IN THE SUPREME COURT OF THE UNITED STATES

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BE&K CONSTRUCTION COMPANY, :

Petitioner :

v. : No. 01-518

NATIONAL LABOR RELATIONS :

BOARD, ET AL. :

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Washington, D.C.

Tuesday, April 16, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:08 a.m.

APPEARANCES:

MAURICE BASKIN, ESQ., Washington, D.C.; on behalf of the Petitioner.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

P R O C E D I N G S

(11:08 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 01-518, the BE&K Construction Company v. the National Labor Relations Board.

Mr. Baskin.

ORAL ARGUMENT OF MAURICE BASKIN

ON BEHALF OF THE PETITIONER

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

This case presents an important question arising under the Petition Clause of the First Amendment. Petitioner BE&K Construction is asking the Court to hold that the First Amendment protects objectively based lawsuits from being declared unlawful by the National Labor Relations Board.

Now, the Court has already held that the First Amendment does protect lawsuits from statutory sanction under both the NLRA and the antitrust laws so long as the suits are meritorious, meaning that they are not objectively baseless. In the Bill Johnson's case, the Court said -- and I quote -- it is not unlawful to pursue a meritorious lawsuit under the National Labor Relations Act. In fact, the Court said it twice and specifically cited the Noerr-Pennington doctrine of the antitrust law.

Then it --

QUESTION: How do you describe the test applied by the board?

MR. BASKIN: Well, the test by the board is one which says that the employer must be -- must prevail, must be 100 percent prevailing in the lawsuit. As a standard that's impossible for any employer to anticipate in advance. No -- no employer can ever be 100 percent sure of prevailing.

QUESTION: Should there be any other component? I mean, I think your client lost basically. So --

MR. BASKIN: Well, the question is what was --

QUESTION: What else should be part of the test?

MR. BASKIN: The test is what is the -- was there an objective basis for the litigation. It's not a win-or-lose test, as the Court said in Professional Real Estate -- and I'll quote again -- it's got to be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.

QUESTION: Well, should the test from Professional Real Estate automatically be carried over to the Labor Relations Act?

MR. BASKIN: Well, in this case, Your Honor, an answer is yes because the Court itself has interacted with the -- both of the acts. They cross reference with each

other. Bill Johnson's referred directly to the California Motor Transport. Professional Real Estate referred to Bill Johnson's as if it's one consistent whole. And it is.

QUESTION: Well, but I -- I wonder if -- if the National Labor Relations Board doesn't have some discretion to say that the labor situation is somewhat different, as they apparently do, from the antitrust situation.

MR. BASKIN: Well, but the irony here is that the NLRB has not -- has not interpreted its own statute. It's not being deferred to here. The NLRB is interpreting this Court's decision in Bill Johnson's.

QUESTION: Which happened to say precisely what the NLRB said it said.

MR. BASKIN: Well, no, Your Honor. In Bill --

QUESTION: If a judgment goes against the employer in the State court, if it goes against him, then he's had his day in court. And then the board may proceed to adjudicate the unfair practice claim, and then the employer's suit, having been proved unmeritorious, the board can take that fact into account when it decides the labor law violation.

MR. BASKIN: Three --

QUESTION: And you've been reading three cases

to us, so that seems to be the language that you have. I -- I read that as saying you lose. Period. End of the matter. That's what the board decides.

Now, I put that so you'll reply to it.

MR. BASKIN: Yes. Three things in the phrasing that you just said. First, the Court said the board may proceed, did not say it's an automatic result. Said may adjudicate the unfair labor practice, did not say it's an automatic result.

And then key phrase, having proved to be unmeritorious, what does unmeritorious mean? Well, this Court has consistently said what unmeritorious means. It said so before Bill Johnson's in the Christiansburg case.

QUESTION: Mr. Baskin, back up a bit.

MR. BASKIN: Yes.

QUESTION: The -- the Court in that very paragraph gave a definition of what it meant. So, I wouldn't look outside this document for what the Court meant by with merit/without merit when the -- look at the sentence in the middle of that paragraph. It says if the judgment goes against the employer and the State court.

MR. BASKIN: Yes.

QUESTION: Judgment against you. Or if his suit is withdrawn or is otherwise shown to be without merit. Otherwise shown to be merit. I took that to mean if you

lose, it's shown to be without merit. There may be other situations in which it's shown to be without merit. So, it seems to me the best place to find out what the Court meant merit/without merit is the very opinion that we're construing.

MR. BASKIN: Yes, and if it were the holding of the opinion, it would have greater weight. But this is not the holding that we're talking -- that we're parsing out here. This is dicta because the essential --

QUESTION: Well, there are two responses to the dicta point it seems to me. The first one is it was dicta, but it was dicta that preceded a remand in which this issue in fact would be explored. And the second response is the -- as I understand it, the board itself has followed the -- the dicta for -- I forget how many years now, but consistently followed it and Congress has done nothing about it. So, A, query whether it's dicta, and B, even if it is, isn't it the kind of dicta that at this point definitely should be followed?

MR. BASKIN: It is clearly dicta because the Court stated what was the issue before it, and the sole issue before it in Bill Johnson's is stated at the beginning of the opinion, whether the NLRB may issue a cease and desist order to halt the prosecution of a State court civil suit brought by an employer to retaliate

against employees.

And the holding of the case, which analyzes the First Amendment at great length, says that the right of access to the courts is too important to be an unfair labor practice. And it also defines meritorious as being reasonable basis, language in the Court's opinion.

QUESTION: I think there's another element that you're ignoring. I thought the board looked both at whether it was a meritless lawsuit against the unions and whether it was for a retaliatory purpose.

MR. BASKIN: Yes.

QUESTION: Isn't that the other element?

MR. BASKIN: Yes. Both elements must be present.

QUESTION: Okay. And how do we define retaliatory purpose? What -- what constitutes that --

MR. BASKIN: Well, it's --

QUESTION: -- do you think, in the board's rule?

