

ORIGINAL

( FEDERAL MARITIME COMMISSION )  
( SERVED APRIL 5, 2002 )  
( EXCEPTIONS DUE 4-29-02 )  
( REPLIES TO EXCEPTIONS DUE 5-21-02 )

FEDERAL MARITIME COMMISSION

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DOCKET NO. 01-04

SELBUY INTERNATIONAL, INC.  
d/b/a CANYON ENTERPRISES

v.

GARDIAN SERVICES GROUP, LTD.

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Selbuy International, Inc., d/b/a Canyon enterprises ("Canyon"), filed a complaint in which it charged the respondent, Guardian Services Group, Ltd. ("Guardian"), with a violation of section 1 O(d)( 1) of the Shipping Act of 1984 ("Act") based on various alleged unfair and unreasonable practices by Guardian as a freight forwarder in the shipment of goods from Saudi Arabia to the United States. This is considered to be an Initial Decision. It is held:

1. The Federal Maritime Commission ("Commission") does not have subject matter jurisdiction over the complaint, as section 3(17) limits the application of the Act to freight forwarders engaged in the exportation of goods from the United States.
2. Even if the Commission had jurisdiction over the complaint, Guardian did not serve as a freight forwarder, much less as a non-vessel ocean common carrier ("NVOCC") in connection with the services it provided to Canyon.
3. The complaint by Canyon is dismissed.

*Stephen M. Dichter and Merritt L. Bingham* for complainant.  
*Bruce M. Luchansky* for respondent.

**INITIAL DECISION<sup>1</sup> OF MICHAEL A. ROSAS,  
ADMINISTRATIVE LAW JUDGE**

Canyon, a California corporation engaged in the business of selling spare automobile parts, seeks reparations for damages that it suffered due to Guardian's alleged failure to timely transport spare automobile spare parts ("goods") from Saudi Arabia to Los Angeles. Consequently, Canyon alleges that it lost the opportunity to resell the goods at a substantial profit and incurred additional shipping costs.

Canyon alleges that Guardian's failure to timely transport the goods amounted to unfair and unreasonable practices under Section 10 of the Act, 46 App. U.S.C. § 1709(d)(1). Canyon also commenced a civil action against Guardian in United States District Court, Central District of California, Case No. 01-03059 (LGB) at around the same time that this proceeding was filed. However, with the approval of the District Court, Canyon and Guardian agreed to stay that action until this proceeding was resolved because the subject matter in both forums were related and arose from the same transactions.

The controversy stems from several communications between the parties regarding the rates for the shipment of the goods. Canyon alleges that it entered into a contract with Guardian on February 21, 2000, the date when Guardian initially quoted the cost of shipping the goods. It is further alleged that Canyon requested and received confirmation from Guardian of the shipping rates on June 12, 2000.

Guardian contends that it provided assistance to Canyon in shipping the goods to the United States, but denies that it functioned as an ocean freight forwarder. It also denies that it entered into

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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).

a contract with Canyon on February 21 or June 12, 2000, or that any of the payments made by Canyon to Guardian were excessive.

Comolainant's Direct Case

The direct case submitted by Canyon consists of a brief and exhibits A through J. The brief includes the affidavit of Canyon's President, William E. Herem, ("Herem Affidavit"), and the depositions of John Appel, a former Canyon employee, and Benjamin F. Cassell, Senior Vice-President of Guardian.

Canyon contends that it employed Guardian as its agent to arrange for three shipments of goods by vessels from Dammam and Jeddah, Saudi Arabia because Guardian quoted the lowest price per container. The first rate was \$1,375.00 for the delivery of 20-foot containers and \$1,650.00 for the delivery of 40-foot containers from Jeddah, Saudi Arabia to Los Angeles; The second rate was \$1,450.00 for the delivery of 20-foot containers and \$1,725 .00 for the delivery of 40-foot containers originating in Dammam. The goods were purchased from the Universal Motors Company in Dammam, Saudi Arabia in July, 2000. The first shipment was transported on or about September 12, 2000.

