(S E R V E D)
(JUNE 16, 1992)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 16, 1992

DOCKET NO. 91-58

BANK LINE LIMITED

v.

JET SET MARINE, INC.

DEFAULT JUDGMENT

In this proceeding, in which complainant has been trying to recover freight due on a shipment covered by a bill of lading dated January 24, 1991, respondent shipper has once again ignored its responsibilities under the Commission's rules. I conclude that the time has therefore come for judgment to be issued against respondent and, under the circumstances, to issue a judgment by default.

A complete explication of the events that gave rise to the complaint and the procedural history of this case can be found in rulings issued on May 8, 1992. (See Motion for Summary Judgment Denied Without Prejudice; Respondent Ordered to Correct

Deficiencies, May 8, 1992.) For convenience, I summarize those rulings and incorporate the entire rulings in the present judgment by reference.

Complainant Bank Line Limited carried a shipment of a speed boat, engines and accessories from New York to Port Louis, Mauritius in January 1991, but was never paid the freight due on the shipment under Bank Line's tariff, amounting to $8,057. Complainant alleged that respondent Jet Set Marine, Inc. had therefore violated section 10(a)(1) of the 1984 Act by knowingly and willfully obtaining or attempting to obtain transportation at less than applicable rates by an unjust or unfair device or means. Respondent has never filed a verified answer to the complaint. Instead, by its President, Mr. Dennis Fridmann, respondent has mailed three letters to me, in which Mr. Fridmann essentially states that his company suffered injury because of an alleged delay in delivery and because complainant induced him to re-book the shipment with Bank Line rather than book with another line on the alleged representation of Bank Line that it would deliver the cargo 30 days earlier than would the other line.

Respondent has demonstrated a continual failure to comply with its responsibilities under the Commission's rules and the various procedural orders issued. First, respondent failed to file its answer to the complaint, although notified with the service of the complaint as to when the answer was due. Accordingly, I notified respondent that it was in default and ordered it to show cause why judgment should not be issued against it. (See Notice of Default and Order to Show Cause, January 8, 1992.) By letter dated January 27, 1992, Mr. Fridmann explained that his business was closed in December and asked the "court" to accept a late-filed letter. This letter was not verified and a copy was not sent to counsel for

complainant. Because the Commission is not a court and is supposed to be more flexible than courts, I accepted the letter as an answer to the complaint, although it had not been verified, as required by the Commission's rules (46 CFR 502.112(b)). I instructed the parties to discuss settlement and to provide a status report. If settlement discussions were not successful, I advised counsel for complainant to file an appropriate pleading. (See Procedural Rulings, January 31, 1992.)

I was advised by counsel for complainant that Mr. Fridmann had not submitted documentation in support of respondent's claims of delay and additional expense and therefore that complainant wished to file a motion asking for summary judgment. Permission to file such motion was granted, and respondent was advised that it should not ignore the proceedings and the Commission's rules and should enter into good-faith discussions with counsel for complainant seeking settlement. (See Notice of Establishment of Procedure Leading to Decision, March 5, 1992.)

Before the time set for the filing of complainant's motion for summary judgment, Mr. Fridmann again sent me an unverified letter without sending a copy of the letter to counsel for complainant. He reiterated his position regarding alleged delay and additional expenses, itemized the alleged additional expenses, and deducted them from the freight bill, leaving a balance of $4,643.75. Mr. Fridmann stated that "[t]his amount is what Bank Line is due for shipping our freight from New Jersey to Mauritius." (See letter, dated March 24, 1992, from Mr. Dennis Fridmann to me.)

To cure respondent's failures to serve complainant with his letter and to afford complainant an opportunity to deal with the above letter, I allowed complainant to

supplement its motion for summary judgment, which had been filed without knowledge of Mr. Fridmann's March 24 letter, and mailed a copy of the letter to complainant's counsel. On May 26, 1992, as supplemented on April 2, 1992, complainant filed its Motion for Summary Judgment. Respondent was advised that it could reply to the motion and supplement by April 20, 1992. Respondent was also warned that by continuing to mail unverified letters and failing to mail copies to complainant's counsel, respondent was ignoring the Commission's rules and apparently was declining to communicate with complainant's counsel in an effort to seek settlement or at least agree upon procedure. (See Amended Procedure for Ruling on Motion for Summary Judgment, March 27, 1992.)

