


employment. Thus, a federal employee may not sue the government under the FTCA. *Noga v. United States*, 411 F.2d 943, 945 (9th Cir.1969), cert. denied, 396 U.S. 841, 90 S.Ct. 104, 24 L.Ed.2d 92 (1969); *Van Trease v. United States*, 400 F.2d 853, 855 (6th Cir.1968); *Boyer v. United States*, 510 F.Supp. 1081, 1082 (E.D.Pa.1981). Accordingly, the tortious liability of the government for its employees has been eliminated. *Smith v. Rivest*, 396 F.Supp. 379 (E.D.Wis. 1975).

[6] In the instant case, Tazelaar was injured while acting within the scope of his employment as a civilian employee of the U.S. Air Force. Therefore, Tazelaar's exclusive remedy for injuries is under the FECA, and he cannot sue the United States under the FTCA.⁶

Accordingly, the government's motion to dismiss is granted. It is so ordered.

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CONSTRUCTION EXPORTING ENTERPRISES, UNECA, Plaintiff,

v.

MIKKI MARITIME LTD., Heritage Ship Agency, Inc. and Gulf Range Ship Agency, Inc., Defendants.

No. 82 Civ. 7738-CLB.

United States District Court,
 S.D. New York.

March 24, 1983.

On motion for maritime attachment under federal rule, the District Court,

⁶ Tazelaar's proffered response asserts essentially that the substitution of the United States as party defendant and dismissal of this lawsuit under 5 U.S.C. § 8116(c) violates his rights to due process and equal protection. Although, for the reason discussed earlier in this opinion, we are not formally considering the constitutional arguments in Tazelaar's proffered response, we believe that they lack merit. Notwithstanding these arguments, a number of circuits have reached the identical result that we reach today. Moreover, *Noga v. United States*,

Briant, J., held that where although plaintiff vessel charterer apparently had first believed that vessel owner was actually present in New York, in that charterer sought state law attachment, vessel owner had transferred its presence to Greece for obvious purpose of facilitating profitable transaction which could not be performed lawfully from New York, vessel owner could not successfully oppose attachment, under federal rule, based on premise that vessel owner was not found within district.

Motion granted.

1. Admiralty ⇐=47

Where although plaintiff vessel charterer apparently had first believed that vessel owner was actually present in New York, in that charterer sought state law attachment, vessel owner had transferred its presence to Greece for obvious purpose of facilitating profitable transaction which could not be performed lawfully from New York, vessel owner could not successfully oppose attachment, under federal rule, based on premise that vessel owner was not found within district. Supplemental Admiralty and Maritime Claims Rule B(1), 28 U.S.C.A.; Fed.Rules Civ.Proc. Rule 64, 28 U.S.C.A.; N.Y.McKinney's CPLR 6201.

2. Admiralty ⇐=47

Right to attachment, under federal rule, based on premise that vessel owner is not found within district is not defeated by filing of general appearance. Supplemental Admiralty and Maritime Claims Rule B(1), 28 U.S.C.A.

3. Admiralty ⇐=47

Vessel owner's presence in district at times prior to May 18, 1982 did not defeat

411 F.2d 943 (9th Cir.1969), cert. denied, 396 U.S. 941, 90 S.Ct. 104, 24 L.Ed.2d 92 (1969), rejected the argument that a construction of the Federal Drivers Act which barred common law recovery against the United States deprived a plaintiff of due process of law. *Id.* at 945. That court was, however, not presented with the issue of whether the insulation of federal drivers from a common law right of action denied a plaintiff due process, since *Noga* did not sue the driver of the vehicle.

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CONST. EXPORTING ENTERPRISES v. NIKKI MARITIME LTD. 1373

Cite as 558 F.Supp. 1372 (1982)

right to attachment, under federal rule, based on premise that vessel owner was not found within district, where attachment was to be determined in district as of November 22, 1982 when original complaint was filed, to which date amended complaint related back. Supplemental Admiralty and Maritime Claims Rule B(1), 28 U.S.C.A.

a loss of the entire cargo, valued by plaintiff in excess of 13 Million Dollars. The entire crew was rescued and brought to the United States. The records of the vessel are said to be available in this district, and the two most significant witnesses, the Master and Chief Engineer, reside in the United States.

4. Arbitration — 7.9

Issuance of attachment, under federal rule, based on premise that vessel owner was not found in the district was not inconsistent with United Nations Convention for Recognition and Enforcement of Foreign Arbitral Awards. Supplemental Admiralty and Maritime Claims Rule B(1), 28 U.S.C.A.; 9 U.S.C.A. § 201.

