

ORIGINAL

SHANGHAI HAI HUA SHIPPING CO., LTD. (HASCO), ET AL.

FEDERAL MARITIME COMMISSION

Ocean Common Carrier Status of Shanghai
Hai Hua Shipping Co., Ltd. (HASCO) and
SNL/HASCO Cross Space Charter and
Sailing Agreement: FMC Agreement
No. 011807

Docket No. 02-09

Served: January 13, 2003

ORDER

I. **BACKGROUND**

This proceeding was initiated by the Commission on June 26, 2002 pursuant to sections 4, 5, 6, 8, 10, 11, and 19 of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. app. §§ 1703, 1704, 1705, 1707, 1709, 1710, and 1718. The Commission's Order of Investigation, Request for Additional Information, and Order to Show Cause ("Order to Show Cause") directed an investigation into whether Shanghai Hai Hua Shipping Co., Ltd. ("HASCO") is an ocean common carrier; whether the SNL/HASCO Cross Space Charter and Sailing Agreement, Agreement No. 011807 ("Agreement"), should be disapproved if it is found that HASCO is not an ocean common carrier; and whether the Agreement should be disapproved if it is found that the Agreement, as filed, does not meet the requirements of 46 C.F.R. § 535.103(g). In addition, the Order directed HASCO to show cause why its tariff (No. 017636-001) should not be

cancelled; and why HASCO should not be ordered to cease and desist doing business as a common carrier until such time as it provides proof to the Commission that it publishes and maintains a valid automated tariff as a non-vessel-operating common carrier (“NVOCC”) and maintains a bond and resident agent as required by section 19 of the Shipping Act and Commission regulations.

HASCO has filed a Request for Oral Argument (“Request”), to which the Bureau of Enforcement (“BOE”) filed a Response (“BOE Oral Argument Response”). HASCO has also filed a Petition for Limited Hearing (“Petition for Hearing”) for the purpose of cross-examining a witness, Jeremiah D. Hospital, Chief of the Commission’s Office of Agreements, Bureau of Trade Analysis (“BTA”), whose verified statement BOE presented in support of its Memorandum of Law. BOE filed a response in opposition (“BOE Response”) to HASCO’s Petition for Hearing. HASCO subsequently filed a Petition to File a Reply to BOE’s Response (“Petition to File”), along with its proposed Reply. BOE filed a Response to HASCO’s Petition to File. In addition, HASCO filed a Vaughn Index pursuant to the Commission’s September 5 Order, and BOE has filed a Response to HASCO’s Vaughn Index filing.’ This Order addresses each of these four sets of filings.

‘We ordered HASCO to identify those documents or correspondence that it claimed were privileged through preparation of a Vaughn Index. September 5 Order at 22. In a Vaughn Index, a party asserting a privilege is required to make the claim expressly, and describe the nature of the documents, communications, or things not produced or disclosed in a manner that, while not revealing the information sought to be protected or disclosed, enables other parties to assess the applicability of the privilege or protection. Id. at n.10 (citing Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973)).

II. POSITIONS OF THE PARTIES

A. HASCO's Request for Oral Argument and BOE's Response

HASCO filed a Request for Oral Argument pursuant to the Order initiating this proceeding and Rule 241 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.241. HASCO offers both procedural and substantive arguments as to why the Commission should allow oral argument in this proceeding. HASCO contends that this proceeding is procedurally unprecedented, because the Commission has joined a section 6(d) request for additional information with a section 11 (c) investigation, thus raising issues of the use of section 6(d) unrelated to section 6(g) concerns, confidentiality, and separation of functions in an adjudicatory proceeding. HASCO also asserts that the proceeding raises unprecedented substantive issues because the Commission is questioning, *inter alia*, the status of a time charterer as a vessel-operating common carrier ("VOCC"); the legality of an agreement between two entities, where one time charters a vessel from the other who also time charters its vessels; whether the publication of a tariff without providing service constitutes a violation of sections 8 and 10(b) after the passage of the Ocean Shipping Reform Act ("OSRA"); and whether a tariff filed by a putative VOCC who fails to provide service converts such a tariff into a non-vessel-operating common carrier ("NVOCC") tariff.

HASCO charges that the Commission failed to provide adequate notice of the bases for its Order initiating this proceeding and suggests that resolution of the unprecedented issues it has identified would be enhanced by "the opportunity for the parties and the Commissioners to discuss them face to face." HASCO Request at 1-2.

BOE contends that HASCO has failed to demonstrate why argument by memorandum is inadequate to present its case. BOE's Oral Argument Response at 1. BOE states that its Reply to HASCO's Memorandum of Law and supporting affidavit of Jeremiah D. Hospital rely on legal analysis and guidance provided in the Commission's now two-year-old decision in Ocean Common Carriers Subject to the Shipping Act of 1984, 28 S.R.R. 1414 (2000) and address only those issues raised by the Order to Show Cause and HASCO's objections thereto previously stated in its pleadings. Thus, BOE submits that its Reply and affidavit do not raise any "new matters" to be addressed in oral argument. Id. at 2.

B. HASCO's Petition for Hearing. and BOE's Response

HXSCO contends that it has not been provided the opportunity to confront the adverse facts and arguments alleged in the verified statement of Mr. Hospital due to the structure of this proceeding, and questions the admissibility of the testimony, the competence of the witness, and "issues of fact that are adverse to the Respondents." Petition for Hearing at 1-2. HASCO alleges that cross-examination is required because the witness stated in paragraph 8 of his verified statement that his conclusion was based on "information and belief." HASCO argues that the witness fails to reveal the information on which he relies, indicating that he is not testifying of his own knowledge.

HASCO further argues that the testimony is replete with legal arguments and conclusions, the statement lacks any indication of the witness' competency to offer the discussion and analysis of time charter provisions contained in the statement, and the statement contains statements of fact adverse to HASCO which are inaccurate. With respect to the competence of the

witness, HASCO alleges that cross-examination is necessary to determine his knowledge and experience in drafting, negotiating, reviewing, implementing, or interpreting time charters, as well as his knowledge of the time charters of other carriers, and his competence to assess the economic viability of ocean common carrier services. Id. at 3. HASCO further submits that the witness' understanding of its time charter, as limiting its use of space on the vessel to 1,000 TEUs, is inaccurate. Id.

