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FEDERAL	MARITIME	COMMISSION			

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 10-06

YAKOV KOBEL AND VICTOR BERKOVICH

v.

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

REMAND INITIAL DECISION¹

I. INTRODUCTION

A. Overview and Summary of Decision

This proceeding was initiated by a complaint filed with the Federal Maritime Commission on July 6, 2010. Complainants Yakov Kobel and Victor Berkovich allege that Respondents Hapag-Lloyd A.G. (“HLAG”), Hapag-Lloyd America, Inc. (“HLAI”) (HLAG and HLAI collectively referred to as “Hapag-Lloyd”), Limco Logistics, Inc. (“Limco”), and International TLC, Inc. (“ITLC”) violated various sections of the Shipping Act of 1984 (“Shipping Act”). After discovery, an evidentiary hearing, and briefing, on February 14, 2012, an Initial Decision was issued dismissing the complaint.

¹ This Remand Initial Decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. Rule 227, Rules of Practice and Procedure, 46 C.F.R. § 502.227.

On July 12, 2013, the Commission issued an Order Vacating Initial Decision In Part and Remanding For Further Proceedings. *Yakov Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R. 1720 (FMC 2013) (“Remand”). The Commission: (1) affirmed the Initial Decision dismissing all claims against the Hapag-Lloyd Respondents; (2) vacated the Initial Decision with respect to Respondent Limco’s possible violation of section 10(d)(1) and remanded for further adjudication of whether Limco failed to establish, observe, and enforce just and reasonable regulations and practices by issuing changed bills of lading and facilitating ITLC’s liquidation of Complainants’ three containers, and, if it is found that Limco violated section 10(d)(1) by such action, whether the violation caused injury to Complainants; (3) vacated the Initial Decision with respect to the dismissal of Complainants’ section 10(d)(1) claim against Respondent ITLC and remanded that issue for further adjudication consistent with its Order; and (4) affirmed the Initial Decision with respect to the dismissal of all other claims. Remand, 32 S.R.R. at 1724.

Complainants engaged Respondent ITLC to assist in transporting a total of five shipper-owned containers of cargo from Portland, Oregon, to Gdynia, Poland. ITLC engaged Respondent Limco, a licensed non-vessel-operating common carrier (“NVOCC”), to provide the transportation services. Limco in turn engaged Hapag-Lloyd, who has been dismissed from the proceeding, as the ocean common carrier for the transportation of the containers to Poland.

Complainants paid for and picked up the first two containers to arrive in Poland. A third container, which Complainants paid ITLC to transport, was damaged and delayed en route to Poland. Complainants did not make timely payments for the last two containers. Concerned about accruing storage charges for the three remaining containers, ITLC liquidated the three containers. ITLC notified Limco of the new shipper and consignee and Limco changed the bills of lading, allowing the purchaser of the containers to pick them up in Poland. The issues presented are whether ITLC was an ocean freight forwarder who violated the Shipping Act by liquidating three of the Complainants’ containers and whether Limco violated the Shipping Act by changing the shipper and consignee on the bills of lading after the liquidation.

As discussed more fully below, the evidence supports finding section 10(d)(1) Shipping Act violations by both ITLC and Limco. ITLC failed to establish, observe, and enforce just and reasonable regulations and practices in handling the three containers that it improperly liquidated. In addition, Limco failed to establish, observe, and enforce just and reasonable regulations and practices in changing the bills of lading at ITLC’s request, when it knew, or should have known, that ITLC was acting adversely to Complainants’ interests. Accordingly, Complainants have met their burden to demonstrate section 10(d)(1) Shipping Act violations by Respondents ITLC and Limco.

Familiarity with the proceedings is presumed. This decision contains three sections: the introduction, analysis and conclusions of law discussing ITLC and Limco in turn, and the order.

B. Procedural Background

This proceeding was initiated by a complaint filed with the Federal Maritime Commission alleging that the Respondents violated various provisions of the Shipping Act in connection with the transportation of three containers of cargo from Portland, Oregon, to Gdynia, Poland, in 2008. The Notice of Filing of Assignment and Complaint was issued on July 14, 2010. An Amended Complaint was filed on October 15, 2010. The Order on Dispositive Motions, issued May 24, 2011, granted in part and denied in part Respondent Hapag-Lloyd's motion to dismiss and/or for summary judgment and dismissed Complainants' claim for double damages.

A hearing was held in Portland, Oregon, from August 8-11, 2011, after which the parties filed post-trial briefs. The Initial Decision was issued on February 14, 2012. The Commission issued its Remand on July 12, 2013. Pursuant to the schedule, Complainants filed their Remand Brief on August 30, 2013; Respondents ITLC and Limco filed their Remand Opposition Briefs on October 17, 2013; and Complainants filed their Remand Reply Brief on November 4, 2013.

II. ANALYSIS AND CONCLUSIONS OF LAW

A. Burden of Proof

To prevail in a proceeding brought to enforce the Shipping Act, a complainant has the burden of proving by a preponderance of the evidence that a respondent violated the Act. 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); 46 C.F.R. § 502.155; *Sea-Land Serv. Inc.*, 30 S.R.R. 872, 889 (FMC 2006); *Exclusive Tug Franchises*, 29 S.R.R. 718, 718-19 (ALJ 2001). "[A]s of 1946 the ordinary meaning of burden of proof was burden of persuasion, and we understand the APA's unadorned reference to 'burden of proof' to refer to the burden of persuasion." *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 102 (1981). "[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose." *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman S.S. Corp. v. Gen. Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994).

