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MARINE TERMINAL OPERATOR SCHEDULES UNDER THE OCEAN SHIPPING REFORM ACT OF 1998[1]

By William P. Ryan

Introduction

The Ocean Shipping Reform Act of 1998 ("OSRA")[2] was enacted by Congress in October 1998, with an effective date of May 1, 1999. The OSRA was intended to "amend the Shipping Act of 1984 to encourage competition in international shipping and growth of United States exports, and for other purposes."[3] The purposes of the OSRA relate to the establishment of a nondiscriminatory and efficient transportation system

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[1] This is the first of two articles on Marine Terminal Operator Schedules under the Ocean Shipping Reform Act of 1998. The second article will address exculpatory clauses and related matters in Marine Terminal Operator Schedules, and will be published in the Third Quarter 2018 edition of Benedict's Maritime Bulletin.

[2] Pub. L. No. 105-258, 112 Stat. 1902.

[3] *Id.*

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Managing Editor's Introductory Note

We begin this edition with the first of two articles on Marine Terminal Operators Schedules created under the auspices of The Ocean Shipping Reform Act of 1998. These Schedules address the terms and conditions which may govern marine terminal operations. Our author, William P. Ryan, ably and in detail describes the purpose and effect of such Schedules established by marine terminal operators and the benefits of performing services under their terms. He relates how these Schedules may operate as implied contracts, even without specific knowledge of their terms, or how they may be written into marine contracts between terminal operators and carriers. He discusses the parties to such Schedules, limitations of liability that may be written into them, their potential application to stevedoring services and trucking operations, time for suit and notice limitations, provisions for liens on cargo for services rendered under them, and the caselaw construing and applying their terms and conditions.

The second article on this subject will appear in our next edition.

Our next article, by Kyle Brennan, provides an in-depth look at the hazards of mis-description of dangerous cargoes in shipping documents, focusing on the March 6, 2018 fire aboard the MAERSK HONAM, a 2017-built, Singaporean-flagged, 15,262 TEU Ultra Large Container Vessel (ULCV) in the Gulf of Aden while traveling from Asia to Europe. As Kyle relates, these types of large-scale, unexplained fires on board containerships can often be traced back to a single plight facing the maritime industry: improperly declared cargo, an increasingly prevalent problem. He explains the international regulations governing containerized hazardous cargo and some of the attendant risks when such goods are misdeclared, examines the liabilities of different parties in a complex supply chain, and proposes some solutions to the problem of misdeclared hazardous goods in containers.

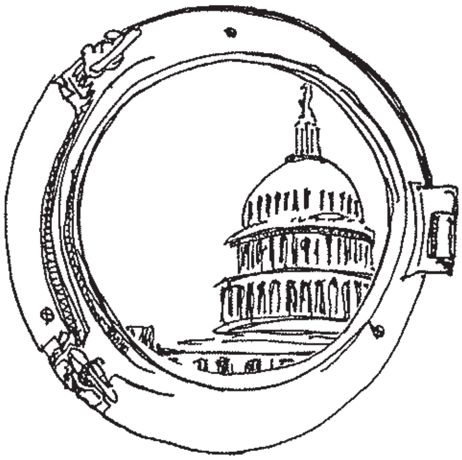
In his regular column, Window on Washington, Bryant Gardner gives a precise synopsis of the recently passed massive $1.3 trillion Omnibus Appropriations Bill funding the Government for the rest of the year providing much-needed funds for maritime-related programs. Included in the budget is much of the funding needed by the Coast Guard to perform their variegated and necessary mandates, the need for which was the topic of Bryant's last column which led our last edition. However, as Bryant warns, Hill watchers should look for mounting Republican efforts to pull back on other funding areas, including through the rescission of amounts previously appropriated and not yet spent.

We finish with our Recent Developments case summaries to keep you informed on developments in various aspects of maritime law.

As always, we hope you find this edition interesting and informative, and ask you to consider contributing an article or note for publication to educate, enlighten, and entertain us.

Robert J. Zapf

WINDOW ON WASHINGTON



ROLL GREEN WAVE!

By Bryant E. Gardner

Laissez les bon temps rouler! In late March 2018, Congress passed a massive $1.3 trillion Omnibus Appropriations Bill funding the Government for the rest of the year providing much-needed funds for maritime-related programs.[1] The Bill,[2] which passed the Senate only hours before another Federal Government shut-down, and on the eve of Congress's spring recess, weighed in at 2,300 pages and $138 billion more than 2017 spending, and was passed so hurriedly that many, probably most, legislators had no opportunity to read it or even get a handle on what it included. House party leaders gave members just hours to review the Bill, tamping down opportunities to explore and object to its detail. And with Congress checked-out and home for two weeks, the President had little opportunity to negotiate.

