FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

January 16, 1992

DOCKET NO. 91-43

VINMAR, INC.

v.

CHINA OCEAN SHIPPING COMPANY

COMPLAINT DISMISSED; PROCEEDING STAYED AS TO COUNTER-COMPLAINT

This proceeding began with a complaint served on October 7, 1991, and re-served, as amended, on October 10, 1991. Complainant, Vinmar, Inc., is a Texas corporation located in Houston, Texas, which is engaged in the business of selling petrochemicals and plastics for delivery in the United States and foreign nations. Respondent, China Ocean Shipping Company (COSCO), is a vessel-operating common carrier by water serving the trade between ports in the United States and ports in East Asia. COSCO has an agent, Cosco North America, Inc. (COSCONA), located in Secaucus, New Jersey.

By reason of the alleged violations of law, complainant alleges that it has been subjected to injury by being denied the benefits of the proposed service contract, which it had accepted, because it has had to ship cargo with other carriers at higher rates than those in the proposed service contract and because complainant has had to alter its contracts of sale from CIF terms to FOB or FAS terms, at substantial loss of profit, and because Vinmar has lost sales to competitors enjoying lower rates. Complainant alleges injury in the amount of $252,075, to the date of the filing of the amended complaint, and alleges that it will suffer further injury until COSCO makes the rates, terms and conditions of the proposed service contract available to Vinmar. Vinmar asks that the Commission order COSCO to cease and desist from the aforesaid violations of law and order COSCO to file the proposed service contract with the Commission and make its provisions available to Vinmar, and also asks for an award of reparations in the amount stated above, plus further sums as appropriate, with interest and attorney's fees.

In its answer to the amended complaint, COSCO admits the allegations of fact concerning the events surrounding the correspondence between COSCONA and Vinmar leading to the alleged formation of a service contract. In other words, COSCO does not deny that its agent sent the letter with two copies of a proposed contract to Vinmar, nor that Vinmar signed the copies and returned them to COSCO or its agent on July 19, 1991. COSCO's defense is that Vinmar is not a similarly situated shipper and consequently is not entitled to the essential terms and conditions of the service contract in question. In addition, COSCO filed its own counter-complaint, in which COSCO alleges that Vinmar has itself violated law by attempting to coerce COSCO into giving Vinmar more attractive freight rates by using Vinmar's ability to make use of the Commission's regulations and applicable law empowering shippers to seek the essential terms and conditions of service

notify Vinmar in writing that COSCO would not tender the contract offer. However, COSCO did not notify Vinmar that it would not send such an offer. Instead, COSCO sent the offer, which was signed and accepted. Vinmar therefore states (Memorandum supporting Motion at 5):

> The parties, therefore, have fully performed the requirement of section 581.6(b)(3) for the formation of a me-too contract. COSCO made an offer in the form of a contract capable of being accepted from COSCO; Vinmar accepted that offer by the act of signing and returning the form contract within the time period for such action set forth by COSCO.

Vinmar acknowledges that COSCO later claimed that Vinmar was not similarly situated to the shipper who had entered into Service Contract No. S/C 934. However, Vinmar argues that if COSCO believed Vinmar not to be similarly situated, COSCO should have notified Vinmar of that decision, instead of sending a contract offer to Vinmar. Vinmar argues that not only under the Commission's regulations but under basic contract law, Vinmar accepted the offer tendered by COSCO in the form required, therefore creating a binding contract. Once such a contract was created, argues Vinmar, it was COSCO's duty under the Commission's regulations to sign the contract which had been signed by Vinmar and to file it with the Commission under 46 CFR 581.6(b)(4), a purely ministerial act. However, until COSCO files the contract, the contract cannot be carried out under the regulation cited. Therefore, COSCO's failure to perform this ministerial filing duty prevents Vinmar from utilizing the contract and is, in addition, a violation of section 8(c), which provides in pertinent part that ". . . each contract entered into under this subsection shall be filed confidentially with the Commission. . . ." Also COSCO's refusal to file the contract with the Commission and thus its preventing the parties from carrying out the contract, Vinmar argues, constitutes a refusal to deal, in violation of

can be forced into such a contract with a shipper which COSCO believes will not uphold its end of the contract. Also, COSCO argues that the controversy is moot because COSCO has in fact filed the service contract S/C No. 934-A, albeit with a change in the contract year from July to July 1992 to November to November 1992.

