

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>PHILADELPHIA METAL TRADES</b>	:	
<b>COUNCIL, MTD, AFL-CIO, <u>ET AL.</u>,</b>	:	
<b>Plaintiffs</b>	:	<b>CIVIL ACTION</b>
	:	
v.	:	
	:	
<b>ADMIRAL THAD W. ALLEN, <u>ET AL.</u>,</b>	:	<b>NO. 07-145</b>
<b>Defendants.</b>	:	

**MEMORANDUM AND ORDER**

GENE E.K. PRATTER, J.

APRIL 3, 2007

Plaintiffs Philadelphia Metal Trades Council, MTD, AFL-CIO (“PMTC”) and Metal Trades Department, AFL-CIO (“MTD”)<sup>1</sup> complain pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702-706 (“APA”), that the United States Coast Guard ruled in an arbitrary and capricious manner when it found that certain of Aker Philadelphia Shipyard, Inc.’s (“Aker”) Tankers qualified as “built in the United States” for the purposes of Section 27 of the Merchant Marine Act of 1920, 46 App. U.S.C. § 883 (the “Jones Act”)<sup>2</sup> and Coast Guard Regulation 46 C.F.R. § 67.97 (2006). Plaintiffs commenced this action against the Coast Guard, and its Commandant, Admiral Thad W. Allen, as well as the National Vessel Documentation Center (“NVDC”), and its Director, Thomas L. Willis. Upon agreement of all parties, on February 13, 2007, the Court permitted Aker to intervene as a defendant pursuant to Rule 24(a) of the Federal

---

<sup>1</sup>Plaintiff PMTC is an unincorporated labor organization comprised of members who work for Aker at its Philadelphia Shipyard. MTD is an unincorporated labor organization that acts on behalf of PMTC and its employees in lobbying and litigation efforts.

<sup>2</sup> The provisions of 46 App. U.S.C. § 883 were recodified by Pub. L. 109-304 (Oct. 6, 2006) and are now contained in various sections of Title 46 U.S.C. Chapter 121, Documentation of Vessels (46 U.S.C. §§ 12101-12152) and Title 46 U.S.C. Chapter 551, Coastwise Trade (46 U.S.C. §§ 55101-55121).

Rules of Civil Procedure.

General Dynamics NASSCO (“NASSCO”) now moves to intervene as a defendant in this case, either as a matter of right, or with the Court’s permission. Plaintiffs oppose the intervention on the grounds that although NASSCO has sufficient interest in the litigation, its interest is adequately represented by either Aker or by the government. Because NASSCO’s existing contractual rights will be directly affected in a substantially concrete way by the relief sought by Plaintiffs, and because the Court holds that none of the parties to this suit adequately represent NASSCO’s interests, the Court will grant the motion to intervene.

## **I. BACKGROUND**

In relevant part, the United States shipping laws require that “merchandise” transported by water between points within the United States (via domestic or foreign port) must be transported in a vessel that was “built” in the United States. 46 U.S.C. § 883 recodified at 46 U.S.C. § 12112.<sup>3</sup> The Coast Guard has administrative responsibility for certifying vessels for the purposes of the Act. Its regulations deem a vessel to be “United States built” if (1) “all major components of its hull and superstructure are fabricated in the United States”; and (2) “the vessel is assembled entirely in the United States.” 46 C.F.R. § 67.97.

In the present case, Plaintiffs contend that the Coast Guard acted contrary to applicable statutes, and its own regulation, in determining that certain vessels being constructed by Aker were eligible for Certificates of Documentation with coastwise endorsements. According to Plaintiffs, in preparation of its production of ten Veteran Class MT-46 Product Tankers, on April

---

<sup>3</sup>Prior to codification of the Appendix, Section 27 of the Jones Act authorized vessels for coastwise trade provided that they were “vessel[s] built in and documented under the laws of the United States...” 46 App. U.S.C. § 883.

25, 2006, Aker submitted a request to the NVDC for a ruling that these tankers would be deemed to have been built in the United States for the purpose of the Jones Act, and its implementing regulations, and thus eligible for coastwise trade. Approximately one month later, the Director of the NVDC ruled that Aker's tankers would comply with the law, and in so doing, the Director determined that Aker's use of certain foreign pre-assembled and pre-outfitted equipment modules and piping systems did not violate the statute or the regulations. The Director found that the inclusion of these modules and systems in the tankers was proper because of a "long-established corollary principle[]," that "the Coast Guard has consistently held that items not integral to the hull or superstructure, such as propulsion machinery, consoles, wiring harness and other outfitting have no bearing on a U.S. build determination and may, therefore, be foreign built without compromising the coastwise eligibility of a vessel." (Compl. ¶ 33(a).)<sup>4</sup>

Plaintiffs allege that the ruling violates the APA and the Jones Act because the ruling allows Aker to outsource assembly and pre-outfitting of certain equipment modules and piping systems to foreign facilities, thus reducing the work available to American shipyard employees, contrary to the protections guaranteed by the Jones Act. (Resp. 5-6.) They seek the Court's order declaring that the Coast Guard's ruling, and all other Coast Guard rulings relying on the challenged interpretation underlying this dispute, are arbitrary and capricious. Plaintiffs also seek injunctive relieve restraining the government Defendants from giving effect to the challenged interpretation, enjoining the government Defendants from issuing any Certificates of

---

<sup>4</sup>PMTC and MTD appealed the Director's decision on June 22,2006, and on November 15, 2006, the Commandant of the Coast Guard, through Rear Admiral B.M. Salerno, issued an opinion denying the appeal. (Compl. ¶ 39.) Plaintiffs assert that this was final agency action under 5 U.S.C. § 704.

