

# 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: January 31, 2013

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**BY THE COMMISSION:** Richard A. Lidinsky, Jr., *Chairman*; and Mario Cordero, *Commissioner*. Rebecca F. Dye, *Commissioner*, concurring; Michael A. Khouri, *Commissioner*, dissenting; William P. Doyle, *Commissioner*, not participating.

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## **Order Dismissing Petition for Commission Action**

### I. PROCEEDING

This proceeding is currently before an Administrative Law Judge (ALJ). On November 21, 2012, Respondents Olympus Growth Fund III, L.P., Olympus Executive Fund, L.P., Louis J. Mischianti, David Cardenas, and Keith Heffernan (Olympus Respondents), filed a Petition for Commission Action (Olympus

Respondents' Petition), which was referred to the ALJ pursuant to Commission Rule 69(a). Rule 69(a) provides that "[a]fter the assignment of a presiding officer to a proceeding and before issuance of his or her recommended or initial decision, all motions must be addressed to and ruled upon by the presiding officer unless the subject of the motion is beyond his or her authority, in which event the matter must be referred to the Commission." 46 C.F.R. § 502.69(a).

In their Petition for Commission Action, Olympus Respondents request that "the Commission order the Presiding Judge to comply with the Commission's August 1, 2011 order in this proceeding, or alternatively, certify the record in this proceeding to the Commission so that the Commission may make the findings required under its August 1, 2011 order." Olympus Respondents' Petition at 1. Olympus Respondents argue that the ALJ must "determine the issue of the Olympus Respondents' participation prior to considering and determining any other matter in this proceeding." *Id.* at 12.

On December 5, 2012, Complainant Mitsui O.S.K. Lines, Ltd. (Mitsui) filed a response, Complainant's Response to Olympus's Petition for Commission Action Dated November 21, 2012 and Global Link's Objection to October 16, 2012 Procedural Order, and Further Motion for an Extension of the Briefing Schedule (Mitsui Response to Olympus Respondents' Petition). In its Response, Mitsui argues that "Olympus's improper request should be treated as a repetitious motion in violation of Commission Rule 73."<sup>1</sup> Mitsui states that "Olympus's improper 'petition' is duplicative of prior arguments raised by Olympus ad nauseam and should be denied not only with prejudice but with an allowance for MOL to recover its defense fees and costs." Mitsui Response to Olympus Respondents' Petition at 2.

On December 11, 2012, the ALJ issued an Order on Petition

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<sup>1</sup> The Commission's rules of practice and procedure have recently been revised, and the prohibition against repetitious motions is currently codified at 46 C.F.R. § 502.69(d), which provides that "A repetitious motion will not be entertained." This provision was previously codified at 46 C.F.R. § 502.73(e).

for Commission Action, Response by Complainant, and Motions by Complainant and CJR Respondents for Extension of Briefing Schedule (ALJ Order of December 11, 2012). In his Order, the ALJ stated as follows:

During the course of this proceeding the Olympus Respondents have repeatedly argued that, in order to comply with the Commission's Order of August 1, 2011 [in this proceeding], I am obligated to conduct a separate adjudication and issue a separate decision on the issue of whether the Olympus Respondents participated in the violations of the Shipping Act alleged in the complaint so as to subject them to liability to Complainant Mitsui O.S.K. Lines, Ltd. and to Global Link Logistics, Inc. under its crossclaims. I addressed that contention in my Order Partially Denying Motion of the Olympus Respondents to Proceed under the Commission's August 1, 2011, Order and Amending Order to Submit Status Reports which was issued on September 5, 2012. In that Order I stated my rationale and conclusion that the Commission's Order of August 1, 2011, does not require a separate adjudication as advocated by the Olympus Respondents. Since the issuance of the Order of September 5, 2012, the Olympus Respondents have restated their contention on a number of occasions, including a motion for reconsideration, a response to an Order to Submit Status Reports, and objections to the Procedural Order and Briefing Schedule of October 16, 2012.

ALJ Order of December 11, 2012 at 2. Citing Commission Rule 69(a), which provides that motions beyond the authority of an ALJ must be referred to the Commission, the ALJ stated that because "the petition seeks relief that is beyond my authority, it must be referred to the Commission for such further action as it deems appropriate." *Id.* the ALJ also referred Mitsui's Response to Olympus Respondents' Petition to the Commission, on the grounds

that “it addresses a matter that is properly before the Commission.”  
Id.

