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NEVILLE PETERSON LLP

1400 16th Street, N.W. • Suite 350 • Washington, D.C. 20036
Telephone: (202) 861-2939 • Fax: (202) 861-2924 and 861-6077

MICHAEL K. TOMENGA
Direct (202) 776-1148
District of Columbia Bar
mtomenga@npwdc.com

June 12, 2007

E-File

The Honorable Vernon A. Williams
Secretary of the Board
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

**Re: Opposition to Acceptance of Petition of
Horizon Lines, LLC for a Declaratory Order**

Dear Secretary Williams:

Enclosed is the opposition of American Seafoods Company LLC to the Board's acceptance of a petition filed by Horizon Lines, LLC seeking a declaratory order (FD 35039). This submission is not a petition and no filing fee is required. Accordingly, we are submitting it via E-file.

Please contact the undersigned if there are any questions.

Respectfully submitted,



Michael K. Tomenga
Casey K. Richter

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE NO. FD35039

**OPPOSITION OF
AMERICAN SEAFOODS COMPANY LLC**

**AGAINST ACCEPTANCE OF
HORIZON LINES, LLC
PETITION FOR DECLARATORY ORDER**

June 12, 2007

**SUBMITTED BY:
Michael K. Tomenga
Casey K. Richter
Neville Peterson LLP
1400 16th Street, N.W.
Washington, DC 20036
Tel: (202) 776-1148
Fax: (202) 861-2924**

American Seafoods Company LLC (“ASC”) urges the Surface Transportation Board (“the Board”) to reject the petition for a declaratory order requested by Horizon Lines, LLC (“Horizon”). Horizon seeks a declaratory order that the movement of merchandise via through routes from Dutch Harbor, Alaska to Boston, Massachusetts and New Bedford, Massachusetts described in rate tariffs filed by ASC and Sunmar do not meet the standard of “reasonableness” set for in 49 U.S.C. § 13701 and are not through routes “recognized” by the Board within the meaning of the statute formerly known as the Third Proviso to the Jones Act (“Third Proviso”). 46 U.S.C. App. § 883, Third Proviso (2005) (reorganized as 46 U.S.C. § 55116 by Pub. L. No. 109-304, 120 Stat. 1485 (October 6, 2006)).

It is well-established that the Board has broad discretion to determine whether to issue a declaratory order to terminate a controversy or remove uncertainty in a case that relates to the subject matter jurisdiction of the Board. Neither situation exists in the matter that is the subject of the petition.¹ A declaratory order will not terminate a controversy inasmuch as Horizon has already received an adverse decision from the U.S. District Court for the District of Columbia (“District Court”) and has stated its intent to appeal such decision. A declaratory order would have no effect on that litigation. Moreover, the subject of the petition does not relate to the subject matter jurisdiction of the Board. Rather the petition relates to an interpretation of a statute that is within the administration of U.S. Customs and Border Protection (“CBP”). Furthermore we note that, to the extent that the statutes administered by the Board are concerned, there is no controversy over the correct interpretation of the relevant statutory terms.

¹ Horizon also cites jurisdiction under 49 U.S.C. § 721. However the issuance of a declaratory order under that provision requires a showing of irreparable harm which Horizon has not even alleged.

Congress has authorized the Secretary of the Treasury to administer the navigation laws including 46 U.S.C. App. § 883 and the Third Proviso thereof. The Secretary of the Treasury delegated that authority to the U.S. Customs Service ("Customs"). Customs has since been reorganized as CBP, an agency within the Department of Homeland Security. *See Homeland Security Act of 2002* (Pub. L. 107-296, 116 Stat. 2178). CBP retains authority to administer the Jones Act, except for certain enforcement responsibilities transferred to the U.S. Coast Guard pursuant to a Memorandum of Agreement in 1978. *See Treasury Order* 100-16 (May 15, 2003); *Treasury Order* 165, *as amended* (Dec. 15, 1952); *Customs Directive* 4410-005a (dated November 25, 1987).

The recodification of United States Code title 46 Appendix in H.R. 1442, *see* Pub. L. No. 109-304, 120 Stat. 1485 (2006), made no change to CBP's authority to administer the Jones Act and the Third Proviso thereto. *See* H.R. 109-170 at 2 (2006) ("the purpose of H.R. 1442 is to complete the codification of title 46, United States Code, Shipping, as 'positive' law. It does so by reorganizing and restating the laws currently in the appendix to title 46. It codifies existing law rather than creating new law. * * * In the drafting, the intent is to comply with the standard in section 285b(1) of title 2, United States Code, which provides that the restatement of existing law shall conform to 'the understood policy, intent, and purpose of Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections. * * * To restate these various provisions of law as a cohesive unit, it is necessary to make changes in organization, style, and terminology. These changes are not intended, however, to lead to changes in result, and therefore they should not impair the precedent value of earlier judicial decisions or other interpretations.'").

Both CBP and the District Court have rejected Horizon's argument that the Third Proviso contains an implicit "reasonableness" requirement that requires an affirmative determination of the "commercial purposefulness" of that portion of the through route over Canadian rail lines. Horizon provides no reason why the Board should now exercise its discretion to interpret the Third Proviso contrary to the long-standing position of CBP, the agency charged with the administration of the statute, and contrary to the recent decision of the federal district court that is consistent with CBP's position in this regard

Although in its petition at page four Horizon states that "[t]he Court provided no analysis of what constitutes a 'through route'," the district court specifically addressed Horizon's argument in this regard as follows:

Plaintiff [Horizon] also argues that the Third Proviso contains an implied prohibition on "sham or commercially impractical Canadian rail movements to achieve 'technical compliance' with the literal terms of the statute." (Pl.'s Mot. At 16). In support, plaintiff [Horizon] argues that the term "through route" has been defined by the Supreme Court merely as "an arrangement, express or implied, between [transportation providers] for the continuous carriage of goods from the originating point on the line of one carrier – to destination on the line of another" *St. Louis Sw. Ry. Co. v. United States*, 245 U.S. 136, 139 n.4 (1917). (Pl.'s Opp. & Reply at 15-16.). Plaintiff [Horizon] can point to no case in which the intent of the shipper, other than to transport goods according to the route described, was relevant to the determination of whether a through route existed. **If Congress wishes to limit the Third Proviso to specific routes or to require the STB to evaluate the commercial soundness of a proposed route, it has the authority to do so, but the Third Proviso as currently written contains no such requirement.**

Horizon Lines LLC v. United States, 414 F. Supp. 2d 46, 55 n. 6 (D.D.C. 2006)(emphasis added).

Horizon is not without an opportunity to pursue any disagreement that it has with the district court's decision on this point. Moreover, Horizon has stated its intent to appeal the

decision of the district court on this specific issue. *See* Horizon's brief in opposition to the dismissal of the consolidated appeal before the U.S. Court of Appeals for the District of Columbia Circuit ("DC Circuit") filed by ASC and the United States.

Horizon intends to challenge the district court's decision that the third Proviso does not require a commercially meaningful Canadian rail movement

Horizon Lines, LLC v. Am. Seafoods Co. LLC, Court No. 06-5165 (consolidated with No. 06-5181), 2007 U.S. App. LEXIS 1401 (D.C. Jan. 22, 2007), Appellee's [Horizon's] Memorandum in Opposition to Appellant's Motion to Dismiss at 3.

Horizon's argument to the effect that route "recognition" must be some legal act performed by the Board that is separate and distinct from acceptance of a rate tariff has no merit when the original statutory language is consulted. Prior to codification, the Third Proviso read in pertinent part:

... over through routes heretofore or hereafter recognized by the Surface Transportation Board for which routes rate tariffs have been filed or shall hereafter be filed with the Board

It is clear that Congress intended no legal act of recognition separate from the filing of a rate tariff with the Board. This was the interpretation of the pertinent statutory language provided by CBP, as found by the district court in *Horizon Lines LLC v. United States*, Civil No. 05-0952, 2005 U.S. Dist. LEXIS 40246 (D.D.C. Sept. 23, 2005). *See* Customs Headquarters Ruling Letter 112085 and District Court Opinion at p. 3 ("Thus, CBP has found that a non-qualified vessel may engage in non-contiguous coastwise trade where: ... b) routes rates tariffs have been or shall hereafter be filed with the [STB], and have not subsequently been rejected for filing, have become effective according to their terms, and have not been subsequently suspended, or withdrawn by the [STB].").

Horizon did not raise its “recognition” argument before the District Court because there was no basis to do so relying on the original statutory language as it existed prior to recodification. Horizon’s argument is based solely on the language of the recodification to which, it argues the Board must adhere. Pet. at 6, fn. 4, and 7-8. As noted above, on the contrary, Congress intended the proper interpretation of the recodification to result in no change to the interpretation of the original statute. The District Court addressed the meaning of the original statute when it stated:

... there is no evidence that ‘routes rate tariff’ as used in the Third Proviso is intended to signify anything other than a typical “rate tariff” filed with the STB. A ‘rate tariff’ is not route-specific except to include the origin and destination of the goods.

Op at 18. Citations omitted.

As the District Court found, and as is evident from the Board’s regulations, a rate tariff filed with the Board contains no specific routing for the Board to approve. Hence there is no specific routing for the Board to approve and nothing more than the filing of a rate tariff with the Board is required for operation under the Third Proviso -- as Customs correctly determined.

Inasmuch as the DC Circuit may decide the issues raised by Horizon in due course, there is no need for the Board to issue a decision on this issue now. If the Board were an indispensable party to decide this issue, Horizon could have joined the Board as a party to the district court litigation. Horizon did not do so. Nor did the district court find it necessary to join the Board as an indispensable party. The lack of Board participation in the district court litigation highlights that there is no controversy here for the Board to decide.

It is notable that Horizon does not complain that the Board violated its regulations or the terms of the statute in accepting the Sunmar and ASC rate tariffs mentioned in its petition.

Horizon instead argues to the effect that the Board should interpret the term “reasonableness” in section 13701 in a manner that goes beyond the statutory and regulatory scheme of the Interstate Commerce Commission Termination Act (“ICCTA”; Pub. L. 104-88, 109 Stat. 803, Dec 29, 1995).

Congress could not have been more clear in stating its intent about the aspects of a through route in the noncontiguous trade that must be reasonable. Nowhere does Congress require that the specific routing within a joint through route be subject to review by the Board.

Section 13701(a) provides:

05Requirements for reasonable rates, classifications, through routes, rules, and practices for certain transportation

(a) Reasonableness.

(1) Certain household goods transportation; joint rates involving water transportation. A rate, classification, rule, or practice related to transportation or service provided by a carrier subject to jurisdiction under chapter 135 [49 USCS §§ 13501 et seq.] for transportation or service involving—

(A) a movement of household goods,

(B) a rate for a movement by or with a water carrier in noncontiguous domestic trade, or

(C) rates, rules, and classifications made collectively by motor carriers under agreements approved pursuant to section 13703 [49 USCS § 13703],

must be reasonable.

(2) Through routes and divisions of joint rates. Through routes and divisions of joint rates for such transportation or service must be reasonable.

