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FEDERAL MARITIME COMMISSION

YAKOV KOBEL and VICTOR BERKOVICH,

Complainants,

v.

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

Respondents.

Docket No. 10-06

COMPLAINANTS' REMAND BRIEF

I

INTRODUCTION

The Federal Maritime Commission (FMC) issued an order affirming the initial decision dismissing all claims against Hapag-Lloyd and vacating the initial decision in part and remanding for further proceedings on July 12, 2013.

The court has ordered supplemental briefs addressing the issues on remand from the Commission, namely: (1) further adjudication as to whether International TLC, Inc. (ITLC), as a freight forwarder, violated Section 10(d)(1) by unlawfully liquidating Complainants three containers and cargo therein; (2) whether Limco failed to establish, observe and enforce just and reasonable regulations and practices by issuing changed bills of lading and facilitating ILTC's liquidation of Complainants' three containers, and, if found that Limco violated Section 10(d)(1) by such action, whether the violation caused injury to Complainants; and (3) addressing the issue of remedy.

These issues were addressed in Complainants' opening and reply post hearing briefs as well as in their Exceptions to the initial decision. Complainants incorporate the arguments

1 and authority cited in those briefs and will refer to certain sections of those briefs as
2 applicable in this brief.

3 Complainants response and argument as to the above issues raised by the Commission
4 on remand are set forth below.

5 II.

6 INTERNATIONAL TLC

7 **A. INTERNATIONAL TLC ACTED AS A FREIGHT FORWARDER WITH**
8 **RESPECT TO COMPLAINANTS SHIPMENTS OF THREE CONTAINERS AND**
9 **THE CARGO THEREIN.**

10 The Commission stated in its order “The record strongly indicates that ITLC acted as
11 an unlicensed freight forwarder”. Kobel et al v. Hapag-Lloyd et al p. 45, (Commission, July
12 12, 2013.) (Emphasis added)

13 The term “ocean freight forwarder” means a person who dispatches shipments from
14 the United States, via a common carrier and books or otherwise arranges space for those
15 shipments on behalf of shippers. 46 U.S.C. §40102(18). Kobel et al v. Hapag-Lloyd et al,
16 supra, p. 46.

17 The Commission referred to numerous facts supporting the conclusion that ITLC acted
18 as an unlicensed freight forwarder. In particular ITLC made shipping arrangements for the
19 shipment of Complainants three containers. ITLC accepted freight payments from
20 Complainants and forwarded these payments to Limco Logistics. ITLC designated Baltic Sea
21 Logistics (BSL) as the destination agent in Gdynia, Poland. Kobel et al v. Hapag-Lloyd et al,
22 supra p. 45.

23 In addition, ITLC prepared some export documents and provided other related services
24 incident to those shipments pursuant to U.S.C. §40102 (18)(ii). ITLC admitted that it
25 probably prepared the packing list for all five containers (Barvinenko TR 357). ITLC
26 investigated shipping the containers by rail from Poland to the Ukraine (Barvinenko TR 362).

1 The bills of lading for Complainants containers MOGU2002520 and OGU2112451,
2 MOG2003255 showed ITLC as the freight forwarder. Exhibits 1, 8 and 9. Barvinenko
3 testified that ITLC organized the entire shipment. (Barvinenko TR 362.)

4 An intermediary's conduct, not what it labels itself, will be determinative of its status.
5 Kobel et al v. Hapag-Lloyd et al, supra p. 48. EuroUSA. Shipping, Inc. 31 S.R.R. 967, 975
6 (ALJ, 2009) The above facts cited by the Commission as well as the numerous facts outlined
7 in Complainants' Opening Brief and Exceptions clearly indicate that, as inferred by the
8 Commission's order, ITLC acted as a freight forwarder with respect to the shipment of
9 Complainants' three containers.

10 (See Complainants' Opening Brief pp 28-30, Reply Brief pp 22-23, Complainants'
11 Exceptions pp 17-18.)

12 **B. TLC'S LIQUIDATION OF COMPLAINANTS' THREE CONTAINERS**
13 **WAS UNLAWFUL AND VIOLATED SECTION 10(d)(1).**

14 The Commission stated in its decision that ". . . because even if ITLC was licensed as
15 an ocean freight forwarder, the liquidation of Complainants' containers by ITLC, as an ocean
16 freight forwarder appears dubious and probably unlawful anyway." Kobel et al v. Hapag-
17 Lloyd et al supra p. 45 (Emphasis added)

18 The Commission further found that "ITLC did not demonstrate any legal right it had,
19 as a freight forwarder to liquidate Complainants' containers". Kobel et al v. Hapag-Lloyd et
20 al, supra, p. 48.

