

(**FEDERAL MARITIME COMMISSION**)
(**SERVED OCTOBER 6, 1995**)
(**EXCEPTIONS DUE 10-30-95**)
(**REPLIES TO EXCEPTIONS DUE 11-21-95**)

FEDERAL MARITIME COMMISSION

DOCKET NO. 94-10

ALL MARINE MOORINGS, INC.

v.

ITO CORPORATION OF BALTIMORE

Complainant, All Marine Moorings, Inc., a company doing some 70% of the line handling (vessel mooring) business at the Port of Baltimore and operating at some 19 terminal locations in the Port, alleges that respondent I.T.O. Corporation of Baltimore, a stevedore/marine terminal operator under a lease of a part of the premises at one location, South Locust Point, and operating at two other terminals, has restricted or excluded All Marine from competing for the line haul business at that one particular location and attempted to establish a monopoly, has unreasonably prejudiced All Marine, and has acted unreasonably, in violation of sections 10(b)(11), 10(b)(12), and 10(d)(1) of the Shipping Act of 1984 and corresponding sections of the Shipping Act, 1916. All Marine contends that I.T.O. has failed to justify its exclusionary, competitive practices and seeks reparations. I.T.O. contends that it has the right to perform mooring services at its leased premises itself, that such practice is more efficient for its business, and that All Marine has had financial and other difficulties, making its reliability questionable. It is held that:

- (1) I.T.O. has established no monopoly throughout the Port, has a right to perform line handling services at its own leased premises, without being required to permit a competitor to come onto the premises to do the same work, and has a right to do the work itself, as it does at other ports, but that its concerns over All Marine's financial ability and competency are exaggerated, with no evidence that such purported

difficulties have impeded all Marine's performance of line handling throughout the Port. There is also no evidence that I.T.O.'s decision to offer full service, including line handling at South Locust Point, causes operational difficulties for carrier customers, who are far more interested in the quality of the stevedoring/marine terminal services than in line handling.

- (2) A fair reading of the I.T.O. lease with the Maryland Port Administration (MPA) indicates that the lessee, I.T.O., is authorized to perform line handling at South Locust Point as a necessary auxiliary service to stevedoring and marine terminal services, and with whom I.T.O. arranges to do the work is of no concern to the lessor, MPA, so long as the work is done properly and no complaints are heard from carrier customers. The MPA is a neutral bystander to the instant dispute and, as requested, is dismissed from the proceeding.

W. Michel Pierson for complainant All Marine Moorings, Inc.

JoAnne Zawitoski for respondent I.T.O. Corporation of Baltimore.

J. Joseph Curran, Jr. and *Donald A. Krach* for respondent Maryland Port Administration.

**INITIAL DECISION¹ OF NORMAN D. KLINE,
ADMINISTRATIVE LAW JUDGE**

This case involves the question whether a marine terminal operator which has a lease to conduct its business at a location in the Port of Baltimore, Maryland, has the right to perform the business of tying up ships calling at its location, known as line handling or mooring, to the exclusion of a competing company that also performs line handling services, and, if the marine terminal operator has such a right, whether it has violated various provisions of the Shipping Act of 1984 by taking steps to exclude the competing company from the leased premises. The case began with the filing of a complaint, which was served on April 15, 1994. Complainant, a company known as All Marine Moorings, Inc., which performs line handling or mooring services throughout the Port of Baltimore, alleges that

¹This 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 CFR 502.227).

respondent I.T.O. Corporation of Baltimore entered into a lease of terminal facilities at South Locust Point in Baltimore on or about July 2, 1993, and, at the time and thereafter, advised All Marine Moorings that I.T.O. Corporation would perform all mooring services at South Locust Point and that All Marine would be barred from the location except for two existing contracts which All Marine had with carriers. Furthermore, All Marine alleges, respondent I.T.O. advised shipping agencies, carriers, and other entities that they would be required to use I.T.O.'s line handling services and would not be permitted to contract with All Marine for such services. Since that time, All Marine further alleges, carriers and agencies have been prevented from employing All Marine at South Locust Point. All Marine alleges that I.T.O. Corporation is attempting to monopolize mooring services at South Locust Point and has injured All Marine in the amount of \$116,420, which are revenues allegedly lost by All Marine to I.T.O. All Marine asks also for a cease and desist order and alleges that I.T.O.'s conduct violated sections 16 and 17 of the Shipping Act, 1916, and corresponding sections of the 1984 Shipping Act, sections 10(b)(11), 10(b)(12), and 10(d)(1), which prohibit undue or unreasonable preferences or disadvantages and unreasonable terminal practices. I.T.O. admitted some of the allegations but denied violating law and claimed that its lease with the Maryland Port Administration (MPA) gave I.T.O. the exclusive right to perform the line handling services at South Locust Point.

