IN THE SUPREME COURT OF THE UNITED STATES

GRANITE ROCK COMPANY,
Petitioner
v. : No. 08-1214
INTERNATIONAL
BROTHERHOOD OF
TEAMSTERS, ET AL.

Washington, D.C.
Tuesday, January 19, 2010

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 a.m.

APPEARANCES:

GARRY G. MATHIASON, ESQ., San Francisco, Cal.; on behalf of Petitioner.

ROBERT BONSALL, ESQ., Sacramento, Cal; on behalf of Respondent Teamsters Local 287.

PETER D. NUSSBAUM, ESQ., San Francisco, Cal; on behalf of Respondent International Brotherhood of Teamsters.

C O N T E N T S

P R O C E E D I N G S

(10:59 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 08-1214, Granite Rock Company v. the International Brotherhood of Teamsters.

Mr. Mathiason.

ORAL ARGUMENT OF GARRY G. MATHIASON

ON BEHALF OF THE PETITIONER

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

This case involves two questions. Taking them in the order that the Ninth Circuit addressed them, we look first at whether the complaint contained sufficient facts to support a cause of action against a non-signatory international union that engages in a company-wide strike that violates the no-strike clause of a contract between the local and the employer.

This is not a strike for higher wages, better benefits; it's a strike for an amendment to the contract that would provide immunity for the international and other locals with regard to past wrongdoing. The --

CHIEF JUSTICE ROBERTS: It's a tort action, right?

MR. MATHIASON: It is a tort action by being

structured as inducement and interference. It is grounded in contract. Specifically, what you would look for, for jurisdiction, is to --

CHIEF JUSTICE ROBERTS: I suppose -- grounded in contract. I suppose the existence of a contract is an evidentiary matter that you have to establish, but the cause of action is still tort, and of course 301(a) is limited to violations of contracts.

MR. MATHIASON: Your Honor, 301(a) provides jurisdiction if there's a suit for a breach -- if there's a suit for violation of a contract, and that can be between a nonparty and a party, and then the contract is between the union and the employer.

CHIEF JUSTICE ROBERTS: I don't see how somebody who is not a party to the contract can violate the contract. They can be liable for all sorts of things, but I don't see that they can be liable for violating the contract.

MR. MATHIASON: Mr. Chief Justice, the concept that we are advancing is the plain language of the statute. Violation of a contract is right at the heart of this suit. You have for 150 years, jurisprudence where in enforcing contracts, which is the central mission of the statute, there --

CHIEF JUSTICE ROBERTS: I suppose you can have tortious interference with the contract. Can you, without the -- establishing the existence of a contract?

MR. MATHIASON: I can't imagine how you would. You might have a different --

CHIEF JUSTICE ROBERTS: Yes, I suppose that's --

MR. MATHIASON: -- kind of tort.

CHIEF JUSTICE ROBERTS: -- tortious interference with -- what is it, the ability to enter into a contract, I think, is recognized in some jurisdictions.

MR. MATHIASON: That's -- that's cognizable. That's certainly not here.

What we're doing is looking at a very minor adjustment in what would otherwise be a straightforward contract action; and that is that you have a situation where the international displaced the local after the contract was entered into, took control, and that control we manifested in several specific points within our complaint. And another way -- it's effectively an agency relationship between the -- at that point between the international and the local, but it's an agency relationship to control them

to effect the breach.

JUSTICE ALITO: Well, then you could have sued on an agency claim, couldn't you?

MR. MATHIASON: We did originally look at an agency claim. The problem with that is that under an agency claim, at the time the contract was formed, it's clear the local was not operating on behalf of the international. It was --

JUSTICE KENNEDY: Well, but I mean -- if you're coming up and saying, well, we have a principal-agent here, I could understand that, but that's I didn't think the question we are here to decide.

MR. MATHIASON: The question to decide is whether there's a cause of action.

JUSTICE KENNEDY: On -- on the tortious interference as to whether or not that's under 301. Sure, agent-principal, I understand that. But that -- that's a new argument so far as I'm concerned.

MR. MATHIASON: Your Honor, that argument really isn't new at all. With regard --

JUSTICE KENNEDY: Is it your briefs? Is it part of the question?

MR. MATHIASON: It is in our briefs. It is directly in our briefs. With regard to a footnote, we

actually say that --

JUSTICE KENNEDY: Well, but the -- the basic question is -- the Chief Justice began with it -- isn't this -- isn't this a tort action? You say, well, it's grounded in contract. I -- I really have a problem with the word "grounded." If you say it necessarily implicates or it's entangled, then I could understand that. But grounded in contract -- we ask what the source of the original obligation is. And these parties were not -- or the international was not part of the -- part of the -- part of the contract.

MR. MATHIASON: We take the position that the contract has within it the protection of the contract. In other words, if you have a party that is in a position to control one of the signatories to the contract and they cause that signatory to breach the contract, and -- then in every regard that is the equivalent of a violation of contract. They are the responsible party. They -- to --

JUSTICE BREYER: So suddenly it's all a lot of things that would have been pre-empted to go to the board. For example, you have a labor dispute on a construction business, and one union's out there telling the other: Keep on going. And then some other group comes in and says: Don't let them do that

to you. And another says: You don't have to do that under your contract. And there are 19 unions and they are all fighting about -- each other, and everybody is going to end up suing each other in Federal court.

I thought the purpose of the LMRA was to stop that. The purpose of the Labor Act, the Wagner Act was to stop that. They didn't want Federal courts any more than State courts interfering in that kind of thing. So why should we read an exception into this?

MR. MATHIASON: Your Honor --

JUSTICE BREYER: It would reproduce the situation that led all the Congresses and Presidents in the 1930s to stop it.

MR. MATHIASON: Your Honor, the very essence of section 301 was to deal with midterm contract strikes.

JUSTICE BREYER: Yes, that's right, and they said: Here's how we'll deal with that. We'll deal with that by giving the employer and the union a right to go into court and enforce the contract or get damages for its violation. That we figure furthers labor relations.

But it's pretty hard for me to see how it could further labor relations by letting any third party under the sun come in and say everything that

went on during a labor dispute is a -- is a tort in respect to the contract that might not even have been signed yet.

MR. MATHIASON: Your Honor, what you have just described in terms of the impact on labor relations is exactly what we are focused on here. This is not any party. This is the international that effectively displaces, takes control, tells the employer that they have the independent ability to resolve the dispute --

JUSTICE SOTOMAYOR: You are not arguing us creating Federal common law for tortious interference. You are saying they're the actual party to the contract. So which theory are you -- are you arguing?

