Supreme Court of the United States

October [redacted] TERM, 1969

In the Matter of:

Docket No. 63

UNITED STATES,

Petitioner,

vs.

W. M. WEBB, INC., et al.

REspondents.

Place Washington, D. C.

Date Novvember 17, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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BENHAM

IN THE SUPREME COURT OF THE UNITED STATES

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vs

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Respondents

No. 63

Washington, D. C.
November 17, 1969

The above-entitled matter came on for argument at 10:14 o'clock a.m.

BEFORE:

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

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 63, the United States against Webb and others. Mr. Solicitor General.

ORAL ARGUMENT BY ERWIN N. GRISWOLD, U.S.

SOLICITOR GENERAL ON BEHALF OF PETITIONER

MR. GRISWOLD: Mr. Chief Justice, and may it please the Court: This is a Federal tax case involving the application of the Social Security Old Age Tax and the Federal Unemployment Tax to the owners of ships with respect to captains and crew members who fish off the South Atlantic Coast and the Gulf of Mexico for menhaden.

Menhaden are a frequently-encountered fish which is not regarded as edible by humans but which is caught in large quantities and processed into fish meal and fish oil which are used primarily for fertilizer or for feeding poultry and other livestock.

The case comes here on a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The statutory provisions involved are set forth in the Appendix to the Government's brief at Page 39 to 41.

Now, before stating the facts it will be helpful, I think to put the precise terms of the statute before the Court. The Old Age Tax is imposed by Section 3111 of the Internal Revenue Code and in terms equal to the following percentage of the wages paid by him with respect to employment.

And then in Section 3121 the term wages is defined. Now, wages means all remuneration for employment and then in 3121(d) is a definition of the term "employee" to include any individual who, under the usual common law rules applicable in determining the employer-employee relationship has the status of an employee.

In this setting out in our brief of the statutory provisions we omitted one at this point which may have some conceivable application. It is in Section 3121(d)4 and it provides that employment shall not include services performed by an individual on or in connection with a vessel not an American vessel or in connection with an aircraft, not an American aircraft, if (a) the individual is employed on and in connection with such vessel or aircraft when outside the United States, and (b) such individual is not a citizen of the United States or the employer is not an American employer. Now, that's an entirely exclusionary provision. It leaves only the inference that it was intended to apply to American citizens employed on American vessels by -- owned by American owners.

Q Mr. Solicitor General, did you say that is b-4 or d-4?

A That is D-4. 3121(d)-4, contains a negative pregnant that Americans employed on American-owned vessels are covered. I will say, as Mr. Lyman will remind you that that is still subject to the definition of employment or employee in

Section 3121(d).

Now, that's the Old Age Tax. There is also an Unemployment Insurance Tax. The Old Age Tax, you will recall, is imposed on both the employer and the employee, with the employer under obligation to withhold the employee's share and pay over the total to the Treasury.

The Unemployment Tax is imposed only on the employer. And there again, it is imposed at a percentage of the total wages paid by him during the calendar year with respect to employment. This appears on Page 40 in the Appendix to our brief. The term "wages" is defined to mean all remuneration for employment and again we have the term "employment" defined. And here in a somewhat more complicated manner. Employment is defined as any service performed -- any service of whatever nature performed after 1954 by an employee for the person employing him.

(b) on or in connection with an American vessel, and then you come to the end of that at the top of Page 41, except and this gets very involved, because this exception I am about to state is then subject to an exception itself. Except service performed by an individual in (as as an officer or member of the crew of a vessel while it is engaged in) the catghing, harvesting vultivating or farming of any kind of fish, shellfish, crustacea, and so on and here is the next exception:

Except(B) Service performed on or in connection with -

vessel of more than 10 tons. So, they take out all fishing, but then they except from that takeout service on vessels of more than 10 tons and all of the vessels involved in this case were of more than 10 tons, so that it comes within the exception to the exception and this is included in the definition of employment, but again, is subject to the provision in Section 3306(i) that, for purposes of this chapter, the term "employee" includes an officer of a corporation, but does not include any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or (2) any individual who is not an employee under such common-law rules.

Now, that is the statutory setup. It is part of a large whole, but one can focus rather closely on those two provisions: the one in the Old Age Tax and the one in the Unemployment Tax which -- by which Congress has emphasized that the test of employment is the common-law -- the usual common law rules applicable in determining the employer employee relationship.

Q Mr. Solicitor General, as I read this now, under your guidance, I gather that we come right down, with respect to both taxes, to the definition of employee in each case, don't we? In other words, this definition of employment under the second tax we really end up at the door by which we

entered. It doesn't add or subtract much of anything; is that right?

