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(July 24, 2006)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

July 24, 2006

DOCKET NO. 04-09

AMERICAN WAREHOUSING OF NEW YORK, INC.

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

DOCKET NO. 05-03

AMERICAN WAREHOUSING OF NEW YORK, INC.

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

INITIAL DECISION¹

INTRODUCTION

Two separately filed cases involving the same parties were consolidated for hearing and decision. The complainant American Warehousing of New York, Inc. (American) filed Docket 04-09 on August 5, 2004, alleging that the respondent, the Port Authority of New York and New Jersey, had violated the Shipping Act of 1984, 46 U.S.C. App. § 1700 *et seq.* with regard to the leasing arrangements of a pier that American occupies. While that

¹ This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. §502.227).

action was pending Docket 05-03 was filed on June 15, 2005 alleging new violations of the Shipping Act that had occurred after Docket 04-09 had been filed. Both the complainant and respondent are marine terminal operators subject to the jurisdiction of the Commission. The parties are also in litigation in the Civil Court of the City of New York, Kings County, on the Port Authority's attempt to evict American as a tenant.

Shortly before the hearing was scheduled to begin American's attorney withdrew from the representation. American retained new counsel. This change has complicated the organizing of the exhibits in the file. In addition to the numbered exhibits submitted during the hearing, there are two bodies of documents that have been received into evidence.

Because of the brief period that they had to prepare for the hearing, the new counsel submitted a number of additional exhibits with their post-hearing briefs, which they marked A through O. In order to accommodate the difficulties in pre-hearing preparation that the new counsel faced, these post-hearing exhibits were accepted into evidence.

Before his withdrawal, former counsel submitted a number of documents that he numbered 1 through 65. At the hearing, the current counsel re-affirmed the desire to have those documents included in the record. The first 4 of those documents were leases of other tenants of the Port Authority, which are quite lengthy. Those leases are on file with the Commission and can therefore be cited without the need to include them in the record of this hearing. Therefore, the portions of prior counsel's prehearing submission that have been received into evidence are those marked 5 through 65.

BACKGROUND

American engages in trade at Pier 7 of the Port Authority's Red Hook facility on the Brooklyn, New York waterfront. Its business includes storing, handling, and distributing cocoa and other commodities. The Pier 7 facility includes both berthing areas for ships and a warehouse, which is licensed by the New York Board of Trade and by the Cocoa Merchants Association of America for storage of cocoa.

A sister company, American Stevedoring, Incorporated (ASI) also conducts business at the Red Hook facility. The two firms have some principals in common, and in some areas they operate in concert. For example, ASI personnel load and unload cargo from ships that is destined for storage in American's facility. American has on occasions paid rent owed to the Port Authority by ASI, and Mr. Chester Hopkins, then an employee of ASI, sat in on the lease negotiations between the Port Authority and American. In spite of such overlaps in ownership and operations, the two are separate corporations, operate independently in many respects, and occupy different facilities under different leasing arrangements.

The Port Authority is an agency formed by a compact between the states of New York and New Jersey. It is charged with the responsibility of managing, among other things, the seaport facilities of the bistate area. It owns the Red Hook facility.

A company named Commodity Storage Inc. (CSI) was a prior tenant on Pier 7. American acquired the assets of CSI and operated at Pier 7 under its lease. American takes the position that it succeeded to CSI's tenancy under the lease. This, like many issues in this case, raises a question of New York real property law that is beyond the scope of the Commission's authority. For purposes of this action I assume, without deciding, that American succeeded to CSI's rights under the latter's lease of Pier 7.

Ships can berth and cargo can be loaded and unloaded on both the north and south sides of Pier 7. The south side is longer and has more berthing and cargo handling capacity than the north side.

Cocoa is grown in tropical climates and the import trade is seasonal, with storage demands that vary substantially over the course of the year. When additional space beyond that ordinarily used is required to accommodate seasonal increases in storage space the additional space is referred to as "swing space" and a clause in the lease permitting the use of such swing space is called an "accordion clause."

In the cocoa trade plans and contracts are made far in advance and both foreign suppliers and domestic customers desire stability in the supply chain. An importing and warehousing firm is less likely to receive business if its continued occupancy of its facilities is uncertain.

