safe
16 and healthful work place. The company then agrees to
17 provide the union the limited role that I have just
18 described. The contract does not provide that the union
19 has a right on its own to inspect the mine, and the
20 contract does not provide that the union shall be entitled
21 to correct any defects or deficiencies that might be
22 noticed during the course of either of these types of
23 inspections.

24 Indeed, the limited nature of the union's role is
25 reflected in part by the fact that the union, under

1 Federal law, did not have the right to even accompany a
2 Federal inspector during the Federal inspections of the
3 mine, and the company would not permit the union to do so.

4 QUESTION: Well, Mr. Cohen, if the provisions of
5 the collective bargaining agreement are clear, although
6 they give the union very little authority, and perhaps the
7 Supreme Court of Idaho has piled on a lot of
8 responsibility commensurate with that authority, I don't
9 know that that goes to the preemption question. The
10 preemption question, I thought, was whether the Court
11 would have to interpret the collective bargaining
12 agreement.

13 MR. COHEN: Well, with two -- there is two aspects
14 of the preemption issue. One would be the question of
15 interpretation, but there is a more threshold proposition,
16 Mr. Chief Justice.

17 QUESTION: So you don't rely on the interpretation
18 aspect?

19 MR. COHEN: Well, parenthetically, as we have
20 argued in our brief, there is no question but that before
21 the question of whether or not the union assumed any duty,
22 because before the union -- unless and until the union
23 assumes a duty, there can be no tort liability. The
24 question of whether or not there is any assumption of a
25 duty would have to turn on an interpretation of the

1 collective bargaining agreement. That would go to the
2 question of whether a tort was committed under state law.
3 We have a threshold proposition. The threshold
4 proposition --

5 QUESTION: Well, but you -- I still don't think you
6 have answered my question. Do you rely on that part of
7 the preemption doctrine, as you describe it, which says
8 you cannot as a state court interpret a collective
9 bargaining agreement?

10 MR. COHEN: No. The more precise formulation, Mr.
11 Chief Justice, would be that when you are interpreting it
12 you must apply Federal law, whether you are a state court
13 or a Federal court. Yes, we do rely on that in our
14 supplemental position that under no circumstance could
15 there ever have been a duty found to exist here on the
16 union to inspect.

17 But the -- but the basic premise and the focus of
18 our position is that effort by the State of Idaho to
19 impose a tort law obligation on the union, arising out of
20 the, quote, "inspection," that effort, that attempt to
21 regulate the union's conduct is preempted by the most
22 fundamental principle of Federal preemption, namely that
23 when the union's conduct -- and there is no dispute about
24 this, Mr. Chief Justice -- however the, anyone wants to
25 frame the actual conduct, the union was engaged in that

1 conduct exclusively because it was the collective
2 bargaining agent. It had obtained a provision in the
3 collective bargaining agreement to permit it to do the
4 accompanying, and it was actually exercising that right to
5 accompany the inspector. Here we were, then --

6 QUESTION: Now, what -- what of our cases supports
7 this, what you are, is apparently your primary position?

8 MR. COHEN: Well, the case that supports our
9 primary position is *Vaca v. Sipes*, for the basic
10 proposition that insofar as the representational function
11 of processing of grievance and administering the grievance
12 arbitration proceeding is concerned, there is a Federal
13 duty. The Federal duty was designed to accommodate all
14 the competing interests, carefully delimited what that
15 Federal duty would be, and that Federal duty occupies the
16 field. It is the exclusive duty, insofar as, and I think
17 this is --

18 QUESTION: Certainly *Vaca* doesn't say it is the
19 exclusive duty, does it?

20 MR. COHEN: Yes it does. *Vaca* says insofar as the
21 union is administering the contract through the grievance
22 arbitration proceeding, Federal law governs. And the
23 square holding of *Vaca* was the Missouri Supreme Court's
24 attempt to apply Missouri law to impose a duty on the
25 union different from the Federal duty of fair

1 representation could not stand, and in fact was held not
2 to be applicable.

3 QUESTION: Suppose, Mr. Cohen, the contract here
4 expressly put a -- placed a duty on the union, namely that
5 the union did promise to inspect the mine. You would take
6 the same position that, that although there -- I suppose
7 there would be a 301 action against the union? But does
8 it also owe a duty of fair representation to carry out
9 that duty correctly?

10 MR. COHEN: I think I would respond as follows,
11 Justice White. Theoretically, as this Court in fact
12 recognized in I.B.E.W. v. Hechler, theoretically the union
13 could assume by contract duties in excess of what the
14 traditional kind of representational service is. That is
15 at least theoretically possible.

16 I think the Court would understand and appreciate
17 that is a very unlikely circumstance, given the reality of
18 collective bargaining, the union acting for and on behalf
19 of people in that unit, exacting promises and commitments
20 from the employer. It would be a very unusual
21 circumstance to believe that in that process of collective
22 bargaining, the consequence would be that the union would
23 assume a duty which was then enforceable by members of the
24 bargaining unit.

25 However, even were that to take place, we would

1 have to look at that collective bargaining agreement,
2 interpret it to see is this that very unusual circumstance
3 where employer permitted a union to assume that kind of
4 authority, and in fact, the union actually assumed it.

5 QUESTION: Well, what about, what about my question
6 now?

7 MR. COHEN: Your question, as I understood it, was
8 in that --

9 QUESTION: Suppose the union undertakes, in the
10 collective bargaining agreement, to inspect the mine?

11 MR. COHEN: That would not, obviously, be this
12 case.

13 QUESTION: Because that is what this case is. The
14 state court, as I understand it, construed this contract
15 as the union undertaking a duty to inspect.

16 MR. COHEN: The state --

17 QUESTION: So, let's assume that is right. Then
18 what about -- what about preemption?

19 MR. COHEN: All right, now --

20 QUESTION: What would be your primary position
21 then?

22 MR. COHEN: Our position would basically be this
23 Court has not addressed that problem. But it would be --
24 it would be -- there are circumstances and factors and
25 considerations at work in that kind of a situation that

1 are not at work here. Because let me say --

2 QUESTION: Well, why not? Why not? Didn't the --

3

4 MR. COHEN: Because the argument would be, Mr.,
5 Justice White, the argument would be, in that kind of a
6 situation the union arguably is displacing the managerial
7 function of inspecting, and the union then would be
8 assuming what would traditionally be an employer role.

