U.S. Court of International Trade

Slip Op. 09–110

HORIZON LINES, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 07–00039

Dated:

ORDER

Wallach, Judge:

I.
Introduction

On June 3, 2009, Defendant United States ("Defendant") made an oral Motion for Judgment as a Matter of Law Dismissing Plaintiff Horizon Lines, LLC's ("Plaintiff") Cause of Action Contesting the Partial Dutiability of Tug Charges ("Defendant's Motion") pursuant to USCIT Rule 52(c). Based upon the following findings of fact and conclusions of law, Defendant's Motion is GRANTED.

II
Findings of Fact

1. On July 7, 2006, U.S. Customs and Border Protection ("Customs") in Headquarters Ruling No. W116467 rejected Plaintiff's argument made in the underlying protest that the tug expenses associated with the dry docking of the CSX HAWAII, a U.S.-flag C6 Class steam vessel, now named HORIZON HAWAII ("HAWAII") in Lisnave, Mitrena Yard in Setubal, Portugal ("Lisnave") in 2002 were a single purpose expense incurred for non-dutiable inspections. Customs instead found that the tug towage costs at issue appeared clearly to be a dual purpose expense, in part undertaken due to dutiable vessel repairs and, as such, were dutiable on a pro-rated basis.

2. Plaintiff paid duty in the amount of $11,374.30 on the pro-rated portion of the tug charges set forth in Invoice No. 220–1495/Barwil, Owner's Ref. No. 1507 for towage related to the HAWAII at Lisnave.

3. Plaintiff's dry docking specifications for the HAWAII required in addition to the inspections, repair items be dealt with while the vessel was in dry dock.

4. The testimony of Mark Cianci and the uncontested facts showed that the repair work performed pursuant to owner's reference number "3.1–1" of Lisnave Invoice No. 00174/2002/LISN, for the charge titled "PAINTING PREPARATION" is the type of work customarily performed only when a vessel is in a dry dock and was required to be done during the dry docking according to Plaintiff's dry dock specifications.

5. The testimony of Mr. Cianci and the uncontested facts showed that the repair work performed pursuant to owner's reference number "3.1–4a" of Lisnave Invoice No. 00174/2002/LISN, for the charge titled "FLAT BOTTOM" is the type of work customarily performed only when a vessel is in a dry dock and was required to be done during the dry docking according to Plaintiff's dry dock specifications.

6. The testimony of Mr. Cianci and the uncontested facts showed that the repair work performed pursuant to owner's reference number "3.1–4b" of Lisnave Invoice No. 00174/2002/LISN, for the charge titled "VERTICAL SIDES" is the type of work customarily performed only when a vessel is in a dry dock and was required to be done during the dry docking according to Plaintiff's dry dock specifications.

7. The testimony of Mr. Cianci and the uncontested facts showed that the repair work performed pursuant to owner's reference number "3.1–7" of Lisnave Invoice No. 00174/2002/LISN, for the charge titled "MISCELLANEOUS DRYDOCK PAINTING" is the type of work customarily performed only when a vessel is in a dry dock and was required to be done during the dry docking according to Plaintiff's dry dock specifications.

8. The testimony of Mr. Cianci and the uncontested facts showed that the repair work performed pursuant to owner's reference number "3.1–8" of Lisnave Invoice No. 00174/2002/LISN, for the charge titled "CATHODIC PROTECTION SYSTEM ALTERNATIVE A" is the type of work customarily performed only when a vessel is in a dry dock and was required to be done during the dry docking according to Plaintiff's dry dock specifications.

9. The testimony of Mr. Cianci and the uncontested facts showed that the repair work performed pursuant to owner's reference number "3.1–11" of Lisnave Invoice No. 00174/2002/LISN, for the charge titled "RUDDER. RUDDER HORN" is the type of work customarily performed only when a vessel is in a dry dock and was required to be done during the dry docking according to Plaintiff's dry dock specifications.

10. The testimony of Mr. Cianci and the uncontested facts showed that the repair work performed pursuant to owner's reference number "3.1–13" of Lisnave Invoice No. 00174/2002/LISN, for the charge titled "MAIN SCOOP TO CONDENSER" is the type of work customarily performed only when a vessel is in a dry dock and was required to be done during the dry docking according to Plaintiff's dry dock specifications.

11. The testimony of Mr. Cianci and the uncontested facts showed that the repair work performed pursuant to owner's reference number "3.1–14" of Lisnave Invoice No. 00174/2002/LISN, for the charge titled "ROPE GUARD" is the type of work customarily performed only when a vessel is in a dry dock and was required to be done during the dry docking according to Plaintiff's dry dock specifications.

12. The testimony of Mr. Cianci and the uncontested facts showed that the repair work performed pursuant to owner's reference number "3.1–16" of Lisnave Invoice No. 00174/2002/LISN, for the charge titled "RUDDER POST GLAND PACKING" is the type of work customarily performed only when a vessel is in a dry dock and was required to be done during the dry docking according to Plaintiff's dry dock specifications.

13. The testimony of Mr. Cianci and the uncontested facts showed that the repair work performed pursuant to owner's reference number "3.2–8" of Lisnave Invoice No. 00174/2002/LISN, for the charge titled "STERN TUBE SHAFT SEAL RENEWAL" is the type of work customarily performed only when a vessel is in a dry dock and was required to be done during the dry docking according to Plaintiff's dry dock specifications.

14. The testimony of Mr. Cianci and the uncontested facts showed that the repair work performed pursuant to owner's reference number "3.2–33" of Lisnave Invoice No. 00174/2002/LISN, for the charge titled "S.W. SERVICE OVBD HULL PENETRATION RENEWALS" is the type of work customarily performed only when a vessel is in a dry dock and was required to be done during the dry docking according to Plaintiff's dry dock specifications.

15. The testimony of Mr. Cianci showed that the work performed pursuant to owner's reference numbers "3.1–1, 3.1–4a, 3.1–4b, 3.1–7, 3.1–8, 3.1–11, 3.1–13, 3.1–14, 3.1–16, 3.2–8, and 3.2–33" of Lisnave Invoice No. 00174/2002/LISN consisted of repair work.

16. Plaintiff conceded in response to a question from the court during argument on Defendant's USCIT Rule 52(c) motion, that in fact, certain repair work was performed in dry dock which could only have been done in dry dock, while the HAWAII was at Lisnave in 2002.

17. The testimony of Mr. Cianci showed that the tug expenses used to push the HAWAII both on and off the dry dock at Lisnave in 2002 were necessarily incurred to accomplish dutiable repairs.

18. Should any Finding of Fact designated herein, be more properly deemed a Conclusion of Law, it is so designated.

III
Conclusions Of Law

1. Under 28 U.S.C. § 2639(a)(1), Customs' decision is "presumed to be correct" and the "burden of proving otherwise shall rest upon the party challenging such decision."

2. Plaintiff argued at trial that Customs improperly applied and impermissibly expanded the ruling in *SL Serv., Inc. v. United States*, 357 F.3d 1358 (Fed. Cir. 2004) ("*SL Serv. II*"), by pro-rating duties on the costs of tugs for inspections in contravention of *Am. Ship Mgmt., LLC v. United States*, 25 CIT 1033, 1036, 162 F. Supp. 2d 671 (2001) ("*ASM*"). *See* Pre-Trial Order, Schedule D–1 ¶ 3.

3. The case upon which Plaintiff relies, *ASM*, was effectively reversed by *SL Serv. II* (which also reversed *SL Serv., Inc. v. United States*, 26 CIT 1210, 244 F. Supp. 2d 1358 (2002) ("*SL Serv. I*")). Further, *ASM* found that tug charges which were part of the dual (mixed) purpose dry dock charges could not be apportioned because mixed charges were not pro-rateable. *See ASM*, 25 CIT 1033. *SL Serv. II* reversed *ASM*'s findings and held that in the context of dual-purpose expenses, it is rational to apportion expense on the portion that is attributable to the dutiable repairs. *SL Serv. II*, 357 F.3d at 1362. Therefore, to the extent that *ASM* provides any support for the concept that mixed charges such as tug charges are duty-free, that finding was reversed.

