FEDERAL MARITIME COMMISSION

ODYSSEA STEVEDORING OF PUERTO RICO, INC. *v.* PUERTO RICO PORTS AUTHORITY; INTERNATIONAL SHIPPING AGENCY, INC. *v.* PUERTO RICO PORTS AUTHORITY; SAN ANTONIO MARITIME CORPORATION *v.* PUERTO RICO PORTS AUTHORITY.	Docket Nos. 02-08; 04-01; 04-06

Served: November 22, 2004

ORDER

There are presently three privately-filed complaint proceedings before the Commission in which the Puerto Rico Ports Authority (PRPA) is a respondent. PRPA claims that it is entitled to sovereign immunity from the Commission's adjudication of these complaints. See Federal Maritime Comm'n v. South Carolina State Ports Auth., 535 U.S. 743 (2002) (sovereign immunity bars Commission adjudication of a privately-filed complaint against a non-consenting state).

A. Docket No. 02-08

Odyssea Stevedoring filed a complaint against PRPA on May 31, 2002, claiming several violations of the Shipping Act and seeking reparations, a cease and desist order, and other relief. On December 23, 2003, PRPA filed a motion to dismiss, claiming that it is entitled to sovereign immunity from the adjudication of Odyssea's complaint. On September 15, 2004, the presiding Administrative Law Judge issued an oral ruling denying PRPA's motion, and denying its request for a stay pending appeal to the Commission. The following day, the Commission issued an order staying the proceeding, in order to permit it to review the issue of PRPA's alleged sovereign immunity.

B. Docket No. 04-01

International Shipping Agency, Inc. filed a complaint against PRPA on December 29, 2003, claiming several violations of the Shipping Act and seeking reparations and other relief. On March 5, 2004, PRPA filed a motion to dismiss on the basis of sovereign immunity. On September 17, 2004, the presiding ALJ denied PRPA's motion and ordered it to respond to the complaint. On September 21, 2004, the Commission issued an order staying the proceeding, in order to permit it to review the issue of PRPA's alleged sovereign immunity.

C. Docket No. 04-06

San Antonio Maritime Corporation and Antilles Cement Corporation filed a complaint against PRPA on April 21, 2004, claiming several violations of the Shipping Act and seeking reparations, a cease and desist order, and other relief. On June 16, 2004, PRPA filed a motion to dismiss on the basis of

sovereign immunity. On September 27, 2004, the presiding ALJ referred the issue of PRPA's sovereign immunity to the Commission.

D. Procedural schedules

The parties to these proceedings submitted proposed procedural schedules to facilitate the Commission's determination whether PRPA is entitled to sovereign immunity. The several complainants argue that adequate briefing has taken place and that the Commission should decide the cases on the records presently before it. PRPA suggests that additional briefing would be useful, but also argues that the cases should be consolidated in order to allow more efficient resolution of what it views as identical or nearly-identical issues common to the three proceedings.

DISCUSSION

The question presently before the Commission is whether PRPA is entitled to sovereign immunity from the adjudication of privately-filed complaints alleging violations of the Shipping Act. The parties to the three proceedings focused their arguments on whether PRPA is an "arm of the state." See Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429-430 n.5 (1997) ("the question whether a particular state agency has the same kind of independent status as a county or is instead an arm of the State, and therefore 'one of the United States' within the meaning of the Eleventh Amendment, is a question of federal law."). As the Commission recently explained in Ceres Marine Terminals, Inc. v. Maryland Port Administration, 30 S.R.R. 358 (2004), the standard to be applied in reaching that determination varies from one circuit to another. The parties presented various arguments addressing the standard applied by the U.S. Court of

Appeals for the First Circuit, which has jurisdiction over Puerto Rico. They disagreed on what the First Circuit's standard is, whether that standard is viable in the aftermath of the Supreme Court's decision in South Carolina, and how that standard should be applied to the facts of the three cases.

The parties have provided adequate briefing on the issue of PRPA's status vel non as an arm of the state. However, they have not addressed the threshold issue whether the Commonwealth of Puerto Rico should be treated like a state for the purposes of constitutional sovereign immunity.

