OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-217

TITLE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, Appellant V. LARRY DAVIS

PLACE Washington, D. C.

DATE February 25, 1986

PAGES 1 thru 40

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IN THE SUPREME COURT OF THE UNITED STATES

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INTERNATIONAL LONGSHOREMEN'S :

ASSOCIATION, AFL-CIO, :

Appellant :

v. : No. 85-217

LARRY DAVIS :

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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 10:52 o'clock a.m.

APPEARANCES:

CLARLES R. GOLDBURG, ESQ., New York, New York; on behalf of Appellant.

BAYLESS E. BILES, ESQ., Bay Minette, Alabama; on behalf of Appellee.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Goldburg, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF CHARLES R. GOLDBURG, ESQ.

ON BEHALF OF APPELLEE

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

In this case the ILA attempted to organize a group of ship superintendents, and the union is alleged to have told the men it could get them their jobs back if they were fired for union activity.

The first issue to consider is whether the defense of federal preemption is waivable. In the Garmon case, this Court said that when an activity is arguably subject to Section 7 or Section 8 of the Act, the states are deprived of subject matter jurisdiction. Since the defense of federal preemption deprives the Court, the State Court of subject matter jurisdiction, the defense should be nonwaivable. Among the factors that the Court noted in Garmon in reaching this conclusion is that the LMRA is not merely a matter of substantive law. Congress created a tribunal, the National Labor Relations Board, with specially designed procedures, and the Court recognized that a variety of local procedures and attitudes could lead to

inconsistent adjudications just as easily as inconsistent rules of substantive law.

QUESTION: Then it is your submission, Mr. Goldburg, that a defense like this could have been raised even for the first time on appeal?

MR. GOLDBURG: That is correct, Justice Rehnquist.

QUESTION: And what if the judgment had finally become final, coul you collaterally attack the judgment because of lack of jurisdiction?

MR. GOLDBURG: No, I do not believe that the judgment could be collaterally attacked. It is my understanding that the Court has held that subject matter -- well, in a sense, it -- I'm sorry. The question then would be a matter of full faith and credit, and I believe full faith and credit does not preclude inquiry into jurisdiction.

QUESTION: I got the impression from your brief that some of your arguments about subject matter jurisdiction were based on the idea that it can be raised, or based on cases arising in the federal courts. Why should those be carried over to a state court system?

MR. GOLDBURG: Because in Garmon I believe that this Court held that Congress deprived the states

of subject matter jurisdiction to rule on this type of a controvrsy. Congress took the subject matter jurisdiction away, and therefore the states have no --

QUESTION: Well, of course, the Supreme Ccirt of Alabama answered that by saying that our trial courts of general jurisdiction have jurisdiction tc try in this representation case.

MR. GOLDBURG: But the fact that -- well, I think all states have courts of general jurisdiction, and if merely by the state giving one of its trial courts general jurisdiction they could overrule Congress on a decision to take subject matter jurisdiction away, national labor policy would be frustrated.

QUESTION: Well, does the term -- does the Garmon case use the term subject matter jurisdiction?

MR. GOLDBURG: It says jurisdiction?

QUESTION: Yes, but why do you use the term subject matter jurisdiction?

MR. GOLDBURG: Well, I think that's the only jurisdiction that the Court could have been talking about because the Court was very concerned with a variety of local procedures being applied by the states and a variety of attitudes being possessed by the states on labor controversies, and I think the only way that Congress could ensure that these types of issues were

submitted to the Board and that the conduct that Congress intended to be protected under Section 7 would be protected would be if state courts did not have the jurisdiction to reach the merits of this type of controversy.

QUESTION: Well, do you know why this point wasn't raised until after trial in this case?

MR. GOLDBURG: I think it was purely inadvertence. I don't think there was any strategic motivation.

QUESTION: It wasn't -- well, I suppose the Alabama courts could look at it as an effort to get a favorable judgment on the merits, and if you don't get that, then you raise this point afterward.

MR. GOLDBURG: But I just don't see how we can infer a strategic motivation because we -- you say favorable judgment. It was a jury trial. It wasn't like the union was hoping there would be a favorable decision written. It seems to me that --

QUESTION: Well, you know, I agree that it's perfectly possible, I suppose, the union could win the case before the jury, wasn't it?

MR. GOLDBURG: Well, if the defense of federal preemption had not been upheld, say, on a pretrial motion, they still would have gotten a jury trial. I

just don't see lany reason for a union or the lawyer who was trying the case to holi back on a defense and risk waiver. I mean, if they had thought of the defense, I don't think they would have risked waiver.

