In the

# Supreme Court of the United States



AMERICAN RADIO ASSOCIATION, AFL-CIO ET AL,

PETITIONERS,

V.

MOBILE STEAMSHIP ASSOCIATION, INC., ET AL

No. 73-748

Washington, D. C.
October 21, 1974

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Washington, D. C.

Monday, October 21, 1974

The above-entitled matter came on for argument at 1:32 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:

HOWARD SCHULMAN, ESQ., 1250 Broadway, New York, New York 10001 For the Petitioners

FRANK McRIGHT, ESQ., 1101 Merchants National Bank Building, Mobile, Alabama 36602, For Respondent Mobile Steamship Association

ALEX F. LANKFORD, III, ESQ., 3000 First National Bank Building, Mobile, Alabama 36602 For Respondent Robert E. Malone

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in American Radio Association versus Mobile Steamship Association.

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

ORAL ARGUMENT OF HOWARD SCHULMAN, ESQ.,

ON BEHALF OF PETITIONERS

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

I find myself back again in a return voyage, it appears like, on behalf of Merchant Seamen. Of course, initially I was here in behalf of questions of their rights under the Federal Labor Act and we have an additional point today which is presented to the Court of the Free Speech First Amendment rights.

We had intended to devote substantial time to both arguments. However, in the light of an unfortunate repetition by the Solicitor General, again, without leave of this Court and for submitting an untimely brief, as he did in Windward, we are going to be compelled to devote a little more time to the presemption argument than we had originally contemplated.

Present here, as distinguished from the Windward case, where, in Windward, the claim was by the ship upon shipowner.

The conduct of the unions there interfered with the ship's contract among its seamen and its internal relations and for that reason, this Court determined that it fell within the parameters of the Burns Doctrine where the Act was not applicable.

Now, we have a totally different picture here. In this instance, the Association of Mobile Stevedoring Employers brought the action in the Alabama State Court alleging almost the verbatim practical provisions of Section 8B4 of the Act that these pickets had directed their activities to the stevedore employees of the Association, caused them to breach their agreements, induced them not to go to work upon this foreign vessel and claimed at that time that, therefore, they were entitled to an injunction.

Now, when we look at both the complaint of the Respondent -- there is an additional Respondent in this case and there is an additional Respondent, I don't want to forget him, a farmer who had some produce complained that his right to do business was interfered with insofar as the Longshoremen wouldn't load his grain aboard the vessel, or unload his grain to put aboard the vessel.

When we look at the final analysis of what has happened in the factual context of this case, you have the Alabama State Court, not passing upon the merits in the Windward case of the internal economy of the vessel, the

foreign seamen, their contract with their shipowner, but, on the contrary you have the Alabama court regulating the employer-employee relations existing between the Longshoremen American Association Employer and its employees and the American Seamen Unions and I say, in that respect, this is conduct when you examine the Congressional scheme which was left exclusively to the competence of the Labor Board.

Now, there are many illustrations of this pattern of conduct. It is not unique. There are many areas where, under the congressional scheme as determined by this Court and so applied, where the underlying dispute, the causes of dispute, the primary dispute is without the competence of the board.

Nevertheless, other aspects of the dispute remain within the sole and exclusive authority -- and I'd like to just comment on a few of them, if I may.

Now, for example, the Broome-Hattiesburg case where in that instance the Labor Board had determined on the standards of commerce that the parties in that instance did not meet the requirements, the quotient for commerce and determined under those circumstances that there was no jurisdiction over the primary dispute, there was no commerce.

Nevertheless, this Court held in that case that conduct complained of -- the secondary conduct within the

Congressional scheme of regulating conduct of American employers and American unions were within the exclusive province of the Board and we have had three cases in Maritime to the effect -- and Mr. Chief Justice may recall one of them. He heard one of the arguments in the Grainhandlers case against the NLRB.

The first one, however, comes out of the Fourth Circuit and you get the identical pattern that Longshoremen in that case in Local 1438 NLRB, the Longshoremen in that particular case were picketing the vessel, claiming political reasons. But one of the issues presented there was whether or not the Board, in this instance, because it was a foreign flag ship owner, had competence to process such a complaint or such a challenge.

And the circuit held yes. Now, what the conduct there complained of and what the conduct the Board was seeking to remedy was not the internal affair of the vessel, pointing out clearly that that is what Benz, Incres, and McCulloch had stood for at that posture and time. But on the contrary, the relationship existing among American employers, among American unions and American workers.

Now the sea context came up within the D. C. circuit and in the Seventh Circuit involving Canadian vessels. It ame out of the same context, one at a preliminary injunction stage and one at an enforcement of the

Board's order and in those cases, the unions in both instances took the following position:

They said, Look, the underlying dispute involved here is one involving a Canadian foreign flag vessel, a Canadian shipowner foreign flag and I draw that distinction quite clearly between a foreign flag ship and a foreign shipowner.

In that instance --

QUESTION: Has the Court made that distinction?

MR. SCHULMAN: As I read Windward, the Court talks about foreign shipowner.

QUESTION: Well, have we ever made the sharp distinction that you are making --

MR. SCHULMAN: No, no.

QUESTION: -- between foreign flags and foreign owners?

MR. SCHULMAN: No, I don't think there is any sharp distinction. I am speculating.

QUESTION: On the Jones Act context we talked about it.

MR. SCHULMAN: On the Jones Act, yes, and on the Rhoditis you have.

