

ORIGINAL

( FEDERAL MARITIME COMMISSION )  
( SERVED SEPTEMBER 29, 2000 )  
( EXCEPTIONS DUE 10-23-00 )  
( REPLIES TO EXCEPTIONS DUE 11-14-00 )

FEDERAL MARITIME COMMISSION

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DOCKET NO. 00-08

SAFMARINE CONTAINER LINES N.V. AND SAFMARINE  
AND CMBT LINES N.V. (SCL) TRADING AS CMBT

v.

GARDEN STATE SPICES, INC.

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Complainants, who are ocean carriers, carried five shipments of spices for respondent shipper and delivered the shipments, surrendering their cargo lien on the representation that respondent would pay freight with valid checks. Respondent, however, tendered checks that "bounced" on account of insufficient funds. Later respondent agreed to pay the freight due as a settlement of the complaint proceeding. However, respondent again tendered invalid checks unsupported by funds. Respondent never answered the original complaint nor an order to show cause after respondent breached the settlement agreement. It is held:

- (1) Respondent has violated section 10(a)(1) of the Shipping Act of 1984 by obtaining ocean transportation without paying for it, by an unjust device or means.
- (2) Complainants are injured in the amount of \$10,625, and reparations are awarded in that amount plus interest.

*Kevin J. Keelan* for complainants.

No appearance for respondent.

**INITIAL DECISION' OF NORMAN D. KLINE,  
ADMINISTRATIVE LAW JUDGE**

This case, which had apparently terminated with the execution of a settlement agreement, is again before the Commission because of the apparent failure of respondent to comply with the agreement. Because the complaint was dismissed without prejudice to its refiling should respondent fail to comply with the terms of the agreement and because respondent has failed to comply with that agreement and has failed to reply to an order to show cause why judgment should not be entered against it, the case is ripe for judgment.

In the complaint which began this proceeding, Safmarine, two ocean common carriers, trading as Safmarine, alleged that they had carried five shipments of various spices from India to New York but respondent Garden State Spices, Inc. (Garden State) tendered checks for payment of the freight, which checks were returned unpaid by the bank because of insufficient funds. Despite repeated demands for payment, Garden State allegedly did not pay the freight due, demonstrating bad faith and deceit and causing Safmarine to lose its cargo lien on the shipments and to suffer damages because of unpaid freight amounting to \$10,625. Safmarine consequently alleged that Garden State had violated section 1 O(a)(1) of the Shipping Act of 1984 and asked for an award of

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<sup>1</sup>This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. 502.227)

this sum plus interest and attorney's fees.\* Garden State did not file an answer to the complaint but instead entered into discussions that led to a settlement agreement under which Garden State was supposed to pay the freight due and satisfy Safmarine's complaint by paying Safmarine three installments of \$4,208.33 each, on or before August 1, September 1, and October 1, 2000, by certified or cashier's check. In case of default by Garden State after notice of the default had been given to Garden State, such judgment was to include unpaid freight plus interest from June 15, 2000, and any attorney's fees, costs and disbursements incurred by complainants.

Citing the strong policy of the law and the Commission favoring settlements and several leading Commission cases on the subject, I approved the settlement agreement and dismissed the complaint without prejudice to its reactivation by complainants in the event of default by Garden State. See Settlement Approved; Complaint Dismissed Without Prejudice, 28 S.R.R. 1498 (ALJ), finalized, July 27, 2000 (F.M.C.). In dismissing the complaint, however, I took pains to explain that the dismissal was contingent on Garden State's full compliance with the terms of the settlement agreement and that if Garden State defaulted, I would, following two previous cases of defaults by parties to settlement agreements, reactivate the complaint on request of complainant and would furthermore issue a show cause order against Garden State that could lead to a possible default judgment if Garden State did not reply to the order. By motion received September 6, 2000, counsel for Safmarine advised that Garden State had defaulted on its settlement agreement obligations and

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\*Section 1 O(a)( 1) of the 1984 Act provides:

