

Issued: December 30, 2021

FEDERAL MARITIME COMMISSION

OCEAN NETWORK EXPRESS PTE. LTD. AND OCEAN NETWORK
EXPRESS (NORTH AMERICA) INC. -POSSIBLE VIOLATIONS OF 46
U.S.C. § 41102(c)

DOCKET NO. 21-17

ORDER OF INVESTIGATION AND HEARING

The Federal Maritime Commission (FMC or Commission) deems it appropriate and in the public interest that a proceeding be, and hereby is, instituted, against Ocean Network Express PTE. LTD. and Ocean Network Express (North America), Inc. (collectively ONE), vessel-operating common carriers (VOCC) for possible violations of 46 U.S.C. § 41102(c).

On October 7, 2020, the Commission issued a Notice of Inquiry (“NOI”)¹ to solicit public comment on the practice of VOCCs defining the merchant clause in their bills of lading (BOLs) and how VOCCs apply such definitions to persons with whom the VOCCs may not be in contractual privity.² The Commission received allegations that certain VOCCs may be enforcing the terms of their BOL, including collection of freight and charges jointly and severally against

¹ Docket No. 20-16, Notice of Inquiry-Vessel-Operating Common Carrier Definition and Application of the Term "Merchant" in Bills of Lading, Oct. 7, 2020, https://www2.fmc.gov/readingroom/docs/20-16/20-16_NOI_Final_for_posting.pdf/.

² Zim Am. Integrated Shipping Servs. Co., LLC v. Sportswear Grp., LLC, 2021 U.S. Dist. LEXIS 223441 (United States District Court for the Southern District of New York held that “where a respondent [identified on a BOL only as the notify party] may fall within the definition of such a broad *Merchant clause*, a party is not bound to the terms of a bill of lading unless the party consents to be bound.”).

entities that are not party to and have not agreed to be bound by the BOL. It is alleged that ONE engaged in this practice.

I. THE COMMISSION'S JURISDICTION AND REQUIREMENTS OF LAW

1. Pursuant to section 41102(c) of Title 46 of the United States Code, “[a] common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.”
2. ONE is alleged to have overbroadly defined and applied the definition of merchant in its BOL in such a manner as to unilaterally impose joint and several liability for freight and/or charges on a party with whom ONE was not in contractual privity and who had not consented to be bound by the terms of the BOL.
3. As a result of this practice, ONE is alleged to have violated 46 U.S.C. § 41102(c).
4. The activities of ONE, identified herein, were provided as part of and in connection with transportation by water of cargo between the United States and a foreign country for compensation over which the Commission has jurisdiction pursuant to the Shipping Act of 1984 (46 U.S.C. §§ 40101 *et seq.*), as amended.
5. Under 46 U.S.C. § 41302(a), the Commission is empowered to investigate any conduct or agreement that the Commission believes may be in violation of the Shipping Act.
6. The Commission may, after notice and opportunity for hearing, issue an order relating to any violation of the Shipping Act, including assessment of a civil penalty. 46 U.S.C. § 41304.

II. BASIS OF VIOLATIONS

As evidence of this unlawful practice, it is alleged that:

7. ONE, is a company organized under the laws of Singapore with its principal place of business at 7 Straights View, #16-01 Marina One East Tower, Singapore, 018936.
8. According to Commission records, ONE maintains its United States headquarters, Ocean Network Express (North America) Inc., at 8730 Stony Point Parkway, Richmond, VA, 23235.
9. ONE operates as an Ocean Common Carrier (FMC Organization No. 027043) as defined in 46 U.S.C. § 40102.
10. According to Commission records, Greatway Logistics Group, LLC (Greatway) is a Florida, limited liability corporation (LLC), licensed by the Commission as a non-vessel-owning common carrier (NVOCC) (FMC Org. No. 026938) since February 2018.³
11. ONE issued bills of lading numbered ONEYSAOU24000400 and ONEYSAOU24596300.
12. As an Ocean Common Carrier, ONE provided ocean transportation for compensation under BOLs ONEYSAOU24000400 and ONEYSAOU24596300 for cargo from Brazil to Houston, TX.
13. On BOLs ONEYSAOU24000400 and ONEYSAOU24596300, Greatway was not shown as the Shipper or Consignee.
14. Greatway was listed on ONE BOL ONEYSAOU24000400 as a notify party.
15. Greatway was not identified on ONE BOL ONEYSAOU24596300.
16. Upon information and belief, Greatway was not a party to either bill of lading and did not consent to their terms and conditions.
17. Upon information and belief, Greatway had no interest in the cargo as consignee, shipper, or beneficial owner of the cargo.

³ Greatway is not a party to this proceeding.

