BEFORE THE

FEDERAL MARITIME COMMISSION

Yakov Kobel and Victor Berkovich v. Hapag-Lloyd (America), Inc.; Hapag-Lloyd AG; Limco Logistics, Inc.; and International TLC, Inc.	))))))))))	Docket No. 10-06

REMAND OPPOSITION BRIEF OF LIMCO LOGISTICS, INC.

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I. PRELIMINARY STATEMENT

On July 19, 2013 the Commission issued an Order directing Supplemental Briefs to be submitted by Complainants, Yakov Kobel and Victor Berkovich, and Respondents International TLC, Inc. ("ITLC") and Limco Logistics Inc. ("Limco"). As to Limco, the Commission remanded the action to determine whether Limco violated section 10(d)(1) by issuing changed bills of lading and facilitating ITLC's liquidation of Complainants' three containers. Additionally, if there was a violation, to determine whether it caused injury to Complainants.

As discussed in more detail below, it is clear that Limco's actions were not in violation of 10(d)(1). Limco established just and reasonable practices through the publication of its bill of lading and tariff, both containing its contract of carriage terms and conditions, in compliance with the Regulations of the Federal Maritime Commission, 46 C.F.R. Part 520. At all times relevant to the shipping transactions, Limco operated pursuant to its bill of lading contract of carriage terms and conditions. Further, Limco's handling of the subject shipment was consistent with its common law rights and duties. Moreover, Complainants have failed to establish damages as there is no market for the shipped cargo in the Ukraine and Complainants cannot establish "special reasons" for an alternative valuation.

Therefore, the Administrative Law Judge should reaffirm her February 14, 2012 Decision in favor of Limco.

II. ARGUMENT

A. Limco's Actions in Issuing Changed Bills of Lading Used in the Liquidation of Three Containers Does Not Constitute a Violation of Section 10(d)(1)

1. Burden of Proof

A complainant alleging that a respondent violated section 10(d)(1) of the Act "has the initial burden of proof to establish the violation." Bimsha International v. Chief Cargo Services, Inc. and Kaiser Apparel, Inc., Docket No. 10-08, December 14, 2011, 2011 WL 7144011 (F.M.C.), 6-7. As noted by the ALJ, "[t]o prevail in a proceeding brought to enforce the Shipping Act, a complainant has the burden of proving by a preponderance of the evidence that the respondents violated the Act. 5 U.S.C. §566(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., 39 S.R.R. 872, 889 (FMC 2006); Exclusive Tug Franchises, 29 S.R.R. 718, 718-719 (ALJ 2001). "[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose." Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 281 (1994); Initial Decision of The Honorable Erin Masson Wirth, A.L.J. dated February 14, 2012, ("ALJ decision"), pg. 18.

Complainants have not satisfied this burden.

In Complainants' Remand Brief, Complainants misrepresent and inaccurately apply the law discussed in Bishma International v. Chief Cargo. In Bishma, the complainant alleges that Chief Cargo violated the Shipping Act by releasing each shipment without requiring presentation of an original bill of lading. There is no discussion of misdelivery in Bishma and misdelivery is irrelevant to the facts at hand. There is no factual parallel in Bishma to this action.

Complainants further allege that the Webb-Pomerene Act, 49 U.S.C. 80104(1)(a)[sic] ("Webb-Pomerene") provides that a negotiable bill of lading may be negotiated by indorsement and only Berkovich could "change the bills of lading." However, Complainants ignore the remaining sections of Webb-Pomerene which permit a negotiable bill of lading to be "negotiated by a person possessing the bill, regardless of the way in which the person got possession, if a common carrier, under the terms of the bill, undertakes to deliver the goods to that person." 49

U.S.C. 80104(c)(3). Thus, Berkovich is not the only party permitted to "change the bills of lading."

Complainants also allege Limco could not change or issue a new bill of lading without Complainants' consent. Consent, however, was given.

The record is clear that Complainants chose to entrust the arranging for the shipments to ITLC. As such, ITLC was acting as Complainants' agent, with implicit authority to act in the place and stead of Complainants.[1] In this situation, ITLC found a buyer to purchase the shipments as the Complainants had failed to remit freight and storage charges which were owed over five (5) months prior.

