Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

H. K. PORTER COMPANY, INCORPORATED
DISSTON DIVISION-DANVILLE WORKS,

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD AND
UNITED STEELWORKERS OF AMERICA
AFL-CIO

Respondents

Docket No. 230

Place Washington, D. C.

Date January 15, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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Petitioner

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No. 230

NATIONAL LABOR RELATIONS BOARD AND UNITED STEELWORKERS OF AMERICA, AFL-CIO.,

Respondents

The above-entitled matter came on for argument at 11:04 o'clock a.m. on Thursday, January 15, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 230, Porter Company against the National Labor Relations Board, et al.

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

ORAL ARGUMENT BY DONALD C. WINSON, ESQ.

ON BEHALF OF PETITIONER

MR. WINSON: Mr. Chief Justice and may it please the Court: This case is before the Court on certiorari to review a procurement order of the Court of Appeals of the District of Columbia, which enforced a supplemental order of the National Labor Relations Board.

The Board's order was entered against Petitioner, H. K. Porter Company, supposedly as a remedy for bad faith bargaining in violation of Section 8858 of the National Labor Rklations Act.

More specifically, the company was found to have refused to agree tothe union's demand for a huge check-off provision for the purpose of frustrating an agreement with the union.

The Board's supplemental order, which is the focal point of this controvery before this Court, requires the company to, and I quote: "Grant to the union a contract clause providing for the check-off of union dues." The very precise and very clear-cut issue now presented is whether the Board, under the National Labor Relations Act, has the power to order a

party to agree to a substitute provision of a collective bargaining agreement. The company, of course, take the position that the Board does not have such power. The Board now says that it has the power to order agreement through a substitute provision.

The bargaining --

Q Well, what substitute provision?

A The substitute provision, Mr. Justice Black, was a huge check-off provision -- a provision, of course, in a collective bargaining agreement by which the company aids and assists the union in the collection of dues by deducting union dues fromthe employee's wages and then transit them to the union.

Q In other words, the Board said that this was a demand of the union to which the company must agree?

A The way the case worked out, Mr. Chief Justice, is actually worked that way. The Court of Appeals is actually if I may say so, the instigator of the remedy here, as to what has occurred. This

This case went through the Examiner; the Examiner went through the general bargaining order. The case then went up to the Board; the Board adopted the general bargaining order; it went to the District of Columbia Circuit; the District of Columbia Circuit enforced and refused the union's request for a direct order, which we are now arguing about, which was later

entered. But, on the first time up, the District of Columbia rejected the union's position; the District of columbia Circuit Court.

Then, after that occurred, we filed a petition for certiorari with this Court. We took the position that because of the wording used in the opinion, it seemed to us that the Court of Appeals was talling us: "If you want to avoid contempt you had better agree without any further talking."

Well, when this Court denied our petition for cert, we then took the interpretation which we felt we had tounder the law, as we interpret the law, that the general bargaining order required us to bargain over a dues collecting system, but not simply to walk in and agree.

The union took the position at the subsequent negotiations that, "No, Porter, you are required to agree and we don't have to talk to you any more about it. You are required to agree to a dues check-off provision."

Q Well, didn't the original opinion of the Court of Appeals suggest that very thing?

A It suggested it, and in order to avoid contempt, the Court could not see how we could avoid agreeing.

Well, Mr. Chief Justice, we then got into the position of divergent interpretations of this original bargining order, and the union then asked the Board to initiate a contempt proceeding. The Board's regional director advised the parties

that the company had now complied with the bargaining order and that the case was thereby closed.

The union, then, filed a motion for clarification with the District of Columbia Circuit Court. The First time the the Circuit Court denied the motion for clarification and said, "We think contempt is the proper route to test compliance."

Then the union went back to the Court of Appeals with a second motion, asking for reconsideration of the earlier motion. This time the Court of Appeals came out with an opinion and the Court remanded the case to the Board, and that's why we have a supplemental order before this Court, in stead of the original order.

The Court of Appeals, in its second opinion, its clarifying opinion, told the Board that "We feel under the -- that the Section 8(d) of the Act does not prohibit the Board from entering an order to agree to a substantive contract provision; that the Board can either order agreement direct', or it can compel a concession be given in exchange for the demanded provision."

Q Now, where is the citation to the place where the Board compelled by word the other party to agree to a specific provision of the contract?

A It is in the Supplemental Order issued by the Board, Mr. Justice Black, on page 4 of Porter's brief under the "Statement of the Case."

Q Is it in the appendix, also?

A IT is in the appendix, also.

Q Well, give us both citations; if you will.

A Yes.

Q What part of the appendix? I have it before me; what page?

A It's on Page 137 of the appendix, the supplemental order is far at the lefhand side on page 136; "A general bargaining order was first entered," and then at the top of the righthand page, 137, the order is: "Grant to the union a contract clause providing for check-off of union dues.

Q That's the place that you rely on?

A Yes.

This case presents to this court for thefirst time in the 35-year history of the National Labor Relations Act, a situation in which the Board has ordered one party to agree to a contract term. We submit thatthis order violates both the specific intent of Congress, as expressed in the wording of Section 8(d) of the Act, as well as the basic premise of freedom of contract, as contained and has been recognized to exist in Section 8(d).

This section of the act prpvides that the obligation to bargain in good faith does not compel either party to agree to a proposal or required the making of a concession. And, of course, this Court in both the American National Insurance case

and the Insurance Agent's case, recognized Section 8(d) as prohibitingthe Board from either directly or indirectly compelling concessions or otherwise sitting in judgment on the terms of the collective bargaining agreement.

It's true that Section 10(c) of the Act, permits the Board to enter such remedial orders, such affirmative orders, as will effectuate the policies of the act. We recognize the distinction that the Court of Appeals and the Board and the union are now arguing, that Section 8(d) itself, does not directly relate, by express terms, to the scope of the remedy. But it certainly expresses a fundamental policy of the act, that of freedom of contract.

This Court, in the cases I cited a moment ago, recognized that the intent of Congress and the legislative history was well-cited by Mr. Justice Brennan in the Insurance Agent's case. But the intent of Congress was to keep the Board from either directly or indirectly compelling agreement. We contend that the supplemental order is in clear derogation and violation of this fundamental policy.

And, it's interesting that the Board, until its supplemental order took exactly the same position, the Board did not enter, even though the union demanded it, or did not enter a direct order to agree, initially. And, in fact, when we filed our petition for cert the first time in this Court the Board took the position that the bargaining order did not

violate Section 8(d), that it merely ordered us to bargain in good faith and they pointed out specifically that they had not violated Section 8(d).

Q Where is that in the record? Do you have it offhand?

A Yes. WE cited it in our brief. That would be on page 15 of the Porter brief, Mr. Justice Stewart, right in the center of the page. And this is in answer to our petition for certiorari the first time, and the Board pointed out there that the original order did not violate the provisions of 8(d).

If I may digress one moment, you will recall that we were arguing that the effect of the Court of Appeals' opinion was to cause us to agree and the Board points out that the original order did not violate Section 8(d); that the statutory duty to bargain does not require the making of a confession. The Board's order merely directs the company to bargain in good faith.

Q You don't know where that is in the appendix, do you?

A I doubt if the briefs would be in the appendix, Your Honor.

Q No, no, I mean wouldn't that order of the Board be in the appendix?

A The original order of the Board is in the appendix.

Q That's what I mean.

A The original order is on page 55.

Q So, it would be somewhere in there?

Q Of the apperdix?

A Well, they adopted the recommended order, so I should refer you to page 52 for the examiner's recommended order, the Board merely having adopted that, and the recommended order was a negative and affirmative "cease and desist from refusing to bargain in good faith and affirmatively bargain."

And, of course, I point out that the Board's regional director, subsequent to this original bargaining order, found that the company had bargained. This is when the company came to the union and said, "We are ready to bargain now over a dues collection system," and the union took the position: "No, you are required merely to agree now."

And then when the union asked the Board to initiate contempt the union -- pardon me, the Board advised the parties by letter that the company had complied with both the negative and the affirmative requirements of that original order and that the case was hereby closed.

