



MARITIME LAW ASSOCIATION OF THE UNITED STATES

Meeting in New York, New York

Committee on Stevedores, Marine Terminals and Vessel Services

April 30, 2015

The Committee held its annual meeting at 10:00 a.m. at Thursday, April 30, 2015 at Holland and Knight, 31 West 52nd Street, New York, New York and was chaired by F. Nash Bilisoly. Alex Giles attended as Vice Chair of the Committee. Committee Secretary Deborah C. Waters kept the minutes.

John Bradley attended the meeting telephonically.

Welcome

Nash Bilisoly, Esquire, Vandeventer Black LLP, Norfolk, Virginia

Mr. Bilisoly welcomed members of the Committee and thanked Holland & Knight for the generous use of its conference room and for providing refreshments to the Committee.

He stated based upon the lengthy legal materials and case synopses always provided by Thomas Langan, Committee leadership obtained CLE credit for the meeting. The content and written materials provided at the meetings likely will qualify for credit in all states.

Legal Update

Tom Langan, Risk Manager, Weeks Marine, Inc., Cranford, New Jersey

10:05 – 11:05

Mr. Langan presented a 41-page Case Law Update, hard copies of which were provided at the Committee meeting. Prior to the Committee meeting, the Update was electronically uploaded to the MLA website and filed among the official documents of the Committee. The Case Law Update is hereby incorporated into these minutes by reference to the electronic record on the MLA Committee document archive. During his presentation, Mr. Langan reviewed many cases and statutes, highlights of which are below. Members of the Committee participated in a lively discussion concerning several of the cases, some of which are noted below.

- Mr. Langan noted legislation is pending before the South Carolina legislature to end concurrent jurisdiction of the South Carolina's Worker's Compensation Act in and the Longshore and Harbor Workers' Compensation Act. The bill is expected to pass.
- Mr. Langan noted there is proposed rule making filed by OWCP regarding internal electronic communication. The comment period ends May 11, 2015.
- IRS has increased the federal mileage rate to \$.575 per mile and \$.23 per mile for medical travel.
- Department of Labor: The U.S. Department of Labor closed its Baltimore office effective September 30, 2014; the Fourth and Fifth Compensation Districts have been consolidated in Norfolk.
- *Naquin v. Elevating Boats, LLC*, 744 F.3d 927 (5th Cir. 2014): Mr. Langan noted on February 23, 2015, the Supreme Court denied the petition for certiorari in this case, which concerns a determination of seaman status. The case was the subject of extensive discussion at the Spring 2014 meeting of the Committee and again at this meeting. The jury found the plaintiff was a seaman and awarded him a verdict which the court then remitted. Later the p & i carrier appealed coverage and the court held it did not owe coverage because the seaman was on land at the time of the injury.
- *Dize v. Association of Maryland Pilots*: Mr. Langan noted on October 6, 2014, the Supreme Court denied the petition for certiorari in this case, which concerns a determination of seaman status regarding the *Chandris* 30% rule. The case was the subject of extensive discussion at the Spring 2014 meeting of the Committee. Again, the Committee entered into another lively discussion concerning the case regarding whether it was rightly or wrongly decided and as it relates to the creation of lack of business certainty with regard to ship owners' insurances.
- On December 24 2014, a petition for certiorari in *McBride, et al. v. Estis Well Services, LLC*, holding that punitive damages for unseaworthiness are not available. We are awaiting a decision.
- *Hicks v. Tug Patriot, et al.*, overturned prior Second Circuit precedent in the maintenance and cure context holding that attorneys fees are available in addition to punitive damage.
- *Kealoah v. Director, OWCP* [Leeward Marine]: Ninth Circuit adopted a chain of causation test v. irresistible impulse test for coverage determination. The court stated the proper inquiry is whether the worker's work-related injury caused his attempt at suicide.
- *Continental Terminals, Inc. v. Waterfront Commission of New York Harbor*. The Terminal sought an injunction declaring its terminal was not within the jurisdiction of the Commission and the Waterfront Commission sought a determination the terminal is within the jurisdiction of the Commission. The Court ruled in favor of the Commission.
- *In Re: Weeks Marine, Inc.* Court grants borrowed servant status to a crane operator such that Weeks Marine was responsible for his benefits.

[CLE Code 1943 was given at the end of Mr. Langan's presentation. Mr. Bradley acknowledge it.]

Frescati Shipping Co. v. CITGO Asphalt Refining Co. (ATHOS I)
Alexander Giles, Baltimore, MD

Mr. Giles reported on the Frescati Shipping case which held safe berth warranty extends beyond the berth. The case has been remanded from the Third Circuit back to the trial court and it is in trial as of the date of this meeting. Trial began March 6, 2015.

