

ORIGINAL

(S E R V E D)  
( September 18, 2002 )  
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

September 18, 2002

DOCKET NO. 99-16

CAROLINA MARINE HANDLING, INC.

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL.

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**MOTION TO DISMISS OF SOUTH CAROLINA  
STATES PORTS AUTHORITY GRANTED**

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Respondent South Carolina State Ports Authority (“SPA” or “SCSPA”) has filed a motion to dismiss SCSPA from this proceeding because, in *Federal Maritime Comm’n. v. S. C. State Ports Authority*, 2002 WL 1050457 (U.S. May 28, 2002), the United States Supreme Court held that SCSPA is immune from suits such as this brought against SCSPA by private citizens before the Federal Maritime Commission.

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<sup>1</sup>SCSPA filed this motion to dismiss pursuant to Rules 73 and 12 of the Commission’s Rules of Practice and Procedure, 46 C.F.R. §§ 502.73 and 502.12, and Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure.

SCSPA states that the Court recognized that States, by ratifying the Constitution, ceded some of their sovereignty by consenting to suits initiated by the federal government or by another State; that, however, the States retained their recognized immunity from suits brought by private citizens; that the Court reasoned that the Commission's procedure and authority to resolve private complaints is directly analogous to litigation in a federal court, from which the States are immune under the U.S. Constitution; that like the complaint and the procedure that was before the Supreme Court, this proceeding was initiated by the complaint of a private party against SCSPA, which is an arm of the State of South Carolina;<sup>2</sup> and that since SCSPA has not waived its immunity from this proceeding, it should be dismissed.

SCSPA states that complainant Carolina Marine Handling, Inc. ("CMH") nonetheless contends that SCSPA has waived its sovereign immunity by stipulating in its tariff that suits be brought in South Carolina state circuit courts;<sup>3</sup> that a State or State instrumentality can, of course, waive its sovereign immunity and consent to a suit brought by a private litigant before a federal administrative agency or before a federal court; and that the Supreme Court has held that waivers are given effect "if exacted by the most express language or by such overwhelming implication from the text as would leave no room for any other reasonable construction."<sup>4</sup>

SCSPA believes that CMH is wrong; that SCSPA has not waived its immunity from this suit; that the tariff provision in question merely stipulates the jurisdiction in which any disputes may be

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<sup>2</sup>Citing *Ristow v. South Carolina Ports Authority*, 58 F.3d 105 1 (4<sup>th</sup> Cir. 1995).

<sup>3</sup>Reply of Carolina Marine Handling in Opposition to Motion to Dismiss of South Carolina State Ports Authority, at 49.

<sup>4</sup>Citing *Edelman v. Jordan*, 94 S.Ct. 1347 (1974); *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S.Ct. 458, 464 (1909).

resolved,' which may or may not be viewed as a limited waiver of its immunity; that whether the provision may be considered a waiver is irrelevant to this case, since the provision is limited to actions maintained "exclusively in the Circuit Courts of the State of South Carolina"; and that a State does not waive its sovereign immunity by consenting to suit in its own courts.<sup>6</sup>

SCSPA states that with regard to federal fora, the tariff provision defers to jurisdictional choices made by the U.S. Congress, but only those "from which the Authority would not have sovereign or Eleventh Amendment immunity";<sup>7</sup> that this tariff provision thus explicitly recognizes and preserves SCSPA's immunity from suits in federal fora; and that, moreover, it constitutes neither

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<sup>5</sup>SCSPA states that the entirety of the SCSPA's Tariff No. 8 applicable to the Port of Charleston can be obtained through SCSPA's website at <http://www.port-of-charleston.com> and that Rule 34-021, on which CMH relies, reads as follows:

**RULE 34-021**

**JURISDICTION**

**ISSUED: 06JAN1999**

**EFFECTIVE: 06JAN1999**

Jurisdiction for any action against the Authority, arising from Authority services, whether in law or equity, whether sounding in contracting or in tort, lies exclusively in the Circuit Court of the state of South Carolina, and in no other forum. In the case of an action in tort, jurisdiction is in the Circuit Court of South Carolina and brought in the county in which the act or omission occurred. In any action sounding in contract, jurisdiction is solely in the Circuit Court of Charleston County. Use of Authority facilities or services further constitutes consent to jurisdiction in accordance with this Item, and constitutes waiver of Jurisdiction or venue in any other location or forum.

This Item does not apply to actions brought pursuant to Acts of the Congress of the United States that expressly designate the jurisdiction in which such actions should be commenced, and from which the Authority would not have sovereign or eleventh amendment immunity.

SCSPA states that, indeed, under the tariff, CMH's previous use of SCSPA's facilities and services itself "constitutes waiver of jurisdiction or venue in any other location or forum."

<sup>6</sup>Citing *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299,306 (1990) (in turn citing *Fla.. Dept. of Health & Rehabilitative Services v Florida Nursing Home Ass 'n*, 450 U.S. 147, 150 (1981) (per curiam)).