4. The Federal Circuit's opinion in *SL Serv. II* interpreted the language "expenses of repairs" in 19 U.S.C. § 1466(a) as applying to dual purpose expenses, such as the tug expenses at issue here, which are expenses integral and necessary for both the dutiable repair work and non-dutiable operations and are dutiable on a pro-rated basis. *See Horizon Lines, LLC v. United States*, No. 2009–1075, 2009 WL 2372112, at *3 (Fed. Cir. August 4, 2009) citing *SL Serv. II*, 357 F.3d at 1362.

5. The court's grant of Defendant's oral motion for a directed verdict pursuant to USCIT R. 52(c) dismissed Plaintiff's claim number 3 contained in Schedules D–1 and E–1 of the Joint Pre-Trial Order (alleging that, Customs wrongly applied and impermissibly expanded the decision in *SL Serv. II*, 357 F.3d 1358 *rev'g SL Serv. I*, 26 CIT 1210, *cert. denied* 543 U.S. 1034, 125 S. Ct. 809, 160 L. Ed. 2d 598 (2004), by pro-rating duties on the cost of tugs (towage), which

Plaintiff maintained were single-purpose expenses related to mandatory inspections). The court's grant of Defendant's oral motion for a directed verdict pursuant to USCIT R. 52(c) was appropriate as, Plaintiff had been fully heard on the issue, and given the testimony of its witnesses, Plaintiff's claims related to the tug expense issue could not be maintained as a matter of law.

6. Should any Conclusion of Law designated herein, be more properly deemed a Finding of Fact, it is so designated.

IV
Conclusion

Based upon the above-stated Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED and DECREED that Defendant's oral USCIT Rule 52(c) Motion for Judgment as a Matter of Law Dismissing Plaintiff Horizon Lines, LLC's Cause of Action Contesting the Partial Dutiability of Tug Charges be, and hereby is, GRANTED.

Dated: October 7, 2009
New York, New York

/s/ Evan J. Wallach
EVAN J. WALLACH, JUDGE

Slip Op. 09–111

HORIZON LINES, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 07–00039

[Judgment for Plaintiff.]

Dated: October 7, 2009

Williams Mullen (*Dean A. Barclay, George H. Bowles,* and *Evelyn M. Suarez*) for Plaintiff Horizon Lines, LLC.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Edward F. Kenny* and *Jason M. Kenner*); and *Michael Heydrich*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, Of Counsel, for Defendant United States.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Wallach, Judge:

I
Introduction

This matter is before the court for decision following a bench trial on June 2 and June 3, 2009. In this action, Plaintiff Horizon Lines, LLC ("Horizon" or "Plaintiff") challenges the assessment of three categories of duties for work to its vessel in 2002 by U.S. Customs and Border Protection ("CBP"). At trial, Defendant United States ("Government" or "Defendant") conceded that one category of duties (diesel generator support structure expenses) was incorrectly assessed and was granted a directed verdict as to another category contested duties. The lone remaining issue pertains to work performed on cell entry guides in three vessel holds that Plaintiff contends are non-dutiable modifications as opposed to dutiable repairs. For the following reasons, this work constitutes modifications and accordingly Plaintiff is entitled to a refund.

II
Background

This action arises from work done at Lisnave, Mitrena Yard in Setubal, Portugal ("Lisnave") on the CSX HAWAII, a U.S.-flag C6 Class steam vessel, now named HORIZON HAWAII ("HAWAII") from March 29, 2002 to April 29, 2002, during Voyage 214. Complaint ¶ 1; Answer ¶ 1; Pre-Trial Order, Joint Section C: Uncontested Facts ("Uncontested Facts") ¶ 1. The HAWAII was dry docked at Lisnave between April 9 and April 22, 2002. Uncontested Facts ¶ 14. Horizon, formerly known as CSX Lines, LLC, timely filed with CBP vessel repair entry No. C20-0058605-0 for the HAWAII, Voyage 214 (the "Entry"), upon first entry into the United States on May 7, 2002. Complaint ¶ 2; Answer ¶ 2. By letter dated August 27, 2002, Plaintiff completed its Entry with its "Application for Relief" supplementing the Entry with additional documentation, including original invoices and a spreadsheet indicating Plaintiff's position regarding the dutiability of each specific work item or expense. Uncontested Facts ¶ 3. Duties on the Entry were assessed in the amount of $854,525.26 by CBP's Vessel Repair Unit ("VRU") in New Orleans on January 21, 2005. Complaint ¶ 3; Answer ¶ 3; Uncontested Facts ¶ 4.

Horizon timely filed protest No. 2002–05–100387 (the "Protest") on April 20, 2005, contesting the assessment of certain duties by CBP on the Entry. Complaint ¶ 4; Answer ¶ 4; Uncontested Facts ¶ 5. On May

5, 2005, CBP's VRU forwarded Plaintiff's Protest to CBP Headquarters Carriers Branch for a ruling on the Protest. Uncontested Facts ¶ 6. On July 7, 2006, CBP Headquarters directed VRU to redetermine the vessel repair duties in accordance with CBP Headquarters Ruling No. W116467 ("HQ W116467"). Uncontested Facts ¶ 7. On September 11, 2006, CBP VRU granted Plaintiff's Protest in part and denied it in part in accordance with HQ W116467. Complaint ¶ 5; Answer ¶ 5; Uncontested Facts ¶ 8. In implementing HQ W116467, CBP redetermined the dutiable amount on the Entry to be $599,814.73 and issued a refund to Horizon in the amount of $254,710.53. Uncontested Facts ¶ 8. Horizon paid all duties assessed on the Entry pursuant to 28 U.S.C. § 2637(a). Complaint ¶ 6; Answer ¶ 6; Uncontested Facts ¶ 9.

Plaintiff filed its Complaint in the present lawsuit on or about February 12, 2007, contesting the denial of the following portions of Plaintiff's Protest: (1) cell and entry guides; (2) diesel generator support structure expenses; and (3) the cost of tugs (towage). Uncontested Facts ¶ 10; Complaint ¶¶ 8–11. For the first, the pertinent statute provides in relevant part that CBP is to assess duties on "the expenses of repairs made in a foreign country . . . ." 19 U.S.C. § 1466(a). For the second, the Government, after reviewing American Bureau of Shipping ("ABS") reports produced pursuant to subpoena in this litigation, and based upon deposition testimony of the witnesses describing the work performed, agrees that the diesel generator support structure expenses are non-dutiable. Uncontested Facts ¶¶ 12, 33. For the third, this court at trial granted Defendant's USCIT Rule 52(c) motion for judgment as a matter of law for the cost of tugs (towage). Trial Transcript ("TT"), June 3, 2009, at 94. Accordingly, the sole issue for determination here is whether work performed on certain cell entry guides constituted dutiable repairs.

III
Standard of Review

This court has jurisdiction pursuant to 28 U.S.C. § 1581(a) that provides for judicial review of denied protests. Although CBP decisions are entitled to a presumption of correctness under 28 U.S.C. § 2639(a)(1), the court makes its determinations upon the basis of "the record made before the court," rather than that developed by CBP. *See* 28 U.S.C. § 2640(a); *United States v. Mead Corp.*, 533 U.S. 218, 233 n.16, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). The court makes the following findings of fact and conclusions of law as a result of the *de novo* trial. *See Universal Elecs. v. United States*, 112 F.3d 488, 493 (Fed. Cir. 1997).

IV
Findings of Fact

1. Plaintiff in this litigation challenged diesel generator support structure expenses determined by CBP to be dutiable repairs identified as Item 3, Lisnave Invoice No. 0075/2002/LISN, Owners Ref. Nos. 9.1.6A, 9.1.6E and Item 6, PO006823/ABS.[1]

2. Plaintiff paid excess duties in the total amount of $17,226.32 on the diesel generator support structure expenses that CBP concedes is non-dutiable.

