

ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

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WASHINGTON, D.C. 20543

CAPTION: CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner V. NANCY J. SCHWALB AND WILLIAM McGLONE; and NORFOLK & WESTERN RAILWAY COMPANY, Petitioner V. ROBERT T. GOODE, JR.

CASE NO: 87-1979; 88-127

PLACE: WASHINGTON, D.C.

DATE: October 3, 1989

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CHESAPEAKE AND OHIO RAILWAY :

4 COMPANY, :

5 Petitioner, :

6 v. : No. 87-1979

7 NANCY J. SCHWALB AND WILLIAM :

8 McGLONE; :

9 and :

10 NORFOLK & WESTERN RAILWAY :

11 COMPANY, :

12 Petitioner, :

13 v. : No. 88-127

14 ROBERT T. GOODE, JR. :

15 - - - - - X

16 Washington, D.C.

17 Tuesday, October 3, 1989

18 The above-entitled matter came on for oral argument
19 before the Supreme Court of the United States at 11:51 o'clock
20 a.m.

21 APPEARANCES:

22 WILLIAM T. PRINCE, ESQ., Norfolk, Virginia; on behalf of the
23 Petitioners.

24 CHRISTINE A. DESAN-HUSSON, ESQ., Assistant to the
25 Solicitor General, Department of Justice, Washington,

1 D.C. (pro hac vice); on behalf of United States, as
2 amicus curiae, supporting Petitioners.

3 BRUCE A. WILCOX, Norfolk, Virginia; on behalf of Respondents.
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1 P R O C E E D I N G S

2 (11:51 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument next
4 in No. 87-1979, Chesapeake & Ohio Railway Company against
5 Nancy J. Schwalb, and No. 88-127, Norfolk & Western Railroad
6 Company v. Robert T. Goode.

7 Mr. Prince, you may proceed whenever you're ready.

8 ORAL ARGUMENTS OF WILLIAM T. PRINCE

9 ON BEHALF OF THE PETITIONERS

10 MR. PRINCE: Thank you. Mr. Chief Justice, and may
11 it please the Court:

12 The issue in this case is whether the workers who
13 maintain and repair ship-loading equipment at a waterfront
14 situs are engaged in longshoring operations and therefore are
15 covered by the Longshore and Harborworkers' Compensation Act.

16 The Supreme Court of Virginia says they're not. The
17 -- when the Supreme Court of Virginia was first faced with the
18 identical issue, there were very few federal reported cases
19 that gave any guidance at all, and that was in 1977 and the
20 case was Ralph White against the Norfolk & Western Railway
21 Company.

22 In this case, the three cases that are now before
23 the Court, the three employees, like Ralph White, were engaged
24 in the maintenance and repair of longshore equipment. Each
25 brought a -- a claim against the railway company under the

1 Federal Employers Liability Act claiming damages caused by
2 employer negligence.

3 In each of the cases, the railway company gained
4 dismissal on the ground that the employees were engaged in
5 longshoring operations and that their exclusive remedy was
6 under the Longshore Act.

7 That was the exact situation that prevailed in 1977
8 in the Ralph White case, and if I may, the Ralph White case is
9 important in this context.

10 Ralph White was an electrician who worked on the
11 piers in Norfolk at Lambert's Point. His work was the repair
12 and the maintenance of -- of the apparatus -- excuse me, the
13 electrical apparatus -- that was used to run to coal loading
14 machinery at Lambert's Point.

15 Not only did Ralph White repair the machinery that
16 kept the operation going, but he actually went on board ships
17 and, on some occasions, he actually worked on scaffolding
18 attached to the piers oh -- over the navigable waters.

19 The Supreme Court of Virginia held in 1977 that
20 Ralph White was not engaged in longshoring operations because
21 he did not manually handle cargo, or he did not actually
22 operate the machinery that kept the -- the operation going.

23 Now, that was in 1977. By mid-1980, nearly all of
24 the circuit court judges in Virginia who had the same, or
25 nearly the same issue come before them, had stopped following

1 the Supreme Court of Virginia in its Ralph White case and had
2 started following the decisions of this Court in Northeast
3 Terminal v. Caputo and Pfeiffer v. Ford, and especially the
4 opinions of the federal circuit courts of appeal, especially
5 the 4th Circuit, and the Benefits Review Board opinions which
6 were interpreting this Court's opinions in Caputo and
7 Pfeiffer.

8 The Court in Caputo said that Congress intended
9 expanded coverage, and in Pfeiffer you said that Congress
10 intended a simple, uniform standard of coverage.

11 By mid-1980, the federal circuits and the Benefits
12 Review Board had worked out, following Caputo and Ford, a --
13 essentially consistent interpretation that was uniform and
14 simple in factual situations like this.

15 But in 1988, when these three cases reached the
16 Supreme Court of Virginia, the court -- the Virginia court --
17 rejected the reasoning of the federal courts and rejected the
18 reasoning of the many decisions of the Benefits Review Board
19 and specifically reapplied its reasoning in the Ralph White
20 case, holding that these three employees were, in effect,
21 janitors and were not involved in longshoring operations.

22 Let me tell you for a few minutes about what these
23 three employees did. They were -- two were employed by the
24 C&O Railway, which is now CSX Transportation, and one was
25 employed by Norfolk & Western. Nancy Schwalb and William

1 McGlone worked for the coal loading facility at C&O at Newport
2 News, and they were engaged in cleaning the equipment that was
3 used in the coal loading operation.

4 The operation at both facilities is the picking up
5 of these coal cars, turning them upside down, dumping the coal
6 into the hoppers, from which they get onto belts and go onto
7 the ship loaders.

8 Now, the two employees working in Newport News had
9 the job of cleaning the -- what -- what are known as the
10 trunnion rollers. These -- these are rollers upon which these
11 dumpers move, and in the dumping operation coal unavoidably
12 falls and collects around those trunnion rollers and if that
13 coal is not cleaned away, then the operation will -- will come
14 to a stop. They also were involved in cleaning coal that had
15 come off the belts and were -- was accumulating under the
16 belts.

17 Now the two circuit court Judges -- the two Virginia
18 circuit court judges -- who heard the jurisdictional evidence
19 both found that the work that Nancy Schwalb and William
20 McGlone were doing was essential to the coal loading
21 operation, and that if it was not done, that operation would
22 come to a halt.

