

Supreme Court of the United States

OCTOBER TERM, 1969

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JAN 23 1970

In the Matter of:

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 INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, :
 LOCAL 1416, AFL-CIO :
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 Petitioner, :
 :
 vs. vs. :
 :
 ARIADNE SHIPPING COMPANY, LIMITED, a :
 Liberian corporation, and EVANGELINE :
 STEAMSHIP COMPANY, S. A., a Panamanian :
 corporation, :
 :
 Respondents, :
 :
 -----X

Docket No. 231

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Place Washington, D. C.

Date January 13, 1970

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	<u>ORAL ARGUMENT OF:</u>	<u>P A G E</u>
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2	Seymoure M. Waldman, Esq., on behalf Petitioner	3
3	Richard M. Leslie, Esq., on behalf Respondents	21

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	<u>REBUTTAL ARGUMENT OF:</u>	<u>P A G E</u>
6		
7	Seymour M. Waldman, Esq., on behalf Petitioner	44

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BOWERS

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IN THE SUPREME COURT OF THE UNITED STATES

October
 Term, 19~~68~~⁶⁹

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
LOCAL 1416, AFL-CIO,

Petitioner,

v.

ARIADNE SHIPPING COMPANY, LIMITED, a
Liberian corporation, and EVANGELINE
STEAMSHIP COMPANY, S. A., a Panamanian
corporation,

Respondents.

No. 231

Washington, D. C.
January 13, 1970

The above-entitled matter came on for argument at
1:25 p.m.

BEFORE:

- WARREN BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- EYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice.

APPEARANCES:

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1 facts been otherwise, and had the record been quite different
2 from what it is, and had the record disclosed, which it did
3 not, that all of the longshore work, but admittedly longshore
4 work, was performed by members of the ship's crew, then the
5 National Labor Relations Board would still have exclusive
6 jurisdiction, and this Court's cases, as I shall develop later,
7 dealing solely with shipboard relations, labor relations between
8 the crew, acting qua crew, and the vessel have no applicability
9 to longshore work and do not withdraw jurisdiction from the
10 National Labor Relations Board over longshore labor disputes
11 resulting out of operations wholly within the territorial
12 confines of the United States.

13 Q In other words, a foreign flag ship cannot
14 bring its own longshoremen as part of the ship's company and
15 escape the reach of the Board.

16 A That is correct, your Honor. It is no
17 different from any foreign employer employing aliens wholly
18 within the geographical jurisdiction of the United States. It
19 is as if the Fiat Automobile Manufacturing Company of Italy
20 were to establish an automobile plant in Detroit, and try to
21 staff it wholly with Italian nationals. I suppose it is
22 conceivable. We have no question, and that is what we urge
23 upon this court, that in that situation that operation would
24 be subject to the federal labor laws, as well as other federal
25 regulatory laws, and we are in effect no different. This is

1 work not traditionally seamen's work. This is work performed
2 as much on shore as on ship. It is work wholly within the
3 geographical confines, and the considerations which impelled
4 this Court to hold in the three cases relied upon by the
5 Florida Courts that shipboard labor relations are not within
6 the jurisdiction of the Labor Board are totally absent here.

7 Q They may be one of the germane issues, may
8 they not, which you assume to be resolved, which you assume
9 to be a fact, and that is that longshoremen's work is
10 involved here. As I understand it, they claim these ships
11 carry no freight, no cargo, no automobiles any more, and that
12 what is involved here is simply carrying passengers' suitcases
13 on board. May there not be an issue as to whether or not that
14 is traditionally work of the crew, the purser's staff, and so on
15 of the ship, or whether it is necessarily longshoremen's work?

16 A Your Honor, again I have got to distinguish
17 between what the record shows and what they contend. Again I
18 have to make an alternative contention. I have to say that
19 on the basis of this record that point does not arise, but
20 were the record to be otherwise, we would still take sharp
21 issue with them. First, the record does show, and it is the
22 only testimony in the record that there was loading of cargo,
23 automobiles, et cetera. They claim the contrary. There is no
24 evidence to that effect in the record.

25 Second of all, however, they admit that there was

1 the loading and unloading of baggage, and there was the
2 loading aboard of ship's stores. There is actually other
3 work, such as handling of lines that is traditionally longshore
4 work. We pointed out, particularly in our reply brief, that
5 this is work that the National Labor Relations Board has
6 already traditionally and as a matter of its rulings held to
7 be longshore work. It has done that on the basis of the
8 industrial practice that prevails in this country. We have
9 cited, for example, the NLRB certification of the longshore
10 unit in the Port of New York, which is of course by far the
11 largest port in the nation, and that certification in express
12 terms applies to the loading of cargo, including baggage and
13 ship's stores. We have cited a case on the West Coast in which
14 the Board assumed jurisdiction over a jurisdictional dispute
15 under Section 10(k) involving expressly the handling of
16 passenger baggage aboard a foreign crew ship, again on the
17 basis of industrial practice where this is longshore work and
18 is historically longshore work, awarded this work to the
19 employees represented by the Longshoremen's Union on the West
20 Coast.

21 Q You say line handling. Line handling is
22 traditionally longshore work?

23 A Yes, sir.

24 Q That just could not physically have been done
25 by members of the crew because they could not get back aboard.

1 A Certainly as a ship is coming in, unless they
2 are going to jump ashore before the lines are passed ashore,
3 that has to be shore based employees' work, and is, and was
4 performed here. I think this is actually where they are wrong.
5 It was performed by shore based terminal labor. Actually
6 there is another record in another case which so indicates on
7 these vessels. That is why we say, yes, granted the facts
8 as they say, they are still wrong, but the facts are not as
9 they say. We would say, your Honor, that if there is any real
10 issue as to whether or not this work was admittedly performed
11 as longshore work, that is for the Labor Board to determine,
12 just as the Labor Board must determine threshold jurisdictional
13 questions, such as the status of employees as supervisors or
14 "employees" within the meaning of the Act, whether an
15 organization is a labor organization within the meaning of the
16 Act. Otherwise, you have opened up the possibility of a state
17 court, perhaps a hostile state court fashioning its findings
18 in such a way as to exclude from the National Labor Relations
19 Board that jurisdiction which Congress intended it to have.