3. Horizon in this litigation challenged expenses for certain work on the HAWAII's cell entry guides in holds 5, 6, and 7 of the HAWAII identified as Item 3, Lisnave Invoice No. 0075/2002/LISN, Owners Ref. Nos. 8.10031/3, 8.10031/4, 8.10031/12, 8.10031/13, and 8.9100–10 Field Order Nos. 276, 275, 279 and 278 (the work comprising these expenses is collectively hereinafter referred to as the "Cell Entry Guide Modifications").[2]

4. The Cell Entry Guide Modifications were permanently incorporated into the hull of the vessel because of the manner in which they are attached to the hull and the purpose that they serve.

5. The Cell Entry Guide Modifications have remained permanently incorporated into the hull of the vessel since their installation.

6. The Cell Entry Guide Modifications have remained onboard the vessel during an extended lay-up.

7. The Cell Entry Guide Modifications constitute a new design feature that substantially improved speed and ease of container loading, substantially reduced the susceptibility of the cell guide system to damage, and did not replace an existing structure.

8. The Cell Entry Guide Modifications constitute an improvement and a change to the operation and efficiency of the vessel because the modifications increased speed and ease of container loading, substantially reduced the susceptibility of the cell guide system to damage, reduced the need for voyage repairs, and improved the safety of cargo operations.

9. The Cell Entry Guide Modifications replaced cell and entry guides that were in full proper working order when the HAWAII arrived in Lisnave in 2002.

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[1] At the Pre-Trial Conference on May 22, 2009, Defendant conceded that Plaintiff is owed a refund for the $1,199.82 charge identified as Item 6, PO006823/ABS.

[2] During trial, Plaintiff did not contest the assessment by U.S. Customs and Border Protection for certain work to cell guides in cargo holds 5, 6 and 7 identified as Item 3, Lisnave Invoice No. 0075/2002/LISN, Owners Ref. No. 8.4 Field Order Nos. 312, 313, 314, in the amounts of $6,071.00, $31,580.00, and $14,782.00, respectively. *See* Trial Transcript, June 2, 2009, at 157–58; Pre-Trial Order, Schedule E–1, at 2 Claim (1).

10. The testimony of Horizon's port engineer for the Lisnave dry docking, Mark Cianci, is highly probative and credible.

11. Through Mr. Cianci, Horizon presented probative and credible evidence of Horizon's business purpose and practice of maintaining cell entry guides in good working order.

12. Through Mr. Cianci, Horizon presented probative and credible evidence that Mr. Cianci would have been made aware if any of the cell entry guides were not in good working order at the time the vessel arrived in Lisnave in 2002.

13. Horizon presented probative and credible evidence that Mr. Cianci was not made aware that any of the cell entry guides were not in good working order.

14. Defendant presented no probative or credible evidence that the existing cell entry guides were not in good working order, at the time of dry docking.

15. Defendant presented no probative or credible evidence that the Cell Entry Guide Modifications were needed to correct deficient performance. Instead, the evidence is conclusive that the Cell Entry Guide Modifications were intended to improve the performance of the original design.

16. The HAWAII having commissioned a naval architect and marine engineer to prepare drawings for the shipyard to construct the Cell Entry Guide Modifications demonstrates that the work was a modification.

17. If the work comprising the Cell Entry Guide Modifications had been a repair, there would have been no need to commission drawings. The shipyard could have followed existing drawings for the original design if it was repairing and restoring the cell entry guides to their original condition.

18. The expert testimony of Edwin T. Cangin is highly probative and credible on the issue of whether the Cell Entry Guide Modifications constituted modifications.

19. Defendant did not offer any expert testimony which rebutted the testimony of Mr. Cangin.

20. Defendant did not challenge on cross-examination Mr. Cangin's opinion that work comprising the Cell Entry Guide Modifications constituted a modification and not a repair.

21. The Government's witness, Peter D. Kahl, another experienced Port Engineer, also considered the work comprising the Cell Entry Guide Modifications to be a modification.

22. The court finds credible Mr. Cangin's expert opinion that the work comprising the Cell Entry Guide Modifications constitutes a modification, not a repair.

23. CBP's Protest decision relies on the analysis made by Vessel Repair Specialist Glenda Bradley.

24. Ms. Bradley was the individual responsible for reviewing and denying Horizon's claims.

25. Ms. Bradley had limited experience working as a Vessel Repair Specialist when she processed the Entry.

26. Ms. Bradley's job did not involve visiting shipyards or inspecting ships associated with vessel repair entries.

27. Ms. Bradley admitted that, until she was deposed in the course of this case's litigation, she did not understand the difference between a cell guide and an entry guide.

28. The evidence shows that CBP did not understand the nature of the work involved, did not seek out any expertise to help it understand the work involved, and based its decision on a misunderstanding of the documentation submitted by Horizon.

29. Incorrect statements in the shipyard invoice relied upon by CBP in finding the Cell Entry Guide Modifications to be dutiable repairs were not demonstrative of the actual state of affairs.

30. Incorrect statements in the ABS survey relied upon by CBP in finding the Cell Entry Guide Modifications to be dutiable repairs were not demonstrative of the actual state of affairs.

31. The Cell Entry Guide Modifications constitute non-dutiable modifications and not dutiable repairs.

32. Horizon properly segregated the non-dutiable Cell Entry Guide Modifications from other dutiable work.

33. Horizon paid excess duties in the total amount of $104,560.00 on the work comprising the Cell Entry Guide Modifications at issue in this case.

34. Should any Finding of Fact designated herein, be more properly deemed a Conclusion of Law, it is so designated.

V
Conclusions of Law

1. The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(a).

2. This court is charged with making findings of fact and conclusions of law *de novo*—that is, based on "the record made before the court." *See* 28 U.S.C. § 2640(a); *Universal Elecs. Inc.*, 112 F.3d at 493.

3. CBP incorrectly assessed duties under 19 U.S.C. § 1466(a) for the diesel generator support structure expenses that CBP concedes is non-dutiable.

4. Horizon is entitled to a refund in the amount of $17,226.32 plus interest as provided by law for the duties on the diesel generator support structure expenses that CBP now concedes is non-dutiable.

5. The Cell Entry Guide Modifications in holds 5, 6 and 7 of the HAWAII are the sole remaining contested issues in this case following the close of trial and in light of all concessions made and motions granted at trial.

6. CBP's Protest decision as to the Cell Entry Guide Modifications is not entitled to deference because the decision did not exhibit due care or expertise and was, accordingly, not persuasive. *See Mead*, 533 U.S. at 228 citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40, 65 S. Ct. 161, 89 L. Ed. 124 (1944).

7. The testimony of Horizon's expert witness constitutes a *prima facie* case and, being unrebutted, as well as supported by other credible substantial testimony and evidence, has overcome the unsupported presumption of correctness attaching to CBP's Protest decision under 28 U.S.C. § 2639(a)(1). *Cf. Bacharach Indus. Instrument Co. v. United States*, 2 Cust. Ct. 306, 314 (1939).

8. A recognition in *Texaco Marine Servs., Inc. v. United States*, 44 F.3d 1539, 1544 (Fed. Cir. 1994) that the language "expenses of repairs" in 19 U.S.C. § 1466(a) is "broad and unqualified" does not apply in the case at bar, because *Texaco* interpreted the phrase "expenses of repairs" as covering all expenses (not specifically excepted in the statute) which, but for dutiable repair work, would not have been incurred. *Texaco* did not address the distinction between a repair and a modification. Newly designed installations on a vessel are alterations of ship design and not repairs. *See United States v. Admiral Oriental Line*, 18 CCPA 137, 141 (1930) ("the installation of swimming tanks can not be regarded as repairs.").

9. For 19 U.S.C. § 1466(a) purposes, the term "repairs" describes work putting something that has sustained damage back into working condition whereas the term "modifications" describes work addressing a problematic feature.

10. Because the HAWAII's cell entry guides, after the shipyard work, exhibited new design features that improved or enhanced the vessel's operation or efficiency, the "good working order" condition of the cell entry guides, before the shipyard work, is not a relevant consideration in determining whether the work constitutes a nondutiable modification, for purposes of 19 U.S.C. § 1466(a).

11. The fact that the improved or enhanced operation or efficiency of the HAWAII's cell entry guides, after the shipyard work, reduced the potential for damage, which might have resulted if the new design features had not been implemented, does not transform the shipyard work into repairs, for purposes of 19 U.S.C. § 1466(a).

