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BLOG

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In the aftermath of the tragic destruction and disruptions of hurricanes, there are usually some calls to "waive the Jones Act." Putting aside whether such a waiver can ever be efficacious, it might be useful to review how very narrow the circumstances must be to justify such a waiver under the law as it has been amended.

The "Jones Act" is a popular term for a set of laws which reserve U.S. domestic maritime trade to qualified U.S.-flag vessels. Waiver requests are usually predicated on the supposed lack of U.S.-flag service in the aftermath of a hurricane and therefore the need to utilize a foreign vessel for what is otherwise transportation reserved to U.S.-flag vessels.

Short-term, usually item-specific (such as being limited to petroleum products) Jones Act waivers have been issued in the past following hurricanes. But those waivers were all issued prior to 2021 changes to the waiver law. A bit of history is in order since the Jones Act by its terms does not provide for the possibility of a waiver.

During World War I, the U.S. Congress gave express permission to the U.S. Shipping Board (a predecessor to the current U.S. Maritime Administration) to issue "permits" to foreign vessels to engage in U.S. domestic trade (but excluding Alaska). Almost 400 permits were issued. When the war ended, Congress ended the authority.

It was not until World War II that waiver authority was created which eventually became permanent. On December 12, 1941, President Franklin D. Roosevelt signed an Executive Order granting the Secretary of Commerce authority to waive compliance with navigation and vessel inspection laws "for war purposes." The reasoning was that the war effort took priority over vessel inspection and navigation laws, including safety laws and the Jones Act.

Congress affirmed the President's authority in the 1941/1942 War Powers Acts which established the waiver standard as being "necessary in the conduct of the war." Nothing in these laws required a determination that no U.S.-flag vessel was available before a waiver was granted.

Numerous vessel inspection laws – such as load line or lifeboat requirements – were waived during World War II. One waiver was issued to permit licensed officers to retain their original licenses on their person rather than "under glass" on the vessel's bridge to facilitate abandoning ship if necessary. The Jones Act was also waived during war, without controversy.

The waiver law lapsed after World War II but was reinstated in 1950 to deal with the same sort of shipping impediments in the Korean War that had arisen before. The 1950 law introduced a new standard – “in the interest of national defense” – which informed the law for a long period after that until relatively recently.

Once unmoored from “necessary in the conduct of the war,” all kinds of waivers have met the “interest of national defense” standard, often without any discernible connection to national defense. A towing by a Canadian tug on a single voyage, use of a Canadian dredge on the St. Lawrence seaway, a single voyage of liquified petroleum gas from Alaska to the continental USA, and a period waiver to move molten sulfur in the coastwise trade all received waivers. In no instance was the justification more involved than the bare statement that these waivers were “in the interest of national defense.”

The waiver standard expanded to cover energy production and transportation in the 1980’s culminating in a 1990 inter-agency agreement establishing a process for issuing waivers in the case of “actual or imminent energy supplies.” The connection to national defense was again not made clear.

The trend continued with hurricanes starting with Hurricane Katrina ending with Hurricane Harvey where short period of time energy waivers were issued. For the first time, a short-period general cargo waiver for shipments to Puerto Rico was issued in 2017 after Hurricane Maria.

The law remained largely the same from 1950 until the Obama Administration issued dozens of waivers in connection with a sale of Strategic Petroleum Reserve oil in June 2011. This angered the Jones Act community and the waiver law has been steadily narrowed since then.

One thing added in 2012 was a requirement that the U.S. Maritime Administration post on its website every finding that a U.S.-flag vessel was not available in connection with the issuance of a waiver. MARAD has made only four such postings since 2012, and two of them were issued in 2022 in connection with Hurricane Fiona. No period of time waiver was issued for Fiona unlike earlier hurricanes.

In January 2021, the law was amended such that no waiver can be issued without a finding that no U.S.-flag vessels are available under all circumstances (Department of Defense-issued waivers previously did not have to comply with that requirement), and non-DoD-issued waivers are limited to 10 days extendable to 45 days “with respect to any one set of events.”

Perhaps most significantly, and after 70 years, Congress reverted in substance if not in words to the original formulation of “necessary in the conduct of the war.” Congress changed the “in the interest of national defense” standard for DoD-issued waivers “to address an immediate adverse effect on military operations.”

The strict time limit for non-DoD-issued waivers combined with the strict standard for DoD-issued waivers now makes Jones Act waivers impractical except in narrow circumstances. Most opinions that the Jones Act should be waived to deal with the aftermath of Hurricane Milton fail to take this into account. What was an unbounded political tool has become almost no tool at all.

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