No. 09-71186

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SEA-LOGIX, LLC and SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD,
Petitioners

v.

WILLIE BOOKER and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

---

BRIEF FOR THE FEDERAL RESPONDENT

CAROL A. DE DEO
Deputy Solicitor for National Operations

RAE ELLEN FRANK JAMES
Associate Solicitor

MARK A. REINHALTER
Counsel for Longshore

SEAN G. BAJKOWSKI
Counsel for Appellate Litigation

RITA ROPPOLO
Attorney, U. S. Department of Labor,
Office of the Solicitor
Suite N2117, 200 Constitution Ave. NW
Washington, D.C. 20210
(202) 693-5664

Attorneys for the Director, Office of Workers' Compensation Programs

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION.... 1

STATEMENT OF THE ISSUE.. 3

STATEMENT OF THE CASE.. 3

STATEMENT OF THE FACTS 4

1. Booker's Employment with Sea-Logix 4

2. The ALJ's August 17, 2006, Decision.. 7

3. The Board's August 23, 2007, Decision... 8

SUMMARY OF THE ARGUMENT 8

STATEMENT OF THE STANDARD OF REVIEW 11

ARGUMENT 11

1. Transporting Containers from the Maersk Terminal to the CFS for Stripping is Maritime Employment 13

a. *Because the unloading process is not complete until cargo is stripped from a container, transporting cargo to a stripping facility is part of the unloading process* 13

b. *Truck drivers who satisfy the status test are not excluded from coverage under the Longshore Act*............................ 16

c. *Sea-Logix's remaining objections lack merit*............................... 21

2. Transporting Stuffed Containers from the CFS to the Maersk Terminal is Maritime Employment 23

3. Transporting Containers from the Maersk Terminal to the JIT Railhead is Maritime Employment 24

4. Transporting Containers from the Maersk Terminal to Other Marine Terminals in the Port of Oakland is Maritime Employment 25

CONCLUSION 28

STATEMENT OF RELATED CASES 29

CERTIFICATE OF COMPLIANCE 30

CERTIFICATE OF SERVICE 31

TABLE OF AUTHORITIES

CASES:

Boudloche v. Howard Trucking Co.,
632 F.2d 1346, 1348 (5th Cir. 1980) 12, 20

Chesapeake & Ohio Ry. Co. v. Schwalb,
493 U.S. 40 (1989) 8, 11, 12

Chevron, U.S.A., Inc. v. Natural Res. Def. Council,
467 U.S. 837 (1984) 11

In re CSX Transp., Inc.,
151 F.3d 164 (4th Cir. 1998) 12

Dorris v. Director, OWCP,
808 F.2d 1362 (9th Cir. 1987) 20, 21, 26, 27

Dorris v. California Cartage Co.
17 BRBS 218 (Ben. Rev. Bd. 1985) 27

General Construction Co. v. Castro,
401 F.3d 963 (9th Cir. 2005) 11

Gilliland v. E.J. Bartells Co.,
270 F.3d 1259 (9th Cir. 2001) 10

Handcor, Inc. v. Director, OWCP,
568 F.2d 143 (9th Cir. 1978) 10, 23

Harmon v. Baltimore & Ohio R.R.,
741 F.2d 1398 (D.C. Cir. 1984) 13

Hayes v. CSX Transp., Inc.,
985 F.2d 137 (4th Cir. 1993) 22

John T. Clark & Son of Maryland, Inc. v. Cooper,
687 F.2d 39 (4th Cir. 1982) 24

Northeast Marine Terminal Co. v. Caputo,
432 U.S. 249 (1977) .... *passim*

Novelties Distrib. Corp. v. Molee,
710 F.2d 992 (3d Cir. 1983) 22

P.C. Pfeiffer Co. v. Ford,
444 U.S. 69 (1979) .... *passim*

Schwabenland v. Sanger Boats,
683 F.2d 309 (9th Cir. 1982) 12

Sea-Land Services, Inc. v. Director, OWCP,
685 F.2d 1121 (9th Cir. 1982) 12

Taylor v. Zapata Haynie Corp.,
623 F.2d 332 (4th Cir. 1980) 15

Triguero v. Consol. Rail Corp.,
932 F.2d 95 (2d Cir. 1991)... 21

Warren Bros. v. Nelson,
635 F.2d 552 (6th Cir. 1980) 16

FEDERAL STATUTES:

Longshore and Harbor Workers' Compensation Act,
33 U.S.C. §§ 901-950 (2000) ... 1

33 U.S.C. § 902(3) ... 3, 8, 11
33 U.S.C. § 903(a) ... 11
33 U.S.C. § 902(3)(A)-(H) ... 16
33 U.S.C. § 921(a) ... 2
33 U.S.C. § 921(c) ... 2

FEDERAL REGULATIONS:

20 C.F.R. § 802.407(a) ... 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-71186

SEA-LOGIX, LLC and SIGNAL MUTUAL
INDEMNITY ASSOCIATION, LTD,

Petitioners

v.

