

FEDERAL MARITIME COMMISSION

DSW INTERNATIONAL, INC. v.
COMMONWEALTH SHIPPING, INC.,
ABOU MERHI LINES, LLC, AND ABOU
MERHI LINES, SAL

Docket No. 1898(F)

Served: July 23, 2012

BY THE COMMISSION: Richard A. Lidinsky, Jr.,
Chairman; Joseph E. Brennan, Rebecca F. Dye, Michael A.
Khouri, and Mario Cardero, *Commissioners*.

ORDER

The above-captioned case is before the Commission on *sua sponte* review of the Initial Decision (Decision) of the administrative law judge (ALJ). The ALJ dismissed with prejudice DSW International, Inc.'s (DSW) claims against respondents Abou Merhi Lines, LLC and Abou Merhi Lines (USA), LLC; found no violations of Sections 10(b)(3), 10(b)(4)(D), 10(b)(4)(E) or 10(b)(1)¹ of the Shipping Act of 1984 (Act); dismissed with prejudice DSW's claims against Commonwealth Shipping, Inc. (Commonwealth); found that Abou Merhi Lines, SAL (Abou SAL)

¹ 46 U.S.C. §§ 41104(3), 41104(4), 41104(1).

violated Section 10(d)(1)² of the Act; and ordered Abou SAL to pay DSW reparations in the amount of \$11,434.30, plus interest from June 21, 2008. For the reasons set forth below, we: dismiss the claims against Abou Merhi Lines, LLC and Abou Merhi Lines (USA), LLC with prejudice; find no violations of Sections 10(b)(3), 10(b)(4)(D), 10(b)(4)(E) or 10(b)(1) by Commonwealth or Abou SAL; find no violations of Section 10(d)(1) by Commonwealth or Abou SAL; and, accordingly, dismiss all claims against Commonwealth and Abou SAL with prejudice.

I. Standard of review

Under 46 C.F.R. § 502.227(a)(6), when the Commission reviews an initial decision, “the Commission, except as it may limit the issues upon notice or by rule, will have all the power which it would have in making the initial decision.” It is not clear that the standard of review contained in 46 C.F.R. § 502.227(a)(6) applies to decisions under Subpart T.³ We note, however, that Subpart T provides no other standard of review. There is no reason why the Commission, in reviewing an initial decision in a proceeding under Subpart T, should not have all the power it would have in reviewing an initial decision in a formal proceeding governed by subpart A through Q. Therefore, as in any other formal proceeding, we review the ALJ’s decision *de novo*.

II. Burden of proof

A complainant alleging a violation of the Act has the initial burden of proof. 5 U.S.C. § 556(d), 46 C.F.R. § 502.155. In order to prevail, a claimant must substantiate his or her allegations by a preponderance of the evidence or show that it is more probable than not that the allegations are true. Hale v. Dep’t of

² 46 U.S.C. § 41102(c).

³ Except as specifically provided in Subpart T or as listed in 46 C.F.R. § 502.321(b) (neither of which references 46 C.F.R. § 520.227), the rules in Subparts A through Q of Part 502 (including Subpart M which contains 46 C.F.R. § 502.227(a)(6)) do not apply to situations covered by Subpart T.

Transportation, 772 F.2d 882, 885 (Fed. Cir. 1985). DSW, as the complainant, has the burden of proving by a preponderance of the evidence that Respondents violated the Act.

III. Facts

DSW is a Texas corporation whose president is Arinze Udegbune. Mr. Udegbune also operates as a sole proprietorship under the assumed name DSW Sports & Import (DSW Sports).⁴ Commonwealth is a non-vessel-operating common carrier (NVOCC) licensed by the Commission, FMC License Number 020769N. Abou SAL is a joint stock company organized under Lebanese law and registered with the Commission (Organization No. 020944) as a vessel-operating-common carrier (VOCC). Abou Merhi Lines (USA), LLC is a Maryland limited liability company which serves as the agent of Abou SAL. Abou Merhi Lines, LLC, a Florida limited liability company, was formed in 2008 to process vehicle title paperwork on behalf of Abou Merhi Lines (USA), LLC and has since been administratively dissolved.

