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Via eRulemaking Portal

W. Ralph Basham
Commissioner
c/o Commercial Regulations Branch and Rulings
Office of International Trade
U.S. Customs and Border Protection
Mint Annex
1300 Pennsylvania Ave., NW.
Washington, DC 20229

Re: Comments on CBP's Proposal for Uniform Rules of Origin for Imported Merchandise Docket Number USCBP-2007-0100 (73 FR 43385) and (73 FR 51962)

Dear Mr. Basham:

The Maritime Cabotage Task Force (MCTF) appreciates this opportunity to comment on the Bureau of Customs and Border Protection of the Department of Homeland Security (CBP) proposed extension of the Uniform Rules of Origin for Imported Merchandise to new and different product determinations under its regulations at 19 C.F.R. 4.80b governing the coastwise transportation of merchandise. The MCTF is a broad-based coalition representing the U.S. domestic maritime industry. Comprised of more than 400 American companies, associations, shipyards, labor organizations, defense groups, and others interested in maintaining America's strong domestic maritime industry, the MCTF is a leading advocate for the strict enforcement of U.S. maritime cabotage laws.

The MCTF strongly opposes the proposed expansion. Current CBP regulations codify the judicial precedent established in *AMA v. Blumenthal* (590 F.2d 1156 (1978)) and CBP has consistently ruled in accordance with this judicial precedent (see HQ Rulings 115762, 114476, 114851, 115604, 115274, 115482, and others). This judicial precedent established that for Jones Act purposes the substantial transformation analysis of a "new and different" is the appropriate basis for determining whether the transportation of merchandise processed in an intermediate location is subject to the Jones Act. Should CBP implement the proposed changes, any change should be limited to country of origin determination for Customs entry declaration purposes under section 102 and should not be extended to the Jones Act provision as codified in section 4.80b(a).

Background

The CBP Notice of Proposed Rulemaking (NPRM) proposed to extend the application of the country of origin rules codified at 19 C.F.R. Part 102, which heretofore have applied only to goods imported under NAFTA and to textiles, to all country of origin determinations made under the customs and related laws and under the navigation laws of the United States unless otherwise specified. (73 Fed. Reg. 43385-87) According to CBP, the new rules have proven to be more objective and transparent and provide greater predictability in determining the country of origin of imported merchandise than the system of case-by-case adjudication currently in use for all country of origin determinations under the customs and related laws (other than for NAFTA and imported textiles) and the navigation laws of the United States.

Discussion

CBP has proposed that all determinations of what constitutes a "new and different" product under the Jones Act will be decided in accordance with the same rules for determining the country of origin of imported goods. Although the proposal is intended to provide more objective and transparent rules for making such determinations, it also has the potential for reversing many prior CBP "new and different" Jones Act rulings. That tariff shift method, first proposed in 1991, was established in 1996 for all imports from Canada and Mexico and nearly all imports of textile products — but not with respect to Jones Act determinations.

New and different product determinations under Part 4 of CBP regulations are part of a separate and distinct regulatory scheme from those made under Part 102. Customs itself has long held that new and different product determinations under Part 4 of its regulations are separate and distinct from the "substantially transformed" standard embodied in the Part 102 regulations. *See, e.g.,* Headquarters Ruling 112895 (February 2, 1994)(noting that the processing standard for "new and different" under 46 U.S.C. §883 was not the same as the "substantial transformation" test under other statutes).

Country of origin determinations under the navigation (coastwise) laws arise under the doctrine first addressed in American Maritime Association v. Blumenthal, 458 F. Supp. 849 (1977) which holds that the processing of merchandise laden at a coastwise point at an intermediate, non-coastwise point into a "new and different product", severs the continuity of transportation such that transportation by water to or from that intermediate non-coastwise point by a non-coastwise qualified vessel does not violate the "via a foreign port" provision of the Jones Act. Placing Part 4 new and different product determinations within the scope of the Part 102 rules for country of origin determinations threatens to undermine longstanding interpretations respecting transportation under the coastwise laws, making it easier for processing at an intermediate, non-coastwise point to exempt the processed merchandise from the scope of those laws.

CBP has been careful to indicate the "new and different" product approach for purposes of the Jones Act has not been the same as the "substantial transformation" approach for other statutes. Changes to the ways in which CBP analyzes Jones Act issues would no doubt open up what were once settled issues and bring even more uncertainty to shippers involved in coastwise trade. Moreover, the NPRM does not address the potential impact of the rule if made effective on prior case-by-case Jones Act rulings. Even if such rulings were "grandfathered" in any effective rule, application of Part 102 to "new and different" product determinations in the future may produce inconsistent results with historical case-by-case determinations.

Lastly, the NPRM fails to provide any guidance as to how CBP will handle situations where a tariff classification dispute arises and results in a different determination under the Jones Act long after the physical movement of merchandise in coastwise trade. Should Customs pursue the proposed amendment to 4.80b(a), the implementing rule should clarify that parties in receipt of previously issued rulings can continue to rely on such rulings. To disallow such reliance would have a significant and dramatic impact on the operations of those entities that have will have detrimentally relied upon the previously issued rulings in arranging their vessel operations under long term contracts.

Summary

For the reasons cited, any change under the NPRM should be limited to country of origin determination for Customs entry declaration purposes under section 102 and should not be extended to the Jones Act provision as codified in section 4.80b(a). In this respect, the MCTF endorses the comments of the American Association of Exporters and Importers (AAEI) submitted to this docket, stating its strong belief that this proposed provision should be struck with respect to the coastwise laws and that the judicially supported substantial transformation analysis should continue to be used for Jones Act purposes.

Sincerely,

Philip Grill
Chair