## II. BACKGROUND

On September 5, 2012, the ALJ issued an Order Partially Denying Motion of the Olympus Respondents to Proceed under the Commission’s August 1, 2011, Order and Amending Order to Submit Status Reports (ALJ Order of September 5, 2012), in which he addressed a motion filed by Olympus Respondents. In their motion, Olympus Respondents contended that to comply with the Commission’s Order of August 1, 2011, the ALJ was obligated to “either grant their motion for summary judgment or hold an evidentiary hearing (presumably after establishing a briefing schedule) and issue a ruling on the sole issue of whether the Olympus Respondents have any liability on Mitsui’s amended complaint or Global Link’s crossclaims before proceeding with the rest of the case.” ALJ Order of September 5, 2012 at 1. The ALJ determined that there “is nothing in the language of the Commission Order [of August 1, 2011] to suggest that it was intended to require bifurcation,” and he denied Olympus Respondents’ motion “insofar as it calls for separate proceedings on the issue of their participation in the alleged violations of the Shipping Act.” Id. at 2, 3. By separate order also issued September 5, 2012, the ALJ denied Olympus Respondents’ motion for summary judgment.

On September 20, 2012, Olympus Respondents filed a Motion for Reconsideration of September 5 Orders and Request for Extension of Time to File Request for Leave to Appeal September 5 Orders to the Commission (Motion for Reconsideration). On October 2, 2012, the ALJ issued an Order Denying Motion for Reconsideration of September 5 Orders and Request for Extension of Time to File Request for Leave to Appeal September 5 Orders to the Commission (ALJ Order of October 2, 2012). In his Order, the ALJ stated as follows:

Neither the Commission’s Rules of Procedure, 46 C.F.R. Part 502, nor the Federal Rules of Civil Procedure

specifically address motions for reconsideration of interlocutory rulings at the trial level. However, Rule 73(e), 46 C.F.R. § 502.73(e), entitled “Motions”, states, in pertinent part, that “A repetitious motion will not be entertained.”

ALJ Order of October 2, 2012 at 3. The ALJ went on to state that “the bulk of the Motion for Reconsideration by the Olympus Respondents is no more than a reiteration and enlargement of arguments contained in their previous motion,” and he concluded that “there is no good cause for reconsideration of those arguments.” *Id.* at 4. With regard to Olympus Respondents’ request for extension of time to file a request for leave to appeal from two interlocutory orders, the ALJ stated that granting this request “would almost certainly require yet a fifth extension of the deadline for the issuance of the Initial Decision.” *Id.* He concluded that “[t]he allowance of an appeal by the Olympus Respondents would create rather than prevent substantial delay and expense to the detriment of the other parties, and possibly to the Olympus Respondents as well if the appeal is unsuccessful.” *Id.* at 5. The ALJ noted that the situation in this proceeding is analogous to that in *Cargo One v. COSCO Container Lines Company, Ltd.*, 29 S.R.R. 620 (ALJ 2002), in which the ALJ observed that the deadline for the issuance of an Initial Decision in that proceeding would “be hard to meet under the most expeditious procedures, and clearly impossible if the proceeding is conducted in phases, the first of which is focused solely on reconsideration of the respondent’s motion.” ALJ Order of October 2, 2012 at 5. Finally, the ALJ noted that Olympus Respondents would have ample opportunity to raise all pertinent issues in their original and reply briefs, and he therefore ordered that Olympus Respondents’ Motion for Reconsideration be denied.

On October 16, 2012, the ALJ issued a Procedural Order and Briefing Schedule (ALJ Order of October 16, 2012), in which he determined that an oral hearing was not necessary to a full and fair adjudication of the factual and legal issues in this proceeding. He noted that while Olympus Respondents again argued that there should be a separate hearing on the issue of their participation, “I

have already addressed that argument and will not revisit it.” Id. at 2, n. 2.

As set out above, on November 21, 2012, Olympus Respondents filed a Petition for Commission Action, which was referred to the ALJ pursuant to Commission Rule 69(a). On December 11, 2012, the ALJ issued an order referring the Petition and Mitsui’s Response thereto, to the Commission.

