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MARINER RIGHTS

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INTRODUCTION

Protection of Seamen

õThe protection of seamen was one of the principal reasons for the development of admiralty[1] as a distinct branch of law. *[[1]The term "admiralty" refers to the federal courts that have jurisdiction over the nation's maritime affairs.]*

õTraditionally, the work of a seaman was difficult and extremely dangerous, requiring long stays away from home and exposure to the perils of the sea. From earliest times, maritime powers, therefore, enacted special protections for seamen as features of their maritime codes. In both the United States and Britain these protections go back over 200 years.

õAs a result of this solicitude[1] of the law for seamen, the hiring of mariners was a formal ritual. A government official[1] read the seaman his rights, and Articles of Agreement were signed initially by the Master, followed by each seaman in turní *[[1]**Vocabulary: Solicitude** = Anxious desire to care for (seamen)... [2]Congress eliminated the position of this government official, the "Shipping Commissioner" in 1978. The Master now performs his duties on vessels on international or intercoastal voyages.]*

õAlthough present law is less formal and quaint, there is still extensive regulation of the seamanøs contract of employment, working conditions and general welfare. The conditions of employment of seamen also have been the subject of numerous international conventions, most recently under the aegis of the International Labour Organization (ILO).ö[1] *[[1] Schoenbaum, T.J. Admiralty and Maritime Law, 3rd. ed., §4-1, p.194.]*

Seamen as Wards of the Admiralty

In the 19th and well into the second half of the 20th century, seamen were accorded certain protections that in effect made them õwards of the admiralty.ö

In 1942, in Garrett v Moore-McCormack Co., the Supreme Court laid down those principles that in a large measure explain the basis of the õwards of the admiraltyö theory:

õEvery court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and

complying; and are easily overreached. But courts of maritime law have been in the constant habit of extending toward them a peculiar protecting favor and guardianship. They are emphatically the wards of admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians and trusts with their trustees. They are considered as placed under the dominion and influence of men, who have naturally acquired a mastery over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted into the terms of every contract in which they engage. If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side which are not compensated by extraordinary benefits on the other, the judicial interpretation on the transactions is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that pro tanto the bargain ought to be set aside as inequitable.ö

Other aspects appear in Norris, M.J., The Law of Seamen, 4th. Ed., §24.2 as follows:

õMerchants are shrewd, careful, familiar with the forms of business, watchful and far-sighted in providing for their own interests; while seamen are ignorant, improvident, and necessitous, a most useful and necessary class of persons to a maritime and commercial people both in peace and war, gallant and fearless of personal danger but ***wholly unable to defend their rights against the superior knowledge, sagacity, and wealth of their employers***. They are therefore wisely, upon principles of public policy, as well as private justice, placed under the protection of the law. They are permitted to sue in forma pauperis because if they were not allowed to come into court in this way, but were required to find security for costs, like other parties, it would amount to a practical denial of justice. Their contracts with shipowners are narrowly watched and if any unusual stipulations are introduced, departing from the usual terms of the contract and renouncing any advantages which are secured to them by the general principles of the maritime law, they will be set aside unless they are reasonable in themselves and founder upon adequate consideration. If the shield of the law were not thus interposed to protect them from the consequences of their own improvidence, they would be liable from their carelessness, ignorance, and destitution to constant impositioní ö

õSeamen are not a class of men who ordinarily make provision against the future. On their return from a voyage they are usually dependent upon their wages for present support, and if they are withheld they ordinarily find themselves in a state of entire destitution, not only without present means to provide for their immediate and most pressing necessities, but without credit. If their employers choose to impose upon them hard terms, they are obliged to take what is offered them to meet their immediate wants or forthwith to reship in another vessel. ***They are thus placed too much in the power of the owners to be able to negotiate with them on equal terms***. If the owners choose to make use of that power to drive a hard bargain, and compel seamen to a settlement on unjust terms, both public policy and private justice require that such settlements be open to re-examination, so that men should not be deprived of just remuneration for their servicesí ö

Does All This Apply to Lower-Level Mariners?

The foregoing discussion deals with the general treatment of seamen by Courts of Admiralty ó Federal District Courts ó where seamen without the money to defend themselves may file suit õin pauperisö (literally, as paupers or poor people) and can receive assistance in defending their interests.. However, relatively few disputes involving our mariners ever seem to make it into Federal District Court.

Plantation Mentality

Many of our mariners complain that they are accorded few rights, that the Coast Guard brands them with an inferior label as õ***lower-level***ö mariners, and that their employers do not respect them and treat them disrespectfully. This õdisrespectö reflects some of the less-complimentary adjectives recited in the foregoing passages that imply that mariners must be treated like children that are incapable of correctly making important decisions and taking care of their own interests while others may well fit in that mold. The term õ***lower-level***ö was coined by the Coast Guard to refer to mariners who serve on vessels of less than 1,600 gross tons in contrast to those who serve on larger vessels.

When you apply for a job, you are told what your salary will be and what other õbenefitsö come with the job. Unless you belong to a union, there is no õbargainingö with your employer. When you sign on, you take whatever money and õbenefitsö your employer offers you on whatever terms they are offered and become an õ***employee at will***ö that may be fired for good cause or for no cause whatsoever.

Our Association calls this a õPlantation Mentalityö harking back to a time when slaves were totally dependent on the good will and generosity of the plantation owner. This leaves most of our lower-level mariners in the status of õemployees at willö ó although free to leave whatever job protection the õplantation ownerö may offer at any time and upon any disagreement with any aspect of the working conditions. Although we are not and never have been a labor union, we suggest that those mariners who seek to rise above this level and protect their own interests, form or join a labor union with other employees of the same company and collectively bargain for better conditions with their employer.

Basic Differences Between Upper and Lower Levels

Most õ***upper-level***ö mariners now hold college degrees and are licensed as third, second or chief mates or engineers and masters. Most õ***lower-level***ö mariners come up through the ranks and generally do not have college degrees. In fact, the Newman Report[(1)], that examined the education level in the coastal parishes of Louisiana in 1973 found the average of seventh-grade level for people employed in the transportation sector of the offshore mineral and oil industry. These two separate areas, upper and lower, have co-existed for years. *[(1)Refer to our Report # R-428-A,* Maritime Education and Training for Lower-Level Mariners. The Newman Report *on our website.]*

Upper-level mariners are generally union members while employers have conspired to ensure that their lower-level licensed mariners never have the opportunity to join a labor union. We have seen how low some employers would stoop and the expense to which they would go to prevent the growth of unions on the Western Rivers (1998-Pilots Agree) and in the Gulf of Mexico (1999-2003, Offshore Mariners United). This paints with a broad brush some basic differences between two groups of mariners and certainly sweeps over a number of exceptions.

Our Association hopes that the gulf between upper- and lower-level mariners will be eliminated. We watched upper-level mariners and four national maritime unions extend their help and friendship to assist our lower-level mariners at considerable expense for a number of years. Our Association recognizes and fully appreciates this gesture and the concrete support they gave us in founding the Gulf Coast Mariners Association in 1999 to serve as an independent õVoice for Mariners.ö If we accomplish anything, it will only be because these maritime labor unions under the guidance of the AFL-CIO gave us the guidance and impetus to take our first steps. Our õindependenceö refers to financial independence and in no way a rejects; rather it affirms that our õlower-levelö mariners must work together and stand on their own two feet!