B. Legal Analysis

Complainants allege that the Respondents violated 46 U.S.C. § 41102(c) of the Shipping Act, referred to by its prior designation as section 10(d)(1), which states:

(c) Practices in Handling Property. - 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.

46 U.S.C. § 41102(c).

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including two types of ocean transportation intermediaries. “The term ‘ocean transportation intermediary’ means an ocean freight forwarder or a non-vessel-operating common carrier.” 46 U.S.C. § 40102(19).

“The term ‘ocean freight forwarder’ means a person that – (A) 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 (B) processes the documentation or performs related activities incident to those shipments.” 46 U.S.C. § 40102(18). “The term ‘non-vessel-operating common carrier’ means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier.” 46 U.S.C. § 40102(16). As discussed below, the evidence shows that ITLC was an ocean freight forwarder and Limco was an NVOCC for these shipments.

C. ITLC

1. Arguments

Complainants allege that ITLC acted as a freight forwarder with respect to Complainants’ shipments of three containers and the cargo therein; ITLC’s liquidation of Complainants’ three containers was unlawful and violated section 10(d)(1); and the manner and procedure of ITLC’s liquidation of Complainants’ containers was unlawful and violated section 10(d)(1). Complainants’ Remand Brief at 2-8.

ITLC asserts that Complainants have failed to establish an unreasonable regulation or practice; Complainants arranged a number of freight forwarder activities themselves; freight forwarding services were performed by Limco; ITLC carried out its transportation obligation to arrange the shipment of Complainants’ containers; Complainants have not successfully demonstrated that ITLC failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering their property; and the efforts of ITLC were just and reasonable. ITLC Remand Opposition Brief at 2-8.

In their remand reply brief, Complainants contend that a single failure to observe and enforce just and reasonable regulations and practices is a violation of section 10(d)(1); ITLC acted as an unlicensed freight forwarder; and ITLC did not have a legal right to liquidate Complainants’ three containers. Complainants’ Remand Reply Brief at 1-4.

2. Discussion

To determine whether ITLC violated section 10(d)(1), it is necessary to determine whether ITLC operated as an ocean freight forwarder and, if so, whether it had a legal basis to liquidate Complainants' containers.

An ocean freight forwarder "dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(18). A non-vessel-operating common carrier "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 U.S.C. § 40102(16).

As the Commission explained:

A freight forwarder such as ITLC dispatches shipments only "on behalf of shippers." They are not themselves shippers. As such, a freight forwarder, such as ITLC, cannot enter into a service contract with an ocean common carrier such as Hapag-Lloyd. A freight forwarder's name may appear in the shipper identification box on the bill of lading, but the freight forwarder must be identified as the "shipper's agent." 46 C.F.R. § 515.42(a).

Remand, 32 S.R.R. at 1742.

In the case at bar, ITLC arranged for Limco Logistics, a licensed NVOCC, to make shipping arrangements for the Complainants' shipments. Findings² 3, 7. ITLC accepted payments that were made for shipping the containers and forwarded payments to Limco. Findings 30, 32, 42, 44, 78. ITLC suggested that Baltic Sea Logistics be the agent at the destination port in Poland. Finding 18. However, ITLC did not issue bills of lading. *See* Findings 13-16. Complainants purchased their own containers for shipping. Finding 9. Complainants loaded and transported the containers to the Port of Portland. Findings 23, 35, 36, 46, 47. When one container was overweight, Complainants resolved the problem and returned the container to the port. Finding 36. There is no evidence that ITLC hid the name of the NVOCC and Complainants were listed on the Limco bills of lading. Findings 24, 27, 37, 39, 49. All five containers were booked and moved under Limco's service contract with Hapag-Lloyd. Finding 15. ITLC did not have a service contract with Hapag-Lloyd. Finding 16. Bills of lading were issued by Limco, not ITLC, listing Complainant Berkovich³ as the shipper. Findings 24, 37, 49. The bills of lading list the forwarding agent as Limco as agent for

² Citations to specific numbered findings of fact in the Initial Decision are designated by "Finding" and citations to the August 2011 hearing transcript are designated by "Tr."

³ In some of the exhibits, Complainant Berkovich's name is spelled "Verkovich."

ITLC. Findings 24, 37, 49. Complainants were responsible for making arrangements to ship the containers from Poland to the Ukraine. Tr. at 362. ITLC performed a number of typical freight forwarder services.

ITLC's arguments that it is not an ocean freight forwarder are not convincing. The fact that the Complainants and Limco may have also performed some services that are traditionally performed by freight forwarders does not alter ITLC's role. A "carrier's status is determined by the nature of its service offered to the public and not upon its own declarations. A close look at its activities is necessary." *Activities, Tariff Filing Practices & Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 64 (FMC 1965). "The Commission has found that no single factor of an entity's operation is determinative of its status as a common carrier. Rather, the Commission must evaluate the indicia of common carriage on a case-by-case basis." *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, 29 S.R.R. 119, 162 (FMC 2001) (citations omitted). The evidence establishes that ITLC was an ocean freight forwarder, acting as the agent of disclosed principals.