21 ITLC did not have a legal right to sell Complainants' three containers. First
22 Complainants never authorized nor consented to ITLC's sale of Complainants' containers.
23 Nor did Complainants authorize or consent to the change of the shipper/consignee for the bills
24 of lading for the three liquidated containers. (F120) (Undisputed fact 30, Barvinenko TR 393-
25 394.)

26 Second, ITLC did not have any contractual right or security interest in the containers

1 to allow ITLC to sell the containers and cargo. There was only an oral agreement to ship the
2 containers (F5) but no written agreement. (Barvinenko TR 248) ITLC was not an NVOCC at
3 the time of the shipment of these three containers and therefore did not have any effective
4 tariff applicable to these three containers. (F4, Exhibit 75)

5 Third, ITLC did not have any statutory lien such as a carrier's lien or possessory lien
6 on the containers and cargo. It was not an NVOCC for the shipment of these three containers.
7 Therefore, it did not have a carrier's lien for unpaid freight. ITLC never had possession of the
8 containers and therefore did not have a statutory possessory lien on the containers. The
9 containers were at the port in Gdynia, Poland at the time ITLC liquidated them. (See
10 Complainants' Exceptions P. 18 - 20.)

11 The minority opinion suggests that ITLC may have had a warehouseman lien but did
12 not make any judgment on this issues. Kobel et al v. Hapag-Lloyd et al, supra, p. 97.
13 However, without possession of the containers and cargo, ITLC could not have any
14 warehousemen lien. Moreover, there is no evidence that ITLC ever paid any storage charges
15 for the three liquidated containers. Kobel et al v. Hapag-Lloyd et al, supra pp. 47-48.

16 Fourth, ITLC did not have any judgment or court order authorizing it to sell
17 Complainants' containers and cargo.

18 Finally, the Commission found that ITLC did not have any beneficial interest in the
19 three liquidated containers. The Commission stated:

20 "Any advance payment ITLC may have made to Limco,
21 however, did not create any beneficial interest in the
22 Complainants' three containers that would have entitled ITLC
23 to liquidate them. 46 C.F.R. §515.2(b)" . . .

* * *

24 "Although it appears that BSL pressured to hold ITLC liable for
25 storage costs for the three containers remaining at the port of
26 Gdynia and demanded action by February 6, 2009 (F113), there
is no evidence that ITLC ever advanced any storage charges to
BSL on behalf of Complainants. Even if ITLC had advanced
some storage charges, such a payment would not have created
any beneficial interest in Complainants' cargo. BSL's pressure
for storage charges cannot justify the liquidation of
Complainants' three containers by ITLC, a freight forwarder,

1 without any legal rights, court order or Complainants'
2 authorization." Emphasis added (Kobel et al v. Hapag-Lloyd et
3 al, supra, pp. 47-48).

4 ITLC, like any other creditor, does not have any right to sell another party's property
5 without a security interest or contractual right, statutory lien or obtaining a judgment or court
6 order simply because it is owed money from the other party.

7 The Commission implicitly rejected the alleged justifications presented by ITLC in its
8 Exceptions that Complainants' failure to timely pick up the containers and failure to act on
9 ITLC's final notice justified the liquidation of the three containers to recover costs, among
10 other justifications raised in ITLC's exceptions. (See Kobel et al v. Hapag-Lloyd et al, supra,
11 p. 48 (July 12, 2013)).

12 On the contrary, the Commission referred to facts which controvert any claim for
13 abandonment, namely that Complainants paid \$1,500 on or about January 9, 2009, \$7,065 on
14 or about March 26, 2009 and \$1,635 on or about April 2, 2009 to ITLC (F112, 125, 129). See
15 Kobel et al v. Hapag-Lloyd et al, supra, pp. 47-49). Complainants paid the freight for the
16 damaged container, MOGU2002520 on July 25, 2008. (Ex 109, Barvenenko TR 384-385)
17 The payment on the containers on January through April were for containers 2051660 and
18 2101987 (Finding 112). Complainants' sent an email to Baltic Sea Logistics on February 13,
19 2009 (Ex. 105), inquiring about the storage charges (F115, Ex. 104) Complainant Berkovich
20 went to Gdynia, Poland personally to pick up the three containers on April 6, 2009. (F126)
21 Kobel et al v. Hapag-Lloyd et al supra pp 47-49 (See also Complainants' Exceptions p. 21-22
22 and Complainants' Reply Brief p. 25).

23 The Commission held that ITLC's allegations could not justify a freight forwarder's
24 unlawful liquidation and breach of the freight forwarder's fiduciary duty to the shipper.
25 Kobel et al v. Hapag-Lloyd et al, supra, p. 48-49 (July 12, 2013).

