

FEDERAL MARITIME COMMISSION

SOUTH CAROLINA MARITIME SERVICES, INC.

Complainant,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY

Respondent.

Docket No. 99-21

Served: July 18, 2002

Order dismissing proceeding based on Respondent's sovereign immunity from regulatory adjudications.

BY THE COMMISSION: Harold J. CREEL, Jr., *Chairman*;
Joseph BRENNAN and Delmond J.H. WON, Commissioners.

COUNSEL: George M. Earle, HUNTER, MACLEAN, EXLEY & DUNN, for Complainant South Carolina Maritime Services, Inc. Edward J. Sheppard and Patricia Snyder, THOMPSON COBURN, LLP, for Respondent South Carolina State Ports Authority.

ORDER

This proceeding was initiated by a complaint filed by South Carolina Maritime Services, Inc. (Maritime Services) against the South Carolina State Ports Authority (SCSPA). The complaint alleged that SCSPA had violated several provisions of the Shipping Act of 1984 by refusing to allow Maritime Services' cruise ship, the M/V TROPIC SEA, to berth at the Port of Charleston, South Carolina.' The complaint was assigned to the Commission's Office of Administrative Law Judges (ALJs). 46 C.F.R. § 502.146 (2001).

SCSPA moved to dismiss the complaint on the basis of its sovereign immunity from suit.² State sovereign immunity is reflected in the Eleventh Amendment to the United States Constitution, which provides that:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

¹ The complaint alleged that SCSPA had violated section 10(b)(10), 46 U.S.C. app. § 1709(b)(10), and section 10(d)(4), 46 U.S.C. app. § 1709(d)(4).

² In Ristow v. South Carolina Ports Auth., 58 F.3d 1051 (4th Cir. 1995), it was determined that SCSPA is an arm of the State of South Carolina and therefore entitled to sovereign immunity from lawsuits filed in federal district court.

The Commission's ALJ granted the motion to dismiss. South Carolina Maritime Services v. South Carolina State Ports Auth., 28 S.R.R. 1307 (ALJ 2000). Because the ALJ's decision appeared to affect the scope of the agency's jurisdiction, the Commission determined, on its own initiative, to review that decision. See 46 C.F.R. § 502.227(c).

A. Commission Review

We reversed the ALJ's order of dismissal, and instructed the ALJ to adjudicate Maritime Services' complaint. South Carolina Maritime Services, Inc. v. South Carolina State Ports Auth., 28 S.R.R. 1385 (2000). The Commission reasoned that it retains jurisdiction to adjudicate a complaint filed against a state-run port because the Eleventh Amendment, on its face, limits the "Judicial power of the United States," and the Commission is an independent Executive Branch agency that does not exercise judicial power. See Frevtaev, Commissioner of Internal Revenue, 501 U.S. 868,909 (Scalia, J., concurring in part and concurring in the judgment) ("[A]dministrative board[s of the United States] exercise the executive power, not the judicial power of the United States"). As we stated in our order, our view was that principles of state sovereign immunity from suit,

even freed from the linguistic boundaries of the Eleventh Amendment, [were] meant to cover proceedings before judicial tribunals, whether Federal or state, not executive branch administrative agencies like the Commission.

28 S.R.R. at 1388. We also noted that even in cases where the Supreme Court had broadly construed the scope of the States' immunity from suit, the exercise of judicial power was always implicated, and that there was no precedent to support extending sovereign immunity beyond the range of judicial power. 28 S.R.R.

at 1387 (citing Alden v. Maine, 527 U.S. 706 (1999) and Seminole Tribe v. Florida, 517 U.S. 44 (1996)). We accordingly determined that the agency's adjudication of Maritime Services' complaint against SCSPA should proceed.

B. Review in the Court of Appeals

Before the adjudication went forward, however, SCSPA filed a petition for review of the Commission's order in the United States Court of Appeals for the Fourth Circuit. See 28 U.S.C. §2342 (appeal of Commission orders). The Commission, as well as the United States of America (represented by the Department of Justice, see 28 U.S.C. § 2348), defended the Commission's decision that the Eleventh Amendment should not preclude the administrative adjudication of a complaint against a state-run port.

The court of appeals disagreed and ordered the Commission to dismiss Maritime Services' complaint. South Carolina State Ports Auth. v. Federal Maritime Comm'n, 243 F.3d 165 (4th Cir. 2001). Because the court of appeals' decision limited the Commission's regulatory jurisdiction to adjudicate complaints filed against state-run ports, we determined to seek Supreme Court review by filing a petition for a writ of certiorari. See 28 U.S.C. § 2350(a) (authorizing the Commission to seek Supreme Court review of an adverse decision by a court of appeals).

C. Review in the Supreme Court

The Commission filed its petition on July 10, 2001, and the Court granted the petition on October 15, 2001. Federal Maritime Comm'n v. South Carolina State Ports Auth., 534 U.S. 971 (2001) (granting petition for writ of certiorari).