WILLIE BOOKER and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF APPELLATE AND SUBJECT
MATTER JURISDICTION

This case arises from a claim for benefits filed by Willie Booker against his employer, Sea-Logix, LLC, pursuant to the Longshore and Harbor Workers' Compensation Act ("Longshore Act"), 33 U.S.C. §§ 901-950 (2000). Administrative Law Judge Jennifer Gee ("the ALJ") denied benefits in an order dated August 17, 2006, which Booker appealed to the Benefits Review Board on

August 31, 2006, within the thirty-day period prescribed by 33 U.S.C. § 921(a). Excerpts of Record, p. ("ER") 3.

The Board vacated the denial on August 23, 2007, and remanded the case to the ALJ for further review. ER 27. Sea-Logix and the self-insurance group of which it is a member, Signal Mutual Indemnity Association, moved for reconsideration of the Board's decision on September 21, 2007, within the thirty-day period prescribed by 20 C.F.R. § 802.407(a). The Board denied this motion on November 30, 2007. ER 40. On January 8, 2009, the ALJ awarded benefits on remand. ER 46. Sea-Logix appealed this decision to the Board on February 3, 2009, within the prescribed thirty-day period, 33 U.S.C. § 921(a). The Board affirmed the ALJ's award in a final decision on February 25, 2009. ER 52. Sea-Logix petitioned this Court for review on April 21, 2009.

This Court has jurisdiction over Sea-Logix's petition because section 21(c) of the Act, 33 U.S.C. § 921(c), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. Sea-Logix's April 21, 2009, petition to this Court was filed within sixty days of the Board's February 25, 2009, decision; and the injury, within the meaning of section 21(c), arose in California, within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUE

The Longshore Act applies only to employees with maritime status (*i.e.*, who are "engaged in maritime employment," 33 U.S.C. § 902(3)). This includes any intermediate step of loading or unloading cargo to or from a vessel and all work that is integral or essential to the loading and unloading process. Booker regularly transported containers of cargo (1) from a marine terminal to an adjoining container freight station where cargo was "stripped" (*i.e.*, unloaded from the containers and divided by consignee for land shipment); (2) to the marine terminal after they had been "stuffed" (*i.e.*, loaded with cargo) at the container freight station; (3) from the marine terminal to a nearby railhead, where the containers were loaded onto railroad cars for shipment to consignees; and (4) from the marine terminal to other marine terminals in the same port. Was the Board's holding that Booker was engaged in maritime employment in accordance with law?

STATEMENT OF THE CASE

In this Longshore Act claim, Booker seeks benefits for injuries to his back, which Sea-Logix has stipulated were caused by "cumulative occupational activities" during his employment with Sea-Logix from March 1, 2003, to October 7, 2005. *See* ER 46. Initially, the ALJ dismissed Booker's claim, ruling that he did not have status as a maritime employee. ER 3. Booker appealed and the Board

reversed, finding that Booker was a maritime employee and remanding the case to the ALJ to determine whether the medical evidence established that Booker was entitled to benefits under the Act (an issue not previously resolved by the ALJ in light of her negative coverage finding). On remand, Sea-Logix and Booker agreed that Booker had been injured as a result of his employment with Sea-Logix in a stipulation reserving Sea-Logix's right to seek review of the Board's decision "that Claimant had covered 'status' under 33 U.S.C. § 901, *et seq*." ER 46-47. After the ALJ approved the stipulation, Sea-Logix and Booker jointly moved the Board to affirm that order summarily, which the Board granted. This appeal followed.

STATEMENT OF THE FACTS

1. Booker's Employment with Sea-Logix

Sea-Logix owns and operates a warehouse known as a container freight station ("CFS"). Hearing Transcript, pp. ("HT") 51, 153; Petitioners' Brief at ("Pet. Br.") 7. The CFS is adjacent to the Maersk Terminal, a marine terminal where ocean-going vessels are loaded and unloaded. HT 48, 69, 105, 203. The CFS is also approximately one mile from the Joint Intermodal Terminal ("JIT") railhead. HT 190; Pet. Br. at 10. At the JIT railhead, cargo that had arrived by sea at the Maersk Terminal was transferred to railroad cars. HT 109, 199. *Id.* All three facilities are located in the Port of Oakland. HT 202, 210; Pet. Br. at 9, 17-18, 29 n.3. The Maersk Terminal is separated from the CFS and the JIT railhead

by a fence; when goods pass through its gates, the event is recorded electronically and liability for those goods transfers to or from Sea-Logix. HT 69, 164, 177, 231.

Booker worked as a short-haul truck driver for Sea-Logix from March 1, 2003, to October 7, 2005. HT 17-19, 23, 104. The majority of Booker's work consisted of transporting cargo between the Maersk Terminal and inland customers. ER 4, HT 44. All parties agree that this activity is not maritime employment. ER 4. Booker also occasionally worked for Sea-Logix as a hostler driver, receiver, dock man, and big lift driver. ER 16, 28. While these are maritime activities, the ALJ found that they did not confer status upon Booker because he performed them "gratuitously and irregularly." *Id.* Booker did not challenge that finding before the Board. ER 28 n.2.