12. The Government's position that an absence of "good working order" condition, if any, or that a prior "deficient" design, if any,

transformed the shipyard work comprising the Cell Entry Guide Modifications from a modification into a repair is legally incorrect and contrary to the evidence. The Government failed to advance credible evidence to rebut Plaintiff's evidence that the Cell Entry Guide Modifications were not repairs to existing parts of the vessel.

13. The Cell Entry Guide Modifications replaced cell and entry guides that were in full proper working order when the HAWAII arrived in Lisnave in 2002.

14. CBP incorrectly assessed duties under 19 U.S.C. § 1466(a) for the Cell Entry Guide Modifications because such work constituted non-dutiable modifications as opposed to dutiable repair work.

15. Horizon is entitled to a refund in the amount of $104,560.00 plus interest as provided by law for duties imposed on the Cell Entry Guide Modifications.

16. Should any Conclusion of Law designated herein, be more properly deemed a Finding of Fact, it is so designated.

ORDER

Plaintiff is directed to submit to the court within 10 business days a proposed judgment consistent with these Findings of Fact and Conclusions of Law.

Dated: October 7, 2009
New York, New York

/s/ Evan J. Wallach
EVAN J. WALLACH, JUDGE

Slip Op. 09–112

GRISEL PADILLA D/B/A G. PADILLA & COMPANY Plaintiff, v. UNITED STATES, Defendant

Before: Gregory W. Carman, Judge
Court No. 09–00305

[Defendant's motion to dismiss granted.]

Dated: October 8, 2009

Peter S. Herrick, P.A. (*Peter S. Herrick*), for Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David Silverbrand*); *Christine Henter*, United States Department of Commerce, of counsel; *Beth Brotman*, United States Customs and Border Protection, of counsel, for Defendant.

OPINION

CARMAN, JUDGE:

Introduction

This matter is before the Court on Defendant's Motion to Dismiss for lack of subject matter jurisdiction pursuant to USCIT Rule 12(b)(1), and for failure to state a claim upon which relief can be granted, pursuant to USCIT Rule 12(b)(5). For the reasons set forth below, Defendant's motion is granted.

Background

Plaintiff is a licensed customs broker operating in San Juan, Puerto Rico. (Complaint ("Compl.") ¶ 2.) In October and November of 2004, Plaintiff was the importer of record for five entries of polyethylene retail carrier bags ("PRCBs") manufactured by King Pac Industrial Co., Ltd. ("King Pac"). (*Id.* ¶¶ 2, 5.) The PRCBs from Thailand were subject to antidumping duty order A–549–821. (*Id.* ¶ 1.) At the time of entry, goods manufactured by King Pac were subject to the cash deposit rate of 2.80%, which was the "all others rate" calculated by the Department of Commerce in the final determination of sales at less than fair value in July 2004. (*Id.* ¶ 6; *see also* Notice of Amended Final Determination of Sales at LTFV: PRCBs from Thailand, 69 Fed. Reg. 42,419.) Plaintiff made cash deposits for the five entries at the 2.80% cash deposit rate. (Compl. ¶ 7.) In January 2007, at the completion of the first administrative review, King Pac was assigned a firm–specific antidumping duty rate of 122.88%. PRCBs from Thailand: Final Results of Antidumping Duty Administrative Review, 72 Fed. Reg. 1,982 (Jan. 17, 2007). Liquidation of Plaintiff's entries was enjoined while the results of the first administrative review were litigated in *Universal Polybag Co., Ltd. v. United States*, 577 F. Supp. 2d 1284 (Ct. Int'l. Trade 2008). (*See* Compl. Ex. B.) The injunction issued in *Universal Polybag* dissolved by its own terms on October 28, 2008 when the opinion of this court was not appealed. (*Id.*) On December 1, 2008, Commerce issued liquidation instructions to U.S. Customs and Border Protection ("Customs"). (*Id.*) On January 2, 2009, Customs liquidated Plaintiff's five entries at an antidumping duty rate of 122.88%. (Compl. ¶ 10.) Consequently, Plaintiff now owes an additional $92,176.99 in antidumping duties for these five entries, that it asserts it cannot afford to pay. (*Id.* ¶ 17.)

Plaintiff challenged the liquidation of the five entries at the higher antidumping duty rate by filing a protest with Customs on March 3, 2009. (*Id.* ¶ 11, Ex. D.) Plaintiff's protest was "denied" by Customs as

"not protestable under 19 U.S.C. 1514." (*Id.* ¶ 12; Ex. E.) Plaintiff sent Customs a letter asking Customs to void its denial of Plaintiff's protest, but Customs declined. (*Id.* ¶¶ 13, 16, Exs. F, H.) On June 18, 2009, Customs informed Plaintiff that failure to pay the duties owing on these entries may result in sundry consequences and penalties. (*Id.* Ex. I.) Plaintiff then filed this lawsuit on August 4, 2009.

In its Complaint, Plaintiff advances two "counts." "Count I" seeks a preliminary injunction that "enjoin[s] Customs from carrying out its intentions set forth in Exhibit I . . . , [and] enjoin[s] Customs from denying its protest and application for further review." (*Id.* ¶¶ 18–19.) "Count II" seeks a writ of mandamus directing Customs "to refer Padilla's cap provision protest to Commerce for a decision." (*Id.* at 5–6.) Fourteen days after filing its Complaint, which, by the nature of Count I may also be construed as an application for preliminary injunction, Plaintiff filed a motion for a temporary restraining order. (Pl.'s Corrected Mot. For TRO (Docket # 10).) Defendant has now filed a motion to dismiss Plaintiff's Complaint pursuant to USCIT Rules 12(b)(1) and 12(b)(5). (Def.'s Mot. to Dismiss (Docket #14).)

Jurisdiction

I. *Parties' Contentions*

Plaintiff asserts that this Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(i)(4). (Compl. ¶¶ 3–4.) Defendant argues that in this case, however, Plaintiff is challenging Customs' denial of Plaintiff's protest, and that the appropriate jurisdictional vehicle for such a case is 28 U.S.C. § 1581(a). (Def.'s Mem. in Supp. of Its Mot. to Dismiss and Opp'n. To Pl.'s Mot. for a TRO and Prelim. Inj. ("Def.'s Br.") 1, 5 (*citing* Compl. ¶¶ 12, 24, 30).) Defendant claims that "[i]f Padilla had complied with the statutory requirements, this Court would possess jurisdiction to entertain Padilla's challenge to CBP's denial of its protest pursuant to 28 U.S.C. § 1581(a)." (*Id.* at 6.) Presumably, the statutory requirement to which Defendant refers is the jurisdictional prerequisite that "all liquidated duties, charges, or exactions [need to] have been paid at the time the action is commenced" under § 1581(a). *See* 28 U.S.C. § 2637(a) (2006). Because Plaintiff did not pay the outstanding duties before commencing this lawsuit (Compl ¶ 17), jurisdiction under § 1581(a) is unavailable. *Id.*

In response, Plaintiff claims that it "could not challenge CBP's denial of its protest pursuant to 28 U.S.C. § 1581(a) since CBP claims the protest raised a non-protestable issue." (Pl.'s Mem. In Opp'n. To Def.'s Mot. to Dismiss and Supp. for Pl.'s Mot. for a TRO and Prelim. Inj. ("Pl.'s Br.") 1.) However, Plaintiff does not offer any explanation as to why a protest "denied" by Customs as "non-protestable" falls

outside of this Court's jurisdiction in § 1581(a). Instead, Plaintiff attempts to characterize its Complaint as "challenging Commerce's liquidation instructions issued on December 1, 2008," and reasserts that § 1581(i) is the correct jurisdictional provision. (*Id.* 1–2.)