MR. BASKIN: Yes. It's very -- pretty much the same as the improper motivation purpose test that was in the Professional Real Estate case, which also has the two-part test. You look at the objective basis first, and then and only then if there's no objective basis, you look at whether there was a retaliatory motive.

And how that's defined, although the Court did

not grant cert on that issue, we contested vigorously the -- the board's finding of retaliatory motivation here -- because in fact the board has made it a rubber stamp. It's become automatic if the case relates in any way to union activity, the board finds that it's retaliatory motivation.

But the first part of the test is an objective one that the Court has spelled out both in Bill Johnson's itself and in Professional Real Estate. And to take any -- to take the board's standard puts employers in an impossible situation. It is unworkable. Going back to the question of dicta or not, you have ambiguous language at best because we have several different references to meritorious throughout the Bill Johnson's opinion.

QUESTION: May I just ask this, Mr. Baskin? Do you think there is a distinction between an ongoing case and a completed case?

MR. BASKIN: It's one mostly as to timing and facts available to the board, and I think that's what the Court was --

QUESTION: But the -- in your view, the standard is the same. It's not that the board tries to enjoin the proceeding as -- as opposed to later on bringing an unfair labor practice after it's over.

MR. BASKIN: The substantive standard should be

the same.

QUESTION: It should be, but --

MR. BASKIN: Should be.

QUESTION: -- do you think that Johnson says it's the same?

MR. BASKIN: We're all here today because the language in the tail end of the Bill Johnson's opinion is ambiguous as to what they intended the standard to be.

QUESTION: And at least it says there's a different standard.

MR. BASKIN: As to -- the -- the impact was --

QUESTION: And your view is there should be no different standard.

MR. BASKIN: Correct.

QUESTION: And that's the whole key to the case.

MR. BASKIN: That really is the whole key to the case.

QUESTION: And why not?

QUESTION: Mr. Baskin, is your -- is your argument -- in your opening remarks, you -- you referred only to the First Amendment. Is -- is it -- is it a constitutional argument you're making? To -- to agree with you here, do I have to agree that if Congress passed a law adopting the English rule on -- on attorney's fees, that would be unconstitutional?

MR. BASKIN: No. We are not saying that. We are not seeking to constitutionally -- we are asking no more than that you apply this standard to the two statutes you've already applied it --

QUESTION: Which says -- so, it's a statutory argument.

MR. BASKIN: No. It is a constitutional and statutory argument, which is what the Court itself said in both of these cases because there's a sanction involved.

QUESTION: I don't know what you mean by a -- is it -- does the Constitution prohibit it or not?

MR. BASKIN: It prohibits a statute from prohibiting it.

QUESTION: The Constitution prohibits. So, your answer to my question is --

MR. BASKIN: Constitutional and statutory.

QUESTION: You -- you cannot -- that Congress could not adopt the English rule.

MR. BASKIN: No. The difference -- here's the important difference.

QUESTION: It would do that by statute.

MR. BASKIN: But is there an -- a declaration of unlawfulness involved? There are many fee-shifting statutes. We're not taking issue with mere fee-shifting, but the National Labor Relations Board is saying that BE&K

broke the law, and that's what also happened under the antitrust laws. They're saying -- they're issuing a cease and desist order from filing so-called nonmeritorious litigation.

QUESTION: But the fact that it's triple damages is a little different than fee-shifting. So, one could easily say, when you're exposed to treble damages, putative damages, yes, that's a punishment. Here fee-shifting is the rule in most countries in the world.

So, what is the more here? I understand the more in antitrust cases, treble damages. Here you say, well, there's a finding that you have committed an unfair labor practice. What are the consequences in addition to that you have to pay the other side's lègal fees? What are the adverse consequences --

MR. BASKIN: First, the most important is the declaration that you are a law violator in and of itself. You have to post a notice for your employees not only at this job site but all across the country. You have your -- your customers become aware of it. The unions certainly make sure your customers become aware of it. There's the serious danger of debarment either privately or by governmental action.

QUESTION: Explain that. You did say that in your brief about debarment, and I didn't -- I can

understand when you say someone -- someone's reputation is affected by being labeled a law violator. But you said something about -- about the jeopardy of debarment and I wasn't clear how that would work.

MR. BASKIN: It's not meant in the legal sense and the Government -- we're not -- we're not talking about whether the Government has to debar the company, but both private actors and many Government contracting officers take the view they don't want to deal with people who have been declared to be law violators. The goodwill and reputation of the company is at stake.

QUESTION: Well, in our lower case, the -- Wisconsin set out to do that on a State basis, didn't it? If you violated the Labor Act, the State was not going to deal with you.

MR. BASKIN: Yes, they did. And then the Federal Government just last -- 2 years ago in the previous administration, had come through with a set of rules saying that companies would be debarred if they were found to have violated labor laws.

So, having this -- a declaration of illegality in place is what makes this different, Justice Scalia, from a random fee-shifting statute, and that's why we are not asking you to do anything other than what you've already done, which is to apply the First Amendment to two

statutes which you have determined have great commonality over the years, as each one keeps referring back to the other in this doctrine.

QUESTION: What do you do with the 2 decades that have elapsed -- about 2 decades -- since Justice White's opinion which has been interpreted by the board the way the language most naturally reads? The one thing is to say when the case first came out it was ambiguous. But now we have 2 decades of consistent interpretation of that language by the board.

MR. BASKIN: I regret to say it's a tribute to the speed of the board's processes and the process of getting this case up to this level on this issue because this case alone has taken 7 years to work its way through the board. When the litigation was begun in this case, it was 1987. The Bill Johnson's case was fresh. There was considerable doubt as exactly -- as to exactly what it meant. I should note that in the district court opinions that are part of the appendix, the unions raised Bill Johnson's and said that it -- they were protected under it, citing it interchangeably with Professional Real Estate.

QUESTION: They won over half their cases, didn't they?

MR. BASKIN: Excuse me?

