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January 18, 1982

Pages 1 thru 40

REPORTING

400 Virginia Avenue, S.W., Washington, D. C. 20024

Telephone: (202) 554-2345

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, AFL-CIO, ET AL.,

4

Petitioners

5 v. : No. 80-1663

6
ALLIED INTERNATIONAL, INC.

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8 Washington, D.C.

9 Monday, January 18, 1982

10 The above-entitled matter came on for oral argument
11 before the Supreme Court of the United States at 2:10 p.m.

12 APPEARANCES:

13 ERNEST L. MATHEWS, JR., ESQ., New York, N.Y.; on
14 behalf of the Petitioners.

15 DUANE R. BATISTA, ESQ., Boston, Mass.; on behalf of
the Respondent.

16 LAWRENCE G. WALLACE, ESQ., Office of the Solicitor
17 General, Washington, D.C.; as amicus curiae.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments next
3 in the International Longshoremen against Allied
4 International.

5 Mr. Mathews, I think you may proceed whenever
6 you're ready.

7 ORAL ARGUMENT OF ERNEST L. MATHEWS, JR., ESQ.

8 ON BEHALF OF THE PETITIONERS

9 MR. MATHEWS: Mr. Chief Justice, and may it please
10 the Court:

11 This case involves a totally different aspect of
12 the same union conduct that gave rise to the Jacksonville
13 Bulk case. In that case you had an employer suing under
14 Section 301 of the Labor Act to enforce his no strike
15 clause. In this case you have a customer of a customer of
16 the longshoremen's employer who brought an action for
17 damages under Section 303 of the Act, alleging that the
18 union's conduct was a secondary boycott in violation of
19 Section 8(b)(4). That section provides or forbids a union
20 from picketing or refusing to handle goods where an object
21 thereof is to force someone to cease doing business with
22 someone else.

23 This Court granted certiorari to review an order
24 of the Court of Appeals for the First Circuit, which by a
25 divided panel reversed the District Court's dismissal of the

1 Section 303 suit. There were other causes of action pleaded
2 which we will allude to, but they are not the subject of the
3 proceeding this afternoon.

4 The union takes the position in this suit that
5 just as Occidental said so strenuously, there is no labor
6 dispute. We are now echoing it. There is no labor dispute,
7 because the ingredient of suit on a collective bargaining
8 agreement under a provision to provide labor is not at issue
9 in this lawsuit. The only dispute here, we say, is that
10 non-labor political, and most important, foreign dispute
11 between the union and the Russians.

12 We feel that the First Circuit was in error when
13 it held that the activities in this case were in commerce so
14 as to be even subject to the provisions of Section 303 of
15 the Act. We also feel that they were in error when they
16 held that there was a violation of the Act when in this case
17 there just isn't any primary labor dispute. And we also
18 would urge this Court that the activity of the longshoremen
19 is protected under the First Amendment. That's a long way
20 down the road. Actually, the jurisdictional point on
21 whether the case is in commerce disposes of everything, and
22 you go beyond there to whether you have a primary labor
23 dispute. That the Court should get to the First Amendment
24 question is probably doubtful, but I think it casts, if you
25 will, a shadow forward because so much of what I will say

1 has to do with the fact that this is a political, but more
2 important that it is a conscientious refusal to be involved
3 in evil.

4 QUESTION: Well, do you suggest you can't give up
5 First Amendment rights by contract?

6 MR. MATHEWS: You certainly can, and this is not a
7 contract case. That's why we really didn't urge the First
8 Amendment case too strenuously in the Jacksonville Bulk
9 thing, because the arbitrator could very well say yes, but
10 you've waived them by contract, and you can. But in this
11 case it's not a contract case, and the ILA has not waived
12 their rights.

13 QUESTION: But the thrust of the employer's action
14 is to get you back to work.

15 MR. MATHEWS: The thrust of whose action?

16 QUESTION: Well, doesn't somebody want to get you
17 back to work?

18 MR. MATHEWS: Well, actually no. In this case
19 they're seeking damages.

20 QUESTION: Well, they want to get you back to work.

21 MR. MATHEWS: Well, yes.

22 QUESTION: And so why isn't that a labor dispute?
23 It's a dispute over whether or not you can cease furnishing
24 your labor without suffering damages.

25 MR. MATHEWS: No. Well, there is a labor dispute

1 element vis-a-vis our own employer. There is no labor
2 dispute element --

3 QUESTION: Well, I thought that's what you said
4 there wasn't in the -- that's what you said it was in the
5 last case.

6 MR. MATHEWS: Yes. We said it was a labor
7 dispute. It is a labor dispute when it's on a labor
8 contract.

9 QUESTION: Well, but nevertheless, it's a dispute
10 over whether you're going to furnish labor or whether you
11 can strike in the circumstances of this case.

12 MR. MATHEWS: Yes, but -- well, I don't think we
13 have a problem with Norris-LaGuardia in this particular --

14 QUESTION: I know, I know. But you said it wasn't
15 a labor dispute.

16 MR. MATHEWS: Well, I don't think there is any
17 primary dispute. There may be a secondary labor dispute;
18 that is, whether we have to work or not. But there is no
19 primary labor dispute, and in the course of my argument I
20 will get to that issue. But much more fundamental is the
21 threshold issue of whether the activities here are in
22 commerce. And here the union relies on the decisions of
23 this Court a few years ago, or a whole line of decisions
24 really going back for some 20, almost 25 years, but
25 particularly the last two statements in the Windward and

1 Mobile cases.

2 Over a period of years the Court has ruled that
3 the NLRA was just not intended by Congress to be thrust into
4 affairs that did not concern domestic commerce. The phrase
5 that the Court has used to denote what was not under the Act
6 is "not in commerce."

