OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-195

TITLE ICICLE SEAFOODS, INC., Petitioner V. LARRY WORTHINGTON, ET AL.

PLACE Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

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ICICLE SEAFOODS, INC., :

Petitioner :

v. : No. 85-195

LARRY WORTHINGTON, ET AL. :

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Washington, D.C.

Tuesday, February 25, 1986

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

APPEARANCES:

CLEMENS H. BARNES, ESQ., Seattle, Washington;
on behalf of Petitioner.

CARSON F. ELLER, ESQ., Tacoma, Washington;
on behalf of Respondents.

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 Icicle Seafoods against Worthington.

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

ORAL ARGUMENT OF

CLEMENS H. BARNES, ESQ.

ON BEHALF OF PETITIONER

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

The Fair Labor Standards Act's overtime pay requirements do not apply to someone who is "employed as a seaman." The Act does not define the term "employed as a seaman." However, administrative and court interpretations have clarified that the term "seaman" is not limited to what we would ordinarily think of as sailors -- skippers, deck crew. It includes other members of a ship's crew -- its cooks, its pursers, and, pertinent here, its engineers.

The question is the case is whether marine engineers aboard a seagoing processing vessel were correctly categorized as seamen and therefore paid a fixed salary without allowance for overtime. The issue this morning is whether the Ninth Circuit under the

appropriate standard of review correctly substituted its own determination that these engineers are not seamen because they primarily perform not maritime but industrial duties, on the trial judge's determination that the engineers or the Arctic Star were employed as seamen because the nature of their work was maritime.

The Court of Appeals' degree of freedom to substitute its own determination in this regard depends in our analysis upon whether that Court disagreed with the trial judge's understanding of how to define the term "employed as a seaman," in which case it would be free to substitute its own definition, or whether it disagreed with the district court's interpretation of the facts, in which case it would be required to pay deference to the trial judge's findings under the clearly erroneous rule.

Here our contention is and the record shows the Court of Appeals did not fault the district court for misunderstanding the definition of the term "employed as a seaman." There wasn't doubt about that term. It was well established that someone is employed as a seaman of he is "a member of a ship's crew whose work is primarily maritime."

What the Ninth Circuit disagreed with was the trial judge's determination that the work of these

engineers was primarily maritime, and substituted its own determination that the maritime work was only incidental to primary duties which were in essence industrial maintenance.

QUESTION: Mr. Barnes, the ultimate question of whether the workers were seamen, is it a mixed question of fact and law, do you suppose?

MR. BARNES: Well, that depends in our analysis on what the issue is. If the question is --

QUESTION: The ultimate determination whether someone is a seaman, is that a mixed question of fact and law?

MR. BARNES: It has both elements to it. If the dispute is over how you define the term "seaman," from our standpoint, what character of duties make someone a seaman, if that is what is at issue, you have the legal aspect of that question.

If the issue is what are the character of the duties of these particular workers, then that aspect of the determination is factual.

QUESTION: The subsidiary fact finding that goes into it would be factual?

MR. BARNES: Yes.

QUESTION: Did -- now, there are administrative regulations, are there not?

MR. BARNES: Yes.

QUESTION: Interpreting what the law requires --

MR. BARNES: Yes.

QUESTION: -- for who is a seaman?

MR. BARNES: Yes.

QUESTION: And did the district court make any reference at all to those administrative regulations?

MR. BARNES: They were before the court.

QUESTION: Did the district court mention them at all? I didn't find any reference in the district court's opinion.

MR. BARNES: The language of the findings and of the conclusions is in the terminology of the regulations. But specific reference is not made in the oral opinion.

QUESTION: Well, is there some question or difficulty here because the craft on which they were working is not self-propelled or engaged in navigation? So did the Ninth Circuit disagree with some of the district court's legal holdings that went into its opinion?

MR. BARNES: The Ninth Circuit mentioned that the Arctic Star spends in its opinion more time at anchor than she does under way, that is true. But in

the regulations and in the Ninth Circuit opinion itself, there is no rule of law which develops that a barge which is not self-propelled cannot be staffed by seamen. And indeed, the Administrator's regulations specifically deal with that kind of situation.

The case that earlier arose here indeed involved this very kind of situation, Your Honor. It involved, for instance, dredging barges. And the distinction that was drawn -- dredging barges, which of course are also towed; they are not self-propelled.