Now, I point this out very frankly it has nothing to do with the issue now before this Court, except that the union and the Board in the brief, argue appropriateness. They say very little, I suggest, about the statutory power, or what we contend to be the lack of statutory power, but they do argue

appropriateness, even though they contend we haven't raised the issue.

Well, I submit to you that a general bargaining order must be appropriate in the very case in which the Board found that it effectuated the desired result; that is: it got the employer to bargain.

Q As I read the Government's brief, and its question presented, it agrees with you that the issue is whether it has power to compel the making of that agreement?

A Yes, that is the issue, Mr. Justice Black.

Q And is there any denial of it in any other part of the Government's brief?

A That that is the issue, we are all in agreement.

Q All are agreed that the question is whether, under the law, the Board, under any circumstances, has the power to compel a company to agree to a specific term of the contract?

A I think we are all in agreement that that is the specific issue.

I would like to call the Court's attention, if I may, to the approach used by the Court of Appeals. The Court of Appeals, very properly recognized that freedom of contract is a fundamental policy and premise of the act and they agreed that remedies which impinge on it are not to be lightly undertaken.

But they then pointed out that under Section 10(c) the Board is to balance the policies and to try to move forward under all policies.

They then cited what they considered to be an equal policy and that is a policy of the act to equalize the bargaining power of employees and employers, by assuring the right of workers to bargain collectively.

The Court of Appeals then proceeded to state such alleged facts as the fact that the dues checkoff provision is in 92 pefcent of industry contracts; that dues checkoff is likely to be of life or death import to a fledgling union; that dues checkoff provisions and ordering of it is only a minor intrusion on freedom of contract. They even cited the fact that the union's nearest office is 85 miles away and that the employees were scattered over a wide area.

The book concluded that the collection of dues without a dues checkoff provision had presented the union with a substantial problem of communication and transportation. We submit that this approach, although laudatory in the balancing of the policies, but this approach of looking at the need of the union for this provision and in saying it's of little effect on the company. And, of course, it has been cited all through the record. At the original hearing, the company said, "We're not objecting as a matter of inconvenience," and so forth, "cost."

I submit that this is exactly what 8(d) prohibits, and that this Court has recognized that 8(d), that Congress prohibited the Board from balancing the needs, from sitting in judgment on whether one party should have had the provision and the other party didn't have a good enough reason for denying it.

In fact, I also suggest that this area of whether a business reason is needed for refusing a contract demand by the other bargaining party is part of the issue of this case.

Q Well, Mr. Winson, I gather that the Board found here that Porter had taken a bad faith, or otherwise impermissible bargaining position; is that right; or did so find?

A Yes, Mr. Justice Brennan.

Q And I understand the Board's argument to be that 8(d) doesn't permit a party to choose to agree to a proposal for a reason that would violate the statute. Do you take a different position?

A Yes, I do, Your Honor.

Q That is, you take the position that 8(d) protects you without regard to good or bad faith?

A I think it has to, Mr. Justice Brennan, for the very reason that everybody's in agreement that 8(d) prohibits the Board from using a refusal to agree as evidence of bad faith. Well, to me it seems illogical to say this and at the same time say that once bad faith is found on the basis of other evidence,

and this is all subjective intent, that then the Board can order agreement on the very same contract --

Q Is there anything in the legislative history of 8(d) which indicates that Congress dealt with its application in the context of a finding of bad faith?

A In the context of a finding of bad faith; yes.

Q There is? In the legislative history?

A Yes, I think we're all in agreement that on the findings of bad faith, that is, on the use of a refusal to agree as evidence of bad faith bargaining that, I think the intent of Congress is clear and everybody agrees with it. It's on the scope of the remedy which is where we are running into our problem now; on the scope of the remedy.

And, of course, to us the evil to be cured -- the evil that Congress is after here, is to keep the Board from intruding into the collective bargaining process; well, to prohibit the use of a refusal to agree as evidence, but then at the same time, for Congress to permit it on the order to agree to that very same contract provision, just doesn't make sense, it seems to us.

With the legislative history and as this Court has recognized the intent of Congress is too broad for that, we submit. It's too much, for example, for this Court to say that the Board was prohibited from directly or indirectly, sitting in judgment, for example.

Now, what the Court of Appeals --

Q Of course, Insurance Agents' didn't involve a situation like this, where there is a finding of bad faith on the part of the employer. That, actually, was the conduct of the union, wasn't it?

A Yes, and that was a case of regulating the economic weapons.

I would submit, Mr. Justice Brennan, that there is a closer analogy of the Insurance Agents' case to this one in merely the wording in your opinion, which of course, we rely heavily upon.

And I cite, I must give credit for the Chief Justice for my argument on this point, but he dissented; the Chief Justice dissented in the Roanoke Iron case in the District of Columbia Circuit, which happened, by coincidence to be a dues checkoff case, also. And, the Chief Justice pointed out there the grant or refusal, the presence or absence of a dues checkoff provision is, in effect, an economic weapon in the sense that the union without a dues checkoff provision is, there is no doubt in many cases, they are under economic pressure. But, as the Chief Justice pointed out in his dissenting opinion in the Roanoke case, an employer, with his employees on strike, is harmed even more. Also, we're talk

Also, we're talking, in effect, I think, about a bargaining tool; a bargaining tactic. Granted, Porter did not

say to the union in this case: "We are withholding or refusing to agree to a dues checkoff because we want to trade it next year. But the more a union would demand a provision like this, obviously, the more the employer is going to resist to the point of getting something in return.

Q Do you think Katz is any support for the -- or is any problem to you; let me put it that way?

A It doesn't present any particular problem. I don't think it presents any particular problem for me. What do you have in mind, specifically, Mr. Justice Brennan?

Q Well, that was an instance, wasn't it, of conduct on the part of an employer which was a violation of the statute, but I don't believe there was an order -- I don't believe there was an order that went beyond a restoration-type remedy, did it, did it?

A No; it didn't, Your Honor.

And the union and the Board, of course, cite status quo cases. This case, I don't think, is worth arguing beyond our brief. This case certainly goes beyond the restoration of status quo.

Q Well, may I ask you, Mr. Winson, do you,-- perhaps I'm only repeating the question I asked you earlier -- I gather your position is that in the application of 8(d) it's immaterial whether the employer's conduct was in good or bad faith?

A Well, no, Mr. Justice Brennan, for the reason that the bad faith has to be there or we wouldn't be to the point of a remedy in a bargaining case.

In other words, in an 8(a)(5) case, except for a mere refusal, but even that of course, is bad faith -- but what I'm saying is that where the parties have bargained or have sat down and then there is a finding of an 8(a)(5) violation, then that has to be premised, of course, on bad faith.

So, we're now at the point of a remedy. For the union and the Board to argue here that there is a line that can be drawn by this Court, we submit, is just not practical. To talk for example, as the union does, of run-of-the-mill cases that by and large they wouldn't suggest that this kind of an order could be entered in run-of-the-mill bargaining cases. Who is to determine what is a run-of-the-mill bargaining case?

Taking the Court of Appeals' words, they say this is only a minor intrusion. Who's to determine whether it's a minor intrusion? All of this is what Congress told the Board to stay out of with Section 8(a)(5).

Q I'm not too clear about your response about the factor of good faith. Let me try it with a hypothetical.

Suppose, in a period when, and in an area when increases are being granted of 50 cents an hour widely in an industry. A particular employer receives an offer from the union, demand from the union for 5 cents an hour increase, a

very modest demand, much below the others, and the employer refuses to grant any increase. Do you think that the Board can inquire into the good faith or bad faith, the presence or absence of either and use it as a basis to direct the employer to grant a five-cent-an-hour increase?

A Of course, taking the last part, I take the position that under no circumstances can a party be ordered to agree, but to take your -- the question you have asked me -- of course, the Board, if this were charged and if the complaint was issued by the Board, then obviously, the question to be answered by the examiner at that point and by the Board, would be: "Did the employer bargain in good faith?" That is a subjective intent, and I am sure that this charge wouldn't evolve merely on the refusal of a nickel wage increase; at least I dont think so.

You will notice, for example, in this case, it wasn't merely the refusal to agree. The examiner said the refusal to agree was to frustrate an agreement and took it a different step. It was a little different from Roanoke in this extent, you will recall.

