In the

Supreme Court of the United States

OIL, CHEMICAL AND ATOMIC WORKERS, INTERNATIONAL UNION, AFL-CIO, ET AL.,

Petitioners

v.

MOBIL OIL CORPORATION, ETC.,

Respondents

No. 74-1254

Washington, D.C.

March 29, 1976

Pages 1 thru 45

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

OIL, CHEMICAL AND ATOMIC WORKERS, INTERNATIONAL UNION, AFL-CIO, ET AL., Petitioners,	:	
v.	:	No. 74-1254
MOBIL OIL CORPORATION, ETC., Respondents.	:	

Washington, D. C.,

Monday, March 29, 1976.

The above-entitled matter came on for argument at 1:08 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

LAURENCE GOLD, ESQ., Washington, D. C.; on behalf of the Petitioners.

JAMES W. HAMBRIGHT, ESQ., Beaumont Savings Building, Beaumont, Texas 77701; on behalf of Respondents.

- - -

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 Oil, Chemical and Atomic Workers, International Union v. Mobil Oil Corporation.

Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.,

ON BEHALF OF PETITIONERS

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

QUESTION: Mr. Gold, before you begin, your reply brief came in this morning, didn't it?

MR. GOLD: No, it was filed on Friday, sir.

QUESTION: Even though it is marked March 29, it was filed here on the 25th?

MR. GOLD: Yes, sir --

QUESTION: On the 26th.

MR. GOLD: The 26th.

QUESTION: I suggest you straight that out with the Clerk, because it is late, the way it is filed.

MR. GOLD: Yes, it would have been late today, but unless I was misinformed, it was filed on Friday afternoon.

QUESTION: Sometimes they come in after business hours and they don't get marked routinely.

MR. GOLD: We will check with the Clerk's office. I apologize.

QUESTION: Well, the Clerk's office is open on Saturday, too.

MR. GOLD: Yes.

This case is here on a writ of certiorari to the Fifth Circuit. That court, en banc, reversed a panel decision and held that the agency shop clause in the collective bargaining agreement in question here contravened Texas' law prohibiting such forms of union security. That clause, as is common, required the payment of dues by employees who have completed thirty days of employment as a condition of continued employment.

The collective agreement here is between the Oil, Chemical and Atomic Workers Union and its local and the Mobil Oil Corporation, and the agreement covers unlicensed seamen who work on the corporation's tankers which ply the high seas between Texas and the Eastern ports and also on occasion between foreign ports.

The clause in question is set out at page 281 of the printed appendix, and the entire agreement is at pages 280 through 329.

We believe that two questions are presented. The first is what is the test for determining to whom the law applies when you have a situation in which an agreement is negotiated and administered in different states and work is performed in still another jurisdiction and there are contrasting

union security policies in all three.

We suggest that the answer to that question is that the law of the jurisdiction where the bulk of the work is performed is the law that should apply.

There is a second question, and that is whether the test we have just stated applies in a case such as this, where one of the jurisdictions is the high seas, or whether its application is limited to cases in which the work is land-based within the United States.

QUESTION: Mr. Gold, you don't rely, do you, on the constitutional complex principles that would say Texas didn't have enough contact with this contract, even apart from federal preemption?

MR. GOLD: No, we view this as a federal statutory case. Section 14(b) sets the framework for the case, and we don't think that it is a case which is in the area of constitutional conflicts of laws.

Very summarily, the facts are these: The District Court found, and it is a conservative estimate, that the covered seamen do 80 to 90 percent of their work on the employer's tankers that I just described, while those tankers are on the high seas and outside the boundaries of any state.

QUESTION: But every employee does some of his work in Texas?

MR. GOLD: They are on --

QUESTION: 10 percent? 20 percent?

MR. GOLD: 10 to 20 percent is the estimate. Our figures, as we note at pages 3 and 4 of the record, would indicate that perhaps it is closer to 5 percent. I would also note, in light of your question, that that time in port is approximately the same amount of time spent in northern ports, where, again, the seamen are on ship when the boat is under pilot or when it is being loaded and unloaded, and there is a non-right to work --

QUESTION: And where are the workers hired?

MR. GOLD: They are hired principally in two different locations, as the record shows, perhaps 60 percent in Texas and 40 percent in northern ports.

QUESTION: And you wouldn't distinguish between the 60 and the 40 in your presentation?

MR. GOLD: The lower court would not make such a distinction. We don't believe that the point of hire or the point of residence are the points which indicate who is covered. However, if you had a unit where you had people working in one state and other people working in another state, then we would think that there would be a difference, and the leading NLRB case which we rely on makes just that distinction. There are bargaining units from time to time which are in more than one state.

The District Court held that since the Mobil Oil

Corporation's headquarters for -- administrative headquarters, out of which it ran its American flag tanker fleet, was in Texas, that the greatest part of the administration of the agreement took place in Texas when you compare that state to any other state. Neither the District Court nor the Court of Appeals' majority, however, gave any weight to any of the activities which occurred on shipboard in reaching that conclusion.

As I have already stated, it is our view that really the only operative fact that is relevant here is the fact that the overwhelming bulk of the work takes place on ships which are on the high seas. We suggest that the job situs is the appropriate test, for four separate reasons.

First of all, the job situs test, we believe, is the test which most accurately reflects the language of section 14(b), which is the operative provision of the federal labor law in question here.

Before getting to that, if I may digress, in 1947, there was a complete review of the entire question of unions security by the Congress in connection with the passage of the Taft-Hartley amendments, and the resolution of that review was that as a matter of federal law, uniform throughout employment in this country, the closed shop, which requires union membership at the time of hire, was to be barred, that no employee who was not a union member at the time of hire could be

required to join the union for the first thirty days or pay dues, that thereafter there was nothing in federal law which prohibited as a condition of continued employment the requirement that employees pay dues, but that the states were free to enact their own policy on the question of whether, after the 30th day of employment, employees could be required to pay dues or become union members as a condition of continued employment.