In 2008, DSW contacted Commonwealth regarding the transport of two cars, a 2004 Ford Explorer and a 2001 Honda Accord, to Lagos, Nigeria. Commonwealth booked the vehicles with Grimaldi USA, a VOCC.⁵ The parties do not agree as to the reason why this booking was cancelled, but do agree that Commonwealth notified DSW that ocean transportation would instead be provided by Abou SAL from Jacksonville, Florida to Cotonou, Benin. According to an affidavit submitted by Victor Onyeujo, the President of Commonwealth, DSW agreed to this change. It is not clear from the record what arrangements, if any, the parties agreed to regarding the transportation of the cargo from Cotonou, Benin to Lagos, Nigeria, the previously agreed-to final

⁴ DSW Sport is an automobile dealership licensed by the Texas Department of Transportation.

⁵ Grimaldi USA's booking notice indicates that the cars were scheduled to depart Jacksonville, Florida, on May 28, 2008, with a destination of Tin Can Island, Lagos, Nigeria, and an estimated arrival date of June 19, 2008.

destination.

On June 6, 2008, Abou Merhi Lines (USA), LLC, as agent only, issued two Abou SAL bills of lading.⁶ The terms and conditions of Abou SAL's bills of lading contained a section providing that one vehicle was to be considered one freight unit and that the carrier was not liable for any loss or damage exceeding \$500 per package or unit, consistent with the Carriage of Goods at Sea Act (COGSA), 46 USC §§ 30701 *et seq.* Abou SAL Bill of Lading –Terms and Conditions, Section 10, App. at 48. The terms and conditions also contained a “Period of Responsibility” clause providing that “[t]he carrier or his agent shall not be liable for loss or damage to the goods during the period before loading and after discharge from the vessel, howsoever, or in whatsoever manner such loss or damage arises.” Abou SAL Bill of Lading –Terms and Conditions, Section 4, App. at 48. The terms and conditions also contained a “Himalaya clause” providing that no servant or agent

⁶ Abou SAL's bill of lading CTU0797-217/3013616 identified Commonwealth Shipping, Inc. as the shipper; Udemba Electronic Coy [sic] Ltd., 133 IDEWU Industrial Olodi-Apapa, Lagos, Nigeria as the consignee; the *Sunbelt Dixie* as the ocean vessel; Jacksonville as the port of loading; Cotonou as the port of unloading; and described the commodity as a second-hand motor vehicle 2004 Ford Explorer VIN 1FMZU67K44UB59703. The notify block indicated “Same as consignee.” No place of delivery by an on-carrier was indicated. However, in the consignee box below the address for the consignee were the words “In transit to Niger.” We note that at some time before January 28, 2008, DSW Sports bought the Ford Explorer for approximately \$5,000 and then purportedly sold it to DSW for \$21,200. However, no money changed hands. Abou SAL's bill of lading CTU0796-217/3013623 identified Commonwealth Shipping, Inc. as the shipper; Udemba Electronic Coy [sic] Ltd., 133 IDEWU Industrial Olodi-Apapa, Lagos, Nigeria as the consignee; the *Sunbelt Dixie* as the ocean vessel, Jacksonville as the port of loading; Cotonou as the port of unloading; and described the commodity as a second-hand motor vehicle 2001 Honda Accord LX Vin 1HGCG16541A079154. The notify block indicated “Same as consignee.” No place of delivery by an on-carrier was indicated. However, in the consignee box below the address for the consignee were the words “In transit to Niger.” On February 26, 2008, DSW Sports bought the Honda Accord for a total of \$1750.00. DSW Sports purportedly sold the car the same day to DSW for \$16,900. However, no money changed hands.

of the carrier or any independent contractor or sub carrier employed by the carrier was to be under greater liability than the carrier. Abou SAL Bill of Lading –Terms and Conditions, Section 11, App. at 48.

Abou SAL received both vehicles at the port of Jacksonville. A load list issued by Abou Mehri Lines (USA), LLC shows that both vessels were loaded on the *SunBelt Dixie* 0813 (voyage number) and departed Jacksonville on June 6, 2008. On June 16, 2008 (ten days after Abou SAL's bills of lading were issued), Commonwealth issued two bills of lading.⁷ According to an