### III. DISCUSSION

Olympus Respondents have repeatedly argued before the ALJ that the Commission’s August 1, 2011, Order requires that he hold a separate hearing on the issue of their participation in the alleged Shipping Act violations set out in the Complaint. The ALJ has determined that there “is nothing in the language of the [August 1, 2011] Commission Order to suggest that it was intended to require bifurcation,” and he denied Olympus Respondents’ Motion to Proceed under the Commission’s August 1, 2011 Order, “insofar as it calls for separate proceedings on the issue of their participation in the alleged violations of the Shipping Act.” ALJ Order of September 5, 2012 at 2, 3. Subsequently, in his order of October 2, 2012, the ALJ cited Commission Rule 73(e), recodified as Rule 69(d), which provides that “[a] repetitious motion will not be entertained,” and stated that the “bulk of the Motion for Reconsideration by Olympus Respondents is no more than a reiteration and enlargement of arguments contained in their previous motions.” ALJ Order of October 2, 2012 at 4. He stated that Olympus Respondents will have ample opportunity to raise all pertinent issues in their original and reply briefs, and concluded that “there is no good cause for reconsideration of those arguments.” Id. In his October 16, 2012, Procedural Order and Briefing Schedule, the ALJ noted that “Olympus Respondents have again argued that there should be a separate hearing on the issue of their participation,” and stated that he has “already addressed that argument and will not revisit it.” ALJ Order of October 16, 2012 at 2, n. 2. Finally, in his Order of December 11, 2012, in which he referred Olympus Respondents’ Petition to the Commission, the ALJ noted that since the issuance of his Order of September 5,

2012, “the Olympus Respondents have restated their contention on a number of occasions, including a motion for reconsideration, a response to an Order to Submit Status Reports, and Objections to the Procedural Order and Briefing Schedule of October 16, 2012.” ALJ Order of December 11, 2012 at 2.

Rule 69(a) of the Commission’s rules provides that in an adjudication, a request for a ruling not otherwise specifically provided for must be by motion. Rule 69(a) further provides that after an ALJ has been assigned to a proceeding and before an initial decision has been issued, all motions are to be ruled upon by the ALJ unless the subject matter of the motion is beyond his or her authority, in which case the matter is to be referred to the Commission. 46 C.F.R. § 502.69(a). Rule 69(d) provides that a repetitious motion will not be entertained. 46 C.F.R. § 502.69(d).

Olympus Respondents’ Petition for Commission Action is a motion under Rule 69(a), as it requests “an order or ruling not otherwise specifically provided for in . . . [the Commission’s Rules of Practice and Procedure].” 46 C.F.R. § 502.69(a). Furthermore, it is a repetitious motion, as the argument raised therein by Respondents has been addressed and rejected by the ALJ in his Order of September 5, 2012, as well as in his Order of October 2, 2012. As the ALJ stated in his Order of December 11, 2012, Olympus Respondents have repeatedly argued that the presiding officer is required to conduct a separate adjudication and issue a separate decision on the issue of whether they participated in the alleged violations of the Shipping Act, so as to subject them to liability to Complainant Mitsui O.S.K. Lines, Ltd. and to Global Link Logistics, Inc. under its crossclaims. The ALJ addressed this argument in his Order of September 5, 2012, in which he concluded that the Commission’s Order of August 1, 2011, did not require a separate adjudication on this issue. He affirmed this conclusion in his Order of October 2, 2012, and declined to address it again in his Order of October 16, 2012.

When a request for relief has been determined to be repetitious, Rule 69(d) provides that it will not be entertained. The Commission has generally declined to entertain repetitious requests

for relief. See *Green Master Int'l Freight Services Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 1319, 1322 (FMC 2003), and *Holt Cargo Systems, Inc. v. Delaware River Port Authority*, 28 S.R.R. 1268, 1272 (ALJ 1999). As stated by the ALJ in his Order of October 2, 2012, Olympus Respondents will have ample opportunity to raise all pertinent issues in their original and reply briefs.

### CONCLUSION

We conclude that Olympus Respondents' Petition for Commission Action is a repetitious motion. Therefore, consistent with Commission Rule 69(d), 46 C.F.R. § 502.69(d), it will not be entertained.

THEREFORE, IT IS ORDERED, That Olympus Respondents' Petition for Commission Action is dismissed.

By the Commission.

Karen V. Gregory  
Secretary

### **Rebecca F. Dye, Commissioner, Concurring.**

I agree with Commissioner Khouri that the Olympus Respondents should be dismissed from this proceeding.

