

ORIGINAL

S E R V E D
April 1, 2009
FEDERAL MARITIME COMMISSION

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WASHINGTON, D.C.

DOCKET NO. 02-04

ANCHOR SHIPPING CO.

v.

**ALIANÇA NAVEGAÇÃO E LOGÍSTICA LTDA.,
COLUMBUS LINE, INC.,
HAMBURG SÜDAMERIKANISCHE
DAMPFSCHIFFFAGARTS-GESELLSCHAFT KG, and
CROWLEY AMERICAN TRANSPORT LINE, INC.**

INITIAL DECISION GRANTING REQUEST TO DISMISS COUNTER-COMPLAINT¹

Anchor Shipping Company (Anchor) is (or was) a non-vessel-operating common carrier (NVOCC). Respondent Aliança Navegação E Logística Ltda. (Aliança) is an ocean common carrier. Anchor and Aliança were parties to one or more service contracts during the period from April 29, 1999, to May 6, 2000.²

Prior to the commencement of this proceeding, Anchor initiated arbitration as required by the terms of the service contract. An arbitrator from the Society of Maritime Arbitrators conducted

¹ The initial decision will become the decision of the Commission in the absence of review by the Commission. Rule 227, Rules of Practice and Procedure, 46 C.F.R. § 502.227.

² For a more extensive discussion of the procedural history, see *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, FMC No. 02-04, Order at 2-20 (ALJ Dec. 16, 2008) (Order Dismissing Complaint for Failure to Comply with the Commission's Rules of Practice and Procedure and Orders Entered in this Proceeding). For convenience, I will use a short form citation of *Anchor v. Aliança* without the docket number to orders issued by administrative law judges.

the arbitration. After reviewing the evidence, the arbitrator issued a decision addressing issues under the service contract and issues under the Shipping Act. The arbitrator found in favor of Anchor, deducted an amount for freight charges and interest due Aliança, and awarded Anchor a net of \$381,880.59 in damages, interest, legal expenses, and "Allowance for Party costs leading to the interim Award." *Arbitration between Anchor and Aliança Under Service Contract EC99-0511*, Decision and Final Award at 57 (July 31, 2001). Aliança paid Anchor the amount awarded by the arbitrator.

On March 7, 2002, Anchor commenced this proceeding by filing a Complaint with the Commission alleging that Aliança caused injury to Anchor through misconduct in violation of the Shipping Act of 1984 (Shipping Act), now codified at 46 U.S.C. §§ 40101-41309. Aliança moved to dismiss the Complaint for failure to state a claim and Anchor filed a motion for leave to file an Amended Complaint adding Crowley American Transport, Inc., Columbus Line, Inc., and Hamburg Südamerikanische Dampfschiffahrt as respondents. On May 2, 2002, the presiding administrative law judge granted Aliança's motion to dismiss and denied Anchor's motion to amend the complaint. *Anchor v. Aliança*, 29 S.R.R. 1047 (ALJ 2002). On May 10, 2006, the Commission vacated the dismissal, granted Anchor's motion to amend "in part," and remanded the case for further adjudication. *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 998 (2006). The Commission stated that "[o]n 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." *Id.*, at 999-1000.

On remand, I granted respondent Aliança's motion for leave to file a counter-complaint. On February 12, 2007, Anchor filed an answer to the counter-complaint.

On September 27, 2007, I dismissed portions of Anchor's complaint, *Anchor v. Aliança* (ALJ Sept. 27, 2007) (Memorandum and Order on Respondents' Partial Motion to Dismiss and/or for Summary Judgment), and on December 16, 2008, I dismissed the remainder of Anchor's complaint. *Anchor v. Aliança* (ALJ Dec. 16, 2008) (Order Dismissing Complaint for Failure to Comply with the Commission's Rules of Practice and Procedure and Orders Entered in this Proceeding). On January 22, 2009, the Commission served a notice not to review the December 16, 2008, dismissal, *Anchor v. Aliança*, FMC No. 02-04 (Jan. 22, 2009) (Notice Not to Review), and on February 11, 2009, the Commission denied Anchor's appeal of the September 27, 2007, dismissal. *Anchor v. Aliança*, FMC No. 02-04 (Feb. 11, 2009) (Order Denying Complainant's Appeal of Dismissal).

