

FEDERAL MARITIME COMMISSION

REVOCATION OF OCEAN
TRANSPORTATION
INTERMEDIARY LICENSE NO.
022025 CARGOLOGIC USA LLC

Docket No. 14-01

Served: August 28, 2014

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

Order Revoking Ocean Transportation Intermediary License

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), *Possible Revocation of Ocean Transportation Intermediary License No. 022025-Cargologic USA LLC*, 33 S.R.R. 299 (FMC 2014), 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 did not respond to the Commission's Order. BOE submitted its affidavit of fact and memorandum of law on March 27, 2014. On June 23, 2014, the Commission issued an order directing BOE to supplement the record. The Commission also ordered on June 23, 2014 for Cargologic to show cause by July 21, 2014, why its OTI license should not be revoked. On June 25, 2014, BOE submitted a supplemental memorandum containing the Supplemental Verified Statement of Sandra L. Kusumoto, Director of the Bureau of Certification and Licensing. (Kusumoto Supplemental Statement). Cargologic did not respond to the Commission's June 23, 2014 order.

We hereby revoke Cargologic's license pursuant to 46 U.S.C. § 40903(a) and order Cargologic to cease and desist all OTI activities as it is in violation of 46 C.F.R. §§ 515.18(a)(6) and 515.31(g).

II. DISCUSSION

The issue in this proceeding is whether Cargologic failed to report the resignation of its qualified individual (QI) and whether it failed to seek approval of a replacement QI, as required by 46 C.F.R. § 515.18. BOE alleges 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." According to the information contained in Ms. Kusumoto's Supplemental Verified Statement, Mr. Gurfinkel left the employ of Cargologic in January 2013 and is currently employed by Blue Cargo Group. (Sandra L. Kusumoto,

Director of the Bureau of Certification and Licensing, Supplemental Verified Statement, para. 9 & 10).

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 the Bureau of Certification and Licensing (BCL) dated March 25, 2013, November 21, 2013, and December 21, 2013 as well as the Order.¹ 46 C.F.R. § 515.31(g) states 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." Attached to Ms. Kusumoto's Supplemental Verified Statement are copies of BCL's correspondence with Cargologic which show that lawful inquiries were made by Jeremiah Hospital, the Director of the Commission's Office of Transportation Intermediaries. BOE argued in its initial memorandum of law that because Cargologic failed to submit a written response to the Commission's Order, it defaulted and therefore the statements of fact set forth in the Order and the legal conclusions the Commission proposed to draw from the statements of fact were uncontested. (BOE Memorandum of Law, p. 2, citing *Adair v. Penn-Nordic Lines*, 26 S.R.R. 11, 15 (ALJ 1991) and

¹ Ms. Kusumoto's affidavit indicates 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 requested it to 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's affidavit 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 requested it to 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).

Alabama Power Co. v. Fed. Power Comm'n., 511 F.2d 383, 391 (D.C. Cir. 1974)). Had the Commission proceeded with an Order of Investigation in this proceeding instead of an Order to Show Cause, BOE's allegations may have proved sufficient in the absence of a response by the Respondent. See 46 C.F.R. § 502.63(c)(4)(i) ("Well pleaded factual allegations in the Order of Investigation and Hearing not answered or addressed will be deemed to be admitted."). Those allegations are not sufficient however, in the context of an Order to Show Cause.