QUESTION: That is sort of --

MR. SCHULMAN: This Court has and also, under Rhoditis, the comments directed by Mr. Justice Harlan about

McCulloch, you can't have this evaluation, this balancing, nevertheless, the Rhoditis majority apparently did not accept that and directed no comments to it and, again, I assume that they paid attention and disagreed.

No, I think they are talking about, Mr. Chief Justice, the Windward opinion talks about foreign shipowner and I assume when the Court uses foreign shipowner, it means just that.

Now, this is a different issue. It is a different question. It is not before this Court and it may very well pose a different issue when, in effect, you have got a foreign flag vessel, constructively, by law, American-owned, as many of these major petroleum and multinational corporations exist under Liberia, where there is no question, admittedly, by their own specimen, that these vessels are American-owned, directed by Americans under a pledge to be kept that way, constructively American subject to their call.

And I think the concerns for relationships with respect to what I refer to euphemistically as a true foreign shipowner and another, I think are different. But in all candor, I do not -- this case in that particular fact pattern is not before this Court.

Now, in addition to Maritime and in addition to questions of whether or not the volume of the business keeps the particular employer within the coverage of the Act,

there are other instances as well.

Example, a railroad, this Court's decision in New York-New Haven, Local 25; there, the underlined dispute involved there was not within the competence of the Act and yet this Court held at another demonstration that under those circumstances, what the complaint there -- what the party complaining of there was, the secondary conduct within the competence of the Labor Board and that this was part of Congress' scheme and I think a last illustration -- and I am sure there are many more -- the last one I could possibly come across -- is the agricultural industry.

The agricultural industry is not within the Board's competence and nevertheless, there are cases -- and we cite the Ninth Circuit in forcing the San Francisco Labor Council, notwithstanding the dispute with the farm laborers, the Chavez group -- nevertheless, American unions, subject to the Act, American employers, the Labor Board has jurisdiction, exclusive jurisdiction. At least, under Garmon, it is arguably prohibited.

Now, this is what I see, what we see, what this case is all about.

The Solicitor General, the Government, proposes that it doesn't -- the analogy we gave or the authorities we have doesn't apply, and cites Hanna Mining.

And I think I'd like to direct a few moments'

attention to this Court's holding in Hanna Mining. Hanna Mining case was an attempt by an American officers' union to engage in picketing in the waters of the State of Wisconsin to compel the supervisors and compel the employer as well to make the supervisors join the union and the case came before this Court with the Wisconsin court finding that that conduct was arguably within the ken or the exclusive jurisdiction of the Board.

I think Mr. Justice Harlan made quite clear, in that case, that the conduct which was sought to be remedied finding no such preemption was conduct which would go unregulated, which Congress in its scheme said the Labor Board should not regulate and that to come down with a result and to find that the state court was preempted by the Labor Board would leave that conduct totally uncontrolled and in that instance, on the -- I think that Mr. Justice Brennan held in his concurring opinion, the union there, which is complaining incidentally there was secondary conduct, but the core -- and this is language that Mr. Justice Harlan used, "The vital core of the dispute" was the attempt by the Engineers' Union to organize these people to economic force and that was in the desires of their members, which was not controtable at all, even under the federal law, particularly in view of Section 8(B)(7) and the fact that the supervisors, I should say, are

without the structure of it.

Now, that is worlds apart, totally different analogy of contest in any sense of arguing with this case.

We have a foreign shipowner, if he has cause to believe, has a remedy in the state court that can take hold of any conduct which interferes with an attempt to breach the agreements between the foreign seamen and the foreign shipowner, the articles, the contracts.

In Hanna Mining, the result, as determined by the Wisconsin court, did not permit of that and when I am directed to, in substance, what we are talking about is the Congressional scheme. I think we all come back to that again as to what Congress had in mind and what its motivations and purposes were.

Congress had in mind that American employers and American unions -- American workingmen most significantly, had certain rights. There were accommodations. There were adjustments. And that 8(B)(4) encompasses all that legislative history and debate so that not only is certain conduct intended to be prohibited, involving neutrals, but there is also certain rights, protected activity, which Congress determined should be exercised by American workers.

I find, frankly, maybe subjectively, quite alarming the Solicitor General's proposal for what he calls "concurrent jurisdiction."

What he is saying, he is asking this Court to do, notwithstanding all its legislative history, is the following:

He says, insofar as it affects the secondary conduct, as in this case -- and look at page 29 of the Appendix and at the Alabama Supreme Court's injunction, and they don't say a word about the foreign vessel. They just regulate my client's conduct and this employer and all vessels, American and otherwise, as if this was a typical, garden-variety Labor Board injunction and the Solicitor General says, by concurrent jurisdiction, that regulation about secondary conduct should be, in effect, bifold.

Not under federal law, though. Not like under Section 301 of the Act for breach of contract or Section 303 for damages for violation of secondary boycott, where state courts have jurisdiction, concurrent jurisdiction but must apply federal law. Oh, no. The Solicitor General asks for a situation where my friends on the other side get two bites at the apple, not one, and maybe other people will get the equivalent two bites.

He says there is concurrent jurisdiction between the Labor Board on the one hand, to take a look into it to see whether conduct is prohibited or whether it is not violative, and on the other hand, it is a right of the party to go to state courts.

I frankly find this totally at odds with the many decisions of this Court relative to the intent of the Act -- and we are talking about secondary boycott conduct and the need for uniformity in Section 10 (a)'s command for exclusivity.

