

U.S. Department of
Homeland Security

United States
Coast Guard



Director
National Vessel Documentation Center

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16713/5/2
October 23, 2007

Kevin C. O'Rourke, Esq.
Senior Vice President and General Counsel
Matson Navigation Company
555 12th Street
Oakland, California 94607

Dear Mr. O'Rourke:

We refer to your letter of August 13, 2007 whereby you have requested a final rebuilding determination with regard to the vessel M/V MOKIHANA, official number 655397 (the "Vessel"). Before reaching the merits of your request we think that it is appropriate to briefly summarize the events leading to this request.

I. SUMMARY OF EVENTS PRECEDING REQUEST

A. The Preliminary Determination

By letter dated June 15, 2004, which was later supplemented by subsequent correspondence from Herbert Engineering Corp., Matson sought a preliminary rebuilding determination with regard to certain work proposed to be performed in a foreign shipyard to three Matson vessels, one of them the Vessel at issue here. In order to accommodate the demand for rolling cargo between Hawaii and the Mainland, the proposal was to convert the aft end of one or more of the vessels for that purpose, with a portion of the work to be done in China (part of the upper deck and all decks, platforms and side shell below the upper deck, including associated outfitting and mechanical/electrical systems) and the balance in the United States (the remainder of the upper deck and the automobile garage, including associated outfitting and mechanical/electrical systems). The steelweight of the relevant work to be done in China, excluding non-structural work, was said to be 815.5 long tons, comprising 6.7% of the steelweight, or discounted lightship weight, of the vessels prior to the work.

Upon review of the information submitted, and application of the regulatory standards set forth at 46 C.F.R. § 67.177 in accordance with past practice, we concluded, and advised you by our letter of June 23, 2004, that the work described in your submission, if performed in China, would not result in the loss of coastwise privileges of those vessels under the Second Proviso of the Jones Act. We further cautioned you in that letter that, if at the conclusion of the project the steel work performed in China exceeded 907 long tons, representing 7.5% of the discounted lightship weight of the vessels prior to the work having been performed (the standard set forth at 46 C.F.R. § 67.177(b)(3) and below which a vessel constructed of steel is deemed not to have been rebuilt), it would be necessary to submit an application for a final determination in accordance with 46 C.F.R. § 67.177(e). By subsequent letter dated November 17, 2005, however, we revised those instructions and requested that you send written confirmation upon completion of the work in China as to each of the vessels even if the steel work performed did not exceed the threshold established by our letter of June 23, 2004 and submit an application for a final determination in the event that threshold was exceeded.

B. The Litigation in the United States District Court for the Eastern District of Virginia

On November 17, 2006, while the work on the Vessel was still in progress in China and, consequently, before confirmation of the work done or an application for a final determination had been submitted, the Coast Guard (together with the U.S. Department of Homeland Security and the National Vessel Documentation Center) were served with a complaint filed in the United State District Court for the Eastern District of Virginia (Alexandria Division), Civil Action No. 1:06-cv-01297-TSE-LO, on behalf of Shipbuilders Council of America, Inc. and Pasha Hawaii Transport Lines LLC (the plaintiffs hereinafter referred to as the "Opponents").

By Memorandum Opinion of U.S. District Judge T.S.Ellis, III dated April 6, 2007, and subsequent Order, the Coast Guard's Motion to Dismiss the Complaint for lack of subject matter jurisdiction (in that the June 23, 2004, letter issuing a preliminary rebuilding determination did not constitute final agency action) was granted.

C. Events Subsequent to Dismissal of the Litigation

By your letter dated April 13, 2007, you informed us that the completion of the China phase of the Vessel's modification project had resulted in a change in gross and net tonnage. Consequently, your letter attached a completed CG-1258 for exchange of the Vessel's Certificate of Documentation for a new Certificate of Documentation which would reflect the Vessel's new tonnages. An International Tonnage Certificate issued by the American Bureau of shipping was also attached.

