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BY HAND DELIVERY

Office of the Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573

Re: Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District; FMC Docket 06-02

Dear Secretary VanBrakle:

Enclosed for filing in the referenced docket, please find an original and 15 copies of the Lake Charles Appeal from Order Dismissing Complaint. Please stamp and return the extra copies in the envelope attached hereto for return to us by our messenger.

Thank you for your attention to this matter. Please let me know if you have any questions.

Very truly yours,

Thompson Coburn LLP



Ryan K. Manger

Enclosures

cc: Randall K. Theunissen, Esquire (by email)
Neil Vincent, Esquire (by email)
Hon. Kenneth A. Krantz (by email)

Liquefied Natural Gas (“LNG”) vessels), even when it does not hold itself out to the general public for that purpose. Rather, the Ruling holds—without extended discussion, and without permitting sufficient time for the development of critical jurisdictional facts—that LNG carriers are not common carriers. Ruling at 5. Moreover, the parties have not yet taken a single deposition, nor conducted the third party discovery that is essential to determine whether: (1) West Cameron is a marine terminal operator; (2) the proposed LNG terminals are marine terminals; and (3) the LNG vessels are common carriers. This failure to allow discovery is particularly inappropriate in the face of the admittedly incomplete West Cameron document production under the initial discovery requests.

Finally, a marine terminal operator is subject to agency jurisdiction even when it has not “performed any act prohibited by statute.” This jurisdictional rule is necessary in order to allow the Commission to assert its jurisdiction for the purpose of determining if such a prohibited act has occurred.

Background

This case involves the unlawful assessment of wharfage charges by West Cameron against vessels transiting the Calcasieu Ship Channel in Louisiana, in violation of the Shipping Act of 1984, 46 U.S.C. § 1701 *et seq.* (the “Shipping Act”). Lake Charles filed its complaint against West Cameron on January 24, 2006.¹ Lake Charles owns property located in Cameron Parish and has a lease agreement with Cameron LNG, LLC to develop a LNG terminal at the site. Am. Compl. at ¶¶ 14-17. West Cameron has demanded that it be paid by Lake Charles for the Cameron LNG project to move forward, but it will not offer any services for these wharfage

¹ Lake Charles filed an amended complaint, which was accepted on a motion for leave on February 16, 2006, but it did not make any substantive changes to the original complaint against West Cameron.

charges. *Id.* at ¶¶ 19-21. Such charges are imminent because West Cameron has imposed similar wharfage charges on LNG vessels that will call at terminals operated by Cheniere LNG, Inc.² *Id.* at ¶¶ 23-26. Further, West Cameron has announced that it has in place a wharfage charge to be assessed “in association with the operation of any LNG project located within West Cameron.” *Id.* at ¶1; *see also* Lake Charles Supplemental Brief at 4-5 (attaching West Cameron board resolution and notes confirming wharfage charges assessed by West Cameron). Lake Charles seeks an inquiry into these unjust and unreasonable practices of West Cameron, which impose an unreasonable disadvantage upon Lake Charles and its tenants.

On February 16, 2006, West Cameron filed its motion to dismiss, to which Lake Charles submitted its opposition on March 6, 2006. West Cameron also sought to stay all discovery pending its motion to dismiss. On March 16, 2006, the presiding judge denied the motion to stay and ordered West Cameron to answer the initial discovery requests served by Lake Charles within ten days. That order also allowed the parties 25 days to file supplemental briefs on the pending motion to dismiss. West Cameron produced its initial discovery response on March 29, 2006, and both parties filed their supplemental briefs on April 10, 2006. As noted in the Lake Charles supplemental brief, the West Cameron document production was admittedly incomplete due to the destruction of documents caused by last year’s hurricanes. *See* Lake Charles Supplemental Brief at 6-7.

