

S E R V E D
September 5, 2013
FEDERAL MARITIME COMMISSION

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DOCKET NO. 11-12

**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 ON MOTIONS FOR FINAL JUDGMENT AND TO AMEND COMPLAINT
AND ORDER TO FILE STATUS REPORT**

I. Procedural History

Complainants Kawasaki Kisen Kaisha, Ltd.; Nippon Yusen Kaisha; United Arab Shipping Company (S.A.G.); and Yang Ming Marine Transport Corporation filed this proceeding almost two years ago to contest a cargo facility charge (“CFC”) imposed by Respondent The Port Authority of New York and New Jersey (“Port Authority”).

On June 20, 2013, Complainants’ Motion for Summary Judgment was denied (“Summary Judgment Order”). Also on June 20, 2013, an Order on Discovery Motions granted Respondent’s motion to compel production of contracts and motion to compel witness production (“Discovery Order”). In addition, on June 20, 2013, a Fourth Revised Scheduling Order was issued which required the parties to proceed expeditiously (“4th Scheduling Order”).

On July 8, 2013, Complainants filed a Petition for Leave to Appeal Order Served June 20, 2013, seeking leave to appeal the Order Denying Complainants’ Motion for Summary Judgment. On July 11, 2013, Complainants filed a Motion to Stay Discovery Pending Appeal. On July 24, 2013, the Petition for Leave to Appeal and the Motion to Stay were denied (“Appeal/Stay Denial”).

On August 8, 2013, Complainants filed a Motion for Final Judgment on the Record as it Stands (“Final Judgment Motion”) and a Motion to Amend Complaint (“Amend Complaint Motion”).

On August 15, 2013, Respondent filed a Status Report as required by the 4th Scheduling Order. The Status Report indicates that the Complainants have refused to produce documents or appear for depositions or even to participate in drafting a joint status report, in violation of the 4th Scheduling Order. August 2013 Status Report at 2.

On August 23, 2013, Respondent filed its oppositions to the Final Judgment Motion and Amend Complaint Motion. This Order denies these pending motions and orders Complainants to file a Status Report indicating what progress has been made in discovery. If sufficient progress is not being made, Complainants risk dismissal of their case.

II. Motion for Final Judgment

In their Final Judgment Motion, Complainants contend that:

The Vessel Operators understand the metric imposed by the precedents to be that if a vessel pays the CFC, it must in return have some discrete service bestowed on the vessel by the Port (not by a lessee terminal)- and if it does not pay the CFC, it does not get the Port service. We understand that if this metric is not honored, a charge to the vessel violates the Act. If this understanding of Commission precedent is wrong, or a new rule is to be announced, so be it. We submit the point of litigation before the Commission is to resolve actual disputes and clarify Shipping Act law in the most efficient manner possible. The Vessel Operators are striving to that end.

Final Judgment Motion at 3.

In its Opposition, Respondent asserts that:

Complainants yet again seek an advisory opinion on the very same hypothetical question that they have previously presented, which, as before, is totally divorced from the facts: *if* a vessel were charged a fee, but received no services in connection with that fee, would such a fee violate 46 U.S.C. § 41102(c)? But the CFC is *not* charged to vessels (it is charged to ocean common carriers); the Complainants are *not* mere vessel operators (although they sometimes operate vessels as one aspect of their much larger integrated cargo transportation enterprises); and Complainants *do* receive services, as well as undisputed benefits, in connection with their payments of the CFC, including the ability to transport cargo safely and efficiently through the port facilities by road and/or rail.

Final Judgment Opposition at 1-2 (emphasis in original).

Previous orders addressed Complainants' desire for a summary decision. The Summary Judgment Order states:

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.

Summary Judgment Order at 5.

Complainants' request to stay and appeal the denial of summary decision was denied in an order stating:

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.

Appeal/Stay Order at 3.

Complainants are correct that "the point of litigation before the Commission is to resolve actual disputes." Resolution of actual disputes requires a factual basis on which to make the decision. Complainants' contention that there are no factual disputes remaining after the pleadings are amended is not persuasive. The fundamental factual disputes which prevented the motion for summary judgment continue. This duplicative request, previously denied in two orders, will not be permitted. The proceeding is not ripe for decision until discovery is completed and a decision can be rendered on a full and complete record, as indicated previously.

III. Motion to Amend Complaint

Complainants filed a motion to amend the Complaint with the Amended Complaint. Complainants state that the "purpose of the amendment to the original complaint is to eliminate misunderstanding of the case Complainants are presenting, formally deleting a Shipping Act allegation of section 41106(2) violation, and streamline the complaint." Amend Complaint Motion at 1.