We think that that background is relevant because it indicates a congressional determination to be neutral between right to work and union security states. Both policies are valid under the national labor, and since policies are valid, it seems to us clear that there has to be a circumscribed scope for the policy of a right to work state or of a union security state, and the limitation has to be one concerning what employment relationships are centered in that state, because if one state could in essence export its policy to cover employment relationships in another, that would be contrary to the basic policy of neutrality, and the question therefore is what is the meaning of the employment relationship, where is the center of the employment relationship.

As I have indicated before I started that digression, we believe it is the place where the employees are working and we believe that that is the test, first of all, which does the best service to the language.

Among other places, section 14(b) is set out in full,

it is a short provision, at page 14 of our opening brief, the brown brief for petitioners. It is phrased as a permission to the states and is phrased also in terms of covering numerous states. To put it in focus, we think that a fair paraphrase of the language is that each state may prohibit the execution or application of an agreement requiring membership in a labor organization as a condition of employment in that state or territory, and we think that on the normal and accepted concept of where is somebody employed for purposes of determining what his permissible conditions of employment are thirty days and thereafter during his tenure of employment, it is a place where he is working. That just seems to us to be the common sense of the matter.

It is true, as the company points out, that the statute permits a state to prohibit both the execution and application, it is in the subjective, either one or both may be prohibited by a state, but we don't think that cuts against our argument that the prohibition has to relate to employees who are working in that state, because the common sense of that, we believe, is that a state may prohibit execution of an agreement covering employees in the state in question in order to assure that the agreement can be declared unlawful before anybody is discharged. If a state were only to prohibit application, the argument could have been made, we take it, that the mere execution of the agreement, if no one is discharged, is not illegal,

and we don't --

QUESTION: Is the language of 14(b) set out in full somewhere, did you say, in your --

MR. GOLD: Yes, on page 14, set out as an indebted --

QUESTION: I see it.

MR. GOLD: -- quote. And as --

QUESTION: How many states have adopted these statutes?

MR. GOLD: I think it is 17, if I have my numbers correct.

QUESTION: How many in the Fifth Circuit?

MR. GOLD: In the Firth Circuit, I believe that all aside from Louisiana are right to work states. On the other hand, as I have indicated, these voyages typically go from Texas to New York, Rhode Island and New Jersey, all of which are union security states.

QUESTION: But they would be on the high seas, actually they would be in Florida territorial waters for a good deal of time, wouldn't they?

MR. GOLD: I don't think so --

QUESTION: The follow the same course we used to --

MR. GOLD: My understanding of the record --

QUESTION: Through the straits of Florida?

MR. GOLD: You mean below Florida and under --

QUESTION: Coming up the east coast of Florida?

MR. GOLD: All I can say, Mr. Justice Stewart, is that

my understanding of the record is that it is conceded -- found, rather, that 80 to 90 percent of their work takes place on the high seas outside the territorial waters of any state.

QUESTION: They are for a while in the territorial waters of Texas, while they are in the gulf?

MR. GOLD: That's right, they come in --

QUESTION: In the pilotage area?

MR. GOLD: That's right.

QUESTION: And then they are in the territorial waters of Florida, if they follow the normal trade routes, for a while?

MR.GOLD: I am afraid that your expertise on that matter is greater than mine.

QUESTION: Well, it is pretty ancient expertise. I don't think the geography has changed --

MR. GOLD: Okay. As I said --

QUESTION: -- even though I have.

MR. GOLD: As I have indicated, the record facts, as we understand them and as the District Court found them, are that such vessels are located on the high seas or in ports other than ports located in the State of Texas approximately 80 percent to 90 percent of the time, and that finding is set out at page 8 of our brief, and that has been the basis upon which we have understood the case.

QUESTION: Of course, when they get up into the

eastern ports, New York, Providence, Boston, the ships then are in non-right to work states --

MR. GOLD: Correct.

QUESTION: -- although the crew generally goes ashore on liberty during the loading and unloading operations, don't they?

MR. GOLD: Well, the record indicates that the crew is permitted off the ship when they are not standing watches or otherwise working for eight hours at a time, that indicates that the time found during which the seamen are in territorial waters, aside from the point you have raised, Mr. Justice Stewart, is probably less, if anything, than the court found, if we looked at working time.

QUESTION: Mr. Gold, what if you have a collective bargaining contract executed in Houston or Beaumont covering workers who, it was conceded, were trained in Texas for 25 days and then sent somewhere else which didn't have a right to work law? Would you say that Texas could not forbid the execution of that sort of an agreement?

MR. GOLD: Yes, I would, Your Honor --

QUESTION: I take it, you probably would?

MR. GOLD: -- and I would say that, by the same token, if all the facts you stated were true and the occurrence took place in Louisiana, and the employees were then sent to Texas, that Texas could prohibit application of that agreement, or if

it was executed solely to cover such employees --

QUESTION: Surely, Texas couldn't prohibit its execution in Louisiana.

MR. GOLD: Well, "prohibit execution" may be an improper term, but what I was trying to say was I believe that Texas, in the situation we are talking about, if youhad only a single unit of such employees, could enjoin its application to those employees, and I would think that is true if the agreement was negotiated in Louisiana, whether if both of the signatory parties, namely the union and the employee, were located in Louisiana, so long as the work was taking place in Texas. That is a consequence of our theory, and we think that that neutral principle is the best application of section 14(b), not because we believe we are going to win every case under it, but because it makes the most sense for all the reasons that I am trying to state.