(b) Prescription by Board for violations. When the Board finds it necessary to stop or prevent a violation of subsection (a), the Board shall prescribe the rate, classification, rule, practice, through route, or division of joint rates to be applied for such transportation or service.

(c) Filing of complaint. A complaint that a rate, classification, rule, or practice in noncontiguous domestic trade violates subsection (a) may be filed with the Board.

(d) Zone of reasonableness.

(1) In general. For purposes of this section, a rate or division of a motor carrier for service in noncontiguous domestic trade or water carrier for port-to-port service in that trade is reasonable if the aggregate of increases and decreases in any such rate or division is not more than 7.5 percent above, or more than 10 percent below, the rate or division in effect 1 year before the effective date of the proposed rate or division.

(2) Adjustments to the zone. The percentage specified in paragraph (1) shall be increased or decreased, as the case may be, by the percentage change in the Producers Price Index, as published by the Department of Labor, that has occurred during the most recent 1-year period before the date the rate or division in question first took effect.

(3) Determinations after complaint. The Board shall determine whether any rate or division of a carrier or service in noncontiguous domestic trade which is not within the range described in paragraph (1) is reasonable if a complaint is filed under subsection (c) or section 13702(b)(6) [49 USCS § 13702(b)(2)].

(4) Reparations. Upon a finding of violation of subsection (a), the Board shall award reparations to the complaining shipper or shippers in an amount equal to all sums assessed and collected that exceed the determined reasonable rate, division, rate structure, or tariff. Upon complaint from any governmental agency or authority and upon a finding or violation of subsection (a), the Board shall make such orders as are just and shall require the carrier to return, to the extent practicable, to shippers all amounts plus interest, which the Board finds to have been assessed and collected in violation of subsection (a).

49 U.S.C. § 13701(a). Emphasis added.

It is clear from the highlighted statutory language quoted above that, with respect to “through routes,” Congress intended the “reasonableness” requirement in section 13701(a) to refer to the reasonableness of the entire through route in the noncontiguous trade and not the

specific routing within the through route. Nowhere in section 13701 did Congress require the Board to review the specific routes within the through routes for reasonableness. It is evident then that Horizon's controversy lies with Congress and not with the Board. As a consequence, the Board could not grant the declaratory order requested by Horizon without contravening the terms of the ICCTA and congressional intent thereunder.

Accordingly, for the reasons explained above, namely that there is no controversy for the Board to resolve and no uncertainty that exists within a case that is related to the subject to the jurisdiction of the Board, we urge the Board to reject Horizon's petition for a declaratory order.

Attached for the Board's convenience are copies *Horizon Lines LLC v. United States*, Civil No. 05-0952, 2005 U.S. Dist. LEXIS 40246 (D.D.C. Sept. 23, 2005); Treasury Orders 100-16 and 165; and, *Horizon Lines, LLC v. Am. Seafoods Co LLC*, Court No. 06-5165 (consolidated with No. 06-5181), 2007 U.S. App. LEXIS 1401 (D.C. Jan. 22, 2007), Appellee's [Horizon's] Memorandum in Opposition to Appellant's Motion to Dismiss.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Casey K. Richter".

Michael K. Tomenga
Casey K. Richter
Neville Peterson LLP
1400 16th Street, N.W.
Suite 350
Washington, DC 20036
(202) 776-1148 phone
(202) 861-2924 fax

CERTIFICATE OF SERVICE

I, Casey K. Richter, certify that I have this day served copies of this document upon all parties of record in this proceeding, electronically.


Casey K. Richter

June 12, 2007

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

HORIZON LINES, LLC,

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants,

and

AMERICAN SEAFOODS COMPANY LLC,

Defendant-Intervenor.

Civil Action No. 05-0952 (ESH)

MEMORANDUM OPINION

Plaintiff Horizon Lines, LLC ("Horizon") has filed this challenge under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, to the ruling of the Bureau of Customs and Border Protection ("CBP" or "Customs") interpreting the Third Proviso to Section 27 of the Merchant Marine Act of 1920 ("Jones Act"), ch. 250, 41 Stat. 988, codified as amended at 46 U.S.C. app. § 883 (2004), to permit the transportation of frozen fish from Alaska to the East Coast of the United States in a foreign-flagged vessel via a foreign port and over Canadian rail lines without filing rate tariffs with the Surface Transportation Board ("STB"). In a previous opinion, the Court granted American Seafoods Company, LLC's ("ASC") Motion to Intervene as Defendant to protect its interest in a Customs ruling that is nearly identical to the one challenged

by Horizon. *Horizon Lines LLC v United States*, No. 05-952, slip op. at 6 (D.D.C. Sept. 23, 2005). Currently before the Court are cross-motions for summary judgment filed by Horizon, CBP and ASC, and ASC's Motion to Dismiss for Lack of Subject Matter Jurisdiction

BACKGROUND

CBP is a government agency within the Department of Homeland Security responsible for interpreting and enforcing the cabotage laws of the United States, including the Jones Act.¹⁷ The Jones Act is a protectionist statute that prohibits any goods "transported by water, or by land and water . . . between points in the United States . . . either directly or via a foreign port," from being shipped, "for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States " 46 U.S.C. app. § 883. Vessels meeting the requirements of § 883 are referred to as "Jones Act qualified." Foreign-flagged vessels are not Jones Act qualified, but may still engage in domestic, or "coastwise," trade if they meet certain statutory exemptions. The exemption at issue in this case, known as the Third Proviso, permits non-qualified vessels to transport

merchandise . . . between points within the continental United States, including Alaska, over through routes heretofore or hereafter recognized by the Surface Transportation Board for which routes rate tariffs have been or shall hereafter be filed with the Board when such routes are in part over Canadian rail lines and their own or other connecting water facilities.

¹⁷ At the time of the initial ruling at issue in this case, the agency was known as the U.S. Customs Service and resided within the Department of the Treasury. In 2002, Congress passed the Homeland Security Act, Pub. L. 107-296, 116 Stat. 2135 (2002), which transferred the agency to the Homeland Security Department and renamed it the Bureau of Customs and Border Protection. *Id.* §§ 403, 1502.

Id. Thus, CBP has found that a non-qualified vessel may engage in non-contiguous coastwise trade where.

a) through routes are utilized which have heretofore or are hereafter utilized by the [STB]

b) routes rate tariffs have been or shall hereafter be filed with the [STB], and have not subsequently been rejected for filing, have become effective according to their terms, and have not been subsequently suspended, or withdrawn by the [STB]

c) the routes utilized are in part over Canadian rail lines and their own or other connecting water facilities

(Headquarters Ruling Letter ("HRL") 112085 at 3; AR 69). Customs has also "held that 'over Canadian rail lines' means simply over rail trackage in Canada, and that 'their own or other connecting water facilities' means water facilities covered by a through route regardless of whether those facilities connect directly with the Canadian rail line covered by that through route." (*Id.*)

Plaintiff Horizon is a Jones Act qualified shipper and thus competes with non-qualified shippers and water carriers that operate in the U.S. non-contiguous domestic trade pursuant to an exception to the Jones Act. (Buchanan Aff. ¶ 6.) One such competitor is Sunmar Shipping, Inc ("Sunmar"), which on August 9, 2003, received a Ruling Letter from CBP, which was then the U S Customs Service, finding that Sunmar's proposed method of shipping frozen fish from Dutch Harbor, Alaska to Boston, Massachusetts via New Brunswick, Nova Scotia was in compliance with the Third Proviso. (HRL 115446 ("*Sunmar I*") at 6; AR 48.) Specifically, Sunmar proposed to charter non-Jones Act qualified vessels to move the goods from Alaska to Bayside, New Brunswick, a port that is approximately 6 miles south of St Stephen, New

Brunswick, across the St Croix River from the Calais, Maine point of entry to the United States. Rather than proceed directly to Calais, however, Sunmar proposed to move the goods in a triangular pattern, first by truck to either McAdam or St. John, New Brunswick and then via a Canadian rail carrier from McAdam to St. John or St. John to McAdam. (*Sunmar I* at 2; AR 44) From there, the goods would be trucked to Calais and into the United States. (*Id*) This method adds approximately 145 miles to the route prior to entry into the United States (Plaintiff's Motion for Summary Judgment (Pl.'s Mot.) at 7.)

Notwithstanding the Third Proviso's explicit rate tariff filing requirement, Customs approved Sunmar's proposed method of shipping despite the fact that Sunmar did not intend to file rate tariffs for any portion of the route. The agency noted that frozen processed fish or seafood has been exempted since 1983 from any rate tariff filing requirement when transported by rail (*Sunmar I* at 2, *citing* Exemption From Regulation – Rail Transportation – Frozen Food, Ex Parte No. 346 (Sub-No. 15), 367 I.C.C. 859 (Nov 30, 1983); AR 44.) It also referenced the Interstate Commerce Commission Termination Act ("ICCTA"), which abolished the ICC, deregulated much of what had been under the ICC's jurisdiction, and vested all the ICC's remaining authority in the newly created STB. (*Sunmar I* at 4, *citing* ICCTA § 201(a), Pub. L. 104-88, 109 Stat. 803 (Dec. 29, 1995) (codified as amended at 49 U.S.C. § 702.) Section 204(a)(2) of the ICCTA abolished obsolete ICC regulations, and the STB's new regulations only required rail carriers to make rates and service terms publicly available upon formal request. 49 C.F.R. § 1300.2(a). Customs reasoned that, "although the statute specifies the filing of rate tariffs with the [STB], mechanistic adherence to that requirement in the present climate of deregulation would lead to an absurd result that cannot be justified " (*Sunmar I* at 5 (internal

quotation marks omitted); AR 47.) “Accordingly,” Customs concluded, Sunmar’s proposal “is not prohibited merely because no tariffs may be filed to cover the movements.” (*Id.*)

On July 21, 2003, Horizon petitioned CBP to revoke or modify *Sunmar I*, arguing that Sunmar failed to comply with the Third Proviso’s tariff filing requirements and that the proposed route was “commercially absurd and purposeless,” and thus contrary to the statutory intent of the Third Proviso. (Letter from Myles Ambrose, Counsel to Horizon Lines LLC, to Glen Vereb, Branch Chief, Entry Procedures and Carriers Branch, U.S. Customs and Border Protection (July 21, 2003) at 2; AR 21.) In response, CPB requested guidance from the STB regarding the rate tariff filing requirement. (Letter from Glen Vereb to Vernon Williams, Secretary, Surface Transportation Board (Sept. 24, 2003); AR 14.) STB informed Customs that, while the ICCTA had “eliminated tariff filing for rail carriers” and the Trucking Industry Regulatory Reform Act of 1994, Pub. L. No. 103-311, 108 Stat. 1683 (Aug. 26, 1994), had done the same for “motor carriers of property,” the ICCTA continued to require “water carriers operating in the U S. noncontiguous domestic trade . . . to file tariffs with the STB ” (Letter from Melvin Clemens, Director, Surface Transportation Board to Glen Vereb (Dec. 4, 2003) (“STB Letter”), *citing* 49 U.S.C. § 13702, AR 12) The tariff requirement for water carriers “applies to commodities otherwise exempted from regulation for rail or motor service.” (*Id.*)