9 QUESTION: Do you agree that the Idaho Supreme
10 Court interpreted the collective bargaining contract to
11 put a duty on the union --

12 MR. COHEN: Absolutely.

13 QUESTION: -- to inspect?

14 MR. COHEN: Absolutely.

15 QUESTION: Well --

16 MR. COHEN: But we -- but in fact --

17 QUESTION: Now, suppose we accept that?

18 MR. COHEN: But, in fact --

19 QUESTION: Suppose we accept that?

20 QUESTION: You need to wait until Justice White
21 finishes with his question before you begin your response.

22 QUESTION: Suppose -- suppose -- suppose he -- we
23 accept that construction of the contract? Then what is
24 your primary position?

25 MR. COHEN: Accepting the construction of the

1 contract as the findings were made here was that all the
2 union did was accompany. If we accept it -- there is no
3 disputed fact as to what the union's conduct was, Justice
4 White. It was accompany. In fact, the state --

5 QUESTION: You're just not answering my question.

6 MR. COHEN: -- the state court characterized it as
7 doing more.

8 QUESTION: Well, so, if we, suppose we agree with
9 them.

10 MR. COHEN: If we did more, if we did more our
11 position would be as long as the union was basically
12 performing a representational function, and what they were
13 trying to do was influencing the way the employer carried
14 out its safety and health responsibility, that would
15 continue to be preempted. We do recognize, however --

16 QUESTION: It would be preempted because of the
17 duty of fair representation?

18 MR. COHEN: Yes, yes.

19 QUESTION: Not because it's -- it would be a 301
20 action?

21 MR. COHEN: It would -- it would be preempted
22 because it was essentially a duty of fair representation
23 case. But I am not denying that there is a possibility
24 that a provision could be agreed to that somehow would
25 create some kind of an additional 301 claim that might be

1 enforceable.

2 QUESTION: Well, that is your fallback position,
3 isn't it?

4 MR. COHEN: Well, yes. It's a fallback in this
5 sense. This Court, earlier this term in the Breininger
6 case, where what was involved was a hiring hall, and the
7 union said after all what we are really doing is taking
8 over a managerial function, this Court said well, the
9 reality is you are administering a safety -- a provision
10 of a collective bargaining agreement. And insofar as you
11 are doing that, the Federal duty of fair representation
12 governs your conduct, and you must conduct yourself
13 consistent with that Federal duty.

14 Now, the -- as I said, the Vaca case directly
15 addressed the question where there was one particular type
16 of representational activity involved, one particular
17 activity, namely, the grievance process. The, our
18 analysis of the Federal law is that that same approach is
19 equally applicable, as long as you have an exclusive
20 bargaining agent functioning, administering or enforcing a
21 provision of a collective bargaining agreement. That is
22 the nature of the conduct that was being sought to be
23 regulated here.

24 No matter how you want to characterize the
25 plaintiffs' theory, the complaint alleged at the

1 beginning, the union undertook to act as an accident
2 prevention representative and to enforce the safety and
3 health articles of the collective bargaining agreement,
4 and the union performed that service negligently. That
5 was the focus in which this case proceeded. It has
6 continued to proceed as the basic thrust of the
7 plaintiffs.

8 Our position is that insofar as that aspect of the
9 union's conduct is concerned, the union has a duty. Now,
10 when this Court and the basic national labor policy
11 reviewed the question of how do you accommodate the
12 interests of individual employees, their bargaining
13 representative, and the company, when you have that kind
14 of conduct taking place.

15 And the line that was drawn, the effort to
16 accommodate all those competing interests, which comes
17 right out of the core of the National Labor Relations Act
18 when a union is conducting its activities, was to say on
19 the one hand the union is going to be the exclusive
20 representative, the representative of everyone in that
21 unit. But with that extraordinary grant of power we have
22 to accommodate the interests of individual employees
23 against such abuses.

24 And the balance that was struck was designed to
25 assure on the one hand employees' rights would be

1 protected, but on the other hand the union would be left
2 in a position that it could be a viable collective
3 bargaining representative and serve the interests of
4 everyone in the bargaining unit.

5 And out of that combination of interests and
6 concerns came the Federal duty of fair representation, a
7 duty which says the union must act fairly to all the
8 people in the unit, that it must exercise its discretion
9 in complete good faith and with honesty of purpose and
10 that it cannot engage in any hostility or discrimination
11 against anyone or treat anyone arbitrarily.

12 QUESTION: Excuse me, Mr. Cohen.

13 MR. COHEN: Yes.

14 QUESTION: Is it your position, then, that there is
15 a Federal common law of torts against the union for any -
16 - any negligence in its assumed exercise of bargaining
17 activities?

18 MR. COHEN: Justice Scalia, I wouldn't say it is a
19 Federal common -- Federal common law of torts. We would
20 say that by virtue of having this authority and
21 responsibility, that principle, that Federal law principle
22 governs the manner in which the union conducts itself,
23 incidentally a principle in which negligence has no role.

24 QUESTION: You, you would say that this Court, that
25 this suit could have been brought in Federal court, then,

1 on a Federal theory that the union, through its actions,
2 assumed the obligation to inspect, and its -- its breach
3 of that assumption gives rise to a Federal cause of
4 action?

5 MR. COHEN: We would say that there is a Federal
6 claim for the breach of the duty of fair representation.
7 That there always is when a union is conducting itself and
8 administering and enforcing a provision of a collective
9 bargaining agreement.

10 QUESTION: No, no, no. This hasn't -- this is not
11 -- it has nothing to do with a collective -- let's assume
12 there was nothing in the collective bargaining agreement
13 at all about accompanying mine inspectors or anything
14 else. But, in point of fact, the union got into the habit
15 of going around with the, with the mine inspectors, and
16 indeed -- just what the state court said here.

17 MR. COHEN: I am sure you can appreciate, Justice
18 Scalia, that the union, I know of no instance where a
19 company would have allowed a union --

20 QUESTION: Well, I know that, but this -- it
21 happens --

22 MR. COHEN: -- to engage in that. But were that to
23 be the case, the union still is functioning as the
24 exclusive bargaining representative.

25 QUESTION: And -- and there would be a Federal

1 cause of action.