After delivery of the first shipment, Canyon authorized shipment of the remaining goods at the rates initially quoted by Guardian. The remaining goods were sent in two shipments through East & West Express, a company based in Jeddah, Saudi Arabia, in early January 2001. One shipment consisted of nine 40-foot containers delivered from Dammam to Los Angeles, while the other shipment consisted of two 40-foot containers delivered from Jeddah to Houston. However, Canyon did not receive the goods by the due date of January 27, 2001 because Guardian allegedly failed to transmit the payments to its agent in Saudi Arabia.

Canyon had trouble communicating with Guardian for several weeks and, when it finally heard from Guardian, was told that the shipping charges had increased significantly. Canyon disputed the charges and Guardian refused to authorize its agents to release the original bills of lading to the ocean carriers. The ocean carriers refused to release the goods to Canyon until they received the original bills of lading, stored the goods and imposed demurrage charges totaling \$23,959.57. Canyon subsequently capitulated and paid Guardian \$32,900.00 pursuant to a non-waiver agreement. As a result, the ocean carriers released the goods to Canyon. Canyon disputed the “extra contractual charges” and subsequently utilized another freight forwarder, Express Forwarding, for the shipment of the remaining six containers.

Canyon alleged that Guardian’s practices were unreasonable and unjust in violation of the Act. In its complaint, Guardian sought reparations in the amount of \$137,859.57, plus interest and attorney’s fees. The claimed reparations consisted of \$32,900.00 in excessive shipping charges, \$23,959.57 in demurrage charges, \$6,000.00 for idle worker costs and \$75,000.00 in lost profits. However, Canyon now claims, in its brief, that the proof substantiates reparations in the amount of \$540,403.00.

#### Respondent’s Direct Case

Guardian’s brief is accompanied by the affidavit of John Appel, deposition transcript of William Herem and four exhibits consisting of correspondence between Canyon, Guardian and other companies involved in the shipments. Guardian’s position is that it was retained by Canyon to assist in the shipment of the goods from Saudi Arabia to the United States. Guardian insists that it did not violate the Act because it did not function as a freight forwarder and, in any event, acted reasonably under the circumstances. Moreover, Guardian contends that the Commission does not have

jurisdiction over freight forwarders engaged in the process of importing goods to the United States from a foreign country.

Guardian quoted prices to Canyon for the shipment of the goods from Saudi Arabia to the United States, but based that information on shipping rates that it obtained from a freight forwarder based in Saudi Arabia. Guardian asserts that the consignor of shipments was Universal and the consignee was East & West Express. Guardian further alleges that it, acting through agents, obtained possession of the goods and caused them to be transported in three shipments to Los Angeles and Houston, Guardian places much of the blame for the delay in shipments and increased costs on Enkay Express, a Saudi Arabian company with whom it had done much business in the past, which changed the terms of the deal after the goods were shipped.

#### Complainant's Reply Brief

Canyon's reply brief, which is accompanied by one additional exhibit, contends that Guardian should be estopped from objecting to Commission jurisdiction because it represented to United States District Court Judge Lourdes G. Baird that the Commission had concurrent jurisdiction over this controversy and judicial economy would be served by litigating this proceeding and staying the District Court action. A stipulation, which was ordered by Judge Baird, is annexed to Guardian's reply brief. Furthermore, Canyon insists that Guardian submitted itself to the Commission's jurisdiction when it obtained a freight forwarder license and, therefore, all of its acts in connection with ocean transportation, regardless of whether they involve imports or exports, fall within the Commission's jurisdiction. Lastly, Canyon contends, for the first time in this litigation, that Guardian functioned as a common carrier and, therefore, the Commission has jurisdiction over Guardian's activities, regardless of whether they involve imports or exports.

### Findings of Fact

1. Canyon is a California corporation with its principal place of business in Sylmar, California.

2. Canyon is engaged in the business of selling spare automobile parts.

3. Guardian is a Maryland corporation which provides an assortment of services in relation to the transportation of goods, including services as an ocean freight forwarder.

4. On January 27, 1998, the FMC issued license no. 4464, authorizing Guardian to act as an ocean freight forwarder in the foreign export commerce of the United States.