STB also observed that no tariffs “bearing the description ‘routes rates [sic] tariffs’” are accepted by the STB; rather, all tariffs are “rate tariffs [that] are not route-specific.” (*Id.*; AR 13.) Where rate tariff filings are required, however, carriers may provide route and other service information “so long as it is clearly identified for informational purposes only.” (*Id.* (emphasis in original)) Further, STB found that the rate tariff filing requirement applied only to

“common carriers . . . that hold out their services to the public generally,” and opined that because CBP described Sunmar as “using chartered vessels[.] . . . Sunmar’s operations could be considered private carriage and non-jurisdictional to the STB for tariff filing purposes.” (*Id.*)

On January 21, 2004, CBP denied Horizon’s request to revoke or modify *Sunmar I*. (HRL 116021 (“*Sunmar II*”); AR 7) The agency ruled that because “Sunmar is using chartered foreign-flagged vessels, which are private carriage, Sunmar’s operations are not within the jurisdiction of the STB [and] Sunmar . . . cannot file rate tariffs with the STB for any purpose, even informational.” (*Sunmar II* at 4; AR 10.) “Thus,” the agency concluded, “it was not possible for Sunmar to comply with the rate tariff filing requirements in the Third Proviso ” (*Id.*) CBP further reasoned that Sunmar’s inability to comply “should not result in a de facto exclusion of all chartered non-coastwise-qualified vessels from transporting merchandise coastwise in compliance with those remaining requirements of the Third Proviso [because] mechanistic adherence to that requirement for private carriage which is not within the jurisdiction of the STB is unjustified.” (*Id.* (emphasis in original).) The agency also rejected Horizon’s argument that the Third Proviso contained an implied “commercial usefulness” requirement, noting that the term “through route” has not previously been interpreted to require the most “direct” route. (*Sunmar II* at 5; AR 11.)

Horizon sought further reconsideration on March 17, 2004, arguing that CBP’s response in *Sunmar II* took “unwarranted liberties with the statute” and posed “a significant risk to the military, economic and homeland security interests of the United States.” (Letter from Myles Ambrose, Counsel for Horizon to Robert Bonner, Commissioner, Bureau of Customs and Border Protection (Mar 17, 2004); AR 4.) Specifically, Horizon argued that CBP erred by failing to

construe the Third Proviso narrowly and by declining to find that “sham” rail movement fell outside the protection of the Third Proviso (*Id.* at 2, AR 5.) Customs again rejected Horizon’s petition. In its March 28, 2005 Ruling Letter, it incorporated by reference its decision in *Sunmar II* and reiterated that “the plain language of a law . . . need not be followed where necessary to avert absurd or impossible results [such as] impossibility of compliance.” (HRL 116185 at 2 (March 28, 2005) (“*Sunmar II*”); AR 2.)

Horizon commenced this action on May 15, 2005, challenging CBP’s *Sunmar* rulings as “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law under § 706 of the Administrative Procedure Act. (Pl.’s Mot. at 9 *quoting* 5 U.S.C. § 706(2)(A)) ASC moved to intervene to protect its interest in HRL 115124 (Aug. 11, 2000) (“*ASC Ruling*”), an interest that CBP referred to in *Sunmar I* as “nearly identical” to that of *Sunmar*. (*Sunmar I* at 5, AR 47) The parties, including defendant-intervenor ASC, have filed cross-motions for summary judgment. ASC has also filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction. In addition, the Court received briefs from *amici curiae*: one from Kennecott Holdings Corporation (“Kennecott”) and Teck Cominco Alaska Incorporated (“Teck Cominco”) in support of defendant’s and defendant-intervenor’s motions for summary judgment (“Kennecott Br.”) and one from Totem Ocean Trailer Express, Inc. (“TOTE”) in support of plaintiff’s motion (“TOTE Br.”). After reviewing the submissions of the parties and *amici*, the Court will grant Horizon’s Motion for Summary Judgment (“Pl.’s Mot.”) and deny CBP’s Motion for Summary Judgment (“Def.’s Mot.”), ASC’s Cross-Motion for Summary Judgment (“ASC SJ Mot.”) and ASC’s Motion to Dismiss for Lack of Subject Matter Jurisdiction (“ASC Jur Mot.”).

ANALYSIS

I. ASC's Motion to Dismiss

As an initial matter, ASC challenges both the Court's jurisdiction to hear this case and Horizon's standing to bring it.^{2/} Specifically, ASC argues that exclusive jurisdiction over this matter rests with the Court of International Trade ("CIT") under 28 U.S.C. § 1581(h) or (l) (2000), and that even if the Court has jurisdiction, Horizon has failed to satisfy the requirements for Article III standing.^{3/} (ASC SJ Mot. at 7 -15.) Neither argument has merit.

^{2/} *Amici curiae* Kennecott and Teck Cominco assert that the statute of limitations on Horizon's cause of action has run, leaving the Court without jurisdiction. (Kennecott Br. at 17.) ASC did not raise a statute of limitations challenge in its Cross-Motion for Summary Judgment, but it did incorporate *amici's* argument in its reply. (ASC Reply at 23-24.) Notably, CBP does not assert a statute of limitations bar. *Amici's* argument is devoid of merit. First, *Amici* and ASC cite 28 U.S.C. § 1658, which provides a four-year limitations period for civil actions based on federal claims. That statute, however, does not apply to suits against the United States under the APA, which are subject to a six-year limitation period. 28 U.S.C. § 2401(a); see *Crown Coat Front Co. v. United States*, 386 U.S. 503, 507 (1967) (applying § 2401(a) to review of agency action). Second, *amici* attempt to trace Horizon's cause of action not to *Sunmar I* on August 9, 2001, for which Horizon clearly filed within the limitations period, but to July 23, 1998, the date CBP issued HRL 114407, which approved a transportation scenario "nearly identical" to that in *Sunmar*. (Kennecott Br. at 18, *Sunmar I* at 5-6.) A cause of action under the APA accrues on the date of final agency action. *Harris v. F.A.A.*, 353 F.3d 1006, 1009-10 (D.C. Cir. 2004). *Amici* cite no case, however, for the proposition that a prior agency decision commences the statute of limitations for all future substantially similar rulings. Moreover, the D.C. Circuit has held that when "for any reason the agency reopens a matter and, after reconsideration, issues a new and final order, that order is reviewable on the merits, even though the agency merely reaffirms its original decision." *Sendra Corp. v. Magaw*, 111 F.3d 162, 167 (D.C. Cir. 1997). Thus, to the extent that *Sunmar I* and HRL 114407 contain identical rulings, *Sunmar I* could be considered to represent a reconsideration of its decision in HRL 114407, thereby extending the time for Horizon to file a petition for review.

^{3/}Significantly, the government does not raise any procedural challenges to Horizon's ability to prosecute its claim.

A. Subject Matter Jurisdiction

The Court has jurisdiction over Jones Act claims under both the general federal-question provision, 28 U.S.C. § 1331, and the specific grant of admiralty and maritime jurisdiction, 28 U.S.C. § 1333(1). The CIT is a specialized court of limited jurisdiction. *See Kmart Corp. v. Cartier, Inc.*, 485 U.S. 176, 182-89 (1988) (not all importation prohibitions fall within CIT's exclusive jurisdiction). The CIT's jurisdiction extends only to the review of pre-importation restrictions on specific merchandise: "classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters." 28 U.S.C. § 1581(h). This case relates to compliance with the cabotage laws of the United States; *i.e.*, restrictions on methods of merchandise transportation, not merchandise importation.⁴ ASC's reliance on 28 U.S.C. § 1581(i)(3) and (4), conferring CIT jurisdiction over "embargoes or other quantitative restrictions on the importation of merchandise" and the administration of such embargoes, is likewise misplaced. While the Jones Act arguably imposes an "importation prohibition" on goods not shipped in compliance with its terms, such restrictions do not fall within the statutory definition of "embargo" as used in § 1581(i)(3). The Third Proviso to the Jones Act "does not set a governmentally determined quantitative limit on the entry of . . . any particular product." *Kmart Corp.*, 485 U.S. at 186. Rather, it relates to restrictions on maritime and other types of shipping, leaving this Court with jurisdiction under both 28 U.S.C. §§ 1331 and 1333(1).

⁴Even the CIT's jurisdiction over "vessel repairs" relates to the dutiability of such repairs under 19 U.S.C. § 1466 (2000), not the transportation of such goods. *See Sea-Land Serv., Inc. v. United States*, 239 F.3d 1366 (Fed. Cir. 2001).

B. Standing

ASC's standing argument fares no better. The law of standing is well-established. The "irreducible constitutional minimum of standing" consists of injury-in-fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "That is, to establish standing under Article III, a complainant must allege (1) a personal injury-in-fact that is (2) fairly traceable to the defendant's conduct and (3) redressable by the relief requested." *Rainbow/PUSH Coal. v. F.C.C.*, 396 F.3d 1235, 1240 (D.C. Cir. 2005) (internal quotation marks and citations omitted). In addition, when, as here, a party asserts a claim under the APA, it must establish that the injury alleged "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis of [plaintiff's] complaint." *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 883 (1990) (quoting *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 396-97 (1987)).

Horizon alleges a competitive injury that results from CBP's decision to permit non-Jones Act qualified vessels to transport goods under the Third Proviso that would otherwise have to be shipped by a Jones Act qualified shipper such as Horizon. (Buchanan Aff. ¶ 6.) A long line of precedent supports the principle that when a "particular statutory provision . . . reflect[s] a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision." *Hardin v. Ky. Utils. Co.*, 390 U.S. 1, 6 (1968), *see, e.g., Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998), *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970); *MD Pharm., Inc. v. DEA*, 133 F.3d 8, 11 (D.C. Cir. 1998). It is indisputable that the Jones Act is a protectionist statute that seeks, *inter alia*, to enhance the competitiveness of American shippers. *See Jones Act*, 46 U.S.C.

app. § 861 (“[I]t is declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of . . . a merchant marine,” “owned and operated privately by citizens of the United States”) As an American-owned and -operated shipper, Horizon falls squarely within the zone of interests protected by the Jones Act, *Allen v. Wright*, 468 U.S. 737 (1984), and may assert competitive injury as a basis for standing

ASC contends, nonetheless, that Horizon has failed to allege its competitive injury with sufficient specificity to establish Article III standing. *Warth v. Seldin*, 422 U.S. 490, 508 (1975). In support, ASC cites *Shipbuilders Council of Am. v. United States*, which involved a third party challenge to a Customs ruling interpreting the Jones Act to permit non-coastwise-qualified barges to perform certain “dry-docking” operations. 868 F.2d 452 (D.C. Cir. 1989). The Court dismissed the case for lack of jurisdiction and lack of standing. The facts of that case, however, are not analogous to this one. In *Shipbuilders*, plaintiff, a trade association that was not party to Custom’s original ruling, only petitioned the agency to repeal its ruling one day prior to filing its complaint in federal court. Thus, the complaint was not based on any agency action adverse to plaintiff and was therefore ruled to be non-justiciable. *Id.* at 455-56. Had the plaintiff in *Shipbuilders* timely filed an administrative challenge, as Horizon has in this case, a denial of its petition would have constituted “final agency action” subject to judicial review under the APA. *Id.* at 455

