In the

Supreme Court of the United States

LLOYD BARRENTINE, ET AL.,	)	
	)	
	)	
PETITIONERS,	)	
	)	
V.	)	No. 79-2006
	)	
ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.,	)	
	)	
RESPONDENTS.		

Washington, D.C.
January 13, 1981

Pages 1 through 41

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LLOYD BARRENTINE, ET AL.,

Petitioners,

v. : No. 79-2006

ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.,

Respondents.

Washington, D. C.

Tuesday, January 13, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:15 o'clock p.m.

APPEARANCES:

DAVID C. VLADECK, ESQ., Suite 700, 2000 P Street, N.W., Washington D.C. 20036; on behalf of the Petitioners.

S. WALTON MAURRAS, ESQ., P.O. Box 43, Fort Smith, AR 72902; on behalf of the Respondents.

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 next in Barrentine v. Arkansas-Best Freight System.

Mr. Vladeck, you may proceed when you are ready.

MR. VLADECK: Thank you.

ORAL ARGUMENT OF DAVID C. VLADECK, ESQ.,

ON BEHALF OF THE PETITIONERS

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

Petitioners in this case are truck drivers employed by Respondent, Arkansas-Best Freight System. They operate out of ABF's Little Rock, Arkansas, terminal. They are required prior to embarking on an over-the-road trip to conduct a rigorous pre-trip safety inspection of their vehicle. Among other things they must check all of the safety devices, the brakes, coupling devices, and so forth, to make sure they are in good working order. Generally it takes the drivers approximately 15 minutes to half an hour to conduct this inspection, and when defects are found to take the vehicle to ABF's repair facility, which is located at the terminal.

ABF refuses to compensate the drivers for this time. Accordingly, the drivers have filed a series of grievances alleging that ABF's refusal violates the terms of their contract. These grievances, in turn, were processed by the union, which processed them through the joint grievance committee

procedures spelled out in the collective bargaining agreement.

Despite the fact that the lower courts have found that applying a literal reading of the collective bargaining agreement this time would be compensable, the joint grievance committees rejected the drivers' grievances. Accordingly, with no further remedy left under the contract, petitioners filed suit in March, 1977, alleging --

QUESTION: Did I understand you to say there was no other remedy available?

MR. VLADECK: Under their contract. Petitioners -- the grievances had been pursued through final stage of the grievance procedure set forth in the contract. Accordingly, petitioners filed suit in district court, alleging among other things that ABF's refusal to compensate them for this time violated the minimum wage provisions of the Fair Labor Standards Act.

QUESTION: But no allegation that it violated the contract?

MR. VLADECK: Yes, Your Honor, there was an allegation that it did.

QUESTION: But that isn't what this case is about?

MR. VLADECK: Well, we have not pressed that issue here, Your Honor. Despite the fact that defendants have pressed the Fair Labor Standards Act issue, however, neither court below reached the merit of that question. Rather, both

courts held instead that the prior submission of their contract-based grievance claim to arbitration barred the right to have court review of their statutory claim under the Fair Labor Standards Act.

Accordingly, the sole question presented here is whether submission of their contract claim to the joint grievance committee barred subsequent court review of their claim under the Fair Labor Standards Act.

Petitioners submit that the courthouse door must remain open to review the merits of their statutory claims, regardless of whether there has been a prior arbitration award and that the resolution of the issue presented here is controlled by two principles.

The first principle that I will discuss is that the decision below was inconsistent with the provisions of the Fair Labor Standards Act itself. This Court in a series of decisions has held that rights conferred under the Fair Labor Standards Act cannot be waived or bargained away as part of the collective bargaining process.

QUESTION: Then you necessarily mean that an agreement to arbitrate is bargaining away those rights?

MR. VLADECK: No, Your Honor, what my contention here is, is that this contract as construed by the joint grievance committees violates the Fair Labor Standards Act, and what petitioners want is the right to go into court to

litigate that question under the statute.

QUESTION: And your contention would be not that the arbitrator had applied an improper reading of the contract but that even if the contract had expressly said that this is the wages we will be paid and we will not be paid for the time you claim, the federal law simply prohibits that kind of contract?

MR. VLADECK: That's correct, Your Honor.

The second point that I will turn to later on is that the decision below cannot be reconciled with this Court's decision in the Gardner-Denver decision.

QUESTION: What kind of a case was Gardner-Denver?

MR. VLADECK: Gardner-Denver was a Title VII case, Your Honor.

QUESTION: That's right. This is not a Title VII case, is it?

MR. VLADECK: That's correct, Your Honor, but petitioners' position is that the standard of nonpreclusion of court review of federally granted rights should govern in this case, and as I will argue later, the statutes are parallel in all material respects and those parallels demonstrate that Gardner-Denver should govern in this case as well. But let me first turn to my argument under the statute.

The Fair Labor Standards Act is a broadly remedial statute. It embodies a number of distinct and diverse policy

judgments made by Congress. Among other things the Act sets forth a strict policy of guaranteed minimum wage compensation for all workers covered by the Act. In addition, it grants certain workers the right to premium pay for overtime work. To insure effective enforcement of the statute, Congress has authorized courts to impose a variety of remedies, including double damages, attorneys' fees, injunctive relief, back pay awards in cases where the employee prevails.