Obviously, I don't go so far as to say that we would be here arguing this point if it didn't result in this --

QUESTION: What would you do if the contract is executed in Texas and exactly 50 percent of the work is done in Texas and 50 percent done in the state that does not have a right to work law?

MR. GOLD: Well, if you get to a point where the balance is absolutely equal, the labor board -- and to sort of move into my second point and try to answer that question --

the labor board would deal with the administration of a provision requiring union shop elections in order for a union shop provision to go into effect, and it had to deal with the variety of questions which can arise in determining which law applies. And basically what the labor board did was set down two rules.

The first rule is the job site of the employees in question, is determinative. The second rule, which arose in a slightly different way than you state, but is equivalent to it, is that the headquarters of the employees, the place where they are paid, receive their instructions and report, controls. And that arose in a case of truck drivers going through many states, some right to work, some union security, and the board's conclusion that there wasn't any way to really find out where the preponderant amount of the work was. The board nevertheless said that since we are focusing on the situation of these employees whose condition of continued employment is in question, was the issue, that it would look to the employee headquarters in the absence of a clear job site, and we think that that was a sensible principled reading of the statute and enjoys and gives the argument we make the added weight set out in cases such as Norwegian Nitrogen and other cases which talk about the effect of a rule developed by an administrative agency at the --

QUESTION: Well, how much of the job has to be

performed in the state with the right to work law before that law is applicable?

MR. GOLD: We would think that whichever state the preponderance of the work was done ought to be the state whose law controls, and I would take it that there will be some cases where you may get into as close a situation as you envisage, but I don't think that they will be --

QUESTION: What about the collective bargaining contract that covers workers in two different states and some workers do all their work in one state and other workers do all their work in another?

MR. GOLD: That was precisely the issue that first faced the board in a case called Giant Food, which we cite, and the board said that the employees who worked entirely in the right to work state were covered by the right to work, and the employees in the union security state could have the union security provision applied to them, and we think that that makes the very best sense that can be made in this area in terms of --

QUESTION: So the bargaining contract has to reflect both, I take it?

MR. GOLD: Well, that's right. There are agreements, such as the one you had before you in General Motors, where you have plants -- I have no idea how many states, but in a very vast number of states, and the basic reaction of the court was that obviously the Indiana law would apply as to the plants in

Indiana, but that wouldn't have negated the agreement as to the employees in Michigan.

QUESTION: And hence the place of contracting isn't very important?

MR. GOLD: No, we would not believe that it ought to be important. The one thing that is clear in employer-employee relationships is that we can count on the employer to have people work where he needs them. On the other hand, where an agreement is negotiated may have nothing at all to do with the situation of the employees and what is the rule most fairly attuned to their situation.

Obviously, if the rule were the place of negotiation, there might be tests of strength about where an agreement was to be negotiated.

QUESTION: One could concede your two-state analogy, I suppose, saying that the union security state has every bit as much right to have its policy enforced as does the right to work state, and still feel that here the result might come out differently than you suggest because, as you say, the federal policy is neutral, you don't have a pro-union security state pulling against a right to work state, but it is basically Texas versus the Federal government.

MR. GOLD: Well, I think --

QUESTION: You don't say that the federal policy is neutral, do you?

MR. GOLD: No, I say the federal conflicts principle is neutral, but --

QUESTION: I thought earlier you said that the federal policy was neutral with respect to right to work --

MR. GOLD: What I was attempting to say, Mr. Justice Rehnquist, was that the federal policy is neutral between law givers. Normally, if the federal government does something, it is supreme by the fact of its action. Here, in 8(a)(3), the federal government has not utilized the preemptive powers it has on the basis of the commerce clause. But, again, because it seems to wrap up so many things, I go back to the first labor board case, this Giant Food case, which --

QUESTION: And that involved the District of Columbia?

MR. GOLD: -- which involved the District of Columbia. Now, Congress has never enacted a right to work law for any federal jurisdiction in which it has the same type of exclusive control that a state has, that the state of Texas has within Texas. And in that sense, the federal jurisdictions are union security jurisdictions, just the way New York is. Most union security states don't have a law saying that union security is permissible. There is the absence of a law prohibiting agreements between employers and unions which require condition of continued employment. And the federal jurisdiction, such as the District of Columbia, is that type of jurisdiction.

Now, it is the second point of our argument that the high seas, an American flag ship on the high seas is within an exclusive federal jurisdiction, the federal maritime jurisdiction, which is just the same for present purposes as federal jurisdiction over the District of Columbia. So you do have, in terms of the neutrality of conflicts principle, the same type of interests at stake that you would have in a case where the employees spent 80 or 90 percent of their time in the District of Columbia, but 10 percent of their time in Virginia.

QUESTION: Do you think you can draw the same inference from Congress' failure to legislate with respect to union security on the high seas that you could from its failure to legislate with respect to union security or its absence in the District of Columbia?

MR. GOLD: Yes, Mr. Justice Rehnquist, we think it is proper to do so for the reason that, as we point out at length in our brief -- and as Judge Ainsworth, who is an admiralty and maritime lawyer of some note pointed out in his dissent -- the federal government has always regulated the employment conditions of American ship sailors on the high seas in the way that states have regulated employment conditions within the states. Indeed, the federal law regulating that employment relationship was far more detailed, I think, far less laissez-faire than a comparable state policy.

QUESTION: But you could get a number of federal

maritime enactments that would apply to a worker within the three-mile or ten-mile territorial limits of Texas waters, couldn't you?

