



SEMAPHORE

Newsletter of the Maritime Law

Association of Australia and New Zealand



Emotions Stirred by Jones Act Waivers

Jones Act waivers granted to expedite the shipment of fuel supplies to Puerto Rico following September's Hurricane Fiona, have received a stinging response from American maritime labour and shipping interests.

On September 28, Secretary of the United States Department of Homeland Security (DHS) Alejandro Mayorkas announced the first of the two waivers, which permitted an international vessel to carry fuel from the mainland to the unincorporated United States territory.

"In response to urgent and immediate needs of the Puerto Rican people in the aftermath of Hurricane Fiona, I have approved a temporary and targeted Jones Act waiver to ensure that the people of Puerto Rico have sufficient diesel to run generators needed for electricity and the functioning of critical facilities as they recover from Hurricane Fiona," he stated.

"The decision to approve the waiver was made in consultation with the Departments of Transportation, Energy, and Defense to assess the justification for the waiver request and based on input from the Governor of Puerto Rico and others on the ground supporting recovery efforts."

A similar statement was made on October 16, when Secretary Mayorkas granted a waiver for a shipment of LNG.

American Shipping Companies Dismayed

In an open letter to Secretary Mayorkas on September 29, American Maritime Partnership president Ku'uhaku Park said the United States domestic maritime industry was "deeply disappointed".

"As DHS surely knows, all federal agencies involved in this situation – the United States Department of Energy, the United States Coast Guard, the Federal Emergency Management Agency and the United States Army Corps of Engineers – reported prior to the waiver that there was no diesel fuel shortage in Puerto Rico," he wrote.

"The fuel situation on the island has been compromised by difficulties with the on-land distribution system there. Truck distribution within Puerto Rico, not maritime transportation, is the issue, just as it was in Hurricane Maria five years ago. In fact, American tank vessels, and foreign vessels too, have arrived and continue to arrive with additional fuel for Puerto Rico.

Mr Park labelled the decision not only "unnecessary" but "unlawful", given the Jones Act requires a determination of the non-availability of American vessels before a waiver can be granted.

"In this case, because the vessel in question was already four days underway when the waiver was applied for, such a determination was not possible. That should have ended the inquiry.

"Instead, the United States Maritime Administration (MARAD) conducted an unprecedented retroactive United States availability determination 12 days after the fact, and we are well aware that American vessel operators reported United States vessel availability in that survey. The United States vessel



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Alejandro Mayorkas*

availability survey is intended to be a sincere effort to avoid outsourcing American jobs to foreign operators – it is not a check-the-box exercise conducted nearly two weeks after the fact to justify a waiver.”

Mr Park asserted that the DHS had now signalled to all parties that “the American Federal Government will grant waivers that do not meet the conditions of Section 501”.

“As a result, DHS can expect a rash of new waiver requests. In that sense, this waiver sets the worst possible precedent, extending far beyond the factual circumstances in this specific case.”

Furthermore, Mr Park said the DHS had “rewarded” a foreign operator for taking the “nearly unprecedented step” of applying for the waiver after a vessel was underway and therefore “negating the possibility of a legitimate United States vessel availability survey”.

“DHS has permitted the waiver recipient to engage in disaster arbitrage – the practice of exploiting humanitarian crises to enrich themselves.

“We are disappointed that DHS would ignore the requirements of Section 501, side with foreign operators over Americans operators and mariners in an unprecedented way, and sanction the worst possible commercial behaviour. We urge you to never approve a waiver like this again.”

Maritime Unions Weigh In

A joint September 30 [statement](#) by the Seafarers International Union, the American Maritime Officers, the International Organisation of Masters, Mates and Pilots, and the Marine Engineers’ Beneficial Association expressed “shock and outrage”.

“Our unions represent American Merchant Mariners who sail aboard Jones Act vessels, including those that serve Puerto Rico,” stated the maritime unions.

“Every day, our mariners go to work to ensure that Puerto Rico and the rest of the United States have safe and dependable domestic shipping, helping to move all the goods they need to live, work, and raise their families. And, every day, our mariners subject themselves to the dangers of the sea. Not all of them make it home.

“The Jones Act is critical to our continued ability to maintain a domestic United States-flagged merchant marine. As such, we take protecting it seriously. That’s why we are shocked and outraged at the United States Department of Homeland Security’s decision to issue an illegal, unjustified and unnecessary Jones Act waiver for a British Petroleum tanker that took active steps to ignore and then circumvent fundamental American law.”

The maritime unions labelled the waiver a “betrayal of the principles of federal maritime law dating back centuries, made worse by the facts of the case”.

“A foreign ship with a foreign crew loaded fuel in an American port and diverted to Puerto Rico to take advantage of increased fuel prices after the island was hit by Hurricane Fiona. There was no national security crisis. There were American ships available – indeed, the ship was at sea four days before a waiver was even applied for.

“This cargo was not humanitarian aid. It was a blatant cash grab and a bald-faced political stunt. The companies behind this vessel gambled that they could pressure the United States Government into ignoring our laws and policy because of the hurricane and they were correct.

“Let us repeat – this waiver was unnecessary. United States-flagged vessels and foreign-flagged vessels carrying legal cargoes of fuel – either from American ports or from foreign ports – had safely discharged their cargoes in Puerto Rico after the storm.

“American ships were available. American crews were available. But none of that mattered, because the political optics of a ship waiting to bring fuel to the island apparently matters more than a century of bedrock American law.”

House Committee Asks Questions

On October 21 the bipartisan leadership of the House Committee on Transportation and Infrastructure also announced they had written to Secretary Mayorkas on the matter.

“We concur with MARAD that consideration of a waiver while a vessel is already underway is ‘novel and problematic’ and would like to better understand the reasoning for your decision to issue a waiver for a company that appeared to be gaming the Jones Act waiver process,” stated the letter.

“Moreover, the question of availability was not intended to be answered in retrospect – the statute is intended to be a prospective evaluation to give United States-flagged ships the first opportunity to move the goods, without the need to waive the law.

“We do not understand how the DHS, either independently or acting through MARAD, made a retroactive determination that no United States-flagged vessels could have performed the move for which the waiver was granted – and did so on the day the waiver was granted.”

Contrasting Voice

However, at least one strongly-contrasting opinion has been provided by senior executives of the Cato Institute, Scott Lincicome and Colin Grabow.

In an October 28 article titled “Jones Act Waiver Debacle Demonstrates the Need for Reform”, Messers Lincicome and Grabow opined that when disaster strikes, a “full array of options must be on the table to speed relief to Americans in peril”.

“Protectionist and outdated obstacles to that relief should be urgently removed,” they stated.

“And, as last month’s debacle showed, we should start with the Jones Act.”

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