26 The Commission stated that a freight forwarder is an agent or shipper for the purposes
of arranging cargo transport and owes the greatest trust and fidelity to the shipper. Kobel et al

1 v. Hapag-Lloyd et al, supra, p. 49-50 (July 12, 2013). U.S. v. Armand Ventura, 724 F.2d 305
2 (2nd Cir., 1983).

3 A freight forwarder, as a fiduciary, performs a vital and sensitive function and is
4 required to observe the highest standards of behavior to their principal, the shipper. Kobel et
5 al v. Hapag-Lloyd et al, supra, p. 50 (July 12, 2013); Nordana Lines A.S. v. Jamar Shipping,
6 Inc. 27 S.R.R., 233, 236 (ALJ 1995). A freight forwarder's breach of its duty can be a
7 violation of Section 10(d)(1). Kobel et al v. Hapag-Lloyd et al, supra, p. 50 (July 12, 2013).
8 Citing Nordana Line A.S. v. Jamar supra.

9 Describing the fiduciary duty of a freight forwarder to the shipper, the Commission
10 stated:

11 "The Commission also has long held that ocean freight
12 forwarders are fiduciaries performing vital, sensitive functions,
13 and who are required to observe the highest standards of
14 behavior toward their principals, the shippers. Nordana Line
15 AS v. Jamar Shipping, Inc. 27 S.R.R. 233, 236 (ALJ 1995). A
16 freight forwarder's breach of its fiduciary duty can be a
17 violation of Section 10(d)(1). See id. Freight forwarders have
18 long been held to high standards of care and integrity because
19 they are fiduciaries who are in unique positions of trust and are
20 able to inflict harm on their clients and on the shipping public.
21 Tractors and Farm Equipment Ltd. 26 S.R.R. at 796" Kobel et
22 al v. Hapag-Lloyd et al, supra, p. 50.

23 (See also Complainants' Exceptions pp. 18-21 and Complainants' Opening
24 Brief pp 31-33, Complainants' Reply Brief, pp 23-26)

25 **C. THE MANNER AND PROCEDURE OF ITLC'S LIQUIDATION OF**
26 **COMPLAINANTS' CONTAINERS WAS UNLAWFUL AND VIOLATED SECTION**
10(d)(1).

Not only was the liquidation unauthorized and unlawful, but the liquidation sale was
not performed in a commercially reasonable manner. The ALJ states that she has concerns
about the manner in which the liquidation was completed, but then concludes that
Complainants did not establish that it was unreasonable. Kobel et al v. Hapag-Lloyd et al p.
39 (ALJ, Feb 14, 2012).

1 ITLC's sale of these three containers was not reasonable and did not comply with the
2 requirements for a sale of personal property under the Uniform Commercial Code for a
3 security interest or statutory lien, or the corresponding Washington State Statutes. See UCC
4 9-609, 9-613, UCC 7-308(1), RCW 62A7-308(1).

5 First, the written notice of unpaid balance does not mention or even refer to the
6 damaged container MOGU 2002520, nor any accruing storage charges on that container (Ex
7 79, Ex 80) which was ultimately liquidated with the other two containers.

8 Second, the notice does not state whether the sale will be public or private, nor does it
9 give a date or time. This notice indicates that the two containers, MOGU 2101987, and
10 MOGU 2051660 will be utilized if full payment is not made within five days (January 14,
11 2008). This time is less than the minimum requirements under the UCC or Washington State
12 statute.

13 Third, the final notice of unpaid balance falsely demanded full payment of \$43,727
14 (Ex 79, 80). Complainants did not owe Affordable Storage \$14,987, which ITLC had never
15 paid (Barvinenko, TR 380). Complainants paid Affordable Storage \$8,500 on December 30,
16 2008 (Ex 123). The false charges of \$8,000 for border standby and \$4,400 for alleged
17 overweight cargo related to containers MOGU 2112451 and MOGU 2003255, which had
18 been released to Complainants on November 21, 2008 (F33). ITLC did not pay any of these
19 storage fees (TR 380-381). Instead, ITLC was essentially attempting to collect funds for
20 Baltic Sea Logistics and other contractors (TR 380).

21 Fourth, ITLC did not advertise in any newspaper or journal, but simply posted a sign
22 in its office, which did not disclose the purchase price. (Remishevskiy TR 305-306, TR 383).
23 There was never a marine survey of the cargo in two of these containers (Barvinenko TR 383)
24 and there is no evidence that a cargo liquidator was ever used or consulted.

