

ORIGINAL

(S E R V E D)
(November 9, 1999)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

November 9, 1999

DOCKET NO. 99-14

GLOBAL TRANSPORTE OCEANICO S.A.

v.

COLER OCEAN INDEPENDENT LINES CO.

AWARD OF ATTORNEY'S FEES

Complainant Global Transporte Oceanico S.A. (Global) has filed a petition seeking an award of attorney's fees pursuant to section 1 l(g) of the Shipping Act of 1984, as amended, and the Commission's regulations, 46 C.F.R. 502.224. Respondent has not replied to the petition.' By an

¹Complainant's petition was filed (served) on October 7, 1999, within one week after service of the Initial Decision. The Commission's relevant rule (46 C.F.R. 502.254(c)) specifies that prevailing complainants must normally wait 30 days for Commission review of such decision plus another 60 days for a possible petition for judicial review before even filing their petitions for attorney's fees. However, when respondents have totally defaulted and there is no likelihood of court review, petitions for attorney's fees have been filed without waiting 90 days and have even been finalized by the Commission without waiting for the 60-day period for an unlikely court-review petition to expire. See, e.g., Docket No. 99-08 - *Classic International, Inc. v. Young Hee, etc.* (Petition filed even before the Initial Decision was issued); Docket No. 89-10 - *Safbank Line Ltd. v. The Hairlox Co., Inc.* (Petition filed before the 30-day period for

(continued...)

Initial Decision, served October 1, 1999, and made administratively final by the Commission on November 5, 1999, Global obtained a decision in the nature of a default judgment finding that respondent Coler Ocean Independent Lines Co. (Coler), an NVOCC (non-vessel operating common carrier) located in Miami, Florida, had obtained a transportation service from Global, which carried a shipment from Miami, Florida, to Buenos Aires, Argentina, under a bill of lading dated March 19, 1999, but never fully paid the ocean freight and charges lawfully due. Instead respondent Coler first gave Global a bad check, then made partial payment and agreed in writing to pay the \$15,000 balance due in three installments, but reneged on this written agreement. Respondent Coler, who never replied to the original complaint nor to an order to show cause and explain its default, deprived Global of the lawfully due freight and also deprived complainant of its cargo lien by removing the cargo without paying fully for the transportation service. According to case law and, moreover, owing to respondent's default, it was found and concluded that respondent had violated section 10(a)(1) of the Shipping Act of 1984, as amended, by knowingly and willfully obtaining transportation at less than the lawfully applicable rates by means of an unjust or unfair device or means. Respondent was therefore ordered to pay complainant the unpaid \$15,000 balance due for the service it had received, and it was also found and concluded that pursuant to relevant law, complainant was entitled to interest and to seek an award of reasonable attorney's fees pursuant to the relevant law and the Commission's regulations, cited above.

¹ (. . . continued)

Commission review of the Initial Decision expired). As the Supreme Court observed in *American Farm Lines v. Black Ball Freight Service, et al.*, 397 U.S. 532, 539 (1970) (“ . . . [I]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.”); see also 46 C.F.R. 502.10 (Commission may waive its rules of procedure “if the expeditious conduct of business so requires.”). Accordingly, I have ruled on the instant petition even though complainant did not wait 90 days after service of the Initial Decision before filing it. As I note elsewhere, respondent Coler has failed to reply or to file any pleading four times in this proceeding and has disappeared leaving no forwarding address.

