

ORIGINAL

In the

Supreme Court of the United States

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

Prtitioners,

v.

DIVERSON FORD, ET AL.,

Respondents.

No. 78-425

Washington, D. C.
March 20, 1979

Pages 1 thru 51

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Tuesday, March 20, 1979

The above-entitled matter came on for argument at
1:02 o'clock p.m.

BEFORE:

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

APPEARANCES:

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

WILLIAM C. BRYSON, ESQ., Office of the Solicitor
General, Department of Justice, Washington, D. C.
20530; on behalf of the Respondents

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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 Pfeiffer Company v. Diversion Ford and others.

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

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

ON BEHALF OF THE PETITIONERS

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

These two cases combined for purposes of this hearing bring to the Court for resolution that question which it did not have to reach in a decision in 1977 in what has commonly been come to be known among the bar as the Caputo case.

In the Caputo case, the Court held that an amphibious worker who was subject to being assigned to work both on the dock and on the navigable waters of the United States was a type of worker that Congress intended to cover in order to provide a uniform compensation system for him in the 1972 amendments to the Act.

Caputo was such an amphibious worker, being subject to assignment either on the dock or on a vessel on the navigable waters during the course of his employment on the date of his accident.

The petitioners respectfully submit that it is this navigable water standard on which the Court turned in its

Caputo opinion. It is founded on the historical decisions of this Court, stemming back to the famous case of Southern Pacific v. Jensen. Counsel in this case have drawn the line of demarcation between their two positions very clearly.

Simply speaking, in extending the Act's jurisdiction ashore in 1972, did Congress intend to provide a uniform compensation system for amphibious workers who were covered prior to 1972 for only a part of their work activity, that part which was done on navigable waters. As we respectfully submit, that is all that Congress intended. Or did Congress intend, as the federal respondent asserts, to cover all waterfront workers who work on piers, wharves, terminals and other areas adjoining navigable waters.

Before this Court in Caputo, the federal respondent contended that it reached only those waterfront workers who were directly involved in the loading or unloading of land transportation. That was their position in reply to our petition for certiorari in this case. In their reply brief here, they have expanded this to include all waterfront workers who may be injured on piers, wharves, or other terminal areas that meet the situs test of the 1972 amendments.

QUESTION: Mr. Vickery, this case doesn't involve any controversy about situs, does it, but only about status?

MR. VICKERY: Situs is not at issue. Bryant, the cotton hitter, was injured in a warehouse and a vessel was

moared outside at the pier along side this warehouse, and Diverson Ford was injured on railroad tracks that ran out on the pier in the Port of Beaumont Navigation District, so situs is not an issue.

QUESTION: And does exist, I mean --

MR. VICKERY: It does exist in this case, there is no question about it.

QUESTION: And the controversy is over the question of status.

MR. VICKERY: The question of status. Situs exists only to the extent that the federal respondent now contends that situs only is enough to also satisfy the status test.

QUESTION: Yes.

MR. VICKERY: But other than that, situs is not involved. Oddly enough, we are not too far apart insofar as the factual situations existing in these three cases either. There is not much of a dispute as far as that is concerned, but there are very distinct differences in the types of employment that these men were engaged in.

First of all, this Court recognized that Caputo was a regular longshoremen or a longshoremen by occupation. That is, he spent a substantial part of his working time in the actual loading or unloading of vessels. Neither Ford nor Bryant spent any substantial period of time in loading or unloading vessels. In fact, Bryant had not engaged in the

loading or unloading of cargo from a vessel for approximately five or six years prior to the date of his accident. Ford had participated in the loading and unloading of vessels in the Port of Beaumont on only seven days during the year immediately prior to his injury. Ford was not a longshoremen by occupation. He would be more aptly described as a laborer. He worked approximately seven days as a longshoreman during the year prior to his injury. He worked approximately 35 or 36 days as a warehouseman doing the type of work he was doing here, loading or unloading land transportation. The rest of the time, we don't have specific dates, but during the rest of the time he also did construction work in the Beaumont area and he also drove a beer truck for a beer distributor. So there is no way to classify either of the two men involved in this case as being longshoremen or as having engaged in loading or unloading vessels prior to their injury of enough significance to make them longshoremen by occupation.

In fact, Ayers Steamship Company, for whom Bryant works, has no stevedoring operations at all. It never loads or unloads a vessel. It is a steamship agent who assembles cargo for the vessels that it represents in the warehouses. It uses warehouse workers like Bryant to unload the land transportation, to stow the cargo in the warehouse to await the arrival of the vessel.

QUESTION: Do they strip containers?

MR. VICKERY: No, sir.

QUESTION: They are not subject to that type of work?

MR. VICKERY: No, sir.

QUESTION: So they are specifically not subject to that assignment.

MR. VICKERY: The union contract provides that that is deep-sea longshore work. Ayers has never stuffed or stripped a container.

QUESTION: In your brief, Mr. Vickery, you urge the Court not to place too much or any emphasis in its test in determining status on whether or not the claimant is a longshoreman, at least as I read your brief.

MR. VICKERY: Yes, sir.

QUESTION: Although the statute does make that one of the tests, doesn't it?

MR. VICKERY: Well, I think the statute requires him to be both a longshoreman and at the time of his injury to be engaged in maritime employment, for example.

QUESTION: So then being a longshoreman is part of the test or one of the tests, isn't it?

MR. VICKERY: Yes, but if he --

QUESTION: It is under the statute, whether we like it or not.

MR. VICKERY: But let me give you an illustration of why I think you have to consider something other than

longshoreman as an occupation. If Caputo had been moonlighting on the date of his accident and had been driving the truck, he would not have been subject to being assigned to work on the navigable waters of the United States.

QUESTION: Well, what if the --

MR. VICKERY: He would have been a longshoreman by occupation.

QUESTION: What if the collective bargaining agreement with the Teamsters local and that trucking company had said in this case we are going to call every truckdriver a longshoreman and that is your job, longshoreman, just because some day you might want to get the advantage of this under the statute.

