

ORIGINAL

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January 14, 2009

FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 06-05

VERUCCI MOTORCYCLES, LLC

v.

SENATOR INTERNATIONAL OCEAN, LLC

**INITIAL DECISION¹ BY PAUL B. LANG,
ADMINISTRATIVE LAW JUDGE**

Statement of the Case

This case arises out of a Complaint which was filed by Verucci Motorcycles, LLC (“Verucci” or “Complainant”) on March 31, 2006, in which it alleged that Senator International Ocean, LLC (“Senator” or “Respondent”) violated the Shipping Act of 1984 (“Act”) with regard to a shipment of motorcycles from China to Puerto Rico and Miami, Florida which were consigned to Verucci. On May 1, 2006, Senator filed an answer in which it denied liability and raised certain affirmative defenses. On March 22, 2007, Acting Chief Administrative Law Judge Clay G. Guthridge denied Senator’s motion to dismiss or, alternatively, for summary judgment.²

¹ This decision will become the decision of the Commission in the absence of review thereof by the Commission, Rule 227, Rules of Practice and Procedure, 46 C.F.R. §502.227.

² Judge Guthridge reassigned this case to me on December 5, 2008.

Discovery has been completed and the parties have submitted their prehearing statements as required by Rule 95 of the Rules of Practice and Procedure, 46 C.F.R. §502.95.³

Preliminary Issue

On December 22, 2008, in an attempt to obtain printed copies of the exhibits to Verucci's prehearing statement, I first became aware that Verucci had not filed an original and four copies of its prehearing statement and exhibits as required by Rule 118(a)(2), 46 C.F.R. §502.118(a)(2). Rather, Verucci provided the Secretary and the Office of Administrative Law Judges with computer discs ("CDs") containing its prehearing statement with exhibits in .pdf, or facsimile, format.

Even a cursory examination of the case file indicates that this is but the latest of a series of failures by Verucci to comply with regulations and orders regarding the timely filing of documents. On March 13, 2008, Judge Guthridge issued an Order dismissing the Complaint because of the failure of Verucci to comply both with the Rules of Practice and Procedure of the Commission and with an order to supplement its responses to Senator's discovery requests; Verucci had also failed to respond to an order to show cause why the Complaint should not be dismissed. By Order of May 7, 2008, the Commission reopened the proceedings to allow for the submission of additional evidence. The stated reason for the Commission's action was recognition of the fact that Verucci was not represented by counsel and was thus entitled to a certain degree of leniency. The Commission also cited the fact that Pierre Hachar, Sr., Verucci's president, had reportedly been hospitalized. Besides remanding the case to the presiding officer, the Commission directed Verucci to submit its prehearing statement and to supplement its discovery responses as directed by Judge Guthridge in the Order of December 21, 2007, and to, "strictly adhere to such orders as may be issued by the ALJ henceforth."

On November 13, 2008, Judge Guthridge issued an order for Verucci to serve and file proposed findings of fact and a reparations statement in word processing format. Verucci filed its prehearing statement on November 19, 2008, but, as stated above, the filing was in the form of a CD with no "hard copies" of exhibits and in other than a word processing format.

On December 22, 2008, I sent an e-mail message to the representatives of both parties directing Verucci to provide me with paper copies of the exhibits to its Rule 95 statement. The exhibits were to be delivered by overnight messenger service so as to arrive by December 23. On the same date I sent another e-mail message to representatives of both parties directing Verucci to provide the Secretary with the requisite number of copies of the exhibits to its Rule 95 statement by the close of business on December 23. I further indicated that, if Verucci did not comply, its prehearing statement would not be considered to be timely filed. Finally, I indicated that

³ For the sake of brevity, subsequent citations to the Rules of Practice and Procedure will be in the form of "Rule ___" along with the C.F.R. citation.

the message was to be considered as an order which supplemented, rather than superseded, my prior message of that date. A representative of Verucci contacted my office on January 5 to state that Verucci's business office would be closed for the holidays from December 22 to January 7 and that Verucci would respond to my instructions as to documents "as soon as possible thereafter." I have elected not to delay the issuance of this Initial Decision until such time, if ever, as Verucci complies.

Verucci's noncompliance with Commission Rules and orders would justify the dismissal of the complaint or the issuance of a decision without consideration of its prehearing statement and exhibits. However, stretching to the limit the principle of leniency toward unrepresented parties and in a desire to address the merits of this case, I have given due consideration to Verucci's prehearing statement and exhibits.

Positions of the Parties

Complainant

Verucci contends that Senator is a freight forwarder, customs broker and non-vessel-operating common carrier ("NVOCC") and is under the jurisdiction of the Commission. According to Verucci, Senator violated its duty to Verucci in the following manner, thus subjecting Verucci to cargo delays and significant financial loss⁴:

1. Senator failed to route Verucci's cargo in accordance with its instructions. Specifically, Senator caused a portion of the cargo to be discharged in Port Everglades, Florida rather than in Miami as Verucci had instructed.