"Lower-Level"

The Coast Guardøs old Merchant Vessel Personnel Division (G-MVP) coined the terms õupper-levelö and õlower-levelö to distinguish between license holders above and below the 1,600 gross tons benchmark. It was a simple choice to make for a number of reasons. Increasingly, upper-level mariners with õunlimitedö licenses are products of a state or federal maritime academy with a college degree. There are fewer and fewer õhawsepipersö who have come up through the ranks left in the upper-level license category.

õLower-levelö started out as a harmless term. However, over the years it became captive to the fact that many employers treat their mariners disrespectfully. Our Association never conducted a crusade against the term õlower-levelö because of its harmless origin in the Coast Guardøs ivory-tower bureaucracy that, for the most part, does not have the first hand knowledge or experience (and some donøt have the faintest clue) as to what our lower-level mariners do for a living. The same insensitive bureaucrats that created the term found a euphemistically and less offensive substitute in the words õlimited tonnageö that is becoming more common.

Merchant Marine Officers

Each license announces on its face that its holder is a **MERCHANT MARINE OFFICER**. Stop and consider the following example for a moment. Between May 21, 2001 and May 21, 2006 over 15,000 õOperatorsö of uninspected towing vessels became õMastersö or Mate/Pilotö of towing vessels and have a license announcing their status as a Merchant Marine Officers to prove it.

The dictionary defines an õofficerö as one who holds a position of rank or authority in the army, navy, or any similar organization, especially one who holds a commission. The U.S. Merchant Marine is a õsimilar organizationö as is the Coast Guard.

Those mariners who served in any branch of the military know the difference between officers and enlisted personnel and appreciate the difference. Those mariners who earned their licenses through years of experience and study are accorded the rank of a licensed officer and a piece of paper called a license to prove it. As such, you have

the rank (master, mate, pilot, engineer) and authority commensurate with this knowledge and experience to serve on vessels of a particular size or type.

The Coast Guard expects Merchant Marine Officers to carry out their sworn duties and take charge of the vessel or a particular watch or area (i.e., deck or engine) of that vessel. Officers must accept the responsibility that goes with the job and obey all laws and regulations. The point is that merchant marine officers are held to a much higher standard than ordinary seamen.

Our Association encourages our mariners to raise the standards of our lower-level Merchant Marine Officers. Higher standards explain, for example, why it is very difficult for an officer with a drug or DWI conviction to retain or regain his license after it is suspended or revoked. In the Coast Guard, an officer guilty of a proven drug violation would be drummed out of the service in disgrace ó end of career!

The Coast Guard has its own Administrative Law system to administer its regulations to offending merchant mariners, both officers and ratings...at least those mariners who hold Merchant Mariner Documents. However, many mariners who serve on rivers and inland waters and on coastwise vessels of less than 100 gross register tons do not hold Merchant Mariner Documents.

Disrespectful treatment of our mariners should gradually give way to a more enlightened approach as new regulations require basic and advanced training. Most companies are starting to comprehend that individual mariners can no longer afford the cost of training expenses to comply with new regulations since these costs can reach many thousands of dollars.

Unless the state or federal government decides to underwrite the costs of training,[1] vessel owners must do so or suffer from personnel shortages that strangle their business. Consequently, õthe companyö will have a much greater financial stake in its employees than in the past. However, until 1998 the only training most õlower-levelö mariners received was õon the jobö training commonly called õOJT.ö *[[1]Refer to our Report #R-428-E. GCMA Supports Proposed Forgivable Education Loan Program. 6p.]*

At some point, an aspiring deckhand might decide to õgo to schoolö and prepare for a license, become an able seaman or tankerman. Basic license training generally took two to three weeks and cost about $500 at a license-prep õcramö school. This represented the mariners õinvestmentö in his education while the years of service represented his õinvestmentö in his career. Unfortunately, little thought was ever given to properly preparing õlower-levelö engineers.[1] *[[1]Refer to our reports #R-401, Rev. 1,. Crew Endurance and the Towing Vessel Engineer – A Direct Appeal to **Congress**. 30p; Report #R-412, Towboat Engineer's Death Points to Need for Changes in the Law. 20p.; and Report #R-428-H. Maritime Education and Training: Lower-Level Engineering Programs. 23p.]*

Cram courses generally provided the bare minimal training that led to a Coast Guard exam and, if successful, a license or z-card endorsement.

Companies now have to pay for advanced training with their own money. They are starting to appreciate the cost of training a mariner to todayøs standards although some companies that tap state and federal training funds may continue to abuse their mariners until their outdated policies lead to the point where they can no longer man their vessels with reliably trained personnel.

The most important lesson in all traditional deck license exams was the õrules of the roadöí always a 90% subject. Way down on the bottom of the list, if it was there at all, were the õ***rules of the game***ö that covered laws and regulations every mariner should know. Since the Coast Guard never emphasized these rules on an exam, they often received little more than passing consideration. Compared with seamanship, boat handling, and piloting, learning about rules and regulations was a boreass subject most mariners were more than willing to readily admit they knew little about.

One problem that persists is that many mariners simply assume their employers know the laws, rules and õregsö and assume that it was simply part of running the business. After all, most companies have access to lawyers or have them on retainer to bail them out of legal difficulties. By knowing little about the laws and regulations covering the job, our lower-level mariners find themselves at the mercy of their employers who, in some cases, really know little more about õrules and regulationsö than their own employees.

Nevertheless, a lower-level marinerøs ***lack of knowledge of the laws and regulations*** that govern his job puts him at a permanent disadvantage. With an abundant supply of replacements, employers could pick and choose from a roomful of qualified candidates with the attitude that the company would bestow its benefits upon only the most worthy and desirable candidate(s).

Change is well underway. An abundant supply of õbodiesö or õlicensesö is no longer available anywhere in the maritime industry ó in this country or, for that matter, in the rest of the world. The pool of candidates can barely

support todayøs operations to say nothing of future projections. Wages, stagnant for a decade, increased dramatically in light of the shortage. The jobs that used to be õunskilledö now require more training than they did only 5 years ago.

The old (and illegal) practice of employers õcreatingö sea service time to license hopefuls off the street is coming to a close with the introduction of new rules and regulations for towing vessel officers as well as the STCW requirements for mariners who work offshore.

Companies and Human Resources Managers that continue to treat their employees as õboat trashö soon will find themselves at a very great disadvantage and will scrape the bottom of the barrel just to survive. Our Association recognizes companies with these antediluvian attitudes with a place in our Newsletterøs well-publicized Brown List.

Mariners "Rights" Are Based on Laws and Regulations

The reality of the situation is that our mariners receive their protection from laws passed by Congress and regulations promulgated by the Coast Guard based upon those laws rather than from the paternalism of an Admiralty Court ó though we appreciate it when the courts understand the problems our seamen face.

Although as American citizens each of us enjoys more rights and privileges than most other people living in this world, in the workplace we find many of the existing laws and regulations we encounter are not adequately enforced. Mariners have counted on the Coast Guard to enforce the laws and, in recent years, have been sadly disappointed. In addition, on almost 17,000 barges that are not inspected by the Coast Guard, OSHA has not done much better.[1] *[[1] Refer to our Report # R-426, Rev. 1. Report to **Congress**: Challenges Facing the Coast Guard's Marine Safety Program – Effectively Regulating the Towing Industry." 14p.]*

When the rules are enforced, they often appear slanted in a manner that relieves employers from their responsibilities rather than to benefit or even protect working mariners.