Petitioner Global asks for an award of \$4,765.50 as reasonable attorney's fees for the legal services it received from counsel. To support its petition, Global submits an affidavit signed by Robert J. Ryniker, an attorney licensed to practice in the state of Texas and in the Southern District of Texas, Houston Division. Mr. Ryniker swears that two attorneys worked on the case for complainant, one attorney (Mr. Michael K. Bell) spending 5.1 hours on the case at the rate of \$225 per hour; and the other (Mr. Douglas J. Shoemaker) spending 26.8 hours at a rate of \$135 per hour. Consequently, the total fees for these two attorneys amounts to \$4,765.50.² These fees are within the zone of reasonableness according to previous cases in which such fees have been awarded. See, e.g., Docket No. 99-08 - *Classic International, Inc. v. Young Hee Ko, et al.*, Notice of Default Judgment (ALJ, June 30, 1999), F.M.C. notice of finality, August 3, 1999, 28 S.R.R. 1086 (three attorneys worked on the case at rates of \$240, \$220, and \$135 per hour); Docket No. 98-07 - *CTM International, Inc. v. Medtech Enterprises, Inc. et al.*, Award of Attorney's Fees, September 22, 1999 (ALJ), F.M.C. notice of finality, October 26, 1999, 28 S.R.R. 1096 (single counsel billed at hourly rate of \$200).³ Moreover, respondent has failed to reply on three separate occasions, first, by failing to answer the original complaint, second, by failing to reply to an order to show cause why it had failed to file such answer and why a default judgment should not be entered against it, and, third, by failing to file a reply to the instant petition, which the Commission's rules expressly permitted it to do within 20 days after the filing of the petition, which day falls on October 27, 1999 (see 46 C.F.R. 502.254(d)). Respondent has even failed to respond a fourth time, by not filing

²26.8 hours times \$135 per hour equals \$3,618. 5.1 hours times \$225 per hour equals \$1,147.50. The total is \$4,765.00.

³The affiant, Mr. Ryniker, who, as mentioned, is licensed to practice in the Houston area, swears that "considering the nature of the controversy, the rates are comparable to those customarily charged in this area for the same or similar services for attorneys with the experience, reputation and ability of Douglas J. Shoemaker and Michael K. Bell." See Ryniker Affidavit. Respondent has not challenged this statement.

exceptions to the Initial Decision finding it liable to complainant for the \$15,000 unpaid freight still owing and due, plus interest.⁴ It is generally held that if a party fails to reply to well-pleaded allegations and consequently falls into default, that party admits well-pleaded allegations as well as specific amounts claimed as damages. See, e.g., the Initial Decision in this case, cited above, at 3, and the several cases cited therein; see also 10A Wright, Miller and Kane, *Federal Practice and Procedure*, sec. 2688 at 63-64; 10 Moore's *Federal Practice* (3d ed.), sec. 55.12. Accordingly, complainant Global is awarded the sum of \$4,765.50 as reasonable attorney's fees and respondent Coler is ordered to pay that sum.⁵

Norman D. Kline

Norman D. Kline
Administrative Law Judge

⁴Respondent has apparently vacated its premises, leaving no forwarding address, according to a postal return of service of the Initial Decision. As a party in litigation before this agency, respondent has violated its duty of keeping the Commission informed of its current address and must suffer the consequences for having failed in this duty. See *Go/Dan Industries, Inc. v. Eastern Mediterranean Shipping Corp.*, 28 S.R.R. 788 n. 3 (1999), and cases cited therein (respondent NVOCC departed his business address and disappeared, suffering default judgment).

⁵Petitioner also asks for an award for "expenses, including filing fee, photocopies, long distance telephone and postage." Such things relate to costs of litigation rather than attorney's fees. Section 1 l(g) of the 1984 Act, as amended, authorizes the Commission to award "reparations . . . plus reasonable attorney's fees." This statute is therefore an exception to the normal American rule by which each party pays its own attorney's fees. See *Alyeska Pipeline Service Co. v. The Wilderness Society, et al.*, 421 U.S. 240 (1975). However, the statute cited is a fee-shifting statute that applies only to one administrative agency, this Commission, which is not a court, and it does not extend to costs of litigation, such as filing fees and the other cost items claimed by petitioner. Consequently, the additional \$300.34 in such costs that are claimed by petitioner are not awardable under law. See Docket No. 91-46 - *Safbank Limited v. Nefra Trading*, Determination of Attorney's Fees, July 1, 1992 (ALJ), F.M.C. notice of finality, August 7, 1992 (unreported) (no award for costs, only for attorney's fees).