25 Fifth, Oleg Remishevskiy, a customer of ITLC also from Bonny Lake, Washington
26 (TR 298-301), allegedly purchased the three containers from Int'l TLC without any

1 negotiation of the purchase price of \$9,900 owed to ITLC for freight charges for MOGU
2 2101987 and MOGU 2051660. Remishevskiy never paid ITLC the \$5,600 which Int'l TLC
3 demanded from Complainants for storage charges for the two liquidated containers, as stated
4 in its false invoice (Ex 80). (Remishevskiy, TR 321).

5 Finally, the sale of more goods than necessary to ensure satisfaction of an obligation is
6 not commercially reasonable. UCC 7-308, RCW 62A7-308(1). In this case, the containers
7 and the cargo together had a documented value of approximately \$120,000. Valeriy
8 Stuchkov, a Valvoline dealer in the Ukraine, testified that there is a high demand for good
9 motor oil from the United States (TR 442-445). A sale for \$15,000 for freight (\$9,900 and
10 purported storage of \$5,600) clearly does not warrant selling all three containers and their
11 cargo when each had more than enough value to cover the freight and storage charges, when
12 the total documented value of the cargo alone was over \$114,000 (Ex 5, 16, 22, 50-62, 64,
13 65).

14 In sum, the circumstances of the unlawful liquidation sale by ITLC were clearly
15 unreasonable under both the Uniform Commercial Code and Washington State law, not to
16 mention highly suspicious. ITLC, by selling all of the containers and cargo valued at over
17 \$120,000 for only the amount that it claimed owed to it for freight, without making any effort
18 to obtain a higher price, clearly breached its fiduciary duty with respect to the customers'
19 interest in the property.

20 As stated above, a freight forwarders breach of its fiduciary duty can be a violation of
21 Section 10(d)(1). Kobel et al v. Hapag-Lloyd et al p. 50, Nordana Line A.S. v. Jamar
22 Shipping, Inc. supra P. 236 (ALJ, 1995)

23 (See also Complainants' Opening Brief pp. 33-36; Reply Brief pp 24-25 and
24 Exceptions pp 22-24.)

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1 III.

2 LIMCO LOGISTICS

3 A. LIMCO LOGISTICS VIOLATED SECTION 10(d)(1) BY FAILING TO
4 ESTABLISH, OBSERVE AND ENFORCE JUST AND REASONABLE
5 REGULATIONS AND PRACTICES BY ISSUING CHANGED BILLS OF LADING
6 AND FACILITATING ITLC'S LIQUIDATION OF COMPLAINANTS' THREE
7 CONTAINERS.

8 The Majority opinion in Kobel et al v. Hapag-Lloyd et al, supra p. 34 (July 12, 2013),
9 held that an OTI may violate Section 10(d)(1) if it fails to establish practices that are just and
10 reasonable or fails to observe and enforce its established just and reasonable practices. A
11 single failure to observe or enforce a just and reasonable practice can be a violation under
12 Section 10(d)(1). Kobel et al v. Hapag-Lloyd et al, supra, p. 22 (citation omitted). The
13 Commission stated: "A single failure is still a failure and thus a violation of Section 10(d)(1)
14 regardless of whether it was only one failure or whether the single failure is part of a sequence
15 of failures or multiple failures. Kobel et al v. Hapag-Lloyd et al, supra, p. 33.

16 Limco Logistics changed bills of lading for Complainants' three containers from
17 Complainant Viktor Berkovich to Oleg Remishevskiy. (F118). Limco notified BSL by email
18 that the shipper/consignee had been changed and attached the new Limco bills of lading
19 (F120). Complainants did not consent nor authorize Limco or ITLC to change the bills of
20 lading. (F122) Complainants never endorsed the bills of lading or granted a written power of
21 attorney to ITLC or Limco to change the shipper/consignee on the bills of lading from
22 Complainant Berkovich to Remishevskiy.(Kobel TR 116, Lyamport TR 746, 747) (F120)
23 Further, Limco did not notify, inquire or communicate with Complainants regarding the
24 change of the bills of lading at ITLC's request. Kobel et al v. Hapag-Lloyd et al, supra, p. 41.

25 The record does not show whether Limco had any established practices for changing
26 bills of lading, especially without shippers consent or authorization, nor did they present any

1 such established practice. Nevertheless, even if Limco had established just and reasonable
2 practices of changing the shipper/consignee on its bills of lading, as stated by the
3 Commission: “. . . it must then be asked whether Limco failed to observe and enforce,
4 establish just and reasonable practices with respect to Complainants’ three containers and that
5 failure caused injury to Complainants.” Kobel et al v. Hapag-Lloyd et al, supra, p. 40 (July
6 12, 2013). (Emphasis added)

7 The Commission stated that bills of lading may serve three functions: (1) a form of
8 receipt of goods; (2) a memorandum of contract of affreightment; and (3) a document of title.
9 Kobel et al v. Hapag-Lloyd et al, supra, p. 41. By changing the shipper/consignee on the bills
10 of lading of the three containers from Complainant Berkovich to Remishevskiy, Limco
11 changed the title and therefore the right to possession for these three containers and cargo to
12 Remishevskiy.

