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## THE CONFLICTS PROBLEM BETWEEN THE LONGSHOREMEN'S ACT AND STATE WORKMEN'S COMPENSATION ACTS UNDER THE 1972 AMENDMENTS

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The purpose of this article<sup>oo</sup> is to analyze in a preliminary way the new conflicts problems created by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (Longshoremen's Act).<sup>1</sup> Indeed, the boundary between state workmen's compensation acts and federal involvement in waterfront injuries has, through the exertions of the Supreme Court and the Congress, undergone a major shift no less than seven times in sixty years. This convoluted and often tedious story need not be retold here,<sup>2</sup> although some references to it may be necessary from time to time to make the present position intelligible. The seven phases through which this relationship has passed may at this point be merely identified in a categorical way: Phase I: unqualified federal preeminence in injuries over navigable waters.<sup>3</sup> Phase II: the "maritime but local" exception to the absolute preeminence of federal power.<sup>4</sup> Phase III: the passage of the Longshoremen's Act in 1927, containing two limitations: occurrence of the injury upon navigable waters and applicability only "if recovery

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1. 33 U.S.C.A. §§ 901-50 (Supp. 1976), amending 33 U.S.C. §§ 901-50 (1970).

2. For a complete account of this development, see 4 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 89.10-.70 (1976) [hereinafter cited as A. LARSON]; LARSON, *The Conflict of Laws Problem Between the Longshoremen's Act and State Workmen's Compensation Acts*, 45 S. CAL. L. REV. 699 (1972).

3. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215-16 (1917).

4. *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 476 (1922).

for the disability of death through workmen's compensation proceedings may not be validly provided by state law."<sup>5</sup> Phase IV: the "twilight zone" rule of *Davis v. Department of Labor & Industry*<sup>6</sup> under which the Supreme Court declined to review cases falling within a broad zone of uncertainty under the "absence of state power" and "maritime but local" tests. Phase V: the "concurrent jurisdiction" rule of *Bethlehem Steel Co. v. Moore*<sup>7</sup> and *Calbeck v. Travelers Insurance Co.*,<sup>8</sup> under which the Supreme Court declined to disturb assumption by either state acts or the Longshoremen's Act of jurisdiction even over areas previously assigned to the other during Phases II and III; in the process the Court effectively deleted from the Act the "absence of state power" limitation. Phase VI: the dominance of the "navigable waters" test, under which the Longshoremen's Act *always* applied to injuries over navigable waters,<sup>9</sup> and *never* applied to injuries *not* over navigable waters.<sup>10</sup> Phase VII: the "status" and expanded "situs" tests of the 1972 amendments, which are the concern of this article.

In October 1972, Congress amended the Longshoremen's Act to create a two-tiered test of coverage. The two components of that test may be called the *situs* and the *status* requirements. The situs test consists of the previous navigable waters rule, expanded to embrace adjoining areas of the sort that might ordinarily be the setting for injuries in maritime employment. It is found in the section on "Coverage," which formerly was limited to injuries "occurring upon the navigable waters of the United States (including any dry dock)."<sup>11</sup> The amendment enlarges the parenthetical passage, so that the full paragraph reads as follows:

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 adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).<sup>12</sup>

The status test is entirely new. Before 1972 there was nothing in the act limiting the concept of "employee" in terms of the character of the

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5. Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 3(a), 44 Stat. 1426 (1927), as amended, 33 U.S.C. § 903 (1970).

6. 317 U.S. 249, 256 (1942).

7. 335 U.S. 874, *aff g mem.*, *In re Moores' Case*, 323 Mass. 162, 80 N.E.2d 473 (1948).

8. 370 U.S. 114 (1962).

9. *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 126-27 (1962).

10. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 215 (1969).

11. 33 U.S.C. § 903(a) (1970).

12. Longshoremen's and Harbor Workers' Compensation Act § 3(a), 33 U.S.C.A. § 903(a) (Supp. 1976).

worker's activities.<sup>13</sup> After 1972 the claimant must satisfy not only the situs test as to the injury, but also the following status test embodied in the definition of "employee":

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.<sup>14</sup>

Two other changes were made, neither of which appear to have much substantive importance. The words, "if recovery for the disability or death through workmen's compensation proceedings may not be validly provided by State law," were deleted.<sup>15</sup> As noted earlier, this clause had in effect been judicially repealed in *Calbeck*.<sup>16</sup>

The other minor change is the expansion of the definition of "employer" to match the definition of employee:

The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).<sup>17</sup>

The unimportance of this change stems from the fact that the force of the "employer" definition seems to be entirely derivative from the two basic tests of situs and employee status. It has been repeatedly held that, once the claimant's status as an "employee" is established, the employer automatically becomes an "employer" covered by the act.<sup>18</sup> The Fourth

13. The definition formerly read: "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." Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 2(3), 44 Stat. 1425 (1927).

14. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 902(3) (Supp. 1976).

15. Compare Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 3(a), 44 Stat. 1426 (1927) with 33 U.S.C.A. § 903(a) (Supp. 1976).

16. 370 U.S. 114 (1962). Refer to text accompanying note 8 *supra*.

17. Longshoremen's and Harbor Workers' Compensation Act § 2(4), 33 U.S.C.A. § 902(4) (Supp. 1976), amending ch. 509, § 2(4), 44 Stat. 1425 (1927). The definition formerly read: "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.)" Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 2(4), 44 Stat. 1425 (1927).

18. *Blundo v. International Terminal Operating Co.*, 2 Benefits Review Board Serv. 376 (1975), *aff'd*, 544 F.2d 35 (2d Cir. 1976), *cert. granted*, 97 S. Ct. 522 (1977); *Tourville v. Portland Stevedoring Co.*, 3 Benefits Review Board Serv. (Ad. L.J.) 51 (1976); *Dubay v. FMC Marine & Rail Equip. Corp.*, 3 Benefits Review Board Serv. (Ad. L.J.) 43 (1976); *Anderson v. McBroom Rig Bldg. Serv., Inc.*, 2 Benefits Review Board Serv. (Ad. L.J.) 97 (1975); *McMenomon v. Northeast Terminal Co.*, 2 Benefits Review Board Serv. (Ad. L.J.) 51 (1975).

Circuit said as much in *I.T.O. Corp. v. Benefits Review Board*.<sup>19</sup>

Section 4 of the amended Act, 33 U.S.C. § 904, limits liability for compensation to an "employer" as defined in § 2(4), 33 U.S.C. § 902(4). The definition is so drafted that it appears that an employer will always be liable for his "employees" covered injuries. It therefore does not prescribe another, additional test for coverage.<sup>20</sup>

It may seem poignant in the extreme that the Longshoremen's Act, having, after forty-two years of uncertainty and floundering, finally in 1969 achieved a unitary and almost litigation-free rule on coverage, should now be plunged back into what promises to be a doubly prolific generator of litigation — the two-part test, each part of which has boundaries that are novel, undefined, and uninterpreted — not to mention the reopening of all the old questions about "twilight zone" and concurrent coverage of state and federal law. By 1976 there were already dozens of cases exploding all over the country and reaching appellate courts in practically every circuit.

Obviously there had to be some overpowering reason to account for this scramble back into the morass only a few years after belatedly reaching solid ground. The reason was not some intellectual preference for a superior conflict-of-laws theory. The reason was money.

For a number of years before 1972, the Longshoremen's Act maximum weekly benefit had stayed firm at \$70 a week. The reason it remained constant was that longshoremen were routinely getting large unseaworthiness verdicts against shipowners, who in turn routinely passed the burden along to the stevedoring employer under the *Ryan* doctrine.<sup>21</sup> Since the claimant was often getting — and his employer ultimately paying — a much higher amount than any compensation award, the pressure for increasing compensation benefits was somewhat drained off, and the justification for placing yet another burden on the long-suffering stevedoring firm was weakened.

By 1971 there were eleven maritime states whose maximum weekly benefits for permanent total disability were higher than those afforded by the Longshoremen's Act: Alaska, Connecticut, Hawaii, Maine, Maryland, Massachusetts, Michigan, New York, New Jersey, Rhode Island, and Washington.

The inevitable result of this disparity was that, in the conflict-of-laws picture, the traffic was made up mostly of claimants trying to avoid the federal act and claim under a state act.<sup>22</sup> Indeed, this was the situation as

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19. 529 F.2d 1080 (4th Cir. 1975), *modified on rehearing*, 542 F.2d 903 (1976) (en banc), *petition for cert. filed*, 45 U.S.L.W. 3417 (U.S. Dec. 7, 1976) (No. 76-730).  
20. 529 F.2d at 1083.

21. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 133-34 (1956).  
*See* 3 A. LARSON, *supra* note 2, §§ 76.43-53.

22. *See* 2a A. LARSON, *supra* note 2, § 89.40 at nn.54 & 55 for a compilation of these cases.

far back as the original *Davis* "twilight zone" case,<sup>23</sup> as well as in the next landmark cases of *Moore's*<sup>24</sup> and *Baskin*.<sup>25</sup> As long as state coverage remained generally more advantageous, the severe limitation of the Longshoremen's Act imposed by *Nacirema*<sup>26</sup> as to injuries upon navigable waters was hardly a source of distress to longshoremen. But when in 1972 the maximum longshoremen's benefits were more than doubled, going initially from \$70 to \$167, the federal-state comparison was turned upside down. Later, as of 1975, the maximum weekly benefit for permanent total disability under the Longshoremen's Act had reached \$318.38. Only one state, Alaska, had a higher maximum: \$358.00. In most of the other important maritime states, the basic state maximum was now less than half of this, and sometimes a third or less: New York, \$95; Massachusetts, \$95; New Jersey, \$128; Florida, \$112; Louisiana, \$85; Texas, \$70; California, \$119.

The quid pro quo for this spectacular increase in compensation benefits was the abolition of the seaworthiness warranty for longshoremen together with the *Ryan* type of recovery over by the shipowner against the stevedoring firm.

Consequently, from 1972 on, in every state except Alaska, there has naturally been tremendous motivation from the claimant's point of view to broaden the reach of the Longshoremen's Act as widely as possible, beginning with the expanded situs test in the amendments themselves. If it was awkward for a longshoreman in New York harbor to walk out of an \$80 act into a \$70 act every time he crossed a gangplank onto a ship, it would have been intolerable, under the amendments, for him to walk out of a \$167 act into an \$80 act every time he crossed the gangplank back to dry land — not to mention walking out of a \$318 act into a \$95 act in 1975.

Even under the pre-1972 conditions, the Supreme Court in *Nacirema* had indicated its awareness of the awkwardness of this in-and-out kind of coverage, but had referred the problem back to Congress, which had created the problem in the first place by its unqualified use of occurrence of the injury upon navigable waters as a coverage test. An even less subtle call to Congress was contained in the Supreme Court's opinion in *Victory Carriers, Inc. v. Law*,<sup>27</sup> where the Court said that "if denying federal reme-

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23. *Davis v. Department of Labor & Indus.*, 317 U.S. 249 (1942). Refer to text accompanying note 6 *supra*.

24. *Bethlehem Steel Co. v. Moore*, 335 U.S. 874, *aff'g mem.*, *In re Moore's Case*, 323 Mass. 162, 80 N.E.2d 478 (1948). Refer to text accompanying note 8 *supra*.

25. *Baskin v. Industrial Accident Comm'n*, 338 U.S. 854 (1949). In *Baskin* the Court cited *Moore's Case* in effect to require, not merely permit, a state court to make an award in the "twilight zone."

26. 396 U.S. 212 (1969).

27. 404 U.S. 202 (1971). This decision in effect applied the approach in *Nacirema* to the task of drawing the line between suits against shipowners based on unseaworthiness and state workmen's compensation claims. The plaintiff longshoreman was injured by an alleged defect in his stevedore employer's pier-based forklift truck while

dies to longshoremen injured on land is intolerable, Congress has ample power under Articles I and III of the Constitution to enact a suitable solution."<sup>28</sup>

As just sketched, the denial indeed did become intolerable when the federal benefits were more than doubled. The result was the expansion of the situs test to a degree which was obviously intended to eliminate the in-and-out problem in the great bulk of covered waterfront activities. The *Victory Carriers* statement was in fact noted in the Senate hearings on the amendments.<sup>29</sup>

Before commencing a detailed analysis of the effect of the 1972 coverage tests in practice, one further preliminary observation is in order. All

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the longshoreman was operating it on the dock transferring cargo to a point alongside the vessel where it was to be hoisted aboard by the ship's own gear. The longshoreman brought an action against the ship and the shipowner based on unseaworthiness of the vessel and the negligence of the shipowner. The shipowner filed a third-party complaint against the stevedoring company for indemnity in the event that the shipowner was held liable. Both actions were dismissed on motions for summary judgment. The Fifth Circuit reversed, on the theory that the concept of loading the ship was broad enough to include the plaintiff's activity here, and on the assumption that loading and unloading activities were sufficiently identified with the ship to permit unseaworthiness actions, particularly in light of the Supreme Court decision in *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963). The Supreme Court in turn reversed the judgment of the court of appeals, and held that state law and not the federal maritime law governed when the injury occurred on a dock as a result of an alleged defect in the employee's own employer's forklift. 404 U.S. at 204. The Court began by strongly reasserting the basic rule that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident, and that maritime law governs only those torts occurring on the navigable waters of the United States. *Id.* at 205. The Court traced in detail the history of the problem of drawing the line between maritime and state jurisdiction, but emphasized that the area of uncertainty had been on the seaward side of the "Jensen line," not on the landward side. The *Nacirema* case was quoted at some length in connection. *Id.* at 208 n.7. As to the *Gutierrez* case, which was the strongest authority the plaintiff had, and which was heavily relied on by the dissent of Justices Douglas and Brennan, the Court argued that the source of the injury was defective apparatus connected with the ship, whereas in the instant case the defective mechanism was entirely separate from the ship and, moreover, was the property and responsibility of the stevedoring company. *Id.* at 210-11, 213-14. The *Gutierrez* case was based on the Admiralty Extension Act of 1948, which provides that "the admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. § 740 (1970). In *Gutierrez* the source of the accident was defective cargo containers belonging to the ship, which had spilled some beans on the dock, on which the longshoreman slipped. 373 U.S. 206, 207 (1963). The distinction between *Gutierrez* and the instant case might appear rather slender on the facts, but the crucial difference was that an instrumentality of the ship was involved in the one and not in the other. The Court was definitely unwilling to broaden the boundaries of maritime jurisdiction to include any loading or unloading activities associated with the ship, not only because it could find no decisional or statutory authority for so doing, but also because the prospect of defining the new and broader area of "loading and unloading activities" was a rather forbidding one, particularly in view of the confusion that had already grown up on that issue among the lower federal courts. As to the broad policy issues involved, the Court pointed out that the longshoreman already had a no-fault remedy available to him in the form of workmen's compensation and that therefore the only thing at stake was the amount of his recovery rather than the fact of recovery. 404 U.S. at 215. Moreover, under the *Ryan* case the stevedoring company would probably wind up paying the bill in either event.

28. 404 U.S. at 216.

29. *Hearings on S. 2138, S. 525 & S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare*, 92d Cong., 2d Sess. 177 (1972).

the emphasis up to this point (and in congressional and public discussions at the time) on the "expansion" of Longshoremen's Act coverage should not be allowed to obscure the fact that the expansion took place *solely* in the enlargement of the situs covered. The addition of the status test is not an expansion but a contraction. This is necessarily so because, before 1972, there was no requirement whatever that *this* employee be in maritime employment. The only reference to maritime employment was in the definition of "employer."<sup>30</sup> To be a covered employer, the employer must have had at least one employee in "maritime employment" — but it did not have to be this employee. Suppose a railway had several true maritime employees. Then suppose one of its brakemen, who never did any work even remotely resembling longshoring, entered a ship to use the men's room, and was injured. The Longshoremen's Act by its literal terms would clearly have applied.

It is not difficult to reconstruct the reason why the enlarged situs test had to be accompanied by something like the new status test. Without such a limitation every nonmaritime employee of any employer who had so much as one maritime employee would be covered if he merely happened to be somewhere in a terminal, warehouse, shipyard or other adjoining area.

The Benefits Review Board, which is the quasi-judicial administrative appellate body set up by the 1972 amendments, at one time took the position that anyone who had been covered before 1972 was necessarily covered after 1972. In *Weyerhaeuser Co. v. Gilmore*<sup>31</sup> the question was whether a pondman employed by a lumber company was covered after 1972. The pond qualified as "navigable waters," and the company did indeed have some other employees in maritime employment. Before 1972, then, as the Ninth Circuit conceded, plaintiff would have been covered. The court continued: "The Board correctly stated: 'One of the purposes of the 1972 amendment to the Act was to extend coverage inland from the water's edge, not to narrow its scope.'"<sup>32</sup>

At this point, however, the court found that the Board had allowed itself to be carried away by a kind of freehand impression of the amendments as being exclusively expansive: "The Board then inexplicably found and concluded: '[A]nyone covered under the Act prior to the 1972 amendments must indeed be permitted to come within its protection subsequent to the amendments.'"<sup>33</sup> The court observed a little later: "The Board's erroneous conclusion that Claimant is entitled to LHCA benefits stems from a misinterpretation of the frequently stated 'expansion' of coverage by the 1972 amendments. This expansion refers only to the broadened definition of 'navigable waters . . . .'"<sup>34</sup>

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30. Refer to text accompanying note 17 *supra*.

31. 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 97 S. Ct. 179 (1976).

32. 528 F.2d at 959.

33. *Id.*

34. *Id.* at 960.

Finally, the court summed up the purpose of the amendments by approving the position of the Administrative Law Judge, who had been overruled by the Board:

We join in the observation of the Law Judge that the intent of Congress in extending the Act was not to "open the doors" to all employees, but to minimize the adverse effect of a shoreside location or situs when a *maritime* employee is injured.<sup>35</sup>

In this instance, the employee worker was found to be a lumbermill worker with no relation to "maritime employment" in the traditional sense.<sup>36</sup>

#### I. THE SITUS TEST: NAVIGABLE WATERS AND ADJOINING AREAS

The situs test under the 1972 amendments limits coverage to injuries "occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*)."<sup>37</sup>

Three kinds of questions of construction can be identified in the new language, which consists of all the italicized parenthetical material, except the words "dry dock," which were there before 1972. The first question concerns the meaning of the word "adjoining," which, it must be stressed, precedes both the list of explicitly named areas and the catchall phrase. The second question concerns the meaning of specifically named areas, such as "pier," "wharf," and "terminal." The third concerns the catchall phrase, "adjoining areas customarily used by an employer in loading, unloading, repairing or building a vessel."

