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A BASIC GUIDE TO THE RIGHTS OF COMMERCIAL FISHERMEN UNDER THE NATIONAL LABOR RELATIONS ACT, THE FAIR LABOR STANDARDS ACT, THE JONES ACT AND STATE WORKMEN'S COMPENSATION LAWS.

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FOREWORD

This paper is not meant to be all inclusive but is to be used as a basic guide in understanding the rights of commercial fishermen in relation to organizing, receiving minimum wages and normal working hours and recovering for injuries suffered on the job. The acts which will be discussed are the National Labor Relations Act, the Fair Labor Standards Act and the Jones Act and State Workmen's Compensation Laws.

A. ORGANIZATIONAL RIGHTS OF FISHERMEN - NATIONAL LABOR RELATIONS ACT.

I. General Discussion

The purpose of this article is to present an analysis of the basic principles and requirements of the National Labor Relations Act [NLRA]. This paper is not meant to be all inclusive, but is merely a basic guide to inform the commercial fishing industry of the jurisdictional tests that must be satisfied in order to come under the NLRA. Part I of this article presents a general background and discussion of the NLRA. Part II discusses coverage under the NLRA with respect to employers. This encompasses an analysis of the "affecting commerce test," the NLRA "dollar-volume test," and the NLRB's authority to decline jurisdiction. Part III examines the NLRA from the employee's perspective. What is the scope of coverage? What employees are excluded from coverage? Who is an "employee". Part IV is a discussion of NLRB procedures for obtaining advisory rulings and opinions on jurisdictional issues. Finally, Part V analyzes union certification by the NLRB, the representation election, and the NLRB investigatory procedures.

The National Industrial Recovery Act of 1933[1] gave employees the right to bargain collectively with employers concerning the terms and conditions of employment, but it made no provision for protection or enforcement of that right. It was not until 1935 when the Wagner Act[2] was passed that employees were provided positive protection against employer interference with employee self-organization rights. Under the Act, any employer's refusal to bargain collectively with the duly authorized representative of his employees constituted an unfair

labor practice for which the Act provided specified sanctions.

The Wagner Act did generally for interstate business what the Railway Labor Act[3] had done with respect to railroads and airlines. Its statement of policy set out industrial peace as the ultimate end, with promotion of collective bargaining and protection of employee organizational rights as the principal mean to that end.[4] In 1947, the Wagner Act was amended by the Taft-Hartley Act[5] and was denominated the National Labor Relations Act. Whereas the original Wagner Act was premised on a finding that industrial strife is a result of the denial of employee rights by employers, and provided only for employer unfair labor practices,[6] the amended Act incorporates an additional finding[7] that such strife is in part caused by certain undesirable practices by the labor unions and thus provides also for union unfair labor practices.[8] Both as originally enacted and as amended, the NLRA expresses a national interest in the promotion of collective bargaining, to the end that industrial peace be secured. The Act provides that employers[9] and unions alike are under a similar obligation to bargain.[10]

The NLRA was further amended by the Labor-Management Reporting and Disclosure Act of 1959.[11] The primary purpose of this amendment is corrective, that is, it reaffirms the basic policies of the NLRA and incorporates provisions designed to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which are contrary to the objectives and policies of the NLRA.

The National Labor Relations Act states and defines the rights of employees to organize and to bargain collectively with their employers through repre-

sentatives of their own choosing. To ensure that employees can freely choose their own representatives for the purpose of collective bargaining, the Act establishes a procedure by which they can exercise their choice at a secret ballot election conducted by the National Labor Relations Board [NLRB]. Further, to protect the rights of employees and employers, and to prevent labor disputes that would adversely affect the rights of the public, Congress has defined certain practices of employers and unions as unfair labor practices.

The law is administered and enforced principally by the National Labor Relations Board and the General Counsel acting through 42 regional and other field offices located in major cities in various sections of the country. The General Counsel and his staff in the Regional Offices investigate and prosecute unfair labor practice cases and conduct elections to determine employee representatives. The five-member Board decides cases involving charges of unfair labor practices and determines representation election questions that come to it from the Regional Offices.[12]

II. Employers Covered Under the NLRA.

A. Who is an Employer.

In determining exactly what entities are considered to be employers, it is necessary to analyze the definitions of the terms "person" and "employer" as set forth in the Act. The term "person" is defined in Section 2(1) as:[13] "one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers." As defined in Section 2(2), the term "employer" includes:[14]

> Any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any Federal Reserve Bank, or any state or political subdivision thereof, or any person subject to the Railway Labor Act,

> as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

The general implication is that by use of the term "person" in the definition of "employer", it was intended that all entities coming under the definition of "person" are subject to the provisions of the NLRA if they act as employers or act directly or indirectly as agents of employers. Thus, a "person" may also be an "employer" when they perform the function of an employer, i.e., exercise complete control over employment conditions of one or more individuals.[15]

B. The "Affecting Commerce" Test.

Whether or not any given employee or group of employees is covered by the NLRA depends on whether their employer's business activities are of sufficient nature and scope to satisfy the jurisdictional standards of the Act. Before the National Labor Relations Board [NLRB] will assume jurisdiction over a particular labor dispute the Board must find that labor strife in the employer's business would tend to have a substantial effect on interstate commerce.[16] If such a finding is made, the employer will ordinarily be covered. Section 2(7) of the NLRA defines the term "affecting commerce" as:[17]

> The term "affecting commerce" means in commerce, or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

The term affecting commerce is much broader in scope than coverage of disputes in commerce.[18] Coverage of disputes affecting commerce encompasses, in many instances, disputes in business which are generally considered as "local", such as mining,[19] manufacturing,[20] construction,[21] and retailing.[22] The underlying theory for extending coverage to business of this type is that work stoppages in them would necessarily affect the free flow of interstate commerce where those

businesses either bought their materials from other states or shipped their products out of the state of manufacture.

An employer is covered by the Act if any of the raw materials he uses in the manufacture of his product come from outside the state, even though he sells all his products within the state of manufacture.[23] The fact that the finished product is sold and distributed in the state of manufacture does not preclude a finding that a labor dispute between the employer and the employees would not affect interstate commerce, since such labor strife might result in stopping or curtailing the employer's out-of-state purchases.[24] An employer is also covered if he sells or distributes any of his products out of state. Although an employer's activities may, when separately considered, be wholly intrastate in character, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens or obstructions, the Act will apply.[25] The result is that even though an employer's activities are purely local or intrastate, the Act will nevertheless apply where the employer's business interlaces with the businesses which operate in interstate commerce.[26]

C. Jurisdictional Yardstick - Dollar-Volume Tests

Although the NLRB may properly have jurisdiction over a particular employer, and thus jurisdiction over the employees, it may decline to assert its jurisdiction if the dollar-volume test applicable to the type business in question is not satisfied.[27] The board does not act in all cases and usually only exercises its power in cases involving enterprises which substantially affect commerce. The tests applied by the NLRB in determining whether it will assert jurisdiction are based on the dollar-volume of the employer's out-of-state sales and purchases.

The tests, which may be applicable to the commercial fishing industry,

and under which the NLRB has been operating since 1958, are:[28]

> Non-retail business: Sales of goods to consumers in other states directly, or indirectly through others (called outflow), of at least $50,000 per year, or purchases of goods from suppliers in other states directly, or indirectly through others (called inflow), of at least $50,000 per year.
>
> Retail business: At least $500,000 total annual volume of business.

