

ORIGINAL

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( July 12, 2000 )  
(FEDERAL MARITIME COMMISSION)

**FEDERAL MARITIME COMMISSION**

**WASHINGTON, D. C.**

July 12, 2000

**DOCKET NO. 99-16**

**CAROLINA MARINE HANDLING, INC.**

**v.**

**SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL.**

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**MOTION FOR RECONSIDERATION GRANTED  
AND COMPLAINT DISMISSED AS TO RESPONDENTS  
CHARLESTON INTERNATIONAL PROJECTS, INC.  
AND CHARLESTON INTERNATIONAL PORTS, LLC**

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Respondents Charleston International Projects, Inc. and Charleston International Ports, LLC (“movants”) filed a motion for reconsideration of the May 2, 2000 ruling denying their motion to dismiss. Movants state that the ruling fails to recite any facts concerning these respondents’ conduct other than that they either negotiated for or obtained a license to operate a breakbulk marine

terminal, and fails to cite any authority establishing that these respondents' conduct was in any way unlawful.

In response to the allegations of complainant Carolina Marine Handling, Inc. ("CMH") that these respondents violated sections 10(d)(1), 10(d)(3), 10(b)(11), 10(b)(12) and 10(d)(4) of the Shipping Act of 1984 ("1984 Act"), movants contend that the only two actions which CMH has identified, that they committed, is that one company, Charleston International Projects, Inc. ("Projects, Inc.") unsuccessfully attempted to obtain a license to operate a marine terminal on property that CMH has never used, and that Charleston International Ports LLC ("Ports LLC") successfully negotiated and obtained from South Carolina State Ports Authority ("SPA") a license to operate a breakbulk marine terminal and began operating such a terminal in September 1999. Movants contend that merely obtaining access to and control of a marine terminal is neither a forbidden practice nor contravenes any FMC regulation. Movants also argue that obtaining or failing to obtain a license to operate a marine terminal does not involve the licensee in refusing to deal with anyone, the giving of any unreasonable preference or advantage or otherwise engaging in any form of discrimination, unlawful or otherwise.

In its reply, CMH urges denial of the motion for reconsideration as a repetitious motion. CMH also states that the Commission's application of marine terminal practices is not so restricted as to exclude movants' activities under its license from SPA filed with the Commission, under protest, as FMC Agreement No. 20102.

## Discussion and Conclusions

A presiding officer may properly reconsider and reverse interlocutory rulings made prior to the initial decision, whether those rulings are made by him or her or by a previously assigned administrative lawjudge. See *Knight v. Lane*, 228 U.S. 6 (1912); *Bookman v. U.S.*, 453 F.2d 1263 (Ct. Cl. 1972); and *Faircrest Site Opposition v. Levi*, 418 F. Supp. 1099 (N.D. Ohio 1976).

Movants have now made clear that the May 2, 2000 ruling was based on some misconceptions; that Projects, Inc. is a different “person” than Ports LLC; that Projects, Inc. is a corporation, while Ports LLC is a limited liability company; that Ports LLC did not exist until March 1999; that there is no authority under the 1984 Act for treating Projects, Inc. and Ports LLC as the same person; and that, while Performance Automotive Services, Inc. changed its name to Charleston International Projects, Inc., they are not the same entity as Ports LLC. The use of the term “CIP,” referring to both Projects, Inc. and Ports LLC, contributed to the misconception.

As to Projects, Inc., the amended complaint recognized that Projects, Inc. has no maritime experience or expertise; that it is not licensed to do business in South Carolina and has no operating history, no office, and no published telephone number; that it has never (1) had a license to operate a marine terminal in Charleston or anywhere else, (2) operated a marine terminal, or (3) loaded or unloaded any cargo from any ship; and that Projects, Inc. is not and never has been a marine terminal operator.

Movants have now established that the facts recited in the May 2, 2000 ruling are not shown to give rise to any violation of the 1984 Act; that, according to the ruling, Projects, Inc.:

(1) “under the name of Performance Automotive Services, Inc. . . . negotiated an agreement with SPA in 1997 for use of the Naval Complex’s Alpha Pier;”

(2) “donned a different hat and emerged as Charleston International Projects in concert with SPA;” and

(3) “when RDA agreed to abandon the Alpha Terminal in favor of the City of North Charleston to assuage its objections over its use as a cargo handling facility, . . . cojoined again with SPA. . . to gain access and control of Zulu Pier, the prize marine terminal of the Naval Complex and which CMH was using already.”

Only the first two allegations involve Projects, Inc., as it is clear from the license itself that Ports LLC, not Projects, Inc., is the licensee; that the amended complaint alleges that Projects, Inc. unsuccessfully negotiated an agreement to operate a marine terminal (and at a site where CMH was not operating); that such unsuccessful negotiations cannot be construed as Projects, Inc. violating any of the assailed provisions of the 1984 Act such as “refusing to deal” with CMH, “unreasonably discriminating against” CMH, or giving an “undue or unreasonable preference or advantage” to any person; and that the amended complaint thus does not even arguably allege actionable conduct by Projects, Inc.

