

In the

Supreme Court of the United States

WINDWARD SHIPPING (LONDON))
LIMITED, ET AL.,)

Petitioners,)

v.)

No. 72-1061

AMERICAN RADIO ASSOCIATION,)
AFL-CIO, ET AL.,)

Respondents.)

Washington, D. C.

December 3, 1973

Pages 1 thru 34

Duplication or copying of this transcript
by photographic, electrostatic or other
facsimile means is prohibited under the
order form agreement.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE
DEC 10 4 19 PM '73

HOOVER REPORTING COMPANY, INC.

Official Reporters
Washington, D. C.

546-6666

IN THE SUPREME COURT OF THE UNITED STATES

-----:
WINDWARD SHIPPING (LONDON)
LIMITED, ET AL.,

Petitioners,

v.

No. 72-1061

AMERICAN RADIO ASSOCIATION,
AFL-CIO, ET AL.,

Respondents.
-----:

Washington, D. C.
Monday, December 3, 1973

The above-entitled matter came on for argument
at 2:26 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT S. OGDEN, JR., ESQ., 30 Rockefeller Plaza,
New York, New York 10020; for the Petitioners.

HOWARD SCHULMAN, ESQ., 1250 Broadway, New York,
New York 10001; for the Respondents.

- - -

C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
Robert S. Ogden, Jr., Esq., For the Petitioners	3
Howard Schulman, Esq., For the Respondents	19

* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-1061, Windward Shipping Limited v. American Radio Association.

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

ORAL ARGUMENT OF ROBERT S. OGDEN, JR., ESQ.,

ON BEHALF OF PETITIONERS

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

This case is before this Court on a writ of certiorari to review a judgment of the Court of Civil Appeals of the 14th Supreme Judicial District of Texas.

The Texas court held that under the rule of San Diego Building Trades Council v. Garmon that its jurisdiction was preempted by the National Labor Relations Act and that it could not adjudicate petitions seeking injunctive relief under state law against picketing by American unions which was directed against foreign flag ships and which protested that the wages of the crews on such ships were substandard. The picketing prevented the ships from being either loaded or unloaded.

The petitioners in this case are the Windward Shipping Company, Windward Shipping (London) Limited, which is a British Company. It is a managing agent of one of the picketed ships, and the other two companies are Liberian

corporations which own the respective vessels.

The respondents are six American unions representing licensed and unlicensed seamen.

The facts are as follows: Both of the ships are registered under the laws of Liberia and both fly the Liberian flag. Both are engaged solely in carrying cargo in international trade. The crews of both vessels are all foreign nationals, they are all represented by foreign unions, they work under wages and working conditions which are established in foreign ships articles, and which are in accordance with foreign collective bargaining agreements.

The respondent unions do not represent any of the officers or crews on the ships.

This picketing took place in the Port of Houston in October of 1971, and the pickets picketed at the gangway of the ships. The picketing was peaceful, there was no violence. One of the vessels, a ship called the S.S. Theomana, had docked in Houston to load a cargo, an export cargo which was bound for Bandar Shahpur, Iran, and the other, the Northwind had docked to unload a cargo of coffee and to take on a cargo of grain which was --

Q Is there any local labor involved in the loading or unloading? Any longshoremen?

MR. OGDEN: There would have been if the ships could have been loaded and unloaded. They were not able to.

Q I am trying to flush out the comparison with the Ariadne case, I think it is.

MR. OGDEN: Yes. Well, in this case the ships were not able to be loaded or unloaded because of the picket lines.

Q It never reached the point of using local longshoremen?

MR. OGDEN: They tried to. One of the ships, as a matter of fact, was partly unloaded and then the longshoremen, when the picket line came, they stopped the loading. They wouldn't cross the picket line. There was no --

Q I thought local labor was used to make the ships seaworthy, to trim the cargo by agreement?

MR. OGDEN: You are right. Eventually that was permitted as a concession by the unions.

Q To get the cargo trimmed so that the ships could be made seaworthy.

MR. OGDEN: So the ships could be made seaworthy, so they could leave the country.

Q Wasn't that done with local labor?

MR. OGDEN: That was done with local labor, that's right, yes.

If I understood your question, Mr. Chief Justice, the point is that there was no question in this case of the crew performing any labor on the shore side. So the effect of the picketing was that organized labor, including the longshoremen

1 and others, respected the picket lines and the unloading and
2 loading of the cargoes could not be accomplished with the ex-
3 ception of the fact that a slight concession was made to allow
4 the trimming of the vessels so they could eventually depart from
5 the United States without accomplishing either the loading or
6 the unloading of their cargoes. This concession was made after
7 the court action had been commenced and was a part of the court
8 action.

