In the

Supreme Court of the United States

NORTHEAST MARINE TERMINAL COMPANY, INC., ET AL.,
Petitioners,

v. No. 76-444

RALPH CAPUTO, ET AL.,
Respondents.

INTERNATIONAL TERMINAL OPERATING COMPANY, INC.,
Petitioner,

v. No. 76-456

CARMELO BLUNDO, ET AL.,
Respondents.

Pages 1 thru 72

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INTERNATIONAL TERMINAL OPERATING COMPANY, INC., Petitioner, v. CARMELO BLUNDO, ET AL., Respondents.	No. 76-454

The above-entitled matters came on for argument at 10:03 o'clock a.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:

WILLIAM M. KIMBALL, ESQ., 25 Broadway, New York, New York 10004; on behalf of the Petitioners, Marine Terminal Company, Inc.

E. BARRETT PRETTYMAN, JR., ESQ., 815 Connecticut Avenue, N.W., Washington, D. C. 20006; on behalf of Petitioner, Terminal Operating Company, Inc.

ANGELO C. GUCCIARDO, ESQ., 160 Broadway, New York, New York 10038; on behalf of Respondents, Caputo and Blundo.

FRANK H. EASTERBROOK, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Federal Respondent, 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 first this morning in No. 76-444, Northeast Marine Terminal v. Caputo, consolidated with No. 76-454, International Terminal v. Blundo.

Mr. Kimball, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM M. KIMBALL, ESQ.,

ON BEHALF OF PETITIONERS, NORTHEAST MARINE TERMINAL

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

These consolidated cases present first impression questions as to the meaning and scope of the status and situs 1972 amendments to sections 2(3) and 3(a) of the Longshoremen's and Harbor Workers' Compensation Act.

Petitioners in 76-444, whom I represent, have always conceded that there is no situs question in their case, and so I hope to be permitted to limit my remarks to the status question.

These consolidated cases present the status question in two distinguishable fact situations. In 76-444, the employee Caputo was helping load a consignee's truck with break bulk boxes of cheese. In 76-454, employee Blundo was tallying cargo which was being removed from a shipping container. Therefore, I hope to be allowed to focus my remarks on whether employees

doing the sort of work which Mr. Caputo was doing, truck loading work, have the coverage status.

Now, the threshold question is whether I may properly focus solely upon the work which Mr. Caputo was doing when he was injured, or whether, as did the majority below, I must also consider the fact that on other occasions Mr. Caputo spent a significant part of his time aboard ships doing the traditional loading and discharging work of a longshoreman.

Neither the Administrative Law Judge nor the Benefits Review Board paid any attention whatsoever nor even mentioned what Mr. Caputo did on other occasions. The Administrative Law Judge specifically fixed Mr. Caputo's status at the time of the inuury and the board affirmed on the ground that at that time he was loading and discharging a ship and not loading a truck as Judge Widener discerned in a similar fact situation in the Adkins case, which is initially cited on page 5 of petitioners' blue covered brief.

The legislative history is not crystal clear. The majority below and the First and Third Circuit Courts of Appeals have held that status should not be determined solely as of the time of injury. The Fifth and Ninth Circuit Courts of Appeals have held to the contrary.

This Court, in decisions prior to the 1972 amendments, has held that section 3(a) situs, section 2(2) injury in the course of employment, and section 2(3), section 3(a)(1) exclusion

of crew members must all be determined at the time of injury and not with reference to what the employee generally did on other occasions.

It is suggested in our brief that it would be anomalous if section 2(3) employee status were determined on the basis of what the man generally did, but then he was excluded under the same section because of what he was particularly doing on an occasion.

It is further suggested in our brief that the general functional criteria will be almost appallingly difficult to administer and adjudicate for reasons which we have suggested at pages 10 and 11.

Now, the federal respondent has distorted our first point by suggesting that longshoremen who are working on a ship and who are obviously covered by both the old and the new Act would not be covered while they were using the ship's toilet facilities. They would be, because of the work they were doing or had been assigned to do. And they would also be covered while they were taking a coffee break aboard the ship, because of the work which they had been assigned to do.

Although the federal respondent makes an important concession that Congress' expressed intent to extend coverage "to employees who would otherwise be covered by this Act for part of their activity," implies that only persons who might have been partly covered under the old Act are covered under

the new Act. And parenthetically I would respectfully suggest to the Court that in content what I have just quoted "by this Act" pretty clearly means by the old Act which the committee was looking to amend.

As I say, although the federal respondent makes that important concession, it argues that because of what it says is the risky task for cargo handling on the waterfront, all "physical" cargo handling activity within the statutory situs confers statutory status.

We have a stipulation in 76-444 that the work which the employee was doing, namely loading cheese in a consignee's truck with the assistance of a dolly, had the same risk factor wherever trucks are loaded or unloaded with dollies.

Now, presumably the government's suggestion that there should be a limitation on physical activity, was meant to exclude clerical employees on the situs who, as Judge Friendly wrote, are not covered even by the most liberal construction of the statute.

I should add also parenthetically that in a considerable number of unappealed Benefits Review Board decisions, the board has held that clerical personnel are covered by the amendments.

QUESTION: What would clerical employees be doing on the dock? I could understand a checker or somebody keeping track. Would that be within your definition of a clerical

employee?

MR. KIMBALL: I am thinking more precisely, if Your Honor pleases, these are vast installations and they have offices on these terminals.

QUESTION: Yes.

MR. KIMBALL: No longer do the executives go to the city and conduct the work long-range.

QUESTION: They go down to the --

MR. KIMBALL: They are down on the terminal and, of course, they have all these usual clerical people down there, secretaries --

QUESTION: Telephone operators?

MR. KIMBALL: -- telephone operators, all people of that sort.

QUESTION: I see. Who are employees of a longshoreman company?

MR. KIMBALL: They are employees of a statutory employee, if Your Honor please --

QUESTION: A statutory employer, right.

MR. KIMBALL: -- because that employer has some of its employees who definitely are working loading and discharging ships.

QUESTION: And the situs is on the dock?

MR. KIMBALL: That is true, sir.

QUESTION: And what of the work of a secretary is

hazardous?

MR. KIMBALL: Excuse me, Your Honor?

QUESTION: Is a secretary's work hazardous?

MR. KIMBALL: I don't conceive it to be so, no.

QUESTION: Then how is it covered?

MR. KIMBALL: It is not covered, according to the opinion below. But the Benefits Review Board has repeatedly decided --

QUESTION: On what basis is what I want to know.

MR. KIMBALL: Well, the Benefits Review Board, if Your Honor pleases, is virtually reading situs and status requirements out of the statute. They seem bent upon extending this coverage to an appalling extent. They would blanket, I believe, the United States with this coverage if they could do so. In the thousands and thousands of cases which now there must be before the Benefits Review Board, I do not recall a single one in which an employer has prevailed.

QUESTION: Wouldn't a bookkeeper or a telephone operator whose place of employment was on the dock and whose employer fell within the definition of 2(4) -- and that would be maritime employment, because that is the employer's business, so wouldn't the telephone operator or bookkeeper fall within the literal terms of these two statutes, statutory provisions?

MR. KIMBALL: No, sir, they wouldn't fall within the literal terms of the statute or within its intent terms,

because --

QUESTION: Well, take away -- apart from its intent, how about the literal terms, you don't think they are in maritime employment?

MR. KIMBALL: If Your Honor pleases, because of the definition of employee in section 2(3), no.

QUESTION: Where are you referring to?

MR. KIMBALL: I am referring on page 1 of the appendix in the blue brief.

QUESTION: It is on page 3 of your brief, I believe, isn't it?

MR. KIMBALL: It may be there as well, sir.

QUESTION: Now, why --

MR. KIMBALL: And the language there is "employee who means any person engaged in maritime employment," and so on and on.

QUESTION: Well, don't you think that a telephone operator employed by a stevedoring company, whose business is to load and unload ships, is engaged in maritime employment?

MR. KIMBALL: No, sir, because I believe the statute necessitates that the employee of the stevedore be engaged in loading and unloading ships.

QUESTION: Well, we are talking now about maritime employment.

MR. KIMBALL: That's right, sir.

QUESTION: It says "including any longshoreman," but just stop with the first phrase, wouldn't the clerical employee be covered?

MR. KIMBALL: I do not conceive it to be so, Your Honor.

QUESTION: Well, are you reading the following phrase after the word "longshoreman" as modifying the entire concept, that is "or other persons engaged in longshoring operations," and you say, I take it, that a secretary is not engaged in longshoring operations, even if she works for a maritime employer?

MR. KIMBALL: That is true, sir.

QUESTION: And that would be true of the telephone operator or all the other people who don't actually function as longshoremen?

MR. KIMBALL: Participate in some way in the movement of cargo, participate in some way other than remotely by shuffling papers or doing things of that nature.

QUESTION: There is no other definition of maritime employment in the Act?

