ORIGINAL

In the

Supreme Court of the United States

P. C. PFEIFFER COMPANY, INC., ET AL.,

PETITIONER,

V.

DIVERSON FORD, ET AL.,

RESPONDENTS.

No. 78-425

Washington, D. C.
October 1, 1979

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P. C. PFEIFFER COMPANY, INC., ET AL., Petitioners,	:	
v.	:	No. 78-425
DIVERSON FORD, ET AL., Respondents.	:	

Washington, D. C.

October 1, 1979

The above-entitled matter came on for oral argument at 2:06 p.m.

BEFORE:

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

APPEARANCES:

E. D. VICKERY, ESQ., Royston, Rayzor, Vickery & Williams, 3710 One Shell Plaza, Houston, Texas 77002; on behalf of the Petitioners

PETER BUSCEMI, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; pro hac vice.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-425, Pfeiffer Company v. Diversion Ford, et al.

Mr. Vickery, you may proceed whenever you are ready.

ORAL ARGUMENT OF E. D. VICKERY, ESQ.,

ON BEHALF OF THE PETITIONERS

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

We are here today to reconsider on reargument the meaning of the term "maritime employment" as this term was used by Congress in the 1972 amendments to the Longshoremen's and Harbor Workers Compensation Act. We are here to consider it in light of the past statements of this Court and particularly of the most recent decisions of this Court involving two individuals named Caputo and Blundo.

Surprisingly enough, there is much common ground with respect to the facts of the situation involved in these two cases. Neither Ford nor Bryant were longshoremen by trade or occupation. Neither of them were amphibious workers. Neither of them were subject to being assigned to work in whole or in part on the navigable waters of the United States.

They were involved in the same physical task of the same physical type of work, the loading or the unloading of land transportation. They were not involved in longshoring operations which the Secretary of Labor had defined for safety

and health purposes at least as being the loading and the unloading of vessels.

The work done by Mr. Bryant, who was the cotton header, removing cotton from a dray wagon in the port of Galveston, had been confined to the land exclusively and totally for a period of approximately five to six years prior to his injury. So for at least this period of time he had not been an amphibious worker of any kind.

Worker Ford who was employed in the port of Beaumont and was securing a military vehicle onto a railroad car in order that it might proceed inland to an Army arsenal, was a laborer who during the year immediately prior to his injury had engaged in several different tasks of a laborer. He had worked approximately 39 days as a warehouseman, doing the same type of work that he was doing on the date of this accident, working entirely ashore, not in any way subject to assignment to work on the navigable waters of the United States.

He had worked only seven days as a longshoreman during this year, the period of time, that is in actually loading and unloading cargo from vessels. During the balance of this period of time he had served as a truck driver for a beer distributor and he had worked as a construction worker in and around the Beaumont area.

While neither of these two workers meet the maritime employment test which is now required of them after the 1972

amendments, both of their employers met the maritime employment test which was required of the employer since 1927, that test being that the employer must have some employees who perform a part of their work on the navigable waters of the United States.

Mr. Bryant's employer in Galveston was a steamship agency. A steamship agency performs functions for the vessel's master when it arrives in port such as helping to clear customs, immigration, public health, doing shore-side things for him. In connection with that, therefore, the agency has to have some employees who will from time to time go on the navigable waters of the United States.

It had no longshoring operations of any kind. Bryant's employer never loaded or unloaded any vessels. Insofar as Mr. Ford is concerned, he was working in a warehouse division for P. C. Pfeiffer Company. That company also has a steamship agency similar to the one that Mr. Bryant's employer has, performs the same functions for vessels. It did, however, have the additional division in which it also performed stevedoring operations. It had not performed, however, any stevedoring operations at all, any longshoring operations with respect to the cargo that it was working on at the time of Mr. Bryant's injury. It was performing its duties pursuant to a contract it had with the Port of Beaumont to load cargo that had been brought into the Port of Beaumont on vessels aboard

land transportation for movement into the inland areas of the United States or to unload land transportation if the cargo was outbound and destined to be loaded aboard a vessel. In both instances, there was no vessel at the dock at the time of the injuries sustained by these two men.

The question has been put sharply in focus in the briefs before the Court and it turns on, as I previously indicated, the meaning of the term "maritime employment" as used in the Longshoremen's Act.

In the 1970 enactment originally of the Longshoremen's Act, Congress drew the line for maritime employment insofar as employers were concerned at the water's edge. They drew it there on the basis of two earlier decisions of this Court. Jensen v. Southern Pacific held that a longshoreman performing work on the navigable waters was engaged in maritime employment. Knickerbocker also followed and held precisely the same thing.

In 1922, this Court in a decision involving a man named Nordenholt held that a longshoreman handling cargo on a dock, longshoring operations on a dock were not maritime employment. The courts of New York had concluded on the basis of Jensen and Knickerbocker that all of the loading or unloading of a vessel constituted maritime employment and was therefore within the jurisdiction, the admiralty and maritime jurisdiction of the United States and had denied relief under

its state compensation act. The Supreme Court reversed and held that the New York courts had misread the Court's opinions and that in fact the handling of cargo on a dock with respect to the loading and unloading of vessels was not maritime employment and therefore was subject to the jurisdiction of a state workmen's compensation act. This was the meaning of the state law and the meaning of the term "maritime employment" when the act was initially passed in 1927.

The question then is did Congress do anything to change the definition or to change the meaning of "maritime employment" in the 1972 amendments.

