

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 11-08

NDAHENDEKIRE BARBARA

v.

**AFRICAN SHIPPING; NJOROGÉ MUHIA; ALCO LOGISTICS, LLC;
BRENDA ALEXANDER; AND AIR 7 SEAS TRANSPORT LOGISTICS, INC.**

INITIAL DECISION¹

I. INTRODUCTION

A. Overview and Summary of Decision

On May 10, 2011, the Federal Maritime Commission issued a notice of filing of complaint and assignment (“Notice”). The Notice indicates that complainant Ndahendekire Barbara filed a claim alleging that respondents African Shipping; Njoroge Muhia; Alco Logistics, LLC; Brenda Alexander; and Air 7 Seas Transport Logistics, Inc. violated section 10(d)(1) of the Shipping Act of 1984, now codified at 46 U.S.C. § 41102(c).²

¹ The initial decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.318. An appeal by a party must be filed with the Commission’s Office of the Secretary within twenty-two days from the date of service of the decision. 46 C.F.R. § 502.318.

² On October 14, 2006, the President signed a bill reenacting title 46, United States Code, Shipping, as positive law. The bill’s purpose was to “reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law.” H.R. Rep. 109-170, at 2 (2005).

This case is notable for the lack of participation by all of the parties. In January 2012, counsel for complainant admitted that she had lost contact with the complainant, who left for work in Europe in November 2011. Recording of January 6, 2012, hearing at minute 14:10-14:50, *see also* minute 10:50. It appears that contact was not reestablished, as the complainant has had limited participation, including not filing any additional evidence or affidavits since the complaint was filed. Nonetheless, counsel for complainant has continued to pursue the case. Complainant has not met her burden to establish that the respondents violated the Shipping Act.

As explained below, the evidence in the record does not support a finding that the respondents violated the Shipping Act. Air 7 Seas Transport Logistics, Inc. was voluntarily dismissed with prejudice on February 16, 2012. Alco Logistics, LLC and Ms. Brenda Alexander were never served with the complaint and therefore will be dismissed without prejudice. Njoroge Muhia and African Shipping appeared *pro se* and there is not sufficient evidence to find that they violated the Shipping Act. Both remaining sets of respondents will be discussed in turn after summarizing the procedural history.

B. Procedural History

On May 2, 2011, the Federal Maritime Commission received the complaint in this matter. On May 10, 2011, a notice of filing of complaint and assignment, notice of assignment, and initial order were issued.

On June 16, 2011, Air 7 Seas filed its answer and a cross-claim seeking indemnity and contribution from the other respondents in the event it was subject to a judgement in this matter.

On November 15, 2011, a notice of default, order to show cause, and order requiring additional briefing was served (“November Order”). Responses to the November Order were filed by the complainant, Air 7 Seas, and Mr. Muhia and African Shipping.

On December 20, 2011, a pre-hearing conference was scheduled for January 6, 2012. Counsel for complainant and counsel for respondent Air 7 Seas appeared for the conference, which was recorded but not transcribed. Rulings from the pre-hearing conference were memorialized in a January 9, 2012, order. These counsel requested a second pre-hearing conference which was scheduled for January 26, 2012. All of the parties failed to appear at the January 26, 2012, pre-hearing conference. On January 27, 2012, a briefing schedule was issued.

On February 16, 2012, Air 7 Seas was voluntarily dismissed with prejudice.

Pursuant to the briefing schedule, complainant’s brief was due on February 27, 2012; Respondents’ opposition was due on March 14, 2012; and complainant’s reply was due on March 21, 2012. Complainant filed a timely four page brief. No responses were received and the time for filing a response has passed. Accordingly, the matter is ripe for decision.

II. ANALYSIS

A. Alco Logistics and Brenda Alexander

In November, the complainant, Ndahendekire Barbara, was ordered to show cause why the complaint against Alco Logistics and Brenda Alexander should not be dismissed for failure to serve within thirty days, as required by Commission rules. November Order at 3.

In complainant's response to the November Order, she contends that Brenda Alexander and Alco Logistics played a crucial role in the non-delivery of the shipments; failed to pay Air 7 Seas and World Cargo Transport; fraudulently contracted with complainant to deliver her shipment; and disappeared and left no forwarding contact information. Complainant's Response to Notice of Default, Order to Show Cause, and Order Requiring Additional Briefing ("Response") (Dec. 22, 2011) at 1-2. Complainant also objects to not being given the opportunity to serve the complaint. Response at 2.

After the parties' arguments were heard in a January 6, 2012, telephone pre-hearing conference, complainant was granted additional time to continue to attempt to serve Alco Logistics and Brenda Alexander, pursuant to Commission rule 113(b). January 9, 2012, Order at 2. There is no indication that any subsequent attempts at service were made or that these parties have been served with the complaint. The complainant does not mention Alco Logistics or Brenda Alexander in her brief.