That letter indicated that Matson was requesting only a registry endorsement to the Certificate of Documentation, not a coastwise endorsement, and that Matson would seek a coastwise endorsement after the final phase of the project was completed in a U.S. shipyard and before the Vessel re-entered the domestic trade. That final phase was said to be scheduled to begin on or about May 14, 2007 in a shipyard in Alabama.

Because the CG-1258 submitted on behalf of the Vessel did not request a coastwise endorsement, and you had not yet submitted a request for a final rebuilding determination, we were not called upon to make a rebuilding determination at that time.

Since the dismissal of the litigation (and completion of work to the Vessel in China) we have received a significant amount of correspondence concerning this matter on behalf of the Opponents, principally from Messrs. Sher & Blackwell. That correspondence included letters from Messrs. Sher & Blackwell, with attachments, enclosures and exhibits, dated April 19, 2007, April 30, 2007, May 16, 2007, June 11, 2007, August 9, 2007 and August 27, 2007. We also received a letter dated May 7, 2007, from Trailer Bridge of New York, N.Y., in support of elements of the Opponents position.

Finally, we received your letter of August 13, 2007, with attachments, by which you have now requested a final rebuilding determination, consistent with the Memorandum Opinion of Judge Ellis and our letter of November 17, 2005.

D. Referral to the Naval Architecture Division for Evaluation and Fact Finding

Because of the apparently significant factual discrepancies between your letter of August 13, 2007, and contentions made on behalf of the Opponents, on August 20, 2007 we submitted all of the relevant information and correspondence received subsequent to dismissal of the complaint and completion of the work in China (all of the letters, with attachments, enclosures and exhibits, referred to above which were received from, in support of or on behalf of the Opponents as well as your letters of August 13, 2007 and April 13, 2007) to the Coast Guard's Naval Architecture Division (the "NAD"). In so doing, we requested a review, evaluation and fact finding on the issues of (i) the actual total steelweight added to the Vessel in China (which presumed that our practice of calculating steelweight by using the greater of the steel removed or the steel added would be applied) and (ii) the steelweight of significant components added to the Vessel in China.

We elected to make this referral so that the NAD could apply its expertise to the review of the submission received with your application, as well as the competing information received from the Opponents in support of their position, but to do so for the limited purpose of offering an expert opinion as to the overall steelweight calculation presented as well as to the steelweight calculation of any components added during the course of the work done overseas. However, beyond offering its assessment as to those calculations, the NAD played no role in this determination. The application of the applicable regulations to the facts presented by this matter remains the responsibility of the Coast Guard's National Vessel Documentation Center (the "NVDC").

II. APPLICABLE LEGAL AND REGULATORY STANDARDS AND CONCLUSIONS OF THE NAVAL ARCHITECTURE DIVISION

A. Applicable Legal and Regulatory Standards

In accordance with the second proviso of 46 App. U.S.C. § 883 (recodified by P.L. 109-304 on October 6, 2006 as 46 U.S.C. §§ 12101(a) and 12132(b)) (such recodified sections together referred to as the "Second Proviso") any vessel that 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 U. S., and that is later rebuilt outside of the U. S., permanently loses its coastwise trading privileges. Specifically, as recodified, the Second Proviso provides as follows:

at 46 U.S.C. § 12101(a),

“(a) 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.”,

and at 46 U.S.C. § 12132(b),

“(b) 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.”

The current regulations implementing the Second Proviso are found at 46 C.F.R. § 67.177 and were adopted by final rule promulgated on April 22, 1996 (61 FR 17814) (the "Final Rule"). Those regulations provide, in pertinent part, as follows:

"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."

Finally, we note that the phrase "major component", as used in the Second Proviso at 46 U.S.C. § 12101(a) and in 46 C.F.R. § 67.177(a), is not further defined by either statute or regulation. However, by long-established practice of the Coast Guard, only components added to the vessel which amount to 1.5 percent or more of the vessel's steelweight, prior to the addition, are considered major components.