2 MR. COHEN: And the Federal -- it would be a
3 Federal cause of action, but that would be the only cause
4 of action for that kind of conduct, because what the union
5 is trying to do in that circumstance is to influence the
6 manner in which the employer is providing, is satisfying
7 its relationship to that union. Now, in most cases if
8 there was a collective bargaining agreement, obviously
9 that would be the union's purpose, to try to monitor the
10 way the employer was living up to its commitments, and
11 certainly to be in a position to try to influence the
12 employer in the manner in which the employer was carrying
13 out its responsibilities.

14 QUESTION: Mr. Cohen, take Justice Scalia's
15 hypothetical a step further, if you will. Supposing that
16 the union officers -- you don't need to look at the clock.
17 Suppose that the union officers were on their way to
18 inspect the mine in a union-owned car ran over someone
19 negligently. Now, would there be any question what the
20 plaintiff in that case, the injured person, could sue in
21 the Idaho state courts?

22 MR. COHEN: Absolutely could sue via common law
23 action. It could, the duty of fair representation would
24 play no role in that kind of a circumstance. And
25 precisely because the duty of fair representation would

1 place no role, we aren't in a unique circumstance --

2 QUESTION: So, so if we were to conclude that the
3 duty of fair representation really played no part in
4 Justice Scalia's hypothetical, then that would mean that
5 that -- this -- that action too would be -- could be
6 brought in state court?

7 MR. COHEN: Yes, but I want to --

8 QUESTION: Your position is contrary, I realize
9 that.

10 MR. COHEN: Our position is you have to look to the
11 nature of the conduct in question. Driving an automobile,
12 how the local union preserves its personal property.
13 Those are areas where we have acknowledged in our brief -
14 - indeed I don't think it's acknowledgement -- are
15 completely outside the parameters of the operation of the
16 Federal duty of fair representation. All common law
17 obligations that any other citizen would owe are owed by
18 the union.

19 But in a sense, Chief Justice, that highlights the
20 contrast from the actual situation presented here, because
21 here we're in that very unique area where the union is
22 functioning as the exclusive agent, as the administrator
23 of the safety and health provision, and as the
24 representative of everyone in that mine, designed to
25 influence the way in which the employer is conducting its

1 --

2 QUESTION: Suppose that, take it a step further.
3 The contract says explicitly the union shall have no duty
4 to inspect the mine. This is solely the duty of the
5 employer. The union then, on its own, tells the employees
6 we have inspected mine shaft number 12 and find it safe.
7 And they are negligent in that and people are injured.
8 Cause of action there against the union?

9 MR. COHEN: Well, the question would be whether or
10 not there was a misrepresentation by the union, and
11 whether it would be reasonable for anyone to rely on that
12 circumstance.

13 QUESTION: You know what the Idaho tort law is.
14 The Idaho tort law is there, in the situation I put, that
15 there be a cause of action for negligence.

16 MR. COHEN: I -- I still believe --

17 QUESTION: Is it somehow displaced by Federal law?

18 MR. COHEN: In that situation, I think, once again,
19 we are in the area where you have at least, the argument
20 would at least be you're predominantly involved in the
21 union's conducting its exclusive representative status and
22 providing services to individuals. I know that the line
23 can move further along depending on a spectrum of facts
24 and circumstances. Certainly, where a contract's involved
25 we don't have that problem. But I think we would at least

1 have the basis for maintaining the argument that there
2 still is the functioning of the union in its traditional
3 representative status that is at work there.

4 I recognize there could be competing considerations
5 in that regard, but there are no competing considerations
6 here, as we say, because there is no dispute that -- the
7 only reason the union was functioning here was because it
8 had obtained a provision in the agreement which gave it
9 the limited right that it had to accompany the inspector.

10 QUESTION: In my situation, my hypothetical, I want
11 you to stipulate that the union was negligent in what they
12 did. Would there be a Federal cause of action?

13 MR. COHEN: Well, insofar as a Federal cause of
14 action is concerned, mere negligence or bad judgment does
15 not on the merits make out a claim for a breach of the
16 duty of fair representation. There is a good reason for
17 that, and the reason is the policy concern that you want
18 to give the union a wide range of reasonableness when it
19 is conducting its activities and having to make the
20 judgment that it has to make as the bargaining
21 representative. Should we inspect. How do we inspect.
22 What kind of collective bargaining protections are we
23 going to try to achieve in the contract.

24 QUESTION: This isn't the duty of fair
25 representation, though. It's a tort arising out of an

1 activity that it was performing in the conduct of its duty
2 of fair -- we're not saying that the union has violated
3 its contractual obligations at all. We're -- your thesis
4 is if a tort arises out of its either express contractual
5 performance, or out of any other aspect of its trying to
6 make the employer accountable for the relations with the
7 workers, that tort is excluded from state law. It's a
8 separate tort. It's not the duty of fair representation.
9 Now, does that tort exist under Federal law or not?

10 MR. COHEN: I don't believe it does.

11 QUESTION: There is just no such tort. All you
12 have is --

13 MR. COHEN: I am certainly not aware of one that
14 does this, but we are still back to our fundamental
15 proposition. No matter how the court tried to
16 characterize the duty it was trying to place on the union,
17 it's the act or conduct sought to be regulated that is the
18 key consideration. And whether it is a tort under one
19 state law or another, the bottom line is, we believe, that
20 insofar as the union is conducting itself as the exclusive
21 bargaining representative, doing the services to protect
22 people in the unit, then there is no room for state law to
23 apply.

24 QUESTION: So in effect you are arguing for a
25 Federal immunity?

1 MR. COHEN: Not a Federal immunity --

2 QUESTION: You say that there is only duty of fair
3 representation, and that it doesn't include that, and it's
4 not state law --

5 MR. COHEN: Justice Kennedy, the -- if the Federal
6 duty of fair representation applies, then there is a legal
7 standard --

8 QUESTION: But you're telling us that it doesn't.

9 MR. COHEN: In the case that we are concerned with,
10 we have a Federal duty of fair representation that is at
11 work, is the exclusive duty and the governing duty as to
12 our conduct, and the Plaintiffs have abstained proceeding
13 on that basis. They didn't plead any breach of the
14 Federal duty. They didn't, they disclaimed ever relying
15 on it. And after all these years of summary judgment
16 proceeding, it is absolutely clear that that was good
17 judgment because they could not make out a breach of the
18 duty of fair representation.

