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(MARITIME ADMINISTRATION)

U.S. DEPARTMENT OF TRANSPORTATION
MARITIME ADMINISTRATION
WASHINGTON, D.C.

MATSON NAVIGATION COMPANY

Docket No. A-199

In the matter of the request of the Shipbuilders Council of America, Inc. and Pasha Hawaii Transport Lines LLC that the Maritime Administration investigate whether certain work performed in foreign shipyards on vessels owned by Matson Navigation Company constitutes reconstruction or rebuilding of those vessels.

OPINION AND ORDER OF THE
MARITIME ADMINISTRATOR
DIRECTING A LIMITED INVESTIGATION

SEAN T. CONNAUGHTON
Maritime Administrator

Introduction

The Maritime Administrator issues this preliminary order in response to the request of the Shipbuilders Council of America, Inc. and Pasha Hawaii Transport Lines LLC (individually, "Shipbuilders" and "Pasha;" collectively, "Petitioners") that the Maritime Administration investigate whether certain work performed in foreign shipyards on vessels owned by Matson Navigation Company ("Matson") constitutes reconstruction or rebuilding of those vessels. Petitioners maintain that the Matson vessels have been reconstructed or rebuilt abroad, and the vessels are therefore ineligible to participate in the Capital Construction Fund (CCF) and civilian cargo preference programs.[1] Matson avers that it has complied with the CCF program and its vessels remain qualified under the Cargo Preference Act of 1954, as amended. Matson further argues that Petitioners lack standing to challenge the status of the vessels.

For the reasons stated herein, the Administrator restates the standards that currently apply to reconstruction/rebuild determinations relative to the CCF and civilian cargo preference programs and directs, only for cargo preference purposes, that an investigation be made into the work performed on certain Matson vessels.

Background

Petitioners' letter of November 28, 2006 requested that the Matson vessels, M/V MOKIHANA, M/V MAHIMAHI, and M/V MANOA, be removed from the CCF program and asked the Maritime Administration to notify other government agencies that the vessels would not be eligible to carry civilian preference cargo reserved to U.S.-flag vessels for three years. A subsequent letter submitted by Petitioners dated January 29, 2007 requested that the Maritime Administration open a docket to investigate whether foreign work previously performed on the three afore-mentioned vessels, and, additionally, the SS LIHUE, SS MATSONIA, SS LURLINE, MV RJ PFEIFFER, SS MAUI, and SS KAUAI, has disqualified those vessels. Petitioners also stated that the new docket should include all relevant information pertaining to the work that has been done in the various shipyards, including the plans, specifications, general arrangements, drawings, inspections, and surveys that were done in each instance as well as correspondence to and from the relevant classification society, naval architects and engineering consultants.

On January 17, 2007, the Maritime Administration's Secretary requested that Petitioners and Matson identify their correspondence in this matter as related to Docket No. A-199. However, a public docket was not established under the Department of Transportation Docket Management System.

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[1] Trailer Bridge, an owner and operator of U.S.-flag vessels, filed a letter, dated May 8, 2007, supporting Pasha's position.

Matson submitted a statement on February 26, 2007, contesting Petitioners' conclusions. Among other things, Matson argues that the Maritime Administration's CCF regulations do not disqualify any Matson vessel and that the Maritime Administration has approved Matson's foreign projects. Matson also opposes the Maritime Administration instituting an investigation and claims that Petitioners are not entitled to Matson's plans, drawings and specifications. By letter of July 26, 2007,[2] Petitioners responded to Matson's statement and submitted additional information and materials which, according to Petitioners, show that Matson has in fact not complied with its CCF responsibilities, and that work performed by Matson in foreign shipyards has disqualified Matson's vessels from the CCF and civilian cargo preference programs.