In 2002 American and the Port Authority began negotiations for a new lease. A lease was negotiated and was executed in November 2002 but was made retroactive to 1999. This lease was due to expire on April 30, 2003. Because of the concerns for stability of occupancy discussed above American wished a long-term lease, but agreed to the short-term lease because the Port Authority was unwilling to grant a longer lease. American expected that the lease would be a stop gap measure that would allow time for negotiation of a longer lease. The Port Authority was not willing to enter into a long term lease and regarded the short-term lease as providing a period of time for the orderly winding up of American's operations at Pier 7.

The description of the leased premises in the short-term lease referred to "the enclosed space shown in diagonal hatching on the sketch attached hereto." The sketch shows the Pier 7 area with diagonal hatching on the southern half of the warehouse. The lease does not contain an accordion clause to permit use of the northern half of the warehouse as occasional swing space, but does give American an option to lease the northern half of the warehouse.

ISSUES IN CONTENTION BETWEEN THE PARTIES

RENTAL HISTORY

On November 13, 2003, after the short-term lease had expired the Port Authority served a rent demand on American. Later, on December 8, 2003 Patricia Keough, Senior Property Representative for the Port Commerce Department of the Port Authority, served a copy of a Notice of Termination on Michael Scotto, the President of American. This in turn led to the eviction action in Kings County.

Ms. Keough testified and provided records of American's rent history. In their post-hearing exhibits, however, counsel for American have noted that the decision not to offer a long-term lease was made by the Port Authority's board in 2002, before the short-term lease was negotiated (Post-hearing exhibit M). This timing for the decision is consistent with the studies of other uses for the facility that will be discussed below. It is apparent from those studies that at that time the Port Authority was considering other potential tenants and other uses for the facility.

Furthermore, references to American's rent history under the short-term lease are potentially misleading. That lease was made retroactive to 1999, but was not entered into by the parties until late 2002. During the early part of that period the Port Authority, was not even billing American, but continued to bill CSI for the rent (Post hearing exhibit L).

Examining the short-term lease out of context would lead a reader to conclude that the parties entered into an agreement in 1999 under which American undertook to pay the rent. Examination of what payments were made at what times between 1999 and 2002 would then be highly significant. In this case, however, the lease was not made in 1999, it was made in 2002 and made retroactive to 1999.

Another source of contention concerning rent is the construction by American of tensile membrane structures in the vicinity of the pier. These structures, also described as fabric buildings or tents, are designed to be sturdier and more permanent than the ordinary usage of the word "tent" implies, and to provide long term storage. American contends that it was owed reimbursement by the Port Authority for this capital improvement, and that when the Port Authority failed to reimburse it, it was entitled under state law to withhold rent.

Like all issues of New York landlord-tenant law raised in this complaint, the claim of entitlement to withhold rent is a matter for the state court and not for the Commission. For purposes of this complaint it is sufficient to note that it took place after the Port Authority's decision not to negotiate a long term lease.

The rental history of Pier 7 since 2002 has obviously added considerable strain to what was already a difficult relationship between the parties. That history, and the competing claims of each side, may result in one side or the other prevailing in the state court that

will consider the case under New York property law. However, that recent history does not bear on the question of whether the Port Authority's 2002 decision not to negotiate a new lease constituted unreasonable preference or prejudice under the Shipping Act.

The history before negotiations for the short term lease reflect a period when the Port Authority did not even acknowledge American as a client under the then-existing lease and collected rent through the cumbersome process of first billing CSI. The most serious rent disputes have arisen after the decision not to agree to a long term lease, and the rent dispute does not appear to have been a causative factor in that decision at the time that it was made.

OCCUPANCY OF THE NORTHERN HALF OF PIER 7

On April 1, 2001, while American was occupying the pier as a successor under the CSI lease, Mr. Scotto wrote a letter to Ms. Keough to notify her that American was terminating 50 percent of the leasehold effective May 1, 2001. The short-term lease that was negotiated the next year was limited to the southern half of the warehouse, with an option to rent the northern half. American never exercised this option.

The Port Authority contends, here and in the Kings County action, that American has illegally squatted on the northern half. American counters that it uses the northern half as occasional swing space in accordance with custom within the industry.

Pier 7 has ship berthing space and doors on both its north and south sides. The storage area of the warehouse is an open space without interior walls or partitions to subdivide it, either along its long axis between the north and south halves, or elsewhere.

A tenant of half of the warehouse could make use of the other half in two ways, and there was testimony that American had done both. First, there is incidental transit in the course of operations. If every square yard of floor space on the southern half was covered with cargo, the only way for a forklift or other implement to approach it to move cargo would be from the northern half. In addition, ships berth on both sides of Pier 7. To transport cargo from a ship berthed on the north side while keeping the northern half of the warehouse off limits would require the extremely inefficient practice of driving each load around the outside of the warehouse to a door on the southern half.