² Cheniere LNG, Inc., which owns, operates, or leases property for two LNG facilities located in Cameron Parish, entered into certain agreements with West Cameron by which it agreed to pay \$1,000 per vessel that calls at Cheniere’s LNG facilities. *See* Am. Compl. at ¶¶ 24-26.

After receiving the documents from West Cameron, Lake Charles contacted West Cameron on April 6, 2006, to schedule depositions but was unable to secure its cooperation.³ On May 5, 2006, Lake Charles proceeded to notice depositions for several decision-makers of West Cameron and planned to follow those depositions with third party discovery of Cheniere. On May 10, 2006, West Cameron moved to quash the deposition notices, and Lake Charles filed its opposition two days later. On May 18, 2006, the presiding judge quashed the deposition notices pending his ruling on the motion to dismiss.

Argument

A motion to dismiss for lack of subject matter jurisdiction should not be granted unless it “appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” See *Flynn v. Veazey Constr. Corp.*, 310 F. Supp. 2d 186, 189-90 (D.D.C. 2004) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In reviewing a motion to dismiss, the complaint’s factual allegations must be presumed true and all reasonable inferences drawn in plaintiff’s favor. See *Shear v. Nat’l Rifle Ass’n of Am.*, 606 F.2d 1251, 1253 (D.C. Cir. 1979). To determine whether it has jurisdiction over the claim, however, the court may consider materials outside the pleadings. *Flynn*, 310 F. Supp. 2d at 190 (citing *Herbert v. Nat’l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992)). The Ruling restricts the Commission’s jurisdiction over this matter without sufficient evidentiary support and denies Lake Charles the opportunity to supplement the jurisdictional facts alleged in the amended complaint in response to the motion to dismiss. FMC jurisprudence demands that Lake Charles be permitted discovery to develop

³ In response to the request of the presiding judge, the parties discussed the potential for mediation **until the time that Lake Charles served the deposition notices when it realized that it would not be possible to reach agreement on a mediation process.** See Lake Charles Opposition to Motion to Quash at 5.

the record before a determination that the Commission lacks jurisdiction. *See, e.g., River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 27 SRR 621 (ALJ, 1996), discussed below.

I. The Ruling Fails to Recognize the Commission’s Jurisdiction Over West Cameron and the Unlawful Wharfage Fees Assessed by West Cameron

Lake Charles alleges that West Cameron is a “marine terminal operator” subject to the jurisdiction of the Commission. Am. Compl. at ¶ 5. The determination of whether or not the Commission has jurisdiction in this proceeding is predicated on whether or not the parties fall within the ambit of the Shipping Act. The term “marine terminal operator” is defined as:

a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier.

Section 3(6) of the Act. The term “common carrier” is further defined as:

a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that – (A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country....

Section 3(15) of the Act. The only exceptions to the term “common carrier” specified by the Act are for ferries, ocean tramps and chemical parcel-tankers. *Id.*

The primary purpose of the Shipping Act is “to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs.” 46 U.S.C. App. § 1701. The regulatory oversight is necessary, particularly with respect to marine terminals, which are infused with the public interest. *See, e.g., American Export-Isbrandtsen Lines, Inc. v. FMC*, 444 F.2d 824, 828 (D.C. Cir. 1970) (“The law for centuries has recognized that public wharves, piers and marine terminals are affected with a public interest”). It is thus essential that the Commission

fully and carefully evaluate whether or not it has jurisdiction over West Cameron before dismissing a complaint alleging the unlawful assessment of wharfage fees in violation of the Shipping Act.

A. The Ruling Fails to Recognize the Breadth of the Term “Common Carrier”

Despite the public policy favoring the investigation of alleged violations of the Shipping Act, the presiding judge found the Commission lacked jurisdiction in part because he determined—without the benefit of adequate discovery—that the LNG vessels are not “common carriers.” The Ruling ignores long-standing FMC caselaw extending jurisdiction by stating that “common carriage” requires “receipt of cargo for the general public on a piecemeal basis.” Ruling at 2. Regulatory agency jurisdiction, especially in an industry undergoing constant technological development, must be dynamic and evolve with the industry it regulates. *See, e.g., Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (finding the FCC has jurisdiction over commingled cable and internet service, even though the controlling statute only provides jurisdiction over cable service only, and recognizing the general rule that “agencies have authority to fill gaps where the statutes are silent” and the subject matter “is technical, complex, and dynamic.”).

