ORIGINAL

In the

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD PETITIONER V. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO AND COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, ET AL, RESPONDENTS	)))))))))))	No. 79-1082

Washington, D. C.
April 22, 1980

Pages 1 thru 67

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD

Petitioner:

v

No. 79-1082

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO AND COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, ET AL.

Respondents:

Washington, D.C.

Tuesday, April 22, 1980

The above-entitled matter came on for oral argument at 10:21 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the Petitioner

J. ALAN LIPS, ESQ., Taft, Stettinius & Hollister, 600 Dixie Terminal Building, Cincinnati, Ohio 45202; on behalf of Petitioner

CONSTANTINE P. LAMBOS, Lorenz, Finn, Giardino & Lambos, 25 Broadway, New York, New York 10004; on behalf of Respondents

THOMAS W. GLEASON, International Longshoremen's Association, AFL-CIO, One State Street Plaza, New York, New York 10004; on behalf of Respondents

CONTENTS

ORAL ARGUMENT OF PAGE

LAWRENCE G. WALLACE, ESQ., on behalf of the Petitioner 4

J. ALAN LIPS, ESQ., on behalf of the Petitioner 18

CONSTANTINE P. LAMBOS, ESQ., on behalf of the Respondents 31

THOMAS W. GLEASON, ESQ., on behalf of the Respondents 40

REBUTTAL ARGUMENT OF

LAWRENCE G. WALLACE, ESQ., on behalf of the Petitioner 63

P R O C E E D I N G S

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

ORAL ARGUMENT OF LAWRENCE G. WALLACE

ON BEHALF OF THE PETITIONER

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

QUESTION: Mr. Wallace.

MR. WALLACE: In this case, the Court of Appeals for the District of Columbia Circuit set aside the Decisions and Orders of the National Labor Relations Board in two separate cases which are the most recent in a series of Board Decisions dealing with the validity under the Anti-boycotting Provisions of the National Labor Relations Act of various provisions and applications of the Rules on Containers which are in the East Coast labor contract between the Respondent union and the shipping companies governs major ports on the East Coast.

The Board Decisions, in our view, represent a consistent pattern of factual findings, inferences, and conclusions; and prior to the Decision in this Case, the Board Decisions had been upheld by three Courts of Appeals in various applications; and indeed, this Court had denied certiorari in one of those cases, the Conex case, a leading case,

that the Second Circuit Court of Appeals had decided.

The Court below, in our view, drew different factual inferences from the Board; and on the basis of those inferences, rejected its conclusions thereby resulting in a conflict in the Circuits which requires resolution by late spring or early summer if the negotiations for the new labor contract are to proceed since we now have conflicting views expressed by the Courts of Appeals with respect to the Rules on Containers in cases that indeed involved the same Rules as applied to the Port of New York.

The particular incidents that led to the refusals to deal at issue here involved the consolidation of less than container load cargo into containers by freight forwarders in the Port of New York and so-called shortstopping, which was the stripping of containers as the unloading is called, that were full shipper's load incoming cargo, that were stripped by truckers in Baltimore and Hampton Roads port areas.

In both instances these incidents were performed within 50 miles of the port, and the essence of the Rules on Containers in the collective agreement, as here pertinent, is an attempt to reserve to the members of the responding union all stuffing and stripping of containers within 50 miles of the port; either by requiring duplication of the work or by imposing prohibitive fines found by the Board in

this case to have the effect of requiring a boycott or by the explicit requirement of the refusal to deal with the offending companies. And the essence of the Board's holding is that in this respect the Rules overreach; go beyond work preservation to an attempt to acquire work that had traditionally been performed by others. The distinction between primary and secondary activity that has been drawn by this Court in the National Woodwork and Pipefitters cases.

As the Board viewed what had occurred here, the Respondent union was attempting to compensate for the increase in productivity caused by containerization and for the reduction in manhours therefore required on the docks by attempting to take away work traditionally done by others. In essence, the Board's findings are that there have traditionally been two markets performing related but separate functions, depending on which market the shipper chose to utilize. In some instances, the shipper would send goods directly to the pier loosely to be handled by the longshoremen and loaded or unloaded that way and picked up at the pier. In many other instances, they worked both prior to and since containerization through what had been known as freight forwarders or freight agents whose function was to sort and consolidate cargo to provide for its expedition, to provide for its sequential handling at the pier, which would

result in faster loading, less time that it would be subject to damage or assessed on the pier; and sequential unloading at the port of its destination. And there had indeed been an evolution of the use of containers which we've recounted in some detail in our Reply Brief prior to the use of containerized ships which has been the big advance in technology and which has to a large extent, made the old cargo method of loading and unloading ships obsolete. And all during this evolutionary process and indeed in the early years of the use of container ships, the same breakdown in work functions has existed and been carried forward until the response in these Rules on Containers.

Something of this background and traditions of functional differentiation in the industry will be elaborated by Mr. Lips who will be arguing next.

Now, as the Board viewed the case, and as we view it now, of course, it would be permissible for the Respondent union to seek to preserve the aspect of the work they have traditionally performed: the on-pier stuffing and stripping of containers on behalf of shippers who choose to deliver their cargo without the services of these middlemen, the consolidaters or freight forwarders. They would have a right to take action against their employers if the employers were to subcontract the work that they had traditionally done on the pier, they might also seek to induce

their employers to take measures to attract more business in this way by perhaps having the steamship companies make available, if they saw fit to, trucks to carry the goods to the pier and schedule the on-pier loading of containers in a way that would attract more of the business to the area where the Respondent union has traditionally done their work.

But the Rules on Containers go considerably beyond this kind of measured and proper response under the Labor Act and include, at least as an object which is enough under Section 8(b)(4) and under the Court's Decision in Pipefitters, the acquisition of the areas of work that have traditionally been performed by others. They are, at least within the 50-mile zone, an effort to say that only the on-pier work can use the new technology; and those that have traditionally engaged in the off-pier practices must be denied the benefits of the new technology.

QUESTION: As I read the Majority Opinion of the Court of Appeals, and I believe it was Judge Robb's Dissenting Opinion here, where he said that if a container is part of a whole -- a very large crate would have to be part of a whole, too -- I had the feeling that one would have to know the business pretty well to make a judgment on that. And I had thought that that was a matter that was pretty much left to the Board subject to review by the Courts of Appeals for

abusive discretion.

MR. WALLACE: Well, I couldn't agree more with that suggestion, Mr. Justice Rehnquist.

The Board has heard extensive evidence about this industry in case after case and necessarily has more cumulative information about the background of this industry and the practices than any reviewing Court of Appeals has been favored with and has drawn its inferences accordingly in what we believe to be a consistent pattern of decisions. And with proper deference to the factual inferences drawn by the Board, there would have been a consistent pattern of Court of Appeals Decisions and really no need for this Court to be drawn into the area.

But there're only the two places where uniformity of result can be expected: the Board or this Court, in the circumstances here.

QUESTION: Only because there's only one of each.

MR. WALLACE: That is correct, Mr. Justice.

There are times when the Board's pattern of decisions may not be as consistent as it has been in this particular area, but here there has been a consistent pattern. And I do think the Court of Appeals erred in faulting the Board for ignoring the precontainerization work traditions of the industry. The Board's Opinions refer quite

specifically to the precontainerization background. We have set out on page 20, and also on pages 21 and 22, of our Brief, some excerpts from, first, the Conex Opinion on which the Board specifically relied in the New York case before the Court now, in which it talks, at the beginning of the second paragraph on page 20, about the precontainerization background; and then in the second sentence, that the advent of containerization didn't change this.

The same thing is true of the Administrative Law Judges Opinion adopted by the Board in the Hampton Roads case that is also before the Court. First, at the bottom of page 21, there is discussion of the precontainerization background; and at the top of page 22, the advent of containerization did not change this.