⁷ Commonwealth issued bill of lading JCS3002-1793-719, identifying DSW as the shipper; Udemba Electronics Coy Ltd., Lagos Nigeria, as the consignee; *Sea Ahmed* Voy 806 as the exporting carrier; Jacksonville as the port of loading; Cotonou as the foreign port of unloading; describing the commodity as used 2004 Ford PK, VIN 1FMZU67K44UB59803 and stating "onboard 06/01/2008 at Jacksonville on board named vessel Sea Ahmed Voy 806 via Abou Merhi Lines as carrier." No place of delivery by an on-carrier was indicated. However, the marks and numbers section of Commonwealth's bill of lading contains the notations "RO-RO" and "***Transit Nigeria". The freight forwarder block of this bill of lading indicated that the forwarding agent was Commonwealth Shipping, Inc. with an FMC license number of 019202. The notify block indicated "Same as above," referring to the information contained in the consignee block. The title for the Ford provided to Abou SAL when the Ford was shipped indicates that the owner of the Ford was DSW Sports, not DSW as provided for on the bill of lading. Similarly, on June 16, 2008, Commonwealth issued Commonwealth bill of lading JCS3002-1794-720, dated June 16, 2008, identifying DSW as the shipper; Udemba Electronics Coy Ltd., Lagos, Nigeria, as the consignee; *Sea Ahmed* Voy 806 as the exporting carrier; Jacksonville as the port of loading; and Cotonou as the port of unloading; describing the commodity as used 2001 Hond [sic] 4D; VIN 1HGCG16541A079154; and stating "on board 06/01/2008 at Jacksonville on board vessel Sea Ahmed, Voy 806 via Abou Merhi Lines as carrier." No place of delivery by an on-carrier was indicated. However, the marks and numbers section of the bill of lading contains the notations "RO-RO" and "***Transit Nigeria." The freight forwarder block of this bill of lading indicated that the forwarding agent was Commonwealth Shipping, Inc. with an FMC number of 019202. The notify block indicated "Same as above", referring to the information contained in the consignee block. The title for the Honda provided to Abou SAL when the Honda was shipped indicates that the owner of the Honda was DSW Sports not DSW as provided for on the bill of lading.

affidavit submitted by Victor Onyeujo, the President of Commonwealth, after Commonwealth received proof copies of Abou SAL's bills of lading and invoice and sent freight payment to Abou Mehri Line,⁸ it received original bills of lading from Abou SAL and handed them over to DSW. According to responses provided by Commonwealth during discovery, the amount of freight paid by DSW to ship the two vehicles was \$3,200.

The Elissa Group, agents for Abou SAL in Cotonou, procured the services of ETS "A.M.P." to unload the cargo from the *Sunbelt Dixie* upon its arrival in Cotonou. ETS "A.M.P." issued a discharge report dated June 21, 2008. According to the affidavit filed by Mehri Abou Mehri, the director of Abou SAL, the discharge report lists vehicles that were not discharged, and, therefore, remained on the *Sunbelt Dixie*. The two vehicles relevant to this proceeding were not listed among the vehicles remaining on the vessel. The Elissa Group no longer serves as Abou SAL's agent in Cotonou, and the record contains no information from the Elissa Group. The record contains copies of three DSW checks: one dated May 15, 2008, to Commonwealth in the amount of \$2000; one dated July 8, 2008, to Bank of America in the amount of \$300; and one dated August 1, 2008, to Commonwealth in the amount of \$2675.

IV. Procedural history

On March 31, 2009, DSW filed a complaint with the Commission requesting informal adjudication pursuant to 46 C.F.R. Part 502, Subpart S (Informal Procedure for Adjudication of Small Claims). DSW identified Commonwealth and Abou Merhi Lines, LLC as Respondents in the caption of the complaint. In the body of the complaint, DSW claimed that Abou SAL and Abou Merhi Lines (USA), LLC were also involved in the shipment. DSW claimed it was entitled to reparations in the

⁸ It is not clear from the record if Commonwealth sent payment to Abou Mehri Lines (USA), LLC or Abou SAL or when payment was sent. (I.D. App. at 37.)

amount of \$46,284.30 plus interest and attorney's fees.⁹ On May 27, 2009, Commonwealth indicated that it did not consent to informal adjudication pursuant to Subpart S, and requested that the matter be resolved pursuant to Subpart T (Formal Procedure for Adjudication of Small Claims). On the same date, Commonwealth filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, pursuant to 46 C.F.R. §§ 502.12 and 502.73, arguing that the Commission does not have jurisdiction over cargo damage claims as they are not among the prohibited practices set forth in the Act.

On July 1, 2009, the ALJ issued a Notice of Assignment and Order to Supplement the Record, requiring the submission of briefs and proposed findings of fact. The parties were instructed to submit an appendix of the documentary evidence on which they were relying. The parties did not comply precisely with the ALJ's order. However, at various times during the fall of 2009 and 2010, they submitted along with their amended complaint, briefs and, in response to further ALJ orders, exhibits and exhibit indexes. The ALJ also ruled on Commonwealth's May 27, 2009, motion to dismiss, finding that, pursuant to 46 C.F.R. § 502.321, 46 C.F.R. §§ 502.12 and 502.73 do not apply in the proceeding; denying the motion to dismiss without prejudice; and allowing Commonwealth to raise the arguments in its brief.

