

ORIGINAL

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July 13, 2007
FEDERAL MARITIME COMMISSION

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WASHINGTON, D. C.

DOCKET NO. 07-01

APM TERMINALS NORTH AMERICA, INC.

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY

**MEMORANDUM AND ORDER ON
RESPONDENT'S MOTION TO DISMISS COMPLAINT**

BACKGROUND

I. THE COMPLAINT.

On January 9, 2007, complainant APM Terminals North America, Inc. (APM), commenced this proceeding by filing a complaint alleging that respondent Port Authority of New York and New Jersey (Port Authority) violated the Shipping Act of 1984. The complainant alleges that APM and the Port Authority are marine terminal operators within the meaning of section 3(14) of the Shipping Act of 1984. 46 U.S.C. § 41301.

The complaint alleges that on January 6, 2000, APM and the Port Authority entered into FMC Agreement No. 201106, a lease pursuant to which APM leased certain land and facilities at

the Elizabeth Port Authority Marine Terminal. The lease is alleged to have required the Port Authority to deliver an additional parcel of land to APM (the "Added Premises") at some point between January 6, 2000, and December 31, 2003. At the time APM and the Port Authority signed the lease, Maher Terminals (Maher), another marine terminal operator, apparently occupied the Added Premises. The complaint suggests that Maher's lease with the Port Authority required Maher to vacate the Added Premises by December 31, 2003. In its reply to the motion to dismiss, APM states that after APM and the Port Authority signed FMC Agreement No. 201106, the Port Authority entered into a new lease with Maher (FMC Agreement No. 201131) that did not establish a date certain for Maher to vacate the Added Premises. (Reply to Respondent's Motion to Dismiss the Complaint at 2.)

On December 23, 2003, as the deadline for transfer of the Added Premises approached, APM notified the Port Authority by letter of the substantial harm to APM's operations that it claimed would result if the Port Authority failed to deliver the Added Premises as required by the lease. APM also suggested that the potential harm could be mitigated if at least part of the Added Premises could be made available to APM. The Port Authority failed to deliver the Added Premises or any portion thereof by December 31, 2003.

The complaint alleges that as of August 23, 2005, the Port Authority still had not delivered any part of the Added Premises and that the Port Authority continued to permit Maher to use and occupy this area. On August 23, APM sent another letter to the Port Authority stating that the Port Authority's failure to deliver the Added Premises as contemplated by FMC Agreement No. 201106 had resulted in the harm that APM had predicted in its December 23, 2003, letter. The Port

Authority finally delivered the Added Premises to APM “on or about December 25, 2005, almost two full years beyond the agreed upon deadline.” (Complaint at 5.)

APM alleges that the Port Authority’s actions constitute a failure to operate in accordance with the terms of the lease agreement in violation of section 10(a)(3) of the Shipping Act (46 U.S.C. § 41102(b)(2)); unjust and unreasonable practices in violation of section 10(d)(1) of the Shipping Act (46 U.S.C. § 41102(c)); an unreasonable refusal to deal or negotiate with APM in violation of sections 10(d)(3) and 10(b)(10) of the Shipping Act (46 U.S.C. §§ 41106(3) and 41104(10)); and imposition of undue or unreasonable prejudices or disadvantages with respect to APM in violation of section 10(d)(4) of the Shipping Act (46 U.S.C. § 41106(2)). APM alleges that it was harmed in the following ways by the Port Authority’s failure to deliver the Added Premises to APM by December 31, 2003: (1) loss of expected operating revenues from the Added Premises; (2) substantial additional operations, labor, and construction costs at the Initial Premises; and (3) increased construction costs at the Added Premises. APM seeks an order requiring the Port Authority to cease and desist from violating the Shipping Act, awarding reparations to APM for the Port Authority’s violations of the Shipping Act, commanding the Port Authority to comply with the agreement, and granting such other and further relief as the Commission determines to be proper, fair, and just in the circumstances.

II. THE PORT AUTHORITY’S MOTION TO DISMISS.

On January 29, 2007, the Port Authority responded to the complaint by filing a Motion to Dismiss Complaint asserting two arguments. Its first argument is essentially a claim that the Commission does not have subject matter jurisdiction over APM’s complaint. Accepting the factual allegations of the complaint, the Port Authority argues that:

each and every one of these factual allegations revolves around, and is wholly based upon the alleged failure of the Port Authority to convey the added premises to APMT on or before December 31, 2003. This alleged failure is in turn based entirely upon the alleged failure of the Port Authority to comply with the terms of the marine terminal facilities agreement Thus, the Complaint . . . is based upon the failure of the Port Authority to comply with the terms of the marine terminal facilities agreement. This failure is alleged to constitute a violation of 46 U.S.C. § 41102(b)(2) which provides that a person may not operate under an agreement that is “required to be filed” with the Commission if the operation is not in accordance with the terms of the agreement.