B. Conclusions of the Naval Architecture Division

A copy of the Memorandum dated October 16, 2007, of H. Paul Cojeen, Chief, NAD (CG-5212 (PSE)), issued in response to the request of the NVDC in this matter, is incorporated as an attachment to this letter. Its conclusions are discussed below.

(i) Overall Steelweight Calculation

In evaluating the material submitted to it, by both Matson and the Opponents, the NAD divided its review and conclusions into three initial subject areas: first, as to the scope of the foreign shipyard work; second, as to the weight estimates of the work; and third, as to the discounted steelweight of the Vessel prior to the work.

First, the NAD compared the proposed scope of work as described in the request for a preliminary rebuilding determination submitted in 2004 with the work done as described in the request for a final rebuilding determination submitted in 2007 and assessed them to be "in close conformance". After reviewing the differences, it was stated as follows:

"These differences are still within the overall scope of converting the aft end of the vessel to vehicle stowage, as originally represented to the USCG."

Second, with regard to the weight estimates of the work, the NAD observed that the weight estimates provided in both 2004 and 2007 are just summaries of the major work items and that detailed weight calculations had not been submitted. However, after reviewing the major differences between the 2004 and 2007 weight estimates, it was stated as follows:

“Matson states that the weight calculations with respect to the new structural work were performed by Herbert Engineering using detailed design drawings prepared by the shipyard and that the weight calculations with respect to the other repair work were performed by a steel inspector and reviewed by Herbert Engineering.”

And further:

“In the absence of detailed weight calculations, we cannot confirm the Matson submittal. However, these are not difficult calculations to perform when working from shipyard drawings, and we would not expect them to be in significant error.”

Third, with regard to the discounted steelweight of the Vessel prior to the work, the NAD noted the differences in assumptions employed by Matson, and argued for by Messrs. Sher & Blackwell, and observed as follows:

“In the absence of a detailed post-construction analysis from 1982, it is not possible for us to determine the final steelweight. However, Sher & Blackwell’s argument that none of the overage should be applied to the original steelweight estimate is unrealistic: the final weight of all components of the ship, including the hull, are expected to be heavier than estimated during design and construction. Matson’s approach --- to equally apply the overage to all components --- is reasonable under the circumstances.”

Finally, the NAD concluded as follows:

“In conclusion, we find that the modifications fall within the overall scope of work as originally represented to the USCG; that the differences between the 2004 weight estimate and 2007 final estimate are reasonably accounted for; (and) that the discounted steelweight calculated by Matson is reasonable....”

Guided by the NAD evaluation and conclusions, the NVDC finds that there does not exist a credible basis to reject the steelweight calculation presented in your application; specifically, we find that insufficient basis has been presented to reject your representations that “the total structural steel added in China to the hull or superstructure of the Vessel is 891.0 LT”, which figure is inclusive of the weight of components added to the Vessel, and that “foreign steel added to the hull or superstructure of the Vessel, including repairs to other parts of the Vessel, therefore, constitutes 7.37% of the discounted steelweight of the Vessel”. We therefore also find, pursuant to 46 C.F.R. § 67.177(b) (3), that on the basis of this steelweight calculation, the Vessel would not be considered rebuilt.

(ii) Steelweight Calculation of Added Components

Your request for a final rebuilding determination represented that “(T)he largest item lifted on the Vessel in the China Shipyard weighed approximately 26.9 metric tons, or 0.22% of the discounted steelweight of the Vessel.” This is well below the 1.5% of discounted steelweight that has been established by longstanding practice of the Coast Guard as the threshold for the

determination of whether “major components” had been added to the vessel in a foreign shipyard.

However, the Opponents, specifically in their letter of April 30, 2007, offered the counter assertion that as many as three components which met or exceeded the threshold for “major components” --- one, in particular, which was said to have weighed 384 long tons, or approximately 3.4% of the Vessel’s discounted steelweight (a calculation which is, itself, disputed by the Opponents but which has already been addressed by the NAD and above) --- had been added to the Vessel in China. In light of this apparent discrepancy we asked the NAD to specifically address this issue in its review and evaluation of the Opponents various submissions.