MR. GOLD: Well, we make the point in our reply brief that we think the only thing we claim -- and I hope we made it clearly in our opening brief, too -- the only thing we claim is that there is exclusive jurisdiction on the high seas. When you get into territorial waters, you get into all the complexities of the extent to which the state law and the federal law are concurrent, complexities which we don't think are answered by any of this Court's precedents that we know. And nothing that we are arguing here would prejudge the question of whether the state right to work law would be preeminent for somebody who worked solely within the territorial waters or primarily within the territorial waters of a given state.

I would like to reserve --

QUESTION: Before you sit down, if you haven't thought about this, you could be thinking about this while you are sitting down: This is a matter of construing the language of 14(b), which appears on page 14.

MR. GOLD: Yes.

QUESTION: Do you think the phrase "in any state or territory in which such" and so on modifies employment or does it modify execution or application of agreements?

MR. GOLD: In our view, it modifies employment or

there would have been no need to gon to say in which such execution or application is prohibited. In other words, we think the respondents wish to suggest that this provision reads "nothing in this act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment where such execution or application of prohibited by the state or territorial law."

QUESTION: Yes.

MR. GOLD: And we think the second reference indicates that the focus is on the employee who we are trying to determine may have to pay dues as a condition of continued employment.

QUESTION: So you say the employment must be in any state or territory --

MR. GOLD: Yes.

QUESTION: -- rather than the execution or application, execution specifically in this case --

MR. GOLD: That's right.

QUESTION: -- in any state or territory?

MR. GOLD: And again to go on with some of the examples that I was discussing with Mr. Justice Rehnquist and Mr. Justice White, we don't believe it would make very good sense to say if you have a situation in which an agreement is negotiated in Texas and all the work is to be done in Louisiana,

that this was intended to permit Texas to cancel Louisiana's choice by saying you were foolish enough to wonder into our state to executive the agreement, even though the people who are really affected by it aren't working here, we are going to invalidate the agreement.

QUESTION: The agreement, I suppose, means collective bargaining agreement, doesn't it?

MR. GOLD: Yes.

QUESTION: Mr. Gold, has the petitioner abandoned the primary jurisdiction issue that was raised in the petition?

MR. GOLD: In light of your opinion in Connell, we have not pressed it.

MR. CHIEF JUSTICE BURGER: Mr. Hambright.

ORAL ARGUMENT OF JAMES W. HAMBRIGHT, ESQ.,

ON BEHALF OF RESPONDENTS

MR. HAMBRIGHT: Mr. Chief Justice Burger, members of the Court:

The issue in this case is whether Texas, the State of Texas has sufficient interest in the employment relationship between respondent and the employees in its tanker fleet headquartered at Beaumont so that under section 14(b) of the NLRA, as amended, the Texas right to work law applies to the agency shop clause in that agreement.

The trial court said that it did. The Firth Circuit said that the trial court was correct. We urge this Court to

affirm, primarily for the reason that Congress has made no exception as to seafaring or maritime employees under the Taft-Hartley Act, as it did under the Railway Labor Act for airline pilots and train crews, and for the further reason, Your Honors, that the employment relationship in this case is centered in Texas.

We start with the proposition --

QUESTION: I take it, you wouldn't be here if none of the work was done in Texas?

MR. HAMBRIGHT: Your Honor, I think in this case we have so much more than the work. We have the hiring, firing and --

QUESTION: I understand that, but suppose none of the work was done in Texas, all was done in Louisiana, say --

MR. HAMBRIGHT: Your Honor, 14(b) speaks in terms of execution or application, and I can't conceive of a situation where under the phrase "application" that I could be here before you if there was utterly no work done in the state where I was urging the contract's application.

QUESTION: So if an agreement is negotiated and executed in Texas covering employees working at two different plants, one in Texas and one in Louisiana, the lw of Louisiana rather than of Texas would govern the employees working at the Louisiana plant?

MR. HAMBRIGHT: In that connection, Your Honor, we

come back to the phrase "execution," and that is what your question is directed toward, and in looking through the legislative history, I found nothing to indicate whether they meant execution to mean signing the document or performing the work, because execution, when you execute a contract, sometimes it means you carry out the terms of the contract. So without reaching that area, and the looking I have done has turned up nothing, I would have to say Your Honor is correct.

QUESTION: So the only difference in this case is that 10 to 20 percent of the work in addition was done in Texas?

MR. HAMBRIGHT: Oh, no, Your Honor, we take the position that under the phrase "application," there comes things such as enforcement of the agency shop clause itself. Justice Douglas held that in Schermerhorn, the second, the second Schermerhorn case, which this Court unanimously decided in 1963, when he said that if there could be any doubt that the language of the section means that the act shall not be construed to authorize any "application" of a union's security contract, such as discharging an employee which, under the circumstances, is prohibited by the state, the legislative history of the section dispel it. So therefore, Your Honor, I think that when we speak of application, we cannot just look at work, as my colleague is suggesting, but we must look at things such as the enforcement of a union's security clause, and this Court has squarely noticed that distinction.

Now, it is our contention that we start with the proposition laid down by this Court in the Cooley case that a state can enact a law regulating maritime commerce if the state law covers a matter not requiring a single uniform rule nationally, and if the state law is not in conflict with the national law.

Now, in this situation, on the question of uniformity, Congress says there shall be disuniformity in the area of right to work. Again, in the Schermerhorn, the second opinion, which I have referred to, Justice Douglas wrote for the unanimous Court that there is a conflict between state and federal law, but it is a conflict santioned by Congress, with directions to give the state the right of way to state laws barring the execution and enforcement of union security agreements. And he used the word "enforcement." He didn't say "execution and application," as the statute does. He departed just a little bit and said the "execution and enforcement."

QUESTION: But you say that wasn't a departure from the true meaning of the statute.

MR. HAMBRIGHT: I think that Your Honor --

QUESTION: I thought that was your point?