QUESTION: Didn't they win -- they won some 15 out of their 29 cases.

MR. BASKIN: Depending on how you count, they just barely got over 50 percent.

QUESTION: Did you ask -- talking about the history of the case, could you tell me how did this case end up in the Sixth Circuit?

MR. BASKIN: Well, in fact, by the time this case got to the court of appeals, BE&K was no longer doing business in California. The gravamen of its doing business was in the Sixth Circuit.

QUESTION: I see.

MR. BASKIN: And that's why the decision was made --

QUESTION: I'd like you to address, if I can go back to the -- what I think was the Chief Justice's question. Your -- your basic point, I take it, assuming with you, as I will, for the moment that the language is ambiguous in Bill Johnson, is that we should treat or the statute should be interpreted as treating the antitrust statute and the labor statute a case brought by a defendant the same way.

And obvious differences, which I'd like you to address, are that, one, there is a history in the labor law of employers using cases brought at law either to

break unions or to win disputes. And that was one of the reasons why the NLRA was passed. That had nothing to do with the antitrust laws. There is no such history.

Second, the employer -- the -- the matter is committed to an expert board in the labor area, which apparently believes that the way to enforce the labor law, unlike the antitrust law, is to say the sham exception exists before the case is decided, but once the case is decided, we're going to keep employers out of the courts by saying if they lose, that's the end of any immunity that they get. And we will now look to what their motive was in bringing this lawsuit. We have an expert board. We have a different history. We have different statutes.

MR. BASKIN: The --

QUESTION: And now, what is your response?

MR. BASKIN: The irony is that the Court considered those purported differences in the Bill Johnson's case and rejected them.

QUESTION: All right. Obviously -- look --

MR. BASKIN: No, no. I'm talking about the first part.

QUESTION: I -- but I'm trying to stay away from Bill Johnson because obviously if you're right that the statute holds it, I mean, I -- all right. Go ahead. Sorry. I didn't mean to interrupt.

MR. BASKIN: Well, to me it's -- the interesting thing about this case is the Court has itself considered these very questions that you're raising and you have answered them, and you do not need to revisit them to -- to come out with the conclusion that the NLRB has either misinterpreted the standard or that the standard is unworkable.

QUESTION: Well, but I -- I have -- I have the same question that I think underlies Justice Breyer's concern. You would seem to give zero weight to the board's interest in stopping a purely retaliatory suit. The board says, now, you have organized this clerical unit and if -- if you persist in your union activity, we're going to sue you for the way you've been keeping our books. We're going to sue you for malpractice, blah, blah, blah, blah. And so long as there's any basis for the suit, they can do that in your -- or am I misstating your view?

MR. BASKIN: Well, only in one respect. It has to have an objective basis. We are not here defending sham litigation, baseless litigation.

QUESTION: Well, I suppose there's always abuse of process if there's -- but if there's some basis, then you can use it specifically to retaliate.

MR. BASKIN: More than some. It must be

reasonable basis. And yes, yes.

QUESTION: You can specifically use it to retaliate.

MR. BASKIN: The Court -- this Court has said that if there is an objective basis, that means it's a meritorious lawsuit. Then there may also be a motivation of retaliation. Weighty, countervailing considerations.

QUESTION: But -- but we're talking -- we're talking in -- in the labor context.

MR. BASKIN: Yes.

QUESTION: And you lose the suit. So, there's -- you do not -- you're not the prevailing party in the suit. And you -- you lose on the merits. There's nothing the board can do about it if you've donè it specifically to retaliate and for no other purpose.

MR. BASKIN: If it is a reasonable, meritorious suit, as this Court has defined it, where the right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right because of the First Amendment to the Constitution, the right to petition the courts with a meritorious lawsuit.

QUESTION: But the First Amendment argument goes by the boards once the case is over.

MR. BASKIN: No, Your Honor, because -- for the same reasons that the Court held in Professional Real Estate. The employer has the right not to be second guessed with 20/20 hindsight as long as it had a reasonable basis for the suit.

QUESTION: Yes, but that ignores the fact that we're not concerned solely with chilling; we're also concerned with retaliation. And if we didn't have the retaliatory character of the lawsuit involved, I would think you would have a much stronger argument as you just made it. But the retaliation is there and I don't see how we can accept your -- in effect, your chilling argument without ignoring the retaliatory character.

MR. BASKIN: Because the emplòyers are being chilled and, in effect, the retaliation --

QUESTION: Well, they're being chilled in -- in engaging in retaliation for the exercise of statutory rights.

MR. BASKIN: But there's actually less retaliation that's going to take place once the suit is completed. If that were the standard, then the board should be instructed to intervene sooner to keep the employees from having to spend more money to defend themselves.

QUESTION: And the -- the answer to that, it

seems to me, is set out in the cases. We've got a -- we've got a federalism interest in letting the State courts at least adjudicate their cases. So, that's the answer to that objection.

MR. BASKIN: Well, here there's even a more compelling interest. You have two statutes, Federal statutes, that the employer was invited to file lawsuits under.

QUESTION: All right. Let's go back then to the -- to the difference between the two Federal statutes. The premise of Justice Breyer's question a moment ago accepted the ambiguity. If we are not that indulgent and if we read Bill Johnson's the way Justice Ginsburg read it -- and I will be candid to say I read it -- number one, the ambiguity does not leap out at us.

And number two, I'd like to go back to Justice Ginsburg's question. Even if we assume there was ambiguity at the beginning, we have had 20 years of board practice which seems to me to have dissipated any ambiguity. What's your response to that?

MR. BASKIN: Well, the ambiguity was in the opinion that led the board to take an erroneous view --

QUESTION: That's right I believe, and the board has made it very clear how the board is reading it, and after 20 years, we've got a pretty clearly settled body of

law, haven't we?

MR. BASKIN: Well, a settled body of erroneous law. And is that what the Court --

QUESTION: And we're interpreting statutes -- the -- the settled body is clear and Congress is apparently quite agreeable to it.