9 The picket signs read as follows: "Attention to the
10 public. The wages and benefits paid to seamen aboard the
11 vessel S.S. Theomana are substandard to those of American sea-
12 men. This results in extreme damage to our wage standards and
13 loss of our jobs. Please do not patronize this vessel. Help
14 the American seamen. We have no dispute with any other vessel
15 on this site."

16 In the picketing of the other ship, of course, the
17 other ship's name was substituted in the picketing signs. The
18 unions also passed out leaflets at the dockside, but the
19 pickets had been instructed not to answer any questions which
20 might have been asked of them as to the purpose of the picket-
21 ing, but merely to carry the picket signs and to pass out the
22 leaflets. The leaflets are printed on page 6 of our main brief.

23 In any case, the Texas court found that the picketing
24 was directed to allegedly substandard wages paid to foreign
25 seamen with a concurrent request to the public not to patronize

1 foreign ships.

2 The background of the picketing was that it was planned
3 at a joint meeting of American seamen's unions wherein it was de-
4 termined to conduct a campaign of peaceful picketing against
5 foreign flag ships. The picketing which is involved in this
6 particular case was related to other contemporaneous picketing
7 of foreign ships in Houston and in other ports.

8 For example, we brought to the Court's attention in
9 our supplemental brief filed just after our brief in support of
10 a petition for certiorari a reference to the Alabama state
11 decision of Mobile Steamship Association which was a case which
12 evolved out of the same picketing, and this is was picketing
13 which was taking place in Alabama at the same time. There were
14 other ships picketed in other states.

15 In summary form, the principal point of our argument
16 is that this Court has already determined in its previous de-
17 cisions that the act does not apply to labor disputes between
18 United States unions and foreign ships which relate to the
19 maritime operations or sometimes called the internal affairs.
20 Anyway, what people are talking about is the wages and condi-
21 tions of the crew.

22 These decisions culminated in the Ariadne case which
23 dealt specifically with picketing to protest substandard wages
24 and which set out to test what determines whether the act is or
25 is not applicable when such a dispute takes place between an

1 American union and a foreign ship. The critical inquiry is
2 whether or not the activities of the particular employees whose
3 wage levels are being protested are or are not within the mari-
4 time operations of the foreign ships.

5 A significant element of these previous decisions of
6 this Court, which I will refer to in more detail in a moment,
7 were the foreign relations implications of any holding that the
8 National Labor Relations Act was intended to govern in disputes
9 involving the internal affairs of foreign ships.

10 The foreign relations and the domestic economic impli-
11 cations of this particular case in the context of what it was,
12 a wide boycott of many, many ships, completely outshadow any
13 implications that would have existed in the Benz case, for ex-
14 ample, or in the Ingres case, which were picketing, which in-
15 volved a single ship.

16 Here we had unions picketing all foreign ships which
17 they could reach and claiming that the federal labor laws in
18 effect give them a protective right to use picketing to bar such
19 ships from our shores unless the foreign ships pay their crews
20 at wage levels which are the same as American wage levels.

21 I think certainly the foreign implications of this are
22 quite staggering, if you look at it from the point of view of
23 the foreign maritime countries who will be interested in this
24 decision.

25 Going to the cases which this Court has decided, the

1 first case was the 1957 case of Benz. I think all of the cases
2 have really gone back to the initial Benz decision and to the
3 reasoning in that decision. Benz involved picketing of an
4 American ship by various seamen's unions in a dispute which
5 centered on the wages of the crew. The unions in that case were
6 picketing to try and induce the foreign ship owners to reemploy
7 members of the crew at wage levels which were higher than those
8 which had been provided for in the ship's articles.

9 The Court in Benz stated that the question to be de-
10 cided was whether the labor act applies to a controversy involv-
11 ing damages resulting from the picketing of a foreign ship
12 operated entirely by foreign seamen under foreign articles while
13 the vessel is temporarily in an American port. The Court held
14 that it does not.

15 The union's argument that the case was -- the juris-
16 diction of the state court was preempted was rejected in Benz
17 fundamentally because the Court said that they found no indica-
18 tion in the legislative history that Congress intended the
19 National Labor Relations Act to apply to disputes between
20 nationals of foreign countries operating ships under foreign
21 laws and noted that the whole background of the National Labor
22 Relations Act is concerned with industrial disputes between
23 American employers and employees.

24 For us to run interference in such a delicate field of
25 international relations, held the Court, there must be present

1 an affirmative intention of Congress clearly expressed. It
2 alone has the facilities necessary to make fairly such an im-
3 portant policy decision.

4 It is interesting, and we pointed this out in our main
5 brief, that in the Benz case the unions expressed the same long-
6 term goals as have been argued are the basis of the picketing
7 in this case, namely that they were trying to protect the jobs
8 of American seamen by their picketing activities in Benz.

