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FIXING THE LANDWARD COVERAGE OF THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

INTRODUCTION

In 1917, the United States Supreme Court, in *Southern Pacific Co. v. Jensen*,¹ held that an award of benefits under a state workmen's compensation statute to the widow of a fatally injured longshoreman was unconstitutional because the decedent's accident had taken place on the navigable waters of the United States.² This decision marked the beginning of more than fifty years of conflict between the Supreme Court and Congress over the methods, limitations, and interpretation of federal statutory efforts to provide workmen's compensation coverage for longshoremen, dock workers, and other maritime³ employees injured during the course of their employment on the navigable waters. In 1972, Congress attempted to resolve this dispute by substantially amending the key federal statute granting workmen's compensation benefits to injured maritime workers, the Longshoremen's and Harbor Workers' Compensation Act of 1927 (LHCA).⁴

Unfortunately, Congress' efforts have only spawned a new and equally perplexing series of problems. Indeed, litigation concerning the amended LHCA has occurred in a number of substantive areas.⁵ One current problem is of particular interest — the nature and extent of the Act's coverage. The primary difficulty stems from two interrelated sections of the amended Act, sections 903(a) and 902(3), which respectively contain the so-called "situs" and "status" requirements for coverage.⁶ Section 903(a) makes federal

1. 244 U.S. 205 (1917).

2. All waters, whether salt or fresh, tidal or nontidal, natural or artificial, which are navigable for either interstate or foreign commerce purposes, are "navigable waters." This includes the high seas, ports and harbors that connect with the high seas, the Great Lakes, and various rivers and lakes (even though totally contained within the border of one state). See G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 1-11 at 31-33 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK].

3. "Maritime" is defined as "[c]onnected with the sea in respect to navigation, commerce, etc.; pertaining to, or having to do with, navigation and naval affairs or shipping and commerce by sea." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1503 (2d ed. 1942).

4. 33 U.S.C. §§ 901-950 (1970), as amended by Act of Oct. 27, 1972, Pub. L. No. 92-576, 86 Stat. 1251 (1972) (codified at 33 U.S.C. §§ 901-950 (Supp. V 1975)).

5. See, e.g., *Atlantic & Gulf Stevedores, Inc. v. Director*, 542 F.2d 602 (3d Cir. 1976) (employee, under certain conditions, is entitled to counsel fees when he successfully gains compensation award that his employer resisted).

6. In terms of the amended Act, "situs" refers to the location, be it on land or water, where the employee incurred his or her injury. "Status" refers to the nature of the duties performed by the injured employee.

"Situs" and "status" are concepts with deep historical roots in admiralty jurisdiction. However, while the "situs" concept is used in an identical fashion by both the amended LHCA and admiralty jurisdiction, the same is not true for "status." In admiralty jurisdiction, "status" is the conceptual basis for a suit in contract. In

workmen's compensation coverage available to any "employee" if he is injured "upon the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."⁷ Section 902(3) then defines an "employee" to be "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations."⁸

These two sections significantly alter the operation of the original 1927 LHCA. First, section 903(a) of the amended Act extends federal coverage to a variety of land-based, port-related areas located outside the traditional geographic ambit of "navigable waters."⁹ In other words, within the perimeters of section 903(a)'s coverage an injured employee can claim LHCA benefits without regard to his land or water situs at the time of injury. This contrasts sharply with the original section 903(a) of the 1927 Act which, with one exception,¹⁰ limited federal coverage exclusively to those employees who incurred injury on the "navigable waters," as conventionally defined.

The second major change, found in section 902(3) of the amended Act, predicates coverage on the nature of the employee's work assignment. To obtain LHCA coverage, the injured employee must perform tasks which possess a relationship with maritime commerce and shipping sufficient to qualify as "maritime employment." Unlike the 1927 Act, federal coverage no longer extends to a given employee merely because his accident takes place on the "navigable waters." Instead, the employee now must also have the "status" of being engaged in "maritime employment."¹¹

The courts have encountered considerable difficulty in reconciling these two prerequisites for coverage¹² with technological changes, such as containerization,¹³ that have revolutionized the manner in which cargo is

contrast to the amended LHCA, it refers not to the type of activity engaged in by the employee, but to the subject matter of the contract upon which the suit is based. See note 28 *infra*.

7. 33 U.S.C. § 903(a) (Supp. V 1975).

8. *Id.* at § 902(3) (Supp. V 1975).

9. See note 2 *supra*.

10. The 1927 LHCA permitted coverage to extend shoreward to drydock facilities. 33 U.S.C. § 903(a) (1970) (amended 1972).

11. Under the 1927 Act, an employee was defined only in negative terms: "The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." 33 U.S.C. § 902(3) (1970) (amended 1972). Interpretation of the term "employee" under the 1927 Act is discussed at note 45 *infra*.

12. One commentator has argued that a third prerequisite for coverage exists — the employer of the injured employee must have employees engaged in maritime employment. See Vickery, *Some Impacts of the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act*, 41 INS. COUNSEL J. 63, 68 (1974). No court has accepted this contention.

13. "Containerization" refers to the process of transporting maritime cargo in large, prepacked shipping units. These units, known as containers, are large metal boxes into which smaller crates, boxes, bags, barrels or other such packages are consolidated for shipment to a single destination, even though the

handled in a modern port.¹⁴ In general, assuming the situs requirement is met, the difficulty lies in determining which employees in a diversified port operation are eligible for federal coverage in light of the cryptic statutory phrase "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations."¹⁵ More specifically, the problem currently confronting the courts is whether the "status" criterion in section 902(3) of the amended Act was enacted with the goal of extending coverage to longshoremen engaged in loading and unloading duties which, while not traditionally performed by longshoremen, are nonetheless performed by them with increasing frequency in contemporary ports.

Six United States Circuit Courts of Appeals have rendered opinions on this matter,¹⁶ with the analysis splitting into three primary theories. The narrowest view is that only those employees handling cargo in the area between the hold of the ship and the "point of rest," that is, the first or last land-based cargo storage area on the pier, can be described as "engaged in maritime employment."¹⁷ Under a somewhat broader view, the status test is satisfied if the employee incurred his injury while performing cargo handling tasks which are "functionally equivalent" to those performed by longshoremen in the past.¹⁸ In the event the tasks being performed at the time of injury are not "functionally equivalent," the employee is still

various contents may be meant for multiple consignees. Ordinarily containers are shipped on vessels specifically designed for carrying containers, and loaded or unloaded at special container facilities.

Brief for Petitioner at 5 n.3, *I.T.O. Co., Inc. v. Blundo*, cert. granted, 97 S. Ct. 522 (1976) (No. 76-454).

After a container is removed from the vessel by an overhead crane, it is placed on a chassis with wheels. The container can then be hauled by a tractor to various locations within the marine terminal facility and over the highways. Its physical appearance on the highway resembles that of the conventional tractor-trailer. *Id.*

14. See, e.g., A. EVANS, TECHNICAL AND SOCIAL CHANGES IN THE WORLD'S PORTS (1969).

15. 33 U.S.C. § 902(3) (Supp. V 1975).

16. *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976), petitions for cert. filed, 45 U.S.L.W. 3364 (U.S. Nov. 8, 1976) (No. 76-641), 45 U.S.L.W. 3450 (U.S. Dec. 27, 1976) (No. 76-880); *I.T.O. Corp. v. Benefits Review Bd.*, 542 F.2d 903 (4th Cir. 1976) (en banc), vacating 529 F.2d 1080 (4th Cir. 1975), petitions for cert. filed, 45 U.S.L.W. 3401 (U.S. Nov. 19, 1976) (No. 76-706), 45 U.S.L.W. 3417 (U.S. Nov. 24, 1976) (No. 76-730); *Sea-Land Service, Inc. v. Director*, 540 F.2d 629 (3d Cir. 1976); *Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264 (1st Cir. 1976), petition for cert. filed, 45 U.S.L.W. 3332 (U.S. Oct. 22, 1976) (No. 76-571); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir.), cert. granted sub nom., *Northeast Marine Terminal Co. v. Caputo*, 97 S. Ct. 522 (1976) (Nos. 76-444, -454); *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), cert. denied; 97 S. Ct. 179 (1976).

17. *I.T.O. Corp. v. Benefits Review Bd.*, 542 F.2d 903 (4th Cir. 1976) (en banc), vacating 529 F.2d 1080 (4th Cir. 1975), petitions for cert. filed, 45 U.S.L.W. 3401 (U.S. Nov. 19, 1976) (No. 76-706), 45 U.S.L.W. 3417 (U.S. Nov. 24, 1976) (No. 76-730). See text accompanying notes 71 to 98 *infra*.

18. *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir.), cert. granted sub nom., *Northeast Marine Terminal Co. v. Caputo*, 97 S. Ct. 522 (1976) (Nos. 76-444, -454). See text accompanying notes 99 to 126 *infra*.

considered to be "engaged in maritime employment" if he has spent a substantial part of his time in the past actually taking cargo on or off a vessel.¹⁹ Finally, the broadest view of the amended Act is that any employee participating in an "integral part of the process" of moving maritime cargo to or from land transport is "engaged in maritime employment."²⁰ The Supreme Court has granted certiorari in one of these cases to examine the problem of the Act's coverage.²¹ This Comment will explore the background of this problem, analyze and criticize the theories developed by the courts of appeals, and discuss some of the broader issues arising from the controversy.

BACKGROUND

The movement in the United States to provide a system of guaranteed compensation coverage for workmen injured during the course of their employment began in the early 1900's.²² Advocates of such legislation concentrated their efforts at the state level, but most legislatures, fearful that compensation statutes violated the Constitution, proceeded cautiously.²³ In March, 1917, the Supreme Court dispelled these apprehensions when it ruled that workmen's compensation statutes did not necessarily violate the Constitution.²⁴

Several months later, however, the Supreme Court, in *Southern Pacific Co. v. Jensen*,²⁵ found serious constitutional problems did exist with regard to the application of state compensation legislation to a person whose work was maritime in nature and who suffered injury on the navigable waters of the United States. In *Jensen*, a longshoreman working in the port of New York was fatally injured on the gangway of a ship while he assisted in the unloading process.²⁶ The Court observed that in such an instance, the two

19. *Id.*

20. *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976), *petitions for cert. filed*, 45 U.S.L.W. 3364 (U.S. Nov. 8, 1976) (No. 76-641), 45 U.S.L.W. 3450 (U.S. Dec. 27, 1976) (No. 76-880). See text accompanying notes 127 to 136 *infra*.

21. *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir.), *cert. granted sub nom.*, *Northeast Marine Terminal Co. v. Caputo*, 97 S. Ct. 522 (1976).

22. The standard features of a workmen's compensation statute are discussed in 1 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 1.10 (1972). [Hereinafter cited as LARSON].

23. *Id.* at § 5.20. The basic fear was that holding employers strictly liable for accidents involving their employees might violate the due process clause.

24. *New York Central R.R. v. White*, 243 U.S. 188 (1917); *Hawkins v. Bleakley*, 243 U.S. 210 (1917); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917). The *White* Court found there was no fourteenth amendment bar to state legislation which held employers strictly liable to their injured employees and which abolished the defenses of assumption of risk, the fellow servant doctrine, and contributory negligence. 243 U.S. at 198-200. After these three decisions, the pace of enactment quickened. By 1920, only eight states were without workmen's compensation statutes. 1 LARSON, *supra* note 22, at §§ 5.20-5.30.

25. 244 U.S. 205 (1917).

26. *Jensen* was driving a small electric freight truck loaded with lumber out of a vessel when the truck became lodged against the guide pieces of the gangway. *Jensen*

traditional grounds for invoking the federal judiciary's exclusive admiralty jurisdiction²⁷ — a maritime locality (*situs*) and a contract with a maritime subject matter (*status*) — were clearly present.²⁸ The rights and liabilities of the parties regarding Jensen's death were therefore to be governed by the general maritime law.²⁹

Under the general maritime law, Jensen's survivors had the right to sue his employer, the Southern Pacific Company, for damages in a maritime tort action.³⁰ Similarly, Southern Pacific had the right to raise all available defenses in such an action and, if possible, escape liability altogether. The Court noted that both of these rights had been extinguished under the provisions of the New York Workmen's Compensation Act;³¹ the employee's sole remedy was to file a claim for the statutorily regulated benefits of the Workmen's Compensation Act, and the employer was held strictly liable.

reversed the direction of the truck and went through the hatchway back into the ship. But he neglected to lower his head and struck the top line of the ship, suffering a broken neck. *Id.* at 208.

