FEDERAL MARITIME COMMISSION

THE LAKE CHARLES HARBOR AND TERMINAL DISTRICT *v.* WEST CAMERON PORT, HARBOR AND TERMINAL DISTRICT	Docket No. 06-02

Served: August 2, 2007

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

The Lake Charles Harbor and Terminal District ("Lake Charles Harbor" or "LCH") filed a complaint with the Federal Maritime Commission ("Commission") against West Cameron Port, Harbor and Terminal District ("West Cameron" or "WC"), alleging violations of sections 5, 10(d)(1), and 10(d)(4) of the Shipping Act of 1984. The proceeding was assigned to an administrative law judge, before whom WC filed a motion to dismiss. After discovery was completed and supplemental briefs filed, the ALJ granted the motion to dismiss, concluding that WC was not a marine terminal operator ("MTO") under the Shipping Act.

LCH appealed the dismissal order to the Commission pursuant to Rule 227(b)(1), 46 C.F.R. § 502.227(b)(1). After a

thorough review, we have determined to affirm the ALJ's order dismissing the complaint.

BACKGROUND

LCH is a deep-water port authority and a political subdivision of the State of Louisiana, located in Calcasieu Parish. WC is located in Cameron Parish and is also a political subdivision of Louisiana.

A. The Complaint

In its complaint, LCH asserts that WC is imposing unjust and unreasonable fees "for vessels using the Calcasieu River Ship Channel," that WC does not offer any facilities and services to vessels and that there is no reasonable relationship between the fees and the services provided, in violation of section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. §§ 40101-41309 (2006). Complaint at 1, 8. LCH also alleges that West Cameron violated section 10(d)(4) of the Shipping Act, 46 U.S.C. § 41106(2), by imposing wharfage fees that place LCH and its tenants at an unreasonable disadvantage in connection with shipping cargo to and from the port of Lake Charles. Complaint at 8. Finally, LCH contends that two agreements to fix and regulate rates and other conditions of terminal services between WC and Cheniere LNG, Inc. should have been filed with the Commission under section 5 of the Shipping Act, 46 U.S.C. § 40302. Complaint at 9.

LCH avers that West Cameron has announced that it:

> [H]as in place a "wharfage" charge to be assessed "in association with the operation of any Liquefied Natural Gas ('LNG') project located within West Cameron."

Complaint at 1. (The source of the phrase in quotation marks was not identified in the complaint or in LCH's other pleadings). LCH contends that companies that call at Lake Charles are working under "the threat that the charge may – at any moment – be imposed upon them." Id. LCH also asserts that WC is positioned to "extract tribute" from "every vessel which passes through Cameron Parish on its way to/from the Port of Lake Charles." Id. at 2. LCH claims that the threat will "inevitably scare away other potential investors" who would be "attracted to Calcasieu Parish and the Port of Lake Charles." Id. LCH further asserts:

> By assessing these charges **simply for the use of the Channel**, West Cameron is acting as a toll taker, similar in nature to the legendary toll takers who stretched a chain across the Rhine River to force vessels to pay tolls while not providing any benefits to the boats.

Id. LCH argues that this threat is imminent as WC has already "extracted" a commitment from Cheniere LNG to pay wharfage fees of $1,000 per vessel pursuant to the Sabine Pass MOU and the Creole Trail Option. Id. at 7.

LCH requests that the Commission: conclude that WC has violated the Shipping Act; award reparations for the injuries it has suffered; issue an order directing WC to cease and desist charging "wharfage" fees or any other fees unreasonably connected to the services WC provides; and issue an order mandating that WC file any agreements relating to rates, conditions of service, and exclusive, preferential, or cooperative working arrangements. LCH also requests costs and reasonable attorney fees and such other relief that the Commission deems proper. Id. at 10.

B. The Motion to Dismiss

West Cameron moved to dismiss, arguing that the Commission lacks subject matter jurisdiction because WC is not a marine terminal operator as that term is defined in section 3(14) of the Shipping Act. LCH responded to the motion by arguing that it was premature because WC provided nothing more to support its contentions than its lawyers' arguments. LCH averred that, without the benefit of discovery, it could not respond to the fact and mixed fact/law assertions made in the motion.

