OFFICES AND OFFICERS -- STATE -- BOARD OF PILOTAGE COMMISSION -- LICENSING OF PILOTS PILOTING VESSELS ON PUGET SOUND -- CITIZENSHIP -- AGREEMENT WITH CANADIAN AUTHORITIES -- PENALTIES FOR VIOLATING PI

AGO 1962 No. 181 - Dec 12 1962

Attorney General John J. O'Connell

OFFICES AND OFFICERS -- STATE -- BOARD OF PILOTAGE COMMISSION -- LICENSING OF PILOTS PILOTING VESSELS ON PUGET SOUND -- CITIZENSHIP -- AGREEMENT WITH CANADIAN AUTHORITIES -- PENALTIES FOR VIOLATING PILOTAGE LAWS.

1. Under chapter 88.16 RCW pilots of Canadian citizenship (who may not be licensed as pilots in this state) may not engage in the piloting of vessels between British Columbia and Puget Sound ports through those portions of the Haro Straits lying within the boundaries of the state of Washington.

2. The state of Washington or any agency thereof may not enter into an agreement with officials of the Canadian government providing for the distribution of responsibility for pilotage in such waters between American and Canadian pilots.

3. Penalties for failure to abide by the pilotage laws are contained throughout chapter 88.16 RCW and are to be enforced by regularly constituted county authorities.

December 12, 1962

Honorable Jerry Hagan
Director, Department of
Labor and Industries
General Administration Building
Olympia, Washington

Cite as: AGO 61-62 No. 181

Dear Sir:

By letter previously acknowledged you have requested the advice of this office on three questions which we paraphrase as follows:

(1) Under chapter 88.16 RCW may pilots of Canadian citizenship, and not licensed as pilots in this state engage in the piloting of vessels between British Columbia and Puget Sound ports through those portions of Haro Straits lying within the boundaries of the state of Washington?

(2) If not, may the state or any agency thereof, enter into an agreement with Canadian authorities providing for the distribution of responsibility for pilotage in such waters between American and Canadian pilots?

(3) If services of Canadian pilots under the above circumstances are [[Orig. Op. Page 2]] not allowed, what authorities are charged with enforcement of the law?

Your questions are answered in the following analysis.

ANALYSIS

At the outset it is deemed appropriate that the background of the controversy be examined. As we understand the facts, the question involved is the division of pilotage responsibility and fees for services rendered ships traveling between British Columbia and points in Puget Sound. On such movements, ships carry both American and Canadian pilots, one of whom is responsible for the safety of the ship at all times. The route of such vessels calls for operation in Haro Straits, which is partly in Washington and partly in Canadian waters. On northbound movements, about ninety percent of the voyage takes place in Washington waters. Southbound, on the other hand, calls for approximately fifty percent of the pilotage operation being conducted within the boundaries of this state.

For many years the American and Canadian pilots have had a "working agreement" calling for the transfer of the ship at a point near the Lime Kiln on San Juan Island. The effect of this arrangement has been to permit Canadian pilots who do not hold Washington pilots' licenses to ply their trade within the geographic limits of the state of Washington. In recognition of this agreement, ship owners have recently negotiated a formal contract with the Canadian pilots perpetuating the arrangement, and providing for pilotage fees from British Columbia points to the routine change-over point off Lime Kiln. American pilots are now claiming the right to pilot to the International Boundary, and to collect fees therefor.

For the purposes of this opinion, we will assume that no vessels are involved that are exempted by reason of RCW 88.16.070. Consequently, your questions call for construction of the remainder of chapter 88.16 RCW, and the possible influence of federal law covering the subject. Under the facts as above stated, it is our opinion that the following law applies:

I. By RCW 88.16.010 (chapter 18, Laws of 1935), the legislature created the board of pilotage commissioners in this state, and charged it with the responsibility of regulating pilotage and pilotage rates within the territorial limits of the state of Washington. However, pilotage on Puget Sound waters has been regulated since 1888.

The legislature has long established standards of eligibility for persons requesting issuance of a license to act as pilots on inland [[Orig. Op. Page 3]] waters. These standards are contained in RCW 88.16.090, which provides in pertinent part as follows:

"No person shall pilot any vessel subject to the provisions of this chapter on Puget Sound or adjacent inland waters unless he be appointed and licensed to pilot such vessels on said waters under and pursuant to the provisions of this chapter. No person shall be eligible to be appointed a pilot unless he is a citizen of the United States, over the age of twenty-five years and has been a resident of the state of Washington for at least three years immediately prior to the time of his appointment, . . ." (Emphasis supplied.)

Thus, under this statute, a citizen of Canada is disqualified from securing a pilot's license. He is also disqualified from performing pilot functions without such a license.

The terms of the statute are clear and unequivocal. Any doubt as to their validity rises only from a possible conflict with Article I, § 8, of the United States Constitution, which specifically reserves to Congress the right to regulate interstate and foreign commerce. Pilotage is an integral part of such commerce. Olsen v. Smith, 195 U.S. 332, 25 S.Ct. 52, 49 L.Ed. 224 (1904). This being the case, there arises a question of federal pre-emption, that is, whether Congress has occupied the field to a point where state regulation would be invalid.