7 QUESTION: But the latter is really a shorthand
8 form of the former.

9 MR. MATHEWS: Yes. It's a term of art. And
10 sometimes you might say it's not subject to NLRB
11 jurisdiction, sometimes you might say it's not subject to
12 the Act, sometimes you might say it's not in commerce. All
13 the time you are talking about the same thing: what did
14 Congress intend to cover by the Act. And the phrases they
15 weave in and out, but I think they always mean the same
16 thing.

17 And the Court has said -- of course, the
18 ramification if they are not in commerce and not subject to
19 the Act, then they are not subject to regulation by the
20 NLRB, and they also cannot be made the subject of an action
21 under Section 303 of the Act.

22 Most of these cases have involved causes of action
23 brought by foreign entities themselves against the union who
24 has picked a dispute or gotten involved in a dispute with
25 the foreign entity. And in most of the cases the foreign

1 entity has gone into state court, and the union has tried to
2 say no, this is under the federal act; and this Court has
3 consistently told the union no, it is not under the federal
4 act; the foreign entity may pursue its remedies in state
5 court.

6 In Windward this Court held that the union
7 activity to protest wages and conditions on a foreign ship
8 was not in commerce when it was complained of by the foreign
9 ship owner. It was the classical thing. The foreign ship
10 owner went to state court. The union said no, there's no
11 jurisdiction. I believe in that case the state court agreed
12 with the union. It went up through the highest court of the
13 state, came to this Court, and the Court said no, this is
14 not even arguably protected by the federal act, it is a
15 matter of state law, and sent the case back. That arose in
16 the Port of Houston.

17 Then a few months later in the Port of Mobile,
18 Alabama the union did the same thing to the same ship
19 company, but instead of the ship company bringing the
20 action, an American employer who hired longshoremen -- in
21 this case the longshoremen were not the picketing people --
22 but the American stevedore brought a state tort action
23 saying you're interfering with my contract to unload the
24 ship, and I believe a soybean farmer brought an action
25 saying you're interfering with my contract to have my

1 soybeans carried.

2 And the union said look, what they're arguing here
3 is a secondary boycott subject to Section 8(b)(4) of the
4 Act. It is under federal jurisdiction and you can't bring a
5 state court action. And this Court again instructed the
6 union no, that is not true. We held in the Windward case
7 that your activity directed towards a foreign entity was not
8 in commerce, and we can't say that the same activity, just
9 because it's complained of by a different plaintiff, is now
10 capable of being split off or, and the word the Court uses,
11 the key word, is bifurcated, and made the subject of a
12 domestic dispute. No, leave it to the state courts.

13 I think this case would not have presented any
14 difficulty to anyone if we had had our companion Windward
15 case. If the first time that this Russian action of the
16 longshoremen had been triggered was when a Russian ship came
17 into port -- and they were on their way when the thing was
18 called -- when this Russian ship came into port if the
19 longshoremen had refused to handle the goods, whatever they
20 might have been, and the Russians had gone into state court,
21 I think anyone would see that the principles in Windward
22 apply even more persuasively than they did in Windward.

23 Not only is this not a dispute aimed at the
24 concerns of the domestic Labor Act -- the wages, conditions,
25 hours of employment, the relations between domestic

1 employers and employees -- but it's not even concerned with
2 labor at all. It's concerned with military policy, if you
3 will, foreign policy.

4 The thrust of the union's action is in no way
5 directed toward a labor objective and is outward directed
6 away from our shores a half a world away to Afghanistan. I
7 don't think anyone would have any difficulty seeing that
8 that was not a labor dispute in commerce. I confused my
9 terms. Labor dispute was the last case. The key word here
10 is that was not in commerce for purposes of federal
11 jurisdiction and preemption, so that these Russians could
12 not go into state court.

13 If we'd had that case, as I say, the Windward
14 principles would apply, and then there would be no
15 difficulty in seeing that once you had your Windward, your
16 Mobile would follow.

17 QUESTION: Let me try a variation of Justice
18 Powell's question to you. Suppose the particular employer
19 was actively engaged in supporting the enactment of
20 right-to-work laws in various states, including that area,
21 and otherwise the circumstances were the same.

22 MR. MATHEWS: And there was no foreigner. Then I
23 don't think the in commerce problem would arise, no. What
24 makes it not in commerce is the fact that it is directed
25 outside. The question as to whether it's a labor dispute

1 and all that might still arise, but we couldn't make the
2 argument that that was not in commerce, no.

3 QUESTION: Suppose it involved shipments to Hawaii
4 or Alaska? That's pretty much in commerce, isn't it?

5 MR. MATHEWS: Yes. Hawaii and Alaska are part of
6 the United States.

7 QUESTION: All right. Now, it's out of Louisiana
8 or make it New Jersey on its way to ports in California or
9 Seattle. In commerce or not?

10 MR. MATHEWS: The goods may be in commerce. The
11 dispute is not in commerce. That is the point. When you
12 read Windward and Mobile, the thing that is not in commerce
13 is not the goods. I mean, this Court was not blind to
14 reality. The activities in all of these cases -- Benz,
15 McCulloch, Incres, all of them, Ariadne -- they were all
16 just as much in commerce as a practical effect. But what
17 isn't in commerce, if Mr. Brezhnev gets a stomachache, the
18 stock market goes down; in our interrelated world,
19 everything's in commerce. But when we're talking about
20 those words "in commerce," it's what did Congress intend to
21 regulate. Congress didn't intend to regulate foreign --

22 QUESTION: Isn't that really it? You keep saying
23 in commerce. I expect that's only a shorthand way for
24 saying that there are certain kinds of differences, and this
25 is one, that Congress did not intend should be within the

1 reach of the National Labor Relations Act.