In our society, with each õrightö also comes an obligation. If you exercise your right to sit for a license and successfully earn that license, you will find the obligations accompanying that license can be very troubling because you are in an unenviable position of having to serve two masters, namely: 1)your employer and 2)the U.S. Coast Guard. It is important to understand the extent of both obligations and to protect any rights you may have.

SEEKING EMPLOYMENT: THE LOADED EMPLOYMENT APPLICATION

[Contribution courtesy of Michael E. Shelton, Esq]

This story started with an employment application that an Association member found so invasive of his privacy that he refused to fill it out and decided not to work for the company. He took his more than thirty years of service as a river pilot and went to work somewhere else...and sent us the õloadedö employment application to examine.

We asked our team of maritime attorneys whether the specific fifteen items called for in the application were "legal" questions to ask. Houston attorney Michael E. Shelton[1] provided responses to many of our questions. *[[1]Michael E. Shelton, Esq., 5615 Kirby Drive, Suite 300, Houston, TX 77005. Phone: (713) 807-0700; 1 (800) 423-9745; FAX: (713) 807-0713.]*

QUESTION #3. Have you ever been given a Coast Guard letter of warning or been assessed a civil penalty for violation of maritime or environmental regulations? If Yes, please explain.

QUESTION #4. Have you had a spill to the deck or water in the past 12 months? If Yes, where and when?
*[**Comment by Mr. Shelton:** Though a prospective employer is able to ask these questions, an applicant would not have to answer them. The practical effect of not answering is that employment would be refused.]*

QUESTION #6. I certify that the facts contained in this application are true and complete to the best of my knowledge. I understand that any falsified statements on this application or omission of fact on either this application or during the pre-employment process will result in my application being rejected, or, if I am hired, in my employment being terminated.
*[**Comment by Mr. Shelton**: I have run into this in suits where the seaman didn't tell the truth about some history and the defendant will invariably argue that if they had been told the truth the seaman would not have been hired, i.e., that this was a "threshold" requirement.]*

QUESTION #9. I voluntarily consent to all such examinations, screenings and investigation. I release (XYZ Company), its officers, employees and agents from any claims arising from any information obtained from such examinations, screenings and investigations.
*[**Comment by Mr. Shelton:** This would concern me. I can easily see an employer using this to "blackball" a seaman and with this language maybe get away with it.]*

QUESTION #10. Employment at (XYZ Company) is on an "at-will" basis and is for no definite period and may, regardless of the date or method of payment of wages or salary, be terminated at any time with or without cause. Other than the president of (XYZ Company), no supervisor, manager, or other persons, irrespective of title or position, has authority to alter the õat-willö status of your employment or to enter into any employment contract with you. Any agreement with you altering your at-will employment status must be in writing and signed by the President of XYZ Company.
*[**Comment by Mr. Shelton**: Texas is an "at will" state; this is legal here. **Additional NMA comment:** The same is true in Louisiana and in many other states. Some employees who work for a company for years often fail to realize the "at-will" status of their employment until it is too late. We recall p. 20 of our Sept./Oct. 2001 Newsletter where Captain Kevin D. Kelly received the "Silver Shaft Award" from ACBL after 26 years of service! A properly negotiated union contract will give company employees definite enforceable rights.]*

QUESTION #11. A consumer report and/or an investigative consumer report including information concerning your character, employment history, general reputation, personal characteristics, police record, education, qualifications, motor vehicle record, mode of living, and/or credit and indebtedness may be obtained in connection with your application for and continued employment with the Company. A consumer report containing injury and illness records and medical information may be obtained after a tentative offer of employment has been made. Upon timely written request of the Human Resources Department of the Company, and within 5 days of the request, the name, address and phone number of the reporting agency and the nature and scope of the consumer report will be disclosed to you.
*[**Comment by Mr. Shelton**: This concerns me. It is way too much Big Brother! What possible concern could a credit rating be for qualifications for a seaman to his employer? Under Item #9, the employer could disclose this to the world with impunity. **Additional NMA Comment:** A credit report shows an employer how desperate you may be for a job with his company and, indirectly, how far he can push you once you are employed.]*

QUESTION #13. I authorize any investigator or representative of the Company bearing this release to obtain information from schools, residential management agents, employers, criminal justice agencies, or individuals, relating to my activities. This information may include, but is not limited to, academic, residential, achievement, performance, attendance, personal history, disciplinary, arrest, conviction records, and prior drug and alcohol testing.
*[**Comment by Mr. Shelton:** (This) would allow an employer (not just a prospective employer) to have access to virtually every facet of the seaman's life. (It is) way too broad in my opinion for what an employer needs to know. Also, (it) could be released to the world under #9 (above).]*

QUESTION #15. I release any individual, including record custodians, from any and all liability for damages of whatever kind or nature, which may at any time result to me on account of compliance, or any attempt to comply with this authorization.
*[**Comment by Mr. Shelton:** A "global" release like this would allow an employer or prospective employer to walk away free even if he maliciously disclosed the information.]*

EMPLOYER BACKGROUND CHECKS: PROTECTION OR VIOLATION?

By Mike Terry

You're filling out the application for a new job and there it is in bold letters: You must agree to a background check as a prerequisite for employment.

During the interview you are asked, "If we check for criminal records, are we going to find anything?"

At the bottom of the application it says: Anyone who knowingly provides incorrect information, or incorrect information through omission of fact, can be subject to termination at any time.

At the end of the interview, the prospective employer gives you a written form asking for your permission to run an extensive background check that will verify your Social Security number, driving record, criminal record, credit records and civil court records.

Does your employer have the right to do this? Should you sign? What are your rights?

Reason for the Background Checks

More employers are performing criminal background checks on new hires. In some states and for some professions, it is a legal requirement. One of the primary reasons is an increase in negligent-hiring lawsuits. An employer, says Lynn Peterson, president of PFC Information Services Inc. in Oakland, CA., "can be sued for actions taken on the part of an employee."

An employer has a legal responsibility to hire someone who is safe, qualified and fit for the position. "If they fail to use reasonable care and they hire someone that they either knew or should have known presented a foreseeable risk of harm to a third party, then that employer is liable," says Lester Rosen, attorney and president of Employment Screening Services Inc. in Novato, CA.

The size of financial settlements, awarded by juries, in these negligent hiring lawsuits is on the rise. "In 1999, employers lost 60 percent of all negligent hiring/supervision jury trials," according to "Practical Guide to Employment Law." The average settlement is more than $1.6 million dollars according to at least one study, says Jason B. Morris, president of Background Information Services Inc., of Cleveland, OH.

Another reason employers are running background checks is that people lie. "We know, nationally, when you look across all industries that about 10 percent of all applicants have some sort of criminal record," says Rosen. "That doesn't mean it's a disqualifying criminal record. It's a form of discrimination to automatically reject an applicant with a criminal record without considering whether there's a good business reason, but at least an employer needs to know if there's a criminal record involved. We know that up to 40 percent of resumes contain material omissions or fraudulent statements about credentials, education, or employment.

Some studies suggest that up to 40 percent of resumes contain some piece of fiction that is beyond the bounds of good taste."

But what about you? You don't have a criminal record. You have good credit. Why should you have to agree to a background check?

