



API International Trade and Customs Conference

Coastwise Trade Update

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March 7, 2010

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Cabotage Laws – A Brief History

- Derived from the French word “caboter,” which means to sail coastwise
- Today, it means the right to trade between points in the United States → “Jones Act” Vessels
- Origins – 1789, with fees imposed on foreign-built vessels, and tax / duty preferences given to U.S.-built and owned vessels – expanded substantially by the Merchant Marine Act of 1920
- Designed primarily to guarantee the participation of U.S. shipyards / vessels in the domestic trade
- Coastwise laws generally involve the transportation of merchandise and passengers, towing, and dredging

“U.S.-Flag Vessel”

- **A “U.S.-flag vessel”**
 - U.S. flag and U.S. crew
 - U.S. ownership
 - U.S. entity must own it (stock ownership not a factor)
 - CEO and Chairman of the Board must be U.S. citizens
 - Majority of a quorum of the board must be U.S. citizens
 - Does not need to be U.S. built
 - Owner called a “Documentation Citizen”
- **Documentation Citizen cannot engage in coastwise trade**
 - US-Foreign Trade
 - Anchor Handlers
 - Government Programs
 - Salvage Vessels
 - NOT a “Jones Act” vessel

“Jones Act Vessel”

- Coastwise laws generally prohibit the transportation of passengers or merchandise between points in the United States (*i.e.*, within 3 miles of the coast) in any vessel other than a “coastwise-qualified vessel”
 - U.S. built
 - U.S. flag
 - 75% U.S. owned
 - U.S. President/CEO
 - U.S. Chairman of the Board
 - Majority of quorum
 - Never sold foreign
 - Owner called a “Coastwise Citizen”



“Bowaters Vessel” – Limited Coastwise Citizen

- **A company not qualified as a Coastwise Citizen can operate vessels in the coastwise trade, if:**
 - Majority of officers and directors are U.S. citizens;
 - 90% of employees are U.S. residents;
 - Engaged primarily in the manufacturing and mineral industry (stone, cement, oil/gas)
 - Aggregate book value of vessels (must be less than 500 gross tons) cannot exceed 10% of aggregate book value of assets; and
 - Must purchase or produce in the U.S. at least 75% of the raw materials used or sold in its operations.
 - If requirements met, the Coast Guard will issue a “Bowaters Endorsement” on the vessel’s Certificate of Documentation
- Bowaters company may transport its own employees, equipment, supplies, materials, and third-party contractors not charged for such transportation between and among shore bases and its oil fields.
- Transportation for a third party not allowed – only proprietary cargo

Coastwise Merchandise Statute



§ 55102. Transportation of Merchandise

- A vessel may not provide any part of the 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 is wholly owned by U.S. citizens and has a certificate of documentation with a coastwise endorsement.
- Trigger is the lading of merchandise at one coastwise point and the unloading of it at a different coastwise point.
- In simplest terms, loading something at Point A and unloading it at Point B

What is a Coastwise Point?



- The Coastwise Laws apply to:
 - Inland waters and Great Lakes
 - The 3-mile territorial sea – the entire territorial sea is a “point,” including a vessel in the territorial sea, whether anchored or not
 - All “points” on the Outer Continental Shelf, e.g., wells, platforms, and anchored vessels used in oil and gas development

Exceptions...



- The Coastwise Laws do not apply to:
 - American Samoa
 - Northern Mariana Islands
 - Canton Island and the U.S. Virgin Islands
 - Until the President declares by proclamation that the coastwise laws apply
 - Other narrow exceptions also exist

Coastwise Merchandise Statute – “Third Proviso”



§ 55116. Canadian rail lines

- The “Jones Act” does not apply to:
 - the transportation of merchandise between points in the continental United States, including Alaska (but not Hawaii), if
 - over through routes in part over Canadian rail lines and connecting water facilities...
 - if the routes are recognized by the Surface Transportation Board and rate tariffs for the routes have been filed with the Board.
- But...rate tariffs not required to be filed with the STB except for this purpose...

