

BEFORE THE
FEDERAL MARITIME COMMISSION

YAKOV KOBEL AND VICTOR BERKOVICH
Complainants

v.

FMC Docket No. 10-06

HAPAG-LLOYD (AMERICA), INC., HAPAG-LLOYD AG,
LIMCO LOGISTICS, INC., AND INTERNATIONAL TLC, INC.
Respondents

INTERNATIONAL TLC, INC MEMORANDUM OF EXCEPTIONS
TO CONCLUSIONS IN THE REMAND INITIAL
DECISION AND A SUPPORTING BRIEF

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I. INTRODUCTION

International TLC, Inc (hereinafter “ITLC”) hereby file their memorandum of exceptions to conclusions contained in the Remand Initial Decision of Administrative Law Judge Erin M. Wirth, dated July 30, 2014. This memorandum of exceptions is filed pursuant to Rule 227 (46 CFR Section 502.227).

II. MEMORANDUM OF EXCEPTIONS TO CONCLUSIONS

On July 30, 2014, Administrative Law Judge Erin M. Wirth served a Remand Initial Decision in this matter. Pursuant to 46 CFR 502.227, Respondent ITLC respectfully submit their memorandum of exceptions and a brief in support of its exceptions. ITLC excepts to this Remand Initial Decision on the following grounds:

- a. The Federal Maritime Commission (hereinafter “Commission”) lacks subject matter jurisdiction over this case (excepting to page 3 of remand initial decision);
- b. ITLC did not violate section 10(d)(1) of the Shipping Act of 1984 (hereinafter “Shipping Act”) (excepting to page 9 of remand initial decision);
- c. ITLC’s alleged breach of its fiduciary duty involving three containers in a single transaction is not a violation of section 10(d)(1) of the Shipping Act (excepting to page 9 of remand initial decision); and,
- d. The order that the claims against ITLC be granted should not be entered against respondent (excepting to page 18 of remand initial decision).

III. BRIEF IN SUPPORT OF RESPONDENT ITLC MEMORANDUM OF EXCEPTIONS

A. The Federal Maritime Commission Lacks Subject Matter Jurisdiction

Because the Complainants' true grievances are based in tort or cargo loss/damage, the Commission lacks subject matter jurisdiction over this case. The Commission's jurisdiction is limited to cases where there are violations of the Shipping Act, and not ordinary disputes that claim cargo loss, damage, or breach of contract. Respondents have repeatedly asserted that the Complainants' claims for damages or loss to cargo are causes of action under the Carriage of Goods by Sea Act ("COGSA"), which can only be adjudicated in Federal Court. Federal courts have held that claims for cargo loss or damage cloaked in negligence, fraud, conversion and breach of contract theories are pre-empted by COGSA. Barretto Peat, Inc. v. Luis Ayala Colon Sucrs., Inc., 896 F.2d 656, 661 (1st Cir. 1990) (plaintiff unable to circumvent COGSA's operation by couching its complaint in terms of conversion or breach of contract); National Automotive Publications, Inc. v. United States Lines, Inc., 486 F. Supp 1094, 1099 (S.D.N.Y. 1980) (plaintiffs could not avoid application of the Act's substantive provisions by couching its claims in terms of negligence, breach of contract, and wrongful detention of goods); B.F. McKernin Co., Inc. v. United States Lines, 416 F. Supp. 1068, 1071 (S.D.N.Y. 1976) (the Court held that where a federal statute is controlling, its provisions cannot be circumvented by casting the claims in terms of common law negligence or tort).

Although characterizing their complaint as being a Shipping Act violation claim, Complainants' causes of action are actually COGSA claims based on damage or cargo loss/conversion. Complainant Kobel repeatedly referred to being "defrauded" by the Respondents (Kobel, TR p. 166, Line 166; p. 195, Lines 10-17). Furthermore, Complainants'

attorney characterized the conduct of the Respondents as “negligence” and “conversion of Mr. Kobel and Mr. Berkovich’s property” (International TLC Exhibit 58, page 4). In addition, in Complainants’ Reply to Respondents’ Post-Trial Brief, Complainants allege “failure/wrongful delivery” of their cargo, which presents elements required for asserting a claim under the common law tort of conversion. Thus, it is apparent from Complainants’ own language that they are asserting the types of claims that the courts have consistently held are to be determined in accordance with COGSA. Complainants should not be allowed to avoid COGSA, its one-year statute of limitations and \$500 per package limitation by couching their tort claims as Shipping Act claims. Accordingly, for the reasons set forth above, this case should be dismissed as a whole for lack of subject matter jurisdiction.

