

## FEDERAL MARITIME COMMISSION

CENTURY METAL  
RECYCLING PVT. LTD,

*Complainant,*

v.

DACON LOGISTICS, LLC, et al.,

*Respondent.*

Docket No. 12-09

Served: November 8, 2013

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**BY THE COMMISSION:** Mario CORDERO, *Chairman*, Richard A. LIDINSKY, Jr., and William P. DOYLE, *Commissioners*. Rebecca F. DYE, and Michael A. KHOURI, *Commissioners*, dissenting.

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### **Order Affirming Initial Decision on Default**

On October 19, 2012, Century Metal Recycling Pvt. Ltd. (Century Metal) filed a Complaint alleging that Respondents Dacon Logistics, LLC, d/b/a CODA Forwarding (Dacon), Great American Alliance Insurance Company (Great American), Avalon Risk Management (Avalon), Hapag-Lloyd America, Inc. (Hapag-Lloyd), and Mitsui OSK Lines (Mitsui) violated section 10(d)(1) of the Shipping Act of 1984 (Act). On June 20, 2013, the presiding Administrative Law Judge (ALJ) issued an Initial Decision on

Default finding that Dacon violated section 10(d)(1) of the Act, 46 U.S.C. § 41102(c), and that Complainant Century Metal suffered actual injury as a result of that violation. We affirm the Initial Decision on Default finding that Respondent Dacon violated section 10(d)(1) of the Act and awarding reparations in the amount of \$323,663.71.

### **BACKGROUND**

This matter came before the Commission on *sua sponte* review requested by a member of the Commission pursuant to 46 C.F.R. § 502.227(d). The Complaint alleging that Respondents Dacon, Great American, Avalon, Hapag-Lloyd, and Mitsui violated section 10(d)(1) of the Act was served upon Dacon on October 25, 2012. With the exception of Dacon, all Respondents answered the Complaint, settled the claims against them, and were dismissed from the proceeding in a series of previously issued orders which became administratively final.

According to the Complaint, Century Metal paid Dacon, a licensed non-vessel-ocean common carrier (NVOCC) and Ocean Freight Forwarder (OFF), a total of \$60,500.00 under five separate bills of lading to transport thirty containers of aluminum and zinc to India. (Compl. at 3) Dacon then engaged Hapag-Lloyd to transport one shipment of ten containers and Mitsui to transport the remaining twenty containers. Hapag-Lloyd and Mitsui identified Dacon as the shipper on the bills of lading for these shipments. (Compl. at 3-4) Hapag-Lloyd and Mitsui refused to release the containers in India because Dacon did not pay for the ocean transportation causing Century Metal to incur about \$3,000.00-\$4,000.00 per day in detention charges. (Compl. at 4-5) Century Metal contacted Dacon at least twice about the hold on the containers. (Compl. at 4) Dacon agreed it would take care of the problem, but the containers were not released to Century Metal until after Century Metal paid the ocean freight and detention charges.

On June 20, 2013, the ALJ issued an Initial Decision on Default finding that Dacon violated section 10(d)(1) of the Act and

Complainant Century Metal suffered actual injury as a result of that violation. The ALJ found Dacon to be liable to Century Metal for reparations in the amount of \$323,663.71, plus interest accrued, beginning January 1, 2013.

Dacon did not answer the Complaint or challenge the Initial Decision on Default entered against it.<sup>1</sup>

## **DISCUSSION**

### **A. Default**

The ALJ properly determined that Dacon was in default because it was given notice of the proceeding but failed to answer or otherwise respond to any actions or motions in this proceeding. The Commission agrees with the ALJ's finding that Dacon was properly served. The Secretary sent the Complaint to Dacon by United Parcel Service (UPS) at the address in the Complaint (31 Mountain Blvd., Warren, NJ 07059-5644), and it was delivered and signed for upon delivery. Commission records demonstrate that Dacon's address of record was 31-U Mountain Blvd., Warren, NJ 07059-5644, both when it became licensed as an NVOCC and ocean freight forwarder and also when its license was revoked. 78 Fed. Reg. 28845 (May 16, 2013). During the proceeding, the ALJ sent notices to both addresses. In addition, on April 17 and 30, 2013, the Office of Administrative Law Judges sent by first class mail a copy of the Order to Show Cause to Dacon, and the mail was not returned. Based on Commission records and the presumption of delivery articulated in *Loubriel v. Fondo del Seguro del Estado*, 694 F.3d 139 (1st Cir. 2012), Dacon received proper notice of both the Complaint and the Order to Show Cause.

