

# BENEDICT'S MARITIME BULLETIN

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## WAIVING A RIGHT TO JURY UNDER THE JONES ACT? – POST-INJURY ADVANCES AND ARBITRATION AGREEMENTS

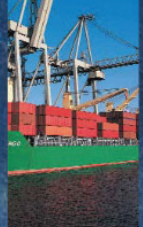
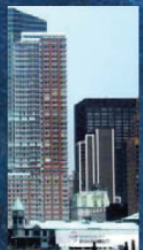
By Vince C. Reuter\*

Perhaps the most significant part of the Jones Act is its explicit “right of trial by jury.”<sup>1</sup> In modern litigation, this right has provided seafarers with considerable leverage against their employers after an injury. That leverage is primarily based, of course, on an employer’s fear of the so-called “runaway jury.” The chance of a jury award that is exponentially higher than the parties’ relationship can dramatically change risk evaluation in the seafarer’s favor. To be sure, this article isn’t about the fairness of jury awards, and certainly doesn’t take any sides between injured seafarers and their employers. Instead, it’s about potential after-the-fact limits to that jury right. Specifically, this article discusses the enforceability of arbitration through post-injury agreements for the advancement of future unearned wages—an issue that practitioners on both sides should understand thoroughly.

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<sup>1</sup> See 46 U.S.C. § 30104. (“A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right to trial by jury, against the employer.”)

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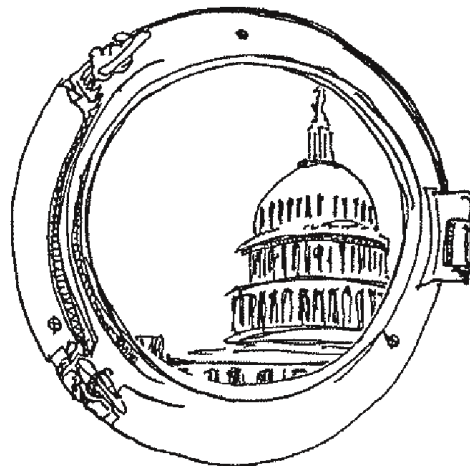
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Matthew Bender®

## WINDOW ON WASHINGTON



### *Cherry Blossoms and Maritime Policy*

By Bryant E. Gardner\*

Spring is in the air in D.C. The cherry blossoms are in bloom around the Tidal Basin, and tourists from around the world are back with a vengeance, having thrown off their three-year, COVID-driven hiatus. Spring congressional hearings, marker bills, and appropriations hearings are also in overdrive, bringing a glimpse of the pressing maritime policy issues and potential legislative changes in store for the industry this year.

#### *March 23, 2023 House Transportation and Infrastructure Committee Hearing*

On March 23, 2023, the House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation held a hearing on the Biden Administration's Fiscal Year 2024 Budget Request for Federal Maritime Transportation Programs and Implementation of the Ocean Shipping Reform Act of 2022 ("OSRA 22"). The Subcommittee shares jurisdiction over the maritime industry with the House Armed Services Committee, overseeing the non-national security aspects of the Merchant Marine and matters pertinent to the Shipping Act of 1984, as amended. Witnesses included the Honorable Dan

Maffei, Chairman of the Federal Maritime Commission ("FMC"), and Rear Admiral Ann Phillips (Ret.), Administrator of the U.S. Maritime Administration ("MARAD").

In his opening statement, Committee Chairman Daniel Webster (R-FL) addressed MARAD's Port Infrastructure Development Program ("PIDP"), which provides competitive grants to improve the safety, efficiency, or reliability of the movement of goods through, in, or around ports.<sup>1</sup> The president's budget includes \$230 million for the program, in addition to the \$450 million in advance appropriations received through the Infrastructure Investment and Jobs Act.<sup>2</sup> The chairman expressed concern that the PIDP includes a prohibition on the use of funds for automated cargo handling equipment and that MARAD has included the requirement in its notice of funding opportunity for the Marine Highways program without a companion statutory prohibition. Additionally, the chairman expressed concerns regarding MARAD's delays in approving deepwater ports applications under the Deepwater Port Act of 1974, a concern subsequently

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<sup>1</sup> U.S. Maritime Administration, About Port Infrastructure Development Grants, <https://www.maritime.dot.gov/PIDPgrants>.

<sup>2</sup> Pub. L. No. 117-50, Title VIII, 135 Stat. 429, 1442 (2021).

echoed by Congressman Brian Babin (R-TX).<sup>3</sup> The chairman also inquired regarding MARAD's progress inquiring into the potential cybersecurity threat of Chinese-manufactured cargo cranes.

