

ORIGINAL

(FEDERAL MARITIME COMMISSION)
(SERVED AUGUST 3, 2001)
(EXCEPTIONS DUE 8-27-01)
(REPLIES TO EXCEPTIONS DUE 9-18-01)

FEDERAL MARITIME COMMISSION

DOCKET NO. 01-02

TRANSWORLD SHIPPING (USA), INC.

v.

FMI FORWARDING (SAN FRANCISCO), INC.
a/k/a INTER-MARITIME FORWARDING CO. (SAN FRANCISCO), INC.
AND UNION-TRANSPORT CORPORATION

Complainant Transworld Shipping (USA), Inc. ("Transworld"), a non-vessel-operating common carrier, has charged the respondents with unfair and deceptive practices in violation of sections 10(a)(1) and (d)(1) of the Shipping Act of 1984 ("Act") and with Commission regulations requiring disclosure of the locations of branch offices and of changes in corporate structures and relationships. Transworld entered into a stipulation with respondent FMI Forwarding (San Francisco), Inc. ("FMI-SF"), an ocean freight forwarder, that Transworld would limit its claim for reparations to the proceeds of a bond tiled by FMI-SF with the Commission. In return, FMI-SF would not contest Transworld's allegations. The stipulation was approved by the Administrative Law Judge. The Administrative Law Judge also approved a confidential stipulation of settlement between Transworld and respondent Union-Transport Corporation. The other respondent, Inter-Maritime Forwarding Company, Incorporated, a division of Union-Transport Corporation, was found not to be a legal entity and was eliminated from the proceeding. Transworld subsequently filed a motion for summary judgment against FMI-SF. Since FMI-SF is the only remaining respondent, the ruling on Transworld's motion is considered to be an Initial Decision. It is held.

- (1) By failing to answer the verified complaint FMI-SF is deemed to have admitted all of the well pleaded allegations contained therein. However, in agreeing not to contest Transworld's case, FMI-SF has neither admitted liability nor relieved Transworld of the burden of proving its entitlement to relief.
- (2) FMI-SF violated 46 C.F.R. § 5 15.18(a)(5) by failing to inform the Commission of the change of its corporate name.
- (3) FMI-SF violated 46 C.F.R. § 515.3 l(a) and (b) by conducting business under the name of its parent corporation and by failing to have its license number permanently imprinted on its billing forms.
- (4) FMI-SF violated sections 10(a)(1) and (d)(1) of the Act by falsely claiming that it had not received freight payments from shippers and by failing to forward those payments to Transworld.
- (5) Under section 11 (g) of the Act reparations may only be awarded upon findings of violations of the Act. Violations of Commission regulations may provide the basis for such findings.
- (6) The Commission follows guidelines established by the courts for the assessment of damages.
- (7) The fact that Transworld's allegations have not been contested does not relieve it of the necessity of presenting *aprima facie* case that its economic losses were proximately caused by the actions of FMI-SF.
- (8) Transworld has not shown that it suffered actual injury from the failure of FMI-SF to report the change of its name to the Commission or from its deceptive billing practices.
- (9) Transworld is entitled to reparations in the amount of freight monies which FMI-SF received from shippers and did not pay over to Transworld.
- (10) The Commission may not base its factual findings on speculation and conjecture. Actual injury must be shown with a reasonable degree of certainty.
- (11) Transworld is only entitled to reparations for freight payments to FMI-SF which have been documented by copies of checks from the shippers. It cannot reasonably be inferred that FMI-SF also received freight payments from shippers which have not been documented.
- (12) The Act does not contemplate the award of costs or expenses to a prevailing complainant.
- (13) Transworld is not entitled to reparations for the cost of document retrieval and copying by the Commission staff. That expenditure was not directly caused by the unlawful conduct of FMI-SF but was an expense of perfecting Transworld's claim.

INITIAL DECISION BY PAUL B. LANG, ADMINISTRATIVE LAW JUDGE¹

Procedural History

This proceeding arose out of a complaint in which Transworld Shipping (USA), Inc. (“Transworld”) charged the respondents with various unfair and deceptive practices in violation of sections 10(a)(1) and 10(d)(1), 46 U.S.C. app. §§ 1709 (a)(1) and (d)(1), of the Shipping Act of 1984 (“Act”). The complainant also alleged that the respondents violated various regulations promulgated by the Commission requiring disclosure of the locations of branch offices and of changes in their corporate structures and relationships. By order dated April 2, 2001, the Administrative Law Judge approved a stipulation between Transworld and respondent FMI Forwarding (San Francisco), Inc. (“FMI-SF”) whereby the respondent agreed that it would no longer participate in this proceeding and would not contest Transworld’s allegations. Transworld in turn agreed to limit its claim for reparations to the proceeds of bond number 9920744 which FMI-SF had filed with the Commission. By order dated June 11, 2001, the Administrative Law Judge approved a confidential stipulation of settlement between Transworld and respondent Union-Transport Corporation (“UTC”) and dismissed the proceeding against UTC with prejudice.