Now, another interesting fact that is coming out of that, you could arrive at a situation where people such as the Respondent's here could go into a state court and get relief under state law -- whether it is in the old Lemly Guy, inducing breach of contracts or other concepts, for which the top court of Alabama may affirm -- and of which there is no federal question to come before this Court.

Yet another party goes before the Labor Board and the Labor Board's case comes before this Court and you get a diametrically-opposed situation and that is only some of the horrors.

There are more significant horrors. We have, I believe, 30-some-odd coastal states where are water in this country. Are we to have 30-some-odd interpretations depending upon the states as to the impact of secondary boycotts?

That would be totally violative of the Congressional intent.

I think you have got similar problems with the

Solicitor General's conduct.

Norris-LaGuardia is an integral part of our labor policy which says federal courts generally are prohibited from issuing an injunction and yet part of that fabric in Congressional legislative scheme is that Norris-LaGuardia is to reserve solely to the federal system certain conduct which carries with it that state courts are not to act on it and the same state courts -- absent little Norris-LaGuardia acts -- have no such proscription.

We wind up, again, under this opted-for policy, coming out at the extreme once again and, finally, in connection with what appears to me to be some of these horror stories, is the question of Section 10(A) and its express Congressional intent of ceding aboard jurisdiction.

But it has got to be consistent with the Act. There has got to be an agreement consistent with it and the law must be equally applied.

Again, under the Solicitor General's contention, it would totally violate each and every one of those terms and provisions.

I think there is, of course, an even more significant point. Mr. Justice Rehnquist, in the Windward opinion, cited this Court's Lauritzen case and the footnote there of brash appeals, candid brash appeals of the seamen in those instances who wanted this Court to legislate, in

effect.

I say this is equally, if not more, a brash attempt for the Solicitor General to do that. But there is something more significant which was not present, either in Lauritzen or in Windward.

Since this case, there has been proposed in both Houses, legislation which seeks to preserve domestic employment opportunities for American seamen and that is what we are engaged here.

It is known as the Energy Transportation Security Act of 1974. Extensive hearings were held. The Solicitor's client, the State Department, came before both Houses and they each and every one of these are he is making subjectively in his brief, national concerns, concerns for the economy, international relations, exascerbation.

He apparently was not successful. For whatever reason, whether they disagreed or found no basis or made the adjustment, Congress has moved and Congress has passed that bill in the following manner:

The bill was passed overwhelmingly in the House, rejecting the State Department's proposals, overwhelmingly in the Senate. The conferees of both Houses have met. The report of the conferees has been acted upon by the House and accepted overwhelmingly.

The Senate's report will be acted upon, was just

recently, over the recess.

But, equally significant, is that the Solicitor General recognized that the proper forum where to go with this sort of argument is not to drag it through this Court --

QUESTION: What Act was that?

MR. SCHULMAN: The Energy Transportation Security Act?

QUESTION: Yes.

MR. SCHULMAN: We have it in our brief. We cited it in our brief.

QUESTION: Well, succinctly, what does it say?

MR. SCHULMAN: What the law says is that imported American oil -- petroleum products in this country -- it has got to be carried 30 percent -- up to 30 percent in American flag ships.

As legislative history demonstrates, one of the purposes, as expressed by Senator Long in a long colloquy with the Assistant Secretary of Commerce, was to make sure there were domestic employment opportunities for American seamen.

QUESTION: Is this, what, exports or imports?

MR. SCHULMAN: Imports of petroleum products.

QUESTION: Imports to our country --

MR. SCHULMAN: That's right.

QUESTION: Imports to our country of petroleum

products.

MR. SCHULMAN: Carriage of petroleum products into our country.

QUESTION: Thirty percent has to be in American bottoms?

MR. SCHULMAN: That's correct, up to 30 percent.

QUESTION: Well, what do you mean, "Up to 30 percent"?

MR. SCHULMAN: It's graduated.

QUESTION: It could be zero.

MR. SCHULMAN: No, by 1977 -- it is a graduated scale. By 1977 it has got to be a full 30 percent.

QUESTION: I see.

MR. SCHULMAN: Certain rights are reserved in the event of an emergency, obviously, to suspend upon action of the Executive and the Legislative Branch.

QUESTION: None of that has any bearing on the issue we have here.

MR. SCHULMAN: It doesn't have any bearing on it? No, other than it demonstrates, to me, that each and every one of the arguments that the Solicitor has used here in his brief submitted to this Court, he has used before Congress and we so demonstrated in our supplemental brief. We cite where he has used it.

And in each and every instance, the Congress has

just rejected it.

QUESTION: Congress is making a policy decision, is it not?

MR. SCHULMAN: Yes, and that is what I believe, however.

QUESTION: Do you think that is what we are making here?

MR. SCHULMAN: No. I think the Solicitor is asking you for -- of course, when you read his brief, he talks about the concerns. He is saying, "This should be so because of the concern for foreign relations. This should be so because of the concern for national affairs. This should be so because of the concern for the economy."

Each and every instance, to me, that it presents an issue, is purely legislative and equally significant, made by the Secretary -- the Secretary of State as well as other agencies of the United States Government, the Executive Branch, the Congress cannot accept it and that, to me, is a brash appeal.

