FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

September 17, 2004

DOCKET NO. 04-01

INTERNATIONAL SHIPPING AGENCY, INC.

v.

THE PUERTO RICO PORTS AUTHORITY

MOTION TO DISMISS DENIED;
ORDER TO ANSWER COMPLAINT
AND RESPOND TO DISCOVERY REQUESTS;
NOTICE OF REFERRAL TO ALTERNATIVE DISPUTE RESOLUTION

I. The Parties

The Complainant International Shipping Agency, Inc. ("Intership") is a corporation organized under the laws of the Commonwealth of Puerto Rico. Intership is a marine terminal operator involved in the business of providing stevedore and marine terminal operator services to ocean

common carriers engaged in U.S. domestic and foreign commerce at several berthing facilities in the Port of San Juan, Puerto Rico.

The Respondent, the Puerto Rico Ports Authority ("PRPA") is a public corporation of the Commonwealth of Puerto Rico. It is a marine terminal operator that owns and controls all of the marine facilities at the Port of San Juan, including facilities at: Puerto Nuevo, Puerta de Tierra, Isla Grande, and the Army Terminal. PRPA is involved in the business of furnishing terminal facilities and services to ocean common carriers operating in U.S. domestic and foreign commerce. PRPA leases facilities to other marine terminal operators, such as Intership.

PRPA has a legal existence and personality separate and apart from those of the Government of Puerto Rico and any official thereof and power to sue and be sued. 23 L.P.R.A., Sections 333(b) and 336(e).

II. The Complaint

Intership filed a 25-page, detailed Complaint against PRPA with the Federal Maritime Commission ("Commission") on December 29, 2003. The Complaint alleged PRPA failed to operate in accordance with the M/N/O Terminal Lease and Development Agreement (FMC No. 224-201011), failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property, refused to deal or negotiate with Intership, and has imposed unjust and unreasonable prejudice or disadvantage with respect to Intership.[1]

[1] See Complaint in the instant proceeding, *International Shipping Agency, Inc. v. The Puerto Rico Ports Authority*, FMC Docket No. 04-01 (served January 6, 2004).

Intership requests PRPA be required to answer the charges in the Complaint. Intership seeks civil penalties, reparations, and a cease and desist order prohibiting PRPA from continuing to violate the Act and to establish and put in force such practices as the Commission determines to be lawful and reasonable. PRPA also seeks an order commanding PRPA to comply with all applicable provisions of the Piers M/N/O Agreement that the Commission finds as having been violated contrary to the Act, and that such other and further relief be granted as the Commission determines to be proper, fair and just under the circumstances.

III. Procedure

PRPA was served with the Complaint and the Complainant's First Request for Admissions, First Set of Interrogatories, and First Request for Production of Documents on January 6, 2004. PRPA's Admissions, Responses and Production of Documents were due on February 5, 2004.[2]

PRPA filed a Consent Motion for an additional thirty days to file an answer or other response to the Complaint, to complete discovery and to respond to the Complainant's initial discovery on January 23, 2004.[3] The Consent Motion was granted on January 27, 2004, and PRPA was ordered to answer the Complaint and respond to the discovery requests on March 5, 2004. The time for completion of discovery was enlarged to June 4, 2004.[4]

---

[2] 46 C.F.R. 502.64.

[3] Consent Motion for Enlargement of Time to File Answer to Complaint, filed on January 23, 2004.

[4] Order: (1) Enlarging Time to File Answer to Complaint; (2) Enlarging time for the Completion of Discovery; and (3) Enlarging Time to Respond to Complainant's Initial Discovery, served January 27, 2004.

A. PRPA's Motion to Dismiss the Complaint

PRPA filed a 40-page, detailed Motion and Memorandum of Law in Support of a Motion to Dismiss the Complaint, Stay Discovery, Compel a More Definite Statement, and Compel Joinder of Necessary and Proper Parties. On March 5, 2004, PRPA requested a Stay of Proceedings Pending Submission to Alternate Dispute Resolution, if any allegation survived the motion to dismiss.[5] In closing, PRPA requested oral argument on these motions.[6]

PRPA also submitted general objections, innumerable specific objections and denials to the Complainant's First Request for Admissions, First Set of Interrogatories, and First Request for Production of Documents.[7]

PRPA maintains the Shipping Act provides the Commission with no basis for jurisdiction over PRPA's alleged failure to perform certain obligations under Agreement No. AP-96-97-(4)-92 (the "Contract") with Intership. The Contract was formed by the parties in 1996 to address economic development and construction of certain new terminal facilities in the Puerto Nuevo area of the Port of San Juan, Puerto Rico. Therefore, PRPA argues the Commission has no jurisdiction over the core and derivative allegations regarding the Contract.

In addition, PRPA asserts the Complaint is baseless. PRPA alleges it is not responsible for the ill-conceived and inept business decisions of Intership and does not serve as an insurer for it.

---

[5]See PRPA's Motion and Memorandum of Law in Support of Motion to Dismiss the Complaint, Stay Discovery, Compel a More Definite Statement, Compel the Joinder of Necessary and Proper Parties, and Stay Proceedings Pending a Submission to Alternative Dispute Resolution, filed on March 5, 2004.

[6]*Id* at page 39.

[7]See the Respondent's Response to Complainant's First Request for Admissions, First Set of Interrogatories, and First Request for Production of Documents, filed March 5, 2004.

PRPA deferred its statement of the facts in favor of legal explanations that purportedly warrant the dismissal of the Complaint.

B. Intership's Response and Opposition to Motion to Dismiss

In a response filed on April 16, 2004, Intership opposed PRPA's Motion to Dismiss and asserted it should be denied in its entirety. Intership also requested PRPA be ordered to answer the Complaint and respond to discovery requests. Intership stated its opposition to PRPA's request for Alternative Dispute Resolution ("ADR") due to its past rejection of requests for mediation and its failure to request mediation according to the rules. In addition, Intership opposes mediation if it would cause these proceedings to be stayed.[8]

C. PRPA's Letter to Administrative Law Judge dated April 21, 2004

Mr. Lawrence Kiern, counsel for PRPA, wrote a two-page *ex parte* letter to the Presiding ALJ on April 21, 2004. The letter did not indicate a copy had been sent to opposing counsel.[9] Mr. Kiern argued against Intership's opposition to PRPA's numerous motions and once again requested an oral argument on the issues. PRPA also requested a chance to reply to Intership's opposition to dismissing the complaint, if its motion for oral argument was denied.

---

[8]See Intership's Reply to Respondent's Motion and Memorandum of Law in Support of Motion to Dismiss the Complaint, Stay Discovery, Compel a More Definite Statement, Compel Joinder of Necessary and Proper Parties, and Stay Proceeding Pending Submission to Alternative Dispute Resolution, filed April 16, 2004.

[9]46 C.F.R. 502.11(a). " 'Ex parte communication means' an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given. . . ."

PRPA also enclosed a copy of a March 28, 2004, "Public Invitation for Comments Regarding Reallocation of Certain Facilities in Puerto Nuevo" (purportedly issued by PRPA) and asked that it be considered a supplement to Attachment 10 of PRPA's Motion to Dismiss.[10] The Presiding ALJ did not respond to Mr. Kiern's requests because his letter was an *ex parte* contact with the judge and in violation of Commission rules. The letter was not filed with the Secretary to the Commission according to Commission rules.

Counsel for PRPA was previously warned by the Presiding ALJ and the previous ALJ, Judge Michael A. Rosas, in *Odyssea Stevedoring v. PRPA*, Docket No. 02-08, not to submit unauthorized correspondence and pleadings.[11] Therefore, the April 24, 2004 communications from PRPA were contrary to a number of the Commission's Rules of Practice and Procedure, including ethical issues and orders from ALJs.

D. PRPA's Letter to Administrative Law Judge dated June 10, 2004

Mr. Kiern, counsel for PRPA, wrote another two-page, unsolicited letter, to the Presiding ALJ on June 10, 2004. This correspondence included a four-page June 4, 2004 "Supplemental Public Invitation for Comments & Notice of Public Meeting Notice" (purportedly issued by PRPA).

---

[10] See PRPA's two-page letter to the ALJ with a one-page attachment from attorney Lawrence I. Kiern dated April 21, 2004 and faxed to the ALJ on that date.

[11] See *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority*, FMC Docket No. 02-08, Notice of Oral Argument on Motion for Summary Judgment, April 30, 2004. The file in this proceeding consists of a constant exchange of letters, motions and objections between counsel since this Complaint was filed in May 2002. On November 2, 2002, Judge Michael A. Rosas admonished counsel not to provide him with any more unauthorized correspondence and pleadings. Likewise, this presiding officer does not welcome any more unauthorized correspondence or communication in the present proceeding from either party. The parties are cautioned that further written correspondence and pleadings are barred at this stage of the proceeding.

Mr. Kiern requested that the June 10, 2004 letter and four-page attachment be considered a supplement to Attachment 10 of the Motion to Dismiss.[12]

Mr. Kiern made a third request for oral argument on PRPA's Motion to Dismiss, and second Request to Supplement the Motion to Dismiss. Once again, PRPA counsel did not file the letter of June 10, 2004 letter, attachments and motions with the Secretary of the Commission. Therefore, the ALJ neither responded to this communication nor considered the information contained in the unauthorized correspondence when making this ruling.

E. *Ex Parte* Contact with ALJ through *San Antonio Maritime Corp. and Antilles Cement Corp. v. Puerto Rico Ports Authority*, ("*SAM v. PRPA*"), Docket No. 04-06

In *San Antonio Maritime Corp. and Antilles Cement Corp. v. Puerto Rico Ports Authority ("Sam v. PRPA"),* Docket No. 04-06, PRPA filed a Motion to Dismiss and for Summary Judgment of SAM's Complaint and discussed the instant case, *Intership v. PRPA,* Docket No. 04-01, and *Odyssea Stevedoring of Puerto Rico, Inc v. Puerto Rico Ports Authority*, ("*Odyssea v. PRPA*"), Docket No. 02-08.

Although PRPA is represented by the law firm of Winston & Strawn, LLP, in all three cases, the three Complainants are represented by three different law firms. These three cases have not been consolidated by the Office of Administrative Law Judges for the Commission. There is no evidence that PRPA provided Intership and Odyssea or their counsel with prior notice of PRPA's argument of their cases in *SAM v. PRPA,* Docket No. 04-06.

---

[12]See PRPA's two-page letter to the ALJ with a four-page attachment signed by attorney Lawrence I. Kiern on June 10, 2004, and faxed to the ALJ on that date, as well as a copy of the two-page letter of April 21, 2004 and one-page attachment.

In *SAM v. PRPA*, Docket No. 04-06, PRPA filed a Motion and Memorandum of Law in Support of Motion to Dismiss the Complaint, Stay Discovery, Compel a More Definite Statement, Join Necessary Parties, and Stay Proceedings. These defenses are almost identical to PRPA's defenses in the present proceeding. PRPA stated:

> [l]ike two other pending proceedings before the Presiding Officer, which are also the subject for motions to dismiss and for summary judgment, SAM alleges that PRPA evicted it because of the Golden Triangle Project and Regatta 2000, projects of the Commonwealth of Puerto Rico.[13]

In *SAM v. PRPA*, Docket No. 04-06, PRPA argued its motion to dismiss for failure to join indispensable parties in the Complaint regarding the allocation of rights at *Isla Grande*. PRPA stated:

> Recently, following prolonged negotiations among Port users, they experienced first hand the challenges of keeping everyone happy regarding the allocation of shared resources of the Port, including *Isla Grande*. The results of these negotiations and comments received regarding *Isla Grande* have been published for public comment as part of PRPA's ongoing effort to resolve the competing demands of multiple port users for diminished facilities.[14]

In *SAM v. PRPA*, Docket No. 04-06, PRPA argued that SAM's Complaint conflicts directly with PRPA's ongoing public notice and comment process. PRPA attached the "Public Invitation for Comments Regarding Reallocation of Certain Facilities in Puerto Nuevo," dated March 25, 2004, as Attachment M; and the "Supplemental Public Invitation for Comments & Notice of Public

---

[13]See *SAM v. PRPA*, Docket No. 04-06, Respondent's Motion to Dismiss, page 5 and footnote 16. See Respondent's Motion for Summary Judgment, *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority*, Docket No. 02-08, at 12-14 and 40-44, received December 23, 2003 (including selected exhibits) attachment B); Respondent's Motion and Memorandum of Law in Support of Motion to Dismiss the Complaint, Stay Discovery, Compel a More Definite Statement, Compel Joinder of Necessary and Proper Parties, and Stay Proceedings pending Submission to Alternative Dispute Resolution, *International Shipping Agency v. Puerto Rico Ports Authority*, Docket No. 04-01, Part I.B., received March 5, 2004. See also page 6, footnote 20.

[14]See *SAM v. PRPA*, Docket No. 04-06, Respondent's Motion to Dismiss, etc., pages 37 and 38.

Meeting Regarding Reallocation of Certain Facilities in the Puerto Nuevo Area of the Port of San Juan and Other Matters," dated June 4, 2004, as Attachment N. These documents are not exhibits in the *Intership* proceeding.

PRPA argued its Motion for Joinder using these two alleged public notices to illustrate the competing demands of multiple port users of *Isla Grande* which include Intership and Odyssea. It was unnecessary for PRPA to use Intership and Odyssea as examples of port users to prove PRPA's case. PRPA's argument was an *ex parte* communication and in violation of Commission rules.[15] Counsel for Intership and Odyssea should not have to search through other cases and read documents in the Commission's docket files to determine if PRPA is arguing their cases before the presiding ALJ without giving the other party notice of this communication.

Intership is hereby notified of PRPA's *ex parte* communication in *Sam v. PRPA,* Docket No. 04-06. Intership is also notified that the arguments offered in *Sam v. PRPA* are not considered part of the record herein.

F. Intership's Motion to Strike

On June 14, 2004, Intership was served with a copy the June 10, 2004 letter, attachments and motions to the Presiding ALJ from PRPA. PRPA's June 10, 2004 letter referenced an attached letter to the Presiding ALJ -- dated April 21, 2004 -- that Intership never received. As a result, Intership filed a Motion to Strike from the record PRPA's letters dated June 10, 2004 and April 21, 2004, all

[15] *SAM v. PRPA*, Docket No. 04-06, Respondent's Motion to Dismiss, etc., page 37, footnote 149.

documents attached to those letters, and any additional letters sent to the Commission without Intership's knowledge.

In addition, Intership opposed PRPA's request to supplement the record with additional documents, a "reply to the reply" brief, and oral argument.[16]

G. PRPA's Opposition to Motion to Strike

On June 22, 2004, PRPA submitted its Opposition to the Complainant's Motion to Strike from the record PRPA's letters dated June 10, 2004 and April 21, 2004, and asked for other relief. PRPA offers "inadvertent clerical oversight" as an explanation for Intership not being served with the April 21, 2004 letter. PRPA maintains Intership was eventually served with the April 21, 2004 letter on June 10, 2004, and was not prejudiced by the delay.[17]

PRPA requested the one-page March 28, 2004 "Public Invitation for Comments Regarding Reallocation of Certain Facilities in Puerto Nuevo," attached to the April 21, 2004 letter, and the four-page June 4, 2004 "Supplemental Public Invitation for Comments & Notice of Public Meeting," published in the San Juan, Puerto Rico press, be considered as a supplement to Attachment 10 to the Motion to Dismiss as a matter of completeness.[18] This request is denied because a supplement to Attachment 10 is not necessary for "a matter of completeness" and due to PRPA's continual failure to comply with the Commission's rules of procedure.

---

[16] See Intership's Motion to Strike, filed June 15, 2004.

[17] See Respondent's Opposition to Motion to Strike and for Other Relief, filed June 22, 2004.