Opening for the minority, Congressman Rick Larsen (D-WA) noted the dominance of foreign carriers, with only 2% of U.S. international trade carried by U.S.-flag vessels, and the need for a stronger U.S.-flag presence demonstrated by the recent supply-chain crisis and ongoing international conflicts. Congressman Larsen applauded the 2% budget increase for MARAD and the 14% increase for the FMC, and took note of the ongoing efforts to combat sexual assault and sexual harassment ("SASH") at King's Point and afloat. He also stressed the importance of PIDP and the Small Shipyard Grant program,<sup>4</sup> expressing disappointment that the president's budget includes only \$20 million for the shipyards program.

MARAD Administrator Phillips outlined ongoing initiatives at her agency, including PIDP, \$980 million for recapitalization of the Ready Reserve Force ("RRF") government-owned sealift fleet, progress on implementing new SASH-prevention rules for U.S.-flag vessels and the U.S. Merchant Marine Academy, a new \$42 million capital improvement contract for the academy, and issuance of an interim final rule to implement the Tanker Security Program providing a stipend of \$6 million per enrolled product tank vessel in exchange for availability to the Department of Defense in times of war and national emergency, similar to the successful dry cargo vessel Maritime Security Program. Regarding the Chinese cargo cranes concerns raised by Chairman Webster, Administrator Phillips deferred discussion of the classified report on the matter until the findings have been finalized. She also indicated that the administration awarded \$39 million for the Marine Highway Program<sup>5</sup> in 2022, with another \$12.4 million in grants to become available this year, and an additional \$11 million requested in the president's budget.

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<sup>3</sup> 33 U.S.C. § 1501 et seq.; *see also* U.S. Maritime Administration, About the Deepwater Port Act, <https://www.maritime.dot.gov/ports/deepwater-ports-and-licensing/about-deepwater-port-act>. Deepwater ports include those located beyond the U.S. territorial sea for the import and export of oil and natural gas.

<sup>4</sup> 46 U.S.C. § 54101; *see also* U.S. Maritime Administration, Small Shipyard Grants, <https://www.maritime.dot.gov/grants-finances/small-shipyard-grants>.

<sup>5</sup> U.S. Maritime Administration, United States Marine Highway Program, <https://www.maritime.dot.gov/grants/marine-highways/marine-highway>.

The Maritime Administrator reported that last year's PIDP grants included four related to offshore wind deployment totaling almost \$100 million, with additional capacity to further support offshore wind initiatives. Additionally, the Administrator reported an increase in Federal Ship Financing Program "Title XI" applications for wind vessels since MARAD designated them "vessels of national interest" under the program, with five of seven pending applications for wind vessels.<sup>6</sup> Congressman Jake Auchincloss (D-MA) called for increased Title XI appropriations to fuel growth of American's offshore wind fleet.<sup>7</sup>

Congressman Jeff Van Drew (R-NJ) decried the "dangerous rush to industrialize our oceans with offshore wind," stating that proposed offshore wind leases cover over two million acres, including over 3,000 turbines, each over 1,000 feet tall. He noted that the offshore structures may interfere with navigation and the maritime supply chain, military maneuvers, and search and rescue, and result in personal injury and loss of life and danger to marine wildlife. He also questioned the MARAD Administrator regarding her prior advocacy for offshore wind and association with climate-related groups. Congressman Larsen responded with a line of questioning to establish that the Biden administration's overarching position is supportive of offshore wind, inclusive of MARAD.

Chairman Maffei touted rapid actions by the FMC toward implementation of OSRA 22. The FMC consumer affairs office has been averaging 100 shipper requests for assistance each month, and the number of formal complaints docketed with the Commission has tripled since 2019, requiring the addition of two more administrative law judges, when one sufficed before the pandemic-induced supply chain crisis. "Charge complaints," created by OSRA 2022, offer a streamlined adjudication process for shippers, who filed 260 such complaints between June 16, 2022 and March 14, 2023, 97 of which were perfected and assigned for investigation by the FMC, resulting in the waiver or refund of \$800,000 in charges against shippers. Chairman Maffei indicated that the FMC has two rulemakings underway to implement OSRA 22 and that the FMC is in the midst of its most intense period of activity during its half-century in existence.

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<sup>6</sup> 46 U.S.C. § 53701 et seq.; *see also* U.S. Maritime Administration, Federal Ship Financing Program (Title XI), <https://www.maritime.dot.gov/grants/title-xi/federal-ship-financing-program-title-xi>.

<sup>7</sup> Administrator Phillips testified that the FY 2023 budget includes only \$3 million for Title XI.

