

Probing the Mysteries of the Jones Act—Part 2

by Michael J. Rauworth

In the previous issue of *Sea History* (Summer 2017, No. 159), we began looking at the Jones Act, which pops up in the national news cycle every so often but confounds most people as to what it is. While politicians and those uninvolved in maritime pursuits occasionally debate its merits and flaws with regard to the economy, few outside of the industry and maritime law have a grasp of what it is, how and why it was created, and why it matters.



COURTESY PORT OF LOS ANGELES

Port of Los Angeles

This nearly century-old legislation holds great sway over the lives and professions of merchant mariners and those in the shipping industry, and even they often don't understand its intent and effects. In Part 1, attorney and master mariner Mike Rauworth introduced us to the legal doctrines on which the law was based, especially concerning the rights of seamen to sue their employer when they become injured or ill while in service to their ship. In this issue, he delves into the Jones Act itself.

—Deirdre O'Regan, Editor, *Sea History*

As promised in the previous issue of *Sea History*, in this edition we will get to the Jones Act itself—but it's quite a mouthful to chew on. At the outset, we should say that the proper name of this act of Congress is the Merchant Marine Act of 1920. It came to have its shorthand name because of its principal sponsor, Senator Wesley Jones of the state of Washington (1863–1932).

First, let's distinguish among the three different meanings that are intended when people use the phrase "Jones Act." The first meaning involves lawsuits for damages—in general—for personal injuries to seamen. This usage implies that a seafarer is suing under all the rights available to him/her—including Maintenance and Cure, Unseaworthiness, and the Jones Act itself, even though the speaker may not even be aware of these terms. This is what we might call a "slang" usage of the phrase the "Jones Act."

The second usage refers to the Jones Act proper, as a law passed by Congress that gives seafarers specific rights to sue, even if they are not eligible to sue under Maintenance and Cure and

Unseaworthiness. In this usage, the phrase "Jones Act" is intended by the speaker to refer to the congressionally-enacted statute as distinct from its companion remedies, Maintenance and Cure and Unseaworthiness. This is the usage that will consume most of our attention in this article.

The third usage also refers to the Merchant Marine Act of 1920—but a different part of that act, one that has to do with an esoteric term: *cabotage*. Cabotage is a legal doctrine that reserves the domestic sea trade of a nation to ships that fly its flag. This

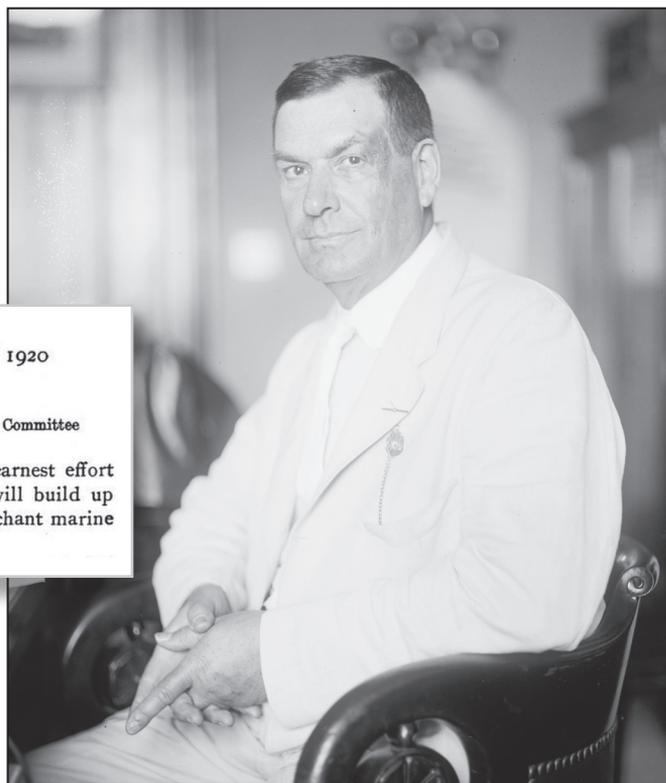
Senator Wesley L. Jones was born in Illinois, but settled in Washington State in 1889. He served in the US House of Representatives in 1898 and was later elected to the US Senate, where he served from 1909 until his death in 1932. In the Senate, he served on the Fisheries and Appropriations committees and, after 1920, served as chairman of the Senate Committee on Commerce. It was in this capacity that he began his work on the Merchant Marine Act of 1920.

THE MERCHANT MARINE ACT OF 1920

WESLEY L. JONES

U. S. Senator from Washington, Chairman of Commerce Committee

THE Merchant Marine Act of 1920 is an earnest effort to lay the foundation of a policy that will build up and maintain an adequate American merchant marine in competition with the shipping of the world.