19 Now, if the Idaho state law decision were to stand,
20 in essence what that court has said is merely by
21 accompanying the inspector they determined that we assumed
22 an affirmative duty to inspect. And here is where the
23 union would be left in those circumstances. Either we
24 would have to in fact achieve the right to inspect, to
25 conduct our own inspections, a right I might add that

1 there is nothing to suggest we would ever achieve from
2 this employer or perhaps any other employer, given the
3 state of this record that they wouldn't even allow us to
4 accompany the Federal inspector.

5 So we would either have to do that so that we could
6 have in fact a meaningful inspection right, or we would
7 have to choose not to participate in circumstances where
8 what the union did was make the following judgment. We
9 are going to have rank and file employees accompany the
10 inspector. We are going to use the union's
11 representative, the rank and file employee status, as a
12 means of communication to allow the miners who are
13 actually on the job, who are facing possible hazards, to
14 notify, to communicate with the union so in fact those
15 concerns could be passed on to the inspector or the
16 company. That was the judgment that the union made as to
17 how it was going to conduct its activities.

18 And to set aside that, to allow the state law to
19 function in these circumstances, would in those
20 circumstances in essence undermine the union's right to
21 have made this judgment, a right which is at the heart of
22 the duty of fair representation and the accommodations
23 that have been made when you have the three parties at
24 work, namely the individual employee, the union and the
25 company.

1 I think I will reserve my remaining time, Chief
2 Justice.

3 QUESTION: Very well, Mr. Cohen.

4 Mr. Howard, we'll hear now from you.

5 ORAL ARGUMENT OF KENNETH B. HOWARD

6 ON BEHALF OF THE RESPONDENT

7 MR. HOWARD: Mr. Chief Justice, and may it please
8 the Court:

9 This case involves two issues that have been raised
10 by the Petitioner in this case. One is whether or not the
11 Idaho common law is preempted by 301 in this particular
12 instance, and the second is whether or not there is a duty
13 of fair representation, and whether that is the only duty,
14 the sole duty that the union owes under this kind of a
15 circumstance.

16 QUESTION: Well, didn't -- didn't the Idaho Supreme
17 Court find a duty on the union to inspect?

18 MR. HOWARD: Yes -- yes --

19 QUESTION: And didn't they base that on the
20 collective bargaining contract, their interpretation of
21 the collective bargaining contract?

22 MR. HOWARD: Yes and no.

23 QUESTION: How do you say it's no?

24 MR. HOWARD: The supreme court in its -- it had
25 three opinions on this particular case. If you read all

1 of the opinions there is discussion in those opinions
2 about the collective bargaining agreement. There is no
3 question about that. But after the case was remanded to
4 the Idaho Supreme Court and it reviewed its language in
5 the context of the Hechler decision by this Court, the
6 Idaho Supreme Court clearly said we are not looking to and
7 don't care about what the collective bargaining agreement
8 says. That is not important in establishing whether or
9 not there is a state-based cause of action established --

10
11 QUESTION: Well, I know, where did they find --
12 purport to find the duty to inspect?

13 MR. HOWARD: The duty to --

14 QUESTION: They didn't say that just any collective
15 bargaining agent for miners has a duty to inspect a mine.

16 MR. HOWARD: No, clearly not.

17 QUESTION: Well, then, under state law. So where
18 did they get it?

19 MR. HOWARD: The duty to inspect comes from the
20 undertaking itself. It comes from --

21 QUESTION: What undertaking?

22 MR. HOWARD: The undertaking of going down and
23 inspecting. You look at the conduct, at the actions
24 involved in the inspecting. Had -- had the union, under
25 Idaho law, had the union promised in the collective

1 bargaining agreement, for instance, to inspect, and never
2 inspected, there would be no cause of action under Idaho
3 law. Idaho law does not recognize a breach of a contract
4 by failure to do something that you promised to do. There
5 is no such tort --

6 QUESTION: As I understand it they didn't find a
7 duty to inspect. They found a duty to inspect carefully.
8 That is to say, if you do inspect you have a duty to
9 inspect carefully. But they didn't find a duty to
10 inspect, did they?

11 MR. HOWARD: Justice Scalia, I believe that they
12 did find a duty to inspect based upon the facts in the
13 record at this point in time. Obviously, here, we have
14 not had a trial on the merits yet. We are addressing this
15 case, even after these 18 years, based upon the status of
16 the record.

17 QUESTION: Then I really don't understand the case.
18 I thought what the Idaho court was saying was that if you
19 choose to inspect, though you have no duty to, you have to
20 do it carefully. Which is, you know, sort of old tort
21 law. But you are saying that that is not what they said.

22 MR. HOWARD: No.

23 QUESTION: They said there was a duty to inspect.

24 MR. HOWARD: I believe that they said if we can
25 prove, if the plaintiffs can prove that there was in fact

1 an inspection taking place, that is our obligation, then
2 there is a duty to do it carefully. Yes, there is a duty
3 to do it with reasonable care. That is part of our burden
4 of proof though, is to show the undertaking itself.

5 QUESTION: So -- so -- well, all right. You have
6 given me two answers. Which one is it, the last one?

7 MR. HOWARD: I am sorry, I don't understand.

8 QUESTION: They did not find a duty to inspect.
9 They simply found that if you inspect you have to do it
10 carefully. Is that an accurate description of what you
11 think they said?

12 MR. HOWARD: That's correct. I believe that that
13 is correct.

14 QUESTION: May I ask then, if -- if instead of a
15 union we had here a trade association which was interested
16 in improving mine safety throughout its -- all the member
17 companies, and they sent a committee along, to go along
18 with the routine inspection by the employer. They had
19 three people just go along, they want to see what the --
20 how they are doing, and they are sloppy. They don't find
21 anything that is in plain sight and they don't report
22 anything. Would they assume a liability under Idaho law
23 to the people who were later injured by an explosion?

24 MR. HOWARD: Justice Stevens, the Idaho law
25 relating to this subject requires certain foundational

1 elements be proved before you can determine whether
2 somebody has established the necessary undertaking. It
3 has to be an undertaking under either 323 or 324 --

4 QUESTION: Well, I am asking -- I think Justice
5 Scalia and I are both trying to find out what the source
6 of the duty is. And I thought your response was the
7 source of the duty is the fact that they did in fact
8 inspect.

