

(COMMITTEE PRINT)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

(Third Party Liability)

REPORT

BY

SPECIAL SUBCOMMITTEE

OF

COMMITTEE ON EDUCATION AND LABOR

HOUSE OF REPRESENTATIVES

EIGHTY-FOURTH CONGRESS

SECOND SESSION

ON

BILLS RELATING TO THE LONGSHOREMEN'S AND
HARBOR WORKERS' COMPENSATION ACT

U.S. Congress, House, Committee on Education
and Labor, Special Subcommittee on Longshoremen's
and harbor workers' compensation act.



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LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

(Third Party Liability)

The Committee on Education and Labor has been increasingly concerned with a number of developments under sections 5 and 33 of the Longshoremen's and Harbor Workers' Compensation Act. For some time the committee has recognized minor deficiencies in the act, which, through proper legislation, can be corrected. There has been brought to the committee's attention, however, certain trends which affect the basic theory of workmen's compensation legislation. These are the extending to longshoremen rights which are additional to and not embraced within the framework of compensation legislation and which are an apparent infringement upon the exclusiveness of liability guaranteed to employers by the act. Remedial legislation was proposed during the 84th Congress and a number of bills were referred to this committee for study.

A special subcommittee of the Committee on Education and Labor investigated the merits of the proposed remedial legislation. Public hearings were conducted on May 23, 24, and June 11, 1956, at which time representatives of labor, management, compensation, and maritime underwriters and other interested parties presented their views and commented upon the proposed bills. These hearings are entitled "Longshoremen's and Harbor Workers' Compensation Act (Third Party Liability)."

Before commenting upon the merits of the proposed legislation and expressing the opinions and recommendations of the subcommittee, a brief analysis should be made of each bill. Objectives of proposed legislation must be considered in the light of judicial interpretations of the existing act and the effect that each bill will have upon the rights of employers and employees.

All workmen's compensation acts are based upon a quid pro quo between employer and employee. Employers relinquish certain rights otherwise protected by law in return for which employees relinquish certain of their legal rights. By reason of this, employees are assured hospital and medical care and subsistence during the convalescence period. Employers are assured that regardless of fault their liability to an injured workman is limited under the act. In some instances an employee is injured by the negligence of a stranger to the employer-employee relationship. When such a situation develops, section 33 of the Longshoremen's and Harbor Workers' Compensation Act reserves to the employee the right to seek damages against the stranger, thereby enabling him to obtain, if successful, an amount larger than he would receive as compensation.

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act makes the statutory liability of an employer the exclusive liability for injury to an employee arising out of the employment. This section also reserves to the employee the right to recover damages against third parties who may be responsible for the injury.

Section 33 pertains to employee actions against third parties responsible for the injury. This section requires the employee to elect whether to accept a compensation award or pursue his third-party action. Once a compensation award is made to the employee, the right of action against the responsible third party is automatically assigned to the employer. Thereafter, the employee has no control over subsequent action with respect to pursuing or settlement of the claim.

Developments under the act which concerned the subcommittee have been suits by injured workers against coemployees which have resulted in large recoveries ultimately paid by the employer; successful employee suits against a third party, who subsequently was successful in obtaining indemnification from the employer; the automatic assignment of a third-party cause of action to the employer and then refusal by the employer to pursue the third-party claim because of a conflict of interest; denial of compensation to an injured workman pending his election to bring action against a third party; extension of the maritime doctrine of "warranty of seaworthiness" to include employees covered by the act.

Remedial legislation proposed during the 84th Congress and studied by the subcommittee was designed to correct developments under the law as set forth above. H. R. 5357, introduced by Congressman Zelenko, would give to an injured employee full and independent opportunity to prosecute a third-party claim while receiving compensation. This bill would also eliminate suits between coemployees when one is injured by the negligence of the other. H. R. 11113 and H. R. 11119 are identical bills introduced by Congressmen Coon and Roosevelt. These bills would eliminate suits between coemployees and would bar recoveries under the maritime doctrine for breach of warranty of seaworthiness. H. R. 11234, introduced by Congressman Kilgore, would guarantee to employers immunity from any action in which compensation is available to an employee.

Changes in the act which would be brought about with the adoption of H. R. 5357 were considered reasonable by all witnesses appearing before the subcommittee. This bill seeks the amendment of section 33 of the act. Basic changes which would be accomplished with the adoption of this bill would be—

(a) Employees injured by the negligence of third parties would receive compensation immediately without regard to having to first elect whether to bring action against the responsible third party;

(b) Injured employees would have a period of 6 months in which to elect to bring action against a third party responsible for the injury;

(c) Failure of the injured employee to bring action against the responsible third party within the 6-month period assigns the claim to the employer after due notice to the employee;

(d) In the event of recovery by the employer of an amount in excess of compensation payments the employer would be entitled

to retain one-third of the recovery after certain specified adjustments;

(e) Suits between coemployees based on the negligence of a coemployee would be eliminated.

In addition to the above-enumerated changes in the law, it was suggested that an additional provision be included which would prevent employees from settling third-party suits for an amount less than the compensation paid unless first having obtained the written consent of the employer or insurance carrier.

In the opinion of many witnesses who testified on this bill, the proposed changes are beneficial and unobjectionable. Some witnesses considered the present provisions of the act as harsh, unjust and as having a tendency to thwart the beneficial objectives of compensation legislation. A recent decision of the United States Supreme Court, *Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corp.*, decided January 9, 1956, forcefully pointed out the necessity for protecting the third party rights of injured employees. The case of *Czaplicki v. The Vessel "S. S. Hoegh Silvercloud,"* decided June 11, 1956, showed the injustice wrought on an injured worker under the automatic assignment provision of the act. Another case which was brought to the attention of the subcommittee showed that in certain situations injured workers bringing suit against coemployees were able to recover substantial sums which were subsequently paid by their employers.

It is felt by the subcommittee that the objectives of H. R. 5357 are commendatory and should be adopted by appropriate legislation. The committee staff has been instructed to prepare a bill embodying the changes outlined above.

The bill introduced by Congressman Kilgore (H. R. 11234) provides for the amendment of section 5 of the act. This bill, if adopted as written, would grant absolute immunity to the employer from suits by third persons against whom an injured employee was successful in a third-party action. This immunity would extend to the employer regardless of any duty or obligation owed by the employer to such third party. It would embrace situations in which the joint negligence of the employer and third party caused injury to the employee; to cases where the employer and third party have an expressed contract of indemnity; to cases where there exists an oral or implied contract of indemnity and to cases where there exists a primary-secondary liability relationship.

The exclusiveness of liability granted to employers by section 5 of the act is the very heart of compensation legislation as it pertains to employers. Court decisions such as that in the Ryan case, already mentioned, and a recent decision of the United States Court of Appeals for the District of Columbia Circuit,¹ have caused a breach to be made in the heretofore accepted principle that an employer's liability for injury of an employee is exclusive and in place of all other liability.

During the hearings on H. R. 11237 the subcommittee was impressed with representations made to it that an employer's negligence should not be excused merely because an employee was subject to the Compensation Act. Numerous examples of negligent conduct on the part of employers were brought to the subcommittee's attention and it was suggested that any abridgement of the recent judicial

¹ *Hitafer v. Argonne Company, Inc.* (1950) (87 App. D. C. 57, 183 F. (2d) 811, cert. den. 340 U. S. 852).

decisions would encourage laxity and would be inconsistent with justice and public policy.

Public policy demanded the adoption of compensation legislation and as an incident of the employment contract the employer is given absolute immunity from suits by employees injured in the course of employment. In return for this limited liability the employee is given certain specific rights to medical care and compensation regardless of fault. In other words, employers have been subjected to liability without fault. Legislation of this type contemplates the altering of basic rights between employers and employees and the altering of additional rights insofar as public policy demands. The exclusiveness of liability granted to employers under the act contemplates that their liability shall be restricted and be limited to benefits afforded the employee under the act.

It was pointed out to the subcommittee that the Ryan case will increase future litigation and employers will no longer be protected under the exclusive liability guaranteed by section 5 of the act. This infringement of the exclusiveness of liability should not, in the opinion of the subcommittee, be permitted and the principle embodied in this bill should be adopted by appropriate legislation.

During the hearings the proponents of H. R. 11234 consented to a modification of the bill to provide that contracts of indemnity between employers and third parties responsible for employees' injuries should be recognized. It was suggested that the exception be limited to written contracts for indemnity. The subcommittee expresses no opinion at this time whether such an exception would be too restrictive or whether any contract of indemnity, whether written, oral, or implied, should be recognized. This matter should be the subject of additional investigation.

Amendment of sections 5 and 33 of the act is contemplated by identical bills H. R. 11113 and H. R. 11119. Section 5 would be amended so as to bar suits between coemployees and others. The desirability of a provision to bar suits between coemployees is recognized and is favored by the subcommittee. It is our opinion that this amendment to the act is covered by a similar provision in H. R. 5357 which has been previously discussed.

These bills would also amend section 33 of the act by proposing a new subsection to be known as "subsection (j)." The proposed new subsection would bar an injured employee from any recovery arising from a breach of warranty of seaworthiness and would make contributory negligence of the injured employee an absolute bar to any action against a third person.

The warranty of seaworthiness is an ancient maritime doctrine well recognized by admiralty law. This doctrine makes the owner of a vessel absolutely liable for injuries to a member of the crew of a vessel regardless of fault, the same as in compensation legislation. Negligence of the vessel is not an issue. In 1946 the Supreme Court extended to longshoremen and other maritime workers the status of crew members of a vessel thereby enabling such workers to take advantage of this doctrine when they were injured aboard a vessel. A number of cases have arisen which appear to be extreme appli-

cations of this doctrine; for instance, a stevedoring company furnished faulty equipment which caused injury to one of its employees. The employee, rather than accepting compensation, sued the vessel under this doctrine and recovered an amount substantially in excess of compensation payments. The owners of the vessel and its crew had no knowledge of the faulty equipment, they had no control over the equipment and were not negligent—yet, under this peculiar doctrine, the injured workman was permitted a substantial recovery. In another case the injured workman had actually caused the very condition on the ship which injured him. He elected to sue the vessel and under this doctrine obtained a substantial recovery despite the fact that no negligence could be established on the part of the ship or its crew. In each of the related cases the injured employee was entitled to compensation from his employer, but in seeking greater remuneration for his injury he was permitted to recover under this unique doctrine.

Workmen's compensation law is peculiar to and embraces only the employer-employee relationship. The question in the subcommittee's mind is whether the seaworthiness doctrine which is completely foreign to the theory of compensation acts should be injected into this type of legislation or whether it would be more proper to have a statutory enactment which deals specifically with the rights of seamen. In this regard the subcommittee is impressed with the views of the Department of Labor, wherein the Department recommends against embodying the seaworthiness doctrine in compensation legislation.

The subcommittee recognizes that the seaworthiness doctrine, when extended to cover longshoremen and maritime workers, created a new and additional right for such workers which was not considered available to them at the time the Longshoremen's and Harbor Workers' Compensation Act was adopted. The subcommittee feels, however, that legislation affecting the general maritime law should not be embodied in this act, and therefore, recommends against this proposed legislation.

The subcommittee appreciates the concern of the various parties participating in these hearings over the inequity of permitting employees entitled to benefits under this act to recover substantial sums from third parties when such parties are without fault. The subcommittee, in recognition of this concern, is recommending to the appropriate committee of Congress that legislation be considered which will remedy this situation.

Subsection (j) of the proposed bill would also establish contributory negligence on the part of an injured employee as an absolute bar to recovery against a third person. This provision of the bills met with considerable opposition. It was pointed out to the subcommittee that such a provision would deprive the injured worker of basic rights under the law of negligence, such as the doctrine of comparative negligence and the last clear chance doctrine. In considering proposed legislation of this type, the subcommittee should be ever mindful that the Longshoremen's and Harbor Workers' Compensation Act is the basic compensation law of the District of Columbia. As such, the provisions of this act are extended to all industrial workers in the District of Columbia and therefore any remedial legislation must be considered not only of its effect upon maritime workers but also its

effect upon the industrial workers of this metropolitan area of almost 1 million people. The last clear chance doctrine is recognized in the District of Columbia. Likewise, the doctrine of comparative negligence is recognized in jurisdictions in which this act is also operative. The subcommittee, therefore, feels that such a provision is not warranted.

During the progress of these hearings it became evident that substantial agreement could be obtained between the interested parties on the type of legislation which should be recommended. It was suggested that an attempt be made to draft a bill which would reflect the objectives and intentions of those affected by any changes in the existing act. A proposed "clean bill" was submitted to the subcommittee and copies of this bill were distributed to all interested parties with the request that comments and suggestions be made. The proposed "clean bill," together with letters and statements received concerning it are presented as an appendix to this report.

