S E R V E D
May 4, 2016
FEDERAL MARITIME COMMISSION

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DOCKET NO. 16-10

RUSH TRUCK CENTERS OF ARIZONA, INC., RUSH TRUCK CENTERS OF CALIFORNIA, INC., RUSH TRUCK CENTERS OF COLORADO, INC., RUSH TRUCK CENTERS OF FLORIDA, INC., RUSH TRUCK CENTERS OF GEORGIA, INC., RUSH TRUCK CENTERS OF IDAHO, INC., RUSH TRUCK CENTERS OF KANSAS, INC., RUSH TRUCK CENTERS OF NORTH CAROLINA, INC., RUSH TRUCK CENTERS OF OHIO, INC., RUSH TRUCK CENTERS OF OKLAHOMA, INC., RUSH TRUCK CENTERS OF TEXAS, LP., RUSH TRUCK CENTERS OF UTAH, INC., ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

v.

NIPPON YUSEN KABUSHIKI KAISHA, NYK LINE (NORTH AMERICA) INC., MITSUI O.S.K. LINES, LTD., MITSUI O.S.K. BULK SHIPPING (USA), INC., WORLD LOGISTICS SERVICE (USA) INC., HÖEGH AUTOLINERS AS, HÖEGH AUTOLINERS, INC., NISSAN MOTOR CAR CARRIERS CO. LTD., KAWASAKI KISEN KAISHA, LTD., "K" LINE AMERICA, INC., WALLENIUS WILHELMSEN LOGISTICS AS, WALLENIUS WILHELMSEN LOGISTICS AMERICAS LLC, EUKOR CAR CARRIERS INC., COMPAÑÍA SUD AMERICANA DE VAPORES S.A., and CSAV AGENCY NORTH AMERICA, LLC

INITIAL ORDER

On April 28, 2016, the Commission issued a Notice of Filing of Complaint and Assignment (Notice) for this proceeding. Commission regulations require the parties to meet and confer to establish a schedule and to consider mediation. The parties must submit a joint status report with proposed schedule, as outlined below, within twenty days of the service of the answer.

Pursuant to the Commission's Order, the initial decision is to be issued within one year. Pursuant to Rule 201(g), "[d]iscovery must be completed within 150 days of the service of a respondent's answer," and pursuant to Rule 201(h), the parties are required to meet and confer:

(a) to establish a schedule for the completion of discovery, including initial disclosures and discovery related to experts; (b) to resolve to the fullest extent possible disputes relating to discovery matters; and (c) to expedite, limit, or eliminate discovery by use of admissions, stipulations, and other techniques. 46 C.F.R. § 502.201. As part of the joint status report, the parties must submit a joint proposed schedule which concludes discovery within 150 days of service of the answer and allows issuance of the initial decision within one year.

Pursuant to Rule 64, within fifteen days of the service of a respondent's answer, the parties "must participate in a preliminary conference with the Commission's Office of Consumer Affairs and Dispute Resolution Services (CADRS) as to whether the matter may be resolved through mediation. The preliminary conference may be conducted either in person or via telephone, video conference, or other forum." 46 C.F.R. § 502.64. The proceeding will not be stayed during the dispute resolution process. In the joint status report, the parties must state whether each party has contacted CADRS and whether the parties have agreed to engage in mediation. The parties are directed *not* to state the parties' positions on whether to agree to mediation or their settlement positions in the joint status report.

In addition, the parties must abide by the following additional instructions:

ADDITIONAL INSTRUCTIONS

Filing

1. Information regarding where to find the Commission's rules of practice and procedure (46 C.F.R. Part 502), Commission decisions, and other information helpful for parties may be found on the Commission's website, at *http://www.fmc.gov/resources/attorneys_litigants.aspx*.

2. The original and proper number of copies of documents must be filed with the Secretary of the Commission as required by newly revised Rule 2 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.2.

3. Parties are encouraged to file documents with the Office of the Secretary via email, priority mail, or overnight mail. In addition to filing with the Secretary, the parties are also encouraged to send courtesy copies to the presiding judge via email at *judges@fmc.gov*.

4. The parties may elect to receive service of the rulings, orders, and decisions in this proceeding through email in lieu of service by U.S. mail. A party opting for electronic service must advise the presiding judge in writing or by email sent to *judges@fmc.gov* and provide the email address where the party wishes to receive service. A party must notify the Commission of any change of service address.

5. *Case citations.* Because the Commission currently uses Lexis, citations to judicial opinions on Westlaw should include a parallel citation to Lexis, if possible. Citations to Commission decisions or rulings may be made to the official F.M.C. reporters, Pike & Fischer Shipping Regulation Reports (S.R.R.), Lexis or Westlaw, or Commission slip opinions or orders by docket number, title, and date of service. Citation to Lexis or Westlaw must include the corresponding S.R.R. citation or the F.M.C. docket number, the title of the case, and the precise date of the ruling. If a document from another source is cited, the decision or ruling must be transmitted via e-mail to *judges@fmc.gov*.

Discovery

6. New rules regarding discovery require initial disclosures within seven days of filing of the answer, limit the number of interrogatories and depositions, and impose time limits to complete discovery. 46 C.F.R. §§ 502.201-502.210.

7. The parties are reminded of their obligation to ensure preservation of all relevant evidence, including electronically stored information. *Zhi Chen v. District of Columbia*, 839 F. Supp. 2d 7, 12 (D.D.C. 2011); *The Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).

8. Discovery materials must not be filed until used in the proceeding. 46 C.F.R. § 502.2(k).

9. Compliance with the date set for completion of discovery requires that the parties serve discovery requests sufficiently in advance of the discovery cutoff so that all responses and objections will be due on or before that date.

