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BEFORE THE
FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMM

Docket No. 09-01

MITSUI O.S.K. LINES LTD.

COMPLAINANT

v.

GLOBAL LINK LOGISTICS, INC., OLYMPUS PARTNERS, OLYMPUS GROWTH
FUND III, L.P., OLYMPUS EXECUTIVE FUND, L.P., LOUIS J. MISCHIANI, DAVID
CARDENAS, KEITH HEFFERNAN, CJR WORLD ENTERPRISES, INC. AND CHAD J.
ROSENBERG

RESPONDENTS

COMPLAINANT'S REPLY TO GLOBAL LINK'S BRIEF IN SUPPORT
OF ITS COUNTERCLAIM AGAINST MITSUI O.S.K. LINES

Complainant Mitsui O.S.K. Lines Ltd. ("Complainant" or "MOL") hereby submits its reply to respondent Global Link Logistics, Inc.'s ("Global Link") Brief in Support of its Counterclaim Against Mitsui O.S.K. Lines. For the reasons set forth below, the Counterclaim should be denied.

The Counterclaim, distilled to its essence, is that MOL's case lacks merit because it had knowledge of the split routing practice and that the filing of a complaint lacking in merit constitutes a violation of Section 10(d)(1) of the Shipping Act. The subject of MOL's knowledge or lack thereof has been addressed in MOL's initial and reply briefs on the merits (see pp. 64 to 65 of initial brief and pp. 33 to 60 of reply brief), which discussions are herein

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incorporated by reference. Because MOL had no knowledge of the split routing practice, its complaint has merit and Global Link's counterclaim must fail.

Moreover, as a matter of law, the filing of a complaint does not constitute a violation of Section 10(d)(1). This section of the Shipping Act makes it unlawful for a common carrier, marine terminal operator, or ocean transportation intermediary to

fail to establish, observe, and enforce just and reasonable regulations and practices *relating to or connected with receiving, handling, storing or delivery property.*

46 U.S.C. §41102(c)(emphasis added). The Commission has repeatedly held that conduct which is not related to or connected with receiving, handling, storing or delivering property is not a violation of Section 10(d)(1). See, *Burlington Northern Railroad Company v. M.C. Terminals, Inc.*, 26 S.R.R. 682, 694 (ALJ 1992)(citing cases in which Commission found it lacked jurisdiction over conduct which did not relate to the receipt, handling, etc. of property); *J.M. Altieri v. The Puerto Rico Ports Authority*, 7 F.M.C. 416, 419 (ALJ 1962)(conduct other than shipping practices do not fall within scope of conduct prohibited by what is now Section 10(d)(1)). The filing of a complaint is not a practice and is not related to or connected with receiving, handling, storing or delivering property and hence cannot be a violation of Section 10(d)(1) of the Shipping Act.

A finding that an unsuccessful complainant could be liable to the respondent for attorneys' fees is contrary to the plain language of the Shipping Act. 46 U.S.C. §41305(b) provides:

If the complaint was filed within the period specific in section 41301(a) of this title, the Federal Maritime Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.

The foregoing language, as well as the language of 46 C.F.R. §502.254(a), make it clear that attorneys' fees are to be awarded only to complainants that receive an award of reparations. Such fees may not be awarded to respondents, or to complainants that do not receive reparations. See, *The Janel Group of Los Angeles, Inc v. RTM Lines*, 32 S.R.R. 418, 423 (Settlement Officer, 2010)(respondent not entitled to attorneys' fees); *Bimsha International v. Chief Cargo Services, Inc. and Kaiser Apparel, Inc.*, 32 S.R.R. 353, 382 (ALJ 2011)(complainant not receiving award of reparations not entitled to attorneys' fees).

Here, even if Global Link is deemed a complainant (which it should not be), it is not seeking any reparations other than attorneys' fees. Accordingly, even if its other arguments had merit (which they do not), it fails to fulfill the statutory pre-condition for an award of attorneys' fees, i.e., an award of reparations. In this regard, in a decision almost precisely on point, the Commission held that a respondent which files a complaint seeking the recovery of attorneys' fees as reparations is not entitled to such fees.