The need to amend the complaint was discussed at a prehearing conference held on June 6, 1994. The problem was that respondent I.T.O. had contended that its lease with the MPA as well as the MPA tariff had granted I.T.O. the exclusive right to perform line handling services at South Locust Point and required MPA's consent before any person

could tie vessels to the wharf at South Locust Point. Because I.T.O. had made its lease and the MPA tariff part of its defense, it appeared that All Marine could not obtain complete relief, assuming All Marine proved violations of law by I.T.O., without naming MPA a party respondent. Also, if the allegations as to violations were proved by All Marine, respondent I.T.O. might be caught between inconsistent obligations because of MPA's alleged veto power. Accordingly, as done in the courts under Federal Rule 19, 28 U.S.C.A., Joinder of Persons Needed for Just Adjudication, All Marine was directed to file an amended complaint naming MPA as a party respondent and invoking the Commission's authority under section 11(c) of the Shipping Act of 1984 (and section 15 of the Shipping Act, 1916, if applicable) in the event that All Marine wished to ask the Commission to remove any impediment to its requested relief by disapproving, canceling or modifying the I.T.O./MPA lease agreement. (See Notice of Rulings Made at Prehearing Conference, June 8, 1994, 26 SRR 1396.) On June 21, 1994, All Marine served its amended complaint, adding MPA as a party respondent. Respondent I.T.O. again answered, denying violations of law, admitting some allegations, contending that its lease with MPA gave I.T.O. exclusive rights, and contending that All Marine lacked the legal capacity to file the complaint. Respondent MPA admitted some allegations but denied violations of law and contended that the instant dispute was between All Marine and I.T.O. Corporation, that MPA leaves provision of all ancillary services to the lessee, I.T.O., that MPA should not be involved in the case at all, that MPA has done nothing and is not a marine terminal operator at South Locust Point, and that its tariff and lease speak for themselves and do not violate either the 1984 or the 1916 Shipping Acts.

After the amended complaint and answers were filed, the parties utilized the Commission's discovery process (interrogatories, requests for production, depositions) to develop the evidentiary record and after occasional delay to obtain protective orders and because of illness of a witness, the discovery process concluded in April 1995. Because many basic facts were not disputed and others did not require observation of witnesses at an oral, trial-type hearing to determine, it was believed that the evidentiary record could be developed by admitting the various materials obtained by the parties through the discovery process and that the case could be submitted on briefs. It was also ruled that full litigation of the reparations issue could be deferred pending determination of the question of violations, as permitted by 46 CFR 502.251 and 502.252. (See Notice of Telephonic Conference and Rulings Made Therein, November 14, 1994.) Another matter concerned the status of MPA, which had been contending soon after its inclusion in the case that it did not belong in it and should be dismissed because the controversy was solely between All Marine and I.T.O. MPA was advised that it could at the appropriate time seek dismissal by means of a motion for summary judgment or by awaiting the conclusion of the evidentiary phase of the proceeding and then arguing for dismissal. (See Further Procedure and Schedule Established, June 15, 1995, at. 3.) On September 5, 1995, MPA filed its Motion for Summary Judgment, arguing that it should be dismissed from the proceeding, that it is not involved with decisions as to who will perform line handling in the Port of Baltimore, that its lease agreement with I.T.O. does not relate to line handling nor does its tariff, and that MPA has committed no act which would warrant its retention in the case.

As a result of the procedure followed by the parties, therefore, the record consists of various discovery materials with attached documents together with the briefs and MPA's Motion for Summary Judgment, its Memorandum in Support of Motion for Summary Judgment, with six attached exhibits, and two replies to MPA's Motion filed by All Marine and I.T.O.²

Findings of Fact

1. Line handling services are utilized in connection with the berthing and departure of vessels. Line handlers sporadically work with tugboats during docking maneuvers but more frequently work with members of the ships' deck crews in tying up and untying ships at the pier.