2. Senator engaged in prejudicial, unfair and unjust business practices, thereby causing Verucci to fail to meet its obligations to its customers and to the foreign manufacturer of the motorcycles. Specifically, Senator reneged on its agreement to provide Verucci with a line of credit of \$250,000 and the option to delay payment until 30 days after the receipt of the cargo.

3. Senator acted in an unreasonable and intransigent manner by refusing to deal or negotiate with Verucci. According to Verucci, Senator "resorted to unjust discriminatory methods of doing business, all to the detriment of Verucci."

4. Senator did not fulfill its service agreement with Verucci in that Senator routed Verucci's cargo to Port Everglades in an attempt to reduce its own costs.

⁴ The text of the Complaint does not include the dates on which the violations are alleged to have occurred. However, attachments to the Complaint, including a table showing invoice, departure and arrival dates of the motorcycles and scooters, show that the relevant time period is from on or about November 2, 2005, to on or about January 7, 2006.

5. Senator was grossly negligent in the preparation of customs forms in which Verucci's cargo was "mis-declared". Specifically, Verucci alleges that Senator improperly declared the motorcycles to be in classification 8, *i.e.*, that they were not manufactured primarily for use on public roads and, therefore, are not motor vehicles subject to Federal Motor Vehicle Safety, Bumper and Theft Prevention Standards. According to Verucci, the correct classification is the "opposite" of the one indicated by Senator. Verucci further alleges that the misclassification of the cargo resulted in its seizure by customs authorities.

6. Senator negligently issued incorrect bills of lading that indicated the wrong shipper and consignee as well as other "confusing information" that contributed to costly delays after the cargo had arrived at its destination.

7. Senator negligently failed to provide timely customs clearance service for Verucci's cargo that was shipped to Puerto Rico. According to Verucci, Senator represented itself as being able to handle all aspects of Verucci's shipment. Yet, one week after seven containers arrived in Puerto Rico, Senator informed Verucci that it could not handle the customs clearance. According to Verucci, this action by Senator caused significant delays and resulted in demurrage and storage charges which adversely affected Verucci's ability to meet its obligations to its customers.

Verucci maintains that, in view of the above stated violations of the Act by Senator, it is entitled to reparations of \$3,891,825.00 as of the time of the filing of the Complaint. The reparations are for the retail value of the motorcycles and scooters⁵, estimated attorney's fees⁶, and "extra charges". According to Verucci, information from Senator indicates that the reparations claim is increasing by \$64,320.00 per month, presumably because of demurrage and other charges which must be paid before the cargo is released.

Respondent

Senator maintains that it is not a customs broker and had no obligation to act as such. Senator further maintains that the Bureau of Customs and Border Protection ("Customs") seized Verucci's cargo because of a lack of certification of compliance with federal safety standards.

With regard to the alleged misdirection of Verucci's cargo, Senator maintains that it advised Verucci that delivery to Miami would be accomplished through Port Everglades. Verucci's desire to avoid a rigorous customs inspection at Port Everglades is contrary to public policy and is not a legitimate basis for relief. Furthermore, Verucci presented no evidence to show that delays in delivery were caused other than by its

⁵ Verucci maintains that the motorcycles and scooters could not be sold due to the wrongful actions of Senator which caused delays in their release.

⁶ No attorney has entered an appearance on behalf of Verucci.

failure to pay freight charges to Senator, failure to pay its supplier so as to obtain bills of lading which were necessary for the release of the cargo and for securing permission from Customs for the release of the cargo. Finally, Verucci did not appeal an adverse decision to that effect by the Florida Eleventh Circuit court.

With regard to Verucci's other allegations, Senator maintains that they are unsupported by the evidence. Specifically, Verucci did not prove that it was entitled to a \$250,000 line of credit from Senator, nor has Verucci shown that Senator was operating under "unfilled" agreements.⁷ Senator further maintains that there is no evidence of misrepresentations or false information on any Senator bills of lading. Finally, Senator maintains that Verucci's claim for reparations is frivolous. Verucci itself has failed to satisfy a judgment of more than \$120,000 by the Florida court in favor of Senator.

Senator has responded to Verucci's allegations as follows:

1. Senator admits that it is a NVOCC, but denies that it is a freight forwarder or customs broker. Senator maintains that the listing of ocean transportation intermediaries ("OTIs") on the official Commission website proves that this is so. Accordingly, Senator maintains that it is not bound by Commission regulations and precedent related to the duties and obligations of freight forwarders and customs brokers.

2. Senator denies that it failed to carry out its transportation obligations to Verucci. In support of that position, Senator states that Verucci has failed to provide copies of bills of lading prepared by Senator (Senator denies that such bills of lading exist) which indicate how the cargo was to be routed, nor has Verucci provided documentation showing that Senator agreed to any particular routing prior to the departure of the cargo from China. Senator further states that Verucci's "contraband" was interdicted by Customs and that the entry of the cargo was handled by a customs broker and is beyond the control of Senator as the NVOCC. According to Senator, all of the documents related to the routing and entry of the cargo were prepared by a company other than Senator.

