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

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MAY 17 1973

Mr. Nicholas D. Pasco
Senior Vice President
American Export Lines, Inc.
26 Broadway
New York, New York 10004

Dear Mr. Pasco:

We refer to your letter of January 31, 1973, and earlier letter, asking for decision whether foreign-built vessels are ineligible for carriage of military cargoes. A memorandum of law was enclosed with your letter of January 31. This memorandum examines the legal foundation for American Export's claim that foreign-built vessels are ineligible to carry military cargoes.

Resolution of the question requires consideration of two basic cargo preference statutes: Act of April 28, 1904, ch. 1766, 33 Stat. 518, as amended, 70A Stat. 146; 10 U.S.C. 2631, and Act of August 26, 1954, ch. 936, 68 Stat. 832, as amended, September 21, 1961, 75 Stat. 565, 46 U.S.C. 1241(b). The former provides that only vessels of the United States or belonging to the United States shall be used in the transportation by sea of supplies bought for use of the military departments. The latter requires that at least 50 percent of all Government cargo, whether military or civil, be transported in privately owned United States-flag commercial vessels. The 1961 amendment in part provided that a vessel built outside the United States subsequent to September 21, 1961, could not be considered a privately owned United States-flag commercial vessel within the meaning of the statute until the vessel had been documented under the laws of the United States for a period of three years.

The memorandum of law is devoted primarily to showing that the cargo preference granted by the 1904 Act, insofar as it applies to private carriage is restricted to vessels built in the United States as well as registered in the United States. Three basic contentions are advanced:

- Ineligibility of foreign-built vessels to carry military cargoes

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> (a) that the 1904 Act was viewed by the Congress which enacted it as an aid to <u>both</u> the U.S. shipbuilding and ship-operating industry, and had as its specific purpose the restriction of military ocean cargoes carried on private vessels to U.S. constructed as well as U.S. registered ships; (b) that this was the authoritative interpretation of the statute throughout its first 60 years, an interpretation accepted by the Comptroller General as recently as in 1968; and (c) that this interpretation finds added support in the Congressional policy, most recently expressed in a series of legislation spanning the period 1954-1961, to foster American shipbuilding and shipping by reserving cargoes subject to government control for U.S. constructed and registered vessels to the maximum practicable extent.

We would readily agree that the 1904 Act was viewed by the Congress which enacted it as an aid to both the U.S. shipbuilding and ship-operating industry. We are not convinced, however, that the act had as its specific purpose the exclusive restriction of military ocean cargoes carried on private vessels to U.S. constructed as well as U.S. registered ships.

The extensive Senate debate on the bill that ultimately was passed (S. 2263) indicates that the act was intended to aid United States shipping, to foster employment of United States seamen, and to promote the shipbuilding industry in the United States. Undoubtedly the preference granted by the act contributed to all three objectives, but we do not believe that the preference, as enacted, was limited exclusively to vessels built in the United States. If this had been the primary intention, express language to that effect could have been employed. In this connection, two other cargo preference bills, both of which used the term "American-built ships," had been considered by the Congress (S. 2437 and H.R. 14441), but they were passed over in favor of S. 2263.

The preference granted by the 1904 Act, insofar as it applies to private carriage, is expressly limited to "vessels of the United States" and it is clear that the term was intended to have the same meaning that it has in the navigation laws. In the Senate debate on the bill, this discussion is reported, 38 Cong. Rec. 2408:

Mr. COCKRELL. I should like to have a definition of what are 'vessels of the United States.' Does that mean that the United States must be the owner of the vessel?

Mr. HALE. This only applies to those; it does not at all go into the general question. It is only the simple question that when the Government transports stores or goods to foreign ports it shall be done by vessels of the United States.

Mr. BERRY. Not belonging to the United States?

Mr. HALE. No; but vessels that are papered by the United States.

Mr. ALLISON. Registered.

