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In the

Supreme Court of the United States

ATLANTIC COAST LINE RAILROAD COMPANY,

Petitioner.

vs.

ERIE LACKWANNA RAILROAD COMPANY, et al..

Respondents.

No. 71-107

Washington. D. C.
April 17 1972

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HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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v.	:	No. 71-107
ERIE LACKAWANNA RAILROAD COMPANY, et al., Respondents.	:	

Washington, D. C.,

Monday, April 17, 1972.

The above-entitled matter came on for argument at 2:10 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DEVEREUX MILBURN, ESQ., Carter, Ledyard & Milburn, 2 Wall Street, New York, New York 10005; for the Petitioner.

E. BARRETT PRETTYMAN, JR., ESQ., 815 Connecticut Avenue, N. W., Washington, D. C. 20006; for the Respondents.

C O N T E N T S

[Second day - pg. 39]

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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 No. 71-107, Atlantic Coast Line Railroad against Erie Lackawanna Railroad.

Mr. Milburn, you may proceed whenever you're ready.

ORAL ARGUMENT OF DEVEREUX MILBURN, ESQ.,

ON BEHALF OF THE PETITIONER

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

Your Honors please, I would like to reserve five minutes for rebuttal at the end of my argument.

MR. CHIEF JUSTICE BURGER: The white light will signal your time.

MR. MILBURN: Thank you, sir.

The question which this appeal presents to the Court is whether or not this Court should recognize a right to contribution in maritime non-collision cases.

An obstacle to granting such a right is Halcyon Lines vs. Haenn, a famous case.

A subsidiary question is whether contribution by the Erie Railroad is precluded by the Longshoremen's and Harbor Workers' Compensation Act; an alternative is: Should the Court of Appeals have applied a New Jersey statute creating a right of contribution by supplementation?

The factual setting in which these questions are to

be decided is relatively simple and can be briefly stated.

An action was commenced in May of 1966 against Atlantic by Plaintiff Benazet, for injuries he sustained on July 30th of 1964. For those injuries, Erie Railroad paid him compensation under the Act.

The jurisdiction of the District Court rested on diversity of citizenship.

A box car belonging to Atlantic, but on Erie's tracks and having been in Erie's possession for three days, rolled down the Erie track across a floating bridge and onto a car float which was floating. Benazet climbed the back of the box car to adjust the brakes, and while turning the wheel, the brake wheel, the footboard gave way, thus throwing his weight backwards against the wheel, and supports of the wheel gave way and Benazet fell to the deck and suffered serious injuries.

This occurred after the Atlantic box car had been through many railroads, as stated in the brief for Erie Railroad.

Erie, although it had a duty to inspect upon receiving the car, did not detect the decay of the footboard or the fissure in the supports of the wheel, which could be detected from the ground.

As a short aside, the case was tried on the grounds that it was a common-law tort and maritime law was not thought

of until after the summation by both counsel and just prior to the charge, when a memorandum was submitted that this thing that the box car was on was a float and not attached to the pier, not attached to the land except by the floating bridge, and therefore maritime law applied.

Counsel were given from 5 o'clock that evening until 9 o'clock the next morning to readjust their thinking, and suddenly they become experts in maritime law.

The District Judge gave a questionnaire to the jurors. The jurors found that Atlantic was negligent. The jurors found that Erie was negligent. And the jurors further found that Erie's negligence was a substantial factor contributing to the injuries of Benazet.

The judge, Judge Cooper, dismissed Atlantic's third-party claim against Erie on the ground that in maritime law no right of contribution existed, and refused supplementation by using the New Jersey Joint Tortfeasors Contribution Act.

The Second Circuit Court of Appeals affirmed, while finding that our arguments were appealing, nevertheless stating that they felt bound by the Halcyon decision of this Court. Certiorari was granted by this Court on October 26th of 1971.

The first problem that we are faced with, obviously, is Halcyon v. Haenn. That decision decided that a right to contribution had never been extended in maritime non-collision cases. This was true even though such a right existed in

collision cases.

Furthermore, the Court held that this was a subject for Congress rather than for judicial decision.

Q In collision cases, it's a 50/50 rules, isn't it, regarding --

MR. MILBURN: At the present time I believe you have that problem before you on certiorari of the Tugboat San Jacinto case, as I understand it.

Q I want to ask you whether, in your view, the decision in that case on which we granted certiorari, however it goes, would have a connection or an effective impact upon this case?

MR. MILBURN: I would say it would have an impact in that if it went to divided damages in accordance with fault, in our opinion that is the most just way of deciding these problems, and we would have changed our brief, and we would have changed our argument, but we didn't think we could change the entire maritime law, all in one day, until we saw that case.

Q I notice in your brief you suggest that we accept the 50/50 rule --

MR. MILBURN: That's because -- purely because it was traditional, and also because the two dissenting justices in Halcyon came down on that side with three choices, or four choices.

Q How does the jury verdict -- there were special interrogatories to the jury, you indicate --

MR. MILBURN: That is right, sir.

Q Will you relate for me how their response affects this claim that this is a maritime collision and not a railroad negligence case?

MR. MILBURN: Well, I think the only way it affects it is that it establishes (a) unfortunately the negligence of Altnatic and (b) the negligence of Erie and the fact that Erie was -- its negligence was a substantial factor in contributing to the injuries of Benazet.

I think that that is important when we get into the active/passive arguments which have been used so often in indemnity and in other cases such as this.

Q It all becomes simple if it becomes an admiralty case, is that it?

MR. MILBURN: It will, I hope, Your Honor, if Halcyon is overruled, it will become very simple.