As I stated in my dissent from the Majority Order of August 1, 2011, I would dismiss Mitsui's claims for violations of section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. 41102(c), and 46 C.F.R. 515.31(e) against the Olympus Respondents and the CJR Respondents for lack of subject matter jurisdiction.

In my dissent from the Majority Order concerning the three issues before the Commission at that time, I stated that I would affirm the ALJ's dismissal of Mitsui's claims against the Olympus

Respondents and the CJR Respondents for lack of subject matter jurisdiction under section 10(d)(1) of the Shipping Act of 1984.

**Michael A. Khouri, Commissioner, Dissenting.**

I respectfully dissent from the majority decision of the Commission. I would grant the Petition.

The Commission Order dated August 1, 2011, 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 provided direction at page 34,

In order to prevent delay or undue inconvenience in this proceeding, the ALJ should direct the parties to focus discovery first on the issue of whether Olympus Respondents and CJR Respondents engaged in the requisite participation – as individuals or entities rather than mere shareholders of Global Link – in Shipping Act violations to warrant holding them separately liable for violating section 10(a)(1) and/or section 10(d)(1), or whether claims against one or both of these parties should be rejected. (emphasis added)

The Commission Order then concluded its discussion at page 36 with the following guidance and directive,

An initial issue to be determined by the ALJ is whether the evidence produced proves that Olympus and/or CJR Respondents participated in the Shipping Act violations alleged. In order to prevent delay or undue inconvenience, the ALJ should direct the parties to focus their initial discovery on the issue of the nature of these Respondents' alleged participation in the alleged Shipping Act violations,

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so that the ALJ can make an initial determination whether their continuation in the proceeding is warranted. (emphasis added)

The Commission's direction was clear. "Focus discovery first on...requisite participation...". "An initial issue...the ALJ should direct the parties to focus initial discovery on...nature of these Respondents alleged participation...". "So that the ALJ can make an *initial determination* whether [these Respondents'] *continuation* in the proceeding is warranted."

The preceding sections of the Commission's August 1, 2011 Order were supported and confirmed by a unanimous 5 to 0 vote of the Commission.

For the ALJ to state in his September 5, 2012 Order that there "...is nothing in the language of the [August 1, 2011] Commission order to suggest that it was intended to require bifurcation...insofar as it calls for separate proceedings on the issue of their participation in the alleged violations of the Shipping Act." [emphasis added], is simply wrong and fails to provide a judicial process of fundamental fairness that this Commission owes to the parties.

The issues of subject matter jurisdiction and personal jurisdiction, as lawfully exercised by a federal regulatory agency in the interpretation and enforcement of a statute that was properly enacted by Congress and delegated to such agency is discussed in several dimensions in the Commission's August 1, 2011 Order, including the majority decision, the concurrences and dissent.

After a review of the extensive record of pleadings, briefs and legal memorandums in this matter, I continue to search for any prior Commission decision in a Section 10, Prohibited Acts case concerning a respondent corporation which was in continual good standing in the state of its incorporation and that holds a valid FMC license as an OTI, and such OTI, in fact, obtained ocean transportation for property, and such OTI's name is properly reflected on all relevant shipping documents; where the Commission has asserted subject matter jurisdiction or personal

jurisdiction over a party respondent who was (i) an owner of equity in the respondent OTI corporation, or (ii) a member of the Board of Directors of the OTI corporation, or (iii) a duly qualified officer of the OTI corporation without additional allegations, pleadings, averments and proffered evidence of further legal entanglements and deficiencies that thereby legally ensnarl such party(s) within the Commission's purview. Most relevant in the instant case is the complete absence of any plausible allegation that would, at a minimum, point towards a piercing of the OTI corporation's corporate veil. I have not been advised of even one such allegation – plausible or otherwise.

Once again, in the small chance that there is any lingering confusion, I reaffirm my discussion and findings in my concurrence and dissent in the Commission's August 1, 2011 Order. Further, I concur with and reaffirm Commissioner Dye's discussion and dissent in the same styled Commission Order.

If the Commission once again declines to take up the issues set forth in the current Petition for Commission Action and, instead, allows the petitioner parties to be subjected to the continued personal burden and financial expense of the full discovery, hearing and briefing process leading to a full Initial Decision by the newly designated Presiding Officer, then the Commission will fully earn the opprobrium of the parties, the reviewing Federal Courts and the global shipping community.