

ORIGINAL

FEDERAL MARITIME COMMISSION

EXCLUSIVE TUG FRANCHISES -
~~MARINE TERMINAL OPERATORS~~
SERVING THE LOWER MISSISSIPPI

Docket No. 01-06

Served: June 7, 2004

**ORDER DENYING PEAVEY COMPANY'S PETITION
FOR RECONSIDERATION**

On February 4, 2004, the Commission issued an Order denying Peavey Company's request that the Commission issue orders pursuant to section 15 of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. app. § 1714, to several overseas companies in order to obtain information related to the common carrier status of certain vessels that called at Peavey's terminal. Docket No. 01-06, Exclusive Tug Franchises - Marine Terminal Operators Serving the Lower Mississippi (Order Denying Peavey Company's Request that the Commission Issue Section 15 Orders, February 4, 2004) ("Slip Op."). The Commission found that there is no basis upon which it may grant requests of non-Commission private parties to issue section 15 orders in Commission proceedings, particularly in light of the fact that the Shipping Act provides an alternate means of obtaining the information by subpoena, which Peavey failed to utilize. Slip Op. at 19. Peavey now petitions the Commission for reconsideration of this Order pursuant to sections (a)(2) and (a)(3) of Rule 261 of the Commission's Rules of Practice and Procedure, 46 C.F.R.

§§ 502.261(a)(2) and (a)(3).’ We now deny Peavey’s petition.

POSITIONS OF THE PARTIES

A. Peavey

Peavey argues that there are substantive errors of law and fact in the Commission’s Order. Peavey Petition at 1-2. Peavey asserts that the Commission’s interpretation of section 15 is unnecessarily restrictive and is legally erroneous. Id. at 2.

Peavey avers that the Commission denied it the opportunity to seek information with respect to the issue of the Commission’s jurisdiction over Peavey by section 15 orders, when the Commission itself already utilized section 15 orders to request the same evidence from other parties. Id. Moreover, Peavey contends that the Commission “has set up circumstances” whereby this relevant information, “likely in the

‘Rule 261(a) states in pertinent part that “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.”

possession of third parties outside the United States will not be available to Peavey, the Administrative Law Judge, and the Commission.” Id. at 3.

Peavey further contends that the Commission’s decision is inconsistent with Commission precedent. The Commission has found in previous cases, Peavey asserts, that it has the power to issue section 15 orders at the request of a private litigant. Id. at 3 (citing Banfi Products Corp. • Possible Violations of Section 16, Initial Paragraph, of the Shipping Act. 1916 and Section 10(a)(1) of the Shipping Act of 1984, 26 S.R.R. 307 (1992); American Export Isbrandtsen Line - Rates on Military Cargo, 13 S.R.R. 753 (1973); Agreement No. 9827 Between United States Lines. Inc. and Sea-Land Service. Inc., 11 S.R.R. 426,427 (1970)). Moreover, Peavey claims, the Commission’s decision in Petition of Coalition for Fair Play in Ocean Shipping for Section 15 Order in Transpacific Inbound Trade Lanes, 28 S.R.R. 1061 (1999), upon which the Commission relies in its Order, neither overrules Agreement No. 9827 nor cites other Commission precedent, statutory or legislative authority to support the finding that section 15 is an agency information gathering authority that does not provide to private parties procedural rights to obtain information. Id. at 4.

In addition, Peavey argues that the Commission’s finding that Peavey failed to use its subpoena power in a timely manner to obtain the documentation it was seeking from the appropriate entities is factually and legally erroneous. Id. at 4-5. Peavey maintains that it issued eleven subpoenas in its attempts to obtain the relevant documents, but no documentation was produced in response. Id. Peavey claims that it requested the section 15 orders “not as a substitute for discovery but as the last, and

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perhaps only, means available” to secure the information related to the issue of jurisdiction. Id. at 5.

Peavey therefore asserts that its “rights and defenses” have been prejudiced by the Commission’s denial of its request for section 15 orders and that due process dictates that Peavey be entitled to discover and review all information which may be pertinent to the question of jurisdiction. Id.