The ALJ directed the parties to engage in discovery to address the issues raised by the motion to dismiss. See ALJ Order, March 16, 2006. Afterwards, the parties filed supplemental briefs elaborating on their arguments for or against dismissal.

C. ALJ's Order Granting the Motion to Dismiss

After the supplemental briefs were filed, the ALJ ruled on the motion to dismiss. As an initial matter, he concluded that, pursuant to Rule 12 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.12, Rule 12(b)(1) of the Federal Rules of Civil Procedure would apply to WC's motion to dismiss. He noted that under this rule, it is the complainant's burden to prove that the tribunal has jurisdiction in the face of a motion to dismiss. ALJ Order at 3. He further ruled that where a motion to dismiss attacks the substance of the complaint and relies on affidavits or other evidence properly before the court, the party opposing the motion must present affidavits or other evidence necessary to satisfy its burden. Id.

LCH had argued that it needed to depose WC's witnesses and to present oral argument, in order to respond adequately to the motion to dismiss. The ALJ rejected these contentions, noting that:

> The evidence to address the points relating to subject matter jurisdiction was at least as available to [Lake Charles] as it would have been after deposition of officials of WC.

Id. The ALJ explained that although LCH had failed to take advantage of the discovery opportunities before it, nonetheless "the motion to dismiss has been decided on the basis of evidence submitted by both parties after documentary discovery." Id.

Reviewing the facts before him, the ALJ determined that the present case differs substantially from the circumstances addressed in Plaquemines Port, Harbor and Terminal District v. Federal Maritime Commission, 838 F.2d 536 (D.C. Cir. 1988)("Plaquemines"). The Plaquemines court concluded that Plaquemines port's "combination of offering essential services and controlling access to the private facilities amount to the furnishing of terminal services." Plaquemines, 838 F.2d at 543. The ALJ found that in the instant proceeding, WC does not provide any services that constitute the equivalent of terminal facilities, and he emphasized the lack of any evidence to support LCH's contention that WC is an MTO:

> In this case WC does not provide fire and rescue services, or any services constituting the equivalent of terminal facilities. Provision of such services was one of the conditions on which the court [in Plaquemines] based the finding of jurisdiction. WC could block access to the private terminal facilities located in LC's territory. This is a simple fact of geography, which the Louisiana legislature has addressed by prohibiting WC from charging tolls for passage through its territory, and no evidence has been presented of such a toll being charged or threatened. There is no evidence that it provides any terminal services

> but it is located in a position that would make it physically possible for it to discriminate among carriers going into Lake Charles, if it chose to violate the relevant state law. If the holding of Plaquemines is extended far enough to cover this case, WC would become a marine terminal operator within the meaning of the Shipping Act merely by existing in the place that it does, whether or not it ever performed any act prohibited by the statute.

ALJ Order at 4-5 (emphasis added).

D. LCH's Appeal of the ALJ's Order and WC's Reply

LCH appealed the ALJ's order to the Commission. In its appeal, LCH argues that the order is flawed because 1) it fails to acknowledge the breadth of Commission jurisdiction over marine terminal operations, and 2) it fails to allow sufficient discovery to establish essential jurisdictional facts. LCH Appeal at 1. LCH alleges that the ALJ leapt to evidentiary conclusions without affording the parties an adequate opportunity to develop the record, and argues that "[t]he Ruling that is now before the Commission is based, in part, on the false premise that extensive discovery was conducted by the parties." Id. at 13. LCH also contends that WC's geographic position gives it the power to control access to marine terminals, and that this alone is sufficient to support jurisdiction under Plaquemines. Id. at 10.

WC filed a reply to the appeal, in which it asserts that LCH was required to submit affidavits or other evidence countering WC's affidavits in order for LCH to carry its burden of proof on the issue of subject matter jurisdiction. WC Reply to Appeal at 16. WC refers to precedents indicating that the non-moving party must submit evidence outside the pleadings to support assertions of subject matter jurisdiction by the tribunal. Id. at 15. WC contends that LCH had numerous opportunities to submit

evidence to prove that WC is an MTO, and that it failed to take advantage of those opportunities, instead repeatedly putting forward "its unsupportable position for carte blanche discovery for the mere exercise of doing it." WC Reply to Appeal at 26. WC contends that much of the discovery requested by LCH goes to the merits of the alleged Shipping Act violations, not the threshold jurisdictional issues. Id. at 9.