As a matter of punctuation and grammar, it would appear that the qualifying clause at the end ("customarily used," etc.) modifies only the words "other adjoining area." If it had been meant to modify the words "pier," "wharf," "terminal," etc., a comma would have been placed after the words "other adjoining area." Assuming that this construction is correct, the process of proof of inclusion, as to any of the specifically listed areas, would consist of only two steps: a showing that the area was indeed a "pier," "terminal," or other listed facility, and a showing that it "adjoined" navigable waters. But as to areas not expressly named, the first step would involve a somewhat different type of proof. The particular area in question would itself have to be shown to be "customarily used" for one of the four purposes mentioned. The presumption seems to be that the expressly named facilities are customarily used for these purposes, so long as they adjoin navigable waters. All other areas must establish their credentials by a functional analysis of their customary use and, in addition, would have

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35. *Id.* at 961.

36. *Id.* at 962.

37. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 903(a) (Supp. 1976) (new material in italics).



to satisfy the "adjoining" requirement.

### A. Meaning of "adjoining"

As just noted, both the named areas and the "other" areas are covered only if "adjoining." If an area or facility is not specifically named, but if it is *within* an area that is specifically named and that adjoins navigable waters, this is sufficient.<sup>38</sup> The most common application of this generalization is that a warehouse is covered if it is within a "terminal" that adjoins navigable waters,<sup>39</sup> and in such a case the distance of the warehouse itself from navigable waters is immaterial, whether it be 72 feet,<sup>40</sup> 100 yards,<sup>41</sup> 685 feet,<sup>42</sup> 800 feet,<sup>43</sup> 850 feet<sup>44</sup> or even 2000 feet.<sup>45</sup>

The more difficult type of problem is that in which the particular facility is neither itself contiguous to navigable waters nor within a terminal that in turn is contiguous to navigable waters. Thus, in *Santumo v. Sea-Land Service, Inc.*,<sup>46</sup> the warehouse in question was not "inside" a terminal but was across the street from the employer's main yard, which itself was adjacent to a navigable waterway. The Board ruled that this slight physical interruption did not rob the area as a whole of its "adjoining area" character. On the particular facts, this decision was not particularly surprising. The entire area belonged to the employer, and was known as the Sea-Land Terminal. The particular warehouse "played an integral part in the loading and unloading process." The Board first cited and relied on several cases, of the kind already mentioned, for the proposition that "terminal" includes "all the facilities within the terminal area." Obviously, "within

38. See *Cabrera v. Maher Terminals, Inc.*, 3 Benefits Review Board Serv. 297 (1976). In *Cabrera* the Board stated: "The word 'terminal' has been held to include all the facilities within the terminal area. *Vinciguerra v. Transocean Gateway Corp.*, 1 Benefits Review Board Serv. 523 (1975)." 3 Benefits Review Board Serv. at 300.

39. *I.T.O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080 (4th Cir. 1975), *modified on rehearing*, 542 F.2d 903 (1976) (en banc). In *I.T.O.* one of the claimants was injured in a warehouse or transit shed 685 feet from the water's edge within a terminal. Another worked in a warehouse 850 feet from the water's edge in a terminal. The court said:

We have no doubt that each of the claimants satisfies the situs test of the post-1972 Act. As a minimum, they were injured at a terminal, adjoining navigable waters, used in the overall process of loading and unloading a vessel.

*Id.* at 1083-84.

40. *Richardson v. Great Lakes Storage & Contracting Co.*, 2 Benefits Review Board Serv. 31, 32 (1975).

41. *Robinson v. Northern Metal Co.*, 2 Benefits Review Board Serv. (Ad. L.J.) 240 (1975).

42. *I.T.O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080, 1082 (4th Cir. 1975), *modified on rehearing*, 542 F.2d 903 (1976) (en banc).

43. *Brown v. Maritime Terminals, Inc.*, 1 Benefits Review Board Serv. 212, 213 (1974).

44. *I.T.O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080, 1082 (4th Cir. 1975), *modified on rehearing*, 542 F.2d 903 (1976) (en banc).

45. *Cabrera v. Maher Terminals, Inc.*, 3 Benefits Review Board Serv. 297, 300 (1976).

46. 3 Benefits Review Board Serv. 262 (1976).

the terminal area" is a little broader than "within the terminal" and can effortlessly be made to include a facility immediately across the street.

But the Board went further and invoked a generalization that, taken literally, could become the focal point of almost unlimited controversy and litigation: "An adjoining area as defined by the Act must be deemed bounded only by the limits of its use as a maritime enterprise."<sup>47</sup>

It does not take a particularly vivid imagination to see what this principle will lead to in practice. For example, in *Allen v. Sea-Land Service, Inc.*,<sup>48</sup> the warehouse in question was two city blocks from dockside, over a road controlled by conventional traffic signals. This was held to be on navigable waters because it was part of a dockside facility used for loading and unloading vessels.

If two blocks — then why not two miles? Or twenty? Or two hundred? The only limit is said to be the facility's "use as a maritime enterprise." Presumably the maritime commerce could be alleged to continue for almost any distance, provided its maritime purpose continued, and did not change into landward delivery and distribution.

This is not to say that the two decisions just cited were wrong. On their facts they are probably right, in that a street or even two blocks hardly seems enough of a physical separation to justify subdividing an obviously integrated waterfront operation. The purpose here is merely to utter an early warning against becoming embarked upon a progressive geographical expansion in which each widened concentric circle is compared with the last, until the original statutory boundary is irretrievably lost.

As a matter of statutory construction, the most obvious criticism of the Board's generalization is that it leaves the word "adjoining" with nothing to contribute. The full clause involved reads: "other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." The Board's dictum accurately describes the effect of the phrase beginning "customarily used." The word "use" is the key word in each case, the Board's phrase being "use as a maritime enterprise." If this is all there is to the rule, why was "adjoining" hooked on at the beginning, not once but twice? The answer, once more, is that Congress intended a dual coverage test — one part of which related to function, and one to geography. Congress could have extended coverage to the outer limits of maritime commerce, enterprise, or contract, but did not. It drew a physical boundary, beginning with navigable waters as such, and then expanding to "adjoining" areas, adding, in the case of "other areas," the requirement of customary use in named maritime activities. The word "adjoining" is a word descriptive of a physical relationship of proximity. It cannot realis-

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47. *Id.* at 266.

48. 3 Benefits Review Board Serv. (Ad. L.J.) 96 (1975). See *Sea-Land Serv., Inc. v. Director, Office of Workers' Compensation Programs*, 540 F.2d 629 (3d Cir. 1976).

tically be stretched to include some sort of relationship of purpose or function.

The kind of minefield that lies ahead appears even more ominous when one turns to the version of the same problem presented by shipbuilding activities.

In *Luker v. Ingalls Shipbuilding*,<sup>49</sup> the claimant was injured in a "pre-outfitting area," located approximately 1,000 feet from the nearest water's edge. One gets the impression that this site was within the employer's overall shipyard complex, but the facts do not make it clear whether this particular shed was physically within a single shipyard, or whether it might have been separated from it by public streets or other property not belonging to this employer. The Board appears to treat such distinctions as immaterial, so long as the area is functionally part of the shipbuilding process. The Board said: "The actual distance of the area from the water's edge is not a determinative factor in resolving the question of situs under the Act."<sup>50</sup>

This is undoubtedly true, so long as the facility is part of a larger area which itself is contiguous to navigable water, as in the case of a warehouse located within a terminal. It cannot, however, be said with equal assurance that contiguity is not a determinative factor, and the Board does not reveal the key facts on which that question would turn.

The Board used exactly the same approach in *Morgan v. Ingalls Shipbuilding Corp.*,<sup>51</sup> decided on the same day. Morgan was killed in a shop used for fabrication of parts that were later used in the construction and repair of ships and other seagoing vessels. In this opinion we are given neither the facts on contiguity nor the facts on distance from water. The court disposes of the entire question with the same sweeping formula noted earlier in connection with a terminal case:<sup>52</sup>

An adjoining area as defined in the Act must be deemed bounded only by the limits of its use as a maritime enterprise. The entire facility at which Morgan worked was designed and used for ship construction and repair. Therefore, the jurisdictional requirements of Section 3(a) of the Act are satisfied.<sup>53</sup>

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49. 3 Benefits Review Board Serv. 321 (1976).

50. *Id.* at 325.

51. 3 Benefits Review Board Serv. 310 (1976).

52. Refer to text accompanying note 47 *supra*.

53. 3 Benefits Review Board Serv. at 313. For administrative law judge decisions holding various points in a shipyard area covered, see the following: *Dubay v. FMC Marine & Rail Equip. Corp.*, 3 Benefits Review Board Serv. (Ad. L.J.) 43 (1975) (claimant was injured while working as a rigger on an overhead crane which was to be used in marine assembly or parts fabrication); *Kininess v. Alabama Dry Dock & Shipbuilding Co.*, 3 Benefits Review Board Serv. (Ad. L.J.) 24 (1975) (site of the accident was also a crane which claimant was sandblasting, in an area used for storage and maintenance of the crane, which in turn was used in shipbuilding and repair); *Roberts v. Ingalls Shipbuilding*, 2 Benefits Review Board Serv. (Ad. L.J.) 158 (1975) (shipyard foreman slipped on steps near the employer's dock building, about 200 feet from where vessels were docked); *Mohamed v. Seatrain Shipbuilding Corp.*, 2 Benefits

A process strikingly similar to that involving terminals was not long in getting started. In *Maxin v. Dravo Corp.*<sup>54</sup> the situs at stake was a structural shop in which components of all kinds of marine products were pre-assembled. The employer attempted to rely on the fact that a thoroughfare, Grande Avenue, ran between the structural shop and the major body of navigable water. As in the terminal case, the Board rejected this argument out of hand, calling it "illusory." The Board stressed that this facility was part of a large integrated shipyard, and that merely being bisected by a public road was of no consequence. Again, the Board uttered the formula equating "adjoining" with "use as a maritime enterprise."

So far, so good. But inevitably will come the cases in which the parts fabrication shop is two blocks, two miles or two hundred miles away. Assuming that the parts being fabricated are identical to those fabricated in the cases already decided, how can the Board say that this fabrication is any less within the limits of maritime enterprise? And if this is the holding, again the question will be raised, "whatever happened to the word 'adjoining'?"

It is quite common for components of ships to be fabricated in all kinds of specialized shops in different parts of the country. Similarly, recalling that two of the law judge cases involved crane maintenance, one may also look forward to claims that repair work on machinery used in shipbuilding must itself be deemed to take place in an area adjoining navigable waters — no matter where it takes place.

Once more it can be concluded that, although the Board is undoubtedly right in holding that a mere bisecting of an integrated shipyard or terminal by a public road should be immaterial, it will eventually, and perhaps very soon, have to work out a much more refined and restricted formula than its rule that "adjoining" follows "maritime enterprise," to deal with the foreseeable pressure to expand the relatively generous longshoremen's benefits to an ever-widening circle of parts fabricators, machine repairers and storage warehouses that are not so obviously within an integrated waterfront operation.

### *B. Terminals; Loading and Unloading Areas*

The word "terminal" is not defined in the amended act, and almost none of the numerous cases holding an area covered as being within a

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Review Board Serv. (Ad. L.J.) 85 (1975) (situs of injury was a "slab area" in a shipyard in which components for vessels were built, separated from a dry dock by a 30-foot causeway).

54. 2 Benefits Review Board Serv. 372 (1975).

"terminal" have ventured such a definition,<sup>55</sup> presumably because the point was not in controversy in these cases. At least a partial definition may be found in the syllabus in *Santumo*: "A warehouse at which cargo is received from and delivered to vessels, and packed into and removed from containers, is a terminal within the meaning of Longshoremen's Act Section 3(a) . . . ."<sup>56</sup>

But, of course, terminals include much more than warehousing facilities. Indeed, as had been seen earlier:<sup>57</sup> "The word 'terminal' has been held to include all the facilities within the terminal area."<sup>58</sup> Thus, it includes a railroad platform within the terminal from which claimant was unloading pipe onto a freight car.<sup>59</sup>

It was noted earlier that, for reasons of grammar and punctuation, the qualifying phrase "customarily used by an employer in loading, unloading, repairing, or building a vessel" seems to attach only to the words "other adjoining area," and not to the specifically named facilities, such as terminals. In any event, it should be stressed that the use of the article "an" before the word "employer" clearly shows that it is never necessary to show that the area was necessarily customarily used by *this employee's* employer for these purposes. Thus, in *Blundo v. International Terminal Operating Co.*,<sup>60</sup> the claimant was injured while working as a checker with a crew of men who were stripping a container at the 19th Street Pier, within the employer's terminal at Brooklyn. The containers had been off-loaded at a different pier and brought to this terminal by truck for stripping. The Board said:

55. See *I.T.O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080 (4th Cir. 1975), *modified on rehearing*, 542 F.2d 903 (1976) (en banc); *Perez v. United Terminals, Inc.*, 3 Benefits Review Board Serv. 368 (1976); *Cabrera v. Maher Terminals, Inc.*, 3 Benefits Review Board Serv. 297 (1976); *Santumo v. Sea-Land Serv., Inc.*, 3 Benefits Review Board Serv. 262 (1976); *Bradshaw v. J.A. McCarthey, Inc.*, 3 Benefits Review Board Serv. 195 (1976); *Caputo v. Northeast Marine Terminal Co.*, 3 Benefits Review Board Serv. 13 (1975); *Bryant v. Ayers S.S. Co.*, 2 Benefits Review Board Serv. 408 (1975); *Mezzina v. Marine Terminals Corp.*, 2 Benefits Review Board Serv. 401 (1975); *Blundo v. International Terminal Operating Co.*, 2 Benefits Review Board Serv. 376 (1975); *Lopez v. Atlantic Container Lines, Ltd.*, 2 Benefits Review Board Serv. 265 (1975); *Stockman v. John T. Clark & Son, Inc.*, 2 Benefits Review Board Serv. 99 (1975); *Richardson v. Great Lakes Storage & Contracting Co.*, 2 Benefits Review Board Serv. 31 (1975); *Brown v. Maritime Terminals, Inc.*, 1 Benefits Review Board Serv. 212 (1974); *Logan v. Universal Terminal Stevedoring Corp.*, 3 Benefits Review Board Serv. (Ad. L.J.) 55 (1975); *Tourville v. Portland Stevedoring Co.*, 3 Benefits Review Board Serv. (Ad. L.J.) 51 (1975); *Robinson v. Northern Metal Co.*, 2 Benefits Review Board Serv. (Ad. L.J.) 240 (1975); *Ascione v. Universal Terminal & Stevedoring Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 230 (1975); *Farrell v. Maher Terminals, Inc.*, 2 Benefits Review Board Serv. (Ad. L.J.) 84 (1975); *Ridgely v. Great Lakes Storage & Contracting Co.*, 2 Benefits Review Board Serv. (Ad. L.J.) 63 (1975).

56. *Santumo v. Sea-Land Serv., Inc.*, 2 Benefits Review Board Serv. (Ad. L.J.) 209 (1975), *aff'd*, 3 Benefits Review Board Serv. 262 (1976).

57. Refer to note 38 *supra*.

58. *Santumo v. Sea-Land Serv., Inc.*, 3 Benefits Review Board Serv. 262, 265-66 (1976).

59. *Ascione v. Universal Terminal & Stevedoring Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 230 (1975).

60. 2 Benefits Review Board Serv. 376 (1976).

Since the claimant was injured within a terminal customarily used by an employer in loading or unloading vessels, even though at a neighboring pier rather than the specific pier where the claimant was working, the jurisdictional requirement of Section 3(a) is satisfied.<sup>61</sup>

### C. Shipbuilding and Repair Areas

Several types of facilities used in shipbuilding and repair are specifically listed in Section 3(a): "any adjoining . . . dry dock . . . building way, marine railway. . . ." It is interesting that among the specific areas listed, there is no counterpart to the broad word "terminal" applicable to the shipbuilding category. That is, the list does not include the word "shipyard," as it might have been expected to do. Accordingly, any area other than a dry dock, building way or marine railway<sup>62</sup> must bring itself within the "other areas" catchall clause, and satisfy the qualifying phrase "customarily used by an employer in . . . repairing, or building a vessel." The end result, however, seems to be that any area or facility is covered if it can be said to be within a shipyard.<sup>63</sup>

## II. CONSTITUTIONALITY OF LANDWARD EXTENSION OF COVERAGE

Treatment of the issue of constitutionality of the Act's 1972 landward extension can take two forms — the short form or the long form. The short form, which has been adopted by the Benefits Review Board, consists of a demonstration that the Supreme Court has decided the question in advance, leaving no occasion for detailed analysis. The long form requires a careful retracing of the development of the present doctrine of scope of maritime power, as to both situs and status, followed by an examination of the possible backup role of the commerce power.

In *Victory Carriers, Inc. v. Law*<sup>64</sup> the Supreme Court had found it necessary to hold that state law rather than the federal maritime law controlled when an injury occurred on a dock as a result of an alleged defect

61. *Id.* at 379-80, citing *Harris v. Maritime Terminals, Inc.*, 1 Benefits Review Board Serv. 301 (1975).

62. As to these terms, see 3 A. LARSON, *supra* note 2, § 89.34.

63. See *Luker v. Ingalls Shipbuilding Corp.*, 3 Benefits Review Board Serv. 321 (1976) (area used for construction of units of vessels); *Morgan v. Ingalls Shipbuilding Corp.*, 3 Benefits Review Board Serv. 310 (1976) (shop used for fabrication of parts to be used in ship construction and repair); *Dubay v. FMC Marine & Rail Equip. Corp.*, 3 Benefits Review Board Serv. (Ad. L.J.) 43 (1975) (injury occurred in an area of the employer's shipyard used for fabricating vessel segments); *Kininess v. Alabama Dry Dock & Shipbuilding Co.*, 3 Benefits Review Board Serv. (Ad. L.J.) 24 (1975) (claimant sandblasting a crane in an area used for storage and maintenance of the crane; the crane, in turn, was used in shipbuilding and repair); *Maxin v. Dravo Corp.*, 2 Benefits Review Board Serv. 372 (1975) (structural shop where components of marine products were preassembled); *Roberts v. Ingalls Shipbuilding*, 2 Benefits Review Board Serv. (Ad. L.J.) 158 (1975) (injury occurred near the employer's dock building); *Mohamed v. Seatrain Shipbuilding Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 85 (1975) ("slab area" where components for vessels were built).