QUESTION: Did you in that little historical review, did you tell us which case it was that established the twilight zone concept?

MR. VICKERY: No, sir. The twilight zone came on later. This was Davis v. Department of Labor, I believe --

QUESTION: Yes.

MR. VICKERY: -- and Parker v. Motor Boat Sales.

QUESTION: And that came after the enactment of the first legislation?

MR. VICKERY: Yes, sir, that came in the late thirties or early forties, as I recall.

QUESTION: All right.

MR. VICKERY: I should perhaps mention that within four years after the Longshoremen's Act was passed, this

question of what constituted maritime employment was put squarely to this Court in a railroad cast involving a railroad man named Nogara, and the Court held that because he was injured while working on a car-float that he was engaged in maritime employment and his exclusive remedy was under the Longshoremen's and Harbor Workers Compensation Act and denied any rights to recover under the Federal Employer's Liability Act.

This was reaffirmed by this Court in O'Rourk in 1953. Subsequent cases have reaffirmed the principle of O'Rourk and as late as 1971 in Victory Carriers v. Law, this Court held that Nordon Holt had not been overruled and it was still good law, that work on the docks, the loading and unloading of vessels is not maritime employment.

When we come to the 1972 amendments, in trying to determine the congressional purpose, in trying to determine why they required for the first time in 1972 that a longshoreman meet the maritime employment test, we have to look primarily to the legislative history, that they were talking about the historical definition or the traditional meaning of maritime employment was confirmed by Senator Williams of New Jersey who, as Chairman of the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, and having his staff put together a legislative history of the 1972 amendments, he wrote a very brief foreword. He states in this

foreword that the principle feature or one of the features of the 1972 amendments was the extension of the act's protection to shoreside work of those engaged in the traditional maritime employment covered by the act.

The intention was to cover shoreside work of those workers who met the traditional definition of maritime employment.

QUESTION: That is shoreside work within the limits of the situs test under the statute?

MR. VICKERY: Yes, sir.

QUESTION: And there is no issue in this case but what the situs criteria had been met, is there?

MR. VICKERY: The situs test has been met in this case.

QUESTION: Both of these injuries occurred in the situs covered by the act?

MR. VICKERY: Yes, sir, they occurred on an adjoining area within the meaning of the statute.

QUESTION: So what isn't satisfied, the maritime employment question?

MR. VICKERY: The maritime employment status test that employees must now meet.

QUESTION: And it isn't met here because his duties never required any work on board a ship?

MR. VICKERY: That is correct.

QUESTION: And so no one working within the situs is covered unless his duties at some time include or part of his duties include going back and forth on a ship?

MR. VICKERY: I have suggested that the statute indicates that persons working ashore who are not subject to being assigned to perform part of his work on navigable waters.

QUESTION: On the day of his accident.

MR. VICKERY: On the day of his accident, yes, sir.

QUESTION: Well, what if he is working -- what about a crane operator who never is subject to being assigned to work on a ship and he is shoare-based all the time, he just runs a crane that picks up cargo on the ship and gets it off?

MR. VICKERY: The crane operator under those circumstances, since he is directly involved in the loading --

QUESTION: But he never sets foot on the ship and never intends to and no one expects him to.

MR. VICKERY: I understand that. He is engaged in the longshoring operations which Congress intended to be included.

QUESTION: Because he is unloading.

MR. VICKERY: Because he is involved in the unloading and the loading of the vessel, yes, sir.

QUESTION: And regularly so.

MR. VICKERY: Yes, sir.

QUESTION: So he doesn't have to be going aship,

because he is covered by another part of the statute, you say, he is engaged in longshoring operations.

MR. VICKERY: Yes, sir.

QUESTION: So you can be engaged in longshoring operations without going on a ship.

MR. VICKERY: Yes, sir.

QUESTION: But you can't be in maritime employment generally without being potentially subject to assignment on shipboard.

MR. VICKERY: That is correct.

QUESTION: How about the longshoreman who just picks up cargo that has been put on the pier and makes the first delivery of it to a warehouse fifty yards away or a hundred yards away, he never goes on a ship.

MR. VICKERY: I think you will find that he being engaged in the longshoring operations, he is going to be subject to being assigned to go aboard --

QUESTION: I know, but I am assuming that he isn't. Assume that he isn't.

MR. VICKERY: I think that it is --

QUESTION: Say he is just a checker. Say he is just a checker that is checking that cargo on the -- that immediaely comes off the ships, he never goes on a ship and never is expected to.

MR. VICKERY: If he is directly involved in the

loading a the unloading of a vessel, he is fairly covered, whether he actually ever goes aboard a vessel or not.

QUESTION: Well, would the checker who just counts the cargo that has been placed on the dock, never goes on-board aaship?

MR. VICKERY: Those checkers are always subject to having to go aboard the vessel. He checks to see whether the proper --

QUESTION: You won't accept my limitation that this checker never goes on-board a ship and isn't expected to?

MR. VICKERY: He is subject to being assigned to go aboard that vessel.

QUESTION: What if he isn't, then you must say that he would not be covered.

MR. VICKERY: He is engaged in longshoring operations directly involved in the loading and the unloading of the vessel.

QUESTION: Well, what about a trucker who simply backs his truck up to the outward edge of the situs, the shoreward of the situs and dumps bales right inside the fence which are then ultimately by a progression of steps taken to the ship, is he engaged in longshoring activities?

