U.S. Department of Homeland Security

United States Coast Guard

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16713/5/2
October 28, 2011

H. Clayton Cook, Esq.
Seward & Kissel LLP
1200 G Street, N.W.
Washington, D.C. 20005

Dear Mr. Cook:

We are writing to you as counsel for Grand River Navigation Company, Inc. and Rand Logistics, Inc. and in response to your letter of August 4, 2011. In that letter you requested a preliminary determination pursuant to 46 C.F.R. § 67.177(g) with regard to certain work to be done to the barge MARY TURNER (ex- EROL BEKKER), Official Number 646730 (the "Vessel" or "Barge").

By your letter you have reported that the Vessel, originally built as Hull 728 by Bay Shipbuilding Co., of Sturgeon Bay, Wisconsin, is being purchased by Grand River Navigation Company, Inc. (the "Owner"), a member of the Rand Logistics, Inc. group of companies. The Owner proposes to have certain work done to the Vessel in Mexico (called the "Mexico Alterations") as well as what you have described as some related, but independent, alterations which will take place in the United States (called the "United States Alterations").

The United States Alterations are identified by your letter as items 7 and 8 (of 8 items) and are said to consist of the following:

> "7. Removal of the existing unloading boom; and
>
> 8. Installation of a 250-foot boom with associated luffing and slewing equipment."

In response to our request for further clarification with regard to the new boom you responded by e-mail dated August 11, 2011, as follows:

> "The boom is a salvaged boom from the JOSEPH H. FRANTZ which was scrapped in 2005. The word "new" is actually a misnomer; the boom was actually built in 1965 by the Christy Corporation in Sturgeon Bay, Wisconsin. This boom is only "new" to the Barge MARY TURNER, it is actually 36 years (or so) old."

You further indicated that "(T)he boom is existing, and is currently the property of the Rand Corporation, and is stored at one of their facilities."

Before addressing the Mexico Alterations and the implications of that work for the vessels continued entitlement to coastwise privileges, we first address certain issues that are or could be raised by the proposed installation of the boom in the United States and the bifurcated nature of this project between work proposed to be done in Mexico and work proposed to be done in the United States.

We note that the second proviso to the Jones Act (formerly codified at 46 U.S.C. App. § 883 and currently recodified at 46 U.S.C. §§12101(a) and 12132(b)) provides, at 46 U.S.C. § 12101(a), as follows:

> "Rebuilt in the United States. – In this chapter, a vessel is deemed to have been rebuilt in the United States only if ***the entire rebuilding***, including the construction of any major component of the hull or superstructure, was done in the United States." (emphasis added)

But despite the apparent breadth of that provision and the emphasized phrase it has never been the case that all rebuilding work must be performed in the United States. American Hawaii Cruises v. Skinner, 713 F.Supp. 452 (D.D.C. 1989), appeal denied 893 F.2d 1400 (U.S. App. D.C. 1990). Nor must work done in a U.S. shipyard, even if related to an overall project which includes certain work done in a foreign shipyard, be included in applying the regulatory tests of 46 C.F.R § 67.177 to that foreign work when determining whether a vessel has or has not been rebuilt foreign. Shipbuilders Council of America v. United States Department of Homeland Security (M/V MOKIHANA), Memorandum Opinion of Judge T.S. Ellis, III dated December 3, 2009 (U.S.D.C, E.D.V.A. (Alexandria Division)).

In this instance we note the following as to the proposed United States Alterations:

First, to even be considered under either of the regulatory tests set forth in 46 C.F.R. § 67.177 (the "major component test" of subparagraph (a) and the "considerable part test" of subparagraph (b)) the boom in question would need to be found to possess the structural characteristics which are the precondition to be included within the definition of either "hull" or "superstructure". However, neither the boom nor its associated electrical/mechanical systems would be so included, as confirmed by the report of the Coast Guard Naval Architects Division ("NAD") referenced below.

Second, the "new" boom was actually built in the United States and, as such, would not fall within the category of a "major component...not built in the United States (which) is added to the vessel" (46 C.F.R. § 67.177(a)), even if it were deemed to be part of "hull" or "superstructure".

And third, steel work done in the United States, whether by removal or addition, and whether or not considered to be related to the same overall "project" as work done overseas, has not and need not (the M/V MOKIHANA decision) be considered when applying the "considerable part test" of 46 C.F.R. § 67.177(b). Again, this would be the case even if the boom were deemed to be part of "hull" or "superstructure".

For these reasons, we find no need to further consider any of the United States Alterations in the context of this determination.

We turn now to consideration of the Mexico Alterations. You have described those alterations as consisting of items 1 through 6 (of 8 items), as follows:

> "1. Installation of a new ballast system, ballast pump machinery rooms aft, ballast tank level and pumping automation;
>
> 2. Installation of a 1000-kilowatt bow thruster and controls;
>
> 3. Fabrication and installation of 4 cargo-hold screen bulkheads;
>
> 4. Modifications of electrical generator and switchboard;
>
> 5. Lowering of current 8-foot-high hatch coamings back down to original as-constructed 15-inch-high coamings; (and)
>
> 6. Dry-docking and 5-year survey."

Your letter estimated the lightship steelweight of the Vessel by three different methods (yielding an average of 4,805.06 long tons) and reported calculations that "the Mexico Alterations...fall within the range of 5.69 percent to 5.73 percent of the existing steelweight of the Vessel." In addition your letter, and its attachments, reported and documented that "no single component built separate from and added to the Vessel outside of the United States will amount to more than 1.5 percent of the existing steelweight of the Vessel".

We referred your letter and its attachments to the NAD for review and analysis and will refer to their report, attached hereto as Exhibit A, in further discussions in this letter.

Following our request for clarification and your response of August 24, 2011, it was the conclusion of the NAD that the more accurate discounted lightship steelweight which should be used for the purpose of this determination is 4,796.53 long tons.

However, it was also concluded that:

(i) Your estimate that the Mexican Alterations would constitute between 5.69% and 5.73% of the Vessel's discounted lightship steelweight incorrectly included certain component weights that would not be considered part of the hull or superstructure and that the actual weight, and percentage, attributed to items that would be so considered was 21.4 long tons, or 0.45%. Moreover, as the total steel weight percentage of such items is, itself, well below the applicable 1.5% threshold for classification of an item as a "major component", it is also the case that no single item or component of steel added would approach, let alone exceed, that threshold.

(ii) However, after further clarification in response to our request, the amount of removed steel from the hatch coamings presented a different picture than originally appeared to be the case. As those hatch coamings are subject to load line regulations they are considered to be part of the hull or superstructure, for purposes of this determination. Moreover, following review of the clarification requested, the total weight of the removed steel from those 14 hatch coamings was estimated to be 95.43 long tons, or 2.0%.

In applying the "considerable part" test of 46 C.F.R. § 67.177 it has been the well-established practice of the Coast Guard to count the greater of steel added or steel removed. In this case the steel removed, at 2.0%, constitutes the greater of the two and is well below the regulatory limit of 7.5%. In fact, in this case even the aggregation of steel removed and steel added would fall well below that limit.

Consequently, for all the reasons set forth herein, we conclude that neither the United States Alterations, nor the Mexico Alterations, nor even the two considered together, will result in the MARY TURNER being deemed to have been rebuilt foreign and such alterations will not jeopardize the Vessel's eligibility for a coastwise endorsement under 46 U.S.C. § 12112.

We ask you to please confirm to this office in writing following completion of the work that the work done to the Vessel is as you have described it in your submissions in support of this determination.

Sincerely,

Timothy V. Skuby
CAPT, USCG Retired
Director