The Maritime Administration issued a notice in the Federal Register on November 14, 2007, 72 Fed. Reg. 64109, seeking public comment on what standards the Maritime Administration should apply when making determinations of foreign reconstruction of vessels that participate in the CCF and cargo preference programs. The comment period closed January 14, 2008, with about ten comments submitted. Although the comments disagreed as to what substantive criteria and enforcement procedures ought to apply to foreign rebuild and reconstruction determinations, there appeared to be a rough consensus that the Maritime Administration should articulate clear standards in the context of a rulemaking procedure. The Maritime Administration intends to develop a regulation of general applicability. However, any resulting regulation can only apply prospectively.[3] The Maritime Administration will here address Petitioners' allegations regarding whether Matson's past shipyard work disqualifies those vessels as a matter of ad hoc adjudication.

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[2] Petitioners requested, and were granted, an extension of time to respond to Matson's statement to allow for processing a Freedom of Information Act request, including an appeal of an initial withholding.

[3] The Administrative Procedure Act defines a rule as an action of "future effect." 5 U.S.C. § 551(4). See *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988) (Scalia concurring):

> "The first part of the APA's definition of "rule" states that a rule
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> "means the whole or a part of an agency statement of general or particular applicability *and future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency...." 5 U.S.C. § 551(4) (emphasis added).
>
> "The only plausible reading of the italicized phrase is that rules have legal consequences only for the future. It could not possibly mean that merely *some* of their legal consequences must be for the future, though they may also have legal consequences for the past, since that description would not enable rules to be distinguished from "orders," see 5 U.S.C. § 551(6), and would thus destroy the entire dichotomy upon which the most significant portions of the APA are based. Adjudication--the process for formulating orders, see § 551(7)--has future as well as past legal consequences, since the principles announced in an adjudication cannot be departed from in future adjudications without reason." *Id.*, at 216. (Citations omitted).

Discussion

Cargo Preference:

Of the various cargo preference statutes,[4] only the Cargo Preference Act of 1954 has a U.S. build requirement. That statute provides a preference in the carriage of certain cargoes financed by the United States Government to "privately-owned commercial vessels of the United States." However, that term is defined by statute to exclude "a vessel that, after September 21, 1961, was built or rebuilt outside the United States or documented under the laws of a foreign country, until the vessel has been documented under the laws of the United States for at least 3 years." 46 U.S.C. §55305(a).

The statute does not define or specify the factors to be used in determining whether a vessel has been "rebuilt." Nor do Maritime Administration regulations address the matter. The rebuilt exclusion was added to the Cargo Preference Act in 1961 to afford U.S. vessels and U.S. shipyards protection against foreign-generated competition. Pub.L. 87-266, 75 Stat. 565 (1961).[5] The Senate Report accompanying the Cargo Preference amendment explains its purpose as follows:

> "In the past few years an increasing number of foreign-flag vessels and vessels built or rebuilt in foreign shipyards have been documented under American registry. The purpose of or at least one purpose, of so registering was to qualify these vessels for participation as American-flag ships under section [55305(a)] and thus permit them to carry those cargoes restricted by law to American-flag vessels. Foreign markets have been quiet, and the ships in question could operate more profitably under U.S. registry because of these 50-50 cargoes, so they have been transferred to American registry. No duty is paid on such foreign-built or foreign-rebuilt ships.
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> * * *
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> Unless the present bill is enacted, it is unlikely that there will be any building, or rebuilding, or American unsubsidized vessels in American shipyards for a long time to come, with the result that a substantial portion of the work which should normally be available to this country's skilled shipyard craftsmen would be done by foreign shipyard labor. . ."

S. Rep. No. 667, 87th Cong., 1st Sess. 2-3 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2806, 2808.

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[4] Among the statutes that require that ocean transportation be accomplished in U.S.-flag vessels are: 1. The Military Cargo Preference Act of 1904, 10 U.S.C. § 2631; Section 901(a) of the Merchant Marine Act of 1936, as amended, 46 U.S.C. §55302; Public Resolution No. 17 of the 34th Congress, 46 U.S.C. § 55304; The Cargo Preference Act of 1954, 46 U.S.C. § 55305.

[5] The same "rebuilt" abroad exclusion had been added to the Jones Act a year earlier, in 1960. Pub.L. No. 86-583, § 1, 74 Stat. 321 (1960).