Now, maybe my subjective thinking is a little colored, but it would appear to me that if you go to one foreign body and you reject it there, it doesn't sit well to look for another suitor, to go to another foreign, to go shopping and I submit, and so submits the state, I believe this is what the Solicitor is doing here, doing just that.

I see I have just a few moments, and I'd just like to direct a few remarks First Amendment argument and the Free Speech argument.

The Alabama Supreme Court, talking about the conduct involved here, the conduct involved was the same conduct in the national policy actions of these unions all over the country, mute pickets, handing out signs, acting for help and assistance to protect their jobs.

Alabama Supreme Court says, in approaching that issue, that, first of all, it has the right notwithstanding, I add, First and Fourteenth Amendment, to cease and issue a notice restricting all picketing pending its looking into the purpose and object where the effects may affect the national economy of the state.

Now, as I read this, the prohibited conduct which this Court expressed from Thornhill up to Keefe of a blanket provision, saying, when that affects the economy of our local area, that our state policy is that all picketing is to be restrained.

We know of no such authority to that effect.

We do not think that a state possesses that right on the mere expression that it may affect the local economy to stop all free speech. That is not Giboney. That is not Vogt. That is not Hanke and the other cases authorizing in labor disputes a state valid policy in the

domain open to them for specific conduct, to restrict the specific conduct, such as antimonopolistic practices.

But I think there is more in this case which we find and argued in our brief.

In addition to that, Alabama says, wrongful interference and nothing more, just the two words, "wrongful interference," with a person's right to do business as a matter of state policy may enjoin picketing.

I submit -- or pamphleting. I submit that runs directly afoul of this Court's decision in Keefe, where the man was engaged in business at his house. That poses a problem. I believe Alabama may not so broadly restrict.

They have not established the confines, the valid state public policy assuming the demand is open to him, assuming there is no preemption.

And, finally, we have involved here, I think, in the final analysis, is Alabama making a finding by its Supreme Court when the district court and the local court made no findings effect and the Alabama Supreme Court, in answering our objection to that said, well, they must have made certain findings, otherwise they wouldn't have issued the injunction.

I guess, under those circumstances, we don't need appellate courts.

Nothwithstanding that, the issue which we are

presenting here, and we have enumerated quite a bit in our brief, is that they hit upon a personal hope and desire of a very low official who testified under very skilfull cross-examination, my good friend, Frank McRight, here, as to his personal hopes and desires, what he would personally like to see and admittedly, he had nothing to do with the campaign other than to set up the picket lines and carry the instructions out and based upon that, the Court said, the purpose of this picketing may have been to tie up the whole harbor until Congress brought some legislation to bring the whole harbor down.

And I say, under this Court's decision in Graham, the need to search the record to find subsisting facts, essential facts to warrant restrictions of the First and Fourteenth Amendment, should be made in this case and I think when they are made in this case, there is no finding that the conduct of this individual, his own personal hopes and expectations, could be charged against the conduct of this committee and the thousands of American seamen who are merely exercising a fundamental right.

I reserve the few moments left, if I may, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Schulman.

Mr. McRight.

ORAL ARGUMENT OF FRANK McRIGHT, ESQ.,

ON BEHALF OF RESPONDENT,

MOBILE STEAMSHIP ASSOCIATION, INC.

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

I had, quite frankly, thought with this Court's issuance of the decision in Windward that Petitioner's preemption argument wouldn't be urged.

The picketing in Windward was the same as the picketing in Mobile. It was in furtherance of the same national program involving the same unions, the same picket signs, having the same effect, using the same leaflets.

The same consequences in Windward, as this Court noted in Windward, were noted by the Alabama Supreme Court as to picketing in Mobile.

It was either to force a raise in the internal standards in those vessels or to block those vessels from the use of the U. S. ports and, of course, this Court held that in Windward, under those circumstances, the picketing was not subject to the jurisdiction of the National Labor Relations Board.

Essentially, the Petitioners argued two distinctions between this case and the Houston picketing in Windward.

One, they have apparently abandoned here in oral argument. That is, the allegation that the vessels involved were collectively American-owned. So we won't need to talk about that one.

The other distinction is that, although the primary dispute here may not be in commerce, there were secondary effects which are in commerce and which are subject to the jurisdiction of the National Labor Relations Board.

Of course, in Windward, we were talking about the picketing not being in commerce. It is the same picketing here that was involved so this Court's determination that the picketing was not in commerce certainly should carry some weight beyond the allegation that the primary dispute was not in commerce and it was the picketing here that was the subject of our complaint.

The allegations of the state court complaint were against the picketing. Specifically, paragraphs 20, 21, 22 of the complaint "complained of picketing and other interference directed at the foreign flag vessels in the Port of Mobile."

So it was the picketing itself that was the basis of the Mobile Steamship Association's complaint. The fact that there may be secondary aspects involved here has pretty well been disposed of. I think this Court, in

Hanna versus MEBA indicated that where the primary dispute, in that case a dispute involving efforts to organize supervisors, employees not covered by the National Labor Relations Act, indeed, foreign crewmen not covered by the National Labor Relations Act here, where the primary dispute was not in commerce.

As this Court held in Windward, the fact that a state court injunction might, in fact, regulate some conduct arguably subject -- arguably violative of Section 8(B)(4), did not prevent the State Supreme Court from -- the state courts from acting.

The Court indicated -- Mr. Justice Brennan in the concurring opinion, that the issue was whether Congress had excluded state regulation of picketing outside the coverage of the Act when the picketing also has secondary aspects arguably within the reach of Section 8(B)(4) and the Court said no, that in that area federal occupation of the matter is at a minimum and state power is at a peak.