The Commission's rules state that the "presiding officer may dismiss a complaint that has not been served within thirty (30) days after the complaint was filed." 46 C.F.R. § 502.113(d). Similarly, the Federal Rules of Civil Procedure state that if the complaint cannot be served within 120 days, it may be dismissed without prejudice. Fed. R. Civ. P. 4(m). Pursuant to Rule 113, the complaint may be served by the complainant as well as by the Commission. 46 C.F.R. § 502.113(b).

This case was filed almost a year ago and during that time, Alco Logistics and Brenda Alexander have not been served with the complaint. The complainant was advised in November 2011 that failure to serve these parties would result in their dismissal. November Order at 3. The complainant was given additional time to perfect service. There is no evidence of any subsequent attempts at service. Indeed, these parties are not even mentioned in the complainant's brief. Accordingly, Alco Logistics and Brenda Alexander will be dismissed without prejudice.

B. Njoroge Muhia and African Shipping

1. Background

In November 2011, respondents Njoroge Muhia and African Shipping, who were in default, were ordered to show cause why default judgment should not be entered against them. November Order at 2. In addition, the complainant was advised that she:

must provide additional information supporting [her] allegations including the damages alleged. It is not clear whether African Shipping is incorporated. If it is, the complainant may need to pierce the corporate veil to find Njoroge Muhia personally liable for the company's actions. In addition, the damages requested are not itemized. The complainant must provide an itemized list of damages, supported by evidence.

November Order at 2.

Njoroge Muhia and African Shipping sent the Commission a letter dated December 5, 2011, which was served on the parties on December 20, 2011. Order Accepting Submission (Dec. 20, 2011). This document was accepted as an answer by both Mr. Muhia and African Shipping to the complaint and Air 7 Seas cross-claim as well as a response to the November Order. January 9, 2012, Order at 2. Mr. Muhia indicated that he was the acting agent for "what was known as African Shipping" and that he was unable to afford the services of a lawyer but that he would "explain the situation to the best of [his] knowledge." Answer at 1.

Complainant's brief and proposed findings were filed on March 8, 2012. Complainant requests a default judgment against Mr. Muhia and African Shipping. No findings of fact are proposed and no evidence is included in complainant's brief and proposed findings. No response was filed by any of the respondents.

2. Default

Complainant, in her brief, contends:

The Initial Complaint was served to African Shipping and Mr. Muhia at 2260 Robinson Rd., Marietta, GA 30068; all documents this office has mailed to that address have been returned by the United States Postal Services as undeliverable; therefore, this office has been unable to send discovery requests to the Respondents African Shipping and Mr. Muhia.

Complainant's Brief at 2. Complainant also argues that Mr. Muhia did not serve his answer properly, did not provide an updated mailing and email address, and did not appear at either of the telephone pre-hearing conferences. Complainant's Brief at 2.

The Marietta address is the address provided by the complainant for African Shipping. Complaint at 3. However, the mailing addresses provided by the complainant in the complaint for Mr. Muhia is in Woodstock, GA. Complaint at 3. This Woodstock address is the same address listed by Mr. Muhia in the answer. Answer at 1. The complainant does not allege that mail to this address was undeliverable, and, in fact, Mr. Muhia and African Shipping responded to the order to show cause sent to this address. Thus, there is no evidence that the original address provided by Mr. Muhia is not valid and complainant does not provide evidence of any attempts to serve Mr. Muhia at this address.

It does not appear that the complainant attempted to serve discovery on Mr. Muhia at the Woodstock address listed in both the complaint and the answer. Pursuant to Commission Rule 201, discovery must commence at the time the initial pleading is filed. 46 C.F.R. § 502.201(b). It should also be noted that although complainant had contact information for respondent Air 7 Seas, as of January 6, 2012, complainant had not served discovery requests on that respondent, either. Recording of January 6, 2012, hearing at minute 14:50-15:05. African Shipping and Mr. Muhia did not fail to respond to discovery as there is no indication that any discovery was ever requested from them.

The complainant also objects to respondents' failure to participate in two telephone pre-hearing conferences. Counsel for complainant, however, also failed to attend the most recent pre-hearing conference, even though it was scheduled at her request. Mr. Muhia did fail to formally provide a current email address as required in two orders, however, that is not a sufficient basis to find him in default, particularly as parties are not required to have email addresses.