3. Senator denies that it engaged in prejudicial, unfair and unjust business practices to the detriment of Verucci. Specifically, Senator maintains that Verucci has failed to present evidence of a \$250,000 line of credit and notes that, in a suit brought by Senator against Verucci in a Florida court, Verucci alleged that the line of credit was in the amount of \$300,000.

4. Senator denies that it acted in an unreasonable and intransigent manner or that it refused to deal or negotiate with Verucci. Senator maintains that Verucci has failed to provide evidence of discrimination or of the treatment of a similarly situated entity.

⁷ During the course of a telephonic status conference on May 2, 2007, the representative of Verucci stated that the use of the term "unfilled" was related to the alleged failure of Senator to perform its contractual obligations.

Senator further maintains that, although it agreed to mediate the dispute within the time limits established by the Commission, Verucci refused to do so.

5. Senator denies that it failed to fulfill its service agreement with Verucci and states that there was no such agreement. According to Senator, the e-mail exchanges between the parties show that Senator clearly disclosed the fact that it intended to route the cargo through Port Everglades on its way to Miami. Senator also notes that Verucci made identical allegations in its counterclaim in the suit which was brought by Senator in a Florida court; Verucci's counterclaim was dismissed with prejudice.

6. Senator denies that it incorrectly declared Verucci's cargo in customs EPA (presumably Environmental Protection Agency) declarations, thus resulting in the seizure of the cargo. Senator again states that it is not a customs broker and further states that, on January 2, 2007, National Seizures Officer Scott Greenberg issued a letter stating, in effect, that the seizure of the cargo was not caused by the checking of an incorrect box on a Department of Transportation form. Rather, the seizure was the result of the fact that the scooters were imported without the required certification from the manufacturer that they met federal motor vehicle safety standards.

Senator maintains that Verucci was aware that the seizure of its cargo was caused by "a failed attempt to smuggle contraband goods into the United States in conspiracy with the supplier" and that Verucci never informed Senator or any related party of the nature of the goods. In support of this allegation Senator points to an agreement between Verucci and the manufacturer of the motorcycles which contains a declaration that the motorcycles do not have the required safety certificate and that the manufacturer would not assume responsibility if "catch [*sic*] by EPA or USA Customs."

7. Senator denies that it issued bills of lading with erroneous shipping information and asserts that Verucci has not produced any Senator bills of lading. Senator characterizes Verucci's allegations as vague, unsupported and untrue.

8. Senator denies that it was grossly negligent in failing to provide timely customs service for the portion of Verucci's cargo that was consigned to Puerto Rico. According to Senator, Verucci abandoned several containers of motorcycles because customs clearance could not be effected on its "contraband". Senator further states that no carrier has advance knowledge of the extent of customs enforcement at any port and at any given time. Senator asserts that uneven customs enforcement is the result of an intentional effort to frustrate the attempts of smugglers to evade detection and that vigilant customs enforcement in this case prevented public exposure to the unsafe vehicles that Verucci was attempting to import. Senator also asserts that Verucci has previously been cited in Puerto Rico for failure to comply with the requirements for the importation of motor vehicles. This resulted in Verucci's inability to engage the services of a customs broker.

According to Senator, evidence submitted by Verucci itself proves that Senator did not handle the cargo that was consigned to Puerto Rico. Furthermore, Verucci has

presented no evidence as to when it first discussed customs clearance with Senator or when Senator itself was first informed of the arrival of the cargo. Accordingly, Verucci has not supported its allegation that Senator failed to inform Verucci of the arrival of the cargo in a timely manner. Senator again states that it is not a customs broker and could not have arranged for customs clearance in any event.

In response to Verucci's claim for reparations, Senator asserts that all or most of the claims made by Verucci in this proceeding are identical to those of its counterclaim to the suit by Senator in the Florida Circuit Court. In that action the court awarded Senator all of the damages which it claimed while dismissing Verucci's entire counterclaim with prejudice. Thus, Verucci's reparations claims are barred by the principle of *res judicata*. In addition, Verucci may not claim attorney's fees since it is not represented by an attorney in this proceeding.

Senator also asserts that Verucci lied to the Commission so as to induce it to overturn an order of dismissal by Judge Guthridge. According to Senator, and contrary to the representations by Verucci, Pierre Hachar, Sr. was no longer the president of Verucci and his alleged illness was not a valid reason for the failure of Verucci to submit a timely response to an order to show cause why the complaint should not be dismissed.

For the reasons stated below I have concluded that Verucci has not shown that it is entitled to relief. Accordingly, I will dismiss the Complaint.

Findings of Fact

1. Verucci is a limited liability company engaged in the business of manufacturing and wholesale distribution of motorcycles and scooters (Verucci's proposed findings of fact and Senator's response, ¶1).