2. Since 1988, when Mr. Simmers joined I.T.O. at Baltimore, the practice at Baltimore was for line handling to be performed by independent services rather than by

²The various evidentiary materials are filed as attachments to the briefs and pleadings. The main testimonial evidence is contained in three depositions, given by Mr. Thomas J. Simmers, Vice President, I.T.O. Corporation, Mr. Salvatore J. Ciociola, AMM's President, and Mr. Michael Angelos, MPA's former Executive Director. See Exhibits C, E, and F, attached to I.T.O.'s reply brief. See also the affidavit of Mr. Simmers, Exhibit A to I.T.O.'s reply brief, and other documents attached to I.T.O.'s reply brief set forth in a list of Exhibits attached to that reply brief. Complainant has submitted an affidavit of Mr. Ciociola, attached to complainant's opening brief, and excerpts from the Simmers and Angelos depositions, attached to its opening brief. Finally, complainant submitted a supplemental affidavit of Mr. Ciociola, an affidavit of Mr. Gerhard Widderich, Vice President of Rice Unruh Reynolds Corporation, steamship agents, and three other documents relating to All Marine's standing with the State of Maryland's Department of Assessments and Taxation, All Marine's accounting methods, and excerpts from MPA's publication regarding the Port of Baltimore. See Exhibits to Complainant's Reply Brief, attached to the Reply Brief. In its Motion for Summary Judgment, MPA has furnished affidavits of Mr. James J. White, MPA's Director of Operations, and Mr. David J. Ziolkowski, MPA's Manager, Intermodal Pricing and Tariffs, together with excerpts from the Simmers, Angelos, and Ciociola depositions, and the text of a decision of the Maryland Court of Appeals. AMM contends that I.T.O. has improperly submitted the entire depositions of Messrs. Simmers, Ciociola, and Angelos because portions of those depositions were taken subject to objections and portions are not admissible. However, AMM does not press the matter and has not asked for a ruling on specifics. See Complainant's Reply Brief at 1-2. The lease agreement between MPA and I.T.O. is attached to MPA's Answer to Amended Complaint.

terminal operators or stevedores. However, at Baltimore, steamship lines or their agents negotiate for line handling services either with stevedores/marine terminal operators, usually on an annual basis, or with an independent company, such as All Marine. If the particular marine terminal operator provides its own line handling services, as I.T.O. does at South Locust Point, those services may become, as at South Locust Point, part of the bundle of services contracted for between the terminal operator and the steamship line, providing what I.T.O. calls "one-stop shopping." Otherwise the steamship line may contract with an outside company, such as All Marine. Years ago, before the creation of the Maryland Port Authority and the development of state-owned piers in the late 50's and early 60's, most piers in the Port of Baltimore were owned and operated by railroads or by steamship lines operating the piers. However, from 1926, members of the family of Michael Cataneo had performed line handling services and, up to 1988, six or seven other line handling companies had competed with the Cataneo family.

3. There is no unanimous agreement as to whether line handling is stevedoring, part of marine terminal services, both, or neither. I.T.O. maintains that it is considered to be a traditional marine terminal service. I.T.O. cites a report published by the Office of Port and Intermodal Development of the Maritime Administration, which concluded that vessel berthing and line handling were services "typically common to all terminals." I.T.O. itself has historically provided line handling as a part of its marine terminal services at a number of other ports in the United States, including New York, New Jersey, New Orleans, and several others. Mr. Thomas Simmers, I.T.O.'s Vice President, testified that by 1988, when he joined I.T.O. in Baltimore, he had nearly twenty years' experience in the line handling