64. 404 U.S. 202 (1971).

in the employer's own forklift; therefore, under pre-1972 law an unseaworthiness action would not lie. The Court stressed heavily that, as the law then stood, maritime law governed only those torts occurring on navigable waters. But the Court added this dictum: "[I]f denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Arts. I and III of the constitution to enact a suitable solution."<sup>65</sup> The reference to these two Articles means, of course, that the extension could be supported under both the commerce power and the maritime power.

The Benefits Review Board, in *Coppolino v. International Terminal Operating Co.*,<sup>66</sup> its first opinion on the constitutional issue, quoted the *Victory Carriers* passage and said that the constitutional question was "easily disposed of" by reference to it. In the numerous subsequent cases raising the constitutional argument, the Board has merely cited *Coppolino* and said that the matter was settled for the reasons there stated.<sup>67</sup>

In *Coppolino*, the Board added only one further citation, *Washington v. W.C. Dawson & Co.*,<sup>68</sup> evidently to underline the residual source of federal power inhering in the commerce clause. The Supreme Court there said:

Without doubt Congress has power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general Employer's Liability Law or general provision for compensating injured employees; . . . Exercising another power—to regulate commerce—Congress has prescribed the liability of interstate carriers by railroad for damages to employees . . . and thereby abrogated conflicting local rules. (citations omitted)<sup>69</sup>

65. *Id.* at 216.

66. 1 Benefits Review Board Serv. 205 (1975). Recent decisions upholding the constitutionality of the 1972 amendments include the following: *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir. 1976), *cert. granted sub nom.*, *Northeast Marine Terminal Co. v. Caputo*, 97 S. Ct. 522 (1977); *Sea-Land Serv., Inc. v. Director, Office of Workers' Compensation Programs*, 540 F.2d 629 (3d Cir. 1976); *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976), *petition for cert. filed sub nom.*, *P.C. Pfeiffer Co. v. Ford*, 45 U.S.L.W. 3364 (U.S. Nov. 8, 1976) (No. 76-641); *Stockman v. John T. Clark & Son*, 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).

67. *See, e.g.*, *Perez v. United Terminals, Inc.*, 3 Benefits Review Board Serv. 368, 370 (1976); *Luker v. Ingalls Shipbuilding*, 3 Benefits Review Board Serv. 321, 325 (1976); *Morgan v. Ingalls Shipbuilding Corp.*, 3 Benefits Review Board Serv. 310, 313 (1976); *Cabrera v. Maher Terminals, Inc.*, 3 Benefits Review Board Serv. 297, 300 (1976); *Santumo v. Sea-Land Serv., Inc.*, 3 Benefits Review Board Serv. 262, 267 (1976); *Scaffiddi v. Pittston Stevedoring Corp.*, 3 Benefits Review Board Serv. 47, 49 (1975); *Blundo v. International Terminal Operating Co.*, 2 Benefits Review Board Serv. 376, 380 (1975); *Maxin v. Dravo Corp.*, 2 Benefits Review Board Serv. 372, 375 (1975).

68. 264 U.S. 219 (1924).

69. *Id.* at 227-28.

The Board concludes:

Thus, the Supreme Court has already made clear that there is congressional authority for the extensions of jurisdiction in the longshoring and shipbuilding industries both via its maritime jurisdiction and its power to regulate commerce.<sup>70</sup>

However, a more exhaustive analysis of the constitutional problem is in order, for two reasons. First, as a glance at the list of cases raising the issue will show, the constitutional attack promises to form an almost routine segment of the defense of borderline cases, until the matter is ultimately put to rest by the Supreme Court. Second, there is a definite interplay between concepts of constitutionality and the breadth or narrowness with which the scope of the act will be interpreted, both as to situs and as to status. A court whose view of the constitutional power is relatively narrow may well apply a narrow statutory interpretation, in order to keep within constitutional bounds. Conversely, a court with a broad view of the reach of federal constitutional power will feel more readily disposed to indulge in a broad reading of the statutory language, uninhibited by constitutional worries.

Under what might be called the traditional concept of maritime power, the extension of the Longshoremen's Act to such landward areas as piers, wharves, terminals, marine railways, building ways, and shipbuilding yards would have been held unconstitutional. A long line of cases had held piers, docks, wharves and the like to be extensions of the land and hence subject to state, not federal, jurisdiction.<sup>71</sup> Another long line of cases had held that new ship construction, as distinguished from ship repair, fell within local acts.<sup>72</sup> At the same time, the Supreme Court was expressing the character of this division of jurisdiction in uncompromising terms. In *Crowell v. Benson*,<sup>73</sup> for example, the Court said, in the course of sustaining the constitutionality of the Longshoremen's Act:

70. *Coppolino v. International Terminal Operating Co.*, 1 Benefits Review Board Serv. 205, 210-11 (1975).

71. *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 7 (1946); *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647, 648-49 (1935); *T. Smith & Son v. Taylor*, 276 U.S. 179, 181 (1928); *State Indus. Comm'n v. Nordenholt Corp.*, 259 U.S. 263, 272-73 (1922); *Cleveland Terminal & Valley R.R. v. Cleveland S.S. Co.*, 208 U.S. 316, 321 (1908); *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1866); *Houser v. O'Leary*, 383 F.2d 730, 731-32 (9th Cir. 1967); *Johnston v. Marshall*, 128 F.2d 13, 14-15 (9th Cir.), cert. denied, 317 U.S. 629 (1942); *Stansbury v. Atlantic & Gulf Stevedores, Inc.*, 159 So. 2d 728, 729 (La. Ct. App. 1964).

72. *John Baizley Iron Works v. Span*, 281 U.S. 222, 230-31 (1930); *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449, 457 (1925); *American Mut. Liab. Ins. Co. v. Neuman*, 318 F. Supp. 398, 400-01 (S.D. Ala. 1969); *La Casse v. Great Lakes Eng'r Works*, 242 Mich. 454, 219 N.W. 730, 734 (1928) (containing thorough analysis of Supreme Court cases in point); *Travelers Ins. Co. v. Gonzalez*, 351 S.W.2d 374, 376 (Tex. Civ. App.—Waco 1961, writ ref'd n.r.e.); cf. *Messel v. Foundation Co.*, 274 U.S. 427 (1927); *Seeler v. Otis Elevator Co.*, 281 App. Div. 140, 120 N.Y.S.2d 325 (1952).

73. 285 U.S. 22 (1932). See general discussion of this case and the doctrine of "constitutional fact" at 3 A. LARSON, *supra* note 2, § 80.42. See also Larson, *The Doctrine of "Constitutional Fact"*, 15 TEMP. L.Q. 185 (1941).



These fundamental requirements are that the injury occurs upon the navigable waters of the United States and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly, but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.<sup>74</sup>

And if any doubt could remain after such a statement, the Court goes on to drive the point home with specific reference to the navigable waters requirement:

In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction.<sup>75</sup>

The first sentence of the excerpt immediately above contains a reminder of a fact that is easy to overlook, in view of the long acceptance of the power of Congress to amend the admiralty law. This is the fact that the Constitution contains no direct conferral of express power on Congress to legislate as to maritime matters. What the Constitution does do is to extend the judicial power to admiralty and maritime causes: "The judicial Power shall extend . . . to all cases of admiralty and maritime jurisdiction."<sup>76</sup>

Nevertheless, it has been accepted throughout history, and in innumerable cases,<sup>77</sup> that the Constitution impliedly granted this power to Congress.<sup>78</sup> For present purposes, this absence of a fixed constitutional clause may help in part to explain why both the courts and the Congress have felt unusually free to alter maritime law to meet the needs of the times. It was only two years after the brassbound rigidity of *Crowell* that the Supreme Court uttered the following manifesto of flexibility in *The Thomas Barlum*:<sup>79</sup>

The authority of the Congress to enact legislation of this nature was not limited by previous decisions as to the extent of the admiralty jurisdiction. We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned, as, for example, they were abandoned in discarding the doctrine that the admiralty jurisdiction was limited to tidewaters.<sup>80</sup>

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74. 285 U.S. at 54-55.

75. *Id.* at 55.

76. U.S. CONST. art. III, § 2.

77. See cases cited in 1A BENEDICT ON ADMIRALTY § 91, 5-4 n.10 (7th rev. ed. 1975).

78. See *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *The Thomas Barlum*, 293 U.S. 21 (1934).

79. 293 U.S. 21 (1934).

80. *Id.* at 52.

Any number of illustrations could be cited, both before and after *Crowell*, and both related and unrelated to the Longshoremen's Act, of stretching maritime jurisdiction here and bending it there.

As far back as 1884, Congress passed an act<sup>81</sup> extending admiralty jurisdiction shoreward, to include damages by a vessel to a land structure. Furthermore, in 1948 a more comprehensive Admiralty Extension Act<sup>82</sup> was adopted, covering all cases of damage and injury to persons or property caused by a vessel on navigable waters even if that injury or damage was done or consummated on land.

The Supreme Court in *Crowell* appeared to disregard as inconsequential the statutory extension of the concept of navigable waters to include "any dry dock." Yet, all kinds of high-and-dry marine and building ways,<sup>83</sup> not to mention the dry land surrounding them,<sup>84</sup> have been brought within the term "dry dock." When the Supreme Court itself affirmed *per curiam* a case in which a marine railway 400 feet from the waterline was held covered as a "dry dock,"<sup>85</sup> it was becoming evident that the traditional doctrines containing the navigable waters concept were crumbling badly. To move from this broadly construed "dry dock" to the lengthened list of waterfront areas inserted in 1972 between the same pair of parentheses was thus to appear more as a change in degree than as a conceptual breakthrough.

By far the most significant enlargement of the admiralty domain for present purposes, however, was the development of the principle that maritime character could attach to a particular episode, not merely through the situs of the injury, but through the maritime nature of the injured worker's employment — no matter where he was when injured.<sup>86</sup> The leading case was *O'Donnell v. Great Lakes Dredge & Dock Co.*,<sup>87</sup> decided in 1943, holding that the Jones Act applied to inland injuries if they were in the course of a seaman's employment and were related to the ship's activities. A similar test was applied to the remedy of maintenance and cure in the same year.<sup>88</sup>

As long as the Longshoremen's Act was bounded exclusively by a situs rule, there was of course no way of importing this principle into the Longshoremen's Act conflicts area. But in 1972, Congress explicitly injected

81. Act of June 26, 1884, ch. 121, § 18, 23 Stat. 57.

82. 46 U.S.C. § 740 (1970). The constitutionality of the Admiralty Extension Act was upheld in *United States v. Matson Navigation Co.*, 201 F.2d 610, 616 (9th Cir. 1953). This act was applied by the Supreme Court in *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963).

83. See 3 A. LARSON, *supra* note 2, § 89.34.

84. *Holland v. Harrison Bros. Dry Dock & Repair Yard, Inc.*, 306 F.2d 369, 372-73 (5th Cir. 1962).

85. *Avondale Marine Ways, Inc. v. Henderson*, 201 F.2d 437, 438 (5th Cir.), *aff'd per curiam*, 346 U.S. 366 (1953).

86. For a more detailed discussion of the evolution and elaboration of this principle, see 3 A. LARSON, *supra* note 2, § 90.27.

87. 318 U.S. 36 (1943).

88. *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 736-37 (1943).

a maritime employment test into the Longshoremen's Act by beginning its definition of the term "employee" with these words: "The term 'employee' means any person engaged in maritime employment . . . ."<sup>89</sup> The result was to transplant bodily the entire "maritime employment" doctrine of *O'Donnell* and subsequent cases into the Longshoremen's area, still subject, however, to a situs limitation that has no counterpart in the Jones Act. Within that limitation, the maritime power under the Longshoremen's Act enjoys all the affirmative reach built up by the Jones Act cases. For present purposes, there is no substantial distinction between the two acts so far as constitutional issues are concerned.<sup>90</sup>

It need only be added that old distinctions such as that between shipbuilding and ship repairing have no contemporary relevance to determining what "maritime employment" can be constitutionally covered. Specifically, the old notion that new ship construction was inherently nonmaritime was demolished once and for all by *Calbeck*, when it decreed Longshoremen's Act coverage of two welders working on a new vessel floating on navigable waters.<sup>91</sup>

It was noted at the threshold of this discussion of constitutionality that the Supreme Court had, in effect, given its blessing in advance to the use of the commerce power, if necessary to support landward extension of longshoremen's remedies.<sup>92</sup> At the same point, a supporting quotation from the 1924 Supreme Court case was adduced.<sup>93</sup>

It is a truism of constitutional law that, if Congress could have accomplished a particular result under any of its constitutional powers, the constitutionality of that result will be upheld even if the power apparently relied on — for example, admiralty, in this instance — should prove to fall short.<sup>94</sup>

This use of the commerce and maritime powers in tandem is nothing new. As early as 1851, the Supreme Court held that the admiralty power could not be narrowed by invoking limitations on the commerce power.<sup>95</sup> By 1884 it was accepted that the commerce power and the admiralty power were parallel sources of congressional authority to legislate as to navigation, with the one source being used in some instances and the other in

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89. Longshoremen's and Harbor Workers' Compensation Act, § 2(3), 33 U.S.C.A. § 902(3) (Supp. 1976).

90. It may be added that a similar expansion took place in the landward extension of the unseaworthiness remedy. *See, e.g.,* *Thompson v. Calmar S.S. Corp.*, 331 F.2d 657, 659 (3d Cir. 1964); *Litwinowicz v. Weyerhaeuser S.S. Co.*, 179 F. Supp. 812, 817 (E.D. Pa. 1959).

91. 370 U.S. 114, 116 (1962).

92. Refer to text accompanying note 65 *supra*. For the view that Congress in the 1972 amendments did not rely on the commerce power, but used its maritime power to the full extent see *Sea-Land Serv., Inc. v. Director, Office of Workers' Compensation Programs*, 540 F.2d 629 (3d Cir. 1976).

93. Refer to text accompanying note 66 *supra*.

94. *See, e.g.,* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

95. *The Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 452-53 (1851).

others. The Supreme Court in the landmark *O'Donnell* case observed that remedies for seamen were derivative both from the commerce power and from the "necessary and proper" clause as applied to the execution of Congress' admiralty power.<sup>96</sup>

It is abundantly clear, then, that if some residual constitutional power were thought necessary to make up for any deficiency in today's broad maritime powers (which seems unlikely), that residual power could be found in the authority to regulate commerce.

### III. THE "STATUS TEST": MARITIME EMPLOYMENT

Before 1972, coverage of the Longshoremen's Act turned exclusively on situs of injury, and that situs in turn was strictly bounded by navigable waters.<sup>97</sup> In 1972, in order to get away from the undesirable effects of having longshoremen and harbor workers popping in and out of the federal act with every gangplank crossing, the situs test was enlarged to embrace terminals, piers, and other areas adjoining navigable waters and used for loading, unloading, building and repairing ships.<sup>98</sup> If the amendments had stopped there, however, the expansion of coverage would have seriously overshot the mark. The reason was that, before 1972, any employee injured on navigable waters was under the Act, however unrelated to longshoring or other waterfront activities his regular work might be. For example, let us suppose the case of a railway brakeman whose work occasionally takes him into a marine terminal. We will suppose also that the railway is a covered employer by virtue of having some true maritime employees.<sup>99</sup> While in the terminal, the brakeman asks to see Joe, a stevedoring supervisor, and is told that Joe is on a ship lying at the dock. The brakeman goes onto the ship to look for Joe, and falls into an open hatchway. Before 1972, the brakeman would have been clearly under the Longshoremen's Act.

Now, the number of cases in which railway workers, outside truckers, deliverymen, and others crossed onto navigable waters in such circumstances as these was perhaps not large enough to cause major concern before 1972. But when the covered situs was expanded to include entire terminal and shipbuilding areas, it became obvious that some additional limitation had to be superimposed to prevent coverage of every trucker or railway worker that entered a terminal and every local materials supplier or service man that entered a shipyard.

The solution chosen was to place a special limitation on the definition of employee:

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96. *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943).

97. See *Nacirema Operating Co. v. Johnson*, 396 U.S. 312 (1969); *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962).

98. Refer to note 12 *supra*.

99. Refer to note 18 *supra* and accompanying text.

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.<sup>100</sup>

The addition of the status test thus had both an expansive and a constrictive purpose and effect. The expansive effect was to ensure the constitutionality of the landward expansion of the situs test, as shown in the discussion in the subsection immediately above.

The constrictive effect was to exclude from coverage various nonmaritime workers who before 1972, like the railway brakeman, might have found themselves within the Longshoremen's Act through the sheer accident of having been upon navigable waters at the time of injury. The curious idea that everyone covered before 1972 must have been covered after 1972, once espoused by the Benefits Review Board, was exploded by the Ninth Circuit in *Gilmore*, as shown earlier.<sup>101</sup> The Fourth Circuit also addressed itself to this point in *I.T.O. Corp. v. Benefits Review Board*.<sup>102</sup>

The pre-1972 Act thus did not distinguish among employees depending on the function they performed. Instead, the geographical location of the injury was all-important, with coverage stopping at the water's edge.

Sections 2 and 3 of the present Act establish a dual test for coverage. The situs requirement has been retained, with the definition of "navigable waters" expanded to include certain specified land areas. In addition, a new "status" test has been added: the person injured ("employee") must have been engaged in "maritime employment," a concept which is nowhere defined but which includes "longshoring operations." The net effect of the 1972 Amendments was therefore to *broaden* the area in which an injury would be covered, and *narrow* the class of persons eligible according to job function.<sup>103</sup>

#### IV. LONGSHORING: "POINT OF REST" VERSUS "MARITIME COMMERCE" THEORY

The first major controversy to appear touching the scope of longshoring activities covered by the amended act can best be described as a contest between the *point of rest* theory and the *in maritime commerce* theory. By early 1977 four circuits (First, Second, Third, and Fifth) had rejected

100. Longshoremen's and Harbor Workers' Compensation Act § 2(3), 33 U.S.C.A. § 902(3) (Supp. 1976).

101. Refer to text accompanying notes 31-35 *supra*.

102. 529 F.2d 1080 (4th Cir. 1975), *modified on rehearing*, 542 F.2d 903 (1976) (en banc), *petition for cert. filed*, 45 U.S.L.W. 3417 (U.S. Dec. 7, 1976) (No. 76-730).

