

(S E R V E D)
(AUGUST 12, 1997)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

August 12, 1997

DOCKET NO. 97-02

MCKENNA TRUCKING COMPANY, INCORPORATED

v.

**A.P. MOLLER-MAERSK LINE AND
MAERSK INCORPORATED**

COMPLAINT DISMISSED

Both complainant McKenna Trucking Company and respondents A.P. Moller-Maersk Line and Maersk Incorporated, its agent, have requested by their Stipulation of Dismissal that the instant complaint be dismissed with prejudice to permit the parties to litigate their dispute before the Federal District Court in New Jersey under the federal antitrust laws. I find sound reason in support of their request and, as explained below, it is hereby granted.

This case began when McKenna Trucking, a motor common carrier engaged in hauling containers for various ocean carriers operating under ocean carriers' intermodal

tariffs in the Port of New York area, alleged that it had been excluded from handling Maersk's intermodal hauling business because Maersk had signed an exclusive hauling contract with another motor carrier known as Bridge Terminal Transport, Inc. (B.T.T.). McKenna Trucking alleged that Maersk's action had taken away business from McKenna Trucking in favor of B.T.T. and had had a negative impact on competition in the intermodal trucking industry in the relevant geographic area due to the alleged market power possessed by Maersk. Furthermore, McKenna Trucking alleged that the respondents had agreed to carry out a plan to eliminate McKenna Trucking from the relevant market by having B.T.T. give rebates to Maersk. As later amended to add Maersk Line to the original complaint, McKenna Trucking alleged that respondents had defrauded the public and injured the intermodal trucking industry and asked for reparations for alleged lost revenue in excess of \$758,000, for cease and desist orders, and other things. McKenna Trucking alleged that respondents had violated six sections of the Shipping Act of 1984, namely, sections 10(b)(1), 10(b)(4), 10(b)(6), 10(b)(10), 10(b)(11), and 10(b)(12). On motion by respondents asking for summary judgment or for dismissal of the complaint, I ruled that the complaint had to be dismissed as to the first four sections of the Act cited. These four sections deal with the requirements that ocean carriers adhere to their filed tariff rates or refrain from charging discriminatory rates. However, McKenna Trucking had not alleged that Maersk Line had been departing from its filed tariff rates or had been charging different rates to similarly situated shippers but rather had been harming a trucking company because Maersk had been allegedly receiving rebates from its preferred trucking company, B.T.T., a company that lies outside Commission jurisdiction under such circumstances. As to the remaining sections

of the Act alleged to have been violated, namely, sections 10(b)(11) and 10(b)(12), which deal with unreasonable or undue preferences or prejudices or disadvantages or unreasonable refusals to deal, I ruled that determination of such issues depended on evidence of record and could not be dismissed merely from reading the complaint. See *Complaint Dismissed in Part, etc.*, served May 19, 1997, 27 SRR 1045, notice of administrative finality as to the dismissal, June 23, 1997 (unreported).

As explained at some length in the ruling cited above, the subject of the dispute seemed to involve questions of monopolies or destructive effects on competition in the motor-carrier industry adversely affecting motor carriers in the relevant market area. Such a dispute sounds very much in antitrust law, not shipping law, and indeed McKenna Trucking also filed an antitrust complaint in the U.S. District Court in New Jersey making the same allegations under the federal antitrust laws and apparently seeking treble damages, which type of award, of course, this Commission is unauthorized to make. However, as pointed out in the rulings, before issuing summary judgment, the non-moving party, here, McKenna Trucking, is entitled to an opportunity to seek out relevant evidence in support of its complaint through discovery to show that it is justified in proceeding further toward a decision on the merits of its complaint. In the instant case, there was also a serious jurisdictional problem related to some extent to the nature of the complainant, a motor carrier alleging that it had been excluded from business. Under applicable case law, the Commission and the courts have repeatedly emphasized that the primary concern of the Shipping Act is to protect the shipping public, not members of the transportation industry, at least under the sections of the Act cited by McKenna Trucking. I therefore ruled that

McKenna Trucking would be afforded a reasonable amount of time to seek out evidence from shippers that they had been adversely affected because Maersk had decided to choose one motor carrier rather than McKenna Trucking or some other motor carrier to haul containers under Maersk's intermodal tariff. I strongly suggested that McKenna Trucking seek to depose shippers to allow respondents an opportunity to cross-examine those witnesses and advised that I would sign subpoenas for McKenna Trucking if necessary. McKenna Trucking was given approximately 30 days to advise me of its intentions and plans to take discovery and another 30 days to advise as to what type of discovery McKenna intended to use. McKenna's counsel advised that if his efforts revealed that there was no prospect of locating shipper witnesses who could provide evidence supporting the Commission's jurisdiction over the subject matter of this case, he would so advise and not expect the case to continue before the Commission. See Notice of Second Conference and Rulings Made Therein, served June 17, 1997. McKenna's counsel has not advised that he has located shipper witnesses and wishes to provide evidence supporting the Commission's jurisdiction over the subject matter of the dispute. Instead, by agreement with respondents' counsel, he asks that the instant complaint be dismissed with prejudice so that McKenna Trucking can proceed to litigate its antitrust complaint before the federal court in New Jersey.

From the outset the instant complaint raised serious questions as to whether McKenna Trucking had chosen the correct forum to hear its allegations. As noted above, four of the sections of the Shipping Act invoked in the complaint had to be dismissed from the face of the complaint and even the two remaining sections of the Act were of

questionable viability under shipping law. In short, the allegations in the complaint appeared to lie far more appropriately under antitrust law than shipping law because they implicated effects on competition in the intermodal trucking industry rather than adverse effects on the shipping public, the primary beneficiaries of the Shipping Act of 1984. It may be that the main reason the complaint was filed with the Commission in the first place is the fact that the Shipping Act in section 7(c)(2) appears to preclude McKenna Trucking from seeking relief under the antitrust laws if respondents' alleged unlawful conduct was prohibited by the Shipping Act.¹ However, there is no evidence that respondents' conduct implicates the Shipping Act and, furthermore, respondents have agreed in their Stipulation of Dismissal not to raise the section 7(c)(2) defense in the antitrust suit now pending in federal court.

The Commission has no time or resources or indeed authority to entertain proceedings rightfully belonging in federal courts under the antitrust laws when there is no evidence that the case implicates the Commission's jurisdiction under the Shipping Act of 1984. This is such a case and it is accordingly dismissed with prejudice as the parties request.



Norman D. Kline
Administrative Law Judge

¹Section 7(c)(2) of the Shipping Act of 1984 provides that "[n]o person may recover damages under section 4 of the Clayton Act (15 U.S.C. 15), or obtain injunctive relief under section 16 of that Act (15 U.S.C. 26), for conduct prohibited by this Act." The purpose of section 7 was to assure that a wrongdoer would not be found liable under two different laws for the same conduct, assuming that the conduct was violative of the Shipping Act. See discussion in this docket, Complaint Dismissed, etc., served May 19, 1997, at 16 n. 7 (27 SRR at 1050 n. 7).