The supreme court of Washington has had occasion to discuss the question of federal pre-emption. Reference is made to the case of State v. Ames, 47 Wash. 328, 92 Pac. 137 (1907), wherein the court was asked to construe the eligibility requirements of the prior statute. The court in discussing pre-emption states as follows, commencing at page 330:

"Taking up these contentions in their order, the first to be noticed is the claim that Congress has exclusive jurisdiction to regulate pilotage within the public waters of the United States. This contention is true only in a limited sense. Congress undoubtedly has paramount jurisdiction to regulate pilotage in the public waters, and in so far as it has sought to exercise that jurisdiction, its acts [[Orig. Op. Page 4]] upon the subject are supreme and supersede all state laws. But Congress has not attempted to regulate the entire subject of pilotage. So far it has confined itself to the regulation of pilotage as to vessels engaged in the coastwise or interior commerce of the country, making no provision at all as to pilotage of vessels engaged in strictly foreign commerce. The states, therefore, are free to enact laws regulating the pilotage of vessels engaged in foreign commerce, and the statute in question, in so far as it does this, conflicts with no Federal statute and is to that extent valid. . . ."

That the condition mentioned by the court still exists is revealed by reference to 46 U.S.C.A., § 211, which provides:

"Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose."

This statute has been on the books since 1789.

It is a long-established rule that in the regulation of interstate and foreign commerce the states may act within their respective jurisdictions until Congress sees fit to act, and when Congress does act, the exercise of its authority overrides all conflicting state legislation. The Minnesota Rate Cases, 230 U.S. 352, 33 S.Ct. 729, 57 L.Ed. 1511 (1913).

This rule also prevails in pilotage. The supreme court, with great uniformity, has held that, while Congress retains plenary jurisdiction over pilotage, until it acts, the states may regulate. See,Cooley v. Board of Wardens of Port of Philadelphia, et al., 53 U.S. 299, 12 How. 299, 13 L.Ed. 996 (1851); and Anderson v. Pacific Coast Steamship Co., 225 U.S. 187, 32 S.Ct. 626, 56 L.Ed. 1047 (1912), which involved pilotage on shipping moving between San Francisco and Puget Sound ports.

Since there has still been no action on the part of Congress in the prescription of pilotage services on ships engaged in foreign [[Orig. Op. Page 5]]commerce, the pilotage requirements of this state are fully effective as to that type of commerce. Question (1) is therefore answered in the negative.

II. Response to your second question requires an examination into the general authority of this state to enter into agreements with foreign nations. This again demands consideration of certain provisions of the United States Constitution. We believe the question to be resolved by reference to Article I, § 10, which provides in part:

"No State shall enter into any treaty, alliance, or confederation; . . .

". . .

"No State shall, without the consent of congress, . . . enter into any agreement or compact with another state, or with a foreign power, . . ."

While there are no specific pronouncements by the United States Supreme Court on the question of agreements between states and foreign powers with respect to pilotage, disabilities previously considered by the court would be equally applicable to any attempt to enter into such relationships. It was held in Holmes v. Jennison, 14 Pet. 538, 10 L.Ed. 579 (1840), that the language of the constitution with respect to agreements with foreign powers includes all manner of such agreements, whether oral or completely formal.

We find no treaty, compact or agreement presently in effect entered into by the governments of the United States and Canada regulating pilotage, except as it relates to the Great Lakes following opening of the St. Lawrence Seaway. See, United States Treaties and Other International Agreements, Vol. 12, Part 1, page 1033 (1961). Further, we find no grant of authority by the Congress of the United States that would permit the state of Washington or any agency thereof to enter into a compact or agreement with Canadian authorities on this particular subject. Consequently, we must conclude that the power does not exist, and your second question is also answered in the negative.

Should the pilotage problem become so acute as to require a solution along these lines, the question would have to be addressed to Congress or to the United States Department of State. The constitution does not contemplate self help by a state in dealing with foreign nations.

III. Your third inquiry relates to the question of enforcement.

[[Orig. Op. Page 6]]

Penalties for failure to abide by the pilotage laws are contained throughout chapter 88.16 RCW. It may be observed generally that violations are misdemeanors, and that guilt attaches to both the offending pilot and the ship owner. Under RCW 88.16.150, offenders are to be prosecuted in the county in which the violation occurs, or in case of doubt as to the specific locale of the offense, in any county through which the ship, boat, or vessel passes during the trip in which the violation took place. Since the board of pilotage commissioners is granted no power of arrest and all penalties are criminal in nature, it is incumbent upon regularly constituted county authorities to enforce the terms of the chapter, and prosecute violations thereof.

We trust the foregoing will be of some assistance to you.

Very truly yours,

JOHN J. O'CONNELL
Attorney General