9 MR. HOWARD: That is correct.

10 QUESTION: But is that -- if that is enough, then
11 in my trade association example they would have the same
12 duty.

13 MR. HOWARD: If the inspection rises to the level
14 necessary to meet the elements of the cause, the state
15 recognized cause of action, yes.

16 QUESTION: But what, what elements are there? They
17 are sloppy. I mean, in my hypothesis they have the proof,
18 they have got the consent of the company to go along on
19 whatever the periodic inspection is, and they see a lot of
20 stuff that somebody ought to recognize as being very
21 dangerous, but they don't tell anybody. They figure we're
22 going to write notes about it, and in the future when we
23 write our report we'll say these are dangerous practices,
24 but we don't feel we have any responsibility other than to
25 find out what we can during the course of inspection.

1 Does the very fact that they are making an
2 inspection impose a duty to do anything with the knowledge
3 they gain thereby?

4 MR. HOWARD: To the extent that we have the words
5 of the Idaho Supreme Court, the answer to your question is
6 yes. The elements that were asserted at the time that,
7 and were inferentially but not specifically adopted by the
8 Idaho Supreme Court, was that the elements that are
9 contained in the Restatement of Torts 324A.

10 QUESTION: I take it that includes some reliance on
11 the part of the injured party?

12 MR. HOWARD: Some reliance on behalf of either the
13 injured party or, if it is 324 -- or excuse me, 324A, it
14 can be the undertaking that is, an undertaking taken on
15 behalf of someone else for the protection of a third
16 party. There you can have the reliance of either the
17 third party or the person who you undertook the reliance
18 for.

19 QUESTION: Well, how can you proceed in the tort
20 action in Idaho without establishing or relying upon the
21 collective bargaining agreement provision regarding the
22 union participation in the inspection?

23 MR. HOWARD: Justice O'Connor --

24 QUESTION: Won't that have to be part of your cause
25 of action? And I assume it will be part of the defense as

1 well, to try to show the reasonableness of any reliance
2 and the extent of any duty.

3 MR. HOWARD: The duty recognized by the Idaho
4 Supreme Court does not rely at all upon the collective
5 bargaining agreement. Had the collective bargaining
6 agreement laid down certain guidelines --

7 QUESTION: But you say it did rely on a restatement
8 view of this type of tort action.

9 MR. HOWARD: That is correct. It -- but --

10 QUESTION: So, ultimately there is going to have to
11 be some kind of duty established. Otherwise, as Justice
12 Stevens suggests, any volunteer going along on an
13 inspection, a newspaper reporter, anybody, would become
14 automatically liable. And you surely don't take that
15 position.

16 MR. HOWARD: Do not -- we do not take that
17 position, Justice O'Connor.

18 QUESTION: So you have to rely on the nature of the
19 duty created under the collective bargaining agreement,
20 don't you?

21 MR. HOWARD: Not under the collective bargaining
22 agreement. By an examination of the conduct itself. If,
23 for instance, we -- we were examining the conduct of the
24 union in this particular case with regard to an
25 inspection, and there was never an inspection with regard

1 to a certain area of the mine. They never walked into it
2 but they did inspect a different area of the mine, but the
3 collective bargaining agreement said you should inspect
4 the whole mine. We could not rely upon the collective
5 bargaining agreement under Idaho law.

6 Also, with regard --

7 QUESTION: Well, I take it under Justice O'Connor's
8 hypothetical, if you have some -- and Justice Stevens', if
9 you have some independent volunteer that goes down there
10 and makes an inspection, that person is liable (a) if it
11 is negligently done and (b) if the injured party
12 reasonably relies on it. Isn't that the theory of the
13 Idaho court, or is it?

14 MR. HOWARD: Those are two of the elements
15 involved. The elements also involved -- it has to be an
16 undertaking of services for the protection of another.
17 That is why it is relevant in this case, particularly with
18 regard to safety. The Restatement of Torts is not just
19 talk about any kind of undertaking, it talks about the
20 undertaking of services for the protection of another, and
21 it has to then either increase the risk of harm or it has
22 to call for some reliance on the part of the parties
23 involved.

24 QUESTION: You mean -- you don't mean undertaking
25 in the sense of a promise. It's just, you -- just by

1 conduct you act in a way for the purpose of protecting
2 somebody.

3 MR. HOWARD: That is correct, Justice White. It is
4 the conduct itself which is the focus of the examination
5 under the Idaho law in this case.

6 QUESTION: It is crucial to the Idaho law that it
7 be for the benefit of another, right? I mean, if -- if
8 the people who did inspecting were insurance underwriters,
9 and the only reason they are looking for it is to see
10 whether it is worth taking out a policy on this mine, they
11 would not acquire any obligation to the miners by that
12 inspection, I assume. Right?

13 MR. HOWARD: Justice Scalia, yes, absent some
14 showing that they undertook for that --

15 QUESTION: For the miners.

16 MR. HOWARD: Right.

17 QUESTION: So the only way you really get this
18 union is because the union did it for the workers, and
19 doesn't that really get you into the collective bargaining
20 agreement? The only reason you know that these people are
21 not like insurance underwriters is because they are the
22 bargaining representatives of these people. Doesn't the
23 whole tort ultimately rest upon their bargaining
24 representative capacity?

25 MR. HOWARD: Justice Scalia, I don't believe that

1 it does. What the common law of Idaho does is supply that
2 same kind of an obligation to anyone. It isn't just a
3 union, you don't just have to go back to the union
4 undertaking the services for the protection of another on
5 behalf of the employer.

6 If the union nonetheless has that obligation or
7 takes on that obligation under its collective bargaining
8 agreement, and has an independent duty, a parallel duty,
9 if you will, under the state law, then the state law does
10 provide this obligation. The state law doesn't arise,
11 however, unless the union actively engages in the conduct
12 itself, and the examination of the conduct yields the
13 duty.

14 QUESTION: The conduct for the benefit of the
15 other. The thing is, it seems to me you don't quite reach
16 your goal unless you prove that the unit did it -- did it
17 for the benefit of the employees. And the only way you
18 prove that is to show the jury that this is their union.
19 Of course it is doing it for their benefit. It is not an
20 insurance underwriter. And that gets you into the
21 collective bargaining agreement, it seems to me. It gets
22 you into the relationship of the union as the collective
23 bargaining representative of the employees.

