

STATEMENT

OF

DAVID F. ANDERSON  
ASSOCIATE GENERAL COUNSEL

OF

MATSON NAVIGATION COMPANY, INC.

TO THE

SUBCOMMITTEE ON MERCHANT MARINE  
MERCHANT MARINE AND FISHERIES COMMITTEE  
HOUSE OF REPRESENTATIVES

HEARING ON

H.R. 3141, H.R. 4024, H.R. 4581

H.R. 4582, H.R. 4583, H.R. 4584

TO PROMOTE THE U.S.-FLAG LINER FLEET

May 1, 1986

Mr. Chairman and Members of the Subcommittee, I am David F. Anderson, Associate General Counsel of Matson Navigation Company, Inc.. Thank you for this opportunity to discuss the need for strengthening Section 805(a) of the Merchant Marine Act, 1936. Since this hearing is concerned with fundamental changes to the operating subsidy program, it is an appropriate forum to present a proposal to strengthen this essential provision of the Merchant Marine Act which has been rendered almost meaningless by recent agency and court decisions.

The substantive provisions of Section 805(a) have remained unchanged since the inception of the Merchant Marine Act in 1936. They are designed to prevent operating-differential subsidy contractors or their corporate or individual affiliates from owning, operating or chartering, or having any pecuniary interest in, vessels engaged in domestic intercoastal or coastwise service, without the written permission of the Secretary of Transportation. The statute requires denial of applications for written permission if the Secretary finds that approval will result in "unfair competition to any person, firm or corporation operating exclusively in the coastwise or intercoastal service" or that it would be "prejudicial to the objects and policy" of the Act.

Section 805(a) also provides that it shall be unlawful for any subsidy contractor or affiliate to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign trade operations, for which a subsidy is paid, into any coastwise or intercoastal operations.

Matson has an exclusively domestic liner service engaged in the carriage of cargo between ports on the U.S. Pacific Coast and ports of the State of Hawaii. Other operators have exclusively domestic liner services in the Hawaii, Alaska and Puerto Rico trades. All face the threat of potentially unfair competition by operating-subsidy contractors or their affiliates which Section 805(a) was designed to prevent. Since the 1970 amendments to the Merchant Marine Act extended operating-differential subsidy to bulk carriers, exclusively domestic liquid or dry bulk carriers face the same threat. Matson's President, Michael S. Wasacz recently represented the Jones Act liner operators as a Member of the Congressional Maritime Caucus Advisory Board. The unsubsidized Jones Act liner operators group was unanimous in recommending to the Maritime Caucus Chairman Walter Jones that Section 805(a) be strengthened.

The need to strengthen and clarify Section 805(a) is largely the result of a December 1984 decision of the Secretary of Transportation under Section 805(a) (i.e. Docket No. S-724, Aeron Marine Shipping Company, et al.) which rendered that section virtually meaningless by holding that:

- (1) There can be no "unfair competition" in the absence of diversion of subsidy funds to the domestic trades.
- (2) It is not necessary for operating subsidy applicants to disclose the nature and scope of operations they propose to conduct in the domestic trades, or even which domestic trade or trades will be served.

(3) Once operating subsidy applicants have shown that there will be no diversion of subsidy funds, the burden shifts to the protestants to establish prejudice to the objects and policy of the act.

(4) Adverse impact of the entry of operators with operating subsidy on existing exclusively domestic operators is irrelevant since the only relevant consideration is the long range impact on the level of service in the trade in question.

The decision of the Secretary of Transportation was upheld by the United States District Court of the District of Columbia and is now under appeal to the United States Court of Appeals (Nos. 85-5927 and 85-6004).

As previously mentioned, Section 805(a) specifically provides that it shall be unlawful for any subsidy contractor or affiliate to divert any money or other thing of value used to support foreign trade operations, for which a subsidy is paid, into the coastwise or intercoastal trades. A logical interpretation of the Section 805(a) requirement that applications for writtern permission be denied if the Secretary finds that approval will result in "unfair competition" is that this "unfair competition" must mean something other than diversion of subsidy funds to domestic trades. There is no need to declare "unfair" that which has already been declared unlawful.

The Secretary's decision in Aeron Shipping Company, therefore, effectively repeals Section 805(a)'s prohibition against "unfair competition" by requiring a showing of diversion of operating subsidy funds into the domestic trades. In other words, according to the Secretary, unless an operating subsidy applicant criminally defrauds the United States government, it cannot create "unfair competition" in the domestic trades. Moreover, there is no way for a protestant to show that granting an application for written permission will result in diversion of subsidy funds into the domestic trades.

The present policy of the Maritime Administration/Maritime Subsidy Board to accept blanket applications for service in any and all domestic trades without requiring disclosure of even a general plan of operation, makes it impossible for a protesting domestic carrier to sustain its burden of proof to establish that this future unspecified activity will cause unfair competition or prejudice to the objects and policy of the Act. Without having some idea of the proposed domestic operations, it is impossible for a protestant to assess or prepare a showing of the extent to which its ability to continue operations will be impaired. Yet, even if an unsubsidized protestant could sustain its burden to prove that it would be driven out of business or forced to curtail service, this is not sufficient to establish prejudice to the objects and policy of the Act under the Secretary's decision. Under Aeron Shipping Company, the Secretary requires protestants to prove that

entry by the operator with operating subsidy into the domestic trades will have long-term adverse impact on the availability of shipping services in the trade. There is no way for a protestant to prove that (1) it will be driven out of business or forced to curtail service and that (2) there will be no replacement service available to fill this service void, even in the long run.

Incursions into the domestic trades by operating subsidy contractors or their affiliates which have an adverse impact on the services of existing exclusively domestic operators should be considered unfair and prejudicial to the objects and policy of the Act per se. That is the only effective way to further the objects and policy of the Act in preserving and promoting a U.S. Merchant Marine that will fully serve the needs of our domestic and foreign commerce.

To accomplish the objectives noted above, Section 805(a) should be amended by striking the colon preceeding the proviso, substituting a period and adding the following language:

"Applications for written permission shall be required to disclose the nature and scope of operations proposed to be conducted in domestic intercoastal or coastwise service. The Secretary of Transportation shall consider the impact of a grant of written permission on the operations of existing exclusively domestic services, and shall disapprove applications if approval would be

likely to impair the ability of existing exclusively domestic services to continue adequate levels of service to smaller ports or would otherwise have a significant adverse impact on existing exclusively domestic services.

Thank you for your consideration of our views.

David F. Anderson

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