2 MR. MATHEWS: That's right.

3 QUESTION: And this is one. That's really what
4 your argument is. Starting with Ingres, that whole line of
5 cases.

6 MR. MATHEWS: That's right.

7 QUESTION: And the definition has been whether or
8 not the union is aimed at doing things involving a foreign
9 power, as in the case of a foreign ships company and that
10 sort of thing, isn't that it?

11 MR. MATHEWS: That's right. And here the same
12 thing. Well --

13 QUESTION: Isn't there a difference, though, Mr.
14 Mathews? You used the example of the Windward and the
15 Mobile cases, and you point out those were foreign ship
16 owners. Had they been American ship owners that brought
17 those cases, then I think you'd agree they would have been
18 covered.

19 MR. MATHEWS: Yes.

20 QUESTION: And here we have an American ship owner.

21 MR. MATHEWS: Yes and no. The American ship owner
22 is not bringing this case.

23 QUESTION: We do have an American ship owner?

24 MR. MATHEWS: Pardon?

25 QUESTION: We do have an American ship owner.

1 MR. MATHEWS: Yes, but this is not -- I mean
2 obviously we are not -- our boycott, our activity is not
3 limited to a particular ship the way that was. It's limited
4 to Russian goods and maybe Russian goods carried on American
5 ships.

6 The First Circuit, whose decision we're appealing
7 here, grappled with that problem, too, because the board
8 after it failed to get a 10(1) injunction against this in
9 Houston, which was affirmed by the Fifth Circuit on this
10 very ground that it was in the Bahamas, went to Boston and
11 tried to get an injunction and made the argument well, then,
12 in Houston the ship was a foreign ship and in Boston the
13 ship is an American ship. And it didn't get very far with
14 the First Circuit, because as the court realized, it's the
15 nature and thrust of the union's activity. What is the
16 union trying to affect?

17 Now, if it were an American ship and we were
18 trying to affect the conditions aboard an American ship, pay
19 to American seamen who were subject to the Act, yes, that
20 would be in commerce. Where it's not an American ship --

21 QUESTION: See, the words "in commerce" define a
22 kind of activity rather than the motive of the people
23 engaged in it, and those cases, it seems to me, could be
24 summarized by saying that the activities of foreign ship
25 owners in delivering goods to the American shores are not in

1 commerce within the meaning of these statutes.

2 MR. MATHEWS: Well, yes -- no, I don't think they
3 could, because the one little exception that proves the
4 rule, that the Court in the Ariadne case where if you looked
5 at what happened, there were the people on the dock and
6 there was the foreign ship, but you really couldn't tell
7 what it was all about, the Court held that was in commerce
8 because what they were disputing over was the foreign ships'
9 wages that they payed American longshoremen on the ground.
10 So it's really what is the union trying to affect.

11 QUESTION: In other words, the exclusion from what
12 would normally appear to be commerce is foreign ship owners
13 insofar as they employ foreign seamen.

14 MR. MATHEWS: Well, that of course is an argument
15 that some people make, that the only thing that's not in
16 domestic commerce are foreign ship owners who don't employ
17 or employ foreigners. I think that's restricting Mobile and
18 Windward to the precise situation raised there, and it's
19 really unrealistic.

20 QUESTION: But the dissents in those cases make a
21 pretty good argument for not reading them expansively, let
22 me put it that way.

23 MR. MATHEWS: But for instance, what would you do
24 if the same thing happened at an airport, and we no longer
25 had a foreign ship owner but we had a foreign air fleet, and

1 the objection was to the way they paid their pilots or
2 something. I don't think there'd be a real distinction
3 there.

4 The real thing is, the controlling factor was what
5 this Court said, that the Congress just didn't intend to
6 regulate these foreign matters, strain them through the
7 filament of this Act. And the Court based its holding very
8 strongly on an idea of comity, which I really think I have
9 to address because everyone seems to take this comity to
10 mean they didn't want the National Labor Relations Board
11 getting involved in all this. And I think that that's a
12 very oversimplified approach, because there was no question
13 in most of those cases but that the National Labor Relations
14 Board just wasn't going to get into it. Nobody could force
15 somebody to bring a charge before the NLRB any more than
16 they could force them to bring a Section 303 action.

17 QUESTION: Well, would you make the same argument
18 if the strike banners said quit doing business with some
19 shipper that was shipping to Russia?

20 MR. MATHEWS: Would I make the same argument?

21 QUESTION: They went to the employer and said quit
22 doing business with Ford shipping to Russia, and they went
23 on strike and said quit doing business with Ford.

24 QUESTION: And add to that that the objective is
25 to have an influence on the pending labor negotiations which

1 are pending right this minute. Suppose that was the
2 objective of the union saying don't handle any Ford
3 shipments overseas.

4 MR. MATHEWS: To have an influence on Ford's
5 pending labor -- well, no. If that were in fact the case,
6 then I don't think you could say it was not in --

7 QUESTION: Well, what about the in commerce
8 argument, though. No matter what the purpose of the strike
9 was, what the ultimate objective was, the pressure was
10 placed on the employer by a strike to quit doing business
11 with Ford because Ford was shipping goods to Russia.

12 Now, you wouldn't be making the same commerce
13 argument.

14 MR. MATHEWS: No, I don't think -- because you
15 would not have that first confrontation between the union
16 and the foreign power. I think really there you have a
17 bifurcated --

18 QUESTION: But what if the result of the action
19 that you took in this case was precisely that: quit doing
20 business with Ford?

