

FEDERAL MARITIME COMMISSION

DOCKET NO. 12-01

OC INTERNATIONAL FREIGHT, INC.,
OMJ INTERNATIONAL FREIGHT, INC.
AND OMAR COLLADO

RESPONDENT'S
BRIEF

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I. **Introduction**

This proceeding was instituted by an Order For Hearing on Appeal of Denial of License and Order of Investigation and Hearing of the Federal Maritime Commission (Commission or FMC) served April 2, 2012, pursuant to sections 11 and 19 of the Shipping Act of 1984, 46 U.S.C. §§ 40901, 40902, 41302 and 41304. The Order directed that an adjudicatory proceeding be instituted to determine:

(1) whether to affirm Bureau of Certification and Licensing's (BCL) November 17, 2011 denial of the Ocean Transportation Intermediary (OTI) application of OC International Freight, Inc. (OC) and Omar Collado;

(2) whether OC, OMJ International Freight, Inc. (OMJ) and/or Omar Collado violated Section 10(a)(1) of the Shipping Act of 1984 (Act), 46 U.S.C. §41102, by knowingly and willfully allowing other persons to obtain ocean transportation for the property at less than the rates and charges that would otherwise be applicable through the device of permitting such persons to unlawfully access OMJ's service contracts;

(3) whether OC, OMJ and/or Omar Collado violated Section 19 (a) and (b) of the Shipping Act, 46 U.S.C. §§ 40901 and 40902, by acting as an ocean transportation intermediary without a license or evidence of financial responsibility;

(4) whether, in the event violations of sections 10 or 19 of the Shipping Act are found, civil penalties should be assessed against OC International Freight, Inc., OMJ International Freight, Inc., and/or Omar Collado, and, if so, the amount of penalties to be assessed; and

(5) whether, in the event violation are found, appropriate cease and desist orders should be issued.

The Order named OC, OMJ and Omar Collado as Respondents. (hereinafter referred to collectively as Respondents, and sometimes individually by name as appropriate). The Commission directed that the Bureau of Enforcement (BOE) be made a party to this proceeding.

A. Procedural History

On December 2, 2010, OC and Mr. Collado filed an application for an OTI License. BOE No. 110.¹ Mr. Collado was identified as the proposed qualifying individual on the application, as well as the president and sole proprietor of OC. Following its standard verification and investigation procedures with respect to OTI applicants, on November 17, 2011, BCL issued a Notice of Intent to Deny OC's license application, alleging violation of section 10(a)(1) and section 19 of the Act revealed by an investigation conducted by a Commission Area Representative. Based on the asserted violations, BCL determined that OC and Mr. Collado lacked the requisite character to be licensed as an OTI pursuant to the standards set forth in 46 C.F.R. § 515.14. By letter dated December 2, 2011, OC requested a hearing on BCL's license determination.

On April 2, 2012, the Commission issued the above referenced Order assigning the matter for hearing before an Administrative Law Judge (ALJ). The ALJ issued an initial order on April 12, 2012. BOE commenced discovery on April 18, 2012, by serving Respondents with its First Interrogatories and Request for Production of Documents as well as its First Request for Admissions (RFAs). BOE No. 157. BOE

served a second set of Interrogatories and Request for Production of Documents on June 12, 2012. Mr. Collado served responded to BOE's First and Second Requests for Interrogatories and Productions of Documents. BOE No. 1062. Mr. Collado did not respond to any of BOE's RFAs. In addition to the above discovery, BOE deposed Mr. Collado in Miami, Florida on July 18, 2012. A transcript of his deposition testimony and related exhibits are submitted in the Appendix filed with this brief. BOE No. _____. BOE's Rule 95 Statement was submitted on August 13, 2012. Respondent's statement was submitted on August 28, 2012, pursuant to an extension granted by the ALJ.

II. Discussion

The burden of proof in a licensing proceeding is on the applicant. *Independent Ocean Freight F Application—Lesco Packing Co. Inc., 19 FMC 132, 136 (FMC 1976).*

The revoking or suspending of an OTI license should be limited to the most egregious circumstances, such as OTI's violating the Shipping Act or commission regulations, committing other federal offenses, or materially misrepresenting information regarding their qualifications. *Stallion Cargo, Inc.—Possible Violations of Section 10 (a) (1) and 10 (b) (1) of the Shipping Act of 1984, 29 S.R.R. 665, 683-84 (FMC 2001).*

It is undisputed that Mr. Collado has never been arrested, charged, or convicted with any criminal offense.

Likewise, Mr. Collado has never forfeited collateral for any felony, misdemeanor, or other violation.

Section 19(a) of the Shipping Act states that "the commission shall issue an

intermediary license to any person that the commission determines to be qualified by experience and character to act as an ocean transportation intermediary”.

Mr. Collado, as qualifying individual, maintained an active OTI license from November 15, 2001 until January 15, 2010 when its license was revoked. It is again undisputed that Mr. Collado has the experience necessary to act as an ocean transportation intermediary.