Mr. HALE. Yes; registered. It is understood in business very well. They are to be vessels of the United States and not foreign tramps. That is all there is of it.

And, 38 Cong. Rec. 2594:

Mr. BACON. I suggest to the Senator from Maine that the term 'vessels of the United States' has a technical meaning.

Mr. HALE. Yes.

Mr. BACON. It does not mean vessels owned by the United States.

Mr. HALE. It does not.

Mr. BACON. It is found under the navigation laws, and means vessels of American registry.

It is significant that none of the answers to direct questions about the meaning of the term "vessels of the United States" indicated that it encompassed only ships built in the United States. And it seems clear that the bill under discussion was not intended to define the term but that its meaning was to be ascertained by reference to other laws.

Since the earliest days of the Republic, the navigation laws of this country have defined vessels of the United States as those registered or enrolled according to law. Act of December 31, 1792, ch. 1, Sec. 1, 1 Stat. 287. The current definition, substantially unchanged from earlier times, is codified in 46 U.S.C. 221, in relevant part, as follows:

> Vessels registered pursuant to law and no others, except such as shall be duly qualified according to law for carrying on the coasting or fishing trade, shall be deemed vessels of the United States, and entitled to the benefits and privileges appertaining to such vessels * * *.

At the time the 1904 law was enacted, all vessels built in the United States were entitled to registry provided they were owned by United States citizens. Revised Statutes, Section 4132. But registration was not limited exclusively to such vessels; there were exceptions, although admittedly narrow ones. Vessels wherever built, captured in war by citizens of the United States and lawfully condemned as prize, could be registered. Similarly, vessels adjudged to be forfeited for a breach of the laws of the United States, whether built within or without the United States, could be registered. Wrecked vessels could be registered provided they were substantially rebuilt in the United States. (Revised Statutes, Section 4136). And, of course, then as now, foreign-built vessels could be admitted to registry under special acts of Congress granting that right to specific vessels.

It must be concluded, therefore, that the Congress which enacted the 1904 law was aware that some classes of foreign-built vessels were entitled to registry under the navigation laws and thus were to be deemed "vessels of the United States, and entitled to the benefits and privileges appertaining to such vessels." If the Congress had intended to limit the preference in the 1904 Act to vessels built in the United States, it could have said so, and it seems probable that the term "vessels of the United States" was used intentionally in order to accord the preference not only to ships built in the United States but also to such limited classes of foreign-built vessels as might be then or thereafter admitted to registry under the law. In any event, we see no compelling reason to read the act as granting a preference to one class of vessels and denying it to another class when both classes consist of duly registered vessels which are, by statutory definition, "vessels of the United States," and entitled to the benefits and privileges appertaining to such vessels.

In 1912, Congress amended the registry laws to permit registry of foreign-built vessels engaged in trade with foreign countries, and the amendment has remained in effect since that time. Act of August 24, 1912, ch. 390, Sec. 5, 37 Stat. 562, 46 U.S.C. 11. Since then, foreign-built vessels engaged in the foreign trades "registered pursuant to law" must be deemed "vessels of the United States, and entitled to the benefits and privileges appertaining to such vessels," 46 U.S.C. 221. And we believe one of the benefits and privileges appertaining to such vessels is the cargo preference accorded by the 1904 Act since the preference is extended to vessels of the United States and is not limited either expressly or by necessary implication to vessels built within the United States.

While the Congress which passed the 1904 Act obviously had power to limit the preference therein to vessels built within the United States had it chosen to do so, it could not bind succeeding Congresses in the determination of what were or were not to be deemed vessels of the United States;

> Ships or vessels of the United States are the creations of the legislation of Congress. None can be denominated such, or be entitled to the benefits or privileges thereof, except those registered or enrolled according to [law]. White's Bank v. Smith, 74 U.S. 646, 655 (1868).