20 Q The mere claim, however, does not take
21 jurisdiction away from the courts, does it? That would violate
22 everything that the Inces case and its companions stand for,
23 which is that the Labor Board does not have any jurisdiction
24 whatever over the seagoing crew of foreign flag ships, so far
25 as they are the crew of the ships. The mere claim that they

1 are doing some sort of work that somewhere in the United
2 States is done by somebody else except for the crews of ships
3 does not take all of the jurisdiction away from the courts, I
4 should suppose.

5 A Of course, then you get to the question of who
6 decides it. If the claim is well founded, you are starting off
7 with the claim, and somebody has got to make a claim first in
8 some form before there can be proof adduced. Let us assume
9 the claim is made that this crew is going inland several miles
10 and picking up ship's supplies out of a warehouse and doing
11 work there, and that has created a jurisdictional dispute, a
12 labor dispute, because this is traditionally Teamster work
13 under the Teamster's contract for that very establishment, and
14 there is a dispute that arises. A claim is made. I would
15 have to say, your Honor, that I would think that would be for
16 the Labor Board to determine in the first instance. I suppose
17 you can get frivolous claims, but I do not read the Court's
18 decisions in *Inces* and *Sociedad Nacional* to say that when
19 there is a dispute about the nature of the work, whether it is
20 seamen's work or otherwise, that is a dispute to be determined
21 judicially. I don't think those cases pose that question.

22 Q In other words, there was no such issue.

23 A That is right, your Honor, and I don't think
24 the question has reached the Court, but the answer is how I
25 would say it would be determined, which I emphasize is not

1 presented in this case.

2 Q What do you claim, that the crew was doing
3 longshoremen's work, or that some independent shore based crew-

4 A The record, your Honor, and I emphasize the
5 only record in this case of any evidence is the transcript of
6 the hearing on the application for a temporary restraining
7 order held three days after commencement of this action at
8 which the respondents here, as plaintiffs, introduced no
9 evidence whatsoever as to which there was a single witness on
10 this issue called by the union and the union's president, who
11 testified three things, in essence, and it really only takes
12 up two pages in the record; first, that the signs were protesting
13 or publicizing substandard wages; second, that the kind of work
14 which was involved which they were protesting was longshore
15 work, loading cargo, loading automobiles, ship's stores.

16 Q You claim that even if it was the ship based
17 crew that was doing this work, that there is preemption?

18 A Yes, your Honor, we do.

19 Q In spite of Inces and those cases?

20 A Yes, your Honor.

21 Q What about the third point?

22 A The third point he said was, he was asked who
23 was doing this now, and he said partly the crew and partly
24 American residents hired locally and specially for the occasion.

25 Now, the record does not disclose what combination

1 these two groups worked out in performing it, whether there
2 was any functional division, how many there were of one group
3 and how many of the other. Obviously we know from the nature
4 of the case that handling of ship's lines, shore based, had to
5 be done by employees other than the ship's crew. There is no
6 indication at all as to the functional commingling that was
7 involved there, but there is in the record without
8 contradiction that the two groups were involved.

9 The union throughout, of course, contended both that
10 the issues were preempted by the grant of exclusive jurisdiction
11 of the National Labor Relations Board, and that there were
12 abridgements involved in any attempt to enjoin the conduct of
13 the union's right under the 1st and 14th Amendments to
14 publicize its disputes. These issues were argued throughout.

15 After a temporary restraining order was issued on
16 the basis of the fact that this was work performed for a
17 foreign flag vessel, and after the trial court in the hearing
18 ruled that there was no abridgement of free speech because
19 this was violative of Florida law, albeit there was no
20 evidence or claim of violence or obstructionism, no attribution
21 in evidence or in the record at all of any particular objective
22 to the union's picketing, let alone any legal objective, no
23 indication by the Court as to what state rule of law,
24 statutory or judge-made, was violated by the objective or type
25 of picketing involved, merely the naked assertion that this

1 was in violation of state law, on the basis of this the Court
2 rejected the free speech argument, as well as the preemption
3 contention raised by the union, and issued the temporary
4 restraining order.

5 On interlocutory appeal raising the preemption
6 question, the District Court of Appeals affirmed, the
7 plaintiffs, respondents here, went back to the trial court,
8 moved for summary judgment without any affidavits, the union
9 opposed on the grounds there were factual issues to be
10 developed, I assume the factual issues that Justice Stewart
11 and Justice White have raised in the questioning here. The
12 trial judge granted the motion for summary judgment, again
13 granted a permanent injunction. That was affirmed by the
14 District Court of Appeals. We are here now on a record that
15 does not show a scintilla of evidence, not a line of testimony
16 by a single witness on behalf of plaintiffs, as to which a
17 permanent injunction is now outstanding against any area
18 standard picketing, any substandard wage picketing, on the
19 part of this union.

20 Q Do you challenge the injunction in its
21 entirety?

22 A No, your Honor. There are provisions of the
23 injunction that relate to so-called safety signs, which at the
24 time were also being displayed by the union. After the
25 hearings in the trial court, after the grant of the permanent

1 injunction, but before the appeal to the Florida Appellate
2 Courts, the union expressly abandoned its objections to that
3 portion of the injunction dealing with the safety signs,
4 because the Federal authorities had tightened the safety
5 regulations on foreign crew ships touching American ports as
6 well as domestic ships, and the union regarded this as a law
7 enforcement matter.

8 Q What paragraphs of the injunction then are
9 conceded to be valid?

10 A 1 and 2.

11 Q 1 and 2, and you challenge both 3 and 4?

12 A 4 as I read it, and there is some ambiguity,
13 but as I read the opinion of the District Court of Appeals,
14 I think the District Court of Appeals intended to annul
15 Paragraph 4 in its entirety, although that is not entirely
16 clear. So it is really Paragraph 3 of the numbered paragraphs
17 that is in issue.

18 Q What if Paragraph 4 was not annulled?

19 A A fortiori we would challenge that. That is
20 even broader than Paragraph 3. We would also challenge the
21 preliminary unnumbered paragraphs which appear to be
22 decretal in nature, although they don't appear to be enjoining
23 the union from any conduct. But it is primarily Paragraph 3
24 that is at issue.

