

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

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CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

SHIPBUILDERS COUNCIL OF)
AMERICA, INC.)
A Virginia Non-Stock Corporation,)
Steven W. Silver, r/a)
2300 Clarendon Blvd., Suite 2010)
Arlington, Virginia 22201)

CROWLEY MARITIME CORP.)
9487 Regency Square Blvd.,)
Jacksonville, Florida 32225)

OVERSEAS SHIPHOLDING)
GROUP, INC.)
666 Third Avenue)
New York, New York 10017)

Plaintiffs,)

v.)

Case No. 1:07cv665
GBL/BRP

UNITED STATES DEPARTMENT OF)
HOMELAND SECURITY)
425 Murray Lane, Building 410)
Washington, D.C. 20528)

UNITED STATES COAST GUARD)
2100 Second Street SW)
Washington, D.C. 20593)

NATIONAL VESSEL)
DOCUMENTATION CENTER)
792 T.J. Jackson Drive)
Falling Waters, WV 25419)

Defendants.)

**COMPLAINT FOR REVIEW OF AGENCY ACTION AND FOR
DECLARATORY AND INJUNCTIVE RELIEF**

JURISDICTION AND VENUE

1. This court has jurisdiction under 5 U.S.C. § 702, 28 U.S.C. §§ 1331, 1333, 1337, 1361, 1651 and 2201-02, 46 U.S.C. §§12101 *et seq.*, and 46 U.S.C. §§ 55301 *et seq.* Venue is proper under 28 U.S.C. § 1391(e).

NATURE OF THE CASE

2. This is an action for review of the issuance of a certificate of documentation with a coastwise endorsement by the National Vessel Documentation Center (“NVDC”), a unit of the United States Coast Guard (“Coast Guard”), authorizing the Motor Tanker SEABULK TRADER (“M/T SEABULK TRADER”) to engage in U.S. domestic trades even though it has had double sides added in a foreign shipyard to make it a double-hulled vessel. Since the beginning of this Nation, our domestic shipping trades (or “coastwise” trades) have been reserved to vessels built in the United States in order to provide a supply of suitable vessels and trained mariners to promote the commercial interests of the country, and to serve as a military auxiliary in time of war or national emergency. Consistent with this rule, a vessel that has obtained coastwise trading privileges and is later rebuilt must be rebuilt entirely in the United States in order to retain coastwise trading privileges.

3. The U.S. flag oil tanker fleet is currently undergoing a major renewal as a result of the Oil Pollution Act of 1990 (“OPA 90”), 46 U.S.C. §§ 3703a *et seq.* To improve environmental protection, OPA 90 phases out the use of single-hulled vessels to carry oil in U.S. waters, and requires use of double-hulled vessels. Some companies, including two of the plaintiffs in this action, are renewing their fleets in compliance with U.S. law by building or rebuilding double-hulled vessels in U.S. shipyards. They are

investing billions of dollars in construction orders for environmentally advanced vessels, orders that are helping to revitalize America's commercial shipbuilding industry.

4. Other companies, however, are skirting the law by constructing double hulls on existing vessels in foreign shipyards. They obtained preliminary determinations in confidential proceedings before the NVDC stating that such work would not disqualify the vessels from U.S. coastwise privileges. On May 9, 2007, NVDC issued a certificate of documentation with a coastwise endorsement to Seabulk Energy Transport Inc. covering the M/T SEABULK TRADER. The M/T SEABULK TRADER had just departed a shipyard in the People's Republic of China, where extensive work was done to its hull to convert (or retrofit) the vessel from a single-hulled to a double-hulled configuration. NVDC's issuance of the certificate of documentation with a coastwise endorsement permits the M/T SEABULK TRADER to operate in U.S. domestic trades.

5. The Coast Guard's decision to issue the coastwise endorsement and thereby approve the rebuilt vessel for continued use in the coastwise trades causes substantial harm to companies that will be forced to compete with the M/T SEABULK TRADER while having incurred the much higher costs of complying with the law. It will have far reaching consequences to the entire U.S. flag fleet and the U.S. shipbuilding industry as it is applied in other cases. Because the decision is arbitrary, capricious, an abuse of discretion, contrary to law, and issued without observance of procedures required by law, Plaintiffs seek in this action an order declaring it to be invalid, vacating it, and enjoining the Coast Guard from acting in further reliance on it.

THE PARTIES

6. Plaintiff SHIPBUILDERS COUNCIL OF AMERICA, INC. ("SCA") is a Virginia corporation. SCA is the largest national trade association representing the U.S. shipyard industry. SCA represents 36 members that own and operate over 100 shipyards in the United States. Members of SCA have the capacity and capability to perform the work necessary to build or rebuild double-hulled tank vessels sufficient to meet U.S. domestic transportation requirements.