II. *Discussion*

A. There Is No Jurisdiction Under 28 U.S.C. § 1581(a).

At the heart of this case is a protest that Plaintiff filed with Customs that was "denied" by Customs as "not protestable." (*See* Compl. ¶¶ 11, 12, 13, 16, 19, 27; *see also* Exs. D (Padilla's protest), E (Customs' denial of the protest).) This case therefore bears some resemblance to a classic § 1581(a) case, which is brought in this Court "to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a) (2006). Plaintiff's protest was not denied under section 515 of the Tariff Act of 1930 (19 U.S.C. § 1515), even though it was marked "denied" by Customs officials; in fact, it was rejected. The government is therefore not correct in asserting that § 1581(a) was the appropriate jurisdictional vehicle for Plaintiff to use in bringing this case. (*See* Def.'s Br. 6.)

Section 515 of the Tariff Act of 1930 is codified at 19 U.S.C. § 1515. This statute explains how Customs shall handle an administrative protest filed with the agency. In pertinent part, the statute provides that "within two years from the date a protest was filed **in accordance with section 1514** of this title . . . [the appropriate customs officer] shall allow or deny such protest in whole or in part." 19 U.S.C. § 1515(a) (2006) (emphasis added). In other words, a protest must be filed "in accordance with section 1514," before it can be denied "in whole or in part" within the meaning of § 1515 and before it can be contested in this Court under 28 U.S.C. § 1581(a). *See id.*

Section 1514, in turn, specifies that only certain Customs decisions are validly the subject of a protest. *See* 19 U.S.C. § 1514 (2006); *see also Am. Nat'l. Fire Ins. Co. v. United States*, 30 CIT 931, 939–40, 441 F. Supp. 2d 1275, 1285 (2006) ("The seven categories listed in § 1514(a) are exclusive, and if Customs' underlying decision does not relate to any of these seven categories, the court may not exercise § 1581(a) jurisdiction over an action contesting Customs' denial of a protest filed against that decision.") (internal quotation omitted). When Plaintiff filed a protest challenging the antidumping duty rate applicable to the five liquidated entries of PRCBs, it was not challenging a protestable decision of Customs. *See Mitsubishi Elecs. Am., Inc. v. United State*s, 44 F.3d 973, 977 (Fed. Cir. 1994) ("Customs actions [in antidumping cases] do not fall within 19 U.S.C. §

1514(a).”). This is because the rote collection of antidumping duties in compliance with instructions from Commerce does not constitute a “decision” of Customs within the meaning of § 1514. *Id.*; *see also, Unipro Foodservice, Inc. v. United States*, 32 CIT __ , __ , 577 F. Supp. 2d 1348, 1351-52 (2008) (finding that Customs’ compliance with liquidation instructions issued by Commerce is “merely ministerial” and specifically does not fall within the scope of § 1514(a)(3)) (internal quotation omitted). “Thus, without a decision under section 1514(a), [there is no] jurisdiction under section 1581(a).” *Mitsubishi*, 44 F.3d at 977.

Confusion seems to have arisen in this case because Customs marked the face of the protest as “**[d]enied in full** for the reason checked,” and explained only in an attachment to the protest that the issue raised was “not protestable under 19 U.S.C. 1514.” (*See* Compl. Ex. E (emphasis added).) This marking may have led counsel for the government to conclude that the protest had been “denied in full” under section 515 of the Tariff Act of 1930, and that Plaintiff should have brought this case under § 1581(a). (*See* Def.’s Br. 6.) As explained above, because a protest not filed in accordance with § 1514 can never be “denied in full,” it cannot be contested in a § 1581(a) case. When Customs receives a protest that does not raise a protestable issue within the meaning of 19 U.S.C. § 1514, the agency should mark the protest “[r]ejected as non-protestable.” (*See* Compl. Ex. E, (Part 18 of CBP form 19); *see also* Ex. F at 3 (Customs’ ADD/CVD handbook excerpt).) Marking the protest “rejected” sends a clear signal to all involved that there has been no denial of the protest within the meaning of 19 U.S.C. § 1515, and the protest cannot subsequently be contested in this court under 28 U.S.C. § 1581(a). Marking rejected protests as denied only fosters confusion among the parties bringing or challenging such protests, government attorneys defending against such litigation, and the courts.

B. There is No Jurisdiction Under 28 U.S.C. § 1581(i)(4).

In its Complaint, Plaintiff asserts that this Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(i)(4). (Compl. ¶ 3–4.) In responding to the government’s motion to dismiss, Plaintiff attempts to characterize its Complaint as “challenging Commerce’s liquidation instructions issued on December 1, 2008.” (Pl.’s Br. 1–2 (*citing Heveafil SDN. BHD v. United States*, 23 CIT 447, 449 (1999) (a case in which this court took jurisdiction over a challenge to Commerce’s liquidation instructions under 28 U.S.C. § 1581(i)).) Because the parties dispute the nature of the action brought by Plaintiff, the court must first assess the true nature of the complaint. *Cf. Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006)

("[M]ere recitation of a basis for jurisdiction, by either a party or a court, cannot be controlling . . . we look to the true nature of the action in the district court in determining jurisdiction of the appeal.") (internal quotation omitted).

In Count I of its Complaint, Plaintiff seeks a preliminary injunction against Customs. (Compl. ¶¶ 18–24; *see also* BACKGROUND *supra*, at 3–4.) A preliminary injunction is "[a] procedural device which is interlocutory in nature and which is designed to preserve the existing status of the litigants **until a determination can be made on merits** of the controversy." *Black's Law Dictionary* 1062 (5th ed. 1979) (citation omitted; emphasis added). Because the purpose of a preliminary injunction is to preserve the status quo until the merits of the underlying dispute can be resolved, it is highly irregular for a party to request a preliminary injunction as part of the substantive relief sought in the Complaint itself. Indeed, such an approach is conceptually flawed. The Court therefore construes Count I as an application for preliminary injunction, and not as a substantive cause of action.[1]

In "Count II," Plaintiff asks the Court to grant a writ of mandamus instructing Customs to "refer Padilla's cap provision protest to Commerce for a decision." (Compl. 5–6; *see also* BACKGROUND *supra*, at 3–4.) A writ of mandamus is used "to compel performance of [a] ministerial act or mandatory duty **where there is a clear legal right** in plaintiff, **a corresponding duty** in defendant, and **a want of any other appropriate and adequate remedy**." *Black's Law Dictionary* 866 (5th ed. 1979) (citation omitted; emphasis added). A writ of mandamus has been described as "a summary, expeditious, and drastic writ, based on the assumption that the applicant has an immediate and complete legal right to the relief demanded." *Syntex Agribusiness, Inc. v. U.S. Int'l Trade Comm'n.*, 617 F.2d 290, 291 (C.C.P.A. 1980); *see also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) ("[T]he writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations."). Quite simply, Plaintiff has failed to identify **any** legal basis for its requested writ. Plaintiff has not established why it has a legal right to have its protest forwarded to Commerce, why Customs has a legal obligation to do so, or why there is a want of any other appropriate and adequate remedy. Regardless of the flimsy nature of this petition, the Court determines that the only substantive cause of action brought in Plaintiff's complaint is a naked, unsupported request for a writ of mandamus against Customs.

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[1] Because the Court is granting Defendant's motion to dismiss for lack of subject matter jurisdiction for the reasons set forth below, the Court does not entertain Plaintiff's applications for preliminary injunction or temporary restraining order.

While it is clear from the preceding evaluation of the Complaint that Plaintiff has not stated a claim upon which relief can be granted, it is axiomatic that the Court must first conduct a threshold inquiry regarding its jurisdiction to hear the case. *See Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 94–95 (1998) ("The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception.") (internal quotations omitted). This Court holds that 28 U.S.C. § 1581(i)(4) does not provide the court jurisdiction to hear this case. Merely pleading jurisdiction under § 1581(i) cannot "be used to create a cause of action where one does not otherwise exist." *ITT Semiconductors v. United States*, 6 CIT 231, 237, 576 F. Supp. 641, 646 (1983). Plaintiff's failure to set out allegations in the Complaint in a way that "demonstrate why this court should exercise such jurisdiction in this case" is grounds for dismissal. *See id.* at 237–38; *see also Almond Bros. Lumber Co. v. United States*, 32 CIT __ , __ , 2009 WL 1397182 at *8 (2009) (dismissing for lack of jurisdiction under § 1581(i) on account of the plaintiff's failure to plead sufficient facts to persuade the court that jurisdiction was appropriate). For the foregoing reasons, then, Plaintiff's Complaint is dismissed for lack of subject matter jurisdiction pursuant to USCIT Rule 12(b)(1).