[18] See Motion to Dismiss, Attachment 10, "Minutes of the Meeting of Maritime Operators of the Puerto Nuevo Port held on October 21, 2003," filed March 5, 2004.

I. History of PRPA and Intership regarding the leasing of marine terminal property in Puerto Rico

A. FMC Docket No. 94-25

The events giving rise to this Complaint have their origins in FMC Docket No. 94-95, instituted by Intership on October 28, 1994. In that case, Intership filed a complaint against PRPA alleging violations of the 1984 Shipping Act because of its discriminatory treatment of Intership regarding the leasing of certain marine terminal property.

Intership has provided stevedoring and marine terminal operator services to ocean common carriers in the Port of San Juan, Puerto Rico, pursuant to month-to-month leases from PRPA, since 1961. Intership began operations at the Drydock Terminal, Piers 9 and 15 in 1961, Pier 11 in 1971, Isla Grande in 1984, and Pier 12 in 1992.

PRPA advised Intership that it would eventually have to vacate the Pier 11 and Isla Grande facilities. Since at least 1986, Intership asked PRPA to lease it other unoccupied land on Isla Grande in order to expand its operations, as well as to develop modern port and terminal facilities.

PRPA informed Intership that the unoccupied land on Isla Grande was not available for a commercial lease because it had been designated for Puerto Rican government projects. PRPA advised Intership that the only property available was the undeveloped Army Terminal facility. Therefore, Intership entered into a lease agreement for the Army Terminal in 1991.

Conversely, PRPA granted one of Intership's competitors an extremely advantageous lease and development agreement over the entire Isla Grande port facility in 1992. PRPA then attempted to evict Intership from Isla Grande. Consequently, PRPA violated the terms of the Army Terminal Lease Agreement granting Intership the right to continue operating at Isla Grande until the Army

Terminal was fully developed. As a result of these and other actions by PRPA, Intership filed a Complaint against PRPA before the FMC (Docket No. 94-25), on October 28, 1994.

B. Settlement Agreement regarding FMC Docket No. 94-25

In order to avoid further litigation, PRPA and Intership entered into a Settlement Agreement on December 2, 1996. The agreement purported to address Intership's goal to consolidate its San Juan operations by granting it certain preferential berthing rights and the exclusive right to develop two new public terminals at Pier ½N and O that were adjacent to a terminal at Pier M which was already operated by Intership on a temporary basis. The settlement terms also included development rights of certain back land areas behind Piers L, M, N, and O.

The agreement also benefitted PRPA because Intership's financial and operational support allowed PRPA to proceed with the development of a new Public Terminal that would expand its ability to serve national and international cargo vessels. The lease and development agreement that was the main consideration of the settlement is reflected in and governed by the Piers M/N/O Terminal Lease and Development Agreement, FMC. No. 224-201011, effective December 2, 1996.

C. The Piers M/N/O Agreement–December 2, 1996

Under the terms of the Piers M/N/O Agreement, PRPA granted Intership first preferential berthing rights at Pier M and Piers ½ N & O (to be developed), second preferential berthing rights

at Pier L, the right to extend crane rails to Pier L under certain conditions, and exclusive lease and development rights of more than 42.854 *cuerdas* of the back lands of Piers L, M, N and O.[19]

On or before the execution and filing of the Piers M/N/O Agreement, twenty-eight (28) *cuerdas* of unoccupied land were delivered to Intership. However, approximately 14 *cuerdas* of land were not delivered to Intership. This land was occupied by holdover tenants who were not paying rent to PRPA and using the land for non-marine purposes.

PRPA agreed to use its best efforts and exercise all of its rights and legal remedies to vacate and deliver the occupied land to Intership, as soon as practicable. The Piers M/N/O Agreement provided that PRPA would grant Intership comparable space at Puerto Nuevo to make up for any shortfall, if PRPA was unable to remove some or all of the holdover tenants.

Under the terms of the Piers M/N/O Agreement, PRPA was not permitted to request or require Intership to vacate its facilities at Isla Grande or Piers 11 and 12 until it delivered to Intership all the occupied areas and they were completely developed and operational. In addition, PRPA guaranteed Intership berthing rights at Piers J, K, L, and M of Puerto Nuevo until Piers ½ N & O were complete and operational.

The Piers M/N/O Agreement anticipated a five-year construction and development period with Intership and PRPA sharing in various aspects of the planning and construction work. Since the orderly and timely development of the Public Terminal was dependant upon the parties performing their respective obligations on time, they agreed to cooperate and resolve any issues in the development of the Inter Marine Public Terminal in a diligent and timely manner.

---

[19] A *cuerda* is a traditional unit of land area measurement in Puerto Rico, roughly equivalent to an acre.

The Piers M/N/O Agreement defines certain aspects of the work that are the responsibility of PRPA and were to be funded by PRPA through a loan obtained from the Government Development Bank of Puerto Rico.

The Piers M/N/O Agreement provides for a Joint Management Committee to meet monthly to coordinate the project and address development issues. The Committee failed to resolve any of the conflicts that are the subject of this Complaint despite more than seventy meetings. Finally, the Piers M/N/O Agreement sets forth procedures for the resolution of claims and disputes, including mediation.

II. Matters Complained of by Intership

A. Problems in the Development of the Public Terminal and Guaranteed Berthing

Intership maintains that PRPA has failed to properly and timely perform its obligations regarding the construction and development of PRPA's improvements and failed to assist Intership as required by the FMC Agreement, causing significant unreasonable delay and an exorbitant increase in the cost of developing the Public Terminal.

Intership alleges PRPA failed to timely vacate and deliver all of the 14 *cuerdas* of occupied areas promised to Intership. It also asserts PRPA refused to provide Intership with comparable marine terminal areas at Puerto Nuevo to make up for the occupied areas that were not delivered. In addition, Intership complains of the loss of approximately three *cuerdas* of leased areas because of the Kennedy marginal road expansion.

Intership argues PRPA ignored many requests from Intership for the temporary lease of several available Puerto Nuevo lots to alleviate the serious lack of terminal space caused by PRPA's failure to deliver the occupied areas.

B. Problems with the construction of Piers 1/2N & O

Regarding the construction of Piers ½ N & O, Intership alleges that PRPA negligently accepted deficient and insufficient dredging from its contractor. Intership maintains that PRPA negligently certified the dredging to substantially less than the depth specified in the construction drawings and the Piers M/N/O Agreement. Intership asserts that the deficient and inadequate dredging by PRPA's contractor caused "soft bottom" problems that interfered with pile driving.

PRPA allegedly proceeded to deposit bolder type rocks on the bottom of piers ½N & O despite warnings by the piers' designers that such a "solution" could, in fact, cause other problems. As a result, Intership argues that PRPA's negligent actions and omissions resulted in construction delays and costly change orders for Piers ½ N & O.

In addition, Intership claims that PRPA certified the substantial completion of Piers ½ N & O in August 1999 and the piers began settling shortly thereafter. In April 2000, the sheet piling was displaced and Piers ½ N & O have been unusable ever since. Although PRPA allegedly failed to repair Piers ½ N & O, it charged Intership use of these piers.

C. **Problems with the use of Pier L**

During the construction and attempts to repair Piers ½N & O, PRPA allegedly ignored Intership's demands of its guaranteed berthing rights at Piers H, J, K and L and second preference on Pier L, and even partial use of Pier L to compensate for Intership's loss of use of the 900 feet of Piers ½ N & O.

PRPA allegedly allowed NPR, Inc. ("NPR"), then the Lessee of Pier L, and its stevedoring subsidiary, San Juan International Terminals ("SJIT"), to continuously interfere with Intership's operations at the Public Terminal by opening certain gates that conflicted with the traffic in and out of the Public Terminal. Intership asserts that PRPA refused to close the gates without NPR and SJIT's authorization even though they had more than 12 other entrances and exit gates in the 119 *cuerdas* of marine land they leased from PRPA.

Intership contends that PRPA further tolerated and acquiesced to other actions of NPR and SJIT that were clearly intended to prevent Intership from using Pier L, such as: stacking and storing containers and equipment and repairing cranes on the "L" platform. PRPA allegedly failed to charge demurrage or take any action to avoid such interference with Intership's secondary preferential use of Pier L.

Intership submits that PRPA allegedly failed or refused to resolve the numerous problems and development issues which were the subject of more than 70 meetings of the Joint Management Committee. As a consequence of PRPA's actions and/or omissions, Intership alleges it had to accelerate its plan for acquisition of cranes and stevedoring equipment as the only way to increase

productivity and compensate for the deprivation of the contracted berthing and terminal facilities that PRPA delivered belatedly, or not at all.

Intership has invested approximately $25,000,000 in cranes and stevedoring equipment, far exceeding its investment commitment of $19,5000,000. Intership maintains its capacity to obtain new business has been adversely affected by the actions and inactions of PRPA notwithstanding Intership's efforts to mitigate its damages.

D. Problems with Isla Grande and eviction from Isla Grande and Piers 11 & 12

PRPA allegedly refused to assign to Intership the Pan American Dock at Isla Grande for the berthing of Intership's car carriers, but assigned this berth to re-bar vehicles from 2000 to 2002. Intership submits that PRPA has used the construction of the Royal Cruise Lines terminal as a pretext for denying the berth to Intership since September 2001.

In addition, Intership maintains that PRPA has failed to provide electricity to Intership's car facility at Isla Grande, forcing it to provide its own power with generators.

PRPA's actions allegedly forced Intership to discharge its car carriers at inappropriate berthing facilities in Puerta de Tierra (at a higher risk of damage to the cars and increased operational costs) and to transfer the cars to Isla Grande. PRPA allegedly required Intership to pay rent, security and other operating expenses at its Isla Grande car facility during this time.

Intership argues that PRPA, through the above described actions, constructively evicted Intership from its Isla Grande car facility, without complying with the conditions' precedent imposed upon it by the Piers M/N/O Agreement.

In May 2000, PRPA allegedly evicted Intership from Piers 11 & 12, by tearing down the doors of the Pier 11 warehouse building where Intership had its offices and by interrupting the water service (on occasion of the San Juan Regatta 2000). Therefore, Intership maintains PRPA failed to comply with the conditions' precedent imposed upon it by the Piers M/N/O Agreement.

E. Depletion of the Government Development Bank of Puerto Rico ("GDB") Funds

Intership asserts that PRPA improperly paid for the insufficient dredging of Piers ½ N & O from GDB financing, even though dredging was not part of PRPA's Improvements to be paid from the GDB fund. As a result of this action by PRPA, Intership claims that more than $3,700,000 became unavailable to pay for PRPA's Improvements authorized by the Piers M/N/O Agreement.

Intership also alleges that PRPA improperly paid from the GDB financing change orders to the construction contracts for various PRPA's improvements (including Piers ½ N & O), which exceeded 25% of the projected cost and was caused directly by PRPA's failure to properly perform and timely discharge its construction responsibilities regarding the Public Terminal.

In addition, Intership claims that PRPA improperly reimbursed itself from the GDB financing for credits for wharfage and dockage extended to Intership for Interim Improvements.

Furthermore, Intership argues that PRPA improperly depleted the GDB financing causing Intership to absorb the cost of completing projects, such as: the "South Lots," the gate and access entrance to the Public Terminal and other projects that are still underway. Intership has disbursed in excess of $5,000,000 to fund the pending developments, and claims that PRPA refused to reimburse Intership for these expenditures or obtain additional financing.

F. Untimely repair of Piers ½ N & O and Intership's Gantry Cranes

Upon displacement of the sheet piling of Piers ½ N & O in April 2000, PRPA allegedly represented that it would repair the piers by December 2001. Intership continually warned PRPA that Piers ½ N & O had to be repaired on time for the arrival of the Post-Panamax gantry cranes ("Gantry Cranes") in San Juan. Intership asserts that PRPA ignored and refused several requests to treat the repair of Piers ½ N & O as an emergency.

Intership purchased two high speed Gantry Cranes for installation at Piers ½ N & O, at a total investment of $8,500,000, including financing costs, as part of its commitment under the Piers M/N/O Agreement. Intership purchased the Gantry Cranes relying on PRPA's representation and assurance it would repair Piers ½ N & O by December 2001. Intership started advising PRPA of its intention to purchase the cranes in February 2001.

Nevertheless, it allegedly took PRPA until August 2001 to solicit bids for a repair contract. The only contractor to bid was the same contractor that had performed the insufficient dredging for Piers ½ N & O. This contractor could not be awarded the contract because it had since been debarred from performing contracts for the federal government and the government of Puerto Rico. Consequently, Piers ½ N & O were not repaired by December 2001.

At the suggestion of Intership, PRPA entered into discussions with a second contractor who had offered to start the repair by January 2002 and promised to tender 450 feet of berths at Piers ½ N & O by March 2002. The March 2002 completion date would have allowed Piers ½ N & O to be repaired on time for the arrival of the Gantry Cranes. Intership kept PRPA advised of the schedule for completion of the piers and estimated dates of arrival of the Gantry Cranes to San Juan.

In December 2001, PRPA allegedly claimed the repair plan proposed by the second contractor was inconsistent with PRPA's theory and its consultant's theory with regard to the cause of the structural failure of Piers ½ N & O. Since there was a pending arbitration case with the contractor who built the piers, PRPA rejected the offer of the second contractor and awarded the repair contracts to a third contractor.

PRPA allegedly advised Intership that the repair work would commence in January 2002. The third contractor was asked to tender 450 feet of Piers ½ N & O by March 2002, which would still be on time for the arrival of the Gantry Cranes.

The Gantry Cranes arrived on July 20, 2002, however, Piers ½ N & O were not ready for the receipt, installation, and commissioning of the cranes. PRPA committed in writing to repair Piers ½ N & O by April 2003, but again failed to complete the repairs by those dates. Furthermore, Intership asserts that the repairs of Piers ½ N & O were not made as of the date of the filing this Complaint and the Gantry Cranes have been sitting at Pier O, idle and inoperable.

Intership alleges innumerable injuries and damages as a direct result of PRPA's failure to repair Piers ½ N & O on time for the arrival and installation of the Gantry Cranes in July 2002. back into service, Intership's consultants have advised that there will be a permanent dysfunction and disfigurement of the piers that will reduce the reach of the Gantry Cranes.

G. Alleged Discriminatory Treatment Regarding the Puerto Nuevo Port Zone

Ever since the Piers M/N/O Agreement was signed, Intership allegedly expressed to PRPA its interest in leasing additional exclusive terminal areas adjacent to Piers M/N/O, at full tariff rates.

Intership repeatedly noted NPR was using Pier L and its back lands to store junk and abandoned equipment. Intership maintains NPR did not pay full rent for this land because of PRPA's perpetuation of special concessions it had made to the government entities predecessors of NPR.

In 2001, while NPR was in bankruptcy proceedings, PRPA allegedly inquired whether Intership would be willing to lease from it additional Puerto Nuevo land in the event PRPA would receive part of the back land leased to NPR. Intership confirmed in writing its request for lease of 30-40 *cuerdas* adjacent to Piers M/N/O. PRPA purportedly acknowledged Intership's request and agreed to give it "serious consideration" depending on the outcome of NPR's bankruptcy.

During 2001 and 2002, PRPA and Intership actively negotiated a lease to Intership of approximately 21 *cuerdas* of the "L" backlands and first preferential rights to Pier L in consideration of Intership's willingness to improve and develop the same at its own cost, substantial projected revenues for PRPA in wharfage and dockage, and other considerations.

Intership alleges that in or around November 2002, Sea Star Line, LLC, purchased the lease agreements of NPR with PRPA in the bankruptcy proceedings. NPR supposedly returned to PRPA approximately 16 *cuerdas* of the backlands of Pier L and approximately 15 cuerdas of backlands of Pier G pursuant to certain agreements between PRPA and Sea Star and the terms of a bankruptcy court's order.

Intership maintains that PRPA failed, and refused to confer that lease to Intership in spite of negotiations between PRPA and Intership and its previous recognition of Intership's interest in and request for a lease of Pier L and its backlands.

