

**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**

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**ORDER ON DISCOVERY MOTIONS**

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This order addresses three pending discovery motions in this proceeding. Separate orders issued concurrently deny the Complainants' motion for summary decision and revise the scheduling order. The dispute centers around a cargo facilities charge ("CFC") imposed by the Port Authority of New York and New Jersey ("Port Authority") on vessel common carriers such as Complainants Hanjin Shipping Co., Ltd.; Kawasaki Kisen Kaisha, Ltd.; Nippon Yusen Kaisha; United Arab Shipping Company (S.A.G.); and Yang Ming Marine Transport Corporation. Familiarity with the proceeding is presumed.

**I. Motion to Compel Contracts in Response to Port Authority's Request No. 27**

On January 3, 2013, Respondent Port Authority moved for an order compelling each of the Complainants to produce copies of certain contracts and agreements in response to document request number 27 of the Port Authority's Second Request for Production of Documents. On January 17, 2013, Complainants filed an opposition to the Respondent's motion to compel.

The Port Authority seeks production of the following three categories of agreements within Complainants' possession, custody, or control:

1. Contracts or agreements with all shippers, including beneficial cargo owners or non-vessel-operating common carriers for ocean and intermodal services to or from the Port of New York and New Jersey;

2. Contracts or agreements with all rail carriers for transportation services to or from the Port of New York and New Jersey; and,
3. Contracts or agreements with all motor carriers for transportation services to or from the Port of New York and New Jersey.

Motion to Compel at 1. The Port Authority contends that the requested contracts are not plainly relevant to this proceeding and Complainants' other objections are without merit. Motion to Compel at 5-10.

Complainants oppose the motion, arguing that the information is not relevant because Complainants do not receive any service for the cargo facility charge and because the cargo facility charge payments are maintained in a general fund. Opposition to Motion to Compel at 1-3. Complainants admit that they provide port to port as well as intermodal through transportation and contend that no discovery is required on these issues. Opposition to Motion to Compel at 3-6. Complainants contend that the specific requested discovery is burdensome and irrelevant and that the production of confidential information is inherently burdensome. Opposition to Motion to Compel at 6-10.

Pursuant to the Commission's Rules, parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." 46 C.F.R. § 502.201(e). However, the Commission Rules also permit the presiding officer, for good cause, to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." 46 C.F.R. § 502.201(j). "It is fundamental that the scope of discovery is not limitless and is restricted by the concepts of relevancy." *American President Lines, Ltd. v. Cyprus Mines Corp. and Cyprus Minerals Co.*, 26 S.R.R. 1227, 1234 (FMC 1994).

An order ruling on a previous motion to compel denied a broader request which encompassed these documents. Given the narrowing of the request and the clarification of the issues, it appears that the revised request is relevant. The issue of whether the Complainants' relationship with their affiliates is too tenuous to justify the cargo facility charge cannot be decided until discovery is complete. Similarly, whether the services and benefits received by Complainants justify the cargo facility charge cannot be determined at this stage of the proceeding. Even if the benefits received by Complainants or their affiliates ultimately are not sufficient to justify the charge, they are relevant to that determination and therefore are discoverable.

Moreover, Complainants cannot refuse to provide discovery on intermodal service on the grounds that the Port already understands their business model. The parties are required to present evidence to support their case and they are entitled to utilize discovery procedures to obtain that evidence, even on issues which they already understand. The Protective Order will protect confidential information and it does not appear that the request is overly burdensome.

The Port Authority has specifically identified improvements to rail, transit, and security to justify imposing the cargo facility charge and Complainants have admitted that they benefit, at least to some extent, from these improvements. Therefore, contracts or agreements with shippers, rail carriers, and motor carriers are relevant and discoverable. Accordingly, the motion to compel production of contracts is granted.

## **II. Joint Motion for Protective Order and Cross-Motion to Compel Witness Production**

On January 4, 2013, Complainants filed a motion seeking a protective order staying Respondent's notices of depositions of each Complainant on the ground that the deposition topics do not cover relevant matters. On January 14, 2013, Respondent filed an opposition to the protective order motion and a cross-motion for an order compelling each Complainant to produce one or more witnesses for a Rule 30(b)(6) deposition.

Complainants urge that the proposed deposition topics be subjected to "rigorous relevancy testing" and contend that the proposed notice topics are barred by irrelevance as well as being overbroad and intrusive into confidential, sensitive, and proprietary business matters. Protective Order Motion at 1-4. Complainants argue that relationships to logistics companies are "pointlessly intrusive" and "not remotely related" to the proceeding. Protective Order Motion at 6. Complainants contend that their ability to pass the cargo facility charge through to others cannot excuse or mitigate a violation of the Shipping Act and goes to "deeply confidential, core business matters." Protective Order Motion at 7-8. Complainants assert that questions regarding the cargo facility charge's impact on its business require revelation of confidential financial information, are not relevant, and are obvious. Protective Order Motion at 8-9. Complainants allege that information regarding express rail and trucking are vague and irrelevant and questions about their document retention and collection procedure should be asked by interrogatory instead of a deposition. Protective Order Motion at 9-10.