BOE argues that "[t]he effect of an order to show cause is to shift the burden of [proof] going forward to Respondent, and require it to 'affirmatively demonstrate' the lawfulness of its operations." BOE Supplemental Memorandum, p. 3, citing *In re Interpool Ltd.*, 23 S.R.R. 899, 902 (FMC 1986); *Agreement No. 9905*, 14 F.M.C. 163, 165 (FMC 1970); *Canaveral Port Authority – Possible Violations*, 29 S.R.R. 1436, 1446 (FMC 2003). We do not read the cases as supporting BOE's argument. In the *Interpool* case, the Commission received a Request for an Order to Show Cause (Request) which asked the Commission to direct a conference to show cause why its recently adopted tariff rule did not constitute activity prohibited by the Shipping Act. The Commission treated the Request as a petition and published a notice in the *Federal Register* soliciting comments. The Commission later determined to deny the petition. In doing so, the Commission noted that "[t]he effect of such an order would be to shift the burden of going forward to [the conference] and require it to affirmatively demonstrate the lawfulness of its Rule." The Commission also noted that the "show cause procedure requires the Commission to first establish a *prima facie* case of a violation of the shipping statutes. Such an expedited hearing procedure is generally reserved for situations involving issues only of law, where there is no question as to the material facts involved but only as to the legal implications of those facts." *Interpool*, 23 S.R.R. at 902. The Commission found that the facts in the case were critical and further found that the Commission could not establish a *prima facie* case that showed the tariff rule violated the Act. The Commission

determined therefore to address the rule through an appropriate proceeding. *Id.*

The *Agreement 9905* case involved protests to the approval of an agreement involving the sale of four vessels. The protests were based on the possible future use of the vessels. The Commission issued an order to show cause requesting the purchaser of the vessels to file an affidavit indicating its future operational plans for the vessels and ordered the protestors to show cause why the agreement should not be approved. The protestors subsequently withdrew their objections and the Commission approved the agreement for the sale of the vessels. In its order approving the agreement, the Commission addressed one protestor's argument that the issuance of a show cause order improperly shifted the burden of proof to the carriers protesting approval of the agreement. The Commission stated that the burden of proof was not transferred to the protesting carriers but rather it remained with the Commission to adduce evidence to support a finding under one of the four standards of section 15. *Agreement 9905*, 14 F.M.C. at 165.

The *Canaveral Port Authority* case involved an order to show cause issued to a port authority to demonstrate why it should not be found in violation of section 10(b)(10), 46 U.S.C. § 41106(3), for its refusal to consider a tug and towing franchise's application. The Commission found that the order to show cause in that case set forth a *prima facie* case of the port authority's refusal to deal or negotiate and it was therefore the port authority's responsibility to present a justification for its actions. The Commission found, however, that it was ultimately BOE's burden to prove that the justification presented by the port authority was not reasonable and that the port authority's actions constituted a violation of the Shipping Act. *Canaveral Port Authority*, 29 S.R.R. at 1446.

As the proponent of the Order, the Commission, in this case, via BOE, 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). 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. The party having control of information bearing upon a disputed issue may be assigned the burden of bringing it forward or suffer an adverse inference for its failure to respond; the ultimate burden of proof or persuasion, however, does not shift.² In this proceeding, BOE bears the burden of proof.

The factual record in this proceeding establishes that Mr. Gurfinkel is no longer serving as the QI for Cargologic, and that Cargologic failed to report his resignation and file a replacement QI, a violation of 46 C.F.R. § 515.18(a)(6). The record also establishes that Cargologic has failed to respond to an “inquiry” from the Commission in violation of 46 C.F.R. § 515.31(g). Accordingly, BOE has met its burden of proof.

III. CONCLUSION

IT IS ORDERED, That Cargologic is in violation of 46 C.F.R. §§ 515.18(a)(6) and 515.31(g).

IT IS FURTHER ORDERED, That Cargologic’s license is revoked pursuant to 46 U.S.C. § 40903(a) and Cargologic shall cease and desist all OTI activities.

² The procedural rules of the Commission cited by BOE on page 4 of its supplemental memorandum are not applicable here. 46 C.F.R. § 502.62(b)(6) applies to complaints between private parties. 46 C.F.R. § 502.63(c)(4) applies to adjudicatory investigations initiated by the Commission while 46 C.F.R. § 502.65(b) provides the procedure for finding a party in default either in a proceeding between private parties initiated by complaint or in an adjudicatory investigation initiated by the Commission. None of these rules apply in the case of an order to show cause issued by the Commission.

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FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

Karen V. Gregory
Secretary