

S E R V E D
June 20, 2013
FEDERAL MARITIME COMMISSION

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DOCKET NO. 11-12

COSCO CONTAINER LINES COMPANY LIMITED; EVERGREEN LINE A JOINT SERVICE AGREEMENT; HANJIN SHIPPING CO., LTD.; KAWASAKI KISEN KAISHA, LTD.; NIPPON YUSEN KAISHA; UNITED ARAB SHIPPING COMPANY (S.A.G.); and YANG MING MARINE TRANSPORT CORPORATION

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

ORDER DENYING COMPLAINANTS' MOTION FOR SUMMARY JUDGMENT

I.

On December 7, 2012, a motion seeking summary decision and statement of facts not in dispute were filed by Complainants Cosco Container Lines Company Limited; Evergreen Line a Joint Service Agreement; Hanjin Shipping Co., Ltd.; Kawasaki Kisen Kaisha, Ltd.; Nippon Yusen Kaisha; United Arab Shipping Company (S.A.G.); and Yang Ming Marine Transport Corporation.

On February 1, 2013, an opposition to the motion for judgment and a response to the statement of facts not in dispute with additional facts were filed by Respondent, The Port Authority of New York and New Jersey ("Port Authority").

On February 15, 2013, Complainants filed a reply to Respondent's opposition.

On February 25, 2013, Respondent filed a motion for leave to file a sur-reply arguing that the Complainants raised a jurisdictional issue for the first time in their reply brief. On March 11, 2013, Complainants filed a response to Respondent's motion to file a sur-reply which addressed the jurisdictional issue and did not oppose the Respondent's motion to file a sur-reply. The request to file a sur-reply is **GRANTED** and the arguments in the sur-reply and sur-reply response have been considered.

The parties' filings include material which the parties have identified as confidential. Public versions were provided with the confidential material excluded. The parties narrowly limited their use of the confidential designation. Accordingly, confidential treatment is **GRANTED** as requested. Additional guidance regarding marking and filing confidential information is included in the scheduling order being issued concurrently with this order.

For the reasons set forth below, Complainants' motion for summary decision is **DENIED**.

II.

Complainants move for summary decision, arguing that the Respondent's terminal tariff (section H) and its implementation, imposing on Complainants' vessels a container facility charge ("CFC"), violates section 41102(c) of the Shipping Act. Motion at 1 (citing 46 U.S.C. § 41102(c)). Complainants discuss foundational facts, the substitution of the CFC tax for the rail user fee, and the winners and losers. Motion at 2-13. Complainants contend that the Port tariff does not apply to activities at leased terminals; the Port Authority cannot charge the CFC to vessel operators under the terms of section H, contract law, or the Shipping Act; and no port services are rendered to vessel operators to be subjects of the two-step test of section 41102(c). Motion at 13-27. Complainants also raise jurisdiction as an issue. Sur-Reply Response at 4-8.

Respondent asserts that Complainants' motion is founded upon a misunderstanding of the law, hotly disputed facts, and is premature because discovery is not complete. Opposition at 1. Respondent discusses the development of the Port Authority's cargo facility charge, implementation of the cargo facility charge, enforcement of the cargo facility charge, the Complainants, procedural history, Complainants' obstruction of discovery, and the motion for judgment and Complainants' subsequent admissions. Opposition at 3-16. Respondent contends that Complainants' admissions about the benefits they receive from the cargo facility charge preclude any determination that the Complainants are entitled to judgment as a matter of law, and the carriers' various other contentions are either legally groundless or based on misrepresentations of the facts. Opposition at 16-29.

III.

A. Motion for Summary Decision Standard

The Commission has emphasized that

At the summary judgment stage, the role of the judge ". . . is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, [477 U.S. 242, 249 (1986)]. The party seeking summary judgment . . . has the burden of demonstrating that there is no genuine issue of material fact. *Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970); [10A]Wright, Miller & Kane, [*Federal Practice and Procedure* § 2727, p. 455 (3d ed. 1998)].

EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. – Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission’s Regulations at 46 C.F.R. § 515.27, 31 S.R.R. 540, 545 (FMC 2008).

The party moving for summary judgment bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *Green v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). However, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 587.

Even if summary judgment is technically proper, sound judicial policy and the proper exercise of judicial discretion permit denial of such a motion for the case to be developed fully at trial. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979); *New York v. Amfar Asphalt Corp.*, 1986 WL 27582, at *2 (E.D.N.Y. 1986) (*aff’d New York v. Hendrickson Brothers, Inc.*, 840 F.2d 1065 (2nd Cir. 1988)); *In re Korean Air Lines Disaster of September 1, 1983*, 597 F. Supp. 613, 618 (D.D.C. 1984). See also Fed. R. Civ. P. 56 advisory committee notes, 2007 amendments (“there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact”).

B. Jurisdiction

Complainants’ position on jurisdiction is not clear. They argue that the cargo facility charge violates the tonnage clause of the Constitution and acknowledge that the tonnage clause and 33 U.S.C. 5 “are matters for court, not commission scrutiny.” Sur-Reply Response at 6-7. Complainants state:

Complainants also decline to pursue the lawfulness of the CFC itself under the Shipping Act insofar as jurisdiction is absent. That way is blocked by the unavoidable jurisdictional defect announced in the above-cited cases.

Thus while Complainants have pared this docket down to its essential elements under 41102 and are honoring the absence of jurisdiction over the substance of the CFC, essential elements of Section 41102 violations remain clearly within the Commission’s jurisdiction, and plainly unlawful.

Sur-Reply Response at 7. Complainants contend that the cargo facility charge, itself, is related to the Port Authority’s general revenue needs and not receiving, handling, storing, or delivery of property but that other parts of the Port’s Tariff are not outside the Commission’s jurisdiction. Sur-Reply Response at 8.

“Proper jurisdiction for a federal court is fundamental and necessary before touching the substantive claims of a lawsuit.” *Arena v. Graybar Elec. Co., Inc.*, 669 F.3d 214, 223 (5th Cir. 2012). “A litigant generally may raise a court’s lack of subject matter jurisdiction at anytime in the same civil action, even initially at the highest appellate instance.” *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 576 (2004) (citations omitted). When a defendant makes a “factual” attack on a court’s subject-matter jurisdiction, the court is “free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.” *Morris v. U.S. Dept. of Justice*, 540 F. Supp. 898, 900 (S.D. Tex.1982), *aff’d*, 696 F.2d 994 (5th Cir.1983). The party asserting jurisdiction bears the burden of proof if the opposing party raises lack of subject matter jurisdiction. *Branon v. Debus*, 289 Fed. Appx. 181, 183, 2008 WL 3307218, *2 (9th Cir. 2008) (citing *Lew v. Moss*, 797 F.2d 747, 749 (9th Cir.1986)).

To establish jurisdiction, the Complainants must show that (1) Respondents provide terminal services, (2) that services are provided to common carriers, and (3) that the charge at issue is related to handling cargo. If there is no jurisdiction, the merits of the case, i.e. the reasonableness of the fee, is not reached and the complaint is dismissed. See *Auction Block Co. and Harbor Leasing, LLC v. The City of Homer*, FMC Dkt. 12-03 (Initial Decision) (ALJ May 20, 2013) (exceptions filed).

Nothing in the record presented so far suggests that the Commission lacks jurisdiction over this matter. It appears that the Port Authority provides terminal services, that those services are provided to common carriers, and that the cargo facility charge is levied upon, and therefore related to, the handling of cargo. One wonders why a Complainant would initiate a proceeding in a venue that it believed did not have jurisdiction.

C. Discussion

Complainants filed a statement of ninety-one material facts not in dispute (“Complainants’ Facts”). Respondent disputed the majority of these facts and provided seventy-seven additional material facts (“Respondent’s Facts”). Complainants filed a reply to the combined 168 facts (“Reply to Facts”).