Apparently, in reply to complainant's motion and supplement to the motion, although respondent did not expressly so state, Mr. Fridmann again sent an unverified letter to me, dated April 11, 1992, but this time, I was advised, he mailed a copy to counsel for complainant. In this letter, Mr. Fridmann apologized for not being a "professional in this field" and stated that he had been "trying to solve this without incurring any more expense to add to the losses that we have already incurred." (See April 11, 1992 letter.) Mr. Fridmann did not deny that Bank Line did deliver the shipment but stated that he had provided Bank Line with a document showing that he had booked the shipment with another line but had changed the booking to the Bank Line but that Bank Line's delay in delivery had caused respondent additional expenses and had adversely affected his relationship with the customer in Mauritius. (*Id.*) Mr. Fridmann also stated in his letter that he had provided a list itemizing the additional alleged expenses suffered by respondent

to counsel for complainant who "has ignored it." (*Id.*, at 2.) He again apologized for his "unprofessional response" to the various motions. (*Id.*)

Before ruling on the Motion for Summary Judgment, I instructed complainant to supplement the record by furnishing evidence as to how the shipment was rated under the relevant tariff. In response to this instruction, complainant furnished a copy of a tariff page showing that the correct rate for the shipment was $8,057, inclusive of all accessorial charges. (See letter dated April 27, 1992, from complainant's counsel with attached tariff pages.)

Although respondent did not deny that Bank Line had delivered the freight, respondent appeared to be raising a defense, albeit unverified, that Bank Line had caused respondent injury because of delay in delivery, and respondent appeared to be trying to set off alleged damages against the amount of the freight claimed. Because of that fact and the principles governing motions for summary judgment, which, among other things, require a judge to construe doubts against the moving party, I denied complainant's motion for summary judgment without prejudice. (See Motion for Summary Judgment Denied Without Prejudice, cited above, May 8, 1992.) As I explained in the rulings cited, the Commission is not a court and is therefore supposed to be more flexible than courts. Therefore, I accepted Mr. Fridmann's letters, although unverified, as an attempt to raise an affirmative defense. I pointed out that it is essential to distinguish between enforcement of section 10(a)(1) of the Act and simple freight collection. The former case involves evidence of false claims, fraud, deception, concealment, or bad faith warranting a finding that a respondent shipper has knowingly and willfully used an "unjust or unfair device or means"

to obtain transportation for less than the applicable rates. A stubborn but good-faith refusal to pay freight, however, does not qualify as a violation of section 10(a)(1), according to court cases cited in the rulings. Care must be taken not to convert the Federal Maritime Commission into a mere collection agency, which could happen were the Commission to ignore the requirement that complainant show false claims, deception, etc.

On the other hand, respondent was advised that despite repeated warnings, it had failed to furnish a defense or evidence under oath and that the question of respondent's good faith in raising the defense of delay and alleged offsetting injuries was critical. Furthermore, respondent was advised that it could not continue to ignore the proper rules of procedure merely on the ground that it had no legal counsel. (See rulings cited at 17, citing two cases, including *Andrews v. Bechtel Power Corporation,* 780 F.2d 124, 140 (1st Cir. 1985).)

As pointed out in the rulings cited (at 17), the burden of proof in this case rests on complainant, which has to prove all the elements of a section 10(a)(1) violation. However, before Bank Line should be required to go forward with any more evidence regarding its claims that respondent is stalling and is not acting in good faith, I ruled that respondent ought to show that it was acting in good faith. In other words, despite repeated warnings, respondent had failed to produce evidence under oath to support its claims of delay and injury, and as far as can be seen, respondent had never contacted complainant's counsel to see if discussions could lead to settlement. In fact, Mr. Fridmann did not even mail copies of his first two letters to complainant's counsel.

