In the

Supreme Court of the United States

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FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

PETITIONERS,

V.

PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHOEMEN'S AND WAREHOUSEMEN'S UNION, ET AL.,

RESPONDENTS.

No. 76-938

Washington, D. C.
December 7, 1977

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v.	:	No. 76-938
PACIFIC MARITIME ASSOCIATION, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, et al., Respondents.	:	

Washington, D. C.,

Wednesday, December 7, 1977.

The above-entitled matter came on for argument at 10:07 o'clock, a.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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

DANIEL M. FRIEDMAN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Petitioners.

R. FREDERIC FISHER, ESQ., Lillick, McHose & Charles, Two Embarcadero Center, Suite 2600, San Francisco, California 94111; on behalf of Respondent PMA.

NORMAN LEONARD, ESQ., Gladstein, Leonard, Patsey & Andersen, 1182 Market Street, San Francisco, California 94102; on behalf of Respondent ILWU.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments first this morning in No. 76-938, Federal Maritime Commission and others against the Pacific Maritime Association.

Mr. Friedman, you may proceed whenever you're ready.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE PETITIONERS

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

Section 15 of the Shipping Act requires persons covered by the Act to file with the Federal Maritime Commission a category, seven different categories of agreements, one of which is "every agreement controlling, regulating, preventing or destroying competition".

The Commission is instructed by the statute to disapprove agreements that fail to meet certain statutory criteria and to approve all others. It is illegal to carry out either an agreement that the Commission has not approved subject to the Act, or one that has been disapproved. And any agreement approved by the Commission thereby obtains antitrust immunity.

There are two questions in this case which is here on a writ of certiorari to the Court of Appeals for the District of Columbia Circuit.

The first one is whether Section 15 covers any provisions of collective bargaining agreements.

And the second is, if that question is answered affirmatively, whether the Federal Maritime Commission in this case properly denied to the particular provisions here involved a labor exemption, an exemption that the Commission has recognized as appropriate under Section 15 for collective bargaining agreements in certain circumstances.

The respondent, the Pacific Maritime Association, is an employers association comprised of most of the employers in the West Coast maritime industry, steamship companies, terminal operators and stevedores. The respondent, International Longshoremen's and Warehousemen's Union, is the collecting bargaining representative of the employees in that industry, and bargaining on the Pacific West Coast generally takes place on an areawide basis.

There are, however, a small number of employers operating on the West Coast who are not members of the Pacific Maritime industry, including a number of ports on the Pacific West Coast that operate their own terminal facilities.

Since 1935, PMA and its predecessors and the union have operated under a collective bargaining agreement that provided detailed arrangements governing the operation of the waterfront on the West Coast. The most important aspect of this is that together they have organized and controlled a joint registered work force, a force which is registered, and which is dispatched under union hiring halls that are

jointly administered to particular employers on a job basis. The men are rotated, you don't have a particular crew working full-time for a particular employer. The men are rotated from job to job, as the jobs come up.

The PMA has a very elaborate system of central recordkeeping and payroll records. Everyone is paid centrally, even though they work for one employer two days and for another employer three days of the week; and, in addition, there's a very extensive jointly operated fringe benefit program under which they have a guaranteed annual wage, pension plans, welfare plans, vacation plans, and so on, and all members of PMA are required to contribute to the fund that sustains these fringe benefits.

Now, prior to 1972, which was when the agreement involved in this case was negotiated, employers who were not members of PMA could obtain men from the registered work force, union members, by negotiating directly with the local unions involved in their particular areas. And this happened frequently. Separate contracts were negotiated between many of the ports involved in this case and the local union.

And, in addition, the individual ports were able to negotiate for the fringe benefits provided under the master contract by a participation agreement that they negotiated with PMA and the union.

And under this arrangement, the union permitted some

of the non-member employers to use what they call steady gangs or steady men, that is, men who worked full-time for one employer rather than being rotated from individual to individual.

PMA was of the view that the non-member's use of the registered work force, as it functioned, put its members, the PMA members, under what they describe as an obvious competitive disadvantage as against the non-members. And a major reason PMA's president indicated, at page 90 of the record, was that under this arrangement if PMA members were closed down as a result of a labor dispute, the members -- the ports who were not members could continue to operate, because they were not bound by the arrangements, they were not members of PMA; as a result of this, cargo and business was diverted from the members of PMA during these periods of disturbance, labor disturbance, to the non-members, which they felt gave the non-members an unfair competitive advantage.

They also believe the use of the steady men gave them an advantage. And, finally, they thought that it gave the non-members an advantage that they were not required to pay their full share of the fringe benefits in the same way that PMA members were.

And, after extensive bargaining in 1972, PMA and the union agreed upon something called the non-member participation agreement, an arrangement that was made a part of the collective bargaining agreement, and the provision provides

that non-members must agree to be bound by the terms of the non-member participation agreement as a condition to using the registered work force.

Now, we've set forth in our brief a number of provisions, at pages 10 and 11 of our brief, a number of provisions of this non-member participation agreement that had an impact upon the non-members. But there are two of them that I'd like to stress at this argument, because these are the ones, we think, that probably have the greatest impact in terms of competition.

The first thing was that the non-members must use the registered work force on the same terms as the members, which included drawing them, of course, from the union hiring halls, which they had been doing in the past, and a limited use of them, in case there were union work stoppages against PMA, to the same extent that members of PMA were limited. And the non-member participation agreement stated: the essence of this requirement was the acceptance by non-member participants of the principle that a work stoppage by ILWU against PMA members is a work stoppage against non-member participants.

In other words, if there was a work stoppage against PMA, the non-members of PMA nevertheless would be bound not to use the work force at the time that PMA members were barred from it.

The second thing is that the non-members who wished

to use the registered work force had to participate in the fringe benefit plan on the same terms and conditions as PMA members; that is, they had to make the same payments to the fringe benefit program that PMA members would make.

After the union and PMA agreed upon this non-member participation agreement, they endeavored to get the non-member ports to sign the agreement. And they pointed out to the non-member ports that unless they signed this agreement, they would not be able to use the registered work force. And that is set forth at pages 65 and 77 of the Appendix.

QUESTION: Mr. Friedman, you refer to non-member ports, and my understanding is that the PMA consists of steamship companies, terminal operators, stevedores and so forth. When you say "non-member ports", are there entire ports which have none of those -- who are members of the PMA?

MR. FRIEDMAN: There are some ports, as I understand it, where no one is a member; there are other ports where the port-operated facilities are not, but there are other facilities in the port that are operated by PMA.