MR. BASKIN: Well, first, the Court has said you don't defer -- that -- that you can't read anything into congressional inaction, particularly when it has taken this long before the board ruling really was definitive. And it has taken that long. The issue has been in doubt for most of that 20-year period.

But the -- going beyond that, the -- the board --

QUESTION: I don't understand that. Why do you say it's been in doubt for most of the 20-year period?

MR. BASKIN: Because it's been in doubt. Cases like this one have been taking a long time to wind their way through the process. At each step, the board said, well, we think that it -- there -- it was contested, as the board said --

QUESTION: You mean it has been contested constantly during that --

MR. BASKIN: Yes.

QUESTION: -- 20 -- 20-year period?

MR. BASKIN: Absolutely.

QUESTION: Has the board ever taken a different position in the 20-year period?

MR. BASKIN: There have been dissents, but no, the board has generally taken a consistent view.

QUESTION: So, the board's position has been clear for 20 years.

MR. BASKIN: Yes, but the board --

QUESTION: The board is slow. It may take the -- the cases may be in wending their way through.

MR. BASKIN: But the board is not entitled to deference in its interpretation of the U.S. Constitution or of this Court's decision. And that's all that we're talking about here is the board's interpretation of the Constitution and this Court's opinion. It's not interpreting the statute.

QUESTION: I think we're not raising -- I think Justice Ginsburg's question and my question is not so much geared to an issue of deference. We're -- we're trying to -- to get at the -- what seems to us the fact that the law has become settled. It may require no deference. It may have become settled because an administrative agency was interpreting what you think was an ambiguous opinion of this Court in the first place. But it seems to have become settled.

And there is a good reason, which underlies ultimately our -- our approach to stare decisis in statutory cases, for letting settled statutory understandings stayed settled unless the legislative branch wants to change them. And that's the argument we're getting at, not deference.

MR. BASKIN: Well, it is -- stare decisis is a form of deference, and we're talking about stare decisis would apply to the Court's own opinion. Only this Court is required to defer to itself about its own opinion. Your -- and so that's why we are talking about deference, I would submit. At least I interpret your question as asking should you stick with what the board has come up with. This Court has not ruled on --

QUESTION: I'm saying that --

MR. BASKIN: -- on Bill Johnson's since Bill Johnson's.

QUESTION: I'm saying that in -- as -- as your own answers indicate, for 20 years there seems to have been a -- a settled practice on the part of the board which at best is not inconsistent with our opinion. Why shouldn't we let a settled statutory regime stay settled unless the legislative branch wants to change it?

MR. BASKIN: I contest that it's a settled statutory regime, that we are dealing with a First

Amendment right, and that the board's outcome, which it has taken this long to reach back to the court, is wrong under the First Amendment. It has proved to be unworkable and it subjects employers to the impossible situation in future cases and in cases going on right now that they are expected to have 100 percent certainty of the outcome.

Indeed, the -- the board could, under this standard, say that you can win a jury verdict, go -- have it upheld by the district court, only to be reversed by an appeals court, and still be found under this Court's standard to be nonmeritorious and you lose. You have -- you have violated the law.

QUESTION: If there's a retaliatory motive.

MR. BASKIN: If there's a retàliatory motive. And that's all it takes. There's a retaliatory motive. You go through all of that based on an attack on your businesses, which is why employers tend to file these lawsuits. They don't like lawyers that much, don't want to spend the money to do it, but they're under attack. BE&K was under attack in every conceivable forum.

QUESTION: But, I mean, that's a normal problem, isn't it, with the labor statutes and most other statutes. It forbids retaliatory behavior. Of course, you'll have cases where people make the wrong decision about it, where it's hard to predict, and so forth. But that's the

general situation.

MR. BASKIN: Well --

QUESTION: We're trying to carve out a -- an exception where you're home free from that.

MR. BASKIN: Well, no, it's the board that's carving out an exception from the basic First Amendment protection that this Court has recognized already.

QUESTION: Mr. Baskin, that -- that goes back every time to how you construe this paragraph, and so if the position that Justice White is making a distinction here between, on the one hand, an ongoing proceeding -- the First Amendment says you can't stop it. Never mind deference to State courts. That's another consideration that weighs it to the same end, but traditionally under the First Amendment, a prior restraint, stop it, has been what the Court has looked at most cautiously. Then Justice White tells us, but it's different once the adjudication is over.

The -- the line between prior restraint and subsequent punishment goes all the way through First Amendment learning, and you treat this as, well, ambiguous, but if it were clear it's that there's any difference between stopping an ongoing proceeding and looking at a situation after it's been adjudicated?

MR. BASKIN: There -- there can be a difference,

mainly the difference of having more facts, having an outcome in front of the board at that point. And what the Court wanted to get across -- the issue in front of the Court in Bill Johnson's was don't interfere with an ongoing lawsuit. We don't know how it's going to turn out.

All right. Once it turns out, if it's without merit -- meritorious -- I'd just invite the Court to look at each use of the word meritorious in the Bill Johnson's opinion. You will regrettably find some inconsistencies not only internally but with other opinions of this Court both before Bill Johnson's and after. You have the opportunity to clarify the law now in a way that is very straightforward under the Professional Real Estate Investors test.

If there are no other questions, I'd like to reserve the remainder of my time for rebuttal.

QUESTION: Very well, Mr. Baskin.

Mr. Wallace, we'll hear from you.

ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE RESPONDENTS

MR. WALLACE: Thank you, Mr. Chief Justice, and may it please the Court:

The board and the courts of appeals have had no difficulty in reading Bill Johnson's the way I think most

people would read this Court's opinion as comprehensively addressing what the board was doing with respect to the unfair labor practice under section 8(a)(1) of the filing of --

QUESTION: Mr. Wallace.

MR. WALLACE: -- retaliatory lawsuits.

QUESTION: Mr. Wallace, when I ask you a question, please stop.

