

FEDERAL MARITIME COMMISSION

MAVL CAPITAL INC. ET AL.,

Complainants,

v.

MARINE TRANSPORT LOGISTICS, INC.
ET AL.,

Respondents.

Docket No. 16-16

Served: June 10, 2022

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*,
Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, Max M.
VEKICH, *Commissioners*.

Order Affirming Initial Decision on Remand

This case is before the Commission following a remand to the Administrative Law Judge (ALJ) to address the merits of Complainants' claim that Respondent Marine Transport Logistics, Inc. (Marine Transport) violated 46 U.S.C. § 41102(c) by selling two vehicles stored as export/import cargo to cover unpaid fees without prior notice or due process. Marine Transport justified the sale as authorized by its house bill of lading. On remand, the ALJ found Marine Transport acted unreasonably and consistent with its normal, customary, and continuous practice in selling the two

vehicles and that its actions violated § 41102(c). However, the ALJ denied Complainants' claim for reparations because they failed to prove "actual injury" as required by 46 U.S.C. § 41305 and did not produce sufficient reliable evidence substantiating the amounts they seek for the loss of the two vehicles and related expenses. The ALJ also denied Complainants' request to hold Marine Transport's employee, Respondent Dmitry Alper, personally liable for the § 41102(c) violation.

In timely-filed exceptions, Complainants argue that the ALJ misapplied the burden of proof and erred in finding their reparations evidence insufficient. Complainants seek \$48,500 for the loss of a 2006 Mercedes SL 26 and \$67,000 for the loss of a 2011 Porsche Panamera and \$10,000 for ocean freight charges related to the Porsche and also ask to be declared the prevailing parties. Complainants argue that a declaration of value for customs purposes for the Mercedes and a contract from an overseas buyer for the Porsche prove their claim. Marine Transport argues the ALJ's decision is soundly based on the record and legally correct and further asserts that the reparations Complainants seek for the two used vehicles are clearly excessive.

For the reasons set forth below, the Commission affirms the ALJ's decision in its entirety, denies Complainants' claim for reparations for lack of evidence, and denies as premature Complainants' request to be declared the prevailing parties.

I. BACKGROUND

A. Factual Background

Complainants MAVL Capital Inc. (MAVL) and IAM & AL Group, Inc. (IAM) are in the business of importing and exporting vehicles for the overseas market. Initial Decision on Remand (I.D.R.), 6. Maxim Ostrovskiy is a principal in both companies. Marine Transport is a licensed non-vessel operating common carrier (NVOCC), and Dmitry Alper acted as its General Counsel and later

as Director of Operations. *Id.* Complainants stored the Mercedes and the Porsche in Marine Transport's New Jersey warehouse as import/export cargo. *Id.* at 7-9, 23. At some point, the parties had a disagreement over Mr. Ostrovskiy gaining access to the Mercedes, and he allegedly issued verbal instructions to ship the Mercedes to Germany. *Id.* at 9.

The Mercedes was not shipped to Germany but was instead sold, along with the Porsche, to cover Complainants' unpaid storage charges. Marine Transport sold the vehicles pursuant to its bill of lading which provides that "the Carrier shall have the right in its absolute discretion to dispose of the Goods and/or to sell the Goods by public auction or private sale without notice to the Merchant." *Id.* at 11-12. Both vehicles were shipped to Dubai, United Arab Emirates where the Mercedes was sold for under \$4,000. *Id.* at 9.

B. Procedural History

Complainants alleged that Respondents violated 46 U.S.C. §§ 41102(c) and 41104(a)(3) and (10) and 46 C.F.R. Part 515 in selling the Mercedes and the Porsche and by Respondents unlawfully interfering with Complainants' attempt to export three motorcycles stored by a competitor NVOCC. Complainants originally sought "[d]irect damages in excess of \$180,000 constituting the amounts paid for the purchase of the vehicles plus additional consequential damage for sums arising out of lost contracts, plus interest." Complaint, 9.

