

(Served)
(March 11, 2009)
(Maritime Administration/)
(Maritime Subsidy Board)

U.S. DEPARTMENT OF TRANSPORTATION
MARITIME ADMINISTRATION

FARRELL LINES, INCORPORATED

Docket No. A-200

In the Matter of Operating-Differential Subsidy
Asbestosis-Related Protection and Indemnity
Deductible Payments under
Title VI of the Merchant Marine Act of 1936

FINAL OPINION AND ORDER OF
THE MARITIME SUBSIDY BOARD

James Caponiti, Acting Chairman
Rand Pixa, Acting Member

Introduction

This Final Opinion and Order of the Maritime Subsidy Board (MSB) concerns the eligibility of Farrell Lines Incorporated (Farrell) to receive Operating-Differential Subsidy (ODS) payments for asbestosis-related crew claims paid by Farrell under the deductible provision of Farrell's protection and indemnity (P&I) insurance policy pursuant to Title VI of the Merchant Marine Act of 1936 and Maritime Administration implementing regulations, 46 C.F.R. Part 282.

Background

The Maritime Administration and Farrell entered into ODS Agreement No. MA/MSB-482 (Agreement) on December 31, 1980. By a January 3, 1992 addendum to the Agreement, No. 40, Farrell and the Maritime Administration agreed that the Agreement would terminate on December 31, 1997.

The Agreement provided for the payment to Farrell by the Maritime Administration of ODS for qualified U.S.-flag vessels, in the amount of the excess of certain U.S.-flag vessel operating costs over the fair and reasonable costs of those items if the vessel were operated under the registry of a country whose vessels were substantial competitors of the vessel covered by the agreement. Among the subsidizable operating expenses covered by the Agreement were crew wages and protection and indemnity insurance (P&I). The Maritime Administration's ODS regulations, 46 C.F.R. Part 282, authorized the payment of claims ordinarily paid by the P&I policy but which were below the threshold deductible limits of the policy.

The actual payments accruing to ODS operators were calculated on a yearly basis and incorporated into the Agreement by means of an addendum. With regard to Farrell's Agreement, Addendum No. 56, dated January 5, 1998, provided that the Maritime Administration's obligation under the Agreement had been satisfied, with the exception of "claims related to protection and indemnity deductibles for asbestos related illnesses sustained during the contract period and subsequent to June 30, 1979." Addendum 56, however, neither specified how such subsidy payments would be calculated nor incorporated by reference previous correspondence between Maritime Administration staff and Farrell.

In an August 22, 1996 letter to Farrell, Michael Ferris, Director, Office of Costs and Rates, Maritime Administration, proposed alternative procedures for calculating Farrell's ODS rates for various items of subsidizable operating expenses. With respect to P&I deductibles for crew asbestos claims, Ferris offered to recommend establishing a billing rate of 82.6% for asbestos-related P&I deductibles. James G. Norton accepted this procedure on behalf of Farrell by signing Ferris' letter on September 30, 1996. Again, on December 1, 1998, Ferris confirmed by letter to Farrell that the percentage rate applicable to subsidizable asbestosis related P&I deductible expenses was 82.6%. Ferris also indicated that the 82.6% rate would remain in effect through December 31, 1997, and would continue for the handling of unsettled asbestos claims arising during the contract

period. Additionally, Ferris confirmed that there was “no agreement between the parties to change the procedures or liability regarding asbestosis claims.” Ferris reconfirmed this procedure by a February 28, 2000 letter to Farrell. Although Farrell has periodically submitted vouchers for asbestos-related P&I deductibles apparently based on Ferris’ formula, and such vouchers have been paid over a number of years, no addendum was ever executed memorializing the 82.6% rate, or indeed, even authorizing the payment of ODS for claims paid by Farrell in the years following the termination of the Agreement.¹

The last voucher submitted by Farrell for \$219, 280.41, was not paid. A letter sent to Farrell by the Associate Administrator for Business and Workforce Development on March 4, 2008, questioned whether Farrell was still the contractor in view of the acquisition of Farrell by non-citizens, and whether an agreement existed between Farrell and the Maritime Administration as to the level of subsidy payable. Farrell responded in a letter of June 2, 2008, maintaining that it was indeed entitled to the ODS payment, in that Farrell was and is still the ODS contractor and U.S. citizenship was not required past 1997.

In a letter of September 4, 2008, the Secretary of the Maritime Subsidy Board reviewed the history of Farrell, which was a U.S. citizen during the effective period of the Agreement, but had been acquired by non-citizens. The letter advised Farrell that the Maritime Administration is without authority to pay ODS to an entity that is no longer a U.S. citizen qualified to receive ODS. The letter found it was appropriate to rescind ODS Agreement No. MA/MSB-482, and that Farrell shall have no further rights under that Agreement.

