

( FEDERAL MARITIME COMMISSION )  
( SERVED JUNE 2, 1995 )  
( EXCEPTIONS DUE 6-26-95 )  
( REPLIES TO EXCEPTIONS DUE 7-18-95 )

FEDERAL MARITIME COMMISSION

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DOCKET NO. 95-07

SHIPCO TRANSPORT INC.

v.

SATURN AIR SEA CARGO

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Complainant, a non-vessel operating common carrier (NVOCC), alleged that respondent, another NVOCC, acting in bad faith and making misrepresentations, induced complainant to handle 27 shipments, to extend credit, and to release the shipments and lose complainant's cargo lien without being paid the freight due. Furthermore, respondent stopped payment on its check for five of the shipments, knowing that it had insufficient funds when it tendered the check. Respondent failed to answer the complaint or an order requiring it to explain its failure to answer. It is *held*:

- (1) Respondent's conduct constitutes the use of an unjust or unfair device or means to avoid payment of the lawful freight due, in violation of section 10(a)(1) of the Shipping Act of 1984.
- (2) Complainant is awarded reparations for unpaid freight totaling \$26,446.86, plus interest.

*Carlos Rodriguez* and *Henry P. Gonzalez* for complainant.  
No appearance for respondent.

**INITIAL DECISION<sup>1</sup> OF NORMAN D. KLINE,  
ADMINISTRATIVE LAW JUDGE**

By complaint served April 19, 1995, complainant Shipco Transport Inc., non-vessel operating common carrier (NVOCC), alleges that respondent Saturn Air Sea Cargo, another NVOCC, owes Shipco \$26, 296.86 in connection with 27 shipments which Shipco handled for Saturn between June and November 1994 but without getting paid the freight due. Shipco alleges that relying on bad-faith representations by Saturn that Saturn had the ability to pay the freight, Shipco agreed to handle Saturn's shipments and to extend Saturn credit. Furthermore, again relying on Saturn's misrepresentations, Shipco alleges that it released the cargo, thereby losing its possessory lien without receiving payment of the freight due on the shipments. To illustrate further Saturn's bad faith, Shipco alleges that in November 1994 Saturn willfully tendered to Shipco a check in payment for five shipments, knowing that Saturn would issue a stop payment order to its bank and that there were insufficient funds to cover the check. Shipco alleges finally that it has made repeated demands on Saturn for payment and received promises by Saturn to pay under the credit agreement between the two companies but has still not been paid. Shipco claims that the conduct described shows that Saturn has violated section 10(a)(1) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1709(a)(1), resulting in damages to Shipco for which Shipco asks reparations in the amount stated above, as later amended.

Under the Commission's rules, respondent was supposed to file its answer to the complaint by May 9, 1995, 20 days after date of service of the complaint. See 46 CFR

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<sup>1</sup>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 CFR 502.227).

502.64(a). However, respondent failed to file its answer. Accordingly, as authorized by another Commission rule (46 CFR 502.64(b)), and as is customary when respondents fail to file answers to complaints, I afforded respondent an opportunity to explain why it had not filed an answer and why a decision should not be entered against it. See Notice of Default and Order to Supplement Record, served May 11, 1995. In addition, because the complaint did not explain how the total amount of reparations had been calculated nor the times of the alleged injuries, I instructed complainant to furnish this information so that the proper amount of the alleged injuries and interest could be calculated under the Commission's regulations regarding calculation of interest due in reparation awards. See 46 CFR 502.253.

In response to my rulings, complainant has furnished a detailed explanation of the amount of alleged injuries. However, respondent has for the second time ignored the proceeding. Accordingly, the matter is ripe for decision.

#### Discussion and Conclusions

Complainant alleges that respondent's conduct violates section 10(a)(1) of the Shipping act of 1984 (46 U.S.C. app. sec. 1709(a)(1)). That law provides that:

(a) No person may--(1) knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable.

As mentioned above, complainant has alleged that respondent, in bad faith, made representations to complainant that it had the ability to pay freight due on forthcoming

shipments and entered into a credit agreement with complainant, and that complainant thereafter extended credit and handled 27 shipments for respondent in reliance on respondent's representations and surrendered possession of the cargoes, thereby losing complainant's possessory lien, without receiving payment of the freight due. Furthermore, as further illustration of respondent's bad faith, complainant has alleged that respondent tendered a check in purported payment for five of the 27 shipments while knowing that there were insufficient funds to cover the check in the bank and that respondent would issue a stop-payment order to the bank. Complainant has alleged also that it has made repeated demands on Saturn for payment but has received only unfulfilled promises to pay. I find such conduct to constitute a violation of section 10(a)(1) of the Act.

The failure of Saturn to reply to the well-pleaded allegations in the complaint means, in law, that Saturn has admitted the allegations both as to the violations of law and the amount of liquidated damages set forth in the complaint. This rule has been followed both by the courts and the Commission. See *Hugh Symington v. Euro Car Transport, Inc.*, 26 SRR 871, 872 (1993), and cases and authorities cited therein; *Safbank Line Ltd. v. Royale Transport, Inc.*, 25 SRR 951, 953 (ALJ, F.M.C. notice of finality, June 8, 1990). See also 46 CFR 502.64(a) ("recitals of material and relevant facts in a complaint . . . unless specifically denied in the answer thereto, shall be deemed admitted as true . . ."). Although in recent years the Commission has restricted the scope of its jurisdiction under section 10(a)(1) of the Act to screen out mere freight-collection cases from those that properly fall under this law, the Commission has recognized that the type of conduct, now,

in effect, admitted by respondent, is sufficient to take this case out of the merely freight-collection category and to place it squarely within the proscriptions of section 10(a)(1).

