

BEFORE THE
FEDERAL MARITIME COMMISSION

YAKOV KOBEL AND VICTOR BERKOVICH
Complainants

v.

FMC Docket No. 10-06

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

REMAND OPPOSITION BRIEF
OF RESPONDENT INTERNATIONAL TLC, INC

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I. INTRODUCTION

Pursuant to the Order Scheduling Supplemental Briefs issued on July 19th of 2013, International TLC, Inc., (“International TLC”) hereby submit their remand opposition brief. The Federal Maritime Commission (“Commission”) dismissed the claims against Hapag-Lloyd and remanded Section 10(d)(1) claims against International TLC and Limco Logistics. The following remand opposition brief will address the issue of whether International TLC violated Section 10(d)(1) of the Shipping Act, and will integrate pertinent findings that have been addressed in its post-trial brief.

II. JUST AND REASONABLE REGULATIONS AND PRACTICES UNDER SECTION 10(D)(1) (46 U.S.C. § 41102(c))

The issues raised herein are focused on whether the Respondents violated Section 10(d)(1) and the argument that if a regulated party has established, observed, and enforced just and reasonable regulations and practices, then is a single failure by the party to either observe or enforce a regulation and practice a violation of Section 10(d)(1). Specifically, is the involvement of three containers in a single transaction and an alleged breach of contract, a violation of the Shipping Act? The Shipping Act was enacted for an essential purpose to establish a nondiscriminatory regulatory process for the common carriage of goods and to encourage and promote the growth and development of competitive and efficient transportation system in the ocean commerce, as set forth in 46 U.S.C. § 40101. In its large context, the Shipping Act was subsequently amended to protect and prevent harm to the ocean international trade. Section 10(d)(1) states that:

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

Congress used a similar interpretation of statutory language in the Packers and Stockyards Act, 1921, 7 U.S.C. § 208(a), which states:

(a) It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

Citing numerous other sections of the Shipping Act in its order served July 12, 2013, the Commission states, “All of the above-cited sections of the Shipping Act are focused on conduct wholly peculiar to ocean commerce or on abusive maritime business practices that would have substantive adverse impacts on the ocean commerce of the United States.” Kobel et al v. Hapag-Lloyd et al p. 57 (Commission 2013). Concluding that a single event, an isolated act, or a simple cargo claim heard in courts under contract law is a violation of the Shipping Act undermines Shipping Act’s broad purpose. The language used suggests that this statute does not apply to a single failure by a party to either observe or enforce a regulation and practice. Congress’s use of the plural term “regulations and practices” in the Shipping Act of 1916 suggests that a single event does not constitute a Shipping Act violation. Commission cites Whitam v. Chicago, R.I. & P. Ry. Co. in its order, which states that the court held that the term “practice”... “implies systematic doing of the act complained of, and usually as applied to carriers and shippers generally.” Kobel et al v. Hapag-Lloyd et al p. 67 (Commission 2013). The conclusion that the Shipping Act language, “establish, observe, and enforce just and reasonable practices and regulations” was intended to apply to single event or an isolated omission, would suggest that Congress really intended to imply “strict liability” when it enacted this law. If that was indeed its purpose, a complainant could easily rewrite a simple conversion claim or COGSA claim into a

Section 10(d)(1) claim, and therefore evade COGSA's one-year statute of limitation, and at the same time be awarded attorney fees reparations. Similarly, although characterizing their claim as being a Shipping Act violation, Complainants' causes of action are actually COGSA claims based on damage or cargo loss/conversion, as demonstrated by the evidence on record.

Complainant Kobel repeatedly reported being "defrauded" by the Respondents (Kobel, TR p. 166, 195) Furthermore, Complainants' attorney characterized the conduct of the Respondents as "negligence" and "conversion of Mr. Kobel and Mr. Berkovich's property" (International TLC Exhibit 58, page 4). In addition, in Complainants' Reply to Respondents' Post-Trial Brief, Complainants allege "failure/wrongful delivery" of their cargo, which presents elements required for asserting a claim under the common law tort of conversion. Making their case more confounding is the fact that Complaint Berkovich continued to do business with International TLC, multiple times, after the liquidation sale of their containers. (Int'l TLC Ex. 61, Ex. 62, Ex. 63, Ex. 64) (Berkovich, TR 486-489).

Complainants failed to demonstrate, by preponderance of the evidence, that their claim is anything more than a simple contract breach claim. To demonstrate a Shipping Act violation, Complainants first must establish a pattern or consistent practice, not a single event. Second, Complainants have the burden to demonstrate that International TLC failed to establish, observe, and enforce just and reasonable regulations and practices. Having failed to establish that it was a pattern or practice and what the unreasonable practices and procedures of International TLC were at the time of the alleged misconduct, Complainants' claims are unfounded. The Commission should affirm the conclusions of law reached in the Initial Decision.

III. COMPLAINANTS' REMAND BRIEF

In their remand brief, Complainants focus on the claim that International TLC might have acted as a freight forwarder. Complainants assert that because International TLC probably prepared the packing list and investigated shipping the container by rail from Poland to the Ukraine, it may have acted as a freight forwarder. (Complainants' Remand Brief p. 2). However, as the ALJ stated in the Initial Decision filed on February 14, 2012, Complainants themselves arranged a number of freight forwarding activities, including purchase, loading, transportation of containers, and arranging transportation of containers from Poland to the Ukraine. Kobel et al v. Hapag-Lloyd et al p. 37 (ALJ, 2012). Furthermore, International TLC never hid the name of the NVOCC Limco Logistics. Complainants communicated directly with Limco Logistics about their shipment. International TLC offered the Complainants to work directly with Limco Logistics, omitting International TLC, an offer which Complainants declined. (Barvinenko, TR 359, 360).