There is a saying that one who acts through an agent does so at his peril. Complainants, having clothed ITLC with authority to act on their behalf, may not now disavow ITLC's actions because the consequences of ITLC's actions were not to their liking. Any conduct by ITLC which Complainants claim caused them injury was a direct result of their own neglect of their interests by failing to timely remit payment of outstanding freight and storage charges.

Finally, in a seeming effort to buffer the contention that only Berkovich could change the bills of lading, Complainants cite to the section of Webb-Pomerene which finds a person may be fined or imprisoned for not more than five (5) years if he "(2) knowingly or with intent to defraud—(A) falsely makes, alters, or copies a bill of lading subject to this chapter; (B) utters, publishes, or issues a falsely made, altered, or copied bill subject to this chapter." 49 U.S.C. § 80116(2)(A),(B). However, the mere citation to § 80116 by Complainants in support of its contention is insufficient as Complainants fail to provide any evidence of a violation. Therefore, the necessary predicate for invoking § 80116 is missing.

[1] Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 33-34, 125 S. Ct. 385, 399, 160 L. Ed. 2d 283 (2004) (citing, see, e.g., Kukje Hwajae Ins. Co. v. The M/V Hyundai Liberty, 294 F.3d 1171, 1175-1177 (9th Cir. 2002) (an intermediary acted as a cargo owner's agent when negotiating a bill of lading with a downstream carrier).

2. Limco Properly Exercised Its Rights Under the Bill of Lading Terms and Conditions

Limco's actions were consistent with its rights under the terms of its bill of lading contract of carriage. Complainants retained the assistance of ITLC in order to arrange for the transportation of its containers to the Ukraine. Trial Transcript, 25:9; 69:9-14. ITLC then engaged Limco to provide NVOCC services for the transportation of the five shipments.

Limco established just and reasonable practices in issuing standard bill of lading contracts of carriage with its terms and conditions on the reverse of each, which governed the relationship between Limco and the shipper. These terms and conditions of carriage were available for download on Limco's website and appear in Limco's tariff, which Limco is required to issue and be maintained by the Federal Maritime Commission. See, 46 CFR Part 520.

The name "Viktor Verkovich" was listed as the shipper, consignee and notify party on the bills of lading. The terms and conditions define "Merchant" as the "Shipper, the Receiver, the Consignor, the Holder of this Bill of Lading and any person having a present or future interest in the Goods or any **person acting on behalf of any of the above-mentioned persons**." (emphasis added). Trial Ex. 53.

Mr. Kobel was acting on behalf of Mr. Berkovich in retaining ITLC to arrange for the shipment. ITLC then arranged all of the particulars of the shipment for Mr. Berkovich and Mr. Kobel. It is clear Complainants and ITLC, acting on Complainants' behalf, constitute "Merchants" under the terms and conditions. Thus, Complainants and ITLC are bound to Limco's terms and conditions.

Complainants may argue they are not contractually bound to the bills of lading as ITLC engaged Limco, not Complainants personally. However, ITLC was Complainants agent and therefore Complainants are liable for its actions.[2]

"Where a contract is made by an agent, the principal whom he represents may maintain an action upon it in his own name, although the name of the principal was not disclosed at the time of making the contract; and, although the contract be in writing, parol evidence is admissible to show that the agent was acting for his principal." Ford v. Williams, 62 U.S. 287, 289, 16 L. Ed. 36 (1858). The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction. Ford v. Williams, 62 U.S. 287, 289, 16 L. Ed. 36 (1858); Kaloe Shipping Co. Ltd. v. Goltens Serv. Co., Inc., 315 F. App'x 877, 880 (11th Cir. 2009); Educators Mut. Ins. Ass'n v. Evans, 2011 UT App 171, 258 P.3d 598, 614 (Further, "'[a] contract of the agent is [a] contract of the principal.'" Garland v. Fleischmann, 831 P.2d 107, 110 (Utah 1992) (quoting Ford v. Williams, 62 U.S. 287, 289, 21 How. 287, 16 L.Ed. 36 (1858)).); CC-Aventura, Inc. v. Weitz Co., LLC, 06-21598CIV, 2007 WL 2176027 (S.D. Fla. July 25, 2007).

