

ORIGINAL

FEDERAL MARITIME COMMISSION

CC:OS/OGC
ALJ(2)
D.B

FORMAL DOCKET NO. 1898 (F)

DSW INTERNATIONAL, INC., a Texas Corporation
Claimant,

v.

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



RESPONDENT COMMONWEALTH SHIPPING, INC.'S
BRIEF

TO THE HONORABLE COMMISSION:

INTRODUCTION

This is a suit seeking money damages between two private parties, a shipper and an NVOCC, for the loss of two automobiles¹ in transit between Jacksonville, Florida and Cotonou, Benin in West Africa, while they were in the possession of ABOU MERHI LINES, LLC, a VOCC. The shipment was made pursuant to a contract of carriage in the form of a bill of lading. The shipper not only alleges that the automobiles have a value of \$45,500², but also that it is

¹ The two automobiles are a 2004 Ford Explorer and a 2001 Honda Accord.

² According to Kelly's Blue Book, the maximum value of a 2004 Ford Explorer in excellent condition is \$11,915. See <http://www.kbb.com/KBB/UsedCars/PricingReport.aspx?YearId=2004&VehicleClass=UsedCar&ManufacturerId=15&Condition=Excellent&ModelId=100&PriceType=CPO&VehicleId=2420&Mileage=71000&SelectionHistory=2420|31981|32210|0|0>

The maximum value of a 2001 Honda Accord in excellent condition is \$7,700.

See:

<http://www.kbb.com/KBB/UsedCars/PricingReport.aspx?YearId=2001&Mileage=50000&VehicleClass=UsedCar&ManufacturerId=18&ModelId=122&PriceType=Private+Party&VehicleId=4395&SelectionHistory=4395|31981|32210|0|0&Condition=Excellent&QuizConditions=>

entitled to prejudgment interest at the rate of 10% per annum, post-judgment interest at the rate of 12% per annum, consequential damages, and attorneys fees.

Congress has extensively regulated the relationship between shippers and carriers pursuant to bills of lading, and has enacted the Carriage of Goods by Sea Act, 46 U.S.C. §1301-1315, commonly known as “COGSA.” With the recodification of Title 46, COGSA has been transferred to the notes of 46 U.S.C. 30701 where it remains an uncodified law of the United States.³ Nevertheless it has not been repealed, remains an active statute, and regulates the relations between these two parties in this case.

The Carriage of Goods by Sea Act contains a number of important features including a one-year statute of limitations⁴, and a \$500 “per package” limitation.⁵ Automobiles are considered to be “packages” under judicial interpretation of COGSA and Commonwealth’s maximum liability to DSW would have been limited to \$1,000 for the shipment if it had brought suit in a court of competent jurisdiction within the one year statute of limitations. However,

³ Congress transferred COGSA to the notes section in anticipation of the adoption of a new cargo liability regime known as the Rotterdam Rules, formally known as the United Nations Convention on contracts for the International Carriage of Goods by Sea.

⁴ “In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: Provided, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.” 46 U.S.C. §1303(6).

⁵ “Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding \$500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.” 46 U.S.C. §1304(5).

DSW failed to bring suit within one year, thereby barring its claim for damage to the cargo in its entirety.

DSW has filed an action with the Federal Maritime Commission under its 3 year statute of limitations, alleging that the loss of, or damage to the automobiles constitutes a violation of the Shipping Act of 1964. DSW does not allege that any regulation or practice of COMMONWEALTH is unjust or unreasonably discriminatory, but only that COMMONWEALTH has “unreasonably refused to deal or negotiate” a settlement for the loss of the vehicles. It asserts that the refusal to settle a suit for damages is a violation of Section 10(b)(10) of the Shipping Act, 46 App. U.S.C. 1709 (2002), recodified at 46 USCS § 41104.⁶

SUBJECT MATTER JURISDICTION

Jurisdiction over “cases and controversies” arising under bills of lading is committed to the judicial branch of government under the Article III of the Constitution and is beyond the jurisdiction of Article I Courts or of administrative commissions with quasi-judicial functions, such as the Federal Maritime Commission.