MR. MATHIASON: We originally made the argument that they were -- they were the moving party, the undisclosed principal, that actually caused the contract to come into existence. We can't factually support that. They were upset with the decision to enter into the contract.

JUSTICE SOTOMAYOR: So you've given up the agency argument?

MR. MATHIASON: We abandoned it only with regard to formation. We absolutely did not and do not abandon that argument thereafter for the breach.

Thereafter, what happened is you have the international taking control of the local and causing the local to breach the contract. And that differentiates it from many, many other circumstances where you have third parties.

JUSTICE KENNEDY: Well, it seems to me the strongest argument you have is that this tortious interference is pre-empted under State law. So we have a -- a vacuum if we don't accept -- accept your view.

Let me ask you this: My understanding is -- correct me if I am wrong, please -- this Court has not said that they -- that the State law cause of action for interference with contract relations is pre-empted. This Court has not said that. Am I correct about that?

MR. MATHIASON: This Court would --

JUSTICE KENNEDY: The circuits have said that, but we haven't said that. Am I right about that?

MR. MATHIASON: Your Honor, with all due respect, I think this cause of action would clearly be pre-empted under Allis-Chalmers and subsequent decisions.

JUSTICE KENNEDY: No, no. I'm talking --

I'm talking specifically that -- interference with advantageous business relations or interfering with an existing contract -- that, we have not addressed in this Court.

MR. MATHIASON: In Allis-Chalmers, the Court did address the pre-emption doctrine and indicated that it would extend to torts.

JUSTICE KENNEDY: But -- but it did not -- it did not include interference with a -- with a contractual relation. We have not, as a specific holding -- tell me if I'm wrong. I will look at Allis-Chalmers.

MR. MATHIASON: No, Your Honor, I think you're correct, but --

JUSTICE SCALIA: Allis-Chalmers involved the two parties to the contract, a tort claim by one party to the contract against the other party to the contract, right?

MR. MATHIASON: That's correct, Your Honor.

JUSTICE SCALIA: And this involves a tort claim by one party to the contract against a third party. It seems to me it's quite -- quite different from Allis-Chalmers.

JUSTICE KENNEDY: It -- it would seem to me that one of your strongest points is that this is pre-

empted by State law. If -- if that's not true, then we would be deciding the case based on a premise that is -- is unclear.

MR. MATHIASON: Your Honor, we have taken the strong position that it is pre-empted by 301. It will involve an interpretation of the contract and an application of the contract. To view that as otherwise not pre-empted would be to start attacking 301 in terms of a uniform national system of administering contracts in Federal labor law.

JUSTICE STEVENS: Well, what is -- what is the contractual issue? What is the issue of interpreting the contract that this case presents if you let the 301 case go forward?

MR. MATHIASON: The issue would be whether the action of engaging in the strike violates the no-strike clause of the collective bargaining agreement.

JUSTICE STEVENS: Is there any dispute about that?

MR. MATHIASON: I think there is a dispute about that. I think there’s a dispute about the underlying existence of the contract, and then the -- the no-strike clause is complex.

JUSTICE SOTOMAYOR: How is that issue still alive? Wasn't there an NLRB order in May of '06 that

said -- or directed that the contract become effective as of July 2nd?

MR. MATHIASON: That's correct, Your Honor.

JUSTICE SOTOMAYOR: Did anybody appeal that order or challenge it?

MR. MATHIASON: Yes. That order was appealed to the Ninth Circuit, and the Ninth Circuit affirmed it. From our perspective, it's a final determination that July 2nd is the starting date of the contract. However, you still have a formation issue.

JUSTICE SOTOMAYOR: So did -- but how -- if you lost in your appeal to the Ninth Circuit and the contract is effective July 2nd, what issue remains for anybody to decide with respect to contract formation?

MR. MATHIASON: We --

JUSTICE SOTOMAYOR: Because there has been a final adjudication of the question of the effective date of the contract.

MR. MATHIASON: That's our position. We succeeded on that issue before the Ninth Circuit.

JUSTICE SOTOMAYOR: So now the only question that appears to be extant in my mind is whether or not there was a breach of the no-strike clause. So why isn't that subject to arbitration by the very terms of

the arbitration clause?

MR. MATHIASON: We agree that that would go to arbitration, and it's scheduled to go to arbitration between the local and the company. The second question that was brought to play in this particular case is whether the formation question goes to an arbitrator or goes to --

JUSTICE BREYER: Yes, but what -- there is no doubt about the formation, just as Justice Sotomayor said. There is a contract, the contract that was signed on December 17th. It is formed. You don't doubt that it's formed. They don't doubt that it's formed. And that contract has an arbitration agreement in it. And one of the questions that will be arbitrated, I take it, is whether that December 17th contract, because of its retroactivity provisions, provides damages for what happened in July. And part of that will require the arbitrator to interpret the December 17th contract --

MR. MATHIASON: Your Honor --

JUSTICE BREYER: -- to decide whether it does cover that event of July 2nd. Now, what has this got to do -- I mean, I would have thought -- is that -- I mean, what is your argument?

MR. MATHIASON: Your Honor, the critical

issue isn't the NLRB ruling, although that's going to have to be drawn upon. There is a denial that a contract was formed on July 2nd that continues to today. And the question is: Where does that get decided? Does it get decided in a court, as we did before with a unanimous jury verdict? Or does that now get vacated and sent to an arbitrator with no agreement --

JUSTICE GINSBURG: But why is there -- is there anything, any question about formation, given that there is a contract? The contract is retroactive to May, so if the contract is retroactive to May, then certainly a contract was formed and that issue is -- is academic, but --

MR. MATHIASON: You're -- Justice Ginsburg, this is right at the center of the analysis in that we contend, the company, that there was a formation on July 2nd. The other side contends that something happened on August 22nd that would constitute the formation event. There was no -- if our contract --

JUSTICE GINSBURG: But why does it matter? Why does it matter if we have a contract? A contract has been formed; everybody agrees about that. And everybody agrees that the effective date is May.

MR. MATHIASON: It's of critical importance

which contract was formed, because there's a quid pro quo in labor law that's critical, and that is that you agree to arbitration in exchange for a no-strike clause. That happened on the 2nd. If we had not had formation on July 2nd and the first formation was on the 22nd of August, then we would have been denied all of the benefit of the contract. We never would have made the same deal.

