

Supreme Court of the United States

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Supreme Court, U. S.

OCT 28 1969

OCTOBER TERM, 1969

In the Matter of:

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Docket No. 9

NACIREMA OPERATING CO., INC., ET AL.,
Petitioners,
Pet

vs.

WILLIAM H. JOHNSON, ET AL.,
Respondents.

-----X

Docket No. 16

JOHN P. TRAYNOR AND JERRY C. COSTING,
Petitioners,

vs.

WILLIAM H. JOHNSON, ET AL.,
Respondents.

-----X

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ORAL ARGUMENT OF:

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1969

NACIREMA OPERATING CO., INC., ET AL.,

Petitioners

vs

WILLIAM H. JOHNSON, ET AL.,

Respondents

No. 9

JOHN P. TRAYNOR AND JERRY C. COSTING,
DEPUTY COMMISSIONERS,

Petitioners

vs

WILLIAM H. JOHNSON, ET AL.,

Respondents

No. 16

Washington, D. C.
October 20, 1969

The above-entitled matter came on for argument at
11:15 o'clock a.m.

BEFORE:

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

1 APPEARANCES:

2 RANDALL C. COLEMAN, Esq.
3 Baltimore, Maryland
4 on behalf of Nacirema
5 Operating Co., Inc., et al.

6 ERWIN N. GRISWOLD, Esq.
7 Solicitor General of the United States
8 Department of Justice
9 Washington, D. C.
10 (on behalf of Traynor and Oosting

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12 Baltimore, Maryland
13 on behalf of Johnson and Klosek

14 RALPH RABINOWITZ
15 Norfolk, Virginia
16 on behalf of Avery
17
18
19
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1 was affirmed by the District Court and further affirmed for the
2 Court of Appeals for the Fourth Circuit. So, that's not
3 before the Court today.

4 In the cases here, two longshoremen were working in
5 Maryland: William Johnson and Joseph Klosek were employees of
6 the Nacirema Operating Company. They were working in a gon-
7 dola car on the Bethlehem Steel high pier at Sparrow's Point
8 Maryland. Their job was to act as slingers, that is, men who
9 hook on steel beams to the cables or falls which were suspended
10 from the vessel which was alongside the pier in the process
11 of loading the ship.

12 The accident which befell those men was the result of
13 the draft swinging and it knocked Mr. Klosek from the gondola
14 car to the pier. He sustained injuries which resulted in his
15 death and Mr. Johnson was pinned against the side of the
16 gondola car and he there sustained his injuries.

17 In the Albert Avery case, the accident also befell
18 him which he was in a gondola car and he was on the City Piers
19 in Norfolk, Virginia, acting as a slinger and the cargo there
20 involved was a cargo of logs. The logs swung against him and
21 injured him while he was in the gondola car.

22 Now, in each case, in Maryland and in Virginia, the
23 cases were presented to the respective Deputy Commissioners;
24 the Deputy Commissioners in each instance denied coverage under
25 the Longshoremen's Act and maintained that the accidents had

1 not occurred on the navigable waters of the United States.
2 Thereafter the cases were appealed to the District Court for
3 the District of Maryland and to the District Court for the
4 Eastern District of Virginia. And in those two courts the
5 decisions of the Deputy Commissioners were upheld.

6 I might point out that as part of the facts and which
7 the Court will certainly wish to consider is that these piers
8 were very long piers; they were on pilings; they did extend
9 over navigable waters of the United States. The men who
10 worked on these piers could and did pass freely between the
11 ship and the pier.

12 Now, when the case was taken to the District Court
13 from the Court of Appeals for the Fourth Circuit, they were
14 first argued before separate panels, then consolidated and
15 argued before the Court en banc. The Court of Appeals for the
16 Fourth Circuit reversed the District Court Judges in the
17 Eastern District of Virginia and the District of Maryland and
18 in a five-two decision held that these accidents did fall
19 within the coverage of the Longshoremen's Act.

20 The case was then presented to this Court and
21 certiorari was granted. The Solicitor General applied the
22 certiorari on behalf of the two Deputy Commissioners. We
23 applied for certiorari on behalf of the stevedoring companies
24 below; certiorari was granted. The case was argued initially
25 before this Court in March of this year and then set down for

1 rearargument today.

2 I recall that in the initial argument I had been
3 asked whether or not an appeal from the Deputy Commissioner
4 came up in Admiralty or on the civil side and I replied that
5 it arose on the Admiralty side of the docket. I was correct,
6 so far as Maryland was concerned, but I was not fully correct
7 because I find that it's a matter of local practice and though
8 in Maryland those appeals come up in Admiralty; in the Avery
9 case, which came up in Virginia, the local practice differed
10 and it came up on the civil side. You can see the caption of
11 the cases at Pages 11 and 12 of the Appendix and Page 35 of
12 the Appendix in our cases.

13 Q Mr. Coleman, the Court Appeal, that's a District
14 Court proceedings from the Deputy Commissioners?

15 A Yes, sir.

16 Q And what practical difference, if any, does it
17 make whether it's denominated on the Admiralty side or the
18 civil side?

19 A I don't think it makes any practical difference.
20 I had been asked the question of how they arose; on what side.
21 I find that it's entirely a matter of local practice within
22 the courts, and I think it makes no difference at all, it's
23 just a matter of what the court says you do. And in Maryland
24 they say you do it in Admiralty and in Virginia they say you
25 do it on the civil side and they will simply caption it that

1 way.

2 The thing -- the point which I think is very critical
3 in this case and which was entirely overlooked in the court
4 below, despite the fact that it was argued in the briefs,
5 extensively covered in the two opinions of the District Judges,
6 the fact that these injuries occurred on piers and the further
7 that a long line of decisions has held without any question
8 that piers are extensions of the land. I think probably the
9 leading case is this Court's decision in 1945. It was
10 announced by Mr. Justice Black. It was Mr. Chief Justice
11 Stone's decision: Swanson against Marra Brothers. It involved
12 a pier injury when Swanson was injured on the pier as a result
13 of a life raft from the vessel dropping on him, falling on
14 him and injuring him.

15 In speaking of the Longshoremen's Act, this language
16 has been quoted repeatedly when the question has arisen. The
17 Court said that this Act -- that's the Longshoremen's Act --
18 is restricted to compensation for injuries occurring on
19 navigable waters. It excludes from its own terms and from the
20 Jones Act, any remedies against the employer for injuries
21 inflicted on shore. The Act leads injuries employees in such
22 cases to pursue the remedies afforded by local law and in these
23 very cases, the accidents occurred on piers and compensation
24 in all three cases has been given to the man and the widow of
25 Mr. Klosek under the State Act, because they were considered

1 land injuries.

2 Q What was that you were reading from?

3 A I was quoting, Your Honor, the Swanson against
4 Marra Brothers, the one Your Honor announced -- I think Mr.
5 Chief Justice Stone wrote the opinion.

6 This Court followed, in Swanson against Marra
7 Brothers; still follows; has always followed the line of
8 demarcation which was drawn in the Jensen case. Southern
9 Pacific against Jensen, if Your Honors recall, involved fatal
10 injuries which occurred on a gangway. That gangway was con-
11 sidered to be on navigable waters. There had been an effort
12 to give New York State Compensation for the injuries sustained
13 there, but the Supreme Court would not permit it, saying it
14 violated the Constitution and the line that was drawn in
15 Jensen followed in the Dawson case; followed in the Knicker-
16 bocker case, the triumvirate that has frequently been referred
17 to in this Court ever since those decisions, was line between
18 navigable waters of the United States and land or extensions
19 of the land and there it occurred on navigable waters the
20 Longshoremen's Act applied. Where it occurred on land or
21 extensions of land, the State Act applied.

22 Now, these injuries did not occur on the section that
23 is included in the Longshoremen's Act of any drydock. A pier
24 such as this or walk is not considered a drydock. What is
25 considered a drydock has been considered and discussed at

1 length by this Court in the Avondale Marine Ways against
2 Henderson. That was Mr. Chief Justice Douglas's decision.
3 Certainly these accidents do not fall within the twilight
4 zone which was Davis against the Department of Labor. The
5 twilight zones are undefined and undefinable areas which are
6 very shadowy, but there is nothing shadowy in this instance,
7 because it was clearly a pier injury all the way.

8 Where confusion sometimes arises, and I was asked a
9 number of questions along these lines at the last argument,
10 is where the impact occurs at one place and the damage which
11 ensues occurs somewhere else. This Court has been uniform in
12 its holdings of how to apply coverage under those conditions.