(a) No person may-( 1) knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable

that counsel for complainants had advised Garden State that it was in default of the Settlement Agreement and should cure the default within five days. Garden State had defaulted, according to counsel, by giving three checks to Safmarine's counsel, none of which was a certified or cashier's check, contrary to the Settlement Agreement. Furthermore, the first of the three checks "bounced" because of insufficient funds in Garden State's account. Consequently, on September 7, 2000, I issued an Order to Show Cause Why Judgment Should Not Be Entered Against Respondent Garden State Spices, Inc. Garden State was instructed to file its answer to the complaint and explain why judgment should not be entered against it and was instructed to telefax its reply to the order by September 27, 2000 as well as file by U.S. mail. However, Garden State has not replied.<sup>3</sup> Accordingly, I am now issuing the instant decision in the nature of a default judgment.

### **Applicable Principles of Law**

As I indicated in the Order to Show Cause, cited above, it has been held in numerous cases by the Commission and the courts that the failure of a respondent or defendant to answer the well-pleaded allegations in a complaint can result in issuance of a default judgment against the non-answering respondent or defendant for any sum certain sought by the complainant as damages. For some of the cases, see *CTM International, Inc. v. Medtech Enterprises, Inc., et al.*, 28 S.R.R. 1091, 1093 (1999); *Bermuda Container Line Ltd. v. SHG Int'l Sales, Inc., et al.*, 28 S.R.R. 312,314 (1998), and cases cited therein; *Go/Dan Industries, Inc. v. Eastern Mediterranean Shipping Corp.*, 28 S.R.R. 788,789 (1999); 1 OA Wright, Miller and Kane, *Federal Practice and Procedure* (1998),

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<sup>3</sup>I am advised orally by counsel for Safmarme that Garden State did not serve him with a reply either.

sec. 2688 at 448. See also *D.B. v. Bloom*, 896 F. Supp. 166 (D. N.J. 1995) (issuance of default judgment, while a drastic sanction, is within court's discretion if court is satisfied that judgment is supported by the pleadings and other information of record).

In the instant case, respondent Garden State has not only never answered the complaint nor answered the Order to Show Cause, cited above, but has compounded its original failure to pay Safmarine by presenting Safmarine with invalid checks and dishonoring its Settlement Agreement. The Commission has held that to find a violation of section 1 O(a)( 1) of the 1984 Act requires a finding that the respondent knowingly and willfully obtained or attempted to obtain transportation for less than the lawful rates by an unjust or unfair device or means and that such a finding requires more than a mere showing that the respondent failed to pay its bills. In other words, the Commission has held that the Commission is not a mere collection agent but rather it administers and enforces the Shipping Act of 1984. Consequently, there must be a showing of bad faith or deceit such that the complainant carrier has lost its cargo lien by turning over the shipment to a dishonest or deceitful shipper who did not intend in good faith to pay. See *Unpaid Freight Charges*, 26 S.R.R. 735 (1993), which promulgated 46 C.F.R. 571.2 (now 46 C.F.R. 545.2); *Waterman Steamshzp Corporation v. General Foundries, Inc.*, 26 S.R.R. 1173 (ALJ), adopted in relevant part, 26 S.R.R. 1424 (1994). In *Waterman*, the Commission found respondent shipper to have practiced the requisite deceit and bad faith by inducing the complainant carrier to turn over the cargo at destination, thus losing its cargo lien, and presenting checks to the carrier which were promptly dishonored. In other cases involving violations of section 1 O(a)( 1) of the 1984 Act, the respondents not only failed to pay the freight when due after taking possession of the cargoes but thereafter dishonored their settlement agreements. See *CTM International, Inc. v. Medtech Enterprises, Inc., et al.*, 28 S.R.R. 1091 (1999);

*Global Transporte Oceanico S.A. v. Coler Ocean Independent Lines Co.*, 28 S.R.R. 1160, 1161 (1999), and cases cited therein. Cf. *Hugh Symington v. Euro Car Transport, Inc.*, 26 S.R.R. 871 (1993) (respondent carrier violated settlement agreement).