27. The exclusive nature of the federal admiralty jurisdiction is derived from Article III, Section 2 of the United States Constitution, which states: "The Judicial power shall extend to . . . all cases of admiralty and maritime jurisdiction . . ." However, the word "exclusive" has a special meaning in terms of federal admiralty jurisdiction. It does not relate to the forum for adjudication because in personam maritime actions may be freely heard by state courts under the "saving to suitors" clause of the Judiciary Act of 1789, 28 U.S.C. § 1333 (1970) (original version at ch. 20, § 9, 1 Stat. 77 (1850)). See GILMORE & BLACK, *supra* note 2, at § 1-13. Instead, "exclusive" applies to the controlling body of law that governs maritime matters in general. Thus, in the majority of maritime cases, the application of the "general maritime law," as developed by the federal courts and Congress, is required. Contrary state law which conflicts with the "general maritime law" is invalid. *Id.* at §§ 1-16 to 1-18. For a discussion of other problems involving the "saving to suitors" clause, see note 36 *infra*.

28. Justice Story, while on circuit in 1815, established these two criteria for admiralty coverage. He commented that:

On the whole, I am, without the slightest hesitation, ready to pronounce, that the delegation of cognizance of "all civil cases of admiralty and maritime jurisdiction" to the courts of the United States comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality [*i.e.* *situs*]; the former extends over all contracts, (wheresoever they may be made or executed . . .) which relate to the navigation, business or commerce of the sea [*i.e.* *status*].

De Lovio v. Boit, 7 F. Cas. 418, 444 (C.C.D. Mass. 1815) (No. 3,776).

It should be noted, however, that the Supreme Court has recently limited admiralty tort jurisdiction to those injuries which have some "significant relationship" with "traditional maritime activity." See *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268 (1972).

The use of "status" in defining admiralty jurisdiction should not be confused with the use of "status" in the amended LHCA. See note 6 *supra*.

29. 244 U.S. at 217-18.

30. GILMORE & BLACK, *supra* note 2, at § 6-4.

31. 244 U.S. at 210-11. The "agreement" that the employer is held strictly liable and the employee is deemed to have waived his right to sue in tort (the employee taking a lesser amount in guaranteed benefits instead) lies at the heart of a workmen's compensation act. See LARSON, *supra* note 22, at § 1.10.

The *Jensen* Court ruled that state legislation of this nature could not constitutionally cover longshoremen when they were injured on the navigable waters. The source of the Court's holding was Article III, section 2 of the Constitution, under which the power to control the nation's maritime law impliedly was granted solely to the federal government.³² The rationale for this grant, said the Court, was that the freedom to navigate required, above all, a uniform national maritime law.³³ By extinguishing certain rights of employers and employees, the New York statute had materially altered the general maritime law and thereby jeopardized that law's uniformity. For this reason, the Court held that application of the Workmen's Compensation Act to longshoremen working on the navigable waters was unconstitutional.

In practical terms, the *Jensen* holding meant that state workmen's compensation protection abruptly terminated when a longshoreman stepped from the shore onto the gangplank. A longshoreman suffering an injury while moving cargo on the shore would receive compensatory state benefits; his co-worker, suffering the same injury while moving the same cargo on board ship, would receive nothing. Thus, the water's edge — later termed the "*Jensen* line" — became the boundary between state and federal jurisdiction.³⁴

This disturbing anomaly in coverage prompted immediate action by the United States Congress. Nevertheless, in enacting remedial legislation, Congress totally disregarded the *Jensen* Court's pronouncements on the need for national uniformity in maritime law. Instead, Congress chose to respond to a relatively minor point in the *Jensen* decision — the Court's rejection³⁵ of the theory that state compensation acts could permissibly cover workmen injured on the navigable waters by virtue of the "saving to suitors" clause of the Judiciary Act.³⁶ Apparently, Congress believed it could successfully overcome the Court's objections by amending the saving clause

32. See note 27 *infra*.

33. 244 U.S. at 217.

34. It should be noted, however, that the worker injured seaward of the *Jensen* line could still sue his employer in a maritime tort action.

35. 244 U.S. at 218.

36. The "saving to suitors" clause, prior to 1948, read as follows:

[T]he district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of the common law remedy, where the common law is competent to give it

1 Stat. 76-77 (1850). A slightly modified version, enacted in 1948, is found at 28 U.S.C. § 1333 (1970).

The saving clause makes it clear that maritime actions involving common law remedies need not be brought solely in federal court. State courts are fully competent in such instances. See GILMORE & BLACK, *supra* note 2, at § 1-13. In *Jensen*, however, the Supreme Court ruled that state compensation act remedies were "of a character wholly unknown to the common law," and therefore "not saved to suitors from the grant of exclusive jurisdiction." 244 U.S. at 218. This conclusion has been viewed skeptically by the commentators. See, e.g., GILMORE & BLACK, *supra* note 2, at § 6-45, at 405-06.

to allow states the power to extend the coverage of their existing compensation acts to maritime workers.

Unfortunately, the Supreme Court proved unreceptive to this simple expedient. Twice Congress amended the saving clause,³⁷ and twice the Court rejected the amendment as a constitutionally invalid delegation of federal power to state government.³⁸ As a result, the congressional effort to fix responsibility at the state level³⁹ for the provision of workmen's compensation coverage for all longshoremen, regardless of the shore or water situs of their injury, reached "a Constitutional dead-end."⁴⁰

The Court, however, in dicta, left open an alternative method for remedying the problems created by the *Jensen* line. Although Congress had no authority to extend the jurisdiction of state statutes seaward into the maritime area, it did have the power to enact "a general employers' liability law or general provisions for compensating injured employees."⁴¹ Congress eventually responded to this suggestion by enacting its own compensation statute — the Longshoremen's and Harbor Workers' Compensation Act of 1927.⁴²

While the 1927 Act closely resembled the typical state workmen's compensation statute,⁴³ it also clearly reflected the congressional belief that, in general, workmen's compensation coverage was a state matter. Section 903(a) of the Act was narrowly drawn to cover only those workers excluded from state coverage by virtue of the *Jensen* decision:

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.⁴⁴

Three requirements for coverage are evident in the above-quoted section. First, the injured party had to be an "employee." By applying two interrelated sections of the Act, courts interpreted this term to mean any person working for a business concern or individual having at least one

37. Act of Oct. 6, 1917, Pub. L. No. 65-82, ch. 97, 40 Stat. 395; Act of June 10, 1922, Pub. L. No. 67-239, ch. 216, 42 Stat. 634.

38. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924).

39. The Supreme Court, years later, acknowledged that the aim of Congress during this period had indeed been to place the responsibility for workmen's compensation on the states. See *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 117-18 (1962).

40. GILMORE & BLACK, *supra* note 2, §6-46, at 408.

41. *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227 (1924).

42. 33 U.S.C. §§901-950 (1970) (amended 1972). The 1927 Act was found to be constitutional in *Crowell v. Benson*, 285 U.S. 22 (1932).

43. Indeed, the LHCA was patterned on the New York Workmen's Compensation Act. 3 LARSON, *supra* note 22, at §89.10.

44. 33 U.S.C. §903(a) (1970) (amended 1972).

employee working upon the navigable waters.⁴⁵ In other words, the Act only specified that some employees of the employer had to have a maritime "status"; the injured employee himself need not have such status. Second, and more importantly, the employee's injury had to occur on the navigable waters of the United States. Stated simply, maritime situs was the crucial prerequisite for coverage. Finally, the employee's injury could not also be covered by any state compensation system.

From the start, the 1927 Act proved to be an administrative and judicial quagmire.⁴⁶ In particular, the Supreme Court's repeated attempts to determine the exact geographic location of the jurisdictional interface between the federal and state compensation acts produced confusion, arbitrariness, and disparate treatment for injured longshoremen performing seemingly similar, if not identical, activities. The problem first surfaced with the "maritime but local" doctrine, which influenced the application of the LHCA from 1927 to 1942. Developed in a series of post-*Jensen* but pre-Act cases, this doctrine allowed the jurisdiction of state workmen's compensation acts, in limited circumstances, to extend seaward of the *Jensen* line to include employees injured on the navigable waters.⁴⁷ The sole prerequisite for such an extension was a finding that the nature of the work performed by the longshoreman at the time of his injury, even though indisputably maritime, nonetheless was of mere local (as opposed to national) importance. In such a case, the application of the compensation laws of the various states would neither "work material prejudice to any characteristic feature of the general maritime law, [n]or interfere with the proper harmony or uniformity of that law in its international or interstate relations."⁴⁸

The "maritime but local" doctrine was originally designed to soften the impact of *Jensen* during the pre-Act years.⁴⁹ This outcome was to be achieved by allowing the state compensation acts to extend as far seaward

45. As noted earlier, the 1927 Act defined an "employee" solely in negative terms. See note 17 *supra*. Therefore, it became customary to define an "employee" as anyone who worked for a party that met the Act's definition of an "employer," which was a party "any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any drydock)." 33 U.S.C. § 902(4) (1970) (amended 1972). See 10 SUFFOLK U.L. REV. 1179, 1180 (1976).

46. See GILMORE & BLACK, *supra* note 2, at § 6-46.

47. See, e.g., *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922) (application of state compensation law to employee injured on the navigable waters while building a ship is permissible because shipbuilding contracts are historically nonmaritime in status; therefore state compensation act would not materially interfere with the nationwide uniformity of the general maritime law); *State Indus. Comm'n v. Nordenholt Corp.*, 259 U.S. 263 (1922) (application of state compensation law is permissible because employee's fatal injuries were incurred on a dock which, although extending over navigable waters, was considered a land situs.)

48. *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 476 (1922). An employee engaged in work of a "maritime but local" nature could claim benefits only under the applicable state compensation act. He could not sue his employer in admiralty and, as will subsequently be apparent, neither could he claim benefits under the LHCA. GILMORE & BLACK, *supra* note 2, § 6-49, at 419.

49. GILMORE & BLACK, *supra* note 2, § 6-49, at 419.

as constitutionally permissible. However, when built into the LHCA,⁵⁰ the "maritime but local" doctrine succeeded only in adding a harsh element to the administration of the Act. The division of the multitude of activities performed in a port into categories of "local" or "national" importance proceeded solely on a case-by-case basis.⁵¹ As a result, attorneys representing longshoremen injured on the navigable waters while performing as yet uncategorized activities frequently could only guess whether filing a claim under the state or federal statute was the proper course to pursue. With the two acts being mutually exclusive, the end-results were completely at odds with the goal of a typical workmen's compensation scheme: compensation was slow and uncertain, and litigation became more frequent and more costly. Moreover, many claimants, discovering only after trial that they had filed under the wrong act, received no benefits at all — the statute of limitations barred their claim for compensatory benefits under the alternative act.⁵²

In 1942, the Supreme Court, in *Davis v. Department of Labor and Industries*,⁵³ effectively scrapped the "maritime but local" distinction. Justice Black, writing the majority opinion, announced that a new theory would henceforth govern the issue of state versus federal compensation act coverage for injuries incurred on the navigable waters. In certain factual situations, a "twilight zone" existed where the coverage question could be decided only on a case-by-case basis.⁵⁴ However, Justice Black strongly implied that in such cases, the state and federal statutes would no longer be mutually exclusive;⁵⁵ instead, they would have concurrent jurisdiction.⁵⁶

50. To most observers, the "maritime but local" doctrine was built into the LHCA by virtue of the "may not validly be provided by state law" language found in § 903(a) of the Act (quoted in full at text accompanying note 44 *supra*). See GILMORE & BLACK, *supra* note 2, § 6-49, at 419. *But see* Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962), where Justice Brennan argued the "may not validly be provided by state law" language was a mere repetition of the Act's "navigable waters" requirement found in the first half of § 903(a). 370 U.S. at 126. For a complete discussion of Justice Brennan's point of view (which, in terms of its theory rather than its result, was soundly denounced by most commentators), see D. ROBERTSON, ADMIRALTY AND FEDERALISM (1970), app. G [hereinafter cited as ROBERTSON].