13 I intend to run down those cases very quickly, if I
14 may. In the Admiral People's case which was a 1935 decision
15 of the Court, a passenger who fell from the gangway to the dock
16 was injured on the dock and it was held that that was within
17 the Admiralty Court jurisdiction at the time because the
18 Admiralty accident or the tort occurred on navigable waters.
19 The injury that is the damage to the person occurred to the
20 passenger when he hit the dock, but it arose -- the tort,
21 the wrong, occurred when on navigable waters.

22 It approved that did not involve the Longshoremen's
23 Act, but which in the body of the Admiral People's, wthis
24 Court referred to the reasoning of the Court of Appeals for
25 the Fifth Circuit in Reholt against Croll and there the

1 longshoreman had completed his job on the pier, was being
2 hoisted from the pier in a sling to the deck of the ship. The
3 sling swung against the side of the ship and he hit the side
4 of the ship and that's where the Court considered that the
5 accident occurred. He fell back and sustained injuries on the
6 pier and the Supreme Court in the Admiral People's, approved
7 that finding of the Court of Appeals for the Fourth Circuit.

8 In Minnie against Port Huron it faced the problem
9 directly involving a longshoreman. This Court denied State
10 Compensation coverage to a longshoreman who was on the ship
11 when he was swung by a swinging load on the ship and knocked
12 to the pier. It was held that the accident which brought about
13 the damage that occurred on navigable waters. It cited with
14 approval its prior decision. -- it reaffirmed its prior decision
15 in Smith and Son against Taylor, which was a 1928 decision,
16 that State Law covered a longshoreman who was struck by a
17 swinging load on the pier and was knocked into the water.

18 So that the Supreme Court has been uniform in its
19 holding that where the tort or injury occurs, even though the
20 damage from it occurs elsewhere, the coverage depends on the
21 place of the happening of the accident, the tort or the
22 striking or the wrong.

23 Now, I'm bound to say that this has not been ab-
24 solutely uniformly applied in all the circuits, but it has been
25 uniformly applied in the Supreme Court and there is absolutely

1 uniformity when the action clearly occurred on a pier or
2 clearly occurred on navigable waters. There has been no
3 holding anywhere by any court, except by the Court of Appeals
4 for the Fourth Circuit, the decision below, that when an
5 accident clearly occurs on a pier, and in this case, both the
6 impact and the injury occurred on the pier, there has never
7 been a holding except the court below, to the effect that that
8 should be covered by the Longshoremen's Act.

9 This Court has uniformly applied it in these series
10 of cases: Jensen, Knickerbocker, Dawson. Those were navigable
11 waters cases and the Court would not permit compensation under
12 the State Compensation Act in Nordenhope and Swanson against
13 Marra Brothers. The injuries were clearly pier injuries and
14 there the Court applied State Compensation. The latest cases
15 in the circuits are the Travelers against Shea and Nicholson
16 against Callbeck from the Fifth Circuit. There they were
17 clearly pier injuries. It was held that there was no compesn-
18 sation under the Longshoremen's Act, and this court denied
19 certiorari in those two cases in 1968 and the Ninth Circuit
20 made the same holding in Houser against O'Leary, likewise a
21 pier injury, clearly, unmistakably, just as in this case, the
22 Ninth Circuit denied coverage under the Longshoremen's Act and
23 in 1968 this Court denied certiorari.

24 So that the only exception to this uniform rule of all
25 the circuits and this Court is the decision below. It relied

1 on the Callbeck case, Callbeck against the Traveler's Insurance
2 Company, reported at 370 U.S. 114. Since the Court did rely
3 so heavily on that, I would like to go into it, if I may,
4 rather extensively, because I think the Court below mistakenly
5 read and applied the Callbeck decision.

6 That case involved injuries to two or more shipyard
7 workers who sustained injuries on ships which were under con-
8 struction and on navigable waters. Now, the Court was concer-
9 ned just what to do in that case, because in a similar cas
10 which this Court had decided, Grant Smith Porter Ship Company
11 against Rhode. The Court had held that in new construction a
12 State Act applied. They were fearful that there might be a gap
13 that in areas such as the new construction in the Callbeck
14 against Traveler's Insurance Company case, there might be no
15 coverage at all, so what the Court did hold in Callbeck was
16 that there could be coverage under either Act. It did not
17 say that pier injuries or land injuries were covered by a State
18 Act. What it said repeatedly, over and over again was that
19 irrespective of what else may be considered in this case, these
20 workmen were injured on navigable waters. He said it over and
21 over again and the Court held that since the injuries to the man
22 in the Callbeck case did occur upon navigable waters, they had
23 the right to recover under the Longshoremen's Act.

24 Now, the Court in that case repeated and reaffirmed
25 its adherence to the Jensen line of demarcation. They

1 referred to it in so many words. The line again is back
2 which has been drawn and clearly established for 42 years
3 between navigable waters of the United States and land or
4 extensions of land. It referred to the very language of
5 Senate Report 973 which has been quoted extensively in the
6 dissenting opinion below and in the opinions both of Judges
7 Watkins and Hoffman in the District Court as the language shows
8 that the legislative history likewise supports such a finding
9 Senate Report 973 says: "Injuries occurring in loading or
10 unloading are not covered unless they occur on the ship or
11 between the wharf and the ship. And these injuries didn't
12 occur on the ship; nor did they occur between the wharf and
13 the ship. They occurred on the pier.

14 The Court below likewise held and considered that the
15 Admiralty Extension Act extended and expanded the coverage of
16 the Longshoremen's Act. I think, Your Honors, that the Court
17 below was mistaken in that.

18 The Admiralty Extension Act did, indeed, expand the
19 Admiralty tort jurisdiction to torts which occurred on land
20 if caused by a vessel on navigable waters. That's all the
21 Admiralty Extension Act did.

22 Now, that does not mean that the Admiralty Extension
23 Act did not have an impact on these very cases. By virtue of
24 the Admiralty Extension Act that Mrs. Klosek and Mr. Johnson
25 have presently pending third party damage claims in the

1 United States Court for the District of Maryland for damages
2 as a result of this.

3 Q That would be against the shipowner?

4 A Yes, sir; against Bethlehem Steel Company.

5 Q Is that the ship owner?

6 A Yes, sir; Bethlehem owns it. The ship was the
7 Bethtex.

8 Q Is that to be for unseaworthiness or --

9 A Unseaworthiness -- if I remember correctly the
10 allegation is that the crane which was on the ship was defec-
11 tive in some way and so there's a suit pending by virtue of the
12 Admiralty Extension Act against the vessel owner. And that's
13 how the Admiralty Extension Act comes into play in this type
14 of action. It doesn't have anything to do with Longshoremen's
15 Act coverage.

16 Now, I think what the lower court failed to take
17 into account was the very language of the Admiralty Extension
18 Act. In the second paragraph of the Admiralty Extension Act
19 refers to bringing a suit in rem or in personam. That's not
20 what happens under the Longshoremen's Act. The Longshoremen's
21 Act is an administrative claim. You don't bring claim; you
22 don't bring suit in rem under the Longshoremen's Act. You can
23 do that for damages by virtue of the expansion of Admiralty
24 tort jurisdiction.

25 It's an administrative proceeding under the

1 Longshoremen's Act which involves no suit at all; it's an
2 administrative claim. It's brought only for compensation.
3 A claim is filed, rather than suit, so I think the lower court
4 simply did not take into account the legislative history, the
5 reasons, the purposes of the Act or anything else, and misread
6 the clear language.

7 That Act was passed entirely -- in 1948 it was passed
8 in order to rectify certain inequities which existed when
9 people or persons or things that were damaged on land by ships
10 on navigable waters were, until the passage of this act, denied
11 the right to an Admiralty proceeding.

12 That leads Your Honors into brief consideration of
13 this Court's decision in Rodriguez against Aetna Casualty
14 and Surety Company. That case was decided by the unanimous
15 Court after the argument in this case in March. And I believe
16 Rodriguez case may have been argued before the March argument.
17 It did not specifically involve the Longshoremen's Act, but the
18 Rodriguez case did involve the death on the High Seas Act in
19 which the Court held that Congress had adopted State Law
20 rather than Federal Law for civil actions involving wrongful
21 deaths of workers employed on artificial island drilling rigs.

22 Now, since the author of the decision, Mr. Justice
23 White, did refer in his opinion to Admiralty jurisdiction and
24 accidents on piers located above navigable waters, it seems
25 important to examine that language in the light of this case.