PMA, by the way, will accept anyone's membership, who agrees to its terms. But I use this as kind of a shorthand, it really is all non-members of PMA who are engaged in any of these activities, but this particular case basically involves the ports.

QUESTION: And they are primarily publicly operated

ports? Or not.

MR. FRIEDMAN: Primarily, yes.

QUESTION: They are -- public bodies operate them?

MR. FRIEDMAN: Yes, they are all public bodies, and the public bodies are required, under the State statute, to do certain things or to not do certain things.

QUESTION: Yes.

MR. FRIEDMAN: The response of the ports to the adoption of this non-member participation agreement and the endeavors by the union and PMA to get them to join it and sign up was two things: First, they filed a complaint with the Federal Maritime Commission; and, secondly, they filed three antitrust cases. Two of those are still pending, the third has been dismissed.

The complaint with the Commission alleged that this non-member participation agreement --

QUESTION: Was the dismissal on the merits?

MR. FRIEDMAN: No, it was dismissed by the plaintiff. The record indicates they decided to dismiss at some point.

And I might add that the antitrust complaint that was dismissed challenged only one narrow aspect of this particular non-member participation agreement, something dealing with what they call stuffing and unstuffing of containers at the waterfront; and that has dropped out of the case, because the National Labor Relations Board has held that that

was an illegal "hot cargo clause", so that's no longer in the case.

They alleged that the non-member participation agreement was an agreement that had to be filed under Section 15; that it was an illegal agreement under both sections 15 and also several other sections of the Act, and they urged the Board to take jurisdiction of the case and to disapprove the agreement -- I'm sorry, the Commission not the Board.

The Commission severed for preliminary determination two questions in the case, one, whether Section 15 covered this agreement, and, second, if it did, whether it was entitled to a labor exemption.

Lengthy affidavits were filed in the case, and the basic point the ports made was that the registered work force contains the skilled people necessary to operate these facilities, and that without the skilled people they could not effectively operate their facilities.

On the other hand, the ports point out that if they attempted to use non-union labor, if they could get it, to do this work, the union undoubtedly would throw picket lines around and close down the ports.

If, on the other hand, they signed up under this agreement, it would do two things according to the ports: one, it would increase their expenses for a variety of reasons; secondly, it would turn over control of their labor relations,

which, under their statutes, they are obliged to handle, to third persons, because they were bound -- by doing this they would bind themselves to all of the requirements of the PMA.

The Commission held that it has jurisdiction under Section 15 over this agreement, and that the agreement was not entitled to a labor exemption. The Commission applied the standards it had developed in a case called Boston Shipping, to determine the existence of a labor exemption.

QUESTION: Is there any statutory labor exemption in the Federal Maritime Act?

MR. FRIEDMAN: No, there is not, Mr. Justice, but the Commission's theory is that since an antitrust exemption results when they approve an agreement under Section 15, and since competitive considerations are an important factor in the Commission's administration of Section 15, it is appropriate to imply into this statute a labor exemption comparable to that that this Court has developed under the antitrust laws. And that's the basic theory upon which the Commission operates.

QUESTION: Mr. Friedman, am I right, the Commission hasn't yet either approved or disapproved the agreement?

MR. FRIEDMAN: That is correct. All the Commission has done is make the threshold determinations --

QUESTION: That it must be filed.

MR. FRIEDMAN: -- that the agreement has to be filed and that it's not entitled to a labor exemption. And, indeed,

after it makes those determinations, it issues another order setting the issues on the merits for hearing and determination.

The Commission said that this was an agreement which controlled or affected competition between the members and the non-members, and therefore was covered by Section 15, and accordingly was required to be filed, unless a labor exemption existed.

It found there was no labor exemption for two reasons, under two of the criteria it had developed under Boston Shipping. First, it said, this provision did not relate to a mandatory condition -- a condition of mandatory subject of bargaining, because it was directed not at the labor conditions of the members of PMA but to the labor conditions of third persons, that is, the non-members, the ports.

And, in addition, the second related issue is that since it attempted to impose terms and conditions on people outside of the membership of PMA, it was, in attempting to impose those conditions, beyond the bargaining unit.

It concluded that this non-member participation agreement had a potentially severe and adverse effect upon competition, but only a minimal effect on the collective bargaining process. That's at page 70A of the Appendix to the Petition.

QUESTION: Mr. Friedman, when the Commission asks whether the agreement is entitled to a labor exemption, even

though it must be filed under Section 15, if they say that it does, is that just -- that it does have such-and-such, is that just the equivalent of approving it?

MR. FRIEDMAN: No, that is not. That means that --

QUESTION: But that does mean that -- it does mean that the Commission will not proceed to deal with the antitrust considerations in the matter because they think that under our cases, or under the Court's cases, whatever effect on competition is covered by the labor exemption?

Is that it?

MR. FRIEDMAN: That is correct. This would not -- this rule in the Commission granting the labor exemption would not be an approval under Section 15 that would confer antitrust --

QUESTION: But it would also keep them from disapproving it?

MR. FRIEDMAN: Yes. Yes, it does.

QUESTION: It keeps them from disapproving it, although otherwise they might disapprove it on the grounds that it's affecting competition?

MR. FRIEDMAN: That is correct. But, of course, in considering whether there is a labor exemption, they do carefully consider the impact on competition. In other words, --

QUESTION: Oh, I understand.

MR. FRIEDMAN: But they -- this is the end of the

case, as far as the Commission --

QUESTION: But, if they say that the agreement is not entitled to a labor exemption, then they're going to decide whether they would approve it or not?

MR. FRIEDMAN: That is correct.

QUESTION: And I take it, from what you answered Mr. Justice Stevens, just saying that the agreement is not entitled to a labor exemption is not equivalent of disapproving it?

MR. FRIEDMAN: No, no. No.

QUESTION: So they still could approve it and thereby insulate it from antitrust?

MR. FRIEDMAN: Yes, they could. If we prevail in this case, the Commission will go ahead and it could approve it or it could disapprove it.

QUESTION: And say that this is essential for --

MR. FRIEDMAN: Yes, that they --

QUESTION: -- for the running of the steamship business?

MR. FRIEDMAN: Yes. They could -- the only issue, I repeat, is this threshold issue.

QUESTION: And if there's a finding contrary to this case, that there is a labor exemption, then what follows? The Commission --

MR. FRIEDMAN: That's the end of the proceeding.