This appeal centers on four of Booker's other job duties. The first, transporting containers from the Maersk Terminal to the CFS for stripping, began when Maersk Terminal workers loaded containers of cargo from recently-docked vessels onto his truck. HT 162, 167.[1] Booker then drove his truck to the adjacent

---

[1] "A container is a large metal box resembling a truck trailer without wheels. It can carry large amounts of cargo destined for one or more consignees. If the goods are for a single consignee, the container may be removed from the pier intact and delivered directly to him, but if it carries goods destined for several consignees, it must be unloaded or 'stripped' and the goods sorted according to consignee. This operation may be done at the waterfront or inland. The analogous process during the loading phase is called 'stuffing.'" *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 253 n.2 (1977).

CFS, where CFS workers unloaded the containers and "stripped" them (*i.e.*, opened the containers and unloaded and divided the cargo by consignee) for delivery to various consignees by land. Pet. Br. 22.

His second duty, transporting stuffed containers from the CFS to the Maersk Terminal for shipment, was essentially the reverse.[2] Goods from many different consignees were transported to the CFS, where they were "stuffed" (*i.e.*, consolidated into single containers) and loaded onto Booker's truck. HT 71, 208-09; Pet. Br. 11, 22. Booker then drove the stuffed containers to the Maersk Terminal, where terminal workers stored them until they were loaded onto a vessel. HT 26, 51-3, 170, 208-09.

His third duty was transporting containers from the Maersk Terminal to the JIT railhead. ER 33.[3] Containers that had recently been unloaded from ships were attached to his truck at the Maersk Terminal; Booker then drove to the JIT railhead, where railroad employees loaded the containers onto railroad cars for shipment to consignees. HT 56-9, 61-65, 131, 164, 171-72, 189, 214, 218. Booker performed this duty approximately one day per week until Sea-Logic stopped

[2] The Board and Sea-Logix treat these two facets of Booker's job as one "shuttling" operation. ER 30; Pet. Br. at 7, 10-11. They are treated separately in this brief for increased clarity.

[3] Below, Booker referred to this duty as operating a "land bridge." HT 57. Sea-Logix refers to it as "marine yard to joint intermodal terminal railhead via public highways." Pet. Br. at 7.

transporting containers from the Maersk Terminal to the JIT railhead in early 2005. ER 33; Pet. Br. at 8.

His fourth and final duty was transporting containers from the Maersk Terminal to other terminals within the Port of Oakland. HT 178-79. Containers that were originally expected to be loaded onto vessels at the Maersk Terminal would sometimes arrive after the target vessels had been fully loaded or had departed. These containers were attached to Booker's truck for transport to another marine terminal within the Port of Oakland, where they would be loaded onto a vessel for shipment. *Id.* In all four of these job duties, Booker was required to drive on public roads for part of the time. HT 49, 69, 112, 134-36. Booker is a member of the Teamsters union. HT 98-99.

2. The ALJ's August 17, 2006, Decision (ER 3-25) Based on these facts, the ALJ concluded that Booker did not have status as a maritime employee and thus was not covered by the Longshore Act. This conclusion was based on, *inter alia*, her findings that Booker's "primary employment responsibility" (transporting cargo between the Maersk Terminal and inland consignees) was non-maritime; that the containers he transported from the Maersk Terminal to the CFS, the JIT railhead, and other marine terminals had already been "grounded" at the Maersk Terminal; that he was a member of the Teamster's union; that he did not drive

"exclusively" in a maritime port but also along public roads; and that he did not handle cargo while it was in the Maersk Terminal's legal custody. ER 20-24.

3. The Board's August 23, 2007, Decision (ER 27-40) In the decision on appeal, the Board reversed, ruling that the ALJ erred by focusing on whether Booker's "primary" responsibility was maritime rather than whether any of his regular duties were maritime; by effectively relying on the "point of rest" theory – discredited by the Supreme Court in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977) – in treating the initial loading and unloading of containers from a vessel to a dock as the endpoints of the loading and unloading process; and by focusing on formal factors such as the legal custody of cargo and Booker's union membership rather than on the functional nature of Booker's work. ER 30-32. The Board then concluded that Booker was a maritime employee because each of his four relevant job duties was an intermediate step in the loading and unloading process. ER 33-37.

SUMMARY OF THE ARGUMENT

To be covered by the Longshore Act, a claimant must have "status" as an employee "engaged in maritime employment." 33 U.S.C. § 902(3). All employees "involved in the essential or integral elements of the loading or unloading process" have maritime status. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46 (1989). Where loading or unloading occurs over several steps, each employee

"engaged in the intermediate steps of moving cargo between ship and land transportation" has status. *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 83 (1979).

The exact point where transportation shifts from sea-based to land-based is difficult to determine in many cases, but it is unnecessary to draw such a line in this case. Booker has maritime status because at least four of his regular duties fall comfortably within the lines already drawn in earlier decisions of Supreme Court and this Court.

First, Booker transported recently-unloaded containers from the Maersk terminal to Sea-Logix's CFS, where those containers were stripped and their cargo sorted and loaded onto trucks for transportation to inland consignees. The Supreme Court has squarely held that the unloading process extends at least until a container is stripped. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 271 n.33 (1977) ("Until the container was stripped, the unloading process was clearly incomplete."). By transporting cargo that had not yet been stripped, Booker engaged in an intermediate step in the unloading process and therefore has status under the Longshore Act.

