

ORIGINAL

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(February 12, 2002)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

February 12, 2002

DOCKET NO. 99-24

CARGO ONE, INC.

v.

COSCO CONTAINER LINES COMPANY, LTD.

VOLUNTARY DISMISSAL OF COMPLAINT GRANTED

Complainant Cargo One, Inc. ("Cargo One") and respondent COSCO Container Line Company, Ltd. ("COSCO") voluntarily stipulate to a dismissal of this complaint with prejudice and without costs to either party pursuant to Rule 12 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 501.12, and Federal Rule of Civil Procedure 41(a)(1)(ii).

By complaint filed November 19, 1999, Cargo One alleged that COSCO breached a service contract and thereby violated sections 1 O(b)(1), 1 O(b)(d), 1 O(b)(6)(E), 1 O(b)(11), 1 O(b)(12), and 1 O(d)(1) of the Shipping Act of 1984 ("1984 Act"). COSCO filed a motion to dismiss the complaint

which was denied in *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1353 (ALJ 2000). (The Bureau of Enforcement (“BOE”) had earlier been allowed to intervene, 28 S.R.R. 1349 (ALJ 2000).)

COSCO filed a motion for leave to appeal the denial of its motion to dismiss which was granted, in 28 S.R.R. 1363. The Commission issued an “Order” vacating the order denying COSCO’s motion to dismiss and remanded the proceeding to the Administrative Law Judge, 28 S.R.R. 1635.

In a letter dated December 21, 2000, BOE, as an intervenor and officer of the court, succinctly summarized the Commission’s order addressing, *inter alia*, whether *Vinmar v. China Ocean Shipping Co.*, 26 S.R.R. 420 (1992), had continuing vitality. The letter is so valuable that it was incorporated into the transcript of the subsequent prehearing conference in this proceeding. Its salient aspects appear next for convenience:

The Commission’s Order is a significant departure from a line of cases beginning with *Vinmar, Inc. v. China Ocean Shipping Co.*, 26 S.R.R. 420 (1992) (“*Vinmar*”).² That line of cases had interpreted section 8(c) of the Shipping Act of 1984, 46 U.S.C. app. § 1707(c) (“Act”), very broadly as precluding Commission jurisdiction over complaints alleging violations of the Act on the basis of facts which also appeared to support an action for breach of a service contract.’ As the Order noted, at p. 27: [28 S.R.R. at 1643]

²In addition to *Vinmar*, those cases include *DSR Shipping Co., Inc. v. Great White Fleet, Ltd.*, 26 S.R.R. 627 (1992), and *Western Overseas Trade and Dev. Corp. v. ANERA*, 26 S.R.R. 874 (1995).

²Section 8(c) provides, in pertinent part, that “[t]he exclusive remedy for breach of contract entered into under this subsection shall be an action in an appropriate court, unless the parties otherwise agree.

[I]t is the Commission's experience under the Shipping Act that strict deference to some of the language in *Vinmar* may have eviscerated other statutory rights and remedies envisioned by that legislation. For that reason, we ultimately concur with Cargo One and BOE that the sweeping pronouncements enunciated in *Vinmar* should be revisited and reconsidered.

In revisiting and reconsidering *Vinmar* and its progeny, the Commission drew a distinction in the instant proceeding between alleged violations of section 10(b)(1) and 10(b)(3) of the Act, on the one hand, and violations of sections 10(b)(6)(E), 10(b)(11), 10(b)(12), and 10(d)(1), on the other. With respect to the former sections, the Commission created a presumption that such allegations should be dismissed as within the exclusive jurisdiction of the courts under contract law. Specifically, the Order states:

[S]ections 10(b)(1) and (3) [footnote omitted] are premised on the obligation to meet one's contract commitments, and are therefore essentially breach of contract actions which section 8(c) renders not properly before the Commission in the absence of evidence offered by complainant (as the party bearing the burden of proof) that some extraordinary aspects of the allegation distinguish it substantially from a breach claim. *Id.* at 35-36 [28 S.R.R. at 1645]

With respect to the latter allegations, which involve unfair or unjustly discriminatory practices, undue or unreasonable preferences, undue or unreasonable prejudice or disadvantage, and just and reasonable regulations and practices, the Commission found that these are "inherently related to Shipping Act prohibitions and are therefore appropriately brought before the Commission." Order, at 36. [28 S.R.R. at 1645] Moreover, the Commission pointed out that the courts which are more properly equipped to address breach of contract actions, "are not authorized to address Shipping Act matters exclusively within the Commission's jurisdiction." *Id.* Then, finding that no remedy for such violations would be provided in a breach of contract action, and that reliance on Commission-instituted investigations to pursue such violations would "eviscerate the reparations remedy afforded complainants by the statute," the Commission found "that the ALJ should proceed to consider these claims." *Id.* at 36-37 [28 S.R.R. at 1645] (Emphasis supplied [by BOE].)

