

ORIGINAL

S E R V E D
June 9, 2011
FEDERAL MARITIME COMMISSION

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WASHINGTON, D.C.

DOCKET NO. 08-03

MAHER TERMINALS, LLC

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY

MEMORANDUM REGARDING STAY PENDING APPEAL

I. BACKGROUND.

On May 16, 2011, I issued a Memorandum and Order on the motion for summary judgment filed by the Port Authority of New York and New Jersey (PANYNJ). *Maher Terminals, LLC v. Port Authority of New York and New Jersey*, FMC No. 08-03 (ALJ May 16, 2011) (Initial Decision Granting in Part Motion for Summary Judgment and Dismissing Claim for a Reparation Award Based on Lease-term Discrimination Claims) (May 16 Decision). I noted that the Decision would be reviewed by the Commission. *Id.* at 46-48. I stated that:

Commission Rule 153 permits the presiding officer to stay a proceeding when leave to appeal an interlocutory order is granted. I will defer ruling on a stay pending receipt of memoranda from the parties stating their positions on staying this proceeding pending the Commission's review of this decision. On or before May 20, 2011, the parties are ordered to file memoranda addressing the presiding officer's authority to stay this proceeding pursuant to Rule 153 or any other ground pending the Commission's review of this decision, and the propriety of staying the proceeding pending Commission review. If the parties choose, they may file a joint memorandum.

Id. at 48.

On May 20, 2011, Maher filed Maher Terminals, LLC's Memorandum Regarding the Authority and the Propriety of a Stay Pursuant to the Order of May 16, 2011 (Maher Memorandum).

Maier argues that a stay should not be entered. The Secretary received [PANYNJ's] Memorandum in Support of a Stay Pending the Commission's Review of the Initial Decision Dated May 16, 2011 Granting in Part the Port Authority's Motion for Summary Judgment (PANYNJ Memorandum) on May 23, 2011. PANYNJ argues that the proceeding should be stayed while the Commission reviews the May 16 Decision.

II. CONTROLLING LAW.

Commission Rule 153 states "[u]nless otherwise provided, the certification of the appeal shall not operate as a stay of the proceeding before the presiding officer." 46 C.F.R. § 502.153(d). The May 16 Decision states that "Rule 153 permits the presiding officer to stay a proceeding when leave to appeal an interlocutory order is granted." *Maier v. PANYNJ*, FMC No. 08-03, Memorandum at 48 (ALJ May 16, 2011) (Initial Decision).

In its memorandum in response to the May 16 Decision, Maier states that "[t]he May 16th [Decision] cites no authority for the proposition." (Maier Memorandum at 2.) *Crowley Liner Services*, the case on which Maier bases its argument, recognizes that Rule 153 permits the presiding officer to stay the proceeding when an appeal is allowed. *Crowley Liner Services, Inc. v. Puerto Rico Ports Authority*, 29 S.R.R. 452, 453 (ALJ 2001) (editor's note discussing September 26, 2001 Notices; complete version of Notice available at 2001 WL 1632547). In its opposition to PANYNJ's motion for summary judgment, Maier relied extensively on the Commission's decision in *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc. (Inlet Fish)*, 29 S.R.R. 306 (FMC 2001). (Maier's Reply in Opposition to Respondent's Motion for Summary Judgment at 4-5, 23, 23-26.) The Commission described the administrative law judge's actions as follows:

The ALJ first issued an order holding in abeyance MSL's request to appeal the denial of its motion to dismiss, on September 27, 2000. The motion was to be held in abeyance pending the taking of discovery to ascertain jurisdictional facts. However, MSL, in a letter sent to the ALJ, reiterated its request that its appeal go to the Commission and that no discovery take place until the Commission had ruled. *Inlet Fish* then sent a letter in reply, MSL replied to *Inlet Fish*'s letter, and *Inlet Fish* replied to MSL's letter. On October 12, 2000, the ALJ altered his position, granted MSL's motion for leave to appeal to the Commission, and stayed the proceeding, and all discovery, pending the outcome of that appeal.

Inlet Fish, 29 S.R.R. at 310. Therefore, it is well established that Rule 153 permits the presiding officer to stay a proceeding when leave to appeal an interlocutory order is granted.

The factors to be considered in determining whether a stay is warranted are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-674 (D.C. Cir. 1985), citing *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925. (D.C. Cir.1958). The consideration of the factors on a motion for stay is left to the sound discretion of the administrative law judge. *Permian Basin Area Rate Cases*, 390 U.S. 747, 773 (1968); *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-845 (D.C. Cir. 1977). The applicant for a stay has the burden of demonstrating that a stay should be imposed. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1985). See *Odyssey Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority*, 30 S.R.R. 1324, 1328-1334 (2007).

In a proceeding in which a party sought a stay of a Commission Order pending review by the court of appeals, the Commission articulated the test for a stay as follows:

[I]t is necessary to look to case law for guidance. In [*Virginia Petroleum Jobbers*] the Court of Appeals for the District of Columbia Circuit set out four standards to be applied in determining whether a stay should be granted. The four standards are as follows: (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? Without such a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of administration and judicial review. (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest? [*Virginia Petroleum Jobbers*, 259 F.2d at 925.]

Although *Virginia Petroleum Jobbers* involved a petition for judicial stay pending review on the merits, the "irreparable harm" and "public interest" factors can be considered to have application where an administrative agency is being petitioned to stay one of its own orders pending an appeal.

Western Overseas Trade and Dev. Corp. v. Asia North America Eastbound Rate Agreement, 26 S.R.R. 1382, 1383-1384 (FMC 1994).