51. For an extensive listing of these cases, see 3 LARSON, *supra* note 22, at § 89.22.

52. See, e.g., Ayres v. Parker, 15 F. Supp. 447 (D. Md. 1934) (employee, who had mistakenly filed claim under state compensation act, was barred by statute of limitations from filing claim under the LHCA). The statute of limitations for the 1927 LHCA tolled one year after the injury. 33 U.S.C. § 913 (1970) (amended 1972).

53. 317 U.S. 249 (1942).

54. In essence, the "twilight zone" was merely a new name for the old "maritime but local" cases. To the Court, the "twilight zone" involved that type of employment which, "by reason of particular facts, could fall on either side" of the *Jensen* line, resulting in seeming coverage for an employee under either a federal and/or state workmen's compensation statute. *Id.* at 255-56.

55. *Id.* at 256-58.

56. The way to achieve this result was only vaguely hinted at in the majority opinion. To Chief Justice Stone, dissenting, the majority's result could be reached only by indulging in two interrelated presumptions — that an award under a state compensation act was to be presumed valid and that an award under the federal

Indeed, this was largely the reading the lower courts gave to the decision.⁵⁷ Some twenty years later, concurrent jurisdiction for injuries incurred seaward of the *Jensen* line was explicitly recognized by the Court in *Calbeck v. Travelers Insurance Co.*⁵⁸

Unfortunately, the jurisdictional problems plaguing the Act were by no means at an end. *Davis* and *Calbeck* had only resolved how far *seaward state* compensation acts permissibly could extend. The question how far landward the coverage of the *federal* statute could advance did not reach the Court until 1969. In *Nacirema Operating Co. v. Johnson*,⁵⁹ a consolidated appeal involving three longshoremen injured (one fatally) on various piers while loading ships, the Court ruled the three claimants were not eligible for compensation under the LHCA. Congress, said the Court, had clearly chosen a water situs to be the determinative test for coverage under the Act.⁶⁰ Since piers historically had been treated as a land situs,⁶¹ the Court reasoned that the injuries had not occurred, as required by the Act, "upon the navigable waters of the United States." Therefore, the LHCA did not cover these three claimants. The Court noted that if Congress desired to cover longshoremen injured landward of the *Jensen* line, it could easily do so on the basis of their "status," since longshoremen work under employment contracts with a maritime subject matter.⁶² Such changes, however, were a matter for the legislature, not the judiciary, and therefore the Court declined to extend the coverage of the LHCA landward onto the pier.⁶³

Nacirema clearly foreclosed any possibility under the 1927 LHCA of equal treatment for longshoremen injured while performing essentially identical tasks on the dock as opposed to the vessel. Longshoremen were condemned to endure ever-shifting compensation coverage because, in the course of a day's work, they constantly crossed back and forth between the pier, a land situs, and the vessel, a water situs. However, this was not the only effect of *Nacirema*. The decision came to stand for an even more startling anomaly — that two longshoremen working on the pier would receive different benefits if, as a result of their accidents, one longshoreman fell into the water while the other fell to the ground.⁶⁴

statute was to be treated similarly. See GILMORE & BLACK, *supra* note 2, at § 6-49, at 420.

57. ROBERTSON, *supra* note 50, at 211-12.

58. 370 U.S. 114 (1962). However, *Calbeck* employed a line of reasoning completely different from that used in *Davis*. See authorities collected in note 50 *supra*. As a practical matter, the *Calbeck* decision allowed injured employees to file for either state or federal compensation benefits.

59. 396 U.S. 212 (1969).

60. *Id.* at 223-24.

61. *Id.* at 214-15.

62. *Id.* at 215-16 n.7.

63. *Id.* at 223-24.

64. When the *Nacirema* case was originally argued in the United States Court of Appeals for the Fourth Circuit, four separate cases involving four different longshoremen were consolidated for the appeal. See Marine Stevedoring Corp. v.

The *Nacirema* Court's ruling that the LHCA did not cover longshoremen injured landward of the *Jensen* line proved to be only one source of dissatisfaction with the 1927 Act. Low benefit levels⁶⁵ and extensive third party litigation⁶⁶ also stimulated calls for reform. As a result, Congress

Oosting, 398 F.2d 900 (4th Cir. 1968) (en banc). In three of the four accidents, the longshoremen physically remained on the pier during the entire occurrence. However, in the fourth accident, the longshoreman was hurled off the pier into the water. The Fourth Circuit ruled all four claimants qualified for coverage under the LHCA.

The employers appealed only those three cases where the claimants' injuries were sustained entirely on the land. It was the award of federal benefits to these three longshoremen that was reversed in *Nacirema*. The mere fact that a claimant was injured in such a way as to catapult him into the water consequently became a decisive factor in resolving the issue of state versus federal coverage. The Fourth Circuit, found such a distinction "harsh and incongruous." *Id.* at 907. The Supreme Court acknowledged that this state of affairs was not desirable, but concluded that the incongruities could not be avoided under the 1927 Act. 396 U.S. at 223-24.

65. Prior to the 1972 amendments, the maximum compensation for disability was \$70 per week, a figure which had not been increased since 1961. 33 U.S.C. § 906(b) (1970) (amended 1972). As the average longshoreman's wage in 1972 approached \$200 per week, the 1927 Act clearly failed to provide an adequate income replacement for injured employees. See SENATE COMM. ON LABOR AND PUBLIC WELFARE, LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972, S. REP. NO. 1125, 92d Cong., 2d Sess. 4 (1972) [hereinafter cited as S. REP.]. Under the amended Act, the schedule of benefits was raised significantly. The Act ensures that the vast majority of injured workers receive approximately two-thirds of their average weekly wage as compensation for disability.

66. Following the basic concept underlying most workmen's compensation legislation, the 1927 LHCA ensured that a given longshoreman received compensatory benefits for injuries incurred in employment-related accidents, regardless of the presence or absence of negligence on the part of his employer. The longshoreman, however, gave up his right to sue his employer in a tort action. The longshoreman's sole remedy against his employer in the event of injury was to file a claim for benefits under the Act. See 33 U.S.C. § 905 (1970) (amended 1972).

However, as with most compensation acts, the LHCA also expressly preserved an injured employee's right to bring a tort action against any third party who might potentially be liable in regard to the accident. See 33 U.S.C. § 933 (1970) (amended 1972). This provision, innocuous enough in a typical shore-based employment situation, proved to have a different effect when applied to the longshoring industry. Indeed longshoremen

regularly work on premises (i.e., ships) owned by third parties (shipowners) which are temporarily relinquished to the employers (master stevedore) for the carrying out of . . . loading and unloading operations. Thus, the situation of employment-related injuries attributable to the acts of third parties (not employers) . . . is the order of the day in maritime employment.

GILMORE & BLACK, *supra* note 2, § 6-46, at 410.

Historically, the shipowner's duty was simply to provide a ship that was seaworthy to those seamen in his employ. However, in the 1940's and '50's the Supreme Court substantially rewrote the law in this area. First, the Court transformed the shipowner's duty to provide a seaworthy ship into a form of strict liability. See, e.g., *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944). Second, the Court ruled that an unseaworthiness claim could be brought against the owner of the vessel not only by an actual seaman, but also by a longshoreman working on the ship in loading and unloading operations. See *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). Finally, in 1956, the Court ruled that a shipowner who was required to pay a

substantially revised the 1927 Act in 1972.⁶⁷ Of particular importance to the subject of this Comment was Congress' revision of section 903, the "coverage" provision of the Act. As before, the employee's injury must occur on the "navigable waters" of the United States; a maritime "situs" must be present. However, the boundaries of this "situs" have been dramatically broadened. "Navigable waters" now includes "any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."⁶⁸ Therefore, in a most explicit fashion, Congress has legislatively overruled the *Nacirema* decision and moved the coverage of the LHCA landward of the *Jensen* line.⁶⁹

Under the amended Act, an injured claimant still must qualify as an "employee" before he is entitled to federal benefits. However, in contrast to the 1927 LHCA, the term "employee" is no longer defined by reference to the activities performed by the claimant's employer. Instead, the amended Act requires the claimant himself to be a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations"⁷⁰ before he merits the designation of "employee." The clear implication of this status requirement is that the claimant must have some personal connection, by virtue of the functions he performs, with the work of the sea.

Accordingly, the Act now contains two requirements for the assertion of federal power over employment-related death and injury in the maritime

damage award as a result of a successful unseaworthiness suit by a longshoreman could seek indemnity from the longshoreman's employer, the stevedore, on the theory that the stevedore had breached his express and/or implied warranty of workmanlike performance to the shipowner. See *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956).

The net effect of these decisions was to render the stevedore liable to any of his injured employees for a substantial tort claim. As a result, § 905 of the 1927 Act, which stated that the employer's liability to his employee was exclusively that prescribed by the Act, became meaningless. Insurance costs for stevedores skyrocketed, and litigation expenses for both employers and employees mounted steadily. See S. REP., *supra* note 65, at 9. In addition, federal district court dockets in many areas became jammed with longshoremen's unseaworthiness actions. *Id.*

To counter these problems the 1972 amendments to the LHCA, in effect, legislatively overruled *Sieracki* and *Ryan*. A longshoreman may now sue a third party for negligence but not for unseaworthiness; and the stevedore is no longer liable in any fashion to the third party who is the subject of the suit. See 33 U.S.C. § 905(b) (Supp. V 1975).

67. 33 U.S.C. §§ 901-950 (1970) as amended by Act of Oct. 27, 1972, Pub. L. No. 92-576, 86 Stat. 1251 (1972) (codified at 33 U.S.C. §§ 901-950 (Supp. V 1975)). See generally Gorman, *The Longshoremen's and Harbor Workers' Compensation Act — After the 1972 Amendments*, 6 J. MAR. L. & COM. 1 (1974); Comment, *Broadened Coverage Under The LHWCA*, 33 LA. L. REV. 683 (1973); Note, *Maritime Jurisdiction and Longshoremen's Remedies*, 1973 WASH. U.L.Q. 649 (1973); 4 RUT. — CAM. L. J. 404 (1973); 47 TUL. L. REV. 1151 (1973).

68. 33 U.S.C. § 903(a) (Supp. V 1975).

69. GILMORE & BLACK, *supra* note 2, § 6-50, at 424.

70. 33 U.S.C. § 902(3) (Supp. V 1975).

industry — situs and status. The application of the status criterion has already generated considerable difficulty. Indeed, the task of determining which shore-based employees in a modern, diversified port facility are engaged in "maritime employment" has proven to be a vexing one to the federal courts. Since this question is now before the Supreme Court, it is particularly critical to examine how the lower federal courts have construed this term in order to evaluate the possible resolutions.

THE "POINT OF REST" ANALYSIS

The United States Court of Appeals for the Fourth Circuit addressed the problem of defining "maritime employment" in *I.T.O. Corp. v. Benefits Review Board*,⁷¹ a consolidated appeal involving three employees who incurred injuries on the land while performing various tasks in the ports of Baltimore, Maryland and Norfolk, Virginia. The first claimant, Adkins, was a forklift operator in a warehouse located at the Dundalk Marine Terminal in the Port of Baltimore. On March 2, 1973, a load of brass tubing, packed in a container, arrived at the terminal aboard the S.S. American Legend. At that time, the container was removed from the ship, placed on a chassis, and trucked approximately three-quarters of a mile from the ship's side to a marshaling yard. The American Legend, which was able to fully discharge its cargo in a single day, sailed from Baltimore the same day it arrived. The container, however, remained in storage at the marshaling yard until March 5, when it was moved to the warehouse where Adkins was assigned. There, the container was "stripped," that is, unloaded, and the tubing itself placed in storage. Four days later, while moving the load of tubing from its storage place in the warehouse to a loading area where a delivery truck waited to transfer the tubing to its final inland destination, Adkins suffered back and leg injuries.⁷²

The second claimant, Brown, also a forklift operator, worked in a terminal warehouse in Norfolk, Virginia. When goods destined for eventual shipment by water arrived at the terminal either by truck or rail, they were stored in specified areas in the warehouse where Brown worked. It was Brown's function to move these items from their storage areas to other locations within the warehouse where empty containers stood waiting. At that point, other employees would take the individual items of cargo delivered by Brown and "stuff," that is, load the containers with them.⁷³ While engaged in his duties, Brown suffered carbon monoxide poisoning.

