ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-861

TITLE NATIONAL LABOR RELATIONS BOARD, Petitioner V. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

PLACE Washington, D. C.

DATE April 23, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL LABOR RELATIONS BOARD, :

Petitioner, :

V. : No. 84-861

INTERNATIONAL LONGSHOREMEN'S :

ASSOCIATION, AFL-CIO, ET AL. :

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Washington, D.C.

Tuesday, April 23, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 o'clock a.m.

APPEARANCES:

NORTON JAY COME, ESQ., Deputy Associate General Counsel, National Labor Relations Board, Washington, D.C.; on behalf of the petitioner.

JAMES ALAN LIPS, ESQ., Cincinnati, Ohio; on behalf of the respondents American Trucking Associations, et al. in support of the petitioner

DONATO CARUSO, ESQ., New York, New York; on behalf of respondents New York Shipping Association, et al.

ERNEST L. MATHEWS, JR., ESQ., New York, New York; on behalf of respondents International Longshoremen's Association, et al.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in National Labor Relations Board against the International Longshoremen's Association.

Mr. Come, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF NORTON JAY COME, ESQ.,

ON BEHALF OF THE PETITIONER

MR. COME: Mr. Chief Justice, and may it please the Court, this case calls for this Court to review a second time the rules on containers which are a part of collective bargaining agreements between the International Longshoremen's Association and shipping industry employers on the Atlantic and Gulf coast.

The rules were adopted in response to a technological innovation in the shipping industry known as containerization, which has had an impact on longshoremen's work. As this Court may recall, containers are large, reusable metal receptacles 20 to 40 feet in length and capable of carrying upwards of 30,000 pounds of freight which can be moved on and off an ocean vessel unopened, and they can then be affixed to a truck chassis and transported intact to and from the pier like a trailer.

The rules provide in general that if

containers owned or leased by the shipping companies are to be unloaded or loaded, stripped or stuffed as that process is called in the industry, within 50 miles of the port by anyone other than the beneficial owner of the cargo, the work must be done at the pier by longshoremen.

The rules require shipping companies to deny containers to any facility operating in violation of the rules and to pay liquidated damages of $1,000 per container or for any container handled in violation of the rules.

Now, at first blush the rules would appear to violate Section 80 of the National Labor Relations Act which prohibits an employer and a union from agreeing that the employer will cease doing business with another person because they require the shipping companies to deny containers and thus do business with anyone operating in violation of the rules.

But this Court has held that 80 applies only to secondary activity and not to activity serving a legitimate primary purpose, and among the primary purposes protected by the Act is the purpose of preserving for the contracting employees themselves work traditionally done by them.

On the other hand, decisions of this Court

have established that an agreement does not have a legitimate work preservation objective and is instead for a secondary objective that is unlawful under Section 80 if it seeks to acquire for union members work that was not previously theirs.

Now, the last time this case was before this Court, what I shall refer to ILA-1, this Court vacated two decisions of the NLRB and it concluded that the rules on containers and their enforcement constituted secondary activity proscribed by Section 80 and 8(b)(4)(B) of the Labor Act.

The Court concluded that the board, in finding that the rules in their applications did not serve a valid work preservation objective had applied an erroneous definition of the work in controversy, defining the disputed work as the container work performed by the truckers and consolidators at their off-pier premises after the innovation of containers, thereby foreclosing the longshoremen from playing any part in the loading or unloading of containerized cargo.

The Court accordingly remanded the case to the board to take another look at the rules applying a proper definition of the work, and the Court explained that the -- or instructed the board in determining

whether the rules had a lawful work preservation object to see whether they were tailored to the objective of preserving the essence of traditional work patterns.

In short, the board was to undertake a careful analysis of the traditional work patterns that the rules were allegedly seeking to preserve and determine whether the historical and functional relationship between this retained work and traditional longshore work could support the conclusion that the objective was work preservation rather than work acquisition.

On remand, the board consolidated the two prior proceedings with seven other proceedings involving the rules, and after making the analysis which the Court directed it to make of the traditional work patterns, concluded that the rules violated the Labor Act in their application to a widespread practice known as shortstopping and to certain traditional warehousing activities.

These practices occur in connection with what is termed FSL container loads, containers holding import cargo or export cargo -- import cargo destined for only one consignee, and export cargo from only one shipper.

The board upheld the application of the rules that were at issue insofar as they applied to less than container loads which are containers holding export

cargo from or import cargo destined to more than one shipper or consignee.

The Court of Appeals, disagreeing with the board in part, held that the rules were lawful in their application to shortstopping and to the warehousing practices that the board found them to be unlawful, and this is the only aspect of the Court of Appeals decision which is now before this Court.

QUESTION: Mr. Come, is there anything in the board's opinion stating that loading and unloading before the shortstop by truckers is not traditional longshremen's work?

Did you find anything to that effect in the opinion?

MR. COME: Well, what the board did was to affirm the basic findings of the Administrative Law Judge except in two respects, which do not alter his finding that the shortstopping was not functionally related to traditional longshore work. That was related to the work patterns of the motor carriers.

So, by affirming the Administrative Law Judge's findings and not rejecting this basic finding with respect to shortstopping, we submit that the board did approve the Administrative Law Judge's finding.