D. Board's Right to Decline Jurisdiction.

Although an employer's business activities meet the "affecting commerce" test, the Board does not always exercise jurisdiction.[29] If the NLRB refuses to assert jurisdiction over a case, the Act is not available to the employer, the union, or the employees involved.[30] It is only when the Board asserts jurisdiction that the law comes into play. Even where it has power to act because the employer involved is engaged in interstate activities, it may refuse to do so on the ground that those interstate activities are not, under Board-established jurisdictional tests, sufficiently extensive.[31] Under these tests, the Board may decline jurisdiction on the ground that the particular employer's business is so small or essentially local that an actual or potential labor dispute in that business would not substantially affect interstate commerce. The Board's authority to decline jurisdiction in these types of cases stems from the Labor-Management Reporting and Disclosure Act of 1959.[32] That act provides that the Board may, by rule of decision or by published rules, decline to assert jurisdiction in cases having an insubstantial effect on commerce. However, it may not decline jurisdiction over any case which, under the dollar-volume standards prevailing on August 1, 1959, jurisdiction would be asserted.[33] As a result, the Board

is allowed to broaden its jurisdiction, but it cannot narrow it by refusing to assert jurisdiction over employers whose business activities exceed the dollar-volume standards. Thus, the Board may take jurisdiction of an employer lacking the minimum jurisdictional amount, provided that the employer's business activities satisfy the "affecting commerce" requirements of the Act. Ordinarily, if an employer's business meets or exceeds the appropriate annual dollar volume, it will be deemed to "affect commerce." The Board, however, can assert jurisdiction only where it has evidence that the gross-dollar-volume test is met. Therefore, if an employer refuses to supply the Board with financial information, the Board may assert jurisdiction without a finding that the requisite jurisdictional standards have been met.[34]

In those cases in which the Board does not assert jurisdiction, the Labor-Management Reporting and Disclosure Act of 1959 provides that state and territorial courts may assume jurisdiction.[35]

III. Employees Covered Under the NLRA.

A. Scope of Coverage.

Although the NLRA provides that certain groups of employees are exempt from coverage, generally, the Act covers virtually every conceivable type of employee who, in the common understanding, sells his services for a wage or salary and performs a given function with or without supervision.[36] Coverage under the Act is not dependent upon the number of employees in a particular business since the Act does not specify a minimum number of employees as a prerequisite to Board jurisdiction. However, the employee, in order to be covered must be working for an employer whose business activities are sufficient to satisfy the "affecting commerce" test.[37] The Act applies to part-time, seasonal, day-to-day

workers, and applicants for employment, as well as regular full-time workers.[38] These workers are entitled to all of the rights guaranteed by the NLRA, including the right to form, join, and participate in labor unions without employer interference, coercion, or discrimination.

B. Excluded Workers.

Section 2(3) of the Act provides that certain groups of workers are excluded from the definition of the term "employee".[39] These are:

(1) Individuals employed as agricultural laborers.

(2) Individuals in the domestic service of any family or person at home.

(3) Individuals employed by their parents or spouses.

(4) Individuals who are independent contractors.

(5) Supervisors.

(6) Employees of employers subject to the Railway Labor Act.

(7) Employees of other persons not employers within the meaning of Section 2(2) of the Act. (Employers who do not meet the "affecting commerce" requirement.)

Of these seven categories, the independent contractor exemption may be of particular importance in determining whether commercial fishermen are entitled to coverage under the Act. If an employer-employee relationship exists between the seafood processing company and the fishing crews it employs, and if the company's business activities are of such nature and scope to satisfy the "affecting commerce" requirement, there is little doubt that the NLRB could properly assert jurisdiction over a labor dispute in that business. If, however, the work relationship between the company and the fishermen is that of an in-

dependent contractor, the Board could not assert jurisdiction since section 2(3) of the Act expressly exempts from coverage independent contractors. However, a finding that members of the fishing crews were not "employees" of the processing company within the meaning of the NLRA, does not preclude a finding that the crews are employees of some other entity. For example, where it appears that the processing company has contracted with the owner of several fishing vessels to supply raw seafood, the members of the fishing crews, although not employees of the processing company, might be deemed to be "employees" of the boat owner[40] and nevertheless entitled to coverage under the Act.[41] Of course, the business of the vessel owner would have to satisfy the jurisdictional standards of the Act.

C. "Right of Control" Test.

In determining whether an individual is an employee or an independent contractor, the Board has applied the "right to control" test.[42] Under this test, where the person for whom services are performed reserves the right to control the detailed work activities and the manner and means by which the results of the job are to be accomplished, the relationship is one of employment, but where control is reserved only as to the end result of the job, the relationship is that of an independent contractor. Several factors have been utilized by the Board in resolving the question of whether control or the right of control exists: (1) whether the master has the power to terminate the contract of employment at will; (2) whether he has the power to fix the price in payment for the work or vitally controls the manner and time of payment; (3) whether he furnishes the means and appliances for the work; (4) whether he has control of the premises; (5) whether he furnishes the materials upon which the work is done and receives the output there-

of, the contractor dealing with no other person in respect to the output; (6) whether he has the right to prescribe and furnish the details of the kind and character of the work to be done; (7) whether he has the right to supervise and inspect the work during the course of the employment; (8) whether he has the right to direct the details of the manner in which the work is to be done; (9) whether he has the right to employ and discharge the sub-employees and to fix their compensation; and (10) whether he is obliged to pay the wages of said employees. The resolution of the question depends upon the facts of each case, however, and no one factor is determinative.[43]

IV. Advisory and Declaratory Orders Concerning NLRB Jurisdiction.

A. Formal Advisory Opinions.

An employer confronted with recognition demands from a union attempting to organize the employees, or a union seeking representation status, may obtain from the Board a formal advisory opinion on whether or not jurisdiction will be asserted. However, before the Board will render such an opinion, a representation proceeding must currently be pending before an agency or court of a State or Territory and the party requesting the opinion is a party to such proceedings.[44] Not only may the employer and union request such an opinion, but also any interested party including the court or agency before which the representation proceeding is pending.

Such opinion is requested by filing a petition, in writing and signed, with the Executive Secretary of the Board in Washington, D.C.[45] The opinion is limited to whether the Board would assert jurisdiction; it has nothing to do with the merits of the case or with the substantive issues.[46]

B. Informal Advisory Opinions.

Although a formal petition is required to obtain an advisory opinion from the Board, other avenues are available to persons seeking informal and, in most cases, speedy opinions on jurisdictional issues. Informal rulings on jurisdiction, in the form of advice and information on jurisdictional issues, which are not regarded as binding upon the Board or General Counsel, may be obtained at NLRB regional offices by any interested person.[47]

C. Declaratory Orders.

A procedure is also available for obtaining from the Board declaratory orders concerning jurisdictional issues. Such an order may be obtained when both an unfair labor practice charge and a representation petition are pending concurrently in a regional office. However, the regulations provide that a declaratory order can only be requested by the Board General Counsel.[48] The declaratory Board order is binding on the parties to the proceedings.[49]

V. Union Representation Under the NLRA.

A. Board Certification.

1. The Election Petition.

Although many employers will freely recognize a union if it is shown that the union has received support from a majority of the employees to act as their bargaining representative, there are employers who will refuse to recognize or bargain with a union until the union has been certified by the Board.[50] To obtain certification, the union must file a petition with the Board, asking that the Board conduct a representation election to determine whether or not a majority of the employees in a particular bargaining unit are in favor of having that union act as their bargaining representative. The petition may be filed by any employee or

group of employees or by an individual or labor organization acting in their behalf, or it may be filed by any employer who has received a demand from the union that it be recognized as the bargaining agent of his employees.[51]

Before the election will be held, the petition must be investigated by the Board to determine whether the following conditions have been met:

"(1) a question concerning representation must exist, except in cases involving lawful organizational or recognition picketing by noncertified unions;

(2) the activities or business operations of the employer (of the employees involved) must affect commerce;

(3) there must be an appropriate bargaining unit;

(4) if the petition has been filed by an individual or labor organization, there must be a showing that a sufficient number (at least 30 percent) of the employees involved have indicated that they wish to be represented by the individual or labor organization that filed the petition, except in cases involving lawful organizational or recognition picketing by noncertified unions."[52]

2. Representation Hearing.

If the Board's investigation discloses that there is a question concerning representation, the parties have two options: (1) they can agree to an informal consent election[53] or (2) if no agreement can be reached between the parties, the Board will institute formal proceedings by setting the case down for a hearing.

At the hearing, the parties are afforded a full and fair opportunity to present their respective positions, to introduce evidence in support of their positions, and to make oral arguments.[54] The main questions sought to be resolved in the hearing are whether or not there are reasons why the requested

election should not be held and whether the employees seeking representation constitute an appropriate bargaining unit.[55]

After the hearing, the Board will either order an election or, if the evidence presented at the hearing discloses that no question of representation exists or if the proposed unit is not appropriate, dismiss the petition.

