

FEDERAL MARITIME COMMISSION

AUCTION BLOCK COMPANY AND
HARBOR LEASING, LLC

Complainants,

v.

THE CITY OF HOMER AND
PORT OF HOMER,

Respondents.

Docket No. 12-03

Served: August 12, 2014

BY THE COMMISSION: Mario CORDERO, *Chairman*, Richard A. LIDINSKY, Jr., and William P. DOYLE, *Commissioners*; Rebecca F. DYE, *Commissioner*, concurring, with whom Michael A. KHOURI, *Commissioner*, joins.

Memorandum Opinion and Order

This proceeding is before the Commission for consideration of Complainants' Exceptions to the May 20, 2013, Initial Decision of the Administrative Law Judge (ALJ). *Auction Block Co. v. City of Homer*, 33 S.R.R. 107 (ALJ 2013). On April 3, 2014, the Commission heard oral argument on the FMC's jurisdiction over the complaint. The Commission affirms the Initial Decision dismissing the complaint for lack of jurisdiction. We hold that under the Shipping Act, the City and Port are not currently engaged "in the business of furnishing wharfage, dock warehouse, or other terminal facilities in connection with a common carrier" at the Fish Dock. *See* 46 U.S.C. § 40102(14)

I. BACKGROUND

On April 2, 2012, Complainants, the Auction Block Company (Auction Block), a seafood processing and logistics firm, and Harbor Leasing, LLC (Harbor Leasing), filed a complaint with the Commission against Respondents, The City of Homer (City) and the Port of Homer (Port), alleging violations of the Shipping Act of 1984 (Shipping Act), 46 U.S.C. § 40101 *et seq.* Complainants alleged the City and Port were Marine Terminal Operators (MTOs) that violated the Shipping Act through unreasonable prejudice or preference, refusal to deal, and unfair practices. *See* 46 U.S.C. §§ 41106(2)-(3), 41102(c). The essence of the dispute involves a lease between the City and Harbor Leasing, dated March 26, 2008, for Fish Dock terminal facilities utilized by Auction Block. Complainants allege that Icicle Seafood, Inc. (Icicle), a seafood processing company operating at the Port, was charged lower terminal facility fees by the City than those charged to Auction Block under the terms of the published tariff. *Auction Block Co.*, 33 S.R.R. at 109.

The Port is located in South Central Alaska on a 4.5-mile long promontory, known as the Homer Spit, which extends into Kachemak Bay. *Id.* at 111. The Port operates three docks that provide terminal facilities. *Id.* at 113. At the end of the Homer Spit are its Deep Water and Pioneer Docks, both of which service common carriers. *Id.*; Respondent's Appendix at 373-374, 1087, 1100, 1102, and 1225. Within the City's harbor, which is protected by a jetty, the City operates the Fish Dock and small boat docks. The Port publishes a Port and Harbor Terminal Tariff for rates and services, and is registered with the Commission as a "Marine Terminal Operator." 33 S.R.R. at 113.

Harbor Leasing is a real estate management company that leases property from the City and in turn leases property to Auction Block. *Id.* at 112. Complainants state that Harbor Leasing and Auction Block are two interrelated companies doing business buying and selling commercially caught fish in international and American markets. *Id.* at 116.

Complainants amended the complaint several times as the proceeding progressed. During the course of the proceedings, the Complainants dropped some of their original allegations, namely that the City operated under an “un-approved agreement.” Respondents raised as defenses that the Commission lacks subject matter jurisdiction, the complaint fails to state a claim for which relief can be granted, and reparations are barred by the statute of limitations. During the proceedings, the ALJ heard motions for summary judgment. Respondents moved for partial summary judgment, claiming that as a matter of law, the action was barred by the statute of limitations. Complainants argued in a motion for summary judgment that there was no genuine issue of material fact, and that the Shipping Act had been violated as a matter of law. On November 27, 2012, the ALJ denied Complainants’ motion seeking summary judgment, and denied Respondents’ motion seeking partial summary judgment.