Maybe the background checks protect you as well. "In the larger scheme of things, I think it's very important to ensure that you're hiring people who are safe, from the perspective of the people who are co-workers," says Peterson. "I think it's very important to know that the person working next to you is a safe person. Particularly if you're talking about sending people out into the home; you've got to do it."

Types of Background Checks.

So what's out there? Exactly what pieces of your personal history can your employer delve into?

Resume and employment verification.

- **Social Security number verification**. It is illegal for an employer or third-party consumer reporting agency (CRA) to access the Social Security Administration for this purpose. However, this can be performed using public records and credit bureau data.
- **Criminal record checks**. This is not a database check, if done correctly. The National Crime Information Center's (NCIC) database is not currently available to private employers, though legislation is being considered. A criminal record check is performed at county courthouses and sometimes state records are checked. Says Peterson, "The records are not available online and we have to send what we call a 'court-runner' out to the courthouse just as a quick check of the files to see if there's any criminal information pertaining to that person."
- **Department of Motor Vehicles**. Your driving record may be checked whether the job requires driving or not. It's an easy way to verify date of birth and addresses. "A driving record," says Rosen, "is a true statewide criminal record of that particular state, and it might reveal some level of responsibility. It might not matter if someone made an illegal left turn, but if somebody didn't go to court to deal with it may be suggestive."
- **Civil court records**. This can reveal lawsuits in which the potential employee was either a plaintiff or defendant in a case concerning a former employer. "In many states," says Peterson, "restraining orders are regarded as civil records, and if somebody has had a restraining order filed against him, it may be a cause for concern."
- **Worker's compensation**. Accessibility varies from state to state.

- **Credit report**. "A credit history check is allowed under the ***Fair Credit Reporting Act*** (FCRA) for employment purposes," says Tena Friery, research director with the Privacy Rights Clearinghouse. "This means that employers can make these kinds of non-skills determinations and reach a conclusion that if somebody is reliable at paying their own bills, they'll be a reliable employee, which certainly overlooks that some people have a bad credit history for medical reasons or for things that are really beyond their control."
- **Sexual offenders databases**.

Your Rights

Background checks are covered by the Fair Credit Reporting Act (FCRA), which in turn is covered by the Federal Trade Commission. "There is a specific law that covers background checks by third parties, and that law is the FCRA," says Friery. It's the same law that governs the credit reporting industry, but it also covers a number of other kinds of consumer reports, one of which is the employment report."

Among its many provisions, the ***FCRA gives the following rights to consumers***:

The request for background checks must be on a separate document. "The provision," says Friery, "must be on a document that's separate from a job application or any other document. So it must stand out, in other words."

Pre-adverse action letter. If the applicant is turned down for any reason, they must be given an explanation for the employer's decision. "This is before any action is taken not to hire them," says Friery, "or to fire them, because this also applies to current employers. And along with that comes a statement of rights and a copy of the report."

Consent. The FCRA applies only to third-party credit reporting agencies. "In-house checks," says Friery, "are not covered by the FCRA. California does, however, have a requirement that an employer who obtains public record information by way of a 'self' check give the subject an opportunity to receive copies of the public records." This varies from state to state.

The FCRA does not address the consequences of refusing consent. "That's because the FCRA imposes specific obligations on employer-users of consumer reports," says Friery, "but there's no room to read more into it than what's required by the words of the law. The FCRA is really more a law about certain types of consumer reports, the companies that prepare such reports and the companies that use them. Employer decision making and discretion are matters generally left to state employment laws ó or Equal Employment Opportunity questions."

Discrimination and Obligation

Clearly the laws and regulations governing background checks are a delicate, and sometimes awkward, dance between the Federal Credit Reporting Act, Equal Employment Opportunity laws and nondiscriminatory hiring practices.

"There are some disturbing things about it," says Friery. "For one thing, this really overlaps with employment law and employer's discretion, which is really pretty much unlimited unless the employer runs afoul of discrimination laws. They really are in the position to be able to make job determinations. If they want to adopt a no-tolerance rule for criminal conviction no matter how far back it goes, there's nothing that really says they have to adopt more lenient practices."

And there's something unsettling about the notion that once you agree to allow these checks as a requirement for employment, your employer can follow up on them whenever it wants to. If you're a good employee, why should your employer have the right to check your credit history or driving record from time to time? How is that necessarily relevant to your work performance?

In addition, if a consumer reporting agency makes a mistake and you are not hired as a result, or you are fired as a result, there is not much you can do about it. "Once there is a mistake made," says Friery, "the employer does not have to reinstate a job offer or even take that person back if it resulted in a firing. So the subject really has very little recourse except to try to deal with the consumer reporting agency, the background screener that reported faulty information." You, as a consumer, however, do have a right to have the information corrected.

The laws need some fine-tuning to protect consumers' rights and privacy protections, but there many examples of why background checks are important. And, in any case, knowing what's actually in your own credit report can be the first step in understanding what is at stake during a background check.

Americans can get a free copy of their credit report once a year from each of the three consumer reporting companies ó Equifax, Experian and TransUnion. The companies began rolling out the program í in the western part of the country, and it's been slowly moving eastward so all consumers soon will have access to their free reports.

YOUR DUTY TO YOUR EMPLOYER

As an employee of any company, you must perform your job in a positive and conscientious manner. If something goes wrong, or the relationship between you and your employer sours, you usually have a choice of quitting your job or being fired.

Unless you are working under a union contract that prohibits it, you are an õemployee at willö and can be fired for any reason at any time. For **example**, Captain Kevin Kelly told us he was employed with over 26 years of service with American Commercial Barge Lines (ACBL). Twenty-one of his years with this large company were as Pilot or Captain. He was terminated when he refused to push a 12-barge tow on the upper Mississippi River because his towboat was in disrepair and unsafe. He stated in a letter to our Association: õThat the M/V TOM FRAZIER was in disrepair is indisputable. That its state of disrepair was bad enough to affect its performance is also indisputable. Whether or not it was unsafe is an opinion. Frankly, at the time, I was the only person qualified to make that decision.ö[1] *[[1]Refer to our Newsletter, Sept./Oct. 2001, p.20. Letter was published with permission.]*

Donøt count on your years of service with a company to make much of a difference. As an õemployee at willö you are on your own. One of the principal reasons why mariners join unions is to spell out and then safeguard their employment rights.

LEGAL BLACKLISTING VIA THE FAIR CREDIT REPORTING ACT

Letøs say that you and your employer or one of your supervisors had a disagreement, and you **either quit or were fired**. At this point, your employer is entitled to make up his own mind whether he would ever be willing to <u>**rehire**</u> you <u>at his place of business</u>. It is also at this point where he may take <u>further steps</u> to discourage others from hiring you based on his own experience. Our Association expresses serious concerns about this process.

As an õemployee at willö your employment with any company may be terminated at any time for any reason...<u>or for no reason at all</u>. You may have a way to appeal your employerøs decision if you are a member of a union and have a contract (i.e., written agreement) that establishes a workable procedure for dealing with these matters with your employer. If not, your employer may terminate your employment today, tomorrow...or even after 26 years of loyal service...or even on the day before you plan to retire. He can do this for just about any reason. There may be some exceptions, but you will have to find a lawyer, hopefully specializing in employment law, to determine if you have a leg to stand on. This may be both frustrating and expensive.

