

SUPREME COURT OF THE UNITED STATES

No. 92-1550

ABF FREIGHT SYSTEM, INC., PETITIONER v. NATIONAL
LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT
[January 24, 1994]

JUSTICE KENNEDY, concurring.

I join the opinion for the Court and agree as well with the concerns expressed by JUSTICE SCALIA. Our law must not become so caught up in procedural niceties that it fails to sort out simple instances of right from wrong and give some redress for the latter. At the very least, when we proceed on the assumption that perjury was committed, the government ought not to suggest, as it seemed to do here, that one who violates his testimonial oath is no worse than the student who claims the dog ate his homework. See Tr. of Oral Arg. 42.

The Board's opinions show that it can become quite exercised about trial-related misconduct that obstructs its own processes. See *Lear-Siegler Management Service Corp.*, 306 N. L. R. B. 393, 394 (1992) (tolling the backpay award of an employee who threatened a witness, because such manipulation undermined "[t]he integrity of the Board's judicial process"). The Board seems more blithe, however, about the potential for dishonesty to disrupt the workplace. See *Owens Illinois, Inc.*, 290 N. L. R. B. 1193 (1988) (reinstating and awarding backpay to an employee who lied under oath, because the employer "failed to meet its burden of establishing that [the employee] is unfit for further employment"). True, the gravest consequence of lying under oath is the affront to the law itself. But both employer and employee have reason to insist upon honesty in the resolution of disputes within the

workplace itself. And this interest, too, is not beyond the Board's discretion to take into account in fashioning appropriate relief.

92-1550—CONCUR

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