(Motion to Dismiss Complaint at 4-5.) The Port Authority asserts that “[t]he Commission [by regulation] has expressly exempted marine terminal facilities agreements . . . from the filing requirements of the Act.” (*Id.* at 5. *See* 46 C.F.R. § 535.310(b) (“All marine terminal facilities agreements as defined in § 535.310(a) are exempt from the filing and waiting period requirements of the Act and this part.”).) Relying on *United States v. Nixon*, 418 U.S. 683, 694-696 (1974) and *Tunik v. Merit Systems Protection Board*, 407 F.3d 1326 (Fed. Cir. 2005), the Port Authority asserts that this exemption has the force of law and is binding on the Commission. The Port Authority concludes that:

it was not possible for the Port Authority to have violated 46 U.S.C. § 41102(b)(2) by not complying with the terms of the marine terminal facilities agreement No. 201106 since the Commission has exempted the terms of that agreement from the provisions of 46 U.S.C. § 41102(b)(2) and therefore has no jurisdiction to “enforce” the terms of the agreement that is not required to be filed with it.

(*Id.* at 5-6 (footnote omitted).) It argues that the fact that the parties actually filed the agreement as permitted by the regulations, *see* 46 C.F.R. § 535.301(b) (“*Optional filing.* Notwithstanding any exemption from filing, or other requirements of the Act and this part, any party to an exempt agreement may file such an agreement with the Commission.”), does not bestow jurisdiction on the Commission because jurisdiction cannot be established by the agreement of the parties. (*Id.* at 6.)

Second, the Port Authority argues that the parties entered into the agreement with the understanding that the Port Authority might not be able to deliver the premises on or before December 31, 2003. The Port Authority claims that Paragraph 1(d) of the agreement provides:

Notwithstanding any other provision of this Agreement, in the event that the added premises or any portion thereof shall not have become a part of the premises under this Agreement by December 31, 2003, then and in such event, [APM] shall have the right to terminate this Agreement upon prior written notice given to the Port Authority within one hundred eighty (180) days' [*sic*] of December 31, 2003, and each party shall and does release and discharge the other of and from any claims or demands based on this Agreement or based on any breach or alleged breach hereof with respect to such termination. Termination under the provisions of this paragraph shall have the same effect as if the effective date of the termination stated in the notice were the date of expiration of the term of the letting under this Agreement.

(*Id.* at 6-7.) The Port Authority argues that this provision of the lease gave APM two options in the event the Added Premises were not delivered: (1) terminate the agreement and attempt to negotiate a new agreement; or (2) proceed under the terms of the existing agreement notwithstanding the absence of the Added Premises. The Port Authority argues that APM is asserting a third option not contemplated by the agreement: continuing to receive the benefits of the agreement while asserting a claim for reparations for the Port Authority's failure to deliver the Added Premises as required by the agreement. (*Id.* at 7.)

On May 22, 2007, the Port Authority filed a motion to supplement its motion to dismiss. The motion to supplement summarizes the allegations of the complaint, then summarizes claims about the Port Authority's relationship with Maher and correspondence between the Port Authority and Maher about Maher's potential liability for any harm suffered by APM because the Added Premises were not delivered to APM before December 31, 2003. The Port Authority attached copies of correspondence between it and Maher to the motion to supplement.

III. REPLY TO THE MOTION TO DISMISS.

With regard to the Port Authority's jurisdictional argument, APM argues that the fact that the Commission exercised its authority under the Shipping Act to grant a limited exemption to the filing of marine terminal facilities agreements does not eliminate Commission jurisdiction over a complaint alleging breach of that agreement as a violation of section 10(a)(3) of the Act. It cites to *Crowley Liner Services, Inc. v. Puerto Rico Ports Auth.*, 29 S.R.R. 394, 408-410 (ALJ 2001), as authority for this proposition. (Reply to Respondent's Motion to Dismiss the Complaint at 4-5.)