COSCO argues that (apparently after sending the contract offer forms to Vinmar) COSCO discovered that Vinmar had breached an earlier service contract with COSCO and had taken months before paying the penalties due for the breach. Thus, COSCO learned that Vinmar had tendered only 40 percent of the 5,000 tons required under the earlier service contract, which Vinmar had obtained in December 1988, and had failed to pay the penalties provided under the contract for eight months. COSCO argues, furthermore, that during the discussions with Vinmar about service contract S/C No. 934, Vinmar made it plain that Vinmar was not interested in fulfilling the terms of that contract but rather was using its right to equal access to that contract as leverage to negotiate a better rate with COSCO. COSCO claims, according to an affidavit supporting its pleading, that Vinmar admitted that it did not have 40,000 tons in orders, although the service contract in question required a commitment of that volume by the shipper. COSCO describes the difficult ongoing relationship with Vinmar, during which COSCO received what it characterizes as a "threatening letter from Vinmar's lawyers, announcing that Vinmar would commence proceedings before this agency unless COSCO would 'honor [its] obligations under the service contract.'" (Reply to Motion at 4.) COSCO states that it responded promptly through counsel, informing Vinmar that Vinmar was not a similarly situated shipper and was therefore not eligible for access to contract S/C No. 934, and "put Vinmar on notice that coercive and abusive tactics would be considered a violation of section 10(a)(1) of the Shipping Act of 1984." (*Id.*) Furthermore, "Vinmar was advised that it had no valid claim

and orders as well as for violations of the Act. However, section 8(c) of the Act expressly deprives the Commission of jurisdiction to prescribe remedies for breach of a service contract, absent language in the contract in which the parties agree to have the Commission adjudicate a breach of contract allegation. There is no such agreement in the contract in question. In fact paragraph 10 of the contract provides for binding arbitration in Beijing. Therefore, argues COSCO, "Vinmar takes the position that it has an enforceable contract which COSCO has breached. Consistent with that argument, Vinmar must proceed to arbitration in Beijing, not seek relief from the Commission." (Reply to Motion at 12.)

Discussion and Conclusions

A question of jurisdiction is a matter that any court or agency can raise at any stage of the proceedings, and subject matter jurisdiction is not something that parties can confer on the Commission without statutory authority even if they were to agree. (See *Majd-Pour v. Georgiana Community Hosp., Inc.,* 724 F.2d 901, 902 (11th Cir. 1984); 5 Wright and Miller, *Federal Practice and Procedure,* sec. 1350 at 545; 15 Wright, Miller, and Cooper, *Federal Practice and Procedure,* sec. 3905 at 421-422; *New Orleans Steamship Association v. Plaquemines Port,* 23 SRR 1363, 1371 (FMC 1986); *Insurance Corp. v. Compagnie des Bauxites,* 456 U.S. 694, 702 (1982) (lack of subject matter jurisdiction cannot be cured by waiver or stipulation of the parties); *International Association of NVOCCs v. ACL et al.,* 25 SRR 167, 174-175 (ALJ), affirmed, 25 SRR 734, 743-744 (1990) (agency's jurisdiction is limited by its statute).

These undisputed facts are enough, in my opinion, to show that COSCO and Vinmar entered into a service contract under the Commission's regulations and under the basic principles of contract law.