1 And I think that it's perfectly clear from all the existing
2 laws to date that there is certainly no Longshoremen's Act
3 coverage for land injuries.

4 I believe, Your Honors, it's also clear that the
5 Longshoremen's Act extends only to accidents which occur on
6 navigable waters and there can be Admiralty jurisdiction, of
7 course, where is Longshoremen's Act coverage. But there is not
8 Admiralty jurisdiction. I mean there is not Longshoremen's
9 Act coverage in everyplace that there's Admiralty jurisdiction.
10 Because we have already seen that the Admiralty Extension Act
11 gives Admiralty jurisdiction in cases like the Gutierrez case
12 where a ship on navigable waters causes damage ashore.

13 Now, the language of this Court in its unanimous
14 opinion in Rodriguez just very recently was: "The accidents
15 had no more connection with the ordinary stuff of Admiralty
16 than do accidents on piers."

17 Mr. Justice White later on stated: "The accidents
18 would be no more under Admiralty jurisdiction than accidents
19 on a wharf located above navigable waters." If that is what
20 this Court thinks is a law, that is what this case is all about.
21 If these accidents didn't occur on navigable waters; if this
22 case doesn't involve Admiralty jurisdiction, then clearly the
23 lower court had to be wrong. And that was the decision of
24 this Court in Rodriguez since the initial argument in March of
25 1969.

1 The last point that I would like to cover is the
2 continued stress by the Respondents below by the Longshoremen,
3 that it is so unfair to Longshoremen who happen to reside in
4 Virginia and Maryland, not to be able to received Federal
5 compensation because Federal Compensation in Maryland and
6 Virginia is considerably greater than the State Compensation
7 in those two states.

8 Well, one: It seems to me that is clearly a legisla-
9 tive argument. But it ignores what they are planning to do to
10 longshoremen located in those states where the State Compensa-
11 tion is in excess of the Federal Compensation. I know, for
12 example, there's Alaska, California, New York, to name three.
13 Thus, if, in fact, they want to change the law for Maryland and
14 Virginia, they are going to take away from the longshoremen in
15 other jurisdictions what those states provide. If the
16 Congress sees fit to change the language of the Longshoremen's
17 Act or if the states see fit to change the amount of compensa-
18 tion, that is one thing. But I submit, Your Honors, that this
19 case is one which falls clearly within the language of the
20 Longshoremen's Act; it's been uniformly decided here that if
21 the accidents do not occur on navigable waters they are not
22 covered by the Longshoremen's Act.

23 Thank you.

24 MR. CHIEF JUSTICE BURGER: Mr. Solicitor General.
25

1 ORAL ARGUMENT BY ERWIN N. GRISWOLD,
2 SOLICITOR GENERAL OF THE UNITED STATES
3 ON BEHALF OF PETITIONERS TRAYNOR AND
4 OOSTING

5 MR. GRISWOLD: Mr. Chief Justice and may it please
6 the Court, since this is a reargument I have tried to think of
7 ways in which I could be of assistance to the Court and it has
8 seemed to me that I might focus primarily on two aspects of the
9 case which have been so well covered by Mr. Coleman.

10 The first is to emphasize again the fact that this
11 case involves purely a question of statutory construction. It
12 is not a question of Constitutional Law. The statute is set
13 forth at Pages 2 to 4 of the Government's brief and the
14 immediately relevant language is that in Section 3 of the Act
15 about three inches below the top of Page 3.

16 "Compensation shall be payable under this chapter
17 in respect of disability or death of an employee, but only if
18 the disability or death results from an injury"-- and here is
19 the crucial word -- "occurring upon the navigable waters of
20 the United States (including any dry dock) and if recovery
21 for the disability or death through Workmen's Compensation
22 proceedings may not be validly provided by State Law."

23 Now, I think it is significant that that language does
24 not say "within the Maritime or Admiralty jurisdiction of the
25 United States," nor does it say "as far as Congress may validly

1 make Federal Law apply. On the contrary the way the statute
2 was worded so that Congress was trying to restrict the scope
3 of Federal Law and was endeavoring to have State Law apply
4 whenever it could, but it knew that there were areas where
5 State Law could not apply and therefore it felt compelled to
6 enact this statute to provide a remedy for those who were out0
7 side the scope of State Law; not for those who were inside the
8 scope of Federal Law, but for those who were outside the scope
9 of State Law.

10 Now, this statute was passed on March 4, 1927 and I
11 suggest that the crucial question is the understanding of
12 Congress in 1927 when that statute was written, and not what
13 the Constitutional Law was then; not what the Constitutional
14 Law would be now; but what was the common understanding and
15 apprehension of persons familiar with this problem in 1927?
16 Now that, of course, goes back to the fact that State Workmen's
17 Compensation Laws were enacted beginning about 1912 -- no,
18 Federal Workmen's Compensation Law.

19 In the Jensen case which came to this Court in 1917,
20 but which involved an injury which occurred in 1915 and 1914,
21 the facts were that the injury occurred to a man who was
22 operating a truck on a gangway between a pier and the ship. He
23 backed into the ship; his head was hit on the back by the ship
24 as he was moving his truck in and he was killed. The accident
25 occurred on a gangway, but above navigable water and the actual

1 impact was with the ship itself.

2 And in the case of Southern Pacific Company against
3 Jensen, it was decided in 1917. The Court held that that was
4 within the Maritime jurisdiction of the United States and that
5 the law as to that must be uniform, and that couldn't be if the
6 State Laws applied and it was beyond the territorial jurisdic-
7 tion of the legislative power of the states.

8 Now, it isn't relevant, it seems to me, whether that
9 was right or sound or was a decision which the Court would now
10 follow. That was the decision which was made and was the
11 important part of the background of the statute which Congress
12 enacted ten years later.

13 Then there is another decision which came before the
14 statute: State Industrial Commission against Nordenhold, as
15 decided in 1922. That was also a proceeding under the New York
16 Workmen's Compensation Act for the death of a longshoreman who
17 was injured on a dock while engaged in unloading cement from a
18 ship. His job was to receive the bags of cement and pile them
19 on the dock in tiers. He fell from the pile of bags to the
20 floor of the dock. The opinion says it was a dock; there was
21 nothing to indicate whether it was a pier or a wharf and I
22 don't think that makes any difference, a wharf being parallel
23 with a ship or a pier extending into the water away from the
24 shore. And the Court held in an opinion by Mr. Justice
25 McReynolds, that the State Compensation Law could apply and in

1 the Opinion Justice McReynolds referred to, and I quote:

2 "The dock in that locality is the exclusive test of Admiralty
3 jurisdiction. DeSana who was the workman, was injured upon the
4 dock, an extension of the land. See Cleveland Terminal and
5 Volley Railroad Company against Cleveland Steamship Company
6 in 208 U.S." And that was a case where a ship had hit some
7 docks or piles over water and the protecting piling of a
8 bridge. It was an Admiralty case, a libel against the ship.
9 It was held that it was not within the Admiralty jurisdiction.
10 The result of that case might well be changed by extension of
11 the Admiralty Act, but it is important, in that it was the
12 basis, cited as a basis for the decision of this Court in the
13 Nordenhold case in 1922.

14 During this period Congress made two efforts to
15 provide compensation for longshoremen. One was by an amendment
16 of the jurisdictional provision with respect to jurisdiction of
17 Federal Courts and the other was by a statute, which, in effect,
18 undertook to say that it is the will of Congress that State
19 Compensation Acts should apply to injuries to longshoremen
20 whether on land or on water.

21 In both situations this Court held that the acts of
22 Congress were unconstitutional; were beyond the power of
23 Congress because of the requirement the Court found that the
24 Admiralty power should be exercised on a uniform basis
25 throughout the United States.

1 I mentioned that because it shows plainly that
2 Congress had had its fingers burned and the draftsmen of the
3 statute in 1927 were not reaching out but were careful to
4 avoid any possible constitutional pitfalls. And this is
5 made apparent, not only by the wording of the statute, but
6 which I have referred, but also by the Committee Report at
7 that time, which was quoted by Mr. Coleman, Senate Report
8 Number 973 on the bill which became the Longshoremen's Act,
9 where the Committee referred to the fact that injuries occurring
10 in loading or unloading the ship are not covered unless they
11 occur on the ship or between the wharf and the ship. And what
12 could be a clearer reference to the Jensen case than that.

13 So as to bring them within the Maritime jurisdiction
14 of the United States, not as we now conceive it; not as it
15 might have been conceived then, but as has been defined by
16 this Court in the Jensen case and the two which follow.