23 Now, the Supreme Court of Virginia in its decision
24 in this case actually accepts that finding and stated in its
25 opinion that, if the work was not done, the dumpers would

1 malfunction and the conveyer belts would become damaged and
2 the work would be interfered with.

3 Nevertheless, the Supreme Court, accepting the fact
4 that this work was essential and would cause the -- the coal
5 loading to stop if it were not done, said that it was
6 construing this Court's opinion in the Caputo case and that
7 this Court in the Caputo case was saying that if an employee
8 did not actually handle cargo, then he was not engaged in
9 maritime employment or longshoring operations.

10 QUESTION: We'll resume there at 1:00 o'clock, Mr.
11 Prince.

12 (Whereupon, at 12:00 noon, the Court was recessed,
13 to reconvene at 1:00 p.m., this same day.)

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1 AFTERNOON SESSION

2 (12:59 p.m.)

3 QUESTION: Mr. Prince, you may continue your
4 argument.

5 MR. PRINCE: Thank you.

6 Your Honors, I was saying just before the luncheon
7 recess that the Supreme Court of Virginia had acknowledged in
8 its opinion that the coal loading process would come to a stop
9 if the work was not done that Schwalb and McGlone were doing.
10 And then the Supreme Court of Virginia said that it was
11 construing your opinion in Caputo and said that that opinion
12 held that employees who were not actually handling cargo were
13 not involved in the essential elements of longshoring
14 operations and, therefore, these employers were not covered by
15 the Act.

16 It is also noteworthy that in the Caputo case, you
17 said that an employee who was not involved in the ongoing
18 process of loading was not covered. The Virginia Supreme
19 Court specifically stated that it would not adopt an ongoing
20 process test.

21 The third employee, the one whose case --

22 QUESTION: This is not the test that you are
23 presenting?

24 MR. PRINCE: No, Your Honor. Actually, I think the
25 -- what you have said in the Pfeiffer and Ford cases, that an

1 employee who is involved in an integral part of the loading
2 process is covered, also, the term has been used, "essential
3 elements." So any employee who plays even a small part of an
4 integral part is covered, and these employees are all engaged
5 in the repair and maintenance of equipment which would come to
6 a halt if not done.

7 QUESTION: An integral part of what, Mr. Prince?

8 MR. PRINCE: An integral part of the loading
9 operation -- of the longshoring. What we are looking at is
10 longshoring operations. The loading of coal in this instance,
11 or the movement of cargo from land transportation to ship.

12 QUESTION: This would be so even though, parttime,
13 he swept out the office?

14 MR. PRINCE: Even if, parttime, they swept out the
15 office. You have said that in your earlier cases, that if an
16 employee is covered for some part of his work, or her work,
17 then that employee is covered for all of their work.

18 QUESTION: Even though, in this instance, it were
19 limited to cleaning the -- the fallen coal? Where you told us
20 that --

21 MR. PRINCE: If it was limited to cleaning out the
22 fallen coal, because it was a -- it was --

23 QUESTION: That would be enough to bring them within
24 coverage?

25 MR. PRINCE: That would be enough, because it was a

1 factual finding that, if that coal was not cleaned out from
2 under the conveyer belts, the conveyer belts would be damaged
3 and would interfere with the loading so it was essential to
4 get that coal cleaned, and therefore, those employees are
5 involved in the longshoring operations.

6 QUESTION: And this was all they did?

7 MR. PRINCE: No, that was not all they did, Your
8 Honor.

9 QUESTION: What else did they do?

10 MR. PRINCE: One of the other employees -- well,
11 they -- one of the employees at the time of injury -- and of
12 course the time of injury is not the test, but one of the
13 employees, Mrs. Schwalb, at the time of injury, was cleaning
14 out coal from the trunnion rollers, which was necessary to
15 allow the dumpers to operate.

16 QUESTION: Sure. Sure. But did they have any other
17 duties, other than -- other than this integral part of the
18 loading process?

19 MR. PRINCE: They did some amount of cleaning of
20 bathrooms and of offices.

21 QUESTION: But the injury was -- all of them were in
22 the process of performing their loading duties?

23 MR. PRINCE: That -- that is correct, Your Honor.

24 QUESTION: Did they do any repair work on damaged
25 equipment or anything?

1 MR. PRINCE: Not Schwalb and McGlone, but the third
2 employee, Robert Goode, actually worked up on the dumper. And
3 at the time of his injury --

4 In fact, the circuit judge who heard the
5 jurisdictional evidence in that case found that the
6 overwhelming amount of his time was -- was done in the
7 maintenance of ship-loading equipment. He was a pier
8 machinist.

9 Now, at the time of his injury, he was repairing a
10 retarder, which is a piece of equipment up on the dumper that
11 is used to bring the cars to a stop when they get to the
12 position where they are to be dumped, and the repairs that he
13 did in fact brought a stop to the operation.

14 Repairs had to be done -- the repairs could not be
15 done while the coal was being loaded and the work stopped.

16 QUESTION: Incidentally, did any of the three
17 employees bring a -- a Federal Employer Liability Act suit?

18 MR. PRINCE: Your Honor, they all brought one. That
19 is how this came on. Each one of them brought Federal
20 Employer Liability Act claims, and the railway company in each
21 case moved to dismiss on the ground that the Court did not
22 have jurisdiction because the exclusive remedy was under the
23 Longshore Act.

24 QUESTION: Whereas damages, I gather, under the FELA
25 are likely to be greater than the compensation under the

1 Longshore Act?

2 MR. PRINCE: They would most likely be greater. It
3 -- it's the difference between a negligence action and a
4 compensation remedy.

5 QUESTION: Mr. Prince, the limits of this so-called
6 functional relationship test that you propose aren't entirely
7 clear.

8 In a sense, all employees at the maritime situs
9 might be said to contribute to the loading process.

10 MR. PRINCE: That is true, Your Honor.

11 QUESTION: It has -- the test you propose has the
12 disadvantage of forcing the courts, in a case-by-case basis,
13 to determine how essential and how integral the work is to the
14 loading process.

15 MR. PRINCE: Your Honor, I don't -- I don't think
16 it's going to be a test of how essential. I think the factual
17 determination is, is it essential, or is it an integral part
18 of the loading?

19 There comes a point where land transportation ends
20 and everything thereafter is the movement of the cargo toward
21 the ship and onto the ship. All of that effort -- the
22 movement of the coal once land transportation ends -- is an
23 integral part.

