

# FEDERAL MARITIME COMMISSION

CAROLINA MARINE HANDLING, INC.

v.

SOUTH CAROLINA STATE PORTS  
AUTHORITY, CHARLESTON NAVAL  
COMPLEX REDEVELOPMENT  
AUTHORITY, CHARLESTON  
INTERNATIONAL PROJECTS, INC. AND  
CHARLESTON INTERNATIONAL PORTS,  
LLC

Docket No. 99-16

Served: November 28, 2006

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**BY THE COMMISSION:** Steven R. BLUST, *Chairman*,  
A. Paul ANDERSON, Joseph E. BRENNAN, Harold J.  
CREEL, Jr., and Rebecca F. DYE, *Commissioners*.

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**Order Denying Leave to File Reply Memorandum,  
Denying Petition for Reconsideration, and Granting  
Motion to Remove Dismissed Party from Case Caption**

On June 30, 2006, the Federal Maritime Commission  
("Commission") issued an Order in Carolina Marine Handling, Inc.

v. South Carolina State Ports Authority, et al., holding that all claims against South Carolina State Ports Authority (“SCSPA”) and Charleston Naval Complex Redevelopment Authority (“RDA”) should be dismissed since both parties are arms of the State of South Carolina entitled to sovereign immunity. Carolina Marine Handling, Inc., 30 S.R.R. 1017, 1028-29, 1035 (2006). The Order also reversed the decision of the presiding administrative law judge (“ALJ”) to dismiss Charleston International Projects, Inc. (“Projects, Inc.”) and Charleston International Ports, LLC (“Ports, LLC”), collectively referred to therein as “CIP,” as parties to the proceeding. Id. at 1037-38. The Commission determined that: “[D]iscovery is warranted to flesh out the ‘identity’ of Ports, LLC. The possible overlapping identities of CIP, initially as Preventive Automotive Services, then Projects, Inc., and then as Ports, LLC, is a genuine issue of material fact that needs to be resolved before a motion for dismissal or summary judgment may be granted.” Id. at 1038. Therefore, the Commission reinstated Projects, Inc. and Ports, LLC as parties and remanded the case to the ALJ so that discovery could proceed.

Projects, Inc. and Ports, LLC (“Petitioners”) filed a Petition for Reconsideration of that Order on July 26, 2006, under Rule 261 of the Commission’s Rules of Practice and Procedure, 46 C.F.R. § 502.261 (2006). On August 14, 2006, Carolina Marine Handling, Inc. (“CMH”) filed a Reply in Opposition to the Petition for Reconsideration. The Petitioners filed a Reply Memorandum in Support of their Petition on August 14, 2006, and a Motion for Leave to File that Reply Memorandum on August 16, 2006 (“Motion for Reply”). On September 29, 2006, SCSPA filed a Motion to have its name removed from the caption of the case (“SCSPA Motion”).

For the reasons set forth below, we have determined to deny the Petitioners’ Motion for Leave to File a Reply Memorandum, and we deny the Petition for Reconsideration. In

addition, we have decided to grant the SCSPA Motion to remove its name from the case caption.

### **BACKGROUND**

On July 12, 2000, the ALJ dismissed CMH's Amended Complaint as to Projects, Inc. and Ports, LLC for alleged violations of the Shipping Act of 1984, finding, among other things: (1) that "there is no authority under the 1984 Act for treating Projects, Inc. and Ports LLC as the same person;" (2) that "Projects, Inc. is not and never has been a marine terminal operator;" and (3) that "Ports LLC did not even exist until March 1999[,] . . . had no license to operate a marine terminal until August 30, 1999[, and thus] . . . cannot be liable for any alleged conduct that occurred prior to August 30, 1999." Carolina Marine Handling, Inc., 28 S.R.R. 1603, 1603-04 (ALJ 2000). Since the parties submitted material in addition to their pleadings, the motion to dismiss should have been evaluated as a motion for summary judgment. See Fed. R. Civ. P. 12(b)(6). Before deciding a motion for summary judgment, the parties must be afforded an opportunity to conduct reasonable discovery. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (holding that summary judgment is only appropriate "after adequate time for discovery"); First Chicago Int'l v. United Exchange Co., 836 F.2d 1375, 1380 (D.C. Cir. 1988) (holding that a motion for summary judgment is premature when the plaintiff is not given a reasonable opportunity to conduct discovery on the merits). To date, the parties have had no such opportunity to conduct discovery.