QUESTION: Well, that is a -- then you are just saying the preemption doctrine shouldn't apply rather than arguing that the impact on the stevedores, for example, was nor arguably within the jurisdiction of the Board.

MR. MC RIGHT: Yes, sir. I am saying that the complaint that the stevedores made was against the picketing.

QUESTION: You would concede and still make your

same argument --you would concede that, at least arguably, the stevedores would have a remedy under 8(B)(4), before the Board.

MR. MC RIGHT: Your Honor, I think we might allege it, but I am very much afraid that under the --

QUESTION: I know, but arguably, you could -- because you are a neutral employer. You see what I mean? You are feeling the pinch.

MR. MC RIGHT: Yes, sir.

QUESTION: And maybe the primary employer is not subject to the Act, but, nevertheless, you are the --

MR. MC RIGHT: I don't think under those circumstances that the Board, under Windward, could get its hands on the real problem.

And the real problem here being the picketing, the coersive picketing directed at the parties like us.

QUESTION: Oh, the neutral party is in commerce. I mean, it is -- well --

MR. MC RIGHT: But I think the situation --

QUESTION: But, anyway, your argument primarily is, even if that is true, the preemption doctrine should not apply.

MR. MC RIGHT: Yes, sir.

QUESTION: So you are -- the Solicitor General seems to -- seems compelled to say that this is arguably

within the jurisdiction of the Board, but, nevertheless, there should be concurrent jurisdiction of the state court. Is that your argument?

MR. MC RIGHT: That is what he is saying. I am saying that the real problem here with the picketing was, and we'll get into that in a few minutes on the constitutional question, the real problem with the picketing here was that it interfered with the operation of the Alabama State Docks. It shut it down and it virtually closed the Port of Mobile and could close the ports of this country to foreign shipping.

I don't think the National Labor Relations Board has jurisdiction to entertain that kind of objection.

QUESTION: So you don't agree with the Solicitor General.

MR. MC RIGHT: Not entirely, no, sir.

QUESTION: You say there is not preemption at all, not even to the extent of allowing the Board to have concurrent jurisdiction.

MR. MC RIGHT: Not as to the complaint we made in the state court, no, sir.

QUESTION: But if it were applicable, the Board could enjoin the picketing to protect the neutral employer, which is getting pretty close to the site on the problem.

MR. MC. RIGHT: If we could prove secondary

motive, perhaps -- but they couldn't get to the problem that we complained of.

QUESTION: Well, anyway, you'd rather not have to try to prove an 8(B)(4) case before the Board.

MR. MC RIGHT: That is essentially the case.

QUESTION: That is the way with preemption employers.

QUESTION: You are happy with the state court having exclusive jurisdiction.

MR. MC RIGHT: Yes, sir.

Now, as to the constitutional issue -- and I want to hurry, because we have agreed to divide argument. We have got another Respondent, the farmer that was injured by the picketing, too.

But as to the constitutional issue, I think the evidence is pretty clear that the picketing was not really publicity, but really intended, designed and conducted to signal other organized workers not to go to work. The picketing commenced within a very few minutes after the ILA, in fact, was ordered to return to work by the federal courts.

It was timed and located to be in the path of the ILA. The ILA is an affiliated union with the six maritime unions that are Petitioners here.

Indeed, the Masters, Mates and Pilots, one of

the petitioning unions, is a part of the ILA, the division of the ILA. They knew, they said they had more than a reasonable expection that the ILA would not cross the picket lines.

When the union's witness was asked why he didn't time and locate the picketing and so was not to interfere with the work calls of the ILA, the comment was made by counsel that that kind of question shows incredible ignorance of what a picket line is supposed to be, what that particular picket line was supposed to be and it was admitted in the brief that Petitioner's picket line meant, essentially, do not work. Do not work on these vessels, brother union members and the objective was to -- in effect, was to shut the state docks down to foreign shipping.

It came at a very critical time because, at that particular time, the Soledad farmers --

QUESTION: What case here do you think is the closest to warranting an injunction against this kind of so-called"informational picketing?"

MR. MC RIGHT: Well, I think Hanke, sir. I think this Court, in a number of cases, has indicated that picketing by organized labor in the path of other organized labor is more than free speech.

In the Hughes case, the Court said picketing by the organized group is more than free speech. The presence

of such a picket line may induce action.

In Giboney, it is clear that the unions were doing more than exercising their right to free speech and I would like, because there was reference in a reply brief to the Logan Valley case -- indeed, the briefs in Logan Valley where the Petitioner has indicated that there was signal picketing involved there, to state for the Court that in Logan Valley we only had one issue -- the Court only was faced with one issue and that was a pure property question.

There was an appeal to union members, but union members as consumers and not union members as employees and I think that is a significant difference. I think union members as employees or any members of any organized group tend to act by virtue of traditions, tend to act by virtue of taboos and solidarity that aren't involved in a situation where the appeal is purely to consumers asking for, by virtue of the persuasive nature of the message, individual action.

QUESTION: Is there a state court finding here as to the purpose of the picketing?

MR. MC RIGHT: In the state trial court, no, sir. There was a discussion of the purpose of the picketing and its conduct in the Alabama Supreme Court.

QUESTION: But that finding is critical to your

argument, isn't it? I mean, some sort of a finding as to what the purpose was, that it really wasn't just informational picketing?