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additional feature of the Jones Act provides that only ships of the US flag, built in US shipyards, and staffed by US seafarers, may carry goods from a “port or place” in the United States to another “port or place” in the US. Similar legislation that applied to the transportation of passengers passed as early as 1886.

The personal injury facet of the Jones Act is of interest principally to maritime personal injury lawyers, seafarers’ unions, marine insurers, and the risk-management offices of shipowners, and is the subject of considerable differences of opinion. The first groups are very much in favor of it, and the latter would generally prefer to see it replaced by a different legal regime.

The cabotage feature of the Jones Act is the subject of sporadic but very intense political dispute, with a different lineup of interests on the respective sides. On the side of preserving it are seafarers unions, the shipbuilding industry, the existing US flag merchant marine, and the politicians of states with a shipbuilding workforce. On the side of abolishing this cargo preference are foreign-flag vessel operators and cargo interests, namely those whose goods are required to be carried on US flagged vessels—and which could be carried less expensively if foreign-flag operators were allowed to compete on the same trade routes. If the cargo preference were abolished, of course, the foreign-flag operators would have the domestic market for water transportation opened up to them, US shipyards would lose a lot of business (perhaps fatally), and lots of American seafaring jobs would disappear.

Thus it is this cabotage facet of the Jones Act that is intended when someone talks about “the Jones Act trade.” In today’s world, that trade is principally the service that connects the continental United States with Alaska, Hawaii, Puerto Rico, and its other island territories. The cabotage portion of the law is, if you will, a “macro,” or national, maritime policy provision. By contrast, the personal injury facet is a “micro” provision, of interest primarily to the individual seafarer who becomes injured on the job.

The personal injury facet of the Jones Act was the culmination of a series of acts of Congress in the late 1800s and early 1900s enacted for the benefit of US merchant seafarers. This was a fairly remarkable transition, both as to personal injury benefits, and as to other improvements in the lot of the merchant seafarer. To illustrate just one of these parallel benefits, let’s start with an



COURTESY INGALLS SHIPBUILDING

American shipyards depend, in part, on the Jones Act to stay in business and, in turn, keep shipbuilding skills and capacity alive in the United States. (above) Ingalls Shipbuilding in Pascagoula, MS.

excursion into constitutional law. The Thirteenth Amendment to the Constitution, enacted in the immediate aftermath of the Civil War, provides as follows:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Nevertheless, in 1897 the Supreme Court upheld a federal statute (dating from 1790) that provided for criminal penalties (including imprisonment) for desertion in the case of civilian merchant-seamen signed aboard the barque *Arago*—essentially, for quitting their jobs. Does this sound much like “involuntary servitude” to you? [The case is *Robertson v. Baldwin*, 165 US 275 (1897), if you care to check it out.] The *Robertson* case inspired a serious counter-movement and legislative reform efforts. The first came in what was known as the White Act in 1898, which did away with imprisonment as a penalty for violation of a seaman’s employment contract (i.e. desertion) in domestic ports, and reduced the penalty for desertion in foreign ports. But it wasn’t until 1915 and the passage of the LaFollette Seamen’s Act (a.k.a. the “Magna Carta of the Sea”), that the civilian seafarer was finally, entirely, free of the risk of criminal penalties for quitting his or her job.

The criminal penalties were important in the maritime labor economy of the time. They essentially made seamen into slaves of the ships in which they served, albeit slaves that earned wages. Once signed on, they were not free to quit. This, plus the ability of a seaman to pledge a part of his shipboard earnings in advance, were the lifeblood of the system of labor exploitation known as *crimping*, or *shanghaiing*. Sailors arriving in port were induced to take up lodgings at waterfront boardinghouses, where the “attractions of the shore” soon left them without the wages they had just been paid. The boardinghouse operators (that is, the crimps) were happy to extend further credit to the seaman (on highly disadvantageous terms), and to sell them (on similar terms) the oilskins, etc., needed for their next job at sea. The crimps could be paid by the master of the next ship as an advance against the seaman’s future wages, once the seaman was delivered aboard, drunk or sober, conscious or not. Thus the seafarer, whose signature may have been forged on the articles, was now already in



HORIZON LINES - MATSON

US-flag container ship Horizon Reliance transports cargo across the Pacific between the West Coast and Hawaii. Horizon Lines is a subsidiary of Matson, Inc.

debt and was forced—by the threat of going to prison—to serve out the term of the articles (maybe for years) on board the new ship, regardless of the treatment or conditions.