The Commission's regulations provide that well-pleaded factual allegations in a complaint will be deemed to be admitted when a respondent fails to answer a complaint within the time provided. *See* 46 C.F.R. § 502.62(b)(6)(i). Century Metal's

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<sup>1</sup> On May 8, 2013, the Director of the Commission's Bureau of Certification and Licensing issued an Order of Revocation revoking Dacon's NVOCC and OFF licenses effective April 25, 2013, because Dacon's NVOCC and OFF bonds were cancelled. 78 Fed. Reg. 28845 (May 16, 2013).

Complaint was well-pled and Dacon's failure to respond results in the facts submitted as pled. *Id.*; see also, *Parks Int'l Shipping, Inc., et al.*, \_\_\_ S.R.R. \_\_\_, Docket No. 06-09 (FMC Sep. 16, 2013) (treating issues as conceded when party fails to respond).

B. Violation of section 10(d)(1)

Because we have deemed the contentions in the Complaint admitted, we now address what Dacon has admitted by failing to respond to the Complaint. Century Metal has established that Dacon violated section 10(d)(1) of the Act. Century Metal alleged that it paid the money Dacon charged for each of the shipments, which included the ocean freight charges of Hapag-Lloyd and Mitsui. Dacon, however, did not in turn pay the ocean freight charges to Hapag-Lloyd and Mitsui. The carriers required Century Metal to pay Hapag-Lloyd \$17,540.00 and Mitsui \$37,200.00 for the ocean transportation of the containers.

Century Metal paid Dacon \$60,500.00 for services that included ocean freight charges. Under the arrangement, and as alleged by Century Metal, Dacon should have forwarded the respective amounts due and owed to Hapag-Lloyd and Mitsui in order to secure the release of the thirty containers. Hapag-Lloyd was owed \$17,540.00 and Mitsui was owed \$37,200.00 in ocean freight charges for a total of \$54,740.00. As a result of Dacon's failure to pay these amounts to Hapag-Lloyd and Mitsui, the containers were held and Century Metal was required to pay a total of \$268,923.71 in detention charges for the release of its containers. Century Metal's actual injury amounted to \$323,663.71, which includes the detention charges plus additional freight charges in the amount of \$54,740.00.

The Commission has found conduct similar to Dacon's to be a violation of section 10(d)(1), which states that a common carrier such as Dacon "may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). The Commission has recognized that an NVOCC's failure to timely pay ocean freight is a violation of section 10(d)(1). *Houben v. World Moving Services, Inc.*, 31 S.R.R. 1400 (FMC 2010). Failing to timely forward a shipper's

payment to the ocean common carrier for ocean freight transport has been deemed a failure to observe reasonable practices and is, therefore, a violation of section 10(d)(1). *See Petra Pet, Inc. v. Panda Logistics Ltd; Panda Logistics Co., Ltd and RDM Solutions, \_\_\_ S.R.R.\_\_\_\_*, Docket No. 11-14 (FMC Oct. 31, 2013) (finding that an NVOCC's withholding and aborting of a shipment to coerce payment of a debt for other shipments was an unreasonable practice and violated section 10(d)(1), and that the failure of an NVOCC to remit freight payments and to communicate with or provide the status of the shipment to the shipper was a section 10(d)(1) violation); *Houben*, 31 S.R.R. 1400, 1405; *Go/Dan Industries, Inc. v. Eastern Mediterranean Shipping Corp.*, 28 S.R.R. 788 (ALJ 1999); and *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11, 18-19 (ALJ 1991) (finding that ocean freight forwarder's failure to pay ocean freight in a timely manner is a section 10(d)(1) violation). By failing to use funds that Century Metal paid Dacon in order to pay the ocean common carriers for the ocean transportation of the containers, Dacon failed to observe a just and reasonable practice in violation of section 10(d)(1).