MR. MC RIGHT: Yes, sir, and I think that finding is contained in the Alabama --

QUESTION: Where is that?

MR. MC RIGHT: -- Supreme Court.

QUESTION: Without it -- without it you would be urging us to make our own -- to do our own reading of the record.

MR. MC RIGHT: Well, I think --

QUESTION: In the first instance.

MR. MC RIGHT: Yes, sir. I think there is enough of the facts shown that the picketing was located in the path of ILA laborers, that Mr. Neary wanted to shut down --

QUESTION: Well, how close did the Alabama court come to holding what you say the facts show?

MR. MC RIGHT: Well, on page 14a of the Appendix, "The dispute was either one between the unions and the foreign shipowners to force a rise in the internal standards of those vessels, or one where the intent was to block the use of those ships to force Congressional action."

On page 21, the Appellants contend that the only purpose was to carry out publicity picketing to inform the public of the plight of the American seaman. The

Appellee contends the picketing was done for the purpose of inducing and encouraging the Appellee's employees to cease loading.

QUESTION: What did the Court say as between those two statements?

MR. MC RIGHT: Pardon?

QUESTION: What did the Supreme Court say as to those two statements? Did they pick one of them as true and one of them as false?

MR. MC RIGHT: I'm sorry to use the time.

On page 25 at the bottom of the page --

QUESTION: 45?

MR. MC RIGHT: 25, your Honor.

QUESTION: Well, Mr. McRight, the court that issued the injunction didn't make any findings of any kind?

MR. MC RIGHT: No, sir.

QUESTION: How can you do that?

MR. MC RIGHT: Well, I'll say this, your Honor, in Alabama, the practice and custom has not been for the state court to, as a matter of custom in a findings of fact, conclusions of law. Granted that in a federal system this is required under Rule 54 -- or 51, I'm not sure which.

QUESTION: Well, what are we left to do on this now? Go into the record and make our own findings?

MR. MC RIGHT: Your Honor, I think there is ample

findings in the Alabama Supreme Court opinion to sustain the position that we --

QUESTION: Well, then, you have got some more argument than what you have already read, I assume?

MR. MC RIGHT: On page 25 -- and I think there that they take -- that the court takes the position that under either alternative, if a purpose was to block the use of the Port of Mobile to foreign vessels or to force foreign shipowners to increase their wages, either of those would be violative of Alabama public policy. I don't really --

QUESTION: Do you think that the Supreme Court of Alabama follows the custom of many other state courts in reviewing both on fact and law and equity appeal whereas they wouldn't damage actions?

MR. MC RIGHT: Yes, sir, they certainly would because the case was tried to a judge and in that event, evidence is presented to the Court and the appeals instance can be read just as well as heard by the trial court.

QUESTION: And we should read it, too.

MR. MC RIGHT: I don't think it is that much there, your Honor and I do think that it is largely uncontroverted, certainly as to the signal effect of the picketing and certainly as to its ultimate purpose. I don't think there is any real controversy of fact over those two points and I think that, with that in mind, that this Court,

applying Hanke, where you have a situation that union members were appealing to union deliverymen not to make deliveries in order to force recognition of the unions by self-employed persons, that this Court indicated that a balance has to be struck and that balance comes to this Court bearing a weighty title of respect.

I would like to say that the Petitioner's reference to the Amicus brief filed by the -- excuse me, to the briefs filed in the Logan Valley case are very helpful and, in particular, I would ask the Court, if it would, to take a look at the Amicus brief filed by the AFL-CIO in that case, who appeared as Amicus here.

I think they recognized the point that we are making; that is, that signal picketing, because it is by nature so very coersive, can be limited, even though the act sought is lawful in and of itself, uncoersive solicitation of that particular Act would be constitutionally protected free speech.

That statement and other statements begin on page 16 of the brief and are very enlightening on the different kinds of picketing and how my friends on the other side of the table view the picketing generally in terms of constitutional context.

I think the real question here -- certainly their Alabama policy, the Alabama State Docks is a public

facility. Certainly the picketing interfered with the operation of that public facility. There are decisions of this Court that indicate that intentional interference with the operation of public facilities may be constitutionally limited, interference with court systems, the jail system were the subject of the cases of Cox and the Adderly decisions.

Beyond that, these unions, by their announced purpose, could and would close the ports of this country, including the Port of Mobile, the only seaport in Alabama, to foreign shipping.

Foreign shipping comprises, by tonnage, I think something like 95 percent of the commerce -- foreign commerce of the country, something like 70, 80 percent of the vessels that call at the Port of Mobile fly a foreign flag.

I think any society acting in its self-interest can establish a policy. Indeed, Congress could establish a policy if it so wished.

Alabama, through its judiciary, has recognized that policy that the interference on such a large scale with the essential economy of a society can be regulated and the question presented is whether or not the Petitioners have a constitutionally-protected right to use signal picketing to close the Port of Mobile, indeed, the ports of

this country, to foreign flag shipping.

Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Lankford.

ORAL ARGUMENT OF ALEX F. LANKFORD, III, ESQ.,

ON BEHALF OF RESPONDENT

ROBERT E. MALONE

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

In response to Mr. Justice Marshall's inquiry as to what the record shows as to the purpose and intent, and Mr. McRight commented that there was really no dispute on it, on page 126a, the question was put to the Petitioners' only witness, "My hope is to clutter up the Port of Mobile with foreign ships, Liberian, Panamanian ships to bring sufficient pressure on the United States Government to do something about the American Merchant Marine.