With regard to the Port Authority's argument that paragraph 1 of the agreement limits APM's remedy for breach, APM counters that while the language on which the Port Authority relies gives APM the right to terminate, it does not state that the right to terminate is the sole remedy. The language of the agreement:

makes clear that the parties only waive claims and demands based on any breach or alleged breach "with respect to such termination." It does not state that if APMT chooses not to terminate, that APMT would waive all rights and remedies relating to the breach. Further, section 30 explicitly provides that all remedies provided for in the Agreement are non-exclusive and that the provision for a remedy in the Agreement shall not prevent the exercise of any other remedy.

(Reply to Respondent's Motion to Dismiss the Complaint at 7-8 (footnote omitted).)

APM filed a reply to the Port Authority's motion to supplement the motion to dismiss. APM claims that the additional information set forth in the motion to supplement supports APM's claim that the Port Authority breached the agreement with APM when it failed to deliver the Added Premises by December 31, 2003.

DISCUSSION

I. RESPONDENT'S MOTION TO SUPPLEMENT ITS MOTION TO DISMISS.

The Port Authority's motion to supplement does not set forth any facts or argument relevant to the argument in its motion to dismiss that the Commission does not have subject matter jurisdiction over APM's complaint. The allegations regarding its relationship with Maher have absolutely no bearing on the Port Authority's claim that the lease agreement between the Port Authority and APM limits APM's remedies for the alleged failure of the Port Authority to deliver the Added Premises before December 31, 2003. Therefore, the motion to supplement the motion to dismiss must be denied.

II. MOTION TO DISMISS COMPLAINT.

A. The Commission Has Jurisdiction over the Complaint.

There does not appear to be any dispute that FMC Agreement No. 201106 is a marine terminal facilities agreement within the meaning of the Shipping Act, 46 U.S.C. § 40301(b), and the regulations. 46 C.F.R. § 535.310(a) (2006). The Act requires that "[a] true copy of every agreement referred to in [section 40301(b)] of this title shall be filed with the Federal Maritime Commission." 46 U.S.C. § 40302(a). The Act further provides that "[a] person may not operate under an agreement required to be filed under section 40302 . . . of this title if . . . (2) the operation is not in accordance with the terms of the agreement or any modifications to the agreement made by the Federal Maritime Commission." 46 U.S.C. § 41102(b).

The Port Authority argues that APM's complaint should be dismissed because "the Commission has exempted the terms of that agreement from the provisions of 46 U.S.C. § 41102(b) and therefore has no jurisdiction to 'enforce' the terms of the agreement that is not required to be

filed with it.” (Motion to Dismiss Complaint at 5-6.) In other words, the Port Authority is claiming that the Commission does not have subject matter jurisdiction over APM’s complaint.

The Commission’s Rules of Practice and Procedure (Rules) do not explicitly provide for a motion to dismiss for lack of subject matter jurisdiction. The Rules do provide 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. Civil Rule 12(b)(1) permits a pleader to raise by motion lack of jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1).

On a Rule 12(b)(1) motion (lack of subject matter jurisdiction), the Commission “should apply the standards applicable to a summary judgment motion,” under which “the moving party will prevail only if material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.” *Richmond, Fredericksburg & Potomac R.R. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991), cert. denied, 503 U.S. 984 (1992). Moreover, “it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.” [*Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).]

Carolina Marine Handling, Inc. v. South Carolina State Ports Authority, 28 S.R.R. 1436, 1454 (ALJ 2000).

By its terms, section 535.310(b) exempts marine terminal facilities agreements only “from the filing and waiting period requirements of the Act and this part,” 46 C.F.R. § 535.310(b), but does not exempt these agreements from any other requirement of the Act. The Port Authority conflates the exemption from filing granted by section 535.310(b) with sections 40302(a) and 41102(b) of the Act to argue a conclusion that is clearly not justified.

At the time the Commission first exempted marine terminal facilities agreements from the filing and waiting requirements, section 16 of the Shipping Act empowered the Commission to exempt classes of agreements subject to the Act from requirements of the Act:

The Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this chapter or any specified activity of those persons from any requirement of this chapter if it finds that the exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, result in a substantial reduction in competition, or be detrimental to commerce. The Commission may attach conditions to any exemption and may, by order, revoke any exemption. No order or rule of exemption or revocation of exemption may be issued unless opportunity for hearing has been afforded interested persons and departments and agencies of the United States.