71. 529 F.2d 1080 (4th Cir. 1975), *vacated*, 542 F.2d 903 (4th Cir. 1976) (en banc), *petitions for cert. filed*, 45 U.S.L.W. 3401 (U.S. Nov. 19, 1976) (No. 76-706), 45 U.S.L.W. 3417 (U.S. Nov. 24, 1976) (No. 76-730).

72. Brief of the Director, Office of Workers' Compensation Program at 9-11, *I.T.O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080 (4th Cir. 1975), *vacated*, 542 F.2d 903 (4th Cir. 1976) (en banc), *petitions for cert. filed*, 45 U.S.L.W. 3401 (U.S. Nov. 19, 1976) (No. 76-706), 45 U.S.L.W. 3417 (U.S. Nov. 24, 1976) (No. 76-730).

73. 529 F.2d 1080, 1082 (4th Cir. 1975). When fully loaded the container would then be moved by a vehicle called a "hustler" to one of two areas. If the container would not be loaded aboard a vessel for some period of time, it would be stored in a

The third claimant, Harris, performed the function which sequentially followed that performed by Brown. He operated a small truck-like vehicle called a "hustler," with which he moved previously stuffed containers from the long-term container storage area to the container marshaling area located near the pier. Later in the day, when the designated ship finally arrived at the pier, the containers would actually be loaded aboard the vessel. While moving containers, the brakes on Harris' hustler failed and he was injured in a collision with a parked container.⁷⁴

Adkins, Brown, and Harris all filed claims for benefits under the amended LHCA. In each instance, their employers unsuccessfully fought the claims at two separate administrative levels.⁷⁵ The employers then filed appeals with the United States Court of Appeals for the Fourth Circuit.⁷⁶ In deciding the issue, the court first observed that all three claimants clearly met the situs requirement of the amended Act.⁷⁷ In addition, the court found that at the time of their respective injuries, each employee was clearly performing a function within the "overall process" of loading and unloading a ship.⁷⁸ However, the court was unable to determine, from the words of the Act itself, whether employees performing such land-based tasks in the "overall" loading/unloading process were truly engaged in "maritime employment" so as to satisfy section 902(3) of the Act. The Fourth Circuit finally resolved this problem by ruling that all longshoremen injured while unloading or loading cargo in the area between the vessel and the first or last land-based cargo storage or holding area ("point of rest") were engaged in "maritime employment" and thereby covered by the federal act.⁷⁹ Since Adkins, Brown, and Harris were all injured landward of the "point of rest," they were entitled solely to state workmen's compensation benefits.⁸⁰

"long-term container storage yard." If actual shipboard loading was more immediate, the container would be taken to a "marshaling area" adjacent to the pier for short-term storage. *Id.*

74. *Id.*

75. See *Harris v. Maritime Terminals, Inc.*, 1 BENEFITS REV. BD. SERV. 301 (1975); *Brown v. Maritime Terminals, Inc.*, 1 BENEFITS REV. BD. SERV. 212 (1974); *Adkins v. I.T.O. Corp.*, 1 BENEFITS REV. BD. SERV. 199 (1974). If an employer contests a claim filed under the LHCA by an injured employee, a hearing is conducted by an administrative law judge to resolve the issue. 33 U.S.C. § 919 (1970) (Supp. V 1975). Appeals from such decisions are then heard by the Benefits Review Board (BRB), an independent three member reviewing panel within the Department of Labor. 33 U.S.C. § 921(b) (Supp. V 1975).

76. Any party may appeal a decision of the BRB to the United States Court of Appeals for the circuit in which the claimant's injury occurred. 33 U.S.C. § 921(c) (Supp. V 1975).

77. 529 F.2d at 1083-84.

78. *Id.* at 1081. The court, in using the phrase "overall process," was apparently referring to the broad perspective view which can be taken of the loading/unloading process. Such a view would conceive the loading/unloading process as including all cargo-handling tasks taking place between the "ship and the point of discharge to the consignee or point of receipt from the shipper." *Id.* See note 121 *infra*.

79. *Id.* at 1087.

80. The "point of rest" doctrine enunciated in the opinion of Judge Winter, with Judge Craven, dissenting, was subsequently reheard en banc by six judges. 542 F.2d

The majority opinion, written by Judge Winter, took a standard approach to interpreting the statute. First, the court noted that the Act itself, other than stating that "maritime employment" included "any longshoreman or other person engaged in longshoring operations,"⁸¹ was totally silent on the matter of coverage.⁸² Then the court made a brief sojourn into the preamendment cases and administrative regulations. The court concluded that the cases were of minimal assistance in defining the words of section 902(3),⁸³ while the administrative regulations provided only limited authority on the meaning of the phrase "longshoring operations."⁸⁴ Therefore, the court turned to an examination of "the legislative history of the 1972 Amendments and . . . the context in which they were enacted" for further illumination.⁸⁵

The court first undertook a brief examination of the forty-seven year history of the LHCA. The majority observed that the *Nacirema* decision was the seminal case for understanding the extended coverage provisions of the amended Act.⁸⁶ According to this view, the amendments represented a direct response to the *Nacirema* Court's suggestion that Congress could cure the anomalies of coverage under the 1927 Act. Thus, a basic goal of Congress in passing the amendments was to afford longshoremen injured landward of

903 (4th Cir. 1976). The en banc opinion substantially modified the result of the panel decision. See note 98 *infra*. Adkins was again denied federal benefits, but Harris and Brown were granted LHCA coverage. While the "point of rest" doctrine is therefore of indeterminate validity in the only circuit which has accepted the theory, it cannot be lightly dismissed. Indeed, it represents the central theory the longshoring industry will argue before the Supreme Court. See, e.g., Brief for the Petitioner at 34-37, I.T.O. v. Blundo, cert. granted, 97 S. Ct. 522 (1976) (No. 76-454). The "point of rest" analysis was also advocated in a dissenting opinion written in the Second Circuit decision which rejected the "point of rest" theory. See *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 57 (2d Cir. 1976) (Lumbard, J., concurring and dissenting); note 126 *infra*.

For discussion of the Fourth Circuit three judge panel opinion in *I.T.O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080 (4th Cir. 1975), see 54 N.C.L. REV. 925 (1976); 8 ST. MARY'S L.J. 210 (1976); and 10 SUFFOLK U.L. REV. 1179 (1976).

81. 33 U.S.C. § 902(3) (Supp. V 1975).

82. 529 F.2d at 1083.

83. The case law, said the court, "shed[s] no real light on how far shoreward the maritime nature of loading and unloading extends"; those cases had "limited recovery to injuries sustained on the seaward side of the water's edge because such was the limit of admiralty jurisdiction." *Id.* at 1084.

84. The Occupational Safety and Health Administration, in regulations designed to increase safety in the longshoring industry, promulgated the following definition: "[t]he term 'longshoring operations' means the loading, unloading, moving or handling of cargo, ship's stores, gear, etc., into, in, on, or out of any vessel on the navigable waters of the United States." 29 C.F.R. § 1918.3(i) (1974). The court viewed the regulations as an indication of the narrow meaning of the term "longshoring operations" at the time the 1972 amendments were passed. Nevertheless, the court conceded that because the regulations were drafted prior to the 1972 amendment, they could very well be redrafted at a later time to cover a broader range of shore-based employees. 529 F.2d at 1084.

85. 529 F.2d at 1085.

86. *Id.* at 1086.

the *Jensen* line the opportunity to file for federal benefits. The only problem was to decide how far landward of the *Jensen* line Congress had wanted to extend coverage.

In the Senate Committee Report on the amendments, the court found what it considered to be persuasive evidence explaining Congress' purpose in extending the coverage of the Act.⁸⁷ The committee began its discussion of coverage by stating that, in general, the 1972 amendments were designed to cover those employees "who would otherwise be covered by this Act [the 1927 LHCA] for part of their activity."⁸⁸ Then, the committee illustrated the meaning of this general assertion by describing, with some precision, the types of employees it envisioned as either eligible or ineligible for federal coverage.⁸⁹ The court briefly examined all of the committee's examples of covered and noncovered employees. However, the court apparently accorded substantial weight to two examples in particular. First, the committee stated that longshoremen who unload cargo from a ship and transport it "immediately . . . to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters" are covered under the federal Act.⁹⁰ The court, focusing on the word "immediately," inferred from this statement that those longshoremen who handle cargo shoreward of the "storage or holding area" where cargo is "immediately" transported were thereby excluded from coverage under the LHCA.⁹¹ Then the court turned to the second example, which stated that "employees whose responsibility is only to pick up stored cargo for further transshipment" were not eligible for federal benefits.⁹² The court apparently understood this to refer to those

87. The House and Senate Reports contain virtually identical discussions of the extended coverage provisions of the 1972 amendments. *Compare* S. REP., *supra* note 65, at 12-13 *with* HOUSE COMM. ON EDUCATION, AND LABOR, LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972, H. REP. NO. 1441, 92d Cong., 2d Sess. 10-11 (1972). [Hereinafter cited as H. REP.].

88. 529 F.2d at 1085 (quoting S. REP., *supra* note 65, at 13).

89. The Committee stated:

To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading and unloading functions are covered by the new amendment.

S. REP., *supra* note 65, at 13.

90. 529 F.2d at 1087 (quoting S. REP., *supra* note 65, at 13).

91. *Id.* at 1088.

92. *Id.* at 1087.

employees who move about or lift cargo which has been stored in the terminal but which is destined for eventual transshipment.⁹³

With these examples in mind, and using only the briefest of explanation and reasoning, the court abruptly announced that the committee's examples of covered and noncovered employees exposed a clearly discernible pattern. They demonstrated that the committee intended the coverage of the amended Act to the defined with reference to the "point of rest" — a concept of industry-wide usage that was equally applicable in both loading and unloading situations.⁹⁴ When unloading, the point of rest was that point "on the pier, wharf, or terminal adjoining navigable waters" where cargo is first stored or held (brought to "rest") after it leaves the ship.⁹⁵ When loading, it is that point "on the pier, wharf, or terminal adjoining navigable waters" where the cargo is last stored or held prior to actual shipboard loading.⁹⁶ The court ruled that when cargo is between the ship and the first or last points of rest, those employees handling such cargo are engaged in "maritime employment."⁹⁷ When cargo is handled landward of this point, the maritime nature of the work disappears, as does the coverage of the federal Act.⁹⁸

93. *Id.* at 1088.

94. The court apparently relied on two preamendment sources to define the "point of rest." *Id.* at 1087. The first source described the "point of rest" as "a point within a terminal where the terminal operator designates that cargo or equipment be placed for movement to or from a vessel." *Id.* at 1095 (Craven, J., dissenting) (quoting Norfolk Marine Terminal Association Tariff (Item 290)). The second source, employing a similar definition, said the "point of rest" was

that area on the Terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading.

Id. at 1096 (Craven, J., dissenting) (quoting 46 C.F.R. § 533.6(c) (1976)).

Both of these sources refer to the point at which a marine terminal operator can assess charges against the vessel for performing various services. In the vessel unloading situation, the terminal cargo handling operation does not begin (and the terminal operator cannot collect fees for performing cargo handling services) until the cargo either has passed beyond the "point of rest" or has remained at the "point of rest" beyond a certain length of time. Similarly, when cargo is outbound, the terminal operator can assess charges only as long as the cargo is landward of the "point of rest." In essence, the "point of rest" defines the time at which the respective duties of the stevedore and marine terminal operator begin and end. *See* 46 C.F.R. § 533 (1976).