So the Board having found the work traditions to be what they have been really was at the end of the case as far as they were concerned. The case seemed to be ruled by principles this Court has established. The Court of Appeals having rejected the Board's factual conclusions, went on to reach more specifically the interrelated question of right to control the work and whether the employer had the right to control the work that's in issue here. And we believe the Court of Appeals erred in this respect as well.

The difference between this case and National Woodwork with respect to the right to control is that in

National Woodwork, the employer had the unilateral choice whether to install the prefinished doors or whether to engage in his traditional practice; and this case much more closely resembles the Pipefitters case where customer choices were directing the employer's course of conduct. Here it's the shippers who are choosing to use the consolidation or deconsolidation services of the middlemen.

QUESTION: Mr. Wallace, you're telling us that the Court decided the right-to-control issue érroneously, or are you telling us that it was wrong to get into the issue at all? Or both?

MR. WALLACE: Well, I am telling you it was erroneously decided. Perhaps it's an issue that the Court should have asked for the Board's views on initially, but the Board did brief the issue before the Court of Appeals and argue it because it seemed clear to counsel for the Board -- and we've briefed it in this Court -- that the case is controlled by Pipefitters. And in any event --

QUESTION: Therefore, the right to control issue is not really relevant?

MR. WALLACE: Well --

QUESTION: These were customer decisions. Not employer decisions.

MR. WALLACE: Under Pipefitters, there wasn't a right to control, as we view the case; and therefore, this

was an unlawful boycott even if the Court of Appeals disagreed with the Board's findings and factual inferences about the work traditions in the industry. The Board didn't have to explicitly state anything about the right to control. But the issues do have a close interrelationship, and we think Pipefitters governed it, and we told the Court of Appeals as much.

And in addition, there is a new wrinkle on right to control in this case; and that is that the Shipping Act and the Federal Maritime Commission interpretation of the Shipping Act make it clear that there is no right to control in the manner exercised by the Rules at issue here because the Rules amount to a discrimination between customers within the 50-mile zone and customers beyond the 50-mile zone of exactly the kind that the Shipping Act prohibits.

And curiously enough, in the Court of Appeals' Opinion which did not address the Shipping Act question, the Court relies very strongly in a footnote in its Opinion on the distinction between those within the 50-mile zone and those beyond the 50-mile zone. The very violation of the Shipping Act.

QUESTION: At what page is that?

MR. WALLACE: This is on page 51(a) of the Appendix to the Petition for Certiorari, in footnote 177: To avoid what the Court itself characterizes as the reductio

ad absurdum of its Opinion, it relies on the violation of the Shipping Act to show the reasonableness of the Response that has been adopted here. While the fact is, were it not for the discrimination in violation of the Shipping Act, the reasoning of the Court of Appeals, likening the loading and unloading of containers to the loading and unloading of a ship's hold would permit Respondents to follow containers all over the country, and to insist on monopolization of the loading and unloading of containers anywhere in the United States.

QUESTION: Is there anything in the Opinion, Mr. Wallace, to suggest what would be the result if, in relation to that footnote, the ILA negotiated a contract for 100 miles on the next negotiation?

In other words --

MR. WALLACE: Well, the Court didn't really address that --

QUESTION: Well, I get some hint that the Court was saying: 50 miles and no more. Is that enlarged on anywhere else?

MR. WALLACE: Well, perhaps that's the suggestion to avoid what the Court would say would be an absurd result, But the fact of the matter is, that is reliance on a discrimination that violates the Shipping Act.

We have here the unusual circumstance of two

separate federal agencies having decided that these Rules are a violation of two different federal statutes. Which is a heavy burden indeed for the Rules to bear. Of course, it's always the Labor Act which is before the Court in this case. But I don't think it should be viewed in isolation.

QUESTION: Is there any litigation involving the Shipping Act?

MR. WALLACE: There now is litigation to review the Maritime Commission's Decisions in these cases. We refer to --

QUESTION: Rules violating the Shipping Act.

MR. WALLACE: Yes. We refer to this on page 12 of our Reply Brief.

QUESTION: And where they presently stand?

MR. WALLACE: They have not yet been decided by any Court, but Commission has made its determination, and there's no primary jurisdiction problem.

QUESTION: Is there on-going antitrust litigation involving the ownership of the containers by the shipping companies?

MR. WALLACE: There's a pending petition in this Court, Mr. Justice, which the Court has not acted on from a Third Circuit case which is an antitrust claim.

QUESTION: Private? Or government?

MR. WALLACE: It's a private case. The govern-

ment's views had been requested by the Court, and we filed a Brief --

QUESTION: Having to do with the ownership of the containers by the shipping companies.

MR. WALLACE: Yes. Having to do with the "concerted refusal to deal" with containers owned by the shipping companies, pursuant to these Rules. We suggested in our filing that the validity of the Board's interpretation of the National Labor Relations Act should be decided first.

Now, the customer choices that are involved here are based on important economic considerations which are a part of the totality of circumstances to which the Court referred in Pipefitters. The Rules in the application we are talking about now really threaten to eliminate the intermodal advantages of containers which can be affixed directly to a truck chassis and moved from there directly into the ship's hold and vice versa, and to eliminate the services of the off-pier indoor consolidation and deconsolidation businesses with the advantages of expedition and protection against damage and theft that experience has shown that they provide, and that has, in the market place, attracted a large share of the business to them.

And one further consideration bearing on these economic advantages is that in National Woodwork, both the Court and Mr. Justice Harlan in concurrence emphasized the

lack of Congressional guidance in this area other than Congress's traditional reliance on the bargaining process and the hope that the problems of technological innovation will be worked out there.

There has been some change in this situation since the decision in National Woodwork. There is an Act that we refer to on page 52 of our Brief in footnote 35, The National Productivity and Quality of Working Life Act of 1975, which states as the policy of the government to stimulate a high rate of productivity growth and which provides that the laws of the United States shall be so interpreted as to give full force and effect to this policy. Now, this was not relied on by the Board in arriving at its interpretation of the National Labor Relations Act.

QUESTION: Woodworkers. You have suggested that if we had had this statute at the time of Woodworkers we would have reached different results.

MR. WALLACE: Well, perhaps not in that case. But I think that this Act and the policies of this Act should certainly be taken into account by a reviewing Court before it rejects the Board's interpretation of the National Labor Relations Act when the Board's interpretation is consistent with the policy of this Act, and a rejection of that interpretation would seem to be contrary to the policy of this Act.

Congress has provided further guidance than was available to the Court in National Woodwork. It doesn't mean that the result in that case was incorrect. The Board is living with National Woodwork.

QUESTION: You say this argument was not made in the Court of Appeals.

MR. WALLACE: It was not made in the Court of Appeals.

QUESTION: And would the Board rely on this at all?

MR. WALLACE: The Board did not rely on it.

QUESTION: Doesn't that make a difference?

MR. WALLACE: Well, the Board's interpretation on the National Labor Relations Act turns out to be consistent with the policy of this Act; and before a reviewing Court rejects that interpretation, it should take the policy of this Act into account, to the extent the reviewing Court --

QUESTION: Well, are you suggesting we ought to send it back to the Court of Appeals, and tell them to redo the case in light of that statute?

MR. WALLACE: Well, I'm not making that suggestion at all.

QUESTION: But you're suggesting that we do it.

MR. WALLACE: Well, I'm suggesting that the Board's interpretation under the National Labor Relations Act

even without this Act in the picture, should have been upheld by the Court of Appeals; and this is just another reason that corroborates the reviewing Court should not reject this interpretation when the rejection would result in contravention of this policy as well.

But I certainly am not suggesting that the case be remanded to the Court of Appeals. I think resolution of the case is very important to labor peace in the East Coast ports and the ability to negotiate the new contracts this summer. And that was the basis of our expedited petition to this Court very shortly after the Court of Appeals denied rehearing.