BOE asserts in response that HASCO's Petition for Hearing fails to comply with the requirements of the Commission's Order to Show Cause that any request for an evidentiary hearing identify the facts to be proved, the relevance of such facts to the issues, a description of the evidence to be adduced, and why such evidence could not be submitted by affidavit. BOE Response at 2. BOE argues that HASCO is not entitled to an evidentiary hearing as a matter of law, based on the Commission's long-standing practice of conducting proceedings without oral testimony or cross-examination of witnesses unless a party has shown that there are genuine issues of material fact that cannot be resolved without such a hearing. HASCO has not identified any such issues of material fact, BOE contends. In addition, BOE points out that the bases for the witness' conclusion on "information and belief" that HXSCO does not qualify as an ocean common carrier within the meaning of the Shipping Act were explicitly set forth in his statement that "I base my conclusion on the following factors" and the subsequent paragraphs (not cited by HASCO) of the verified statement. Id. at 6.

C. HASCO's Petition to File a Reply to BOE's Response and BOE's Response

On September 13, 2002, HASCO filed another pleading,

requesting leave to file a Reply to BOE's Response to its Petition for Hearing. The Petition to File is accompanied by the Reply HASCO proposes to file.

HASCO suggests that the Commission waive Rule 74's prohibition of replies to replies in order to prevent "manifest injustice." See 46 C.F.R. § 502.74(a)(1). HASCO again contends that it will be denied due process if it is unable to cross-examine the single witness against it. HASCO maintains that certain statements and allegations in BOE's response are "incorrect or just plain wrong" and further that the Commission must make its determination on the basis of as complete a record as possible.

In its Reply, HASCO addresses BOE's Response to its Petition for Hearing. HASCO asserts that the crux of BOE's Response is that HASCO should have known what Mr. Hospital's affidavit was going to contain, and that HASCO has had ample opportunity to respond. HASCO further asserts that BOE is attempting to "put a self-serving statement before the Commission" and is attempting to prevent the statement from being subject to cross-examination. HASCO's Reply at 4. HASCO contends that this proceeding will be devoid of the fundamental fairness and due process required by the Commission's regulations and the Administrative Procedure Act ("APA") unless it is afforded an opportunity to confront BOE's witness by cross-examination at an evidentiary hearing. Id. at 4-5.

BOE contends in response that HASCO has not identified any injustice that would occur if the Commission does not waive its rule prohibiting a reply to a reply. BOE again suggests that what HASCO actually seeks is a waiver of the requirements stated in the Commission's Order initiating this proceeding that a party requesting an evidentiary hearing identify the facts to be proved, their relevance to the issues, the evidence to be adduced, and why

such evidence cannot be submitted by affidavit. BOE Response to Petition to File at 2, n.2, citing the Order at 11.

BOE notes that the Commission's Order to Show Cause constitutes a *prima facie* case that HASCO is not an ocean common carrier and requires HASCO to come forward with contrary evidence and argument to show that it is an ocean common carrier within the meaning of the Shipping Act. However, BOE points out, HASCO declined to produce further evidence or affidavits of its own and stated that the issues in this proceeding are "issues of law, not issues of fact." *Id.* at 2. BOE charges that HASCO relies on simple disagreement with BOE's witness as a substitute for presentation of an evidentiary case of its own. BOE also notes that even in the Reply it seeks to file, HASCO does not identify any matter affirmative to its case that would be produced by its cross-examination.

D. HASCO's Vaughn Index and BOE's Response

In response to the Commission's September 5 Order, HASCO filed its Vaughn Index, listing documents responsive to the Request for Additional Information for which it claims privilege. HASCO also requests confidential treatment for the entirety of its Vaughn Index submission. In addition, HASCO contends that the Commission's use of a Vaughn Index in this case is unprecedented.

HASCO maintains that the documents identified but not produced are subject to three types of recognized attorney-client privilege: (1) (general) attorney-client privilege; (2) attorney work product privilege; and (3) joint defense counsel or common interest privilege. HASCO does not argue the specific application of these various forms of privilege generally or specifically with respect to the individual documents in this case but states that the

unprecedented nature of this proceeding makes the legal costs of preparing an “extensive legal memorandum” on the issue prohibitive. HASCO instead refers the Commission to a 1998 Recommendation of the Counsel on Judicial Administration of the Association of the Bar of the City of New York as its brief in this case on the scope and extent of attorney-client privilege in the Federal system. HASCO Vaughn Index at 3-4. HASCO also refers the Commission to Supreme Court Standard 503(b) with respect to the common interest privilege, described as applying to communications between the client or his lawyer and a lawyer representing another in a matter of common interest.

HASCO contends that the attorney work product and common interest privileges are applicable to documents created and information exchanged between counsel in anticipation of litigation. HASCO claims that this privilege thus applies to the preparation of any agreement required by law to be filed at the Commission, in light of the Commission’s power to investigate and seek injunctions against agreements. Id. at 5.

With respect to specific documents responsive to Question 13 of the Commission’s Request for Additional Information, HASCO now states that its original response was erroneous and that there are no privileged documents within the ambit of that question. However, with respect to Question 14, HASCO identifies eight documents, all e-mails, responsive to the question as to which it claims attorney-client privilege. The first of these documents is described as:

1. May 13, 2002: Email from Garret Zhang Xiaoli (“Zhang”) Marketing Manager, Shipping Business Department II, Shanghai Hai Hua Shipping Co., Ltd. to Neal M. Mayer (“Mayer”), counsel for HASCO with attached two pages of email from

Robert Yoshitomi (“Yoshitomi”), counsel for Sinolines to Christine Fan of Sinolines reporting on Yoshitomi discussions with Peter King of the Bureau of Enforcement concerning a proposed agreement between Sinolines and HASCO.

All three forms of privilege are said to be applicable to this document.

