

**FEDERAL MARITIME COMMISSION**

---

**DOCKET NO. 10-08**

---

**BIMSHA INTERNATIONAL**

**V.**

**CHIEF CARGO SERVICES, INC. AND KAISER APPAREL, INC.**

---

**RESPONDENT'S MEMORANDUM EXCEPTING TO CERTAIN FINDINGS AND  
CONCLUSIONS CONTAINED IN THE INITIAL DECISION OF THE  
ADMINISTRATIVE LAW AND BRIEF IN SUPPORT OF RESPONDENT'S  
MEMORANDUM OF EXCEPTIONS**

---

Joseph J. Perrone, Esq.  
Bennett, Giuliano, McDonnell & Perrone, LLP  
*Attorneys for Respondent Chief Cargo Services, Inc.*  
494 Eighth Avenue, 7<sup>th</sup> Floor  
New York, New York 10001  
Tel: 646-328-0120  
Fax: 646-328-0121  
E-mail: [jperrone@bgmplaw.com](mailto:jperrone@bgmplaw.com)

## **INTRODUCTION**

Respondent Chief Cargo Services, Inc., a non-vessel operating common carrier, through its attorneys, Bennett, Giuliano, McDonnell & Perrone, LLP, files its Memorandum Excepting to Certain Conclusions and Findings Contained in the Initial Decision of Administrative Law Judge Clay G. Guthridge dated December 14, 2011 and Brief in Support of Respondent's Memorandum of Exceptions.

### **A. RESPONDENT'S MEMORANDUM OF EXCEPTIONS**

On December 14, 2011, Administrative Law Judge Clay G. Guthridge served an Initial Decision (hereinafter "the Decision") in this matter. It is respectfully submitted that the within memorandum and brief are timely submitted pursuant to 46 C.F.R. § 502.227 because twenty-two days or less have passed since the date of service of the Decision. Respondent excepts to this Decision on the following grounds:

- a. The Federal Maritime Commission lacks jurisdiction to hear the case (excepting to the rationale and conclusion contained with pages 3-6 of the Decision);
- b. That Chief Cargo did not violate section 10(d)(1) of the Shipping Act of 1984 (excepting to applicability (pages 6-8) and conclusion of violation (pages 26-34) of 10(d)(1) of the Decision);
- c. Respondent's delivery of three shipments in and of itself without surrender of the original bill of lading cannot be a violation of section 10(d)(1) of 46 U.S.C. § 41102(c) (excepting to the conclusion contained on p. 34 of the Decision); and,

- d. The cease and desist order issued by the Commission should not be entered against respondent (excepting to the conclusion contained on p.38 of the Decision).

For the reasons that follow, respondent requests that changes to the Decision reflecting the foregoing exceptions be so ordered.

## **B. BRIEF IN SUPPORT OF RESPONDENT'S MEMORANDUM OF EXCEPTIONS**

### **a. The Federal Maritime Commission Lacks Subject Matter Jurisdiction Because Its Jurisdiction Does Not Extend to Claims or Causes of Actions Encompassed By Other Federal Legislation and Bimsha's Claim Does Not Involve Elements Peculiar to the Shipping Act of 1984**

As has been argued at length throughout this litigation, the Commission lacks subject matter jurisdiction to hear this case because the Commission's jurisdiction is limited to cases where there are violations of the Shipping Act of 1984, not ordinary financial disputes, Cargo One, Inc. v. COSCO, FMC 99-24 (2000). Petitioner's complaint, though cloaked in the language of the Shipping Act of 1984 for apparent jurisdictional and procedural reasons<sup>1</sup>, actually alleges causes of action under the Webb-Pomerene Act and breach of contract. The Federal Courts are the only courts of competent jurisdiction because petitioner's causes of action arise under a codified federal law, and concern a breach of a maritime contract (for which the federal courts have jurisdiction under the U.S. Constitution).

The Commission erred in its finding that petitioner did not have a contract with respondent, for carriage of its goods which has a choice of law and forum provision as

---

<sup>1</sup> Had Petitioner brought the claims as federal maritime claims for breach of the contract of affreightment, they all would have been time barred under the applicable terms since they were brought more than one (1) year after carriage.

part of its terms, which under former 8(c), now. The bills of lading are the controlling contracts for which a breach has been alleged. Just because petitioner did not allege that respondent breached a “service contract”, does not mean that the claims in its complaint don’t rise to a cause of action for a breach of contract. This was another attempt by Bimsha to deprive the proper courts of jurisdiction for this matter by way of crafty and selective pleading.

This matter is a case of admiralty and maritime jurisdiction, and thus is under the exclusive dominion of the U.S. District Courts.

**b. Respondent’s Delivery of Shipments Without Surrender of the Original Bill of Lading Was Not a Violation of the Shipping Act of 1984 Because No Practices or Procedures Prohibited Its Actions**

In analyzing the role of the Federal Maritime Commission in assessing claims brought before it, one must keep in mind the principle purpose of the Federal Maritime Commission is to encourage commercial shipping and to prevent carriers from favoring particular customers or discriminating against others. To that end, the Commission’s jurisdiction is severely limited and deals with practices and procedures, not ordinary disputes between a carrier and its customer concerning a singular or series of transactions that went wrong or cargo that became damaged. That is the province and has always been of the federal courts. In order for the federal maritime commission to have jurisdiction under the Shipping Act of 1984, the petitioner needs to fit his claims within one of the established categories.

