

FEDERAL MARITIME COMMISSION

REVOCATION OF OCEAN
TRANSPORTATION
INTERMEDIARY LICENSE NO.
022025 CARGOLOGIC USA LLC-
ORDER TO SHOW CAUSE

Docket No. 14-01

Served: June 23, 2014

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

Order to Supplement the Record

I. INTRODUCTION

By Order to Show Cause (Order), served February 18, 2014, and published in the *Federal Register* on February 24, 2014 (79 Fed. Reg. 10152), the Commission directed Cargologic USA LLC (Cargologic or Respondent) to show cause why the Commission should not revoke its ocean transportation intermediary (OTI) license for failure to report the resignation of its qualifying individual (QI) and seek approval of a replacement, as required by 46 C.F.R. § 515.18, and for failure to respond to lawful inquiries of the Commission with respect to its OTI business, as required by 46 C.F.R. § 515.31(g). The Commission ordered that Cargologic

submit its affidavits of fact and memorandum of law on or before March 21, 2014. The Order designated the Commission's Bureau of Enforcement (BOE) as a party. BOE was directed to submit reply affidavits of fact and memoranda of law on or before April 7, 2014. Cargologic has not responded to the Commission's Order. BOE submitted its affidavit of fact and memorandum of law on March 27, 2014.

II. DISCUSSION

At issue in this proceeding is whether Cargologic failed to report the resignation of its QI and whether it failed to seek approval of a replacement QI, as required by 46 C.F.R. § 515.18. BOE argues that because Cargologic has failed to submit a written response to the Commission's Order, it has defaulted and therefore the statements of fact set forth in the Order as the basis for the proceeding against the Respondent and the legal conclusions the Commission proposed to draw from the statements of fact are uncontested. BOE Memorandum of Law, p.2, citing *Adair v. Penn-Nordic Lines*, 26 S.R.R. 11, 15 (ALJ 1991) and *Alabama Power Co. v. Fed. Power Comm'n.*, 511 F.2d 383, 391 (D.C. Cir. 1974).

The Commission's Order sets out BOE's allegations that Matvey Gurfinkel was approved as the sole QI for Cargologic and "[u]pon information and belief, Mr. Gurfinkel was no longer employed with nor serving as QI for Cargologic as of March 2013." BOE submitted an undated affidavit or verified statement signed by Sandra Kusumoto, Director of the Commission's Bureau of Certification and Licensing (BCL). Kusumoto Affidavit, para.1. Ms. Kusumoto's affidavit repeats the BOE allegation contained in the Commission's order that "upon information and belief, Mr. Gurfinkel is no longer employed with nor serving as QI for Cargologic as of March 2013." Kusumoto Affidavit, para. 6. The same statement appears in BOE's memorandum of law as proposed finding of fact 5. BOE Memorandum of Law, Proposed Finding of Fact 5, p. 4.

BOE also seeks the revocation of Cargologic's license for failing to respond to any lawful order or inquiry by the Commission, specifically correspondence from BCL dated March 25, 2013; November 21, 2013; and December 21, 2013, as well as the Commission's Order.¹ Commission regulations provide that "[u]pon the request of any authorized representative of the Commission, a licensee shall make available promptly for inspection or reproduction all records and books of account in connection with its ocean transportation intermediary business, and shall respond promptly to any lawful inquiries by such representative." 46 C.F.R. § 515.31(g). In order to properly determine whether Cargologic has failed to respond to an "inquiry" from the Commission, the record should include copies of the correspondence from BCL to Cargologic.

As the proponent of the Order, the Commission has the burden of proof. 5 U.S.C. § 556(d). The term "burden of proof" as used in the Administrative Procedure Act (APA) has been construed to mean burden of persuasion. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994) (*Greenwich Collieries*). The Court in *Greenwich Collieries* stated that "when the party with the burden of persuasion establishes a prima facie case supported by 'credible and credited evidence,' it must either be rebutted or accepted as true." *Id.* at 280.

¹ In her affidavit, Ms. Kusumoto states that on March 25, 2013 and November 21, 2013, BCL mailed correspondence to Cargologic's principal office via UPS, informing Cargologic that all OTI licensees must maintain an active QI and requesting that it submit an application to replace its QI in accordance with Commission regulations at 46 C.F.R. § 515.18(c). Ms. Kusumoto states that, according to UPS records, the packages were properly delivered. Kusumoto Affidavit, para. 6 and 7. Ms. Kusumoto also states that on December 11, 2013, BCL emailed correspondence to the president of Cargologic, Mr. Epshteyn, informing Cargologic that all OTI licensees must maintain an active QI and requesting that it submit an application to replace its QI by December 18, 2013. Kusumoto Affidavit, para. 8. According to Ms. Kusumoto's affidavit, BCL has not received any communications from Cargologic. Kusumoto affidavit, para. 6, 7, and 8.

Ms. Kusumoto's affidavit contains no further information to substantiate the allegation that, as of March 2013, Mr. Gurfinkel was no longer employed with or serving as QI for Cargologic, e.g., the source of this information or information concerning Mr. Gurfinkel's current employment. It does not appear that the current factual record in this proceeding establishes a prima facie case supported by credible and credited evidence that Mr. Gurfinkel is no longer serving as the QI for Cargologic, nor does it appear that the current factual record establishes a prima facie case that Cargologic has failed to respond to an "inquiry" from the Commission. The current record does not provide adequate grounds for revocation of Cargologic's license.

THEREFORE, IT IS ORDERED, That no later than July 7, 2014, BOE supplement the record with: 1) any available additional information regarding the purported termination of Mr. Gurfinkel's employment with Cargologic; and 2) copies of BCL's correspondence with Cargologic.

It is FURTHER ORDERED, That no later than July 21, 2014, Cargologic shall, through the submission of affidavits of fact and memorandum of law, show cause why the Commission should not revoke its OTI license for: 1) failure to report the resignation of its QI and seek approval of a replacement QI, as required by 46 C.F.R. § 515.18; and 2) failure to respond to lawful inquiries of the Commission with respect to its OTI business, as required by 46 C.F.R. § 515.31(g).

Finally, it is FURTHER ORDERED, That the deadline for the issuance of a final decision of the Commission in this proceeding shall be extended from June 24, 2014, to August 18, 2014.

By the Commission.

Karen V. Gregory
Secretary