Distinguished by 57 Comp. Gen. ——
(B-145455, 6-12-78)

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

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MAY 5 1978

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Dear Mr. Secretary:

We refer to letter of March 4, 1970, from the Assistant Secretary of Defense (Installations and Logistics), asking for our decision on the question whether appropriated funds properly may be expended for the transportation by sea of Department of Defense cargo in containership service provided by United States lines which use foreign-flag feeder ships for part of the service. The question as presented relates to circumstances where ocean carriers are available to transport the cargo the entire distance in U. S.-flag vessels.

The problem is said to arise from the increased use of containers and containerships for transportation of cargo by sea and the increasingly common practice of large transoceanic containerships to serve only one or two major ports. Assembly and distribution of container cargo from and to ports a relatively short distance away from these major ports ordinarily is performed in auxiliary ships operated under foreign flags. These auxiliary ships are referred to as foreign-flag feeder ships and their service has been called foreign-flag feeder service. Some examples of the geographic relationship of the containership and feeder-served ports include service to Korea by transshipment at a Japanese port and service to the United Kingdom and Scandinavia by transshipment at Continental ports.

The Department of the Navy has indicated that it believes feeder ships will play an important role in extending containership services to the smaller ports and in insuring the growth and well-being of the U.S.-flag Merchant Marine. Also, counsel for the Military Sea Transportation Service (MSTS) is of the opinion that MSTS properly may utilize a carrier which uses foreign-flag feeder ships to pick up or deliver cargo within a so-called "geographic area of origin or destination" provided the cargo is transported between the geographic area of origin and the geographic area of destination in U.S.-flag ships.

The 1904 Cargo Preference Act, as amended, reads:

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> "Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons." Act of April 28, 1904, ch. 1766, 33 Stat. 518, as amended, Act of August 10, 1956, ch. 1041, 70A Stat. 146, 10 U.S.C. 2631.

It may be noted that the statutory mandate requiring transportation of military supplies in United States vessels is not limited to transportation of such supplies on the high seas but includes all transportation by sea, including transportation performed within territorial waters if by sea.

The statutory mandate is not absolute and is subject to two exceptions, one express and the other implied. If the President finds that the freight charged by United States vessels is excessive or otherwise unreasonable, the statute explicitly provides that contracts for transportation may be made as otherwise provided by law. So far as we know, there has been no executive finding under the statute respecting any current transportation of military supplies by sea.

The second exception arises by necessary implication in circumstances where United States vessels are not available to perform the transportation by sea that is required. In such circumstances, foreign-flag vessels may be used. This exception was recognized in 1907 by the Attorney General of the United States, 26 Ops. Atty. Gen. 415, 419, and the view has been followed administratively since that time.

The implied exception also has been recognized by the United States Court of Appeals for the District of Columbia Circuit,

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sitting en banc, in the case of Curran v. Laird, decided November 12, 1969. The court there held the 1904 Cargo Preference Act to be subject to an implied exception that foreign ships may be used when American ships are not available and that this implied exception does not require a finding by the President himself but may be invoked upon a finding made by other officials in the Executive Department (slip opinion, p. 9).

In the circumstances presented to us, neither of the exceptions discussed above is applicable. Service is said to be available in United States vessels for the entire distance between ports of origin and destination and freight charges by such vessels have not been found to be excessive or otherwise unreasonable. The question therefore is whether a third exception can be read into the Act to permit transportation by sea of containerized military cargo in a U.S.-flag ship for the major portion of a voyage and in a foreign-flag feeder ship for a minor portion of the voyage. And if the Act can be read to permit such transportation, a further question arises whether preference must be given to a carrier which will transport the cargo the entire distance in a U.S.-flag ship over a carrier which will transport the cargo in part by foreign-flag feeder ship.

We fail to see how the plain words of the 1904 Cargo Preference Act can be read to permit transportation of military supplies by sea in part in United States vessels and in part in foreign-flag vessels, absent circumstances justifying invocation of one or the other of the two recognized exceptions. If the Congress had intended this result, some qualifying language manifesting this intention undoubtedly would have been included in the Act at the time it was debated and passed or at the time it was codified by the 1956 Act. The manifest purpose of the Act was to accord a preference to United States shipping lines in the carriage by sea of military supplies for the Government but only upon condition that United States vessels be used. Carriage of such supplies in foreign-flag ships, even though owned or chartered by United States shipping lines, would not qualify for the preference and thus could not be used by the Government shipping agencies where

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United States vessels were available at charges not excessive or otherwise unreasonable.

It is said, however, that use of feeder ships is essential to the attainment of the full economic benefits of containership services and that it would not be desirable to impede the establishment and use of feeder-ship services by U.S.-flag carriers where such impediments do not exist for their foreign-flag competitors. The argument might be a compelling one were it not for the fact that the situation here involved is one where service is available entirely in United States vessels, service which the Act manifestly was designed to protect, and thus to extend the protection of the Act to another class of service, performed in part in foreign-flag vessels, could only be done at the expense of those carriers ready, willing and able to provide through service in United States vessels.

Furthermore, the 1904 Act imposes no restriction on competition for commercial cargo. Absent partial statutory restrictions, such as contained in Section 804, Merchant Marine Act, 1936, 46 U.S.C. 1222, United States carriers apparently would be free to utilize foreign-flag feeder service for commercial cargo.

It is said also that containership service in conjunction with foreign-flag feeder service could not possibly have been contemplated by the Congress that passed the 1904 Act since at that time there was no indication of the subsequent development of present containership service. The argument seems to be that this fact makes it questionable whether the Act was intended to prohibit use of foreign-flag feeder ships in light of the evolution of modern containership service. But the possibility of transshipment of cargo from large oceangoing vessels to smaller coastwise vessels for further transportation by sea from a major port to a smaller port certainly existed at the time the Act was passed, and such service would seem to be analogous to containership-feedership services. There is no indication in the Act that transshipment of military cargo to foreign ships for further transportation by sea would be permissible, where American ships were available for through service at charges not excessive or otherwise unreasonable.

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Finally, the concept has been advanced that feeder-ship service in effect transforms a major port into a complex of ports and that the call of a transoceanic containership at the major port is in reality a call at every port within the complex. Thus, the only transportation by sea that should be considered in applying the Act would be that provided by the containership between the port complexes. The concept is a novel one, but the transformation of the major port into the complex of ports which the concept envisions is effected by use of feeder ships engaged in transportation of cargo by sea. In the case of military supplies, such service, if used and if provided by foreign-flag feeder ships, would deprive those carriers operating United States vessels directly to ports within the complex of their rightful share of defense cargo.

For the reasons stated, we believe appropriated funds may not be properly expended for transportation of military supplies by sea in part in United States containerships and in part in foreign-flag feeder ships where United States vessels are available for carriage of the cargo the entire distance at freight charges not found to be excessive or otherwise unreasonable.

Sincerely yours,

(SIGNED) ELMER B STAATS

Comptroller General
of the United States

The Honorable
The Secretary of Defense