The second type of use is more substantial than these momentary operational transits. That is the use of the northern half of the warehouse for storage. This practice is characterized by the Port Authority as squatting and American as use of swing space. American offered evidence, from third parties as well as from its own employees, that use of swing space to accommodate the different cargo storage needs at different times is a standard practice in the industry. This is consistent with the inherently seasonal nature of an agricultural product like cocoa.

American views the rigid insistence of the Port Authority on limiting its leasehold to half of the warehouse as inappropriately restrictive. It may be noted in passing that while this may be an anomaly in industry practice, it is an anomaly that American unilaterally introduced into the relationship between the parties. It did so explicitly by Mr. Scotto's letter of April 1, 2001, and reinforced the matter by inaction when it had obtained a lease that gave it a leasehold on one half of the warehouse and an option that, if exercised, would have given it clear authority to use the entire warehouse.

The Port Authority has an argument based on the express terms of the lease and American has an argument based on custom within the industry. This is another issue of property law within the competence of the New York courts rather than the Commission. For purposes of this complaint, as with the rent dispute, the most significant aspect of the dispute is its timing. The evidence of what the Port Authority characterizes as squatting comes from the period after the decision not to negotiate a long term lease. Like the rent dispute, the dispute over the northern half of Pier 7 has in recent years added heat to the conflict, but does not appear to have been a substantial cause of it at the outset.

In connection with the issue of use of the northern half of the pier, the complainant's post-hearing brief raised questions concerning my transportation to and from the hearing site on December 5, 2005. I will set forth my recollection of the events concerned.

Before the scheduled hearing dates of November 28-30, 2005 I had reserved a conference room in a federal building in Manhattan. Counsel for the complainant advised me that they had rented space in the New York County Lawyer's Association building in downtown Manhattan and requested that the hearing be held there instead. It was not clear to me why counsel wished to incur the expense of renting a room when a nearby federal facility was available free of charge. However, the respondent did not object to the proposed arrangement and I agreed to hold the hearing at the Lawyer's Association building.

In the course of the proceedings it became apparent that another day of hearings would be necessary to complete testimony. Monday December 5 was settled on. The Port Authority offered the use of a conference room at the Red Hook facility for the additional day of hearings:

Counsel for American had indicated that as part of their case when the hearing resumed they would be challenging aspects of the Port Authority's case as it concerned the layout and utilization of Pier 7. This related to the respondent's theory that the complainant had improperly squatted on the northern half of the pier. American's counsel did not specify the nature of the evidence they planned to put on, and were of course perfectly within their rights not to do so.

Since it became clear that the physical appearance of the pier was going to be a matter in controversy on the last day of hearings I raised with counsel the possibility of conducting a view or inspection of the pier area. I stated my belief that views of scenes by courts and adjudicatory bodies are rarely justified, but that depending on the nature of the evidence

that was submitted the procedure might prove worthwhile in this case. If we held the hearing at the Red Hook facility we would have the flexibility either to conduct a view of the scene or not. Since I did not know the nature of the complainant's anticipated presentation of evidence on the issue, I was not in a position to have an opinion on whether or not such a view would turn out to be useful.

During a recess I discussed travel arrangements for the renewed hearing. Mr. Donovan, counsel for the Port Authority, suggested returning from Washington to New York by train rather than airplane because of the difficulties of ground transportation from the airports in the New York area. I believe that Ms. Bauer, counsel for American, was present during this discussion, but I am not sure. Mr. Donovan and I are the only participants in the hearing who had to travel from outside the greater New York metropolitan area.

I booked my trip on an Amtrak train that was scheduled to leave Washington early enough to allow me to be in Brooklyn for the 9:00 scheduled start of the hearing. I saw Mr. Donovan on the platform at Union Station in Washington. We wished each other good morning and I boarded the train, riding in a different car from Mr. Donovan.

I did not see Mr. Donovan onboard the train, and next saw him after getting off of the train at Pennsylvania Station in Manhattan. He told me that the Port Authority was going to send a car to bring him from the subway to the hearing site and offered to give me a ride. I accepted his offer and we rode in the same subway car to a station in Brooklyn.

