

FEDERAL MARITIME COMMISSION

ANCHOR SHIPPING CO. V. ALIANÇA
NAVEGAÇÃO E LOGÍSTICA LTDA.

Docket No. 02-04

Served: May 10, 2006

BY THE COMMISSION: A. Paul ANDERSON, Joseph
BRENNAN, Harold J. CREEL, Jr., Commissioners.
Steven R. BLUST, Chairman, Rebecca F. DYE,
Commissioner, concurring.

Order Vacating ALJ's Dismissal Order and Remanding Proceeding for Further Adjudication

INTRODUCTION

The above-captioned proceeding was initiated by a complaint filed by Anchor Shipping Co. ("Anchor" or "Complainant") against Aliança Navegação E Logística Ltda. ("Aliança" or "Respondent"). Anchor, a non-vessel-operating common carrier ("NVOCC"), alleges that Aliança, an ocean common carrier, violated numerous sections of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. app. § 1701 *et seq.*, during the course of its service contract with Anchor. Anchor seeks \$1,000,000 in reparations.

Prior to filing this complaint with the Federal Maritime Commission ("FMC" or "Commission"), Anchor initiated an

arbitration proceeding, as required by the terms of its service contract. An arbitrator from the Society of Maritime Arbitrators conducted the arbitration. After reviewing the evidence, the arbitrator issued a decision, which addressed both contractual and Shipping Act issues, as requested by Anchor. The arbitrator awarded Anchor over \$381,000, which Aliança has paid.

Following the issuance of the arbitrator's decision, Anchor filed its complaint with the Commission. Aliança, in turn, filed a motion to dismiss in which it made several assertions. Aliança argued for dismissal akin to the grounds stipulated in Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Aliança also asserted an affirmative defense of issue preclusion or collateral estoppel in its motion. Aliança argued that Anchor should be precluded from bringing this complaint before the Commission, as the contentions in Anchor's complaint had already been ruled upon in binding arbitration.

The Administrative Law Judge ("ALJ") issued an Order ("Order") dismissing Anchor's complaint and denying its motion to amend the complaint. The ALJ stated that the policy of the law, as well as the Commission's regulations, encouraged the finality of arbitration awards. Anchor Shipping Co. v. Aliança Navegação E Logística, 29 SRR 1047 (ALJ 2002). The ALJ also found that it would be unfair and unjust to allow Anchor to litigate a claim already settled in arbitration and that it would be equally unfair to allow Anchor to bring new parties into a dispute that had already been settled.

Following the ALJ's ruling, Anchor filed its appeal in which it argues, *inter alia*, that in the arbitration Anchor did not raise all of the issues relating to Shipping Act violations; the arbitrator's decision limited the award to breach of contract issues, thus relinquishing to the Commission any authority to find violations of the Shipping Act; and disallowing Anchor from bringing a formal complaint before the Commission would be "unjust and unfair," as

Anchor would be precluded from being awarded reparations resulting from any Shipping Act violations. Anchor's Appeal at 4. In its appeal, Anchor also requests an oral hearing, should the Commission determine that one is necessary.

Aliança filed a reply to Anchor's appeal, in which it argues that the Order is properly grounded in the reasons given for the dismissal, as Anchor already raised the same alleged facts and claims before an arbitrator and was awarded damages that would exceed those that the Commission could award. Aliança's Reply at 1-2.

This proceeding is before the Commission on appeal for the purpose of determining whether the ALJ properly granted Aliança's motion to dismiss and denied Anchor's motion to amend the complaint, and whether the Commission should grant Anchor an oral hearing in this proceeding. For the reasons set forth below, we vacate the ALJ's Order dismissing Anchor's Complaint and denying its motion to amend the complaint, and remand the proceeding to an ALJ for further adjudication. Further, we grant Anchor's motion to amend its complaint and deny Anchor's request for oral argument.

BACKGROUND

A. Arbitration Decision

On July 31, 2001, arbitrator Lucienne Carasso Bulow ("Arbitrator") issued a Decision and Final Award in the Anchor Shipping Co. v. Aliança Arbitration. The Arbitrator ruled that Aliança breached the service contract in several ways. Based on a review of the evidence, the Arbitrator concluded that Aliança was not satisfied with the contract from its inception and tried to avoid performance pursuant to the contract's terms.

The Arbitrator found that Anchor was entitled to reimbursement for freight rate differentials it had to pay other ocean

common carriers to ship cargo versus shipping the same cargo under the service contract, as well as reimbursement for other related expenses it incurred as a result of Aliança's failure to perform pursuant to the terms of the contract. The Arbitrator ruled further that Anchor was entitled to lost profits on cargoes that it would have shipped if Aliança had not breached the service contract. Arbitration Decision at 46.

