New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 254—NO. 72
WEDNESDAY, OCTOBER 14, 2015

ADMIRALTY LAW

Expert Analysis

El Faro's Sinking Stirs Jones Act Debate

By **James E. Mercante**

The Merchant Marine Act was passed nearly 100 years ago. The law continues to haunt or to help the commercial shipping industry. It all depends on which side of the ship you're on.

The law is a 'preference' for the U.S. shipping industry requiring, among other things, that vessels transiting between U.S. ports be built in the United States, carry a U.S. flag, employ an American crew and have an American owner. Almost a century later, the law better known as the Jones Act, remains on its feet despite some heavyweight opponents, many of whom point to the effects of the law, including two stark examples this year.

One is Puerto Rico's reportedly historic debt crisis—revealing the commonwealth is $72 billion underwater. Because of the Jones Act, foreign ships cannot call at Puerto Rico ports either before or after coming to the mainland states. As a result, Puerto Rico receives the majority of its foreign imports from Florida, where U.S. flagged ships are loaded with supplies that have been already offloaded from foreign flagged vessels.[1] This arguably inflates shipping costs and results in high market prices for residents.[2]

The catastrophic loss of the 790-foot containership EL FARO in the notorious "Bermuda Triangle" during Hurricane Joaquin, has put the Merchant Marine Act back on radar. Ironically, the ship was en route to Puerto Rico, on its weekly transit carrying cargo from Jacksonville, Fla. The U.S. Coast Guard reported on Oct. 5 that the EL FARO lost engine power while in the eye of the hurricane with over 40-foot waves, eventually resulting in the loss of the ship and all 33 crew onboard.

Several of the officers aboard the ship were from local schools—SUNY Maritime, and the U.S. Merchant Marine Academy (the author's alma mater). The ship was carrying about 400 containers on deck and 294 trailers and cars below deck. It was built in 1975 nearly 40 years ago. Thus, maritime commentators took aim at the act that allegedly made it cost-prohibitive to properly repair, upgrade or replace the containership prior to its final journey.[3]

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Protecting Maritime Industry

Not to be confused with Section 33 of the Merchant Marine Act, which is a precious 'sword' for the maritime personal injury bar as it rules seamen's negligence claims with its "featherweight" standard of causation, Section 27 is the 'shield' that protects the U.S. maritime industry. Implemented in 1920, the Merchant Marine Act to this day remains codified in 46 U.S.C.A. §55102, which states, in relevant part:

> b) Requirements.—Except as otherwise provided in this chapter or chapter 121 of this title, a vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel–
> (1) is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and
> (2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.

The act was designed to promote the sale of overstocked U.S. government ships built for World War I. The Senate recommended that these ships be owned by U.S. citizens, fly a U.S. flag and employ a U.S. crew with the purpose being to maintain a dependable American fleet at the country's disposal in case of a national emergency.

The Jones Act morphed into a method to promote (or "protect") U.S. trade, industry and commerce. Opponents of the Jones Act argue that the law is not only antiquated, but creates a cost-prohibitive monopoly for the U.S. shipping industry. Supporters claim that the law creates a steady flow of lucrative maritime jobs and enhances domestic commerce. The act reportedly is directly responsible for about 500,000 American jobs and injects over $92.5 billion into the U.S. economy annually.[4]

On the Front Lines

The Jones Act has been consistent in one respect—making headlines. For instance, in 1996, Jones Act reform legislation called "Coastal Shipping Competition Act of 1996" attempted to allow non-U.S.-flagged, foreign-built vessels owned or chartered by U.S. citizens, to operate in the U.S. coastal trade market subject to the condition that the vessel's home state provide similar courtesy to U.S. ships. The legislation was knocked out without any formal hearings in Congress.[5]

On Sept. 11, 2001, the Jones Act helped to achieve one of the most significant maritime rescue operations in history.[6] Immediately following the terrorist attacks here, New York's

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transportation was put on lockdown and thousands found themselves trapped.[7] The U.S. Coast Guard informed nearby vessels of the situation. Voluntarily and spontaneously, hundreds of U.S. commercial vessels raced to the scene and evacuated over 500,000 people in less than nine hours. Thus, supporters credit the Jones Act for providing a U.S. fleet ready and able to carry out such a large scale marine operation.[8]

Then, in the aftermath of Hurricane Katrina in 2005, the Jones Act was temporarily waived to allow foreign vessels to assist in recovery efforts.[9] In 2010, there was major concern as to whether the Jones Act's strict U.S. ships policy would hinder the clean-up and containment of the Gulf Oil Spill. In response, Arizona Senator John McCain introduced legislation to repeal the Jones Act—pointing to the Gulf oil spill and potential damage to the surrounding states as evidence of the law's ill effects in the United States. However, as it turned out, when someone actually read the law, it was deemed to be inapplicable to the Gulf Oil Spill because the assist and recovery vessels were not transiting between points (ports) in the United States. Thus, many foreign vessels participated in the clean-up and McCain's proposal was shot down.[10]