In view of the considerations expressed in this report, the subcommittee makes the following specific recommendations with respect to future legislation pertaining to sections 5 and 33 of the Longshoremen's and Harbor Workers' Compensation Act.

1. That H. R. 5357 be amended so as to prohibit settlement of a third-party action by an injured employee without prior approval of the employer or insurance carrier where the settlement amount is less than compensation payments.

2. That H. R. 5357, as amended, be favorably reported to the full Committee on Education and Labor, with the request that it be immediately reported to the House of Representatives for action.

3. That H. R. 11113 and H. R. 11119 be rejected by the committee for the reason that—

- (a) The provision covering suits between employees is adequately covered by H. R. 5357;

- (b) Any attempt to alter the historic rights of seamen through compensation legislation is contrary to orderly legislative process;

- (c) The defense of contributory negligence would eliminate basic common law and statutory rights of injured employees in various jurisdictions.

4. That copies of these hearings and of this report be forwarded to the Committee on Merchant Marine and Fisheries with the request that early consideration be given to legislation which would modify the rights under the seaworthiness doctrine of employees covered by the Longshoremen's and Harbor Workers' Compensation Act.

5. That the principle proposed by H. R. 11234 be accepted and that additional investigation be conducted to determine whether an exception to an employer guaranty of immunity should embrace all type contracts or be limited to written contracts for indemnity.

APPENDIX

PROPOSED "CLEAN BILL"

[H. R. —, 84th Cong., 2d sess.]

A BILL To amend the Longshoremen's and Harbor Workers' Compensation Act, so as to limit the liability of an employer who has paid compensation; to make certain adjustments concerning the rights of a longshoreman against nonemployer third parties in actions arising out of compensation cases; and to equalize the rights of injured longshoremen and other industrial workers ashore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 5 of the Longshoremen's and Harbor Workers' Compensation Act is amended to read as follows:

"SEC. 5. The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, or by reason of an employer's breach of any contractual obligation of such employer to another against whom such employee has a cause of action subject to the provisions of section 33 of this Act unless such obligation arises out of a written contract by such employer which expressly indemnifies against liability for damages because of injury or death sustained by an employee of said employer: *Provided, however,* That nothing in this section shall prevent recovery based on negligence. If an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

SEC. 2. Section 33 of said Act is amended to read as follows:

"COMPENSATION FOR INJURIES WHERE THIRD PERSON IS LIABLE

"SEC. 33. (a) If an employee entitled to compensation under this Act be injured or killed by the negligence or wrong of a third person not in the same employ, such employee or, in case of death, his legal representative, need not elect whether to take compensation and medical benefits under this Act or to pursue his remedy against such third person but may take such compensation and medical benefits and at any time either prior thereto or within six months after the awarding of compensation or within nine months after the enactment of a law or laws creating, establishing, or affording a new or additional remedy or remedies, and in any event before the expiration of eleven months from the date of the injury giving rise to the cause of action pursue his remedy against such third person subject to the provisions of this Act. If such employee or, in the case of death, his legal representative takes or intends to take compensation, and medical benefits in the case of any employee, under this Act and desires to bring action against such third person, such action must be commenced not later than six months after the awarding of compensation or not later than nine months after the enactment of such law or laws creating, establishing, or affording a new or additional remedy or remedies, and in any event before the expiration of eleven months from the date of the injury giving rise to the cause of action. In such case, the employer liable for the payment of such compensation shall have a lien on the proceeds of any recovery from such third person whether by judgment, settlement, or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under, or provided, or estimated, by this Act for such case and the expenses for medical

treatment paid or to be paid by it, and to such extent such recovery shall be deemed for the benefit of such employer. Notice of the commencement of such action shall be given within thirty days thereafter to the Secretary of Labor, the employer, and the employee upon a form prescribed by the Secretary.

"(b) If such employee or, in case of death, his legal representative, has taken compensation under this Act but has failed to commence action against such third person within the time limited therefor by subsection (a), such failure shall operate as an assignment of the cause of action against such third person to the employer liable for the payment of such compensation. Except as hereinafter provided, the failure of such employee or legal representative, to commence an action pursuant to the provisions of subsection (a) of this section, shall not operate as an assignment of the cause of action as provided herein, unless the employer shall have notified the claimant in writing by personal service or by registered mail at least thirty days prior to the expiration of the time limited for the commencement of an action by subsection (a), that such failure to commence such action shall operate as an assignment of whatever cause of action may exist to such an employer. If the employer shall fail to give such notice, the time limited for the commencement of an action by subsection (a) shall be extended until thirty days after the employer shall have notified the claimant in writing that failure to commence an action within thirty days after the mailing of such notice shall operate as an assignment of the cause of action to such employer, and in the event the claimant fails to commence such action within thirty days after the mailing of such notice, such failure shall operate as an assignment of such cause of action to such employer: *Provided, however,* That any such action against a third party, either by the claimant or his legal representative or the employer, must be commenced before the expiration of one year from the date of the injury giving rise to the cause of action. If such employer as such an assignee, recovers from such third person, either by judgment, settlement, or otherwise, a sum in excess of the total amount of compensation awarded for the injury to such employee and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures including attorneys' fees incurred in effecting such recovery, it shall forthwith pay to such employee or his legal representative two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee or his dependents. When the compensation awarded requires periodical payments the number of which cannot be determined at the time of such award, the Secretary shall, when the injury or death was caused by the negligence or wrong of another not in the same employ, estimate the probable total amount thereof upon the basis of the survivorship annuitants table of mortality, remarriage tables of the Dutch Royal Insurance Institution and such facts as he may deem pertinent, and such estimate shall be deemed the amount of the compensation awarded in such case, for the purpose of computing the amount of such excess recovery, subject to the modification thereof as hereinafter provided.

"(c) In the event of a modification of an award increasing the compensation previously awarded or in the event that the total amount of periodical payments made pursuant to an award under which the number of such payments could not be determined at the time of the award, shall exceed the total thereof as estimated by the Secretary, the principal of any of such excess recovery theretofore paid to such employee or legal representative shall be credited against such increase or such excess. In the event of a modification of an award ending or diminishing the compensation previously awarded or in the event that the total amount of periodical payments made pursuant to an award under which the number of such payments could not be determined at the time of the award, shall be less than the total thereof as estimated by the Secretary, such employer shall forthwith pay to the person entitled to compensation any additional amount of such excess recovery to which such person may be entitled by reason of such modification or such deficiency, determined as hereinbefore provided.

"(d) If such employee proceeds against such third person the employer shall contribute only the deficiency, if any, between the amount of the recovery against such third person actually collected, and the compensation provided or estimated by this Act for such case.

"(e) The right to compensation or benefits under this Act shall be the exclusive remedy to an employee when he is injured or killed by the negligence or wrong of another in the same employ.

"(f) The liability of any party other than the employer, to persons entitled to benefits under this Act, for death or personal injuries occurring on the navigable waters of the United States shall be determined in accordance with the general maritime law: *Provided, however,* That no such person shall be entitled to recover

damages for death or for personal injuries arising from any breach of the warranty or seaworthiness afforded members of the crew of any vessel: *Provided further*, That nothing in this section shall prevent recovery based on negligence.

"(g) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

ASSOCIATION OF CASUALTY AND SURETY COMPANIES,
Washington, D. C., June 28, 1956.

Mr. JAMES M. BREWBAKER,
*General Counsel, Committee on Education and Labor,
House of Representatives, Washington, D. C.*

DEAR MR. BREWBAKER: Thank you for your letter of June 22, concerning proposed amendments to sections 5 and 33 of the Longshoremen's and Harbor Workers' Compensation Act. We would prefer that no action be taken rather than the enactment of the proposed bill.

The proviso beginning on line 11 of page 2 of the proposed bill would apparently vitiate the exclusiveness of the employer's liability. Though perhaps unintended, this language is a substantial departure from that contained in H. R. 11234, a bill we supported in our appearances before the subcommittee.

We proposed certain other changes in our previous appearances, and will be glad to further explain those recommendations with members of the staff if time permits.

Thank you for your courtesy in advising us.

Very truly yours,

HOWARD M. STARLING, *Manager.*

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION,
Washington, D. C., June 29, 1956.

Mr. JAMES M. BREWBAKER,
*General Counsel, Committee on Education and Labor,
House of Representatives, Washington, D. C.*

DEAR MR. BREWBAKER: This is in reply to your letter asking for comments on the proposed subcommittee bill dealing with the subject of employer liability and the subject of third-person liability under the Longshoremen's and Harbor Workers' Compensation Act.

The proposed bill is a composite of the several measures pending before the subcommittee on the subjects stated above. Our position on these measures was stated in a supplemental statement I filed with the subcommittee dated June 7, 1956. On the basis of that statement we are in favor of those provisions of the proposed bill which are taken from H. R. 5357. However, we cannot accept the last subsection of the proposed bill which eliminates the doctrine of seaworthiness, a provision taken from H. R. 11113 and a companion bill, H. R. 11119. Moreover, we find that subsection (e) of the proposed bill might lead to litigation seriously limiting long-established rights of longshoremen under the present act.

We are, therefore, compelled to take the position with reference to the proposed bill as a whole, that we urge no action be taken at this time. At the same time we reiterate the position set forth in my supplemental statement in which we advise the committee that we shall make a study of asserted inequities arising under the present application of the doctrine of seaworthiness with a view toward reaching some area of agreement with the various parties at interest.

I would like to comment further on our objections to the proposed subcommittee bill.

1. Elimination of the doctrine of seaworthiness: The proviso eliminating seaworthiness as a basis for recovery for longshoremen is far too broad. It would not only impair the rights of longshoremen with reference to third party suits against shipowners but would also have an adverse effect on safety. A brief explanation will indicate the substantial weight behind this point.

The shipowners contend that they want to be placed in the same position in relation to the Longshoremen's Compensation Act as are other employers in relation to State compensation programs. They assert that the elimination of the doctrine of seaworthiness will still leave them liable for third-party suits where negligence is involved. This position appears reasonable on its face. However, it ignores the

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realities of longshore operations aboard a vessel. This is extremely hazardous work which can hardly be compared to any kind of shoreside employment. It is significant, for example, that over 60 percent of all longshore accidents occur aboard vessels. It is fundamental, therefore, that every safeguard be provided in order to guarantee that all equipment and working space shall be in such condition that it will not be responsible for causing an accident.

Let us see what the elimination of the doctrine of seaworthiness can lead to. If, for example, a new winch is installed aboard a vessel the shipowner would be relieved of any liability unless negligence could be established. In effect, the shipowner could take advantage of the warranty by the manufacturer that the new winch is safe in all respects. However, the winch might be defective and, if so, the shipowner would avoid any liability. What we say is that the shipowner, even when he installs new equipment, must test that equipment and make certain it measures up to requirements for safe operations. This precaution is assured as long as the doctrine of seaworthiness is applied. This is one of the basic reasons why our organization is opposed to the broad proviso set forth in the proposed subcommittee bill.

We are ready to concede that some inequities may arise as a consequence of breaches of seaworthiness caused by a stevedore aboard the vessel. We feel this is a subject worthy of study. We intend to make a thoroughgoing survey of this aspect of the doctrine of seaworthiness. We are also prepared, after an adequate study, to discuss this problem with management and attempt to arrive at an equitable solution.

2. Subsection (e): It will be noted that the language of this subsection appears to provide merely that compensation shall be the exclusive remedy in those cases where the accident is due to the negligence of a fellow employee. That, of course, is what the law has been in cases where such negligence is the sole or exclusive cause of the accident. But as the proposed provision now reads, what will be the situation if the injury or death is caused by a combination of negligence on the part of a fellow employee and either an unsafe condition of gear or equipment, or contemporaneous negligence on the part of the ship.

It is certainly possible to predict that insurance lawyers will argue that wherever the negligence of a fellow employee is a contributing factor to the accident, the compensation is the exclusive remedy, even though there is likewise negligence of a nonemployee of the stevedoring company, or unseaworthiness. If the courts should so construe the proposed new language, it would have the effect of actually reducing rights already in existence under the act.

You have also asked for our comments on a recent decision of the United States Supreme Court entitled *Blazey Czaplicki v. The Vessel "S. S. Hoegh Silvercloud."* In the opinion of our lawyers this decision covers a situation which would arise very rarely. It is their judgment that the decision does not upset the law or its underlying theory, and should not occasion any need for legislation.

It will be noted that this case involves an issue arising under the assignment provisions of section 33. The theory underlying this assignment provision is that there is a conflict of interest between the insurance company that pays the compensation on the one hand, and the insurance company that is liable for a third party recovery on the other; and it is assumed that the assignment provision will not operate to the complete detriment of the longshoreman, because after the assignment takes effect, it is supposed that the compensation-carrying insurance company will then prosecute the third party action against the insurance company writing the damages policy, and if a recovery is made which exceeds the amount of the compensation paid, then the longshoreman will be entitled to receive that difference.