MR. WALLACE: I didn't hear you. I'm sorry.

QUESTION: Well, listen a little more closely.

Do you disagree with Mr. Baskin's contention that the word meritorious is used inconsistently in the part of Bill Johnson's that we're talking about?

MR. WALLACE: I do disagree with that, and -- and no court of appeals that has reviewed board decisions since Bill Johnson's has read it that way. The Court quite clearly distinguished between enjoining ongoing lawsuits, which it said could be done only if the lawsuit was baseless. Otherwise, the board has to wait until the lawsuit has been resolved. If the lawsuit turned out favorably to the employer, then it could not be an unfair labor practice. But if the lawsuit turned out to be unmeritorious, if the employer lost, then the board could consider whether it was filed for a retaliatory purpose.

QUESTION: It did say that, but of course, that

was not the situation before the Court. I mean, it -- it may be the clearest dictum in the world. It may be the dictum closest to a holding possible, but it is still dictum. The Court did not have before it a case in which the employer had already brought the suit and had lost. Now, you know, it said what would happen in that situation, and you know, I think that's entitled to some weight. But the issue that your opponent wants to argue here is whether the Court was wrong to say that.

MR. WALLACE: I beg to differ. The Court specifically noted that some of the claims of the employer had already been dismissed in the State courts, and in footnote 15, at the end of the -- its opinion, it said the board, therefore, can use the criteria we --

QUESTION: But those cases were not before them. It said what the board can do in those cases that are not now before us. As I say, it may be a dictum that is the very next thing to a holding, but it is not a holding. Those were not cases that the Court had in front of it.

MR. WALLACE: It -- it was a direction for how further proceedings in the case should be handled.

QUESTION: Exactly, as many dicta are. As many dicta are, and we do not always observe those directions when we -- when we have the opportunity to examine the matter in a -- in a more immediate context.

MR. WALLACE: In any event, if I may turn now to address the question that the Court asked the parties to address in formulating the question presented here. Our submission in this case is that this Court's holding in Professional Real Estate Investors interpreting the antitrust laws and the Court's decision in Bill Johnson's, including this -- these dicta to govern further proceedings interpreting the National Labor Relations Act, are entirely compatible with one another in light of the important differences in the purposes, processes, remedies, and practicalities of enforcement that were implicated in the two statutory schemes at issue.

QUESTION: Well, I -- I have one particular difference in mind that I'd like you to comment on. I -- I -- it's -- it seems to me that what is sought to be done here is much worse as far as the independence of the courts and the guarantee of access to the courts by -- by the citizenry is concerned than what was sought to be done in -- in -- what case -- Professional Real Estate.

And this is the difference. In Professional Real Estate, it would have been the courts that would have decided the facts which would have imposed upon the losing party attorney's fees. In this situation, it is going to be the Labor Board that will decide the factual question of whether there was a retaliatory motive, and the courts

will have to defer to that factual finding if there is a basis in the record, whether the courts agree with it or not.

I find it quite offensive to think that Article III courts are going to be told that certain people who have come to them for relief will pay a penalty for doing so on the basis of a retaliatory motive found not by Article III courts at all but by the labor court -- but by the Labor Board. In that respect, this case is much worse than -- than what was going on in -- in Professional Real Estate.

MR. WALLACE: Well, the board is not contradicting anything found by the courts. The question of retaliatory motive was not at issue in the underlying litigation, and the board has to wait under this Court's decision in Bill Johnson's before it addresses the question of whether there's been an unfair labor practice --

QUESTION: They will address it in a proceeding before the board. They will find an unfair labor practice on the basis of their finding of a retaliatory motive.

And I -- I note, by the way, as to, you know, how -- how much we can trust those -- those findings -- I had one of my law clerks look up how many -- how many times the board has imposed this kind of an unfair labor

practice penalty for -- for bringing a lawsuit. Since the Power Systems case in '78, which is when they started this process, they have 26 decisions ordering the employer to pay attorney's fees incurred in defending a lawsuit and 3 decisions in which it -- it ordered a union to do so. Now, is -- is there some reason that unions are not using lawyers as much as companies are these days?

MR. WALLACE: Well, the -- the cases against unions are much less numerous to begin with because unions are less apt to bring lawsuits to interfere with the rights of employees under section 7 for concerted activity. We're talking about a retaliation against section 7 rights. Usually that's been the subject of employer suits, but the board does apply the same test when --

QUESTION: There were union lawsuits in this present case, weren't there? Plenty of them.

MR. WALLACE: But those were against the employer, and -- and they --

QUESTION: But suits -- suits against the employer can certainly be brought to impair the -- the rights of the employees not to -- not to unionize.

MR. WALLACE: That would have to be a showing a violation by the union of 8(b)(4), not -- not that the lawsuit was an 8(a)(1) violation against the concerted

activities rights of employees. The employer would have to show that the union lawsuit violated duties that the union owes, and that was resolved against the employer on the merits in this case because the -- the subject of the lawsuits was about working conditions at the site of employment, which was a legitimate union concern.

QUESTION: Never -- never mind the 26 to 3. Just -- just tell me why I -- as -- as an Article III judge, I should not be concerned about leaving it to a Federal agency to make the factual finding that will determine whether somebody will be punished for bringing a reasonable lawsuit, although one which ultimately loses in Federal courts. Why shouldn't I be concerned about that?

MR. WALLACE: Well, this isn't punishment. It's make-whole relief under an administrative scheme which is meant to protect employees in the exercise of their concerted rights, and it involves no contradiction of any issue that was before the -- the court in the underlying litigation which did not have occasion to address whether the suit was brought for a retaliatory purpose.

QUESTION: Mr. Wallace, Mr. Baskin told us that there are punitive aspects to this that could lead to debarment he said. So, it's not simply to provide for fee-shifting, but that there are heavy consequences.