Ultimately, the Arbitrator awarded Anchor \$381,880.59 in damages, which reflected the freight differential on refused bookings, freight differential/lost profits, reimbursement of expenses, 8.75% interest from May 6, 2000, to the date of the award, compensation for time spent preparing claims and submissions from November, 1999 to February, 2000, and reasonable legal expenses.

B. Positions of the Parties

1. Anchor's Complaint and Motion to Amend the Complaint

On March 7, 2002, Anchor filed its complaint. On April 1, 2002, Anchor filed a motion to amend the complaint.¹ Anchor alleges that Aliança and the other named respondents violated numerous sections of the Shipping Act. Anchor seeks reparations pursuant to section 11 of the Shipping Act, as well as imposition of civil penalties pursuant to section 13.² The majority of Anchor's

¹In its motion to amend the complaint, Anchor moves to add the following respondents to its complaint: Crowley American Transport, Inc., Columbus Line Inc., and Hamburg Sudamerikanische Dampfschiffahrt [sic]. Motion to Amend Complaint at 2.

²Section 11(g) provides, in relevant part, that: "[f]or any complaint filed within 3 years after the cause of action accrued, the

allegations directly relate to the breach of contract claim. Anchor also alleges that Aliança used its influence within the shipping industry to coerce Anchor into accepting rate increases, reductions in volume allowed under the contract, and other unilateral amendments. Complaint at 2. Anchor asserts that it was coerced into accepting unwarranted amendments to the contract and that Aliança and the other named respondents were involved in concerted actions in violation of section 10(c) and were operating under unfiled agreements.³ Anchor contends that Aliança knowingly allowed a meritless case to go to arbitration, causing Anchor to undergo “hardships and financial fatigue.” *Id.* at 5. Anchor also alleges that Aliança’s representatives “misconducted themselves” during the arbitration. *Id.* at 6-7. Anchor contends further that while it received an arbitration award, it has suffered and continues to suffer consequential damages not covered by the arbitration award.

2. Aliança’s Motion to Dismiss

In its motion to dismiss, Aliança makes several contentions, but the crux of its motion is that Anchor’s complaint should be dismissed as the issues have already been ruled upon in binding

Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury . . . caused by a violation of this Act plus reasonable attorney’s fees[.]” 46 U.S.C. app. § 1710(g). Section 13 provides, in relevant part, that: “[w]hoever violates a provision of this Act, a regulation issued thereunder, or a Commission order is liable to the United States for a civil penalty[.]” 46 U.S.C. app. § 1712(a).

³Under section 3(1), an “agreement” means an understanding, arrangement, or association (written or oral) and any modification or cancellation thereof; but the term does not include a maritime assessment agreement. 46 U.S.C. app. § 1702(1).

arbitration. Aliança contends that all the sections of the Shipping Act Anchor cites in its complaint “were present in the arbitration.” Aliança’s Motion to Dismiss at 9. Aliança avers that the Arbitrator found that Aliança violated certain sections of the Shipping Act and referred to section 8(c) for the authority to apply a certain measure of damages.⁴ *Id.* at 6.

Aliança argues that Anchor’s claims for reparations were either made or could have been made in the claim for damages in the arbitration. Aliança claims that the consequential damages that Anchor now seeks could have been awarded in the arbitration, if Anchor had been able to prove that they were incurred as a result of Aliança’s breach of the service contract.

Aliança avers that an order dismissing the complaint is proper in this instance. Aliança asserts that there are only two contentions in the complaint that were not raised previously in the arbitration: (1) whether Aliança arranged for its affiliated carrier to offer Anchor a service contract as a means of switching Anchor from using Aliança’s service contract; and (2) whether Aliança, through its counsel, allowed meritless objections to cause this arbitration. Aliança claims that it is not a violation of the Shipping Act to arrange for a service contract to be offered, as carriers are encouraged to offer service contracts to shippers; and that the second allegation regarding Aliança’s alleged misconduct during the arbitration is solely an attack on counsel.

Lastly, Aliança contends that section 8(c) of the Shipping Act bars this dispute from coming before the Commission, as the service contract provided that any dispute arising from the service

⁴The Arbitrator found that Aliança’s conduct in breaching the service contract also violated sections 8(c)(2), 10(a)(3), 10(b)(2), 10(b)(3), and 10(b)(10). 46 U.S.C. §§ 1706 (c)(2), 1709 (a)(3), 1709 (b)(2), 1709 (b)(3), and 1709(b)(10).

contract would be before an arbitrator. Aliança contends further that the portions of the complaint that allege violations of sections 6, 7, and 9 of the Shipping Act should be dismissed, as those sections are inapplicable in this matter.⁵

3. Anchor's Reply

Anchor claims that if its motion is granted, its complaint and amended complaint more than adequately set forth the cause(s) of action upon which relief can be granted. It is Anchor's contention that even if allegations of Shipping Act violations were raised for the purpose of establishing "motive, premeditation or general antecedents," they would still need to be brought before the Commission for "enforcement of penalties or reparations, under any set of circumstances." Anchor's Reply at 2. Anchor argues that the service contract was drafted in accordance with the Shipping Act and FMC regulations and that it is also governed by New York law. Anchor argues further that any issues raised to establish motive for the breach of a service contract are not precluded from being brought before the Commission for resolution, including the awarding of reparations as well as the assessment of civil penalties.

