

DECISION

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

FILE: B-193687

DATE: August 22, 1979

MATTER OF: NATOTIME Dry Cargo Charter Party

DIGEST:

Clause in NATOTIME agreement for charter hire of ships during wartime which provides that hire can be paid in advance is not barred by 31 U.S.C. § 529, the general advance payment prohibition, since agreement is for use as wartime contingency and therefore would be within parameters of national emergency advance payment exception authorized by 50 U.S.C. § 1431, et seq. (1976).

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Identifier

The Assistant Secretary for Maritime Affairs, United States Department of Commerce, requests our advice whether the United States, as represented by the National Shipping Authority (NSA), may, in time of war and in accordance with arrangements made under the North Atlantic Treaty, pay charter hire in advance for ships allocated for use by the United States from a pool of North Atlantic Treaty Organization (NATO) flag shipping. We understand that NSA is a standby agency of the Department of Commerce.

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The Assistant Secretary for Maritime Affairs is the U.S. member of the Planning Board for Ocean Shipping (Planning Board), a NATO civil emergency planning body established in 1950 by the North Atlantic Council, which has developed plans for wartime shipping operations. Upon outbreak of war, NATO member nations would assume control of the ships of their respective flags and form a pool from which ships would be assigned to work on the basis of the overall best interests of the NATO membership. A NATO civil/wartime agency, the Defense Shipping Authority (DSA), which is accountable to the North Atlantic Council, would manage this operation. DSA would establish a Freight Rates Committee, authorized to set freight rates for NATO flag ships in order to eliminate inequities in rate charges among the differing nations for the same service. The Assistant Secretary

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for Maritime Affairs supports the plan as "highly advantageous to the United States."

The shipping charter agreement developed by the Planning Board is called "NATOTIME DRY CARGO CHARTER PARTY" (NATOTIME Agreement). A charter party is a contract by which an entire ship, or some principal part thereof, is let by the owner to another person, (in this case the NSA) for a specified time or use. 70 Am. Jur. 2d, Shipping § 112. Clause 10 of the NATOTIME Agreement provides for charter hire to be paid in advance. The United States has approved the draft agreement subject to a reservation concerning clause 10. The issue is whether approval of clause 10 by the United States is prohibited by 31 U.S.C. § 529, which states in pertinent part that "no advance of public money shall be made in any case unless authorized by the appropriation concerned or other law."

An agency of the Government which exercises functions in connection with the prosecution of the national defense effort is authorized to enter into contracts or into amendments or modifications of contracts and to make advance payments thereon without regard to other provisions of law relating to contracts, whenever the President or any of the officials designated by executive order determine that such action would facilitate the national defense. (Pub. L. 85-804; 72 Stat. 972; August 28, 1958, 50 U.S.C. § 1431, et seq.) (1976); and Executive Order (E.O.) 10789, 23 FR 8897 (1958), amended by E.O. 11051, 27 FR 9683 (1962), and by E.O. 11382, 32 FR 16247 (1967). This Act is only effective during a national emergency declared by Congress or the President and for six months after the termination of the emergency or until an earlier cutoff date is designated by Congress.

President Truman's Proclamation of December 16, 1950, No. 2914, 15 FR 9029 (1950) [published as a note before 50 App. U.S.C. § 1 at p. 1935 (1976)], which declared a national emergency to meet the threat of Communist aggression has never been repealed and continues to provide the basis for using Pub. L. 85-804.

The 1958 Senate Report on the bill which was enacted as Pub. L. 85-804 noted that the Proclamation made in 1950 was still in effect and that the authority granted by the Act could be utilized because of the National Emergency. S. Rep. No. 2281, 85th Cong. 2nd Sess. (1958), 1958 U.S. Cong. & Adm. News 4043, 4044.

The National Emergencies Act, Pub. L. 94-412, 50 U.S.C. §§ 1601-1651 (1976), although providing for the termination of "all existing powers and authorities based on any general declaration of national emergency in effect on the date of enactment", contains § 1651 (d) (6), which exempted Pub. L. 85-804, 50 U.S.C. §§ 1431-1435 from the provisions of the National Emergencies Act. It expressly states that:

"The provisions of this chapter shall not apply to the following provisions of law, the powers and authorities conferred thereby, and actions taken thereunder."

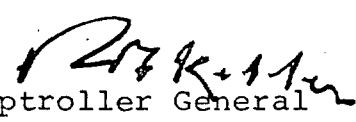
The Senate Report on the National Emergencies Act recognizes that the 1950 Presidential proclamation has never been revoked. Sen. Rep. No. 94-1168, 94th Cong. 2nd Sess. (1976), 1976 U.S. Cong. & Adm. News 2288, 2294. The Department of Defense regulations contained in 32 C.F.R. 163.9, 165.50 et seq., cite Pub. L. 85-804 as a statutory basis for authorizing advance payments under certain circumstances concerning national defense.

E.O. 10789, supra, refers to both Pub. L. 85-804 and the Presidential Proclamation of 1950. This order permits the Secretary of Commerce to promulgate regulations subject to the limitations and regulations in paragraphs one through fourteen of the order.

Specifically, NSA, the authority empowered to sign the advance hire agreements, would be a designated agency under the above laws. E.O. 10789 delegates implementation authority to the Secretary of Commerce as well as to ten other executive agencies. E.O. 10789, Part II, para. 21. These officers may delegate their authority to military and civilian officials in their respective agencies. E.O. 10789, Part I, para. 2, Part II, para. 21. Therefore, it appears that the powers granted by the order would be flexible enough without procedural change to cover NSA..

Provided the determination is made that the national defense will benefit by the NATO arrangement for a shipping pool, a determination which apparently would not be in question at the time of an impending European conflict, the advance payments under clause 10 of the NATOTIME Agreement would be legally permissible. On this basis, we would not object to the Secretary of Commerce adopting regulations which would permit advance payments with the proviso that the explicit procedures contained in the Executive Order, such as the requirement for adequate security, are contained in these provisions. See E.O. 10789, Part 1, para. 9.

The general prohibition against advance payments, 31 U.S.C. § 529, is qualified by the phrase "unless authorized by the appropriation concerned or other law." When implemented by the Secretary of Commerce as provided by E.O. 10789, Pub. L. 85-804 would satisfy the qualified language of 31 U.S.C. § 529.


Deputy

Comptroller General
of the United States