MR. WALLACE: Well, the -- the case to which the

Chief Justice referred earlier, Wisconsin Department of Industrial Relations against Gould, was one in which this Court held that Wisconsin law was preempted, and Wisconsin could not refuse to make purchases, State purchases, from companies that had been found to have violated the National Labor Relations Act because the whole purpose of the remedy scheme under the National Labor Relations Act is remedial and the remedies are limited, and the idea is to get labor disputes behind us, not to have disruptions of the economy, to keep productivity going, and to keep the people employed.

QUESTION: Well, is -- is the point of this colloquy whether or not this act can be called punitive or this NLRB doctrine can be called punitive? I -- I had thought you said that it is punitive, or am I wrong? Maybe you think nothing -- maybe you think nothing turns on that.

MR. WALLACE: Well, I -- I wouldn't think that -- that anything would turn on it, but it is not punitive. The only remedy that's granted is a make-whole remedy that the costs incurred by the prevailing defendants in a suit brought for an improper motive, namely to coerce those defendants in the exercise of rights granted them by Federal statute when suit turned out --

QUESTION: But is there any other effect by

virtue of the finding of the unfair labor practice?

MR. WALLACE: Well --

QUESTION: I mean, true in terms of money, it's the fees. Is there any other effect --

QUESTION: -- by virtue of their finding?

MR. WALLACE: Notice is to be posted. The cease and desist order issues. Those -- those parts of the remedy were not challenged in this case.

QUESTION: Well, let's just talk about the make-whole remedy. We held in 1982 that in a private suit for an unfair labor practice, which provides for making whole the -- the plaintiff for -- for his damages, there was no authority in the court to award attorney's fees, that making whole there did not include attorney's fees. What -- and -- and, you know, the language was very clear about the American rule and what a -- what a change it would be. Why -- why should it be any different when the unfair labor practice is -- is decreed by the board rather than in a private action?

It doesn't say explicitly that you can get attorney's fees, just as -- just as the other -- the -- the private action provision didn't say explicitly. It just said, you know, whatever damages you have. And damages were not intended to include that. Why should we hold any differently in this situation, especially when

the result is to leave it to the board to decide whether -- whether somebody will be punished for bringing a meritorious but ultimately unsuccessful suit in Federal court?

MR. WALLACE: Well, board proceedings are much less burdensome than -- than court proceedings to those that are issue, and the Court held in Bill Johnson's that the board remedy of recompensing the defendants who prevailed in this suit for their costs, because the suit was brought to defeat their section 7 rights, was a permissible remedy by the board.

QUESTION: We held it or -- or said it. I mean, that -- that's one of the disputes here, isn't it?

MR. WALLACE: Yes. They held it in the sense of -- of prescribing that rule for the further proceedings to be held in that very case on remand from the Court's order.

QUESTION: We're just going around the dictum point again. I consider it dictum, and -- and the issue is whether that was a wise thing to say.

MR. WALLACE: Well, when the Court prescribes a rule of that nature, the United States considers itself bound by it in its further handling --

QUESTION: Yes. I'm -- I'm not criticizing you for arguing the point, certainly not.

QUESTION: Mr. Wallace, I -- do you agree that under the board's rule here that it does allow the board to find the unfair labor practice and impose the sanctions on litigation brought by employers that is not limited to just shams and abuse of process?

MR. WALLACE: That's --

QUESTION: It does allow the imposition of these things for an employer suit that could be considered objectively reasonable at the time it was brought.

MR. WALLACE: Exactly so. That -- I thought the Court made it quite clear in Bill Johnson's that as long as the suit was an unmeritorious one, in the sense that it did not prevail, the board could afford the limited remedy that's available under the act.

QUESTION: Well, does that have the necessary effect of at least chilling some conduct that is protected by the First Amendment? I mean, it seems to me it does. You have to -- you would have to concede that it does.

MR. WALLACE: But it -- it's a far less daunting situation than what the Court was faced with under the antitrust laws in the Professional Real Estate Investors case.

QUESTION: Mr. Wallace, isn't it correct that the scope of chilling is limited to those with a retaliatory motive?

MR. WALLACE: Absolutely.

QUESTION: I thought it's where the board finds --

QUESTION: -- already chilled those cases.

QUESTION: -- to those where the board and not Federal courts on their own find a retaliatory motive.

MR. WALLACE: But, of course, the board's findings are subject to judicial review.

QUESTION: For -- so long as there's substantial evidence, which means -- you know.

MR. WALLACE: Correct.

QUESTION: All right. So --

QUESTION: In every 8(a)(1) case, the retaliatory motive is found by the board. That's part of the statutory proceeding, isn't it?

MR. WALLACE: That is correct.

QUESTION: The other parts of this statutory proceeding do not exclude the Federal courts from their business, do they, which this does by imposing penalties upon people who come to the Federal courts?

MR. WALLACE: Well, I think this Court's make it quite -- this Court's decisions make it quite clear that under the National Labor Relations Act, it is board rather than courts that have the responsibility of ruling about unfair labor practices.

QUESTION: We agree with that and the only issue is whether that statutory provision places within the board the power to impose this particular sanction for an unfair labor practice, a penalty for bringing a meritorious lawsuit.

MR. WALLACE: Well, make-whole relief --

QUESTION: Isn't the make-whole relief simply that they've said, since ours is a statute which foresees taking labor disputes out of the courts and putting them into the board, since that's why it was passed, we're going to say a -- a loser in a Federal lawsuit that violates that basic underlying purpose has to pay attorney's fees to the winner? Now, is there anything here other than that?

MR. WALLACE: Not -- not at all. That's -- that is what is at issue, and the -- the National Labor Relations Act authorizes the board, under this Court's opinion in Bill Johnson's, to afford that kind of a limited remedy --

QUESTION: Well, isn't what --

QUESTION: Is the courts' -- is the board's definition of a unmeritorious lawsuit simply one which -- in which the plaintiff does not get what the plaintiff wants. It's thrown out of court, so to speak.

MR. WALLACE: That's approximately it, yes, Mr.