MR. VICKERY: I think that is --

QUESTION: Does that make him a longshoreman if he is called so and if that is the job classification?

MR. VICKERY: I don't think so.

QUESTION: What?

MR. VICKERY: No, sir.

QUESTION: What is the test? What is it? In your submission, what is the test?

MR. VICKERY: In my submission, the test is the traditional definition of maritime employment, which this Court has given it.

QUESTION: I understand that, but it says -- the

statute says including any longshoreman, so what does that mean?

MR. VICKERY: A longshoreman is a man who loads and unloads vessels.

QUESTION: On the day he is hurt?

MR. VICKERY: Yes, sir.

QUESTION: Under the statute?

MR. VICKERY: Yes, sir.

QUESTION: Whatever his job description is?

MR. VICKERY: Yes, sir. If he is directly involved in the loading or unloading of a vessel, then he could be properly denominated to be a longshoreman.

QUESTION: Even though his job description is something else like a laborer or a messenger or something else?

MR. VICKERY: Yes, sir. The interchange of the laborers between the warehousemen and the actual loading of the vessel is something --

QUESTION: What if he is drafted --

MR. VICKERY: Sir?

QUESTION: What if he is a night watchman who is drafted to do some loading and unloading?

MR. VICKERY: I think if he is involved in the loading or the unloading of the vessel, Congress intended to cover him because I think he is subject to being assigned to work either on the dock or on the vessel and he becomes --

QUESTION: Well, that is covered by other person engaged in longshoring operations.

MR. VICKERY: Yes, sir.

QUESTION: My question goes to what your understanding is of the statutory meaning of longshoreman. That wasn't clear to me from reading your brief.

MR. VICKERY: The statutory meaning of longshoreman is a person who engages in the loading or the unloading of a vessel.

QUESTION: Then why isn't it chronological in view of the other statutory law, a person engaged in longshoring operations?

MR. VICKERY: Why did they have to have that?

QUESTION: Why is it wholly meaningless if that is all it means?

MR. VICKERY: Well, there are other people who engage in longshoring operations besides longshoremen.

QUESTION: But you said that is the definition of longshoreman.

MR. VICKERY: All right. But what Congress was trying to say, Mr. Justice Stewart, is reflected by what it said with respect to checkers. Checkers are directly involved in the loading or unloading of the vessel, are subject to being assigned to work either on a vessel or on the dock, and Congress was specifically referring to that. It needed these

other persons involved in longshoring operations to identify people like the checkers, to also identify shore-side crane operators who are not longshoremen, but they are leased by the terminal facilities, the terminal owners, leased cranes to be used in the loading and discharging of the vessels with an operator. They are not longshoremen by occupation or they are not longshoremen working regularly in the loading or unloading of vessels.

I think that is in referring to it as an occupation, I think you are dealing with a man who spends substantially all of his working time working as a longshoreman in the loading or the unloading of vessels.

QUESTION: And on the day of his accident, what if he was a longshoreman up until yesterday?

MR. VICKERY: That is why you need the maritime employment --

QUESTION: I know, but that is separate statutory language.

MR. VICKERY: Yes, sir.

QUESTION: It is our duty to try to give meaning to every word of the statute if we can.

MR. VICKERY: And what I am trying to say to you is that because he is a longshoreman today, he has to be engaged in maritime employment tomorrow, just like he does today when he is working as a longshoreman. The fact that he may be a

longshoreman by occupation, as I am an attorney by occupation, but if I drive a taxicab tomorrow that wouldn't give me any benefits as an attorney. If he is driving a taxicab down to the dock tomorrow to pick up people in his moonlight job, even though he is a longshoreman by occupation, he is not engaged in maritime employment, and even though he is injured on an adjoining area he would not be covered simply because he is a longshoreman by occupation when he is engaged in that particular occupation.

I submit that that is the importance and it is the reason that I don't think you can look at the terminology longshoreman in the statute in isolation.

The Powell case from the Ninth Circuit is another good example of the situation if you consider the problems that will arise, if you consider the longshoreman by occupation as being the sole test. In Powell, this man had been a longshoreman for a good many years until about seven months prior to his accident. He then quit working as a longshoreman and started working for the grain elevator unloading railroad cars with grain into the grain elevator. As such an employee, he could never be involved in the work of the longshoreman which was done by independent contracting stevedores in the loading and the unloading of the vessel.

QUESTION: And what did the Ninth Circuit say?

MR. VICKERY: The Ninth Circuit held that he was no

longer a longshoreman, that he had converted his job and he was now strictly an unloader of rail cars at the grain elevator.

QUESTION: So he wasn't covered by the statute?

MR. VICKERY: So he was not covered by the statute. And the problem of looking at longshoremen by occupation, Ford poses the question is he a longshoreman by occupation because he works seven days, if not seven days, what, how many months, how many weeks to make him a longshoreman by occupation, to make him automatically covered regardless of what job he is doing.

QUESTION: Well, whatever the word means, you think he has to be that at the time that he is injured or killed --

MR. VICKERY: Yes, sir.

QUESTION: -- to be covered by the statute?

MR. VICKERY: If you are going to use just the --

QUESTION: Maybe he had never been a longshoreman. Maybe he had been a lawyer until this morning.

MR. VICKERY: Right.

QUESTION: He was hired as a longshoreman. If he is killed today, then he is a longshoreman.

MR. VICKERY: He is a longshoreman.

QUESTION: And is covered by the statute.

MR. VICKERY: Yes, sir.

QUESTION: Suppose a longshoreman wheeled something

off a ship and wheeled it right to a truck that was going to carry it away and he was helped by Mr. Ford and the truck driver to load the truck and all three got hurt. I suppose the truck driver wouldn't be covered because he isn't engaged in maritime employment or what?

MR. VICKERY: The legislative history makes it clear that he is not covered.

QUESTION: It is because why?

MR. VICKERY: Because he is not engaged in maritime employment.

QUESTION: He is not engaged in longshoring operations?

MR. VICKERY: He is not engaged in longshoring operations.

