ORIGINAL

(FEDERAL MARITIME COMMISSION)
(SERVED DECEMBER 10, 1998)
(EXCEPTIONS DUE l-4-99)
(REPLIES TO EXCEPTIONS DUE l-26-99)

FEDERAL MARITIME COMMISSION

DOCKET NO. 98-24

GO/DAN INDUSTRIES, INC. AND
ATLANTIC CUSTOMS BROKERS, INC.

v.

EASTERN MEDITERRANEAN SHIPPING CORP.
DBA ATLANTIC OCEAN LINES,
ANIL (AKA "ANDY") K. SHARMA, INDIVIDUALLY,
AND ATLANTIC OCEAN LINE CORP.

Respondents who operated as non-vessel operating common carriers (NVOCCs) found to have violated section 10(d)(1) of the Shipping Act of 1984 by failing to pay freight money to an underlying vessel-operating carrier as well as other applicable charges, by failing to answer repeated inquiries from complainant shipper and its freight forwarder, and by closing its businesses without notice, all causing financial injury to complainants who had to pay additional money to ensure delivery of their cargo. Reparations are awarded to both complainants, including interest, as provided by law.

Henry P. Gonzalez for complainant.
No appearance for respondent.

INITIAL DECISION[1] OF NORMAN D. KLINE,
ADMINISTRATIVE LAW JUDGE

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[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).

This Initial Decision is a Default Judgment against respondents which is being issued for the reasons explained below. It represents the third formal proceeding before the Commission involving respondent Anil Sharma and one or more of his NVOCC companies involving unlawful activities not to mention numerous informal complaints about his conduct.[2] Moreover, Mr. Sharma has closed his businesses, departed for parts unknown, and has ignored the proceedings but fortunately he had obtained an agent for service of process so that there is no legal impediment to issuance of appropriate judgment against him.[3] Furthermore, because, as required by law, he had obtained a surety bond to protect persons suffering injury on account of his unlawful activities and because current law makes such sureties responsible to cover damages arising out of Mr. Sharma's Shipping Act violations, a judgment against him can be recovered by injured complainants from the surety. See section 23(b), Shipping Act, 1984, 46 U.S.C. app. sec. 1721(b) (claims against surety). As explained below, it will be evident that the injured parties who filed the instant complaint are entitled to judgment so as to compensate them for damage caused by the respondents and, under the peculiar circumstances, to judgment in a reasonably prompt manner so that they may have an opportunity to recover for their monetary damages before the bond is depleted.

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[2]See Docket No. 98-12 - *Panalpina, Inc. v. Eastern Mediterranean Shipping* Corp., cited later in this decision; see also Docket No. 98-16 - *Eastern Mediterranean Shipping Corp. d/b/a Atlantic Ocean Line and Anil K. Sharma Possible Violations of Sections 10(a)(1), 10(b)(1), and 10(d)(1) of the Shipping Act of 1984,* Order of Investigation and Hearing, served September 18, 1998. In addition, the Commission's Office of Informal Inquiries and Complaints is aware of a number of other possible problems arising out of Mr. Sharma's NVOCC activities and another complaint has been filed against him. See *Benjamin Moreka v. Eastern Mediterranean Shipping Corporation,* Informal Docket No. 1836[I].

[3]Respondents' decision to ignore this proceeding and the various orders and rulings served on their last-known business address plus on their registered agent for service of process does not serve to immunize them from the rulings and orders served in this proceeding. It was their obligation to keep the Commission and their registered agent informed as to their current address, which duty they failed to observe, and they must suffer the adverse consequences. See *In re Mack,* 330 F. Supp. 737,738 (S.D. Tex. 1970) (party must notify court of change of address); *Freed v. Plastic Packaging Materials, Inc.,* 66 F.R.D. 550,552 (E.D. Pa. 1975); see especially *Double "S" Truck Line, Inc. v. Frozen Food Express,* 171 F.R.D. 251,253 (D. Minn. 1997) (defendant must make sure that its registered agent for service of process is kept informed as to defendant's current address).

