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BEFORE THE  
FEDERAL MARITIME COMMISSION

YAKOV KOBEL and VICTOR BERKOVICH

Complainants

v.

HAPAG-LLOYD A.G., HAPAG-LLOYD AMERICA, INC., LIMCO LOGISTICS, INC.,  
INTERNATIONAL TLC, INC

Respondents

Docket No. 10-06

INTERNATIONAL TLC, INC'S POST TRIAL BRIEF

I.

**INTRODUCTION**

Pursuant to this Court's Revised Hearing Preparation and Briefing Schedule, dated July 5, 2011, Respondent International TLC, Inc ("Int'l TLC") hereby submits their Findings of Fact and Conclusions of Law with this Post Trial Brief. For reasons stated below, Complainants failed to prove by primacy of the evidence that Int'l TLC violated Sections 19(a) and 10(d)(1) of the Shipping Act.

II.

**INT'L TLC DID NOT CONDUCT BUSINESS AS AN UNLICENSED ENTITY**

Complainants allege that Int'l TLC engaged in unlawful shipping activities in violation of Section 19(a) of the Shipping Act. This provision states the following:

(a) No person in the United States may act as an ocean transportation intermediary unless that person holds a license issued by the Commission. The Commission shall issue an intermediary license to any person that the Commission determines to be qualified by experience and character to act as an ocean transportation intermediary.

Int'l TLC was not licensed as an NVOCC prior to July 24, 2008. Before that time, International TLC was licensed by the Washington State and operated as a loading and consulting company for their clients, and had not operated as an NVOCC. Initially, Int'l TLC had a Sole Proprietorship license issued for International T.L.C., which was opened in July 2, 2005 and located at 11508 SE 189<sup>th</sup> LN #19 Renton, WA 98055. (Int'l TLC Ex. 1). Before Int'l TLC was issued an NVOCC license, this company was not advertised or operated as an NVOCC company, and Limco Logistics ("Limco") performed all NVOCC functions such as issuing their house bills of lading and contracting with ocean common carriers. (Complainants' Exhibits 1, 8, 9, 12, 19) (Barvinenko, TR 412). On January 2, 2008, Int'l TLC applied for a Domestic Profit Corporation license, registered under International T.L.C. Inc at 11508 SE 189<sup>th</sup> LN #19 Renton, WA 98055. (Int'l TLC Ex. 2). After the NVOCC license was issued on July 24, 2008, Int'l TLC began issuing its own house bills of lading and signing into service contracts with vessel-operating common carriers. (Complainants' Ex. 75).

Int'l TLC had been operating as Domestic Profit Corporation prior to being licensed by the Federal Maritime Commission, and had at no time improperly represented themselves as an NVOCC to the public. (Barvinenko, TR 413). Section 3 (17) (B) states that a:

(17) "non-vessel-operating common carrier" means 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.

In accordance with this provision, Int'l TLC had not been a shipper in its relation with an ocean common carrier, nor did this company issue its own bills of lading before being licensed

as an NVOCC. (Barvinenko, TR 361, 362, 412). Int'l TLC hired Limco to act as the NVOCC in this transaction. (Barvinenko, TR 405). Limco issued their own bills of lading and was a shipper in its relation with an ocean common carrier. (Complainants' Ex. 1, Ex. 28). All NVOCC-related functions were performed by Limco at the time that the Complainants shipments were made. Consequently, since Int'l TLC did not operate or act as an NVOCC, it did not violate Section 19(a) of the Shipping Act.

Complainants inaccurately allege that Int'l TLC appears in the freight forwarding box in three Limco bills of lading; in fact, that space in Limco's bills of lading is titled "forwarding agent". (Complainants' Ex. 1, Ex. 8, Ex. 9). Int'l TLC did not request Limco to place Int'l TLC in the forwarding agent box. (Barvinenko, TR 369).

### III.

#### **LIQUIDATION SALE OF COMPLAINANTS' CARGO TO RECOVER UNPAID CHARGES IS NOT A SHIPPING ACT VIOLATION**

Complainants allege that Int'l TLC, Limco, Hapag-Lloyd A.G. ("HLAG"), and Hapag-Lloyd America, Inc. ("HLAI") violated Section 10(d)(1) of the Shipping Act. Section 10(d)(1) states that:

(1) No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

Complainants allege that Int'l TLC did not have the authority to change the shipper/consignee name to Oleg Remishevskiy on the bills of lading for the three liquidated containers, namely MOGU2051660, MOGU2101987 and MOGU2002520, however they fail to note that the change of the shipper/consignee in these bills of lading occurred after the liquidation sale of these containers, which lawfully transmitted the cargo ownership to Oleg Remishevsky.