QUESTION: -- says you don't need to file it --

MR. FRIEDMAN: You don't -- well, if they filed it --

QUESTION: -- or does it approve it?

MR. FRIEDMAN: In effect, they would -- I presume they would, in effect, return it. That is, they --

QUESTION: But they don't approve it?

MR. FRIEDMAN: They don't approve it. I want to make that very explicit.

QUESTION: But they must say, then, you don't -- because the labor exemption is applicable here, this is not an agreement that need be filed?

MR. FRIEDMAN: I would say that's the effect --

QUESTION: Is that what follows?

MR. FRIEDMAN: That would be the effect of it.

QUESTION: What is their order? In finding a labor exemption, then what does the Commission do?

MR. FRIEDMAN: I couldn't tell you. I would hope to get the answer --

QUESTION: In any event, they don't purport to approve it, --

MR. FRIEDMAN: No.

QUESTION: -- and the agreement then is still open to attack in the courts as a violation of the Act?

MR. FRIEDMAN: Oh, yes, they have not --there's no approval.

QUESTION: It's not approved, but it certainly hasn't

been disapproved.

MR. FRIEDMAN: It hasn't been approved or disapproved. It's --

QUESTION: There's a finding -- because there's a labor exemption, you don't need to file this for approval, is that it?

MR. FRIEDMAN: But, in effect, you have to --

QUESTION: Well, you're going to find out for me.

MR. FRIEDMAN: You have to preliminarily file an order, I suppose, for them to know whether it has a labor --

QUESTION: Yes.

MR. FRIEDMAN: But the end result of giving it a labor exemption is as though it didn't have to be filed at all.

QUESTION: But it effectively takes the antitrust issue out of the administrative process?

MR. FRIEDMAN: Oh, yes. That's -- it's over, because --

QUESTION: And puts it back potentially in the courts, if anyone wants to sue.

MR. FRIEDMAN: Into the antitrust court, and I assume the antitrust court would not be bound, of course, by the Commission's determination.

QUESTION: Well, they don't purport to decide this.

MR. FRIEDMAN: No. No.

QUESTION: Well, Mr. Friedman, when you talk of labor exemption in this context, you're talking about exemption from the requirements of the Shipping Act rather than the antitrust laws.

MR. FRIEDMAN: That's correct.

QUESTION: So that means if there's a labor exemption, as you're using the term, it means that the agreement need not have been filed pursuant to Section 15.

QUESTION: Exactly.

QUESTION: That must be the concept.

MR. FRIEDMAN: That's right. If that's what -- if that it is --

QUESTION: If they had so ruled, yes.

MR. FRIEDMAN: Yes. But all I'm suggesting is that sometimes you may have to --

QUESTION: It may have been on file, sure, but it --

MR. FRIEDMAN: -- to determine whether you had to file.

QUESTION: Yes.

MR. FRIEDMAN: Indeed, sometimes people will file an agreement requesting a ruling that it doesn't have to, to be sure that they're not subject to the Shipping Act.

QUESTION: But in determining whether or not there is a so-called labor exemption, the Commission draws not on Shipping Act cases but on the decisions of the federal courts, including this Court.

MR. FRIEDMAN: It draws on those decisions, but it brings to bear its expertise on the shipping industry in balancing and weighing the competing impact on the one hand, on collective bargaining in labor, and, too, on the other hand, on competition.

QUESTION: And it draws on Allen Bradley and those cases.

MR. FRIEDMAN: And those cases, in weighing the competition.

QUESTION: Which exonerated certain activities of labor unions from the antitrust laws.

MR. FRIEDMAN: Yes.

QUESTION: That's the body of law upon which the Commission evidently draws.

MR. FRIEDMAN: Oh, yes. Yes. It says, in fact it states that the exemption is drawn from those decisions, its four criteria it developed in Boston Shipping was stated to be its view of a distillation of the teachings of this Court and the antitrust community cases.

Indeed, in this very case, it said that it thought this particular agreement was very similar in its ultimate impact, in its ultimate contours to the agreement this Court held was not entitled to a labor exemption in the Pennington case, because it said, in both cases it's a contract under which attempts are made to impose terms and conditions outside

of the bargaining. And of course in Pennington there was an attempt to drive the people out of business, which is not here, but it seems, and we fully agree, that the basic rationale of those decisions, of these decisions of this Court is that labor and management cannot get together and attempt to impose terms and conditions outside the bargaining unit on employers outside the bargaining unit.

QUESTION: They cannot because of the antitrust laws. Because, subject to the antitrust laws is what you mean?

MR. FRIEDMAN: Yes.

QUESTION: And the reason the Commission draws on our labor cases, or the Court labor cases, is because it is charged with considering antitrust considerations in approving agreements that have to be filed, and there is, in turn, a pro tanto exemption from the antitrust laws for certain types of labor agreements?

MR. FRIEDMAN: That is correct.

QUESTION: But it doesn't draw on our labor cases, it draws on our antitrust cases.

MR. FRIEDMAN: On your antitrust cases.

QUESTION: Right.

MR. FRIEDMAN: Except to one extent, to the extent, for example, where they have to consider whether something is a mandatory subject of bargaining; and if this Court has interpreted that provision under the National Labor Relations

Act, it would draw on those cases. But basically what I would say is that it draws upon the antitrust cases --

QUESTION: Right.

MR. FRIEDMAN: -- in determining the scope of the labor exemption, but then it implicates Shipping Act considerations when it decides whether or not the particular agreement is entitled to the labor exemption.

QUESTION: Are you, or is it necessary for you to defend the correctness and wisdom and accuracy of the Board's -- of the Commission's so-called distillation of these cases?

MR. FRIEDMAN: Well, I think it probably is, because our opponents challenge it. Our opponents say that the Commission has improperly defined the labor exemption.

QUESTION: Well, do you think it's a little over-simplified, if not a little naive -- if that's not too strong a word.

MR. FRIEDMAN: Well, I don't think so, Mr. Justice, because that presents the general contours, the general contours. I think their real criticism with us perhaps is more in the application of that test to the facts of this case than in the test itself.

I don't think there's any quarrel between us that the Commission properly can draw upon this Court's decisions defining the scope of the antitrust labor exemption, in determining the scope of the labor exemption under --

QUESTION: In any event, in this case the Commission found that there was no so-called labor exemption.

MR. FRIEDMAN: That is correct.

QUESTION: And, rightly or wrongly, that's what it found. Now, your brothers on the other side, their first position is that no collective bargaining agreement is subject to Section 15's requirement of filing, isn't it?