Indeed, over the last fifty years, the Commission has exercised its jurisdiction over certain common carriers that were specialized in a particular cargo trade. For instance, in the well-known “banana cases,” the Commission examined whether or not vessels that specialized in the carriage of bananas were common carriers. *See Graceland, Inc. v. Federal Maritime Board*, 280 F.2d 790 (2nd Cir. 1960). In that case, the Second Circuit affirmed the finding of the Commission that a common carrier did not lose its status just because it chose to engage in a specialized trade, such as the transportation of bananas, and nothing else. The court noted that

bananas require special carriage conditions, and therefore the carrier would be entitled to prescribe those requirements, but that fact did not negate its status as a common carrier. *Id.* at 791-792. As a common carrier, the carrier was prohibited from discriminating unjustly against any shipper in violation of the Shipping Act.

More recently, the Commission has extended its jurisdiction over “common carriers” to include ore/dry chemical bulk vessels in *River Parishes v. Ormet*, 28 SRR 751 (FMC 1999). The Commission found that extending jurisdiction to bulk trades is not contrary to the Shipping Act, as the Act does not define common carriers based on the type of cargo carried. *Id.* at 765. Additionally, in 2001, the Commission further extended its jurisdiction to include chartered bulk grain vessels on the lower Mississippi River in order to regulate the marine grain terminal elevators serving those vessels. *See* Docket 01-06, Exclusive Tug Franchises—Marine Terminal Operators Serving the Lower Mississippi River. In terms of economic regulatory principles, LNG vessels are virtually the same as bulk grain ships for purposes of FMC jurisdiction. Both are specialized vessels that are designed to carry a particular cargo and are not held out to the general public, but rather specialize in a particular cargo.

The seminal case on defining the status of a common carrier, *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 6 SRR 483 (FMC 1965), as cited in the Ruling, was decided in the infancy of the container industry. It was rightly intended to apply the principles of economic regulation to the then revolutionary development in ocean cargo shipping – containerization. That decision, if interpreted correctly, should guide the Commission to overturn the Ruling in this matter. In finding that the respondent in *Containerships* was a common carrier, the Commission rejected the unilateral attempt of the respondent to deem itself

a contract carrier in order to avoid agency jurisdiction, analyzed the facts, and found that the respondent remained a common carrier subject to the jurisdiction of the Commission.

The Commission found that no single factor of a carrier's operation is determinative of its status as a common carrier, but rather it must evaluate the indicia of common carriage on a case by case basis. *Id.* at 489-492. The most critical factor is whether the carrier "holds himself out to accept goods from whomever offered to the extent of his ability to carry." *Id.* at 489; *see also* 46 U.S.C. app. § 1702(6). However, "the Commission has held that it is not necessary for a carrier to hold himself out to transport all commodities for all shippers." *Id.* at 490. The Ruling ignores this mandate from *Containerships*. Other factors to determine the regulatory significance of a carrier's operation, each of which must be considered for their combined effect, include: (1) the variety and type of cargo carried; (2) number of shippers; (3) type of solicitation utilized; (3) regularity of service and port coverage; (4) responsibility of the carrier towards the cargo; (5) issuance of bills of lading or other standardized contracts of carriage; and (6) method of establishing and charging rates. *Id.* at 492.