24 As -- as this Court said in the Ford case, anyone
25 who is involved in a portion of the work is involved in an

1 integral part of it, and in -- and in fact, there would be
2 probably no worker who would be involved in all of it, not in
3 -- in today's modernization of this equipment. Everyone is
4 involved only in a part of it.

5 QUESTION: What about a machinist --

6 MR. PRINCE: So I don't think, Your Honor --

7 QUESTION: Mr. Prince, what about a machinist who --
8 who works for the railroad only in downtown Norfolk who --
9 who repairs, among other things, one of these trunnions that's
10 essential for the movement of coal?

11 QUESTION: Under the rulings of the Pfeiffer and
12 Caputo, if he spends part of his time in repairing ship-
13 loading equipment, he would be covered all the time.

14 QUESTION: Yes, but this is -- it would not satisfy
15 the situs requirement.

16 MR. PRINCE: He wouldn't -- oh, I beg your pardon.

17 QUESTION: I said in downtown.

18 MR. PRINCE: He would not be on the situs. Right,
19 he would not be on the situs. He would not meet the situs --

20 QUESTION: So, you add to your test not just that it
21 be essential, or an integral part of the loading process, but
22 that it be done on the site?

23 MR. PRINCE: On the situs, and there was no question
24 in this case that all three employees were on -- on a
25 statutory situs at the time. So, yes, they have got to be on

1 the situs, and the employer --

2 QUESTION: Yes, but that's just on the situs at the
3 time of the injury, isn't it?

4 MR. PRINCE: At the time of the injury.

5 QUESTION: So, this man that Justice Scalia talks
6 about worked downtown 364 days out of the year but came down
7 on November 1st and had an accident, he'd be covered?

8 MR. PRINCE: That's a hard question.

9 QUESTION: That's your position though, is it not?

10 MR. PRINCE: I think there could be, as the -- I
11 think it's the 9th Circuit, in one case referred to an
12 employee's presence on the waterfront, or on the situs, as
13 episodic, and I guess there could be an episodic presence in
14 the situs that would exclude that particular worker.

15 QUESTION: Well -- what is episodic, once a week?

16 MR. PRINCE: No -- rarely. Extremely rare. One of
17 the circuits found --

18 QUESTION: How about once a month?

19 MR. PRINCE: That an employee who spent two and a
20 half percent of his time on the situs was covered.

21 QUESTION: That -- that is your position? If he
22 spends -- spends two and a half percent of his time on the
23 situs, he's covered?

24 MR. PRINCE: That would be -- yes. I think --
25 excuse me.

1 QUESTION: What about a timekeeper working on the
2 situs?

3 MR. PRINCE: If a timekeeper were merely an office
4 worker he would be excluded by statute, but if he were out in
5 the area where the work was being done, if he was involved in
6 -- in getting the cargo moved, he would be covered.

7 The 1984 amendment specifically excluded office
8 workers. And I might say that there was an amendment offered
9 in 1981 that would exclude workers who were engaged in
10 repairing and maintaining ship-loading equipment and that
11 amendment was dropped before the 1984 amendments were enacted.

12 Your Honor, if I may, I'd like to reserve the
13 remainder of my time.

14 QUESTION: Very well, Mr. Prince. Ms. Desan-Husson?
15 Am I pronouncing your name correctly?

16 MS. DESAN-HUSSON: Desan-Husson.

17 QUESTION: Desan-Husson. Very well, you may
18 proceed.

19 ORAL ARGUMENT AS AMICUS CURIAE

20 SUPPORTING PETITIONERS

21 MS. DESAN-HUSSON: Thank you, Mr. Chief Justice, and
22 may it please the Court:

23 These cases require only that this Court confirm the
24 integral part standard it has already establish and confirm
25 that the standard applies to cover the employees here.

1 The standard is dictated both by the language and by
2 the objectives of the Longshore Act. The Department of Labor
3 has consistently adopted this interpretation of the act. The
4 courts of appeals have uniformly applied the same test.

5 The result has been reliable compensation for all
6 injuries, no matter their size, received by workers loading
7 cargo on the waterfront.

8 I would like to review how both the language and the
9 objectives of the Longshore Act direct an integral part
10 standard, but first, to clarify. The integral part standard
11 is a broad standard based on the types of work that Congress
12 specified to be covered by the Longshore Act.

13 It is capable of disposing of the majority of
14 status-based disputes that come up under the act. Under it, a
15 worker is covered if his work is necessary to keep a loading
16 operation going.

17 Justice O'Connor, you asked about what principles
18 would limit the application of the test. Foremost, the test -
19 - a worker must be doing that is essential to the mechanics of
20 loading. So, if there is a chef in a cafeteria on a situs,
21 the chef would not be covered under this act. That might be
22 convenient for the workers, but it's not necessary.

23 Secondly, just in a pragmatic sense, the 1984
24 amendments act as an outer boundary. It is clear -- the
25 courts have a clear signal that workers on those categories

1 are too tenuously related to the work of loading to be covered
2 by the act.

3 As Justice Scalia pointed out though, the -- the
4 function of the status provision is to select for a type of
5 work, and some types of work -- the logic of the status
6 provision includes workers who are outside the geographical
7 location of the situs test.

8 So that someone who is mining steel, or mining metal
9 that will be used in the ship-loading equipment, would be
10 covered by the logic of the test, but the fact is that that
11 person is never going to be on the situs.

12 That is, the situs and the status test work in
13 tandem to select sort of the intersection of two groups of
14 workers who are covered by the act.

15 And -- finally, I would -- I would say that the
16 status provision does select most workers on the waterfront,
17 and that is the point of the Longshore Act, is to cover those
18 workers.

19 QUESTION: What about the problem of the occasional
20 visit to the situs and the injury occurring there?

21 MS. DESAN-HUSSON: It would depend on how often the
22 worker was on the situs. If a worker is regularly sent there
23 once a week or once a month, that worker would be covered by
24 the Longshore Act, if he then goes and does work on the situs
25 that is essential for the loading process.

1 I think that we wouldn't push a position that
2 someone who is, fortuitously, once a year or once every five
3 years, on the situs, would be covered. But if it's a regular
4 assignment, so that they regularly do go to the situs, they
5 would be covered.

6 The language of the status provision indicates in
7 two ways that it was meant to cut broadly and functionally.

8 QUESTION: What is the language of the situs
9 provision?

10 MS. DESAN-HUSSON: The language of the situs
11 provision is at 903(a) and it acts to cover all workers who
12 are injured on navigable waters and then --

13 QUESTION: So it's very nice of you to say that you
14 wouldn't press that -- that argument, but how could you avoid
15 pressing that argument?