In the course of that review the NAD posed certain additional questions to you which, taken together, asked that you address the maximum lifting capacities at the China shipyard. You responded by letter of October 12, 2007, and we incorporate those questions, and responses, from your letter, in full, as follows:

“Question 1 (submitted to Matson by the NAD via the NVDC): We cannot verify Matson’s statement that the heaviest crane lift (in the Chinese yard) was 26.9 Mtons. Would you please request further supporting information from Matson?

Response (submitted by Matson to the NAD via the NVDC): The Chinese shipyard reported to Matson that the biggest block lifted onto the M/V MOKIHANA (the “Vessel”) was F-5 of the upper trailer deck weighing 26.9 tons. Herbert Engineering independently reviewed the block layout plan prepared by the Chinese shipyard and determined that the largest block weighed 26.9 tons.

Question 2: Are the cranes at the Chinese repair yard capable of lifting sub-assemblies of the weights alleged by Sher & Blackwell (refer to their letter of April 30, 2007; paragraph J)?

Response: Paragraph J of the Sher & Blackwell letter is misleading because the discounted steelweight of 11,419 LT is incorrect. In the Coast Guard’s letter of June 23, 2004, the Coast Guard agreed that the discounted steelweight of the Vessel was adequately established to be 12, 097 LT. The “actual installed steel weight” on the table in paragraph J is also misleading. Paragraph J uses figures from Matson’s withdrawn letter of October 26, 2006. These figures not only do not reflect the actual work done on the Vessel, they also do not reflect the weight of the actual units lifted onto the Vessel in the Chinese shipyard. The attached brochure from the COSCO (Nantong) Shipyard Co., Ltd. Shows that 60 tons is the largest lift capability of the floating cranes, 40 tons is the largest lift capability of the cranes on the piers and one mobile crane has a lift capability of 180 tons. None of these cranes would have been capable of lifting the 384 LT, 265.5 LT and 230.3 LT listed on the table in paragraph J.

Question 3: Did the yard, in fact, make such lifts?

Response: No, the Chinese shipyard has confirmed that the largest lift was 26.9 tons.”

Your responses to the questions posed by the NAD were forwarded to the NAD to be taken into account in its review and evaluation of all of the materials put before it on this question. The NAD concluded as follows:

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“In conclusion, we find...that the largest lifted sub-assembly was 26.9 Mtons (26.4 Ltons).”

Guided by the NAD evaluation and conclusion, the NVDC finds that there does not exist a credible basis to reject the steelweight calculation of added components presented in your application; specifically, we find that insufficient basis has been presented to reject your representation that the largest component added to the Vessel in China weighed 26.9 metric tons, or 0.22% of the discounted steelweight of the Vessel. We therefore also find, pursuant to 46 C.F.R. § 67.177(a), that as no “major components” were added to the Vessel in China, it would not be considered rebuilt.

III. CONCLUSION

For the reasons set forth herein, we find that the M/V MOKIHANA, official number 655397, has not been rebuilt foreign and is, therefore, entitled to the issuance of a Certificate of Documentation endorsed for coastwise privileges. As such, the form CG-1258 submitted on behalf of this Vessel will be acted upon and a Certificate of Documentation so endorsed will be issued forthwith.

Sincerely,



DOUGLAS G. CAMERON
Staff Attorney
By direction

Attachment: Memorandum of H. Paul Cojeen, Chief, Naval Architecture Division (CG-5212 (PSE)), dated October 16, 2007



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October 16, 2007

MEMORANDUM

From: H. Paul Cojeen
Chief, Naval Architecture Division (CG-5212)(PSE)

A handwritten signature in black ink, appearing to read "H. Paul Cojeen", written over a horizontal line.