2. Senator is listed on the Commission website, www.fmc.gov, as a NVOCC, license no. 016643.⁸ Senator is not listed as a freight forwarder.

3. Senator International Freight Forwarding Limited ("Senator FF"), organization no. 015916, is listed on the Commission website as an unlicensed NVOCC.⁹ Senator FF is also listed by the Commission as a freight forwarder, license no. 016643.

4. Some time prior to October 29, 2005, Verucci entered into a written contract with Wuxi Futong Motorcycles Co., Ltd ("Wuxi") whereby Wuxi agreed to manufacture 4,732 motorcycles and scooters to be completed at various times between October 29, 2005, and December 14, 2005. The contract also provides, in pertinent part:

⁸ I take official notice of Commission records.

⁹ The Commission allows unlicensed OTIs to be listed if they are not based in the United States.

NON COMPLIANT [*sic*] MOTORCYCLES THAT EXCEED 50CC AND DETAINED AT USA PORT BY USA EPA AND OR US CUSTOMS SHOULD BE THE SOLE RESPONSIBILITY OF [Wuxi]. ALL COSTS [which] SHOULD BE INCURRED DIRECTLY AND CONSEQUENTIALLY BY ANY NON COMPLIANT SHIPMENT INCLUDING PENALTIES SHOULD BE PAID BY [Wuxi].

* * * * *

LIGHTS OF VIPER AND RETRO, TIRES AND LIGHTS OF VC50TS-3M AS WELL AS TIRES OF VIPER, 150CC AVISPA AND VC50FS-10D DON'T HAVE DOT CERTIFICATE. [Wuxi] WILL NOT TAKE ANY RESPONSIBILITY IF CATCH [*sic*] BY EPA OR USA CUSTOMS

....
(Senator Appendix, pp.30, 31)

It is unclear how many motorcycles and scooters fell within the scope of the last paragraph, but the first paragraph suggests that some of them were assumed to be in compliance with U.S. environmental and customs laws and regulations. While it may be assumed that Verucci was to be the ultimate consignee of shipments to the United States, the contract is silent as to which party is responsible for shipping arrangements and the attendant costs.

5. On October 18, 2005, Verucci completed a credit application form to which was attached a document entitled "**TERMS AND CONDITIONS OF SERVICE**" (Senator Appendix, pp.41-46). Although the exhibit does not include a signature page, the first paragraph states:

These terms and conditions of service constitute a legally binding contract between the "Company" and the "Customer". In the event the Company renders services and issues a document containing Terms and Conditions governing such services, the Terms and Conditions set forth in such other document(s) shall govern those services. (Emphasis in original.)¹⁰

In paragraph 1, "Company" is defined as Senator International Freight Forwarding, LLC, "its subsidiaries, related companies, agents and/or representatives." "Customer" is defined merely as "the person for which [*sic*] the Company is rendering service." "Third parties" are defined to include:

. . . forwarders, OTIs, customs brokers . . . and others to which [*sic*] the goods are entrusted for transportation, cartage, handling and/or delivery and/or storage or otherwise.

¹⁰ At the end of the document there is a statement of copyright by the National Customs Brokers & Forwarders Association of America, Inc.

Paragraph 4, entitled, "**No Liability for the Selection or Services of Third Parties and/or Routes**", states, in pertinent part:

Unless services are performed by persons or firms engaged pursuant to express written instructions from the Customer, [the] Company shall use reasonable care in its selection of third parties, or in selecting the means, route and procedure to be followed in the handling, transportation, clearance and delivery of the shipment; advice by the Company that a particular person or firm has been selected to render services with respect to the goods, shall not be construed to mean that the company warrants or represents that such person or firm will render such services nor does [the] Company assume responsibility or liability for any action(s) and/or inaction(s) of such third parties and/or its agents . . . all claims in connection with the Act [sic] of a third party shall be brought solely against such party and/or its agents

6. On or about May 2, 2006, Verucci filed a counterclaim in a suit which was brought by Senator and Senator FF in the Circuit Court of the 11th Judicial Circuit In and For Dade County, Florida, General Jurisdiction Division, Case No. 06-05160 CA 32 (Senator Appendix, pp.16-24) ("Florida suit"). The counterclaim includes counts for breach of contract, COGSA (presumably the Carriage of Goods by Sea Act), conversion, and fraud in the inducement. The relevant portions of the counterclaim are as follows:

In paragraph 4 it is alleged that, in or around September of 2005, the parties entered into a "verbal" (presumably oral) transportation agreement whereby Senator and Senator FF would handle all transportation arrangements for motor scooters manufactured in China to Verucci in Florida.

In paragraph 6 it is alleged that Senator and Senator FF breached the agreement by refusing to provide Verucci with a \$300,000 line of credit, by routing the cargo through Port Everglades rather than Miami, by failing to have a qualified customs broker in Puerto Rico to handle the importation of 15 containers of the shipment, and by failing to complete proper paperwork for the importation of 10 containers of the shipment (presumably the portion of the shipment that was discharged in Port Everglades).