Respondent objects to the motion to amend, arguing that the motion was filed just seven days before the scheduled close of discovery; that it compounds inconsistencies in Complainants' position; and that the Complainants merely make an empty show of formally deleting the discrimination claim that they had already dropped before their last motion for judgment. Amend Complaint Opposition at 1-3. Respondent contends that the deleted section was expressly waived ten months ago and that the amended complaint should not justify a renewed request for final judgment. Opposition at 2-4.

In this case, the hearing schedule has been set and the parties are expected to proceed expeditiously. To the extent that the parties are able to narrow the issues to be litigated, that is encouraged. However, the motion to amend was filed in conjunction with the motion seeking final judgment. Since that motion has been denied, the Complainants will be given an opportunity to determine how best to proceed with a hearing on the merits. If the Complainants and Respondent agree that an amended complaint would economize litigation and narrow the issues to be decided, they may file another motion to amend the complaint. The motion to amend the Complaint is denied without prejudice.

IV. Order to File Status Report

On June 20, 2013, Complainants were ordered to provide discovery and given a deadline of July 8, 2013. Discovery Order and 4th Scheduling Order. The parties were instructed that "Complainants filed this case in August of 2011, almost two years ago. . . . At this point, the parties are expected to proceed expeditiously." 4th Scheduling Order at 1. In addition, the parties were ordered to file monthly joint status reports on the 15th of each month. 4th Scheduling Order at 1.

On July 24, 2013, Complainants' motion to stay was denied in an order which stated: "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." Appeal/Stay Denial at 3.

On August 15, 2013, Respondent filed a Status Report as required by the 4th Scheduling Order. The Status Report states that the:

Port Authority provided Complainants with a draft copy of this status report for their comment and approval, but Complainants' counsel advised that their view is that the parties should not "re-commence the filing of monthly status reports at this time" because, according to Complainants' counsel "the [Presiding Officer] is fully informed of the status of the docket by the motions (and expected responses) she is currently addressing."

August 2013 Status Report at 1. The Status Report further indicates that Complainants have refused to produce documents or appear for depositions, in violation of the 4th Scheduling Order. August 2013 Status Report at 2.

“A scheduling order ‘is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.’” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992) (quoting *Gestetner Corp. v. Case Equipment Co.*, 108 F.R.D. 138, 141 (D. Me. 1985)). Moreover, “[p]arties cannot control an agency’s docket or procedures through agreement among themselves.” *Simmons v. United States*, 698 F.2d 888, 893 (7th Cir. 1983). Under the Commission Rules, the presiding officer has the authority to “regulate the course of the hearing” and to “fix the time for filing briefs, motions, and other documents to be filed in connection with hearings and the administrative law judge’s decision thereon.” 46 C.F.R. § 502.147(a). The authority of courts to control their dockets is well settled. *Link v. Wabash Railroad Co.*, 370 U.S. 626, 630-31 (1962); *United States v. Hughey*, 147 F.3d 423, 429 (5th Cir. 1998).

Complainants initiated this proceeding over two years ago and the parties have been instructed multiple times to move the case along expeditiously. Complainants appear to prefer a ruling regarding the legality of the cargo facility charge without providing additional discovery. As discussed above, in July in the Appeal/Stay Order, and in June in the Summary Decision Order, this issue cannot be resolved without an opportunity for Respondent to obtain discovery and defend itself.

At this point, the Complainants have three options. They may immediately provide the required discovery and proceed to a determination on the merits; they may file a motion to withdraw the Complaint (indicating whether the withdrawal is because of a settlement or for other reasons); or, if they refuse to provide discovery, may have the case dismissed for discovery violations. Complainants are required to file a Status Report indicating which path they intend and indicating whether all required discovery has been provided. Respondent may file its own separate Status Report and may file a motion for sanctions if necessary. The Status Reports shall be filed by September 16, 2013, when the next joint status report is due. In following months, the parties shall file joint status reports. Failure to respond to discovery or failure to file the required status reports may result in dismissal.

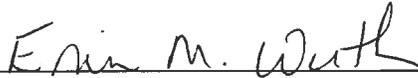
V. Order

For the above stated reasons, it is

ORDERED that Complainants’ Motion for Final Judgment be **DENIED**. It is

FURTHER ORDERED that Complainants’ Motion to Amend Complaint be **DISMISSED WITHOUT PREJUDICE**. It is

FURTHER ORDERED that on or before September 16, 2013, Complainants file a Status Report indicating what progress has been made in discovery.


Erin M. Wirth
Administrative Law Judge