"That is your intention?

"Yes, sir.

"That is your purpose?

"Yes, sir."

This is in the record. To me or to anyone it is unequivocal. The witness was the sole witness presented by Petitioners as a live witness in the court in Mobile. This is the fifth court that farmer Malone has been in on this

issue and each court we go, the higher we go, the lower Mr. Neira goes.

He is the -- has been the port agent for the Petitioner SIU and the Port of Mobile for 15 years. It is he who called all of the coordinating unions together and told them what they were going to do.

It is Mr. Neira who put the pickets out on the line and told them what to do but when we get to the highest court in the land, he is reduced to a man of menial mutterings, vagrant mutterings, just barely able to find his way in and out of the union hall.

This testimony is so damaging that the man has been belittled and belittled and belittled the higher we go in court.

The time and the place of these pickets is extraordinarily interesting. It came at the heighth of the grain season where the grain must be harvested. It cannot be left out there. These farmers don't have enough storage to store the grain. The only place in South Alabama, Northwest Florida and Mississippi for export grain is the public grain elevator at the state docks in the State of Alabama in Mobile. When that gets stopped up, the grain stays in the field and it rots.

The pickets were put up within minutes of the time that a federal judge in Mobile ordered a sister union, the

ILA, back to work.

The pickets were put in an isolated place at the state docks. Information to the public, the only public that was there, were the ILA members, the Petitioners' sister union members, who wouldn't cross their picket lines to load and unload the vessels.

The other element of the public that was there were the foreign seamen, whom they wanted to see the signs and whom Mr. Neira again testified that that is what we wanted to do, we wanted to see them. We wanted them to start a dispute with their foreign owners so that those owners would pay them the equivalent of American wages.

This was testimony right into the Windward case where it was held or noted, at the very least, that the Petitioners in that case -- the Petitioners in this case -- would hope to accomplish would be to make the foreign shipowners raise their wage and pay them equivalent wages.

The results were dramatic. The whole port was shut down and at a time when the only vessels in port were foreign flag, every one of them picketed, every one of them, every single one of them. That stopped the court. It stopped the grain elevator. It puts the farmers' grain out in the fields to rot.

On the free speech, the free speech with pickets, is free speech plus and can be regulated by the state within

reasonable bounds.

Logan Valley tells us that we must not unduly interfere with the normal use of public property. Here the Respondents were denied the use of state docks property entirely, public property.

The decisions are federal decisions, require the Court to balance this freedom of communication, freedom of speech against the state's power to reasonably curtail that freedom of speech and this is what the trial court in Mobile did, was to balance these competing interests.

There were four competent lawyers representing Petitioners in that trial. When the decision was announced, not one of them said to the judge, "How about telling us what you find the client did wrong?"

They were sitting in the courtroom. They all knew. And if they wanted findings, they could have at least requested them from the judge and I submit --

QUESTION: Does your Alabama rules of procedure in equity cases provide that either party may request findings?

MR. LANKFORD: Yes, they may request them but they are not always given. If I had thought, as a trial lawyer, that the court had no basis for finding anything against me, I would have requested findings and to prepare the case for appeal. I am simply saying that when the court announced its

decision -- and it is in here in the record -- and asked for comments from counsel, there was no complaint that you have not defined exactly what you said our clients did wrong.

QUESTION: Does the circuit judge, I gather from your answer, have the discretion to refuse findings --

MR. LANKFORD: Yes.

QUESTION: -- even though they are requested?

MR. LANKFORD: Yes. That is true. Recently, the federal -- essentially, the federal rules for civil procedure have been adopted in the state, but they were not so enforced at the time.

QUESTION: Mr. Lankford, was the permanent injunction ever obtained in this case?

MR. LANKFORD: No, sir, this was a preliminary injunction. That was the nature of it and the case is still to be tried on the merits. But as the Alabama Supreme Court pointed out, the court has wide discretion as to whether or not to grant a preliminary injunction and must weigh these facts and I submit the court did weigh -- the trial court in Alabama did weigh.

QUESTION: So that preliminary injunction remains in effect to this day?

MR. LANKFORD: Correct.

QUESTION: As between your side and the other side, which has the burden of converting it into a permanent one?

MR. LANKFORD: It is his move. If he wants to go back and fight the lawsuit, we are ready. However, he has got farmer Malone in the federal court suing him for a million dollars in punitive damage for alleged violation of the Civil Rights Act of 1871 so this is a case pending in the United States District Court in Mobile where Mr. Schulman filed it, saying that these Petitioners against farmer Malone saying that he went into state court under color of law and maliciously and wantonly got me enjoined. We want $15,000 normal damages from farmer Malone and we want a million dollars punitive damages from farmer Malone and I want farmer Malone to pay my attorneys' fees.

We are talking about how many bites you get out of the apple. That case has been stayed pending the decision of this case before this Court.

And I have a copy of the complaint if any of the Court would like to see it or perhaps I even ought to suggest that.

If free speech -- if what they have done under the guise of free speech is permitted, then it is going to be the select committee of the Petitioners who set the wages, the working conditions and everything about foreign seamen aboard foreign flag vessels calling in the United States of America.

If this free speech claim is approved by this

Court, that is what is going to happen.