Respondent contends that the Complainants' failure to produce witnesses for noticed depositions is inexcusable and that Complainants may not unilaterally decide what is relevant. Opposition to Protective Order Motion at 1-2. Respondent asserts that the deposition topics are highly relevant and that if Complainants occupy the central position in the economic and logistical transport chain, they are the most appropriate parties to be charged the cargo facility charge. Opposition to Protective Order Motion at 5. Respondent states that discovery of the following issues are central to the issue of the reasonable relationship between the cargo facility charge and the benefits received by Complainants: Complainants' relationships with their subsidiary logistics companies regarding transportation of containers at the port; the ability to pass port and terminal charges through to customers; the impact of the cargo facility charge on Complainants' business; and the impact of use of rail and trucking. Protective Order Motion at 6-9. The Respondent also asserts that including questions about document retention and collection in the depositions is efficient.

To determine whether the cargo facility charge is reasonable, it is necessary to determine what services/benefits are received by Complainants. These may be received directly or indirectly, and the parties may present argument on this issue in their final brief. For purposes of discovery, Respondent may inquire about Complainants' relationships with their subsidiary logistics companies regarding transportation of containers at the port; the ability to pass port and terminal charges through to customers; the impact of the cargo facility charge on Complainants' business; the impact of use of rail and trucking; and document retention and collection. Accordingly, the protective order motion is denied and the cross-motion to produce witnesses is granted.

### **III. Omnibus Motion to Quash or Modify Respondent's Five Subpoenas**

On December 24, 2012, Air Tiger Express Companies, Inc.; CyberLogitec Co. Ltd.; Hanjin Logistics, Inc.; "K" Line Logistics (U.S.A.) Inc.; and Yusen Logistics Co., Ltd. (collectively the "Nonparty Affiliates") filed an omnibus motion to quash or modify Respondent's five subpoenas. On January 3, 2013, the Port Authority filed its opposition to the motion to quash.

The Nonparty Affiliates, who are represented by Complainants' counsel, explain that they are "affiliated in some way" with the Complainants. The Nonparty Affiliates contend that the subpoenas probe "core business information of Complainants' non-carrier affiliates and, are all the more disconnected from this dispute than discovery involving the CFC-paying vessel operators." Motion to Quash at 4. The Nonparty Affiliates contend that the deposition topics and document requests are irrelevant and burdensome. Motion to Quash at 5 - 10. In addition, the Nonparty Complainants assert that Federal Rule of Civil Procedure 45 is inapplicable and express threats of civil contempt are intimidating and erroneous. Motion to Quash at 10.

The Port Authority contends that the "targeted discovery regarding the central issue in dispute—whether and to what extent the Complainants benefit from the infrastructure, intermodal services, and security improvements funded by the CFC" is relevant. Opposition to Motion to Quash at 2. The Port Authority also argues that the motion fails to proffer any facts that the requested discovery subjects them to an undue burden and that there are no confidentiality concerns because the confidentiality stipulation between the parties expressly protects Complainants' subsidiaries, affiliates, and third parties. Opposition to Motion to Quash at 2.

Commission Rule 131 permits subpoenas for the attendance of witnesses or the production of evidence, provided that the subpoena is not unreasonable, oppressive, excessive in scope, or unduly burdensome. 46 C.F.R. § 502.131. The *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority* case states that an "administrative subpoena is appropriate and enforceable if it is within the agency's statutory authority, the information sought is reasonably relevant to the proceeding and the demand is not unreasonably broad, too indefinite or burdensome." 29 S.R.R. 1396, 1398 (ALJ 2003) (citations omitted).

In a district court case regarding enforcement of a Federal Maritime Commission subpoena in a private party case, the court first considered the relevance of the requested information, noting the competitively sensitive nature of the information sought, and stated:

This action was not [brought] on behalf of the FMC to enforce its own subpoena, but was brought on behalf of a party to an action before the FMC; in such circumstances, the relevance and the purpose for which the information is sought must be carefully scrutinized. This is especially true where the parties to the enforcement action are business competitors and the information sought is very confidential business information.

*In the Matter of the Petition for the Enforcement of Subpoenas of the Federal Maritime Commission Issued to Jose Diaz/Tioga Fruit Terminal, Inc. and Chilean Line, Inc.*, 28 S.R.R. 90, 92 (E.D. Pa. 1997).

In the case *sub judice*, relevant evidence is being sought from an affiliate or subsidiary of the Complainants, not from an independent nonparty. In addition, the discovery is not being sought by a competitor, rather from a port authority. Indeed, it is the Complainants who are competitors with each other. As discussed previously, discovery regarding the Complainants' relationships with their affiliates and any benefits they receive from the infrastructure, intermodal, or security improvements are relevant and discoverable. Accordingly, the motion to quash is denied.

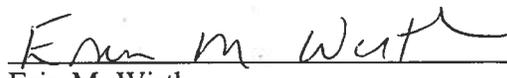
#### IV. Order

For the above-stated reasons, it is hereby

**ORDERED** that Respondent's motion to compel production of contacts be **GRANTED**.

**IT IS FURTHER ORDERED** that Complainants' motion for a protective order be **DENIED** and Respondent's cross-motion to compel witness production be **GRANTED**.

**IT IS FURTHER ORDERED** that the omnibus motion to quash or modify Respondent's five subpoenas be **DENIED**.

  
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Erin M. Wirth  
Administrative Law Judge