

FEDERAL MARITIME COMMISSION

DOCKET NO. 12 - 01

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

**BUREAU OF ENFORCEMENT'S
REPLY TO RESPONDENTS' BRIEF ON APPEAL OF
INITIAL DECISION ON REMAND**

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Pursuant to Rule 227 of the Federal Maritime Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.227, the Bureau of Enforcement (BOE) hereby replies to the Respondents' (OC International Freight Inc., OMJ International Freight Inc. and Mr. Omar Collado) Brief on Appeal of Initial Decision on Remand (Respondents' Exceptions). Respondents' Exceptions in Docket No. 12-01 were filed on November 22, 2013.

I. 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. §§ 40901, 40902, 41302 and 41304.¹

On March 26, 2013, the Administrative Law Judge (ALJ) issued her Initial Decision. BOE filed exceptions on April 17, 2013, seeking Commission review. 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 was then remanded to the ALJ for further adjudication "consistent with this Order." Remand Order, at 27.

On July 24, 2013, the ALJ established a briefing schedule on remand. BOE filed its Brief upon Remand on August 14, 2013, and Respondents filed their Brief on September 4, 2013. Oral

¹ 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 sections 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.

Argument was held on September 18, 2013, and Reply Briefs were filed by both parties on September 30, 2013.

On October 30, 2013, the ALJ issued her Initial Decision on Remand, finding that Respondents:

- 1) engaged in an unfair or unjust means in violation of section 10(a)(1);
- 2) obtained a benefit from their arrangement with Island Cargo; and
- 3) knowingly and willfully violated section 10(a)(1) and 19 of the Shipping Act.

The ALJ imposed a civil penalty in the amount of \$226,000.00, which amounts to \$6,000.00 per section 10(a)(1) violation for the period prior to July 31, 2009, and \$8,000.00 per section 19 violation occurring after July 31, 2009.

On November 22, 2013, Respondents filed their Brief on Appeal of Initial Decision on Remand.

II. Discussion

Respondents except to two aspects of the Initial Decision on Remand, namely:

- 1) Whether the facts support a finding that Respondents' engaged in an unfair or unjust device or means (Respondents' Exceptions at 2-3); and
- 2) The amount of the civil penalty assessed by the ALJ upon remand (Respondents' Exceptions at 3).

While Respondents may not like the ALJ's conclusions, they demonstrate no legal error in the ALJ's reasoning as to the first issue. Certainly, Respondents can demonstrate no set of facts in the record contrary to the ALJ's determination, as Respondents offered no evidence at hearing and proffered no findings of fact in their trial brief or in their brief on remand. Respondents'

Brief on Exceptions fails to identify any facts from the record below which controvert the ALJ's findings.

As to the second issue, the ALJ's Initial Decision on Remand correctly heeds the instructions of the Commission. Having found violations of section 10(a)(1) of the Shipping Act, the ALJ has assessed an appropriate civil penalty at the lowest possible level for knowing and willful violations.

A. Unjust Device or Means

Respondents argue that “[l]acking 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.” Respondents’ Exceptions at 2-3. Their argument, however, turns a blind eye to the realities of this proceeding. The ALJ did not *sua sponte* decide to retreat from her earlier decision; she was ordered by the Commission to reconsider whether fraud had been committed against either the underlying carrier or to competing shippers. (Order Remanding for Further Proceedings, p. 20). In its Order Remanding for Further Proceedings, the Commission stated that:

The fraud which must be shown in order to establish an unjust or unfair means may be either fraud to the underlying common carrier or to competing shippers. The ALJ does not appear to consider the potential fraud committed by OMJ who, when signing its service contracts, certified that it was acting as an NVOCC for shipments moving under the service contracts but then acted only as a freight forwarder. Nor does it appear that the ALJ considered any fraud against other Shippers. We therefor remand the case to the ALJ for a further determination as to whether violations of Section 10(a)(1) occurred. (Citations omitted). Remand Order at 23.

With these instructions, the ALJ sought to reassess the Respondents’ activities.

As BOE submitted in our Remand Brief, when Mr. Collado signed the Seaboard service contract, he certified that the shipper signatory (Respondent OMJ) would be acting as an

NVOCC. RFA 11, 45, 139; I.D. at 18. Respondents' admissions conclusively establish that Respondents knew that OMJ was not then acting as an NVOCC, RFA 140, BOE 178; and that Respondents knowingly, and directly, assisted Island Cargo to gain access to the rates and terms of its service contract. RFAs 42, 104, 148, 171; BOE 165, 173, 178. Viewed as a whole, Respondents deceived Seaboard by intentionally signing a service contract representing that they would be acting as an NVOCC while knowing full well that they would not meet the ongoing qualification of remaining a shipper² with respect to those shipments actually transported under such contract. Respondents knew they would be acting only as a freight forwarder for those shipments, RFA 16, 18-43, 140-141, 163-170; and that Island Cargo would instead be acting as the NVOCC for all such shipments. RFA 17, 52. These facts were all considered on review by the ALJ.