The Maritime Administration has interpreted the term, "rebuilt," in relevant precedent. In 1994, the Maritime Administration was requested by Aquarius Marine Co. to rule whether its U.S.-flag tanker, the GOLDEN MONARCH, if converted in a foreign shipyard to a dry bulk carrier, would retain cargo preference eligibility. The Maritime Administration found that the conversion did constitute a "rebuilding" for cargo preference purposes, notwithstanding the U.S. Coast Guard's finding that the vessel's conversion was not a "rebuilding" for purposes of eligibility under the coastwise trade laws. Docket No. A-185, 26 S.R.R. 1356-1362. The Maritime Administration equated "rebuilding" with "reconstruction," a term defined under the Maritime Administration's longstanding policy governing eligibility of vessel reconstruction projects for funding under the Construction-Differential Subsidy program. The Maritime Administration found both terms to be "a conversion of a ship requiring extensive structural and physical changes." *Id.* The Maritime Administration also considered the conversion in vessel type, from a tanker to a dry bulk carrier, in determining whether the GOLDEN MONARCH had been "rebuilt." *Id.*

The U.S. Court of Appeals for the Second Circuit, in *Aquarius Marine Co. v. Peña et al.,* 64 F.3d 82 (2d Cir. 1995), found the Maritime Administration's interpretation as to the GOLDEN MONARCH reasonable. That court noted the difficulty in relying on prior authority to illuminate the meaning of "rebuild," citing two cases, *The Grace Meade,* 25 F.Cas. 1387 (E.D. Va. 1876) and *The Jack-O-Lantern,* 258 U.S. 96 (1922), which came to opposite conclusions. 64 F.3d at 86, fn. 3.

More recently, in 2005, the Maritime Administration determined that the barge CONNOR, like the GOLDEN MONARCH, was converted from a tank vessel into a dry bulk carrier, and had been rebuilt foreign. Docket No. A-198, (Oct. 26, 2005). The new steel added to the CONNOR represented only 4.92% of the vessel's tonnage. However, the Maritime Administration found that the cost of conversion of the CONNOR, including the cost of towing the vessel to the foreign shipyard and the cost of ad valorem tax on the value of the foreign shipyard work, was a significant portion of the capitalized cost of the barge itself. On that basis, the Maritime Administration determined that the modifications performed in a foreign shipyard constituted extensive structural changes. *Id.* at 9-10. The Maritime Administration also considered the impact of the CONNOR's operation on competition, specifically noting that the CONNOR had underbid another U.S.-flag carrier to win an award of preference cargo. *Id.* at 11-12. The Maritime Administration's decision that the foreign work on the CONNOR constituted a "rebuilding" was not challenged in court.

The Maritime Administration's cargo preference determinations indicate that a "rebuilding" means a "conversion of a ship requiring extensive structural and physical changes." In addition, the rebuilding determination is guided by weighing the following factors:

1. extent of structural changes;
2. cost of the work relative to the cost of the vessel;
3. whether the work effects a conversion in vessel type;

4. effect on U.S. shipyards;
5. effect on U.S.-flag competition; and
6. purposes and policy of the Merchant Marine Act of 1936, as amended.

In developing these criteria, the Maritime Administration relied on the Office of Ship Construction Policy Guide Manual, dated June 24, 1976. The Policy Guide Manual was developed primarily to address the criteria for approving reconstruction projects eligible for subsidy under the Construction-Differential Subsidy Program, 46 U.S.C. § 53101 note. Vessels constructed with the assistance of construction-differential subsidy are required to operate exclusively in the U.S. foreign trade. *Id.* Inasmuch as vessels engaged in the carriage of preference cargoes also operate in the U.S. foreign trade, it was reasonable to apply the Policy Guide Manual to assess rebuilding projects for cargo preference purposes. However, it should be stressed that the Policy Guide Manual is not a binding rule; it is only a guidance document.