The series of acts of Congress that broke up the system of crimping followed—*roughly*—the growth of the maritime labor movement, as well as the improvement in the seafarer’s right to compensation for personal injuries. A key figure in both was Andrew Furuseth, a Norwegian-American known as the “Abraham Lincoln of the Sea.” He was an early leader in the maritime labor movement, and remained so until the 1930s. His congressional lobbying—and that of the labor unions—was instrumental in attaining the passage of this series of acts that broke up the system of crimping, and that advanced the legal system by which injured seamen could receive compensation.

Furuseth was instrumental, for example, in the enactment of the LaFollette Seamen’s Act of 1915 (noted above). In addition to its attack on the crimping system, that act also sought to close a major loophole that had existed in the rights of seafarers to recover for personal injuries. As things stood as of 1915, a seaman could obtain Maintenance and Cure if ill or injured, and could recover under the Unseaworthiness theory if his/her vessel were found not to be reasonably fit for its intended service. But if injured, instead, due to the operational (or even momentary) negligence of the vessel owner—or of the master, officers, or fellow seafarers—the injured worker was out of luck; there was no right for a seaman to be compensated for those injuries.



STATE HISTORICAL SOCIETY OF WISCONSIN VISUAL ARCHIVES

(l-r) Andrew Furuseth, Senator LaFollette, and journalist Lincoln Steffens. Furuseth and LaFollette were the architects of the Seamen’s Act of 1915.

The 1915 act contained provisions by which Congress amended the pre-existing law, seeking to give seafarers, for the first time, a right to sue and be compensated for operational negligence—for example, being ordered out onto a deck being swept by dangerous waves. Unfortunately, the Supreme Court decided that Congress had missed the mark—that its change to the statute did not have the effect apparently intended. [*Chelentis v. Luckenbach SS Co.*, 247 US 372 (1918)].

Congress had to go back to the drawing board. And so in drafting the Jones Act in 1920, it turned to a scheme of legal

recovery for industrial accidents that it had already enacted, and which had already stood up to legal challenges in court—the system of compensation for railway workers. Essentially, Congress gave to seafarers the same rights to sue their employers as those enjoyed by their railway counterparts. You may recall from the previous article that railway workers and seamen are the only two classes of industrial workers (employed by non-governmental employers) who are exempt from the nationwide scheme of workers compensation.

Thus, in the Jones Act, seafarers finally obtained the right to sue their employers for injuries due to negligence—that is, the failure to exercise due care. This includes negligence of the shipowner, the master, the officers, or of fellow crew members. Remarkably, non-seafarers (such as passengers, repair technicians employed ashore but injured on board, surveyors, Coast Guard inspectors, and others on board but not as employees) had previously enjoyed the right to sue the shipowner for similar injuries caused by the same negligence. But it took until 1920 for seafarers to catch up.

So, let us now compare Jones Act rights with its companion rights. First of all, under the Jones Act, a seafarer may sue only his/her employer—and that employer may differ from the shipowner. So, if the seafarer is not eligible to recover under Unseaworthiness (because the injuries were due to transitory, operational negligence—and not a condition of the vessel) or under Maintenance and Cure (because all amounts due have been paid), there may be no right to cause the vessel to be arrested. In order to sue, the injured seafarer may have to find a location where jurisdiction over the employer can be established.

Second, under both Maintenance and Cure and Unseaworthiness, there can be recovery even if the shipowner could not realistically have done anything to prevent the condition causing the injury. This is not the case under the Jones Act—the injured seafarer must prove that his/her employer (or an employee, including the master or other seafarers) failed to exercise due care, and that the injury resulted from that failure. This provides a major distinction from the situation of almost any other industrial worker—the seaman, despite being injured on the job, can actually *lose* his case (and receive nothing), if he is unable to prove that there was a failure to exercise due care. Workers nearly everywhere else are entitled to benefits (usually under workers’ compensation schemes), and get paid even if the employer was not at fault.

Third, as noted, if the facts support it, a seafarer can bring a lawsuit that claims for recovery under: (a) Maintenance and Cure; (b) Unseaworthiness; and (c) the Jones Act. The seafarer cannot receive a “double recovery” under such circumstances, but may qualify for payment (for example, of his past medical expenses) under one, two, or three theories of recovery.

Fourth, a person who qualifies as a seaman for one of these personal injury remedies qualifies under all of them. The test for seaman’s status for these purposes (to which we will return later) is distinct from the test for seaman’s status under at least one other provision of law, the Fair Labor Standards Act, 29 USC. §201-219, dealing with minimum wage and overtime requirements.