PRPA alleged that it needed to conduct a public procurement for the said facilities. However, PRPA agreed to transfer the 15 *cuerdas* of Pier G backlands to carrier Horizon Lines without public procurement. In addition, PRPA allegedly paid for the demolition of a warehouse and the environmental clean-up to allow the use of said land by Horizon Lines.

At present, Intership handles approximately 30% of the containerized cargo, 80% of the automatic cargo, all of the alcohol and molasses cargo and other break bulk cargo for its customer carriers in the Port of San Juan. During 2002-03, Intership moved in excess of 330,000 cargo containers and automobiles, equivalent to 550,000 TEU's.

On the other hand, Horizon Lines leased from PRPA ninety-four (94) *cuerdas* in Puerto Nuevo, almost three times the land leased by Intership, and handles less than half the cargo handled by Intership. The excess space enjoyed by Horizon Lines has prompted its alliance with a stevedore, who controls the Port of Ponce, to provide stevedoring services at the Port of San Juan.

H. Intership's Article XXXII claims and disputes

On April 11, 2003, Intership submitted to PRPA an "Article XXXII Claim and Dispute" ("First Claim") because of the alleged injuries sustained by Intership resulting from PRPA's continued failure to operate in accordance with the terms of the Piers M/N/O Agreement. PRPA failed to respond or act with respect to Intership's First Claim.

On May 20, 2003, Intership requested mediation with PRPA pursuant to Article XXXII. On June 13, 2003, PRPA agreed to mediation of Intership's First Claim and second Article XXXII Claim and Dispute ("Second Claim"), which was not filed at that time. On August 15, 2003,

Intership submitted to PRPA its Second Claim. PRPA failed to respond to or act with respect to Intership's Second Claim.

Notwithstanding PRPA's agreement to mediate both claims, it allegedly failed to respond to Intership's proposal of candidates for a mediator and follow through with the mediation. For these reasons, Intership argues it has exhausted the claim and dispute procedures of the Piers M/N/O Agreement.

III. Alleged Violations of the Shipping Act of 1984

A. Intership alleges that the actions of PRPA set forth in Parts IV and V of the Complaint constitute its failure to operate in accordance with the terms of the Piers M/N/O Agreement in violation of section 10(a)(3) of the 1984 Act, 46 U.S.C. app. sec. 1709(a)(3). Intership maintains that PRPA's actions and/or failure to act has had an adverse effect on the development of the Public Terminal, including without limitation:

> PRPA's failure to deliver comparable marine terminal areas at Puerto Nuevo to make up for the occupied areas not delivered to Intership; the failure to enforce Intership's second preference on Pier L; the failure to provide Intership guaranteed berthing at Piers H, J, K and L; the failure to implement the PRPA's Improvements; the eviction of Intership from Isla Grande and Piers 11 and 12; and the improper depletion of GDB funds to be used for Port's improvements.

B. Intership submits that the actions of PRPA set forth in Parts IV and V of the Complaint constitute its unjust, unreasonable, and unlawful practices in violation of section 10(d)(1) of the 1984 Act, 46 U.S.C. app. sec. 1709(d)(1), including without limitation:

> PRPA's failure to repair Piers ½ N & O while charging Intership rent for their use; the obstruction of Intership's use of its facility at Isla Grande; failing to enforce Intership's right to the second preference use of pier L and guaranteed berthing at

Piers H, J, K and L, using strong-arm tactics to evict Intership from Isla Grande and Piers 11 and 12; misleading Intership as to the timing of the repairs to i/2 N & O; and allowing other users to store junk and abandoned equipment on the backlands of Piers L, M, N, and O without paying Port charges.

C. Intership maintains that the actions of PRPA set forth in Parts IV and V of the Complaint constitute its unreasonable refusal to deal or negotiate with Intership in violation of sections 10(d)(3) and (10(b)(10) of the 1984 Act, 46 U.S.C. app. secs. 1709(d)(3) and 1709(b)(10), including without limitation:

> Refusing to follow the mediation provisions of the Piers M/N/O Agreement; failing to take the action agreed to in the meetings of the Joint Management Committee; ignoring Intership's requests for the lease of several available Puerto Nuevo lots to alleviate the serious lack of terminal space confronted by Intership; and refusing to negotiate with Intership for the use of Pier L and its backlands citing conditions not imposed on other Port users.

D. Finally, Intership claims that the actions of PRPA set forth in Parts IV and V of the Complaint constitute its impositions of undue or unreasonable prejudices or disadvantages with respect to Intership in violation of section 10(d)(4) of the 1984 Act, 46 U.S.C. sec. 1709(d)(4), including without limitation:

> Allowing other users of the Port to interfere with Intership's operations at the Public Terminal; allowing other users of the Port to violate the use and cleaning standards for p referential areas; allowing other users of the Port to use the Port facilities without paying rent or other Port charges; refusing to reimburse Intership for the costs Intership has incurred in making PRPA improvements; awarding the backlands of the Port to other users without public procurement while insisting that any cuerdas leased to Intership be by public procurement; and granting a disproportionate amount of space to other Port users who handle substantially less cargo than Intership.

IV. Injuries claimed by Intership

As a direct result of violations of the 1984 Act by PRPA, Intership claims it has suffered and will continue to suffer substantial economic damages and injury, as follows:

1. In an amount exceeding $31,000,000 consisting of foregone profit, net capital expenditures and other expenditures, including interest.

2. In an amount exceeding $1,3000,000 for the Intership's eviction from and loss of use of its Isla Grande car facility.

3. In an amount exceeding $5,000,000 for the costs incurred by Intership in completing the development of the Public Terminal that the PRPA was required to pay from the GDB Project Financing and refuses to reimburse Intership or obtain additional financing.

4. A direct result of the violations of the 1984 Act by the PRPA set forth in this complaint and more particularly the PRPA's failure to repair Piers ½ N & O and consequent impediments of the installation, commissioning and operation of Intership's Post-Panamax gentry cranes, Intership has suffered additional economic damages and injuries in an amount exceeding $14,000,000 confiding of foregone profits and additional expenditures.

Conclusions of Law

The U.S. Congress enabled the Federal Maritime Commission ("Commission") to administer the Shipping Act through 46 U.S.C., Chapter 36, International Ocean Commerce Transportation. The Complaint was filed pursuant to section 11(a) of the Shipping Act, 46 U.S.C. app. sec. 1710(a). PRPA and Intership are marine terminal operators within the meaning of section 3(14) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1702(4).

The Commission's Rules of Practice and Procedure ("Rules") govern, in part, the manner in which parties will conduct themselves before the Commission. 46 C.F.R. Subpart A, Sec. 502. The Rules will be construed to secure the just, speedy, and inexpensive determination of every

proceeding. 46 C.F.R. 502.1. In proceedings pursuant to 46 C.F.R. 502, for situations that are not covered by a specific Rule, the Federal Rules of Civil Procedure ("FRCP") will be followed to the extent that they are consistent with sound administrative practices. 46 C.F.R. 502.12.

In deciding motions to dismiss, such motions are addressed to the pleadings not the evidence. A complaint should not be dismissed unless it appears beyond a doubt the complainant could not prove any set of facts consistent with the allegations entitling it to the relief requested under the law that is invoked. *Crowley Liner Services, Inc. and Trailer Bridge, Inc. v. Puerto Rico Ports Authority,* 29 S.R.R. 394, 405, FMD Docket No. 00-02 (ALJ Sept. 2001).

In PRPA's five motions for dismissal, reasonable doubts are to be construed in favor of the non-moving party, Intership.

V. Whether the Commission Lacks Subject Matter Jurisdiction

PRPA asserts that the Commission lacks subject matter jurisdiction for the section 10(a) allegations because the parties filed the Contract with the Commission as part of a settlement of a prior matter before the Commission. PRPA appears to characterize the issues in this case as a simple breach of a contract. However, this assertion is not supported by the evidence or the law.

PRPA cites an incorrect standard for determining whether subject matter jurisdiction lies with the Commission. According to PRPA, "[a]gency subject matter jurisdiction does not reside when the matter is "within the conventional competence of the courts.[20] (Motion to Dismiss at 3, citing

[20] *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 306 (1978).

Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 305 (1978)). PRPA's representation that the standard cited in *Nader* relates to subject matter jurisdiction is, however, false.[21]

Nader and the other cases cited by PRPA involved questions of primary jurisdiction, not subject matter jurisdiction.[22] Therefore, the standard cited by PRPA is not applicable.

Likewise, PRPA's argument that the Commission does not have subject matter jurisdiction according to section 8(c) of the Shipping Act is misleading and inapplicable. PRPA misquotes section 8(c) and incorrectly states that:

> The exclusive remedy for breach of contract claim . . . shall be an action in the appropriate court. . . .

In referencing section 8(c), PRPA neglects to mention that section 8(c) applies only to breaches of service contracts. Section 8(c) of the Shipping Act does not provide a remedy for a breach of contract for marine terminal operators and stevedores. It only provides a remedy for ocean common carriers and shippers for breach of service contracts, as follows:

---

[21] In *Nader*, 426 U.S. at 305-06, PRPA manufactures the reference to subject matter jurisdiction. It does not exist in the actual language of the case, which reads as follows:

> The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case. We are particularly aware that, even where the wrong sought to be redressed . . . has been the subject of Board consideration and for which compensation is provided in carrier tariffs, the Board has contemplated that there may be individual adjudications by courts in common-law suits brought at the option of the passenger.

Nader, 426 U.S. at 305-06 (the underscored language is what is quoted by PRPA). The issue in *Nader* was not whether the agency had jurisdiction, but rather whether the court also had jurisdiction.

[22] The doctrine of primary jurisdiction does not test whether an agency or a court has subject matter jurisdiction over a claim. Rather it seeks to determine whether a court should stay or dismiss a proceeding to allow an agency to first resolve issues falling within its particular expertise. See, e.g., *Syntek Semiconductor Co. v. Microchip Technology, Inc.*, 307 F.3d 775, 780 (9th Cir. 2002).

> An individual ocean common carrier or an agreement between or among ocean common carriers may enter into a service contract with one or more shippers subject to the requirements of this Act. The exclusive remedy for a breach of a contract entered into under this subsection shall be an action in an appropriate court, unless the parties otherwise agree. In no case may the contract dispute resolution forum be controlled by or in anyway affiliated with a controlled carrier as defined in section 3(8) of this Act, or be the government which owns or controls the carrier.

PRPA's argument that "Chief Judge Kline has ruled that Section 8(c) applies to Marine Terminal Operator Agreements" is wrong and seriously misleading. The case cited by PRPA to support this argument, namely, *Crowley Liner Services, Inc. and Trailer Bridge, Inc. v. Puerto Rico Ports Authority*, 29 S.R.R. 394, FMC Docket No. 00-02 (ALJ Sept. 20, 2001), had absolutely nothing to do with section 8(c) of the Act. Section 8(c) deals with breaches of service contracts between ocean common carriers and shippers.

PRPA is not an ocean common carrier or a controlled carrier;[23] PRPA is a "marine terminal operator."[24] This case involves a marine terminal facility's agreement, not a service contract between ocean common carriers and shippers. Therefore, section 8(c) has no relevance to the section 10(a)(3) allegations. PRPA's argument is not only incorrect, it is misleading. It also constitutes a failure of counsel to live up to the professional conduct expected of attorneys practicing before the Commission.

Further, the invalidity of PRPA's section 8(c) argument is underscored by the contrary position taken by it in prior litigation. PRPA made a claim under section 10(a)(3) of the Shipping

---

[23]Section 3(16) of the Shipping Act.

[24]Section 3(14)–a "marine terminal operator" means a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to sub-chapter II of chapter 135 of title 49, United States Code."

Act in *Crowley Liner Services, Inc. and Trailer Bridge, Inc. v. Puerto Rico Ports Authority*, 29 S.R.R. 394, FMC Docket No. 00-02 (ALJ Sept. 2001) at 405:

> . . . PRPA alleges that *Crowley* has violated section 10(a)(3) of the 1984 Act because *Crowley* has failed to comply with the terms of its lease agreement as required to be filed with the Commission under the 1984 Act. PRPA also alleges that Crowley has breached its lease agreement with PRPA and seeks damages for unpaid charges, plus interest, costs and attorneys' fees, a cease and desist order and, in addition, civil penalties.[25]

Likewise, PRPA's reliance on *Cargo One, Inc. v. COSCO Container Lines Co.*, Docket No. 99-24, 28 S.R.R. 1635 (FMC Oct. 31, 2000), which interprets Section 8(c) is incorrect. *Cargo One* supports, rather than argues against, the existence of subject matter jurisdiction in this case:

> [W]e find it inappropriate and contrary to the intent of the statute that section 8(c) bar any Shipping Act claim which bears some similarity to, overlaps with, or is couched in terms suggesting that the remedy may be available in a breach of contract action. We believe the more appropriate test is whether a complaint's allegations are inherently a breach of contract claim, or whether they also involve elements peculiar to the Shipping Act. We find that as a general matter, allegations essentially compromising contract law should be dismissed unless the party alleging the violation successfully rebuts the presumption that the claim is not more than a simple contract breach of claim. In contrast, where the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support such a claim, that the matter is appropriately before the agency.

Intership has shown the alleged violations raise issues beyond contractual obligations that include significant questions about the legality of some of PRPA's practices. Intership has also

---

[25] Crowley sought to dismiss the complaint by PRPA on the grounds that the agreement at issue was not required to be filed. The Presiding Officer, however, refused to dismiss the complaint on this basis, finding that the Commission has jurisdiction over such agreements even though they are subject to a limited exemption from filing requirements. 29 S.R.R. at 408-410.

proven it has evidence supporting its claims that is more than merely "conclusory allegations," or "unsubstantiated assertions," or only a "scintilla" of evidence.[26]

PRPA has not made the requisite showing that essential evidence is lacking for support of Intership's case. On the other hand, Intership has shown it has more than a "scintilla" of evidence regarding the issue of whether PRPA is giving more favorable treatment to other maritime operators in the Port of Puerto Rico.

Marine terminal operators, such as PRPA, are subject to the preference and prejudice prohibitions of the Shipping Act (now sections 10(d)(1), 10(d)(3), 10(d)(4) of the 1984 Act) that impose upon all persons subject to the Shipping Act the "duty" to serve the public impartially. This case involves the equality of treatment between similarly situated persons–especially in the marine terminal industry.[27]

Persons subject to the Shipping Act, e.g., marine terminal operators, are obliged to equitably allocate their facilities and space to the public. Since the Commission has jurisdiction over a complaint made against PRPA, the Commission may determine whether the marine terminal operator has violated the Shipping Act.

The test of the Commission's subject matter jurisdiction is whether cognizable claims have been made under the Shipping Act. Intership has met this burden by showing it has cognizable claims that PRPA has not allocated its facilities equitably to the public. Intership has alleged facts

---

[26] *Little v. Liquid Air Corporations,* 37 F.3d 1069, 1075-1076 (5th Cir. 1994) (en banc).

[27] *A.P. St. Phillip v. Atlantic Land & Improvement Co. and Seaboard Coastline RR,* 13 F.M.C. 166, 174 (1969), *Investigation of Free Time Practices–Port of San Diego,* 9 F.M.C. 525, 545-547 (1966), *American Export Isbrandtsen Lines v. F.M.C.,* 444 F.2d 824, 828 (D.C. Cir. 1970).

that, if proven, would establish PRPA has engaged in possible violations of sections 10(a)(3), 10(b)(10), 10(d)(1), 10(d)(3) and 10(d)(4) of the Shipping Act. 46 C.F.R. 501.2.[28] PRPA has failed to cite any adequate basis for finding otherwise.

Congress created the Commission to administer the Shipping Act. Consequently, the Commission has jurisdiction over the subject matter of the Complaint and may determine whether PRPA has violated the Shipping Act.