QUESTION: Do you think that eliminated work,

work that is eliminated because of technological change can ever be preserved by a collective bargaining agreement?

MR. COME: I think that it may be possible in some circumstances. I think that the board did not have to face that flat proposition because in this case the eliminated work that was sought to be replaced was in the board's view and the Administrative Law Judge's view not work that was functionally related to traditional longshore work.

It is an easier case where the employees seek to substitute for the eliminated work work that is not functionally related to what they have been doing, and that is this case.

Now, the hypothetical case that Your Honor is positing, as I understand it, is a situation where an effort is made to restore eliminated work that is functionally related to work that had previously been performed.

As I say, the board did not have to come to grips with that issue in this case. That will depend upon how one interprets National Woodwork. Under one reading of that case it could lead to the conclusion that you could preserve.

QUESTION: The board appeared to rely on the

fact that the work had been eliminated by the technolcgical change. At least when I read it that seemed to be what the board was talking about.

MR. COME: Well, but, Your Honor, I submit that what the board said should be read in the light of the findings of the Administrative Law Judge that the board did not disturb, and he -- with respect to shortstopping, the situation is this.

Prior to containerization, the cargo would be taken out of the hold of the ship by the longshoremen and put on the dock. It would then be loaded onto local trucks, and carted to the motor carrier's terminal.

QUESTION: Loaded by whom, Mr. Come?

MR. COME: It would be loaded by longshoremen in some cases, in other cases by both longshoremen and truckers. That breakbulk, that initial breakbulk handling has been eliminated as a result of containerizatien.

But the full containerization after it was loaded on the truck it would be shortstopped.

MR. COME: That is --

QUESTION: And it would be warehoused. These very activities that go on now with containerization --

MR. COME: That is correct.

QUESTION: -- went on before.

MR. COME: They went on before, and as the board views it, what the longshoremen are trying to do is to substitute for that initial breakbulk handling that has been eliminated. The second handling that the motor carrier employees and the warehousemen --

QUESTION: Had always done.

MR. COME: -- had always done for purposes unrelated to longshore work. These are purposes that are related to --

QUESTION: You mean to meet highway weight or --

MR. COME: That is correct, Your Honor, or in the case of the warehousemen to meet the demands of --

QUESTION: Their customers.

MR. COME: -- of their customers who say stow it and ship 50 cartons for export.

QUESTION: Or sometimes, I gather, for purposes of satisfying distribution --

MR. COME: That is correct, Your Honor, and the board found that that work is not functionally related to traditional longshore work. That has always been part of the work patterns of the trucking employees and the warehouse employees, and that the longshoremen in seeking to claim that work have gone beyond the limited privilege given for attempting to preserve

traditional work, unlike the situation with the consolidation of less than container loads, where the board found that that work had merely moved from the pier to the consolidation terminal.

QUESTION: Mr. Come, do longshoremen at the pier itself do any of this loading on the trucks to meet highway weight or safety requirements?

MR. COME: No, they do not, and as a matter of fact, you can't really determine whether you are going to have to do that until you get the thing to the terminal.

The way the rules work, these full shipper load containers, they all go through. The longshoreman makes no claim to them as longas they go through to the ultimate consignee. The only time that they seek to grab hold of them is when they are being --

QUESTION: At the terminal.

MR. COME: That is correct, and that work is not, in the board's view, traditional longshore work.

QUESTION: So you think it is really -- the situation is really no different than if the -- what is it, FSL?

MR. COME: Yes, full shipper's load.

QUESTION: Yes. Those containers go right through to the ultimate consignee within 50 miles.

There is no claim to those.

MR. COME: That is correct.

QUESTION: And they shouldn't be for the same reason.

MR. COME: That is right, where they shortstop for reasons that are unrelated to longshore purposes.

I would like to reserve the balance of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Lips.

ORAL ARGUMENT ON BEHALF OF JAMES ALAN LIPS, ESQ.,
ON BEHALF OF THE RESPONDENTS
AMERICAN TRUCKING ASSOCIATIONS, ET AL.,
IN SUPPORT OF THE PETITIONER

MR. LIPS: Mr. Chief Justice, and may it please the Court, in a case like this where the primary and secondary objective is found only by looking at whether or not the bargaining unit is seeking to acquire work as opposed to some other objective, there are only two considerations that need be addressed.

One is, what is the traditional work, what is the disputed work in comparison with that work, and where the work is of a different character and kind or type or any word like that that connotes a change in form, then technically speaking none of that work relates to traditional work because the traditional work

of handling a bag at a time is no longer in existence. It is now unitized in a container.

So, technically speaking, none of the new work in its new form is related to the old work, and we argued last time we were here that that work can't be preserved. None of it can be preserved by the ILA. The Court seems to have --

QUESTION: Well, you take the position that eliminated work can never be preserved.

MR. IIPS: Eliminated work that, whether it is completely gone, obviously, it can't be brought back, or if it changes form, so that it is a new and different kind of work. Then we take the position none of it can be brought back.

However, I recognize that ILA-1 --

QUESTION: The other side says, well, we can do it, we can just require it to be duplicated, make two people do the same thing twice.