JUSTICE BREYER: So, why isn't --

CHIEF JUSTICE ROBERTS: I suppose it's a question for your friends on the other side whether they think the ratification or the contract that was entered into in December that's effective in May -- if that makes them liable for violating the no-strike clause, right?

MR. MATHIASON: Mr. Chief Justice, there's a critical issue in labor relations, and that is clearly when it's ratified brings into effect the no-strike clause. That's embedded --

CHIEF JUSTICE ROBERTS: So what happens if it's ratified retroactively? Is the no-strike clause in effect?

MR. MATHIASON: The no --

CHIEF JUSTICE ROBERTS: You want to say yes, right?

MR. MATHIASON: Well, it would be -- it would be completely imprudent for to us say that in May the no-strike clause was in effect. It wasn't, because the parties were still in a labor dispute and negotiating. July 2nd, that's when the no-strike clause came into effect.

JUSTICE BREYER: I think people are not communicating. Imagine on December 17th you and I enter into a contract and it's all written in red, all right? And one of these red sentences says: I will pay you $32 extra an hour from the moment that the blue contract went into effect. See?

Now, whether -- that moment when the blue contract went into effect is a question, isn't it, that we would turn over to the arbitrator, the person who is arbitrating the meaning and application of the red contract. That's simply a question of fact and contractual meaning like any other.

Now, what have I said that's wrong?

MR. MATHIASON: Your Honor, what's really central is the fact that when we signed in December, we signed the agreement of July 2nd. That is critical. If there had been no ratification on July 2nd, there would be no contract. And when the union signed, they take the position that they signed a

contract ratified on August 22nd. Those are radically different events, and the -- the real issue then is, where do you determine this core initial issue?

JUSTICE BREYER: Why is that a difficult issue? I can easily modify the hypothetical. The red contract says: Joe Smith will be paid $32 extra an hour from the moment when this red contract takes effect.

Okay? And, now we have an issue, when everybody's agreed, we'll send the meaning of the contract to arbitration. We'll send the application of the contract to -- to arbitration. One of the questions is: When, for purposes of the $32, did this contract, which we have admittedly signed, take effect? Why isn't that question for an arbitrator?

Is there any authority at all --

MR. MATHIASON: Yes --

JUSTICE BREYER: -- anywhere that says it isn't -- I can't -- I can't even know what authority -- what reasoning it would be.

MR. MATHIASON: Justice Breyer, the second contract, if it's the contract as proposed by the other side, never would have had a clause with that much money in it because we would have had to absorb for the strike. We signed the contract on the

assumption that it was the contract entered into July 2nd, and --

JUSTICE ALITO: Am I correct that neither you, neither Granite Rock nor the local, thinks that the December collective bargaining agreement really was fully retroactive? They don't think it was --

MR. MATHIASON: That's correct.

JUSTICE ALITO: -- it meant that the no-strike clause was in effect on the day when the old collective bargaining agreement expired, and you don't think that the new arbitration clause was in effect on the day when the old collective bargaining agreement expired, or do I not understand your positions?

MR. MATHIASON: Justice Alito, that’s exactly right. We agree with that. It wasn't. I mean, there is a crystal-clear understanding between the parties that the time of ratification is the time that the no-strike clause came into effect, and if there was no ratification on July 2nd, we wouldn't have signed the contract with the wage levels that are described in December. When we signed it, we signed it with the assumption that it was the contract that was formed on July 2nd.

And the issue of formation was never given to arbitration. The arbitration clause in this

particular case is what arises under the contract. It's a much narrower clause than this Court has seen in other cases and was not submitted --

JUSTICE SOTOMAYOR: But I keep going back to: That issue was decided. It was decided by the NLRB, and that was affirmed by a court of law, and so -- by the Ninth Circuit. I don't understand what the extant issue is. The -- the -- now what's left is applying that in arbitration to the question of the effectiveness of the no-strike clause.

But it has nothing to do with whether or not the issue of ratification has been decided and by whom.

MR. MATHIASON: Justice Sotomayor, we take the position, much like you've indicated in your hypothetical or actual description, that the NLRB decision is definitive. But there has to be a body, an entity, that actually adjudicates whether this is preclusive, and the question is: Does that go to a court, as it already has, with a unanimous jury verdict finding that it was ratified, or does it go to an arbitrator, who then looks at the NLRB decision and says, I guess I am bound by it?

We never agreed to submit the formation question to arbitration. There is no clear and

unmistakable agreement to do that, and so, consequently, it's the forum issue of where that's decided. We couldn't agree more that it's a futile act. In other words, the contract is now final and over, it starts on July 2nd, and we should go right into the issue of whether there's a breach of contract.

But there's this interim step because we don't yet have agreement from the other side that that issue is moot and resolved.

JUSTICE GINSBURG: If the contract had read, not simply "claims arising under this contract," but in addition said "including the formation or breach thereof," if the -- if the arbitration clause had included formation, then you would have no argument.

MR. MATHIASON: There would be no --

JUSTICE GINSBURG: It would go to the arbitrator.

MR. MATHIASON: Justice Ginsburg, there's no question that the parties could agree to have formation arbitrated if they do so in a clear and unmistakable way. The problem that we have here -- we agree with that -- the clause, if -- if the clause included formation, then that issue would go to the arbitrator. But the issue then becomes is there a

contract? And that's a threshold issue, that you have to bring life to the agreement to get subject matter jurisdiction.

JUSTICE BREYER: I thought of another way of putting this because I am having a hard time with it. You and I could do this, couldn't we? We could try to enter into a contract on May 1, and who knows what happens, we disagree about what happened, and by the way that had an arbitration clause in it. Now, whether -- since we disagree about it, that would go to the judge, whether we formed that contract with its arbitration clause, because everything's up in the air.

A year later, we enter into another contract, and what that contract says is, we are going to arbitrate every dispute between us, including that old dispute about whether there was that old contract, okay? And we could do that, and then you would -- you would certainly arbitrate the issue of contract formation, even for the old one, because we said we would do it, right?

MR. MATHIASON: If --

JUSTICE BREYER: Okay. So why isn't the December 17th contract that second contract in respect to the July 2nd?

MR. MATHIASON: Your Honor, if that had been, let's say, 4 years later, and we entered into a new contract willingly and getting the exchange, the no-strike clause for the arbitration, and that new contract said, this is going to deal with all past disputes, including prior contracts, fine.