21 MR. MATHEWS: Well, I don't think that you can do
22 it by the result.

23 QUESTION: You don't think that's the purpose?

24 MR. MATHEWS: Yes. Well, that's part of the
25 essential analysis of any secondary boycott is purpose, and

1 it seems to run through, as I say in the Ariadne case, it
2 was what is the purpose of the union.

3 QUESTION: Are you stuck with the results you
4 predictably produce?

5 MR. MATHEWS: No, I would not. If you want to
6 jump to that, Justice White, I think that kind of
7 mechanistic approach is just one reason why this thing
8 should be left to state courts and not given to a
9 bureaucratic agency that tries to put round holes in square
10 pegs.

11 The only thing -- and all of the evidence -- I
12 mean you do not have before you the analogs --

13 QUESTION: You mean if the state court took this
14 on and then enjoined it you wouldn't be objecting on the
15 ground that the board had exclusive jurisdiction?

16 MR. MATHEWS: Well, we certainly wouldn't now, not
17 with what we know about the NLRB, certainly not.

18 (Laughter.)

19 MR. MATHEWS: No. And we really feel that the
20 kind of thing that is involved is really just beyond, I
21 don't want to say competence, but the ken of the board.
22 They look at things from this secondary boycott point of
23 view. If I can give you an example, we raised First
24 Amendment questions. They get so far as the finding that
25 the international union did certainly encourage the

1 longshoremen in what they did. Once you have that, that's
2 enough to make an inducement for a secondary boycott.

3 But they stop right there and then just don't go
4 into the question of where did this come from, was it really
5 an expression of the will of the individual workers. No.
6 We've satisfied our inducement. You check that box and
7 mechanistically you go on to the next. Any predictable,
8 foreseeable result must be an object. In fact, they amend
9 Section 8(b)(4) and put "effect" instead of "object." If
10 the union could predict it, it must be an object of the
11 union to bring to pass.

12 I, for one, can't see how a rational person does
13 that. I've said to every court if I wished to marry a girl,
14 I get her mother as my mother-in-law. It is necessary, it
15 is foreseeable, it is predictable, but it may be the
16 furthest thing from my object in the world. But in our
17 human life we've got to take the good with the bad.

18 If the union's object was nothing more than to
19 themselves refrain from being involved in dealing with the
20 invaders, the predictable results would be just the same.
21 You just can't jump to the conclusion that they must have
22 had some other object. They may have only the object to
23 control their own --

24 QUESTION: That may be so in terms of whether
25 there might be an unfair labor practice, but I don't know

1 why you have to apply the same rationale to whether it's in
2 commerce or not.

3 MR. MATHEWS: I was talking in terms of the unfair
4 labor practice. Your question escapes me, sir.

5 QUESTION: Well, your first argument is that
6 there's no domestic commerce involved here.

7 MR. MATHEWS: That's right. That the whole
8 thrust, purpose, motive of ILA's activity --

9 QUESTION: That may not be an unfair labor
10 practice. I mean just because it might be in commerce
11 doesn't mean there's an unfair labor practice.

12 MR. MATHEWS: No, that's true.

13 QUESTION: -- That your rationale about what an
14 unfair labor practice is may not apply to whether it's in
15 commerce or not. It may be that impact and effect are
16 enough.

17 MR. MATHEWS: To bring it into commerce.

18 QUESTION: Yes.

19 MR. MATHEWS: It may be. Of course, we would
20 argue if it is in commerce, why, it is not an unfair labor
21 practice because we don't have the prescribed object.

22 If you will, I'd like now to reserve the rest of
23 my time for rebuttal.

24 CHIEF JUSTICE BURGER: Mr. Batista.

25 ORAL ARGUMENT OF DUANE R. BATISTA, ESQ.

1

ON BEHALF OF THE RESPONDENT

2

3 the Court:

4

Let me first address the issue of jurisdiction and the foreign flagship cases. One essential thread that comes through all of the foreign flagship cases, starting with Benz through Windward and Mobile, is the question, the concept, the issue of comity. Again and again this Court in those cases has said it is because of comity and comity considerations alone that we find either the given activity in question to be in commerce or not in commerce.

12

I think initially we need to step back a bit to take a look at these foreign flagship cases and perhaps put them into perspective. To my knowledge, and neither the ILA or the AFL-CIO in its amicus has cited anything else, the foreign flagship cases are the only cases anywhere in our jurisprudence that hold that comity considerations preclude a federal statute from applying and regulating and governing the conduct of Americans on American soil that has a substantial effect on other Americans.

21

QUESTION: Well, Mr. Batista, do you understand that to be, after you've gone all through the policy considerations, conclude therefore Congress never intended this Act to reach that conduct?

25

MR. BATISTA: Well, I think this Court in dealing

1 with the particular unique situations presented by the
2 foreign --

3 QUESTION: Hasn't that ultimately been the -- of
4 course, I was in dissent in all those cases -- but isn't
5 that ultimately the bottom line, that a statute simply can't
6 be construed to reach conduct of this kind because of the
7 foreign policy considerations.

8 MR. BATISTA: Yes. Conduct of the kind presented
9 in the foreign flagship cases.

10 QUESTION: Yes.

11 MR. BATISTA: Which I hope to demonstrate is very,
12 very different in terms of comity considerations than the
13 conduct involved in this case.

14 Now, the foreign flagship cases basically by and
15 large, and particularly Windward and Mobile, involved
16 picketing by Americans right at the immediate site of a
17 foreign flagship and its crew. It was picketing designed
18 for the purpose of either forcing American law or American
19 standards upon the management and particularly labor
20 relations of that foreign flagship.

