

FEDERAL MARITIME COMMISSION

DOCKET NO. 12-01

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

**RESPONDENTS BRIEF ON APPEAL OF INITIAL DECISION ON
REMAND**

OF THE

RESPONDENTS'

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

**Omar Collado,
on behalf of all Respondents
4458 NW 74th Avenue
Miami, FL 33166
305-592-5515**

NOVEMBER 22, 2013

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TABLE OF AUTHORITIES

Cases

Kin Bridge Express – Possible Violations 28 SRR 984 (ALJ) 1999
Rose Int’l Inc., Overseas Moving Network Int’l Ltd., 29 SRR, 119 (FMC 2001)

Statutes

46 U.S.C. Section 40901 (Section
19(a)).....*passim*
46 U.S.C. Section 40902 (Section
19(b)).....*passim*
46 U.S.C. Section 41102(a) (Section
10(a)(1)).....

Rules

46 C.F.R. Section 502.207
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Pursuant to the Presiding Officer's Order of October 30, 2013, the Respondents. OC International Freight, Inc., OMJ International Freight, Inc. and Omar Collado (OC) file their Brief On Appeal Of Initial Decision addressing the issues vacated by the Commission's order Remanding for Further Proceedings, served on July 22, 2013 (Remand Order).

RELEVANT PROCEDURAL BACKGROUND

This proceeding was instituted by a combined Order for Hearing on Appeal of Denial of License and Order of Investigation and Hearing, served April 2, 2012, pursuant to sections 11 and 19 of the Shipping Act of 1984 (Shipping Act), 46 U.S.C. sections 40901, 40902, 41302 and 41304.

On March 26, 2013, the Administrative Law Judge (ALJ) issued her Initial Decision. While holding that Respondents violated section 19 by acting as an unlicensed an unbounded ocean transportation intermediary for the period after January 15, 2010, the ALJ concluded that the evidence did not support findings that Respondents violated section 10(a)(1) of the Shipping Act, 46 U.S.C. section 41102(a). The ALJ affirmed BOE's letter of intent to deny OC and Mr. Collado an OTI license, issued a cease and desist order with respect to all Respondents, and assessed a civil penalty of \$60,000 jointly and severally against all Respondents for 14 knowing and willful violations of section 19(a) and (b), 46 U.S.C. Sections 40901 and 40902.

On April 17, 2013, BOE filed exceptions seeking Commission review. BOE asserted that (1) the ALJ erred in finding that Respondents did not violate section 10 (a)(1) by discounting Respondents' admissions under 46 C.F.R. section 502.207; by incorrectly assessing whether Respondents employed concealment of their unlawful access scheme; by incorrectly finding that Respondents did not obtain transportation; and by incorrectly finding that Respondents did not act knowingly and willfully; the ALJ failed to enter a specific finding that Respondents' violations of section 19 were committed knowingly and willfully; and (3) the ALJ erred in failing to assess and adequate civil penalty. Respondents filed exceptions on April 24, 2013, to which BOE replied on May 16, 2013.

On July 22, 2013, the Commission issued an Order Remanding for Further Proceedings in which it: (1) adopted the ALJ's findings of fact; (2) vacated the ALJ's section 10(a)(1) determination; (3) upheld the ALJ's findings of violations under Section 19; (4) upheld the issuance of a cease and desist order and letter of intent to deny OC's license application; and (5) vacated the ALJ's assessment of a civil penalty in the amount of \$60,000. The proceeding

ARGUMENT

UNJUST OR UNFAIR MEANS

In its initial decision of March 26, 2013, the ALJ held as follows:

“The evidence demonstrates that there was no fraud or concealment as required by the shipping act to establish a section 41102 (a) violation” Initial decision at 20. The ALJ however, despite introduction of no new evidence, decided in its Initial Decision On Remand of October 30, 2013, “there is sufficient evidence to find that Respondents themselves, benefited from the fraud” Initial Decision at 9. This finding of fraud by the ALJ comes in unilateral contrast to the Initial Decision in which the ALJ found that “ It appears that respondents made no attempt to conceal that Island Cargo’s role in the shipments. Indeed respondents cooperated with the BOE and did not deny or attempt to hide Island Cargo’s role through out this proceeding” Initial Decision at 20.

The ALJ makes a blanket statement that respondents benefited from the fraud but fails to support this finding which is a complete retreat from its finding on the Initial Decision of March 26, 2013.

Although the ALJ retreats from its Initial Decision by finding that the respondents committed fraud, it still states in its Initial Decision on Remand that: “BOE does not point to any specific admission regarding where there respondents utilized an unjust or unfair means or whether respondents committed fraud or concealed their activities from the underlying common carrier or competing with shippers” Initial Decision on Remand at 7.

The above finding by the ALJ seems to bolster the Respondents position that it committed no fraud or concealment. At no time did the Respondents deceive Seaboard as the BOE contends. In fact as the ALJ points out in the Initial Decision the bills of lading prepared by Seaboard indicates that OMJ is an agent of Island Cargo. Initial

Decision at 20. Again the ALJ's decision to retreat from its findings of no fraud or concealment in its Initial Decision of March 26, 2013, is without justification and therefore in error. As stated in the Initial Decision, there evidence is not sufficient to find that the respondents engaged in fraud or concealment as required to establish use of unjust or unfair device" Initial Decision at 22.

Lacking any new evidence it is an error for the ALJ to retreat from its findings the respondents engaged in fraud or concealment a necessary ingredient in the analysis of unjust or unfair means. Rose Int'l Inc. Moving Network Int'l Ltd., 29 S.R.R 119 (FMC 2001)

B. – CIVIL PENALTIES

The ALJ ordered in its Initial Decision a \$ 60000.00 penalty against Respondents for willful and knowing violations of Section 40901 and 40902 of the Shipping Act., Initial Decision at 35.

In the Initial Decision on Remand however the ALJ imposed a total penalty of \$ 226000.00. The \$ 60000.00 penalty was a proportionate penalty relative to the violations alleged. As in the Initial Decision on Remand there was a total undercharge for those nineteen (19) shipments in question. Initial Decision on Remand at 5.

This \$ 226000.00 penalty is totally disproportionate to the violation that respondents is being assessed. This penalty goes beyond the congressional purposes of deterrence and compliance when imposing civil penalties. KinBridge Express – Possible Violations, 28 SRR 904 (ALJ 1999) This penalty manifestly disproportionately to the violations alleged and is grossly unfair. This penalty is designed to destroy a business and livelihood of a one man operation.

Therefore, the ALJ's decision to significantly increase the penalty in a disproportionate manner is in error.

CONCLUSION

The ALJ committed reversible error in retreating from its Initial Decision of March 26, 2013, by finding that the Respondents had engaged in fraud and concealment without the introduction of new evidence.

The ALJ committed reversible error by increasing the civil penalty in a disproportionate and unfair manner.

Respectfully submitted,



Omar Collado,
on behalf of all Respondents
4458 NW 74th Avenue
Miami, FL 33166
305-592-5515