Chairman Maffei also fielded questions regarding the state of the supply chain, and the role of container demurrage and detention. He opined that legitimate detention and demurrage is important provided it operates in accordance with the “incentive principle” by encouraging the flow of cargo. However, he opined that when such charges accrue in instances wherein the shipper cannot pick up its cargo, due to a terminal closure on a weekend or a blizzard, then the shipper should not be charged demurrage and detention. He also noted that excessive free time given to some of the larger shippers, three or four weeks of free time in some cases, has contributed to bottlenecks in the ports.

Congressman John Garamendi (D-CA), who cosponsored OSRA 22 with Congressman Dusty Johnson (R-SD), suggested that the Shipping Act should be amended to permit the FMC to issue binding orders without the need to go to court to enforce them.

*March 28, 2023 House Armed Services Committee Hearing*

On March 28, 2023, the House Armed Services Subcommittees on Readiness and Seapower Projections Forces held a joint hearing on Posture and Readiness of the Mobility Enterprise. Readiness Subcommittee Chairman Michael Waltz (R-FL) opened by stressing the importance of focusing upon the Indo-Pacific theater and expressing concern regarding fuel supply lines across the Pacific Ocean in the wake of the closure of the Red Hill fuel depot in Hawaii. Opening for the Seapower Subcommittee Republicans, Congressman Trent Kelly (R-MS) applauded the success of the Tanker Security Program, but opined that the fledgling 10-ship fleet is “just the tip of the iceberg” and called for prioritizing that capacity immediately. He also expressed concern regarding the shortage of merchant mariners threatening national defense sealift and force projection capability.

Seapower Subcommittee Ranking Member Joe Courtney (D-CT) agreed with Kelly’s points regarding the Tanker Security Program, and also highlighted the urgent need to recapitalize the RRF. However, he shunned the practice of buying used foreign vessels to recapitalize the fleet, noting the need to fill order books at American yards and American shipbuilding capacity. In doing so, he questioned vessel price and availability risk factors associated with buying used foreign-built vessels on the world market, which he contrasted with “steady state” building programs domestically. Chairman Waltz questioned U.S. yard prices, but stated that “the only way to get at it and get at the labor shortages is to actually reinvigorate the market.”

United States Transportation Commander General Van Ovost testified regarding the state of American sealift capability, expressing support for the Tanker Security Program, Maritime Security Program, Jones Act, and recapitalization of the RRF roll-on, roll-off vessels, which on average are 44 years old, with 17 of 44 vessels more than 50 years old. She also highlighted the U.S. Transportation Command’s (“TRANSCOM’s”) ongoing campaign to end reliance upon foreign-owned, foreign-controlled tankers and to grow the pool of American mariners to meet national defense needs. She also indicated that TRANSCOM is looking toward reliance upon dispersed floating vessel fuel storage—both contractor owned and government owned—to address bulk fuel supply chain issues in the Pacific. Asked about her biggest challenges, General Van Ovost said that Congress’s repeated passage of continuing resolutions, in lieu of fresh funding streams, undermines military readiness and the military’s ability to develop modernization programs.

In contrast to Congressman Courtney, General Van Ovost expressed support for the Navy’s plan to purchase foreign-built ships rather than building them in America for the RRF, and opined that the current purchase rate of two vessels per year must be increased to replace vessels aging out of service. Representatives Christopher Deluzio (D-PA), Jen Kiggans (R-VA), and Donald Norcross (D-NJ) asked Administrator Phillips how the country arrived at its reliance upon foreign shipbuilders for military capability and what can be done to boost domestic vessel production. The Administrator responded that the nation allowed its capability to deteriorate following World War II and noted that Congress has not provided funding for the authorized 10ship program to recapitalize the RRF with American-made vessels. General Van Ovost opined that the main barrier to the employment of U.S. yards is their limited capacity, with each of the services competing for the same limited drydock space, prompting Kiggans to note that in recent weeks, four West Coast drydocks had closed, leaving 18 operating nationally.

Addressing the national mariner shortage, Admiral Phillips testified that the country has a shortage of 1,800 mariners needed for basic national defense mobilization over a six-month activation period. MARAD faces significant challenges accurately identifying the existing pool of mariners and their skill sets for the manning of required vessel types. Chairman Waltz characterized the shortage as a “red star cluster” important issue requiring near-term attention from the administration. Administrator Phillips indicated that MARAD is working with the seafaring union schools and numerous educational institutions around the country, dubbed

“Maritime Centers of Excellence,” to increase mariner training, and stated that the addition of the Tanker Security Program fleet and the new school vessels at the six state maritime academies are expected to boost mariner numbers, along with increased safety afloat from new SASH prevention initiatives.

