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August 16, 2016					
FEDERAL	MARITIME	COMMISSION			

FEDERAL MARITIME COMMISSION

DOCKET NO. 16-12

**PRO TRANSPORT, INC., PRO TRANSPORT JACKSONVILLE, INC.,
PRO TRANSPORT SAVANNAH, INC., and PRO TRANSPORT CHARLESTON, INC.**

v.

SEABOARD MARINE OF FLORIDA, INC. and SEABOARD MARINE LTD., INC.

**ORDER DENYING RESPONDENTS' MOTION FOR STAY and
ORDER TO FILE AMENDED COMPLAINT**

I. RESPONDENTS' MOTION FOR STAY IS DENIED.

On May 12, 2016, the Commission issued a Notice of Filing of Complaint and Assignment (Notice) for this proceeding and sent the Complaint and Notice to Respondents. The Complaint alleges that Complainants "provide transportation and transportation services, primarily to and from commercial ports along the southeastern seaboard of the United States" (Complaint ¶ 1), and "act[] as a motor carrier for its customers in the transportation of cargo off loaded from and loaded on ocean carriers . . . and transport[] cargo to [their] customers throughout Florida and other states." (*Id.* ¶ 4.) Respondents "acted as an ocean common carrier, a marine terminal operator, and/or as an agent for an ocean common carrier." (*Id.* ¶ 2.) Respondents have "refused to pay [Complainants for] services" (*id.* ¶ 5) and have "unjustly terminated [their] relationship with Pro Transport such that Pro Transport no longer is transporting cargo for Seaboard as a customer." (*Id.* ¶ 6.) The Complaint alleges that Respondents' actions violate the Shipping Act and that Complainants have been injured by the violations.

Commission rules required Respondents to answer or otherwise respond to the Complaint on or before June 6, 2016. 46 C.F.R. § 502.63(b). On June 3, 2016, Respondents filed an Unopposed Motion to Stay Proceeding Pending Mediation. Respondents stated that Complainants commenced an action against Respondents in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County Florida under the caption and docket number *Pro Transport, Inc., Pro*

Transport Jacksonville, Inc., Pro Transport Savannah, Inc., and Pro Transport Charleston, Inc. v. Seaboard Marine Ltd., Inc., Case No. 16-9612-CA-01 (the state court case). Respondents stated that this proceeding before the Commission “raises many of the same factual and legal issues as the State court case.” (Unopposed Motion at 2.) The judge in the state court case had ordered the parties to engage in mediation and a mediation session was scheduled for June 30, 2016. Respondents stated that “[t]he mediation will cover and hopefully resolve all the issues raised in both the State court and FMC case.” (*Id.*) “Staying this proceeding before the Commission pending resolution of the mediation allows the parties to concentrate on resolving both cases in the near future while in the process conserving the resources of the Commission and the Parties.” (*Id.*) Respondents requested a stay pending completion of the State court ordered mediation on June 30, 2016. (*Id.* at 5.)

The request for stay was granted in an order enlarging the time to July 13, 2016, for Respondents to answer or otherwise respond to the Complaint. The order noted that the Commission had ordered the presiding officer to issue an initial decision in this proceeding by May 12, 2017, and that “[n]o further enlargements to answer will be granted.” *Pro Transport, Inc., Pro Transport Jacksonville, Inc., Pro Transport Savannah, Inc., and Pro Transport Charleston, Inc. v. Seaboard Marine of Florida, Inc. and Seaboard Marine Ltd., Inc.*, FMC No. 16-12 (ALJ June 3, 2016) (Order Enlarging Time to Answer or Otherwise Respond).

On July 13, 2016, instead of answering or otherwise responding to the Complaint, Respondents filed a motion for an indefinite stay of this proceeding. Respondents state that prior to the mediation ordered in the state court case, they sent a letter to Complainants in this proceeding (plaintiffs in the state court case) notifying Complainants that Respondents would be asserting a counterclaim in that case. In response, counsel for Complainants cancelled the mediation.

Respondents contend that the FMC complaint and the state court complaint are based on the same conduct with some additional allegations added in the Commission proceeding “to give a garden variety commercial dispute the appearance of a Shipping Act issue.” (Respondents’ Motion for a Stay at 2.) Respondent rely primarily on *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), and two Commission proceedings, *General Motors LLC v Nippon Yusen Kabushiki Kaisha, et al.*, 34 S.R.R 7 (ALJ 2016), and *SSA Terminals, LLC, et al. v. The City of Oakland*, 32 S.R.R. 107 (ALJ 2010). Respondents contend that because the state court case was filed first, the state court is geographically more convenient to the parties than the Commission, litigation in the state court and in the Commission will result in piecemeal litigation, the alleged nonpayment for services is primarily a state claim, Respondents’ counterclaim in the state case is not a Shipping Act claim, the additional allegations in the Commission complaint “were added solely for purposes of attempting to create a colorable argument with respect to Commission jurisdiction over the complaint,” and the public will not be harmed by a stay, the Commission should stay this proceeding. (Respondents’ Motion for a Stay at 4-7.) Complainants oppose entry of a stay and request oral argument on the motion.

Commission precedent holds that even when there has been prior litigation between the parties, the Commission has an obligation to determine whether an entity has violated the Shipping Act. As summarized in *Anchor Shipping*:

Prior to the commencement of [*Anchor Shipping*], Anchor initiated arbitration as required by the terms of the service contract. An arbitrator from the Society of Maritime Arbitrators conducted the arbitration. After reviewing the evidence, the arbitrator issued a decision addressing issues under the service contract and issues under the Shipping Act. The arbitrator found in favor of Anchor, deducted an amount for freight charges and interest due Aliança, and awarded Anchor a net of \$381,880.59 in damages, interest, legal expenses, and “Allowance for Party costs leading to the interim Award.” *Arbitration between Anchor and Aliança Under Service Contract EC99-0511*, Decision and Final Award at 57 (July 31, 2001). Aliança paid Anchor the amount awarded by the arbitrator.