B. BOE

The Commission’s Bureau of Enforcement (“BOE”) contends that Peavey fails to satisfy any of the criteria of Rule 261 and its petition for reconsideration should be summarily rejected. BOE asserts that Peavey makes no argument that there has been a change “in applicable law, which change has occurred after issuance of the decision or order.” 46 C.F.R. 502.261(a)(1). BOE Reply at 1-2. Not only does Peavey acknowledge that the Commission’s authority to grant section 15 orders is discretionary, BOE argues, but the Commission clearly demonstrated that in previous case law section 15 orders have not been issued on behalf of private parties. Id. at 2-3 (citing Banfi Products, 26 S.R.R. 307 (where BOE, not a private party, requested that a section 15 order be issued, and the Commission, while permitting respondents to offer questions in the order, did not base its decision upon respondents’ role); Agreement No. 9827, 11 S.R.R. 426 (where the Commission did not issue a section 15 order at the request of the Department of Justice)).

Moreover, BOE avers, the Commission’s decision in Petition of Coalition for Fair Play, 28 S.R.R. 1061, clarified that section 15 does not provide a private right of relief with respect

to procedural rights to obtain information. This holding, BOE contends, did not deviate from its earlier rulings where requests for the issuance of section 15 orders were denied. Id. at 4.

BOE further argues that the Commission's Order contains no substantive errors in material fact, as Peavey claims. BOE maintains that the Commission was aware in rendering its decision that eleven subpoenas were issued at Peavey's request. Id. at 5. Rather, BOE asserts that the Commission noted in its Order that Peavey failed to use its subpoena power in a timely manner as all of the vessels for which it sought documents were identified in the Commission's June 11, 2001 Order to Show Cause. Id. at 5-6.

DISCUSSION

Peavey seeks reconsideration of the Commission's Order denying its request for issuance of section 15 orders to several overseas companies. Petitions for reconsideration must meet the criteria established in Rule 261 of the Commission's Rules of Practice and Procedure. Rule 261 states, in pertinent part, that

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.

46 C.F.R. § 502.261(a). Peavey seeks reconsideration pursuant to sections 261(a)(2) and (a)(3).

1. Alleged factual errors

Peavey contends that the Commission's Order contains a substantive error in material fact. Peavey argues that contrary to the Commission's claim that Peavey failed to use the subpoena power, it, in fact, issued eleven subpoenas in its attempts to obtain the information. BOE disputes this argument, asserting that the Commission noted the issuance of the eleven subpoenas and found that Peavey failed to use its subpoena power in a timely manner.

The Commission acknowledged in its Order that Peavey sought certain information with respect to jurisdiction in the course of discovery, to no avail, and that Peavey was seeking that same information from "different. additional entities" through the issuance of section 15 orders. Slip. Op. at 18 (emphasis added). Thus, Peavey was seeking to obtain the information from entities that it chose not to subpoena during discovery. The Commission's factual finding that Peavey failed to utilize its subpoena power in a timely manner is sound, and Peavey's argument is rejected.

2. Alleged legal errors

Peavey further alleges that the Commission's Order contains 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." 46 C.F.R. § 502.261(a)(3). Peavey fails to explain what finding, conclusion or other matter in the Commission's Order it was unable to comment on or was not addressed by the briefs or arguments of either Peavey or BOE. Rather, Peavey's argument is almost entirely focused on asserting that the Commission's decision is legally erroneous because it is inconsistent with Commission precedent, because the Commission itself had used section 15 orders to attempt to obtain the same evidence, and because it has been denied due process.

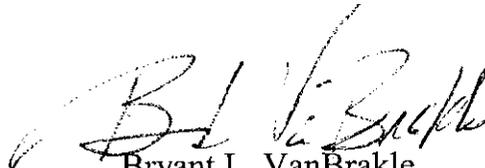
Peavey filed a request for the Commission to issue orders pursuant to section 15 to several overseas companies in order to obtain information related to the common carrier status of certain vessels that called at Peavey's terminal. In its Order, the Commission addressed only this issue and did not present any findings, conclusions or other matters upon which Peavey did not have the opportunity to comment or that were not addressed in the briefs or arguments of either Peavey or BOE. Moreover, a contention that the Commission's decision is legally erroneous is not a proper basis upon which to seek reconsideration. See Application of U.S. Atlantic & Gulf-Jamaica and Hispaniola Steamship Freight Ass'n and Sea-Land Service, Inc. for the Benefit of United Brands for Chiauita Int'l Trading Co., 22 S.R.R. 1266 (1984) (allegations of errors of law are not permitted in petitions for reconsideration). Peavey's remaining

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claims are therefore beyond the scope of the Commission's procedural rules and are denied.

THEREFORE, IT IS ORDERED, That Peavey Company's Petition for Reconsideration is denied.

By the Commission.


Bryant L. VanBrakle
Secretary