

# Current Alert

Legislative & Regulatory Issues of Contemporary Import to the U.S. Marine Transport Industry No. 27 December 11, 2005

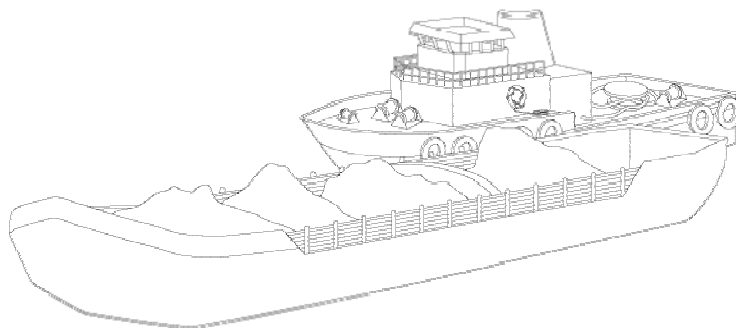
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## INSPECTED VESSELS



### When Is A Law Not A Law?

On August 9, 2004, when President GW Bush signed Public Law 108-293 (The Coast Guard and Maritime Transportation Act of 2004), he laid to rest the ambiguous status of a class of vessels that had, heretofore, been roundly debated within industrial, regulatory and judicial circles. Specifically, §415 of that law pulled into the ranks of Coast Guard “Inspected Vessels” all “Towing vessels.” It did so, by simply adding such vessels (as subparagraph (15) of 49 USC 3301) to the lengthy list of watercraft already requiring that additional measure of US Coast Guard scrutiny. Such US Coast Guard overview is traditionally memorialized by the issuance of a Certificate of Inspection (COI).



### Some History

There has been a long-time controversy relating to which US regulatory agency has jurisdiction over occupational safety & health matters aboard towing vessels (vessels that push or pull other vessels). The Occupational Safety & Health Administration (OSHA), of course, has subjective jurisdiction over most US workplaces. Within the OSHAct, however, §4 (b)(1) sets out a fairly specific circumstance wherein OSHA is precluded from exercising its workplace safety authority:

*(4) (b) (1) Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.*

# Current Alert

Page Two

When, however, does it become clear that another Federal agency exercises the statutory authority necessary to “(4)(b)(1)-out” the pervasive jurisdiction of OSHA? Who makes that decision, and what criteria must be used in order to come to a reasonable, legally consistent conclusion in that regard?

Jurisdictional questions such as these are almost invariably the responsibility of the Courts. A horde of such arguments have been entertained within the administrative law forum over the years, with effected employers arguing in front of the quasi-judicial Occupational Safety & Health Review Commission (OSHRC) that the US Coast Guard is the proper and historically-relevant Federal agency to properly oversee all safety matters arising on such vessels. Many such employers presented compelling arguments; many did not. Some won their cases; others did not.

One particular case, however, rose up to be heard at the 2<sup>nd</sup> Circuit Court of Appeals. Its caption: Donovan v. Red Star Marine. In *Red Star*, the 2<sup>nd</sup> Circuit ruled that the Coast Guard lacked the necessary statutory authority to promulgate and enforce occupational safety and health standards aboard “uninspected vessels” (vessels that were not required to have a current and valid US Coast Guard-issued COI). Red Star Marine, whose extremely talented Counsel could have used some Divine intervention in making his case, got substantially sandbagged by the Coast Guard’s Chief Counsel (Rear Admiral Ed Daniels) who, in a letter to the Court, freely stipulated that his agency lacked the necessary legal authority over occupational safety & health issues on such vessels. It was a slam dunk for Labor Secretary Ray Donovan. Red Star Marine, not to be outdone, filed a petition for a writ of *Certiorari*, hoping to have the 2<sup>nd</sup> Circuit’s decision overturned by the US Supreme Court. In their wisdom, the Supremes declined to hear arguments. All of the foregoing occurred in 1984-1985.

In 1999, in the aftermath of a workplace fatality occurring aboard another “uninspected vessel”, a similar jurisdictional question arrives for review at the 5<sup>th</sup> Circuit Court of Appeals. In that case, an OSHRC administrative law judge had properly found that the Coast Guard lacked the necessary statutory authority with which to regulate and enforce occupational safety & health issues aboard “uninspected vessels”. For reasons that are mysterious, however, the 5<sup>th</sup> Circuit reversed. Sensing the correctness of the 2<sup>nd</sup> Circuit’s interpretation in *Red Star*, the Secretary of Labor filed her petition for a writ of *Certiorari*. This time, the Supremes agreed to hear the case.

In the resultant unanimous decision (Justice Scalia recused in that his son Eugene was, at the time, being considered as the Bush administration’s appointee for Solicitor of Labor) handed down by that Court on January 9, 2002 [Chao, Secretary of Labor v. Mallard Bay Drilling, Inc.], the Justices reversed the 5<sup>th</sup> Circuit Court of Appeals. Instructively, the opinion, delivered by Justice Stevens, held that:

*Because the Coast Guard has neither affirmatively regulated the working conditions at issue, nor asserted comprehensive regulatory jurisdiction over working conditions on uninspected vessels, it has not exercised its [requisite] authority under §4 (b)(1).*

## And Now, the Obligatory Politics

If a law is less than crystal clear, and its perceived ambiguity somehow requires an interpretation from the highest Court in the land, you can bet that at least two things are going to happen: 1). Some serious money is going to get spent in litigating the case; and 2). Someone's ox is going to get gored in the process. In *Mallard Bay*, not surprisingly, both occurred.