It is now also clear that the amended complaint fails to state a claim against Ports LLC which at this time operates a breakbulk marine terminal and is thus a marine terminal operator when it provides services in connection with a common carrier and is subject to the Commission’s jurisdiction to some limited extent. This fact, however, does not render Ports LLC liable for any violation of the 1984 Act in this proceeding. As Exhibit A to the motion for reconsideration makes clear, Ports LLC did not even exist until March 1999, and it could not have engaged in any of the conduct alleged in the amended complaint that took place before that time. Ports LLC had no license

to operate a marine terminal until August 30, 1999, because it was not a marine terminal operator before that date, and the 1984 Act provisions, upon which CMH relies, require conduct by a marine terminal operator at the time of the conduct. Obviously Ports LLC cannot be liable for any alleged conduct that occurred prior to August 30, 1999.

The only facts alleged in the amended complaint that concern Ports LLC is the allegation, No. 3 above, that “when RDA agreed to abandon the Alpha Terminal in favor of the City of North Charleston to assuage its objections over its use as a cargo handling facility. . .[Ports LLC] rejoined again with SPA . . . to gain access and control of Zulu Pier, the prize marine terminal of the Naval Complex and which CMH was using already.” However, merely obtaining access to and control of a marine terminal is neither an unreasonable “practice” nor contravenes a forbidden “regulation.”

Movants demonstrate that the May 2, 2000 ruling is based on incorrect information in stating that CMH “was using already” the facilities that Ports LLC has obtained a license to operate; that it is undisputed that by August 1999, CMH was not using Zulu Pier or any other property that is subject to the license; and that it is thus undisputed by CMH that:

- (1) CMH had previously subleased a cold-storage facility and obtained a license to use several piers that RDA had subleased to Charleston Shipbuilders, Inc. (CSI);
- (2) CMH’s sublease and license agreement was for only five years and provided that CMH’s sublease and license automatically terminated if CSI’s lease with RDA was terminated;
- (3) CMH failed to pay the rent due under the sublease and license for December 1998 and January 1999, and thus was in default;
- (4) CSI had requested that RDA terminate its lease for the subject property and piers, and that RDA thus terminated the lease on May 19, 1999;

(5) CMH's sublease and license terminated according to its own terms on May 19, 1999.

(Amended Complaint, ¶¶ S, V; Affidavit of Jack C. Sprott, ¶¶ 24-27, 45, 47, 50-51, 60.) It is now clear that the May 2, 2000 ruling was in error in the notion that CMH was using Zulu Pier or any other property that is subject to the license, or had some right to use the premises, when Ports LLC obtained its license.

In summary, the only conduct that the complaint, amended complaint, and all of the material submitted by CMH allege on the part of Ports LLC in its capacity of marine terminal operator is the obtaining of a license to operate a breakbulk marine terminal and no authority has been shown that makes the mere obtaining of such a license a violation of any provision of the 1984 Act.

It is now clear that the amended complaint alleged no facts and the May 2, 2000 ruling established no facts that Projects, Inc. or Ports LLC had violated the assailed sections of the 1984 Act.

Movants have also made clear that the License Agreement (which has been filed with the Commission under protest as FMC Agreement No. 20102) is not required to be filed with the Commission because it is exempt from filing as a "marine terminal facilities agreement," which the Commission's regulations define as "any agreement between or among two . . . marine terminal operators . . . which conveys to [one] of the involved parties [a] right[s] to operate [a] marine terminal facility by means of [a] lease [or] license, . . . for the use of marine terminal facilities," 46 C.F.R. §535.311(a). It is undisputed that the license is an "agreement" that "conveys" to Ports LLC a "right to operate [a] marine terminal facility by means of a . . . license, for the use of marine

terminal facilities,” and the exemption applies to “any” agreement. Thus, the exemption applies to the License Agreement at issue (FMC Agreement No. 20102).

There are contentions that the License Agreement is not exempt variously because the License Agreement requires Ports LLC to charge the same rates as those set forth in SPA’s tariffs at the Port of Charleston, and renders the agreement as one between “CIP and SPA/Port of Charleston”; because the License Agreement permits the Joint Cooperation Committee to approve deviations by Ports LLC from rates in the SPA terminal tariff; and because Ports LLC’s marine terminal tariff is located at SPA’s website and directs to SPA online inquiries concerning pricing information for both the Port of Charleston and the Charleston Naval Complex. However, merely facilitating the dissemination of pricing information to the shipping public is not shown to cause the agreement to lose its exemption because it does not provide for the “fixing of and adherence to uniform . . . rates . . .” as required by 46 C.F.R. § 535.307(b), *infra*. Moreover, it has now been made clear that the Commission has determined that such activity would not exclude a license from the exemption. See *Marine Terminal Facilities Agreements—Exemption*, 58 Fed. Reg. 5627, 5629-30 (Jan. 22, 1993). The Commission denied a request that the exemption not apply to any license or lease that “include[s] price-fixing or other possibly anti-competitive provisions,” stating that “redefining the term ‘marine terminal facilities agreement’ to exclude any agreement that could have an anti-competitive effect would serve no useful regulatory purpose.” *Id.* Obviously, since “price-fixing” covers charging “the same rates as those set forth in SPA’s tariffs” that provision of the License Agreement does not destroy the exemption. The same is true for the other objections noted earlier.