When we executed that contract in December, we executed the contract that we believed was formed in July. There is no meeting of the minds. In other words, the union's execution was on a contract they say was formed on the 22nd.

There is a major, major issue here, and that is on July 2nd we made the concessions on wages, working conditions, and the rest of it, with the explicit understanding that it would be ratified at that time. Stipulated fact number 16, I think it's in the joint appendix 377, has that qualification in it.

If it wasn't ratified on July 2nd, then what happened is it was withdrawn, it exploded, there was nothing, there was nothing to be signed in December. We only signed what was agreed to on July 2nd and maintained that position because we believe we got the benefit and the protection of a no-strike clause all the way through that time period.

And so that is the critical distinction.

And now I couldn't agree more with this Court that it's an academic exercise to go to either an arbitrator or a court on whether it is in effect as of July 2nd. We believe the NLRB decision is preclusive in that regard.

But there is underneath it, there has to be a forum. There has to be somebody to say that. If an arbitrator got the case, looked at it, said, well, I'm not sure I really agree with the NLRB, and I think I'm going to decide it differently, and that then went to review in a court, and the arbitrator made a mistake of law, a mistake of fact, it's not completely clear to me that we would be able to come back to this Court and get it effectively changed.

We are saying that the issue of formation was submitted to the court, it was litigated.

And I would like to very much, Chief Justice, reserve the rest of my time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Bonsall.

ORAL EXAMINATION OF ROBERT BONSALL

ON BEHALF OF RESPONDENT

TEAMSTERS LOCAL 287

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

I'd like to turn to some questions that were just raised. This is not a question of whether there is a contract dated July 2nd, nor is this a question of whether there was a contract dated August 22nd. Those are issues of contract ratification.

There is only one collective bargaining agreement. That collective bargaining agreement was attached as an exhibit to the employer's first amended complaint. The trial court recognized this fact, in joint appendix page 231.

The contract was attached to the -- to the complaint lodging a breach of contract against this labor organization. There can be no doubt that that collective bargaining agreement says, on the very first page and the very last page, that the effective date is May 1st, 2004, and its expiration date is April 30th of 2008.

CHIEF JUSTICE ROBERTS: So, if there was a contract beginning May 22nd, then that included the no-strike clause?

MR. BONSALL: The issue, Your -- Mr. Chief Justice, would be whether the parties when they entered into that agreement and made that entire agreement retroactive to May 1st of 2004, whether the parties intended that the retroactivity clause would

apply for all purposes to any disputes arising to the parties. For example --

CHIEF JUSTICE ROBERTS: So -- so you don't think -- I guess this is following up on Justice Alito's question. You don't think it included the no-strike clause --

MR. BONSALL: Well --

CHIEF JUSTICE ROBERTS: -- for -- that would apply to July 2nd?

MR. BONSALL: We contend that it would not, and here's the reason why. If --

CHIEF JUSTICE ROBERTS: Well, if it doesn't -- I'm sorry to interrupt you. But if it doesn't include the no-strike clause and the question is whether the July 2nd one does, all this talk about the December agreement being retroactive to May is really kind of beside the point.

MR. BONSALL: Well, I think that it’s important for two reasons. First, factually, if the Court places itself in the position of the parties on July 1st, at that point in time some things are clear. The union and its members have been out on strike for approximately 3 weeks, and they have engaged in tough negotiations at the bargaining table trying to reach a new contract, because that old contract had expired

almost 2 months ago. And the parties reach a tentative agreement on all the wages, hours, and terms of conditions of employment. But then the parties also incorporate a retroactivity clause, to make sure that all these rights and benefits would inure to the union members beginning May 1, the day after the last contract expired.

The Court should ask itself that -- when the union and its members are engaging in lawful, protected, concerted activity, a strike, on July 1, did they intend to convert that lawful economic activity into a breach of contract?

JUSTICE ALITO: And you say no, but what do you say about the -- but you say that the arbitration clause was intended to be retroactive.

MR. BONSALL: Excuse me, Your Honor.

JUSTICE ALITO: But you say that the arbitration clause -- or do you? -- in the later -- in the agreement that was ratified in December was retroactive?

MR. BONSALL: No, I think --

JUSTICE ALITO: Neither one is retroactive?

MR. BONSALL: On July 2nd, as counsel has indicated, there is a real dispute, a continuing dispute, between the parties whether the contract was

ratified on July 2nd.

JUSTICE ALITO: No, I understand that. I've having difficulty -- can we just put the December -- in the view of both sides, can we just put the December agreement aside? It has nothing to do with the argument that's before us.

The argument before us has to do with the -- whether there was a ratification on July the 2nd.

MR. BONSALL: We think that the -- there is only one contract, Your Honor. That contract was executed on December 14th by management's representative and December 17th by the union's representative. That's the labor agreement. Now --

CHIEF JUSTICE ROBERTS: Well -- I'm sorry, but that's the central issue. Your friend says no, we had a contract on July 2nd, and that's for the court to determine, not the arbitrator, because it's a question of formation.

MR. BONSALL: Well, the fact that counsel has reiterated over and over again that this is a question of contract formation -- in fact there is no formation issue when the Court is being asked to decide whether there is an arbitral issue. The Court needs to look at the collective bargaining agreement; and the contract that was in effect at the time that

the party -- the union -- made its demand for arbitration clearly indicated that there was a contract in place, and it contained a -- an -- excuse me -- extremely broad arbitration provision, that requires that all disputes -- all disputes arising under the collective bargaining agreement would be subject to the grievance and arbitration provision.

JUSTICE GINSBURG: I thought that the union's initial position was that there was no agreement, and it refused to arbitrate. Isn't that what -- wasn't the union's refusal to arbitrate what precipitated this case?

MR. BONSALL: That is not correct, Your Honor.

On July 26th of 2004, the union was confronting a Boys Markets injunction that was being sought by the employer. The issue before the trial court was whether the union should be enjoined, its strike should be enjoined. And counsel for the union took the clear position that there was not a contract in place at that time on July 26th, but even if there was, the injunction should not issue because of this Court's decision in Buffalo Forge.

The matter that was continuing to be an issue in conflict did not arise under the collective

bargaining agreement because it involved other labor organizations and essentially a back-to-work agreement. So on July 26th, the union did take the position that there was no contract, but the reason why an injunction was not appropriate was because of Buffalo Forge.

I don't know if that addresses --

JUSTICE GINSBURG: I thought that at that time the union refused to arbitrate.

