

*Original*

cc: os/  
OGC  
ALJ(?)  
PJB

FEDERAL MARITIME COMMISSION

RECEIVED

2009 SEP 21 PM 3:43

FEDERAL MARITIME COMMISSION

DOCKET NO. 06-06

**EUROUSA SHIPPING, INC., TOBER GROUP, INC., AND CONTAINER INNOVATIONS, INC. - - POSSIBLE VIOLATIONS OF SECTION 10 OF THE SHIPPING ACT OF 1984 AND THE COMMISSION'S REGULATIONS AT 46 C.F.R § 515.27**

**MOTION TO REOPEN THE PROCEEDING FOR THE PURPOSE OF RECEIVING ADDITIONAL EVIDENCE**

The Bureau of Enforcement ("BOE") moves to reopen this proceeding to admit additional evidence of Respondent Tober Group, Inc.'s ("Tober") ability to pay a civil penalty for violations of the Shipping Act of 1984 ("1984 Act"). That evidence, including additional findings of fact and argument thereon, is contained in the attached document entitled "ADDITIONAL PROPOSED FINDINGS OF FACT, BRIEF AND APPENDIX OF THE BUREAU OF ENFORCEMENT". The evidence consists of information regarding outstanding federal tax liens and state tax warrants filed against Tober, as well as claims against Tober's ocean transportation intermediary bond. This information is contained in the statements of Dorothy H. Wade and Martin W. Wilson submitted herewith in the attached Appendix.

**PROCEDURAL HISTORY**

On February 5, 2009, the Administrative Law Judge ("ALJ") issued a procedural order setting forth guidelines for the submission of proposed findings of fact, evidence to support those

proposed findings of fact and argument. The order contemplated a hearing through submission of evidence and argument in documentary form. By order dated May 11, 2009, the ALJ granted BOE's motion for extension of deadlines and set May 22, 2009, for the filing of Proposed Findings of Fact, Supporting Evidence and Briefs. Tober Group, Inc.'s ("Tober") Response to BOE's Proposed Findings of Fact and their Proposed Findings of Fact, Appendix and Brief were due on June 26, 2009, with BOE's replies due on July 17, 2009. BOE filed its Proposed Findings of Fact, Supporting Evidence, and Brief on May 22, 2009. Tober has not filed a Response to BOE's Proposed Findings of Fact nor has Tober filed its Proposed Findings of Fact, Appendix or Brief.<sup>1</sup> The ALJ has not issued an initial decision in this proceeding. BOE moves to reopen this proceeding in order to submit additional evidence of Tober's ability to pay a civil penalty.<sup>2</sup> The evidence consists of information describing federal tax liens and state tax warrants filed against Tober as reflected in public records, as well as claims against Tober's ocean transportation intermediary bond.

## **DISCUSSION**

46 C.F.R. § 502.230 governs the reopening of a proceeding by the presiding officer or the Federal Maritime Commission ("Commission"). The rule states:

At any time after the conclusion of a hearing in a proceeding, but before issuance by the presiding officer of a recommended or initial decision, any party to the proceeding may file with the presiding officer a motion to reopen the proceeding for the purpose of receiving additional evidence. A motion to reopen shall be served in conformity with the requirements of subpart H and shall set forth the grounds requiring reopening of the proceeding, including material changes of fact

---

1. In an interim order issued in response to a motion to withdraw as counsel for Tober, the ALJ ordered Yonatan Benhaim, Tober's president, to identify who will appear for Tober in this proceeding. (Interim Order issued on a Motion to withdraw as counsel for Tober Group, Inc., March 12, 2009). Yonatan Benhaim did not respond to the ALJ's order. (See ALJ's Order granting motion to withdraw as counsel for Tober Group, Inc., April 29, 2009).  
2. Evidence already exists in the record, in the form of a declaration by David P. Street, accompanying a motion to withdraw as counsel dated February 27, 2009, that Tober is out of business. Attached to Mr. Street's statement is an e-mail from Yoram Benhaim, which also stated that Tober is out of business.

or of law alleged to have occurred since the conclusion of the hearing.<sup>3</sup> 46 C.F.R. § 502.230(a).