So this statute, as well as the other reasons I have suggested, seem to us to indicate that the Court should uphold the Board's determination that Congress did not intend the answer to containerization to be a boycott agreement adopted at a bargaining table at which many of those most profoundly affected, the shippers, the truckers, the consolidators, and deconsolidators, and all of their employees, were not represented.

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

CHIEF JUSTICE BURGER: Mr. Lips.

ORAL ARGUMENT OF J. ALAN LIPS

ON BEHALF OF PETITIONER

MR. LIPS: Thank you Mr. Chief Justice. May it please the Court.

The work in issue here is the loading and unloading of cargo to and from the containers. And the only real question is whether or not the geographic location of that work, when it's done, is work that is traditionally within the jurisdiction of the ILA or, in this case, the truckers and the land-related transportation industry.

The record is complete in this and other cases that containers per se, that is, large boxes have been used for years, since before World War II, in and out of the ports on the East Coast covered by these Rules. And for years, the ILA never took the position that this was their work. They passed these containers through frequently; both by those shipped by consolidators or the principals in this case for Dolphin Forwarding Company were called nonvessel operating common carriers.

QUESTION: But this technology has been an evolving one, has it not?

MR. LIPS: It most certainly has.

But the question becomes: at what point could or should have the ILA said "this is our work." They certainly weren't ignorant of containers that passed through the ports, and they let them through for years without claiming this work which, to us, suggests very strongly that

they didn't consider this their work. Traditionally, non-vessel operating common carriers solicited their own customers. They shipped their own goods. They issued the bills of lading. They were responsible for the movement, not only from the time it left their facility across the land, but across the sea, too. So they were the shipper, as it were; and they assumed responsibility for the packaging of the container; and this was historically done for years.

It's only when the container became so efficient that it began to eliminate the work of longshoremen on the piers that the longshoremen looked for a way to replace that work; and the way they seized was to replace it with work that was somebody else's work; by bringing it back on the piers. Now, the truckers on the import side had traditionally done the same thing. In Hampton Roads and Baltimore, even after the modern container came into use there around the mid-60's or '65 or a little bit before, it wasn't for three more years in those ports that the ILA claimed that that was their work.

Of course, it wasn't their work because the truckers had been doing it with the modern containers as well as the old containers for years.

The ILA's chief argument in this case is a very simplistic one. It simply says: we will draw an arbitrary 50-mile line; and within that line, all work that relates to

containers is our work. And it can just as easily be done on the pier as it can out in the warehouse. Or the freight station. Or the consolidation station. It can just as easily be done.

Therefore, we think these are surrogate piers established for the purpose of avoiding longshore rates. Well, they missed the question at all. That's too simplistic an answer. The fact is that the container system is a part of the intermodal transportation system. It functions from point to point. It was designed to be that way . It's new and different work. The Court of Appeals recognized it was new work. It said it was new work. The Court of Appeals simply said: it believed that it should have the ability to rationalize the new work vis-a-vis the old work. Well, of course, it came to a different conclusion in its rationalization than the Labor Board did. But the work itself is new. The container is designed to go from point to point which is not necessarily from seaport to seaport. It's from the point at which the customer and the intermodal transportation system desire that the cargo be put in to and taken out of the container; and if it's limited to simply the port, from one pier to the next, then the container has no more function than the cargo net. It's simply a metal box that lifts cargo up to the ship and takes it off again.

The reason that the work is different and cannot be done on the pier is interrelated to why shippers use containers. To understand that, you need to understand what an NVOCC does. When he brings the packages in, he is taking less-than-container load packages: 5 packages from Cincinnati; 10 from Pittsburgh. These are packages that the seacarriers really can't handle anyway. They don't have the facilities to consolidate all of the many less-than-container load consolidations that go out. So the NVOCC pulls these things together, and he loads them in a sequential order in the container because he knows that when that container gets to its ultimate destination, those packages are going to be delivered to different spots. And so he loads the --

QUESTION: How was that traffic handled before containerization?

MR. LIPS: It was usually consolidated; that is, the NVOCC's traffic was consolidated just like it is now. But then, when it was taken to the seaport terminal by a truck, for example --

QUESTION: In other words, it would just go loose.

MR. LIPS: Yes. And it was not kept together.

QUESTION: The consolidator would take less than truck load shipments and put them together as a truck load, wouldn't he?

MR. LIPS: The consolidator would coordinate. Before the container system, the consolidator would basically coordinate. He would bring all these together. He would be --

QUESTION: How would he get them to the pier.

MR. LIPS: He would truck them.

QUESTION: By truck --

MR. LIPS: And over-the-road carriers.

QUESTION: Loose in the truck.

MR. LIPS: Loose in the truck.

QUESTION: Yes.

MR. LIPS: Unless he used a different kind of container. There is historical evidence of that.

QUESTION: And then when he got to the pier, what would happen?

MR. LIPS: When he got to the pier, that cargo would be unloaded by the longshoremen and the trucker working together. Then the cargo would be placed on the boat. There's no -- it didn't always stay together. Sometime it came off in pieces.

QUESTION: And now what happens is: he consolidates it in the container.

MR. LIPS: That's correct.

QUESTION: He takes the container to the pier. And what happens at the pier?

MR. LIPS: At the pier, the container is taken off the truck chassis.

QUESTION: By whom?

MR. LIPS: By the longshoremen. With a crane. It's lifted off the truck chassis; put on the ground in the staging area. Then it's moved to the ship; put on the ship and on the other end, it's taken off, put in the staging area, picked up by the trucker, and moved off.

QUESTION: I take it, before containerization, that pier work by the longshoremen took hours. Did it? Or days?

MR. LIPS: Yes. It did.

QUESTION: And now, it's just a matter of lifting the filled container aboard the ship. Isn't it?

MR. LIPS: That's correct.

QUESTION: Which I gather can be done in a very small fraction of the time.

MR. LIPS: The record indicates that with close coordination, sometimes the container can be delivered within an hour or two before the ship sails.

QUESTION: As against several hours -- or days -- of loading.

MR. LIPS: And sometimes, a week or more.

On the import side, the same occurrence happens. When the product comes off in break-bulk form -- some of it

going to Greensboro, North Carolina, for example, might be on this side of the pier. Some of it going to the same location may be a mile away on the other side of the terminal. When the trucking company comes and picks it up, not only has he waited --

QUESTION: Who loads it today? Who loads the container aboard the truck today?

MR. LIPS: Well, the seaport terminal company with the crane.

QUESTION: I know. I mean, what workers?

MR. LIPS: Well, I think the longshore workers.

QUESTION: The longshoremen do.

MR. LIPS: There is a truck chassis. It's two wheels with a rod in between. It's built to fit the container; and when they take it off the ship, it's dropped right onto the chassis, as I understand it, and moved and parked in the holding area.

QUESTION: But sometimes, it's the actual trailer, isn't it?

The container becomes a trailer.

MR. LIPS: The container sits on a wheel base.

QUESTION: Yes.

MR. LIPS: It very seldom sits on a flat bed, a regular flat bed of a car.

QUESTION: It then becomes the trailer.

MR. LIPS: It becomes the trailer. Or in the case of the railroad train, it becomes part of the flatcar. The containers are sometimes taken to the flatcar and put on there; and the rail siding is right on the pier. And shipped off.

And of course, sometimes those containers by rail are taken to another deconsolidation point, and unloaded.

QUESTION: In any event, the workers who load -- whether it's a train or a flatcar. Whatever it may be. They are longshoremen at that point.

MR. LIPS: At that point. They do.

QUESTION: Mr. Lips, we are here discussing purely facts, I take it. Are these facts that were found by the Board and approved by the majority of the Court of Appeals? Or were they upset by the Court of Appeals?

MR. LIPS: Well, they were clearly in the record before the Board and found by the Board.

The Court of Appeals slid over the factual findings by saying that the test that was applied by the Board; that is, this work is traditionally related to truckers' work -- was a test that was developed before an analysis of the facts. When in reality, that conclusion was based on these factual developments.

