

FEDERAL MARITIME COMMISSION

DOCKET NO. 12-01

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

EXCEPTIONS OF THE RESPONDENTS'
TO THE INITIAL DECISION

O.C. International Freight Inc.
OMJ International Freight Inc.
and Omar Collado (Respondents')
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April 24, 2013

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Pursuant to Rule 227 of the Federal Maritime Commission's Rule of Practice and Procedure 46 C.F.R. § 502.227, the Respondent files its Exceptions to the Initial Decision, served March 26, 2013 (Initial Decision or I.D) in Docket No. 12-01.

I. 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 or Act), 46 U.S.C. §§ 40901, 40902, 41302 and 41304. The Order directed that an adjudicatory proceeding be instituted to determine:

(1) whether to affirm the 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 its qualifying individual, Omar Collado;

(2) whether OC International Freight, Inc. (OC), OMJ international Freight, Inc.

(OMJ) and/or Omar Collado violated Section 10(a)(1) of the Shipping Act, 46 U.S.C. § 41102, by knowingly and willfully obtaining ocean transportation for property at less than the rates and charges that would otherwise be applicable through the device of permitting other 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 section 10 or 19 were found, civil penalties should be assessed against OC, OMJ and/or Omar Collado, and, if so, the amount of penalties to be assessed; and

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

OC, OMJ and Omar Collado were duly named as Respondents. The Commission also directed that the Bureau of Enforcement (BOE) be made a party.

Following discovery, BOE filed its Rule 95 statement on August 13, 2012. Respondents' statement was submitted on August 28, pursuant to an extension granted by the ALJ.

BOE filed its Proposed Findings of Fact, Appendix and Opening Brief on October 12, and a 5-page Reply Brief on December 11, 2012. Respondents' Brief was filed November 21, 2012.

On March 26, 2013, the ALJ issued her Initial Decision. While holding that Respondents had violated section 19 by acting as an unlicensed and unbounded ocean transportation intermediary for the period after January 15, 2010, the ALJ concluded that the evidence did not support any findings that Respondents violated section 10(a)(1) of the Shipping Act. The ALJ

nonetheless issued a cease and desist order with respect to all Respondents and assessed a civil penalty in the amount of \$60,000, issued jointly and severally against all Respondents for 14 knowing and willful violations of section 19 (a) and (b).

II. EXCEPTIONS

1. The ALJ erred in upholding the BCL's determination to deny OC's license application.
2. The ALJ erred in issuing cease and desist orders against the Respondents.
3. The ALJ erred in ordering a civil penalty of \$60,000.00 against Respondents.

III. ARGUMENT

The Shipping Act provides that the Commission shall issue an OTI license only to persons that the Commission first determines to be qualified by experience and character. 46 U.S.C. § 40901. The Commission's regulations 46 C.F.R. § 515.15 implement the standards for licensing, and state that:

If the Commission determines, as a result of its investigation, that the applicant;

- (a) Does not possess the necessary experience or character to render intermediary services;
- (b) Has failed to respond to any lawful inquiry of the Commission; or
- (c) Has made any materially false or misleading statement to the Commission; then a letter of intent to deny the application shall be sent to the applicant.

The Respondents have not been held involved in any illegal scheme with indications of moral turpitude. In G.R. Minon-Freight Forwarder License, 12 FMC 75 (FMC 1968), the

commission denied an application on those grounds. The Respondents have not been arrested or found guilty of any crime. The Respondents have not been accused of having acted illegally in concert with his clients as noted in Bolton and Mitchell, Inc. – Indep. Ocean Freight Forwarder License No. 516, 17 FMC 328, 331 (FMC 1974). In fact Mr. Collado’s integrity in these proceedings has never been called into question. In fact at all times the Respondents have cooperated fully and have been truthful under oath and have even made admissions against their own interest. Mr. Collado has admitted that he made mistakes regarding his interpretation of the law.

Shouldn’t these actions taken as a whole constitute necessary “character” as required by the regulations.

As stated by the ALJ in the initial decision that revoking or suspending an OTI 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. Initial Decision Page 27

The Respondents’ failure to disclose certain tax liens and judgments was not made with intent to deceive and certainly should not be considered a “materially false” statement. “Material” is defined as, *important, more or less necessary; having influence or effect; going to the merits; having to do with matter as distinguished from form.* Blacks Law Dictionary Revised Fourth Edition, 1968.

The application was not made with materially false information. These items involved relatively minor debts and matters part and parcel of operating and maintaining a business for many years. Most of those items were satisfied, or are being satisfactorily resolved. They

should not be cast as a material non-disclosure. Not one piece of evidence or witness was presented whom cast any aspersions on the Respondents' operation of its business affairs for many years while it operated its OTI operations.