The distinction that developed from the cases is whether the particular workers that are at issue are part of that vessel's crew, meaning their work is to maintain that vessel, or whether they are really floating miners, whether their work really is to be part of the dredging crew and the vessel carries them to their work. That's the difference.

But there is no -- in fact, it's to the contrary. The regulations of the Administrator provide that on a -- they specifically deal with a non-self-propelled barge, and they specify that whether a hand aboard a non-self-propelled barge is a seaman depends on whether principally his duties are maritime in character or whether, by contrast, he is more like a floating stevedore or whether he is involved in the

production work that occurs aboard the vessel. So there was no --

QUESTION: Are these people engineers, so-called?

MR. BARNES: They are engineers.

QUESTION: They were not licensed?

MR. BARNES: They are not Coast Guard licensed, because there are specific exemptions that apply to this industry and these types of crafts.

QUESTION: Is that non-licensure fact of any significance in the case?

MR. BARNES: In my opinion it is not. The trial judge determined that -- because the trial judge had before her a discussion of what duties a licensed seaman does, a licensed marine engineer does. And with the witnesses she reviewed -- before her were reviewed, a question of which of these duties seemed to describe those of the engineers aboard the Arctic Star.

And a major point in the opinion and in her fact finding in that the duties of these particular engineers are the duties of marine engineers and they are the essential equivalent of what a marine Coast Guard licensed engineer would do.

QUESTION: Is there a reason why they weren't licensed?

MR. BARNES: It's not required.

QUESTION: Yes, but don't they move from ship to ship? If this were a self-propelled ship, they certainly would have to be licensed?

MR. BARNES: I am the first to admit I'm not an admiralty lawyer, Your Honor.

What the trial judge determined, to follow up on where we were, is that these marine engineers are seamen because their duties are maritime, and the specific fact findings that she made are important to review, because they were these.

First, that these engineers were responsible for maintaining all the systems for the operation of that vessel while at moorage or under way.

Second, that they had to be available on call 24 hours a day if necessary to keep the vessel operating. The sea doesn't work a 9:00 to 5:00 day, either.

Third, that they performed the tasks of Coast Guard licensed seamen.

Fourth, that theirs was the work of a marine engineer; marine engineer was not just a title.

Fifth, that they were members of the crew of the Arctic Star and performed work which was maritime in character.

And from that followed her ultimate factual conclusion that their employment was that of a seaman.

QUESTION: Mr. Barnes, did the Court of Appeals disagree with any of those five findings?

MR. BARNES: They --

QUESTION: Any of those specific things?

MR. BARNES: That's the problem in the opinion. They did not tackle the findings of fact and say, we find that these are clearly erroneous.

QUESTION: Yes.

MR. BARNES: Or that we don't have to find whether they're clearly erroneous, because they involve legal interpretations. They did neither one.

What the Ninth Circuit did is this. Initially, it felt that the determination of the whole question of what is seaman status is a question of law, and boldly in its first opinion said: This is a question of law and we are free to substitute our determination for that of the trial court.

We moved for a rehearing en banc, challenging that independence and pointing out that it was contrary to the established standard of review in such questions in the Supreme Court and in the Ninth Circuit cases. And in a revised opinion, the Ninth Circuit did this, very similar in our opinion to what occurred in the

Pullman-Standard versus Swint case which was here a couple of years back.

The opinion acknowledges there is some role for trial court findings which are subject to limited scrutiny. But what it did was to substitute its own fact findings all the same, without finding the trial court's findings were clearly erroneous. It is true that the Ninth Circuit in its revised opinion said that it was applying a de novo standard of review only to the application of this exemption to the facts, but I submit to you that there was no area of disagreement between the Ninth Circuit and the trial court which the Ninth Circuit could have properly reviewed de novo.

QUESTION: Well, Mr. Barnes, I think the thing that still confuses be is that the regulations, the administrative regulations for determining who is a seaman, require or set forth a test, that the work of a seaman is work in aid of navigation, in aid of navigation.

And as I understood it, the Ninth Circuit thought the district court never addressed that, never addressed the test set out in the administrative regulations, because the trial court based its finding just on, well, this is maritime, but it never said whether the work was in aid of navigation or how it

was.

Now, is that what the Ninth Circuit was worried about, do you suppose?

MR. BARNES: If so, I would have thought they should have remanded to determine whether those facts --

QUESTION: Well, I would have thought so, too, although it went ahead and decided them on its own, didn't it?