MR. HAMBRIGHT: Mr. Justice Stewart, I think that the enforcement is part of the application, yes, sir, without --

QUESTION: Oh.

MR. HAMBRIGHT: He further -- and on this uniformity

point, he further said that Congress, in other words, chose to abandon any search for uniformity in dealing with the problems of state laws barring the execution and application -- he is back, Mr. Justice, he is back on state laws and application of agreements authorized by 14(b) and decided to suffer a medley of attitudes and philosophies on the subject. So in that regard, I think it would be well to see what we have here on the subject of uniformity from the Solicitor General, who filed a brief at the invitation of this Court.

In his brief -- and that is the Solicitor General's brief, on page 14 -- he said that he agreed that the United States agrees that a state right to work law can be applied to the maritime industry. That is what he came up with, Your Honors, after looking it over. Now, he filed three briefs with you. First, he filed a memorandum urging you to grant this writ. Then he filed a brief with you, and then he filed a reply to our brief. So I am talking about his primary brief.

He says in there that the United States agrees that a state right to work law can be applied to the maritime industry, then he further says, on that same page, that section 14(b) of Taft-Hartley contains no exclusion for maritime workers as does the Railway Labor Act. Then he further said that Congress expressly permits diversity of regulation as to union security, and then his grand finale, which I think is most pertinent here, he says maritime commerce would not necessarily be

disrupted or hindered by the application to different ships or different employers of different union security rules.

QUESTION: But in his grand grand finale, he agreed that the job site should control?

MR. HAMBRIGHT: Sir, he seemed to find nothing wrong with the idea that Texas law might well apply to these employees. He only felt that Texas had an insufficient contact.

QUESTION: He said job site.

MR. HAMBRIGHT: Yes, sir. His test on --

QUESTION: He doesn't say controls.

MR. HAMBRIGHT: Yes, sir, his test, the Solicitor General's brief, on page 15, and I quote his test, "A state has a sufficient interest in the employment relationship only if the employee performs some work within the state."

QUESTION: Now, to get to his grand grand finale, which is on page 3 of his last brief -- isn't that his last brief?

MR. HAMBRIGHT: That is the final word from him.

QUESTION: That is the final word from him.

MR. HAMBRIGHT: Yes, sir, Mr. Justice, it is. He said that Texas does not have sufficient interest and that the job site, in his view, is predominant. But let me explain how I think he arrived at that and perhaps dropped the ball.

In his brief, on page 15, and I am speaking of his primary brief, seven lines down, he states "these employees

perform no work whatever in Texas." He is quoting there Judge Judge Ainsworth, from the Fifth Circuit. Now, that is one thing he says on page 15. Then on page 18 --

QUESTION: What are you referring to?

MR. HAMBRIGHT: His primary brief, Your Honor, the Solicitor General.

QUESTION: On page 15?

MR. HAMBRIGHT: Yes, sir, the Solicitor General's brief, page 15.

QUESTION: It is a footnote that you are talking about?

MR. HAMBRIGHT: Yes, sir. Yes, sir, that's right, seven lines down in the footnote. I'm sorry. He says "these employees perform no work whatever in Texas."

Then, Your Honors, on page 18, which coincidentally is 18 lines down, he says "you can only perform a union security clause where work is done or where dues are collected and all of these events take place outside Texas. The work is performed at sea, the dues are deducted from wages paid at sea."

Then he goes on, on page 7, line 5, he says, in referring to this work force, "a group of workers who perform their work outside the boundaries of any state."

QUESTION: Well, he acknowledges all this in the supplemental memorandum, doesn't he?

MR. HAMBRIGHT: He acknowledges that he had misstated

the --

QUESTION: Well, he acknowledges that they do some work in Texas?

MR. HAMBRIGHT: Yes, sir. But the thrust of his job situs test is that there is no work done in Texas, because he says, Your Honor, that it must be a state where some work is done. He lays that down in his primary brief there.

Then, again in his primary brief, on page 11, line 8, he says, "Texas cannot impose its judgment upon seamen all of whom work and are paid outside its borders." Now, if it please the Court, this is not in accord with --

QUESTION: Excuse me, I just want to be sure I follow what you are calling our attention to. As I read the brief, the first thing on page 15 was the quote from Judge Ainsworth, rather than a quote of the Solicitor General himself, and I don't think you directly quoted the language on page 11, either. Does it say exactly what you said?

MR. HAMBRIGHT: I think it does, Mr. Justice Stevens.

QUESTION: I didn't find it, let me just put it that way.

MR. HAMBRIGHT: On page 11, he says, "How can it impose its" -- speaking of Texas -- "how can it impose its judgment upon the seamen involved in the instant case, all of whom work and are paid outside its borders?"

QUESTION: Thank you. I see it now.

MR. HAMBRIGHT: Yes, sir, it is about seven lines down. So my point is that on four different pages of this brief --

QUESTION: That is a statement that they all work outside its borders, it is not a statement that none of them work within its borders.

MR. HAMBRIGHT: Yes, Your Honor.

QUESTION: Which is quite different.

MR. HAMBRIGHT: Now, in point of fact, the findings of fact show that all of these seamen do work in Texas, they all come there regularly and repetitively. It shows that the voyages normally start and stop in Texas. It shows, the statement of findings of fact on appendix page 29, states that a more substantial part of the administration of the bargaining agreement occurs in Texas than in any other state.

Now, on the question of payment, the Solicitor speaks about collection of dues, says they are deducted from wages paid at sea. The facts show that these dues are computed and deducted in Beaumont, that they are mailed off from Texas.

QUESTION: Well, that is almost a semantical point, isn't it? I mean they are deducted from wages, the residue of the wages being paid at sea, but the union dues are in fact deducted in Beaumont. You can state it either way, but it doesn't seem to me evidences a real factual dispute.