Second, he transported recently-stuffed containers from Sea-Logix's container freight station to the Maersk Terminal, where they would be placed on a vessel. As this Court has recognized, stuffing cargo into containers for shipment by sea is part of the loading process, analogous to stripping's function in the

unloading process. *Handcor, Inc. v. Director, OWCP*, 568 F.2d 143, 144 (9th Cir. 1978) ("A stuffer . . . as well as a stripper, is a maritime employee since the work of a stuffer is the functional equivalent of loading cargo aboard ship."). Consequently, Booker's transportation of the stuffed containers to the vessel was an earlier intermediate step in the loading process.

Third, Booker transported containers from the Maersk Terminal, where they had been unloaded from ships, to the JIT railhead, where they were placed onto railroad cars for overland shipment to consignees. When the Supreme Court considered a similar ship-to-rail unloading process in *P.C. Pfeiffer Co. v. Ford*, 44 U.S. 69 (1979), it ruled that an employee who fastened cargo onto railroad cars had status. Booker, who transported cargo at an earlier, seaward point in a similar process, also has maritime status.

Fourth, Booker transported loaded containers that could not be placed into their intended ships at the Maersk Terminal to other marine terminals in the Port of Oakland, where they were loaded onto alternate ships. This duty, functionally identical to moving cargo between two docks within the same terminal, is indisputably an intermediate stage of the loading process. For each of these four reasons, the Board's decision that Booker has maritime status should be affirmed.

STATEMENT OF THE STANDARD OF REVIEW

The Board's legal determination that Booker is engaged in maritime employment is subject to *de novo* review. *Gilliland v. E.J. Bartells Co.*, 270 F.3d 1259, 1261 (9th Cir. 2001). As the administrator of the Longshore Act, the Director's construction of the Act is entitled to "considerable weight," and the Court "will defer to the Director's view unless it constitutes an unreasonable reading of the statute or is contrary to legislative intent." *General Constr. Co. v. Castro*, 401 F.3d 963, 965 (9th Cir. 2005), citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984).

ARGUMENT

To be entitled to benefits under the Longshore Act, a claimant must satisfy both a "status" requirement and a "situs" requirement. The only question before the Court is whether Booker satisfies the status requirement, which asks whether a claimant was "engaged in maritime employment." 33 U.S.C. §§ 903(a), 902(3).[4]

The Longshore Act does not define "maritime employment," but it is well-established that all employees who are "involved in the essential or integral

---

[4] The situs inquiry asks whether a claimant was injured on the navigable waters of the United States or one of the adjoining areas specified in 33 U.S.C. § 903(a), including any "terminal . . . or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." Sea-Logix did not raise the situs issue below, Pet. Br. at 17, and admits on appeal that the JIT railhead, the CFS, and the Maersk Terminal are "presumptively locations that meet the situs requirement of 33 U.S.C. § 903(a)." Pet. Br. at 18.

elements of the loading or unloading process," *Schwalb*, 493 U.S. at 46, or are "engaged in the intermediate steps of moving cargo between ship and land transportation," *Ford*, 444 U.S. at 83, are engaged in maritime employment. The status question is not controlled by an employee's job title or union affiliation, or by an employer's business operations, but is "an occupational test that focuses on loading and unloading," *Ford*, 444 U.S. at 80, and embraces a wide range of workers. *See, e.g.*, *Schwalb*, 493 U.S. at 43, 47 (housekeeping and janitorial employees who cleaned coal from underneath conveyor belts used to transport coal from a railroad hopper car to a ship have maritime status).[5]

Finally, a claimant is not required to spend most – or even a substantial portion – of his or her time engaged in maritime activities to have status. *Schwabenland v. Sanger Boats*, 683 F.2d 309, 312 (9th Cir. 1982) (rejecting "substantial portion" requirement). A maritime duty that is a regular but small part of a claimant's work duties is sufficient to confer status. *Id.*[6] Both the Board and

---

[5] Sea-Logix appears to admit that "the mechanics who repair and maintain the very trucks, chassis, and containers that Booker was driving and pulling are covered under the Act" under *Schwalb* because that equipment is "essential to the loading or unloading process." Pet. Br. at 23. It is difficult to imagine how a truck could be essential to a loading and unloading process while its driver is not.

[6] *See also Sea-Land Services, Inc. v. Director, OWCP*, 685 F.2d 1121, 1124 (9th Cir. 1982) (same); *In re CSX Transp., Inc.*, 151 F.3d 164, 169 (4th Cir. 1998) (employee who spent fifteen percent of his time on maritime duties has status); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 1348 (5th Cir. 1980) (employee who spent 2.5-5% of his time on maritime duties has status).

the ALJ (whose decision Sea-Logix expressly does not challenge, *see* Pet. Br. at 3) found that each of the four duties at issue were a "regular part" of Booker's duties. ER 20, 23, 35. Therefore, Booker has status if the Court agrees with the Board and the Director that even one of these activities qualifies as "maritime employment."