Anchor avers that its complaint is properly filed before the Commission. Anchor claims that Aliança knew that the arbitration related only to the breach of contract issue and that Shipping Act violations, as well as any violations of the Commission's regulations, would need to be brought before the Commission. Anchor claims further that it would be an injustice if it is not afforded the right to prove its case. The enforcement of penalties for the alleged violations contained within the complaint, Anchor

⁵Section 6 stipulates the actions the Commission must undertake once an agreement is filed; section 7 details a list of agreements or activities exempted from the antitrust laws; and section 9 sets forth the special provisions applicable to government controlled carriers. 46 U.S.C. app. §§ 1705, 1706, and 1708.

argues, is still pending, as Anchor only sought contract-related and punitive damages through arbitration. Anchor contends that only the Commission has the authority to properly address and find Shipping Act violations and award reparations or assess penalties.

With respect to Aliança's argument that the doctrine of issue preclusion warrants the dismissal of this complaint, Anchor asserts that the doctrine does not apply, as the Shipping Act violations were never before the Arbitrator.

C. ALJ's Order Dismissing Complaint and Denying Motion to the Amend Complaint

1. Order Dismissing Complaint

The ALJ granted Aliança's Motion and dismissed Anchor's complaint. The ALJ ruled that because Anchor chose to go to arbitration and even won, it would be unfair to respondent Aliança, which had a right to believe that the arbitral award would be final and would terminate its dispute with Anchor, to subject it to litigation before the Commission on the same matter. Anchor Shipping, 29 SRR at 1059. The ALJ further concluded that it would be unfair to bring new companies into the dispute by allowing Anchor to amend its complaint. The ALJ noted that there is a strong policy in favor of alternative dispute resolution, particularly arbitration. Id. at 1051-53. Further, the ALJ stated that the Commission encourages arbitration as well as other alternative dispute resolution techniques in all types of Commission proceedings, especially in cases involving disputes among parties to service contracts. Id. at 1053.

The ALJ next addressed whether Anchor may file its complaint before the Commission, as it mixes breach of contract claims with Shipping Act claims. Id. The ALJ indicated that in Cargo One, Inc. v. COSCO Container Lines Co., Ltd., 28 SRR 1635 (2000), the Commission determined that as a general matter, a claim consisting of primarily a contract law issue should be

dismissed, unless the complainant successfully rebuts the presumption that the claim involved no more than a simple breach of contract. Conversely, if the claim raises issues beyond contractual obligations, unless unsupported by the facts, the likely presumption is that the matter is appropriately before the Commission. Anchor Shipping, 29 SRR 1054 (citing Cargo One, 28 SRR at 1645).

Relying on Cargo One, the ALJ found that the Commission should not exercise jurisdiction over Anchor's complaint. First, the ALJ concluded that in the instant case, unlike Cargo One, Anchor pursued arbitration, as required by its service contract. Anchor was ultimately awarded over \$381,000, which Aliança has paid. The arbitration in this instance, the ALJ continued, was conducted pursuant to New York law, whereas in Cargo One the arbitration would have been held in Beijing under Chinese law. Id. (citing Cargo One, 28 SRR at 1637). Furthermore, the ALJ noted that, as Anchor received an arbitral award unlike the complainant in Cargo One, the doctrine of finality with respect to arbitral awards was at stake in the present case. The ALJ therefore ruled that entertaining Anchor's complaint would undermine "both the strong policy encouraging use of arbitration instead of expensive litigation, and the policy of respecting the integrity of the parties' own contracts where they promised to arbitrate." Id. at 1055.

In order to determine which claims were inherently Shipping Act claims versus contract claims, the ALJ stated that it would be necessary for the Commission to review the 16 sections of the Shipping Act that Anchor alleges were violated. The ALJ noted that this would have to be done for a complainant that had already won a sizeable award from arbitration, and now "seeks to undermine the binding nature and finality of that award." Id. The ALJ ultimately concluded that any presumption that some of Anchor's claims are inherently Shipping Act matters that should be heard by the Commission had been rebutted. Id. at 1055 and 1061.