The remaining e-mails, similarly described, are exchanges between Mr. Mayer and Mr. Yoshitomi with respect to drafts of the subject agreement or the HASCO/Great Western Agreement (Agreement No. 011778) and the applicability of its provisions to the proposed Sinolines/HASCO relationship, and between Mr. Mayer and Mr. Zhang regarding discussions between Mr. Mayer and Mr. Yoshitomi on the status of the HASCO/Sinolines agreement. In each instance, the common interest privilege is among the forms of attorney-client privilege identified as applicable.

In response, BOE initially objects to HASCO’s “practice of asserting blanket protections of confidentiality to its filings.” BOE Response to Vaughn Index at 2. BOE claims that, as a result of HASCO’s claims of confidentiality, it has been unnecessarily burdened by having to file its Response under seal pursuant to Rule 119 of the Commission’s Rules of Practice and Procedure. 46 C.F.R. § 502.119. BOE requests that the Commission address the scope of confidentiality that may be claimed as to legal or policy arguments raised on behalf of a party. Id.

BOE next addresses specific documents contained in HASCO’s Vaughn Index. BOE argues that Item no. 1 in the Vaughn Index, quoted above, is in fact two documents: one

communication from Mr. Zhang to Mr. Mayer, and the other a communication by which Ms. Christine Fan of Sinolines conveyed to Mr. Zhang information given by Sinolines' counsel.² BOE contends that the communication between Ms. Fan and Mr. Zhang is a communication between two principals in their respective firms, and, therefore, is not privileged. *Id.* at 4. BOE further argues that the attorney-client privilege for the communication containing legal advice from Sinolines' counsel addressed to Ms. Fan was waived by virtue of its transmission to HASCO, and that the attorney-client privilege for all other communications related to this subject thereby also has been waived. *Id.* at 5-6. Therefore, BOE now seeks production of all but one of the documents.

III. DISCUSSION

A. HASCO's Request for Oral Argument

HASCO has filed numerous pleadings in this proceeding in which it has had ample opportunity to present its arguments in written format. Moreover, many of the procedural issues raised by HASCO were addressed in our September 5 Order. Although we find HASCO's request for oral argument overly broad, we will grant it. However, oral argument will be limited to the issues of whether HASCO is a vessel-operating common carrier within the meaning of the Shipping Act, and, if not, whether its existing

*Although Item no. 1 appears to consist of the two documents described by HASCO, BOE posits the existence of another document to which the latter was attached. We agree that HASCO's description of these documents implies the existence of a third document - a communication from Ms. Fan or another person at Sinolines to Mr. Zhang, conveying the Yoshitomi/Fan e-mail - which has not been produced and is not described.

tariff should be canceled and a cease and desist order entered.

B. HASCO's Claims of Confidentiality

HASCO's blanket assertion of confidentiality for its Vaughn Index as well as the entirety of its Response to the Request for Additional Information is unwarranted. We discussed the issue of confidentiality in the September 5 Order, in which we noted that, unlike Sinolines, HASCO had not filed a petition for an order to protect specifically identified commercially sensitive information from public disclosure. Order at 17. We pointed out in that Order that Section 6 of the Shipping Act, 46 U.S.C. app. §1705, limits the assurance of confidentiality for information provided with or in support of agreements by providing the exception for information "relevant to an administrative . . . proceeding." We further noted that the "Order instituting this proceeding. . . reflects the Commission's determination that the requested information is relevant to this administrative proceeding." *Id.* We continue to consider our request for additional information itself to have been limited in scope to the issues as to which we instituted this proceeding, and, therefore, the information solicited is subject to section 6(j)'s exception from confidentiality.

HASCO may seek to protect information which it identifies as commercially sensitive by filing a petition for confidentiality. However, HASCO's blanket assertions of confidentiality place additional burdens on BOE and impede the efficiency of this proceeding. They also burden the use of such information in connection with the oral argument requested by HASCO as well as the Commission's decision herein. Therefore, in the absence of a specific petition for a protective order from HASCO, all filings other than those subject to the protective order already granted in our September 5 Order will be treated as

part of the public record of this proceeding from ten days after the date of this Order. HASCO remains free to file a petition for a protective order at any time, identifying those items for which it requests confidential treatment and the basis therefor, as well as the manner in which it proposes that such information be treated during the oral argument it has requested.

C. HASCO's Petition to File

The general rule in Commission proceedings is that “a reply to a reply is not permitted.” 46 C.F.R. § 502.74(a)(1). However, the Commission’s rules further provide that any of the rules of procedure may be waived “to prevent undue hardship, manifest injustice, or if the expeditious conduct of business so requires.” 46 C.F.R. § 502.10.

HASCO alleges that manifest injustice will result if it is not permitted the opportunity to confront through cross-examination the sole witness in this proceeding. That alleged injustice, however, is unrelated to HASCO’s request to file an additional reply not countenanced by the Commission’s rules of procedure. The Petition to File and the accompanying Reply fail to identify any manifest injustice that would be addressed through receipt of the reply. Nevertheless, we will grant the Petition to File, and have considered the arguments in the Reply as part of our consideration of the Petition for Hearing, along with BOE’s Response to the Petition to File, to ensure a full airing of the parties’ views.

D. HASCO's Petition for a Limited Hearing

HASCO states that it wishes to cross-examine BOE’s witness, Mr. Hospital, with respect to a number of points in his statement to test his competency and conclusions. HASCO

characterizes its request in terms of due process, *i.e.*, as an opportunity to “confront” the sole witness against it, and to test his competence to draw the conclusions he does from the facts. However, HASCO’s claims arise from the structure of this proceeding rather than the specific statements contained in the verified statement of BOE’s witness.

HASCO complains that it could not have anticipated the statements made by Mr. Hospital or the legal arguments and Commission cases cited and relied on in his verified statement as the basis for the (allegedly unprecedented) criteria applied in his review of this Agreement and thus had no opportunity to rebut them. In reality, HASCO seeks an additional opportunity to offer legal analysis and argument of the issues. HASCO contends, moreover, that the issues and relevant facts were inadequately described in the Order to Show Cause and that the procedures unfairly burden HASCO. We disagree. We set forth the facts indicating the non-existence of prior vessel service in the U.S. trades by HASCO despite its prior agreement activity and tariff publication, and described the issues, focusing particularly on the question whether HXSCO could be considered to be a “vessel-operating common carrier.” Order to Show Cause at 3.