MR. VICKERY: No, sir, he is not and clearly is not. I think for longshoring operations that the courts have looked to the definitions of longshoring operations that the

Secretary of Labor had promulgated in connection with the safety and health regulations under the Longshoremen's Act itself. He specifically describes longshoring operations as being the loading and unloading of vessels, and that is what it says.

QUESTION: Well, certainly some sort of line has going to have to be drawn which Congress didn't draw by simply not defining longshoring occupations.

QUESTION: We are not involved today in this case, as I understand it, in the definition of longshoring operations but, rather, with the definition of maritime employment, is that correct?

MR. VICKERY: That is correct.

QUESTION: Well, isn't that where some line has to be drawn?

MR. VICKERY: The statute specifically refers to longshoreman or other person engaged in longshoring operations as being included within the meaning of the term "maritime employment."

QUESTION: But we are talking --

MR. VICKERY: Even if they clearly don't meet by technician, by stipulation, these men are not longshoremen. The government attempts to say that the loading or unloading of land transportation is a longshoring operation. This Court held in Caputo that loading and unloading trucks is an

old fashioned process of doing just that and is not the loading and unloading of vessels. And I submit to you that the loading and unloading trucks and railroad cars do not meet any semblance of the definition of longshoring operations.

QUESTION: Mr. Vickery, I have some problem. If longshoring even when carried on entirely ashore is an example of maritime employment, as I think you have conceded, then the test of maritime employment cannot be the Jensen line.

MR. VICKERY: The test of maritime employment has to be, I submit, Mr. Justice Stevens, insofar as every other worker who is not engaged in longshoring operations.

QUESTION: Everything except longshoring is divided at the shore?

MR. VICKERY: Yes.

QUESTION: Well, that is not the way the statute reads. It talks about a person engaged in maritime employment, including any longshoreman. So a longshoreman is a kind of person engaged in maritime employment --

MR. VICKERY: That's correct.

QUESTION: -- even though his work is entirely ashore.

MR. VICKERY: That's right. What Congress was trying to do was to provide a uniform compensation system for those workers on the waterfront who crossed the Jensen line, that is the water's edge. That was the jurisdictional dividing

line between the state and the federal statutes in 1972. What Congress was concerned about was providing a uniform compensation system for those employees who had to cross that Jensen line, do some of their work on the water is what qualifies them as maritime employees, being subject to perform part of their work on maritime water makes them covered by these 1972 amendments and makes them engaged in maritime employment.

Congress wanted to provide uniform remedy for those who are covered for a part of their activities prior to 1972 and they did it by adding a requirement that these people, other than those specifically named in the statute, would have to meet the maritime employment test just like the employer had to meet it from 1927 to 1972, and it uses precisely the same statutory limits.

QUESTION: Do you therefore also take the position then that a harbor worker, ship repairman and so forth is covered even though his work was entirely ashore?

MR. VICKERY: Yes.

QUESTION: And those would still be examples of maritime employment?

MR. VICKERY: Yes, sir, I believe so and those terms are also specifically defined by the Secretary of Labor with respect to the safety and health regulations for those particular industries -- shipbuilding, ship repairing, and ship working.

QUESTION: Well, as I read it, I think we are getting a little far afield I think from the issue involved here. But the way I read the statute, it is that the term "employee" means any person engaged in maritime employment and any harbor worker, as though they were different.

MR. VICKERY: I think the word "including" relates to the worker, the harbor worker as well as the --

QUESTION: Well, the repetition of the word "any" would imply that to me, however.

MR. VICKERY: The statute --

QUESTION: While I have interrupted you, what is a ship breaker? I think I asked you that during the last argument, but I have forgotten.

MR. VICKERY: A ship breaker is one who has the unfortunate occurrence of liking it. We had one in Hawaii a few months ago, and it is headed for a ship breaker. We are talking the wreck out by pieces and delivering it to a ship breaker.

QUESTION: A ship breaker.

MR. VICKERY: A ship breaker is one who finishes the job and sells it for scrap.

QUESTION: I see. He is a demolition fellow, then.

MR. VICKERY: Yes, Your Honor.

QUESTION: I see.

MR. VICKERY: If I may, I would like to save the

rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Buscemi.

ORAL ARGUMENT OF PETER BUSCEMI, ESQ.,

PRO HAC VICE

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

The question presented in these cases is whether two Texas marine terminal workers either within the scope of their employment while handling cargo on the docks are covered by the Federal Longshoremen and Harbor Workers Compensation Act as amended in 1972. In practical terms, the issue is whether the injured workers will get the benefits of the insurance required by the federal statute for the employees within its coverage or will be restricted to lesser benefits provided by the insurance required under the applicable workmen's compensation code.

The 1972 amendments to the Longshoremen's Act succeeded in eliminating some of the inequities that arose under the act as originally passed, but in doing so it raised new questions of statutory interpretation at least as troublesome as those presented by the 1927 act.

In particular, in defining the statutory term "employee," Congress used several broad phrases that have been left without further definition in the statute. Although

the 1972 legislative history offers some guidance, it stops considerably short of providing an exhaustive catalog of the coverage and exclusions of the amended statute. Indeed, the arguments in this case are clearly shown if the statements in the committee report seem to look in different directions and to support the conflicting interpretations of the revised act.