A I think that's exactly it, except that I would say that this definition comes as a piece of amosaic which also includes some references to fishing and ships and boats of more than ten tons and thus, it is perfectly plain that Congress did not intend to exclude employment on ships such as are involved in this case.

Q Right.

A But I fully agree that a large part of the problem before the Court is this application of this common-law test specified in the statute as to the facts of this case.

Q And the test of the definition of the word "employee."

A The determining of whether these people are employees.

Q Under 3121(d) and under 3301(i).

A Yes, Mr. Justice Stewart.

Q Now, this case was tried before the District Court without a jury and there was an extensive stipulation of facts and there were also depositions and evidence. On all of which the District Court made findings of fact and conclusions of law.

The underlying facts are essentially not in

dispute and they may be summarized as follows:

The fishing involved in this case was partly in the South Atlantic Coast and partly in the Gulf of Mexico. There are 14 Respondents in five cases which were consolidated in the Court below. Each owns one or more boats which fish for menhaden; their cost varying between $24,000 and $157,000.

In other words, the Respondents all had substantial capital vested in the enterprise. The Respondents sell the fish to processing plants. The Respondents who, not only own the boats and keep them fully-equipped, paid for all the repairs, and paid for insurance on the boats. They paid for fuel for the boats -- all of the fuel for the boats.

The method of operation was one which has an ancient history in the fishing business. It seems to go back three or four centuries, at least. It's called the lay system. There are some variations, but the owner of the boat, from people whom he knows, secures the services of an experienced fisherman as the captain of a vessel. He is selected because of his honesty and experience and his ability to enlist and organize and supervise a crew.

When the captain has been chosen he arranges a crew and here I would like to turn to some of the findings of the District Court so that there can be no suggestion that I am not representing the facts adequately. Finding 13 on Page 320 of the record. "The arrangements between the Plaintiffs and each

Captain was entirely oral; the term of the arrangement was not specified, but it was understood to persist for a fishing season; it could be terminated by either party voluntarily or involuntarily at the conclusion of any trip during the season." That seems to me to show a great potentiality for control by the boat-owners. "This could occur only when a boat was in port, and before another fishing trip was commenced. While the arrangement could be terminated, custom and practice was for it to be continued for the season.

Q I supposed, Mr. Solicitor General it could also be argued that that flexibility also gave the master quite a bit of control.

A Inevitably, Mr. Chief Justice, and that, I suppose, is inherent in the post of being the master of a vessel, while it is at sea.

Q Well, I was thinking in terms of his powers to terminate the contract at the end of any voyage.

A Yes, I suppose any employee ordinarily can quit at any reasonable time. That doesn't negative the fact that he is an employee.

Q Do I understand that the trips are just one-day trips?

A The trips are ordinarily one day in the Gul. They occasionally were longer in the South Atlantic, particularly in the winter. At this time there were not refrigerated

ships, although there are now and the controlling factorthe menhaden being quickly perishable,-- the controlling factor was the temperature. In the Gulf the temperature was high and the trips were one day. The evidence shows that in the South Atlantic they occasionally lasted three or four days. They were ordinarily short trips.

Now, I call attention to Finding 22 on Page 323. In negotiating for the service of a captain it was understood that the captain would select the crew members. Prior to the commencement of a new season the taxpayers, who are the boat-owners and respondents here, would furnish the captain with the pay-scale of crew members and the crew size to be employed for the season. If a bonus was to be paid for fishing the entire season, this information also was furnished the captain.

So, I point out that the owners here fixed the -- I can't quite say the rate of pay, because under the lay system the men are paid so much per thousand pounds of the catch, but they fix the rate per thousand pounds that the men were to be paid.

And then I call attention to Finding 24 on Page 324: "Defendant contends and the Plaintiff denied that the captain was required to pay a crew member not less than the scale established by the Plaintiff. The testimony of the various captains leave no doubt that the plaintiff not only fixed the pay scale of the crew, but also the number ofthe crewmen to be

hired."

And finally of the findings I would refer to Finding 46 on Page 333:

"The plaintiffs did have the right to control the results of the captain's work and interferered on the process to some degree to assure proper results from the undertakings."

Next I would like to point out that the evidence is clear that the captains were required to obtain from each crew man, the evidence says a W-2 form, but the W-2 form is the one by which you report to the individual at the end of the year what has been withheld. It's actually this familiar W-4 form which is the employee's withholding exemption certificate and then it was also a part of the procedure, duly established and carried out that the captains, at the end of each trip, turned in the data with respect to the crewmen, showing which crewman had served and what the amount of the catch had been and what the weight per thousand pounds was for each crewman and in our reply brief we have reproduced Exhibits 1 and 2 which were introduced into evidence in the Court below, and about which there is no controversy or dispute.