MR. IIPS: Well, what is it that they are talking about? They are saying that they can require duplicate work on the pier by unloading the container, but unloading the container is the new form of work. That is not the traditional work. Handling breakbulk cargo was the traditional work.

QUESTION: We didn't agree with your position

the last time.

MR. IIPS: Exactly, sir. What I believe you said was that --

QUESTION: We thought that the work that they were claiming was just moving somewhere else.

MR. IIPS: The suggestion that I believe you said was that that portion of the new work is related to the old work may be preserved, but that portion that is not related because it serves a different transportation purpose or function cannot be preserved, because what I believe the Court said and what we believe this case to be about is that you can't just decide this case by virtue of examining physical skills of handling cargo a piece at a time, because both sides have handled this cargo traditionally for years like that, as Harmat said, from the dawn of time.

What we say here is that we are dealing with a new form of work, and because purpose relates to function, then the purpose of this work is related to motor transportation, at least this portion, shortstopping portion is beyond the traditional function of ILA labor.

QUESTION: What is the logical role of the 50-mile limit?

MR. IIPS: There is none, sir. It is totally

arbitrary, and what we --

QUESTION: It might just as well be ten miles or 1,000 miles, you think?

MR. IIPS: I believe you are right.

QUESTION: I am not suggesting a conclusion. I am putting it as a question.

MR. IIPS: I agree that it is totally arbitrary and has no functional relation to the traditional interplay of the work.

QUESTION: Neither you nor your friend have used the word "featherbedding." Is this something like featherbedding?

MR. IIPS: I believe it is exactly featherbedding, Your Honor, in some sense, not necessarily entirely, because we --

QUESTION: Isn't it like putting two engineers or two oilers on a vessel where only one is needed?

MR. IIPS: That is true only where the work is actually duplicated in most cases, in this case, if the work that is done on the pier will not be duplicated by any employer within a 50-mile zone whom we represent because the work will be diverted beyond the 50-mile zone, the undisputed evidence in the record as to that effect. Shippers and consignees are not going to have this work done twice. It makes no economic sense, and

they won't do it.

So, our warehousemen who have hundreds of thousands of dollars of warehouses in the piers that they can't move beyond the 50 miles are going to dry up and die, and our motor carriers who are local cartage carriers within the 50-mile zones are not going to have anything to do, because shippers simply will not pay to have the work duplicated.

One thing you need to understand factually is, shortstop work is done at the cost of the motor carrier for his convenience. This work, full shippers load work, is paid for on a transportation basis from point of origin to point of ultimate destination.

There are no charges levied for the unloading of that cargo by transportation companies. When the ILA stops that work at the pier, he adds on unloading charges. When the ILA releases that work, as it has done according to the rules, and lets it go wherever it is going to go without unloading.

But then the motor carrier shortstops the work, no additional charges are charged to the consignee or shipper because the motor carrier is sustaining the cost of that unloading for economic reasons related to his own business, and that serves a trucker function which has nothing to do with traditional maritime

transportation functions.

QUESTION: Well, Mr. Lips, I gather the Court of Appeals thought that if the result was duplicative work, inefficient handling and so forth, that is not a problem for us, but for the Congress.

MR. LIPS: I believe that the Court of Appeals misunderstood --

QUESTION: No, but that is what the Court of Appeals thought, was it not?

MR. LIPS: I haven't grasped the essence of your statement then, because I misunderstand what you are asking.

QUESTION: That if the consequence of all this is that the longshoremen are right and you negotiate your own work preservation agreement, and there is duplicative work, it is done twice, as Justice O'Connor suggested, didn't the Fourth Circuit seem to think that was a problem to be resolved by the Congress and not by the Courts?

MR. LIPS: Well, I will try to answer the question as I understand it. We believe the Fourth Circuit misunderstood the facts to begin with. There will not be duplicative work. There is no such holding in the decision. There is no such evidence to support such a conclusion.

Secondly, that element, that discussion by the Fourth Circuit as to whether or not there would be work acquisition, transfer of work back to the pier or not is simply a surrounding circumstance that may bear on whether or not there is a functional relationship.

But the transfer of work is only a circumstance, and the Court used it as an ultimate legal test. We think the established law is clear that actual work transfer is not an element of secondary objective.

Now, whether or not in the Congress's wisdom it believes that by making the transfer of work an element of secondary activity is a good thing to do, I don't know. I suggest simply that that standard applied by the Court of Appeals was merely a circumstance that really is not dispositive of the functional relationship.

Thank you very much.

CHIEF JUSTICE BURGER: Mr. Caruso.

ORAL ARGUMENT OF DONATO CARUSO, ESQ.,

ON BEHALF OF RESPONDENTS

NEW YORK SHIPPING ASSOCIATION, ET AL.

MR. CARUSO: Mr. Chief Justice, and may it please the Court, we have heard argument from the opponents of the rules, and we have had the opportunity to review their briefs, and essentially what they are

saying, their entire case rests on the proposition that the board can't write English and the Fourth Circuit can't read it.

They take the position that the board made a finding that the work involved in stripping or stuffing containers as assigned by the rules in the context of shortstopping and warehousing is not functionally and historically related to longshore work. The board never made that finding.