Agencies have broad discretion in deciding whether to reopen a proceeding and their decisions are reviewed under an abuse of discretion standard. Interstate Commerce Commission v. Jersey City et al., 322 U.S. 503 (1944); Interstate Commerce Commission v. Bhd. of Locomotive Engineers, 482 U.S. 270 (1987).

BOE's motion is prompted by the ALJ's recent initial decision in Docket No. 07-02, Owen Anderson and Anderson International Transport-Possible Violations of Sections 8(a) and 19 of the Shipping Act of 1984 ("Shipping Act"), served August 28, 2009, addressing the imposition of civil penalties. ("I.D.") In that decision, the ALJ discussed the factors enumerated in Section 13 of the Shipping Act governing imposition of a civil penalty and held that BOE has "the burden of establishing that a civil penalty should be imposed and if so, the amount of the civil penalty that should be assessed." (I.D., pp. 78,79). The ALJ concluded that BOE had not met its burden of production of evidence regarding Respondents' ability to pay a penalty and had not met its burden of persuasion regarding the amount of civil penalty to be assessed. Therefore, the ALJ reasoned that no civil penalty could be assessed. (I.D., p.83).<sup>4</sup>

The record in this proceeding discloses that Tober is out of business and no longer operating since at least January, 2009. (See Footnote 2, supra). That circumstance was believed to address the ability to pay and permit an inference that Tober does not have an ability to pay, a factor to be weighed in considering the other Section 13 factors. Existing Commission precedent

---

3. BOE notes that the rule in its current version at 46 C.F.R. § 502.230 was issued in 1967 and constituted a change from the Commission's original rule governing reopening of proceedings. The original version, codified at 46 C.F.R. § 502.261, contained a requirement that, if the purpose of the petition for reopening was to take further evidence, there be a showing that the evidence was not available at the time of the prior hearing. That requirement was deleted in the current rule. See General Order 16, Amdt. 2, 33 FR 9402, June 27, 1968 (issuance of 46 C.F.R. § 502.230); General Order 16, 30 FR 13604, 13616, October 26, 1965 (issuance of 46 C.F.R. § 502.261).

4. The Anderson decision is not yet administratively final. At BOE's request, the time for filing exceptions has been extended to October 21, 2009. (Notice of Extension, served September 9, 2009).

reflects a very low threshold in the quantum of evidence necessary to address the ability to pay in situations where the respondent has gone out of business subsequent to its violations or has chosen to ignore and not participate in the Commission proceeding.<sup>5</sup> See, e.g., Portman Square, Ltd., 28 S.R.R. 80, 86 (1998, ALJ)(requiring “some evidence”); Everfreight Int’l Ltd., et al. 28 S.R.R. 329 (1998, ALJ). (BOE is only required to make a reasonable effort to obtain financial information).

However, the Anderson decision indicates that something more than Tober’s out-of-business status may be required in considering the ability to pay factor. The statements tendered herewith provide additional information that reflects Tober’s current financial condition. The interests of judicial economy and efficiency would be served by reopening the record for the limited purpose of submitting this information prior to issuance of an initial decision. Reopening will permit consideration of the statutory factors on the basis of a more complete record and enable the ALJ to reach a conclusion on the assessment of a civil penalty rather than finding it necessary to bypass that issue notwithstanding the finding of statutory violations, as in Anderson.

The Commission’s preference for a complete record was discussed in the case of Hudson Shipping (Hong Kong) Ltd. d/b/a Hudson Express Lines-Possible violations of Section 10(a)(1) of the Shipping Act of 1984, 29 S.R.R. 1376 (ALJ 2002), where the ALJ reopened the record and vacated discovery sanctions prior to issuance of an initial decision. The ALJ explained the rationale favoring reopening to permit the development of a complete record:

. . . it is Commission policy that the evidentiary record be fully developed fully [sic] before an initial decision is rendered. Maersk Line Agency for the Benefit of Mitsui and Co., 22 FMC 224 [19 SRR 1014] (1979). . . [i]t is not just the policy, but the responsibility of the Commission and, by delegation of authority, the presiding judge, to inquire into and consider all relevant facts. Michigan Consolidated Gas Co. v. Federal Power Commission, 283 F2d 204, 226, *cert.*

---

5. BOE notes that Tober initially participated in the proceeding but subsequently stopped participating after going out of business.