To the extent that HASCO’s complaint is that Mr. Hospital’s testimony is replete with legal argument, the proceeding HASCO requests is an inappropriate means of addressing those arguments. They are appropriately addressed in legal memoranda or oral argument, not through cross-examination.

While the witness’ testimony may be characterized as “expert” testimony, as to which his qualifications as an expert might be subject to challenge, in reality the subjects HASCO says it wishes to explore through cross-examination do not relate to the witness’ qualifications but to the weight he assigned to

particular facts in this case. With few exceptions, it is his conclusions, not his competence, which HASCO disputes. HASCO's contentions that Mr. Hospital's conclusions are inaccurate are disagreements with the inferences he draws from the documentary evidence, not disputes with respect to the facts. As discussed in more detail below, HXSCO has not offered to provide evidence that would contradict those inferences or support a contrary conclusion.³ An evidentiary hearing is not necessary to address the weight to be assigned to particular evidence.

Generally, agencies may hold evidentiary or trial-type hearings involving live testimony and cross-examination of witnesses when there are genuine issues of material fact in dispute, as to which such testimony is likely to produce a resolution of the issue. Section 556(d) of the APA provides in relevant part that "[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d). But, unless material facts are in dispute there is no right to cross-examination and confrontation. See National Trailer Convoy, Inc. v. Interstate Commerce Comm'n, 293 F. Supp. 643, 636 (N.D. Okla. 1968).

³The Order to Show Cause provided that,

[s]hould any party believe that an evidentiary hearing is required, that party must submit a request for such hearing together with a statement setting forth in detail the facts to be proved, the relevance of those facts to the issues in this proceeding, a description of the evidence which would be adduced, and why such evidence cannot be submitted by affidavit.

Order to Show Cause at 11.

Cross-examination is thus not an absolute right in administrative cases. See, e.g., 1 John Henry Wigmore, *Wigmore on Evidence* § 4(c) (Tillers 1983).

HASCO identifies four reasons for its request to cross-examine Mr. Hospital: (1) his testimony is based on unidentified “information and belief” rather than his own knowledge; (2) he lacks competence and experience to offer the legal arguments and conclusions identified by allusion to specific paragraphs of his testimony; (3) he has not demonstrated competence to analyze time charter provisions; and (4) his account of the time subcharter is inaccurate. However, as more fully discussed below, HASCO has failed to identify any material issue of fact in connection with each of these contentions. We also discuss below HASCO’s due process argument, made more fully in its Reply filed with its Petition to File.

1. “Information and belief”

HASCO first contends that Mr. Hospital’s statement in paragraph 8 of his verified statement, that he offers his conclusions “on information and belief,” calls into question the specific information he relied on and its source, and that cross-examination is required to clarify the matter. As BOE points out, however, Mr. Hospital states in that same paragraph that the evidence in the record upon which he bases his statements and the conclusions he draws is identified with particularity in the subsequent paragraphs. Those paragraphs detail the information in the record provided by HASCO and Sinolines which was relied upon by the witness. Therefore, there is no dispute as to material fact requiring an evidentiary hearing with respect to this aspect of his statement.

2. The witness' competence and experience with respect to agreements

HASCO next questions the competence of the witness to offer legal arguments and conclusions contained in paragraphs 10 and 22 through 26 of the verified statement. HASCO suggests that this alleged lack of competence would be demonstrated on cross-examination. However, HASCO does not dispute the witness' qualifications and experience as set forth in paragraph 1 of the verified statement or contend that the judgments and inferences drawn from the documentary evidence with respect to the particular matters discussed in the paragraphs identified by HASCO are not within the authorities and duties of Mr. Hospital's position. To the extent that HASCO's challenge is a general one, to the "expertness" of the witness with respect to Commission precedent and policy as to agreement matters, HASCO does not identify any evidence it would offer to call into question Mr. Hospital's competence to apply the Shipping Act or Commission decisions to the matters within his area of responsibility. It does not provide any argument or offer of evidence that there is a degree of expertise relevant to this case which he lacks.

Examination of the specific paragraphs identified by HASCO fails to reveal any matter as to which HASCO seeks to dispute the facts as stated by the witness, as opposed to the inferences and conclusions drawn by the witness. With respect to paragraph 10 (application of the Commission's rules at Part 520 to automated tariff systems), HASCO does not dispute the witness' statements of the content of the Commission's rules. To the extent that Mr. Hospital's statement does include legal arguments and conclusions of law, they are contained in paragraphs 22 through 26.

The appropriate means to challenge legal arguments is in opposing legal argument on the merits of the issues, rather than through cross-examination. The Commission considers these paragraphs of Mr. Hospital's testimony part of BOE's legal argument, to be addressed on their merits in the Commission's decision. Although the use of a witness to offer these conclusions may be of questionable value simply because they are legal arguments and conclusions of law rather than the presentation and assessment of facts, the appropriate way for HASCO to address these arguments is nevertheless through the oral argument that we are providing.

3. The witness' competence regarding time charters

HASCO next calls into question the witness' competence to analyze time charter provisions, pointing generally to statements contained in paragraphs 14-18 of the verified statement, without, however, specifically identifying any statement of fact therein which it disputes. Instead, HASCO charges that the witness does not demonstrate competence with respect to time charters and states that cross-examination is necessary to determine the witness' knowledge and experience in drafting, reviewing, implementing, and interpreting time charters generally as well as his knowledge of time charters utilized by other carriers.

HASCO makes no showing of the relevance of any of the referenced functions to the witness' competence to assess whether this particular time subcharter and planned operation under the agreement qualify HASCO as an ocean common carrier under the terms of the Shipping Act. One does not have to draft, negotiate or implement an instrument to read and compare it to another, or to analyze it under the requirements of the Shipping Act. Mr. Hospital reviews and interprets time charters when relevant in connection with agreement filings, as indicated in the statement

of his duties in paragraph 1 of his verified statement. Neither the Commission's Order to Show Cause nor the witness' testimony is addressed to time charters in general. Therefore, the time charters of other carriers are irrelevant: the only time charter in question is the time subcharter between HASCO and Sinolines, as it is limited by and subject to the terms of this Agreement.

