

ORIGINAL

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JUNE 28, 1996  
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

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DOCKET NO. P3-95

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MARINE TERMINAL TARIFF PROVISIONS  
REGARDING LIABILITY OF VESSEL AGENTS;  
PETITION FOR RULEMAKING

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ORDER DENYING PETITION

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This proceeding is before the Federal Maritime Commission ("FMC" or "Commission") upon a Petition for Rulemaking filed by several maritime associations pursuant to Rule 51 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.51. The Petition explains that the real parties in interest in this matter are 250 independent vessel agents doing business in various U.S. ports and public terminals, some of which are members of each of the petitioning associations.<sup>1</sup> The Petition requests the Commission to initiate a rulemaking proceeding declaring unlawful any marine terminal tariff provision which holds vessel agents liable for the terminal charges of their disclosed principals -- i.e., the vessel owners. This step, Petitioners assert, will encourage terminal operators to find another solution to the problem of liability for vessel owners' terminal charges.

The Petition was published for comment. Sixteen comments were submitted, fifteen by port interests opposing the Petition, and one

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<sup>1</sup> Since the filing of the Petition, several other maritime associations joined the Petition.

by a vessel agent supporting it. Petitioners subsequently advised that they were attempting to initiate discussions with the American Association of Port Authorities ("AAPA") to resolve these issues, and accordingly requested that "pending these proposed discussions," the "Petition remain on the Commission's docket." Petitioners formalized their request in a Motion to Hold Petition in Abeyance Pending Efforts to Achieve an Acceptable Settlement ("Motion"). This Motion was also opposed by port interests.

The Commission heard oral argument.

#### THE PETITION

Petitioners' complaint is with the common and long-standing practice of ports and marine terminals publishing provisions in their tariffs to the effect that vessel agents would be held responsible for terminal charges incurred on behalf of their vessel owner/clients. The Petition maintains that this imposes an onerous burden on agents, which are generally small entities, and constitutes an unfair, unilateral assignment of liability.

The Petition points out that it is the ports who solicit vessels to call on and use their facilities, and that vessel agents merely hold themselves out to perform vessel agency services when the vessel owners require them. While the ports and terminal operators reap large fees from vessel calls, it is argued, the fees earned by vessel agents for their services<sup>2</sup> are generally much

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<sup>2</sup> Possible vessel agency services, which vary from vessel to vessel, are described as arranging for vessel berthing, tugs, cleaning, food provision, pilotage, stevedoring and medical visits for crew, as well as handling immigration and commercial matters, (continued...)

smaller. It is therefore unfair, the Petition asserts, for vessel agents to absorb the losses to the ports and terminals when the vessel owner goes bankrupt or otherwise fails to pay its bills.

Petitioners argue that it is unrealistic to expect vessel agents to extract a bond or guaranty from the vessel owners, as their competitive relationship is such that a vessel agent making such demands would go out of business. Moreover, an indemnification agreement allegedly would be useless if the vessel owner went bankrupt. It is the ports, Petitioners argue, which are in a better position to evaluate the financial stability of the vessels whose business they solicit, and to establish conditions under which vessel calls can take place, such as by requiring appropriate financial security.

By seeking to impose liability on vessel agents, the ports are allegedly strong-arming the agents via their tariff provisions to assume responsibility they would never agree to incur if they were negotiating a private contract. By publishing the provision in their tariffs, Petitioners argue, the ports adopt the fiction that the vessel agents implicitly accept liability by agreeing to do business in the port.

The Petition acknowledges that the Commission has addressed this issue on a case-by-case basis, citing Palmetto Shipping & Stevedoring Co. v. Georgia Ports Authority, 24 S.R.R. 50 (I.D.),

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<sup>2</sup>(...continued)  
including marketing, sales, documentation, inland transportation arrangements, management of container and chassis pools, and processing cargo claims.

761 (FMC) (1988); West Gulf Maritime Association v. Port of Houston Authority, 22 FMC 420 (1980) ("WGMA II"); and West Gulf Maritime Association v. Port of Houston Authority, 21 FMC 244 (1978) ("WGMA I"). Petitioners seek in particular to distinguish the Commission's holding in Palmetto (that such provisions are not unlawful). They argue that unlike in the Palmetto scenario, where the vessel agents were also regional stevedoring companies deriving only a small percentage of their revenues from vessel agency work, the vessel agents petitioning here are small entities deriving most or all of their revenues from their vessel agency operations.

