

FEDERAL MARITIME COMMISSION

ANCHOR SHIPPING CO. v.
ALIANÇA NAVEGAÇÃO e LOGÍSTICA
LTDA., COLUMBUS LINE, INC.,
HAMBURG SUDAMERIKANISCHE
DAMPFSCHIFFFAHRTS-GESELLSCHAFT
KG, AND CROWLEY AMERICAN
TRANSPORT, INC.

Docket No.
02-04

Served: February 11, 2009

BY THE COMMISSION: Joseph E. BRENNAN, Harold J. CREEL, Jr., and Rebecca F. DYE, *Commissioners*.

ORDER DENYING COMPLAINANT'S APPEAL OF DISMISSAL

By Order served July 31, 2008, the Commission: (1) granted a motion by *pro se* complainant Anchor Shipping Co. ("Complainant" or "Anchor") to extend the time for filing an appeal of the Administrative Law Judge's ("ALJ") September 27, 2007 order dismissing portions of Anchor's complaint; (2)

permitted Anchor to either supplement the arguments made in its December 26 “exceptions” or file a wholly new document supporting its appeal on or before August 15, 2008; and (3) denied Anchor’s May 16, 2008 motion to compel the Commission’s Bureau of Enforcement to intervene in this proceeding.

In light of the possible further filing by complainant Anchor, the Commission did not substantively address Anchor’s December 26 “exceptions” to the ALJ’s September 27, 2007 order granting, in part, Respondents’ motion to dismiss.¹ On August 14, 2008, Anchor filed its Response to the Commission’s July 31, 2008 Order, and on August 21, 2008, Respondents replied to Anchor’s Response.

¹ Those portions of Anchor’s complaint not dismissed remained before the ALJ for continued review and preparation for trial: On August 27, 2008, the ALJ issued several procedural orders resolving pending motions and discovery matters, and directed the filing of prehearing statements. On November 4, 2008, the ALJ issued an order instructing Anchor to show cause why the remaining balance of its complaint should not be dismissed for failure to file its Rule 95 prehearing statement. On November 26, 2008, the ALJ issued another order enlarging time for Anchor’s response to the ALJ’s show cause order. Anchor did not subsequently respond to the ALJ’s orders or file its prehearing statement. On December 16, 2008, the ALJ dismissed those portions of Anchor’s complaint still before the ALJ. That dismissal became administratively final on January 22, 2009.

DISCUSSION

The Commission has before it the following two items with respect to Anchor's appeal:

- (1) Whether the Administrative Law Judge was correct in dismissing Complainant's request for imposition of civil penalties; and
- (2) Whether the Administrative Law Judge was correct in dismissing Complainant's claims that Respondents violated sections 6, 7, and 9 of the Shipping Act.

Even if the allegations by Anchor are viewed in the light most favorable to Complainant,² no relief can be granted to the Complainant for the above two items. The Commission therefore denies Anchor's appeal of the ALJ's order of dismissal.

I. COMPLAINANT'S SUPPLEMENTAL FILING

In the July 31, 2008 Order, the Commission permitted Anchor to either supplement the arguments in its December 26, 2007 "exceptions" or file a wholly new document supporting its appeal. July 31, 2008 Order at 3-5. At that time, the Commission

² In *Qin's, Inc. v. Superior Link International, Inc.*, the ALJ noted that "In ruling on Rule 12(b)(6) motions, furthermore, courts view the complaint in the light most favorable to complainant." 30 S.R.R. 400, 403 (ALJ 2004). See also *McKenna Trucking Co., Inc. v. A.P. Moller-Maersk Line and Maersk Inc.*, 27 S.R.R. 1045, 1054 (ALJ 1997).

took especial pains to instruct Anchor to “address only those issues dismissed by the ALJ in his September 27, 2007 Order.” *Id.* at 4.

On August 14, 2008, Anchor filed its Response to the Commission’s July 31, 2008 Order.³

On August 21, 2008, Respondents replied to Anchor’s supplemental filing, stating that “contrary to the Commission’s Order that Complainant only address those issues dismissed by the ALJ in his September 27, 2007 Order, the submission by Complainant fails to address any of the issues dismissed by the ALJ.” Respondents’ Reply at 2.