In fact, the board wrote very plainly three times in its decision, three times it held and found that the work involved there is functionally and historically related to longshore work.

On Page 54 of the appendix that was submitted with the petitions for certiorari, the board states, "It is clear that the Adminstrative Law Judge considered the work claimed by this rule to be functionally related to the traditional work of longshoremen in loading and unloading cargo on and off a ship for ocean transport. The same statement is made on Page 53. The same finding is made on Pages 58 to 59.

The board's counsel takes the position that this statement is only in connection with consolidation work, that context in which the board upheld the rules, but the statement I just read is in a portion of the

NLRB's decision that has the title shortstopping. It is plain that the board found the functional historical relationship --

QUESTION: I don't think there is any argument that what the four containers, the longshoremen were surely handling cargo at the pier even though it was later shortstopped or warehoused. Surely they are -- what the longshoremen are trying to do is to be paid for that work that has been eliminated.

But what about the work that was done before containers? What about the work that was done by the trucking people in shortstopping and by the warehousemen people in their warehousing operations? What about that work? Was that related to longshoremen's activity or not?

MR. CARUSO: No, it wasn't, but that's not the work that the rules seek to assign, Justice White.

QUESTION: Well, just bear with me. I just want to know whether you agree or not that that work was -- was it or was it not related to longshoremen's work?

MR. CARUSO: The off-pier enterprises unloaded trucks, and then they performed a variety of tasks, segregating cargo, palletizing cargo, in connection with loading over-the-road equipment or warehousing.

QUESTION: And they are still doing that now

with containers.

MR. CARUSO: And they are still doing that.

QUESTION: Yes.

MR. CARUSO: And if the rules on containers are applied, they still do that work. That is the point that the Fourth Circuit made. The Fourth Circuit recognized that, that you can't have acquisition without acquisition. In order for our adversaries to prevail, they have to have a factual basis upon which to conclude --

QUESTION: Don't you think that work is going to be done outside the 50-mile limit from now on?

MR. CARUSO: I don't think it will, because we talk about the 50-mile range --

QUESTION: You mean the shippers are going to put up with being charged twice for this business?

MR. CARUSO: There are two answers to that, Justice White. The first one is, in the past -- strike that.

In connection with the reasons for shortstopping, our adversaries tell us that there is a need not to have an empty container moving back to the pier.

QUESTION: Yes.

QUESTION: There is a need to have equipment

that is compatible with containers. All of those reasons also dictate that if the rules are applied, the work is not going to go outside 50 miles, for the same reasons that they say that the container is being shortstopped. Those same reasons apply.

But the more important element from a legal standpoint is that in order for these rules to be unlawful, Congress has told us what the test is. This Court has reiterated the test. There has to be a showing that it says a secondary objective.

There cannot be a secondary objective in that situation because the longshoremen aren't getting anything. If the rules went out -- if the work went outside the 50-mile range, the rules say that those containers may move intact without any work being performed by the longshoremen.

Certainly the longshoremen have no objective to lose work. They want to bring back to the piers the work that they have always traditionally performed. The basis for the NLRB's decision was, well, this work has been eliminated as a necessary consequence.

QUESTION: On that basis I suppose the board -- if that was a valid reason for ruling against you, I suppose it would have been a valid reason with respect to the consolidators.

MR. CARUSO: I think that would probably be a fair conclusion to draw, but it isn't a valid reason.

QUESTION: Yes. Well, we didn't think so either, apparently, the last time.

MR. CARUSO: It seems obvious to me that, you know, the word "eliminated" means that the work that the longshoreman has done --

QUESTION: Has been eliminated.

MR. CARUSO: -- in the past has been eliminated. It is their work. Now, to acquire your own work is preservation. It is not acquistion.

QUESTION: When you say it is their work, you mean by tradition it was work that they performed?

MR. CARUSO: Well, it is work that is functionally and historically related to their traditional work.

Obvicusly, no one stripped or stuffed containers when containers didn't exist, but there was the cargo-handling functions in connection with the loading and unloading of the vessel, and those functions still exist.

That container is the container owned by my clients, the employers of the longshoremen. It is their equipment. That container has to be unloaded in order for the cargo to be delivered as part of my client's

obligation to see to it that the cargo is transported.

QUESTION: What do you suggest is the function of the 50-mile limit instead of 35 or 65?

MR. CARUSO: Well, it is a rule. The contention is made that it is going to run -- that it is an arbitrary rule, because all the work is now going to fly out past the 50-mile range. There is no evidence in this record that there is anyone out there on the 50-yard line.

There just isn't any evidence. The evidence indicates that the truckers, that the warehousemen, the consolidators are clustered around the piers. All they are doing is taking that container, moving it several blocks down from the pier just for the purpose of unloading it. That is the work that the longshoremen have done in the past. It is functionally related to it.

QUESTION: So you think they are really doing something besides historic shortstopping?

MR. CARUSO: Well, to be -- yes, they are.

QUESTION: You think they are doing someting now --

MR. CARUSO: They are.

QUESTION: -- after containers that they weren't doing before?

MR. CARUSO: They are unloading the container. The container was not there to begin with.