In the Czaplicki case it so happened that the insurance company which carried the stevedoring company's compensation insurance was the very same company that had written the public liability insurance policy for the shoreside contractor who was the wrongdoer. On the basis of special facts in this case there was obviously no incentive for the insurance company to sue itself, with the result that the theoretical possibility of the longshoreman recovering more than the compensation that had been paid to him, did not exist. For this reason, the Supreme Court held that under these circumstances the relationship between the longshoreman and compensation carrier was not friendly but rather constituted a conflict of interest; hence the assignment provision of section 33 under these particular circumstances would be held inoperative.

And now that I have come to the end of a rather lengthy communication, I would like to compliment the subcommittee and the staff for the very thoroughgoing and conscientious consideration which has been applied to the legislation under consideration. We deeply appreciate this, and the courtesy which has

been shown to our organization as well as to all other parties involved in this matter.

Very truly yours,

JEFF KIBRE,
Washington Representative.

DEPARTMENT OF LABOR,
OFFICE OF THE UNDER SECRETARY,
Washington, June 29, 1956.

HON. JAMES M. BREWBAKER,
General Counsel, Committee on Education and Labor,
House of Representatives, Washington, D. C.

DEAR MR. BREWBAKER: This is in reply to your recent letter requesting my comments on a proposed committee print of a bill to amend the Longshoremen's and Harbor Workers' Compensation Act.

There are many technical defects in this bill and I am attaching an analysis of section 2, which includes a number of subsections.

Section 1 of the draft would make an employer's already exclusive liability in tort cases also applicable in cases involving breach of contract, unless the employer expressly agrees in the contract to indemnify the person with whom he contracts. In connection with accomplishing this purpose I do not believe this provision would be appropriate. It cannot be construed readily when read together with other parts of the section and the literal effect of the proviso therein is to destroy the exclusive liability feature which the section is intended to give. While I do not make any recommendation for changing this section, if it is to be changed as the committee print indicates, attached is draft language which would meet this and other objections.

Section 2 of the draft would amend section 33 of the Longshoremen's Act which relates to compensation for injuries where third parties are liable. Section 33 presently describes the relative rights of employers and employees under the act when a third party is responsible for an injury which is also compensable under the act. In my opinion, there are many language difficulties and ambiguities in section 2 of sufficient importance to warrant further attention and redrafting if the committee should find it necessary to modify section 33 of the Longshoremen's Act. While in general the provisions of section 2 of the bill appear to follow the pattern of the New York workmen's compensation law, the committee should take into account that significant changes would be wrought in the Longshoremen's Act with respect to the rights and liabilities of the parties in interest. The committee should be apprised of the effect of the language in the committee print. The attached analysis will help to make clear some of the difficulties which the bill in present form would pose.

At the end of the proposed new section 33, in subsections (e) and (f) are provisions designed, respectively, to make the compensation remedy exclusive where the harm is caused by a fellow employee and to limit third-party actions. The provisions of subsection (e) (p. 7 of the bill) appear inappropriate for the purpose intended, in that they not only would bar suits against coemployees, but would bar suits against other nonemployee joint tortfeasors as well, if a coemployee happened to be involved in the situation. Moreover, the subsection is silent as to exclusiveness of the compensation remedy in respect to dependents. You will note that the attached sheet contains modified language relating to section 5 of the Longshoremen's Act which includes a provision designed to accomplish the same purpose as subsection (e).

As I stated in my recent testimony before the subcommittee, I am strongly opposed to including in the Longshoremen's Act provisions which are foreign to a workmen's compensation law and which belong in a different statute. I believe that the proposed provisions for subsection (f) of section 33 of the Longshoremen's Act would have the effect of depriving employees, because they are employees, of the common right of other citizens to sue in State courts. This in my opinion would be wrong, if not unconstitutional, and might do harm to other employees who are not longshoremen but who happen to be on navigable waters in non-maritime employments when injured. Furthermore, I do not wish to be understood as proposing or supporting the denial of the warranty of seaworthiness to longshoremen and others in like situations. If the protection of this warranty is to be denied them, the language to accomplish this purpose belongs elsewhere. The attached draft contains an indication where language might more appropriately be placed to accomplish the purpose.

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If the committee should ultimately conclude to amend section 33 of the Longshoremen's Act in the respects indicated in the bill, pages 3 to 7, inclusive, and this Department can be of assistance in preparing language which would be more equitable to employees than the language of the present bill, I should be pleased upon request to have an appropriate study made for this purpose.

Yours sincerely,

ARTHUR LARSON, *Under Secretary of Labor.*

(Analysis of section 2 of committee print, referred to in above letter follows.)

ANALYSIS OF SECTION 2 OF COMMITTEE PRINT TO AMEND THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

GENERAL COMMENTS

It is not appropriate to refer to the "Secretary" in connection with claims procedures generally under the Longshoremen's Act. The statutory official who hears and decides matters in respect to claims is the "Deputy Commissioner."

The term "legal representative" is erroneously used to designate the "person" who would "take" compensation in death cases. Death benefits are paid directly to the eligible survivors identified in the act—not to the legal representatives of the deceased. The section is deficient in failing to make reference where necessary to such eligible survivors. The legal representatives are involved, however, in the collection of disability benefits which accrue but are not paid prior to the death of an injured employee. They are also the plaintiffs in many jurisdictions in actions for wrongful death.

The section is also defective in referring in a number of places to "injury" where apparently both injury and death cases are in contemplation.

SPECIAL COMMENTS

Employer's lien on employee's recovery

The proposed section 33 (a) would give the employer a lien on the employee's recovery in a third-party suit to the extent of compensation and medical expenses which an employer has paid under the act, plus the "estimated" value of any future compensation and medical expenses payable. An employee may be unfairly deprived of his equitable share in his recovery under this provision, since authority is not given to the Deputy Commissioner or to any other official to make or verify the estimate of future costs which an employer may be entitled to keep. Further, provision is not made for a right in an employee to recoup from the employer in the event an employer obtains an unconscionable portion of the employee's recovery based on the employer's excessive estimate of future costs.

Relative rights of employers and employees in third-party cases

The proposed section 33 (b) would give an employer the right to retain a profit of one-third of his recovery in a third-party suit brought by him as assignee in an injury or death case compensable under the Longshoremen's Act, after he deducts an attorney's fee and other litigation expenses. On the other hand, when an employee sues a third party he would not be entitled to deduct the litigation expenses incurred by him in creating the fund from which the employer stands to benefit. The entire amount of recovery by the employee would be subject to credit against compensation and medical expenses payable under the act.

Under the present Longshoremen's Act, in order to protect an employee's interest in the recovery in third-party suits brought by the employer, the act requires that the litigation expenses and all other charges of employers, deductible from the recovery, must be approved by the Deputy Commissioner. The present proposal, however, omits this safeguard and places no limit upon what an employer might seek as expenses. The opportunities for overreaching in this loose arrangement are evident.

Restrictions on an employee's right to sue third parties

The proposed section 33 (b) would also provide that an employee's right to sue in third-party cases would be assigned to the employer and be lost to the employee unless he pursues his right against the third party (a) 6 months after he starts receiving compensation under an award, (b) 9 months after new tort legislation is enacted, or (c) 11 months after his injury. An employee might unwittingly lose a valuable third-party right even though he should not desire compensation. The mere "intention" of the employee "to take compensation

and medical benefits" would be sufficient and proof of intention may be slight. Acceptance of one medical treatment might be enough. The effect of this would be unjustly to deprive an employee of valuable rights. The third-party provisions are not so drawn that the rights arising from the existence of a third-party liability are evenly balanced—the equities are heavily balanced in favor of the employer.

Time limitations of actions

The proposed section 33 (b) also provides that actions by a "claimant," his legal representative or employer must be commenced within 1 year. Many jurisdictions have longer periods of limitations, 3 years being common in tort cases. Apparently, the effect of this provision would be to provide third parties with a defense in the nature of a short bar of limitations against suits by employers or by employees. The reason for this favorable treatment for third parties is not apparent. This provision also may raise many questions respecting attempted modification of State statute by a bar of jurisdictional limitations in a Federal law. Since workmen's compensation laws are based on a quid pro quo principle, a giving up of rights by both employer and employee, the validity of bestowing the benefit to third parties of a short time limitation for actions against them when they give up nothing, is questionable.

TITLE I

Add to the end of section 5 of the Longshoremen's Act the following:

"The provisions of this section relating to exclusive liability shall apply with respect to the liability of an employer arising as the result of his breach of a contractual obligation owing to another against whom a beneficiary under this Act has a cause of action cognizable under section 33 of this Act, unless such obligation arises out of a written contract by the employer in which he expressly undertakes to indemnify such other against liability for damages because of the injury or death of an employee of said employer. The relief from liability accorded to an employer by this section shall also extend in the same manner and to the same extent to officers, agents, and coemployees of the employee, employed by the same employer, including the estates of such persons."

TITLE II

Add to title 46 (Shipping), United States Code section 183, the following sentence: "The liability of the owner of a vessel or of any other person arising in cases of personal injury or death from breach of warranty of seaworthiness in respect of a vessel shall not extend to any person performing service aboard or in relation to the vessel, unless such person is a member of the crew of a vessel at the time of injury and is employed as such."

BAKER, GARBER & CHAZEN,
Hoboken, N. J., June 28, 1956.

Re Bill dated June 16, 1956 to amend sections 5 and 33 of Longshoremen's and Harbor Workers' Compensation Act

JAMES M. BREWBAKER, Esq.,
*General Counsel, Committee on Education and Labor,
Washington, D. C.*

DEAR MR. BREWBAKER: I wish to thank the committee for instructing you to mail me a copy of the proposed amendment and asking me to comment thereon. I am taking the liberty of sending copies of this letter to each member of the committee in the hope that the members of the committee will have an opportunity to read my comments prior to the committee meeting on July 2.

I am writing this letter on behalf of my firm as well as myself. We do a great deal of admiralty work. I was the one who argued the case before the United States Supreme Court on behalf of the successful libelant in the case of *Blazey Czapliski v. The Vessel "S. S. Hoegh Silvercloud,"* which is mentioned in your letter.

I wish to express my shock on reading the provisions of the proposed committee bill of June 16, 1956, relating to amendments to the third-party provisions of the Longshoremen's and Harbor Workers' Compensation Act. Except for the fact that the longshoreman is no longer forced to elect between remedies under the Longshoremen's and Harbor Workers' Compensation Act and his third-party

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rights, every change that I have noticed seems to work against his interest. This bill does not, on balance, improve the third-party rights of longshoremen. If anything, it seems to operate in the other direction.

I have spent 2 full days going over this bill and am writing this lengthy letter as a result. I will start by stating the changes I would recommend in the proposed bill. Thereafter I will discuss the changes I propose. If the bill is adopted without the changes I have suggested, I would oppose it on the ground that the provisions of the bill would operate to harm the legitimate interest of an injured longshoreman. I have divided this letter and captioned paragraphs in it for your convenience.

I strongly recommend that the following changes be made.

SUGGESTED CHANGES

1. Delete at page 2, line 11: "*Provided, however,* That nothing in this section shall prevent recovery based on negligence."

2. Delete at page 4, line 2: "In such case, the employer liable for the payment of such compensation shall have a lien on the proceeds of any recovery from such third person whether by judgment, settlement, or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under, or provided, or estimated, by this Act for such case and the expenses for medical treatment paid or to be paid by it, and to such extent such recovery shall be deemed for the benefit of such employer."

In its place substitute: "The obligation of the employer under this statute to make compensation payments shall continue until the payment, if any, by such third person is made. If the sum recovered by the employee from the third person is equivalent to or greater than the liability of the employer under this statute, the employer shall be released from such liability and shall be entitled to be reimbursed, as hereinafter provided, for the medical expenses incurred and compensation payments theretofore paid to the injured employee or his dependents less employee's expenses of suit and attorney's fee as hereinafter defined. If the sum recovered by the employee as aforesaid is less than the liability of the employer under this statute, the employer shall be liable for the difference, plus the employee's expenses of suit and attorney's fee as hereinafter defined, and shall be entitled to be reimbursed, as hereinafter provided for so much of the medical expenses incurred and compensation payments theretofore paid to the injured employee or his dependents as exceeds the amount of such difference plus such employee's expenses of suit and attorney's fee. As used in this section, 'expenses of suit' shall mean such expenses, but not in excess of \$200 and 'attorney's fee' shall mean such fee, but not in excess of 33½ per centum of that part of the sum paid in release or in judgment to the injured employee or his dependents by such third party to which the employer shall be entitled to reimbursement under the provisions of this section, but on all sums in excess thereof, this percentage shall not be binding."

3. Delete at page 5, line 18: "*Provided, however,* That any such action against a third party, either by the claimant or his legal representative or the employer, must be commenced before the expiration of one year from the date of the injury giving rise to the cause of action."