A. Int'l TLC directed Limco to change the shipper/consignee name on the bill of lading for the Complainants three containers directly in relation to the Complainants' failure to make proper and timely payments to Int'l TLC and promptly collect their cargo overseas. The Complainants' negligence to make proper payments to Int'l TLC, their failure to pick up their cargo from Poland in a timely manner, the failure to act on the final notice of unpaid balance, and their failure to give a written response to Int'l TLC final notice resulted in the liquidation of the Complainants' three containers and does not constitute a Shipping Act violation by Int'l TLC. (Kobel, TR 233, 234) (Complainants' Ex. 79). Since Complainants no longer had a legal interest in the cargo, there is no requirement for Int'l TLC to obtain an authorization for the liquidation.

B. While the Complainants were not making their payment to Int'l TLC, Int'l TLC also owed Limco. (Lyamport, TR 692, 693). Complainants also owed for overseas storage charges, which were ultimately charged to Int'l TLC due to the Complainants' failure to arrange for a timely and full payment of these charges. (Int'l TLC Ex. 38, pp 7). On October 29, 2008, Int'l TLC received an email from Limco President, Mikhail Lyamport, urging Int'l TLC to make a payment for Complainants' last two containers. (Int'l TLC Ex. 35). On December 18, 2008, Int'l TLC received an email from Baltic Sea Logistics stating that the Complainants' last three containers continued to remain at Gdynia port. Baltic Sea Logistics informed Int'l TLC about the very high demurrage charges that need to be paid and the need for action to pick these containers up. Baltic Sea Logistics informed Int'l TLC that these containers would need to be unloaded and all charges would charge the account of Int'l TLC. (Int'l TLC Ex. 36) (Complainants' Ex. 103) (Barvinenko, TR 400) (Lyamport, TR 740). All this time, Baltic Sea Logistics and Limco were waiting for instructions and payment from Int'l TLC, while Int'l TLC was still waiting for the

payment from Complainants to release their last two containers MOGU2051660 and MOGU2101987 at destination. This represented all the pressure put on Int'l TLC from Limco in the U.S. and Baltic Sea Logistics in Poland about the need to resolve the storage and ocean freight charges for Complainants' containers. (Int'l TLC Ex. 38, pp. 9) (Complainants' Ex. 73, pp 2) (Lyamport, TR 693, 734, 744). Complainants' nonpayment of a collection of charges prevented the release of their cargo. Therefore, the liquidation of the Complainants' three containers was directly caused by the Complainants' negligence to arrange for the proper payment and pickup of their containers, and was not a violation of Section 10(d)(1) of the Shipping Act by Int'l TLC.

C. Int'l TLC provided sufficient time and numerous opportunities for Complainants to make their payments. Upon the containers' arrival in Poland, Complainants did not provide Int'l TLC with any instructions and did not move their containers from Port of Gdynia in spite of the fact that there was no delay in the delivery of these containers. Complainants simply let the containers stay in Poland for months without showing any interest in receiving these containers. Since the departure of containers MOGU2051660 and MOGU2101987 from the Port of Portland in July of 2008 and until January 9, 2011, for approximately seven months, Int'l TLC exercised just and reasonable practices to provide numerous reminders to Complainants to remit their payment and pick up their containers from Poland. (Int'l TLC Ex. 32). Complainants disregarded these opportunities provided by Int'l TLC, and continued to promise to make their payments "soon" in their phone conversations with Mr. Barvinenko. Int'l TLC offered the Complainants over seven months to make the payment for their containers, which is far more time than in the interests of Int'l TLC. Altogether, Int'l TLC exercised every possibility to resolve the nonpayment issue with the Complainants. When Int'l TLC could not prolong the wait to collect

the owed ocean freight, a decision needed to be made regarding the disposal of the cargo to collect all monies due to Int'l TLC, Limco, and Baltic Sea Logistics. Int'l TLC liquidated the Complainants' three containers in order to recover the costs associated with the Complainants' nonpayment of ocean freight and the failure to pick up of their containers in Poland. The liquidation sale of the three containers due to nonpayment for freight and storage charges is not a violation of any provision of the Shipping Act.

D. Complainants allege that Int'l TLC violated Section 10(d)(1) of the Shipping Act by "misleading Complainants and failing to provide accurate information" regarding Complainants' containers.