Rather than conducting further discovery, Transworld has filed a motion for summary judgment against FMI-SF. Since FMI-SF is the last remaining respondent,² the ruling on Transworld’s motion will conclude this phase of the proceeding and is, therefore, an initial decision.

¹This will become the decision of the Commission in the absence of review (Rule 227, Rules of Practice and Procedure, 46 C.F.R. § 502.227).

²The complaint had also named Inter-Maritime Forwarding Company, Incorporated, a division of Union-Transport Corporation as a respondent. Subsequent pleadings revealed that this respondent was not a legal entity and that, as a division of UTC, its designation as a separate respondent was of no legal effect. By order dated April 12, 2001, the aforementioned respondent was removed from the caption to more accurately reflect the relationship of the parties. The subsequent dismissal of UTC covers its divisions as well.

Allegations of the Complainant

Transworld's motion is supported by the verified statement of Bjoem Pelzer, its Regional Manager, and by the complaint, also verified by Mr. Pelzer; each of the documents is accompanied by exhibits. Transworld alleges that, as a non-vessel-operating common carrier ("NVOCC"), it arranged for the ocean transportation of goods at the behest of FMI-SF which acted as an ocean freight forwarder. Unbeknownst to Transworld, FMI-SF was one of several corporations operated and controlled by Howard Mann, Robert Mann and Eric Friedlander. Those individuals used the various corporate entities in a scheme to transfer assets and to avoid payment to creditors.

Transworld further alleges that, in response to inquiries as to the payment of outstanding invoices, representatives of FMI-SF falsely stated that it had not yet received freight monies from certain shippers for whose goods Transworld had arranged ocean carriage. According to Transworld all of the actions by FMI-SF were in violation of sections 10(a)(1) and 10(d)(1) of the Shipping Act of 1984 ("Act"), 46 U.S.C. app. §§ 1709(a)(1) and (d)(1)³. Transworld was allegedly induced into extending credit to FMI-SF because of its deceptive practices and statements.

Transworld seeks relief in the form of reparations in the amount of \$15,867.56 along with prejudgment interest and attorney's fees. The claim for reparations is the sum of \$14,830.76 in unpaid freight charges and \$1,036.80 that it paid to the Commission in order to obtain copies of pertinent documents. The freight charges are verified by invoices and bills of lading; the fee for

³Section 10(a)(1) prohibits any person from using false billing or any other unjust means to obtain ocean transportation at less than rates or charges that would otherwise be applicable. Section 10(d)(1) prohibits regulated entities, including ocean transportation intermediaries, from, ". . . fail[ing] to establish, observe and enforce Just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." In its capacity as a freight forwarder FMI-SF falls within the definition of "ocean transportation intermediary" as set forth in section 3(17)(A) of the Act, 46 U.S.C. app. § 1702(17)(A)

record review and copying is verified by copies of an invoice from the office of the Secretary of the Commission and a check from counsel for Transworld.

In response to a request from the Administrative Law Judge for additional evidence in support of its claim for reparations, Transworld submitted a supplemental memorandum to which is attached copies of certain invoices from FMI-SF to shippers for whom Transworld provided transportation services as well as copies of checks which the shippers sent to FMI-SF in payment of the invoices.⁴

Transworld states that it has been unable to obtain invoices and checks for all of the shipments for which it seeks reparations. It argues that, because of the tacit admission of its allegations by FMI-SF, an inference should be drawn that FMI-SF received payment for all of the shipments in question and that it is entitled to an award of reparations in the full amount of its claim.

Pursuant to the stipulation, FMI-SF has not responded to the motion.

Findings of Fact

1. At all times pertinent to this proceeding Transworld was licensed by the Commission as a NVOCC.

2. On June 22, 1999, Inter-Maritime Forwarding Co. (San Francisco), Inc. ("IMF") was issued license number 154 19F as an ocean freight forwarder.