16 MS. DESAN-HUSSON: I'm sorry, which?

17 QUESTION: In light of the fact that all the situs
18 provision says is, if you're injured there. I mean, it's --
19 it's nice of you to say well, we wouldn't press it if he's
20 just there and happens to be injured there, but that's how it
21 reads, isn't it?

22 MS. DESAN-HUSSON: No. You would have to be injured
23 on the situs and you would have to be performing a -- a job
24 that was integral to the loading.

25 QUESTION: Well, that's right. But that's what

1 we're talking about. We're talking about somebody who -- who
2 repairs trunnions and once in two years he happens to go there
3 to deliver the trunnion he's repaired and gets injured, and
4 you're saying well, we wouldn't press the applicability of the
5 situs provision. Well, it's not -- it's up to you to press
6 it. It seems to me the language of it would say it applies,
7 wouldn't it?

8 MS. DESAN-HUSSON: What I meant -- the case that I
9 thought you were posing was, somebody who repairs the trunnion
10 rollers in downtown Norfolk or somewhere else, or who mines
11 the metal, if that person fortuitously comes onto a situs
12 provision and to the situs--

13 QUESTION: And gets injured.

14 MS. DESAN-HUSSON: They would not be covered.

15 QUESTION: Why not?

16 MS. DESAN-HUSSON: But it -- it's the work -- the
17 work has to be going on, on the situs. The worker must be
18 doing work that's essential to the loading process on the
19 situs. I think the language of the status provision supports
20 this.

21 Did I -- did I make myself clear?

22 QUESTION: No, and I think you're disagreeing with
23 Mr. Prince, if -- if I understand you correctly. I think he
24 would say that even a worker who repairs the trunnions down
25 town, if he comes up and, you know, delivers them once a month

1 and gets injured --

2 MS. DESAN-HUSSON: If -- if the delivery -- I think
3 that that worker would qualify in the sense that he was
4 delivering -- his delivery was a regular job on the situs, he
5 would qualify.

6 QUESTION: The issue is whether he's an employee
7 within the meaning of the statute, isn't it?

8 QUESTION: The status test is whether he's an
9 employee.

10 MS. DESAN-HUSSON: That's right.

11 QUESTION: And he's an employee, if he does it -- if
12 he does work essential to the loading operation downtown,
13 isn't he? He has to be injured on the situs, but does the
14 situs have anything to do with whether he's an employee or
15 not?

16 MS. DESAN-HUSSON: My understanding of the -- of the
17 situs provision is that it -- it would select for employees
18 who were working who met the status provision.

19 QUESTION: Well, I suppose it has to do with whether
20 he's a maritime employee?

21 QUESTION: That's right. And then --

22 MS. DESAN-HUSSON: Well, that's right. I mean, he
23 has to work for an employer who is -- who --

24 QUESTION: Well, work for the railroad. He's --
25 that's an employer. The term "employee" means any person

1 engaged in maritime employment, including various things, and
2 the question is whether repairing and maintaining loading
3 equipment is maritime employment, and the answer, according to
4 you, is yes.

5 MS. DESAN-HUSSON: Yes, that's right.

6 QUESTION: Because it's essential. It seems to me
7 if you do it in New York it's still maritime employment, and
8 then you have to be -- you have to be injured on -- on the
9 situs.

10 MS. DESAN-HUSSON: I think that --

11 QUESTION: I mean, what's so horrible about that? I
12 mean, just -- just accept it.

13 MS. DESAN-HUSSON: Well, I --I'm willing to accept
14 that case. I'm willing to accept that case. I --
15 I wasn't --

16 QUESTION: Isn't that the only consistent position
17 you can take? If you define the term "maritime employment" by
18 the character of the work the person does, and you say the
19 character of work maintaining and repairing equipment is
20 maritime employment, it doesn't matter where he does it, it's
21 maritime employment, and the -- the situs requirement merely
22 is a requirement that says the injury must occur on a situs.
23 It doesn't have anything to do with whether it's maritime
24 employment or not.

25 MS. DESAN-HUSSON: I would accept that -- that

1 position. I think that it -- it's not a situation that's
2 likely to occur very often, and the great majority of people
3 are going to be on the situs.

4 If I could move to the language of the provision,
5 Congress specified that longshoring was covered, but it didn't
6 stop there. It added that those engaged in longshoring
7 operations were also covered.

8 If longshoremen load and they're covered by the word
9 "longshoremen," then there would be no point to the phrase,
10 "longshoring operations." That phrase must refer to a larger
11 group, and I would suggest the natural reading is maintenance
12 and repair people.

13 QUESTION: And that's a natural way you would
14 describe maintenance and repair, too, I suppose.

15 MS. DESAN-HUSSON: I would. I would.

16 QUESTION: If you wanted to deliberately cover
17 maintenance and repair people, you don't think you might
18 mention them?

19 MS. DESAN-HUSSON: Well, I think there are a number
20 of -- of categories that it would be hard to specify in the
21 act.

22 The second feature of the language that I think is
23 worth noting is that Congress defined coverage by establish --
24 establishing as a universe of workers that were covered all
25 those that were engaged in maritime employment.

1 That is, it used a term which, as the Court made
2 clear in Perini, had been given a broad meaning before 1972.
3 Then, making explicit that the list was not exhaustive, it
4 specified the named categories of workers who were engaged in
5 maritime employment -- that is, longshorers, et cetera. It
6 then repeated the functions of those workers in the situs
7 provision.

8 Attention to the objectives of the statute makes it
9 even clearer that Congress wrote broadly and functionally when
10 it wrote the status provision.

11 It wrote functionally because it was responding --
12 it was reforming a system in which injury had depended only on
13 the location -- in which recovery had depended only on the
14 location of an injury.

15 It wrote broadly because it did not want the new
16 line to become as arbitrary as the old line. It needed a
17 flexible line to make account -- make allowance for new
18 technology.

19 In this case, the loading operation is almost wholly
20 automated, so that if technology reduces manual functions, a
21 line that would -- would cover longshorers would have to cover
22 those who are doing maintenance and repair, if it wasn't to be
23 quite arbitrary and only cover the people who flipped the
24 switch as opposed to the people who repaired the switch.

25 Second, Congress wanted a simple, rational standard

1 that would cover all who were on the waterfront. It therefore
2 declined to import distinctions like the point of rest that
3 the Court rejected in Pfeiffer and in Northeast Marine
4 Terminal.