46 CFR Sec. 515.11(a), states that “to be eligible for an ocean transportation intermediary license, the applicant must demonstrate to the commission that:

(1) It possesses the necessary experience, that is, its qualifying individual has minimum of three (3) years experience in ocean transportation intermediary activities, in the United States, and the necessary character to render ocean transportation intermediary services.

OMJ was issued an OTI license on September 13, 2006. Its license was revoked on January 15, 2010 for failure to maintain a bond. Its license was not revoked for any “character” issue or any wrongdoing of any type. No complaints were ever given to the FMC regarding OMJ or Mr. Collado, as qualifying individual, during the time of its licensure.

The judgment and tax liens relating to the Respondents have been partially satisfied or paid. Those were sustained as a result of maintaining a small business operation. These should not impugn the “character” of Mr. Collado. These are part of the operations and economic hardships of a small business. Lacking financial resources should not impugn the character of an individual or entity.

The Respondents did not “knowingly and willfully” allow persons to obtain ocean transportation for property at less than the rates and charges that would otherwise be applicable through the device of permitting such persons to unlawfully access OMJ’s service contracts. OMJ’s interpretation of the Shipping Act was incorrect. It is undisputed that Island Cargo Services was provided access to OMJ’s service contract with Seaboard Marine. However, OMJ innocently and without intent to deceive or defraud any person or entity, allowed Island Cargo, a foreign company, this access with the understanding that this was permissible behavior so long as OMJ was licensed as an OTI. However, at no time as any person or entity filed suit or made a claim with respect to, or arising out of any actions or business practices between OMJ and Island Cargo. Only upon being informed by AR Margolis that these practices were incorrect, were the Respondents first alerted to the fact that their interpretation of the Shipping Act and the applicable law was incorrect. However, these practices were done in good faith, acting upon the belief that its license as an OTI allowed it to carry on this practice with a foreign entity without violating any law or regulation.

The Respondents should not be assessed civil penalties, and if appropriate, it should be nominal. 46 U.S.C. 41109(b) relating to assessment of penalties and titled, “Factors in Determining Amount” states, “In determining the amount of civil penalty, commission shall take in to account the nature, circumstances, extent and gravity of the violation committed and, with respect to the violation, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require.

The Respondent's good faith acknowledgement that it incorrectly allowed Island Cargo to access its service contracts with both Seaboard Marine and Crowley should substantially mitigate any penalty sought to be imposed by the commission. The Respondents particularly, Mr. Collado recognized his error in the interpretation of the law and admitted as such to AR Margolis and on his deposition. He has cooperated fully with the investigation and has answered all inquiries to the best of his ability. As previously stated, no person or entity has filed suit or made a claim with respect to the business practices alleged that are the subject of the Respondent's denial of their application. No member of the public has claimed to be harmed. Therefore, any civil penalty to be assessed should be nominal. The Respondents lack the ability to pay any substantial penalty assessed, much less the amount requested by the Bureau in this matter. In Merritt v. US, 960 F.2d 15 (2nd Cir. 1992), the Court vacated a \$395,000.00 fine assessed by the commission. The Court held that the fine was vacated and remanded because the commission failed to follow a statutory mandate to consider the Respondent's ability to pay.

In this matter the Respondent has provided the Bureau with adequate financial discovery in which unquestionably the Respondent can only sustain a minimal or nominal penalty, for its actions in good faith it acknowledges having incorrectly committed. Therefore, any civil penalty assessed based on the statutory factors enumerated in 46 U.S.C. 41109, should be only nominal and not substantial as requested by the Bureau.

III. Conclusion

The Bureau of Certification and Licensing's denial of OC's application for an OTI license, should be reversed and vacated.

The Respondent, Omar Collado, has both the experience and character required to satisfy the licensing requirements for an OTI. Mr. Collado as qualifying individual of OMJ has vast experience in the shipping business to render ocean transportation intermediary services. His character should not be impugned because of some judgments and tax liens arising only from the financial hardships which are part of sustaining a small business. Mr. Collado has never been charged, arrested, or convicted of any criminal offense. He possesses the necessary experience and character required to be licensed as an OTI.

Any civil penalty if appropriate should be nominal not substantial as requested by the Bureau. The Respondents lack the ability to pay any fine if not nominal.

Respectfully submitted,

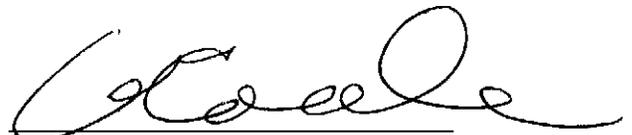


Omar Collado
On Behalf Of All Respondents
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November, 2012, the foregoing Respondents Brief has been served upon the Bureau of Enforcement by electronic mail.

Signed in Miami-Dade County, Florida on November 12, 2012.


Omar Collado