Documentation based upon that interpretation, and requiring the government Defendants to rescind any previously issued Certificates of Documentation that were premised on the challenged interpretation.<sup>5</sup>

On February 9, 2007, Aker moved to intervene in this matter to protect its “investment-backed” interests. Plaintiffs did not oppose Aker’s intervention because the “complaint challenged an agency ruling that directly address[ed] and impact[ed] Aker’s contracts and the particular vessels it was constructing.” (Resp. 7.) The Court granted the motion on February 13, 2007. Just under two weeks later, NASSCO followed Aker’s lead and sought to intervene in this matter.

## II. DISCUSSION

The Federal Rules permit intervention by those who “might be practically disadvantaged by the disposition of the action,” not simply those “who would be legally bound as a matter of res judicata.” Kleissler v. United States Forest Serv., 157 F.3d 964, 970 (3d Cir. 1998) (quoting 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 1908, at 301 (1986)). Having timely applied to the Court, a movant must prove that it has a “sufficient interest in the litigation;” a “threat that [its] interests will be impaired or affected, as a practical matter, by the disposition of the action”; and that its interests are inadequately represented by the existing parties to the litigation, in order to assert a right of intervention. Kleisser, 157 F.3d at 969.

The parties do not dispute that NASSCO’s motion is timely, and that NASSCO has a

---

<sup>5</sup>Pursuant to 46 U.S.C. § 12106 and 12135, and 46 C.F.R. § 67.173, a Certificate of Documentation may be invalidated and subject to cancellation upon a determination that the issuance of the certificate was improper for any reason.

sufficient interest that may be impaired by the disposition of this action. In January and May 2006, NASSCO obtained letter rulings from the Coast Guard, similar to those obtained by Aker, regarding its agreement to purchase various foreign-fabricated, pre-assembled, equipment and materials, for use in its production of nine tankers for U.S. Shipping Partners.<sup>6</sup> NASSCO estimates the production contract to be worth \$1 billion, and has contractually represented and warranted to U.S. Shipping Partners that it would obtain “all requisite approvals from applicable U.S. regulatory authorities to qualify each of the Vessels for a coastwise endorsement of their US Coast Guard . . . Certificates of Documentation.” (Mot. 6.)

However, Plaintiffs argue that NASSCO has no right of intervention because its interests are adequately represented by either Aker or the government. In essence, Plaintiffs contend that the nature of issues in this case – questions of law that require the Court to interpret the relevant statute and regulations, rather than questions of fact – renders NASSCO’s presence superfluous. In seeking to certify the Coast Guard’s interpretation of the statute and regulations, Plaintiffs argue that NASSCO has the same ultimate objective as Aker and the government, and thus has no need, and thus no right, to intervene in support of its redundant position.

The burden to prove that NASSCO’s interests are not adequately represented by the existing parties, “however minimal,” is its own. Hoots v. Pennsylvania, 672 F.2d 1133, 1135 (3d Cir.1982). Representation will be considered inadequate if any one of the following three criteria

---

<sup>6</sup>Further relying upon the letter rulings, and in order to produce the tankers for U.S. Shipping partners, NASSCO entered into two multi-million dollar contracts with DSEC Co., Ltd., a wholly-owned subsidiary of Daewoo Shipbuilding and Marine Engineering Co., Ltd., Republic of Korea, for designs, items, equipment and materials. (Mot. 7.) NASSCO argues, and the Court agrees, that the broad relief sought by plaintiff will implicate NASSCO’s contractual obligations and expectations.

are present: (1) the applicant's interests, though similar to those of a party to the suit, diverge sufficiently that the existing party cannot devote proper attention to the applicant's interests; *or* (2) there is collusion between the representative party and the opposing party; *or* (3) that the representative party is not diligently prosecuting the suit. Alexander v. Rendell, 2007 WL 917073, at \*17 (W.D. Pa. Mar. 23, 2007) (citing Brody by and through Sugzdinis v. Spang, 957 F.2d 1108, 1123 (3d Cir.1992)).<sup>7</sup>

The government's interests are sufficiently different from NASSCO's to satisfy the Court that it does not adequately represent NASSCO's interests in the matter. In certain instances, a governmental party may adequately represent the interests of a proposed private party intervenor, such as the case where the governmental body or officer is charged by law with representing the interests of the absentee. Alexander, 2007 WL 917073, at \*17 (citing Com. of Pa. v. Rizzo, 530 F.2d 501, 505 (3d Cir.1976)). However, as in Kleissler, 157 F.3d at 974, the government Defendants have "numerous, complex and conflicting interests" in this matter and have dynamic policy objectives and incentives, e.g., the protection of shipbuilding employees as well as the protection of domestic ship production. They are not charged with the obligation of representing the interests of private vessel manufacturers.