QUESTION: Well, this piece of cargo came straight off the ship and is being loaded right on the truck.

MR. VICKERY: All right, then what you have there, what you have to look at there is the congressional intent to cover or to provide a uniform compensation system, you've got to look at the maritime employment test.

QUESTION: So you say that the driver --

MR. VICKERY: All need to meet the maritime employment test.

QUESTION: The truck driver just doesn't engage in maritime employment, so that excludes him you say.

MR. VICKERY: Right.

QUESTION: Now how about in this same accident at the same moment the longshoreman would clearly be covered?

MR. VICKERY: Yes, sir.

QUESTION: Because he is unloading the ship.

MR. VICKERY: Yes, sir.

QUESTION: And he is a longshoreman. Now, how about Mr. Ford there, he is engaged in -- he always does this, he is on the pier, he is attached to -- maybe he is hired by the stevedoring company, but he isn't a longshoreman. Right then he hasn't been unloading a ship, he hasn't been on the ship, but would he be covered in that example?

MR. VICKERY: I do not think he would be covered because he would not meet the maritime employment status test. The maritime employment test is whether or not a person is subject to being assigned to work on board a vessel and on the dock.

QUESTION: I know, but here comes a piece of cargo off the vessel, it never stops, it gets right to the truck, he helps the longshoreman put it on the truck and he is hurt.

MR. VICKERY: He is engaged in longshoring operations at that time, I would have to say that he is engaged in longshoring operations at that time. But it is not enough unless he also meets the maritime employment test, and the maritime employment test that this Court has enunciated since

Southern Pacific v. Jensen is only that work which is done on navigable waters. That is where the dividing line between maritime employment and non-maritime employment has been drawn by this Court repeatedly.

QUESTION: But, Mr. Vickery, it is not your contention that the injured employee has to be engaged in work on navigable waters at the time of his injury to be covered?

MR. VICKERY: No, sir.

QUESTION: Is it?

MR. VICKERY: No, sir. That is what Congress said. Congress said that we want to cover this man who prior to the 1972 amendments was covered only for the work that he did on the ship.

QUESTION: Right.

MR. VICKERY: Prior to the 1972 amendments, men who were engaged in maritime employment, as this Court had repeatedly defined it, were subject to having their compensation remedy --

QUESTION: I thought you said there wasn't any situs problem in this case.

QUESTION: There isn't.

QUESTION: Why would there have been a situs problem in my example?

MR. VICKERY: There is no situs problem involved in your example, Mr. Justice White. But in determining

maritime employment where the person is working is determinative of that issue. That is what started the whole thing in 1917 when Southern Pacific v. Jensen held maritime employment is on the vessel only and the state compact can't apply. In Nordenholt they reaffirmed that. They said handling cargo on the dock is not maritime employment in 1922. In 1927 Congress sought to solve the problem by passing the Longshoremen's Act and it put in a maritime employment requirement.

This Court considered a question of what is maritime employment under the Longshoremen's Act in 1930, in Nogueira, and they expressly held maritime employment was work performed on the navigable waters of the United States. That was reaffirmed in Pennsylvania Railway v. O'Rourke Company in 1953. It was the basis of the holding of this Court in 1971, in the Erie-Lackawanna case, and again in Cooper Stevedoring v. Fritzkoisky.

QUESTION: But the O'Rourke case and some of the other cases were purely situs cases, weren't they? O'Rourke, as I remember, was a brakeman on the Pennsylvania Railroad.

MR. VICKERY: Yes, sir.

QUESTION: That was his job.

MR. VICKERY: That's right.

QUESTION: But he was injured on navigable waters and therefore it was held that the FELA was not applicable.

MR. VICKERY: That's right, because --

QUESTION: And it was a situs case.

MR. VICKERY: That's right, because he was working on navigable waters, is what made him engaged in maritime employment.

QUESTION: Even though he was a railroad brakeman.

MR. VICKERY: Even though he was a railroad brakeman. That is what made the railroad --

QUESTION: So it wasn't a status case, it was a situs case.

MR. VICKERY: Well, the only person who had to have any status prior to the 1972 amendments was the employer, and the employer had to meet the maritime employment test by showing that it had employees who worked on navigable waters. O'Rourke himself would have satisfied that but the Court held that the railroad had other employees who worked on navigable waters, therefore the railroad was --

QUESTION: Was an employer within the meaning of the then statute.

MR. VICKERY: All right, and that required maritime employment.

QUESTION: Right.

MR. VICKERY: And that is what I am saying, that is where the Court got the definition of maritime employment, from the employer definition. Congress used precisely the same words in the 1972 amendment and now requires that both

the employer and the employee meet the maritime employment status test.

QUESTION: Right. The O'Rourke case was the one -- I haven't read it for a long time -- Justice Reed wrote it and it was a five-to-four case, was it?

MR. VICKERY: Was it five-to-four? I'm sorry, I don't recall who wrote it.

QUESTION: I think Mr. Justice Reed wrote the opinion.

MR. VICKERY: But it was a five-to-four decision, that's correct.

I would like to reserve the rest of my time for rebuttal, if there are no further questions.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Vickery.
Mr. Bryson.

ORAL ARGUMENT OF WILLIAM C. BRYSON, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

The question in this case is the extent to which the Longshoremen's Act as amended in 1972 applies to employees engaged in handling cargo on the waterfront. Now, the position of the Department of Labor is that the Act applies to all waterfront employees who are engaged in the process of transferring cargo between land and water transportation.

Now, the petitioners have characterized the department's position as being somewhat broader than that. It is not. The position is that with respect to cargo handling, it is necessary that the employee be engaged in the process of moving cargo between land and sea transportation.

Now, the Board and the Director have reached this position as a matter of construing the statutory term longshoring operations.

QUESTION: Would that definition of yours include Mr. Justice White's truck driver in this case?

MR. BRYSON: No, it would not, Mr. Justice Blackmun, and the reason would be --

QUESTION: Tell me how he would be excluded.