An initial review of the list of the work performed on Matson vessels indicates that the work complained of on most of the Matson vessels patently do not constitute "rebuilding." The foreign work involving modifying container holds, cell guides, hatch comings, power systems, etc., to accommodate larger containers on the SS LIHUE, SS MATSONIA, LURLINE, M/V PFEIFFER, M/V MOKIHANA, M/V MAHIMAHI, M/V MANOA, and SS KAUAI, involves neither extensive structural changes nor a change in vessel type. Other work involving modifying waste heat boilers, winches or other incidental changes likewise does not constitute extensive structural changes or a change in vessel type. Such work projects, which are not even alleged to constitute extensive structural changes and a change in vessel type, need not be investigated further.

However, there are two Matson vessels which warrant a closer look, the SS LURLINE and the M/V MOKIHANA.[6] The modification to these vessels involves adding automobile RO/RO capacity. That is, the modifications would allow these vessels to load automobiles, by means of a ramp, into a garage-like area on the vessel, while still carrying containers. A pure RO/RO vessel is generally considered to be a different type of vessel than a pure containership. However, converting a containership into a combination RO/RO/containership is a close call. Matson argues that there is no change in the type of cargo carried by these vessels, as these vessels previously carried automobiles—albeit in containers or racks. Another complicating factor is that only part of the conversion was performed abroad and the rest of work was performed in the United States. Matson states that "the cost of the work in China is less than 10 percent of the book value of the [M/V MOKIHANA] after the modification will be completed." Matson statement of Feb. 26, 2007, p. 17. On the other hand, Petitioners have submitted schematics and pictures of the M/V MOKIHANA, which they describe as evidencing a "gutting" of the vessel aft of the engine room casing and the addition of major components of the hull. Petitioners letter of July 26, 2007, Exhibit H, paragraph W.

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[6] It is our understanding that Matson has decided not to proceed with foreign work on the M/V MAHIMAHI and M/V MANOA.

Without plans and specifications, drawings and general arrangements, and possibly other pieces of information, on both the foreign and domestic work, it is not possible to come to a conclusion as to whether the foreign work constitutes extensive structural changes and a change in vessel type. Matson is hereby requested to provide such information to the Maritime Administration forthwith.[7] The Maritime Administration staff will review such material, and may request additional material if needed. Following such review, the Maritime Administration will issue a decision on whether the SS LURLINE and the M/V MOKIHANA remain eligible for a preference to carry U.S. Government sponsored civilian cargoes.

Capital Construction Fund:

The Capital Construction Fund (CCF) was established by the Merchant Marine Act of 1970, Pub. L. 91-469, § 21.[8] The CCF provides tax deferral benefits for the acquisition, construction and reconstruction of U.S.-flag vessels that are constructed in the United States, and if reconstructed, reconstructed in the United States.

The CCF program is administered through contracts which spell out the obligations of the fundholder and the provision of tax deferral benefits by the Maritime Administration.[9] The tax benefit—deferral of tax on deposits—begins when a deposit of a type and in an amount allowed under the CCF agreement is deposited in an approved fund. The tax deferral ends when the money in a CCF is withdrawn to finance an approved program objective. The Maritime Administration has the authority to set the conditions for CCF deposits and withdrawals. The Maritime Administration also has the authority to determine that certain withdrawals—i.e., those made for a non-approved purpose—are "nonqualified" and subject to tax penalties.

Deposits by parties to CCF agreements may come from four sources: (1) operating income from agreement vessels; (2) amounts saved due to the depreciation deduction allowed for agreement vessels; (3) net proceeds from the sale or other disposition of an agreement vessel, or from insurance proceeds with respect to it; and (4) receipts from the investment or reinvestment of amounts held in the fund. The vessels which form the basis for determining deposits are designated in the CCF agreement as "eligible vessels."

Withdrawals from the fund may be made only for approved program objectives. These objectives may consist of a combination of acquisition, construction or reconstruction of vessels. The withdrawals may be paid directly to the seller or fabricator of a vessel, or may be paid over time to a lender to defray the principal portion of the debt incurred in connection with the program objective. The vessels which benefit from the CCF financing are designated in the CCF agreement as "qualified vessels."