MR. KIMBALL: There is no definition of maritime employment in the Act, Your Honor, and that, of course, has been the difficulty all along.

QUESTION: Mr. Kimball, on the question of situs, too, do you read the definition in 3(a) as including buildings which

are on a pier or wharf? They have a list of things, none of which includes a building, but they do include a building way, which kind of suggests to me that they didn't intend to include building.

MR. KIMBALL: Your Honor, I read the situs requirement as including structures on a pier, dock or adjoining structure.

QUESTION: What is building way in 3(3)?

MR. KIMBALL: I am trying to find it. I think building way, if Your Honor pleases, is a structure having to do with the construction or repair of ships. It goes along with marine railway.

Now, adopting a suggestion in the Third Circuit jobs case, the federal respondent argues that Congress' inclusion of "employees who pick up" -- I say inclusion, I misspoke myself and badly so, and this gets into why we don't cover coast line operators, perhaps. Congress specifically excluded "employees who pick up stored cargo for further transshipment."

The government respondent argues that that must necessarily mean truckmen who receive delivery of cargo for further overland transportation. But that interpretation makes the last two sentences of the committee report, which are quoted on page 5 of the appendix to the blue covered brief, it makes those last two sentences idiotically redundant. And it

ignores the fact that by statutory definition those truckmen are not covered by the Act because the trucking companies are not statutory employers as defined by section 2(4) of the statute.

And I would like to point out, because we read these things so many times and the words escape us unless we read them over and over, but it is interesting to note the distinction which the committee is making, and I think inarguably with malice of forethought, if you please, on this fifth page.

They talk up there toward the top: "Thus, employees" -- thinking in terms of statutory employees -- "whose responsibility is only to pick up stored cargo" and so forth. Then they talk down the last two sentences about individuals, and they talk not about employers but they are talking about persons. And then they make an interesting distinction. In the very last two lines they talk about navigable waters, which under the expansive situs definition we know includes shore installations of the sort that Mr. Justice Stevens was remarking about, but here they draw a distinction between navigable waters and pier adjoining navigable waters, which under the amended definition is part of navigable waters.

Now, the federal respondent has distorted -- excuse me -- the federal respondent has made some diversionary suggestions which I respectfully submit both to the federal respondent and to this Honorable Court are less than helpful.

They refer, for instance, to defense base act decisions by this Court, the O'Leary case, the O'Keeffe case.

QUESTION: Mr. Kimbal, before you read your point about navigable waters including a pier, your last sentence, I didn't understand the argument you based on that last sentence. I didn't understand your point at all.

MR. KIMBALL: If Your Honor please --

QUESTION: I understand that the pier is within the statutory definition of nevigable waters and the report says the pier is to be distinguished from navigable waters, which seems inconsistent. What do you draw from that?

MR. KIMBALL: I draw from that, if Your Honor pleases, that the last two sentences of the report are an effort to indicate that truckmen who are employed by trucking companies are not intended to be included, therefore in an earlier part of the report when the committee excludes employees whose responsibility is only to pick up stored cargo for further transshipment, they are not talking about truckmen or employees of trucking companies. They are talking about somebody else. And I respectfully suggest that they are talking about people like Caputo or indeed people who are performing functions like Mr. Blundo, which Mr. Prettyman will talk about in just a moment.

These defense base act citations I suggest are not helpful. The Court has held that being injured at a defense base act situs is not sufficient to entitle an employee to

compensation. The decisions which the government has cited hold that the injury must result from a zone of special danger risk at the defense base situs. We know by stipulation that Mr. Caputo was not performing any high-risk longshoring activity for which, as the majority below conceded, the Act is intended to compensate.

The federal respondent pleads for deference to the Benefit Review Board consistent administrative interpretation which, as I have I hope not offensively suggested to the Court, and as is recognized by the majority below, is a bootstrap operation by the board wherein they started off the first day expanding this Act I think beyond mean and, as illustrated in the reply brief in 76-454, the board has given virtually no heed to any status or situs limitations.

QUESTION: Well, it wouldn't be the first government agency that did that sort of thing, would it, and a lot of those have been upheld by this Court as being administrative constructions.

MR. KIMBALL: I think the difficulty, if Your Honor pleases, is that the Benefits Review Board doesn't appreciate that in ever expanding the statute it may be depriving employees of other rights and remedies which are superior to those provided by the Act. I suggest, for instance, that if you expand the statute to the ultimate limits then no one is ever going to be able to sue under the authority of this Court's decision in

Gutierrez, no one is ever going to be able to sue a shipowner for damages because of an unseaworthy cargo container. Nor is a railroad employee going to be able to sue.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Prettyman.

ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR., ESQ.,
ON BEHALF OF PETITIONER, INTERNATIONAL TERMINAL
OPERATING COMPANY, INC.

MR. PRETTYMAN: Mr. Chief Justice, and may it please the Court: I am Barrett Prettyman, and I represent the International Terminal Operating Company, which I will call ITL, the employer of the injured employee, Mr. Blundo in this case.

ITL really wears two hats. It is a stevedoring company whose traditional job is to load and unload a vessel, but it is also a terminal operator. It employees terminal workers and warehousemen to do the remaining work that needs to be done on a terminal after the ship is loaded or unloaded.

Mr. Blundo was a checker and had been for some five years with ITL. Interestingly, checkers also wear two hats. A checker can be at the vessel's edge, checking the seal, for example, of containers as they come off the vessel, and he is part of the longshoring operation. He checks those containers as they are lowered on, as they first hit the pier. That is the checker directly -- and I am quoting now --"directly involved in the loading or unloading functions," that Congress

referred to in their report, and those are the checkers that they said were going to be covered, and of course we contend that they were going to be covered because they are part of the loading or unloading process.

But Mr. Blundo at the time of the accident and most of the other time was wearing his other hat as a checker. That is, he was engaged some distance away from where the loading and unloading had taken place, he was removed both by distance and by function, he was at a different terminal, a substantial period of time had passed since the container that he was working on had been unloaded, and this particular container was being stripped in a warehouse used for customs inspection. His sole job, his sole job was to break the seal and, as the contents were unloaded by strippers, he was to check them against his manifest to make sure that the contents inside the container corresponded with the manifest that said were the right things.

QUESTION: Was this container unloaded at this pier? Is this the case where we don't know where even it was unloaded in this pier --

MR. PRETTYMAN: That is correct.

QUESTION: -- or from what ship?

MR. PRETTYMAN: We know that it was not unloaded at this terminal, but we do not know where it was unloaded.

QUESTION: Or from what ship?

MR. PRETTYMAN: Or from what ship or by whom.

QUESTION: And it might have come by truck from some other pier to this one?

MR. PRETTYMAN: We do know it came by truck. I happen to know it came fourteen miles because I measured it, but that is not in the record. The record doesn't even show how far it came. But he himself did not know whose it was, from what ship it came, from what terminal it came, or even who unloaded it.

QUESTION: Or how long it had been there?

MR. PRETTYMAN: Or how long it had been there. He said that sometimes the period of time was up to a week and another witness said it was quite often even longer than that before they got to the particular function that he was engaged in.

QUESTION: What was this, the North River Pier or --

MR. PRETTYMAN: What, the pier where he was working?

QUESTION: Where he was working.

MR. PRETTYMAN: This was the 19th Street Pier in Brooklyn.

QUESTION: A Brooklyn pier.

MR. PRETTYMAN: Right.

QUESTION: When you use the word "unloaded," you mean removed from the ship to the dock?

MR. PRETTYMAN: And is taken to its first point of

rest.

QUESTION: But there is no question but what this container came from a ship?

MR. PRETTYMAN: That's correct, no question.

Now, we say that Mr. Blundo was not directly involved in the loading or unloading functions, which I have just referred to as Congress' criteria as to whether he was to be covered or not.

QUESTION: Well, is it your contention that everything that happened up to where the container was was part of the unloading process?

MR. PRETTYMAN: The unloading process starts when the container is taken out of the hold or off the top of the ship, depending upon whether it is break-bulk or container operation, and taken down to the ground and then moved either to the marshalling area for the container or the transit shed for the break-bulk cargo, and at that point when it reaches that point, you are loading or unloading function --

QUESTION: So the answer is yes?

MR. PRETTYMAN: Yes, sir.

QUESTION: You are back to the point of rest.

MR. PRETTYMAN: Absolutely.

QUESTION: Well, you don't want to stay there, do you?

MR. PRETTYMAN: That is exactly where I want to stay. I am advocating the point of rest, Your Honor.

QUESTION: And you think the '72 amendment has nothing to do with it?

MR. PRETTYMAN: Oh, I think the '72 amendment adopted point of rest because the '72 amendment specifically says and refers to the fact that in the terms of unloading, taking it to the storage area or holding area, and that is point of rest, and I will get in just a minute to some of the specific language they used in the report in which they clearly indicated that they wanted all the operations up to that storage or holding area covered because that was the unloading operation, but they did not want covered people working beyond that in the terminal area.