In *Burlington Northern Railroad Company v. M.C. Terminals, Inc.*, 26 S.R.R. 682 (ALJ 1992), *aff'd* in relevant part at 26 S.R.R. 934, 950 (1993), the respondent terminal operator filed a complaint in U.S. District Court. seeking to collect tariff charges it alleged the complainant railroad had not paid. The federal judge found for the terminal operator on some counts, but referred one claim to the FMC under the doctrine of primary jurisdiction. The railroad then filed a complaint with the FMC, alleging all of the tariff items in question were void as contrary to the Shipping Act, and then sought leave to amend its complaint to recover attorneys' fees incurred in defending the terminal's claim in federal court. The FMC's administrative law judge found that because the railroad was not seeking and was not entitled to reparations, it could not be entitled

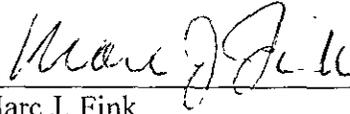
to attorneys' fees incurred in defending the terminal's collection action in federal court. 26 S.R.R. 698-699.

Similarly, because Global Link is not seeking and is not entitled to any reparations as a result of MOL filing a complaint, it is not and cannot be entitled to reparations. In fact, the Counterclaim is a transparent attempt to qualify as a complainant and recover attorneys' fees, without having any basis in law to do so.

Awarding Global Link attorneys' fees would also be contrary to the policy of the Shipping Act. When a federal statute such as the Shipping Act provides for the recovery of attorneys' fees, it normally does so to encourage private litigation in order to implement public policy. *Awards of Attorneys' Fees By Federal Courts and Federal Agencies*, Congressional Research Service, June 20, 2008, page I ("CRS"). This is often referred to as a "remedial purpose." *Attorneys' Fees In Reparation Proceedings*, 23 S.R.R. 1698, 1699 (FMC 1987). In other words, attorneys' fees are awarded to encourage potential complainants to file actions which enforce the prohibitions contained in the Shipping Act, thereby furthering the purposes for which Congress enacted the statute. Awarding attorneys' fees to a respondent that has not sought reparations would have a chilling effect on the filing of meritorious complaints and would be contrary to the intent of Congress in providing for the recovery of attorneys' fees and the protection Congress afforded those who file complaints.

In light of the foregoing the Counterclaim, which is a thinly veiled attempt by Global Link to obtain attorneys' fees to which it is not lawfully entitled, must be dismissed.

Respectfully submitted,



Marc J. Fink
COZEN O'CONNOR
1627 I Street, N.W., Suite 1100
Washington, D.C. 20006
(202) 912-4800 (tel)
(202) 912-4830 (fax)

David Y. Loh
COZEN O'CONNOR
45 Broadway Atrium, Suite 1600
New York, NY 10006-3792
Tel: (212) 509-9400
Fax: (212) 509-9492

Attorneys for Mitsui O.S.K. Lines, Ltd.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the following individual(s) via electronic mail:

David Street (dstreet@gkglaw.com)
Brendan Collins (bcollins@gkglaw.com)
GKG Law, PC
1054 31st Street, Ste. 200
Washington, D.C. 20007

Attorneys for Respondents Global Link Logistics, Inc.

Warren L. Dean (wdean@thompsoncoburn.com)
C. Jonathan Benner
(jbenner@thompsoncoburn.com)
Harvey Levin (hlevin@thompsoncoburn.com)
Kathleen E. Kraft (kkraft@thompsoncoburn.com)
Thomson Coburn LLP
1909 K Street, N.W., Ste. 600
Washington, D.C. 20006

Andrew G. Gordon (agordon@paulweiss.com)
Paul Weiss Rifkind Wharton & Garrison LLP
1285 Avenue of the Americas
New York, NY 10019-6064

*Attorneys for Respondents Olympus Partners, L.P.;
Olympus Growth Fund III, L.P.; Olympus
Executive Fund, L.P., Louis J. Mischianti; David
Cardenas and Keith Hefferan*

Ronald N. Cobert (rcobert@gjacobert.com)
Andrew M. Danas (adanas@gjacobert.com)
Grove, Jaskiewicz and Cobert LLP
1101 17th Street, N.W., Suite 609
Washington, D.C. 20036

Benjamin I. Fink (bfink@bfvlaw.com)
Neal F. Weinrich (nweinrich@bfvlaw.com)
Berman Fink Van Horn P.C.
3475 Piedmont Rd., Suite 1100
Atlanta, Georgia 30305

Attorneys for Respondents CJR World Enterprises, Inc. and Chad Rosenberg



David Y. Loh
Cozen O'Connor
45 Broadway Atrium, Suite 1600
New York, NY 10006-3792
Tel: (212) 509-9400
Fax: (212) 509-9492
Attorneys for Complainant Mitsui O.S.K. Lines Ltd.