DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

60862

FILE: B-136530

DATE: MAY 12 1976 98960

MATTER OF: Interpretation of 1954 Cargo Preference Law, 46 U.S.C. 1241(b)(1) (1970).

DIGEST:

LASH (Lighter Aboard Ship) services to be performed partly with privately owned United States-flag commercial vessels and partly with a foreign-flag FLASH system to deliver certain Government-sponsored cargoes to port of Chittagong in Bangladesh contravenes the 1954 Cargo Preference Act because direct service to Chittagong is available by US-flag breakbulk vessels and because special circumstances (here, geographic configuration of port precluding use of normal LASH unloading operations) cannot be used to circumvent the cargo preference laws.

This decision to the Secretary of Commerce responds to the request of the Assistant Secretary for Maritime Affairs for a ruling on the correctness of a legal opinion prepared by the General Counsel of the Maritime Administration.

The General Counsel held in his opinion that LASH (Lighter Aboard Ship) services to be performed partly with privately owned United States-flag commercial vessels and partly with a foreign-flag FLASH system to deliver certain Government-sponsored cargoes to the port of Chittagong in Bangladesh would not contravene section 901(b)(1) of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1241(b)(1) (1970), popularly known as the 1954 Cargo Preference Law.

LASH operations had their tentative beginnings in 1969. As described in congressional hearings in 1971, cargo transported in LASH operations is loaded into specially designed barges (lighters) and towed out to the side of the mother ship. There the barges are loaded onto the mother ship which carries them to foreign ports. Upon arrival in a foreign port, the barges are offloaded from the mother ship and towed to a destination in those foreign waters, either at the port of entry or to another point in the waters of the country of offloading. The operation is reversed for the return voyage. Hearings on H.R. 155 Before a Subcomm. of the House Comm. on Merchant Marine And Fisheries, 92d Cong. 1st Sess. 93, 106, 1971; see, also, Sacramento-Yolo Port District, Petition, 341 I.C.C. 105, 112 (1972).

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The specially designed barges or lighters are about 60 feet long, 30 feet wide and 13 feet high; they are shallow draft unpowered watercraft classed by the American Bureau of Shipping for river, bay, and sound service. See Section 25 of the Merchant Marine Act, 1920, as amended, 46 U.S.C. 881 (1970). They accept all cargoes: industrial or agricultural or raw materials; and the cargoes can be large-volume, low capital investment cargoes or small-volume high capital investment cargoes.

We understand that the acronym "FLASH" means "Float On/Float Off Feeder Lash Vessel". It is a new development in the handling of cargo through intermodal systems. A FLASH unit is a floating platform with ballast tanks equipped with a raked bow to facilitate towing. When it is ready for loading, the tanks are flooded and the entire vessel is lowered in the water. Gates at the stern are opened and the LASH barges are floated inside. The ballast is evacuated and the FLASH unit rises in the water. The LASH barges then rest aboard the platform, which is towed by an ocean-going tug, presumably a foreign-flag vessel.

Central Gulf Lines, Inc. (Central Gulf) operates a US-Flag LASH service to Southeast Asia. The facts about this service as it relates to deliveries to Chittagong are recited in the General Counsel's opinion and in the Assistant Secretary's letter; they are summarized below.

Central Gulf guarantees direct delivery to Chittagong, but its mother ships, which have an overall length of 893 feet and a design draft of over 40 feet, cannot navigate the Karnaphuli River on which Chittagong is located. The bar at the mouth of the Karnaphuli varies from a low of 21 feet in low water season (February) to a high of 30 feet (July and August). Additionally, only vessels up to 580 feet in length can navigate the river. Thus, Central Gulf's vessels are forced either to utilize the open sea anchorage off the mouth of the river or to unload their barges at the nearest safe, protected anchorage and tow the barges to Chittagong.

The carrier states that this open sea anchorage is not sufficiently safe for the discharge of LASH barges, especially during the monsoon season. The nearest deepwater protected anchorage is the port of Kyaukpyu, Burma, approximately 200 miles from Chittagong. Central Gulf plans to unload the barges from its mother ships there and tow the barges to Chittagong.

