

S E R V E D

July 24, 2013

FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

DOCKET NO. 11-12

**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 PETITION FOR LEAVE TO APPEAL AND MOTION TO STAY

I. Summary

On July 8, 2013, Complainants Kawasaki Kisen Kaisha, Ltd.; Nippon Yusen Kaisha; United Arab Shipping Company (S.A.G.); and Yang Ming Marine Transport Corporation filed a Petition for Leave to Appeal Order Served June 20, 2013 (“Petition for Leave to Appeal”), seeking leave to appeal the Order Denying Complainants’ Motion for Summary Judgment (“Summary Judgment Order”). On July 18, 2013, Respondent Port Authority of New York and New Jersey filed its Reply in Opposition to the Petition for Leave to Appeal (“Petition Opposition”).

On July 11, 2013, Complainants filed a Motion to Stay Discovery Pending Appeal (“Motion to Stay”). On July 18, 2013, Respondent filed its Opposition to the Motion to Stay (“Stay Opposition”). The Motion to Stay will be addressed after discussion of the Petition for Leave to Appeal.

II. Petition for Leave to Appeal

A. Arguments of the Parties

In the Petition for Leave to Appeal, Complainants contend that the Summary Judgment Order “decided this case finally against Complainants on two threshold legal issues” – jurisdiction and “no service, no lawful charge.” Petition for Leave to Appeal at 1, 3. Complainants also object that the Summary Judgment Order did not rule on various other allegations of Shipping Act violations.

Petition for Leave to Appeal at 4. Complainants contend that Commission precedents support review and that the Commission retains jurisdiction over all pending cases. Petition for Leave to Appeal at 6-7. Complainants indicate that they seek review of all issues which have been presented as part of their case. Petition for Leave to Appeal at 10.

Respondent alleges that nearly two years into the proceeding, “Complainants still are finding new ways to avoid producing discovery” and that “Complainants seek to elevate their case to the Commission before the record contains any of the crucial facts that will likely be fatal to their claims.” Petition Opposition at 1. Respondent contends that “a mere denial of summary judgment is almost never a proper basis for an appeal, and Complainants have not even attempted to establish that this case fits within the very narrow exceptions set forth in the FMC Rules and abundant judicial precedent.” Petition Opposition at 1. Respondent asserts that it has not conceded material facts and that the Summary Decision Order did not finally decide issues adversely to Complainants. Petition Opposition at 4.

B. Analysis

The Summary Decision Order, which denied summary decision prior to conducting discovery, was not a final determination of any issue in the proceeding. Regarding jurisdiction, the Order states: “Nothing *in the record presented so far* suggests that the Commission lacks jurisdiction over this matter.” Summary Decision Order at 4 (emphasis added). The Order concludes: “The question of whether the cargo facility charge violates the Shipping Act requires an analysis of disputed material facts.” Summary Decision Order at 5. On the same day the Summary Decision Order was issued, another order in this proceeding granted Respondent’s motions to compel witnesses and documents. *See* June 20, 2013, Order on Discovery Motions.

The Commission Rule most relevant to Complainants’ Petition for Leave to Appeal is Rule 153, which states:

- (a) Rulings of the presiding officer may not be appealed prior to or during the course of the hearing, or subsequent thereto, if the proceeding is still before him or her, except where the presiding officer shall find it necessary to allow an appeal to the Commission to prevent substantial delay, expense, or detriment to the public interest, or undue prejudice to a party.

46 C.F.R. § 502.153(a). “Unless otherwise provided, the certification of the appeal shall not operate as a stay of the proceeding before the presiding officer.” 46 C.F.R. § 502.153(d).

Complainants may not appeal the denial of summary decision as of right because the decision did not finally decide any issues in the case. Complainants fail to address the Rule 153 factors of substantial delay, expense, or detriment to the public interest, or undue prejudice to a party. Complainants were ordered to produce specific discovery relevant to the proceeding and a Protective Order is in place to protect confidential material which may need to be disclosed. Complainants must provide relevant documents and produce relevant witnesses in order for the case to proceed.

It may well be that Complainants' allegation that the cargo facility charge ("CFC") violates the Shipping Act has merit. However, Respondents are entitled to discovery and an opportunity to defend themselves in this proceeding. Once discovery has been completed, the parties will be in a better position to fully brief the issues and the decision will be based on a thorough understanding of the material facts. Sending the proceeding to the Commission without an adequate factual record would delay the proceeding and add additional expense to the parties. Moreover, even if the legality of the cargo facility charge could be decided as a matter of law, to do so without an understanding of the underlying facts would be unwise.

Complainants have failed to establish a need for Commission review at this stage of the proceeding. Accordingly, the Petition for Leave to Appeal is denied.

III. Motion to Stay

In the Motion to Stay, Complainants state:

Complainants assert that the Presiding Officer has: applied the incorrect standard for assessing the reasonableness of a marine terminal operator charge, declined to rule on other facial challenges to the Port's CFC 'Tariff', and incorrectly dismissed Complainants' jurisdictional argument regarding the status and enforceability of the CFC under the Shipping Act. Complainants are seeking Commission review on these issues, which are legal in nature and not dependent on or related to the factual issues targeted for discovery in the Order. A ruling in Complainants' favor on any of these issues would obviate the need for any further discovery. Accordingly, it is appropriate that further discovery (including regarding any expert witness reports, which Complainants will not undertake) be stayed at this juncture.

Motion to Stay at 2.

In their Opposition, Respondent states:

Throughout this litigation, Complainants have engaged in a campaign of delay and obfuscation to prevent discovery into the 'facts' underlying their Complaint. Their Motion to Stay is just their latest attempt. Because discovery of Complainants' integrated global shipping and logistics enterprises—which coordinate the transportation of cargo from its point of origin, across the ocean, through the port's infrastructure, and inland to its ultimate destination—would conclusively demonstrate that Complainants receive substantial services and benefits from the Port Authority infrastructure and security funded by the Cargo Facility Charge ("CFC"), Complainants have done everything they can to get the FMC to decide this case without the benefit of a complete record.

Stay Opposition at 1.

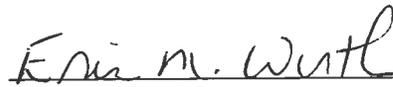
The Motion to Stay requested a stay during the appeal. Since the request for leave to appeal has been denied, the Motion to Stay is moot and will be dismissed. This proceeding has been pending for almost two years and the parties are expected to proceed expeditiously. Complainants may not refuse to participate in the proceeding that they brought. Failure to produce discovery or to meet deadlines may result in sanctions, including dismissal.

IV. Order

For the above-stated reasons, it is hereby

ORDERED that Complainants' Petition for Leave to Appeal Order Served June 20, 2013, be **DENIED**. It is

FURTHER ORDERED that Complainants' Motion to Stay Discovery Pending Appeal be **DISMISSED AS MOOT**.



Erin M. Wirth
Administrative Law Judge