5 A rational coverage of all those engaged in
6 longshoring operations would cover those who were working with
7 the same equipment and were exposed to the same hazards, and
8 those who should -- should merit the same compensation whether
9 they are repairing the equipment or operating it.

10 QUESTION: Thank you, Miss Desan-Husson.

11 QUESTION: Mr. Wilcox, we'll hear from you now.

12 ORAL ARGUMENT OF BRUCE A. WILCOX

13 ON BEHALF OF RESPONDENT

14 MR. WILCOX: Mr. Chief Justice, may it please the
15 Court:

16 We appear before you this afternoon on behalf of
17 Nancy Schwalb, William McGlone and Robert Goode, three
18 railroad workers who were injured while they were on the job.
19 We do not agree that these workers were engaged in maritime
20 employment.

21 The issue before the Court is whether these three
22 railroad employees are covered for their work-related injuries
23 by the Federal Employers' Liability Act, which was passed in
24 1908 to benefit railroad workers, or by the Longshore and
25 Harborworkers' Compensation Act, which was originally enacted

1 in 1927 to provide benefits for longshore and harborworkers
2 not covered by state workers' compensation statutes.

3 We suggest that a review of the legislative history
4 of the Longshore Act and the amendments to that act in 1972,
5 together with a review of this Court's decisions since the
6 enactment of the 1972 amendments to the Longshore Act, will
7 cause you to decide that these railroad workers should be
8 treated as railroad workers and not as longshore and
9 harborworkers.

10 Your decision here today will not affect longshore
11 and harborworkers. It will only apply to a limited number of
12 railroad workers.

13 Nancy -- Nancy Schwalb and William McGlone held jobs
14 as laborers at the Chesapeake & Ohio Railway Company. They
15 performed housekeeping and janitorial services in offices, in
16 shops, in bathrooms, locker rooms and at other places situated
17 on the railroad's pier and adjacent property in Newport News,
18 Virginia.

19 Schwalb was hurt in a fall as she was walking along
20 a catwalk. William McGlone was hurt while clearing away coal
21 beneath a conveyor belt.

22 Robert Goode is employed by the Norfolk & Western
23 Railway Company as a machinist. A machinist is railroad
24 language for a mechanic. He repairs railroad equipment. On
25 the day he was hurt, he was assigned to inspect and repair if

1 necessary a retarder on the southside dumper at the Lambert
2 Point Yard.

3 As mentioned earlier, a retarder is a breaking
4 system that stops railroad cars. Retarders are common and
5 located throughout the railroad system. The retarder is
6 attached to a larger piece of railroad equipment called a
7 dumper.

8 Railroad cars are moved onto the dumper, held in
9 place by the retarders, which are the breaking system, and
10 then they are rotated to unload the railroad cars by turning
11 them upside down.

12 QUESTION: On your approach, then, would any of the
13 railroad's employees engaged in this operation be covered by
14 the Longshoreman's Act?

15 MR. WILCOX: Not those that were engaged in these
16 functions here. Now, they conceivably could be --

17 QUESTION: That isn't what I asked you. That isn't
18 what I asked you. Any others that were moving this coal from
19 the car to the ship. Were any of them? Would any of them be
20 covered?

21 MR. WILCOX: Your Honor, it depends on where you
22 draw the line. We would suggest that these railroad employees
23 were, and especially Bobby Goode, was involved in unloading a
24 railroad car, which is -- he could be doing that at any
25 location -- or, he was repairing a piece of equipment that

1 unloads a railroad car, and he could be doing that at any
2 location throughout the railroad system where they have
3 retarders.

4 QUESTION: He unloaded it into a ship, didn't he?

5 MR. WILCOX: Well, he unloaded it onto a system of
6 conveyer belts, which we would suggest, and we argued in our
7 brief, that those conveyer belts, once the coal is unloaded
8 onto the belt, they could take the coal to a power plant or a
9 steel mill or any other type of facility that uses a lot of
10 coal.

11 QUESTION: But they weren't doing it here. They
12 were taking it to a ship.

13 MR. WILCOX: Eventually it got to a ship. Yes, sir,
14 it did.

15 QUESTION: It wasn't eventually; it was the next
16 stop. Right?

17 MR. WILCOX: It had to go through a system, sir,
18 where it -- the direction of the coal actually changed, and up
19 until that time it's our position that he could have been
20 involved in just merely unloading a railroad car.

21 QUESTION: Of course, you could say the same thing
22 about the people that were operating the conveyer belt, too.
23 So those people wouldn't be included, right? Because the
24 conveyer belt could have been going to a power plant instead
25 of to a ship, right?

1 MR. WILCOX: Again, it depends on where the conveyer
2 belt is located and where the --

3 QUESTION: Well, we know where it was located. But
4 it could have been going into a power plant, so you could make
5 the same argument. So all of the employees, not only who
6 repair the conveyer belt, but even those who operated the
7 conveyer belt shouldn't be covered, because it could have been
8 going somewhere else.

9 MR. WILCOX: It goes to the question of what is the
10 situs, what is the location here, which is part of the
11 statute.

12 QUESTION: Right. I know what it goes to, but
13 what's your answer about the people who are operating the
14 conveyer belt?

15 MR. WILCOX: I would have to maintain the same
16 thing. It could be going somewhere else, yes, sir.

17 QUESTION: So that leaves you nobody. Who -- who is
18 covered? I mean, do you have to be standing on the ship?

19 MR. WILCOX: Well, originally, that's what the act
20 said. You had to be out over the water. Then it was amended
21 to include other harbor and longshore workers that were on the
22 landward side by the amendments in 1972.

23 But you do have to focus on what these workers were
24 doing at the time they were injured, and what their occupation
25 is.

1 QUESTION: Does it just turn on who employed them,
2 or not?

3 MR. WILCOX: If it did, we wouldn't be here. They'd
4 be covered by the Federal Employers Liability Act.

5 QUESTION: So you're saying none of the railroad
6 employees moving this coal to the ship would be covered by the
7 Longshoreman's Act?

8 MR. WILCOX: No, sir. Once -- once it gets into the
9 actual loading process --

10 QUESTION: Tell me one that would be covered.

11 MR. WILCOX: Well, if for example -- and I know
12 there's a -- there's a federal case law, the Harmon case. He
13 was a railroad employee who was working in a funnel system
14 that actually down-loaded the cargo right into the hold of the
15 ship.