In paragraph 22 Verucci alleges that it has suffered damages in excess of \$3,841,825.00 for the lost value of the scooters, attorney's fees and related shipping charges.

In its prayer for relief, Verucci sought damages in excess of \$3,841,825.00 plus attorney fees, prejudgment interest and costs along with a general prayer for such additional relief as determined by the court.

7. On September 11, 2007, Circuit Court Judge Sarah I. Zabel issued a Final Summary Judgment Order on Veruccic [sic] Counterclaims Related to Ten Containers Seized at Port Everglades in the Florida suit (Senator Appendix, pp.25 and 26). In the Order, Judge Zabel awarded final summary judgment on behalf of Senator and Senator FF on Verucci's counterclaim related to the 10 containers of cargo seized at Port Everglades. Although Senator alleges that the remainder of Verucci's counterclaim was also dismissed, there is no evidence as to the status of the portion of the counterclaim for the cargo that was discharged in Puerto Rico.

8. A portion of Verucci's cargo was covered by a bill of lading issued by an entity named SMARTCARGO (Verucci Appendix, p.14). Wuxi is named as the shipper; the consignee is Verucci Puerto Rico, Inc. and Verucci in Miami is named as the party to be notified. Under item 18 of the bill of lading, apparently entitled "Freight and Charges" (the pdf. image is not fully legible), there is the name of "Senator Freight Forwarding Int. LLC" with an address of 11250 NW 25th Street, Suite 11B, Miami, FL 33172.

9. On November 14, 2005, Mario Chapman, who identified himself as the Business Development Manager of Senator International (at the same address, but with a different suite number as Senator FF), sent an e-mail message to Ignacio Peña of Verucci in which he stated:

Now, our office told me that they have more bookings to Miami, but to Puerto Rico, they were cancelled by Wuxi and given to another forwarder. We only have three containers of the original seven we thought we were handling and they sailed already last week.

(Senator Appendix, p.29)

10. Five customs declarations (Verucci Appendix, pp.18-22) were submitted for customs port 5203, which includes Port Everglades but not Miami (Verucci Appendix, p.17), for scooters belonging to "Verucci Motorcycles." The date of entry was December 19, 2005; the declarant was listed as "Senator International/Michael Lora" with the same address, but different suite number, as shown on the SMARTCARGO bill of lading.

11. On January 11, 2006, William Troy, who identified himself as being from "Senator International", and with the e-mail address of william.troy@mia.senator-international.com, informed Pierre Hachar (whether Junior or Senior is unclear) by e-mail that certain payments were due with regard to Verucci's cargo and that, "*the credit limit of \$25,000.00 is no longer applicable*" (Verucci Appendix, p.30; emphasis supplied).¹¹ At the bottom of the page there is the beginning of another message from Troy to Hachar and Ignacio Peña (identified in Verucci's prehearing statement as its General Manager) in

¹¹ Mr. Troy also made reference to instructions from Verucci that the cargo was to be returned to China.

which Troy and some of the recipients of the message are identified as being with "SenatorUSA". There are numerous other pieces of correspondence to Verucci from representatives of an entity identified as Senator International.

12. On December 28, 2005, six notices of detention were issued by Customs (Verucci Appendix, pp.44-49). On each of the notices the merchandise is identified as scooters; "Senator International/Verucci Motorcycles" are identified as the broker and importer respectively. The port is identified as Port Everglades; the Customs entry numbers are, respectively: GR6-01303 773, GR6-01303 781, GR6-01303 799, GR6-01303 823, GR6-01303 831, and GR6-01303 849.

13. On January 12, 2007, Scott Greenberg, an official with U.S. Customs and Border Protection, Department of Homeland Security, issued a memorandum indicating that he had reviewed the seizure in January of 2006 of six shipments of motor scooters imported by Verucci from Wuxi in China. Mr. Greenberg stated that the seizure was not the result of the improper completion of a customs form, but occurred because the scooters were imported without the manufacturer's certification of compliance with federal motor vehicle safety standards as required by 49 U.S.C. §30115. The memorandum refers to each of the Customs entry numbers on the detention notices (Senator Appendix, pp.27, 28).

14. An e-mail message dated January 10, 2006, from William Troy to Ignacio Peña states that, "I presume you have been informed by your broker" that the first seven containers to PR (presumably Puerto Rico) have been placed on "intensive exam" by Customs. Peña responded to Troy on the same date, stating that:

Since Senator Puerto Rico (ETH Cargo)¹² declined to handle the customs clearance and we subsequently turned all documentation to Eurocaribe's office there for clearance, it is our understanding they will take care of everything.

(Verucci Appendix, p.59)

15. On September 14, 2007, Pierre Hachar, Sr. filed a certificate with the Florida Department of State, Division of Corporations stating that he was resigning as a manager of Verucci (Senator Appendix, p.47). It is unclear how many other managers remained at Verucci after Mr. Hachar's resignation.