17 And not only do we have that clear statement in the
18 legislative history in 1927, but we also have the contemporaneous
19 administrative conception, which is cited on Page 17
20 of our brief. Twice in 1927, within a few months after the
21 statute was passed; again in 1928 and continuously thereafter,
22 right down to these two cases.

23 The administrative construction by the agency charged
24 with administering this Act has been to draw the line between
25 ships, gangways to ships on the one hand; and piers on the

1 other.

2 I think it's also not irrelevant to point out a
3 decision of this Court in 1928 which is just a year after the
4 Longshoremen's Act was passed. This case did not involve the
5 Longshoremen's Act, but it does show clearly enough the state
6 of thinking at that time which is the state of thinking which
7 determined the intention of Congress in drafting the Long-
8 shoremen's Act. This is P. Smith & Son, Incorporated against
9 Taylor in 276 U.S., an Opinion by Mr. Justice Butler. There
10 the deceased was a longshoreman; he was working on a staging
11 that rested solely upon the wharf and projected a few feet over
12 the water to and near the side of the vessel and was engaged
13 in unloading a vessel when a sling loaded with five sacks of
14 soda, weighing 200 pounds each, was being lowered over the side
15 by means of the winch on the vessel. The sling struck the
16 deceased and knocked him off the stage into the water where
17 he was sometime later found dead.

18 And the Court referred to the fact that the stage and
19 wharf on which deceased was working are to be deemed an exten-
20 sion of land, and that's a quotation, citing the Cleveland
21 Terminal case.

22 And said again in Page 182: "The blow of the sling was
23 what gave rise to the cause of action. It was given and took
24 effect while the deceased was upon land; it was the sole,
25 immediate and proximate cause of his death and the Court

1 concluded that the State Law should apply.

2 After that we have some interval until 1941 and
3 several cases thereafter. In two decisions written by Justice
4 Black in 1941 and in 1942; in an opinion by Mr. Justice Reed
5 in 1953 and most recently in Mr. Justice Brennan's Opinion in
6 the Calbeck case, the Court referred in these words to the
7 Jensen line of demarcation as something which was established
8 known and accepted. And it's perfectly plain, of course, that
9 the Jensen line of demarcation is the line between the water
10 and the land and specifically as applied to this type of case
11 between the water and the pier, because there are numerous
12 cases of which perhaps the Nordenhold case is the most signi-
13 ficant, which hold that the pier was an extension of the land;
14 is a part of the land and is to be treated as the land for
15 that purpose.

16 One of the significant cases in this period is the
17 one to which Mr. Coleman has referred as Swanson against the
18 Marra Brothers, one of the very final opinions of Chief Justice
19 Stone in 328 U. S. That is significant here, I think, because
20 it was a longshoreman working on a pier, loading cargo and he
21 was injured when a life raft fell from the vessel and injured
22 him. And the Court decided there that the Longshoremen's Act
23 excludes from its own terms and from the Jones Act, any remedies
24 against the employer for injuries inflicted on shore, and it
25 went on to refer, and this is quoted on Page 16 of our brief,

1 to land torts, and plainly contemplated that this injury to
2 this workman, who was a longshoreman working on a pier, was a
3 land tort. And so we feel that the setting in which this
4 statute was drafted makes it quite plain that Congress was
5 seeking to define and to lay down the Jensen line of demarca-
6 tion, but that line had been made very clear by the decisions
7 of this Court at that time that this was expressly referred to
8 and adopted by the Congressional Committee Report at the time
9 that current administrative practice was in accord and that
10 this Court has ever since, in numerous cases, reiterated the
11 fact that the line has been drawn as the Jensen line of de-
12 marcation.

13 MR. CHIEF JUSTICE BURGER: Thank you.

14 (Whereupon, at 12:00 o'clock p.m. the argument in the
15 above-entitled matter was recessed to reconvene at 12:30
16 o'clock p.m. this day)

1 AFTERNOON SESSION

2 12:33 o'clock p.m.

3 MR. CHIEF JUSTICE BURGER: Mr. Solicitor General,
4 you may proceed.

5 MR. GRISWOLD: Mr. Chief Justice, and may it please
6 the Court, before the recess I tried to outline some of the
7 background subscribing to finding the situations within which
8 Congress acted when it legislated in 1927. I referred to the
9 Nordenhold case decided by this Court in 1922, involving a
10 pier injury and I would like simply to supplement that by
11 referring also to the Court's Opinion in Washington against
12 Dawson and Company in 1924. Now, that was a case which held
13 invalid the second Act of Congress to make Workmen's Compen-
14 sation Acts applicable.

15 In the Dawson Opinion the Court said, on Page 227:
16 "Industrial Commission against Nordenhold Company related to
17 a claim based upon death which resulted from injuries received
18 by the longshoreman while on the dock"-- a matter never within
19 the Admiralty jurisdiction.

20 Now, whether that is right or not; whether that is
21 what this Court would now hold, seems to me not significant.
22 That is what this Court declared in 1924 and that was the most
23 recent basis upon which the Congress could act when it drafted
24 the statute which was enacted in 1927.

25 Q Whose opinion was this?

1 A Mr. Justice McReynolds. Nearly all the opin.
2 in this area in that period were Mr. Justice McReynolds.

3 Now, in concluding my portion of the argument, I would
4 like to refer, as Mr. Coleman did to the Rodriguez case,
5 decided last June. That case had a course somewhat parallel
6 to this case; it was argued in February; this case was argued
7 in March. On May 19th the Court sent this case down for
8 reargument. On June 7th it decided the Rodriguez case. And I
9 have had a relatively leisurely opportunity over the summer to
10 consider the Rodriguez opinion and its application to this
11 case and I must confess that I have not been able to find out
12 any basis upon which I can come to any other conclusion than
13 that the Rodriguez Opinion, in effect, decides this case.
14 Mr. Coleman referred to some of these passages; I have marked
15 half a dozen of them.

16 On Page 355 the Court said: "Since the Seas Act does
17 not apply of its own course under Admiralty principles, and
18 since the Lands Act deliberately eschewed the application of
19 Admiralty principles to be of novel structure, Louisiana is
20 not ousted by the Seas Act."

21 And on Page 359 the Act redresses only those deaths
22 stemming from wrongful actions or omissions occurring on the
23 high seas and these cases involved a series of events of
24 artificial islands. Admiralty jurisdiction has not been con-
25 strued to extend to accidents on piers, jettys, bridges or even

1 ramps or railways running under the sea.

2 And again on Page 360: "If there's an island, albeit
3 an artificial one and the accidents had no more connection
4 with the ordinary stuff of Admiralty than do accidents on
5 piers."

6 And finally, on Page 361: "In these circumstances the
7 Seas Act which provides an action in Admiralty clearly would
8 not apply under conventional Admiralty principles, since these
9 were structured and careful scrutiny of the hearings shows that
10 it was the view that Maritime Law was inapposite to these
11 structures." And there is finally a considerable reliance on
12 the fact that the employee on these structure are land-based
13 and they go back and forth to their homes on land, and of
14 course, that is equally applicable to the Longshoremen who are
15 involved here.

16 And I would have only one final point to make, which
17 is with respect to the Calbeck case which is a rather broad
18 and sweeping opinion, but I would point out that it deals
19 entirely with the water side of the Jensen Line of Demarcation.

20 It says that on the water side the Longshoreman Act
21 is intended to be provided broadly and comprehensively. There
22 is nothing in the decision and little in the language in the
23 Calbeck Opinion which has any reference whatever to the land
24 side. This case involves something on the land side. It may
25 be arbitrary to draw the line at that particular point; it is,

1 of course, arbitrary to draw it at any point. The line might
2 -- it might well have been sensible to have said that
3 longshoremen are governed by State Acts, but then we would have
4 had seamen who were governed clearly by Admiralty. We would
5 have had men working side by side getting different benefits.
6 If the Longshoremen's Act were extended to longshoremen, no
7 matter where they worked, we would have all kinds of problems
8 about how far inland it extended; and we would again have
9 people working side by side getting different benefits.

10 It is our view that the line has been clearly and
11 firmly drawn, whether rightly or not, at the edge of the water,
12 either on the shore or on a pier at the time the 1927 Act was
13 passed, but that is the line which Congress adopted and that
14 this Court has repeatedly referred to as the Jensen Line of
15 Demarcation and that should be controlling here.

16 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor
17 General.