1. Transporting Containers from the Maersk Terminal to the CFS for Stripping is Maritime Employment

a. *Because the unloading process is not complete until cargo is stripped from a container, transporting cargo to a stripping facility is part of the unloading process*

Traditionally, unloading was done shipside: individual pieces of cargo were removed from the vessel's hold, moved away from the vessel's side, and then transported to a nearby storage or holding area where they were loaded for transportation to consignees. *Caputo*, 432 U.S. at 252 n.2, 270. The use of containers, however, has changed the manner in which cargo is loaded and unloaded. In particular, it has resulted in certain loading and unloading functions being performed on land, sometimes at a great distance from the marine terminal. *Caputo*, 432 U.S. at 263-64; *Harmon v. Baltimore & Ohio R.R.*, 741 F.2d 1398, 1402 (D.C. Cir. 1984).

The Supreme Court first addressed Longshore Act coverage in the container era in *Caputo*. One of the *Caputo* claimants, Blundo, was a "checker" working in Brooklyn when he was injured. *Caputo*, 432 U.S. at 252. A container had been

removed from a vessel outside Brooklyn and taken to the 21st Street Pier, where Blundo was working. Blundo would break the seal on the container and, as the container was stripped, he would check and mark each item of cargo. *Id.* at 253. After it was stripped, checked and marked, the cargo was sorted by consignee and placed in a warehouse. *Id.*

The issue before the Court was whether workers who handled cargo *after* its initial unloading were still involved in the "unloading" process, or whether, based upon a "point of rest" theory, only the immediate handlers were covered, leaving subsequent workers to be deemed involved in non-covered land transportation. To resolve this issue, the Court observed first that the 1972 amendment to the Act broadening the "situs" requirement to include land-based areas was a remedial provision that should be liberally construed. *Caputo*, 432 U.S. at 268. The Court explained that this amendment was driven largely by Congress' desire to adapt the Longshore Act to containerized shipping:

> [With containerization, i]n effect, the operation of loading and unloading has been moved shoreward; the container is a modern substitute for the hold of the vessel. As Judge Friendly observed below, "(s)tripping a container. . . is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it is performed on shore and not in the ship's cargo holds."

Id. at 269-271.

Applying this reasoning to Blundo, the Court found that his work as a checker was "clearly an integral part of the unloading process as altered by the advent of containerization" and therefore satisfied the status test. *Id. at* 271. That the container had been removed from a ship at another pier and transported overland to the location where it was stripped was of "no significance" to the Court. *Id* at 271 n.33. Blundo had status because "[u]ntil the container was stripped, the unloading process was clearly incomplete." *Id.*[7] *see also Taylor v. Zapata Haynie Corp.*, 623 F.2d 332, 332 (4th Cir. 1980) ("At least, until the cargo has been sorted and checked and placed for delivery to the consignee, the people handling it are engaged in the unloading process.").

Booker did not physically strip cargo from containers, but he was responsible for transporting containers from the Maersk Terminal to the CFS where the stripping occurred. HT 162, 167; Pet. Br. at 22. Because the unloading process continued until the containers were stripped, Booker clearly participated in unloading, and therefore has status as a maritime employee under *Caputo*.

[7] The Court therefore rejected the "point of rest" theory Blundo's employer had proposed. Under that theory, only workers handling cargo before it reached its first point of rest on a pier would have status. *Caputo*, 432 U.S. at 274-75.

b. *Truck drivers who satisfy the status test are not excluded from coverage under the Longshore Act*

Sea-Logix attempts to avoid this conclusion by seizing upon isolated quotations from *Caputo* and *Ford* to construct an argument that Booker's status as a truck driver undermines his status as a maritime employee. Pet. Br. at 14-18. As an initial matter, this approach is difficult to square with the text of the Act. Congress expressly excluded several categories of employees from coverage under the Act, even if they are engaged in maritime employment. 33 U.S.C. §§ 902 (3)(A)-(H). Truck drivers are not included on this list, and therefore are covered by the Longshore Act if they satisfy the same status and situs tests that apply to every other employee. *See Warren Bros. v. Nelson*, 635 F.2d 552, 555-56 (6th Cir. 1980) (truck driver who "was involved in the process of moving cargo from ship to storage . . . from the cab of a truck rather than behind a wheelbarrow or dolly" covered by the Longshore Act).

In any event, Sea-Logix's argument disintegrates when the decisions it quotes are closely examined. Sea-Logix primarily relies upon this quotation from *Caputo*:

> [P]ersons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truckdrivers [sic], whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered.

Pet. Br. at 15 (quoting *Caputo*, 432 U.S. at 267). This hardly supports the view that truck drivers are excluded from coverage. Instead, it embraces only the more limited view that truck drivers (and anybody else, for that matter) *who are not engaged in the overall process of loading and unloading* are not covered. That is certainly correct. Indeed, that is the reason why the larger part of Booker's job – transporting containers directly between the Maersk Terminal and inland consignees – is not maritime employment. It is also the reason why driving cargo that had already been stripped from containers at the CFS to inland consignees would not be maritime employment. Pet. Br. at 17. These are examples of delivering cargo *that had already been unloaded* from maritime transportation. Transporting cargo from the Maersk Terminal (after unloading began when it was removed from a ship's hold) to the CFS (where unloading was completed after the cargo was stripped, sorted, and loaded onto trucks for overland transport to a consignee), is a different matter entirely. It cannot reasonably be described as anything other than an intermediate step of the unloading process, and nothing in *Caputo* (or any other decision) suggests a different result.[8]

---

[8] Sea-Logix also purports to find support in one sentence in *Caputo's* statement of facts: "The container Blundo was checking had been taken off a vessel at another pier facility outside of Brooklyn and brought overland by an independent trucking company to the 21st Street Pier." 432 U.S. at 253; *see* Pet. Br. at 16-17. From the very little we know of the independent trucking company in *Caputo*, the analogy is at least somewhat apt – like the unknown driver, Booker transported containers that had been taken off a vessel to an area where those containers were stripped.