A merchant mariner aboard the Military Sealift Command ship SS Capella (T-AKR 293) takes a reading on gauges in the engine room.

Fifth, a person who is ruled to be a seaman for purposes of these personal injury remedies is by definition ineligible for benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). The LHWCA was enacted in 1927 after it was determined that Congress was without power to include these employees under state-enacted workers' compensation acts. However, the scheme of coverage under the LHWCA is very nearly parallel to that of state compensation acts, which were addressed in the previous article. While a final *ruling* that an individual is a seaman precludes benefits under the LHWCA, it is possible for a claimant to "straddle" the boundary until that time, preserving his/her rights to LHWCA benefits in the event his/her Jones Act claim is denied based on his/her status. This of course assumes that the duties of the claimant are such that the claimant could arguably claim to be a seaman, and at the same time have some duties that qualify under the LHWCA—*principally* those associated with longshoremen and shipyard workers.

Sixth, by statute, neither students nor instructors aboard a properly-qualified sailing school vessel are seamen, and the same thing applies to scientific personnel aboard vessels classified as oceanographic research vessels by the Coast Guard. These individuals have to proceed under the General Maritime Law for compensation for injuries.

Seventh, the Jones Act affirmatively provides that a suit by an injured seaman may be heard by a jury; other cases in admiralty courts typically are not entitled to a jury. If a seaman brings a Jones Act claim and joins with it claims under Maintenance and Cure and Unseaworthiness, all may be heard by the jury.

Eighth, while persons filling jobs required by a Coast Guard Certificate of Inspection are a clear case of those qualifying as seamen, there is a vast, vast, body of court decisions dealing with persons whose status is not so clear. Depending on the circumstances, there may be many bridges to cross. The individual must have a more or less permanent "employment-related connection to a vessel in navigation," and his work must "contribute to function of the vessel or to the accomplishment of its mission." What connection is sufficient, what is a vessel, when is a vessel "in navigation," and what work "contributes the function" are all questions that have been litigated nearly to death, and cannot be capsulized in this article. One important example of this relates to volunteers. Some cases have held volunteers to be seamen (and

thus eligible for all three personal injury remedies), and some cases have held volunteers not to be seamen. The practical effect of this (for a shipowner) is to discuss a suitable insurance endorsement with one's broker—an endorsement that will provide coverage for an individual injured aboard regardless of what status a court may eventually find applies to him or her.

While a plaintiff proceeding under the Jones Act must prove he or she was injured due to negligence of his employer (or its employees), this challenge differs from what applies in ordinary negligence cases. First of all, if the injured plaintiff can show that the employer violated a safety statute that contributed to his injury, the employer may be liable without further proof of negligence, and this may bar the employer from seeking to have the damages reduced due to any lack of due care on the part of the injured seaman.

Second, the standard of causation in the Jones Act is considerably more favorable to the seaman than in other negligence cases. Once a plaintiff has shown negligence, he or she is able to submit the case to the jury if the employer's negligence played any part, however slight, to causing the injury. The result is a very favorable legal climate for seamen injured in the course of their employment.

Third, the "primary duty doctrine" provides a defense when the person injured is the person on board who was responsible for the condition that caused the injury; this doctrine seems to be applied most often in cases involving an injury to a fairly senior officer.

There is much more that could be said about the Jones Act, and its companion remedies. The effort here, however, is to provide the reader with a "digestible" overview of these doctrines, and not to make the reader an expert. Indeed, even with a far greater familiarity with these legal doctrines, it would be dangerous for the reader to make business decisions based on his or her assessment of whether or not an individual is likely to recover in a personal injury case. There is frankly so much uncertainty, even as to seaman status, that any such prediction would be far too risky. It is precisely this uncertainty that proper insurance is meant to address. A properly-endorsed insurance policy can provide coverage for injury to any individual who may come to be injured on a vessel—whether seaman, passenger, or something else—and regardless of what status a jury may *someday* decide applies to that person, based on the facts at trial, be it seaman status, harbor worker status, in a status entitled to benefits under state workers compensation, or something else.

Thus, apart from "insure with care," the most important practical take-aways from this analysis are: (1) be sure to conform to all safety regulations; and (2) run a careful ship. ⚓

Michael Rauworth's "day job" is as a maritime lawyer, based in Boston. He serves as president and board chair of Tall Ships America, and maintains his Coast Guard license as master of sail, steam, and motor vessels of any tonnage, with pilotage on the waters of three states, and over 200,000 sea miles to his credit. He retired from the US Coast Guard with the rank of captain, having served as Harbor Defense Commander in Operation Uphold Democracy in Haiti, and in command of five reserve units.