18 Mr. O'Connor.

19 MR. RABINOWITZ: It's Mr. Rabinowitz. We have
20 switched around a little, if Your Honor please.

21 ORAL ARGUMENT OF RALPH RABINOWITZ, ESQUIRE

22 ON BEHALF OF RESPONDENT AVERY

23 MR. RABINOWITZ: Mr. Chief Justice, if it please the
24 Court, Ralph Rabinowitz, Norfolk, and I represent Longshoreman
25 Albert Avery.

1 Simply this case deals with the question of whether
2 Congress meant to cover longshoremen working a ship from a
3 dock when he was injured by ship's gear. Did Congress fully
4 exercise its power; its subject matter power over this area,
5 that is the central question. And I take it that this ques-
6 tion was answered in the Calbeck case, when this Court was
7 treating the very section of the Act that we deal with today.
8 And the Court said this: "The elaborate provisions of the Act
9 reviewed in the light of of prior Congressional legislation as
10 interpreted by the Supreme Court, leaves no room for doubt
11 as it appears to us. The Congress intended to exercise to
12 the fullest extent all the power and jurisdiction it had over
13 the subject matter. It is sufficient to say that Congress
14 intended the Compensation Act to have a coverage co-extensive
15 of the limits of its authority."

16 Q Would you have made the same argument prior to
17 the Admiralty Extension Act?

18 A Yes, Your Honor, I would.

19 Q You have to say that, I think.

20 A No, the -- I don't have to say it. The holding
21 below, of course, is grounded on maybe two -- it's an --

22 Q Well, if you are going to rely on the Calbeck
23 statement you would have to.

24 A The Calbeck statement supports this. The subject
25 matter of power. Going back to Jensen, if Your Honor please,

1 the reason the Jensen did not allow State Act to apply its
2 compensation to the longshoremen, was because the State Act
3 was to deal with the area which was exclusively of Federal
4 competence. And the Court said this in Jensen: "The work of
5 a stevedore is maritime in its nature and his employment was a
6 maritime contract. The rights and liabilities of the parties
7 in connection therewith were matters clearly within the
8 Admiralty jurisdiction."

9 But, going to first holding of the Fourth Circuit
10 below: "This is a matter that is exclusively of Federal com-
11 petence under the Constitution." And Jensen said State Compen-
12 sation Acts cannot apply because of that --because of the
13 character of the longshoremen's employment.

14 And so this message is bringing it up to date with
15 what was said in Calbeck, that this is an area of Federal
16 competence and Congress meant that to exercise its full power
17 over that area, the character of the employment.

18 Now, the second holding or the alternate holding
19 below, Mr. Justice White, was the Admiralty Extension Act
20 argument. And we noted the Admiralty Extension Act was a valid
21 exercise of Congressional power and we know that both the
22 Longshoremen's Act, if Your Honor please, and the Admiralty
23 Extension Act both speak in identical terms. One says, "upon
24 navigable waters;" the other says, "on navigable waters."

25 Q What -- how do you characterize cases in this

1 Court or others which say that injuries on piers are not within
2 the Admiralty jurisdiction?

3 A There are pre-1927 cases that say that.

4 Q And what do those cases represent, an announce-
5 ment as to what the limits of the Admiralty jurisdiction are?

6 A They are announcements of the limits of the
7 Admiralty tort jurisdiction; not contracts, not status, not
8 the character of employment, pre 1927, but in Calbeck, if Your
9 Honor please, MR. Justice Brennan said expressly: "We do not
10 think the Act should be construed on the basis of pre-1927
11 Admiralty tort cases which were restrictive, which doubt not
12 cover dockside interests; which are --

13 Q But, the Court had said, I take it, prior to
14 1927 that the Admiralty tort jurisdiction did not reach the
15 pier injuries.

16 A That's correct.

17 Q And if you say that Calbeck said that Congress
18 intended to utilize its full power to the full extent of the
19 Admiralty jurisdiction. The Admiralty jurisdiction wouldn't
20 extend landward to reach pier injury until and unless the
21 limits of the Admiralty jurisdiction were changed, either by
22 a decision of this Court or by the Congress.

23 A If you take your statement to mean just Admiralty
24 torts, yes, Your Honor, but if you mean that, as we all know,
25 Admiralty jurisdiction is not just tort-based; it's status-

1 based or contract-based or, as Jensen said, character of
2 employment-based; and that's what Congress wanted to fill the
3 void with. Jensen had said to the State Act, "don't touch
4 this area because these are longshoremen. The character of
5 their employment, employment relationship is such that they
6 cannot be made to come under an area of exclusive Federal
7 competence."

8 Now, when --

9 Q Well, the day after the Longshoremen's Act you
10 would have argued that a pier injury is covered under the
11 Longshoremen's ACT?

12 A Yes, sir; Your Honor on the first holding of the
13 Fourth Circuit below, or until recently --

14 Q That's all right. How would you make the
15 argument?

16 A I would say this: The day after the Act was
17 passed I would say this, if Your Honor please: Jensen kept
18 longshoremen from recovering under the State Act.. Why?
19 Because they said "we cannot touch this area; this character
20 of their employment; the contract is a maritime contract which
21 cannot be touched; it is an area of exclusive Federal compe-
22 tence. The Act of 1927 was passed to cover these men that the
23 State Acts were kept from helping.

24 And Congress had tried two times to make the State
25 Acts, do this in the court and it struck that down.

1 In 1927 the Court came along and filled this void.

2 Q Well, there wasn't any void on the pier.

3 A Yes, Your Honor there was. In a case called,
4 for example, there was certainly a void out here. IN the
5 case of Johnson -- Anderson against Johnson, 224 New York 539,
6 120 Northeast 55, a 1918 case. A man had slipped down on the
7 pier; he had tried to get State Compensation.

8 Q Yes, but other cases have said that the State
9 could go up to the gangplank.

10 A Sir?

11 Q Didn't other cases say that they could go up to
12 the gangplank?

13 A Some did. It was this area where nobody knew
14 much what was happening, if Your Honor please, and this was
15 what Congress was trying to do. It was an area where some
16 states were giving the man compensation on the dock; some
17 states were not giving him compensation on the dock; there was
18 no firm line.

19 For in the Davis case, Mr. Justice Black recognized
20 this and I am quoting from Jensen. He said, quoting Jensen:
21 "When a state could and when it could not grant protection
22 under a Compensation Act was left as a perplexing problem, for
23 it was held difficult, if not impossible to define this
24 boundary with exactness." I quoted exactly from Jensen and
25 Mr. Justice Black in Davis requoted that, and said, "there

1 isn't even a firm law when the State Act could apply." So,
2 the twilight zone doctrine was started.

3 Even before the Admiralty Extension Act in the
4 O'Donnell case this Court extended the Jones Act for seamen
5 ashore. And look at the language of this Court in Calbeck,
6 almost identical language.

7 In O'Donnell, the Court said, and this was before the
8 Admiralty Extension Act: "Congress, in the absence of any
9 indication of a different purpose must be taken to have in-
10 tended to make them applicable so far as the words and the Con-
11 stitution permit and to have given to them the full support of
12 all the Constitutional powers it possessed. Hence, the Act
13 allows the recovery sought unless the Constitution forbids it."

14 If you juxtapose that language with the language of
15 this Court in Calbeck, it's almost the identical language.

16 Q Well, wouldn't your argument be that what you
17 are arguing that Congress intended by the Longshoremen's Act
18 to cover all maritime related employment which they could
19 have controlled. I suppose shore-based activities of long-
20 shoremen?

21 A Yes, Your Honor. And during the course of their
22 employment.

23 Q So, you arguing that Congress intended not to
24 fill the void, but duplicate State remedies.

25 A In some cases there would be a duplication, but

1 in Calbeck, Mr. Justice Brennan said that -- he said that
2 there is no mutually exclusive area. State Compensation
3 doesn't preclude Federal Compensation. Well, this is obviously
4 exclusive, if Your Honor please. It can be an area of over-
5 lapping jurisdictions. However, you cannot allow certain
6 confidence to be ruled by whether or not a state acts. Let us
7 say --

8 Q You I can agree with that and ask what Congress
9 intended to do in this act. Did it intend to fill a void or
10 did it intend to duplicate?

11 A No, sir; it contended to fill a void which
12 Jensen had mainly started by precluding state compensation
13 from longshoremen because of the character of their employ-
14 ment; maritime contracts. AND if Your Honor please, this is
15 clear from our legislative history; in the Senate Report,
16 particularly. It is stated just like that.

17 It stated, in these terms, if Your Honor please.
18 The Act is construed -- the legislative history is construed
19 just like this in the Senate Report.