As an ocean freight forwarder, ITLC owed a fiduciary duty to Complainants. There is no indication or argument that ITLC's fiduciary duty ended when the goods arrived in Poland. Rather, the evidence suggests that the fiduciary duty remained through the time of the liquidation. If ITLC violated its fiduciary duty, then Complainants have established a violation of section 10(d)(1).

As the Commission stated,

The Commission also has long held that ocean freight forwarders are fiduciaries performing vital, sensitive functions, and who are required to observe the highest standards of behavior toward their principals, the shippers. *Nordana Line AS v. Jamar Shipping, Inc.*, 27 S.R.R. 233, 236 (ALJ 1995). A freight forwarder's breach of its fiduciary duty can be a violation of section 10(d)(1). *See id.* Freight forwarders have long been held to high standards of care and integrity because they are fiduciaries who are in unique positions of trust and are able to inflict harm on their clients and on the shipping public. *Tractors and Farm Equipment Ltd., [v. Cosmos Shipping Co., Inc.]*, 26 S.R.R. 788, 796 (ALJ 1992)].

Remand, 32 S.R.R. at 1743.

Complainants assert that ITLC's sale of these three containers was not reasonable and did not comply with the requirements for a sale of personal property under the Uniform Commercial Code for a security interest or statutory lien, or the corresponding Washington⁴ State Statutes. Complainants Remand Brief at 7 (citing UCC 9 609, 9 613; UCC 7 308(1); RCW 62A7 308(1)). Specifically, Complainants contend that the written notice of unpaid balance does not refer to the damaged container; the notice does not indicate whether the sale will be public or private and does

⁴ Both ITLC, seller, and Oleg Remishevskiy, buyer, were located in Washington state. Complainants Ex. 82

not provide the date of sale; the notice demanded payment for amounts not owed to ITLC; the sale was not advertised in any newspaper or journal and a marine survey or cargo liquidator were not utilized; the price for the containers was not negotiated; and the sale of more goods than necessary to ensure satisfaction of an obligation is not commercially reasonable. Complainants' Remand Brief at 7-8.

The evidence shows that containers MOGU2051660 and MOGU2101987 accrued storage charges in Poland from early September 2008 until they were liquidated in February 2009. Finding 104. The damaged container, MOGU2002520, arrived and began accruing storage charges in December 2008. Findings 103, 115.

From October 2008 to February 2009, ITLC received emails from Limco Logistics and Baltic Sea Logistics indicating that ITLC would be responsible for storage and liquidation fees for the three unclaimed containers. Findings 105-107, 113; Tr. at 384. On January 9, 2009, ITLC sent a letter to Complainants entitled "Final Notice of Unpaid Balance," advising them that containers MOGU2051660 and MOGU2101987 remained in the port of Gdynia, that freight on those containers had not been paid, and that unless payment in full was made within five days, by January 14, 2009, the cargo would be utilized to cover all amounts due. Finding 108.

ITLC's January 9, 2009, letter to Complainants lists an unpaid balance of \$43,727.73 for freight and other charges. Finding 109. After telephone conversations with Complainant Kobel, ITLC issued a revised invoice listing just the unpaid freight charges for containers MOGU2051660 and MOGU2101987, which totaled \$10,200. Finding 111. Complainants paid \$1,500 of the outstanding balance on or about January 9, 2009, although they had promised to pay the full amount. Finding 112.

ITLC advertised the containers for sale with a sign in its office. Finding 116. Oleg Remishevskiy, who purchased the containers that were liquidated, was told that the three containers contained plywood and oil, and was shown the packing lists. Tr. at 307-08. ITLC indicated that he would have to pay the freight due, \$9,900, and the unpaid storage, estimated at around \$15,000. Tr. at 308. Mr. Remishevskiy agreed to purchase the containers and their contents from ITLC on February 23, 2009, for \$9,900 and fees owed to Baltic Sea Logistics. Finding 117. Mr. Remishevskiy testified that the containers held the cargo listed in the packing lists and that the cargo was not damaged. Tr. at 315, 330.

Complainants thereafter paid ITLC \$7,065.00 on or about March 26, 2009, and \$1,635.00 on or about April 2, 2009, for containers MOGU2051660 and MOGU2101987. Findings 125, 128. Complainant Victor Berkovich testified that he and another person, who was to resolve issues with documents, went to pick up the containers at the container terminal in Gdynia, Poland, on April 6, 2009, but discovered that the containers were no longer there. Finding 126. ITLC sent a letter to Complainants about the liquidation in May of 2009 and returned the payments that were made for the liquidated containers. Finding 129; Tr. at 385-87. Complainants did not learn or discover that the bills of lading had been changed for containers MOGU2002520, MOGU2051660, and

MOGU2101987 from Victor Berkovich to Oleg Remishevskiy until after April 6, 2009. Finding 127.