Since most õlower-levelö mariners are <u>not</u> union members and are <u>not</u> wealthy, the next question following termination is, õwhere can I get another job.ö It is at this point where a problem **may** appear with your õemployment history.ö

Your Employment History

Consumer reporting agencies (CRA) known by various names at various times as õFirst Advantageö[1] õHire Checkö, õThe Industrial Foundation of the South,ö et al. provide õservicesö they <u>sell</u> to maritime employers to maintain records of your õemployment historyö so potential employers can weed out <u>undesirable</u> job applicants by accessing their computer. *[[1]100 Carillon Pkwy, Suite 100, St. Petersburg, FL 33716. ☎727-290-1110; 1-800-321-4473, ext 8 M-F 0800-2000 EST.]*

If you are an employer, it is only reasonable and prudent to try to avoid hiring careless or troublesome employees who tend to have a history of <u>accidents</u>, employees who have a history of <u>health problems</u>, or have a history involving <u>lawsuits</u>. It is easy for an employer to <u>avoid</u> these problems if he does not hire these individuals in the first place. Yet, in the haste of crewing a boat or finding a live body to fill a job opening, the details of a previous injury or lawsuit may not matter! Under more settled conditions, with the õbetterö employers, these factors may play a decisive role in whether you land a job or not.

If you <u>ever</u> suffered a serious injury on the job and/or sued an employer, many employers may consider you an õundesirableö job candidate...especially when they have a large pool of job applicants to choose from.

Say that you are at the office of a potential employer and answered a õHelp Wantedö ad in the newspaper. You arrived at the specified time with two other candidates and sit in an outer office awaiting interviews for the same job. You see the õHuman Resources Managerö in his office looking at his computer screen. He calls the man sitting on your right, and 20 minutes later the man emerges with the job you wanted. The man on your left leaves

in disgust, but you ask to speak with the HR Manager. He knows who you are because he has already examined your õEmployment Historyö on the computer screen, and he already chose the best candidate based on the three employment applications and õEmployment Histories.ö

What is in Your Employment History?

The HR Manager may or may not let you look at his computer screen. However, you want to know what it says because this is the second or third time you were unable to obtain the job you wanted. You suspect that one of your former employers, possibly the one you just left, entered an unfavorable (and presumably unfair) comment on your õEmployment Historyö ó that appeared on the computer screen you were not allowed to examine.

Your former employer is permitted by law to pass on the information in your õwork historyö that you are:

- Eligible for rehire by his company,
- Not eligible for rehire by his company, or
- No comment.

After all, he was your boss and he represents the company you worked for at some time in the past (i.e., up to seven years ago!). These are his only three choices that are nothing more than check marks.

Of these three choices, only the **"Not eligible for Rehire"** (or words to that effect) can be seen as a black mark (i.e., the õblack listö or õblackballö) against you with other employers who have no wish to hire an õundesirable.ö Of course, õWould NOT Rehireö is only one personøs opinion, but it automatically õflagsö a cloud under which you left your previous employer...whatever it was.

A prospective employer, the HR Manager in this case, **might** ask you for an explanation...or **might** quietly pass over you in favor of the guy sitting next to you in his waiting room with a õcleanö record who walked out with the job you wanted. The HR Manager might accept your application, file it, and tell you: õDonøt call us...weøll call you.ö That may be the last time you hear from him. You will never know whether you were judged on your experience as shown by your job application or by your õEmployment History.ö

However, you really want is to look at his computer screen and see what ALL your previous employers had to say about you. You do have some rights ó punching him in the nose and swiveling his computer screen are not among them!

The Fair Credit Reporting Act

The Federal Trade Commission (FTC) regulates the work that Consumer Reporting Agencies (CRA) do in collecting your õEmployment Historyö under the Fair Credit Reporting Act (FCRA). FCRA is a law passed by Congress that regulates the activities of consumer reporting agencies (CRA).

The Federal Trade Commission becomes concerned when they receive reports that consumer-reporting agencies are operating outside the law. They are less concerned that employers **may** use (or have used) the information provided by consumer reporting agencies in a discriminatory manner. After all, if either the CRA or a former employer violates the law, you can hire a lawyer and try to go after them to recover damages. This can be both frustrating and expensive! So it helps to know something about the law.

Because of the number of complaints we received, our Association looked into the matter. Although we received only a limited number of responses, we followed-up each one.

A Letter to Our Congressman

Our Associationøs office lies within Louisianaøs Third Congressional District. In 2003 Congressman Billy Tauzin represented the Third District and was also the Chairman of the House Committee on Energy and Commerce. This committee has oversight of the Federal Trade Commission FTC). Since the FTC enforces provisions of the Fair Credit Reporting Act (FCRA), after studying FCRA we wrote the following letter to Congressman Tauzin. We believed this was a very important letter for our mariners. Unfortunately, we were very disappointed that Congressman Tauzin never saw fit to even acknowledge this and subsequent letters. Congressman Tauzin retired from Congress in 2004.(1)

September 1, 2003

SUBJECT: Fairness and the Fair Credit Reporting Act

Dear Representative Tauzin,

I am writing to you as Chairman of the House Committee on Energy and Commerce as well as one of your constituents to earnestly ask you to amend a provision in the Fair Credit Reporting Act (FCRA). I am writing on

behalf of the Gulf Coast Mariners Association, an independent Association representing the interests and concerns of approximately 50,000 õlower-levelö merchant mariners who serve on the nationøs tugs, towboats, small passenger vessels, and offshore supply vessels.

"Employment purposes." 15 USC §1681b indicates that one of the permissible purposes of a consumer report is for õemployment purposes.ö The Federal Trade Commission further defines these õpermissible purposesö relating to employment to include reports used for evaluating a consumer õfor employment, promotion, reassignment, or retention as an employee.ö Our request concerns **abuse** of this provision in a significant, non-unionized portion of the maritime industry for employment purposes.

We believe that a good employee will try to maintain a good work record. The fact that such a record really exists and may follow him in the workplace provides a positive and sobering influence upon his or her conduct and stability.

Unfortunately, there is one feature that stands out and detracts from the value of this type of õconsumer report.ö That point deals with the answer to the question, õWould you rehire this employee?ö or, restated, õIs this former employee eligible for rehire by your company?ö

We receive widespread reports from our mariners that this single point is used to evaluate and subsequently to õ**blacklist**ö many of our mariners. It is a õquick and dirtyö test of suitability for employment. Our complaint lies with the law and not with the Consumer Reporting Agency that only appears to be doing what the law and/or the Federal Trade Commission allow. We make the following arguments for change. **[Enclosure #1]** is a Work Report with the õwould rehireö blank circled. An employer may elect a õYesö, õNoö or simply to make no comment.