The vesting clause contained in Article III, Section 1 of the United States Constitution provides that:

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

⁶ 46 USCS § 41104 provides that:

A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not—...

(4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of—...

(10) unreasonably refuse to deal or negotiate

Bills of lading for the carriage of goods by sea are maritime contracts and jurisdiction over maritime contracts is granted to the judicial branch of the federal government by Article III, Section 2 of the Constitution.

Article III, Section 2 of the United States Constitution provides that:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--*to all cases of admiralty and maritime jurisdiction*

Since judicial power to resolve “cases and controversies” in “all cases of admiralty and maritime jurisdiction” has been vested by Article III, Sections 1 and 2 in the federal courts, the exercise of judicial power by the Federal Maritime Commission to resolve private disputes violates the principle of separation of powers.

In addition to violating the principle of separation of powers, assumption of jurisdiction over this case by the FMC deprives private parties, and particularly COMMONWEALTH, of certain rights under the Constitution, including the right to have cases decided before a judge who is appointed for life (specifically “during good behavior”) and whose compensation may not be reduced during their time in office. It deprives COMMONWEALTH of the right to a trial by jury under the 7th Amendment to the Constitution (“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.”). Further, it deprives COMMONWEALTH of due process under the 5th and 14th Amendments to the Constitution since it deprives it of property without the protections provided to private parties by the Constitution.

EXISTENCE OF FMC LACKS TEXTUAL SUPPORT IN THE CONSTITUTION

While it may seem odd to challenge the constitutionality of a governmental agency which has been in existence since 1961, the “triumph of the administrative state”⁷ has been accomplished and maintained in large part because no party has challenged the basic organizational powers of non-executive branch commissions. The issue must be raised early in this proceedings in order to avoid the assertion at a later date that the question of the constitutionality of the FMC was not before the agency, and was only considered after the complaining party had lost at the administrative level. The exhaustion doctrine requires that the FMC have a full opportunity to consider the issue so that it may be preserved for later appeal.

The public has been tolerant of the continuous growth of virtually unregulated federal agencies while the nation thrived economically, as it has since World War II. However, the nation no longer thrives. It lurches from financial debacle to financial debacle, always threatened with collapse. Fed Chairmen warn Congress at every opportunity that the present budgetary system is unsustainable, and foreign nations search, with the implied blessing of the Department of the Treasury, for another currency to replace the dollar in international trade. This is an appropriate time in history to reexamine the basic structures of the federal government, and particularly the existence of commissions which do not answer to the executive branch.

The lack of a textual basis in the Constitution for the structure of a commission which does not answer to the executive branch of government has been noted by various justices of the Supreme Court in the past, particularly as it relates to the FMC. Specifically, in FMC v. S.C.

⁷ As Justice Souter stated in his dissent in Alden v. Maine, 527 U.S. 706, 807 (2001) “the proliferation of government, state and federal, would amaze the Framers, and the administrative state with its reams of regulations would leave them rubbing their eyes.”

State Ports Auth., 535 U.S. 743, 754 (2002) Justice Thomas pointed out that the existence of the FMC as an independent agency lacks any textual basis in the Constitution.⁸

While the vesting clauses of Constitution vest executive power in the Presidency, legislative power in Congress, and judicial power in the Judicial Branch, commissions answer to none of the three. The notes to 46 U.S.C. App §1111 include The Reorganization Plan No. 7 of 1961 specifically state that:

There is hereby established a Federal Maritime Commission, hereinafter referred to as the Commission. *The Commission shall not be a part of any executive department or under the authority of the head of any executive department.*

Justice Thomas, whose experience before ascending to the bench was primarily in the administrative system, has been particularly willing to address the role which agencies play in government, and particularly the fact that they seem to exist outside the scope of the vesting clauses, exercising quasi-judicial, quasi-legislative, and quasi-executive powers while being unaccountable to voters, or the established branches of government. In fact "Justice Thomas goes out of his way to invite a fundamental rethinking of the current doctrinal approach" to the delegation doctrine in Whitman (Administrator of EPA) v. American Trucking, 531 U.S. 457 (2001). See Strauss, Rakoff, and Farina, Gellhorn and Byse's Administrative Law (Foundation Press)(2007); and Lawson, Gary, The Rise and the Rise of the Administrative State, 107 Harv. L. Rev. 1231 (1994).