Freight forwarding services, among which are: ordering cargo to port; preparing and/or processing export declarations and bills of lading; booking or confirming cargo space; arranging warehouse space; arranging cargo insurance; clearing shipments in accordance with United States Government export regulations, were all performed by a licensed OTI, which was Limco Logistics in this case. 46 C.F.R. § 515.2(i). Precisely, Limco Logistics ordered the cargo to port; made a booking with Hapag-Lloyd; arranged space on the vessel; prepared bills of lading; cleared Complainants' shipments; and filed the AES EEI with U.S. Customs, all of which are freight forwarding services and subsequently performed by Limco Logistics. Therefore, Complainants' claim that International TLC might have acted as a freight forwarder with respect to their cargo is unfounded and not supported by the evidence, and should be dismissed. Because

Complainants declined to purchase ocean cargo insurance for their allegedly valuable cargo, this service was not done by Limco Logistics, which otherwise would have been. As evidenced by the record, International TLC did not operate as a freight forwarder, and therefore did not violate Section 10(d)(1) of the Shipping Act as alleged by Complainants.

Even if International TLC had operated as an ocean freight forwarder, which is not supported by the evidence, the weight of the evidence in the record supports that it carried out its transportation obligation to arrange the shipment of Complainants' containers to Poland. The evidence on record demonstrates that International TLC provided sufficient time and numerous opportunities for Complainants to make their full ocean freight payments. International TLC offered the Complainants over seven months to make their payment for the containers, which is far more than reasonably necessary or commonly allotted. International TLC thoroughly and consistently worked on Complainants' behalf to ensure the delivery of their cargo to Poland, and to resolve any problems when they arose in regards to the damaged container. Additionally, International TLC made frequent phone calls to the Complainants to inform them about the status of their containers, and kept Complainants fully informed at all times. (Barvinenko, TR 399, 413, 414). Throughout their business relationship with the Complainants, International TLC made more phone calls to the Complainants with respect to the status of their shipment, than the number of calls received from Complainants. (Barvinenko, TR 413, 414) (International TLC Ex. 32). Phone records show that just between October 15, 2008 and November 18, 2008, International TLC placed 30 phone calls to Mr. Kobel, whereas Mr. Kobel called merely one time to International TLC during that entire 30-plus day period. Even if International TLC had operated as a freight forwarder, Complainants have not successfully demonstrated that International TLC failed to establish, observe, and enforce just and reasonable regulations and

practices relating to or connected with receiving, handling, storing, or delivering their property. Complainants' claims are unfounded, unsupported by the evidence, and should be dismissed.

IV. EFFORTS OF INTERNATIONAL TLC WERE JUST AND REASONABLE

Based on the weight of the evidence in the record, it is evident that the efforts of International TLC were just and reasonable in its dealing with Complainants and attempts to collect the owing freight on the containers. When Complainants' containers arrived in Poland, they continued to accrue storage charges for over five months, until the containers had to be utilized. After months of numerous opportunities to collect freight and warn the Complainants that the containers must urgently be removed from Poland, the containers remained at the port, and were deemed to be abandoned by Complainants as Complainants would not come in contact with International TLC, failed to pay the amount owing, and did not comply with the Final Notice that was issued. There was no indication whether Complainants intended to ever pay for or pick up the containers.

All of the cargo in Complainants' containers was purchased at retail prices and Complainants not did not know the regulations concerning the import of oil products to the Ukraine. Complainants' cargo was not in compliance with Ukrainian import regulations. (Kobel, TR 215, 251, 252). This cargo would not have been able to be sold in the Ukraine, given its packaging and labeling, and can be confirmed by the fact that none of the cargo in their previous two containers was sold and the two loaded containers, MOGU2112451 and MOGU2003255, continue to sit on their father-in-law's property in the Ukraine. (Kobel, TR 219, 220).

The cause of the loss of Complainants' containers was their unreasonable delay in fully paying for the shipping costs and picking up the containers from Poland. Complainants' argument with respect to the delay in paying and picking up their containers is devoid of merit.

Complainants failed to mitigate their losses, and even if International TLC had operated as a freight forwarder at the time, a claim that is unsupported by the evidence, Complainants have not demonstrated a causal relationship to the loss. Conclusively, International TLC fulfilled its agreement to deliver the Complainants' containers to Poland, and Complainants have not established that the liquidation sale was unreasonable. Complainants have not established that International TLC failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property, and therefore are not entitled to reparations.

V. CONCLUSION

As explained in this brief, Complainants' claims are unfounded and lack merit. Complainants' interpretation of Section 10(d)(1) is contrary to the Congress' broad purposes of the statute itself. Complainants demand a "strict liability" interpretation of Section 10(d)(1), arguing that any deviation from normal practices would be considered unjust and unreasonable and would hold the carrier liable for any damages as a result of such deviation. This interpretation is implausible and would lead to aberration from the statutory language. Complainants Kobel repeatedly reported being "defrauded" by the Respondents, and their Counsel characterized the conduct of the Respondents as "negligence" and "conversion of Mr. Kobel and Mr. Berkovich's property". From their own language, it is apparent that Complainants' claims are based on conversion or breach of contract and are covered by COGSA. Complainants' have not demonstrated a failure to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property, and are therefore not entitled to reparations. For the foregoing reasons, Complainants' claim should be dismissed and the Initial Decision affirmed.

Respectfully submitted,

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