Then the damages will be apportioned in funds with the fault of the parties who caused it.

Q Well, as I understand it, nobody questions the proposition now that this is an admiralty case governed by admiralty law?

MR. MILBURN: That is correct.

Q There is no issue about that now?

MR.MILBURN: No issue, no.

Q Although it was a late-blooming idea in the trial of the case.

MR. MILBURN: Yes. Yes, it was, Mr. Justice.

Q You couldn't apportion damages according to fault on the basis of this jury's verdict, could you, Mr. Milburn?

MR. MILBURN: No, you could not, Mr. Justice Rehnquist. There would have to be a remand and a further jury finding, yes.

Now, --

Q You mean if you did it proportionately, or what?

MR. MILBURN: If you did it proportionately, and not divided them --

Q Yes.

MR. MILBURN: -- if you divided them equally, you don't need anything.

Q Yes.

Q Is that the usual rule?

MR. MILBURN: Equal division? That is the usual rule in admiralty, up until the time that you hear the San Jacinto case.

Q Right. I see.

MR. MILBURN: Congress --

Q What was the cause of -- what kind of a maritime

cause of action was there in this case?

MR. MILBURN: A tort claim -- well, I don't understand you.

Q Well, this was a -- was this a suit by a what against a whom? Was it by a seaman?

MR. MILBURN: An injured longshoreman.

Q Was it by a seaman?

MR. MILBURN: No, an injured longshoreman.

Q Why was this fellow a longshoreman?

MR. MILBURN: Because he was on the water, Your Honor.

Q Well, I know, but why wasn't he a seaman?

MR. MILBURN: He was a railroad worker.

[Laughter.]

Q Well, all right, he was a railroad worker, but he was on --

MR. MILBURN: Well, his --

Q Wasn't he employed by Erie?

MR. MILBURN: His job was --

Q Wasn't he employed by Erie?

MR. MILBURN: Yes, sir.

Q And Erie owned the ship?

MR. MILBURN: Yes, sir.

But his job was --

Q And he was employed by Erie?

MR. MILBURN: And he was employed by Erie. His job

loading the barge.

Q So he was performing a longshoreman's job?

MR. MILBURN: A longshoreman's job, yes.

Q Or maybe a Jones Act seaman's job?

MR. MILBURN: Well, the Jones Act has divided damages, too, so --

Q Yes. But because this all came very late in the trial, it wasn't very clear, but certainly there would have been or could have been an unseaworthiness claim against --

MR. MILBURN: Against Erie.

Q -- against Erie, whose barge it was, as well as a limited claim against either or both of them under the Jones Act?

MR. MILBURN: That is correct. There wasn't --

Q Not that, I guess, he probably had a claim under both of them under the --

Q Well, the Jones Act isn't available to longshoremen, is it?

MR. MILBURN: No, sir.

Q No.

Q And so a longshoreman, if he sues a shipowner, -- if a longshoreman sues a shipowner, not for seaworthy but for negligence, what is that, jsut a maritime cause of action for negligence, or can he sue a shipowner for negligence under this?

MR. MILBURN: He can sue a shipowner for unseaworthiness.

Q I know, but how about negligence?

MR. MILBURN: Well, we wouldn't need negligence if we had unseaworthiness, because, absent fault without --

Q I know, but here's a longshoreman suing a shipowner.

MR. MILBURN: Not in our case, no, sir.

Q But could he have sued the shipowner?

MR. MILBURN: He could have sued --

Q For negligence?

MR. MILBURN: I don't know the case that says he could have sued the shipowner on negligence, but he could have sued the shipowner for unseaworthiness, which, I assume, is the same as saying negligence without fault.

Q I understand that. But the liability you established here was for negligence?

MR. MILBURN: Yes, sir.

Q Yes. And you want to assert that against Erie?

MR. MILBURN: Yes, sir.

Q Anybody on board a ship can have a suit for negligence under Kermarec.

MR. MILBURN: That's right.

Q Right. Regardless of any employment relationship.

MR. MILBURN: Yes, sir.

Now, if I could just spend a few, very few seconds on our lack of congressional activity. We didn't have it in -- there isn't any.

Two decades have passed since the Halcyon decision. There have been bills in Congress, which are in both of the briefs, which indicate in a periphery sort of a way that this was considered, was put in bills but it was never reported and never amounted to anything. This is understandable, probably because of the decision in the Ryan case, which followe the Halcyon case by some two years. And in the Ryan case, which I am sure Your Honors are familiar with, an indemnity was found by an implied warranty on the part of the stevedore and the shipowner recovered from the stevedore.

This relieved the shipowner, in most cases, of his absolute liability and his failure to be able to contribute -- to obtain contribution from the stevedore company.

Now, I think that the Ryan case explains that, and I think in our brief you will find a footnote which indicates that far from coming in to argue about Halcyon, they came in to say that the whole unseaworthiness theory was wrong, and bills should be introduced to eliminate that. But we did not have any congressional action in the last two decades which would change the result of Halcyon.

I think our answer to that is contained completely in our quote from Moragne, which appears in our brief. I think

that in the interests now of symmetry in the maritime law, it is time for this Court to create such a right, to recognize a right of contribution in cases similar to this.

Now, if I might spend just a second on the history of Halcyon and that line of cases, it started, as I'm sure you know, with the Porello case, and then, through Sieracki to Halcyon and from Halcyon to Pope & Talbot. A great deal is made of the Sieracki case.

I'd like to just point out one difference between that case and our case. There was a great deal of language there, and there is a great deal of language in all these cases on this point, about the absolute liability of the shipowner, and the non-delegable character of that liability. Many cases go off on that line that we cannot let him pass on any part of his liability because if he does so he will not have a safe ship, he will not have the incentive to have as safe a ship.