Having barred the taking of depositions, the presiding judge was unable to examine each of the factors presented in *Containerships* in his analysis as to whether or not the LNG vessels are "common carriers." Lake Charles expected to depose individuals from Cheniere with respect to such issues as vessel itineraries, and the identity and number of shippers/consignees of the LNG vessels calling at terminals in West Cameron.⁴ For instance, there is simply no evidence before the Commission as to whether or not the vessels calling at West Cameron carry cargo for

⁴ Lake Charles intended to depose key individuals at Cheniere, including Mr. E. Darron Granger, whose affidavit was submitted by West Cameron in support of its motion to dismiss. As mentioned below, Lake Charles had no opportunity to respond to the Granger Affidavit, which is critical to investigating the common carrier status of the LNG vessels.

multiple shippers per voyage, which could subject the vessels to Commission jurisdiction under the rule that two or more shippers on a voyage creates a presumption of common carriage. *See Containerships*, 6 SRR at 490 (citing *Transp. By Mendez & Co. Between U.S. and Puerto Rico*, 2 USMC 717, 720 (1944); *D.L. Piazza Company v. West Coast Line, Inc.*, 3 FMB 608, 612 (1951)). The earlier Commission cases exercising jurisdiction over such specialized vessels as the banana carriers, ore/dry chemical bulk vessels and bulk grain vessels require the presiding judge to conduct an investigation into the status of the LNG vessels before dismissing the complaint. The Ruling does not mention the settled Commission precedent extending jurisdiction over specialized vessels and, thus, prematurely dismisses the Lake Charles complaint without an investigation into the status of the LNG vessels calling at the terminals in West Cameron.

B. The Ruling Misconstrues the Term “Furnishing Facilities” With Respect to “Marine Terminal Operators”

Until *Plaquemines*, the terminology “furnishing facilities” was assumed to apply to an entity that leased or otherwise physically provided terminal facilities to a common carrier. In *Plaquemines*, the respondent Louisiana port district neither owned nor furnished marine terminal facilities in the traditional sense. *See Plaquemines Port, Harbor and Terminal District v. Federal Maritime Commission*, 838 F.2d 536, 540 (D.C. Cir. 1988). The Commission ruled, however, that the port district’s power to prevent common carrier vessels from reaching privately operated terminal facilities, with the inherent ability to discriminate, was a sufficient nexus to create agency jurisdiction over the port district.

The Ruling attempts to distinguish the matter at hand from *Plaquemines*, by finding that West Cameron “does not provide fire and rescue services, or any services constituting the

equivalent of terminal facilities.”⁵ Ruling at 4. The fact that the parish/port district in *Plaquemines* also furnished typical governmental emergency services was not essential to the jurisdictional finding. The provision of such services was a justification for the charges in question. The critical issue for jurisdiction in *Plaquemines* was “the degree of the Port’s involvement [that] enables the Port to discriminate in the fees it charges by controlling access to private terminal facilities.” *Id.* at 543. West Cameron, as the port authority statutorily authorized and directed to “regulate commerce and traffic of the harbor and terminal district in such a manner as may in its judgment be best for the public interest,” has the ability to control access to the port. La. R.S. 32:2553(A); *see* Am. Compl. at ¶ 9. The Ruling (at 5) misses the mark in arguing that West Cameron’s position to exclude common carrier vessels is a geographic accident and irrelevant to the jurisdictional analysis—the fact is that this Commission has found precisely such a geographic relationship to create jurisdiction. *Plaquemines*, 838 F.2d at 543 (finding that the ability to exclude common carrier vessels creates Commission jurisdiction). We are ignorant as to what services that West Cameron provides to LNG vessels because the presiding judge prevented the discovery that would have disclosed those facts. Additionally, any reliance on the potential violation of state law is inapposite to the issues before the Commission, which is only concerned with violations of the Shipping Act.

