

There can, of course, be no dispute that, given the appropriate facts, an improper method of handling cargo would render a vessel unseaworthy. But, where as here, the injury occurred when experienced plaintiff failed to use suitable equipment then available, it cannot be held that there was a "method" or "plan" of loading which was improper. Appellant's reliance on *Waldron*, supra, is misplaced. There, the assignment of insufficient manual assistance constituted the unseaworthy condition. But here, the record is utterly barren of even a suggestion that too few longshoremen were assigned to stow the bags. The case begins and remains a simple one. Appellant and his co-worker took it upon themselves not to make use of available pallet boards as a platform from which to stow the cargo, and not to utilize the manual assistance of other longshoremen then available.

Upon consideration of the record, briefs and argument, it is ordered that the judgment of the district court be and hereby is affirmed on the basis of the findings and conclusions set forth in that court's opinion. 268 F.Supp. 932.

Roosevelt JOHNSON, Appellant,

v.

UNITED STATES of America and Panama Canal Company, Appellees.

Anthony BUCKNER, Appellant,

v.

UNITED STATES of America and Panama Canal Company, Appellees.

Nos. 25485, 25486.

United States Court of Appeals
Fifth Circuit.

Nov. 7, 1968.

Certiorari Denied March 24, 1969.

See 89 S.Ct. 1195.

Clifton S. Carl, Garrett & Carl, New Orleans, La., for appellants.

Kathleen Ruddell, Asst. U. S. Atty., New Orleans, La., Morton Hollander, Daniel Joseph, Michael C. Farrar, Attys., Dept. of Justice, Washington, D. C., Louis C. LaCour, U. S. Atty., New Orleans, La., Edwin L. Weisl, Jr., Asst. Atty. Gen., Washington, D. C., for appellees.

Before GEWIN and BELL, Circuit Judges, and BOOTLE, District Judge.

PER CURIAM:

The appellants, Roosevelt Johnson, [No. 25485], and Anthony Buckner, [No. 25486], brought suit against the appellees under the General Maritime Law, the Public Vessels Act, 46 U.S.C. § 781 et seq., and the Suits in Admiralty Act, 46 U.S.C. § 741 et seq. seeking re-

covery for injuries allegedly sustained in the course of their employment as federal employees aboard the SS CRIS-TOBAL, a vessel owned and operated by the Panama Canal Company, a wholly-owned agency and instrumentality of the United States. The United States District Court for the Eastern District of Louisiana granted a motion for summary judgment in favor of the Government and dismissed the complaints on the ground that the exclusive remedy of the appellants against the United States was under the Federal Employees Compensation Act, 5 U.S.C. § 751 et seq.¹

Our decision in this case is controlled by decisions of the Supreme Court and prior decisions of this court which we consider to be clearly dispositive of the issue presented. These decisions compel the conclusion that a seaman who was injured in the course of his employment as a federal employee of the Panama Canal Company, a federal instrumentality, is limited to the benefits provided under the terms of the Federal Employees Compensation Act and, therefore, such seaman may not maintain a suit for damages against the Government. *Johansen v. United States*, 343 U.S. 427, 72 S.Ct. 849, 96 L.Ed. 1051 (Public Vessels Act); *Patterson v. United States*, 359 U.S. 495, 79 S.Ct. 936, 3 L.Ed.2d 971, (Suits in Admiralty Act); *Jarvis v. United States*, 342 F.2d 799 (C.A. 5), affirming Petition of United States, 212 F.Supp. 214 (E.D.La.), cert. den. 382 U.S. 831, 86 S.Ct. 70, 15 L.Ed. 2d 75 (Suits in Admiralty Act); *Suhar v. United States*, 351 F.2d 952 (C.A. 5) (general maritime law); *Aho v. United States*, 374 F.2d 885 (C.A. 5), cert. den. 389 U.S. 930, 88 S.Ct. 292, 19 L.Ed.2d 282 (libel in admiralty). The *Johansen* and *Patterson* decisions have been reaffirmed recently. *Amell v. United States*, 384 U.S. 158 at 160-161, 86 S.Ct. 1384, 16 L.Ed.2d 445; *United States v. Demko*, 385 U.S. 149, at 151-152, 87 S.Ct. 382, 17 L.Ed.2d 258.

The judgment is affirmed.

**ALART ASSOCIATES, INC., Plaintiff,
and Counter-claim Defendant-
Appellee,**

v.

**Cy APTAKER and Preview Distributors,
Inc., Defendants, Counter-claimants, and
Third-Party Plaintiffs-Appellants,**

v.

**Alvin G. BLUMBERG, Third-Party
Defendant-Appellee.**

Nos. 127, 128, Dockets 32395, 32396.

United States Court of Appeals
Second Circuit.

Argued Oct. 8, 1968.

Decided Oct. 28, 1968.

1. By statute the section designations have been changed to 5 U.S.C. § 8101 et seq.

Julius E. Foster, New York City, for defendants-appellants.

