

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 67

[Docket No. USCG–2010–1124]

Application for Foreign Rebuilding Determination

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability and response to comments.

SUMMARY: On February 25, 2011, the Coast Guard published a document seeking comments on a petition for rulemaking to amend the Coast Guard regulation concerning foreign-rebuilt determinations for vessels entitled to a coastwise trade endorsement. Under the Jones Act, to maintain a coastwise trade endorsement, a vessel must not be rebuilt outside the United States. This document responds to the comments we received on our February 25, 2011 request for comments, and announces the availability of our response to the petitioners denying their petition.

DATES: On March 13, 2012, the Coast Guard denied the December 9, 2010 petition to amend 46 CFR 67.177.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this document as being available in the docket, are part of docket USCG–2010–1124 and are available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket online by going to <http://www.regulations.gov>, inserting USCG–2010–1124 in the “Keyword” box, and then clicking “Search.”

FOR FURTHER INFORMATION CONTACT: If you have questions on this document, call or email Lieutenant Commander Erin Ledford, Executive Secretary, Maritime Safety and Security Council, U.S. Coast Guard; telephone 202–372–3857, email Erin.H.Ledford@uscg.mil. If you have questions on viewing material in the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Background

In a petition dated December 9, 2010, Marc J. Fink, on behalf of a coalition of maritime organizations, petitioned the Coast Guard to amend 46 CFR 67.177,

Application for foreign rebuilding determination. On February 25, 2011, we published a document in the **Federal Register** (76 FR 10553) seeking comments on that petition for rulemaking.

The regulation the petition seeks to amend sets the parameters for rebuilt-foreign determinations and directs when vessels with coastwise trade endorsements whose hulls or superstructure are altered outside the United States must submit a written statement to the National Vessel Documentation Center. Section 67.177 also states when vessel owners considering such alterations may seek a preliminary rebuilt determination.

Under 46 U.S.C. 12132(b), to maintain a coastwise endorsement a vessel must not be rebuilt outside the United States. For definitions of “coastwise endorsement” and “rebuilt in the United States,” see 46 U.S.C. 12101.

We received five submissions in response to our February 25, 2011 request for comments, and have responded to these comments below. After considering these comments we responded to the petitioners in a letter.

As reflected in that letter, we concluded that amendments to 46 CFR 67.177 are neither needed nor desired, and therefore we denied the petition. The petition and its three exhibits, along with our letter responding to the petition, are available in the docket as indicated under **ADDRESSES**.

Discussion of Comments

All five submissions to the docket in response to our February 25, 2011 document, including a submission from the petitioners, supported the petition. Four of the five specifically requested that that we move forward expeditiously with a rulemaking in order to clarify what types and amounts of foreign shipyard work on vessels are allowed under the Merchant Marine Act of 1920, known as the Jones Act, 41 Stat. 988, c. 250; see specifically 46 U.S.C. §§ 12101, 12112, 12132(b), and 55102.

In their submission in response to the request for comments, the petitioners stated that amending § 67.177 is necessary to resolve a number of industry disputes over what types and amounts of foreign shipyard work on vessels are and are not permissible under the Jones Act. The petitioners also stated that amending § 67.177 as they proposed would be beneficial because this regulation would then—

- Specifically define “major component,” and thus clarify what constitutes a major component.
- Establish clear and uniform guidance to the industry regarding the

Coast Guard’s standards for determining when certain work on a vessel in a foreign shipyard constitutes a rebuilding of that vessel pursuant to the Second Proviso to the Jones Act.

- Resolve ambiguities and open questions in the current rules that are currently left unanswered by mixed court decisions, including what is the relationship between the “major component” test and the “considerable part” test.

A shipyard company stated that a definition of what constitutes a major component is needed for purposes of determining whether a vessel is rebuilt, and of when subassemblies individually added to a vessel become, in totality, a major component. This company noted that the existing discretionary rebuild test of 7.5 to 10 percent of hull or superstructure steel weight is ambiguous when applied to a vessel modification for purposes of evaluating compliance with the Jones Act, and that amending this provision to establish a single threshold for applying the rebuild test will significantly improve the conflicting interpretations of compliance that currently exist.