A party is not entitled to a default judgment as a matter of right, even where the defendant is technically in default. *Lewis v. Lynn*, 236 F.3d 766, 767 (5th Cir. 2001). Default judgments are not favored and should be reserved for extreme situations. *Willis v. Freeman*, 83 Fed. Appx. 803, 805 (7th Cir. 2003). Because "defaults are generally disfavored and are reserved for rare occasions, when doubt exists as to whether a default should be granted or vacated, the doubt should be resolved in favor of the defaulting party." *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d Cir. 1993). "Further, concerns regarding the protection of a litigant's rights are heightened when the party held in default appears *pro se*." *Enron Oil Corp. v. Diakuhara*, 10 F.3d at 96. The Commission, like other administrative bodies, has treated *pro se* litigants with special leniency. *Bernard & Weldcraft Welding Equipment v. Supertrans Int'l, Inc.*, 29 S.R.R. 1340, 1341-1342 (ALJ 2002).

Dismissal by default is not favored where the case can be addressed on the merits. Because there is no evidence that Mr. Muhia and African Shipping failed to respond to any discovery requests, the extreme remedy of default is not appropriate. Indeed, the limited amount of evidence submitted by Mr. Muhia – an answer and a few documents – is very similar to the substantive evidence submitted by the complainant – a complaint and a few documents. Given this scenario, a decision will be rendered on the arguments and evidence submitted by the parties. Accordingly, under these facts, a default decision is not appropriate and the case will be decided on the merits.

3. Merits

The complainant did not provide proposed findings of fact, proposed findings of law, or supporting evidence in her briefs and Mr. Muhia and African Shipping did not file a brief. However, the complaint and answer both attach supporting documents. The parties have seen the documents attached to the complaint and answer and have not objected to them. The documents attached to the complaint and the answer will be admitted and utilized in making a determination on the merits. The positions of complainant and respondents will be discussed prior to discussing the merits.

This Initial Decision is based on the pleadings, exhibits, briefs, and documents filed by the parties. Under the Administrative Procedures Act (“APA”), an Administrative Law Judge may not issue an order “except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C. § 556(d); *Steadman v. SEC*, 450 U.S. 91, 102 (1981). Administrative adjudicators are “not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are ‘material.’” *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959); *In re Amrep Corp.*, 102 F.T.C. 1362, 1670 (1983).

The Shipping Act provides that a “person may file with the . . . Commission a sworn complaint alleging a violation of this part.” 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 999 (FMC 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co., Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000) (allegations of violations of section 10(d)(1) involving just and reasonable regulations and practices “are inherently related to Shipping Act prohibitions and are therefore appropriately brought before the Commission.”).

a. Complainant’s position

The complaint indicates that the Ndahendekire Foundation supplies medical equipment and food to the people of Uganda, Sudan, and Congo. Complaint at 11. The complainant alleges that the respondents failed to ensure that her containers were delivered safely, securely, and on time to the required destination and that this failure caused her to incur additional shipping costs and the loss of her contract to provide supplies and equipment. Complaint at 4.

According to the complaint, on July 23, 2009, Mr. Muhia, Chief Executive Officer of African Shipping, notified Ms. Barbara that the cost for shipping two containers would be \$8500 and for two chassis would be \$6400, amounts which were invoiced on September 10, 2009. Complaint at 5; attachments A-B. On August 17, 2009, Ms. Barbara met with Mr. Muhia to measure the chassis. Complaint at 5. Partial payments for the shipments were made by Ms. Barbara in August and September of 2009. Complaint at 5. The complaint indicates issues with transportation to the port and unexpected storage charges resulting in an agreement for Ms. Barbara to pay \$600 in cash, leaving a remaining balance of \$3000. Complaint at 6. The complaint states that Mr. Muhia refused to release the bill of lading for the chassis without the final payment, which was made on November 9, 2009. Complaint at 6-7. It is not clear when a bill of lading was provided to complainant, but she indicates that it was not genuine. Complaint at 7.

The complaint further alleges that the containers arrived on October 28, 2009, and were accruing demurrage charges but that Mr. Muhia said he was unaware the containers had been delivered. Complaint at 7. Ms. Barbara and Mr. Muhia called World Cargo Transport which stated that Ms. Alexander and Alco Logistics had not paid it. Complaint at 8. Ms. Barbara then learned from Air 7 Seas that they had not been paid to ship the chassis which were in Belgium, *en route*, delayed pending additional payments. Complaint at 8. The complaint alleges that Ms. Barbara

made a number of telephone calls and states that “[e]ach person Ms. Barbara spoke to directed her to speak with Ms. Alexander. Ms. Alexander was unresponsive.” Complaint at 9.