Kim M. Lefever, New York City (March, Gillette & Wyatt, Douglas W. Wyatt, New York City, on the brief), for plaintiff-appellee.

Before FRIENDLY, ANDERSON and FEINBERG, Circuit Judges.

FEINBERG, Circuit Judge:

Defendants Cy Aptaker and Preview Distributors, Inc. appeal from two orders of Walter R. Mansfield, J., of the United States District Court for the Southern District of New York. This is another of the surprisingly frequent occasions when neither party to an appeal has briefed the appealability of the order complained of until we raised the issue at oral argument. See, e. g., *Donlon Indus., Inc. v. Forte*, 402 F.2d 935 (2d Cir. 1968); *Wilkins v. American Export-Isbrandtsen Lines, Inc.*, 401 F.2d 151 (2d Cir. 1968).

After plaintiff's suit for copyright infringement was filed, it became clear that there was a discrepancy between the name used in the complaint and on the copyright certificate (Alart, Inc.) and plaintiff's true corporate name (Alart Associates, Inc.). Convinced that this

was a fatal flaw, defendants moved for summary judgment before Judge Metzner; plaintiff argued that the difference in name was inadvertent and had caused defendants no prejudice. Judge Metzner denied defendants' motion for summary judgment and granted plaintiff permission to amend its complaint to reflect the actual corporate name. Undeterred, defendants promptly moved for reargument, but Judge Metzner adhered to his original determination. Over six months later, defendants again moved for summary judgment on substantially similar grounds. The motion was again denied, this time by Judge Mansfield. 279 F.Supp. 268. Regarding the basic contention as "frivolous and dilatory" and pointing out that it had already been unsuccessfully raised twice before, he also ordered defendants to pay \$300 to plaintiff as "reasonable expenses * * * including reasonable attorney's fees." Fed.R.Civ.P. 56(g). Over a month later, defendants doggedly moved for reconsideration, which Judge Mansfield denied. Defendants appeal from both of Judge Mansfield's orders.

[1-3] We have examined the issue of appealability and have considered defendants' supplemental brief on the point. It has long been clear that denial of a motion for summary judgment is not appealable as a "final decision" under 28 U.S.C. § 1291. Moreover, it has been plain for almost two years that denial of such a motion is not appealable under 28 U.S.C. § 1292(a) (1), even though plaintiff brought the motion and the complaint prayed for an injunction, *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23, 87 S.Ct. 193, 17 L.Ed. 2d 23 (1966), a result foreshadowed a few weeks earlier in this circuit, *Chappell & Co. v. Frankel*, 367 F.2d 197 (2d Cir. 1966) (in banc). Defendants argue that the \$300 sanction imposed by Judge Mansfield confers appealability under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-547, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). We find no authority directly on point, no doubt due to the extreme infrequency with which Rule 56

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(g) is invoked and general awareness of the policy behind the federal final judgment rule. As a practical matter, the orders do not dispose of the case or impede its normal processing. Cf. *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), cert. denied, 386 U.S. 1035, 87 S.Ct. 1487, 18 L.Ed.2d 598 (1967). Moreover, defendants' claim that Judge Mansfield abused his discretion can be reviewed after final judgment is entered—along with the case on the merits if defendants lose, and on an assessment of costs if defendants win. Cf. *Farmer v. Arabian American Oil Co.*, 324 F.2d 359 (2d Cir. 1963), rev'd on other grounds, 379 U.S. 227, 85 S.Ct. 411, 13 L.Ed.2d 248 (1964). See also *Gibbs v. Blackwelder*, 346 F.2d 943 (4th Cir. 1965). Therefore, keeping in mind the salutary policy against piecemeal review, we do not believe that the collateral order doctrine should apply here. Cf. *United States v. Fried*, 386 F.2d 691, 695 (2d Cir. 1967); *American Express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F.2d 277, 280-282 (2d Cir. 1967). We express no view on whether the \$300 sanction was unduly harsh or on the validity of defendants' attack on plaintiff's copyright.

Accordingly, the appeal is dismissed.

Bernard E. Burk, New Orleans, La.,
for appellant.

George A. Bourgeois, Jack E. Yelverton, Asst. Attys. Gen., Baton Rouge, La., Jack P. F. Gremillion, Atty. Gen. of State of La., Jim Garrison, Dist. Atty., Orleans Parish, State of La., for appellees.

Before GEWIN and BELL, Circuit Judges, and BOOTLE, District Judge.

PER CURIAM:

Appellant, a state prisoner, appeals from the district court's denial of habeas corpus relief, contending that in his trial in the Criminal District Court, Parish of Orleans, State of Louisiana, certain errors were committed, that these errors are of federal constitutional proportions, and that therefore his incarceration is invalid. The errors he in-

Hildree OLIVER, Appellant,

v.

J. D. MIDDLEBROOKS, Supt., et al., Louisiana Correctional and Industrial School, Appellees.

No. 24953.

United States Court of Appeals
Fifth Circuit.

Oct. 17, 1968.