The Coast Guard believes that, as a result of the recent decision of the Fourth Circuit Court of Appeals in *Shipbuilders Council of America v. U.S. Coast Guard*, 578 F.3d 234 (2009) involving the SEABULK TRADER, certainty and predictability have been achieved on the foreign rebuild regulation, and particularly its major component test and the relationship between that test and the corresponding “considerable part test”. The Coast Guard believes there is now a settled understanding of the interpretation of 46 CFR 67.177 to a greater degree than there has been over the course of many years of attempts to address this contentious issue.

The Coast Guard notes that the current regulation was promulgated after controversy surrounding the previous attempt to regulate on this subject. That previous regulation—46 CFR 67.27–3, Required application for rebuilt determination (1988)—was challenged in court and overturned in 1989. See *American Hawaii Cruises v. Skinner*, 713 F.Supp. 452 (D.D.C. 1989). The current regulation was then issued in 1996, in response to that successful challenge. See 60 FR 17290, April 5, 1995, and 61 FR 17814, April 22, 1996. However, it was also challenged in court in the SEABULK TRADER case in 2006, with initial success at the District Court level. See *Shipbuilders Council of America v. U.S. Dept. of Homeland Sec.*, 551 F.Supp.2d 447 (E.D.Va. 2008). But this time the Fourth Circuit Court of

Appeals reversed that District Court decision and held, instead, that the Coast Guard's "interpretive scheme has the great virtue of construing each provision of the regulation to have functional significance" and, further, that its interpretation "offers a holistic vision of the regulation that gives effect to each of its provisions." *Id.* at 245. Thus, the current regulation now enjoys the strong imprimatur of support, giving rise to certainty and predictability in its interpretation, by a Court of Appeals of the United States.

The petitioners may disagree with the substance and effect that the clarity established by the Fourth Circuit Court of Appeals has revealed. However, the changes sought by the petition would, in the name of clarity, change the substantive outcomes of Coast Guard determinations and upset a regulatory regime that has been in place since 1996.

Prior to the decision by the Fourth Circuit Court of Appeals, and the Coast Guard determinations that it affirmed, the foreign rebuild regulation may have appeared to some to be less than clear. However, that lack of clarity related less to the lack of a definition of "major component," which is the centerpiece of petitioners' proposal, and more so to a structural tension in the rule itself; specifically, the uneasy combination of a quantitative test (the considerable part test) with a qualitative test (the major component test). The Fourth Circuit Court of Appeals examined the Coast Guard's balancing of these tests and, as noted above, found that the Coast Guard's interpretive scheme had resolved those tensions.

For example, among the items deemed by petitioner's proposed rule to be major components are container racks. Even by petitioner's definition, major components are components of the hull or superstructure of a vessel. However, "hull" and "superstructure" remain defined terms at 46 CFR 67.3 and, in both cases, the central characteristic for any item to be considered a component of either is that it be structural in nature. It has long been the case that container racks (excluding their foundations, pedestals or required reinforcements) have been determined by the Coast Guard National Vessel Documentation Center (NVDC), aided with technical support from naval architects and marine engineers at the Coast Guard Naval Architecture Division (NAD), to be non-structural "outfit." As such, they would be and have been excluded from consideration under the major component test as well as, for that matter, from the calculation of the considerable part test. For a

recent analysis of the structural or non-structural nature of container racks see the NVDC's U.S. build determination letter dated August 1, 2011, and accompanying analysis of the NAD dated July 15, 2011, in the case of a NASSCO flat-deck container barge, both of which are now posted on the NVDC Web site, <http://www.uscg.mil/hq/cg5/nvdc/>, under "Latest News".

Consequently, while apparently retaining the requirement that major components must be structural components of the hull or superstructure, petitioners would nevertheless, as part of the same definition, specifically deem an item, long-established by expert analysis to be non-structural in nature, to be a major component. Including this specific item (the container rack) as a major component in the definition by regulatory fiat, would be inconsistent with Coast Guard prior practice; it would also be inconsistent with the proposed rule itself. While acknowledging the requirement that major components of the hull and superstructure must, at the very least, have a structural characteristic, the proposal would completely revamp that basic understanding.