Ms. Barbara negotiated with Air 7 Seas and Atlantic Container for the release of her containers. She paid additional amounts to obtain the release, was taxed by customs for four vehicles rather than two vehicles, and was charged demurrages from October 2009 to April 2010. Complaint at 10. The Ndahendekire Foundation lost its contracts by failing to meet the delivery deadlines. Complaint at 10-11. The complainant seeks \$150,000 in damages. Complaint at 11. These amounts are not itemized and there are no receipts or documents supporting the amount alleged.

The complaint includes two invoices from African Shipping to The Ndahendekire Foundation for a total of four containers, copy of a check from Barbara Ndahendekire to African Shipping for \$12,500, a receipt from African Shipping to Ms. Ndahendekire for \$12,000, another copy of one of the African Shipping Invoices with notations regarding a \$3000 payment; and a letter from Air 7 Seas to Atlantic Container Line authorizing release of a shipment to the Ndahendekire Foundation. Complainant Attachments A-F.

b. Respondents’ position

The answer explains respondents’ version of events in sixteen numbered paragraphs and includes exhibits supporting the claims. The answer includes a December 20, 2009, letter from Ndahendekire Barbara explaining concerns regarding her cargo and a complaint in Georgia state court filed by African Shipping against Brenda Alexander, dated December 2, 2009. Answer Attachments 1-2.

Mr. Muhia contends that he “informed Barbara that African Shipping is not freight forwarder or carrier, but rather a business entity that [collects] used goods from the US to sell in Africa and donate whatever cannot be sold, in the process we recover shipping costs incurred.” Answer at 1. Mr. Muhia states that African Shipping gets good shipping deals from Brenda at Alco Logistics and that he had shipped a few containers with her with no issues or problems. Answer at 1. He states that Barbara asked him to get a booking for her at the African Shipping rate because she was on a tight budget. Answer at 1. He then states that he spoke with Brenda and Barbara regarding the quotation, measurements of the containers, and size of the chassis. Answer at 1. He indicates that “Barbara/Alco Logistics did not inform Njoroge Muhia or Ndahendekire Barbara that by separating the containers from the Chassis, the shipments was now split into 4 units from the original 2 units (where each chassis was loaded with a container).” Answer at 2.

The answer further contends that “Muhia Njoroge/African Shipping did not have a contract with Ndahendekire Barbara stating that we were going to ship her containers to Uganda as claimed” and that he “did not know that Brenda/Alco Logistics used Air Seas 7 to take the Chassis.” Answer at 2. He states that he was on a three way call with Barbara and Mike with World Cargo services who indicated that an additional \$6,500 was due and owing and that the measurements were not correct. Answer at 2. Mr. Muhia states that Ms. Barbara later called him and told him to stop

dealing with the issue and that she was going to follow up with Brenda/Alco Logistics. Answer at 2. Mr. Muhia concludes that he reported the matter to the police in the county where Brenda Alexander lived and that he instituted a case against Brenda Alexander that has been pending because she cannot be located and has not been properly served. Answer at 2. A copy of the claim, which was filed on December 2, 2009, is attached to the answer. Answer at Attachment 2.

c. Discussion

Pursuant to section 10(d)(1) 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).

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 the respondents 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. General Foundries Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994).

The allegations in the complaint and answer are similar. The parties agree that Brenda Alexander and Alco Logistics accepted payment for shipping goods for the complainant and then failed to make payments to the shipping companies. The parties agree that Brenda Alexander was unresponsive and Muhia Njorge went so far as to file a criminal complaint against her as the situation was unfolding. Ultimately, complainant did receive her goods, although there is no indication of the status of the goods when they were received.

The weight of the evidence does not support finding a violation of the Shipping Act by Muhia Njorge and African Shipping. The evidence demonstrates that Muhia Njorge and African Shipping, in good faith, provided payments from complainant to Brenda Alexander and Alco Logistics; that Muhia Njorge and African Shipping communicated and assisted complainant in completing the shipment; and that Muhia Njorge and African Shipping did not cause the complainant’s loss. There is no evidence that Muhia Njorge and African Shipping failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with delivering property in violation of section 10(d)(1). *See, e.g., Panalpina Inc. v. Eastern*

Mediterranean Shipping Corp., 28 S.R.R. 525, 526 (ALJ 1998). Accordingly, the allegations do not demonstrate violations of the Shipping Act by Muhia Njorge and African Shipping.

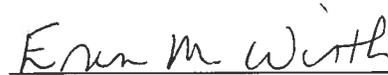
ORDER

For the reasons set forth above, it is hereby

ORDERED that the claim against Alco Logistics and Brenda Alexander be **DISMISSED WITHOUT PREJUDICE**, and

FURTHER ORDERED that the claim against Njorge Muhia and African Shipping be **DISMISSED WITH PREJUDICE**, and

FURTHER ORDERED that this proceeding be **DISCONTINUED**.



Erin M. Wirth
Administrative Law Judge