20 Q What page are you looking at?

21 A I am looking at -- from my brief on Page 24, if
22 Your Honor please, which is an old brief which is quoting from
23 Mr. Justice Sobeloff's review of the legislative history.
24 Page 24, from the SEenate Report on the bottom of the page,
25 starting with the indented paragraph. "If longshoremen could

1 avail themselves of the benefits of State Compensation Laws
2 there would be no occasion for this legislation, but un-
3 fortunately, they are excluded from these laws by reason of the
4 character of their employment and they are not really ex-
5 cluded but the Supreme Court has held more than once that
6 Federal legislation cannot, constitutionally, be enacted that
7 will apply State Laws to this occupation."

8 And there the Congress recognized what the Court had
9 in Jensen. It had said, "because of the character of the
10 longshoremen's employment, this is an area of Federal compe-
11 tence." In Jensen the Court was worried about lack of uni-
12 formity, longshoring having to do with ships that go from port
13 to port and they said this is an area of Federal competence.

14 Going on to just the realities of this case, we have
15 the very simple facts that the ship caused the injuries
16 here, and the case could go off on those facts alone, but I
17 suggest that the Court should construe the Act in the way that
18 I have suggested in which Congress meant.

19 If you read the debate for once you find that the
20 employers and the employee's representatives were unanimous in
21 wanting a broad act. They wanted an act that would cover
22 all the men -- all the longshoremen in the course of their
23 employment. They didn't want an act that would be here a bit;
24 there a bit. And it's not so strange to cover the dock in
25 the course of maritime employment.

1 When a ship comes into a dock a ship has always been
2 held to assert thereby a possessory character over the dock.
3 Way back in ex parte Easton, 95 U.S. 68, this Court held that
4 wharfage had to be paid. The ship actually started to have a
5 proprietary right over the pier when it tied up to load and
6 unload. The Court said this: "Access to the ship or vessel
7 rightfully occupying a berth at a wharf for purposes of
8 loading and unloading is the undoubted right of the owner or
9 charterer of such a ship for which such right has been
10 secured.

11 In other words, the character of that right is a
12 possessory right of the ship. And the ship causes injuries
13 in this case.

14 Now, there has been some comment about whether a
15 third party action has been filed in certain cases here. In
16 Avery's case no third party action, no Court action has been
17 filed. Avery wants his Federal Compensation. He was hurt in
18 1961 and he has yet to get it. He's a longshoreman. The Act
19 is called the Longshoremen's Act. The legislative history
20 says, "We are passing this act to give the longshoremen the
21 benefit of compensation," and I suggest to this Court that
22 there is no commonsense reason and no reason in the legislative
23 history or in the development of the cases in this Court to
24 keep these longshoremen who are hurt by the ship, because they
25 happen to be standing on the dock, from getting Federal

1 compensation, as Congress intended.

2 The Petitioners would rely strongly on Swanson against:
3 Marra Brothers. Swanson was not a case under the Longshore-
4 men't Act; simple as that. It was not a case in this Court
5 where the man had asked for Longshoremen's Act benefits. He
6 had sued the ship under the Jones Act and he had not sued his
7 employer. Now, the Jones Act requires you to sue your em-
8 ployer. And that's all that that case was about; simple as
9 that.

10 This case today is ruled by Calbeck. The language in
11 Calbeck is clear; statements are not hard to understand. They
12 are as follows: In some it appears that the Longshoremen's
13 Act was designed to assure that a compensation readily existed
14 for all injuries sustained by employees on navigable waters and
15 to avoid uncertainty as to the source, State or Federal, of
16 that remedy.

17 Section 38 should then be construed to achieve those
18 purposes. Plainly the Court of Appeals' interpretation,
19 fixing the boundaries of Federal Compensation, or Federal
20 coverage where the outer limits of State competence had been
21 left by pre-1927 Constitutional decisions, does not achieve
22 them. There the Court expressly says you cannot fix the
23 boundaries of Federal competence on the basis of pre-1927
24 constitutional decisions. Again, the Court says the line of
25 demarcation is not a static one, fixed by pre-1927

1 constitutional decisions.

2 Again, we iterate to you what the Court said in
3 Calbeck. Congress intended to exercise to the fullest extent
4 all the power and jurisdiction it had over the subject matter.
5 In the application of the Act, therefore, the broadest ground
6 that permits you to take. Why didn't Congress include docks
7 when it said, drydocks? And that's simple: drydocks are, in
8 the main, on dry land. They were then; they are now. Just
9 about all drydocks are built on dry land. There wasn't any
10 reason to include docks. The reason they had to put drydocks
11 on there as as an express addendum was because they were built
12 on dry land, and this is recognized by Judge Palmieri in his
13 District Court case, the Aryan case, when he said Congress
14 obviously expected docks to be covered by the words "upon
15 navigable waters," but feared that drydocks might be held by
16 the Courts to be without the Act, and therefore felt it
17 advisable to expressly mention the latter.

18 Q Are the drydocks on land or water?

19 A The drydock is almost always on land, if Your
20 Honor please.

21 Q How do you suppose a ship gets into a drydock.
22 on land?

23 A Well, I'm not an expert on drydocks, if Your
24 Honor please, but --

25 Q Well, I'm not either, but I served about four

1 years at sea and I never saw a drydock that was built on dry
2 land.

3 A If Your Honor please, the drydocks I've seen at
4 the new shipyards I have seen the nuclear shipyard are all
5 built on dry land, but there might be some that are on water.
6 They have some that pump water in and out; I've seen that.
7 But most of the ones I have seen have been on dry land.

8 My experience, however, has been confined to the
9 Virginia area.

10 Now, the --

11 Q It still would have been maritime employment,
12 wouldn't it, even if it was on dry land, which I doubt.
13 Drydock; wouldn't it have been maritime employment within the
14 reach of Congress under the Admiralty jurisdiction?

15 A Yes, Your Honor.

16 Q Well, why did they have to include drydocks if
17 they already intended to exercise the full scope of the
18 Admiralty jurisdiction?

19 A If Your Honor please, they wanted to be sure;
20 they just wanted to be sure.

21 Q A drydock doesn't really have much in common
22 with an ordinary pier or wharf, does it, in terms of its
23 function?

24 A Not really; it's a different function.

25 Q Totally different thing, isn't it?

1 A I would say so; yes, Your Honor. It's a
2 different animal, one has to do with ship repair and construc-
3 tion and the other has to do with the live vessel loading and
4 unloading.

5 If Your Honor please, the Rodriguez case has nothing
6 to do, that I can see, with this case. It does not deal with
7 the Longshoremen's Act; it is a case having to do with the
8 interaction of two other acts, the Death on the High Seas Act,
9 and the Outer County Mineral Shelflands Act.

10 The Court recognizes that Admiralty jurisdiction
11 would obtain if a vessel caused injury, as was the case here.
12 The vessel caused injury here. The Court expressly recognizing
13 Rodriguez, if a vessel causes injury, Admiralty jurisdiction
14 obtains.

15 The most important case is Calbeck and I say Calbeck
16 rules in the instant. Nordenhold -- again, Nordenhold is a
17 case; it's a relic before Congress acted. It's a relic
18 before Congress acted where the Supreme Court stated expressly
19 that all result is dependent upon the fact that there is no
20 pertinent Federal statute and so the question is: are we going
21 to let this widow recover; or are we not going to let her re-
22 cover, because Jensen had said that he's a longshoreman and the
23 character of his employment keeps us from helping him under the
24 State Act. Well, are we going to retrogress from what we said
25 in Jensen and start a local concern doctrine? A doctrine which

1 was a beneficent doctrine to let the State Act go ahead and
2 give the widow the compensation.

3 With the addendum -- remember there is no Federal
4 statute. With sort of the Court asking Congress, "get on the
5 stick; come on, let's pass an act for these longshoremen."
6 Nordenhold 1922 and Congress responding thereafter; similarly
7 T. Smith and Son which is relied upon by the Petitioners.
8 Again, a pre-1927 case. Well, perhaps it is in 1928; however,
9 the death occurred in 1925.

10 And this is what the Aryan Court in the second
11 Circuit said about Smith -- P. Smith and Sons: The court
12 simply held that application of a State compensation statute
13 did not encroach upon Admiralty jurisdiction. Mr. Justice
14 Butler, understandably, did not mention the Longshoremen's Act
15 for the Federal remedy was not yet effected.

16 Finally, I say to this Court that the holding could
17 be grounded either of the two bases that the Fourth Circuit,
18 Judge Sobeloff's Opinion, was grounded. One: the character of
19 the employment was such that Congress meant to cover these
20 injuries and Jensen had precluded State Compensation in this
21 area; Congress dealt with this area and used the full power at
22 hand.