103. 529 F.2d at 1083.

the "point of rest" test, while one (Fourth) was divided on the question.<sup>104</sup>

The two theories and their supporting arguments are well presented in the original majority and dissenting opinion in the *I.T.O.* case decided by the 4th Circuit late in 1975 but modified by the court en banc in 1976.

In the majority opinion, written by Judge Winter, and concurred in by Chief Judge Haynsworth, the point of rest doctrine, adopted by the court, is summarized at the beginning of the opinion in the following words:

We conclude that the Act's benefits extend only to those persons, including checkers, who unload cargo from the ship to the first point of rest at the terminal or load cargo from the last point of rest at the terminal to the ship.<sup>105</sup>

Judge Craven, dissenting, provides an excellent working summary of the maritime commerce theory, favored by the Benefits Review Board, by identifying six general positions adopted by the Board:

Repeatedly and consistently the Board has emphasized:

(1) Outright rejection of the "point of rest" theory as a determinative factor in cases where coverage is disputed.

(2) Waterborne cargo remains in maritime commerce until such time as it is delivered to a trucker or other carrier to be taken from the terminal for further transshipment.

(3) Cargo first enters maritime commerce when it is unloaded from a truck or other carrier and is handled by terminal employees working upon the "navigable waters" of the United States as defined in the Act.

(4) The "loading and unloading" of ships is a continuous process involving many different employees working at various places within the terminal area and performing different tasks, but includes the handling of cargo during all times it is in maritime commerce.

(5) It is sufficient to bring an employee within the scope of maritime employment that his duties at the time of injury involved handling cargo that is in maritime commerce.

(6) The Act does not require that one actually be engaged in loading or unloading vessels to be an "employee" within the meaning of the Act.<sup>106</sup>

104. *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir. 1976), cert. granted sub nom., *Northeast Marine Terminal Co. v. Caputo*, 97 S. Ct. 522 (1977); *I.T.O. Corp. v. Benefits Review Board*, 542 F.2d 903 (4th Cir. 1976) (en banc), modifying 529 F.2d 1080 (4th Cir. 1975); *Sea-Land Serv., Inc. v. Director, Office of Workers' Compensation Programs*, 540 F.2d 629 (3d Cir. 1976); *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976), petition for cert. filed sub nom., *P.C. Pfeiffer Co. v. Ford*, 45 U.S.L.W. 3364 (U.S. Nov. 8, 1976) (No. 76-641); *Stockman v. John T. Clark & Son*, 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).

105. 529 F.2d at 1081.

106. *Id.* at 1092-93.

It hardly needs to be stressed that the outcome of this controversy will have far-reaching effects on the coverage of thousands of waterfront workers, and on the extent to which the 1972 amendments succeed in achieving their announced goal of a unified system of compensation for waterfront workers. The best way to approach this important issue is to appraise in some detail the arguments of the majority and dissent in the *ITO* case. The case was obviously very exhaustively briefed and argued by counsel for the numerous parties<sup>107</sup> and others who appeared *amicus curiae*, and the two opinions seem to contain most of the arguments that could be marshalled on either side.

The exact nature of the facts is of some importance in understanding the significance of this case. Three employees, having somewhat different duties, were involved. The employer's terminal operation was a very large one, as a result of which the total process of moving cargo from a land-based truck to a ship was segmented into several specialized movements. Roughly, there appeared to be four such possible segments. First, the goods would be moved, often by forklift, from the truck or rail car that had brought them to the terminal, and would be placed in a warehouse. Second, a forklift operator (in this case, the plaintiff Brown) would pick up, as here, cotton piece goods and barrels of chemicals from the warehouse in which they had been deposited after delivery by truck or rail. He moved these items to a container which was then "stuffed," that is, loaded.

The third segment occurred when the fully loaded container was picked up by another vehicle called a "hustler" and moved to a marshaling area adjacent to the pier. There the container was stacked with other containers to await loading on the ship. Plaintiff Harris in this case operated a "hustler." Finally, the fourth stage was the actual loading of the cargo onto the ship.

Plaintiff, Adkins, performed the function here described as the first segment, except in reverse. He was injured while moving a load of brass tubing from storage in a warehouse to a delivery truck waiting to transport the goods to their final destination.

Note that all of these operations were performed within the terminal, so that there was no question, as the court promptly points out, but that the *situs* test was satisfied, even though the shed where Adkins was working was 685 feet from the water line, and the warehouse where Brown worked was 850 feet from water. Conversely, none of these employees apparently

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107. At least 45 employers were parties, not to mention associations and carriers.

ever boarded a ship or physically placed goods on a ship.<sup>108</sup>

Because of the capsulized character of these sequential operations the court assumed that it was possible to deal with the case free of the complications that might have been present if the employees had had a greater or lesser admixture of unmistakably covered activity in their duties—as, for example, by sometimes boarding a ship or helping with an actual shiploading operation.

The majority first approached the problem by trying to extract an answer from the intrinsic meaning of the key words in the definition: "Maritime employment," "longshoreman," and "persons engaged in longshoring operations." The court concluded that this approach could not yield a definitive answer. As to the term "maritime employment," the court first sets out the traditional rule:

"Maritime employment" is a phrase that embodies the concept of a direct relation to a vessel's navigation and commerce. *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 61, 34 S.Ct. 733, 735, 58 L. Ed. 1208 (1914) ("The libellant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character.")<sup>109</sup>

But the court then explains why these early generalizations do not settle the current issue:

But while the cases establish that loading and unloading a vessel is maritime employment, they all limited (sic) recovery to injuries sustained on the seaward side of the water's edge because such was the limit of admiralty jurisdiction. See discussion and collection of authorities in *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 204-07, 92 S. Ct. 418, 30 L. Ed.2d 383 (1971). Thus the cases shed no real light on how far shoreward the maritime nature of loading and unloading extends, particularly where as here, the shore-based aspects of the overall loading and unloading operations have been split into numerous functions assigned to different employees.<sup>110</sup>

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108. One discovers late in the majority's opinion, in a footnote, that this was not quite entirely so:

We are aware that Adkins testified that in the past, and sometimes over weekends, he was employed in various capacities "loading and unloading ships" and "on a ship." We think that the record is clear, however, that Adkins was not so employed at the time he was injured; rather his duties were confined to operating a forklift in Shed 11. As we have indicated in the text, the status of his employment is to be determined as of the time of the accident—not by what his previous duties may have been or by what his duties are when he accepts sporadic overtime assignments.

*Id.* at 1088 n.4.

The court's resort to the device of making the position at the time of accident control is criticized in detail at text accompanying note 133 *infra*.

109. 529 F.2d at 1084.

110. *Id.*



The court next looks for guidance in the words "longshoreman" and "longshoring operations," and finds the result inconclusive this time because of a disagreement among the sources of law. The court concedes that a Second Circuit case might seem to support the broader interpretation of longshoring:

It is true that in *Intercontinental Container Transport Corp. v. New York Shipping Ass'n*, 426 F.2d 884 (2 Cir. 1970), it was said that "[h]istorically the work of longshoremen included the preparation of cargo for shipment by making up, for example, drafts and pallets and, in connection with unloading cargo, the breaking up of drafts and pallets, sorting the cargo according to its consignees and delivering it to the trucks or other carriers." *Id.* at 886. At the same time, however, the opinion recognized that "[t]he work of stevedores is the loading and unloading of ships," *id.* at 889.<sup>111</sup>

But the majority set off against this case a regulation of the Secretary of Labor embodying a narrower definition of "longshoring":

Perhaps more significant is the fact that the Secretary of Labor, in promulgating regulations to foster safe conditions in the longshoring industry, defined "longshoring operations" as 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) (emphasis added). See 29 C.F.R. § 1910.16(b)(1) (1974).<sup>112</sup>

At this point the court makes no further attempt to marshal authorities on the meaning of these crucial words, since its main purpose has been satisfied: to demonstrate that the meaning of the words themselves is sufficiently uncertain to require resort to legislative history in the search for what Congress really meant by them.

Because we conclude that the terms "maritime employment," "longshoreman" and "longshoring operations" are not such words of art that we would be justified in deciding the case without resort to the legislative history of the 1972 Amendments and full consideration of the context in which they were enacted, we turn to these secondary sources. (citations omitted)<sup>113</sup>

As we shall see in a moment, the reason for the court's haste to get on

111. *Id.*

112. *Id.* The court follows this with a recognition of a possible line of attack on this source:

Of course these regulations were adopted prior to enactment of the 1972 Amendments and it may well be, as the government argues, that they will ultimately be redrafted when the scope of the 1972 Amendments has been judicially determined. They are significant evidence, however, of the meaning attached to the words at the time that Congress was considering the 1972 Amendments.

*Id.*

113. *Id.* at 1084-85.

to legislative history was that its strongest argument lay in some morsels of that history. For exactly the same reason, Judge Craven was equally anxious to prove that the meaning of the operative words was sufficiently clear to make resort to legislative history unnecessary and inappropriate. He himself leaves no doubt about this:

The basic disagreement between myself and my brothers is whether or not resort to the legislative history was necessary at all in these cases. My brothers feel that the language of the 1972 amendments is ambiguous, and they accordingly embark upon their search for congressional purpose and intent citing as authority *United States v. Oregon*, 366 U.S. 643, 648, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961). I find no such ambiguity and note that the operative sentence in the *Oregon* case cited by my brethren reads as follows: "Having concluded that the provisions of [the statute] are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act." 366 U.S. at 648, 81 S. Ct. at 1281.<sup>114</sup>

Accordingly, Judge Craven musters an impressive array of cases,<sup>115</sup> in addition to the single case cited by the majority, supporting his position that the concept of longshoring or "loading and unloading" of ships extends to cargo handling beyond the "point of rest." He examines the facts of ten cases in detail and quotes at length from several of them. Thus, in *Litwinowicz v. Weyerhaeuser Steamship Co.*,<sup>116</sup> a case involving work performed inside a railway car to prepare steel beams for unloading onto a pier, the court said:

The term loading is not a word of art, and is not to be narrowly and hypertechnically interpreted. Plaintiffs' actions at the time of the accident were direct, necessary steps in the physical transfer of the steel from the railroad car into the vessel, which constituted the work of loading.<sup>117</sup>

Judge Craven tops his list of precedents with an opinion from the Fourth Circuit itself in *Garrett v. Gutzeit*.<sup>118</sup> The plaintiff's job there was to take bales off of hand trucks inside a pier shed and stack them. This was held to be an integral part of the "unloading" process. The court specifically rejected the narrower view:

114. *Id.* at 1094.

115. *Garratt v. Gutzeit*, 491 F.2d 228 (4th Cir. 1974); *Law v. Victory Carriers, Inc.*, 432 F.2d 376 (5th Cir. 1970), *rev'd on other grounds*, 404 U.S. 202 (1971); *Thompson v. Calmar S.S. Corp.*, 331 F.2d 657 (3d Cir. 1964); *Hagens v. Ellerman & Bucknall S.S. Co.*, 318 F.2d 563 (3d Cir. 1963); *Byrd v. American Export Isbrandtson Lines, Inc.*, 300 F. Supp. 1207 (E.D. Pa. 1969); *Olvera v. Michalos*, 307 F. Supp. 9 (S.D. Tex. 1968); *Litwinowicz v. Weyerhaeuser S.S. Co.*, 179 F. Supp. 812 (E.D. Pa. 1959).

116. 179 F. Supp. 812 (E.D. Pa. 1959).

117. *Id.* at 817-18.

118. 491 F.2d 228 (4th Cir. 1974).

The [district] court apparently concluded that "unloading" ceases when the cargo is no longer in contact with the ship, *i.e.*, when the bales were deposited on the pier and discharged from the ship's gear. Although we find this theory appealing because of its ease of application, we believe that the case law rejects such a narrow definition of "unloading."<sup>119</sup>

It then makes the operative test turn on whether the particular activity was a necessary part of the unloading operation:

We, however, are guided by the historical development of the warranty rather than by arbitrary definitions of admittedly amorphous terms . . . . The record in the instant case demonstrates that it was necessary to move the bales away from the side of the ship as they were discharged from the ship's gear so that additional bales could be unloaded. It was, therefore, a "necessary step in the unloading operation."<sup>120</sup>

Judge Craven presents a number of other arguments for stopping short of examining legislative history, but for various reasons they do not constitute his strongest case.<sup>121</sup>

One may now pick up the thread of the majority's argument to discover the principal reason for their decision. The court traces the torturous history of coverage of waterfront injuries, up to the point at which the Supreme Court, in *Nacirema* and *Victory Carriers*, pointed out that any landward extension of the act would have to come from Congress. The court then proceeded to quote at length from the virtually identical House and Senate

119. *Id.* at 234. This language was quoted in the *I.T.O.* case. 529 F.2d at 1100.

120. 491 F.2d at 236. This was also quoted in the *I.T.O.* case. 529 F.2d at 1100.

121. The first is the routine maxim, amply supported by authorities, that the Act should be liberally construed. This maxim, however, has seldom outweighed the kind of specific evidence of legislative intent that the majority believed it found in the congressional reports.

The second broad argument is invocation of the statutory presumption of coverage in § 20 of the Act. See 1 A. LARSON, *supra* note 2, § 10.33 for a discussion of the problems involved in attempting to apply this presumption literally.

The third preliminary argument is that interpretations of a statute by an agency charged with its enforcement are entitled to great deference. Judge Craven lists 32 decisions of the Benefits Review Board supporting his interpretation. Many of these, as well as similar later decisions, are examined *infra*. It may be questioned whether this familiar principle applies to a quasi-judicial body charged, not with administration of a specialized program, but with the settling of disputes between private litigants. The principle itself rests on the idea that an administrative commission dealing with a technical area is more competent than a general court to pass on certain specialized questions within its competence. But the Benefits Review Board is not staffed by persons selected for their waterfront experience. They also have to deal with matters affecting the District of Columbia Act, the Black Lung Act, and so on. They are in this respect no different from the typical workmen's compensation board reviewing decisions of referees and examiners. As such, their findings of fact are entitled to the usual deference, but traditionally their findings of law are not—and the issue here is one of law, in the form of a question of statutory interpretation.

The same comment applies to Judge Craven's fourth point, which is that the scope of review of a Benefits Review Board decision should be narrow. However that may be, it obviously cannot be so narrow as to relieve the court of the duty to correct an error of law in the form of an incorrect construction of a statute—if that is indeed what was at stake.

reports<sup>122</sup> accompanying the 1972 amendments.<sup>123</sup>

The first excerpt cited by the court as damaging to plaintiffs' contention was one that seemed to limit post-1972 coverage to workers who prior to 1972 would have been covered as to part of their activities:

It [the Committee] said its intent was to provide benefits to employees "*who would otherwise be covered by this Act for part of their activity*" (emphasis added). As an example, it cited employees who unload cargo from a ship and transport it "immedi-

122. S. REP. NO. 1125, 92d Cong., 2d Sess. (1972); H.R. REP. NO. 1441, 92d Cong., 2d Sess. (1972).

123. H.R. REP. NO. 1441, 92d Cong., 2d Sess. 10-11 (1972) reads as follows:

The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoremen's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, 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 (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. 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 transshipment 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 or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, *i.e.* a person at least some of whose employees are engaged, in whole or in part, in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

ately . . . to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters." U.S. Code Cong. & Admin. News 1972, p. 4708. Such employees were to be compensated if they were injured over navigable waters or on the adjoining land area. Conversely, employees not engaged in loading or unloading a vessel were *not* to be covered even if they were injured on land in an area used for such activity.<sup>124</sup>

But the most damaging passage was still to come:

The report specifically stated that "employees whose responsibility is only to pick up stored cargo for further transshipment would *not* be covered" (emphasis added), nor would purely clerical employees who do not participate in the loading and unloading of cargo. However, checkers "*directly* involved in the loading and unloading functions" (emphasis added) would be eligible for benefits. U.S. Code Cong. & Admin. News 1972, p. 4708.<sup>125</sup>

It can now be plainly seen why the majority were impatient to get to legislative history, while Judge Craven was anxious to avoid it.

The court does not hesitate to press home its advantage, and announce its "point of rest" formula:

We especially note that the committee report is explicit in delineating the portion of the overall loading and unloading process during which coverage attaches to longshoremen and persons engaged in longshoring operations: the Act applies between the ship and, in the case of unloading, the *first* storage or holding area on the pier, wharf, or terminal adjoining navigable waters. Although the instance of loading a ship was not discussed, we think that the same principle controls in reverse: coverage is afforded from the *last* storage or holding area on the pier, etc., to the ship. We perceive the landward limit of coverage to be the "point of rest" as that term is generally understood in the industry, Norfolk Marine Terminal Association Tariff, No. 1-C at 18, Item 290, Respondent's Exhibit 1, *Harris v. Marine Terminals, Inc.*, No. 74-LHCA-108 (Aug. 15, 1974), and defined by the Federal Maritime Commission in its regulations governing terminal operators. 46 C.F.R. § 533.6(c) (1974). See also *American President Lines, Ltd. v. Federal Maritime Bd.*, 115 U.S. App. D.C. 187, 37 F.2d 887, 888 (1962); *DiPaola v. International Terminal Operation Co.*, 311 F.Supp. 685, 687 (S.D.N.Y. 1970).<sup>126</sup>

Judge Craven, having amassed a number of arguments why legislative history should never have been resorted to in the first place, finally attacks the relied-on passages directly. His principal argument is that the language of the report is at best ambiguous, and could equally well be interpreted as intended to exclude truck drivers and others who pick up cargo for transshipment and delivery beyond the terminal:

124. *I.T.O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080, 1087 (4th Cir. 1975).