On November 25, 1998, complainants, a manufacturer and shipper of automobile radiators known as Go/Dan Industries, and its freight forwarder, Atlantic Customs Brokers, Inc., filed their complaint with the Commission, which was served on respondents' registered agent and their last-known business address in New York City. Complainants alleged that respondents mishandled a shipment of auto radiators to be carried from Cleveland, Ohio to Nigeria, which complainants had booked in May 1998. However, respondents never paid over freight money to the underlying ocean carrier on which respondents had loaded the cargo and furthermore did not pay other charges, thereby delaying delivery of the cargo to destination. Moreover, respondents did not reply to numerous inquiries about the status of the shipment and closed their offices, leaving no forwarding address. Finally, on their own initiative, complainants located the shipment and paid the due charges to the underlying ocean carrier, including freight money that they had already paid respondents, and incurred other expenses all directly related to their efforts to locate and secure release and delivery of the shipment to destination, which delivery had been the proper responsibility of respondents under whose bill of lading the shipment was supposed to move. Complainants itemized all their damages which totaled over $8,000 and seek reparations in this amount, claiming that respondents violated section 10(d)(1) of the 1984 Act, which requires carriers like respondents to establish, observe, and enforce just and reasonable regulations and practices, relating to or connected with receiving, handling, storing, or delivering property.[4]

Because of complainants' expressed need for prompt action, they asked that the time normally set for respondents to answer complaints, which is 20 days under the rules, be reduced, as

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[4]Section 10(d)(1) of the Shippmg Act of 1984 (46 U.S.C. app. sec. 1709(d)(1) provides in pertinent part:

> (1) No common carrier . . . may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

permitted by 46 C.F.R. 502.10, when found necessary "to prevent undue hardship" and "manifest injustice" and "if the expeditious conduct of business so requires." In view of respondents' total disregard of Cornmission proceedings despite their legal responsibilities when complaints are filed against them and their disappearance, it did not appear likely that they would participate in this proceeding to defend themselves any more than they did in a previous complaint case, naming one of Mr. Sharma's NVOCC companies as respondent. See Docket No. 98-12 - *Panalpina, Inc. v. Eastern Mediterranean Shipping Corp.,* Initial Decision, September 21, 1998, administratively final, October 23, 1998, 28 S.R.R._____ Respondents replied neither to complainants' request to reduce the time for them to answer the complaint nor answer the complaint itself. Under the rules I had found sufficient reason to shorten the time as requested by complainants. See Order Reducing Time to File Answer to Complaint and Advising Respondents of Possible Default Judgment, December 1, 1998. Respondents were warned that their failure to respond to the complaint would result in a default judgment against them based on the well-pleaded allegations in the complaint and such specific monetary damages that are compensable under applicable law. This warning was served on respondents' registered agent as well as at their last-known business address. However, as anticipated, they have failed to respond. Accordingly, the case is ripe for judgment.

The general rule followed by the courts and this Commission is that a failure of a respondent to answer a complaint will lead to a default judgment based upon the well-pleaded allegations in the complaint and liquidated or easily determinable damages. See Docket No. 98-12 - *Panalpina, Inc. v. Eastern Mediterranean Shipping Corp.,* cited above, at 4, citing *Shipco Transport, Inc. v. Mr. Syed N. Shirazi, et al., 28* S.R.R. 20 (1998); and *Shipco Transport, Inc. v. Saturn Air Cargo, 27* S.R.R. 437 (1995); *Hugh Symington v. Euro Car Transport, Inc., 26* S.R.R. 871,872 (1993), and cases and authorities cited therein. In the usual case when there is some reason to believe that a

respondent may have inadvertently failed to file an answer to a complaint, it is customary to advise such respondent that he is in default and to give him a second chance to explain his failure so as to avert a default judgment and afford him an opportunity to defend. See Docket No. 98-12 - *Panalpina, Inc. v. Eastern Mediterranean Shipping Corp.*, cited above, at 3-4. Under the Commission's rules, furthermore, "[i]n the event that respondent should fail to file and serve the answer within the time provided, the presiding officer may enter such rule or order as may be just . . ." (46 C.F.R. 502.64(b)). It is obvious that respondents have no intention of participating in this proceeding, have closed their businesses, and have left the harm they have caused behind them. Such conduct is obviously not just and I find that complainants are entitled to judgment and to an award of reparations as explained below.