business while working for I.T.O. or Atlantic & Gulf Stevedores in other ports. All Marine, on the other hand, believes that line handling is not considered to be a traditional marine terminal service. AMM cites a Commission opinion in *A.P. Philip, Inc. v. Atlantic Land and Improvement Co.*, 13 F.M.C. 166, 171, 11 SRR 309 (1969), in which the Commission observed that "terminals themselves do not become involved in the actual docking and undocking of vessels. . . ." AMM also cites the Fact Finding Officer's opinion in *Fact Finding Investigation No. 17, Rates, Charges and Services Provided at Marine Terminal Facilities*, 24 SRR 1260, 1269 (1988), in which the officer found that operations at marine terminals could not be neatly divided into categories such as stevedoring or terminal operations. The opinion also relied on a survey of persons involved in the industry. In this survey, 46 marine terminal operator and stevedore respondents classified vessel berthing or mooring as a terminal service, 21 as a stevedoring service, 14 as both a terminal and stevedoring service, and 34 as neither a terminal nor a stevedoring service. (24 SRR at 1283.) Thirty-six carrier respondents classified vessel berthing or mooring as a terminal service, 12 as stevedoring, 21 as neither, and five as both. (24 SRR at 1289.)

4. All Marine Moorings is a line handling company that was formed in 1990 and has done business continuously since that time. Line handling is All Marine's sole business. From 1990 to mid-1993, All Marine shared the line handling business at the Port of Baltimore largely with Cataneo, Inc., which went out of business in the summer of 1993. Mr. Salvatore Ciociola is All Marine's President and has held that position since early 1991. His wife is Vice-President of the company. The company currently has 12 employees in all, including Francis, Mr. Ciociola's son, who runs the office, handles the books, and dispatches

the laborers, his daughter-in-law, who does some bookkeeping and typing, two other sons, who are line handlers, and a grandson, who is also a line handler. At all times since All Marine's formation, it has employed persons who had experience in line handling. At one time All Marine's corporate charter was revoked by the State of Maryland for failure to file a personal property tax return for 1992, but the charter has been revived, and All Marine is currently in good standing with the state. (See Exhibit 1, Supplemental Affidavit of Salvatore Ciociola; and Exhibit 2, attached to AMM's Reply Brief.)

5. In 1990, when All Marine first began its operations, the overwhelming majority of its revenues were derived from line handling services performed for Maersk Line at Dundalk Marine Terminal. In 1991, the first year All Marine began working at South Locust Point, between 94% and 95% of All Marine's total revenues came from line handling performed at terminals other than South Locust Point, with All Marine's largest source of revenue, again, coming from work done at Dundalk Marine Terminal. In 1992, between 91% and 92% of All Marine's total revenues came from line handling performed at terminals other than South Locust Point, with 81% of All Marine's business coming from Dundalk and Seagirt Marine Terminals. In 1993, the year that I.T.O. entered the line handling business in Baltimore, between 93% and 94% of All Marine's total revenues came from line handling performed at terminals other than South Locust Point, with 74% of All Marine's business, again, coming from Dundalk and Seagirt Marine Terminals. In the first nine months of 1994, approximately 94% of All Marine's total revenues came from line handling performed at terminals other than South Locust Point, with Seagirt and Dundalk again accounting for nearly 70% of All Marine's business in the first nine months of 1994.

6. All Marine earned revenues in 1990 of approximately \$9,150.00. All Marine's profit or loss on these revenues for 1990 is unknown, as All Marine has been unable to locate a copy of its 1990 income tax forms, but Mr. Ciociola testified that he did not believe the company made a profit that year. In 1991, All Marine had a loss but on revenues of over \$200,000. In 1992, All Marine had a loss on but revenues of over \$360,000. In 1993, the year I.T.O. went into the line handling business at South Locust Point, All Marine for the first time enjoyed a profit in connection with its line handling business with revenues of over \$500,000. In 1994, for the first nine months of that year, All Marine earned a profit with revenues over \$600,000, making 1994 All Marine's best year ever in terms of profits. All Marine's gross revenues from operations at South Locust Point actually increased in each of the four years from 1991 to 1994.

7. All Marine employs experienced union line handlers as does I.T.O. All Marine's crews are radio dispatched and are available 24 hours a day, seven days a week, as are I.T.O.'s. Currently, All Marine and I.T.O. are the only two providers of unionized line handling services at the Port of Baltimore, employing members of the International Longshoremen's Association (ILA). There are two other, very small line handling companies furnishing non-union line handlers at a handful of private marine terminals in Baltimore. From 1966 to 1990, Cataneo, Inc. was, if not the sole, then the largest provider of union line handling services in Baltimore. Following Cataneo's exit from business in 1993, some of Cataneo's workforce went with All Marine while the remainder of Cataneo's line handlers went with I.T.O. Even before Cataneo went out of business, Mr. Rick Brigerman, who had been chief line handler for Cataneo, came to work for I.T.O.