ITLC requested via email on March 2, 2009, that Limco change bill of lading LIM16090 for container MOGU2002520, bill of lading LIM16802 for container MOGU2051660, and bill of lading LIM16803 for container MOGU2101987 to change the listed exporter and consignee from Victor Berkovich to Oleg Remishevskiy. Finding 118. Limco notified Hapag-Lloyd of the new shipper and consignee details for containers MOGU2002520, MOGU2051660, and MOGU2101987 on March 2, 2009. Finding 119⁵; Complainants' Ex. 86-87.

The evidence establishes that Complainants paid for the first three containers they shipped, including the one that was damaged, delayed, and liquidated and the two containers that were picked up by Complainants. The other two containers that were liquidated had not been paid in full when liquidated. A "maritime lien only secures money owed pertaining to the carriage of a particular shipment." *Petra Pet, Inc. v. Panda Logistics Ltd.*, 33 S.R.R. 4, 10 (FMC 2013). Commission caselaw confirms that withholding the release of cargo based on a debt unrelated to the specific cargo in order to facilitate payment of a debt is an unreasonable practice that violates section 10(a)(1). *Bernard & Weldcraft Welding Equip. v. Supertrans Int'l, Inc.*, 29 S.R.R. 1348, 1356 n.14 (ALJ 2003); *see also Am. Steel Barge Co. v. Chesapeake & O. Coal Agency Co.*, 115 F. 669, 672 (1st Cir. 1902) (a lien against cargo "cannot be applied . . . beyond the amount of freight stipulated in the bill of lading"); *The Albert Dumois*, 54 F. 529, 530 (E.D.N.Y. 1893) ("By virtue of this provision the shipowner may enforce a lien upon the cargo for the freight stated in the respective bills of lading, but for no more.") ITLC's liquidation of container MOGU2002520, which had been paid for by the Complainants, was not reasonable.

The evidence establishes that even if ITLC could have legally placed a lien on the containers, that the liquidation did not occur in a commercially reasonable manner. ITLC placed one advertisement in their own office, but did not obtain an inventory of goods, conduct a public auction, or attempt to obtain fair market value for the shipments. ITLC failed to notify Complainants regarding the date, location, or other details of the liquidation. There is no evidence in the record that the Complainants were specifically notified that the partial payment received was insufficient, although there is evidence that Complainants had promised to submit the full amount. In addition, Complainants were not notified of the liquidation, even as they continued making payments in late March and early April. Complainants did not find out about the liquidation until after they traveled to Poland to pick up the containers. The manner in which the liquidation of all three containers was conducted was not reasonable.

Moreover, the evidence shows that ITLC failed to provide full and accurate information to Complainants, including failing to provide details of the liquidation and failing to advise of the sale or provide copies of the revised bills of lading, in violation of Commission regulations. 46 C.F.R. § 515.32(c) (requiring freight forwarders to not withhold "any information concerning a forwarding

⁵ The date in Finding 119 should be March 2, 2009. Complainants' Ex. 86, 87.

transaction from its principal” and to “exercise due diligence to assure that all information provided to its principal or provided in any export declaration, bill of lading, affidavit, or other document which the licensed freight forwarder executes in connection with a shipment is accurate”); *see also* Remand, 32 S.R.R. at 1742. The failure to fully advise the Complainants of the liquidation and status of their containers was not reasonable.

There is no evidence that ITLC established just and reasonable regulations and practices for handling shipments for which they did not receive payment or that were not picked up timely. ITLC did not identify the legal basis for its liquidation of the three containers. ITLC did not establish that it paid any storage charges or possessed the containers, or that a warehouseman lien would apply. ITLC has not argued that it could take advantage of the liquidation provision in the Limco bills of lading, and even if it could, the liquidation was not conducted at public auction, as required by the Limco bills of lading. As the Commission indicated, destination agent Baltic Sea Logistics’ “pressure for storage charges cannot justify the liquidation of Complainants’ three containers by ITLC, a freight forwarder, without any legal rights, court’s order, or Complainants’ authorization.” Remand, 32 S.R.R. at 1742.

An argument could be made that ITLC was acting in the best interest of Complainants, because selling the cargo would stop the accrual of demurrage. However, if the liquidation was done to assist Complainants, it would have been done with their knowledge and participation and would have sought the best possible price for the cargo. The evidence does not support a finding that ITLC’s actions, including the liquidation, were in the Complainants’ interest. Rather, the evidence establishes that ITLC breached its fiduciary duties to the Complainants.

For these reasons, Complainants have established that ITLC failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property when it breached its fiduciary duty by improperly liquidating Complainants’ three containers. Accordingly, Complainants have established that ITLC violated section 10(d)(1) of the Shipping Act.

D. Limco Logistics

1. Arguments

Complainants contend that Limco violated section 10(d)(1) by failing to establish, observe, and enforce just and reasonable regulations and practices by issuing changed bills of lading and facilitating ITLC’s liquidation of Complainants’ three containers and that Limco’s violation of section 10(d)(1) caused injury to Complainants. Complainants’ Remand Brief at 9-15.

Limco contends that its actions in issuing changed bills of lading used in the liquidation of three containers does not constitute a violation of section 10(d)(1); Limco properly exercised its rights under the bills of lading terms and conditions; and the Complainants were not injured. Limco Remand Opposition Brief at 1-12.