Anchor’s Response discusses none of the issues dismissed by the ALJ. Anchor variously argues that: the Commission including its “individual departments, agencies, offices and/or bureaus” is conspiring to assist the carriers in “misleading US Congress with respect to 1998 OSRA.” Anchor’s Response at 1; the Commission “permitted the operation of unreasonable, unjust, anti-competitive, predatory and discriminatory discussion

³ For purposes of this review, the Commission treats Anchor’s submission as supplementing, rather than replacing, its earlier filing.

agreements, which operate in conjunction and association with other carriers and other carrier agreements which are overbearing on the trade.” *Id.* at 2; and the Commission “failed to acknowledge and/or act upon Obstruction of Justice, and multiple Corruption and Racketeering.” *Id.* at 2. Anchor’s other assertions are similarly misdirected or irrelevant to the Commission’s authority under the Shipping Act, including its request that the Commission reassign the proceeding to “District Court in Miami, Florida.” *Id.* at 6.

In granting Complainant an opportunity to supplement or replace its earlier filing so that the Commission might “place this proceeding back on a proper procedural track,” the Commission’s Order expressly cautioned Anchor that “any discussion related to issues that were not dismissed by the ALJ will be disregarded” by the Commission. July 31, 2008 Order at 4. Anchor’s supplemental filing raises only issues wholly extraneous to the matters dismissed by the ALJ’s September 27, 2007 decision. Anchor’s filing is contrary to the Commission’s express direction to Anchor in permitting such additional filing. Because Anchor has not further addressed those claims dismissed by the ALJ, the Commission

accord no weight to Anchor's August 14 Response and considers only Complainant's December 26 "exceptions" as setting forth the legal and factual basis for its appeal of the ALJ's ruling.

II. THE ALJ'S ORDER DISMISSING REQUEST FOR IMPOSITION OF CIVIL PENALTIES

In Section III of its Amended Complaint, Anchor stated that it seeks "full enforcement of the Civil Penalties prescribed under Section 13(a)" of the Shipping Act, and additionally requested "Commission's consideration with respect to Additional Penalties pursuant to Section 13(b)." Amended Complaint at 2.

Section 13(a) of the Act provides that "A person that violates this part or a regulation or order of the Federal Maritime Commission issued under this part is liable to the United States Government for a civil penalty." 46 U.S.C. § 41107(a). The Commission may assess a civil penalty only "after notice and an opportunity for a hearing." 46 U.S.C. § 41109(a).

Penalties other than monetary penalty assessments are provided under section 13(b) of the Shipping Act. This section provides, *inter alia*, that "For a violation of section 10(b)(1), (2), or

(7) of this Act, the Commission may suspend any or all tariffs of the common carrier, or that common carrier's right to use any or all tariffs of conference of which it is a member, for a period not to exceed 12 months." 46 U.S.C. § 41108(a). Penalties to be imposed under section 41108 are subject to review by the President of the United States, and may be disapproved for reasons of national defense or foreign policy. 46 U.S.C. § 41108(e).

While every complaint filed with the Commission must allege a violation of the Shipping Act, 46 U.S.C. § 41301(a), relief is generally limited to "reparations for an injury to the complainant caused by the violation." *Id.* The Shipping Act "does not contemplate the imposition of civil penalties in a private party complaint proceeding." *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213, 1231 (FMC 1990). The ALJ noted in his September 27 Order that "[P]rivate complainants have no standing in the matter [of civil penalties]," citing *Prudential Lines v. Farrell Lines*, 22 S.R.R. 826, 851 (ALJ 1984). September 27 Order at 9. The ALJ accordingly dismissed that portion of Anchor's complaint which seeks imposition of civil

penalties as a remedy supplemental to private reparations.