In January 2017, the ALJ dismissed all Complainants' claims except the § 41102(c) claim for the sale of the Porsche. The Commission reversed the ALJ's dismissal of the § 41102(c) claim for the sale of the Mercedes and remanded that claim to the ALJ to be decided along with the § 41102(c) claim for the sale of the

Porsche.¹ On remand, the ALJ determined that Marine Transport violated § 41102(c) by selling the Mercedes and Porsche without prior notice or due process but denied Complainants' reparations claim for lack of sufficient evidence. I.D.R., 20-32.²

In timely-filed exceptions, Complainants argue that the ALJ erred in finding their reparations evidence insufficient and ask the Commission to declare them the prevailing party since the ALJ found liability under § 41102(c). Complainants' Br. in Support of Exceptions (Exceptions) (Nov. 12, 2021). Marine Transport urges the Commission to affirm the ALJ's decision in its entirety and deny the request for prevailing party status.

II. DISCUSSION

A. Standard of Review

When the Commission reviews exceptions to an ALJ's Initial Decision, it has "all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). The Commission therefore reviews the ALJ's findings de novo. *Id.*; see also *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 12-02, 2015 FMC LEXIS 43, *110-*11 (FMC Dec. 18, 2015). Complainants bear the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 FMC LEXIS 35, *41 (FMC Dec. 17, 2014). Under the preponderance standard, Complainants must show that their allegations are more probable than not. *DSW Int'l, Inc. v. Commonwealth Shipping, Inc.*, FMC Docket No. 1898(F), 2012 FMC LEXIS 32, at*2 (FMC July 23, 2012).

¹The Commission's decision is published at *MAVL Capital Inc. v. Marine Transp. Logistics, Inc.*, FMC Docket No. 16-16, 2020 FMC LEXIS 216 (FMC Oct. 29, 2020).

²The ALJ's Initial Decision on Remand is published at *MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, No. 16-16, 2021 FMC LEXIS 161 (ALJ Sept. 29, 2021).

B. Reparations Claim

The ALJ determined that Complainants failed to meet their burden of proving an actual injury commensurate with the reparations they seek for the loss of the Mercedes and Porsche. I.D.R., 32. The ALJ found that Complainants' evidence was insufficient and inconclusive. *Id.* With respect to the Mercedes, the ALJ found that while it "is possible that Complainants paid for the Mercedes in Germany and paid the shipping costs from Germany," it was "also possible that someone else paid the purchase price and shipping fees." *Id.* The ALJ reached a similar conclusion with respect to the Porsche and determined that while it was possible Complainants had paid various sums referenced in Complainants' documents, it was equally possible that they had not. *See id.*

1. Legal Standard

Section 41305(b) provides that the Commission "shall direct the payment of reparations to the complainant for actual injury caused" by a Shipping Act violation if the claims were brought within the three-year time period for filing a complaint.³ 46 U.S.C. § 41305(b); § 41301(a). Complainants bear the burden of proving that they are entitled to reparations. *Yakov Kobel v. Hapag-Lloyd A.G.*, FMC No. 10-06, 2014 WL 25316331, at *13 (FMC July 30, 2014). As the Commission has explained:

(a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.

James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist., FMC Docket No. 94-32, 2003 WL 22067203, at *7-

³This action was filed within three years of the sale of Complainants' vehicles, so timeliness is not an issue.

8 (FMC Aug. 26, 2003) (quoting *Waterman v. Stockholms Rederiaktiebolag Svea*, 3 F.M.B. 248, 249 (1950)). Establishing a Shipping Act violation alone does not justify reparations—complainants must also show that they sustained a pecuniary loss as a result of the unlawful act. *Yakov Kobel*, 2014 WL 5316331, at *13.