16 QUESTION: Wasn't this movement from -- from the
17 railroad car to the ship continuous, when the conveyer belt
18 ran from the car to the ship?

19 MR. WILCOX: It did in the sense that it went --

20 QUESTION: It didn't stop anywhere. It just went.

21 MR. WILCOX: That's right, but it --

22 QUESTION: It's sort of like that chute that you
23 just mentioned.

24 MR. WILCOX: Well, if you follow that, if it -- the
25 railroad then could make the same argument, Your Honor. If it

1 took the -- from the point a railroad car was loaded at the
2 wine -- mines in West Virginia and went all the way, without
3 interruption, and without stopping, and was then loaded onto a
4 ship, the same argument would apply.

5 QUESTION: Well, I suppose then -- suppose the
6 railroad said we don't want to do this with our own employees.
7 We're going to hire a longshoreman to move this coal. We'll
8 deliver the cars to the site and the longshoremen run the
9 conveyer, furnish the conveyer belt, run it under the ship.

10 MR. WILCOX: Your Honor, my understanding is that,
11 in fact, is what's happened. Most of this has been contracted
12 out, in that area.

13 QUESTION: Would they -- would they be covered under
14 the Longshoremen's Act?

15 MR. WILCOX: Again, you have to focus on what
16 they're doing. What is their job? And I? --

17 QUESTION: I know. I've just told you what it was.
18 They arrive at -- the cars arrive at the yard, on the
19 railroad, at the siding, and the longshoremen move this --
20 stevedoring outfit just moves the coal onto the ship, by the
21 same conveyer belts. Would they be covered?

22 MR. WILCOX: They would be covered from the point
23 that it's actually being loaded onto the ships. I guess my
24 distinction is -- is not as clear as it could be, and it
25 points out the problems of the -- where the coverage starts

1 and stops.

2 QUESTION: Well then, if you have doubts about that,
3 why, I don't know why you don't have the same doubts about the
4 railroad employees. I just say the railroad company hires a
5 stevedoring company to move this coal from ship -- from car to
6 ship, just exactly the way it was being moved here.

7 MR. WILCOX: I understand your question, Your Honor,
8 and it depends -- for example, in Robert Goode's case you
9 would have to examine what those individuals were working on
10 at the time.

11 If they are "longshoremen," that would be because
12 they maybe belong to a longshore union or something, but they
13 may be required to work on railroading equipment, and that's
14 the problem we have here today. The -- the --in Goode's case,
15 he was working on railroading equipment.

16 Now, it's a matter of definition. Was he working on
17 a piece of equipment that is involved in the essential
18 elements of loading a ship, or is he involved in working on a
19 piece of equipment that is -- in -- part of the essential
20 elements of unloading a railroad car?

21 It does become a question of definition, and you
22 have to look and see what -- what his actual occupation was.

23 QUESTION: Mr. Wilcox, do you recognize that most of
24 the federal courts considering these questions have adopted
25 the test that the Solicitor General's Office suggests, rather

1 than the one adopted by the Supreme Court of Virginia?

2 MR. WILCOX: That's true to some extent, but I
3 believe that if the Court reviews the cases -- for example, in
4 the Dravo case, which is a 3rd Circuit case, it's very similar
5 to the situation for McGlone and Schwalb.

6 That involved a -- a laborer, a person who was
7 involved in clean-up activities similar to what Schwalb and
8 McGlone were doing, and in that case, 3rd Circuit, they have -
9 - they have indicated that the Longshore Harborworkers
10 Compensation Act does not apply. They haven't extended it.
11 It's not uniform as to where all the circuits stand on this
12 case.

13 The Virginia Supreme Court in the White decision
14 relied on the Weyerhauser case, which was a 9th Circuit case,
15 which has not been overruled, and that, again, limits the
16 expansion of the longshore coverage.

17 If we have to examine the legislative intent of the
18 Congress when the act was amended in 1972. This Court has
19 reviewed that intent, both in the Caputo decision and later in
20 the Perini decision, which was Director v. -- Office of
21 Workers Compensation v. Perini.

22 QUESTION: Well, Perini had language in it rejecting
23 the test adopted by the Virginia Supreme Court, didn't it?

24 MR. WILCOX: It may have, but it did review the
25 purposes of expansion, or the amendments, and as Your Honor

1 well recalls, having written the opinion, the purposes were to
2 expand coverage, to extend it to longshoring workers and it
3 recognized the changing nature of the industry.

4 Because of containerization a lot of the work had
5 moved from the ship and onto the land, and there --but there
6 were three main groups that were interested in amending that
7 Longshore Act, and this was indicated first in the Caputo
8 decision and then later reexamined in the Perini case.

9 They involved three groups. The first of the groups
10 were the ship owners, who did not want to be sued on a
11 seaworthiness doctrine by the longshore workers. The second
12 were the employers of the longshore workers, who had -- under
13 a judicially created doctrine had to indemnify the ship
14 owners, and the third group were the workers themselves, who
15 wanted to have an improvement in their benefits.

16 And the problem here was the benefits under the
17 federal statute were ordinarily superior to the benefits under
18 the state workers' compensation statutes, and one of the
19 purposes for amending the act and expanding the coverage was
20 to permit these longshore and harborworkers to enjoy improved
21 benefits under the federal statute.

22 Now, in the case we have here, we think it's
23 important to note that all three of these workers are railroad
24 workers. None of them filed an action to be brought within
25 the coverage of the Longshore and Harborworkers Compensation

1 Act. This is -- in all the other cases this Court has
2 reviewed, it was individuals who filed for their claims under
3 the Longshore Act --

4 QUESTION: Are you suggesting that its optional?

5 MR. WILCOX: No, I'm not suggesting that it's
6 optional.

7 QUESTION: Well, why is that relevant, that none of
8 them filed claims?

9 MR. WILCOX: Well, because if the purpose for
10 amending the act was to improve their benefits, these workers
11 here, these railroad workers, all -- already have a perfectly
12 suitable source of compensation through the Federal Employers
13 Liability Act.

14 It's not optional. I mean, they have a method. For
15 the last 80 years, they've had a way to file for claims when
16 they're hurt on the job, and that's through the FELA. And we
17 don't suggest that it's optional, but they already have an
18 adequate remedy that's provided to them through the Federal
19 Employers Liability Act.

20 QUESTION: So, we should disregard the language of
21 the statute and go back and see whether the sponsors, or so to
22 speak, the lobbyists, have this in mind?