QUESTION: So there is a difference between you and Mr. Kimball?

MR. PRETTYMAN: No.

QUESTION: Mr. Kimball said that the congressional history didn't do him any good at all.

MR. PRETTYMAN: Well, let me put it to you this way: Mr. Kimball and I are in slight disagreement on one point only, as I understand it, and that is I think the congressional history is crystal clear as I read it. Mr. Kimball does not think it is as clear as I do. But I do not think that Mr. Kimball disagrees with me about point of rest. I think he reads the congressional history in the end, clear or unclear, as adopting the point of rest thesis.

Now, first of all, I think it is very important that the point that I was just trying to make, that Congress really intended loading and unloading to being maritime employment, and that is what they were talking about, I think it is very important that that be established. Let's just take one sentence from the committee report, and the Senate and the House adopted really virtually the same committee report, and those committee reports, the significant portions are at the end of Mr. Kimball's brief, this blue backed brief here, starting in the appendix, and he first has the words of the statute and then on page ii you will see the present act down at the bottom, and this we have a very significant statement here, really the only statement because there was virtually no floor debate on this. We had the only statement as to what Congress really intended by maritime employment.

It is quite true, Mr. Justice Rehnquist, that we don't have a definition within the statute itself of maritime employment. But I don't think anyone can read these few pages without it becoming crystal clear what they intended by maritime employment, namely the loading and unloading process.

For example, they say -- now, just listen to this sentence: "The committee does not intend" --

QUESTION: Where are you, Mr. Prettyman?

MR. PRETTYMAN: I'm sorry, Your Honor.

QUESTION: What page of the blue brief?

MR. PRETTYMAN: This would be on page iv, at the very bottom.

QUESTION: Thank you.

MR. PRETTYMAN: The sentence at the very end.

"The committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity."

Now, if I may interpret that, what they are saying is you can even meet the situs test but you are not covered if you are not engaged in that loading or unloading process. I am emphasizing loading and unloading because obviously the building of the vessel is not part of the case before the Court.

Now, as to --

QUESTION: Well, those employees may be employees of an employer who doesn't meet the statutory test, too?

MR. PRETTYMAN: Well --

QUESTION: That could be a taxi driver from the streets of Brooklyn who is over there on a pier to pick up a fare.

MR. PRETTYMAN: Well, it could be, Your Honor, except I really don't think that that is --

QUESTION: I mean it may be that to which the committee was addressing itself.

MR. PRETTYMAN: Oh, I don't think so, Your Honor,

because the sentences before this --

QUESTION: Isn't it modified by the word "employees"?

MR. PRETTYMAN: Yes, that is exactly right. It says the employees, so in order to qualify under employee you have to be the employee of a covered employer.

QUESTION: Exactly.

MR. PRETTYMAN: Yes. Well, it is saying the employees, that is people who are normally covered by the Act who perform the --

QUESTION: Whose employer is a covered employer?

MR. PRETTYMAN: Yes.

QUESTION: You think that is implicit?

MR. PRETTYMAN: Right, who perform this work, would be covered under -- I'm sorry, I said at the top of page iv, it is at the top of page v. "The Committee does not intend to cover employees who are not" --

QUESTION: The definition is almost tautological in a way, isn't it? The term "employer" is defined in terms of what employees you employ.

MR. PRETTYMAN: You have a very strange setup here, Your Honor, in which you do say that an employer is an employee if he has employees who are employees, and at the same time you are saying that so long as one man is an employee then you have an employer under the Act. You do have a rather strange dichotomy there. But I think this entire discussion really

does not go to employer. Everyone has simply assumed that if you have one or more employees who are covered, you automatically have your employer. But I think what this sentence is talking about, they are not really talking about a cab driver, with all due respect, because they are talking about somebody who is injured in this particular area, and I think it is clear throughout this whole paragraph here that when they are talking about employees they are talking about people who are employed on the pier to do some type of terminal work.

QUESTION: The covered employer.

MR. PRETTYMAN: Yes.

QUESTION: To what extend did the '72 Act extend coverage?

MR. PRETTYMAN: It extended to this extent, Your Honor, and it substantially extended it. You remember, during the '72 discussions before Congress, a representative of ILA got up and said, look, we've got longshoremen who are cut in half, here is a man who is injured on the ship and he is a longshoreman, doing typical longshoreman's work. If the same man happens to be on the pier, he is going on the pier to do maybe similar work, he is not covered. We've got a cut in half situation.

QUESTION: Like the checker in this case?

MR. PRETTYMAN: Well --

QUESTION: Like the checker in this case.

MR. PRETTYMAN: Well, except -- if I may for a moment -- it was really addressed to the Nacirema situation, and the Nacirema case, you know, set up this strange situation.

QUESTION: There are dozens of Nacirema cases.

MR. PRETTYMAN: Pardon me?

QUESTION: Which Narirema case? There are literally dozens of them.

MR. PRETTYMAN: I'm sorry, Your Honor. It is the one cited in our brief. It is a '69 case, and it is the one that holds that you cannot be covered under the '27 Act, you cannot get compensation if you have an injury on the pier, even if it is caused by a pertinence of a ship, even though you would be covered if you were injured onboard ship.

QUESTION: Yes.

MR. PRETTYMAN: That is the Nacirema case. That was the case that was cited again and again to the Congress, and that is precisely the evil that Congress was attempting to get at here. It was trying to say that you do have these employees who are engaged in the loading or unloading process, right up to the point of rest of a storage or holding area, and if they happened to be on the pier they are not covered, if they happen to be on the ship they are.

There was even a Fourth Circuit case in which the man was injured on the pier but happened to fall in the water, and they said because he was lucky enough to fall into the water he

was covered, but if he had happened to fall on the pier he wasn't covered, and that is what Congress was concerned about, and that is what they were addressing these amendments to.

Now, if I may complete my answer, Mr. Justice Marshall, the reason that there has been a substantial extension of coverage is that a great many of the gangs that worked these ships increasingly work on shore, and this is particularly true of containers, and Congress specifically noted that in these last few pages here. They refer specifically to the fact that containerization has resulted in more and more men working on the pier, so --

QUESTION: Isn't the checker in this case, in the language of the people talking about the Act, of the man that was in and out of federal jurisdiction?

MR. PRETTYMAN: No, at the time he --

QUESTION: The checker in this case?

MR. PRETTYMAN: The checker in this case had nothing to do at the time that he was injured with the unloading process. He --

QUESTION: But just before that he did have.

MR. PRETTYMAN: No, not just before that. We have no evidence of that in the record at all.

QUESTION: Well, then I misunderstood you. I thought you said the checker, one of his hats, to use your words, was to check the things as they came off.

MR. PRETTYMAN: I'm sorry, I --

QUESTION: And the other hat he wore was what he was doing here.

MR. PRETTYMAN: Mr. Justice --

QUESTION: That is in and out of federal jurisdiction.

MR. PRETTYMAN: I see where the difficulty lies, and I apologize for confusing you. When I began talking about a checker wearing two hats, I was talking about checkers in general. Checkers in general wear two hats in the sense that they can be doing one of two types of jobs, one at the ship's edge and the other at some distant terminal. Now, this particular man was working at the time of injury at the distant terminal. We do have evidence that is part of a proffer that is not actually proof but part of a proffer that he did spend on other occasions up to 20 percent of his time on lighters or on board a ship, but we have no indication of how long ago this was or what the precise nature of that work was, or anything else.

This man, so far as this record is concerned, was wearing the second hat that I was talking about, and was far removed from the unloading process. And I would like to point out to you in that regard that Congress specifically said in the report that I was just referring to that checkers were covered only if they were directly involved in the loading or unloading process. Now, that statement simply makes no sense

if you adopt the view, for example, of the Benefit Review Board, that it doesn't make any difference where a checker is or what he is doing or whether you have a clerical worker or not.

Let me just give you an example of the extent to which the Benefit Review Board has gone, despite these statements in here, there are at least eight statements, eight statements in the legislative history that I have just referred you to which severely qualify the extension of compensation and made clear that Congress was not attempting to cover the entire terminal or the entire universe. Despite that, the Benefit Review Board has said that a temporary delivery clerk who slipped on ice between the parking lot and the time clock, checking it out, was covered. They have said that a man who trips over a beam while returning to a work shack with his men's time cards is covered. They have said that a fellow who injures his back while replacing paper in an IBM machine is covered.

Now, if you take those examples -- and I want to emphasize that the government apparently backs the Benefit Review Board, they say a number of times in their brief that they are fully backing them -- if you take those statements and compare them with statements in the legislative history that say, for example, there is a transfer to the storage or holding area and if it is not unloading or loading it is not covered

even if the injury occurs in that area, or that if an employee is engaged only in transshipment which can only mean in context the taking from the holding area or the first point of rest to another point of the terminal, if he is engaged in transshipment he is not covered. They say that.