25 On the preemption point, it is our contention

1 essentially that the considerations which led to this Court's
2 decision in the Seamen's cases have no bearing here. In those
3 cases, this Court was persuaded by not the possibility of a
4 conflict with foreign law, foreign regulations, international
5 treaties to which this nation was a party, but the inevitability
6 of such conflict. The relations between seamen and the ship
7 necessarily continue wherever the ship goes throughout the
8 high seas, and at any port of call, including ports in the
9 United States and ports in the nation of registry. There can
10 in the nature of the case be only a single set of laws
11 governing this unitary relationship, a single union representing
12 the crew -- you can't have separate unions depending on which
13 port the ship is in at any one moment -- et cetera, and for
14 these reasons there has developed the law of the flag and the
15 principle generally that as a pragmatic expedient that there
16 being one law that must predominate, the law of the flag will
17 be that law. It was this principle in effect that the Court
18 invoked in the Seamen's cases in saying that although the
19 language of the National Labor Relations Act may be sufficiently
20 broad to cover this type of dispute, absent any clearer
21 expression of Congressional intent, the Court would not assume
22 that Congress intended to vary so the general relations among
23 the nations.

24 Now, this just does not apply at all when there is
25 a longshore dispute, even if exclusively the ship's crew were

1 involved in performing the work.

2 Q Let me get it straight. I thought you said
3 a moment ago that this picketing, as far as the record shows
4 on the evidence, was directed at both the ship's crew and third
5 party longshoremen work, both.

6 A That is correct.

7 Q Then you don't agree, Mr. Waldman, or maybe I
8 misread you, with Footnote 6 in the Government's brief? The
9 Government's brief says, "Here, American longshoremen were
10 locally hired to do the longshore work, and the Union was
11 seeking to carry its dispute to them."

12 A That is correct partially. We were objecting
13 to whoever was performing the longshore work, and on this
14 record it was two classes of people. Insofar as this footnote
15 indicates that we were only or might have only been objecting
16 to the work --

17 Q You have probably already answered this, Mr.
18 Waldman, but let me ask it again. Even if the ship's crew
19 were the only ones doing this longshore work, you would still
20 be here, would you not?

21 A Absolutely.

22 Q All right.

23 Q Let us assume you are wrong on that, and it
24 was only the ship's crew, there is no preemption under Inces
25 in those cases. Assume that that is the law. Then what would

1 be the result if both the ship's crew and third parties are
2 being picketed?

3 A Then it should go to the National Labor
4 Relations Board to determine how the combined set of facts
5 and the considerations that apply to the combined set of facts
6 yield a result consonant with the terms of the Act and this
7 Court's decisions.

8 Q Well, Mr. Waldman, to that extent, then, you
9 do agree with this sentence in Footnote 6 of the Government's
10 brief? "Were there any risks of improperly involving the ship's
11 crew, that could be accomodated in the first instance by the
12 Board in any proceedings before it."

13 A Mr. Justice White has in his question assumed
14 I was wrong on my primary legal thesis.

15 Q I am, too, but I am talking about this mixture.

16 A If I make that same assumption, and the reason
17 I have to agree is I didn't know whether that assumption --

18 Q With that assumption, but a mixture.

19 A With that assumption, I would agree with
20 Footnote 6. Without that assumption, and on my argument as it
21 is, I disagree with Footnote 6 of the Board's brief. Perhaps
22 the Board was burned a little too much in Ingres and is
23 withdrawing more than it should. I would not say that this
24 should be a balancing of contacts in longshore disputes any
25 more than the Court felt contrary to the position expressed

1 both by the Department of Justice and the Board in Incre
2 that a balancing of contacts to some extent should apply in
3 the Seamen's case. I think the balancing of contacts, if we
4 are going to talk of that, should be performed by this Court
5 as it did in the Seamen's case, but with the opposite result.
6 We say the Labor Board does have jurisdiction. We would be
7 here complaining if they declined jurisdiction, whether the
8 work were performed by the ship's crew or by a mixed group.
9 This work has no extraterritorial consequences. The Board's
10 assumption of jurisdiction applies totally within American
11 territories. There is no indication in this record or in any
12 brief that any foreign nation has sought to regulate purely
13 longshore labor disputes in ports of another country. This
14 would be contrary not only to the international law, the law
15 of the flag, and its converse, the law of territorial
16 jurisdiction; it is contrary to industrial reality throughout
17 the world, because, and we emphasize this in our brief, the
18 longshoreman is not a uniquely American industrial creation.
19 We have not cut out or excised a portion of the normal
20 seaman's trade and given it to some other group of people.
21 The longshoremen and the seamen are functionally and
22 individually diverse in every country of the world, in every
23 major port of the world, so far as I know. We have cited
24 international conventions, international labor enactments,
25 which apply to the work of a longshoreman, the loading and

1 unloading of cargo. We cited domestic laws to the same effect.

2 We are dealing here with an American situation which
3 parallels the international situation, and in other countries
4 as well, they expect to and do regulate their longshore labor
5 disputes under their own laws, no matter who is performing the
6 work. That is precisely what we say should apply here.

7 May I just raise one other point in connection with
8 the record? This relates primarily to something Mr. Justice
9 White mentioned. In terms of the state of the record, I do
10 want to emphasize what we pointed out in our briefs, that the
11 District Court of Appeals in Florida seemed to view this case
12 somewhat as the Government's brief Footnote 6 does. It,
13 although affirming, describing the picketing as protesting
14 the employment of American residents. Perhaps I can say that
15 is more favorable to us than need be. I merely emphasize
16 that certainly the District Court of Appeals did not rest its
17 decision on the ground that this was the foreign crew
18 performing the work. They seem to exclude the foreign crew
19 as longshore labor, or entirely, in the District Court of
20 Appeals opinion. They rested exclusively on the fact that
21 this was a foreign flag vessel. So that we do not have a
22 case where the state courts contrary to the record adopted the
23 position urged by respondents. This is not one of those.

24 () It sounds like the factual matters are not
25 very well taken care of. If we happen to disagree with you

1 on what the result should be with respect to a ship's crew
2 doing longshoremen's work, wouldn't there have to be some
3 clarification of the facts?

