U.S. Department of Homeland Security

United States Coast Guard

Director
National Vessel Documentation Center

792 T J Jackson Drive
Falling Waters, WV 25419
Staff Symbol: NVDC
Phone: (304) 271-2506
Fax: (304) 271-2405
Email: Timothy.V.Skuby@uscg.mil

16713/5/3
14 April 2011

Mr. Robert J. Alario
Managing Member
Alario & Associates, LLC
32 Moccasin Flower Trail
Landrum, SC 29356

Dear Mr. Alario:

By your letter dated February 21, 2011, (received at our office on March 10, 2011) you have asked that we make a determination as to whether certain proposed work to be done to the vessel M/V CADE CANDIES (the "Vessel") would affect its U.S. built status. As our correspondence with regard to this request is actually more extensive than that, we think it is appropriate at the outset to briefly review.

This matter was first brought to our attention by letter dated October 6, 2010, from David G. Dickman of Venable LLP, with a copy to you. Although that letter inexplicably couched its request as one for a new vessel determination pursuant to 46 C.F.R § 67.175, it was clear from context and subsequent correspondence that what was really sought was a ruling that the Vessel would be deemed U.S. built in accordance with 46 C.F.R. 67.97 notwithstanding the foreign manufacture of three items to be included in its construction (Schottel thrusters/nozzles, Kongsberg Dynamic Positioning units, and a foreign manufactured crane). As the first two of the listed items were to be assembled into the Vessel in the U. S., and as such did not impact the requirements of 46 C.F.R. § 67.97(b) (the provisions of 46 C.F.R. § 67.97(a) not being impacted either), the focus of subsequent correspondence quickly settled upon the third item, the foreign manufactured crane, as to which the owner was considering final installation (the foundation and base having been installed in the U.S.) in the foreign shipyard where it was manufactured.

We responded to Mr. Dickman by telephone, and then by e-mail dated October 12, 2010, and expressed concern and skepticism about the plan to install the crane in a foreign shipyard, referring him to (i) our determination in the case of Aker Philadelphia Shipyard (modules assembled overseas but required to be assembled into the intended vessels in the U.S.), dated May 24, 2006, as well as the Agency appeal affirming that decision dated November 15, 2006, and the decision in Philadelphia Metal Trades Council v. Allen, 2008 WL 4003380 (E. D. Pa., August 21, 2008) which found in favor of the Coast Guard's interpretation (together, referred to as "Aker")) and (ii) our determination in the case of the American Bridge/ Fluor Enterprises, Inc. Joint Venture (a derrick and sponsons manufactured overseas but required to be assembled into the intended barge in the U.S.) (referred to as "ABFJV").

Additional correspondence concerning the issue of the crane then ensued: e-mails from Mr. Dickman dated October 26 and 27, 2010, November 11, 2010, and December 6, 2010, responded to by our e-mails of October 27, 2010, November 19, 2010, and December 7, 2010. His e-mail of December 6, 2010, was the last we heard from Mr. Dickman on this matter, nor was he copied on any of your further correspondence. As you have noted, we exchanged e-mails directly with you on December 8 and 9, 2010, and then heard nothing further on this matter until receipt on March 10, 2011, of your letter dated February 21, 2011. As you have noted, we expressed great skepticism toward your position in that last e-mail exchange but indicated that we were "willing to go the extra mile in our review" in the event there was anything more you wished to bring to our attention. At the same time, however, we also indicated that we did not want to create unwarranted optimism in light of "our present views and views already expressed to Mr. Dickman."

From December 9, 2010, we did not hear anything further on this matter until March 10, 2011. At that time we acknowledged receipt of your February 21, 2011, letter and you indicated in reply on that same date that additional material would be forthcoming. By your letter of March 25, 2011, the last correspondence on this matter, you transmitted a stability analysis of the Vessel.

At the end of the day the basic facts at issue here are not particularly complex and the principle to be applied is straightforward --- whether a deck crane manufactured abroad for the intended purpose of inclusion on a vessel under construction in the U.S. (where the base and foundations had already been constructed) may be installed on the vessel in that foreign port, rather than in the U.S. shipyard, without impacting the provision of 46 C.F.R. § 67.97(b) which requires that, to be considered built in the United States, the vessel must be "assembled entirely" in the United States.

In support of your position, you have seized upon language from the ABFJV determination which, in discussing the foreign manufactured derrick and sponsons at issue there, stated as follows:

> "Based upon the conclusion [by the Naval Architecture Division] that the derrick and sponsons are integral to the operation of the barge, for which operation it is clearly and purposefully being built, it is our determination that the attachment or connection of these components to the barge outside of the United States would cause the barge to be deemed not to have been 'assembled entirely in the United States'"

Based upon that language you then argue, and have submitted correspondence from Lloyd's in which it is concluded, that as the crane does not perform an "essential role" for the Vessel, it should be exempt from that statutory and regulatory requirement based on the language above --- ironically, a determination which ultimately held that the "assembled entirely" requirement **did** apply to the foreign-manufactured derrick and sponsons in that case.

We also note, by the way, that that same Lloyd's correspondence commented as follows:

"Whether the lifting appliance is fitted now or at a later date will not affect the class assignment, or in other words, change the ship's essential role. However stability aspects should be borne in mind; if it is delivered without the lifting appliance then stability calculations and tests should reflect this configuration. If the crane is added at a later date then stability will need to be reassessed."