QUESTION: Well, I know, but they used to unload the trucks.

MR. CARUSO: Yes, and if the rules were applied, they will continue to unload --

QUESTION: And then reload, and then reload.

MR. CARUSO: And then reload their over-the-road equipment.

QUESTION: The only thing is, they are unloading containers rather than a truck.

MR. CARUSO: Yes, but the difference there, of course, is that in the past the truck was owned by their employer. Now the container is owned by my clients, who employ the longshoremen. That is a very important difference. It is a difference that really has a significance in the so-called right of control area. That is not an issue that is before us today.

QUESTION: What is the difference in the overall economic sense?

MR. CARUSO: From my perspective, the board seems to be taking the unspoken position that it is going to be more economical if the rules are invalidated. From my client's perspective, we don't see that.

If the rules are invalidated, we have an obligation under federal labor law to sit down at a bargaining table and bargain with the union over some new means of preserving their work. That is going to be costly.

During the ten years that these rules have been enjoined, have been found to be errors of law, my clients have suffered because we had to come up with something else, and that something else was costly.

So, from an economic standpoint --

QUESTION: You say something else. What is the something else?

MR. CARUSO: Well, I don't want to give any sort of a hint to my colleague here who represents the union as to what he should come up with at the bargaining table. I would prefer not to get into that area. I think he is perfectly capable of coming up with the something else.

QUESTION: Perhaps he will explain it to us.

MR. CARUSO: So when you analyze the board's decision, you find that the board found an answer to questions posed by this Court in ILA-1, namely, that the work at issue in the shortstopping and warehousing context is functionally and historically related to traditional longshore work.

They also found that that work, that stripping and stuffing work is not integrated into any of the off-pier work practices. Absent that integration, when the stuffing and stripping required by the rules is performed at the piers there is no possibility for any off-pier work to be acquired by the longshoremen because the stuffing and stripping work is not integrated with any of that work. If there were integration, then the ruling would have been different, but there wasn't any integration.

On that basis, they concluded that the rules have a lawful work preservation objective. Then they attempted to invalidate the rules on the basis of a proposition or theory that an attempt to preserve or retain eliminated work constitutes work acquisition.

The Court of Appeals readily corrected that error. In order to have acquisition there has to be a transfer of work.

QUESTION: Let me ask you how the rule operates. Doesn't the rule forbid the employee -- the -- doesn't the union require the employer to cease doing business with anybody who unloads one of these containers within 50 miles?

MR. CARUSO: Well --

QUESTION: Yes or no?

MR. CARUSO: I would say no. It depends on how you define "cease doing business." The business still continues. It is just a question of not releasing the container. What the rules require is that the cargo be brought to the pier.

QUESTION: It requires the employer not to furnish a container --

MR. CARUSO: That's correct.

QUESTION: -- to a trucking company who shortstops within 50 miles.

MR. CARUSO: If the trucking company shortstops, then the sanction is not to release a container to that company unless the company --

QUESTION: That is a form of ceasing, requiring somebody to cease doing business. You cease renting them a container or paying. Isn't that right?

MR. CARUSO: Our perspective is, in order to determine whether it is a cessation of business, one doesn't look at it today, after ten years of injunctions.

QUESTION: Let me put it another way. A trucking company must not shortstop if the rules are to be obeyed.

MR. CARUSO: No --

QUESTION: I mean, it may not shortstop with a

container.

MR. CARUSO: Yes, it can continue to shortstop, continue to warehouse, but if it is going to be done, they should inform us, and they should bring their truck down to the pier and pick up the cargo, as was the traditional method of doing that business.

QUESTION: So the answer is, they may not shortstop with a container.

MR. CARUSO: That is basically correct.

QUESTION: And so if the -- it seems to me that the rules then to have an impact off the pier. It certainly prevents these trucking companies from shortstopping if they have a container.

MR. CARUSO: They can continue to shortstop but without utilizing my client's container. That's correct. Now, that may be an impact, but we contend that is an ancillary effect of a primary work preservation agreement --

QUESTION: So containerization -- containers can play no part in shortstopping. They have to come down to the pier and pick the stuff up loose in their truck just like they used to.

MR. CARUSO: And that is a continuation of business the way it used to be performed.

QUESTION: Exactly. Exactly.

MR. CARUSO: There is no cessation of business. It is business as usual.

QUESTION: Exactly. Business as usual, and it won't be any more expensive.

MR. CARUSO: It shouldn't be any more expensive. In fact, they contend that the container is expensive because they've got to send the container back to the pier, because they don't want to incur the per diem charges. They don't want to have to haul that container empty back to the pier.

So, I think the effect is certainly exaggerated by my adversaries. But I think one of the important elements from our standpoint is the effect of permitting the board by adminstrative fiat to in effect change the law of Congress, that Congress enacted.

When we negotiated this bargain, it would have been our preference as businessmen not to have to deal with these rules, not to agree to the rules, but Congress said we must bargain, and Congress said that the union has a right to preserve work. We sat down and we bargained.

As we understood the law, we were engaged in a perfectly lawful activity. Now the board is attempting to pervert the meaning of words like "acquisition" and "elimination," and to come up with a conclusion in which

perfectly primary activity is now given a secondary taint.