Well, the difference is that we're not the shipowner. Erie is the shipowner. We don't have liability without fault. Erie is the one that has that. And I think that that to some extent distinguishes Sieracki and Pope & Talbot and, to some extent, Halcyon.

Now, when they get through Halcyon and Pope & Talbot, the law suddenly takes a bend to the right. They can't -- the shipping industry, maritime law finds the Halcyon case

hard to stomach. And instead of that it develops the Ryan theory. And the Ryan theory came two years later, decided by Mr. Justice Burton, who had dissented in Halcyon; and the Ryan case developed a theory of indemnity and said that the stevedore had an implied warranty -- was given an implied warranty for workmanlike service. In some cases there was a written warranty of workmanlike service, but in the Ryan case it was an implied warranty of workmanlike service.

From Ryan we went to Weyerhaeuser v. Nacirema. There the indemnity held even though it was equipment that was used negligently by the stevedore, and it said in that case -- this Court said in that case, that not even the negligence of the shipowner would defeat this claim of indemnity against the stevedore.

That was the case that also said the active/passive concept of negligence was not important in -- it was inopposite in cases such as we have here.

After that we had the Fisser case, the Crumady v. Fisser, where even the equipment that was faulty and used in a faulty manner by the stevedore was supplied by the shipowner.

Then, in Waterman, we had the warranty, not only running to the shipowner, but it ran to the consignee of the cargo. And finally, in Italia we reach the conclusion that the stevedore was liable in indemnity even though he had not been negligent himself.

The next case, which came along and which really is where we are at the present moment, was the Federal Maritime v. Burnside, which suddenly showed the opposite side of the coin. This case suddenly said that the shipowner might owe some duties itself, that it owed a duty to the stevedore. And in that case it said it owed a duty to the stevedore and its last sentence said that it did not judge, at that time, between the liability of the stevedore indemnity and the negligence of the shipowner, the violation of his duty to the stevedore. And it left it at that.

Now, the Burnside case pointed out that there was no quid pro quo running between these two people, the stevedore and the shipowner. There is a quid pro quo running between the stevedore and his employee, and that is contained in the Longshoremen's Act. He gave up and he accepted the stevedore, absolute liability. And in return for that he gave -- he received a limitation of his damages.

Now, Burnside leads us to looking for a possible solution -- I might just add one other line of cases running out of Halcyon, which is the Fifth Circuit, the Horton and the Watz and now the Second Circuit with its latest Moran case. All those cases interpret Halcyon as being limited to its facts, as holding that there's only -- no right to contribution when one of the parties is barred, his liability is limited by statute.

Now, we have maintained and set forth in our brief that the liability of Erie in this case is not limited by statute, or is not exclusively set by the statute. As I said before, Benazet has a right to sue Erie for unseaworthiness.

If it did sue, and this is based on the Yaka and the Jackson v. Lykes cases, if it did sue Erie and was successful, it could recover in addition to its payments under the Longshoremen's Act.

We therefore could extend the Horton, Watz, and Moran cases in such a way as to avoid Halcyon and say that Halcyon is limited to its facts, and here the liability is not limited, and only under the Act, but there is also unseaworthiness liability.

On the other hand, by so doing, we would avoid the frontal attack on Halcyon, which we feel is so necessary at this time.

Now, as was stated in the Italia case, contribution is based on law, and indemnity is based on a contract theory. Both are unjust. I don't say contribution is unjust, but the denial of the right of contribution and indemnity are unjust, in that both put 100 percent of the liability on one side or on the other. Unless, of course, the indemnity is set by a written contract.

Now, that brings me to an interesting case, which is annexed to our reply brief as an appendix, Dole v. Dow

Chemical. That case was decided by the New York Court of Appeals within the last week or so; it came out within the last week or so.

In that case the manufacturer manufactured an insecticide or a powder, an aerosol of one kind or another, and the user sprayed the room and shortly thereafter his employee walked in and died because of the effects. He claimed -- the user claimed that it wasn't on the can how it should be used. The manufacturer said it was on the can, "and you didn't use it right; you should have aired the room."

Judge Bergan in that case threw aside all considerations of active and passive negligence, and that case was a natural for active and passive negligence and indemnity -- in an indemnity case.

But he threw that aside and he decided that he was going to fashion a new remedy, and that remedy was going to be decided upon where did the fault lie; and if the fault was evenly divided or unevenly divided, in either case he was going to decide which -- where the fault lay and in what percentage and in what proportion, and in that way distribute it.

Now, he talks in the language of indemnity, but he comes out with a result of contribution. And quite frequently during his opinion he suddenly stops talking about indemnity and talks about contribution; but it is the result that we are

particularly interested in. It is the discarding of the active/passive theory. And the idea of sitting down and looking at this problem, you're both negligent and this fellow got hurt; now you ought to pay in proportion to which you were negligent.

And we recommend the consideration of that decision as a solution, as a cutting of this knot between indemnity 100 percent and denial of contribution 100 percent, and let the damages fall wherever this Court will decide in the next few weeks, either equally divided because it's maritime law, in some other way depending on the San Jacinto case.

Now, the one thing about the Dole case that I would emphasize is that at the end he ends up with a tort solution, and this is a tort case; and his was a tort case. And you ought to have a tort decision dividing the remedies equally, or unequally, in accordance with fault; but you should not -- these cases should not really be decided on the basis of contract and implied warranty.

Now, the next problem that arises is the Longshoremen's and Harbor Workers' Act, and its language, which, to some at first blush, might indicate that it was exclusive, that it was the exclusive liability of the Erie Railroad.