QUESTION: So you say the Court of Appeals second guessed the Board, in effect.

MR. LIPS: Yes, sir. I certainly believe they do. They did. The Court of Appeals said that the conclusion the Board reached as to what these facts showed was a focus of a test that prevented the Board from looking at all of these facts; but a close reading of the administrative law judge's decisions and the Board's decisions indicates that it very carefully looked at the sequential order of the pilferage, the breakage of cargo --

QUESTION: Let me ask just one factual question with your colloquy with Mr. Justice Brennan.

The situation you describe, I take it, assumed that the consolidation into one large container occurred more than 50 miles from the pier. Is that right?

I was under the impression that the loading of the container by the consolidater had been within 50 miles, that the ILA was reopening and restuffing those containers.

MR. LIPS: They never consistently did that, your honor, until about 1975. On occasion, the Board held as a bargaining tactic --

QUESTION: What are they doing at the time the facts developed in this case? Weren't they doing it then?

MR. LIPS: They did it differently in different places. In New York, for example --

QUESTION: Isn't this what you were complaining about?

MR. LIPS: Beg your pardon, sir?

QUESTION: I thought that's one of the things you were complaining about.

MR. LIPS: Well, certainly, we are. I thought you asked --

QUESTION: But now you're telling me they didn't do it.

MR. LIPS: No. I misunderstood you, your honor.

The ILA in different ports apply the Rules differently. But in almost no case did the ILA consistently in any one port apply the Rules. The ILA never really took command of all less-than-container load work or all discharge work on the import side. Occasionally they would enforce the Rules. Up until about 1973 or '74, and then when the Dublin Supplement was nogotiated, at that point they put a lock on everything. And they said at that point, 50 miles is a logical limitation on our work. It's purely arbitrary.

QUESTION: What I'd like to know is: after the Dublin Supplement, and when you have a container that comes from less than 50 miles from the port, what happens to that container when it gets to the port?

MR. LIPS: Under the Rules, the container generally was left alone; was not stripped and restuffed on the port. Under the Rules, in the Port of Baltimore, with

respect to the Dolphin case, and on occasion, well, with respect to the Conex case, the longshoremen, on occasion, stripped the less-than-container load goods from the container and restuffed it, if it was loaded within the 50 miles. If it was loaded beyond the 50 miles --

QUESTION: On occasion, you say. How often did they do that? Does the record tell us? Is this the regular practice?

MR. LIPS: The Board in the associated case on the import side, the administrative law judge found that the union was only aware of or only took action against about 7 or 8 containers over a period of a two-year period. They actually levied fines over containers that were stripped in violation of the Rules on the import side.

Now, there's no evidence in the record that I know of that breaks down the numbers of containers in the Port of New York on the export side, for example, and says that those were full shippers loads; a certain number of them were loaded outside the 50-mile Rule; some were loaded within the 50-mile Rule.

QUESTION: Now, the fines were levied, not against your client, but against the steamship companies. Is that right?

MR. LIPS: The fines were levied against the steamship companies which then turned to our clients and

said: we don't have any contractual basis to make you reimburse us, but we're going to tell you, if you don't reimburse us, we won't give you any more containers.

QUESTION: Right.

MR. LIPS: Because the ILA's real dispute is with the trucker that's doing this work; and the only way it can get at the trucker and force this work back on the pier, is through the economic pressure against the seacarrier.

It's hard for me to understand why, that if the ILA says, as it admits, that the full shippers load container: we don't want. We have abandoned that work. It can leave. Then those containers, let's say 100 of them in a week, leave the pier, the ILA's given up on those containers, and all of a sudden because they're stopped within 50 miles and converted to road equipment for some good business reason, then all of a sudden the union is prejudiced in some way. They've lost their work, they claim. It's illogical. Once they've given up that work, it's gone; and the fact that it's stripped within 50 miles, doesn't convert it back to their work. They've lost nothing more than they lost when they let it off the pier to begin with.

QUESTION: At what point do you say the secondary activity begins in this sequence of events?

MR. LIPS: Well, with respect to the Rules, it begins the day they're published and declared to be

enforceable against all the trucking companies.

QUESTION: You don't get a secondary situation from something written on a piece of paper. You get it from activity. What activity?

MR. LIPS: The activity that is the secondary boycott activity is where the seacarrier says to the trucking company: we will not give you any more containers unless you agree to our superimposed unilateral condition to not strip these containers within 50 miles.

QUESTION: But it's your contention that the entering into the agreement by the shipping companies and the labor union was a violation of 8(e) is it not?

MR. LIPS: Yes, sir. We believe --

QUESTION: In the absence of any activity.

MR. LIPS: We believe that the existence of the contract itself has a coercive effect on business.

CHIEF JUSTICE BURGER: Mr. Lambos.

ORAL ARGUMENT OF CONSTANTINE P. LAMBOS

ON BEHALF OF RESPONDENTS

MR. LAMBOS: Mr. Chief Justice. And may it please the Court.

I stand before this Court this morning on behalf of the steamship industry operating in the North Atlantic range to state to you that we made an agreement with the ILA in 1968; that we made additional Rules of enforcement in

1973; that we fully believedthen and believe now, we had fully resolved a critical issue of automation; and that we had done so under the Rules set forth by this Court in National Woodworkers and reenforced by this Court in Pipefitters, or restated by this Court in Pipefitters.

I think it is important that we ask certain questions initially. Whose automation? Whose job depletion? Whose job loss? Whose labor relations?

And I think that under the principles of National Woodwork, we find that all of these questions must be answered on the facts found by the National Labor Relations Board in favor of the longshoremen. And that the industry which suffered strike and strife in 1968, and in 1971, and in 1977, in order to resolve this issue, should be held to have conformed to the traditions of National Woodwork, and to have applied that law correctly.

It is our position before this Court that the Court of Appeals aptly and properly decided this issue as a question of law. As it stated below, in quoting from the Board's brief, the Board now seeks to make this a factual question.

The Petitioner's real complaint is with the Board's analytical framework and not its findings of fact.

We say to this Court, and to your honors, that there is such error of law in this case, that the Board

bears, that the Court of Appeals properly remanded the matter back to the Board; and it did so on the basis of the ignoring by the National Labor Relations Board of the entire issue here.

Let's go back. What is the work of longshoremen, and what has the traditional work of longshoremen been?

From the time of the Phoenicians, the piece-by-piece loading and unloading of ships --

QUESTION: Mr. Lambos. Do you accept then all of the findings of fact of the Board in this case?

MR. LAMBOS: Yes, Mr. Justice Rehnquist.

We accept all of the findings of the Board, and we say -- and there is no issue here. Because we know what longshoremen did before. Everyone agrees the Board included --

QUESTION: I, for example, don't know what longshoremen did before so I have to get it out of the record.

MR. LAMBOS: I think that you will find that the Board specifically stated in various cases. You can look at the Conex case in the decision of the administrative law judge. Because basically the Conex case starts this whole trilogy of cases, although the Conex case itself is not before this Court. We have Dolphin and San Juan involving the Port of New York; and then we have the Houston associated cases involving the Ports of Baltimore and Hampton Roads -- all

applying this same collective bargaining agreement which, as I said earlier, strike and strife sought to resolve, an issue where tens of thousands of longshoremen lost their work, where we brought in beautiful, new, automated ships, where we wanted to pay low price for it, and where we were compelled by strike and strife to seek to make a lawful, proper arrangement.

QUESTION: You say you accept the findings of the Board. I take it that you think it's a question of law that the Board resolved when it said that this work in dispute did not traditionally belong to the longshoremen.

MR. LAMBOS: Yes, your honor

QUESTION: I take it they said that there were two different markets; and two different traditional ways of doing things. And the consolidater's business was traditionally a separate business and never was the longshoremen's business.

Is that what they said?

MR. LAMBOS: They roughly said that.

QUESTION: You don't accept that.