The effect is, unlike a situation where Congress enacts a law which has a prospective application, this is going to have a retroactive application, a retrospective application, and it is going to place my clients in the position of having to answer potential claims, possibly under the antitrust laws for treble damages, and also other damage type of claims of substantial sums of money on the basis of action that we took 15 years ago which at that time we considered and still consider to be perfectly lawful activity. It is primary activity.

If there is going to be a change in the law, then it should be done prospectively, it should be done by --

QUESTION: The Act of Congress, certainly it doesn't help your clients here. It is the National Woodworking case, in which this Court upheld the board. Reading the Act that Congress has written, I think your clients would be in very great difficulty, and the board, supported the view you take in National Woodworking, now it takes a different view.

There is no reason why the board can't shift its position.

MR. CARUSO: I think Congress indicated in 1959 by the enactment of the primary proviso -- that is where Congress indicated that even though there may be a cessation of business, and even though there may be an agreement to agree to cease doing business, if it is for a primary purpose it is perfectly lawful, and we submit that this is for a primary purpose.

And the board is attempting by administrative fiat to convert it into something secondary just by affixing that label and calling it secondary, on the basis of the fact that the work has been eliminated. But if the work has been eliminated, what has been eliminated as a necessary consequence is longshore --

QUESTION: The whole idea of elimination comes from the National Woodworkers case. The statute as written talks about ceasing to do business and prohibits it.

MR. CARUSO: Ceasing to do business for a secondary objective, because Congress indicated that if it is for a primary purpose, and preservation of work is for a primary purpose --

QUESTION: Where do you find that in the statute?

MR. CARUSO: It is in Section 8(b)(4). It is in the primary proviso, and indicates that nothing

contained in Section 8(b)(4) shall be deemed to make unlawful any primary strike or primary picketing.

That is my understanding of the law, and I believe that this Court has indicated in many cases that that is the present status of the law, that in order for an activity to be unlawful under Section 8(b)(4), the dispositive factor is, is it secondary? Is it for a secondary objective?

Here there is no factfinding that it is secondary. In fact, all of the facts as found by the board indicated that it is perfectly primary activity.

CHIEF JUSTICE BURGER: You are infringing on your colleague's time now, counsel.

MR. CARUSO: Thank you very much.

CHIEF JUSTICE BURGER: Mr. Mathews.

ORAL ARGUMENT OF ERNEST L. MATHEWS, JR., ESQ.,
ON BEHALF OF RESPONDENTS
INTERNATIONAL LONGSHOREMENS' ASSOCIATION, ET AL.

MR. MATHEWS: Mr. Chief Justice, and may it please the Court, 12 years ago the general counsel of the National Labor Relations Board started trying to pound a square peg into a round hole, and he has been doing it for 12 years.

It doesn't fit, and time and again General Counsel's office has changed the theory on why the rules

cn containers are unlawful, but always clung slavishly to the idea that they must be unlawful.

First, they had the wrong definition of the work in controversy which this Court corrected in IIA. They had the abandonment theory which everybody has long since abandoned. Then they came up with the new integrated, intermodal transportation system, which Judge Harmat sc easily blew cff the map.

And then they came up with the idea of right cf control, which turned out to be a secondary boycott under federal shipping law. Then finally we got tc the decision in this case and the board came up with work acquisition when no work is acquired, and they came up with the concept that eliminated work cannot be preserved.

Justice O'Connor asked counsel for the board, did the board find that the handling of containers in connection with shortstopping was not the functional and historical relationship to longshore work. Mr. Come picked up the white book, but he never read to you where the board made any such finding because they didn't make any such finding.

You can read the decision. They fcund that all the stuffing and stripping work was the functional and historical relationship to traditional longshore

work, but then they said that some of that had been eliminated, and so it couldn't be preserved.

Of course, they used the word "acquisition," that that was acquiring work, and when we caught him up on that, how can you acquire work when you don't get anything, well, that is just a shorthand phrase for elimination.

Now, in front of this Court, the word "acquisition" is a shorthand phrase for not being the functional, historical relative to traditional longshore work. They keep changing their terms. And normally when we think and come up with reasons and they don't support our conclusions, we change the conclusion.

But the board doesn't. It just keeps changing the reason and staying with its conclusion that the rules are unlawful.

QUESTION: Mr. Mathews, in speaking of terms, IOA is AFL-CIO, isn't it?

MR. MATHEWS: Yes, Your Honor.

QUESTION: There is an amicus brief here filed on behalf of the AFL-CIO. As I read that, their approach is somewhat different from yours. Is that correct?

MR. MATHEWS: Yes.

QUESTION: Do you agree with them at all?

MR. MATHEWS: I don't think we get into that area, Your Honor. They did not have our permission or our consent to file an amicus brief. We thought we could handle this by ourselves. They go off and totally jettison the work preservation analysis, and doing it solely in sort of a right of control. You don't get to that.

QUESTION: Exactly. That is why I am asking the question.

MR. MATHEWS: Yes.

QUESTION: I think there is a certain appeal to their approach that is not present in your approach.