⁴The invoices are on the billing forms of Inter-Maritime Forwarding Company, Inc at a New York City address. A notice is at the bottom of each form directing questions to FMI-SF at telephone and facsimile numbers with an area code of 4 15 which is for California. The invoices do not show FMC license numbers. Each of the shippers' checks was drawn to the order of Inter-Maritime Forwarding Company, Inc ; some of the checks also include the New York City address which is on the billing form.

3. On January 10, 2000, IMF changed its corporate name to FMI-SF by filing the required documents with the Secretary of State of the State of California.’

4. By letter dated March 17, 2000, from Robert B. Mann, Chairman and CEO of Inter-Maritime Forwarding Co., Inc., the parent corporation of Inter-Maritime Forwarding Co. (San Francisco), Inc , license number 15419F was surrendered to the Commission. Mr. Mann stated in his letter that Inter-Maritime Forwarding Co. (San Francisco), Inc. had ceased all operations.

5. At various times from on or about August 17, 1999, to on or about December 8, 1999, Transworld, at the behest of FMI-SF (under its original name)“, provided ocean transportation services to certain shippers who had been identified by FMI-SF as its customers,

6. By December 8, 1999, there were unpaid invoices from Transworld to FMI-SF in the total amount of \$14,830.76.⁷ No portion of that amount was paid to Transworld as of the time of the commencement of this proceeding.

7. At all times pertinent to this proceeding FMI-SF, Inter-Maritime Forwarding Co, Inc. and various other corporations were under common ownership and control and shared business premises and employees. However, FMI-SF did not inform the Commission that it was operating at locations other than its San Francisco address.

⁵On July 17,2001, an inquiry by the Administrative Law Judge to the Commission’s Office of Transportation Intermediaries revealed that the change of name had not been reported to the Commission

⁶For the sake of clarity “FMI-SF” will be used in describing its transactions with Transworld regardless of how the corporation identified itself.

⁷The invoices were directed to “INTER-MARITIME FWDG COINC” at the address of FMI-SF in San Francisco In issuing bills of lading, Transworld entered the same name and address under “Forwarding Agent - References”.

8. On or about August of 1999 through on or about February of 2000 FMI-SF, in response to inquiries from Transworld concerning the payment of outstanding invoices, informed Transworld that it had not yet received payment from the shippers.

9. Contrary to the representations of FMI-SF to Transworld, the following freight payments were received by FMI-SF and not remitted to Transworld':

<u>Shipper</u>	<u>Invoice No.</u>	<u>Amount</u>	<u>Date of Receipt</u>
Duraflame	99090050	\$2,602.00	Nov. 9, 1999
Super Ice	99100053	904.00	Oct. 28, 1999
Duraflame	99100080	1,975.00	Nov. 9, 1999
Santa Clara Nut Co.	99110058	700.00	Dec. 9, 1999
Rogers Foods	99110064	1,400.00	Dec. 13, 1999
Rogers Foods	99110098	166.50	Dec. 20, 1999
Duraflame	99110116	700.00	Dec. 21, 1999
Tuold International	99110119	1,017.13	Dec. 13, 1999
Pusateri Nut Co.	99120014	600.00	Dec. 30, 1999
Rogers Foods	99120037	208.13	Jan. 10, 2000

10. FMI-SF allowed Inter-Maritime Forwarding Company, Inc. to send invoices to the shipper customers of FMI-SF for freight charges which should have been paid to FMI-SF rather than to Inter-Maritime Forwarding Company, Inc. The number of the license issued by the Commission to FMI-SF was not permanently imprinted on the billing forms.

*Although there is no evidence as to when FMI-SF actually received each payment, it is reasonable to estimate that receipt occurred on two working days after the date of the check from the shipper

Discussion and Analysis

I. Violations of the Act and Commission Regulations

Transworld correctly asserts that, in failing to answer the verified complaint, FMI-SF is deemed to have admitted all of the well-pleaded allegations contained therein, *Tampa Bay Int'l Terminals, Inc. v. Coler Ocean Independent Lines, Inc.*, 28 S.R.R. 1390, 1391 (I.D., FMC notice of finality May 2, 2000). Similarly, FMI-SF has failed to contest the factual assertions in the Pelzer statement. It is significant to note, however, that, in agreeing not to contest Transworld's case, FMI-SF has neither admitted liability nor relieved Transworld of the burden of proving its entitlement to relief."

