

ORIGINAL

FEDERAL MARITIME COMMISSION

GREEN MASTER INT'L
FREIGHT SERVICES LTD -
POSSIBLE VIOLATIONS OF
SECTIONS 10(A) (1) AND
10(B) (1) OF THE SHIPPING
ACT OF 1984

Docket No. 01-10

Served: June 10, 2003

Order Denying Green Master's Petition for Stay and
Reconsideration.

ORDER

This matter is before the Federal Maritime Commission ("Commission") upon a petition by Green Master Int'l Freight Services, Ltd. ("Green Master") for Stay and Reconsideration of the Commission's order in this proceeding. On February 28, 2003, the Commission issued an order affirming the administrative law judge's ("ALJ") decision, finding that Green Master violated sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. app. §§ 1709(a)(1) and (b)(1) (1998), and assessing penalties against it in the amount of \$1,530,000.

Green Master has now filed a Petition for Stay and Reconsideration pursuant to Rules 73 and 261 of the Commission's

Rules of Practice and Procedure, 46 C.F.R. §§ 502.73 and 502.261.’ In its petition, Green Master requests that the Commission stay its decision to impose the civil penalty of \$1,530,000 while it considers exceptions filed by Sea-Land Service, Inc. (“Sea-Land”) in Docket No. 98-06, Sea-Land Service, Inc. - Possible Violations of Sections

‘Rule 73 provides:

In any docketed proceeding, an application or request for an order or ruling not otherwise specifically provided for in this part shall be by motion. After the assignment of a presiding officer to a proceeding and before the issuance of his or her recommended or initial decision, all motions shall be addressed to and ruled upon by the presiding officer unless the subject matter of the motion is beyond his or her authority, in which event the matter shall be referred to the Commission. If the proceeding is not before the presiding officer, motions shall be designated as “petitions” and shall be addressed to and passed upon by the Commission.

Rule 261 provides in relevant part that in order not to be subject to summary rejection, a petition must:

Address a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party. Petitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received.

10(b)(1), 10(b)(4), and 19(d) of the Shipping Act of 1984 (“Sea-Land Proceeding”), and amicus curiae briefs filed in support of Sea-Land by four trade associations.² Green Master further requests, in the event the Commission determines to change its policies with regard to the imposition of civil penalties, that the Commission reconsider the amount of penalty imposed on it. The Bureau of Enforcement (“BOE”) filed a reply opposing Green Master’s petition.

BACKGROUND

A. Green Master’s Petition

Green Master asserts that “the basis of its petition -- the request by Sea-Land Service, Inc. and four maritime industry associations that the Commission re-examine its policy on application of penalties to tariff filing violations -- constitutes an ‘other matter upon which [Green Master] has not previously had the opportunity to comment,’” consistent with Rule 261. Petition at 1. As an alternative, Green Master submits that its petition is appropriate “as an application or request for an order or ruling not otherwise specifically provided for” in the Commission’s Rules, pursuant to Rule 73. Id. n.1.

²The four trade associations are: the National Customs Brokers and Forwarders Association of America (“NCBFAA”); the Transportation Intermediaries Association (“TIA”); the National Industrial Transportation League (“NIT League”); and the NVOCC-Government Affairs Conference (“NVOCC-GAC”). The administrative law judge in the Sea-Land Proceeding imposed a civil penalty in excess of \$4 million against Sea-Land. Sea-Land filed exceptions to the decision, and the four trade associations filed amicus curiae briefs asking the Commission to reconsider its policies with regard to the size of civil penalties imposed for willful violations of the Shipping Act.

Green Master cites to various excerpts from the briefs of the four amici and argues that because these associations “represent substantial interests in the ocean shipping industry . . . there is substantial concern within all sectors of the ocean shipping industry about the Commission’s current civil penalty policies, especially as related to tariff violations.” Id. at 2-4. In addition, Green Master opines that the Commission will likely address these concerns in the Sea-Land Proceeding. Id. at 4. Green Master further avers that this case is precisely the type of situation that has raised concerns in the industry such that, if the Commission decides that “its policy on civil penalties should be adjusted,” it should also reconsider its policy for ocean transportation intermediaries, and should use the instant proceeding as a vehicle for any such reconsideration. Id. at 4-5.

