

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-30
CONTRACT MARINE CARRIERS, INC.

ORDER

July 6, 1984

This proceeding is before the Commission upon a Motion to Dismiss filed by respondent Contract Marine Carriers, Inc. (CMC). CMC was granted leave to file its motion by the Commission in an order also suspending consideration of this proceeding. The Commission's Bureau of Hearing Counsel (Hearing Counsel) has filed a response in accordance with that order.

BACKGROUND

This proceeding was initiated by order served June 21, 1982, to determine whether CMC's practice of undertaking contract carriage at different rates than those published in its tariffs for the same trade and commodities violates sections 18(b)(3), 16 Second, 17 and 14 Fourth of the Shipping Act, 1916 (1916 Act) (46 U.S.C. § 817(b)(3), 815 Second, 816, and 812 Fourth). By stipulation the matter was submitted for consideration by Administrative Law Judge William Beasley Harris (Presiding Officer) on a written record. The Presiding Officer issued an Initial Decision finding that the Commission had jurisdiction over the contract practices of CMC and that CMC had engaged in practices violative of the 1916 Act. Exceptions to the Initial Decision were filed by CMC; Replies to these Exceptions were filed by Hearing Counsel.

On March 6, 1984 CMC requested that the Commission suspend consideration of the proceeding to permit it time to file a motion to dismiss based on the imminent passage of the Shipping Act of 1984 (1984 Act) (46 U.S.C. app. § 1701 *et seq.*).¹ The Commission granted the request and in so doing directed CMC to address the following specific issues in any motion filed: (1) whether the 1984 Act rendered this proceeding moot; (2) whether the rights of third parties will be affected by dismissal; and (3) whether section 20 of the 1984 Act (46 U.S.C. app. § 1719) is relevant to a final disposition of this case. Hearing Counsel was also instructed to address these matters.

¹The Shipping Act of 1984 was signed into law by the President on March 20, 1984 and by its terms became effective on June 18, 1984.

DISCUSSION

CMC argues that this proceeding should be discontinued as moot and because no regulatory purpose will be served by a disposition of the merits. It alleges that the inclusion of service contracts within the Commission's jurisdiction under the 1984 Act supports its position that they were not within the scope of the 1916 Act. Regulation of CMC's service contracts pursuant to this proceeding would allegedly be premature and contrary to the congressional intent underlying those provisions in the 1984 Act which address "service contracts."

CMC acknowledges the Commission's jurisdiction over its contract practices under the 1984 Act and states its intention to meet the publication requirements of that Act. CMC argues that, although conduct engaged in prior to the effective date of the 1984 Act is subject to the 1916 Act, the assessment of civil penalties is not an issue in this proceeding and there is no evidence that any third parties would be prejudiced or disadvantaged by a discontinuance of the proceeding.

Hearing Counsel opposes dismissal of this proceeding arguing that a regulatory purpose would be served by a decision on the jurisdictional issue presented in this case, *i.e.*, whether the Commission has jurisdiction over "contract carriage" services provided by common carriers. Hearing Counsel also contend that the rights of any unknown third parties would be effectively eliminated by a dismissal of this case.

For reasons stated below, the Commission will grant CMC's Motion to Dismiss. It should be pointed out here, however, that this dismissal is without prejudice to the rights of any third party interest that may have been injured by CMC's past conduct to seek redress for such injuries before the Commission. The discontinuance of this proceeding is in no way to be interpreted as a disposition on the merits of any issues presented in this proceeding or to otherwise limit the right of third parties to file complaints with the Commission based on the conduct at issue in the proceeding.

There is no doubt that certain aspects of this proceeding are moot, *i.e.* any *prospective* proscription of specific conduct by CMC with regards to violations of the 1916 Act. The statutory provisions which the Presiding Officer concluded that CMC had violated, sections 18(b)(3), 16 Second, 17 and 14 Fourth of the 1916 Act, have been superseded by section 10(b) (1-4, 6) of the 1984 Act (46 U.S.C. app. §1709(b) (1-3, 6)).² Although the provisions of section 10(b) (1-4, 6) generally correspond to those of sections 18(b)(3), 16 Second, 17 and 14 Fourth of the 1916 Act, there are some important differences. Section 10(b) (1-3), which carries forward the prohibitions of section 18(b)(3) of the 1916 Act, specifically

²Section 20(a) of the 1984 Act repeals section 18(b) of the Shipping Act, 1916; section 20(b)(2) of the 1984 Act makes sections 14 and 16 applicable only to "common carriers by water in interstate commerce"; section 20(b)(8) of the 1984 Act strikes section 17, first paragraph from the Shipping Act, 1916.

refers to service contracts, thereby recognizing that a carrier may have both tariff rates and service contract rates. Section 10(b)(6), which is a substantial revision of section 14 Fourth, expressly exempts service contracts from the prohibition against unfair or unjustly discriminatory practices. A finding that CMC did not comply with the 1916 Act would clearly be of little value in interpreting the requirements of the 1984 Act.