7. Unless reversed, the Coast Guard's action will seriously and adversely affect the interests of U.S. shipyards and shipyard employees, including members of the Plaintiff SCA, in that they, (A) have lost and, based on the precedent established by this action, will lose the right to compete solely with U.S. shipyards to perform any double-hull retrofitting work, and (B) may lose orders for newly-constructed tank vessels to the extent that demand in the domestic tanker industry is met with tank vessels that have been rebuilt in foreign shipyards.

8. Plaintiff CROWLEY MARITIME CORP. ("Crowley") is a Delaware corporation. Crowley is one of the leading American shipping companies. It provides a diversified array of marine services, including domestic and international container shipping, logistics, and marine contract and salvage operations. Crowley is also one of the largest independent operators of petroleum tank barges and tankers in the United States. Crowley's tank vessels include self-propelled tank ships, articulated tug and barge units ("ATBs") (specially designed vessels which consist of a tank barge that has been notched in the aft section, and a high-powered tugboat that connects to the barge in the

notch and pushes it through the water) and conventional tug and barge units (barges that are towed behind the tug attached with a cable).

9. Four tank vessels in Crowley's fleet are currently configured as double-bottomed, single-sided vessels. Beginning in 2012, these vessels will not comply with the requirements of the OPA 90 that they be fully double-hulled. Crowley determined that these vessels would lose their domestic trading privileges if they were retrofitted to meet OPA 90 requirements in a foreign shipyard.

10. Crowley is in the process of building by 2010 a total of at least fourteen (14) new ATBs entirely in U.S. shipyards at a total cost of about \$1 billion. Crowley deploys these and other tank vessels in its fleet to carry petroleum products throughout U.S. domestic commerce. Crowley's vessels meet the requirements of U.S. law, and will compete directly with the M/T SEABULK TRADER and other similarly situated vessels. Based on the Coast Guard's action and the resulting precedent allowing the conversion in foreign shipyards of U.S. flag tank vessels to double hull configurations, the M/T SEABULK TRADER and similar vessels will operate at substantial savings over competing Crowley vessels.

11. Plaintiff OVERSEAS SHIPHOLDING GROUP, INC. ("OSG") is a Delaware corporation with headquarters in New York. OSG is the second largest independent tanker owner in the world, with a fleet of more than 100 vessels, including approximately 25 U.S. flag tank vessels that operate in U.S. coastwise trades. OSG's fleet includes self-propelled tank vessels and ATBs. OSG subsidiary OSG Ship Management, Inc. ("OSGM") operates and technically manages the U.S. flag vessels.

12. OSG owns eight tank vessels (ATBs) that it was required to retrofit with complete double-hull configurations to comply with OPA 90. Seven of those vessels were retrofitted to fully double-hulled configuration in a U.S. shipyard, and the eighth is currently under construction in a U.S. shipyard. Performing such work in a U.S. shipyard is substantially more expensive than in a shipyard in the People's Republic of China, and OSG thus has incurred, and is continuing to incur, substantial additional costs as a result of the requirement of U.S. law that tank vessels be retrofitted in a U.S. shipyard in order to retain domestic trading privileges.

13. In addition, OSG has already built new tank vessels, and is in the process of building additional new tank vessels in U.S. shipyards to replace U.S. flag vessels that are being phased out of service pursuant to OPA 90, including both self-propelled vessels and ATBs. OSG's tank vessels meet the requirements of U.S. law, and will compete directly with M/T SEABULK TRADER and other similarly situated vessels.

14. Unless reversed, this action will seriously and adversely affect the interests of companies that own and operate tank vessels that have been or will be built or rebuilt entirely in the United States, including Plaintiffs Crowley and OSG, in that said owners will be forced to compete with a tank vessel that has been rebuilt at substantially lower costs in a foreign shipyard and allowed to operate in U.S domestic trades contrary to U.S. law.

15. Defendant U.S. DEPARTMENT OF HOMELAND SECURITY is a department of the Executive Branch of the United States Government, responsible for the administration of the applicable vessel documentation statutes and the regulations promulgated thereunder.

16. Defendant U.S. COAST GUARD is an agency in the U.S. DEPARTMENT OF HOMELAND SECURITY, responsible for the administration of applicable vessel documentation statutes, and the regulations promulgated thereunder.

17. Defendant NATIONAL VESSEL DOCUMENTATION CENTER (“NVDC”) is the organizational unit designated by the Commandant of the United States Coast Guard to process vessel documentation transactions and maintain vessel documentation records for vessels documented and registered under the laws of the United States, and is responsible for the administration of the applicable vessel documentation statutes, and the regulations promulgated thereunder.