13 Although the initial decision did not find any evidence that Limco knew the containers
14 had been liquidated by ITLC (Kobel et al v. Hapag-Lloyd et al p. 31 (ALJ, 2012), the
15 Commission otherwise stated: “Considering that Limco knew or should have known that
16 Complainants were the owners of the containers, it appears questionable whether Limco did
17 not know that ITLC was selling or liquidating the containers.” Kobel et al v. Hapag-Lloyd et
18 al, supra, p. 42-43.

19 The Commission found that the Complainant and Limco had “. . . repeated personal
20 contact between Complainants and Limco personnel regarding the damaged container. Limco
21 did not notify or inquire of Complainants about ITLC’s instructions and changed the shipper
22 and consignee to Oleg Remishevskiy.” Kobel et al v. Hapag-Lloyd et al, supra, p. 41-42
23 (July 12, 2013). (Emphasis added)

24 Limco knew or should have known that Complainants, not ITLC, was the owner and
25 principal party for these three containers. Kobel et al v. Hapag-Lloyd et al supra, p. 41. Limco
26 invoices and bills of lading showed Complainant as shipper/consignee (F13) (Ex 1, 2, 12, 14

1 and 19). Limco filed export documents showing Complainants as the principal party in
2 interest (Ex 25, 26, 27) Lyamport admitted that Complainants had repeated with Limco staff
3 to the point of harassment, especially concerning the damaged container. (Lyamport TR 727-
4 728)

5 Limco also knew or should have known that ITLC had liquidated the three containers.
6 The testimony of both Lyamport of Limco and Barvinenko of ITLC prove that Limco had
7 knowledge of the liquidation sale and ITLC's plans to liquidate the containers prior to the
8 alleged liquidation sale. Barvinenko gave the following testimony:

9 "Q Did you have discussions with Limco Logistics prior to selling these three
containers?"

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

12 Q. Were you having discussions with Mr. Lyamport at Limco almost on a daily
basis leading up to the time you sold these three containers?"

13 A. Discussions about what?

14 Q. About these three containers and the storage charge.

15 A. Yes, it was obviously an issue number 1 on our list because we had multiple
16 parties contacting us on a daily basis. (TR 387-388)

17 * * *

18 "Q Did they [Limco] participate with you in planning the sale?

19 A Well, they were notified. They knew that containers would be sold."
(TR 389)

20 * * *

21 Barvinenko further testified as follows:

22 "Q So did Limco give you advice as to selling these containers?"

23 A They insisted that the containers be moved or they would be liquidated. We
really didn't have any choice." (Barvinenko, TR 390)

24 Mr. Lyamport admitted in his deposition that he received a copy of the notice of
25 unpaid balance from ITLC to Berkovich dated January 9, 2009 (Complainants' exhibit 79)
26 sometime in January, 2009 before the sale. (Lyamport deposition, exhibit 78, pp. 33, dep p.

1 126-127). Both Lyamport and Barvinenko admitted having "big discussions" about these
2 containers almost every day (Barvinenko TR 387-388; Lyamport TR 743-744).

3 Lyamport testified at the hearing as follows:

4 "Q. Okay, Starting at the top on page 117, the question was: Did you have any
5 discussions with International TLC prior to changing these - - these bills of lading on these
6 three containers?

7 And your answer was: Discussion as far as what like?

8 And the question was: That they should be changed in order for you to get paid.

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

15 What was your response?

16 A. Yes.

17 Q. So you did have a lot of discussions leading up to these - - the sale - -

18 A. We had discussion, yes - -

19 Q. Okay.

20 A. - - about these containers."

21 (Lyamport TR 743, 744, Lyamport dep. Ex 78, p. 30, dep p. 117)

22 Furthermore, neither Lyamport nor Barvinenko denied that Limco knew that ITLC
23 liquidated the three containers.

24 There is substantial evidence to prove by a preponderance of evidence that Limco
25 knew or should have known about ITLC's liquidation sale to meet the burden of proof on this
26 issue.