If the commission is to deny or deprive an applicant who is an otherwise honest person and laborer, from his right to make a living, then the measure or scope of an "egregious" circumstance in determining acceptability should be broad and severe not on some minor or remedial occurrence.

The cases cited herein supra, G.R. Minon and Bolton and Mitchell, are examples of what the scope should be in determining what conduct or actions by applicants should not be accepted for inclusion into the practice. The Respondents in this matter have conducted themselves forthright and sincere since the investigation and commencement of this proceeding. Therefore, a person's "character" should be measured by actions not by some financial oversight or missteps.

Cease and desist orders are appropriate when there is a reasonable likelihood that Respondents will resume their unlawful activities. Alex Parsinia d/b/a Pac. Int'l Shipping and Cargo Express, 27 SRR, 1335, 1342 (ALJ 1997)

The ALJ erred in ordering a cease and desist against Respondents.

The ALJ ruled its decision "the evidence is not sufficient to find the Respondents engaged in fraud or concealment as required to establish use of an unjust or unfair device". Initial Decision P. 22.

The issuing of cease and desist orders in this matter seems to contradict the ALJ's own findings. If the Respondent's actions particularly Mr. Collado, "reflect no intent to deceive or

defraud” it begs the question why Respondents should now be ordered to halt an activity of which they acted without malice or intent to deceive or defraud. A cease and desist order must be tailored to the needs and facts of the particular case. Marcela Shipping Co. Ltd., 23 SRR 857, 871-872 (ALJ 1986)

In this case the Respondents cooperated fully and forthright throughout this investigation and inquiry. Mr. Collado met with AR Margolis whom informed him of his actions relative to Island Cargo. Mr. Collado unbeknownst to him and in this present corrected his actions in those regards. He continued working only as a freight consolidator and warehouse by and through Source Consulting, a licensed NVOCC. It is unnecessary and reversible error to issue a cease and desist order in this matter because it is not tailored to the needs and facts of this case as stated in Marcella.

The ALJ erred in assessing and ordering civil penalties in the amount of \$60,000.00 against the Respondents.

Section 13(a) of the Shipping Act provides for civil penalties for violations of the Shipping Act as follows:

A person violates this part or a regulation or order of the... Commission issued under this part is liable to the United States Government for a civil penalty. Unless otherwise provided in this part the amount of the penalty may not exceed [\$8,000.] for each violation or, if the violation was willfully and knowingly committed, [\$4,000] for each violation.

Certainly the ALJ’s civil penalty order of \$60,000 was much less than requested by the BOE. However, said penalty against the Respondent is unduly harsh and extreme. Cari-Cargo, Int. Inc., 23 SRR 1007, 1018 (FMC, 1986)

Section 13(c) of the Act states that in “determining the amount of a civil penalty the Commission shall take into account the nature, circumstances, extent, and gravity of the violation

committed and, with respect to the violator the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require”. If the Respondents are no longer able to continue operating their business then this penalty, other than nominal, will be unduly harsh and extreme. Any nominal penalty and reasonable restriction on the Respondents ability to operate will achieve the same purpose. As the ALJ found the “Respondent appears to have a limited ability to pay a civil penalty”. Initial decision P. 33 That being the case \$60,000.00 is excessive and unduly harsh.

IV. CONCLUSION

Based on the reasons enumerated, in this brief, the Respondents submit that the ALJ erred in: (1) upholding the BCL’s determination to deny OC’s license application; (2) issuing cease and desist orders against the Respondents; and (3) ordering a civil penalty of \$60,000.00 against Respondents. Accordingly, it is requested that after consideration of these Exceptions and the second in this proceedings, the Commission remand this matter to the Administrative Law Judge for further proceedings with respect to the issue of the denial of OC’s license application and assessment of cease and desist orders and imposition of civil penalties. The commission should affirm the ALJ’s finding with respect to dismissal of the violations of Section 41102(a) of the Shipping Act of 1984, 46 U.S.C. § 41102 (a).

Respectfully submitted,

Omar Collado
On Behalf Of All Respondents
4458 NW 74TH Avenue
Miami, Florida 33166
305-592-5515

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 2013, the foregoing Exceptions of the Respondents to the Initial Decision has been served upon the Bureau of Enforcement and Cory R. Cinque by electronic mail.

Signed in Miami-Dade County, Florida on April 24, 2013.

Respectfully submitted,

Omar Collado
On Behalf Of All Respondents
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