The ALJ also considered two concerns that the Commission

might have if Anchor's complaint were dismissed: whether the Commission would shirk its responsibility to administer the Shipping Act over which it has exclusive jurisdiction if the Commission deferred to the arbitral award; and whether the Commission or future parties would be bound by the arbitral decision in the present case. Id. at 1058. The ALJ found that neither of these concerns warranted the Commission hearing Anchor's complaint. First, the Commission would not be deferring to another court or judicial forum; rather, the Commission would be deferring to the parties' own agreement to participate in binding arbitration. Second, the ALJ noted that arbitration is a form of alternative dispute resolution, which encourages parties to avoid costly, time-consuming litigation, and that a decision emerging from binding arbitration has no precedential value in future proceedings. The ALJ stated that should the Commission entertain Anchor's complaint, the strong policy favoring arbitration would be undermined, and that the Commission would be fostering litigation rather than enforcing repose. Anchor Shipping, 29 SRR at 1059.

In granting Aliança's Motion, the ALJ concluded that Anchor, which chose to go to arbitration and won a sizeable award from a competent arbitrator, is unsatisfied with its award and now seeks more money under the same or new legal theories based on the same or similar facts that were before the Arbitrator. The ALJ concluded further that should Anchor's complaint be heard by the Commission, it would contravene the strong policy in the law giving the results of binding arbitration finality, and that it would be unfair to Aliança, which expected a conclusive resolution. The ALJ thus granted Aliança's motion.

2. Order Denying Motion to Amend Complaint

The ALJ determined that he need not exercise his discretion to allow Anchor to amend its complaint. The ALJ indicated that pursuant to the Commission's regulations at 46 C.F.R. § 502.70(a), "[a]mendments or supplements to any pleadings will be permitted or rejected . . . in the discretion of the officer designated to conduct

the hearing[.]” Id. The ALJ ruled that based on his finding that the complaint should not be before the Commission, it would be pointless to allow Anchor to amend its complaint. In light of Anchor’s substantial arbitral award, the ALJ found that it would be an injustice to allow Anchor to add additional respondents to the original complaint. Finally, the ALJ concluded that Anchor’s failure to limit the scope of the arbitration to solely address breach of contract issues does not permit it to offset that error at Aliança’s expense, particularly when Aliança has paid a significant sum to Anchor pursuant to the Arbitrator’s ruling. Id. at 1061. The ALJ accordingly denied Anchor’s motion to amend its complaint.

D. Anchor’s Appeal

Anchor appealed the ALJ’s order to the Commission. Anchor argues that it did not choose to go to arbitration; rather, arbitration was required pursuant to the terms of its service contract. Anchor argues further that it did not present its complete evidence and testimony on Shipping Act violations in arbitration, nor did it raise all of the issues. Anchor’s Appeal at 3. Anchor also alleges that the Arbitrator limited the award to breach of contract damages and clearly relinquished her authority to the Commission to enforce any Shipping Act violations.

Anchor avers that it would be unfair and unjust to bar its complaint before the Commission. First, Anchor contends that it did not have an opportunity to be awarded reparations in the arbitration, and that Aliança knew that the arbitration was limited to breach of contract claims.

Anchor contends that it is not “disrespecting the integrity of arbitration and the strong policy giving finality to arbitral decisions” by filing its complaint with the Commission. Id. at 7. Anchor claims that it does not disagree with the arbitrator’s decision; rather, it seeks “enforcement of the statutory law, rules, and regulations.” Id. Anchor contends that the Shipping Act violations cannot be resolved through independent arbitration and can only be resolved

by the Commission.

With respect to damages, Anchor alleges that it continues to suffer damages estimated at \$150,000 per year and that it will continue to suffer them indefinitely. Furthermore, Anchor claims that “section 11 of the Shipping Act specifically provides for reparations not to exceed twice the amount of the actual damages, which in itself implies reparations over and above the actual damage proven through arbitration[.]” Id. at 11. Anchor also requests oral argument.

Anchor asserts that, contrary to the ALJ’s conclusion, it has not alleged that an arbitrator could not enforce any portion of the Shipping Act; instead, Anchor is implying that the “arbitrator did deal with sections of the Shipping Act, but that she was not asked to award reparations under section 11 [of the Shipping Act.]” Id. at 21.

Anchor also addresses the ALJ’s finding that Anchor should not be afforded the opportunity to bring its complaint before the Commission because it has already received a sizeable award in arbitration, and the strong policy in the law that favors binding arbitration. Anchor reiterates its assertions that the Shipping Act claims were never resolved by the Arbitrator and that the Arbitrator did not have the authority to resolve such claims. Further, Anchor claims that the Arbitrator only addressed a portion of the Shipping Act violations, and that the award of \$381,000 reflected the damages incurred until the date of the award. Anchor claims that it has suffered consequential damages estimated at \$150,000 per year for losses during the past two years.