Coastwise Passenger Statute



§ 55103. Transportation of Passengers

- The *Passenger Vessel Services Act* states that “no foreign vessel shall transport passengers between ports or places in the United States, either directly or by way of a foreign port, under penalty of \$300 for each passenger so transported and landed.”
 - Such vessels also must be coastwise-qualified

Coastwise Towing Statute



§ 55111. Towing

- Only coastwise-qualified vessels may tow other vessels, other than a vessel in distress, between coastwise points, either directly or by way of a foreign port or place, or for any part of such towing.
 - This includes between coastwise points on the OCS or from shore to coastwise points on the OCS.
 - Penalties include a fine of between \$250 and \$1,000 against the owner or master of the towing vessel, and an additional fine of \$50 per gross ton of the vessel towed.
 - Intermediate coastwise points permitted by non-coastwise tug so long as tug and barge remain connected until foreign point

Applicability to Other Vessels

- Oceanographic Research / Seismic Vessels
- Icebreaking Vessels
- Dive Support Vessels
- Construction Vessels
- Cable/pipe layers



- The use of such vessels is not a use in the coastwise trade so long as they do not transport “passengers” or “merchandise.”
- Oil Spill Response Vessels – as a general matter, OSRVs used in oil spill response must be coastwise qualified.

Salvage Statute

- No foreign vessel may engage in salvage operations in the 3-mile territorial sea or internal waters – this has been interpreted to mean U.S. flag vessels must be used, not coastwise qualified.
- CBP may authorize the use of a foreign-flag vessel if no U.S.-flag vessel is available.
- Three elements are necessary to constitute salvage:
 - Marine peril;
 - Service voluntarily rendered, not required by contract or duty; and
 - Success in whole or in part, with the service contributing to the success.
- Penalties include seizure and forfeiture of the vessel and equipment



What is Merchandise? What is a Passenger?

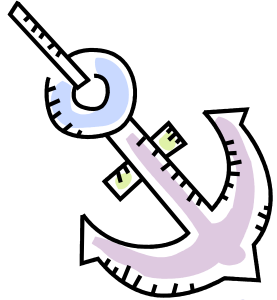


- Merchandise – “Goods, wares, and chattels of every description.”
 - Includes “valueless” materials such as dredge spoils, salvage scrap, rocks, and mud, regardless of whether the material has commercial value.
 - Does not include “equipment” or “supplies” of the vessel.
- Passenger – any person carried on a vessel who is not connected with the operation, navigation, ownership, or business of the vessel.

What is Equipment?

- “Equipment” includes articles “...necessary and appropriate for the navigation, operation, or maintenance of the vessel and for the comfort and safety of the persons on board.”
- If used from the transporting vessel
- “Equipment” includes:
 - Materials used in or necessary for drilling operations;
 - Remotely operated vehicles, anchors, anchor lines, rotary tables, traveling gear, top drives, draw works, and motion compensators.





Movement of Anchors

- Coast Guard and Maritime Transportation Act of 2006 → vessels handling anchors for a MODU must be U.S. flag (though not coastwise qualified).
- U.S.-flag vessels also must be used to transport merchandise from a U.S. point to a MODU on the OCS even if it is not attached to the seabed.
 - Coastwise-qualified vessels must be used if the MODU is attached to the seabed.
- The vessel transporting the MODU's anchors from one coastwise point to another, however, must be coastwise qualified.
- If the anchors are transported on the foreign-flag MODU, they would constitute equipment of the MODU, and thus could be legally transported by the MODU between coastwise points.

What is okay?