With respect to Ford and Bryant, the injured workers in this case, the director's position is that they are covered under the act because they are marine terminal workers whose job it is to handle cargo between land and sea transportation and who were injured while performing those duties. They are indeed in maritime employment and they are engaged in a particular sub-set of maritime employment known as longshoring operations within the meaning of the statute.

Whatever may be the case with respect to persons who do not ordinarily handle cargo or persons who are injured when they are doing something other than handling cargo, persons in the positions of Ford and Bryant fall squarely within the group of employees that Congress intended to cover by the 1972 amendments. The petitioners argue, however, that Ford and Bryant are not covered by the amended statute because they were not subject to assignment aboard a vessel on the date they were injured.

I would like to proceed first by discussing what we

believe are the deficiencies in the petitioners' --

QUESTION: Well, isn't it a little more than that? How many days a year had they done any type of longshoremen work? It was just a few days, wasn't it?

MR. BUSCEMI: Only in the case of Ford, Mr. Chief Justice Burger. Ford worked as a stevedore for seven days in the previous year. He worked as a terminal worker moving cargo on the dock for 39 days during the previous year. He also had several other jobs including a truck driver and construction worker.

Bryant, on the other hand, was a cotton header and, as far as I know, a cotton header only for the last five or six years, had been moving cotton bales around at the pier warehouses at the Port of Dallas.

QUESTION: Long after they had left the ship.

MR. BUSCEMI: Yes, that's true, and that is the same fact that was true in the Caputo case in which Mr. Caputo moved sheeting after it had been standing on the dock for five days.

Now, the first and most finite problem with the petitioners' test is that it is not found in the language of the statute. The definition of "employee" says nothing about whether a worker is subject to assignment aboard a vessel on the day he is hurt. And the particular phrase "longshoring operations" does not suggest that any person engaged in such

operations must be subject to assignment aboard a vessel.

Indeed, if I understood him correctly, Mr. Vickery just said that he did not believe that a person had to be subject to assignment aboard a vessel.

Secondly, the petitioners' test does not accord sufficient weight to the underlying purpose of the 1972 amendments which was the expansion of the act's coverage. The petitioners rely heavily on the fact that section 2(3) of the amended act, the definition of "employee," defined employee as a person engaged in maritime employment and then goes on to list several examples. The petitioners seize on that phrase "maritime employment" and argue that its meaning should be ascertained from a series of cases decided by this Court long before the 1972 amendments, at a time when the Jensen line still covered, and the definition of "employee" did not even mention the phrase "maritime employment," since it provided that certain people were not included within the term "employee."

The critical question in those cases was not whether the employee was engaged in maritime employment, but whether he was injured on the navigable waters of the United States, because it was thought, it was held in the 1927 act that only persons injured on the navigable waters of the United States were covered employees.

The statutory definition of "employer" under the

1927 act did include the phrase "maritime employment" but it was modified by the additional phrase "upon the navigable waters of the United States," and that was a surprise because the act only covered injuries occurred on the navigable waters and so quite naturally it covered an employer as only one who had employees who were working on those waters.

The petitioners' insistence on interpreting the maritime employment as used in the current definition of "employee" by reference to cases decided under the original act ignores the basic purpose of the '72 amendments, to move the coverage of the act shoreward in the Jensen line.

The term "navigable waters" is defined to include piers, docks, terminals and other adjoining areas used for the loading and unloading of cargo.

QUESTION: Righ there, if any area is covered, whatever area is covered, it must be found that the area is customarily used for the loading or unloading of a vessel?

MR. BUSCEMI: That is not the language of the statute, Mr. Justice White.

QUESTION: Well, it says "or other adjoining areas" customarily used by an employee in loading --

MR. BUSCEMI: I am sorry. I was focusing on the earlier phrase --

QUESTION: I am focusing on the present law in defining the situs and whatever is within the situs is an area

that must be an area that is customarily used for loading or unloading a vessel.

MR. BUSCEMI: Yes, that's right.

QUESTION: Is that right?

MR. BUSCEMI: Yes. I'm sorry.

QUESTION: And is it conceded here that the situs test is satisfied?

MR. BUSCEMI: Yes, Your Honor.

QUESTION: So the area in which this accident occurred must then be an area that is customarily used for loading or unloading vessels?

MR. BUSCEMI: Absolutely, no question about it.

The new definition of "navigable waters" does not only appear in section 3(A) of the amended act, the section that describes the coverage to cover injuries. It also appears in section 2(4) of the amended act, the definition of employer. A statutory employer is now an employer in which his employees are employed in maritime employment in whole or in part upon the navigable waters of the United States, including any adjoining pier, wharf, drydock, terminal, or other adjoining areas.

QUESTION: Well, that was almost necessary in order to reach the expanded situs which everybody agrees was expanded in the 1972 law.

MR. BUSCEMI: My point, Mr. Justice Stewart, is only

that maritime employment as is used in the amended act includes employment on the navigable waters and also on the adjoining piers, docks, wharfs, terminals and other adjoining areas.

QUESTION: As long as those areas are used in the loading or unloading a vessel.

MR. BUSCEMI: That's right. Now, the petitioners

QUESTION: But 2(4) doesn't say that, doesn't contain that limitation, does it?

MR. BUSCEMI: Section 2(4) says that the term "employer" means --

QUESTION: It is printed on page 6 of petitioners' brief, so I don't think you have to read it.