23 Secondly, alternatively, the Court could go off on
24 the holding on the basis of the Admiralty Extension Act. The
25 Admiralty Extension Act says in its legislative history,

1 Senate Report Number 1593, Second Section, Pages 1 and 2.

2 For example of the bridge or pier or any person or property
3 situated thereon is injured by a vessel, the Admiralty Courts
4 of the United States do not entertain a claim for damages thus
5 cause -- this was before -- the bill under consideration would
6 provide for the exercise of Admiralty and Maritime jurisdiction
7 in all cases -- all cases of the type above-indicated.

8 It has been said and argued that the Longshore Act
9 wasn't mentioned in this Act; neither was the Warranty of
10 Seaworthiness; neither was a whole range of Acts of Congress.
11 Certainly it wasn't mentioned, because the legislative history
12 said that the jurisdiction is covered in all these cases; all
13 these cases. So, why would Congress have to go down and say,
14 "We mean all cases; we mean the Longshore Act; the Rivers Act;
15 the this and that -- they didn't have to do that. And the
16 Admiralty Extension Act has been applied in various and sundry
17 ways that were never mentioned expressly by Congress in the
18 legislative history of the Admiralty Extension Act.

19 I suggest to the Court that simply-stated Calbeck rules;
20 that the Fourth Circuit's Opinion en banc should be affirmed;
21 that there is no good reason in the legislative history or in
22 the common sense of the situation to exclude the very men who
23 were meant to be helped by Congress from the benefits of this
24 Act. There is nothing in the language that excludes the in-
25 juries here; there is nothing in the legislative history that

1 excludes the injuries herein.

2 The only reason that Congress didn't use Maritime
3 jurisdiction rather than "upon navigable waters," is because
4 they were afraid that Maritime jurisdiction -- that phrase was
5 too restrictive. They wanted the most comprehensive phrase
6 they could find. This is clear in the legislative history.

7 So, I respectfully suggest and pray that this Court
8 affirm the decision of the Fourth Circuit Court of Appeals en
9 banc.

10 MR. CHIEF JUSTICE BURGER: Mr. O'Conner.

11 ORAL ARGUMENT BY JOHN J. O'CONNOR, JR.

12 ON BEHALF OF RESPONDENTS JOHNSON AND KLOSEK.

13 MR. O'CONNOR: Mr. Chief Justice, and may it please
14 the Court: As we understand the issue in these cases, it is
15 this: Does the Longshoremen's Act cover injuries occurring
16 "on the navigable waters of the United States;" whether on the
17 deck of a pier as well as on the deck of a ship when the
18 precipitating instrumentality is a shipboard crane.

19 By a solid five to two en banc decision, the Court of
20 Appeals for the Fourth Circuit held that such a pierside
21 injury was compensable under the Act. The four bases of the
22 holding are set forth on Pages 2 and 3 of our original brief.
23 Former Chief Judge Sobeloff offered a masterful opinion which
24 carefully considered and rejected the various arguments ad-
25 vanced before this Court today.

1 These cases involve longshoremen members of a 16-man
2 gang, a definite work unit, actively engaged in loading
3 ocean-going freighters. Their duties, their rest periods,
4 their lunch periods, all required them to go back and forth
5 between the vessel and the pier. They were doing the same
6 work; they were receiving the same pay; they were exposed to
7 the same risks; they were employed by the same corporation.
8 The thrust of our arguments is that they were entitled to the
9 same Workmen's Compensation.

10 In the last analysis, as the Solicitor General
11 indicated, we can reduce these cases to their simplest compon-
12 ent. They revolve about the correct Federal interpretation
13 of the phrase, "upon the navigable waters of the United
14 States."

15 In the Opinion offered by Judge Sobeloff, the Court
16 of Appeals held that this term applied equally to all struc-
17 tures or navigable waters, whether the structure happened to
18 be ship or whether the structure happened to be a pier. A
19 ship actually displaces more water than does a pier, and some-
20 one on a pier is considerably closer to navigable waters than
21 someone on the deck of a ship that may be 15 to 50 feet above
22 the surface of the navigable waters.

23 Now we hear frequently this particular phrase is
24 bandied about: a pier is an extension of the land. We submit
25 that that is as inaccurate factually, as it is historically.

1 Logically and functionally a pier is an extension of the ship;
2 it is really nothing more than an oversized gangway. A pier
3 can not be conceived except in connection with navigable
4 waters and a ship. Servicing a vessel, facilitating its
5 loading or discharging is its raison d'etre.

6 In the words of Johnson Company versus Garrison a
7 1914 decision of this Court, quote: "The mooring of a vessel
8 is as necessary as its movement." And the United States
9 District Court for the Southern District of California came to
10 that commonsense conclusion that a pier is the extension of
11 a ship in the immigration case in the United States versus
12 Yee Nee How a 1952 decision reported in 105, sets up at Page
13 517.

14 Going into the history of the situation, in the
15 waning decades of the 17th Century, Louis XIV of France
16 promulgated his Ordinance de la Marine. This had that
17 Admiralty jurisdiction inter alia extended to "damages done to
18 keys, dikes, jettys, palisades and other works," and "wrongs
19 committed upon the seas and the ports, harbors and beaches".

20 When the courts restrictively applied his instruc-
21 tions, the King issues a clarifying directive in 1694 known as
22 the Royal Declaration. He reiterated the comprehensive
23 scope of the Admiralty.

24 Benedict on Admiralty in a pre-1865 edition -- I
25 found this is in my notes, but I have not been able to

1 confirm it, but I am sure it is accurate. In Section 107
2 advises that at the time of the Commonwealth Admiralty juris-
3 diction included "all cases of prejudice to the banks of the
4 navigable rivers" or, "locks, wharves and keys."

5 And the language of commissions issued to Admiralty
6 judges then in court, "all injuries done upon the public
7 rivers and upon the shores and banks adjoining them." And as
8 we all know the lien of a wharfinger is recognized and en-
9 forced in Admiralty.

10 Then it comes down to a more recent decision out of
11 this Court: The United States versus Louisiana, 1967. The
12 denial of that fictional theory a pier is an extension of the
13 land is implicit in this decision which holds that the natural
14 shoreline of 1845 was the correct line of demarcation for
15 measuring the three marine links. The case decided that a
16 jetty was not an extension of land to push the boundary
17 beyond a normal three marine link figure. A pier, similarly,
18 does not extend the jurisdiction of a State. It still is
19 measured from a natural shoreline with a hard waterfront.

20 We are somewhat baffled at the position of the
21 Solicitor General in these cases because we had occasion to
22 read the splendid brief that he filed in the Calbeck case.
23 On Page 51 he had this to say: "Where injured employee sought
24 recovery under the State Acts the presumption of constitution-
25 ality would sustain an award; similarly, the statutory

1 presumption in the Longshoremen's Act could sustain an award
2 in the very same circumstances. The two presumptions, in
3 effect, gave the employee injured in the twilight zone, an
4 election to proceed under Federal or State Law."

5 Now, let's turn our attention to the philosophy of
6 workmen's compensation laws. Workmen's Compensation is a
7 recognition for the protection and compensation of persons who
8 are injured in work-connected activities. Since the act is
9 remedial legislation it is to be applied with the broadest
10 liberality to achieve its humanitarian purposes. The Court
11 Appeals has directed the entry of an award in these cases.
12 As Judge Palmieri admonished in a Michigan Mutual case, a
13 Federal compensation award should be upheld, "if there is
14 any reasonable argument for coverage under the Act."

15 There is considerably more than a reasonable argument
16 for coverage under the Act in these cases. As this Court has
17 admonished, we are to avoid "harsh and incongruous results."
18 And, as a decision in the Fourth Circuit urged, the Act's
19 beneficent purposes are not to be "frustrated" by needless
20 refinements.

21 The philosophy of Workmen's Compensation statutes is
22 protective. The liability arises as an incident of the employ-
23 ment relationship as related to the contract of employment.
24 It is not predicated on fault as in tort actions.

25 Now, let's turn our attention to the actual wording

1 of the statute.

2 The key expression in these cases is, "If the dis-
3 ability of death results from an injury occurring upon the
4 navigable waters of the United States (including any drydock),'
5 the touchtone of coverage is this generic phrase, "upon the
6 navigable waters of the United States."

7 Now, Congress could very easily have restricted the
8 application of this law by a simple provision such as "occur-
9 ring upon a ship (including the gangway)", but Congress did
10 not. It used the very generic, broad terminology, because it
11 wanted everyone under the umbrella of its protection.