THE PUBLIC RIGHT/PRIVATE RIGHT DISTINCTION

The Supreme Court has authorized administrative agencies to litigate private rights in certain circumstances, for example where "Congress, acting for a valid legislative purpose

⁸ Specifically Justice Thomas stated "it is ironic that Justice Breyer adopts such a textual approach in defending the conduct of an independent agency that itself lacks any textual basis in the Constitution.."

pursuant to its constitutional powers under Article I, has created a seemingly 'private right' that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986), quoting from N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). However, that is not the case here.

The right to sue for damage to cargo is a private right, even though it is affected by the passage of COGSA. In Curtis v. Loether, 415 U.S. 189 (1974) the Supreme Court held that the Seventh Amendment requires a jury trial in an action for money damages under the Civil Rights Act of 1968, It said "whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." Here, cargo damage suits may clearly be brought in the "ordinary courts of law" but the FMC lacks the ability to provide the parties with a jury trial. Consequently, cargo damage claims cannot be litigated before the FMC.

THIS CASE EXCEEDS THE DELEGATED POWERS OF THE FMC

The enabling Act which created the FMC delegates the power to enforce Shipping Act of 1984, the Foreign Shipping Practices Act of 1988, Section 19 of the Merchant Marine Act, 1920, and Public Law 89-777 (Financial Responsibility for Death or Injury to Passenger and for

Nonperformance of Voyage)⁹. There is nothing in the enabling legislation which delegates to the FMC the power to hear cargo damage suits.

This present case is alleged to be filed under the Shipping Act. DSW's Amended Complaint at 1; DSW's Brief at 2. The Shipping Act was enacted to "provide an efficient and economic transportation system in the ocean commerce of the United States," "to promote the growth and development of the United States exports through competitive and efficient ocean

⁹ SEC. 103. TRANSFER OF FUNCTIONS TO COMMISSION

The following functions, which are now vested in the Federal Maritime Board under the provisions of Reorganization Plan No. 21 of 1950 (64 Stat. 1273), are hereby transferred from that Board to the Commission:

(a) All functions under the provisions of sections 14-20, inclusive, and sections 22-33, inclusive, of the Shipping Act, 1916, as amended ([former] 46 U.S.C. 812-819 and 821-832), including such functions with respect to the regulation and control of rates, services, practices, and agreements of common carriers by **water and of other persons.**

(b) All functions with respect to the regulation and control of rates, fares, charges, classifications, tariffs, regulations, and practices of common carriers by water under the provisions of the Intercoastal Shipping Act, 1933, as amended ([former] 46 U.S.C. 843-848).

(c) The functions with respect to the making of rules and regulations affecting shipping in the foreign trade to adjust or meet conditions unfavorable to such shipping, and with respect to the approval, suspension, modification, or annulment of rules or regulations of other Federal agencies affecting shipping in the foreign trade, under the provisions of section 19 of the Merchant Marine Act, 1920, as amended (46 U.S.C. 876), exclusive of subsection (1)(a) thereof.

(d) The functions with respect to investigating discriminatory rates, charges, classifications, and practices in the foreign trade, and with respect to recommending legislation to correct such discrimination, under the provisions of section 212(e) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1122(f)).

(e) To the extent that they relate to functions transferred to the Commission by the foregoing provisions of this section:

(1) The functions with respect to requiring the filing of reports, accounts, records, rates, charges, and memoranda, under the provisions of section 21 of the Shipping Act, 1916, as amended ([former] 46 U.S.C. 820).

(2) The functions with respect to adopting rules and regulations, making reports and recommendations to Congress, subpoenaing witnesses, administering oaths, taking evidence, and requiring the production of books, papers, and documents, under the provisions of sections 204, 208, and 214 of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1114, 1118, and 1124).

transportation,” and “to establish a nondiscriminatory regulatory process for the common carriage of goods by water.” (The Shipping Act, Section 2. Declaration of Policy). See 46 U.S.C. 1701 (2002).

