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The Jones Act Applies to Cargo?

By Marilyn Raia

Most maritime lawyers and seafarers are familiar with the part of the Jones Act that provides a remedy for injuries and death suffered by seamen in the course of their employment on a vessel in navigation, 46 U.S.C. § 30104. They know the Jones Act, named after Senator Wesley Jones from Washington, was enacted in 1920 to protect and maintain the United States Merchant Marine. What is not so well-known about the Jones Act is its applicability to the carriage of cargo.

The Jones Act Basics with Respect to Cargo

The operative language of 46 U.S.C. § 55102, another part of the Jones Act, provides "… a vessel may not provide any part of transportation of merchandise by water or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel 1) is wholly owned by citizens of the United States for the purpose of engaging in the coastwise trade; and 2) has been issued a certificate of documentation with a coastwise endorsement or is exempt but would otherwise be eligible for the certificate and endorsement." A voyage between two ports in the United States and its territories is called a "coastwise" voyage. Stated another way, the statute prohibits foreign-owned vessels from transporting merchandise on coastwise voyages. The United States Virgin Islands, American Samoa and Northern Marianas Islands are exempt from the application of 46 U.S.C. § 55102.

Cargo transported in violation of the Jones Act is subject to seizure and forfeiture. In the alternative, the entity transporting the cargo or causing the cargo to be transported in violation of the statute can be held liable for the greater of 1) the value of the cargo transported in violation of the statute; or 2) the cost to transport it.

If circumstances warrant, the Commissioner of the United States Customs and Border Protection [CBP] has authority to adjust the penalty on terms that are reasonable and just, if the penalty was incurred without willful negligence or the intent to defraud. Further, the Department of Homeland Security has authority to suspend the Jones Act for the coastwise transportation of merchandise on a foreign-owned vessel if necessary for the interest of national defense and if sufficient vessels remain available for national defense.

By way of example, the Jones Act was suspended in 2017 by the Department of Homeland Security in connection with the transportation of water and supplies to Puerto Rico after Hurricane Maria.

Unfortunately, the term "merchandise" was not defined in the Jones Act. Courts have interpreted the term broadly but practically. Courts have also deferred to the interpretation of the term by CBP to determine whether a violation has occurred.A

Drilling Rig is Merchandise

Furie Operating Alaska LLC v. U.S. Department of Homeland Security, 2014 WL 1289581(D. Alaska 2014) involved the transportation of a jack-up drilling rig, *Spartan 151* from Texas to Alaska. Furie originally intended to transport another rig, the Tellus, from Texas to Alaska on a foreign-owned vessel. It obtained a waiver of the Jones Act from the Department of Homeland Security. Thereafter, the transportation of the Tellus did not occur because of repairs and legal disputes.

Four years later, Furie entered into a contract to use the *Spartan 151* in Alaska instead of the

Tellus. It located a different foreign-owned vessel to transport the rig from Texas to Alaska and advised CBP of its intent to use that vessel based on the prior waiver of the Jones Act for the Tellus. CBP advised Furie that the waiver was no longer valid. Furie applied for a new waiver which was denied on the basis there was a United States citizen-owned vessel that could transport the *Spartan 151* from Texas to Alaska. Furie believed the information about the availability of that vessel was incorrect and assumed a waiver of the Jones Act would be granted when the correct information became known.

Assuming the waiver would be granted, the foreign-owned vessel left Texas with the *Spartan 151*. However, the waiver was not granted. Personnel from the Department of Homeland Security agreed to meet with Furie to negotiate the penalties that would follow the discharge of the *Spartan 151* from the foreign-owned vessel in Alaska.

In light of the pending penalty, the foreign-owned vessel was diverted to Vancouver, British Columbia where the *Spartan 151* was discharged. After further communications with Furie, a CBP official agreed to recommend a mitigated penalty of $6.9 million be assessed against Furie.

Thereafter, the *Spartan 151* left Vancouver on a United States citizen-owned vessel and arrived in Alaska a few weeks later. CBP then informed Furie it would be assessing a penalty of $15 million. Furie did not pay the penalty and sued the Department of Homeland Security. The Department of Homeland Security filed a counterclaim against Furie seeking enforcement of the $15 million penalty. Furie moved to dismiss the government's counterclaim.

Furie argued the penalty should not be enforced because the *Spartan 151* was not "merchandise" within the meaning of the Jones Act but should be considered a "vessel", the transportation of which was not governed by 46 U.S.C. § 55012 but rather by another statute, 46 U.S.C. § 55111. That statute requires the towing of a vessel on a coastwise voyage to be done by a documented American towing vessel. It also provides for a much lower penalty, namely, a lump sum of $1,100 and $60 per ton of the towed vessel. The government argued the *Spartan 151* was "merchandise" within the meaning of the Jones Act because it was transported on another vessel and not in tow of another vessel.

The district court agreed with the government. It first recognized the Jones Act does not define "merchandise". However, it noted that in the past CBP had relied on the Tariff Act to determine what was and was not "merchandise." That act broadly defines "merchandise" to be "goods, wares, and chattels of every description" but restricts the definition to merchandise in a commercial way rather than personal effects. It reasoned when jack up drilling rigs are carried aboard another vessel on coastwise voyages, they are being transported in a commercial sense and lose their function as vessels. Accordingly, the court denied Furie's motion and Furie had to pay a $15 million penalty under the Jones Act.

A Vehicle May Not Be Merchandise

Autolog Corporation et al v. Regan, 731 F.2d 25 (D.C.C. 1984) also involved the interpretation of "merchandise" as used in the Jones Act.

Scandinavian World Cruises [SWC] operated three Bahamian flag vessels. One operated between New York and Freeport, Grand Bahama. The other two operated between Freeport and Florida. The company placed an advertisement in the New York Times that read "Cruise to Florida for less than it costs to drive." Passengers who wanted to use this service traveled from New York to Freeport on one vessel usually with their vehicle, disembarked, cleared Bahamian

customs, and usually stayed in Freeport for less than 48 hours. They then boarded another of the company's vessels for the voyage to Florida. All three vessels carried passengers and vehicles. The fare was the same whether or not the passenger brought a vehicle on board.

Several American interstate truckers and rail carriers sought an injunction from the Secretary of the Treasury to prohibit SWC from engaging in the advertised service on the grounds it violated the Jones Act. They alleged foreign flag vessels were intending to transport passengers and "merchandise", i.e. the passengers' vehicles, on a coastwise voyage. Three water carriers who had planned to enter the Atlantic trade, and the Seafarers International Union which represents seamen crewing United States citizen-owned vessels, joined the suit.

The district court entered judgment in favor of SWC. It held there was no violation of the Jones Act. The District of Columbia Circuit agreed. It noted the United States Customs Service had specifically approved the proposed service and had historically treated vehicles that accompanied passengers as baggage, not "merchandise." It considered "the basic international understanding" set forth in the Convention Relating to the Carriage of Passengers and Luggage that "luggage is any article or vehicle except those carried under a bill of lading or other contract primarily concerned with the carriage of goods." It found the determination that a passenger's vehicle is baggage or luggage to be consistent with Congressional intent behind the Jones Act, namely, to ensure a domestic monopoly for the transportation of commercial goods between United States ports. Finally, it noted SWC did not transport vehicles that were unaccompanied by passengers.

The Jones Act was enacted in 1920 to protect the United States Merchant Marine. It is most commonly recognized in the context of seamen's personal injuries and death. However, another part of the Jones Act applies to the carriage of merchandise on coastwise voyages. Unless the Jones Act is suspended or an exemption is granted, only United States citizen-owned vessels may transport merchandise on coastwise voyages.