On August 6, 2009, DSW filed a motion for default judgment against Abou Mehri Lines, LLC, based on its failure to appear in the proceeding. On October 16, 2009, DSW filed a motion for leave to file an amended complaint and its amended complaint naming Abou Mehri Lines, LLC, as a Respondent. DSW filed a second motion for default judgment against Abou Mehri Lines, LLC on November 19, 2009. DSW's motion for

⁹ DSW's damage claim consists of \$23,700 for the Ford Explorer; \$17,100 for the Honda Accord; \$1,000 for trucking from Dallas to Jacksonville; \$1284.30 for storage charges in Jacksonville; and shipping charges in the amount of \$3200.

leave to file an amended complaint was granted on November 23, 2009. On November 23, 2009, the ALJ determined to defer ruling on DSW's two motions for default judgment against Abou Merhi Lines, LLC until considering the initial decision in the proceeding. During the months of December, 2009 and January, 2010, both DSW and Commonwealth filed their answers, briefs, proposed findings of fact and responses to proposed findings of fact. On January 8, 2010, DSW filed a third motion for default judgment against Abou Merhi Lines, LLC.

There was no further activity in this proceeding until August 31, 2010, when the ALJ issued a Second Order to supplement the record. The ALJ ordered DSW to file additional affidavits, documents or memoranda addressing the alleged liability as a common carrier of Abou Merhi Lines, LLC as well as other questions regarding DSW's corporate structure and the sale of the two vehicles from DSW Sports to DSW. The ALJ also ordered Commonwealth to file evidence regarding the change in shipping lines from Grimaldi USA to Abou SAL. Commonwealth filed its answer to the Second Order to supplement the Record on September 20, 2010. DSW filed its response on October 12, 2010. On October 29, 2010, DSW replied to Commonwealth's response to the Second Order to supplement the record.

On September 24, 2010, Abou Merhi Lines (USA), LLC, appearing for the first time in the proceeding, filed a Memorandum of Law. It argued: 1) that Abou Merhi Lines (USA), LLC, as the agent of Abou SAL, was not liable for DSW's claims; 2) that the Act does not provide relief for cargo loss or damage; 3) that a number of the violations of the Act alleged by DSW did not apply to Abou Mehri Lines (USA), LLC; 4) that DSW's reparations claims are limited by COGSA and general maritime principles for measuring damage for cargo loss; and 5) that DSW's claim for an award of attorney's fees should be disallowed. On November 2, 2010, the ALJ issued an order requiring Abou Merhi Lines (USA), LLC to show cause why its memorandum of law should not be stricken and default judgment should not be entered because it had

offered no explanation as to why it had not timely filed its memorandum or responded to any other pleadings in the proceeding. Abou Merhi Lines (USA), LLC responded in a memorandum signed by counsel but did not submit evidentiary support for the factual assertions in its memorandum. On November 10, 2010, the ALJ issued an order requiring Abou Merhi Lines (USA), LLC to submit competent evidence supporting its factual assertions. Abou Merhi Lines (USA), LLC filed an affidavit from Mehri Abou Mehri, the director of Abou SAL, a corrected affidavit, and an amended response to the order to show cause. These documents were accepted by the ALJ for filing and consideration.

On November 24, 2010, the ALJ served an order permitting DSW to reply to Abou Merhi Lines (USA), LLC's amended response to the order to show cause. On December 6, 2010, the ALJ served a memorandum and order discharging the order to show cause and denying DSW's three motions for default judgment. In that order, the ALJ determined that, although DSW's original and amended complaints did not list Abou SAL or Abou Merhi Lines (USA), LLC, in the caption, both Abou SAL and Abou Merhi Lines (USA), LLC were identified in the body of the complaint as one of the parties being involved in the shipment and that provided sufficient information to support a finding that DSW made its claims against Abou SAL.¹⁰ (December 6, 2010, Memorandum and Order at 9). The ALJ *sua sponte* amended the caption of DSW's amended complaint to identify Abou SAL as a