MR. BARNES: It did.

Now, when one traces back the language Your Honor is mentioning to the regulations, which are extensive -- the regulations say a lot of things, but they also say that. When you trace back to the origins of that phrase, you get back to the barge cases, the barge cases I was mentioning.

And while, because primarily I believe the facts in the cases that the Administrator was looking at involved transportation, vehicles which are primarily transport vehicles, when you trace the language back to the origins, it is a case which draws a distinction not between whether the employees are primarily aiding in navigation -- after all, the regulations also exempt cooks, surgeons, people who plainly have nothing whatsoever to do with being a "sailor." Those

regulations exempt a number of people who are not involved in navigation.

And when you trace back that language to its origins, it leads you to cases which distinguish between whether a worker is part of the ship's crew or part of a production crew working aboard the ship.

QUESTION: Mr. Barnes, there's a lot of argument between the two of you as to whether these were pure findings of fact or were something more than that. If they were something more than that and de novo review was proper, do you lose your case?

MR. BARNES: If the Ninth Circuit feels that there is an element of legal interpretation in those facts, I don't say we lose our case, because the remedy is a remand to sort out that which is legal from that which is factual.

When someone says, I find the person is a seaman, I find that his duties are maritime, I find -- and it gets more and more concrete -- I find that he does the work of a Coast Guard licensed engineer, there is of course a range of things, and it's not so easy to tell when fact starts and when you start getting into a legal term, especially when a statute uses words that are common in the English language.

No, I don't say we lose our case on that.

QUESTION: Well, I would hope not, although I must confess in reading the briefs it almost seems that way as between the two of you. There is so much made over whether these are pure findings of fact.

MR. BARNES: Well, the reason we make much of that is that when one reviews the trial record, and keeping in mind this was a trial before a judge who heard the evidence and the testimony and concluded that these are the facts, we think that's very significant, because the Ninth Circuit did not address those findings and say that, we disagree with them because they're clearly erroneous. And that's why we make much of it.

As we look at the record before you, at the very least this case could be decided either way on the record that's before you, at the very least. And if that's so, if there is room to interpret the evidence that the trial court heard two ways, then, as you've recently recognized in the Anderson case, is is not the Ninth Circuit's job, it's not the Ninth Circuit's job to substitute its interpretation for that of the trial court.

The Ninth Circuit apparently felt the Government --

QUESTION: May I interrupt there, because maybe I'm troubled by the same thing Justice O'Connor

is. Supposing they had said -- and I know their opinion doesn't quite say this -- with respect to the five subsidiary, clearly factual inquiries, the district court was absolutely right, and then they said, nevertheless we don't think that this person -- these people were seamen, because this doesn't establish their work was in aid of navigation.

Would that have been permissible?

MR. BARNES: That would have been in incorrect legal standard. They would have applied the wrong rule of law, and we would have sought review for a different reason.

QUESTION: I see. But is it your view that on the ultimate -- I'm still not quite clear -- on the ultimate determination of whether they're seamen or not, that that has to be viewed under the clearly erroneous standard?

MR. BARNES: I will go that far, yes. The ultimate determination of seaman, when the issue has to do with what the duties of the workers were, not with how do you interpret the term. That's the distinction I'm trying to draw, and what I'm trying to suggest is an approach to analyzing it that goes this way.

When we're looking at the question of what standard of review to apply to a question like, are the

engineers aboard the Arctic Star employed as seamen, that we sort out what is the nature of disagreement between the Ninth Circuit and the trial court. Which aspect of that question are they disagreeing with? Are they disagreeing with how the trial court interpreted the term of what is a seaman, or are they disagreeing with what the trial court found the duties of these particular workers were.

QUESTION: Is whether or not he is a seaman a pure fact question when it determines the whole case?

MR. BARNES: When the issue is what does "seaman" mean within the statute, it's a legal question. As a for instance, let's suppose the --

QUESTION: Is it a fact question?

MR. BARNES: It is both fact and law. If for instance the question is is the cook a seaman, that is a legal question.

QUESTION: Well, if it's fact and law, do you require the court to find clearly erroneous?

MR. BARNES: We're talking past each other, I'm sorry. If the disagreement between the courts on that point has to do with the fact aspect of that next question, I would say they do have to review it on a clearly erroneous basis.

QUESTION: Now we have separated. We do have

a fact aspect.