It would have been very simple for the trial court to raise federal preemption on its own, sua sponte, because the allegations of the complaint show that the alleged misrepresentation arose from organizational activity.

QUESTION: Well, that would be a rather strange rule of law to require a trial court to raise an issue that a party was in a far better position to raise than the trial court.

MR. GOLDBURG: Well, under the Alabama rules of civil procedure, the court is to raise subject matter jurisdiction sua sponte. It's the same as the federal rules as far as that's concerned.

QUESTION: Well, yes, but presumably, you know, you have your typical generalist trial court judge has to be familiar with a number of different areas of law, to expectlhim to raise it when a party in whose interest it is to raise it doesn't know enough to raise it would be a rather strange rule.

MR. GOLDBURG: But I think this Court said in Lockridge that the Court designed the arguably protected

standard so state trial courts could very easily police themselves in this area. They don't have to be right because if they make the wrong decision, the issue will go to the state appeals court or ultimately this Court on appeal, but they can satisfy any interest in efficiency, in integrity and in finality of the trial court proceeding by raising the issue sua sponte.

Indeed, in this particular case I don't believe there was any waste of trial time at all because the Alabama Supreme Court indicates in its opinion that even if they didn't think the defense was waivable, they don't think federal preemption applies on the merits, and it's clear from that that even if the defense had been raised say, on a motion to dismiss, and the trial court had granted a motion to dismiss, the Alabama Supreme Court would have sent the case back for trial because they said in their footnote they didn't think it was preempted.

QUESTION: Mr. Goldburg, can I ask you, do you think it makes any difference what kind of preemption it is? In other words, some of the cases we say there is actual -- it's actually prohibited or actually protected, and others arguably prohibited and arguably protected. Would you say that the matter, even if it's just arguably protected or prohibited, that it still

defeats subject matter jurisdiction on the state part?

MR. GOLDBURG: Justice Stevens, as I read Garmon, the same standard applies for arguable or actual.

QUESTION: Well, if you take that view, supposing you had a case in which you had an arguable remedy before the labor board so that you can't go forward in the state court, and the party went before the labor board and then lost and determined that it no longer was arguably prohibited? Would then jurisdiction be revived in the state court or would it still be preempted?

MR. GOLDBURG: Yes, I think once there has been a clear determination by the labor board, not just the regional director, by at least general counsel of the labor board, once there has been a clear determination, that supervisors are involved, I believe at that point that the states could apply their law, that they would have jurisdiction.

QUESTION: So it is conceivable that there is a temporary total foreclosure of jurisdiction rather than just sort of a defer to the --

MR. GOLDBURG: Yes.

QUESTION: But there hs to -- don't you think there has to be some opportunity to get the arguable

question before the board?

MR. GOLDBURG: Well --

QUESTION: How could this plaintiff have proceeded before the board?

MR. GOLDBURG: He could have filed a charge under Section 8(a)(1) or Section 8(a)(3) --

QUESTION: About what?

MR. GOLDBURG: That his discharge was coercive, that is, that the other superintendents in the unit were discouraged --

QUESTION: He files it -- he files it under -- he files against the company?

MR. GOLDBURG: Yes, file against the company under 8(a)(1) or 8(a)(3).

QUESTION: How about against the union? His suit is for misrepresentation.

MR. GOLDBURG: Yes, but --

QUESTION: Can a union misrepresentation be an unfair labor practice?

MR. GOLDBURG: A union misrepresentation can generally be an unfair labor practice. We concede that this particular representation could not have been an unfair labor practice for the simple reason this was a representation --

QUESTION: Well, then, what -- how can you

possibly argue that this plaintiff should be foreclosed from a state court suit when there is no way that he could get any remedy against the union before the board?

MR. GOLDBURG: Well, if he had followed his procedure before the board, he wouldn't have needed a remedy as far as the ILA was concerned. If the board had found that he was an employee, the board could have reinstated him with back pay.

If, on the other hand, the board had found that he was not an employee, I believe at that point he would have had a remedy against the union. However, at that point we reach our argument that the Alabama claim of its strict liability should be preempted at that point, and that once there has been a finding that he is a supervisor rather than an employee, I think a malice standard should apply in terms of the representation that you would make.

QUESTION: Well, that's way down the line.

MR. GOLDBURG: Yes.

We are talking about misrepresentation which is, granted, a law of general application here, but the Court has held that state tort law can be preempted because tort law is indeed a method of controlling policy.