21 I think one might reasonably view, and certainly
22 one might reasonably not view, but one could reasonably view
23 that kind of conduct as creating a comity problem with
24 respect to relations with the foreign nation under whose
25 flag the ship was flying.

1 Here we have a very, very different, totally
2 different situation. I think we could perhaps view our
3 situation if we took a mirror image. Let's assume that the
4 United States found it necessary to intervene militarily in
5 El Salvador. Let us assume that as a result of this a
6 Brazilian labor union interfered with trade between Brazil
7 and the United States. Let us now assume that the
8 Brazilians applied their national labor law, national
9 Brazilian labor law, to regulate or control the action of
10 that labor union.

11 I can't imagine there's anybody in this room that
12 would feel that somehow the Brazilians were interfering with
13 either internal United States law or internal United States
14 policy by applying their Brazilian national law to cover and
15 regulate the conduct of that Brazilian labor union in
16 Brazil. And that of course, flipping the mirror image back
17 again, is exactly the situation we have in this case.

18 QUESTION: Mr. Batista, apart from the comity
19 argument, hasn't this Court in the Treefruits case and in
20 the Safeco case indicated that Section 8(b)(4) is directed
21 to an isolated evil, and due to the First Amendment concerns
22 given that a very narrow meaning quite apart from the
23 foreign comity issue?

24 MR. BATISTA: Well, that really goes to the second
25 issue which is not jurisdiction but whether or not there has

1 been a violation of the Act. And I think if we turn to that
2 issue, we really, Allied and I think the NLRB, reading their
3 opinion, are strongly relying on Safeco and precisely the
4 distinction made by this Court between Safeco and
5 Treefruits, which is fundamentally that when a union induces
6 employees to, in this case, refuse to handle a product, and
7 it is reasonably foreseeable that substantial business
8 disruption will result from that inducement, and that
9 inducement can no way be viewed as a primary strike, then by
10 applying the simple, plain language of the National Labor
11 Relations Act, of Section 8(b)(4), you have a secondary
12 boycott.

13 As far as the impact of the constitutional element
14 is concerned, Safeco specifically drew the distinction
15 between on one hand the substantial business disruption; on
16 the other hand contrasting Treefruits, the slight business
17 disruption.

18 Also, I think an excellent point was made by
19 Occidental in their amicus brief with respect to the
20 constitutional issue, and that was there would be no
21 constitutional issue raised in this case if this were just a
22 run-of-the mill, ordinary hot cargo secondary boycott
23 arising out of a run-of-the-mill, ordinary labor dispute
24 over wages, hours, terms, or conditions of employment that
25 caused this degree of disruption.

1 On the other hand, if this degree of disruption
2 had been caused arising out of a political objective -- for
3 example, protestors blocking exits or entrances to a nuclear
4 power plant -- again, there would be no question that those
5 protestors who are disrupting the operation of that nuclear
6 power plant didn't have First Amendment protection to do
7 this.

8 So in other words, what we're suggesting is what
9 the ILA is trying to do here is add nothing to nothing and
10 get something. We really submit and we think that the
11 briefs, not only our brief, the brief of the Solicitor
12 General, the briefs of the amici dealing with the
13 constitutional issue show very conclusively that there
14 really is absolutely no substantial constitutional issue
15 here.

16 The scale of disruption on one hand when balanced
17 again against whatever residual constitutional interests
18 might be involved, remember, we are not talking here about
19 rights of individual workers to refuse individually or even
20 spontaneously in concert to handle product. We are talking
21 about an order issued by the head of a major labor union who
22 has the power -- which labor union has the power to shut
23 down trade, East Coast, Gulf Coast, and the Great Lakes
24 ports.

25 And as far as we can see, the only constitutional

1 right involved is that of allegedly a Mr. Gleason to apply
2 his own beliefs and his own feelings; and we feel that that
3 certainly is not balanced out vis-a-vis the extraordinary
4 disruption involved in this case.

5 QUESTION: Mr. Batista, may I go back to the
6 jurisdictional issue for a moment? You emphasize the comity
7 theme that runs through those cases, and the point being, as
8 I understand it, that the American activity that's not
9 protected would interfere with foreign interests in running
10 its own affairs with respect to labor relations.

11 But isn't there the same comity interest here in
12 that the activity of the international labor association or
13 -- I'm sorry -- the Longshoremen's Association, ILA, clearly
14 must cause friction with Russia if they're not going to ship
15 goods to Russia because of this activity.

16 Why isn't the comity -- I don't understand why the
17 comity argument you make doesn't cut against you.

18 MR. BATISTA: Well, for one thing, the activity,
19 governmental regulation of that activity can only create a
20 comity problem if that government regulation tends to
21 protect the activity. In this situation, as we've tried to
22 develop in our brief and also some of the amici, the
23 activity in question can't be protected because unlike the
24 primary picketing at the primary situs of a foreign
25 flagship, which could be arguably protected activity

1 depending on the nature of the picketing, statements perhaps
2 some of the pickets have made, and what not -- here, the
3 conduct occurring in the United States, the order of Mr.
4 Gleason, which is the conduct in question, is clearly
5 secondary.

6 And secondly, as also demonstrator argued by Mr.
7 Gies in the JBT case, it can't be protected in any event by
8 Section 7 of the National Labor Relations Act because it's
9 devoted towards a political objective by virtue of this
10 Court's -- at least language in this Court's Eastex decision.

11 So for that reason we cannot see --

12 QUESTION: Your point is that it's friction caused
13 by governmental activity as opposed to the private activity.

14 MR. BATISTA: Well, the friction can be caused by
15 the private activity. The question of comity comes into
16 play where the governmental activity tends to protect
17 something that causes the friction.