After a few minutes waiting at the Brooklyn subway station a car arrived. We got in and drove to the Red Hook facility. Mr. Arie Van Tol, a witness in the hearing, was driving and another Port Authority employee was in the front seat. I had never been in that part of Brooklyn before, but when we entered the port facility I could see the lower Manhattan skyline straight ahead, so I knew that we were facing the East River. After passing several buildings the car turned left so that the river was on our right. I assumed from that fact that we would pass Pier 7 on our right. When the car turned left to parallel the East River I turned my head left to avoid seeing anything of the waterfront area. I believed that I should see the facility either as part of an inspection with all parties present or not at all. At one point Mr. Van Tol said "there are the fabric buildings" or words to that effect. I knew what the fabric buildings were from testimony and documentary evidence but did not turn to look. I continued looking out the left side window of the car throughout the ride until we arrived at the administrative building. I do not know whether the route we took was the most direct route to the administrative building from the subway station.

When I arrived at the administrative building the participants made small talk before going on the record. As people who travel to a meeting in a large city often do, we discussed traffic and how each person's trip to the site went. I believed from this and from my simultaneous arrival with Mr. Donovan that it was clear to those present that he and I had traveled to the building together.

The Port Authority provided coffee and doughnuts before the start of the hearing. When we recessed for lunch it arranged for the delivery of soft drinks and food. All of these items were available to me, to counsel for both sides, to the hearing reporter and to the witnesses who were present.

As evidence was presented it became clear that a viewing of the Pier 7 facility would serve no useful purpose and neither side proposed that one be held. Views of a scene have inherent difficulties in preserving an accurate record of what the participants saw, and take place after the events at issue. Counsel for the complainant presented a detailed presentation, through testimony as well as photographic and documentary evidence, of the conditions of the pier at the time periods at issue, and a view of what it looked like on the day of the hearing would have added nothing meaningful to the evidence on that aspect of the case. A glance at the exterior from a moving automobile would have been even more useless.

When the hearing adjourned a Port Authority employee who I had not previously met drove Mr. Donovan and me to the subway station. While we were still a few blocks away the driver received a call on his cell phone asking him to bring us back because counsel for the complainant were missing a document and thought that one of us might have picked it up. We returned to the conference room and searched for the document. Given that we left the building together, the driver got a call to bring us back, and we returned together I believed that it was clear to counsel for the complainant that we were sharing a ride.

We returned to the car, and were driven to the subway station. By this time it was dark, but I again looked out the landward (i.e. right) side windows as we drove along the waterfront to avoid seeing the pier area. Mr. Donovan and I took a subway back to Pennsylvania Station. We parted in the lobby of the station. I did not see him boarding the train for Union Station or see him while I was onboard the train. I may have seen him on the platform at Union Station and said "good night," but I do not recall.

During the four days that I spent in New York for this hearing there were many periods of recess when I made small talk with counsel for both sides. I avoided discussion of the merits of the case during these periods, as I did during my travels on December 5. Except for the remark by Mr. Van Tol mentioned earlier, neither I nor anyone in my hearing made any remarks related to the case during those travels.

ALTERNATE LAND USES

The prior counsel's submissions include a number of consultant's reports, news media accounts, and letters going back several years that relate to potential future uses of the Red Hook facility. Among the alternative maritime uses considered have been a cruise ship terminal, a container-on-barge facility for containers from the Port Authority's facilities at Port Elizabeth and Port Newark, New Jersey bound for the local market, and

leasing to a different marine terminal operator. In addition, non-maritime uses such as "big box" retail stores and residential construction have been considered.

In 2003 the Port Authority issued a Request for Expression of Interest (RFEI) for the Red Hook facility and a parcel in Port Newark, New Jersey (Prior Counsel's exhibit 8). The RFEI stated that proposals would be considered for both parcels or for Red Hook alone, and indicated that a lease from May 1, 2004 for a minimum of 5 years would be available. It was thus a matter of public record that the Port Authority was seeking alternative uses of Red Hook, and therefore of Pier 7.

IMPEDING OPERATIONS AND IMPAIRING REPUTATION

Evidence was presented that, early in the Kings County litigation, ships bound for Pier 7 were not permitted to dock. In each case, either through prompt intervention by the court or on advice of counsel, the Port Authority relented and permitted docking.

The most recent such incident, cited in Docket 05-03, occurred in June, 2005. American requested permission for a vessel named the Umiavut to dock at the south side of Pier 7 and on June 9 this permission was denied. (Hearing exhibit 10). June is after the end of the busy season for cocoa arrivals and a vessel under repair had been berthed on the south side of the Pier, which is the longest berth available in Red Hook. The Umiavut berthed at Pier 8 (Hearing exhibit 38). The few brief disruptions of vessel operations are not so serious as to constitute Shipping Act violations.