The role of these provisions is dual. Congress used them to both determine employer violations and to insure that workers who had been injured by Fair Labor Standards Act violations were fully compensated for their injuries. Because of the remedial nature of the statute, this Court has often recognized that rights conferred by the Fair Labor Standards Act can neither be waived nor bargained away during the course of the collective bargaining process. Indeed, this Court has expressly held that any customer contract that falls short of these policies -- for example, an agreement to pay less than minimum wages -- cannot be used to deprive workers of their statutory rights.

Nonetheless, in the face of these decisions, the court below's decision effectively insulates from judicial scrutiny the contract which we contend does precisely that: cuts back on petitioners' right to certain minimum wage compensation. Under the lower court's theory, arbitration, which

is, as this Court has recognized, an extension of the collective bargaining process, can be used to foreclose employees' right to sue under the Fair Labor Standards Act. And petitioners submit that this result simply cannot be reconciled with this Court's prior decisions.

QUESTION: Well, we have held, haven't we, in a recent case that a collective bargaining contract could override the Norris-La Guardia Act?

MR. VLADECK: I'm not familiar with that case.

QUESTION: In Boyd's Market and Buffalo Forge and that line of cases?

MR. VLADECK: Well, Your Honor, we're talking here about statutory rights that are conferred on an individual worker. These are not the majoritarian rights that are derived from a collective bargaining agreement. And our position is that where rights are expressly conferred by Congress and Congress has provided that the courts should enforce those rights, an arbitration decision or a collective bargaining agreement cannot cut back on those statutory rights.

QUESTION: But under the Norris-La Guardia Act, there were stringent restrictions placed on injunction. Injunctions run against individuals as well as unions, and yet in some of our later cases we said that those stringent restrictions could be altered by the provisions of a collective bargaining agreement.

MR. VLADECK: I am aware of no decision of this Court which supports the proposition that an arbitration award or a contract can cut back on an employee's rights that have been both conferred directly by statute and are enforcable by that statute through the courts. And that is this case.

The point that I'm trying to make is that unless the Fair Labor Standards Act claim can be brought into court after an arbitration award, then the Act affords employees nothing more than they would derive from the collective bargaining agreement. In a sense the lower court decision renders the Fair Labor Standards Act a nullity insofar as it applies to workers who are covered by collective bargaining agreement.

The second point I want to make under the statute --

QUESTION: Before you leave that, I have a little problem. When this contract was entered into, it was understood one way or the other that this statute was here. And if you had meant not to nullify the statute, you could have said so in the contract.

MR. VLADECK: Well, Your Honor --

QUESTION: Or you could have said that you did, one way or the other. That could have been put in the contract.

MR. VLADECK: Your Honor, a provision could certainly have been put in the contract, but as this Court has recognized -- for example, in the Steelworkers trilogy,

labor contracts are not as precise perhaps as we would all like. They --

QUESTION: But don't you think that at the time they ought to be getting to start to get ready to being precise?

MR. VLADECK: Well, Your Honor, let me point out --

QUESTION: Wouldn't it help everything if we could be precise?

MR. VLADECK: Well, I agree with Your Honor that it would certainly help, but let me point out that in Gardner-Denver --

QUESTION: At least we would have been saved one case, wouldn't we?

MR. VLADECK: That's correct, Your Honor.

QUESTION: That is progress.

MR. VLADECK: But in Gardner-Denver, the statutory right was exactly identical to the contractual provision. The people who wrote the collective bargaining agreement cribbed precisely from Title VII. Nonetheless, this Court unanimously held that a prior arbitration decision, even under the terms of a collective bargaining agreement that were precisely identical to the statute, did not relieve the federal courts from their duty to examine the statutory claim on the merits. So, I guess in a longwinded sense, my answer to your question is that even if the contract had borrowed precisely

from the language of the Fair Labor Standards Act, courts would nonetheless be required to review the merits of that decision, to review the merits of the statutory claim, to make sure that the rights had not been impaired.

QUESTION: Mr. Vladeck, do you think this case from your point of view is a harder one than Gardner-Denver? After all, it does affect laches; Gardner-Denver didn't.

MR. VLADECK: Well, in some respects, Your Honor, I think it's an easier case. Why don't I talk about that first? It's an easier case because unlike Gardner-Denver, where Congress had set up an elaborate mechanism of dispute resolution prior to court review, elaborate exhaustion requirements, deferrals to state agencies, as this Court elaborated in the Mohasco decision last term. There is nothing in the Fair Labor Standards Act which bars immediate employee access to the courts.

Now, getting back to the thrust of your question, I think that that was one of the reasons the lower court ruled against us. That is, that they distinguished between the nature of employee wage claims and claims of discrimination. I think there are several answers to that.

In the first place, the decision that wage claims are somehow simpler or less complex than claims of discrimination is inherently a difficult one. I doubt strongly that this Court wants to weigh the relative complexity of various

federal statutes in deciding how vigorous the Court should be in enforcing a Congress command.