[2] In arranging for the shipment, ITLC acted "on behalf of" the shipper, or as Complainants agent. Three elements are necessary for an agency relationship: "(1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties *that the principal will be in control of the undertaking.*" *Id.* (emphasis added); *see also Beckenstein v. Potter & Carrier, Inc.*, 191 Conn. at 134, 464 A.2d 6 (noting critical feature of principal's "right to control the day-to-day work of the alleged agent" (citing Second Restatement § 14))." Johnson v. Priceline.com, Inc., 711 F.3d 271, 277 (2d Cir. 2013); See also, In re M/V Rickmers Genoa Litig., 622 F. Supp. 2d 56, 74 (S.D.N.Y. 2009), opinion adhered to on reconsideration, 643 F. Supp. 2d 553 (S.D.N.Y. 2009) and aff'd sub nom. Chem One, Ltd. v. M/V RICKMERS GENOA, 502 F. App'x 66 (2d Cir. 2012). Here, Complainants retained ITLC to arrange and contract with those necessary to carry out the shipment. There is no dispute ITLC accepted those responsibilities. Further, Complainants retained control, as evidenced by their record of interaction with ITLC throughout these shipping transactions.

Section 16 of Limco's bill of lading contract of carriage terms and conditions states:

> 16.2 Freight shall be deemed earned on receipt of goods by Carrier, the goods lost or not lost, whether the freight is intended to be prepaid or collected at destination . . . Merchant shall remain liable for all charges hereunder notwithstanding any extension of credit to the freight forwarder or broker by Carrier. Full freight shall be paid on damaged or unsound goods.
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> 16.3 . . . Merchant shall be liable for all demurrage or detention charges imposed on the goods or their containers by third parties.
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> 16.4 The Shipper, consignee, holder hereof, and owner of the goods, and their principals, shall be jointly and severally liable to the Carrier for the payment of all freight and charges, including advances and shall, in any referral for collection or action for monies due to Carrier, upon recovery by Carrier, pay the expenses of collection and litigation, including reasonable attorneys' fees.

The terms and conditions also contain the following lien provision:

> 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 for its payment is made, Carrier may sell at public auction

Pursuant to this provision, Limco, as the carrier, possessed a valid lien against all parties constituting the Merchant. In this case, the "merchants" were Complainants and ITLC.

Complainants admit that Limco could have properly sold the goods pursuant to 49 U.S.C. § 80111(d)(2). ("[a] common carrier is not liable for failure to deliver goods to the consignee or owner of the goods or a holder of the bill if the goods have been sold lawfully to satisfy the carrier's lien."). Complainants argue, however, that ITLC sold the goods and not Limco. However, Complainants ignore that throughout the shipping transactions, Complainants and ITLC were both liable under the terms and conditions.

Further, both were required to take action to mitigate damages that might result from the abandonment, actual or constructive, or liquidation of the cargo. Land O'Lakes, Inc. v. Superior Serv. Transp of Wis., Inc., 500 F. Supp. 2d 1150, 1156 (E.D. Wis. 2007) ("As in any action for contract damages, a shipper is under a duty to take reasonable steps to reduce the amount of its loss. Paper Magic Group, Inc. v. J.B. Hunt Transport, Inc., 318 F.3d 458, 461 (3d Cir.2003)."). Complainants failed to discharge their duty to mitigate when they refused to pay outstanding freight and storage charges, despite numerous notices, and sat idly by as the charges increased exponentially. Consequently, their claim for indemnity for the value of the goods is a direct result of their own acts or omissions.

The relationship between Complainants and ITLC, Limco's role and responsibilities, and ITLC's control over the shipment in furtherance of its agency authority conferred by Complainants, has been consistently recognized in all parties' briefs as well as in the ALJ's decision and the Order Vacating Initial Decision In Part and Remanding For Further Proceedings dated July 12, 2013 ("Commission Order").

For example, the ALJ found Limco was not directly involved with receiving, handling, or storing property and was not responsible for the accidental damage and inadvertent loading of one of the containers. ALJ Decision, pg. 31. The ALJ also found Limco promptly conveyed information regarding the damaged container and placed a hold on the two undamaged liquidated containers based on Complainant's nonpayment of freight following their arrival on September 1, 2008. Id.; Trial Transcript 265:9-10. The ALJ concluded there was no evidence that "Limco acted unreasonably in handling any of these containers. Under these facts, Complainants have not demonstrated an unreasonable practice or procedure." Id.

