

ORIGINAL

FEDERAL MARITIME COMMISSION

MITSUI O.S.K. LINES LTD.

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

Docket No. 09-01

Served: August 10, 2011

BY THE COMMISSION: Richard A. LIDINSKY, JR.,
Chairman, Joseph E. BRENNAN, Rebecca F. DYE, and
Mario CORDERO, *Commissioners*. *Commissioner* Michael A.
KHOURI, concurring.

**Order Denying Motion for Commission Investigation and
Dismissing Motion for Prompt Resolution of Appeal and
for Stay of Proceeding Before Administrative Law Judge**

I. PROCEEDING

This complaint proceeding, which is currently before an

Administrative Law Judge (ALJ), was initiated by Mitsui O.S.K. Lines Ltd. (Mitsui) on May 5, 2009. In its complaint, Mitsui alleges that respondents Global Link Logistics, Inc. (Global Link); Olympus Partners; Olympus Growth Fund III, L.P. (OGF); Olympus Executive Fund, L.P. (OEF); Louis J. Mischianti; David Cardenas; Keith Heffernan; CJR World Enterprises, Inc. (CJR); and Chad Rosenberg violated sections 10(a)(1) and 10(d)(1) of the Shipping Act of 1984, and Commission regulation 46 C.F.R. § 515.31(e), by engaging in a practice referred to as “split routing,” “mis-booking,” or “re-routing.” Respondents Louis J. Mischianti, David Cardenas, and Keith Heffernan are general partners of OGF and OEF, and were officers and directors of Global Link at the time the alleged split routing occurred. OGF, OEF, Mischianti, Cardenas, and Heffernan will be referred to as the Olympus Respondents. Respondent Chad J. Rosenberg owns CJR and was an officer and director of Global Link at the time the alleged split routing occurred. CJR and Rosenberg will be referred to as CJR Respondents.

In a Memorandum and Order issued June 22, 2010, the ALJ determined that the Commission has jurisdiction over the inland segment of an international through movement. *Mitsui O.S.K. Lines, Ltd. v. Global Link Logistics, Inc.*, 31 S.R.R. 1369, 1381-82 (ALJ 2010). In a subsequent Memorandum and Order, issued August 13, 2010, the ALJ granted Olympus Respondents’ motion for leave to appeal this determination. *Mitsui O.S.K. Lines, Ltd. v. Global Link Logistics, Inc.*, 31 S.R.R. 1432 (ALJ 2010).

On January 19, 2011, Olympus Respondents and CJR Respondents filed a Joint Motion for Commission Investigation of Mitsui O.S.K. Lines, Ltd. (Motion for Investigation). In addition, Olympus Respondents filed a Motion seeking (1) prompt resolution of an interlocutory appeal involving the Commission’s jurisdiction over the inland segment of an intermodal through movement, and (2) stay of the proceedings before the ALJ (Motion for Prompt Resolution of Appeal and Stay). Mitsui filed a reply to the motions (Mitsui Reply). On July 15, 2011, Olympus Respondents filed a

request to the Commission for Action on Pending Interlocutory Appeal and Motion for Prompt Resolution.

II. ADMINISTRATIVE LAW JUDGE MEMORANDUM AND ORDER

In a Memorandum and Order on Motions Filed January 19, 2011, *Mitsui O.S.K. Lines, Ltd. v. Global Link Logistics*, 31 S.R.R. 1699 (ALJ 2011), the ALJ referred the Motion for Investigation to the Commission, stating that the action requested was beyond his authority. *Id.* at 1701. To the extent that the Motion for Investigation could be construed as a motion for reconsideration of his June 22, 2010 Order, in which he denied a motion to investigate whether Mitsui knew or should have known about the practice of split routing, the ALJ denied the Motion for Investigation. *Id.*

With regard to the motion for stay and the request that the Commission promptly resolve the jurisdictional issue on appeal before it, the ALJ stated that he does not have authority to establish a schedule for the Commission's consideration of matters before it, and he therefore referred this request to the Commission. *Id.* at 1702. With regard to the request for stay of the proceeding before him, to the extent that the motion could be construed as a motion for reconsideration of his two prior orders denying a stay, he denied the motion as repetitious. *Id.* To the extent that the motion could be construed as a motion asking the Commission to stay the proceedings before him while the Commission considers the appeals before it, the ALJ referred the motion to the Commission as "the motion asks for relief that is beyond the power of the presiding officer." *Id.*

III. MOTIONS AND REPLY

A. Motion for Investigation

In their Joint Motion for Commission Investigation of Mitsui O.S.K. Lines, Ltd., Olympus Respondents and CJR

Respondents seek to have the Commission initiate an investigation into the practices and conduct of Mitsui in this proceeding. According to Respondents, “[a]n investigation is necessary to address the abuses upon which Mitsui’s Complaint rests and its efforts to perpetuate a fraud on the Commission in this case.” Motion for Investigation at 4. Respondents argue that Mitsui’s complaint is based on a false declaration that it did not know of the alleged split routing practice. Respondents state that Mitsui knew of and encouraged the practice of split routing, and further state that Olympus Respondents have submitted evidence in this proceeding that shows that Mitsui knew of the practice.

Respondents argue that it is not their responsibility to police the conduct of a complainant before the Commission, and the Commission should address the serious ethical issues presented by the case, including Mitsui’s prior knowledge of split routing. Therefore, Respondents request that the Commission initiate an investigation into the veracity of Mitsui’s verified complaint. *Id.* at 9.

B. Motion for Prompt Resolution of Appeal and for Stay

In their motion for prompt Commission resolution of their appeal regarding the Commission’s jurisdiction over the inland segment of through ocean transportation, Olympus Respondents state that the Commission should promptly resolve the appeal, as they are being required to defend a claim on which the Commission cannot grant relief. Motion for Prompt Resolution and for Stay at 13.