In its place substitute: "*Provided, however,* That a court having jurisdiction of whatever cause of action may exist against such third person, at any time, on application by one of the persons who have or might otherwise have the right to sue and on notice to the remainder of such persons may permit the employee, or in the case of death his legal representative, or his employer, individually or jointly and on such terms as justice may require to institute or continue an action against a third party where the cause of action has not already been settled or otherwise finally disposed, the provisions of this section notwithstanding."

4. Delete at page 6, line 6-7: "two-thirds of such excess, and to the extent of two-thirds of any such excess".

In its place substitute: "All of the excess, and to the extent of all such excess".

5. If my suggested change of the sentence at page 4, line 2, is made and the substitute I suggest is accepted, the paragraph at page 7, lines 16-20, should be deleted and the remaining paragraphs relettered.

6. Delete at page 8, line 4-9: "*Provided, however,* That no such person shall be entitled to recover damages for death or for personal injuries arising from any breach of the warranty of seaworthiness afforded members of the crew of any vessel: *Provided further,* That nothing in this section shall prevent recovery based on negligence."

Abolition of the right to sue for unseaworthiness: At page 8, line 4, of the bill it states: "Provided, however, That no such person shall be entitled to recover damages for death or for personal injuries arising from any breach of the warranty of seaworthiness afforded members of the crew of any vessel: *Provided further*, That nothing in this section shall prevent recovery based on negligence."

It comes as a great shock to me in this day and age that the Congress of the United States would deliberately say that those who manage, own, and control vessels, many of which are from foreign lands where our standards of safety and concept of the value of life and limb are not recognized, do not have to supply a "seaworthy" vessel for a longshoreman to work upon.

When I went to testify, before the committee, I did not know that such a proposal had been made. That it was made and subsequently appears in the committee draft is fantastic. It certainly speaks well for the persuasiveness of the shipowner's representatives. The reasons for requiring a shipowner to provide a seaworthy vessel were very well stated by Mr. Justice Rutledge in the leading case on this subject, *Seas Shipping Co. v. Sieracki* (328 U. S. 85, 66 S. Ct. 872 (1946)). Mr. Justice Rutledge stated at page 89:

"The nub of real controversy lies in the question whether the shipowner's obligation of seaworthiness extends to longshoremen injured while doing the ship's work aboard but employed by an independent stevedoring contractor whom the owner has hired to load or unload the ship. * * *

Then at page 95, after prior cases and opinions were discussed, he stated:

"* * * All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parceling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection. The risks themselves arise from and are incident in fact to the service, not merely to the contract pursuant to which it is done. The brunt of loss cast upon the worker and his dependents is the same, and is as inevitable, whether his pay comes directly from the shipowner or only indirectly through another with whom he arranges to have it done. The latter ordinarily has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious or his own action creates them. If not, no such obligation exists unless it rests upon the owner of the ship. Moreover, his ability to distribute the loss over the industry is not lessened by the fact that the men who do the work are employed and furnished by another. Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew. * * * That the owner seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection."

The doctrine of unseaworthiness is not only a historical one but is rooted in necessity. An Egyptian vessel, a Polish vessel, an Indian vessel, or a Panamanian vessel comes into an American port. Her seamen speak foreign tongues and are governed by foreign laws. The conditions on board the vessel are not created, maintained, or controlled by the longshoreman or his employer. The vessel may be in port for a few days and then not be here again for several years. A longshoreman comes on board and is injured because there is grease or oil on an overhead walked and he slips and is injured. Or the walk suddenly breaks and he falls 20 feet into a hatch. Or while the ship's winch is being operated, it suddenly jerks because of a defect in the cable causing a half-ton load of cargo to slip from its cable and fall on longshoreman in the hold below. In each of these cases if the longshoreman were required to establish his case in accordance with the strict doctrines of common-law negligence, he would be under a terrific handicap. First of all, he is in no position to obtain witnesses as to prior conditions. It is unlikely that the ship's crew would give him any information, even if he could locate them and interview them. Secondly the members of the ship's crew could not be subpoenaed into court because they would not be within the jurisdiction of the court at the time of trial as a general rule. Thirdly, depositions of such witnesses in foreign countries would be expensive and beyond the financial resources of the average longshoremen. Finally, it can hardly be expected that foreign seamen whose jobs may depend on the good will of the masters and owners of the vessels would admit that they knew there was anything wrong with their vessels.

Yet in proving negligence, the longshoreman has the burden of proving that the master of the vessel had notice of the defective condition of the vessel. Generally it is not enough to prove a defective condition existed. It must be established that the master knew of the condition or that the condition lasted so long that he must have known of it. This is often too much to ask of a longshoreman whose acquaintance with a vessel is brief and ends in an accident.

Since the master of the vessel has control it is only fair and reasonable that he be required to furnish a sound or "seaworthy" vessel for workers whether they be "longshoremen," "seamen," or other "harbor workers" called upon to do ship's work. Certainly the life and limb of a longshoreman is entitled to the same care and protection as the life and limb of a seaman.

Of course, what is said of foreign vessels, also applies to other vessels which travel from port to port and have crews which come from all parts of the United States.

The difference between conditions on board a vessel and those on land is obvious. Working as they must with bulky heavy objects often in confined and narrow spaces or in and around open hatches the longshoreman has more than the ordinary share of hazards to contend with without imposing on him the duty to work on an "unseaworthy" i. e., defective vessel.

In addition, the longshoreman who is on board a vessel for a day or two at most is in no position to determine the peculiar characteristics of each vessel and guard against its defects.

At the hearing great stress was placed by the shipowner's representative on the decision of Judge Learned Hand in the case of *Grillea v. U. S. et al.*, decided April 26, 1956, in the United States Court of Appeals for the Second Circuit. It is to be noted that this decision was a 2 to 1 decision on the merits. It is a recent decision and whether it will stand if appealed further or if the problem it presents arises in another case is anyone's guess. I will discuss the merits of the case later.

This case involved a specialized situation where the longshoreman had some relation to the creation of the unseaworthy situation. In the vast majority of cases he has none and the unseaworthy condition is wholly and solely created and maintained by the vessel, its officers, crew members and agents. If some members of this committee do not like the *Grillea* decision this is no reason to relieve the shipowner from his recognized general duty to provide a seaworthy vessel. It would be a case of throwing out the water with the baby and would represent a serious regression in the development of maritime law, hardly in keeping with the liberal intent of the Longshoremen's and Harbor Workers' Compensation Act and the desire to protect the life and limb of American workers.

Great stress was placed by the shipowner's representative on the following language of Judge Hand in the *Grillea* case. He stated:

"* * * It may appear strange that a longshoreman, who has the status of a seaman, should be allowed to recover because of unfitness of the ship arising from his own conduct in whole or in part. However, there is in this nothing inconsistent with the nature of the liability because it is imposed regardless of fault; to the prescribed extent the owner is an insurer, though he may have no means of learning of, or correcting, the defect. Indeed, as to these it is a kind of 'Workmen's Compensation Act'; though limited by the value of the ship and by the fact that it only covers injuries caused by the defects that we have mentioned. The following passage from *Seas Shipping Co. v. Sieracki* (328 U. S. 85, 94) expresses the considerations that lie behind it. The owner 'is in position as the worker is not to distribute the loss in the shipping community which receives the service and should bear its cost.

"These and other considerations arising from the hazards which maritime service places on men who perform it rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault analogous to other well-known instances in our law. * * * It is a form of absolute duty owing to all within the range of its humanitarian policy.'"

The argument was made that the unseaworthiness doctrine gave to the longshoreman a second compensation act, citing Judge Hand's opinion. Of course a careful reading of the quotation shows that the court spoke of it as a "kind of 'Workmen's Compensation Act'" obviously using the words in a nontechnical sense. There is still a world of difference between a compensation act and unseaworthiness. For example, a longshoreman stands in the hold of a vessel, a winch operator, another longshoreman fails to make observation and swings a

load of cargo on a sling causing it to strike the longshoreman in the hold. Because he was injured in an accident arising out of and in the course of his employment, the longshoreman in the hold is entitled to compensation but under no stretch of the imagination can he sue for unseaworthiness because there is no defect in the vessel. The vast majority of longshoreman compensation cases do not involve claims against vessels simply because no defective or "unseaworthy" condition of the vessel is involved. It is only when the shipowner permits an "unseaworthy" condition to exist on board his vessel that he becomes responsible for the damage it causes.

Furthermore, there is good reason to insist that a shipowner check conditions on his vessel so that his vessel is seaworthy at all times. In the *Grillea* case the hatch cover which caused the libellant to fall had been placed in the wrong place by the longshoremen who covered the hatch some time prior to the accident. The cover was peculiar because it was designed to go over a place where there was a pad eye. As a result, when the hatch covers were placed back some time before the accident by the longshoremen, this particular cover was put in the wrong sequence and when libellant stepped on it, it teetered and he fell into a hold. Who but the master of the vessel and his crew knew or should have known of the peculiarity of their hatch covers? The court in the *Grillea* case said in effect that the master of the vessel or a member of the crew on his behalf had time to inspect these covers to see that they were "seaworthy," i. e., safe. Is there anything wrong with a rule of law which imposes such a standard of safety on the owner of a vessel? Who else would be in a better position to guard against such hazards, the longshoreman who comes on board a vessel for a few hours or the master and crew who live on the vessel?

A statement was also made that the longshoreman has more rights than a seaman because a longshoreman has a compensation act. This is not true. A seaman has a right to maintenance and cure, regardless of fault or negligence, which rights are the equivalent and more of the rights to medical treatment and temporary disability given to longshoremen under the Longshoremen's and Harbor Workers' Compensation Act. Furthermore, the seaman has the Jones Act, under which the concept of negligence has been very liberally interpreted, more liberally than it has at common law. The Jones Act also has eliminated most common-law defenses to a seaman's action. In addition the measure of damage under the Jones Act is the real loss of wages and future earnings, rather than any arbitrary fixed schedule as under the Longshoremen's and Harbor Workers' Compensation Act. A seaman who loses a leg, aside from maintenance and cure, would be entitled to anywhere from \$40,000 to \$150,000 if he recovers under the Jones Act, depending on circumstances. Under present schedule under the Longshoremen's and Harbor Workers' Compensation Act a longshoreman losing a leg would be entitled to 248 weeks' compensation (33 U. S. C. A. 908). At the present time the maximum weekly earning payable for loss of a leg is \$35 per week. This would amount to \$8,680. This is hardly comparable to the results obtainable under the Jones Act, particularly where the injured man is young, was skilled and able-bodied, and had been supporting a family on an income of \$4,000 a year or more. Even with the contemplated increases in the maximum rates under the Longshoremen's and Harbor Workers' Compensation Act the results would not be comparable. In addition to his rights of maintenance and cure and his rights under the Jones Act, the seaman also has his rights under the general maritime law for "unseaworthiness." If it is felt that there is something lacking in the rights of seamen, then why not supply the deficiency in those rights rather than punish the longshoreman?

The day a longshoreman's rights to a recovery under the Longshoremen's and Harbor Workers' Compensation Act are comparable to those under the general maritime law he will no longer be interested in pursuing his cause of action against vessels and their owners for unseaworthy conditions. Only the compensation carriers would be concerned with any possible third-party recovery. However, the day is still far off when the recoveries in compensation will be comparable to those available in courts of law. For the present, the longshoreman's cause of action for unseaworthiness is vital to him from the viewpoint of encouraging shipowners to keep their vessels seaworthy at all times and hence safe and from the viewpoint of giving the injured longshoreman and his wife and family a reasonable recovery for their losses where his injury is caused by the failure of the shipowner to provide a seaworthy vessel.

I have gone into great detail in stating my viewpoint because I wish to emphasize the very serious nature of what is being proposed. It is something which requires very careful consideration. The doctrine of unseaworthiness and its

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applications is one which has been developed over many years in the thoughtful written opinions of many judges in the United States Supreme Court, the United States circuit courts, and the United States district courts. The roots of the doctrine go back to antiquity. The subject is not a simple one that can be adequately understood after a few hours of explanation. The situations where the doctrine applies have literally hundreds of variations. The courts are still grappling with new situations which are arising all the time. Yet it is proposed to undo all this work with one clause in a workman's compensation act which is supposed to be liberally construed in favor of the injured longshoreman and his family.

If any change is desired in the doctrine of unseaworthiness the subject should not be handled as part of a revision of the third-party provisions of the Longshoremen's and Harbor Workers' Compensation Act, but rather in a separate bill dealing with an alteration of basic maritime law. The hazards which unseaworthiness involves should be listed and discussed at length. Testimony should be taken from the persons who know of the broken, dead, and maimed men who were injured because of defects which rendered vessels "unseaworthy." Then, if the Congress of the United States wishes to release shipowners from the duty of keeping their vessels "seaworthy" it can do so. To handle this subject as anything less than a major change in basic maritime law is both unwise and unjust. I do not believe any change is necessary, but if any change is made, it should be only after full and extensive consideration.