More recently, during a heavy snow winter in 2014, New Jersey was left without sufficient rock salt to treat the state's public roads and sidewalks. After purchasing nearly 40,000 tons of rock salt from the State of Maine, New Jersey had no means of transporting the cargo. The only available ship with capacity to carry such a load was foreign flagged. Recognizing the saltless predicament, New Jersey applied for a waiver of the Jones Act to allow a foreign flag vessel to handle the shipment. A waiver is discretionary with Congress and is not granted unless found to be both necessary for national defense and a qualified U.S. flagged ship is not available. 46 U.S.C. §501(b). Indeed, the U.S. government denied the request despite the unavailability of a U.S. bottom for the haul. Jones Act critics were eager to point out the ironic inefficiency of a law that was supposedly intended to provide the U.S. with a dependable merchant fleet.[11]

New Jersey's situation created a snowball effect. By Jan. 22, 2015, Senator McCain publicly advocated a repeal of the Jones Act, calling it "An archaic 1920s-era law that hinders free trade, stifles the economy and hurts consumers—largely for the benefit of labor unions."[12] McCain stealthily injected a rider onto legislation known as the Keystone XL Oil Pipeline Bill, which would have had the effect of revoking the Jones Act. The rider ultimately failed as unseaworthy and did not make it into the final version of the bill. The act remained unscathed.

Fast forward to Puerto Rico's debt crisis, and the Jones Act and its trade constraints are once again being blamed.[13] On Sept. 9, 2015, the Governor of Puerto Rico, Alejandro Garcia Padilla, proposed a five-year exemption from the Jones Act to allow Puerto Rico to get back in the ring and be a contender.[14] To duck this proposal, a military lobbyist group, 'The Navy League', issued a letter to Congress calling the Jones Act a "fundamental law of American waterborne transportation."[15] According to the Navy League, eliminating the Jones Act in Puerto Rico would "undermine national security." The Navy League also pointed out, "Puerto Rico soon will be served some of the most modern, state-of-the-art vessels in the American fleet. Exempting Puerto Rico and changing the rules in the middle of the game would cause a ripple effect that would impact the entire American shipping industry."

Puerto Rico's high cost of imports concern is echoed in Hawaii since foreign flag ships can only make one U.S. stop at a time. This potentially incentivizes foreign vessels to skip over these outlying areas and head straight for the larger markets located on the U.S. mainland. Indeed, in *In re Hawaiian & Guamanian Cabotage Antitrust Litigation*, 754 F.Supp.2d 1239, f.n. 18 (W.D. Wash. 2010), a U.S. federal court noted in its dismissal of an antitrust suit brought against ocean carriers by shippers of cargo that "although many factors affect pricing, the differences plaintiffs have identified between the Hawaii and Asia/Guam markets are consistent with the higher costs plaintiffs have quoted for shipping cargo to Hawaii, which must, unlike goods transported to Asia, cover the expenses of both legs of the journey." The plaintiffs argued that the cost to ship a 40-foot cargo container from the west coast of the United States to Japan was $4,250. (and to Hong Kong $3,575), while the rate for the same size container to Hawaii was $10,373.

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Sinking Stirs New Debate

The Jones Act may level the playing field for U.S. ship operators because everybody in the game has to pay the same price to build U.S. vessels and hire a U.S. crew. As explained by the U.S. District Court, District of Columbia in *OSG Bulk Ships, Inc. v. U.S.*, 921 F.Supp. 812 (D.D.C. 1996), "United States shippers operating exclusively in the domestic trade thus incur equivalent costs in constructing and operating their fleets and are protected against lower cost foreign competition which, under the Jones Act, are prohibited from operating domestically in the United States." A watertight argument can be made that the Jones Act protects the U.S. ship-building industry from reaching the same fate as the once-prosperous U.S. steel and automotive industries.

The EL FARO (The Lighthouse in Spanish) was on a Jones Act trade route. Critics of the act wasted no time in raising the sinking as yet another Jones Act issue by suggesting that shipping companies run older vessels because of the act and that updates to extend the life of a vessel (such as EL FARO had in 1992 and 2006) are often seen as cheaper than rebuilding a ship in the United States from scratch.[16]

Only time will tell whether the new debate over an old law's economic impact will have any influence over the continued integrity of the act. But, as we approach its 100th anniversary, it appears that the law—particularly with this year's trumped up "close our borders" presidential campaign mantra—is here to stay.

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