These show that for each individual what is headed at the top a payroll and they show the amount of fish caught, the rate for each man, the total payment, the Social Security Tax withheld, the Income Tax withheld, the amount deducted for each individual for his share of the cost of food because

the crewmen paid for the food; the amount deducted for advances which had previously been made; the other deductions which were, because as I understand it, the crewmen paid $5 each to provide the pay of [illegible] cook; the cook being thought of as providing their meals which were their responsibility.

Finally, the balance and then also at the bottom of the second sheet of Exhibit 1 are shown the other checks were were issued, which included $10 for the food. And these, according to the record, were all the shipowner's checks; the Respondents' checks here. They got all the money and they paid all the bills.

And finally, Exhibit 2 which is at the back shows the individual record which was kept for each member of the crew, again showing these deductions which are aggregated at the bottom of the page for the whole years, so that they could be duly reported to the individual on Form W-2, the amount of deductions for Social Security Tax, for income tax and for other matters.

Now, let me point out that this -- the fact that this case is here it seems to me to be an instance of the difficulty we sometimes get into in this country in administering relatively simple matters. It is nearly 30 years ago that the Treasury issued a ruling with respect to this situation saying that captains and crewmen operating under thellay system are employees and are subject to the Social Security tax.

This is SST, Social Security Tax, 387, which was published in the Accumulated Bulletin for 1940, Volume I, and is cited in our brief. "In addition, this Court has decided cases like the Silk case in 331 U.S., which involved another group of relatively simple workmen. They were coal unloaders there. They furnished their own picks and shovels. In this case the men furnished nothing except the foul weather gear, which would be boots and raincoats.

In the Silk case this Court reversed both of the Lower Courts and held that the coal unloaders were employees. In addition to the Silk case, there are, of course, many cases under the Fair Labor Standards Act and under the National Labor Relations Act.

Now, it will be said by Mr. Lyman that neither the Silk case nor SST 387 are relevant because they were both issued before Congress amended the statute in 1948 and it was in 1948 that Congress put in this language about the common law test to which Mr. Justice Stewart referred a while ago.

But, as is pointedout in our brief, at the time that Congress put this into the statute, the legislative history plainly showed that Congress was endorsing the Silk case. It referred to the -- on Page 15 of our brief is a quotation from the SEnate Report:

"In the view of your committee these decisions affirm that the usual common-law rules, realistically applied, must be

used to determine whether a person is an "employee" for purposes of applying the Social Security Act."

And in 1950, two years later, referring to the situation the Conference Report said: "A restricted view of the employer-employee relationship should not be taken in the administration of the Federal old-age and survivors insurance system in making coverage determinations."

So, I find nothing to indicate that the language of the statute put in in 1948 was intended to repeal or overrule the Silk case; nothing to indicate that the early administrative interpretation should not be followed.

I would point out that we are here dealing with a maritime employment; we are necessarily concerned with the customs of the sea and the law of the sea. Under the law of the sea it's perfectly plain that these captains and crew members would be entitled to maintenance and cure; would be entitled to protection under the Jones Act.

The proposition that captains and crews under the lay system are employees for purposes of the Social Security taxes and it has been accepted by the Court of Claims in two cases cited at Page 37 of our brief; and one involving fishing for scallops from New Bedford and the other involving fishing for shrimp and oysters from the Gulf of Mexico, and also by the Court of Appeals for the First Circuit, affirming pro curiam an opinion by Judge Genew in the District of Maine,

involving a fishing trawler operating out of Portland, Maine.

The only problem has been in the Fifth Circuit and there things got off to a bad start in Enochs against the Williams Packing and Navigation Company, cited on Page 37 of our brief. That was a suit to enjoin the collection of these taxes in circumstances essentially the same as those here. And both the District Court and the Court of Appeals in the Enochs case allowed the injunction. That involved, as far as both Courts were concerned, a determination that these people were not employees. When the case came here, this Court reversed holding that it was not appropriate to disregard the statue and ignore the restriction on injunctions against the collection of taxes, but that left standing the rest of the Fifth Circuit decision and then the Corporate Packing case cited on Page 37 and in this case the Court of Appeals has, understandably, continued to follow its decision in the Enochs case, otherwise repudiated by this Court that these people were not employees.