Green Master states that ordering a stay of the civil penalty in this proceeding will cause no harm or disadvantage, arguing that because the amount of the civil penalty will not change while the stay is pending, “no message of a change of policy or undeserved leniency will be conveyed pending the agency’s reconsideration of this issue.” Id. Moreover, because Green Master is not seeking a stay of the portion of the order which directs the discontinuance of statutory violations, it contends that it is not seeking to continue activities found by the Commission to be unlawful. Id. at 5-6. Green Master further argues that it has no assets in the United States subject to attachment, other than its non-vessel-operating common carrier (“NVOCC”) bond, and that there is no danger it might use the stay to transfer assets beyond the Commission’s jurisdiction. Id. at 6.

B. BOE’s Reply

BOE urges the Commission to deny Green Master’s petition, asserting that Green Master has not met the administrative standards for requesting a stay and reconsideration under Rule 261.

Reply at 2-3. BOE argues that Green Master has already enjoyed adequate opportunities to comment on the Commission's assessment of civil penalties, and notes that Rule 261 prohibits the Commission from receiving a petition which merely elaborates upon or repeats arguments made prior to the decision. Id. BOE also argues that Green Master's petition is "contingent upon events which may, or may not, take place in Docket No. 98-06, a proceeding upon which Green Master does not have a right to comment and which neither of the parties addressed in this proceeding." Id. BOE further contends that Green Master, rather than trying to attach its interests to the "wholly unrelated, unresolved events in another Commission proceeding," should have "exerted the effort, to request on its own behalf that the Commission reconsider its civil penalty assessment policies." Id.

BOE submits that Rule 73 is an insufficient basis upon which to grant Green Master's petition, stating that the rule provides a party the opportunity to file a motion or petition for an order or ruling not otherwise specifically provided for in the Commission's rules, whereas a petition for reconsideration is already authorized by Rule 261. Id. at 3. BOE also asserts that Green Master's request is premature because the Commission has not determined to review the civil penalty assessed in the Sea-Land Proceeding. BOE explains that if the Commission eventually rejects Sea-Land's request, a review of the civil penalty assessed in this proceeding will not occur. Id. at 4.

Finally, BOE states that there is no basis for reconsidering the civil penalty amount in the present proceeding because the statutory requirements for assessing civil penalties under section 13(c) of the Shipping Act have been properly considered. See 46 U.S.C. app. § 1712(c). Reply at 4-5. Citing prior Commission

cases,³ BOE avers that both the Initial Decision and the Commission's decision in this proceeding discussed and analyzed the factors specifically enumerated in section 13(c) and that the civil penalty amount assessed in this proceeding is appropriate both under the Shipping Act and in light of previous Commission decisions. Id. at 6-7.

DISCUSSION

We deny Green Master's petition on two independent grounds: the petition does not satisfy the procedural requirements of either Rule 261 or 73; and the petition does not provide a substantive basis for overturning the Commission's imposition of the \$1,530,000 penalty.

A. Petition for Reconsideration

Green Master submits that its petition is appropriate under Rule 261 as "an 'other matter upon which [Green Master] has not previously had the opportunity to comment,'" or alternatively,

³BOE cites Docket No. 99-18, Stallion Cargo, Inc. - Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 29 S.R.R. 665 (I.D.), administratively final October 18, 2001; Docket No. 00-10, Universal Logistic Forwarding Co., 29 S.R.R. 325 (I.D.), administratively final January 18, 2002; Docket No. 01-09, Transglobal Forwarding Co., Ltd. - Possible Violations of Section 10(a)(1) of the Shipping Act of 1984, 29 S.R.R. 814 (I.D.), administratively final June 17, 2002; Docket No. 98-20, Refrigerated Container Carriers Pvt. Ltd. - Possible Violations, 28 S.R.R. 799 (I.D.), administratively final May 21, 1999; and Docket No. 94-11, Trans Ocean-Pacific Forwarding, Inc. - Possible Violations of Section 10(b)(1) of the Shipping Act of 1984, 27 S.R.R. 409,412 (I.D.), administratively final February 9, 1996.

under Rule 73 “as ‘an application or request for an order or ruling not otherwise specifically provided for’ in the Commission’s Rules.” Petition at 1. BOE contends that Green Master’s petition does not meet the requirements of either Rule 261 or 73. Reply at 4.