9 The Court -- I think the Benz case shows that the fact
10 that the goals of an American union which are -- the fact that
11 they are domestic goals does not mean that a dispute which
12 centers on the wages of the foreign crews of a vessel are
13 governed by the labor act. In other words, the goals of the
14 union are not to be confused with the subject matter of the dis-
15 pute.

16 The next case was the McCulloch case in 1963. That
17 case involved whether or not the NLRB was empowered by the labor
18 act to conduct an election on-board a foreign ship. The
19 specific question that the Court said was to be decided was
20 stated to be whether the act as written was intended to have
21 any application to foreign registered vessels employing alien
22 seamen. And the Court concluded, in accordance with the Benz
23 decision -- I think it just followed the Benz decision, it
24 followed from the Benz decision -- that the jurisdictional pro-
25 visions of the act do not extend to the maritime operations of

1 foreign flag ships employing alien seamen.

2 The third case was the Ingres case. Ingres, as Benz,
3 again involved picketing of a foreign ship by an American union,
4 and the same question was involved, namely whether the state
5 courts were preempted from adjudicating a petition for relief
6 filed by the shipowner. In the Ingres case, the union which
7 was doing the picketing had been organized primarily -- had been
8 formed primarily to organize to find seamen. And the picketing
9 in that case was part of their campaign to try and organize the
10 foreign seamen on the ship.

11 Again, as in Benz, and as in the case at bar, the
12 unions claimed in Ingres that their goals were protection of the
13 job opportunities of American seamen against the competition
14 which lower costs of foreign flag ships bring.

15 Q Mr. Ogden, is this the kind of thing that leads
16 to retaliatory action in home ports of these vessels?

17 MR. OGDEN: Well, I think that it would be highly --
18 it would be deemed by any foreign country to be highly provoca-
19 tive if it were thought that federal law protected the right of
20 a union to bar foreign ships from U.S. trade because the foreign
21 ships were not paying their crews the same wage levels that
22 American ships are. Now, whether or not and what form any
23 retaliatory action might take, it is probably a question for the
24 diplomats. But I think that you can't overlook the fact that
25 there is every likelihood that something would be done.

1 Q Do you still live in London?

2 MR. OGDEN: I do, yes.

3 Q Do you know of any action of this kind at British
4 docks in your experience?

5 MR. OGDEN: I have never heard of such a thing in any
6 of my experience, no, anywhere.

7 Q In any event, it is not in the record?

8 MR. OGDEN: I beg your pardon?

9 Q In any event, it is not in the record?

10 MR. OGDEN: No.

11 Q Is there anything in the record about the pay
12 received by the crews of this ship?

13 MR. OGDEN: There is quite a bit in the record on the
14 pay of the crews of the ship, but there is no suggestion --

15 Q Tell us about that a little.

16 MR. OGDEN: The pay -- it is true that the crews are
17 paid substantially less than American seamen. It is also true
18 that this is a -- I am not sure that I am not going outside of
19 the record here --

20 Q Is there anything in the record about their cost
21 of living at their home port or wherever they live?

22 MR. OGDEN: Well, no, there isn't, Your Honor, but
23 these are foreign seamen. I can say that it was testified to in
24 Congress, and I did make a citation, there is a citation to the
25 testimony in our main brief, that the wages on American ships

1 are normally about three or four times higher than those on any
2 foreign ships, that the American able bodied seamen for example
3 makes roughly the equivalent of what the captain of a foreign
4 ship makes.

5 Q These two ships were Liberian flag of convenience
6 ships, weren't they?

7 MR. OGDEN: These were Liberian flag ships, Your Honor.

8 Q Is it conceded that it was convenience?

9 MR. OGDEN: It certainly --

10 Q Was there anything argued that shows that if one
11 of those people --

12 MR. OGDEN: Do you mean were they eventually American
13 owned or something like that?

14 Q Yes.

15 MR. OGDEN: There is nothing --

16 Q How many ships flying the Liberian flag --

17 Q Were there any Liberians on the ship?

18 MR. OGDEN: No.

19 Q No members or anybody else?

20 MR. OGDEN: I very much doubt it.

21 Q I do, too.

22 Q Does the record show the nationality of the crew-
23 men at all other than that they were just generally foreign?

24 MR. OGDEN: Yes, there was -- quite a few of the crew-
25 men were from -- I believe were from the Sierra Leone, they

1 belong to the Sierra Leone's Seamen's Union. Some of the
2 officers of the crew were Greek.

3 Q Mr. Ogden, is there anything in the record that
4 would show what the effect would be if the ruling of the Texas
5 court became the law of the land? Would it dry up, as a prac-
6 tical matter, the use of foreign ships coming to our ports or
7 not?

8 MR. OGDEN: It would give to the American seamen's
9 unions the absolute power to bar any foreign ship from American
10 ports who did not pay their crews at American wage standards.