MR. BARNES: Yes.

QUESTION: Before it was the whole thing.

MR. BARNES: The word -- excuse me.

QUESTION: What is it now, fact?

MR. BARNES: The word "seaman" has both legal aspects and fact aspects, depending on what the question is. If the question is how do you define a seaman under this statute, that's a legal interpretation. If you ask, are they seamen for purposes -- when the issue is what do their duties involve, that is factual, and that's where the disagreement was, as we read it, between the Ninth Circuit and the trial court.

The disagreement was over the part of the question, what are the duties of these engineers? Are they predominantly maritime or only incidentally maritime? And that's what the Ninth Circuit and the trial court disagreed upon, which we submit to you is factual.

In a nutshell, the dispute in our opinion is not essentially one over legal interpretation. It is a dispute essentially over how do you view the evidence. And where it's a dispute over how you view the evidence, the Ninth Circuit's freedom to substitute its answer for the trial court's assessment on this point was subject

to the restrictive rule that only a clearly erroneous determination could be set aside and the Ninth Circuit's answer substituted.

There are policy reasons for discouraging appellate courts from involving themselves too extensively in the fact finding process, with which I am sure you -- of which I know you are aware.

In a nutshell, our opinion is that the trial judge's determination that the essential nature of the work of the engineers aboard the Arctic Star is maritime and that they are therefore exempt as seamen is one that you cannot -- one cannot say is a clearly erroneous determination and therefore the Ninth Circuit should not have reversed the trial court's judgment.

CHIEF JUSTICE BURGER: Mr. Eller.

ORAL ARGUMENT OF

CARSON F. ELLER, ESQ.

ON BEHALF OF RESPONDENTS

MR. ELLER: Mr. Chief Justice, if it please the Court:

Two issues were presented to this Court and one was accepted. The one that was not accepted was the issue on the definition of "seaman." I therefore conclude that the definition as handed down by the Ninth Circuit in this case becomes the law of the land.

That definition of "seaman" is 180 degrees --

QUESTION: You mean the law of the case?

MR. ELLER: I think it is the law of the land that the Ninth Circuit's definition of "seaman" not stands, because --

QUESTION: We just denied cert of it.

MR. ELLER: The issue is not before the Court. It was my understanding we were only here on the standard of review, the second issue.

QUESTION: What makes it the law of the land?

MR. ELLER: Well, unless this Court is overruling the Ninth Circuit on the definition of "seaman," that was the impression I had, it would --

QUESTION: But we didn't affirm it.

MR. ELLER: Well, that's correct. The Court's correct.

At any rate, Your Honor, the definition that they gave there at the Ninth Circuit is directly opposite of what the one was given in the district court, and therefore the conclusion is that a mistake was made. Once a mistake has been made, then comes to play the clearly erroneous rule.

The clearly erroneous rule has been much

maligned and it has been much talked about. There have been three very major cases in the 1980's that this Court has handed down: Pullman, and Bose, and Bessemer City versus Anderson.

After the Court of Appeals has decided that a mistake has been made, then I suppose the next job it has to do is to find a way to overrule the district court and to do it with dignity. There seem to be, in my review of all the cases, some very much reluctance of the part of a circuit court to find a district court clearly erroneous.

They go to great efforts to avoid that if possible, even going back to the Gypsum case in 1948. That's where the language originate that a mistake was made. They used that word rather than say it was clearly erroneous.

The rule then has a second part which deals with credibility, and in my opinion once you have removed the credibility portion from Rule 52 you have practically destroyed it. In this case, credibility definitely was not at issue. The facts could have very well been stipulated to. There is nothing in dispute about what a welder does.

QUESTION: But didn't we say in Pullman-Standard that the clearly erroneous standard of

review applied just beyond where there were credibility determinations to be made?

MR. ELLER: Yes. I have a copy of that here, and it goes a little bit further. You said there that the Court of Appeals was quite right in saying that if the district court findings rested on an erroneous view of the law they may be set aside on that basis.

And that Court goes on then -- or this Court in that case went on and discussed the other method of review that was set forth in The New York Times versus Sullivan case.

QUESTION: Well, I thought you were maintaining now that, because there was no issue of credibility in the district court, the clearly erroneous standard didn't apply. And I was saying that I thought in Swint we had said otherwise.