QUESTION: If it happens that a ship is unloaded directly into a consignee's conveyance, you would say that all the people engaged in putting it in the conveyance is covered, I take it?

MR. PRETTYMAN: Normally, the only time you have a --

QUESTION: I didn't say normally, I said if ever, if ever a ship is unloaded into a consignee's conveyance.

MR. PRETTYMAN: That would be a bulk operation and you would have no longshoremen, but I would assume --

QUESTION: There you have no point of rest, do you?

MR. PRETTYMAN: You have no point of rest. That would be a bulk operation.

QUESTION: I know, but somebody does it.

MR. PRETTYMAN: They would be covered.

QUESTION: Yes. That is all I wanted to know.

MR. PRETTYMAN: Now, in the situation analogous to that, where you have it unloaded directly to the point of rest and immediately picked up by the consignee, all the people up to the point of rest would in fact be covered, but then you have --

QUESTION: Let's assume there is a point of rest and the cargo is unloaded, would the same crews -- is it possible that on some piers or in some terminals the same crews move it from the first point of rest into consignee's conveyance?

MR. PRETTYMAN: Well, this virtually never happens, Your Honor. You have a gang which is the unloading gang. They are assisted by certain other people who are engaged in what we call the longshoring operation. Those people work really as a unit.

Now, the only time that I can imagine that what you are talking about occurs is when -- let's say, for example, everybody is through work at five o'clock and they are about to go home and all of a sudden the stevedoring company says, wait a minute, we've got a crash job over here in the terminal area, would you be willing to take it.

QUESTION: Now, does your client -- is your client responsible for taking, for loading cargo into the consignee's conveyance?

MR. PRETTYMAN: He is responsible for getting them to -- as a terminal operator, he is responsible for getting them to the consignee's truck.

QUESTION: Assume that I work for your client, on one day could I be assigned to unloading the ship and the next day assigned to moving cargo to the consignee's conveyance?

MR. PRETTYMAN: It is possible. The more likely

thing, what normally happens is that if you work as part of a gang, which is normally about 18 people plus drivers, if you work as part of a gang you even have on the computer runout, you have a number of your gang, you check the day before to see whether your number is up, and if your gang's number is up and you are not sick or something, then you know that you are to turn up at a certain ship the next day and you work that gang and you work the gang all day. And then you check the next day and you normally are going to work with the gang.

QUESTION: But you might be part of another gang the next day?

MR. PRETTYMAN: You can be, but normally what has happened is that these gangs have tended to become units and they tend to work together, and the men change only when there is a death, retirement, illness or something of that sort.

QUESTION: But there is not a different union, is there?

MR. PRETTYMAN: Normally the ILA covers everybody on the terminal, but you have different locals. For example, the checkers, Mr. Blundo was in an entirely separate local, and normally on most piers the locals are different, if you are a terminal operator, than if you are a part of the gang. And I want to emphasize that in terms of even where you have one company like ITL that does both stevedoring work and the maritime work, on their records, in their computer runouts, in their pay

scale and all the rest of it, you are treated completely separately if you are part of the unloading process as opposed to if you are part of the terminal operation, a completely different operation on the books of that company even though it is the same company hiring both sets of people.

Now, in terms of the respondents, they indicate to us that there are certain inequities that are going to grow out of our system if you adopt point of rest. I will take just a couple of minutes, because I want to save some time for rebuttal, to point out inequities that arise if you adopt their system rather than ours.

For example, you would have Mr. Caputo covered, and the truckdriver is doing exactly the same work that he is, is not covered. You would have Mr. Blundo covered, but the off-terminal checker who could be checking precisely the same container on another day, and this is done off-terminal, would not be covered. You --

QUESTION: On account of situs?

MR. PRETTYMAN: That's correct. You could have Mr. Blundo --

QUESTION: And your first example would be on account of the employer test, would it not?

MR. PRETTYMAN: Pardon me?

QUESTION: Your first example had to do with truckdrivers and that would be because presumably his employer would

not be a covered employer?

MR. PRETTYMAN: Well, they would also concede, I think they would concede, I am not sure, I would be interested in hearing, but I think they would say that the truckdriver does not meet the status test, period. But in addition to that you would have Mr. Blundo and Mr. Caputo both covered but you have state workers -- and this is something they have never mentioned, have stayed very carefully away from -- but in your terminal operations, in a great number of these docks, you have state workers doing your terminal operations, and under the statute they are excluded, which is going to give them, if you adopt their viewpoint, a tremendous cost advantage, of course, because they don't have to pay these higher federal benefits. And they have said nothing about the fact that you are going to have state employees who are excluded doing exactly the same work as the terminal operators who are covered and an entirely different system for both.

QUESTION: Were state employees excluded under the old Act?

MR. PRETTYMAN: Under the old Act, Your Honor, I am not sure. I just don't know.

And finally you have strippers and stuffers who work both sides of the terminal, you have consolidators who are quite a difference away from the terminal, stripping and stuffing containers, and yet only those who happen to be inside the terminal

are going to be covered if you adopt their viewpoint.

Well, I can go on and on with these examples. But the real inequities and the kind of crazy situations develop not under our theory but they develop under the theory if you try to extend coverage as far as the government would have you do it.

I would like to save, if possible, the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Prettyman.

Mr. Gucciardo.

ORAL ARGUMENT OF ANGELO C. GUCCIARDO, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I represent the two injured employees in both of these cases, Carmelo Blundo and Mr. Caputo.

First, before starting my argument, I wish to correct certain misconceptions that have already been put forth to you, and namely it is this, that the way of life on the waterfront is that it is a shape job. Even though you may have a regular employer or be a member of a regular gang, you have to report in the New York and New Jersey area to a hiring hall that is maintained by the Waterfront Commission, and then you are sent out to work wherever work is available.

QUESTION: Mr. Gucciardo, Mr. Prettyman has given us some conception of his ideas of how the waterfront works, you

are now giving us some of yours. I don't know that either of you would qualify as an expert witness if this were in a trial court. If there are disputes between the two of you, whose word are we to take as to the practices?

MR. GUCCIARDO: Your Honor, I state this: I come from a family of longshoremen. I have been in this business since 1953, handling longshore work almost regularly from 1953 up until the present time. I am familiar with the waterfront.

So a longshoreman gets hired and he goes to his hiring boss. If he is hired as terminal labor, his duties are a number of categories. That is, he can load and unload a lighter, which is a float, he can load and unload ship stores on a ship, load and unload containers and load and unload trucks. He doesn't know in advance when he gets to that pier exactly where he is going to be assigned. That is Mr. Caputo for you. When he gets there in the morning, even though he may be a regular employee, he may go onboard a lighter to unload a lighter. This is the walking in and out of federal jurisdiction that Congress intended to correct.

Not only that; if he is assigned in the morning to unload a lighter and that work is finished and the lighter is finished, his extra labor boss may then say unload the trucks that are delivering cargo that have to be put onboard a vessel. The same way with the checker. The checker does not know in advance each day where he will be assigned. He reports to his

boss who is incidentally the same labor boss, and he tells him where to go and what to do.

ITL was involved in this case in Blundo.

QUESTION: Mr. Gucciardo, could I just ask you one question before you get too deeply into your argument. Under your theory of the statute, supposing Mr. Caputo took his wife to the movies and after the show they decided to walk across the pier where he normally works and he fell and was injured, would he be covered?

MR. GUCCIARDO: No, sir. Under that theory, he is not in the course of employment. He is not working. If he chose to go there on his off-time and wanted to --

QUESTION: But then do you contend that his status at the time of the injury is controlling?

MR. GUCCIARDO: That is correct.

QUESTION: The fact that he is generally a longshoreman is irrelevant?

MR. GUCCIARDO: No, that is material, Your Honor. He is generally a longshoreman but you also have to be in the course of employment to have a compensable injury. You cannot, for example, quit at five o'clock and decide to come back because a friend of yours is working and you want to meet with him so you can go home together. You may have the same thought. Well, after you have quit and you are waiting for your friend who may work an hour overtime, which happens, and get hurt, he

is not covered.

QUESTION: Is the reason he is not covered because of something in section 2(4) or something in section 3(a)? What is the reason under the statute that he is not covered?

MR. GUCCIARDO: Because he is not in the course of employment at the time of the accident.

QUESTION: Where does the statute require that?

MR. GUCCIARDO: This is general compensation law. In order for an accident to be compensable, you must be in the course of employment, people working for their employer in furtherance of their employer's activity.

QUESTION: I understand that general compensation. Does this tatute contain a similar requirement and, if so, in what section? Do you know?

MR. GUCCIARDO: No.

QUESTION: And if you don't know --

MR. GUCCIARDO: I am not aware of any particular statute dealing with that particular point.