The Award of Reparations

As indicated above, the general rule when respondents have defaulted is to base findings for complainants on the well-pleaded allegations in their complaints and to award money damages for specified liquidated amounts requiring little or no calculations. Complainants have itemized their claims for monetary damages as shown in Schedule A attached to their complaint. The total damages claimed by complainant Atlantic Customs Brokers, Inc. is $4,136.00, and by complainant Go/Dan Industries, Inc., the total claimed is $4,285.00, for a grand total of $8,421 .OO.

Complainants have itemized each element of their claimed monetary damages, listing five such items for Atlantic Customs Brokers, Inc. and three items for Go/Dan Industries, one of which is for attorney's fees ($500). Except for Atlantic Customs's item no. 1 ("FMC Complaint Filing Costs"), I find no problem as a matter of law for the Commission to award reparations "for actual

injury. . . caused by a violation of this Act . . . ." However, I find no authority for the Commission to award Atlantic Customs for the costs of paying the Commission its filing fees for the complaint. These are costs, not monetary damages caused by violations of law, and the statute and applicable law of damages distinguish between "costs" and actual damages or injury to complaining parties caused by violations *of* the *1984* Act. See *TAFE v. Cosmos Shipping Co., Inc., 26* S.R.R. 788,803 (1992); *Taxpayers For Animus-La Plata v. Animus-La Plata, 739* F.2d 1472, 1480 (10th Cir. 1984). The remaining items of damages claimed by Atlantic Customs (i.e., minus the $166 filing fee) total $3,970. Atlantic Cargo is therefore awarded that amount as reparations plus interest calculated from the date of filing of the complaint (November 25, 1995) pursuant to section 1 l(g) of the 1984 Act and 46 C.F.R. 502.253.[5]

Complainant Go/Dan Industries similarly lists items of claimed monetary damages. These consist of three items: $3,685 for freight charges that Go/Dan had to pay twice because of respondents' failure to pay the underlying ocean carrier; $100 for telephone and fax communications to the buyer of the cargo regarding the status of the shipment; and $500 for attorney's fees. All three items can be compensated in law. However, under the relevant Commission regulation, 46 C.F.R. 502.254, a prevailing party is not supposed to file its petition for attorney's fees until a "final reparation award" which means final disposition of the merits by the Cornmission plus an additional period of time to allow for possible court appeal. See 46 C.F.R. 502.254(c)(2). According,

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'Under section 1 l(g) of the 1984 Act and 46 C.F.R. 502.253, the Commission is authorized to award interest running from the "date of injury." Absent any specific date of injury in the record, for the particular items of claimed damages, it is permissible to use the date of the tiling of the complaint as the "date of injury." See Docket No. 98-12 - *Panalpina, Inc. v. Eastern Mediterranean Shipping Corp.,* cited above, at 5 n. 7; *Moosman v. Joseph P. Blitz, Inc.,* 358 F.2d 686,688 (2d Cir. 1966). When there is better evidence of the precise date of injury, such evidence is used instead. Such better evidence has been used with regard to complainant Go/Dan's claim for freight paid because there is more specific evidence of the precise date (date of payment), as explained in the text of this decision.

complainant Go/Dan Industries is awarded reparations in the amount of $3,785 and may, if it chooses, file a petition at the appropriate time for reasonable attorney's fees.

Norman D. Kline

Norman D. Kline
Administrative Law Judge

Washington, D.C.
December 10, 1998