Petitioners cite dicta in Palmetto stating that a "relevant inquiry would appear to be who has the better ability to require advance security from vessel principals." Palmetto (FMC) at 765. They further claim that the Commission urged "all parties [to] agree upon a system requiring advance security from vessel principals rather than force one party or other to either bear the risk of loss or turn away business." Id. at 765-66. Thus, Petitioners relate, the Commission suggested either a negotiated "mutually acceptable practice," or the prescription of "industry-wide liability practices pursuant to its rulemaking authority . . . ." Id. at 766, n. 12.

Arguing for an industry-wide solution, Petitioners ask the Commission "to declare unlawful in this rulemaking proceeding any marine tariff provision that holds the vessel agent liable for terminal charges of its disclosed principal." This allegedly will force the ports and terminal operators to find a solution other

than looking to the vessel agents. Petitioners note that a compromise was worked out on a regional basis in Alaska Marine Terminals v. Port of Anacortes, 22 S.R.R. 1181 (1984) ("Anacortes"). They state that there is "no need at this time for the Commission itself" to prescribe a rule, but that the striking down of the vessel agent liability tariff rule will serve as the impetus for the ports and terminal operators to fashion their own solution. Petition, at 12.

Finally, Petitioners request the agency "find" the subject tariff provisions to be unjust and unreasonable, citing sections 16 First and 17 of the Shipping Act, 1916 ("1916 Act"), 46 U.S.C. app. 815, 816, and sections 10(b)(1)<sup>3</sup> and (b)(12) of the Shipping Act of 1984, ("1984 Act"), 46 U.S.C. app. 1709(b)(1)[11], (b)(12).

#### COMMENTS ON THE PETITION

##### Supporting Comment

Only one commenter supports the Petition -- World Shipping, Inc., described as an independent vessel agent serving vessels on the Great Lakes. This commenter reiterates the arguments raised in the Petition.

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<sup>3</sup> Apparently a typographical error; we assume section 10(b)(11) was intended, as that provision, unlike section 10(b)(1), is applicable to marine terminal operators, and parallels section 16 First of the 1916 Act.

Opposing Comments

The fifteen comments in opposition to the Petition were received from port and marine terminal interests.<sup>4</sup> The ports make several arguments in opposing the Petition: the Petition is procedurally defective; it misstates the facts or is unsupported by a factual foundation; and it urges a finding that is contrary to well-settled FMC case law.

The procedural deficiencies alleged are that the Petition does not propose an actual rule, and that the relief requested -- a finding that tariff provisions holding vessel agents liable for their principals are unreasonable -- is more akin to an adjudicatory order than a rule, and should be based on a factual record. It is noted that there is no such record here, however -- only the unsupported allegations of the Petitioners -- and no evidence in support of the Petition's claims that the tariff rules complained of have any deleterious effect on vessel agents, they maintain.

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<sup>4</sup> These commenters are The American Association of Port Authorities; Port of Beaumont; Port of Corpus Christi Authority; Georgia Ports Authority; Port of Houston Authority; Lake Charles Harbor & Terminal District; Manatee County Port Authority; Port Authority of New York and New Jersey; North Carolina State Ports Authority; Northwest Marine Terminal Association; Port of Pascagoula; Port Arthur Public Port; South Carolina State Ports Authority, Board of Commissioners of the Port of New Orleans, Port Everglades Department of Broward County, Bridgeport Port Authority and Gulf Ports Association; Tampa Port Authority; and Virginia International Terminals, Inc.

As the comments are largely duplicative (most make precisely the same arguments, and some submissions are verbatim copies of others), they will generally be summarized as the collective views of "the ports", unless otherwise indicated.