The ILA was engaged in organizational activity so we are at the core purpose of the LMRA. The Section 7 includes the right of union officials to discuss organization with employees.

QUESTION: Mr. Goldburg, could I go back to the question I asked you a minute ago?

MR. GOLDBURG: Yes.

QUESTION: Because I'm still trying to think your position through.

Supposing the statute of limitations had not yet run on a state cause of action that is -- that there's an arguable remedy before the labor board, and so they file suit and you come in and dismiss and say there is no jurisdiction, and the employee goes ahead before the labor board.

Could the state court keep the case pending in order to toll the statute of limitations, or under your view would it have an absolute duty to dismiss the case for want of jurisdiction?

MR. GOLDBURG: Well, my view is they would have to dismiss the case without prejudice since they wouldn't have any subject matter jurisdiction.

QUESTION: Without prejudice, and then, I take it, if they then come back later after losing before the labor board, you would be able to plead the statute of

limitations.

MR. GOLDBURG: Well, I -- many states have an extention of the statute of limitations for that type of a situation where, say that the first action is dismissed on a technical ground that doesn't make --

QUESTION: It's not a technical ground. It's one of subject matter jurisdiction.

MR. GOLDBURG: But subject matter jurisdiction is addressed to the jurisdiction of the court.

QUESTION: Right.

MR. GOLDBURG: It's not addressed to the question of whether substantively plaintiff would have had a course of action if the court had jurisdiction. So many states have extensions of the statute of limitation for that type of situation. I believe my state has a six month extension of the statute of limitations for that type of situation.

We are involved with organizational activity. It is important for the union to be able to solicit argual employees in this type of situation so that the employees can learn the advantages and disadvantages of organization from others.

In the Hanna Mining case, this Court held that, or it was stated that organizing supervisors is not even arguably protected, but in -- the critical

distinction in Hanna Mining, there had been a clear determination that supervisors were involved, there had been an appeal from the regional director to general counsel. There has been no clear determination in the present case, and therefore these people are arguably employees.

QUESTION: What -- was there a collective bargaining contract? There wasn't a collective bargaining contract at all.

MR. GOLDBURG: No, the parties did not proceed to the point of collective bargaining although the superintendents signed authorization cards; the union never got to the point of sitting down with the employer, perhaps once the coercive discharges of Davis and Trione took place, the organizational drive really fell apart.

I believe that in this case the state interest in applying its law is exceedingly weak. The superintendents, after all, made a Section 7 decision that they would affiliate with the union and authorize the union to engage in collective bargaining for them. Obviously the State of Alabama has no interest in regulating this Section 7 decision that the superintendents made.

The state also has a very little interest here

in protecting the employment relationship of these people that were fired for union activities because the Alabama state law is that it is a hiring at will, and the employer could fire them for really any reason whatsoever.

The statement that was allegedly made by the union that the superintendents could get their job back embodies with it an opinion that the men are being told that they are employees rather than supervisors. Based on the federal policy of free debate that this Court recognized in the Linn and Austin cases, I believe these type of opinion statements should be protected.

Further, Section 8(c) of the act which, although by its terms it applies to written communications, I think goes on to say that views, arguments or opinions are not evidence of an unfair labor practice and therefore should be arguably protected.

In this case, as I have said, the plaintiff did not seek his remedy before the NLRB. Instead, he filed a state misrepresentation action in which an essential element of the cause of action was the falsity of the representation on the part of the ILA. The jury had to find that Davis was in fact a supervisor to conclude that the representation that the ILA made was

false.

Now, this issue, whether or not the man was a supervisor, has been entrusted to the NLRB. Davis could have filed an unfair labor practice charge under Section 8(a)(1) or 8(a)(3). If he was an employee, the discharge by the employer was coercive or discriminatory. Now, as a result, what is implicated here is the primary jurisdiction of the NLRB. If this is a Section 7 case, we claim arguable protection; however, we also implicate the primary jurisdiction of the NLRB, the jurisdiction of the board to rule on this employee-supervisor question.

Since Davis could have invoked board jurisdiction, the Sears case is distinguishable because Sears turned on the inability of the aggrieved party to seek board jurisdiction. Here the supposedly aggrieved party could have sought board jurisdiction and could have gotten a ruling --

QUESTION: But only against -- only against the company.

MR. GOLDBURG: Yes. The board could only grant damages against the company, but if the Court granted damages, he wouldn't need a remedy as far as the ILA was concerned.

QUESTION: But that's rather scant belief.