Although HASCO identifies no dispute of material fact as to any statement in any of the paragraphs it enumerates, it objects to Mr. Hospital's conclusion in paragraph 14 that, in light of counsel's statement that HASCO would have no economic reason to charter a single vessel for service in the U.S. foreign trade without the agreement, the subcharter does not represent an "arms length" transaction. Mr. Hospital also refers to HASCO's statement that a one-vessel service does not make economic or commercial sense. HASCO disagrees only with the "not arms length" characterization of its transaction.

In paragraph 15, Mr. Hospital makes statements about the Great Western/HASCO Agreement, suggests that it demonstrates HASCO's intent to gain the economic benefits of VOCC status, and suggests that HASCO's arrangement with Sinolines is for the same purpose. In paragraph 16, Mr. Hospital states that he compared the time subcharter to the five Sinolines charters for its vessels, including the vessel to be time subchartered to HASCO as the TRADE BRAVERY; that those charters provide Sinolines with authority for renaming each of the vessels; and that the five charters have substantially identical terms. In paragraph 17, Mr. Hospital states that HASCO's subcharter for the TRADE BRAVERY provides substantially less authority over its operations than the underlying charter to Sinolines, identifying and comparing specific provisions, including those which limit the geographic trading area in which the vessel may be operated. HASCO does not dispute the facts referred to, which are that the

specific provisions differ and the manner in which they differ.

Finally, in paragraph 18, Mr. Hospital compares specific provisions of the time subcharter to the Sinolines' charter for the same vessel with respect to Protection and Indemnity coverage, and rights to rename, repaint and place insignia on the vessel, and concludes that the time subcharter leaves the identity and control of the vessel with Sinolines. Mr. Hospital also notes that other provisions of the two charters, including the subcharter rate, are the same. HASCO does not dispute any statement of fact as to the manner in which the provisions of the subcharter differ from the provisions of the Sinolines charter for the TRADE BRAVERY.

There is no dispute as to a material issue of fact set forth in any of these paragraphs identified by HASCO as to which a hearing might be appropriate.

4. The accuracy of the witness' assessment of the time charter

The last basis upon which HASCO contends that it must have an opportunity to cross-examine BOE's witness is that Mr. Hospital's statement gives an inaccurate account of the time subcharter. HASCO claims that the testimony is inaccurate for two reasons. The first is the statement that the time subcharter limits HASCO to the use of 1,000 TEUs on its subchartered vessel. However, HASCO mischaracterizes Mr. Hospital's testimony. In fact, the witness refers to the provisions of the Agreement and reads the Agreement provisions in conjunction with the time subcharter as providing this limitation. Thus, with respect to this aspect of Mr. Hospital's testimony, HASCO fails to identify a genuine issue of material fact as to which there is a dispute.

The second alleged inaccuracy is the statement in paragraph 19 that HASCO's participation is not necessary to the economic or commercial viability of Sinolines' existing service. However, HASCO does not dispute the facts recited in Mr. Hospital's statement: that Sinolines has taken delivery of and commenced service with all five vessels (verified statement at paragraph 19), and that it is operating those vessels in a Transpacific service pursuant to an agreement with an unrelated carrier filed and effective under the Shipping Act, which does not refer to or depend upon the existence of this Agreement (verified statement at paragraph 21).

Neither HASCO nor Sinolines alleges in its Memorandum of Law or Response to the Request for Additional Information that the Agreement is necessary to the economic or commercial viability of Sinolines' service in this trade. HASCO offers no facts in support of its assertion of this position for the first time in its Petition for Limited Hearing that are not already in the record, nor does it offer to produce evidence inconsistent with the facts evidenced in the documents cited by Mr. Hospital as to the present operations of the parties. HASCO's bald statement at the end of paragraph 5 that "there is an issue" of Mr. Hospital's competence to assess the economic or commercial viability of ocean common carrier services is unsupported by any reference to facts to be offered by HASCO that might call into question the witness' competence. Once again, we find no dispute as to material fact.

5. HASCO's due process areument

HASCO's argument that due process requires that it have an opportunity to confront an adverse witness through cross-examination adds nothing to our assessment that there are no disputed issues of material fact in this case to the resolution of

which cross-examination could contribute. The requested hearing would not serve the purpose for which the APA provides that cross-examination should be available, *i.e.*, “a full and true disclosure of the facts.” 5 U.S.C. § 556(d).

HASCO’s complaint is that it did not anticipate the manner in which the Commission’s staff would assess the written evidence in this record, *i.e.*, the Agreement itself, the Sinolines time charters, the HASCO time subcharter, and the parties’ responses to the Request for Additional Information, in light of existing legal authorities, including the Commission’s post-OSRA interpretation of the statutory definition of the term “ocean common carrier” at issue here. HASCO’s Reply to BOE’s Response to the Petition to File at 4.⁴ HASCO now suggests (in its Vaughn Index) that it anticipated that the issue of its status as an ocean common carrier would arise in connection with this Agreement.

HASCO argues that it is unfairly disadvantaged by the timing set forth in the Order to Show Cause that required it to present any facts it wished to produce by affidavits before it had seen the assessment of the facts and arguments to be presented by

⁴HASCO further argues that the Commission’s decision in Ocean Common Carriers Subject to the Shipping Act of 1984, 28 S.R.R. 1414 (FMC, 2000) (“Docket No.99-10”), cited and discussed in Mr. Hospital’s testimony and BOE’s memorandum of law, is irrelevant here because the only question it addressed was that of geographic coverage: whether a carrier whose vessel operations did not touch a U.S. port could be considered an ocean common carrier, not what constituted operation of the vessels. However, whether or not the case is relevant is a question of law, not a question of fact open to dispute and resolution through cross-examination. HASCO has suffered no lack of due process as a result of BOE’s reliance on the cited authority.