The Court notes that Plaintiff is correct in asserting in its response papers that this court has jurisdiction under 28 U.S.C. § 1581(i)(4) to consider a lawsuit brought under the Administrative Procedure Act to challenge Commerce's liquidation instructions, even after the entries in question have been liquidated. *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1312 (Fed. Cir. 2004). However, the Court finds nothing in the Complaint that advances such a claim.

The Court additionally notes the questionable basis of Plaintiff's underlying grievance with the government. Plaintiff asserts that the so-called "cap provision" found in 19 U.S.C. § 1673f(a) applies to its 5 entries of PRCBs made in October and November of 2004, and that this provision limits the collection of antidumping duties on those entries to the 2.80% cash deposit rate calculated during the investigation. (Compl. ¶ 22.) It appears that Plaintiff has misapprehended the operation of the cap provision. The statute reads:

> If the amount of a cash deposit, or the amount of any bond or other security, required as security for an estimated antidumping duty under section 1673b(d)(1)(B) of this title is different from the amount of the antidumping duty determined under an antidumping duty order published under section 1673e of this title, then the difference for entries of merchandise entered, or

> withdrawn from warehouse, for consumption before notice of the affirmative determination of the Commission under section 1673d(b) of this title is published shall be—
>
> > (1) disregarded, to the extent that the cash deposit, bond, or other security is lower than the duty under the order, or
> > (2) refunded or released, to the extent that the cash deposit, bond, or other security is higher than the duty under the order.

19 U.S.C. § 1673f(a) (2006). An explanation of this admittedly complex statute was expertly rendered by the Court of Appeals for the Federal Circuit in *Thai Pineapple Canning Indus. Corp. v. United States*, 273 F.3d 1077 (Fed. Cir. 2001).

> Once Commerce makes a preliminary determination that merchandise is being sold in the United States at less than fair value, Commerce orders the posting of a cash deposit or bond for each entry of merchandise at a rate based on the preliminary estimated dumping margin. 19 U.S.C. §1673b(d)(1)(B)(1994). After Commerce makes a final determination that the subject merchandise is being sold at less than fair value, *id.* § 1673d(a), and the International Trade Commission makes a final determination that an industry is materially injured, *id.* § 1673d(b), Commerce publishes an antidumping order with a new assessment rate based on the dumping margin determined during Commerce's investigation. *Id.* § 1673e(a). For entries of merchandise **after Commerce's affirmative preliminary determination and before the Commission's affirmative injury determination**, if the deposit of estimated duty under § 1673b(d)(1)(B) is higher than the duty under the antidumping order, the difference is refunded. 19 U.S.C. § 1673f(a) (Supp. V 1999). On the other hand, if the deposit is lower than the duty under the order, the difference is disregarded. *Id.* That is, the preliminary estimated duty acts as a "cap" on the duty that can be collected for entries made **between the date of Commerce's preliminary determination and the date of the Commission's injury determination, often referred to as the "cap period."**

Thai Pineapple, 273 F.3d at 1082 (emphasis added). In this case, it appears that the cap period ran from January 26, 2004 (the date on which Commerce issued its affirmative preliminary determination in

the PRCB investigation) to the end of July 2004,[2] when the Commission issued its affirmative injury determination. Because Plaintiff's entries were made after the end of the cap period, those entries do not appear to be subject to the limitations of 19 U.S.C. § 1673f(a). Indeed, the statutory scheme seems to contemplate that goods entered at the cash deposit rate after the cap period, but prior to the completion of the first administrative review, are subject to liquidation at an entirely different antidumping rate after the administrative review is complete. *See generally* 19 U.S.C. § 1675(a); *see also* 19 C.F.R. §§ 159.58(a) (requiring liquidation to be suspended "on or after the date of publication of the 'Notice of Preliminary Affirmative Antidumping Determination.'"); 351.213(e)(1)(ii) (explaining that the first administrative review 'will cover . . . entries . . . during the period [of review.]'). As this is precisely the fact pattern alleged by Plaintiff in this case, it appears that Plaintiff may not have a legitimate grievance with the United States at all.

Conclusion

For the foregoing reasons, Plaintiff's Complaint is dismissed pursuant to USCIT Rule 12(b)(1). Judgment will be entered accordingly.

Dated: October 8, 2009
New York, NY

/*s*/ *Gregory W. Carman*
GREGORY W. CARMAN, JUDGE

Slip Op. 09–113

FORMER EMPLOYEES OF INVISTA, S.A.R.L., Plaintiffs, v. U.S. SECRETARY OF LABOR, Defendant.

Court No. 07–00160

[Sustaining U.S. Department of Labor's second redetermination on remand, certifying workers' eligibility to apply for Trade Adjustment Assistance and Alternative Trade Adjustment Assistance]

Dated: October 9, 2009

Ruskin Moscou Faltischek, P.C. (*Thomas A. Telesca*), for Plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S.

[2] The USITC website indicates that the "End" of the Commission's investigation was July 23, 2004. *See* http://www.usitc.gov/trade_remedy/731_ad_701_cvd/ investigations/2003/polyethylene_retail_carrier_bags/finalphase.htm (last visited Oct. 8, 2009.) The same date is listed as the end of the cap period in Commerce's instructions to Customs following the first administrative review. (*See* Compl. Ex. B, ¶ 3.)

Department of Justice (*Carrie A. Dunsmore*); *Stephen R. Jones*, Office of the Solicitor, U.S. Department of Labor, Of Counsel; for Defendant.

MEMORANDUM OPINION

RIDGWAY, Judge:

I.
Introduction

In this action, former employees of the Chattanooga, Tennessee plant operated by Invista, S.a.r.l. ("the Workers") contest the determinations of the U.S. Department of Labor denying their petition for certification of eligibility for trade adjustment assistance ("TAA") and alternative trade adjustment assistance ("ATAA"). The determinations at issue include the Labor Department's original denial of the Workers' petition, as well as the agency's denial of the Workers' request for reconsideration, and the agency's negative determination following a voluntary remand. *See* 72 Fed. Reg. 7907, 7909 (Feb. 21, 2007) (notice of denial of petition); 72 Fed. Reg. 15,169 (March 30, 2007) (notice of denial of request for reconsideration); 73 Fed. Reg. 32,739 (June 10, 2008) (notice of negative determination on voluntary remand).

Invista I reviewed the Workers' challenge to the Labor Department's negative determination in the voluntary remand proceeding, and remanded this matter to the agency for a second time. *See Former Employees of Invista, S.a.r.l. v. U.S. Sec'y of Labor*, 33 CIT ____, 626 F. Supp. 2d 1301 (2009) ("*Invista I*"). Now pending before the Court is the Labor Department's Notice of Revised Determination on Remand, together with the supporting Supplemental Administrative Record. *See* Notice of Revised Determination on Remand, 74 Fed. Reg. 51,195 (Oct. 5, 2009) ("Second Remand Determination"); Supplemental Administrative Record ("Second Supplemental Administrative Record").[1] Reversing its earlier rulings, the Labor Department's

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[1] The administrative record in this action consists of three parts — the initial Administrative Record (which the Labor Department filed after this action was commenced), the Supplemental Administrative Record (which was filed after the agency's negative determination on remand), and a second Supplemental Administrative Record (the "Second Supplemental Administrative Record" or "S.S.A.R.") filed with the Second Remand Determination at issue here.

The three parts of the administrative record are separately paginated. According to the Labor Department, all three parts include confidential business information. Only the Second Supplemental Administrative Record is cited herein. References to the public version of that record are noted as "S.S.A.R. ____," while references to the confidential version are noted as "C.S.S.A.R. ____."

Finally, much — if not all — of the information in the administrative record that has been designated "confidential" by the Labor Department in fact is not confidential. The agency's

latest determination grants the Workers' Petition, certifying them as eligible to apply for both TAA and ATAA. *See* 74 Fed. Reg. at 51,196.