The man says I have a complaint against the union for misrepresentation, and you say, well, you've got a remedy against the company for something else.

MR. GOLDBURG: Justice Rehnquist, I don't believe it's scant relief at all. It is a reinstatement and back pay. I think that's everything. I mean, this is a man who himself is engaged in organizational activity. If the board could reinstate him and give him back pay, I think that's everything.

QUESTION: Well, if -- it is scant relief, I suggest, to a plaintiff who says I have a complaint for misrepresentation against B to tell him, well, you can't sue B for misrepresentation but you can sue A for something else.

MR. GOLDBURG: But if he gets complete relief, I think that satisfies the state's concern.

QUESTION: Well, I would assume that Alabama feels it has a concern to protect its people against misrepresentation, and part of that is making plaintiffs whole, but part of it is mulcting defendants and damages.

MR. GOLDBURG: But I don't think that the state can properly focus on the union's activity until there has been a clear determination that it's supervisors as opposed to employees that are --

QUESTION: Well, why do you say that the only -- under our cases, that the board is the only agency that is entitled to decide whether somebody is a supervisor or an employee.

MR. GOLDBURG: Well, in -- there's a case, I believe it's the Perko case, that this Court said that the issue is wisely entrusted to the NLRB because --

QUESTION: Well, if it's entrusted, it is entitled to decide it, that's right, but exclusive of any other thing?

MR. GOLDBURG: Well, as I read Hanna Mine and also the Beasley case from this Court -- I believe it is Beasley v. Food Fair, I believe that what the Court was saying there is that the states cannot apply their law to --

QUESTION: Well, what if this employee, this superintendent, had gone to the board saying I was illegally fired, I was an employee, and he files it with the regional director, the regional director says you're a supervisor, friend; you have no protection, and he appeals it to the general counsel, the general counsel says the same thing.

Then he sues the union. He sues the union and he says misrepresentation. But for him to win, the jury has got to find that he was a supervisor.

MR. GOLDBURG: But at that point, the Court --

QUESTION: And would you then -- wouldn't you then say that the state court -- certainly you think it is bound by what the board said?

MR. GOLDBURG: That is an issue of collateral estoppel which would be up to the state court at that point.

QUESTION: Yes, but -- yes. But you certainly would say that you would not be collaterally estopped, wouldn't you?

Now --

MR. GOLDBURG: Yes --

QUESTION: I mean, the only way that a collateral estoppel issue could come up is if you brought it up, and the only -- and if you say the court could, the state court could adjudicate it, it can adjudicate whether somebody is a supervisor.

MR. GOLDBURG: My argument at that point would be that I wouldn't be collaterally estopped by the board determination because there is no opportunity for judicial review. However, I will concede as far as the Court is concened at this point, that is a matter of state evidentiary law. It really doesn't matter as far as the issue of preemption is concerned.

QUESTION: I know, but there would be the

issue, the state court would have to decide it.

MR. GOLDBURG: But one --

QUESTION: Was he a supervisor or wasn't he?

MR. GOLDBURG: But once there's been a clear determination, the state only has jurisdiction to rule on that issue once there's been a clear determination. In other words, once the board has --

QUESTION: You mean once the board's opportunity to decide it has been exhausted.

MR. GOLDBURG: Yes. And at that point, once there has been a clear determination, the issue which is raised is whether the state court must apply a malice standard as this Court held in Linn, or whether this -- or whether the Court would be preempted from allowing liability based on a strict liability theory. In the present case --

QUESTION: What if -- what if these gentlemen had gone to this, had gone to a lawyer, had gone out and hired a lawyer and said can we organize, and the lawyer says of course you can organize, but if you are a supervisor, you have no protection. But I don't think you're a supervisor at all. I think you're an employee. If you're fired, I can get your job back for you. This is just a private attorney. And they persist in organization and they get canned, just like they did

here, and he sues the lawyer, sues the lawyer for malpractice, claiming that he gave him very bum advice, and the issue then turns on whether he was -- whether there was any grounds for thinking he was a supervisor or an employee.

Now, do you think that state court wouldn't have jurisdiction to decide that issue?

MR. GOLDBURG: That's a --

QUESTION: Would they have to say sorry, take the supervisor question to the board?

MR. GOLDBURG: Justice White, that's a stronger case for the plaintiff. Perhaps because --

QUESTION: Well, why is there a difference between the union and that lawyer?

MR. GOLDBURG: Because I don't think there's a fiduciary obligation between the union and the prospective --

QUESTION: There is?