MR. BONSALL: No. There was no question about arbitrating anything. The employer didn't ask to have arbitration at all at the July 26th hearing. The only question at that point in time was whether there was ratification or not. The employer insisted that the union's representative had made a communication to the employer's representative that the contract had been ratified.

Having the witnesses for both labor and management in the courtroom, Judge Ware said, well, I'll take evidence regarding whether this communication occurred. Did George Netto represent to Bruce Woolpert that in fact a contract had been ratified?

That was the very narrow issue decided by --

JUSTICE GINSBURG: But, at least now that we

have had the NLRB's -- the NLRB has weighed in and said that there was a contract as of July 2nd, why isn't that conclusive?

MR. BONSALL: We think that there's still an issue that is being sent to the arbitrator, the breach of contract and damages, but as a precursor to that, we contend that the issue never should have been litigated at all by the trial court about whether there was formation, because there was no question of formation at that time. It was only a question of contract ratification, and that issue falls within the scope of the broad arbitration provision under the collective bargaining agreement. When we go back --

JUSTICE SOTOMAYOR: I thought you answered Justice Alito "no," but I thought his question was a very simple one. You're taking the position, I think, that there's no dispute that on -- in December a contract was formed.

MR. BONSALL: Correct.

JUSTICE SOTOMAYOR: It was made retroactive to a date before July. It started in May --

MR. BONSALL: Yes.

JUSTICE SOTOMAYOR: -- and it covers a time frame.

MR. BONSALL: Uh-huh.

JUSTICE SOTOMAYOR: The dispute between the parties is what that retroactivity under the contract means and which provisions are in effect or not. Isn't that what your argument is -- that this is not contract formation; this is a question of -- of the applicability of individual provisions to a set of facts?

MR. BONSALL: Absolutely correct, Your Honor. The employer is alleging that there is a breach of the no-strike clause. The union is alleging a defense to that allegation by asserting a merits-based issue regarding whether, in a certain narrow gap period, falling in between the effective date of the contract --

JUSTICE SOTOMAYOR: So your answer to Justice Alito should have been: We are arguing that the no-strike clause was not in effect, but we do take the position that the arbitration clause was --

MR. BONSALL: That's --

JUSTICE SOTOMAYOR: -- made retroactive.

MR. BONSALL: That's exactly correct, Your Honor. And --

CHIEF JUSTICE ROBERTS: And what do you expect the arbitrator to do? The arbitrator -- since you agree that there's a contract in effect --

MR. BONSALL: Yes.

CHIEF JUSTICE ROBERTS: -- the arbitrator is not going to decide whether the contract is there or not.

MR. BONSALL: He will not.

CHIEF JUSTICE ROBERTS: And the contract has a no-strike clause.

MR. BONSALL: That's correct, Your Honor.

CHIEF JUSTICE ROBERTS: So you expect the arbitrator to say you get the benefit of the contract that lets me decide something, and even though there's a no-strike clause in the contract, you want the arbitrator to say that no-strike clause is not operative on July 2nd?

MR. BONSALL: We expect the arbitrator to take a look at the facts that existed on July 2nd and make a determination whether in fact at that point in time the union has a meritorious claim that the contract was not ratified, and therefore the no-strike clause --

CHIEF JUSTICE ROBERTS: Even though -- I'm sorry to interrupt you. But even though the later agreement was that it would be retroactive?

MR. BONSALL: Absolutely. Both parties openly negotiated and hammered out and had their

representatives sign a collective bargaining agreement. The employer was entirely free, if it was inclined to do so, to suggest that they would not sign an agreement unless the union consented.

JUSTICE ALITO: So in substance, you -- you think that the arbitrator would decide the issue of contract formation, whether --

MR. BONSALL: No.

JUSTICE ALITO: Well, I thought you just said that the arbitrator would decide whether there was an agreement on July the 2nd.

MR. BONSALL: The arbitrator would not be deciding contract formation. The arbitrator would be deciding within the scope of the collective bargaining agreement whether the no-strike clause was effective to bind the employer -- excuse me -- to bind the union from a short period of time from July 2nd to August 22nd. That would be the only real claim, because the union actually -- there's no question -- was out on strike. This is not in dispute.

What the trial court did in this case was to usurp the function of the arbitrator. The parties selected one arbitrator.

JUSTICE GINSBURG: Well, perhaps you can clarify one thing for me. I thought that these two go

together -- two things that go together: One is the no-strike clause, and one is the arbitration clause.

MR. BONSALL: Yes.

JUSTICE GINSBURG: And you are trying to uncouple them, and so, even though one is quid pro quo for the other, you would say the union wants to keep what favors it, that is the arbitration clause, but reject what favors the employer, that is the no-strike clause.

It seems to me that if you have one, you have the other, but you can't say, oh, yes, we have the arbitration clause, but we don't have the no-strike clause.

MR. BONSALL: Yes, I -- I think this Court has addressed that very issue, Justice Ginsburg, in Drake Bakeries. An employer was confronted with a strike. The employer immediately went into Federal court and filed a breach of contract action against the labor organization, and it insisted that these two contract provisions, the right -- the no-strike clause and the grievance procedure, were inextricably tied. And this Court pointed out that they are not in all circumstances exact counterweights.

JUSTICE STEVENS: Well, they’re not in all circumstances, but will you respond to your opponent's

argument? Why in the world would they have signed on -- on July 2nd if they didn't think they were going to get the benefit of the no-strike clause?

MR. BONSALL: When they signed the agreement, Your Honor, they absolutely did get the benefit of it. There was no strike at all after August 22nd that was --

JUSTICE STEVENS: If they had the benefit of the no-strike clause --

MR. BONSALL: -- in violation of the collective bargaining agreement.

JUSTICE STEVENS: -- then any subsequent strike would have violated the contract?

MR. BONSALL: Absolutely. If there was a subsequent strike at any time in --

JUSTICE STEVENS: Well, there was a subsequent strike.

MR. BONSALL: There was not, Your Honor. After -- after --

CHIEF JUSTICE ROBERTS: Is that an issue for the arbitrator? Now that we know there was an agreement on July 2nd, is the question whether the strike continued or not for the arbitrator?

MR. BONSALL: I'm not sure that I understand your question. The -- I think the arbitrator will be

--

CHIEF JUSTICE ROBERTS: Well, you say there was no strike, and I -- I thought the other side said there was.

MR. BONSALL: There absolutely was a strike. It began in the early weeks of June.