MR. BRYSON: Well, essentially the reason is that that truck driver would not be engaged in maritime employment. That truck driver would be engaged in employment -- most of his employment would be looking towards the land he would be engaged in most of his conduct, most of his daily conduct in moving cargo between the maritime marine terminal and points inland of that and his job basically would not be a maritime job.

QUESTION: Well, you said most of his efforts. I guess we can all agree to that, but in Mr. Justice White's illustration he was doing something more than that.

MR. BRYSON: Exactly, but as this Court pointed out

in the Caputo case, the whole thrust of the Act is to look to the nature of the employment, not the particular act that the employee is engaged in at the time.

QUESTION: As I remember the Caputo case, the opinion expressly excluded the truck driver.

MR. BRYSON: Exactly.

QUESTION: My question, of course, is whether your proposed test doesn't include him?

MR. BRYSON: No, I think not, and the reason being that we focus on the marine terminal worker because this is a person who spends all of his time, who as a matter of profession, as a matter of occupation is someone who is constantly dealing with cargo that has immediately been unloaded from a vessel or is about to be loaded onto a vessel. He is like the harbor worker, like the shipbuilder, like the ship preparer, a person who is there on the marine situs, on the maritime situs, is dealing day in and day out with cargo that is immediately to be loaded or immediately unloaded from a vessel. The truck driver comes in once a week or whatever and moves on to land occupation. His occupation is not that that could fairly be termed as maritime employment.

QUESTION: Mr. Bryson, what do you think the phrase maritime employment means?

MR. BRYSON: Well, the term, of course, is not given as --

QUESTION: Well, it has been defined rather -- it has become almost a term of art in the decisions of this Court, hasn't it?

MR. BRYSON: Well, the decisions of the Court to which counsel referred --

QUESTION: And indeed the predecessor statute required the employer to be in maritime employment in order to be a covered employer, he had to have some of his employees in maritime employment.

MR. BRYSON: He has to have some of his --

QUESTION: And that was given a specific and almost a -- it became almost a term of art, didn't it?

MR. BRYSON: He had to have some of employees engaged in navigable waters.

QUESTION: Yes.

MR. BRYSON: Now, navigable waters has been redefined, of course, in the '72 Act to include --

QUESTION: But employment hasn't been defined at all, has it?

MR. BRYSON: No, maritime employment has not been defined.

QUESTION: So wouldn't it be the natural thing to look and see what that term means in the decisions of the Court?

MR. BRYSON: But the problem, Mr. Justice Stewart,

with trying to define maritime employment the way it was used, although I think not defined in the old cases, the way it was used to the extent that it was used to suggest that maritime employment was limited to employment which actually occurred over water, is that that would not take care of a lot of the different kinds of maritime employment that are involved in the 1972 amendments. For instance, ship builders are --

QUESTION: They are because they are specifically covered by the statute.

MR. BRYSON: That's right, but the statute says maritime employment and then proceeds to include a number of groups within that concept of maritime employment, and the legislative history on that point is quite clear, that it means the entire group of specific occupations to be within the notion of maritime employment.

If I can read from the section-by-section analysis in the Senate report, it says the amendment amends section 23 of the Act to define an employee as any person engaged in maritime employment, and then it goes on to say the definition specifically includes any longshoremen or other person engaged in longshoring operations and any harbor worker, including a ship repairman, ship builder and ship breaker.

Now, Congress knew and it was clear in 1972 that there were a number of different types of, say, just to take

an example, ship builders who never set foot on the water, who would never be on the hull of a ship after it was launched. These are people who are spending their time working on land in a maritime situs but who are doing work which is so integrally related to maritime navigation and commerce that Congress thought to bring them within the definition of maritime employment. Now, they did not define the term, of course, and that is so much trouble has ensued in trying to define the statute.

QUESTION: What is a ship breaker?

MR. BRYSON: A ship breaker I believe is someone who is either in the conversion, a form of ship repair, a form of converting ships from one form to another. But the point is that there are a number of these individuals who never set foot on land, including --

QUESTION: You mean set foot on navigable waters.

MR. BRYSON: Excuse me -- on navigable waters as it used to be defined.

QUESTION: One can't st foot on navigable waters.

MR. BRYSON: Of course, they spend all their time on navigable waters as it is now defined because it has been defined to include all of these maritime situs areas such as a dock, a pier, a wharf, a building way and so forth.

Now, the Director and the Board have looked at --

QUESTION: Mr. Bryson, are those two separate

entities or one entity for purposes of appellate review, the Director and the Board?

MR. BRYSON: For the purpose -- well, they are clearly two different entities. The Director is the delegee of the Secretary of Labor who is charged with administering the Act and appears as a party seeking to in this case support the Board's order. Now, perhaps I didn't --

QUESTION: Where is the Director authorized to be a party in these proceedings? As I read section 921(c), application can be had to the Court of Appeals to set aside an award of the Benefits Review Board and copies are to be served on the Board and other parties. I can certainly see why the Board would be a party, but why is the Director a party?

MR. BRYSON: Well, the Director is designated to defend the Board's orders and I do not know --

QUESTION: By whom?

MR. BRYSON: I believe in the statute there is a provision which provides --

QUESTION: In the statute?

MR. BRYSON: In the statute there is a provision which provides that the Secretary of Labor shall assign attorneys to administer the Act and to -- I believe it says to defend the Board's orders as well. Now, the --

QUESTION: Why wouldn't the Board nonetheless be the

party, albeit defended by attorneys assigned by the --

MR. BRYSON: There have been some cases in which the Board has been named as a party, some of the cases. It has come to be the fashion to characterize the Director as the party, but it could well be the Board as in the National Labor Relations Act.

QUESTION: You feel it is immaterial though?

MR. BRYSON: Here because what happened here, although there is some dispute as to whether the Director has the power to seek review of a Board order which is contrary to the Director's position, in this case it was the Director's position and the private party's position that was sustained in the Court of Appeals and sustained in the Board, so that the Director's standing is --

QUESTION: There is no internal inconsistency?