Aliança's counter-complaint remained pending. On February 26, 2009, I ordered each party to file on or before March 13, 2009, a proposed schedule for resolution of Aliança's counter-complaint. *Anchor v. Aliança* (ALJ Feb. 26, 2009) (February 26, 2009 Procedural Order). On March 13, 2009, the Commission received a document signed by Anchor's president entitled Petition for Order to Show Cause. This document states that the president "noticed you recently posted a Fraudulent and Misleading Statement on the FMC Website, claiming to the shipping trade and general public, that FMC had allegedly dismissed Anchor's alleged phantom appeal from an FMC

Order of Dismissal.” (Petition for Order to Show Cause ¶ 1.) Anchor’s president contends that the record does not support this statement on the web site, then “petition[s] the Full Commission to immediately remove the fabricated public bulletin, and to consider posting the appropriate clarifications, along with a well overdue, Order to Show Cause for not taking action to at least enjoin the proven discriminatory, anti-competitive, predatory practices (oral agreements) of the Hamburg Sud Group.” (*Id.* ¶ 3.) The petition also seeks other relief unrelated to further prosecution of Aliança’s counter-complaint. The petition does not set forth any facts or argument justifying relief. Therefore, I will deny the Petition for Order to Show Cause.

On March 12, 2009, Aliança filed a response to the order with a request to dismiss its counter-complaint voluntarily. Aliança grounds supporting dismissal without prejudice of its counter-complaint are summarized as follows:

- that Anchor has not had a Commission license to operate as a non-vessel-operating common carrier since 2002
- if Aliança were to prevail, it is unlikely that Anchor would have any assets to pay reparations
- if Aliança were able to pierce the corporate veil to execute a judgment against Anchor’s president, it is unlikely that he has the assets to satisfy a judgment
- Anchor’s complaint against Aliança has been dismissed
- since Anchor’s complaint has been dismissed and Aliança has a “dismal chance” of collection if it were successful, it does not make economic sense for Aliança to continue this litigation

(Aliança Response to February 26, 2009 Procedural Order and Request to Withdraw Counter-Complaint at 1-2.) Anchor has not replied to Aliança’s request to dismiss, and the time to reply to the request has run. 46 C.F.R. § 502.74.

The Commission does not have a specific rule to cover a voluntary request/motion to dismiss. Commission Rule 12 provides that “[i]n proceedings under this part, for situations which are not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent that they are consistent with sound administrative practice.” 46 C.F.R. § 502.12. The Federal Rules of Civil Procedure govern the voluntary dismissal of an action by a plaintiff. *See* Fed. R. Civ. P. 41(a)(2) (when an answer to a complaint has been filed, “an action may be dismissed at the plaintiff’s request only by court order, on terms that the court considers proper. . . . Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice”).

I find that under the circumstances of this case, dismissal without prejudice of Aliança’s counter-complaint against Anchor is proper, as it would be a waste of Aliança’s resources and Commission resources to litigate Aliança’s counter-complaint to a conclusion. Therefore, I will grant Aliança’s request to dismiss without prejudice its counter-complaint against Anchor.

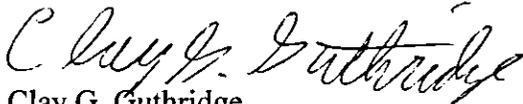
ORDER

Upon consideration of the Petition for Order to Show Cause from Anchor's president received by the Commission on March 13, 2009, the record herein, and for the reasons stated above, it is hereby

ORDERED that the Petition for Order to Show Cause be **DENIED**.

Upon consideration of the request of respondent Aliança Navegação E Logística Ltda. to dismiss its counter-complaint against complainant Anchor Shipping Company, the record herein, and for the reasons stated above, it is hereby

ORDERED that the request of respondent Aliança Navegação E Logística Ltda. to dismiss its counter-complaint against complainant Anchor Shipping Company be **GRANTED**. Aliança Navegação E Logística Ltda.'s counter-complaint against Anchor Shipping Company is dismissed without prejudice and this proceeding is terminated.


Clay G. Guthridge
Administrative Law Judge