CHIEF JUSTICE ROBERTS: Right.

MR. BONSALL: And it continued, actually, through September 22nd of 2004. That was the duration that the union was on strike.

CHIEF JUSTICE ROBERTS: Right, but their position is that there was a contract on July 2nd that included a no-strike clause --

MR. BONSALL: Yes.

CHIEF JUSTICE ROBERTS: -- that you violated.

MR. BONSALL: That's correct.

CHIEF JUSTICE ROBERTS: Okay. And your answer is, one, that there is no contract, right?

MR. BONSALL: Our defense to the allegation of the no-strike clause before the arbitrator would be that at that time the parties had not ratified the agreement, and that ratification did not occur until August 22nd, which also appears as a concession by the employer in paragraph 27 of their third amended

complaint. They also say that the contract was ratified on August 22nd.

JUSTICE ALITO: But that would be an issue for the -- you think that that would be an issue for the arbitrator to decide, whether there was a contract ratified on July the 2nd?

MR. BONSALL: Or August 22nd, yes, Your Honor.

JUSTICE ALITO: And if the arbitrator thought that it was in existence on July 2nd, then --

MR. BONSALL: Then --

JUSTICE ALITO: -- you would lose?

MR. BONSALL: I think that's correct, Your Honor.

JUSTICE ALITO: So that's an issue of contract formation; is it not? In substance it is.

MR. BONSALL: If I may finish?

CHIEF JUSTICE ROBERTS: Oh, sure.

MR. BONSALL: In substance it's contract formation if you can place yourself back in time on July 2nd or August 22nd. It is moot and entirely academic when the parties ratify an agreement at some point in time and sign the contract in December. There is no question of contract formation in this case. There’s only a question of contract

ratification during a very narrow period.

CHIEF JUSTICE ROBERTS: And that -- and that position depends upon your answer to Justice Ginsburg's question, that you are severing arbitration and the no-strike obligation?

MR. BONSALL: Under Drake Bakeries, we do not believe that we are severing at all. We think that when an employer brings a breach of contract claim in Federal court under a collective bargaining agreement that contains a broad arbitration clause, their remedy is to seek that breach of contract and damage claim before the arbitrator.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. BONSALL: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Nussbaum.

ORAL ARGUMENT OF PETER D. NUSSBAUM

ON BEHALF OF THE RESPONDENT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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

There are three basic points that I would like to discuss with the Court this morning with regard to the section 301 issue.

The first is that, in our view, the issue as to whether or not a tort claim can be brought under

301 begins and ends with the clear language of section 301, which talks about suits for violation of contract.

The second point I'd like to make is that allowing the tort action, as Granite Rock is urging, would work a big change in the structure that Congress has established by which it has decided that major issues of labor law, such as the weapons -- economic weapons that parties can use, should be decided by Congress through statute and by the National Labor Relations Board through the application of the statute.

JUSTICE KENNEDY: Do you take the position that the cause of action for interference with a contract has been pre-empted insofar as State law is concerned?

MR. NUSSBAUM: That's, of course, not an issue in this case because it was never attempted --

JUSTICE KENNEDY: What is your position on that point?

MR. NUSSBAUM: The law in most of the circuits is that any case which involves the interpretation of a contract is pre-empted. I'm not sure that this Court has --

JUSTICE KENNEDY: Do you -- do you -- does

your client take the position that that law is correct, that the Federal law has pre-empted State law actions for interference with -- with contract relations?

MR. NUSSBAUM: Yes.

JUSTICE KENNEDY: All right. So then you are submitting to this Court that the purpose of the National Relation -- Labor Relations Act and its effect was to give immunity to unions for intentional interference with contractual relations?

MR. NUSSBAUM: No, that is not what I believe happened.

JUSTICE KENNEDY: Well, isn't that the effect of your argument here?

MR. NUSSBAUM: No, I do not believe it is. Let me just first clarify something, that the pre-emption of State torts is not dependent on section 301. State torts for interference with contract would have been pre-empted prior, under Garmon or Machinists pre-emption, because of those two doctrines, that it would interfere with conduct that is arguably prohibited or arguably protected, or that it is in an area unregulated by Congress. But it doesn't leave the employer remediless in a situation like this, far from it.

This employer had a breach of contract action under the contract that it is pursuing --

CHIEF JUSTICE ROBERTS: Not against the international?

MR. NUSSBAUM: Not against the international. That's correct.

JUSTICE GINSBURG: If it's true -- if it's true, which we can take for purposes -- for the current purpose, that the international really did induce the local to continue the strike, you said there's no action in State court because that's pre-empted. Unfair labor practice proceedings is against the local, not the -- not the international. So there's nothing.

It is in your view, you -- you said, well, there’s relief against the local, but there’s no remedy at all against the international, even if the allegation is true that this strike would never have occurred if it hadn't been for the pressure from the international.

MR. NUSSBAUM: No, I disagree. There is an avenue that Granite Rock could have pursued but did not pursue, and that was to have filed a charge against the international with the National Labor Relations Board, which is the body that should be

making this precise decision as to whether this action by the international, an economic weapon, is permissible or is outlawed by the National Labor Relations Act. Granite Rock chose not to file an unfair labor practice, but it could have.

And we cited -- it's cited, actually, in the amicus brief by the AFL-CIO, the Paperworkers case, which demonstrates that an international union that interferes with the bargaining of local unions can itself be guilty of an unfair labor practice.

CHIEF JUSTICE ROBERTS: Counsel, I'd like your broader perspective as a representative of the international, because I think it's an important issue of labor policy. If I think that the cause of actions available under 301(a) and the pre-emptive effect of 301(a) ought to be coextensive, which -- which do you prefer, a broader 301(a) or a narrower pre-emption? I think it makes a difference.

MR. NUSSBAUM: I'm not -- I'm sorry -- I'm not sure I understand the question.

CHIEF JUSTICE ROBERTS: I think 301 -- I think whatever -- I don't think there should be a no-man's land between you can bring your action under 301 and it's pre-empted by 301.

In other words, if -- if you are right, that

they cannot bring a tortious interference action under 301, I don't think it should be pre-empted. If you are wrong and they can bring it, then I can understand that it should be pre-empted.

MR. NUSSBAUM: Let me -- let me try to answer your question, as I'm -- as I'm understanding it. First, the issue as to whether or not they could bring a 301 action under -- a tort action under 301, it was not pre-empted by 301.