Nor would any regulatory purpose be served by rendering an opinion on the legality of CMC's past conduct. First, the assessment of civil penalties is not at issue in this proceeding. Second, the record does not disclose any third parties adversely affected by CMC's conduct. Although it is possible that civil penalties could be assessed and that an injured third party come forward at this time, these matters could not be addressed in *this* proceeding unless it is essentially reconstituted.³ Such theoretical contingencies do not appear to justify continued litigation in this case.⁴

There does not appear to be any dispute that contractual arrangements entered into by CMC after March 20, 1984 are subject to public disclosure under the requirements of the 1984 Act.⁵ However, it is not at all clear that the Commission could require CMC to file its present contracts entered into prior to March 20, 1984.⁶ Requiring CMC to undertake alternative

³ See *National Steel & Shipbuilding Co. v. Director, Workers Comp. Pro.*, 616 F.2d 420 (9th Cir. 1980); see also *First Nat. Bank of Bellaire v. Comp. of Currency*, 697 F.2d 683 (5th Cir. 1983).

⁴ CMC alleges that section 20(e)(2) of the 1984 Act applies to complaints filed with the Commission and allows a one-year period within which complaints alleging a violation of the 1916 Act may be filed after the effective date of the 1984 Act. Section 20(e)(2) provides:

(2) This Act and the amendments made by it shall not affect any suit—

(A) filed before the date of enactment of this Act; or

(B) with respect to claims arising out of conduct engaged in before the date of enactment of this Act, filed within one year after the date of enactment of this Act.

While a full discussion of the legal effects of section 20(e)(2) is unnecessary for a proper disposition of CMC's Motion to Dismiss, it is our opinion that section 20(e)(2) was intended only to preserve court antitrust actions and has no application to cases pending before the Commission. H.R. Rep. No. 53, 98th Cong., 1st Sess. 39 (1983).

⁵ CMC submits that its service contracts will eventually be subject to the service contract provisions of the 1984 Act, section 8(c) (46 U.S.C. app. § 1707) which provides:

(c) Service Contracts.—An ocean common carrier or conference may enter into a service contract with a shipper or shippers' association subject to the requirements of this Act. Except for service contracts dealing with bulk cargo, forest products, recycled metal scrap, waste paper, or paper waste, each contract entered into under this subsection shall be filed confidentially with the Commission, and at the same time, a concise statement of its essential terms shall be filed with the Commission and made available to the general public in tariff format, and those essential terms shall be available to all shippers similarly situated. The essential terms shall include—

(1) the origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements;

(2) the commodity or commodities involved;

(3) the minimum volume;

(4) the line-haul rate;

(5) the duration;

(6) service commitments; and

(7) the liquidated damages for nonperformance, if any.

The exclusive remedy for a breach of contract entered into under this subsection shall be an action in an appropriate court, unless the parties otherwise agree.

⁶ Section 20(e)(1) of the 1984 Act (46 U.S.C. app. § 1719) provides:

Continued

remedial actions to preclude the possibility of continuing adverse effects from its *past* practices would be of limited value and would not appear to serve a regulatory purpose.

The only matter of continuing significance raised in this proceeding is the issue of the Commission's jurisdiction over the contract practices now (other than those involving service contracts) of carriers which are also operating as common carriers with tariffs on file. Although CMC has asserted that it will file its service contracts with the Commission in accordance with the 1984 Act, Hearing Counsel is correct in asserting that the 1984 Act does not clearly put to rest all the underlying jurisdictional uncertainties that essentially gave rise to this proceeding. However, as is the case with CMC's alleged violations of the substantive provisions of the 1916 Act, a jurisdictional decision in this case based on circumstances and the law existing prior to June 18, 1984 would be of little value in administering the 1984 Act. The Commission is of the opinion that a rulemaking proceeding, wherein all interested and affected parties may contribute their views, would be a better vehicle to address this remaining issue. It is our intention therefore to initiate such a proceeding by separate order.

THEREFORE, IT IS ORDERED, That the Motion to Dismiss filed by Contract Marine Carriers, Inc. is granted; and,
IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

Each service contract entered into by a shipper and an ocean common carrier or conference before the date of enactment of this Act may remain in full force and effect and need not comply with the requirements of section 8(c) of this Act until 15 months after the date of enactment of this Act.

CMC cites the following passage of the legislative history of the 1984 Act as explanatory of the Congressional intent underlying section 20(e)(1):

The Committee's intention in this, as well as other sections of the act is to institute changes in liner shipping regulations and practices without undue or unnecessary economic disruption. S. Rep. No. 3, 98th Cong., 1st Sess. 42 (1983).