11 Q Well, not if somebody then decided that the labor
12 laws didn't reach -- all the Texas court said was it was pre-
13 emptory, didn't it? Didn't it arguably protect it?

14 MR. OGDEN: Well --

15 Q What if somebody decided that it wasn't actually
16 protected?

17 MR. OGDEN: There is that possibility.

18 Q Well, you could win this case and still lose in
19 the long run, because you have just begun to litigate. Suppose
20 the Chamber of Commerce came down with the same signs, do you
21 think the First Amendment has anything to do with this case?

22 MR. OGDEN: Well, I don't think it has anything to do
23 with this case, no, because the Texas court --

24 Q Well, not with respect to the issue here. But
25 eventually you may have to face certainly First Amendment

1 arguments.

2 MR. OGDEN: We may have to face First Amendment argu-
3 ments eventually.

4 Q Even if you won here on this issue?

5 MR. OGDEN: Well, that's right. It would have to be
6 remanded to the court below. It is two years since the picket-
7 ing took place.

8 Q Yes.

9 MR. OGDEN: And unfortunately if we win, as I think we
10 should, when two years have passed during which time the ships
11 don't dare come to the United States because there is an out-
12 standing threat in the record that any time they come they are
13 going to be shut down with picketing -- well, you just have a
14 very strange legal situation, because it is just too much delay
15 for the question, in the questions being decided.

16 Q Well, is there any way that your clients can get
17 this question of coverage decided? No one has yet decided
18 whether the act actually covers this, actually protects this
19 activity.

20 MR. OGDEN: Well, I dare say that if the NLRB said
21 that it did, we would be back here again.

22 Q I know, but I take it the Moore drydock formula
23 would have considerable significance for the board in that deter-
24 mination, would it not? I gather this Texas court said that the
25 criteria of Moore drydock was satisfied, but that doesn't mean

1 the board would agree with the Texas court, does it?

2 MR. OGDEN: Well, there isn't any question, Your Honor,
3 in this particular dispute that it was a primary dispute between
4 the union and the ship. There is no question here of a secondary
5 dispute.

6 Q Well, the only issue here is whether it is argu-
7 ably protected or arguably prohibited. But the ultimate reso-
8 lution of that question is for the board, if there is preemption,
9 isn't it?

10 MR. OGDEN: I think that there is no arguability here,
11 because I think in the Ariadne case the test is laid down that
12 has to be followed, and if you follow that test you come out --
13 if the Texas court had followed that test which was laid down in
14 that decision, it would have come out with the answer. And I
15 don't know what arguability means because --

16 Q Was there any way that you could get the question
17 to the board?

18 MR. OGDEN: There isn't any way you could take a
19 question of this sort to the board because the --

20 Q The Texas court said this was within the exclusive
21 jurisdiction of the National Labor Relations Board. Now, how do
22 you get there to find out whether the arguable case is so or not?

23 MR. OGDEN: Well, I guess one thing you can --

24 Q Is there a declaratory --

25 MR. OGDEN: There is no procedure for it. There is no

1 procedure for you to get there to find out. It is one of the
2 reasons why I said it is so hard to get relief or get even a
3 ruling on anything in these kinds of cases.

4 Q You could direct it to go there yourself.

5 MR. OGDEN: That's right. I think, where we are get-
6 ting over into a discussion here of the arguably subject rule
7 of Garmon now, I think that on a question of this sort, where
8 the question is one of the initial applicability of the labor
9 act to a situation, not whether a particular activity under the
10 labor act is protected or prohibited. I don't think the test
11 should be whether it is arguable, whether I can stand here and
12 somebody else can stand on the other side, and two can argue it
13 out, that there is preemption. I think the state court should
14 be allowed to make the decision of whether under the rules set
15 out by this Court as to whether or not the act applies. If the
16 act applies, all right, then it is arguable that the activity
17 may be protected or prohibited, and if the act applies then the
18 state court must step back. But if it doesn't, I think that the
19 state court should be able to determine under its own law whether
20 or not the petitioner is entitled to relief.

21 Q Well, why didn't the -- if the court thought that
22 this was arguably protective prohibited, why didn't you file a
23 charge that the union was committing an unfair labor practice
24 and say picketing for recognition for more than --

25 MR. OGDEN: All right, suppose we -- the only unfair

1 labor practice, we might have filed, say, an 8(b)(7).