“Reparations will only be awarded based on actual damages.” *Yakov Kobel*, 2014 WL 5316331, at *14 (citing *Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co., Inc.*, FMC No. 81-57, 1992 FMC LEXIS 86, at *59-60 (ALJ Nov. 23, 1992) (admin. final Dec. 31, 1992)). Actual damages means “compensation for the actual loss or injuries sustained by reason of the wrongdoing” which complainants must show to a reasonable degree of certainty. *Cal. Shipping Line, Inc. v. Yangming Marine Transport Corp.*, FMC No. 88-15, 1990 WL 427466, at *23 (FMC Oct. 19, 1990); *Rose Int’l Inc. v. Overseas Moving Network*, FMC No. 96-05, 2001 WL865708, at *76 (FMC June 7, 2001). That does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained. *See Yakov Kobel*, 2014 WL 5316331, at *14. Reparations claims that come before the Commission generally involve lost or damaged cargo, and the Commission bases reparations either on the cargo market price or the invoice price paid by the complainant. The method chosen depends on the evidence available and which calculation more accurately measures the actual loss. *See id.*

2. Complainants’ Evidence of Market Value

Complainants seek reparations based on the vehicles’ “market value at the port of destination.” Exceptions, 7. Complainants do not point to direct evidence of market value and instead rely on a customs broker’s valuation estimate for the Mercedes and a contract to purchase the Porsche as proof of their loss. *See id.* at 8-13. Complainants also refer to other miscellaneous documents relating to wire transfers and payments as supporting their claim. *See id.*

a. Mercedes' Alleged Market Value

Complainants' sole basis for claiming the Mercedes had a market value of \$48,500 is the value declared for customs purposes when it arrived from Germany in November 2012. *Id.* at 8-9.⁴ Complainants do not point to any evidence indicating that this estimate was based on the car's actual condition or to show that it is a reasonable, accurate, or reliable approximation of the car's actual value. *See id.* Instead, they focus on evidence that has no apparent bearing on those critical factors. *See id.* For example, Complainants state that the customs declaration was signed by customs broker John F. Kilroy Co. Inc. as "attorney in fact" and that Kilroy received a "Customs Clearance Pass Through" fee of \$1,106.81 from Atlantic Cargo Logistics. *Id.* at 9. They also rely on language on the United States Customs and Border Patrol form indicating that the signer declares the information and prices on the form are true. *Id.*

Complainants argue that this evidence regarding the customs broker and the fees paid somehow cures the defects the ALJ found and refutes the ALJ's determination that their evidence was too speculative and unreliable to prove the Mercedes had a market value of \$48,500. Even if the invoice and related documents show what Complainants contend--which is not at all clear since the documents do not show payments coming directly from MAVL (the Mercedes' alleged owner)--all that would establish is that Kilroy was the customs broker and was paid a fee. *See id.* The evidence Complainants discuss in their exceptions does not cure the critical deficiencies in the customs declaration. *See id.* Namely, the evidence does not address the broker's basis for assigning \$48,500 as the declared value, indicate what knowledge (if any) he had about the car's actual condition, or what factors he considered in assigning

⁴Complainants ask the Commission to note that Complainant (presumably referring to Mr. Ostrovskiy) purchased the Mercedes "three years prior to its import into the United States" for his personal use. Exceptions, 8. Complainants have not produced the invoice for the Mercedes' purchase and do not cite any support in the record for this assertion or explain how (if at all) it supports the amount they seek for the loss of the Mercedes. *See id.*

that value. Those ambiguities are not cured by language on the form indicating that signer represents the information provided is true. Even if the broker believed that the information he provided was accurate, that does not prove his belief was reasonable or accurate, since there is nothing to suggest he had a factual basis for that opinion. *See generally Flanagan*, 2003 WL 22067203, at *7-8 (“conclusory statements” that do not demonstrate lost business with “any particularity” insufficient to prove reparations).

Apart from the reliability issues with the customs declaration, Complainants’ own statements indicate that the Mercedes was not in good condition which suggests that \$48,500 is unrealistically high. Mr. Ostrovskiy had the Mercedes shipped back to the United States from Germany so he could inspect it for needed repairs and order custom parts. *See I.D.R.*, 7-8 (Finding Nos. 21-23). That plan clearly suggests that Mr. Ostrovskiy believed the Mercedes needed repair work. *See id.* Otherwise he would not have gone to the trouble and expense of having the car shipped back to the United States in the fall of 2012. The ALJ’s finding that the Mercedes was “sold for under \$4,000 in Dubai” sometime in 2013 also suggests that the brokers’ estimated value was unrealistic. *See I.D.R.*, 9 (Finding No. 42).