The case was then briefed, and oral argument was heard on February 25, 2002. On May 28, 2002, the Court issued its decision.³ Federal Maritime Comm'n v. South Carolina State Ports Auth., 122 S.Ct. 1864 (2002). In an opinion written by Justice Thomas, the Court determined that “state sovereign immunity bars . . . an adjudicative proceeding” initiated by a private person against a state-run port. Id. at 1868. Accordingly, the Court affirmed the court of appeals’ order directing the Commission to dismiss Maritime Services’ complaint.⁴

1. Judicial power

The Commission had argued that the Eleventh Amendment’s requirement that the “Judicial power of the United States” cannot be extended to “any suit in law or equity” filed against an unconsenting State provided a specific, textual limit on the scope of the States’ sovereign immunity from suit. The Commission had also asserted that, as an independent Executive Branch agency, it does not exercise judicial power.

The Court appeared to agree that the Commission does not exercise judicial power; however, it also ruled that such a conclusion “does not end our inquiry,” because “the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment.” 122 S.Ct. at 1871. The Court determined that the Eleventh Amendment “does not define the

³ Because no petition for rehearing was filed, the Court’s final judgment was issued on June 27, 2002.

⁴ Five Justices voted to affirm the court of appeals and four voted to reverse. In the majority, Justice Thomas was joined by Chief Justice Rehnquist and Justices O’Connor, Scalia, and Kennedy. Voting to reverse were Justices Stevens, Souter, Ginsburg and Breyer.

scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." Ibid.

The Court thus concluded that the proper inquiry is not whether Commission adjudications are covered by the Eleventh Amendment, but instead "whether the sovereign immunity enjoyed by States as part of our constitutional framework applies to adjudications conducted by the FMC." Ibid (emphasis supplied).

2. Original understanding

The Court determined that the proper test is whether "the Framers would have thought the States possessed immunity" from regulatory adjudications. 122 S.Ct. at 1872. The Court first looked to history to discern what the Framers would have believed. However, the Court found that "the relevant history does not provide direct guidance for our inquiry" because of a "relatively barren historical record." Ibid. Hindered by a lack of evidence from engaging in a historical analysis, the Court looked instead to its own precedent, and noted that it had "applied a presumption" in past cases that the Constitution would not be construed to allow proceedings against States if such proceedings were "anomalous and unheard of when the Constitution was adopted." Ibid (citing Hans v. Louisiana, 134 U.S. 1, 18 (1890)).

To determine whether the Hans presumption should apply to administrative adjudications conducted pursuant to the Shipping Act, the Court examined the procedural rules employed in those adjudications, 122 S.Ct. at 1873-1874, and concluded that the similarities between those procedural rules and the processes used in civil litigation in the federal district courts were "overwhelming." Id. at 1874. Because of these similarities, the Court determined that, if the Framers had understood (as they

did) that the States were immune from suit in federal district court, they would have understood the States to be immune from administrative proceedings using similar procedural rules as well.

The Court further explained that “[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.” Ibid (emphasis supplied). Due to the procedural similarities between Commission proceedings and civil litigation, the Court found that it would be an affront to the States’ “dignity” to subject them, against their will, to regulatory adjudications.

3. Rejected arguments

The Court rejected four arguments advanced by the Commission and the United States. First, both the Commission and the United States had argued that because Commission orders require a district court order to be enforced, see 46 U.S.C. app. 1713, the agency’s orders are not coercive in the sense relevant to a sovereign immunity inquiry. The Court ruled that the fact that Commission orders are not self-executing was not relevant because States would nevertheless feel effective coercion to participate in an adjudicatory proceeding. 122 S.Ct. at 1875. The Court noted that if a State refused to appear in a Commission proceeding, it would lose the right to appeal any eventual order to a court of appeals, and it would lose the right to raise most defenses in any eventual enforcement proceeding in a district court. Id. at 1876. The Court viewed this loss of judicial review as sufficient coercion to implicate the States’ sovereignty concerns.

Second, the United States (but not the Commission) had argued that the agency’s adjudications would have no impact on a State’s treasury because any reparations award issued by the

Commission would be unenforceable against a State under the Eleventh Amendment. The United States contended that this supposed *immunity* later in a proceeding, at the enforcement stage before a district court, was sufficient reason to conclude that the States should not be immune from Shipping Act adjudications at the agency stage.⁵ The Court rejected this argument, concluding that it “reflects a fundamental misunderstanding of the purposes of sovereign immunity.” *Id.* at 1877. The Court found that the States’ sovereign immunity exists not only to protect against money judgments (which would be enforced in a district court), but also against the “indignity” of being subjected to adjudicatory proceedings in the first place.

