

ORIGINAL

FEDERAL MARITIME COMMISSION

ANDERSON INTERNATIONAL
TRANSPORT AND OWEN ANDERSON –
POSSIBLE VIOLATIONS OF SECTIONS
8(A) AND 10 OF THE SHIPPING ACT OF
1984

Docket No. 07-02

Served: December 4, 2009

BY THE COMMISSION: Richard A. Lidinsky, Jr.,
Chairman, Joseph E. Brennan and Rebecca F. Dye,
Commissioners

**ORDER GRANTING PETITION
TO REOPEN THE PROCEEDING AND FOR REMAND**

On August 28, 2009, the Administrative Law Judge (ALJ) issued an Initial Decision finding that Anderson International Transport and Owen Anderson (Respondents) had violated the Shipping Act of 1984 (Shipping Act). Applying the D.C. Circuit's holding in *Merritt v. United States*, 960 F.2d 15 (D.C. Cir 1992), the ALJ declined to assess a civil penalty due to a lack of record evidence regarding each Respondent's ability to pay a civil penalty.

Pursuant to 46 C.F.R. § 502.230, the Bureau of Enforcement (BOE) petitioned the Commission to reopen this proceeding in

order to admit evidence concerning Respondent's ability to pay a civil penalty and to remand the proceeding to the ALJ for a determination on the imposition of a civil penalty.¹ BOE also requested, pursuant to 46 C.F.R. § 505.226, that the Commission take official notice of such information contained in the bankruptcy pleadings.² For the following reasons, we grant the petition insofar as BOE seeks to reopen the record and to remand the proceeding to the ALJ for the purpose of considering the additional evidence.

PROCEDURAL HISTORY

The Commission initiated this proceeding by Order of Investigation and Hearing served March 22, 2007. On September 6, 2007, the ALJ issued a Discovery Schedule and Procedural Order setting forth deadlines for discovery and submission of written materials and/or commencement of presentation of evidence. Pursuant to that scheduling order, BOE filed its Rule 95 statement on November 30, 2007; however, neither Respondent filed a Rule 95 statement.³ On February 15, 2008, BOE filed its Proposed Findings of Fact and Appendix. Respondents neglected to file a response to BOE's Proposed Findings of Fact and Appendix, as required, nor did they file a counter-statement of Proposed Findings of Fact. On April 4, 2008, BOE filed Amended Findings of Fact and a Motion for an Order to Show Cause against Respondents.

¹ The evidence, including additional findings of fact and argument thereon, was attached to BOE's "Additional Proposed Findings of Fact, Brief and Appendix of the Bureau of Enforcement." The evidence consists of information found in certain pleadings filed in Respondent Owen Anderson's bankruptcy case in the U.S. Bankruptcy Court, Southern District of Texas (Case No. 08-36657).

² In addition, BOE also petitioned the Commission for a stay of the due date for filing exceptions in this proceeding. This latter aspect of the petition was granted by the Commission on October 19, 2009.

³ Respondent Anderson International Transport acts as a sole proprietorship, operated by Owen Anderson. Initial Decision at 1 fn. 2.

On November 4, 2008, the ALJ ordered Respondents to explain why they had not filed their Rule 95 statements as required by orders dated September 6, 2007 and December 21, 2007, and to file a response to BOE's Revised Proposed Findings of Fact by December 12, 2008. Respondents have not complied with the ALJ's Order to Show Cause. At the direction of the ALJ, BOE filed revised proposed findings of fact by November 21, 2008.⁴

On August 28, 2009, the ALJ issued an Initial Decision finding that Respondents operated as an unlicensed, unbonded, ocean freight forwarder in violation of the Shipping Act. However, citing *Merritt*, 960 F.2d at 17, the ALJ found that the Shipping Act requires consideration of the Respondents' ability to pay in order to assess a penalty. Initial Decision at 84. Without evidence in the record as to ability to pay, the ALJ concluded that he was unable to assess a civil penalty despite the findings of violations.

On October 8, 2009, BOE filed the instant petition to reopen the proceeding for the purpose of taking further evidence, to remand the proceeding to the Administrative Law Judge and to take official notice of additional evidence. BOE's petition to reopen the proceeding is centered upon new evidence concerning Respondents' ability to pay. BOE submits that while preparing its exceptions, BOE learned that in October 2008, Respondent Owen Anderson filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court, Southern District of Texas. The Chapter 7 bankruptcy case was converted to a Chapter 13 proceeding in December 2008 and subsequently was dismissed in April 2009 for failure to comply with an earlier court order. BOE argues that the pleadings filed during the pendency of Owen Anderson's bankruptcy petition, including a statement of financial affairs, schedules of assets and liabilities, and a Chapter 13 statement of current monthly and disposable income dated April 2, 2009, as well as pleadings filed by claimants, provide new information regarding

⁴ BOE's Revised Proposed Findings of Fact supersede those Proposed Findings of Fact filed February 15, 2008.

Respondents' ability to pay a civil penalty. BOE further contends that the new information will permit the Commission to complete consideration of the statutory factors governing imposition of a civil penalty.

DISCUSSION

Pursuant to 46 C.F.R. § 502.230 (d), the Commission may reopen a proceeding for the purpose of taking additional evidence. That rule states:

Where a decision has been issued by the presiding officer or where a decision by the presiding officer has been omitted, but before issuance of a Commission decision, the Commission may, after petition and reply in conformity with paragraphs (a) and (b) of this section, or upon its own motion, reopen a proceeding for the purpose of taking additional evidence.