125. *Id.*

126. *Id.*

The sentence in the House Report thought crucial by the majority reads as follows: "Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo." U.S. Code Cong. & Admin. News 1972, p. 4708. I think they read more into the sentence than is there. In the first place, over-the-road and local truck drivers who come to a terminal to pick up cargo for further transshipment would certainly not be covered for several reasons: (a) ordinarily they are at the outer perimeter of the terminal and not on "navigable water," [footnote omitted] (b) usually truck drivers, certainly if unionized, never load their trucks; they only *drive* them. The sentence from the House Report is inartful, and seems to mean that neither clerical workers nor truck drivers picking up shipments are covered and for the same reason: neither category of workers have anything to do with the loading or unloading of cargo. The wording in the House Report just quoted cannot be so broadly construed so as to exclude from coverage those workers who (1) work on the "navigable waters" and (2) must directly handle cargo in the *overall* process of loading and unloading ships.<sup>127</sup>

Judge Craven then notes that the "point of rest" terminology, although it turns up in such places as Maritime Commission regulations, was never written into the amendments or expressly applied to this act, either in the legislative history or in the literature analyzing it. If such a sharply limiting definition had been intended, reasons Judge Craven, surely it would have appeared somewhere in the record in unequivocal form. He adds a practical point:

Counsel for appellants have conceded, both in their briefs and in oral argument, that the location of the "point of rest" will vary from port to port, depending upon the sophistication of each port's cargo-handling facilities. The definitions relied upon by the majority, moreover, would grant to the terminal operator power to shift unilaterally the "point of rest" seaward or shoreward at his whim or caprice.<sup>128</sup>

In other words, not every longshoring operation is as neatly divided into segments as those at the huge ITO terminal. What happens in small operations when longshoremen are in and out of the four different segments identified at the outset?

When all the arguments are in, and all the supporting materials have been deployed on both sides — judicial precedents, administrative holdings, legislative history, texts, articles, maritime regulations, maxims, and presumptions — the most telling point of all may well be Judge Craven's straightforward observation that, if the majority is right, then Congress simply has not accomplished what it set out to achieve: to replace the

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127. *Id.* at 1095.

128. *Id.* at 1096.

pre-1972 in-and-out patchwork of coverage by a simplified and uniform system of compensation. Judge Craven sounds this theme in the opening sentences of his dissent:

William T. Adkins, Donald D. Brown, and Vernie Lee Harris will, I think, be surprised to learn that they are not longshoremen, and astonished to discover that they are not engaged in maritime employment of any kind. If they are not, as my brothers hold, then the Congress has labored prodigiously only to have accomplished nothing at all in its effort to simplify the problems of maritime workers' compensation. While these cases are the first to reach a court of appeals under the 1972 amendments to the Act, [footnote omitted] they will surely not be the last. Henceforth, injured employees and their counsel must comb the waterfronts of this circuit, probing hopelessly, like Diogenes with his lantern, for the elusive "point of rest" upon which coverage depends.<sup>129</sup>

Later in his dissent, Judge Craven develops this argument further by showing that it amounts to a second *situs* test:

If the "point of rest" theory remains wedged between the lines of the LHWCA, the result can only be to erect yet another "situs" requirement for coverage. Once the initial "situs" test is satisfied, *i.e.*, it is determined that a worker is injured on "navigable waters" as defined by the Act, the only remaining inquiry should be whether his employment is "maritime." A worker's "status," *i.e.*, whether he is engaged in maritime employment, should be determined by the *nature* of his work, and not where he performs it. Yet, the "point of rest" theory, adopted by the majority, means that workers performing the *same* function, handling the *same* cargo, will be treated differently depending upon where they work even though they are all working on the premises of a terminal conceded to be within the Act's definition of "navigable waters." It was precisely this anomaly, where workers exposed to identical risks receive disparate workmen's compensation benefits, which provided the impetus for the 1972 amendments. Thus, the majority effectively holds that the Congress has failed in its efforts to correct a bad situation, and that coverage even yet depends upon a fictional location—point of rest—that has no relation whatever to the inherent risks of employment.<sup>130</sup>

These "inherent risks," Judge Craven stresses, involving the typical machinery and other apparatus involved in waterfront activities, are no respecters of lines drawn by reference to "points of rest." Accordingly, he argues, the boundaries of coverage should follow lines related to the purpose and function of the Act, rather than related to conceptual theories about what is or is not "maritime."

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129. *Id.* at 1089.

130. *Id.* at 1096-97.

The *I.T.O.* case was reheard en banc before six judges. By a vote of 4 to 2, the decision of the Benefits Review Board awarding benefits to Adkins was reversed. The decisions of the Board granting benefits to Brown and Harris were affirmed by an equally divided vote. The "swing vote" was that of Judge Widener. Judge Russell joined Chief Judge Haynsworth and Judge Winter in voting for reversing the Board in all three cases. Judge Butzner joined Judge Craven in voting to affirm the Board in all three cases. Judge Butzner wrote a brief opinion in which he said:

I fully agree with Judge Craven that the point of rest theory espoused by the majority of the court is a judicial gloss on the 1972 Amendments of the Longshoremen's and Harbor Workers' Compensation Act, which is warranted by neither the Act nor its legislative history.<sup>130.1</sup>

Judge Widener did not write his own separate opinion, but his views were summarized in Judge Winter's opinion:

On the issue of the extent of the Act's coverage, Chief Judge Haynsworth, Judge Russell and I subscribe to the views expressed in the majority panel decision. Judge Widener subscribes to the principle expressed in that opinion, although he defines the exact point between coverage and non-coverage somewhat differently.

In his application of the principle, Judge Widener concludes that the claimant Adkins is not covered by the Act, but that claimants Brown and Harris are covered. He reasons that the test of coverage is whether an otherwise eligible employee is injured while engaged in loading or unloading a ship; coverage would not extend to activities for transshipment of goods removed from a ship or goods destined for a ship.<sup>130.2</sup>

What Judge Winter evidently means by agreement with the "principle" of the majority panel is that Judge Widener accepts the "point of rest" idea, but moves it from the side of the ship to the side of the truck (or railway car). The act of loading goods onto the truck, to Judge Widener, instead of being the last stage of unloading the ship, is the first stage of loading the truck for its journey to the consignee. Presumably, when the movement is reversed, he would view the unloading from the truck into the terminal as the last stage of the trucking movement; rather than the first stage of the loading of the ship.

This compromise solution seems to have little merit. It turns too much on a sort of colloquial concept of what "loading the ship" means. The realistic approach, since we are here concerned with a "status" test, is whether the claimant's work as a whole is identified with the waterfront or with over-the-road transportation. Obviously if an employee of the trucking or railway company assisted in the unloading, and then moved away with the truck or train, his employment would not be covered. But

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130.1 542 F.2d 903, 910.

130.2 *Id.* at 905.



a terminal employee whose entire function is associated with the movement of goods within the terminal, in connection with the loading on a ship or unloading from a ship, should not be segregated from other terminal workers by a semantic distinction between loading a ship and unloading a truck. Moreover, as Judge Butzner points out, the practical difficulties of applying Judge Widener's boundary line to the almost unlimited variety of fact combinations in these cases would be formidable indeed.

By early 1977 four additional circuits had spoken on this issue.<sup>130,3</sup> All four rejected the "point of rest" theory of the Fourth Circuit. At the same time, two circuits indicated in dicta that they would not extend coverage as far as it has been extended by the Benefits Review Board, or would be extended by Judge Craven in his dissenting opinion in the *I.T.O.* case—for example, to clerks.

*Pittston* involved two workers, Blundo and Caputo. Blundo was a "checker." Caputo was a loader who was injured while loading cargo into the consignee's truck. In the First Circuit case, Stockman was a "stripper," i.e., he unpacked cargo from containers. Blundo, Caputo, and Stockman were all held covered under the 1972 amendments.

The Third Circuit case, *Sea-Land*, involved a tractor rig driver who was injured while moving a trailer over public streets from one of his employer's terminals to another, a mile and a half apart. The court held that his status depended on what he was transporting at the time of injury. If he was transporting a discharged cargo container to a temporary storage area, or a cargo container to be loaded aboard a vessel, he was in maritime employment. If he was delivering a cargo container to a consignee, or if he was shuttling equipment between the two terminals, he was not.

The Fifth Circuit case, *Jacksonville Shipyards*, presented an array of five assorted marginal fact situations, three related to shipbuilding and repair, and two related to longshoring. Perdue, a shipfitter, who was injured while alighting from a bus to "punch out" at a point a mile from the aircraft carrier on which he was working, was excluded on both situs and status grounds. Skipper, a welder engaged in ship repair work, at the time of injury was dismantling a structure to salvage some steel for use in building a sandblasting facility; he too was excluded on both situs and status grounds. Nulty, a carpenter injured at a shipyard while building a piece of woodwork to be installed on a ship under construction, was held covered. Ford, who was injured while helping to secure a military vehicle, which had arrived earlier by sea, to a flat car, was also held covered. Final-

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130.3 See *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir. 1976), cert. granted sub nom., *Northeast Marine Terminal Co. v. Caputo*, 97 S. Ct. 522 (1977); *Sea-Land Serv., Inc. v. Director, Office of Workers' Compensation Programs*, 540 F.2d 629 (3d Cir. 1976); *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976), petition for cert. filed sub nom., *P.C. Pfeiffer Co. v. Ford*, 45 U.S.L.W. 3364 (U.S. Nov. 8, 1976) (No. 76-641); *Stockman v. John T. Clark & Son*, 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).

ly, Bryant, a "cotton header" injured while loading cotton in a pier warehouse was similarly found covered.

*Pittston* and *Stockman*, like *I.T.O.*, presented no situs question at all. But *Sea-Land*, since the injury occurred on a public street, necessarily raised a situs as well as a status question, as did several of the claims in *Jacksonville Shipyards*. The main content of the opinions in *Pittston*, *Stockman*, and the Fourth Circuit case is concerned with legislative history.

Judge Friendly, in *Pittston*, extracted from this history two relatively clear items of legislative intent, again seconded by the *Stockman* opinion:

Two conclusions emerge from this with seeming certainty: One is that Congress was concerned about "the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels," new facts of life of the waterfront which, as this court noted in *Intercontinental Container Transport Corp. v. New York Shipping Ass'n*, (citation omitted), mean that a good deal more of the longshoreman's traditional jobs are now performed on shore. Stripping a container of goods destined to different consignees is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it is performed on shore and not in the ship's cargo holds. Congress intended to cover men engaged in these activities if they met the situs test contained in the Act—irrespective of the employee's position vis-a-vis a "point of rest." . . .

The second conclusion is that Congress was concerned with providing uniformity of coverage for persons engaged in the loading or unloading functions on the piers. It wished to minimize the occasions when longshoremen and other harbor workers would be walking from the liberalized benefits of LHWCA to the much lower ones provided by state compensation laws.<sup>130.4</sup>

Judge Friendly concludes:

We therefore hold that the Amendments at least cover 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 consignee has actually begun its movement from the pier (or in the case of loading, from the time when the consignee 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. That is as far as we need to go to affirm *Blundo's* and *Caputo's* awards; whether the proviso is essential can be left for another day. The facts of these cases likewise do not require us to formulate a rule for the situation wherein the goods have been deposited in a public warehouse by the stevedore in unloading or the shipper in loading.<sup>130.5</sup>

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130.4 *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 53-54 (2d Cir. 1976).

130.5 *Id.* at 56.

The proviso reflects the point which bothered both courts more than any other: the statement in the Committee report that "[t]he intent of the Committee is to permit a uniform compensation to apply to employees who would otherwise be covered by this Act for part of their activity."<sup>130.6</sup>

Judge Campbell, writing for the First Circuit in *Stockman*, does a skillful job of handling this difficulty, so far as the claimants in these cases are concerned. He draws a distinction between entire categories of workers, no substantial number of whom would have been covered even in part before the amendments, and workers who are in a category most of whose members were previously covered at least in part, but who as individuals might not meet that test.

Both circuits seem to be quite ready, in dicta, to rule out clerks and similar employees whose entire category would fall outside the requirement of having been partly covered before the amendments.

The rationale in *Sea-Land* is unlike that in either majority or dissenting opinions in any of the other cases. Confronted with a borderline "situs" issue, as well as with a borderline "status" issue, the court solved both its problems by adopting a theory that status is to be determined by function, and that if the employee is functionally engaged in maritime employment, maritime situs will, so to speak, follow maritime function. The court said:

The reference in §§ 902(4) and 903(a) to the navigable waters of the United States should be regarded no more than a shorthand way of relating the function being performed by the injured employee to waterborne transportation, the jurisdictional nexus. . . .

. . . The line which Congress intended to draw was between maritime commerce and land commerce, and the coverage of the federal law starts at the point where the cargo passes to or from an employer engaged in the former to an employer engaged in the latter.<sup>130.7</sup>

It would be inaccurate to say that the operator of a maritime terminal is engaged in land commerce merely because his employees put sea-borne cargo onto trucks and railway cars inside the marine terminal.

The Fifth Circuit decision in *Jacksonville Shipyards*, written by Judge Tjoflat, takes an expansive view of coverage, so far as the concept of loading and unloading is concerned. One of the longshoremen held covered, Bryant, was engaged in an intermediate handling function, and so was clearly covered once the narrow "point of rest" theory was rejected. But Ford was injured while helping load a vehicle onto a flatcar. Thus he was beyond the borderline drawn by Judge Widener. The Fifth Circuit expressly found that loading the goods onto a flatcar was the last stage of the maritime journey, and that various delays and storages in the interval between the

130.6 H.R. REP. NO. 1441, 92d Cong., 2d Sess. (1972).

130.7 *Sea-Land Serv., Inc. v. Director, Office of Workers' Compensation Programs*, 540 F.2d 629, 638-39 (3d Cir. 1976).

ship and the inland transportation were immaterial.

As of January 1977, there had thus already appeared a spectrum of views on where the limits of coverage should be placed, with perhaps seven variants ranging from the narrowest to the broadest: The original *I.T.O.* opinion, (Fourth Circuit panel) putting the boundary at the point of rest beside the ship; Judge Widener's modification (Fourth Circuit en banc in *I.T.O.*, concurring) moving the point of rest to the side of the truck or railway car; Judge Friendly's view (Second Circuit, *Pittston*), rejecting the point of rest theory, but also by dictum rejecting coverage of clerical workers; Judge Campbell's opinion (First Circuit, *Stockman*), also rejecting the point of rest rule, and also by dictum excluding clerks, but including any member of any category a substantial part of whose members were previously covered, regardless of the particular individual's situation; Judge Gibbon's approach in *Sea-Land*, making status depend on maritime function, even on a public street; Judge Craven's dissent in *I.T.O.*, rejecting the point of rest approach, and indicating approval of the record of decisions made by the Benefits Review Board, which would include all workers involved in the processing of maritime cargo, including clerical workers; finally, Judge Tjoflat's combination in *Jacksonville Shipyards*, taking the broadest view of loading and unloading, including loading onto an inland carrier, but sharply constricting the scope of the amendment by imposing a pinpoint approach on the status test.

It would be difficult to imagine a situation presenting a more urgent need for an early Supreme Court resolution,<sup>130.8</sup> with perhaps tens of thousands of workers inhabiting a shadowland in which the range of the possible benefits may vary as much as three or four hundred percent.

This review of the point-of-rest versus maritime commerce controversy may be rounded out with the observation that the Benefits Review Board in subsequent cases has "stuck to its guns" and refused to accept the Fourth Circuit's position.<sup>131</sup> The Board does not allow itself to be drawn into a rematch based on the elaborate legal arguments in the Fourth Circuit opinion. It disposes of the matter in each instance with this formula:

The Board is well aware of the restrictive interpretation given the status requirement by the Fourth Circuit Court of Appeals in the recent case of *I.T.O. Corporation of Baltimore v. Adkins* . . . . However, we are of the opinion that our interpretation with regard to coverage is more in keeping with the amended statute and the

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130.8 At this writing, certiorari has been granted in one of the cases, *Pittston*, and applied for in several others. Refer to note 130.3 *supra*.

131. *Bradshaw v. J.A. McCarthy, Inc.*, 3 Benefits Review Board Serv. 195, 198 (1976); *Santumo v. Sea-Land Serv., Inc.*, 3 Benefits Review Board Serv. 262, 264 (1976); *Cabrera v. Maher Terminals, Inc.*, 3 Benefits Review Board Serv. 297, 299 (1976); *Norat v. United Terminals, Inc.*, 3 Benefits Review Board Serv. 337, 338 (1976).

legislative history, and we will continue to follow the line of reasoning developed in previous decisions and reiterated in this case.<sup>132</sup>

#### V. OVERALL DUTIES VERSUS IMMEDIATE TASK AS TEST

A claimant's status as a covered "employee" is determined by an evaluation of his work activities considered as a whole, not of his activity at the moment of injury.<sup>133</sup> In *Mildenberger v. Cargill, Inc.*,<sup>134</sup> claimant was injured while blending grain in the basement of a grain elevator within a terminal. After the blending, the grain was weighed, then put in bins for temporary storage, and ultimately loaded on a vessel. When the grain was being actually loaded, claimant worked in the galley controlling the flow of grain onto the conveyor belts carrying the grain to the vessel. The Board first found that the work of blending the grain was itself an integral part of the loading process. But, the Board continued, even if it were not, the claimant would still be an "employee" under the Act because "a large part" of claimant's duties consisted of controlling the flow of grain onto ships — undoubtedly a direct part of the loading process. The Board said:

His status as a maritime employee does not change merely because a segment of his work is not "loading." The purpose of the Act is to provide compensation for persons engaged in maritime employment, which includes longshoring operations. Claimant's work must not be viewed so narrowly as to isolate each segment of his workday or workweek. Such a narrow view of claimant's work activities would condition coverage upon the fortuitous circumstance of a claimant's activity at the moment of injury rather than upon his status as a maritime employee.<sup>135</sup>

The Board then states the rule in these terms: "Thus, a claimant's status must be determined from an evaluation of his work activities considered as a whole."<sup>136</sup> This rather self-evident conclusion could perhaps be left without additional discussion, if it were not for a directly contrary *dictum* in the original *I.T.O.* majority opinion and a *contra* holding in *Jacksonville Shipyards*. Early in the *I.T.O.* opinion, the court presents the following statement without discussion or elaboration:

Ordinarily the question of whether a person was engaged in "maritime employment" is to be determined as of "the time of the accident." *Parker v. Motor Boat Sales*, 314 U.S. 244, 247, 62 S.Ct.

132. *Bradshaw v. J.A. McCarthy, Inc.*, 3 Benefits Review Board Serv. 195, 198 (1976).

133. *Mildenberger v. Cargill, Inc.*, 2 Benefits Review Board Serv. 51, 55 (1975); *Bradshaw v. J.A. McCarthy, Inc.*, 2 Benefits Review Board Serv. (Ad. L.J.) 177 (1975); *De Liso v. Transocean Gateway Terminal, Inc.*, 2 Benefits Review Board Serv. (Ad. L.J.) 254 (1975); *Halbrook v. Louis Dreyfus Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 8 (1975); *Alvarez v. Atlantic Container Lines, Ltd.*, 2 Benefits Review Board Serv. (Ad. L.J.) 137 (1975).