To achieve the policies declared in Section 2, the Commission is authorized to protect the consumer, the shipper, and the public; to maintain an orderly and responsible development of international ocean shipment; to supervise and control the ocean common carriers and/or Marine Terminal Operators, and to investigate the complaints lodged against, and, if necessary, to impose penalties upon, the ocean common carriers. Id.

Section 10 of the Shipping Act provides a list of actions that are prohibited to ocean common carriers. Complainant’s Amended Complaint alleges that the Respondents violated Section 10(b)(3) of the Shipping Act, which prohibits the common carriers from “retaliat[ing] against any shipper by refusing, or threaten[ing] to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason.” The Complainant misread the intent of the law. This Section is similar to the Clayton Act in that it was enacted to prevent the monopolizing of the shipping industry.

Abou Merhi also violated Section 10(b)(4)(D) that provides, “No common carrier, either alone or in conjunction with any other person, directly or indirectly, may...engage in any unfair or unjustly discriminatory practice in the matter of...the loading and landing of freight, or the adjustment and settlement of claims.” Abou Merhi further violated Section 10(b)(10) of the Shipping Act, under which an OCC is specifically prohibited from “unreasonably refus[ing] to deal or negotiate” with the shipper.

The Respondents additionally violated Section 10(d)(1) of the Shipping Act, which provides “No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.”

COMMONWEALTH and ABOU MERHI did not commit a violation of the Shipping Act. They did not collude, or conspire to deny shipping capacity to DSW, nor to fix prices. COMMONWEALTH asserts that this claim is baseless in fact and in law. The case at hand should never have been filed with the Commission. It should have been filed in state or federal court for what it is: a loss of cargo claim.

Complainant states that "[i]f the freight had arrived at the port of destination in a damaged condition, the Respondents would have been clearly liable for such damage and would have been required to pay damages. In this case, however, there was not even a damaged freight. The freight had simply disappeared while the freight was in exclusive possession and control of the Respondents." Complainant ignores COMMONWEALTH's Answer where COGSA is raised as a limit of liability.

Complainant's invocation of the doctrine of *Res Ipsa Loquitur* is not necessary. This doctrine comes into play in torts cases only, and only when a tort has been committed, but there is no legal avenue for the Plaintiff to recover. As the possibility of Default Judgment against ABOU MERHI for its repeated failure to participate in this proceeding indicate that DSW is not without recourse. As Complainant itself even states: "This is not even a tort case."

Respondent restates its belief that this case has no place before the Commission as it is a "garden variety" cargo loss claim.

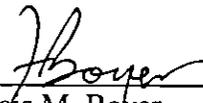
"The Complainant is aware that in order to prevail and receive reparations he has the burden of proving the actual pecuniary loss he sustained as a proximate cause of the Respondents' violations. James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist., 30 S.R.R. 8 (2003) at 13; Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co. Inc., 26 S.R.R. 788 (ALJ 1992), at 798-799." Respondent's Finding of Facts indicate that any pecuniary loss has been inflated as to the real value of the vehicles.

Additionally, Respondent restates its opposition to any pre-judgment and post-judgment interest and to the attorneys fees.

COMMONWEALTH SHIPPING, INC. by and through Francis M. Boyer of SULLIVAN
& COMPANY, its law firm of record, respectfully submits this Brief to the Commission.

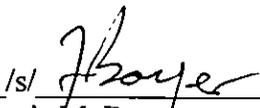
Respectfully submitted,

SULLIVAN & COMPANY
— Maritime Attorneys —

By 
Francis M. Boyer
Florida Bar No. 55458
8777 San Jose Blvd. Suite 803
Jacksonville, Florida 32217
Tel. (904) 355-6000; Fax (904) 737-0920
Attorney for Respondent COMMONWEALTH
fmboyer@yahoo.com/rsullivan@fcsf.edu

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of December 2009, a true and correct copy of Respondent COMMONWEALTH's Brief has been served upon Don Chae, DSW's attorney of record, by means of electronic transmission to chaelaw2000@yahoo.com, and upon ABOU MERHI LINES, LLC at 13453 N. Main Street Suite 505, Jacksonville, Florida 32218, by First class U.S. Mail.


Francis M. Boyer