MR. BUSCEMI: Right -- "employed in maritime employment upon the navigable waters of the United States, including the" --

QUESTION: But it doesn't say anything about "so long as." It doesn't contain any language such as paraphrased by my Brother White.

MR. BUSCEMI: Well, customarily used by an employer in loading or unloading, repairing or building a vessel. I think that is what Mr. Justice White was referring to.

QUESTION: I am referring to 3(a) which limits the compensation --

MR. BUSCEMI: The comparable phrase in 3(a).

QUESTION: Right.

MR. BUSCEMI: If the petitioners are right and maritime employment includes only work on the waters, not on the adjoining areas, the statutory definition of "employer" makes no sense. There is simply no such thing as maritime employment on the navigable waters including the adjoining pier.

QUESTION: Well, if Caputo is right and there is both a status and a situs test and it is conceded that the situs test is met here, what would be examples of people who would meet the situs test as it is met here but who do not meet the status test in your view?

MR. BUSCEMI: Well, the first example is given to us in the congressional committee report, which is printed in Footnote 27 of the Court's opinion in Caputo. The congressional committee, both the House and the Senate committee say an employee whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor should the cargo employees whose jobs do not require them to participate in the loading or unloading of cargo.

QUESTION: Well, would transshipment of already unloaded cargo then be different than simply depositing of cargo that would ultimately be loaded a couple of weeks later so long as they both met the situs test?

MR. BUSCEMI: Yes, I think that is clear from the committee reports. The committee reports simply wanted to make clear that they do not deal with over-the-road truckers who came onto the dock as the truck driver in Caputo to et the cheese or whatever other cargo was there.

QUESTION: But what if he came on dock to leave the cheese?

MR. BUSCEMI: Well, it would just be the reverse situation. If he was delivering it or if he was taking it away.

QUESTION: He would be covered in neither case?

MR. BUSCEMI: That's right.

QUESTION: What if he got out of his truck, backed up his truck and he is picking up a load of cheese and he backs his truck up and he says, come on, boys, put it on my truck, and Mr. Caputo takes the cheese out of a warehouse and puts it on his truck and in the process he is hurt. He is covered.

MR. BUSCEMI: Mr. Caputo is covered, yes.

QUESTION: Even though the truck driver wouldn't be if he went with him to help him get the cheese out of the warehouse?

MR. BUSCEMI: I am not sure that that accords with the way it works on the dock, but I think that is probably correct, that the truck driver probably would not be covered

in those circumstances.

QUESTION: So there is just this arbitrary line, Congress just drew it.

MR. BUSCEMI: Yes, I think that is right.

QUESTION: Take it or leave it.

QUESTION: And such a line inevitably includes some that might not be included and leaves out some that ought to be included, is that not so?

MR. BUSCEMI: Well, there are always difficult cases close to the line.

QUESTION: Well, I am using the hypothetical of Mr. Justice White. They were both handling the same package but one is covered and one is not.

MR. BUSCEMI: That's right, Your Honor.

QUESTION: Would you explain to me again what the line is? I am not sure, I think I have lost your line. What do you say the line is that marks coverage when you've got some people who load from one area within the situs to a truck on the situs. When is such a person covered and when is he not, assume he is employed by an employer, a statutory employer?

MR. BUSCEMI: Well, I think that the coverage deals with the loading and unloading of cargo from a boat or from a ship, and I think when you are talking about the trans-shipment over the road or over the rail, you are no longer

talking about the loading or unloading of cargo from the ship. The loading or unloading ends at the -- let's say the unloading ends at the time that the cargo is given over to some land mode of transportation. The loading begins at the time that the cargo is given over from the land mode of transportation to a sea transportation.

QUESTION: Now, let's think about these two men here. Was't one of them employed -- were they in the connection between the land mode of transportation and the intermediate mode?

MR. BUSCEMI: Mr. Ford was engaged in the last step of the operation giving over the cargo to a land mode of transportation. The cargo -- when Mr. Ford was finished with his job, the cargo had been unloaded and had been placed on the railroad car and was ready for transshipment, to use the committee's word, to the arsenal, I believe it was, at Fort Hood, Texas.

QUESTION: Well, if it goes up to the point of loading it onto the means of transportation that takes it off of the situs, it means that all leading on the situs would be covered. Because the next thing that happens, if I understand you correctly, is that the truck driver drives the truck off the situs.

MR. BUSCEMI: Yes, I think that --

QUESTION: So that all loading and unloading on the

situs is covered.

MR. BUSCEMI: Yes, I think that is a point, the loading performed by these marine terminal workers is covered, that is exactly what we are saying and that is exactly what the Court held in Caputo, but Caputo --

QUESTION: So you are saying the status and situs tests are coextensive.

QUESTION: Yes, there is no difference between -- you don't have to meet two tests, you only have to meet one, if Justice Stevens is right.

QUESTION: But you aren't --

MR. BUSCEMI: I don't think --

QUESTION: You need the situs test only.

MR. BUSCEMI: I just gave two examples from the committee reports using examples of the kinds of employees who may be injured on the situs but would not be covered. Clerical employees, for example, would not be covered.

QUESTION: Well, any loading or unloading on the situs would be covered.

MR. BUSCEMI: That's right.

QUESTION: So with respect to loading and unloading, the situs test and the status test are coextensive.

MR. BUSCEMI: Well, with respect to loading and unloading, that is true, but the point is that that is what the status test is all about, what they are doing on the marine

terminal.