18 Here we're going in the other direction. I think
19 here we're going in the direction really of the question
20 that was raised in the Plumbers Union v. Dorr County case
21 before this Court in the late 1950s where the issue was
22 whether secondary boycott applications law could apply to a
23 dispute with the county or municipality. And the question
24 was raised does this interfere with the municipality, and
25 this Court's answer was no, if anything, applying the

1 secondary boycott provisions to terminate the disruption
2 furthered the interest of the municipality.

3 So for these reasons we really feel that the
4 foreign flagship cases are totally distinguishable and apart
5 from this situation.

6 One final element which is also quite
7 distinguishable and should be kept in mind, the essential
8 inherent dispute or difference in this case revolves around
9 the cargo. Now, while Mr. Gleason's order also involves
10 Russian ships, Russian ships are not involved in any way,
11 shape or form in this particular case.

12 We used the example, hypothetical in our brief.
13 This case conceptually could have arisen just as easily in
14 the middle of Nebraska where on a trucking dock in Omaha a
15 teamster local union ordered its members not to handle
16 Russian cargo. And it just simply escapes Allied what
17 possible relevance foreign flagship cases could have to this
18 essential product and cargo dispute. So it's only the cargo
19 dispute and the product dispute that is before this Court
20 today.

21 QUESTION: Your basic comity argument, though,
22 would be equally strong even if there were Russian flagships.

23 MR. BATISTA: Yes, in our view.

24 I think unless the Court has any further questions
25 -- well, let me just cover one point further relating to the

1 secondary boycott issue, and that is that one particular
2 statement that my brother Mr. Mathews made I feel is
3 particularly cogent relating to the situation faced by
4 Allied in terms of the Russian boycott, and that was that a
5 safety factor, he said, in restricting political strikes and
6 disruption of this nature is the union members' need to and
7 interest in being able to eat.

8 The critical element as far as Allied is concerned
9 is we don't have that safety factor here. Russian trade is
10 but a relatively small percentage of the trade that passes
11 through every or most of the ports in this country. As long
12 as those ports are reasonably busy, the union can order its
13 members not to handle Russian cargo, and those members will
14 lose little or nothing in terms of wages.

15 Also, the shipping association employers, as a
16 result of this, as long as the ports are reasonably busy,
17 losing little or nothing in profits. So they have no
18 interest in terminating the dispute, the union members have
19 little or no interest. It is only Allied and the interests
20 of American foreign policy and others involved in Russian
21 trade that are adversely affected.

22 That's precisely why we feel it is absolutely
23 necessary to have protection under the National Labor
24 Relations Act to ensure that parties such as Allied can have
25 protection, and the public can have protection, and the

1 national interest can have protection against this kind of
2 union conduct.

3 Allied asked the Boston Shipping Association to
4 file and commence a 301 action under their labor contract.
5 They refused. It just wasn't important enough to them. And
6 indeed, only five 301 actions, according to the union's
7 brief, were filed against this Russian boycott that
8 involved, oh, perhaps over a billion dollars' worth of trade
9 potentially. One of those, of course, was Occidental's in
10 the JBT case. So we cannot rely on contracting parties to
11 resolve this kind of issue. We need the National Labor
12 Relations Act.

13 Thank you.

14 CHIEF JUSTICE BURGER: Mr. Wallace.

15 ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

16 AS AMICUS CURIAE

17 MR. WALLACE: Mr. Chief Justice, and may it please
18 the Court:

19 I would like to touch briefly on each of the three
20 issues in the case: the in commerce issue, whether there's
21 a violation of 8(b)(4), and the First Amendment issue.

22 The in commerce issue, it seems to us, would be
23 clarified if one would pose the question whether a primary
24 labor dispute with these particular employers would be
25 covered, a dispute between the union and what the Court of

1 Appeals called the all-American cast of characters here. It
2 seems that the answer is obvious, and the fact that the
3 dispute here is secondary in nature doesn't give a reason
4 for reaching a different result. It's only in cases where
5 that dispute and its manifestations coincided with the
6 primary labor dispute that was outside the jurisdiction that
7 the Act that the court has reached a different result. Here
8 there is no primary labor dispute. Even though there is a
9 primary dispute of a different nature, there is no concern
10 that somehow the Act or the board's scope because of a
11 primary dispute that coincides with the secondary one will
12 be improperly extended beyond the area where Congress
13 intended it to extend. And for that reason, there's no
14 reason to reach a different result with respect to a
15 secondary dispute between the union and these employers than
16 would be reached with respect to a primary dispute which
17 would clearly be within the scope of the Act.

18 Mr. Mathews has posed the hypothetical that a
19 different result or the result would be clearer if this were
20 a Russian ship rather than an American ship. That question
21 happens to be pending before the board now, and the board
22 has not yet spoken on it. But what is apparent is that the
23 analog that he draws to this Court's decision in *Windward*
24 and *Mobile* does not seem on the face of it to be the closest
25 analog, because those two cases involved a dispute about the

1 terms of employment of the foreign seamen on the foreign
2 ship wherein so far as a labor dispute is involved here, the
3 question is whether American longshoremen will service the
4 foreign ship.

5 That is the type of question that was involved in
6 the Ariadne case rather than in Windward or Mobile where the
7 opposite result was reached. And the Court held that
8 picketing with respect to the longshoremen and the terms
9 under which they would service a foreign ship was arguably
10 protected by the Act and therefore could not be enjoined by
11 the state courts. And that at least on the face of it seems
12 to be the closer analogy to the hypothetical.