The applicable Commission rule is 46 CFR 581.6(b)(3), which provides:

> The carrier or conference shall reply to the request by mailing, or other suitable form of delivery, within 14 days of the receipt of the request, either a contract offer with the same essential terms which can be accepted and signed by the recipient upon receipt, or an explanation in writing why the applicant is not entitled to such a contract. The carrier or conference may require the contract offer to be accepted within a specified period of time.

The regulation expressly refers to a "contract offer" twice, and the letter of July 12, 1991, assuredly constitutes such an offer within the meaning of the regulation. COSCONA even acknowledged its obligation under section 8(c) of the Act to provide the offer to Vinmar in response to Vinmar's request to access the service contract and further indicated or implied that it would file a copy of the signed contract with the Commission if the signed contracts were returned to COSCONA within five working days. Under 46 CFR 581.6(b)(3), as quoted above, a carrier is permitted to attach conditions to the contract offer by requiring that it be accepted within a specified period of time, as was done here. As also shown above, the regulation permitted the carrier to refuse to tender an offer to Vinmar within 14 days if the carrier furnished an explanation in writing why Vinmar was not entitled to the contract. However, COSCONA chose to tender the offer to Vinmar, and when it was accepted in the prescribed manner, a contract was created under both the Commission's regulations and basic principles of contract law. When COSCONA received the signed copies of the service contract on July 19, 1991, it became COSCONA's duty, acting for COSCO, to file the signed copy with the Commission, as required by section 8(c)

written contract, offeree cannot avoid liability by testimony that this was done with no intention to be bound); sec. 3.13 at 229 (offeror may attach conditions to the manner of acceptance, which offeree must satisfy); sec. 3.22 at 278 (offeror cannot revoke offer once it has been accepted in the prescribed manner, but offeree is also bound to the contract).)

For the reasons stated, therefore, I conclude that COSCO and Vinmar entered into a contract when the contract offer was signed and returned to COSCONA on July 19, 1991. The fact that COSCO failed to follow up the receipt of the signed contract by filing it with the Commission, as required by section 8(c) of the 1984 Act, does not signify that no contact had been entered into. It signifies rather a failure to comply with a duty imposed by that law, i.e., it constitutes a violation of section 8(c) of the Act. However, because COSCO did not carry out the contract terms and conditions while the contract had been unfiled, COSCO probably did not violate the corresponding regulation, 46 CFR 581.6(b)(4). By the terms of that regulation, it can be violated only if the parties had put the contract into effect without first having filed it with the Commission. However, the more important question is whether the underlying statute has been violated, and, if so, what are the consequences of that violation.

At the conference held on January 14, 1992, in my office, counsel for Vinmar contended that notwithstanding the language of section 8(c) that the "exclusive remedy for a breach of a contract entered into under this subsection shall be an action in an appropriate court unless the parties otherwise agree," the Commission still retains jurisdiction over the controversy under sections 8(c) and 10(b)(12) of the Act. Complainant also alleges violations of sections 8(c) and 10(b)(12) in its Motion (See Motion and supporting Memorandum at 6-7.) The argument is that the filing of the signed copy of the contract is a ministerial act only, and that COSCO's failure to file it with the Commission

refusal to carry out the contract violates section 8(c) of the Act because that law requires that the essential terms of the contract "shall be made available to all shippers similarly situated." Also, it is argued, COSCO's failure to file the contract with the Commission constitutes a refusal to deal and subjects Vinmar to unlawful prejudice and disadvantage.

I cannot agree with Vinmar's analysis. It is obvious that Vinmar is seeking enforcement of its rights under a service contract that COSCO has breached. Also, COSCO has not refused to deal with Vinmar. Rather COSCO has refused to carry out the deal it had allowed itself to enter into by sending the written offer to Vinmar, which Vinmar accepted. Furthermore, by attempting to retain a claim under section 10(b)(12) of the Act regarding unlawful prejudice and disadvantage, Vinmar would in effect be circumventing the congressional intention that service contracts, once entered into, be enforced by courts or otherwise, but not by the Commission unless the parties agreed.