4 A I would think, your Honor, there should still
5 be a reversal on the grounds that this record shows without
6 contradiction that this work was being performed at least in
7 part by American residents hired locally, in which case we
8 would urge that Footnote 6 of the Government brief correctly
9 sets forth the result, namely, that the NLRB still has
10 jurisdiction in the first instance to consider that. This is
11 not a case where the record facts are in contradiction. They
12 are very clear as to what they show. Respondents may disagree,
13 but respondents did not bring that disagreement to the trial
14 court or to any other Florida state court in the form of
15 evidence or the like.

16 Q One problem about the Government's brief is,
17 in its stating the facts in Footnote 6 as it does, it was filed
18 a good many days before the respondent's brief, and the
19 Government was not aware of the claims that the respondent was
20 going to make in its brief about that.

21 A That is correct, your Honor.

22 I just want to emphasize what I said earlier. If one
23 were to immunize the work performed by the ship's crew from
24 Labor Board jurisdiction when that work is not seamen's work,
25 when that work is performed within American territorial confines

1 exclusively, when that work is performed on shore, then I
2 think a Pandora's Box has been opened. The ship's crew of
3 foreign flag vessels are traditionally paid well below
4 American standards. Their conditions generally are well below
5 American standards, and there would be no problem at all in
6 the ship when in port assigning its crew to do terminal work,
7 to do not only the loading and unloading of the ship, but to
8 do the loading and unloading of the trucks bringing in cargo,
9 or taking cargo away, to do ship repair work in drydock, and
10 as I say, even to go inland and pick up supplies. To me, at
11 least, it would be unthinkable that given a statute which is
12 expressly designed to eliminate or minimize disruptive
13 industrial disputes, and to secure uniformity, that the
14 National Board would be powerless to step into the kind of
15 labor disputes that would inevitably ensue in that kind of
16 a situation. We just think it is perfectly clear that the
17 Board has and must have jurisdiction.

18 If I may just very briefly touch on the free speech
19 point, this Court has held that in applying the constitutional
20 protection of free speech to picketing that picketing is free
21 speech plus, and therefore one must balance the union's rights
22 to express and publicize its disputes and the state's rights
23 to control the plus element. But in doing that, this Court
24 has set forth certain conditions. It has circumscribed the
25 states because there are constitutional considerations.

1 First, the state must define the unlawful objective.
2 Second, the evidence must be federally reviewable, and must
3 support the conclusion that there has been this unlawful
4 objective. Third, the unlawful objective must pass federal
5 constitutional muster. For example, the states may not
6 demand contract privity as a necessary condition of picketing.
7 That is an archaic, economically unrealistic limitation of the
8 boundaries of a labor dispute, and this Court has so held for
9 thirty years.

10 Here there is no evidence, there is no state
11 articulation of the unlawful objective, there is no state
12 finding or conclusion or expression in any opinion as to what
13 objective they do think the union had, and there is no
14 indication what particular rule of law the union is supposed
15 to have violated. There is no opportunity in this Court or
16 any court to pass upon the state's standards, because they are
17 never expressed. We think this record fails so abysmally to
18 meet the standards that the Court has set in the picketing
19 cases, it almost reaches the due process point of the kind
20 expressed in Thompson against Louisville, Gregory against
21 Chicago, and similar cases.

22 Unless there are further questions, if I have time,
23 I would like to reserve it. Thank you.

24 MR. CHIEF JUSTICE BURGER: Very well, Mr. Waldman.
25 Thank you.

1 Mr. Leslie, you may proceed whenever you are ready.

2 ARGUMENT OF RICHARD M. LESLIE, ESQ.

3 ON BEHALF OF RESPONDENTS

4 MR. LESLIE: Mr. Chief Justice, Honorable Justices,
5 may it please the Court:

6 There is no longshore in here. There is no cargo
7 here. There was not in 1966. There is not in 1970. And if
8 there was cargo here, if there were cars here, we would have
9 a different case. In fact, we might even go so far as to say
10 maybe the injunction should be dissolved unless you want to
11 increase Incres. These are not the facts before this Court.

12 Q Where are the facts?

13 A That is what I wanted to point out, Mr.
14 Justice. Since I have had the privilege to represent this
15 client since the first day, which was the 23rd of May, 1966,
16 the original verified complaint, I feel it is my obligation
17 to this Court to state all of the facts and circumstances to
18 avoid any risk that this Court could be misled into a ruling
19 on the basis of inaccurate facts.

20 Q Of course, we are confined to the facts of
21 record, and what we may judicially know, which is not very much
22 in this case.

23 A Let me start with Tim Kane's deposition.
24 This is record page 53-54. Tim Kane is a vice president of
25 Eastern Steamship Line. This is in this case before you. It

1 is Mr. Gopman, who has been the union attorney all of the way
2 through, asking about the loading and unloading. He says
3 in the middle of the page about the ship's crew of the Bahama
4 Star: "What else do they do?"

5 Q Excuse me, counsel. Are you in the appendix
6 on page 53?

7 A No, no, I am in the record on page 53-54.
8 Inadvertently, and I can't understand this, but inadvertently
9 the deposition was left out of the appendix, this whole
10 deposition testimony, although you will find it related in
11 the record. The entire 35 pages of questions by Mr. Gopman
12 of Mr. Kane have been left out of the appendix, but they are
13 in the record. Let me read you from that, because this is
14 extraordinarily --

15 Q That is not a printed record, is it?

16 A In the printed record before this Court, yes,
17 your Honor.

18 Q But not in the appendix.

19 A It is not in the appendix. I did not realize
20 that until I got before you today that that somehow was
21 omitted. It must just have been an error on my part, because
22 I did not put together --

23 Q It is up to the parties to get into the
24 appendix what they want to bring to the attention of the Court.

25 A That is right, your Honor, but I understand

1 Mr. Justice Stewart, according to the rules, that it is still
2 before the Court, even if not put in the appendix. I believe
3 it is Rule 17.

4 Q It is lodged with the Court, and I have not
5 got the rules before me, but as I have them in mind and
6 recollect them, those rules make it incumbent upon the parties
7 to put into this printed appendix such parts of the record that
8 the parties want to bring before the Court.

9 A Respectfully, your Honor, I checked that rule,
10 because I saw this was not here, and the Rule 17, on page 15
11 of the Supreme Court Rules, says that everything in the record
12 is before this Court. But that is why I want to tell you what
13 the facts are, because this has been found three times as to
14 this no cargo, no cars, and therefore no longshoring.