MR. BRYSON: That's right, no, not here. There have been cases in which there is internal inconsistency, but not here. In fact, the Board and the Director from the beginning have taken the same position with respect to the definition of the terms longshoring operation and maritime employment, by defining those terms to include the entire operation in the marine terminal with respect to cargo handling, and --

QUESTION: Doesn't that go very far toward, as I think was suggested in a question a few moments ago by my

Brother Blackmun, doesn't that go very far toward eliminating the status requirement in the statute?

MR. BRYSON: It doesn't --

QUESTION: Assuming the employer is a covered employer because he has other employees who are --

MR. BRYSON: Exactly.

QUESTION: And then doesn't that go awfully far toward eliminating the status requirement as to the employee, the claimant?

MR. BRYSON: With respect to cargo handlers, it certainly does. In our view, cargo handlers are engaged in longshoring operations and therefore you don't have to go any farther to determine that that is maritime employment, so there is no further status inquiry that has to be made.

QUESTION: Right.

MR. BRYSON: Now, the legislative history does point out that certain kinds of employees, even though they may be there on the situs are not covered and that would include, for instance, clerical employees.

QUESTION: For one thing, if the employer is not covered, they are not covered.

MR. BRYSON: Well, if their employer is -- their employer may be covered --

QUESTION: If he is not an "employer" as defined by the Act.

MR. BRYSON: He may be an employer and they may still not be covered.

QUESTION: If he is not, then they are not covered.

MR. BRYSON: Exactly.

QUESTION: And if he is, they may or may not be covered.

MR. BRYSON: Exactly.

QUESTION: That's right.

MR. BRYSON: If he is covered though, as in the case of --

QUESTION: Clerical employees.

MR. BRYSON: -- clerical employees may well not be because it is --

QUESTION: You say may well. What about a clerical employee who is doing clerical work in connection with moving cargo from within the maritime --

MR. BRYSON: That is --

QUESTION: That is a checker.

MR. BRYSON: That is exactly right. I was just going to say that gets to a line that is a difficult line to draw and it is a line which has come up in a couple of cases, although not too often. Clerical workers tend not to suffer very many injuries and there haven't been very many cases --

QUESTION: What if you had a truck driver who worked exclusively on the pier between, say, a warehouse,

hauling cargo from the warehouse to a railroad pick-up.

MR. BRYSON: He would be covered.

QUESTION: As a truck driver he would be covered?

MR. BRYSON: Well, he would be covered because he would be engaged in the overall process of moving the cargo in the marine terminal area between the vessel and further land transportation, which is the railroad which would take it off. Now, he would be covered because in our view he would be engaged in longshoring operations and --

QUESTION: And what if the railroad to which he delivered it was five miles off the maritime site?

MR. BRYSON: Well, if it was off the --

QUESTION: But he regularly picked it up from the warehouse on the site and took it to the railroad station five miles away.

MR. BRYSON: That is a difficult question to answer. I don't know that that sort of situation appears very often in the industry. But the answer to that would depend I think if he is picking up the cargo at the terminal and carrying it on and just essentially being a middle man between the terminal and a further land transportation, which is as I understand your example, I would say he would not be covered because he would not be --

QUESTION: He would be under your definition, as I understand your brief.

MR. BRYSON: I don't believe so. I believe that his case would be a case in which he was not working at the terminal moving things through the terminal, rather he is taking it from the terminal, as I understand your hypothetical, and moving it from the terminal to a further transfer point outside of the terminal. But if he were, for instance, as a ---

QUESTION: But he regularly worked within the terminal moving cargo between maritime transportation and land transportation, every day he does it.

MR. BRYSON: But he is not working within the confines of the terminal, he is taking things from the edge of the terminal ---

QUESTION: Not all day, but he does for the first portion of his journey.

MR. BRYSON: The portion of the journey in which he --

QUESTION: Is your test limited to the case in which the land transportation commences within the terminal, is that the test?

MR. BRYSON: Where the land transportation commences at the interface between the terminal, where the terminal employees give the cargo over to a mode of land transportation, at that point, and the land transportation takes it elsewhere --

QUESTION: That is unloading, but how about loading?

MR. BRYSON: Well, in the case of loading, the reverse would apply, he would not be covered if he were bringing the cargo into the terminal, even if it were not at the edge of the terminal physically but actually put it down within thirty feet inside the terminal --

QUESTION: That is reminiscent of the discredit point of rest test, isn't it?

MR. BRYSON: I think not. The point of rest test, of course, distinguished within the terminal between where the cargo came off the vessel and was placed down and so forth -- here we are talking about the edge of the terminal which is the situs line.

QUESTION: Your hypothesis is that land transportation always commences right on the edge of the terminal?

MR. BRYSON: No, it may not be, but --

QUESTION: Could it not sometimes commence within and sometimes on the edge and sometimes without --

MR. BRYSON: Exactly. In the --

QUESTION: -- and you get different results in those three cases.

MR. BRYSON: No, I don't think so, Mr. Justice --

QUESTION: So even if the land transportation commences five miles outside the terminal, if the truck driver regularly goes within the terminal, he is covered. That is

what I understand you to say.

MR. BRYSON: No, I think not because he would be basically --

QUESTION: Now there are three cases and I want you to answer all three. One, where the land transportation commences within, another right on the edge and the third where it begins without the terminal, and you get different results in the three.

MR. BRYSON: I don't think so. I think that the place in which this land transportation agent is picking up the --

QUESTION: He always picks it up within. He is unloading. He always picks it up within, at the place of where the land transportation commences. Now, does it matter whether it is just outside the terminal, and if it is just outside the terminal six inches, is that the same case as if it is ten miles outside the terminal? Do you have a clearly defined position?

MR. BRYSON: I may have your hypothetical somewhat mixed up. This is a process in which we have unloaded a vessel --

QUESTION: You have put some cotton in a warehouse, you take it from the warehouse on some kind of a truck to a railroad and the railroad spur track on which it is loaded are three different examples -- one, the track comes onto the

pier or whatever it is, secondly, it is right at the border, and, thirdly, it is outside.

MR. BRYSON: No, I would say none of those three cases would be covered.