- Same Spot/Same Dock
 - Merchandise therefore not transported between two coastwise points
 - Point A to Point A
- Continuity of Voyage Broken
 - No intent for the merchandise to come back to the United States
 - Becomes “common stock” of a foreign country
- Merchandise Rejected by Government
 - Adequate documentation indicated that merchandise destined foreign
 - Product rejected for failing to meet government requirements
 - Breaks “continuity of the voyage”
- “New and Different Product”
 - Transformation must take place at foreign location (cannot take place aboard the vessel)
 - Fact-specific determination
- Commingled Products
 - First Sold Foreign
- Pivoting Movements
 - Crane barges
- *Coastwise Trade: Merchandise – An Informed Compliance Publication* (January 2009)



“New and Different Products”

- 19 CFR 4.80b(a) – “...merchandise is not transported coastwise if at an intermediate port or place other than a coastwise point (that is at a foreign port or place, or at a port or place in a territory or possession of the United States not subject to the coastwise laws), it is manufactured or processed into a new and different product, and the new and different product thereafter is transported to a coastwise point.”
- Rulings
 - Case-by-case and very fact specific
 - CBP’s Laboratories & Scientific Services reviews
 - Cows, Fish, Fuels, Chemicals, Cranes, Wheat, Pet Coke/Coal
 - Fuel blending – CBP adopted ASTM standards because they represent industry-developed criteria for characterizing fuels
 - Blending cannot occur aboard a vessel

Proposed Changes to Rules of Origin

- CPB NPRM on July 25, 2008 that proposed to overhaul rules used to determine country of origin
 - Comment deadline extended twice – December 1, 2008
 - No new developments
- **Current Law:** When a good is subject to processing in more than one country, origin is mainly determined on a case-by-case basis by application of the “substantial transformation” test – resulting in a new name, character, and use.
 - Jones Act “new and different” product rulings are different
- **Proposal:** Replace case-by-case approach with a tariff shift approach, i.e. does processing in a foreign country results in a change of tariff classification.
 - Tariff Shift for fuels – If heading 2710, a fuel must either: (1) change to another heading or (2) if no heading change, undergo change in product involving a chemical reaction
 - Proposal includes Jones Act “new and different” product test

Commingled Merchandise

- Action must be taken to alleviate CBP's concern that an amount of the product equal to that transported on non-coastwise-qualified vessels will end up back in the U.S.
 - An amount of commingled product at least equal to the amount of product transported on non-coastwise-qualified vessels must be sold foreign prior to transportation of any of the commingled product to the U.S.
 - Adequate records must be maintained to show that such amount was first sold foreign
- Examples – Caustic Soda, LNG, and Fuel Oil rulings

Jones Act Waivers

- Submitted to CBP for approval. Scrutinized by other key federal agencies and industry proponents of Jones Act prior to being granted
- Test - whether waiver is necessary “in the interest of the national defense”
- Typically granted in only extreme or catastrophic circumstances, such as hurricane, oil spill, or immediate energy shortage
- Two categories - requests submitted by the Department of Defense and requests submitted by all others
 - DOD requests must be granted
 - Non-DOD requests may be granted
 - MARAD determination regarding availability of coastwise qualified vessels
 - DOE determination regarding energy shortage
- Examples - *Exxon Valdez*; Hurricane Katrina; Cook Inlet, Alaska

Customs Rulings

- There are numerous subtleties to the coastwise laws as they are very fact specific – and company specific
 - "...no other persons should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter."
- CBP is the agency responsible for interpreting the coastwise laws – the Coast Guard deals with vessel documentation and citizenship issues
- Advisable to seek a ruling if activities do not fit squarely within the coastwise laws to avoid enforcement actions and questions from competitors or others



Enforcement/Penalties



- U.S. Customs & Border Protection Jurisdiction
 - Interprets / enforces the Jones Act
 - Enforcement difficult and not vigorous
- Merchandise Violations
 - Penalties may be assessed against any person transporting the merchandise or causing it to be transported, including the importer, consignee, master, vessel agent, or vessel owner/operator.
- Penalties
 - Include seizure of the merchandise transported illegally or a penalty up to the domestic value of the merchandise or actual cost of the transportation, whichever is greater.
- CBP's Mitigation Guidelines: Fines, Penalties, Forfeitures and Liquidated Damages
 - Unless vessel in distress or some humanitarian reason for coastwise violation, it will be considered commercial expediency.
 - Repeat offense hurts possibility of mitigation



Headline...