But, in the hypothetical you are asking me, certainly the question has to be: was it good faith or bad faith. Once the Board found that, yes, the employer refused to agree to a nickel wage increase in bad faith in the sense he was bargaining in bad faith, and there must have been

other reasons that they had a secret motive of trying to get rid of that particular union president or business agent. In other words, some documents were discovered, or some extrinsic evidence.

Fine. The employer has now been found guilty of bad faith bargaining in violation of 8(a)(5). But, we submit, at that point the Board cannot order the company to agree to that provision.

Q But we're only dealing with the remedy problem here, aren't we?

A It's only a remedy problem; it's only a remedy problem, where the Court of Appeals distinguished and says that if the matter -- if 8(a)(5) is related only to the determination issue, the evidence issue --

Q Yes, but even though it's only a remedy problem am I wrong in thinking that your position is that the language of 8(d) that "such obligation does not compel either party to agree to a proposal or require the making of such." That that language operates as a limitation upon any remedy. That's your basic position.

A That's our position.

Q And it doesn't make any difference at all whether the position that the company has taken in bargaining is of good faith, bad faith, or any other.

A That's my position; that's my position.

Q That's what I thought.

A That's my position. , exactly.

Q 10(c) made the broad power to the Board to address grievances, but 10(c), however broad, doesn't go that far.

A It doesn't go that far, because the 8(d) policy stands in its way.

Something is coming in here that you mentioned a moment ago, this business reason of the Board and the union in their briefs. The Board, in its opinion, in support of a supplemental order, talk in terms that the company did not have a business reason. I know of no law that says that you have to have a business reason. Again, I cite the Chief Justice in his dissenting opinion --

Q The majority opinion doesn't help you very much here from the Court of Appeals.

A You mean in the Roanoke case?

Q You will have to give us better authority than that.

A Well, I think your reasoning, Mr. Chief Justice, is completely applicable here, and that is the question of holding. Even though you don't have a business reason, you just don't agree with a provision because the union wants it so badly they're going to give you something for it; maybe not this year, but the following year. This is what bargaining is all about,

we submit. We submit that this is what bargaining has to do with here. We think it's redundant to say that the Board can order a party to agree and that he can order him to agree in order to effectuate the requirements of bargaining.

Q I take it that one thing, Mr. Winson, about the issue of checkoff, is either there is, there will be or there won't be a checkoff. It's hard to compromise that one; isn't it?

A True.

Q Are there any middle grounds as to whether there will be or won't be a checkoff?

A There are middle grounds, of course, in dues collection and this is what the company offered to discuss with the Board, or with the union after the original Board order. It offered to discuss a method, a satisfactory method that was satisfactory to both parties for the collection of the union dues, because there are other methods involved. I mean, there could be other ways of collecting union dues.

But, generally speaking, in this country in labor contracts, I would agree, that it usually there is a checkoff provision or there isn't a checkoff provision.

Q But that is not the only provision of a collective bargaining contract that's either, or; is it?

A No, it isn't. That's exactly what I was going to say. This is only one provision, Mr. Justice Brennan, and

it's obviously a provision that could be traded.

You will recall from the facts involved in this case that the union in every bargaining meeting, back in the bargaining involved here, insisted they would never sign a contract without a dues checkoff provision.

We submit that this case is a landmark case and presents a personal issue to this Court and if the supplemental order is permitted to stand after this long, 35-year history without this type of a remedy, that we're going to have a new scheme of bargaining; we're going to have exactly what happened in this case; one in which the parties go as far as they can over the bargaining table and then one of the parties, usually the union, of course, will come to the Board and say that the company failed to bargain in good faith. We then have a finding of a bad faith bargaining, Mr. Justice Brennan, your hypothetical again. Then the question of remedy.

Now, since there's been a finding of bad faith bargaining, there may be some preliminary issues of whether it's a run-of-the-mill case. That's been suggested to us, or it may be a question of whether it may be a minor intrusion, and so forth; that's been suggested to us. But, in any event, the Board would have the power to order the company to agree to the very contract provision which the union could not obtain at the bargaining table.

Does the Court have any further questions? I didn't

reserve any time.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Cohen.

ORAL ARGUMENT BY LAWRENCE M. COHEN, ESQ.

ON BEHALF OF CHAMBER OF COMMERCE OF THE UNITED STATES, AS AMICUS CURIAE

MR. COHEN: Mr. Chief Justice, and may it please the Court: I'm appearing here today on behalf of the Chamber of Commerce of the United States, because we, in agreement with Mr. Winson, believe that this is a landmark case in the field of labor relations.

It involves the question, as we have indicated, of whether the National Labor Relations Board may dictate the terms of collective bargaining agreements. It has never done this before, and it seeks to do so here and not withstanding the clear language of Section 8(d).

Q I understood both of you to say that the issue has never been presented to the Court before?

A No, I said, neither the Board nor the Court or even commentator, has suggested up to this case, that the Board has the power to dictate and tell the parties to a collective bargaining negotiation: "These are the terms you must agree to."

Q There has never been a court -- it's never been presented to us?

A It's never been directlypresented to this

Court; that's correct.

Q Argued?

A And it's never been argued to this Court. Of course, by implication and numerous decisions of this Court, the Court has indicated that that is not the function of the Board. And Congress indicated that is not the function of the Board

That is really the question we have here today, is whether Congress meant what it said --

Q Well, Mr. Cohen, has there ever been an order like this requiring the insertion of a particular provision in a collective bargaining agreement?

A This is the first case that's ever been --

Q That's the reason why it's never been here before.

A That's correct.

Q Well, that's your point, that it's neverbee been done before.

A That is the point. Our point is it has never been done because it has been presumed that the Board -- this is the kind of a decision that the Board should not be required to make, and should not be made by virtue of Section 8(d).

Section 8(d) is not a limitation only on the Board's finding of good faith. It affects all of the policies of the act, as I think this Court indicated in the Fansteel case.

The Board seeks inthis case, also to invoke this

remedy, notwithstanding that it has decided that the remedy wasn't required here and in fact, decided that the contempt powerof the Courts of Appeals, which is the traditional means of obtaining compliance with Board orders, should not be utilized in this case.

It's difficult to understand, therefore, how this case can be viewed by the Respondents as one of only minor significance. If the Board has the power in this case, then it has the power in any case whenver it concludes that a party, either a company or a union, did not articulate a sufficient justification for -- or a sufficient business reason or a union reason, for refusing to accept a proposal, that it can then compel acceptance of that proposal and regulate the results of collective bargaining.

Q Is there any remedy, if it were plainly and clearly shown in the order that the employer has just decided he will not agree, will not sign any contract. He keeps it going for five to ten years?

A I think, Mr. Justice Black, that an employer can not use bargaining as a cloak. And I think that this--

Q What?

A A cloak or a device to preclude agreement. I think the question is did they seek an overall agreement. I think the Board cannot say by virtue of Section 8(d) that an employer who refuses to accept any particular proposal have,

therefore, violated the act. It is not a per se type of violation. You refuse -- you offer to checkoff; will you not accept it? Therefore, you are -- we have violated the act.

Q Well, I gather anyway, Mr. Cohen, really, isn't your position that no matter how intransigent an employer may be, all that can happen is that an order to bargain collectively may be met.

A No --

Q And if he -- well, some order of that kind. But no remedy in any event, which goes so far as to require the employer to execute a particular provision or a particular agreement is within the power of the Board to make; is that it?

A That is correct.

Q And that if there are, that if an employer simply is the kind that Mr. Justice Black suggests, and then you get what orders you can get and if he persists in his intransigence, then you have to go to contempt or some other way of reaching it; isn't that it?

A I suggest that the Board has not only a general bargaining power in its remedial arsenal. It has numerous ways; it has a lot of ingenuity in devising appropriate remedies. If those remedies fail for some reason, then there is a contempt power of the Court of Appeals. For example, the Court of Appeals here in viewing this case on contempt, without looking at the narrow question: Did you or did you not grant a checkoff?

They found L in this case originally because the employer had an anti-- had tiator with an anti-union animus. He refused to accept any form of dues collection, not only a checkoff. He voiced an attitude here that, which the Board felt indicated disparagement of the union. So that when the case arrived at contempt the Court of Appeals would indicate "Is the employer still using the same negotiator?" "Has he offered any form of dues collection?"

