(SERVED)
(OCTOBER 26, 2005)
(MARITIME ADMINISRATION)

U.S. DEPARTMENT OF TRANSPORTATION
MARITIME ADMINISTRATION

MOBY MARINE CORPORATION

Docket No. A-198

In the Matter of the Eligibility
Of the Barge CONNOR
For Carriage of Cargoes Under
The Cargo Preference Act of 1954

FINAL OPINION AND ORDER OF
THE DEPUTY MARITIME ADMINISTRATOR

JOHN JAMIAN
DEPUTY MARITIME ADMINISTRATOR

SERVICE LIST:

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I. INTRODUCTION

This final Opinion and Order of the Maritime Administration (MARAD) concerns the eligibility of the U.S.-flag barge CONNOR (Vessel) to carry cargoes subject to the Cargo Preference Act of 1954 which is codified as Section 901(b) of the Merchant Marine Act of 1936, as amended.

II. BACKGROUND

The CONNOR (ex-ENERGY 9801, ex-HYGRADE 95) is a 390 ft., steel hulled, U.S.-flag (USCG Doc. No.:511528), non-self propelled vessel which was built at Avondale Shipyards in Avondale, Louisiana in 1967. The Vessel's current documentation was issued on September 1, 2005 for Vessel Service: FREIGHT CARGO. The CONNOR is owned by Moby Ruth Inc., and operated by Moby Marine Corporation, both of Palm City, Florida (hereafter referred to individually or jointly as Moby).

Moby offered the CONNOR to carry 10,000 metric tons of bulk wheat to Haiti in response to a Title II[1] freight tender dated August 23, 2005. On September 2, 2005 MARAD provided to the U.S. Agency for International Development (AID) a fair and reasonable rate calculation for the CONNOR based on a presumption (later brought into question) of eligibility of the Vessel to carry 1954 Cargo Preference Act cargoes. On September 6, 2005, AID awarded the bid to Moby.

[1] Title II refers to: P.L. 480, Title II–Emergency and Private Assistance, which provides for the donation of U.S. agricultural commodities to meet emergency and non-emergency food needs in other countries, including support for food security goals.

By letter of September 21, 2005, Counsel to Allied Transportation Company (Allied) informed MARAD that to its knowledge and belief the CONNOR should be declared ineligible on the basis that the CONNOR was rebuilt foreign.[2]

Following notification by MARAD, Moby responded and provided information on the Vessel, and the work being done to the Vessel in the foreign shipyard. Counsel for Moby specified that their responses be withheld from Allied or others, unless requested under the Freedom of Information Act (5 U.S.C. 552) and the Department of Transportation Procedures at 49 C.F.R. §§7.14, 7.17.[3] Moby provided redacted versions of their submissions to MARAD. A summary of those facts provided for the record includes: Vessel purchased on March 29, 2005; its previous service was for oil cargoes in the New York trade; Moby towed the Vessel on May 12, 2005 from New York to its Fort Pierce, Florida facility; Moby began work to gas-free, clean and convert the Vessel for bulk cargo carriage, however, sufficient ABS welders were not available to their facility, and, based on the NOAA Hurricane Forecast for the upcoming season and recent past hurricane experience, it was not practicable to accomplish the work required to convert the Vessel for bulk cargo carriage at their facility as planned. Moby elected to accomplish the work necessary to convert the Vessel for bulk cargo carriage in a foreign shipyard, Industrias Astivik in Cartagena, Colombia.[4]

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[2] 9-21-05 letter from John A. Douglas (Counsel to Allied Transportation Company) to John Jamian, Acting Maritime Administrator.
[3] 10-13-05 letter from Stuart S. Dye (Counsel to Moby Marine Corporation and Moby Ruth, Inc.) to Murray A. Bloom, Acting Deputy Chief Counsel.
[4] 9-29-05 Moby Marine Corporation letter from James Griffin III to Thomas W. Harrelson.

III. JURISDICTION

Since 1904 Congress has enacted a series of cargo preference laws. These laws are designed to provide an economic incentive to U.S.-flag shipowners by requiring exporters and importers to use U.S.-flag vessels to transport a certain percentage of any oceanborne cargoes that are financed, directly or indirectly, by the U.S. Government. Thus, preference cargoes help assure the sufficiency of the nation's sealift capability and the existence of a vital U.S. intermodal transportation infrastructure. MARAD is tasked with ensuring that cargo preference compliance is achieved by government agencies and their contractors.