QUESTION: Yet, our treatment of the prohibitions against discrimination in age has been kind of a mixture, has it not, of the Fair Labor Standards Act mechanisms and the Title VII mechanisms, the Title VI mechanisms?

MR. VLADECK: I think that's correct but I don't think that the Court has been any less vigilant in protecting those rights. All that -- my point is that -- to begin with, apart from the inherent difficulty in measuring the relative complexities of various statutes, this Court -- it is a doubtful proposition that this Court wants to waive the relative importance of various remedial statutory schemes passed by Congress.

But even assuming that that's relevant, that it's a relevant inquiry, here the long history of the Fair Labor Standards Act and several of this Court's opinions recognizing its vital policy underpinnings, strongly support petitioners' contention that it merits equally vigilant court enforcement as Title VII or any other remedial humanitarian protection of statute.

QUESTION: Do you think, if you prevail here, that it will open the gates to a flood of wage claims in the federal courts?

MR. VLADECK: Your Honor, I think that that option

is more likely under the lower court's theory than if we prevail. Under the lower court's theory, as I read it, and I'm not sure it is without ambiguity, employees would have the option of either first going into court or using the collective bargaining procedure spelled out in their contract. If they opt for arbitration under the lower court's theory, they are barred from going into court thereafter, and an employee who is faced with waiving forever his right to liquidated damages, attorneys' fees, back pay, the host of remedies that could be imposed under the Fair Labor Standards Act, as well as the superior procedural rights afforded in court review, may well opt to go into court rather than to choose for arbitration.

It may well be that the most efficient answer that this Court can provide is the same one it did in Gardner-Denver, and that is to hold that regardless of whether the workers first employ the arbitration process, they retain the right to go into court but preserving the option of arbitration, which is relatively cheap and relatively quick. It may well be, as this Court observed in Gardner-Denver, employees will opt first to arbitrate their grievances. It may well be in a large number of cases that whatever remedies they're entitled to under the contract will be adequate. If that is the case, then in a large class of cases there will be no ultimate resort to the courts.

QUESTION: If there is an impartial arbitrator at

the end of the line, very likely the Fair Labor Standards Act is going to be taken into account, I would suppose.

MR. VLADECK: Well, Your Honor, I think that this Court --

QUESTION: It wasn't taken into account here, was it?

MR. VLADECK: No, Your Honor, it was not.

QUESTION: And there was no impartial arbitrator?

MR. VLADECK: No, Your Honor, it was a panel of partisans.

QUESTION: A joint board?

MR. VLADECK: That's correct. That's correct, Your Honor.

QUESTION: Well, now, there was some litigation maybe a decade ago about tax exempt foundations and I think the Internal Revenue Service took the position that tax contributions were not deductible if the school discriminated on the basis of race. Would you say that the same principle ought to be applied by the Internal Revenue Service if a school failed to pay minimum wages?

MR. VLADECK: Your Honor, that's not one of the remedies that's accorded under the Fair Labor Standards Act, so I --

QUESTION: Well, it's not one that's accorded anywhere, so far as I know.

MR. VLADECK: Well, I guess my first answer,

Your Honor, is that it's far afield from the question here. And I guess it's really a question that ought to be addressed to the Department of Labor. I think Congress has in the Fair Labor Standards Act evidenced a very strong concern that the statutory requisites be enforced. If that is an additional way to secure enforcement and the courts have upheld it, I see no difficulty with that. But, again, I think that is not this case.

QUESTION: Well, even if you lost, the United States wouldn't be barred from suit, would they?

MR. VLADECK: Well, I'm not sure that's correct. Under the Fair Labor Standards Act --

QUESTION: You wouldn't mind taking the case, though, for the United States, would you?

MR. VLADECK: No, Your Honor, that's another case that I would like to argue.

QUESTION: Well, if this Court held that that was correct, what would you think about it?

MR. VLADECK: Well, my first question would be --

QUESTION: Then you wouldn't have any hesitation in bringing the suit, would you?

MR. VLADECK: No.

QUESTION: You said there was a suit; if you were representing the Government.

MR. VLADECK: No, but again it's a question that I

would not like this Court to reach. Our principal submission is that the Fair Labor Standards Act grants to the employee a right to bring suit in a court, either federal court or state court, to enforce the rights conferred upon him by Congress. That's really all we're asking for in this case, is a right to get into the courthouse door. This case, at this stage --

QUESTION: Well, if the -- would the United States be entitled to bring a suit to have a collective bargaining agreement declared illegal if it's been consistently construed by the parties who made it not to take account of the Fair Labor Standards Act?

MR. VLADECK: That would not be the way the case would be characterized.

QUESTION: I know. That isn't what I asked you.

MR. VLADECK: They could bring suit on behalf of the employees.

QUESTION: And, to enjoin the enforcement of a collective bargaining contract to that effect?

MR. VLADECK : Yes, Your Honor. but I think they would frame the remedy in a different manner.

QUESTION: Well, they needn't confine their suit each time just to recovering the wages for an individual employee?