Relevant Statutory and Regulatory Provisions

A. The Jones Act

18. The preamble to the law reserving domestic maritime trade to U.S. flag vessels, as codified without intended substantive change by Public Law 109-304 (Oct. 6, 2006), provides in part:

(a) OBJECTIVES. – It is necessary for the national defense and the development of the domestic and foreign commerce of the United States that the United States have a merchant marine –

(1) sufficient to carry the waterborne domestic commerce and a substantial part of the waterborne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of the waterborne domestic and foreign commerce at all times;

(2) capable of serving as a naval and military auxiliary in time of war or national emergency;

(3) owned and operated as vessels of the United States by citizens of the United States;

(4) composed of the best-equipped, safest, and most suitable types of vessels and manned with a trained and efficient citizen personnel; and

(5) supplemented by efficient facilities for building and repairing vessels.

(b) POLICY. – It is the policy of the United States to encourage and aid the development and maintenance of a merchant marine satisfying the objectives described in subsection (a).

46 U.S.C. § 50101.

19. In furtherance of this policy, U.S. law requires commercial vessels to have certificates of documentation that carry endorsements identifying the trades in which each vessel may operate. In order to provide services in the U.S. domestic trades, a vessel must have a certificate of documentation with a coastwise endorsement. Section 27 of the Merchant Marine Act, 1920 (commonly referred to as the “Jones Act”), as codified, thus provides:

REQUIREMENTS.—Except as otherwise provided in this chapter or chapter 121 of this title, a vessel may not provide any part of the transportation of merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel—

(1) is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and

(2) has been issued a certificate of documentation with a coastwise endorsement under chapter 121 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.

46 U.S.C. § 55102(b).

20. A vessel may be issued a coastwise endorsement only if the vessel “was built in the United States”, or meets other criteria not relevant to this action. 46 U.S.C. § 12112(a)(2).

21. A coastwise qualified vessel loses its eligibility to provide services in the coastwise trade if that vessel is rebuilt outside the United States.

A vessel eligible to engage in the coastwise trade and later rebuilt outside the United States may not thereafter engage in the coastwise trade.

46 U.S.C. § 12132(b). For purposes of this provision:

... 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.

46 U.S.C. § 12101(a).

22. The provisions of current law requiring a coastwise vessel to be rebuilt in the United States to retain its coastwise privileges are a recodification, without intended substantive change, of the Second Proviso of the Jones Act, which read:

That no vessel which has acquired the lawful right to engage in the coastwise trade, by virtue of having been built in or documented under the laws of the United States, and which has later been rebuilt, shall have the right thereafter to engage in the coastwise trade, unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel, is effected within the United States, its Territories (not including trust territories), or its possessions.

46 U.S.C. App. § 883, codified by Pub. L. 109-304 (Oct. 6, 2006).

B. OPA 90

23. OPA 90, enacted primarily in response to the EXXON VALDEZ oil spill in 1989, made extensive changes in the laws governing the transportation of oil by tank vessels in United States waters. The changes were designed to make the shipment of crude oil and refined oil products (“oil cargoes”) in the United States environmentally safer.

24. Among the key changes mandated by OPA 90 was to phase out the shipment of oil cargoes in single-hull vessels in U.S. waters. *See* 46 U.S.C. §§ 3703a(c)(3),(4). The phase-out schedule began in 1995 and ends in 2015. Three factors determine the phase-out deadline applicable to a specific single-hull vessel: (a) its age; (b) its size (or gross tonnage); and (c) its hull configuration. A single-hull vessel with double-sides or a

double-bottom may have a maximum of five years more service life than it would otherwise have based on its age and size.

25. Because of the OPA 90 phase-out schedule, owners of tank vessels and U.S. shipyards have had to make important investment decisions. In making these decisions, U.S. shipyards and tank vessel owners have had to assess the continuing demand for domestic transportation of oil cargoes, and the extent to which the demand will be met in various ways. Options to meet the demand include transporting oil using existing or new double-hull tank vessels, single-hull vessels that have been retrofitted with double hulls, or in some other manner (such as by pipelines or imports of refined oil products).

26. Owners of U.S. shipyards, including members of Plaintiff SCA, have invested hundreds of millions of dollars (in some cases supported by public funding) to renovate their facilities in order to have the capability of building modern, double-hull tank vessels.

27. Owners of single-hull tank vessels for which the OPA 90 deadline is approaching have three basic options: (a) scrap the vessel; (b) use the vessel to carry cargoes not covered by OPA 90 (such as grain cargoes, or oil cargoes outside the United States); or (c) convert (or retrofit) the vessel to a double-hulled configuration. In choosing among these options, a key consideration is the shipyard at which the retrofit work would be performed. While retrofitting a vessel in a U.S. shipyard would permit the vessel to maintain domestic trading privileges, it would also be substantially more expensive than performing the work in many foreign shipyards, including those in the Peoples' Republic of China.

