

Making Sense of the Jones Act Waiver Conundrum

In response to the governor of Puerto Rico's request, the Department of Homeland Security (DHS) waived the Jones Act on Thursday. The waiver covers all products shipped to Puerto Rico loaded on board a vessel over the next 10 days and delivered to Puerto Rico by October 18. The persistent question from the public has been "why did the waiver take so long"? Having served as counsel to the maritime administrator during the grant and denial of multiple Jones Act waivers, I can attest to the fact that there are multiple facets to the answer. In an effort to simplify the issue, the waiver considerations can be broken down into three issues: authority, infrastructure, and national interest.

The first aspect relates to the limited authority to waive the Jones Act. Under 46 U.S.C. § 501, the Jones Act can be waived one of two ways. First, as was done today and in the recent Florida waivers, DHS can waive the Jones Act on request of the secretary of Defense to "the extent the Secretary considers necessary in the interest of national defense" (a "501(a) waiver", as noted by our recent [publication](#)). Second, DHS can issue a waiver requested by anyone when the secretary of DHS considers the waiver necessary in the interest of national defense following a determination by the maritime administrator that no Jones Act-qualified U.S.-flag vessels are available (a "501(b) waiver"). This limited authority raises two issues. First, despite being a crucial element of both 501(a) and 501(b) waivers, there is no statutory or regulatory definition of "national defense". Historically it has been unclear when a weather-related emergency rises to the level of a "national defense" interest. Second, with regard to 501(b) waivers, there is no clear metric for determining when a Jones Act vessel is "available". The ports of loading and unloading, schedule of shipments, and numerous other factors affect vessel availability. Additionally, the shipper's flexibility in those elements, including whether the cargo can be broken down into smaller lots, often affects the availability of qualified vessels. Due to the abundance of statutory silence, the government's consideration of whether a national defense basis exists – which often requires considerable interagency input – and whether qualified vessels are available can often be a lengthy process.

The second key consideration when deciding whether to waive the Jones Act is the status of the related intermodal infrastructure. Carriers operating in the Jones Act trade generally have established networks and provide regular, scheduled service, which yields significant benefits for shippers. When the Jones Act is waived, carriers temporarily entering this trade will often lack the established networks necessary to deliver cargo to the affected area. This results in waivers granted by the government often going unused, as was recently witnessed in Florida. In addition, the ocean leg only represents one portion of the transportation required to deliver aid to affected areas. As currently witnessed in Puerto Rico, the ultimate delivery of aid depends upon the status of the affected area's transportation infrastructure and intermodal network. Increasing the number of vessels entering a port may not result in increased aid to those in need if the port is not capable of off-loading those vessels or if the affected inland areas are inaccessible by rail or motor carrier. At worst, additional vessels can increase port congestion, actually delaying deliveries. Given the current infrastructure and communication challenges in Puerto Rico, the practical on-ground impact of this temporary Jones Act waiver is yet to be seen.

Finally, the national strategic interest plays a key role in the government's decision-making process. Critics of the Jones Act will often question the national defense utility of the 97-year-old



Jeff R. Vogel

Member

jvogel@cozen.com
Phone: (202) 304-1453
Fax: (202) 861-1905

Related Practice Areas

- Maritime Regulatory
- Transportation & Trade

law; however, there are certain indisputable facts that support its national defense importance. First, numerous Jones Act vessels – including nearly every vessel in the Puerto Rico trade – are enrolled in the Voluntary Intermodal Sealift Agreement (VISA). VISA provides on-demand access to sealift capacity and corresponding intermodal infrastructure when required to meet Department of Defense needs. When called upon, these vessels deliver not only the nation’s commerce but also the materials necessary to support U.S. military interests throughout the world. Additionally, and perhaps most importantly, the U.S. mariners that serve aboard Jones Act vessels are the very same that crew the Department of Defense and Maritime Administration surge fleet during initial deployment and surge operations. Simply put, when considering waiving the Jones Act, the government must consider the waiver’s potential impact on U.S. mariners, which represent a critical strategic asset to the U.S. government. Therefore, the waiver needs to have a practical impact on those in need to be justifiable.

The Jones Act waiver process is extremely complex and the impacts – both positive and negative – of a waiver being granted are often poorly understood. Therefore, before requesting a Jones Act waiver, shippers and affected stakeholders must understand the government decision-making process. Additionally, if a carrier is considering entering the Puerto Rico trade during the current Jones Act waiver period it is critical that it understands the regulatory implications of such action. In both cases, advanced consultation with agencies of jurisdiction and appropriate counsel are essential.

Please contact Jeff Vogel in the firm's Maritime Regulatory practice with any questions you may have regarding this update.