15 Q In doing so, you may represent properly only
16 matters which are in the record itself.

17 A Surely, your Honor. That is why I put the
18 record pages 53 and 54, which are pages 28 and 29 of the
19 original transcript, which I happen to be reading from, and
20 unfortunately not in the appendix.

21 Q But is that before us?

22 A Yes, it is, your Honor, because it is in the
23 record of this case.

24 Q It is in the record on this case?

25 A Yes, your Honor.

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Q And that record is on file but is not printed?

A That part unfortunately was not printed with the appendix. It is on file but not printed with the appendix.

Mr. Gopman asked exactly what the crews do, and they went on and said about the passenger baggage, told about that area, and the record, page 54, page 29, he asked what else the ship's crew does. They say, "Some are employed to load stores." He said, "Does that include food?" He said, "Yes."

Q. Is that all, sir?

A. That is all."

That is the point we are trying to make, because Mr. Gopman, the union attorney, knew this very well, because this is on this record on the 16th of August 1966. You will recall this case started with our injunction in May of 1966. But even before that, there was a case called Eastern vs. Longshoremen, the same ships, the same facts.

Q The loading of stores, food, alcoholic beverages, all types of food and beverages, supplies of all natures. This is your record on page 53.

A Right.

Q Is that true?

A That is true. The ship's crew does that. They take aboard the provisions of the ship. There is no doubt about it. And they also handle the baggage. There is

1 no doubt about that. But that is why I am pointing out on
2 these three different occasions, not only this time, but three
3 days before this Court in Eastern, and that is why I put that
4 in my brief, because it was laid out so clearly there, in
5 there when Mr. Gopman asked the question about cargo, he was
6 told by this same man, again under oath, no cargo at all.
7 Mr. Gopman asked "No cargo at all?" The answer was no.

8 "Q. On either vessel?

9 "A. Either vessel.

10 "Q. Do you load or ship automobiles?

11 "A. No, sir, not any more. I haven't done it for a
12 long time.

13 "Q. You used to?

14 "A. Don't take cars either way."

15 Now, there was a third time that Mr. Gopman, and I
16 won't bore the Court with the details, but there was a third
17 time when this man was under deposition again. That was June
18 1966, May, June and August, and he was asked again about cargo,
19 and again there was nothing there.

20 Q Is there uncontradicted testimony that there
21 were American longshoremen connected with this operation?

22 A No, sir, and I would like to read that testimony
23 because I think that is very important. In the transcript
24 of the hearing, and this is 44-A of the appendix, it starts
25 with Cleveland Turner being sworn. Apparently this is somewhat

1 of an omission here, too, because the first thing that Mr.
2 Gopman asked was permission to proffer this testimony.

3 Q What is that page of the appendix again?

4 A Page 44. Let me give you one further fact on
5 this that is going to be helpful in your understanding of
6 what this testimony is. There were at that time two ships
7 involved, the Bahama Star, which sailed out of Miami, which is
8 Dade County, Florida, and the Ariadne, which is what is before
9 you now. The Bahama Star no longer operates. It is not owned
10 by this company. It is not even here. The Ariadne operates
11 out of Fort Lauderdale, Broward County, Fort Everglades, 25
12 miles apart. I point that out because when you see what this
13 Mr. Turner, who newly took over this union, apparently he
14 succeeded a Judge Henderson, you will see that his testimony
15 is only as to Miami, and it is only as to the type of picketing.
16 He is asked at the bottom of page 44 specifically what type
17 of work were you interested in. He was not asked what work
18 was done on that ship. He was not asked whether there was
19 cargo or cars, but what type of work were you interested in,
20 and he says the loading of the ship, stowage, loading of
21 automobiles, loading of cargo, ship's stowage.

22 Q What about the question and answer at the top
23 of page 45?

24 A On page 45, he says, "Were these performed by
25 employees of the ship?" "A. Part of it by employees of the

1 ship and some of it by outside labor." These words "outside
2 labor" are the only words that give comfort to the union's
3 position.

4 Q That is pretty good comfort, isn't it?

5 A Let me answer that. That is why I pointed out
6 Fort Lauderdale and Miami. If you will notice, I only asked
7 him a few questions, because I saw he had his days mixed up.
8 I went down in here, and this is a question in the middle of
9 the page, and I said:

10 "That is the one you have been enjoined" --- meaning
11 enjoined in the other cases -- "I mean did you have a sign
12 saying the Ariadne paid substandard wages?" "Monday I didn't,
13 but I had on the ship Monday in Miami." He means the Bahama
14 Star. This is the first time we ever heard of wages. Our
15 complaint asked for an injunction as to safety. But even
16 there it shows that it is the Bahama Star in Miami, 25 miles
17 distant from Port Everglades and the Ariadne. As far as we
18 know, there was never a sign up there.

19 But what we are trying to say is this outside labor
20 is not the fact in this case, and I would go so far as to say
21 if there is a question of outside labor, if you think that we
22 hire people to do it, and that is why I said since I have been
23 in it since 1966, I have to bring the true facts to you at the
24 risk of going outside the record, of course with your
25 permission.

1 Q If you go outside the record, I remind you
2 again it must be within the four corners of this transcript
3 or else we don't want you to go outside the record.

4 A Mr. Justice, what I mean is if you think there
5 is outside labor here, we would ask that the case be remanded
6 for further testimony. There is not outside labor here.

7 Q You mean in connection with the Ariadne.

8 A In connection with either ship.

9 Q There is the testimony, "outside labor", and
10 I did not see that you put on any testimony to contradict
11 that testimony.

12 A Frankly, your Honor, we did not, because it has
13 never been raised until we came up here, because there was
14 never any question in the counsel's mind who was in Miami.

15 Q What did the state court say?

16 A That is why I would like to go further with
17 the sequence, so you see what happened in this case. After we
18 got a temporary injunction, which of course is a fairly quick
19 proceeding, then, and this is a verified complaint, your Honor,
20 it was not as if there was no evidence before the Court, and
21 the answer which came a few weeks later, well after the order
22 was entered, was not verified. It was just a denial. But
23 when it went to the Appellate Court, the Appellate Court of
24 Florida on the basis of these same facts that there was no
25 outside labor, and this is what we have argued all of the way

1 through --

2 Q Where did the state court say there was no
3 outside labor?

4 A I could not pull it out of the decision.
5 That is my understanding from arguing the case that they
6 accepted our position. I can't point to a word in there where
7 they said there is no outside labor involved. I did not mean
8 to say that, if I did.