Q Yes, but no matter how bad his conduct has been, your position is that in any event the Board has absolutely no power, under any circumstances, to require him to agree to a particular provision?

A That is correct. And if that --

Q And all of this by force of the language of 8(d).

A By force of the language of 8(d) and the policy that pervades the act; that the parties are the ones to decide what are the contents of the collective bargaining agreement.

It is suggested in the brief of the union that what they are trying to do here is, in effect, engage in the task of remedial reform; that because of this problem that you just posed, which I think is a rare one; but because of that problem, the Board has to devise some kind of weapon here. Now, if that's true, and I don't accept it to be the fact, but if that's

true, then that is the function of the Legislature, I suggest; not of the Courts. If the remedies are inadequate here; if there is a case in which it's absolutely necessary that there be a compelled agreement, despite the language of 8(d) then the legislature should have put that in the act.

There is nothing in the legislative history of the act thatindicates that that's what Congress intended.

Q Actually, you're saying there is a prohibition in the act.

A There is a great prohibition in the act, and because of that prohibition, Section 8(s) says you cannot compel agreement; that's not bad faith. But the vice of issuing a remedy to correct that problem is, indeed, compelling agreement.

And that's the crux, I think, of our position here.

MR. CHIEF JUSTICE BURGER: Mr. Come.

ORAL ARGUMENT BY NORTON J. COME, ASSISTANT GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD

MR. COME: Mr. Chief Justice and may it please the Court: We believe that although this is a novel remedy this is far from a landmark case for the simple reason that the remedy stands on the basis of the facts of the particular case which are very unique.

Q Now, I want to get your position straight. You -- it is clear, is it not, that thisis the first time the Board has ever ordered either party to a collective bargaining -- to

collective bargaining, to agree to a particular provision in the contract? Is that correct or incorrect?

A I believe that is correct, Your Honor.

Q And you say that this is, therefore, not a very important -- but nonetheless, this is not a veryimportant case, because this is unique -- it's not very unique, but if it's unique, it's unique. This is the first time that the Board has ever ordered this remedy and you must be saying, I suppose, that this is the first time that an employer has ever behaved this way in the history of the Board; is that it?

A That is correct, as I will attempt to show very, very briefly.

Q One question.

A Yes, Your Honor.

Q I thought I had a vague recollection that we handed a point up in a contempt case before; is that right?

A Not to my knowledge, Your Honor.

Q You would probably know.

A The closest that this Court has had has been a case like Heinz, for example, very early in the day where an employer agreed to a contract and refused to put it into writing. In that situation the Board ordered him to execute the contract and this Court sustained that remedy.

Q The Act says he must do that; doesn't it?

A The Act now in 8(d) specifically says that he

must do that.

Q May I ask this, Mr. Come? I take it that if the Board has this power this is a two-way street and there may be circumstances in which the union can be required to sign a particular -- accept a particular clause; is that right?

A That might be if you get a union in the situation that this employer got himself into. I think that this employer, as I will attempt to show verybriefly, painted himself into such a corner that the considerable freedom that he had to bargain he deliberately gave up.

Q Did the Board see it in that light in the first instance, before it went to the Court of Appeals the first time?

A Well, I thinkthat the Board did, Your Honor, insofar as the basic violation.

Q But, you didn't order this remedy.

A The Board thought that the stereotype refusal-to-bargain remedy would cure the situation, but in the light of the post decree negotiations the further enlightment that the Court of Appeals gave the Board and after all, the Board and the Courts of Appeals are partners in this business of trying to work out a satisfactory administration of the act, were appreciated that for this unusual type of situation something more than the conventional order to bargain was required.

Now, this is a situation where on the Board's unfair

labor practice findings which were affirmed by the Court of Appeals and which this Court denied the company's petition for certiorari on.

We have a situation where an employer has twice been found to have refused to bargain in good faith with the union for the purpose of frustrating an agreement with the union; any agreement with the union.

Q How wouldthe refusal to agree to a checkoff frustrate any agreement with the union unless the union said they wouldn't agree to any contract without a checkoff?

A Well --

Q It's the only way to produce an impasse; isn't it?

A It could produce an improper impasse if the employer's reasons for refusing to agree are bad faith reasons. Now, here is a situation where after the first refusal to bargain order -- I might say that the union was first certified in 1961. So, the first set of negotiations broke off in 1962. The Board found the company was refusing to bargain in good faith and that order was enforced by the Fourth Circuit. They resumed negotiations in October of '63 and they had 21 meetings and had still not reached an agreement. It wasonly after the 20th meeting that the company gave up on one of the demands that was found to be the basis for the refusal to bargain the first time.

At the end of the 21st meeting you had three issues which were still unresolved: wages, insurance and the union's request for a checkoff provision. Now, the records show that the company did not resist the checkoff because there was an inconvenience to the company. You have the chief negotiator of the company admitting that in the record, or for any other business reason or because therewas a company policy against a checkoff. He pointed out that the company regularly made payroll deductions at this plant for government bonds, for health insurance, for United Fund, which is equivalent to the United Giver's Fund, to a Good Neighbor or Sunshine Fund, and he conceded that there was no more inconvenience in checking off union dues than there was in checking off for these other purposes.

Q What if the employer wanted to save the check-off concession for a year when he couldn't afford to give a very large wage increase; once he knew it was quite important to the union. Would that be a legitimate business reason? To save it for the future?

A I know that Your Honor has suggested that would be so in the Roanoke case and I think I could assume arguendo that perhaps it might be, but there was no suggestion that there was anything like that here, because you had five years of bargaining negotiations. There was no suggestion at all that the checkoff was being used as a trading device;

certainly, in the course of five years of negotiations, where you are bargaining back and forth the checkoff is going to be used as a trading device, that would have appeared.

The company negotiator, frankly conceded at the Board hearing that his only reason for not giving the checkoff was that the company was not going to aid and comfort the union at this location.

I submit that in the context of this case it is an illegitimate reason that is antithetical to the basic tenets of bargaining in good faith, because if you have to recognize the union as the collective bargaining representative as this employer did, and bargain in good faith with a view toward entering into a contract, anything that you give in a contract is going to give aid and comfort to the union. And this employer was making that the touchstone.

In the context of this case it indicated it beyond that, that really the reason he wasn't giving it was that -- it was just because the union was asking for it, because he had agreed to checkoff for other purposes; he agreed that there was no greater inconvenience in doing it for union dues. And, indeed, he further conceded that at other plants they did check off union dues. And as the company counsel stated at one point in the record, at page 16, that "Perhaps our refusal to grant the checkoff clause has been harrassment of the international union.

Now, given this history and this context, the Board was justified in concluding as it did, and as the Court of Appeals agreed, that this was not a company that had a good faith reason for withholding a checkoff. We are not suggesting an employer has to grant a checkoff, that he cannot in good faith refuse to grant a checkoff, but this was an employer who withheld a checkoff for the sole reason of blocking an agreement with the union and that, indeed, he had indicated that, not only was this his reason but he had no other reason for withholding a checkoff.

Q May I say that as I understand your adversary's argument, they think that good faith has nothing to do with it; that the law just does not justify the Board in commanding that a particular provision be put in the contract; isn't that right?

A That is correct, Your Honor, and I --

Q Now, suppose Congress had passed a law providing for checkoffs, can you think of any constitutional objection to that?

A No, I cannot. I think that the short answer to their argument, I think is the one that Justice Brennan suggested, in which I intend to come to in a moment; namely that 8(d) has to be read in the light of 10(c) and the legislative history of 8(d) so far as I have been able to ascertain, and I have studied it rather carefully, shows no indication that Congress was concerned with the problem of a remedy once you had established

that the refusal to bargain was in bad faith. The main thrust of 8(d) is that the Board in determining whether there has been a refusal to bargain in good or bad faith, should not regard as decisive, or determinative, in determining bad faith, whether or not the employer did or did not or the union did or did not, agree to certain substantive proposals, as to whether they were reasonable or unreasonable.