In support of their motion for stay, Olympus Respondents argue that as a matter of federal law and practice, the Commission must stay or alternatively must order the ALJ to cease all proceedings that concern the issue on appeal. They state that the interlocutory appeal divested the ALJ of jurisdiction, and federal practice is to stay proceedings where there is an interlocutory appeal of subject matter jurisdiction. Olympus Respondents argue

that the Commission must stay the proceedings or order the ALJ to cease the proceedings based on the ALJ's acting in contradiction to law and policy regarding the Shipping Act, and to Commission precedent and rules. *Id.* at 17-19. They argue that the ALJ erred in exercising jurisdiction over Mitsui's complaint, and in not being bound by a statement regarding the status of Olympus Respondents in an earlier unrelated proceeding.

C. Reply

While Mitsui has no objection to the prompt resolution of the interlocutory appeal before the Commission, it does object to Respondents' repetitive allegations and disregard of the ALJ's authority and rulings. Complainant's Reply to Respondents' Motions for an Investigation and for a Stay Pending Appeal (Mitsui Reply).

Mitsui argues that instituting an investigation into the veracity of a complaint whenever there is a disputed fact would create a two-step process that would bring "virtually all litigation to a standstill." *Id.* at 4. Mitsui states that the ALJ recognized this when he denied an earlier request by Olympus Respondents for an investigation of Mitsui. Mitsui argues that the Commission should affirm the decision of the ALJ and deny the request for investigation, noting that Respondents will have the opportunity to present their evidence at trial and Mitsui will have the opportunity to rebut that evidence.

With regard to Olympus Respondents' motion for stay, Mitsui notes that the ALJ previously denied their motion for stay, both on their initial motion and on motion for reconsideration. Mitsui argues that the only real basis that Olympus Respondents assert in support of a stay is their contention that the appeal automatically divests the ALJ of jurisdiction over the proceedings. Mitsui states that this contention is incorrect, as the ALJ correctly found that pursuant to Commission rules, certification of an appeal to the Commission does not operate as a stay of the proceedings

before the ALJ, unless otherwise provided. *Id.* at 5-6 (citing 46 C.F.R. § 502.153(d)).

Mitsui states that there is no automatic stay, and in determining whether a stay is appropriate, the Commission applies the test established in *Virginia Petroleum Job. Ass'n v. Federal Power Com'n*, 259 F.2d 921 (D.C. Cir. 1958). Mitsui addresses each of the four elements of the test, even though it notes that Olympus Respondents have not addressed the elements and have therefore failed to satisfy their burden of justifying the imposition of a stay. Mitsui concludes that Olympus Respondents have failed to establish any one of the four elements, and therefore their motion for stay should be denied.

IV. DISCUSSION

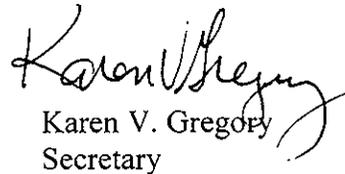
In a recent Order in this proceeding, served August 1, 2011, we affirmed the ALJ's conclusion in his June 22, 2010 Memorandum and Order that the Commission has jurisdiction over the inland segment of ocean transportation on a through bill of lading issued by an ocean common carrier, and that it therefore has jurisdiction over the activities alleged in Mitsui's complaint. We therefore denied Olympus' Respondents' appeal of the ALJ's conclusion. *See Order Denying Appeal of Olympus Respondents, Granting in Part Appeal of Global Link, and Vacating Dismissal of Alleged Violations of Section 10(d)(1) in June 22, 2010 Memorandum and Order on Motions to Dismiss (Order Denying Appeal)* (served August 1, 2011). In light of the action taken in the *Order Denying Appeal*, Olympus Respondents' Motion for Prompt Resolution of Appeal and for Stay is moot, as their appeal has been denied.

Respondents base their Motion for Investigation on their allegation in the complaint proceeding before the ALJ that Mitsui knew of and participated in the split routing scheme. They argue that "[i]t is simply not appropriate for the Respondents to be required to bear the burden and expense of investigating the

IT IS FURTHER ORDERED, That Olympus Respondents' Motion for the Commission's Prompt Resolution of Interlocutory Appeal on Question of Jurisdiction, Motion for Order Staying Proceedings before the Presiding Judge, and Motion for Other Relief is dismissed as moot.

IT IS FURTHER ORDERED, That Olympus Respondents' Request to the Commission for Action on Pending Interlocutory Appeal and Motion for Prompt Resolution is dismissed as repetitious.

By the Commission.


Karen V. Gregory
Secretary

Commissioner Michael A. Khouri Concurring

I concur in the denial of the Joint Motion for Commission Investigation of Mitsui O.S.K. Lines, Ltd., and I concur with the Order that dismisses as moot the Olympus Respondents' Motion for the Commission's Prompt Resolution of Interlocutory Appeal on Question of Jurisdiction, Motion for Order Staying Proceedings before the Presiding Judge, and Motion for Other Relief.

I concur in the result of the Order that dismisses Olympus Respondents' Request to the Commission for Action on Pending Interlocutory Appeal and Motion for Prompt Resolution, pursuant to Commission Rule 73(e). However, solely to avoid confusion, I reaffirm my discussion and findings in my concurrence and dissent in the Commission's *Order Denying Appeal of Olympus Respondents, Granting in Part Appeal of Global Link, and Vacating Dismissal of Alleged Violations of Section 10(d)(1) in June, 22, 2010 Memorandum and Order on Motions to Dismiss*, served August 1, 2011.