MR. LAMBOS: I don't accept that as a conclusion of law.

QUESTION: That's a classical factual determination.

MR. LAMBOS: I would disagree with that, Mr.

Justice Rehnquist, because I think that the facts upon which the Board acted, straight upon the record, indicated one basic error of law.

QUESTION: But then you're accepting -- or not accepting -- the historical findings of fact of the Board?

MR. LAMBOS: I am accepting the historical findings of fact of the Board which say that the longshoremen did the work initially; that the consolidater brought down the cargo piece by piece for the longshoremen to stuff it and strip it; and I quarrel with the Board's starting its examination into this matter by looking at what happened after the innovation and not --

QUESTION: That's a factual inquiry, too.

MR. LAMBOS: I disagree with that, your honor.

I think that where you start is a matter of law. And where you start is where the Board went wrong. Because if you define, as the Board did; if you define the work after the innovation, obviously there is no such thing as job preservation.

QUESTION: Well, what if the consolidaters business had started a hundred years ago, and had been just accepted by the longshoremen? They consolidated in the sense they had boxes and crates and they would take little packages and put them into bigger boxes; and a lot of things that used to have been done on the pier wasn't done there anymore. And

it's been going on for a hundred years. And then this happened

MR. LAMBOS: It would be the same, your honor, as the situation in National Woodworkers --

QUESTION: But what --

MR. LAMBOS: Where they made doors in factories for years and years before that.

QUESTION: But you would still say that this was a work preservation agreement.

MR. LAMBOS: I would say it's a work preservation --

QUESTION: Even though it had been going on this way for a hundred years.

MR. LAMBOS: So long as the longshoremen were those who did the work prior to the innovation.

QUESTION: And as long as they had done it a hundred years ago.

MR. LAMBOS: The longshoremen did it, yes; hundreds and hundreds of years before that as well on a piece-by-piece basis.

And you must bear in mind, your honors, the principles that you enunciated National Woodworker, where you said: what is the threat of displacement here? Tens of thousands of jobs have been lost.

Obviously, we welcome the advantage of innovation, and obviously, we have had the advantages of innocation. Because what is the philosophy of the Rules, and what has

the ILA said?

They have not said as was stated here: everything within 50 miles of the pier must come down for stuffing and stripping. They said: that which goes to the beneficial owner, to the shipper, or the consignee, even within the 50-mile limit, may go.

What we are looking for is that which might reasonably be performed on the pier without intruding upon this innovation. We are willing to give you 80%; but in return for the millions and millions of manhours of lost time, and in return for giving up so many of our workers and their livelihoods, we would like to have that part of the work which we may keep on a practical basis.

QUESTION: You say that this does not intrude on this new technology?

MR. LAMBOS: It does not intrude on this technology because what it has permitted to do is for unions and management to sit together and work out their problems without the union saying, as it may say here, if we have to go back to square one; we say nay, and we on our side say yea; and there is no compromise possible because we don't know how some finder somewhere down the line may accept any compromise; and therefore, the only alternative appears to be industrial warfare. And we've already had it four, five six times, Mr. Chief Justice, and that is what we

wish to avoid.

QUESTION: How about a 100-mile limit?

MR. LAMBOS: Your honor --

QUESTION: It would be a matter of agreement. You say we agree on it; that would be it.

MR. LAMBOS: I think that the common law of the industry now is 50 miles. The 50-mile Rule depends upon the port district. It started out because the Port of New York District was a 50-mile area around Columbus Circle. It is part of our common law, and I think 100 would be no good and I think 52 miles might not be any good. That was not the deal that was made. But we have --

QUESTION: Where do you get the facts -- those surely are factual inquiries.

MR. LAMBOS: Pardon me?

QUESTION: Those surely are factual inquiries. What is the common law of the industry?

MR. LAMBOS: That's also in the record. Especially with respect to Judge Wagman, the Administrative Law Judge, and is part of the Appendix in the Conex case in which this Court denied certiorari. And it's all there.

As you know, your honor, in the Dolphin and San Juan case, there are very few findings of fact because most of our factual exhibits were rejected by the Court, by the Board, on the grounds that they would determine this issue on

the Conex matter.

QUESTION: But there has been a common thread, at least to my understanding running through both Pipefitters and Sandor and Woodworkers. Perhaps as best summarized in the last sentence of Pipefitters where it says: it appears to us that in reweighing the facts and setting aside the Board's Order, the Court of Appeals improperly substituted its own views of the facts for those of the Board.

MR. LAMBOS: You will find, your honor, on a fair reading of the case before the Court of Appeals that they accepted the facts, and they said --

QUESTION: But your opponents don't agree with that.

MR. LAMBOS: Pardon me?

QUESTION: Your opponents don't agree with that. Your opponents say the Court of Appeals simply made an end run or ignored the fact.

MR. LAMBOS: Well, they say that here, your honor; whereas, in the Court of Appeals, they said: there are no issues of fact. And the Judge Ulyzanski in the Conex case said: there are no issues of fact. And the Board below said: there are no issues of fact.

We know that the work of longshoremen is just as your honor has pointed out. In the Caputo case and in the Pfeiffer case, that the work of the longshoremen today

includes that which is the functional equivalent of the piece-by-piece moving; and that is, the stuffing and stripping of the container. And I suggest that the determinations, even though under a different statute, are what the Court below did here; and that is, define the work of the longshoremen as this Court requires it to do under National Woodwork and Pipefitters.

QUESTION: Well, where you say the Court defines the work. That's not finding facts. That's laying down rules of law. Isn't it?

MR. LAMBOS: That's correct, your honor.

We say that the Board has failed to take those rules of law, laid down by this Court in National Woodwork and in Pipefitters, and apply them to the facts which they found. And had they done so, they would not have committed the error which we say was corrected by the Court of Appeals in remanding the matter back to the Board.

CHIEF JUSTICE BURGER: Mr. Gleason.

ORAL ARGUMENT OF THOMAS W. GLEASON, JR.

ON BEHALF OF RESPONDENT

MR. GLEASON: Mr. Chief Justice. And may it please the Court.

I think the first thing that we should point out here is the fact that: what are we talking about when we talk about the rules on containers?

We are only talking about containers that are owned or leased by the steamship companies. We are not talking about containers or boxes that belong to the shippers. If a shipper brings down a box, and he has done it, or a consolidater has done a box and it's his box; no matter where it's done within the 50-mile radius or any place else, it goes right on the ship. There is no stopping of the containers if they belong to a consolidater, a shipper, or any body else. The only thing that we talked about are those containers that are owned and leased and in the control of the steamship companies.

QUESTION: Owned or leased?

MR. GLEASON: Owned or leased. And in some cases your honor, even used, because when you go into some of these cases; what they had done, some of the companies, the consolidaters: they had gone out, got a container off a railroad company, and they came back, and then the steamship company would pick up the lease on the container. And most of these containers were not marked. In fact, we had to amend the rules so that we asked the steamship companies to mark those containers that had to be stripped or not stripped. And that was the basis of the contract in 1968.

QUESTION: Well, do I get from that that two containers which would be precisely the same dimensions, perhaps manufactured by the same manufacturer, one owned by one

party, and the other owned by a different party, would be treated differently by the ILA.

MR. GLEASON: No, your honor.

QUESTION: You wanted a label on them so you could identify which ones had to be stripped.

MR. GLEASON: Those containers that were owned by the steamship company and also those containers that were moving to the consignee, whether it was outside the pier, a shippers load, or whether it was in another area. They indicated only those containers that were consolidated containers or containers that had to be stripped that were going to go within the 50-mile radius.

QUESTION: And what function does - - what economic function does the stripping of this one container perform?