Discussion and Analysis

The Status of Senator

Senator has emphasized that it is neither a freight forwarder nor a customs broker and that, consequently, it does not fall within the scope of statutes and regulations

¹² Apparently this is yet another affiliate of Senator International.

governing the conduct of such entities. That argument begs the question of how Senator represented itself to Verucci.¹³ The threshold question is whether Verucci could reasonably have assumed that, in dealing with Senator or Senator FF, it had arranged for the full-service handling of its shipment. The evidence, while incomplete, suggests that Verucci was entitled to make such an assumption.

Senator does not deny that it dealt with Verucci and, indeed, relies on such dealings as a defense to Verucci's allegations of refusal to deal (Senator prehearing statement, p.4). It is unclear exactly how those dealings began, but it appears likely that, pursuant to the written contract between Senator FF and Verucci, Senator, as a "related company" and a NVOCC, was assigned the task of arranging for the movement of the Verucci's cargo from China to Puerto Rico and Miami (Finding of Fact 5).

Both the e-mail addresses of Senator's representatives and the text of their messages to Verucci refer to their company as "Senator International." This is the same term that was used in customs declarations which one of the Senator entities (presumably Senator FF) filed on behalf of Verucci (Findings of Fact 9, 10). Among the attachments to Senator's prehearing statement is an affidavit by Uwe Kirschbaum who identifies himself as the president of Senator (Senator Appendix, p.39). The Senator International website, www.senator-international.com, which I referenced on January 2, 2009, provides the following information:

- a. Mr. Kirschbaum founded Senator International as an air freight forwarder in Germany.
- b. Senator International advertises its NVOCC Division.
- c. There is a portion of the website entitled "Customs Clearance Expertise."
- d. The website includes a sample of a bill of lading issued by Senator. The bill of lading has a Senator International logo on its face.

All of this evidence, taken as a whole, indicates that Senator International is an umbrella organization composed of Senator, Senator FF and other entities, and that it holds itself out as providing a full range of logistical and transportation services with regard to the movement of cargo. Therefore, aside from the merits of Verucci's claim in this case, it was entitled to assume that one or more of the Senator family of companies was prepared to handle all aspects of its shipment of motorcycles and scooters from China to Puerto Rico and Miami. Verucci, for whatever reason, saw fit to name only Senator as the Respondent in this case in spite of the fact that both Senator and Senator FF were parties to the Florida suit and defendants in Verucci's counterclaim (Finding of

¹³ While Senator is not listed as a freight forwarder (Finding of Fact 2), the Commission does not maintain a directory of customs brokers.

Fact 6). Nevertheless, Senator cannot legitimately claim to be immune from liability merely because it is not licensed as a freight forwarder or customs broker.¹⁴

The Shipment to Puerto Rico

In weighing the evidence and applying the pertinent law, I am guided by the principle, as set forth in Rule 155, 46 C.F.R. §502.155, that Verucci has the burden of showing that it is entitled to relief. The applicable standard of proof is the preponderance of the evidence or, stated otherwise, that the existence of a fact is more probable than not, *Petition of South Carolina State Ports Authority for Declaratory Order*, 27 S.R.R. 1137, 1161 (1997).

Verucci's allegations with regard to the Puerto Rico shipment are set forth on page 15 of its prehearing statement:

Senator failed to perform regarding the customs clearance of Verucci's cargo to Puerto Rico. Senator was grossly negligent in (a) pre-alerting three different dates for the arrival date: (b) alerting Verucci one full week after cargo had already arrived that they were not able to perform customs clearance, as originally agreed.

. . . Senator's actions and negligence were directly responsible for the delays, detentions and seizures of Verucci's cargo. They were the direct and proximate cause of Verucci's economic problem, as Verucci suffered lost sales and was ultimately unable to satisfy its numerous commitments to vendors and clients.

Verucci's reparations statement (Verucci, p.16) lists "retail value 710 units (Puerto Rico)" in the amount of \$674,500.00. Presumably Verucci also attributes some portion of the estimated attorney's fees of \$50,000 and unspecified "extra charges" of \$450,000.00, which are allegedly increasing by \$64,320.00 a month, to the Puerto Rico shipment (Verucci Appendix, p.8).

In marked contrast to the evidence regarding the Port Everglades shipment, the record is devoid of detention notices or other documentation regarding Customs action on the Puerto Rico shipment. Therefore, there is nothing other than Verucci's allegations to support the proposition that the Puerto Rico shipment was detained because of wrongful action by Senator. The circumstances surrounding the seizure of the Port Everglades shipment suggests at least the possibility that, like the Port Everglades shipment, the Puerto Rico shipment was detained because of the manufacturer's failure to provide the required certification (Finding of Fact 12).

¹⁴ Customs brokers are not licensed by the Commission but by the Secretary of Homeland Security pursuant to 19 U.S.C. §1641(b).