In addition, I feel that this provision is discriminatory and would be unconstitutional on this ground. However, regardless of its constitutionality, it would be a sad sight to see Congress single out the poor longshoreman who has trouble enough, for this type of treatment.

I therefore urge strongly that the proviso on page 8, lines 4-9, be eliminated completely as should the proviso on page 2, lines 11-12, which creates an ambiguity on the subject.

The 1-year statute of limitations relating to third-party actions: At page 5, line 18, of the proposed bill the following proviso appears: "That any such action against a third party, either by the claimant or his legal representative or the employer, must be commenced before the expiration of 1 year from the date of the injury giving rise to the cause of action."

This provision is properly part of a broader picture of maritime causes of action and does not belong in a compensation act. Should a longshoreman who is injured on a vessel have a 1-year statute of limitation, a seaman under the Jones Act have a 3-year limitation period, and a repairman who is not covered by the Longshoremen's and Harbor Workers' Compensation Act but by a State compensation act have a totally different standard. I think the answer is obvious.

It is true that under the Longshoremen's and Harbor Workers' Compensation Act (sec. 13) a claim in compensation must be filed within 1 year. However, the situation is not comparable to that which exists in the area of third-party suits.

In the case of a compensation action there is practically no problem of service or jurisdiction as the employer invariably is a local firm. Employees usually obtain medical benefits and compensation automatically when injured on the job and generally are informed of their compensation rights, by the compensation bureau in an automatic manner. In the case of third-party actions service and jurisdiction are vastly more complicated problems. Many vessels come into a given port rarely and irregularly. Many are owned and operated by persons who have no offices or agents in United States ports where they can be served or have agents only in large seaport cities. This means that cases arising in smaller ports would have to be forwarded to attorneys perhaps a thousand or more miles away, possibly even to a foreign country if the absolute 1-year bar is to be avoided. The expense and hardship involved in doing this would automatically prevent many longshoremen from asserting substantial claims against shipowners for negligence and for defects in their vessels causing injuries.

The Jones Act which deals with the right of seamen to sue for injuries incurred in the service of their vessels has a 3-year statute of limitations. (See *Pope v. McCrady Rodgers Co.* (164 F. 2d 591 (3 Cir. 1947.)) The same period applies to actions by railroad workers under the F. E. L. A. (45 U. S. C. A. sec. 46). Certainly there is no reason to treat longshoremen any differently than seamen or railway employees in this respect. If anything, suits against third parties by longshoremen require longer time periods because of the greater difficulty involved in identifying and obtaining jurisdiction over vessels, many of them of foreign registry and the persons or corporations who owns, charter, or manage them.

New York State, where a great deal of admiralty litigation arises, has the problems of shifting populations and large complex business arrangements analogous to

the conditions found in the shipping industry. It has a 3-year limitations period. (See N. Y. C. P. A. sec. 49 (6).)

There are States which have 1-year and 2-year limitation periods for personal-injury cases. However many of these States have conditions which differ vastly from those obtaining in an industry where the potential defendants move from port to port and often cannot be sued in the place where the injury occurred for long periods of time if at all. In addition, practically all States have varying "tolling" provisions to their limitations provisions which the proposed amendment does not. These tolling provisions prevent the limitations period from running. Under certain conditions they vary from State to State and in many cases are numerous and broad. Some tolling provisions apply where there has been a fraudulent concealment of a cause of action. (54 C. J. S., *Limitations of Actions*, sec. 206, where the defendant is a nonresident or is absent from the jurisdiction. 54 C. J. S., *Limitations of Actions*, sec. 208, where there is obstruction or evasion of process or concealment of the person. 54 C. J. S., *Limitations of Actions*, secs. 213, 214, where the plaintiff is an infant (in a legal sense). 54 C. J. S., *Limitations of Actions*, sec. 235, where the plaintiff is imprisoned or insane. 54 C. J. S., *Limitations of Actions*, secs. 241, 242.) There are undoubtedly other tolling provisions which I have not mentioned. The tolling provisions relating to absence of the defendant, nonresidence of the defendant, insanity of the plaintiff, infancy of the plaintiff and fraud are most common and are necessary under any limitations statute to prevent complete injustice.

Because the tolling provisions vary, no two limitations statutes can be compared merely by looking at the time period involved. Only by considering the nature of the litigation covered and the "tolling provisions" designed to avoid injustices and the interpretations of the courts can the relative merits of such limitations periods be weighed. A third-party limitations period should not be put in compensation act. If at all, it should be dealt with as a part of the general maritime law, keeping in mind the special problems involved in that general class of cases.

It is to be noted that the 1-year provision of section 913 (a), Longshoremen's and Harbor Workers' Compensation Act, enables a claimant to file a claim in compensation 1 year from the date of the last payment if his employer pays compensation without an award. This means that if a man is seriously injured so that he remains out of work and receives treatment for a period of 6 months and his employer terminates payment after that period, the employee still has 1 year within which to start suit. Under the proposed amendment neither the claimant nor his employer may at this point sue the third party responsible for the accident. In a serious case it may well be physically impossible for an injured employee to consult an attorney for a year or more. While his rights in compensation would be protected his rights against third parties would not. (See also the tolling provision relating to "minors" and "incompetents," sec. 913 (c), Longshoremen's and Harbor Workers' Compensation Act which extends the time to make a compensation claim under the Longshoremen's and Harbor Workers' Compensation Act.)

If the 1-year provision is passed every attorney, if he is aware of the 1-year trap, will automatically institute suit in every case as he could not take the risk of writing a claim letter, waiting perhaps weeks for a reply then engaging in negotiations and risking that the limitations period may slip by. Longshoremen who are seriously injured do not often obtain the services of an attorney immediately, particularly where they are under treatment and receiving compensation. Investigations which will give claimant's attorney the information which will enable him to start suit often take a great deal of time. On the other side, before negotiating settlement the insurance carriers for the shipowners need time after claim is made to complete their investigation and to have physical examinations of the claimant. Because, the attorneys, the claim agents, the physicians and all persons involved in claims negotiations are all busy people, weeks and even months occasionally go by between the necessary steps. Where a shipowner is a foreign corporation, proposed settlements may have to go to some foreign country for review and approval. The net effect of forcing immediate suits will be to further clog the court calendars and virtually eliminate the possibility of settlement before suit. In addition, many attorneys and longshoremen, not familiar with the fact that a limitations period for third-party actions lurks in the Longshoremen's and Harbor Workers' Compensation Act, particularly in States having limitations periods of 2 or 3 years and in view of the fact that the equitable doctrine of laches will apply as a limitations period in all other maritime actions will engage in protracted settlement suit negotiations and will not

institute suit until it is too late, or will find they do not have the time required to get the necessary information or take the necessary preliminary steps to suit.

Sometimes after suit is instituted and claimant's attorney uses the pretrial discovery procedure he finds that another party should have been sued. Since a considerable time elapses usually between the instituting of a suit and the completion of discovery, the 1-year period may have expired by this time and the proper party could not be brought into the suit. The ways in which a 1-year limitations period would operate to deprive an injured longshoreman of his right to sue a third party responsible for his injuries are endless. This provision does not belong in a compensation act. Like the provision relating to "unseaworthiness" is worthy of full discussion in its own right and should be considered as a proposed major change in the general maritime law. It too is discriminatory and therefore, I believe, unconstitutional. The clause at page 5, line 18, should be deleted.

Revision of the "election" provisions: The specific provision which states that an employee "need not elect" (p. 3, line 7) is a worthy improvement over the present law. No State compensation act with which I am familiar requires such an election. New York State law from which this was taken has long since dropped the election provisions of its act. Compensation and third-party liability are based on entirely different concepts of law and proceed on entirely different assumptions. The only problem that must be considered is that the employee does not collect twice for the same injury and that the employer not be required to pay for such injury where it is the fault of a third party in a position to pay damages. This is provided for in the proposed amendment.

The requirement that suit by an employee be instituted within 6 months after an award conditioned on an employer giving 30-day notice in writing thereafter before an assignment can take place is fair and reasonable. The requirement that notice be given in writing will put the longshoreman on notice that he might lose valuable rights and normally he could be expected to consult an attorney with such notice. It is to be noted that very often the longshoreman does not have any attorney represent him in his compensation proceedings. The Longshoremen's and Harbor Workers' Compensation Act discourages representation by attorneys in compensation proceedings because of the small size of the fees allowed which makes it profitable only for those attorneys who can obtain a large volume of cases without too much time spent on each case. The written notice should serve as a warning that he consult counsel.

In addition to avoid fraud, mistake, or some other form of injustice, in special situations which may arise, I would add the following sentence at page 5, line 18. This will protect both the longshoreman and his employer where one or the other has the right to sue and does not exercise it properly: "*Provided, however, a court having jurisdiction of whatever cause of action may exist against such third person, at any time, on application by one of the persons who have or might otherwise have the right to sue and on notice to the remainder of such persons may permit the employee, or in the case of death his legal representative, or his employer, individually or jointly and on such terms as justice may require to institute or continue an action against a third party where the cause of action has not already been settled or otherwise finally disposed, the provisions of this section notwithstanding.*"

With reference to the unanimous decision of the Supreme Court on June 11, 1956, in *Czaplicki v. The Vessel "S. S. Hoegh Silvercloud."* I do not think that the decision alters the need for a revision of the existing assignment provisions of the Longshoremen's and Harbor Workers' Compensation Act. The Czaplicki decision provides a solution for a situation where an insurance company insures an employer for his compensation obligations and also insures a third-party tortfeasor for liability. The employer's compensation carrier obviously is not interested in suing the third-party tortfeasor because if they succeed the same company will eventually pay the judgment rendered against the third-party tortfeasor. In this situation, the court says, because of the conflicting interest of the insurance company even under the present "election" provisions, the court will intervene to protect the longshoreman and will permit him to sue even though there has been an award.

The Czaplicki case applies to a narrow situation. It does not cover the situation where the insurance carriers for compensation and liability are different but nevertheless friendly. In one case insurance company X may be the compensation carrier and insurance company Y be the liability carrier. Tomorrow the situation may be reversed. Would they be interested in stirring up litigation on behalf of the poor longshoreman? Hardly. The most they'd be concerned about is settling the third-party case for enough to cover the compensation lien. If they

can do that, why would they fight for more and risk losing their lien? The injured employee, if he retains his right to sue, on the other hand, must recover enough to pay off the compensation lien first before he can benefit from his third-party action. This guarantees the compensation carrier that it will not be sold short on a settlement.

Sharing of attorney's fees by employee and compensation carrier on proceeds of third-party action: The sentence starting at page 4, line 2, of the proposed amendment, quoted on page 2 of this letter, is taken from H. R. 5357, which is in turn taken from the New York Compensation Act, I believe. I didn't notice it at the time of the hearing or else I would have commented on it. Under section 33 (d), at present, the employer or his insurance carrier are entitled only to their lien for compensation and expenses and a reasonable attorney's fee from a third-party recovery and the full excess goes to the injured longshoreman. Under the proposed amendment the employer or his insurance compensation carrier get a windfall of an additional one-third of the excess. This is certainly not necessary or just. On the other hand, no provision is made to have the insurance compensation carrier pay out of the money it receives as a result of a successful suit against a third-party tortfeasor a proportionate share of the costs and attorney's fees incurred by the injured longshoreman who incurs the risk and expense of suing the third-party tortfeasor. At the hearing I called the attention of the committee to the provisions of the New Jersey Compensation Act (N. J. S. A. 34:15-40), which provides that where the employee sues or settles with the third-party tortfeasor the compensation carrier, which benefits from this enterprise pays a pro rata share of the attorney's fee up to 33½ percent of the amount of the lien claimed and expenses up to \$200. This provision has worked well in this State to the apparent satisfaction of all. It has helped in the settlement of cases because the injured longshoreman is more likely to consent to a compromise settlement when he knows that his attorney's fee which is usually based on a percentage of the full third-party recovery will be borne in part by the compensation carrier who benefits by having a recovery of the money paid in compensation.

I would therefore recommend the deletion of the sentence appearing at page 4, line 2, which I have quoted on the second page of this letter and the substitution of the paragraph appearing below it on page 2 of this letter. The substituted language is taken substantially from the New Jersey statute.

Limitation of recovery against third parties to theory of "negligence": On page 2, line 11 the following appears: "That nothing in this section shall prevent recovery based on negligence. * * *"

This sentence is unnecessary and will lead to confusion. Does it mean that nothing in the act would prevent an employee from suing his employer for negligence? Does it mean that suits against the third parties responsible would be limited to suits based on negligence? If the former is intended, it violates the fundamental theory of the Compensation Act. If the latter is intended the sentence is ambiguous. This sentence does not belong in this section and should be eliminated. I have discussed this point further in connection with the section dealing with "unseaworthiness."