Now, even under the common-law test; even if it's given a narrow construction we contend that these captains and crewmen came within it. Here all of the capital came from shipowners; they owned the ships; they paid for their repairs and for their fuel; they paid for the nets, which cost some $10,000. All the men provided was their foul weather gear: boots and slickers and the like. They did not even provide

picks and shovels as in the Silk case. The rate of compensationof the captains and crews was fixed by the owners; the size of the crew was determined by the owners. The captains could change this, but only at the expense of themselves of all the crew. The owners were the entrepreneurs; they were in charge; they fixed the pay scale. The owners paid the bills. They were the only ones that had money in hand for the purpose. They took out insurance and took the gain if the price of fish went up, and took the risk for loss.

They were clearly in charge and that should be enough when the statute is realistically applied. Even under a strict view of the common-law test. And when this question arises in a maritime setting, as it does here, that conclusion becomes even more clear.

There are three ways, it seems to me, that this case can be decided: one is practical and workable, the others lead only to uncertainty and confusion.

First, the Court can hold that the captains and the crews were the employees of the owners, thus reversing the decision below. That's what the parties actually did here; that makes the Social Security System realistic and workable as applied to these workers who have no capital invested; no management in the enterprise. That puts the paperwork of withholding and tax-paying where it can practically be handled, asit was handled in this case.

Or second, the Court can hold that the captains and crews are not employees of the shipowners; that will eliminate withholding of income tax and the worker's share of Old Age Tax and it would eliminate payment of Old Age Tax and Unemployment Tax by the owners. Now, this can be said for it. That people would know where they stood. But it would mean that the captain and the crews would have to pay their income tax without withholding and would have to pay self-employment tax at an increased rate.

Q Is there any chance that the members of the crew would be employees of the captain?

A I suppose so; I don't know. Some suggestion -- Mr. Lyman suggests in his brief that they would be self-employed and pay their own tax, which seems to me to be quite unrealistic.

Q I should think if they are not employees of this Respondent, they would be employees of the captain, offhand.

A That could be, but that isn't the way the captain thinks of it.

Q He wouldn't like it, I suppose.

A He would have to maintain employment records and carry on relations with the union and things of that kind.

And finally, the question could be left for the decision of the tryer of the facts in each case. That is what

has happened so far in the Fifth Circuit. It happened, for example, in the Enochs case when it went to the District Court after this Court's decision that the collection of the tax could not be enjoined.

But that raised chaos. A jury verdict establishes no rule; it would not bind others, nor would it bind the same parties on slightly different facts. There have beennumerous jury verdicts on this question in the Fifth Circuit and they give no guidance to anyone. That approach makes it impossible for the Treasury to administer the statute in a fair and consistent manner and makes it equally impossible for boat-owners or captains or crew members to know what their responsibilities are.

There is no dispute as to the facts inthis case. Most of the facts were stipulated. There was evidence but there is no contradiction in the evidence. That we would have put some of the matters somewhat differently, the Government accepts the findings of fact made by theDistrict Court. Our position is that those findings lead, as a matter of law, to the conclusion that the captains and crews here are employees of the owners of the ships who provided the means and made the rules and took the money and paid the bills.

Accordingly, we urge that the judgment below should be reversed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor

General.

Mr. Lyman.

ORAL ARGUMENT OF JOSEPH J. LYMAN, ESQ.

ON BEHALF OF RESPONDENTS

MR. LYMAN: Mr. Chief Justice and may it please the Court: The Respondents say that the only question of substance here is whether the concurrent findings of fact in the District Court and the Court of Appeals below, are amply supported by the record; and whether those Courts applied the proper legal standards in reaching the conclusions of law.

Or, whether the findings and conclusions are clearly erroneous.

Now, these cases are suits for refund of Federal employment taxes erroneously paid on the earnings of certain fishermen who used and operated the Respondents' menhaden vessels.

Q Excuse me. Do you contend the conclusion of the finding of no employment relationship is a finding of fact, subject to the clearly erroneous rule, or a legal question?

A A mixed question of law and fact, I believe, Your Honor.

Q Well, what if it is; what about on review?

A Well, Your Honor, I would say that on review that where a statute would preclude the decision of the District Court, I would say that would be a question of law and reviewable

on appeal, where the statute would precluse the decision.

However, where fact elements are concerned, in this mixed question, reviewing courts are bound by the "clearly erroneous" ruling and a reviewing court will set aside a trial decision only when the facts found fall short of meeting the statutory requirements. I believe that was this Court's ruling in Trust of Bingham.

Q All that means is that the Court accepts the historical facts found unless they are clearly erroneous, but then it's a question of law as to whether they meet the standards.

A That's correct.

Q So there is no "clearly erroneous" rule in reviewing that conclusion from the facts.

A I don't see how it could be there, no.

Well, the simple issue before the District Court was whether the boatowners, and those are the respondents here, were liable for the excise tax portion of the employment taxes imposed on the earnings of the fishermen; and that's the captain and the crewmen.

