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Docket Number 1898(F)

DSW INTERNATIONAL, INC.	*	**FEDERAL MARITIME COMMISSION**
Complainant	*	
	*	**(Formal Complaint)**
V.	*	
	*	
COMMONWEALTH SHIPPING, INC.	*	
ABOU MERHI LINES(USA), LLC.	*	**WASHINGTON, DC**
Respondents	*	

COMPLAINANT'S BRIEF

TO THE HONORABLE COMMISSION:

"A common carrier of goods is an insurer." This is one of the most time-honored common law rules. This rule means that a common carrier is liable for all losses which may occur to property entrusted to his charge in the course of business, unless he can prove the loss happened as a consequence of an act of God, act of the enemies of the United States, or a misconduct of the owner of the property.

This common law rule was adopted in American jurisprudence in the 19TH century. As recently as 2005, the Supreme Court of California enunciated this rule in its *Gomez v. Walt Disney Company et al* (35 Cal 4TH 1125, Cal Sup Ct, 2005). In its decision, quoting Beale's "The History of the Carrier's Liability" in *Selected Essays in Anglo-American Legal History*, Assn of Am Law Schools, ed. 1909, at 148, the Court stated

> The English common law rule said that "common carriers of goods were absolutely responsible for the loss of, or damage to, such goods."...Carriers of goods are bailees and at early law "goods bailed were absolutely at the risk of the bailee." ...Thus carriers of goods for reward were "responsible absolutely for the goods delivered, even when lost by theft, and regardless of negligence." (35 Cal 4TH 1125, at 1129-1130).

This common law rule was codified in the United States when Congress first enacted Carriers of Passengers by Water Act in 1819, and it was subsequently amended and strengthened

by the act of Congress of 1847. In California, the rule was adopted in 1865 in the case of *Agnew v. Steamer Contra Costa* (27 Cal 425, Cal Sup Ct, 1865). Therein, the Court held that a common carrier of goods… "was an insurer against all injury not resulting from the act of God or the public enemies, or from the conduct of the animal."(35 Cal 4TH 1125, at 1130).

This doctrine of the common carrier's strict liability has been adopted not only by the United States and California, but also by and throughout virtually all of the 50 states in the Union. In Texas, the common carrier was ruled to be liable as an insurer for any loss or injury to the goods. See *Burnett v. Riter* (276 SW 347, Civ App, 1925) at 349.

This present case was of course filed under the Shipping Act. The purpose of enacting the Shipping Act was to enhance, not to limit, the spirit of the common law rule. The Shipping Act was enacted to "provide an efficient and economic transportation system in the ocean commerce of the United States," " to promote the growth and development of the United States exports through competitive and efficient ocean transportation," and "to establish a nondiscriminatory regulatory process for the common carriage of goods by water." (The Shipping Act, Section 2. Declaration of Policy).

To achieve the policies declared in Section 2, the Commission is authorized to protect the consumer, the shipper, and the public; to maintain an orderly and responsible development of international ocean shipment; to supervise and control the ocean common carriers, known as the VOCC, NVOCC, OTI, and/or Marine Terminal Operators in the Shipping Act; and to investigate the complaints lodged against, and, if necessary, to impose penalties upon, the ocean common carriers.

Section 10 of the Shipping Act provides a list of actions that are prohibited of the ocean common carriers, known as the VOCC, NVOCC, OTI, and/or Marine Terminal Operators in the

Shipping Act. The Complainant's Amended Complaint complains of the Respondents' violations of the Shipping Act. As an ocean common carrier Abou Merhi violated Section 10(b)(3) of the Shipping Act, which prohibits the common carrier from "retaliat[ing] against any shipper by refusing, or threaten[ing] to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason."

Abou Merhi also violated Section 10(b)(4)(D) that provides, "No common carrier, either alone or in conjunction with any other person, directly or indirectly, may...engage in any unfair or unjustly discriminatory practice in the matter of...the loading and landing of freight, or the adjustment and settlement of claims." Abou Merhi further violated Section 10(b)(10) of the Shipping Act, under which an OCC is specifically prohibited from "unreasonably refus[ing] to deal or negotiate" with the shipper.

The Respondents additionally violated Section 10(d)(1) of the Shipping Act, which provides "No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property."

As clearly delineated in the DSW's Amended Complaint and in its Proposed Findings of Fact, the Respondents' liability as ocean common carriers arose while the Respondents had absolute possession of and exclusive control over the two motor vehicles that the Complainant requested the Respondents to transport from Jacksonville, Florida, to Cotonou, Benin.

As Exhibit 9g(Port Storage & Delivery, Inc. Invoice #746, dated 5/19/2008) indicates, the two subject motor vehicles were delivered to the Respondent at the port of Jacksonville on or about May 19, 2008. On or about the same date, the Complainant paid to the Respondent the

ocean shipping charges($3,200.00) for the two vehicles, and surrendered the titles of the two motor vehicles to the Respondent for customs clearance purposes. Thereafter, during the early part of June 2008, the Complainant received bills of lading for the two vehicles being shipped, two bills of lading from Commonwealth for each of the two vehicles and from Abou Merhi for each of the two vehicles. According to the information provided by Commonwealth, the scheduled date of arrival of the freight(two subject motor vehicles) at Cotonou, Benin, was June 23, 2008.