BOE. That argument turns on HASCO's related charge that the Order to Show Cause was vague and did not give HASCO sufficient notice of the issues in this case. That argument is belied by the arguments HASCO offers in its Vaughn Index, *i.e.*, that the e-mail correspondence between the principals and their attorneys and between attorneys for the principals which preceded entry into the Agreement and the time subcharter were prepared in anticipation of litigation before the Commission. HASCO clearly understood before issuance of the Order to Show Cause that the issue of its status as an ocean common carrier turned on the arrangements it sought to make for the operation of the vessel space to be made available to it under this Agreement and time-subcharter. The Order to Show Cause established that issue as the central issue of this proceeding. HASCO had the opportunity to address the issue in its legal memorandum in response to the Order to Show Cause. The problem is not that BOE has presented arguments that could not have been anticipated by HASCO.

Much of HASCO's argument in the Reply addresses HASCO's charge that it was unfairly disadvantaged by Mr. Hospital's assessment that the time subcharter is not necessary to the economic or commercial viability of Sinolines' service. More accurately, HASCO's argument appears to be that it is disadvantaged by the inferences drawn by the witness from the undisputed facts.⁵ Neither BOE nor the witness relied on any facts not previously known to HASCO and already part of the

⁵To the extent that these are inferences, rather than disputed facts, their presentation in the form of a verified statement from a member of the Commission's staff rather than in the legal memorandum presented by BOE is irrelevant. The verified statement is presented as a joint effort of BTA and BOE. BOE's Response to HASCO's Petition for Hearing at 2.

record. In light of HASCO's acknowledgment, in declining to provide testimony of its own, that the issues herein are legal, not factual, we find this argument to be without merit.

HASCO had the opportunity to present legal arguments as well as facts it considered relevant in its Response to our Request for Additional Information. It had the additional opportunity to offer its own assessment of the facts in this case in its legal memorandum filed in response to the Order to Show Cause. We find, moreover, that HASCO has created for itself an additional opportunity to address the issues through the filing of its Petition to File and its Reply, and will have another opportunity to address the issue of VOCC status at oral argument. We perceive no way in which HASCO has been disadvantaged to any degree by the lack of opportunity to have the last word due to the filing schedule established in the Order to Show Cause.

As discussed above, there appear to be no disputed issues of material fact in this case requiring a hearing. The right to cross-examination is not absolute: it is limited to that which is necessary for "a full and true disclosure of the facts," 5 U.S.C. §556(d), and is unavailable where there are no material facts in dispute. We will therefore deny HASCO's Petition for Hearing.

E. HASCO's Vaughn Index and BOE's Response

HASCO has identified eight documents (or, with respect to Item no. 1, a set of documents) which it considers to be responsive to the Commission's Request for Additional Information, and has claimed that each of these documents is shielded from compulsory production because it is subject to one

or more forms of attorney-client privilege.’

HASCO invokes these privileges without analyzing or individually ascribing reasons for application of the particular form of privilege claimed to the document described. HASCO declines to offer arguments in support of its claims of privilege because of the costs of preparing pleadings. Vaughn Index at 3 and n. 3. Instead, HASCO “adopts as its brief” the January 28, 1998 Recommendation prepared by and published on the website of the Council on Judicial Administration of the Association of the Bar of the City of New York, which discusses the issue of the scope and extent of attorney-client privilege in the Federal system in general terms. *Id.* at 4.

HASCO further maintains that “the burden . . . is on [BOE] to demonstrate not only that the privilege is not available but that the document in question is relevant and material to the issues in this proceeding.” *Id.* This position is incorrect. The burden of proof that a privilege is applicable is on the party invoking the privilege. *See SEC v. Gulf&W. Indus. Inc.*, 518 F. Supp. 675,682 (D.D.C. 1981).

Although BOE takes issue with HASCO’s broad assertion of attorney-client privilege based on its claim that all documents

‘These are the privileges for communications between a client and his attorney seeking or giving legal advice (also known as “attorney-client” privilege, which is used here in a narrower sense than the general term applied collectively by HASCO to the privileges claimed in this case); the “common interest” privilege; and the “work product” privilege. *See* Order, Docket No. 01-06, Exclusive Tug Franchises - Marine Terminal Operators Serving the Lower Mississippi River, served April 17, 2002, discussing the attorney-client and work product privileges.

relating to any proposed agreement are prepared in anticipation of litigation, it nevertheless accepts HASCO's assertion that the documents prepared during the discussions leading to the filing of this Agreement were conducted with a view to litigation. BOE's Response at 3. BOE does not otherwise address the individual forms of the privilege asserted by HASCO in its Vaughn Index. BOE contends more generally that any privilege which might have applied to the documents identified by HASCO was waived.

The crux of BOE's argument is Item no. 1, or actually the missing element of Item no. 1. BOE argues that the communication between Mr. Zhang and Ms. Fan is not a privileged communication, and therefore any attorney-client privilege applicable to these documents was waived. BOE also asserts that Sinohnes should have disclosed any communication between Mr. Zhang and Ms. Fan in its response to the Request for Additional Information, and that Sinolines failed to identify any such communication, even under a claim of privilege. Id. at 6.⁷

We address below whether the forms of the privilege claimed by HASCO apply to the documents described, as well as whether the assertion of privilege by Sinolines shields any of the documents from production, and whether, in either event, the

⁷Sinolines did claim attorney-client privilege, in broad terms, in counsel's cover letter filed with its Response to the Request for Additional Information. Counsel stated that Sinolines' response consisted of all responsive documents other than those subject to attorney-client privilege. See Sinolines' Response to the Request at 1. Although BOE filed a response to HASCO's Response to the Request for Additional Information, in which it objected to HASCO's broad assertion of attorney-client privilege, it made no similar response to Sinolines' filing or objection to Sinolines' assertion of attorney-client privilege.

privilege has been waived.

1. Privilege for Communications between Client and Attorney

HASCO contends that the general attorney-client privilege, which it has defined as being “used in connection with direct communications between counsel for HASCO and employees of HASCO,” shields Item nos. 1 and 6 in its Vaughn Index from disclosure. Vaughn Index at 3.