MR. VLADECK: That's correct, Your Honor. I'd like

to turn for a moment to one of the arguments raised by the court below in rejecting application of Gardner-Denver. The principal reason was, as I think Mr. Justice White suggested, that wage claims are somehow less complex, or somehow less deserving of protection by the courts than discrimination claims. And I think the fundamental problem with that approach is that it rests on a misapprehension of the nature and scope of the arbitrable process.

To begin with, arbitrators have no general authority to apply the dictates of public law. Rather, this Court has made it clear in a number of decisions that an arbitration award will be only enforced, only so long as it draws its essence from the contract between the parties. Moreover, the arbitrator would not have the right to impose the broad range of remedies Congress thought necessary to root out violations of the Fair Labor Standards Act.

The third reason is that the arbitration process is not necessarily adequate procedurally to protect statutory claims. Let me give you an example here, where we're dealing not with conventional arbitration but with a joint grievance committee.

There was no neutral arbitrator. Although there are many grievances filed, there is no written decision. Petitioners do not even have a right to have counsel present during the grievance hearing. So there is no parallel between

the remedies and procedural safeguards that are afforded under this procedure and in general under arbitration, as there are in court procedures.

And lastly, the finality that is normally given to arbitration award rests in part on the fact that arbitrators are simply proctors of the bargain. They are simply trying to derive what it was that the parties privately bargaining for a contract decided to agree upon.

In sharp contrast, under the Fair Labor Standards Act, Congress has dictated what the standards are, and Congress did so to provide for uniform nationwide standards. There is no way that a patchwork of arbitration decisions can implement Congress's policy embodied in the Fair Labor Standards Act.

Moreover, the lower court appeared to presume that Fair Labor Standards Act rights could somehow be merged into the rights that are accorded under the collective bargaining agreement. That is not the case. The Fair Labor Standards Act accords distinct rights; they do not form a part of the collective bargaining process at all. They exist independently of the contract and they were conferred by Congress. To relegate those rights to the arbitral forum would be in contravention of what Congress spelled out in the Act itself in its broad jurisdictional provisions.

QUESTION: What if, Mr. Vladeck, you had a collective

bargaining agreement that set out various rates of pay and hours and working conditions and then said, nothing herein contained shall be understood to require any violation of the Fair Labor Standards Act. And there was a grievance under that contract, and the arbitrator found that there was no violation of the Fair Labor Standards Act, and rejected the grievance, although the grievance was brought under the collective bargaining agreement itself. Then later, if that employee brought a lawsuit under the Fair Labor Standards Act, what if any preclusive effect should the prior arbitration have?

MR. VLADECK: Well, I think that is precisely the Gardner-Denver question, because in Gardner- --

QUESTION: It was left open, wasn't it?

MR. VLADECK: Well, the Court dropped a footnote, last page of the decision, footnote 21, where the Court suggested that while it did not want to resolve the issue there, the appropriate course of action might be for the district court to assess to what degree the language of the statute and the language of the contract were identical, whether the procedures that are normally accorded in a court were also accorded in the arbitration, and then accord whatever deference the lower court felt the arbitration decision was entitled to. But the court, at the end of that footnote --

QUESTION: That's the answer the Court gave. I'd say

it left the question open.

MR. VLADECK: Yes, Your Honor. I do -- but I think the Court in part answered the question by its final sentence in that footnote. It said that "courts must remain open to resolve statutory claims." And I think the fair import --

QUESTION: But it suggested that a trial court might in such a lawsuit give preclusive controlling effect to the prior arbitration, didn't it? Might, might.

MR. VLADECK: Well, I guess I have trouble with the word "preclusive." It said it might accord it great weight, which I think is very different from according it preclusive effect, Your Honor. I think that preclusive effect generally means that you always determine whether the --

QUESTION: In any event it wouldn't be res judicata, it would be something less than that?

MR. VLADECK: That's correct, Your Honor. I see that I only have five minutes remaining. I'd like to reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Maurras.

ORAL ARGUMENT OF S. WALTON MAURRAS, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

The purpose for the Fair Labor Standards Act was to protect the unorganized worker and it was not to protect

organized labor. This purpose is implicit in the legislative history of the Act and was exemplified in the exchange in the Senate between Mr. Walsh and Mr. Black in which the question was asked, if upon the adoption of the FLSA it would have any effect on existing or on future collective bargaining agreements? And the negative response was given.

QUESTION: Wasn't there a proposal somewhere along the line in the debate of this pending bill to make the Fair Labor Standards Act applicable only to unorganized workers, and wasn't that proposal rejected?

MR. MAURRAS: It was, Your Honor. However, nothing -- To the contrary, the statute was left silent as to whether it was exclusive for unorganized labor or included both. It did not thereafter go and specifically address the question.

This Court, subsequent to the adoption of the Act in the Brooklyn Savings Bank case, acknowledged the fact that the purpose for the Act was to protect the unorganized worker. And although subsequent to the Brooklyn Savings Bank Case this Court decided in Jewel Ridge and in the Anderson v. Mt. Clemens case that acts which had not previously been determined to be work or compensable under the collective bargaining agreements were compensable under the FLSA. Congress responded to the decisions of the Court by adopting the Portal-to-Portal Pay Act, and in so doing stated in its findings and purposes that it was necessary to adopt that Act because of judicial

interpretation that were in disregard of the customs, practices, and contracts between employers and employees. Again, the Court, subsequent to the Portal-to-Portal Act, decided the case of Bay Ridge in which the Court stated that the FLSA required that certain activity be treated as overtime which had not been treated as overtime in the contract. The result of the decision was to have the payment of FLSA overtime on top of contractual overtime.