Among the statutes for which MARAD monitors compliance is the Cargo Preference Act of 1954, as amended,[5] and one of the ways this is carried out is to provide notice of eligible vessels to the government agency moving the cargoes.[6] In this regard, the courts have recognized MARAD's authority on the question of a vessel's eligibility to carry cargo subject to the Cargo Preference Act of 1954.[7]

IV. ISSUES

The relevant portion of the Cargo Preference Act of 1954 reserves a 50 percent portion of government-impelled agricultural cargoes for *"privately owned United States-flag*

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[5] 46 App. U.S.C. 1241(b)

[6] Memorandum of Understanding among the Commodity Credit Organization, the Agency for International Development, and MARAD, effective July 20, 1987, provides that MARAD shall furnish the other agencies with a list of vessels eligible to carry preference cargoes.

[7] *Aquarius MarineCo. v. Peña et al.*, 64 F.3d 82 (2d Cir. 1995), "The Maritime Administration ... has responsibility for determining which vessels qualify for U.S. cargo preferences under the Act. 49 C.F.R. §§ 1.4(j)(8) & 1.66(e)."

commercial vessels," which, *"shall not be deemed to include any vessel which ... shall have been ... rebuilt outside the United States ... until such vessel shall have been documented under the laws of the United States, for a period of three years."*[8] (Similarly, the 25% incremental reservation of preference cargo afforded by the Food Security Act[9] is also subject to the foreign rebuilding exclusions.[10])

Therefore, the central issue before MARAD is whether the work performed on the CONNOR in Cartagena, Columbia is a rebuilding for purposes of the Cargo Preference Act of 1954.

V. DISCUSSION

A. *The Existing Legal Precedent.*

No factors are specified, nor definition given, for the term "rebuilt" by the Cargo Preference Act of 1954. However, MARAD has interpreted the term in a relevant precedent. In 1994, MARAD was requested by Aquarius Marine Co. for a ruling whether its U.S.-flag, San Clemente Class tanker, the GOLDEN MONARCH, if converted in a Korean shipyard to a dry bulk carrier, would retain cargo preference eligibility. The agency's ruling on the GOLDEN MONARCH in MARAD Docket No. A-185[11] articulates a workable definition based on the way in which the term had been

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[8] 46 App. U.S.C. §1241(b).
[9] 46 App. U.S.C. §1241f.
[10] *Aquarius MarineCo. v. Peña et al.*, 64 F.3d 82 (2d Cir. 1995), "Subsection 1241f(c)(1) specifies that the requirements for transporting agricultural goods under the Food Security Act are "subject to the same terms and conditions as provided in section 1241(b) [§ 901(b)] of this title." "
[11] 26 S.R.R. 1356-1362.

used for other consistent agency program determinations. It also establishes that the extent of the foreign work determining a vessel to be "rebuilt" can be less than that entailed in the performance of special surveys, or replacement of hull plating and/or structure required to put or keep a vessel in class. The decision of the United States Court of Appeals, Second Circuit in *Aquarius Marine Co. v. Peña et al.*[12] (Aquarius), which upheld MARAD's Docket No. A-185 ruling, clearly states:

> *"... that MARAD's interpretation of §901(b) is a permissible reading of the statute. To define "rebuilt" in the context of the maritime laws as "a conversion of a ship requiring extensive structural and physical changes" is consistent with the common usage and the dictionary meaning of the term";*

that

> *"... "rebuild" can also mean a "near total restoration," ...[but that] is not the only plausible definition of that term";*

that it is permissible

> *"... for MarAd to equate "rebuild[ing]" with a "reconstruction" ..."*

as interpreted for determinations relating to grant of construction differential subsidies under 46 U.S.C.App. §1151(a) & (c); and, that

> *"... the issue is to distinguish a rebuilding from less consequential changes. The smaller the changes, the less likely the conclusion that the vessel has been rebuilt."*

Applying it's definition, MARAD determined the GOLDEN MONARCH to be "rebuilt" based on the facts in that vessel's case which included changing the type of vessel from one type to another which is expressly considered to be a reconstruction per MARAD policy, and noting the extent of steel work and the costs.[13]

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[12] *Aquarius MarineCo. v. Peña et al.*, 64 F.3d 82 (2d Cir. 1995).
[13] 26 S.R.R. 1356-1362

Counsel for Moby agrees that the applicable legal precedent is the MARAD definition for rebuilt quoted above, but believes the work on the CONNOR was not extensive enough to disqualify it from the Cargo Preference Act of 1954, as amended.[14]

Applying the legal precedent requires consideration of the qualitative nature of the work carried out, and, the quantitative scope of the vessel's modifications or renovations.