The respondents' liability of nonliability for these taxes depended upon the definition of the term "employee." And that term is defined in two sections of the Internal Revenue Code; both of which adopt the common-law control test.

Now, the trial court held that the taxpayer owners

had proved their claims for refund and as a consequence, the fishermen were not their employees under those statutes. For other purposes they may have been, but under those statutes they weren't.

Not, the Trial Court resolved all issues under these statutes; all issues of fact in favor of the boatowners and particularly, those issues as to the absence of control over the manner and method in which the work is done.

Now, the Circuit Court refused to set aside the Trial Court's findings and conclusions since they were the result of a choice between two permissible views of the weight of the others, and held they were not clearly erroneous.

Now, the District Court made 51 separately-numbered detailed findings, and covering about 19 pages of this record. Briefly, I would say the needle points, as far as our presentation is concerned would be this:

The respondents were owners of menhaden boats. They equipped and maintained them, repair them for commercial fishing. They contracted with captains to gather the fish. Now, an owner would relinquish complete control of that boat to the captain; the captain would then staff it with his own crew; his own organization which consisted of mates, engineers, pilots, experienced net men and a cook; maybe two. The captain would then provision the boat at his own expense and in any way that he saw fit. And all this was without the interference by the

owner.

Q You mean by provision it, you mean groceries and foods?

A Yes, Your Honor.

Q And those were deducted from his share of the take?

A No, he paid thoseout of his own pocket.

Q Well, that's what I mean. But the -- if no fish were caught the captain was out the groceries?

A That's right; many times that's happened.

Q So, he took the risk of loss in this enterprise?

A Yes, Your Honor.

Q Only for the groceries?

A Groceries or -- that would be all.

Q Fuel and other things?

A No; those were all paid by the owners.

Q And also, I suppose if he -- well, the crew members were paid also only if fish were caught?

A That is correct.

Your Honor, just to clear that up; the crew members were paid out of the pocket of the captain.

Q He didn't owe them anything unless they caught some fish?

A That's correct.

I want to correct one -- I just want to give my view of

Mr. Griswold's statement that this is a "lay" system. This wasn't a lay system at all. This was a pure sail. In other words, when a fishboat came in and the captain came in with a large catch he sold that to the owner.

Q And then the owner sold to the plant.

A The owner of the plant had another arrangement of some kind. The plant was not a party to this suit. And it's important here that the plant was not a part in this suit, because in one of these findings which Mr. Griswold mentioned he said that respondents made up payroll records. That wasn't so. The plant made up these payroll records. The plant was in the middle, acting as agent, you might say, for the captain and also for the owners, because it was to the plant's interest to get as many of these people to bring fish in as possible.

Well, anyway, the captain agreed without a guarantee of any kind to make fishing trips for a season and return the catch to the plants with their own -- by parties who are not parties to this suit.

Now, the price that the owner paid to the captain was agreed upon between the owner and the captain. This was, if the Court please, a bilateral decision after negotiations. This wasn't something where he said, "I'm going to give you this much; and it's all you willget. This was a give-and-take proposition.

The prices differed with the seasons and they even

differed among owners and captains. But once a price was fixed for a season it remained that price during the season.

Now, there was nothing in the arrangements which indicated that a captain would be offered a boat beyond a single season. He would promise to fish a boat for anybody else beyond a single season. There was no continuity of relationship for anybody here in any meaningful sense.

Q Would there be promises to the fishermen by beyond a single voyage?

A Yes, I would say that it was contemplated here that they would take it for the season, which was about four or five months or six months, depending on where they were.

Q But terminable at will by either party?

A Yes, but as a practical matter, if the Court please, if the boat is equipped and ready to go and there are plenty of fish out there and the captain has his organization I cannot imagine that an owner would just willy-nilly fire a captain, and leave a profitable venture sitting at the dock. If anyone was going to quit it would be the captain.

Of course, if the fish disappeared or the captain fell ill, of course, that might end the voyage. But the owner, he hoped and prayed the captain would stay and that he had a good crew and that he wouldn't lose the crew.

Now, these captains were free to perform these services for any boat-owner at any time. There was no suggestion

that the owners had a preferred call on the time or efforts of these captains.

Now, the crew was hired and paid by the captain. Now, the compensation paid to the crew came solely out of the pocket of the captain. If there was a catch, Mr. Justice White, the proceeds of that sale became the captain's money. There is no lay system here. It was then divided among the crew in accordance with the prior arrangements with the captain and the crew. If there was no catch, as you say, then no one was paid.

Now, there was no evidence in this record of a union contract involved at all, or bargaining agents between the parties. Each captain dealt with each owner on an individual basis and each crewman dealt with each captain on an individual basis.