MR. GOLDBURG: I don't believe that the -- that Mr. Davis was a member of the union at that point. He was solely an employee that was being solicited by the union at that point. I believe that the union has a Section 7 interest in soliciting the employee at that point. It's not a fiduciary --

QUESTION: Well, that cuts both ways, too,

doesn't it then? I mean, you mean because they have a Section 7 interest, they are completely -- they have nc duty to avoid misrepresentation?

MR. GOLDBURG: But because there's a Section 7 interest, the union is entitled to more leeway than that which an attorney would be. There is no federal statute --

QUESTION: And this is you sole answer to my -- to you are trying to distinguish between a union and that lawyer I was talking about a while ago.

MR. GOLDBURG: Because there's a federal statutory right involved that grants the union more leeway than an attorney would have because there is no federal statute protecting the right to practice law.

In this particular case there was a general verdict, so we can't tell whether the jury based its verdict on malice, on intentional theory or on a strict liability theory, and as a result, I think that the union should be entitled to at very least a new trial based on the submission of the strict liability.

I also suggest that the $75,000 verdict here was excessive in view of the fact that the trial evidence was that the man only lost three months worth of work.

QUESTION: Well, is that a federal questic?

MR. GOLDBURG: I believe that there are several cases, Linn and Farmer, where this Court said that --

QUESTION: Well, we would have to extend that, those cases, to this situation, to say malice. You have to have malice for punitive damages.

MR. GOLDBURG: Yes, but in Linn and Farmer, this Court also held that the state trial court must be under a strict duty to make sure that the damages awarded are not excessive. so the excessiveness, I believe, would be a federal question.

QUESTION: Did you raise this argument before the Supreme Court of Alabama?

MR. GOLDBURG: Yes.

QUESTION: Did they pass on it?

MR. GOLDBURG: They didn't reach it per se because they felt that the issue of federal preemption had been waived. So they did not speak as to the excessiveness of the verdict.

QUESTION: They say at the end of their opinion, we have carefully reviewed the appellant's alternative state law grounds for reversal and find each of them to be without merit. I am surprised that they didn't at least mention your Linn argument if you had made it.

MR. GOLDBURG: Well, I think that in their footnote they said that even if the defense had not been waived on its merits, they didn't think that there was any merit to the defense of federal preemption.

QUESTION: Well, suppose we agree with you that the defense wasn't waived and the preemption issue here, you think the state court has actually decided the issue, and that if we agree with you, we also then have to face the preemption question.

MR. GOLDBURG: That's correct, Justice White, based on their footnote.

Does the Court have any other questions?

CHIEF JUSTICE BURGER: Mr. Biles?

ORAL ARGUMENT OF BAYLESS E. BILES, ESQ.

ON BEHALF OF APPELLEE

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

It is Larry Davis' position in this case that this Court should dismiss this appeal. We feel that the Supreme Court of Alabama decision was based upon an adequate and independent state ground. This Court has consistently refused to decide cases which rest upon state court decisions which rest upon adequate and independent state grounds.

The Alabama Supreme Court in their opinion

specifically held that they were basing their opinion upon their interpretation of the Alabama Rules of Civil Procedure, Rule 8(c) and upon a 1983 Alabama case, Powell v. Phenix Savings wherein the Alabama Supreme Court had previously decided that federal preemption in Alabama did not go to the subject matter jurisdiction.

QUESTION: If they were wrong on that, however, I take it that the Alabama law would be that you could raise that subject matter jurisdiction issue at any time.

MR. BILES: If they were wrong with respect to --

QUESTION: Let's assume that they were wrong as to whether they thought preemption was subject matter jurisdiction issue. Suppose it was actually, and if they had thought it was, they would have let it be raised at any time.

MR. BILES: If we are talking about the type of subject matter jurisdiction that cannot be waived, certain.

QUESTION: Well, you mean there is, there is a type of subject matter jurisdiction in Alabama that --

MR. BILES: I would like to take that back. No, sir. Subject matter jurisdiction cannot be waived in Alabama.

QUESTION: All right.

MR. BILES: But Alabama, as --

QUESTION: So if they had thought preemption was subject matter jurisdiction, it would not have been waived by failure to raise it.

MR. BILES: That is correct. But under --

QUESTION: What sort of matters does the Alabama Supreme Court consider to be subject matter jurisdiction so far as the circuit courts go?

MR. BILES: Those matters which truly challenge the power of the Court to hear the case. For instance, bankruptcy. You couldn't file a bankruptcy proceeding in a state court in Alabama because Congress specifically has set bankruptcy proceedings. Also, we have different jurisdictional amounts in civil cases for different courts in our judicial system in Alabama, and they recognize those type challenges as subject matter jurisdiction challenges.