QUESTION: So we have to go outside the written language of the statute to find the limitation you have just described?

MR. GUCCIARDO: Yes, because when Congress says that covered as compensation cases, then you refer to compensation law, and that is what the mistake is made in dealing with these cases. They are citing a lot of cases involving unseaworthiness.

Well, longshoremen who are looking to establish the liability on the part of the ship have to establish that they are in the service of the ship on the theory of unseaworthiness. That has nothing to do with compensation law.

QUESTION: Well, you aren't even an employee if you are off work, are you?

MR. GUCCIARDO: That is correct. You are not an employee --

QUESTION: And you aren't engaged in maritime employment if you aren't working?

MR. GUCCIARDO: That is correct. You might just as well be a walker in the street.

QUESTION: Well, that is just plain -- isn't that in section 2 then, section 2(3), the term "employee"? You aren't even an employee if you are not on duty, are you?

MR. GUCCIARDO: That's correct. You are not an employee, and I would say that under that term, section 2(3) encompasses that meaning, meaning the person engaged in maritime employment.

QUESTION: By that you then mean at the time of the injury? There is a dispute in the brief that apparently has evaporated, because I thought one of the -- Judge Friendly relied on part of his status over a period of time as an employee. You seem to have abandoned that.

MR. GUCCIARDO: Judge Friendly took a more narrow

view than I take, Your Honor. I maintain that once you are an employee within the terminology used in the Act which is clear, then the whole body of compensation law is applicable. So that if this person has to go to the bathroom and sustains an accident in the bathroom on the employer's premises, of course, or if he is checking out and has to punch out, which is the Jackson case in the Fifth Circuit, that employee should be covered.

I take issue with the Jackson case as decided by the Fifth Circuit, because the man was working all day long within the covered employment, then all of a sudden he has to check out, for that purpose he is covered under state law? I don't see it. The only reason that the justices in that particular case decided that way because the employers and the carriers would have us put blinders on and say he has got to be doing something in maritime employment at the time. That is not so.

QUESTION: Well, under your theory the man starts out doing maritime employment on the dock in the morning and is asked to drive a truck ten miles away at noon to take some of the stuff, comes back and has an accident while he is driving the truck, he is covered.

MR. GUCCIARDO: That is not what happens on the waterfront.

QUESTION: Well, if that did happen on the waterfront, would he or would he not be covered under your theory?

MR. GUCCIARDO: The purposes for which he is then driving that truck would have to be examined.

QUESTION: But he could be?

MR. GUCCIARDO: Yes, he could be, and I will tell you where that has come about. There was the Stiffidi case which was involved in the Dellaventura case, which was dismissed for technicalities. In that particular case, an employer had been moving -- the Pittston Stevedoring Company had been moving its pier from one location to another, which was within ten blocks. So rather than hire private trucking for all of the existing cargo that was remaining on Pier 10 to go to the state pier or Pier 12 -- I don't remember the number of the pier -- they used their own drivers to go across city streets and within the terminal.

In the Stiffidi case, of course, he was injured after he got inside of the terminal and was opening the container for the purposes of restuffing them into another container. So that the Administrative Law Judge held that to be compensable and the Benefits Review Board also held it to be compensable.

But taking your example, if he had been hurt between Pier 10 and Pier 12, I would say under those particular set of circumstances that he would also be covered under the Act.

QUESTION: That wouldn't come under 3(a), would it, the situs test?

MR. GUCCIARDO: Yes, because Mr. Stiffidi was injured

in an area that is commonly waterfront in Brooklyn. That entire --

QUESTION: On the streets of Brooklyn you say that is navigable waters of the United States?

MR. GUCCIARDO: Gowanis Bay, Your Honor. Wilton Board is on Gowanis Bay and goes --

QUESTION: Well, we don't have that case here.

MR. GUCCIARDO: Yes.

QUESTION: You don't have quite that appeal on argument to me.

MR. GUCCIARDO: Yes, we do have it, Your Honor, because Blundo occurred in Brooklyn and so did Caputo.

QUESTION: What if during the course of true longshoremen operations the longshoreman wants to go uptown a half mile off the pier and get some cigarettes and the gang boss says it is all right for him to do it, and he is injured as he is going in or out of the tobacco shop. Is he covered or not covered?

MR. GUCCIARDO: There is a provision of the law which says, under the compensation law, if you abandon your employment and are injured while abandoning employment, then you are not covered.

QUESTION: Well, did he abandon it when the gang boss let him go?

MR. GUCCIARDO: Under those set of circumstances,

yes, Your Honor. The boss says you can have some time off --

QUESTION: Hasn't the Review Board taken rather a different view of that in some comparable cases?

MR. GUCCIARDO: Not to my knowledge. I could give you a similar example perhaps if you are being disturbed by that particular point where I did have a case involving a longshoreman who was told by the boss, now you go pick up the pay of all the men who worked on pier so and so during the week. Because it is a shape job, they have to go to the various piers to pick up their salary, so if the boss gives him time off with pay -- that is very crucial, that with pay -- and he goes to pick up that pay of all his employees for that particular gang and brings it back, that is also compensable under the law, because they are traveling the waterfront and this is accepted procedure between terminal operators and the International Longshoremen's Association, that one man go to pick up the pay for all of the men.

QUESTION: Since when is a longshoreman a seaman? Didn't the Southern District extend the waterfront to Times Square in the seamen's case?

MR. GUCCIARDO: I think what it had -- of course, seamen are excluded under this Act, but I know what you have reference to, that it is possible to extend --

QUESTION: But none of that washes off on the longshoremen?

MR. GUCCIARDO: Not at all, Your Honor. That has to do with seamen and it has to do with the Jones Act and is entirely different.

QUESTION: Thank you.

MR. GUCCIARDO: I wanted to make a point that section 920, which deals with presumptions, should be continued to be enforced. The average longshoreman cannot afford proceedings to prosecute these cases. All of the costs of these proceedings are borne by me personally and my firm, of course.

So that the purpose of the law was that the burden of proof should be on the employers and their carriers, because they were best able to sustain the cost of prosecuting these claims.

All a person has to do who is injured on the waterfront is to say I am a longshoreman, I was working on the job and I got hurt, and my employer engaged longshoremen to work on the ship and on the piers. Now the burden is on the employer and carrier to come forth and disprove that claim.

You will notice in both of these cases -- in the Caputo case they presented no evidence whatsoever. In the Blundo case, they attempted to present some evidence in the form of a safety man whose knowledge of the facts seemed to be faulty. But in any event, there is no proof to the contrary offered in any record that this does not fall within the presumption of the Act; also the other phase of the law, which

says that if there are serious questions of fact in law, then it is to be resolved in favor of the claimant. Well, isn't this what is occurring here now? There is a serious question of fact in law, and if that is truly bothering you, gentlemen, that has to be resolved in favor of the claimant because that is what the law has been for many, many years.

Another misconception -- I am sorry to jump back and forth, but my adversary Mr. Prettyman says that it almost never happens that ships are unloaded directly. It happens quite often and happens in two instances that I know of -- banana ships and frozen cargo. They are perishable items. So that if that has to be unloaded, the same longshoremen, Mr. Caputo and Mr. Blundo, are used in a direct line from the ship directly into the consignee's truck. They have to use the longshoremen to load their trucks because they require special heavy equipment such as hi-los, dollies and manual labor to put it into the truck, a truckman can't possibly carry all this equipment with him. It is recognized on the waterfront that this is the way it has to be done.

The only reason that the truckman participates is otherwise the employer would be paying him to do nothing and watch the truck being loaded, so he tells him you have to help.

The word "transshipment" used by the committee reports in the House and in the Senate meant exactly that. An employer doesn't transship within his own terminal. Somebody

else does it, takes it outside of. You don't move furniture in your own house from upstairs to downstairs. That is not moving away from your house. They are moving the cargo away from the terminal, somebody else does it and it is that person who picks it up that is intended to be excluded.

I's sorry, I went over, Your Honor.

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

Mr. Easterbrook.

ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.,

ON BEHALF OF THE FEDERAL RESPONDENT

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

It is the position of the Department of Labor that the amended Longshoremen's and Harbor Workers Compensation Act applies to all injuries suffered by waterfront workers during the process of transferring cargo between land and water transportation.

It is a simple rule, easily applied, and we believe that it correctly defines the meaning of the statute.

QUESTION: Mr. Easterbrook, just so I am sure of your position, if I read your brief correctly, it is the government's position that the example I gave of a man returning from the movie and walking across the pier, he would be covered, am I right?

MR. EASTERBROOK: It is the government's position

that it would not be covered, and the reason for that does not have to do with his status as an employee. It has to do with the test established in section 2(2) of the statute, which is not reprinted in any of the briefs.

QUESTION: What is the 2(2) --

MR. EASTERBROOK: Section 2(2) --

QUESTION: I tried to find it in --

MR. EASTERBROOK: Section 902(2).