3. The "Names and Addresses" Rule.

As part of its direction of the election, the Board may require the employer to submit a list of the names and addresses of all employees in the appropriate bargaining unit. The Board will then provide a copy of this list to the union or any other party to the election. The right of the Board to require the employer to provide such a list has been upheld on the grounds that the disclosure requirement encourages an informed employee electorate and allows unions the right of access to employees that management already possesses.[56]

If a majority of the employees in the bargaining unit vote to allow the union to act as their bargaining agent, and any objections to the election have been resolved, the Board will certify the union. There are a number of benefits that accrue to the union as a result of certification. For example, the employer must bargain with the union for at least one year, a rival union may not engage in a strike or picketing for recognition, and if the employee and union sign a contract during the one-year period following certification, it will usually bar a rival union's petition for election for a period of 3 years.[57]

Conclusion

The NLRA applies, and thus the Board has jurisdiction over employers whose business activities "affect interstate commerce." The affecting commerce

test is the basic prerequisite to coverage under the Act.[58] Although an employer meets this jurisdictional test, the Board may nevertheless decline to assert jurisdiction on the grounds that the extent of the employer's interstate business activities do not satisfy the dollar-volume jurisdictional standards promulgated by the Board.[59] If, however, both the affecting commerce test and the dollar-volume tests are met, the Board must assert jurisdiction over the employer and thus the employees.

Where it appears that an employer-employee relationship exists between the employer-processing company and the employees-fishermen, and where the employer's business activities are sufficient to satisfy the jurisdictional standards,[60] the NLRA will be applicable to any labor dispute occurring in the employer's business.

If the relationship between the company and the fishermen is something other than an employer-employee relationship, such as an independent contractor relationship where the owner of the fishing vessels is the employer and not the processing company, the NLRA may also be applicable. In such case, the vessel owner's business must be examined to determine if the jurisdictional standards are satisfied and, if so, the Act will apply. The vessel owner would be the employer under the Act and would be under an obligation to bargain if the union has been recognized by the employer or has received Board certification.

FOOTNOTES

1. The NATIONAL INDUSTRIAL RECOVERY ACT, the first in a whole series of New Deal enactments designed to lift the nation out of the depression of the thirties, was declared unconstitutional in Schechter Corp. v. United States, 295 U.S. 495 (1935).
2. 49 Stat. 449 (1935).
3. 44 Stat. 577 (1926).
4. 29 U.S.C. § 151 (1970).
5. 61 Stat. 136 (1947).
6. 29 U.S.C. § 141 (1970).
7. 29 U.S.C. § 158(a) (1-5) (1970).
8. 29 U.S.C. § 158(b) (1-7) (1970).
9. 29 U.S.C. § 158(a) (5) (1970).
10. 29 U.S.C. § 158(b)(3) (1970).
11. 73 Stat. 519 (1959).
12. National Labor Relations Board, A LAYMAN'S GUIDE TO BASIC LAW UNDER THE NLRA (1971).
13. 29 U.S.C. § 152(1) (1970).
14. Id. at § 152(2).
15. For a general discussion of 29 U.S.C. §§ 152(1) and (2) see C.C.H. LABOR LAW RPTR. ¶ 1620.
16. 29 U.S.C. § 160(a) (1970).
17. 29 U.S.C. § 152(7) (1970).

18. NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224 (1963).

19. See, e.g., NLRB v. Stremel, 141 F.2d 317 (10th Cir. 1944); NLRB v. Sunshine Mining Co., 110 F.2d 780 (9th Cir. 1940); Clover Fork Coal Co. v. NLRB, 97 F.2d 331 (6th Cir. 1938).

20. See, e.g., NLRB v. Aluminum Prod. Co., 120 F.2d 567 (7th Cir. 1941); NLRB v. Planters Mfg. Co., 105 F.2d 750 (4th Cir. 1939); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

21. See, e.g., Plumbers, Steamfitters, R.P.F. & A. v. County of Door, 359 U.S. 354 (1959); United Brotherhood of Carpenters and Joiners v. NLRB, 341 U.S. 707 (1951); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951); McLeod v. Bldg. Serv. Employees, 227 F. Supp. 242 (S.D.N.Y. 1964); Van Auker Const. Co., 1968-2 CCH NLRB No. 20,447 (1968); Kanemoto, Gen'l Contractor, 164 NLRB 106 (1967).

22. See, e.g., Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938); J. L. Brandeis & Sons v. NLRB, 142 F.2d 977 (8th Cir. 1944); Cox's Food Ctr., Inc. v. Retail Clerks Local 1653, 60 L.C. No. 10,270 (Ida. 1969); Furusato Hawaii, Ltd., 192 NLRB 18 (1971); Robbins & Robbins, Inc., 152 NLRB 151 (1965).

23. International Brotherhood of Electrical Workers v. NLRB, 341 U.S. 694 (1951).

24. NLRB v. Tex-O-Kan Flour Mills Co., 122 F.2d 433 (5th Cir. 1941); Wilson & Co. v. NLRB, 124 F.2d 845 (7th Cir. 1941).

25. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

26. NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224 (1963).

27. See, e.g., Office Employees Int'l Union v. NLRB, 353 U.S. 313 (1957); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951); San Francisco Local Joint Exec. Bd. of Culinary Workers v. NLRB, 501 F. 2d 794 (D.C. Cir. 1974); OK Barber Shops, 187 NLRB 115 (1971); Myers & Camille, 131 NLRB 17 (1963); Wedding Nurseries, 1960 CCH NLRB 9463 (1960).

28. These standards are set forth in 23 NLRB Annual Report 8-12 (1958).

29. These local businesses, however, must have a sufficient relation with interstate commerce such that the "affecting commerce" test is met.

30. NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); Nathanson v. NLRB, 344 U.S. 25 (1952); Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261 (1940); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

31. 29 U.S.C. § 164(c)(1) (1970).

32. 73 Stat. 519 (1959).

33. 29 U.S.C. § 164(c)(1) (1970). It should be noted that § 164(c)(2) provides:

> Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

34. See, e.g., Intergraphic Corp. of America, 160 N.L.R.B. 1284 (1966); Fisherman's Co-operative Ass'n, 128 N.L.R.B. 62 (1960); Plant City

Welding & Tank Co., 123 N.L.R.B. 1146 (1959); Tropicana Prods. Co., 122 N.L.R.B. 121 (1958).

35. 29 U.S.C. § 164(c)(2) (1970). See also note 27 and accompanying text, supra.

36. See 29 U.S.C. § 152(3) (1970).

37. See 29 U.S.C. § 160(a) (1970).

38. See, e.g., Sahara-Tahoe Corp., 173 N.L.R.B. (No. 204) (1968); Leone Ind., 172 N.L.R.B. (No. 158) (1968); Alaska Packers Ass'n, 7 N.L.R.B. 141 (1938).

39. 29 U.S.C. § 152(3) (1970).

40. In such case, the boat owner would be deemed the "employer" within the meaning of 29 U.S.C. § 152(2) (1970).

41. Indeed, the Board has taken jurisdiction of several cases involving commercial fishermen. Although the issue in these cases concerned the appropriateness of the bargaining unit (size, scope, etc. . .) they are worthy of note since they recognized that commercial fishermen were entitled to protection under the NLRA. See, e.g., Borden Co., 156 N.L.R.B. 1075 (1966); East Coast Trawling & Dock Co., 153 N.L.R.B. (No. 106) (1965); William P. Riggin & Son, Inc., 153 N.L.R.B. (No. 107) (1965); General Foods Corp., 110 N.L.R.B. 1088 (1954); Alaska Salmon Industry, Inc., 98 N.L.R.B. 1213 (1952); Southern Shellfish Co., 95 N.L.R.B. 957 (1951). See also, A. Paladini, Inc., 168 N.L.R.B, 952 (1967), wherein the Board held that under the right of control test, captains of employer's 3 fishing boats were not independent contractors but rather supervisors of crewmen who were employees of employer.

42. See, e.g., National Freight, Inc., 146 N.L.R.B. 144 (1964); Continental Bus System, Inc. v. NLRB, 325 F.2d 267 (10th Cir. 1963); Martin-Marietta Co., 136 N.L.R.B. 1530 (1962); Coca-Cola Bottling Co. of N.Y., Inc., 133 N.L.R.B. 762 (1961).