Similarly, there is no evidence to support Verucci's allegation that Senator delayed informing it of the arrival of the cargo in Puerto Rico. While Verucci might have originally been justified in expecting Senator (or a related company) to handle the customs clearance in Puerto Rico, it was subsequently notified that Wuxi, whether or not justifiably, had appointed another freight forwarder (Finding of Fact 9). Furthermore, the correspondence between Messrs. Troy and Peña (Finding of Fact 14) indicates the understanding of Senator or Senator FF that, prior to the arrival of the shipment in Puerto Rico, Verucci had made other arrangements for customs clearance.

The Shipment to Port Everglades

A comparison of Verucci's Complaint in this case to its counterclaim in the Florida suit leaves no doubt that they are based upon the same transaction, *i.e.*, the movement of Verucci's cargo of motorcycles and scooters from China to Puerto Rico and Miami (Finding of Fact 6). The close similarity between the counterclaim and the Complaint in this case, as well as the final judgment in the Florida suit (Finding of Fact 7) raises the possibility that Verucci may be barred from pursuing all or part of its claim for the Port Everglades shipment under the doctrine of *res judicata* or collateral estoppel.

As stated in *Galin Ataei v. Barber Blue Sea Line, et al.*, 24 S.R.R. 647 (I.D., 1987):

. . . it is well settled that *res judicata* bars both claims that were actually litigated and those that could have been litigated. . . Generally, it has been held that the "cause of action" or "claim" . . . is bounded by the injury for which relief is demanded, and not by the legal theory on which the person asserting the claim relies. (*Id.* at 653; emphasis in original.)

See also, *Elinel Corp. v. Sea-Land Service, Inc.*, 26 S.R.R. 1399 (1994).

The doctrine of *res judicata* is not without limits. In *Anchor Shipping Co. v. Alianca Navegação E Logística Ltda.*, 30 S.R.R. 991, 997 (2006) the Commission held that the submission of a controversy to arbitration, with a final award of damages, did not justify the dismissal of a subsequent complaint arising out of the same facts, but based upon alleged violations of the Act. While the *Anchor* holding may be distinguishable from the instant case, the evidence with regard to the Port Everglades shipment is such that the merits of that portion of Verucci's claim can be readily addressed. In view of the statutory duty of the Commission to enforce the Act, I have opted to evaluate the Port Everglades claim on the basis of its merits rather than on a comparison of Verucci's allegations in this proceeding with those in the Florida suit.

Verucci alleges that Senator violated its instructions to route the cargo directly to Miami. There is no evidence to support this allegation other than an affidavit from Susset Osorio (Verucci Appendix, p.43) who professes personal knowledge of Verucci's instructions to Senator that all of Verucci's cargo be routed "exclusively and only to the Port of Miami." While the affiant presumably is an employee of Verucci, there is no

statement of the basis of her knowledge nor is there any other evidence to support the communication of such instructions to Senator or Senator's acknowledgement. Furthermore, in the absence of further evidence, Verucci's alleged instructions could be construed as meaning that its cargo was to be delivered in Miami rather than in Port Everglades, which is in the same general geographic area.

Verucci bases its allegations of Senator's "prejudicial, unfair and unjust" business practices on the proposition that it failed to honor an agreement to provide Verucci with a \$250,000 line of credit and a 30 day grace period after the receipt of cargo within which to make payment. There is no evidence of a line of credit other than an e-mail message from Senator which refers to a \$25,000 line of credit (Finding of Fact 11). Verucci has offered nothing to show that Senator had agreed to a 30 day grace period. It is unlikely that Senator would have relinquished its possessory lien on Verucci's cargo based only on an oral agreement.

Apparently Verucci's allegations that Senator refused to deal with it are derived from Senator's withholding of the \$250,000 line of credit and the 30 day grace period for payment. As stated above, Verucci has presented no credible evidence to support those allegations.

The allegation that Senator failed to perform its service agreement is no more than a restatement of the prior allegation of its violation of instructions to route all cargo directly to Miami. The Osorio affidavit, in the absence of additional evidence, is insufficient to support that allegation.

Verucci alleges that Senator caused the detention of its cargo by inaccurately describing, or "mis-declaring", it as not being primarily intended for use on public roads. Yet, the memorandum from Mr. Greenberg (Finding of Fact 13) unequivocally states that the inaccurate completion of custom forms was not the cause of the detention of the cargo. The inaccurate description of the cargo would, if any thing, suggest that it was subject to less stringent safety standards which would tend to reduce the possibility of its inspection and seizure by Customs.

Verucci has produced no bills of lading issued by Senator and, therefore, has not supported its allegations that they were improperly prepared. Even if that were not so, Verucci has not explained how inaccuracies in bills of lading contributed to its alleged monetary losses.¹⁵

Verucci's Claim for Reparations

Verucci's claim for reparations is for the retail value of the Puerto Rico and Port Everglades shipments, estimated attorney fees of \$50,000 and "extra charges" incurred through February 13, 2006. The claim includes a statement that, according to Senator,

¹⁵ Senator's denial that such bills of lading exist begs the question of how it acted as a NVOCC without issuing bills of lading.

the extra charges are increasing by the amount of \$64,320.00 per month. Verucci has submitted no evidence in support of the amount of reparations which it claims.