*denied*, 364 US 913 (1960). The Commission's role is not one of 'an umpire blindly calling balls and strikes for adversaries appearing before it.' Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F2d 608, 620 (2d Cir 1965). The Commission would not be fulfilling its responsibility if it were to decide the issues upon a [sic] incomplete record. Indeed, of even greater importance than the concept of fairness between the parties, as they maneuver to develop a record which fits neatly within their positions, is the need to ensure that justice is served and all relevant facts are investigated and considered by the Commission. Isbrandtsen Co. v. United States, 96 FSupp 883, 892 (SD NY 1951); Landis, *The Administrative Process* 39 (1938). Id., p.1377.

The Commission may reopen a proceeding for the purpose of taking further evidence, particularly if the evidence is a material fact that "might affect the outcome of the suit under the governing law". Green Master Int'l Freight Services Ltd.- Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 29 S.R.R. 1303, 1318 (FMC 2003), citing Gonzalez v. Torres, 915 F Supp 511, 515 (DPR 1996). The information BOE seeks to submit is relevant and material since it addresses Tober's ability to pay, a factor that must be considered in assessing a civil penalty. Reopening the record to allow for admission of additional evidence regarding Tober's ability to pay will foster a more complete record.

### **RELIEF REQUESTED**

BOE moves to reopen this proceeding in order to admit evidence obtained from public records regarding federal and state tax liens filed against Tober and information regarding claims against Tober and the bonds which covered its ocean transportation activities. This information is relevant to a determination of Tober's ability to pay a civil penalty. Accordingly, BOE respectfully requests that the attached Additional Proposed Findings of Fact, Brief and Appendix be accepted into the record in this proceeding.<sup>6</sup>

---

<sup>6</sup> Additionally, the ALJ may reopen the proceeding for the reception of further evidence on his own motion. 46 C.F.R. § 502.230(c).

Due to its inability to communicate with Respondent Tober, BOE requests that this motion be treated on an *ex parte* basis under Rule 105, 46 C.F.R. 502.105.

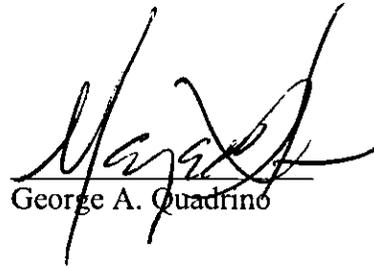
A handwritten signature in black ink, appearing to read "George A. Quadrino", is written over a horizontal line.

George A. Quadrino, Deputy Director  
Elisa P. Holland, Trial Attorney  
Bureau of Enforcement  
Federal Maritime Commission

September 21, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that on this **21st** day of September, 2009, a copy of the foregoing **MOTION TO REOPEN THE PROCEEDING FOR THE PURPOSE OF RECEIVING ADDITIONAL EVIDENCE AND SUBMISSION OF ADDITIONAL EVIDENCE** has been served upon all the parties of record by first class mail or e-mail.



George A. Quadfino

Angelo J. Carrera, President                      and  
Container Innovations, Inc.  
123 Pennsylvania Avenue  
Kearny, NJ 07032  
[angelo@containerinnovations.com](mailto:angelo@containerinnovations.com)

Angelo J. Carrera  
Container Innovations  
556 East 7<sup>th</sup> Street  
Brooklyn, NY 11218

Henry Gonzalez  
Rodriguez, O'Donnell, Ross, Fuerst,  
Gonzalez, Williams & England, P.C  
1211 Connecticut Avenue, N.W. Suite 812  
Washington D.C. 20036  
Tel: (202) 973-2980  
Fax: (202) 293-3307  
[Gonzalez@rorfgw.com](mailto:Gonzalez@rorfgw.com)  
Counsel for EuroUSA Shipping, Inc.

John R. Keough, III  
Waesche, Sheinbaum  
& O'Regan, P.C.  
111 Broadway  
New York, NY 10006  
Tel: (212) 227-3550  
Fax: (212) 267-5767  
[j.keough@waeschelaw.com](mailto:j.keough@waeschelaw.com)  
Counsel for EuroUSA  
Shipping, Inc.

Yonatan Benhaim  
c/o Empire Container Lines  
18 Chapel Avenue  
Jersey City, NJ 07305  
(201) 395-9950  
[yonib@empireline.com](mailto:yonib@empireline.com)

Yonatan Benhaim  
17815 Dalny Road  
Queens, NY 11432