DISCUSSION

The determination of whether there is Commission jurisdiction in this case requires an analysis of whether WC is "[e]ngaged . . . in the business of furnishing wharfage, dock, warehouse, or other terminal facilities." 46 U.S.C. § 40102(14). If WC is engaged in such business, the inquiry then turns to whether its activities are "in connection with a common carrier." Id.

A. Standard of Review Under Rule 12(b)(1)

Rule 12 of the Commission's Rules of Practice and Procedure provides for the application of the Federal Rules of Civil Procedure where the Commission's procedural rules do not contain a specific rule (subject to the limitation that such application is consistent with sound administrative practice). 46 C.F.R. § 502.12. The Commission's Rules do not address motions to dismiss for lack of subject matter jurisdiction. Accordingly, Federal Rule of Civil Procedure 12(b)(1) applies to WC's motion to dismiss.

WC's motion to dismiss mounted a substantive challenge to LCH's assertion of Commission subject matter jurisdiction, including affidavits that attacked the factual allegations in the complaint. When a defendant makes a Rule 12(b)(1) motion challenging the factual basis of subject matter jurisdiction, courts have required the plaintiff to bear the burden of proving that

jurisdiction exists. See Richmond, Fredericksburg & Potomac R. Co. v. U.S., 945 F.2d 765, 768 (4th Cir. 1991). When subject matter jurisdiction is at issue, courts are permitted to consider evidence outside the pleadings without converting the motion to dismiss into a motion for summary judgment. See id.; Coalition for Underground Expansion v. Mineta, 333 F.3d 193, 198 (D.C. Cir. 2003). Plaintiffs resisting a motion to dismiss under Rule 12(b)(1) are permitted to present evidence of the facts on which jurisdiction is based (by affidavit or otherwise). Gualandi v. Adams, 385 F.3d 236, 244 (2d Cir. 2004). In addition, courts will generally require that plaintiffs be given an opportunity to conduct discovery where the jurisdictional facts are peculiarly within the knowledge of the opposing party. See id.

In the present proceeding, the ALJ premised his ruling that WC is not an MTO on LCH's failure to counter the affidavits and evidence of WC, which showed that WC was not an MTO because it had not provided terminal facilities or services. See ALJ Order at 3-5. LCH now argues that "FMC jurisprudence demands that Lake Charles be permitted discovery to develop the record before a determination that the Commission lacks jurisdiction." LCH Appeal at 4-5. However, LCH did engage in discovery before filing its supplemental brief and did attach some of the evidence obtained through this discovery to its brief. After the ALJ granted LCH's motion to compel discovery, WC provided responses to LCH's interrogatories and requests for production of documents on March 29, 2006. In exhibits to its supplemental brief, LCH included resolutions and handwritten notes produced by WC in response to its request for production of documents. LCH argued that it should have been entitled to additional discovery before the ALJ ruled on the motion to dismiss. Appeal at 11; LCH Supplemental Brief at 6. However, a party opposing a motion to dismiss is not entitled to unlimited discovery in order to find evidence that jurisdiction exists. For the purposes of evaluating WC's motion to dismiss for lack of jurisdiction, the opportunity

for discovery afforded to LCH was reasonable. In such circumstances, discovery is permitted to give the complainant an opportunity to gain access to evidence within the respondent's control, but it should not be used as a tool to prolong litigation after the complainant has tried and failed to identify evidence to support its assertion of jurisdiction. We accordingly reject LCH's claim that further discovery was needed before the ALJ could appropriately rule upon WC's motion to dismiss.

B. Subject Matter Jurisdiction – Furnishing Terminal Facilities or Services

LCH cites Plaquemines and contends that the Commission has subject matter jurisdiction over WC because it is a public port agency authorized to exercise control over the Calcasieu Channel and over marine terminals in Cameron Parish, and because WC has the ability to exclude common carriers from reaching marine terminals in Lake Charles. LCH Appeal at 10. LCH also argues that the Commission has previously exercised its jurisdiction over tug services where the port authority exercises control over such services by controlling access to terminal facilities. Id.

