

S E R V E D  
July 1, 2009  
FEDERAL MARITIME COMMISSION

**FEDERAL MARITIME COMMISSION**

**WASHINGTON, D.C.**

**DOCKET NO. 1898(F)**

**DSW INTERNATIONAL, INC.**

v.

**COMMONWEALTH SHIPPING, INC., and  
ABOU MERHI LINES, LLC**

---

**NOTICE OF ASSIGNMENT and  
ORDER TO SUPPLEMENT THE RECORD**

---

On March 31, 2009, the Secretary received a complaint alleging violations of the Shipping Act of 1984 from complainant DSW International, Inc. (DSW). The complaint alleges that Respondents Commonwealth Shipping, Inc. (Commonwealth) and Abou Merhi Lines, LLC (Abou) violated the Shipping Act when they failed to deliver two automobiles that DSW shipped from Texas to Nigeria. DSW requested informal adjudication of the complaint pursuant to 46 C.F.R. Part 502, Subpart S. On May 27, 2009, respondent Commonwealth filed an answer and a motion to dismiss claiming that the Commission does not have subject matter jurisdiction and the complaint fails to state a claim upon which relief can be granted. Commonwealth stated that it did not consent to informal adjudication pursuant to Subpart S and requested that the matter be resolved pursuant to Subpart T. Respondent Abou has not responded to the complaint.

Since Commonwealth objected to adjudication pursuant to Subpart S, on May 27, 2009, the Secretary referred this matter to the Office of Administrative Law Judge. Memorandum dated May 27, 2009, from the Secretary to the Administrative Law Judge. *See* 46 C.F.R. § 502.304(f) (“If the respondent refuses to consent to the claim being informally adjudicated pursuant to this subpart, the claim will be considered a complaint under § 502.311 and will be adjudicated under Subpart T of this part.”). The undersigned judge will conduct such hearings and conferences as may be necessary to resolve the issues in this proceeding and to issue an Initial Decision or dispositive ruling.

**I. MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.**

Commonwealth contends that “Rule 73 and Rule 12 of the Commission’s Rules of Practice and Procedure . . . permits [*sic*] motions to be filed under Federal Rules of Civil Procedure 12(b)(1) and (6).” (Motion to Dismiss at 1.) While Commonwealth correctly cites to authority permitted by Rules 12 and 73, Subpart T provides that “[e]xcept as specifically provided in this part, rules in subparts A through Q, inclusive, of this part do not apply to situations covered by this subpart.” 46 C.F.R. § 502.321. Rule 12 is in Subpart A and Rule 73 is in Subpart E. Therefore, they do not apply in this proceeding. Accordingly, I will deny the motion to dismiss without prejudice. Commonwealth may raise the arguments set forth in its motion in the brief to be filed pursuant to this Order.

**II. ORDER TO SUPPLEMENT THE RECORD.**

Subpart of the Commission’s rules governing discovery is not applicable to proceedings under Subpart T; therefore, there is no formal discovery in this proceeding. While there is no formal discovery, the parties are urged to cooperate and voluntarily produce information requested by other parties.

The Rules do provide that “[t]he administrative law judge may require the submission of additional affidavits, documents, or memoranda from complainant or respondent.” 46 C.F.R. § 502.314. Accordingly, I am requiring the parties to submit additional materials described below. Furthermore, if a party is unable to obtain information from another party by voluntary means, on or before July 22, 2009, the party seeking the information may file a request that the administrative law judge require submission of the information pursuant to Rule 314. The request shall explain why the information is relevant to this proceeding, what attempts have been made to obtain the information voluntarily, and why the information cannot be obtained in some other manner. Such request will be served electronically on other parties. In addition to hard copies filed with the Commission pursuant to Rule 320, 46 C.F.R. § 502.320, the requesting party shall send the request electronically to the Commission at the following email address: [secretary@fmc.gov](mailto:secretary@fmc.gov). A party opposing the request shall serve and file its response within five days of service of the request. In addition to hard copies filed with the Commission pursuant to Rule 320, the responding party shall send the response electronically to the Commission at the following email address: [secretary@fmc.gov](mailto:secretary@fmc.gov). It is hoped that the parties have no need to make such a request.