It is important to note that the point of rest is neither the point where cargo first touches ground when it is unloaded from a ship by the ship's tackle, nor the point where cargo last touches the ground before the ship's tackle hoists cargo aboard the vessel. Instead, it refers to the holding area located away from the side of the ship where cargo is assembled for short-term storage.

95. 529 F.2d at 1087.

96. *Id.*

97. *Id.* at 1088.

98. Judge Craven, in a lengthy dissent, argued that the point of rest doctrine was incorrect. In particular, he observed that the point of rest doctrine is not mentioned explicitly in either the statute or the committee report. The majority, therefore, had "no license to find in a statute words which the Congress did not put there." *Id.* at

THE FUNCTIONAL EQUIVALENCE/UNIFORM COVERAGE ANALYSIS

The difficult task of defining "maritime employment" came before the United States Court of Appeals for the Second Circuit in *Pittston Stevedoring Corp. v. Dellaventura*,⁹⁹ a consolidated appeal involving two land-based workers¹⁰⁰ injured in the Port of New York. The first claimant, Blundo, sustained an injury when he slipped on a patch of ice at the pier where he was working.¹⁰¹ At the time of his accident, Blundo was "checking"¹⁰² cargo being stripped from a container. The container, unloaded from a vessel several days earlier in a different part of the harbor, had been trucked over city streets to the pier where Blundo was assigned.¹⁰³

1096. As a result, Judge Craven urged that the theories advanced by the Benefit Review Board, *see, e.g., Avvento v. Hellenic Lines, Ltd.*, 1 BENEFITS REV. BD. SERV. 174 (1974), be affirmed by the court. Under the BRB's analysis, Adkins, Harris, and Brown would be covered by the amended Act because they were engaged in the continuous process of loading and unloading cargo in maritime commerce: a process that begins when goods are delivered to the terminal building for maritime transport and which ends only when those goods are taken from the terminal for final inland transport. 529 F.2d at 1092-93.

After the three judge panel "point of rest" opinion was issued, the Fourth Circuit reheard the I.T.O. case en banc. 542 F.2d 903 (4th Cir. 1976) (en banc), *petitions for cert. filed*, 95 U.S.L.W. 3401 (U.S. Nov. 19, 1976) (No. 76-706), 45 U.S.L.W. 3417 (U.S. Nov. 24, 1976) (No. 76-730). The en banc opinion substantially altered the results of the first decision. Judges Winter and Haynsworth continued to subscribe to the point of rest doctrine. They were joined by Judge Russell. Judges Craven and Butzner sided with the former's dissenting panel opinion. As a result, Judge Widener became the deciding vote. His theory, expressed solely in the opinion of Judge Winter, was that employees moving goods in the terminal for mere convenience or transshipment purposes, are not covered by the LHCA. However, when they move cargo in the terminal during the overall process of loading or unloading a ship, they are entitled to LHCA benefits. In conformity with this thinking, Judge Widener sided with the three "point of rest" adherents in the Adkins case. Adkins was denied federal benefits in the resulting four-to-two vote. In contrast, Widener sided with the dissenters in the cases of Harris and Brown, and their awards were upheld in the resulting three-to-three deadlock.

99. 544 F.2d 35 (2d Cir.), *cert. granted sub nom.*, *Northeast Marine Terminal Co. v. Caputo*, 97 S. Ct. 522 (1976) (Nos. 76-444, 454).

100. The consolidated appeal originally involved four individual workers. However, the employers' appeals in two cases were dismissed at the outset for procedural reasons. *Id.* at 42-46.

101. *Id.* at 41.

102. When a container carrying goods destined for several consignees is being "stripped," a "checker" is present to verify the contents of the container against the bill of lading. *Id.* at 41 n.4. However, whether cargo is being shipped by container or otherwise, the "checker" plays a vital role in the cargo handling process at a marine terminal. The "checker" records the condition in which cargo arrives at the terminal prior to maritime shipment. He also ascertains the condition of cargo that has been discharged from a vessel for subsequent land transit. In this way, the maritime carrier's responsibility for cargo damage or loss is immediately and accurately determined. *See L. KENDALL, THE BUSINESS OF SHIPPING* 68, 78 (1973).

103. 544 F.2d at 41.

The second claimant, Caputo, was injured while rolling a dolly loaded with cheese out of the terminal warehouse into a consignee's truck.¹⁰⁴ The cheese had been unloaded from a vessel at least five days prior to the accident.¹⁰⁵

The Second Circuit, per Judge Friendly, ruled that both Caputo and Blundo met the situs requirement of the amended Act.¹⁰⁶ However, the court encountered difficulty in applying the status requirement. The court observed that the Act itself failed to define either "engaged in maritime employment," or "longshoreman or other person engaged in longshoring operations."¹⁰⁷ In addition, the court stated that definitions of these words used in other contexts prior to the amendments were of minimal value in assessing what Congress may have meant when it enacted the amendments in 1972.¹⁰⁸ Therefore, an extensive analysis of the legislative history was necessary.¹⁰⁹ As a result of that analysis, the court held that the amended Act, at a minimum,

cover[s] all persons meeting the situs requirements (1) who are engaged in stripping or stuffing containers or (2) are engaged in the handling of cargo up to the point where the consignor [*sic*, consignee] has actually begun its movement from the pier (or in the case of loading, from the time when the consignor has stopped his vehicle at the pier), provided in the latter instances that the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel.¹¹⁰

104. *Id.* at 42.

105. *Id.*

106. *Id.* at 51. The question whether Blundo met the situs requirement of the Act was contested at the hearing before the administrative law judge. *Id.* at 51 n.19.

107. *Id.* at 41.

108. *Id.* at 50-51.

109. Prior to its examination of the legislative history, the court rejected a number of possible methods by which to analyze the words of § 902(3). The court stated that the language of § 920 of the Act, to the effect that coverage should be presumed for any claim filed under the Act, was simply not "helpful" when the dispute involved an issue as crucial as the proper interpretation of the statute's language. *Id.* at 48. *But see* Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 541 (5th Cir. 1976), *petitions for cert. filed*, 45 U.S.L.W. 3364 (U.S. Nov. 8, 1976) (No. 76-641), 45 U.S.L.W. 3450 (U.S. Dec. 27, 1976) (No. 76-880).

Similar reasoning applied, said the court, to the suggestion that the various courts of appeals should defer to the decisions made by the administrative agency charged with the responsibility of applying the statute, the Benefits Review Board. In the area of statutory interpretation, the court asserted that its competence was simply superior to that of the BRB. 544 F.2d at 48-50. *But see* Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d at 541. It should be noted that the Second Circuit had little confidence in the opinions of the BRB. The court harshly criticized the BRB for rendering conclusory decisions which gave minimal information on the nature of the longshoring industry. 544 F.2d at 47.

Finally, the Second Circuit ruled that while the oft-cited principle that "remedial legislation should be construed liberally" was helpful, it was by no means of decisive importance. *Id.* at 51. *But see* Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d at 541.

110. 544 F.2d at 56.

On the basis of this holding, the court ruled that Blundo and Caputo met the status requirement and were therefore covered by the Act.

Obviously, the Second and Fourth Circuits had distinctly different appraisals of the legislative history of the 1972 amendments. Yet the Second Circuit found that more than a mere difference of interpretation separated the two courts. Indeed, the Second Circuit stated that the legislative history clearly precluded the use of the "point of rest" doctrine.¹¹¹ The keystone in the court's analysis was its observation that the congressional committee reports had treated the language of section 902(3) of the amended Act in a disjunctive fashion.¹¹² For whatever reasons, Congress had "perceived a need to provide expressly for coverage for 'any longshoreman' *in addition to* what it established for a person engaged in 'longshoring operations.'" ¹¹³ The court concluded that the actual words of section 902(3) had to be read in the same disjunctive manner found in the committee reports.

Under such an interpretation, a longshoreman would be covered by the Act (assuming he met its other requirements) even though he was *not* engaged in "longshoring operations." This result, said the court, clearly condemned the "point of rest" doctrine because, almost by definition, any person moving cargo between a ship and the first or last points of rest was engaged in "longshoring operations." If the point of rest doctrine were correct, then only a desire by Congress to be redundant could explain why that body also provided coverage for "any longshoreman."¹¹⁴

The court then set out to explain Congress' express coverage of both "any longshoreman" and any "person engaged in longshoring operations."¹¹⁵ The committee reports, said the court, demonstrated that Congress was concerned with the problems brought about by containerization and other modern cargo-handling methods. In particular, the reports revealed a congressional awareness that "new facts of life on the waterfront . . . mean that a good deal more of the longshoreman's traditional jobs are now performed on shore."¹¹⁶ Therefore, the court concluded that Congress

111. *Id.* at 52.

112. The court was referring to the statement in the committee report which said: "[a]ccordingly, the bill would amend the act to provide coverage of *longshoremen*, harbor workers, ship repairmen, ship builders, shipbreakers, and *other employees engaged in maritime employment.*" *Id.* (quoting S. REP., *supra* note 65, at 13) (emphasis added).

113. *Id.* (emphasis added). Under the Second Circuit's interpretation, § 902(3) would state: The term "employee" means "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring activity or engaged in other maritime employment." *Id.*

114. *Id.*

115. The court rejected the argument that "any longshoreman" meant, literally, "any longshoreman." "Obviously it is not enough that a claimant calls himself a longshoreman or that a longshoreman's union in a particular port has forced employers to hire its members for such unlongshoreman-like positions as clerks or guards." *Id.* *Accord*, *Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 272 (1st Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3332 (U.S. Oct. 22, 1976) (No. 76-571).

116. 544 F.2d at 53.

undoubtedly considered these now shore-based activities to be the clear "functional equivalent[s]" of those tasks performed by longshoremen in precontainerized days aboard or alongside the vessel.¹¹⁷ In other words, although the tasks involved in handling containerized cargo might seem different from those typically carried out by longshoremen in the past, Congress nonetheless considered these activities to be "longshoring operations." Curiously, the court's analysis stopped at this point; no attempt was made to relate these observations to Congress' reasons for extending coverage to both "any longshoreman" and any "person engaged in longshoring operations."¹¹⁸

Nevertheless, this interpretation produced a clear outcome in terms of claimant Blundo, who was injured while assisting in the "stripping" of a container. The court concluded that in enacting the amendments in 1972, it had been Congress' goal to cover employees performing activities which were "functionally equivalent" to traditional longshoring activities, so long as they met the Act's situs test.¹¹⁹ According to the court's analysis, "stuffing" and "stripping" were certainly within the coverage of the 1972 amendments. Therefore, the award of LHCA benefits to Blundo was correct.¹²⁰ Unfortunately, the court offered no criteria for determining whether a given task is or is not "functionally equivalent." Instead, the court merely stated that "stuffing" and "stripping" containers are the "functional equivalents" of the longshoreman's time honored tasks of stowing cargo into the ship's hold and sorting cargo as it is unloaded from the ship.¹²¹

The committee report, said the court, also gave a second explanation for the use of the term "any longshoreman" in section 902(3) of the Act. In enacting the amendments, Congress wanted "to permit a uniform compensa-

117. *Id.*

118. Although the court failed to discuss Congress' reasons for expressly covering both groups, a possible explanation is available. By using the phrase "any longshoreman," Congress perhaps hoped to ensure that an injured longshoreman would still be covered by the LHCA, even if the courts did not agree with Congress that land-based tasks now performed by longshoremen were "functionally equivalent" to "longshoring operations."

119. *Id.*

120. 544 F.2d at 56.

121. *Id.* It should be noted that the functional equivalence analysis demands an expansive concept of the process of loading and unloading a vessel. The Second Circuit said that such a view would recognize that the loading and unloading of a vessel "does not stop as soon as the cargo first hits the pier on being removed from a vessel, nor does it begin only when the cargo stands on the pier next to the vessel on which it is about to be loaded." *Id.* at 53 n.21. Instead, the loading process would begin with the receipt of cargo from the consignor, and the unloading process would end with the delivery of cargo to the consignee.