MR. ELLER: I'm not saying it doesn't apply. I don't find the exact language offhand, but it says that the burden of establishing the clearly erroneous rule is not as great at that point. It weakens it. And the clearly erroneous then must stand on just that, that it was clearly erroneous.

The credibility appears in the same sentence. But the funny thing about reviewing these cases, Your Honor, is the easy way that necessity finds to get

around it. The New York case, versus Sullivan, I think pioneered the question of constitutional law. It made an exception. We do not have to follow Rule 52, that case said, because this was a constitutional question. And I do not find the word "Constitution" in Rule 52.

So, it being a rule of equity, I think necessity --

QUESTION: Why do you call it a rule of equity?

MR. ELLER: Some of the cases I referred to -- as a matter of fact, I think Mr. Moore that wrote the encyclopedia on the Federal Rules alludes to that, that it's not a strict standard of law. If there's a necessity for it, like in The New York Times versus Sullivan, then, a constitutional question being of such great importance, First Amendment rights, we're not -- this Court is not bound to follow Rule 52.

But my whole reason for bringing it up, Your Honor, is I think Rule 52 is highly flexible, and this Court --

QUESTION: Well, do you think in the context of the Federal Fair Standards Act that we should not apply Rule 52 to the subsidiary fact findings?

MR. ELLER: In this case -- well, I cannot answer that in all of the aspects of the Fair Labor

Standards Act. One of the aspects --

QUESTION: Well, is that your position?

MR. ELLER: No, your Honor, it is not.

One aspect of the Fair Labor Standards Act deals with the executive. That's another exemption. That is treated one way. Seamen in this case, another exemption, is treated another way. And we must keep in mind that exemptions are narrowly construed.

The seamen question here, as it was presented in the findings of facts and conclusions -- and you'll notice by reading the findings of facts and conclusions that the conclusions are two simple sentences. The court found that these men were exempt. That is the law.

They were exempt under Rule 213(b). Well, my client says to me: What's 213(b)? I said: That is the portion of the Act that defines "seaman." And my client says: What does it say? Well, it says that you must be working aboard a vessel that is used for transportation and that you must be aiding in its navigation. That is law. That is the law.

And that brings me to the next issue, that it's obvious, if that is law, that this is a case of mixed findings and law. And the reason for that --

QUESTION: But is it not essentially a

question of fact, what he does?

MR. ELLER: Describing it, yes, Your Honor, it is. Describing what the workman does is a question of fact. For instance, Mr. Worthington is a welder. He can be a welder anyplace, and his duties are the same. A welder is a welder is a welder.

He testified at trial that one of the things he did one day was extend the processing line. He fabricated a metal bench or something. And that describes what he does. Actually, that was never in dispute.

Mr. Cameron was the chief mechanic. He worked on a variety of things. Two of the other fellows were specialists. Mr. Kent was a -- or Davies was an electrician.

And those are findings -- those are facts, Your Honor. I agree with you 100 percent. But after you read that, then you must apply those to the legal definition of "seaman," and that's where it becomes mixed findings and law.

Taking that with the fact --

QUESTION: But if the record shows that he doesn't do the things that seamen do traditionally and he does the things that maintenance and repairmen do, aren't you back to pure facts again?

MR. ELLER: If you could stop there, yes, Your Honor, you would be.

QUESTION: Why can't you stop there?

MR. ELLER: You have to come to some conclusion after you have looked at what they do?

QUESTION: The conclusion is that he's a welder and a repairman.

MR. ELLER: The findings as presented by the defendant says that he's a seaman, he's exempt. When they spell out 213, I think they're backed into a corner, Your Honor. They tried to simplify, and that brings this point. They tried to simplify the conclusions to make the standard of review come out like it did.

And I have put in my brief, and this Court has in some recent cases agreed, that the method in which the court had the findings prepared is frowned upon. I found no cases that do anything about it, but designating one party after the decision has been handed down, designating one party to prepare the findings and then adopting those, is one of the problems created here.

And I think the Petitioner got backed into a corner on that and I have no sympathy for him, because in making his findings very short and referring to a

Section of the Act, they're referring to the section that defines "seaman," and that is pure law. You cannot separate them.

Mr. Moore in his analysis when he wrote the encyclopedia says it's almost impossible to separate facts and conclusions in many cases, and this Court has said that, I think in the Bose case. And I agree, and we nitpick it to death trying to do that. I don't think there will ever be a rule that clearly defines findings.