Q Well, assuming the breadth that you argue for in 10(c) as to that extent, at least, some qualification on the prohibition of 8(d), where do you draw the line in this? What's the point at which you say, "Yes, 10(c) goes so far that we can ignore 8(d) in this case." What's the standard by which it is to be decided, when you may and when you may not ignore 8(d)?

A Well, I think that the keys to the -- that the nature of the violation affords the standard. Where you have a situation like you have here, where the employer does not only bargain in bad faith, but he has indicated that he has no legitimate reason for withholding agreement, other than this bad faith reason. And the nature of the proposal is one like a checkoff, where, as you pointed out, it's a pretty cut and dried proposition. I mean that it is unlike wages in the sense that it is most unlikely that there can be any economic or business consideration that would qualify the amount of the increase.

Certainly, in that kind of a case, namely the checkoff

situation, it is not doing violence to the policy of 8(d) to say that the Board, under 10(c) can provide this kind of a remedy, because otherwise --

Q I'd like to ask you one other question, then.

A Yes, sir.

Q Because it seems to me like most of this is around what you mean by bad faith, and what that means. Do you mean that bad faith, that they have just decided that they are not going to make any agreement and they are offering these as excuses to keep from doing so?

A I think so. I think that they have used their refusal to agree to a checkoff as a cloak for not agreeing to any contract with the union at all.

Q You say they are going through a form of collective bargaining, and agreeing to bargain, but in reality they won't bargain.

A That is correct.

Q Now, what is the remedy if this is not the remedy? I imagine that sometimes employers just think, "Well, I don't want to do this." I would say that many of them would think, "I'm not going to collect dues from my workers. That's not a part of my business; I don't want to hire a bookkeeper;" would that be legitimate?

A If that were his reason and that is all that you had, there would not be an unfair labor practice finding to

begin with.

Q On the other hand, if, instead of that being his reason, you say that the Board is entrusted with the power to determine;"well, that's not your real reason. Your real reason is you just don't want to make any bargaining agreement."

A That is correct, Your Honor.

Q They are not bargaining at all, and therefore, would it not at some time get to the position, if that is right, where if you cannot order that the contract be signed that the Board failed and this man could keep it going on forever?

A That is correct, Your Honor; and that is exactly what happened here, because --

Q Well, I, frankly, as I understand your answer to Mr. Justice Black's question would mean that the Board could impose this remedy in any 8(d)(5) violation, Whenever there is a finding of a lack of good faith bargaining, it seems to me then the Board would have the power to impose this remedy. And I think that has to be your argument.

A I respectfully disagree, Your Honor.

Q Well, if it isn't that broad, Mr. Come, what about arbitration courses? I don't think things have changed much since I was in practice, and employers views about arbitration clauses were much as you describe what you say was the position taken here by the spokesman for the company as to a checkoff clause. Can you conceive that the Board, there would

be circumstances under which the Board could compel an employer to sign an arbitrarion provision?

Q Especially if the corporation says -- if the employer said, "We're a corporate body, and our ability to agree cannot be delegated by us to anyone else." Suppose they added that to Justice Brennan's --

Q Well, that makes the usual argument. I used to make that kind of argument.

A I think that as an original proposition those are all valid, good faith reasons for refusing --

Q Well, there are all in the area of aid and comfort. They are not going to --

A No. I think that aid and comfort in this case has to be read inthe light of all of the facts that I have laid out which shows that this isn't an employer who has turned down the checkoff either because he doesn't want to get into the dues collection business, because it's inconvenient forhim; he doesn't want to prefer the union to other creditors of his company or other legitimate reasons that you could think of which would be perfectly okay. You wouldn't have any 8(a)(5) finding to begin with and youwould never get to the remedy.

Q What about saving it for the future, as I mentioned before; would that be a legitimate business reason?

A I think that it might be; yes.

Q But, another thing: Are you suggesting that

it's the obligation of either the union or the employer always to reveal all the reasons why they do or do not agree?

A Well, I think that at some point those reasons should come out if you are going to have good faith bargaining. As this Court pointed out in the Truitt case --

Q In which case?

A In the Truitt case which Your Honor wrote. That involved the problem as to whether or not an employer who claimed inability to pay had to substantiate his claim at some point by bringing forth his records. I think that claims made in bargaining, if they are in good faith, have to be honest claims, and at some point the cards have to be laid on the table, and certainly after six years of negotiations that we had here, if the company's real motive was to hold off the checkoff for trading purposes, that should have come out.

Q I thought it was the essence of negotiations that a negotiator was entitled to keep his cards covered. I think we will stop for lunch now.

(Whereupon, at 12:00 o'clock p.m. the argument in the above-entitled matter was recessed, to be resumed at 12:30 o'clock p.m. the same day)

(The argument in the above-entitled matter resumed at 12:30 o'clock p.m.)

FURTHER ARGUMENT BY NORTON J. COME, ASSISTANT GENERAL COUNSEL, NLRB

MR. CHIEF JUSTICE BURGER: To pursue something that Justice Brennan opened up, the reciprocity or two-way aspect of this kind of a remedy.

Suppose, for example, an employer made a demand for a provision in the union contract that the bargaining team be made up of such officers as the union would designate, but that it would always include three members of the work force of a particular unit; and that he then asserted that this was because he wanted to encourage union democracy and develop a sense of responsibility, improve the leadership of the union, et cetera; and the union says, "No, we'll do this our own way." The Business Agent says, "I don't want any spies in here." And they founder on that demand and have a complete impasse and get to just about where we are here.

Do you think the Board could order the union to agree to that provision, under any circumstances?

A I don't think so, Your Honor, because I don't think you would have an unfair labor practice there, to begin with, for two reasons: In the first place I think that the composition of the union bargaining team and there would not be a mandatory subject for collective bargaining. It is not within

the area of wages, hours, and other terms and conditions of employment --

Q How did dues checkoff get to be negotiable bargaining?

A Well, I think that it is well-settled and the company does not --

Q How did it generally? I suppose when unions began they didn't have any checkoffs. It's a fairly recent development; isn't it? in the history of bargaining?

A Well, I don't know that it is that recent, but in any event, most people in the field would readily agree that that is within the area of wages, hours and other conditions, terms and conditions of employment. But the composition of the union bargaining team is, at best, a permissive subject of collective bargaining, like the strike ballot clause, or who signs the agreement-type of thing that the Court had in Borg-Warner. And the Court indicated there that with respect to that sort of stuff, although parties may be able to propose. they cannot insist on impasse.

Secondly, even if it were within the area of mandatory bargaining, on the set of facts that you give me, it seems to me that the union has a valid justification for refusing to enlarge the bargaining team. Now,

Q But it would certainly be consistent with the spirit of the Labor Act and Landrum-Griffin and a great many

things to improve union democracy this way; wouldn't it?

A Well, that may well be, Your Honor, but as yet the statute only requires bargaining about wages, hours and other terms and conditions of employment. That's the area of mandatory bargaining.

Q Well, then, you pick one that would be within the orbit of mandatory bargaining. Can you suggest one under any circumstances that the Board could ever order the union to agree to?

A Well, I haven't thought about it, Your Honor. I thinkthat the essential predicate, though, that -- to the order in this case, and that I find lacking in the hypothetical cases that I've been getting, is that in this case, there was a threshold finding by the Board that the refusal to grant the checkoff was in bad faith and that the sole purpose for refusing to grant it was to frustrate an agreement with the union.

As Justice Black said, the company went through the motions of bargaining, but it really didn't want agreement and it was holding off on the checkoff because that was the way of carrying out its scheme of frustrating an agreement.

Furthermore, you have a record which shows that not only was this employer's reason, but he had no other conceivable reason for opposing the checkoff. So, that you have a refusal to bargain in good faith over the checkoff, based upon this kind of evidence.

And the limited question in this case is not whether the Board has power to compel concessions under other circumstances, but whether, given this particular unfair labor practice finding, that is grounded, as I have indicated, the Board has a remedy for the -- for that kind of refusal to bargain, court order for checkoff.

And we submit, that if you get this kind of a unique situation, a checkoff -- an order to draft a checkoff is really the only frank thing to do, because an order to bargain in good faith suggests that there is something left that you could bargain about.