2 Q Not an 8(b)(4)(b)?

3 MR. OGDEN: But we did file, one of the companies did
4 file an 8(b)(4)(b) charge. Mind you, the 8(b)(4)(b) charge,
5 that was withdrawn voluntarily --

6 Q Why?

7 MR. OGDEN: Well, I want to make very clear what that
8 charge was. It never alleged that the picketing directed
9 against this ship was a secondary boycott. That was alleging
10 that picketing directed against the shoreside facilities of a
11 third party, a shipping -- I forget the name of the company,
12 but it was some other company, some stevedoring company, that
13 amounted to a secondary boycott. It was never doubted that the
14 primary dispute was between the union and the foreign ships,
15 and I think -- I wasn't handling, we weren't handling the case
16 at that stage, but I would guess that the counsel who were
17 handling it decided that insofar as that picketing was concerned,
18 that the Moore drydock rules --

19 Q No other 8(b)(4)(b) possibilities?

20 MR. OGDEN: Well, Ingres held that the act doesn't
21 apply to organizing, picketing and so forth. It is quite plain
22 from Ingres that you could be thrown out. There would be no
23 jurisdiction.

24 Q Well, if you were thrown out for want of juris-
25 diction, then you would know that in the board's opinion the

arguable case went out the window, it didn't cover it.

MR. OGDEN: No, no. It might be a violation of 8(b)(7)(b). The union might be picketing in violation of 8(b)(7), but that doesn't do you any good if the board has no jurisdiction and if the act doesn't apply, and they would have to say -- and I agree with this -- they would have to say that under Inces they could not listen to an 8(b)(7) charge that was filed by --

Q So the act doesn't arguably prevent it.

MR. OGDEN: Well, it doesn't arguably cover --

Q You don't know what the board would have done?

MR. OGDEN: I think it is hard to say. If I haven't used up my time, I would like to save a couple of minutes for rebuttal.

MR. CHIEF JUSTICE BURGER: You have consumed all your time.

MR. OGDEN: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Schulman?

ORAL ARGUMENT OF HOWARD SCHULMAN, ESQ.,

ON BEHALF OF RESPONDENTS

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

Q I hope you are going to address yourself to the 8(b)(4)(b) and --

MR. SCHULMAN: I am going to address myself, if I can,

1 Mr. Justice Brennan, to all the issues.

2 Fundamentally, there is no disagreement between counsel
3 and parties here that the conduct engaged by the respondents
4 here is normal, typical, protected section 7 activity. It is
5 the added factor that the vessel which was involved is foreign,
6 and I would like to address myself to that because I think it is
7 how you approach the case.

8 Q It is a little more than that, unless you mean by
9 foreign, that by virtue of its foreign flag it has no American,
10 no seamen aboard who are paid by American standards.

11 MR. SCHULMAN: Yes, I think that is quite significant,
12 Mr. Chief Justice. American seamen, as every other American
13 worker, has been granted a section 7 right, and this Court has
14 held that in Benz clearly. And what these seamen are doing in
15 this case, as so distinguished from Benz and the other cases,
16 are as follows:

17 They are saying to the public at large, look, we were
18 90,000 seamen only a short time ago; as a result of the sub-
19 standard wages and conditions, we are down to 30,000 people;
20 these are one of the vessels, we don't want to represent the
21 people, we don't want to aid them, we are not seeking organiza-
22 tion, we are not seeking to apply the act, we are asking you,
23 the public, to ostracize them and patronize American ships.

24 Q Do the American Automobile Workers have the same
25 right to picket the docks if they were unloading Volkswagens?

1 MR. SCHULMAN: No, because I think in that particular
2 instance, Mr. Chief Justice, you would have a secondary boycott.
3 But they have a certain right to publicize, they have the right
4 to go on a media and communicate, as we did in this case, and
5 to hand out pamphlets and literature.

6 Q But not picket. Is that your answer?

7 MR. SCHULMAN: Well, if they would induce a neutral
8 then obviously it would be a secondary boycott. But addressing
9 my remarks to the issues here, first to answer some of the in-
10 quiries made by members of the bench, yes, the wage rates pro-
11 vided in this vessel, which are substandard, are found on page
12 four of our brief, \$68.10 to a seaman aboard this vessel for a
13 month's wages.

14 MR. CHIEF JUSTICE BURGER: We will pick up at this
15 point the first thing in the morning.

16 [Whereupon, at 3:00 o'clock p.m., the Court was in
17 adjournment.]
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

WINDWARD SHIPPING (LONDON)
LIMITED, ET AL.,

Petitioners,

v.

No. 72-1061

AMERICAN RADIO ASSOCIATION,
AFL-CIO, ET AL.,

Respondents.

Washington, D. C.
Tuesday, December 4, 1973

The above-entitled matter came on for further argument
at 10:09 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT S. OGDEN, JR., ESQ., 30 Rockefeller Plaza,
New York, New York 10020; for the Petitioners.

HOWARD SCHULMAN, ESQ., 1250 Broadway, New York,
New York 10001; for the Respondents.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in
Windward Shipping v. American Radio Association.

Mr. Schulman, you have 27 minutes left.