I wish to apologize again for the length of this letter. However the proposed bill is such that it cannot be discussed quickly. It involves proposals which are of great importance to many people. I hope that my suggestions and comments will be of use to the committee.

Respectfully,

BAKER, GARBER & CHAZEN,
By BERNARD CHAZEN.

Re Longshoremen's and Harbor Workers' Compensation Act.

PACIFIC AMERICAN STEAMSHIP ASSOCIATION,
Washington, D. C., June 26, 1956.

MR. JAMES M. BREWBAKER,
General Counsel, Committee on Education and Labor,
House of Representatives, Washington, D. C.

DEAR MR. BREWBAKER: Thanks for your letter of June 22, 1956, asking for comments on the committee print bill concerning employer liability and third-party liability under the Longshore Act.

As you know, our association's staff and counsel spent a considerable amount of time on this legislation to date, and were instrumental in asking the committee

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to look into the matter in the first place. Therefore, any comments on this committee print will be furnished from our San Francisco office in time to meet the Friday deadline.

Very truly yours,

RALPH B. DEWEY,
Vice President.

PACIFIC AMERICAN STEAMSHIP ASSOCIATION,
San Francisco, Calif., July 6, 1956.

Re Longshoremen's and Harbor Workers' Compensation Act Amendments
(H. R. 11113, et al. (Clean Bill), 84th Cong.)

Mr. JAMES M. BREWBAKER,
*General Counsel, Committee on Education and Labor,
House of Representatives, Washington, D. C.*

DEAR MR. BREWBAKER: Thank you for your letter of June 22, enclosing proposed "clean bill" on the above subject, embodying the Roosevelt-Coon bills and the Zelenko and Kilgore bills, which were the subject of conferences in Washington, New York, and San Francisco after our two appearances before the committee.

American-flag steamship operators on the Pacific coast are agreeable to this bill and definitely desire action in this Congress, on the condition that it be amended by changing the proviso on lines 11 and 12, page 2, to read: "*Provided, however, That nothing in this section shall prevent recovery by a third party against an employer based upon the employer's negligence.*"

As we read the intent of the committee in suggesting this language, it is in part to balance the same language which has been inserted in section 33 (f) (p. 8, lines 8 and 9). The addition of that language in section 33 (f) seems to meet a concern expressed to me by Mr. Roosevelt in the hearing, I believe, and definitely by Mrs. Green when I discussed the matter with her. Both of them understood the logic of not applying the seaworthiness doctrine to the longshoreman, but wanted to make certain that the legislation would not prevent the longshoreman from suing the ship in the event of its negligence. We are perfectly agreeable to that, and, while no such language is needed to insure that right, we believe it is perfectly proper to insert it so as to remove any doubts in the minds of longshore unions.

However, inserting it in the same form in section 5 would, as you undoubtedly have already noted, completely negate the principle of compensation, and would allow the longshoreman to sue the stevedore contractor for his negligence, which he could not have done before and cannot do now. The stevedore contractor is the direct employer and his absolute limit of liability to the longshoreman is compensation. On the other hand, if it is amended as we indicate, then the ship is permitted to sue the stevedore contractor, if it can be proven that the real cause of the injury was the negligence of the stevedore, even if the longshoreman had already recovered in negligence against the ship. I believe that other segments of the industry may make this same proposal to you.

With respect to our desire for passage in this Congress, we hope it may be communicated to the committee that the subject of the full compensation of the injured longshoreman is encompassed by this bill, by other presently existing provisions, as well as by the schedule of benefits in the act, which schedule has been substantially increased by a previous bill already reported out by this committee. The Pacific-coast operators, as represented by our association, agreed that there was an inequity being suffered by longshoremen because of the \$35 weekly benefit schedule, and affirmatively suggested in its testimony that it be increased to \$42.50, and that other proportionate adjustments be made. On the other hand, representatives of the International Longshoremen's and Warehousemen's Union on the Pacific coast stated before your committee that this seaworthiness problem (sec. 33 (f)) amounted to an inequity being suffered by the steamship operator. Our industry has not suggested that the two bills be conditioned upon each other, and does not suggest it now. It has made no effort to slow passage of the benefits bill. On the other hand, the industry submits to the judgment of the committee the question as to whether or not, if the admitted inequity is to be removed from one side, the similarly admitted inequity on the other should not also be removed.

We sincerely hope that the committee can give this the consideration that it warrants.

Very truly yours,

R. E. MAYER, *President.*

PACIFIC AMERICAN STEAMSHIP ASSOCIATION,
Washington, D. C., June 6, 1956.

Re Longshoremen's and Harbor Workers' Compensation Act: Proposed Revision of H. R. 11113 and H. R. 11119.

Mr. WARD E. BOOTE,
*Assistant Solicitor, Division of Employee Benefits,
Department of Labor, Washington, D. C.*

DEAR MR. BOOTE: Thank you for giving me a copy of your letter of May 31, 1956, on the above subject.

With reference to the fourth paragraph of your letter, I assume that if the amendment does not take away any right of a worker to sue a third party for negligence that the Department of Labor would not object. All of the more than 60 million industrial workers in the United States, with the exception of some few thousand longshoremen, must show the negligence of the third party if they desire to recover damages from such third party over and above their statutory right to compensation from their employers.

Example: A painter working for a painting contractor decorating the front lounge of the new AFL-CIO building in Washington, who is covered incidentally by the same act, would have to show negligence on the part of the ALF-CIO building if he were to recover damages from them over and above compensation from his employer, the contractor, if the injury were caused by a condition in the building. Under the Sieracki case, the longshoreman has the absolute right of recovery against the ship in exactly the same circumstances.

The only difference under the Roosevelt-Coon bills would be that the longshoreman would have the same duty as the painter—i. e., to prove that the third party was negligent and be prepared to prove that he was not himself contributorily negligent. Under the Roosevelt-Coon bills, the longshoreman would still recover against the ship if the ship were negligent.

This seems to me then to leave only one objection in the minds of the Department of Labor—i. e., that since we are not attempting to excuse ourselves from negligence, we are merely proceeding in the wrong statute. This point is covered in paragraph 3 of your letter. I first agreed with you in this conclusion on the telephone because it certainly sounds logical that the Compensation Act should be a document reserved entirely to determining the rights between an employer and his employee for the purposes of compensation. However, on further examination of the act, it becomes plain that that is not the case. Section 33 in several places determines rights between the worker and a third party—i. e., determines rights in substantive tort law between individuals not in the privity of the employment relationship. For instance, section 33 (a) provides that the employed person may not even enjoy his substantive tort right against a third party unless he agrees to give up some of his rights under compensation. Section 33 (b) assigns his substantive tort right against a third party to his employer and takes it away from him entirely if he takes a final award. Section 33 (d) permits the employer to compromise the employee's cause of action against a third party.

We believe you will agree that the Compensation Act is the logical place for these provisions to appear since they are modifications of a substantive right and in some cases a complete bar to a substantive right. Similarly, then that act is the proper place for our amendment.

Further, the cases on seaworthiness extend the remedy to all harbor workers, including longshoremen (the ship's carpenter case), but not to others such as contractors, passengers, visitors, etc. Hence we are only seeking an amendment concerning persons covered by the act. This would further indicate the propriety of placing the amendment in the act.

We sincerely hope that you may be able to give further consideration to consenting to the propriety of our amendment being placed in the Compensation Act. The additional hearing on the matter is now put over to Monday.

Sincerely yours,

R. E. MAYER, *President.*

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DEPARTMENT OF LABOR,
OFFICE OF THE SOLICITOR,
Washington, June 14, 1956.

Re Longshoremen's and Harbor Workers' Compensation Act: Proposed Revision of H. R. 11113 and H. R. 11119.

Mr. ROBERT E. MAYER,
President, Pacific American Steamship Association,
Washington, D. C.

DEAR MR. MAYER: I received your letter of June 6 commenting upon the letter of the Under Secretary to Mr. James Brewbaker, general counsel, Committee on Education and Labor, House of Representatives, which you refer to as a letter dated May 31, 1956 (but my copy shows that it was mailed June 1, 1956).

Section 33 of the Longshoremen's Act does not purport to alter or in any way diminish, enlarge, or modify the obligation of a third party, whatever that obligation may be under law which exists outside of the Compensation Act. All that section 33 does is to permit the employee to proceed to seek relief under such law outside the act or, if he does not want to proceed in that manner, he may accept compensation and his right becomes assigned to the employer. This section is concerned with the employee's right to bring the suit, as you may note. In no way does it affect the obligation or liability of the third party. It is procedural in aspect. It permits an assignment of the cause of action. The plaintiff may be either the employee or the employer, depending upon the election. In effect, it deals with the subject of "parties" and not liability.

As pointed out by the Under Secretary in his testimony and in the letter referred to, the Longshoremen's Act should not be used as a medium for altering or affecting the liability of a third party, whether the liability arises as a result of tort or whether it grows out of a right quasi-contractual in nature. In respect to the warranty of seaworthiness, the Longshoremen's Act does not extend the right of this warranty to longshoremen, harbor workers or anyone else covered by the law. This right exists outside of the Longshoremen's Act in the area of the general maritime law, which is subject to direct regulation by the Congress in the exercise of its power to revise and modify the general maritime law.

The matter you mention was given very careful attention and thought prior to the hearing. The reasons for keeping such modifications out of the Longshoremen's Act are very sound.

Very truly yours,

STUART ROTHMAN,
Solicitor of Labor,
By W. E. BOOTE,
Assistant Solicitor,
Division of Employee Benefits.

PACIFIC AMERICAN STEAMSHIP ASSOCIATION,
San Francisco, Calif., June 21, 1956.

Re Longshoremen's and Harbor Workers' Compensation Act: Proposed revision of H. R. 11113 and H. R. 11119.

Mr. W. E. BOOTE,
Assistant Solicitor, Division of Employee Benefits,
Department of Labor, Washington, D. C.

DEAR MR. BOOTE: Thank you for your letter of June 14 on the above subject.

We certainly do want to give every consideration to the views of the Department of Labor and appreciate your pointing out to us as you did the very fine distinction between the principles set forth in your letter of June 14 and those of my letter of June 6.

We have discussed this with a few people in the House who recognize what you have in mind. They believe that the broader view is that since we treat of the rights of the employee against the third party within the framework of this act, it would be illogical to go abroad into an unrelated statute to discuss modification of the liability of that third party when the same parties are involved in the same relationships and the same employment. We do not however presume to express the views of any Members of Congress but merely the offhand impressions of some with whom we discussed it.

We certainly agree with your views in general that we should not encumber the Compensation Act with numerous provisions not germane to the subject of compensation.

I want to thank you particularly for the prompt attention you gave to this matter when I was in Washington recently, attempting to get some kind of agreement among the various interested parties who testified concerning this legislation.

Very truly yours,

ROBERT E. MAYER, *President.*

AMERICAN MUTUAL ALLIANCE,
Washington, D. C., June 28, 1956.

Mr. JAMES M. BREWBAKER,
*General Counsel, Education and Labor Committee,
House of Representatives, Washington, D. C.*

DEAR MR. BREWBAKER: Thank you for your letter of June 22, in which you request our comments upon the proposed legislation to amend the Longshoremen's and Harbor Workers' Compensation Act and the recent United States Supreme Court decision, *Blazey Czaplicki v. The Vessel "S. S. Hoegh Silvercloud."*

We are conscious of the efforts put forth by the committee to come forth with sound legislation in this area of the Longshoremen's and Harbor Workers' Compensation Act and we appreciate this opportunity to present our views with respect to the clean bill drafted by the committee.

With reference to the amendment of section 5 of the act, we are unalterably opposed to the new language found on page 2, lines 11 and 12, reading as follows: "*Provided, however, That nothing in this section shall prevent recovery based on negligence.*" This language departs from the concept of exclusiveness of remedy, which is basic in all workmen compensation acts and which Congress intended to follow when it enacted the present law. If the foregoing language is retained contrary to what we feel to be the original intent of Congress, we feel that no action should be taken on the bill at this time. However, if such language is excluded from the bill, we would be in favor of it.

We still are of the opinion that the amendment, as provided by the Kilgore bill, H. R. 11234, adequately resolves the Ryan case situation and reaffirms the exclusiveness of remedy theory of the act. It is our understanding that the Green bill (H. R. 10765) has been cleared by the Rules Committee and will be brought to the floor of the House soon for consideration. We believe the need for legislation to resolve the problem created by the Ryan case is as urgent as that for H. R. 10765. The committee is aware of the inequitable effects of the Ryan case and we submit that legislation to correct this situation should not be predicated upon whether or not there are other problems in this area such as that of seaworthiness. We submit further that legislation to correct the Ryan case situation will create no detriment to any of the interested parties in this field. Accordingly, we respectfully request inclusion of the Kilgore amendment (H. R. 11234) in any bill considered by the committee.