27 An NVOCC assumes responsibility for transportation of a shipment 46. U.S.C.
28 §40102(6)(A). Kobel et al v. Hapag-Lloyd et al, supra, p. 41. An NVOCC's failure to fulfill
29 its obligation constitutes a violation of Section 10(d)(1). Kobel et al v. Hapag-Lloyd et al,
30 supra, p. 43, Paul Houben v. World Moving Service, Inc. 31 S.R.R. 1400, 1405 (FMC, 2010).

1 Mis-delivery by an NVOCC can be a violation of Section 10(d)(1). Bishma
2 International v. Chief Cargo, Docket No. 10-06 p. 34 (ALJ, December 14, 2011); DSW
3 International 1898 F at p. 21 (ALJ, March 29, 2009, rev. on other grounds and dismissed July
4 23, 2012).

5 A carrier is strictly liable for mis-delivery of goods. Schoenbaum Admiralty and
6 Maritime Law, Section 10-18, p. 860, (Fifth Ed. 2011). A common carrier is strictly liable for
7 damages to a person having title or right to possession of goods when the carrier delivers
8 goods to a person not entitled. 49 U.S.C. 80111(a), C-Art Ltd. v. Hong Kong Highland Line
9 America SA, 940 F2d 530 (9th Cir., 1991, Cert denied, 503, U.S. 1005).

10 The Webb-Pomerene Act provides that the right to a bill of lading may be negotiated
11 by endorsement only by a person who has the right to convey title. 49 U.S.C. 80104(1)(a).
12 Berkovich was listed as shipper/consignee on Limco's three bills of lading and was the only
13 person who had a right to change the bills of lading. Limco could not change or issue a new
14 bill of lading for these containers without Complainants' consent or endorsement. 49 U.S.C.
15 §80116(2)(A)(B).

16 A carrier is not liable for failure to deliver goods to a consignee or owner of the goods
17 or holder of the bill of lading if the goods were sold lawfully to satisfied a carrier's lien.
18 49 U.S.C. §80111(d)(2). However, Limco does not fall within this exception because ITLC
19 sold the goods but was not a carrier and therefore could not sell to satisfy a carrier's lien.
20 Limco admitted that ITLC was a freight forwarder for these shipments. (Lyamport TR 678)

21 A violation of the Webb-Pomerene Act, 49 U.S.C. §80101 to 80166 by an NVOCC
22 can be a violation of Section 10(d)(1). (See Bishma International v. Chief Cargo supra pp. 5,
23 6, 34.)

24 (See also Complainants' Exceptions pp 12-15; Complainants' Opening Brief, pp 14-16, 19-20
25 and Complainants' Reply pp 19-21.)

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1 **B. LIMCO'S VIOLATION OF SECTION 10(d)(1) CAUSED INJURY TO**
2 **COMPLAINANTS**

3 Limco's conduct of changing the shipper/consignee on the bills of lading for
4 Complainants' three containers from Complainant Berkovich to Remishevskiy changed the
5 title from Complainants to Remishevskiy. Limco's notice to BSL and Hapag-Lloyd, changed
6 the title and right to possession, thereby depriving Complainants the right to possess these
7 containers and the title to them.

8 On March 2, 2009, Limco notified BSL and Hapag-Lloyd of the change of the
9 shipper/consignee on the bills of lading and attached a new Limco bills of lading. (F118, 119,
10 Ex 85). Title and right to possession shifted from Complainants to Remishevskiy for these
11 three containers. At that point, Complainants would not have been able to obtain possession
12 of their containers even if they had demanded them at the port in Gdynia, Poland.

13 Remishevskiy traveled to Gdynia, Poland in mid-March, 2009 with copies of the new Limco
14 bills of lading and personally pick up all of these containers. (Remishevskiy, TR 314-316)

15 The written contract between ITLC and Remishevskiy (Ex 82) could not have enabled
16 Remishevskiy to obtain possession of these containers. The contract showed ITLC as the
17 seller and not Complainants. Limco's bills of lading still had Complainant Berkovich as the
18 shipper/consignee. (Ex. 1, 12, 19) There was never any document which transferred title for
19 the three liquidated containers from Complainants to ITLC.

20 The changed bills of lading from Complainant Berkovich to Remishevskiy and
21 subsequent notification to BSL with new bills of lading was necessary to facilitate and cause a
22 mis-delivery of these containers to Remishevskiy. The contract of sale between ITLC and
23 Remishevskiy alone could not have allowed Remishevskiy to obtain possession of these
24 containers because there was a break in chain of the title between Complainant Berkovich and
25 ITLC.

26 Although ITLC played a major role in liquidating the containers, as stated in the

1 Commission's decision, (Kobel et al v. Hapag-Lloyd et al, supra, p. 42 (July 12, 2013)) ITLC
2 had nothing to sell and without Limco's bills of lading with the change of the
3 shipper/consignee, thereby changing the title and ownership of the containers and cargo
4 therein.