LASH barges are certified only for rivers, bays, and sounds, and are not oceanworthy vessels. To tow them they must be joined together rigidly and fitted with a false bow, and there is no feasible way to do this at sea. It also would be imprudent to tow them in the open sea for any distance, especially for a 200-mile voyage in the Bay of Bengal during monsoon weather. To overcome these obstacles, Central Gulf plans to move the barges in its FLASH units.

Central Gulf recently has taken delivery of four FLASH units which were built in Japan and documented under foreign flag. Three of these units, with a capacity of eight LASH barges each, are currently employed in the Singapore region. A FLASH unit is a vessel, since the word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water. See 1 U.S.C. 3 (1970).

Chittagong and other ports in that area are served by several U.S.-flag operators, other than Central Gulf, which provide direct service to the immediate port area entirely aboard U.S.-flag breakbulk vessels. In most instances, however, they anchor their vessels in the roads and lighter some or all of their cargo on foreign-flag shallow draft vessels, before they are able to cross the river bar.

The General Counsel of the Maritime Administration takes the position that the shipping agencies may use Central Gulf's services because (1) its U.S.-flag mother ships deliver the cargo to the nearest location practical for discharge of those vessels because no U.S.-flag services are available to complete the movement, (2) the foreign-flag portion of the transportation is de minimis in regard to the overall voyage, (3) Central Gulf's competitors must also use foreign-flag lighterage services, although their nearest safe anchorages are less distant and (4) a requirement of U.S.-flag towage from the nearest safe anchorage, where such is unavailable, would foreclose much of this trade to the U.S. operators in contravention of the legislative purpose of the 1954 Cargo Preference Law.

We do not believe that these reasons justify an exception here to the provisions of the 1954 Cargo Preference Law.

The 1954 Cargo Preference Law, as amended, reads in pertinent part:

> "Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas: Provided, That the provisions of this subsection may be waived whenever the Congress by concurrent resolution or otherwise, or the President of the United States or the Secretary of Defense declares that an emergency exists justifying a temporary waiver of the provisions of this paragraph and so notifies the appropriate agency or agencies: And provided further, That the provisions of this subsection shall not apply to cargoes carried in the vessels of the Panama Canal Company. Nothing herein shall repeal or otherwise modify the provisions of section 1241--1 of this title. For purposes of this section, the term 'privately owned United States-flag commercial vessels' shall not be deemed to include any vessel which, subsequent to September 21, 1961, shall have been either (a) built outside the United States, (b) rebuilt outside the United States, or (c) documented under any foreign registry, until such vessel shall have been documented under the laws of the United States for a period of three years * * *."

It seems unquestioned that the basic purpose of cargo preference legislation is to assure to privately owned United States merchant-flag vessels a substantial portion of the waterborne export and import foreign commerce which the Congress has proclaimed in repeated statutes as necessary to the maintenance of an adequate merchant fleet. S. Rep. No. 1584, 83d Cong., 2d Sess. 1 (1954). See, also, the declaration of policy concerning the development and maintenance of the American Merchant Marine in Section 101 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1101 (1970).

The specific purpose of cargo preference legislation was outlined in President Kennedy's Presidential Directive, April 1962, Regarding Cargo Preference; it reads in part:

> "These statutes (including, but not limited to, sec. 901(b) of the Merchant Marine Act, 1936 (46 U.S.C. 1241(b) and Public Resolution 17, 73d Cong. (15 U.S.C. 616A)), are designed to insure that U.S. Government-generated cargoes move in substantial volume on American-flag vessels. This policy, which is directed to Government-generated cargoes and which does not control commercial movements of export-import cargoes, is an important factor in maintaining the merchant fleet necessary to meet our national goals and is in accordance with the general practice of other maritime nations who move the vast majority of their government shipments in vessels of their own flag."
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> "While the individual Government agencies' administration of the cargo preference statutes has been generally satisfactory, the laws' implementation has frequently run more nearly to the minimum rather than the maximum. It is, therefore, extremely important that the statutes be implemented in a manner designed to achieve fully their purpose."

S. Rep. No. 2286, 87th Cong., 2d Sess. 43, 44 (1962).

And the aim of the 1954 Cargo Preference Law was to codify and broaden existing law, not to derogate from it. 41 Op. Atty. Gen. 192, 196 (1954); 42 Op. Atty. Gen. No. 14, page 7 (1963). Thus, the act must be strictly construed and the existence of special circumstances cannot be used to circumvent or evade the cargo preference laws.