QUESTION: Does the circuit court have a limited jurisdiction moneywise?

MR. BILES: No, Your Honor, it does not.

QUESTION: What is your answer to the -- are you familiar with the Curry case?

MR. BILES: No, sir, but if you could give me the facts, I would certainly try --

QUESTION: Well, it is a question about subject matter jurisdiction.

MR. BILES: I was going to address the Michigan v. Long case which --

QUESTION: You go ahead. You proceed at your own pace. That's all right.

MR. BILES: Thank you.

I was going to point out to this Court that the Alabama Supreme Court decision was based solely on Alabama procedure. This is not Michigan v. Long where the state court decision was based upon two grounds and the Court went ahead, the Supreme Court of the state went ahead and stated that it was ruling the way it did because of the way it interpreted Terry v. Ohio, which of course was the United States Supreme Court case dealing with the United States Constitution. In this case, preemption under Alabama procedure was determined by the Alabama Supreme Court to be an affirmative defense which, if not pleaded, is waived.

This, I think, is supported by the decisions in this Court, the Lockridge decision. In the Lockridge decision, this Court stated that when Congress passed the National Labor Relations Act, it didn't tell us to what extent it ousted state law. Therefore, we, the Supreme Court of the United States, are not going to

hold that the National Labor Relations Act preempted local regulation which in every and any way touches upon the complex relationships between unions, employees and employers. The Court went on to state, obviously much of this is left to the states. Certainly when Congress passed the National Labor Relations Act, it never expressed an intention to preempt state procedural -- state procedure.

Absent a clear intent to preempt state procedure, federal law takes state courts where it finds them. This Court stated that in Brown v. Gerdes. As a matter of fact, the first judiciary act, and from the very beginning, we have envisioned that state courts would adjudicate state claims and federal claims without the imposition of a federal procedural code.

The ILA argues that preemption goes to subject matter jurisdiction and that it cannot be waived. Of course, I have already pointed out what this Court stated in Lockridge, that obviously much is left to the states in this area. In the Garmon case, the Farmer case, the Sears case, the Linn case, this Court applied a weighing test to determine whether or not the states, the interest that the state was attempting to protect outweighed the conflict with the National Labor Relations Act. That necessarily implies that state

courts in the first instance in these situations have the right to hear evidence, take testimony, and decide and decipher preemption from non-preemption issues.

Furthermore, we feel that subject matter jurisdiction and how a state court applies and recognizes subject matter jurisdiction is a question of state law. The Alabama courts, as I have already stated, consider nonwaivable only the narrow class of true jurisdictional objections such as bankruptcy.

It's truly amazing how the ILA tried this case below. They came into the Circuit Court of Mobile County, agreed to play ball by the rules in the Circuit Court of Mobile County. They didn't object to those rules. They didn't object to the procedural rules in the state of Alabama. And now they stand before the highest court in the land and ask you to give them another shot. They never raised the preemption until after the verdict. They raised it then in a motion for j.n.o.v. as ground number 15 of 16 grounds. They waited approximately two years after the beginning of this lawsuit before they raised it, and they had plenty of opportunity under Alabama procedure to raise it. They could have raised it on their motion to dismiss. They could have raised it in their answer. They could have amended their answer at any time even before the jury

goes out in Alabama you can amend your answer. They could have raised it on summary judgment. They could have raised it on directed verdict.

They filed a motion for summary judgment. They filed a motion to dismiss. They filed a motion for directed verdict at the end of my case, my client's case, and also at the end of all the evidence, never mentioned it, never said one word about it. There's no record on preemption.

This case wasn't tried with preemption in mind.

In the Herndon v. Georgia case, this Court recognized that a federal constitutional right can be waived if it's not timely raised under state procedure, and if it's not timely raised under state procedure and it is therefore not passed on below, this Court held in Herndon v. Georgia that it wouldn't reach the issue.

The issue was not passed upon below.

The ILA concedes, as well they conceded in their brief, they conceded to you here today, that if Mr. Davis were a supervisor, there would be no preemption and no question about preemption. Again, it is totally amazing how they tried this case below. Their tune has completely changed since they tried the case. They never challenged Davis' supervisory status

below in the trial court. They never -- they are the ones who introduced the regional director's ruling with respect to Mr. Trione, Mr. Trione being a fellow ship superintendent at Ryan-Walsh like Davis was. Mr. Trione was provided an attorney by the ILA when he was fired. He wasn't able to bring his lawsuit because he had to go bankrupt before he got to court.