VI. Whether the Complaint is Barred by the Doctrine of Sovereign Immunity

PRPA argues that the Complaint must be dismissed because the Port of Puerto Rico is immune from suit under the Eleventh Amendment of the U.S. Constitution. PRPA is correct that the Eleventh Amendment bars a federal court suit against a state without its consent. However, this case does not involve a state or the Territory of Puerto Rico. The respondent is the Puerto Rico Ports Authority, a public corporation.[29] It is an independent legal corporation and not part of the Puerto Rican government. Public corporations are not "arms of the state" under the laws of Puerto Rico.

---

[28] *Crowley Liner Services and Trailer Bridge, Inc. v. Puerto Rico Ports Authority,* FMC Docket No. 00-02, 29 S.R.R. 394, 405-406 (ALJ Sept. 20, 2001), and cases cited therein.

[29] Puerto Rico Ports Authority Act, Chapter 25 of the Code of Puerto Rico, Title 23, Sections 331 through 357. (Section 333(a) creates a "public corporation".)

PRPA is incorrect in its assertion that it is entitled to claim such immunity while acting as a marine terminal operator. The Commission has found PRPA to be a marine terminal operator and not an arm of, or part of, the Puerto Rican Government.[30]

The issue of whether PRPA has sovereign immunity barring the Complaint under the Eleventh Amendment of the U.S. Constitution has been squarely rejected by the U.S. Court of Appeals for the First Circuit. In *Royal Caribbean Corp. v. Puerto Rico Ports Authority*, 973 F.2d 8 (1st Cir. 1992), the court found, "[s]everal critical factors that suggest the [PRPA], in running and maintaining the docks, is not entitled to Eleventh Amendment Immunity." *Id.* at 10 (emphasis in the original).[31] The relevant factors include:

> local law and decisions defining the nature of the agency involved; whether payment of any judgment will come out of the state treasury; whether the agency is performing a governmental or proprietary function; the agency's degree of autonomy; the power of the agency to sue and be sued and enter into contracts; whether an agency's property is immune from state taxation and whether the state has insulated itself from responsibility for the agency's operations. *Id.* at 9.

The primary factors considered by the court in reaching this conclusion were the commercial, rather than the governmental nature of owning, operating, and managing transportation facilities, the financial independence of PRPA, and the operational autonomy of PRPA. *Id.* At 10-11. The

---

[30] *Id.* at 399-400, and *HUAL AS v. Puerto Rico Ports Authority,* Docket No. 03-01, 29 S.R.R. 1264 (ALJ Feb. 2003). (See Joint Stipulation #82.) See also *Royal Caribbean Corp. v. Puerto Rico Ports Authority*, 973 F.2d 8 (1st Cir. 1992); *Transcaribbean Maritime Corp. v. Commonwealth of Puerto Rico,* 2002 WL 1024813, P.R. Cir. Ct. App. (March 27, 2000); *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Authority*, 991 F.2d 935, 939-942 (1st Cir. 1993).

[31] PRPA's lack of immunity has previously been recognized in FMC proceedings. See *Hual AS v. Puerto Rico Ports Authority,* Docket No. 03-01, 29 S.R.R. 1264 (ALJ Mar. 3, 2003) ("the 1st Circuit Court of Appeals, which has jurisdiction over Puerto Rico, has held that the PRPA is not immune from private complaint suits when operating a port. . . .").

Eleventh Amendment jurisprudence developed since *Royal Caribbean* reaffirms that result and makes it even clearer that PRPA is not an arm of the state entitled to immunity.

In *Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico and the Caribbean Cardiovascular Center Corp.*, 322 F.3d 56 (1st Cir. 3003), the court stated that there was extensive reason for restraint when deciding whether an entity had state sovereignty:

> "[W]here an entity claims to share a state's sovereignty and the state has not clearly demarcated the entity as sharing its sovereignty, there is great reason for caution. It would be every bit as much of an affront to the state's dignity and fiscal interests were a federal court to find erroneously that an entity was an arm of the state, when the state did not structure the entity to share its sovereignty." *Id.* at 63.

PRPA incorrectly asserts that the standard for determining whether a particular entity is entitled to sovereign immunity is limited exclusively to the type of activity at issue in this Complaint. In making this argument, PRPA again misquotes the Supreme Court. PRPA asserts that the question of whether the activity at issue is a "governmental or proprietary function" is now the "paramount factor" in determining whether an entity is an arm of the state. (Motion to Dismiss at 11 n. 36, citing *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 765.)

The Supreme Court in *South Carolina* did not address the issue of whether South Carolina State Ports Authority was an arm of the state. The Court specifically noted the uncontested fact that the South Carolina State Ports Authority was an "arm of the state."[32] The Court did not discuss the test for making such a determination, let alone rule that the governmental or proprietary function

---

[32] *Id.* at 751. The Supreme Court in *MT. Healthy City School District Board of Education v. Doyle,* 429 U.S. 275, 280 (1977), held that Eleventh Amendment Sovereign Immunity was only available to "arms of the State" and not otherwise available to municipalities, counties and the like. *Ibid. Elam Construction, Inc. v. Regional Transportation Authority,* 129 F.3d 1343, 1345-1346 (10th Cir. 1997).

factor should be paramount when applying any such new test. What *South Carolina* did hold was that the purpose of the Eleventh Amendment is not only to protect state treasuries, but also to protect the dignity of the state.[33] (*Id.* at 765).

The holding in *South Carolina* is consistent with *Royal Caribbean* and subsequent Eleventh Amendment cases that continue to balance a variety of factors when determining whether an entity is an arm of the state. Indeed, the First Circuit has noted this dual purpose of the Eleventh Amendment, and has made it clear that fulfilling that purpose does not mean favoring immunity.

With respect to the test itself, the First Circuit analysis has evolved into a two-step process which looks first at whether the state has clearly structured the entity to share in its sovereignty, and second at whether damages would be paid from the state treasury.[34]

In *Redondo Construction Corp. v. Puerto Rico Highway and Transportation Authority*, 357 F.3d 124, 126 (1st Cir. 2004), the court reformed its arm-of-the-state analysis for Eleventh Amendment immunity in response to intervening Supreme Court precedent and elaborated on the *Fresenius*[35] two-part test as follows:

> Under *Fresenius*, a court must first determine whether the state has indicated an intention -- either explicitly by statute or implicitly through the structure of the entity -- that the entity shares the state's sovereign immunity. If no explicit indication

---

[33] *Federal Maritime Commission v. SCSPA,* at 765.

[34] *Fresenius Med. Care Cardiovascular Resources Inc. v. Puerto Rico & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56 (1st Cir. 2003), cert. denied, _____U.S._____, 124 S.Ct. 296, 157 L.Ed.2d 142 (2003).

[35] *Fresenius* applied the two-stage framework of *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30. 115 S.Ct 394, 130 L.Ed.2d 245 (1994), to the question of whether a special purpose public corporation established by a state should enjoy Eleventh Amendment immunity. *Fresenius,* 322 F.3d at 64-68.

> exists, the court must consider the structural indicators of the state's intention. If these point in different directions, the court must proceed to the second stage and consider whether the state's treasury would be at risk in the event of an adverse judgment.

In fact, the statutes in the present case explicitly state that the Commonwealth did not intend for PRPA to share in its sovereignty. Indeed, the Commonwealth explicitly granted PRPA "the power to sue and be sued." P.R. Laws Ann. Title 23, Sec. 336(e) (LEXIS Supp. 2001) (emphasis added).[36] The relevant statute also provides for PRPA to have "a legal existence and personality separate and apart from those of the Government and any officials thereof." P.R. Laws Ann. Title 23, Sec. 333 (LEXIS 1999).

Further, the implicit structural factors as weighed in *Royal Caribbean* (e.g., commercial functions, independent financial existence, and operational autonomy) continue to require a finding of no sovereign immunity. Since application of the first part of the test weighs so heavily in favor of denying immunity, it is not necessary to turn to the second part of the test. If, however, the second step is considered, the results are conclusive. The following relevant statute makes it clear that the treasury of the Territory of Puerto Rico would not be at risk, if a judgment was rendered against PRPA:

> The debts, obligations, contracts, bonds, notes, debentures, receipts, expenditures, accounts, bonds, undertakings and properties of the Authority, its officers, agents or employees, shall be deemed to be those of the said government-controlled corporations, and not those of the Commonwealth of Puerto Rico, or any

---

[36] Exhibit 1.

office, bureau, department, commission, dependency municipality, branch agent, officials or employees thereof. [37]

Application of the proper two-part tests requires that PRPA not be treated as an arm of the state entitled to Eleventh Amendment immunity because it is clear that the state's treasury is not at risk.[38] Even if the sole inquiry were the nature of the activities at issue, as PRPA contends, the finding in *Royal Caribbean* that owning and operating a marine terminal is commercial in nature still stands.

In an effort to avoid this clear precedent, PRPA argues that it is not acting in its capacity as a marine terminal operator in its dealings with Intership. PRPA now claims to be engaging in the "regulation of land use" because certain allegations in the Complaint relate to, or can allegedly be excused by, activities undertaken by PRPA in relation to port development activities. PRPA has the clear burden of establishing facts to meet this novel contention.

PRPA fails to explain, however, how engaging in port development equates to "regulating land use." It neither cites any regulation it has issued pertaining to land use, nor pointed to any authority for it to issue such regulations. Furthermore, there is no evidence that Intership is basing its claims upon either the Regatta 2000 or the Golden Triangle Project.

PRPA compares its port development activities to promotional harbor development projects in other cities, but cites nothing to indicate that the other harbor development operations constitute

---

[37] P.R. Laws Ann. Title 23, Sec. (LEXIS 1999); see also Royal Carribean, 973 F.2d at 10 ("The record indicates that the Ports Authority, not the Commonwealth treasury would likely pay an eventual judgment in the plaintiff's favor").

[38] See *Fresenius*, 322 F. 3d at 65, 72.

land use regulation on the part of their respective port authorities. Property development, is in fact, a distinct commercial, not governmental activity.[39] There is no competent evidence that the Golden Triangle project had any impact in PRPA issues in this proceeding. Piers M, N and O were not part of the Golden Triangle.[40]

PRPA attempts to characterize its constructive eviction of Intership (and other failures to provide facilities and land as required by the Agreement) as some sort of exercise of "an eminent domain."[41] PRPA has not provided any competent evidence or theory of law that eminent domain applies in this case. Moreover, the Commonwealth of Puerto Rico has never appeared on any brief to support PRPA's claims.[42]

PRPA attempts to place responsibility for the taking of Intership's leased property on the Governor of Puerto Rico and the Highway Authority. PRPA cannot claim sovereign immunity based on the actions of others. Moreover, these arguments have been rejected by the Puerto Rico Appeals Court and by the Commonwealth government in *Transcaribbean Maritime Corp. v. The Commonwealth of Puerto Rico,* 2002 WL 1024813, P.R. Cir. Ct. App. (March 27, 2002).

---

[39]PRPA claims that many of its activities are part of the "Golden Triangle project." Even if such development activities were not commercial in nature, Piers M, N and O in Puerto Nuevo are not part of the Golden Triangle. Moreover, there is nothing in the pleadings (and PRPA has presented no evidence) to suggest that the Golden Triangle project had any impact on PRPA actions at issue in this proceeding.

[40]This argument has been rejected by the Puerto Rico Appeals Court and by the Commonwealth government in *Transcaribbean Maritime Corp. v. The Commonwealth of Puerto Rico,* 2002 WL 1024813, P.R. Cir. Ct. App. (March 27, 2002).

[41] See P.R. Const. Art. II, Sec. 9 (Exhibit 2).

[42]Compare the Commission's decision in *Ceres Marine Terminal, Inc. v. Maryland Port Administration,* Docket No. 94-01, August 16, 2004..

Transcaribbean Maritime Corporation, a terminal operator, sued PRPA and the Commonwealth of Puerto Rico, claiming it was wrongly removed from its facility in connection with the Regatta 2000 event. In that case, both the Commonwealth government and the Puerto Rico appellate court emphatically rejected the argument that PRPA was acting on behalf of the Commonwealth when it ejected users in anticipation of the Regatta 2000 event.

In *Transcaribbean Maritime Corp. v. The Commonwealth of Puerto Rico* (in which PRPA was a party), the court found that PRPA's actions were proprietary and independent. The court adopted the position argued by the Commonwealth's Solicitor General in its brief that reflects the views of the Commonwealth's government regarding its relationship with PRPA.

In the Puerto Rican Solicitor General's brief, it cites *Royal Caribbean Corp. v. Puerto Rico Ports Authority,* 973 F.2d 8 (1st Cir. 1992), for the proposition that PRPA's dock operating activities are "proprietary" and not governmental. Based on this proposition, the Commonwealth's Solicitor General asserts that the Commonwealth has no responsibility for PRPA's exercise of rights "through which [PRPA] has the ability to purchase, acquire, lease and dispose of any equipment, service, material or real estate." Further, the Solicitor General makes clear that the Commonwealth did not–and legally could not–order the eviction of the Puerta de Tierra tenants:

> As [PRPA] is a public corporation, [the Commonwealth of Puerto Rico] has no legal authority to intervene in the contracts carried out between [PRPA] and a private entity as TMC. It does not have authority, either, in the leasing of usage of land (piers and ports) of [PRPA]. That is, [the Commonwealth] has no authority to order the dislodgement of TMC. [The Commonwealth] has no authority to assign or supply TMC with a substitute pier complying with TMC's requirements.

In light of these unequivocal statements from both the Commonwealth's executive and judicial branches, there is no basis for PRPA's continued insistence that it was acting as the arm of the Commonwealth in removing Intership from its piers.

Also, in *Transcaribbean Maritime Corp v. the Commonwealth of Puerto Rico,* the court dismissed the proceedings against the Commonwealth, and PRPA was left to answer for its actions independently. PRPA has failed to disclose the existence of Puerto Rican appellate case law that undercuts PRPA's representations regarding its main sovereign immunity argument in this case.

Finally, PRPA tries to claim sovereign immunity because a loan from a Government Bank was used to finance work to be carried out under the Agreement. The funding was obtained through a loan, not through government appropriations. If anything, the fact that the funding was obtained through a loan weighs in favor of treating PRPA as a private entity engaged in commercial activities.[43] PRPA's final argument for sovereign immunity is totally without merit.

In conclusion, PRPA's argument that PRPA has sovereign immunity barring the issues of the Complaint under the Eleventh Amendment of the U.S. Constitution is rejected. PRPA has failed to meet its burden that it is an arm of the state entitled to immunity.[44] Therefore, the Complaint is not barred by the Eleventh Amendment and the Commission has jurisdiction to hear this case.

---

[43] See also *Sanchez-Lopez v. Fuentes Pujols*, 247 F. Supp. 2d 37, 41 (D.P.R. 2002) (the Puerto Rico Development Bank was not entitled to sovereign immunity even though it received $15 million from the GDB as original capital).

[44] *Wojcik v. Mass. State Lottery Comm'n,* 300 F.3d 92, 99 (1st Cir. 2002); *Fresnius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico and the Caribbean Cardiovascular Center Corp.,* 322 F.3d 56 (1st Cir. 2003).

VII. Whether the Complaint fails to state a claim for which relief can be granted

PRPA alleges the claim should be dismissed for failure to state a claim upon which relief can be granted according to FRCP 12(b)(6) because the Statute of Limitations bars the complaint,[45] the Complaint fails to allege essential elements,[46] or where the contract upon which the action depends includes built-in defenses barring the complaint.[47]

A. Whether the Statute of Limitations Bars the Complaint

PRPA asserts that the Complaint, which was filed on December 29, 2003, identifies allegations that fall outside the relevant period of limitation and, therefore, some of Intership's allegations must be dismissed. According to section 11(g) of the Shipping Act, claims shall be barred "three years from the time a cause of action accrues." PRPA claims that any relief for any alleged harm that Intership knew or had reason to know prior to December 29, 2000 is barred by the Shipping Act.