Congress again responded to that decision of the Court with the Overtime-on-Overtime Act, and in its statement of findings for the necessity of the Act said that the claims which had resulted from the Court's decision were windfalls and were in derogation of the collective bargaining agreements as they were understood by the parties. Congress also said that the arrangements for the overtime was the result of collective bargaining, and that there was no evidence that it was other than at arm's length.

So I would submit to the Court that because of the subsequent actions of Congress in trying to restrict the decisions so that the FLSA did not take precedence over legitimate bona fide collective bargaining agreements, evidences the intent of Congress to protect the unorganized worker as opposed to organized labor.

The FLSA itself does not require that the action for its enforcement be judicial in nature. Section 216(b)

says that an action for damages for back wages or for liquidated damages may be brought in a court of competent jurisdiction. It does not use the mandatory "shall." There is no language in the statute that prohibits alternate forms. If Congress had wanted to prohibit alternate forms, it certainly could have done so, as it did in the Securities Act, and said that you cannot -- specifically -- cannot waive any of the rights accorded.

In Donahue v. Susquehanna Collieries, that court acknowledged this idea that if Congress had wanted to exclude arbitration as a method of resolving FLSA claims, that Congress could have specifically so stated in the Act. Now, the petitioners have stated in their reply brief that Donahue is clouded. Then I would submit to you that that cloud is more apparent than real. The cases the petitioners cite as creating a cloud in fact state that the Arbitration Act cannot be used to enforce employment contracts. They do not go beyond that holding. There is nothing in the holdings which says that FLSA claims cannot be arbitrated if the parties voluntarily agree to it in the context of a bona fide collective bargaining agreement.

And as a matter of fact, in one of the petitioners' cases, the Colonial Hardwood Flooring case, that court says, that while they hold that the Arbitration Act is not applicable, that is not to say that the parties may not voluntarily

agree to arbitrate their disputes.

QUESTION: Counsel, would you say the same thing as to OSHA rights, if the parties agree to those?

MR. MAURRAS: Your Honor, the policy considerations behind OSHA rights I think are somewhat different from the policy considerations the Congress may have of the persons intended to be protected in the scope of the legislation. I'm not prepared to make a blanket statement but I am prepared to state that I believe that the Leone court is correct in its holding that the time spent in an OSHA inspection is not compensable time under the FLSA.

QUESTION: What about the Equal Pay Act?

MR. MAURRAS: I'm sorry, Your Honor, in what context?

QUESTION: Suppose the parties agreed that the subject of equal pay should be subject to arbitration, and that the statute should not apply. Would that override the provisions of the Equal Pay Act?

MR. MAURRAS: Your Honor, again, I think it depends on the policy considerations expressed by Congress as interpreted by this Court as to the relative weight to be given the statute. I'm not prepared to argue that the rights under the Equal Pay Act are subject to waiver or subject to an agreement to arbitrate.

QUESTION: How about a collective bargaining agreement that provided for wages lower than the minimum wage?

MR. MAURRAS: This collective bargaining agreement does not so provide, Your Honor --

QUESTION: I know, but --

MR. MAURRAS: -- but if one did, I would think --

QUESTION: And the grievance was processed and it was turned down?

MR. MAURRAS: Yes, sir. I do not agree that an arbitrator cannot take into consideration the general law of the land. I think he can, I think he must. I don't think any decision of this Court says that he cannot.

QUESTION: Well, did this joint board take the Fair Labor Standards Act into consideration?

MR. MAURRAS: Your Honor, I was not present during the consideration by the board. All I can state to the Court is --

QUESTION: Suppose he didn't? Suppose this joint board didn't? Suppose it was presented to the joint board, and the joint board said --

MR. MAURRAS: As a wage claim?

QUESTION: Awfully sorry, but we just don't take that into account. We go by the collective bargaining agreement.

MR. MAURRAS: If the joint board refused to acknowledge the law of the land, whatever that law may be, if it refused to acknowledge the law, I think it would be wrong.

QUESTION: And the employee could go into court?

MR. MAURRAS: Yes, sir, I do, and I think he could go into court under existing decisions of this Court that he had not been fairly represented, as I think that would clearly fall under the concept of no fair representation, to which he is entitled.

The arbitration provision in this case is broad enough to cover the FLSA claims. Now, there have been prior decisions of the Court which have said that where the scope of the arbitration clause is limited, that claims that arise under FLSA would not be considered because of the limited scope of the arbitration clause.

Article 44 in this contract says that any controversy which may arise is subject to the arbitration. It's not limited to controversies arising under the contract. Article 43 also provides that any grievance of any employee will be processed. So we have an arbitration clause that has a very broad scope. There is no limitation of what can be presented.