5 More importantly, the contract of sale between ITLC and Remishevskiy itself states:

6 "After the buyer has paid in full the \$9,900 U.S.A., the three (3)
7 bills of lading will be changed to the buyers' name." Ex 82

8 Thus, the issuance of new bills of lading with the shipper, consignee changed to
9 Remishevskiy was an intragal part of the liquidation sale and directly resulted in mis-delivery
10 of the containers to Remishevskiy.

11 IV

12 REMEDY

13 The Shipping Act, Section 11 allows reparations to Complainants for actual injury
14 caused by a violation. Reparations under the act and damages are synonymous. FMC v.
15 South Carolina State Court, 535 U.S. 743, 775 (2002, Breyer dissenting) The Commission
16 generally follows the law of damages followed by the courts. Tractor and Farm Equipment
17 Ltd. v Cosmos Shipping Inc. 26 S.R.R. 788, 798, 799 (ALJ, 1992), Tianshan Inc. v. Tianjian
18 Hua Feng Transport Agency LTD, Docket No. 0804 at p. 21 (March 9, 2011). A complainant
19 must show with reasonable certainty that the violation of law is the proximate cause of a loss
20 or injury. Kobel et al v. Hapag-Lloyd et al, supra, p. 40 (ALJ July 12, 2012); Rose
21 International, Inc. v. Overseas Moving Network International LTD, 29 S.R.R. 119, 187
22 (Commission 2001); Flannigan Shipping v. Lake Charles Harbor and Terminal District, 30
23 S.R.R. 8, 13 (2003). Three factors for reparations are: (1) damages must be the proximate
24 result of violations of the statute in question; (2) no presumption of damages; and (3) the
25 proof of pecuniary loss resulting from the unlawful act. Tractors and Farm Equipment LTD v.
26 Cosmos Shipping, Inc. 26 S.R.R. 788, 798, 799 (ALJ 1992). Kobel et al v. Hapag-Lloyd et al

1 p. 40 (ALJ, 2012)

2 In this case, the conduct and actions of both ITLC and Limco caused the pecuniary
3 loss to Complainants and, in particular, the loss of their three containers and the cargo therein.
4 As stated in above in Section II (B), ITLC unlawfully sold the three containers and cargo to
5 Remishevskiy without any legal right or authority from the Complainants. Then, at ITLC's
6 request, Limco Logistics changed the bills of lading for Complainants' three containers to
7 Remishevskiy.

8 By changing the bills of lading, Limco facilitated the mis-delivery to Remishevskiy
9 and which denied Complainants' right to possession and title to their property. (See Section
10 III above.)

11 In the initial decision the ALJ stated there was no way to determine the contents in
12 each of the three containers. Kobel et al v. Hapag-Lloyd et al, supra p. 40 (ALJ 2012). Later
13 in the initial decision the ALJ found:

14 "Moreover, determination of the contents of all but the damaged
15 container depend on Complainants' statements". Kobel et al v.
Hapag-Lloyd et al, supra p. 40, (ALJ, 2012

16 However, in addition to Complainants' statements (F132) Remishevskiy testified that
17 when he picked up the three containers in Poland in March, 2009, he inspected all three
18 containers and found the contents of the containers were consistent with the packaging list for
19 each container prepared by Complainants. (Remishevskiy, TR 315) Remishevskiy also
20 testified that the cargo in the containers was not damaged. (TR 330) Furthermore, Hapag-
21 Lloyd hired an independent surveyor to survey the damaged container in Hamburg, Germany
22 in November, 2008. That survey confirmed that the cargo in the damaged container was
23 identical to the packing list prepared by Complainants and did not indicate that there was any
24 damage to the cargo. (Ex 46, p. 2-3, Ex 1, Ex 5)

25 There is no evidence in the record to dispute that the three containers did not contain
26 the cargo listed on the packing list as testified by Complainants. There is substantial evidence

1 to prove by a preponderance of the evidence that the cargo in the containers was the same as
2 that listed in the packing list for each container based upon Complainants testimony as
3 corroborated by the packing list and invoices, survey and Remishevskiy testimony.

4 Generally, damages for cargo claims is the market value of the cargo at the port of
5 destination DSW International v. Commonwealth, p. 22 Initial Decision (ALJ 2009), reversed
6 on other grounds (Commission, 2012) The objective of the market value rule is to make the
7 damaged party whole, and the court will look primarily at the economic realities of the
8 situation. Schoenbaum, Admiralty and Maritime Law, Vol I Section 10-38, p. 946 (5th Ed.,
9 2011) The market value rule is flexible. Schoenbaum, Admiralty and Maritime Law p. 948.
10 Market value may be discarded and a more accurate means resorted to if market value is not
11 appropriate. DSW supra p. 22, (ALJ, 2009) Illinois Central Railroad v. Crail 281 U.S. 57,
12 64, (1930). Schoenbaum Admiralty and Maritime Law supra Vol 1, §10-38 p. 946-949.