MR. FRIEDMAN: At all. Yes.

QUESTION: So that whether or not there is a labor exemption within the Board's criteria is really irrelevant to that basic argument, isn't it?

MR. FRIEDMAN: That's right. You only reach the question of a labor exemption if you agree that the Board has jurisdiction over --

QUESTION: Over some.

MR. FRIEDMAN: -- over some agreement.

QUESTION: Yes.

MR. FRIEDMAN: And let me address myself to that question, because the Court of Appeals said labor -- collective bargaining agreements are exempt as a class from the requirements of Section 15.

Now, Section -- in the Shipping Act, Congress provided an almost unique regulatory scheme. Agreements that would be illegal in any other industry under the antitrust laws may be permissible in the Shipping Act, provided that the government

regulatory agency has examined these agreements, has evaluated them under the standards, and has determined it's over-all in the public interest, taking account of all the competing and conflicting considerations, to approve them.

QUESTION: There's a very similar provision in the regulation of aviation in the CAB, isn't there?

MR. FRIEDMAN: But that, I think, tends to be narrower, in the sense that --

QUESTION: Is it?

MR. FRIEDMAN: -- I think it's for certain types of agreements; but I think the difference is the pervasive character of concerted agreements in operations in the shipping industry -- I mean, the statute was passed, as the Court knows, against the background of the Alexander Report of the Shipping Conference System. And were it not for this legislation, the conference agreement, in which everyone fixes prices and rates and so on --

QUESTION: Would be clearly grossly violative of the antitrust laws.

MR. FRIEDMAN: Yes.

Now, one of the provisions which the Court applies, which the statute provides, is that agreements controlling, regulating, preventing or destroying competition have to be filed with the Commission. There's no question that some provisions in collective bargaining agreements would have that

effect. In this case the parties agreed to require things to be done by the non-member ports that would have that impact upon the ports.

We think that there's nothing in the language or the legislative history of the whole scheme of the Shipping Act to indicate that Congress intended a blanket exemption of all collective bargaining agreements from the Shipping Act. What we think is that Congress intended the Commission in the first instance to take a look at anticompetitive agreements, even though they may have been the result of competitive bargaining, and that national labor policy is to be implicated not by saying that the Commission has no jurisdiction over any of these agreements, but through the application of the labor exemption that the Commission had determined.

The labor exemption itself, in this case, was properly projected by the Commission, because, as the Commission stated, -- and this is at page 63A of the Appendix -- the agreement was specifically designed to compel non-member entities to join PMA under the threat of exclusion from the ILWU work force. As such, it clearly imposes terms and conditions upon persons outside the bargaining group.

And this Court, in Pennington, recognized that there's nothing in the national labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other

bargaining units or to attempt to settle these matters for the entire industry. And that, we think, is precisely what this agreement was designed to do. PMA was putting into a collective bargaining agreement with the concurrence of the union provisions designed to eliminate what PMA viewed as unfair competition by its competitive factors in the industry, by the non-member ports. And we don't think that the labor exemption can be invoked to justify that kind of an agreement.

I'd like to reserve the balance of my time.

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

Mr. Fisher.

ORAL ARGUMENT OF R. FREDERIC FISHER, ESQ.,

ON BEHALF OF RESPONDENT PMA

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

I'd first like to address myself to a couple of the questions asked by members of the Court, I think it will clarify a couple of matters if I do so.

Mr. Justice Rehnquist asked whether PMA had any members who were ports. Mr. Justice Rehnquist's request to Mr. Friedman, I'm responding to.

PMA has no members who are public ports at the present time. There is an application pending by one port to join. But public port authorities generally do not employ stevedores. The non-member ports here are an exception -- excuse me, they

do not perform stevedoring themselves and therefore they do not employ longshoremen. So, in the normal course, a public port is a landlord, as in the case of the Port of San Francisco or the Port of Los Angeles. And you don't find them having need to have labor relations with the ILWU, and you therefore don't find them becoming members of PMA or otherwise dealing with the ILWU.

Mr. Justice White asked the question whether it might be the equivalent of approving the agreement if, in the event the Commission determined the labor exemption applies. I'd say that's clearly not the case. The labor exemption goes to the Commission's jurisdiction over the agreement to act one way or the other, a determination -- in fact, one of the problems with having the Commission in this particular act, is that the determination that an agreement is labor exempt doesn't bind anybody for the future, anyone -- certainly anyone who is not a party to that proceeding is free to turn around and file an antitrust complaint after the fact.

So a determination by the Maritime Commission that you have a labor exemption doesn't really get you anywhere in terms of security, if you wish to use that term, for the future.

QUESTION: Mr. Fisher, what happens as a consequence of a Commission determination that an agreement is within -- is subject or within the -- is exempt because of the labor

exemption. Does it simply send the agreement back and say: because of this finding, it was not necessary to file this agreement for approval?

MR. FISHER: That's right. It's a jurisdictional determination. And, as a matter of fact, an industry group, such as ourselves, did not file our agreement for the -- with the Commission, to ask them what they thought of it. As a practical matter, that's the last thing in the world you would want to do, if you felt that the Commission had no business meddling with it.

QUESTION: Right.

MR. FISHER: And in this case the non-member ports brought the agreement to the attention of the Commission. We ultimately filed the document because it had to be looked at under the circumstances in the case.

QUESTION: But only in response to a request.

MR. FISHER: Normally you would sit it out and wait for someone to complain about it. And you would not go in and file the thing, asking for a determination, unless you felt it was such a marginal case that you had to do that to protect yourself.

QUESTION: Right. That's very rare.

MR. FISHER: But normally you would feel that if your agreement was a collective bargaining agreement, not subject to the Commission's power to modify the substance of, to approve,

disapprove, regulate after the fact, second-guess you, you would vigorously resist that.

QUESTION: You would simply not file it.

MR. FISHER: You would not file it; no.

QUESTION: Right.

MR. FISHER: In the normal course. You take your chances.

QUESTION: And the Commission finding that an agreement is within the labor exemption leads to a Commission holding, at least implicit if not explicit, this agreement need not have been filed.

MR. FISHER: Need not have been filed in the first place. That's correct. Even if it had been physically filed.

QUESTION: In fact filed.

MR. FISHER: That's absolutely correct.

QUESTION: Right.

QUESTION: Do you argue, then, that the Labor Board has exclusive jurisdiction?