But they hired him an attorney. The attorney filed a complaint just like they were talking about to seek to make Ryan-Walsh reinstate him. The regional director ruled that he was a supervisor, had no protection under the Act. He was represented at that time by an ILA attorney, no appeal taken.

They introduced the ruling of the regional director at the trial. They introduced Trione, set up a picket at their urgence, a one-man picket. Ryan-Walsh went down and filed a preliminary injunction against him. The state -- the circuit court in Mobile County ruled again, Mr. Trione, as a ship superintendent at Ryan-Walsh, you are a supervisor. They at the trial below asked the circuit judge to charge the jurors that supervisors could join unions. They didn't challenge Mr. Trione's definition or delineation of ship superintendent's duties that were set out at the trial of this case.

QUESTION: Part of their story also was that they didn't say that we will get your job back if you're fired.

MR. BILES: Yes, sir, that was part of their story, and it didn't go over with --

QUESTION: And -- well, I know, but their story was that they said that if it turns out you're a supervisor, why, you can be fired. That was part of their story.

MR. BILES: That was Mr. Holland's story.

QUESTION: Yes, that was part of their story.

MR. BILES: It was interesting to note in the facts of the case that Mr. Holland also put on two other people who were with the union who were at that infamous meeting that night who didn't remember that Mr. Holland said those things. Even his own witnesses didn't remember that Mr. Holland said those things.

This case was tried at the trial court level with the total understanding by everybody, including the ILA, that Mr. Davis was a supervisor, that that issue didn't have to be addressed by the trial court. It was never questioned. Now the ILA wants to say to you that we are arguably protected because this is organizational activity directed toward people who are arguably employees under the Act. When you say arguably

employees under the Act, that implies certainly that there are some facts to based that argument upon. There are absolutely no facts in this record to indicate that Larry Davis was anything other than a statutory supervisor, absolutely no facts. As a matter of fact, they introduced evidence that he was. I couldn't understand why they were doing it when they did it.

QUESTION: Do you think the -- do you think the submission to the regional director which was unappealed sort of ends the matter anyway?

MR. BILES: Your Honor, this Court has pointed out in Hanna Mining that a final ruling by the general counsel clears it up with unclouded legal significance, but this Court has never held that in the first instance you must have that type of question answered by the National Labor Relations Board. As a matter of fact, in operating --

QUESTION: How about my question? Is rejection of the claim by the regional director and failure to appeal it to the general counsel, does that have the same effect as though the general counsel had agreed with the regional supervisor?

MR. BILES: That's not my position, no, sir. I couldn't say that. But I can say that this Court in Operating Engineers v. Jones recognized Mr. Jones'

statutory supervisory status even though the National Labor Relations Board had never ruled on it either way.

Also, in the Sears and Garmon case, addressing that issue and addressing that question further, Justice White, the Court recognized that if the state courts in this area can understand and interpret the legal significance of acts under federal law by applying compelling precedent to essentially undisputed facts, then there is no preemption.

QUESTION: What, on their appeal from the judgment of the trial court, did they appeal directly to the Alabama Supreme Court?

MR. BILES: Yes, sir.

QUESTION: Did they then -- did the union then claim that this gentleman was not a supervisor?

MR. BILES: They did.

QUESTION: You mean even though they had conceded it, you say, in the trial court?

MR. BILES: They did, just as they are arguing to this Court today, that he is arguably an employee when there are absolutely no facts on the record to support that he was an employee.

QUESTION: Alabama Supreme Court didn't, because of their disposition, didn't discuss supervisor or not, did it?

MR. BILES: No, sir. The Alabama Supreme Court never reached that issue, stated that it was not reaching the merits of the issue at all. This case went off simply on the procedural ruling of the Alabama Supreme Court.

QUESTION: What would you say if an employer seeks to get an injunction against a union on the grounds that it's -- he's picketing to get representation when, at a time when he shouldn't, when it shouldn't, and the state court issues an unjuction against the picketing, and against the argument that this is an arguable unfair labor practice, and comes up here and we say that the state court should not have issued the injunction at all, and we say we reverse the judgment below as beyond the power of the Georgia courts. Consequently, the state court had no jurisdiction to issue an injunction or to adjudicate this controversy which lay within the exclusive powers of the National Labor Relations Board, and of course, this is one of the cases on which the argument is based that this is a subject matter jurisdiction question.