In the Initial Decision, the ALJ concluded that at the Fish Dock, the City and Port did not operate as MTOs. Therefore, the ALJ dismissed all of Complainants’ claims against Respondents with prejudice, finding that the Commission lacked jurisdiction. On June 21, 2013, Complainants filed Exceptions to the ALJ’s conclusions of law and certain findings of fact, and requested oral argument before the Commission on the Exceptions. On August 1, 2013, Respondents filed a reply to Exceptions in which they opposed the request for oral argument. On December 18, 2013, the Commission granted oral argument. The parties filed pre-argument briefs, and oral argument was heard on April 3, 2014. At oral argument, Complainants alleged that the City and Port are MTOs that violated the Shipping Act through unreasonable prejudice or preference, refusal to deal, and unfair practices. 46 U.S.C. §§ 41106(2)-(3), 41102(c). They asserted that the March 26, 2008, lease between the City and Harbor Leasing for terminal facilities utilized by Auction Block constituted unfair practices and preference.

Complainants contended that Respondents are MTOs subject to the Shipping Act as they own and operate all terminal facilities, and the Port services common carriers at other docks within the port. They argued this gives the Port the ability to

discriminate in the fees it charges to access the Port, and asserted there is no legal authority to support the proposition that jurisdiction of the Commission vests separately at each “sub-area” within the port. *See* Complainants Pre-Hearing Brief at 26.

The City and Port of Homer asserts that since the Port does not operate as an MTO at the Fish Dock, and Auction Block is not a common carrier under the Shipping Act, the Commission lacks subject matter jurisdiction over the complaint. The crux of their argument is that MTO status must be determined on a “facility-by-facility basis,” and any FMC jurisdiction is determined based on the activities and services at the facility at issue. Respondents cite *Puerto Rico Ports Authority v. Federal Maritime Commission*, 919 F.2d 799, 802 (1st Cir. 1990), and *Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Authority*, 335 F. Supp. 2d 275, 282-83 (D. Conn. 2004), to support their position that jurisdiction is limited to the location and services in dispute.

II. DISCUSSION

The jurisdictional issue in this proceeding is whether the Shipping Act applies to the complaint. Complainant has the burden of demonstrating that the Commission has jurisdiction over the dispute. *River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 188, 201 (ALJ 1998), *aff’d* 28 S.R.R. 751 (FMC 1999).

A party falls within the definition of an MTO, and therefore the jurisdiction of the Shipping Act, when it provides terminal facilities in connection with a common carrier. 46 U.S.C. § 40102(14). Auction Block concedes it is not a common carrier. Oral Argument Transcript (Transcript) at 9. The parties do not dispute that the Port provides terminal facilities and services common carriers at certain port facilities.

Complainants argue that since the City and Port operate as an MTO in providing terminal facilities at the Deep Water Dock and the Pioneer Dock, they also operate as an MTO at the Fish Dock, where Complainants’ business is located. The City and Port argue that operations at the three separate and distinct terminal

facilities located on the “spit” should be analyzed on a “facility-by-facility” basis, and as common carriers do not call at the Fish Dock, the City and Port do not operate as an MTO at the Dock. In support of its arguments, Auction Block placed substantial reliance on *R.O. White & Co. and Ceres Marine v. Port of Miami Terminal Operating Co.*, 31 S.R.R. 783 (ALJ 2009). In *R.O. White*, the ALJ determined the Commission had personal jurisdiction over a company comprised of several former MTOs, on the grounds that the members retained sufficient control over terminal operations, and therefore maintained their status as MTOs. 31 S.R.R. at 807-808. In this case, there is no dispute that the City and Port operate as an MTO at the Deep Water and Pioneer Docks, and that the Commission has jurisdiction over their provision of terminal facilities at these two locations. The issue here is whether the City and Port operate as an MTO at the Fish Dock, thereby placing their provision of terminal facilities *at that dock* under the Commission’s jurisdiction.

In the Initial Decision, the ALJ determined Complainants were not common carriers for purposes of the Shipping Act as Auction Block was not registered or licensed with the Federal Maritime Commission as a common carrier, and it did not hold itself out to the general public to provide transportation by water, assume responsibility for the transportation from the port or point of receipt to the port or point of destination, or use a vessel operating on the high seas. Rather, the ALJ found that Auction Block held itself out as a fish processing plant and brokerage service company. In addition, the ALJ determined the City and Port do not operate as MTOs at the Fish Dock since the terminal facilities at the Fish Dock are not provided in connection with common carriers, as defined by the Shipping Act.