Also, what is going to happen is that this select council of the Petitioners are going to tell the American businessman what he can export, to whom he can export, and the price he can charge because if they run all the foreign flag vessels out of here, he is going to be in a pickle and this is what they are trying to do and they will, if free speech approved in this case.

QUESTION: Mr. Lankford, suppose that, instead of picketing, they had placed ads in the newspaper and sent out letters and things? Would there be a violation of state law by way of unlawful interference with business?

MR. LANKFORD: No, sir, I do not think so. I think it would be purely informational picketing . It was not set in the path of a sister union's aisleway, men going to and from work. It didn't take the port and tie up and clutter up the whole port with foreign vessels. It was far different, your Honor, from simply notifying the public.

If this free speech was approved, then this select committee of the Petitioners are going to be writing this country's treaties with every maritime nation in the world because they are going to be changing what happens to a foreign flag vessel when it calls in our port, if they have the right to run them off of our ports and they will, if this Court gives them the right.

goods from our shores to foreign shores and on behalf of Farmer Malone, I appeal to this Court not to permit this kind of activity to choke the American farmer, because this is what is going to happen to him if the stamp of approval of this conduct that happened in Mobile is given by this Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Lankford.

Did you have anything further, Mr. Schulman?

MR. SCHULMAN: Yes, sir, a few moments more.

REBUTTAL ARGUMENT OF HOWARD SCHULMAN, ESQ.

MR. SCHULMAN: I would have thought, after listening to my friends,, I won the Windward case, not lost it.

All this calamitous talk about tying up ports. Well, that is what this Court decided in Windward the foreign shipowner can go into court and enjoin the picketing and I don't understand why all these foreign vessels are not going to call at our ports.

There isn't any basis at all to their argument and I think any question about the motivations of the people I represent or the farmer involved as to what he is concerned there, that should be better directed to Congress.

I'd like to direct a remark that both Mr. Justice Marshall and Mr. Justice White, I believe, asked my friends

relative to the findings being made by the state court. I am reading now from page 28 of the Appendix. "The trial judge decree granting writ of temporary injunction made no finding of fact from the evidence and that is complete and absolute.

"But, apparently, the trial judge found from the evidence that there was wrongful interference by the Appellants with the Appellees' business, for otherwise he would not have ordered the writ of temporary injunction to issue."

The answer to that is, it was no finding. The Alabama Supreme Court just makes that indication on an assumption.

QUESTION: Did you say page 28?

MR. SCHULMAN: 28.

QUESTION: Of the --?

MR. SCHULMAN: Of the Appendix.

QUESTION: That is what I have, but --

MR. SCHULMAN: I's sorry.

QUESTION: 20a.

QUESTION: 20?

MR. SCHULMAN: 20a.

QUESTION: Oh, but then, over at page 23a, the Supreme Court says, "This necessitates our deciding whether or not there was any evidence to support a conclusion that

"the picketing had as a purpose or object the wrongful interference with the appellee's business."

And then, doesn't the Supreme Court go on to examine the record?

MR. SCHULMAN: Yes, and for which it says --

QUESTION: And conclude that there was no abusive discretion based on that evidence?

MR. SCHULMAN: Yes, and that it may have been -- that the court below may have based upon that.

QUESTION: Well, I gather -- it would appear, at least, Mr. Schulman, that maybe we don't do this in the federal courts, but in some state courts that I am familiar with, one would have said the same thing, equity cases.

We didn't need findings of chancery court. We examined the record and made our own determination based on the record -- in equity cases.

MR. SCHULMAN: In equity, yes.

QUESTION: And that is what this is, I guess.

MR. SCHULMAN: Yes. But whether that meets the standards necessary of the First and Fourteenth Amendment I think is a different question.

QUESTION: That may be.

MR. SCHULMAN: With respect to the situation involving Hanna and Windward, in both those instances, the state court regulated otherwise unregulated conduct.

That is not the case here. The otherwise conduct involved here is a secondary aspect, regulated by the Labor Board.

Now, with respect to this talk about the record as to the position of witnesses, I don't intend to waste this Court's time in discussing that, other than as set forth in the record and the position of this Mr. Neira and whether there was adequate evidence upon which a court could move in and say all these rights of these tens of thousands of American seamen are suddenly abrogated and I think it is a requirement to search that record and determine that, under the Grant case, whether or not there was, in fact, the necessary quantum to warrant such restriction, as the Alabama court did here.

Thank you.

QUESTION: Before you sit down, Mr. Schulman. Am I -- on your preemption point, do I gather you distinguish Windward because the Plaintiffs here are not the foreign shipowners?

MR. SCHULMAN: No, that is not the -- it isn't because of titles, no. It is because of the substantive nature of the complaint.

In the Windward case, the unions were accused of interfering and trying to change the contractual.

As this Court said, they must have hoped or

expected they would have given more money. Therefore, it falls under Benz, which holds it involves internal operation of the vessel.

QUESTION: And what is the difference here?

MR. SCHULMAN: The difference here is that there is -- this is not the issue of this Plaintiff here is not to regulate the conduct of foreign shipowners. He is saying, our picketing is stopping him from doing business, which it is.

QUESTION: And, therefore, you say that is an 8(b)(4).

MR. SCHULMAN: And that is an 8(b)(4).

QUESTION: And that is exclusively for --

MR. SCHULAMN: And that is exclusively for the Labor Board, yes, Mr. Justice Brennan.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Where upon, at 2:30 o'clock p.m., the case was submitted.]