In light of the Second Circuit's apparent perception of the "narrow view" of loading and unloading, the question arises whether the court fully understood the location of the "point of rest." The point of rest is not the place where "cargo hits the pier on being removed from the vessel." See note 94 *supra*. Yet, the court seems to have confused the "point of rest" definition with the "ship's tackle" definition. See 544 F.2d at 53.

tion system to apply to employees who would otherwise be covered by this Act for part of their activity."¹²² In contrast to the Fourth Circuit, the Second Circuit determined that this language revealed broader congressional intentions than merely remedying the evils brought about by *Nacirema*. Indeed, this congressional

concern for uniformity was not limited to rectifying the disparity between the longshoreman making up the draft on the ship and the longshoreman receiving it on the pier [that is, *Nacirema*]; it extended to the disparity that would result if a line were drawn between the latter and a longshoreman, perhaps the very same one, who moved the unloaded cargo to another place on the pier.¹²³

The court, stressing the words "uniform coverage," therefore concluded that Caputo, and employees like him, would be covered by the amended Act when loading cargo into or unloading cargo from the vehicles of consignees or consignors. To be eligible for coverage, the employee need only meet three qualifications: that he not come under one of the express exceptions found in the committee report;¹²⁴ that, in the past, he had "spen[t] a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel";¹²⁵ and that his injury took place in a permissible situs.¹²⁶

THE "INTEGRAL PROCESS" ANALYSIS

The third and final theory for defining "maritime employment" was advanced by the United States Court of Appeals for the Fifth Circuit in *Jacksonville Shipyards, Inc. v. Perdue*.¹²⁷ The court, adopting the broadest interpretation to date of the 1972 amendments, ruled that any employee who participated in "an integral part of the process of moving maritime cargo from a ship to land transportation" or vice-versa was covered by the Act.¹²⁸

122. *Id.* at 54 (quoting S. REP., *supra* note 65, at 13).

123. *Id.*

124. *Id.* For the list of Congress' express exceptions, see note 89 *supra*.

125. *Id.* at 56. The court apparently added this proviso in response to the "otherwise . . . covered by this Act for part of their activity" language found in the committee report. The court left the issue whether this proviso was "essential" to be decided in a future decision. *Id.* For further discussion of this proviso, see text accompanying notes 168 to 170 *infra* and Addendum.

126. 544 F.2d at 56. Judge Lumbard, in a dissenting opinion contended that the Fourth Circuit's "point of rest" rule was "easier to apply" and "more in keeping with the realities of maritime employment" than the tests adopted by the majority opinion. *Id.* at 57. In *Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 275-77 (1st Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3332 (U.S. Oct. 22, 1976) (No. 76-571), the First Circuit expressly rejected the point of rest doctrine and adopted, in large part, the reasoning of the Second Circuit.

127. 539 F.2d 533 (5th Cir. 1976), *petitions for cert. filed*, 45 U.S.L.W. 3364 (U.S. Nov. 8, 1976) (No. 76-641), 45 U.S.L.W. 3450 (U.S. Dec. 27, 1976) (No. 76-880).

128. *Id.* at 543.

In *Jacksonville*, a consolidated appeal, two employees¹²⁹ were injured while performing cargo handling tasks. The first claimant, Ford, was injured in Beaumont, Texas while loading a military vehicle onto a railroad flat car for subsequent inland transport.¹³⁰ The vehicle had been discharged from a vessel and stored at the pier for a minimum of two days prior to the accident. The second claimant, Bryant, was working as a "cotton header" in a warehouse located adjacent to a pier in Galveston, Texas.¹³¹ Bryant's job was to store loads of cotton received from warehouses located further inland. The cotton would remain stored in Bryant's warehouse for approximately one week; members of the longshoremen's union local¹³² would then arrive to transfer the cotton to a waiting vessel.

In a remarkably brief analysis of the committee reports, the court noted that Congress definitely desired to cover those employees who load or unload a vessel. The court then observed that Congress also extended coverage to certain employees, in particular, "checkers," when they were "directly involved in the loading or unloading functions."¹³³ Although this language referred only to checkers, the court asserted that the statement indicated a more general intent on the part of Congress — to cover employees not only while loading or unloading vessels, but also while "directly involved" in loading or unloading tasks.¹³⁴ The court, by implication, indicated that the test for direct involvement was satisfied if the injured employee was performing work which was "an integral part of the process" of cargo movement between land and water transport.¹³⁵ Applying this analysis, the court concluded that both Bryant and Ford were covered by the amended Act.¹³⁶

129. *Jacksonville* actually involved five consolidated cases. *Id.* at 536. The three cases involving employees not engaged in cargo handling activities will not be discussed in this Comment.

130. *Id.* at 543.

131. *Id.* at 544.

132. The "cotton headers," who handled cotton solely in the warehouse, had their own individual union local. The longshoremen's local was a separate organization. *Id.*

133. *Id.* at 539 (quoting H. REP., *supra* note 87, at 11) (emphasis supplied by court).

134. *Id.* at 539-40.

135. *Id.* at 543, 544. The court expressly rejected the "point of rest" doctrine, on the theory that the two examples of covered and noncovered employees found in the committee reports, and relied on by the Fourth Circuit, were not of decisive weight. "In our opinion, these remarks establish no more than that workers who bring cargo to a storage area from on board ship are covered, while those persons (generally truckers or railroad personnel) who merely receive and transport it inland are not covered." *Id.* at 540.

136. *Id.* at 543, 544. The Third Circuit, in *Sea-Land Serv. Inc. v. Director*, 540 F.2d 629 (3d Cir. 1976) also took a broad view of the Act, but for entirely different reasons. The court held that Congress, in enacting the 1972 amendments, exercised its full legislative jurisdiction in admiralty. *Id.* at 638. As a result, LHCA coverage is available, regardless of situs, to all those who handle cargo after it leaves land transportation (prior to vessel loading) or before it leaves maritime transport for subsequent rail or truck carriage. *Id.* However, this theory is unlikely to find favor. Indeed, the Supreme Court expressly rejected a similar contention made with regard to the 1927 LHCA in *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969). The

ANALYSIS AND CRITICISM

The decisions of the Second, Fourth, and Fifth Circuit Courts of Appeals, as well as those of the other circuits, represent fairly standard efforts at statutory construction. However, in light of Congress' distressing failure to produce even a reasonably clear longshoremen's statute in 1972, it is doubtful whether such efforts can produce conclusions that are truly dispositive. Indeed, the courts of appeals reached widely varying conclusions largely because of the small amount of decidedly ambiguous language found in the committee reports and the statute itself. Not surprisingly, therefore, the opinions seem vaguely unsatisfying, as if they merely skirted the issue. Indeed, the highly conclusory nature of the Fourth and Fifth Circuit opinions, when combined with the Second Circuit's admitted ignorance about loading and unloading operations in a modern port,¹³⁷ gives the impression that the courts had only a vague understanding of the maritime industry. Whether this is true or not, all three opinions failed to reconcile the highly specialized nature of cargo handling in a modern port with the words of the statute and the congressional committees. A short analysis of the organization of the waterfront and the functions performed there is therefore in order.

Court reasoned that defining the coverage of the 1927 Act with reference to the ever changing judicial interpretations of the limits of admiralty jurisdiction would leave the Act's coverage confused and uncertain. *Id.* at 223. Even more importantly, such a theory would mean "that every litigation raising an issue of federal coverage would raise an issue of constitutional dimensions, with all that that implies, . . ." *Id.* at 221 (quoting *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 126 (1962)). This analysis seems equally pertinent to the amended Act.

Finally, the Ninth Circuit's view of §902(3) should be briefly noted. In *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 97 S. Ct. 179 (1976), the court ruled that the basic criterion for ascertaining "status" was whether the injured employee had a "realistically significant relationship with 'traditional maritime activity involving navigation and commerce on navigable waters.'" *Id.* at 961. The court held that the claimant, who was injured when he fell off a floating walkway while sorting and feeding logs into a mill for processing, did not meet this test. As this opinion did not involve longshoremen or longshoring operations, it is of limited relevance to this Comment.

Of course, there are other sources of interpretation of the amended Act's status requirements besides the courts. In particular, the noted commentators Gilmore and Black have discussed the issue. They largely dismissed the language of the committee reports and concluded that the statute itself

can reasonably be read to mean that all persons who suffer employment-related injuries within the Act's expanded territorial limits are covered, provided only that they are employed by an employer "any of whose employees are employed in maritime employment [of the types specified], in whole or in part."

GILMORE & BLACK, *supra* note 2, §6-51, at 429. This is the broadest view of §§ 902(3) and 903(a) advocated by any authority.

137. The court stated that it had an extensive number of questions about the maritime industry. 544 F.2d at 47. Indeed, it censured the Benefits Review Board for not developing a record that could answer these questions. Despite this lack of knowledge concerning the maritime industry, the court proceeded to offer its opinion on the proper construction of the amended act. *Id.*

A port is a shore-based facility where cargo of varying types is placed into or removed from water transportation. However, within such a facility, there are strictly observed divisions of labor which have grown up through expediency, governmental regulations, union agreements, and tradition.¹³⁸ In a typical modern port, cargo, whether import or export, is handled in a two-stage operation with, in most cases, two distinct employers — the marine terminal operator and the stevedore contractor. The stevedore contractor is responsible for loading and unloading a ship. He performs this function pursuant to a contract with the ship's owner, agent, or charter operator. The stevedoring function, however, takes place solely between the ship's hold and the point of rest on the pier, dock, or wharf. In contrast, all cargo handling tasks performed landward of the point of rest are the responsibility of the marine terminal operator or owner.¹³⁹ In a number of ports, "the stevedore, contractor and the marine terminal operator are separate and unrelated entities."¹⁴⁰ In other ports, these two parties may be corporately related, or even the same. Yet even when this occurs, "the functions, duties and responsibilities of a contract stevedore and a marine terminal operator remain the same as if there were no corporate relationship."¹⁴¹

The stevedore and the terminal operator each hire different types of labor to meet their specialized needs. However, in most instances, both employers draw their labor from members of the longshoremen's union.¹⁴² The stevedore hires what are known as "longshoremen gangs."¹⁴³ These are groups of between fifteen and twenty-three longshoremen who hire themselves out and work solely as a "gang" unit. They work between the ship and the point of rest loading and unloading cargo into or from the ship.¹⁴⁴ In contrast, the men employed by the terminal operator to perform the myriad of tasks in the terminal, while hired from the ranks of union

138. R. ORAM, *CARGO HANDLING AND THE MODERN PORT* 5 (1965).

139. THE NATIONAL ASSOCIATION OF STEVEDORES, *THE STEVEDORE & MARINE TERMINAL INDUSTRY OF THE UNITED STATES*, i-iv (1974). For example, with import cargo, the stevedore places the cargo at the point of rest where either the consignee himself takes delivery or the cargo undergoes further handling by the marine terminal owner or operator. Similarly, with export cargo, the point of rest is where the stevedore assumes control of cargo delivered by the shipper or the marine terminal owner or operator for actual shipboard loading. *Id.* at iii.

It should be noted, however, that the point of rest is not a fixed geographic location. It "may vary from terminal to terminal or between cargo types." *Id.* Thus the point of rest separates *functions*, not locations on a pier. In any event, no matter where the point of rest is "located," "the exchange of control and responsibilities remains the same in all instances." *Id.*

140. *Id.* at iv.

141. *Id.*

142. KENDALL, *supra* note 102, at 92. On the Atlantic and Gulf coasts, the union is the International Longshoremen's Association (ILA); on the Pacific coast, it is the International Longshoremen's and Warehousemen's Union (ILWU).

143. KENDALL, *supra* note 102, at 91.

144. For further discussion on the nature of a "gang," see text accompanying notes 149 to 154 *infra*.

members, are not hired in gangs.¹⁴⁵ Instead, they are hired individually for such jobs as stripping, stuffing, and checking. These employees are not designated as "longshoremen." Instead, they are known collectively as "dock labor."¹⁴⁶

These facts suggest several interesting conclusions. First, the point of rest is a clear, ascertained point within a given port. It is not an arbitrary location. Indeed, it has performed a historic function in separating the terminal operator from the stevedore and in indicating when the former must begin or end his assessment of charges for cargo handling services.¹⁴⁷ Secondly, and most importantly, it is a point which can logically separate federally-covered and state-covered employees. When the employee is performing dock labor, he will be under state coverage; when he is performing gang labor, he will receive federal coverage.