9 But then this case came back again, and it came back
10 again under our summary judgment procedure when we asked for
11 a temporary injunction. We asked for a temporary injunction
12 in May of 1966, and then a permanent injunction on March 31,
13 1967, nine months later. Under our procedure we have to
14 allow a minimum of twenty days for hearings. We have to allow
15 the other side to put in affidavits. If there was any cargo,
16 if there were any automobiles, if there was any outside labor,
17 certainly the side that had lost, the union, would bring
18 this in, but there were no further facts because these have
19 never been argued, because at that time we were only talking
20 safety. If you notice the handbilling in there, that is as
21 to safety. Wages never came up until a cold record was read.
22 That is why I said I felt it my obligation, since I had
23 started this case in 1966, to try and tell you all of the facts.

24 Now, this is March 31, 1967. The order for a
25 permanent injunction is not until May 1, 1967, almost eleven

1 months.

2 Q I did not get that. You are interested in
3 telling us all of the facts of record, pointing out all of the
4 facts of record, and you referred to pages in the original
5 record showing that there was no outside labor involved. I am
6 afraid I did not get those pages. I have the original record
7 here in front of me now and I would be interested in getting
8 that.

9 A No, your Honor, what I said, or what I meant
10 to say, if I did not express myself clearly, was that this was
11 the only testimony as to outside labor. This gentleman, Mr.
12 Turner, said "outside labor", those words.

13 Q What was the only testimony?

14 A That was the only --

15 Q What was? Where does it appear?

16 A It is his testimony, your Honor.

17 Q Where can I find it, which you say is the only
18 testimony as to outside labor?

19 A His testimony is in the appendix on page 45,
20 where he says, "some of it by outside labor".

21 Q I have seen that. That is not my question at
22 all. My question is this. You began early in your argument
23 by telling us that the record, the original record, and here
24 it is, shows that in fact there was no outside labor, and I
25 simply did not get the pages of the original record to which

1 you referred us. I am interested in getting that now.

2 A No, sir, I meant to say there was no cargo,
3 there were no cars. I took that on the original record from
4 what I have as page 28 and 29, which is the record page 53 and
5 54.

6 Q Well, now, which is it?

7 A Both of those pages. Those are the two pages
8 that they talk about.

9 Q Pages 28 and 29, and pages 53 and 54.

10 A That is right.

11 Q Now, the pagination I have --

12 A Pages 28 and 29 of the original deposition.
13 That is the record pages 53 and 54.

14 Q So you are referring me to the same thing,
15 28 and 29 are the same thing that I can find on pages 53 and 54.

16 A Yes, sir.

17 Q It is 28 and 29 of the original deposition,
18 which is 53 and 54 of the original record.

19 A That is right, which I just respectfully can't
20 explain why it is not in the appendix.

21 Q I have it here. I just wanted to get the pages
22 that is all.

23 A Our point is since we had this all of the way
24 through, three times there were no cars, no cargo, there is no
25 longshoring. There is no one to hire, and what is before this

1 Court is basically the case as it was before Ingres. I
2 would like to go down some more of the factual part.

3 Q What about all of the machinery on the dock
4 and a man to handle it? He was dockside, wasn't he?

5 A Your Honor, there is no machinery on the dock.
6 There are no men to handle it.

7 Q I read in this record here that there was a
8 man that was hired specifically to make sure that the machinery,
9 the belts and all, did not break down. Am I wrong?

10 A Respectfully, I don't know where that is. I
11 know of no such machinery.

12 Q I am sure if my Brother Stewart gets away with
13 it, I will help you.

14 A There are no hoists. There are no cranes.
15 There are no cargo hatches. These are three and four day
16 cruises to Nassau and sometimes a week cruise to the various
17 ports there. But what I wanted to show again about the time
18 sequence was the injunction made in 1966. The summary
19 judgment asking for a permanent injunction in 1967, eleven
20 months later, when he grants this, when Judge Lee grants this
21 May 1, 1967, then the union has ten days to ask for a rehearing
22 They did this. That is May 9, 1967. It went all the way until
23 September 1967, sixteen months later, before the rehearing was
24 denied. Again no affidavit by the union, no fact, no fact of
25 cars, cargo, outside labor. What we are saying is the only

1 words inhere that this case could be reversed on, respectfully,
2 are Cleveland Turner's words on page 45, "Some of it by
3 outside labor". He did not say American residents. He did not
4 say union. He did not say non-union. He said outside labor.
5 All the way to here in four years there has been no contention
6 of this, because those are not the facts, and that is why I
7 went so far in the opening statement to say if you had any
8 idea these were the facts, remand this case for testimony. I
9 will even go so far as to say if we have carried a car in four
10 years, dissolve the injunction as to cars. If we have carried
11 cargo. It does not happen. We are talking about fifteen
12 room stewards on the Ariadne. These people stay with the
13 passengers throughout the trip.

14 Q Are any of them residents of the United States?

15 A They are all foreign crew members.

16 Q They are all foreigners. Do any of them
17 reside in this country?

18 A None of the room stewards, and I cannot relate
19 every crew member. Some of the other crew members might. It
20 is nowhere in the record. It is only that they are a totally
21 foreign crew.

22 Q None of them are citizens here.

23 A I don't think so, but I hesitate on that,
24 because that has never been raised, because they were under
25 the Liberian articles and they were signed as foreign crewmen,

1 and they worked as foreign crewmen.

2 Q The opinion of the Florida District Court of
3 Appeals says that the facts tended to show the following,
4 that the union was attempting to inform the public that the
5 American residents who were working on the cruise ships were
6 being paid substandard wages. I take it they are referring
7 not to the room stewards or anybody, but I take it they are
8 referring to some American residents who were doing longshoreman
9 work.

10 A All I can say is they adopted the union
11 position, and they adopted the words "American residents".
12 You will never see the words "American residents" in this
13 transcript or in the record anywhere.

14 Q But here is the Florida Court and they say
15 we have looked at the testimony, and the testimony tends to
16 show the following, that there were American residents working
17 on the cruise ships.