13 With respect to whether this is a secondary
14 boycott prohibited by 8(b)(4), in one sense it is the
15 classic example of a secondary boycott, a refusal to handle
16 hot cargo, regardless of the reason why the union considers
17 it to be hot cargo. It certainly, as we show in our brief,
18 within the terms of 8(b)(4), and as we indicate, the
19 legislative history discussed the purpose of 8(b)(4) in very
20 comprehensive terms. At one point during the debate Senator
21 Taft said after hearing weeks of testimony no one ever
22 succeeded in explaining to us the difference between a good
23 secondary boycott and a bad secondary boycott.

24 Now, it is true that most of the testimony and
25 most of the discussion concerned what typically had been

1 experience, which was an effort to engage in secondary
2 boycotts in support of primary labor activity. Political
3 strikes were not commonplace and certainly weren't in the
4 forefront of the discussion. Minority views were expressed
5 in the committee reports and were supported by President
6 Truman in which they tried to limit the prohibition of
7 8(b)(4) so as to preserve the legality of secondary activity
8 that would be in support of legitimate primary labor-related
9 activity that the union would have an economic interest in.
10 But even that effort to preserve secondary activity in that
11 limited context failed, even when it would be in the union's
12 economic self-interest to engage in the secondary activity,
13 because the prevailing view was that the secondary activity
14 unfairly had adverse effects on other employers and
15 businesses that were not offending.

16 And there is also one indication that political
17 strikes were not wholly beyond the attention span of
18 Congress in enacting Taft-Hartley, and that was the fact
19 that they included in Taft-Hartley a now repealed section,
20 Section 9(h), the anti-communist affidavit section, that was
21 discussed in this Court's opinion in American Communications
22 Associations against Downs, which is not cited in the briefs
23 but it's 339 U.S. 382. And the reason that Congress put the
24 non-communist affidavit into Taft-Hartley was because of
25 concern that union officials with an allegiance to a foreign

1 power or to a party directed by a foreign power might use
2 their office to conduct political strikes, and that would be
3 an unwarranted disruption of commerce.

4 So that this concern was not wholly beyond the
5 purview of those who enacted Taft-Hartley and spoke in such
6 comprehensive terms about prohibiting secondary boycotts.

7 Now, to turn briefly to the First Amendment claim
8 here, which arises not in the context of picketing where
9 there is arguably greater protection of free expression, but
10 in the context of a union-directed work stoppage.

11 The hot cargo, the refusal to handle the hot cargo
12 here really amounts to an adoption by the union of a trade
13 embargo with a foreign power, what might be thought to be a
14 quintessentially governmental decision whether to engage in
15 a trade embargo.

16 The First Amendment claim of a right to do this is
17 really quite an extraordinary claim. This is a matter that
18 not only is a matter of high governmental policy but a
19 matter of concern to all citizens in the country and to all
20 aspects of opinion in the country, to be expressed through
21 the representative processes.

22 But the union, because it is strategically located
23 to do so on its own, is claiming a right to short-circuit
24 anyone else's discussion of the matter or efforts to
25 influence governmental policy and to decide on its own that

1 a trade embargo with a foreign nation will in fact be
2 effectuated. This is an extraordinary claim of a First
3 Amendment right which is really antithetical to the purpose
4 of the First Amendment.

5 QUESTION: So is your basic submission that it's
6 conduct rather than speech, is that it?

7 MR. WALLACE: That is the basic submission. The
8 fact that it is conduct engaged in for the purpose of
9 expressing a political protest does not mean that the First
10 Amendment immunizes it. That is --

11 QUESTION: If they just went ahead and worked but
12 carried the same message around on cardboard it would be all
13 right.

14 MR. WALLACE: Or wore black armbands or whatever
15 they wanted to do. And the board has suggested that they
16 could, of course, picket the Russian embassy or consular
17 offices. But in United States against O'Brien in an opinion
18 of this Court by Chief Justice Warren a similar claim was
19 made with respect to the First Amendment right to burn draft
20 cards as a form of political protest and was rejected by the
21 Court. And this is certainly conduct that has detrimental
22 effects on other persons that might even be analogized more
23 to a First Amendment claim of right to engage in acts of
24 political terrorisms, but one needn't go that far. There
25 simply is not a basis for a legitimate First Amendment claim

1 to engage in conduct of this sort.

2 CHIEF JUSTICE BURGER: Do you have anything
3 further, Mr. Mathews?

4 ORAL ARGUMENT OF ERNEST L. MATHEWS, JR., ESQ.,
5 ON BEHALF OF THE PETITIONERS

6 MR. MATHEWS: Well, Mr. Chief Justice, and if it
7 please the Court:

8 A word about the safety factor, the asymmetrical
9 problem that Mr. Batista mentions. All I can say is that
10 really it's sort of a naive argument to make. The last time
11 this union was before this Court it was on the question of
12 containerization, the infamous rules on containers, where
13 the union is going crazy over the loss of work due to
14 technology. To think that the loss of any day's pay is not
15 a real sacrifice for longshoremen to make or for locals who
16 have particularly heavy traffic in Russian cargo is just
17 simply not to be with the realities.

18 I'm sure the Court is aware of the condition of
19 the United States merchant marine at this time. Most cargo
20 is carried on foreign ships. To think that the ship owners
21 and the shipping associations are not concerned over loss of
22 business is just to be arguing in a different world.

23 QUESTION: What if they refuse to handle and
24 unload ships carrying Japanese automobiles on the West Coast
25 on the grounds that this was hurting the United Automobile

1 Workers, which surely it is, and a lot of other people --
2 bankers, automobile dealers.

3 MR. MATHEWS: In that case I don't think you would
4 have the not in commerce argument, because what -- the
5 union's dispute would not be motivated towards the policies
6 of the foreign competitor. It would be motivated toward the
7 policies of people who import Japanese goods. It's not that
8 the Japanese did something bad; they made the best product
9 they could at the cheapest price.

