[Editorial] Lazy Jones Act Thinking

By Charlie Papavizas

The Jones Act is being blamed for the inability of the State of New Jersey to get additional road salt in time for use this winter. As often happens when the press turns its attention to a maritime issue, the stories usually obscure rather than illuminate the real issues.

To start with, the restriction of U.S. domestic maritime commerce to qualified U.S.-flag vessels is way older than 94 years. The very first U.S. Congress in 1789 instituted a preference for U.S.-flag vessels in domestic commerce – and that principle has been carried forward to the present day.

Section 27 of the Merchant Marine Act, 1920 – together with similar restrictions applicable to passengers, dredging and towing commonly referred to as the "Jones Act"– changed the pre-existing law to be sure, but not fundamentally. That section was hardly debated in Congress and the record reflects that no one thought it marked a new policy. As Sen. Wesley L. Jones, the father of the "Jones Act" said at the time: "We do not deal in general in this bill with the coastwise laws. They are left just as they are . . ."

So, yes, the Jones Act idea is an old one (but much older than 94 years!) – but its ancient origin is not so much an indicator that it is a relic – but rather that it reflects a fundamental principle of the United States. And that principle is that U.S. domestic commerce – whether it be by land, air or sea – should be reserved to U.S. citizens.

Now, undoubtedly some will note that the Jones Act imposes different restrictions on U.S. maritime domestic commerce than the land and air requirements. And that is in fact the case. But, the restrictions preventing a foreign airplane owned and operated by foreign citizens from carrying passengers between U.S. cities is a duplicate of the Jones Act restrictions to the same effect. The underlying – and very well accepted principle – is the same.

Which brings us back to the New Jersey salt problem. Surely, the State cannot claim that they were surprised by the Jones Act any more than they should be surprised that no one can take a flight on British Airways from Newark to Chicago. Which suggests that perhaps the Jones Act is being used as a convenient excuse for poor logistical planning rather than as a real impediment.

When the subject turns to getting a Jones Act waiver, the reporting is equally confused. It is often assumed (always a bad way to think about any law) that the Jones Act can be waived merely if it is a commercial impediment. For good or bad, that is not the case.

The Jones Act can only be waived if is determined that such a waiver is "necessary in the interest of national defense" – which is a high bar and rarely invoked. In addition, the waiver process has been strengthened in the last few years by the Jones Act community to require that the U.S. Maritime Administration be sure no U.S.-flag vessels are available to meet the demand *and* to identify actions that could be taken to enable qualified U.S.-flag vessels to meet the need.

In practice, think severe hurricane as the type of impetus needed to make the "national defense" case. Some of the few Jones Act waivers were granted after each of hurricanes Katrina, Rita and Sandy. Is getting road salt to New Jersey that type of impetus? Only time will tell as nothing has surfaced publicly about how the Government will respond to a reported New Jersey waiver request.

So, the Jones Act may be, or may not be, having an impact on getting salt to New Jersey. But before everyone starts thinking that the Jones Act is some sort of oddity or can be easily dispensed with, they should look again at what the Jones Act really is and how the law really works.

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