18 A We could never explain that. All I can say is
19 they said those words. It is not in the record. Their
20 decision, which has been all of the way through five courts
21 now --

22 Q I take it, though, that they could not have
23 been suggesting that part of the crew or that some members of
24 the crew were American residents, because you deny it.

25 A If they were, they were guessing. All I

1 checked so I could represent this to you, because it is not in
2 the record, was these 15 room stewards. They are foreign. I
3 did not check every one of the I think it is 180 crew members
4 to see if they are foreign. They all were hired foreign as
5 foreign crew members. They are all under foreign articles.

6 Q Mr. Leslie, if you will look at 52-A, which I
7 believe is that Mr. Justice White is looking at, the Florida
8 Court did not say that there was any evidence of American
9 residents. They said the union was attempting to inform the
10 public that there were American residents involved. It is not
11 a suggestion of fact, but merely a statement of what the union
12 was claiming to be the fact to justify its picketing.

13 A Apparently the union has said that, your Honor.
14 We find it nowhere in the record. We don't think it is factual.
15 It is just as the union has said throughout, that there were
16 American longshoremen, but those words were never in the record.
17 They rely on the two words, "outside labor", by Cleveland
18 Turner, who we say is mistaken. We are saying that the judge
19 on a verified complaint said this was a passenger ship, and on
20 the testimony of the deposition of Tim Kane that all the crew
21 was doing was baggage and ship's stores, that this is enough
22 to sustain our position.

23 Q Who handles the lines on the dock for the ship?

24 A That was interesting, Mr. Justice, when you ask
25 that, because there has never been any handling lines in the

1 case. I have no idea. I agree with you, somebody would have
2 to do it from there. But my note on when you asked that
3 question before, and when opposing counsel replied, is that
4 there is no handling of lines. I don't know. I am sure lines
5 are thrown off. If they are thrown off to longshoremen, I
6 don't know. It has certainly never been in our case. As a
7 matter of fact, right before that, as long as I am addressing
8 this to your Honor, you hit what we thought was the point of
9 our case exactly, that here as in Ingres you have a foreign
10 crew doing acts, and there never has been any doubt of that.
11 The only acts they are doing that could be in contention are
12 the 50 feet that they move the baggage from the customs area
13 to the gangway. Everything else is aboard ship.

14 Q With respect to this question I just asked you,
15 it could not possibly be aboard ship, because if you are aboard
16 ship you can't be on the dock, and somebody has to be on the
17 dock to handle the lines.

18 A That has never come up in this case. I agree
19 there must be somebody on the dock. I don't see how they
20 could be ship's crew. Theoretically they could, because we
21 have a little pilot boat and they could go in that way.

22 Q That would be a very rinkydink operation to do
23 that.

24 A Yes. I don't think it is possible. I think
25 it would have to be some way other than the ship's crew.

1 Q I don't know that it is relevant, Mr. Leslie,
2 but it is not unknown for a ship considering itself in a
3 hostile port to send a line crew ashore by a tender. I don't
4 suppose we can speculate on that here.

5 A No, that was my point, respectfully, Mr.
6 Justice, that we can't speculate on that, but this is not a
7 hostile port. This is work that has always been done by these
8 people. I heard the comments of counsel about what happened in
9 Europe and other places. It does not happen here, and that is
10 why I want to tell this Court what these room stewards do.
11 When someone comes to the ship, they buy a ticket and they
12 are at a dock there. They have hand baggage. They don't have
13 steamer trunks. They are not going to Europe. This room
14 steward comes down, asks them what room they are in, and he
15 carries their bags the 50 feet -- it is in this record that
16 Tim Kanet testified to -- the 50 feet from the customs area to
17 the gangway, up the gangway and into their room. This same room
18 steward is with these people throughout the trip. He moves
19 the bags when they get ready to get off, whether it is in
20 Nassau or a foreign port to the rail and down the gangway, and
21 then maybe 50 feet into the customs area. Nobody else goes
22 into the customs area. There just is not any longshoring in
23 this case. I have heard longshoring out my ears, and there
24 is not any longshoring. There are not any cargo carriers.
25 There are not any longshoremen employed. I don't mean to make

1 that point so strongly.

2 I would like to go down some of the points that were
3 raised in opposing counsel's argument.

4 When Mr. Chief Justice Burger asked, he received
5 this comment from counsel. Foreign flag ships can bring their
6 own longshoremen and avoid the Board. Well, if he will agree
7 to that, heavens, we have not even done that --

8 Q Mr. Waldman did not agree with that. Mr.
9 Waldman said if you bring your own longshoremen, those longshore-
10 men are subject to the act.

11 A I misunderstood him, because that is even
12 further than we would go. We just have a crew that does one
13 thing. It takes orders from its foreign officers who tell it
14 its responsibilities, and unlike American crews, it works
15 probably a longer day.

16 Wages, I don't know whether these people get more or
17 less. The record is bare of this. The union never told you
18 about wages. They have never said that our people get more
19 or less. There are no facts like this before your Honors.
20 It is a guess, a conjecture. I conjecture we get more. I
21 don't know. If these were the facts, again in the 16 months
22 from the temporary injunction, which naturally is granted a
23 little bit in haste, in those 16 months, couldn't some of these
24 facts have been brought up? We suggest that the only reason
25 why this case is here is that a union says, "We have the title

1 of union and we want to organize people. Therefore, we will
2 try it on these ships, in spite of Benz, in spite of McCulloch,
3 Sociedad and in spite of Ingres. There is no use to argue to
4 your Honors what those cases held. I can see from your
5 questions that even at six years old they are vivid in your
6 minds. And under Ingres you can't do what they are doing, so
7 they try to get away from Ingres and say this is not a ship's
8 crew, this is longshoremen. Your questions pointed that out.
9 It is not longshoremen. It is the ship's crew.

10 Q Could I ask you one or two questions here to
11 see if I can get my mind clear? I don't quite understand the
12 difference between you. Suppose you are wrong, and the facts
13 which they say are true are true. Should you win or lose?

14 A No, if I am wrong on the facts, if there are
15 American residents doing longshore work, if it is not the crew,
16 then I have a good chance to lose. The only way I could win
17 then is for you people to say, as you said in Ingres, that it
18 is still basically a foreign crew. But that is why I do go so
19 far --

20 Q And then you say that you are right on the
21 facts, although they are not printed in this printed part.
22 Now, what do you ask us to do to find out who is right on the
23 facts? Is there any part of the record that is before us that
24 we can tell who is right on that?