- õWould not rehireö is not based upon any uniform set of employment guidelines. It is a subjective opinion of some person working for a former employer who is under no obligation to reveal his/her identity or even position within the company. It could represent the opinion of a President, a Personnel Director, or even a clerk-typist with access to the companyøs computer. In the case covered in **[Enclosure #1]** the employee was never õfiredö or even given a õpink slip.ö
- A mariner does not know which person õblacklistedö him or when it was done. However, õwould not rehireö now can appear on a computer screen at a job seekerøs next job interview. Or, it may appear as part of the õreinvestigationö the present law allows. In this case, **[Enclosure #1]** the job applicant found out about it three years later ó much of that time spent unemployed but constantly seeking work. Although he made written inquiry to both his former employer and to the Credit Reporting Agency, he was never told why his former employer would not rehire him. The information the mariner chose to add to his consumer report to counteract the õblacklistingö was nothing more than a shot in the dark since he had no access to solid facts he could refute. Even worse, his statement now stands out like a sore thumb on his work report.
- Most job applications require job seekers to list their previous employers. In the transportation industry, 49 CFR §40.25 even requires prospective employers to verify a job seekerøs drug records for the past two years. If the prospective employer made such a call he would have a greater opportunity to speak with a responsible person in authority and ask legally permissible questions about the job seeker. A õwould not rehireö computer entry short circuits the entire process and is manifestly unfair to job seeker.
- Accepting õwould not rehireö notations without identifying them by name coupled with the limitation of liability in 15 USC 1681h make it very extremely for an injured employee to prove in court that he was disqualified from employment by õ...false information furnished with malice or willful intent to injure such (a) consumerö if this is the case. Our experience shows that most mariners, especially those who are unemployed, do not have the means, the ability, and the knowledge to deal with the administrative procedures of the Credit Reporting Agencies ó even when those agencies scrupulously follow the law.

It is for these reasons and in the interest of fairness to our mariners that I ask you on behalf of our Association to amend the Fair Credit Reporting Act to exclude the solicitation of the information by Credit Reporting Agencies that allows notations such as õwould not rehireö or õnot eligible for rehireö to appear on a work report furnished by such an agency. s/Richard A. Block, Secretary, GCMA

Selling Your Employment History

Your õEmployment Historyö is just one of many information products that Credit Reporting Agencies (CRA) sell to employers. As a õconsumerö you are entitled to a free copy of your employment history. To obtain your free copy, you must fill out the blank form to ***request a copy of your consumer report*** and (often) mail it along with a photocopy of your driverøs license, to the address on the form. The information is a private matter and is strictly

between you and the CRA. Within two weeks you should receive a copy of your Consumer Report at the mailing address you provided them. Look over the report. It will list returns from any employers they have a record of your working for during the past seven (7) years. All it will tell you is if any of those employers provided a notation that you were:

- Eligible for rehire by his company,
- Not eligible for rehire by his company, or
- No comment.

Again, the õ**Not Eligible for Rehire**ö is the blackball.

Addressing: “Not Eligible for Rehire”

If you find any inaccuracies on the report, you should take steps to address the matter immediately. õInaccuraciesö refers to errors of fact and not just things you do not like! In either event, to use their terminology, you **MAY** have a õconsumer dispute.ö

If any of the information is inaccurate, you have a right to correct it...and should do so. However, our concern at NMA centers on whether you find that a former employer says you are õnot eligibleö for rehire with his company ó even if you do not want to work for his company ever again. If you understand that this decision was a result of your bad conduct, you should take your lumps! However, if you believe the õwould not rehireö determination was unfair, you should take steps outlined by the CRA to dispute the black mark and have it removed.

If you believe you were treated unfairly by a previous employer you can ask the CRA to õreinvestigateö your claim ó and they are required to do so. Your previous employer might reconsider the matter and remove his õWould not rehireö black mark. If this happens, the CRA will notify you.

If the employer will not remove the black mark, ***you have the right to explain your side of the story*** in a statement generally containing no more than 100 words. This statement is edited and added to your employment history where it will remain for other prospective employers to see. If you reach this point, be absolutely certain that your statement is well written and concise since it will attract the immediate attention of any prospective employer. To avoid this rather unsatisfactory solution, you might want to call or visit your former employer and ask him for reconsideration.

[NMA Comment: After all is said, there is still the most common form of blacklisting – “badmouthing” within the industry. We saw following the “Pilots Agree” strike in 1998 where vindictive and retaliatory “badmouthing” helped to decimate the towing industry’s pool of trained, experienced, and licensed mariners.]

VIOLATING COMPANY RULES CAN JEOPARDIZE YOUR COAST GUARD CREDENTIALS

Be Sure You Understand What Your Employer Expects of You

When you first go to work for a company, you may be given a copy of an Operations Manual or a set of instructions. You may be told to read this manual and then sign a document stating that you read and understand it. This is a reasonable way to conduct business. It is routine ó and is an important step in the employment process.

Many mariners are so anxious to accept a job offer that they may not take this task seriously and just flip through the pages without reading them carefully and seldom ask questions. At some future date, perhaps after an accident, you may discover that you neglected or broke a õcompany regulation.ö That fact may take on added significance if your employer brings the violation to the Coast Guardøs attention or their investigation discloses it in some other way.

Unfortunately, many mariners do not realize that the Coast Guard can take your license or merchant mariners document (MMD) for õmisconductö if you violate an established õcompany policy.ö õ***Misconduct***,ö as defined in 46 CFR §5.27,as õí human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a shipøs regulation[1] or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required.ö

To serve under the authority of a Coast Guard license you must take an oath as required by 46 U.S. Code §7105: õAn applicant for a licenseí shall take, before the issuance of the licenseí an oath before a designated official,

without concealment or reservation, that the applicant will perform faithfully and honestly, according to the best skill and judgment of the applicant, all the duties required by law.ö

The Coast Guard explains various laws (i.e., statutes) in the õregulationsö that appear in the Code of Federal Regulations. Regulations carry out the law and may be more detailed, specific, and õuser friendlyö in their explanations. Essentially, you not only have the right to be protected by the law or regulation but also have an obligation to obey it. Which law(s)? EVERY LAW.

BREAKING THE LAW

If your employer asks you to do something that is clearly against the law (i.e., an Act of Congress) or any regulation (i.e., rule promulgated by the Coast Guard), you have both a right and an obligation to follow the law. So, if you do not know the laws or regulations that govern your license, your vessel, and the marine industry in general, you will always be at a disadvantage. This does not mean that you have to be as knowledgeable as a lawyer, but you should understand certain basic laws and regulations that govern the marine industry.

Our Association is critical of some of the license õcram coursesö that do not take the time to even introduce basic laws and regulations to our mariners. However, we will help guide you to laws and regulations you need to know!

One Prime Example: Violating the 12-Hour Rules

Your employer has a great deal of power over the mariners he employs, not the least of which is the power of the paycheck. Some employers exercise their power wisely while others do not.

Your boss is on thin ice when he asks a licensed officer to violate a law or regulation in the conduct of his business. The fact that employers often get away with outrageous conduct has not gone unnoticed judging by the steady stream of complaints mariners bring to our attention. The first and foremost complaint from our mariners always has been the violation of the õ12-hour rule.ö

Violation of the 12-hour rule leads to fatigue that contributed to a number of serious accidents including numerous bridge allision accidents cited in our Report #R-293-A and #R-293-B.[(1)] *[[(1)]Report #R-293-A, Rev.3. Towboats and Bridges, A Dangerous Mix., 28p and Report #R-293-B, Rev.5. Congressional Action Requested to Prevent Overhead Clearance Accidents. 11p.]*

Violation of the 12-hour rule also has serious õmanningö implications throughout the industry. In June 2000, our Association started the ball rolling by making certain that high-level officials in the Coast Guard, National Transportation Safety Board, Congress, and the International Transport Workers Federation that deal with our mariners know that serious violations of work-hour regulations occur regularly among õlower-levelö mariners in the United States, one of the worldøs most advanced countries. We did this by issuing our õYellow Bookö available on our internet website.[(1)] The message has been out there for the whole world to see for the past eight years! *[[(1)]Our Report #R-201, Mariners Speak Out on Violation of the 12-Hour Work Day, 200p. with contributions from 57 of our mariners.]*

Although the Coast Guard, maritime employers, and mariners all received the message that making licensed officers violate work-hour regulations is against the law, some still deny that the problem exists. Some companies ignore the law and Coast Guard policies, while some mariners consider it õmachoö to do the job of two men, earn more money, and come out smiling!