43. Air Control Prods., Inc., 132 N.L.R.B. 114 (1961); Buffalo Courier-Express, Inc., 129 N.L.R.B. 932 (1960).

44. 29 CFR § 101.39 (1975).

45. 29 C.F.R. § 102.99(a) provides that a petition requested by a party to the representation proceeding must allege:

(1) The name of the petitioner.

(2) The names of all other parties to the proceeding.

(3) The name of the agency or court.

(4) The docket number and nature of the proceeding.

(5) The general nature of the business involved in the proceeding.

(6) The commerce data relating to the operation of such business.

(7) Whether the commerce data described in this section are admitted or denied by other parties to the proceeding.

(8) The findings, if any, of the agency or court respecting the commerce data described in this section.

(9) Whether a representation or unfair labor practice proceeding involving the same labor dispute is pending before the Board and, if so, the case number thereof.

Subsection (c) provides:

Eight copies of such petitions shall be filed with the Board

in Washington, D.C. Such petition shall be printed or otherwise legibly duplicated: Provided, however, that carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

46. See 3 C.C.H. LAB. L. REP. § 5505.212 (1972).

47. 29 C.F.R. § 101.41 (1975). See also, 1975 GUIDEBOOK TO LABOR RELATIONS 30.

48. 29 CFR § 101.42(b) (1975).

49. Id. at § 101.43(f).

50. See 2 C.C.H. LAB. L. REP. § 2510 (1972).

51. 29 U.S.C. § 159(c)(1) (1970).

52. 2 C.C.H. LAB. L. REP. § 2510 (1972).

53. Consent elections are by far the most numerous and the least time-consuming because they are conducted through the agreement of the employer and the union or unions seeking to represent the employer's employees. Thus, the parties to a consent election voluntarily agree upon the appropriate unit in which the election shall be held, the name of the union or unions which shall appear on the ballot, the payroll period for eligibility, and the date, hours, and place of the election. 2 C.C.H. § 2701 (1972).

54. 2 C.C.H. LAB. L. REP. § 2510 (1972).

55. Id. In grouping employees into bargain units, the Board gives major consideration to: (1) similarity of skills, wages, hours, and other working conditions among the employees involved; (2) history of collective bar-

gaining in the particular employer's business and in the industry as a whole, and (3) desires of employees.

56. NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. See, Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966).

57. See, 2 C.C.H. LAB. L. REP. § 2510 (1972).

58. 29 U.S.C. § 160(a) (1970).

59. 29 U.S.C. § 164(c)(1) (1970).

60. Standards are set forth in 23 NLRB ANNUAL REPORT 8-12 (1958).

B. MINIMUM WAGES AND RESTRICTIONS ON MAXIMUM WORKING HOURS OF COMMERCIAL FISHERMEN - THE FAIR LABOR STANDARDS ACT.

I. General Discussion

The Fair Labor Standards Act[1] (hereinafter referred to as the FLSA), a federal statute passed in 1938,[2] provides for minimum wages,[3] and sets maximum hours,[4] for those employees and employers subject to the Act. Generally, all employees whose employment activities have the requisite relationship to interstate and foreign commerce and employees of "enterprises" engaged in commerce or the production of goods for commerce are covered by the Act unless specifically exempted.[5] Employers whose employees are covered under the FLSA are required to comply with the Act's provisions, including specified record keeping requirements.[6] The United States Department of Labor is authorized to make investigations and to oversee violating employers to assure compliance with the Act.[7] Court enforcement of the Act is also authorized.[8] Congress enacted the FLSA in an effort "to provide a minimal standard of living necessary for the health, efficiency, and general well-being of workers and to prescribe certain minimum standards for working conditions."[9] In applying the Act to particular fact situations, the courts have liberally construed it in favor of application in an attempt to achieve its remedial and humanitarian purposes.[10]

II. Basic Definitions

In order to understand the FLSA's application to commercial fishermen, it is necessary to be familiar with the basic terms used in the Act and the

manner in which the terms are generally construed by the courts and the Department of Labor.

A. "Employer"; "Employee"; "Employ"

An "employer," as defined by section 3(d) of the Act, "includes any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ."[11] An "employee," as defined in section 3(e) of the Act, "includes any individual employed by an employer,"[12] and "employ," as defined in section 3(g), includes "to suffer or permit to work."[13] The courts, in determining whether there is an employer-employee relationship that comes within the provisions of the Act, will look beyond the label given to the relationship by the parties and "examine the economic realities presented by the facts of each case."[14]

B. "Person"

The term "person," as used in the Act, is defined as "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons."[15]

C. "Commerce"

The term "commerce" as used in the Act includes interstate and foreign commerce. Section 3(b) of the Act defines the term to mean "trade, commerce, transportation, transmission, or communication among the several states or between any state and any place outside thereof."[16] The application of this term to specific employment activities is discussed in greater detail in the section dealing with the Act's general scope and coverage.[17]

D. "Goods"

As used in the Act, the term "goods" includes "goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any port or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof . . . ."[18]

E. "Production"

To understand the term "production" as it applies to the principles underlying the Act's general coverage, one must refer to section 3(j) of the Act, which defines "produced." This term is used to mean "produced, manufactured, mined, handled, or in any other manner worked on in any state; and for the purposes of this [Act] any employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof . . . ."[19]

III. General Coverage of the Act.

There are two general types of coverage under the FLSA: (1) individual employee coverage, which, as the term suggests, applies only to the particular employee in question; and (2) enterprise coverage. Under the concept of enterprise coverage, all of the employees of a particular business are covered by the Act, regardless of the relationship of their individual employment activities to commerce. Both types of coverage will be separately discussed below.

A. Individual Employee Coverage

The FLSA applies to all individual employees who are "engaged in commerce or the production of goods for commerce."[20] In determining whether a particular employment situation comes within this definition, the courts have essentially engaged in a line-drawing exercise, guided by the concepts of national policy, the Act's legislative history, and the practicalities of administering the Act.[21] It has been established that the phrase "engaged in commerce" is to be construed broadly and in favor of the Act's application.[22] The activities of the employee, and not of the employer, are the focus in determining the Act's coverage.[23] "Employees whose activities are so directly and vitally related to interstate commerce as to be in practice and legal contemplation a part thereof, are to be considered as engaged in interstate commerce, and may, therefore, be within the provisions of the FLSA."[24] Employing this test, the courts have found activities such as the following to be within the Act's proscriptions: Unloading and loading of returnable bottles which ultimately wound up in interstate commerce;[25] collecting trash from premises of customers who produced goods for commerce;[26] regularly handling goods which move in interstate commerce;[27] and regularly carrying deliverymen who delivered to tenants mail twice daily and interstate freight regularly each week.[28] As stated by Brennan v. Wilson Bldg., Inc.:[29]

> The fact that all of [the employer's] business is not shown to have an interstate character is not important. The applicability of the Act is dependent on the character

of the employee's work. If a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established . . . he is covered by the Act.[30]

From the above discussion, it appears that most employees engaged in the commercial fishing industry are covered by the FLSA. Since those who handle goods which ultimately move in interstate commerce are covered by the Act,[31] and most products taken from the coastal waters ultimately do enter the stream of interstate commerce, then most employees of commercial fisheries are "engaged in the production of goods for commerce",[32] and are, therefore, covered by the FLSA. Indeed, the Department of Labor is of the opinion that:

> [i]n general, employees of businesses concerned with fisheries and with operations on seafood and other aquatic products are engaged in interstate or foreign commerce, or the production of goods for such commerce, as defined in the Act, and are subject to the Act's provisions except as [specifically exempted].[33]

B. Enterprise Liability

Although an employee is not himself/herself "engaged in commerce or the production of goods for commerce" (and thus subject to individual coverage under the Act), he or she may nonetheless be covered by the FLSA if employed in "an enterprise engaged in commerce or the production of goods for com-

merce."[34] Under "enterprise liability", all of the employees of a particular business are covered by the Act if two or more of its employees are engaged in interstate commerce or the production of goods for interstate commerce.[35] The "enterprise" also must meet a specified $250,000 dollar-volume test for sales or business done annually.[36]

As was discussed in the previous section, it seems clear that most employees of the fishing industry are engaged in the "production of goods for commerce."[37] Applying the same principles outlined in that section, it seems equally clear a commercial fishing business is also engaged in the "production of goods for commerce." Therefore, it necessarily follows that most employees of a commercial fishing business are covered by the FLSA by way of the "enterprise liability" concept, if the business in question does a $250,000 gross volume of business annually.