Inthe situation that I have presented, the employer has so painted himself into the corner that there is nothing to talk about. Talk would only make for additional delay, because as the Court of Appeals pointed out when he goes back he can't give the same reasons that he gave before for refusing a checkoff, and to permit him at this point to manufacture new reasons that he admitted before were not a factor, would make a mockery of the collective bargaining process.

So, what we're left with, then is whether or not 8(d) in this particular situation that I'm talking about would preclude the Board from using its 10(c) powers which would otherwise be broad enough to permit this kind of a remedy,would absolutely bar the Board in this situation from ordering a checkoff.

We submit that it does not, for the reasons that the legislative history of 8(b) shows that what Congress was concerned about there was the Board making the initial finding of bad faith based upon the failureof the employer to concede to a union proposal because of the Board's judgment that since it was a reasonable proposal, it was unreasonable, and therefore, bad faith for him to refuse to agree.

That is not --

Q May I ask you about that legislative history?

A Yes, Your Honor.

Q I was over there at that time and I don't know, but is there anything that you have seen anywhere that indicates that any of the Senators or Congressmen had in mind that the Board could do this, or is it more in line with following the ideas of Railroad Labor Act which, when you reach the end, you have still got to strike or lock-out.

Now, what did you find in the legislative history to indicate -- of course, I'm trying to agree with you logically as to what should be done if they want to force it by governmental action. What do you find to indicates that there was any desire on anybody's part to force it by governmental action?

A Well, I thinkthat the legislative history was silent on the question of what kind of remedy the Board imposed once it found an unfair labor practice. The history is directed tothe elements that go into finding a refusal to bargain in good

faith or bad faith, to begin with. And there the history indicates that Congress didn't want the Board to make a bad faith bargaining finding based merely on the fact that the employer had refused to make a concession. That's as far as the history of 8(d) carries you.

And as I showed you earlier, the Board's bad faith finding here is not based on any such consideration.

Q Well, Mr. Come, surely the very basic premise of our whole labor relations structure is that we're regulated to see that the parties sit down at the bargaining table and come out with agreements that they agree upon and that government shall not force agreements upon them. That's the very essential of our whole structure; isn't it?

A That is correct, Your Honor.

Q Now, doesn't -- whether under the guise of remedy or anything else, isn't that rather, to assert such a power is rather in conflict with that basic premise; isn't it?

A Well, I think there are two answers to that. In the first place this Court recognized this in Insurance Agents' and -- that even in finding whether or not there has been an initial refusal to bargain in good faith, there is a tension between the freedom of contract and the duty to bargain in good faith. As Judge Magruder put it in Prince, "You can't be blinded wholly to the reasonableness of the proposal." But, beyond that, once you have found on the basis of ample

evidence that has nothing to do with the reasonableness of the proposal, that the employer has bargained in bad faith, you have to balance the freedom of contract policy of 8(d) against other policies of the act. The policy of bargaining in good faith toward an agreement is a policy. Providing effective remedies for refusals to bargain that are meaningful in the particular context and when you balance those policies against the freedom-of-contract policy in a similar situation that we have here, we submit that on balance the Board could reasonably conclude that the policy of 10(c) dominates.

Q Mr. Come, is there any finding here that the purpose of the employer here was to weaken the union by not agreeing to the checkoff provision?

A The --

Q I didn't see any, but --

A The finding of the Board was most clearly rearticulated in its supplemental decision on page 135 where it says that "The Respondent has repeatedly violated Section 8 8(a)(5) and admittedly has no business for opposing the check-off and as its only reason for such opposition was to frustrate agreement with the union."

Q I know, but that's not the question I'm putting to you.

The question I'm putting to you is whether there was a finding that the affirmative reason, the real reason for this

was to weaken the position of the union. And then my next question is going to be: Do you think you would have a different case if there had been such a finding?

A Well, I don't think that the Board specifically found that the purpose was to weaken the union. I think that that is implicit in the finding that the sole purpose and only purpose was to frustrate an agreement, because that is the necessary consequence of refusing to agree in bad faith over a period of five years, and I think that the history of why 8(a)(5) was put into the act, shows that Congress recognized that that was so. That they put in an affirmative obligation to bargain in good faith because it was recognized by Senator Wagner and others that a mere obligation to recognize doesn't mean anything unless there is an obligation to bargain in good faith with a view to arriving at an agreement, because if you don't do that in good faith and try to come to an agreement that is necessarily going to wear down the union and weaken it.

That, I think --

Q Well, going back to the question the Chief Justice asked you a little earlier in the argument here; how does this frustrate the agreement. The union can have an agreement if it is willing to forget about the checkoff clause.

A That is quite true. However, the union is entitled to hold out for a checkoff so long as the employer is in bad faith, refusing to give up on the checkoff. Here the

employer, he's not refusing a checkoff for a valid reason, which he could do and if the union refused to give up on the checkoff, that would be a frustrating of the agreement that would not be a violation of the statute, but where the refusal to get an agreement is due to the employer's bad faith refusal to give you the checkoff, then it is a refusal to bargain in good faith, because what the employer is doing there is he is using the refusal to give you the checkoff, really as a sham for not dealing with this union at all, and that is what the nub of this case is.

Q I happen to know a man in Alabama who is a big employer. I have no doubt on earth about why he would object; he didn't like unions; he didn't like to deal with them and he would rather surrender almost his business than to deal with unions.

Now, I have never thought that the Board would have the power to make him deal with them that way, to certain terms. They could make him bargain and negotiate, but I had never thought of that act as being anything more than one which, like the Labor Relations, led them on as far as you could lead them and when they got at dagger's point, let them fight it out.

A Well, I think --

Q Let's assume that you could put the president of this company in jail for civil contempt for an indefinite period untilhe bargained, if the findings that you all seem to

agree upon, are correct. That's bad faith.

A That's why we feel that it's a much more forthright thing for the Board to specifically tell the company in its order what it is that is needed to demonstrate his good faith, and that's why the order here was made specifically.

Now, to come back to your example, Mr. Justice Black --

Q They didn't say that that man testified at these hearings?

A What's that?

Q I may say that that man testified at these hearings for the act, and he testified against it. Now, I don't see how logically you are right. If we wanted to carry it to the end where the government is going to force an agreement, not which would keep them from striking, which wouldn't keep them from having a lock-out.

I agree, and as Justice Douglas asked you: You could try him for contempt; you put him in jail for contempt and he has his word: "I don't want to deal with unions," and you say, "Well, that's not it; you just don't want to make any contract at all." And you get that, finally, on a bad basis, to prosecute a man criminally. But I cannot see why, accepting what you say, because it seems to me here if I had to decide it offhand, and having had that experience with men who thought that way, I would say he's just dilly-dallying around; it's a sham;

it's a sham.

Well, that's a pretty thin ground on which to send a man jail for contempt; isn't it? And that's what it would finally come to.

A Well, I thinkthat if you have to distinguish a hard bargaining case from a case that -- such as we have here, I mean there is no question that, as an original proposition, an employer doesn't have to agree to proposals just because the union is making them. I mean, there is plenty of room for good faith, collective bargaining, even though that means that you end up at loggerheads and the union has the option of either striking or the employer of locking up. That is not this case. This is an employer --

Q Why isn't it?

A Well, on the findings of the Board that were affirmed by the Court of Appeals, this is the case of an employer who is going into bargaining --

Q He pretended to object on one ground, when in reality, he was objecting on the other. That's the question you would have to submit to a jury in a contempt case.

A But, by making the requirement specific you avoid a contempt action because the employer knows what he is asking --

Q I agree, but Congress hasn't yet said it wanted to go that far, I'm afraid, in connection with the duties it

puts on the union by the workers and the government.

A Your Honor, I submit that this is a remedy problem for a very unusual type of situation and that --

Q Why, I would think there would be many.

A What's that, Your Honor?

Q I would think there would be many.

A No, because in the usual situation you cannot -- you will find that there has just been hard bargaining or you will find that if the employer has acted in good faith you cannot say from the record that further bargaining would be meaningless. I mean, he has not indicated, as this employer has --

Q There can be no further bargaining, because the Board has ordered that he has to accept a provision to which he is opposed.

A Well, the Board has done that only because in his initial bargaining he indicated thathe had no reason other than the invalid reason for opposing a checkoff.

Q I'm not criticizing, but --

A Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Come.

