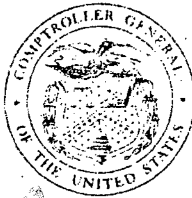
DECISION



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

X 49 Comp. Gen. 755
distinguished

FILE: B-145455 DATE: June 12, 1978

MATTER OF: Interpretation of 1904 Cargo Preference Act, 10 U.S.C. 2631 (1976)

DIGEST:

Where service in United States vessels is not available for entire distance between U.S. port of origin and overseas destination, 1904 Cargo Preference Act requires transportation by sea aboard U.S. vessels with transshipment to foreign land carrier to be preferred over transportation by sea aboard U.S. vessels with transshipment to foreign-flag feeder ship even though latter is less costly.

The Assistant Secretary of the Navy (Manpower, Reserve Affairs and Logistics) requests an advance decision involving the 1904 Cargo Preference Act, 10 U.S.C. 2631 (1976). He states that the question is whether that Act prohibits the Department of Defense from using in overseas areas foreign-flag shipping services for shipping military supplies where there is no United States vessel available and where use of the foreign-flag shipping services would result in the overall lowest transportation cost to the Government.

The Assistant Secretary states that the need for this authority arises from the increased use of containers and containerships for transportation of cargo by sea and the increasingly common use 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 flag. These auxiliary ships are referred to as foreign-flag feeder ships and their service has been called foreign-flag feeder service.

The Secretary refers to our decision in 49 Comp. Gen. 755 (1970) in which we held that the 1904 Cargo Preference Act prohibits the use of foreign-flag feeder shipping services for any part of a voyage where shipping services are available in United States vessels for the entire distance between ports of origin in the United States and the destination port overseas.. He mentions difficulties and inconsistencies which arise because of that decision which he believes require our further review.

PUBLISHED DECISION
57 Comp. Gen.

As examples of the types of problems now encountered, the Assistant Secretary refers to the transportation of dry containerized military cargo between U.S. East Coast ports and places in Scotland such as the ports of Grangemouth and Greenock and the city of Thurso. This trade is served by three U.S.-flag carriers.

One U.S.-flag carrier sails to Rotterdam, Netherlands, where it transships to foreign-flag feeder ships cargo destined to Grangemouth; cargo for Greenock and Thurso is further transshipped at Grangemouth to foreign land carriers.

The other two U.S.-flag carriers sail to Felixstowe, England, where they transship to foreign land carriers cargo destined to the three places in Scotland. One of these carriers offers an alternative route to Greenock utilizing transshipment at Felixstowe to a foreign-flag feeder ship; it also offers an alternative route to Thurso utilizing transshipment at Felixstowe to a foreign-flag feeder ship and a further transshipment at Greenock to a foreign land carrier.

In the Assistant Secretary's view, use of the U.S.-flag carrier which transships cargo at Rotterdam to foreign-flag feeder ships should be preferred because it offers the overall lowest transportation cost to the Government. This view, he says, is clearly consistent with the 1970 decision because none of the three carriers serves the three places in Scotland with United States vessels. He believes that the alternative of using the other two carriers who transship at Felixstowe to foreign land carriers would result in a preference for foreign land transportation over foreign water transportation, a preference he cannot read into the 1904 Act.

The Assistant Secretary also states that if we believe that service through Felixstowe is required by the Act, a further question is presented: Should the less expensive foreign-flag feeder service be favored over the more expensive foreign land service?

The 1904 Cargo Preference Act, as amended, 10 U.S.C. 2631 (1976) reads:

"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."

In 49 Comp. Gen. 755 we recognized that the statute 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. And in the present case we assume that no such determination has been made.

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. 26 Op. Atty. Gen. 415, 419 (1907). As Curran v. Laird, 420 F.2d 122, 133 (D.C. Cir. 1969) makes clear, the implied exception may be used where ". . . military supplies, perhaps urgently needed, must sit upon the docks despite the availability of foreign vessels to carry them" which is not the case here.

We declined in 49 Comp. Gen. 755 to read a third exception into the Act to permit transportation by sea of containerized military cargo in a U.S.-flag ship for the major part of the voyage and in a foreign-flag feeder ship for a minor part of the voyage where United States vessels were available for the entire distance at charges not excessive or otherwise unreasonable. Here, United States vessels are not available for the entire distance. The question then is whether the Act prohibits transshipment to foreign-flag vessels when transshipment to foreign land carriers is available.

In our view the plain words of the 1904 Cargo Preference Act prohibit the use of foreign-flag vessels for any "transportation by sea" absent circumstances justifying the use of either of the two recognized exceptions. The fact that U.S.-flag carriers in the exercise of their managerial discretion chose different intermodal arrangements for moving containerized transportation between places is immaterial; the law in requiring the use of United States vessels necessarily forbids the use of foreign vessels.

The idea that use of the U.S.-flag vessel which transships cargo at Rotterdam to foreign-flag feeder ships should be preferred because it offers the lower overall transportation cost also is immaterial. The mandatory language of the law clearly indicates that cost considerations cannot be used to avoid the requirement that United States vessels be used except where the President finds that the freight charged is excessive or otherwise unreasonable. 48 Comp. Gen. 429, 432 (1968); 43 Comp. Gen. 792, 797 (1964). Furthermore, our decision in 49 Comp. Gen. 755 (1970) is inapposite because that decision involved a situation where the transportation by sea could be performed entirely by United States vessels.

The use of the two carriers who transship cargo at Felixstowe to foreign land carriers in our opinion does not introduce into the 1904 Cargo Preference Act a preference for foreign land transportation over foreign water transportation. One purpose of the law is to protect American shipping from competitive foreign shipping, not from foreign land transportation. Further, the form of inland movement from the port is immaterial. See 43 Comp. Gen. 792 (1964).

The last consideration prohibiting the use of foreign-flag vessels in this case, besides the plain words of the 1904 Act, is the practical difficulty of determining the acceptability of the alternatives involving the use of foreign-flag vessels. The objectives of the Act are to aid United States shipping, foster employment of United States seamen, and promote the shipbuilding industry in the United States. 52 Comp. Gen. 809, 811 (1973). Would using a foreign-flag vessel from Rotterdam, Netherlands, to complete the voyage to the three destinations in Scotland better fulfill the Act's objectives than using a foreign-flag vessel from Felixstowe, England? Should this determination be made by comparing the nautical mileage from Rotterdam to destination with the nautical mileage from Felixstowe to destination, or by comparing other factors or alternatives? If there were an alternative of using a United States flag vessel to a port in the Caribbean which used a foreign-flag vessel to complete the voyage to any of the three destinations in Scotland, would that be an acceptable alternative? There is nothing in the 1904 Act or its legislative history to help answer these questions. And we think that given these problems, relaxation of strict enforcement could lead to reduction in the use of United States vessels contrary to the intention of the 1904 Act.

B-145455

Since we have decided that service through Felixstowe with a transshipment to foreign land carriers is required by the Act, no answer is necessary to the question of choosing at Felixstowe between the more expensive foreign land transportation and the less expensive foreign-flag feeder services.

R F Keller

Acting Comptroller General
of the United States

FILE COPY - COMP GEN