---

[45] *Young v. Leopone*, 305 F.3d 1 (1st Cir. 2002); *La Chapelle v. Berkshire Life Ins. Co.*, 142 F.3d 507, 509 (1st Cir. 1998).

[46] *Cooperman v. Individual, Inc.*, 171 F.3d 43, 47 (1st Cir. 1990) (quoting *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir.1988) ("To survive a motion to dismiss, plaintiffs must set forth 'factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable theory.'").

[47] *Hodges v. Buzzeo*, 193 F. Supp. 2d 1279, 1281 (M.D. Fla. 2002) (citing FRCP 10(c)); *Watson v. Bally Mfg. Corp.*, 844 F. Supp. 1533, 1535 (S.D. Fla. 1993), aff'd 84 F.3d 438 (11th Cir. 1996) ("In determining whether to grant a 12(b)(6) motion, the Court may also consider the allegations in the Complaint, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint.").

The Commission has determined that a cause of action "accrues" when the complainant knew or had reason to know of the harm alleged.[48] Likewise, if the alleged harm continues for an extended period of time, the limitation period begins to run when the complainant first *knew or should have known* of the harm.[49] There is no competent evidence or rule of law that the Complaint should be dismissed because some of the harm occurred before December 29, 2000 and Intership knew or should have known about the harm.

First, section 11(g) applies only to claims for reparations, not to claims seeking the Commission's intervention with respect to nonreparation orders such as orders to cease and desist.[50] Thus, PRPA's statute of limitations defense is irrelevant with regard to Intership's requests for nonreparation's remedies.

Second, the Commission's own rules provide in 46 C.F.R. 502.63(b) that:

> The Commission will consider as in substantial compliance with a statute of limitations a complaint in which complainant alleges that the matters complained of, if continued in the future, will constitute violations of the shipping acts in the particulars and to the extent indicated and in which complainant prays for reparation accordingly for injuries which may be sustained as a result of such violations.

Although PRPA's unacceptable activities may have begun more than three years ago, Intership alleges that PRPA continues to violate obligations under the Agreement and the Shipping

---

[48] *Inlet Fish Prod., Inc. v. Sea-Land Service, Inc.*, Docket No. 00-03, 29 S.R.R. 306, 311-13 (F.M.C. Sept. 19, 2001).

[49] *Id.*

[50] *Inlet Fish Producers v. Sea-Land Service, Inc.*, Docket No. 00-03, 29 S.R.R. 306, 311-13 (FMC Sep. 19, 2001).

Act. In this case, the complaint clearly includes allegations o f continuing offenses and seeks reparations in connection with those violations.

Third, PRPA's attempt to invoke the section 11(g) statute of limitations ignores the nature of the Complaint. The Complaint was initiated due to PRPA's ongoing failure to operate in accordance with requirements of the Shipping Act.[51]

Although PRPA's unacceptable activities may have begun more than three years ago, its liability for violations under the Shipping Act does not arise from a single discrete act that occurred in the past and is now complete. Rather, PRPA's liability arises from continued violations of obligations that continue to exist under the Agreement[52].

PRPA also makes a pointless argument that any cause of action brought by Intership "must be brought within a one (1) year limitations period" on the grounds that PRPA's tariff requirements are "enforceable under the Shipping Act of 1984 as implied contracts."[53] The law is well settled that a port's tariff cannot impose a shorter statute of limitations for Shipping Act violations than those embodied in the Shipping Act.[54]

---

[51] See, e.g., Complaint, Part V, C ("PRPA . . . continues to refuse to provide comparable marine terminal areas at Puerto Nuevo to Intership"); D ("PRPA . . . continues to ignore many requests from Intership for the temporary lease of several available Puerto Nuevo lots"); G ("PRPA . . . continues to fail to repair Pier 1'/2 N & O, despite charging rent to Intership for their use"); M ("Since Sept. 2001, the PRPA has used the construction of the Royal Caribbean Cruise Line terminal as a pretext for denying berths to Intership"); DD (PRPA advised Intership that the repair work to Piers ½ N & O "would commence in 2002"); HH (" the PRPA has failed to repair Piers ½ N & O as of this date").

[52] PRPA was required to provide 42 *cuerdas* of land in December 1999 and has a continuing obligation to provide the land per Piers M/N/O Agreement, Article III(B)(4).

[53] Motion to Dismiss at 16.

[54] See *U.S. v. American Express Isbrandtsen Lines*, Docket No. 67-30, 9 S.R.R. 959, 960 (ALJ Feb. 1, 1968); *Carborundum Corp. v. Venezuelan Line,* Docket No. 72-38, 13 S.R.R. 861, 864 (ALJ May 18, 1973) ("It is now well

(continued...)

Furthermore, PRPA's argument, that the one year statute of limitations under its tariff bars this Complaint, is without merit. Intership is not claiming a cause of action under the PRPA tariff. PRPA and Intership are parties to a marine terminal lease agreement. The Complaint only mentions PRPA tariff at Part V, SS, as follows:

> Ever since the Piers M/N/O Agreement was signed, Intership expressed interest to the PRPA in leasing additional exclusive terminal areas adjacent to Piers M/N/O, at full tariff rates.

PRPA's "tariff defense"is frivolous and not justified by existing law.[55] PRPA's allegation that the statute of limitations expired in April 2003 for Intership's complaint is not supported by the facts or law governing this case. Therefore, the Complaint is not barred by the Statute of Limitations and PRPA's motion to dismiss because of this defense is denied.

B. Whether the Complaint fails to allege essential elements

PRPA contends that the Complaint should be dismissed because it has not sufficiently pleaded essential elements upon which it relies for the alleged violations of the Shipping Act. In particular, PRPA maintains the Complaint must include the dates of the alleged malfeasance in order to determine whether the allegations are barred by the statute of limitations of the Shipping Act or the Tariff. PRPA's defense relies heavily on *San Diego Unified Port District v. Pacific Maritime Ass'n ("SDUPD v. PMA"),* Docket No. 03-12, 30 S.R.R. 31, 39 (F.M.C. Dec. 30, 2003).

---

[54] (...continued)
settled that claims filed within two years [under the 1916 Act] cannot be barred by tariff regulations imposing a shorter time limitation.").

[55] See FRCP 11–Signing of Pleadings, Motions, and Other Papers; Representation to Court; Sanctions.

PRPA argues that this Complaint should be dismissed based on the holding in *SDUPD v. PMA.* In that case, SDUPD alleged that Pacific Maritime Association ("PMA") violated sections 10(d)(1), (2), and (4) of the 1984 Shipping Act.[56] The issue in PMA's motion to dismiss the Complaint was whether the Complaint presented an issue for adjudication by the Federal Maritime Commission under the Shipping Acts, since PMA was an employer bargaining association.[57]

The *SDUPD v. PMA* court stated to grant such a motion, it should appear "beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief."[58] Thus, the issue is whether, in light most favorable to SDUPD and with every doubt resolved in its favor, its Complaint against PMA stated any claim for which relief can be granted and is properly cognizable under the Shipping Acts and could be heard by the Federal Maritime Commission.[59] The ALJ held that:

---

[56] Specifically, the Shipping Act of 1984 provides in section 10(d) that:

> (1) No common carrier, ocean transportation intermediary, or marine operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.
> (2) No marine terminal operator may agree with another marine terminal operator or with a common carrier to boycott, or unreasonably discriminate in the provision of terminal services to, any common carrier [or] ocean tramp.
> (4) No marine terminal operator may give any undue [or] unreasonable prejudice or disadvantage with respect to any person.

[57] *SPUPD v. PMC,* at 32.

[58] On the Pacific Coast, each longshoreman is dispatched to an employer as part of a gang to perform a specific loading or unloading job. PMA is a bargaining association for these longshoremen. *SDUPD v. PMA,* at 31, citing *Volkswagenwerk v. FMC,* 390 U.S. 261, 297 (1968).

[59] *SDUPD,* at 35, quoting *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). *SDUPD,* at 35-36, quoting *Fuhrer v. Fuhrer,* 292 F.2d 140 (7th Cir. 1961).

> A port cannot seek reparations from the PMC on grounds that revisions to a priority list for assigning longshoremen at the port constituted actionable discrimination under the 1984 Act. PMA is a collective bargaining agent exempt from such liability under Commission precedent and under the Maritime Labor Agreement Act, [60] which has been incorporated into the 1984 Act. Accordingly, the Commission does not have jurisdiction over the port's case.[61]

Although the ALJ granted PMA's motion to dismiss, the circumstances in *SDUPD v. PMA* are not present in this case. PMA is a collective bargaining agent exempt from liability under the Shipping Act. PRPA and Intership are marine terminal operators within the meaning of section 3(14) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1702(14), and the Shipping Act applies to this case. Therefore, the Commission has jurisdiction over this matter.

In SDUPD's motion to dismiss, it also contended that the action of PMA demonstrated that it invaded the prohibitions of the antitrust laws more than necessary and had breached its duty concerning the intent of antitrust laws. When the ALJ determined the conclusory allegations stated in the complaint were insufficient to state a claim under the Shipping Acts, he cited the following holding from *Blackburn v. Frisk University*, 443 F.2d 121 (1971):

> . . . There are no facts alleged in support of the conclusions, and we are required to accept only well pleaded facts as true. *L'Orange v. Medical Protective Co.*, 394 F.2d 57 (6th Cir.), not the legal conclusions that may be alleged or that may be drawn from the pleaded facts. *Sexton v. Barry*, 233 F.2d 320 (6th Cir.). Cert. denied, 352 U.S. 870 . . . .

PRPA contends that the Complaint has not sufficiently pleaded essential elements regarding four of the five alleged violations of the Shipping Act and should be dismissed. PRPA argues that

---

[60] Sec. 5(f) Maritime Labor Agreements. This Act does not apply to maritime labor agreements.

[61] *SDUPD*, at 31.

the Complaint failed to include the dates of alleged wrongdoing necessary to ascertain if the allegation is barred by the limitations of the Shipping Act or Tariff."

The fact that a "Tariff" is irrelevant to this case was discussed previously, as well as PRPA's attempt to bar the Complaint because it was not filed within the appropriate statute of limitations. The statute of limitations argument ignores the nature of the Complaint which was initiated because of PRPA's "ongoing failure" to operate in accordance with requirements of the Shipping Act.[62]

Although PRPA's alleged unacceptable activities may have begun more than three years ago, its liability for violations under the Shipping Act does not arise from a single discrete act that occurred in the past and is now complete. Rather, PRPA's liability arises from continual violations of obligations that continue to exist under the Agreement.[63]

The structural failure of Piers ½ N and O created a displacement of the sheet piling at the piers in April 2000 which breached the contract. Intership was aware of the breach of the contract and notified PRPA. Although PRPA repeatedly set new dates for repair of the piers, it allegedly failed to repair the piers by the agreed upon dates of December 2001, March 2002, and April 2003.[64] All of the negotiated dates occurred within the three-year statute of limitations.

---

[62] See, e.g., Complaint, Part V, C ("PRPA . . . continues to refuse to provide comparable marine terminal areas at Puerto Nuevo to Intership"); D ("PRPA . . . continues to ignore many requests from Intership for the temporary lease of several available Puerto Nuevo lots"); G ("PRPA . . . continues to fail to repair Pier 1'/2 N & O, despite charging rent to Intership for their use"); M ("Since Sept. 2001, the PRPA has used the construction of the Royal Caribbean Cruise Line terminal as a pretext for denying berths to Intership"); DD (PRPA advised Intership that the repair work to Piers ½ N & O "would commence in 2002"); HH (" the PRPA has failed to repair Piers ½ N & O as of this date").

[63] PRPA was required to provide 42 *cuerdas* of land in December 1999. PRPA has a continuing obligation to provide the land per Piers M/N/O Agreement, Article III(B)(4).

[64] See Complaint, Part V, Sections V, DD, GG.

Furthermore, the alleged continual violations by PRPA of the Agreement and the Shipping Act resulted in some new violations that form the basis of the Complaint. Therefore, each day of a continuing violation constitutes a separate offense.[65] Since each of these continuing and repeated violations have occurred within the statutory period, the Complaint is not barred by the statute of limitations.

In addition, PRPA's argument that Intership failed to allege the essential elements in the Complaint is without merit. The simplified pleading requirements of FRCP 8(a) and the Commission's pleading requirement:

> . . . do not require a party to plead detailed evidence in complaints, which are designed primarily to give general notice of the type of litigation that is involved and a short plain statement of a claim. Pleadings before administrative agencies, especially, are considered to be relatively unimportant. Once a respondent has been put on notice of the type of claim involved, such respondent may thereafter ascertain the details of the claim by means of pre-hearing inspection and discovery processes . . . .[66]

PRPA incorrectly asserts that Intership's section 10(a)(3) claim should be dismissed because the Agreement under which the claims are being made was not required to be filed pursuant to 46 U.S.C. 1704. PRPA's assertion is false. Section 1704(a) articulates the following filing requirement for Agreements:

---

[65] See *Canaveral Port Authority, Possible Violations of Section 10(b)(10)*, Docket No. 02-02, 29 S.R.R. 1436, 1450-51 (FMC Feb. 24, 2003)(port authority's continued refusal to consider an application for a tug and towing franchise was an ongoing violation of section 10(b)(10) beginning July 19, 2000 and continuing until May 20, 2002 when the port published an invitation for applications for an additional tug franchise).

[66] *International Association of NVOCCs v. Atlantic Container Line*, Docket Nos. 81-5 and 88-4, 24 S.R.R. 1079, 1086 (ALJ July 12, 1988). See also *Kawasaki Kisen Kaisha, Ltd. v. International Exchange Inc.*, No. 00-01, 28 S.R.R. 1411, 1412 (ALJ Apr. 26, 2000).

> A true copy of every agreement entered into with respect to an activity described in section 1703(a) or (b) of this title shall be filed with the Commission, except agreements related to transportation to be performed within or between foreign countries and agreements among common carriers to establish, operate, or maintain a marine terminal in the United States. In the case of an oral agreement, a complete memorandum specifying in detail, the substance of the agreement shall be filed. The Commission may by regulation prescribe the form and manner in which an agreement shall be filed and the additional information and documents necessary to evaluate the agreement.

An explanation of the Agreements within the scope of Chapter 36–International Ocean Commerce Transportation is found in 46 U.S.C. 1703. In particular, 46 U.S.C. 1703(b) is applicable because it applies to agreements between marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers to:

> Discuss, fix, or regulate rates or other conditions of service; or
>
> Engage in exclusive, preferential, or cooperative working arrangements, to the extent that such agreements involve ocean transportation and foreign commerce of the united States.[67]

Accordingly, the exemptions that pertain to marine terminal operators only apply to the filing and notice requirements.[68] PRPA is cognizant that the exemption only applies to notice and filing requirements because it was a Respondent in a case whereby the ALJ expressly denied such an assertion regarding marine facilities agreements.

In *Crowley Liner Services, Inc. v. Puerto Rico Ports Authority*, Docket No. 00-02, 29 S.R.R.394, 409 (ALJ Sept. 20, 2001), the ALJ held the exemption does not relieve the parties

---

[67] See also *Maritrend, Inc. v. Galveston Wharves*, S.D. Tex. 1993, 152 F.R.D. 543. (International Ocean Commerce Transportation Act applied to facts and claims alleged by stevedore company against marine terminal operators in connection with a denial of license, allegedly due to fact that company was nonunion employer and did not utilize union labor; Act specifically applies to agreements among marine terminal operators.)

[68] 46 C.F.R. 535.

from other requirements of the Shipping Act or prohibit the Commission from investigating or adjudicating complaints of section 10(a)(3) violations between marine terminal operators. Therefore, PRPA's motion to dismiss the Complainant's section 10(a)(3) allegation is not warranted by existing law and is denied.