The record also includes a June 2013 invoice naming Copart/Car Express as the seller that describes the Mercedes as having sustained “severe water damage” and lists \$3,600 as the total purchase price. *See I.D.R.* at 9 (Finding No. 39). Complainants submitted this invoice in support of their remand brief. *See Complainants’ App.*, Vol. 1, App. H (Bates Nos. DEF 4, DEF 15). The ALJ entered several findings related to this invoice which collectively suggest that the information it contains is not accurate. *See I.D.R.*, 9 (Finding Nos. 39-41). Specifically, the ALJ found that: (1) the June 7, 2013 invoice “was not created and/or generated by Copart and ‘Car Express did not purchase the VIN that is Lot 26998321,” (2) the June 7, 2013 invoice “was provided to Alexander Safonov after the Mercedes arrived in Dubai;” and (3) “Aleksandr Solovyev, sole principal and officer of Car Express and [Royal

Finance Group]” stated that those companies “were not involved with the 2006 Mercedes.” *Id.* These findings suggest that the June 2013 invoice in and of itself does not have evidentiary value, and the Commission did not consider it as evidence that the Mercedes had actually sustained water damage, but this invoice does raise further doubts about the accuracy of the customs brokers’ \$48,500 estimate.

Complainants assert that the ALJ erred in finding that the evidence was equally balanced because Marine Transport made contradictory statements about selling the Mercedes to Middle East Asia Alfa for \$3,500. *See* Exceptions, 10-11. That argument misstates the ALJ’s reasoning and misapplies the law. As the party seeking reparations, Complainants had the burden of proving their actual injury, and the ALJ correctly found that Complainants’ evidence was not sufficiently reliable to reasonably infer that the Mercedes had a market value of \$48,500. *See* I.D.R. 9 and 32. Marine Transport’s statements about the amount the Mercedes later sold for in Dubai was not a factor in finding that Complainants’ evidence insufficient. Whether Complainants have met their burden of persuasion does not turn on which side’s evidence is more credible--it is a matter of determining whether the Complainants’ evidence is reliable and trustworthy and supports a reasonable inference that they are entitled to the reparations that they seek. *See id.* at 32; *see also Yakov Kobel*, 2014 WL 5316331, at *13.

Complainants have not met their burden of proving that the Mercedes actually had a market value of \$48,500 as of November 2012 or in the June to August 2013 timeframe when Marine Transport seized the car and had it sold to cover its outstanding charges. Further, Complainants do not point to evidence that supports awarding a different amount for the loss of the Mercedes.

For all the reasons discussed above, the Commission affirms the ALJ’s decision denying reparations for the loss of the Mercedes.

b. Porsche's Alleged Market Value or Invoice Price

Complainants' sole basis for asserting that the Porsche had a market value of \$67,000 is a sales contract with a Russian buyer who agreed to purchase the car in April 2013 for that price. *See* Exceptions, 12-14. The contract provides that IAM agrees to sell the 2011 Porsche Panamera to Sokolov Oleg Yuryevich of Moscow, Russia for \$67,000 with delivery to Kotka, Finland to take place within 30 days.

The ALJ did not adopt Complainants' proposed findings regarding the sale contract. *See* I.D.R., 9-11. Complainants proposed that the ALJ find that:

114. On April 25, 2013, IAM had sold the Porsche to "Sokolov Oleg Yuryevich" for \$67,000.00 and received payment from him . . .

115. After complainants failed to deliver the Porsche to Sokolov Oleg Yuryevich, and pursuant to complainants' contract with Mr. Sokolov, complainants were forced to refund the \$67,000.00 to him, plus an additional penalty for failure to deliver, resulting in a total loss of \$98,088.00 for this car . . .