The Commission more recently based jurisdiction over a ports authority’s control of access to marine terminal facilities in Docket 02-03, *Exclusive Tug Arrangements in Port Canaveral, Florida*, 29 SRR 1199 (FMC 2003). The Commission exercised jurisdiction over the

⁵ There is no evidence on the record to support the finding that West Cameron does not provide fire and rescue services, or other ordinary governmental services, because Lake Charles has been prohibited from taking depositions of West Cameron officials.

ports authority's tug services (which normally is an activity outside Commission jurisdiction), "where marine terminal operators exercise control over tug services in a manner that limits or controls access to terminal facilities." *Id.* at 1219-1220 (relying on *Petchum, Inc. v. Canaveral Port Authority*, 28 FMC 281, 293 (1986); *A.P. St. Philip, Inc. v. Atlantic Land and Improvement Company and Seaboard Coast Line R. Co.*, 13 FMC 166, 171-172, 11 SRR 309 (1969)). As mentioned below, Lake Charles has not been afforded the opportunity to explore the extent of control exercised by West Cameron through discovery, and thus it is improper to dismiss the complaint at this early stage.

II. The Ruling Leaps to Evidentiary Conclusions Without the Benefit of Effective Discovery

Discovery, as a mechanism to develop facts and evidence for presentation in a case, is recognized as essential. Yet, the Ruling dismisses the amended complaint without providing a sufficient opportunity to investigate jurisdictional facts. The Commission has consistently found that the parties must be afforded an opportunity to conduct discovery over early motions to dismiss to establish issues of fact. *See, e.g., River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 27 SRR 621 (ALJ, 1996) (finding complainant entitled to seek evidence through discovery as to whether the terminal operator has served a common carrier vessel); *Independent Pier Co. v. Philadelphia Port Corp.*, 25 SRR 1335 (ALJ, 1991) (denying respondent's motion to dismiss in order to permit discovery, where respondent claimed the Commission lacked jurisdiction over it because it was not a marine terminal operator); *Marine Surveyors Guild, Inc.*, 24 SRR 628 (FMC 1987) (requiring supporting facts and arguments on issue of jurisdiction because Commission had not been previously called upon to examine practices of a marine terminal operator with respect to marine surveyors).

Chief ALJ Kline, in *River Parishes*, examined the necessity for discovery to proceed on jurisdictional issues of fact over an early motion to dismiss. “Case law holds that the burden of proof on the question of jurisdiction falls on the party seeking to involve the tribunal’s jurisdiction, i.e., the complainant here, and that to deny reasonable discovery into the necessary relevant facts would be reversible error.” *River Parishes*, 27 SRR at 623 n.2. As Lake Charles noted in its opposition to the motion to dismiss, Judge Kline looked to Moore’s Federal Practice, which provides:

If the jurisdictional allegations of the complaint are disputed, the party asserting the existence of subject matter jurisdiction should be given the opportunity to demonstrate that jurisdiction exists prior to dismissal of the action. (Footnote and case citations herein omitted.) Reasonable discovery for this purpose should be allowed, and failure to permit such discovery is usually treated as reversible error. (Footnote and case citations therein omitted).

Id. (citing 2A Moore’s Federal Practice (2d ed. 1995) para. 12.07 [2-1] at p. 12-59). *See* Lake Charles Opposition to Motion to Dismiss at 6-8. The Commission has followed this doctrine in its own cases. *See id.* (citing *American Warehousemen’s Assoc. v. Port of Portland*, 14 SRR 148 (ALJ 1973); *Std. Fruit v. PMA*, 19 SRR 1459 (ALJ 1980)).

In another case, the presiding judge denied a similar motion to dismiss for lack of jurisdiction as premature. *Independent Pier Co. v. Philadelphia Port*, 25 SRR 621 (ALJ 1991). The complaint alleged that respondent violated § 5(a) of the Shipping Act by not filing its lease, as well as §§ 10(a)(2) and 10 (a)(3) of the Act. The respondent argued that none of the parties were marine terminal operators because they did not furnish wharfage, dock, warehouse or other terminal facilities in connection with a common carrier, but instead merely leased the premises for a fixed monthly rental. The presiding judge found that further discovery was necessary because the limited evidence as to whether or not the parties were marine terminal operators, and/or common carriers, was argumentative and inconclusive. *Id.* at 1337. Moreover, the

presiding judge found it was more desirable to continue discovery generally since jurisdictional discovery was equally applicable to the decision on the merits. *Id.* at 1338.