Legislative/Regulatory Update. Deferred because it was covered by Mr. Langan.

Freight Forwarders/Custom House Brokers Subcommittee
Alberto J. Castaner-Padro

Mr. Castaner-Padro presented the Subcommittee report. He stated on April 16, 2015, the National Customs Brokers and Forwarders Association of America (the “Association”) filed a petition before the Federal Maritime Commission to initiate a rule making that would expand the Negotiated Rate Arrangements (NRA) exemption in 46 CFR Part 532 to allow: (1) inclusion of economic terms beyond rates into NRAs; (2) modification of NRAs at any time upon mutual agreement between NVOCCs and their customers; and (3) revise 46 CFR Part 531, NVOCC Negotiated Service Arrangements (NSA) to either eliminate the filing and essential terms publication requirement of NSAs or eliminate 46 CFR Part 531 in its entirety.

Mr. Castaner-Padro further reported on April 23, 2015, the FMC issued a Notice allowing interested persons to submit views or arguments in reply to the petition before June 8, 2015.

Legislative/Regulatory Update

No report; the issues were all covered and discussed in the Legal Update provided by Mr. Langan.

Vessel Repairs and Shipbuilding Subcommittee

No Report. The Committee does not currently have a Chair.

Port Productivity and Labor Report
Deborah Waters, Esquire, Waters Law Firm, Norfolk, Virginia

Deborah Waters reported as follows:

Port Congestion: Ports across the country have been stressed to maintain or increase cargo throughput in the face of increased cargo volume, labor problems on the West Coast and larger ships discharging a greater number of containers during a single port call. Every large port has been called upon to increase it through-put to meet the demand. As a result, the Federal Maritime Commission held a number of conferences to discuss strategies for dealing with the crisis.

Port Volume: American Association of Port Authorities reported the U. S. Department of Transportation forecasts that the amount of total freight moved through U.S. ports will increase

by 50% by the year 2020.¹ It also reported 23 million jobs are generated because of seaport activity.²

American Association of Port Authorities had its annual meeting in Washington, D.C. earlier this month and reported the estimated cost of repairing the aging U.S. transportation infrastructure – including roads, rail, tunnels and bridges - will be \$28.9 billion. The AAPA asserts transportation infrastructure is crucial to enable our seaports to handle efficiently their expected cargo volumes. At the present time, port cargo activity accounts for approximately one quarter of U.S. economic activity.

Panama Canal Expansion: United States marine terminals are feverishly preparing for the opening of the improved Panama Canal. The completion date for expansion of the Panama Canal has been pushed back yet another time, from April 2015 to April 2016. The project includes deepening and widening of the Canal as well as addition of lock capacity, all of which is expected to double its potential traffic flow. Canal improvements will permit wider vessels carrying up to 13,000 TEU's per vessel to traverse the route. The channel currently accommodates vessels carrying only 5,000 TEUs.

Litigation against the New York/New Jersey Waterfront Commission:

The cases and legislative action described below are evidence of the ongoing battle between labor and management on one hand and the Waterfront Commission of New York Harbor on the other:

- *Continental Terminals, Inc. v. Waterfront Comm'n of New York Harbor*, __ F.3d __, 215 WL 1499357 (2d Cir., April 2, 2015)

In this case, a warehouse operator in Jersey City, New Jersey sought a declaratory judgment that its operation was not within the jurisdiction of the Waterfront Commission of New York Harbor. The Commission filed a counter suit seeking a declaration that the warehouse operation was within the jurisdiction of the Commission.

The facts were that at the pier large gantry cranes unloaded from large vessels containers of coffee that were then moved to a place of rest on the marine terminal. At a later time, Continental picked up its containers from the terminal and transported them to its warehouse where its employees stripped the containers of their cargo and put it in the warehouse and held it for its ultimate purchaser. In the process, Continental would also weigh, sort and repackage some of the cargo.

Under the enabling statute, *N.Y. Unconsol. Laws* § 9806, the definition of “waterfront facility” includes a “warehouse, depot or other terminal that is located within 1,000 yards of any pier. . . and . . . is used for waterborne freight in whole or in part.” In this case, the parties disputed the definition of “pier” and whether the term was limited to structures located on the water or

¹ American Association of Port Authorities, Website, aapa-ports.org, “U.S. Public Port Facts,” April 29, 2015.