MR. GLEASON: Well, if you strip the container, and the problem we have is: we had to protect; we're looking to protect the work of the longshoremen, i the longshoremen strip the container within the pier area, that meant work. The problem was that the moment the carrier was able to take those containers and give them out to consolidaters who were only people that, the record is clear, that only came into business after containerization, they would do it at substandard wages., They would be working at three, four dollars an hour, and therefore, the automated carriers

would be paying less contributions on the manhours going into the pension and welfare funds in the various ports; and therefore, put the conventional operator out of business.

Now, he had the work hours.

QUESTION: I go into my hypothetical. Two containers have arrived on the pier and are absolutely identical. Perhaps, as I said, made in the same factory. One is owned by one party; and the other is owned by another. One of them is picked up by a hoist and put on the vessel. In the hold. Is that right?

MR. GLEASON: Yes, sir.

QUESTION: The other one -- what would you do with the other one?

MR. GLEASON: Your honor, if its a shippers load or its a container that's owned by the consolidater, if it's his container, then it goes right on the ship. Now, the problem you have with some of the steamship lines -- and this came out in the evidence -- is the fact that one of the consolidaters came down with a 45-foot container and brought it down to the PRMMI, Puerto Rican. Well, a 45-foot container cannot fit in a slot on a 30 -- where they use 35-foot containers. So therefore, PRIMMI says: look, we can't take your container. The only way we can take your container is strip it and put it into 35-foot containers.

But basically, if that consolidater had a

container, and it was two of the same containers, one was owned by the steamship company and one was owned by the consolidater, and it was his container, and it was a roll-on, roll-off ship, they'd both go right on the ship without handling.

Now, the problem we have, and we restricted this only to those containers that were owned and leased. Prior to containerization, Ford Motor Company which would bring down and pack in their own plant -- they have a consolidater -- pack great big cases with thousands of parts. We permit those to go through. It was always went through, and we still permit it to go through. We don't have to do the packing of those containers. In fact, in one of the cases mentioned in the brief filed by Tidewater: Shipside Packing. In that particular case, Shipside was a subsidiary of one of the steamship companies under the contract, and they were packaging. And after we found out they were packaging and after the order, we submitted an affidavit to the Fourth Circuit saying that the rules did not apply, and it was a right decision.

But you've got to remember that we have one-million containers in the Port of New York comes to the port. Now, when you have several containers that are not marked, certainly, we're going to have a problem with a couple, but in 1968 when we sat down -- and the record will show,

and I think if you look at Exhibit No. 12, at page 464, which shows the manhours -- it was not until 1968, when the Rules and containers came in, that the workforce and the manhours started to decline. Because they had the Rules, and then automation went full start ahead.

They went from 40 -- approximately, I think, in 1968 -- was approximately 44 million manhours, with approximately 27 thousand employees; and now, today, we have less than 20 million manhours, and we have less than 12 thousand employees.

Now, we have not impeded automation. We have not impeded progress. In fact, the steamship companies have made billions of dollars. If you look just at the times, the rate of pay over the years, with the savings here.

QUESTION: Mr. Gleason, are those figures the figures of ILA work? Or total work performed in stripping and stuffing?

MR. GLEASON: Those are the hours in the Port of New York alone.

QUESTION: I see.

So this does not include the number of hours performed at the consolidaters' places of business.

MR. GLEASON: No. Your honor, I think, if you look. I think the story of consolidation and automation is pretty well spelled out in an article called Waterfront Labor

Response to Technological Change, A Tale of Two Unions, by Philip Ross, Professor Ross. And I think he takes the comparison in 1970 -- he made this study -- and he compares automation on the East Coast with automation on the West Coast. And in that -- just a quote --

QUESTION: Is that in the record?

MR. GLEASON: Yes. It has been in the record. It was in the record in the Conex case.

QUESTION: Was it found as a fact by the Board in this case?

MR. GLEASON: Your honor, the problem was that we were not permitted to present any evidence before the Board in the Dolphin case. We could not present --

QUESTION: Is this part of the Dolphin case?

MR. GLEASON: It's referred to by Judge Wright.

QUESTION: I'm not asking you whether it was referred to by Judge Wright.

Were these proceedings part of the Dolphin case?

MR. GLEASON: Well, your honor, again, this was not presented in the Dolphin case, but it was presented in the Conex case.

QUESTION: This isn't part of the Conex case. Is it?

MR. GLEASON: Well, the Board here takes everything that goes back to the Conex case. They say everything

is the facts and the law in the Conex case. We were not permitted to put in any evidence as far as the facts and the history.

QUESTION: In this case. In these particular proceedings ?

MR. GLEASON: Yes, your honor.

QUESTION: In the hypothetical question I've put to you, Mr. Gleason, I don't know whether you lost me or I lost you. But let me try again. Put it this way.

What is the purpose of putting some labels on containers to identify the ownership?

MR. GLEASON: The purpose is to know who owns the containers and whether they fell within the Rules.

QUESTION: And what do you do as a result of seeing a particular label on one? The ownership -- it belongs to a consolidater, let us say. What happens then?

MR. GLEASON: If a container came in and it was a consolidater's container, then they would look to see whether or not the work was done within the 50-mile radius.

QUESTION: And then if it is within the 50-mile radius.

MR. GLEASON: If it was done within the 50-mile radius, we would tell the company that this was a violation; we'd have to strip the container.

QUESTION: Tell us precisely.

MR. GLEASON: Then they would strip the container, and load it in another container. But the union was against -- the union over the years was against this, and saying: hey, you know, it's wrong to give these containers out -- your containers out -- to the consolidaters.

QUESTION: Let me back up.

You see, you understand this thoroughly. We don't necessarily understand it as well as you do.

This container is this large box which could be as big as a small garage sometimes, isn't it?

MR. GLEASON: Yes, your honor.

QUESTION: A one-car garage. And you decide this is one that's violated the 50-mile limit. So you take everything out of that container, is that right? When you say: strip it, you take the things out. And put it in another container that might be exactly the same size and the same manufacturer.

MR. GLEASON: Your honor, they all have to be the same containers. That consolidated container that you are talking about is the steamship company's container.

QUESTION: And then having moved it from the one container into the other, you pick it up with a hoist and put in the hold.

MR. GLEASON: That's right, your honor.

And what we have tried to do, is stop that and

say: hey, you're giving containers out to consolidaters who are not entitled to do this work. If a consolidater wants to bring his freight down to the pier, let him bring it down to the pier. In fact, going to a consolidater is an additional step in the process because: why should a man who has a piece of cargo, five cases, and he has it within a 50-mile radius -- why should he take it and bring it to a consolidater where there can be pilferage and what have you -- breakage -- just like any other company. And then take it from the consolidater to the pier, when he could directly take it from his place of business directly down to the pier to the longshoreman where then he could load it into the container.

So you have the added step then here. This was make work. And I think that the fact is -- and I go back to Professor Ross -- that he said 1966 -- after containerization had started in 1959. He says: in 1966 the percentage of general cargo moved by containers in New York, the largest port in the country was under 3 percent.

QUESTION: Are these containers now being used on cargo airlines?

MR. GLEASON: Yes, your honor.

No. They have special containers. They have their own containers.

QUESTION: The container system. This technology.

Are there any cases where they pick up -- pick things up off the ship? Take the container off the ship and take it out to the airport and load it.

MR. GLEASON: No, your honor. I don't think so.

What they would do is, if they have a container that's coming in on a ship into New York and it then was going to be flown to California, they would take that container and they would bring it over to the airline; and probably if it was one owner and it was his container, then it would probably either be stripped over there, and if it wasn't, it would be stripped at the pier, and they would bring a container over and load it in it. It depends on who owned the freight.

QUESTION: What if the parties saw to it that the container which is used on the airplane was also used in the hold of the ship --

MR. GLEASON: Put on an airplane?

We have no problem with that. It's going outside the 50-mile radius. It would go right through.

QUESTION: And the airport would be within 50 miles.

MR. GLEASON: Sure. But the problem is: it's going outside the area. It's just like Houff here. Houff had containers. He's a truckman. He came down to take those containers -- I think it's several hundred miles away.