QUESTION: Right.

MR. EASTERBROOK: That section requires that the injury have arisen out of the course of employment. That would not be met in the case of the injury in your hypothetical, Mr. Justice Stevens.

QUESTION: What about my friend who is going up to get the cigarettes, in your view, in the government's view?

MR. EASTERBROOK: Assuming that he is moving away from the waterfront, Your Honor, in that event coverage is excluded by the situs rule of the statute, section 3(a) or section 903(a). He too is not covered.

QUESTION: What about transshipment, where it moves from -- it comes off the ship from Dock A, it is moved to Dock B, to Dock C and Dock D, and the man has moved it on Dock X, is he covered?

MR. EASTERBROOK: Yes, Your Honor, in our view he is covered and indeed that is very similar to the Blundo case we

have here.

QUESTION: Well, would that be if it was six months later?

MR. EASTERBROOK: In our view time has nothing to do with it, and I would like to develop for a moment, if I might, what we believe is the correct test of coverage.

The statute establishes on its face the test that, as Judge Friendly pointed out, can be satisfied in three ways: A worker is covered if he is a longshoreman, or if he is engaged in longshoring operations, or if he otherwise meets the test of maritime employment.

It is clear that unless Congress was wasting words, some persons are covered even though they are not injured at a moment when they are engaged in any longshoring operations.

QUESTION: Well, that is not a necessary reading of 2(3), is it? If you take the phrase "including any longshoremen or other person engaged in longshoring operations," it is certainly possible as a matter of usage to read "engaged in longshoring operations" as modifying the word "longshoreman as well as other person," is it not?

MR. EASTERBROOK: It is conceivable that that is correct, Mr. Justice Rehnquist, although we don't believe that that is the best reading of the statute. But it seems tolerably clear that the focus of the statute was upon the occupation of the worker. The description of longshoreman and the

other description in section 2(3) of the statute is a description of the occupations in which persons engage on the waterfront -- longshoreman, harbor worker, ship repairman. It is a focus on occupations, rather than a focus on particular tasks at the moment of the injury, and that focus on occasion rather than on tasks at the moment of injury is sufficient to doom petitioners' theories and arguments.

The occupation of longshoreman traditionally has been understood to include a wide variety of waterfront tasks. In Victory Carriers v. Law, for example, this Court used longshoremen in that generic sense to include persons who carry out most tasks on the waterfront. And there is no reason to suppose that Congress, which enacted this statute only a few months later and in some measure in response to this Court's decision in Victory Carriers and Nacirema Operating Company, was using longshoremen in some more narrow sense.

All of this too must be considered against the fact that a maritime carrier employs stevedore contractors and marine terminal operators like petitioners to carry out its duty to make cargo available to consignees. The task is maritime. It is the marine carrier who engages petitioners to carry out tasks on its behalf, and it pays for their services. The ultimate responsibility is that of the marine carrier. The petitioners act on their behalf.

We have discussed this duty at pages 27 to 28 of our

brief, and this has caused some difference of view, I think, between the two petitioners.

Petitioner Northeast concedes at pages 18 and 19 of its brief that this duty exists and that the coverage of the Act therefore continues until the marine terminal or the stevedore contractor has carried out that duty of making cargo available.

Since Blundo was injured before the cargo was made available, under the test advocated by Petitioner Northeast, Blundo would be covered by the Act. Petitioners' contrary arguments take us a long way from the statute.

Petitioners practically ignore the statute's plain words. Counsel for petitioners were not talking about longshoremen and longshoring operations during their oral argument. They were talking instead about loading and unloading, words that do not appear in the statute.

The words loading and unloading have come from the legislative history of the statute, and petitioners suggest that this, rather than longshoremen and longshoring operations, is the proper test of coverage.

QUESTION: Do you suggest, Mr. Easterbrook, that this statute is so clear that we need not resort to legislative history?

MR. EASTERBROOK: No, Your Honor, it is not and we think to resort to the legislative history is --

QUESTION: It is about as unclear as any statute could conceivably be, isn't it? Or perhaps you could conceive of one more so?

MR. EASTERBROOK: It leaves something to be desired. I think that the most important part that we draw from the face of the statute is its focus on occasions rather than tasks, and I think that is very important to the argument, because petitioners have tried in order to manufacture a moment of injury test to shift the focus to tasks rather than occupations.

In any event, petitioners --

QUESTION: They could have said we are abandoning the point of rest, you know, in just plain English.

MR. EASTERBROOK: I'm sorry, Your Honor, I didn't grasp the question.

QUESTION: Congress could have said we are abandoning the theory of coming to rest as determinative of this.

MR. EASTERBROOK: Your Honor --

QUESTION: Did they abandon it or not?

MR. EASTERBROOK: Your Honor, Congress never adopted it and therefore it was not theirs to abandon. It had never been a test under the pre-amendment Act. The test before --

QUESTION: It wasn't considered?

MR. EASTERBROOK: In our view, it was not even considered by Congress.

QUESTION: It wasn't even mentioned?

MR. EASTERBROOK: It is not even mentioned in the legislative history.

QUESTION: They did mention the fact that you walk in and out of federal jurisdiction?

MR. EASTERBROOK: That is very strongly mentioned in the legislative history.

QUESTION: That is the same thing.

MR. EASTERBROOK: Your Honor, I believe that it is terribly important that Congress focused on walking in and out of the coverage of the statute. The question presented in this case is in large measure where they walk in and out of that coverage. It used to be before the 1972 amendments that they walked in and out of that coverage at the water's edge, right smack at the edge of the water, and that is what this Court held in Nacirema Operating Co. and Victory Carriers v. Law. That is where the dividing line was.

What petitioners propose to do is to move that dividing line inland to the point of rest and then any longshoreman who walks back and forth from one side of the point of rest walks in and out of federal coverage just like before, only he walks in and out of federal coverage at a different place.

QUESTION: But isn't there another difference, Mr. Easterbrook, that under the old view he walked in and out of

coverage during the same day, regularly, whereas here he is pretty much in or out for a whole day at a time?

MR. EASTERBROOK: Your Honor, we believe that that argument is inconsistent with the record. Mr. Caputo testified that during times when he was assigned to the terminal labor category, as he was assigned to the terminal labor category on the day he was injured, he spent approximately 20 percent of his time on the water. He further testified in the record of this case --

QUESTION: But it was 20 percent of the days, it is not 20 percent of each day?

MR. EASTERBROOK: It was not broken down in the record. He testified further that if he had succeeded in loading the truck, which he was doing when he was injured, his very next assignment could have been on the water, and that within days he worked on the water sometimes and at other assignments at other times.

Mr. Blundo testified similarly. That testimony came in as part of an offer of proof. The reason it was an offer of proof, rather than ordinary evidence in this case, was that counsel for Petitioner ITL objected on the grounds that the testimony was irrelevant.

QUESTION: Well, is it your view of the record that it supports the notion that it is quite frequently true that employees work on both sides of the point of rest during the

same day?

MR. EASTERBROOK: Both longshoremen in this case testified that they themselves worked on both sides of the point of rest in the same day.

QUESTION: Well, that really wasn't my question. Do you think the record fairly supports the view that employees typically work on both sides of the point of rest on the same day?

MR. EASTERBROOK: There is no testimony in the record concerning that from anyone other than the two respondents, and they testified that that was true.

QUESTION: Do you think we can take judicial notice of the material in the brief that has this kind of a Brandeis brief on where the point of rest is? That seems to support the contrary view, as I read it.

MR. EASTERBROOK: Your Honor, it is a very funny brief. I see no reason why you can't take it for whatever it is worth, with the understanding that it was written by an adversary.

QUESTION: And Judge Friendly, of course, pointed out his difficulty was that we didn't have those facts before us, and he in effect suggested that he might have viewed the case differently if they had been before him. My question is do you think they are beforeus now?

MR. EASTERBROOK: I think you can consider them in

the way that you ordinarily consider data that comes in in the Brandeis brief, with the understanding that it is inserted there by an advocate.

QUESTION: But what does it --

MR. EASTERBROOK: Pardon?

QUESTION: Let's assume we accept entirely the truth of all of that, what relevance does it have?

MR. EASTERBROOK: In our view, very little.

QUESTION: That is what I thought. That is what I thought your view was, is what I --

MR. EASTERBROOK: Our point is that it makes not very much difference whether a lot of people walk back and forth from one side of the point of rest to another. Our point is that it shouldn't be that kind of dividing line of coverage exists at all, no matter how many people are walking back and forth.

QUESTION: Well, Judge Friendly, in his opinion for the Court of Appeals for the Second Circuit, laid a good deal of store by the fact that one or more of these employees at least at other times and on other days had worked in employment that would be clearly covered. Do you think -- how important is that, in your view?

MR. EASTERBROOK: At a minimum, it dispositive in these cases before it indicates that these respondents meet the test of longshoremen.