### **CONCLUSION**

THEREFORE, IT IS ORDERED, that the Initial Decision on Default is affirmed.

IT IS FURTHER ORDERED, that Respondent Dacon Logistics, LLC is liable to Century Metal Recycling Pvt. Ltd. and shall pay to Complainant by November 25, 2013, reparations in the amount of \$323,663.71 and interest (\$249.09) totaling \$323,912.80.

FINALLY, IT IS ORDERED that this proceeding is discontinued.

By the Commission.

Karen V. Gregory  
Secretary

*Commissioner Dye*, dissenting:

I dissent from the majority's decision to uphold the Administrative Law Judge's (ALJ's) finding that Dacon Logistics violated section 46 U.S.C. § 41102(c), and the ALJ's award of \$323,663.71 in reparations, for the reasons stated in the dissent by Commissioner Khouri, with whom I joined, in *Yakov Kobel v. Hapag-Lloyd A.G.*, Docket No. 10-06, \_\_ S.R.R. \_\_, (FMC July 12, 2013).

*Commissioner Khouri*, dissenting:

I do not agree with the majority's decision to uphold the Administrative Law Judge's (ALJ) Initial Decision on Default finding that Respondent, Dacon Logistics, LLC. (Dacon), violated section 10(d)(1), 46 U.S.C. Section 41102(c), of the Shipping Act.

I adopt and fully incorporate herein the views, arguments and reasoning set forth in my dissents in *Yakov Kobel, et al. v. Hapag-Lloyd A.G., et al.*, \_\_S.R.R\_\_ (FMC July 12, 2013); *Bimsha International v. Chief Cargo Services, Inc., et al.*, 32 S.R.R.1861 (FMC 2013); *Smart Garments v. Worldlink Logix Services, Inc.*, \_\_S.R.R.\_\_ (FMC September 12, 2013); *Temple v. Anderson, et al.*, \_\_S.R.R. \_\_, Case No. 1919(I) (FMC October 22, 2013) (Order vacating and remanding decision of Settlement Officer); *Petra Pet, Inc., v. Panda Logistics Ltd., et al.*, \_\_S.R.R.\_\_ (FMC October 31, 2013), and *Best Way USA, Inc. v. Marine Transport Logistics*, \_\_ S.R.R. \_\_ (FMC November 8, 2013).

As was the situation in these above cited cases, the Respondent in the case *sub judice* may be in breach of a contractual term of the applicable bills of lading for failure to pay for the ocean transportation which resulted in detention charges. However, notwithstanding any such potential cause of action that might be recognized in an appropriate court of law, the facts presented in this case do not begin to address the requisite elements of a section 10(d)(1) claim.

The case *sub judice* involves a single contract between Complainant and Respondent involving thirty containers shipped

with two vessel operating common carriers over a thirty day period under five bills of lading. There is no allegation in the pleadings and Complainant put forth no evidence that Respondent engaged in a “practice” of failing to pay for the ocean transportation and causing detention charges to be incurred. As discussed in *Kobel*, *Bimsha*, *Smart Garments*, *Temple*, *Petra Pet*, and *Best Way*, a successful claim under section 10(d)(1) of the Shipping Act requires more. As I held in *Temple*:

[A] cognizable section 10(d)(1) claim requires (i) a “practice” of conduct, acts or omissions, with the term “practice” meaning the complained of activity was continual and habitual conduct over time, (ii) a determination that such conduct, acts or omissions are unjust and unreasonable, and, last, (iii) the practice of employing such unjust and unreasonable activity is adverse and detrimental to the commerce of the United States.<sup>2</sup>

Based on the foregoing discussion and analysis, I find that the factual allegations in the complaint, with full benefit of assumptions as to truth and veracity and deemed admitted because Respondent failed to answer the complaint, do not state a claim that is cognizable under section 10(d)(1) of the Shipping Act.

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<sup>2</sup> *Temple*, *supra*, at \_\_\_. See *Stockton Elevators*, 8 F.M.C. 187, 201 (emphasis added)(“However, even if the granting of the five allowances or the arranging for the single wharfage reduction could be designated practices, neither could be found to be unjust or unreasonable. The commerce of the United States was not deterred.”)