QUESTION: None would be covered?

MR. BRYSON: No, I think none of those three cases would be covered.

QUESTION: Not even number one?

MR. BRYSON: Well, the point is that the railroad employee here --

QUESTION: He is not a railroad employee, he is an employee of an employer.

MR. BRYSON: Right.

QUESTION: That is our hypothesis all the way through, an employer who has some employees.

MR. BRYSON: And if his basic employment was to move the --

QUESTION: The cotton bales from a warehouse to a railroad.

MR. BRYSON: I would say he would not be covered because he would be moving, basically engaged in land transportation into a marine terminal and further activities once you get to the marine terminal, further activities within the terminal.

QUESTION: I was just talking about unloading.

QUESTION: I think Justice Stevens was asking about taking the stuff away.

QUESTION: That's right, I am just talking about unloading, going away from the ship to the land transportation. He is a truck driver.

MR. BRYSON: Right.

QUESTION: You say he is never covered because he is a truck driver, is that it?

MR. BRYSON: Well, that is an important --

QUESTION: That is different from what you said earlier.

MR. BRYSON: -- that is an important element in terms of --

QUESTION: Why?

MR. BRYSON: Because he is basically engaged in transporting cargo from a marine terminal to somewhere else.

QUESTION: To a railroad. Every example I give you is from a warehouse within the terminal to a railroad which is going to ship it to New York or some place across the country.

MR. BRYSON: Right.

QUESTION: And the three different examples are, one, where the railroad has a spur on the terminal; secondly, right at the edge, and, thirdly, outside.

MR. BRYSON: I'm sorry, I did misunderstand your

example. Where the railroad spur is within the marine terminal, he would be covered.

QUESTION: All right.

MR. BRYSON: I'm sorry.

QUESTION: Would you say he would be covered if it is right at the edge?

MR. BRYSON: If it is right at the edge, if --

QUESTION: What if it is six inches outside the edge?

MR. BRYSON: Well, if it is six inches outside the edge, I think he would also --

QUESTION: What if it is ten feet outside the edge?

MR. BRYSON: Well ---

QUESTION: Well, that is the kind of problem you are going to get.

MR. BRYSON: I understand.

QUESTION: You are asking us to draw a good hard fast line and have you got that line firmly in mind, that is what I am trying to find out.

MR. BRYSON: The problem is that this situation doesn't appear very often in the industry. It is a difficult line to draw, of course, with respect to this statute which has very general statutory language about what constitutes longshoring operations. But the general pattern in the industry is for the spur to go into the marine terminal and

you have people who are employed by the marine terminal to transfer cargo from the vessel or from the place inside the marine terminal to the spur that's located right there.

Now, of course --

QUESTION: But then are you saying that his entire employment must be on the situs?

MR. BRYSON: No. It may be that he is basically employed on the situs, if he is employed by an employer, that he spends a lot of his time on the situs, but he is basically a terminal worker, but he may occasionally go off the terminal and deliver something. The fact that he goes off the terminal --

QUESTION: I have seen some of these terminals, I guess we all have, and I haven't seen one yet that has a sign that says this is six inches past. In a real port you don't know where a terminal ends, isn't that true? Some of them have fences and some of them don't.

MR. BRYSON: Well, in these cases --

QUESTION: If you don't have a fence, how do you know where's the end of it?

MR. BRYSON: The terminal is generally defined by the relationship of the land transportation and the sea transmittal cargo between the sea and the land transportation device, either railroad or truck. Now, in the Caputo case itself, there was some question as to where --

QUESTION: Where a track comes in -- what I am trying to get in my mind clear -- on to the wharf, on to the pier, whatever you want to call it, do you know exactly when it's on the pier? Is there a sign that says, "This is the pier"? Of course there's not.

MR. BRYSON: Well, in many cases, for instance as in the Port of Beaumont there is a sign that says, "This is the Port of Beaumont."

QUESTION: But the sign is up in the air.

MR. BRYSON: That's true, that's true. It may create some difficulty in determining exactly what the limits of the terminal are, but there aren't very many cases that we've had --

QUESTION: On that point, Mr. Bryson, in the Caputo case, reading from page 253 of the opinion, the container Blundo was checking had been taken off a vessel at another pier facility outside of Brooklyn and brought overland unopened by an independent trucking company to the 21st Street pier. The question that raises in my mind, is the truck driver that hauled that container from one pier to another covered?

MR. BRYSON: Well, that truck driver I believe, although I'm not sure that the record reflects that, I believe that truck driver was not employed by employer.

QUESTION: Well, again, assuming he was employed by

an employer --

MR. BRYSON: Well, if you were employed by the terminal operator, let's say, I would think he would be covered because he'd be moving between one facility of the terminal and another.

QUESTION: Different terminals.

MR. BRYSON: Well, that may be, and he would still be, because the cargo had not been unloaded at that point, he would still be --

QUESTION: All I am suggesting to you is that moving from one maritime terminal to another really isn't very different from moving from one maritime terminal to a railroad station five miles away, and I'm sure that happens fairly often.

MR. BRYSON: Well, I think the usual pattern is for the railroad spur to be coming up to the terminal, and if it is the employee of the terminal operator that is doing the moving, he would be engaged in longshoring operations. Now --

QUESTION: I take it then the gangplank now just extends to the edge of the terminal?

MR. BRYSON: That's right. I think that's one way of putting it. It isn't the way I would put it, but I think that's accurate. And the definition of navigable waters is the way Congress did just that. They said the Jensen Line will be moved from the gangplank to the edge of the marine

terminal, and they used the word "terminal" in redefining navigable waters.

Now, the petitioners have proposed a test under which the coverage under the act would depend on whether the employee was subject at any point during the day that he was injured to being assigned on board a vessel. Now, there are a number of problems with this test, and the first and most fundamental problem is that it fails to take account of the basic purpose of the 1972 Act, which was to move the Jensen Line inward, to move it away from the gangplank --

QUESTION: Don't you think it's very important to distinguish between the test of situs and the test of status?