In the instant case, like the complainant carriers in *Waterman*, *CTM International*, and *Bermuda Container Line Ltd.*, as well as other cases of this type, the complainant carriers Safmarine turned over the cargo and thus lost their lien. Moreover, as in *Waterman* and *Global Transporte Oceanico*, respondent shipper, Garden State, presented invalid checks that “bounced” and, as in *CTM International*, *Global Transporte Oceanico* and *Hugh Symington*, the respondent dishonored its agreement to settle. Moreover, Garden State has failed to respond either to Safmarine, which advised it of its violation of the Settlement Agreement, or to the Order to Show Cause in this proceeding or to the original complaint. I find, therefore, that Safmarine has been damaged by the deceitful practices of respondent Garden State and that, as alleged in the complaint and never denied, Safmarine released the shipments to Garden State “in consideration of Respondent tendering checks represented by Respondent as full payment of the collect freight and charges.” (See verified Complaint at paras. G and VI, p. 4.) Accordingly, it is found and concluded that respondent Garden State Spices, Inc. has violated section 10(a)(1) of the Shipping Act of 1984 by obtaining transportation at less than the applicable rates and charges by an unjust or unfair means. It now remains to determine the amount of reparations to be awarded.

Section 1 l(g)oftheShippingAct of 1984 (46 U.S.C. app. sec. 1710(g)) provides in pertinent part:

... [T]he Commission shall . . . direct payment of reparations to the complainant for actual injury (which, for purposes of this subsection, also includes the loss of interest at commercial rates compounded from the date of injury) caused by a violation of this Act plus reasonable attorney's fees.

According to the unrefuted allegations in the complaint, Safmarine carried five shipments on which freight was due and remains unpaid in the amount of \$2 125 per each shipment. The dates of injury for three shipments were February 7, 2000 and for the two others, were February 21, 2000. (See verified Complaint, para. V.) Accordingly, the total award of reparations is \$10,625 (five times \$2125).<sup>4</sup> Interest is awarded on three shipments on which total freight due is \$6375 (three times \$2125) beginning from February 7, 2000. On the remaining two shipments on which total freight due is \$4250 (three times \$2 125), interest is awarded beginning from February 21, 2000. (See verified Complaint, para. V, showing the "dates of injury" and 46 C.F.R. 502.253.) The specific amount of interest will be calculated by the Commission when the Commission makes this

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<sup>4</sup>The awards in this case are limited to those that the Commission, as an administrative agency and not a court, is authorized by the Shipping Act of 1984 to make. Thus, this decision does not attempt to enforce the Settlement Agreement that Garden State violated, which Agreement included an agreed amount for attorney's fees in addition to the unpaid freight plus a "confess-judgment" provision. *Hugh Symington v Euro Car Transport, Inc*, cited above, 26 S.R.R. at 872 (Commission does not enforce settlement agreements but rather enforces the Shipping Act and awards reparations based on violations of that Act); this docket, Settlement Agreement Approved; Complaint Dismissed Without Prejudice, 28 S.R.R. 1498, 1499 n 2 (2000)

Initial Decision final. At the appropriate time counsel for Safmarine may petition for an award of reasonable attorney's fees pursuant to 46 C.F.R. 502.254.<sup>5</sup> It is so ordered.



Norman D. Kline  
Administrative Law Judge

Washington, D.C.  
September 29, 2000

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<sup>5</sup>The Commission's regulation (46 C.F.R. 502.254) provides that petitions for attorney's fees shall normally be filed with the presiding judge in cases where there are no exceptions filed by respondents but only after the Commission makes the judge's initial decision final, normally about 30 days after service of that decision. A ruling on the petition is not normally issued by the judge until the 30-day review period has expired. See Docket No 99-14 - *Global Transporte Oceanico SA v. Coler Independent Lines Co*, 28 S.R.R. 1162 (1999) (petition for attorney's fees in default case filed within one week after service of Initial Decision; judge's ruling on the petition not issued until after the Commission had made the Initial Decision final). Incidentally, the Commission is authorized only to award reasonable attorney's fees, a term that does not include "costs." See *Global Transporte*, 28 S.R.R. at 1163 n. 5.