I would say that there are three reasons why -- not reasons, but three reasons why this is not necessarily true. It was decided in the Ryan case that the Act did not -- was on exclusive. In the Weyerhaeuser v. United States case, it

was decided that -- it was said that our Act, the Longshoremen's Act is virtually identical with the Workmen's Compensation Act, the Federal Employees' Compensation Act, which was under consideration there, and that didn't bar what we are asking for; and thirdly, there is no quid pro quo that we are saying, as we said in the New York case and as was indicated in Burnside, that we have a separable, legal entity of rights here. We've got Atlantic against Erie, Erie against Atlantic; all Mr. Benazet does, really, in this case is to measure the damages which are to be apportioned.

MR. CHIEF JUSTICE BURGER: Mr. Milburn, you're now using your rebuttal time.

MR. MILBURN: Yes, sir.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Prettyman.

ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I am Barrett Prettyman, and I represent the respondent, Erie Lackawanna Railroad, in this case.

I think there's something superficially appealing about the proposition advanced by petitioner here: We have two people at fault, says petitioner, make them divide the damages which are due the injured party.

Well, it's not so simple, and I think once we get into it I will show that it's not so appealing, either.

Let's look first to see how the rule would operate within the specific facts of this case, and then let's see how they would operate generally.

There were two serious defects in this railroad car which was owned by Atlantic, and both of these defects were at least two years old. During those two years, this box car had been in the possession of 49 different railroads. It had been in the possession of seven railroads as often or more often than it had been in Erie's possession. And it had been in Atlantic's own possession eight times, twice as many as it had been in Erie's.

More importantly, it had been in Atlantic's repair shop for other repairs at least four times during this period, and there were three additional inspection reports by Atlantic, one of them within seven weeks of this accident.

It had never been in Erie's repair shop.

Now, the relevance of that is this: the testimony shows that the owning railroad has a very special duty in regard to its own cars.

Q How long had Erie had it, again?

MR. PRETTYMAN: Three days.

The owning railroad, when it has its car -- now, this is not just in the repair shop, but when it gets hold of

its own car, it looks for cartable damage, damage which was done by others and should have been repaired by them but wasn't; it looks for excessive wear and tries to anticipate excessive wear. It looks also at empty cars, and this is important, because in this case, for example, the car was full, we couldn't have looked inside;while the particular defect happened to be outside, it indicates the owning railroad has more of a chance to review the damage to a car.

Moreover, once the car goes into the repair shop, it gets a complete inspection, supposedly, from top to bottom. Thus, while the normal inspection of a braking system, which is done by a car -- in whose possession the car happens to fall, is a two-minute examination: normally walking around the car and inspecting things on sight.

The owning company has a special duty to look at its own cars, and particularly when it's in its own repair shop. Now, remember, this car was in Atlantic's own repair shop four times during this two-year period.

It was pure happenstance that this accident happened, while the car happened to be in Erie's possession rather than somebody else's, one of these 48 other railroads. There was nothing wrong with the car float or car bridge which was what Erie owned here; nothing wrong with that. There's no evidence that Mr. Benazet, who is Erie's employee, was negligent, contributorily negligent; in fact the jury

said no he wasn't. There was no evidence that any other Erie employee was in any way negligent here.

This accident could as easily have happened on any other person's property as Erie's.

Following the accident, and here's rather a unique point, going to your point, Mr. Justice White, following the accident Erie promptly paid Mr. Benazet over $11,000 under the Longshoremen's and Harbor Workers' Act. And I think one of the interesting facts here is that you have a man who is paid under the Longshoremen's Act, treated as a longshoreman, and yet if we're the shipowner, why isn't he a crewman? And, if I may very respectfully suggest it, this is one of a number of reasons why my own view is that this is quite an inappropriate case to decide this far-reaching question of maritime law, because you do have this confusion between things like the Safety Appliance Act, and the Longshoremen's Act, and so forth. And this particular rather peculiar incident where you have railroad cars being on a car bridge.

Maritime law --

Q The thing that we ought to overrule is O'Rourke v. Pennsylvania Railroad.

MR. PRETTYMAN: Which is precisely in point, Your Honor.

Q I know.

Q To me that's what causes at least some of the

problem here.

MR. PRETTYMAN: Well, I might say --

Q But nobody is asking us to overrule that?

MR. PRETTYMAN: No, sir. And as a matter of fact both parties agree that the maritime law applies; but you do have these rather peculiar facts over and above your normal maritime situation, including trying to figure out which party is equal to the stevedoring company and which party is equal to the shipowner.

Now, I want to emphasize that in paying under the Longshoremen's Act, Erie had no choice. This was an absolute duty and without relation to fault; no normal defenses applied, such as the fellow served under assumption there was contributory negligence.

Now, we had to pay that money, without regard to anything. We had to pay it. And we paid it. And that money has been paid.

Now, those are the facts against which we approach the law in this case.

Q And that you were liable for simply because of the employment relationship, that he was injured in the course of his employment?

MR. PRETTYMAN: Correct. Correct.

Q And was a longshoreman --

MR. PRETTYMAN: And was treated as a longshoreman;

that's correct.

Now, we turn to the law. There was no contribution, as you know, at common law. And then the courts fashioned an exception in collision cases.

What Halcyon did, really, was to extend, was to refuse to extend this particular exception to non-collision cases. Why?

Wall, I think it did so for a very good reason. Congress has repeatedly legislated in this field. Harbor Workers' Act, Harter Act, Jones Act, Public Vessels Act, Death on the High Seas Act, Extension of Admiralty Jurisdiction Act, Limited Liability Act; and yet it had repeatedly refused to provide for contribution.