Jurisdiction lies under 28 U.S.C. § 1581(d)(1).[2] As discussed below, the Labor Department's Second Remand Determination, certifying the Workers as eligible to apply for TAA and ATAA, is sustained.

II.
Background

This should have been a relatively easy case for the Labor Department. The agency previously certified former Invista employees who did *the same jobs* at *the same plant* as the Workers at issue here. It nevertheless took four bites at the apple for the agency to get it right.

As detailed in *Invista I* (familiarity with which is presumed), the plaintiff Workers in this case are former employees of the Nylon Apparel Filament Fibers Group at Invista's Chattanooga, Tennessee plant. At the time of their termination on January 31, 2007, they processed orders for apparel fiber in support of apparel fiber production at an Invista plant in Mexico. Apparel fiber had previously been manufactured at the Chattanooga plant, until domestic production ceased and all such production was shifted to the Mexico facility in 2004. *See generally Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1305.

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longstanding practice in Trade Adjustment Assistance cases of indiscriminate, broadbrush designation of large portions of the administrative record as "confidential" — including generally all information provided by employers — effectively precludes review by parties with an immediate interest in a case (such as the plaintiff workers), as well as review by parties and counsel in other cases that may be similar, and by legislators, scholars, journalists, and other concerned members of the public with an interest in the administration of the Trade Adjustment Assistance program.

There is a fundamental public interest in transparency in government, and a powerful presumption in favor of disclosure. Judges' decisions, in particular, must be open to public scrutiny. The public has a right to review a judge's rationale, not merely the outcome, in a case. And litigants in other similar cases have a legitimate need (and a right) to review the facts underlying a judge's decision, and how the judge applied the law to those facts, to discern the relevance and significance of the judge's decision vis-a-vis their own cases. The rule of law depends, in large measure, on similar cases being treated similarly. These and other principles weigh heavily against according confidential treatment to information in litigation, subject only to those specific, narrow exceptions recognized by law. *See generally, e.g., Union Oil Co. of California v. Leavell*, 220 F.3d 562, 567–68 (7th Cir. 2000) (Easterbrook, J.); *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943 (7th Cir. 1999) (Posner, J.); *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165, 1176–81 (6th Cir. 1983) (discussing, *inter alia, Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)).

The Labor Department will be required to review and resubmit the entire administrative record, including specific justification (with citations to appropriate legal authority, and supported by the requisite factual showings) for each proposed redaction. In the future, the agency must conduct such a review before filing the administrative record with the court.

[2] Except as otherwise noted, statutory citations herein are to the 2000 edition of the United States Code. Similarly, citations to regulations are to the 2006 edition of the Code of Federal Regulations.

The 2004 shift in production to Mexico led to widespread layoffs of production workers and support personnel at the Chattanooga plant. Invista management filed a petition for TAA and ATAA benefits on behalf of the terminated workers, which the Labor Department granted. Specifically, the Labor Department's 2004 certification certified as eligible for TAA and ATAA all Invista workers "engaged in *employment related to the production of*," *inter alia*, apparel fiber "who became totally or partially separated from employment on or after June 7, 2003, through two years from the date of certification [*i.e.*, two years from August 20, 2004]." *See generally Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1305–06 (*quoting* 69 Fed. Reg. 54,320, 54,321 (Sept. 8, 2004); additional citations omitted) (emphasis added). The Workers at issue here survived the 2004 lay-offs, and continued their work at the Chattanooga site in support of apparel fiber production, even after that production shifted to Mexico. However, on November 14, 2006 — a mere three months after the 2004 TAA/ATAA certification expired — the Workers were notified that they were being terminated effective January 31, 2007. *See generally id.*, 33 CIT at ____, 626 F. Supp. 2d at 1306.

In mid-December 2006, Invista's Plant Manager filed the TAA/ATAA petition at issue here, on behalf of the Workers. In the TAA/ATAA Petition, the Plant Manager attested that the Workers' terminations were "a continuation of the shift in production to Mexico as described in [the 2004 TAA/ATAA certification] that expired August 20, 2006." *See Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1306 (*quoting* TAA/ATAA Petition). The Plant Manager further explained that — notwithstanding the 2004 shift in production to Mexico — "all orders [for apparel fiber had] continued to be processed from the United States" up to that time, but that such work was now going to be transferred to "CSR's [*i.e.*, Customer Service Representatives] located in South America." *See id.* , 33 CIT at ____, 626 F. Supp. 2d at 1306 (citation omitted). The TAA/ATAA Petition also noted that two of the subject Workers were age 50 or older, that their skills "are not easily transferable," and that "[c]ompetitive conditions within the industry are adverse." *See id.*, 33 CIT at ____, 626 F. Supp. 2d at 1306 (citation omitted).

The Labor Department denied the Workers' TAA/ATAA Petition. *See generally Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1306 (*citing* 72 Fed. Reg. at 7909 (denying TAA/ATAA Petition on grounds that "[t]he workers' firm does not produce an article as required for certification")). The Labor Department found that "domestic production of an article within . . . [Invista's] Nylon Apparel Filament Fibers Group

[had] ceased more than one year [before],” and that the petitioning Workers thus “were not in support of domestic production within the requisite one year period.” *Id.* , 33 CIT at ____, 626 F. Supp. 2d at 1306 (citation omitted). The Labor Department therefore concluded that the Workers could not be “considered import impacted or affected by a shift in production of an article”; and, because the agency determined that the Workers were not eligible for TAA, the Workers’ petition for ATAA was also denied. *Id.* , 33 CIT at ____, 626 F. Supp. 2d at 1306 (citation omitted).

The Workers requested that the Labor Department reconsider its determination, underscoring that they had “missed the opportunity of receiving . . . [TAA and ATAA] benefits by less than 3 months,” and emphasizing that they would have been covered by the 2004 TAA/ATAA certification — and thus “would have been able to have the opportunity of receiving the benefits of . . . TAA [and ATAA]” — if only Invista management had notified them of their impending terminations “in August, versus November of 2006.” *See Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1306–07 (*quoting* Request for Reconsideration). Echoing a point made by Invista’s Chattanooga Plant Manager in the TAA/ATAA Petition, the Request for Reconsideration stated that the Workers’ layoffs in effect were the culmination of the 2004 shift in production of apparel fiber to Mexico — the “direct result of the . . . apparel machines going to Mexico, the loss of textile manufacturing in the U.S. the bigger picture.” *Id.*, 33 CIT at ____, 626 F. Supp. 2d at 1307 (citations omitted).

With no further investigation, the Labor Department denied the Workers’ Request for Reconsideration. *See* 72 Fed. Reg. at 15,169. The Labor Department acknowledged the Workers’ claim that their terminations were “a direct result of the same shift in production to Mexico . . . which resulted in workers certification for TAA in 2004.” *See Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1307 (citations omitted). However, the Labor Department stated that, pursuant to agency regulations, it only “considers production that occurred one year prior to the date of the petition.” *See id.*, 33 CIT at ____, 626 F. Supp. 2d at 1307 (citation omitted). The Labor Department therefore concluded that — because the Chattanooga plant ceased production of apparel fiber in 2004 — the Workers’ TAA/ATAA Petition was “outside of the relevant period.” *See id.*, 33 CIT at ____, 626 F. Supp. 2d at 1307 (citation omitted).

This action followed. The Workers filed a Motion For Judgment Upon the Agency Record, arguing, *inter alia*, that the Labor Department had denied the Workers’ TAA/ATAA Petition based on the agency’s determination that the Workers “were not in support of domestic

production within the requisite one year period," but that the agency had failed to identify the authority for the asserted one-year limitation. *See Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1307 (citations omitted). In addition, the Workers faulted the Labor Department for "fail[ing] to adequately consider the relevancy of the prior [TAA/ATAA] certification." *See id.*, 33 CIT at ____, 626 F. Supp. 2d at 1307 (citation omitted). Conceding that, by its terms, the one-year limitation in 29 C.F.R. § 90.2 appears to apply only in cases where layoffs result from "increased imports," the Government sought — and was granted — a voluntary remand to permit the Labor Department to determine whether the one-year time bar also applies in "shift of production" cases such as this. *See id.*, 33 CIT at ____, 626 F. Supp. 2d at 1307 (citations omitted).