The Court then went on to find that the plaintiff’s allegations failed to present “specific, concrete facts” demonstrating that it was injured by Custom’s ruling. *Id.* at 457 (internal quotation marks omitted). Plaintiff’s injury in *Shipbuilders* was far more speculative than Horizon’s. In *Shipbuilders*, the trade association could not demonstrate that any of its members

was capable of performing the dry-docking operation at issue in the case. *Id.* at 457 Plaintiff's alleged injury amounted to nothing more than its hypothesis that "if the Customs interpretation continues to govern, foreign barges will probably displace barges that otherwise eventually would be built and operated" by the trade association's members. *Id.* Here, there is no question that Horizon, as a coastwise-qualified carrier engaged in shipping from Alaska to ports on the eastern seaboard, is capable of performing the work done by non-qualified shippers under the Third Proviso. Thus, Horizon is in direct competition for the very business that can be obtained by Sunmar and ASC as a result of Customs' current interpretation of the Third Proviso

Once it is found that Horizon's "illegal competition" argument is sufficient to constitute injury-in-fact, the additional requirements of causation and redressability are easily satisfied. Horizon's putative injury is the result of CBP's allegedly unreasonable interpretation of the Third Proviso. *Liquid Carbonic Indus. Corp. v. F E R C*, 29 F.3d 697, 701 (D.C. Cir. 1994) ("Increased competition represents a cognizable Article III injury.") Vacatur of the agency's ruling would prevent Horizon's competitors from making use of CBP's flawed ruling, thereby eliminating Horizon's competitive injury. *America's Cmty. Bankers v. F.D.I C*, 200 F.3d 822, 828-29 (D.C. Cir. 2000) ("Where an agency rule causes the injury, the redressability requirement may be satisfied . . . by vacating."). Thus, Horizon meets both the constitutional and prudential requirements of standing.^{3/}

^{3/} ASC further asserts that the case is moot because Sunmar no longer makes use of the ruling at issue. (ASC SJ Mot. at 15) Regardless of whether this is the case, Horizon maintains an active claim for at least two reasons. First, Sunmar could rely on the *Sunmar* rulings to begin using the proposed route at any time, causing Horizon an injury that is capable of repetition yet evading review. *S. Pac. Terminal Co. v. I C.C.*, 219 U.S. 498, 515 (1911). Second, other shippers do make use of a route virtually identical to that described in the *Sunmar* rulings, which causes Horizon a continuing harm. (ASC Mot. to Intervene at 2-4.) Moreover, the *Sunmar*

II. Standard of Review

Agency action reviewed under the APA may not be overturned unless it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C.

§ 706(2)(A) The parties agree that the Customs rulings at issue are not entitled to *Chevron* deference, see *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), but are nevertheless entitled to deference under *Skidmore v. Swift Co.*, 323 U.S. 134 (1944). See also *United States v. Mead Corp.*, 533 U.S. 218, 232 (2001) (applying *Skidmore* deference to tariff classifications by U.S. Customs Service). Under *Skidmore*, an agency action is entitled to a level of deference commensurate with “the degree of the agency’s care, its consistency, formality and relative expertness and . . . persuasiveness of the agency’s position.” *Mead*, 533 U.S. at 228.

III. Customs’ Interpretation of the Jones Act

Customs and ASC contend that the agency’s interpretation of the Third Proviso is not only reasonable, and therefore persuasive under *Skidmore*, it is compelled by Congress’s deregulation of the shipping industry. (Def.’s Mot. at 5-7; ASC SJ Mot. at 20-23.) According to

rulings retain legal effect even if *Sunmar* does not make use of the rights conferred therein, as evidenced by the fact that any substantially identical Customs ruling will be revoked as a matter of law if the Court vacates the *Sunmar* rulings. See *Sea-Land Serv.*, 239 F.3d at 1373.

ASC’s position regarding standing and mootness are certainly undercut by the position it took regarding its standing to intervene in this action. (See ASC’s Reply to Pl.’s Opp. to Mot. to Intervene at 2-5.) ASC sought to intervene to protect its “substantially identical ruling” that would be invalidated if the *Sunmar* rulings were overturned, resulting in “harmful financial consequences that will befall ASC.” (*Id.* at 5.) Recognizing the potential for competitive injury to ASC if the *Sunmar* rulings were vacated, this Court permitted intervention, finding that “ASC will be unable to conduct its business as currently structured and will suffer substantial monetary loss” if plaintiff prevails. *Horizon Lines LLC v. United States*, No. 05-952, slip op. at 6 (D.D.C. Sept. 23, 2005). Given the obvious interrelatedness between the *Sunmar* rulings and the ASC ruling, it is difficult to understand ASC’s argument that this matter is moot or that plaintiff lacks standing.

the agency, the “abolishment of rate tariff filing requirements for domestic rail and motor carriers consummated by the ICCTA was a small part of a sweeping change in the law toward deregulation of the transportation industry ” (Def.’s Mot at 9.) The ICCTA, however, contained “no hint . . . of any intent to render the Third Proviso meaningless or do away with this limited exception to the Jones Act ” (Def.’s Mot at 10) Therefore, CBP reasons, “the only way to honor congressional intent both in deregulating transportation and in [maintaining] the Third Proviso was to approve the Sunmar shipment, despite the lack of a rate tariff.” (Def.’s Mot. at 11.) ASC likewise argues that denying use of the Third Proviso to shippers like Sunmar would result in an implied repeal of the Proviso. (ASC SJ Mot. at 21) *See J E M. AG Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc* , 534 U.S. 124, 142 (2001) (holding that the “only permissible justification for repeal by implication is when the earlier and later statutes are irreconcilable”) (internal quotation omitted).

Horizon argues that, far from being persuasive, CBP’s *Sunmar* rulings ignore basic principles of statutory interpretation, rendering them arbitrary and capricious under the APA. (Pl.’s Mot. at 12-30.) According to Horizon, by failing to construe the Third Proviso narrowly, CBP has undermined congressional intent to protect American shipping companies and to ensure national security by maintaining an active merchant marine.^{6/} (Pl.’s Mot. at 3-4, 15.)

^{6/} Plaintiff also argues that the Third Proviso contains an implied prohibition on “sham or commercially impractical Canadian rail movement to achieve ‘technical compliance’ with the literal terms of the statute ” (Pl s Mot. at 16) In support, plaintiff argues that the term “through routes” as used in the Third Proviso means the most “direct” route. (*Id.*) Yet, Horizon concedes that a “through route” has been defined by the Supreme Court merely as “an arrangement, express or implied, between [transportation providers] for the continuous carriage of goods from the originating point on the line of one carrier – to destination on the line of another ” *St Louis Sw Ry. Co v. United States*, 245 U.S. 136, 139 n.4 (1917). (Pl.’s Opp & Reply at 15-16.) Plaintiff can point to no case in which the intent of the shipper, other than to transport goods

Specifically, Horizon contends that Customs departed from the “plain language” rule, which holds that in matters of statutory construction, “the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute’s meaning, in all but the most extraordinary circumstances, is finished.” *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) (citing *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)). (Pl.’s Mot. at 12-13.) Moreover, Horizon claims that CBP has read the rate tariff filing requirement out of the Third Proviso, contrary to the “cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *Alaska Dep’t of Envtl. Conservation v. E.P.A.*, 540 U.S. 461, 489 n.13 (2004) (internal quotation marks and citations omitted) (Pl.’s Mot. at 27.)

The Court agrees that Customs has failed to adhere to accepted principles of statutory construction and finds, moreover, that the persuasiveness of Customs’ interpretation, as reflected in the *Sunmar* rulings, is undermined by factual flaws and inconsistencies.

A. *Sunmar* Rulings are Inconsistent and Factually Flawed

CBP’s conclusion in *Sunmar I* that “mechanistic adherence to [the Third Proviso’s rate tariff filing] requirement would lead to an absurd result” appears to be premised on the belief that the elimination of the “the rail tariff filing requirement” by the ICCTA (and regulations promulgated pursuant thereto) means that “no tariffs may be filed to cover the movements.”

according to the route described, was relevant to the determination of whether a through route existed. If Congress wishes to limit the use of the Third Proviso to specific routes or to require the STB to evaluate the commercial soundness of a proposed route, it has the authority to do so, but the Third Proviso as currently written contains no such requirement.

(*Sunmar I* at 5; AR 47.) If no rate tariffs could be filed by any carrier, the agency reasoned, failing to read the tariff filing requirement out of the statute would render the Third Proviso a nullity. (*Id.*) Yet, CBP's position that the STB no longer accepts rate tariff filings for any method of transportation relevant to the Third Proviso is simply incorrect. The STB specifically informed CBP after Horizon filed its petition for reconsideration that "[w]ater carriers operating in noncontiguous domestic trade are required to file tariffs with the STB," including for "commodities otherwise exempted from regulation for rail or motor service." (STB Letter at 1; AR 12.) The STB also noted that while it did accept rate tariff filings for "common carriers," it had no jurisdiction over private carriage. (STB Letter at 1; AR 12.) Because *Sunmar* "chartered" the foreign vessels at issue, the STB opined, it may be engaged in private carriage and therefore non-jurisdictional with respect to the rate tariff filing requirement. (STB Letter at 2; AR 13.) Nevertheless, at least some class of carriers – foreign common carriers – must still comply with the tariff filing requirement of the Third Proviso, contrary to Customs' assertion in *Sunmar I* that "no tariffs may be filed to cover the movements."⁷ (*Sunmar I* at 5; AR 47.)

The agency recognized and conceded its error regarding the elimination of all rate tariffs in *Sunmar II*:

We agree . . . that when a non-coastwise-qualified vessel is used to move merchandise in the noncontiguous domestic trade and in part over a Canadian rail line in order to utilize the exemption to the 'Jones Act' as provided in the Third Proviso, rate tariffs should be filed with STB, only for informational purposes.

⁷ It is worth noting that CBP appears to equate the elimination of the *rail* rate tariff filing requirement, previously codified at 61 Fed. Reg. 29036, with the elimination of rate tariffs altogether. "[T]he rail tariff filing requirement has been removed . . . Accordingly, no tariffs may be filed to cover the movements." (*Sunmar I* at 5; AR 47.) As the STB Letter makes clear, this is not the case.

(*Sunmar II* at 4; AR 10.) But the agency's error regarding rate tariffs certainly casts serious doubt on the reliability of its legal conclusions. See *City of Kansas City, Mo. v. Dep't of Housing and Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991) ("Agency action based on a factual premise that is flatly contradicted by the agency's own record does not constitute reasoned administrative decisionmaking, and cannot survive review under the arbitrary and capricious standard.")