134. 2 Benefits Review Board Serv. 51 (1975).

135. *Id.* at 55.

136. *Id.*

221, 86 L.Ed. 184 (1941). See *Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334, 340, 73 S.Ct. 302, 97 L.Ed. 367 (1953).<sup>137</sup>

This statement may appropriately be characterized as a *dictum* since it did not influence the actual decision one way or another. Virtually all of the activities of the three plaintiffs—not merely those at the time of the accident—fell beyond the point of rest which the court found to be the outer limit of maritime employment. Later, in a footnote,<sup>138</sup> the court mentions that one of the plaintiffs had sometimes in the past and on weekends worked on ships or on actual loading and unloading, but the court merely reiterated its time of accident rule. It characterized the work on ships as sporadic overtime assignments. If this characterization were accurate, the court could have reached the identical result by applying the Benefits Review Board rule that his duties must be considered as a whole.

The Fifth Circuit, in *Jacksonville Shipyards*, also commits a serious blunder in applying the “pin-point” rule to the status test. What was a harmless dictum in *I.T.O.*—that claimant’s status is determined by what he was doing at the instant of injury—becomes a controlling rationale here which helped to defeat two of the claims. The court’s handling of this point is superficial at best, and downright inaccurate at worst. The court relies on only one authority—*Weyerhaeuser Co. v. Gilmore*.<sup>138.1</sup> But this point was not in issue in *Gilmore*. The claimant there was at all times a pondman. There is nothing to indicate that he was ever covered as to any of his duties. Any use of the words “time of injury,” then, would be purely *obiter dictum*. The court carelessly scrambles the pin-point issue as to status and as to situs in the only other sentence supporting its conclusion: “The legislative history tells us that an injured employee will be covered if he was ‘engaged in loading, unloading, repairing, or building a vessel’ but will not be covered merely because he was injured in the area defined by new Section 903(a).”<sup>138.2</sup> If Congress had meant what Judge Tjoflat suggests, it would have inserted the words “at the time of injury” after the word “vessel” in this passage. The total excerpt from the Report emphatically gives the opposite impression, by stressing that the purpose of the amendment is precisely to avoid the in-or-out coverage that had grown up under earlier tests.

The court’s citation of *O'Rourke* for the proposition that “maritime employment” is to be determined as of time of accident is a plain blunder. To the contrary, the Court specifically held that coverage of the Longshoremen’s Act did *not* require maritime employment. It was on this precise point that four justices dissented. The holding of *O'Rourke* is merely that the time of accident governs the situs test, and that the occurrence of the

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137. 529 F.2d at 1084.

138. Refer to note 108 *supra* for full text of the footnote.

138.1 528 F.2d 957, 960 (9th Cir. 1975), *cert. denied*, 97 S. Ct. 179 (1976).

138.2 *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 539 (5th Cir. 1976).

injury upon navigable waters was controlling. Therefore, the Longshoremen's Act applied, and a railroad brakeman injured on a freight car situated on a car float could not maintain a suit under the FELA.

As to the continuing situs test, now expanded to adjoining areas, it is undoubtedly still true that the time of accident governs. This must be so, because the test is addressed to the injury, not to the person. An injury has a time, and it has a place. Either that place is within the statutorily designated area at that time, or it is not. But the "maritime employment" test is addressed to the status of a person. That status is not necessarily controlled by what he was doing at any particular moment.

The other case cited, *Parker*, is equally out of place. *Parker*, although using the language of maritime employment, was not dealing with a status test of maritime employment in the Act, but with the moribund test of "absence of state power." The real effect of *Parker* was to set the stage for a "twilight zone" period, which culminated in the judicial demolition of the *absence of state power* test altogether.<sup>139</sup>

The modern status test of "maritime employment," which had no counterpart in the Longshoremen's Act at the time *O'Rourke* and *Parker* were decided, assimilates the Longshoremen's test to the Jones Act concept, except as the former is spatially limited by the situs test. And under the Jones Act, as the Supreme Court said in launching the new era of landward extension of that act in *O'Donnell*: "The right of recovery in the Jones Act is given to the seaman as such. . . ."<sup>140</sup>

It cannot be too strongly stressed that, under the status test here involved, we are dealing with the definition and identification of a *person*, not of an event. To take the simplest case: Suppose a man loads cargo onto ships nine-tenths of the time, and one-tenth of the time he blends grain. The Act says that "employee" includes a "longshoreman." Is this man a longshoreman? Look at him. If he is not a longshoreman, what is he?

A good way to highlight the fact that status cannot be pinpointed by a particular moment in time is to try to apply the Fourth Circuit's time of accident test to the Act's definition of employer: "an employer, any of whose employees are employed in maritime employment, in whole or in part. . . ." Now we have no time of accident to use as a point of reference. The status of those employees as in "maritime employment" must be determined independently of any particular moment in time.

The practical reason for this conclusion, as emphasized by the Benefits Review Board in *Mildenberger*,<sup>141</sup> is that the time of accident approach would fragment a single individual's status into covered and noncovered segments as he went from one task to another. Here again, this is precisely what Congress had set out to avoid through the 1972 amendments.

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139. Refer to text accompanying note 8 *supra*.

140. *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 42 (1943).

141. *Mildenberger v. Cargill Inc.*, 2 Benefits Review Board Serv. 51 (1975).

The trouble here stems largely from a failure to distinguish between three independent tests of coverage. As has been noted, one is the test that acts upon the injury itself, and asks *where* it occurred. The next acts upon the person, and asks *who* he was. The third, not to be confused with the second, asks whether he was in the course of employment when injured.

Let us suppose that we have concluded that Joe Hill is a "longshoreman" within the definition of "employee." There may still remain a question, as to a particular activity, whether it was in the course of employment — *not* in the course of *maritime* employment, mind you — just in the course of employment. This kind of question could come up as to any of the familiar borderline course of employment areas: personal comfort, recreational and social activities, going and coming, horseplay, preparatory acts, collecting pay, acts helping customers or strangers, acts benefitting the claimant, union and patriotic activities, rescue or emergency acts, and so on. Suppose, then, as Joe is working in a terminal, a child runs in off the street chased by a mad dog. Joe sets off in pursuit, to save the child, and eventually is himself injured. Now, what is the correct question to ask? Do you ask: Was Joe in *maritime* employment while chasing the dog and therefore in such employment at the time of accident? Or do you ask: Was Joe simply in the course of employment? The correct question is the latter. The question about maritime employment was relevant only to establishing Joe's status as a longshoreman, and that was already settled. From then on, one asks of Joe, as of any other worker under a compensation act, whether he was in the course of employment, by standards that apply equally to nonmaritime and maritime incidents. And, under federal law, he would probably recover under the rescue doctrine.<sup>142</sup> *A fortiori* then, if Joe at the time of accident is not engaged in a marginal activity such as chasing a mad dog, but is working at a task assigned by his employer, he remains "in the course of employment" even if the particular task would not of itself qualify as maritime, and he certainly does not forfeit his longshoreman status and protection for the duration of the nonmaritime task.

Lest it be thought that the rule here favored is a one-way street toward enlarging the coverage of the act, one must stress that the rule cuts both ways and also bars coverage to persons who were not "employees" on the strength of their work activities considered as a whole.<sup>143</sup> Thus, several plaintiffs were held not covered when burned by an explosion on an offshore petroleum production platform, although they sometimes assisted in loading and unloading wireline equipment. Their primary duties, however, were operation of specialized tools and equipment to drop wireline into oil wells to remove sediment. At the time of the explosion, the plain-

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142. See *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951).

143. See, e.g., *Wiley v. Wilson Wireline Servs.*, 2 Benefits Review Board Serv. (Ad. L.J.) 86 (1975); *Henning v. Vacco Wireline Serv.*, 2 Benefits Review Board Serv. (Ad. L.J.) 87 (1975); *Neal v. Wilson Wireline Servs.*, 2 Benefits Review Board Serv. (Ad. L.J.) 88 (1975).



tiffs were changing clothes preparatory to performing these primary duties.

#### VI. TIME AND SPACE INTERVAL BETWEEN OFFLOADING FROM SHIPS AND INJURY

So long as cargo remains in maritime commerce, in that it has not been delivered to a trucker or other carrier for transshipment to its destination,<sup>144</sup> the distance in space or time between the offloading from the ship and the place and time of injury are not determinative of the continuation of maritime employment.

As to spatial distance, a number of cases were cited earlier in the discussion of the situs test involving distances from 75 to 2000 feet from the water's edge, all of which were held immaterial so long as the situs was within a terminal adjoining navigable waters.<sup>145</sup> But, for present purposes, the distances can sometimes be much greater, since they refer, not to the distance between the situs of injury and water, but to the distance the goods have traveled from the ship before being handled by this claimant, and the legal issue is not whether the situs of injury is an area "adjoining" navigable waters but whether the maritime-commerce character of the cargo's movement has been interrupted or destroyed by the sheer size of its journey. In *Dillon v. United Terminals, Inc.*,<sup>146</sup> for example, the container in question had been offloaded from a vessel at Weehawken, New Jersey, and had been transported overland by teamsters approximately twelve miles to Port Newark, New York. The injury occurred as the container was being stripped at the employer's Port Newark terminal facility. Note that there was no situs problem, since, after the overland journey, the cargo was once more inside a terminal. The law judge ruled that variations in locale and continuity did not change the maritime character of the shipment, and that the maritime employment status of the claimant was not affected by the overland interlude.

This principle was carried to its logical conclusion in *Santumo v. Sea-Land Service, Inc.*,<sup>147</sup> in which it was held that cargo in containers transported across the United States to a warehouse where it was unpacked remained in maritime commerce, if the transporter-by-land was the ocean carrier itself. Under *Dillon*, however, it apparently did not matter that the overland transportation was by teamsters. Accordingly, a coast-to-coast land journey of unopened cargo containers would seem to be once more in maritime commerce when they arrive in a terminal, no matter who provided the overland transportation. The injury in *Santumo*, as in *Dillon*, occurred in the course of handling the cargo within a terminal, and there seems to be

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144. See *Blundo v. International Terminal Operating Co.*, 2 Benefits Review Board Serv. 376 (1975); *Cabrera v. Maher Terminals, Inc.*, 2 Benefits Review Board Serv. (Ad. L.J.) 99 (1975).

145. Refer to cases cited at notes 39-45 *supra*.

146. 2 Benefits Review Board Serv. (Ad. L.J.) 1 (1975).

147. 2 Benefits Review Board Serv. (Ad. L.J.) 209 (1975).

no reason why the identity of the overland carrier should make any difference.

As to lapse of time between offloading and injury, awards have been made when the interval was a day,<sup>148</sup> 2 days,<sup>149</sup> 5 days,<sup>150</sup> 7 days,<sup>151</sup> 8 days,<sup>152</sup> a week or two,<sup>153</sup> 15 days,<sup>154</sup> 5 weeks,<sup>155</sup> and 133 days.<sup>156</sup>

In the 133-day case, the employer had specifically argued that the passage of time between removing the cargo from the ship and placing it on the truck, during which time it rested on the pier, was so lengthy that the unloading process had long since ceased and been replaced by a process of storage. The Board disagreed:

There is no question that this cargo was held on the pier pending completion of arrangements for its delivery to a consignee. Removal of a cargo from a vessel and placing it temporarily at rest on a pier does not terminate the maritime nature of the cargo. See *Richardson v. Great Lakes Storage and Contracting Co.*, 2 BRBS 31, BRB Nos. 74-212, 212A (June 26, 1975). That circumstances necessitated retention of this cargo on a pier for an unusually long period is irrelevant.<sup>157</sup>

#### VII. MARITIME STATUS OF PARTICULAR ACTIVITIES

It was noted earlier, in the discussion of the *I.T.O.* case,<sup>158</sup> that the total process of movement of cargo from the outside world to the ship (and the reverse process) may often display as many as four identifiable stages: from truck or railway car to warehouse; from warehouse to "stuffing" point by forklift; from "stuffing" point to dockside by "hustler"; and finally from dockside onto the ship itself.

The Benefits Review Board has held repeatedly and consistently that

148. *Allen v. Sea-Land Serv., Inc.*, 3 Benefits Review Board Serv. (Ad. L.J.) 96 (1975); *Sorrentino v. Universal Terminal & Stevedoring Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 127 (1975); *Green v. Atlantic Container Lines, Ltd.*, 2 Benefits Review Board Serv. (Ad. L.J.) 62, *aff'd*, 2 Benefits Review Board Serv. 385 (1975).

149. *Petti v. Universal Terminal & Stevedoring Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 20 (1975).

150. *Caputo v. Northeast Marine Terminal Co.*, 2 Benefits Review Board Serv. (Ad. L.J.) 4, *aff'd*, 3 Benefits Review Board Serv. 13 (1975); *Ascione v. Universal Terminal & Stevedoring Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 230 (1975).

151. *Logan v. Universal Terminal Stevedoring Corp.*, 3 Benefits Review Board Serv. (Ad. L.J.) 55 (1975).

152. *Parks v. Lavino Shipping Co.*, 2 Benefits Review Board Serv. (Ad. L.J.) 108 (1975), *aff'd*, 3 Benefits Review Board Serv. 236 (1976); *Cabrera v. Maher Terminals, Inc.*, 2 Benefits Review Board Serv. (Ad. L.J.) 99 (1975), *aff'd*, 3 Benefits Review Board Serv. 297 (1976).

153. *Chirco v. Universal Terminal & Stevedoring Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 130 (1975).

154. *De Santis v. Universal Terminal & Stevedoring Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 135 (1975).

155. *Robinson v. Northern Metal Co.*, 2 Benefits Review Board Serv. (Ad. L.J.) 240 (1975).

156. *Dellaventura v. Pittston Stevedoring Corp.*, 2 Benefits Review Board Serv. 340 (1975).

157. *Id.* at 342.

158. Refer to text accompanying note 107 *supra*.

all such cargo movements, and all incidental operations along the way, such as "stuffing," "stripping," and checking, constitute maritime employment. Subject always to the *caveat* that the contest between the point-of-rest theory and the maritime commerce theory, on which theory all these BRB decisions are based, was unresolved at the time these Board decisions were made, one may now review the particular kinds of loading, unloading, and related activity that have been found by the Board to fall within the term "maritime employment."

#### A. *Loading and Unloading Trucks and Railway Cars*

Unloading cargo from a truck inside a pierside warehouse, prior to placement of the cargo by others aboard vessels, is maritime employment.<sup>159</sup> Thus, a "cotton header" injured while unloading cotton bales from a truck was found to be an "employee" under the act.<sup>160</sup> Such cargo handling operations, said the Board, constitute the first step in a series of longshoring operations, although the bales were not moving to the ship itself at the time of injury. Similarly, the moving of cargo from a railroad car to a shed on a wharf is an activity within maritime employment.<sup>161</sup>

The corresponding segment of the reverse process, that of final loading of cargo onto trucks<sup>162</sup> or rail cars<sup>163</sup> for shipment to destination is also within maritime employment. This is considered the final step of unloading a ship,<sup>164</sup> since the cargo is deemed to remain in maritime commerce until it has been delivered to a trucker for transshipment to destination.<sup>165</sup> The claimant is covered even if he was inside the consignee's truck at the time of injury.<sup>166</sup> And, as noted in the preceding subsection, the mere passage

159. *Bryant v. Ayers S.S. Co.*, 2 Benefits Review Board Serv. 408 (1975).

160. *Id.*

161. *Romero v. United Terminals, Inc.*, 2 Benefits Review Board Serv. (Ad. L.J.) 224 (1975); *James v. Atlantic & Gulf Stevedores*, 2 Benefits Review Board Serv. (Ad. L.J.) 222 (1975); *Digiovanni v. Universal Terminal and Stevedoring Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 149 (1975).

162. *Reyes v. United Terminals, Inc.*, 3 Benefits Review Board Serv. 358, 359-60 (1976); *Cabrera v. Maher Terminals, Inc.*, 3 Benefits Review Board Serv. 297, 299 (1976); *Caputo v. Northeast Marine Terminal Co.*, 3 Benefits Review Board Serv. 13, 14-16 (1975); *Dellaventura v. Pittston Stevedoring Corp.*, 2 Benefits Review Board Serv. 340, 343 (1975); *Avvento v. Hellenic Lines, Ltd.*, 1 Benefits Review Board Serv. 174, 175, 179 (1974); *Billitteri v. Universal Terminal & Stevedoring Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 223 (1975); *Cannata v. Universal Terminal & Stevedoring Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 219 (1975); *De Santis v. Universal Terminal & Stevedoring Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 135 (1975); *Chirco v. Universal Terminal & Stevedoring Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 130 (1975); *Blanco v. Universal Terminal & Stevedoring Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 7 (1975).

163. *Ascione v. Universal Terminal & Stevedoring Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 230 (1975).

164. *Avvento v. Hellenic Lines, Ltd.*, 1 Benefits Review Board Serv. 174, 177 (1974).

165. *Cabrera v. Maher Terminals, Inc.*, 3 Benefits Review Board Serv. 297, 299 (1976).

166. *Caputo v. Northeast Marine Terminal Co.*, 3 Benefits Review Board Serv. 13, 14 (1975).

of time does not in itself separate the truck-loading operation from maritime commerce. Many of the cases on this timelapse question were truck-loading cases, including the case in which trucks were being loaded after a 133-day delay.<sup>167</sup>

#### B. *Movement of Cargo Within Terminal and Dockside Area*

Movement of cargo from one point to another in a terminal,<sup>168</sup> or between the terminal and dockside,<sup>169</sup> is also within maritime employment. Moreover, employment as operator of a "hustler," used to transport containers within a terminal, qualifies the claimant as a covered "employee," since he is engaged in an essential step in the overall process of loading cargo.<sup>170</sup>

#### C. *"Stuffing" and Palletizing*

"Stuffing," *i.e.*, packing cargo into containers, is an integral and essential part of the total process of loading cargo aboard a vessel,<sup>171</sup> and workers engaged in such activity, including forklift operators<sup>172</sup> and checkers,<sup>173</sup> are "employees" within the act.<sup>174</sup> By the same token, a worker who palletized cargo in a warehouse as a warehouseman before it was loaded onto vessels was held to be engaged in maritime employment.<sup>175</sup>

#### D. *"Stripping" Containers*

"Stripping" is, so to speak, the reverse of "stuffing" — *i.e.*, it is the unpacking of cargo from cargo containers. Any activity connected with stripping, including attempting to open the doors from the container,<sup>176</sup>

167. Refer to notes 156-57 *supra*.

168. *Smith v. International Terminal Operating Co.*, 2 Benefits Review Board Serv. (Ad. L.J.) 112 (1975).