Chief Justice.

QUESTION: How -- how would it vary? Why do you use the term approximately?

MR. WALLACE: Well, there can -- there can be cases in which a voluntary dismissal was taken with prejudice. Sometimes the question of whether it was an unmeritorious suit becomes a debatable question. But ordinarily it's one, as it was in this case, in which the courts have ruled against claims that the employer made.

QUESTION: Is -- is -- I'm sorry. Is there any authority? I mean, I thought, as a matter of proposition, maybe there would be some authority like a -- an electricity generating regulator would have said in certain kinds of lawsuits, you have to have fee-shifting. The SEC might say in certain kinds of lawsuits, certain companies have to pay attorney's fees. The barbers' regulator might say in certain union -- or certain -- certain instances the barbers have to pay the legal fees of somebody else. Is -- is there any comparable authority any other place that you've found?

It -- it doesn't seem to me an absurd proposition of law or of constitutional law that a regulator who's in charge of a particular group of individuals or businesses says in particular circumstances there will be fee-shifting. But maybe that's total --

maybe this is the only case that's ever come up.

MR. WALLACE: Well, we -- we didn't come up with analogies in which regulatory agencies do the fee-shifting. There are certainly many statutes that provide for fee-shifting. The Fogerty case discusses a number of them.

QUESTION: But they have to be very explicit because it's such an extraordinary thing. That's what our jurisprudence very clearly says. And here with -- with no more explicitness than there was in the case in Summit Valley, the -- the agency is assuming the power to fee-shift and to make the factual determination upon which the fee-shifting turns. I think that's extraordinary.

MR. WALLACE: Well, there is not a reference to fee-shifting as such in the National Labor Relations Act, but Congress did say in section 8(a)(1) that it shall be an unfair labor practice to an employee to interfere with, restrain, or coerce employees in the exercise of the concerted activity rights for mutual aid and protection that are guaranteed in section 7. And this Court in Bill Johnson's recognized that there had been a history of the use of the courts for that purpose.

QUESTION: Mr. Wallace --

QUESTION: In -- in a case like this, if we have essentially these facts, if the finding of the board was

is that the purpose of the employer in bringing the suit was because the employer's board of directors met and they say, we are being hurt in the marketplace, public opinion is against us, we must bring these suits to protect our position in the business community, I take it that is a retaliatory motive.

MR. WALLACE: Well, the retaliatory motive would be -- it would have to be shown that the suit was brought for the purpose of coercing, discouraging, suppressing, restraining the employees in the exercise of their rights.

QUESTION: Well, but you -- you know what I'm trying -- trying to get at. The -- the union is doing these to weaken the employer and the employer meets and says, this is hurting our business, it's hurting us in the marketplace. Is that retaliatory?

MR. WALLACE: Well, the -- the board addresses that question in light of all the circumstances of the case. To the extent that the suit was not baseless in law or fact that the employer brought --

QUESTION: Assume -- assume that there -- it's not baseless.

MR. WALLACE: That weighs in the employer's favor. There are other factors that weigh against the employer. In this --

QUESTION: But it can be retaliatory for the

employer to protect its business against suits by the union which are brought by the union for the motive of weakening the employer. That's retaliatory.

MR. WALLACE: Well, only if the employer has brought suits against the union or the employees. It certainly can defend against any suit --

QUESTION: No. It's been bringing suits in order to stop the other suits.

MR. WALLACE: Well --

QUESTION: Let -- let me ask you in a related vein. Maybe it's an unrelated vein. Can -- could Congress overrule Noerr-Pennington?

MR. WALLACE: This Court did not indicate in any way that it could not reexamine, modify the rules of Noerr-Pennington or of Professional Real Estate. The Court --

QUESTION: In other words, Noerr-Pennington doesn't have a constitutional underpinning.

MR. WALLACE: It -- it certainly construed the antitrust laws in light of the fact that those laws focus mostly on private conduct in the marketplace, not on petitioning for Government-imposed restraints, and that there was a need in construing them not to -- to allow improper chilling of the bringing of lawsuits or other forms of petitioning activity.

And in -- in Professional Real Estate itself, the procedural posture focused on the need for summary judgment to be available against a counterclaim for treble damages under the antitrust laws in circumstances in which the counterclaimant, after the underlying copyright infringement suit was found to be objectively reasonable, was saying, but I still need further discovery in order to ascertain the intent and motives of the original plaintiff in bringing the copyright infringement suit because it's my view that -- that they didn't really expect to prevail and that they were bringing it for anticompetitive purposes.

And the danger that the Court was addressing there was that much of the protective quality of the Noerr doctrine itself could be undermined if the original lawsuit that supposedly is protected could be chilled by the prospect of burdensome discovery and treble damages.

QUESTION: My -- my concern -- my concern is -- is this, is that the First Amendment has its own corrective counterspeech, but what the board has done here is it's defined retaliatory motive so broadly that it's taken away that First Amendment corrective. And that is itself a distortion of First Amendment principles which allowed the unions to bring these suits in the first place, it seems to me.

MR. WALLACE: Well, there -- there is a very limited remedy available here compared to the prospect that treble damages might be awarded on the basis of rather unpredictable findings about subjective motivation in bringing the lawsuit. And it -- it -- it's a remedy that's been applied against a background of what this Court in Bill Johnson's referred to as a -- a powerful tool. Powerful was the word the Court used.

QUESTION: Mr. Wallace, is retaliatory motive -- is that before us in this case? I mean, it may be that this Court, by saying that the board -- that there was, even in this case, insufficient evidence of retaliatory motive, but I didn't think that was the question presented here.

MR. WALLACE: I agree with you on that point, Justice Ginsburg.

QUESTION: Because on that, I was going to ask you, well, what is it that shows that this was in retaliation for violation of section 7 rights instead of being in -- in response to the union's desire simply to harass the employer? I think that there are very serious questions about that, but my view was of this case that -- that wasn't before us.