In its Negative Determination on Remand (the determination at issue in *Invista I*), the Labor Department abandoned its reliance on the one-year time limitation in 29 C.F.R. § 90.2. Instead, the Labor Department based its negative determination on its conclusion that the Workers' terminations "[were] not related to the shift in production of apparel nylon filament to Mexico in 2004," but, rather, were the result of "a business decision to improve the efficiency of . . . [Invista's] customer service organization." *See Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1307 (*citing* 73 Fed. Reg. at 32,739–40). In light of its conclusion that "the shift of production to a foreign country was not a cause of the workers' separations," the Labor Department reserved judgment as to "the impact of the fact that no production took place at the subject firm during the twelve month period prior to the filing of the petition." *See id.* , 33 CIT at ____, 626 F. Supp. 2d at 1307–08 (citation omitted). Finally, because the Labor Department determined that the Workers were not eligible for TAA, their petition for ATAA was denied as well. *See id.*, 33 CIT at ____, 626 F. Supp. 2d at 1308 (citation omitted).

The Workers' renewed challenge to the Labor Department's denial of their TAA/ATAA Petition was the subject of *Invista I*. *Invista I* addressed in detail the Labor Department's affirmative obligation to investigate TAA/ATAA claims "with the utmost regard for the interests of the petitioning workers." *See generally Invista I*, 33 CIT at ____, ____, 626 F. Supp. 2d at 1304–05, 1308–09 (*citing, inter alia, Local 167, Int'l Molders and Allied Workers Union, AFL-CIO v. Marshall*, 643 F.2d 26, 31 (1st Cir. 1981)). As explained there, the Labor Department cannot limit its investigation of a TAA/ATAA petition solely to the petitioning workers' express claims. Instead, the agency must independently investigate the facts of each case, and — based on that investigation — consider all legal theories under which the

petitioning workers might be eligible for certification. *See id.*, 33 CIT at ____, 626 F. Supp. 2d at 1309.

In a case such as this, where there is a potentially relevant prior TAA/ATAA certification, the Labor Department must consider the possibility of amending the prior certification to extend coverage to the new group of petitioning workers. *See generally Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1309. *Invista I* concluded that the Labor Department had failed to do so here, and remanded the matter to the agency for a second time, with instructions requiring the agency to "thoroughly and independently investigate the facts of the case, and — based on that investigation — . . . [to] consider all legal theories under which the petitioning Workers might be eligible for certification, including the possible amendment of the 2004 TAA/ATAA certification." *See id.*, 33 CIT at ____, 626 F. Supp. 2d at 1311.

III.
Analysis

As *Invista I* explained, although the statute and regulations do not explicitly address the amendment of TAA/ATAA certifications, the Labor Department has acknowledged that it extends certifications beyond two years when necessary "to cover all adversely affected workers at the subject firm or appropriate subdivision," in cases where "the later worker separations [were] attributable to the basis for [the original] certification." *See generally Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1309 (*citing, inter alia, United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. and Service Workers v. U.S. Sec'y of Labor*, 33 CIT at ____, 2009 WL 1175654 at *4 (2009); Weirton Steel Corporation, Weirton, WV: Negative Determination on Remand, 73 Fed. Reg. 52,066, 52,068–70 (Sept. 8, 2008)); *see also id.*, 33 CIT at ____ n.5, 626 F. Supp. 2d at 1309 n.5 (compiling cases where agency has amended TAA/ATAA certifications to extend period of coverage).

Invista I observed that the administrative record in this case is replete with evidence supporting the Workers' claim that their terminations were "attributable to the basis for [the original, i.e., the 2004] certification" — that is, the 2004 shift of apparel fiber production to Mexico; and, moreover, that the evidence to the contrary is not only scant, but also weak. *See Invista I*, 33 CIT at ____, 626 F. Supp. 2d at 1309–10 (*quoting Weirton Steel*, 73 Fed. Reg. at 52,068). As *Invista I* noted, the Labor Department's own standards required the Workers' certification if there was a "causal nexus" between the 2004 shift in production and their terminations. *See id.* , 33 CIT at ____, 626 F. Supp. 2d at 1311 (*quoting Weirton Steel*, 73 Fed. Reg. at 52,068).

Incredibly, in the second remand proceeding, it took just *a single phone call* between the Labor Department and a senior representative of Invista to confirm what the Workers have been telling the agency since December 15, 2006 — that is, that their terminations were a direct (albeit delayed) result of the 2004 shift of apparel fiber production to Mexico (which, in turn, was the basis for the Labor Department's 2004 TAA/ATAA certification of the Workers' former Invista colleagues). *See* C.S.S.A.R. 69–71 (documenting Aug. 21, 2009 phone conversation); *see also id.* at 45 (indicating that Aug. 21, 2009 phone call was "lengthy conversation").

A thorough, even-handed initial investigation of the Workers' TAA/ATAA Petition would have rigorously probed the relationship between the Workers' terminations and the 2004 shift in production to Mexico, sparing the parties and the Court untold hours of work, and, more importantly, avoiding the more than two years and seven months of delay in certifying the Workers for the TAA/ATAA benefits to which the Labor Department now concedes they are entitled. *See* TAA/ATAA Petition (Dec. 15, 2006); 19 U.S.C. § 2273(a) (Supp. II 2002) (requiring agency determination on TAA/ATAA petition within 40 days); *see also Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 30 CIT 1315, 1354–57, 454 F. Supp. 2d 1306, 1341–43 (2006) (and authorities cited there) (emphasizing that effectiveness of trade adjustment assistance depends upon its timeliness).

In any event, the Labor Department's Second Remand Determination has now reversed the agency's four prior rulings, and has granted the Workers' Petition, extending the agency's 2004 certification of eligibility to apply for both TAA and ATAA:

> All workers of Invista, S.A.R.L., Nylon Apparel Filament Fibers Group, A Subsidiary of Koch Industries, Inc., Chattanooga, Tennessee, who became totally or partially separated from employment on or after August 21, 2006, through two years from the issuance of this revised determination are eligible to apply for Trade Adjustment Assistance under section 223 of the Trade Act of 1974, and are eligible to apply for alternative trade adjustment assistance under Section 246 of the Trade Act of 1974.

74 Fed. Reg. at 51,196.[3] The Workers have advised that they concur in the agency's determination. *See* Letter to Court from Workers' Counsel (Sept. 29, 2009).

IV.
Conclusion

For the reasons set forth above, the Department of Labor's Notice of Revised Determination on Remand (the Second Remand Determination) is hereby sustained.

Judgment will enter accordingly.

Dated: October 9, 2009
New York, New York

/*s*/ *Delissa A. Ridgway*
DELISSA A. RIDGWAY, JUDGE

[3] The Labor Department does not expressly state that the Second Remand Determination is an amendment extending the 2004 TAA/ATAA certification. *See* 74 Fed. Reg. at 51,195–96. However, the scope of the Second Remand Determination's certification — encompassing those "who became totally or partially separated from employment *on or after August 21, 2006*, through two years from the issuance of this revised determination" — is telling. *See* 74 Fed Reg. at 51,196 (emphasis added). The 2004 TAA/ATAA certification expired on August 20, 2006. *See* 74 Fed. Reg. at 51,195. Further, certifications typically do not cover workers separated more than one year prior to the date of the TAA petition. *See* 29 C.F.R. § 90.16(e)(1).

As an aside, note that there is a conflict between the Second Remand Determination as it is included in the Second Supplemental Administrative Record and how it is published in the Federal Register. In the Second Supplemental Administrative Record, the Second Remand Determination is dated September 3, 2009. *See* S.S.A.R. 77. In contrast, as published in the Federal Register, the Second Remand Determination is dated September 8, 2009. *See* 74 Fed. Reg. at 51,196. That difference could be significant to any workers laid off in the future who may be otherwise eligible for TAA/ATAA benefits, because the certification, by its terms, expires two years from its date of issuance—whether that is two years from September 3, 2009, or two years from September 8, 2009.