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 SCALIA, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

It is ordinarily no proper concern of the judge how the Executive chooses to exercise discretion, so long as it be within the scope of what the law allows. For that reason, judicial dicta criticizing unintelligent (but nonetheless lawful) executive action are almost always inappropriate. The context changes, however, when the exercise of discretion relates to the integrity of the unitary adjudicative process that begins in an administrative hearing before a federal administrative law judge and ends in a judgment of this or some other federal court. Agency action or inaction that undermines and dishonors that process undermines and dishonors the legal system—undermines and dishonors the courts. Judges may properly protest, no matter how lawful (and hence unreversible) the agency action or inaction may be. Such a protest is called for in the present case, in which the Board has displayed—from its initial decision through its defense of that decision in this Court—an unseemly toleration of perjury in the course of adjudicative proceedings.

Michael Manso, the employee to whom the Board awarded backpay *and* reinstatement, testified in this case before Administrative Law Judge Walter H. Maloney the week of January 8, 1990. He was placed under oath—presumably standing up, his right hand raised, to respond to the form of oath set forth in the NLRB Judges' Manual §17008 (1984):

> "Do you solemnly swear that the testimony which you will give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?"

He then proceeded to lie to the administrative tribunal, as he had earlier lied to his employer, concerning the reason he reported an hour late for work on August 17, 1989. He said that his car had broken down; that he called his wife, who came in her pajamas to pick him up; that he drove the rest of the way to work, with his wife, and was stopped for speeding along the way. The employer produced the officer that stopped him, who testified with assurance that Manso was all alone; that Manso mentioned no car trouble as an excuse for his speeding, but simply that he was late for work; and that the officer himself observed no car trouble. Hearsay evidence admitted (without objection) at the hearing showed that an ABF official, after Manso told his breakdown story on August 17, drove out to the portion of the highway where Manso said he had left the disabled vehicle, and found it not to be there. Administrative Law Judge Maloney found that "Manso was lying to the Respondent when he reported that his car had overheated and that he was late for work because of car trouble"—which meant, of course that he was also lying under oath when he repeated that story. 304 N. L. R. B. 585, 600 (1991). The ALJ did not punish the false testimony, but his finding that the dismissal on August 17 was for cause had something of that effect, depriving Manso of reinstatement.

The Board itself accepted the ALJ's finding that the car-breakdown story was a lie, but since it found that the *real* reason for the August 17 dismissal was neither Manso's lateness nor his dishonesty, but rather retaliation for his filing of an earlier unfair-labor-practice complaint, it ordered Manso's

reinstatement. In stark contrast to today's opinion for the Court, the Board's opinion did not carefully weigh the pros and cons of using the Board's discretion in the conferral of relief to protect the integrity of its proceedings. It weighed those pros and cons *not at all*. Indeed, it *mentioned the apparent perjury not at all*, as though that is just part of the accepted background of Board proceedings, in no way worthy of note. That insouciance persisted even through the filing of the Board's Brief in this Court, which makes the astounding statement that, in light of his "history of mistreatment," Manso's lying under oath, "though unjustifiable, is understandable." Brief for Respondent 22, n. 15. (In that context, of course, the plain meaning of "to understand" is "[t]o know and be tolerant or sympathetic toward." American Heritage Dictionary 1948 (3d ed. 1992).)

Well, I am not understanding of lying under oath, whatever the motivation for it, and I do not believe that any law enforcement agency of the United States ought to be. Title 18 U. S. C. §1621 provides:

> "Whoever— . . . . . "having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will tesify . . . truly, . . . willfully and contrary to such oath states . . . any material matter which he does not believe to be true . . . . . "is guilty of perjury and shall . . . be fined no more than $2,000 or imprisoned not more than five years, or both. . . ."

United States Attorneys doubtless cannot prosecute perjury indictments for all the lies told in the Nation's federal proceedings—not even, perhaps, for all the lies so cleanly nailed as was the one here. Not only, however, did the Board not refer the matter for prosecution, it did not impose, indeed did not even

explicitly consider imposing, another sanction available to it (and not generally available to federal judges): denying discretionary relief because of the intentional subversion of the Board's processes.

While the Court is correct that we have no power to compel the Board to apply such a sanction, nor even, perhaps, to require that the Board's opinion explicitly consider it, neither was the Board's action in this case as eminently reasonable as the Court makes it out to be. Nor does it deserve the characterization of being "*well* within [the Board's] broad discretion," *ante*, at 8 (emphasis added). In my estimation, it is at the very precipice of the tolerable, particularly as concerns the Board's failure even to consider and discuss the desirability of limiting its discretionary relief.

Denying reinstatement would not, as the Court contends, involve the "unfairness of sanctioning Manso while indirectly rewarding [ABF] witnesses' lack of candor." *Ante*, at 7. First of all, no "indirect reward" comes to ABF, which receives nothing from the Board. There is a world of difference between the mere inaction of failing to punish ABF for lying (which is the "indirect reward" that the Court fears) and the beneficence of conferring a nonmandated award upon Manso *despite* his lying (which is the much greater evil that the Court embraces). The principle that a perjurer should not be rewarded with a judgment—even a judgment otherwise deserved—where there is discretion to deny it, has a long and sensible tradition in the common law. The "unclean hands" doctrine "closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U. S. 806, 816 (1945) (denying relief because of perjury). See H. McClintock, Principles of Equity §26, p. 63 and n. 75 (2d ed. 1948). And the Board itself has some-

times applied this sanction in the past. See, *e.g.*, *D. V. Copying & Printing, Inc.*, 240 N. L. R. B. 1276 (1979); *O'Donnell's Sea Grill*, 55 N. L. R. B. 828 (1944). In any case, there is no realistic comparison between the ABF managers' disbelieved testimony concerning motivations for firing and Manso's crystal-clear lie that he was where he was not. The latter is the stuff of perjury prosecutions; the former is not.

The Court is correct that an absolute rule requiring the denial of discretionary relief for perjury "might force the Board to divert its attention from its primary mission and devote unnecessary time and energy to resolving collateral disputes about credibility." *Ante*, at 7–8. But intelligent and conscientious application of the Board's supposed rule *permitting* denial of discretionary relief for perjury would not have that effect—and such application should probably have occurred, and should surely have been considered, in an obvious case such as this. Nor am I as impressed as the Court is by the Board's assertion that "ordering effective relief in a case of this character promotes a vital public interest." *Ante*, at 7. Assuredly it does, but *plenty* of effective relief was ordered here without adding Manso's reinstatement, including (1) the entry of a cease-and-desist order subjecting ABF to severe sanctions if it commits similar unfair labor practices in the future, (2) the award of back-pay to Manso for the period from his unlawful discharge on June 19, 1989 to the date of his subsequent reinstatement, and (3) the posting of a notice on ABF's premises, reciting its commitments under the cease-and-desist order, and its commitment to give Manso backpay. All of this would have made it clear enough to ABF and to ABF's employees that violating the National Labor Relations Act does not pay. Had the posted notice also included, instead of ABF's commitment to reinstate Manso (which is what the Board ordered), a statement to the effect that Manso's reinstatement *would* have been ordered but for his false testimony,

then it *also* would have been made clear to ABF and to ABF's employees that perjury does not pay.

I would have felt no need to write separately if I thought that, as the Court puts it, the Board has simply decided "to rely on `other civil and criminal remedies' for false testimony." *Ante*, at 8. My impression, however, from the Board's opinion and from its presentation to this Court, is that it is really not very much concerned about false testimony. I concur in the judgment of the Court that the NLRB did nothing against the law, and regret that it missed an opportunity to do something for the law.