Offshore Marine Service Association Hires Manager of Jones Act Compliance

Source: U.S. Newswire

Publication date: 2008-11-06

CBP

Proposal to Overturn 30 Years of Jones Act Precedent Offshore

- “Christmas Tree” ruling February 20, 2009
- For over 50 years the Jones Act essentially regulated vessels engaged in the traditional transportation of goods between ports
- In 1976 CBP first began to interpret and apply the Jones Act to offshore oil and gas operations and offshore “coastwise points”
- CBP issues “Interpretive Rulings,” upon request, to validate proposed operations and to avoid future CBP challenges and enforcement action which has established long-standing precedent on which the offshore industry has relied for 30 years and invested millions of dollars



Proposal to Overturn 30 Years of Jones Act Precedent Offshore (*cont'd...*)

- Offshore Marine Services Association wrote CBP on March 23, 2009 seeking revocation of the Christmas Tree ruling
- Three days later CBP revoked the ruling
- CBP proposal to revoke or modify over 20 offshore Jones Act rulings spanning over 30 years published in the Customs Bulletin on July 17, 2009
- This precedent allows operators to use foreign flag vessels to carry “equipment” offshore to be used in the installation of offshore infrastructure which CBP has ruled does not fall within the meaning of “merchandise” that would otherwise be prohibited under the Jones Act



CBP's Proposal

- The CBP proposal would have made much of the highly specialized deepwater work subject to Jones Act restrictions
- As a result, key OCS activities such as pipe-laying, cable-laying, diving support work, and heavy-lift crane construction and installation work could have no longer been performed by foreign flag vessels
- This could have severely affected offshore energy development because of the lack of capability and availability of coastwise qualified vessels
- Under its Customs Bulletin publication process final decision required within 30 days of publication and effective date 60 days after issuance of the final decision



Congressional Involvement...Jones Act Issues are Highly Politicized

- **Coast Guard Authorization Bill**

- SEC. 217. ENFORCEMENT OF COASTWISE TRADE LAWS. “Officers and members of the Coast Guard are authorized to enforce [the coastwise trade laws]. The Secretary shall establish a program for these officers ... to enforce [these laws], including the application of those laws to vessels that support the exploration, development, and production of oil, gas, or mineral resources in the Gulf of Mexico. The ... Coast Guard shall submit a report to the Committee on Transportation and Infrastructure of the House of Representatives and the Senate Committee on Commerce, Science, and Transportation within one year ... on the enforcement strategies and enforcement actions taken to enforce the coastwise trade laws.”

- **DHS Appropriations Bill Report**

- “There will be significant advances in current offshore energy exploration and production technology...It is thus important that CBP interpret and apply OCSLA correctly...It is imperative that CBP ensures that the benefits granted to the U.S. maritime industry under laws established by Congress are recognized and enforced with respect to any maritime transportation to and from the United States and such installations.”

Congressional Involvement...Jones Act Issues are Highly Politicized

(cont'd...)

- **Congressional Letters**
 - Over 140 comments sent to CBP and DHS on this issue, many stating full support or requesting more time for the issues to be worked out.
- CBP withdrew its proposal on October 1, 2009

More Disruption Offshore in 2010?

- Industry continues to monitor the situation
- CBP refuses to issue new rulings in the meantime
- Industry continues to operate offshore “as before” but enforcement is inconsistent
- Any new CBP proposal should use the Notice and Comment procedures under the Administrative Procedures Act
- Interpretive Rules” can only be used to reinterpret actions previously issued by an agency to provide for consistency in agency action
- Notice and Comment in the Federal Register is required to completely change an existing regime
- DHS announced on March 4, 2010 it would initiate a rulemaking action to allow for consideration of the potential economic impact of any proposed change to the Jones Act

Questions?

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