QUESTION: Well, suppose a consignee is notified that there is cargo available in a warehouse on the pier and the normal operations require him to go and examine the cargo, to test it or to look at it or examine it to see if he is going to accept delivery. So he sends his employees onto the -- it is clear that they are on the situs, but if they are hurt while they are there, I don't suppose they are covered.

MR. BUSCEMI: No.

QUESTION: And it would be because, why, they are not in maritime employment.

MR. BUSCEMI: They are not engaged in longshoring operations. They are not --

QUESTION: They are not in maritime employment.

MR. BUSCEMI: Or maritime employment. They do not fall into the definition of maritime employment.

QUESTION: Well, is that the answer you give then for the truck driver who goes along who took Mr. Caputo to get the cheese out of the warehouse?

MR. BUSCEMI: Yes, he is not engaged in longshoring operations.

QUESTION: Or he isn't engaged in maritime employment.

MR. BUSCEMI: No, he is not engaged in maritime employment, that's right.

QUESTION: Although Caputo is.

MR. BUSCEMI: Excuse me?

QUESTION: Although Caputo is, because he works for a maritime employer or what?

MR. BUSCEMI: Because he is unloading the cargo from the boat. He is in the last step --

QUESTION: Well, so is the truck driver.

MR. BUSCEMI: He is in the last step of the longshoring operation.

QUESTION: So is the truck driver. He goes with Mr. Caputa, he does exactly what Mr. Caputo does. They just both wheel --

MR. BUSCEMI: For that moment, Mr. Justice White, I think you are right that the truck driver would be doing exactly the same thing as Mr. Caputo but I think --

QUESTION: I just said he was --

MR. BUSCEMI: That's right.

QUESTION: -- so just accept that as --

MR. BUSCEMI: All right.

QUESTION: But he isn't covered because he isn't engaged in maritime employment, is that it?

MR. BUSCEMI: That's right. The Supreme Court --

QUESTION: He is working for the wrong person, is that it?

MR. BUSCEMI: Well, this Court said in Caputo that

this act focuses on occupation. That appears at page 273 of the Court's opinion. It appears in several places in the Court's opinion, but in particular at page 273. The Congress in its committee reports made it clear that truck drivers are not covered, they were not one of the occupations that was within the contemplation of the definition.

QUESTION: Now would inspectors, nor would a consignee's inspectors, for example?

MR. BUSCEMI: I presume not.

I would think the third deficiency in petitioners' approach is that it treats marine terminal employees performing identical tasks differently, depending on the fortuitous circumstance of whether their job description entailed the possible assignment aboard a vessel. They consider three types of work on the dock.

The committee report explicitly mentions the first type, unloading cargo from a ship and immediately transporting it to a holding area on the pier or to some mode of land transportation. The committee reports clearly establish that any employees engaged in such operations are covered by the act, irrespective of whether they are assigned aboard a vessel.

The petitioners' response is that employees performing such work are in fact subject to assignment aboard a vessel, usually or always. But that doesn't mean that Congress

viewed the potential for such an assignment as a prerequisite for coverage under the act.

QUESTION: I thought the petitioners' position on that was that those are persons engaged in longshoring operations --

MR. BUSCEMI: Well, the --

QUESTION: -- which are explicitly covered by the statute.

MR. BUSCEMI: Right, and that is what we believe Ford and Bryant were.

QUESTION: Yes, I know, but I thought that was what the petitioners --

MR. BUSCEMI: Well, today is the first time I knew about that.

QUESTION: Well, maybe it is the first time I knew about it, but that is the petitioners' position.

QUESTION: Well, doesn't anything that qualifies as a longshoring operation have to be within the definition of maritime employment?

MR. BUSCEMI: Yes.

The second kind of marine terminal worker illustrates the anomalies created by the petitioners' test is the stuffing of containers. The committee reports show that one of Congress' major concerns in enacting the '72 amendments was the advent of modern cargo handling techniques, and the Court

recognized that point in Caputo and repeated the Second Circuit's statement that stuffing a container is part of the loading of a ship even though it is performed on-shore. Workers who stuff and strip containers are covered by the act, whether or not they are subject to assignment aboard a vessel.

The petitioners don't disagree, as shown in their brief at page 37 in Note 71, but they recognize that this treatment of stuffers and strippers is incompatible with the subject of of assigned tasks. They argued that Congress intended to create a stuffer and stripper exception to the general rule, but we submit that the point is that the general rule is wrong. There is no such general rule that only employees subject to assignment are covered.

Now, the final kind of marine terminal work that demonstrates a problem is the work that was performed by Caputo and Ford, and we have already talked about that.

I would just like to address one final problem with petitioners' test before addressing the criticisms of the director's test. The petitioners read the word "longshoreman" out of the statute. I think that points was demonstrated in the original argument of this case. They come close to conceding as much on pages 32 and 33 of their brief.

The statute by its plain language covers two kinds of workers, longshoremen and persons engaging in longshoring

operations. Longshoremen, if they are hurt on a covered situs, a dock, a pier or other area adjoining the water, are covered under the act. Even if what they are doing at the time of the injury does not fall in the common understanding of longshoring operations, the act focuses on occupations, as the Court said in Caputo.

Also this is one of the reasons why the director believes that the Powell decision, pending in a petition for a writ of certiorari from the Ninth Circuit, is wrongly sited. Powell was and is a longshoreman.

QUESTION: But is there or is there not any contention in this case that either of the respondents is a longshoreman?