QUESTION: Well, if he presented a claim for the minimum wage under the statute and it was turned down, you say he could go into court?

MR. MAURRAS: Your Honor, if he did, he could, but I submit to you this committee would not do that if the time involved -- and that's the threshold question --

QUESTION: Yes, yes.

MR. MAURRAS: I'll come to that in my argument. But you have to reach that threshold question first, and in this case the committee did reach that threshold question and it was decided adversely to the employees.

QUESTION: On the facts?

MR. MAURRAS: Yes, sir. So that you never get to the second question. Article 50 in the collective bargaining agreement says that the employees are to be paid for all time spent in the service of the employer. And I would submit to the Court that that is at least as broad, if not broader, than the FLSA requirement that the employee be paid for time worked. So that the language of what is required to be paid, in the contract, is as broad as what the FLSA requires for payment.

But before you get to that question, you first have to determine, are the acts that the employees performed work? Now, to do that you have to go to the Muscoda test and determine whether or not this inspection meets the Muscoda requirements. Muscoda required that physical exertion be involved, that it be under the control of the employer, and that it be necessarily and primarily for the benefit of the employer. I submit to you that, as to the DOT safety inspection, at least two of those elements are not met. This inspection is not under the control of the employer. The necessity for it is established by the DOT. The elements which comprise the

inspection are established by the DOT. The frequency of the inspection is prescribed by the DOT, and the person who makes the inspection is prescribed by the DOT. So that -- and when the employee makes the inspection, as the evidence showed, he does so at his own pace, there is no supervision by the company, he departs from where he has picked up his bills of lading, goes out and at his own leisure he makes his inspection and departs.

QUESTION: All of this goes to the merits of the FLS, Fair Labor Standards Act claim?

MR. MAURRAS: Yes, sir.

QUESTION: Which as I understand it are not before us, are they? Or do I misapprehend what's before us?

MR. MAURRAS: Your Honor, I don't know if they're before the Court or not. In the --

QUESTION: Well, I thought they were not.

MR. MAURRAS: In the petitioners' brief and in at least one of the amicus briefs, there are -- if they're not issues, they're gratuitous statements: "Of course, the time is compensable in any event." I don't think that is an accurate statement.

QUESTION: But that's the merits of the Fair Labor Standards Act claim. And is there some question that they may be before us? You don't know whether they are or not.

MR. MAURRAS: Your Honor, as I stated, they are

mentioned in the briefs of the petitioners, they are mentioned in the amicus brief. I choose to address the issues because I don't feel that the time is compensable in any event.

QUESTION: Is that for us to decide? Is that an issue in this case here?

QUESTION: Well, you're saying it's not.

QUESTION: Or don't you know?

QUESTION: You're saying it's an issue though that an arbitrator can decide.

MR. MAURRAS: Sir?

QUESTION: You're saying it's an issue an arbitrator can finally decide?

MR. MAURRAS: Yes, sir. I think that the determination of whether the activities that the employee has engaged in constitute time spent in the service of the employer are exactly the kind of questions that arbitrators have traditionally decided. It's a matter of hours worked, what constitutes hours worked, it's a matter of the law of the shop, previous history.

QUESTION: What if the employee filed a claim and said, filed a grievance and said, I worked 12 hours on June 1 and I was only paid for eight, and I am entitled to some overtime. And the employer said, you didn't work at all beyond eight hours; you just didn't, you're a liar, you're lying. And it went to arbitration and the arbitrator decided he only

worked eight hours. Your suggestion is that that's the end of the case?

MR. MAURRAS: Yes, Your Honor.

QUESTION: That he shouldn't be able to relitigate that fact in a court?

MR. MAURRAS: Yes, Your Honor, that's correct. That's a correct statement of my position.

QUESTION: Whereas, if the arbitrator had said, well, I guess you did work ten hours, but the contract just calls for you to be paid for eight, then you'd say the arbitrator would be in trouble?

MR. MAURRAS: Yes, Your Honor, and I think you have to come back and keep in context that the individual has a right to this fair representation by the union, and if he -- in the context of this contract, with the joint committee, you just could not get the result that you have suggested.

QUESTION: I take it that your argument goes only so far as to say that when there is a decision on the facts that that's what's binding?

MR. MAURRAS: Yes, Your Honor. Also, though, even under this Court's decision in the Arguelles case, I think the decision in the instant case should be affirmed. Now, Arguelles said that the employee had an option to either proceed with his contract remedy of arbitration or to proceed under the statutory remedy and go directly to court.

QUESTION: Mr. Maurras, I'm a little puzzled about what do you contend the arbitrator decided as to whether it was fact or law, as to whether the time where they were waiting around was -- He decided it was not compensable time under the contract. Did he decide it was not compensable time under the statute?

MR. MAURRAS: Your Honor, the decision does not say this is not compensable time under the contract. The grievance that was submitted, at least one of the grievances that was submitted, sets out a factual recitation of what it is that the -- well, they all set out just a factual recitation of the events that occurred that the employee claims to be entitled to payment for. At least one of the grievances, and it's reproduced in the Joint Appendix, also states that the time is compensable under federal wage laws or federal work statutes.