¹⁰ The ALJ cited 5A Charles Alan Wright & Arthur Miller, Federal Practice & Procedure: Civil 3d § 1321 (3d ed. 2004), "Although helpful to the district court, the contents of the caption usually are not considered a part of the pleader's statement of the claim or the response thereto for purposes of applying the pleading rules. Moreover, the caption is not determinative as to the identity of the parties to the action or the district court's personal jurisdiction over the defendant or its subject matter jurisdiction. . . . If the body of the complaint correctly identifies the party being sued or if the proper person actually has been served with the summons and the complaint, federal courts generally will allow an amendment under Rule 15 to correct technical defects in the caption when that is thought necessary."

respondent in the proceeding. The ALJ requested that the Secretary send a copy of his Memorandum and Order to Abou SAL. The ALJ also stated that nothing in the record identified Abou Merhi Lines (USA), LLC as a common carrier and declined to add it to the caption.

On December 6, 2010, the ALJ served a Third Order to supplement the record. After receiving the responses of the parties, on January 5, 2011, the ALJ ordered Abou SAL to provide an English translation of the discharge report of the *Sunbelt Dixie*, which it did on January 12, 2011. On February 7, 2011, DSW replied to Abou SAL's response to the ALJ's order to supplement the record.

On March 29, 2011, the ALJ issued an initial decision. On April 5, 2011, the Commission determined *sua sponte* to review the ALJ's decision pursuant to 46 C.F.R. § 502.318. Neither party requested review of the decision of the ALJ.¹¹ All parties were represented by counsel. On September 13, 2011, counsel for Abou SAL filed a motion to withdraw as counsel. That motion was granted by the Commission on February 2, 2012, after new counsel for Abou SAL filed a notice of appearance.

V. Status of DSW as complainant

Although not raised by Respondents, based on the conflicting evidence in the record as to the ownership of the vehicles, there is a question as to whether DSW is the rightful complainant. While the bills of sale for the cars issued by DSW Sports to DSW show that DSW was the owner of the vehicles, no money changed hands, and the titles submitted to Abou SAL list DSW Sports as the owner of the vehicles at the time the vehicles were shipped. The ALJ

¹¹ Under the rules of Subpart T, 46 C.F.R. § 502.318(a) (rather than 46 C.F.R. § 502.227), within 22 days of the date of service of the decision, a party may request "review of the decision of the Commission asserting as grounds therefor that a material finding of fact or a necessary legal conclusion is erroneous or that prejudicial error has occurred...."

addressed the corporate relationship between DSW Sports and DSW and essentially pierced the corporate veil, finding it more likely to be true that both DSW Sports and DSW operated as the alter egos of Mr. Udgebune, the sole proprietor of DSW Sports and the president of DSW. The ALJ found that because DSW was listed as the shipper on the Commonwealth and Abou SAL bills of lading, DSW was a proper complainant. This issue is moot as we find that no violations were committed and, accordingly, award no reparations to DSW.

VI. Application of *res ipsa loquitur*

DSW argued that the Commission should apply the doctrine of *res ipsa loquitur*¹² to the proceeding. The ALJ correctly rejected this doctrine, determining that the Commission should only provide relief under the Act if the damage or loss is proximately caused by a respondent's violation of the Act and a complainant has proven that causation.¹³

¹² The doctrine of *res ipsa loquitur* is a rebuttable presumption or inference that the defendant was negligent, which arises upon proof that the instrumentality or condition causing the injury was in the defendant's exclusive control and that the accident was one that ordinarily does not occur in the absence of negligence. The Restatement (Second) of Torts, § 328D, describes a two-step process for establishing *res ipsa loquitur*. The first step is whether the accident is the kind that would usually be caused by negligence, and the second is whether or not the defendant had exclusive control over the instrumentality that caused the accident. If found, *res ipsa loquitur* creates an inference of negligence, although in most cases it does not necessarily result in a directed verdict. The Restatement (Third) of Torts, § 17, adopts a similar test, although that test does not include an exclusive control element.

¹³ The ALJ noted that DSW did not cite any Commission precedent applying *res ipsa loquitur* to establish a violation of the Act nor did his research find any Commission case where the Commission determined to find a violation of the Act by applying the doctrine. The ALJ cited European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc., 19 F.M.C. 148, 151 (FMC 1976), for the principle that the Commission does not exercise the authority of a court of law or of equity and cannot rely on common law principles to support a determination of a violation of the Act.