Some of those negatively impacted by the ruling did what they had to do to set things right: They petitioned Congress for a change in the relevant statute. It took a couple of years, but Congress delivered. Buried in a piece of F/Y 2005 Coast Guard appropriations legislation, section 415 of HR 2443 represented a magic wand of sorts, in that all towing vessels (not all "uninspected vessels") over which that magic wand was passed, instantaneously (with the President's signature) became "inspected vessels". With such vessels now out of OSHA's reach, the 5<sup>th</sup> Circuit's intent had been vicariously realized and almost everyone (even OSHA, if the whole truth is known) was happy.

## Bureaucratic Complications

Notwithstanding the instantaneous nature of the transition from "uninspected" to "inspected", it appears that the bureaucracies at OSHA and Coast Guard have managed to seemingly drop the ball in executing the letter of the statute's immediate change. There is no doubt left, even to the casual observer, that all towboats are now comfortably within the general class of "inspected vessels", and are thus, consistent with the Supreme Court's ruling in *Mallard Bay* and with the terms of §4 (b)(1) of the OSH Act, decidedly out of OSHA's general regulatory reach.

Nonetheless, last month, when questioning OSHA national and area office personnel about how and why the agency continues to have a presence in the investigation of accidents occurring aboard towing vessels, the response the publisher received was somewhat puzzling. It has been agreed by OSHA and Coast Guard, apparently, that OSHA will continue to exercise jurisdiction over effected crewmembers' occupational safety and health until such time that a Coast Guard COI could be issued to each such towboat newly defined as an "inspected vessel" under the legislation signed by GW Bush on August 9, 2004. Asked when that might occur, OSHA generally seemed to be under the impression that the Coast Guard would be issuing such certificates only after new, specific Coast Guard regulations were promulgated which covered this class of vessel in a subjective sense. The Coast Guard hasn't, as yet, independently confirmed that impression.

As if to assure the inquirer that such vessels (and their crews) would not be forgotten, OSHA staffers offered their opinion that such specific regulations are authorized by the same law that effected the underlying change of status. In all candor and honesty, the new law does provide at least the potential for a specific regulatory component:

*(j) The Secretary may establish by regulation a safety management system appropriate for the characteristics, methods of operation, and nature of service of towing vessels. [Emphasis added]*

Despite OSHA's assurance, though, equivocal terms like "may" are entirely consistent only when attempting to show that an agency, tasked by statute with the exclusive authority to regulate and enforce workplace safety and health on towboats, doesn't necessarily have to do anything. OSHA, given its own experience with equivocal terms (such as "should"), is keenly aware of the etymology and very experienced with the implications of having any workforce's on-the-job safety dependent upon the consequent interpretation of such inexplicit language.

If Congress had meant to make towboats "inspected vessels" only after appropriate, custom-tailored safety and health regulations had been promulgated, experience dictates that they probably would have said so. Moreover, not all of the fifteen (15) classes of vessels so characterized as "inspected" by 49 USC 3301 have their own specific, tailor-made set of workplace safety and health regulations. Why is it that such a pre-requisite must be in place in the case of towboats? Something simply doesn't square here.

At the bottom-line, one must appreciate that any attempt on OSHA's part to enforce the OSH Act aboard towboats at this point in time would likely be vigorously opposed by towboat owners in general. Moreover, such opposition, given the rather clear content of the newer statute, appears to be now standing on some very solid legal ground.

## Answering the Question

And so, in attempting to fairly answer the question presented at the beginning of this piece:

## When Is A Law Not A Law?

# Current Alert

Page Five

**It must be reasonably said that a law is not really a law unless it's enforced. Without that critical component, it's just a pile of words on a page that just happens to be sitting in a statute book.**

**How OSHA, the workplace safety “watchdog”, managed to get itself complicit in this matter remains a mystery; a matter of conjecture. The agency certainly had to be aware of the pending legislation. After all, the Secretary of Labor, herself, was party to a successful action at the Supreme Court that was right on point with this circumstance. Indeed, her victory at the high Court was the very catalyst for the enabling legislation discussed here. Her staff at OSHA would have or should have been reasonably in-the-know and consulting with the Coast Guard relative to the proper and effective mechanics of keeping such a workplace protected during any transition. Moreover, given the Coast Guard's more-or-less permanent seat on Labor Secretary Elaine Chao's Maritime Advisory Committee on Occupational Safety & Health (MACOSH), it would seem entirely appropriate for such a transition to be fully and completely considered by the Labor Department. If such knowledge and consideration wasn't there, or wasn't forthcoming, someone at 200 Constitution Avenue should be asking why.**

**Members of Congress, too, in fiddling around with the jurisdictional aspects attendant to these vessels, should have been at least a little inquisitive and guarded in how they disposed of the occupational safety and health of crewmembers aboard such vessels. That sentiment is doubly true for all such Members sitting on Committees having jurisdiction over occupational safety and health issues. Triply true, in terms of those Committee's Chairmen. It would be interesting to know if any of them voiced any concern whatsoever. Those who did should be applauded (if not re-elected).**



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