B. ITLC’s alleged breach of its fiduciary duty involving three containers in a single transaction is not a violation of section 10(d)(1) of the Shipping Act

Liquidation of three containers by ITLC in and of itself cannot be a violation of section 10(d)(1). In analyzing the Commission’s central role in the oversight of ocean container commerce, one must keep in mind the principal purpose of the Shipping Act, as set forth in 46 U.S.C. § 40101, which is:

- (1) establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;
- (2) provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices;
- (3) encourage the development of an economically sound and efficient liner fleet of vessels of the United States capable of meeting national security needs; and
- (4) promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.

Section 10(d)(1) of the Shipping Act (now codified as Section 46 U.S.C. § 41102(c)) states that:

A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

To that effect, the Commission's jurisdiction is limited and deals with regulations and practices, not ordinary disputes between a carrier and its customer involving claims regarding an isolated shipment or a series of transactions. The Commission is charged with the responsibility to protect commerce in a broad sense. Therefore, a complaint filed within the jurisdiction of the Commission must allege claims within one of the established categories.

The Commission has long held that a single act or incident in and of itself does not constitute "regulations and practices" for purposes of Section 10(d)(1). Kamara v Honesty Shipping Service and Atlantic Ocean Line, 29 S.R.R. 321 (Settlement Officer 2001); A.N. Deringer, Inc. v. Marlin Marine Services, Inc., 25 S.R.R. 1273, 1276 (Settlement Officer 1990); Investigation of Practices of Stockton Elevators, 8 F.M.C. 181 (FMC 1964); J.M. Altieri v. The Puerto Rico Ports Authority, 7 F.M.C. 416 (ALJ 1962). The conception of "practices" was used by Congress in other settings as well as various state and local legislative courts. Congress used a similar interpretation of statutory language in the Packers and Stockyards Act, 1921, which states "It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services..." 7 U.S.C. § 208(a). McClure v. Blackshere, 231 F. Supp. 678 (D. Md 1964) (the court held that practice implies uniformity and continuity, not a few isolated acts); Rice v. Wilcox, 630 F.2d 586 (8th Cir. 1980) (the U.S. Court of Appeals for the Eighth Circuit held that an isolated instance does not constitute a practice).

In the case at bar, Complainants allege that ITLC violated section 10(d)(1) of the Shipping Act. To demonstrate a violation, Complainants first must establish a pattern or consistent practice, not a single event. The essence of ‘practice’ is uniformity and continuity. ‘Practice’ is not a single, isolated transaction, and it cannot be found that ITLC engaged in a ‘practice’ of misconduct. In European Trade Specialist v. Prudential Grace Lines, Inc., 17 S.R.R. 1351 (FMC1979); Maritime Services Corp v. Acme Fast Freight of Puerto Rice, 17 S.R.R. 1655; Sea-Land Service v. ACME Fast Freight, 18 S.R.R. 853 (FMC 1978), the Commission reaffirms the proposition that to find a violation of the Shipping Act, a normal practice of conduct must be established in the record and violation of regulations must be shown to be continuous. There is no evidence that this dispute was normal and routine. If ITLC did act improperly, only the existence of an isolated error has been demonstrated. Complainants’ allegations that the liquidation of three (3) containers in a single transaction cannot be considered a practice under the Shipping Act.

Complainants have the burden to demonstrate that ITLC failed to establish, observe, and enforce just and reasonable regulations and practices. Complainants have the burden to establish what the practices and procedures of ITLC were, how ITLC failed to observe those practices and procedures and demonstrate that those practices undermine the purposes of the Shipping Act.

It is respectfully submitted that the Commission erred in concluding that the actions of ITLC were a violation of section 10(d)(1) of the Shipping Act. Complainants do not establish sufficient evidence to present a Shipping Act violation. Complainants have not demonstrated what the regulations or practices of ITLC were at the time of the alleged misconduct. Further, because Complainants failed to establish a pattern or practice constituting regulations or practices, as a matter of law, their claims cannot be deemed a violation of section 10(d)(1) of the

Shipping Act. For the foregoing reasons, claims against ITLC should not be entered and Complainants' claims against ITLC should be dismissed.

IV. CONCLUSION

The Commission has a central role to oversee and regulate the nation's commerce on a large scale. Viewing the Shipping Act's broad purposes and Congress' statements of the purposes of the statute itself, the prohibitions in sections 10(d)(1) were intended to protect the flow of commerce in our nation's ocean trades. Concluding that a single act of omission or a common contract, tort, or admiralty law breach is within the prohibitions of the Shipping Act and, thus, within the subject matter jurisdiction of the Commission, simply cannot be what Congress intended.

Wherefore, Respondent ITLC respectfully requests that this Honorable Commission implement changes to the Remand Initial Decision based upon exceptions discussed herein and as supported by evidence admitted in this case.

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2014 I served copies of the foregoing document via e-mail and Express Mail on the below parties:

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