169. *Arena v. Universal Terminal & Stevedoring Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 253 (1975); *Sorrentino v. Universal Terminal & Stevedoring Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 127 (1975); *Ridgely v. Great Lakes Storage & Contracting Co.*, 2 Benefits Review Board Serv. (Ad. L.J.) 63 (1975).

170. *Scaffidi v. Pittston Stevedoring Corp.*, 3 Benefits Review Board Serv. 47, 49 (1975); *Harris v. Maritime Terminals, Inc.*, 1 Benefits Review Board Serv. 301, 302, 304 (1975).

171. *Brown v. Maritime Terminals, Inc.*, 1 Benefits Review Board Serv. 212, 213-14 (1974).

172. *Mezzina v. Marine Terminals Corp.*, 2 Benefits Review Board Serv. 401, 402 (1975).

173. *Jones v. International Terminal Operating Co.*, 2 Benefits Review Board Serv. (Ad. L.J.) 101 (1975).

174. *See Batista v. Atlantic Container Lines, Ltd.*, 2 Benefits Review Board Serv. 193 (1975) (involving loading drums into a container).

175. *McCown v. Strachan Shipping Co.*, 3 Benefits Review Board Serv. (Ad. L.J.) 112 (1976). The court rejected an argument based on the fact that the claimant did not belong to the local union whose members loaded cargo directly onto vessels. *Id.*

176. *Spataro v. Pittston Stevedoring Corp.*, 2 Benefits Review Board Serv. 122, 123 (1975).

actually removing the contents,<sup>177</sup> checking the cargo stripped,<sup>178</sup> and returning a hand truck used in the process to a locker,<sup>179</sup> is maritime employment.

### *E. Incidental Acts Facilitating Maritime Commerce*

Ancillary and incidental activities that facilitate maritime commerce are maritime employment.<sup>180</sup> Thus, claimant's movement from a dock to a terminal of an empty chassis used to transport cargo to and from a vessel has been held covered; moving the chassis was necessary to make room for loading and unloading of the next arriving vessel.<sup>181</sup> The duties of a "pipe man" — unhooking and hooking container lock mechanisms connecting cargo containers with the chassis, preparatory to container stuffing or stripping by others — are an integral part of a continuous longshoring operation.<sup>182</sup> An elevator leadman has been held to play an integral part in assuring the smooth operation of the process of unloading soybeans from barges at a grain storage facility,<sup>183</sup> as have workers whose activity involved weighing grain either for temporary storage or immediate loading on a vessel,<sup>184</sup> and blending grain, most of which would be loaded aboard a vessel after resting briefly in a storage bin.<sup>185</sup> A cooper was held to be in maritime employment when repairing damaged cocoa bean bags after their removal from a vessel to a pier, the Board pointing out that the cargo's movement was necessarily delayed until he had finished his work.<sup>186</sup> Banding cotton bales together and piling them for future loading aboard

177. *Perez v. United Terminals, Inc.*, 3 Benefits Review Board Serv. 368, 369 (1976); *Norat v. United Terminals, Inc.*, 3 Benefits Review Board Serv. 337 (1976); *Suarez v. Sea-Land Serv., Inc.*, 3 Benefits Review Board Serv. 17, 18-19 (1975); *Stockman v. John T. Clark & Son, Inc.*, 2 Benefits Review Board Serv. 99 (1975); *Logan v. Universal Terminal Stevedoring Corp.*, 3 Benefits Review Board Serv. (Ad. L.J.) 55 (1975); *Robinson v. Northern Metal Co.*, 2 Benefits Review Board Serv. (Ad. L.J.) 240 (1975); *Alvarez v. International Terminal Operating Co.*, 2 Benefits Review Board Serv. (Ad. L.J.) 16 (1975) (claimant was also loading cargo from containers onto pallets).

178. *Blundo v. International Terminal Operating Co.*, 2 Benefits Review Board Serv. 376 (1975); *Dillon v. United Terminals, Inc.*, 2 Benefits Review Board Serv. (Ad. L.J.) 1 (1975).

179. *Lopez v. Atlantic Container Lines, Ltd.*, 2 Benefits Review Board Serv. 265, 266-68 (1975).

180. *Franklin v. Atlantic Container Lines, Ltd.*, 2 Benefits Review Board Serv. (Ad. L.J.) 213 (1975).

181. *Watson v. John T. Clark & Son, Inc.*, 2 Benefits Review Board Serv. 47, 48-49 (1975).

182. *Franklin v. Atlantic Container Lines, Ltd.*, 2 Benefits Review Board Serv. (Ad. L.J.) 213 (1975).

183. *Brocks v. Cargill, Inc.*, 2 Benefits Review Board Serv. (Ad. L.J.) 14 (1975).

184. *Halbrook v. Louis Dreyfus Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 8 (1975).

185. *Mildenberger v. Cargill, Inc.*, 2 Benefits Review Board Serv. 51, 52, 54 (1975).

186. *Fairman v. J.A. McCarthy, Inc.*, 3 Benefits Review Board Serv. 239, 240 (1976).

a vessel is covered, the banding being the initial step in the vessel-loading process.<sup>187</sup>

Maintenance and repair of longshoring equipment, whether on ship or on shore, has been held by the Board to be essential to the movement of maritime cargo and accordingly covered.<sup>188</sup> Again, when a number of bottles of liqueur had been broken in transit, the task of separating out the broken bottles was held to be part of maritime commerce.<sup>189</sup> Similarly, a worker, whose regular duties concerned the maintenance, inspection and repair of a pier was found to have been injured in maritime employment, even though at the time he was merely moving a can of paint which was not part of the ship's cargo.<sup>190</sup>

#### F. *Checking and Spotting*

Checkers have been consistently held to be in maritime employment.<sup>191</sup> In this instance, there happens to be a fragment of legislative history to bolster the result. In the Senate Report dealing with the extent of the expansion of coverage intended by the amendments, it is stated: "[C]heckers . . . who are directly involved in the loading or unloading functions are covered by the new amendment."<sup>192</sup> Of course, this still leaves the question of what is meant by "directly involved in the loading and unloading functions." Indeed, the majority in the original *I.T.O.* opinion relied on this passage to support their view that maritime employment extended only to the first point of rest after the cargo left the ship.<sup>193</sup>

The Board, since it has treated all activities up to receipt of the cargo by the consignee's truck as being directly involved in loading or unloading, has of course included checking activities at every point, including stuff-

187. *Santos v. Richard Bugg & Co.*, 2 Benefits Review Board Serv. (Ad. L.J.) 3 (1975).

188. *Bradshaw v. J.A. McCarthy, Inc.*, 3 Benefits Review Board Serv. 195, 198 (1976).

189. *Martinez v. Universal Terminal & Stevedoring Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 212 (1975).

190. *DeLiso v. Transocean Gateway Terminal, Inc.*, 2 Benefits Review Board Serv. (Ad. L.J.) 254 (1975).

191. *Parks v. Lavino Shipping Co.*, 3 Benefits Review Board Serv. 236, 238 (1976); *Lind v. Independent Pier Co.*, 3 Benefits Review Board Serv. 232, 234 (1976); *Green v. Atlantic Container Lines, Ltd.*, 2 Benefits Review Board Serv. 385 (1975); *Blundo v. International Terminal Operating Co.*, 2 Benefits Review Board Serv. 376 (1975); *Allen v. Sea-Land Serv., Inc.*, 3 Benefits Review Board Serv. (Ad. L.J.) 96 (1975); *McCue v. International Terminal Operating Co.*, 2 Benefits Review Board Serv. (Ad. L.J.) 248 (1975); *Jones v. International Terminal Operating Co.*, 2 Benefits Review Board Serv. (Ad. L.J.) 101 (1975); *McMenomon v. Northeast Marine Terminal Co.*, 2 Benefits Review Board Serv. (Ad. L.J.) 51 (1975); *Petti v. Universal Terminal & Stevedoring Corp.*, 2 Benefits Review Board Serv. (Ad. L.J.) 20 (1975); *Dillon v. United Terminals, Inc.*, 2 Benefits Review Board Serv. (Ad. L.J.) 1 (1975).

192. S. REP. No. 1125, 92d Cong., 2d Sess. 13 (1972).

193. See generally *I.T.O. Corp. v. Benefits Review Bd.*, 529 F.2d 1080 (4th Cir. 1975), modified on rehearing, 542 F.2d 903 (1976) (en banc).

ing,<sup>194</sup> stripping,<sup>195</sup> and temporary storage.<sup>196</sup> Coverage has even been held to extend to a checker who checked bags on a railway car, which were being loaded in a container, which then would be placed on a vessel.<sup>197</sup>

The coverage of the act also extends to spotting of cargo for loading on a ship.<sup>198</sup> A claimant, employed as a checker, was held to have been engaged in maritime employment when he drove the employer's automobile around a terminal area to determine the final location of cargo that was ready to be loaded aboard a vessel.<sup>199</sup>

### G. Clerical Work

The Board has taken the position that clerical work is maritime employment if it is directly related to loading and unloading functions.<sup>200</sup> In this instance we again find some legislative history, at the same point in the Senate Report just quoted in connection with checkers. This time, however, the language of the report, being exclusive in effect rather than inclusive, is something to be explained away rather than to be affirmatively relied on by the Board. The Report states:

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 transshipment 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.<sup>201</sup>

In *Coppolino v. International Terminal Operating Co.*,<sup>202</sup> the first case to present this issue, the claimant served as a hiring agent and as head foreman supervising loading and unloading operations. A part of his job involved feeding the names of the hired employees into an IBM machine

194. Refer to note 173 *supra*.

195. Refer to note 178 *supra*.

196. See *Parks v. Lavino Shipping Co.*, 3 Benefits Review Board Serv. 236, 237 (1976).

197. *McMenomon v. Northeast Terminal Co.*, 2 Benefits Review Board Serv. 232 (1976).

198. *Lind v. Independent Pier Co.*, 3 Benefits Review Board Serv. 232, 234 (1976).

199. *Muldowney v. Lavino Shipping Co.*, 3 Benefits Review Board Serv. 229, 230 (1976).

200. *Farrell v. Maher Terminals, Inc.*, 3 Benefits Review Board Serv. 42, 45-46 (1975); *Coppolino v. International Terminal Operating Co.*, 1 Benefits Review Board Serv. 205, 207 (1974).

For a similar holding as to shipbuilding, see *Luker v. Ingalls Shipbuilding*, 3 Benefits Review Board Serv. 321 (1976), in which a clerical function necessary to the overseeing of pipefitting in an assembly shipbuilding process on dry land was held to be maritime employment.

201. S. REP. NO. 1125, 92d Cong., 2d Sess. 13 (1972) (emphasis added).

202. 1 Benefits Review Board Serv. 205 (1974).

located in a building on the pier 150 feet from the water. He injured his back while replacing special paper in the IBM machine. Note that this claimant was directly involved in pure longshoring activities in that he actually supervised loading and unloading functions. The case, then, could have been treated as one in which the character of the activity at the moment of injury was not decisive,<sup>203</sup> and in the first part of its opinion the Board did seem to be taking that line:

The functions of the claimant herein, as a hiring agent and as a head foreman supervising loading and unloading operations, constitute longshoring operations. The fact that at the time of injury he was engaged in a clerical function necessary to the performance of his job does not remove him from the sphere of longshoring operations, nor from coverage under the Act.<sup>204</sup>

But the Board goes on to meet head-on the argument that clerical work itself is not covered. It quotes the excerpt from the Senate Report set out above,<sup>205</sup> and concludes that Congress did not mean to limit coverage to workers engaged in physical loading and unloading. If that had been the intention, it could have been so expressed in the act or in the Report.

Inevitably a case arose in which the employee's only duties were clerical, and in which the claimant's status had to stand or fall entirely on his clerical work, unassisted by a background of other clearly covered duties. In *Farrell v. Maher Terminals, Inc.*<sup>206</sup> the claimant was a temporary delivery clerk. His job was to process paperwork necessary to the delivery of cargo to truckers. He worked in an office in a building adjoining a container shed, 2500 feet from the water line. (To add to the non-maritime flavor of the case, the injury was the result of slipping on a patch of ice between a parking lot and the time clock, and the employer had paid compensation voluntarily under the New Jersey Act.) It was true that the claimant occasionally went to a shed or loading platform to examine markings on cargo, and more rarely might even go aboard a ship to deliver a package.

The Board's disposition of the issue, including the language in the Senate Report, can be summed up as follows. The clerical workers excluded by the Committee language are only those whose work is not related to loading and unloading.

The heart of the present controversy is whether or not the claimant is an "employee" as defined in Section 2(3). *The claimant* was found to be "primarily (if not 'purely') a clerical employee." However, Congress did not intend to exclude all clerical employees from the Act's coverage; only those purely clerical em-

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203. Refer to text following note 133 *supra*.

204. 1 Benefits Review Board Serv. at 207-08.

205. Refer to text accompanying note 201.

206. 3 Benefits Review Board Serv. 42 (1975).



ployees whose jobs do not require them to participate in the loading or unloading of cargo are excluded.<sup>207</sup>

The Board then makes a rather persuasive point by stressing that checkers are expressly mentioned in the Report as covered employees, although their work is clerical in nature — that is, they work with paper and pencil, not with a forklift and crane. This being so, it must not be the overt physical nature of the work that controls, but the functional relation of the work to the movement of cargo. Thus, it can be argued that the cargo could no more be moved without Farrell's paperwork than it could without a checker's clearance. The Board said:

These cited passages [in the Senate Report] use checkers as an example of clerical employees who are covered by the Act; there is certainly no indication in the legislative history that other clerical employees who are also directly involved in the loading or unloading functions, are excluded from coverage under the Act.<sup>208</sup>

It is amusing to observe that the Board in this case has achieved almost overnight a construction which, in a somewhat comparable situation involving the FELA, took the Supreme Court forty years. In 1956, after decades of uncertainty and litigation about the boundaries of the FELA,<sup>209</sup> which turned on the test of affecting interstate commerce, the Supreme Court finally decided that clerical work by a railway employee satisfied this test. In *Reed v. Pennsylvania Railroad Co.*<sup>210</sup> plaintiff was an office clerk whose duties included filing the master tracings from which blueprints of designs of the railroad's engines, cars, parts, and bridges were made. The Supreme Court ruled that her activities affected interstate commerce, because they were indispensable to the conduct of the railroad's business.

Thus, the Board's test is essentially a test already endorsed by the Supreme Court, the only difference being the substitution of "maritime commerce" for "interstate commerce." Of course, the background and legislative history in the two situations are by no means the same; but on the central issue whether clerical work is somehow in an excluded class by itself because of its nonphysical quality, *Reed* could supply an important buttress for the Board position. After all, in *Reed*, the defendants had argued along lines quite similar to those heard in the present controversy. They had urged that the FELA, after all, was supposed to apply to transportation employees, who were subject to the well-known hazards of railroading, and not to office workers injured by glass from a broken office window. So here: It is argued that the Longshoremen's Act is for people who really lift and move cargo, and are exposed to the kind of hazards inherent in such work—not for people who hurt their backs lifting IBM

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207. *Id.* at 44-45 (emphasis added).

208. *Id.* at 45.

209. See 3 A. LARSON, *supra* note 2, §§ 91.40.53.

210. 351 U.S. 502 (1956).

paper or who slip on ice on their way to an office desk covered with bills of lading and such. Yet, once the door has been opened to admit checkers and spotters, it begins to appear that the distinction cannot be merely muscular work versus intellectual work. And if that is not the distinction, it is difficult to see where the stopping-point will be, short of coverage of all clerical work essential to the movement and handling of cargo in maritime commerce.

#### H. Ship Repairmen

The definition of "employee" expressly includes any "ship repairman."<sup>211</sup> Questions occasionally arise as to the breadth of reach of this term, particularly as to various peripheral and ancillary activities.

A relatively clear case was that of *Hite v. Maritime Overseas Corp.*<sup>212</sup> The definition of "employee" under the 1972 amendments was held by a district court to include a shore-based employee engaged in cleaning rust from the walls of a vessel's cargo tank, for purposes of converting it from the hauling of petroleum to the hauling of wheat. It is interesting to note that this was an "upside-down" case, in which the plaintiff was trying to take himself *out* of the Act in order to escape the bar of the 1972 amendments against the bringing of unseaworthiness actions.

The work of a ship repairman does not necessarily have to be work on a ship. It can also be work on other items that in turn are associated with ships or ship repair. Thus, in *Cooper v. Ira S. Bushey & Sons*<sup>213</sup> the claimant was injured while repairing a tank, bordered on two sides by water, from which oil was pumped aboard vessels. The claimant was held covered both because the work itself was maritime employment, and because almost all of his work generally was that of installing and repairing pipes aboard vessels.

Repair of machinery which in turn is used to repair or build ships has been held covered. In *Kininess v. Alabama Dry Dock & Shipbuilding Co.*<sup>214</sup> the claimant was injured while sandblasting a crane, in preparation for its use in connection with his employer's ship repair and shipbuilding activities. His usual duty was that of "inside painting" in the construction and repair of ships. Here again, the claimant was held covered both because his immediate task was in maritime employment and because his overall duties were those of a ship repairman.

For an example of a marginal activity held to fall short of maritime

211. Longshoremen's and Harbor Workers' Compensation Act § 2(3), 33 U.S.C.A. § 902(3) (Supp. 1976).

212. 375 F. Supp. 233 (E.D. Tex. 1974).

213. 3 Benefits Review Board Serv. (Ad. L.J.) 56 (1975).