5. In February 2000, Guardian sent an electronic facsimile ("fax") to numerous companies, including Canyon. The fax included quotations of shipping rates for the export of goods from the west coast of the United States to locations in Middle Eastern countries and stated that the quoted rates were valid through December 2000.

6. On February 17, 2000, Eric Herem, a Canyon employee, responded to Guardian with a request for quotations of rates for the shipment of automobile parts in 20-foot and 40-foot containers from Los Angeles, California\* to Middle Eastern ports, and rates for the shipment of containers from Jeddah, Saudi Arabia to Los Angeles.

7. John Appel, a Guardian employee, responded to Eric Herem's request on February 17, 2000 and provided rates for the shipment of containers from Los Angeles to the Middle East. Eric Herem responded on the same day with a request for additional quotations for the shipment of containers from Jeddah to Los Angeles.

8. Appel contacted Al-Mousim Cargo Services ("Al-Mousim"), a company based in Riyadh, Saudi Arabia and requested quotations for the shipment of containers from Jeddah to Los Angeles.

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<sup>2</sup> The documentation referred at varying times to Los Angeles, Long Beach or both. For the sake of simplicity, I will refer to Los Angeles as the point of destination in California.

On February 20, 2000, Al-Mousim provided Appel with rates for the shipment of containers from Jeddah to Long Beach. Al-Mousim's services were to include direct handling of the goods, transportation within Jeddah city limits and from Al-Mousim's terminal to Jeddah port, customs clearance, port charges, ocean freight from Jeddah to Los Angeles, the bill of lading fee and courier services.

9. On February 21, 2000, Appel provided Eric Herem with quotations of rates for the shipment of containers from Jeddah to Los Angeles. Appel's quotations were based on rates provided by Al-Mousim and included an extra charge for Guardian's fee of \$100 for 20-foot containers and \$105 for 40-foot containers.

10. William Herem, President of Canyon, knew that Guardian was not going to possess or transport the goods, but rather, was going to arrange for the shipment of the goods from Saudi Arabia to the United States through companies based in Saudi Arabia.

11. On June 9, 2000, William Herem asked Appel whether the shipping rates quoted on February 21, 2000 were still valid and also requested that Appel provide him with additional quotations for the shipment of goods from Dammam, Saudi Arabia to Los Angeles.

12. Appel responded to William Herem on June 12, 2000, confirmed that the shipping rates quoted on February 21, 2000 were still valid and provided him with additional rates for the shipment of goods from Dammam to Los Angeles.

13. On June 14, 2000, Appel informed Canyon that Al-Mousim would be acting as the "Agent in Saudi Arabia" and provided Al-Mousim's address, telephone, fax number, e-mail address and a contact named Farooqui.

14. On July 13, 2000, Canyon entered into an agreement with Universal Motors Agencies to purchase obsolete automobile parts.

15. There were no communications between Appel and any employee of Canyon between June 14 and August 16, 2000.

16. During a trip to Saudi Arabia in June and July 2000, William Herem was informed by Al-Mousim that it would not handle the shipment of the goods at the rates that it previously quoted to Appel.

17. On August 4 and August 7, 2000, William Herem communicated with Express Forwarding Company in Jeddah ("Express Forwarding") and requested that Express Forwarding arrange for the shipment of the goods at the rates previously quoted by Al-Mousim. William Herem had been referred to Express Forwarding by Al-Mousim or another company in Saudi Arabia.

18. On August 10, 2000, based upon Canyon's instructions, Universal notified East & West Express, a company located in Jeddah, that it would be handling shipment of the goods.

19. On August 16, 2000, Eric Herem requested that Appel provide additional rates for the shipment of the goods to Phoenix, Arizona.

20. On August 20, 2000, William Herem was informed by Express Forwarding that it would not provide shipment of the goods at the rates previously quoted by Al-Mousim.

21. On August 22, 2000, William Herem informed Appel that Express Forwarding had a problem with the rates previously quoted by Guardian and requested confirmation that the goods would be shipped in accordance with the rates quoted by Appel on June 12, 2000. Appel had never been in contact with Express Forwarding prior to August 22, 2000.