1. Rule 261

Rule 261 sets out the standards for the filing of petitions for reconsideration. It provides, in pertinent part, that in order to prevent summary rejection, a petition must:

Address a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party. Petitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received.

46 C.F.R. § 502.261(a)(3). Based on this rule, Green Master’s petition must be rejected. In its exceptions to the Initial Decision, Green Master had ample opportunity to persuade the Commission to reduce the amount of civil penalty assessed by the ALJ. Relying on the statutory standard set forth in section 13(c), we declined to do so. The petition is in effect a request that we reconsider the ALJ’s imposition of the \$1,530,000 penalty -- a request that Green Master has previously brought before us in its exceptions to the ALJ’s decision, that BOE has previously opposed, and that we have already considered and rejected. Therefore, because the petition is merely a renewed request that we reduce the \$1,530,000 penalty, it fails to raise a previously unaddressed matter. Rule 261(a)(3) provides that a petition that merely elaborates upon or repeats arguments made prior to a decision or order will not be received by the Commission. Because Green Master’s petition does not satisfy

the criteria for granting a petition for reconsideration under Rule 261, it is denied.

2. Rule 73

Rule 502.73 provides that:

(a) In any docketed proceeding, an application or request for an order or ruling not otherwise specifically provided for in this part shall be by motion. After the assignment of a presiding officer to a proceeding and before the issuance of his or her recommended or initial decision, all motions shall be addressed to and ruled upon by the presiding officer unless the subject matter of the motion is beyond his or her authority, in which event the matter shall be referred to the Commission. If the proceeding is not before the presiding officer, motions shall be designated as “petitions” and shall be addressed to and passed upon by the Commission.

46 C.F.R. § 502.73(a). Rule 73 applies to the filing of motions, which must set forth the relief sought and the basis therefor. However, the rule explicitly provides that motions shall be for an order or ruling “not otherwise specifically provided for” by the Commission’s rules. 46 C.F.R. § 502.73(a). Rule 261 specifically provides the means by which parties seeking reconsideration of a Commission order may obtain such relief; Rule 73 is not an appropriate avenue to request reconsideration. Rule 73 should not be used by parties to seek reconsideration on the basis of arguments that are unsuccessful under Rule 261.

Moreover, Rule 73(e) states that a “repetitious motion will not be entertained.” Green Master has availed itself of the

opportunity contemplated under Rule 261, permitting it to seek reconsideration, and its attempt to utilize Rule 73 is duplicative. Therefore, Green Master's petition pursuant to Rule 73 is also denied.

3. Civil Penalty

In addition to mandating that the Commission take into account the nature, circumstances, extent, and gravity of the violation, as well as the degree of culpability, history of prior offenses, ability to pay and other appropriate factors with respect to the violator when assessing penalties, section 13 of the Shipping Act, 46 U.S.C. app. § 1712, sets forth a range in the amount of penalties appropriate for specific violations. That section authorizes the assessment of penalties up to \$27,500⁴ for each violation found to have been committed willfully and knowingly. We took all these factors into consideration when we determined what penalty to assess against Green Master for the 68 violations of the Shipping Act it was found to have committed willfully and knowingly. Docket No. 01-10, Slip Op. at 34-39 (Feb. 28, 2003). Based on our consideration of these factors, we determined that it was appropriate to affirm the ALJ's imposition of a penalty of \$22,500 for each of the violations, rather than the maximum penalty authorized. Id. at 38-39.