E. Aliança’s Reply

Aliança argues in its Reply that Anchor’s appeal should be denied in all respects, as the basis for the Order is firmly supported by Commission precedent and sound legal principles. Aliança’s Reply at 4. Aliança contends that the ALJ properly concluded that

Anchor's claims were addressed by the Arbitrator and that the law bars Anchor from challenging the binding ruling emerging from the arbitration, thereby subjecting Aliança to another proceeding on the same grounds. Id.

Aliança asserts that Anchor has already had an opportunity to present those claims to an arbitrator that it now seeks to bring before the Commission. The service contract provision requiring arbitration, Aliança claims, was very clear, and Anchor, upon signing the service contract, subjected itself to all the provisions contained therein. Consequently, Aliança argues that Anchor's contention that it would be unfair and unjust if Anchor were prohibited from bringing its complaint before the Commission is unfounded. Aliança argues further that Anchor's contention that it would be equally unfair and unjust if other carrier respondents cannot be added to its complaint is futile, as the ALJ determined that the existing claims have already been decided in arbitration.

Lastly, while Aliança concedes that the entities named in the amended complaint were not named in the arbitration and therefore were not liable for the arbitration award, Aliança avers that the claims and issues presented in the amended complaint were the same, and that therefore Anchor should be precluded from having two opportunities to make the same claims.

DISCUSSION

In the present proceeding, the issue of whether a federal administrative agency may decline to adjudicate claims that were first addressed in arbitration and whether this would be considered abdication by the agency of its congressionally mandated obligation to hear such claims was never addressed by the ALJ or either of the parties, and it is necessary to address this issue in the first instance. The question now presented is whether a party to a service contract who participated in arbitration and either could have or did raise all relevant Shipping Act claims in that proceeding, should now be barred from bringing a complaint before the Commission that

pertains to the same service contract.

A. Commission's statutory authority

Whether the Commission has jurisdiction to hear complaints that have been previously arbitrated has been addressed by the D.C. Circuit in cases involving agreements.⁶ The court first addressed this issue in Swift & Co. v. Federal Maritime Commission, 306 F.2d 277 (D.C. Cir. 1962). In Swift, the Federal Maritime Board, the Commission's predecessor agency, found that certain members of a steamship conference had violated the Shipping Act by failing to file a modification of a rate-fixing agreement. The court found that the Board acted reasonably in finding that the modification of the agreement violated the Shipping Act because the Board had not given its approval. In so finding, the court stated that the "agreement is not simply a private contract between private parties, the intent of the parties is only one relevant factor, and the Board not only can, but must, weigh such considerations as the effect of the interpretation on commerce and the public." Id. at 281. Further, with respect to what the court characterized as the "more serious issue," the court held that "private arbitration could not negate the Board's statutory power to determine the validity of the dual-rate agreement." Id. at 282. The court explained that "the Board's function is to interpret and rule on the legality of the agreement's language and effect in the light of the public interest." Id.

The D.C. Circuit reaffirmed its position that a mandatory arbitration clause does not negate a Federal agency's independent regulatory duty in Duke Power Co. v. Federal Energy Regulatory Commission, 864 F.2d 823 (D.C. Cir. 1989). In that case, the court

⁶Section 3 of the Shipping Act defines an "agreement" as an "understanding, arrangement, or association (written or oral) and any modification or cancellation thereof; but the term does not include a maritime labor agreement." 46 U.S.C. app. § 1702(1).

found that the Federal Energy Regulatory Commission (“FERC”) was not precluded from retaining its jurisdiction over determining whether a utility violated a filed rate schedule, despite the presence of an arbitration clause in the agreement among the utilities. *Id.* at 829. “[FERC] has continuing regulatory jurisdiction over rates charged under the agreements . . . and because enforcement of filed rate schedules is distinctly within [FERC]’s statutory mandate, [FERC] has an independent regulatory duty to remedy a utility’s violation of its fixed rate schedule.” *Id.* The court held also that the FERC’s acceptance of an agreement with an arbitration clause does not preclude that agency from resolving disputes at the core of its enforcement mission. *Id.*

In *A/S Ivarans Rederi v. United States and Federal Maritime Commission*, 895 F.2d 1441 (D.C. Cir. 1990), the petitioner sought review of the Commission’s decision to dismiss its complaint against three carriers with whom it had entered into a revenue pooling agreement. The parties unsuccessfully attempted to negotiate a dispute and, pursuant to the terms of the agreement, participated in arbitration. Following an unfavorable judgment, Ivarans filed a complaint with the Commission, alleging that the arbitration award as well as the other pool members violated the Shipping Act by implementing an agreement that differed from the one that was filed with and approved by the Commission. *Id.* at 1445. The D.C. Circuit relied upon *Swift* and *Duke Power* in finding that “private parties cannot agree to waive jurisdiction of the agency charged with the statutory responsibility to ensure that parties implement agreements that have been approved by and filed with the Commission.” *Id.* The court further held that although the Commission may approve the parties’ desire to submit any claims to arbitration first, the Commission nonetheless retains its “statutory right to hear complaints that a filed agreement has been modified through an arbitration decision, in effect to review the arbitration award, even if under a deferential standard of review.” *Id.* (citing *Swift*, 306 F.2d at 282). If the Commission did not retain this authority, the court noted that parties through arbitration could eliminate the filing requirements that Congress considered

necessary for the public interest. Id.