In order to determine whether a business meets this $250,000 prerequisite, there are two considerations which should be noted:

(1) What constitutes "enterprise" is not necessarily determined by the manner in which a business is labeled as a separate business entity.[38] Rather, an "enterprise" is defined by the law to be:

> [T]he related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all activities whether performed in one or more establishments or by one or more corporate or other organizational units in-

cluding departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor.[39]

Thus, there are three statutory tests of what activities constitute an "enterprise" for purposes of the Act: "related activities, unified operation or common control, and common business purpose."[40] It should be stressed that all related activities of businesses under a unified operation or common control are considered to be one "enterprise" for purposes of the Act.[41] This includes integrated activities such as manufacturing, warehousing, and retailing.[42]

(2) As previously stated, the Act imposes its requirements only on businesses meeting the requirement of $250,000 gross volume of sales made or business done annually.[43] Included in this figure is "the gross dollar volume of any . . . business activity in which the enterprise engages which can be . . . measured on a dollar basis."[44] Thus, it should be remembered that not only revenue from sales is included within the dollar-volume limitation, but also "revenue derived from services, rentals, or loans . . . ," or any other business done.[45]

IV. EXEMPTION FROM THE ACT'S COVERAGE - OFFSHORE FISHING ACTIVITIES.

As can be seen from previous discussion, most employees of commercial fishing businesses come within the general coverage of the FLSA. There is,

however, a specific exemption from the Act's coverage for certain specified activities relating to offshore fishing activities. Section 13(a)(5) of the FLSA grants an exemption from both the maximum hours (overtime) and minimum wage requirements.

This exemption applies to: "any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning, or packaging of such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee.[46]

A. General Principles Governing Exemptions From the Act.

In passing the FLSA, Congress clearly intended the Act to have a broad scope.[47] Breadth of coverage is vital to accomplish the Act's purpose.[48] The burden of proving an exemption's application always rests upon the employer asserting it.[49] The exemptions are subject to a rule of "strict construction"; thus, they are narrowly construed.[50] Application of an exemption is limited to those employees who come "plainly and unmistakenly within their terms and spirit."[51] Any doubt as to the applicability of an exemption will be resolved in

favor of the employee's being covered by the Act.[52] Conditions which the Act requires before an exemption applies are "explicit prerequisites to exemption,"[53] and no matter how broad the exemption, it is meant to apply only to the activities specified.[54] "[T]he details with which the exemptions in this Act have been made preclude their enlargement by implication."[55]

B. Employee's Work Relationship to the Exempt Operation.

The language of section 13(a)(5) of the Act makes it clear that its exemption applies only to those employees who are employed in the operations named in the section.[56] Generally, an employee will be considered to be employed in a named operation in two instances: (1) where his work is in performing a named operation;[57] or (2) where his work is so functionally related to a named operation that without his work it could not be carried on.[58] Thus, under § 13(a)(5), an employee will be exempt from coverage under the Act even though he or she does not participate directly and physically in any one of the operations specifically named,[59] if it is determined from all the facts that their services are necessary for the conduct of any of the exempted activities.[60] For example, it has been held that employees engaged in the manufacture and sale of boxes and barrels used for shipment of crabmeat and oysters in interstate commerce were not within the exemption provided by § 13(a)(5).[61] On the other hand, it has been held that an employee engaged in driving a truck in interstate and intrastate commerce for the purpose of loading, unloading, and delivering

fish and seafood was exempt under the provisions of § 13(a)(5) exempting employees engaged in "loading and unloading" the marine products taken at sea.[62] It should be stressed that the determination of whether an employee's activities are necessary to conducting the named activities (and, therefore, exempt from the Act's coverage) will be a case by case determination in which the particular facts of each instance must be taken into account.[63] Among the factors to be considered are the time the activities are carried on, their proximity to the named operations, and the realities of the situation in question.[64]

C. Employee's Relationship to Work on The Specified Products.

Section 13(a)(5) also makes clear the necessity that the employee's work be performed on the named marine products: "any kind of fish, shellfish, crustacea, sponges, seaweeds, or other forms of animal and vegetable life."[65] Thus, it has been held that dredging shells from which to make lime and cement is not exempt, because shells are not living things.[66] Nor is the manufacture of containers or ice for use in shipping or packing seafood products an exempt employment practice.[67] In addition, making commodities (such as clam chowder, crab cakes, etc.) which consist only in part of the exempt acquatic products will not be employment immune from the Act if a "substantial amount"[68] of other products is used to produce such commodity.[69]

D. First Processing, etc. at Sea.

The statutory language of the Act makes it clear that the "first processing, canning, or packing" is exempt only when done off-shore ("at sea") and only when it is performed "as an incident to, or in conjunction with such fishing

operations."[70] Therefore, the Labor Department has taken the position that the first processing, canning, or packing "must take place upon the vessel engaged in the physical catching, taking, etc. of the fish[71] to be exempted.

E. Exempt and Nonexempt Work in the Same Workweek.

Generally, the unit of time to be used in determining the exemption's applicability to an employee is the workweek.[72] Thus, the workweek is the time unit to be considered in determining the applicability of Section 13(a)(5)[73] to an employee.[74] An employee, therefore, may be exempt in one workweek and not in the next.[75] In addition, a situation may arise where an employee, during one workweek, performs both exempt and nonexempt work. In such a case, the exemption will be deemed inapplicable if a "substantial" amount of time during the week is spent performing nonexempt work.[76] It should be stressed that the burden of proving the segregation between exempt and nonexempt work is on the employer,[77] and the employer must keep clear and accurate records of the manner in which the employee's time is spent in order to prove such segregation of the employee's time.[78]

CONCLUSION

Most employees engaged in the commercial fishing industry do come within the coverage of the FLSA, which provides for minimum wages and maximum hours. There is an exemption from the minimum wage and maximum hour provisions, however, for certain types of activities engaged in by employees of commercial fisheries involved in offshore fishing activities.

Generally, employees are exempt from the minimum wage and maximum hour requirements while engaged in the catching or taking of aquatic forms of animal or vegetable life, in the first processing of aquatic life when done while at sea, and the loading and unloading of the aquatic life so taken and processed. Additionally, the exemption from the Act's coverage will apply whenever an employee's activities are essential to the performance of any of the above-named activities. It must be stressed that the determination of the coverage and/or exemption from the Act will be made on a case-by-case basis. The employer has the burden of proving non-coverage of the Act and must keep clear records of any employee's activities claimed to be exempt. Any doubts as to the Act's coverage will be resolved by the courts against the employer and in favor of coverage.

FOOTNOTES

1. 29 U.S.C. § 201, et seq. (1965).
2. Fair Labor Standards Act, ch. 676, § 1, 52 Stat. 1060 (1938) [currently codified at 29 U.S.C. § 201 et seq. (1965)].
3. 29 U.S.C. § 206 (1965).
4. Id. at § 207.
5. See 29 U.S.C. §§ 202 (1965 and Supp. 1975); 29 U.S.C. § 213 (1965 and Supp. Sept. 1976).
6. 29 U.S.C. § 211(c) (1965).
7. Id. at § 211(a)(b) and (c) (1965).
8. Id. at § 217.
9. Brennan v. Plaza Shoe Store, Inc., 522 F. 2d 843, 846 (8th Cir. 1975).
10. E.g., Mitchell v. Lublin, McGaughy & Assoc., 358 U.S. 207, 211 (1959).
11. 29 U.S.C. § 203(d) (1965 and Supp. 1975).
12. 29 U.S.C. § 203(e) (1965 and Supp. 1975).
13. 29 U.S.C. § 203(g) (1965).
14. Hodgson v. Arnheim & Neely, Inc., 444 F. 2d 609, 612 (3d Cir. 1971). See also, e.g., Goldberg v. Whitaker House Corp., 366 U.S. 28 (1961); Bartels v. Birmingham, 332 U.S. 126 (1947).
15. Id. § 203(a) (1965).
16. Id. § 203(b) (1965).
17. See Part III, infra.
18. 29 U.S.C. § 203(i) (1965).