Based upon this language, and the remainder of the Commission's Order at p.37 [28 S.R.R. at 1645], it seems clear that the Commission intended that the ALJ dismiss the complaint herein as to sections 10(b)(1) and (3) of the Act unless complainant can rebut the presumption that these allegations are "essentially breach of contract actions which section 8(c) renders not properly before the Commission...." *Id.* at 37 [28 S.R.R. 1645]. It seems equally clear that the Commission intended that the ALJ afford complainant the opportunity to proceed expeditiously with its claims under sections 10(b)(6)(E), 10(b)(11), 10(b)(12), and

10(d)(1). The Order not only states as much at p. 37 [28 S.R.R. 1645], but, as noted by complainant, the Commission then established a date of June 20, 2001, for issuance of the initial decision. This deadline will be hard to meet under the most expeditious procedures, and clearly impossible if the proceeding is conducted in phases, the first of which is focused solely on reconsideration of the respondent's motion to dismiss.³

The Order does contain a footnote which indicates that “[t]he presumption that a section 10(b)(6)(E), (11), (12), or (d)(1) violation is appropriately brought before the Commission is a rebuttable one, subject to the assessment by the administrative law judge of the facts alleged.”⁴ BOE submits that this note merely restates established law - that jurisdiction can always be challenged at any stage of any proceeding.⁵ The fact that there is a presumption in favor of Commission jurisdiction over such complaints is the unusual aspect of this decision, not the acknowledgment that such jurisdiction can be challenged on the basis of later facts. The right to rebut the presumption cannot be leveraged by respondent into a right to prevent complainant from pursuing its complaint on the merits.

As a general rule, the Commission has found that any issue related to jurisdiction over the parties and the subject matter of a case must be resolved before reaching the merits.⁶ However, the Commission has recognized two exceptions to this general rule, the first of which arises in a situation where a determination on the merits is essential to a determination of jurisdiction because the facts underlying both issues are intertwined.⁷ In the instant case, both the ALJ and the Commission have addressed the jurisdictional issue raised by respondent and have determined to proceed to the merits of the allegations involving matters such as unjust discrimin-

³This motion has already been the subject of a decision by the ALJ, a second decision on a motion for leave to appeal, and a decision by the Commission on appeal, all of which has consumed most of the first year of this proceeding.

⁴*Id.* at 37, note 17. [28 S.R.R. at 1645]

⁵*New Orleans Steamship Association v. Plaquemines Port*, 23 S.R.R. 1363, 1371 (1986) (Jurisdictional issues may be raised at any phase of the adjudicative process because the question goes to the basic authority of the tribunal to entertain the case.); 2 *Moore's Federal Practice* § 12.30[1] (3d ed.); *See also Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908) (Court must dismiss for lack of subject matter jurisdiction even if neither party raises issue.)

⁶*Government of the Territory of Guam, et al. v. Sea-Land Service, Inc., et al.* 28 S.R.R. 252,265 (1998).

⁷*River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.* 28 S.R.R. 751, 762 (1999), citing *GovGuam, supra*. *See also Kawasaki Kisen Kaisha, Ltd. v. Intercontinental Exchange, Inc.*, Order to Show Cause Why Complaint and Counter-Complaint Should Not Be Dismissed for Lack of Jurisdiction, ___ S.R.R. ___ (ALJ August 3, 2000). The second exception is discussed in those cases but is irrelevant here.

ation, unreasonable prejudice, and unreasonable practices. If there are facts which would permit respondent to rebut the presumption of jurisdiction over these allegations, it would appear that those facts are intertwined with those relating to the merits of these complaints. For example, the reasonableness of respondent's practices may well involve obligations under complainant's and other shippers' contracts which could bear on the jurisdictional question.

On August 29, 2001, the parties were directed to consult with Mr. Ronald D. Murphy, the Commission's ADR Specialist:

This proceeding has been before the Commission since November 17, 1999, and it has been since October 31, 2000, that the case was remanded to this office. On August 20, 2001, the Commission promulgated a new rule expanding its Alternative Dispute Resolution ("ADR") services, 66 Fed. Reg. 43,511. Among other things, the rule provides that the presiding judge may direct parties to consult with the Commission's ADR Specialist about the feasibility of utilizing ADR to resolve a case, 46 C.F.R. § 502.91(d). This is clearly the appropriate vehicle for this proceeding at this time. It is strongly urged that the parties take advantage of this procedure to settle this proceeding now.

Therefore, I am exercising my authority under 46 C.F.R. § 502.91(d) and directing the parties to consult with the Commission's ADR Specialist, Mr. Ronald D. Murphy [footnote omitted], about utilizing alternative means of dispute resolution to resolve this proceeding and to file a status report of that effort no later than 3:30 p.m. on September 7, 2001. It is so ordered.

The parties thereafter consulted with Mr. Murphy and have now agreed to voluntarily dismiss the complaint. There is precedent for that course of action. See Docket No. 99-04, *Shipco Transport, Inc. v. Inter-Maritime Container Lines, Inc.* (Voluntary Dismissal of Complaint Granted) (ALJ; administratively final December 20, 2001, unreported), citing Docket No. 94-05, *Maritrend, Inc. v. The Galveston Wharves*, Order Approving Stipulation of Dismissal with Prejudice on Condition, July 18, 1994 (ALJ; administratively final August 19, 1994, unreported), and *So. Pacific*

Trans. Co. and Atchison, Topeka and Santa Fe Rwy. Co. v. Port of Long Beach, 27 S.R.R. 690 (1996). See also Docket No. 95-12, *International Freight Forwarders & Custom Brokers Association of New Orleans, Inc., et al. v. Latin American Shippers Service Association, et al.*, March 12, 1996 (ALJ; administratively final April 17, 1996, unreported).

In the circumstances, it is clear that the parties' request to terminate this proceeding at this juncture is well-deserving, amply supported, and will be granted without prejudice and without costs' to either party.

IT IS ORDERED:

The complaint is dismissed without prejudice.


Frederick M. Dolan, Jr.
Administrative Law Judge

¹The Commission is without jurisdiction to award costs. *Global Transporte Oceanico S.A. v. Coler Ocean Independent Lines Co.*, 28 S.R.R. 1162, 1163, footnote 5 and cases cited therein.