1. Qualitative Factors. Counsel for Moby distinguishes the facts of the GOLDEN MONARCH *"... where the conversion work on that ship was larger in expanse, wider in scope, and well above average in amount with a greater market impact. It was, therefore, found to be "extensive" and a "rebuilt.""* [15] Counsel for Moby argues that the purpose of the modifications to the GOLDEN MONARCH (a 91,390 dwt self propelled vessel) was to convert the oil tanker to a totally new and exclusive function as a dry bulk carrier, *vice* the CONNOR (a 12,590 dwt non-self propelled vessel) where the purpose of the modifications was to broaden carriage capability from only bulk oils to both bulk oils and/or dry bulk.[16] Counsel for Moby points to the ABS certifications and U.S. Coast Guard documents which will identify CONNOR as an OBO combo vessel versus a pure dry cargo freight barge[17].

MARAD notes that the Cartagena work substantially converted the Vessel from a pure oil carrier and it included steel removal and steel addition in order to facilitate bulk and/or packaged dry cargo hatches (cutting, sizing, and installation of hatch coamings

[14] 10-13-05 Stuart S. Dye (Counsel to Moby Marine Corporation and Moby Ruth, Inc.) letter to John Jamian. p.3

[15] Ibid, p.3
[16] Ibid, p.3
[17] 10-13-05 Stuart S. Dye (Counsel to Moby Marine Corporation and Moby Ruth, Inc.) letter to John Jamian. p.3

and hatch covers), manholes w/wheels, and oil system modifications. MARAD therefore finds that these modifications are consistent with a conversion and similar in descriptive scope to the reconstruction of the GOLDEN MONARCH.

MARAD notes that the current class status on the on line ABS Register (http://absapps.eagle.org/unsecured/record/record_vesselsearch) is as follows:

Current Classification: **Maltese Cross A1 Barge**

Description: **Bulk Cargo Barge**

Interestingly, the Register listing has no reference to being a tank barge or OBO or being able to carry oil cargos. It lists the hold capacity but not any tank capacities. Also of note is that ABS includes ASTILLEROS VIKINGOS S.A. – ASTIVIK (the South American yard) as a builder (installer) and describes the project as "Conversion to Dry Bulk Cargo Barge". Thus the reconstructive purpose of the foreign work on the CONNOR is directly comparable to that of the GOLDEN MONARCH.

MARAD also notes that the Vessel's conversion was undertaken purely for the purpose of enabling it to participate in the 1954 Act preference dry bulk cargo market, which is again consistent with the GOLDEN MONARCH ruling, and is further indication that the change is not inconsequential because this is a new market for the Vessel.

- Therefore, based on qualitative criteria alone MARAD determines that the Cartagena work is a conversion which is extensive from a qualitative standpoint because it converts the Vessel from a tank barge to a dry bulk cargo barge.

2. Quantitative Factors. Counsel for Moby compares the total of new steel tonnage added to the GOLDEN MONARCH versus the CONNOR and notes that these totals represent over 8% of the vessels deadweight tonnage for the GOLDEN MONARCH and approximately 4.92% for the CONNOR, and notes that this is a relevant factor in the determination of rebuilt.[18] Counsel for Moby also identifies the cost (and its proportion to the CONNOR's capitalized cost or fair market value) of the Cartagena work as a factor which may be considered for purposes of the determination of rebuilt.[19]

Based on information supplied by Moby MARAD has confirmed the amount of steel weight added and its proportion to lightship weight for the CONNOR. MARAD notes that it is over 3% (8% compared to 4.92%) less than the GOLDEN MONARCH's steel work. However, MARAD also notes that the Cartagena steel weight added percentage is not *de minimis* (or such a small percentage that it can be ignored). As to whether 4.92% new steel on the CONNOR represents extensive changes, MARAD takes note of the fact that Moby's eventual decision to have the work performed in a foreign shipyard grew out of Moby's recognition[20] that it was not going to be able to accomplish the work in house (at Fort Pierce) due to a lack of resources (certified welders), and MARAD may fairly interpret this as a *de facto* admission of the extensiveness of the work to add this percentage of steel to the barge; i.e. the work was so significant as to require resources more readily available in a shipyard.