In their remand reply brief, Complainants assert that Limco violated section 10(d)(1) by changing the bills of lading without Complainants' consent or authority; Limco was not justified to change bills of lading under the terms of its bills of lading and/or published tariff; and Complainants established damages. Complainants Remand Reply Brief at 4-9.

2. Discussion

In its decision, the Commission explained that the questions relevant to a section 10(d)(1) analysis of Limco are:

(1) whether Limco established just and reasonable regulations and practices with respect to changing the bills of lading; and (2) whether Limco failed to observe and enforce just and reasonable regulations and practices by changing Complainants' three bills of lading and thus facilitating the liquidation of the containers. If Limco failed to establish just and reasonable regulations and practices for changing bills of lading, it violated section 10(d)(1). If it is found, however, that Limco established just and reasonable regulations and practices for changing bills of lading, it must then be asked whether Limco failed to observe and enforce them with respect to Complainants' three containers, and that failure caused injury to Complainants.

Remand, 32 S.R.R. at 1739.

Limco asserts that its actions were consistent with its rights under the terms of its bills of lading contract of carriage and that Limco established just and reasonable practices in issuing standard bills of lading contracts of carriage with its terms and conditions on the reverse of each, which governed the relationship between Limco and the shipper. Limco Remand Opposition Brief at 4.

Limco established a policy imposing a lien on shipments. The terms and conditions of Limco's bills of lading state:

Carrier shall have a general lien on any and all property (and documents relating thereto) of Merchant in its possession, custody or control or en route, for all claims for charges, expenses or advances incurred by Carrier in connection with any shipments of Merchant and if such claim remains unsatisfied for 30 days after demands [sic] for its payment is made, Carrier may sell at public auction.

Limco Remand Opposition Brief at 6; Limco Ex. 53 (section 17).

The liquidation, however, was not carried out by Limco. In addition, ITLC did not sell the Complainants' goods at public auction and the letter to Complainants did not provide thirty days notice, as required by Limco's terms and conditions. In other words, ITLC did not observe the requirements for liquidation imposed by Limco's bills of lading.

Limco asserts that “Complainants chose to entrust the arranging for the shipments to ITLC” and as such, “ITLC was acting as Complainants’ agent, with implicit authority to act in the place and stead of Complainants.” Limco Remand Opposition Brief at 3. This raises the issue of whether ITLC retained the implicit authority to act for the Complainants after the improper liquidation. This rests in significant part on whether Limco knew or had reason to know of the improper liquidation.

Principles of agency law provide guidance in evaluating Limco’s actions. The Restatement (Third) of Agency states that a “third party who deals with a principal through an agent, knowing or having reason to know that the agent acts adversely to the principal, does not deal in good faith” for the purposes of determining a principal’s legal relations with the third party. Restatement (Third) of Agency, § 5.04. In addition,

Apparent authority is not present when a reasonable person in the position of a third party would not believe that the principal consents to the agent’s or other actor’s conduct. If a third party has notice of facts that call the agent’s authority into question, and these facts would prompt a reasonable person to make inquiry of the principal before dealing with the agent, the agent does not act with apparent authority.

Restatement (Third) of Agency, § 3.11 (comment e).

This approach is similar to that in the Restatement (Second) of Agency, which states that:

A third person to whom a principal has manifested that an agent has authority to do an act has notice of the termination of authority when he knows, has reason to know, should know, or has been given a notification of the occurrence of an event from which, if reasonable, he would draw the inference that the principal does not consent to have the agent so act for him, that the agent does not consent so to act for the principal, or that the transaction has become impossible of execution.

Restatement (Second) of Agency, § 135. It is therefore necessary to determine whether Limco knew, or had reason to know, that ITLC was acting contrary to Complainants’ interests by liquidating the containers.

Although ITLC initially arranged the shipment with Limco, the Complainants were identified as the shippers, and Limco was aware that ITLC was the agent for disclosed principals. After the container was damaged, Limco communicated directly with Complainant Kobel. Tr. at 727. Limco and ITLC communicated on almost a daily basis regarding these containers in December 2008 and January 2009. Tr. at 742. ITLC was looking to find a way to resolve the situation and provide Limco with new instructions in order to get the cargo moving out of the port. Tr. at 744. Limco knew that ITLC was considering liquidating the containers and knew that ITLC was the freight forwarder, with a fiduciary duty to the Complainants.

ITLC's President, Mr. Barvinenko, testified at the hearing that Limco was "notified" about the sale and "knew that the containers would be sold," stating:

Q. Did you have discussions with Limco Logistics prior to selling this – these three containers?

A. I notified them, and I also asked them if they have somebody over there who would be interested just to conduct a preliminary research.

Tr. at 387. Mr. Barvinenko further testified:

Q. Did Limco ever direct you to conduct this liquidation sale of the three containers?

A. You mean did they authorize us to sell?

Q. Yes.

A. No.

Q. Did they participate with you in planning this sale?

A. Well, they were notified. They knew that containers would be sold.

Tr. at 389.