Respondents' false certification was not only deceptive; Mr. Collado knowingly violated Commission regulations in so doing. The Commission requires shippers to certify their shipper status on service contracts pursuant to 46 C.F.R. § 530.5 (6)(a). While falsely certifying shipper status is itself a violation of Commission regulations, Respondents retained an ongoing legal obligation under the OTI regulations not to prepare or assist in preparation of any paper or document concerning an OTI transaction which it has reason to believe is false or fraudulent; and not to impart to a "principal, shipper, common carrier or other person" false information relative to any OTI transaction, 46 C.F.R. § 515.31(e). OMJ and Mr. Collado were also under an ongoing obligation to "decline to participate" in such transactions, 46 C.F.R. § 515.31(f). In falsely certifying shipper status and failing to remedy (or remove themselves) from such

² Under 46 C.F.R. § 530.3(r), the term shipper "means a cargo owner; the person for whose account the ocean transportation is provided; the person to whom delivery is to be made; a shippers' association; or an NVOCC that accepts responsibility for payment of all applicable charges under the service contract." An entity acting as forwarder does not qualify to execute, or perform under, a service contract. Docket No. P5-98, *Petition of National Customs Brokers and Forwarders Association of America*, 28 S.R.R. 1042, 1050-51 (FMC, 1999).

transactions, Respondents knowingly employed an unjust or unfair device to obtain transportation on behalf of Island Cargo, an unbonded NVOCC. *Parks International Shipping Inc., et al. – Possible Violations of Section 8(A) and 19 of the Shipping Act of 1984 as well as Commission’s Regulations at 46 C.F.R. Parts 515 and 520*, Docket No. 06-09, Memorandum Opinion and Order at 8-9 (September 16, 2013) (fraudulent certification of shipper status is a violation of section 10(a)(1)).

Second, as found by the ALJ, Respondents’ activities amount to a fraud against other shippers. Respondents’ device concealed the true nature of these shipping transactions from other shippers and stifled competition in doing so. The Commission has long recognized the principle that section 10(a)(1) (formerly section 16 of the Shipping Act, 1916) was “aimed at protecting competing shippers and carriers from shippers who attempt to obtain (or who succeed in obtaining) transportation at reduced rates....” *Pacific Far East Lines – Alleged Rebates to Foremost Dairies, Inc., Connell Bros., Co., Ltd. and Advance Mill Supply Corp.*, 11 F.M.C. 357, 362 (1968). In *Hohenberg Brothers Co. v. Federal Maritime Commission*, 316 F.2d 381, 385 (D.C. Cir. 1963), while affirming a Commission decision, the Court noted that in enacting section 16, “Congress was concerned both with protection of carriers against unscrupulous shippers, and of honest shippers against unscrupulous competitors, acting independently or in collusion with a carrier.” *Id.* at 384-85. Similarly, in *Prince Line, Ltd. v. American Paper Exports, Inc.*, 55 F.2d 1053, 1055 (2nd Cir 1932), Judge Learned Hand writes that where the acts of a carrier render its competitors unaware of what transpired, the “equality of treatment” between shippers is destroyed. Judge Hand observed that such equality was one of the primary purposes of the Act and that concealment from shippers was one of the evils that Congress sought to address in enacting section 16. *Id.*

The equality of shippers, by and through the impacts on competition of service contract

abuse, is no less of a concern today than when the Shipping Act of 1916 was first passed. In *Rose Int'l v. Overseas Moving Network Int'l Ltd.*, 29 S.R.R. 119, 173 (FMC 2001), the Commission found that the respondents' device of allowing access to service contracts was done "in a way that their competitors would be unaware of what had transpired" and found that the concealment amounted to an unjust or unfair means. *Id.*, citing *Hohenberg Brothers Co.*, 316 F.2d at 385. The ALJ found that:

[B]y permitting Island Cargo to access discounted rates available through Respondents' service contract, Respondents distorted the competitive marketplace. Proprietary shippers obtaining shipping quotes would presumably have been offered lower rates by Island Cargo than by competing NVOCCS who did not have access to the discounted rates in Respondents' service contract. The reason Island Cargo could offer these lower rates was not ascertainable by competitors. Given this impact on the competitive marketplace, the evidence is sufficient to find that Respondents obtained transportation by "means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means" as required by the Shipping Act for a violation of Section 10(a)(1).