MR. FISHER: Oh, no. No, I think this Court has made that pretty clear. Jewel Tea, Connell make pretty clear that the Labor Board's --

QUESTION: What you've said sounded as though you were implying that only the Labor Board would have jurisdiction.

MR. FISHER: Well, I think it would depend upon -- no, I didn't mean to imply that, if I did. I think it would

depend upon the nature of the question. I mean, for example, the Solicitor General referred to a dispute over the container freight stuffing agreement. As the Court may be aware, this is a monumental subject of labor strife on both Coasts; the issue of whether teamsters or longshoremen stuff off-dock containers. It's been a subject of very critical recent concern, and it's involved in a tangential way, or was involved in this case.

That could very well have been a matter, under the Commission's criteria, that could have gotten the Maritime Commission into the act. In that case, the non-member ports and, more particularly, cartage companies, other off-dock stuffers chose to deal with the matter through a combination of the antitrust courts by filing a complaint and through the NLRB.

It happened that that particular dispute, Mr. Chief Justice, was resolved by the NLRB. They said it was a "hot cargo clause" and knocked it out.

One of the problems we have here is that potentially we have the Maritime Commission in this act, we have the NLRB, which proved itself capable of handling the container freight station stuffing disputes, we have the antitrust courts, who have to resolve Pennington and Jewel Tea type of challenges, and now we would also have the Maritime Commission apparently under some kind of Shipping Act standards. And that's a very,

very messy and undesirable way, I submit to you, to go about handling this dispute.

QUESTION: But, basically, in any one of those forums, the way something starts out is by a plaintiff having standing coming in and challenging, and the decision that the forum has to make, and if it's appealed, the Courts of Appeals have to make, is whether the Federal Maritime Commission or the NLRB or the courts have jurisdiction. And I suppose just the fact that more than one of them might have had jurisdiction to adjudicate a particular complaint, it is not inconsistent with the statutory scheme.

MR. FISHER: Well, I would submit to you that it is inconsistent with the statutory scheme, and one of the reasons, as a practical matter, why I think it's inconsistent, is that in the case of Section 15, unlike the other statutes you referred to, Mr. Justice Rehnquist, you have a pre-implementation approval requirement. And I said to the Chief Justice that in the normal course if you wish to resist Maritime Commission jurisdiction, you would want to take the position it wasn't subject, and you're not handing it over for filing and some kind of an approval.

But, as a practical matter, what if you have one that's fairly close to all fours, let's say, with one where the Maritime Commission asserted jurisdiction, as it did, for example, in the Boston case? Now, there, as a collective

bargaining group, labor and management, you're in the position of having negotiated an agreement at the eleventh hour, perhaps with a strike pending, and you're subject to a statute there where, if the Commission is at least asserting jurisdiction, you're facing possible penalties of a thousand dollars a day per member for failing to file the thing, even apart from whether it's approvable or not.

This isn't quite what you asked, but in my opinion that is very seriously inconsistent with the policies, the labor policies, I think it's inconsistent with the way the antitrust courts get into this particular act.

QUESTION: Well, are you saying, then, that we must construe these various acts so that if one forum has jurisdiction the other doesn't?

MR. FISHER: Oh, no. No. What I'm saying is that as between the NLRB and the courts, there may be a shared jurisdiction. That is to say, if it comes up, if the issue comes up in a Pennington context with an antitrust complaint, Jewel Tea, Connell make very clear that the antitrust court is to resolve the labor questions inherent in resolving the labor exemption disputa.

QUESTION: Well, why can't you say, equally consistently, that the FMC and the courts have shared jurisdiction? And if it's basically a maritime question, the FMC should resolve it?

MR. FISHER: Well, I suppose you can if this Court says so, that's what we'll have to live with somehow. But I don't think it makes any sense.

QUESTION: Well, if it doesn't make any sense, we shouldn't say it.

MR. FISHER: That's precisely my point. I don't think it does make sense. It doesn't make sense to have three cooks stirring this particular pot, and it's a difficult, difficult pot.

QUESTION: But you say two cooks can stir it?

MR. FISHER: If I had my druthers, and I were arguing the Allen Bradley or perhaps, a better case, the Pennington case, I might have very well argued otherwise. It's too late to argue that. I think there are obvious difficulties with it.

But there's one thing the Court did make clear, and I find it very hard to argue with, in Pennington, Connell, in Allen Bradley, and that is that when you get to the point of a collision between two national policies -- and, by the way, this is frequently talked about as an antitrust exemption, or it's a labor exemption from the antitrust laws; that's a shorthand phrase, if I may so submit, for describing a larger jurisprudential process which involves the weighing of two statutory policies, national policies of equal weight. We call it a labor exemption. I've used the term in my brief, too. It's not an exemption, it's a jurisprudential process of

weighing conflicting statutory policies. And I can't quarrel with this Court's decisions, I think they are right, when you say that when that ha-pens the proper forum to do that is a court.

The worst forum of all is for an agency that has no jurisdiction over either the labor or the antitrust questions, which is what the FMC's claim is, --

QUESTION: Why do you say it has no jurisdiction over antitrust questions?

MR. FISHER: Its jurisdiction under the Shipping Act, let's face reality, the job of the Maritime Commission and the reason for the Shipping Act is to grant antitrust exemptions for steamship rate-making conferences, which are otherwise, per se, violations of the antitrust laws.

And its stock in trade is to review agreements that are, on their face, per se violations, no antitrust issues presented there other than the facts of violation --

QUESTION: So it does have jurisdiction, then, with respect to antitrust issues?

MR. FISHER: Well, I --

QUESTION: You can't say it doesn't, because it exempts -- its action in a sense --

MR. FISHER: All right, in a sense, that's correct. In the sense that --

QUESTION: I can't imagine anything that's a clearer

piece of jurisdiction.

MR. FISHER: Well, in the sense that the Maritime Commission grants an exemption, it has to take note of the fact of the antitrust violation in the first place. What I'm saying is it's a simplistic kind of antitrust jurisdiction. The Commission doesn't administer the antitrust laws, it administers the Shipping Act, which is an exception from the antitrust laws.

QUESTION: Well, I would think you'd be delighted if it took this agreement and exempted it.

MR. FISHER: Yes, one would suppose that. It must come as something of a surprise to the Court to hear the industry group trying to explain to the Court why we don't want to have this --

QUESTION: Why you don't want to be exempted?

MR. FISHER: Why we don't want to have this haven, and of course --

QUESTION: Well, you're afraid that the Commission may not do it in a simplistic way?