**A. DSW’s Proposed Findings of Fact, Supporting Evidence, and Brief.**

To prevail in this proceeding, DSW has the burden of proving by a preponderance of the evidence that Respondents violated the Act. 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); 46 C.F.R. § 502.155; *Boston Shipping Ass’n, Inc. v. FMC*, 706 F.2d 1231, 1239 (1st Cir. 1983); *California Shipping Line, Inc.*

v. *Yangming Marine Transport Corp.*, 25 S.R.R. 1213, 1222 (1990) (FMC Report and Order). On or before August 14, 2009, DSW shall file the following documents:

1. **DSW's Proposed Findings of Fact.** This document shall set forth proposed findings of fact in numbered paragraphs. Each paragraph shall be limited as nearly as practicable to a single factual proposition. Each factual proposition shall be followed by an exact citation to evidence that DSW contends will support the proposed finding of fact.<sup>1</sup> The parties can see an example of the format required for the Proposed Findings of Fact at <http://www.fmc.gov/reading/Dockets.asp> in the proceeding *Clutch Auto, Ltd. v. International Touch Consolidator, Inc.*, FMC No. 1880(F), ("Served October 4, 2007, Procedural Order, Attachment A Administrative Law Judge Tentative Findings of Fact"). DSW shall provide to Respondents *and to the Commission* an electronic copy of DSW's Proposed Findings of Fact with the hard copy of DSW's Proposed Findings of Fact. The electronic copy shall be in a word-processing format (e.g., Microsoft Word 2003 or earlier or WordPerfect 10 or earlier) and provided by compact disk or email.

As DSW is seeking reparations for alleged violations of the Shipping Act, DSW shall include with its proposed findings of fact proposed findings regarding damages with proof of the pecuniary loss it alleges it suffered as a proximate cause of the alleged violations. See *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. 8, 13 (2003) ("As the Federal Maritime Board explained long ago: '(a) damages<sup>[2]</sup> must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.'"); *Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co., Inc.*, 26 S.R.R. 788, 798-799 (ALJ 1992) ("The statements of the Commission in [*California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213 (Oct. 19, 1990)] and the other cited cases are in the mainstream of the law of damages as followed by the courts, for example, regarding the principles that the fact of injury must be shown with reasonable certainty, that the amount can be based on something less than precision but something based on a reasonable approximation supported by

---

<sup>1</sup> Parties must designate specific facts and provide the court with their location in the record. *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 775 (9th Cir. 2002). "General references [to evidence] without page or line numbers are not sufficiently specific." *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003).

<sup>2</sup> Reparations under the Shipping Act and damages are synonymous. See *Federal Maritime Com'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 775 (2002) (Breyer, J., dissenting).

evidence and by reasonable inferences, the principle that the damages must be foreseeable or proximate or, in contract law, within the contemplation of the parties at the time they entered into the contract, the fact that speculative damages are not allowed, and that regarding claims for lost profits, there must be reasonable certainty so that the court can be satisfied that the wrongful act caused the loss of profits.”).

2. **DSW’s Appendix.** The evidence on which DSW’s Proposed Findings of Fact are based shall be included in the Appendix described below.
3. **DSW’s Brief.** DSW shall file a brief meeting the requirements of Commission Rule 221, 46 C.F.R. § 502.221, with the exception that the proposed findings of fact required by section 502.221(d) shall be included in DSW’s Proposed Findings of Fact described above.