23 MR. WILCOX: Well, as -- as the Court's well aware
24 by the questions here this afternoon, the question of coverage
25 and who it applies to and who it doesn't apply to is --

1 provokes lots of questions, and we would suggest that the
2 intent of the Congress was to expand the coverage to benefit
3 workers. And it was never intended to expand it to apply to
4 railroad workers because, if one of the reasons to amend the
5 act was to improve benefits, that certainly isn't the case
6 here today, where the railroad --QUESTION: How about the
7 fellow you spoke about who was actually pouring coal into the
8 hold of the ship and was a rail -- railroad worker? I thought
9 you said that was the case of a railroad worker who would be
10 covered?

11 MR. WILCOX: Yes sir, I did, and if you look at what
12 he's actually doing at the time he's hurt, he's loading a
13 ship, and that's -- fits within the definition of the status
14 test.

15 QUESTION: So all railroad workers aren't excluded,
16 even though any of them could sue under the FELA?

17 MR. WILCOX: Yes sir, that's correct, and the Court
18 here this afternoon could make a policy decision that there's
19 already an act sufficient and adequate for railroad workers
20 and rule as -- draw an arbitrary bright line as to who the act
21 applies to and who it doesn't apply to.

22 QUESTION: We -- we can make that policy decision?
23 I thought we were trying to interpret a statute?

24 MR. WILCOX: Yes, sir. But there was a previous
25 decision of this Court that drew such a bright line, and that

1 was in Southern Pacific v. Jensen way back in 1917.

2 QUESTION: You're not suggesting we repeat that, are
3 you?

4 MR. WILCOX: No, I'm not.

5 (Laughter)

6 QUESTION: Mr. Wilcox, we're dealing with a statute
7 that feels it necessary to specifically except from the term
8 "employee" under the act, individuals who are, one, employed
9 by suppliers, transporters or vendors; two, are temporarily
10 doing business; and, three, are not engaged in work normally
11 performed by employees of that employer under this chapter,
12 and -- and a lot of other specific exceptions, which would be
13 unnecessary if your interpretation of the act were the
14 interpretation that Congress accepted and intended.

15 For instance, the exception for individuals employed
16 exclusively to perform office, clerical, secretarial, security
17 or data processing work. If your interpretation were
18 accepted, you wouldn't need that exception. It'd --it'd be a
19 meaningless, senseless exception.

20 MR. WILCOX: Although we didn't -- sir, we didn't
21 mention in our brief, but if you look at the specific language
22 in the act in 33 U.S.C.A. Section 902(3), which contains what
23 an employee's --

24 QUESTION: What page? Are you reading from a page
25 of the record?

1 MR. WILCOX: I'm -- from the joint appendix on page
2 47.

3 QUESTION: What page?

4 MR. WILCOX: 47, Your Honor.

5 QUESTION: Forty-seven.

6 MR. WILCOX: It just -- it occurred to me, we didn't
7 mention it in our brief, but there are specific exclusions
8 from the coverage and in Section 902(3)(D), individuals who
9 are one, employed -- are employed by suppliers, transporters
10 or vendors -- now, is a railroad a transporter? They may be
11 specifically excluded by the language of the act.

12 QUESTION: Well, it has to meet the other two -- the
13 other requirements.

14 MR. WILCOX: Yes, sir. Yes, sir.

15 QUESTION: Two, are temporarily doing business on
16 the premises, and three, are not engaged in work normally
17 performed by employees of that employer under this chapter,
18 and here, this is work normally performed by employees of that
19 employer.

20 MR. WILCOX: There -- there's a further requirement
21 that they have to be subject to the coverage of some state
22 workers' compensation law.

23 But the point is that the -- if the intention of
24 Congress was to provide benefits or to exclude others where it
25 would improve their benefits when they amended the act, it

1 certainly doesn't accomplish that purpose here, today.

2 QUESTION: Sometimes the laws that Congress writes
3 don't completely do what you hope they'll do, but the law is
4 there. I mean --

5 QUESTION: Mr. Wilcox?

6 MR. WILCOX: Yes, sir?

7 QUESTION: If there's coverage under the Longshore
8 Act, that's the only remedy, isn't it?

9 MR. WILCOX: Yes, sir. It does have language that
10 says --

11 QUESTION: So your clients could not have causes of
12 action both under the FELA and the Longshore Act.

13 MR. WILCOX: No, they cannot. The Longshore Act
14 contains language that it is the exclusive remedy if they are
15 covered by the act. We just simply argue that they're not
16 covered by the act.

17 QUESTION: Mr. Wilcox, do you think we owe any
18 deference to the interpretation of the act by the Department
19 of Labor that's charged with administering it?

20 MR. WILCOX: Well, certainly we ask the Court to
21 consider what they've put forward here this afternoon, but we
22 essentially argue that they're wrong, that there was never an
23 intention to cover these types of employees, and if one of the
24 goals is to clarify where coverage starts and where coverage
25 ends, it's -- with the language of the statute as we have it,

1 it's not going to -- it's always going to be taken on a case-
2 by-case basis. You can't -- you don't fall within it
3 necessarily or not. You have to examine what the individual
4 worker was doing when they got hurt.

5 In the Pfeiffer case, decided in 1969, the Court
6 here again reviewed the legislative history of this area of
7 the law and noted that the seven -- the 1972 amendments to the
8 Longshore Act added a second test. Well, that's the status
9 test.

10 In that opinion, it was noted that an earlier
11 decision, the Caputo decision, had specifically rejected a
12 point of rest theory. We suggest that what the railroad is
13 arguing here today is asking the Court to readopt a point of
14 rest theory.

15 The point of rest theory was based on cargo being
16 off-loaded from a ship. It came to rest at some point where
17 it was no longer moving on the shore, and that was where the
18 longshoring activity stopped and some other activity began.
19 In the Caputo decision, that theory was specifically rejected.

20 We suggest that the railroad here today is asking
21 the Court to readopt a similar type of theory, only in the
22 converse. That is, the coal is mined in the mountains and is
23 brought by the railroad car down -- cars down to the railroad
24 yard in Norfolk, where the railroad cars stop, and then at
25 some point the cars are then assembled for moving onto the

1 ships.

2 Now, we would suggest that that -- if that is where
3 the longshoring activity starts, that would be readopting a
4 theory that has been specifically been rejected here.