On October 3, 2008, Farrell requested that the Secretary, Maritime Subsidy Board, reconsider the MSB’s conclusion that Farrell was not entitled to receive payments for P&I deductibles for asbestosis claims. Farrell also requested that Farrell and the Maritime Administration enter into negotiations arriving at a lump sum settlement of the ongoing payments to which Farrell claimed it was entitled. The Maritime Administration has requested examples of how Farrell determined its deductible expenses for asbestosis claims, but has yet to receive any documentation. Therefore, this determination is based on the foregoing facts.

Jurisdiction

By delegation of authority from the Secretary of Transportation, the Maritime Administration administers the Operating Differential Subsidy Program under Title VI of the Merchant Marine Act of 1936, as amended (the “Act”). Under 49 C.F.R. § 1.67(a), the Maritime Subsidy Board (composed of the Maritime Administrator, Deputy Maritime Administrator, and the Chief Counsel) has authority to enter into and terminate ODS agreements. The Maritime Administrator has authority under 49 C.F.R. § 1.66(e) to make subsidy determinations not requiring a hearing. Under 46 C.F.R. § 282.32(b), “an

¹ Ostensibly, the claims were submitted to Farrell by crew members who had contracted asbestosis while serving on Farrell vessels on voyages conducted prior to December 31, 1997, which voyages were covered by the ODS Agreement. It is not known what criteria Farrell used to settle such claims.

operator who disagrees with the findings, interpretations, or decisions of the Contracting Officer with respect to the administration of [46 C.F.R. Part 282]” may submit an appeal to the Secretary, Maritime Subsidy Board.

Issues

- A. Whether Farrell is entitled to receive ODS payments despite the fact that Farrell is no longer a citizen of the United States under section 2 of the Shipping Act of 1916 (then, 46 U.S.C. App. § 802; now, 46 U.S.C. § 50501).
- B. Whether the Maritime Subsidy Board is bound to recognize Farrell as the ODS operator following indirect transfers of the Agreement.
- C. Whether the Maritime Administration and Farrell have agreed on a level of subsidy consistent with Maritime Administration implementing regulations.
- D. Whether the Maritime Administration is bound to continue payments using the 82.6% formula based on its course of conduct in accepting Farrell’s claims and making payments to Farrell after Farrell ceased to be a non-citizen.

Discussion

- A. Whether Farrell is entitled to receive ODS payments despite the fact that Farrell is no longer a citizen of the United States under section 2 of the Shipping Act of 1916 (then, 46 U.S.C. App. § 802; now, 46 U.S.C. § 50501).²

We first examine the statute authorizing payment of ODS. To further the interests of promoting a U.S.-flag presence in the foreign trades, section 601(a), Title VI of the Merchant Marine Act provides “the Secretary of Transportation is authorized and directed to consider the application of *any citizen of the United States* for financial aid in the operation of a vessel or vessels . . . “ (46 U.S.C. § 53101 note) (emphasis added). Thus, section 601(a) requires that ODS must flow to a U.S. citizen.³

Such a conclusion is also supported by the purpose of the ODS program. The ODS program was designed to implement the purposes and policy of the Merchant Marine Act of 1936, particularly to foster a modern, capable merchant marine, “owned and operated under the United States flag by citizens of the United States insofar as may be practicable. . . .” (See section 101 of the Merchant Marine Act of 1936, as amended, 46 App. U.S.C. § 1101, now codified at 46 U.S. § 50501). The payment of ODS to a non-

² It is not in dispute that Farrell was a U.S. citizen prior to the termination of the Agreement in 1997.

³ In its October 3, 2008 letter, Farrell argues that even if the requirement to remain a citizen of the United States is still in effect, it would only be in default of the Agreement, and that Farrell would still be entitled to asbestosis-related subsidy payments arising out of pre-expiration claims. This is not purely a question of construction of the terms of a contract but an issue of statutory authority. Section 608 of Title VI of the Merchant Marine Act, as amended (now codified at 46 U.S.C. § 53101 note), provides that the Secretary has the authority to rescind a contract which is transferred without consent of the Maritime Administration. Given the statutory requirement of Section 601(a), the Maritime Administration could not approve a transfer of an ODS agreement to a non-citizen. As a transfer of the agreement to non-citizen Farrell was not approved, Farrell has no claim under the agreement.

citizen would not serve the purposes of fostering a U.S. citizen-owned and operated U.S.-flag merchant marine.