22. On August 23, 2000, Appel informed William Herem that he had requested verification of the June 12, 2000 shipping rates from another company in Saudi Arabia, Enkay Express, but had not yet received verification and advised Herem to proceed with his plans for shipment of the goods.



30. William Herem had experience in freight forwarding and was aware that rates quoted by freight forwarders were based on quotations from common carriers, which could change from one day to the next.

31. Guardian paid transportation charges directly to East & West Express.

32. After Canyon changed the destination of the goods from Los Angeles to Phoenix, Arizona, Guardian arranged for the inland freight transportation of the goods to Phoenix,

### Discussion and Analysis

Canyon has never sought leave to amend the complaint to allege that Guardian acted as a common carrier or to reflect the new sum claimed. However, as there has been no objection by Guardian, the issues will be treated as if tried with the implied consent of the parties and the complaint shall be deemed amended, *sua sponte*, to conform the pleadings to the proof. Fed.R.Civ.P. 15 (b); 3 *Moore's Federal Practice*, § 15.18[3] (Matthew Bender 3d ed.); *Brandon v. Holt*, 469 U.S. 464 (1985).

#### I. Jurisdiction

Canyon initially asserted that Guardian acted in the capacity of a freight forwarder in connection with the importation of goods from Saudi Arabia. Guardian responded that the Act does not give the Commission jurisdiction over the importing practices of freight forwarders. In its reply brief, Canyon contends that the Act's definition of a freight forwarder can be construed to include the shipment of goods to the United States from other countries and expanded its allegations to assert that Guardian, as a freight forwarder, also acted in the capacity of a common carrier.

There is no doubt that the Commission has jurisdiction over common carriers involved in the importation of goods to and exportation of goods from the United States. Section 3 of the Act defines a common carrier, in pertinent part, as

“a person holding itself out to the general public to provide public transportation by water of passengers or cargo between the United States and a foreign country for compensation that-

(A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and

(B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . .”

Section 3 further defines an NVOCC as a

“common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.”

46 App. U.S.C. 1704 (17)(B).

The Act, while characterizing ocean freight forwarders and NVOCC’s as ocean transportation intermediaries, provides the Commission with jurisdiction over only certain activities of ocean freight forwarders. Section 3 defines an ocean freight forwarder as “a person that-

(i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and

(ii) processes the documentation or performs related activities incident to those shipments[.]”

46 App. U.S.C. 1704 (17) (A).

The plain, unambiguous language of the Act confers jurisdiction upon Commission to regulate ocean freight forwarders engaged in exporting goods from the United States. However, Canyon contends that

“the term ‘from the United States’ modifies the act of dispatching, not the ‘shipments.’” A person can be in the United States and perform the act of dispatching shipments from the United States when the shipments are not in the United States, as Guardian did in this case. If the language were intended as Guardian suggests, it would read ‘a person . . . in the United States who dispatches shipments in the United

States from the United States.’ Guardian dispatched Canyon’s shipments in Saudi Arabia from the United States through its agents.” (Reply Brief at 4)

I disagree with Canyon’s interpretation of the act of dispatching from the United States. Canyon contends that goods are dispatched from the United States if a person arranges, from the United States, to have goods shipped to the United States. That is clearly a stretch. The act of dispatching is defined as the act of sending off to a particular destination. *Webster’s II New Riverside University Dictionary* 387. When applied to a person in the United States, it is clear that the provision clearly applies to exports. As such, resort to legislative history is unnecessary. *Sea-Land Service, Inc. v. FMC*, 404 F.2d 824 [8 S.R.R. 20, 283] (D.C. Cir.1968); *North American Van Lines*, 14 F.M.C. 215,220 [12 S.R.R. 225] (1971); *Caminetz v. United States*, 242 U.S. 470, 485 (1916); *Hugo Zanelli & Co.*, 14 S.R.R. 835 (Initial Decision, 1974, adopted 14 S.R.R. 1266 [FMC 1975], *affdu b nom Zanelli v. FMC*, 524 F.2d. 1000 (5th Cir. 1975) .