Mr. Barvinenko also testified that the idea of selling the cargo was his idea and "it wasn't the decision of Limco Logistics." Tr. at 408. When specifically asked whether the idea of selling the cargo was the decision of Limco, Mr. Barvinenko responded "No." Tr. at 408. When asked whether Limco gave advice as to selling the containers, Mr. Barvinenko, responded that Limco "insisted that containers be moved or they would be liquidated. We didn't really have any choice." Tr. at 390.

The evidence from Limco also demonstrates notice of the liquidation. In October of 2008, Limco emailed ITLC, stating that "[s]hould you not respond to this letter nor arrange for either the pick-up of the container or for new shipping instructions to be provided to us, we will consider the subject containers to be abandoned and will have to confiscate it." Finding 105. Limco, however, did not confiscate or liquidate the containers itself.

Limco's President, Mr. Lyamport, testified that "there was a lot of going back and forth with the customer, with Mr. Berkovich and International TLC in regards to trying to settle on the payment from their side." Tr. at 736. Mr. Lyamport agreed that in his deposition, he was asked whether he had any discussions with ITLC prior to changing the bills of lading, and he answered:

Well, we had numerous discussions about these, all these containers. And it was, yes, a big discussion every – almost every day at this time because I was, as I said earlier, we were pressured by Hapag-Lloyd to resolve this case. And basically International TLC had made – had made a move to find out – find a way to resolve the situation and provide us with instructions, new instructions how to change the name of the shipper, the consignee, in order to get the cargo moving out of – out of the port.

Tr. at 742-44; *see also* Complainants' Ex. 78 at 7. In his deposition, when asked if he was aware that the damaged container was sold in Poland, Mr. Lyamport responded that “we heard that they were – they were trying to liquidate it and have it sold to another party because there was – there were numerous attempts made by International TLC to collect . . . the money on their – on the shipment.” Complainants' Ex. 78 at 19.

Mr. Lyamport, when asked at the hearing about discussions regarding the liquidation sale, testified that:

You said when we were discussing the liquidation sale. We – we – we had the discussion with International TLC to get our payment – to get paid and get the containers picked up. This was – this was our – our main concern, to get the containers picked up from the port so that we have no further liabilities with Hapag-Lloyd.

Tr. at 747. Mr. Lyamport also testified in his deposition that he received a copy of the notice of unpaid balance from ITLC dated January 9, 2009. Tr. at 741; Complainants' Ex. 78 at 33.

After the liquidation sale, ITLC directed Limco to change both the shipper and consignee on the bills of lading for the three liquidated containers from Complainant Berkovich to Mr. Remishevskiy. Tr. at 392. There is no evidence that Limco questioned either ITLC or Complainants about why the change was being requested. Limco changed the bills of lading, as instructed. Tr. at 745. Limco then received final payment from ITLC. Tr. at 745; *see also* Complainants' Ex. 78 at 18 (Limco told Complainants that they should pay ITLC for the freight charges “so [Limco], in turn, can get paid”).

It appears that Limco's practice was to follow freight forwarders' instructions when making changes to bills of lading. Mr. Lyamport testified in his deposition that his staff's role was “to simply receive instructions and follow the instructions of International TLC” and that “she would receive instructions from [ITLC], and she would follow these instructions accordingly.” Complainants' Ex. 78 at 6; *see also* Complainants' Ex. 78 at 30.

There is some dispute as to whether Limco knew about the liquidation. Compare Tr. at 389 with Tr. at 747. However, the more credible testimony is from both Mr. Barvinenko and Mr. Lyamport that ITLC asked advice of Limco prior to the sale, whether through requesting

“preliminary research” or making a move to “resolve the situation” and therefore that Limco knew, or should have known, that ITLC intended to liquidate the cargo in the three containers. Tr. at 387, 744. Limco also knew or should have known that ITLC was a freight forwarder with a fiduciary duty to Complainants and without legal authority to liquidate the containers. Therefore, the evidence indicates that although Limco did not direct or participate in the liquidation, that Limco knew or should have known of the improper liquidation.

Limco was a third party dealing with a principal through ITLC, an agent. Limco knew or had reason to know that ITLC was contemplating an improper liquidation, which would be adverse to the interests of Complainants. These facts would prompt a reasonable NVOCC to inquire further before dealing with the agent. The evidence suggests that Limco did not question ITLC or the Complainants about the requested change to both the shipper and consignee on the bills of lading. Without the bill of lading changes, the liquidation would not have been effective. Once the bills of lading were changed, the improper liquidation was finalized, and Limco received final payment from ITLC.

Typically, changes to the bill of lading are within the scope of authority for the freight forwarder. Limco could have simply asked ITLC if the bill of lading changes were requested by Complainants. Indeed, if Complainants had sold the containers themselves, then the bill of lading changes would have been proper. However, the record does not reflect any discussion or suggestion that the Complainants were willing to sell the containers themselves. Rather, the record reflects that Limco knew that ITLC was investigating and planning to liquidate the containers.

Limco established the just and reasonable practice of changing bills of lading at the request of the freight forwarder. However, Limco was not entitled to rely solely on the freight forwarder’s request under these facts, because Limco knew or had reason to know that the freight forwarder was acting contrary to the principal’s interests. Accordingly, the evidence shows that Limco either did not establish or did not observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property in this situation.