American has alleged that the Port Authority has engaged in a media and rumor campaign to suggest to potential customers and suppliers that American will soon be out of business and that they should take business elsewhere. The RFEI for alternative uses of the facility and the eviction action in Kings County court are both matters of public record. The shipping industry is a closely knit one, the breakbulk segment of that industry even more so, and the breakbulk cocoa segment still more so.

The future of the Red Hook facility has been the subject of community meetings and stories in the news media. It is to be expected that the steps that the Port Authority has publicly taken will long since have become generally known among American's customers and suppliers. It is inevitable that entities within the industry will draw surmises about American's future based on that publicly available information. The evidence does not support substantial damage to American's commercial reputation beyond what was inherent in the publicly noted acts of issuing the RFEI and filing an eviction action.

PERSONAL ANIMOSITY

American argues that the Port Authority's attempts to evict it constitute undue and unreasonable prejudice under the Shipping Act because they result from personal animus.

Corporations and government agencies do not have emotions, but they act through their officers and employees who do. This dispute has gone on for several years and involves important interests of both parties. Personal rancor has, unsurprisingly, grown between employees of both parties over the course of the dispute.

In the dispute over rent history and occupancy of the northern half of Pier 7 counsel for American have argued cogently that the time period to be considered is the point at which the decision not to grant a long-term lease was made, rather than the events since that decision. Applying that principle to this issue, there is no evidence of personal animosity against American as a motivating factor in 2002 when that decision was made.

Finally, personal animosity is an unconvincing explanation because of the different treatment given to American's sister company ASI. ASI and American have the same ownership and overlapping operations, but the Port Authority has not attempted to remove ASI from Red Hook.

CONCERNS OVER AMERICAN'S FINANCIAL VIABILITY

In its post-hearing brief the Port Authority has cited both the rent history discussed above and the lack of audited financial statements by American and expressed concerns over American's financial strength and long-term ability to pay. American has countered that as a small closely held corporation it is not obligated to produce such statements.

Among the prior counsel's prehearing submissions, marked as Exhibit 21, was a business plan for American and its sister company ASI. This plan was prepared by a consulting firm and dated January 3, 2001, Counsel offered it to demonstrate the favorable prospects for future profitability of American if it could continue to operate at its present facility.

This business plan notes that the majority of the business for Red Hook involves combination breakbulk and container vessels. The ships are unloaded at Red Hook and the containers are transported by barge to ASI's facility at Port Newark, while the breakbulk cargo is stored at Red Hook.

The business plan states, at page 20, that:

The "Catch 22" of the Red Hook terminal operation is evident; to eliminate the barge service is to eliminate container service, which would eliminate the majority of the cocoa business being moved on combination breakbulk/container vessels. Without either the container business or the cocoa business there is insufficient volume to support fixed expenses. Therefore it is essential that both cargo services and the barge service be maintained if the mainstay of Red Hook, cocoa, is to be retained. The combination of container, breakbulk and the barge service represents the critical mass that is needed for financial viability and support of future growth.

Later on the same page the report notes that “the commercial activities cannot bear the cost of the Red Hook barge at any time in the seven year projection [i.e. 2001-2007] without assistance in covering its cost.” The report further notes that “there is no financial incentive for any other commercial enterprise to engage in a business which must bear the burden of the barge without economic assistance.” (Page 19)

American’s business plan is explicitly based on an ongoing operating subsidy of the barge service. American can be profitable with the barge service, cannot be profitable without it, and cannot pay for it from the revenues generated by its business.

DISCUSSION

The Red Hook facility is a valuable parcel of waterfront land, and a part of the City of New York’s maritime heritage. The question of the future use to which it will be put is an important one not only for the parties here but for the community and the city. The documents submitted demonstrate that there has for several years been a high degree of interest by elected officials, news media, and community groups. The broad public policy question of what is to be done with Red Hook is being worked out, as it should be, through local institutions. This broad policy question is beyond the scope of the Commission’s authority. Just as the Commission cannot serve as a housing court applying New York landlord-tenant law it cannot serve as a planning commission for the Borough of Brooklyn. It can only deal with the question presented under the Shipping Act concerning the decision not to lease Pier 7 to the complainant.

