

FEDERAL MARITIME COMMISSION

IN THE MATTER OF THE LAWFULNESS
OF UNLICENSED PERSONS ACTING AS
AGENTS FOR LICENSED OCEAN
TRANSPORTATION INTERMEDIARIES –
PETITION FOR DECLARATORY ORDER

Docket No. 06-08

Served: November 6, 2009

BY THE COMMISSION: Richard A. Lidinsky, Jr.,
Chairman; Joseph E. Brennan and Rebecca F. Dye,
Commissioners; and Joseph E. Brennan filed a concurring
opinion.

Order Granting Petition for Declaratory Order

This matter is before the Commission on remand pursuant to the U.S. Court of Appeals for the District of Columbia Circuit's decision in *Landstar Express America v. Federal Maritime Commission*, 569 F.3d 493 (D.C. Cir. 2009) (*Landstar*). For reasons set forth below, we grant the Petition for Declaratory Order of Team Ocean Services, Inc. and affirm that it is lawful for licensed Ocean Transportation Intermediaries (OTIs) to engage unlicensed persons to act as their agents to perform OTI services.

BACKGROUND

As filed with the Commission in August 2006, Team Ocean's petition for a declaratory order seeks to have the Commission issue an order broadly addressing the lawfulness of agents of OTIs, including non-vessel operating common carriers (NVOCCs) and Ocean Freight Forwarders (OFFs): a) to perform non-vessel common carrier services; and b) to perform freight forwarding services on behalf of a licensed OTI principal, without obligation to obtain a separate OTI license from the Commission. Petition for a Declaratory Order at 7.

The Commission issued a declaratory order on February 15, 2008, denying Team Ocean's petition. The Commission's order concluded "...only licensed persons are permitted to provide OTI services to the public." Docket No. 06-08, *In Re Lawfulness of Unlicensed Persons Acting as Agents for Licensed OTIs*, 31 S.R.R. 185, 197-98 (FMC 2008). Landstar petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Commission's declaratory order. On June 26, 2009, the Court ruled that agents providing OTI services need not be licensed:

Agents providing NVOCC services for licensed NVOCC principals are not NVOCCs (or OFFs) solely by virtue of being agents of NVOCCs. They therefore fall outside the coverage of the statute's licensing requirement. The Commission lacks authority to compel those agents to obtain licenses.

Landstar, 569 F.3d at 500. In light of its conclusion, the Court vacated the Commission's declaratory order in Docket No. 06-08, and remanded the matter to the Commission.

DISCUSSION

In its Petition for Declaratory Order, Team Ocean sought to have the Commission issue a declaratory order specifically affirming that:

- a) It is lawful for OTIs to engage unlicensed persons to act as their agents to perform non-vessel operating common carrier (“NVOCC”) services, as those are defined in the Commission’s Rules and Regulations...

* * *

- b) It is lawful for OTIs to engage unlicensed persons to act as their agents to perform ocean freight forwarding services, as those are defined in the Commission’s Rules and Regulations...

Petition at 7-8. Team Ocean thus squarely placed before the Commission the overriding issue whether Section 19 of the Shipping Act of 1984, as modified by OSRA, would permit all OTIs, OFFs and NVOCCs alike, to lawfully provide transportation-related services through the medium of agents.

As framed by the Court in *Landstar*, “The statutory question here is whether *agents* of Ocean Transportation Intermediaries who are not themselves Ocean Transportation Intermediaries must also obtain licenses from the Commission.” 569 F.3d at 496 (emphasis in original). This issue arises from the text of Section 19 itself, which applies the same standard for licensing as to all OTIs, whether NVOCC or OFF:

- (a) IN GENERAL.—A person in the United States may not act as an ocean transportation intermediary unless the person holds an ocean

transportation intermediary's license issued by the Federal Maritime Commission. The Commission shall issue a license to a person that the Commission determines to be qualified by experience and character to act as an ocean transportation intermediary.

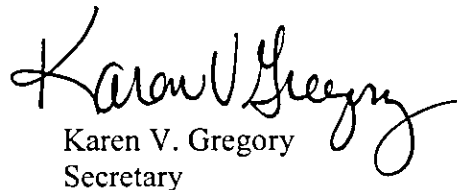
46 U.S.C. 40901(a). As the Supreme Court has explained, neither courts nor federal agencies can rewrite a statute's plain text to correspond to its supposed remedial purpose. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007); *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002). The Court concluded, "[T]he Commission has no authority to require of OFFs who are not themselves OFFs to obtain OFF licenses, just as it has no authority to require agents of NVOCCs who are not themselves NVOCCs to obtain licenses." *Landstar*, 569 F.3d at 500.

CONCLUSION

The Petition for Declaratory Order of Team Ocean Services, Inc., is granted, but only to the extent consistent with the Court's decision in *Landstar* that it is lawful for a licensed OTI to engage an unlicensed person to act as its agent to perform OTI services on behalf of the disclosed licensed OTI.

THEREFORE, IT IS ORDERED that it is lawful for a licensed OTI to engage an unlicensed person to act as its agent to perform OTI services on behalf of the disclosed licensed OTI.

By the Commission.


Karen V. Gregory
Secretary

Concurring Opinion

Commissioner Brennan, concurring in the result.

I concur but make note of the invalidating effect that the Landstar decision, 569 F.3d 493 (D.C. Cir 2009), had on 46 C.F.R. § 515.32(b), which provides that “no licensed freight forwarder shall enter into an agreement or other arrangement (excluding sales agency arrangements not prohibited by law or this part) with an unlicensed person that bestows any fee, compensation, or other benefit upon the unlicensed person.” The requirement that an administrative agency provide a reasoned explanation for its action ordinarily demands that, when the agency action represents a change in administrative policy, the agency will display an awareness that it is changing position. FCC V. Fox Television Stations, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009). The Commission has an obligation to move quickly to acknowledge and resolve any conflict with the agency's existing OTI regulations.