In this particular case, plaintiff is asserting that Chief Cargo violated section 10(d)(1) of the Shipping Act of 1984 and stopped there. That is insufficient to present a justiciable issue for the Commission. It was petitioner Bimsha’s burden to establish at

the FMC hearing what the practices and procedures of the carrier were, if it alleges those procedures were deficient, what the proper procedures should be and how the carriers failure to observe those promulgated practices and procedures or unpromulgated practices and procedures lead to either favoritism or discrimination against the petitioner.

It is respectfully submitted that the Commission erred in concluding that respondent's actions were a violation of the Shipping Act of 1984. Petitioner never established, nor proffered any evidence demonstrating, that respondent failed to establish, observe, and enforce just and reasonable regulations and practices. The burden is on the petitioner to support its claims with admissible evidence, and that has simply not happened. The Commission has overlooked those requirements petitioner needed to satisfy by conclusorily determining that respondent violated the Shipping Act without offering any support for that decision. (*See* the Decision transcript, p. 33-34).

In the cases cited by the commission, European Trade Specialist v. Prudential Grace Lines and Maritime Services Corp v. The Act of Feast Fleet, 17 S.R.R. 1655, aff'd Sea & Service v. The Act Feast Fleet, 18 S.R.R. 853 (FMC 1978), aff'd sub-nom Capital Transport Inc. v. United States, 612 F.2d 1312 (1<sup>st</sup> Cir. 1979), The Commission found as a prerequisite to establishing and enforcing violations under the Shipping Act of 1984 section 10(d)(1), there must be a pattern or consistent practice, not either a single isolated event or even a small number of events, that are subject to that finding. In this case, petitioner's allegations that just three (3) of the thousands of shipments carried by Chief Cargo were delivered without surrender of the original bill of lading; that can hardly be considered a pattern or practice which is actionable under the Shipping Act of 1984. It is the position of respondent, that the ALJ decision in Houben v. World Moving Services,

Inc., 31 S.R.R. 1400 (FMC 2010). Which holds a single isolated incident can be the basis for a 10(d)(1) finding is both wrong and disregards established precedent.

Because plaintiff has failed to establish what the practices and procedures of Chief Cargo were at the time of the alleged misconduct, and because it has further failed to establish it was a pattern or practice, rather than a series of three (3) isolated events, its claims cannot, as a matter of law, be deemed a violation of section 10(d)(1) of the Shipping Act of 1984.

**c. The Cease and Desist Order is Overly Broad and Thus Unenforceable**

As the Commission correctly points out on p. 38, a cease and desist order is issued when there is a reasonable likelihood that the respondent will continue to resume “illegal” activities. That cease and desist order must be tailored to the needs and facts of the particular case. (See the Decision transcript, p. 38, citing to Marcella Shipping Co. Ltd., 23 S.R.R. 857, 871-72.)

The Commission then continues, “there is no indication that Bimsha continues to use Chief Cargo as an NVOCC for its shipments to the United States.” (See the Decision transcript, p. 38). Therefore, by the Commission’s own concession, there is no reasonable likelihood that Chief Cargo will resume the activity complained of by petitioner: the delivery of shipments to Bimsha without the original bill of lading. It is the specific acts complained of that must be the subject of a cease and desist in order for it to comply with the requirements of Marcella, supra.

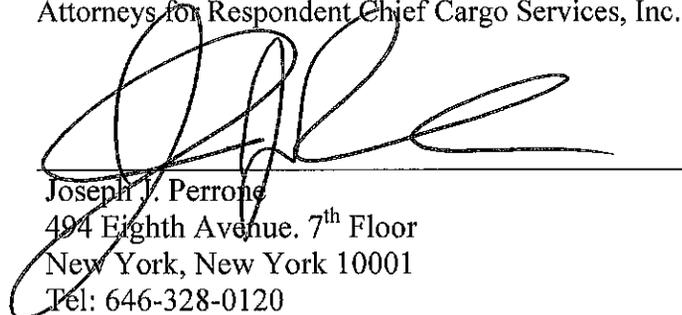
The cease and desist order is not tailored to the needs and facts of this particular case because it does not concern Bimsha or respondent’s interactions with Bimsha. Further, it is overly broad and unduly burdensome as it does not specify any parameters

or time frame for its enforcement. A cease and desist order is not meant to “protect” hypothetical entities for an indeterminate time frame.

### CONCLUSION

Wherefore, Respondent, Chief Cargo Services, Inc., respectfully requests that this Honorable Commission implement changes to its Initial Decision that comport with the exceptions taken herein.

**Bennett, Giuliano, McDonnell & Perrone, LLP**  
Attorneys for Respondent Chief Cargo Services, Inc.



---

Joseph J. Perrone  
494 Eighth Avenue, 7<sup>th</sup> Floor  
New York, New York 10001  
Tel: 646-328-0120  
Fax: 646-328-0121  
E-mail: [jperrone@bgmplaw.com](mailto:jperrone@bgmplaw.com)