Moreover, while the agency corrected one of its errors, *Sunmar II* and *III* perpetuate other mistakes. First, Customs appears to misinterpret the STB letter by concluding that "rate tariffs should be filed with STB, only for informational purposes." (*Sunmar II* at 4, AR 10.) To the contrary, the STB made clear that only information that is *not* required to be filed as part of the tariff itself, such as routing, service information or advertising material, may be filed for informational purposes. (STB Letter at 2; AR 13) The filing of the tariff itself is not merely "for informational purposes;" it is mandatory

Second, even though the agency recognized its error in *Sunmar II*, it again ignored the facts by asserting in *Sunmar III* that "if such STB-related requirements as contained in the text of the Third Proviso were to continue to be required, *no carrier whatever* would be entitled to use the proviso." (*Sunmar III* at 2 (emphasis added); AR 2.) As the STB Letter makes clear, there is a class of carriers – foreign-flagged vessels providing common carriage in the non-contiguous domestic trade – that do in fact file rate tariffs with the STB. By again repeating the fallacious argument that no party can comply with the Third Proviso's tariff filing requirement, the agency appears to be reaching a "decision not based on consideration of the relevant factors." *City of Waukesha v. E.P.A.*, 320 F.3d 228, 257-58 (D.C. Cir. 2003) (internal quotation marks omitted).

Third, the agency appears to further err in *Sunmar III* when it states that because the STB “no longer approves any route-specific rate tariff filings[,] . . . no carrier whatever would be entitled to use the Proviso” if Customs still applied the tariff filing requirement of the Third Proviso. (*Sunmar III* at 2; AR 2) As made clear by ASC, despite CBP’s historical use of the term “routes rate tariffs,” see HRL 115124 at 4 (Aug. 11, 2000); HRL 11987 at 2 (December 2, 1991); HRL 105721 at 2 (July 23, 1982), there is no evidence that “routes rate tariff” as used in the Third Proviso is intended to signify anything other than a typical “rate tariff” filed with the STB. (See ASC SJ Mot. at 20 n 15.) A “rate tariff” is not route-specific except to include the origin and destination of the goods. (AR 13.) Thus, CBP’s reasoning in *Sunmar III* that the text of the Third Proviso requires a type of tariff “no longer approve[d]” by the STB is fallacious; the STB has never required any more specific route information.^{8/}

Finally, the agency’s new rationale, as articulated in in *Sunmar II* and *III*, which draws a distinction between common carriage and private carriage, is far from persuasive. The STB noted in offering its informal opinion to Customs that because Sunmar was “using chartered vessels,” its “operations *could* be considered private carriage and non-jurisdictional to the STB for tariff filing purposes.” (STB Letter at 2 (emphasis added); AR 13) CBP seized on this supposition in rejecting plaintiff’s petition for reconsideration to and jumped to the conclusion that, “as the STB opinion clearly states, . . . Sunmar is using chartered foreign-flagged vessels, which are private carriage.” (*Sunmar II* at 4, AR 10.) As such, “it was not possible for Sunmar

^{8/} Indeed, in one possible reading of the Third Proviso, the phrase “for which routes,” in the provision that reads “over through routes heretofore or hereafter recognized by the [STB] *for which routes* rate tariffs have been . . . filed,” appears to modify the preceding reference to “through routes” rather than the subsequent “rate tariffs.” 46 U S C app. § 883.

to comply with the rate tariff filing requirements in the Third Proviso.” (*Id.*) While an agency may be able to alter its rationale in response to new information, it must still “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicles Mfrs. Ass’n of the United States v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Here, the agency assumed, without explanation or citation to any facts, that a “chartered” vessel invariably falls within the category of private carriage. As *amicus curiae* TOTE demonstrates, however, a “charter” is merely a “lease” of a ship, which can then be used by the charterer either to transport its own cargo exclusively (private carriage) or to offer common carriage to the public. (TOTE Br. at 10-12.) In the face of this argument, the agency concedes that “the vessel chartered by Sunmar could theoretically be engaged for either private carriage or common carriage,” but then concludes that since Sunmar identified itself as the charterer and shipper in its ruling request, it can be “presume[d]” that it was not a “carrier.” (Def.’s Reply at 5.) This presumption, however, appears not to have any record support, and in the absence of any “reasoned explanation” for classifying Sunmar as a private carrier, it is difficult to credit the agency’s conclusion that Sunmar is exempt from the Third Proviso because it may be a private carrier. *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1222 (D.C. Cir. 1999) (“Where the agency has failed to provide a reasoned explanation, or where the record belies the agency’s conclusion, we must undo its action.” (internal quotation marks omitted)).

B. The *Sunmar* Rulings Contravene Recognized Canons of Statutory Construction

Customs justifies its decision to permit Sunmar to make use of the Third Proviso without filing any rate tariffs by arguing:

The inability of Sunmar to comply with STB filing requirements because private carriage is outside the jurisdiction of the STB should not result in a *de facto* exclusion of all chartered non-coastwise-qualified vessels from transporting merchandise coastwise in compliance with those remaining requirements of the Third Proviso. Such exclusion would be tantamount to administratively repealing the Third Proviso for all chartered vessels.

(*Sunmar II* at 4; AR 10.) “Thus,” the agency concluded:

the only reading that gives full effect to the Third Proviso for all vessels is that non-chartered non-coastwise-qualified, or in other words vessels that are public (i.e. common) carriers, are required to file rate tariffs with the STB, even if only for informational purposes, and chartered vessels (i.e., private carriers) are thus exempted from such filing

(*Sunmar II* at 4; AR 10.) As the preceding section makes clear, it is apparent that CBP’s factual conclusion is wrong, since not all chartered vessels would be prohibited from making use of the Third Proviso. And, because CBP’s factual error provides the foundation for its statutory analysis, its interpretation of the law cannot withstand scrutiny

It is generally accepted that unless two statutes “cannot mutually coexist,” *Radzanower v Touche Ross & Co.*, 426 U.S. 148, 155 (1976), courts have a duty “to regard each statute as effective.” *J.E.M. AG Supply*, 534 U.S. at 144. Contrary to the agency’s interpretation, the Third Proviso can be reconciled with the STB’s existing tariff filing requirements by excluding only

those chartered vessels who engage in private carriage.^{9/} It makes just as much sense, and is more consistent with the statute and accepted principles of statutory interpretation, to limit the scope of the Proviso to comport with the STB's current rate filing requirements. In fact, Customs has already taken this approach when interpreting the effect of deregulation on the Third Proviso. *See* 18 Cust. B. & Dec. 969 (1983) ("We have ruled that if the Interstate Commerce Commission does not accept for filing a rate tariff in connection with a through route for such transportation and there is no rate tariff in effect for that through route, the ocean transportation portion of that service may not be performed by a non-coastwise-qualified vessel under the third proviso to 46 U.S.C. § 883.")

Notwithstanding the effort expended by CBP and ASC in arguing against the implied repeal of the Third Proviso (*Sunmar II* at 4, AR 10; *Sunmar III* at 2-3; AR 2-3; ASC SJ Mot. at 20-23, Def.'s Mot. at 7-11), CBP's interpretation in the *Sunmar* rulings would have just such an effect at least with respect to private carriers. It is a " 'cardinal rule . . . that repeals by implication are not favored.' " *Morton v Mancari*, 417 U.S. 535, 549 (1974) (quoting *Posadas v Nat'l City Bank*, 296 U.S. 497, 503 (1936)). "The only permissible justification for repeal by implication is when the earlier and later statutes are irreconcilable" *J E M AG Supply*, 534 at 141-42 (internal quotation marks omitted). The agency argues that the "broad legislative goals" of the ICCTA "toward deregulation of the transportation industry" compel it to read out the tariff filing requirement in order to avoid eliminating the Third Proviso entirely. (Def.'s Mot. at 10-11;

^{9/} Moreover, the agency gives no rational explanation for why private carriers should receive the benefits of the Third Proviso without filing rate tariffs while public carriers continue to labor under the tariff filing requirement. *See Transactive Corp v United States*, 91 F.3d 232, 237 (D.C. Cir. 1996) ("A long line of precedent has established that an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.")

Sunmar II at 4; AR 10.) But as discussed *supra*, the ICCTA did not eliminate all relevant rate tariff filing requirements. Thus, it is the agency's interpretation that impliedly repeals the tariff filing requirement of the Third Proviso for private carriers.

Moreover, unless the intent of the legislature to repeal the prior statute is "clear and manifest," *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (internal quotation marks omitted), courts have a "duty . . . to regard each as effective." *J E M AG Supply*, 534 U.S. at 143. Courts must also assume that "'Congress legislates with knowledge of former related statutes, . . . and will expressly designate the provisions whose application it wishes to suspend, rather than leave that consequence to the uncertainties of implication compounded by the vagaries of judicial construction.'" *United States v. Hsia*, 176 F 3d 517, 525 (D.C. Cir. 1999) (quoting *United States v. Hansen*, 772 F 2d 940, 947-48 (D.C. Cir. 1985)). Nonetheless, the agency concedes that congressional intent was to preserve the Third Proviso and acknowledges that when it enacted the ICCTA, Congress passed "conforming amendments to numerous statutes . . . including the Jones Act." (Def.'s Mot. at 10, 22) In particular, Congress substituted "Surface Transportation Board" for "Interstate Commerce Commission" in the language of the Proviso, 46 U.S.C. app. § 883 (2004), but despite its desire to promote deregulation through the passage of the ICCTA, it did not delete the rate tariff filing requirement, as the agency has done here.

Customs appears to attribute Congress's failure to amend the Third Proviso to inadvertance. Perhaps it was. But "courts are not at liberty to pick and choose among congressional enactments." *Traynor v Turnage*, 485 U.S. 535, 548 (1988) (internal quotation marks omitted) This is particularly so when a conflict exists between a broad congressional enactment and a narrowly-tailored statutory provision. See *Norwest Bank Minn. Nat'l Ass'n v.*

FDIC, 312 F.3d 447, 451 (D.C. Cir. 2002) (“When both specific and general provisions cover the same subject, the specific provision will control, especially if applying the general provision would render the specific provision superfluous.”). In one of its very few decisions interpreting the Third Proviso to the Jones Act, the Supreme Court held that a Canadian-owned railroad company could not engage in coastwise trade unless goods were actually moved over rail lines in Canada, notwithstanding the fact that the Interstate Commerce Act gave the ICC jurisdiction over “the transportation of passengers or property . . . partly by railroad and partly by water when both are used under a common control.” *Cent. Vt. Transp. Co. v. Durning*, 294 U.S. 33, 40 (1935) (quoting 49 U.S.C. app. § 6(13)(b)). Reading the more general Interstate Commerce Act to be consistent with the Third Proviso, the Court concluded that the “application of [the Third Proviso’s] prohibition in terms to any part of the transportation ‘by land or water,’ by a foreign owned vessel, is not to be erased from the statute because the Interstate Commerce Commission was not given authority to enforce it.” *Cent. Vt. Transp. Co.*, 294 U.S. at 40. Similarly, there is no reason to rewrite the tariff filing requirement here, simply because the STB is no longer authorized under the ICCTA to accept rate tariffs for a certain class of foreign-owned shippers who wish to make use of the Third Proviso.