If there really was a need for contribution, said this Court in Halcyon, let Congress provide for it. Congress is better suited to say, not only whether contribution ought to be provided, but also, if so, what measure of contribution should be provided; that is, equally divided, proportional, or, as the Court of Appeals said in Halcyon, limited by the amount of compensation which the employer would have paid if, in that case, he had paid it.

The Court pointed out that there are an awful lot of people interested in these admiralty matters, and they could present their divergent views to Congress, and these views could be reconciled.

Now, that was twenty years ago. Congress has refused to change the Halcyon rule. Where are all those people who were so quick to find maritime abuses? The insurance companies, Maritime Administration, Interior, Treasury, Justice, Commerce Departments; insurance companies, as I said, shipping and stevedoring companies, unions. They have not come forward to complain about the Halcyon rule.

It is true, as we stress, that Congress has introduced bills which we think would have the effect of changing Halcyon, but the interesting thing about it is that the reports on those bills not only indicate that Congress didn't have in mind changing Halcyon, but, more importantly, none of those bills ever even got out of committee. Congress is satisfied withe the Halcyon rule as established by this Court, and, as a matter of fact, I was informed several days ago that on May 2nd, S. 525, which was introduced on behalf of the Administration, will have hearings in the Congress, and with the Chief Justice's permission, I would like to submit copies, Mr. Chief Justice, if I may, of that bill to the Clerk. I have given copies today to my opponent.

That bill would make the compensation the exclusive remedy by anyone against any employer; and this even would include indemnity.

The Secretary of Labor, as I understand, will testify first on May 2nd.

So this is hardly a dead issue in Congress; this issue, which this Court said in Halcyon, was peculiarly one for Congress is actively under consideration.

I would next like to point out that even if Halcyon were restricted in some way there would be no contribution here.

In Halcyon no compensation was paid. The injured worked sued the shipowner, which impleaded the employer; and the Court of Appeals held that the employer was liable for the contribution only for the amount it would have paid in compensation if the employee had elected to sue for compensation.

But in this case Erie has already paid compensation. So even if the Halcyon rule is restricted back to the view of the Court of Appeals in that case, Erie still owes nothing here.

Secondly, in Halcyon, the employer was the real party at fault, not the shipowner. The jury found in that case that the employer was 75 percent negligent, and here, of course, the situation is reversed.

So if the Court adopted a rule of contribution, which was designed to make sure that the chief wrongdoer will not be immune from all liability, which really happened in Halcyon, that purpose would not be served by contribution in this case. But, in any event, we claim that Halcyon shouldn't be cut back,

much less overruled.

Barring contribution is entirely consistent with the established law. Unlike indemnity, contribution is based on joint liability as joint tortfeasors to a common injured party resulting from a single tort. This Court has made that distinction many times. There's no such joint liability here.

Erie's obligation, without regard to fault to this injured party, was to pay him compensation under the Act, which it did. Mr. Benazet, the injured employee, could not have sued Erie for negligence.

With all due respect, Mr. Justice Stewart indicated a minute ago that the Court had established that anyone could sue for negligence. That is accurate, with a single exception: that here the longeshoreman cannot sue his employer for negligence. The furthest the Court has gone, in the Yaka and Lykes Brothers cases, is to say that he can sue for unseaworthiness if the employer is also the owner of the vessel and the employer is solely responsible.

But there's a large difference between suing for unseaworthiness and suing for negligence. On negligence we are absolutely protected by the specific words of this Act. The Act could hardly be clearer in regard to that.

Therefore, contribution is totally inapplicable here.

Now, as to the equity of this situation, they strongly favor Erie, and I'd like to point out --

Q Sorry, Mr. Prettyman, but I think you mentioned earlier that there's another bill pending in Congress?

MR. PRETTYMAN: Yes, sir; and I'm going to submit that to the Clerk.

Q And did you say something -- you suggested a date for a committee hearing or something?

MR. PRETTYMAN: There's a committee hearing set for May 2nd.

Q And what's the thrust of the bill?

MR. PRETTYMAN: The thrust of the bill would provide that no one can recover against the employer who has paid compensation at all; that is, either in a contribution or indemnity, it doesn't use those words, but it in effect makes compensation the exclusive remedy. It would affect even this Court's indemnity cases, really. Because it -- what it would really do is to make explicitly clear that the Act means what a lot of us had assumed it had meant originally, and that was that when you pay compensation, that's it.

Q Before this Court spoke?

MR. PRETTYMAN: Yes, sir.

Now, the same argument, precisely the same argument that Atlantic is making here, in terms of the equities, that was made by the shipowner in Pope & Talbot vs. Hawn. I'd like to refer you very specifically to that case, because in that case, here's what the shipowner argued: He said, to allow

the employee to get full recovery and then to pay over to his employer what he had received in compensation would reward the employer who had also been negligent. That was precisely the argument that he made.

This Court said, no, the Act intends that employers who are absolutely liable to employees for compensation be protected.

Therefore, if the Court overrules Halcyon, it's also going to have to rule this portion of Hawn as well.

Moreover, it's simply not fair to impose contribution in this case, for this reason: here Erie and Atlantic, of course, happen both to be parties, but in other cases, where the employee recovers against a third party, that third party can turn around and sue the employer later for contribution. It doesn't have to be in the same suit. And when it does, the employer is not allowed many of the normal defenses, including statute of limitations.

The burden in these cases, we submit, should fall on the responsible party. There's no question here, as Judge Cooper found, that there was no intervening cause between the negligence of this box car's owner and the accident.