Responding to questions from Congressman Jimmy Panetta (D-CA) regarding China’s expansionist “Silk Road” and “Belt and Road” programs, General Van Ovost testified that China provides America’s “most consequential pacing challenges” and the Chinese Communist Party “continues to use their malign influence to get into port infrastructure and frankly the digital silk road with their ability to use data management systems to infiltrate and then aggregate that data and send it back to China from the logistics flows, which is a key vulnerability.” She further indicated that TRANSCOM is working with the Departments of State and Commerce to counter Chinese investment in the ports of America’s allies and partners around the globe.

*March 28, 2023 House Transportation and Infrastructure Committee Hearing*

On March 28, 2023, the House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation held a hearing on the Maritime Transportation Supply Chain. In contrast to the other maritime hearings during the month, this hearing sought the testimony of private industry, including representatives from ports, shippers, and carriers.

Charles “Bud” Darr, Executive Vice President for Maritime Policy and Government Affairs at the MSC Group, testified on behalf of the World Shipping Council, the Washington-based association representing most of the world’s liner shipping industry. Darr pointed out the steep drop in freight rates since the initial pandemic-induced surge, reporting that market dynamics have returned to pre-pandemic conditions. He opined that congestion during the pandemic occurred not as a result of any meltdown by ocean shipping, but by shortcomings among shoreside elements of the supply chain, leaving ships anchored offshore full of cargo. Additionally, he took exception to the FMC’s decision in *TCW, Inc. v. Evergreen Shipping Agency (Am.) Corp.*<sup>8</sup> insofar as it found detention fees for the use of equipment during a holiday weekend when the equipment return location was closed to be a violation of the Shipping Act.

Matthew Leech, President of Ports America, testified on behalf of the National Association of Waterfront Employers. Leech also reported that maritime cargo volumes have normalized and in many cases are lower than they were pre-pandemic. In response to questions from Congressman Babin, Leech stressed that excessive free time results in excessive congestion, and called for better information sharing from cargo interests requiring longer-stay arrangements in port for purposes of segregating that cargo into lower priority space use.

William H. “Buddy” Allen testified on behalf of the American Cotton Shippers Association. Allen called for “meaningful structural changes” to prevent the next supply chain disruption. He applauded the passage of OSRA 22 and the FMC’s documentation regime governing demurrage and detention, but called for further establishment of causation in such submissions. He also applauded a recent decision by the FMC finding that denial of choice and chassis procurement is an unreasonable practice in violation of the Shipping Act, and highlighted the importance of OSRA 22’s required study on best practices for chassis. Allen also stressed the value of establishing more consistent cargo receiving practices across port operators and better information sharing among supply chain users and service providers, and called for unified FMC jurisdiction across the entire bill of lading move from end to end.

Mario Cordero, Executive Director of the Port of Long Beach and former Chairman of the FMC, testified on behalf of the Port. He highlighted improvements at the Port through PIDP, and expected benefits to cargo flows from implementation of OSRA 22. He recommended providing MARAD with waiver authority to overcome permitting delays for PIDP projects, investing in digital information sharing technology connecting ports and port users, encouraging 24/7 port operations, direct federal funding to facilitate goods movement and reduce emissions through programs like PIDP, and continuing investment in the FMC’s enforcement capabilities coupled with an appreciation for the value that demurrage and detention charges have for incentivizing cargo movement.

Committee Chairman Webster raised the possibility of stripping the antitrust exemption available under the Shipping Act. Mr. Darr responded that current shipping alliances only account for a portion of vessel capacity and function to better utilize vessel capacity available to shippers, allowing more service to more ports than would otherwise be available at the same cost.

<sup>8</sup> 2022 WL 18068977 (F.M.C. Dec. 29, 2022).

Congressman Garamendi expressed support for removing the antitrust exemption, and again raised the possibility of amending the Shipping Act to provide the FMC with independent enforcement authority, without having to seek a court order. Additionally, the Congressman proposed providing priority port access for vessels scheduled to carry American export cargo, receiving support from Mr. Allen on the proposal.

It remains to be seen which of these issues will make their way into legislation during the 118th Congress. However, it appears clear that further tweaks to OSRA

22 are planned, including information sharing mandates and potentially new enforcement authority for the FMC. Additionally, MARAD and TRANSCOM will press forward with the Tanker Security Program and Pacific fuel sealift, recapitalization of the RRF, and implementation of more-robust SASH prevention rules. The FMC, for its part, continues to work through the monumental changes wrought by the pandemic and OSRA 22, building up its regulatory, enforcement, and decisional framework—a task sure to continue for several years at least.

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