MR. HAMBRIGHT: Mr. Justice Rehnquist, it ties in with

this concept, we think. There is an exhibit that shows that in a representative year there is about a $6 million payroll, and that of this amount of money, only about $1,900,000 is carried aboard ship for payment in cash to the seamen. But the other $4 million, the payment of that occurs within Texas.

QUESTION: Where is the money earned?

MR. HAMBRIGHT: Partially in Texas, Your Honor, and --

QUESTION: A very small part.

MR. HAMBRIGHT: Yes, sir, more so than in any other of the states though.

QUESTION: But not more so than on the high seas?

MR. HAMBRIGHT: Oh, no, sir, that is correct. But this money is paid in this manner. The seamen can designate an allotment to their families so that they don't take the money themselves, it is mailed direct to their families, and all of this is handled in Beaumont, and there is well over a million dollars a year disbursed in that manner.

Furthermore, the record shows that these seamen work for 90 days are on vacation 30 days, but they remain a continuous employee all along. And the 30-day portion of their wages, of course, comes directly from Texas to them. And then, of course, the withholding tax is deducted in Beaumont and paid in Austin at the IRS office. So --

QUESTION: What does the record show about the residence of these men? How many of them reside in Texas?

MR. HAMBRIGHT: Your Honor, the record shows that out of 289, 123 reside in Texas. It shows 10 in Rhode Island, 10 in Maine, 13 in Louisiana, 16 in Florida, 21 in New Jersey, and 60 in New York. And then there are 36 others in 16 other states, each having fewer than 6.

Now, the designated shipping port for these men, 152 of them have designated Beaumont as their shipping port, the others, Providence, Rhode Island and some in New York. But the residence of these gentlemen, of course, is a matter that the authors of the Harvard Law Review took into account when they discussed this case. They held or oppined, as much as the Attorney General did, that Texas does have the right to have this right to work law and that there is no exemption for blue water maritime seamen --

QUESTION: Are the Harvard Law Review's opinions regarded as holdings in Texas?

MR. HAMBRIGHT: We view them with a lot more attention than we do some of the reading matter, Your Honor. In this particular case, I viewed it with great authority as it came down point by point in support of what the en banc panel said, until they got again to the bottom line in which they said, apart from my brother here, they said the Harvard Law Review article does not say that job situs is the test, they said that residence ought to be the test. They said that the court did have power to expunge this agency shop clause, but they

suggested that perhaps it would be better if we did it only in part, and if we split it up and let it go away with respect to the Texas residence, but those from, as the authors there said, the New York contingent, let it remain as to them.

Now, of course, the thing wrong with that bottom line approach is, as this Court knows, in the H. K. Porter Company case, this Court held that the court cannot tell parties what to put in their labor contract and can't tell them to modify their clauses but can only tell them to bargain. So I think the Harvard people were on the right track until they got down to the theory part of it. And, of course, there is another impediment to that also, union counsel, at the trial of this case, told Judge Fisher, said, "Your Honor, there is no way the court can carve on this case with sufficient delicacy to split up the coverage of this clause." That is in the record here, but that is what he told the trial court.

And then, again, the Harvard people, I think, may have disregarded the fact that it is not just Texas and New York, but that some of these people live in seven or eight other states, as well.

Now, if it please the Court, I would like to speak for just a moment about --

QUESTION: Could I ask, I take it your position is that the act should be construed so that only one law applies under any contract?

MR. HAMBRIGHT: No, sir, I do not believe, Mr. Justice White, that you should in this case go into a sweeping decision as to that nature, and the reason this is so is that this case does not concern very many people. The Solicitor told you in his initial memo that maybe 50,000 seamen could be affected by it. But in a footnote, he told you that about 20,000 of that figure, which he got from the Bureau of Labor Statistics, were supervisors and not under the act, so that cuts it back to maybe 30,000. But the biggest distinction is, he was speaking of people that work under maritime contracts, as we normally view them, out of hiring halls, where they have no particular company, no particular --

QUESTION: But do you think this decision has only to do with maritime employees?

MR. HAMBRIGHT: Your Honor, it has to do with a company headquartered and centered with its employment relation, as this company --

QUESTION: Well, let's suppose, would you have the same problem or wouldn't you if you had exactly the same facts except that 80 percent of the employment was not done on the high seas but in another state without a right to work law, everything else is the same?

MR. HAMBRIGHT: Your Honor, I think that it is possible it could, if you had a shoe salesman who worked in another state --

QUESTION: Well, it might have quite a wide impact, then?

MR. HAMBRIGHT: It might have, Your Honor, in that regard. No one has considered that approach in the briefs heretofore. I know counsel for the union asked the Clerk for an extension of time to file his brief here so he could check with the other maritime unions --

QUESTION: Well, if all the facts were the same except that 80 percent of the work wasn't done on the high seas but in another state, without a right to work law, would you -- your position would be the same, Texas would be entitled to enforce her right to work law?

MR. HAMBRIGHT: That is correct, Your Honor, it would be, if every fact was the same, indeed, I think so.

I would like to correct, if I may, a few expressions from counsel for the petitioner. He says this labor contract is with Mobil Oil Corporation. Your Honors, it is with Mobil Oil Corporation, Marine Transportation Department, Gulf, East Coast Operations. The importance of that is that this is a separate employing unit and the multistate reciprocal act, which is cited in our brief, and recognizes that in maritime employment unemployment compensation coverage can be handled with the state where the headquarters is located, it refers to employing unit. And, of course, I think we have a rather Texas flavor to the case perhaps without saying that.