MR. BRYSON: Certainly, except that before 1972 --

QUESTION: It is important not to confuse them.

MR. BRYSON: Exactly.

QUESTION: Because they're confusing enough as it is, it's a confusing enough statute as it is.

MR. BRYSON: It certainly is. The problem, though, with petitioner's test is that I think it reinstates situs, a situs test, into the status definition by virtue of going back to the situs question of maritime employment which depended on its being, as petitioners read it, over the one, and saying that that's necessary to get the status, that you have to have, be subject to being assigned on to a maritime situs in order to have a maritime employment status, and I

think that's exactly the problem with petitioner's test.

QUESTION: Would you say that you can have maritime employment without ever being subject to assignment in --

MR. BRYSON: Exactly, yes, as in the case of the shipbuilder, for instance, or, to take an example, there are many instances in which somebody, maybe a dock worker, who is not subject to assignment on the ship but he is engaged integrally in the loading and unloading process -- for instance, to take Mr. Blundo, the checker in the Caputo case, although as a matter of fact, as the court wrote in describing the facts, Mr. Blundo was subject to going on a ship in certain cases. He could very well not have been.

QUESTION: Well, the result might have been different if he had not been, as far as you can tell from that opinion.

MR. BRYSON: The court did not, in discussing Mr. Blundo's status and why he had a status that was a maritime status, they did not, the court did not refer to the fact that he was subject to assignment.

QUESTION: But it is in the opinion as a matter of --

MR. BRYSON: It's in the facts, that's true.

QUESTION: The outer limit, then, of the employment test is maritime employment?

MR. BRYSON: That's right; that's right.

QUESTION: Someone who is not engaged in maritime

employment could not qualify?

MR. BRYSON: That's right. And maritime employment includes each of the various named categories and others, miscellaneous categories that may appear. But in that it covers each of those named categories, it covers such people as ship builders, who in many instances, as I say, may not be subject to being assigned on a vessel. And it also covers the dock worker who may be involved in an integral part of the unloading process. For instance, suppose I'm a dock worker and standing right on the dock and taking cargo directly from the ship, I simply happen not to be subject to assignment to the ship to work on board a ship. I would clearly be engaged in long shoring operations even though I was not subject to being assigned on the ship.

Now, I would be covered under the new act, I would have maritime status because I was engaged in longshoring operations; I would have maritime situs because I would be working over navigable waters, but I would not be included in petitioner's test because I would be not subject to assignment on a vessel.

QUESTION: But your test would also cover the worker who took cargo out of a warehouse on the dock that had been stored there for five or six days?

MR. BRYSON: Well, that's true.

QUESTION: That's this case, with respect to --

MR. BRYSON: That's this case, that's right. In our view and in the view that the board and the director have taken, you can't distinguish between the case in which the cargo moves steadily from the ship to land transportation and the case in which the cargo is taken out of the ship, laid down at the point of rest, and then allowed to sit there for a day or so, and then picked up then and moved on to land transportation. In that case, the board has determined that there just is no way to determine how long it has to sit there, whether if it sits there and is picked up by somebody who works in a different crew, that person should not be covered.

Now, the court rejected that point of rest test in Caputo and the same considerations suggest rejecting the petitioner's test in this case, which would depend on this business of assignment on a vessel on the day of injury.

Suppose for instance the vessel was not in port on the particular day of injury. It's not clear that petitioner's test --

QUESTION: This isn't really the petitioner's test, it's more accurately what the petitioner says the statutory test is.

MR. BRYSON: Well, that's right.

QUESTION: And if suppose the vessel weren't there on the date of injury, under what I understand the petitioner thinks the statute means, you tell us the statute means, then

he wouldn't be covered.

MR. BRYSON: Well, that's right, but we suggest that that would not make good sense in applying --

QUESTION: Maybe not; maybe nothing in the statute makes very good sense, but our duty is to decide what the statute means.

MR. BRYSON: Well, that's certainly true, and our suggestion is that particularly in light of the doctrine that this statute should be given an expansive construction in favor of the injured claimant, that a narrow construction of the statute which would exclude claimants who were injured on the dock moving cargo clearly engaged in longshoring operations, for instance suppose unloading a container, the fact that they were injured on a day that the ship was not in port should not determine their coverage.

QUESTION: Mr. Bryson, could I ask one other question? No one argues this, but is it conceivable that the status test should be answered by some kind of a consideration of the character of the work the man is doing? Could one, for example, say that truck driving is not typical longshoring work and a truck driver would never be covered?

MR. BRYSON: Well, that's right. I think, I would hesitate to say that because it may well be that the terminal will be large enough that you will actually be driving a dolly or some mechanized vehicle -- a forklift is a kind of

truck, I suppose. You may well be moving a truck or you may well be using a very large forklift that looks a lot like a truck. Typically we would say, of course, that would be long-shoring operations, but --

QUESTION: The Caputo case was like that, wasn't it?

MR. BRYSON: Well, Caputo was --

QUESTION: They rode their trucks right on the dock?

MR. BRYSON: That's right.

QUESTION: They went right on --

MR. BRYSON: Caputo was covered, but the truck driver was not, who was busy --

QUESTION: But the trucks were on the dock?

MR. BRYSON: That's right, the trucks were being loaded directly --

QUESTION: I thought earlier when we were talking before, you assumed the truck driver would be performing a kind of work that would normally be covered if it was at the right place in the chain of movement of goods?

MR. BRYSON: Well, if you have a -- certainly a truck driver could be employed in a marine terminal to move cargo from the vessel, the side of the vessel, all the way to the railroad spur, and he would be covered even though typically --

QUESTION: He did none of the physical loading of the truck himself; all he did was sit behind the wheel and

drive back and forth?

MR. BRYSON: That's right. Forklift drivers often do just that.

QUESTION: I understand forklift, but that's a little more like what typical longshoremen, we're talking about the driver of a, you know, teamster -- it's clear, everybody agrees, he's covered if it's done in the right place and at the right --

QUESTION: I would certainly suggest that he would be covered; yes.