There was no objection. But what he did was: instead of taking them and delivering them to the consignee; which he was supposed to do -- and that's the agreement that was made with the steamship lines with their container -- he didn't do that. He stopped down the street and then stripped the container with his people where it could have very well been stripped at the pier, with ILA people on his truck and taken down to 300 miles away.

What we are talking about is the containers that are owned and leased by the steamship companies. Nobody else. And certainly, I think the steamship companies are quite happy with the fact that they have made an awful lot of money. And the problem we have now, is the new ships that are on the drawing boards.

What are we going to do with the new all-purpose ships that are coming in?

I think it's something that management and labor -- it's our contract. It's the work that we normally did with them. This is not a case where the subcontractor is doing the work. This is the collective bargaining relationships between us and the steamship companies only over their containers and the work that we do with their freight, your honor.

QUESTION: Are you satisfied with the result in the Conex case?

MR. GLEASON: No, your honor.

QUESTION: No. And this result would rule that situation, too, I take it.

MR. GLEASON: Yes, your honor. I think that the -- with all of the facts that were presented in the Conex case before the -- he applied the law because he said: if you didn't apply and you didn't look to the work where the tradition was, then you could never have work preservation.

QUESTION: Chairman Fanning -- didn't he join to concur with the Board in the Conex case?

MR. GLEASON: No, your honor.

I think that was in the -- he did.

QUESTION: He did. Didn't he?

MR. GLEASON: Yes, your honor.

QUESTION: But he dissented in this case.

MR. GLEASON: Yes, your honor.

QUESTION: He seemed to think there was a difference between the two cases.

MR. GLEASON: Well, I think the difference was that he probably came about to understand what the rules were about; and the fact that --

QUESTION: And he came to change his mind.

MR. GLEASON: Yes, your honor.

I think one of the problems we have here is that we had a decision in 1970 by the Second Circuit in the ICTC

case which said: this work is the longshoremen's; and it upheld the rules. Now between, 1970 and this case, we had of course a change in the administration at the National Labor Relations Board. We had a new General Counsel who came in and took a different position; but I think based on the law, I think there's no question that the ILA did this in good faith; and it's to their collective bargaining agreement we're looking to, your honor.

QUESTION: Well, Mr. Gleason, you say their collective bargaining agreement. It is under the proscription of the hot cargo clause if it fails to meet certain work preservation standards. Isn't it?

MR. GLEASON: That's --

QUESTION: It isn't as if it were simply a contract between two private commercial people that could go out and make whatever contract they wanted.

MR. GLEASON: I think we solved that problem, your honor, in saying: hey, the work that has to be done on the containers that are owned or leased by the steamship carriers -- we're going to do that work. If the new consolidaters that came in the business, and they have their own containers or they do their own boxing; we'll still handle those containers without stripping. I think that's a reasonable accommodation to the automation and the operation of bringing in new ships.

If you take a look at 1968, and then see what's going on now -- and in Caputo, the evidence before the benefits review board and the administrative law judge, and those injury cases -- certainly built up the history. And I think you have -- Judge Friendly said what a container is: it's only part of the hull of the ship. And what loading is and unloading of that container is: a sorting of cargo.

And what we have is -- we have the work that's being done. Caputo. Today, a man goes on an automated ship; that ship can be loaded and discharged within no more than 16 hours. Now, what are we going to say? The longshoremen only have the loading of the ship. He's not going to work the rest of the week. When we've taken all of those containers out, put them all into the yard. He's working one day on the ship loading the ship or discharging the ship. Tomorrow, he's working on the containers.

QUESTION: Well, Mr. Gleason, when they invented the automobile, they put a lot of horse collar manufacturers out of business.

The technology is at work here. Is it not?

MR. GLEASON: No. your honor. I think here we have -- we're still going to handle that container. That cargo has to be handled, and loaded, and unloaded on the ship. We're not talking -- if we said that the airplane, as you pointed out, was going to handle all the cargo, then we

have no claim to that. And if airplanes are going to handle all the cargo in the country by helicopter, we're out of business. But as long as it has to do with the loading and unloading of cargo on a ship, I think that we have the right to get a piece of automation and all the money that's going to be made and the protection and the jobs of longshoremen.

I think this is -- all you're doing is then telling a person that comes in, and he has a big workforce: well, tomorrow, you're out of work. What are we going to do with these people? I think he has a right to come in and say: hey, we're going to put you to work today, loading that automated ship, and tomorrow you're going to strip containers -- or do whatever we have to do.

We've retrained some of the people so they can be high-low drivers. We've taken some of the people so they can do some of the work of fixing the containers. We have not --

QUESTION: Why wouldn't -- and maybe you just gave up some of this -- but why wouldn't the reasoning that you use apply equally beyond the 50-mile line? Maybe just a matter of negotiation, you limit your claim there. But I think --

Would you just address yourself a little bit to the 50-mile?

MR. GLEASON: Yes.

When we sat down and we negotiated this in 1968, of course, we had a strike; and the President of the United States appointed a Special Mediator, David Cole, to come in. And we sat down, and we argued back and forth: what was best? And we finally come to the conclusion, with the help of David Cole, that in the port area, those little pieces of freight that normally came down to the pier, we could still have that.

Outside the 50-mile radius, we did not want to impede automation; therefore, just as the Board points out in its brief, they talk about a container coming from Chicago to Mayaguez. That's just a consolidated container; goes right through. Nobody stops it. It's only those pieces of cargo that are coming from a shipper or into that area where there would normally flow right down to the pier as it always did.

If Houff prior to containerization had ten cases of cargo coming from out in West Virginia, and he was making a delivery, he wouldn't take it down and strip it at his platform. He'd take it on that truck and bring it right down to the pier where the longshoremen would handle it, and take it off and put it on pallets or put it in slings and await loading on the ship.

QUESTION: Well, what do you say about the argument that the -- say, like in the New York area, where --

and it's certainly argued in this case that the forwarders perform special services besides the stuffing; that in terms of efficiency, expedition, safety, et cetera; that that is a special business;

stuff, but they do more than that.

MR. GLEASON: Your honor. I must say this: that prior to containerization, the freight forwarders, that was the consolidaters; they only done the paperwork. They would make arrangements with truckmen to go pick up the freight, and do this work.

And I think on page 8 of our Brief, in a footnote --

QUESTION: So you say that whatever it is, it isn't much.

MR. GLEASON: No. It isn't.

QUESTION: But why would a shipper ever go to a consolidater or a forwarder rather than taking it down to the pier unless there was some real -- He was paying for it. There's obviously a market for their services.

MR. GLEASON: Your honor. One of the problems that we have is that some of the steamship companies have set up tariffs; and in the tariffs, they give part of their fees to the consolidater to do this work.

In other words, the consolidater gets about five hundred and something dollars off the steamship company plus a part of the revenue. So what he's really doing is: he

would rather have it done outside by nonunion labor. He has a fixed cost, and this is the way they operate. And the problem is, it's really subcontracting out the work.

QUESTION: But that's not work done traditionally by longshoremen.

MR. GLEASON: Sure. We always did the work.

Consolidaters never -- steamship companies never paid --

QUESTION: But, I mean, consolidation done, say, 50 or 100 miles away from the port.

MR. GLEASON: Your honor, I may say this: that I don't know of any consolidation that was ever done 100 miles away from the port prior to containerization.

QUESTION: Well, isn't a primary function of consolidaters to take care of less than car load shipments or less than truck load shipments?

MR. GLEASON: Consolidation really years ago, I think, was in the railroad industry. And I might say the longshoremen did that work in the Port of New York, too. When they brought down, it was only on domestic cargo which was handled by railroads.

It was only, as I said on page 8 that we have a footnote. And I think Mr. Ullman in his role of the American Ocean Freight Forwarder spells out that when they were going out of business, containerization started to hurt

them; they had to get into a new business. And so they started to go into consolidation.