Sea-Logix also seeks refuge in similar comments about truck drivers in *Ford*, another pivotal Supreme Court decision on coverage. Pet. Br. at 20. As with *Caputo*, a close examination of *Ford* undermines, rather than strengthens, Sea-Logix's position. In *Ford*, the Court considered the job duties of two claimants, Bryant and Ford, to determine whether they had status under the Act. Bryant worked as a cotton header. 444 U.S. at 72. Inland shippers sent cotton to the Port of Galveston, where it was stored in a cotton-compress warehouse, after which a dray wagon took the cotton to the pier warehouse, where it was unloaded – by Bryant – and stored. *Id.* Later, the cotton was moved from the pier warehouse onto a ship by longshoremen – a duty that cotton headers like Bryant were forbidden by contract from performing. *Id.*

The second claimant, Ford, was injured while securing military vehicles onto railroad flatcars within the Port of Beaumont. *Id*. The vehicles had been unloaded from a ship and moved to storage by longshoremen, stored for several days, and then placed on the flatcars the day before Ford was injured. *Id.* As a warehouseman, Ford was forbidden by contract from moving cargo from a vessel to storage or to a railroad car. *Id.*

The problem for Sea-Logix is that absolutely nothing in *Caputo* implies that the unknown driver would not be covered by the Longshore Act if he suffered a work-related injury on a maritime situs. Indeed, the driver is not discussed at all.

Ignoring their job titles and contract limitations, the Court emphasized Bryant's and Ford's functions in their respective loading and unloading processes:

> If the cotton that Bryant was unloading [at the pier warehouse] had been brought directly from the compress-warehouse to a ship, his task of moving cotton off a dray wagon would have been performed by a longshoreman. Similarly, longshoremen – not warehousemen like Ford – would fasten military vehicles onto railroad flatcars if those vehicles went directly from a ship to the railroad cars. The only basis for distinguishing Bryant [] from longshoremen who otherwise would perform the same work is the point of rest theory [which had been rejected in *Caputo*].

444 U.S. at 81-82. Accordingly, the Court held that both claimants had maritime status because they were "engaged in intermediate steps of moving cargo between ship and land transportation." 444 U.S. at 83.

Ford lends obvious support to Booker who, like both Bryant and Ford, moved cargo through one stage of a multi-step loading and unloading process. Sea-Logix is more interested in the *Ford* Court's observation that "neither the driver of the truck carrying cotton to Galveston nor the locomotive engineer transporting military vehicles from Beaumont was engaged in maritime employment[.]" 444 U.S. at 83. As it did with similar language in *Caputo*, Sea-Logix analogizes these people to Booker. Pet. Br. at 20. Once again, the analogy is fatally limited. Transporting cotton from outside the Port of Galveston to a cotton-compress warehouse in the Port is analogous to Booker's non-covered

transportation of cargo from inland shippers to the Maersk Terminal. The "essen[ce]" of both tasks is simply to "deliver cargo . . . destined for maritime transportation." *Caputo*, 432 U.S. at 267. Both tasks take place before the loading process begins, and neither confers maritime status. Similarly, an engineer operating the locomotive pulling the vehicles Ford attached to flatcars to their destination is akin to Booker's transportation of cargo from the Maersk Terminal to inland consignees, which of course does not confer maritime status either.

But the question before the Court is whether Booker's *other* jobs, including transporting containers from the Maersk Terminal to the CFS for stripping, are covered. In performing this duty, Booker is not at all analogous to the hypothetical driver or engineer, but rather to Byrant himself, who also moved cargo through one stage of a multi-step loading process. *See Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 1348 (5th Cir. 1980) ("The fact that his employer also assigned him broader duties as a truck driver cannot override its choice to make [the worker] a maritime employee under the Act.").

Sea Logix's quest to exclude truck drivers from Longshore Act coverage next takes it to this Court's decision in *Dorris v. Director, OWCP*, 808 F.2d 1362 (9th Cir. 1987); Pet. Br. at 24. While Dorris, a truck driver, alleged that he had helped stuff and strip containers on a covered situs, the ALJ found to the contrary and that finding was upheld by the Court. *Id.* at 1364. Dorris' primary duty, like

Booker's, was to transport containers between a dock and inland consignees. *Id.* It scarcely needs to be repeated that this duty does not confer status. Nothing in the opinion, however, suggests either that truck drivers are *per se* excluded from coverage under the Act or that Dorris performed any duties analogous to Booker's transportation of containers from the Maersk Terminal to the CFS for stripping.[9]

c. *Sea-Logix's remaining objections lack merit*

Sea-Logix advances an array of arguments beyond the selective quotations from *Caputo*, *Ford*, and *Dorris*, none of which survives analysis. Sea-Logix asserts that Booker cannot be covered because, in transporting containers from the Maersk Terminal to the CFS, he traveled over public roads. Pet. Br. at 27. Sea-Logix fails to explain why this is a significant, much less a determinative, factor in the status inquiry, which focuses "upon the nature, not the location, of the employment." *Ford*, 444 U.S. at 83. Assuming the fact that a claimant worked on a public road is relevant to Longshore Act coverage at all, it would fit more naturally under the situs test.[10]

---

[9] Dorris also transported containers between steamship lines at different harbors, *id.* at 1364-65, which is discussed *infra* at 26.