Typically, all sides groused about the Bill's inadequacies and then moved to take credit for its adequacies. President Trump unleashed a twitterstorm lambasting the "ridiculous situation" that led to the Bill's creation, vowing "I will never sign another Bill like this again. I'm not going to do it again. Nobody read it." Initially, the President threatened to veto the measure, citing its failure to fully fund his southern border wall and failure to resolve the status of undocumented immigrants brought to the U.S. as children ("DACA Dreamers"). After signing it into law, he trumpeted its $61 billion military funding increase and the $1.6 billion provided for the border wall, while lamenting "Had to waste money on Dem giveaways in order to take care of military pay increase and new equipment." He also called for an end to the Senate filibuster requiring a 60 vote majority to pass legislation and the power of a line item veto, neither of which is likely to happen any time soon. Democrats applauded the Bill's maintenance of robust non-defense programs, including a big bump to tackle the opioid crisis and social programs, but many conservative members, including the House Freedom Caucus, decried its failure to control spending. Republican Senator John Kennedy of Louisiana commented that the Bill is "A Great Dane-sized wiz down the leg of every taxpayer."[3] And Senator Corker (R-TN), called

[1] Consolidated Appropriations Act, 2018, Pub. L. No. 115-141 ("Omnibus").

[2] H.R. 1625.

[3] Sean Moran, Breitbart News (Mar. 21, 2018).

the Bill "a grotesque piece of legislation" that would set the standard for $2 trillion in deficit spending. The National Review denounced the Omnibus as "the sort of legislation that would be right at home in the Obama Administration," and democratic congressional leaders hailed the measure as "job-creating, life-saving investments [which] stand in sharp contrast to the Trump budget." While Presidential budgets are always dead on arrival at Capitol Hill, the Omnibus departs remarkably from many of the President's priorities, considering the Republican control of the White House and both houses of Congress.

Most of the Administration's proposals to pare down or eliminate maritime and transportation programs hit the scrap heap. The President proposed top-line funding of $16.3 billion for the Department of Transportation, down from $18.5 billion in 2017. Under the Omnibus, the Department will receive $27.3 billion in net discretionary appropriations.[4] Of that, the Maritime Administration ("MARAD") will receive $980 million, contrasted with the $523 million the agency received in 2017 and the $391 million proposed in the budget. And, the Bill will triple funding for Transportation Investment Generating Economic Recovery ("TIGER") grants, an Obama-era infrastructure funding program first included in American Recovery and Reinvestment Act of 2009.

The Omnibus includes lots of good news for U.S. shipyards, starting with MARAD's programs. The law includes $300 million in new funding to develop a new multi-mission vessel design for use in replacing the ageing state maritime academy training vessels, most notably Fort Schuyler's EMPIRE STATE, recently mobilized to assist with hurricane relief in Puerto Rico. Although the EMPIRE STATE was christened 56 years ago, the Massachusetts Maritime Academy's KENNEDY, in Buzzards Bay, is only four years younger, and also badly in need of replacement. U.S. Maritime Administrator Admiral Mark Buzby has indicated that replacement vessels must be in the 500-foot range and capable of carrying 600 people. Suitable types include ocean ferries, heavy lift ships, and tankers, if existing vessels are to be acquired. Replacing the vessels with new builds has become increasing complicated and expensive as new mission requirements, such as disaster relief auxiliary, have been piled on to the design in order to justify their construction and expense. The Bill also includes $20 million for grants to small shipyards. That grant program received $6 million in 2017 and was slated for elimination in the President's budget. The Omnibus provides $30 million for "Title XI" Maritime Guaranteed loans, which back the construction of vessels in the United States for operation in the U.S. coastwise trade. The Title XI program was also slated for elimination in the budget. Moreover, the Bill provides $116 million for expenses related to the scrapping of obsolete vessels in the MARAD's National Defense Reserve Fleet ("NDRF"). The ship disposal program received $4 million in 2017 and the Administration proposed funding of $9 million.

MARAD operational programs also fared well, particularly when compared to the President's budget. MARAD's Ready Reserve Force ("RRF") mothball fleet of surge sealift vessels, more modern than the rest of the NDRF, had received $246 million in 2017 and the Administration proposed to maintain that funding for 2018. However, the Omnibus funds the RRF at $289 million. The NDRF and RRF fleets are by and large approaching (or past) the end of their useful life, and the U.S. Navy Military Sealift Command and the U.S. Maritime Administration are gearing up to make hard choices about how to recapitalize the fleet. On the one hand, the agencies want to get the fleets rebuilt at a price they can afford. On the other hand, they want to garner the support of the U.S. shipyard constituents and to inject life into the shipbuilding defense industrial base. It remains to be seen how that will play out in the years to come. The Omnibus includes $300 million for the Maritime Security Program ("MSP"), fully funding the program that provides a $5 million per vessel payment to militarily useful U.S.-flag vessels operating in international registry trades, consistent with the fully authorized level of the program and funding provided in 2017. The Administration had proposed cutting the program back to a $3.5 million per vessel payment. The international food assistance programs, including Food for Peace and McGovern-Dole, which provide an important source of government-impelled cargo for U.S.-flag registry trade carriers, received increases of $250 million and $6 million respectively. Unfortunately, Export-Import Bank cargoes remain slowed to a trickle due to an

[4] Other funding is available from transportation trust funds for Federal highway, transit, and aviation programs.

ongoing political fight about the Bank, which has hobbled its ability to approve new loan programs.