Farrell argues that the citizenship requirement does not survive the expiration of the Agreement because the parties did not manifest an express intent that the requirement would continue beyond the Agreement's expiration in 1997. Farrell states that Article I-10 expresses the intent to carry a certain requirement beyond the expiration of the Agreement.⁴ Farrell notes that Article I-10 specifies that the nondiscrimination clause "shall be in effect for the period during which Federal financial assistance is extended to [Farrell] by the United States." Unlike Article I-10, Farrell notes, the citizenship provision of Article II-A(1) uses the phrase "during the period of this Agreement." The absence of the same language from Article I-10 in the citizenship requirement of Article II-A(1), Farrell argues, is strong evidence that the parties did not intend for the citizenship requirement to survive the expiration of the Agreement along with the Maritime Administration's obligation to pay P&I deductible subsidies. The provisions of the ODS agreement do not contradict the statutory requirement that Farrell remain a U.S. citizen in return for continued ODS payments. We do not discern a substantive difference between the language used in Article I-10 and that of Article II-A(1). The phrase "period during which Federal financial assistance is extended by the United States" is indistinguishable from the phrase, "the period of this Agreement."

B. Whether the Maritime Subsidy Board is bound to recognize Farrell as the ODS operator following indirect transfers of the Agreement.

The Maritime Administration held in its October 3, 2008 letter that the Agreement had been transferred without authorization.⁵ The letter went on to rescind the Agreement pursuant to section 608 of the Merchant Marine Act of 1936, as amended. Farrell argues that the acquisition of Farrell by P&O Nedlloyd in 2000, and the subsequent acquisition of P&O Nedlloyd by A.P. Moller-Maersk A/S in 2005, did not constitute a sale, transfer or assignment requiring MSB approval.

Farrell argues that the requirement to get approval for a transfer of the Agreement, as set out in Article II-16 of the Agreement, is limited to transactions "whereby the maintenance, management or operations of any subsidized vessel(s) or essential service(s) of the Operator is to be performed by any other person." Farrell essentially asserts that the operations of the vessels under the Agreement ceased in 1997, and thereafter Farrell is free to transfer the Agreement.

⁴ Section I-10 prohibits Farrell from "participat[ing] directly or indirectly in any manner in any discriminatory act or course of conduct prohibited by Section 8.4 of the Department of Commerce regulations. . . ."

⁵ Farrell argues that nothing has changed because Farrell is still the contractor under the Agreement. However, it has been long settled that the Maritime Administration is obligated to look behind the outward appearance of a company to ascertain where the real interest in the company lies. See *United States v. Niarchos*, 125 F.Supp. 214, 230 (DDC 1954); *United States v. Meacham Corp.* 207 F.2d 535 (4th Cir. 1953) cert. denied 348 U.S. 801 (1954). It is also clearly set out by statute, regulation, and the Agreement, that a transfer of the Agreement includes an indirect transfer, such as here, where the ODS Operator or its parent companies are acquired by another entity.

Farrell's argument is unavailing. Farrell is "managing" the operations of the vessels by receiving the asbestosis crew claims, assessing the validity of those claims and deciding the terms of the settlement of those claims. This is not a situation where Farrell is claiming a sum certain for matters that were already resolved before Farrell, the United States citizen, transferred its operations to a noncitizen.

- C. Whether the Maritime Administration and Farrell have agreed on a level of subsidy consistent with Maritime Administration implementing regulations.

Even if continued subsidy to Farrell as a non-citizen were authorized by law, we must determine whether the 82.6% subsidy rate proposed by Mr. Ferris and accepted by Farrell was proper in light of the terms of the ODS agreement and the Maritime Administration's regulations, which set out a formula for calculating the subsidy for P&I deductibles. Article I-4(c) of the Agreement provides:

In accordance with the terms and provisions of section 603 of the Act, the parties hereto agree . . . that, subsidy shall be payable on the following terms: (I) As to voyages commencing on or after the affective date of this Agreement, . . . the fair and reasonable cost of Protection and Indemnity Insurance premiums and deductible absorptions, . . . incurred in the operation in an essential service, under United States registry, of the Vessels covered by this Agreement, over the United States' estimate of the fair and reasonable cost of the same items of expense . . . if such Vessels were operated under the registry of a foreign country whose vessels are substantial competitors of the Vessels covered by this Agreement.

46 C.F.R. § 282.24(d)(2)(i) specifies that a daily subsidy rate for P&I deductible subsidy will be calculated as follows:

(2) Deductibles.

(i) The eligible illness and injury crew claims paid and pending for each calendar year of a three-year period commencing six years prior to January 1 of the subsidized year shall be recalculated, if necessary, to reflect the operator's current deductible levels. These expenses, after audit, shall be multiplied by the percentage wage differential, as determined in the calculation of wage subsidy for the appropriate fiscal period. The resulting calendar period P&I deductible subsidy for the three-year period shall be divided by the voyage days for the period to arrive at an aggregate daily P&I deductible subsidy. The aggregate fiscal period wage subsidy accrued in the service for the three-year period shall be divided by the voyage days for the period to arrive at an aggregate daily wage subsidy amount. The aggregate daily P&I deductible subsidy for the three-year calendar period shall be divided by the aggregate daily wage subsidy for the three-year fiscal period. The resulting percentage shall be applied to

the wage per diem calculated for each ship type in the service to derive the daily amount of subsidy for P&I deductibles. As to pending claims previously recognized in the historical period, only the amount of changes in cost with respect to such claims shall be subsequently recognized.