Defendant Nikki Maritime Ltd., being a single vessel corporation, is now proceeding to collect its hull insurance and any other awards from pending litigation or arbitration, pay its mortgages and proceed to wind up its affairs.

Plaintiff seeks damages for its loss of the cargo. The charterparty, although not incorporated by reference in the Bills of Lading, requires arbitration in London, and plaintiff has initiated such proceedings through a British Solicitor. In its original complaint, plaintiff sought an attachment of the hull insurance proceeds, then temporarily present in this district, to assure enforcement of the arbitration award.

Caspar F. Ewig, of Hill, Rivkina, Carey, Loesberg, O'Brien & Mulroy, New York City, for plaintiff.

Burlingham, Underwood & Long by Joseph Smith, John S. Martin Jr., U.S. Atty., S.D.N.Y., New York City, for defendants.

This Court, by an oral decision rendered on November 24, 1982, denied plaintiff's motion for an order of attachment, then sought to be issued pursuant to New York CPLR § 6201 as incorporated by Rule 64, F.R.Civ.P. It did so because on the facts then presented, this Court believed itself bound by the very recent decision of the New York Court of Appeals in *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 456 N.Y.S.2d 728, 442 N.E.2d 1239, decided November 18, 1982. However, this Court granted a temporary restraining order to permit review by the Court of Appeals of the Second Circuit.

MEMORANDUM DECISION

BRIEANT, District Judge.

This is an action originally filed November 22, 1982, within the general maritime subject matter jurisdiction of this Court. Familiarity is assumed with all prior proceedings. Plaintiff, a corporation existing under the laws of the Republic of Cuba, having its principal office at Havana, Cuba and not present here, was the charterer and apparently also the owner of the Bills of Lading for 5,000 tons of cement and other break bulk cargo carried aboard the M/V RAGNAR of Panamanian registry, owned by defendant Nikki Maritime Ltd., a Liberian corporation not licensed to do business in New York.

The Court of Appeals remanded, holding as follows in its unpublished informal opinion filed January 31, 1983, Dkt. No. 82-7823:

On September 17, 1982, the M/V RAGNAR, while in transit in the North Atlantic between Mariel, Cuba and Tobruk, Libya, sent out a radio distress signal, stating that her engine room was flooding as a result of a broken valve, and that she was sinking. On September 18, 1982 the vessel sank with

"During oral argument, it was brought to our attention that, on facts now known to appellant's counsel, a 'traditional' admiralty attachment may have been available pursuant to 9 U.S.C. § 8 and Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims, Fed.R.Civ.P. (Supp). In response to our

request for supplemental briefing, appellant set forth facts and arguments under which it claims that such a 'traditional' admiralty attachment could have been obtained. Appellee, in its supplemental brief, disagrees.

Under the circumstances, we believe the best course is to remand the case to the district court to consider whether appellant is entitled to a 'traditional' admiralty attachment. We realize that there are apparently disputes between the parties concerning certain crucial facts relating to the availability of such an attachment here as well as concerning the effect of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 et seq., on a 'traditional' admiralty attachment. But those disputes can be resolved in the district court in the first instance."

Although its decision provided that the mandate issue "forthwith," the mandate of the Court of Appeals was not actually received in the district court until February 14, 1983. However, acting on the erroneous assumption that the mandate had issued, this Court, as a result of hearings held February 3 and 4, 1983, granted a continuation of the temporary restraining order, secured by a bond of \$50,000, and approved the release therefrom of money concededly owed to the first mortgagee of the vessel. This was done pending submission of a motion for a maritime attachment as authorized by the Second Circuit Court of Appeals opinion quoted above. Such a motion was fully briefed and submitted effective February 16, 1983, and is presently before this Court for decision.

In its original complaint and its initial presentation to this Court, plaintiff alleged that the vessel M/V RAGNAR and defendant Nikki Maritime Ltd. were managed from this district by the co-defendant shipping agent, and controlled by a principal who resides in the United States and who is active generally in international shipping through Liberian and Panamanian vessels and corporations. It now appears that on May 14, 1982 the defendant Gulf Range

Ship Agency, Inc., which originally managed the RAGNAR from New York City for this individual, transferred the management of the vessel to Cosmos Shipping and Trading, a Greek entity, located in Piraeus, Greece. This date is significant, because it is the same date upon which the vessel was time chartered to plaintiff, a Cuban corporation. If Nikki or its vessel, or its principal shareholder were subject to the jurisdiction of the United States, as they probably all were on the day before the transfer of the management of this single vessel corporation to Piraeus, Nikki would have been obliged to obtain a license from the United States Department of the Treasury, Office of Foreign Assets Control, in order to do business with a Cuban entity. See generally, 31 C.F.R. § 515.201 and 515.204(a)(1) and (2). Such licenses are not freely granted, and there is no reason to believe one would have been issued here. Arguably, even after the transfer to Piraeus, Nikki Maritime Ltd. and the vessel M/V RAGNAR remained subject to the jurisdiction of the United States because owned or controlled by a person residing in the United States. See 31 C.F.R. § 515.329.