MR. MATHEWS: Well, if you find it appealing, Your Honor, I hope it will convince you, but I don't think you have to go that far. I think theirs is a sort of a new departure. Ours is classic work preservation. Now, I just -- factually, I want to make one point to the Court.

When they talk about this work that the longshoremen do, and whether it is historically and functionally related to historcial longshore work, it is always the same work.

The longshoreman, when he strips a container at the pier, he doesn't know whether that container was a full shipper load or an LCI. He doesn't know whether

it is going to shortstop. He does the same work, and it is that work --

QUESTION: Would you be content to win on the other theory?

MR. MATHEWS: I would be content to win on any theory, Your Honor.

(General laughter.)

QUESTION: That gives you more than you ask for, doesn't it?

MR. MATHEWS: The AFL's position?

QUESTION: You say you wouldn't go that far, or you didn't -- you don't go that far.

MR. MATHEWS: I don't think you have to go that far.

QUESTION: So it goes farther than you go.

MR. MATHEWS: I go as far as finding the rules on containers being lawful weren't preservation agreements, if you do it on a right of control, and this is the point Mr. Caruso is making to you, Justice White. It is our employer's container.

QUESTION: I understand. I understand.

MR. MATHEWS: And they have a right to assign that work to us.

QUESTION: Mr. Mathews, is there any limit in terms of time on how long a union can seek to hold off

improvements by virtue of technological changes and hang onto old work regardless of what has happened?

MR. MATHEWS: Not that I know of, Your Honor.

QUESTION: No?

MR. MATHEWS: Well, that would be up to Congress. Or to the point, I suppose, where the technology, you know, so changed things that there was no recognizable relationship any more, because it really doesn't go on how long, it goes on, are you bargaining with your employer over -- is your dispute with him?

We are under -- what we are accused of is a secondary boycott. Who is our dispute with? Our employer who creates this container and now uses it to do away with our work by sending it off --

QUESTION: Well, the easy answer is that you have an agreement, and you bargain with the employer, and you require him not to send containers to people who shortstop.

MR. MATHEWS: Right. That's true, as the union in National Woodwork had an agreement with his employer not to deal with that fellow who did the precut doors because it impinged on their historical work.

QUESTION: You are probably too young to remember the days when excavations for homes, residences were done with a great big scoop shovel about three and

a half feet wide and a team of horses. Now, of course, it is done by powered, gas powered scoop shovels.

Is the situation that you have got fundamentally any different from that change?

MR. MATHEWS: Yes, it is in this sense.

QUESTION: Could the scoop shovel people come in and insist that their role be preserved in some way, and that every gas powered scoop shovel pay them a certain royalty because they are doing the work of the scoop shovel fellow?

MR. MATHEWS: I think they might. When their employer decided he was going to get rid of the horse-driven scoop shovels and go over to the power digger, that might be primary work, yes, primary activity, because the employer is going to do away with their work.

QUESTION: As Justice O'Connor's question put to you, for how many years or how many generations of people does that last?

MR. MATHEWS: It lasts so long as it is primary activity, as long as their dispute is with their employer or until Congress says otherwise.

QUESTION: Just the lifetime of those who were running scoop shovels and were displaced?

MR. MATHEWS: It would depend on the contract,

but you know, I think the Court, just getting these questions, we are looking at these rules on containers some 15 years after they were enacted. In ILA-1 the Court recognized that when that first container ship came in, the IIA had the right to say no way, go sink it in the Atlantic, we will stay, as we did it in the old days, and we didn't do that.

We recognized that progress has to come, and so we made an agreement. You can have your container ship. You can have the benefits of intermodal activity where a thing can travel 1,000 miles on land with nobody handling it. But all we want to keep is the work that is going to be done in the port area.

Mr. Chief Justice, you have trouble with the 50-mile area. That really came about because that was the limits of the city of New York, where the agreement was first made. It was in the port. If stuffing and stripping is going to be done in the port, it should be done as it always had been, because that is not intermodalism.

When they talk about the shortstopping, remember, they take the container down the street, break it open, put the thing in a truck, and for the next 1,500 miles to the middlewest that is breakbulk cargo. There is no intermodalism there. All they are doing is

using that container to get it off the pier, down the block, so they don't have to pay the longshoremen to unload the container.

And that we did not agree to. We kept that little bit, and we gave up what turned out to be 80 percent of the work, where it is really intermodal, and nobody touches the container and it goes all the way to its destination, and then we even made the exception where its destination happens to be in the port area but it is going to the owner, that, too, can go free of being handled by the longshoremen.

QUESTION: Mr. Mathews, as a practice matter, would it be in some instances cheaper for a shipper to just pay the $1,000 fine than it would for longshoremen?

MR. MATHEWS: No, I don't think it is that much. I don't know if this -- I have had so much litigation with the containers that I have information that might not be in the record of this case, but I think it comes to about $350 to $500 to strip a container so it wouldn't -- and actually, of course, it is not the off pier people who can pay the fine. It is the longshore employers. They pay the fine or liquidated damages for violating their contract.

QUESTION: I suppose that consistent with your position, the ILO, the longshoremen could have bargained

with the employer not to use containers at all.

MR. MATHEWS: Yes, this Court said that.

QUESTION: Yes. They needn't have -- and if the employer had agreed not to use containers, that would have been it.