Canyon sets forth constructive, practical arguments as to why the Commission should regulate the import practices of ocean freight forwarders. Ocean freight forwarders are licensed by the Commission with respect to the export of goods from the United States and no argument has been raised as to why a distinction should be made between exports and imports. However, it does not follow that all of Guardian’s activities are subject to regulation by the Commission solely because a portion of Guardian’s activity includes freight forwarding of exports. *Bethlehem Steel Corp. v. Indiana Port Commzssion*, 21 F.M.C. 629, 632 (1979). Absent legislation conferring jurisdiction over the import activities of freight forwarders, the Commission is barred from regulating them. *Austasia Intermodel Lines, Ltd. v. Federal Maritime Commission*, 580 F.2d 642, 647 (D.C. Cir. 1978); *American Union Transport v. River Plate & Brazil Conferences*, 5 F.M.C. 216, 224 (1957), *affd.* 257 F.2d 607, *cert. den.* 358 U.S. 828 (1958). Equitable and policy

considerations, no matter how virtuous, cannot be used to create jurisdiction where none exists.

*Definition of Packages in COSGA*, 23 S.R.R. 111, 115-1 16 (1985).

Canyon also contends that Guardian should be estopped from raising any jurisdictional objections because it represented to Judge Baird on September 10, 2001 that the Commission was the appropriate forum to determine this controversy. Canyon agreed with Guardian’s position at that time and entered into a stipulation to stay the District Court action. The stipulation was signed and ordered by Judge Baird with a provision for periodic status reports (Reply Brief, Ex. A).

Regardless of any representations by Guardian in obtaining a stay of the District Court action, it is a fundamental principle of law that parties cannot confer jurisdiction on an agency by agreement or estoppel. *Insurance Corp. of Ireland, Ltd., et al. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694,702 (1982); *Weznberger v. Bentex Pharmaceuticals, Inc.*, 412 U.S. 645, 652 (1973); *Transpacific Westbound Rate Agreement v. Federal Maritime Commission*, 938 F.2d 1025, 1032 (9th Cir. 1991); *Clapp v. Commissioner of Internal Revenue*, 875 F.2d 1396, 1398 (9th Cir. 1989); *Plaquemines v. Federal Maritime Commission*, 838 F.2d 536 (D.C. Cir. 1988); *Morongo Band of Indians v. California State Board Of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988), cert. denied 488 U.S. 1006 (1989); *American Mail Line Ltd. v. F.M.C.*, 503 F.2d 157, 170 (D.C. Cir.), cert. denied, 419 U.S. 1070 (1974); 1 *Moore’s Federal Practice* § 0.60[4] (Matthew Bender, 3d ed.).

Accordingly, while the Commission has jurisdiction over the inbound and outbound activities of NVOCC’s, its jurisdiction over ocean freight forwarders is limited to export activities.

## II. Guardian's Role In The Shipment Of The Goods

### A. Common Carrier

Having recognized that the Commission has jurisdiction over the import activities of NVOCC's, we must determine whether the facts established that Guardian acted in that capacity.

An NVOCC typically performs services for the shipper, such as consolidating cargo in containers in order to obtain better rates from ocean common carriers, and supplying trucks and heavy lifting equipment. *Zenith Electronics Corporation v. Panalpina, Inc.*, 68 F.3d 197, 199 (7th Cir. 1995).

Traditionally, the Commission has determined the status of common carriers by considering "the variety and type of cargo carried, number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and method of establishing and charging rates." *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 64-65 (1965); *Transportation-U.S. Pacific Coast to Hawazi*, 3 U.S.M.C. 190, 196 (1950).

Canyon's claim regarding Guardian's status under the Act is based on Guardian's statements in three letters. The first communication from Guardian, a letter faxed by John Appel to Eric Herem of Canyon on February 17, 2000, actually referred to the shipment of exports:

"Thank you for your interest in The Guardian Service Group, Ltd. Guardian has negotiated excellent FCL pricing with Hanjin Shipping Company, American President Line, and CMA from the United States to the Middle East. I can provide the following rate structure to the Middle East from the Port of Long Beach/Los Angeles. . . Please let me know how these rates compare to what you already have. I hope to hear from you soon. (CE000002)<sup>3</sup>

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<sup>3</sup> I have adopted the designations used by the parties for their exhibits. Canyon's exhibits are labeled with the prefix "CE" while Guardian's exhibits are labeled with the prefix "GS".