PRPA also requests dismissal of the Complaint's section 10(d)(4) allegation for failure to declare which parties enjoyed a preference, whether they were similarly situated, whether the prejudice or preference was justified, and what harm was caused by the violation. PRPA, not Intership, has the burden of justifying the difference in treatment based on legitimate transportation factors. In addition, a competitive relationship is not always necessary to prove an undue preference or prejudice.[69]

The allegations contained in the Complaint contain sufficient information to put PRPA on notice as to the nature of the claim and the type of litigation involved. Therefore, PRPA's motion to dismiss the section 10(d)(4) claim is denied.

Additionally, PRPA asks that the sections 10(d)(3) and 10(b)(10) claims be dismissed because it is not alleged that Intership was "shut out from the business."[70] PRPA asserts that Intership's "dominant position" in the port makes such an argument untenable. PRPA's suggestion that Shipping Act violations can only occur when the complaining party is completely prohibited

---

[69] See *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, Docket No. 94-01, 27 S.R.R. 1251, 1270-71 (FMC Oct. 10, 1997), citing *Cargill, Inc. v. Waterman Steamship Corp.*, Docket No 79-72, 21 S.R.R. 287 (FMC Nov. 30, 1981).

[70] Motion to dismiss, at 23.

from doing any business in a port, whatsoever, is not supported by any legal basis.[71] Intership's allegations in the Complaint clearly illustrate it was completely "shut out" from various berths and facilities.

Finally, PRPA has been given fair notice of the claims and grounds upon which they rest under the notice pleading requirements of the FRCP and the Commission. Therefore, PRPA's motion to dismiss for failure to state all essential elements is denied.

C. Whether the Complaint is barred by the Contract's built-in defenses

PRPA maintains a motion to dismiss is properly decided on the basis of the Complaint and any documents attached, incorporated by reference, or otherwise in the record, including the Contract,[72] because the Contract nullifies the Complaint and it must be dismissed.

1. Article XXXII. Claims and Disputes

In particular, PRPA claims the Complaint should be dismissed because it was filed without proper observance of the mandatory alternative dispute resolution ("ADR") provisions contained in the Contract. However, Intership maintains it properly filed a claim with PRPA in accordance with

---

[71] As discussed in *New Orleans Stevedoring Co. v. Bd. of Comm. of the Port of New Orleans*, Docket No. 00-01, 29 S.R.R. 345, 351 (ALJ June 27, 2001), "An example of an unjustified refusal to deal is described in *"50 Mile Container Rules,"* 24 S.R.R. 411, 455 (1987), aff'd sub nom. *New York Shipping Ass'n v. FMC*, 488 U.S. 1041 (1988), in which it was held that adherence to a collective bargaining agreement did not justify acts of discrimination between shippers based only upon the location of cargo." Under PRPA's theory, "50 Mile Container Rules" would have gone the other way since the disfavored shippers were not completely "shut out" of the market.

[72] *McKenna Trucking Co. v. A.P. Moller-Maersk Line and Maersk Inc.*, 27 S.R.R. 1045, 1054 (F.M.C. June 23, 1997) ("exhibits attached to the complaint may be considered"); *Slaby v. Fairbridge*, 3 F. Supp. 2d 22 (D.C.D.C. 1998); (*Cruz v. Melacio*, 204 F.3d 14 (1st Cir. 2000).

the terms of the Agreement.[73] Intership argues that PRPA failed to respond in any way to the claim in contravention of the procedures for resolving claims set forth in the Agreement. Therefore, Intership proceeded to request mediation in accordance with the terms of the Agreement.[74]

Intership claims that the parties agreed to waive all deadlines for filing a formal complaint when mediation attempts failed. Intership also submits that the parties agreed a formal complaint could be filed any time after September 30, 2003, if mediation did not result in a successful resolution of the disputes by that time.[75] Accordingly, Intership maintains it filed this Complaint with the Commission as provided by the Agreement under Article XXXII(C)(1).

PRPA and Intership also disagree on the procedures they took to have this dispute mediated, including choosing a mediator. Intership alleges that it did not proceed with the Contract's ADR provisions because it could not get PRPA to agree on a mediation criterion after months of discussions. More specifically, Intership argues that it submitted a proposal for candidates for a mediator and PRPA failed to respond to its proposal. Intership claims that it therefore "exhausted the claim and dispute procedures of the Piers M/N/O Agreement."[76]

PRPA denies this allegation and maintains that Intership was obliged to follow the solution provided for in the Contract, Article XXXII.C.2, which states:

---

[73] Complaint, Part V, AAA.

[74] Complaint, Part V, BBB.

[75] Piers M/N/O Agreement, Article XXXII(C). The remainder of the paragraph cited by PRPA provides that: "The parties agree to attend and participate in any such mediation until the Dispute is settled to the parties' mutual satisfaction, they are released by the mediator, or thirty (30) calendar days after the written notice of the Request for Mediation (the "Mediation Term") has expired. Article XXXII(C)(1). (Emphasis added.)

[76] Complaint, at 18-19.

> If, in the opinion of either party, the parties are unable to agree on a mediator . . . the parties hereto agree that the Dispute shall be submitted to the American Arbitration Association ("AAA"), in San Juan, Puerto Rico for mediation and the AAA shall appoint a mediator . . . .

It is clear that the Agreement envisioned prompt mediation to be used initially, but did not envision parties having to spend months trying to fruitlessly pursue mediation before resorting to litigation. There does not appear to be any reason for Intership to believe that its claims could successfully be resolved through mediation. Therefore, Intership was not obliged to engage in fruitless attempts to mediate this Complaint. Accordingly, PRPA's motion to dismiss because the Complaint is barred by the Contract's built-in defenses is denied.

2. Article XXXII. Repairs and Alterations

PRPA insists the Complaint should be dismissed in its entirety because a clause in the Agreement holds PRPA harmless for the underlying conduct forming the basis of the Complaint. In particular, PRPA is excused for reasonable inconveniences resulting from diligent repairs made by PRPA to the leased property. The provision relied upon by PRPA states:

> (B) Right of the AUTHORITY to make Repairs and Improvements:
>
> The AUTHORITY reserves the right to make such *repairs* and improvements to the Leased Areas during the term of this Agreement as the AUTHORITY shall deem necessary and appropriate. LESSEE shall have no claim for any and all reasonable inconvenience, annoyance, or injury to its business arising from the AUTHORITY diligently *repairing* or making replacements in the Leased Areas. The AUTHORITY shall coordinate all such work with

> LESSEE, and shall carry out the same in such a manner so as not to unreasonably interrupt the operations of LESSEE and its serviced carriers.[77]

In PRPA's motion to dismiss for failure to state a cause of action, PRPA relies on Article XIII(B) of the Agreement, but this reliance is not supported by the pleadings. Intership's reparation claims and various other claims do not directly involve the repair of Piers N and O. Thus, they are not barred by Article XIII(B). Consequently, PRPA has not provided justification for dismissal of the entire complaint.

For instance, Intership alleges that PRPA violated the Shipping Act by failing to properly and timely execute the necessary repairs on the leased property. Intership's allegation is not that it was subject to reasonable inconvenience or business interruption while PRPA "diligently" made repairs. Instead, Intership argues that PRPA violated the Shipping Act by failing to properly and timely execute the necessary repairs.

PRPA's claim that Intership "fails to allege that injuries arise from a failure to diligently repair or make replacements in the leased areas" is contradicted in its Motion to Dismiss. At footnote 84, PRPA quotes several of Intership's allegations that PRPA failed to diligently make repairs, as follows:

> 84 - See, e.g., Complaint at 12 ("V. Upon the displacement of the sheet piling, the PRPA represented to Intership that it would Repair the same by December 2001. W. The PRPA ignored and refused . . . request to treat the repair . . . as an emergency. X. Intership purchased the Gantry Cranes relying on the PRPA's representation and assurance that the PRPA would repair Piers . . . Y. The PRPA ignored Intership's continuous warnings that Piers ½ N &O had to be repaired on time for the arrival of cranes in San Juan."), 13 ("Z. It nevertheless took the PRPA until August 2001 to

---

[77] Piers M/N/O Agreement, Article XIII(B) (underscored language omitted by PRPA in its Motion to Dismiss).

solicit [b]ids for a repair contract. AA. The PRPA failed to repair Piers ½ N&O by December 2001.") (Emphasis added.)

There is absolutely no basis for PRPA's motion to dismiss based on the defense stated in its "Repairs and Alterations" clause. PRPA's motion to dismiss based on this defense is denied.

3. Article XVI. Force Majeure and the Impossibility of Performance

PRPA seeks to invoke the *force majeure* and the impossibility of performance clauses of the Agreement as a defense for liability of damages incurred by Intership due to the actions of third parties, other than PRPA's contractors and agents, reasonably beyond the control of PRPA. The Agreement provides the following protection against liability for both parties:

> Neither party shall be in default or liable for damages due to being unable to perform or delayed in the performance of any covenant of this Agreement herein by reason of the inability to obtain, utilize labor, material, or supplies, or by reason of circumstances directly or indirectly the result of any state of war or national or insular emergency, or by reason of any laws, rules, orders, regulatory requirement of any federal, commonwealth or municipal government or instrumentality now or hereafter in force, or by reason of any other cause beyond such party's respective reasonable control, or by reason or any act or neglect of the other party or its servants, agents, employees, and licenses. Acts of subcontractors, suppliers, or licensees which are not similarly beyond the control of such entities shall not be deemed beyond the control of the non-performing party to this Agreement.

PRPA maintains it is not an insurer for the alleged business interruptions that caused damages sustained by Intership due to the alleged misconduct of third parties and these claims must be dismissed. Clearly, there are issues of fact that cannot be decided without a hearing. Therefore, the case cannot be dismissed on the bases of the *force majeure* clauses.

PRPA has the burden of proving the *force majeure* clause is applicable to the alleged violations and the conditions of the clause are met in order to excuse performance of particular

obligations.[78] For example, PRPA will have to prove that the actions of stated third parties–NPR, SJIT, San Antonio Maritime and its construction contractor, and the Puerto Rico Highway Authority–were actually beyond PRPA's control.

PRPA's excuses and allegations are suspect especially since all of the actions took place on land owned by PRPA. In addition, PRPA more than likely had a contractual relationship with all of the parties in question, or had legal rights with respect to their presence and/or activities on the property owned by PRPA. Therefore, PRPA's motion to dismiss the Complaint because of *force majeure* and impossibility of performance is denied.

4. Article VII.A.4 - Uncertainty of Development of Areas NP1-1, OP1-1, NE-1, and OE-I

PRPA argues that Intership's claims for damages due to the failure of PRPA to properly repair Piers N and O should be dismissed because the contract gives PRPA the option of not developing Piers ½ N&O. The Army Corps of Engineers and other agencies permitted development of Piers ½ N&O, and PRPA allowed development of these piers. PRPA's argument that it should not be held responsible for damages caused by its failure to repair the piers properly is without merit.

PRPA waived any option not to develop Piers ½ N&O when it developed those piers. There is no evidence that PRPA determined development "would be economically unfeasible because of environmental costs or otherwise." PRPA waived this clause by developing the piers. PRPA's

---

[78] See, e.g., *Phillips Puerto Rico Core, Inc. v. Tradex Petroleum, Ltd.*, 782 F.2d 314 (2nd Cir. 1985) ("The burden of demonstrating force majeure is on the party seeking to have its performance excused, and, as Judge Carter pointed out, the non-performing party must demonstrate its efforts to perform its contractual duties despite the occurrence of the event that it claims constituted the force majeure." *Id.* at 319.)

motion to dismiss because PRPA did not have to develop its piers is nonsense and is denied. In summary, none of the provisions of the M/N/O Agreement bar this Complaint.

D. Whether Intership fails to state a cause of action in its complaint against PRPA for requiring Complainant to participate in an open, transparent land allocation process.

Intership alleges that PRPA violated the Shipping Act by inviting Intership to participate in an open public process to allocate scarce land and facilities available at Puerto Nuevo among the many interested parties. Intership argues that since PRPA delivered to Intership less than the agreed upon 42 *cuerdas* of land, it is required to "provide a comparable marine terminal exclusive operations area at the Puerto Nuevo Marine Terminal Area to make up the difference."

In addition, Intership claims PRPA has breached the contract and the Shipping Act by requiring Intership to participate in an open procurement for land, unlike other port users. As a result, Intership alleges that PRPA has engaged in "other unjust, unreasonable and unlawful practices, has unreasonably refused to deal or negotiate with Intership and has imposed undue or unreasonable prejudices and disadvantages in its dealings with Intership and other marine terminal operators and carriers with respect to its plans for re-allotment of the Puerto Nuevo Port Zone."[79]

During 2001 and 2002, Intership allegedly negotiated a lease with PRPA to Intership for approximately 21 *cuerdas* of the "L" shaped back-land and first preferential rights to Pier "L" in

[79] Complaint, Part V, RR.

consideration of Intership's willingness to improve and develop the same at its own cost, substantial projected revenues for PRPA in wharfage and dockage, and other considerations.[80]

Intership hired an engineer firm prior to completion of the repairs at Piers 1/2N & O, due to substantial uncertainties about the structural integrity of any such repairs. The engineering firm recommended that Intership extend 900 feet of rail at Piers M and L at a cost of $6,000,000 as an "insurance policy" for safeguarding its investment in the gantry cranes.[81] On information and belief, Piers 1/2N & O's were repaired on or about March 6, 2004, and the extension rails to Piers M and L was scheduled to start at the end of April 2004.

Notwithstanding the prior negotiations, PRPA failed to deliver 42 *cuerdas* to Intership, and PRPA failed to timely repair Piers ½N &0. Although Intership scheduled extension of the rails into Piers M and L, PRPA refused to lease any of the back lands to Intership even though 16.56 *cuerdas* were returned by Sea Star Line LLC to PRPA.[82]

Instead, PRPA now claims that Intership must participate in an open procurement for more space, unlike other port users. PRPA argues that there are no precedents under the Shipping Act requiring a port to grant special preference to one of its lessees, to the detriment of other interested parties.

---

[80] Complaint, Part V, UU.

[81] Complaint, Part V, MM and NN.

[82] Complaint, Parts VV and WW.

PRPA's "inclusive process" does not mitigate its obligation to Intership under the Shipping Act, as well as the Agreement. Therefore, PRPA's motion to dismiss based on Intership's failure to state a cause of action by alleging PRPA required Intership to participate in an open public process for allocation of land and facilities available at Puerto Nuevo, unlike the treatment given to other lessees, is denied.

E. Whether PRPA's Motion for a More Definite Statement should be granted

PRPA asserts a more definite statement is required with respect to any allegation that may remain following a ruling on its Motion to Dismiss. PRPA maintains the Complaint is so vague or ambiguous that PRPA cannot reasonably be required to frame a responsive pleading.[83] PRPA claims the Complaint is deficient with respect to relevant time periods for many of its allegations and fails to identify discreet counts.

PRPA purports the Complaint exemplifies shotgun pleading, a defect that an FRCP 12(e) Motion for More Definite Statement should be used to remedy. The core concept of this rule is:

> If a pleading is so vague or ambiguous that a responsive pleading cannot be framed, the responding party need not serve a response, but may instead move the court for an order directing the pleader for a more definite statement.