Shipping Act of 1984, Pub. L. 98-237, § 16, Mar. 20, 1984, 98 Stat. 84 (codified at 46 App. U.S.C. § 1715 (1993 Supp.)). Pursuant to that authority, the Commission issued a Notice of Proposed Rulemaking (NPRM) intended “to discontinue the requirement contained in 46 CFR parts 560 and 572 that marine terminal facilities agreements be filed with the Commission.” 57 Fed. Reg. 24569, 24570 (June 10, 1992). The Commission stated that “the proposed exemption applies *only to the filing requirement and does not absolve the parties to marine terminal facilities agreements from other requirements of the 1916 [and] 1984 Acts.*” *Id.* (emphasis added). The proposed regulation defined marine terminal facilities agreements in section 572.311(a).¹ Section 535.310(b), the regulation on which the Port Authority relies, was set forth in its original form as a portion of section 572.311(b) in the NPRM:

All marine terminal facilities agreements as defined in § 572.311(a) are exempt from the filing and waiting period requirements of sections 5 and 6 of the Shipping Act of 1984 and this part 572, on the condition that copies of the marine terminal facilities

¹ Due to a typographical error, this appears as “§ 572.11” in the Federal Register. 57 Fed. Reg. at 24571.

agreement be made available to any requesting party, and that information identifying facilities agreements currently in effect appear in the marine terminal tariff filed with the Commission as required by part 515 of this chapter. . . . The identifying information shall include [identifying information omitted].

57 Fed. Reg. at 24571.

The Commission received a number of comments in response to the NPRM. In response to those comments, it published a Supplemental Notice of Proposed Rulemaking (SNPRM) revising the proposed regulations. 57 Fed. Reg. 49667 (Nov. 3, 2002). Based on the comments, “the Commission . . . decided to withdraw the original proposal to make publication of certain information in MTO tariffs a condition of the terminal facilities agreement filing exemption.” 57 Fed. Reg. at 49670. It revised proposed section 572.311(b) to delete the condition contained in the NPRM, leaving it to read: “All marine terminal facilities agreements as defined in § 572.311(a) are exempt from the filing and waiting period requirements of sections 5 and 6 of the Shipping Act of 1984 and this part 572.” 57 Fed. Reg. at 49671. In its discussion of the proposed regulation, the Commission set forth its analysis of the exemption criteria of section 16 of the Act:

The proposed exemption should not substantially impair effective regulation since the Commission retains its authority to adjudicate formal complaints and to investigate and take appropriate action to address any statutory violations occurring under arrangements that have been exempted from filing and notice requirements. Section 12 of the 1984 Act . . . and section 27 of the 1916 Act . . . confer the Commission with subpoena powers to obtain the information it may need for investigations and adjudicatory proceedings involving exempt activities. That authority and those powers should in conjunction with the FNPR’s new public notice requirement, be sufficient to ensure that there will be no diminution of the Commission’s present degree of regulatory oversight. Additionally, the proposed exemption applies only to filing and notice requirements, and does not relieve the parties to marine terminal facilities agreements from other requirements of the 1916 and 1984 Acts.

57 Fed. Reg. at 49670 (emphasis added). The Commission promulgated section 572.311(b) as proposed. 58 Fed. Reg. 5627, 5631 (Jan. 22, 1993); *see* 46 C.F.R. § 572.311(b) (1993). In the preamble to the final rule, the Commission deleted the word “proposed” and repeated the analysis of the exemption criteria of section 16. *See* 58 Fed. Reg. at 5630. Therefore, it is patently clear that when the Commission promulgated section 572.311(b), it exempted marine terminal facilities agreements from the filing requirements of the Act, but did not exempt these agreements from the Act itself or eliminate the Commission’s jurisdiction to adjudicate formal complaints and to investigate and take appropriate action to address any arrangements that have been exempted from filing and notice requirements.

In 1998, Congress amended section 16 of the Shipping Act by “striking ‘substantially impair effective regulation by the Commission, be unjustly discriminatory, result in a substantial reduction in competition, or be detrimental to commerce.’ and inserting ‘result in a substantial reduction in competition or be detrimental to commerce.’” Ocean Shipping Reform Act of 1998 (OSRA), Pub. L. 105-258, § 114, Oct. 14, 1998, 112 Stat. 1912 (codified at 46 App. U.S.C. § 1715 (1999 Supp.)).² Section 203 of OSRA required that “[n]ot later than March 1, 1999, the . . . Commission shall prescribe final regulations to implement the changes made by the Act.” In compliance with this mandate, the Commission proposed to redesignate part 572 of Title 46 C.F.R. as part 535 and proposed amendments to some of its provisions. 63 Fed. Reg. 69034, 69038-69044 (Dec. 15, 1998). The proposal included redesignating section 572.311(b) as section 535.311(b), but did not propose