QUESTION: Is there a dispute about what the facts were?

MR. MAURRAS: No, Your Honor, there is none.

QUESTION: There wasn't any dispute about the facts, was there?

MR. MAURRAS: There is none.

QUESTION: Well, then, I don't understand how you're saying that he decided a fact issue that's now binding and precludes his litigating the statutory issue.

MR. MAURRAS: What he decided was that the facts did not constitute time spent in the service of the employer. That is the equivalent of -- that phrase is the equivalent of time worked. A decision has been made that the acts that took place do not constitute time worked.

QUESTION: The decision has been made as a matter of law, these acts don't entitle you to pay under the statute.

MR. MAURRAS: That's correct.

QUESTION: Well, you say that that determination is like the arbitrator saying, you didn't work 12 hours, you just worked eight. It just isn't work.

MR. MAURRAS: Your Honor, if the factual basis for the contractual claim and the factual basis for the statutory claim are the same, then the decision of the arbitrator as to what the effect of those facts are should have the same outcome as to whether the claim is based on the statute or under the contract.

QUESTION: But not if they're different standards? Not if the contractual standard for pay is different from the statutory standard?

MR. MAURRAS: Your Honor, I do not see that there are different standards here. There's a different rate of pay but the standard is that the employee be paid --

QUESTION: Isn't that the very issue he wants to litigate? I mean, maybe you're right. You make a very

persuasive argument that you are, but as Justice Stewart suggested, doesn't that all go to the merits of your claim?

MR. MAURRAS: It may go to the merits of my claim, Your Honor, but my point is that the employee has had the opportunity to litigate or arbitrate -- and he has made his choice -- the merits of his claim, and he should not now be given a second bite at the apple to relitigate it de novo. The trial court here, while it did not go into the underlying facts, whether or not the time was or was not compensable, did give a two-day examination of whether or not the grievance process itself in this case was fair, and after an extensive trial said that it was.

I submit that that is the proper standard.

QUESTION: Well, that was the 301 claim, primarily, wasn't it?

MR. MAURRAS: Yes, sir.

QUESTION: Well, don't you think there's a difference between the board finding, or an arbitrator, as the case may be, a finding: the activities he said he carried out he did not carry out, therefore he performed no work; and a finding: yes, he carried these things on, but those things do not constitute work? Isn't there a difference?

MR. MAURRAS: Yes, there is a difference, Your Honor.

QUESTION: Well, now, as to the former, that he

never did these things at all, I can understand why you could say, if you let that go to arbitration, you ought to be bound by it. But as to the latter, yes, he did these things, but it didn't constitute work, why doesn't that still leave open a statutory claim? The arbitrator says it didn't constitute work but maybe under the statute a court might say, yes, indeed, they did.

MR. MAURRAS: The parties have bargained for what they have, Your Honor. They have agreed in their collective bargaining agreement that the arbitrators will decide these issues. Now, having made that agreement --

QUESTION: That's the difficulty, as I see it. It is that if the arbitrator decides that, yes, he did these things but they don't constitute work, then necessarily he's in the area of whether the statute covers what in fact the arbitrator found he did.

MR. MAURRAS: That's correct, Your Honor, and as I have stated earlier, I believe, that the arbitrator or the grievance committee has the right, if not the obligation, to consider what the law is, in construing the contract, the contract cannot be construed in a vacuum or a void, it has to take into consideration what the law is, to arrive at the correct result.

QUESTION: As I recall, the district judge expressly left open the idea that if there had been a lack of fair

representation, then the grievance finding would not be binding. Is that not correct?

MR. MAURRAS: Yes, Your Honor. I'm not sure --

QUESTION: Did the Court of Appeals disturb that?

MR. MAURRAS: No, sir. I'm not sure that I understand when you say, "left open." The district --

QUESTION: Well, would not harm.

MR. MAURRAS: -- judge was more explicit. He said that if there had not been fair representation, that he would have gone into --

QUESTION: You could attack, you could attack on that ground?

MR. MAURRAS: Yes, sir, absolutely.

I do not believe that the Court should apply the doctrine that it has set forth in Gardner-Denver to FLSA wage claims which involve collective bargaining agreements. Now, basically, the reasons are set forth in the Satterwhite decision. I think that the Satterwhite decision is thorough and I think it is an accurate decision. The differences between the two types of legislation necessarily and legitimately permit different types of approaches to solve the problems that are involved.

Wages and hours and what does and does not constitute work is historically the bread and butter for arbitrators. Wage discrimination and what does or does not constitute

race discrimination is not. It just historically has not been an area that arbitrators have delved into. Race discrimination is often a very subtle form of discrimination. It is not always obvious. It takes specialized training and it's training that arbitrators just generally do not have. Additionally --

QUESTION: Well, do they have it less than judges?

MR. MAURRAS: Do arbitrators have less training or expertise than judges in the area of race discrimination?

QUESTION: Yes.

MR. MAURRAS: Yes, sir. I believe they do. I believe that judges are far more qualified to determine questions of race discrimination than are arbitrators.

QUESTION: Yes, but we had a lot of race discrimination arbitrations before we ever had Title VII.