Reply to: CG-5212 (PSE)
Attn of: ext 2-1372

To: National Vessel Documentation Center

Subj: *M/V MOKIHANA* (O.N. 655397) – FINAL FOREIGN RE-BUILD DETERMINATION

- Ref:
- (a) D. Cameron (NVDC) Email of August 20, 2007, to P. Cojeen (USCGHQ), requesting review and assessment of refs (a) and (b)
 - (b) Material submitted by Matson in support of request for favorable final rebuilt foreign determination for the *MOKIHANA*, O.N. 655397 (3-ring notebook)
 - (c) Material submitted in opposition to Matson's request for favorable final rebuilt foreign determination for the *MOKIHANA*, O.N. 655397 (3-ring notebook w/CD-ROM)

1. Reference (a) requested this division to review two sets of submittals (refs (b) and (c)) pertaining to a final foreign re-build determination for the Matson containership *M/V Mokihana*. This vessel underwent modifications in a Chinese shipyard in 2007 to convert the aft end of the vessel from container stowage to vehicle stowage and to prepare the aft section for future installation of an auto garage (in an American shipyard).

2. The purpose of our review is to comment on certain technical issues with respect to the scope and steel weight of the foreign shipyard modifications so that the NVDC can make a final foreign re-build determination. Upon review, we find three issues to comment upon at this time:

Scope of shipyard work

3. The actual foreign shipyard modifications in 2007 (per Exhibits 1, 2, and 3)¹ are in close conformance with the original scope of planned foreign work as presented to the USCG in 2004 (per Exhibits A-1, A-2, A-3, and B)².

4. With respect to the foreign shipyard work, the original representation to the USCG was that the aft end of the vessel would be converted from container stowage to vehicle stowage. The major aspects of the foreign work were planned to be: reinforcement and infill³ of the Upper Deck and Second Deck in Holds 5(aft), 6, and 7 for vehicle cargo stowage, installation of internal vehicle ramps, installation of a vehicle loading side port, and installation of auto platforms in the holds below the Second Deck.

5. The only differences between the original 2004 plan and the actual 2007 work are:

- (a) all of Hold 5 (not just the aft half) was converted to vehicle stowage;

¹ These exhibits are from the Matson letter to NVDC dated August 13, 2007

² These exhibits are from the Matson letter to NVDC dated June 15, 2004

³ "Infill" refers to creating new intermediate "tween" decks in the cargo holds (the original holds had no tween decks because containers were stacked all the way up to the hatch covers).

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- (b) rather than infilling the cargo holds in way of the Upper Deck, a new deck (the “Upper Trailer Deck”) was installed 7 feet higher. To support this new deck, the side shell structure was extended upwards from the Upper Deck; and
 - (c) The aft Upper Deck (Frs 190-214) was partially replaced/reinforced (this was not originally planned for foreign shipyard work).
6. These differences are still within the overall scope of converting the aft end of the vessel to vehicle stowage, as originally represented to the USCG.

Weight estimates

7. The total foreign shipyard modifications were originally estimated (in 2004) to be 815.5 Ltons. The final 2007 weight estimate is 891.0 Ltons. Both weight estimates are just summaries of the major work items; detailed weight calculations for the actual foreign shipyard work have not been submitted to this division.

8. The major differences between the 2004 and 2007 weight estimates are:

- (a) The original 2004 estimate included the weight of three auto platforms and ramps (235.2 Ltons total). However, the NVDC subsequently determined that the platforms are considered “outfitting” and not subject to the steel weight limitation; therefore, the final 2007 estimate does not include this weight item as Chinese steel work (other than 21.2 Ltons for auto platform supports and foundations);
- (b) The original 2004 estimate included 360.0 Ltons for Upper Deck infill and ramps. The infill deck was not fitted (instead, a new “Upper Trailer Deck” was installed at 256.2 Ltons). The final weight of the aft ramp weights was 68.8 Ltons;
- (c) The actual Second Deck modifications are heavier (254.6 Ltons) than originally estimated (120.0 Ltons);
- (d) The final 2007 estimate includes 42.3 Ltons for the aft Upper Deck modifications, which were not included in the original 2004 estimate; and
- (e) The final 2007 estimate includes 130.3 Ltons for “Repairs & Misc” (not related to the vehicle cargo conversion), which were not included in the original 2004 estimate.
- (f) All other weight differences are minor.