In the present proceeding, the ALJ erred in deferring to the parties' arrangement to arbitrate disputes arising from the service contract. The ALJ stated that arbitration is an alternative dispute resolution technique that the Commission encourages and that to entertain Anchor's complaint would undermine the agreement that Anchor and Aliança reached in their service contract. Id. at 27-28. In support of this proposition, the ALJ cited Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (finding that mandatory arbitration clauses in a securities broker's agreement are consistent with the securities laws and enforceable, even though provisions of the agreement would preclude resorting to a judicial forum).

The ALJ relied upon Shearson when concluding that the strong policy in the law favoring arbitration further supports the dismissal of Anchor's complaint. In Ivarans, however, the D.C. Circuit distinguished Shearson, finding that its holding would not apply in situations where the regulated parties must file an agreement with and receive the approval from the agency charged with protecting the public interest. Ivarans, 895 F.2d at 1446.⁷

⁷We note that under the Shipping Act, 1916, the Commission's statutory duty included reviewing agreements among ocean common carriers and such agreements did not become effective without the Commission's affirmative approval. See 46 U.S.C. app. § 814 (1982). Under the 1984 Act, unless rejected by the Commission, agreements become effective on the 45th day after filing, or on the 30th day after notice of the filing is published in the Federal Register, whichever day is later. 46 U.S.C. app. § 1705(c).

While the agreement in Ivarans was pursuant to the Shipping Act, 1916, the holding still applies to agreements filed under the 1984 Act. Although the Commission no longer affirmatively approves agreements before becoming effective, agreements must still be filed with the Commission, the

Thus, the ALJ improperly dismissed Anchor's complaint. The arbitration clause in the parties' service contract does not outweigh the Commission's duty to protect the public by ensuring that service contracts are implemented in accordance with the Shipping Act. Although service contracts are between private parties, the Commission regulates the content as well as the conduct under the contracts. The regulation of service contracts is akin to the regulation of agreements, because the Commission is the regulatory body charged with administering the Shipping Act and, therefore, must ensure that service contracts and agreements are filed and implemented pursuant to the statutory requirements and Commission regulations. To preclude Anchor from proceeding with its complaint solely because a private arbitrator previously issued a ruling would be inconsistent with our statutory mandate to hear such complaints.

B. Cargo One

The controlling case in this matter is Cargo One, Inc. v. COSCO Container Lines Co., Ltd., 28 SRR 1635 (2000). There, the Commission dealt with a complaint filed by an NVOCC alleging various violations of the Shipping Act relating to its service contract with a VOCC. The Commission noted that "[f]or section 8(c) to have any meaning, it must have been intended to preclude the filing of some complaints of Shipping Act violations, and not just breach of contract claims, as such actions would not be actionable before the Commission in any event." Cargo One, 28 SRR at 1644. The Commission then established the following test:

Commission retains the authority to reject agreements that do not meet the statutory requirements of section 5 of the Shipping Act, and the Commission is still charged with protecting the public interest by ensuring that agreements are not substantially anti-competitive.

are a complainant's allegations inherently a breach of contract claim, or do they also involve elements peculiar to the Shipping Act. In addition, the Commission found that "[a]s a general matter, allegations essentially comprising contract law claims should be dismissed unless the party alleging the violations successfully rebuts the presumption that the claim is no more than a simple breach of contract claim. In contrast, where the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support a claim, that the matter is appropriately before the agency." *Id.* at 1645. However, the Commission later reemphasized that the presumption that certain inherently Shipping Act violations belong at the Commission "[i]s a rebuttable one, subject to the assessment by the ALJ of the facts alleged." *Id.* at 1645 n.17.

The ALJ properly sets forth the Cargo One test in the Dismissal Order. Anchor Shipping, 29 SRR at 1054. However, his attempt to apply the test to the claims before him and his ultimate conclusion do raise some concerns. He first notes that "[i]f the Commission were to retain the instant complaint, it would be necessary to examine some 16 sections of the 1984 Act invoked by complainant Anchor to determine which of them are inherently breach of contract claims as opposed to inherently Shipping Act claims." *Id.* at 1055. He then concludes, "under the circumstances I find that the presumption that some of the claims are inherently Shipping Act matters that should be heard by the Commission has been rebutted." *Id.* However, as he explains later, the facts used by him to rebut any presumption are that Anchor won a sizable award in arbitration on its breach of contract and Shipping Act claims and that Aliança has paid it. These facts alone are not sufficient to rebut any presumption as to the specific allegations raised by Anchor's complaints. As a result, the Commission will have to remand this matter to an ALJ to determine which allegations involve elements peculiar to the Shipping Act.