In the Order of June 30, 2006, the Commission reversed the ALJ's dismissal as to Projects, Inc. and Ports, LLC, remanding the case so that discovery could proceed. The Commission found that there was a genuine issue of material fact as to whether Ports, LLC might be a successor in interest or alter ego of Projects, Inc., and that neither party had provided sufficient evidence to make a determination on that issue. If CMH could establish that Ports, LLC was a successor in interest or alter ego of Projects, Inc., we

noted that “Ports, LLC could be liable for any conduct of its predecessors that violated the Shipping Act.” Carolina Marine Handling, Inc., 30 S.R.R. at 1038.

In their Petition for Reconsideration, Projects, Inc. and Ports, LLC argue that the Commission should have affirmed the decision of the ALJ to dismiss the Amended Complaint against them. They argue that neither party could be liable for violations of the Shipping Act as alleged in CMH’s Amended Complaint since they are separate legal entities. Petition at 12. In its Reply in Opposition, CMH argues that the Petition does not meet the requirements for reconsideration under Rule 261 since it only reargued the Petitioners’ view of the merits of the case and asked the Commission to reach a different conclusion. Reply at 1-2. In their Motion for Leave to File a Reply Memorandum, the Petitioners argue that CMH’s Reply misconstrues Rule 261 and misapplies it to the facts stated in their Petition. Motion for Reply at 1. The Petitioners urge the Commission to give them an opportunity to respond. Id. at 2.

In the June 30 Order, the Commission also held that claims against SCSPA and RDA should be dismissed since both parties are arms of the State of South Carolina and are entitled to sovereign immunity. Carolina Marine Handling, Inc., 30 S.R.R. at 1028-29, 1035. In SCSPA’s Motion to remove its name from the case caption, it argues that the Commission should follow federal practice, citing various district court cases in which a party’s name was removed after the claims against it had been dismissed. SCSPA Motion at 1. SCSPA also asserts that removing its name from the caption will not cause any harm and will eliminate potential confusion as the case proceeds. Id. at 2.

## DISCUSSION

### A. Motion for Leave to File a Reply Memorandum

We deny the Petitioners' Motion for Leave to File a Reply Memorandum. Pursuant to Rule 74(a)(1) of the Commission's Rules of Practice and Procedure, generally, "a reply to a reply is not permitted." 46 C.F.R. § 502.74(a)(1). The Petitioners have not provided any reason to deviate from this general rule in this case as they merely seek an opportunity to rebut the arguments in CMH's Reply in Opposition to their Petition.

### B. Petition for Reconsideration

The Petition for Reconsideration is governed by Rule 261 of the Commission's Rules of Practice and Procedure. 46 C.F.R. § 502.261. That Rule states, in relevant part:

(a) Within thirty (30) days after the issuance of a final decision or order by the Commission, any party may file a petition for reconsideration. . . . A petition will be subject to summary rejection unless it:

(1) Specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order;

(2) Identifies a substantive error in material fact contained in the decision or order; or

(3) Addresses a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party. Petitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received.

For the reasons set forth below, we have determined to deny the Petition for Reconsideration because the Petitioners have not met the requirements of Rule 261(a).