13 In DSW v. Commonwealth supra, p. 24 (ALJ, 2009), complainants could not prove
14 the market value for cars in Nigeria. The ALJ in that case discarded the market value and the
15 complainants were allowed the amount of the proven investment improving and shipping the
16 vehicles.

17 Although Complainants had no written contract for the sale of the cargo in the Ukraine
18 (F135), Complainants are nevertheless entitled to their investment costs for the cargo in the
19 containers, even if the market value in the Ukraine cannot be ascertained

20 Courts use the invoice price as the value of undamaged goods when the fair market
21 value is uncertain or not proved. Schoenbaum Admiralty and Maritime Law, supra Vol I,
22 §10-38 p. 945 (5th Ed., 2011)

23 Complainants testified that they purchased the cargo for the price listed on the packing
24 list for containers MOGU2002520 in the sum of \$13,770 and MOGU2051660 in the sum of
25 \$42,836 and MOGU2101987 in the sum of \$57,720 (F132). In addition to Complainants'
26 testimony concerning the amount paid for the cargo and containers, documentary evidence

1 such as invoices, receipts and cancelled checks, corroborates the amounts paid (Ex 50-62, 64-
2 65) Complainants purchased the cargo at retail price from retail stores (Home Depot,
3 WalMart, Joes' etc.) several months before shipment as stated in the above invoice, receipts
4 and cancelled checks (F131) (Ex 50-62, 64-65) (See p. 25 of Complainants' Exceptions.)

5 With respect to the damaged container (MOGU2002520) Remishevskiy testified that
6 he sold the cargo in the damaged container in the Ukraine. He sold the plywood for \$10,000,
7 an amount greater than the amount listed on the packing list. He sold the two ATVs each for
8 \$1,000 and kept two ATVs for himself. The total amount of cargo sold by Remishevskiy is
9 \$12,000. (Remishevskiy TR 323-324) Furthermore, Remishevskiy's sale of the cargo is also
10 evidence of the market value of the goods in the Ukraine that were contained in the damaged
11 container.

12 The testimony and documentary evidence of receipts and cancelled checks support
13 Complainants' claim for investment costs for cargo as stated in the packing lists for
14 MOGU2002520 in the sum of \$13,770, for MOGU2051660 in the sum of \$42,836 and for
15 MOGU2101987 in the sum of \$57,720.

16 Besides the cargo, Complainants are entitled to reimbursement for the loss of their
17 containers and shipping costs. Complainants paid \$1,700 each for the three containers for a
18 total of \$5,100. Complainants paid transportation costs for these containers in the sum of
19 \$2,046 for a total expense of \$7,146 (F133, Ex. 121, 122)

20 Complainants also paid \$4,600 freight charge for of the damaged container
21 MOGU2002520 on July 25, 2008 which they never received (Ex.109, Barvinenko TR 384-
22 385).

23 In sum, the total amount of Complainants' damages are: cargo in the sum of \$114,326;
24 loss of containers and transportation costs of the containers of \$7,146 and freight charges for
25 the damaged container never received in the sum of \$4,600. The total amount of
26 Complainants' damages resulting from ITLC and Limco's violation of Section 10(d)(1) is the

1 sum of \$126,072.

2 (See Complainants' exceptions p. 24-26 and Complainants' Opening Post Trial Brief pp. 36-
3 37.)

4 V.

5 **CONCLUSION**

6 ITLC, acting as a freight forwarder, has violated Section 10(d)(1) by its unlawful
7 liquidation of Complainants' three containers.

8 Limco wrongfully changed the shipper/consignee on the liquidated containers and
9 issued three new Limco bills of lading without Complainants' authorization or legal authority.
10 Limco's change of the bills of lading contributed and enabled the mis-delivery to
11 Remishevskiy in Poland.

12 Complainants are entitled to reparations for loss of valuable cargo of at least \$114,326
13 as well as costs for the containers and transportation of \$7,146 and freight charges of \$4,600
14 for a total sum of \$126,072.

15 In sum, Complainants should be awarded reparations against ITLC and Limco in a
16 total sum of \$126, 072

17 Dated this _____ day of August, 2013.

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19 _____
20 Donald P. Roach, OSB 75317
21 Attorney for Complainants
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