19. Id. at § 203(j) (1965).

20. Id. at § 202(a) (Supp. 1975).

21. E.g., Brennon v. Wilson Bldg., Inc., 478 F. 2d 1090, 1094 (5th Cir. 1973).

22. Mitchell v. Lublin, McGaughy & Assoc., 358 U.S. 207, 211 (1959); Mitchell v. C. W. Vollmer & Co., Inc., 349 U.S. 427, 429 (1955); Shultz v. Mack Farland & Sons Roofing Co., Inc., 413 F. 2d 1296, 1300 (5th Cir. 1969).

23. E.g., Wirtz v. First State Abstract & Insurance Co., 362 F. 2d 83, 87 (8th Cir. 1966).

24. Id. Accord, Michell v. Jaye Agency, 348 U.S. 945 (1955); Overstreet v. North Shore Corp., 318 U.S. 125 (1943); Brennan v. Metropolitan Trash, Inc., 513 F. 2d 1324 (10th Cir. 1975); Beneficial Finance Co. of Wisconsin v. Wirtz, 346 F. 2d 340 (7th Cir. 1965).

25. Hodgson v. Royal Crown Bottling Co., 465 F. 2d 473 (5th Cir. 1972).

26. Brennan v. Metropolitan Trash, Inc., 513 F. 2d 1324 (10th Cir. 1975).

27. Brennan v. Dillion, 483 F. 2d 1334 (10th Cir. 1973).

28. Brennan v. Wilson Bldg., Inc., 478 F. 2d 1090 (5th Cir. 1973).

29. Id. at 1095, quoting, Walling v. Jacksonville Paper Co., 317 U.S. 564, 571-72 (1943).

30. See also, Mitchell v. Sunshine Dep't Stores, Inc., 292 F. 2d 645, 647-49 (5th Cir. 1961) (employees, including elevator operators, handling and storing interstate merchandise at warehouse before distribution to

local retail stores held to be employees engaged in commerce); Suers de A. Magal & Co., Inc. v. Mitchell, 280 F. 2d 477, 480-81 (1st Cir.), cert. denied, 364 U.S. 902 (1960) (employees, including elevator operators and janitorial personnel, who received and stored goods within warehouse held to be engaged in commerce); Mitchell v. Royal Baking Co., 219 F. 2d 532, 533-34 (5th Cir. 1955) (employees who were handling goods shipped from out of state, including workers unloading and carrying same into warehouse, held to be engaged in commerce); McComb v. W. E. Wright Co., 168 F. 2d 40, 42 (6th Cir.), cert. denied, 335 U.S. 854 (1948) (employees who spent 25% of their time unloading and storing both intrastate and interstate (15% of total) goods engaged in commerce).

31. See text accompanying notes 25-31, supra.

32. 29 U.S.C. § 202(a) (Supp. 1975).

33. LAB. REL. REP. (BNA), 6 Wage and Hour Manual 91:1056d, § 784.18 (1976) (Interpretive Bulletin, Fishing and Seafood, by Wage-Hour Administrator, issued Aug. 11, 1970), (hereinafter, LAB. REL. REP.)

34. See 29 U.S.C. § 206(b) (Supp. 1975) and 29 U.S.C. § 207(a)(2) (Supp. 1976) (emphasis added). See also, e.g., Brennan v. Ventimiglia, 356 F.Supp. 281 (N.D. Ohio 1973).

35. 29 U.S.C. § 203(a) (Supp. 1975). Accord: Falk v. Brennan, 414 U.S. 190 (1973).

36. 29 U.S.C. § 203(a)(1) (Supp. 1975).

37. See text accompanying notes 32-34, supra.

38. Hodgson v. University Club Tower, Inc., 466 F. 2d 745 (10th Cir. 1972) (ownership by different corporate entities not determinative of question of existence of enterprise); Shultz v. Mack Farland & Sons Roofing Co., 413 F. 2d 1296 (5th Cir. 1969) (fact that single individual dominated two corporations which engaged in related activities and had common business purposes of Act's coverage); Wirtz v. Barnes Grocer Co., 398 F. 2d 718 (8th Cir. 1968) (existence of separate corporations does not insulate what would otherwise be considered "enterprise" under Act).

39. 29 U.S.C. § 203(k) (Supp. 1975).

40. Falk v. Brennan, 414 U.S. 190, 196 (1973).

41. Brennon v. Arheim & Neely, Inc., 410 U.S. 512, reh. denied, 411 U.S. 940 (1973).

42. Id. See also, Wirtzv. Savannah Bank & Trust Co., 362 F. 2d 857 (5th Cir. 1966) (real estate and leasing activities considered part of banking enterprise since incidental to or arising from bank's financial and investment activities); Hodgson v. Eunice Sryserette, 368 F. Supp. 639 (D.C. La. 1973) (slaughterhouse which was primarily wholesale outlet and retail grocery store which purchased cuts from slaughterhouse constitute single enterprise since under common control and activities are related); Hodgson v. University Club Tower, 466 F. 2d 745 (10th Cir. 1972) (operation of hotel and operation of apartment house held to be "related activities" so as to constitute single enterprise where both operations under common

control).

43. 29 U.S.C. § 203(s)(1) (Supp. 1975). See text accompanying note 37, supra.

44. S. REP. No. 1487, 89th Cong. 2d Sess., 7-8 (1960).

45. Falk v. Brennan, 414 U.S. 190, 197 (1973).

46. 29 U.S.C. § 213(a)(5) (1965).

47. E.g., Mitchell & Lublin, McGaughy & Assoc., 358 U.S. 207 (1959); Brennan v. Plaza Shoe Store, Inc., 522 F.2d 843 (8th Cir. 1975); Shultz v. Mack Farland & Sons Roofing Co., Inc., 413 F.2d 1296 (5th Cir. 1969).

48. Powell v. United States Cartridge Co., 339 U.S. 497, 515 (1949).

49. E.g., Arnold v. Ben Kanawsky, Inc., 361 U.S. 388, reh. denied, 362 U.S. 945 (1960); Mitchell v. Kentucky Finance Co., 359 U.S. 290 (1959); Brennan v. Southern Productions, Inc., 513 F.2d 740 (6th Cir. 1975).

50. E.g., Hamblen v. Ware, 526 F.2d 476 (6th Cir. 1975); Skipper v. Superior Dairies, Inc., 512 F.2d 409 (5th Cir. 1975); Brennan v. Texas City Dike & Marina, Inc., 492 F.2d 1115, reh. denied, 494 F.2d 1296, cert. denied, 419 U.S. 896 (1974).

51. Phillips v. Walling, 324 U.S. 490, 493 (1945).

52. E.g., Hodgson v. Colonnades, Inc., 472 F.2d 42 (5th Cir. 1973); Snell v. Quality Mobile Home Brokers, Inc., 424 F.2d 233 (4th Cir. 1970); Wirtz v. Jernigan, 405 F.2d 155 (5th Cir. 1968).

The employer carries the burden of proving an exemption's applicability to a particular factual situation. E.g., Gelstrap v. Synalloy

Corp., Indus. Piping Supply, 409 F. Supp. 621 (D.C. La. 1976).

53. Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 390, reh. denied, 362 U.S. 945 (1960).

54. E.g., Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944), accord, Maneja v. Waialua Agric. Co., 349 U.S. 254 (1954).

55. Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 618 (1944).

56. 29 U.S.C. § 213(a)(5) (Supp. Sept. 1976). For the text of this section, see text accompanying note 47, supra.

57. See, e.g., Mitchell v. Myrtle Grove Packing Co., 217 F.2d 952 (5th Cir. 1955), rev'd per curiam, 350 U.S. 891 (1955).

58. Mitchell v. Trade Winds, Inc., 289 F.2d 278 (5th Cir. 1961); See also, McComb v. Consolidated Fisheries Co., 174 F.2d 74 (3d Cir. 1949); Waller v. Humphreys, 133 F.2d 193 (5th Cir. 1943).