1. The Requirement of a Final Decision or Order

Rule 261 allows a party to petition for reconsideration after the issuance of a final decision or order of the Commission. 46 C.F.R. § 502.261(a). Although the June 30 Order qualifies as a final order in regard to SCSPA and RDA, the Order is not final in regard to Projects, Inc. and Ports, LLC because it does not resolve any issues related to these parties.

The Supreme Court has held that: “[T]wo conditions must be satisfied for agency action to be ‘final’: First, the action must mark the ‘consummation’ of the agency’s decisionmaking process . . . . And second, the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citations omitted). As applied to Projects, Inc. and Ports, LLC, the June 30 Order does not meet either of these requirements.

First, when a case is remanded to an ALJ so that discovery can proceed, it does not “mark the ‘consummation’ of the agency’s decisionmaking process.” Id. at 178. The U.S. Court of Appeals for the District of Columbia Circuit has held that decisions by the Department of Labor Benefits Review Board that “remand cases to an ALJ for a determination of damages are not final orders.” Washington Metro. Area Transit Auth. v. Dir., Office of Worker’s Comp. Programs, 824 F.2d 94, 96 (D.C. Cir. 1987). Similarly, the Fifth Circuit has held that “[a]gency orders which remand to an administrative law judge for further proceedings are not final orders . . . .” Am. Airlines, Inc. v. Herman, 176 F.3d 283, 289 (5<sup>th</sup> Cir. 1999). In that case, the Assistant Secretary of Employment Standards of the Department of Labor remanded the case to an ALJ after denying a motion for summary judgment. Id.

These cases are analogous to the one at issue here in that an agency authority issued an order remanding a case to an ALJ for further proceedings. In the June 30 Order, we remanded the case to the ALJ so that discovery could proceed to resolve an unsettled issue regarding Projects, Inc. and Ports, LLC. Such preliminary decisions are not final orders or decisions because the decisionmaking process of the agency has not ended. Like the agency decisions in the two cases cited above, the June 30 Order does not “mark the ‘consummation’ of the agency’s decisionmaking process,” and, therefore, it is not a final order. Bennett, 520 U.S. at 178.

In addition, the June 30 Order is not “one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow’” as it applies to Projects, Inc. and Ports, LLC. Id. The June 30 Order merely remanded the case against the Petitioners to the ALJ so that discovery could proceed, preserving the determination of all issues for the ALJ, and ultimately for the Commission. Since the June 30 Order does not affect the rights or obligations of the Petitioners, it does not meet the second Bennett requirement for a final order.

Although we have decided to deny the Petition for Reconsideration on the grounds that the June 30 Order was not a final decision or order as it applies to the Petitioners, we have also determined that Projects, Inc. and Ports, LLC have not provided the Commission with a valid basis for reconsideration under Rule 261(a), as described below.

## 2. Specific Changes in Material Fact or in Applicable Law Occurring After Issuance of the Order

The Petition specifies no changes in material fact or in applicable law occurring after the Commission issued the Order on June 30, 2006. 46 C.F.R. § 502.261(a)(1). Projects, Inc. and Ports, LLC only note that in January of 2004, Ports, LLC transferred its

license and all interests in the piers at Charleston Naval Complex back to SCSPA, thereupon canceling its FMC tariff and ceasing to do business. Petition at 9-10. However, this is not a change in fact that occurred after the Commission issued the Order in June 2006. Furthermore, this development has no bearing on the question of whether Ports, LLC is a successor in interest or alter ego of Projects, Inc. and could be held liable for its acts. Therefore, even if this asserted factual development occurred after the issuance of the Order, it would not be material. The Petitioners also did not argue that there were any changes in applicable law occurring after the June 30 Order.

### 3. Substantive Errors in Material Fact Contained in the Order

The Petition fails to identify any substantive error in material fact contained in the June 30 Order that would qualify as a ground for reconsideration under Rule 261(a)(2). 46 C.F.R. § 502.261(a)(2).