However, in analyzing the operation and structure of a contemporary port facility, an understanding of other distinctions — in particular, the multi-faceted nature of cargo is equally important. For example, items of varying size and shape which are individually loaded on board and separately stowed in the ship's hold are known as *break bulk cargo*. In addition, there is "*dry bulk cargo*, such as wheat, and *liquid bulk cargo* such as oil, both of which are simply poured into the hold."¹⁴⁸ Finally, there is *containerized cargo*, which ordinarily consists of large metal boxes of uniform size, loaded at a point distant from the pier with various items of break bulk cargo. These distinctions are fundamental. Indeed, the type and quantity of shoreside labor necessary to accomplish a given loading/unloading assignment vary directly with the type of cargo involved.

In a break bulk cargo loading or unloading operation, the cargo is handled by a longshoremen "gang" hired by the stevedore. Gangs have a basic structure that, with minor variations, is found in most ports.¹⁴⁹ The leader of the gang is the "foreman," who, in many ports, is the party hired for work by the stevedore.¹⁵⁰ The foreman, in turn, is responsible for reporting to work at the appropriate time and place accompanied by the regular members of "his" gang. In essence, the foreman is the commander of a core unit of men who, familiar with each other's work habits and trustful of each other's skill in performing the dangerous work of transferring cargo between pier and vessel, always choose to work together as a group.

While loading and unloading the ship, the gang members work in three specific areas — the dock, the deck, and the hold of the ship. On the deck are one or two "winch operators" or "winch drivers," who are chosen from the

145. KENDALL, *supra* note 102, at 92.

146. *Id.*

147. *See* note 94 *supra*.

148. Goldberg, *Containerization As A Force For Change On The Waterfront*, 91 MONTHLY LAB. REV. Jan. 1968, at 8 n.7.

149. KENDALL, *supra* note 102, at 92. *See also* Marine Stevedoring Corp. v. Oosting, 398 F.2d 900, 902 (4th Cir. 1968), *rev'd sub nom.*, Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969).

150. KENDALL, *supra* note 102, at 93.

members of the gang on the basis of their ability to work with the other personnel stationed on deck.¹⁵¹ The operators control the winches, which lift and transfer cargo between the hold and the pier. In turn, the winch operators are highly dependent on the "signal man" or "hatchman."¹⁵² This person, also stationed on the deck, is the vital communication link between the winchman and the other members of the gang working on the shore or in the hold.

Located on the dock are approximately six to eight "piermen," who work alongside the ship. In the loading process, they make up drafts of cargo for subsequent transfer into the hold of the ship; during unloading, they guide drafts of cargo to a safe landing on the pier and then distribute the individual cargo packages to appropriate piles.¹⁵³ The piermen's six to ten counterparts on the ship, who perform similar activities in the ship's hold, are appropriately called "holdmen."¹⁵⁴

Containerized cargo, when first introduced in the late 1950's, produced little change in the above-described gang system.¹⁵⁵ As most ships carried both break bulk and containerized cargo, the demand for traditional gang labor remained strong. However, it was not long before specially designed container-only vessels began to ply the waters. This development brought about two, analytically distinct, major changes in the traditional gang system. First, when loading or unloading a container vessel, the number of longshoremen required aboard the ship itself to accomplish the task was substantially reduced. Whereas a traditional breakbulk gang required the presence of between nine and thirteen men on the vessel (six to ten holdmen, two winchmen, and one hatchman), the containerized gang required only between six and eight (four to six holdmen and two hatchmen).¹⁵⁶ The men displaced from the ship, along with the remainder of the gang, worked on the shore, principally moving containers away from the side of the vessel by truck and forklift to what is known as the "container marshalling yard" (the "point of rest").¹⁵⁷

Containerization, however, also brought a second change to the traditional gang system — far fewer gangs were required to unload or load a container ship. Whereas conventional vessels required between five and seven separate gangs for the loading/unloading process, container ships

151. *Id.*

152. *Id.* For example, it is the signal man who signals the winch operator to cease lowering cargo as it travels its final few feet to the landing point in the hold. As this landing point is some fifty feet below the level of the deck, it is completely out of the winchman's sight. *Id.* The gangwayman's task is therefore vital in avoiding both human injury and cargo damage.

153. *Id.*

154. *Id.* Often there is also an additional "position" in the gang — the relief man. The various members of the gang rotate into this position to rest.

155. Goldberg, *supra* note 148, at 8-9.

156. Brief for the Petitioner, at 17-18, *I.T.O. v. Blundo, cert. granted*, 97 S. Ct. 522 (1976) (No. 76-454, 1976 Term).

157. *Id.* at 18.

generally required only two.¹⁵⁸ Thus, "[t]he 100 men in gangs on conventional ships, plus the additional labor needed for forklift operations and checking, contrasts sharply with the 40 or so men used in cargo handling on the container ship."¹⁵⁹

Clearly, these two container-induced changes seriously threatened the structure of work, level of employment, and strength of the union on the waterfront.¹⁶⁰ On the East Coast, at least, this resulted in a long series of strikes which eventually produced an agreement in 1969 between the ILA and the shipping industry, whereby

all consolidated [that is, loaded with goods destined for more than one consignee] or less-than-truckload (LTL) containers owned or leased by signatory employers which "either [come] from or [are] destined to any point within a 50-mile radius from the center of any North Atlantic District port shall be stuffed and stripped by ILA labor at longshore rates in a waterfront facility"¹⁶¹

Thus as containerization has spread, the nature of the work performed by the union's members has drastically changed. Under the work recapture

158. Goldberg, *supra* note 148, at 9.

159. *Id.* Another commentator, analyzing this situation, noted that:

Labor productivity is astonishingly increased by containerization. One major shipping company reported that each of its work gangs on a conventional ship produced an average of 15 tons per hour compared with 300 tons an hour worked by one gang at a container ship hatch. More generally, the industry considers that "it would take 126 men 84 hours each, or a total of 10,584 man-hours, to discharge and load about 11,000 tons of cargo aboard a conventional ship. The same amount of cargo on a container vessel can be handled by 42 men working 13 hours each or a total of 546 man-hours."

Ross, *Waterfront Labor Response to Technological Change: A Tale of Two Unions*, 21 LAB. L.J. 397, 400 (1970) (quoting *The Sun* (Baltimore), Mar. 28, 1969).

160. See generally Ross, *supra* note 159.

161. *Id.* at 407-08 (quoting "NYSA-ILA Settlement Terms," Jan. 12, 1969, p. 1). The container clause was negotiated between the New York Shipping Association, Inc. (NYSA) and the ILA. By 1970, the same clause was in effect in every Atlantic Coast port from Boston, Massachusetts to Hampton Roads, Virginia. In large part, union fears about the effect of "consolidating" companies led to adoption of the "container clause." Such companies, using lower-priced non-ILA labor in off-pier locations, accept small lots of cargo from various shippers and consolidate them into full container loads. They then truck the containers to the pier for vessel loading. Similarly, consolidators pick up containers loaded with cargo destined for different consignees, strip the containers themselves, and deliver the cargo to its appropriate final destination.

In 1973, the "container clause" was amended by the so-called "Dublin supplement," which was an attempt by the union to strengthen its jurisdiction over all stripping and stuffing of LTL containers passing through East Coast ports. See International Longshoremen's Association; New York Shipping Association, Inc. and Consolidated Express and Twin Express, Inc. 221 N.L.R.B. 956, 964, 968-70 (1975). These industry-union agreements on stuffing and stripping were recently held to violate several provisions of the National Labor Relations Act. *ILA v. NLRB*, 537 F.2d 706 (2d Cir. 1976) (enforcing 221 N.L.R.B. 956 (1975)), *cert. denied*, 97 S. Ct. 740 (1977), *noted in* 90 HARV. L. REV. 815 (1977). In light of this decision, the continued employment of members of the ILA in stripping and stuffing operations is problematic.

agreement described above, a far smaller percentage of the union's members work on or alongside vessels. Instead, they work on the land, as dock labor, performing stuffing and stripping activities in warehouses and terminals.

This analysis of the stevedoring and marine terminal industry clearly reveals the nature of the issue presently before the Supreme Court. As shown above, containerization put longshoremen "ashore" in great numbers, but for two completely different reasons. Thus, when Congress extended the coverage of the LHCA landward, was it concerned with the phenomenon of fewer members of a longshoremen gang being aboard a ship during the loading/unloading process? Or, in contrast, when the Congress stated that "more of the longshoreman's work is performed on land than heretofore,"¹⁶² was it referring to the fact that as fewer gangs are needed per ship, more longshoremen work ashore in terminals and warehouses pursuant to the work recapture agreement signed in 1969? The evidence in the hearings and the committee reports tends to support the conclusion that all the parties involved in the 1972 amendments were apparently concerned solely with the lack of uniform coverage for individual members of the longshore gang. Several excerpts from the hearings of the Senate Subcommittee on Labor illustrate this fact. First, there is the following exchange:

Senator Javits: Lastly, Mr. Secretary, I understand that there is also some controversy about work over land and work over water, and there has been quite a good deal of litigation. Would you have any suggestion as to how we could deal with that subject?

Secretary Hodgson [Secretary of Labor]: . . . I would like to see if Mr. Schubert has any comments on that.

Mr. Schubert [Solicitor to the Department of Labor]:

Well, the latest case to draw a line was the *Nacirema* [*sic*] case, and it drew the line between the ship and the plank and the land on which the dock was located. It seems to me that it is inevitable that a line be drawn somewhere. It is just a matter of judgment as to the most appropriate geographical place.¹⁶³

Both Senator Javits' question and Mr. Schubert's answer indicate they were concerned primarily with the land/water anomaly brought about by *Nacirema* and the effect it had on the longshoremen gang. In particular, Senator Javits' question concerning "litigation" could *only* refer to *Nacirema*, for no litigation regarding terminal employees had taken place under the 1927 Act.

A later statement delivered at the hearings also supports this view. Patrick Tobin, the Washington representative of the ILWU, in discussing longshoremen's accidents and the low level of federal benefits, observed:

162. S. REP., *supra* note 65, at 13.

163. *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972: Hearings on S. 2318, S. 525, and S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. 38-39 (1972).*

[I]t is evident that longshoring is still an extremely hazardous industry.

Employees enter a new and relatively uncontrolled work place with each ship that ties up to a pier. Cargo loaded elsewhere may be poorly stowed; temporary decks may be overloaded; dangerous chemicals may not be properly labeled; machinery may malfunction; there may be rats or slippery dunnage, or many other unforeseen dangers beyond the control of the workers.¹⁶⁴

Mr. Tobin's remarks seemingly refer to those employees who work in gang units on ships and piers, and not to those engaged in terminal duties.

Finally, and perhaps most convincing, is the statement made by Joseph Leonard, International Safety Director of the ILA in the House hearing on the amendment. In discussing the strict division between accidents on the pier and accidents in the vessel, he noted that:

What do we do, cut ourselves in half?

Federal compensation law stops at the gangplank to the pier. When you come off of the gangplank you come under a different law; you come under the state. Thirty-six States cover these docks and maybe more now with the inland waterways.

It is time for a Federal law for compensation for all longshoremen.¹⁶⁵

Clearly, Mr. Leonard was referring to the classic problem created by *Nacirema* and the water/pier line which it reaffirmed.

In light of these three illustrative excerpts, and in the absence of any affirmative statements on extending coverage to terminal workers, it seems that Congress, at least during the hearing stage, was not contemplating any extension of coverage beyond the traditional longshore gang directly affected by the *Nacirema* anomaly and the shift to containerization. Nothing in the committee reports indicates that this evaluation changed during the post-hearing stage. Therefore, the committee statement that "with the advent of modern cargo handling techniques, such as containerization . . . , more of the longshoreman's work is performed on land than heretofore," in all likelihood refers only to the effect of containerization on the individual longshore gang, and not to the phenomenon of new types of labor being performed by longshoremen at an inland situs.