**B. Respondents’ Responses to DSW’s Proposed Findings of Fact, Respondents’ Proposed Findings of Fact, Respondents’ Appendices, and Respondents’ Briefs.**

On or before September 18, 2009, Respondents shall file the following documents:

1. **Respondents’ Replies to DSW’s Proposed Findings of Fact.** This document shall set forth verbatim each proposed finding of fact in DSW’s Proposed Findings of Fact, then admit or deny the proposed finding. Each proposed finding of fact that Respondents deny shall be followed by an exact citation to evidence that Respondents contend will rebut the evidence DSW claims supports the proposed finding of fact. Respondents shall provide to DSW *and to the Commission* an electronic copy of Respondents’ replies to DSW’s Proposed Findings of Fact with the hard copies of Respondents’ replies to DSW’s Proposed Findings of Fact. The electronic copy shall be in a word-processing format (*e.g.*, Microsoft Word 2003 or earlier or WordPerfect 10 or earlier) and provided by compact disk or email.
2. **Respondents’ Proposed Findings of Fact.** This document shall set forth proposed findings of fact in numbered paragraphs. Each paragraph shall be limited as nearly as practicable to a single factual proposition. Each factual proposition shall be followed by an exact citation to evidence that Respondents contend will support the proposed finding of fact. Respondents shall provide to DSW *and to the Commission* an electronic copy of Respondents’ Proposed Findings of Fact. The electronic copy shall be in a word-processing format (*e.g.*, Microsoft Word 2003 or earlier or WordPerfect 10 or earlier) and provided by compact disk or email.

3. **Respondents' Appendices.** The evidence on which Respondents rely for Respondents' replies to DSW's Proposed Findings of Fact and Respondents' Proposed Findings of Fact shall be included in the Appendix described below.
4. **Respondents' Briefs.** Respondents shall file briefs meeting the requirements of Commission Rule 221, 46 C.F.R. § 502.221, with the exception that the proposed findings of fact required by section 502.221(d) shall be included in Respondents' Proposed Findings of Fact described above.

Respondents may, but are not required to, file a joint reply, proposed findings, appendix, and brief.

#### **C. DSW'S REPLIES.**

On or before October 9, 2009, DSW shall file the following documents:

1. **DSW's Replies to Respondents' Proposed Findings of Fact.** This document shall set forth verbatim each proposed finding of fact in Respondents' Proposed Findings of Fact, then admit or deny the proposed finding. Each proposed finding of fact that DSW denies shall be followed by an exact citation to evidence that DSW contends will rebut the evidence Respondents claim supports the proposed finding of fact. This evidence shall be included in DSW's Supplemental Appendix.
2. **DSW's Reply to Respondents' Briefs.** DSW may (but is not required to) file a reply to Respondents' Briefs.

#### **D. Appendices.**

The parties shall prepare the appendices required by the above paragraphs in the following format:

- a. The cover of the appendix shall identify the party or parties that prepared the appendix; *e.g.*, "DSW's Appendix" or "Commonwealth's Appendix";
- b. The pages of the appendix shall be numbered sequentially;
- c. The appendix must begin with a table of contents identifying the page at which each individual document begins;
- d. Each party shall ensure that all documents in its appendix are legible.

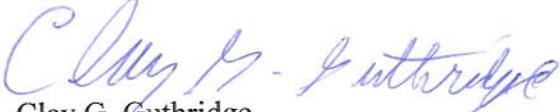
e. The parties are instructed to cite to a document in an appendix already in the record rather than include the same document in its own appendix. For instance, if Respondents contend that a document included in DSW's appendix rebuts the evidence DSW claims supports a proposed finding of fact, Respondents shall cite to DSW's appendix rather than include a second copy of the same document in its own appendix.

The parties can see an example of the format required for the appendix at <http://www.fmc.gov/reading/Dockets.asp> in the proceeding *Clutch Auto, Ltd. v. International Touch Consolidator, Inc.*, FMC No. 1880(F), ("Served October 4, 2007, Procedural Order, Attachment A Administrative Law Judge Tentative Findings of Fact, Appendix").

**E. Service and Filing.**

The parties are directed to serve and file hard copies of the documents required by the order by overnight delivery service.

The parties are directed to consult with each other to determine the most practicable way to send electronic copies of documents in a word-processing format to each other. The parties are directed to send the electronic copy in a word-processing format of required documents to the Commission at the following email address: [secretary@fmc.gov](mailto:secretary@fmc.gov).

  
Clay G. Guthridge  
Acting Chief Administrative Law Judge