Third, the Commission had argued, based on historical evidence and Supreme Court precedent, that the States should not be immune specifically from regulatory adjudications in maritime commerce, because the Federal Government’s need to ensure uniformity in that commerce overrides the States’ sovereign interests. *See, e.g., United States v. Locke*, 529 U.S. 89 (2000). The Court rejected this argument, referring to earlier opinions in which it had found that the States enjoy immunity in judicial proceedings involving maritime commerce. 122 S.Ct. at 1878 (citing *Ex parte New York*, 256 U.S. 490 (1921)). The Court extended those precedents to encompass regulatory adjudications as well.

⁵ The Shipping Act provides that a party receiving an award of reparations from the Commission may seek enforcement of that award in a federal district court. 46 U.S.C. app. § 1713(d). However, neither the Commission nor the Attorney General may seek enforcement of a reparations award. The Court did clarify, nevertheless, that the Commission may impose civil penalties on a party that refuses to pay a reparations order. 122 S.Ct. at 1878.

Fourth, both the Commission and the United States had argued that, if the Court found that private parties may not seek monetary reparations against state-run ports, it should nevertheless permit proceedings seeking prospective relief, such as a cease-and-desist order. The Court rejected this argument, concluding that no relief may be sought by a private complainant against a state-run port because any proceeding naming the port, no matter what relief was sought, would transgress the State's dignity interest in not being subjected to an adjudication against its will. *Id.* at 1879.⁶

DISCUSSION

Because the Supreme Court affirmed the court of appeals' decision, the Commission must execute the court of appeals' order that it dismiss Maritime Services' complaint against SCSPA.

⁶ Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, wrote the principal dissent from the Court's ruling. Justice Breyer argued that the Court had never before said that the Eleventh Amendment's limit on the "[j]udicial power of the United States" should be read to include "the executive power of the United States." 122 S.Ct. at 1883. He also suggested that the terms relied upon by the majority in reaching its conclusion, including "constitutional design," "system of federalism," and "plan of the convention," are not valid because they "do not actually appear anywhere in the Constitution," *Id.* at 1884. He then argued that, in the absence of textual support, the Court's decision must be supported by "considerations of history, of constitutional purpose, or of related consequence." *Ibid.* He found all of these lacking. *Id.* at 1884-1889.

Justice Stevens also wrote a separate dissent, in which he argued that the majority's focus on the States' dignity is anachronistic because "the 'dignity' interests underlying the sovereign immunity of English Monarchs had not been inherited by the original 13 States" when the Constitution was adopted. 122 S.Ct. at 1881.

We would note, however, that the Supreme Court explained that “[t]he FMC . . . remains free to investigate alleged violations of the Shipping Act, either upon its own initiative or upon information supplied by a private party . . . and to institute its own administrative proceeding against a state-run port.” 122 S.Ct. at 1878-1879. The Court held that “[t]he only step the FMC may not take. . . is to adjudicate a dispute between a private party and a nonconsenting State.” Id. at 1879 n.19.

This means that the agency must investigate, using its staff, alleged violations of the Shipping Act by state-run ports, rather than relying upon private complainants to file and prosecute complaints against such ports. The Supreme Court’s decision thus appears to contemplate an increased role for the Commission in the administration of the Shipping Act as it applies to state-run ports.⁷ With this in mind, we would note that any person may bring information regarding possible violations of the Shipping Act to the agency’s attention, and may request an agency investigation. See 46 U.S.C. app. § 1710(c) (“The Commission, upon complaint or upon its own motion, may investigate any conduct or agreement that it believes may be in violation of th[e Shipping] Act”).

⁷ In future adjudicatory proceedings initiated by private complaint, it would appear that the Commission will be required to ascertain whether a marine terminal claiming “arm of the state” status - which determines whether state sovereign immunity attaches - is in fact entitled to such status. See, e.g., Ristow v. South Carolina Ports Auth., 58 F.3d 1051 (4th Cir. 1995) (concluding that the South Carolina State Ports Authority is an arm of the State of South Carolina); but see acintoport Corp. v. Greater Baton Rouge Port, 762 F.2d 435 (5th Cir. 1985) (concluding that the Port of Baton Rouge is not entitled to sovereign immunity).

Additionally, as the court of appeals explained, 243 F.3d at 177, this proceeding did not address whether the doctrine established by the Supreme Court in Ex parte Young, 209 U.S. 123 (1908), which permits lawsuits to be filed against state officers (rather than against the State itself) to seek prospective relief, should apply in Shipping Act adjudications. As the court of appeals noted, in this case there was no opportunity to explore that possibility because Maritime Services “brought the complaint for both legal and equitable relief against the State Ports Authority itself.” 243 F.3d at 177. Therefore, it may be that a future privately-initiated complaint proceeding against the directors of a state-run port, rather than against the port, would be permissible. Such a determination as to whether the Shipping Act allows such a proceeding, however, will have to wait for a case in which the issue is raised.

CONCLUSION

IT IS ORDERED, That South Carolina Maritime Services’ complaint against the South Carolina State Ports Authority is dismissed.

By the Commission.



Theodore A. Zook
Assistant Secretary