MR. WALLACE: I -- I agree with you completely. In fact --

QUESTION: I take it -- I take it the background of this case is that there was a finding of retaliatory motive and we have to make our decision based upon the way the board interprets retaliatory motive in cases such as this.

MR. WALLACE: Well, it's certainly part of the background of the case, but the Court did limit the grant of certiorari to whether these two decisions are compatible given the differences between the two acts.

QUESTION: And we have to defer both to the board's determination of what constitutes a retaliatory motive and, even more so, to the board's factual determination that retaliatory motive existed. All it takes is one witness who says it existed, and that would constitute substantial evidence. And if the board goes with that witness, the courts have to effectively penalize the company for seeking resort in the courts.

MR. WALLACE: Well, there is seldom direct evidence of that kind, although occasionally there is direct evidence of animus in the bringing of the suit. But the board has relied on a number of factors, which we've set out on page 47 of our brief, in various -- in various cases in seeing retaliatory motive. In this case one of the more persuasive ones was that the lawsuit was brought against parties that the plaintiff knew or should

have known did not participate in the allegedly unlawful conduct. They included as defendants unions that had not --

QUESTION: That's an issue that was raised by question 3 of the cert petition, and we didn't grant it.

MR. WALLACE: That's correct. That's correct. The -- the petition --

QUESTION: But -- but --

MR. WALLACE: -- was about the compatibility of the Court's decision in Professional Real Estate with what we had taken to be the Court's clear prescription of the limits on the remedy of the 8(a)(1) and unfair labor practice in the Bill Johnson's case.

QUESTION: Mr. Wallace, we are concerned with the Bill Johnson's case, and a question has been raised about where does the authority to come -- come from for this fee-shifting. It does appear in the Court's opinion in Bill Johnson's. If a violation is found, the board may order the employer to reimburse the employees, whom he has wrongfully sued, for their attorney's fees. Where did the Court come up with that fee-shifting? Was that something that the board had been doing? Did the Government propose it? But it's right there in the Court's of opinion that the proper remedy is fee-shifting.

MR. WALLACE: Precisely so. But the board had

been doing it regardless of the merits of the underlying lawsuit. The board had become so concerned with the use of the courts for retaliatory litigation that whether the lawsuit was meritorious or not, if it found that it was brought for the purpose of defeating section 7 rights, it was awarding fees. And the Court said, no, wait a minute. You can't do that and you can't enjoin lawsuits that are not baseless. The Court was really correcting the board and reining in that remedy in a way that the board has complied with.

QUESTION: Thank you, Mr. Wallace.

Mr. Baskin, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF MAURICE BASKIN

ON BEHALF OF THE PETITIÒNER

MR. BASKIN: Thank you, Your Honor. I would just briefly like to address the question of retaliatory motive, but only as I understood the Justices' questions to be does it suffice alone so that they -- the board can rightly ignore the question of the objective basis. And -- and the reason it does not suffice, among others, is perhaps looking at the 26 decisions Justice Scalia found, there's only one among them where there was no finding of retaliatory motive and there only because it was found that the action didn't relate in any way to the union activity.

QUESTION: There was only one -- one where what?

MR. BASKIN: Where there was no finding, where the board found no retaliatory motive. It found against the employers 25 out of 26 times. Once it found that the employer had lost the lawsuit, automatically according to the board, no merit. Even though they had all the best circumstances leading up to the loss, they lost. No merit.

Then the board proceeds to the retaliatory motive step supposedly going to protect employers, and all they say is does it relate to union activity. Well, if it relates, except for one case where it didn't, boom, you lose. The employers lose.

And what the result of that is, is that no employer can go to court if any sort of protected activity is even arguably involved because even if you convene a panel of experts, as BE&K did in this case, and go as far as you can to make sure you are not trampling on any employee rights, if you go to court, you will be found to have violated the law unless you can say with 100 percent certainty that you're going to win. And no one can say that.

QUESTION: I didn't know -- as long as you're finished, I thought the 26 cases were 26 cases in which they awarded attorney's fees.

MR. BASKIN: No. 26 cases with attorney's fees plus, attorney's fees --

QUESTION: All right. Now, I thought they weren't supposed to award attorney's fees or anything unless there was a retaliatory motive.

MR. BASKIN: Yes. The board found retaliatory motive.

QUESTION: All right. No, but I mean, of course they did. I mean, how many cases where there where people alleged retaliatory motive and they found the opposite?

MR. BASKIN: In the 26 cases --

QUESTION: No. Those are the ones where they won. How many did they lose? I mean, I don't understand this 26 case business. I thought the 26 cases were the ones that they awarded it in, and I thought they were only supposed to award it where it's retaliatory. So, it's hardly surprising it's retaliatory.

MR. BASKIN: No. As I understood Justice Scalia, and frankly our own research, is these are 26 cases that reached the board where the board could have gone either way, and every time, except for the one, they found no merit and retaliatory motive. And they did so almost automatically because of their misreading of a principle. We say a misreading. But either way, it's a bad principle.

QUESTION: Well, when you say the board could have gone either way, you don't mean that you know the evidence and that, in fact, on the evidence, the board could have gone either way. You simply mean that it's a case in which if the evidence showed there was retaliation, they could award the fees, and if the evidence did not show retaliation, they couldn't award the fees. Right?

MR. BASKIN: The 26 cases are --

QUESTION: So, all we know is that in those cases, they found retaliatory motive. We don't know that they're wrong.

MR. BASKIN: Yes, that's -- that's what we know. They found retaliatory motive. And the limited point that I'm making here at the end is that this retaliatory motive idea is no more -- not enough protection under the NLRA just as it is not enough protection -- and you've already found it to be not enough protection -- under the antitrust laws. And that's why the Professional Real Estate standard is the correct standard and it's the only one that protects employers' rights under the First Amendment.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Baskin.

The case is submitted.

(Whereupon, at 12:08 p.m., the case in the above-entitled matter was submitted.)