⁴Section 13(c) originally provided for maximum penalties in the amount of \$25,000; however, in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, Pub. L. 104-134, the amount was increased to \$27,500. See 46 U.S.C. app. § 1712 and 46 C.F.R. § 506.4(d).

In enacting section 13(a), Congress established a penalty for knowing and willful violations at an amount five times greater than for other violations.⁵ Congress sought to deter such conduct, and to punish more harshly those who knowingly and willfully violate the Shipping Act:

Experience with the penalties imposed by the 1916 Shipping Act led the Committee to conclude that they provided no apparent deterrent to the commission of prohibited acts. Civil penalties of the type and amount available under the current law could be absorbed as part of the cost of doing business. . . . The Committee included in H.R. 1878 sanctions and penalties designed to deter the commission of prohibited acts.

H.R. Rep. No. 53, 98th Cong., 1st Sess. Pt. 1, at 19 (1983).⁶

In this case, Green Master repeatedly engaged in conduct violative of the Shipping Act, and indeed its general manager had been the president of a company the Commission penalized for committing such violations. Green Master was aware that its

⁵Shipman Int'l (Taiwan) Ltd. - Possible Violations of Sections 8, 10(a)(1), and 10(b)(1) of the Shipping Act of 1984, 28 S.R.R. 100, 109 (I.D.), administratively final May 30, 1998.

⁶See also Shipman Int'l, supra; Stallion Cargo, supra at 681; Ever Freight Int'l, Ltd., Sigma Express Inc., and Mario F. Chavarria dba Transcargo Int'l - Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984 28 S.R.R. 329, 334 (I.D.), administratively final June 26, 1998; Martyn Merritt, AMG Servs., Inc. etc. - Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 26 S.R.R. 663,664 (1992).

activities violated the Shipping Act and of the penalties associated with such conduct. Thus, we conclude that the imposition of the \$1,530,000 penalty is supported by the record and is consistent with our statutory mandate. Accordingly, Green Master's request to reconsider the penalty amount is denied.

B. Green Master's Petition for Stay

Green Master requests that we stay our decision to impose a civil penalty while we consider the request in the Sea-Land Proceeding to review our policies on the imposition of civil penalties. Petition at 1. BOE opposes this request, contending that there is no basis for a stay of the penalties as Green Master's request has no support in fact, law or procedure. Reply at 7.

The factors to be considered before a stay may be granted were articulated in a four-part test applied by the U.S. Court of Appeals for the District of Columbia Circuit in Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958), and have been applied by the Commission in subsequent decisions.⁷ The factors to be determined under the four-prong test are:

1. Whether the petitioner has made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review.

⁷See, e.g., Western Overseas Trade and Dev. v. Asia N. Am. Eastbound Rate Agreement, 26 S.R.R. 1382 (1994); Docket No. 93-15, Waterman Steamship Corp. v. General Foundries, Inc., Order Denying: Petition for Stay (August 25, 1994).

2. Whether the petitioner has shown that without such relief, it will be irreparably injured?
3. Whether the issuance of a stay would substantially harm other parties interested in the proceeding.
4. What action would better serve the public interest.

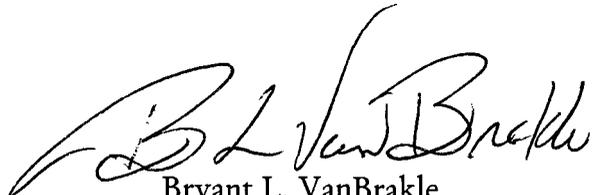
Id. at 925.

Green Master has failed to demonstrate that its petition for a stay should be granted. As previously discussed, its petition does not provide a basis for overturning the \$1,530,000 penalty. Likewise, Green Master has made no showing of “irreparable injury,” nor does it even argue that failure to grant a stay would cause irreparable injury. Thus, Green Master’s request for a stay has no legal foundation and will be denied.

THEREFORE, IT IS ORDERED, That Green Master’s Petition for Stay and Reconsideration is denied; and

FINALLY, IT IS ORDERED, that this proceeding is discontinued.

By the Commission.


Bryant L. VanBrakle
Secretary