1. Int'l TLC did not provide Complainants with "misleading and inaccurate information" about the status of any of the containers, including the damaged container. Conversely, both Int'l TLC and Limco made frequent phone calls to the Complainants to inform them about the status of their containers, and kept the Complainants fully informed at all times. (Barvinenko, TR 399, 413, 414). Throughout the entire business transaction between the Complainants and Int'l TLC, Int'l TLC made more phone calls to the Complainants with respect to status about their shipment, than the number of calls received from Complainants. (Barvinenko, TR 413, 414) (Int'l TLC Ex. 32). In fact, just between October 15, 2008 and November 18, 2008, Int'l TLC placed 30 phone calls to Mr. Kobel, whereas receiving only one phone call from Mr. Kobel during that entire 30-- day period. Additionally, Mr. Berkovich had done business with Int'l TLC before 2008, and had reported that he did not have any complaints with Int'l TLC. (Berkovich, TR 512). Mr. Berkovich continued to do business with Int'l TLC, not once but four times after the subject five containers, and even after the liquidation of the Complainants' three containers. (Int'l TLC Ex. 61, Ex. 62, Ex. 63, Ex. 64). Not only does the

Complainants' testimony lack credibility, the fact that Mr. Berkovich continued to seek business with Int'l TLC, despite their allegations against Int'l TLC, defies all reasonable logic.

2. Complainants have no evidence that Int'l TLC refused to provide any information to them after January 9<sup>th</sup>, 2009. On the contrary, Complainants failed to contact Int'l TLC to inquire about their containers until after they were told by Int'l TLC that three containers have been liquidated due to nonpayment. After that time, Mr. Kobel visited the office of Int'l TLC for the first time. In fact, Mr. Kobel had never visited Int'l TLC office until more than a month after his containers were liquidated. At the office of Int'l TLC, Mr. Kobel behaved aggressively and made numerous threats to the office employees, particularly Aleksandr Barvinenko, demanding that Mr. Barvinenko to pay him money and proclaiming that "I have many powerful people and they will not let this go". (Kobel. TR 180, 181) (Barvinenko. TR 409).

3. Int'l TLC's final notice and invoice in the amount of \$43,727.00 that was sent to Complainants on January 9<sup>th</sup>, 2009 did not charge excessive fees. (Complainants' Ex. 79, Ex. 80). The invoice sent by Int'l TLC lists all charges owed by the Complainants to the various companies that were involved with the Complainants' containers. Included in this invoice was a charge from Affordable Storage Containers for \$14,987.88, the same amount that was billed to Int'l TLC three days earlier from Affordable Storage Containers in the invoice dated January 5. (Int'l TLC Ex. 40). Therefore, Int'l TLC was not making excessive charges, but simply passing the costs that Int'l TLC was charged. (Barvinenko. TR 394, 395). As previously stated, since the Complainants failed to make payments not only to Int'l TLC, but also to Baltic Sea Logistics and Affordable Storage Containers, all charges owed to these companies were now being sent to the account of Int'l TLC. (Kobel. TR 141-143) (Barvinenko. TR 353, 396, 381) (Int'l TLC Ex. 38).

Int'l TLC faxed an invoice and a final notice to Yakov Kobel in the morning of January 9, 2009. Mr. Kobel then called Mr. Barvinenko that same afternoon and informed Int'l TLC that he had received funds from the sale of the first two containers he shipped, MOGU2003255 and MOGU2112451, and is ready to pay all outstanding balance for the other three containers. Yakov Kobel said that he would pay Affordable Storage Containers \$14,987.88 separately and asked that Int'l TLC to remove this charge from their invoice #1007. (Complainants' Ex. 80). Mr. Kobel asked that Int'l TLC only charge him for the freight of his 2 containers, MOGU2051660 and MOGU2101987 (a total of \$10,200.00) and that he would be paying all other charges directly to the companies which he owes. (Barvinenko, TR 381, 382). That is the reason why a second invoice was issued, for these two containers, in a different amount showing only the charges that the Complainants owed to Int'l TLC. (Complainants' Ex. 81).

4. Complainants have not evidence that Int'l TLC gave them any "misleading or inaccurate information" about the status of the three containers after the liquidation sale. Int'l TLC sent Complainants a letter after the liquidation sale with accurate information. (Barvinenko, TR 385).