QUESTION: But your point is that they met the test when they were engaged in the occupation in which they were engaged at the time they were injured. Is that right?

MR. EASTERBROOK: It is two-fold. I agree entirely with what you have said, and in addition they meet the test because they meet the description of Judge Friendly.

QUESTION: Well, why do you need that addition?

MR. EASTERBROOK: We don't need it, but --

QUESTION: And is that a proper test?

MR. EASTERBROOK: It is a proper test --

QUESTION: I thought your point was that under this statute these people are covered --

MR. EASTERBROOK: Yes.

QUESTION: -- when they were engaged in what they were engaged in at the time they were injured.

MR. EASTERBROOK: Precisely. Perhaps I am not being sufficiently clear. It is a proper test for inclusion and not for exclusion. If they meet the description of Judge Friendly of having been on ships before, then they are surely included.

QUESTION: Well, what --

MR. EASTERBROOK: But you don't need to.

QUESTION: You don't mean if they quit their job and they are now a taxi driver, do you?

MR. EASTERBROOK: No, then they would no longer be engaged in maritime operations.

QUESTION: Of course not.

MR. EASTERBROOK: But I --

QUESTION: The test is what they were doing and where they were employed at the time they were injured, isn't that your submission?

MR. EASTERBROOK: No, it is not, Your Honor. We believe that what they are doing at the moment of injury is not necessarily dispositive, if they meet the status of being a longshoreman. So the fact that they were at the moment of injury taking time off, if they were on a rest break, if they were otherwise not doing maritime tasks --

QUESTION: I don't think your brothers on the other side differ with you on that.

MR. EASTERBROOK: I understand that, but there are some cases that differ with us. The Jacksonville Shipyards case --

QUESTION: Well, those cases aren't here.

MR. EASTERBROOK: That's right, but there has been that --

QUESTION: Suppose Blundo was repairing a truck --

MR. EASTERBROOK: Pardon, Your Honor?

QUESTION: Suppose Blundo, instead of loading the cheese, was repairing the truck?

MR. EASTERBROOK: And this was the truck that came off the waterfront?

QUESTION: The truck in this case.

MR. EASTERBROOK: I think we would have to know in that event more about Blundo's ordinary duties and more about the nature of the truck and more about how the truck got there. I don't think we have sufficient information.

QUESTION: Well, how in the world would repairing the truck be longshoring duties?

MR. EASTERBROOK: I think it could, Your Honor, be maritime employment if the truck were a truck which shuttled goods from one part of the waterfront to another, and if repairing the truck were for facilitating that.

QUESTION: Well, was this truck doing that?

MR. EASTERBROOK: This truck was not, as far as we know.

QUESTION: Right.

MR. EASTERBROOK: If this were a truck that simply was making a stop on the waterfront, coming from elsewhere and going back to elsewhere, it wouldn't be --

QUESTION: And if he were repairing that truck, there is no way he could recover?

MR. EASTERBROOK: Assuming that he came with the truck. If he were an ordinary longshoreman and his --

QUESTION: The longshoreman, Mr. Carmelo Blundo --

MR. EASTERBROOK: With the ordinary duties that he had done, he would be covered, yes.

QUESTION: In repairing the truck?

MR. EASTERBROOK: Yes, Your Honor, he would.

QUESTION: Mr. Easterbrook, I would have thought in kind of an indefinite a statute as this that one of the arguments against the point of rest theory would be its administrative difficulty that you would have constant factual disputes. But I frankly gather from your answer to Mr. Justice Marshall's question that we would be engaged in very much the same kind of disputes if we followed your theory.

MR. EASTERBROOK: I don't believe so, Your Honor. I think we could ask a very simpel question, that the board asks. The board asks two kinds of question. One is did this injury occur on the waterfront, at a place satisfying site status. That is ordinarily determined relatively clearly. The second question of question the board asked is whether this person is a person who devotes his life to waterfront activities sufficient to make him a longshoreman. At that point we don't care whether he was at the moment of his injury doing things that were traditionally thought of as longshoremen work. It is another -- the board's test is a means of excluding a very broad category of inquiries that petitioners would have you undertake.

QUESTION: Mr. Easterbrook, what do you think Congress, the committee meant when they said the committee does not intend -- does not intend to cover employees who are not engaged in

loading, unloading, and then some irrelevant words, just because they are injured in an area adjoining navigable waters used for such activity?

MR. EASTERBROOK: Mr. Chief Justice, I believe --

QUESTION: What you have just said is diametrically contrary to that.

MR. EASTERBROOK: I don't believe so. I believe the key to understanding that sentence is the clause beginning "Just because." It is not enough that they simply be injured in maritime situs. They have to have something more. They have to be engaged in the career of being a longshoreman or in longshoring activities, just because they are in the situs they don't qualify. But if they are a longshoreman, that is a different reason for qualifying under the Act other than loading and unloading.

But I would like to point out something else about that, it is something that drew some comment, comment by Mr. Justice Rehnquist earlier, that part of this was tautilogical.

The sentence in the committee report says that the committee does not intend to cover employees who are not engaged in loading and unloading. Under section 2(3) of the statute, no one is an employee unless he is engaged in maritime employment, longshoremen, longshore operations, and so on.

If you read the word "employee" in the legislative history together with its use in the statute, the committee must

be talking about people who are already employees, having qualified because they are longshoremen perhaps. Once you do that, that entire sentence becomes less than perfectly accurate, because then the committee is saying we do not intend to cover employees who are under section 2(3) covered, and that clearly isn't right.

Perhaps it indicates that the sentence was written with less than precise attention to detail. But in any event, the explanation I just gave to you, Mr. Chief Justice, is we believe the correct interpretation of the statute. The just because clause is referring to what the situs requirement is all about and not to a status requirement.

QUESTION: Mr. Easterbrook, is another way of saying the same thing that you don't really read the word "employees" in that sentence as being used in the statutory definition, is that correct?

MR. EASTERBROOK: No, we don't, and indeed --

QUESTION: And an employer may not be a covered employer?

MR. EASTERBROOK: Well, in part that is tautilogical, too, because an employer is covered as an employer if he has any employees.

QUESTION: But this might not -- the use of employees in the committee report may not be the technical use of how it is defined in the statute.

MR. EASTERBROOK: I think that probably is not the technical use as defined in the statute, and that is a problem that infects this committee report considerably. There is a slide back and forth in many places in the committee report between technical language as defined in the statute and lay language, and it makes it very difficult to read the committee report side by side with the statute in good sense.

The point of rest test is in many ways highly artificial. In order to demonstrate this, I have taken some examples from a book compiled by the National Association of Stevedores, one that has been submitted to this Court.

In Philadelphia, the point of rest is the very first resting place after cargo has left the ship's tackle. In other words, where it is dropped by the ship's tackle is the point of rest, except for container vessels at Packer Avenue where the point of rest is in a marshalling yard.

In Boston, the point of rest is in sheds next to the pier. The cargo is picked up and dropped in several places before it gets to the point of rest where it stops waiting for someone to pick it up.

In Wilmington, North Carolina, the point of rest is seaward of the real resting point. It is, in other words, at one of the intermediate stops, and there is a different intermediate point used for break-bulk cargo and container cargo.

In Hampton Roads, Virginia, the point of rest is a

hundred feet forward of the bow and a hundred feet aft of the stern of the vessel.

QUESTION: What definition are you taking of point of rest for these comments?

MR. EASTERBROOK: My point was there is no definition of point of rest, Your Honor.

QUESTION: But you are using it in statements to us. You saying that it occurs a hundred feet such and such. What definition are you taking, even though you may disagree with it?

MR. EASTERBROOK: I am using the statement of the National Association of Stevedores as to what it means, what definition they have used to come up with these lines is quite beyond me. I do not know. My point is that the same words mean different things in different ports, and my suggestion is that perhaps it doesn't mean anything at all.

QUESTION: Do any of these definitions bind any court or any board?

MR. EASTERBROOK: I don't believe so, but what I was trying --

QUESTION: Then what is the relevance?

MR. EASTERBROOK: What I was suggesting is that petitioners have asked you to adopt the point of rest test and I am suggesting that it doesn't mean anything. I am suggesting that you can't figure out what it is.

QUESTION: Well, because it doesn't mean anything to some of these people doesn't suggest that it wouldn't be meaningful to a court to settle the issue, does it?

MR. EASTERBROOK: If you adopted a point of rest test, you would use those words to mean something else, whether that is --

QUESTION: Could not a court make its own definition?

MR. EASTERBROOK: Yes, it could but at that point the question becomes wide.

QUESTION: By making its own definition, I mean making it in light of the statute and the legislative history.

MR. EASTERBROOK: One of the problems of the legislative history in this regard is that the words "point of rest" never appear in the legislative history, and this demonstrates that --

QUESTION: Couldn't you say point of rest is whenever it hits the landing?

