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BLOG

Jones Act "Third Proviso" in the News

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The "Jones Act" "third proviso" has been in the news regarding the transportation of fish and fish products from Alaska to the lower 48 states. It might be useful to review how that proviso came about.

In 1919-1920, the U.S. Congress was faced with the problem of what to do with an enormous fleet of vessels built to prosecute the war in Europe. A decision was taken to sell the fleet to private companies over time in as orderly a process as possible. That process eventually had to be re-visited, but the basic framework was set out in the Merchant Marine Act, 1920.

Sen. Wesley L. Jones (R-WA), then Commerce Committee Chairman, shepherded the legislation through the Senate and was even then associated with the Act which was known at the time as the "Jones Law" or the "Jones Act." Thus, the focus of the legislation was U.S.-flag vessels in the foreign trade, not in the U.S. domestic trade, and virtually every press account of the day focused on provisions in the Act having to do with U.S. foreign trade.

There was, however, one provision (section 27) dealing with the U.S. coastwise trade (there was another section seeking to apply U.S. coastwise laws to the Philippines). Section 27 restated the pre-existing coastwise reservation to U.S.-flag vessels which was first enacted in 1817 for U.S.-owned vessels and which had its origins in preferential import duty law enacted in 1789. Section 27, and another section (33) having to do with merchant mariner injury recoveries, have been singled out over time to define the 1920 Merchant Marine Act as the "Jones Act" in two different contexts.

Section 27 did not alter the principle which had existed since 1789 to restrict the transportation of merchandise between ports, places, or points in the U.S. to qualified U.S.-registered vessels. It did, however, intentionally close a loophole which had developed in 1913 with respect to the carriage of merchandise to and from Alaska partly by water and partly by land. The prior law had been narrowly interpreted such that "for any part of the voyage" in the statute meant that the law only applied to water transportation, not mixed land and water transportation.

Starting as early as 1916, Sen. Jones was urged by his constituents to address the loophole which he did by including section 27 in the law. That section added "by land and water" and changed the phrase to "for any part of the transportation." Objections were raised at the time about the potential disruption of pre-existing patterns of travel of both passengers and merchandise in part over Canadian rail lines.

To address those objections, a proviso was added to the restated coastwise law – then the "first proviso" – which stated that the coastwise restriction did not apply to transportation "over through routes heretofore or hereafter recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall hereafter be filed with said commission when such routes are in part over Canadian rail lines . . ." – and "*excluding* Alaska."

In 1935 this proviso was interpreted by the U.S. Supreme Court which wrote that "its evident purpose was to avoid disturbance of established routes, recognized by the Interstate Commerce Commission as in the public interest, between Northwestern and Eastern states through the lake ports." Later in 1935, the law was restated to make the Canada rail line provision the "second proviso" and then it finally became the "third proviso" in 1956. In 1958 the words "excluding Alaska" were changed to "*including* Alaska" when Alaska became a state.

The Interstate Commerce Commission was terminated by law at the end of 1995 and the Surface Transportation Board was created with some of the ICC's former functions at the same time. In 1996 the third proviso was amended to substitute the Surface Transportation Board for the ICC. In 2006, Congress recodified many maritime laws with the express intention of not making substantive changes.

The "third proviso" as it currently exists continues to provide as conditions of the exception that the transportation be "over through routes" and that the routes be "recognized by the Surface Transportation Board" and that "rate tariffs" for the route be filed with the Board.

The last published interpretation of the third proviso was issued in 2006 by the U.S. District Court for the District of Columbia which reversed prior interpretations by Customs and Border Protection which rested, according to the Court, on a misunderstanding of the Surface Transportation Board process.

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