A lease of real property, like other contracts, involves the parties in a relationship of mutual rights and duties. For the period of the leasehold the landlord gives over possession of the property to the tenant, who undertakes to pay the agreed-upon rent. There will almost always be other provisions that define the relationship, some imposed by law and some negotiated between the parties. In leases of commercial and industrial property those provisions may run to dozens or hundreds of pages, but the exchange of rent for possession is at the heart of the parties’ relationship.

For each party it is easier to decline to renew a lease than it is to break a lease that is still in effect. At the end of the lease period each party is, as a general rule, restored to the position in which it was beforehand. The tenant gets to stop paying rent and the landlord gets to resume possession. When the lease expires each side can figuratively and, in the case of the tenant, literally walk away.

This general rule is subject to numerous exceptions. The lease itself may provide for an option to renew it. Similarly, a provision of law may modify the general rule and require conduct by one of the parties after the lease term has expired. In that regard, the question of whether the law of New York permits the Port Authority to evict American is pending before a court of that state, and the Commission has no authority over that question of state property law.

Before 2002, when the parties entered into the short-term lease, the Port Authority had never leased Pier 7 to American. It acquired American as a tenant when American acquired the assets of CSI. No evidence was presented concerning the nature of CSI's business and specifically whether CSI had required cross-harbor barging subsidized by the Port Authority to remain viable. Now the question arises whether, by acquiring CSI, American also acquired a right under the Shipping Act to obtain a new long-term lease of its own.

Section 10b(10) of the Act (applied to marine terminal operators by Section 10(d)(3)) provides that no common carrier may "unreasonably refuse to deal or negotiate." 46 U.S.C. App. § 1709(b)(10). Section 10(d)(4) provides that "no marine terminal operator may give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person." 46 U.S.C. App. § 1709(d)(4).

The Act, by condemning "undue or unreasonable" preferences and prejudices "clearly contemplates the existence of permissible preferences and prejudices." *Petchem, Inc. v. Federal Maritime Commission*, 853 F.2d. 958, 963) (D.C. Cir. 1988). In *Ceres Marine Terminal, Inc. v. Maryland Port Administration*, 27 SRR 1251 (1997) it was stated that:

In order to establish an allegation of an unreasonable preference or prejudice, it must be shown that (1) the two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors. 27 SRR at 1270-71.

Evidence was presented that the Port Authority has entered into long-term leases with marine terminal operators at other facilities that it owns at Port Newark and Port Elizabeth, New Jersey and at Howland Hook in Staten Island, while it has refused to make a long term lease, or any lease at all after the short-term lease that expired in 2003, with American. These other operators are similarly situated with American in the sense that they are also marine terminal operators and tenants of the Port Authority. However, they are at other and larger facilities. Each facility has unique features that give it advantages and disadvantages. For example, Red Hook has the advantage of its position on the east side of the Hudson River and consequent access to Long Island and New England markets, and the disadvantage of small size and limited upland storage area. Balancing factors such as these are among the business decisions that an agency such as the Port Authority must make in deciding on the use to be made of its facilities. Such business decisions are not matters for the Commission to second guess unless they rise to the level of a Shipping Act violation.

American's business plan depends on an ongoing subsidy in the form of barge service to move containers from Red Hook to the New Jersey container facilities. It has been correctly pointed out that the Port Authority has made capital improvements at those container facilities that have assisted the operations of the tenant marine terminal operators there.

There is a fundamental difference between capital improvements and the type of subsidy represented by the operation of the cross-harbor barge. Capital improvements like cranes and warehouses are an enduring asset of a facility, continuously available to service customers and, to the extent that they increase capacity, can increase business, to the benefit of the operator, the port, and the public.

The value added by the barge service in this case is, by contrast, ephemeral. The money spent on each bargeload transports a particular set of containers and leaves nothing behind.

Even though the benefits of a subsidized barge service are transitory they are real and may be of great value. However, while the benefits of an operating subsidy to the port or to commerce generally may be great or small, they are fundamentally different from the benefits that derive from capital improvements. The decision to make capital improvements at some sites and not to operate a barge from another site are business decisions based on differences in legitimate transportation factors under the third prong of *Ceres*. The decision not to enter into a long-term lease, being based on those transportation factors, was neither an undue or unreasonable preference or prejudice nor an unreasonable refusal to deal or negotiate.

CONCLUSION

The Port Authority did not, by declining to enter into a long-term lease and taking the other actions complained of did not violate Section 10 of the Shipping Act. The requested reparations and other relief are denied.


Kenneth A. Krantz
Administrative Law Judge