5 Again, you have to focus on what these employees were
6 doing at the time and what their jobs were -- at the time they
7 were hurt, and what their jobs were. They were railroad
8 employees. They did not handle cargo. They did not unload
9 ships. They did not load ships. In fact, for Schwalb and
10 McGlone, they were specifically prohibited from handling the
11 cargo and placing it back on the conveyer belts.

12 It's also the -- in Mr. McGlone's case, it's
13 particular -- particularly important because he was injured in
14 a place where -- the same place where he was injured in this
15 case a year before. He suffered an injury on the job, working
16 as a laborer in the same location, and the railroad adjusted
17 that case under the FELA. He made a claim under the FELA and
18 it was settled. It's part of the record here.

19 A year later, in 1983, he suffered another injury
20 doing the same job in the same location, working the same
21 area, with the same duties, and now the railroad denies his
22 FELA claim and asserts that he's not covered by that, and we
23 would suggest that nothing has changed.

24 What has changed? The act was amended in 1972. The
25 -- this Court decided the Caputo case in 1977, the four --

1 Pfeiffer case in 1979, and here, McGlone gets hurt in 1982 and
2 his case is settled under FELA. A year later, he gets hurt
3 doing the same sort of thing and the claim is denied, based on
4 jurisdictional coverage.

5 The only difference, the only distinction of these
6 two situations is, in the second case he suffered a very
7 serious injury and his arm has been permanently disabled and
8 disfigured. He's permanently disabled from returning the
9 railroad work, and the only difference is the severity of his
10 injury.

11 Now, we suggest that what the railroad has done is
12 made an administrative decision that it's cheaper to handle
13 the case, or adjust the case, through the Longshore Act,
14 rather than through the FELA. And, of course, this would be a
15 way of handling the case we again would state the Congress
16 never intended the -- to apply to these type of workers.

17 We would further assert that if what the goal of the
18 railroad would be would be to have a long -- a Worker's
19 Compensation Act for railroad employees --

20 QUESTION: MR. WILCOX, I thought you gave up that
21 argument? I mean, you keep saying it, but you acknowledged in
22 response to Justice Stevens that you cannot argue that no
23 railroad workers were covered. Didn't you answer that in
24 response to Justice -- ?

25 MR. WILCOX: Yes, sir, I did.

1 QUESTION: So then, you're not saying that Congress
2 did not intend railroad workers to be covered. It clearly
3 did. We're just arguing over what railroad workers will be
4 covered. Isn't that right?

5 MR. WILCOX: Well, Your Honor, would -- the -- and --
6 - I -- the point is that it's an expansion of a workers comp
7 statute, and traditionally there has been never a workers comp
8 statute for railroad workers and if that's what's sought here,
9 we suggest that should be handled legislatively rather than
10 expanded judicially.

11 We urge that the Court remember what job Goode was
12 performing when he was hurt. He was the mechanic. He was
13 repairing the railroad equipment. He was repairing a
14 retarder, which is part of the braking system. He was not
15 loading a ship; he was not unloading a ship. He was working
16 on a piece of railroad equipment.

17 This issue of what constitutes maritime employment
18 was most recently before this Court in Herb's Welding v. Gray
19 in 1985. Gray was a welder who worked on an off-shore
20 drilling platform off the Louisiana coast.

21 When he was hurt doing a welding job, he filed a
22 claim for benefits under the Longshore Act. This Court held
23 that he was not entitled to benefits because he was not
24 engaged in maritime employment.

25 The opinion reviewed both the situs and the status

1 requirements for coverage under the act and concluded that
2 Congress' purpose when the Longshore Act was amended was to
3 cover those workers on a covered situs who were involved in
4 the essential elements of the loading or unloading or
5 construction of vessels.

6 The Court held that Gray -- Gray's welding was far
7 removed from such traditional longshoring activities and it
8 was, therefore, not covered.

9 Reviewing the expansion of the definition of the
10 situs test and the addition in the amended act of the status
11 test, the Court recognized the intended limitations of
12 coverage, and it stated, "Congress did not seek to cover all
13 those who breathe salt air." There is a limit to the
14 coverage.

15 The Pfeiffer case stated that the maritime
16 employment requirement is an occupational test that focuses on
17 loading and unloading. The amendments were not meant to cover
18 employees not engaged in loading, unloading, repairing or
19 building a vessel, just because they are injured in an area
20 adjoining navigable waters used for such activity.

21 We urge the Court here to follow these precedents.
22 None of these railroad workers were engaged in essential
23 elements of loading or unloading a vessel. None of them
24 handled the cargo. They were performing traditional railroad
25 functions and were not engaged in maritime employment.

1 Thank you.

2 QUESTION: Thank you, Mr. Wilcox.

3 Mr. Prince, you have one minute remaining.

4 REBUTTAL ARGUMENT OF WILLIAM T. PRINCE

5 ON BEHALF OF THE PETITIONERS

6 MR. PRINCE: I would like to respond to Justice
7 Stevens as to why not -- Congress may not have excluded people
8 who repair and maintain equipment.

9 In the Pfeiffer case, the worker Ford, was a
10 warehouseman and the worker Bryant was a cotton header. Both
11 of those men were involved in intermediate steps of loading
12 and unloading.

13 They were not the final step or the first step, and
14 they were not excluded by statute, but the Court found that
15 they were -- that they were not covered or excluded by
16 statute, no mention, and the Court found that they were
17 covered, and this Court on the question of --

18 QUESTION: But the difference, I suppose, is they
19 were engaged in work that one could say was part of the
20 loading or unloading operation, as opposed to people that --

21 MR. PRINCE: This Court said they were involved in
22 intermediate steps.

23 QUESTION: In the loading operation.

24 MR. PRINCE: In the loading or unloading operation.

25 QUESTION: But I -- I'm not suggesting it's

1 necessarily right, but one could -- could draw a distinction
2 between that kind of work and merely repairing or maintaining
3 equipment.

4 MR. PRINCE: The -- all the circuits have held that.

5 QUESTION: I know that. You -- you're absolutely
6 right.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Prince.
8 The case is submitted.

9 (Whereupon, at 1:48 o'clock p.m., the case in the
10 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-1979 - CHESAPEAKE AND OHIO RAILWAY COMPANY, Petitioner V. NANCY J. SCHWALB AND

WILLIAM McGLONE; and

No. 88-127 - NORFOLK & WESTERN RAILWAY COMPANY, Petitioner V. ROBERT T. GOODE, JR.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY

Lena M. May

(REPORTER)

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