And one of the things you have to look at is the consolidater. These cases, Dolphin. Dolphin didn't have his own employees. He went out and made a deal with another truckman which was ILA people, by the way, an ILA contract; and they went out, and they made a deal for that little incidental work with him to do the work. He never did the work before.

The same thing with -- I would gather -- it was Dolphin. Even Conex started out that way. Even Twin started out that way. And this was the problems that we had. And we thought that we had the problem solved in 1968. And as pointed out, we had no strike in 1974 because we agreed the rules were there. We're not going to change them.

But, again, having longshoremen looking and saying: hey, I'm only getting the one day's work today. I don't know where I'm going tomorrow because of automation. I don't know how you're going to handle this problem. And I certainly think it's a serious problem for us in negotiations. It has always been.

QUESTION: Well, it isn't exactly automation. It isn't automation, is it?

I guess automation gave it -- certainly provided the opportunity for containerization. But it's just a

question of where those containers are going to be filled, stuffed and stripped. Isn't it?

MR. GLEASON: Well, I think it's -- whose containers?

QUESTION: Well, yes --

MR. GLEASON: Whose ever they are --

QUESTION: Nevertheless, what the longshoremen want is the stripping done on the pier.

MR. GLEASON: Only those containers --

QUESTION: I understand.

Rather than some place else. It's not throwing out containers.

MR. GLEASON: And we really don't even want -- taking that container and having it done by a consolidater because we find that there is so much - so many practices. Illegal practices set up. So you take Dolphin. Dolphin was putting on the bill of ladings that the freight was coming from Massachusetts. And of course, everybody thought it was coming from Massachusetts until they found out it was right around the corner from the pier. And the same with the other company. I mean -- this is -- and even Conex, in the Conex case. It was a disgrace. They were paying people off. To get their containers to go through the piers. With the supervisors.

QUESTION: Was that to evade the 50-mile rule?

MR. GLEASON: Yes, your honor. That was the basis of it.

QUESTION: Mr. Gleason, I still have a little problem with the economics of the situation. Does the -- The ultimate rates are fixed. Aren't they? It doesn't make any difference to the shipper whether he goes through a consolidater -- has the stuffing --

MR. GLEASON: I don't think so because they have a minimum rate for, I guess, cargo and out. From what I understand that the -- since automation come in that the NVO's, as they call them, and they were the freight forwarders before. They came in and they could add or decrease the cost of that minimum, depending on the amount of service. But the service, again, of that freight forwarder -- that NVO before was really doing the paperwork; and so therefore, when it came in, in order to get the freight, the steamship company, in their tariffs -- it's a matter of record -- is really giving back to the consolidater -- I think it's around $500 roughly plus I think a percentage.

Now one of the arguments has been in negotiations: hey, what you did to us, you tariffed us right out of our business. You know, you're getting the work and having subcontractors doing the work by putting this in your tariffs. And therefore, causing problems because, in most ports, it's based on the manhours that goes into the pension and welfare

funds. Now, we have this problem in New York. In fact, we had a work stoppage in 19 -- I think it was 1970 -- where because of the hours generated by the conventional operators was going into the fund, and the automated carriers, especially Sea Land -- they were the only ones that were really in the business until, I think 1970; '69; '70. Their hours were way down. Yet, the tonnage they were passing through the port was tremendous.

And so finally, they got around in New York, and they changed to a tonnage basis; but they don't do this in Hampton Roads, and they don't do it in Baltimore, and they don't do it in Norfolk.

And we see ports like Wilmington, North Carolina, where they're bringing containers in. And there's no work. The funds, the pension funds, the welfare funds are all in serious trouble. Now, if they're going to take that and give the work, that little work, that's going to give it to consolidaters who don't own any equipment. All the consolidater has is a pencil, a pad, and a telephone. He has nothing else. He has no investment in this industry. Carriers put all the money in. They're the ones who have to build the ships and put the equipment in.

Now, what we're talking about is something that accommodates both labor and management so that we do have progress in this country.

REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE PETITIONER

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

MR. WALLACE: Just two or three points, Mr. Chief Justice.

One of the difficulties in this case, is that the Board dealt only with the incidents that were before it, and did not make comprehensive findings about the apparent discrepancies between what the Rules provide and what we are told are the practices under the Rules.

As we point out on pages 9 and 10 of our Reply Brief, the Rules in terms apply to containers owned, leased, or used by carriers; and indeed, there's testimony in this case that their application was not restricted to those owned by the carriers; and findings in Conex. I'll recount on page 10 of our Reply Brief to the same effect. I don't know why the Respondent union emphasizes so strongly that the Rules are restricted to those owned by the carriers because those are the ones that are facilities of the common carrier as to which obligations under the Shipping Act cause special problems; rather than, the ones where it's easier to justify the discriminations that the Rules apparently require.

QUESTION: Whatever the actual day-to-day

practices are, however various they may be, there is the Agreement, isn't there?

MR. WALLACE: There is the Agreement.

QUESTION: And isn't it claimed to be --

MR. WALLACE: The Board found it to be an 8(e) violation. That is correct.

And under that Agreement, there is a requirement that those stuffed within the 50 miles and certain others, that weren't at issue in this case, that extend beyond the 50 miles, be stripped and restuffed at the pier or a heavy penalty will be assessed. It has the effect of requiring the cessation of business.

Now, it's true that those either weren't detected in some instances; or if they were detected, the Rules weren't applied. We're told that there have been payoffs. I can't really testify as to what has happened here and answer these factual questions.

But the fact is: that is the Agreement that the Board has held to be an 8(e)

QUESTION: Mr. Wallace, how do you view the Court of Appeals differing with the Board on what work was traditionally within the longshoremen's jurisdiction and what was traditionally within the forwarders or consolidaters business?

Is that -- do you think that's a factual --

MR. WALLACE: It's a mixed question of fact and law. But I would say principally a factual --

QUESTION: Do you think, then, it should be reviewed on a substantial evidence basis by the Board? By the Court of Appeals? Is that it?

MR. WALLACE: I do.

QUESTION: What error did they make?

MR. WALLACE: The Court of Appeals?

QUESTION: On this particular question?

MR. WALLACE: Well, in concluding that the Board didn't have --

QUESTION: But they applied the right test, didn't they?

MR. WALLACE: The Court of Appeals? They applied --

QUESTION: They say they applied -- they came out with the wrong result, but they didn't purport to you some other test, the wrong test in reviewing the Board, did they?

MR. WALLACE: They purported to use the traditional test and to comply with this Court's Decisions, as did the Courts that reached the opposite result in the other cases.

QUESTION: Haven't we said that really the Courts of Appeals ought to be the final word on evidentiary things? On factual findings about the Board?

MR. WALLACE: That was the position that we took

in opposing certiorari in the Conex case. And this Court denied certiorari.

But now, we are faced with two Courts of Appeals purporting to apply the same standards and reaching contrary results about the Port of New York. And the very same Rules --

QUESTION: I suppose --

MR. WALLACE: There's a need for resolution because of the pressing labor situation in those ports. And we think that this Court errs in -- it did apply the standards that the Board should apply. But those are not the standards that a Court of Appeals should apply. The Court of Appeals was in a sense undertaking a reevaluation of the facts under standards that the Board should apply, and it disagrees with the inferences drawn by the Board.

QUESTION: So you do say they applied the wrong standard in reviewing --

MR. WALLACE: Well, in that sense, I do. I do.

And I want to emphasize that we've recounted on page 3 of our Reply Brief the use of consolidation boxes and containers of various kinds prior to the advent of containers that we are now dealing with; and the fact that the history was that that kind of sorting, as was found in the Conex case, was done indoors, off the pier, by these freight forwarders and were not unpacked and reloaded on the piers.

That was traditionally the work of the freight forwarders and consolidaters as the Board found.

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

- - -

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

1980 APR 30 PM 12 48