24 MR. HOWARD: I don't believe, Justice Scalia, that
25 the Idaho law or the Restatement of Torts requires that it

1 be for the benefit necessarily of the union members. The
2 elements are that the services are services to another,
3 and they are undertaken -- the services that are owed by a
4 third person for the protection of a third person.

5 Now, the benefit may, may in fact flow to the
6 employer in this case, who is having part of its
7 obligation as an employer undertaken by the union. The
8 union may view it, and even the union members may view it
9 in fact as a partial benefit to them. But in fact the
10 employer may be receiving the benefit, so I am not sure an
11 analysis strictly based on benefit is consistent with the
12 restatement position.

13 We look at whether or not the services are
14 undertaken for the benefit of another, for the protection
15 of another, and whether or not those services are owed by
16 a third person.

17 QUESTION: May I just ask one other question? Is
18 there any place in your pleading, other than paragraph 13
19 of the complaint, where you set forth your concept of what
20 the state law cause of action is?

21 MR. HOWARD: Within the pleading itself, meaning
22 the --

23 QUESTION: Yes.

24 MR. HOWARD: -- complaint, not the interrogatories
25 and --

1 QUESTION: Yes.

2 MR. HOWARD: No, there is not. That is the extent
3 of the pleadings that have been filed in this case, I
4 think are the ones that are in the appendix --

5 QUESTION: And they were written at a time when you
6 apparently did rely on the collective bargaining agreement
7 as creating some of the duty.

8 MR. HOWARD: I think --

9 QUESTION: At least they appear to be, that they
10 undertook --

11 MR. HOWARD: I think, Justice Stevens, that they
12 were written at a time when the basic notice pleadings
13 were the foundational view that we were taking in this
14 particular case. We had established -- we had pled that
15 there was a duty that arose under state law --

16 QUESTION: The failure is you -- they failed to
17 require fire drills, and they failed to require personal
18 protective equipment. That sort of thing. Failed to -- I
19 take it those would be failures in its bargaining capacity
20 to get the company to do those things, the way you
21 described them there.

22 MR. HOWARD: No, there were failures in terms of
23 the conduct of what was done and what was done negligently
24 with regard to this particular undertaking. Under the
25 Idaho law, if we cannot prove that there was in fact

1 conduct which was undertaken and done negligently, we lose
2 this case on a factual basis. We do not carry our burden
3 of proof.

4 QUESTION: I still -- it's still hard for me to
5 understand -- somehow or other before you can find a tort
6 you have got to find what the duty was that was assumed,
7 just exactly what its dimensions were that you alleged
8 were -- I am still -- and the Idaho Supreme Court really
9 is not very helpful. It says they, they assumed a duty by
10 engaging in this conduct. But their description would
11 cover my hypothetical case, but you don't seem to go that
12 far. My -- of trade association or just some volunteer
13 making an inspection.

14 What -- what is your -- maybe you could just state
15 it for me. What do you think that the union's duty was?

16 MR. HOWARD: In this particular case?

17 QUESTION: And how it arose.

18 MR. HOWARD: The union, by actually engaging in the
19 inspections, by going underground and by factually
20 addressing issues in an actual capacity --

21 QUESTION: What do you mean by an actual capacity?

22 MR. HOWARD: Going underground, making the
23 inspections --

24 QUESTION: Right.

25 MR. HOWARD: -- for the purposes of an inspection.

1 And with regard, in this particular case, to inspections
2 that were owed in part by the employer. I don't think
3 there is any question about the fact that the employer
4 owes a fundamental duty to provide a safe place for its -
5 - for its workers. In this particular case, and part of
6 our burden of proof is, at the time of trial, to show that
7 this undertaking was one that was owed by another, owed by
8 the employer. So the duty to provide a reasonably safe
9 place to work has, as part and parcel of it, a duty to
10 inspect and to examine the premises, and to determine what
11 unsafe conditions may exist and what needs to be corrected,
12 and what the corrective process should be.

13 To the extent that the union actually engaged in
14 that conduct, that is the extent of the duty that I think
15 that the Idaho Supreme Court has established that the
16 union owes in this case --

17 QUESTION: But if their conduct measures their
18 duty, they obviously did what the conduct shows. You are
19 in fact saying they failed to do something more.

20 MR. HOWARD: No, what I am saying, Justice Stevens,
21 is that once they engage in that duty, then they have to
22 do it in a reasonably prudent fashion. They have to
23 exercise due care. The due care becomes the standard with
24 which they discharge that duty.

25 QUESTION: Well, say they -- they look at a lot of

1 things and they acquire some information. Now what --
2 don't you have to say they have some duty to report what
3 they found to someone? Or what? I-- I'm still not -- I
4 mean, they have looked at it, they have engaged in the
5 conduct. And then you are saying they've got a duty to do
6 something more.

7 MR. HOWARD: They have a duty to do something with
8 that information, yes, to act --

9 QUESTION: And where is -- what is the source of
10 that duty?

11 MR. HOWARD: The duty just, again, is to act with
12 regard to reasonable care. Now, what reasonable care is
13 under the circumstances of this particular case is what
14 did they do and was it reasonable. They could report this
15 particular deficiency, whatever it may be, or corrective
16 process, to management. If manage -- if they had no
17 obligation more than that, and that -- and they did not
18 carry out that reporting aspect of it, and did not act
19 with due care with regard to that reporting --

20 QUESTION: Well, but if they're -- they're being
21 accompanied by management personnel, and they both look at
22 the same thing, are you in effect saying that they saw
23 something that management didn't see, and they had to tell
24 management about what they saw? Is that what you -- I
25 mean, I don't see how you can talk about a duty to report

1 to management when it is a joint inspection.

2 MR. HOWARD: But there may be a number of things
3 that you see underground, maybe jointly, maybe not, but
4 the obligation then is to carry out some kind of an
5 activity to bring those deficiencies to the attention of
6 the individual who has the ability to correct them. That
7 may be by way of discussion. That may be by way of
8 reporting through a committee or reporting directly to
9 some supervisor about the deficiency.