The question is whether 301 allows that type of claim at all, whether Congress intended that, and I think the language of the statute, violation of contract, indicates no, because a violation of contract, you can only violate a contract against -- bring an action against someone who --

CHIEF JUSTICE ROBERTS: So it was pre-empted by 301, and they cannot bring it under 301?

MR. NUSSBAUM: Not a Federal court claim under 301.

CHIEF JUSTICE ROBERTS: Right.

MR. NUSSBAUM: A State claim, a State tort action under 301, would be pre-empted. What will happen then is -- is similar to what happened in the -- in the Rawson case. What happens if a State court tort is brought?

It would be pre-empted because of complete pre-emption because it involves a contract and the interpretation of a contract. That doesn't mean that the -- that it's gone. What the Federal court does then is look at the claim and say, with what was pled in the complaint, does that fall within the parameters of 301? And that's exactly what the Court did in Rawson. It said the State court tort action was pre-empted. Now, we have to look and see, is there a claim under 301?

CHIEF JUSTICE ROBERTS: And so if Granite Rock brought this claim in State court, you would say it's pre-empted by 301?

MR. NUSSBAUM: Yes, but we'd be in exactly the same position.

CHIEF JUSTICE ROBERTS: And then, if they turned around and brought it in Federal court under 301, you would say, no, there is no cause of action under 301?

MR. NUSSBAUM: Yes, you would get to the --

CHIEF JUSTICE ROBERTS: Okay.

MR. NUSSBAUM: You would get to the same result, and the process is exactly the same.

CHIEF JUSTICE ROBERTS: So it is in a no-man's land. Their claim for tortious interference

with contract just can't be brought anywhere?

MR. NUSSBAUM: It -- it -- for tortious interference, no, you cannot -- you cannot bring that claim, but what I was saying before is, it doesn't leave them remediless, even with regard to a claim against the international because a charge could be filed --

CHIEF JUSTICE ROBERTS: They could always go to the NLRB --

MR. NUSSBAUM: -- under 8(b)(3), and the board would decide, the -- the conduct in this context, and the board is always looking at the context of it, is this something which is prohibited, something which is protected, something which is unregulated? And it is the board that Congress entrusted that -- that job to.

JUSTICE SOTOMAYOR: What remedies -- I'm sorry.

JUSTICE STEVENS: What is the remedy --

JUSTICE BREYER: Just before you finish, Chief, is it all right if you -- I'm not quite clear on how this pre-emption works, and I perhaps didn't have it right. But imagine 301 had never been enacted. I thought, had that never been enacted, certain kinds of State claims, particularly tort

claims of interference with labor contracts, for example, might have been pre-empted anyway by the Labor Relations -- by the -- by the LMRA.

I thought that did the basic pre-emptive job. And then where it is pre-empted by the LMRA, 301 creates an exception to the pre-emption, so that it isn't pre-empted, if you have a suit. Now, my thinking is probably out-of-date and wrong, so I would like you to explain how it works.

MR. NUSSBAUM: I -- I think perhaps we are saying the same thing --

JUSTICE BREYER: No, no, because I think that your response to the Chief Justice's question, which is why I became uncertain, is that it is the LMRA -- not the LMRA at all that pre-empts tort actions and State activities that interfere with labor relations, as this might. It is, rather, section 301 itself that pre-empts it, and then it is odd because it pre-empts it, but it says, we won't give you any, and -- and that's why I became uncertain.

MR. NUSSBAUM: Let me try because I think I understand why I confused you. I think, before 301, a tort action would have been pre-empted by either the doctrines of Garmon pre-emption or Machinists pre-emption.

CHIEF JUSTICE ROBERTS: In State court or in Federal court?

MR. NUSSBAUM: In -- in State court.

CHIEF JUSTICE ROBERTS: But you bring it in Federal court?

MR. NUSSBAUM: No -- well, no, it would have been -- it would have been pre-empted in Federal court also. It would have been within the primary jurisdiction of the National Labor Relations Board. That's where -- who it goes to.

What I think has happened, Justice Breyer, is, since the enactment of 301, and particularly with this Court's doctrine of complete pre-emption for removal purposes, which I know there's some debate about, when courts look at State law torts, they tend to look at 301, rather than going back to Garmon and Machinists pre-emption.

JUSTICE STEVENS: May I ask you, what is the remedy for an unfair labor practice? Can they get a damage remedy?

MR. NUSSBAUM: Yes. It would be, first, a cease-and-desist order.

JUSTICE STEVENS: Right.

MR. NUSSBAUM: And then a make-whole remedy.

JUSTICE STEVENS: A make-whole remedy --

MR. NUSSBAUM: Yes.

JUSTICE STEVENS: -- for -- okay.

MR. NUSSBAUM: Yes.

CHIEF JUSTICE ROBERTS: What would the make-whole -- I gather a cease-and-desist wouldn't make any sense because this is over, but what would the make-whole remedy entail?

MR. NUSSBAUM: It would have to be a proof of damages that resulted from the unfair labor practice, from the unfair conduct, which, in this situation, would have been the interference into the bargaining process. And how the NLRB would decide what the damages would be, for the international as opposed to the local union, I'm really not sure, but there is certainly the capacity under the NLRA for there to be a make-whole remedy.

JUSTICE SCALIA: So you -- while saying that there's no cause of action for this tort claim, you nonetheless say that the tort claim can be considered an unfair labor practice by the labor board. Why does that make any sense?

MR. NUSSBAUM: Because what Congress -- what Congress did in 301 was to create limited jurisdiction for one type of claim and one type of claim only, violation of contract, breach of contract, an action

against the party that has the obligations under it.

But that doesn't mean that there isn't any claim outside of 301 against a third party. In this case, the third party is the international, and the claim could be made under the National Labor Relations Act. The Paperworker case is an example.

JUSTICE KENNEDY: But if it's outside 301, where does pre-emption come from, Garmon?

MR. NUSSBAUM: The pre-emption -- well, in this case --

JUSTICE KENNEDY: If I could interrupt just for a moment? Allis-Chalmers was 301. Allis-Chalmers says 301 covers contract, and, therefore, there's a pre-emption. So I take it you're not talking about Allis-Chalmers pre-emption. You are talking about Garmon or Machinists or something.

MR. NUSSBAUM: Well, both of them end up pre-empting a State law tort. In this case --

JUSTICE KENNEDY: But if you say both of them, then we're back where we started. If 301 pre-empts, then it should be within the ambit of 301's jurisdiction to the Federal court.