The ALJ later elaborated finding that ITLC arranged for Limco to provide NVOCC services for the shipments, ITLC obtained payment for the containers and then forwarded payment to Limco, and ITLC suggested the use of Baltic Sea Logistics. Id. at 37. Ultimately, the ALJ determined, "[t]he cause of the liquidation of two of these containers, MOGU2051660 and MOGU2101987, was Complainant's failure to pay the agreed upon contract amount for the shipment for over five months." ALJ Decision, pg. 37.

The Commission thereafter recognized ITLC was the predominate actor in this transaction. The Commission concluded ITLC, not Limco, played a major role in liquidating the three containers. Commission Order, pg. 42.

Michael Lyamport of Limco testified that Hapag Lloyd was applying pressure to Limco to remit the freight charges due for the carriage of the shipments. Trial Transcript, 74:1-9. This was due to the fact that Limco was the shipper on the Hapag Lloyd bill of lading and therefore primarily liable as the "Merchant" to Hapag Lloyd for the freight and related charges, such as demurrage, if any.

Out of necessity, therefore, Limco pursued ITLC and Complainants for payment of the outstanding freight and storage charges. In turn, ITLC requested payment from Complainants. Id. at 402:8-13; 485:22-25. More specifically, ITLC spoke with Complainants in the fall of 2008, if not earlier, and then on January 9, 2009 expressly informed Complainants that their cargo would be sold to cover all dues were payment not made in five (5) days. Trial Transcript, 232:3-25, 282:20-283, 503:24-25. ITLC then waited an additional two (2) months before initiating liquidation of the cargo.

As a "Merchant" under the bill of lading, and agent of the shippers, ITLC was contractually responsible to Limco for the charges. As a result, ITLC instructed Limco to change the bill of lading so that the merchandise in the containers could be sold to a third-party to satisfy the outstanding freight and storage charges. Id. at 744:1-12, 745. ITLC provided all of the relevant information directing Limco to reissue the bills. Id. at 682:15-20; 713:10; 392:20-343:3.

ITLC, as a Merchant under the bill of lading, was liable to Limco for the unpaid freight and storage charges. Limco was legally justified in seeking compensation from both the Complainants and ITLC. ITLC took all the necessary steps to mitigate the continued accrual of the storage charges by liquidating the cargo to satisfy the accumulated debts.

Limco is not in violation of Section 10(d)(1) because it pursued its bill of lading contract of carriage rights by seeking to recover all fees and charges owed. However, Limco had no control or discretion over the specific actions taken by ITLC in liquidating the containers. Such control was the right and responsibility of Complainants and their conduct clearly evidences they ignored or abandoned their responsibilities under the bills of lading.

B. Complainants Were Not Injured

Complainants accurately recount the law required to establish reparations or damages with respect to Limco. Damages must be the proximate result of violations of the statute; there is no presumption of damages; and there must be proof of pecuniary loss. Tractor and Farm Equipment LTD v. Cosmos Shipping, Inc., 26 S.R.R. 788, 798, 799 (ALJ 1992) (citing James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist., 30 S.R.R. 8, 13 (2003).).

Complainants argue in changing the bills of lading, Limco facilitated the misdelivery which denied Complainants' the right to possession and title of their property.[3] Complainants

[3] Complainants argue there is misdelivery relying on Bishma where the complainants allege that Chief Cargo violated the Shipping Act by releasing each shipment without requiring presentation of an original bill of lading. In making this argument, Complainants provide no analysis as to why there is a misdelivery in this action. Again, misdelivery is irrelevant to the facts at hand. There is no factual parallel in Bishma to this action

explicitly stated that Limco could enforce a carrier's lien on the cargo. As noted above, Complainants' cargo was subject to the carrier's lien as a result of Complainants' failure to pay for freight charges on two containers and storage charges on all three. Two of the containers incurred storage fees from September through March; the third from December to March 2009.

Complainants are solely responsible for any injury they incurred as they did not properly care for the cargo or fulfill their obligations under the bill of lading agreement with Limco. Pursuant to Limco's bill of lading contract of carriage terms, Complainants, through ITLC, agreed to accept delivery of their cargo and pay for any freight charges and storage fees incurred. Complainants failed to remit payment.