Even if Verucci had met its burden of proof as to Senator's alleged statutory violations, the only readily foreseeable consequences would have been delays in the release of the cargo by Customs, thus resulting in demurrage and increased storage and handling charges, all of which may be unstated elements of Verucci's claim for "extra charges". However, since Verucci has submitted no evidence in support of those charges, it would not be entitled to reparations even if it had established that Senator had violated the Act as alleged.

Verucci's claim for the full value of the scooters is particularly tenuous. Even if Senator had been obligated to arrange for customs clearance in Puerto Rico, the full value of the shipment is not a reasonably foreseeable element of reparations and there is no evidence to show that the parties contemplated such liability.

Pursuant to §11(g) of the Act, 46 U.S.C. §41305(b), the Commission is charged with the award of reparations for "actual injury" suffered by a complainant because of a violation of the Act, along with reasonable attorney fees. The Commission has construed this mandate as requiring a complainant to show that it has suffered injuries which were proximately caused by the violation, *Bermuda Container Line, Ltd. v. SHG International Sales, Inc., et al.*, 28 S.R.R. 492 (I.D., 1998). Thus, even if Verucci had met its burden of proof that Senator had violated the Act, it would only have been entitled to foreseeable, rather than remote, reparations, *Prudential Lines, Inc. v. Farrell Lines, Inc., et al.*, 22 S.R.R. 826, 847 (I.D., 1984). The loss of a business opportunity, much less one resulting in a total loss of the value of the cargo, cannot, other than in exceptional circumstances, rationally be considered as a foreseeable consequence of the failure of a NVOCC, a freight forwarder or a customs broker to properly perform its obligations to a shipper.

In summary, Verucci has not supported its burden of proof that Senator violated the Shipping Act. The Commission, like other administrative agencies, has treated *pro se* litigants with special leniency, *Bernard & Weldcraft Welding Equipment v. Supertrans International, Inc.*, 29 S.R.R. 1338 (ALJ, 2002). However, such leniency does not relieve Verucci of the necessity of producing sufficient evidence so as to support its burden of proof.

Senator's Claim for Attorney Fees

Senator has requested an award of attorney fees, presumably relying on the proposition that Verucci's claims are frivolous and based upon willful misrepresentations. The only reference in the Act to an award of attorney fees is in §11(g), 46 U.S.C. §41305(b), which pertains only to the award of reparations. While there is no provision in the Act for the award of attorney fees to a prevailing respondent, in *AAEL America Africa Europe Line GMBH v. Virginia International Trade & Investment Group, LLC, et al.*, 27 S.R.R. 825, 827 (1996) the Commission indicated that

it might make such an award if the complainant's claim were found to be frivolous; no such finding was made in that case. Similarly, I have concluded that, while Verucci's case was not well presented and might not have been filed if it had consulted an attorney, it was not so devoid of merit as to justify an award of attorney fees to Senator, assuming that the Act allows for such an award. I have reached this conclusion because of the ambiguous status of Senator and of the fact that Senator International holds itself out as a full service company which is prepared to handle all aspects of the transportation of goods by sea. The evidence suggests that most of Verucci's dealings were with Senator FF which, as a freight forwarder and customs broker, handled customs matters for Verucci at least with regard to the Port Everglades shipment.¹⁶ Somehow, Senator became involved in the transaction and it was logical for Verucci to have been unaware or unconcerned about the distinction between the responsibilities of Senator, Senator FF and, perhaps, other organizations affiliated with Senator International.

While Verucci's conduct during these proceedings was far from exemplary, the evidence does not support Senator's assertion that its representatives lied to the Commission concerning the status of Pierre Hachar, Sr. Mr. Hachar resigned as a manager of Verucci (Finding of Fact 15), but there is no evidence as to his status as president. Section 608.422, Florida Statutes Annotated, provides, in pertinent part, that:

(7) Unless otherwise provided in the articles of organization or operating agreement, a member, managing member, or manager may also hold the offices and have such other responsibilities accorded to them by the members and set out in the articles of organization or the operating agreement of the limited liability company.

Neither Verucci's articles of organization nor its operating agreement are in evidence. Therefore, it cannot be determined whether, in resigning as a manager, Mr. Hachar also resigned as president of Verucci. Accordingly, it cannot be determined with certainty that Verucci lied to the Commission in order to induce it to reopen the case after Judge Guthridge had issued an order of dismissal. Accordingly, Senator's request for attorney fees is denied.

For the foregoing reasons, it is **ORDERED** that the Complaint be, and hereby is, **DISMISSED**.¹⁷


Paul B. Lang
Administrative Law Judge

¹⁶ I take official notice that freight forwarders customarily hold themselves out as customs brokers.

¹⁷ Because Verucci has not prevailed in this proceeding and is not represented by an attorney, it is not entitled to an award of attorney's fees.