The undisputed evidence set forth in the verified complaint, the Pelzer affidavit and the supplemental memorandum provides ample proof that FMI-SF violated 46 C.F.R. § 5 15.18(a)(5) by failing to inform the Commission of the change of its corporate name. FMI-SF also violated 46 C.F.R. § 515.3 1(a) and (b) by carrying on its business under the name of Inter-Maritime Forwarding Company, Inc. and by failing to have its license number permanently imprinted on its billing forms, Furthermore, by failing to remit the freight payments which it received from its shipper clients, FMI-SF failed to maintain the high degree of business responsibility and integrity required of ocean freight forwarders, *Pan Inter*, 16 S.R.R. 786,793 (I.D., adopted by FMC March 4, 1976).

The unlawful retention of the freight payments from shippers and the false statements as to nonpayment are violations of both sections 10(a)(1) and 10(d)(1) of the Act. Clearly, FMI-SF attempted to obtain ocean transportation of property at less than applicable rates through an "unjust

"Transworld has acknowledged that it has not been relieved of the burden of proof (Transworld brief, page 6, footnote 5)

or unfair device or means” within the meaning of section 10(a)(1). Indeed, FMI-SF attempted to obtain the ocean transportation without *any* payment. The same pattern of conduct also constitutes a failure to establish and observe “Just and reasonable . . . practices” as contemplated in section 10(d)(1). Virtually identical conduct by an ocean freight forwarder was found to have violated those portions of the Act in *Nordana Lrne AS v. Jamar Shipping, Inc.*, 27 S.R.R. 233 (I.D., FMC notice of finality April 19, 1995).

II. Claim for Reparations

Transworld’s right to reparations does not flow automatically from its proof that FMI-SF violated the Act or Commission regulations.” Transworld must also satisfy the requirements of section 11(g), 46 U.S.C. app. §1710(g), which directs the Commission to award, “. . . payment of reparations to the complainant for *actual injury . . . caused by a violation of this Act . . .* (emphasis supplied).”

In awarding reparations for violations of the Act the Commission follows guidelines established by the courts for the assessment of damages, *California Shipprng Line, Inc. v. Yangming Transport Corp.*, 25 S.R.R. 1213, 1230 (1990). The occurrence of statutory violations by the respondent as well as the causation of the alleged damages must be shown by a preponderance of the evidence, *Tractors and Farm Equipment Ltd. v Cosmos Shipping Co., Inc.*, 26 S.R.R. 788,798 (I.D., FMC notice of finality December 31, 1992). This principle was reaffirmed by the Commission in a decision as recent as *Rose International, Inc. v. Overseas Moving Network Int’l, Ltd.*, Docket No 96-05 (June 1, 2001), page 212, *et seq* Stated simply, Transworld’s burden of proof is twofold:

¹⁰Reparations may only be awarded upon the finding of a violation of the Act. However, a violation of Commission regulations may provide the basis for such a finding.

it must show that FMI-SF violated the Act and that it sustained a monetary loss that was proximately caused by the violation.

Transworld's generalized assertions that it extended credit to FMI-SF in reliance on false statements and promises of payment (Pelzer affidavit, ¶¶ 11, 18) and that it delayed sending invoices to shippers for freight charges because of such misrepresentations (Complaint, ¶ 35) are insufficient to establish the necessary chain of causation between the statutory violations by FMI-SF and Transworld's entitlement to reparations inasmuch as there is no evidence showing when the false statements were made or the monetary consequences of each occurrence. Even if it were to be determined that Transworld addressed its invoices to the parent corporation rather than directly to FMI-SF (see footnote 6) because of deception for which FMI-SF is responsible, there is no evidence to show that the payment of freight charges was impeded because of improper billing.

Transworld's position is not improved by the fact that its allegations are uncontested and that its evidence is un rebutted. As the Commission observed in *Unapproved Section 1.5 Agreement - Coal to Japan/Korea*, 1 S.R.R. 783, 784g (1962):

Testimony does not become sacrosanct when uncontradicted These are but factors to be considered in determining the validity and probative value of the testimony and the inferences that may properly be drawn therefrom in light of all the evidence.

In summary, Transworld has not presented *prima facie* case in support of the proposition that its monetary loss was proximately caused either by the failure of FMI-SF to disclose the true nature of its business organization or by its improper billing practices.

The failure of FMI-SF to pay over to Transworld the freight monies actually collected from the shippers is another matter. That action by FMI-SF was an egregious breach of its obligations as an ocean freight forwarder as well as an unjust and unreasonable practice within the

contemplation of sections 10(a)(1) and (d)(1). Such misconduct was the direct cause of Transworld's monetary loss since the loss would not have occurred if the payments had been properly applied. Transworld is entitled to reparations in an amount equal to the freight payments unlawfully retained by FMI-SF. FMI-SF is also responsible for payments made to its parent corporation or to an affiliated corporation since it may be reasonably inferred that FMI-SF either caused the payments to be made to another corporation or was in a position to have ensured that the payments were not misdirected. FMI-SF will not be allowed to benefit from the fact that it engaged in deceptive billing practices which induced shippers to send freight payments to its parent corporation in New York.