Complainants argue that the application of the City’s tariff to services provided at the Fish Dock gives the Commission jurisdiction over such services. The Commission has concluded, however, that tariff publication alone does not provide a basis for Commission jurisdiction over a terminal facility, even if an entity holds itself out to serve common carriers. In *Petchem, Inc. v. Canaveral Port Auth.*, 23 S.R.R. 974, 981 (FMC 1986), *aff’d*, 853 F.2d 958 (D.C. Cir. 1988), the Commission distinguished an earlier

decision in *Prudential Lines, Inc. v. Continental Grain Co.*, 21 S.R.R. 133 (ALJ 1981), *aff'd* 21 S.R.R. 1172 (FMC 1982). The Commission stated, “*Continental Grain* does not establish that ‘holding out’ by itself creates Commission jurisdiction over a terminal facility.” 23 S.R.R. at 983. The Commission went on to conclude that “[i]f jurisdiction were to be found here over Port Canaveral on the basis of its tariff publication and solicitation of common carriers, an explicit extension of existing precedent would be required.” *Id.*

In this case, the ALJ found that the City applies rates in its Port and Harbor Terminal Tariff to services provided at the Fish Dock, in order to “ensure transparent and uniform governance of all City facilities...,” but “never intended to subject itself to the Shipping Act for conduct on that dock.” 33 S.R.R. at 114. Neither party has cited precedent to support the extension of Commission jurisdiction over the provision of terminal services at the Fish Dock based solely on the application of tariff rates to such services. In addition, unlike the situation in *Petchem*, the City does not “hold out” to provide marine terminal services to common carriers at Fish Dock as defined in the Shipping Act.

The ALJ found that the City provides services to occasional common carriers and cruise ships at its Deep Water Dock and Pioneer Dock, but does not service common carriers at the Fish Dock. *Id.* This point was emphasized at oral argument by counsel for the City, who stated the Fish Dock does not currently serve common carriers as such carriers cannot access the Fish Dock: “This is a very difficult bottleneck to navigate and a large, deep-draft, ocean-going vessel is not going to be able to do this.” Transcript at 32. Counsel for the City further argued that the Fish Dock has never served common carriers, does not hold out to serve common carriers, and “has nothing to do with international shipping.” Transcript at 33.

Auction Block argues that the Commission has not analyzed its jurisdiction over the provision of marine terminal facilities on a facility-by-facility or port-by-port basis. *See* Transcript at 55-56. There is, however, judicial precedent for determining MTO status and Commission jurisdiction at a specific

facility based on analysis for what services are being provided at that facility. In *Puerto Rico Ports Authority*, the court concluded PRPA was not an MTO subject to the Shipping Act in connection with its activities in the Port of Ponce, even though it imposed a service charge on common carriers at that port: “PRPA, under any plausible interpretation, is not in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier at the Port of Ponce.” *Puerto Rico Ports Authority v. Federal Maritime Commission*, 919 F.2d at 802. The court concluded PRPA’s operation as an MTO at the ports of San Juan and Mayaguez was not determinative of its status at Ponce. *Id.*

In a case involving harbor fees at Plaquemines Port in Louisiana, the Commission stated: “The statutory scheme contemplates regulation of any entity if it exercises sufficient control over terminal facilities to have a discernible effect on the commercial relationship between shippers and carriers involved in that link in transportation.” *Louis Dreyfus Corp. v. Plaquemines Port, Harbor and Terminal Dist.*, 21 S.R.R. 1072, 1079 (FMC 1982) (*Plaquemines I*). The harbor fees at issue were subject to scrutiny since the “Commission [found] that such pervasive involvement in the business of common carriers, marine terminals and the commerce of the United States confers on the Commission jurisdiction over the Port.” *Id.* at 1080.

In *Plaquemines Port, Harbor and Terminal Dist. v. Federal Maritime Commission*, 838 F.2d 536, 543 (D.C. Cir. 1988) (*Plaquemines II*), the court reviewed an FMC decision regarding the Louisiana Port Authority, situated on the mouth of the Mississippi River. The port, through private terminal facilities, served thousands of common carriers, and the Louisiana Port Authority imposed a fee through its tariff on those carriers to pay for the costs of the fire and emergency services it provided. Those services involved operating two “patrol/rescue/fire” vessels, a helicopter, a seaplane and a marine communications system. Failure to pay the fee resulted in a denial of access to the private terminal facilities. The court upheld the FMC’s finding that the Louisiana Port Authority was a “Terminal Operator” within the meaning of the Shipping Act because, although it did not own or

operate any of the terminal facilities, “the Port’s combination of offering essential services and controlling access to the private facilities *amounts* to the furnishing of terminal facilities.” *Id.* at 543 (emphasis added).