MR. BUSCEMI: No, Mr. Justice Stewart. I was just using this as an example to demonstrate one of the problems with the test that the petitioners have followed.

QUESTION: But these respondents, each of them is concededly not a longshoreman.

MR. BUSCEMI: That's correct, sir.

Now, the director's interpretation of the statute has the advantage of being consistent in both the expansive purposes of the '72 amendments and the common understanding for the kind of work that constitutes longshoring operations.

As Judge Friendly said in his opinion to the Second Circuit in the Caputo case, if Caputo's injuries had occurred

while he was moving the boxes of cheese from a previous position on the pier to the consignee's trucks and not actually on the truck, as he did, he clearly would have been engaged in unloading in the way that term is used in ordinary speech. The Second Circuit made the statement notwithstanding the fact that the cheese had sat on the dock for five days before Caputo moved it.

The obvious implication is that Ford's work was also unloading, and Bryant's work was loading as the congressional committees use those terms.

In light of all of this, then, how can the director's test be criticized? Well, primarily on the basis of the first sentence which this Court quoted from the committee report in Note 27 to the opinion in Caputo. The sentence says: "The intent of the committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this act for part of their activities."

The petitioners contend that this sentence represents thorough and indeed an exhaustive description of the purpose and effect of the 1972 amendments. The argument is that if Ford and Bryant were doing what they were doing on the date they were injured, they could never have been covered by the Longshoremen's Act before 1972 because they never would have gone aboard ship and the 1927 act only covered injuries occurring on the navigable waters, because persons performing

the work of Ford and Bryant would not have been covered by the 1927 act at any time during the course of their work day, the argument continues, there was no uniformity problem under the original act. Such persons are covered by state workmen's compensation, therefore, the petitioners conclude, the '72 amendment could not have had any effect on persons in Ford and Bryant's position because they were never part of the problem that Congress was trying to solve.

Now, this argument has some superficial appeal but on balance we think it is unpersuasive essentially for the reasons stated by the Court of Appeals on page 41, Note 21 in the petition for a writ of certiorari in this case. There is no reason to assume that in enacting the '72 amendments Congress did the minimum that was necessary to deal with the problem primarily responsible for the act's revision. This is especially so because, as we have just argued, such a minimal measure would have created new inequities equally or nearly as bad as the ones that existed under the 1927 act.

Moreover, as the Second Circuit observed in its opinion in Caputo, the Senate committee report on the '72 amendments states that Congress had an additional purpose in addition to its primary goal. The Second Circuit said the Congress also expressed interest in extending federal coverage to as many longshoremen as possible to avoid a disparity in benefits payable to the same type of injury depending on

the state in which the accident occurred. That appears at 544 F 2d, page 54, Note 23, and in the same committee report at page 12.

In short, by enacting the 1972 amendments, Congress hope to effect a comprehensive resolution of the coverage questions concerning longshoremen and persons engaged in longshoring operations as well as all other forms of maritime employment.

The fact that Ford and Bryant were not part of the most immediate problem that motivated Congress to act when it did does not mean that they necessarily fall outside the coverage of the amended statute.

QUESTION: Yet Congress did not go a fairly simple way to the route you stated it wanted to go by simply defining the test in terms of situs. If it had said nothing about status and situs test, all that you say that the Senate committee said it wanted to accomplish would have been accomplished, a simple test would have been there, obviously they didn't mean to have it that simple and they may have kept it more restrictive.

MR. BUSCEMI: They did not go as far as they might have, there is no question about that. They focused on longshoremen, the status as a longshoreman was a person engaged in the performance of longshoring operations for purposes of this case. Those were the relevant words. It is true that

they did not go as far as they could have. They could have covered the clerical employee, they could have covered the truck driver, they could have covered the consignee's inspector -- they didn't.

QUESTION: Let me get one thing straight. Do you acknowledge that these two men are not longshoremen?

MR. BUSCEMI: Right.

QUESTION: Do you take the position that they were engaging in longshoring operations?

MR. BUSCEMI: Yes.

QUESTION: Okay. That is what I thought you would say.

MR. BUSCEMI: Finally, I just want to say that --

QUESTION: I thought your position was that they were just engaged in maritime employment generally.

MR. BUSCEMI: No, Mr. Justice Stewart. Our position is --

QUESTION: Well, you must concede that your argument is that they were engaged in maritime employment.

MR. BUSCEMI: Yes, but Mr. Justice Stewart just asked whether our position was that they were only in maritime employment and not within the additional phrase "a person engaged in longshoring operations."

QUESTION: But are you conceding that they aren't engaged in longshoring operations and they aren't covered in

this case?

MR. BUSCEMI: I am not conceding that, Mr. Justice White, but our position is that they are engaged in longshoring operations and there is no reason to look any further.

QUESTION: All right.

MR. BUSCEMI: Finally, as this Court said in Caputo, this act is remedial legislation and the courts should take an expansive view of its extended coverage, especially so when such review corresponds with the consistent administrative interpretations by the agency responsible for the act's enforcement.

The Court of Appeals properly followed this principle and its judgment should be affirmed. Thank you.

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

ORAL ARGUMENT OF E. D. VICKERY, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

MR. VICKERY: Gentlemen, as I started my rebuttal argument in March, I start it again today: Look at the last two sentences of the legislative history. It categorically reaffirms the adoption by Congress in 1972 of the maritime employment status test that I am talking about. It expressly says an employer who has no employees who work on navigable waters is not engaged in maritime employment and is not a covered employee. There are employers in Houstin, in the

Port of Houston who hire men to load and unload land transportation who have not one single employee who ever goes on the navigable waters of the United States.