[10] The Second Circuit did just that in *Triguero v. Consol. Rail Corp.*, 932 F.2d 95 (2d Cir. 1991). Conrail "continually characterize[d]" Triguero as a "truck driver" who travelled "stretches of public road, when transporting containers[.]" *Id.* at 100. The court paid little heed to this point in its discussion of Triguero's status, concluding "[q]uite simply, as a hustler driver, we find Triguero playing the requisite integral role in the loading of cargo." *Id.* The court treated Conrail's

Sea-Logix also suggests that Booker does not have status because he was "not employed by a terminal operator" but rather by the owner of a container freight station, Pet. Br. at 16, and that liability for the containers ceased to be the terminal's responsibility once Booker left the terminal area after being subjected to an "Electronic Data Interchange," Pet. Br. at 9. These arguments mistakenly vaunt labels over function. The "maritime employment" requirement is "an occupational test that focuses on loading and unloading." *Ford*, 444 U.S. at 80. *See Hayes v. CSX Transp., Inc.*, 985 F.2d 137, 142 (4th Cir. 1993) ("Coverage is not limited to employees who are denominated 'longshoremen' or who physically handle the cargo"; consequently, a railroad employee may be covered under the Act); *Novelties Distrib. Corp. v. Molee*, 710 F.2d 992, 996-97 (3d Cir. 1983) ("The employee's activity, rather than his legal relationship to the consignee, is the critical factor in determining the point at which cargo is ready to be picked up by 'the next mode of transportation.'").[11]

---

point more seriously in its discussion of situs, but ultimately concluded that Triguero satisfied that requirement as well, noting that "[l]imited travel along public roads is unavoidable, dictated by the accident of geography and, consequently, not dispositive." *Id*. at 101.

[11] Sea-Logix's remark that "Booker has never been aboard a ship in his entire working career," Pet. Br. at 22 n.4, is irrelevant. "In adopting an occupational test that focuses on loading and unloading, Congress anticipated that some persons who work only on land would receive benefits under the 1972 Act." *Ford*, 444 U.S. at 80.

Despite its best efforts, Sea-Logix cannot escape two principles that clearly emerge from *Caputo* and *Ford*: (1) employees engaged in intermediate steps of the unloading process have maritime status; and (2) the unloading process is incomplete until a container is stripped. These principles compel the conclusion that transporting containers from the Maersk Terminal to the CFS for stripping is a covered activity that confers maritime status on Booker. The Board's decision should be affirmed.

2. Transporting Stuffed Containers from the CFS to the Maersk Terminal is Maritime Employment

Booker's second job duty was the reverse of the first: he transported containers from the CFS to the Maersk Terminal after the containers had been stuffed (i.e., after items from various consignors had been consolidated in containers). This Court has recognized that "[a] stuffer . . . as well as a stripper, is a maritime employee since the work of a stuffer is the functional equivalent of loading cargo aboard ship." *Handcor, Inc. v. Director, OWCP*, 568 F.2d 143, 144 (9th Cir. 1978). As a consequence, when stuffed containers from the CFS were loaded onto Booker's truck, he became part of a loading process that had already begun. When he transported those containers seaward to the Maersk Terminal, he engaged in an intermediate step of moving cargo from land to ship transportation. *Ford*, 444 U.S. at 83. For all the reasons Booker's first job duty is covered employment, *see supra* at Section 1, this job is covered as well.

3. Transporting Containers from the Maersk Terminal to the JIT Railhead is Maritime Employment

Booker's third job was transporting containers from the Maersk Terminal to the JIT railhead. Terminal workers unloaded containers from docked vessels and loaded them onto Booker's truck. Booker then transported the containers to the railhead, where they were loaded onto the railway cars for delivery to the ultimate consignees by railhead employees. HT 56-9, 61-65, 131, 164, 171-72, 189, 214, 218; Pet. Br. at 8-9. The Board correctly determined that this was part of the "unloading" process because it was an intermediate step between unloading the container from the vessel and loading of the container onto a railway car for transportation to the consignees. ER 34. Based upon the Supreme Court's decision in *Ford*, the Board could hold no other way.

As discussed *supra* at 18, Ford fastened vehicles to railway flatcars that had been unloaded from a vessel, stored on a pier, and then placed on the flatcars. The railroad transported the vehicles overland to their destination. The Supreme Court held that Ford had maritime status because fastening the vehicles to the flatcars was one step – perhaps the last – in the process of moving the vehicles from sea to land transportation. *Ford*, 444 U.S. at 83. *Accord*, *John T. Clark & Son of Maryland, Inc. v. Cooper*, 687 F.2d 39, 40 (4th Cir. 1982) (finding worker covered where he loaded containers on flatcars at the railhead).