Anchor's complaint contains allegations specific to the Shipping Act such as: unfair or unjustly discriminatory practices,

undue or unreasonable preferences, and undue or unreasonable prejudice or disadvantage. The Commission has an interest in ensuring that service contracts are used in a manner that complies with the Shipping Act and the Commission's regulations, so that it can be certain that the public and the shipping industry are protected. This interest outweighs the intentions of two private parties, as set forth in the arbitration clause of their service contract. While section 8(c) provides that parties to a service contract may agree to arbitrate breach of contract issues, it was not Congress' intent that the Commission be barred from adjudicating whether the parties' conduct violates the Shipping Act and Commission regulations. See e.g., *Ivarans*, 895 F.2d at 1441.

The exception that the Cargo One test provides, that claims primarily contractual in nature should be dismissed, is inapplicable because Anchor alleges certain violations that are particular to the Shipping Act. Thus, Anchor's complaint was prematurely dismissed.

C. Order denying motion to amend the complaint

The ALJ determined that Anchor's motion to amend the complaint should be denied. Anchor Shipping, 29 SRR at 1059. The ALJ held that Anchor previously had an opportunity to obtain the relief that it now seeks in its amended complaint. The ALJ held further that "it would be futile to allow Anchor to amend its complaint where there is a sound objection against allowing the case to proceed to decision on the merits . . . because of the preceding arbitral award in Anchor's favor." Id. at 1061.

Anchor's motion to amend the complaint was improperly denied in part. The motion is granted to the extent that Anchor seeks to amend its complaint regarding its allegations of Shipping Act violations. For instance, Anchor's amended complaint contains allegations that respondents provided an unreasonable preference or disadvantage, operated under agreements that had not been filed with the Commission, and committed other prohibited acts.

Pursuant to Rule 70 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.70(a), the motion to amend the complaint is granted to permit Anchor to further develop these types of allegations. We vacate the ALJ's denial of the motion to amend and permit Anchor to amend its complaint, provided that only the allegations related to violations of the Shipping Act are amended.

D. Request for Oral Argument

Pursuant to Rule 241 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.241, Anchor has requested oral argument. We deny Anchor's request. In light of our determination to remand the proceeding for further adjudication, oral argument is unnecessary at this time.

CONCLUSION

Although the complainant in this case has already obtained an arbitration award relating to certain breach of contract allegations, the Commission is obligated to hear those allegations particular to the Shipping Act, which is consistent with our statutory mandate. Federal and Commission caselaw support the proposition that Anchor may still seek reparations before the Commission. Arbitration is binding on the parties as to breach of contract claims, but it cannot prohibit the Commission from exercising its statutory obligations. The Commission's obligation to ensure the legality of service contracts is of paramount importance.

Because alleged Shipping Act violations are intertwined with breach of contract issues in the present case, such matters must be resolved before the Commission. We find that the ALJ's determination not to exercise jurisdiction over Anchor's complaint was incorrect. Further, Anchor's motion to amend the complaint is granted to the extent that it seeks to amend those portions alleging Shipping Act violations.

On 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.

THEREFORE, IT IS ORDERED, That the ALJ's order dismissing Anchor's complaint is vacated;

IT IS FURTHER ORDERED, That Anchor's motion to amend the complaint is granted to the extent provided in this Order;

IT IS FURTHER ORDERED, That this proceeding is remanded for further adjudication; and

FINALLY, IT IS ORDERED, That the request for oral argument is denied.

By the Commission.



Bryant L. VanBrakle
Secretary

CHAIRMAN BLUST AND COMMISSIONER DYE
CONCURRING:

We agree with the majority of the Commission on the agency's obligation to continue and complete the adjudication of this complaint. However, we would like to address some fundamental matters of law not included in the majority's analysis. As such, we respectfully submit this concurrence.

- A. The Commission must adjudicate all filed complaints

Section 11 of the Shipping Act makes clear that the

Commission does not have discretion whether to hear filed complaints. That section mandates their adjudication:

Any person may file with the Commission a sworn complaint alleging a violation of this Act . . . If the complaint is not satisfied, the Commission shall investigate it in an appropriate manner and make an appropriate order.