In their Petition, Projects, Inc. and Ports, LLC reiterate the material facts upon which the ALJ based his decision to dismiss them as parties: (1) that Projects, Inc. and Ports, LLC have two separate legal identities; (2) that Projects, Inc. was never a marine terminal operator; and (3) that Ports, LLC did not come into existence until March 1999, after the alleged violations of the Shipping Act. Petition at 12.

The Commission's Order did not make any findings of fact as to Projects, Inc. and Ports, LLC. Rather, we found that a question existed as to whether Ports, LLC might be liable for the acts of Projects, Inc. as its successor in interest or as its alter ego. We came to a conclusion that the record lacked sufficient evidence to make such a determination, and that discovery would allow CMH to collect such evidence so that the ALJ could make an informed decision about the relationship between Projects, Inc. and Ports, LLC. Even if we accepted as true all of the facts asserted by

the Petitioners, we could still conclude that discovery is needed. Therefore, there are no substantive errors in material fact that would qualify as a ground for reconsideration under Rule 261(a)(2).

4. Findings, Conclusions, or Other Matters Upon Which the Parties Have Not Previously Had the Opportunity to Comment or Which Were Not Addressed in the Briefs or Arguments of Any Party

The Petition for Reconsideration does not address any findings, conclusions, or other matters upon which the Petitioners have not previously had the opportunity to comment that would justify reconsideration under Rule 261(a)(3). 46 C.F.R. § 502.261(a)(3).

As discussed above, the fact that Ports, LLC may no longer be a marine terminal operator is not relevant to the question of its potential liability. See supra Part B.2. Therefore, even though this asserted factual development occurred after the Petitioners filed their August 2000 Brief with the Commission,<sup>1</sup> it would not have affected our analysis. Regardless of the current status of Ports, LLC, it could still be liable for the past conduct of Projects, Inc. as its successor in interest or alter ego, requiring discovery so that CMH may collect evidence on the relationship between these parties.

Ports, LLC also argues in the Petition that it is not a successor in interest to Projects, Inc., and therefore cannot be liable for its actions. Petition at 14. However, this is a matter that Ports, LLC had ample opportunity to address. CMH asserted in its Complaint of August 11, 1999 and in its Amended Complaint of

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<sup>1</sup> We also note that the Petitioners had more than two years, between January of 2004 when Ports, LLC allegedly stopped operating and the June 2006 Order, in which to inform the Commission of any relevant factual developments.

October 29, 1999, that Ports, LLC was the successor in interest to Projects, Inc. See Complaint at 5; Amended Complaint at 5. Therefore, the Petitioners had the opportunity to contest this assertion in their August 2000 Brief in Opposition to CMH's Appeal and did so. See Brief in Opposition to Appeal at 13-16.

In addition, Ports, LLC argues that it is not an alter ego of Projects, Inc., and therefore is not liable for its actions. Petition at 14. The Petitioners assert that: "[T]he 'alter ego' doctrine is a completely separate and distinct legal doctrine from the concept of 'successor in interest.' CMH has never asserted that Ports is the alter ego of Projects or made any allegations even suggesting that it was." Id. at 14 n.4 (citation omitted).

Nevertheless, our reference to possible liability under an alter ego theory does not qualify as a sufficient ground for reconsideration under Rule 261(a)(3). Petitioners' assertions highlight the fact that the Commission's June 30 Order did not finally dispose of the factual or the legal arguments relative to whether Ports, LLC is a successor in interest or an alter ego of Projects, Inc. Upon completion of discovery, the Petitioners and CMH will be afforded the opportunity to make arguments to the ALJ based on those facts addressing whether Ports, LLC may, or may not, be a successor in interest or an alter ego of Projects, Inc. Hence, the Petitioners will be able to fully address legal differences between a successor in interest and an alter ego in the context of this proceeding before the ALJ.