Even if *Ford* and its progeny represent the outer bound of the unloading process (in the context of unloading shipped goods for rail transportation), Booker is plainly covered. Booker's job – advancing cargo from a marine terminal to a railhead – is necessarily an earlier step in that cargo's overall journey from a ship's hold to a train than Ford's job. Booker's employment is therefore even more plainly maritime than Ford's.[12]

4. Transporting Containers from the Maersk Terminal to Other Marine Terminals in the Port of Oakland is Maritime Employment

Booker's fourth maritime job duty was to transport containers from the Maersk Terminal to other maritime terminals in the Port of Oakland where they would be loaded onto ships. This was necessary when containers at the Maersk Terminal were intended for vessels that were full or had departed. HT 178-79. Moving such a container toward an alternate ship within the Maersk Terminal would be an indisputably maritime activity. The fact that the alternate ship in Booker's case is located in a separate terminal is of no moment. As the *Caputo* Court made clear, geography is not relevant to status:"[t]he only geographical concern Congress exhibited was that the operation take place at a covered situs."

[12] Sea-Logix points out that that it stopped transporting containers from the Maersk Terminal to the JIT railhead eight months before the ALJ's October, 5 2005, hearing. Pet. Br. at 8; ER 46. Sea-Logix does not explain the relevance of this point in light of the fact that Booker regularly performed this duty during the great majority of his tenure with Sea-Logix.

432 U.S. at 271 n. 33. The Board therefore correctly ruled that this is maritime employment.

Sea-Logix argues that the *Dorris* decision mandates a different result. Pet. Br. 24-25. That is not so. After the primary issue in that case (whether the claimant stuffed, stripped, or directly loaded containers onto ships) was resolved in the negative, *supra* at 20-21, the Court considered whether the claimant had status because he occasionally "transported containers between steamship lines located in different harbors." 808 F.2d at 1364-65. This, too, was answered in the negative when the court held "that truck drivers transporting cargo from a berth at a dock to a berth in a different harbor are not engaged in longshore work when the goods are unloaded from a ship and loaded aboard another by other workers." *Id.* However, the Court went out of its way to clarify that this holding applied *only* to transit between different harbors. *Id.* at 1365 ("We need not decide whether moving cargo from berth to berth in the same harbor would be longshore work.").

Dorris does not discuss the claimant's harbor-to-harbor transportation duties, or their functional relationship to a loading or unloading process, in any significant detail. The same is true of the Board decision it affirmed.[13] While these facts rest the heart of the status inquiry, it is unnecessary to speculate about them. Because the instant case involves only transportation between terminals in

---

[13] *Dorris v. California Cartage Co.*, 17 BRBS 218 (Ben. Rev. Bd. 1985).

the same harbor, *Dorris*, by its own terms, is not controlling authority. ER 35. It is unnecessary to speculate about Booker's duties, either. Transporting cargo-laden containers from the Maersk Terminal to other marine terminals where they were placed on alternate vessels for ocean shipment is an intermediate step of one continuous, albeit rerouted, loading process. Booker is therefore a maritime employee.

CONCLUSION

The Director respectfully requests that the Court affirm the decision of the Board finding that Booker satisfied the status requirement for coverage under the Act.

Respectfully submitted,

CAROL A. DE DEO
Deputy Solicitor for National Operations

RAE ELLEN FRANK JAMES
Associate Solicitor

/s/Mark A. Reinhalter
MARK A. REINHALTER
Counsel for Longshore

SEAN G. BAJKOWSKI
Counsel for Appellate Litigation

RITA ROPPOLO
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
Frances Perkins Building
200 Constitution Ave., N.W.
Washington, D.C. 20210
Telephone: (202) 693-5664
Facsimile: (202) 693-5687
E-mail: blls-sol@dol.gov

Attorneys for the Director, Office
of Workers' Compensation Programs

STATEMENT OF RELATED CASES

The Director is not aware of any related cases within the meaning of Circuit Rule 28-2.6.

/s/ Mark A. Reinhalter
MARK A. REINHALTER
Attorney

R. App. P. 32(a)(7)(C)
And Circuit Rule 32-1 for Case Number 09-71186

I certify that:

The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

- ✓ This brief complies Fed. R. App. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

October 8, 2009

s/ Mark A. Reinhalter
Mark A. Reinhalter
Attorney
U.S. Department of Labor

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2009, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system on the foregoing:

Frank B. Hugg, Esq.
5810 Telegraph Avenue
Oakland, CA 94609-1522

Steven M. Birnbaum, Esq.
Law Offices of Steven M. Birnbaum
980 Lincoln Avenue, Suite 200-A
San Rafael, CA 94901

Joshua T. Gillelan, II, Esq.
Longshore Claimants' National Law Center
Georgetown Place, Suite 500
1101 30th Street, N.W.
Washington, D.C. 20007

/s/ Mark A. Reinhalter
MARK A. REINHALTER
Attorney
U.S. Department of Labor