10. The parties must provide an electronic copy, in a word processing format, of all discovery requests served and all responses to discovery with the exception of documents produced. Answers, responses, and objections to interrogatories and requests for admissions or for production of documents must identify and quote each interrogatory or request in full immediately preceding the answer, response, or objection thereto.

11. A motion to compel must set forth verbatim the interrogatory or request, the response that the moving party argues is insufficient, a summary of the moving party's attempts to secure a sufficient response, and the moving party's argument on why the response is insufficient. The moving party must provide an electronic copy in a word processing format of the motion to compel with the hard copy of the motion.

    The non-moving party must use the electronic copy of the motion to compel and add any counter-summary of the attempts to secure a sufficient response, then its argument on why the response is sufficient, below the moving party's summary and argument for each response claimed to be insufficient. The non-moving party must provide to the moving party

and to the Presiding Officer an electronic copy in a word processing format of the motion to compel to which it has added its counter-summaries and arguments.

12. A party withholding documents because of an asserted privilege must serve a privilege log that complies with the requirements of Federal Rule of Civil Procedure 26(b)(5)(A).

Motions

13. New rules regarding motions impose time limits, page limits, address replies, and require the parties to confer prior to filing non-dispositive motions. 46 C.F.R. §§ 502.69-502.71.

14. Any request for action by the Commission or presiding officer must be made by motion, not by letter or email request.

15. A party moving for summary decision must include in a separate document a statement of material facts as to which there is no genuine dispute. This document must set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine dispute. Each paragraph must be limited as nearly as practicable to a single factual proposition. Each factual proposition must be followed by an exact citation to evidence that the party contends will establish the fact or demonstrate that it is uncontroverted; *i.e.*, a page number in the Appendix.[1] *See* 46 C.F.R. § 502.221. The party filing Proposed Findings of Fact must provide an electronic copy of the Proposed Findings of Fact in a word-processing format to all parties *and to the Office of Administrative Law Judges.*

16. A party opposing a motion for summary decision must file a responding statement either admitting or disputing each of the facts in the movant's statement. This document must set forth verbatim each material fact to which it responds, then admit or deny the fact. All material facts in the movant's statement that are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation demonstrating the existence of a genuine issue as to the fact. Each proposed finding of fact that the responding party denies must be followed by an exact citation to evidence that the responding party contends will rebut the evidence the proposing party claims supports the fact. An opposing party may also include in the responding statement additional facts that the party contends are material. Each such fact must be stated in separately numbered paragraphs with a citation to the motion record (page in the appendix) establishing the fact or demonstrating that it is controverted. Each paragraph must be limited as nearly as practicable to a single factual proposition. The party filing a Response to Proposed Findings

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[1] Parties must designate specific facts and provide the court with their location in the record. *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 775 (9th Cir. 2002). "General references [to evidence] without page . . . numbers are not sufficiently specific." *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 889 (9th Cir. 2003).

of Fact must provide an electronic copy of the Response in a word-processing format to all parties *and to the Office of Administrative Law Judges*.

17. Each party must prepare and submit with its motion or reply an appendix containing the documentary evidence on which it relies for its claims regarding material facts. The pages of the appendix must be numbered sequentially.

Confidential Material

18. *Stipulation* – The parties may agree and stipulate between themselves regarding treatment of confidential documents and information obtained during discovery that is not filed with the Commission. The parties may, but are not required to, file a courtesy copy of the agreement with the Commission.

19. *Use in the proceeding* – If confidential information is filed in a memorandum or as an exhibit to a dispositive motion or as part of briefing on the merits, it must be accompanied by a motion justifying confidential treatment. This motion must identify each item for which protection is sought and show good cause by demonstrating that the information is a trade secret or other confidential research, development, or commercial information. 46 C.F.R. § 502.201(j)(1)(vii). The burden is on the party seeking to protect the information to show good cause for its protection.

20. *Filing* – Parties should file two versions of confidential filings marked as the "confidential version" and the "public version." The confidential version may be provided to the Presiding Officer by email but should not be filed with the Office of the Secretary by email pursuant to Commission Rule 5. 46 C.F.R. § 502.5.

21. *Marking confidential material* – In the confidential version, confidential information must be conspicuously and clearly marked on each page, for example by highlighting or braces. The public version must indicate on the cover page and on each affected page "Public version – confidential materials excluded." The public version must clearly indicate any omissions, for example with blackout or braces, and its pagination and depiction of text on each page must be identical to that of the confidential version. For example, the confidential filing may read: "On January 1, 2010, Complainant entered into a **{25}** year lease with respondent for a monthly rent of **{$1000}**." The public version would read: "On January 1, 2010, Complainant entered into a {[redacted]} year lease with Respondent for a monthly rent of {[redacted]}."

22. *Exhibits* – Confidential information in exhibits should be marked as above. If marking within the text is not feasible, individual pages may be replaced in the public version with a page indicating that confidential material was excluded. Entire exhibits should not be excluded, only those pages containing confidential material.

23. *Personal information* – Personally identifiable information such as social security numbers, birth dates, and financial account numbers must be redacted pursuant to Commission Rule 13. 46 C.F.R. § 502.13.

Hearing

24. The parties should review Commission Rules 91 through 95 with regard to settlement and prehearing procedure including the submission of prehearing statements.

25. The parties are expected to attempt to narrow the issues and to shorten the proceeding by stipulations. The parties may, by stipulation, agree upon any facts involved in the proceeding. 46 C.F.R. § 502.162. Stipulations should be signed by the parties and may be filed at any point in the proceedings.

26. The answer must indicate whether an oral hearing is requested and the desired place for such hearing. The presiding officer will determine whether an oral hearing is necessary. 46 C.F.R. § 502.63(c)(3).

Erin M. Wirth

Erin M. Wirth
Administrative Law Judge