VII. Dismissal of Abou Mehri Lines, LLC and Abou Merhi Lines (USA), LLC

The record shows that Abou Merhi Lines, LLC was a Florida limited liability company formed in 2008 to process vehicle title paperwork on behalf of Abou Merhi Lines (USA), LLC, the agent of Abou SAL. The ALJ rightly found that no evidence in the record supported a determination that either Abou Merhi Lines, LLC or Abou Merhi Lines (USA), LLC were common carriers. The ALJ then determined that, because they were not common carriers, their actions were not governed by the sections of the Act they were alleged to have violated and thus, they could not have committed the prohibited acts alleged by DSW. Accordingly, the ALJ dismissed DSW's claims against both Abou Merhi (USA), LLC and Abou Merhi Lines, LLC.

DWS alleged violations of various sections of the Act. Although some apply only to common carriers, Section 10(d)(1) applies to marine terminal operators and ocean transportation intermediaries (NVOCCs and ocean freight forwarders) as well as ocean common carriers. 46 U.S.C. § 41102(c). If the evidence supported such a finding, a marine terminal operator or an ocean freight forwarder, neither of whom are common carriers, could be found to have violated Section 10(d)(1). Here, however, neither Abou Merhi (USA) LLC or Abou Merhi Lines, LLC were common carriers nor is there is any evidence in the record to support a determination that they were marine terminal operators or ocean freight forwarders. Abou Merhi Lines, LLC had no involvement with the shipment, while Abou Merhi (USA), LLC was Abou SAL's United States agent.¹⁴ Additionally, there is no

¹⁴ Abou SAL, as Abou Mehri (USA), LLC's principal, would liable for its acts in violation of the Act. *See Corpco Int'l Inc. v. Straightway, Inc.* 28 S.R.R. 296, 299 (FMC 1998); Hellenic Lines, Ltd.- Violation of Section 16 (First) and 17, 7 F.M.C. 673, 676 (FMC 1964).

evidence in the record that they violated Section 10(d)(1). Accordingly, the claims against Abou Merhi Lines, LLC and Abou Merhi Lines (USA), LLC are dismissed with prejudice.

VIII. Constitutional arguments

The ALJ correctly declined to address the constitutional arguments of Commonwealth that it contended bars the Commission's jurisdiction over the proceeding,¹⁵ noting that "[n]o administrative tribunal of the United States has the authority to declare unconstitutional the Act which it is called upon to administer," citing Buckeye Industries, Inc. v. Secretary of Labor, 587 F.2d 231, 235 (5th Cir. 1979).¹⁶

IX. Applicability of COGSA

Both Commonwealth and Abou Mehri Lines (USA), LLC/Abou SAL argued that the Commission did not have jurisdiction over DSW's claim, as it lies solely within the realm of

¹⁵ Commonwealth made the following constitutional arguments: 1) the dispute between DSW and the respondents is a case or controversy committed to the judicial branch of government under Article III of the Constitution and is beyond the jurisdiction of the Commission; 2) the bills of lading for the carriage of goods by sea are maritime contracts and jurisdiction over maritime contracts is granted to the judicial branch of the federal government by Article III, Section 2 of the Constitution; 3) assumption of jurisdiction over this case by the Commission deprives private parties of certain rights under the Constitution, including the right to have cases decided before a judge who is appointed for life and whose compensation may not be reduced during the judge's time in office, deprives Commonwealth of the right to a trial by jury under the 7th Amendment to the Constitution, and deprives it of property without the protections provided to private parties by the Constitution; and, 4) the existence of the Commission lacks a textual basis in the Constitution.

¹⁶ See also Weinberger v. Salfi, 422 U.S. 749, 765 (1975) (constitutionality of a statutory requirement is beyond the jurisdiction of a federal agency to determine); Petruska v. Gannon University, 462 F.3d 294, 308-309 (3d Cir. 2006) (as a general rule, an administrative agency is not competent to determine constitutional issues).

COGSA.¹⁷ In its memorandum of law filed on September 24, 2010, Abou SAL argued that DSW's claim -- that its cargo was negligently handled with the result that the cargo was lost -- is a COGSA claim rather than a claim under the Act. Abou SAL also argued that under COGSA, there is a one-year statute of limitations¹⁸ and a \$500 "per package" limitation.¹⁹ Abou SAL argued that automobiles are considered to be "packages" under judicial interpretation of COGSA and, therefore, the maximum amount to which DSW was entitled was \$1,000.00, \$500.00 for each vehicle.