A breach of contract is defined as follows (Black's Law Dictionary (5th ed.)) at 171:

> Breach of Contract. Failure, without legal excuse, to perform any promise which forms the whole or part of a contract. Prevention or hindrance by party to contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party or the discharge of a duty by him. Unequivocal, distinct and absolute refusal to perform agreement.

It is difficult to imagine conduct by COSCO that more closely fits the above definition of a breach of contract. While COSCO claims that Vinmar is not qualified as a similarly situated shipper and thus apparently asserts a legal excuse, COSCO has clearly refused to perform under the terms of the original contract running from July to July 1992. Also, COSCO has prevented the contract form being carried out by failing to file it with the Commission, a requirement of 46 CFR 581.6(b)(4). It is also a basic principle of

to perform or suspension of performance results in a breach of the contract. As provided by section 8(c) of the Act, the remedy for such breach must be pursued in fora other than the Commission unless the parties otherwise agree. Had this case not progressed to the point it has reached, i.e., had COSCO rejected Vinmar's request for a contract within the 14 days allowed under the Commission's regulations, and, consequently, had COSCO not entered into a contract with Vinmar, the Commission would obviously have jurisdiction to determine whether COSCO violated section 8(c) of the Act by failing to make the essential terms of a service contract available to a similarly situated shipper, which Vinmar claims to be. This was what happened in *California Shipping,* cited above, 25 SRR 1213. However, after the contract was accepted by Vinmar, section 8(c) of the 1984 Act, as noted above, provides that "the exclusive remedy for a breach of a contract entered into . . . shall be an action in an appropriate court, unless the parties otherwise agree."

Nevertheless, Vinmar argues that the Commission retains jurisdiction under sections 8(c) and 10(b)(12). I do not see how this can possibly be in view of the statutory language of section 8(c), quoted above. Under principles of statutory construction, one turns first to the words of the statute, and, in case of ambiguity, to the legislative history, to determine the intent of Congress, for it is accepted that an agency has no more powers than those conferred on it by its parent statute. Among other principles of statutory construction are those requiring that a statute be read as a whole, that apparently conflicting provisions be reconciled and given effect to the extent possible, and that one should not interpret the language of a statute in such a way as to reach absurd or unreasonable results. (See *International Association of NVOCCs v. Atlantic Container Line et al.,* cited above, 25 SRR 167, 174-175; *California Shipping,* cited above, 25 SRR at 1220; *In Re Surface Mining Regulations Litigation,* 627 F.2d 1346, 1362 (D.C. Cir. 1980).)

authority of the I.C.C. prior to the Staggers Act. (See *Cleveland-Cliffs Iron Co. v. Chicago & North Western Transp. Co.,* 516 F.Supp. 399 (W.D. Mich.), affirmed without opinion, 701 F.2d 175 (6th Cir. 1982); same title, 553 F.Supp. 371 (W.D. Mich. 1982).

Of course, it had long been held that when the Interstate Commerce Act and the Shipping Act, 1916 (and, arguably, the Shipping Act of 1984), contain parallel language and purposes, the two Acts ought to be construed in the same way. (See *North Atlantic Mediterranean Freight Conference - Rates on Household Goods,* 11 F.M.C. 202 (1967), modified on appeal, 409 F.2d 1258 (2d Cir. 1969), citing, among other cases, *Swayne & Hoyt, Ltd. v. U.S.,* 300 U.S. 297 (1937); and *U.S. Nav. Co. v. Cunard S.S. Co.,* 284 U.S. 474 (1932).) The Staggers Act admittedly had deregulatory purposes. However, the Shipping Act of 1984 also purports to have similar purposes in some respects. (See Sec. 2 of the Act, Declaration of Policy ("To establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs."))