We watched senior Coast Guard officers dither, dabble, and offer dismally ineffective leadership eventually and finally bury their heads in the sand. They should be ashamed but obviously thought the storm of controversy would pass! It did not nor will it. Our mariners have no intention of rolling over and playing dead!

Approach This Issue Very Carefully and Use "Halfway" Measures

Let your Association fight this battle in Washington. We advise our licensed mariners to approach this issue very carefully. Upsetting the boss is a sure way to lose your job, and there is little we can do about that. Your boss may even be vindictive and damage your career by õblackballingö you throughout the marine industry. However, this procedure has backfired because so many mariners left the industry that employers have trouble manning their vessels.

Violating the 12-hour rule can lead to an accident, loss of license, end your career or even take one or more lives as the Webbers Falls accident did in 2002.[(1)] . To protect your license, your job, and your career in the marine

industry we suggest a number of õhalfwayö measures because we know that standing up and õdemanding your rightsö will only get you fired. Thatøs the practical side of being an õat willö employee ó your õrightsö are only those your employer allows you to exercise! *[[1]Refer to our Report #R-370-A, Rev. 2. Report to Congress: Fifth Anniversary of the Webbers Falls I-40 Fatal Bridge Accident: Unresolved Issues Revisited. 12p. This report is one of a series on violations of the 12-hour rule.]*

We suggest the following actions:

When the matter arises, politely remind your supervisor that he is asking you to work more than 12-hours in a 24-hour period. Unless he is õmentally challengedö he should know this is illegal. He has no business being your supervisor if he doesnøt know at least this much about Coast Guard regulations. Donøt try to quote the law because you will be viewed as an instigator and this subversive information could spread and õinfectö other employees.

Ask your boss: õWhat happens if I have an accident after running over 12 hours and the Coast Guard finds outö? Will the company hire a lawyer and defend me ó yes or no? If not, you definitely should consider buying license insurance[1] because you will need a lawyer to represent you before an Administrative Law Judge if you are caught ó and even a lawyer may not be able to save your license. His answer will give you an idea of how important he considers you and/or your license are to his operation. Tell him that you risk losing your license if you are caught violating the law even if you do not have an accident. See if this arouses any sympathy from him. *[[1] Refer to GCMA Report R-342, Revision 3. License Defense and Income Protection Insurance.]*

- Ask him about your future (yourself, your family, your job) if you lose your license. Will he find a job for you and pay your salary while you try to recover your license? These are reasonable considerations for any employee whose boss asks him to violate the law. However, they demand a truthful answer ó with the truth only becoming apparent after the fact!
- Inform your immediate supervisor of the risk you are taking, especially if that person does not hold an active USCG license. Let him know that if you get underway that you will be doing him a favor. That means he õwill owe you one.ö This may be enough to tell him that he should avoid asking you to do the same thing for him again and it puts the shoe on the other foot.
- Do NOT accept õovertimeö pay or some other financial reward for breaking the law. This makes you just as guilty as your employer. We will give you an example later.
- Consider how your employer feels about taking risks with your license. If the order to violate work hours comes from a Port Captain or some intermediate superior, ask him to check his decision to have you break the law with the company President or other corporate officer. Your reluctance may be noticed. Tell other mariners working for the same company about your reluctance to break the law. Maybe they will become reluctant if they think about all of the implications, too. Maybe your boss will get the idea unless he is either too stupid, too greedy, or is kissing up to one of his superiors. The chances are you will end up holding the bag because we have found that mariners are much easier targets for the Coast Guard to go after than a large corporation who have lawyers on retainer.

Consider what happens to you if you lose your license (i.e., revocation) or if it is suspended. How many months will you have to live without a paycheck? How will you support your family, pay your house or car note, etc. One towing vessel Master lost his license for one month at a cost in lost pay of almost $13,000. Thatøs not chump change!

- Consider the harassment you face by having to attend a Suspension and Revocation (S&R) hearing and the administrative hurdles you may face in regaining your license. Take the time to attend some other marinerøs S&R hearing on your time off. We attended many of these hearings that are open to the public. There is no better way to find out that you really have something to lose by watching another mariner lose his license or MMD. The process of losing it is neither pleasant nor painless.
- After you make your õprotest,ö no matter how mild it had to be, then **record it in the logbook on your boat.** Most companies seldom bother to review that õunofficialö logbook. The Coast Guard can õaskö the company to see the logbook, could even subpoena it, but we find they very seldom go out of their way to do anything on behalf of our mariners. However, if you send õsmooth or customer logsö to your company office on a regular basis, your employer might view such an entry the same as waving a red flag. This is information your employer does not want his customer to read about. In addition, this could endanger your job. Make note of the date you put it in the logbook you keep on the boat and try to make a copy of that dated logbook page as evidence. Remember, however, that the logbook is company property ó do not remove or deface it!

- We suggest that every licensed mariner keep his own <u>personal logbook.</u> If you have to get underway, immediately make a complete entry <u>in your own personal records</u> as well. õUnderway 2100 hours under protest to Port Captain (name)í ö If you have a trusted witness, have that person sign your entry at that time and record his personal contact information. We repeat that <u>the company logbook belongs to the company</u>. This means that you probably will not be able to access it legally after you leave the boat. Also, you cannot erase a logbook entry after you make it.

The matter is much more serious if your employer expects you to violate the 12-hour rule (or any law) on a regular basisí <u>and if you repeatedly do so</u>! There is a limit to what Coast Guard investigating officers will continue to accept and excuse; and, worst of all, this limit can be very <u>unpredictable</u>. With increasing concern over õhomeland security,ö lax practices excused for years are likely to come under more intense scrutiny.

Notice that not a single one these choices tell you to õcall the Coast Guard.ö These are all things that you can do on your own without involving the Coast Guard. If you do tell the Coast Guard, their typical answer is that they will tell you that they cannot become involved in õ***<u>labor disputes</u>***.ö Our experience has shown that the Coast Guard is SIMPLY NOT INTERESTED in enforcing the 12-hour rules in any way that would help our licensed mariners. Until that mindset changes and the Coast Guard creates the scientific õhours of serviceö regulations õrecommendedö by the National Transportation Safety Board, very little will be done.

Our Association continues to accumulate specific evidence of these work-hour violations of marinersø rights so continue to report them to us **in writing** whenever they occur! We will investigate and may be able to make a case on your behalf or on behalf of our õlower-levelö mariners.

Accepting Money for Breaking the Law Makes You Part of the Problem

On Aug. 28, 2002 at the request of one of our mariners, we asked the Commanding Officer of the Houston-Galveston Marine Safety Office to clarify the legality or illegality a scenario that took place in his inspection zone.

A towboat pushing one or more tank barges was under the control of a properly licensed Master who was relieved by a properly licensed Pilot. Both men had merchant mariner documents endorsed as Tankermen. The logbook showed them working a two-watch system that is allowed under 46 U.S.C. §8104(h) and shows that they did not stand watch for more than 12 hours in a consecutive 24-hour period.