For example, in B-155185, November 17, 1969, we said that whether urea normally moves in commercial channels already bagged, in bulk, or in either form, the Cargo Preference Law may not be avoided through the "simple device" of either the buyer or seller choosing where, urea, the essential item being procured, is to be packaged.

In 39 Comp. Gen. 758 (1960) we held that the law could not properly be circumvented through the purchase of goods at destination rather than at the point of origin of the same goods to be moved by ocean freight.

Compare, also, 49 Comp. Gen. 755 (1970), in which we said that where service is available in United States vessels for the entire distance between ports of origin in the United States and the destination port overseas, to permit the transportation by sea of containerized military supplies in a U.S.-flag vessel for the major part of a voyage and in a foreign-flag feeder vessel for a minor part of the voyage would violate the prohibition in the 1904 Cargo Preference Act, 10 U.S.C. 2631 (1970).

Thus, the special circumstance that the geographical configuration of the port serving Chittagong precludes normal LASH unloading operations does not justify use of a foreign-flag FLASH unit for any part of the voyage when port-to-port breakbulk service is available on privately owned United States-flag commercial ocean vessels. That these vessels anchor in the roads and use foreign-flag shallow draft vessels to lighter some or all of their cargo to the shore seems immaterial. In contrast to barge operations, the term "lighter" refers to a short haul, generally in connection with the loading or unloading operations of vessels in harbors. De Kerchove's International Maritime Dictionary, 2nd ed. 1961. And in some trades it is customarily necessary for vessels to lighter the goods from or to shore. Ocean Transportation, McDowell and Gibbs (1954), page 387. Indeed, the foreign-flag lighters most probably are required by the foreign nations' cabotage laws.

We note that under the Act of September 21, 1961, Pub. L. No. 87-266, 75 Stat. 565, which is codified as the second proviso in the 1954 Cargo Preference Law, Central Gulf could qualify the foreign-flag FLASH units as privately owned United States-flag commercial vessels entitled to a preference by documenting them under the laws of the United States for a period of three years.

A decision that Central Gulf cannot use the foreign-flag FLASH system with its LASH operations into Chittagong will not prevent it from competing for commercial cargoes destined to that port; nor will it prevent it from participating in the shipment of Government-sponsored cargoes to Chittagong once the 50 percent requirement in the 1954 Cargo Preference Law for shipment in United States-flag vessels is met and provided that the agency concerned, in the exercise of its administrative discretion, decides to use Central Gulf's LASH operations to ship the remaining 50 percent.

Congress has demonstrated flexibility in amending the cargo preference laws to accommodate innovative developments in intermodal shipping systems. See the Act of September 21, 1965, Pub. L. 89-194, 79 Stat. 823, Act of August 11, 1968, Pub. L. 90-474, 82 Stat. 700, and Act of November 23, 1971, Pub. L. 92-163, 85 Stat. 486, all of which amended section 27 of the Merchant Marine Act, 1920, 46 U.S.C. 883, commonly called the Jones Act (one of our cabotage laws). These amendatory laws permit the Secretary of the Treasury to extend reciprocal privileges to foreign-flag vessels for the carriage of empty containers and empty LASH barges and for the transfer of cargoes between LASH barges in the United States coastwise trade, so long as the containers or barges are owned or leased by the owner or operator of the foreign-flag vessels and are being transported for use in the carriage of cargo in foreign trade. Hearings on H.R. 155, Before a Subcomm. of the Senate Committee on Commerce, 92d Cong., 1st Sess. (1971). Thus, it is possible that the Congress may be receptive to granting a similar reciprocal exception to the 1954 Cargo Preference Law which would permit American LASH operators to use a foreign-flag FLASH system where geographical port conditions are similar to those at Chittagong.

In these circumstances we believe that the contemplated use of Central Gulf's LASH service as presently constituted to

deliver government-sponsored cargoes to the port of Chittagong in Bangladesh would contravene the 1954 Cargo Preference Act.

R. F. Keller

Deputy Comptroller General
of the United States