<sup>7</sup>Citing Tariff No. 8, rule 34-021 (emphasis added by SCSPA).

the express language nor the overwhelming textual implication the Supreme Court demands to find an effective waiver of a State's sovereign immunity.

SCSPA contends that in this case, as in *Federal Maritime Commission v. S.C. State Ports Authority*, the complainant is a private citizen alleging violations of the Shipping Act of 1984, and that, because SCSPA is immune from suits brought by private litigants before the FMC and it has not waived its sovereign immunity, SCSPA requests that the Presiding Officer dismiss it from this proceeding.

### **Reply of CMH**

Complainant CMH states that even if the Commission were to grant SPA's motion, SPA does not have immunity from Commission oversight and enforcement; that if the Commission were to dismiss SPA from this proceeding, the Commission is nevertheless obligated to provide for the adjudication of issues alleged by CMH in its Amended Complaint.

### **Waiver of Immunity**

SPA's motion also argues that CMH erroneously contends that SPA waived its immunity by virtue of a provision in SPA's marine terminal tariff. CMH contends that SPA's tariff provision lacks the clarity that SPA claims it contains; that, rather, the meaning and intent of the SPA tariff provision are questions of fact that need to be explored; and that this issue was never fully developed before the Administrative Law Judge, and CMH urges that this issue be fully tested.

## The SPA-CIP Agreement

CMH also argues that dismissal of SPA would, in particular, leave unresolved the issues arising from a marine terminal agreement between SPA and respondent Charleston International Ports, LLC (TIP”); that CMH alleged in its Amended Complaint that this agreement and activities under it violated various sections of the Shipping Act (CMH’s October 28, 1999 Amended Complaint, Article V(A)); and that that agreement (FMC Agreement No. 201102 as Amended) grants CIP a thirty-year license to operate a breakbulk marine terminal on property that SPA leases from respondent Charleston Naval Complex Redevelopment Authority (“RDA”).

CMH states that by letter of June 5, 2000, CMH submitted detailed comments opposing this agreement and requested that the Commission find the agreement subject to filing, that the Commission find the agreement to be in violation of the Shipping Act and that the Commission disapprove or cancel the agreement; that the Commission informed the agreement’s filing counsel by letter of June 29, 2000 that, while the Commission allowed the agreement to become effective, the Commission did not consider the issues raised in CMH’s comments because they were, or might be, in litigation in the instant proceeding; and that the June 29, 2000 Commission letter also stated that the Commission’s action in allowing the agreement to become effective was not determinative of the issues raised by CMH’s protest or amended complaint.<sup>8</sup>

CMH also alleges that, in addition, it has become apparent during the period in which this proceeding has been stayed that the agreement parties-particularly CIP-have not performed in

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<sup>8</sup>The Administrative Law Judge initially ruled that the agreement was required to be filed. Ruling on Respondents’ Motions to Dismiss, May 2, 2000, at 72-75. However, later the Administrative Law Judge reversed that ruling. Motion for Reconsideration Granted and Complaint Dismissed as to Respondents Charleston International Projects, Inc. and Charleston International Ports, LLC, July 12, 2000, at 6-10. This issue is now before the Commission on CMH’s August 3, 2000 appeal of the Administrative Law Judge’s July 12, 2000 ruling and CIP’s August 25, 2000 reply.

accordance with its terms, and that the parties-particularly CIP-have engaged in, and continue to engage in, activities not authorized under the agreement, and such conduct implicates additional violations of the Shipping Act, and that, accordingly, if the Commission were to grant SPA's motion to dismiss, the Commission would not be able to rely upon the instant complaint proceeding to assist in its investigation and enforcement roles with respect to this agreement.

### **Commission Investigation**

CMH contends that the recent Supreme Court decision did not diminish the Commission's enforcement authority over state-owned ports; that, therefore, even if the Commission were to grant SPA's motion to dismiss, the Commission is empowered to investigate the activities of marine terminals, such as SPA, especially when those activities result in serious and harmful anticompetitive consequences; and that the Commission is "duty-bound" to determine the appropriate remedy when it finds marine terminals have engaged in unreasonable and discriminatory conduct under the Act, citing *State of California v. United States*, 320 U.S. 577, 584 (1944).

### **Discussion and Conclusions**

As explained by SCSPA and tacitly recognized by CMH, the Supreme Court has decided that FMC complaint proceedings against a state port authority for violations of the Shipping Act of 1984 are barred because such entities are immune from such legal proceedings by the Eleventh Amendment to the U.S. Constitution. Thus, SCSPA's motion must be granted. After thorough investigation, it is concluded that the other issues adverted to in the reply of CMH are beyond the

power of this administrative law judge in this proceeding at this time, and if CMH desires to pursue these issues further, it must present them to the Commission with an appropriate request.

IT IS ORDERED, that the motion of SCSPA to dismiss is granted and the complaint is dismissed.

  
Frederick M. Dolan, Jr.  
Administrative Law Judge