The specific allegations are also disputed by the ports. The Petition's portrayal of the vessel agents' relationship with ports and terminals as a "David and Goliath" one is attacked as unfounded. The ports note that the Petitioners here are not Mom and Pop vessel agents, but rather large steamship associations, whose members include large entities, some being stevedoring companies providing agency services as a means of acquiring the stevedoring business. Conversely, ports are said to be dependent on public funds; many are small; and many do not operate in the black. Thus, they argue, the notion that it is the ports rather than the vessel agents who have "deep pockets" is not necessarily true.

Moreover, the nature of the industry is such that it is appropriate that ports look to vessel agents when the agents' principals are in default, they contend. There allegedly is a long-standing tradition of vessel agents taking responsibility for vessel owners' defaults, both in the U.S. and at foreign ports. Agents are said to be no less capable than are ports of protecting themselves against possible liability: they can require advance payments from their principals (in fact, at least one commenter asserted that this is normal practice<sup>5</sup>); they can acquire insurance; they can negotiate an indemnification agreement with their principals; they can enter contracts with the third parties to which the vessel owners will be incurring charges. By choosing to represent vessel owners on faith that they will pay their debts,

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<sup>5</sup> Houston comments at 8.

the ports maintain, the vessel agents should be prepared to make whole any persons whom their principals leave uncompensated. The Georgia Ports Authority puts it thusly: "An agent could protect itself from a bad credit risk by not offering credit, but would rather not do that. Instead, the agent would rather offer credit and compel the port authorities to bear the risk of default."<sup>6</sup>

The ports claim they are disadvantaged by having to deal with foreign vessels which may be unreachable after the services are provided, and which may not have regular or repeat calls at the port. Small ports, such as Beaumont and Port Arthur, report that most of their vessel business is from tramp operations. "Ships are long gone when the bill comes due," the AAPA asserts,<sup>7</sup> and it is argued to be essential for a port's viability and solvency that a local entity -- i.e., the vessel agent -- be responsible for port charges assessed an absent or evasive vessel.

The ports' major argument against the Petition appears to be that it proposes a blanket finding that would be contrary to a series of Commission adjudicatory decisions holding, on an ad hoc, port-by-port basis, that particular terminal tariff provisions imposing liability on vessel agents were not unreasonable under the Shipping Acts. The port interests argue that Palmetto, WGMA I, WGMA II and other Commission decisions<sup>8</sup> stand for precisely the

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<sup>6</sup> Georgia comments at 16.

<sup>7</sup> AAPA comments at 11.

<sup>8</sup> Harrington & Co. and Palmetto Shipping & Stevedoring Co. v. Georgia Ports Authority, 23 S.R.R. 753 (I.D.), 1276 (FMC) (1986)  
(continued...)

opposite of the result urged by Petitioners. The ports point out that the Commission found in those cases that the agents derived benefits from indirect use of the ports and terminals, which rendered reasonable the tariff provisions making them responsible for the charges owed their clients. Those cases were decided on the basis of evidence of the business practices and relationships among the litigants, the ports state.

It is also noted that while the Commission advised in those proceedings, particularly in Palmetto, that a solution negotiated among ports and vessel agents would be useful, it further stated that it could not impose an industry-wide rule affecting such diversity of practices and circumstances. Nothing has changed since those cases were decided, the ports argue, and it would be incongruous for the Commission to make findings on the basis of vague representations in a rulemaking that contradict prior decisions based on evidentiary records in adjudicatory proceedings. Moreover, they maintain that for the Commission to reverse itself without cause would be an arbitrary and capricious action.

#### MOTION AND REPLIES

Petitioners' Motion to Hold Petition in Abeyance reiterates their preference that a compromise solution be achieved, and states that Petitioners are endeavoring to discuss the issue with the AAPA. Pending these efforts, they suggest, the Commission should

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<sup>8</sup>(...continued)  
("Harrington"); Louis Dreyfus Corp. v. Plaquemines Port, Harbor and Terminal District, 21 S.R.R. 1072 (1982); West Gulf Maritime Association v. Galveston, 22 FMC 101 (1979).

hold off imposing a solution on the parties. If compromise discussions fail, they state, "it is the intention of the petitioners to proceed promptly with a request for extensive discovery."<sup>9</sup>

Several port interests, including the AAPA, oppose the Motion, citing their belief that the Petition is completely without merit and there is nothing to compromise. The AAPA further states that its policy committee determined that AAPA "not attempt to negotiate with Petitioners at this time."