With reference to the *Blazey Czaplicki v. The Vessel "S. S. Hoegh Silvercloud"* case, we are of the opinion that the decision of the Court points up the need for amending section 33 of the act by defining the respective rights of an injured employee, his employer, and the latter's insurance carrier, with reference to proceedings against negligent third parties.

Should the committee agree to the need for legislation to clarify this part of the act, it is our view that whether an action against a negligent third party be brought by the injured employee, or by his employer, or the latter's insurance carrier, the right of the employer or insurance carrier to recoup, out of the proceeds of any judgment, the amount of its liability under the act should be preserved.

Should you desire to discuss the above comments in more detail, we will be happy to meet with you personally at your convenience.

Sincerely yours,

WALLACE M. SMITH.

DWIGHT, ROYALL, HARRIS, KOEGEL & CASKEY,
Washington, D. C., June 27, 1956.

JAMES M. BREWBAKER, Esq.,
*General Counsel, Committee on Education and Labor,
House of Representatives, Washington, D. C.*

DEAR JIM: Thank you for your letter of June 22, enclosing proposed bill to amend section 5 of the Longshoremen's and Harbor Workers' Compensation Act. The bill as written is entirely unsatisfactory and my association would much

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prefer that no action be taken at this session in lieu of the bill being passed as written.

For this bill to be acceptable to my association, line 11 on page 2, "*Provided, however, That nothing in this section shall prevent recovery based on negligence,*" will have to be eliminated.

Very truly yours,

RALPH D. PITTMAN.

KIRLIN, CAMPBELL & KEATING,
New York, N. Y., June 25, 1956.

JAMES M. BREWBAKER, Esq.,
General Counsel, Committee on Education and Labor,
House of Representatives, Washington, D. C.

DEAR MR. BREWBAKER: Thank you for your letter of June 23, with its enclosure.

I have the following suggestions:

On page 2, change lines 11 and 12 to read as follows: "*Provided, however, That nothing in this section shall prevent recovery by the third party based on any negligence of the employer.*" The words italicized in that sentence are my additions. Without these added words, it might be concluded that the act was giving a right to the employee against his employer based on negligence which, of course, is not the intention.

At the bottom of page 5, in line 22, after the word "action", insert a new sentence reading as follows: "Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding for a sum which may or may not yield any recovery whatever to the employee."

This is to remove all of the doubts raised by the Czaplicki decision. The suggested insert is word for word the language of the present law, section 33 (d), except that I have added the words "for a sum which may or may not yield any recovery whatever to the employee."

The reason for this will be fully apparent from a reading of the decision of the Circuit Court of Appeals in *Hunt v. Bank Line* (24 F. 2d 136), which was cited by the court in the Czaplicki decision. There is all the more reason for barring the employee from any voice in what the employer does with the third-party action under the proposed legislation which gives far greater control to the employee than the existing law. Under the proposed legislation, the employee cannot be barred from his own absolute control of the third party action unless he has ignored a registered letter from his employer warning him of the danger of an assignment to the employer unless the employee sues the third party. A minimum regard for fairness dictates the justice of the proposal I am submitting.

On page 6, line 12, the word "another" should be deleted and instead the words substituted "a third person." This makes the expression consistent with the expression in line 5 of page 3 and lines 16 and 17 of page 7.

On page 7, lines 21 to 24 should read as follows:

"(e) The right to compensation or benefits under this Act shall be the exclusive remedy to an employee *or, in case of death, to his dependents*, when he is injured or killed by the negligence or wrong of another in the same employ."

I have italicized the new words I am suggesting.

The purpose of this is to make it read exactly as does the New York act. There should be no doubt that the bar to suing coemployees should apply in death cases as well as in injury cases.

Page 7, line 25, should read:

"(f) The liability of any party other than the employer, *or of any vessel, * * **"

The italicized words are my suggestion.

On page 8, line 9 should read: "*recovery from the third party or any vessel based on negligence.*"

I have italicized my suggested amendment.

The purpose of these suggestions is to make certain that Congress did not intend to have a different rule for in rem liability than that imposed for in personam liability. Since the Grillea case, various attorneys are making such an assertion.

I hope that these suggestions will prove helpful to the committee.

Very truly yours,

VERNON S. JONES.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT 27

BURNS, CURRIE, RICH, MALONEY & RICE,
New York, N. Y., June 26, 1956.

JAMES M. BREWBAKER, Esq.,
General Counsel, Committee on Education and Labor,
House of Representatives, Washington, D. C.

DEAR MR. BREWBAKER: Thank you for your letter of June 22, 1956, asking for comments on the committee print of the proposed amendments to the Longshoremen's and Harbor Workers' Compensation Act.

Confirming previous advice to you, it is our suggestion that the proviso starting on line 11 of page 2 be amended to read: "Provided, however, That nothing in this section shall prevent recovery over by a third party for liability based on any negligence of the employer."

We also recommend adoption of the clarifying amendments being suggested to you by Mr. Vernon Jones. We believe these changes will carry out better the desires of the committee and will make no substantive changes in the program.

Very truly yours,

ALBERT E. RICE.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D. C., July 13, 1956.

JAMES M. BREWBAKER, Esq.,
Committee on Education and Labor,
House of Representatives, Washington, D. C.

DEAR MR. BREWBAKER: This is to acknowledge receipt of your letter of June 22, 1956, in which you forwarded to me the committee print of the proposed bill in which is embodied my bill (H. R. 5357), and in which you express a desire to have my views.

In the same letter you request my comment on the case of *Blazey Czaplicki v. The Vessel "S. S. Hoegh Silvercloud,"* which was decided by the United States Supreme Court on June 11, 1956. This case in some measure alleviates the situation caused by the Ryan decision. It holds that a longshoreman who has accepted compensation under an award does not necessarily lose his right to institute an action in his own behalf. It mitigates in some degree the problem of the longshoreman in such a situation. However, my proposed legislation protects him fully.

I have read the committee print which you enclosed and it is my opinion that the bill would be satisfactory to accomplish the purposes desired, except for one portion thereof, that is, starting on page 7, line 25 F, and continuing to page 8, line 9.

I believe I indicated my views on this before the subcommittee when I stated that this cuts back the long line of decisions of the Supreme Court in which the Court decides that persons doing the work traditionally done by seamen should be entitled to all of the protection that seamen receive, including the warranty of seaworthiness. Removing this cause of action of seaworthiness places a burden upon the injured longshoreman to prove the reason, notice and cause of the defect in the vessel. This type of proof is the type of proof required in the case of negligence. Sometimes it is impossible to prove negligence and the cause of action of seaworthiness establishes itself merely by the proof of the defect and requires the defendant to assume the burden in disproving the claim. This is a valuable and necessary right for an injured longshoreman who is usually indigent as a result of the accident and may not be able to stand the expense of acquiring the necessary evidence in his case.

Furthermore, I believe that this portion of the bill might be considered unconstitutional. The Supreme Court of the United States already held on prior occasions that the inherent characteristics of the maritime law may not be changed except by constitutional amendment. The wiping out of the warranty of seaworthiness would, in my view, change one of the basic features of that law and legislation so designed would, therefore, be invalid.

In regard to page 8, line 10 G, this is unnecessary inasmuch as there is usually a clause in the insurance contract that the insurance company is subrogated to the rights of its insured.

If there is anything further that you wish to discuss with me regarding this bill, please do not hesitate to communicate with me at any time.

With kind regards, I am,
Sincerely yours,

HERBERT ZELENSKO, Member of Congress.

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BROOKLYN, N. Y., June 30, 1956.

Re bill dated June 16, 1956, to amend sections 5 and 33 of the Longshoremen's and Harbor Workers' Compensation Act.

HON. JAMES M. BREWBAKER,
General Counsel, Committee on Education and Labor,
Washington 25, D. C.

DEAR SIR: Permit me to thank the committee for submitting to me copy of the aforementioned bill and requesting my comments and suggestions relative thereto.

It has taken me considerable time to read and digest said unnumbered bill and I am greatly shocked by its contents as it seems opposed to all present concepts of workmen's compensation laws and the laws of torts as pertains to third-party actions as enunciated by our courts.

This bill would attempt by one stroke of the pen to destroy once and for all what it has taken the courts 28 years to arrive at.

I further wish to state that this proposed bill is contrary to the statements made by me when I appeared before the committee on May 23, 1956.

It has been stated by many interested persons before the committee, including the Under Secretary of Labor, that the New York State compensation law is the most advanced law of its kind in the field of workmen's compensation. I take the liberty of quoting, verbatim, section 29 of the New York State workmen's compensation law, which is applicable to the matter presently under consideration, as follows:

SEC. 29. *Remedies of employees; subrogation*

1. If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, need not elect whether to take compensation and medical benefits under this chapter or to pursue his remedy against such other but may take such compensation and medical benefits and at any time either prior thereto or within six months after the awarding of compensation or within nine months after the enactment of a law or laws creating, establishing or affording a new or additional remedy or remedies, pursue his remedy against such other subject to the provisions of this chapter. If such injured employee, or in case of death, his dependents, take or intend to take compensation, and medical benefits in the case of an employee, under this chapter and desire to bring action against such other, such action must be commenced not later than six months after the awarding of compensation or not later than nine months after the enactment of such law or laws creating, establishing or affording a new or additional remedy or remedies and in any event before the expiration of one year from the date such action accrues. In such case, the state insurance fund, if compensation be payable therefrom, and otherwise the person, association, corporation or insurance carrier liable for the payment of such compensation, as the case may be, shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid or to be paid by it and to such extent such recovery shall be deemed for the benefit of such fund, person, association, corporation or carrier. Notice of the commencement of such action shall be given within thirty days thereafter to the chairman, the employer and the insurance carrier upon a form prescribed by the chairman.

2. If such injured employee, or in case of death, his dependents, has taken compensation under this chapter but has failed to commence action against such other within the time limited therefor by subdivision one, such failure shall operate as an assignment of the cause of action against such other to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation. Except as hereinafter provided, the failure of the injured employee or his dependents to commence an action pursuant to the provisions of subdivision one of this section, shall not operate as an assignment of the cause of action as provided herein, unless the insurance carrier shall have notified the claimant in writing by personal service or by registered mail at least thirty days prior to the expiration of the time limited for the commencement of an action by subdivision one, that such failure to commence such action shall operate as an assignment of whatever cause of action may exist to such insurance

carrier. If the insurance carrier shall fail to give such notice, the time limited for the commencement of an action by subdivision one shall be extended until thirty days after the insurance carrier shall have notified the claimant in writing that failure to commence an action within thirty days after the mailing of such notice shall operate as an assignment of the cause of action to such carrier, and in the event the claimant fails to commence such action within thirty days after the mailing of such notice, such failure shall operate as an assignment of such cause of action to such carrier. If such fund, person, association, corporation or carrier, as such an assignee, recover from such other, either by judgment, settlement or otherwise, a sum in excess of the total amount of compensation awarded to such injured employee or his dependents and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such injured employee or his dependents, as the case may be, two-thirds of such excess, and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee or his dependents. When the compensation awarded requires periodical payments the number of which cannot be determined at the time of such award, the board shall, when the injury or death was caused by the negligence or wrong of another not in the same employ, estimate the probable total amount thereof upon the basis of the survivorship annuitants table of mortality, the remarriage tables of the Dutch Royal Insurance Institution and such facts as it may deem pertinent, and such estimate shall be deemed the amount of the compensation awarded in such case, for the purpose of computing the amount of such excess recovery, subject to the modification thereof as hereinafter provided (As amended L. 1947, cc. 9, 144; L. 1951, c. 527, eff. Sept. 1, 1951.)

I had endorsed H. R. 5357, submitted by Congressman Zelenko, as I felt that his bill was the closest to the New York State act.

As one who represents approximately 50 percent of the injured longshoremen in the Borough of Brooklyn, on their behalf I must strenuously object to that portion of the proposed bill which restricts the time within which to sue, to a period of 1 year, which is unconstitutional and, as the Under Secretary of Labor would undoubtedly agree, constitutes class discrimination.

I wish to likewise object to any abolition or abrogation of the right of a longshoreman to recover from a shipowner for unseaworthiness. As I stated before the committee, unseaworthiness is an ancient doctrine enunciated by the courts, wherein they assess damages against a shipowner for an injury to a seaman, or a longshoreman, or other harbor worker, performing work which was historically performed by seamen because and by reason of the shipowner's breach of the warranty of seaworthiness. The law stating that the vessel owed to the aforesaid workers a contractual warranty of seaworthiness, that is, it was and is the duty of the shipowner to furnish this class of workers with a safe place within which to work, and with a vessel, appliances, appurtenances, and equipment reasonably suited for the purposes for which they were intended.

Historically, and I personally recall as a young boy, having been born and raised in and about the waterfront in the Borough of Brooklyn, and prior to the enactment of the Harbor Workers' Compensation Act, a vessel furnished and supplied an officer at each and every hatch whereat longshoremen were working and it was his duty to maintain the equipment and to see to it that the work was conducted in such a manner as not to cause accidents resulting in injuries to the longshoremen and shore workers.