Q Who fixed the terms of the amount of money for the crew?

A Your Honor, the amount of money was issued in a pay scale by the owners. Now, the District Court said nothing more than that. But, I attribute that, Your Honor, to the owner's control over the results of this enterprise, because if somebody didn't do something to stabilize what these men would get in a plant area, there would be chaos. They would be raiding each other's crews right down at the dock. So -- and that has happened many times. So, to avoid that the captains actually, and the owners, would get together and they

may violate the anti-trust laws, but they would fix that price that these crews would get. And then once the crews were fixed -- I think there is a finding which states that the captain had discretion to vary that once he was out. But that was the purpose of that, Mr. Justice Marshall.

Q Who hires and who fires?

A Pardon?

Q The captain hires.

A The captain hires the crew entirely.

Q Can the owner fire them?

A No, Your Honor; absolutely not. That was specifically --

Q He can't fire any member of the crew?

A Well, the Court so found and it's never happened. I mean, the owner now, cannot fire any member of thecrew.

Q But he could fire the captain.

A Well, Your Honor, let's put it this way: When you say "fire," he could take his boat and say to tie it up or he could refuse to give him a boat the following season. Well, I would construe that to mean rather than firing him he just didn'twant to renew the contract at the beginning of another year.

Q Well, suppose he caught him stealing money during the year, would he get rid of him?

A Well, Your Honor, I would hope he would. And I

don't see how that would turn him into an employee.

Q Well, why would he be interested in whether he steals or not if he is an independent contractor?

A I'm afraid I don't follow that.

Q Well, you say he's completely independent of the owner; he pays and hires and fires; he pays them out of his own pocket.

A Yes, sir.

Q How could he steal from himself?

A I don't think he could but if he -- but if just a thief at heart and he stole something else, I imagine he'd get rid of him.

Q Oh, I see.

A It was open to the District Court here to hold for purposes of these two acts, that fishermen could very well have been employees of the owners. But it's obvious in the findings that the District Court had the common-law test clearly in mind.

For example: the Court found specifically that the taxpayer had no right to nor attempted to instruct a captain or a crew as to their fishing activity or how to accomplish it. Another specific finding: there was no express agreement specifying the extent of the taxpayer's control over the captain's activities.

Another: It was clear that no actual control was

exercised over the details of the manner and method employed by the captains and crews. One more: The taxpayers had a right to control the results and interfered to a degree only to assure proper results from the undertaking.

And then the taxpayer's had no control over the crewmen nor did they attempt to exercise it over the captains. Petitioner has ignored these findings, both in his brief and his oral argument.

Q Mr. Lyman, if it turns out that the standard should be the maritime standard and not the technical common-law standard; do you disagree with the conclusion of the Court of Appeals that on thatpremise the case would go against you?

A Well, the Court of Appeals did say that if the maritime --

Q Said that flatly; didn't they?

A Yes, that if the maritime standard were to be applied then they said, "We would have to reverse the decision."

Q So, really, what this case all boils down to in the last analysis is in what sense common law was used inthe stat .e; whether/a technical common law sense as distinquished from equity or admiralty law or whether common law in the sense of general principles as opposed to some free-wheeling operation by the administrative agency. Isn't that the case really is?

A Yes; I guess I would say that would be a fair statement, Your Honor.

So, in summary, the captains participated in bi-lateral decisions and negotiations and fixed the price and they exercised a high degree of independence in conducting their operations; they exercised initiative in decision-making authority.

Mr. Justice Harlan, you're absolutely correct in that respect because one of the points that Petitioner raises -- and Petitioner raises numerous points and we did our best to brief each one thoroughly. But we think two points raised in the main brief and one in the reply brief, suggest a discussion. is The first/in the evaluation of the relationship here, between the boat owner and the fishermen for these tax purposes what legal standard should be applied? The principles of general maritime law, as they contend, or the principles of the common law in the statute, as we contend.

The second point was: assuming that Petitioner's contention that this involves a mixed question of law and fact, would that circumstance call for a different result than that reached by the concurring decisions below.

Now, in the reply brief, if the Court please, there was a new point raised andit poses this question: is proof of filing an employment tax return and the payment of the tax a defense against a suit for its refund? Now, we didn't get a change to brief that for the Court because the reply brief was served on us, I think, only Thursday or Friday. I want to

discuss that briefly here if I may.

At page four through six, which is Point 3 of the reply brief, the Petitioner says that because the respondents filed employment taxes and paid the taxes and kept good records the respondents thought or believed that the captains and crewmen were their employees, and for that reason our suit for refund should be dismissed.