25 A Mr. Justice, what I would say to that is, No. 1.

1 you take the verified complaint, which says passenger ships
2 and these three or four day trips, and nothing about cargo or
3 anything like that. Then you go to the deposition of Tim
4 Kane, which is not nearly as clear in this case.

5 Q What is that?

6 A That is the part that we had so much trouble
7 with the record.

8 Q That is the part that is typewritten here
9 before us.

10 A That is right, pages 53 and 54 of the record.

11 The reason why I quoted the other two times --

12 Q Is that the part that you are relying on, 53
13 and 54?

14 A Yes, your Honor.

15 Q Does that show all that you claim it shows, and
16 can we look at pages 53 and 54 and decide this disputed question
17 between you?

18 A Not as clearly as if when you read 53 and 54,
19 you looked at the other two depositions of Tim Kane under oath
20 by Mr. Gopman, where he sets his questions out a little better.
21 You see, that is why we pointed out to this Court --

22 Q You claim that shows what? Don't go so quite
23 so fast.

24 A That shows that there was no cargo, that there
25 were no automobiles, that the ship had not carried these, and

1 therefore there could be no longshoring work.

2 Q That is the crucial point, in your judgment,
3 in this case.

4 A Yes, Mr. Justice.

5 Q As to which side we should decide for.

6 A That is right. We would ask that if you did
7 not affirm this case that you remand it for that testimony.

8 Q Why would we need the testimony? You say it
9 is, on these pages.

10 A Because the clearest testimony is the Eastern
11 Steamship Lines against this union. You see, these people
12 took their signs --

13 Q That is another case.

14 A Yes, your Honor, but it has been considered
15 by each of the Courts along as a companion case, and Judge Lee,
16 when he decided this case, was aware of the Eastern case and
17 stated that he was aware of it. Of course, it is in the same
18 Circuit Court in Dade County in the same Courthouse. It is a
19 public record, and we would say judicial notice. I can't
20 express this strongly enough. The signs started out saying
21 Eastern safety conditions. They pasted over the signs and put
22 the word "Ariadne", and put the words "Bahama Star". They
23 did not even change their signs. They were not aware of Inces
24 They were not aware of the foreign flag cases. They said they
25 just had the wrong defendant when they had Eastern. That is

1 the ship's agent. You would think Eastern owned the ships
2 probably if you just looked at the sales brochure. It says
3 they are general agents. That is why I am trying to show you
4 that the sequence of this over these four years, because the
5 facts are so clear, and the record only has these little bitty
6 parts, the outside labor contention that the union relies on, and
7 out of two pages of deposition in our verified complaint.

8 Q Is there any other part of the record which
9 we could ask the court below to send to us that would
10 absolutely settle this dispute between you two?

11 A The other two depositions which I have in my
12 brief taken by the same attorney, Mr. Gopman, for the union
13 of the same man, Mr. Tim Kane, and that is the part I read,
14 "No cargo?" "None at all." "No cars?" "None at all."

15 Without cars and cargo you have no longshoring work.

16 Q Yes, I have heard that.

17 A Mr. Justice White asked in spite of Inces if
18 the crew did this, could that get around Inces. That is my
19 point exactly. The crew is doing this. You said in Inces,
20 foreign flag ships, foreign crews, that is a little area that
21 has been carved away. That is taken out of preemption. That
22 is exactly our position. I can't even say it as well.

23 Also Footnote 6 of the Government's brief, we did not
24 have the Government's brief when we wrote our brief, and
25 consequently I wrote to the Government and said, "Heavens,

1 how can you write this kind of brief?" I was fortunate in
2 getting back two letters from the Solicitor General, Mr.
3 Griswold, saying if under Footnote 6 it was the crew, then
4 there might be a different result, and he put it very, very
5 clearly.

6 Q Is that in the record?

7 A The two letters?

8 Q Is that in either the appendix or this
9 typewritten record, or is it in this Courtroom at all?

10 A No, your Honor. The first one is dated
11 December 30, 1969. The second one was sent up to me when I
12 got here, and was dated January 1, 1969. The last sentence
13 says, "We have made it clear in Footnote 6 of our brief that
14 if the facts are as you have stated them, the result might
15 have been different." That is the point that your Honors
16 brought up on Footnote 6. We say that is the case, and we say
17 it has been through five courts, a judge for temporary
18 injunction, an appeal, back to that same judge 12 to 16 months
19 later, another appeal. If the facts were different, and I was
20 on the losing side, certainly I would have brought in those
21 facts, but they are not, so that is why I said to begin with,
22 I did not want this Court to possibly be misled because it is
23 not as clear a record as it could be. It never is in a temporary
24 injunction.

25 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Leslie.

1 You have one minute, Mr. Waldman.

2 REBUTTAL ARGUMENT OF SEYMOUR M. WALDMAN, ESQ.

3 ON BEHALF OF PETITIONER

4 MR. WALDMAN: I can't say too much in a minute, but
5 may I just make these brief points.

6 Mr. Justice Marshall and Mr. Justice Stewart asked
7 the question about handling of lines. Mr. Leslie's memory
8 failed him, because in the deposition of Mr. Kane, in the
9 Eastern case, not in this case, and I don't think it is
10 properly before the Court, but it is there on pages 12 and 13
11 of that deposition. Mr. Kane said the handling of lines is
12 done by shoreside employees, not by ship's crew, by a shore
13 gang. That is in the record of the Eastern case. But this
14 Kane deposition baffles me. This is a deposition taken in a
15 lawyer's office in another case that apparently somehow is
16 filed in this case. I can't see the slightest procedural
17 way that it ever came to the attention of the Court in this
18 case. I see no reference to it in any motion, proceeding,
19 order, statement by the Court, or by counsel. I don't think
20 the judge was ever aware of it. I don't see how any counsel
21 can argue to a court, let alone the Supreme Court, that facts
22 are established by a deposition taken in another case by a
23 lawyer in his office that never comes to the attention of the
24 Court. Your Honors, I won't trespass any longer.

25 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Waldman,

1 thank you, Mr. Leslie. The case is submitted.

2 (Whereupon at 2:30 p.m., the argument in the above-
3 entitled matter was concluded.)

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