59. Of course, an employee directly participating in an activity named in § 13(a)(5) will be exempted from coverage.

60. McComb v. Consolidated Fisheries Co., 174 F.2d 74 (3d Cir. 1949).

61. Dize v. Maddrix, 144 F.2d 584 (4th Cir.), aff'd, 324 U.S. 697 (1944).

62. Johnson v. Johnson & Co., 47 F. Supp. 650 (D.C. Ga. 1942). It should be noted that the Labor Department has taken a contrasting view of such a situation and would exempt an employee engaged in "loading and unloading" "only when performed by [an] employee employed in the procurement activities enumerated in § 13(a)(5)." LAB. REL. REP., supra, n. 34 91.1056 1, S 784, 125.

63. E.g., Mitchell v. Trade Winds, Inc., 289 F.2d 278 (5th Cir. 1961).

64. See, e.g., Maneja v. Waialua, 349 U.S. 254 (1955); Farmers' Reservoir Co. v. McComb, 337 U.S. 775; Wirtz v. Carstedt, 362 F.2d 67 (9th Cir. 1966); Mitchell v. Stinson, 217 F. 2d 210 (1st Cir. 1954).

65. 29 U.S.C. § 213(a)(5) (1965).

66. Walling v. W. H. Haden Co., 153 F.2d 196 (5th Cir.), cert. denied, 328 U.S. 866 (1946); Fleming v. Hawkeye Pearl Buttan Co., 113 F.2d 52 (8th Cir. 1940).

67. Dize v. Maddrix, 144 F.2d 584 (4th Cir.), aff'd, 324 U.S. 697 (1944).

68. The Labor Department has taken the position that, as an enforcement policy, the commodity will be deemed to contain a substantial amount of nonaquatic (i.e., non-exempt) products if more than 20% of a commodity consists of products other than those aquatic products specified in § 13(a)(5). (Interp. Bull. p. 91:1056i).

69. See, e.g., Wirtz v. Chesapeake Bay Frosted Foods Corp., 220 F. Supp. 586 (D.C. Va. 1963), aff'd, 336 F.2d 123 (4th Cir. 1964); Walling v. Public Quick Freezing & Cold Storage Co., 62 F. Supp. 924 (D.C. Fla. 1945).

70. U.S.C. § 213(a)(5) (1965).

71. Opinion p. 91:058.

72. See, Overnight Motor Transportation Co. v. Missel, 316 U.S. 572 (1942); Mitchell v. Hunt, 263 F.2d 913 (5th Cir. 1959); Mitchell v. Stinson, 217 F.2d 210 (1st Cir. 1954).

73. 29 U.S.C. § 213(a)(5) (1965).

74. Mitchell v. Stinson, 217 F. 2d 210 (1st Cir. 1954). An employee's work-week is considered to be a fixed and regularly recurring period of 168 hours. In other words, it is deemed to be seven consecutive 24 hour periods. LAB. REL. REP., supra, n. 34, 91:1056i-j, § 784.114.

75. Mitchell v. Stinson, 217 F. 2d 210 (1st Cir. 1954).

76. For enforcement purposes, nonexempt work will be considered "substantial" in amount if it constitutes more than 20% of the time worked by the employee in a given work week. See, Mitchell v. Stinson, 217 F. 2d 210 (1st Cir. 1954). See also, LAB. REL. REP., supra, n. 34, 91:1056j, § 784.116.

77. E.g., Tobin v. Blue Channel Corp., 198 F. 2d 245 (4th Cir. 1952).

78. See, Anderson v. Mount Clemens Pottery Co., 328 U.S. 680 (1946); Wirtz v. First State Abstract & Insurance Co., 362 F. 2d 83 (8th Cir. 1966); Mitchell v. Owen, 292 F. 2d 71 (6th Cir. 1961); Hogan v. Goldberg, 291 F. 2d 249 (9th Cir. 1961).

C. THE RIGHT OF FISHERMEN TO RECOVER FOR INJURIES - THE JONES ACT AND STATE WORKMEN'S COMPENSATION LAWS.

I. General Discussion

Several remedies are available to fishermen for injuries suffered in the course of employment. The problems to be dealt with here involve the rights of fishermen to recover damages under the Jones Act and the availability of the workmen's compensation statutes to injured fishermen.

II. The Jones Act

The Jones Act[1] is legislation incorporating seamen into the Federal Employees Liability Act[2] [FELA]. Historically, an action by a seaman to collect damages for injury suffered in his employment came under the common law remedies of maintenance and cure or unseaworthiness. Under maintenance and cure, a shipowner is responsible for any injury which occurs or any illness which manifests itself while the seaman is under articles. It is required, regardless of fault, unless the condition is a result of the seaman's gross negligence or unless it existed at the time he signed on and was concealed by him.[3] The concept of unseaworthiness in personal injury matters contemplates that a ship's hull, gear, appliances, ways, appurtenances and manning will be reasonably fit for its intended use.[4]

Traditionally, there was no provision in these remedies for a seaman to recover indemnity for the negligence of the master, or any member of the crew.[5] The purpose of the Jones Act was to provide a remedy for such negligence so that seamen would have the same remedies for negligence as other

tort victims.[6]

The Act gives to a seaman, who is an employee[7] and the member of a crew of any vessel, the right to maintain an action at law, with a jury for personal injuries suffered in the course of employment. In case of death, an action for damages at law may be maintained by the deceased's personal representative. At the seaman's option an action may be brought without a jury in Admiralty. In either case, recovery is based solely on negligence and may be maintained only against a seaman's employer.[8]

A literal reading of the Act indicates that it is a negligence statute. However, it eliminates or modifies affirmative defenses that may ordinarily be available in a negligence action.[9] The fellow servant rule, which would bar recovery when the injury is the result of a fellow employee, is abolished.[10] Contributory negligence acts only as comparative negligence to mitigate damages, and assumption of risk serves only as a consideration in determining comparative negligence.[11]

In order to receive damages, the injured employee must establish a casual relationship between his injury and his employer's negligence. The burden of proof is not large and the standard for both the Federal Employees Liability Act and the Jones Act was set forth in Rogers v. Mo. Pac. Railroad,[12] an FELA case:

> Under this statute, the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the

slightest, in producing injury or death.

Res ipsa loquitur is also available to lighten the burden of proof. Therefore, a showing of injury due to circumstances that could have been by the negligence of the employer may allow recovery.[13]

Recovery is not limited to injuries suffered on board ships. Land based injuries, if suffered in the course of employment by a seaman, may also be indemnified. The Supreme Court has noted:

> There is nothing in the legislative history of the Jones Act to indicate that its words 'in the course of employment' do not mean what they say or that they were intended to be restricted to injuries occurring on navigable waters.[14]

Who is a Seaman for Jones Act Purposes.

Traditionally, the definition of seaman under maritime law was limited to those doing the work of "the Ancient Mariner." The courts developed a three pronged test defining the requirements; first, the vessel upon which the individual was employed had to be in navigation; second, the person had to have a permanent connection with the ship; and third, the individual's function had to be to aid in navigation.[15]

Under the Jones Act the definition of seamen has been less strict. The parameters, in the context of the three pronged test noted above, now seem to be that the ship be an instrument of commerce or transportation on navigable waters (as opposed to being out of service), that the employee has a more or less permanent connection with the ship (as opposed to doing temporary maintenance or repair while docked), and that the employee's duties pertain to the operation

of the vessel or that they forward its enterprise.[16] Fishermen were considered seamen for purposes of recovery under the maritime law before the Jones Act[17] and there seems to be no contest as to their eligibility for Jones Act benefits.[18]

III. State Workmen's Compensation Laws

As previously noted,[19] recovery under the Jones Act is predicated upon negligence. This contrasts with state workmen's compensation acts which operate upon a strict liability standard, but which also serve to limit the liability of the employer. As a result of the differences in the liability standard, there are circumstances in which a fisherman who has suffered injury or death without any negligence involved may be without a remedy unless workmen's compensation statutes apply.[20]

In Mississippi, workmen's compensation benefits are not available to maritime employees because they are excluded by statute.[21] However, in states which do not so specifically exclude maritime employees, the rule is less clear.

IV. The Jenson Rule

In reaction to a New York statute providing workmen's compensation for stevedores, the United States Supreme Court held, in S. Pacific Co. v. Jenson,[22] that state regulations of maritime employment would prejudice the uniform application of maritime law. The court ruled that under provisions of Article III par. 2 and Article I par. 8 of the Constitution of the United States, Congress has paramount power to fix and determine the maritime law, and that the state acts applying workmen's compensation to maritime employees were unconstitutional.