MR. NUSSBAUM: No, it pre-empts exactly for the purpose that this is an issue that should be decided by the regulatory agency, which Congress

entrusted with making exactly these decisions. What economic weapons can an international union, can a parent employer use in a labor dispute?

For the courts to be getting involved in that would be directly contrary to what Congress has been doing since 1935, of saying those decisions of economic weapons are not to be decided by courts applying common law tort principles. We tried that, and we didn't like it.

CHIEF JUSTICE ROBERTS: Well, but that applies in 301. They're not touching the contract. They're not touching the parties to the contract. This is outside the contract. So why should it be pre-empted?

MR. NUSSBAUM: It's -- well, again, the claim that they brought in Federal court was not pre-empted. It was a claim. You looked at the claim. You read the complaint, and you said, you don't have a claim under 301 because it's not one for violation of contract, good-bye.

CHIEF JUSTICE ROBERTS: I understand that.

MR. NUSSBAUM: End of it. The question that Justice Kennedy was -- was addressing to me was: Does that leave them without any remedy? And my answer is, no, it doesn't. Aside from the remedies they have

against the local, they also had a potential remedy against the international through the National Labor Relations Act.

And that -- that was the basic point that I was making.

JUSTICE SCALIA: Has -- has the board, in fact, declared a party who is not a party to the labor contract guilty of an unfair labor practice in prior cases?

MR. NUSSBAUM: The Paperworkers case that we cite -- the answer to your question is: I'm not aware of a case. The one we cited, the international was a party to the case. However, it's clear that the fact that it was a party to the case was not the determinative factor, because what the NLRB did was instruct the international union to strike the pooled voting provision that was in the constitution.

So they didn't say: It's just no good in this case where you are a party to the contract. They said: You can't do it in any situation. That clearly showed that the -- that the NLRB was focusing on the broader type of interference where they didn't have to be a party to the contract.

But even if the NLRB -- and I want to stress this -- were to find that there wasn't a remedy under

the -- the facts of the particular case, that would simply mean that it is protected conduct under the National Labor Relations Act. And the NLRB has made that decision, and it is the agency that should be doing it, rather than having courts get involved in this area of law making up rules, because when you talk about interference, as we know, the tort isn't for all interference; it's for improper interference.

As the Associated General Contractors indicates, that would call into play the courts looking at various factors such as societal values, and that's exactly what Congress didn't intend.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. NUSSBAUM: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Mathiason, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF GARRY G. MATHIASON

ON BEHALF OF THE PETITIONER

MR. MATHIASON: Categorically, Your Honor, the NLRB has no jurisdiction over this case. In footnote 18 of our reply brief, we recount the history. That Paperworkers' case that was just referenced, the international was a signatory. It was the exclusive bargaining representative, and, therefore, it had status under section 8(b)(3).

CHIEF JUSTICE ROBERTS: I'm sorry. Where is that again? Footnote 18?

MR. MATHIASON: It's footnote 18 of our reply brief, and we recount the history that was litigated both at the Ninth Circuit and beyond. There is no remedy before the NLRB --

JUSTICE BREYER: Well, that may be, but then you might have -- then you'd have a remedy in State court. I think the argument was that -- anyway, I have this argument: 301 doesn't pre-empt anything but the contract claim.

Now, go bring your claim in State court. You might have a good claim in State court that isn't pre-empted. Suppose one of their employees hit somebody over the head. You'd have a great claim, and that isn't going to be pre-empted. Now, yours might be, because there is a set of tort actions in State court that the labor acts pre-empt; in particular, those that involve conduct that is arguably protected or arguably forbidden by the labor acts.

So, if you fall outside that category, you are not pre-empted. And if you fall inside the category, you should be pre-empted; not by 301, but by the labor law which gave this kind of decision to the labor board to make. What is -- is that argument

sensible? Is it right? What do you think?

MR. MATHIASON: Justice Breyer, there is a fundamental aspect of that that's just not right, and that is that the conduct involved here was causing a violation of a contract. The international took control of the local and forced the breach. This is the -- this conduct would never be sanctioned if the jurisdiction of the NLRB had access to it, but the -- wisely, I think, the structure of the National Labor Relations Board is -- the 8(b)(3) remedy is against an exclusive agent. They have to be the bargaining agent. International is not the bargaining agent.

And so, consequently, if we accepted the position of the international, you would create a no-man's zone that would apply throughout this country, whereby collective bargaining agreements entered into by locals could be destroyed, violated, by an international that would choose to impose itself on the local and cause that to happen. Most internationals are responsible.

JUSTICE SOTOMAYOR: Do you seriously think that if that becomes a problem, that the NLRB won't declare it an unfair labor practice, or if they don't, that they won't go to Congress and say: There is a no-man's land; now give a remedy like you did in 301?

You're -- you're begging Justice Breyer's question, which is: If the law pre-empts this claim and it's doing so unjustly, who should make that determination? Should it be you in a State court, you in a Federal court, or should it be in the first instance the NLRB who says this is or isn't an unfair labor practice, and if it rules it's not because the law doesn't cover it, or it's not authorized to issue this --

MR. MATHIASON: Your -- Your Honor, I think it's well-established this is not an unfair labor practice, because you don't have jurisdiction under section 8(b)(3).

What is suggested here is that maybe there is a no-man's zone that Congress should go to and regulate, but if you back up to 1947 and the passage of section 301, it's inconceivable that in passing that statute Congress intended to leave all international unions, or anybody that controlled a party, completely free from any reach of law.

JUSTICE SCALIA: Why -- why isn't it under 8(b)(3)? How does 8(b)(3) read? What is it in 8(b)(3) that would exclude this from the labor board's --

MR. MATHIASON: Well, it is not an exclusive

representative. In other words, 8(b)(3) contemplates a bargaining obligation on the part of an exclusive representative, and the international is not in that capacity.

They had control, but they aren't designated in that manner, and there's not one NLRB case in the history of that agency that deviates from that, or we would have been on it immediately. And it just isn't there.

So we were looking at our options, and State court appeared to be very clearly pre-empted by Allis-Chalmers and a row of cases. So that meant that the Federal law, section 301, as suggested by Lincoln Mills, would absorb.

Please recognize that what we are seeking here -- the labels of tort and contract create, I think, a false distinction. We are effectively bringing a contract action for violation of a contract. The linkage is strictly to add in the international as the acting party.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:01 p.m., the case in the above-entitled matter was submitted.)