Farrell and the Maritime Administration never executed an addendum to the ODS agreement to provide this alternative method for calculating P&I deductibles for asbestos claims. Addendum No. 56 to the agreement reflects an agreement to satisfy all claims for other items of subsidizable expense, but excludes “claims related to protection and indemnity insurance deductibles for asbestos related illnesses sustained during the contract period and subsequent to June 30, 1979.” Hence, as the parties did not evidence their intent to depart from the prescribed formula at 46 C.F.R. § 282.24 in the form of an addendum to the ODS agreement, we are constrained to conclude that any payments for P&I deductibles related to asbestosis claims after January 5, 1998, were unauthorized and in error to the extent they were based on a formula other than the one provided in the regulations and the Agreement.

Moreover, the Agreement and regulations provide that subsidy for P&I deductibles be calculated as a daily rate on the basis of the historical formula for each year of the ODS agreement. As of the date of this order, the Maritime Administration has received no documentation from Farrell indicating that Farrell calculated its P&I deductibles according to this formula. It appears that Farrell has been applying the 82.6% rate proposed by Mr. Ferris without any further analysis. This rate clearly departs from the system provided in the Agreement and regulations.

D. Whether the Maritime Administration is bound to continue payments using the 82.6% formula based on its course of conduct in accepting Farrell’s claims and making payments to Farrell after Farrell ceased to be a non-citizen.

A final question is whether the Maritime Administration is bound to continue paying the subsidy to Farrell, post acquisition, by its course of conduct in paying subsidies to Farrell post-acquisition and by the representations of Mr. Ferris. It is “well-settled that the Government may not be estopped on the same terms as any other litigant.” Heckler v. Community Servs., 467 U.S. 51, 60 (1984). In cases where the Executive obligates money without authority from Congress, it violates the Appropriations Clause of the U.S. Constitution, and therefore such payments cannot be enforced. This principle of law applies both where the payment is prohibited by statute and where the payment to be made is inconsistent with the agency’s regulations. See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 385-386 (1947) (holding that because agency regulations were published, the petitioner had constructive notice of their provisions, and refusing to estop the agency on the basis of unauthorized statements of a local agent); see also Office of Personnel Management v. Richmond, 496 U.S. 414, 434 (1990) (holding that the Office of Personnel Management could not be estopped to deny the validity of its agent’s erroneous advice because doing so would violate the Appropriations Clause of the U.S. Constitution).

Both Merrill and Richmond are guiding in this matter. Here, Congress has created a program to benefit and foster domestic shipping, and has authorized the Maritime Administration to develop and administer a process to provide subsidies to U.S.-flag vessel operators. As detailed above, this process has been set out in law, regulation, and formal agreements with operators. The Maritime Administration is not authorized to make ODS payments to non-citizens under the circumstances set forth here. Moreover, even if it were, the payments proposed to be made here are inconsistent with the Maritime Administration's regulations and the ODS contract. Ferris's 82.6% payment formula was clearly inconsistent with Maritime Administration procedures as set out in 46 C.F.R. Part 282 and the Agreement. However, even if it were, the Maritime Administration has received no documentation from Farrell indicating that it calculated its P&I deductibles according to this formula. There is no addendum to the Agreement laying out an alternative method for determining the payment of asbestosis claims, particularly with regard as to whether the claims must have been submitted prior to December 31, 1997.⁶ Any payments previously made with respect to these claims were inconsistent with the law and are subject to actions by the Federal Government for recovery.

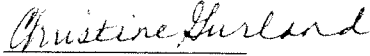
Conclusion

For the reasons discussed above, the Maritime Subsidy Board decides the following:

Farrell is not entitled to ODS payments by the Maritime Administration for asbestosis-related P&I deductible costs because Farrell is no longer a citizen of the United States under 46 U.S.C. § 50501 as required by section 601(a) of Title VI of the Merchant Marine Act of 1936, as amended; the Agreement was transferred without approval; the amount claimed was not computed according to an authorized methodology; Farrell has provided inadequate documentation to support its claims; and past payments do not compel the Maritime Administration to continue those payments.

SO ORDERED BY THE
MARITIME SUBSIDY BOARD

Date: March 4, 2009


Christine Gurland
Acting Secretary,
Maritime Subsidy Board

⁶ The MSB could execute an addendum with the ODS Operator to amend the methodology for determining P&I Insurance deductible expense calculations. However, Farrell is not presently qualified to be an Operator under the ODS Agreement.