[1] Whether Nikki Maritime Ltd. effectively absented itself from American jurisdiction as a result of this transfer of its affairs to Piraeus need not presently concern us. A litigant cannot blow hot and cold in a lawsuit. Having taken the position that the vessel was being managed from Greece, for the apparent purpose of avoiding the legal consequences of being a corporation subject to the jurisdiction of the United States and accordingly unable to enter into a Cuban time charter, this Court does not believe that Nikki may be heard to oppose with success plaintiff's application for a maritime attachment under Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims, which application relies on the premise that Nikki is not "found within the district." Nikki itself says it is not, by its actions in entering into the charterparty with plaintiff believed, when it filed its initial complaint and first sought a state law attachment,

... which originally man-
aged, transferred the manage-
ment of the vessel to Cosmon Shipping and
* entity, located in Piraeus,
Greece. It is significant, because it
is a Cuban corporation which the
plaintiff, a Cuban corporation,
owns, or its principal officer,
subject to the jurisdiction of
the United States, as they probably
will be the transfer of the
vessel to the United States.

GOODWIN v. ELKINS & CO.
Cite as 556 F.Supp. 1375 (1983)

... that Nikki was actually present in New York, the Court believes that it may treat Nikki as being not present or found within the district at all times after May 18th, when it transferred its presence to Piraeus, Greece for the obvious purpose of facilitating a profitable transaction which could not be performed lawfully from New York.

... cases arbitrated under the Federal statute cannot properly be distinguished from arbitration-related attachment permitted under State statutory and decisional law, for the UN Convention makes no distinction, it neither permits or proscribes both. In my view, absent more specific language of proscription in the UN Convention, it permits both."

[2,3] Accordingly, the issuance of a traditional maritime attachment pursuant to Rule B(1) of the Supplemental Rules appears appropriate. The right to the attachment is not defeated by the filing of a general appearance. But for the security of an attachment, because there is no real presence here, the appearance will be of no assistance to plaintiff in enforcing its rights, and is not equivalent to being found within the district. Presence in the district at times prior to May 18, 1982 will not defeat the right to an attachment to be determined here as of November 22, 1982 when the original complaint was filed, to which date the amended complaint relates back. See generally, 7A Moore's Federal Practice ¶ B.06 n. 28 (2d ed.) and B.08 at p. B-351 n. 2.

See also *Andrew Cia. Maritima S.A. v. Andre & Cie*, 430 F.Supp. 88, 93 (S.D.N.Y. 1977). We should not favor constructions which impair our jurisdiction by implication.

Plaintiff's motion is granted.

In light of the Suggestion of Interest of the United States docketed March 7, 1983, the Court assumes that the motion to dismiss in favor of a foreign forum on grounds of *forum non conveniens* is now moot. If counsel for defendant Nikki do not agree, the motion may be renoticed for a hearing in light of the circumstances presently existing.

Settle an order and a writ of attachment on five (5) days notice.

[4] Defendant Nikki also contends that issuance of a Rule B(1) attachment would be inconsistent with the United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention") reproduced following 9 U.S.C. § 201. This is an issue upon which reasonable minds could differ. A number of cases can be found on either side. The issue troubled the sharply divided New York Court of Appeals in *Cooper*, *supra*. Implicit in the majority opinion in that case is an exception for maritime cases (p. 731 of 456 N.Y.S.2d p. 1242 of 442 N.E.2d) and the view of the dissenters seems most persuasive. Judge Meyer wrote (p. 732 p. 1243 of 442 N.E.2d):



J. Donald GOODWIN

ELKINS & CO., et al.

No. 82-4069.

United States District Court,
E.D. Pennsylvania.

March 25, 1983.

"(2) [I]n light of ... the fact that the UN Convention does not specifically address the subject of preaward attachment, the UN Convention cannot properly be said to have proscribed such an attachment by implication; and (3) the use of attachment in maritime contract

Former general partner in brokerage firm brought action alleging that he was induced by fraudulent misrepresentations and failures to disclose material facts to surrender his interest in brokerage firm for less money than he should have received,