10 But that is the due care required in this
11 particular case is that to the extent that they engaged in
12 that conduct, they must do it with due care. They have
13 indicated they don't have that duty of due care at all.
14 All they have is a duty of fair representation, and that
15 fair representation duty does not extend to due care. It
16 extends only to the extent that they --

17 QUESTION: Well, I think they, I think they agree
18 that if they promise to inspect they have a contractual
19 duty to inspect.

20 MR. HOWARD: Justice White, I think that -- at
21 least my reading of the union's position is that to the
22 extent that they undertook a duty to inspect, which they
23 deny -- specifically they deny that they inspected in this
24 case.

25 QUESTION: How do you know what they undertook to

1 do, in the way you use undertake? How do you know what
2 they did underground?

3 MR. HOWARD: We have to, we have to get -- glean
4 that information from the factual circumstance of the
5 case. That is to call witnesses and to look at
6 examination of records to find out what they did.

7 QUESTION: Don't you think the union -- is it fair
8 to say that the union undertook, or what it did
9 underground was what it bargained the employer out of
10 letting them do? What did they actually -- what did the
11 contract actually entitle the union to do underground?
12 Just to accompany the Federal inspectors? I mean the --
13 what did they bargain for and get in the collective
14 bargaining contract?

15 MR. HOWARD: The position which the union has
16 taken, and I, which I concur in, quite frankly, that the
17 collective bargaining gave them by way of rights is
18 several things. To attend certain visits and inspections
19 by the state inspector but not by the Federal inspector.

20 QUESTION: Well, just attend. What were they
21 supposed to do? They just went with them?

22 MR. HOWARD: That's all, that's all they are saying
23 they had to do. They had no duty to inspect.

24 MR. HOWARD: Well, what do you think they --

25 MR. HOWARD: I believe that they actually undertook

1 an inspection. I believe that the proofs in this case
2 show that they actually inspected and reported
3 deficiencies, and they made recommendations, and that they
4 used the occasion of those inspections in order to
5 determine dangerous conditions underground and try and
6 achieve some corrective process, which was outside the
7 collective bargaining agreement. It was under the state
8 law of Idaho. It had nothing to do with their powers
9 under the collective bargaining agreement.

10 We don't examine the collective bargaining
11 agreement at all to find out what they could have done or
12 what they should have done. What we examine is their
13 actions and find out what they did do, and did they in
14 fact carry that out in a reasonable fashion. And the
15 answer in that case is -- in this particular case is no.

16 Under the collective bargaining agreement they had
17 set up a joint safety committee consisting of union as
18 well as management individuals. And they would, after
19 these inspections, go back and visit during these safety
20 meetings for the purpose of exchanging information and
21 making recommendations for corrective action. To the
22 extent that they engaged in that activity, regardless of
23 what the union provided, or, excuse me, regardless of what
24 the collective bargaining agreement provided, to the
25 extent that they engaged in the activity, the reporting

1 those deficiencies, they had a duty to do it in a
2 reasonable fashion.

3 And that is all that the Idaho law says. And there
4 is no comparable Federal law with regard to enforcing that
5 kind of a remedy. The union has taken the position here
6 that its only duty is that of fair representation, which
7 does not -- never raises to the level of due care. It
8 simply stops at having a duty not to exercise
9 discriminatory conduct or act in an arbitrary fashion.

10 In this particular case it's odd that the union
11 should say that it has only a duty of fair representation
12 because, first, in order to have a duty of fair
13 representation I would think that they would have to be
14 working within the confines of the collective bargaining
15 agreement. Our position is that they were not. They were
16 working within the confines of duty -- duties that were
17 actually undertaken underground.

18 And therefore their duty is one of due care. And
19 that can't be described by the duty of fair
20 representation, which only reflects upon their traditional
21 role as a collective bargaining agent, as an agent or an
22 entity for the purposes of achieving grievances.

23 QUESTION: (Inaudible) a union is going to be ill
24 advised ever to bargain the employer out of the privilege
25 of attending an inspection.

1 MR. HOWARD: Well, Justice White, I don't think
2 they would be ill advised at all. I think the reality of
3 present day unionism is that, like any other economic
4 activity in our country, they have to go out and compete
5 for members. And they are going to provide the best
6 possible service. If the Federal law only provides that
7 that service never accompanies, or never reaches the level
8 of reasonable care, then they won't achieve reasonable
9 care. However, if the state law is there to protect the
10 employees with regard to the duty of reasonable care, then
11 everybody will engage in reasonable care and we'll have a
12 safer work place.

13 QUESTION: You think there is a competitive market
14 out there for unions.

15 MR. HOWARD: I do.

16 QUESTION: Really?

17 May I ask one other question? In your complaint
18 you alleged that the union misrepresented its safety
19 concern and its expertise to the rank and file, and I
20 think there was a fraud -- in effect a fraud claim. Am I
21 correct that that is out of the case now, that the summary
22 judgment was entered against you on the fraud part of the
23 case?

24 MR. HOWARD: That is correct. The fraud claim is
25 out.

1 QUESTION: So that you, you don't rely at all on a
2 theory of the union making -- at this point in the case,
3 making misrepresentations to its members about its own
4 ability to conduct inspections or the success it has had
5 in inspecting, or anything like that?

6 MR. HOWARD: No, Justice Stevens. Just upon the
7 conduct itself.

8 QUESTION: Just that they were negligent in doing
9 the inspection.

10 QUESTION: You say on the contract?

11 MR. HOWARD: Conduct.

12 QUESTION: Conduct, all right.

13 MR. HOWARD: One of the aspects of this case with
14 regard to the duty of fair representation that is
15 interesting with regard to the union's position at any
16 rate is that there are a number of developing areas where
17 unions are now starting to engage in traditional roles
18 which had heretofore been strictly the roles of employers.
19 Unions are starting to own businesses, to direct
20 businesses, to manage businesses, as well as being unions.
21 There has to be a line someplace between where this duty
22 of fair representation stops and the duty of due care that
23 may be owed by these other roles which the union is
24 engaging in begins.

25 And that is exactly the demarcation, the line that

1 is drawn in part by this state law. That state law here
2 indicates that where the union engages in an activity,
3 where it actually undertakes an activity owed by another,
4 in this case by the employer, it is now taking on a
5 partial role of the employer, it must live up to that duty
6 of care which the employer would owe. It doesn't have a
7 lesser duty of care, and can't be given a lesser duty of
8 care with regard to that particular aspect of its
9 undertaking, or it would do violence to the fact that here
10 we have a duty which would normally be owed by an
11 employer, where they would owe due care, but now, because
12 the employer can shift it to the union, the union does not
13 owe the due care. The union only owes a different duty,
14 and that is to avoid discriminatory or arbitrary conduct.