PRPA, as the moving party, has the burden to demonstrate that the challenged pleading is too vague or ambiguous to permit a response. PRPA must also identify the deficiencies in the pleading,

---

[83] 46 C.F.R. 502.71; FRCP 12(e).

list the details sought to be provided, and assert an inability to frame a response.[84] The major thrust of PRPA's argument seeking a more definite statement appears to be that the Complaint "fails to state a relevant time period as to many of its allegations." [85]

The Commission only requires modern notice pleading. It does not require Intership to file a bill of particulars. Pleadings before administrative agencies do not require a party to plead detailed evidence in Complaints. It has been the practice in Commission cases to allow respondents to use discovery to fill out bare allegations in complaints because motions for a more definite statement, in lieu of discovery, are disfavored.[86]

The Commission has clearly and repeatedly stated motions for more definite statements "are not encouraged and are permitted only in limited circumstances when it is not reasonably possible to frame an answer to the complaint." Once a respondent has been put on notice of the type of claim involved, the respondent may then ascertain the details of the claim by means of pre-hearing inspection and discovery processes.[87]

---

[84] See *Davenport v. Rodriguez*, 147 F. Supp. 2d 630 (639-40) (S.D. Tex. 2001); *Nebout v. City of Hitchcock*, 71 F. Supp. 2d 702, 706 (S.D. Tex. 1999).

[85] Motion to Dismiss, at 31. See also Motion to Dismiss, at 21-22.

[86] *Holt Cargo Systems, Inc. v. Delaware River Port Authority*, F.M.C. Docket No. 96-13, 27 S.R.R. at 911-912 (ALJ, November 25, 1996).

[87] *International Ass'n of NVOCCs v. Atlantic Container Line*, Docket No. 81-5, 24 S.R.R. 1079, 1086 (ALJ July 12, 1988); see also *Kawasaki Kisen Kaisha, Ltd. v. Int'l Exchange, Inc.*, Docket No. 00-01, 28 S.R.R. 1411, 1412 (ALJ, Apr. 26, 2000) ("It is not necessary for complainants to plead their evidence in their initial complaints and it is customary for the facts to be developed, among other ways, by means of discovery rules."). (The only new argument made by SEFEPA . . . is its request . . . that "this tribunal should require each of the Complainants to file a bill of particulars under 46 CFR Sec. 502.71 setting forth the pertinent information, including the date, times, persons and

(continued...)

Furthermore, a motion for more a more definite statement must be filed before the party serves a response to the pleading claimed to be too vague or ambiguous.[88] Obviously, PRPA did not find the Complaint too vague or ambiguous, since it replied with a forty (40) page Motion and Memorandum of Law in Support of Motion to Dismiss the Complaint. Consequently, PRPA's allegation that it cannot admit or deny the allegations of the Complaint unless a more definite statement is required is without merit.

The Complaint before the Commission is very thorough and complies with Commission pleading requirements.[89] It clearly articulates which provisions of the Shipping Act have been violated and is not confusing or unintelligible. Each of these claims then includes reference to the relevant stated facts in support of the claim.

The Complaint is not confusing, unintelligible, vague or ambiguous. As a result, PRPA's motion for an order directing Intership to submit a more definite statement of its claims pursuant to Federal Maritime Commission Procedural Rule 71 ("Rules") and Federal Rule of Civil Procedure 12 ("FRCP") is denied.

---

[87] (...continued)
places of any contact with SEFEPA for which reparations are sought and an itemization of the damages claimed."..."This request makes clear that the type of information which SEFEPA now requests is precisely the information which should be obtained through discovery. Furthermore, the request illustrates why bills of particular were stricken from the federal rules of procedure forty years ago, namely because they cause unnecessary delay, conflicted with the purpose of the rules which only required that complaints set forth 'a short and plain statement of the claim,' and were almost totally unnecessary because the desired information was obtainable through discovery."

[88] See *Marx v. Gumbinner*, 855 F.2d 783, 792 (11th Cir.1988); *Santana Prods., Inc. v. Sylvester & Associates., Ltd.*, 121 F. Supp. 2d 729,738 (E.D.N.Y. 1999) (because Rule 12(e) motions must be presented before filing a responsive pleading, defendants' decision to file an answer precluded relief under motion.

[89] 46 C.F.R. 502.62 and Exhibit No. 1 to Subpart E.

F. Whether the Complaint fails to join necessary and proper parties and whether potential parties should be given notice of this proceeding

1. Whether the Complaint should be dismissed for failure to join necessary and indispensable parties

PRPA asserts the Complaint should be dismissed for failure to join indispensable and necessary parties to the Complaint pursuant to FRCP 12(b)(7) under FRCP Rule 19. In the alternative, PRPA asks the Commission to order Intership to join an indispensable party pursuant to FRCP 19. Since the Commission has a specific rule with regard to the joinder of necessary and proper parties, the Commission need not follow the Federal Rules.[90]

Applicable sections of the Commission's Rule 44 call for joining all parties "against whom a rule or order is sought" and all parties to an agreement with respect to which a complaint has been made.[91] The Complaint seeks relief for PRPA's alleged violations of the Shipping Act and is only seeking a cease and desist order against PRPA and reparations from PRPA. There is no evidence that there are any other relevant parties to join in this Complaint.

Despite the clear requirements of FMC Rule 44, PRPA seeks to invoke FRCP19 under the theory that complete relief cannot be granted by PRPA, since multiple third parties are actually

---

[90] 46 C.F.R. 502.12. In proceedings for situations not covered by a specific Commission rule, the Federal Rules of Civil Procedure will be followed to the extent they are consistent with sound administrative procedure. See also, *Exclusive Tug Franchises–Marine Terminal Operators Serving the Lower Mississippi River,* Docket No. 01-06, Slip Op. at 3 (ALJ, Apr. 5, 2004).

[91] 46 C.F.R. 502.44 (A). If a complaint relates to through transportation by continuous carriage or transshipment, all carriers participating in such through transportation shall be joined as respondents. (B) If the complaint relates to more than one carrier or other person subject to the shipping acts, all carriers or other persons whom a rule or order is sought shall be made respondents. (C) If complaint is made with respect to an agreement under section 5(a) of the Shipping Act of 1984, the parties to the agreement shall be made respondents.

responsible for PRPA's wrongdoing. PRPA claims that the orders sought against PRPA should really be against third parties:

> San Antonio Marine, its contractor and their respective insurers; the successors to NPR, Inc. and San Juan International Terminals and their insurers; the Puerto Rico Highway Authority and its insurer; and each of the maritime operators in the Port of San Juan that have participated in the formation of, executed, or commented upon the Puerto Nuevo joint land use agreement, including Luis A. Ayala Colon Sucrs., Odyssea Stevedoring of Puerto Rico, Inc., Sea Star Line Agency, Inc., Horizon Lines, Inc., Trailer Bridge, Inc., Island Stevedoring, Inc., and each of their respective insurers.

PRPA has not shown that its failure to meet its obligations to Intership is the fault of any of these third parties. The claimed violations of the Shipping Act are allegedly PRPA's continued failure to meet its obligations to Intership.[92] The alleged failures of PRPA to meet its obligations to Intership appear to be PRPA's alone to remedy, not the obligation of any other party. Consequently, it appears that joinder of another party is not necessary or indispensable.

Prior to the determination of whether a party is indispensable, the presiding officer must determine whether that party is necessary. The test for determining a necessary party and invoking Rule 19 is whether:

> (a) Persons to be Joined if Feasible. A person who is subject to the service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the

---

[92] Respondent continually tries to characterize the Complaint as a breach of contract or, in the case of alleged third party fault, a tort claim. Even if there was third party fault, as noted in *Temple v. Synthes Corp. Ltd.*, 498 U.S. 5 (1990), "[i]t has long been the rule that it is not necessary for all tortfeasors to be named as defendants in a single lawsuit." Id. at 7. Such parties are merely candidates for permissive joinder.

person's absence may: (i) as a practical matter, impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest.[93]

The ALJ must first determine whether the absent party is necessary to the lawsuit and, if so, whether joinder of the absent party is feasible. The joinder of several of these multiple third parties would deprive the Commission jurisdiction over the subject matter of the action.

It is doubtful that it is feasible to join San Antonio Marine, its contractor and their respective insurers; the successors to NPR, Inc. and San Juan International Terminals and their insurers; and the Puerto Rico Highway Authority and its insurer in this lawsuit.[94] There is no evidence that the business activities of these parties is covered under the Shipping Act and could be joined in this Complaint.

Regarding the first prong of the test, all claims for relief purportedly arise from past, present or potential future violations by PRPA. Secondly, Intership only seeks relief for PRPA's violation of the Shipping Act. The Complaint only requests a cease and desist order against PRPA and reparations from PRPA. Thus, complete relief can be accorded among those already parties to the Complaint without the inclusion of additional parties.

---

[93] FRCP 19(a)(1) and (2).

[94] 46 C.F.R. 502.44(A). If a complaint relates to through transportation by continuous carriage or transshipment, all carriers participating in such through transportation shall be joined as respondents. (B) If the complaint relates to more than one carrier or other person subject to the shipping acts, all carriers or other persons whom a rule or order is sought shall be made respondents. (C) If complaint is made with respect to an agreement under section 5(a) of the Shipping Act of 1984, the parties to the agreement shall be made respondents..

Further, PRPA has the burden to prove the absent parties are necessary to the proceeding based upon their claimed interest in the subject of the action. An absent party is not required to actually possess an interest in the subject of an action to be a necessary party; the absent party is required only to claim an interest relating to the subject of the action.[95] There is no evidence that the absent parties' ability to protect their interest, or claim of interest, would be impaired or impeded by a disposition of the suit in their absence.[96] Therefore, joinder of the cited multiple third parties is not necessary or feasible under FRCP 19(a) and the Complaint should not be dismissed for failure to join necessary and indispensable third parties.

2. Whether Intership should be ordered to join third parties

PRPA asserts each of the maritime operators in the Port of San Juan, which have participated in the formation of, executed, or commented upon the Puerto Nuevo joint land use agreement, including: Luis A. Ayala Colon Sucrs, Odyssea Stevedoring of Puerto Rico, Inc., Sea Star Line Agency, Inc., Horizon Lines, Inc., Trailer Bridge, Inc., Island Stevedoring, Inc., and each of their respective insurers have an interest in this action. PRPA insists these parties must be joined because their interests, particularly at Puerto Nuevo, would be adversely affected by any remedy.

---

[95] *Davis v. U.S.*, 192 F. 3d 951, 957-958 (10th cir. 1999).

[96] *Davis v. U.S.*, 192 F. 3d 951, 957-958 (10th cir. 1999).

However, this is not PRPA's claim to make. In *United States v. Bowen*, 172 F.2d 1030, 1043 (9th Cir. 1983), the court stated that:

> . . . [T]he defendants could not assert that [third party] has a legally protected interest in the action, because [third party] has never *claimed* that it has such an interest. Although the Defendant claims that a claim of interest is not required, our precedent declares otherwise. Joinder is "contingent . . . upon an initial requirement that the absent party claim a legally protected interest relating to the subject matter of the action."

Bowen, 172 F. 2d 1030, 1043 (9th Cir. 1983) (emphasis in original).

There is no evidence that any other party has voiced concern over any potential impairment of its interests or expressed an interest in becoming a party in this action. PRPA seems to be implying that any relief will require PRPA to evict other entities from port lands or facilities in order to give Intership access to this property. According to the Complaint, however, Intership only asks that PRPA abide by the terms of the Piers M/N/O Agreement and the Shipping Act.

Furthermore, there is no evidence that any of the multiple named parties have an actual interest or a claimed interest relating to the subject of the action or are necessary for an equitable disposition of this proceeding. PRPA cannot avoid the requirements of a lease agreement or violate the Shipping Act because it has made inconsistent obligations with multiple parties.

It appears that Intership's claims for relief arise from past, present and/or potential future violations by PRPA. It also appears that all remedies sought by Intership derive from the actions, or lack of performance, of PRPA. Thus, PRPA has not proven any of the third parties are necessary to this Complaint for dismissal, even if the Commission had jurisdiction over them.

In addition, PRPA has failed to prove it would be left with a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest,[97] if the named multiple parties were not joined in this Complaint. Further, the relief requested by Intership can be established by the Commission without the inclusion of additional parties.

Once a court has determined that an absent party is dispensable, it may proceed without the absentee and the nonparty's rights and liabilities will not be deemed to have been adjudicated by the action.[98] Thus, the multiple absent parties listed by PRPA are deemed unnecessary to this action and will not be bound by the decision in this case. Consequently, PRPA's motion that certain necessary and proper parties are joined pursuant to 46 C.F.R. 44 and pursuant to FRCP 12(b)(7) under FRCP19 is denied.

3. Whether Intership should be ordered to give notice of this proceeding to potentially interested parties

Finally, PRPA seeks an order from the ALJ that Intership provide notice to potentially interested parties of this action to afford them with an opportunity to participate in this proceeding. PRPA's request shows a startling unawareness of the Commission's procedure. Formal notice of

---

[97] FRCP 19(a)(2).

[98] *Legal Aid Soc. of Alameda County v. Brennan*, C.A.9th, 1979, 608 F. 2d 1319 n. 12 (A court may proceed without binding absent parties. Citing Wright & Miller, certiorari, denied 100 S. Ct. 3010, 447 U.S. 921, 65 L.Ed. 1112).

the proceedings was provided in the January 14, 2002 *Federal Register*,[99] approximately two weeks after Intership filed its Complaint and two months before PRPA filed its present motion.

By statute, "except in cases where notice by publication is insufficient in law," filing a document in the *Federal Register* "is sufficient to give notice of the contents of the document to a person subject to or affected by it."[100] Courts have consistently held that "publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance."[101] Therefore, PRPA's request for an order that Intership provide further notice to potentially interested parties is denied.

G. Whether the parties should be referred to Alternative Dispute Resolution ("ADR")

PRPA requests that the parties be ordered to seek ADR. All persons involved in proceedings under the Shipping Act are required to consider at an early stage in the proceeding whether resort to alternative dispute resolution techniques would be appropriate or helpful. 46 C.F.R. 502.1. Either party may request Alternative Dispute Resolution at any time, but it is voluntary.

PRPA is correct that Intership did not consult with the Commission's Alternative Dispute Resolution Specialist prior to filing the Complaint. 46 C.F.R. 502.62(e). According to the

---

[99] *International Shipping Agency, Inc. v. Puerto Rico Ports Authority,* Notice of Filing of Complaint and Assignment, 69 Fed. Reg. 2139 (2004).

[100] 44 U.S.C. Sec. 1507.

[101] *Friends of Sierra Railroad, Inc. v. ICC,* 881 F.2d 663, 667-68 (9th Cir. 1989). See also, *Covelo Indian Community v. FERC*, 895 F.2d 581 (9th Cir. 1990).

pleadings, Intership was reasonable in disregarding the possibility of ADR with a Commission Specialist based on PRPA's history of failing to mediate under the terms of a Settlement Agreement.

The parties are encouraged to utilize mediation or other forms of alternative dispute resolution in all formal proceedings.

PRPA is correct that a complainant must state whether informal dispute resolution has been considered or the Commission's ADR Specialist has been contacted to comport with the Commission's strong policy encouraging ADR both before and after the filing of complaints. PRPA is aware of Intership's allegation in the Complaint that PRPA would not comply with the requirements of mediation in the Settlement Agreement. A complainant is not required to make futile efforts. It appears that Intership had good cause not to request ADR.

PRPA is also aware that Intership's failure to avail itself of the Commission's ADR services is not grounds for dismissing the Complaint or any sanctions against Intership. Chief ALJ Kline explained this rationale in *HUAL AS v. Puerto Rico Ports Authority,* Docket No. 03-01, Ruling on Motion to Dismiss, 29 S.R.R. 1266 (ALJ Kline, 2003), as follows:

> . . . the rule provides for no sanctions for failure to comply and certainly does not require the drastic sanction of dismissal of complaint, which on its face makes out a valid claim under the Shipping Act, which claim complainant would have to prove.

Any party may request the ALJ, at any time, to appoint a mediator or other neutral party to assist the parties in reaching a settlement, and the provisions of 46 C.F.R. 502.91 shall apply.[102] Since PRPA has made this request, the parties are encouraged to discuss this matter with the

[102] 46 C.F.R. 502.91.