MR. MATHEWS: So, getting back to the Chief Justice, really, the contract, the rules on containers were a tremendous economic benefit to the country. It seems expensive ten years later, because now you are paying the little residue that we kept, but the 80 percent that we gave up let this intermodal traffic flourish, and it made shipping cheaper, because there are no handlings from the ship all the way to the owner, so that we have accommodated progress.

We have done the economic thing. But then, always on an error of law, for ten years the rules weren't enjoined. Now we are looking back and we say, oh, gee, we have to pay these longshoremen in this limited instance where they kept the work, but economically speaking, you have to look at the day the contract was made.

Now, of course, whether it is economic or not has nothing to do with whether it is a secondary boycott or whether it violates the Act, but I know that people find the rules unattractive and say, gee, you are paying

for something you didn't have to pay for.

My way of looking at it is, you are getting something, 80 percent that you used to have to pay for that we could have kept from you but we didn't do it, and when you get to the practicalities of this case, and you talk about progress, what is the lesson that the longshoremen and all unions are getting from the Orwellian approach of the board where they change the meaning of the statute, they change the words, they change their arguments at every stage?

What they are really saying is, you give an inch and we are going to take a mile. We are going to learn that lesson. We are going to stop playing your game. And next time when the robot comes or whatever the next thing is, we are going to say, get rid of it, because if we try to make a work preservation agreement, and then we make it.

And then you say, gee, if we didn't keep anything, it would be much more economical, so let's get rid of that, too, by playing with the words and calling acquisition something that isn't acquisition, and they are going to take that away from us, no, we are going to, you know, we are going to stand on the first line and not fall back.

You are teaching unions to be intransigent.

You are promoting -- not you, gentlemen, but the board is certainly, and we made this agreement 12 years ago, and we have not had the benefit of it really until last July. It didn't go into effect on one error of law after another. They would get 10L injunctions and we couldn't put the rules into effect.

So we have had an agreement. How it works, we don't know, because we have only had a six-month test period after making the agreement 12 years, and the last word by the board, even, is that generally they are lawful. All that enjoining of it with respect to NVOC's, that was all wrong for 12 years. We are not going to give in next time.

So, if the board thinks it is somehow accommodating progress or technological advance or economy, they are crazy. The labor movement is going to get the message. And I am not saying that for the benefit of the union.

I am saying that for the benefit of the country. We want progress. We accommodated progress. We let you have your containerization. But if the board keeps this up, you are not going to get anything more.

QUESTION: Very well.

Mr. Come, do you have anything further?

ORAL ARGUMENT OF NORTON JAY COME, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. COME: Just a couple of points.

In the first place, respondents treat the problem as though the work involved is fungible, overlooking the fact that the only thing that we have before the Court is what happens to these full shippers load containers?

The board found that the rules in their overall objective had a work preservation objective, and as applied to consolidation of less than carload lots had a work acquisition -- a work preservation objective.

It was in that context that the Administrative Law Judge and the board talked about the rules being funtionally related to the traditional work of longshoremen, but the Administrative Law Judge went on to find, and this is at Page 55A of the appendix, that with respect to the shortstopping, the rules claimed work that was traditionally performed by other employees. That is at 55A of the appendix, and the ALJ's finding is at 135A.

Now, the Court of Appeals, as is apparent from looking at Page 27A of the appendix, accepted all of the board's basic findings of fact with respect to shortstopping and warehousing. They lay them out,

showing the elimination of the initial breakbulk work done by the longshoremen indicating the different work that the truckers had always done, and referred to them as unassailable facts.

The place where the Court of Appeals went off the deep end is not because they disagreed with any of the board's factfindings as to whether the work was functionally related or not functionally related to traditional longshore work insofar as this full shippers load containers are concerned, but only because the Court of Appeals thought, and we submit erroneously, that in order to find a secondary objective, you have to find that work has been lost by one group of employees and acquired by another group of employees.

We submit that that is an erroneous view of the work preservation doctrine. The question is, is the work that the contracting employees seeking to preserve traditionally related to their work? If it is, it doesn't make any difference whether other employees will lose work or not.

Conversely, if it is not traditionally related to their work, it is unlawful for them to seek to claim that work even though it may be that the work could be duplicated by other employees and thus nobody loses work.

Work acquisition is merely a shorthand phrase for expressing a conclusion that the work sought is not traditional unit work, and we submit with respect that that is where the Court of Appeals fell off the trolley.

Had it given proper deference to the board's finding this Court said they are entitled to in remanding in IIA and not made this error of law, the Court of Appeals on the basic findings of the board, which it did not disturb, would have enforced the board's order.

We submit that for that reason the judgment of the Court of Appeals should be reversed in that respect.

Thank you.

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

(Whereupon, at 11:03 o'clock a.m., the case in the above-entitled matter was submitted.)

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lderson Reporting Company, Inc., hereby certifies that the ttached pages represents an accurate transcription of lectronic sound recording of the oral argument before the upreme Court of The United States in the Matter of:

#84-861 - NATIONAL LABOR RELATIONS BOARD, Petitioner V. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

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BY Paul A. Richardson

(REPORTER)