The attorney-client privilege essentially provides that a client may refuse to disclose and prevent others from disclosing confidential communications made between the lawyer and client while seeking legal advice. See 3 Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence, § 503.10 (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 1997). The Supreme Court has emphasized the public policy underlying the attorney-client privilege - “that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” Upjohn v. United States, 449 U.S. 383, 389 (1981) ~~the purpose of the attorney-client privilege is to promote freedom of consultation between client and lawyer by eliminating fear of subsequent compelled legal disclosure of confidential communications.~~ United States v. Suarez, 820 F.2d 1158, 1160 (11th Cir. 1987).

With respect to the first document described in Item no. 1, although HASCO fails to clearly describe the contents of the communication between attorney and client, we nevertheless note that the context in which the communication arose - the negotiation and filing of an agreement arguably required by the statute to be filed - is a matter as to which legal counsel is frequently sought. Therefore it appears likely that this

communication did involve a request for legal advice or services. In view of the fact that the attorney-client privilege is absolute unless waived by the client,⁸ we find that HASCO's attorney-client privilege applies to this document.

With respect to the remainder of Item no. 1, the communication between Mr. Yoshitomi and Ms. Fan, any privilege which might attach is not HASCO's to claim because, to the extent that it is a communication between attorney and client, the client is Sinolines and the attorney represents Sinolines, not HASCO. Therefore, HASCO may not claim attorney-client privilege for this document. While Sinolines' general assertion of attorney-client privilege for unidentified documents not produced might apply, it would appear that this form of the privilege was waived by transmission of the document to HASCO.

Item no. 6, described as an "email from Mayer to Zhang reporting status of HASCO/Sinolines Agreement and on discussion between Mr. Mayer and Mr. Yoshitomi," Vaughn Index at 8, is similarly vague. However, as the communication was one between the client invoking the privilege and his attorney, concerning a subject on which legal advice is frequently sought, we find the attorney-client privilege applicable to this document.

2. Common Interest Privilege

HASCO also asserts the common interest form of the attorney-client privilege with respect to all eight items identified in its Vaughn Index.

Supreme Court Standard 503(b) articulates the common

⁸See e.g., Republic Gear Co. v. Bore-Warner Corp., 381 F.2d 551 (2d Cir. 1967).

interest privilege in relevant part:

[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . by him or his lawyer to a lawyer representing another in a matter of common interest.

Supreme Ct. Standard 503(b)(3). The common interest doctrine applies not only when multiple persons are represented by the same attorney, but also in situations “where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.” Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 446 (S.D.N.Y. 1995) (citing United States v. Schwimmer, 892 F.2d 237, 243 (2d. Cir. 1989)). The parties must be engaged in some common legal enterprise. Id. at 447 (emphasis added). The key considerations are that the nature of the interest be identical, not similar, and be legal, not solely commercial. Id. The common interest doctrine does not encompass a joint business strategy that happens to include as one of its elements a concern about litigation. Id.

It appears that HASCO and Sinolines do not have a common legal interest. HASCO and Sinolines share a common business interest, which is to operate pursuant to the Agreement. Sinolines, which is an ocean common carrier, has no legal interest in HASCO’s status as an ocean common carrier. In its Response to the Order to Show Cause, Sinohnes indicates that it will not implement the Agreement until the Commission makes a determination regarding HASCO’s ocean common carrier status and that it has so advised HASCO. Sinolines’ sole representation with respect to HASCO’s VOCC status in its Response to the

Order to Show Cause is that HASCO's status is "demonstrated in the separate response by HASCO." Sinolines' Response to Order to Show Cause at 1-2. Thus, it does not appear that the parties have engaged in a joint defense effort or strategy. The common interest privilege does not apply to these documents.

3. Work Product Privilege

HASCO asserts that the work product privilege is "applicable generally when the documents are created or information between counsel is exchanged in anticipation of litigation." Vaughn Index at 5. HASCO claims that the communications between its counsel and counsel for Sinolines regarding the formation of the Agreement are subject to the work product privilege, as the "preparation of an agreement required by law to be filed with the FMC and required to meet specific regulatory guidelines is always prepared in anticipation of litigation because of the nature of Sections 6 and 11 of the Shipping Act of 1984, which allows the Commission both the power to investigate and to seek injunctions concerning such agreements." Id.

Rule 26(b)(3) of the Federal Rules of Civil Procedure provides in pertinent part that:

a party may obtain discovery of documents and tangible things. . . prepared in anticipation of litigation or for trial or for another party or by or for that other party's representative. . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been

made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Fed. R. CIV. P. 26(b)(3). The foundation of this rule was articulated in Hickman v. Tavlror, 329 U.S. 495,511 (1947), where the Court held that to require attorneys to produce the materials an attorney prepares on his clients' behalf on mere demand would have a "demoralizing effect on the legal profession," as it would cause much written material to remain unwritten, and thus would poorly serve the interests of clients and the cause of justice. However, in order to be entitled to work product immunity, the document or documents in question must first qualify as being prepared in anticipation of litigation. "The mere fact that litigation does eventually ensue, does not, by itself, cloak materials" with work product immunity. The document must have been prepared when an actual claim or potential claim arises that could reasonably result in litigation. See National Union Fire Insurance Co. v. Murrav Sheet Metal Co., 967 F.2d 980,984 (4th Cir. 1992).

While the Commission may seek an injunction or institute proceedings pursuant to sections 6 and 11 of the Shipping Act with respect to any agreement, the necessary and ordinary communications between parties seeking to enter into an agreement are not necessarily done in anticipation of litigation; rather, they are made in the furtherance of a joint business venture. HASCO's reference to "the large number of Commission proceedings and investigations over the years involving agreements" is factually unsupported and does not aid its contention that parties always act in anticipation of litigation

in forming an agreement.”