ORAL ARGUMENT OF HOWARD SCHULMAN, ESQ.,

ON BEHALF OF RESPONDENTS - Continued

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

Just before the recess at yesterday's session, discussion was had relative to the wages being paid the seamen aboard these foreign vessels, and I want to make it quite clear that that is not the issue in this case. The only purpose of that is to show the truthfulness of the picketing pursuant to this Court's dictates in Lynn v. Plant Guards.

The underlying issues in this case, as we see it, is really one of jurisdiction. We do not think there is an issue present here of access to court, but one of applying jurisdictional standards. As we see it, this case breaks down into a dichotomy on the one hand of what we refer to as conduct of the trilogy nature, meaning the Benz, Incres and McCulloch.

On the other hand, we have present this Court's holdings in Marine Cooks v. Panama and Ariadne as to whether it really is the exercise of section 7 rights, and I would like to direct my attention to that dichotomy.

It is clear that in McCulloch, Benz and Incres, present

1 there was an attempt and conduct by the unions to organize,
2 represent, in effect be the statutory bargaining agent for the
3 people aboard those vessels. And this court, in *Ariadne*,
4 summarized that conduct in the holdings and, contrary to what
5 my friend says, there were only certain maritime operations of
6 a foreign flag vessel which are without the reach of the
7 statute, and Congress never intended the statute to be applic-
8 able. And when the act was construed in the trilogy cases, it
9 was held that the construction there sought for, that requested,
10 as this Court said, would necessitate inquiry into the internal
11 discipline and order of a foreign vessel, and it was that
12 intervention and only that intervention that this Court felt,
13 and the holdings go, would bring about the possible conflict in
14 international law. Thus, as this Court went on further in
15 *Ariadne*, the act never had any intention to cover within its
16 coverage disputes between foreign ships and their crews, and
17 their foreign crews. That is what is referred to as to the
18 internal order and discipline.

19 The Court again, referring to the *Ariadne* case, said
20 the conduct there present belied any intent of involvement in
21 that relationship, and it is that relationship which could
22 possibly lead to the conflict with foreign or international law.
23 And in effect present in the trilogy cases was our exporting
24 of American law upon the vessel.

25 Now we turn to the other part of the dichotomy, the

1 activity of American citizens here in the United States in the
2 exercise of their section 7 rights, and that we have in *Marine*
3 *Cooks v. Panama* and in *Ariadne*. In those cases, we have
4 American citizens saying, paraphrasing, as follows: "Look, we
5 have had employment here in the United States for many, many
6 years, and we now find ourselves in the terrible situation
7 economically. For many reasons, truthful reasons, our employ-
8 ment has been taken from us here, right here in New York Harbor,
9 in Seattle Harbor, in San Francisco, and we ask you, as fellow
10 citizens, please don't patronize these vessels which we are
11 truthfully saying are taking our employment." That is section 7
12 rights as we see it, and that is the exercise by American seamen
13 as a class of working people, the rights to which they are en-
14 titled.

15 Now, within that dichotomy -- and that is what we are
16 faced with -- the state court has the jurisdiction. As this
17 state court below did, it took the case, and the court said
18 where does this proverbial act fall? Does it fall within the
19 trilogy conduct and therefore there is no labor board jurisdic-
20 tion, as *McCulloch* and *Benz* and *Incres* hold, or does it fall on
21 the other side of the orchard, which in effect is the preserva-
22 tion of their domestic employment?

23 The court made the decision. The court concluded that
24 the conduct engaged here was not trilogy conduct, and that under
25 those circumstances, having exercised jurisdiction and having

1 found that it is activity to protect their domestic employment,
2 the court concluded that, based upon this Court's decision, such
3 conduct as suggested is actually protected conduct and certainly
4 arguably protected.

5 Q You spoke, Mr. Schulman, of the message that
6 picketers were undertaking to give to Americans, that is "don't
7 patronize these people." But would it be fair to say that there
8 was another message involved here to foreign flag ships, that
9 is "conform to American standards or keep out of our ports"? Is
10 that the other message?

11 MR. SCHULMAN: No, Mr. Chief Justice. What the
12 message --

13 Q If they conform to American standards, you would
14 then -- are you saying that you then have no basis for picketing?

15 MR. SCHULMAN: No, what I am saying is if we as
16 American seamen have our employment opportunities then we have
17 no protest. Now, what we are seeking is American opportunities
18 -- to give a classic example, yesterday, in reference to a
19 question referred to my friend, he mentioned a case in Mobile,
20 Alabama, before the Alabama Supreme Court, and in that case the
21 record shows, Your Honor, while these people were protesting
22 for their loss of employment, two American vessels were laid up
23 looking for work. This is what we are talking about. We are
24 not seeking under any circumstances to tell to any foreign
25 nation that they cannot come to the American ports. What we are

seeking is a protection of our employment, our domestic opportunities to give us an economic opportunity. And I realize the line runs fine, but we are also cognizant, equally so, of repercussions. We recognize that Congress possesses the power to, if it sees fit, for example, recently in the railway labor industry, where the given right, federal right to strike was exercised, and Congress, recognizing a particular situation, moved to it and passed legislation accordingly. We are not engaging in that conduct, Your Honor. And even more so than in the famous Claude Everett board holding, in the exercise of the section 13, the right to picket. There is a rippling effect.