The agency argues that in order to “give full effect to the Third Proviso for all vessels,” it must ignore the rate tariff filing requirement (*Sunmar II* at 4; AR 10.) But when two statutes potentially conflict, the agency’s obligation is not to “give full effect” to one over the other, rather, its obligation is to “regard each as effective.” *Traynor*, 485 U.S. at 548. Moreover, there is no indication that Congress ever intended the agency to interpret the Third Proviso to apply to as many vessels as possible. See *Cent. Vt. Transp. Co.*, 294 U.S. at 39 (“An interpretation of the

proviso which would enable foreign owned vessels to carry merchandise in coastwise traffic [without complying with its terms] would go beyond its purpose and in large measure defeat the prohibition of section 27.”). Indeed, the agency recognizes this when it admits that “the Third Proviso represents a limited exception to the general requirement in section 883 prohibiting a foreign vessel” from engaging in coastwise trade. (*Sunmar III* at 2, AR 2) Despite this recognition, the agency’s interpretation expands the Proviso to permit a non-coastwise-qualified private shipper to engage in noncontiguous domestic trade without filing a rate tariff with the STB. This interpretation ignores both the plain language of the statute and the congressional intent in enacting it, and is not necessary to avoid inconsistency with the ICCTA. It is within the authority of Congress to expand the scope of the Third Proviso, and the fact that certain foreign vessels that wish to take advantage of the Proviso are unable to is the concern of the legislature and not the agency.

CONCLUSION

For the foregoing reasons, the Court finds that Customs rulings in *Sunmar I*, *II*, and *III* are “arbitrary, capricious [and] not in accordance with law,” 5 U.S.C. § 706(2)(A), and remands this case to CBP for further proceedings not inconsistent with this Memorandum Opinion. An appropriate order accompanies this Memorandum Opinion.

s/

ELLEN SEGAL HUVELLE
United States District Judge

Date: February 10, 2006

HORIZON LINES, LLC,
Appellee,
v.
AMERICAN SEAFOODS CO. LLC
Appellant,
UNITED STATES OF AMERICA;
U.S. DEPARTMENT OF HOMELAND
SECURITY, and U.S. BUREAU OF
CUSTOMS & BORDER PROTECTION.
Appellants,

Appellee Horizon Lines, LLC ("Horizon") submits this memorandum of law in opposition to the motion of United States of America, U.S. Department of Homeland Security and U.S. Bureau of Customs and Border Protection (collectively, "Government") to dismiss appeal in No. 06-5181, as well as the appeal of intervenor American Seafoods Company, LLC ("ASC") in No. 06-5165. Horizon respectfully requests that this Court reject the Government's request to dismiss the subject appeals.

For the reasons set forth below, this case is not "moot" as alleged by the Government. In fact, the case is ripe for appeal, and, accordingly, the parties to this proceeding should be afforded the opportunity for judicial review of the district court's findings in this case.

I. This Case is Not Moot

The Government incorrectly argues that recent tariff filings filed by American Seafoods Company LLC ("ASC") and Sunmar Shipping, Inc. ("Sunmar") with the Surface Transportation Board ("STB") render this case "essentially moot." A live controversy continues to exist in this case. In its *Decision Memorandum*, the District Court ruled that the Government's rulings in *Sunmar I*, *II* and *III* were "arbitrary, capricious [and] not in accordance with law" and remanded the matter to the Government. See *United States District Court for the District of Columbia*, Civil Action No. 05-0952 at 24 (February 10, 2006).

While the STB appears to have now accepted tariff filings by ASC and Sunmar, to the best of Horizon's knowledge, the Government (Customs and Border Protection) has not issued any ruling or official government policy revoking the rulings set forth in the *Sunmar* cases. These rulings were the basis for the underlying litigation. Until the Government officially revokes/modifies these rulings, a live controversy continues to exist. A finding by this Court that this decision is moot would permit the Government to evade the District Court's decision and rendering the lower court's findings meaningless.

In addition to the foregoing, Horizon argued before the district court that Congress did not intend the Third Proviso to the Jones Act to be available to foreign flagged carriers whose Canadian rail movements are clearly commercially meaningless.

and only intended to achieve so-called "compliance" with the Third Proviso (i.e., "sham rail moves"). The district court's consideration of this argument was unrelated, and not essential to, its finding that the Third Proviso indeed requires STB tariff filings. Notably, the Government argued before the trial court that Congress in enacting the Interstate Commerce Commission Termination Act ("ICCTA") effectively "abolished" the tariff filing requirements of the Third Proviso. Customs' existing administrative rulings, still in effect, are based upon that same rationale.

II. ASC's Appeal Should Not Be Dismissed

ASC's appeal should not be dismissed. As noted above, a live controversy continues to exist. Dismissal of this case would seriously prejudice the interest of both ASC and Horizon. Horizon intends to challenge the district court's decision that the Third Proviso does not require a commercially meaningful Canadian rail movement, and it is in the interests of judicial economy to have this and all other issues addressed in this appeal rather than in a new proceeding following any remand to Customs. Dismissal is particularly troublesome because ASC has not requested dismissal.

In addition, the Government's Motion to dismiss ASC's appeal is untimely. A motion to dispose of an appeal for review must be filed within 45 days of the docketing of this case. Cir. R. 27(g)(1). The Government has failed to demonstrate good cause as to why it should be allowed to file its motion at this late date. Not only did the Government fail to meet this 45 day deadline, but it waited more than 100 days after the ASC tariff was filed (August 28, 2006) to file its request for dismissal. The Government has provided no satisfactory explanation for this delay. Tariff filings made with the federal

government are a matter of public record. The Government must be considered to have at a very minimum constructive knowledge of this filing. This is particular true in light of the fact that tariff filings are made with the "federal" government. Accordingly, the Government's motion should be dismissed.

III. Conclusion

The Government's request for dismissal should be denied and the Court should disregard the Government's arguments that the issues in this case are moot.

Respectfully submitted,

By 
David Cohen
Myles J. Ambrose
Arthur Purcell
Kristen Smith

SANDLER, TRAVIS & ROSENBERG, P.A.
Attorneys for Plaintiff
1300 Pennsylvania Avenue, N.W. - Suite 400
Washington, D.C. 20004
Telephone: (202) 216-9307
Facsimile: (202) 842-2247

December 18, 2006

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached documents were this day served by hand delivery on the following:

Michael K. Tomenga
NEVILLE PETERSON LLP
1900 M Street NW, Suite 850
Washington, DC 20036

I further certify that copies of the attached documents have been served by first class mail, postage pre-paid, on the following.

Christine N. Kohl
Civil Division, Appellate Staff
UNITED STATES DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Washington, DC 20530

Charles Steuart
Office of Chief Counsel
BUREAU OF CUSTOMS & BORDER PROTECTION
1300 Pennsylvania Avenue, NW
Washington, DC 20229

December 18, 2006



Kristen Smith

BY ORDER OF THE SECRETARY OF THE TREASURY

TREASURY ORDER 100-16

DATE: May 15, 2003

SUBJECT: Delegation from the Secretary of the Treasury to the Secretary of Homeland Security of general authority over Customs revenue functions vested in the Secretary of the Treasury as set forth in the Homeland Security Act of 2002.

By virtue of the authority vested in me as the Secretary of the Treasury, including the authority vested by 31 U.S.C. 321(b) and section 412 of the Homeland Security Act of 2002 (Pub. L. 107-296) (Act), it is hereby ordered:

1. Consistent with the transfer of the functions, personnel, assets, and liabilities of the United States Customs Service to the Department of Homeland Security as set forth in section 403(1) of the Act, there is hereby delegated to the Secretary of Homeland Security the authority related to the Customs revenue functions vested in the Secretary of the Treasury as set forth in sections 412 and 415 of the Act, subject to the following exceptions and to paragraph 6 of this Delegation of Authority:

(a)(i) The Secretary of the Treasury retains the sole authority to approve any regulations concerning import quotas or trade bans, user fees, marking, labeling, copyright and trademark enforcement, and the completion of entry or substance of entry summary including duty assessment and collection, classification, valuation, application of the U.S. Harmonized Tariff Schedules, eligibility or requirements for preferential trade programs, and the establishment of recordkeeping requirements relating thereto. The Secretary of Homeland Security shall provide a copy of all regulations so approved to the Chairman and Ranking Member of the Committee on Ways and Means and the Chairman and Ranking Member of the Committee on Finance every six months.

(ii) The Secretary of the Treasury shall retain the authority to review, modify, or revoke any determination or ruling that falls within the criteria set forth in paragraph 1 (a)(i), and that is under consideration pursuant to the procedures set forth in sections 516 and 625(c) of the Tariff Act of 1930, as amended (19 U.S.C. 1516 and 1625(c)). The Secretary of Homeland Security periodically shall identify and describe for the Secretary of the Treasury such determinations and rulings that are under consideration under sections 516 and 625(c) of the Tariff Act of 1930, as amended, in an appropriate and timely manner, with consultation as necessary, prior to the Secretary of Homeland Security's exercise of such authority. The Secretary of Homeland Security shall provide

a copy of these identifications and descriptions so made to the Chairman and Ranking Member of the Committee on Ways and Means and the Chairman and Ranking Member of the Committee on Finance every six months. The Secretary of the Treasury shall list any case where Treasury modified or revoked such a determination or ruling.

(b) Paragraph 1(a) notwithstanding, if the Secretary of Homeland Security finds an overriding, immediate, and extraordinary security threat to public health and safety, the Secretary of Homeland Security may take action described in paragraph 1(a) without the prior approval of the Secretary of the Treasury. However, immediately after taking any such action, the Secretary of Homeland Security shall certify in writing to the Secretary of the Treasury and to the Chairman and Ranking Member of the Committee on Ways and Means and the Chairman and Ranking Member of the Committee on Finance the specific reasons therefor. The action shall terminate within 14 days or as long as the overriding, immediate, and extraordinary security threat exists, whichever is shorter, unless the Secretary of the Treasury approves the continued action and provides notice of such approval to the Secretary of Homeland Security.

(c) The Advisory Committee on Commercial Operations of the Customs Service (COAC) shall be jointly appointed by the Secretary of the Treasury and the Secretary of Homeland Security. Meetings of COAC shall be presided over jointly by the Secretary of the Treasury and the Secretary of Homeland Security. The COAC shall advise the Secretary of the Treasury and the Secretary of Homeland Security jointly.

2. Any references in this Delegation of Authority to the Secretary of the Treasury or the Secretary of Homeland Security are deemed to include their respective delegees, if any.
3. This Delegation of Authority is not intended to create or confer any right, privilege, or benefit on any private person, including any person in litigation with the United States.
4. Treasury Order No. 165-09, "Maintenance of delegation in respect to general authority over Customs Revenue functions vested in the Secretary of the Treasury, as set forth and defined in the Homeland Security Act of 2002," dated February 28, 2003, is rescinded. To the extent this Delegation of Authority requires any revocation of any other prior Order or Directive of the Secretary of the Treasury, such prior Order or Directive is hereby revoked.
5. This Delegation of Authority is effective May 15, 2003. This Delegation is subject to review on May 14, 2004. By March 15, 2004, the Secretary of the Treasury and the Secretary of Homeland Security shall consult with the Chairman and Ranking Member of the Committee on Ways and Means and the Chairman and Ranking Member of the Committee on Finance to discuss the upcoming review of this Delegation.