Well, if the belief is to be a criterion of employment status it's material only when one party believes that he has the right to control and direct the activities of another; and the other believes that he must submit to that control.

But I find it puzzling how filing a tax return can come to that same arrangement. Now, people pay taxes and file returns for many reasons and I dont think that they ponder a legal concept when they are about to do it.

Now, suppose that respondents here had made their own legal determination and decided that the fishermen were independent contractors and decided not to pay the taxes; what would have happened? Well, of course, a number of things would have happend, but experience in the fishing industry would show this: that the tax collector would file liens on the boats; attach whatever property at hand, including bank accounts; literally tie up your business.

This happened in Enochs versus Williams Packing Company, which came to this Court. It will be remembered that

Williams was a shrimp boat fleet operator. He had made a decision that these men were independent contractors and had for a long time. He didn't pay any tax and didn't file any returns. An assessment of about $50,000 was made; his boats were tied up. Williams went to the District Court and obtained an injunction against the collector. The Circuit Court affirmed with one dissent; it came here on the jurisdictional issue of enjoining the collection of taxes. The injunction was dissolved; it was remanded with directions to dismiss the complaint.

Thereafter Williams paid a small amount of that tax and not because he believed that these people were employees. He filed another suit in the District Court and the Government counterclaimed for $50,000 or whatever the assessment was. Williams prevailed and the Government's counter-claim was dismissed. And that's in Williams Packing versus U.S.; the number is 2631 in the Southern District of Mississippi. The judgment was filed February 8, 1964.

Now, the Government made this same contention without success in another employment tax case. This involved the employment status of certain mechanics and their helpers and they called them applicators. The Court's treatment, I think, is worthy of consideration here, since we didn't get an opportunity to brief it. Please permit me to read just a short paragraph:

The case is Rayhill versus the United States,

364 F 2d 356; and this will complete my analysis at this point. In that case it said: "There in the circumstances of this case can an intent to create an employer-employee relationship be inferred from the fact without more that plaintiff withheld from and paid appropriate Federal taxes on the earnings of the applicators.

"Failure to have made such withholdings and payments might have subjected it to assessments and penalties and possible criminal sanctions. Then, too, plaintiff could not have challenged the deficiency in the tax court or had a reasonable prospect of obtaining an injunction to restrain enforcement of the tax, citing Enochs versus Williams Packing."

One need not resort to Markendon to obtain a judicial determination of the issue here. To suggest to plaintiff he should not have paid the tax if it believes that the applicators were not common-law employees would be to approve snares and traps for the unwary. In addition, the payment of the tax was a jurisdictional prerequisite tothe filing of this suit. It would be an unusual law which first required the payment of the tax as a jurisdictional prerequisite fo the filing of the suit for its refund and then permit its payment to be a ground for its defense against the claim.

Before going into that maritime-oriented employee point, I would like to mention this: that the petition for the writ here indicated that the decision below will disrupt even

handling and administration of the Social Security Act, and would cause certain fishermen to lose Social Security enefits. We take exception to that in full. The Petitioner did not pursue that point, he only had his brief on the merits.

We think the contention raises important issues respecting the social and remedial aspects of the Social Security Act and should not be ignored simply because it was raised. Now, the decision below does not deprive these fishermen of these Social Security benefits.

In holding that these fishermen were not employees it follows as a consequence that they were self-employed or independent contractors, which Congress put into one group.

Q Well, why not employees of the captain?

A Your Honor, that issue is not before the Court.

Q I understand that. But why doasn't it follow inevitably, if they are self-employed; if they are not employees of these respondents?

A Well, in the posture of this case, Your Honor, we only have the tax refund of the employer -- of the respondents.

Q Yes.

A We don't have the situationof the captain having paid a tax on their earnings. However, going into that point, in the case of Joe Grasso and Sons, which is in our brief, this question came up some time ago when the Government tried to

make the captains liable for the taxes if the owners were not liable. It was held that being an independent action the third party complaint was dismissed; it didn't get to that point.

Also, the Court in Grasso, did say that it was quite possible that the relationship between the captains and the fishermen would not be that of employer-employee; you would have to test it against the statute first.

As a matter of fact, the Department of Justice, in an anti-trust case was quite successful inprosecuting members of the fish industry in Local 36 of the International Fisherman's and Allied Workers Union versus U. S. 177 F 2d 320, which is cited in Grasso. And there it was found that the captains and the crewmen were joint venturers.

In that case the government needed proof of joint venture, rather than employer-employee for the success of their prosecution. And even though Social Security taxes were paid in that case, and the defendants tried everything to prove an employment relationship. The Court held it was a joint venture between the captain and the fishermen.