Therefore, before attempting to rule on the merits of Bank Line's claim, I afforded respondent still another opportunity to correct the deficiencies in the record. I ordered that respondent establish its defenses under oath by at least swearing to the claims and statements presented in Mr. Fridmann's three letters before a notary public. If respondent had done this, it might have established that respondent was attempting to proffer a good-faith defense to the claim and was not merely stalling and refusing to pay freight without just cause. I permitted respondent to file its sworn statements in its defense so that such materials would reach me by June 10, 1992. However, once again respondent has failed to follow proper procedure and has filed nothing. Therefore, respondent has again defaulted despite repeated warnings not to ignore the proceeding. Furthermore, since the question of respondent's good faith in raising its defenses was specifically raised and its critical importance emphasized, respondent's failure to furnish such evidence of its good faith is especially harmful to its position.

There comes a time when repeated efforts to assist a party unrepresented by counsel, which party continually ignores the rules of procedure, must end. If respondent were to continue to be afforded indulgences, this would be unfair to complainant, who has followed the rules and is entitled to a decision within a reasonable time, as the Administrative Procedure Act provides. (See 5 U.S.C. sec. 555(b).)

Although I might have issued a judgment on the merits of the claim by finding that respondent's failure to respond after repeated warnings shows that respondent is refusing to pay lawful freight without a good-faith defense, there is precedent for issuing a judgment by default instead under similar circumstances. Thus, in *Safbank Line Limited v. Royale*

International Tansport, Inc., 25 SRR 951, notice of finality, June 8, 1990, cited by complainant, and cited in the rulings mentioned (at 12 n. 2), respondent had similarly filed a letter in answer to a complaint seeking payment of freight due, but not under oath, and later failed to reply to a motion asking for judgment on the pleadings. As discussed in the decision in the case, there was doubt that continued promptings and urgings directed to the respondent, who was ignoring the proceeding after mailing its letter, would cause respondent to be more diligent and responsible, and it would be improper to deny complainant relief in the futile hope that continued indulgences would make respondent more attentive to the proceeding. Also, a default judgment would impress upon the respondent shipper the importance of tariff law and the need to pay attention to complaints filed with the Commission. (See 25 SRR at 953-954.) Accordingly, a default judgment was issued against respondent.

In the instant case, respondent's conduct and failure to pay attention to this proceeding indicates that future indulgences will very likely merely delay final decision and prevent complainant from recovering freight due under its tariff. Should this decision become final, Bank Line may seek enforcement in a United States District Court, as provided by section 14(d) of the 1984 Act, unless the parties reach a settlement. If court proceedings become necessary, perhaps respondent will pay more attention to its responsibilities as a named party litigant.[1]

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[1]Another possible benefit that would result if the dispute must go to a federal district court for enforcement is that the court, unlike the Commission, can hear the defenses raised by respondent which respondent has mentioned, namely, delay in delivery and related matters. There is some doubt whether the Commission, as an administrative agency which does not administer either common-law claims for damages or admiralty claims for loss, damage, or delay in delivery, could hear respondent's purported defenses and set off any proven damages against the freight claim. Such claims and setoffs are easily within a federal court's jurisdiction, however. (See

Accordingly, judgment is now entered against respondent Jet Set Marine, Inc. for the full amount of Bank Line's claim, $8,057. In addition, if the Commission affirms or finalizes this judgment, Bank Line is entitled to interest as provided by 46 CFR 502.253 (running from February 15, 1992, as requested in the complaint) and to reasonable attorney's fees, as provided by 46 CFR 502.254.[2]

Norman D. Kline

Norman D. Kline
Administrative Law Judge

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the discussion in the rulings cited, May 8, 1992, at 18 n. 3.) This assumes, however, that respondent would still be able to raise such defenses before the court although failing to do so properly before the Commission and suffering default judgment thereby. However, section 14(d)(2) of the Act specifies that the findings and order of the Commission shall only be "prima facie evidence of the facts therein stated . . ." in an enforcement proceeding.

[2]Because respondent is not represented by counsel and seems to be unaware of the Commission's rules, respondent is advised that if it wishes to file exceptions to this judgment, it may do so within 22 days after date of service of this judgment. (Se 46 CFR 502.227.) However, respondent is advised that after the issuance of this judgment, the matter is now before the Commission itself and any exceptions should be directed to the Commission, not to me.