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[7] Matson offered to provide such information only to the Maritime Administration and on a confidential basis. Matson statement of Feb. 26, 2007, p. 26. Petitioners have no greater right to examine this material than does the public at large. Accordingly, such materials will not be released, except where required under the provisions of the Freedom of Information Act.

[8] The CCF was recently codified as Chapter 535 of Title 46. See Pub. L. 109-304, An Act to Complete the Codification of Title 46, United States Code, "Shipping", as Positive Law.

[9] See, generally, the Maritime Administration's CCF regulations at 46 C.F.R. § 390.

As here relevant, an "eligible vessel" is defined by statute to mean:

> "(A) a vessel—
> (i) constructed in the United States (and, if reconstructed, reconstructed in the United States), . . .;
> (ii) documented under the laws of the United States; and
> (iii) operated in the foreign or domestic trade of the United States . . .."

46 U.S.C. § 53501(2).

As here relevant, a "qualified vessel" is defined by statute to mean:

> "(A) a vessel—
> (i) constructed in the United States (and, if reconstructed, reconstructed in the United States), . . .:
> (ii) documented under the laws of the United States; and
> (iii) agreed, between the Secretary and the person maintaining the capital construction fund established under section 53503 of this title, to be operated in the United States foreign, Great Lakes, noncontiguous domestic, or short sea transportation trade[10] . . .."

46 U.S.C. § 53501(5).

Petitioners maintain that the Matson vessels, the SS LIHUE, SS MATSONIA, LURLINE, M/V PFEIFFER, M/V MOKIHANA, M/V HAHIMAHI, M/V MANOA, and SS KAUAI, have been reconstructed in foreign shipyards and are neither eligible nor qualified agreement vessels, and must be removed as agreement vessels from Matson's CCF agreement. Petitioners argue that the finding by the Coast Guard that the work in a foreign shipyard will not constitute a rebuilding within the meaning of the Jones Act is not controlling as to whether the same work will constitute a rebuilding under the CCF program. Instead, Petitioners point to the CCF regulations, at 46 C.F.R. § 390.9(b)(3), which define reconstruction as "any improvement to an existing vessel which increases the vessel's competitiveness and involves an aggregate sum in excess of $100,000."

However, section 390.9(b)(3) defines what can be tax deferred in the context of reconstruction—not what types of foreign reconstruction would disqualify a vessel from participating in the CCF program. Section 390.9(b)(3) indicates that a U.S. reconstruction of less than $100,000 would not be an acceptable program objective (unless waived by the Maritime Administration). This provision is included in the section under "qualified withdrawals," and the definition of "reconstruction" applies only to the types of projects that the Maritime Administration would consider to be acceptable CCF program objectives. The provision is not intended to define "reconstruction" in terms of what level of foreign shipyard work would disqualify a CCF agreement vessel.[11]

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[10] As amended by section 1122 of the Energy Independence and Security Act of 2007, Pub. L. 110-140.

[11] Matson argues that foreign reconstruction of a CCF agreement vessel does not disqualify that vessel from participation as a CCF agreement vessel, only that the CCF funds may not be used for foreign reconstruction. However, Matson's argument runs counter to the plain language of the statute and cannot

The Maritime Administration's CCF regulations do not specify the level of foreign shipyard work that would disqualify a CCF agreement vessel. Nor has the Maritime Administration issued formal program guidance on this matter. However, on an informal basis, the Maritime Administration has looked to whether the CCF agreement vessel has been disqualified from the Jones Act as a result of foreign shipyard work.[12]

The Maritime Administration is not obligated to follow Coast Guard Jones Act determinations on rebuilding in making its own determinations under either the cargo preference or the CCF programs.[13] As noted, the Maritime Administration's cargo preference rebuilding criteria vary from that of the Coast Guard. However, unlike cargo preference vessels which operate mostly in U.S. foreign trade, most CCF vessels operate in the non-contiguous domestic trade, and are also Jones Act-qualified vessels. Thus, the Coast Guard rebuilding requirements for Jones Act vessels have greater significance for CCF vessels than those requirements have for preference cargo vessels operating outside the Jones Act trade.