Other provisions of the License Agreement show that it is a facilities agreement and not a marine terminal conference agreement. Movants demonstrate that the following provisions of the license are typical for any commercial real or personal property lease or license. Thus, the license contains provisions concerning use of the premises (section 5), encumbrances (section 25), utilities (section 14), maintenance (section 15), improvements (section 6), indemnification (section 13), damage to the premises (section 24), taxes (section 16), environmental responsibilities (section 26), insurance (sections 17-23), descriptions of the licensed property (section 2 and Exhibit A to the license), and listing of license fees to be paid by Ports LLC (section 4 and Exhibit B). Movants show that none of these matters, which are routine in leases and licenses, are contained in the typical conference agreement.

The May 2, 2000 ruling places significant weight on section 8 of the license, which provides that Ports LLC “shall be responsible for the day-to-day operations of the Premises” with “guidance” from SPA. However, it is now evident that there is no provision in the license requiring Ports LLC to follow such “guidance.” This same provision makes clear that despite such “guidance,” Ports LLC “shall be responsible for the safety, maintenance, accounting, administration and access to the Premises” and that SPA does not have “any right to control the conduct of [Ports LLC] regarding the operation of the Premises.” Moreover, none of the matters upon which SPA is to provide “guidance” - safety, maintenance, accounting, administration, and access to the premises (e.g., roads, gates, etc.) - concern “rates, charges, practices and conditions of service,” falling within the definition of a marine terminal conference agreement at 46 C.F.R. § 535.307(b):

(b) Marine terminal conference agreement means an agreement between or among two or more marine terminal operators and/or ocean common carriers for the

conduct or facilitation of marine terminal operations which provides for the fixing of and adherence to uniform maritime terminal rates, charges, practices and conditions of service relating to the receipt, handling, and/or delivery of passengers or cargo for all members.

Furthermore, section 8 of the license on its face applies only to the marine terminal operated by Ports LLC, and not to both that terminal and terminals operated by SPA, as is also required by the conference definition. *Id.*

The May 2, 2000 ruling similarly is shown to be in error in its faulty reliance on the license's provision, section 8, establishing a "Joint Cooperation Committee" which "determines 'necessary infrastructure improvements; marketing strategies; quality standards; and pricing deviations from the SPA's then current Terminal Tariff.'" Upon further consideration, it is now shown that neither improvements to infrastructure (e.g., roads, sewers, railroad connections, etc.), marketing strategies (e.g., which customers to call on upon or send marketing material to, whether to advertise in trade journals, etc.) nor self-imposed standards for the quality of work refer to "rates, charges, practices and conditions of service" to ocean common carriers within the meaning of 46 C.F.R. § 535.307(b), quoted earlier. In any event, these pertain only to the marine terminal operated by Ports LLC, and not to both to that terminal and terminals operated by SPA, as required by the conference definition. *Id.*

Finally, the other provisions relied upon in the May 2, 2000 ruling-which (1) require both parties to use their best efforts to advertise the terminal (section 9), (2) seek to ensure delivery of quality services to customers (section 9), (3) allow Ports LLC "in its discretion" to use SPA engineers and marketers to assist "in the planning, engineering, and operations at the Premises" (section 10), and (4) generally require SPA "to use its relationships and bargaining position for the

benefit of the Premises and its operations” (section 10)—are not unusual in facilities agreements and are not shown to relate to the “rates, charges, practices and conditions of service” to which ocean common carriers and others are subjected by Ports LLC, and, in any event, they apply only at Ports LLC’s terminal and not to both that terminal and SPA’s terminals, again as required by the conference definition. *Id.*

In short, when compared with the Commission’s definitions of “marine terminal facilities agreement” and “marine terminal conference agreement,” it is now evident that the license agreement at issue (filed with the Commission under protest as FMC Agreement No. 20102) is a marine terminal facilities agreement exempt from the 1984 Act’s tiling requirements.

For the foregoing reasons, the motion for reconsideration will be granted, and the amended complaint dismissed with prejudice with respect to Projects, Inc. and Ports LLC.

IT IS ORDERED:

Movants’ request to file a reply to a CMH’s reply in opposition to the motion for reconsideration is granted and the reply is accepted. The motion for reconsideration of Charleston International Projects, Inc. and Charleston International Ports, Inc. is granted, and the amended complaint is dismissed with prejudice as to Charleston International Projects, Inc. and Charleston International Ports, Inc.

  
Frederick M. Dolan, Jr.  
Administrative Law Judge