6. The Secretary of the Treasury reserves the right to rescind or modify this Delegation of Authority, promulgate regulations, or exercise authority at any time based upon the statutory authority reserved to the Secretary by the Act.

/s/

John W.

Secretary of the Treasury

TREASURY DEPARTMENT ORDER NO. 165

Delegation to the Commissioner of Customs of general authority over functions in the Bureau of Customs

TREASURY DEPARTMENT

WASHINGTON, D. C., December 15, 1952

By virtue of the authority vested in me by section 3 of the Act of March 3, 1927 (5 U.S.C. 281b), and Reorganization Plan No. 26 of 1950 (15 F.R. 4935), it is hereby ordered:

1. There are hereby transferred to the Commissioner of Customs the functions of all officers, employees, and agencies of the Bureau of Customs and, subject to the exceptions hereinafter specified, all the rights, privileges, powers, and duties vested in the Secretary of the Treasury by the Tariff Act of 1930, as amended, by the navigation laws administered by the Bureau of Customs, or by any other law to the extent that it is administered by the Bureau of Customs.

(a) Regulations shall be prescribed by the Commissioner of Customs, with the approval of the Secretary of the Treasury, except that regulations and instructions, not inconsistent with the general rules and regulations of the Treasury Department, which are effective only against persons in their capacity as officers, agents, or employees of the Customs Service and which do not prescribe procedures which the public should know or follow in dealing with the Customs Services, may be prescribed by the Commissioner of Customs without the approval of the Secretary of the Treasury.

(b) Requirements of regulations which may be waived in accordance with law may be waived by the Commissioner of Customs.

(c) Findings of dumping under section 201(a), Anti-dumping Act, 1921, and the ascertainment, determinations or estimation, and declaration of bounties or grants under section 303, Tariff Act of 1930, shall be made by the Commissioner of Customs with the approval of the Secretary of the Treasury, except that, when the Commissioner, with the approval of the Secretary, has determined and declared a rule for calculating or estimating the net amount of any such bounty or grant, any customs officer authorized by the Commissioner of Customs may ascertain and determine, or estimate, the net amount of the bounty or grant paid or bestowed in respect of each particular lot of imported merchandise.

(d) Findings under section 307, Tariff Act of 1930, whether any class of goods, wares, articles, or merchandise is mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions,

and findings whether such goods, wares, articles, or merchandise so mined, produced, or manufactured are mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States, shall be made by the Commissioner of Custom with the approval of the Secretary of the Treasury.

(e) Any authority which may be vested in the Secretary of the Treasury by a proclamation of the President made pursuant to section 318, Tariff Act of 1930, shall be exercised by the Secretary of the Treasury.

(f) Any order under section 511, Tariff Act of 1930, prohibiting the importation of merchandise or instructing a collector to withhold delivery of merchandise shall be made by the Commissioner of Customs with the approval of the Secretary of the Treasury.

(g) No claim, fine or penalty (including forfeiture) in excess of \$20,000 shall be compromised, mitigated, or remitted without the approval of the Secretary of the Treasury.

(h) An award of compensation to an informer under section 619, Tariff Act of 1930, shall be made by the Commissioner of Customs only with the approval of the Secretary of the Treasury when claimed in connection with any decision which has been acted upon or approved by the Secretary of the Treasury.

(i) The authority conferred by the President upon the Secretary of the Treasury by Executive Order 10289 (16 F. R. 9499) with respect to the organization of the Customs Service and to laws administered by the Bureau of Customs shall be exercised by the Secretary of the Treasury.

2. All functions, rights, privileges, powers, and duties transferred by this order may be delegated by the Commissioner of Customs to subordinates in the Bureau of Customs in such manor as he shall from time to time direct.

3. This order supersedes T. D. 52121 and all other orders and instructions heretofore issued to the extent that such orders or instructions are inconsistent herewith.

/s/John S. Graham
Acting Secretary of the Treasury

TREASURY DEPARTMENT ORDER NO. 165, REVISED

Delegation to the Commissioner of Customs of general authority functions in the Bureau of

Customs

TREASURY DEPARTMENT

WASHINGTON, D. C. NOV. 2, 1954

By virtue of the authority vested in me by Reorganization Plan No. 26 of 1953 (3 CFR, 1950 Supp, Ch.III), it is hereby ordered:

1. There are hereby transferred to the Commissioner of Customs the functions of all officers, employees, and agencies of the Bureau of Customs and, subject to the exceptions hereinafter specified, all the rights, privileges, powers, and duties, vested in the Secretary at the Treasury by the Tariff Act of 1930, as amended, by the navigation laws administered by the Bureau of Customs or by any other law to the extent that it is administered by the Bureau of Customs.

(a) Regulations shall be proscribed by the Commissioner of Customs, with the approval of the Secretary of the Treasury except that regulations and instructions, not inconsistent with the general rules and regulations of the Treasury Department, which are effective only against persons in their capacity as officers, agents, or employees of the Customs Service, and which do not prescribe procedures which the public should know or follow in dealing with the Customs Service, may be prescribed by the Commissioner of Customs without the approval of the Secretary of the Treasury.

(b) Requirements of regulations which may be waived in accordance with law may be waived by the Commissioner of Customs.

(c) Determinations under section 201(a), Antidumping Acts, 1921, as amended, that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value shall be made, and advice to the United States Tariff Commission of each such determination shall be given, by the Secretary of the Treasury.

(d) The ascertainment, determination, or estimation, and declaration of bounties or grants under section 303, Tariff Act of 1930, shall be made by the Commissioner of Customs with the approval of the Secretary of the Treasury, except that, when the Commissioner, with the approval of the Secretary, has determined and declared a rule for calculating or estimating the net amount of any such bounty or grant, any customs officer authorized by the Commissioner of Customs may ascertain and determine, or estimate, the net amount of the bounty or grant paid or bestowed in respect of each particular lot of imported merchandise.

(e) Findings under section 307, Tariff Act of 1930, whether any class of goods, wares,

articles, or merchandise is mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions, and findings whether such goods, wares, articles, or merchandise so mined, produced, or manufactured are mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States, shall be made by the Commissioner of Customs with the approval of the Secretary of the Treasury.

(f) Any authority which may be vested in the Secretary of the Treasury by a proclamation of the President made pursuant to section 318, Tariff Act of 1930, shall be exercised by the Secretary of the Treasury.

(g) Any order under section 511, Tariff Act of 1930., prohibiting the importation of merchandise or instructing a collector to withhold delivery of merchandise shall be made by the Commissioner of Customs with the approval of the Secretary of the Treasury.

(h) No claim, fine, or penalty (including forfeiture) in excess of \$20,000 shall be compromised., mitigated., or remitted without the approval of the Secretary of the .Treasury.

(i) An award of compensation to an informer under section 619, Tariff Act of 1930, shall be made by the Commissioner of Customs only with the approval of the Secretary of the Treasury when claimed in connection with any decision which has been acted upon or approved the Secretary of the Treasury.

(j) The authority conferred by the President upon the Secretary of the Treasury by Executive Order 10289 (3 CFR, 1951 Supp., Ch. II) with respect to the organization of the Customs Service and to laws administered by the Bureau of Customs shall be exercised by the Secretary of the Treasury.

2. All functions, rights, privileges, powers, and duties transferred by this order may be delegated by the Commissioner of Custom to subordinates in the Bureau of Customs in such manner as he shall from time to time direct.

3. This order revises Treasury Department Order No. 165, as issued on December 15, 1952 (T. D. 53160), and supersedes Treasury Department Order No. 165-1 (T.D. 53332), and all other orders and instructions heretofore issued to the extent that such orders or instructions are inconsistent herewith. The purposes of this order are to eliminate from the citation of authority for the delegation section 3 of the Act of March 3. 1927 (5 U.S.C. 281b), which was repealed in pertinent part by section 10 of the Act of September 3, 1954, 68 Stat. 1229; to reissue the delegation so that it will cover all pertinent laws in effect on the date hereof; and to eliminate the requirement that findings of dumping under section 201(a), Antidumping Act, 1921, be approved by the Secretary and substitute therefor the above reservation to the Secretary of determinations of sales or likelihood of sales of merchandise at less than its fair value and the

giving of advice of such determinations to the United States Tariff Commission. Delegations of authority heretofore issued by the Commissioner or Acting Commissioner of Customs pursuant to the Treasury Department Orders revised or superseded by this order are not affected hereby.

/s/ H. Chapman Rose
Acting Secretary of the Treasury

Treasury Department Order No. 165, Revised - Amendment 2

Delegation to the Commissioner of Custom of authority to take final action in certain penalty and liquidated damage cases.

TREASURY DEPARTMENT

Washington, D. C., October 29, 1956

By virtue of the authority vested in me by Reorganization Plan No. 26 of 1950 (3 CFR, 1950 SUPP. Ch III), it is hereby ordered that subparagraph (h) of Treasury Department Order No. 165, Revised, issued on November 2, 1954 (T. D. 53654; 19 F. R. 7241), as amended December 5, 1955 (T. D. 53966; 20 F. R. 9320), is further amended to read as follows:

(h) No decision with respect to any claim (including claim for liquidated damages), fine, or penalty (including forfeiture) in excess of \$20,000 shall be made without the approval of the Secretary of the Treasury, except that such approval shall not be required with respect to any claim (including claim for liquidated damages), fine, or penalty (including forfeiture) incurred or arising under:

(1) Section 3114, Revised Statutes, as amended (19 U.S.C. 257), for failure to report, make entry, and pay duties on certain equipments and repairs for certain vessels;

(2) Section 432, Tariff Act of 1930 (19 U.S.C. 1432), for omitting from the vessel manifest any articles to be retained on board as sea stores, ship's stores, or bunker coal or bunker oil, or for landing any such articles without the required permit;

(3) Section 453, Tariff Act of 1930 (19 U.S.C. 1453), for lading or unlading merchandise or baggage valued at \$500 or more without obtaining the required license or

permit;

(4) Section 460, Tariff Act of 1930, as amended (19 U.S.C. 1460), for failure to report or to file a manifest as required by section 459, Tariff Act of 1930, as amended (19 U.S.C. 1459) in the following cases:

(i) Violations due to ignorance of the reporting requirements or to inadvertence and either no merchandise, or only typical personal or souvenir merchandise which would have been free of duty, if entered, is carried on the vessel or vehicle, or

(ii) Where the violation is the first offense, although not due to ignorance or inadvertence and no intended commercial use or threat to revenue is involved;

(5) Section 584, Tariff Act of 1930, as amended (19 U.S.C. 1584), for having on board, or unloading from, a vessel or vehicle, any merchandise which is not included or described in the manifest or does not agree therewith;