MR. MAURRAS: Yes, sir, but since Title VII I don't believe there are very many.

QUESTION: There may not be, but arbitrators simply had to decide race discrimination claims under collective bargaining agreements before Title VII, and did.

MR. MAURRAS: Again, I would just repeat myself, Your Honor. Not since Title VII, and not since the Court has said that the policy of the United States is such that arbitration is not an acceptable method of solution. And that must have evidenced some dissatisfaction by the Court with the results

that the arbitrators were coming up with.

Finally, I would turn to my position that failure to file the written consents under 29 U.S.C. 216(b) is fatal to this action. 216(b) requires that the written consents of the named plaintiffs, or named parties, be submitted, in order for the action to be commenced. Subsection (a) provides that an action is not commenced until the complaint is filed and the written consents are filed. Subsection (b) contemplates a situation in which the complaint is filed but the written consents are not, and it provides that the action is not deemed to be commenced until those written consents are filed. No written consents have ever been filed in this case. I would submit to you that the parties are not properly before the Court. The purpose for the written consent under 216(b) is for the party to opt into and be bound by the decision of the Court. That's not been done here. Although this case started as a combination of a class action under Rule 23 and a collective action under 216(b), the dismissal by the plaintiffs, or rather by the court, of the claims under Rule 23 did not dispense with the necessity for the filing of the written consents. 216(b) has been amended three times since it was adopted: 1966, 1977, and 1974. And in none of those amendments was the requirement for the execution and filing of a written consent ever alleviated. So I would submit to you that this action has not been properly commenced, and that

the plaintiffs are not properly before the Court. Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Vladeck?

ORAL ARGUMENT OF DAVID C. VLADECK, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

QUESTION: Can you address that last point, Mr. Vladeck?

QUESTION: Yes.

MR. VLADECK: Well, we address that at length in our reply brief, and the short answer is that we disagree that consents are required to be filed in noncollective actions. The collective aspects of this case were dismissed by the trial court early on. Even if that answer is not acceptable to the Court, each of the plaintiffs in this action has signed at least two sets of answers to interrogatories, I believe it's been deposed, it's been participated in very actively in conduct of this litigation. The court -- the circuit courts have held that the signing of interrogatory answers is adequate consent requirement. And thus we don't think that provides any basis whatsoever for the Court to dispose of this action. Moreover --

QUESTION: In any event, that wasn't one of the questions even arguably comprised in the question presented on the petition for writ of certiorari, was it?

MR. VLADECK: That's correct, Your Honor. Nor was

it raised below.

QUESTION: And, well, insofar as it may be raised below, it can be raised below.

MR. VLADECK: That's correct, Your Honor.

QUESTION: So it's not properly here, is it?

MR. VLADECK: That's correct, Your Honor.

QUESTION: Well, may the respondent use that as a defense?

QUESTION: Was it even suggested below?

MR. VLADECK: I believe it was suggested insofar as the collective aspects of this action. However, the district court dismissed it.

QUESTION: Well, whatever it may have been, isn't he entitled in defense of his judgment to rely on the theory?

MR. VLADECK: Yes, Your Honor.

I'd just like to respond briefly to Justice Stevens' question. Whether this time is compensable under the Fair Labor Standards Act or not turns on the question under the statute of whether it is integral or indispensable to the primary activity of the employer. That phrase has been the subject of nearly 40 years of judicial construction, a host of Department of Labor regulations, case law, and so forth. It is a statutory question, one that is typically resolved by the courts. I do not -- it is not akin to the question that was put before the arbitrator in this case.

The second point that I'd like to address is the legislative history. Congress has never suggested in its various deliberations on the Fair Labor Standards Act that a contract providing below the minimum standards set forth in the Act could be used to cut back on those minimum standards. It has considered the applicability of collective bargaining agreements many times, and it's never yet, never reached that judgment.

The last point I would like to make is that counsel for respondent has somehow equated the duty of fair representation standard with one about the correct interpretation of a contract, and that standard be somehow engrafted upon a Fair Labor Standards Act litigation. There are two separate standards. Congress has provided distinct statutory rights, rights that are not merged into the collective bargaining agreement. Neither Congress nor this Court has ever even suggested that a court must accept an arbitrator's resolution of a contract claim as dispositive of an independent claim under the statute. To the contrary, the decisions of this Court including the decision in Gardner-Denver suggested the opposite, that while contract rights are properly relegated to the arbitral forum the courthouse door must stay open to resolve statutory claims. And I think this case bears out the wisdom of that policy. Because unless petitioners can get into court, there is no way that they can challenge this pay practice as being

violative of their rights under the Fair Labor Standards Act.

QUESTION: It's a necessary predicate of your position, is it not, under your question presented on page 3 of your petition, that the Fair Labor Standards Act claim was not in fact submitted to or passed upon by the grievance committee?

MR. VLADECK: Well, Your Honor, we now argue that it is immaterial whether it was submitted or not. All that we were trying to emphasize is that in this case it was not submitted.

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

(Whereupon, at 2:15 o'clock p.m., the case in the above-entitled case was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-2006

LLOYD BARRENTINE, ET AL.

V.

ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Bill T. Wilson