MR. FISHER: I guess what I'm afraid of is that the Commission will do it in a simplistic way. But let me just back up a second, Mr. Justice White.

The problem here, I don't think is what agreements the Commission will or will not approve.

QUESTION: No, I get what you're saying.

MR. FISHER: The problem is who makes the determination of whether a labor exemption applies or not.

QUESTION: Who -- what do you -- or, to put it in your words, who should decide whether or not this agreement violates the antitrust laws?

MR. FISHER: Exactly. I mean, let me give you some reality.

We have a 200-page collective bargaining agreement with the union, industrywide. I mean, let's not fool ourselves, every section of this agreement affects competition in some fashion or another. You don't have industrywide bargaining without having effects on competition, you --

QUESTION: Yes, well, we've been through this many times, I think.

MR. FISHER: That's right. But all I'm saying is that if the Commission is going to have jurisdiction over agreements which affect competition, or which have some effect on outsiders, then we're talking about having the Commission, the agency which is least qualified to understand the labor implications of this agreement, passing on the labor exemption question; and I just don't think that's right or it makes any sense.

No one is hurt by -- every other industry in this country --

QUESTION: Mr. Fisher, supposing a treble-damage

action had been filed against the industry on a Pennington theory.

MR. FISHER: Yes.

QUESTION: In a federal court.

MR. FISHER: Yes.

QUESTION: Would it not have been an entirely proper defense for you to have asserted, as a matter of primary jurisdiction, the matter should have first been presented to the Maritime Commission? Wouldn't that have been a classic defense?

MR. FISHER: Oh, one might have. But I've been in the other --

QUESTION: If it were a clearer antitrust question, say -- you don't think Pennington applies, but say the agreement had said, We won't deal with companies that don't agree to the rates fixed by the conference, or something like that? You would write in a collective bargaining agreement. Wouldn't that clearly be a case that if you were sued in the antitrust court, you would say that ought to go to the Federal Maritime Commission first?

MR. FISHER: I would say that would be a last desperation kind of defense.

QUESTION: Last desperation? It's almost routine in this industry, isn't it?

MR. FISHER: Not at all, Your Honor.

If, under the Carnation case, Carnation v. Westbound Conference, this Court ruled that when an agreement has not received the approval of the Maritime Commission, a treble-damage action can be pursued in the antitrust court. It's not a matter of the Commission's primary jurisdiction. I think it was a common-sense kind of ruling.

And so if the attack you're talking about has been mounted against the collective bargaining agreement that has not been submitted voluntarily to the Commission and received the approval, antitrust exemption rubber stamp, then there's nothing to submit to the Commission. Carnation tells us that it's subject to the jurisdiction of the federal courts under the antitrust laws. It's too late.

Now, if the agreement has been submitted to the Maritime Commission and given an approval stamp, that's the end of the line. But the other side of that coin is -- let's assume the most egregious kind of agreement, let's assume that PMA had agreed with the union to do some kind of Pennington act, where we agreed with the union, Let's put somebody out of business, and he's a troublemaker, he's taking all our business, let's put him out of business, let's get rid of him. Write it plain there in the collective bargaining agreement.

Let's assume further we'd filed it with the Maritime Commission, we'd gotten the approval stamp, the antitrust exemption stamp, now what happens to the -- perhaps on an

interim basis, as the government suggests we do.

I must say, that might be very nice for some people in some instances, but it's pretty -- it's a pretty hard thing for the fellow that's driven to the wall, he's denied his antitrust remedy.

I don't think as a matter of policy that's what Congress intended in Section 15. Rate agreements --

QUESTION: But what's so puzzling is you seem to be most interested in vindicating the rights of those who want to disagree with you. I would think you --

MR. FISHER: I'm not vindicating their rights, what I'm saying is, as a matter of policy, I don't think agreements, labor agreements of this kind are the kind of thing that Congress wanted or that the industry really wants to be within the antitrust exemption. Congress didn't advert to labor agreements when they created the antitrust exemption. They created it for steamship rate conferences, not labor agreements.

QUESTION: Well, but you use terms in a very simple way. Agreements are complex things, and if they have anti-competitive consequences, you gave an example yourself, you say if you drove these ports out of business there would be a clear antitrust problem; but if you just double their cost, there's no antitrust problem. I'm not sure the line is quite that bright.

MR. FISHER: There may very well be an antitrust problem. What I am saying --

QUESTION: You'd rather take your risks on having a jury decide it than the Maritime Commission?

MR. FISHER: I would rather take my risks having the federal court decide whether there is a labor exemption or not.

QUESTION: Well, what makes it -- your suggestion is that the Maritime Commission may not really know what it's doing in this area, but you assume that some 500 federal judges are really experts in how the antitrust laws and the labor laws ought to be meshed in the maritime industry. That's a pretty good mouthful itself.

MR. FISHER: Well, I must tell you that there -- that we do not live in the choice between two perfect -- a perfect world, and we don't live in a choice between heaven and hell. We're making relative decisions.

QUESTION: Well, the choice is -- it's just a choice between two evils.

MR. FISHER: But isn't it really a judicial function? And let's consider one other -- Mr. Justice White, your point reminds me of something that I think is important here.

The Commission's argument to this court is that if it is the proper agency or forum, so to speak, to decide the labor exemption question, the consequence, they say, of that is that

the Court of Appeals can only review the Commission's determinations for abuse of discretion. And since the labor exemption question is obviously a judgmental policy kind of point, what they're really telling you is that the Commission's decisions on this subject should not really be reviewable. It is something close to saying that the Commission's decisions are not properly reviewable, except for abuse of discretion, whatever that is, in the Court of Appeals.

Well, in the Allen Bradley case, this Court, in reviewing a district court's decision, said: It's up to us to make this decision, we must decide it here.

QUESTION: Your submission is that there's no -- no part of any imaginable collective bargaining agreement that should ever have to be filed with the Commission.

MR. FISHER: That's absolutely right. And the reason, the reason that is the case is that you don't want the Federal Maritime Commission, which is not a judicial agency, it's a Shipping Act agency, deciding questions like whether the bargain is in good faith, whether it's a mandatory subject of bargaining, et cetera, et cetera, as the Courts inevitably have to do in every one of these labor antitrust cases, as subsidiary questions to the ultimate resolution. It's the wrong forum.

QUESTION: I know that's your submission.