More importantly, the burden -- and this is something that's been developed in your recent cases -- the burden should fall on the party that's able to prevent the accident.

This theme runs through so many of your recent

opinions.

Isn't that what we're really trying to do here? If you're going to talk about the equity; trying to prevent the accident itself.

If Atlantic can get contribution from Erie, when Erie's only fault -- only fault -- was a failure to inspect. That's what the pleading even says on behalf of Atlantic; that's all we were ever charged with, was the failure to inspect. I see no reason why we couldn't bring in the other railroads as well -- rather, Atlantic could bring in the other railroads as well, who had had this car in its possession and further dilute its responsibility.

But even if it splits only with us, the net effect is to give comfort to this one party best able to cure the defects in this box car, and that is its owner. If you gave contribution in this case, you'd be saying that Atlantic doesn't owe $100,000 of this judgment, even though for two years it allowed its own box car to stay in this condition, and even though it had this box car in its possession eight times, in its own shop four times and never detected this condition in its own box car.

Now, I'd like to point out to you, in the light of the rather simplistic argument that you should simply allow contribution, some of the difficulties and a few of the things that you will have to face if you say that it is applicable to

this case.

First, if you decide that contribution is not absolutely barred, as a kind of general proposition, then you are going to have to face the question that did not have to be decided in Halcyon, and that is: Does the Harbor Workers' Act bar contribution where the employer has paid compensation?

Again I can only say I'm not going to read it to you, you're very familiar with it, the language is absolutely clear. And no case, I emphasize, by this Court has held to the contrary.

Secondly, if --

Q Well, we have held -- in Yaka we held that the language didn't seem -- didn't mean what you say it very clearly seems to mean.

MR. PRETTYMAN: I addressed myself to that while you were gone, Mr. Justice, but --

Q I say "we", I meant the Court, I dissented.

MR. PRETTYMAN: Yes. In the Yaka and Lykes Brothers there was, with great respect, I suggest that the Court didn't go that far. What it did say was that the longshoreman could sue for unseaworthiness.

Q Yes.

MR. PRETTYMAN: But only in a situation where the employer was also the shipowner --

Q Was the owner of the vessel.

MR. PRETTYMAN: -- and was solely responsible. Both those cases, the shipowner was solely responsible under the Act. It did not address itself to the negligence question, and neither did the Kermarec case, which involved the invitee.

I suggest that the Court has never held that, against the language of the Act you can sue for negligence, which is an entirely different thing.

Q Well, wasn't the critical thing in Reed v. Yaka that the shipowner was being sued not as a longshoreman but as a shipowner?

MR. PRETTYMAN: Yes, that's right, really.

Q And that the Longshoremen's Act protected him as a longshoreman, as a stevedoring company?

MR. PRETTYMAN: Yes. Yes.

Q But not as a shipowner?

MR. PRETTYMAN: Yes. That's quite true.

Q Well, why wouldn't the same approach permit suit for --

MR. PRETTYMAN: Well --

Q -- negligence against a shipowner rather than against a stevedore?

MR. PRETTYMAN: Because in the shipowner's situation you have a non-delegable duty, though it is the owner of the ship, in regard to unseaworthiness, but you can in turn turn around and get indemnity by bringing in the real party in

interest.

Now, in this case you are suing directly for negligence, presumably, the party who --

Q As a shipowner?

MR. PRETTYMAN: As a shipowner, that's right. But, you see, you have the peculiar proposition here that you've got a longshoreman who is also a seaman, in the sense that he is the employee of the -- . I'd also like to point out that in the Yaka and Lykes Brothers, no rights were established in third parties at all. This related entirely to the suit directly between the longshoreman and his employer; no rights in third parties were established. So that we have the additional distinction, not only was it a suit for unseaworthiness, not only was there sole responsibility, but here we are really talking about, even if you have the suit, even if you allow the suit for negligence on some theoretical ground, aren't you then faced-to-face with the language of the statute? That is, despite some theoretical right to sue, when the statute says that compensation shall be the sole remedy against the employer, aren't you face-to-face with the statutory right?

Q Yes, but the Longshoremen's Act doesn't deal with the shipowner's liability. Or with the rights of crew members.

MR. PRETTYMAN: Well, the Longshoremen's Act, Your

Honor, --

Q The Longshoremen's Act doesn't prohibit the recovery against the shipowner, does it?

MR. PRETTYMAN: Well, I'm sorry, but I respectfully disagree with that. The language --

Q I would suppose you would -- you must!

[Laughter.]

MR. PRETTYMAN: The language, Your Honor, let me just find -- let me find the language here.

The language says: "The liability of an employer prescribed in section 904 ... shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury of death."

Now, what could be clearer than that, if you allow contribution after Mr. Benazet has recovered for negligence against Atlantic, if you allow contribution you are allowing it not on an indemnity theory that somehow there is something owing as between Erie and Atlantic, because there isn't, you are allowing it because of the common tortfeasor status to Mr. Benazet. It is only through his recovery against Atlantic that somehow we would have to owe Atlantic something. This is not indemnity.

Atlantic specifically said in this suit that we did not owe them for indemnity. They're not saying we warranted anything or we owe them some duty; they're saying that because we had to pay Mr. Benazet, because we are negligent to Mr. Benazet, you, as a joint tortfeasor, owe us compensation. The statute specifically says that our liability shall be exclusive, not only to him but to"anyone otherwise entitled to recover damages on account of such injury".

I just can't imagine how language could be more specific than that.

Q But if this barge had been owned by somebody else, this longshoreman could have sued the shipowner for negligence?

MR. PRETTYMAN: You mean not his employer?

Q Yes.