Anchor's Exceptions barely address the civil penalty issue thus dismissed by the ALJ. Anchor merely alleges that the Amended Complaint "sufficiently state/describe the details of what was done." Anchor's Exceptions at 5. In asserting error by the ALJ below, Anchor contends that: "In accordance with the numerous case law that has been presented/cited in this proceeding, pro se litigants are afforded the benefit of inferences." *Id.* at 5; its arguments were "misunderstood, diluted and/or ignored." *Id.* at 6; and "a summary motion is a good and inexpensive way of determining controversies, however only if the motion is . . . not an intentionally deceptive document, intended to avoid justice." *Id.* at 6. None of Anchor's contentions directly pertains to the "civil penalties" issue dismissed by the ALJ.

Neither does Anchor rebut the ALJ's citation of the controlling law in the matter of imposition of civil penalties. *California Shipping Line, Inc.*, 25 S.R.R. at 1231. See also, *East Coast Colombia Conference and Agropecuaria Maritima Santa Rosa Ltda. Petition for Investigation*, 22 S.R.R. 723 (FMC 1984).

In its exceptions, Anchor claims only that “The case law which was cited, does not appear to conform with the present situation respecting appropriate civil penalties.” Anchor’s Exceptions at 8.⁴

Anchor asserts in its exceptions that the ALJ addressed only civil penalties under section 13(a) and, presumably, erred by not discussing additional penalties, such as suspension of tariffs, under section 13(b)(1). *Id.* at 8. Anchor’s argument fails to recognize that Respondents’ Partial Motion only seeks dismissal of Anchor’s “civil penalty allegations.” Respondents’ Partial Motion at 5. Respondents’ motion did not raise the issue of non-monetary penalties under section 13(b), and the ALJ’s September 27 Order did not reach such issue. The ALJ addressed only that civil penalty issue raised by Respondents’ Partial Motion, and correctly granted such motion based upon Commission precedent holding that civil penalties cannot be imposed in a private party complaint proceeding. *California Shipping Line, Inc.*, 25 S.R.R. at 1231; *East*

⁴ Rather than responding substantively, Anchor requested “a short enlargement of time to support this with case law, and the necessary statutes, and citing of law.” Anchor’s Exceptions at 8. The supplemental filing allowed by the Commission’s July 31, 2008 Order provided Anchor such further opportunity to address the civil penalty issue. Anchor did not avail itself of that chance to support its argument with any applicable case law.

Coast Colombia Conference, 22 S.R.R. at 726. Anchor demonstrates no error by the ALJ below, as its allegations with respect to “additional penalties” are not related to the issue raised in Respondents’ Partial Motion and dismissed by the ALJ’s September 27 Order.

III. THE ALJ’S ORDER DISMISSING CLAIMS THAT RESPONDENTS VIOLATED SECTIONS 6, 7, AND 9

In Section V of its Amended Complaint, Anchor claimed “That by reason of the facts in the foregoing paragraphs, complainant has been (and is being) subject to injury as a direct result of the violations by respondent of sections 4, 5, 6, 7, 8, 9, 10, and 12.” Amended Complaint at 6.

Respondents sought dismissal of Anchor’s allegations that Respondents violated sections 6, 7, and 9 of the Shipping Act. Respondents’ Partial Motion at 6. Respondents alleged that there was no possible set of facts or circumstances that could be viewed as Respondents’ violations of sections 6, 7, and 9 of the Shipping Act, as none of these sections impose any obligations upon the Respondents. *Id.* at 6.

We review whether the facts, when viewed in the light most favorable to Anchor, support Complainant's allegations that Respondents violated section 6, 7, and 9 of the Shipping Act.

Sections 6 and 7 of the Shipping Act

Section 6 of the Shipping Act sets out the procedures for the processing and reviewing of agreements filed with the Commission under sections 4 and 5 of the Shipping Act. 46 U.S.C. §§ 40304, 40306, and 41307. Section 4 provides that the Shipping Act applies to certain agreements "by or among ocean common carriers" and "among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers." 46 U.S.C. § 40301. Agreements falling within the scope of section 4 must be filed with the Commission pursuant to section 5 of the Act. 46 U.S.C. § 40302. Once filed with the Commission, the Commission conducts its review under the procedures outlined in section 6 of the Act.