. . . Anchor commenced [a] proceeding by filing a Complaint with the Commission alleging that Aliança caused injury to Anchor through misconduct in violation of the Shipping Act Aliança moved to dismiss the Complaint for failure to state a claim [T]he presiding administrative law judge granted Aliança’s motion to dismiss *Anchor v. Aliança*, 29 S.R.R. 1047 (ALJ 2002). On May 10, 2006, the Commission vacated the dismissal, granted Anchor’s motion to amend “in part,” and remanded the case for further adjudication. *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 998 (2006). The Commission stated that “[o]n remand, we direct the ALJ to address only those allegations involving Shipping Act violations, and any disputes previously addressed by the Arbitrator that are based upon common law breach of contract claims shall remain binding upon the parties.” *Id.*, at 999-1000.

Anchor Shipping Co. v. Aliança Navegação E Logística Ltda., FMC No. 02-04 (ALJ Apr. 1, 2009) (Initial Decision Granting Request to Dismiss Counter-Complaint), Notice Not to Review, May 4, 2009.

Irrespective of the outcome of the state court case between the parties, the Commission will have the obligation to determine whether the Shipping Act was violated. Therefore, Respondents have not established that this proceeding should be stayed to await that outcome. Respondents’ motion for stay is denied.

II. COMPLAINANTS ARE ORDERED TO FILE AN AMENDED COMPLAINT.

Commission Rule 62 requires a complaint to contain “[a] clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the acts or practices alleged to be in violation of the law, and a statement showing that the complainant is entitled to relief.” 46 C.F.R. § 502.62(a)(3)(iii). Commission Rule 66 states that “[t]he presiding officer may direct a

party to state its case more fully and in more detail by way of amendment.” 46 C.F.R. § 502.66(a). I find that the Complaint fails to inform Respondents or the Commission with reasonable definiteness of the acts or practices alleged to be in violation of the Shipping Act.

First, the Complaint alleges that Respondents “acted as an ocean common carrier, a marine terminal operator, and/or as an agent for an ocean common carrier.” (Complaint ¶ 2.) “The term ‘ocean common carrier’ means a vessel-operating common carrier.” 46 U.S.C. § 40102(17).

The term “marine terminal operator” means a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49.

46 U.S.C. § 40102(14). The Complaint provides no details from which it can be determined whether Complainants contend that Respondents operated the vessels on which the shipments were transported by water between a foreign port and the United States, operated as agent for ocean common carriers that transported the shipments, operated the marine terminal at which the shipments were loaded or discharged, or operated as one of these entities on some shipments and entities on other shipments.

Second, “[t]he Commission ‘is not a court, and cannot rely . . . on the powers of a court of equity. On the contrary, the law is settled that an administrative agency can exercise only those powers conferred on it by Congress.’” *Trans-Pacific Freight Conference of Japan v. FMB*, 302 F.2d 875, 880 (D.C. Cir. 1962). The Commission has jurisdiction over matters relating to “transportation by water of . . . cargo between the United States and a foreign country,” 46 U.S.C. § 40102(6), by a common carrier as defined by the Shipping Act. That jurisdiction essentially begins when a common carrier assumes responsibility for transportation of the cargo and ends when the cargo is delivered to the consignee at the place of destination contemplated by the contract of ocean carriage. *See, e.g., Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23-27 (2004) (finding that federal maritime law applies to the inland portions of international shipments transported under a through bill of lading). *See also, Kawasaki Kisen Kaisha, Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 108 (2010) (finding that ocean transportation occurring under a through bill of lading cannot be separated into ocean and domestic inland transportation); *accord, Mitsui O.S.K. Lines Ltd. v. Global Link Logistics*, 2011 FMC LEXIS 12, 56 (FMC 2011) (“[L]egislative history demonstrates that Congress intended that the Commission have jurisdiction over through transportation including the inland segment of such transportation.”) The Commission must determine whether it has jurisdiction over claims made in a complaint.

Complainants allege that they provide transportation and transportation services to and from commercial ports and act as a motor carrier for their customers in the transportation of cargo off-loaded from and loaded onto ocean carriers. Complainants do not allege and do not provide any details from which it can be determined that they provided this transportation for the inland portions of international shipments pursuant to through bills of lading that originated at a foreign port or point

with delivery at an inland point in the United States, for the inland portions of international shipments pursuant to through bills of lading that originated at an inland point in the United States with delivery at a foreign port or point, or solely pursuant to domestic bills of lading.

Therefore, on or before September 2, 2016, Complainants are ordered to file an amended complaint containing a clear and concise factual statement sufficient to inform each Respondent and the Commission with reasonable definiteness of the acts or practices alleged to be in violation of the law, and a statement showing that Complainant is entitled to relief. Respondents must answer or otherwise respond to the Complaint on or before September 16, 2016. *Compare* 46 C.F.R. § 502.62(b) (answer must be filed within 10 days after service of an order denying a motion to dismiss).

ORDER

Upon consideration of Respondents' Motion for a Stay, the opposition thereto, the record herein, and for the reasons stated above, it is hereby

ORDERED that Respondents' Motion for a Stay be **DENIED**. Complainants' request for oral argument on the motion is dismissed as moot. It is

FURTHER ORDERED, *sua sponte*, that Complainants serve and file an amended complaint on or before September 2, 2016. It is

FURTHER ORDERED that Respondents answer or otherwise respond to the amended complaint on or before September 16, 2016.



Clay G. Guthridge
Administrative Law Judge