MR. PRETTYMAN: Sued -- yes, certainly.

Q And -- but if his employer happens to own the boat, own the ship, you say the --

MR. PRETTYMAN: He did sue somebody else. He sued Atlantic, which was not the shipowner, and he did recover. And now the shipowner -- now the non-shipowner, so to speak, the third party, normally, let's say, the stevedoring company, is attempting not to get indemnity from us, because of something we owe directly to them; they're saying because of the common liability as joint tortfeasors to Mr. Benazet, and

that's precisely what the Act says you can't do.

Q Doesn't the whole position of the petitioner depend on joint tortfeasors -- they started out there and then they got over on this. And if you are not one of the joint tortfeasores, does the whole thing not collapse?

MR. PRETTYMAN: Exactly, Your Honor. We're not joint tortfeasores solely because of the compensation act, we have been found negligent in the sense that we had a duty to inspect.

Q Right.

MR.PRETTYMAN: But -- and one of the things which I will get into tomorrow morning just briefly is the idea that even if you allowed contribution here, we're going to get indemnity from them, because that's precisely what you allow in these cases.

Do you want me to continue, Your Honor?

MR. CHIEF JUSTICE BURGER: You have a minute left.

MR. PRETTYMAN: All right, sir.

MR. CHIEF JUSTICE BURGER: If you would prefer to leave it all over to morning, if you're on a new subject matter, --

MR. PRETTYMAN: I was about to start something new, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Then we will begin there tomorrow morning.

MR. PRETTYMAN: Thank you, Mr. Chief Justice.

[Whereupon at 2:59 o'clock, p.m., the Court was recessed, to reconvene at 10:00 o'clock, a.m., Tuesday, April 18, 1972.]

IN THE SUPREME COURT OF THE UNITED STATES

ATLANTIC COAST LINE RAILROAD COMPANY, Petitioner,	:	
v.	:	No. 71-107
ERIE LACKAWANNA RAILROAD COMPANY, et al., Respondents.	:	

Washington, D. C.,

Tuesday, April 18, 1972.

The above-entitled matter was resumed for argument at 10:06 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in 71-107, Atlantic Coast Line against Erie Lackawanna.

Mr. Prettyman, you may proceed whenever you're ready.

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

Yesterday I was naming some of the problems that would face the Court if contribution were now to be allowed as a general proposition, and I was pointing out that the first problem, of course, would be the Harbor Workers' Act, and I was saying that Erie and Atlantic are not joint tort-feasors owing a common duty in tort to Benazet, the injured party. Because, while Atlantic owes that duty to Mr. Benazet, Erie's duty is quite different, namely, to pay compensation under the Act.

I want to make it clear, of course, that Benazet never sued Erie in this case. Benazet sued Atlantic, and Erie was impleaded.

Therefore, even if contribution is not absolutely barred, as a general proposition you must then decide whether the Act, in view of the very clear language, nevertheless makes Erie somehow subject to contribution.

Now, the second problem I'd like to point out is that if you said contribution was somehow available, what do you do about the conflict between contribution and Erie's own

right to indemnity in this case?

Of course, it was not appropriate in the trial court here to submit to the jury Erie's claim for indemnity, because under Erie's theater, neither under State law nor maritime law nor any other law, did it owe anything, and therefore the question of indemnity never arose.

But if you were now to say that contribution was available to Atlantic, upon remand Erie could, we submit, obtain indemnity against Atlantic as the real party at fault.

Now, if I may ask the Court's indulgence, to turn to page 13 of the Joint Appendix. This is the Atlantic complaint against Erie. And in paragraph 6 there on page 13 you will see what they charge Erie with, and this is all they charge Erie with, and this is all, the only reason Erie got into the case.

In plain language, in paragraph 6, they charge us with nothing more than a failure to inspect.

Now, you have held, in Ryan and Crumady and Italia Societa, repeatedly that where there is a duty of seaworthiness on the part of the shipowner, the shipowner can then implead the party really responsible for the accident if the shipowner's only duty was to inspect and can obtain indemnity. That's precisely our situation here. They claim we failed to inspect. We would show that this was their car, that over a two-year period it became in terrible shape, that they didn't

do anything about it, and so forth, and we would say that we're entitled to indemnity here.

Q What's your view of that -- of the basis for indemnity, tort or contract?

MR. PRETTYMAN: The basis for the indemnity in this case would probably be both. It would be a duty on behalf of the owning line, in contract, not to pass along its own car to a connecting carrier when it was not in proper shape; and in tort for imposing upon others a defective car.

It might well be both or either.

Q What do you think our cases put the indemnity on?

MR. PRETTYMAN: I think indemnity is usually a contractual indemnity, or a warranty -- either contractual or warranty; but the lower courts, Your Honor, have now developed a theory of sort of tort indemnity or quasi-contractual indemnity. And whether that would apply here, whether this Court would accept that, I don't know.

But, in view of the fact that I think we could recover under either theory, I don't think it controls here.

In any event, under your prior cases, since we would clearly be entitled to indemnity against Atlantic, now what do you do with the conflicting claim of contribution where the parties would somehow split the judgment, 50/50 or otherwise, and our claim for complete indemnity. That's the

next point you would have to resolve here.

Then you come to the problem of the conflict between various statutes here. As you will remember in Halcyon, one of the reasons the Court didn't want to say there was contribution was that Congress had passed all these other statutes and that contribution was somehow going to fit in to the pattern established by Congress.

Just to give you an example here, there's a Limitation Liability Act. We would be limited to the value of the car float, and to the cargo which, it's not in the record but I'm told that it's something around 34, 35 or 40 thousand dollars.