Shipyards will also benefit from new Navy shipbuilding. The agreement provides $23.8 billion for 14 Navy ships, $3.4 billion and five ships more than the President's request. It is the largest amount that Congress has provided for shipbuilding since the end of the Cold War. Included in the package are $5.5 billion for construction and long-lead components for the next boats in the Virginia class of new attack submarines; $1.6 billion for the new Columbia-class missile boat; $4.1 billion for the carrier program and $1.6 billion for carrier refueling overhauls; $1.6 billion for three Littoral Combat Ships, and $3.4 billion for the next two DDG-51 destroyer vessels.

The Department of Homeland Security's funding doubles under the Omnibus, from $51 billion to $116 billion. Much of this is disaster relief, although the Coast Guard's top-line funding will increase from $10.5 billion to $12.1 billion. The Coast Guard received $7.3 billion for operations, roughly on par with 2017 levels and the President's request. Additionally, the service received $2.7 billion for capital acquisitions and renovations of shoreside facilities, vessels, and aircraft, with $95 million immediately available for the National Security Cutter program. The Coast Guard's capital account appropriation far exceeds the $1.6 billion provided in 2017 or the $1.3 billion requested by the Administration. Of the total, $2.2 billion is for ships ($1.4 billion more than 2017), including $1.2 billion for a National Security Cutter, $500 million for a new Offshore Patrol Cutter, and $340 million for a Fast Response Cutter. Homeland security also received $100 million for Port Security grants, consistent with 2017 levels and contrary to the Administration's proposal to provide $48 million for the program.

The steady stream of cash for yards stems, in part, from the parting graces of outgoing Mississippi Senator Thad Cochran (R-MS), who resigned April 1, after serving in Congress since 1973. The National Security Cutter will be built by Huntington Ingalls Industries, Inc., in Pascagoula. The White House 2018 budget called for $54 million for acquisition and construction of national security cutters, but the Omnibus provided $1.23 billion—23 times what the Coast Guard initially requested, to buy two new cutters. However, as discussed in the last *Window on Washington*, successive administration proposals have tended to hobble and short change the Coast Guard, knowing that the service enjoys widespread support in Congress and will generally be made whole through the congressional appropriations process. Other Cochran priorities in the Omnibus include an additional $150 million for a heavy polar icebreaker, to be a joint Navy-Coast Guard ship with a strong chance of being built in Pascagoula. The Omnibus also includes $180 million for a Navy oceanographic survey ship that was not requested by the Pentagon but will be built by Pascagoula-based V.T. Halter Marine, Inc. Senator Cochran, who earned a reputation as the "quiet persuader" has been a moderating influence in the Senate and has embodied many of the best aspects of the world's greatest deliberative body. He will be missed.

The U.S. Amy Corps also received new funding for the dredging and maintenance of waterways. The Omnibus provides $6.8 billion in funding, an increase of $790 million from 2017 levels and $1.8 billion more than the President requested. This includes $2.05 billion for construction (up $209 million), $3.630 billion for operations and maintenance (up $481 million), and $425 million for flood damage reduction projects on the Mississippi River (up $63 million), providing work for U.S. dredgers and needed improvements to the inland waterways system and related facilities. An estimated $1.4 billion of these activities are eligible for reimbursement from the Harbor Maintenance Trust Fund. The measure also makes use of all estimated annual revenues from the Inland Waterways Trust Fund.

Many conservative Republicans, particularly in the House, have already begun to attack the Omnibus as a profligate pork-fest and seek to distance themselves from it in many respects as midterm elections come into focus. As of writing, efforts are underway to take-up a balanced budget amendment following the release of a Congressional Budget Office report expected to show the deficit topping $1 trillion this year or next and reaching $2 trillion by 2028. Although the balanced budget amendment is unlikely to become a reality, it may serve as a symbolic defensive measure for members facing election before their conservative base. Additionally, Hill watchers should look for mounting Republican efforts to pull back on other funding areas, including through the rescission of amounts previously appropriated and not yet spent. One major lump of such money under the microscope is $730 million in Hurricane Sandy recovery funding, with others coming into focus as well. A major rescissions package is likely to face a tall hurdle, particularly given the Omnibus compromise just struck between GOP and Senate Democrats, because a rescissions package might be viewed as a back-trade. Nonetheless, maritime clients with high priority programs, particularly with prior year outstanding balances open to rescission, should pay close attention in the months to come and be sure that their interests are protected.

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