Complainants' Remand Br. 32-33 (Mar. 17, 2021). Complainants did not object to the ALJ's failure to adopt these proposed findings. *See* Exceptions, 12-14.

Complainants' arguments challenging that the ALJ's finding that they failed to meet their burden of proof on reparations for the loss of the Porsche and related expenses (\$10,000 in ocean freight) are not persuasive. First, Complainants challenge the ALJ's determination that a \$10,000 wire transfer to Royal Finance Group on April 22, 2013 may or may not have been a payment related to the Porsche Panamera and could have been payment for a different vehicle altogether. *See* Exceptions, 13. Complainants cite to a

declaration from Aleksandr Solovyev of Royal Finance Group submitted in a related federal court action “wherein he explains that [Royal Finance] never tried to collect on invoices . . . related to the subject Mercedes” as support for their contention that the \$10,000 wire transfer “could only have been applied to the subject Porsche.” *Id.* (emphasis original).

From this assertion, Complainants argue that the ALJ erred in finding the evidence “evenly balanced” since “there is no evidence on the record contradicting complainants’ argument that the \$10,000 was payment for anything other than the subject Porsche.” *Id.* Complainants summarize their argument for overturning the ALJ’s denial of reparations for the loss of the Porsche as follows:

At the end of the day, MTL has not provided any evidence to contradict complainants’ evidence that the Porsche was in fact sold to a customer overseas for the sum of \$67,000 pursuant to a contract of sale, nor that the value of the car at the port of destination was anything other than \$67,000 pursuant to the case law set forth above. Above that amount, and pursuant to the contract of sale, complainants were also obligated to pay a penalty to their customer for failure to deliver the car pursuant to paragraph 12.1 of the contract.

Exceptions, 13.

Complainants’ argument misapplies the law and turns their burden of proof on its head. *See id.* at 13-14. As the party seeking reparations, Complainants bear the burden of producing reliable evidence supporting a reasonable inference that \$67,000 equals or is at least a reasonable approximation of their actual injury for the loss of the Porsche and showing that they actually paid the \$10,000 for ocean freight or other charges they now seek to recover. *See Yakov Kobel*, 2014 WL 5316331, at *13. Complainants’ evidence rises or falls on its own merit. *See id.* It is not a question of whether Marine

Transport produced evidence refuting Complainants' documents or whether its evidence or arguments are less credible. Respondents do not have the burden of proof. If the Complainants' evidence is inherently too weak or unreliable to reasonably infer that the amount they seek reasonably approximates their actual injury--they have not met their burden of persuasion and their claim fails and reparations are not awarded. *See id.* That is exactly how the ALJ applied the law.

Further, multiple findings--which Complainants do not challenge--cast doubt on the reliability of \$67,000 as a reliable reflection of the Porsche's actual market value. For example, the ALJ found that Aleksandr Solovyev, sole principal and officer of [Royal Finance] and Car Express, stated that 'Car Express purchased the Porsche Panamera for \$41,940 on or about April 18, 2013, at Plaintiff's request with financing provided by Royal Finance Group.'" I.D.R., 9-10 (Finding No. 44). Likewise, the ALJ found that an invoice from Royal Finance referencing the 2011 Porsche Panamera indicated the car cost \$35,379 plus shipping and other charges which brought the total cost to \$40,429. *Id.* at 10 (Finding No. 46). According to the ALJ's findings, another document dated April 23, 2013 from Insurance Auto Auctions (IAA) listed a price of \$40,500 for the Porsche and a \$46,440 total with various fees included. *Id.* (Finding No. 48).⁵

The invoices on which the ALJ's findings are based involve other entities and there is no mention of IAM--the Porsche's alleged owner. *See, e.g.,* I.D.R., 10-11 (Finding Nos. 49-54). As such, they clearly support the ALJ's determination that while the evidence does not clearly show that Complainants actually purchased or paid for the Porsche. I.D.R., 32. As the ALJ stated, while it was "possible" that Complainants wired \$5,500 to IAA on April 18, 2013 and

⁵The Commission did not take into account evidence suggesting that the Porsche was purchased as a salvage vehicle since the ALJ concluded that it "is not clear if these [documents] are reliable. I.D.R., 9 (Finding No. 43). If the Porsche was in fact sold as a salvage vehicle, that would further undermine Complainants' \$67,000 reparations claim.

