

FEDERAL MARITIME COMMISSION

DOCKET NO. 12-01

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

BRIEF UPON REMAND

OF THE

RESPONDENTS'

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

**Omar Collado,
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September 4, 2013

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Pursuant to the Presiding Officer's Order of July 24, 2013, the Respondents, OC International Freight, Inc., OMJ International Freight, Inc. and Omar Collado (OC) file their Brief Upon Remand addressing the issues vacated by the Commission's order Remanding for Further Proceedings, served on July 22, 2013 (Remand Order).

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. 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 and unbonded 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 BCL'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 was accordingly remanded to the ALJ for further adjudication "consistent with this Order." July 22 Order, at 27.

II. ARGUMENT

A. THE CIVIL PENALTY TO BE ASSESSED

The civil penalty should be consistent with the ALJ's initial decision of March 26, 2013.

In Cari-Cargo, Int., Inc., 23 SRR 1007, 1018 (I.D., F.M.C. admin. final, 1936) the court stated:

...in fixing the exact amount of penalties, the commission, which is vested with considerable discretion in such matters, is required to exercise great care to ensure that the penalty is tailored to the particular facts of the case, considers any factors in mitigation, as well as in aggravation, and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law.

As stated herein, the BOE has failed to demonstrate the essential elements and proof of an unjust or unfair device of means. Therefore, lacking this proof a violation of Section 41102(a) has not been established. The ALJ clearly found no fraud or concealment on the part of the Respondents.

Section 13(c) of the Shipping Act provides 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." 46 U.S.C. Sec. 41109(b). The Commission did not take into account the adequacy of the amount of the civil penalties imposed by the ALJ. Lacking a violation of Section 10(a)(1), the ALJ should remain consistent with its decision of March 26, 2013.

B. UNJUST OR UNFAIR MEANS

To establish a violation of section 41102(a), "fraud or concealment is a necessary ingredient in the proof of an unjust or unfair device or means." United States v. Open Bulk Containers, 727 F. 2d 1061, 1064 (11th Civ. 1984) "It is such fraud or concealment that in fact makes the practice unjust or unfair." Open Bulk Containers, 727 F. 2d at 1064.

The ALJ's decision after review of all the facts was that:

"It appears that Respondents made no attempt to conceal Island Cargo's role in the shipment. Indeed, Respondents cooperated with BOE and did not deny or attempt to hide Island Cargo's role throughout this proceeding. Rather, Respondents defend themselves by contending that they thought their actions were permissible. The evidence demonstrated that there was no fraud or concealment as required by the Shipping Act to establish a Section 41102(a) violation." *Id.* at pg. 20.

The Commission remanded to the ALJ for a further determination as to whether violations of Section 10(a)(1) occurred. Remand Order, at 20,

The ALJ correctly relied on Open Bulk Containers, a case involving similar fact patterns as this case, to determine that the Respondents made no attempt to conceal their actions relative to Island Cargo.

The BOE has failed to establish and meet its burden that the Respondents have committed fraud or acted in concealment of their actions. The ALJ was clear and unequivocal that Respondents did not act based on the evidence presented, in a manner rising to the level of deception or concealment, which are essential elements of determining fraud. If the ALJ found the record was void of these essential elements, it should not retreat from the initial order of March 26, 2013, where the determination was made that the BOE has not established an essential element of a violation of Section 41102(a) of the Shipping Act.

If the ALJ found no evidence of fraud on the record after considering the totality of the circumstances, it cannot know without the introduction of additional evidence if any fraud on others shippers has occurred as the Commission has remanded. If the essential elements of fraud or concealment were not present according to the ALJ's ruling, then that determination should apply to any and all potential parties whether directly or indirectly. The ALJ clearly determined that the "contemporaneous documents as well as his testimony reflect no intent to deceive or defraud." *Id.* at 22. Therefore, the ALJ should remain consistent with the March 26, 2013 decision and find that the Respondents did not violate section 41102(a) of the Shipping Act when it allowed Island Cargo to access its service contracts.

C. ADMISSIONS

The Commission directed the ALJ to consider these Admissions in determining whether Respondents committed violations of Section 10(a)(1). Remand Order at 17.

The ALJ did consider those admissions. The ALJ stated as follows: "while these requests for admission are certainly admissible and relevant, the reporting documents are the strongest evidence in the proceeding." Id. at 17. Therefore, the ALJ "relied on all of the evidence and included citations to the supporting documents, where possible." Id.

To state as does the BOE that "the ALJ's Section 10(a)(1) holdings previously assigned little or no weight to the Respondents' admissions" is clearly erroneous. The ALJ described in detail what it considered "problematic" relative to the admissions.

The decision does not dismiss the weight of the admissions, it only indicates that in making its decision the ALJ did not consider the admissions "particularly persuasive." Id. at 17. That is certainly the prerogative of the decision maker in these proceedings. The ALJ did in fact consider those admissions in determining whether or not Respondents were in violation of Section 10(a)(1).

III. **CONCLUSION**

The Respondents, based on the foregoing reasons, respectfully request that the ALJ (1) find that Respondents collectively did not violate Section 10(a)(1) of the Shipping Act consistent with its Initial Decision of March 26, 2013; and (2) assess a civil penalty in the amount previously ordered on the Initial Decision of March 26, 2013, due to violations of Sections 40901 and 40902 of the shipping Act and any other relief it deems just.

Respectfully submitted,

Omar Collado,
on behalf of all Respondents
4458 NW 74th Avenue
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CERTIFICATE OF SERVICE

I certify that on this 4th day of September 2013, the foregoing Respondents' Brief Upon Remand has been served upon the Bureau of Enforcement by electronic mail.

Signed in Miami, Florida on September 4, 2013.

Omar Collado