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[18] 10-13-05 Stuart S. Dye (Counsel to Moby Marine Corporation and Moby Ruth, Inc.) letter to John Jamian, p.4

[19] Ibid, p.4

[20] 9-29-05 Moby Marine Corporation letter from James Griffin III to Thomas W. Harrelson, p.1

Looking to the cost involved with the Cartagena work, Counsel for Moby provided cost breakdowns and calculated percentages of the cost of the foreign shipyard work relative to the Vessel's capitalized cost and relative to the Vessel's minimal fair market value.[21] Relative to costs MARAD first notes that, based on the Moby cost figures[22], the Cartagena work is significant in terms of cost as demonstrated by the fact that those costs are the same order of magnitude as the Vessel's recent sale price.

Then, as to the costs of the Cartagena work and their relationship to the Vessel's capitalized costs and minimal fair market value, MARAD calculates different percentages based on adding to the foreign shipyard costs: one-half of the total towing costs (i.e. Mobilization & Demobilization from New York to Moby facilities at Fort Pierce, FL and, thereafter to and from Columbia); plus all of the expenses associated with Moby employees detailed to Columbia; plus all of the U.S. Customs *ad valorem* duty. Thus the fully burdened Cartagena work cost percentages equate to percentages more than double those proferred by Counsel for Moby relative to the Vessel's capitalized cost and relative to the Vessel's minimal fair market value. It is MARAD's determination that these percentages are a further indication of extensive changes to the Vessel as a result of the foreign conversion.

- Therefore, MARAD determines that the Cartagena work was a reconstruction being quantitatively significant and extensive changes to the Vessel as demonstrated by the cost of the work representing a significant percentage of overall vessel worth, and the vessel

[21] 10-13-05 Stuart S. Dye (Counsel to Moby Marine Corporation and Moby Ruth, Inc.) letter to John Jamian. p.4
[22] Ibid

modifications requiring so much steel work that they constituted extensive structural changes to the Vessel.

B. *Policy Considerations*.

For MARAD's GOLDEN MONARCH precedent, the decision of the United States Court of Appeals, Second Circuit in *Aquarius Marine Co. v. Peña et al.*[23] makes it clear that with reference to MARAD's definition of "rebuilt":

> *"MarAd's interpretation is undoubtedly consonant with the stated policy of the Cargo Preference Act;*

and, that

> *"MarAd's more expansive definition of a "rebuilt" ship obviously tends to further the protectionist intent of the statute".*

Making a determination of rebuilt for purposes of the Cargo Preference Act of 1954 in the case of the CONNOR should also be found to further the purposes and policies of the statutory framework which mandates that administrative discretion.[24] Counsel to Moby addresses this concern as follows:

> *"MarAd's mandate in administering and strengthening the U.S. PL-480 Program is to strengthen and raise the quality and quantity of U.S. Merchant Marine vessels available and actively bidding to carry those U.S. government preference cargoes to at least 75% of the cargoes tendered."*[25]

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[23] *Aquarius MarineCo. v. Peña et al.*, 64 F.3d 82 (2d Cir. 1995).
[24] See *Keystone Shipping Co. v. United States*, 801 F. Supp.771, 785-86 (D.D.C. 1992) (maritime agency must take into account policy behind statutes it construes).
[25] 10-13-05 Stuart S. Dye (Counsel to Moby Marine Corporation and Moby Ruth, Inc.) letter to John Jamian. p.2

However, Moby's summation leaves out mention of MARAD's no less valid mandate *vis-à-vis* U.S. shipyards propounded in section 101[26], which states that it is the policy of the United States to have a merchant marine *"... (e) supplemented by efficient facilities for shipbuilding and ship repair ..."* and the legislative history of the rebuild provision to the Cargo Preference Act of 1954 evidences the desire to protect and foster domestic shipyards by its inclusion[27] (also see shipyard discussion below). Therefore, it is appropriate to consider the determination's effects on both the U.S. Merchant Marine involved in this category of preference cargo trade, and, the U.S. shipyard industry catering to this type of work.