I would like to say that these fishermen are not losing Social Insurance benefits, because by virtue of the 1950 Amendments to the Social Security Act benefits were extended to the self-employed for the first time. Prior to these amendments, it's true, they may have been deprived of such benefits.

So, the distinction today between the common-law employee and the self-employed person or the entrepreneur, with respect to Social Insurance, at least, is no longer meaningful. It's now only a tax matter and the question is: who pays the tax and what is the difference?

As far as --

Q Do they have the same maximums with respect to employees as exists with respect to self-employed people? It's only up to a certain amount of income in both cases?

A In both cases. The same as --

Q The same.

A Except the rate is a little different. I think that the self-employed would pay something less than three-fourths of the total that would be paid to employer and an employee.

Q But, basically the same ultimate benefits?

A The ultimate benefits. As a matter of fact, Your Honor, there is one benefit I think the self-employed man get that a common-law employee does not. He can participate in the 1964 self-employment pension act where lawyers are doing it and I am sure that there are some fish captains who do it.

Now, this equality between the two categories is demonstrated because the earnings credits of these people, which determine their benefits; they are entitled to the same rate and dignity. The Social Security Administration, the same

administration, dispenses benefits to both; the same tax collector collects taxes from them both. No

Now, the Petitioner's main thrust here is that the common-law test should not be applied; that the rule governing employment relationships under maritime law should be decisive in fixing the respondent's tax liabilities.

Now, if liability for these taxes is to be so-determined it is a matter for Congress's consideration, rather than this Court, because it involves Federal fiscal policy preroggatives of legislative definition.

I might say that during the pendency of this case the Treasury Department attempted to seek an amendment of this act to call these fishermen statutory employees. But Congress took no action on it.

But Congress's failure to act, if the Court please, didn't tell us anything, but the incident does tell us this: that the Treasury Department felt that it was vulnerable to adverse decisions by the finder of fact who would apply the common-law rule; otherwise the Treasury Department wouldn't have been concerned about it.

Now, the Petitioner reasons that if a seaman is entitled to maintenance and cure from the owner he must be the owner's employee, under maritime standards. Now, I'll accept that. But Petitioner concludes without more that the seaman mechanically becomes an employee for Federal tax employment

purposes, and hence, a common-law employee.

And the same individual can be an employee and an independent contractor at the same time. This Court said in Local Board versus Hearst: "An individual may be an independent contractor under the common-law control test for purposes of imposing vicarious liability in torts and may be an employee for the purpose of other litigation such as employment insurance.

I see my time is about to expire, if the Court please; but I want to say this: That the fishermen in this case, whom the Court found did not meet the common-law test of master and servant, are nonetheless entitled to maintenance and cure by virtue of their marine employment.

Court said in Aguilar versus STandard Oil Company, when this particular question came up: "Whether by traditional standards a boat owner is or is not responsible for the injuries, yet under maritime law he is nevertheless liable as an incident of the marine employee-employer relationship."

We suggest that the main thrust of Petitioner's point there is without merit. This conclusion is not contrary to public policy, as Mr. Griswold has suggested. It will not frustrate the remedial aims of maintenance and cure or other maritime runs.

There are many independent contractor relationships which are workable under the Social Security Act and the

rulings of the Commissioner of Internal Revenue demonstrate those. One outstanding one that comes to mind is that he considers a self-employed person, one who is able to carry on his own business, a poll-taker, for one of his advertising agencies, simply because this poll-taker works on a job-to-job basis and yet he is paid by the company; directed by the company; nevertheless, as a rule the Internal Revenue Service, contained in the Internal Revenue Bulletin No. 1965-30 of July 26, 1965. It says that those who conduct surveys on certain types of advertising are self-employed persons. They are in a business of their own; simply because they knock on a door and fill out a form for some company. Certainly, fishermen, who are more skilled and who have a way of life, are certainly more in keeping with a trade or business than some poll-taker or real estate salesman, for instance. They consider him a self-employed person.

A taxicab driver. The Internal Revenue has put out many bulletins that taxicab drivers are considered independent contractors, although theydrive the cab in the company, the company has great expenditures and the real estate man, his company has great expenditures in promoting and keeping an office open, yet the Government finds for tax purposes, he, too, is a self-employed person.

So, in conclusion we ask that the Court consider that the common-law test be applied and that if there is any other

test to be applied that the Department of Justice address itself to the Congress.

Thank you.

MR.CHIEF JUSTICE BURGER: Mr. Lyman, the case is submitted. Thank you for your submission and thank you, Mr. Solicitor General.

(Whereupon, at 11:15 o'clock a.m. the argument in the above-entitled matter was concluded)