It is our opinion, therefore, that foreign-built vessels engaged in the foreign trades (or in trade with some trust territories), and duly registered pursuant to law as vessels of the United States, are entitled to participate in the cargo preference granted by the 1904 Act to the extent such participation is limited to foreign commerce and the trust territories and is not precluded by the limitations of the Act of August 26, 1954, as amended, 46 U.S.C. 1241(b), discussed further below.

It is said in your memorandum that interpretation of the 1904 Act as being restricted to U.S.-built vessels as well as U.S.-registered vessels was the authoritative interpretation of the statute throughout its first 60 years, an interpretation accepted by the Comptroller General as recently as 1968. So far as we know, the military departments have always administered the 1904 Act as requiring shipment of military supplies in vessels owned by the Government or in vessels registered or enrolled under the laws of the United States. If there has been an administrative practice limiting application of the 1904 Act to U.S.-built vessels, except insofar as shipment in the coastwise trades has required such application, we are not aware of it.

This Office has never held that the application of the 1904 Act is limited exclusively to U.S.-built vessels. Our decisions frequently have referred to the fact that stimulation of American shipbuilding was one of the purposes of the act but we also have stressed the other purposes: protection of United States shipping interests and the employment of United States seamen. The trainship decision (43 Comp. Gen. 792), referred to in your memorandum of law as supporting your position in this case, involved use of a foreign-registered as well as foreign-built vessel, engaged in a coastwise trade obviously limited to U.S.-built vessels, and the question presented did not require consideration of the question whether the 1904 Act limited carriage of military cargo in foreign trades to U.S.-built vessels. The 1968 decision (48 Comp. Gen. 429), concerning shipment of cargo from Great Lakes ports, also did not involve the question; the question there was whether military cargo could be shipped to Great Lakes ports for transshipment to foreign-flag vessels when United States-flag vessels were available for carriage of the cargo at Atlantic and Gulf coast ports.

Finally, it is said that your interpretation finds added support in Congressional policy, most recently expressed in a series of legislation spanning the period 1954-1961, to foster American shipbuilding and shipping by reserving cargoes subject to Government control to U.S. constructed and registered vessels to the maximum practicable extent. In 1954, legislation was enacted to insure that at least 50 percent of all Government cargo, whether military or civil, be transported in privately owned United States-flag commercial vessels. Act of August 26, 1954, 68 Stat. 832, 46 U.S.C. 1241(b). There is nothing in the legislation or its history to indicate that the term "United States-flag commercial vessels" was then limited to vessels built within the United States. We are informed by the Military Sealift Command (MSC, formerly Military Sea Transportation Service, MSTS) that this act was construed as a limitation on the amount of military cargo that could be shipped in Government-owned vessels and that at least 50 percent of military cargo must thereafter be shipped in privately owned United States-flag vessels.

In 1961, the act was amended to provide, inter alia, that a vessel built outside the United States subsequent to September 21, 1961, could not be deemed a privately owned United States-flag commercial vessel within the meaning of the statute until the vessel had been documented under the laws of the United States for a period of three years. The plain inference is that vessels built outside the United States before that time, if documented under the laws of the United States, could be considered to be

privately owned United States-flag commercial vessels within the meaning of the statute. MSC informs us that the amount of cargo transported in United States-flag, foreign-built vessels is carefully monitored in order to assure compliance with the 1961 proviso.

In view of the foregoing, it is our opinion that foreign-built vessels documented under the laws of the United States are eligible to carry military cargoes in the circumstances and subject to the limitations prescribed by law as described above. In answer to your question whether such vessels documented subsequent to issuance of bids or offers for transportation of military cargo can be used to satisfy contract commitments pursuant to such bids or offers, our answer is in the affirmative, provided the use of such vessels is consistent with their registry, provided such use does not compromise the tonnage limitation of the 1954 Act, as amended, and provided the requests for bids or offers, or the contracts entered into pursuant thereto, do not prohibit such use.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States