Q Well, let's get back to my question. If the foreign ships in question met American standards, do you say, do you concede that you would not have any right to picket them?

MR. SCHULMAN: Well, I would say that they would not substandard, would not be truthful, Your Honor, and we have got to have truthful picketing. That is the direct answer.

Q Then from that, on the basis of what either you said yesterday or perhaps what your friend said, would you say that it is a fact that no country in the world having maritime activity meets our standards of pay?

MR. SCHULMAN: I would say -- I don't know if no country. I would say we enjoy one of the highest standards of living, and that is what we are referring to.

Q Isn't it almost so widely recognized in maritime

1 circles that it is to be judicially noticed that no one --

2 MR. SCHULMAN: I think it is a fair statement.

3 Q -- no country in the world matches our standard
4 of living?

5 MR. SCHULMAN: That is a fair statement.

6 Q Then that means that no ships of any country in
7 the world can come into our ports free of this kind of demon-
8 stration, is that not so?

9 MR. SCHULMAN: That is an assumption I would not ac-
10 cept because if any responsible American citizen exercised that
11 power, that is a political question, and I think Congress would
12 move to the issue and properly so, and this picketing demon-
13 strates, Your Honor, and contained in our brief is a Port of
14 Houston Authority case, and in there the Court refers to -- and
15 I will refer to it very shortly -- there are 49 docks in that
16 harbor, legions of ships --

17 Q And now you are talking about the economics of
18 it.

19 MR. SCHULMAN: No. There are three vessels being
20 picketed, that is what I am saying, Your Honor. The situation
21 come about any more so than if you have domestically in the
22 United States steel mills and organized steelworkers stand in
23 front of another place and say in effect to them that their
24 standards are below -- the argument I think is analogous, for
25 example, and then you could have no more steel mills unless

1 they pay those prices. I don't think that is the fundamental
2 argument. I think fundamentally that is more addressed to a po-
3 litical argument.

4 As I view section 7, Congress said, and it is announced
5 in this Court's Benz decision, that when they passed the act
6 they gave the American worker rights of dignity and economic
7 rights to be exercised here in the United States. And Congress
8 has taken away rights when the exercise has become extreme and
9 people act irresponsible. There is nothing in this case, Your
10 Honor, to indicate in any stretch of the imagination of irres-
11 ponsible conduct, particularly in light of this record of a loss
12 of employment and the literal fight of these American seamen to
13 preserve those which are remaining. That is the issue involved.

14 To an nth degree, yes, of course, any power possessed
15 by any worker in the United States as a combination may con-
16 ceivably lead to a result which may not be beneficial. But is
17 that not an issue for Congress to determine, rather than a
18 question for our judiciary to determine? If that occasion ever
19 arises -- it has not arisen, and that is the important issue.

20 Q Who decides now which foreign flag ships are to
21 be picketed and which ones are not to be?

22 MR. SCHULMAN: I would say the issue resides where
23 there is the greatest degree of unemployment and lack of oppor-
24 tunities. If it happens to be in a particular harbor, like in
25 Mobile, where there are legions of American seamen unemployed,

1 and it may be that the activity may take place frequently there,
2 and perhaps in the Port of New York no activity because of
3 employment situations. I think it is no different than you
4 have what we refer to as area standards picketing in the United
5 States unrelated to maritime. Where does that take place?
6 Maybe it is down in the South, where there are unorganized
7 people. This is what I am referring to in our case. It takes
8 place in instances, and that is what has taken place, where
9 there has been unemployment.

10 And further significant to that, Your Honor, questions
11 have been raised about the Mobile case, number one, questions
12 have been raised about two other cases, appearing in the
13 government's amicus brief, refer to one in Wisconsin and one
14 in Minnesota, and in all those instances, if the Court please,
15 the record shows some people cooperated and some didn't. Some
16 longshoremen worked and some didn't work, and that is the
17 record.

18 What I am saying is that the thing we have here, as I
19 view it, of one the one hand of the right of American seamen,
20 of a federal right given to him. We were not excluded as a
21 class in section 7 rights. Congress did not say everyone is
22 entitled to section 7 rights except American seamen. Congress
23 gave us the rights like everybody else. And if we are going to
24 be excluded, let's be excluded by Congress where we have an
25 opportunity to argue the merits of the case. And let's not be

1 excluded by the courts.