COGSA, adopted in 1936, applies to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade.²⁰ Although parties may contract otherwise, COGSA does not supersede any laws "insofar as they relate to the duties, responsibilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship." COGSA coverage is often referred to as "tackle to tackle."²¹

¹⁷ COGSA, formerly published at 46 U.S.C. Appx. § 1301 *et seq.*, was not included when the Appendix to 46 United States Code was recodified in 2006. The Appendix to Title 46 no longer exists. COGSA was not amended or repealed but is now published in the United States Code as part of the historical and revision notes to the recodification of the Harter Act at 46 U.S.C. § 30701.

¹⁸ Section 3(6). We note that DSW filed its claim with the Commission on March 31, 2009, less than a year after the date of the cargo's arrival in Benin, Cotonou. Without making a determination as to when the statute of limitations on DSW's claim began to run, it appears that DSW's claim would have been timely filed under either statute of limitations. COGSA, unlike the Act, limits damages, absent agreement by the parties, to \$500 per package.

¹⁹ See Section 4(5).

²⁰ Courts have held that NVOCCs are common carriers entitled to the limits of liability contained in COGSA. International Fire & Marine Ins., Co., Ltd. v. Silver Star Shipping America, Inc., 951 F.Supp 913 (C.D. Cal. 1997); *see also* Limited Brands, Inc. v. UTI U.S., Inc., 2005 WL 1629777 (S.D. Ohio 2005); Strickland v. Evergreen Marine Corp. (Taiwan) Ltd., 2008 A.M.C. 561, 561 (D. Or. 2007). Therefore, both Commonwealth and Abou Sal, as common carriers, would be entitled to the limits of liability contained in COGSA.

²¹ COGSA, by its terms, only applies to shipments from the United States to ports of foreign countries and vice versa. Section 13. In Norfolk Southern R.

We note that in the present case, there is some evidence in the record that the loss of the two vehicles did not occur during the tackle to tackle period covered by COGSA (that is, while the vehicles were on board the *Sunbelt Dixie*), but rather occurred at some point after the discharge of the two vehicles in Cotonou. If so, no recovery by DSW would be available under COGSA and COGSA would not be applicable. It was therefore proper for the ALJ to consider whether the Act and its prohibitions applied to the case.

X. Violations of Sections 10(b)(3), 10(b)(4)(D), 10(b)(4)(E) or 10(b)(1) by Commonwealth or Abou SAL

The ALJ noted that DSW did not present any argument as to how a particular act or failure to act by a Respondent violated a specific section and indicated that he reviewed “the entire record in an attempt to identify with some certainty the particular violations of the Act complained of,” citing European Trade Specialists, Inc. v. Prudential Grace Lines, Inc., *supra*. The ALJ then analyzed Sections 10(b)(3), 10(b)(4)(D), 10(b)(4)(E) and 10(b)(1) and the evidence in the record, concluding there was no evidence in the record to support a finding that either Commonwealth or Abou SAL violated any of those sections of the Act. The ALJ was correct in determining that DSW failed to meet its burden of proof, and we affirm the ALJ’s determination that there is no evidence in the record that either Commonwealth or Abou SAL violated

Co. v. James N. Kirby, Pty Ltd., 543 U.S. 14 (2004), the Court held that the statute allows parties “the option of extending [certain COGSA terms] by contract” to cover “the entire period in which [the goods] would be under [a carrier’s] responsibility, including [a] period of ... inland transport.” Id. In Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 130 S. Ct. 2433 (2010) the Court stated that “[applying two different bill of lading regimes to the same through shipment would undermine COGSA and international, container-based multimodal transport.” Id. at 2447. In Mitsui O.S.K Lines Ltd. v. Global Link, the Commission relied on this reasoning of the Court with respect to through shipments. See 32 S.R.R. 126, 131-32 (F.M.C. 2011).

Sections 10(b)(3), 10(b)(4)(D), 10(b)(4)(E) or 10(b)(1) of the Act.