Commission's Alternative Dispute Resolution Specialist, Mr. Ronald D. Murphy. His telephone number is (202)523-5787 and fax number is (202)275-0536.

Mr. Murphy will contact the parties and arrange a suitable schedule for discussions. It is in both parties' interests to strive to reach a settlement under the Commission's Alternative Dispute Resolution program.

H. Whether the proceeding should be stayed pending ADR

PRPA requests that these proceedings be stayed pending Alternative Dispute Resolution. The Commission encourages all parties to use ADR and to be open to genuine attempts at settlement, particularly in complex and difficult proceedings such as this case. Alternative means of dispute resolution are voluntary procedures which supplement rather than limit other available agency dispute resolutions. 5 U.S.C. Sec. 572(c).

Although the parties are encouraged to use ADR, such a request will not be permitted to allow PRPA to delay discovery. Intership's resistance to staying the proceedings pending the outcome of mediation is reasonable, since PRPA has a long history of delaying proceedings.

The discovery rules or any other rules with regard to the proceeding will not be waived unless the expeditious conduct of business requires delay. The rules require the ALJ to find the normal rules should be waived to "prevent undue hardship, manifest injustice, or if the expeditious conduct

of business so requires.[103] Delaying the proceedings should always be avoided.[104] PRPA has not proven that the rules should be waived. Accordingly, all issues are **not** stayed pending the outcome of an Alternative Dispute Resolution.

PRPA is ordered to answer the complaint and respond to discovery requests made on January 4, 2004, within ten business days of this order. 46 C.F.R. 502.64.

I. Whether Intership's Motion to Strike Should be Granted

Intership filed a Motion to Strike from the record PRPA's letters dated April 21, 2004 and June 10, 2004, and all documents attached to those letters, as well as any other documents sent to the Commission without Intership's knowledge. Neither of PRPA's letters dated April 21, 2004 or June 10, 2004, comply with the Commission's Rules of Practice and Procedure, which require that "[i]n any docketed proceeding, an application or request for an order or ruling not otherwise specifically provided for in this part shall be by motion." 46 C.F.R. 502.73.

PRPA's request for oral argument, request to supplement the record and request to file an additional reply brief are all matters that clearly require the filing of a motion in accordance with this rule. These are not mere procedural matters for which *ex parte* communications in the form of a letter from counsel or otherwise may be permitted.

---

[103] 46 C.F.R. 502.10.

[104] *HUAL AS v. Puerto Rico Ports Authority,* Docket No. 03-01, Ruling on Motion to Dismiss, 29 S.R.R. 1266, 1270 (ALJ Kline, 2003).

Even if the letters were to be treated as motions, they fail to comply with the requirements of 46 C.F.R. Sec. 502, Subpart H. Most importantly, PRPA failed to comply with service requirements with regard to the April 21, 2004 letter and attachments. The rules require that:

> No person who is a party to or an agent of a party to any proceeding as defined in § 502.61 or who directly participates in any such proceeding and no interested person outside the Commission shall make or knowingly cause to be made to any Commission member, administrative law judge, or Commission employee who is or may reasonably be expected to be involved in the decisional process of any such proceeding, an ex parte communication relevant to the merits of the proceeding;[105]

PRPA's argument that Intership's motion to strike should be denied because it "raises only meritless technical argument by exalting form over substance" clearly misinterprets the law. In PRPA's Motion to Dismiss, PRPA incorrectly argues the holding in *HUAL AS v. Puerto Rico Ports Authority,* Docket No. 03-01, 29 S.R.R. 1266 (ALJ Kline, Apr. 2003). Judge Kline's holding, cited by PRPA, does not apply to the issues in the present case. PRPA states:

> The Commission long ago explained that as an administrative agency it "ought not be hampered in its proceedings by the hard and fast rules as to pleadings and practice which govern the courts of law." As Chief Judge Kline explained recently, "The fundamental nature of the administrative process and the modern rules of procedure strive to avoid deciding cases on technicalities rather than on the merits and to allow liberal amendments to pleadings to cure technical defects."
>
> Even if the letters had addressed matters that would require a motion under the Rules, i.e., a request for an order or ruling, which they did not, they satisfied the requirements of the Rules for a motion. They were "in writing," "state[d] clearly and concisely the purpose of and the relief sought," and "the facts claimed to constitute the grounds requiring the relief requested."
>
> Even if they had not satisfied the technical requirements of the Rules, which they clearly did, the Presiding Officer can plainly waive the technical Rules to the

---

[105] 46 C.F.R. 502.11(a).

extent necessary to consider the Letters consistent with Chief Judge Kline's admonition to decide cases on the merits and not technicalities.[106]

In particular, the technicality issues in *HUAL AS* had nothing to do with PRPA's failure to serve opposing counsel with documents it served on the ALJ. The technical issues argued by PRPA in *HUAL AS* were that the Complaint was not verified and it failed to specify that the complainant had attempted to avail itself of the Commission's ADR procedures. Neither Commission practice nor the Federal Rules of Civil Procedure, however, would support dismissing an otherwise apparently valid complaint on such technical grounds rather than proceeding to the merits.[107]

PRPA is well aware of the different issues in *HUAL AS* and the present case because PRPA was a party in that case. In addition, PRPA misquotes 46 C.F.R. Sec. 73, the rule regarding filing a motion with the Commission, by taking words out of context and misstating the law. PRPA's misrepresentation of Judge Kline's holding in *HUAL AS* does not conform to the standards of conduct expected of attorneys who appear before the Commission.[108]

In addition, PRPA's request for an oral argument was made three times. It appears that PRPA is attempting to get around the ban on reply to replies by requesting oral argument. Furthermore, a repetitious motion shall not be entertained. 46 C.F.R. 502.73(d). PRPA's continued requests for oral argument, request to supplement the record, and request to file an additional reply

---

[106]Respondent's Opposition to Complainant's Motion to Strike, page 6.

[107]*HUAL AS v. Puerto Rico Ports Authority,* 29 S.R.R. 1266 (ALJ, 2003).

[108]46 C.F.R. 502.26.

brief are all matters that clearly require filing of a motion in accordance with 46 C.F.R. 502.73. Therefore, PRPA's request for an oral argument is denied.

Furthermore, PRPA's motion to reply to the reply on pre-Answer matters is explicitly not permitted by 46 C.F.R. 502.74. Further supplementation of the record is unnecessary for the Presiding Officer to rule on the pre-Answer motions currently under consideration. Therefore, Intership's Motion to Strike is granted.

First, PRPA argues that copies of the alleged public notices should be made part of the Intership record because they are part of the record in *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority* ("Odyssea v. PRPA"), Docket No. 02-08, and *San Antonio Maritime v. Puerto Rico Ports Authority ("SAM v. PRPA,* Docket No 04-06, which were both before the presiding ALJ. These cases have not been consolidated and this statement is only partly true.

The alleged public notices were never part of the record in *Odyssea v. PRPA,* Docket No. 02-08. They were mailed to the ALJ after the *Odyssea v. PRPA* record was closed on April 30, 2004, and not submitted in accordance to the Commission's rules.[109] Since the alleged public notices were offered in *Odyssea v. PRPA* after the record was closed pending a decision on Summary Judgment and in violation of Commission rules, they were returned to PRPA.[110]

---

[109]See *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority*, Docket No. 02-08, Notice of Oral Argument on Motion for Summary Judgment, ALJ Trudelle, issued April 30, 2004.

[110]See *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority*, Docket No. 02-08, Order Rejecting and Returning Correspondence and Pleadings Submitted after April 30, 2004, in Violation of Order Barring Further Correspondence, ALJ Trudelle, issued August 12, 2004.

PRPA's attempt to supplement the record by using other cases pending before the ALJ, without giving Intership notice, is *ex parte* communication.

"No person who is a party to or an agent of a party to any proceeding . . . and no interested person outside the Commission shall make or knowingly cause to be made to any . . . administrative law judge . . . who is or may reasonably be expected to be involved in the decisional process of any such proceeding, an ex parte communication relevant to the merits of the proceeding;" (46 C.F.R. 502.11(a).) An *ex parte* communication "means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given . . . ." (46 C.F.R. 502.11(c).)

PRPA's argument of the *Intership* case in *SAM v. PRPA,* Docket No. 04-06, is contained in the Commission's docket files (which are open to the public), but this public filing does not give Intership notice of the communication to the ALJ through another case in which PRPA is a party.

In the interest of justice and the policy of the statutes administered by the Commission, the ALJ does not consider the *ex parte* communications in this proceeding part of the record. (46 C.F.R. 502.11(g).)

Secondly, PRPA argues for approval of its request to reply to Intership's reply because "there is ample precedent for approving such requests as recently illustrated in the *Odyssea Stevedoring* proceeding whereby both Chief Judge Kline and the Presiding Officer saw the utility of permitting a further reply and waived the rule." This statement is also not true.

Chief ALJ Kline never issued an order approving a reply to the reply in *Odyssea Stevedoring*. Chief ALJ Kline allowed PRPA to file a Motion for Summary Judgment in an order establishing a schedule for submission of dispositive motion by PRPA issued on November 13, 2003. Chief ALJ Kline stated:

> The parties were directed to confer and submit a proposed schedule under which PRPA would file a dispositive motion, Odyssea would reply, **and if shown necessary**, PRPA could file a reply to Odyssea's reply notwithstanding the normal rule that replies to replies are not allowed pursuant to 46 C.F.R. 502.74(a). (Emphasis added).
>
> Further procedure will, of course, depend upon the presiding judge's rulings on PRPA's motion.
>
> The above procedure also considers the fact that the parties are nearing completion of some 150 facts, which, it is expected, will be used by PRPA in support of its motion together with relevant portions of the many materials obtained during discovery, a process that will require some time to complete.[111]

Clearly, Chief ALJ Kline never granted PRPA's request to file a reply to a reply. He stated if it was "shown necessary," PRPA could file a reply to Odyssea's reply. ALJ Kline further stated that "further procedure will, of course, depend on the presiding judge's rulings on PRPA's motions. As stated previously, PRPA's request to reply to Odyssea's reply was regarding a Motion for Summary Judgment with an extensive history and nine volumes of documentation and innumerable exhibits unlike the present case where PRPA has not even answered the Complaint.

---

[111]See *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority*, Docket No. 02-08, Schedule Established for Submission of Dispositive Motion by PRPA, Chief Judge Kline, issued November 13, 2003.

Further, PRPA misrepresented an order by the Presiding ALJ in *Odyssea v. PRPA,* Docket No. 02-08, that granted PRPA permission to respond to Odyssea's opposition to PRPA's motion for summary Judgment and granting permission to Odyssea to file a sur-reply.[112]

PRPA only mentioned this was an "Order Granting Permission to PRPA to Respond to Odyssea's Opposition." PRPA did not give the entire title of the Order that states: "Order: (1) Granting Permission to PRPA to Respond to Odyssea's Opposition to PRPA's Motion for Summary judgment; (2) Granting Permission to Odyssea to file a Sur-Reply."[113]

PRPA took out of context the issues addressed in the above *Odyssea v. PRPA* ruling that waived Rule 74(a)(1) pursuant to Rule 10, 46 C.F.R. 502.10 in that case. The Presiding ALJ actually stated:

> When PRPA argued that a summary-judgment type procedure should be followed in this proceeding, Judge Kline agreed because such a procedure is designed to avoid needless trials, and, even if a motion for summary judgment fails, rulings on such motions can narrow and identify issues that cannot be resolved as matters of law or that need oral testimony and cross-examination at trial to resolve because they involve genuine issues of material fact.
>
> However, before deciding whether to issue a summary judgment, a presiding judge must take care that a summary judgment, if it could be issued, would not be premature and that both parties have an opportunity to address fully new matters that

---

[112]See *Odyssea v. PRPA*, Docket No. 02-08, Order Granting Permission to PRPA to Respond to Odyssea's Opposition to PRPA's Motion for Summary Judgment; Granting Permission to Odyssea to file a Sur-Reply, issued on February 17, 2004.

[113]See *Intership v. PRPA,* Respondent's Opposition to Complainant's Motion to Strike, page 5, footnote 5, dated June 22, 2004, that referred to "*Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority*, Docket No. 02-08, Order Granting Permission to PRPA to Respond to Odyssea's Opposition, Feb. 17, 2004 (parties should have an opportunity to address fully new matters by supplemental pleadings)."

adversely affect their interest when such matters can only be addressed by allowing supplemental pleadings.[114]

As a party in *Odyssea v. PRPA*, Docket No. 02-08, PRPA is aware that the order allowing a "reply to a reply" was regarding a complicated motion for summary judgement issue not a simple Pre-Answer matter. PRPA's representation of facts and law in *Odyssea v. PRPA* in support of its request to "reply to the reply" in *Intership* is false, misleading and frivolous.

Procedural Order

PRPA's Motion to Dismiss is denied.

PRPA's request for oral argument on its Motion to Dismiss is denied.

PRPA's request to supplement the record with its letters dated April 21, 2004 and June 10, 2004, and attachments thereto, is denied.

PRPA's request to reply the reply is denied. The Commission has a stated POLICY that the non-movant in a proceeding be afforded the "last word."[115] Therefore, PRPA's request to reply to Intership's Reply to the Motion to Dismiss is denied.

---

[114]See *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority*, Docket no. 02-08, Order: (1) Granting Permission to PRPA to Respond to Odyssea's Opposition to PRPA's Motion for Summary Judgment; (2) Granting Permission to Odyssea to file a Sur-Reply, dated February 17, 2004.

[115]See *Carolina Marine Handling v. South Carolina State Ports Authority,* 28 S.R.R. 1317, 1318 (ALJ), February 16, 2000.

PRPA is ordered to answer the complaint and respond to discovery requests made on January 4, 2004, within ten business days of this order. 46 C.F.R. 502.64.

Notwithstanding the Order for Completion of Discovery by June 4, 2004, the parties still have the opportunity to confer and file a statement containing their joint procedural recommendations.

Both parties are under a duty to confer and propose a complete discovery s chedule as required by 46 C.F.R. 502.201 (within 10 days of the date of service of this ruling). The parties will submit a status report to the Administrative Law Judge concerning their progress under the discovery schedule within 10 days after the new discovery schedule is set. PRPA has already delayed the proceeding and caused needless cost to the Complainant by misstating the law, miss-characterizing the Complaint, misstating positions taken by ALJs, and taking inconsistent positions from prior litigation.

PRPA's letters dated April 21, 2004 and June 10, 2004, sent to the Presiding Officer by counsel for PRPA, and all attachments thereto, are stricken from the record. Any other documents, including the argument and attachments in *SAM v. PRPA,* Docket No. 04-06, submitted to the Presiding Officer without Intership's knowledge shall be stricken from the record. PRPA is ordered to submit all future papers in accordance with the Rules and to serve all papers filed with the Commission on Intership. Intership's Motion to Strike is granted.

This proceeding is referred for Alternative Dispute Resolution. The parties are encouraged to discuss this matter with the Commission's Alternative Dispute Resolution Specialist,

Mr. Ronald D. Murphy. Mr. Murphy's telephone number is (202)523-5787 and his fax number is (202)275-0536. Mr. Murphy will contact the parties and arrange a suitable schedule for discussions. It is in both parties' interests to strive to reach a settlement under the Commission's Alternative Dispute Resolution program. Although the parties are encouraged to use ADR, such a request will not be permitted to allow PRPA to delay discovery.

As previously noticed, a prehearing conference is scheduled for September 28, 2004, at 10:00 a.m., in the FMC Hearing Room (Room 100), 800 North Capitol Street, N.W., Washington, D.C. The purpose of the conference is to consider any settlement under Rule 91, identify the issues, establish a schedule of procedures, resolve any discovery disputes, and determine other matters to aid in the disposition of this case pursuant to 46 C.F.R. 502.94.

Miriam A. Trudelle
Administrative Law Judge