He also told you that 5 percent is closer to the mark as to the amount of work done in Texas. Your Honors, this has been a creeping percentage. In the union's initial answer, they said less than 5 percent of the work was done in Texas, but when it came time to submit findings of fact, after a two-day trial, they submitted a proposed finding in which they got it up to 10 percent. And then when they submitted a proposed amended conclusion of law, they got it up to 20 percent. And we have evidence here, Your Honors, that puts it up higher than that, because these ships come to Brownsville, Corpus Christi, Houston, Baytown, they are adding, topping off to their cargo, then they go up east and discharge, and they come back in ballast. And the proof shows there is a grievance here where a man, the ship loaded in three different ports and he caught it in Beaumont, and he wanted penalty pay for an overtime matter because he had been in all those ports.

So what I am saying to this Court is that more than 20 percent of the work in fact is done within the territorial waters of Texas in the normal trade and, further, some of the work is done on the shore in Texas. The labor --

QUESTION: Mr. Hambright, are you disagreeing with Finding 18-A that they quote that says 80 to 90 percent is on the high seas or in ports other than Texas?

MR. HAMBRIGHT: No, sir, I am not disagreeing with that because the court uses the 80 to 90 to show that there is

some divergence or some variation. These are averages, Mr. Justice Stevens.

QUESTION: Is there any other findings with respect to the percentage of work that is within or without Texas other than 18-A?

MR. HAMBRIGHT: No, sir, there is not.

QUESTION: So to go beyond that, we have to go to the record, the original record?

MR. HAMBRIGHT: That is correct, Your Honor. That is correct.

Another matter that we have is this business of the old board cases, where he indicated that the test used by the board in 1948, which was one year after Taft-Hartley, and it has never reverted to those, is where they report for work, where they are paid and where they get their instructions. I would like for the Court to know that these ships are controlled by radio from Beaumont, where the fleet manager is located and the fleet marine superintendent, he speaks every day on the radio to the ship's masters -- that is in the record on appeal.

The only place a man can be terminated is in Beaumont, Texas, and there is an exhibit showing a letter where an employee was indeed terminated in Beaumont, to illustrate that. The only place that these people are covered by unemployment compensation insurance is in Texas, nowhere else.

QUESTION: The early board cases to which you are

referring are Giant Food, Northland Greyhound, and Western Electric?

MR. HAMBRIGHT: Yes, sir, Your Honor, and they were decided under a provision that was repealed by Congress within a year or so after that and it has never been reenacted.

QUESTION: That is the requirement of a vote?

MR. HAMBRIGHT: Yes, sir, prior to the --

QUESTION: But the basic issue is the same, wasn't it?

MR. HAMBRIGHT: In think in that case it was not, Your Honor, for this reason: In those cases, the question was which state law applied and not whether any state law applied. So I think they can be distinguished in that manner as well.

QUESTION: But it was not clear to me whether or not you think those cases were rightly or wrongly decided.

MR. HAMBRIGHT: Your Honor, under the facts then before the board, just from reading the cases, I would say that they were decided in accord with expediency --

QUESTION: Well, I don't know if that is right or wrong, but --

MR. HAMBRIGHT: Your Honor, I don't think this will ever be a problem to the board.

QUESTION: My second question is do you think these cases help you in your position in this case or hurt you?

MR. HAMBRIGHT: In those cases, Your Honor, I think they help us because they say you look to the focal point of

the relationship, and they examined everything, not just the work. They examined where they paid, where they instructed, where do they report, and the record shows that all 289 of these employees regularly report to Beaumont at one time or another to catch their ship for the beginning of a voyage. That is in the record. So they use a multi-dimensional analysis and I think that is what this Court should do, like the Fifth Circuit did, and if that is done, if you look at the whole employment relationship, Your Honor, I submit there will be no problem whatsoever to the board in future dealings in this area.

QUESTION: Mr. Hambright, do I understand that these 60-some men in New York go to Beaumont every time they get on the boat?

MR. HAMBRIGHT: They regularly and repetitively go to Beaumont.

QUESTION: For every trip? How do they go there, plane or something?

MR. HAMBRIGHT: Yes, sir, they get --

QUESTION: Are you sure they don't go down on one of the boats?

MR. HAMBRIGHT: Oh, Your Honor, they do, but they also fly --

QUESTION: That is what I thought.

MR. HAMBRIGHT: -- sometimes they fly to catch the

ship there because they get --

QUESTION: They ride right on the same ship?

MR. HAMBRIGHT: Well, when their work cycle is over, Mr. Justice Marshall, the 90 days is over and they go ashore, 30 days later they have to catch a ship again. That decision is --

QUESTION: And they go to Beaumont to catch it?

MR. HAMBRIGHT: Very often that is the case, Your Honor.

QUESTION: I thought you said they always did.

MR. HAMBRIGHT: No, sir, I said that regularly and repetitively they do catch ships in Beaumont, but not every time. I didn't mean to say that, Your Honor.

Another thing that has to do with the application of the labor contract is the handling of grievances. The record shows that 23 out of 27 top-level grievances were heard in Beaumont, Texas in this case, and only 4 went to arbitration. Now, that is a pretty important aspect of labor relations.

All of the employees get their mail in Beaumont. The ones in New York, they are no exception. When they first come with the company -- this didn't show up in the appendix too well, but they get this welcome aboard booklet, and in there it says that your mailing address shall be P. O. Box so-and-so, Beaumont, Texas. So that is just one more indication of the fact that the employment relationship is actually centered in

Texas.

And I hope the Court will bear in mind that these are not hiring hall seamen. These are not seamen who are sitting around waiting and hoping that they might get a job. So where the arms of admiralty around these people with the special privileges affording seafaring men, when they don't have a job at all, and in our case these men have a permanent lifetime job.

Thank you, Your Honors.