9. Matson states that the weight calculations with respect to the new structural work were performed by Herbert Engineering using detailed design drawings prepared by the shipyard, and that the weight calculations with respect to the other repair work were performed by a steel inspector and reviewed by Herbert Engineering.

10. In the absence of detailed weight calculations, we cannot confirm the Matson submittal. However, these are not difficult calculations to perform when working from shipyard drawings, and we would not expect them to be in significant error.

“Discounted steelweight”

11. An important issue is determining the baseline steel weight (also called the “discounted steelweight”) against which the newly-added steel weight is compared. Matson claims that the discounted steelweight for the *Mokihana* is 12,097 Ltons, whereas the opposing counsel (Sher & Blackwell) disagrees and counters that the proper discounted steelweight is only 11,419 Ltons (i.e., the original estimate by Avondale during construction in 1980).

12. Matson's calculation of their estimated steelweight is presented in Exhibit A-1. On the basis of the 1982 inclining results (which determined that the actual light ship was 5.9 percent heavier than the earlier

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estimated light ship), Matson has assumed that all components of the ship are 5.9 percent heavier than the original construction estimates. Therefore, Matson calculates the discounted steelweight to be 12,097 Ltons.

13. Sher & Blackwell disagrees with Matson's assumption that the 5.9 percent light ship increase should be proportionately applied to the original Avondale steel estimate. They argue that steel estimates are "*usually quite accurate and such a discrepancy is more fairly attributable to all the equipment and outfitting other than the steel.*"⁴ They claim that the proper discounted steelweight is exactly what Avondale originally estimated: 11,419 Ltons (i.e., that none of the 5.9 percent overage should be applied to the steelweight).

14. In the absence of a detailed post-construction analysis from 1982, it is not possible for us to determine the final steelweight. However, Sher & Blackwell's argument that none of the overage should be applied to the original steelweight estimate is unrealistic: the final weight of all components of the ship, including the hull, are expected to be heavier than estimated during design and construction. Matson's approach—to equally apply the overage to all components—is reasonable under the circumstances.

Sub-assemblies and lift weight

15. In Exhibit 3, Matson broke down the final shipyard weight estimate by major work item (i.e., "Sideport reinforcement," "Aft Upper Deck," "Second Deck," etc.). Of these, Matson has confirmed that the largest sub-assembly lifted in the Chinese shipyard was "Block F-5" (part of the new Upper Trailer Deck) at 26.9 metric tons (26.4 long tons), and that the capacity of the largest shipyard crane is 180 tons.⁵

16. Sher and Blackwell have categorized these break-down items as "components."⁶ From a naval architectural perspective, the work item break-down and categorization as "components" is meaningless. The same work could be broken down into different weight groupings for different purposes. For example, each of the items could also be broken down into their structural components such as plating, brackets, stiffeners, welding materials, etc.

17. As noted by Matson, Sher and Blackwell cited weights from an earlier Matson submittal, which have been superseded by the final actual shipyard estimate of Exhibit 3. However, the weight differences between the two estimates do not bear upon our comment above.

18. In conclusion, we find that the modifications fall within the overall scope of work as originally represented to the USCG; that the differences between the 2004 weight estimate and 2007 final estimate are reasonably accounted for; that the discounted steelweight calculated by Matson is reasonable, and that the largest lifted sub-assembly was 26.9 Mtons (26.4 Ltons).

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⁴ Sher & Blackwell letter to NVDC dated April 30, 2007 (paragraph I).

⁵ Matson letter to NVDC dated October 12, 2007, with enclosures.

⁶ Sher & Blackwell letter to NVDC dated April 30, 2007 (paragraph J).