III. DISCUSSION.

The undersigned raised the issue of a stay *sua sponte* in the May 16 Decision. In response, PANYNJ argues that a stay should be entered, while Maher opposes entry of a stay. Although strictly speaking, the issue of a stay is not before me on PANYNJ's motion, as the party arguing for a stay, PANYNJ has the burden of demonstrating that a stay should be imposed.

(1) PANYNJ has not made a strong showing that it is likely to prevail on the merits of its appeal.

PANYNJ states that it intends to appeal the denial of its motion for summary judgment with respect to Maher's cease and desist claims, (PANYNJ Memorandum at 4), and I take official notice that on June 8, 2011, the Secretary received PANYNJ's exceptions. PANYNJ does not make a

strong showing in its Memorandum that it is likely to prevail on the merits of its appeal. Even if it made such a showing, PANYNJ recognizes that if it were to prevail, barring a settlement, this proceeding would continue on Maher's claims not subject to the May 16 Order. (PANYNJ Memorandum at 11.) PANYNJ has not demonstrated that this standard favors entry of a stay.

(2) PANYNJ has not shown that without such relief, it will be irreparably injured.

PANYNJ contends that it will be burdened with this litigation if a stay is not entered, but does not argue that it will be irreparably harmed. PANYNJ has not demonstrated that this standard favors entry of a stay.

(3) Issuance of a stay would substantially harm other parties interested in the proceedings.

PANYNJ contends that Maher would not be injured by a stay and would benefit from a stay because it would avoid unnecessary costs incurred prior to the Commission's decision on the appeal. (PANYNJ Memorandum at 11.)

Maher argues that under the May 16 Decision, it incurs higher costs under Lease EP-249 that cannot be recovered and will continue unless and until it obtains a cease and desist order.

A stay while the Commission reviews the May 16 Decision could substantially harm Maher's interest by delaying entry of a cease and desist order. PANYNJ has not demonstrated that this standard favors entry of a stay.

(4) The public interest does not support entry of a stay.

The public has an interest in efficient use of Commission resources as PANYNJ contends. However, there is a competing public interest in the resolution of complaints. PANYNJ has not demonstrated that this standard favors entry of a stay.

PANYNJ contends that Maher delayed seven and one-half year between the date it signed Lease EP-249 and the date it commenced this proceeding, Maher's discovery practices have resulted in delay while discovery motions are pending, and Maher has proposed and/or accepted stay of this proceeding for a total of twenty-six months of the thirty-six months since it filed its Complaint. (PANYNJ Memorandum, *passim*.) See also *Maher v. PANYNJ*, FMC No. 08-03 (ALJ Oct. 9, 2008) (Order Staying Depositions Pending a Decision on Pending Discovery Motions) (staying discovery pursuant in part to Maher's Emergency Consent Motion to Stay Depositions Pending Resolution of Maher's Motion for Protective Order); *Maher v. PANYNJ*, FMC No. 08-03 (ALJ July 23, 2010) (Memorandum and Order on Discovery Motions); *Maher v. PANYNJ*, FMC No. 08-03 (ALJ Aug. 5, 2010) (Order on Joint Motion for 45-Day Extension of Discovery Order Deadlines and for a Teleconference); *Maher v. PANYNJ*, FMC No. 08-03 (ALJ Aug. 27, 2010) (Order on Joint Statement of Status of Settlement Discussion and Motion for 40-Day Extension of Deadlines); *Maher v. PANYNJ*, FMC No. 08-03 (ALJ Oct. 18, 2010) (Order Granting Joint Motion for 60-Day Stay of Deadlines); *Maher v. PANYNJ*, FMC No. 08-03 (ALJ Dec. 17, 2010) (Order Granting in Part

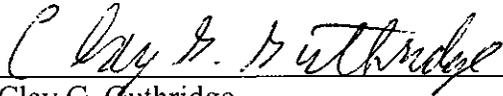
and Denying in Part Joint Motion for Extension of Deadlines). PANYNJ suggests that based on this record, Maher has no right to ask for a stay. The delay in filing the Complaint and the acquiescence to earlier stays do not preclude arguing against a stay pending appeal.

PANYNJ has not demonstrated that this proceeding should be stayed while the Commission reviews the May 16, 2011, Order. Therefore, no stay will be entered.

IV. PENDING DISCOVERY MOTIONS.

PANYNJ contends that if a stay is not entered, its pending discovery motion regarding what it describes as “Empire-related documents” should be decided. (PANYNJ Memorandum at 12-13.) Since the litigation schedule resumed in January 2011, *see Maher v. PANYNJ*, FMC No. 08-03 (ALJ Jan. 11, 2011) (January 11, 2011 Scheduling Order), the parties and subpoenaed deponents have filed fourteen (by my count) motions related to discovery up to and including “RREEF America L.L.C.’s Motion for Leave to File Reply and Reply to The Port Authority of New York and New Jersey’s Joint Opposition to RREEF America L.L.C.’s Motion for Leave to Reply and Reply to The Port Authority of New York and New Jersey’s Opposition to the Motion to Quash its Subpoena and Motion to Strike Maher Terminals, LLC’s Reply in Opposition to Respondent’s Motion to Extend Fact Discovery,” oppositions to the motions, and exhibits for the motions and oppositions. Most of the motions and oppositions have been filed in both confidential and public versions. The papers currently stack up more than twenty-four inches high.

PANYNJ is correct that its pending discovery motion should be decided, and it appears that all of the pending discovery motions must be addressed. On or before June 15, 2011, the parties are ordered to file a joint statement indicating which, if any, of the issues raised by the motions have been resolved or are moot.


Clay G. Guthridge
Administrative Law Judge