Each case stands on its own. For instance, they use the word "maritime." I think that was a direct attempt to get around this strict --

QUESTION: So must we review every case in which a Court of Appeals makes that impossible attempt and comes to some conclusion as to what is facts and what is law?

MR. ELLER: I don't think so, Your Honor. I tried to be --

QUESTION: Isn't that a pretty fact-bound question in itself?

MR. ELLER: I anticipated a question from the Court just like that, Your Honor, and I tried --

QUESTION: I hope you give me a good answer.

(Laughter.)

MR. ELLER: I tried to form in my own mind -- now, if I had the authority, I'm going to redraft Rule 52, and I would do it this way, I couldn't get very far. And that's why I called it a moment ago a rule of equity. It has a lot of discretion and a lot of flexibility.

QUESTION: So again I ask you: Should we disagree with Courts of Appeals on this?

MR. ELLER: I think this Court should -- well, first of all, the Court of Appeals was groping around for a method of reversing with dignity. I think this Court should let the decision of the circuit stand, and I say that, Your Honor, because Justice Frankfurter very appropriately pointed out that this case does not involve national policy and, unless there is such --

QUESTION: He wasn't referring to this particular case, was he?

MR. ELLER: No. This case didn't exist. The case that he was referring to, he was talking about a writ that came up. He says, unless it involves national policy or unless the inconsistencies among the circuits are an embarrassment, that these kind of cert's should not be granted.

And that was going to be one of my concluding remarks, that this Court --

QUESTION: So you think we should dismiss it, is that it?

MR. ELLER: I think we should dismiss it as being improvidentially granted. That would be one way this Court could escape the agony of having to decide if the Ninth Circuit was wrong.

QUESTION: How would we explain that?

MR. ELLER: Pardon me, Your Honor?

QUESTION: How would we explain that?

MR. ELLER: I haven't gotten that far, Your Honor. It might be a little tough.

(Laughter.)

QUESTION: You'll leave that to us.

MR. ELLER: It was a good concept, but I didn't follow it through, apparently.

QUESTION: Well, may I ask you a question about it, assuming we don't dismiss the case. I've just been looking at the district court's findings and there are, as I read it, there are seven. The eighth finding is on a different issue.

And the last sentence of federal seven is: "Each of the plaintiffs' employment was that of a seamen." Now, if we eliminated that sentence and assumed for the purpose of argument that that's a statement of law or something like that, is there

anything in the findings that precede that sentence that you think is erroneous in any way?

MR. ELLER: Yes, Your Honor, I do. For instance, you take the portion on first processing. I think that the interpretation of that is clearly erroneous, because first processing is done, according to the Code of Federal Regulations, aboard the vessel that catches the fish, and this vessel never did catch a fish. No one aboard it caught a fish. The fish was brought in to them. I think that portion of the findings is wrong.

QUESTION: Of course, that one actually went to this other issue, not to the seaman issue, didn't it? Wasn't there an issue about --

MR. ELLER: Yes, there's a second issue --

QUESTION: Insofar as the findings relate to the question whether these individuals were seamen, is there anything in the findings other than the statement at the end of finding seven which you think is erroneous?

MR. ELLER: In describing what they did, I do not think -- I think that is absolutely correct, because the only way you can --

QUESTION: So then does the case boil down to the question whether that last sentence, given all the

other facts, the last sentence, "Each of the plaintiffs' employment was that of a seaman," whether that's a statement of fact or a statement of law?

MR. ELLER: It's mixed.

QUESTION: Or mixed, as you say.

MR. ELLER: It's definitely mixed.

QUESTION: But the question -- it really focuses on that one sentence. Otherwise, there's really no dispute, as I understand you, about the underlying facts.

MR. ELLER: Well, it's like this case in --

QUESTION: Is that correct, that there is no dispute about the underlying facts, only whether they all add up to the conclusion that these people are seamen?

MR. ELLER: You might say that. I have a lot of quarrel with the word "maritime." That was something that came out of left field. "Maritime," the word "maritime" and the way they use it in the findings, does not appear in the Code of Federal Regulations, and I think that was an attempt to get around the burden of trying to define "seaman."

And I think it was actually invented by this court. I find no legal precedent for maritime duty as a test.

QUESTION: Well, all right, "which was maritime." But you don't disagree that the services were performed while the Arctic Star was in navigable waters?