QUESTION: Well, the petitioner certainly wouldn't agree with you.

MR. BRYSON: Oh, no, because I would say that he's not subject to going on a vessel. Now, of course, if he were subject to going on a vessel by his union contract, if for instance --

QUESTION: To being assigned that day.

MR. BRYSON: To being assigned that day.

QUESTION: If he had to go on the ship to have the captain sign the bill of lading or whatever it might be?

MR. BRYSON: Exactly.

QUESTION: Then he'd be covered.

MR. BRYSON: That's my understanding of petitioner's test, because that would be an assignment onto the ship in the course of his employment.

QUESTION: Wouldn't the union settle all of that?

MR. BRYSON: Well, that's a possibility, and that may be how this will all be resolved.

MR. CHIEF JUSTICE BURGER: Mr. Vickery.

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

ON BEHALF OF THE PETITIONERS--REBUTTAL

MR. VICKERY: May it please the Court, there are two things that I particularly need to say to the Court. Please look at the last two sentences of the legislative history. They absolutely and categorically confirm this Court's --

QUESTION: In your brief --

QUESTION: Footnote 36 on page 13.

MR. VICKERY: They absolutely confirm this Court's definition of maritime employment as being used in connection with the 1972 amendments. They state categorically that an employer who does not have any employees who work on navigable waters is not engaged in maritime employment.

There are many companies around the country that do nothing but warehouse work and they don't have a single employee who ever goes on thenavigable waters of the United States. They do exactly the same type of work that Ford was doing, exactly the same type of work that Bryant was doing, but they have not a single employee who does any work on navigable waters.

Congress states categorically that they are not

covered employers under those circumstances.

If those people working on the dock who have no other employees employed by their employer cannot be involved in maritime employment either. This is a bootstrap operation --

QUESTION: The dock is over water?

MR. VICKERY: This Court has held many times the dock is an extension of land and it has nothing to do --

QUESTION: That's the type you're talking about.

MR. VICKERY: Sir?

QUESTION: That's the type you're talking about. You keep saying dock. I wonder what type of dock you're talking about.

MR. VICKERY: Because it's well settled in the law that a dock is the extension of the land, whether there is water underneath the dock or land underneath the dock, Mr. Justice Marshall, I don't think makes any difference.

QUESTION: I just wanted to know.

MR. VICKERY: I see.

I believe that in Ford's case there was no water under the area involved. In Bryant's case, most of the piers and warehouses in Galveston are over water. I am sorry; I misunderstood you, I misunderstood your question.

Now, the second thing that I need to say to the Court, and I respectfully request that you carefully consider

is whether as Federal respondent contends, Congress intended to move the Jensen Line out to the edge of the terminal, or whether Congress simply intended to provide a uniform compensation system for those workers who prior to the 1972 amendment had to cross the Jensen Line. And that's all Congress did. It says the intent is to provide a uniform system to apply to employees who would otherwise be covered by this Act or part of their activity. The Jensen Line is what split the workmen's compensation remedy.

QUESTION: Now, Mr. Vickery, looking at the definition of the term "employee" in Section 23 --

MR. VICKERY: Yes, sir.

QUESTION: It says as you indicate that it means first of all that any person engaged in maritime employment including -- and then it says "including a ship repairman, a ship builder and a ship breaker" -- is it your contention that for a ship repairman or a ship builder or a ship breaker to be covered by this act he must be subject on the day of his injury or death to assignment on work on navigable waters?

MR. VICKERY: I believe that that same maritime employment --

QUESTION: That can be answered yes or no.

MR. VICKERY: Yes, sir. I think the same maritime employment requirement exists there.

QUESTION: So if he is a ship builder, full time,

life-long career ship builder, but he's a ship builder building a ship before it ever is on navigable waters, then he's not covered at all and never was and never can be by this act; is that it?

MR. VICKERY: Your Honor, I believe that's what Congress says. I believe that's what they say. I believe the only possibility of there being a variation in this -- and I've had no ship builder cases, and I'm sorry I'm uninformed --

QUESTION: No, no, the statute does --

MR. VICKERY: -- on it, but the Secretary of Labor had defined all of these terms that are used in the act in connection with the safety and health regulations for longshoring and ship repairs, ship breakers and ship builders. Those were published in 1960, and the Secretary of Labor's definition of longshoring operations in connection with the safety and health program which he has operated since 1960 is so different from the proposed longshoring operations test that the Federal respondent submits to this Court that it's ludicrous.

QUESTION: My question doesn't have anything to do with longshoring operations. This is a different part of the definition.

MR. VICKERY: Right, I understand.

QUESTION: An employee, it means any person engaged

in maritime employment including a ship builder. Now, there's no claim that he's a longshoreman or anything like it. But let's assume that he is and always has been during his occupational life a ship builder, but that his work is in building ships before they're ever on navigable waters.

Your argument has to be that he's not covered at all by this statute.

MR. VICKERY: That is correct. That is not maritime employment within the meaning of the act.

QUESTION: And you do concede that there are ship builders all of whose occupational time is spent not on navigable waters?

MR. VICKERY: I believe the estimate given in the Senate hearings at about 65 or 70 per cent of the work in the shipyard was on navigable waters, and those workers were involved --

QUESTION: And therefore there are 30, 35 per cent that are not.

MR. VICKERY: It would be about 35 that would not. So a ship builder who builds entirely on land, who builds a vessel --

QUESTION: And is not subject on the day of his injury or death to assignment to navigable waters occupationally is not covered by this.

MR. VICKERY: He is not engaged in maritime

employment. There are ship builders, Your Honor, who build tugs, barges and things like that entirely on land, take them by trailer and launch them.

QUESTION: Right.

MR. VICKERY: In my opinion those people are not engaged in --

QUESTION: Some of them in World War II were built in Iowa, as I remember.

MR. VICKERY: Yes, sir. Yes, they can be built entirely on land.

Thank you very much, Your Honor.

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

(Whereupon, at 1:58 o'clock p.m., the case in the above-entitled matter was submitted.)

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