Next to Appel's signature is an unsigned notation by either William or Eric Herem of Canyon stating that "[w]e also asked for inbound rate from Jeddah for returned U.S. goods, please quote 'FCL' for 20 ft and 40 ft. (auto parts). Thanks." On February 21, 2000, Appel responded as follows:

"Confirming our fax conversation of this past Friday, Guardian is pleased to provide the following rates. Quotations based on: 20' and 40' Containers Returned Auto Parts, Origination: Jeddah Saudi Arabia, Destination: Long Beach, California, Value Unknown. Ocean freight charges (includes freight from Jeddah city limits) 20' Container - \$1375.00, 40' Container - \$1650.00, Handling charges in Saudi Arabia - \$50.00/Container. Above rate includes 1. Round trip transportation within Jeddah City Limits, 2. Transportation from Saudi Terminal to Jeddah Port, 3. Customs Clearance in Saudi Arabia, 4. Port Charges, 5. Ocean Freight from Jeddah to Long Beach, 6. B/L Fees, 7. Courier charges. This rate does not include 1. U.S.THC, 2. Customs or Duty Charges. (CE000006)

Appel's letters did not state whether Guardian was going to perform any of the services described. However, the nature of Guardian's services started to become clear in June 2000. On June 12, 2000 Appel confirmed that the rates quoted on February 21, 2000 were still valid and provided additional rates for the shipment of goods from Dammam to Long Beach (GS008). On June 14, 2000, Appel informed Canyon that Al-Mousim would be acting as the "Agent in Saudi Arabia" and provided contact information for Al-Mousim (CEO0001 0).

During a trip to Saudi Arabia in June and July 2000, the nature of Guardian's services became very clear after William Herem met with Al-Mousim and was informed that it would not handle the shipment of the goods at the rates that it previously quoted to Appel (Herem Dep., pp. 44-46). Subsequently, on August 4 and August 7, 2000, William Herem communicated with Express Forwarding and requested that they arrange for the shipment of the goods at the rates previously quoted by Al-Mousim (CEO0001 5, CEO0001 7). On August 20, 2000, William Herem was informed by Express Forwarding that it would not provide shipment of the goods at the rates previously quoted by Al-Mousim (GS010). On August 22, 2000, William Herem informed Appel that Express

Forwarding had a problem with the rates previously quoted by Guardian and requested confirmation that the goods would be shipped in accordance with the rates quoted by Appel on June 12, 2000 (GS009). There is no evidence that Appel had ever been in contact with Express Forwarding prior to August 22, 2000.

On August 23, 2000, Appel informed William Herem that he was waiting for verification of the June 12, 2000 shipping rates from another company in Saudi Arabia, Enkay Express, but advised Herem to proceed with his plans for shipment of the goods (GS013). On August 30, 2000, Appel received revised quotations for shipment of the goods from Enkay Express, who also advised that East & West Express would act as its agent (GS016). During the period of October 11 to 24, 2000, Appel communicated with Enkay Express on several occasions regarding modifications to the original transportation arrangements by Canyon or Universal, increased rates that resulted from those modifications and instructions for delivery of the bills of lading. Appel informed William Herem about these arrangements on October 23, 2000. William Herem notified Appel on October 24, 2000 that the modifications were acceptable (GS018-GS032).

It is clear that, by June 2000, Canyon was aware that Saudi Arabian companies, not Guardian, would actually be performing most, if not all, of the steps necessary to transport the goods to the United States. Guardian did not assume responsibility or liability for the shipment, nor did it issue bills of lading or any other types of contracts of carriage. There was only one type of cargo shipped (automobile spare parts) for one shipper (Universal Motors) and the rates charged by Guardian were essentially service fees added to the rates charged by freight forwarders or NVOCC's in Saudi Arabia.