The Ruling that is now before the Commission is based, in part, on the false premise that extensive discovery was conducted by the parties. Yet, the only discovery had was the admittedly incomplete response of West Cameron to the initial discovery requests. Lake Charles had noticed its initial (party) depositions, and intended to depose Cheniere (vessel interests) personnel in order to establish essential facts about vessels operations, such as vessel itineraries, identity of shippers/consignees, that will be used to demonstrate agency jurisdiction. Lake Charles was prevented from doing so, and thus the Ruling had to rely on a single, untested affidavit on the issue of the vessels' characteristics.

If the time permitted by the presiding judge for supplemental briefs was to serve as the entire discovery period on jurisdiction, as suggested in the Ruling, it was insufficient to investigate the complex facts as to whether or not West Cameron is subject to the jurisdiction of the Commission. Lake Charles had only eight business days to take depositions or other discovery after West Cameron served its incomplete responses before the deadline to submit supplemental briefs expired. Moreover, Lake Charles had **no** opportunity to respond to the affidavit of E. Darron Granger submitted with the West Cameron supplemental brief; Lake Charles was required to submit its own supplemental brief on the same day.⁶ The presiding judge based his Ruling solely on the information at hand at the filing of the supplemental briefs, and quashed the efforts by Lake Charles to conduct depositions of the West Cameron decision-

⁶ West Cameron also submitted an affidavit by A.W. Prebula of CITGO Petroleum Corporation with its supplemental brief. As with the Granger Affidavit, Lake Charles had no opportunity to respond.

makers.⁷ Lake Charles did not have the opportunity to conduct even the most basic fact finding investigation by taking depositions of the West Cameron officials. Nor did it have the opportunity to question Mr. Granger or provide any of its own affidavits to refute the statements made in the Granger Affidavit with respect to the characteristics of the LNG vessels. This barebones process falls far short of the standard adopted by this Commission for fair administrative process.

Finally, the Ruling (at 3) is improperly intrusive in directing Lake Charles to draw its tenants into this controversy, at this time, by using them to provide rebuttal affidavits. Lake Charles is entitled to seek this information by testing the validity of the Granger Affidavit in a deposition. For the purpose of determining Commission jurisdiction, it is inappropriate for the Ruling to assume that Lake Charles is required to seek affidavits from its tenants concerning their fear about charges able to be imposed by West Cameron. Ruling at 3. That is an issue for hearing. Lake Charles is entitled to craft its case within the limits of Commission rules.

⁷ Lake Charles noticed depositions for four West Cameron board members, including Messrs. Cabell and Romero, whose affidavits were submitted by counsel for West Cameron with the motion to dismiss. Without the ability to depose these individuals, Lake Charles is unable to challenge the self-serving statements made in the affidavits.

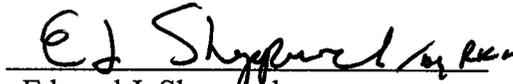
Conclusion

For the reasons stated above, Lake Charles respectfully requests the Commission to overturn the Ruling.

Respectfully submitted,



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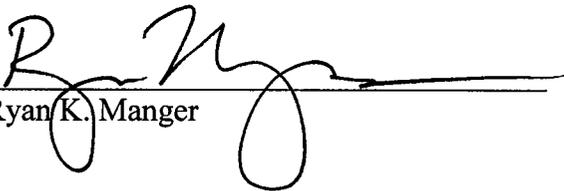
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*Attorneys for Complainant Lake Charles Harbor
and Terminal District*

Dated: June 28, 2006

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Appeal from Order Dismissing Complaint has been served upon all parties of record by email and by air courier this 28th day of June, 2006.


Ryan K. Manger