#### DISCUSSION

The Commission has determined to deny the Petition, as well as the requests to initiate a factfinding proceeding and to issue declaratory rulings.

At the outset, it should be noted that the Petition is one for rulemaking. Under FMC Rule 51, invoked by Petitioners, such petitions are to be accompanied by supporting facts and data, so as to convince the Commission of the need for broad regulatory relief. The instant Petition was accompanied by no such factual information, either in terms of illustrations of isolated instances, or, as would support a petition for relief on a nationwide scale, evidence of pervasive conditions requiring a rule of broad applicability. For example, there were no affidavits from injured vessel agents, explaining how a terminal tariff rule of the

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<sup>9</sup> Petitioners' subsequent request to schedule oral argument in this proceeding and their failure at oral argument to press to hold the Petition in abeyance, suggest that they are abandoning their Motion.

nature complained of operated to their detriment in an unreasonable manner. There were no instances cited of vessel agents being forced out of business, or being burdened with the debts of their principals in an unjust manner, as a result of the application of a terminal operator's tariff. There was no factual basis presented by which the Commission might be able to ascertain whether Petitioners' grievances were theoretical or actual. Instead, the Petition reiterated general concerns which were raised in the prior cases litigated before the Commission, and which were resolved contrary to Petitioners' view that the tariff provisions are unlawful.

It is not clear that, though the Petition was couched as one for Rulemaking, Petitioners are really requesting a rulemaking. The Petition states that "there is no need at this time for the Commission itself to ... prescribe industry-wide liability practices pursuant to its rulemaking authority .... The marine terminal operators and port authorities have the power to fashion and effect their own solution." Petition at 12. Petitioners did not propose a specific rule. Nor did counsel for Petitioners suggest at oral argument that there was any need for a rulemaking. Rather, the Petition urges that the Commission use a rulemaking proceeding as the mechanism for declaring unlawful certain tariff provisions.<sup>10</sup>

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<sup>10</sup> The Petition and the Motion suggest that Petitioners' objective is to encourage the Port interests, particularly the AAPA, to negotiate a resolution with Petitioners. Petitioners threatened to proceed with "extensive discovery" if such  
(continued...)

Nor is the particular relief sought by Petitioners achievable through the processes invoked by them. Petitioners essentially seek a declaratory finding that ports are engaged in unlawful activity to the extent they publish the tariff provision in issue. This would be a coercive ruling, but Rule 68(b) of the Commission's Rules of Practice and Procedure providing for declaratory orders specifies that declaratory orders will not issue for such purposes:

Controversies involving an allegation of violation by another person of statutes administered by the Commission, for which coercive rulings such as payment of reparation or cease and desist orders are sought, are not proper subjects of petitions under this section. Such matters must be adjudicated either by filing of a complaint ... or by filing of a petition for investigation ....

46 C.F.R. 502.68. Here, Petitioners are complaining about matters that are well within their sphere of direct knowledge and experience -- i.e., the circumstances under which they are allegedly held responsible for their principals' nonpayments. The filing of a complaint would therefore appear to be the most appropriate procedure for addressing these allegations. (The filing of a petition for investigation would be more appropriate in situations where the Commission is in a better position to ascertain facts and develop a record than are the aggrieved parties.) Indeed, virtually all the prior Commission decisions which constitute the current body of FMC law on the subject of

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<sup>10</sup>(...continued)  
discussions should fail. Motion at 1. There is, of course, no discovery mechanism attendant to a rulemaking proceeding, much less to a suspended petition for rulemaking.

vessel agent liability are the product of complaint cases directed at particular terminal tariff provisions.