QUESTION: Well, Mr. Fisher, is it conceivable that there might be a collective bargaining agreement which involved

a violation of the antitrust laws, just a patent violation, a Pennington type case, which would nevertheless be in the interest of -- in the public interest for Shipping Act reasons; is that conceivable? And therefore there should be an exemption.

MR. FISHER: I think it's conceivable, but I guess what I have to say to that is that it's probably unlikely, and the main point is that Congress didn't consider that that was the kind of agreement that should be able to get an antitrust exemption.

QUESTION: But it surely did. Why, if any antitrust laws can get exempt under Section 16 -- Section 15 of the Act?

MR. FISHER: Well, any antitrust violation that is subject to Section 15.

QUESTION: Sure, if it fits any of these definitions, regulating, preventing or destroying competition and the like, which is almost another way of describing agreements in restraint of trade.

MR. FISHER: Well, I guess what I come down to is saying this: The standards of Section 15, taken loosely, can apply to almost any industrywide collective bargaining provision that there is in the maritime industry that's subject to the Act. And if you're going -- you just simply have to make a decision as to who is going to decide these questions, and if the Commission is going to decide it, it might be nice

for us to say that we have a nice place to go to get an exemption, that would be handy at times, I suppose. But the fact of the matter is that the practical consequence is you've got the Maritime Commission in the backyard of your labor relations second-guessing you, they don't know anything about labor, they don't know anything about labor questions, and the disadvantage of that so vastly outweighs what is supposed to be the safe haven from the antitrust laws granted by a Section 15 approval, that we've made our choice the other way.

Thank you.

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

Mr. Leonard.

ORAL ARGUMENT OF NORMAN LEONARD, ESQ.,

ON BEHALF OF RESPONDENT ILWU

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

I should like to focus on the questions which have been raised in the preceding arguments from the point of view of the labor organization involved, representing as I do the ILWU.

It was my principal concern in coming here from the West Coast to assure the Court of the legitimacy of the union's interest in this non-member participation clause. Perhaps if I had read the reply brief that the Solicitor filed before I left San Francisco, I might have saved myself the trip.

Because on page 6 of his brief, in addressing the question of whether the union has an interest in the integrity and work opportunities of the registered work force, and in the fringe benefits the agreement covers, the Solicitor says there's no question -- and I'm quoting him now -- that the union has such an interest.

Indeed, he goes on to say that "The Union unilaterally could demand from non-members of PMA, whose employees it represents, the same terms as it undertook to require under this very agreement."

It seems to me, point No. 1, with that concession by the Solicitor, it's clear that what we have here is a labor contract with a legitimate trade union interest, which bears on the question of whether or not there should be a labor exemption.

The Solicitor, however, goes on to argue that because, as he asserts, and as he asserted in his oral argument to this Court, the agreement allegedly imposes conditions on employees of members outside the bargaining unit, it therefore falls within the decisions of this Court in Connell and Pennington.

The problem, however, is that this case, on its facts, is different from Connell and Pennington. What we are talking about here is a work force of employees who are all in one bargaining unit, and who sometimes work for PMA and who very rarely and occasionally work for the non-members. The union

represents all of these people. It isn't as though the United Automobile Workers and the Ford Motor Company negotiated a contract to impose conditions on Chrysler's workers, for example. We have a single solitary work force on the West Coast, who sometimes work for PMA --

QUESTION: Well, they aren't in the same unit, though. I mean, if you went to the Labor Board to be certified, you wouldn't be certified, the unit certified wouldn't include these non-members.

MR. LEONARD: Well, Mr. Justice White, that is precisely the question, and precisely the reason why this is not a matter for Federal Maritime Commission jurisdiction. I don't know what the Labor Board would do in a case like this, and I don't know that the Labor Board has ever decided such a case, where you have a single unit of employees, -- a single unit of employees represented by the same union --

QUESTION: Well, you have the United States here, the Solicitor General represents the United States, I suppose, and the Department of Justice is responsible for administering the antitrust laws; it represents other agencies of the United States. And I take it the United States' submission is that the antitrust issue -- they are perfectly willing to have the antitrust issue and the labor issue decided in the first instance by the Maritime Commission.

MR. LEONARD: Well, I understand that that's the

position of the United States. It was not the position of the Court of Appeals, and it's not our position.

QUESTION: I understand it isn't.

MR. LEONARD: The question that you raise, I submit, Mr. Justice White, raises a very subtle, significant and important question of labor relations: precisely what would the National Labor Relations Board do when confronted with the situation where there's a single employee bargaining unit, interchangeable employees, and, if you will, two separate employer bargaining units.

Now, however that question is resolved on this issue, and the Solicitor General says it should be resolved ala Pennington and Connell, and I will point out in a moment why we think it should be resolved that way; but however it's resolved, it's our submission that it should be resolved by the agency that has the expertise to make that subtle decision in labor relations and not by the Federal Maritime Commission.

QUESTION: Well, doesn't the CAB do much that same thing with respect to airlines, that the Federal Maritime Commission is here claiming a right to do with respect to shippers?

MR. LEONARD: I don't have enough familiarity, Mr. Justice Rehnquist, with what the CAB does in labor relations to answer your question. My familiarity is essentially with the National Labor Relations Board, and,since the beginning of

this case, with what FMC has done, so I'm just not able to answer that question.

QUESTION: How would this kind of issue come before the Labor Board? I can see how it would arise in a federal court in an antitrust treble-damage action, but how does the Labor Board get involved in this -- the kind of question is whether this collective bargaining agreement violates the antitrust laws or is anticompetitive or something like that?

MR. LEONARD: The Labor Board doesn't get involved in the antitrust question, per se. What it does get involved in is the question of the appropriateness of the bargaining unit. In this situation, as Mr. Fisher pointed out, and the container stuffing situation, the complaining parties, the ports and so on, filed charges with the National Labor Relations Board to have the issue of the legality of that container stuffing agreement determined by the expertise of the labor agency.

QUESTION: No, but could the ports here have filed a charge with the Labor Board, claiming that they were somehow hurt by this collective bargaining agreement?

MR. LEONARD: Yes, of course they could.

QUESTION: Under what --

QUESTION: Under what procedure of the Labor Board?

MR. LEONARD: It would be an unfair labor practice

for the union and the employer to enter into a contract to compel the employers or the union to cease doing business with the ports. I think it would be 8(b)(1) or 8(b)(2).

QUESTION: Yes.

QUESTION: But the agreement itself would be an 8(e) agreement, wouldn't it?

MR. LEONARD: Yes, it might be an 8(e) agreement, as it was charged to be in the container cases.

