

ORIGINAL

(S E R V E D)
(July 20, 2005)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

July 20, 2005

DOCKET NO. 04-09

AMERICAN WAREHOUSING OF NEW YORK, INC.

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

DOCKET NO. 05-03

AMERICAN WAREHOUSING OF NEW YORK, INC.

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RULINGS ON MOTIONS

MOTION FOR CONSOLIDATION OF DOCKETS 04-09 and 05-03

The complainant, American Warehousing of New York, Incorporated (American Warehousing) filed its first complaint (FMC Docket no. 04-09) against the respondent, Port Authority of New York and New Jersey (Port Authority) on August 5, 2004, alleging violations of the Shipping Act of 1984, 46 U.S.C. App. 1700 et seq. (Shipping Act). American Warehousing filed its second complaint against the Port Authority (FMC Docket no. 05-03) on June 13, 2005.

Both complaints arise from the parties' dispute over American Warehousing's occupancy of Pier 7 at the Brooklyn Marine Terminal. The Port Authority has brought a petition in the Civil Court of the City of New York, County of Kings, seeking eviction of American Warehousing from Pier 7. The presiding judge in the Kings County proceeding issued an order on February 23, 2005 staying that proceeding pending the outcome of Docket 04-09 before the Commission.

In Complaint 05-03 American Warehousing alleges that the Port Authority has committed additional violations of the Shipping Act since February 23, 2005, and that these actions were motivated by a desire to retaliate against American Warehousing for having successfully obtained a stay in the Kings County eviction action.

By letter motion the Port Authority has moved for consolidation of the two pending actions. American Warehousing has opposed the motion to consolidate. Rule 148 of the Commission's rules provides that two or more proceedings "which involve substantially the same issues" may be consolidated and heard together.

An important part of American Warehousing's theory of the case in both complaints is that the actions complained of are motivated by animus against American

Warehousing and that this motivation tends to show that the actions complained of are “unreasonable” within the meaning of the Shipping Act. Much of the evidence sought during the lengthy course of discovery in Docket 04-09 was intended to obtain evidence for the existence of this animus and much of the several hundred pages of evidence recently submitted by American Warehousing in its case in chief in Docket 04-09 has been offered to show evidence of that animus.

The parties and the facility involved are the same in both pending actions. The broad issue of whether the Port Authority’s actions against American Warehousing are unreasonable and therefore in violation of the Shipping Act is the same in both actions. The primary difference is chronological. Docket 05-03 alleges acts that took place after Docket 04-09 was filed, and alleges an additional source of unreasonable motivation for those acts.

The thrust of the second complaint is that the Port Authority, which was already dealing unreasonably with American Warehousing because of hostility that already existed, acquired an additional basis for its hostility when American Warehousing successfully obtained a stay in the Kings County proceeding. The acts complained of in Docket 05-03, like those in Docket 04-09, are asserted to be motivated by a desire to harm the business interests of American Warehousing. The second complaint alleges more recent acts, by the same respondent, against the same claimant, over the same piece of property, resulting from the same general motivation, although that general motivation is asserted to be supplemented by a recent additional source of hostility. Under these circumstances, Dockets 04-09 and 05-03 are found to involve “substantially the same issues” and are ordered to be consolidated for decision.

MOTION FOR SUMMARY JUDGMENT IN DOCKET 04-09

The Port Authority has submitted a motion for summary judgment and dismissal in Docket 04-09. American Warehousing has opposed this motion.

Docket 05-03, on which discovery has not been conducted and evidence not submitted, has now been consolidated with Docket 04-09 and this was done on the motion of the party that is seeking summary judgment in the first complaint. If summary judgment were granted in Docket 04-09 much of the evidence already submitted for that complaint, particularly on the issue of improper animus, would be relevant on Docket 05-03. The policy of judicial economy that underlies motions for summary judgment would be less well served in the present case than in the ordinary case in which all disputes between the parties are before the forum in a single action.

Furthermore, for purposes of this motion the evidence must be construed in the light most favorable to the non-moving party. Viewed in that light, the evidence submitted by American Warehousing satisfies the threshold required to defeat a motion for summary judgment. Accordingly, the Port Authority's motion for summary judgment and dismissal is denied.