Now, what do you do? If you're going to say there's a 50/50 split, we owe 100,000, we've got the Limitation Liability Act, we only own 35 or 40; what about the Hrder Act? You're going to have to work this contribution in somehow to all these other statutes. There's that problem.

There are other problems which, unfortunately, I don't have time to go into. Such as what the proper split would be. We think that the Court of Appeals' opinion in Halcyon ought to control, or it ought to be strictly based on fault and not 50/50, and so forth. There are a number of problems which you would have to reach.

In conclusion, let me simply say that to grant contribution now, after 20 years of Halcyon, would have an

extremely unsettling effect on maritime law generally, it would throw out the carefully drawn line between indemnity and contribution, which has been established by this case in so many cases, and it would, in fact, create a conflict between the two. It would dilute the owner's responsibility to correct defects, because, from their standpoint, let's face it, the way these railroad cars go, bythe luck of the draw this car is probably going to end up on somebody else's line rather than theirs, and therefore if you're going to dilute responsibility around among the various lines who have had the car, or even share it with the one where the accident happened to happen, so much the better for the owning line.

Q Do I recall your saying, Mr. Prettyman, that 49 different carriers had handled this car?

MR. PRETTYMAN: During the time that the -- there was testimony that the defect had taken at least two years -- both defects had taken at least two years to develop. The rotted board and the fissure in the brake equipment itself could not have occurred overnight, that it took at least two years for that to develop. It developed slowly. And that during that time, if the car had been properly inspected, these defects would have been discovered.

During that two-year period, 49 different railroads had had this car in their possession, yes, sir.

It would impose on employers, in direct contradiction

to the clear and unmistakable language of the Harbor Workers' Act, a duty to pay not only compensation, regardless of fault, but an additional judgment based on what the tortfeasor would have to pay.

And with that, unless you have questions, I think that the judgment clearly ought to be affirmed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Prettyman.

Mr. Milburn, you have four minutes left.

REBUTTAL ARGUMENT OF DEVEREUX MILBURN, ESQ.,

ON BEHALF OF THE PETITIONER

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

I would like to commence this rebuttal period by just reading two sentences, which I think are very important in this case, and they come from the questionnaire presented by Judge Cooper to the jury.

Question 6 --

Q Where in your Appendix are they?

MR. MILBURN: Page 62, Mr. Chief Justice.

Q Thank you.

MR. MILBURN: Question 6: "If you find the Atlantic Coast Line Railroad is liable, was the Erie Lackawanna Railroad also negligent?"

"Answer: Yes.

"If so, was such negligence a substantial factor in

bringing about plaintiff's injuries?

"Answer : Yes."

Now, Judge Cooper, in his opinion, also found that Erie was negligent -- pointed out that the jury had so found, and that Erie's negligence was a proximate cause, as was Atlantic's.

Judge Cooper found not that there was no intervening cause, as was stated yesterday, but that there was no superseding cause, and that we admit; there was no superseding cause. We were a proximate cause, as was Erie.

Now, we seem to be turning up here as the bad guys in this, that we're the only ones that were negligent. Erie has solely a duty to inspect.

Well, I might call Your Honors' attention to a case cited in our petition for certiorari on page 6, Chicago, Rock Island Railroad v. Chicago & Northwestern Railroad in the Eighth Circuit. And I think that that case illustrates pretty clearly that the primary responsibility for an unsafe car lies with the railroad upon whose tracks the unsafe car is at the time of the accident.

I might point out that this car was on Erie's tracks at the time of the accident.

Q Of course, Mr. Milburn, I suppose you could hypothesize a situation where a car had just, within seconds, arrived on the track of the carrying road, and they had taken

over responsibility, and the negligence, had the injury or damage occurred right then, so that's a rule that, as propositional, would have to be applied with some qualifications, would it not?

MR. MILBURN: With some qualifications, Mr. Chief Justice; but I believe in the Rock Island v. Northwestern case, it was about as close as you could come. The tracks intersected at right angles, there was a circular interchange track in between, Rock Island left it on the interchange and Northwestern picked it up, and the Court indicated that Northwestern had the primary responsibility to inspect that car, and it was on their lines, and they had the primary liability.

Now, we were also told yesterday that this car was never in our shop by Erie. Well, if it had been in their shop, and the evidence says that you could notice this decay and the fissure from the ground, if the car had been in their shop, we wouldn't have had the accident, and we wouldn't have been here now. And we maintain that it was their duty and their duty not only to Benazet but also their duty to us to inspect that car, and to put it in the shop and to fix it.

And it was that duty to us that they have violated. That was one of their duties. They had two duties: One to Benazet and one to us; and they violated both of them.

Now, as we've pointed out in our brief, Erie had the last clear chance to fix this car; we didn't. We hadn't

had it for three days. There's no way, before Benazet was hurt, we could have fixed that car. We didn't -- I assume we knew where it was, but we were not inspecting it. They had the duty.

Now, if I --

Q Couldn't you have fixed it one of the times you had it in your shop?

MR. MILBURN: Yes, sir; and I believe that's why we were held negligent by the judge.

To sum up, may I say that Erie is expecting to get out of this scotfree. Erie, in this case the shipowner, with liability without fault; Erie was negligent; Erie had the last chance; Erie employed Benazet; and Erie wants to get out with no money.

In Halcyon, this Court said if they could see that -- if they were convinced of the justice, they might have decided it the other way. I cannot see how there can be any question of the justice in this case if Erie gets off scotfree.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Milburn.

Thank you, Mr. Prettyman.

The case is submitted.

[Whereupon, at 10:18 o'clock, a.m., the case was submitted.]

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