The Supreme Court explained the genesis of constitutional sovereign immunity in great detail in Alden v. Maine, 527 U.S. 706 (1999). In particular, the Court emphasized that the immunity of states from coercive processes arises by constitutional design, not as a mere continuation of the states' common law immunity from suit. Ibid.. The application of this understanding of constitutional state sovereign immunity to Puerto Rico is unclear. In South Carolina, the Court noted that the "preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." 535 U.S. at 760. Given this emphasis on state dignity, the issue arises whether Puerto Rico holds the same constitutional dignity interest held by the states, and whether an administrative proceeding would violate that dignity.[1]

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[1] The Supreme Court has explained that the Shipping Act applies to state entities. California v. United States, 320 U.S. 577 (1944). The Court's opinion in South Carolina clarified that point, and held the states immune only from privately-filed complaints. 535

(continued...)

The First Circuit has consistently held that Puerto Rico is to be treated like a state for sovereign immunity purposes. See Jusino Mercado v. Commonwealth of Puerto Rico, 214 F.3d 34, 37-39 (1st Cir. 2000). The Supreme Court has reserved judgment on the issue. Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 141 n.1 (1993). At least one federal district court outside of the First Circuit has found that Puerto Rico is not entitled to sovereign immunity. Rodriguez v. Puerto Rico Federal Affairs Admin., 2004 WL 2225221 (D.D.C. 2004) ("Given Puerto Rico's history as a territory, and not a state, Puerto Rico cannot be said to have constitutional sovereign immunity."). We believe that it is difficult at first glance to reconcile the First Circuit's doctrine regarding Puerto Rico's sovereign immunity with the Supreme Court's view that sovereign immunity is a particular feature of the constitutional design and of the relationship between the federal government and the states. Cf. U.S. Const. amend. X.[2]

It would be possible simply to defer to the First Circuit's judgment on this question. However, the Commission has explained that it is "an agency with nationwide regulatory authority over the shipping industry" and that it "cannot routinely apply the legal standards of a particular circuit in its decisionmaking." Ceres, 30 S.R.R. at 366 n.4. Moreover, an agency decision to follow the First Circuit's rule could be

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(...continued)
U.S. at 768.

[2] The Solicitor General of the United States has expressed doubt whether Puerto Rico is entitled to Eleventh Amendment immunity. See Sup. Ct. No. 01-1545, Commonwealth of Puerto Rico v. Arecibo Community Health Care, Inc., U.S. Br. in Opp. at 4 (June 2002).

appealed to the D.C. Circuit, negating the putative certainty of that approach. See 28 U.S.C. 2343; Rodriguez, supra, at n.4.

We have determined instead to address the question the Supreme Court reserved in Metcalf & Eddy: whether Puerto Rico is entitled to constitutional sovereign immunity. For this reason, we request that the parties to these proceedings submit additional briefs limited to the following question:

> Whether Puerto Rico should be treated as a state for the purposes of constitutional sovereign immunity from federal administrative proceedings in light of the origin and purposes of such immunity as explained by the Supreme Court in Alden v. Maine, Federal Maritime Commission v. S.C. State Ports Auth., and other relevant opinions.

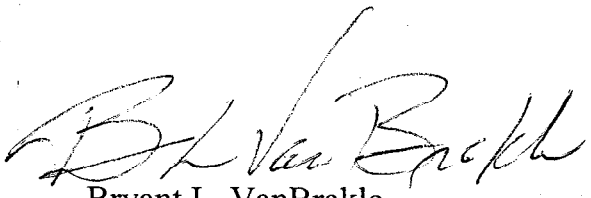
The parties should submit their briefs no later than December 22, 2004. If desired, reply briefs may then be submitted by January 11, 2005.

We are aware that a motion seeking to consolidate these proceedings is pending before the presiding ALJ, subject to the stay on all three cases. It would not be appropriate to consolidate these proceedings at this time. However, PRPA need not submit a separate brief in each proceeding, but may submit a single brief for all three cases, unless it believes that separate briefing is necessary for any reason.

CONCLUSION

THEREFORE, IT IS ORDERED, That the parties will file additional briefs by December 22, 2004, and reply briefs by January 11, 2005.

By the Commission.



Bryant L. VanBrakle
Secretary