An NVOCC assumes responsibility for transportation of a shipment. 46 U.S.C. § 40102(6)(A). Limco agreed to transport Complainants’ cargo to Complainants’ agent in Poland. Limco failed to deliver the three liquidated containers to Complainants in Poland. An NVOCC’s failure to fulfill its obligation constitutes a violation of section 10(d)(1). *Houben v. World Moving Serv., Inc.*, 31 S.R.R. 1400, 1405 (FMC 2010); *William J. Brewer v. Saeid B. Maralan and World Line Shipping, Inc.*, 29 S.R.R. 6, 9 (FMC 2001); *William R. Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11, 22 (ALJ 1991). By changing the bills of lading for these three containers when it knew or had reason to know that the change was requested due to an improper liquidation, Limco violated section 10(d)(1).

E. Causation

Complainants' losses were the direct result of the improper liquidation of their containers. The Respondents, however, contend that Complainants had a duty to mitigate the loss.

Injured parties suffering from a breach of contract have a duty to mitigate damages. *See, e.g., APL Co. PTE Ltd. v. Blue Water Shipping U.S. Inc.*, 592 F.3d 108, 111 (2d Cir. 2010); *Glenn Distribs. Corp. v. Carlisle Plastics, Inc.*, 297 F.3d 294, 302-303 (3d Cir. 2002); *Holbrook Chipper, Inc. v. Georgia-Pacific Corp.*, 1996 U.S. App. LEXIS 8599 (9th Cir. Or. Mar. 26, 1996). The mitigation principle states:

[A] party who has been wronged by a breach of contract may not unreasonably sit idly by and allow damages to accumulate. Such damages are not proximately caused by the breach. The law does not permit the wronged party to recover those damages that “could have [been] avoided without undue risk, burden, or humiliation.”

Corbin Contracts, § 57.11 (2005) (quoting Restatement (Second) of Contracts § 350 (1981) and citing *S. J. Groves & Sons Co. v. Warner Co.*, 576 F.2d 524 (3d Cir. 1978), Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967 (1983)). The mitigation principle only applies to mitigation actions the injured party takes after a breach, not to actions taken prior to a breach in order to prevent damages. *Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1329 (9th Cir. 1995).

The Commission has indicated the mitigation principle may be relevant to the damages analysis. *Cal. Shipping Line, Inc. v. Yangming Marine Transp. Corp.*, 25 S.R.R. 1213, 1231 (FMC 1990). In *Rose Int'l*, the Commission stated that “[m]itigation is a principle used in damages analysis to prevent a party from recovering damages for losses it could have reasonably avoided without an undue risk or burden, and is one applied by the Commission.” *Rose Int'l*, 29 S.R.R. at 191.

In the case *sub judice*, Respondents have not identified any actions that Complainants could have taken to mitigate the damages after the liquidation of their containers. To the extent that Respondents are arguing that Complainants' failure to timely pick up the containers caused the liquidation and loss, this delay did not justify the improper liquidation, as discussed above. The Respondents have not established that the Complainants failed to mitigate their damages.

F. Damages

Under 46 U.S.C. § 41305(b), a complainant is entitled to reparations for “actual injury caused by a violation of this part.” In order to recover reparations, a complainant must show with reasonable certainty that the violation of law is the proximate cause of the loss or injury. *Rose Int'l, Inc.*, 29 S.R.R. at 187; *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. at 25.

Complainants have the burden of proving entitlement to reparations.⁶

As the Federal Maritime Board explained long ago: “(a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.”

James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist., 30 S.R.R. 8, 13 (FMC 2003) (quoting *Waterman v. Stockholms Rederiaktiebolag Svea*, 3 F.M.B. 248, 249 (1950)).

Reparations will only be awarded based on actual damages. *Tractors & Farm*, 26 S.R.R. at 798. Actual damages means “compensation for the actual loss or injuries sustained by reason of the wrongdoing.” *Cal. Shipping Line, Inc.*, 25 S.R.R. at 1230. Regardless of the method used to calculate damages, “the amount [of damages] can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences.” *Tractors & Farm*, 26 S.R.R. at 798-99.

In general, courts use “market value at the port of destination” to measure damages in cargo claims. *Santiago v. Sea-Land Serv., Inc.*, 366 F. Supp. 1309, 1314 (D.P.R. 1973) (citing *St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial*, 263 U.S. 119 (1923)); see also *Atlantic Mut. Ins. Co., Inc. v. CSX Lines, LLC*, 432 F.3d 428, 435 (2d. Cir. 2005). However, the goal of awarding damages is to make the injured party whole. *Santiago*, 366 F. Supp. at 1318.