Mr. Cohen.

ORAL ARGUMENT BY GEORGE H. COHEN, ESQ.

ON BEHALF OF UNITED STEELWORKERS OF AMERICA, AFL-CIO

MR. COHEN: Mr. Chief Justice and may it please the Court: We had initially filed a motion for leave to argue 15 minutes, which was granted, but I see that some part of that time has been assumed.

MR. CHIEF JUSTICE BURGER: You have about ten minutes of it left, I think.

MR. COHEN: Thank you.

The company and the Chamber are here, Mr. Chief Justice --

Q Who do you represent?

A United Steelworkers of America. We're the charging party before the National Labor Relations Board, Your Honor.

MR. CHIEF JUSTICE: Counsel, if you run into pressure we will take that into account.

MR. COHEN: The company and the Chamber are here today, not to challenge any of the findings of fact made by the National Labor Relations Board; not to question the fact that they were motivated by bad faith and refused to enter into a collective bargaining, and not to question whether or not in this this particular case, if the Board had the power to compel a concession, this case was a proper exercise of that power.

The company and the Chamber are here on the bald-faced legal proposition that irrespective of bad faith, irrespective of their recidivism, irrespective of all of these things,

the simple fact remains the Board lacks the power to compel them to exact a concession of the kind that was exacted in this case.

Now, in support of that legal position the company and the Chamber have relied --

Q "Exacted a concession;" is that accurate?

A Compelling agreement, requiring agreement, or compelling concession. I was using the word "exact" with compel.

Q That would declare: "You sign this agreement or else."

A No, I am referring, Your Honor, to the statutory language of "making a concession." In the company's view this was making them concede to something by having to execute it to the contrary.

Q The very word "concession" implies agreement, however reluctant.

A It required an agreement of this nature. I don't think there is any question about that.

Now, in support of this proposition the company relies on -- looks to the statutory language of 8(d) and the legislative history of 8(d). Now, we submit, and we have dealt with this at length in our brief, that 8(d) was set up and established to define more clearly what the statutory obligation to confer in good faith meant and the whole thrust of 8(d) is

conferring in good faith.

It is true that to the extent that Congress recognized that the employer who is bargaining in good faith, is entitled to the freedom of contract principles. That employer who is bargaining in good faith, cannot be compelled to make a concession and cannot be required to make an agreement. That is the express statutory language.

And the legislative history is quite clear in that there is no allusion whatsoever to the question of: "What about this employer who is acting in bad faith?" What Congress was disturbed about and what the language of this section has addressed itself to is the question of the Board's prior practice of having looked into the reasonableness or unreasonableness of a company response to a union demand at the bargaining table, and say well, this union's demand looks fairly reasonable and therefore, when the company responded negatively that's the indicia of bad faith. That's the practice that Congress was addressing itself.

That is not the situation we have here. There's no argument being made by the Chamber or the company that the Board's finding of fact, namely: that the company's position with respect to dues checkoff was taken for the sole purpose of frustrating agreement; transgress 8(d). The company isn't arguing that the basic finding or the statutory violation here in any way was precluded by 8(d). On the contrary, the company

in effect, is saying: "WE, notwithstanding our bad faith, have been given an imprimatur by the Congress in that this bad freedom of contract principles found in 8(d), which we are obviously not entitled to under the language of 8(d), because we were not conferring in good faith. Nonetheless, that language is imported and transported over to 10(c) --

Q Mr. Cohen, does that answer the problem for us? Even if you had no 8(d) wouldn't this problem still be here?

A No, Your Honor; that doesn't answer the problem and we have addressed ourselves to that in the brief and I will be delighted, briefly to do so here, but it seems to me that what we are saying here is that we have a serious question whether or not a bad faith employer or a bad faith employee has any right at all to rely on the statutory language of 8(d). We acknowledge, however, that notwithstanding this foreclosure, that there still is, running through the Labor Act, a basic policy of freedom of contract.

But, of course, as this Court said in the Machinist's Local versus NLRB, "When you look at the Act there is only one way to determine the national labor policy: that's not one section of the Act, that's the entire Act." As a result of that fact, this Court on numerous instances has mandated an approach to remedy which, in effect, says: "Many times we have to fashion competing, balancing, conflicting policies." This is one such instance, we say, Mr. Justice Brennan. This is an instance

quite obviously, and indeed, the Court below recognized this very fact --

Q But it is arguable that the course of the basic premise of regulation to bring about collective bargining, but to leave the terms of the agreement to the parties or else there would be no agreement. If that is, essentially, the basis behind the legislation and then that does raise the question of whether under that circumstance the Board can assert this power.

A I think I would respond by saying, when you say, "but to leave the substantive terms to the parties," this is only on the assumption that we have people who are in good faith, trying to arrive at a collective bargaining agreement. This is -- and this was what was recognized by the Court below when they said, "We recognize there is here a minor intrusion into the freedom of contract." Even if the employer were --

Q Well, I was going a little beyond that, really, I think. What I was trying to suggest was that Congress, after deliberation decided that government was not going to write labor contracts; and it wasn't going to allow any agency of government to prescribe the terms of the labor agreements. Now, if that's so, then I would suppose, unless you have a powerful argument, that the Board can't assert that power.

A Well, that language, I believe, that whole section of the legislative history which you have so ably

referred to in Insurance Agents', that all, I repeat, presupposes a good faith bargaining custom.

Now, there is nothing inthe legislative history when we transpose it to look at 10(c). The Board is empowered withthe board authority to effectuate the policies of the Act. Now, when Mr. Justice Black, in an early time in the hearing, raised the question of was there anything in the legislative history that points to giving the Board this power? I think the answer is twofold: Obviously 8(d) didn't address itself to this problem, because 8(d) presupposes good faith bargaining, but in 10(c) numerous Congressmen got up and said, "Now, what kinds of problems are going to be confronted to the Labor Board, and how can we delineate what their authority should be in remedying those problems?" And the Congress came to the conclusion, and this Court has referred to the statute in many of their decisions: Seven-Up Bottling, Phelps Dodge; there's an enormous amalgam of potential problems, variables, depending on the facts of every case. "What we are going to do is empower the Board to issue what affirmative action it believes will effectuate the policies of the Act?" Obviously, that is not unreviewable, unlimited discretion, but it is a basic discretion and indirectly, I would submit to you, it addresses itself to the type of problem that you are speaking about.

I would say indirectly in 10(c) there is always the possibility that the Board could issue an order of the sort that

it issued here. What we say is the --

Q I thought you were arguing on the other side.

A No, Your Honor.

Q Are you arguing against the Board's order or for it?

A No; I'm arguing for the Board's order; and I'm suggesting that the broad discretion that the Congress left with the NLRB in Section 10(c) supports the issuance of a remedy that was issued in this particular case. It involved the problem of having to fashion and compete two --

Q Are you construing the Act as giving to the Board the power to decide the conditions that the parties must accept?

A No, Your Honor; I am not. What I'm saying is: 10(c) empowers the Board to take the effective action that is necessary to remedy the particular violation found in a given case.

Q Well, do you think the remedy that is necessary is to tell people they've got to sign contracts --

A There could certainly be a situation where a -- I think this has happened numerous times before this case Your Honor, where there has been a violation found -- let's talk in terms of --

Q Well, let's say that the violation is that they just stick to one view and they won't leave it for five years.

What is your opinion on that?

A Are they bargaining in bad faith? Have you got a basic finding of bad faith bargaining --

Q You mean then that if the Board can find facts reasonably supporting the theory that the man really is not against the union's checkoff, that then they can force him to sign a checkoff provision?

A Well, the mere fact that he's interested or not interested, I don't think, would be determinative. I'd say this case highlights that problem. Here is an employer who, for the sole purpose of frustrating the agreement over this five-year period, took a position on dues checkoff. He went to the union jugular. He knew this was what the union wanted. He made the judgment that he was not going to execute an agreement and he was going to use dues checkoff as a device to frustrate reaching an agreement.

But we have something beyond that here, because not only was he using it as a device to frustrate agreement, but he went on to acknowledge that he had no possible, conceivable, legitimate purpose for refusing to grant the checkoff in this case.

Q He did?