In 1993 the Commission, noticing an increasing volume of freight-collection cases filed under section 10(a)(1) of the Act, issued an interpretation of that law in an attempt to ensure that complaints alleging unpaid freight by shippers really involved Shipping Act concerns, such as falsification, deception, fraud or concealment, rather than merely honest differences of opinion. The Commission issued the following interpretive rule (46 CFR 571.2) in *Unpaid Freight Charges*, 26 SRR 735 (1993):

Section 10(a)(1) of the Shipping Act of 1984 states that it is unlawful for any person to obtain or attempt to obtain transportation for property at less than the properly applicable rates, by any "unjust or unfair device or means." An essential element of the offense is use of an "unjust or unfair device or means." In the absence of evidence of bad faith or deceit, the Federal Maritime Commission will not infer an "unjust or unfair device or means" from the failure of a shipper to pay ocean freight. An "unjust or unfair device or means" could be inferred where a shipper, in bad faith, induced the carrier to relinquish its possessory lien on the cargo and to transport the cargo without prepayment by the shipper of the applicable freight charges.

In the rulemaking proceeding which led to the issuance of the above rule, cited above, the Commission explained that a complaining carrier had to show something more than a mere stubborn but good-faith refusal to pay a disputed rate or charge or a refusal to pay based on honest differences. (26 SRR at 737, 739.) As examples, the Commission suggested a number of factors, e.g., "some element of falsification, deception, fraud, or concealment" (*Id.* at 737); "evidence of bad faith or deceit" (*Id.* at 740); or shipper misrepresentation of its ability to pay, inducing carrier to relinquish cargo lien (*Id.* at 739-740). Since issuance of the interpretive rule, the Commission has found a shipper to have

violated section 10(a)(1) when it misled a carrier into relinquishing the cargo without receiving payment of freight by the device of giving the carrier checks which the shipper promptly voided after taking the shipment into its custody. See *Waterman Steamship Corporation v. General Foundries, Inc.*, 26 SRR 1173 (I.D.), adopted in relevant part, 26 SRR 1424 (1994). As in *Waterman*, furthermore, in the instant case respondent had been a party to a credit agreement to pay freight, which respondent did not honor. The Commission did not hold that respondent shipper in *Waterman* had shown bad faith, deceit, or the like and had thus violated section 10(a)(1) merely because the shipper had violated its credit agreement. However, the shipper's misrepresentations as to its ability to pay together with its cancellation of its checks promptly after receipt of delivery persuaded the Commission that the respondent shipper had acted in bad faith and had used an unjust or unfair device or means to avoid payment of lawful freight due. The Commission noted that the shipper's conduct had induced the complaining carrier to surrender the cargo and thus relinquish its cargo lien, and such conduct, the Commission believed, was evidence of bad faith. (26 SRR at 1429.) The Commission cited the language in 46 CFR 571.2, which states that an unjust or unfair device or means can be "inferred where a shipper, in bad faith, induced the carrier to relinquish its possessory lien on the cargo and to transport the cargo without prepayment by the shipper of the applicable freight charges." (*Id.*) In the rulemaking proceeding, cited above, the Commission had specifically condemned conduct by shippers, such as misrepresenting their ability to pay, which conduct induced carriers to relinquish cargo without first receiving payment, thereby losing their security interest. *Unpaid Freight Charges*, cited above, 26 SRR at 739. In the instant case, respondent Saturn

has not denied the allegations that it misrepresented its ability to pay, has reneged on its credit agreement with complainant, and has stopped payment on its check tendered for five shipments. The result is that complainant lost its cargo lien and has still not been paid. Such conduct, like the conduct of the respondent shipper in *Waterman v. General Foundries*, cited above, shows bad faith and the use of an unjust or unfair device or means, in violation of section 10(a)(1) of the Act. For another case decided since issuance of the interpretive rule, cited above, in which a shipper had also dishonored its agreement to pay freight upon delivery, failed to honor a payment schedule to which it had agreed, ignored a complaint filed against it, and was ultimately found to have violated section 10(a)(1) of the Act, see Docket No. 93-05 - *Tropical Shipping and Construction Co., Ltd. v. Valley Wide Produce, Inc.*, Default Judgment, July 20, 1993, F.M.C. notice of finality, August 26, 1993 (unreported).

For the reasons given above, I find that respondent Saturn Air Sea Cargo has violated section 10(a)(1) of the 1984 Act and must pay reparations for the actual injury caused to complainant, namely the unpaid freight. See section 11(g) of the 1984 Act, 46 U.S.C. app. sec. 1710(g). As mentioned earlier, the original complaint alleged that unpaid freight totaled \$26,296.86. However, complainant has furnished more detailed and accurate evidence concerning the amount of reparations claimed and the dates of injury. See Supplement to the Record, served May 31, 1995. According to this Supplement, the total amount of unpaid freight and reparations to be awarded amounts to \$26,446.86, a correction from the original amount claimed in the complaint, which was \$26,296.86, an adjustment upward of \$150. Attached to the Supplement are the bills of lading for each of the 27 shipments, the first dated June 20, 1994, and the last dated November 20, 1994.

Freight was due on each of the shipments 10 days after the date on the bill of lading, as shown on the Supplement.

Accordingly, it is ordered that respondent Saturn Air Sea Cargo pay complainant Shipco Transport Inc. \$26,446.86, plus interest to be calculated by the Commission, as provided by 46 CFR 502.253, based on the information furnished by complainant in the Supplement to the Record, cited above. Complainant is also entitled to petition for an award of attorney's fees at the appropriate time if it so chooses. See 46 CFR 502.254.



Norman D. Kline  
Administrative Law Judge

Washington, D.C.  
June 2, 1995