XI. No evidence of a violation of Section 10(d)(1) by Commonwealth

Section 10(d)(1) states that “[a] common carrier, marine terminal operator, or ocean transportation intermediary 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) (emphasis added). In addressing whether Commonwealth violated Section 10(d)(1), the ALJ focused on DSW’s allegations that it was provided incorrect information by Commonwealth as to the vessel engaged to transport the two vehicles. The ALJ did not address whether Commonwealth had a duty, under its bill of lading, to arrange for transportation of the vehicles from Cotonou, Benin to Lagos, Nigeria (the original destination) and whether Commonwealth may have breached that duty. The record shows that initially Commonwealth was going to transport the vehicles by a vessel operated by Grimaldi to Lagos, Nigeria. At some point, the parties agreed that the vehicles would be transported by vessel from Jacksonville to Cotonou, Benin rather than Lagos, Nigeria. It is not clear from the record whether Commonwealth remained responsible for transporting the vehicles to Lagos, Nigeria and whether Commonwealth may have breached that duty. Commonwealth’s bills of lading listed Cotonou as the port of unloading, and no place of delivery by an on-carrier was indicated in Commonwealth’s bills of lading. The record shows that the vehicles were transported from Jacksonville to Cotonou and discharged from the *Sunbelt Dixie* on June 21, 2008. There is no evidence in the record regarding any actions Commonwealth may have taken or failed to take to accomplish transportation of the vehicles from Cotonou to Lagos. There is no evidence in the record to support a determination that Commonwealth had a duty to transport the vehicles to Lagos or to support a determination that Commonwealth breached that duty. DSW has not met its burden

of proof to establish that Commonwealth violated Section 10(d)(1).

XII. No evidence of a Section 10(d)(1) violation by
Abou SAL

The ALJ found that Abou SAL operated as a VOCC on these shipments and that, when it issued its bills of lading, it assumed responsibility for transportation of the cars from Jacksonville to Lagos, Nigeria, and their delivery to the consignee identified in the bills, Udemba Electronics Coy Ltd. The ALJ found that delivery to Udemba Electronics and not Abou SAL's agent, the Elissa Group, was required in order to fulfill Abou SAL's obligations under its bills of lading. The ALJ went on to find that DSW established that the cars were not delivered to the consignee, Udemba Electronics, and that, although Abou SAL may have demonstrated that it had established just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property, those regulations and practices were not observed and enforced. The ALJ also found that, although it may have been Elissa Group, Abou SAL's agent, that failed to carry out the last step of delivery to Udemba Electronics, Abou SAL is responsible for the activities of its agent. The ALJ concluded that Abou SAL failed to observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property when it and/or its agent failed to deliver the vehicles to Udemba Electronics.

Abou SAL's bills of lading indicate Cotonou as the port of unloading. No place of delivery by an on-carrier was indicated, evidence that Abou SAL was only responsible for transportation of the vehicles from Jacksonville to Cotonou. According to the affidavit of Merhi Abou Merhi, the vehicles were discharged from the vessel and delivered to the Elissa Group, the agent for Abou SAL, as evidenced by the ETS "A.P.M." discharge report. It was not unreasonable for the vehicles to be discharged to the custody of the VOCC's local agent. Additionally, according to Merhi Abou Merhi's affidavit, it was Abou SAL's normal business practice to

adhere to the security procedures of the ports at which it calls. There is no evidence in the record as to what regulations and practices were at issue, nor does the record draw any causal relationship between a failure to observe and enforce just and reasonable regulations and practices and the disappearance of the vehicles.

A complainant must substantiate his or her allegations by a preponderance of the evidence and show that it is more probable than not that the allegations are true. DSW failed to do so. There is no evidence in the record to support a finding that some failure on the part of Abou Sal or the Elissa Group, the agent of Abou SAL, to observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property occurred. Absent such information, the mere disappearance of cargo does not constitute a violation of Section 10(d)(1).

CONCLUSION

For the reasons discussed above, we: dismiss the claims against Abou Merhi Lines, LLC and Abou Merhi Lines (USA), LLC with prejudice; find no violations of Sections 10(b)(3), 10(b)(4)(D), 10(b)(4)(E) or 10(b)(1) by Commonwealth or Abou SAL; find no violations of Section 10(d)(1) by Commonwealth or Abou SAL; and, accordingly, dismiss all claims against Commonwealth and Abou SAL with prejudice.

THEREFORE, IT IS ORDERED, That the claims against Abou Merhi Lines, LLC and Abou Merhi Lines (USA), LLC are dismissed with prejudice from this proceeding.

IT IS FURTHER ORDERED, That no violations of Sections 10(b)(3), 10(b)(4)(D), 10(b)(4)(E) or 10(b)(1) were committed by Commonwealth or Abou SAL.

IT IS FURTHER ORDERED, That no violation of Section 10(d)(1) of the Act was committed by Commonwealth.

IT IS FURTHER ORDERED, That no violation of Section 10(d)(1) of the Act was committed by Abou SAL.

IT IS FURTHER ORDERED, That all claims against Commonwealth and Abou SAL are dismissed with prejudice.

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

By the Commission.

Karen V. Gregory
Secretary