Additionally, the court ruled unconstitutional two attempts by Congress to give claimants the right to collect under state acts.[23]

The Jenson rule set out a geographical boundary to indicate exclusive federal jurisdiction. Injuries occurring on land were within state jurisdiction and injuries on the water were within exclusive federal jurisdiction.[24] Although the rules appears simple, the exceptions that have been carved out have caused inconsistent results.

V. Local Concern Doctrine

The major exception to Jenson has been the local concern doctrine, the basis of which is that the character of the employment may control the compensation allowed as opposed to the location of the injury.[25] Certain types of employment, although maritime, do not have a significant relationship to commerce or navigation. Thus, a carpenter working on a partially completed ship was allowed recovery under a state workmen's compensation act[26] and a crab fisherman working for a local company and who put out his traps less than a mile from shore was allowed to collect state benefits because his activities were merely a matter of local concern and would not materially prejudice the uniformity of maritime[27] law. Their employment was considered maritime-but-local.

On the other side of the coin, a deckhand cleaning ships in a harbor was denied workmen's compensation in an opinion which refused to recognize the local concern doctrine.[28]

With only a few exceptions, one of which has been noted above,[29] the local concern doctrine has been primarily employed when the injured worker

is not within the class of traditional maritime employees. It has primarily been used in Longshoremen's and Harbor Workers Compensation Act [LHWCA] cases and its vitality is in doubt as a result of the twilight zone theory.

Twilight Zone Theory.

The twilight zone theory is an offshoot of the local concern doctrine that was first enunciated in the LHWCA case of Davis v. Dept. of Labor and Industries of Washington.[30] It was applied, by the fifth circuit, to a workmen's compensation claimant in the case of Maryland Casualty v. Toups.[31] Recognizing the possibility of a gap wherein a claimant may be excluded from both Jones Act compensation and workmen's compensation, even though his activity may be land based, the court in Toups incorporated Davis and held that a workmen's compensation award may be available even though a Jones Act remedy would have been available if negligence could have been proved. Decedent who was captain and crew of a vessel used to carry pilots out to sea-going ships, fell off a dock while making fenders for his vessel. The court, noting that there was no negligence upon which to base a Jones Act claim, held nonetheless that the accident was a matter of local concern and to award compensation would not interfere with maritime law.

The nature of this theory is that the injury occurred in that twilight zone in which it is difficult to determine whether or not maritime or state law will apply. As a result of this difficulty, a heavy weight is given to a jury determination of whether or not to apply state law.

Cases in either of these two areas, local concern and twilight zone, are few and those that are, seem to be a result of the interpolation of LHWCA cases

to Jones Act situations. The reaction of commentators as to the appropriateness of the remedies is mixed and further clarification is needed before a definite statement of the law in this area could be correct.

CONCLUSION

Fishermen are clearly eligible for recovery for injuries in a Jones Act suit; however, the judicial bar against joining a Jones Act claim and a claim for unseaworthiness has been eliminated and a plaintiff may plead both.[32] Now since Moragne v. States Marine Lines, Inc.[33] a death action may be maintained under general maritime law.

Also the doctrine of unseaworthiness has been substantially expanded to overlap traditional Jones Act negligence with a rule bordering on strict liability. Beginning with Mahnicke v. Southern S.S. Co.,[34] the court has held that unseaworthiness included "operating negligence." It appears, therefore, that the Jones Act and unseaworthiness have practically merged. A major difference is that under the Jones Act negligence standard, reasonable care by the employer is required. Under unseaworthiness, the owner is under an absolute duty to provide a seaworthy ship. Under these circumstances, the principal reasons for pleading a Jones Act claim may be to get a jury trial, which is not available in Admiralty court.

The need for workmen's compensation seems to be primarily one of perspective. With the expansion of the traditional remedies, the chief proponents of applying workmen's compensation to seamen appear to be employers, who see it as a means of limiting their liability.

However, as indicated in Maryland Casualty Co. v. Toups,[35] there are still areas where a gap in coverage may exist where an employee may be excluded from Jones Act compensation and workmen's compensation. Any interpretation of the cases in the local concern and twilight zone is difficult; one commentator has called them a "wilderness."[36] There seems little hope of clarifying the issue until the Supreme Court acts. As was noted earlier, the Supreme Court cases, and the majority of lower court cases, have been concerned with the Longshoreman and Harbor Workers Compensation Act and not with the Jones Act. Until the difficult issue of the constitutionality of these approaches is resolved, few conclusions can be definitely drawn.

FOOTNOTES

1. 46 U.S.C. § 688 (1970).

2. 45 U.S.C. §§ 51-60 (1970).

3. G. GILLMORE and C. BLACK, THE LAW OF ADMIRALTY, pp. 281-325 (2d ed. 1975).

4. 1 M. MORRIS, MARITIME PERSONAL INJURY, § 29 at 57 (2nd ed. 1966). However, this, or any other definition of unseaworthiness would be inadequate because of the changing nature of the concept. See note 34, infra.

5. The Osceola, 198 U.S. 158, 23 S. Ct. 483 (1903).

6. G. GILLMORE and C. BLACK, supra note 3, § 621 at 329.

7. The Act does not create any rights in favor of one whose relationship is that of an independent contractor. Larsen v. Lewis-Simas-Jones Co., 29 Cal. App. 2d 83, 84 P. 2d 296 (1938).

8. An Act Named Jones, 20 LA. BAR JOURNAL 95, 96 (1972).

9. The Case for a Federal Workmen's Compensation Act to Cover Inland Waterways Seamen, 17 ST. L.U.L.J. 475, 488 (1972-73).

10. Id.

11. Id. at 489.

12. 352 U.S. 500 (1957), Followed for the Jones Act in Villaneuva v. Cal. Tanker Co., 187 F.Supp. 591, 593 (D.N.J. 1970).

13. Johnson v. United States, 333 U.S. 46 (1948).

14. O'Donnell v. Great Lakes Dredge and Dock Co., 318 U.S. 36, 63 S. Ct. 488, 87 L.Ed. 596 (1943). See also Hopson v. Texaco, Inc., 383 U.S. 262, 86 S.Ct. 765, 15 L.Ed. 740 (1966).

15. Bodden v. Coordinated Caribbean Transp. Inc., 396 F.2d 273, 274 (5th Cir. 1966).

16. The term seaman has been expanded to the point where it covers practically any worker, from helmsman to bartender, who sustains an injury while working on almost any structure that floats or once floated. 3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION, § 90.22, p. 470 (1971).

17. The Carrier Dove 97 F. 111.

18. The Montague, 53 F. Supp. 548 (D.C. Wash. 1943). Cordoba Fish and Cold Storage Co. v. Estes, 370 F.2d 180 (Alaska 1962).

19. See note 9, supra.

20. See generally, A. LARSON, supra note 16, § 90.41.

21. MISS. CODE ANN. § 71-3-5 (1972); See, e.g., Valley Towing v. Allen, 236 Miss. 51, 107 So.2d 538 (1959).

22. 244 U.S. 205, 37 S.Ct. 524 (1917).

23. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S. Ct. 438 (1920), State of Washington v. W. C. Dawson and Co., 264 U.S. 219, 44 S. Ct. 302 (1924).

24. The Admiralty Clause and State Workmen's Compensation For Fishermen, 26 MAINE LAW REVIEW 345, 349.

25. A. Larson, supra note 16, § 90.30.

26. Grant-Smith Porter Co. v. Rohde, 257 U.S. 469 (1928).

27. Cordoba Fish and Cold Storage Co. v. Estes, 370 F. 2d 180 (Alaska 1962).

28. Kibadeaux v. Standard Dredging Co., 81 F. 2d 670 (5th Cir. 1936).

29. Note 27, supra.

30. 317 U.S. 249, 63 S. Ct. 225 (1942).

31. 172 F. 2d 542 (5th Cir. 1949).

32. G. GILLMORE and C. BLACK, note 3, supra, at 343.

33. 398 U.S. 375, 90 S. Ct. 1772 (1970).

34. 321 U.S. 96, 64 S. Ct. 455 (1944).

35. 172 F. 2d 542 (5th Cir. 1949).

36. GILLMORE and BLACK, supra note 3 at § 65, p. 280.