Relying on Coast Guard determinations in this area would serve the purposes of the CCF as well. As noted, the Maritime Administration's CCF regulations do not define the term, "reconstructed." However, the Coast Guard has detailed regulations governing what is meant by "rebuilding," a term the Maritime Administration previously held to be synonymous with "reconstruction." It would give carriers some certainty in knowing that their vessels that are both Jones Act qualified and are CCF agreement vessels are not subject to different Government rules regarding the extent of allowable foreign shipyard work. Having that certainty would tend to facilitate use of the CCF program, resulting in more construction and reconstruction in U.S. shipyards—clearly furthering one of the

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be accepted. The definitions of an "eligible vessel" and a "qualified vessel" in § 53501, both exclude vessels reconstructed outside the United States. Matson's argument also runs counter to Maritime Administration precedent. See *American President Lines, Ltd.-Foreign Reconstruction of Vessels,* 23 S.R.R. 1462 (MSB 1986): "Accordingly, if APL reconstructs its three C9-M-132b vessels in a foreign shipyard, the vessels may not thereafter be considered as either eligible or qualified agreement vessels under Section 607 of the Act, and the vessels will have to be removed from APL's CCF Agreement." *Id.* at 1473.

[12] The "Jones Act" refers to the coastwise trade provisions enacted in sections 21 and 27 of the Merchant Marine Act of 1920. Following recodification by Pub. L. 109-304 on October 6, 2006, the Jones Act provides, as here relevant:

> "§ 12101. Definitions
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> (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.
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> * * *
>
> § 12132. Loss of coastwise trade privileges
>
> (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 Coast Guard regulations governing foreign rebuilding for Jones Act purposes are located at 46 C.F.R. § 67.

[13] ". . .we cannot conclude that Congress required the two provisions [Jones Act and cargo preference] be interpreted synonymously." *Aquarius Marine Co. v. Peña et al.*, 64 F.3d 82, 87-89 (2d Cir. 1995).

goals of the purposes and policy of the Merchant Marine Act of 1936. See 46 U.S.C. § 50101.

Petitioners urge the Administrator to initiate an investigation into whether the Matson vessels identified by Petitioners have been reconstructed abroad. Matson argues that Petitioners have no standing to challenge the Maritime Administration's grant of CCF tax benefits to Matson. Matson cites *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976), to support its position that there is not a sufficient link between the granting of tax benefits and any injury suffered by Petitioners. In *Simon*, plaintiffs were indigents alleging that the Internal Revenue Service violated the Administrative Procedure Act by issuing a revenue ruling allowing favorable tax treatment to nonprofit hospitals offering only emergency room service to indigents. The Court reasoned that plaintiffs were not able to establish any injury that would be redressed by a favorable decision.[14]

In the instant case, there likewise does not appear to be any identifiable injury suffered by Petitioners that can be redressed by removing Matson vessels from the CCF. Even if the Maritime Administration were to disqualify Matson vessels from use of the CCF, as urged by Petitioners, the Matson vessels would not be precluded from competing against Pasha. The Shipbuilders' injury presumably concerns a reduction of work to which U.S. shipyards are entitled. However, Matson has built a number of vessels in U.S. shipyards with the assistance of the CCF program, and is spending a considerable amount of money on the current work on the M/V MOKIHANA in a U.S. shipyard. If Matson is barred from using the CCF, it would have a reduced incentive for construction or reconstruction in U.S.-shipyards. Thus, the relief requested by the Shipbuilders does not redress their alleged injury.

In any event, the CCF statute does not contain any mechanism for a third party to challenge someone else's CCF tax benefits.[15] The Maritime Administration's informal administrative actions herein do not amount to a proceeding under the Maritime Administration's Rules of Administrative Procedure, 46 C.F.R. § 201; and petitioners have not been admitted as parties.