The facts here bear stark contrast to those in *Possible Violations of Shipping Acts*, 16 S.R.R. 425 (Initial Decision, adopted, FMC 1975), where Judge Kline found that a respondent was an

NVOCC based on its issuance of bills of lading, assumption of responsibility for cargo, consolidation of cargo at its terminals, distribution of cargo to consignees at the port of destination and its payment of claims to consignees. It is clear that Guardian did not act in the capacity of an NVOCC.

B. Ocean Freight Forwarder

Assuming, *arguendo*, that the Commission has jurisdiction over ocean freight forwarders involved in import activities, the facts do not support a finding that Guardian acted in that capacity. It is clear that Guardian was retained as Canyon's agent and may be pursued in United States District Court for any alleged breach of fiduciary duty owed Canyon. *In re Newpower*, 233 F.3d 922 (6th Cir. 2000). Canyon confided to Guardian the transaction of shipping the goods from Saudi Arabia to the United States on Canyon's behalf and Guardian agreed to handle the shipments for Canyon. The total sum to be paid Guardian, of course, included a fee to Guardian for its services in connection with the shipments. However, the role served by Guardian is vastly inconsistent with that traditionally performed by ocean freight forwarders.

The freight forwarding business emerged prior to the era of containerization and intermodalism. The process of exporting involved several steps which had to be coordinated to assure that deadlines were met and additional charges were not incurred. *I C Benedict on Admiralty* § 38 (7th Edition, Revised). Freight forwarders filled a vital role in making all necessary arrangements to dispatch merchandise to foreign ports. Essentially, they functioned as exporters for their clients. *Zenzth Electronics Corporation v. Panalpina, Inc.*, 68 F3d 197, 198 (7th Cir 1995); *New York Foreign Freight Forwarders & Brokers Assn. v. Federal Maritime Comm.*, 337 F2d 289, 292 (2d Cir 1964), *cert. denied*, 380 US 910 (1965).

Freight forwarders consigned goods from exporters typically make all the arrangements for dispatching the goods to a foreign port. Such responsibilities include arrangements for necessary space with ocean common carriers, storing the goods while they await loading onto the vessel, procuring and preparing documents, obtaining permits for the acceptance of freight at piers, obtaining insurance, convert weights and measurements into the metric system as necessary, keep records of all shipments dispatched and prosecute such claims as may be required by the exporter against carriers, insurance companies, and others; Forwarders also have many other incidental duties. Freight forwarders act as agents of the shipper, but assume no responsibility for the transportation of the goods. *United States v. American Union Transport, Inc.*, 327 U.S. 437, 442-443 (1946).

In *New York Foreign Freight Forwarders*, the Second Circuit expounded on the role of ocean freight forwarders in a proceeding challenging the validity of regulations issued by the Commission pursuant to Freight Forwarder Law of 1961, 75 Stat. 522, 46 U.S.C. §§ 801, 841a, 841b. The court explained that an “exporter who ships goods abroad customarily consigns the merchandise to a forwarder who then makes all arrangements for dispatch to a foreign port. Thus, the forwarder will secure cargo space with a steamship company, give advice on governmental licensing requirements, proper port of exit and letter of credit intricacies, and arrange to have the cargo reach seaboard in time to meet the designated vessel. The forwarder also prepares required documents, including the dock receipt, delivery order, bill of lading, export declaration and the consular invoice required on shipments to certain countries.” 337 F.2d at 292.

Guardian’s actions did not rise to the level of a freight forwarder. It did serve as Canyon’s agent in communicating with Saudi Arabian companies regarding shipping rates, schedules and routes, including details for picking up and stopping-off at intermittent locations. However, East & West Express actually made the arrangements for dispatching the goods to the United States. They



presently constituted, does not permit us to exercise such jurisdiction over such activities. The complaint by Selbuy International, Inc. against Guardian Services Group, Ltd. is dismissed.



Michael A. Rosas  
Administrative Law Judge

Washington, D.C.  
April 5, 2002