² Id.

whether it included the container yard. Of course, a measurement from the edge of the waterside area to the edge of the Continental property was more than 1000 yards; a measurement from the landside edge of the container yard to the Continental property was considerably less than 1000 yards. Upon consideration of the matter, the Court declared the container yard fit the definition of a “wharf³” and found the meaning of “pier” to be synonymous with the meaning of “wharf” and that it all was contained within the marine terminal.⁴

The Court concluded the warehouse operator engaged in stevedoring operations and that the warehouse fell within the definition of “other waterfront terminal” within the meaning of the Waterfront Commission Act. Accordingly, the Court affirmed the decision of the District Court holding the warehouse operations within the jurisdiction of the Commission.

- *New York Shipping Association, Inc., Metropolitan Marine Maintenance Contractors’ Association, Inc., and International Longshoremen’s Association, AFL-CIO, et al., v. Waterfront Commission of New York Harbor*, Third Circuit Court of Appeals, Consolidated Case Numbers 14-3956, 14-3957, 14-3958, 14-4278, 14-4279 and 14-4422.

On September 17, 2014, New York Shipping Association, Inc., Metropolitan Marine Maintenance Contractors’ Association, Inc. and International Longshoremen’s Association, AFL-CIO, *et al.*, filed notices of appeal from orders entered in the United States District Court for the District of New Jersey in which the District Court granted Motions to Strike filed by the Waterfront Commission of New York Harbor.

In sum, the employers and labor jointly sought injunctive relief for refusal of the Waterfront Commission to accept certification for hiring 682 additional employees to work in and around the marine terminals to support the terminals’ cargo operations. The Commission refused to approve the additional employees alleging the collectively-bargained method by which employees are called to work each day discriminates based upon race and gender. The NYSA and ILA alleged the Commission interfered with the collective bargaining process and the resulting system of hiring and employing men and women on the waterfront. The NYSA and ILA further alleged the Commission exceeded its legislative grant of authority when it declared the hiring and registration system undesirable and refused to certify the new hires given the fact the very system it declared discriminatory was specifically protected in the original legislative Compact. The cases are fully briefed and pending before the Third Circuit and are awaiting a decision. In the meantime, the Port is undermanned and cargo operations are dramatically behind schedule.

New Jersey Votes to Withdraw from the Waterfront Commission.

- March 9, 2015: The New Jersey Assembly voted 75-0 to withdraw the State of New Jersey from the Waterfront Commission of New York Harbor, stating the Commission no longer

³ The court quoted Oxford-English Dictionary Vol. XX 185 (2d Ed. 1989) as follows, “Wharf” “a place raised or otherwise marked out on which stuff is deposited for subsequent removal to another place.”

⁴ The Court ignored the fact that its own definition required Continental’s warehouse to be under the same common ownership and control as the pier but it was not.

serves a purpose and impedes commerce. The Senate had already passed the same bill. As of April 30, 2015, Governor Christie had not yet signed the bill into law.

- The Waterfront Commission contends the action is unconstitutional and that New Jersey cannot unilaterally withdraw from the Compact without the agreement of the State of New York.
- The Commission was established in 1953 to combat organized crime on the waterfront. The author of the bill asserted the powers of the Commission are redundant with those of the State Police so the Commission is no longer necessary. Furthermore, Employers are assessed a 2% payroll tax on all port employee hours to pay for the operation of the Commission, adding to its unpopularity and increasing the cost to ship cargo through New York

Labor:

International Longshore and Warehouse Union: Pacific Maritime Association and ILWU began the collective bargaining process in April, 2014 and reached a tentative agreement on February 20, 2015. On April 2, 2015, ILWU delegates at its convention voted to recommend ratification of the tentative agreement. On May 22, 2015, Union membership will vote on whether to accept the terms and conditions of the tentative agreement. The ILWU represents approximately 20,000 dockworkers in 29 ports on the West Coast of the United States.

International Longshoremen's Association: High-ranking representatives of USMX and ILA met in Florida in February to discuss, among other things, preparations for resumption of collective bargaining in ample time to reach an agreement prior to the time of the Master Contract's expiration on September 30, 2018. The parties agreed to discuss a possible extension of the contract's existing terms.

Fall Meeting

Mr. Bilisoly noted the MLA Fall meeting will be held in Bermuda. He asked that participants plan to go. The date, place and time will be announced when they have been determined.

Next Spring meeting 2016 will be jointly with CMI in New Orleans in conjunction with the 50th Anniversary of Tulane Admiralty Law Institute.

MLA will take the CLE information from members at today's meeting and each qualifying member will receive a New York CLE certification. The member will then apply for CLE credit with his own state.

The Executive Committee is concerned that the dinner head count is down from over 1300 to 800 participants. It is wondering whether changing the date from Thursday evening to Friday evening will make a difference. The consensus is that price of the dinner is the key to participation.

The meeting then adjourned at 12:05 p.m.