The last two sentences of the legislative history categorically says that those companies are not employers within the meaning of the act and therefore are not engaged in maritime employment.

QUESTION: Mr. Vickery, would you help me. Why are not these two men engaged in longshoring operations?

MR. VICKERY: They are not engaging in longshoring operations --

QUESTION: Because you have already told me that anybody engaged as a longshoreman or in longshoring operations need not ever go aboard a ship.

MR. VICKERY: The Secretary in 1959 or 1960 was authorized in section 41 of the Longshoremen's Act to pass safety and health regulations. This was long before OSHA came along. He defined longshoring operations. That definition has remained in existence unchanged since 1960. It was in existence in 1972 when Congress amended the act. This is what longshoring operations are in the Secretary of Labor's views, not in the view of the Solicitor's department who deals with this act but the Secretary of Labor insofar as health and safety. Longshoring operations means the loading and unloading, moving or handling of cargo, ship stores,

gear into, in, on or out of any vessel on the navigable waters of the United States.

QUESTION: If you are breaking containers you are not engaged in longshoring under that definition?

MR. VICKERY: No, sir, they're not.

QUESTION: I thought you conceded earlier that they were.

MR. VICKERY: Pardon?

QUESTION: I thought you conceded earlier that people who broke up containers were --

MR. VICKERY: No.

QUESTION: You didn't. I'm sorry.

MR. VICKERY: No, sir. Containers is a special category that Congress carved out in the '72 amendments, as Mr. Justice Marshall reminded the Court in Caputo. The considerations with respect to containers as the Court held in Caputo are irrelevant as far as --

QUESTION: The Secretary's definition is based on the point of rest, isn't it?

MR. VICKERY: Sir?

QUESTION: The Secretary's definition is based on the point of rest, is that right?

MR. VICKERY: No, sir.

QUESTION: Anything beyond the point of rest would not be longshoring operations.

MR. VICKERY: It would not be longshoring operations, that is correct. What the federal respondent in this case is contending is longshoring operations, for example, in a port, the vessel from which the military vehicle was unloaded two to seventeen days prior to his injury, put it on the dock, in storage there. It was moved into the rail car the day before this man was hurt. He was hurt securing that military vehicle on the railroad car. That vessel had already sailed.

The government's position in this case is that longshoring operations of loading and unloading of a vessel, as the Secretary of Labor described it, is still in progress when the vessel is gone to the high seas. And if it came from the vessel 17 days before his injury, that vessel might even be in Europe taking on new cargo and yet the government's position here is that it is still being unloaded in the port of Beaumont.

I submit that the loading and unloading of land transportation simply is not longshoring operations, and the Court said so in Caputo. Caputo was loading a truck and the Court said in Caputo that that is an old fashion process of lading a truck and that is all it is. And to try to converd that into longshoring operations simply because it occurred on an area adjoining navigable waters is ludicrous. Who would walk down to the dock the day Ford was taking Cotton off of the truck or the day that Bryant was taking cotton off

of the truck or that Ford in securing the military vehicle on a railroad car, who would walk onto the dock and say look at that man unloading that ship over there. They would have said look at the man unloading the truck and look at the man securing cargo on the railroad car. It is common ordinary usage of the terms and they clearly indicate that the loading and unloading on land transportation is not covered under the 1972 amendments.

As to the extension of the definition of navigable waters to include all of the adjoining area, just let me refer you to Footnote 59 on page 25 of our written brief. In addition, the last two sentences also confirm that that expansion of the area relates to situs only and not to status.

Also as to people who are not covered but would be covered under the act, look at the four sentences from the end of the legislative history. The committee does not intend to cover employees who are not engaged in loading and unloading vessels on navigable waters simply because they are injured in an area adjoining navigable waters.

Let me say in closing just one other thing, and that is with respect to this Court's doctrine that the act must be liberally construed in conformance with its purpose. I have lived with this for some thirty yeasr in my practice and I would be the last to say that you ought to throw that aside. But in construing in accordance with the congressional

purpose which was to eliminate a non-uniform compensation remedy for those workers who cross the Jensen line, and that was all. Everybody else had been and still has a uniform compensation system.

The Court must also be mindful of the fact that you are dealing in that very delicate area of federal encroachment on state jurisdiction, and I request that the Court take a look at and consider what it said in Victory Carriers v. Law which was a case arising under this act. The Court said there that our regard for rightful independence of state governments which should actuate federal courts requires that they scrupulously confine their own jurisdictions to the precise limits with a federal statue as defined.

Conform with the congressional purpose, yes, but with due regard to the encorachment on the State Wr kmen's Compensation Act. The only non-uniform remedy prior to 1972, the only evil Congress sought to correct related to those employees who crossed the center line in the course of their employment. Everybody else on the waterfront has a uniform compensation remedy. All Congress tried to do was to cover those who crossed the Jensen line.

I respectfully submit that our suggested test is in keeping with statutory language and it is faithful to the legislative history. It is faithful to the liberal construction of the statute which this Court has indicated and I

respectfully submit that it should be adopted.

Thank you very much.

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

(Whereupon, at 3:02 o'clock p.m., the case in the above-entitled matter was submitted.)

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