QUESTION: Mr. Hambright, just before you sit down, in your colloquy with Mr. Justice White, did you agree that this case, properly decided, should be confined to maritime employment, or did you take the view that it has a considerably broader application?

MR. HAMBRIGHT: Mr. Justice --

QUESTION: You said that in those early NLRB cases --

MR. HAMBRIGHT: Yes, sir.

QUESTION: -- which were decided, one in 1947, one in 1948, and one in 1949, I think, you said they were different because they involved two competing, two or more competing states, whereas in this case you just have the State of Texas on the one hand vis-a-vis no state on the other hand.

MR. HAMBRIGHT: That is correct, Your Honor.

QUESTION: Now, is this a case that just involves that, the State of Texas, a state versus no state, or should it

-- does its impact go further, two cases involving competition between or among two or more states?

MR. HAMBRIGHT: Mr. Justice Stewart, I think absolutely the case only involves Texas vis-a-vis the admiralty. There is no showing that any substantial part of the administration of this labor contract occurs elsewhere. In the matter of money, for instance, this $6 million, the proof shows that only $67,000 was disbursed from any other office, less than one percent. So it is so tied in with the State of Texas that you really need not bite off any more than just that one problem. That is our --

QUESTION: But there is no competition impossible between states, is there? If the state doesn't have a right to work law, the federal law governs, so it is always the question of either state or federal law, it is not a question of which state law, it is a question of state or federal law, isn't it?

QUESTION: A state work to right law or 8(a)(3)?

MR. HAMBRIGHT: Yes, sir, and, of course, there --

QUESTION: So I don't understand. I thought you indicated to me that this decision -- that you would be here even if 80 percent of the work was done in Louisiana, rather than on the high seas.

MR. HAMBRIGHT: Well, if it was in the same facts situation, Your Honor --

QUESTION: Exactly, yes, and you said, yes, you would

QUESTION: But done on dry land in Louisiana.

MR. HAMBRIGHT: Well, I am not sure --

QUESTION: But not on the Savine River.

MR. HAMBRIGHT: Your Honor, on the legislative history, you wrote the opinion in Schermerhorn one, and you stated in that case -- which was a unanimous opinion of this Court -- you stated in that case that the connection between 8(a)(3) and 14(b) is clear, and whether they are perfectly coincident we need not now decide, but unquestionably they overlap to some extent.

QUESTION: But I take it you would be here if 80 percent of this work, all of the facts were the same except the work here was done, 80 percent of it was done in Louisiana on dry land?

MR. HAMBRIGHT: Yes, sir, I would be here under those circumstances.

QUESTION: With the same basic argument.

MR. HAMBRIGHT: Yes.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ. -- REBUTTAL

QUESTION: Mr. Gold, let me put a hypothetical to you about 80 percent -- assume 20 percent and more or less of the same kind nof work and the same kind of contacts were in Texas with a company, and 80 percent more or less was in towing oil

rigs across the gulf and around Florida and over to the Adriatic Sea and off to the North Sea, as is done, as you know, and otherwise all of the contacts are the same, but no states other than Texas, just the high seas and the Adriatic Sea and the North Sea and installing these rigs and coming back and loading them and taking some more, what would you say about that?

MR. GOLD: Our theory, Mr. Chief Justice, the result ought to be the same because the work would be on American flag vessels, where 80 or 90 percent of the work was being done on the high seas and we think that that is a federal jurisdiction equivalent to the District of Columbia.

May I very quickly, if I have the time, make two points: First of all, up until 1962, this employer had its headquarters in New York. All of the administrative details that are now performed in Texas were performed in New York, but the work that the covered employees did then, as now, was 80 percent on the high seas. We don't understand, if we look at this in terms of the covered employees and their situation, why there should be a different result because the employer unilaterally is doing his paperwork and other such aspects of its business in one state or another.

The one factor that is simple, relatively easy to understand and to find the facts about is where is the work done, where is the work being done.

QUESTION: Do you think you are plunking for the same

standard the board applied in those older cases --

MR. GOLD: Yes.

QUESTION: -- the headquarters sort of approach?

MR. GOLD: Yes, Your Honor, because --

QUESTION: That certainly involved more than where the work was done.

MR. GOLD: Well, Mr. Justice White, the first case, as I have indicated, was the Giant Food case, where you had employees who stayed in a particular place, half of them in Virginia and half in the District of Columbia, and the board said that the job site was controlling. Then in the more complicated situation, where you could not say with assurance where the preponderance of the work was, they went to the standard that you are discussing, and we agree with both of those holdings. We think they are as sound and as close to equity as one is going to get in this area.

And the last point I would like to make is that we are not arguing that maritime employees are exempt from right to work laws. As I have indicated in trying to answer Mr. Justice Rehnquist's questions, we think it is an entirely different matter if they are working in territorial waters and we don't think that this case gets into that.

And finally, just to give an analogy, so far as I understand it, casinos are only legally run in Nevada, that is a right to work state. The job situs of those employees is

Nevada.

QUESTION: Well, how about the workers on the drilling platforms?

MR. GOLD: On the drilling platforms, I would say that it depended on the location of the drilling platforms. In application of one of your cases, whose name escapes me now, where the Court went into the question of the extent to which under a statute of Congress, those are an extension of the state within the federal maritime jurisdiction.

QUESTION: Mr. Gold, would your argument be the same if these tankers stayed within territorial waters all the way up the coast?

MR. GOLD: No, Your Honor, I think that in that case you would be into the situation --

QUESTION: The state?

MR. GOLD: That's right, and it would be like bus drivers driving through many states and the headquarters test of the Greyhound case would apply.

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

[Whereupon, at 2:15 o'clock p.m., the above-entitled case was submitted.]

- - -