Section 7 of the Act provides the scope of activities or agreements that are exempted from antitrust laws. 46 U.S.C. § 40307. The section also enumerates excepted agreements, to

which antitrust immunity under the Act does not extend. *Id.* This section simply defines which agreements or activities are exempted from antitrust laws and which agreements are excepted from antitrust immunity.

As the ALJ confirmed in his ruling, September 27 Order at 10, sections 6 and 7 impose no carrier duties or obligations by which Anchor can hold Respondents to account under the Shipping Act, citing *Military Sealift Command v. Sea-Land Service, Inc.*, 27 S.R.R. 227, 231 (ALJ 1995), *aff'd in part*, 27 S.R.R. 874 (FMC 1996).

In its exceptions, Anchor “adamantly objects to the dismissal of Sections 6 and 7, for reason stated herein” Anchor’s Exceptions at 8.⁵ The only objection evident in Complainant’s appeal, however, is an allegation that Respondents are “in violation of several parts of Section 10(c), including section 10(c)(6) Allocating, [and] Section 10(a)(2) and (3) Agreements

⁵ Anchor undermines its own position by conceding later in its exceptions that “Sections 4, 5, 6, and 7 are essentially procedural sections of the Act, which primarily pertain to the Commission and the carriers.” Anchor’s Exceptions at 9.

Unfiled/Contrary.” *Id.* at 8-9. Violations of these latter provisions of section 10, Prohibited Acts, were alleged previously by Anchor (Amended Complaint at 4, 5, 7, and 8) and were not dismissed by the ALJ’s September 27 Order. As the ALJ addressed only the specific statutory sections raised by Respondents’ Partial Motion, the Commission concludes that the ALJ correctly granted such motion based upon his determination that neither section 6 nor 7 gives rise to a private cause of action for violation of the Shipping Act.

Section 9 of the Shipping Act

Section 9 is the provision applicable to controlled carriers. 46 U.S.C. §§ 40701-10706. A controlled carrier means “an ocean common carrier that is, or whose operating assets are, directly or indirectly, owned or controlled by a government” 46 U.S.C. § 40102(8).

Respondents deny that any of the Respondents has ever been held by the Commission to be a controlled carrier. Respondents’ Partial Motion at 6. There are no facts alleged by Anchor in its Amended Complaint, its Answer to Partial Motion,

or in its Exceptions that any of the Respondents is substantially owned or controlled by a government.

In responding to the motion to dismiss, Anchor acknowledged that Respondents were not classified as controlled carriers, asserting only that “Anchor has no further comments with respect to Respondent’s [sic] having violated Section 9 of the Act.” Anchor’s Answer to Partial Motion at 13. The ALJ interpreted Anchor’s aforementioned answer as an admission that Respondents were not controlled carriers and thus could not have violated section 9. September 27 Order at 11. The ALJ accordingly dismissed Anchor’s claim under section 9.

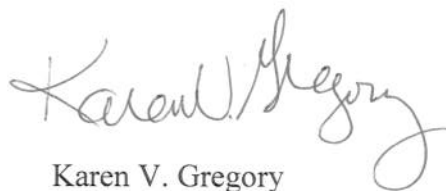
Anchor does not revisit the section 9 allegation in its exceptions. The Commission’s controlled carrier lists dated September 21, 2000, June 3, 2003, and May 5, 2005, respectively, do not show any of the Respondents as a controlled carrier. As none of the Respondents have been determined by the Commission to be a controlled carrier, section 9 is not applicable to Respondents. Anchor has not shown any error by the ALJ below with respect to his dismissal of Anchor’s section 9 claim.

CONCLUSION

THEREFORE, IT IS ORDERED, That Complainant's appeal of the Administrative Law Judge's Order of September 27, 2007, dismissing Anchor's claims with respect to imposition of civil penalties and Respondents' alleged violations of sections 6, 7, and 9 of the Shipping Act, is denied; and

IT IS FURTHER ORDERED, That this proceeding be, and it is hereby discontinued with prejudice.

By the Commission.



Karen V. Gregory
Secretary