A Yes, Your Honor. He acknowledged that there was no administrative inconvenience, indeed, he had --

Q But he was against it.

A He was against it and he was against it for a bad purpose of frustrating collective bargaining. That was the key to the finding.

Q Suppose the union had been bucking him and they said, "We don't want any checkoff; we want to collect that money ourselves, pay it to the workers and let them pay us."

A If it could be demonstrated that we had no bad faith on either side of the table then we wouldn't have a violation and we wouldn't be involved in this remedy situation.

Q How are you going to be able to demonstrate bad faith so that you could really rely upon it as enough to put a man in jail for contempt of court?

A Bad faith, as we all acknowledge, and we realize that it was written into the statute, is a suggested standing, but nevertheless, but it is one of the basic cause of the entire Labor Act. It is true that it requires a determination of what is the employer's motivation, but as you have indicated earlier today, let's assume that an employer set out with a purpose to frustrate reaching an agreement, but he had to make the judgment: "How am I going to keep from reaching an agreement with this union? I'll look to what one of their key -- what their key demand is and I'll use that; I'll use that as the device to foreclose reaching an agreement." And that's exactly what happened here.

Q This morning, I mentioned that the union, some

witness, speaking for the union, said they would never agree to agreement without a checkoff. Is thatin the record; something like that?

A I believe it states clearly in the record that the union was insisting on a dues checkoff provision.

Q And they wouldn't sign a contract without it?

A I don't know if those specific words --

Q Let's assume for the moment that whoever said that was accurate. Would you think that was an adamancy of --

A Absolutely, but there is -- the chief distinguishing factor, Mr. Chief Justice, there is nothing under this Act to preclude a party from adamantly in good faith, insisting on a particular bargaining position. No one has suggested to the contrary.

The chief thing that distinguishes this particular case and in a sense you referred to it in your dissent in Roanoke Iron, was the crucial finding that it was bad faith that motivated this employer. He chose to pick the dues checkoff issue as his device to frustrate reaching an agreement.

Q Well, you are, then, going on the same theory that Mr. Come suggested that a bargainer is always obliged to state all of his reasons.

A That is not the problem that we have before us, Your Honor. This is not a question of setting forth all of one's positions. This is the case in which there is a --

Q Reasons, I'm talking about; the reasons for the position. I thought it was the essence of bargaining that you are not obliged to disclose all your reasons --

A The essence of bargaining, as I am sure you are well aware, is to behave in a manner consistent with the good will and the climate of the statute. And where that finding is made as it was made here, and where this company has put themselves into this box where they were using the checkoff to frustrate reaching an agreement, and, indeed, has no legitimate reason, we say that would be an appropriate remedy in this particular case.

Q Let me pursue the question on 10(c) that you mentioned. The latter part of 10(c) where the statute discusses under what circumstances, it says: "And to take such affirmative action, including reinstatement of an employee with or without bad faith.

Now, I would assume you would agree that the drastic remedy applied here, was something more stringent than a command to sign a particular contract. Wouldn't you think that if Congress had intended to include any such provision as a command to agree to a particular clause, they would have listed that in this statute?

A Well, I would answer that by saying I don't -- as is so often the case, the legislative history of statutes don't communicate the legislator's concern with every potential

problem that could have been posed. And I think, quite the contrary, that Congress intentionally left 10(c) framed in the very broad terms it was framed, namely: "As will effectuate the policies of the Act," because they recognized that there were going to be an entirely difficult number of situations that were going to come up and they didn't want to confine the agency that was administering the statute to one limited or two or three specified remedies.

But, I think --

MR. CHIEF JUSTICE BURGER: Your time is up now, Mr. Cohen, if you would like to close.

Q Before you close, I'd like to say that I had the card before me that said, "Mr. Cohen representing the Chamber of Commerce," so I couldn't quite understand your argument.

A Well, Your Honor, we have an extraordinarily unique situation here. There is a Mr. Cohen here representing the Chamber of Commerce.

Q I see there is.

Q You should get along better.

MR. WINSON: Mr. Chief Justice, I understand from the Marshal that we have a couple of minutes left.

MR. CHIEF JUSTICE BURGER: That's right, you have. Mr. Marshal, will you indicate it? Eleven minutes.

MR. WINSON: Thank you very much.

REBUTTAL ARGUMENT BY DONALD C. WINSON,

ON BEHALF OF PETITIONER

MR. WINSON: I'll just take a couple of those minutes, if I may.

To answer the question that was posed a minute ago, the record does show that the union adamanaly insisted on a dues checkoff provision and although I couldn't quickly find the record reference, Judge Miller, in his dissenting opinion in the Court of Appeals, refers to it even to the extent that the counsel for the Board's general counsel, told the examiner that his own inquiry showed that the union would not sign a contract without a dues checkoff provision.

There have been references now, throughout the brief and the arguments --

Q They were at odds. One of them said, "I won't do it if it's in there;" and the other one said, "I won't do it unless it's in there."

A That's right, Mr. Justice Black, and the company was found to have bargained in bad faith, for the purpose of frustrating an agreement.

Incidentally, that raises the question of whether it's a mandatory subject and somebody said it has never been raised -- in the earlier proceedings before the Court of Appeals we did argue that, where we were not convinced at that time and of course, we are not convinced now that it is a

mandatory subject. But, obviously, this is not something to be raised in this proceeding before this Court. We have not -- we do not have it in issue right now.

But, there have been references characterizing this case in a number of different ways now. As we mentioned earlier, the union brief talks of this, that this remedy that they are after here could not be used in a run-of-the-mill case. The Court of Appeals said that in ordering a checkoff was only a minor intrusion under the terms of the contract. Now, today it said that this is a unique situation.

Well, as Judge Miller, in his dissenting opinion initially, on the merits of this case, concluded by saying that he had never seen a case so barren of support for a bad faith finding found by the examiner and adopted by the Board.

Now, we're not here to argue the facts, obviously, but what I'm saying is that for anybody to say this case is unique or this or that case is run-of-the-mill, that is always a decision that has to be made and there are people who are going to disagree.

Congress, in its wisdom, and never has cited any authority that Congress empowered the Board to decide on the basis of characterizing cases whether it could order an agreement, or whether it couldn't.

Counsel for the Board argued today when asked a question; "Well, where do we draw the line? Where do you

suggest we draw the line?" He said this about the present case where he says that it's within the imaginary line. "Here there was a bargaining in bad faith." Well, there is a bargaining in bad faith in every case, you don't approach the remedy --the question of an 8(a)(5) remedy unless there is bad faith bargaining. He said that there was no business or legitimate reason. I know of no law; I don't think there's law right now to the extent that youhave to have a business reason. I don't think our law has approached that point.

And I suggest that that is probably an important issue now, or an important consideration in this case, whether business reasons are or are not needed.

The third thing he said, "A checkoff provision was cut and dried." Well, I wonder sometimes whether a checkoff was cut and dried. It can affect other provisions; it can affect the wage provision, for example. Obviously, if the union wanted the checkoff badly enough they are going to give up 2 cents an hour to get it or 3 cents; what have you.

So, I suggest that these considerations that have been brought forth today are exactly in the character that Congress told the Board to stay away from in 8(a)(5) and that is a sitting in judgment on whether the case is unique; whether it's cut and dried; whether there were good reasons for refusing the provision. I suggest that I would conclude with a point from the Chamber's brief, a footnote that was pointed out

to me sitting here today. This question of Board intrusion in the bargaining process did not come anew in 1947. I am referring to the legislative history back with the National Labor Relations Act in 1935 and that is footnoted on page 5 of the Chamber's brief, where SEnator Walsh, Chairman of the Committee on Education and Labor, said that "Nothing in this bill allows the Federal Government or any agency to fix wages, regulate rates of pay and so forth. There is nothing in this bill that compels any employer to make any agreement about wages, hours of employment, working conditions."

I merely suggest that this threat of freedom of contract as a basic premise throughout the Act. Section 8(d) is the focal point by which it's brought forth. This basic premise is there; the Court of Appeals did not deny it; the Board and the union in their brief do not deny it. Instead, they say that they should be allowed to agree whenever the intrustion on freedomof contract is only minor.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Winson. Thank you for your submissions, gentlemen. The case is submitted.

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