HASCO’s contention that any agreement filed with the Commission is subject to investigation and therefore, any agreement matter discussed between agreement parties and their counsel, and between counsel for the agreement parties, would come within this form of the privilege is overbroad. It would immunize much of the clearly commercial discussion in which counsel is involved with agreement parties, and is particularly inappropriate in the context of an industry whose members are permitted to operate with immunity from the antitrust laws, subject to the regulatory oversight of this agency.

The attachment described in Item no. 1 as an e-mail from Mr. Yoshitomi to Ms. Fan reporting on his discussions with Mr. King appears to be the work product of Sinolines’ attorney, although the document has been identified and the privilege specifically invoked by HASCO. It may be viewed as having been prepared in anticipation of litigation. Therefore, it is necessary to determine whether the privilege belonging to Sinolines: (1) has been waived by conveyance of the document to a person not employed by Sinolines or its attorney, *i.e.*, Mr. Zhang, and (2) whether the privilege has been asserted by the party to whom it belongs.

BOE argues that transmission of the attachment described in Item no. 1 from Ms. Fan to Mr. Zhang constituted a disclosure which waives Sinolines’ attorney-client privilege as to all documents by its counsel relating to this subject matter.

⁹HASCO’s general claim that the correspondence between counsel, prior to filing of the Agreement, was created in anticipation of litigation is also inconsistent with its insistence that this proceeding is “unprecedented,” and one of “first impression.”

BOE's Response to Vaughn Index at 5. However, while the attorney-client privilege exists to protect confidential communications between attorney and client, and is destroyed by voluntary disclosure to a third person, the work product privilege exists to protect the attorney's work from disclosure to opposing counsel and has been waived only if disclosure has significantly increased the likelihood of adverse parties obtaining the information. 8 C. Wright & Miller, *Federal Practice & Procedure: Civil* § 2024 at 368-369. Disclosure to a third party does not waive the privilege "unless such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary." United States v. American Tel. and Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980). Clearly, HASCO is not an adverse party to Sinolines in this proceeding and disclosing this document to HASCO has not increased the likelihood that BOE would obtain this information. Therefore, the work product protection for this document has not been waived.

Documents that are attorney work product may nevertheless be ordered produced if the party requesting the materials demonstrates that there is a substantial need for the information and it is not available elsewhere without undue hardship. See Fed. R. Civ. P. 26(b)(3). "The general policy against invading the privacy of an attorney's course of preparation is so well-recognized and so essential to the orderly working of our legal system that the burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order." Hickman v. Taylor, 329 U.S. at 512.

The communication in question is Mr. Yoshitomi's assessment of a conversation with Mr. King. BOE already possesses the factual contents of the conversation, inasmuch as

Mr. King was a party to it. An attorney's mental impressions, conclusions, or opinions are work product. Absent demonstration that it has a substantial need for the information and it is not available elsewhere, BOE is not entitled to Mr. Yoshitomi's assessment of this conversation. BOE has made no showing of substantial need.

Although BOE did not address the assertion of privilege for this document by HASCO rather than Sinolines, and the Commission did not order Sinolines to file a Vaughn Index, it would appear nevertheless that this document falls within Sinolines' broad claim of attorney-client privilege for documents it neither identified nor produced. Therefore, we find that the work product privilege applies to the e-mail attachment described in Item no. 1, and it is properly withheld from production.

Neither Item no. 2 nor Item No. 5 qualifies for work product immunity, and therefore, they are not shielded from disclosure. Item no. 2 is described as an e-mail from Mr. Yoshitomi to Mr. Mayer enclosing a draft of the Cross Charter and Sailing Agreement and Information Form. It appears that the draft agreement and information form were not prepared in anticipation of litigation. The exchange of these documents is akin to those communications made in a business venture and are similar to communications made in preparation of entering into a contract, which is precisely what Sinolines and HASCO were doing at that time.

Item no. 5 is described as an e-mail from Mr. Yoshitomi to Mr. Mayer commenting on provisions in the Great Western/HASCO Agreement as applied to the Sinolines/HASCO relationship. Vaughn Index at 7-8. Mr. Yoshitomi's comments regarding an existing agreement and its applicability to the instant one are not protected from disclosure.

While these discussions may have involved HASCO's attempt to convince Sinolines that the Agreement would confer on HASCO the status required for its eligibility to enter into the arrangement, that alone does not convert the correspondence from its commercial focus (arranging a commercially desirable agreement) to one involving litigation or the likelihood of litigation. The work product privilege does not shield all communications simply because litigation has ensued.

Based on HASCO's descriptions, these documents do not appear to have been prepared in anticipation of litigation; rather, they appear to be communications made in the ordinary course of business. Therefore, we find that Item nos. 2 and 5 are not protected by the work product privilege and will order HASCO to produce these documents to BOE.

To the extent that HASCO is ordered to produce additional documents, BOE should be granted the opportunity to use those documents in its case, an opportunity of which it was deprived by the failure of HASCO to produce documents responsive to the Commission's Request for Additional Information which were not shielded by appropriately asserted attorney-client privilege. In order to avoid further substantial delay in this proceeding, HASCO is ordered to produce the documents within ten days of the date of this Order, and BOE is ordered to file any additional legal memorandum it finds appropriate to address the issues in light of the newly-produced documents within seven days after production of the documents. Oral argument will be scheduled thereafter at the earliest convenience of the Commission and the Parties.

CONCLUSION

THEREFORE, IT IS ORDERED That HASCO's

Petition to File is granted;

IT IS FURTHER ORDERED, That HASCO's Petition for Limited Hearing is denied;

IT IS FURTHER ORDERED, That all filings other than those subject to the protective order granted in our September 5 Order will become part of the public record of this proceeding ten calendar days from the date of this Order, unless a petition for protective order with respect to information contained in such filings has been filed;

IT IS FURTHER ORDERED, That HASCO produce within ten calendar days of the date of this Order the documents described as Item nos. 2,3,4,5,7 and 8 of its Vaughn Index;

IT IS FURTHER ORDERED, That BOE file any additional legal memorandum it finds appropriate to address the issues in light of the newly-produced documents within seven days after production of the documents; and

FINALLY, IT IS ORDERED, That HASCO's request for oral argument is granted.

By the Commission.


Bryant L. VanBrakle
Secretary