Respondent disputes many of the material facts in this proceeding. In addition, the parties disagree regarding the legal conclusions to be drawn from the facts. Complainants, in their reply, contend that there are no disputed facts because the evidence speaks for itself and object that other facts include subjective and legal conclusions. For example, Respondents include a material fact that:

The Port Authority determined that the imposition of a single fee rather than three (i.e., a separate Rail Fee, Truck Fee and security fee) would “streamline [the] fee collection process” and more evenly and fairly distribute the costs of roadway, rail, and security improvements across cargo moving through the port.

Respondent Fact 119 (citation omitted). Complainants’ response is that “Complainants do not dispute the quoted description of the Port’s alleged reasoning. Complainants object to the subjective

and legal conclusion that it was in any way 'fair' to charge an ocean common carrier for a service that carrier does not use." Reply to Fact 119 (citation omitted). Whether or not the fee is fair is a fact potentially relevant to the reasonableness of the fee. The parties dispute many other material facts, including whether the ocean common carriers are responsible for the continued movement of containers through the port and the extent to which ocean common carriers benefit from port improvements.

Complainants request that the cargo facility charge be found to violate the Shipping Act as a matter of law. Case law suggests, however, that the Commission must consider "whether the charge levied is reasonably related to the service rendered" and "whether the correlation of that benefit to the charges imposed is reasonable." *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261, 282 (1968). "A charge is unreasonable if it is not reasonably related, either to an actual service performed for, or a benefit conferred upon, the person being charged." *Indiana Port Commission v. Federal Maritime Commission*, 521 F.2d 281, 285 (D.C. Cir. 1975). The D.C. Circuit has remanded cases where the Commission failed to conduct a comparative analysis of the benefits inuring to the several users of the facility." *Baton Rouge Marine Contractors v. Federal Maritime Commission*, 655 F.2d 1210, 1217 (D.C. Cir. 1981).

Complainants seem to argue that fees can only be assessed when a specific service is provided (as opposed to a general benefit) and when the fees fund that specific service (as opposed to a general fund). Case law does not draw such clear lines. The Supreme Court acknowledged that it "may be that a relatively small charge imposed uniformly for the benefit of an entire group can be reasonable under [section] 17, even though not all members of the group receive equal benefits." *Volkswagenwerk*, 390 U.S. at 281. In *Dreyfus*, the Commission said that "there need not be a precise correlation" between costs and fees, although they must be "reasonably related." *Louis Dreyfus Corp. Et. Al v. Plaquemines Corp., Harbor and Terminal District* 25 F.M.C. 59, 69 (F.M.C. 1982). All factors will be considered and weighed to determine the reasonableness of the cargo facility charge.

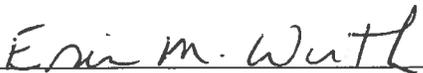
Determination of whether the cargo facility charge violates that Shipping Act requires a comparative analysis of the benefits received by Complainants, including the services provided to the Complainants, and a determination of the reasonableness of the fee imposed. This requires a finding of whether benefits received by shippers or Complainants' affiliates should be taken into consideration, an issue best resolved after discovery and a complete understanding of the relationship between the Complainants and their affiliates. While Complainants contend that they receive no service in return for the cargo facility charge, they do acknowledge receiving a benefit, and the extent of that service/benefit will be a material fact that impacts the ultimate decision. Resolution of these issues will depend on the facts, and implication of the facts, in this case.

The question of whether the cargo facility charge violates the Shipping Act requires an analysis of disputed material facts. Summary decision is only proper if the movant is entitled to a decision as a matter of law, viewing the evidence in the light most favorable to the nonmoving party. Complainants have not established that they are entitled to a decision as a matter of law when the

evidence is viewed in the light most favorable to the opposing party. Accordingly, the motion seeking summary decision is denied.

IV.

For the above-stated reasons, it is hereby **ORDERED** that the motion for summary decision filed by Complainants be **DENIED**.



Erin M. Wirth
Administrative Law Judge