DISCOVERY IN DOCKET 05-03

American Warehousing alleges in Docket 05-03 that the Port Authority has violated the Shipping Act since February 23, 2005 by

1. hampering operations at American Warehousing, specifically by such actions as harassing and delaying trucks and other vehicles and limiting access to piers operated by American Warehousing;

2. delaying and/or denying berths to ships at American Warehousing. The specific case cited involved a ship that was allegedly prevented from discharging its cargo at Pier 7 on June 9, 2005;
3. attempting to convince clients of American Warehousing to take their business elsewhere;
4. attempting to double the rent on Pier 7. This allegation refers to a motion in the pending Kings County proceeding dated April 29, 2005. In that motion the Port Authority requested that the court require payment of use and occupancy during the stay ordered on February 23. In support of this motion the Port Authority asserted that American Warehousing's expired lease covered half of Pier 7, that American Warehousing was occupying the entire pier, and submitted a figure that it asserted was appropriate for the court to order as payment for use and occupancy of the entire pier while the stay was in effect.
5. engaging in various discriminatory, retaliatory, or irrational behavior. Examples cited in the complaint include selectively and disparately enforcing against American Warehousing operations rules in regard to movement of containers and empty pallets.

As noted above, the issues in both complaints are broadly similar. Docket 04-09 alleged acts by the Port Authority and motivations that rendered those acts unreasonable within the meaning of the Shipping Act. Judge Schroeder, who was formerly assigned to that complaint, granted a lengthy period of discovery, which has now been completed, and all of the evidence that American Warehousing could obtain through discovery of both the acts complained of and their motivation has been submitted.

In the second complaint American Warehousing has alleged further acts (summarized above) during a period of approximately four months, and one additional motivation for those acts, supplementing the pre-existing animus that is alleged to have motivated the acts in the first complaint. Presenting American Warehousing's case in chief on Docket 05-03 is thus a matter of showing the occurrence of the acts alleged and of the source of the additional animus that has been alleged.

The additional source of animus alleged in Docket 05-03 is the stay issued in the Kings County proceeding. No discovery is needed to show that this took place. The February 23 order of the Court is in the possession of both parties and has been provided to the Commission.

Item 4 from the list above is a motion submitted to the Court in the Kings County proceeding. Whether the filing of that motion is a violation of the Shipping Act is a matter that both sides are free to argue, but no discovery is needed to establish that the motion was filed.

The other actions alleged between February and June 2005 (impeding trucks, preventing a ship from discharging cargo, contacting customers, etc.) are matters apparently witnessed by employees and/or customers of American Warehousing. From the nature of the allegations it appears that the evidence to prove that they occurred is at least as available to American Warehousing as to the Port Authority, and perhaps more so.

The allegations in Docket 05-03 supplement those already made in Docket 04-09, in which discovery has been lengthy. The complainant has received and submitted to the Commission a substantial quantity of documentation.

Counsel for both parties have forcefully asserted the prejudice that their clients face from continued delay in this matter. The Port Authority alleges that delay is costing it both the rent for Pier 7 that American Warehousing owes and higher rent from a potential new tenant. American Warehousing alleges that the Port Authority's actions in denying it a long-term lease, impeding its operations, and urging its customers to take their business elsewhere are costing it business and threaten to drive it out of business. It

is impossible at this stage of the proceeding to make any determination as to the credibility of these allegations, but the fact that they have been made underscores the strong interest both parties have in resolving this matter quickly.

Since both parties profess an interest in prompt disposition, and the allegations are supplemental to an original complaint that has already been exhaustively investigated by both sides, the following expedited schedule is directed in Docket 05-03:

Discovery will be closed on August 22, 2005

Prehearing statements in accordance with Rule 95 will be filed September 2, 2005

Complainant and respondent will exchange written direct evidence by September 16, 2005

Complainant and respondent will exchange written rebuttal evidence by September 30, 2005. At this time both parties will furnish two copies of all written evidence to the Judge.

No later than October 10, 2005 each party shall provide written notice to the other party and to the Judge of their views on which, if any, witnesses will be required to be available for cross-examination. If cross-examination of any witnesses is found to be necessary a hearing, to be held in New York, will be scheduled.



Kenneth A. Krantz
Administrative Law Judge