MR. BILES: There is no question but that there are --

QUESTION: Did you cite Curry in your brief?

MR. BILES: No, sir, I did not.

There's no question but that there are situations where states are not going to be able to exercise their jurisdiction to decide these type cases, but for instance, if Mr. Davis were an employee, this case becomes a much harder case for me. But there's no question about the fact that he's a supervisor. He's not arguably an employee, and my answer would be since he is obviously a supervisor, he has no rights under this act.

QUESTION: Correct. Right.

QUESTION: You know, a moment ago you said that the Alabama Supreme Court did not indicate whether he was a supervisor or not, but they very clearly did in their footnote 3, their footnote 2, rather, on page 3 of their opinion, they definitely assume he was a supervisor.

MR. BILES: Yes, sir, but they never reached the merits of the preemption issue.

QUESTION: Just said what they would do if they did reach the merits.

MR. BILES: Said what they would do if they did reach it.

QUESTION: Yes.

MR. BILES: This Court further has held in Sears that with respect to the ILA's argument, and their

argument is that they are arguably protected, this Court -- and I quote, if I may -- "as long as a union has a fair opportunity to present the protection issue to the National Labor Relations Board, it retains meaningful protection against risk of error in state courts." The ILA clearly, whenever Mr. Davis and Mr. Trione were fired, could have filed a Section 8 complaint against Ryan-Walsh. At that point in time the National Labor Relations Board would have dealt with their issue that they want to bring to this Court today, their arguable protection issue.

But they chose, and in the words of Sears, they chose to avoid the jurisdiction of the board because they knew that they had such a weak case, they knew that the regional director had already ruled that Trione, who was a fellowship superintendent, was a supervisor. They knew the duties that these people had as ship superintendents. They chose to avoid the jurisdiction of the board, and the protection that was available under the Act was available to them if they wanted to pursue it, and they chose to avoid it.

Furthermore, we would state that -- let me --

QUESTION: Well, you don't suggest that this plaintiff had any remedy before the board against the union, do you?

MR. BILES: No, sir. The only --

QUESTION: The only remedy he had was against the employer?

MR. BILES: That's the way I read it, intelligence.

In closing, let me state to this Court that the ILA committed many procedural defaults at the trial. They come, they come to this Court and dress those procedural defaults in jurisdictional language. They come to the highest court in the land to ask you to forgive them of their procedural defaults. They come here to ask you to give them a second bite at the apple at the expense of Mr. Davis.

They waited almost two years before they raised this issue. We had gone through discovery, unbelievable discovery. I couldn't even take the depositions of Mr. Hollands. He wouldn't bring himself into my jurisdiction, and my client couldn't afford to send me to Texas. We had to try this case -- we didn't know what in the world he was going to say. We have gone through all of this. These people could have raised this issue up front, and if this issue were dispositive, we would have done away with this case. If the issue weren't dispositive, at least a record could have been built on it so this Court could have looked at

the facts involved in the case?

The way the record is now, the trial Court in Alabama never had to make any decision with respect to a supervisor or employee. The ILA treated the man as a supervisor all along, and there's no protection for a supervisor under this case.

I thank you very much.

CHIEF JUSTICE BURGER: Do you have anything further? You have one minute remaining, Mr. Goldburg.

ORAL ARGUMENT OF CHARLES R. GOLDBURG, ESQ.,

ON BEHALF OF APPELLANT -- Rebuttal

MR. GOLDBURG: First of all, to respond to what Justice White asked on the Curry case, we should have cited the Curry case in our brief, but I believe the Court said in the Curry case that Plaintiff alleged in the Complaint allegations which show that --

QUESTION: Yes, but if you had cited it, the opposition might have had a good response to it.

MR. GOLDBURG: To respond to what Justice Stevens asked on the statute of limitations problem, there is also nothing to stop the state from establishing a toll for administrative proceedings of their limitations statute.

My brother says that federal constitutional rights can be waived. I think preemption stands on a

different footing from a mere constitutional violation because with preemption we have the deprivation of subject matter jurisdiction.

I believe that the activity is arguably protected here regardless of whether the plaintiff had any remedy before the union as far as the board was concerned.

If it was just a simple situation that the union was engaged in organizational picketing and the employer went into the state court, we would be arguably protected.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

We will hear arguments next in Local 28 v. the Equal Employment Opportunity Commission.

(Whereupon, at 11:45 a.m., the case in the above-entitled matter 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:

#85-217 - INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, Appellant

V. LARRY DAVIS

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

BY Paul A. Richardson

(REPORTER)