1. The Effect on Competition. Counsel for Moby states[28] that the

CONNOR will be capable of carrying 12,500 metric tons of vegetable oils and/or dry bulk cargoes and thus would compete as a Category II vessel (vessels competing for agricultural cargoes subject to the Cargo Preference Act of 1954 do so in one of four categories based on the tonnage carrying capacity with 'fair and reasonable' rates calculated for each of the categories; Category II vessels can carry between 10,000 and 19,999 dwt[29]). Counsel for Moby avers, as to the effect on competing Category II vessels of ruling the CONNOR eligible (i.e. non-rebuilt) that it:

> *"... will not create an economic threat to Allied or the two other carriers that own and operate Category II bulk barges that are still in service and have actually been active over the past three years."*

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[26] 46 App. U.S.C. §1101.
[27] The amendment to the Cargo Preference Act of 1954 disqualifying foreign-rebuilt vessels, was added in 1961 by Pub. L. 87-266. See Sen. Rept. No. 87-677, August 7, 1961, to accompany S. 1808; H. Rept. No. 87-922, August 15, 1961, to accompany H.R. 6732, p.2.
[28] 10-13-05 Stuart S. Dye (Counsel to Moby Marine Corporation and Moby Ruth, Inc.) letter to John Jamian. p.2
[29] 46 C.F.R. §382.3

and, that

> *"... Allied ... will simply have to sharpen its pencil and offer lower more competitive prices when it bids on Category II PL-480 tenders for the Caribbean Basin."*[30]

Allied has protested the eligibility of the CONNOR and avers that it was the next lowest bidder for AID's 10,000 metric tons of bulk wheat to Haiti freight tender dated August 23, 2005.[31] Based on that protest, MARAD must conclude that the award of the cargo to the CONNOR was deleterious to the financial interests of Allied. It is not MARAD's function to decide which U.S.-flag operator benefits from a preference cargo award, rather, it is MARAD's function to determine eligibility to compete in the preference trade, and then the effects of that competition on the Category II market will play out.

2. The Attainment of Cargo Preference Goals. Counsel for Moby states:

> *"3. The number of U.S.-flag oil or dry bulk barges in service and offered for participation in the U.S. Cargo Preference Program has steadily declined over the past ten years ...*
>
> *4. Therefore, there continues to be fewer U.S.-flag carriers and barges competing for PL-480, oil or dry bulk cargoes resulting in higher costs to the U.S. taxpayer for that U.S.-flag carriage and a higher % of those preferences [sic] cargoes being carried in foreign bottoms."*[32]

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[30] 10-13-05 Stuart S. Dye (Counsel to Moby Marine Corporation and Moby Ruth, Inc.) letter to John Jamian. p.2

[31] 9-21-05 letter from John A. Douglas, Esq. to John Jamian, Acting Maritime Administrator.

[32] 10-13-05 Stuart S. Dye (Counsel to Moby Marine Corporation and Moby Ruth, Inc.) letter to John Jamian. p.6

MARAD data for eligible vessels over the last ten years shows a constant number (five) routinely competing for the subject preference cargoes, and this fact argues against these assertions.

Counsel for Moby also points out that:

> *"If the CONNOR is now disqualified ... MarAd's mandated goal of 75% U.S.-flag carriage will never be approached, let alone realized."*[33]

MARAD concedes that, relative to the P.L. 480, Title II Program the 75% goal may be more likely to be met if the CONNOR were eligible; however, MARAD must weigh all policy objectives as discussed below.

3. The Demise of Moby. If the CONNOR is determined to be "rebuilt" and is precluded from the preference cargo market for three years, Counsel for Moby avers:

> *"Such a result will most certainly ruin this small American family business and cause its immediate demise."*[34]

MARAD recognizes the value to the U.S. flag merchant marine that Moby represents, and MARAD must also recognize the value of Moby's competitors. It is MARAD's position that all vessels must adhere to laws governing their participation in the cargo preference trade. While the threat of the loss of such a U.S.-flag operator may militate against a decision to make the Vessel ineligible for 1954 Act preference cargoes, such an outcome cannot dictate this determination which is based on the factual context of an

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[33] Ibid, p.2

[34] Ibid, p.2

extensive vessel conversion in a foreign shipyard and which is consistent with other desirable policy outcomes as discussed herein.