June 23, 2008, the scheduled date of the arrival, did come and did go, and many more weeks and months passed thereafter; but the Consignee failed to receive any notice from the ocean common carrier that the vehicles had arrived at Cotonou, Benin. Eventually, after the passage of more than a couple of months, the Respondents informed the Complainant that the freight(the two motor vehicles) had been lost **in transit.**

If the freight had arrived at the port of destination in a damaged condition, the Respondents would have been clearly liable for such damage and would have been required to pay damages. In this case, however, there was not even a damaged freight. The freight had simply disappeared while the freight was in exclusive possession and control of the Respondents.

At this point, the Complainant respectfully invokes the doctrine of *Res Ipsa Loquitur.* The Complainant asserts that the two automobiles were effectively under exclusive possession and control of the Respondents, the Complainant having no access nor control over the two automobiles. The Complainant asserts that in such an event, "the thing speaks for itself"; that is, if a tort is committed under such circumstance, the party that had exclusive and absolute control over the goods should be held liable without the tort victim's burden of producing the evidence that the tortfeasor committed the tortious act.

This is not even a tort case. This is a strict liability case in which the common law common carrier rule should be applied. If the Respondents are held to the strict standard of the common law common carrier rule, the *Res Ipsa Loquitur* rule may not be necessary. But no legal reason would seem to bar the application of the *Res Ipsa Loquitur* doctrine in Commission proceedings. The Complainant herein respectfully requests that the Commission approve and adopt the rule of *Res Ipsa Loquitur* in this case and hold the Respondents liable for the loss of the Complainant's cargo.

The Congress has authorized the Commission to investigate and adjudicate a dispute. The Commission further has the authority to impose penalties upon the wrongful party and order a payment of reparations to the complainant for actual injury plus interest plus reasonable attorneys fees. (The Shipping Act, Section 11). The Complainant hereby respectfully requests that the Commission order the Respondents to pay reparations to the Complainant pursuant to provisions of the Shipping Act.

The Complainant is aware that in order to prevail and receive reparations he has the burden of proving the actual pecuniary loss he sustained as a proximate cause of the Respondents' violations. *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. 8(2003) at 13; *Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co. Inc.*, 26 S.R.R. 788(ALJ 1992), at 798-799.

The Amended Complaint of the Complainant respectfully presents a list of actual injury and damage which is as follows:

a. The purchase price of Automobile #One, 2004 Ford Explorer 4-Door Sports Truck, VIN 1FMZU67K44UB59703, was **$21,200.00**,

b. After the purchase of the truck, a truck bed cover and additional truck accessories installed by Auto Interiors of Dallas on 1/30/2008, at the costs of **$1,300.00**,

c. Additional installations such as a night vision camera added by Bonnie & Clyde CB & Stereo on 1/31/2008, at the costs of **$1,200.00,**

d. The purchase price of Automobile #Two, 2001 Honda Accord Passenger Car, V6 Leather, sunroof, all power, and full option added, VIN 1HGCG16541A079154, was **$16,900.00**,

e. The costs of replacing the windshield on the Honda Accord car was **$200.00**,

f. Trucking the two vehicles from Dallas, Texas, to Jacksonville, Florida, was **$1,000.00,**

g. The storage charges for the two vehicles in Jacksonville were **$1,284.30**, and

h. Prepaid Shipping Charges, **$3,200.00**.

The receipts and/or invoices that would evidence the expenses hereabove are attached to the Amended Complaint as **Exhibit 9, a-h,** and incorporated herein for all purposes.

The total amount of the damage the Complainant sustained is **$46,284.30**, which amount the Complainant demands from the two Respondents, jointly and severally, for reparations and damages. Additionally, the Complainant requests that reasonable attorneys fees be paid in the amount of **$7,500.00.**

Additionally, the Complainant requests that pre-judgment and post-judgment interest on the total amount of the damages and the attorneys fees at the commercial rates compounded from the date the cause of action arose to the date of the payment of the judgment be paid as per Section 11(g) of the Shipping Act. The Complainant further requests that he be paid any and all costs and expenses which the Complainant has expended in the course of prosecuting the claim.

DSW International, Inc. by and through Don B. Chae, its attorney of record, respectfully submits this Brief to the Commission in support of its claim against the Resspondents.

Respectfully submitted,

Chae and Associates, PC
Attorneys for Complainant,
DSW International, Inc.

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2009, a true and correct copy of the Complainant's Brief has been served on Francis M. Boyer, Esq. of Sullivan and Company, counsel for Commonwealth Shipping, Inc., by means of facsimile transmission at (904)737-0920, and on Abou Merhi Lines, LLC. at 13453 N. Main Street Suite 505, Jacksonville, FL 32218, by United States mail.

/s/
Don B. Chae

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Complainant's Brief, (7 pages)