2 This is what I find the heart of the issue, and what
3 is taking place, as I see it, is a steady attempt by these in-
4 terests to do just that, take away our section 7 rights and our
5 right to strike and protect our interests. Let me give you an
6 example of what I am referring to.

7 The Port of Houston Authority case, one of the steps
8 they did, they went into the federal court in Houston and said
9 to them, look, you are going to make an exception to Norris-
10 LaGuardia. What is the exception? The exception is interna-
11 tional treaties, international relations, and all our ports
12 will be tied up. The District Court, and the Circuit unanimously
13 affirmed, and this Court denied Circuit and said, look, don't
14 come to us with that, go to Congress.

15 Now, let's see the second step they are doing. They
16 then turn around to us here and say, look, we have articles,
17 ship's articles, whatever they are referred to, they are being
18 interfered with. We want to export that law into your juris-
19 prudence and give honor to that, and this Court, in the *Urvic*
20 case has said we won't do that, this is our jurisdiction.

21 Now let's move to the third area where they are say-
22 ing it. They are then saying carve out an exception from
23 section 7. Everyone in the United States is entitled to
24 section 7 rights but not the American seamen. Carve that out
25 in the interests of international relations. And then they hit

1 what they think is their last point, and they say in the Merchant
2 Marine Act of 1970, Congress passed some legislation to help the
3 American seamen, therefore that should be justification and im-
4 plicit repeal of section 7 rights. And this is what they are
5 faced with. We are faced with the right as American seamen, and
6 we have done good service as American citizens and I need not
7 plead that record. We have lost our jobs and we have come to
8 the only place we can come, the American public, and we have
9 said to them, please help us. Here is the truth and here are
10 the facts. And this is what we think we have a fundamental
11 right to do, aside from constitutional issues. And the oppo-
12 sition has the opportunity and access to the courts. If we are
13 engaging in conduct of the trilogy nature, then we should be
14 enjoined. We make no bones about it, that we are not. In
15 fact, we want to ostracize these vessels, we want no part of
16 them.

17 Really, what the case boils down to in the final
18 analysis is do American seamen have section 7 rights or are
19 they excluded. I don't think they are excluded and I don't
20 think any court in our jurisprudence, in our country should
21 make that determination, and I say that most respectfully.

22 This is a right we have had, and this is a right, if
23 we are going to lose it, let's lose it in the halls of Congress
24 where we can make our points.

25 Yesterday, Mr. Chief Justice, you asked me about an

1 analogy of the United Automobile Workers putting up a picket
2 line, and I think the proper association of that is as follows:
3 Assuming Volvo moved their factory to Virginia and paid the
4 substandard wages, I think the United Automobile Workers would
5 have a perfect right to protect it, and that is what is happen-
6 ing to us. They are moving these factories in on us day after
7 day, and we have no employment. And this is the thrust of my
8 argument.

9 There is one last argument -- it is not really an
10 argument, it is a request to make, and I am actually a little
11 embarrassed to make it. Last Thursday, I returned to my office
12 and I was served with a supplemental memorandum from the
13 Solicitor's office as amicus, and I called the clerk's office
14 on Friday to protest, the fact that I know no provision in any
15 rules for this, there was no leave made to this Court, and no
16 leave was granted, and equally significant, in plain fairness,
17 and fair play to have an opportunity to reply, and I was
18 directed by the clerk to make my request to the Court, and I
19 find unusual circumstances.

20 And my first request is just fundamentally either that
21 supplemental memorandum be rejected as not following the rules
22 or have a reasonable opportunity in fairness to reply to it.

23 As to the last issue in the case -- and not really in
24 the case -- the issue with respect to our constitutional rights
25 to picket, that was not tried below, although we pleaded it.

1 We have no reason to believe that the Texas courts would deny
2 us our constitutional rights. But we do believe, however, that
3 present in this case is activity which was found by the court
4 below falls in the orchard, as I call it, of section 7 pro-
5 tected activity, and it is section 7 protected activity which
6 is actually preempted and which the Court may not go into.

7 I have nothing further to add, Mr. Chief Justice.

8 Thank you.

9 MR. CHIEF JUSTICE BURGER: Mr. Schulman, if you would
10 like to respond, you may do so in a week or ten days, of course
11 sending a copy to your friend.

12 MR. SCHULMAN: Yes. Thank you, Mr. Chief Justice.

13 Q I gather, in responding, you are not withdrawing
14 your application to us to reject --

15 MR. SCHULMAN: No, I am not, Your Honor, because I
16 think it is essentially a political argument contained in that
17 brief.

18 Q Well, your ground I gather is that there is
19 nothing in our rules which support the Solicitor General's
20 filing of that?

21 MR. SCHULMAN: No. No. There was no authority. This
22 was filed 90 days after the rules provide.

23 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The
24 case is submitted.

25 [Whereupon, at 10:28 o'clock a.m., the case was
submitted.]