18. Upon information and belief, Greatway's role in the subject shipments was limited to either arranging for customs clearance by a licensed customs broker for the Consignee, Pacific Lumber Resources, Inc. (PLR) or serving only as the notify party.
19. Upon information and belief, for the subject shipments, Greatway acted in a limited capacity on behalf of a disclosed principal, PLR.
20. Upon information and belief, the cargo moving under the identified BOLs arrived at the Port of Houston in November 2018. Due to a commercial dispute not involving Greatway, the cargo was not picked up until January 2019 accruing charges owed to ONE.
21. In May 2020, ONE filed suit in the United States District Court for the Southern District of Texas against Greatway demanding payment for charges accrued on the above referenced shipments. (case No. 4:20-CV-1734).
22. Upon information and belief, ONE never demanded payment from Greatway prior to initiation of ONE's action in the Texas federal district court for the accrued charges relating to the BOLs.
23. Upon information and belief, Greatway was not liable for the charges accrued under ONE BOL ONEYSAOU24000400 or ONEYSAOU24596300.
24. ONE's BOL Terms and Conditions defines "Merchant" as "the Shipper, Consignee, owner, Person owning or entitled to possession of the Goods or of this Bill, Receiver, Holder, and anyone acting on behalf of any such person, including but not limited to agents, servants, independent contractors, non-vessel operating common carriers ("NVOCCs"), and freight forwarders."
25. ONE's BOL Terms and Conditions state that the "Merchant" is liable for all charges associated with a bill of lading.

26. Upon information and belief, ONE unreasonably defined and applied its definition of a merchant to demand payment from Greatway, when Greatway was not in privity of contract with ONE, did not have a beneficial interest in the cargo moved, and did not assent to be bound to ONE's BOL Terms and Conditions or to be liable for payment of any charges due to ONE.
27. ONE's actions described above constitute its normal, customary and continuous business practice.

III. ORDER

In view of the above, the Commission has decided that an adjudicatory proceeding is required to determine whether ONE is in violation of 46 U.S.C. § 41102(c) of the Shipping Act of 1984 by its practice of demanding payment of charges from Greatway despite Greatway not being liable for such charges. If the facts alleged are proven, ONE has violated the Shipping Act by engaging in practices that are unfair or unjustly discriminatory, and that by employing the same has failed to establish, observe, and enforce just and reasonable regulations and practices.

NOW THEREFORE IT IS ORDERED that pursuant to 46 U.S.C. §§ 41302(a) and 41304, and 46 C.F.R. § 502.63, an investigation is hereby instituted to determine whether ONE is violating or has violated section 41102(c) of the Act by assessing demurrage, detention, per diem and/or other monetary charges to Greatway as a party acting on behalf of the shipper, consignee, or other person with a beneficial interest in the cargo;

IT IS FURTHER ORDERED that Ocean Network Express PTE. LTD. and Ocean Network Express (North America) are designated as Respondents in this proceeding;

IT IS FURTHER ORDERED that the Commission's Bureau of Enforcement (BOE) is designated a party to this proceeding;

IT IS FURTHER ORDERED that notice of this Order be published in the Federal Register, and a copy be served on each party of record;

IT IS FURTHER ORDERED that Respondents must file with the Commission an answer to the Order of Investigation and Hearing and serve a copy of the answer on BOE within 25 days after being served with the Order of Investigation and Hearing as per 46 C.F.R. § 502.63(c). Failure of a respondent to file an answer will be deemed to constitute a waiver of the respondent's right to appear and contest the allegations in the Order of Investigation and Hearing and to authorize the presiding officer to enter a decision on default as provided for in 46 C.F.R § 502.65. Well pleaded factual allegations in the Order of Investigation and Hearing not answered or addressed will be deemed to be admitted;

IT IS FURTHER ORDERED that this matter be assigned for hearing before an Administrative Law Judge (ALJ) of the Commission's Office of Administrative Law Judges at a date and place to be determined by the ALJ in compliance with Rule 61 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.61. This hearing shall include oral testimony and cross-examination in the discretion of the presiding ALJ only after consideration has been given by the parties and the presiding ALJ to the use of alternative forms of dispute resolution, and upon a proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matters in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record;

IT IS FURTHER ORDERED that if violations of the Act are found, this proceeding shall determine whether civil penalties should be assessed against Respondents and, if so, in what amount;

IT IS FURTHER ORDERED that if violations of the Act are found, this proceeding shall determine whether a cease-and-desist order should be issued against the Respondents;

IT IS FURTHER ORDERED that persons having an interest in participating in this proceeding may file petitions for leave to intervene in accordance the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.68;

IT IS FURTHER ORDERED that the requirements of 46 C.F.R. § 502.63(d) be waived, under 46 C.F.R. § 502.10 for the expeditious conduct of business. This waiver is necessary to help alleviate the unprecedented stress being placed on the supply chain, including the significant role that unreasonable billing practices have on congestion and freight fluidity;

IT IS FURTHER ORDERED that all further notices, orders, and/or decisions issued by or on behalf of the Commission in this proceeding, including notice of the time and place of hearing or prehearing conference, shall be served on each party of record;

IT IS FURTHER ORDERED that all documents submitted by any party of record in this proceeding shall be directed to the Secretary, FMC, at Secretary@fmc.gov, in accordance with the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.113 and shall be served on each party of record;

IT IS FURTHER ORDERED that in accordance with the Commission's Rules of Practice and Procedure, that the initial decision of the Administrative Law Judge shall be issued within six months of the date of this Order of Investigation;

IT IS FURTHER ORDERED that in accordance with Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.10, the Administrative Law Judge retains the discretion to amend the procedural timelines in this proceeding to ensure the expeditious conduct of business; and

FINALLY, IT IS ORDERED that in accordance with the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.61, the final decision of the Commission shall be issued by 90 days from service of the Initial Decision.

By the Commission,

William Cody,
Secretary