Aker's presence in this suit provides Plaintiffs with a more compelling case for claiming adequacy of representation of NASSCO by an existing party. Nevertheless, the Court remains convinced of NASSCO's right to intervene. The fact that both Aker and NASSCO use similar construction methodologies, and foreign-fabricated, pre-assembled or pre-outfitted items,

---

<sup>7</sup>NASSCO does not allege collusion or lack of diligent prosecution, only that its interests sufficiently diverge from those of the Defendants, such that Defendants cannot provide adequate representation of its interests.

equipment and materials in their vessels, attests to the sufficiency of NASSCO's economic interests in this litigation, and the practical consideration of the benefit derived from consolidation of disputes into one proceeding. See Kleisser, 157 F.3d at 970. However, though "inextricably intertwined," NASSCO's interests are "distinct from those of" Aker. Id. at 974.

Although Aker and NASSCO are each parties to supply, distribution and sales agreements impacted by the Coast Guard ruling, these agreements have a host of differing contractual terms, and according to NASSCO, pertain to different items, equipment and modules. Aker and NASSCO have different physical plants and manufacturing processes; they generally use foreign materials to different degrees and for different purposes, and specifically have planned for different components of the tankers currently under construction to be of foreign origin. These differences potentially lend themselves to finer distinctions – in either the Court's interpretation of the statute and regulations, or in a private settlement agreement – than Aker chooses to acknowledge. It indeed seems plausible, as NASSCO argues, that the parties could resolve in a settlement agreement that certain types of foreign components are permissible, while others, are not. Thus, as our court of appeals observed in Kleissler, 157 F.3d at 974, the temptation of a party to enter into a settlement agreement, tailored to its particular needs, rather than the needs of a potential intervenor/competitor, is a strong indicator of inadequacy.

That a question of law is central to this matter, and that Aker and NASSCO similarly seek to defend the government's reliance on various corollaries and principles underlying the Coast Guard rulings provided to each company, does not defeat NASSCO's right to intervene.<sup>8</sup> As

---

<sup>8</sup>Neither is it significant that Aker and NASSCO were impacted by different agency rulings; the relief sought by Plaintiffs necessarily impacts both rulings inasmuch as they share a common underpinning in the Coast Guard's enunciated longstanding corollaries of law, which, if

NASSCO accurately points out, the two competitors may choose to litigate the legal questions differently, and already have pursued differing strategies inasmuch as Aker, but not NASSCO, admits that the Coast Guard's November 2006 ruling constitutes final agency action pursuant to the APA. (Reply 4.) In Kleissler, 157 F.3d at 968, the court permitted various private timber companies to intervene in a matter that likewise rested on a question of statutory interpretation. There, an environmental protection group filed suit to challenge whether the United States Forest Service was required by statute to issue an environmental impact statement before allowing logging in a national forest. That this suit centers on a question of law does not render NASSCO's interests to be *identical* to Aker's, nor can they be characterized simply by a desire to prevail. Compare Creative Dimensions in Management, Inc. v. Thomas Group, Inc., No. 96-6318, 1999 WL 163621, at \* 1 (E.D. Pa. Mar. 22, 1999) (the court acknowledged a presumption in favor of adequacy of representation where the proposed intervenor's interests were identical to those represented by plaintiff, and where the interest simply the pursuit of monetary recovery).

The inadequacy requirement of Rule 24(a) is satisfied "if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." Trbovich v. United Mine Workers of America, 404 U.S. 528, 538, n.10, 92 S. Ct. 630 (1972) (citing 3B J. Moore, Federal Practice 24.09-1 (4) (1969)); Shultz v. United Steelworkers of America, AFL-CIO-CLC, 312 F. Supp. 538, 539 (W.D. Pa. 1970) (allowing intervention where it was "quite possible" that the movant's interests would diverge from the defendant's). NASSCO has met its burden to show that its interests are not adequately represented in this suit.

---

disturbed, implicate the contractual obligations of NASSCO as well as Aker.

### **III. CONCLUSION**

Pursuant to Rule 24(a) NASSCO shall be permitted to intervene as a defendant in this matter. The Court need not reach the movant's arguments regarding permissive intervention, as NASSCO has a right of intervention. An appropriate Order follows.

BY THE COURT:

---

GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>PHILADELPHIA METAL TRADES</b>	:	
<b>COUNCIL, MTD, AFL-CIO, <u>ET AL.</u>,</b>	:	
<b>Plaintiffs</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	
	:	
<b>ADMIRAL THAD W. ALLEN, <u>ET AL.</u>,</b>	:	<b>NO. 07-145</b>
<b>Defendants.</b>	:	

**ORDER**

**AND NOW**, this 3rd day of April 2007, **IT IS HEREBY ORDERED** that General Dynamics NASSCO's Motion to Intervene (Document No. 15) is **GRANTED**, and General Dynamics NASSCO may participate in this matter as a defendant-intervenor.

BY THE COURT:

\_\_\_\_\_  
GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE