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OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM

May 31, 2013

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Karen V. Gregory, Secretary
Office of the Secretary
Federal Maritime Commission
Room 1046
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001

Re: Mitsui O.S.K. Lines, Ltd. v. Global Link Logistics, et al.
Federal Maritime Commission: Docket No. 09-01
Our file: 275609

Dear Ms. Gregory:

We are attorneys representing Complainant Mitsui O.S.K. Lines, Ltd. ("MOL") in the above captioned matter currently pending in the Federal Maritime Commission.

Please find enclosed an original and five (5) copies of Complainant's Opposition to Olympus Respondents' Motion to Strike Allegedly False Statements in Complainant's Reply Brief in Further Support of its Claims against Respondents.

A PDF copy of each pleading has been emailed to both secretary@fmc.gov and judges@fmc.gov.

Kindly arrange to stamp a conformed copy for our files. Our messenger has been instructed to wait.

If you have any questions, please do not hesitate to contact us.

Karen V. Gregory
May 31, 2013
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We thank the Commission for its attention and courtesies, and remain,

Sincerely,

COZEN O'CONNOR

A handwritten signature in black ink, appearing to read "DYL", with a long, sweeping horizontal flourish extending to the right.

By: David Y. Loh

DYL/jmb
Enclosures

Karen V. Gregory

May 31, 2013

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cc:

VIA EMAIL ONLY (w/ encls.)

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BEFORE THE
FEDERAL MARITIME COMMISSION

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OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM.

Docket No. 09 -01

MITSUI O.S.K. LINES LTD.

COMPLAINANT

v.

GLOBAL LINK LOGISTICS, INC., OLYMPUS PARTNERS, OLYMPUS GROWTH
FUND III, L.P., OLYMPUS EXECUTIVE FUND, L.P., LOUIS J. MISCHIANI, DAVID
CARDENAS, KEITH HEFFERNAN, CJR WORLD ENTERPRISES, INC. AND CHAD J.
ROSENBERG

RESPONDENTS

**COMPLAINANT'S OPPOSITION TO OLYMPUS RESPONDENTS' MOTION TO
STRIKE ALLEGEDLY FALSE STATEMENTS IN COMPLAINANT'S REPLY BRIEF
IN FURTHER SUPPORT OF ITS CLAIMS AGAINST RESPONDENTS**

Complainant Mitsui O.S.K. Lines, Ltd. ("Complainant" or "MOL") hereby opposes
Olympus Respondents' Motion to Strike Allegedly False Statements in Complainant's Reply
Brief in Further Support of its Claims against Respondents ("Motion to Strike"). For the reasons
set forth below, the Motion to Strike should be denied.

THE APPLICABLE LEGAL STANDARD

The Commission's Rules of Practice and Procedure do not expressly provide for a motion
to strike. Accordingly, under 46 C.F.R. §502.12, the Commission looks to the Federal Rules of
Civil Procedure ("FRCP"). Rule 12(f) of the FRCP governs motions to strike, and has been
relied upon with respect to such motions. See, *Matson Navigation Co., Inc. Proposed General*

Rate Increase of 3.6 Percent Between U.S. Pacific Coast Ports and Hawaii Ports, 25 S.R.R. 1069 (ALJ 1990).

Rule 12(f) provides in relevant part:

Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Such motions are disfavored by the courts,¹ and the burden of proof on the moving party is formidable.² Mere redundancy, immateriality, impertinence or scandalousness is not sufficient to justify striking an allegation -- the allegation must also be shown to be prejudicial to the moving party.³ If any doubt exists about whether the contested matter should be stricken, the motion should be denied.⁴

In *Matson Navigation*, the ALJ applied the foregoing standards to a motion to strike, saying:

Motions to strike portions of pleadings are permitted under the federal rules in connection with "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." (Federal Rule 12(f), F.R.C.P., 28 U.S.C.A.) Nevertheless, such motions are frowned upon because they cause unnecessary delay, and it is considered drastic to strike portions of pleadings unless the matter has no possible relation to the controversy and is prejudicial to the moving party.

25 S.R.R. at 1129 (citations omitted).

Because Olympus Respondents have not alleged, much less shown, that the matter they seek to have stricken is redundant, immaterial, impertinent or scandalous, or the matter is prejudicial to them, their Motion to Strike must be denied.

In view of the utter failure of the Motion to Strike to meet the legal standards applicable under the FRCP, it is not necessary to consider the factual allegations made in

¹ *BJC Health System v. Columbia Gas Co.*, 478 F.3d 908 (8th Cir. 2007).

² *U.S. ex rel Pogue v. Diabetes Treatment Centers of America*, 474 F.Supp.2d 75, 79 (D.D.C. 2007).

³ *Greenwich Ins. Co. v. Rodgers*, 729 F.Supp.2d 1158, 1162 (C.D. Cal. 2010).

⁴ *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission*, 461 F.Supp.2d 1055, 1064 (E.D. Mo.) *aff'd* 530 F.3d 676 (8th Cir. 2008).

the Motion to Strike. However, if such allegations are considered, it becomes apparent that they lack merit.

**THE MOTION TO STRIKE MUST BE DENIED BECAUSE THE TWO STATEMENTS
THE OLYMPUS RESPONDENTS SEEK TO STRIKE ARE ACCURATE**

The statements in MOL's Reply Brief that the Motion to Strike claims to be "false" are in fact accurate. The first statement the Olympus Respondents seek to strike is:

They [Respondents] do not deny that split routing is a violation of the Shipping Act.

MOL's Reply Brief at p. 33. The Motion to Strike argues that the Olympus Respondents have never "believed, stated, agreed or conceded that the practice of 'split routing' is a violation of Section 10(a)(1) of the Shipping Act." That may be true, but it is equally true that the Olympus Respondents have never denied that it is a violation of the Shipping Act for a shipper to provide a carrier with false information about the destination of cargo in order to obtain transportation at rates other than those that are lawfully applicable. Accordingly, MOL's statement is not false and there is no basis whatsoever to strike it.

In fact, the bulk of the Olympus Respondents' argument with respect to this statement is merely a rehash of its twice rejected argument with respect to subject matter jurisdiction, making the Motion to Strike nothing more than a thinly-veiled attempt to file a reply to a reply in the guise of a motion to strike.

The second statement the Olympus Respondents seek to strike is:

Respondents' argument that they did not know "split routing" was illegal is simply not credible. Eric Joiner testified that he told Rosenberg that "split routing" was illegal, and that he did not need an attorney to tell him that. MOL PFF 126 (MOL Exh. BA). When GLL hired outside counsel, the legal advice was that "split routing" was illegal. MOL PFF 145 (MOL Exh. BP).

MOL's Reply Brief sets forth in detail the extent to which the three individual Olympus Respondents knew or should have known that "split routing" was unlawful. All three had previously developed expertise in logistics and transportation. MOL App. 1951-1951-A. Eric Joiner told David Cardenas that "split routing" was unlawful. MOL PFF 132 and 133. Keith Heffernan was aware that "split routing" was brought to his attention because of questions about its legality. MOL PFF 136 and 139. Cardenas and Heffernan were aware of the advice that GLL received from counsel. MOL PFF 147 and 151. Thus, there is no basis to strike MOL's argument that the professed ignorance of the Olympus Respondents with respect to the lawfulness of "split routing" is not credible. That is an issue for the Presiding Officer to decide.

THERE IS NO BASIS TO STRIKE THE DISCUSSION OF SEAMASTER

Similarly, the three grounds upon which the Olympus Respondents seek to strike the discussion of the District Court's decision in *Mitsui O.S.K. Lines, Ltd v Seamaster Logistics, Inc.* are without merit. Indeed, the suggestion that discussion of a federal court decision in a case which is on all fours with the matter under adjudication must be stricken is ludicrous. Citation to relevant precedent is not redundant, immaterial, impertinent or scandalous.

Having said this, Olympus Respondents' first argument is that the *Seamaster* case contradicts the allegations in MOL's complaint. In addition to failing to explain how this could possibly render the *Seamaster* discussion redundant, immaterial, impertinent or scandalous, it is simply not true. MOL has always maintained and continues to maintain that it did not know of "split routing" prior to 2008. The argument that the knowledge of McClintock and Yang cannot be imputed to MOL is entirely consistent with MOL's position, and it is also a logical response to the arguments of the Respondents that MOL is barred from recovering because McClintock

and Yang apparently knew of the “split routing” practice. Nothing in this argument renders MOL’s prior arguments false.