MARAD also notes that Moby could and should have requested an advisory opinion anytime prior to towing the Vessel to Columbia, and, by receiving a determination, avoided the risk of triggering the three year exclusion from the 1954 Act cargo preference trades. Moby is an experienced cargo preference operator, and an awareness of the statutory language of the "rebuilt" exclusion, and applicable MARAD precedents, may be inferred.

4. The Effects on U.S. Shipyards. Counsel for Moby opines that, if the CONNOR is determined to be eligible for 1954 Act preference cargoes:

> *"... that determination will also not diminish prospects for such new construction in U.S. shipyards."*[35]

As mentioned above, MARAD takes note of the legislative history of the 1961 amendments to the Cargo preference Act of 1954 which added the "rebuilt" 3 year exclusion. To wit, the House of Representatives, 87th Congress, Report No. 922, (August 15, 1961) at page 3, clearly states:

> " *NEED FOR THE LEGISLATION*
>
> *... the present bill is felt to be necessary in order to ... protect our shipyards ..."*

[35] Ibid, p.2

Similarly, at page 3 of Report No. 667 (August 7, 1961), the Senate states that:

> *"The maintenance of an adequate American shipbuilding capacity and an adequate force of trained shipyard workers is essential for our national defense. ... Unless the present bill is enacted ... a substantial portion of the work which should normally be available to this country's skilled shipyard craftsmen would be done in foreign shipyards by foreign shipyard labor."*

MARAD cannot subscribe to the assertion that prospects for U.S. shipyards will not be affected adversely by allowing foreign rebuildings into the preference trades, and certainly, the protectionist legislative intent which provides the underpinnings of MARAD's exercise of discretion in this matter does not allow it.

Counsel for Moby also contends:

> *"5. U.S.-flag bulk barges routinely have had, and will continue to have, their costly 5-year special ABS drydocking, surveys and related modifications done in yards abroad, other than routine maintenance or emergencies. ... The reality, therefore, is that ... the playing field will be level and will not provide a meaningful competitive advantage to Moby over its competition in the Category II PL-480 Program."*[36]

In regard to work performed on U.S.-flag vessels in foreign shipyards, if MARAD determines that work to meet the definition of "rebuilt" for purposes of the Cargo Preference Act of 1954, those vessels will be ineligible to carry preference cargoes for the 3-year waiting period. As to the playing field which MARAD considers, this includes the 72 East and Gulf Coast U.S. shipyards (11 with prior barge construction experience) with building positions capable of accommodating a vessel of CONNOR's size. To the best of MARAD's knowledge, none of these yards was overcapacity this year, and it is

[36] Ibid, p.6

likely that many could have fit in a barge reconstruction. Absent a showing of non-availability of U.S. shipyard resources to perform the work, the legislative intent of the "rebuilt" proviso of the Cargo Preference Act of 1954 cannot be set aside.

- Therefore MARAD determines that it's ruling that the CONNOR was "rebuilt" foreign, furthers the purposes and policy of the Merchant Marine Act of 1936, as amended.

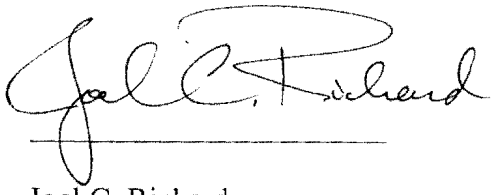
VI. CONCLUSIONS

The work performed in Cartagena, Columbia to convert the CONNOR from a tank barge to a bulk cargo barge constitutes a rebuilding within the meaning of the Cargo Preference Act of 1954. Therefore, MARAD will no longer determine the CONNOR to be eligible to carry preference cargoes subject to the Cargo Preference Act of 1954. The CONNOR was awarded the Haiti cargo based on MARAD's previous representations to AID, and the Vessel is currently engaged in that voyage; therefore, the three year waiting period, triggered by foreign rebuilding, shall commence with the later of either the service of this Opinion and Order, or the conclusion (discharge of cargo) of the Haiti voyage by the CONNOR.

SO ORDERED BY THE

MARITIME ADMINISTRATOR

Date: OCT 26 2005



Joel C. Richard,

Secretary