In Plaquemines, the court addressed a case in which a public port had imposed charges on vessels for certain essential services; nonpayment of the charges resulted in denial of access to private marine terminals within the port. A threshold question was whether the port was a marine terminal operator under the Shipping Act. The court upheld the Commission's jurisdiction over the port, noting that when ports "begin to charge a fee for their services and to control access to private facilities to enforce their charges," they will be adjudged to have "furnished" marine terminal facilities. Plaquemines, 838 F.2d at 543. An essential element in Plaquemines was that Plaquemines Port had actually exercised control by implementing a tariff rule that effectively denied access to private facilities as a consequence of non-

payment.

In the instant proceeding, unlike the situation in Plaquemines, it has not been shown that WC is offering essential services and controlling access to private facilities through the enforcement of fees. It has been shown that WC provides no terminal facilities and performs no terminal services. In its motion to dismiss, WC attached the affidavits of Mr. Cabell and Mr. Romero. Both averred that WC had never furnished wharfage, dock, or warehouse facilities within or without the Commission's jurisdiction; never exercised control over or limited access to terminal facilities; never levied, threatened, or attempted to levy any charge/wharfage/tariff/other fee upon vessels passing through its jurisdiction en route to facilities of LCH; and never threatened or attempted to disrupt any lawful operation of LCH. Motion Memo, Exhibits 1, 2. In addition, WC responded to LCH's discovery requests indicating that: it offered no marine terminal facilities or services to vessels (WC's Reply on Appeal, Exhibit 1 (Interrogatory 5)); it collected no wharfage (id., Exhibit 1 (Interrogatory 7)); and it assessed no fee against vessels at terminals within its jurisdiction (id., Exhibit 1 (Interrogatory 8)).

With regard to the two agreements between WC and Cheniere, it has not been shown that they are an exercise of any ability of WC to control access to private terminal facilities, but rather that they are discrete transactions that are mutually beneficial to the signatory parties. The affidavit of E. Darron Granger underscores that Cheniere entered into the agreements voluntarily and that it was Cheniere that suggested the $1,000 per vessel charge which Cheniere, not vessel interests, would pay to WC when the terminal facilities became operational. Mr. Granger is an employee of Cheniere Energy, Inc., who worked for 38 years in all aspects of planning, construction and operation of LNG facilities. WC Supplemental Brief, Exhibit 3. Mr. Granger avers that Cheniere initiated contact with West Cameron with respect to

the "economic arrangements," which are now the Sabine Pass MOU and the Creole Trail Option and that such were agreed upon "in exchange for the considerations received or to be received by Cheniere from West Cameron" in accordance with the two agreements. Id. Mr. Granger further avers that any payments under the two agreements would be "purely voluntary" and that no fees or charges have been extracted by WC from Cheniere. Id.

In addition to the affidavit of Mr. Granger, WC submitted the affidavit of A.W. Prebula, who attested that WC had not threatened any action affecting CITGO (which LCH named in its complaint as a threatened company). Mr. Prebula is Vice President of Refining for CITGO Petroleum Corporation and, from June 1999 to April 2006, was plant manager for the CITGO Lake Charles Manufacturing Complex. WC Supplemental Brief, Exhibit 2. Specifically, Mr. Prebula stated that: he is not aware of any requests from WC to charge CITGO any type of fee or charge for passage of vessels through WC's territorial jurisdiction; he is unaware of any threats by WC to levy such a charge; CITGO is not altering its business on the Calcasieu Channel as a result of any threat by WC to levy such a charge; he is not aware that CITGO has ever been assessed a fee by WC for passage through WC's territory. Id.

In view of the absence of countervailing evidence, we conclude that WC does not provide "other terminal facilities" under the Plaquemines approach. Accordingly, WC does not fall within the first element of the definition of MTO in section 3(14) of the Shipping Act, 46 U.S.C. § 40102(14). It is therefore not necessary for us to reach the second step of the inquiry, which would address whether any of WC's activities are "in connection with a common carrier."

CONCLUSION

The Commission finds that Lake Charles Harbor failed to demonstrate that West Cameron is an MTO as defined in the Shipping Act. The ALJ properly granted WC's motion to dismiss for lack of subject matter jurisdiction.

THEREFORE, IT IS ORDERED, That the appeal of Lake Charles Harbor and Terminal District is denied;

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

Bryant L. VanBrakle
Secretary