With the passage of time, and the desire of steamship companies to enhance their profits, this practice was discontinued and now you find that some vessels still continue that practice, but the majority of them will have 1 or 2 deck officers doing the work of 4 or 5.

In destroying the longshoreman's right to recover as a result of the unseaworthiness as is contemplated in the committee's fantastic draft of the proposed bill, it bespeaks of the power of the shipping industry in succeeding in relieving itself of both an ancient and modern liability. This type of legislation would not only benefit our local shippers but the foreign shippers, and I dare say that in our ports the majority of the shippers which handle cargo thereat are of a foreign flag. Although the United States maintains rigorous rules and regulations for the upkeep, maintenance and operation of vessels, as promulgated and enforced by our strong sentinel of the sea, our Coast Guard, nevertheless the foreign shipper is permitted to come into our harbors with obsolete, broken, dilapidated and unseaworthy vessels, not subjected to inspection or rules or regulations of our Coast Guard. These are the individuals who would most profit by this legislation at the cost of the broken bones, fractured skulls, arms, legs, and lives

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of our American workers. I am sure that this is not the intent and purpose of the committee.

Furthermore, by this proposed legislation, the shipowners will tell you that the longshoreman and shore worker will still have his cause of action against the ship for negligence. You must bear in mind that in order to succeed in a personal-injury action on the theory of negligence you must establish notice. A ship arrives at 8 o'clock in the morning, the longshoremen are on board at 2 minutes after 8, at 5 minutes after 8 a hatch beam falls on and severs a worker's spinal cord. He is unconscious and removed to a hospital. At 5 p. m. the vessel leaves for a foreign port. It is humanly impossible for such an injured man to establish negligence on the part of the vessel. It was because of this hardship on the injured worker and because of the fact that the vessel and its employees are always constantly in the control of the vessel, the vessel being their home and castle, the present law places upon them the responsibility to inspect and maintain the hull, its appurtenances and equipment in such a state of repair that they are fit for the purpose for which they were intended. A crippled longshoreman in negligence must not only prove that the equipment was defective but must also prove that the master of the vessel had adequate and timely notice to correct this condition. Do you think it's possible to have members of the crew of a certain vessel admit that they had been derelict in their duty and that they had brought their dereliction to the attention of the master?

I have read the 16-page letter submitted by Mr. Chazen of the firm of Baker, Garber & Chazen, and wholeheartedly subscribe to each and every word therein.

On behalf of the longshoremen, we thought that we would prevent an injustice which is now prevalent throughout the United States as a result of the case of *Ryan v. Waterman Steamship Co.*, and it was our belief that Congressman Zelenko's bill (H. R. 5357) would correct that injustice. However, we fear that a more grievous and much more serious injustice will be done to this class of hard workers upon whose shoulders rests the success or failure of our foreign commerce, if the proposed bill is enacted and rather than have that form of legislation which, I am sure, is so strongly recommended by the shipping and stevedoring industry, we would much rather have no action taken at all.

It is unbelievable that in this day and age, wherein the United States has greatly advanced in protecting and safeguarding the rights of the underprivileged, that the type of the proposed legislation should be introduced which in effect further enslaves the longshoreman and harbor worker who, by reason of his lack of education and his failure to find work in other fields of endeavor, is compelled to fall back upon this most hazardous avocation.

The writer therefore respectfully submits his opposition to the proposed committee bill of June 16, 1956, and reiterates his endorsement of H. R. 5357, introduced by Congressman Zelenko, and reiterates his opposition to H. R. 11234, introduced by Congressman Kilgore, and his opposition to H. R. 1119, introduced by Congressman Roosevelt and H. R. 1113, introduced by Congressman Coon, as they all endeavor to frustrate the concepts of our modern jurisprudence as to fault and the intent and purpose of the modern acts of Congress.

Respectfully yours,

PHILIP F. DI COSTANZO.

FREEDMAN, LANDY & LORRY,
Philadelphia, Pa., June 29, 1956.

JAMES M. BREWBAKER, Esq.,
*General Counsel, Committee on Education and Labor,
House of Representatives, Washington, D. C.*

DEAR MR. BREWBAKER: I am interested in the proposed legislation seeking to amend the Longshoremen's and Harbor Workers' Compensation Act. Unfortunately, when the hearings before your committee were previously scheduled, I was actually on trial in the local courts and could not attend; however, I have kept abreast of the situation and am presently in receipt of a letter from you addressed to Mr. Philip F. Di Costanzo and would like to comment on the proposed bill enclosed in your letter.

An examination of this latest proposed bill indicates that it is utterly unsatisfactory for many reasons.

To begin with, the proposed legislation introduced by Congressman Zelenko was brought about as a result of the decision of the United States Supreme Court in *Ryan v. Pan-Atlantic Steamship Co.*, where it became clearly apparent that the stevedoring contractors could virtually defeat a longshoreman's legitimate claim

against the third party simply by withholding payments under the compensation act which the employers were legally obliged to pay. In so doing, the employers could force the longshoreman to accept compensation under an award, thereby assigning the right of action to the employer with the result that the insurance company for the employer would then either refuse to bring any suit at all or a compromise would be effected between the employer's underwriter and the insurance company for the third party which would leave the longshoreman with little or no equity, even though he might rightfully be entitled to a most substantial sum.

The remedy suggested to overcome the inequity which was exposed in the Ryan case simply involved an amendment to the act which would eliminate the assignment in the event of the acceptance of compensation under an award and at the same time it would protect the employer's right of subrogation should there be a third-party recovery. This would permit the longshoremen to obtain their periodic payments of compensation during the period of disability when they are in dire need of it. The bill which Congressman Zelenko has heretofore sponsored, in my opinion, equitably and properly would resolve the situation with justice to both the longshoreman and his employer.

The new bill, which as yet is unnumbered, seems to be a conglomeration of a number of other bills which introduce an element wholly foreign to the issue and which would unjustly enrich the third party tortfeasor. I am confident, also, that the proposed bill is unconstitutional at least in one sense where liability for a breach of the warranty of seaworthiness would be eliminated. The Supreme Court of the United States has already held on prior occasions that the inherent characteristic features of the maritime law may not be changed except by constitutional amendment. The wiping out of the warranty of seaworthiness would, in my view, change one of the basic features of that law and legislation so designed would, therefore, be invalid. I point this out to show not only the inequity and invalidity of such legislation, but also to show that the proposers of such legislation would have the Congress enact a law which would be contrary to the traditional and settled policy of the maritime law since time immemorial.

I would, also, direct your attention to the fact that last week the Supreme Court of the United States handed down an opinion in *Czaplicki v. "S. S. Hoegh Silvercloud,"* which in some measure alleviated the present situation by holding that a longshoreman who had accepted compensation under an award does not necessarily lose all right to institute an action in his own behalf and in his own name. This decision goes far in eliminating much of the problem, but it would be more desirable if a law could be written to spell out the longshoreman's rights and to remove the employer's insurance company altogether from the litigation, leaving the right to sue only to the longshoreman, with a right of subrogation to the employer or his insurance company.

However, if the picture continues to be clouded, as it appears to be at this time, I would personally suggest that there be no legislation whatever rather than to have the bill presently proposed in lieu of the one which Congressman Zelenko recommended.

I might state in closing that my interest in this matter is on behalf of the International Longshoremen's Association Council covering the entire Philadelphia area, which council has expressly directed me to take steps on behalf of the longshoremen as outlined.

Sincerely yours,

ABRAHAM E. FREEDMAN.

DOW & SYMMERS,
New York, N. Y., June 29, 1956.

JAMES M. BREWRAKER, Esq.,
General Counsel, Committee on Education and Labor,
House of Representatives, Washington, D. C.

DEAR MR. BREWRAKER: Thank you for your letter of June 22, 1956, enclosing committee print of June 16, 1956, of proposed bill to amend the existing Longshoremen's and Harbor Workers' Compensation Act.

Your letter has only today come to my attention as I have been away in Norfolk on the trial of a case, and I deeply regret that I have not had a chance to consider the newly drafted bill nor to take it up officially with the committee on admiralty of the Association of the Bar of the City of New York. My initial personal impression is that the bill may present a satisfactory compromise agreeable to the majority of those who have expressed interest in the legislation.

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If, at some later time the proposed bill is still under consideration, or an amendment thereto is submitted, I am quite sure that the admiralty committee will be pleased to study it and submit a further report on the matter.

Incidentally, the new chairman of the committee is Mr. Arthur M. Boal, of Messrs. Tompkins, Boal and Tompkins, 116 John Street, New York, N. Y., who was appointed within the past few weeks to succeed me on the expiration of my 3-year term. Mr. Boal is now at The Hague for an extended proceeding before the International Court, and he asked me before leaving to carry on in connection with this legislation with the committee.

Yours very truly,

WILLIAM G. SYMMERS.

JUNE 28, 1956.

MR. JAMES M. BREWBAKER,
*General Counsel, Committee on Education and Labor,
House of Representatives, Washington, D. C.*

DEAR MR. BREWBAKER: I have carefully read the proposed Longshoremen's bill which you were kind enough to send me. I have also consulted counsel in the matter. We are opposed to the bill. It takes away the rights of longshoremen to claim unseaworthiness of the vessel. The United States Supreme Court after years of labor has finally liberalized the laws and has given the longshoremen the rights which have been withheld from them for many years. Why should we now with one fell swoop withdraw these advantages to longshoremen? It is a bill which seeks to give an advantage to property without considering the human element.

Recently the Zelenko bill was before your committee. It is a humane bill. It is a bill which should have been passed years ago. No person can possibly object to it. It seeks to bring in conformity section 33 of the Longshoremen's and Harbor Workers' Act with section 29 of the Workmen's Compensation Act. Section 29 provides that an injured can sue a third party and at the same time receive medical care and compensation payments. No such rights appear in the Longshoremen's and Harbor Workers' Act. Why shouldn't a man have a right to sue a third party and yet receive his compensation? All the bill has to do is to provide a lien upon the third-party recovery. This protects the employer.

The case of Czaplicki against the vessel *Silver Cloud* illustrates the present inequalities between section 29 of the Compensation Act of the State of New York and section 33 of the Federal act. In the Federal act, if you accept compensation you are barred from bringing suit against a third party. Under the State act, an injured can do both. The reason a new trial was granted in this case was because the election to accept compensation assigned the cause of action to the Travelers Insurance Co., who covered the employer. The Travelers Insurance Co. could not bring suit successfully against another defendant responsible for the accident because the Travelers also covered this other defendant. Under the circumstances, the Court held the assignment to be null and void because an assignment from the injured to an employer contemplates a cause of action by the employer against the persons responsible. Where such cause of action cannot be instituted because of self-interest, then of course the assignment is void in law.

Respectfully submitted.

FRED R. FIELDS,
President, New York District Council, I. L. A.

NEW YORK, N. Y., June 27, 1956.

JAMES M. BREWBAKER, Esq.,
*General Counsel, Committee on Education and Labor,
House of Representatives, Washington, D. C.*

DEAR MR. BREWBAKER: Thank you for your letter of June 23.

The Maritime Law Association, an association now consisting of over 980 maritime lawyers and over 100 representatives of the shipping industry, including representatives of all phases of the maritime field, by its resolution of May 18 expressed its opposition to any bill that would limit the right of a shipowner to recover indemnity from an employer under the decision of the United States Supreme Court in *Ryan Stevedoring Co. Inc. v. Pan Atlantic Steamship Corporation* and the association's executive committee authorized me to express the association's views before your committee.

In view of the express authority I received, and since the association will not have another meeting until November, I cannot very well speak for the association in discussing a compromise bill.

As an individual I would like to point out that the committee print of the proposed compromise bill of June 16 would abolish the exclusiveness of compensation by permitting the employee, as well as a third party, to sue an employer for negligence. I do not believe that was the committee's intent, and to clarify the point I suggest line 12 on page 2 be amended to read as follows (new matter italicized): "prevent recovery *by any third party* based on *any negligence of the employer*. If an employer fails * * *."

As far as the recent decision of the United States Supreme Court in *Blazey Czaplicki v. The s/s Hoegh Silvercloud* is concerned, I represented the Royal Norwegian Government and argued that case in its behalf, pointing out that Czaplicki's counsel were in 1956 asking the Court in effect to amend section 33 of the Compensation Act *nunc pro tunc* to apply to a 1945 accident. The Court's opinion does not define the respective rights of the employer and employee beyond stating that the lower Courts' dismissal of the libel was premature. I can only repeat my argument that statutory amendment should be by legislative, rather than by judicial process so that friendly governments may comply with statutes as enacted, rather than have to prophesy as to judicial decisions made over 10 years later.

Respectfully,

JAMES M. ESTABROOK.