46 U.S.C. app. § 1710 (emphasis added). This understanding was clarified by the U.S. Court of Appeals for the Fourth Circuit, which noted that when “a private party file[s] a complaint . . . [t]he FMC ha[s] no choice but to adjudicate this dispute.” S.C. State Ports Auth. v. Federal Maritime Comm’n, 243 F.3d 165, 176 (4th Cir. 2001). The court also noted that “satisfaction” of a complaint refers to its having been “settled” by the parties; absent such settlement, the agency adjudication must proceed. Id. at 173. This principle originated in section 13 of the Interstate Commerce Act of 1887, which provided:

That any person . . . complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition . . . whereupon a statement of the charges . . . shall be forwarded to such common carrier, who shall be called upon to satisfy the complaint . . . If such common carrier shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint . . . or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate matters complained of in such manner and by such means as it shall deem proper.

24 Stat. 379 (1887). “Satisfaction” of a complaint, therefore, means “mak[ing] reparation for the injury alleged to have been done.” Furthermore, section 11(a) of the Shipping Act makes it clear that one may, but need not, seek reparations in a filed complaint. That section provides:

Any person may file with the Commission a sworn complaint alleging a violation of this Act, other than section 6(g), and may seek reparation for any injury caused to the complainant by that violation.

46 U.S.C. app. § 1710(a).

It is also clear, as the D.C. Circuit explained in A/S Ivarans Rederi v. United States and Federal Maritime Commission, 895 F.2d 1441 (D.C. Cir. 1990), that private parties cannot contract away their access to Commission adjudication of Shipping Act claims through a reliance on arbitration or other alternative dispute mechanisms. As stated in the majority opinion, *supra* at 15, the D.C. Circuit noted that the Commission’s statutory mandate outweighs agreements between two private parties to arbitrate contractual disputes. Although section 8(c) carves out an exception for service contract cases involving breaches of contract, complaints alleging violations of prohibited acts set forth in the statute, 46 U.S.C app. § 1709, must be adjudicated when they are filed with the Commission. In view of the language of the Shipping Act and the D.C. Circuit’s analysis of analogous provisions, the precedent requiring the Commission to exercise jurisdiction over Anchor’s complaint has been firmly established.

B. The *Cargo One* analysis

The majority asserts that while the ALJ properly set forth the Cargo One test to the claims before him, his ultimate conclusion “raise[s] some concerns.” More than just raising some concerns, we believe that the ALJ’s determination is fundamentally incorrect,

in that he misconstrued Cargo One's holding. Cargo One held that if an alleged Shipping Act violation raises issues beyond contractual obligations, the Commission will presume, unless the facts as proven do not support such a claim, that the matter is appropriately before this agency.

The Federal Rules of Civil Procedure provide that in order to dismiss the complaint, a court must find that no relief may be granted under any set of circumstances that could be proven consistent with the allegations contained in the complaint. Fed. R. Civ. P. 12(b)(6). Moreover, all doubts and inferences must be construed in favor of the non-moving party. Scheuer v. Rhodes, 416 U.S. 232, 236 (1976). The Commission follows the Federal Rules in its proceedings. 46 CFR § 502.12. Anchor's complaint and Aliança's motion to dismiss differ on a number of factual issues, and because of these unresolved issues, the Federal Rules dictate that this complaint must move forward to the discovery phase. The majority opinion portrays the ALJ's dismissal of Shipping Act violations as possibly being correct under Cargo One. However, under the Cargo One standard, the Commission would still retain jurisdiction over a complaint following arbitration if that complaint alleges violations that are particular to the Shipping Act. Under the ALJ's logic, prior arbitration would eliminate the need to apply the Cargo One test. Let us make perfectly clear that it is the Commission's unique obligation to adjudicate Shipping Act claims. Once a complainant alleges Shipping Act violations, particularly acts prohibited under section 10 of the Shipping Act, the complaint, on its face, is sufficient to survive a motion to dismiss.

C. Arbitration in a Shipping Act context

As an ancillary matter, it is our view that private arbitrators should not have the authority to determine whether a party to a service contract violated the Shipping Act, irrespective of the parties' intentions to permit an arbitrator to make such a finding. Private arbitration remains appropriate for construing a service contract's terms (i.e., determining what the parties meant in their

contractual relationship), and a resulting decision would remain binding upon the parties. However, if the legality of the service contract itself becomes an issue (*i.e.*, whether its terms or lack thereof violate the Shipping Act), private arbitration is not appropriate. We note that parties are not prohibited from participating in arbitration in which Shipping Act violations are found; however, any decision finding a Shipping Act violation would not be immune from subsequent Commission review.

The Commission is not offering a second bite at the apple. A complainant seeking reparations under the Shipping Act still has the burden of demonstrating “actual injury.” 46 U.S.C. app. § 1710(g). If, as in this case, a complainant recovered damages in a prior arbitration, then it must show harm beyond the award it has already received to justify a reparations award.

Remanding the instant proceeding so that the discovery phase may commence will allow the ALJ to address the merits of Anchor’s contentions. The Commission has a statutory responsibility to ensure that the service contract’s provisions comply with the Shipping Act and Commission regulations.