5. Mr. Berkovich's name was in the computer system in Poland up until the liquidation sale, when the receiver's name was changed to the new owner, Oleg Remishevsky. Baltic Sea Logistics attempted to get in touch with the final receiver of the cargo, however Baltic Sea Logistics could not get in touch with Mr. Berkovich since he was still in the United States up until April 2009. (Int'l TLC Ex. 28, Ex 31) (Berkovich, TR 471).

6. Complainants failed to not only timely pay for the ocean freight but also to pick their cargo up from the Port of Gdynia upon release of container MOGU2002520. Int'l TLC received numerous notices, including those forwarded by Limco from Hapag-Lloyd, stating that

these containers will be disposed of because nobody is picking them up from the port, and all charges associated with this transaction would be charged to Int'l TLC. (Barvinenko, TR 390) (Int'l TLC Ex. 33, Ex. 36). Therefore, because Complainants failed to pick up their containers from the Port of Gdynia in a reasonably timely fashion, these containers had to be liquidated in order to move them out of the Port of Gdynia and make a payment for the incurred storage charges in Poland. The sale and liquidation of Complainants' cargo to recover for the unpaid charges is not a violation of any provision of the Shipping Act.

7. The agreement for the sale of the Complainants cargo was made only between Int'l TLC and Oleg Remishevsky. Mr. Barvinenko did not learn that Mr. Remishevsky was acting as a middleman until Mr. Remishevsky's deposition. (Barvinenko, TR 406). Int'l TLC was not involved with any other third party that Mr. Remishevsky may have had an agreement with.

8. Complainants have no evidence that they contacted Baltic Sea Logistics on or about February 16, 2009 to inquire about storage fees in Poland. Neither of the Complainants had contacted Int'l TLC to inform Mr. Barvinenko about their inquiry with Baltic Sea Logistics regarding the storage charges. (Barvinenko, TR 383, 384). Therefore, Complainants have not basis for their claim that Int'l TLC wrongfully liquidated their containers while they were inquiring about making storage payments.

#### IV.

#### CONCLUSION

Complainants in this case attempted to make an international shipment and the sale of goods in the Ukraine without any prior experience with shipping or selling plywood or oil in the Ukraine. Complainants were unknown in the Ukraine as sellers of this type of cargo, and instead

of starting with one trial container based on their lack of experience, Complainants shipped five containers. Complainants increased their risk for loss in the event that they could not sell the cargo in the Ukraine. They made no written contracts with the buyers of their cargo in the Ukraine, nor were they been able to sell any of the cargo that is now sitting on their father's property in the Ukraine since 2008.

Complainants purchased their cargo consisting of plywood, oil, and ATV's in the United States at retail prices, paid for ocean containers, paid for ocean freight, inland transportation, and storage charges for their containers, and expected to make a profit from the sale of this cargo. Failing to investigate the Ukrainian import regulations for oil products, Complainants overlooked the fact that their cargo could not be legally imported to the Ukraine because it did not comply with the standard metric system and was labeled in English, with no Ukrainian labeling. Complainants did not have the financial means to handle the shipment of these five containers. Complainants' pattern of foreclosures, multiple bankruptcy filings, nonpayment to numerous companies, and issuing check(s) with non-sufficient funds are evidence of Complainants' insufficient financial resources at the time that these shipments were made.

Complainants failed to give a written response to the final notice warning them of a possible liquidation of their cargo. Complainants' failure to observe their duty to make proper payments and to timely pick up their cargo in Poland does not establish a Shipping Act violation on the side of Int'l T.L.C. Although Complainants allege they were "defrauded" by Int'l T.L.C., Victor Berkovich continued to do business with Int'l T.L.C. after the liquidation sale of Complainants cargo took place. Complainant's conduct of continued support of business relations with Int'l T.L.C. after the so called "fraud" voids the allegations made against Int'l T.L.C.

Complainants' testimony has serious credibility concerns. In addition to Mr. Berkovich's prior conviction of forgery, Complainants produced inconsistent statements and their testimonies strongly opposed the evidence presented to the Court. Int'l TLC would also ask the Court to consider the fact that Complainant Mr. Kobel has made numerous threats to an officer of Int'l TLC, Aleksandr Barvinenko, to which Mr. Kobel has testified to.

The Proposed Findings of Fact and Conclusions of Law are attached for further evidence. Complainants failed to meet their burden of proof in all respects, and their claim should be denied. For these and the foregoing reasons, International TLC, Inc respectfully urges this Honorable Court to grant judgment in Respondent's favor.

Dated: October 25, 2011

Respectfully Submitted,



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