There's no question that in resolving these preliminary questions of whether or not there should be a labor exemption in the illustration I've given it shows the subtlety of the kind of labor relations decision that has to be made, the Maritime Commission is undertaking to do the job that Congress has said should be done by the Labor Board.

To support the contention that there is a unique situation in the West Coast which doesn't apply on the -- to which Pennington and Connell do not apply, is the Solicitor's concession on pages 6 and 7 of his reply brief, extremely important from the union's point of view.

In view of the existing institutions on the West Coast, and they are unique and special institutions, as has been indicated and as the briefs established, for the employment of longshoremen, some agreement, the Solicitor says some agreement on the access of non-members to the joint PMA programs, the joint PMA-ILWU programs and facilities is

necessary. In order -- this is a jointly controlled work force. The union cannot say to the non-members: You can have the work force. It has got -- it has got to have PMA's consent, because it's a joint work force, it's not a union controlled work force, and the Solicitor recognizes that therefore some agreement is necessary.

Again he argues that this agreement is entitled to a labor exemption, because it's outside the bargaining unit.

For the reasons I've indicated, we have the very unique situation with respect to what is the bargaining unit here, and that is a question that the Labor Board, rather than the Federal Maritime Commission, needs to determine.

So it is our submission that where the employees involved are common to both sets of employers, you don't have a Pennington situation, you don't have a Connell situation, where the union represents all of the employees, and in Pennington they did not, and in Connell, as was pointed out in Mr. Justice Powell's opinion, the union not only didn't represent the employees in that case, it wasn't even seeking to represent them. Here it represents the employees of both sets of employers.

Where you've got a situation like this, you've got a special kind of a unique labor situation, and the Commission, the Federal Maritime Commission was, with respect, naive and unsophisticated to say what the Labor Board might have done or

would have done under these circumstances, and it was attempting to apply this Court and the Labor Board's criteria in its so-called distillation of this Court's decisions.

Furthermore, the union was faced, as the Solicitor concedes, in these very negotiations with a proposition that PMA had the right to insist on equality of treatment on the most favored nations clause, and if the union had given the non-members anything better than it gave PMA, PMA would have said, "Give it to us too", and the union would have been whip-sawed between two sets of employers.

The -- I see my time is up.

MR. CHIEF JUSTICE BURGER: You may finish your sentence.

MR. LEONARD: The union and the association negotiated in the best interest to solve a very difficult labor problem. I believe they are entitled to a labor exemption; for the reasons stated in our briefs, we think the Maritime Commission did not have jurisdiction. I don't have time to expound upon that, but I'll have to submit that on our briefs.

QUESTION: If you prevail, I take it the antitrust cases, if there are some pending, will just go forward --

MR. LEONARD: Presumably they will.

QUESTION: -- or some others will be filed, and you will have this antitrust issue decided in the courts. And very likely no part of the issue will get before the Board, the

Labor Board.

MR. LEONARD: If the courts don't choose to follow what the Board judges. And the question there is: what is the proper forum for the resolution of these issues, the courts or the Federal Maritime Commission?

QUESTION: Yes.

MR. LEONARD: Thank you.

MR. CHIEF JUSTICE BURGER: You have about two minutes left, Mr. Friedman.

REBUTTAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. FRIEDMAN: First, just a preliminary matter in response to Mr. Justice Stewart's question as to what actually happens if the Board grants a labor exemption. I understand if that takes place, the Commission would enter a declaratory order to the effect that the agreement need not be filed, and then dismiss the proceeding.

But let me get to what seems to me, as the argument developed, kind of really the guts of this case, which is whether this is the sort of agreement that is not proper before the Maritime Commission at all. The suggestion that Mr. Leonard has made is somehow this is a matter to be decided by the National Labor Relations Board.

Well, Mr. Justice White, in your concurring opinion, your opinion in Jewel Tea, you pointed out that the Labor

Board is not really equipped to handle these things. There's no way you can get a decision out of the Labor Board, all you can do is file a charge. And if the general counsel decides not to issue a complaint on the charge, that's the end of it.

But, more significantly than that, this Court has recognized on not a few occasions, most recently in the Burlington case, that situations may arise where -- and cases present issues involving different agencies. In the Burlington case there were problems under the Labor Act and there wre problems under the Interstate Commerce Act. And this Court said the Interstate Commerce Commission properly considered the problems under its statutes, and if something were filed with the Labor Board, the Labor Board would consider it.

Now, the claim is -- an argument here with respect to the bargaining unit. Well, the bargaining unit that was originally certified by the Labor Board of course was the employers on the West Coast who were members of the predecessor association. If somebody thinks that this bargaining unit should now be broadened to include the non-members, they can file something before the Labor Board.

But it seems to us that the Commission was properly and fully justified in accepting the case as it existed; that is, as of now, what you have is a bargaining unit consisting of these employees, some of whom work for PMA members, most of

whom do, some of them occasionally do not, and the PMA members. And when you attempt to impose, when the union and the employers get together and attempt to impose conditions on people who are non-members, those are people outside the bargaining unit, and we just don't think, under these --

QUESTION: I understand that, but you also say that whatever antitrust issue there is here should be first decided by the Maritime Commission.

MR. FRIEDMAN: By the Maritime Commission. That is the --

QUESTION: Even though the antitrust division may be wholly foreclosed.

MR. FRIEDMAN: That, we think, is the scheme Congress has provided under this statute, that not only is there an antitrust exemption, but this Court recognized in the Seatrain case that, in interpreting the statute, whether an agreement is in the public interest, the Commission is required to consider the antitrust implications of that agreement.

QUESTION: Mr. Friedman, just one question before you sit down. Mr. Fisher, I think it was, stressed the pre-implementation approval requirement. And the statute, as I recall, has an exception for rate agreement which may receive interim approval. Is there a statutory authority for interim approval of an agreement of this kind?

MR. FRIEDMAN: Well, there's no statutory, explicit

statutory authority, but we have described in our brief and in our reply brief, and also cited one instance in our main brief, the Commission on occasion has granted this so-called conditional or interim approval to provisions that are included in collective bargaining agreements. They have done this on a couple of occasions.

QUESTION: What's the status, I just wonder, about the agreement in question here, about the provision of the agreement in question here?

MR. FRIEDMAN: That has not been implemented. The parties have kept it in abeyance pending the outcome of this decision, as is true with the administrative proceedings before the Commission.

Thank you.

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

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:10 o'clock, a.m., the case in the above-entitled matter was submitted.]