5. Mere Elaborations Upon and Repetitions of Arguments Made Prior to the Order and Arguments Asserting Errors of Law

The Petition otherwise merely elaborates upon and repeats arguments that Projects, Inc. and Ports, LLC made prior to the Order, 46 C.F.R. § 502.261(a)(3), and asserts that the Commission made errors of law. Neither of these arguments can form a basis for reconsideration under Rule 261. Projects, Inc. and Ports, LLC

summarize the findings of the ALJ at length in their Petition, repeating their arguments that the Commission ought to affirm his dismissal. Compare Petition at 5-8, 11, 12, 15 with Brief in Opposition to Appeal at 13-16, 21-24.

The Petitioners also argue that the Commission made several errors of law in the Order. In particular, they contend that the Commission applied an incorrect standard in assessing a motion for summary judgment, Petition at 12-13; that the Commission confused the concepts of “successor in interest” and “alter ego,” *id.* at 13-14; and that, even if there is a genuine issue of fact regarding these theories, it is immaterial since Projects, Inc. was never a marine terminal operator, *id.* at 11, 15. However, errors of law are not a ground for reconsideration under Rule 261. See Non-Vessel-Operating Common Carrier Service Arrangements, 30 S.R.R. 592, 593 (2005) (“[B]oth petitions contend that the Commission reached an erroneous legal conclusion. As the text of Rule 261 makes clear, however, this is not an acceptable ground for seeking reconsideration.”).

In conclusion, the Petition for Reconsideration does not meet the requirements of Rule 261 because it does not provide an adequate ground for reconsideration and because the June 30 Order was not “final” in regards to the Petitioners. Accordingly, we deny the Petition for Reconsideration. In remanding this case, we are mindful of the fact that it has been more than seven years since CMH filed its August 1999 Complaint requesting discovery. We urge the parties upon remand to cooperate with the ALJ to establish a schedule for the speedy completion of discovery, and we encourage the ALJ to use his sound discretion to move these proceedings forward without any further delay.

#### C. Motion to Remove SCSPA from the Case Caption

We have decided to grant the SCSPA Motion to remove its name from the caption in future case documents. Since the Commission affirmed the dismissal of all claims against SCSPA in

the June 30 Order, SCSPA is no longer a party to this action, and, thus, it will do no harm to the continuing proceedings if SCSPA is removed from the case caption as it has requested. Although there is no Commission Regulation or Federal Rule governing such cases, SCSPA has cited various federal court decisions to remove a party's name from the case caption after claims against it have been dismissed. See SCSPA Motion at 1-2 (citing Hatten v. Prison Health Servs., No. 2:05-cv-6-FtM-99DNF, 2006 WL 2536804, at \*3 (M.D. Fla. Aug. 31, 2006); Martin v. Am. Family Mut. Ins. Co., No. CIV 05CV0960-ZLWBNB, 2006 WL 1660323, at \*1 (D. Colo. June 8, 2006); Davis v. S.D. Dep't of Corr., No.05-4016, 2006 WL 704488, at \*2 (D.S.D. Mar. 10, 2006); Galazo v. Pieksha, No. 4:01-CV-01589(TPS), 2006 WL 141652, at \*1 n.4 (D. Conn. Jan. 19, 2006); Gray v. City of Chicago, 159 F.Supp.2d 1086, 1091 (N.D. Ill. 2001)).

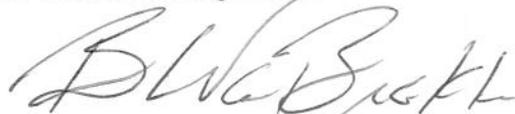
### CONCLUSION

THEREFORE, IT IS ORDERED, That the Motion of Projects, Inc. and Ports, LLC for Leave to File a Reply Memorandum is denied;

IT IS FURTHER ORDERED, That the Petition for Reconsideration is denied;

IT IS FURTHER ORDERED, That the Motion to remove SCSPA from the caption in all future case documents is granted.

By the Commission.



Bryant L. VanBrakle  
Secretary