Respondents' exceptions fail to establish any legal error in the Initial Order on Remand. The ALJ's decision is well-supported by the factual record and Commission precedent and should be upheld by the Commission.

B. Civil Penalties

Respondents next argue that the ALJ committed error by assessing penalties in the amount of \$226,000.00, which amounts to \$6,000.00 per section 10(a)(1) violation, and \$8,000.00 per section 19 violation.³ In its Remand Order, the Commission instructed the ALJ to "revisit the

³ Pursuant to statutory authority found at 28 U.S.C. 2461, the Commission periodically adjusts the penalty amounts set forth in 46 U.S.C. 41107. Under the Commission's regulations at 46 C.F.R. Part 506, the Commission adjusted the maximum levels to \$6,000 and \$30,000, effective August 15, 2000. In 2009, the agency increased these amounts to \$8,000 and \$40,000, respectively. *See* 74 FR 38114-38116 (July 31, 2009).

As the section 10 violations occurred between May 9, 2008 and March 11, 2009 (BOE 192-434), the previous maximum level of \$6,000 would apply to these violations. The \$8,000 level is applicable for the section 19 violations which occurred between January 26, 2010 and June 8, 2010 (BOE 470-757).

amount of the civil penalty imposed in light of any changes in the amount and types of violations found...” Remand Order at 23.

In one of three similar cases handed down since the Initial Decision was issued, the Commission observed “[a]lthough there is no minimum penalty amount for violations found to be knowing and willful, when the Commission has in the past found violations to be knowing and willful, it has generally assessed penalties that exceed the maximum for violations that are not knowing and willful, or \$6000 in this case.” *Anderson International and Owen Anderson – Possible Violations of Section 8(A) and 19 of the Shipping Act of 1984*, Docket No. 07-02, Order Affirming in Part, Reversing in Part, and Vacating in Part Initial Decision on Remand, at 35 (June 25, 2013). The Commission then assessed a civil penalty for knowing and willful violations that was not less than the maximum for violations that were not knowing and willful. *Id.* The Commission has since adhered to this threshold for assessing penalties on two further occasions. *Eurousa Shipping, Inc., Tober Group, Inc and Container Innovations, Inc. –Possible Violations of Section 8(A) and 19 of the Shipping Act of 1984 and Commission Regulations at 46 C.F.R. § 515.27*, Docket No. 06-06, Order Affirming in Part, Reversing in Part, and Vacating in Part Initial Decision on Remand, at 38-9 (September 10, 2013); and *Parks International Shipping Inc. et al.*, Memorandum Opinion and Order at 10 (September 16, 2013).

Consistent with the Commission’s most recent pronouncements, and based on the nature⁴ and timing of the violations (with relation to the updating of penalty amounts), the ALJ assessed the minimum appropriate penalty for violations that were knowing and willful. In so far as the ALJ’s determination is entirely consistent with Commission precedent, Respondents fail to

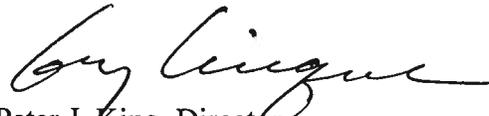
⁴ For reasons of brevity, BOE hereby incorporates by reference its discussion of the case law and civil penalty factors enumerated in BOE’s Opening Brief at 39-48, and in its Exceptions at 22-28.

demonstrate any error therein. Accordingly, BOE urges the Commission to uphold the ALJ's assessment of a penalty in the amount of \$226,000.00.

III. Conclusion

For the foregoing reason, BOE respectfully requests that the Commission deny Respondents' exceptions to the ALJ's Initial Decision on Remand in Docket No. 12-01, and affirm the ALJ's decision with respect to finding violations of section 10(a)(1) of the Shipping Act, as well as the ALJ's assessment of the civil penalty in the amount of \$226,000.00.

Respectfully submitted,



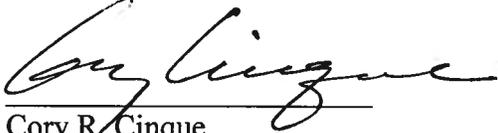
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December 13, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2013, the foregoing Bureau of Enforcement's Reply to Respondents Second Exceptions has been served upon Respondents' by electronic mail.

Signed in Washington D.C.


Cory R. Cinque