Moreover, despite being aware of the accruing storage and outstanding freight charges for over five (5) months, Complainants failed and/or neglected to take any action to secure the delivery or return of the shipments. In so doing, Complainants failed to mitigate or limit the possible damages they now seek to recover as a consequence of such neglect. Erco Indus. Ltd. v. Seaboard Coast Line R. Co., 644 F.2d 424, 432 (5th Cir. 1981); Land O'Lakes, Inc. v. Superior Serv. Transp. of Wisconsin, Inc., 06-C-692, 2008 WL 1969592 (E.D. Wis. May 5, 2008) ("The failure of a shipper to mitigate his damages results in the reduction of the recovery that the shipper otherwise would have been entitled to receive for the loss by the amount of the loss that could have been avoided had the shipper acted reasonably.).

Second, Complainants have failed to establish damages in the amount requested. While Limco agreed the contents of the containers were consistent with the quantities alleged in the packing list, Complainants ignore the fact that these products were not marketable as shipped. The cargo was shipped in gallons where the point of delivery required liters and the labeling was in English as opposed to Russian and English or just Russian. Trial Transcript, 251:22-253:1.

Ignoring this, Complainants argue they are entitled to the price paid for the products shipped in the three containers. In support of this position, Complainants cite to DSW International Inc. v. Commonwealth Shipping and Abou Merhi Lines, LLC, Docket No. 1898(f), March 29, 2011, for the proposition that the ALJ may discard the market value for the amount of the proven investment. However, the ALJ in DSW found there were "special reasons" for discarding the market value test. Those special reasons do not exist here, nor have Complainants offered any for consideration.

In DSW, the Complainants alleged they had contracted to sell two vehicles in Nigeria for over $20,000.00 per vehicle. Complainants were not able to provide any credible evidence of this market value of the vehicles in Nigeria. As a result, the Court relied upon values which were a mere fraction of the alleged amount, specifically $5,000.00 and $1,750.00, which were the alleged cost of the vehicles in the United States.

The Court did look to the purchase price in the U.S. However, this was done because no accurate data could be provided for the value of the vehicles in Nigeria and the purchase price in the U.S. was significantly less than that sought. Where complainants could not meet their burden, the Court deferred to a value for which there was evidence and was less than that being asked, not penalizing respondent for complainant's failure.

In this instance, the five (5) containers were to be shipped to the Ukraine. Two arrived without issue. At the time of the trial, the cargo which is the subject of this proceeding had been in the Ukraine for over two years and it remained unsold by the Complainants. Trial Transcript, 264:9-24. There is limited or no market for the cargo in Ukraine as demonstrated by Complainants' inability to sell the merchandise. Trial Transcript, 522:1-22. Instead, both containers and the entire contents still remain on the Complainants' family's property. The lack of market is the reason why the cargo is not worth that which Complainants' paid, not Limco's handling of the shipments.

It is clear Complainants are trying to recoup the value of a poor business plan and investment, from the carriers. Complainants have not demonstrated "special reasons" as to why market value at the destination should not be the appropriate measure. Moreover, Complainants cannot demonstrate Limco's actions were the proximate cause of any alleged damage nor can they prove their pecuniary loss. Complainants have not and cannot satisfy their burden to warrant damages in the amount claimed.

III. CONCLUSION

Complainants have failed to establish that Limco's actions constitute a violation of section 10(d)(1) of the Shipping Act. When Complainants failed to pay freight and storage charges for over six months, Limco, by recourse against ITLC as a "Merchant" and as the agent of Complainants, was entitled to pursue its full rights under the terms and conditions, including the carrier's lien. ITLC was thereafter obliged to take action to satisfy the Complainants' debts. Complainants have not satisfied their burden of demonstrating that Limco violated the Shipping Act and cannot show they were injured as a result of Limco's actions.

For the foregoing reasons, the Commission should reaffirm the ALJ's February 14, 2012 Decision dismissing the action with respect to Limco.

Dated: New York, New York
October 7, 2013

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record by e-mailing and mailing via first-class mail a copy to each such person.

Dated: New York, New York
October 7, 2013

By: ______________________
Richard L. Furman