In its supplemental memorandum Transworld argues that it is entitled to reparations in the full amount of the unpaid freight regardless of the lack of documentary evidence that FMI-SF actually received certain of those payments from the shippers. It bases its argument on the propositions that FMI-SF has not contested its factual assertions and that, in view of the evidence actually presented, it may reasonably be inferred that FMI-SF received freight payments for which Transworld was unable to produce documentation. That argument is without sufficient legal foundation.

Although the Commission, like other administrative agencies, is not bound by strict rules of evidence, it may not base its factual findings on speculation and conjecture. The Commission has recognized that actual injury must be shown with a reasonable degree of certainty, *California Shipping Line, supra*, 25 S.R.R. at 1230. The only evidence that is in any way relevant to the undocumented freight payments is the statement by Mr. Pelzer that, in February of 2000, he began contacting shippers regarding the nonpayment of invoices at which time he learned that the freight charges had, "in some cases", been paid to FMI-SF several months before (Pelzer affidavit ¶ 12).

That statement is an insufficient basis for a determination that *all* of the freight monies had been received by FMI-SF.

Transworld alleges that it was forced to incur the expense of a document search and copying by the Commission staff because of the “deceitful tactics of the officers of Respondent” (Transworld brief, page 30). Notwithstanding that allegation, the documents supplied by the Commission, however helpful or necessary to Transworld, were used to obtain evidence in support of its claim. Consequently, the payment to the Commission was an out of pocket disbursement by Transworld’s attorney for which it is not entitled to a monetary award. Section 11(g) of the Act authorizes the award of reparations for, “. . . actual injury [with interest from the date of the injury] caused by a violation of this Act plus reasonable attorney’s fees.” The Act does not contemplate the award of costs such as the fee for the filing of the complaint or of expenses such as the fee charged by the Commission for a document search and copying, *Tropical Shipping & Construction Co., Ltd. v. Network 807*, 25 S.R.R. 1590 (ALJ, FMC Notice of Finality August 7, 1991). Therefore, Transworld is not entitled to reimbursement for the cost of document review and copying by the Commission.¹¹

Summary and Conclusions

For the reasons stated above, it is hereby determined that:

1. FMI-SF violated 46 C.F.R. § 5 15.18(a)(5) by failing to advise the Commission of the change of its name.

¹¹The circumstances surrounding the payment of the fee to the Commission subsequent to the wrongful acts by FMI-SF are readily distinguishable from the situation in *Bloomers of California, Inc v Ariel Maritime Group, Inc*, 26 S R R. 183 (1992), in which attorney’s fees incurred by a complainant in defense of a court action by a respondent to collect unlawful charges were awarded as reparations in view of the fact that the maintenance of the law suit was itself a violation of the Act.

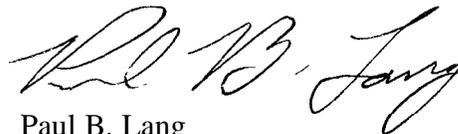
2 FMI-SF violated 46 C.F.R. § 5 15.3 l(a) and (b) by billing its shipper customers on forms which were not issued under the name in which its license was issued and on which its license number was not permanently imprinted.

3. FMI-SF violated sections 10(a)(1) and 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. app. §§ 1709(a)(1) and (d)(1), by failing to remit to Transworld funds which were intended by shippers to satisfy freight charges for ocean transportation services provided by the complainant at the behest of the respondent.

4 FMI-SF liable to Transworld for reparations of a total amount of \$10,272.76 plus interest¹² to be calculated by the Commission. The reparations are the total of the freight payments actually received by FMI-SF and not remitted to Transworld. Interest on each payment of freight s to be calculated from the date it was received by FMI-SF (see Finding of Fact No. 9).

5. Transworld is not entitled to reparations arising out of charges by the Commission for the retrieval and copying of documents.

6. Transworld may be awarded attorney's fees upon petition to be filed within thirty days of a final reparation award pursuant to Rule 254, Rules of Practice and Procedure, 46 C.F.R. § 502.254.



Paul B. Lang
Administrative Law Judge

Washington, D.C.
August 3, 2001

¹²The award of reparations and interest is to be reduced by the amount already received by Transworld pursuant to its confidential settlement with UTC