An important consideration in determining the continuing eligibility of CCF vessels is that such eligibility is governed by an agreement between the Maritime Administration and the fundholder. See 46 U.S.C. § 53503. Parties that enter into contracts (including

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[14] Petitioners argue that Matson has mischaracterized the *Simon* case with regard to Matson's proposition that "there is no standing to participate in a proceeding concerning the tax treatment of a third party." However, redressability is a key element of standing. See *Allen v. Wright*, 468 U.S. 737: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* at 751. (Emphasis added.) accord, e.g., *Hein v. Freedom from Religion Foundation, Inc.*, 127 S. Ct. 2553, 2555 (2007).

[15] If Congress had intended such a mechanism to limit competition between CCF participants and non-participants, it knows well how to write such provisions into law. For example, the operating-differential subsidy program, now located at 46 U.S.C. § 53101 note, provides for formal hearings in which competitors can seek to block grant of subsidy to another carrier.

CCF agreements) with the Government can expect to rely on the contractual rights they bargained for.[16] The standard CCF agreement, reprinted at 46 C.F.R. § 390 App. II, provides:

> "15. *Extension of Federal Income Tax Benefits:* The Maritime Administrator agrees that the Federal income tax benefits provided in the Act and the rules and regulations shall be available to the Party if the Party shall carry out its obligations under this Agreement."

Under the CCF regulations, at Part 390.13, it is for the contracting officer, here, the Associate Administrator for Business and Workforce Development, to determine whether there has been a failure to fulfill a substantial obligation under a CCF agreement. In other words, this matter is an issue of contract compliance to be dealt with by the parties to the contract.

The foreign shipyard work on the SS LURLINE and M/V MOKIHANA has been approved by the Maritime Administration in tacit reliance on the Coast Guard not ruling the vessels to be rebuilt abroad and ineligible for coastwise trade. The Coast Guard has not ruled that any of the Matson vessels identified by Petitioners (all of which operate in Jones Act trade) have been rebuilt abroad and are ineligible to participate in the Jones Act trade.

Matson has made significant CCF deposits and withdrawals, in reliance on the Maritime Administration's approval. If the Maritime Administration were to reverse its approval, Matson could be subject to severe tax penalties. See 46 U.S.C. § 53511. Given Matson's good faith reliance on Maritime Administration approvals and precedents, such imposition of severe penalties would be unconscionable. In this circumstance, no further review of Matson's CCF agreement is warranted. [17]

Conclusion

For the reasons expressed above, the Administrator decides the following:

1. Petitioners' allegations as to the foreign rebuilding of the SS LIHUE, SS MATSONIA, M/V PFEIFFER, and SS KAUAI relative to eligibility for preference to carry U.S. Government sponsored civilian cargoes do not warrant further investigation.

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[16] "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Mobil Oil Exploration & Producing Southeast v. United States*, 530 U.S. 604, 608 (2000) quoting *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996),

[17] A decision not to investigate is not reviewable under *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947). Accord, *Crowley Caribbean Transport, Inc. v. Peña*, 37 F.3d 671, 674-677 (D.C. Cir. 1994), wherein the Court of Appeals for the District of Columbia Circuit held that the Maritime Administration's decision not to enforce section 804 of the Merchant Marine Act of 1936, as amended, was not subject to review.

2. The Maritime Administration will review additional information to be submitted by Matson relative to whether the SS LURLINE and M/V MOKIHANA have been rebuilt abroad and remain eligible for preference to carry U.S. Government sponsored civilian cargoes.

3. No investigation will be opened as to whether any Matson vessel is no longer an "eligible" or "qualified" vessel under Matson's CCF agreement unless the Coast Guard determines that vessel to have been rebuilt abroad and to be ineligible for a coastwise endorsement.

SO ORDERED BY THE
MARITIME ADMINISTRATOR

Date:
MAR 18 2008

Murray A. Bloom
Acting Secretary
Maritime Administration