46 C.F.R. § 502.230 (d). As BOE notes, the current version of 46 C.F.R. § 502.230 was issued in 1967 and constituted a change from the Commission's previous rule governing reopening of proceedings. The modern rule no longer requires a showing that the additional evidence was unavailable at the time of the prior hearing.⁵

BOE argues that the evidence at issue was not available at the time BOE filed its Revised Proposed Findings of Fact in November 2008. BOE Petition at 4, fn 4. Inasmuch as Respondent Owen Anderson filed his Chapter 7 bankruptcy petition in October 2008, it appears that BOE could have known about the existence of

⁵ The prior rule stated that "[i]f the petition be to take further evidence, the nature and purpose of the new evidence to be adduced shall be briefly stated, and it shall appear that such evidence was not available at the time of the prior hearing." 46 C.F.R. § 502.262 (1967).

the Chapter 7 bankruptcy filing at the time of submission of BOE's revised proposed findings of fact on November 21, 2008. Nonetheless, the fact that the information was not uncovered sooner does not affect the validity of BOE's motion under current 46 C.F.R. 502.230(d).

Agencies have broad discretion in deciding whether to reopen a proceeding, and such decisions are reviewed under an abuse of discretion standard. *Interstate Commerce Commission v. Jersey City et al.*, 322 U.S. 503, 516-17 (1944); *Interstate Commerce Commission v. Bhd. of Locomotive Engineers*, 482 U.S. 270, 278-79 (1987) ("overturning the refusal to reopen requires a showing of the clearest abuse of discretion," citing *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 534-535 (1946)). Commission precedent, moreover, favors the agency making its decision based on the most complete record available. *Hudson Shipping (Hong Kong) Ltd. d/b/a Hudson Express Lines-Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 29 SRR 1376 (ALJ 2002). In *Hudson Shipping*, the ALJ explained the rationale favoring reopening to permit the development of a complete record:

. . . it is Commission policy that the evidentiary record be fully developed fully [sic] before an initial decision is rendered. *Maersk Line Agency for the Benefit of Mitsui and Co.*, 22 FMC 224 [19 SRR 1014] (1979)...[i]t is not just the policy, but the responsibility of the Commission and, by delegation of authority, the presiding judge, to inquire into and consider all relevant facts. *Michigan Consolidated Gas Co. v. Federal Power Commission*, 283 F.2d 204, 226, *cert. denied*, 364 US 913 (1960).

29 SRR at 1377. Accordingly, the Commission has the clear authority to reopen a proceeding for the purpose of taking additional evidence.

The evidence that BOE seeks to have admitted is directly relevant and material since it addresses a key finding which the ALJ was otherwise unable to make given the evidence then available in the record. In his Initial Decision, the ALJ stated:

I find that respondents Owen Anderson and Anderson International have committed twenty-two violations of the Shipping Act. Respondents willfully and knowingly committed each violation; therefore, assessment of a civil penalty that may not exceed \$30,000 is appropriate for each violation. BOE has not met its burden of persuasion to establish the amount of the civil penalty to be imposed. For the section 13 factors for which there is evidence in the record, BOE has not established how [sic] the Commission should take into account to ensure that the penalty is tailored to the particular facts of the case. There is no evidence in the record regarding Respondent's ability to pay a civil penalty. Since I am not able to "take[] into account the [Respondent's] ability to pay," I cannot make a "specific finding[]" with respect to each of the factors set forth in section 13(c)." *Merritt v. United States*, 960 F.2d at 17. Therefore, I am unable to assess a civil penalty against Respondents.

Anderson International Transport, Initial Decision at 84.

In *Merritt*, the Court commented that "although the Commission may in its discretion determine how much weight to place on each factor, the Commission must make specific findings with respect to each of the factors set forth in section 13(c) [of the Shipping Act]...." *Id.* at 17. Accordingly, "the Commission must consider ability to pay before it imposes a fine." *Id.* at 18. As in the *Merritt* case, this result still obtains even though the Respondent failed to appear before the ALJ. The *Merritt* court concluded that the Commission retained a discrete burden of making specific

findings on the ability to pay a penalty. *Id.* Without evidence in the record addressing ability to pay, or some justification for its absence, the Commission cannot assess a civil penalty.

As it currently stands, the ALJ's Initial Decision finds that Respondents Owen Anderson and Anderson International Transport violated section 19(a) and (b) of the Shipping Act and the Commission's regulations at 46 C.F.R. § 515, by operating as an ocean transportation intermediary in the United States foreign trades without obtaining a license from the Commission and by operating without providing proof of financial responsibility. In light of these violations, the ALJ ordered Respondents to cease and desist from holding out or operating as an ocean transportation intermediary unless and until a license is issued by the Commission, the Respondent obtains a bond, and publishes a tariff. Further, Owen Anderson was ordered to cease and desist from serving as an investor, owner, shareholder, officer, director, manager, or administrator in any company engaged in providing ocean transportation services except as a bona fide employee of such entity for a period of three years.

The evidence BOE seeks to have admitted consists of pleadings filed during the pendency of Owen Anderson's bankruptcy petition, including a statement of financial affairs, schedules of assets and liabilities and a Chapter 13 statement of current monthly and disposable income dated April 2, 2009. This evidence appears to provide information directly relevant to the missing evidentiary factor required under *Merritt* and will allow the ALJ to give due consideration to the statutory factors under section 13 of the Act governing imposition of civil penalties.

CONCLUSION

For the foregoing reasons, the Commission hereby grants BOE's petition to reopen the record and to remand the proceeding to the ALJ for consideration of admitting new evidence and for further determination on the imposition of a civil penalty. BOE's

petition requesting the Commission to take official notice of this additional evidence is denied, as this matter is more appropriately addressed in the first instance by the ALJ.

NOW THEREFORE, IT IS ORDERED, that the record in the above-captioned proceeding is reopened and that the proceeding is remanded to the Office of the Administrative Law Judge for further proceedings consistent with this Order.

By the Commission.


Karen V. Gregory
Secretary