214. 3 Benefits Review Board Serv. (Ad. L.J.) 24 (1975), *aff'd*, 4 Benefits Review Board Serv. 13 (1976). See also *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976).

employment, one may adduce *D'Amato v. Ira S. Bushey & Sons*.<sup>215</sup> Claimant worked as a chauffeur for the employer. His principal place of employment was Bushey's garage, which was separated by a public street from the employer's shipyard, and was not within the fenced-in area of the shipyard. His duties consisted of driving ship parts between the shipyard and repair shops in New York City, and of carrying passengers within and without the shipyard. He injured himself while lifting a heavy ship's starter to transfer it between a station wagon and a van in the garage. There was some conflict in the evidence on whether claimant sometimes would go aboard a ship to pick up or deliver parts. In any event, the bulk of his duties appeared to be located in the garage or between the shipyard and various repair shops. The law judge ruled out coverage on the ground that claimant was not a covered employee, although he went on and, for good measure, concluded that the situs of the injury was not an "adjoining" area.<sup>216</sup> The two questions were somewhat related, since the judge wondered, if claimant were covered, where in the course of his duties his situs coverage would begin and end as he came and went in the streets of New York. The effect would certainly be to produce a case of partial coverage, which was looked upon with disfavor by the Benefits Review Board.<sup>217</sup> The judge first ruled that "none of Claimant's duties bore upon either longshoring or harbor working." But he went on:

Even if Claimant's function is considered to be related to ship repairing, it is clearly not such an integral part thereof that status coverage should be found. The function of parts delivery is a generic one, not related exclusively to ship repairing. It could just as well have been performed in this case either by the parts repair shop, or an independent delivery service, as by Claimant . . . .<sup>218</sup>

### I. Shipbuilders

The term "employee" is defined to include specifically a "shipbuilder."<sup>219</sup> In view of this express language, the Benefits Review Board has stated

215. 2 Benefits Review Board Serv. (Ad. L.J.) 179 (1975).

216. Refer to text following note 38 *supra*.

217. See *Perdue v. Jacksonville Shipyards, Inc.*, 1 Benefits Review Board Serv. 297 (1975). In this case the claimant was a shipfitter. He was injured while alighting from a bus to "punch out" at his employer's office within the naval station. The office where he was to "punch out" was over a mile away from the ship where he worked, but was still with the naval station and was itself within 50 feet of the water. Moreover, the office was an integral part of the ship repair facility. Claimant was held covered by the Act. *Id.* at 300. On appeal the Fifth Circuit reversed stating that under no reasonable construction of the Act did the area in question either "adjoin" the waters or carry out any of the functions specified in § 903(a). The court also rejected the argument that the Act covers every point in a large marine facility where a ship repairman might go at his employer's direction. 539 F.2d 533, 542 (5th Cir. 1976). But note that in the same case, Nulty, a carpenter injured while building a piece of woodwork to be installed on a ship under construction, was found to be covered. *Id.* at 543-44.

218. 2 Benefits Review Board Serv. (Ad. L.J.) at 185.

219. Longshoremen's and Harbor Workers' Compensation Act § 2(3), 33 U.S.C.A. § 902(3) (Supp. 1976).

that pre-amendment cases holding that new ship construction on dry land was not maritime activity must be rejected.<sup>220</sup> The Senate Report states:

Accordingly, the Bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, *shipbuilders*, shipbreakers, and other employees engaged in maritime employment . . . .<sup>221</sup>

The cases that have appeared in the reports have mostly involved work on components or parts that are later installed in ships, and such work, done in a shipyard, has invariably been considered shipbuilding. Thus, in *Morgan v. Ingalls Shipbuilding Corp.*<sup>222</sup> the worker was a shipfitter helper apprentice in the fabrication shop, a place for cutting, shaping, tacking, and welding steel parts that were later used in the construction and repair of ships. He was actually engaged in this kind of work when killed by the fall of a steel plate. The Board said: "The Board finds this to be an essential aspect of the employer's shipbuilding enterprise and thus maritime employment within the meaning of the Act."<sup>223</sup>

In *Mohamed v. Seatrain Shipbuilding Corp.*<sup>224</sup> claimant was a member of a unit which completed the processing of components prior to their installation on vessels, but which did not install them or transport them to vessels. He was held covered. And in *Dubay v. FMC Marine & Rail Equipment Corp.*,<sup>225</sup> claimant worked as a rigger for one of two overhead bridge cranes, which were used in the fabrication of sections of a vessel under construction. He was found to be a qualified employee.

It has already been noted in connection with the problem of clerical workers<sup>226</sup> that one of the authorities for inclusion of clerical work was a shipbuilding case, *Luker v. Ingalls Shipbuilding Co.*<sup>227</sup> In *Luker*, claimant was a pipe-fitter supervisor, who was returning to his work shack on the shipyard premises with his men's signed time cards when he tripped over a T-beam, injuring his back. With no discussion, the Board concluded that claimant's duties as supervisor were an essential part of ship construction, that he was therefore a "shipbuilder," and that "the fact that, at the time of injury, claimant was performing a clerical function necessary to the performance of his supervisory duties does not exclude him from the Act's coverage."<sup>228</sup>

220. *Luker v. Ingalls Shipbuilding*, 3 Benefits Review Board Serv. 321, 324 (1976).

221. S. REP. NO. 1125, 92d Cong., 2d Sess. 13 (1972) (emphasis added).

222. 3 Benefits Review Board Serv. 310 (1976).

223. *Id.* at 312, citing *Maxin v. Dravo Corp.*, 2 Benefits Review Board Serv. 372 (1975); *Skipper v. Jacksonville Shipyards, Inc.*, 1 Benefits Review Board Serv. 533 (1975); *Nulty v. Halter Marine Fabricators*, 1 Benefits Review Board Serv. 437 (1975).

224. 2 Benefits Review Board Serv. (Ad. L.J.) 85 (1975).

225. 3 Benefits Review Board Serv. (Ad. L.J.) 43 (1975). See also *Kininess v. Alabama Dock & Shipbuilding Co.*, 3 Benefits Review Board Serv. (Ad. L.J.) 24 (1975) (sandblasting a crane).

226. Refer to text following note 200 *supra*.

227. 3 Benefits Review Board Serv. 321 (1976).

228. *Id.* at 325.

### J. Shipbreakers

The definition of employee in the Longshoremen's Act specifically includes "any . . . shipbreaker."<sup>229</sup> This might seem to make the coverage of shipbreakers as clear as that of shipbuilder and ship repairmen—which it would be but for a curious inconsistency in the new material added by the 1972 amendments. The parallel situs test reads as follows:

Compensation shall be payable . . . only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, *repairing*, or *building* a vessel).<sup>230</sup>

"Repairing" and "building"—but nothing about breaking or scrapping. Read in the strictest literal sense, then, since both these tests must be independently satisfied, this combination means that a shipbreaker might have a covered status but not have a covered place for his injury to happen in.

No cases on this dilemma appeared in the first three years of the amendment's life, but the Labor Department at one time started to deal with the question through guidelines. On May 17, 1974, the Department of Labor issued "Proposed Guidelines" on "Coverage under the Longshoremen's and Harbor Workers' Compensation Act." These Guidelines were never promulgated,<sup>231</sup> but they do supply a strong indication of the Department's view on coverage of shipbreaking:

Shoreside coverage; shipbuilding, ship repairing, and ship-breaking.

(a) . . . . The provisions of the Longshoremen's Act now extend to all shipyard work performed in adjoining areas customarily used by an employee in the physical construction, repair, or breaking (*i.e.*, scrapping) of a vessel.<sup>232</sup>

It must be said that the Department was taking some liberties with the statute when, gratuitously and without explanation, it added "breaking" (*i.e.*, scrapping) to the literal text of the coverage section at precisely the point where those words are omitted in the statute itself. It is quite likely that this will indeed be the final outcome in the courts, but this result should not be too easily taken for granted. In its favor is the highly persuasive argument that Congress could hardly have intended to create the paradox of a specifically covered employee with no place for his injury

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229. Longshoremen's and Harbor Workers' Compensation Act § 2(3), 33 U.S.C.A. § 902(3) (Supp. 1976).

230. 33 U.S.C.A. § 903(a) (Supp. 1976).

231. The proposed guidelines originally appeared at 20 C.F.R. Part 710 (1974), but they have been dropped and no longer appear at that point. They were reproduced in 1A BENEDICT ON ADMIRALTY app. B-61 (Supp. 1975).

232. 1A BENEDICT ON ADMIRALTY app. B-61, at 69 (Supp. 1975).

to happen. Accordingly, if there is any conceivable way to squeeze "ship-breaking" into the situs sentence, it will certainly be done. An extremely loose interpretation of ship "building" or "repairing" might be resorted to, although the scrapping process is in real life viewed as a separate category. Of course, if dry docks, building ways, or marine railways are involved in the breaking operation, this would take care of the problem. Moreover, if the area is a diversified one where building, repairing, and scrapping go on side by side, the overall character of the area could be allowed to control. The difficulty would be at its greatest in the case of a specialized shipbreaking yard, which does nothing else, and in which none of the name facilities are involved. Even here, if such a case should arise, a court would probably end by giving effect to the obvious intent of Congress reflected clearly in its express inclusion of a "ship-breaker" in the employee definition. Anyone familiar with the history of the 1972 amendments can easily understand how a slip like this could happen. When one thinks of the frantic 4 A.M. final conference mark-up sessions, with dozens of far-reaching and controversial changes being adjusted, traded, and reconciled under intense time pressure, it is not surprising that the gears should not mesh here and there,<sup>233</sup> and courts can no doubt be counted on to take as charitable a view of the result as the language will bear.

#### K. *Miscellaneous Maritime Employments*

Although the great bulk of maritime employments fall within the categories specifically named — "any longshoreman or other person engaged in longshoring activities, and any harborworker including a ship repairman, shipbuilder, and ship-breaker" — it should not be forgotten that the basic operative coverage phrase is "any person engaged in maritime employment." It is perfectly possible, therefore, for a person to be covered although not employed in any of the activities explicitly listed.

Thus, in *Sharp v. Pacific Gas & Electric Co.*<sup>234</sup> the decedent was an engineer participating in a special scuba diving training program sponsored by his employer. The purpose of the training was to qualify decedent as a diver competent to inspect the employer's underwater facilities and structures. The Board held decedent to have been in covered maritime employment. The Board said:

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233. Another example of an apparent oversight was the failure to put a fixed weekly maximum on death benefits comparable to that on disability benefits, as a result of which the only maximum was the decedent's own average weekly wages. See Longshoremen's and Harbor Workers' Compensation Act § 9(e), 33 U.S.C.A. § 909(e) (Supp. 1976). But see *Director, Office of Workers' Compensation Programs v. O'Keefe*, 545 F.2d 337 (3d Cir. 1976). The Third Circuit, noting the omission mentioned at this point, managed to extract from the statute a congressional intent that the weekly maximum benefit limit should apply to death benefits. Justice Aldisert dissented from this "strained construction." *Id.* at 348.

The District of Columbia Circuit reached the same conclusion in *Director, Office of Workers' Compensation Programs v. Boughman*, 545 F.2d 210 (D.C. Cir. 1976).

234. 2 Benefits Review Board Serv. 381 (1975).

Although "maritime employment" includes . . . any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . ., it is not *limited* to persons engaged in those activities. 33 U.S.C. § 902(3). In this case, in the furtherance of his employer's business purpose, the decedent was being trained to make underwater inspections of various structures and facilities, an activity for which the employer had previously hired only professional scuba divers.<sup>235</sup>

With this case must be compared, however, the Ninth Circuit's decision in *Weyerhaeuser Co. v. Gilmore*.<sup>236</sup> In this case a pondman for a lumber mill was injured when he fell from a floating walkway while sorting logs in a pond adjacent to a saw mill and guiding them into the mill. The pond was found to satisfy the test of "navigable waters," since it was in a salt water bay enclosed by log booms and docks. But the court concluded that claimant's work did not relate to "traditional maritime activity involving navigation and commerce on navigable waters."

The court reconstructs the original purpose of the Longshoremen's Act as providing protection for shipside workers, and sees nothing in the 1972 amendments changing that central objective. The heart of the court's rationale is in this passage:

The occupational hazards intended to be guarded against are the traditional hazards to the ship's service employee arising in the course of his employment: *i.e.*, the perils of the sea and an unseaworthy vessel recognized under maritime laws. Accordingly we believe that to be entitled to the benefits of LHCA, an employee's employment must have a realistic relationship to the traditional work and duties of a ship's service employment. Otherwise the clear and unambiguous congressional language of "maritime employment" is nullified and rendered to read "any employment."<sup>237</sup>

In simplest terms, the claimant was a mill worker whose duties happened to take him on navigable water. The court postulates the case of a pondman at an upland sawmill doing exactly what the claimant here did, and sees no reason why the essential character of the pondman's occupation should alter with the navigable status of the water he happens to be working on.

The essence of the court's "traditional" concept seems to be that the work must have something to do with ships — always remembering that the concept of "ship" has been tremendously broadened in modern times.<sup>238</sup> Accordingly, and giving the court's rationale its full meaning, it seems unlikely that the Ninth Circuit would have agreed with the Board's decision

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235. *Id.* at 384.

236. 528 F.2d 957 (9th Cir. 1975), *cert. denied*, 97 S. Ct. 179 (1976).

237. 528 F.2d at 961.

238. *See* 3 A. LARSON, *supra* note 2, § 90.23.

in *Sharp*, since scuba diving to inspect utility installations hardly seems to fit within the court's description of traditional ship service activity.<sup>239</sup>

#### VIII. THE "TWILIGHT ZONE" AND CONCURRENT JURISDICTION DOCTRINES AFTER 1972

There remains the question: What, if anything, did the 1972 amendments do to change the law as to the "twilight zone" and concurrent jurisdiction doctrines?<sup>240</sup> The answer seems to be: factually, a great deal; legally, not much.

The factual change that in practice sharply alters the picture is the creation of a dramatic disparity in the size of Longshoremen's Act benefits compared with state benefits. It has been noted that most twilight-zone law was the product of attempts to get out of the Longshoremen's Act and into more favorable state acts.<sup>241</sup> For various reasons, including notions of maritime uniformity under constitutional law, movement in that direction had special obstacles to overcome, and the twilight zone principle was a way of surmounting those obstacles. But now we have a situation in which, in every state but Alaska, the pressure will be to get out of state acts and into the federal act. Thus, we will see both financial advantage and federal preeminence pulling in the same direction.

One thing is certain: There is going to be plenty of "twilight" around the edges of post-1972 coverage.

As to the status test, the *I.T.O.* decision contrasted with the Benefits Review Board position, together with the spectrum of circuit court cases in between and perhaps beyond, has created a shadowland extending all the way from the bed of an incoming truck to the last "point of rest" of the cargo before it is placed on the ship.<sup>242</sup>

All the internal movements of cargo within the warehouse, the loadings and unloadings short of the ship, the stuffing and palletizing, the stripping, the repairing of broken containers or equipment, and the clerical work at every stage — all these activities and the workers who perform them were in 1976 placed in a twilight zone much more far-reaching than anything that could have existed before 1972.

Moreover, as to the situs test, the situation is hardly much better. The first signs of the stretching of "adjoining" navigable waters to reach as far as the maritime function itself — across the street, two blocks away, and so on — have already been noted.<sup>243</sup> What kind of penumbra will eventually surround the enlarged "navigable waters" situs only time will tell.

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239. It may be noted that the court in *Gilmore* reversed the Board, and reinstated a denial of compensation by the law judge. 528 F.2d at 962.

240. For a detailed analysis of the status of these doctrines at the time of the 1972 amendments, see A. LARSON, *supra* note 2, §§ 89.24, .25, .35, .40-70.

241. Refer to notes 23-25 *supra*.

242. Refer to text following note 104 *supra*.

243. Refer to text following note 46 *supra*.



The principal practical reason for adopting the original twilight zone was that the Supreme Court was plainly tired of the tedious task of sorting out endless cases as falling on one side or another of the federal jurisdictional boundary.<sup>244</sup> If that was true in 1942, it will be doubly true after 1972.

Of course, if the Supreme Court believes that the federal act has been confined much too narrowly, as may well happen in the *ITO* case, it presumably will not hesitate to say so. But if the issue arises in the opposite form, with employers contending that the Act has been stretched too far, the Supreme Court may soon find itself once more swamped with borderline cases involving both status and situs, and may quite understandably take refuge behind some contemporary counterpart to the twilight-zone doctrine.

The constitutional issues do not seem to have been significantly affected by the amendments. As to the situs test, nothing is changed except the breadth of the situs. The addition of the "maritime employment" status test adds no new constitutional complications, since it has long been settled that a state, when not barred on navigable waters grounds, may validly legislate as to persons in maritime employment.<sup>245</sup> The deletion of the phrase "may not validly be provided by state law," while it eliminates the original cause of the twilight-zone development, seems to have no current impact, since it was already a dead letter before it was legislatively excised.<sup>246</sup>

The problem for the future will be one of federal supremacy and statutory preemption. When the concurrent or successive jurisdiction question takes the form of a state award followed by a federal award, there would thus be no problem. But suppose a borderline worker in Alaska wants to escape from the Longshoremen's Act into the higher-paying Alaska act. The case might first arise as a twilight-zone example. For reasons just sketched, a holding below in favor of state coverage might well be left undisturbed. But suppose a Longshoremen's Act award had already been made. The main ground of the leading pre-1972 case allowing supplemental state compensation, *Hansen v. Perth Amboy Dry Dock Co.*,<sup>247</sup> was not the "absence of state power clause" but the emergence of the "valid state interest" test. This main ground remained unaffected by the 1972 amendments. Nor did the addition of the "maritime employment" test, as just noted, raise any new constitutional problems.

As a matter of federal preemption, the courts would probably uphold the application of the Alaska act as merely supplementing the federal act, not conflicting with it. The purpose of the federal act was to guarantee a federal remedy of a certain minimum size. The usual tests by which the validity of state legislation has been judged when attacked under the supremacy clause appear to be met here.<sup>248</sup> Especially when Congress has

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244. See A. LARSON, *supra* note 2, §§ 89.24-25.

245. See *State Indus. Comm'n v. Nordenholt Corp.*, 259 U.S. 263, 275-76 (1922).

246. Refer to note 9 *supra*.

247. 48 N.J. 389, 226 A.2d 4 (1967).

248. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947).

moved into an area formerly occupied by state legislation, preemption would not be presumed:

Congress legislated here in a field which the states have traditionally occupied. [citation omitted] So we start with the assumption that the . . . power of the States were not meant to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.<sup>249</sup>

To invoke the supremacy clause, federal interest should be found "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."<sup>250</sup>

In view of the background of pre-1972 concurrent and supplementary coverage cases, in view of the creation by Congress of large new areas of uncertainty of coverage putting workers to the possible hazard of wrong initial choices, and in view of the failure of Congress by express language in the amendments to preempt the field as against any possible competing state act, it seems likely that supplementary awards would be upheld even when the federal award had come first.

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249. *Id.* at 230.

250. *Id.* Similarly, there may be preemption when "state policy may produce a result inconsistent with the objective of the federal statute." *Id.* A compensation award, however, that merely supplements a federal award does not fit this description.