The second argument, that the *Seamaster* discussion inserts a new theory into this case, is also without merit. There is no new theory here. MOL has always maintained that it did not know about “split routing.” Respondents have claimed it did. MOL has in its reply brief cited legal doctrine (the adverse interest exception to imputed knowledge) in response to Respondents’ reliance on McClintock and Yang. In the Motion to Strike, Olympus Respondents acknowledge that prior knowledge of MOL has always been an issue in this case (see Motion to Strike at p. 7). Hence, there is nothing new here.

The third and final argument, that MOL admits it was unjustly enriched, is absurd. MOL has always maintained that it was injured by the practice of “split routing.” Consistent with that long-standing position, it has argued that McClintock and Yang acted completely contrary to MOL’s interests (i) by permitting—according to Respondents, encouraging—cargo to move at rates other than those that were legally applicable, thereby depriving MOL of revenue, (ii) by causing MOL either to overpay for trucking beyond the bill of lading point or to pay for tens of thousands of fictitious trucking moves to fake destinations, thereby allowing third parties secretly and unlawfully to steal MOL’s money, and (iii) by exposing MOL to fines and penalties under the Shipping Act.⁵ The efforts of the Olympus Respondents to somehow turn this argument on its head are unavailing and, in any event, are not a basis upon which to strike discussion of the *Seamaster* decision. Put another way, whereas the Olympus Respondents claim that MOL would not have carried Global Link’s cargo but for the “split routing” practice, MOL maintains that if McClintock and Yang had not acted contrary to its interests, MOL would

⁵ Under the strict liability concepts of 46 U.S.C. § 41104(1) of the Shipping Act, MOL remained subject to penalties and fines for the conduct in question, despite its lack of knowledge of the scheme.

have either carried the cargo at lawful rates that, for the vast majority of shipments, would have been higher than those that were applied unlawfully under the “split routing” scheme, or, more likely, replaced the Global Link cargo with other cargo at lawful and just rates that would not have exposed MOL to violations of the Shipping Act, secretly deprived it of revenue, or deceived it into paying for fraudulent truck services. In any event, there is no credible evidence that MOL in any way benefitted from the “split routing” scheme.

Finally, a brief response to the Olympus Respondents’ argument regarding unfair surprise is in order. There is no unfair surprise here. As noted above, it has always been MOL’s position that it did not have knowledge of “split routing” until the summer of 2008 when McClintock received a subpoena to testify in the arbitration. The knowledge and conduct of Paul McClintock and Rebecca Yang, as the MOL employees with the most contact with GLL, has been an issue throughout this proceeding.⁶

All parties were well aware of the knowledge issue from the very beginning of this case, and the adverse interest exception is a well-established part of the jurisprudence of imputed knowledge. The CJR Respondents anticipated and addressed the adverse interest exception in their reply brief. See, CJR Respondents’ Reply brief at p. 49. Since the CJR Respondents anticipated MOL’s argument and the Olympus Respondents apparently reviewed that brief prior to filing their own (see Section III of Olympus Respondents’ Reply Brief at pp. 4-5), the Olympus Respondents cannot now claim to be surprised, unfairly or otherwise, by the adverse interest exception argument.

⁶ As Olympus Respondents point out in footnote #7 of the Motion to Strike, MOL sought to re-depose Paul McClintock. The Olympus Respondents opposed that request, despite MOL’s willingness to limit the questioning to certain emails which suggested McClintock might have prior knowledge of “split routing.” It is ironic indeed that the Olympus Respondents are now claiming to be surprised by an argument based on information which they previously opposed exploring further.

CONCLUSION

The Motion to Strike does not meet the legal standards applicable to such motions under the FRCP. The Olympus Respondents' have not even bothered with a futile attempt to try and demonstrate how the matter they seek to strike is redundant, immaterial, impertinent or scandalous. Moreover, the factual arguments of the Olympus Respondents are without merit for the reasons set forth above. In light of the foregoing the Motion to Strike, which appears to be a thinly disguised pretext for filing a reply to a reply, must be denied.

WHEREFORE, Complainant Mitsui O.S.K. Lines, Ltd. respectfully requests that the Motion to Strike be denied.

Respectfully submitted,



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Dated: May 31, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the following individual(s) via electronic mail:

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