12 Q Couldn't Congress also have said in the
13 parenthesis, "dock or drydock?"

14 A Yes, sir, obviously it could, but as was pointed
15 out, a pier is clearly upon navigable waters. A drydock is
16 not so clearly upon navigable waters. As I understand, they
17 gouge out an area and they let the waters to flow into that
18 part that was formerly dry land. But a pier is in a different
19 category. It does not replace the navigable waters; the
20 navigable waters flow freely underneath the deck of the pier.

21 Q How about a bridge?

22 A I think a bridge --

23 Q A bridge over navigable water but resting on
24 piers.

25 A I think that's a little bit different situation,

1 Your Honor, because a bridge connects two segments of land, so
2 a bridge is more closely allied with a land operation.

3 Q It may be that, but in terms of the phrase you
4 are talking about: "upon navigable waters," how is that
5 different from a pier?

6 A I suppose technically, Your Honor, "upon
7 navigable waters," you can say that someone on a bridge is upon
8 navigable waters, just as someone on a pier; just as the courts
9 have held that someone aloft in an airplane in the Delaman case,
10 is upon the high seas, although several miles up in the air.

11 Now, let's look at some illustrative situations.
12 According to the Petitioner's concept of the law they concede
13 that at the same load involved in these proceedings: (a) struck
14 and crashed a longshoreman in the hold, the injury would be
15 covered by the Act. (b) Struck and crushed a longshoreman on
16 deck would be covered. (c) Struck and crushed a longshoreman
17 on the gangway the injury would be covered. (d) Knocked the
18 longshoreman from the ship onto the pier, the injury would be
19 covered. (e) Knocked a longshoreman on the pier into the
20 water, again coverage. (f) Struck and crushed a longshoreman
21 in a boat under the pier he would be covered. (g) Lifted the
22 longshoreman up and dropped him back to the pier, the injury
23 would be covered. (h) As we all know, that/^{if}we had a third
24 party action he could recover under the Seaworthiness Doctrine,
25 under Guittierrez and the Extension of Admiralty.

1 Now, under these factual situations they admit
2 coverage under the Act. But if the longshoreman is struck on
3 the pier and merely knocked horizontally, remains on the pier,
4 his injury or death, according to them, is not covered.
5 Obviously Congress never intended such a bizarre result. At
6 the earlier arguments, some Members of the Court asked about
7 a situation of this type. We are sure that Congress, being
8 equally practical-minded, thought of similar situations. They
9 devised an act intended to bring all of the men -- the long-
10 shoremen within their protective coverage of the statutes.

11 Q Suppose the derrick was on the building instead
12 of the ship?

13 A Well, I would say, I think, Your Honor, if you
14 are injured on the pier, I think it's compensable, But that
15 brings us to the next point.

16 Our case has an additional Maritime or Admiralty
17 nexus because the offending instrumentality was not on the
18 shore, but on the vessel itself.

19 Q And you say that if it's solidly on the shore it
20 wouldn't make any difference?

21 A I say as far as the liberal purpose of the
22 Longshoremen's Act is concerned, Your Honor, I don't think it
23 makes any difference.

24 Q I think if you are that liberal, it wouldn't.
25 Isn't that what our problem is, is interpreting plain

1 language?

2 A No, sir, because here you have the additional
3 connection with the Admiralty activity. You have a ship --

4 Q It's a longshoreman in the same gang, with the
5 same boss, and doing the same work, but there's a derrick on
6 the building and the derrick swings loose and it strikes one
7 man near the ship, and one man in the middle of the pier and
8 another man up on the -- against the building. You say all
9 three are in the exact same position?

10 A Well, sir, if a man is on a building on the
11 shore I do not say he is covered. I say --

12 Q But he is over the water; he's still over the water.

13 A Yes, sir; I say he's covered.

14 Q Even though he's up against the building?

15 A Well, if he's upon navigable waters; yes, sir.
16 Because that's the touchstone of jurisdiction and Your Honor,
17 we have, with reference to the basis of this law, we have the
18 tort jurisdiction of Admiralty and we have the contract juris-
19 diction of Admiralty. The contract, of course, pertains to
20 the nature of the activity, but over and above the Admiralty
21 basis we have the commerce clause and at the very first hear-
22 ing conducted into the Act, reference was made to the appli-
23 cability of the commerce clause and we don't even theoreti-
24 cally need Admiralty waters because your commerce gives the
25 Congress authority over the activity because of its

1 interstate nature.

2 We feel that the policy of the position may be
3 brought out a bit more clearly if we use this illustration.
4 If a group of men were employed to work in a warehouse and
5 during the course of the employment a load broke free and
6 injured someone in the warehouse and the same load also in-
7 jured someone on the steps of the warehouse and the same load
8 rolled down and injured someone on the sidewalk. All three
9 members of the gang and members of this work detail and
10 employed by this warehouse. The employer and the insurer came
11 into court and suggested that the man working on the sidewalk
12 was not entitled to the same effects and the same laws as his
13 co-employees working in the building and on the steps of the
14 gangway, I am sure this Court will lose no time in stating
15 that is offensive to the due process provision. And the Court
16 has held that this is a limitation, not only in State Laws,
17 but shall also be applied to Federal statutes to prevent
18 unfair discrimination.

19 Perhaps I should now respond to some of the remarks
20 made by the other side during the presentation of their case.

21 The initial concession made by Mr. Coleman was that
22 the piers did extend out over navigable waters. We feel this
23 dispositive of the case. And he also admitted that the men
24 passed freely back and forth between the ship and the pier.
25 We cannot conceive that Congress intended to have a part-time

1 statute that applies as pendulum: as you go aboard ship it
2 does not apply as you come back on the pier.

3 Swanson versus Marra has already been commented upon.
4 An attempt in that case was made to avail the injured long-
5 shoreman of the Jones Act. He could not file a suit under the
6 Jones Act; he couldn't do it then; he cannot do it now. If
7 that longshoreman were to assert his claim today there is no
8 question that he would be entitled to benefits under a third
9 party action.

10 Now, with reference to the Jensen Line of Demarcation,
11 precisely what is meant by that I don't think is entirely
12 clear. As I understand the phrase, what is meant is this:
13 The Supreme Court held that Admiralty was exclusively within
14 the province of the Federal Government. We must have uni-
15 formity in maritime law. Because of this requirement for
16 uniformity, a state, through its Workmen's Compensation, can-
17 not invade the field of Admiralty. So, all Jensen said is that
18 there is a limitation on the state, not to legislate in this
19 field, but did that indicate that the Federal Government had
20 no authority to legislate in this field even if there may
21 happen to be an overlapping with reference to pier injuries.

22 And respecting the cases mentioned about pier
23 injuries, the Jensen decision has been termed an ill-starred
24 one. Some commentators have felt that the Court had some
25 qualms of conscience after deciding this case in depriving the

1 widow of any compensation. Subsequently, in every case that
2 came before this Body, when there was an award in favor of the
3 injured man or his widow and dependents, this Court upheld it.
4 Mr. Justice Black devised this twilight zone. We also had
5 the local but maritime. The Court sought devices to get
6 around that, but we don't feel that the holding that injuries
7 on piers have been recognized as State compensable, have any
8 real bearing because they do not denude or do not comply --
9 do not deprive this Court of its right to legislate in a field
10 which, materially, is its own.

11 With reference to the legislative history an excerpt
12 was given from one of the reports. If you review the legisla-
13 tive history in detail, you will note that everyone connected
14 with this particular problem was interested in obtaining
15 full coverage. The Government representative, a man from the
16 U. S. Department of Labor Statistics, said he wanted the job
17 covered, not the man when the money was in a particular
18 position.

19 The representatives of the I.L.A., the Union involved,
20 similarly said it doesn't make any difference where he per-
21 forms his duties, whether it is on the ship or on the pier, the
22 union wanted all the men protected. Similarly, industry
23 wanted them all protected.

24 Gentlemen, I see that my time has run out. I urge
25 that the decision of the lower court be affirmed on the basis

1 of the arguments advanced here and those contained in our
2 briefs and also in the Opinion of former Chief Justice
3 Sobeloff.

4 MR. CHIEF JUSTICE BURGER: Thank you, Mr. O'Connor.

5 I think you have exhausted all of your time,
6 gentlemen. We thank you for your submissions and the case is
7 submitted.

8 (Whereupon, the argument in the above-entitled matter
9 was concluded at 1:30 o'clock p.m.)

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