The court further discussed FMC jurisdiction:

We agree with the FMC that the Port’s combination of offering essential services and controlling access to the private facilities amounts to the furnishing of terminal facilities. Like the FMC, we read the purpose of the relevant portions of the 1916 Act, and its successor, the 1984 Act, to be the prevention of discrimination in the provision of terminal facilities. Ownership or operation of terminal facilities is not a necessary prerequisite to the ability to discriminate. Thus, the critical issue for jurisdiction is that the degree of the Port’s involvement enables the Port to discriminate. In this case, the Port has the ability to discriminate in the fees it charges by controlling access to private terminal facilities. This is sufficient to sustain FMC jurisdiction.

Plaquemines II, 838 F.2d at 543.

Plaquemines I and *II* illustrate that jurisdiction and the Commission’s regulation of the Port of Homer’s activities at Fish Dock depend on its control over specific terminal facilities in order to affect the commercial relationship between shippers and common carriers. While the City of Homer owns and controls all terminal facilities at the Port, there is no connection to common carriers regarding the activities at Fish Dock. Nor does the ownership and control enable the City to control which common carriers access the Port, as was the case in *Plaquemines I* and *II*. In *Plaquemines*, the failure to pay certain harbor fees to the Louisiana Port Authority resulted in a denial of access to the port’s terminal facilities. Unlike the harbor fees imposed upon all common carriers in *Plaquemines*, the Port of Homer simply owns all facilities. This alone does not enable the Port to discriminate

against common carriers' access to the Port and this already tenuous connection is further undermined by the lack of common carriage activities at the Fish Dock.

Complainants have not met their burden of establishing jurisdiction and have failed to demonstrate that the Port is an MTO at Fish Dock. We affirm the ALJ's narrow determination that under the Shipping Act, the City and Port are not engaged "in the business of furnishing wharfage, dock warehouse, or other terminal facilities in connection with a common carrier" at the Fish Dock at this time.¹

III. CONCLUSION

THEREFORE, IT IS ORDERED, that the Initial Decision dismissing the Complaint for lack of jurisdiction is affirmed.

IT IS FURTHER ORDERED, that this proceeding is discontinued.

By the Commission.

Karen V. Gregory
Secretary

Commissioner DYE concurring, with whom *Commissioner* KHOURI, joins:

In this proceeding, the Commission affirms the ALJ's Initial Decision dismissing the complaint for lack of jurisdiction.

¹ We note the narrow holding in this case is based on the current conditions at Fish Dock. Our analysis might produce a different outcome if the City and Port took actions, including but not limited to, adding improvements and infrastructure at Fish Dock necessary to provide wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier.

The Commission holds that under the Shipping Act, the City and the Port of Homer are not currently engaged “in the business of furnishing wharfage, dock warehouse, or other terminal facilities in connection with a common carrier” at the Fish Dock and therefore, did not operate as marine terminal operators. 46 U.S.C. §40102(14).

While I concur in the Commission’s holding in this proceeding, I do not support the addition of certain dicta in the decision characterizing the Commission’s decision as “narrow,” nor do I understand the addition of the limiting language “at this time.” Order, p. 9.

The holding in this case resolves the jurisdictional question at issue in this matter, based upon the particular facts of the proceeding as they exist currently. The holding, however, is not so factually specific, or “narrow,” as to limit its application to similar fact situations in the future. Additionally, all Commission decisions are based upon the facts as they exist at a particular time, and for this reason, all Commission decisions are effective “at this time.”

In addition, I do not understand the relevance of footnote 1 in the Commission Order that contains the definition of a marine terminal operator under section 40102(14) of title 46 and states the obvious conclusion that the Commission “may” reach a different decision if the fish dock is found, at a future time, to be within the Commission’s jurisdiction as a marine terminal operator. *Id.*

Although the above language is not part of the Commission’s holding in this matter, even as extraneous dicta it confuses rather than clarifies the Commission’s jurisdictional determination in this proceeding. I would remove the above dicta from the Commission’s Order.