² On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill’s purpose was to “reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law.” H.R. Rep. 109-170, at 2 (2005). Section 1715 became 46 U.S.C. § 40103.

any substantive changes in its language. See 63 Fed. Reg. at 69040 (no proposed changes in section 535.311). The Commission did not alter the language of section 535.311(b) when it issued the final rule resulting from the December 15, 1998, proposal. See 64 Fed. Reg. 11236, 11242 (Mar. 8, 1999); 46 C.F.R. § 535.311(b) (1999).

In 2003, the Commission proposed further amendments to Title 46 C.F.R. Part 535 “in response to changes in the shipping industry since the enactment of [OSRA].” 68 Fed. Reg. 67510 (Dec. 2, 2003). Changes in other sections of part 535, subpart C, resulted in redesignating section 535.311(b) as section 535.310(b), 68 Fed. Reg. at 67539, but the Commission did not propose any substantive changes to section 535.310(b). The final rule left section 535.310(b) unchanged from the proposal. 69 Fed. Reg. 64398, 64420 (Nov. 4, 2004). See 46 C.F.R. § 535.310(b) (2006).

At no time since it exempted marine terminal facilities agreements from the filing and waiting period requirements of the Act and the regulations has the Commission made any statement that could be construed as support for the Port Authority’s contention that the Commission intended to exempt marine terminal facilities agreements from any other requirement of the Act or to forego “its authority to adjudicate formal complaints and to investigate and take appropriate action to address any arrangements that have been exempted from filing and notice requirements.” 57 Fed. Reg. at 49670. Chief Judge Kline reached the same conclusion when he considered this argument. *Crowley Liner Services, Inc. v. Puerto Rico Ports Auth.*, 29 S.R.R. 394, 408-410 (ALJ 2001).

The Port Authority’s argument that the Commission does not have jurisdiction to entertain APM’s complaint is without merit and suggests that the Port Authority conducted little, if any, inquiry into Commission’s intent when it exempted marine terminal facilities agreements from the

filing requirements of the Act and the regulations. Therefore, the Port Authority's motion to dismiss for lack of subject matter jurisdiction must be denied.

B. The Port Authority's Motion to Dismiss Based on the Claim That APM's Sole Remedy Is Termination of the Agreement Is Premature.

The Port Authority's second ground for dismissal – that the lease limits the remedies available to APM – does not fit within any of the defenses set forth in Rule 12(b). Furthermore, at this point, APM's complaint is the only pleading in the record and the Port Authority presents matters outside this pleading. See Fed. R. Civ. P. 12(b).

The Port Authority's second ground for dismissal is more in the nature of a motion for summary judgment.

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).

Carolina Marine Handling, Inc. v. South Carolina State Ports Auth., 30 S.R.R. 1243, 1244 (2006).

Accordingly, the Port Authority's motion to dismiss based on the claim that the lease limits the remedies available to APM must be dismissed as premature.

ORDER

Upon consideration of the Motion to Dismiss Complaint filed by respondent Port Authority of New York and New Jersey, Respondent's Motion to Supplement its Motion to Dismiss,

complainant APM Terminals North America, Inc.'s oppositions thereto, and for the reasons stated above, it is hereby

ORDERED that Respondent's Motion to Supplement its Motion to Dismiss be **DENIED**.

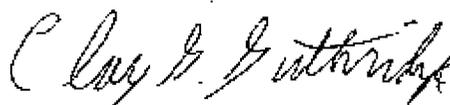
It is

FURTHER ORDERED the Motion to Dismiss Complaint for lack of subject matter jurisdiction be **DENIED**. It is

FURTHER ORDERED that the Motion to Dismiss Complaint on the grounds that the lease provides the exclusive remedy for breach be **DISMISSED** as premature. It is

FURTHER ORDERED that on or before July 30, 2007, respondent Port Authority of New York and New Jersey file its reply to the complaint. 46 C.F.R. § 502.74. It is

FURTHER ORDERED that on or before August 17, 2007, the parties meet or confer to establish the discovery schedule required by Rule 201. 46 C.F.R. § 502.201. The parties are directed to establish a schedule pursuant to which discovery will conclude on or before November 2, 2007. The parties shall file this schedule with the Commission on or before August 17, 2007.



Clay G. Guthridge
Administrative Law Judge