15 QUESTION: (Inaudible) the employer shifted -- the
16 employer pays what it's -- what it has had to pay. But
17 what it has had to pay is limited by Idaho law.

18 MR. HOWARD: But even under Idaho law the --

19 QUESTION: Isn't that right?

20 MR. HOWARD: Well, the employer has a right under
21 Idaho -- yes, the employer has a right under Idaho law to
22 retain --

23 QUESTION: Well, it -- it was held to have -- it
24 has a duty, and it paid for it.

25 MR. HOWARD: But Idaho law --

1 QUESTION: It's strict liability, is it?

2 MR. HOWARD: Well --

3 QUESTION: To a limited extent.

4 MR. HOWARD: Idaho law has -- the workmen's
5 compensation law for Idaho certainly has a duty owed by
6 the employer, and it has set up a system in order to -- in
7 exchange for the duties owed by the employer directly in
8 the employment capacity, to a statutory scheme.

9 But Idaho law specifically addresses the liability
10 of third parties who may be engaged by the employer within
11 that employment circumstance. That protection, that
12 workmen's comp shield, only applies to the immediate
13 employer. It does not apply to any third parties, whether
14 they are supplying machinery or supplying goods or
15 services or supplying inspection services.

16 And the Idaho court has long acknowledged that the
17 remedies available through the comp system are not
18 intended through the employer to act as a complete source
19 of remedies for injured people within the work place, that
20 there are other sources of those remedies. And the comp
21 statute specifically recognizes and authorizes that. The
22 union simply falls, in this particular case, into the same
23 category that anybody would who was engaging in inspection
24 activities and safety-related activities with regard to
25 working individuals in the work place, and making advices

1 to the employer. To the extent that they did that as a
2 private individual, whether under a contract or whether
3 under some other kind of an undertaking, to the extent
4 that they did that, they did it negligently.

5 QUESTION: But -- Idaho law is that absent some
6 third party undertaking to inspect for the employer, the
7 liability of the employer is all the injured miners can
8 look to.

9 MR. HOWARD: If the -- that is correct. If there
10 are no other third parties who are engaged in activity
11 which contribute to the loss, then the workmen's
12 compensation is the sole remedy which would be available
13 to the employees.

14 Thank you.

15 QUESTION: Thank you, Mr. Howard.

16 Mr. Cohen, do you have rebuttal? You have four
17 minutes remaining.

18 REBUTTAL ARGUMENT OF GEORGE H. COHEN

19 ON BEHALF OF THE PETITIONER

20 MR. COHEN: Thank you, Mr. Chief Justice.

21 I want to just remind the Court we are here on
22 summary judgment. The state of the record is undisputed
23 in the following regards. Firstly, that the only reason
24 the union was actually performing and the basis for the
25 performance of its functions was a direct result of

1 Article IX, the safety and health article of the contract.
2 That is Einar Pederson's affidavit in Joint Appendix page
3 47a. He was a member of the local union safety committee.

4 Thereafter, the actual conduct that the union
5 engaged in was totally consistent with the limited role
6 that was given to it under the collective bargaining
7 agreement, the role in relevant part of accompanying these
8 inspectors. There is absolutely no record evidence to
9 indicate that the union on its own conducted any
10 inspections of this mine.

11 Insofar as the question concerning whether the
12 union assumed any of the employer's responsibilities to
13 provide a safe and healthful work place, the trial court,
14 after the full summary judgment proceedings, found, at
15 page 100a of the appendix, that in fact the union did not
16 assume the employer's role or responsibility for safety
17 and health at this work place.

18 QUESTION: Well, you say the trial court found
19 after summary judgment proceedings.

20 MR. COHEN: Yes.

21 QUESTION: Ordinarily trial courts don't make
22 findings of fact in summary judgment proceedings. How did
23 this happen?

24 MR. COHEN: Well, they laid out the undisputed
25 facts --

1 QUESTION: Undisputed facts?

2 MR. COHEN: -- and then the conclusion, Mr. Chief
3 Justice, was the defendant did not undertake to perform
4 the safety functions owed by the Sunshine Mine to rank and
5 file employees. And then they -- they --

6 QUESTION: So the trial court found that because
7 both parties agreed that it was correct, I take it?

8 MR. COHEN: Yes. As well as the documentary
9 evidence which demonstrated what the employer's
10 responsibility was.

11 QUESTION: Suppose we agree with you that the
12 union's duty is measured by the duty of fair
13 representation. And suppose the case -- and you say you
14 can be sued on that duty, under that duty, and that
15 Federal law controls. Suppose the case goes forward, do
16 you think that the plaintiff could prove a breach of duty
17 of fair representation by proving merely negligence?

18 MR. COHEN: No, I don't, Mr. Justice White, and I
19 believe the substance of this Court's holdings in
20 fashioning the duty of fair representation were designed
21 to avoid that, the mere negligence or bad judgments,
22 because on balance, in balancing all the competing
23 interests that are at work here there was a recognition
24 that that would unduly hamstring the manner in which the
25 union was supposed to operate under our Federal labor

1 relations system.

2 QUESTION: In this context, what would breach the
3 duty in carrying out whatever the collective bargaining -
4 - would it have to be arbitrary conduct?

5 MR. COHEN: Discriminatory conduct, refusing to
6 look at a problem that a particular employee called to
7 their attention because of the individual's union or non-
8 union membership, because of any internal political
9 disagreement --

10 QUESTION: Well, what else besides discrimination?

11 MR. COHEN: Arbitrary conduct is, of course --

12 QUESTION: What does that mean? You mean
13 negligence is not arbitrary?

14 MR. COHEN: Well, as of this point in time the
15 Court certainly has not accepted the proposition that
16 negligence is arbitrary, yes.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cohen.

18 The case is submitted.

19 (Whereupon, at 11:59 a.m., the case in the above-
20 entitled matter was submitted.)

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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. 89-322

UNITED STEELWORKERS OF AMERICA AFL-CIO-CLC,

PETITIONER V. THARON RAWSON, ETC., ET AL

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

BY Lona M. May

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