28. In making their investment decisions, Plaintiffs relied upon U.S. law and Coast Guard rules that prohibit tank vessels that have been retrofitted with a double-hull in a foreign shipyard from retaining U.S. domestic trading privileges.

C. Coast Guard Regulations

1. Vessel Documentation – Foreign Rebuild Regulations

29. The Coast Guard regulations implementing the vessel documentation provisions above are promulgated at 46 C.F.R. § 67.177. They provide in relevant part:

A vessel is deemed rebuilt foreign when any considerable part of its hull or superstructure is built upon or substantially altered outside of the United States. In determining whether a vessel is rebuilt foreign, the following parameters apply:

(a) Regardless of its material of construction, a vessel is deemed rebuilt when a major component of the hull or superstructure not built in the United States is added to the vessel.

(b) For a vessel of which the hull and superstructure is constructed of steel or aluminum –

(1) A vessel is deemed rebuilt when work performed on its hull or superstructure constitutes more than 10 percent of the vessel's steelweight, prior to the work, also known as discounted lightship weight.

(2) A vessel may be considered rebuilt when work performed on its hull or superstructure constitutes more than 7.5 percent but not more than 10 percent of the vessel's steelweight prior to the work.

(3) A vessel is not considered rebuilt when work performed on its hull or superstructure constitutes 7.5 percent or less of the vessel's steelweight prior to the work.

30. The NVDC has confirmed in several rulings that a vessel is deemed to have been rebuilt: (a) when a major component of the hull or superstructure not built in the United States is added to the vessel, or (b) when relevant work (that is, work performed on its hull or superstructure) constitutes a considerable part of the hull or superstructure.

31. With regard to the first test, if a major component of the hull or superstructure, not built in the United States, is added to the vessel, the vessel will be determined to have been rebuilt regardless of the material of construction. The NVDC has consistently held that foreign components amounting to less than 1.5% of a vessel's steel weight are not considered "major." It has also held that additions to the hull or superstructure clearly fall within the definition of foreign rebuild, and allowed only small amounts of steel work to be performed on the hull or superstructure in foreign shipyards without jeopardizing the vessel's coastwise privileges.

32. With regard to the second test, the NVDC has applied the percentage limitations in 46 C.F.R. § 67.177(b) in determining what constitutes a "considerable part" of the hull or superstructure.

33. In applying these percentage limitations, the NVDC has ruled in some instances that both the steel to be added and the steel to be removed in the foreign shipyard must be counted. In later instances, the NVDC has ruled that it would count only the greater of the amount of steel added or steel removed, but not both. The NVDC has given no explanation for these inconsistent rulings or change in position.

34. The NVDC has held that the steel weight of work performed in a foreign shipyard above the 7.5% threshold but below the 10% threshold would not disqualify the vessel if there were no additions or modifications to the vessel. The NVDC has also held that components constituting as little as 1.5% of a vessel's steel weight that are added to the hull or superstructure of the vessel in a foreign shipyard may constitute a foreign rebuild and disqualify the vessel from retaining coastwise privileges.

35. The entire rebuilding of a vessel must be performed within the United States. The NVDC has acknowledged that it must consider the nature of a project as a single project, or as differentiated projects, in view of the entire rebuilding requirement when work is to be performed in both United States and foreign shipyards.

2. OPA 90 – Tank Vessel Retrofit Regulations

36. On September 21, 1990, shortly after OPA 90 was enacted, the Coast Guard issued Navigation and Vessel Inspection Circular ("NVIC") 2-90, a copy of which is attached hereto as Exhibit 1. The purpose of NVIC 2-90 was "to provide guidance to the marine industry for the construction of new tank vessels, and the retrofitting of existing tank vessels with double hulls as required" by OPA 90.

37. With respect to retrofitting vessels, NVIC 2-90 stated in relevant part:

The retrofitting of double hulls, double sides, or bottoms within or upon a vessel will be considered to be a rebuilding within the meaning of 46 C.F.R. 67.27-3.

NVIC 2-90, paragraph 4.c. The regulation referenced (46 C.F.R. 67.27-3) was moved without change to 46 C.F.R. § 67.177 when Part 67 was reorganized in November 1993. See 58 Fed. Reg. 60,256 (Nov. 15, 1993).

38. In September 1992, the Coast Guard issued an Interim Final Rule ("IFR") providing detailed construction standards for vessels to meet OPA 90 double hull requirements. 57 Fed. Reg. 36,222 (1992). The IFR amended 33 C.F.R. Part 157, concerning vessel construction, but did not amend 46 C.F.R. Part 67, concerning vessel documentation. The Coast Guard issued "Change 1" to NVIC 2-90, a copy of which is attached to and included with Exhibit 1, to account for the changes in construction standards, but did not alter the NVIC with respect to the retrofitting issues that are the subject of this action. NVIC 2-90 has not been further amended or withdrawn.