In other words, as we read it, the affixing of the crane to the Vessel, which was indisputably built for and intended from the outset to form a part of the Vessel, and for which the bases and foundations had already been prepared, would also impact the overall stability of the Vessel and would require that its stability be reassessed and recalculated.

We think your argument draws an overly expansive conclusion based solely upon the slim read of a negative inference from language of a prior determination --- which determination, in the end, found that the appliances in that case had to be installed on that barge in the United States.* Furthermore, such a finding as to a crane was not unique to the ABFJV determination. See also, determination dated June 2, 2004, (foreign designed and manufactured crane delivered in components for final assembly and installation on a barge in the United States) issued to Lemle & Kelleher, LLP, which determination was later incorporated into the Administrative Record in the Aker litigation.

We think that, ultimately, Aker provides the proper guidance here.

In Aker we concluded, a conclusion later sustained by Court decision, that the phrase "assembled entirely" in 46 U.S.C. § 67.97(b) did **not** require that the assembly, or pre-assembly, of every component, appliance, appurtenance or element of outfit that goes into the final assembly of a vessel must occur in the United States. Rather, we concluded that, as the statute and regulation refer to the assembly of the vessel, not the assembly of all of its constituent parts, the focus should be on the definition of "assembly" as it pertains to the whole of the structure, the vessel itself, not its individual parts. Thus, the Agency decision on appeal in Aker stated the following:

"This interpretation is consistent with prior rulings not solely confined to the issue of modules. Many items of equipment and outfit, including entire propulsion systems, are manufactured, or 'assembled', foreign but have not thereby been precluded from use in the 'assembly' of vessels in the United States as a condition of those vessels' compliance with this regulatory requirement. This interpretation has also been applied to the feed water filter tank to which you make reference in argument. The fact that this unit was manufactured, or underwent 'pre-assembly', foreign does not, in our interpretation of this regulatory requirement, foreclose the possibility that it, like many other items of outfit or equipment,

*We acknowledge that a subsequent determination related to ABFJV by the then-Director of the NVDC, dated January 3, 2008, permitted that vessel to install the derrick and sponsons in a foreign port, as a foreign rebuilding, provided that the barge had first been first delivered and put into commercial operation without them. However, as we stated to Mr. Dickman when he raised that issue, "the creative interpretation engaged in there is, upon further reflection by the NVDC, not one we are inclined to accept as warranting support for a pattern going forward, for many of the reasons your own comments described." In any event, your request does not raise this question.

may be incorporated into vessels still deemed to have been 'assembled entirely' in the United States."

However, it continued:

> **"We note, by the way, that your appeal does not contest the fact that all of these items will be affixed to the Tankers, and final connections made, during their construction in the United States..."** (emphasis added)

And finally:

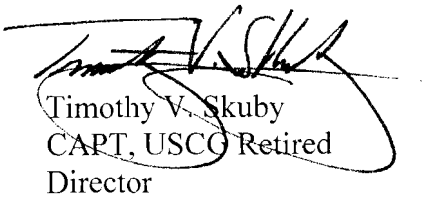
> "The fact, as you have argued, that some of this manufacturing or 'pre-assembly' work could, or might, have been done in the United States is also not the salient issue in the reasonable administration of this regulatory requirement. To make it so might well require, if taken as literally as your argument would permit, that every nut or bolt incorporated into a vessel, or into any of its outfit or equipment, undergo 'assembly', or 'pre-assembly', in the United States. **The concept of vessels deemed to have been 'assembled', even 'assembled entirely', in the United States, has never been accorded that breadth.** (emphasis added)

We view our approach to the matter before us as the mirror image of, or perhaps as a logically necessary corollary to, our decision in Aker. Having foreshortened the application of the phrase "assembled entirely" as it would have been applied there to parts or components, in favor of an application of that phrase which is confined to the assembly of the vessel itself, we believe that the phrase must then be accorded the full breadth of its plain meaning when applied to the vessel itself --- in order to carry out the legislative intent discussed at length in the Aker Court decision. Thus, where an aspect of the assembly of the vessel is implicated, it, meaning the entirety of the vessel, including the incorporation of its various parts, components, appurtenances and appliances, must be "assembled entirely" in the United States.

There really can be no reasonable argument in this case, and has been none, that the very substantial crane at issue here, which was manufactured for this Vessel, appears on drawings of this Vessel dated as early as October, 2007, bases and foundations for which had been constructed in the U.S. shipyard, and the installation of which would require new stability tests of the Vessel to be done, is not, and was not intended from the outset to be, an appliance of, or some part of the entirety of, the Vessel. Rather, drawing upon a negative inference from the language of the ABFJV determination, you only argue that it does not perform an "essential role" for the vessel. We decline to foreshorten the plain meaning of the "assembled entirely" requirement in such a manner and, by so doing, to open it up to a potentially endless list of other unforeseen and unintended but, arguably, similarly "non-essential" other items said to be exceptions to that requirement.

Consequently, we conclude that installation of the foreign-manufactured crane into the Vessel other than in the United States would cause it to forfeit its status as U.S. built.

Sincerely,



Timothy V. Skuby
CAPT, USCG Retired
Director