\$10,000 to Royal Finance on April 22, 2013 for the Porsche Panamera, it is also possible that “those payments were made by someone else or were for a different shipment.” *See id.* The ALJ also noted that the lack of clear evidence is consistent with and perhaps attributable to Complainant’s practice of “conduct[ing] their business with limited written documentation, including making verbal requests and agreements,” which makes it more difficult for them to “provid[e] evidence to establish actual injury.” *Id.*

Complainants appear to argue that it is simply a matter of connecting the dots between a series of documents (including invoices, checks, and wire transfers) that collectively support their reparations claim and show that IAM actually paid for the Porsche. *See* Exceptions, 13-14. The record does not support that argument. Complainants do not point to a clear traceable line between these various documents which leads one to reasonably conclude that IAM paid \$67,000 for the Porsche or incurred the other losses (ocean freight) it now seeks to recover from Marine Transport. *See id.* The ALJ’s determination that the evidence is too speculative and inconclusive to support Complainants’ reparations claim is supported by the record and sound legal reasoning. Further, Complainants do not point to evidence that supports awarding a different amount for the loss of the Porsche or related expenses.

For all the reasons discussed above, the Commission affirms the ALJ’s decision denying reparations for the loss of the Porsche.

D. Request to be Declared the Prevailing Party

Complainants ask the Commission to declare them the prevailing party based on the ALJ’s determination that Marine Transport violated § 41102(c). Exceptions, 6-7. Complainants assert that they qualify as prevailing even though no reparations were awarded because the ALJ’s determination that Marine Transport violated § 41102(c) altered the parties’ legal relationship. *Id.*

Section 41305(e) provides that a prevailing party “may be awarded reasonable attorney fees” in any private party action brought under § 41301. 46 U.S.C. § 41305(e). This provision was enacted as part of the Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281, § 402, 128 Stat. 3022 (Dec. 18, 2014). The Commission adopted implementing regulations and provided further guidance on qualifying to recover fees and the discretionary factors the Commission will consider in deciding whether the petitioning party should recover its attorney fees. *See* 46 C.F.R. § 502.254; Final Rule: Organization and Functions; Rules of Practice and Procedure; Attorney Fees (Final Rule), 81 Fed. Reg. 10508 (Mar. 1, 2016).

Prevailing party status is the first step of the two-party inquiry the Commission engages in to decide whether to grant a petition for attorneys’ fees under 46 C.F.R. § 502.254(c). The Commission’s regulations provide that “the Commission may, upon petition, award the prevailing party reasonable attorney fees” in a private complaint proceeding brought under 46 U.S.C. § 41301.

Complainants’ request to be declared the prevailing party is premature because there is not yet a final decision in this matter. Petitions for attorney fees are due “within 30 days after a decision becomes final.” 46 C.F.R. § 502.254(c). The ALJ’s Initial Decision on Remand is not a final order since Complainants filed exceptions. The Commission’s decision on Complainants’ exceptions will not become final until the period for appealing that decision to the United States Court of Appeals has expired. Under 28 U.S.C. § 2344, “[a]ny party aggrieved by the final order” issued by the Commission has 60 days following entry of the order to petition for its review. Therefore the Commission’s order in this case will not become final until the 60 days allotted for appeal has expired.

For all the reasons discussed above, the Commission denies as premature Complainants’ request to be declared the prevailing party.

IV. CONCLUSION

The Commission hereby:

(1) denies Complainants' exceptions; and

(2) affirms the ALJ's Initial Decision in its entirety.

By the Commission.

William Cody
Secretary