Petitioners at oral argument repeatedly entreated the Commission to initiate a factfinding proceeding to determine the existence of changes in the industry since Palmetto and other decisions. Pressed to explain what type of changes are alleged to have occurred that would justify a factfinding proceeding, counsel made allusions to billing practices, to changes in the balance of equities, to the purportedly new practice of ports aggressively soliciting new vessel calls, and to ports' investments in telecommunications technology. O.A., 10-13, 15, 22, 37, 42. He further suggested that the purpose of the factfinding would be to ascertain in greater detail what the changed circumstances were. O.A., 38, 47, 87, 90. It is not evident what relevance these alleged factors have to the reasonableness of vessel agents' liability for their principals; more importantly, the mere recitation of unsupported and unspecific "changes" is insufficient grounds for a formal Commission inquiry.

In their Petition, too, Petitioners iterate a series of concerns and arguments which they claim are grounds to grant the relief they request. Similar contentions were raised in the complaint cases cited above, and were found to be inadequate. There is no basis to disregard findings made in the course of prior adjudicatory proceedings, and to undertake a broad, nationwide information-gathering proceeding, in order to determine whether there are new industry conditions and developments justifying

further regulatory action. This is especially true inasmuch as it has not been established that there are instances of violations on even a regional or local level. Moreover, the ports vigorously rebut Petitioners' generalized allegations of "change." In their responses to the Petition and in oral argument, the ports state that rarely do they demand that a local agent pay charges incurred by a vessel owner;<sup>11</sup> that alternative arrangements can be made between the port and the agents or vessels;<sup>12</sup> and that agents routinely require advance payment from their principals, or the vessel owners obtain other backing<sup>13</sup>.

Petitioners misstate the holdings and significance of the Palmetto and the two WGMA cases. Those decisions turned largely on what the Commission referred to as "factors unique to the shipping industry, including the 'normal business practice' and 'prior course of conduct' of the agents and port authorities, and the peculiar relationship of the vessel agents as intermediaries" between the ports and the vessel owners. Harrington at 1285-86, cited in Palmetto (I.D.) at 57. It was further emphasized in those cases that ports with sizeable investments, minimal profits (if any) and public character and obligations must be permitted to

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<sup>11</sup> AAPA, O.A., 58; South Carolina State Ports Authority, O.A., 73-74.

<sup>12</sup> Virginia International Terminals, Inc., comments, 1, 2; South Carolina State Ports Authority, O.A., 73, 76-77.

<sup>13</sup> Port of Houston Authority, comments, 8; Board of Commissioners of the Port of New Orleans, O.A., 68. Petitioners also conceded at oral argument that vessel agents sometimes receive prepayment from vessel owners for agency services. O.A., 43-44, 94-95.

collect their port charges if they are to remain financially viable. In instances where the ports enjoy an advantageous bargaining position vis-a-vis a vessel agent, their use of that position does not necessarily constitute unlawful business coercion. Palmetto (FMC) at 765.

Petitioners erroneously suggest that in the Palmetto and two WGMA cases, the Commission was gearing up for a sweeping rulemaking of national scope, and that now is the time to initiate it. Rather, those cases emphasized that an across-the-board solution, however ideally desirable, was impracticable, and that complaints would have to be addressed on a case-by-case basis. Id. at 766. The main cause for the vessel agents' predicament, it was noted in Palmetto, was that the unbridled competition among the agents themselves encouraged some to foolishly decline to demand security from their customers, and then they are stuck holding the bag when the ports expect payment for their services. Palmetto (I.D.) at 94-95. To that extent at least, the problems complained of by the vessel agents are largely of their own making. Despite Petitioners' claim of "changed circumstances," nothing presented in the instant Petition suggests to the Commission that its prior assessments are inaccurate. Nor have Petitioners met their burden of establishing that the factual bases for those assessments have changed.

Counsel for Petitioners conceded at oral argument that there is no "cookie-cutter solution" to the controversy over vessel agent liability. O.A., 91. The Commission agrees. Accordingly, it must

decline the invitation to impose, as Petitioners request, "a more reasoned and appropriate balancing of risk." O.A., 90. It is not the function of the Commission to create and enforce alternative methods for commercial entities to conduct their affairs in the absence of findings of violations of law or regulations. Such findings can be made on a case-by-case basis, in the context of specific facts and circumstances.

THEREFORE, IT IS ORDERED THAT, the Petition for Rulemaking is denied and this proceeding is discontinued.

By the Commission.

  
Joseph C. Polking  
Secretary