The petitioners' proposed amendments, in the name of clarity, seek to re-balance the "holistic approach" found to characterize the current rule and its interpretation by the Fourth Circuit Court of Appeals. By expanding the definition of "major component" it would give significantly greater weight to the major component test over the considerable part test. The reason for this effect is that the steelweight percentage threshold for an item to be considered a major component is 1.5 percent, while the steelweight percentage threshold of the considerable part test (even if amended as the petitioners' propose) is 10 percent. Consequently, by expanding the scope of what would be deemed a major component, it would become far more likely that proposed foreign work would be barred by that 1.5 percent threshold without even having to take into account the 10 percent threshold.

The NVDC's regulatory interpretations have been quite clear and consistent. In making its determinations, it considers the greater of steel added or steel removed. This is the conservative middle ground between those in industry who have advocated, on the one hand, that we consider both steel added and steel removed, and those who have advocated, on the other hand, that we consider only the net of steel added and steel removed.

The petitioners' proposed amendments would introduce other substantive changes. For example, the Coast Guard believes that none of the determinations leading up to the increase in Agency appeals, litigation and Court appeals of the last few years (including the MOKIHANA, SEABULK TRADER, SEABULK CHALLENGE, DELAWARE TRADER, PHILADELPHIA and NEW YORK) would be decided the same way under the petitioners' proposed amendments.

In addition, petitioner's proposal would establish new and onerous procedural impediments to any applicant seeking to have work done at a foreign shipyard. Their proposal would make the process slower, more cumbersome, inflexible, conducive to adversarial disputes and appeals by third parties—whether or not directly affected, and more resource-intensive for the Coast Guard.

For example, new determinations would be required as to whether proposed work was, or was not, casualty-related as well as whether no shipyard in the United States is capable or available to perform the desired work. Notices as to all actions and proposed actions would have to be posted in the **Federal Register**. As already mentioned, appeals would be opened and available to any person, without regard to whether or not they are directly affected by the determination. The Coast Guard would be obligated, somehow, to compel parties to enter into protective orders in connection with those appeals and, of course, it would then be incumbent upon the Coast Guard to police and enforce violations of those protective orders.

Moreover, virtually all applicants consider the information submitted to the Coast Guard in connection with requests for foreign rebuild determinations to be highly proprietary. When those determinations have been contested in the past, including in all of the cases already mentioned, they have been contested by direct commercial competitors of those applicants. Consequently, even a protective order might not offer sufficient proprietary protection to a potential applicant.

The effect of these procedural changes would be to present additional impediments, and thus, likely discourage potential applicants from even applying in the first place.

Finally, because of—

- The substantive re-balancing at the heart of the petition which would raise the bar (by lowering the applicable steelweight percentage in most cases) for any foreign work,

- The inclusion of items as major components which have never before been so included because they represent non-structural “outfit,”

- The procedural impediments which would have the effect of discouraging applicants, and

- Other more restrictive measures, such as the proposal to take into account the weight of both the steel added and the steel removed rather than the greater of the weight of either the steel added or the steel removed, alone or in combination, by amending the current regulation as petitioners propose may cause other countries to challenge the continued applicability of the exemption from certain provisions of the General Agreement on Tariffs and

Trade 1994 (“GATT 1994”) that the Jones Act statutes and regulations currently enjoy.

The Coast Guard understands that the national treatment obligation in the GATT 1994 requires the United States to treat imported goods no less favorably than domestic goods, including with regard to the sale, lease and use of the goods. Vessels engaged in the coastwise trade are considered goods for purposes of the GATT 1994.

The United States has a specific exemption from the national treatment and certain other obligations of the GATT 1994 for the Jones Act statutes and measures, such as the Coast Guard regulations implementing those statutes. That exemption is contained in

paragraph 3 of the GATT 1994. Any changes to the Jones Act statutes or measures implementing those statutes must not make them less consistent with GATT 1994.

For a more detailed response to the specific amendments proposed by the petitioners, please see the March 13, 2012 letter in the docket responding to the petition for rulemaking. This document is issued under authority of 33 CFR 1.05–20 and 5 U.S.C. 552(a).

Dated: March 13, 2012.

F.J. Kenney,

RDML, U.S. Coast Guard, Judge Advocate General, Chairman, Marine Safety and Security Council.

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