MR. ELLER: I would -- navigable waters, I pointed that out in my brief. Is it navigable waters when you're moored in the mouth of a river? I don't know, Your Honor.

The court didn't get into that. They didn't define what's "navigable." That's one thing that Justice O'Connor pointed out. The court didn't define that and they didn't define the workplace. And there again, we were at a disadvantage when we didn't have a court reporter there to take down what the court's decision was.

And then when the court went further and designated the defendant in the case to do the findings, then it further weakened my ability to present the facts to the Court of Appeals, and it put them in a spot.

QUESTION: Mr. Eller, is it correct that the Ninth Circuit thought that the facts were all right as far as they went, but that additional findings should have been made?

MR. ELLER: I get the impression they would have --

QUESTION: It certainly isn't clear from the opinion, but I wonder if that is the fault found by the Ninth Circuit, that the facts as far as they went were all right, but there should have been additional findings?

MR. ELLER: I agree. I think that was --

QUESTION: Why did the Ninth Circuit go ahead and make those findings, instead of saying to the trial judge: We need some additional findings, go make them.

MR. ELLER: I find it a little difficult, Justice O'Connor, to carry the Ninth Circuit's cross. But in an attempt to do so, I point out that I'm sure that they felt that, as I did, that the findings in this case were 180 degrees off from what the existing law was.

Therefore, the Ninth Circuit must find a way with dignity to overrule that. A mistake has been made, and then it started. And they should have come right out and said it's clearly erroneous, but for some reason they don't care to do that.

But at any rate, I would conclude my argument, Your Honor, by saying that justice in this case was done by the Ninth Circuit because we have a tendency in the course of defining the technicalities of the law to ignore why we were there in the first place. We have

four gentlemen that were working 12 hours a day, seven days a week, around machinery, when there was absolutely no necessity for it.

There was no emergency. There was no catch that was on the run. There was no bad weather that was causing all this overtime. It was strictly for profit.

And you must keep in mind what the reason for the Fair Labor Standards Act was when enacted back in the thirties, one of which was to discourage working men 12 hours a day, seven days a week, because they become tired. It was a safety factor. And that was totally ignored here.

Whatever method can be used to avoid that in the future, I think it should be done.

Thank you.

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

REBUTTAL ARGUMENT OF

CLEMENS H. BARNES, ESQ.,

ON BEHALF OF PETITIONER

MR. BARNES: Briefly, Your Honor.

Sometimes the Star is at anchor while it's processing. That's part of the picture. Other times the Arctic Star is under way. Granted, not by its own power, being pulled, tugged by a tugboat, but it is

under way in the open seas.

It takes voyages, according to the transcript, as long as 13 days. It carries its crew as passengers. It will sometimes even carry the fishing boats themselves. It carries cargo in the hold. It is for all intents and purposes on oceangoing vessel. It just doesn't have its own engine.

Now, there are aspects in one respect, there are aspects in the other. It's a question of evaluating and interpreting the facts across the board and not focusing just on one or just on the other.

The rule of Walling versus General Industries was that a trial court, by this Court, is that a trial court's findings that a particular worker because of his duties is exempt, there as an executive, should be left undisturbed unless clearly erroneous. The Ninth Circuit in its opinion attempted to distinguish the rule in Walling versus General Industries, just as Mr. Ellen has, as having involved a question of overturning a trial court's evaluations following disputed testimony -- credibility, in a word.

The opinions of this Court are plain now that, while crebility, ability to observe the credibility of witnesses, is one factor that puts a trial court in a better position to evaluate testimony, it is not the

sole reason that trial court findings are to be left undisturbed unless they are clearly erroneous. The rule, after all, has two parts.

It says that those fact findings are to be left undisturbed unless clearly erroneous and -- not if -- there is a dispute over credibility, and the trial court's ability to judge credibility is also to be kept in mind. The second certainly doesn't limit the first.

In a nutshell, the record could have been read either way, at the very least. The trial court read it one way, the Ninth Circuit disagreed. When it can be read in either way and it involves essentially an interpretation of the facts, under the correct standard of review the trial court should have been reversed only if clearly erroneous. The Ninth Circuit didn't do it, and the trial court in any event was not clearly erroneous in what it found.

Thank you.

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

(Whereupon, at 10:51 a.m., oral argument in the above-entitled case was submitted.)

CERTIFICATION

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

85-195 - ICICLE SEAFOODS, INC., Petitioner V. LARRY WORTHINGTON, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)