However, on times that they were not standing watch, they spent considerable time pumping petroleum products from the barges in their tow for which they received overtime pay above and beyond their regular dayøs pay.

We asked the Coast Guard whether they were performing this function legally under the authority of their Tankermanøs certificate or were they performing this function illegally in violation of 46 U.S.C. §8104(h). We asked whether it made any difference whether the Tankerman duty was performed <u>voluntarily</u> (i.e., of their own free will to make money) or as a condition of their employment.

We noted that the Coast Guard Headquarters Office of Compliance (G-MOC) recently verified that <u>unlicensed crewmembers</u> on inland waters have no restrictions as to the number of hours they may work and that this included not only deckhands, õdeckineers,ö cooks but also certificated Tankermen

The Coast Guard reply: On Nov. 7, 2002 we received this reply from Captain D.F. Ryan II, Chief, Eighth Coast Guard District Marine Safety Division:

õThis is in response to your letter of Aug. 28, 2002 addressed to the Commanding Officer, Marine Safety Office Houston-Galveston, requesting for clarification of the work-hour limitation outlined in Title 46 U.S.C. §8104 (h).

õThe purpose of the work-hour limitation statute is to prevent fatigue-related accidents and promote the safe navigation of tugboats. Section 8104(h) states "***<u>an individual licensed to operate a towing vessel may not work for more that 12 hours in a consecutive 24-hour period except in an emergency</u>***."

õIn September 2000, Coast Guard Commandant (G-MOC-1) released policy letter 4-00, which clarified the work-hour limitations. The policy letter defined ***work*** as "<u>any activity</u> that is performed on behalf of a vessel, its crew, its cargo, or the vessel's owner or operator. This includes standing watches, performing maintenance on the vessel or its appliances, unloading cargo, or performing administrative tasks, whether underway or at the dock." ***It is clear from the definition that a licensed individual cannot perform miscellaneous tasks beyond their normal 12-hour helm duty, even if it is voluntary.*** Consequently, the scenario that you alluded to in your letter (transfer operations of petroleum cargo) would fall under the definition of work.

õSpecific concerns about violations of the work-hour limitations statutes or regulations should be reported to the appropriate Marine Safety Office for review and/or investigation. Accordingly, I urge you to correspond with MSO Houston-Galveston further regarding the potential violations briefly noted in your letter.ö

Of course, by the time we received the Coast Guardøs reply, the incident itself was ancient history.

VIRTUALLY UNLIMITED WORK-HOURS FOR UNLICENSED MARINERS

The preceding discussion dealt with licensed officers. Of equal concern is the fact that there are no regulations that cover the work-hours for unlicensed crewmembers who work on inland waters or the rivers. The Standards of Training, Certification and Watchkeeping (STCW), amended in 1995, requires 10 hours of rest for mariners serving on most vessels on international voyages.

According to the Coast Guard, Congress did not authorize them to write regulations covering the work-hours of thousands of "lower-level" deckhands, engineers, and tankermen. Of course, it would never occur to the Coast Guard to ask Congress to do so. Consequently, our Association asked the Coast Guard to at least recommend a 12-hour work-day for unlicensed mariners to Congress in a õLegislative Change Proposalö ó which they never did.

The American Waterways Operators (AWO) in their Responsible Carrier Program (RCP) recommends a 15-hour limit to the unlicensed marinersø workday. However, our Association went before the Towing Safety Advisory Committee on at least two occasions to protest that this is far too long and could lead to an abusive 105-hour work-week.

We prepared two research reports on this subject : Report #R-370-G. Crew Endurance: The Call Watch Cover-up, 10p. and Report #R-412. Towboat Engineerøs Death Points to Need for Changes in the Law, 20p.

YOUR ASSOCIATION FIGHTS FOR MARINER RIGHTS

On Aug. 2, 2007, our Association was invited to testify before Congress on the subject of Marine Safety. Although our oral testimony was limited to five minutes, we provided written testimony in our Report #R-350, Rev. 3, Mariners Seek Help From Congress on Safety, Health, and Work-Related Problems, 36p. For years, dozens of requests to the Coast Guard and petitions for rulemaking on behalf of our mariners were ignored, watered down, or scuttled. In Report #R-350, Rev. 3 we outlined many problems our õlower-levelö mariners face and sought help directly from Congress. We will continue to follow that path unless or until the Coast Guard becomes more responsive to our problems. We urge our readers to read and study this report. The list of topics includesí

Part 1 – MARINER ISSUES

Issue #1 ó Substandard Merchant Marine Personnel Services
Issue #2 ó Coast Guard Investigations
Issue #3 ó Formal Safety Training for Entry-Level and Engineroom Personnel
Issue #4 ó Regulating Towing Vessels
Issue #5 ó Widespread Hours-of-Service Abuses
Issue #6 ó Unsatisfactory Coast Guard Response to Petitions for Rule Changes
Issue #7 ó Work-Hour Limits for Unlicensed Crewmembers *[Docket #USCG-2002-12579]*
Issue #8 ó GCMA Requests Uniform Logbook Entry Procedures *[Docket #USCG-2002-12581]*
Issue #9 ó Enforce Regulations for Filing Personal Injury Reports *[Docket #USCG-2002-12580]*
Issue #10 ó Clarify the Definition of õOn Dutyö Time *[Docket #USCG-2002-13594]*
Issue #11 ó Ensure Safe and Adequate Potable Water for Mariners *[Docket #USCG-2003-14325.]*
Issue #12 ó Give Mariners a Voice in Setting and Reviewing Safe Vessel Manning Standards
Issue #13 ó Protecting Our Marinersø Health ó Hearing Conservation
Issue #14 ó Protecting Marinersø Health from Second-Hand Smoke
Issue #15 ó Protecting Our Marinersø Health from Asbestos
Issue #16 ó Reporting Drug Program Violations
Issue #17 ó Whistleblower Protection for Mariners
Issue #18 ó A Resolution to Protect Our Mariners from Obsolete Lifesaving Equipment
Issue #19.ó Hypothermia Protection for Inland Deck Crews
Issue #20 ó Homeland Security
Issue #21 ó Appealing Coast Guard Decisions
Issue #22 ó Blacklisting
Issue #23 ó End Objectionable Employment Practices Targeting Mariners

Part 2 – MARINER VIEWPOINTS

Issue #24 ó The Medical NVIC ó A Threat to Marinersø Careers
Issue #25 ó Marinersø Problems with the Administrative Law System
Issue #26 ó The Coast Guard Does Not Understand the Workboat Industry

Issue #27 ó Marinersø Limited Respect for the Coast Guard
Issue #28 ó Limited Coast Guard Resources
Issue #29 ó Coast Guard Partnership With Industry
Issue #30 ó The Revolving Door of Government Service
Issue #31 ó When Employers Speak for Mariners
Issue #32 ó Coast Guard Statistics and Security Gaps
Issue #33 ó Voluntary Guidelines are Monumental Wastes of Time and Effort
Issue #34 ó Sporadic Reliance on NTSB Recommendations
Issue #35 ó Mariner Participation on Federal Advisory Committees
Issue #36 ó Missed Opportunities to Ensure Labor Peace
Issue #37 ó Hard Work, Long Hours, Little Appreciation, and No Respect
Issue #38 ó The Coast Guard Still Overlooks the Newman Report
Issue #39 ó Industryøs Tardy Investment in Training Its Mariners