MR. EASTERBROOK: Pardon, Your Honor?

QUESTION: Point of rest is whenever the cargo leaves the water and hits the land?

MR. EASTERBROOK: That is also a conceivable definition. It is one that is used apparently in Philadelphia. But the problem with that and one that is overriding in the legislative history is that that would create the same sort of walking in and out of coverage that was discussed in Nacirema

and Victory Operators and led to this statute. I think it is clear indeed that if petitioners are right in this case, both Caputo and Blundo were the victims of shifting coverage. Both men worked on ships. Caputo spent most of his time in the holds of ships and even when, as on the day of his accident, he was assigned to terminal labor, he testified that he spent approximately 20 percent of his time on ships. Blundo did likewise. Both men could have been assigned to tasks on the water immediately after completing the tasks on which they ware injured. Both men therefore spent part of their time doing tasks covered even under petitioners' interpretation of the statute.

Both congressional committees wrote, a portion of the legislative history appearing at page iv of the appendix in the blue brief, that the statute would "permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." That indeed explains why the Act is written in terms of covered occupations, rather than in terms of covered --

QUESTION: Mr. Easterbrook, what of the telephone operator working for the stevedore employer in his office on the pier and she is injured in the course of her employment?

MR. EASTERBROOK: Assuming the telephone operator does nothing but operator a telephone, it is quite likely that that is a clearly clerical activity that does not fall

within the ordinary understanding of longshoremen or longshoring operations.

QUESTION: Well, wouldn't the test be whether or not it is maritime employment?

MR. EASTERBROOK: That is the ultimate test.

QUESTION: Wouldn't that be the ultimate statutory test?

MR. EASTERBROOK: It is the ultimate statutory test.

QUESTION: She is covered certainly as to situs?

MR. EASTERBROOK: Yes. It is a case, Your Honor, on which --

QUESTION: And the employer is a covered employer.

MR. EASTERBROOK: It is a case, Your Honor, on which I would not want to do anything to preempt an ultimate determination by the Benefits Review Board and it is not a case that is before us. But there are some problems in meeting the longshoremen and longshoring operations definition.

QUESTION: But maritime employment would be the ultimate issue?

MR. EASTERBROOK: Maritime employment is the ultimate issue and I think that is something the board will have to determine.

QUESTION: Well, if any weight was given to the legislative history, would you think there could be any result other than a holding that a telephone operator is not covered?

MR. EASTERBROOK: I think it is very difficult --

QUESTION: Unless these words are all meaningless?

MR. EASTERBROOK: I think it is very difficult to find coverage for the telephone operator, Your Honor.

QUESTION: Mr. Easterbrook, is there any support for the notion that the term "maritime employment" has sort of a historical significance and refers to the kind of work that years ago was done by people who went down to the sea in ships and so forth?

MR. EASTERBROOK: Your Honor, the term "maritime employment" has a long history in the law of admiralty. I think it is quite clear that the statutory term "maritime employment" doesn't mean the admiralty word "maritime employment," and the clearest example of that is the coverage of shipbuilders. In the law of admiralty, shipbuilders were not engaged in maritime employment.

QUESTION: But under the statute --

MR. EASTERBROOK: Maritime employment, including shipbuilders.

QUESTION: I disagree with you, Mr. Easterbrook. It has two categories. One is the maritime employment category and the other is the harbor worker category. The harbor worker category is the one that includes the ship repairman, the shipbuilder and the ship breaker.

MR. EASTERBROOK: Your Honor, I suppose the

interpretation of the statute in that respect depends on where you put the parenthesis in the sentence.

QUESTION: If you say the term employee means one, any person engaged in employment operation, in maritime employment, including longshoremen or other longshoring activities, and, two, any harbor worker, including ship repairman and so forth.

MR. EASTERBROOK: Your Honor --

QUESTION: Do you think that is a permissible reading grammatically?

MR. EASTERBROOK: It would be.

QUESTION: Isn't it also supported by the fact that additionally the harbor worker was not in maritime employment, as you point out in your own footnote?

MR. EASTERBROOK: It would be, with one exception. The section-by-section description of that section in both the Senate and House committee reports makes it clear that there is only a single test for maritime employment, and everything else in that section is viewed as a subset of that single test, and that is in the section-by-section description.

QUESTION: Is that part of the legislative history any clearer than the paragraph about loading and unloading?

MR. EASTERBROOK: It is, I think. It is at page 16 of the Senate committee report.

QUESTION: And would apply to a dock worker who never

put his foot on a ship?

MR. EASTERBROOK: We think the Act applies to a dock worker who has never put foot on a ship.

QUESTION: And he uses the exact same dollies and winches and everything that people on land use?

MR. EASTERBROOK: Yes, Your Honor. Ultimately the test comes down to what this statute is aimed at. We think the statute is aimed at the interface between land and water transportation, at the occupations involved in moving cargo between one mode of transportation and another. The whole stevedoring and marine terminal industry exists to provide that interface.

Petitioners were injured while performing ordinary and necessary tasks during the movement of cargo between land and water transportation, while the cargo was still on the waterfront. They are the central beneficiaries of the statute and the awards in their favor should be upheld. Perhaps there is uncertainty in this. To the extent that there is, we believe that they are entitled to the assistance of three time tested principles: One, the presumption of coverage in section 20(a) of the statute; two, the rule of liberal construction for remedial statutes. And the presumption of coverage in this statute indicates that this is one of those statutes. And, three, the deference due to the agency charged with the administration of the statute.

These principles means at the minimum that uncertainties in the scope of coverage of the statute should be resolved in favor of coverage. Petitioners' arguments raise no more than uncertainty. They harp upon ambiguities and they offer plausible tests to resolve those ambiguities. But the board too has offered a plausible test to resolve any ambiguities. Its test is more in harmony with the statute and its legislative history, and we believe that the awards in this case were proper.

QUESTION: Mr. Easterbrook, is the government's position entirely consistent with the opinion of the Court of Appeals for the Second Circuit?

MR. EASTERBROOK: No, it is not, Your Honor. The test of coverage that the Benefits Review Board has constructed is somewhat more expansive than the test articulated by Judge Friendly.

QUESTION: So you support the position of the board?

MR. EASTERBROOK: Yes, we do, Your Honor.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Prettyman.

ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR., ESQ.,
ON BEHALF OF PETITIONER, INTERNATIONAL TERMINAL
OPERATING COMPANY, INC. -- REBUTTAL

MR. PRETTYMAN: A few brief points in rebuttal, if it please the Court:

First of all, I do not know of a single decision of the Benefits Review Board that has denied compensation to any clerical worker of any kind who was injured. And I now understand the government to be fully supporting the position of the Benefits Review Board. You will notice in their brief there was some confusion there because they were talking about the people who physically handled cargo. They apparently now have abandoned that requirement; anyone who is on the terminal working and employed is going to be covered.

Number two, the government shows some complexity about point of rest. One of the respondents in these cases is the Director of the Office of Workers Compensation Programs of the Department of Labor. He is a respondent in this case. That very office issued a report just last December. The government has never referred to that report in its breifs, although we referred to it and quoted it in our briefs.

It is interesting that in that report there doesn't seem to be any confusion about point of rest because the Department of Labor there says that the respondent in this case there says, and I quote, "The marine terminal operator is responsible for all movement and handling of the ship's cargo between the point of rest and any place on the marine terminal property except shipside." And the respondent in this case also says stevedoring operations are confined to the area between the ship and the terminal area called point of rest.

So I suggest to you that when Mr. Justice Rehnquist asks which of the attorneys we should listen to as to the difficulties of the case and the phrases and so forth, I suggest that we should listen at least in this regard to the respondent who certainly is an expert as to what the point of rest is, Mr. Easterbrook.

And I might say incidentally as to point of rest, you do not go back and forth across the point of rest as has been described in oral argument, because we are talking about a function here and not a geographical point. If a man is engaged in loading and unloading process, if he is part of the gan, for example, it makes no difference whether he walks back and forth on the other side of the marshalling area or not. If he is engaged in the unloading process by way of example, he is covered.

Now, the exact point of physical point of rest may in fact change from terminal to terminal or yard to yard, as the government has suggested, but it doesn't make any difference because in each yard, at each terminal the point is exactly fixed and, believe me, there is no confusion at each place as to exactly where the point of rest is, as he has described himself using those examples. It doesn't make any difference that geographically it may be different in Los Angeles than it is in New York if in fact it is fixed in each place, and everyone knows where it is.

And let me just finally say that I think the statement was made that loading and unloading was not specifically referred to in the statute. If that was said, I refer you to section 2(4) where it is referred to, section 3(a) where it is referred to, and four times during the reports that I have repeatedly referred to they specifically talk about the loading and unloading function.

Thank you very much.

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

(Whereupon, at 11:38 o'clock a.m., the cases in the above-entitled matters were submitted.)