Thus, a thorough consideration of the legislative history of the 1972 amendments and the literature on the nature of a modern port indicates that the point of rest doctrine offers a credible resolution to the puzzle presented by section 902(3) of the amended Act. Nevertheless, the Fourth Circuit's analysis suffers from several major flaws. First, while the congressional

164. *Id.* at 130-31.

165. *Longshoremen's and Harbor Workers' Compensation Act: Hearings on H.R. 247, H.R. 3505, H.R. 12006, and H.R. 15023 Before the Select Subcomm. on Labor of the House Comm. on Educ. and Labor, 92d Cong., 2d Sess. 297 (1972).*

committees' examples of covered and noncovered employees may support the point of rest approach, the absence of explicit reference to the point of rest in the committee reports is troubling. Indeed, accepting the point of rest doctrine means that the LHCA's coverage will be defined by terminology which appears in neither the statute nor the legislative history. In addition, the committees' specific examples and general discussions are plagued by ambiguity, undermining their usefulness. Moreover, it is unclear whether the situs test of the amended Act retains any validity under the "point of rest" theory. Although a "terminal" is expressly included as a covered situs in section 302(a), the point of rest usually stops far short of the terminal building. Point of rest analysis would therefore seem to render the word "terminal" superfluous. Finally, the Fourth Circuit's opinion suffers from the failure of the court to explain the point of rest by reference to the operating procedures of modern ports. This absence of factual support probably robbed the point of rest analysis of much of its potential impact. Understandably, the seeming abstractness and arbitrariness of the point of rest concept served only to make the opinions of the other circuits appear much stronger.¹⁶⁶

This is certainly true in regard to the Second Circuit's functional equivalence analysis. From a conceptual standpoint, a container *does* appear to be functionally equivalent to the hold of a ship. The stowing and removal of individual pieces of break bulk cargo was and is a typical activity engaged in by the longshoring "gang." The mere fact that this procedure is now conducted in a pierside warehouse as opposed to the hold of a ship would seem to make no difference.

However, the Second Circuit did not extend its analogy far enough. Indeed, those employees stripping and stuffing containers in terminal warehouses are engaged in an activity — freight handling — which goes on daily in countless locales that have no connection whatsoever with the water or "maritime employment." Those employees covered by the Second Circuit's holding are doing no more than loading and unloading trailers, as happens at trucking terminals everywhere. Yet the Second Circuit was apparently able to conclude that the mere fact that marine terminals are located near the water and handle freight ultimately destined for shipboard loading, transforms the employees working inside these terminals in such a way as to distinguish them from their brethren working inland.¹⁶⁷ The

166. The commentary on the "point of rest" analysis has been uniformly critical. See Comment, *The Longshoremen's and Harbor Workers' Compensation Act: Coverage After The 1972 Amendments*, 55 TEX. L. REV. 99, 119 (1976); 54 N.C.L. REV. 925, 938-40 (1976); 8 ST. MARY'S L.J. 210, 218-19 (1976); 10 SUFFOLK U.L. REV. 1179, 1187-93 (1976).

167. This "functional equivalence" analysis seems particularly odd in light of the Second Circuit's recent decision regarding the "container clauses" in the ILA's labor contract. See note 161 *supra*. For in that case the court affirmed the NLRB's conclusion that stripping and stuffing containers holding the cargo of multiple consignees was not a traditional ILA task. See *ILA v. NLRB*, 537 F.2d 706, 711-12 (2d Cir. 1976); 90 HARV. L. REV. 815, 816-18 (1977).

functional equivalence analysis, when logically extended, simply breaks down.

The Second Circuit's "uniform coverage" analysis also presents difficulties. In order for an employee to be covered under the amended Act while loading a consignee's truck, the court stated that an injured claimant would have to show that he had "spen[t] a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel."¹⁶⁸ As the court apparently recognized, this proviso is crucial if any effect is to be given to the committee report's statement that coverage extends to those "employees who would otherwise be covered by this Act for part of their activity."¹⁶⁹ Yet this proviso leads to anomalous results of its own. For example, suppose two workers are both employed by a marine terminal operator as dock labor. While loading a consignee's truck, a piece of cargo falls and both workers are injured. If one of the injured employees frequently worked on a longshoring gang taking cargo on or off a vessel, he would receive federal benefits; his co-worker, who performed gang work only occasionally (or not at all) would receive the far less generous state benefits. This unfair result cannot be avoided under the Second Circuit's analysis.¹⁷⁰

The integral process theory is also appealing at first glance. This stems in large part from the court's observation that the committee reports, with one possible ambiguous exception, were silent on whether employees working in the geographic area located between the first cargo storage area and the point where cargo is placed into land transit were covered by the Act. In light of this silence, the court apparently thought it proper to give the Act an extremely liberal construction in determining the treatment of those employees working in this "intermediate" zone. In essence, the Fifth Circuit's analysis allows the Benefits Review Board to employ a broad-ranging factual inquiry in determining whether given employees are engaged in maritime employment. Furthermore, the Board's inquiry would not be hampered by any statutory language of a particularly confining nature.

168. *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 56 (2d Cir.), *cert. granted sub nom.*, *Northeast Marine Terminal Co. v. Caputo*, 97 S. Ct. 522 (1976) (Nos. 76-444, -454).

169. S. REP., *supra* note 65, at 13.

170. The First Circuit also encountered difficulty in applying the Second Circuit's proviso. *Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 278-79 (1st Cir. 1976), *petition for cert. filed*; 45 U.S.L.W. 3332 (U.S. Oct. 22, 1976) (No. 76-571). In dicta the First Circuit attempted to skirt the proviso's problems by stating that the "otherwise covered for part of their activity" language of the committee reports only required "bona fide membership in a class of employees whose members would for the most part have been covered some of the time under the earlier Act." *Id.* at 279. However, this approach provides only a partial solution to the problem of two longshoremen injured while loading a consignee's truck. The "class" of employees referred to by the court, and covered in part under the 1927 Act, could only be those longshoremen working in gangs. Therefore, the court's formulation would cover an employee who occasionally worked with gangs, but not someone who worked solely in a terminal as dock labor.

Unfortunately, this is the most serious flaw in the integral process analysis. First, it practically reads the status requirement out of the Act. Indeed, such an unrestrained and unregulated approach to defining "maritime employment" draws into that definition those activities which bear only the most tenuous relationship to matters which are "maritime."¹⁷¹ Second, there is no evidence that Congress ever envisioned such a free-wheeling approach. It is unlikely Congress would have offered a series of examples of covered and noncovered employees if it intended essentially any employee injured at a maritime situs to be covered by the Act.

CONCLUSION

Obviously, the choice between these three competing theories is not easy. They each have flaws and virtues. However, on balance, the point of rest doctrine meets a number of needs. First of all, it refers to a point that is known and recognizable to employers and employees. Thus all parties are aware of the nature and extent of LHCA coverage. Second, the point of rest analysis, more so than the competing theories, will eliminate endless litigation over what constitutes "maritime employment." In light of the depressing history of the 1927 LHCA, with its hallmarks of uncertain coverage and delayed compensation, the point of rest analysis represents a distinct improvement. Third, the point of rest represents a distinctly maritime solution to a distinctly maritime problem. Above all, the point of rest is firmly grounded in industry practice and structural organization. In contrast to the other theories, the point of rest is far less reliant on the ambiguous words of the statute or the generally unilluminating legislative history. Finally, and most importantly, the point of rest doctrine ensures that "maritime employment" continues to retain some significant, practical meaning. In light of the ILA's recent loss of its exclusive right to perform stripping and stuffing activities landward of the point of rest,¹⁷² the nature of the longshoring industry will continue in the state of flux which has characterized it for over a decade. If Congress desires to take further action in response to that change, it can do so. But for the present, the point of rest doctrine accomplishes both what Congress desired to do in the past, and what it may well want to continue to do in the future — to ensure that those employees engaged in distinctively maritime employment, whatever that may be, receive adequate, swift, and sure workmen's compensation benefits, without regard to the land or water situs of the accident.

171. For example, "classic" longshoring, as performed by gang labor, enjoys a uniquely maritime connection by virtue of the place of performance — the vessel and the pier immediately adjacent to it. In contrast, there seems to be little maritime character in unloading trailers, stacking cargo, or unloading consignees' trucks.

172. See note 161 *supra*.

ADDENDUM

After this Comment went to press, the Supreme Court, in a unanimous decision written by Justice Marshall, rejected the point of rest theory and affirmed the decision of the United States Court of Appeals for the Second Circuit in *Pittston Stevedoring Corp. v. Dellaventura*.¹ In reaching its decision, the Court acknowledged that the words of the statute and the examples in the Committee Reports were silent as to whether claimants Caputo and Blundo were covered by the 1972 Amendments to the 1927 Act.² Nevertheless, the Court concluded that Caputo and Blundo were clearly covered when “[c]onsideration [is given to] the purposes behind the broadened coverage.”³

In the case of claimant Blundo, who was injured while “checking” cargo being unloaded from a container, the Court found that Congress, in enacting the 1972 Amendments, expressly recognized that containerization “had moved much of the longshoreman’s work off the vessel and onto land.”⁴ In light of this, the Court found the Second Circuit’s “functional equivalence” argument compelling. The Court observed that a “container is a modern substitute for the hold of the vessel” and that Blundo’s checking tasks were “clearly an integral part of the unloading process as altered by the advent of containerization.”⁵ Thus, Blundo was clearly covered under the amended LHCA.

However, the Court observed that the “congressional desire to accommodate the Act to modern technological changes” offered no solution for the case of claimant Caputo, who was injured while loading a consignee’s truck with goods previously unloaded from a ship.⁶ Nevertheless, the Court found there was another “dominant” purpose behind the 1972 Amendments — that “Congress wanted a ‘uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity.’”⁷ The Court construed this phrase to mean that any employee who spends at least some of his time in tasks which are “indisputably longshoring operations” is covered even while performing other, non-longshoring tasks.⁸ As Caputo performed “longshoremen’s gang” activities part of the time, he was therefore covered under the amended Act even when engaged in other duties.

In its analysis of the “point of rest” argument, the Court stated that the absence of this supposedly well-known term from the Act and the legislative history was a major defect in the theory.⁹ However, the Court felt the theory’s fatal flaw was its inability “to accommodate either the language or

1. *Northeast Marine Terminal Co., Inc. v. Caputo*, 45 U.S.L.W. 4729 (U.S. June 17, 1977) affirming *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (1976). For a discussion of the Second Circuit’s opinion, see text accompanying footnotes 99-126.

2. 45 U.S.L.W. at 4733-34.

3. *Id.* at 4734.

4. *Id.* at 4735.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 4736.

the intent of the Amendments.”¹⁰ Indeed, the Court noted that the “point of rest” theory frustrated the “obvious” Congressional desire to cover all employees engaged in the occupation of “longshoreman”, regardless of whether they were or were not performing clearly defined “longshoring operations” at the time of injury.¹¹

The Supreme Court’s decision in *Northeast Marine Terminals*, for the most part, is an unsatisfactory construction of the 1972 Amendments. It is evident the Court experienced difficulty in reconciling the words of the statute with the discussion in the Committee Reports. In particular, the “otherwise covered for part of their activity” language of the Committee Reports forced the Court to limit the coverage of the amended Act to those terminal workers who have also worked in a longshoring gang. From a practical standpoint, this is a most unsatisfactory solution. For instance, suppose the accident which caused claimant Caputo’s injury simultaneously injured another employee working alongside Caputo. If this second employee had never worked on a gang or performed other “indisputably longshoring operations”, then he would be ineligible for LHCA coverage. Thus, under the Supreme Court’s formulation, the end result would be differing treatment for two employees injured in the same place by the same accident.

The Court’s treatment of injured stuffers, strippers, and checkers also produces anomalous results. For example, those marine terminal workers who are injured while handling containerized cargo will receive LHCA benefits. Their brethren, injured in equivalent accidents while working in truck depots (located, for example, across the street from marine terminals) will receive the lower state benefits.

As a result, the Court, by virtue of the *Northeast Marine Terminal* decision, has created a variety of anomalies and inequities which seem to defy logical resolution. In all likelihood, the Court will have to again consider the 1972 Amendments in the near future in order to resolve these problems.

10. *Id.*

11. *Id.*