10 I really -- of course, it is your job to probe and
11 think of this possible ramification and that possible
12 ramification, but I'd much rather argue the case that I have.

13 QUESTION: Don't you think it's relevant to what
14 we've got before us in these two cases?

15 MR. MATHEWS: It's relevant, but it's not quite
16 the same thing that you have before you; because as I said
17 at the start, this is a transdendent thing. The invasion of
18 Afghanistan and the Polish thing is such a horrible
19 situation that the union's response to say I just don't want
20 to have any part to do with those people is a perfect --

21 QUESTION: But there's a much greater
22 compatibility between the latter hypothetical I gave you,
23 protecting American working men, than there is in the
24 Afghanistan or Polish or --

25 MR. MATHEWS: I would disagree. I don't feel any

1 particular outrage that the Japanese make a better good than
2 us cheaper and sell it here. I do feel outraged at what
3 happened in Poland and what happened in Afghanistan, and the
4 longshoremen did, too.

5 QUESTION: I'm talking about the pocketbook issue,
6 which is normally what unions are interested in.

7 MR. MATHEWS: Yes. But that's why I say this
8 isn't a pocketbook issue. It's not a labor dispute. It's
9 not a commercial dispute. It's a political dispute. It's a
10 conscientious dispute. And, you know, to try to squeeze it
11 into the mold of the Labor Act is to regulate --

12 QUESTION: What about refusing to handle any goods
13 from Italy on the grounds that they're trying to bring
14 pressure on the Pope on some of this positions on abortion
15 and so forth?

16 MR. MATHEWS: Of course, Your Honor, you can make
17 a million examples. The point is the world was outraged at
18 Afghanistan, as we have been by Poland. The Pope himself
19 said don't stand by, world, and let Solidarity go down the
20 drain. The Polish ambassador said do something, America;
21 you know, don't just bring Lech Walesa over here and give
22 him awards; do something. The longshoremen did something.

23 QUESTION: But you can't do anything unless you're
24 outraged.

25 MR. MATHEWS: Excuse me?

1 QUESTION: You wouldn't do anything unless you're
2 outraged.

3 MR. MATHEWS: Yes. I think it has to be --

4 QUESTION: Well, who decides whether you're
5 outraged? You do.

6 MR. MATHEWS: Sure. That's a personal -- what
7 outrageous means.

8 QUESTION: Don't you put yourself above the
9 government?

10 MR. MATHEWS: Not above the government. What
11 we're saying is you don't use a labor act to squelch
12 activity that doesn't have anything to do with labor.
13 That's the problem here. You're trying to take the National
14 Labor Relations Act, which as Justice O'Connor said had
15 certain specific evils to regulate, and those evils weren't
16 political protests, political protests that other people
17 might find unpleasant.

18 Look, if any business decided they don't want to
19 handle Russian goods, their workers lose the work, but
20 nobody would say they're violating the law. Why shouldn't
21 longshoremen have the same right to do what Sam Goldwyn
22 said, include me out. As long as you're going to act like
23 that, we're putting you in Coventry. We don't want to have
24 anything to do with you. And to question that this is not
25 really a conscientious decision, a decision that really goes

1 to the deepest held feelings about what is right and wrong I
2 think is just to put blinders on.

3 QUESTION: So you say it's the same as though some
4 civic association, not a union, came down and put a picket
5 line around this ship between the ship and the stevedore,
6 and it just so happens that the union honored that picket
7 line, and then the employer tried to claim that the
8 association that was doing the picketing was engaged in a
9 secondary boycott.

10 MR. MATHEWS: I do. And I think that, you know,
11 we shouldn't have the protection of the Act in that
12 situation. In that situation you have no Norris-LaGuardia.
13 Send it to state court.

14 You know, in doing the research of this case I was
15 amazed at the number of times that the federal district
16 courts just take a case which somebody tries to bring as a
17 secondary boycott and says this is not a labor dispute.
18 You're fighting with a landlord over the rent, or you're
19 fighting about the collection of a bill. Remand it to the
20 state courts. They never get up to the circuits because
21 it's not an appealable order, but they do it as a matter of
22 course.

23 What Allied has here is a claim for tortious
24 interference with conscience, and we're willing to litigate
25 that claim in the state courts, but don't federalize it.

1 Don't make it a federal case which puts the imprimatur of
2 the United States Government on any result.

3 QUESTION: Do you know of an instance where a
4 labor union, an international union has urged us to turn the
5 matter over to the state court?

6 MR. MATHEWS: No, I don't, Your Honor.

7 QUESTION: I didn't think -- this is the first
8 time.

9 MR. MATHEWS: But I would be willing to litigate
10 this case --

11 QUESTION: This is the first time.

12 MR. MATHEWS: -- In front of an American jury
13 rather than a bunch of bureaucrats who very frankly let it
14 come through that their opinion -- and this would be my
15 closing word -- that what's important here is policy.
16 Forget the law. Forget that it's Congress who writes the
17 statutes. Make your own new amendments to the
18 Norris-LaGuardia. Forget your precedents. But just stop
19 this boycott. I think that's an argument that is so ironic
20 in this case because it really belongs over there on the
21 same people who went into Afghanistan.

22 CHIEF JUSTICE BURGER: Thank you, gentlemen.

23 The case is submitted.

24 (Whereupon, at 3:07 p.m., the case in the
25 above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL., vs.

ALLIED INTERNATIONAL, INC. No. 80-1663

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