(6) Section 8 or 204(b), Anti-Smuggling Act, approved August 5, 1935 (19 U.S.C. 1708, 1584), for failure of a vessel not exceeding 500 net tons importing spirits, wines, or other alcoholic liquors to have the certificate required by section 7 of the Anti-Smuggling Act (19 U.S.C. 1707);

(7) Section 585, Tariff Act of 1930, as amended (19 U.S.C. 1585), in respect of any vessel or vehicle which departs or attempts to depart from, any collection district without making the required report or entry, or unloads any merchandise before such report or entry;

(8) Section 592, Tariff Act of 1930 (19 U.S.C. 1592), if the Commissioner finds that the decision is in accordance with an established policy of mitigation or remission which has been approved by the Secretary in a factually similar case;

(9) The Act of February 24, 1915 (46 U.S.C. 14), for false oath to obtain a register for a wrecked vessel;

(10) Section 4143, Revised Statutes (46 U.S.C. 21), for false oath as to ownership by owner to obtain registry of vessel;

(11) Section 4163, Revised Statutes (46 U.S.C. 33), for false oath by agent or attorney to obtain registry of a vessel;

(12) Section 4177, Revised Statutes, as amended (46 U.S.C. 45), in respect of documented vessels failing to have the required number permanently marked;

(13) Section 4179, Revised statutes (46 U.S.C. 50), for changing, or engaging in deceptive practices with respect to, the name of a documented vessel;

(14) Section 4189, Revised Statutes, as amended (46 U. S.C. 60), in respect of any vessel for which any certificate of registry, enrollment or license, or other record or document granted in lieu thereof is knowingly and fraudulently obtained or used;

(15) Section 4153, Revised Statutes, as amended (46 U.S.C. 17), in respect of documented vessels for failing to have the number denoting net tonnage permanently marked;

(16) Section 4139, Revised Statutes (46 U.S.C. 272), for refusal to take, or for taking falsely, the required oath with respect to equipment and repairs for vessels;

(17) Section 4337, Revised Statutes (46 U.S.C. 278), in respect of vessels proceeding on a foreign voyage while enrolled and licensed or licensed;

(18) Section 1 of the Act of May 28, 1906 (46 U.S.C. 292), in respect of foreign-built dredges engaging in dredging in the United States;

(19) Section 4365, Revised Statutes (46 U.S.C. 311), in respect of vessels licensed for the fisheries and found within three leagues of the coast with foreign merchandise exceeding \$500 in value on board without having the permission to touch and trade at foreign ports required by section 4364, Revised Statutes (46 U.S.C. 310);

(20) Section 4370, Revised Statutes, as amended (46 U.S.C. 316(a) and (d)), in respect of any vessel employed in towing in violation of subsection (a) of that section, as amended, or of any foreign vessel engaging in salvaging operations not excepted or authorized by subsection (d) of that section, as amended;

(21) Section 7, Act of June 19, 1886, as amended (46 U.S.C. 319), in respect of certain vessels trading coastwise, or engaged in the fishery, without a valid document and in respect of such vessels having on board foreign merchandise or taxable alcoholic liquors on which the duties or taxes have not been paid or secured to be paid;

(22) Section 4377, Revised Statutes, as amended (46 U.S.C. 325), in respect only of licensed vessels employed in any other trade than that for which licensed, found with a forged or altered license or one granted for any other vessel, or found with any foreign merchandise or taxable alcoholic liquors on board on which the duties or taxes have not been paid or secured to be paid;

(23) Section 4240, Revised Statutes (46 U.S.C. 723), in respect of any vessel transporting

to a foreign port any property taken from a wreck within United States jurisdiction off the coast of Florida;

(24) Section 27, Merchant Marine Act, 1920, as amended (46 U.S.C. 883), in respect of merchandise transported coastwise in a vessel ineligible under that section to engage in such transportation;

(25) Bonds taken pursuant to section 308, Tariff Act of 1930, as amended (19 U.S.C. 1308), if the Commissioner is satisfied that the importation was properly entered under section 308 and there was no intent to defraud the revenue or delay the payment of duty;

(26) Bonds taken pursuant to section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), if the marking duty due under section 304 of the tariff act has been deposited and the Commissioner is satisfied that the importer was not guilty of negligence or bad faith in permitting the not-properly-marked articles to be distributed, has been diligent in attempting to secure compliance with the marking requirements, and has attempted by all reasonable means to effect redelivery;

(27) Bonds taken pursuant to section 551, Tariff Act of 1930, as amended (19 U.S.C. 1553), if the Commissioner is satisfied that all the merchandise in respect of which the claim for liquidated damages was incurred has actually been exported or destroyed and that any failure to obtain customs supervision was without intent to evade any law or regulation;

(28) Bonds taken pursuant to section 565, Tariff Act of 1930 (19 U.S.C. 1565);

(29) Bonds taken pursuant to section 1 (par. 1101), Tariff Act of 1930, as amended (19 U.S.C. 1001, par. 1101), if no loss of revenue is involved; and

(30) Any bond for failure to make entry and deposit estimated duties and taxes or for failure to produce required documents within the time required by the law or regulation, if the Commissioner is satisfied that such failure was not due to any purpose to evade any law or regulation.

/s/

Acting Secretary of the Treasury

Treasury Department Order No. 165, Revised - Amendment 3

Further delegation to the Commissioner of Custom of authority to take final action in certain penalty cases.

TREASURY DEPARTMENT

Washington,, D. C. August 1, 1957

By virtue of the authority vested in me by Reorganization Plan No. 26 of 1950 (3 CFR, 1950 Supp., Ch. III), it is hereby ordered that subparagraph (h) of Treasury Department Order No, 165, Revised, issued on November 2, 1954 (T. D. 53654; 19 F. R. 7241), .as amended December 5, 1955 (T. D. 53966; 20 F. R. 9320), and an amended October 29, 1956 (T. D. 54234; 21 F. R. 8543), is further amended by deleting "and" after item (29); changing the period after item (30) to a semicolon; and adding the word "and" and a new item (31) reading as follows:

(31) Section 2 of the Act of July 14, 1956 (46 U.S.C. 883a), in respect of certain vessels of more than 500 gross tons rebuilt abroad for which the required report of the circumstances of rebuilding is not made.

/s/

Acting Secretary of the Treasury

Treasury Department Order No. 165, Revised Amendment 4

Transfer to the Commissioner of Customs of certain functions, powers, and duties relating to the documentation and operation of vessels and fines, penalties, and forfeitures arising thereunder.

TREASURY DEPARTMENT

Washington, D.C., December 4, 1958

By virtue of the authority vested in me by Reorganization Plan No. 26 of 1950 (3 CFR, 1950 Supp., Ch.III), the functions, powers, and duties vested in the Secretary of the Treasury by the Act of September 2, 1958 (Public Law 85-902, 85th Cong.; 72 Stat. 1736), are hereby transferred to the Commissioner of Customs. The Commissioner of Customs is authorized to

delegate all such functions, powers, and duties to subordinates in the Bureau of Customs in such manner as he shall from time to time direct.

Subparagraph (h) of Treasury Department Order No. 165, Revised, issued on November 2, 1954 (T. D. 53654; 19 F. R. 7241), as amended, is further amended by deleting "and" after item (30); changing the period after item (31) to a semicolon and adding the word "and"; and by adding a new item (32) reading as follows:

(32) Section 27A, Merchant Marine Act of 1920, as amended (46 U.S.C. 883-1), so far as that section imposes any fine or penalty (including forfeiture) for falsifying any certificate under oath or for transporting merchandise or passengers for hire.

/s/
Acting Secretary of the Treasury

Treasury Department Order No. 165, Revised -- Amendment 6

Delegation order amended as it relates to decisions with respect to claims, fines, penalties, and forfeitures.

TREASURY DEPARTMENT,

WASHINGTON, D. C., SEP 23 1964

By virtue of the authority vested in the Secretary of the Treasury by Reorganization Plan No. 26 of 1950 (3 CFR, 1949-1953 Comp. P. 1017) and pursuant to authorization given to me by Treasury Department Order No. 190, Revision 2 (28 F.R. 11570), it is hereby ordered that subparagraph (h) of paragraph 1 of Treasury Department Order No., 165, Revised, dated November 2, 1954 (T.D. 53654; 19 F.R. 7241), as amended, is further amended by deleting:

(h) No decision with respect to any claim (including claim for liquidated damages), fine, or penalty (including forfeiture) in excess of \$20,000 shall be made without the approval of the Secretary of the Treasury, except that such approval shall not be required with respect to any claim (including claim for liquidated damages), fine, or penalty (including forfeiture) incurred or arising under:

and substituting in lieu thereof the following:

(h) Any decision with respect to any claim (including claim for liquidated damages), fine, or penalty (including forfeiture) in excess of \$100,000 shall be made by the Secretary of the Treasury, except decisions with respect to claims (including claims for liquidated damages), fines, or penalties (including forfeitures) incurred or arising under:

/s/
James A. Reed
Assistant Secretary of the Treasury

TREASURY DEPARTMENT ORDER NO. 165, REVISED--AMENDMENT 7

Delegation order amended as it relates to decisions with respect to claims, penalties and forfeitures

By virtue of the authority vested in the Secretary of the Treasury by Reorganization Plan No. 26 of 1950 (3 CFR, 1949-1953 Comp. p. 1017) and pursuant to authorization provided by Treasury Department Order No. 190, Revision 9 (38 F.R. 17517), it is hereby ordered that subparagraph (h)(8) of paragraph 1 of Treasury Department Order No. 165, Revised, dated November 2, 1954 (T.D. 53654; 19 F.R. 7241), as amended, is further amended by deleting:

(8) Section 592, Tariff Act of 1930 (19 U.S.C. 1592), if the Commissioner finds that the decision is in accordance with an established policy of mitigation or remission which has been approved by the Secretary in a factually similar case;

and by inserting in lieu thereof the following:

(8) Section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592);

Dated: SEP 11, 1973

/s/
Edward L. Morgan
Assistant Secretary for Enforcement, Tariff and
Trade Affairs, and Operation

TREASURY DEPARTMENT ORDER NO. 165, REVISED--AMENDMENT 8

Delegation order amended as it relates to waivers of the navigation laws

By virtue of the authority vested in the Secretary of the Treasury by Reorganization Plan No. 26 of 1950 (3 CFR, 1949-1953 Comp. p. 1017) and pursuant to authorization provided by Treasury Department Order No. 190, Revision 9 (38 F.R. 17517), it is hereby ordered that Treasury Department Order No. 165, Revised, dated November 2, 1954, (T.D. 53654; 19 F.R. 7241), as amended, is further amended by adding a new subparagraph (k) to read as follows:

(k) Any decision as to whether to waive compliance with the navigation laws pursuant to the Act of December 27, 1950, 64 Stat. 1120 (46 U.S.C. Chapter 1 Note), shall be made by the Secretary of the Treasury, except that the Commissioner of Customs shall waive compliance with such laws upon the request of the Secretary of Defense to the extent deemed necessary in the interest of national defense by the Secretary of Defense.

Dated: June 14, 1974

/s/
David R. Macdonald
Assistant Secretary of the Treasury