“The test of market value is at best but a convenient means of getting at the loss suffered. It may be discarded and other more accurate means resorted to if, for special reasons, it is not exact or otherwise not applicable.” *Ill. Cent. R.R. Co. v. Crail*, 281 U.S. 57, 64-65 (1930). The “market value formula is not the only measure of damages that may be applied in maritime cargo claims to ascertain the loss that may be recovered.” *Marine Office of Am. Corp. v. Lilac Marine Corp.*, 296 F. Supp. 2d 91, 104 (D.P.R. 2003). “Each case must be governed by its own facts.” *Marine Office of Am. Corp.*, 296 F. Supp. 2d at 104 (citation omitted). For example, in *Ins. Co. of N. Am. v. M/V Frio Brazil*, the market value was uncertain, so the invoice price was used to calculate damages. *Ins. Co. of N. Am. v. M/V Frio Brazil*, 729 F. Supp. 826, 836 (M.D. Fla. 1990). In addition, “in situations where a wrongdoer has by its own action prevented the precise computation of damages, the [Supreme] Court has stated that the wrongdoer must bear the risk of the uncertainty and that damages can be shown by just and reasonable estimates based on relevant data.” *Cal. Shipping Line, Inc.*, 25 S.R.R. at 1230. Therefore, the proper measure of damages is not reduced to one simple formula, but must be evaluated on the individual facts of the case and calculated in order to make the injured party whole.

⁶ Reparations under the Shipping Act and damages are synonymous. See *Federal Maritime Commission v. S.C. State Ports Auth.*, 535 U.S. 743, 775 (2002) (Breyer, J., dissenting).

Respondents contend that the market value method for damages cannot be discarded unless special reasons exist for doing so. Limco Remand Opposition Brief at 11. They argue that no special reasons exist to warrant using the liquidated cargo's purchase price in calculating damages. Limco Remand Opposition Brief at 11. However, the inability to determine market value *is* the special reason which allows the market test to be discarded. Therefore, Respondents' argument that Complainants have not shown special reasons for discarding the market value test is not persuasive.

The goods in containers MOGU2112451 and MOGU2003255, which were picked up by the Complainants, have not been sold. Finding 34. Complainants paid full retail price for the plywood and oil shipped in the three liquidated containers. Finding 131. Complainants indicate that they purchased the cargo at the value stated in the packing list for the cargo for each of the three containers, MOGU2002520, in the sum of \$13,770, MOGU2051660 in the sum of \$42,836, and MOGU2101987, in the sum of \$57,720, for a total sum of \$114,326. Finding 132. Complainants purchased three containers, MOGU2002520, MOGU2051660, and MOGU2101987, for \$1,700 each from Affordable Storage on or about April 28, 2008, for a total sum of \$5,100. Finding 133. Complainants paid transportation costs for these containers in the sum of \$2,046. Finding 133. In addition, Complainants paid \$4,600 for freight for the damaged container, MOGU2002520. Complainants' Ex.109; Tr. at 384-385. Complainants request actual damages with a total sum of \$126,072.

Limco also asserts that the Complainants are trying to recoup the value of a poor business plan from the carriers. Limco Remand Opposition Brief at 12. Indeed, it is not clear whether the oil in containers MOGU2051660 and MOGU2101987 could have been imported into the Ukraine, given its packaging and labeling, and it is undisputed that Complainants had no written contracts for the sale of the goods in the three liquidated containers, MOGU2002520, MOGU2051660, and MOGU2101987. Findings 134, 135. While Complainants clearly had a poor business plan and failed to timely pay for or pick up their containers, this does not justify or offset the actual damages Complainants suffered as a result of the improper liquidation. Whether or not Complainants were likely to make a profit, they are still entitled to their actual damages.

ITLC complains that the Complainants declined to purchase ocean cargo insurance. ITLC Remand Opposition Brief at 6. However, the parties cite no evidence that failure to purchase ocean cargo insurance would limit the actual damages available for violation of the Shipping Act. Indeed, it is not clear that insurance would even cover loss due to liquidation.

The evidence provided largely supports Complainants' allegations of damages. There are receipts for purchases of plywood, motor oil, and other items claimed as damages. Complainants' Ex. 50, 52-53, 55, 57-61, 63-65. Respondents have not objected to the evidentiary support for the alleged damages. Mr. Remishevskiy, who purchased the containers that were liquidated, testified that there was no damage at all to the cargo inside them and that the cargo matched the packing lists. Tr. at 330. In addition, the independent surveyor hired by Hapag-Lloyd confirmed that the cargo in the damaged container matched the packing list. Complainants' Ex. 46 at 1-4.

The evidence demonstrates that as a consequence of the violations by ITLC and Limco, Complainants have sustained \$126,072 in actual injury for loss of the three containers and their cargo, transportation, and freight charges. The two Respondents will be jointly and severally liable for the damages. Complainants are also entitled to interest running from the date of liquidation, February 23, 2009, to be calculated by the Commission when this judgment and decision become administratively final. *See* 46 C.F.R. § 502.253. In addition, the Complainants may be eligible for attorney's fees, upon petition, pursuant to Commission Rule 254. 46 C.F.R. § 502.254.

III. ORDER

Upon consideration of the findings and conclusions set forth above, and the determination that International TLC, Inc. and Limco Logistics, Inc. violated 46 U.S.C. § 41102(c) of the Shipping Act, it is hereby

ORDERED that the claims herein against International TLC, Inc. be **GRANTED**.

It is **FURTHER ORDERED** that the claims herein against Limco Logistics, Inc. be **GRANTED**.

It is **FURTHER ORDERED** that International TLC, Inc. and Limco Logistics, Inc. be jointly and severally liable to Yakov Kobel and Victor Berkovich for a reparation award of \$126,072.



Erin M. Wirth
Administrative Law Judge