Because the parties have entered into a service contract, it would obviously subvert and circumvent congressional intent if the Commission were to attempt to adjudicate what is essentially an action arising out of an alleged breach of contract. It appears therefore that the remedy for Vinmar under the contract (paragraph 10) lies in an arbitration proceeding in Beijing perhaps subject to some type of review in a court. This leaves little or no room for the Commission to adjudicate the dispute or to attempt to enforce Vinmar's alleged rights under the service contract it accepted.[3]

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[3]It is beyond the scope of these rulings and unnecessary to determine whether Vinmar should file a complaint with a district court or seek arbitration under the service contract or if Vinmar is required to follow the arbitration provision of the contract, what role the courts might still play. One authority believes that section 8(c) does not authorize the Commission to adjudicate a contract dispute even if the parties ask the Commission rather than a court to do so. According to this authority, parties cannot enlarge the Commission's jurisdiction by their

earlier, however, the record shows that COSCO did not refuse to deal with Vinmar. On the contrary, it made the mistake, if such that was, of sending a contract offer to Vinmar and putting Vinmar in the position of binding COSCO to a contract by accepting the offer, instead of exercising its right under the Commission's regulations to advise Vinmar in writing that no offer would be sent to Vinmar. Once the contract offer was accepted and COSCO became bound by contractual obligations and by the obligation to file the contract with the Commission, COSCO later refused to perform under the contract. This is not a refusal to deal. This is rather a refusal to carry out the deal that Vinmar thought it had when Vinmar accepted the contract offer. In other words, the so-called refusal to deal argument is really an argument that COSCO has breached the service contract.

As for the argument that COSCO has also violated section 10(b)(12) by subjecting Vinmar to unlawful prejudice and disadvantage, such argument might have been valid had COSCO not entered into a contract with Vinmar. Once the contract had been accepted by Vinmar, however, Vinmar's alleged injury on account of alleged prejudice and disadvantage merged with the injury it allegedly suffered on account of the breach of contract. In fact, Vinmar is seeking enforcement of its rights under the contract and damages resulting from the breach, including lost sales. If an arbitral panel or a court decides in Vinmar's favor that COSCO did breach its contract with Vinmar, it would appear reasonable to believe that an award of damages would be considered. Whether Vinmar could prove lost sales before an arbitral panel or court and whether it would be awarded something for such damages, as well as the normal damages resulting from the failure of Vinmar to obtain the benefit of its bargain with COSCO, are matters for those tribunals to consider. However, having itself signed the contract, Vinmar normally must take the obligations as well as the benefits which the contract is supposed to confer.

Whatever happens, however, Congress has stated that the exclusive remedy for a breach lies with the courts unless the parties otherwise agree. Therefore, whatever claim for injury Vinmar might have had under section 10(b)(12) has become subsumed as a matter of law in an action for breach in a forum other than the Commission in accordance with congressional intent. Allowing Vinmar to pursue a section 8(c) or 10(b)(12) complaint case before the Commission, asserting rights under its service contract because of a breach of that contract by COSCO, would be inconsistent with and contrary to the section 8(c) grant of exclusivity of remedy in fora other than in the Commission.

For the reasons stated, Vinmar's complaint, as amended, is dismissed for want of jurisdiction by the Commission, as required by section 8(c) of the 1984 Act.

There remains the matter of COSCO's counter-complaint, in which COSCO alleges that Vinmar has violated section 10(a)(1) of the Act by attempting to obtain access to Service Contract S/C No. 934 through coercion and duress and abusive resort to Commission process. Vinmar has denied the allegations and has filed a motion asking for dismissal or summary judgment as regards the counter-complaint. It was agreed by counsel that COSCO should defer filing its reply to the motion pending disposition of Vinmar's complaint under section 8(c) and 10(b)(12) of the Act by the Commission following appeal of these rulings, as provided by 46 CFR 502.227(b). Accordingly, the proceeding is stayed as to COSCO's counter-complaint pending ruling of the Commission on appeal.

Norman D. Kline

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Administrative Law Judge