8. Since it began doing business, All Marine's share of the line handling business in the Port of Baltimore has steadily increased. In 1990, when All Marine began, it serviced only about ten ships or less than 1% of the market for line handling services in Baltimore. In 1991, All Marine had about 25% of the line handling market in Baltimore, and by 1993, All Marine's market share had climbed to about 35%, all at Cataneo's expense. By the end of 1993, according to All Marine's president, even after I.T.O. had entered the market, All Marine had at least 75% of the line handling business in the Port. By the end of 1994, All Marine's share was about 70% compared to I.T.O.'s share of about 20% for the entire Port. The remaining 10% was split between the two, non-union companies.

9. When Mr. Simmers, I.T.O.'s vice president, first arrived in Baltimore, he reviewed all of I.T.O.'s operations and targeted additional services that he believed I.T.O. should perform itself rather than have some third party do them. His philosophy was to offer a "seamless," more efficient, and more cost-effective terminal operation and to help I.T.O. compete with the eight or nine other stevedores/marine terminal operators in Baltimore. Given his prior experience with I.T.O.'s line handling operations at other ports, it was understandable for Mr. Simmers to want to include line handling as one of the "seamless" web of services that I.T.O. could offer its customers at South Locust Point. However, the opportunity to do so did not arise until 1993 when Cataneo went out of business and that company's experienced union labor pool became available. Initially, Mr. Simmers intended that I.T.O. offer line handling only at South Locust Point. However, once some of the steamship lines calling at other I.T.O. locations in Baltimore (Seagirt and Dundalk) discovered that I.T.O. had picked up Cataneo's labor force, with which the lines were

comfortable, the lines asked if I.T.O. could provide line handling at the other two terminals as well.

10. Soon after I.T.O. commenced its line handling operation at South Locust Point, Mr. Simmers of I.T.O. had a conversation with Mr. Ciociola of AMM. Mr. Simmers advised Mr. Ciociola that I.T.O.'s lease for South Locust Point from MPA gave I.T.O. the right to provide all terminal facilities at that facility, including line handling, and that I.T.O. henceforth intended to provide all line handling services at South Locust Point. Mr. Simmers also sent a facsimile to all of I.T.O.'s current customers at South Locust Point, advising them that, effective on a certain date, I.T.O. would provide all the line handling services at south Locust Point. A tariff schedule and rate agreement were attached to the facsimile. Some of I.T.O.'s customers asked why I.T.O. decided to provide the services itself or asked for clarifications of the decision, but none protested it. However, one steamship agent, Mr. Gerhard Widderich, vice president of Rice Unruh Reynolds Corporation, wanted to give All Marine some line handling work at South Locust Point in January 1994, but All Marine was not permitted to handle the order. Mr. Widderich was informed by Mr. Simmers of I.T.O. that All Marine would not be permitted by I.T.O. to handle the order. (Affidavit of Gerhard Widderich, para. 3; Simmers Deposition at 82-83; Ciociola Affidavit at 3.) According to Mr. Ciociola, furthermore, some steamship line agents, whose ships called at South Locust Point, informed Mr. Ciociola that they could not give All Marine the line handling work because Mr. Simmers told them that their ships could not come into South Locust Point if they wanted All Marine to do the line handling. (Ciociola Deposition at 140-141.) Nevertheless, it should be remembered that steamship lines do not

choose which terminal to call in Baltimore because of who performs line handling services. The lines generally choose the stevedore/terminal operator first based upon the type and quality of services and prices for those services offered by the stevedore/terminal operator. Mr. Michael Angelos, MPA's former Executive Director, whose job was to negotiate with steamship lines who wanted to come into the Port of Baltimore, was not aware of any situation in which a steamship line's decision as to which terminal in Baltimore to use was driven by the provider of the line handling services there.

11. I.T.O. did inform All Marine that it would permit All Marine to fulfill the existing, written line handling contracts that All Marine had with one or two steamship lines at South Locust Point. All Marine has continued to perform under these contracts to this day with I.T.O.'s permission, and All Marine continues to advertise in local trade journals that All Marine serves all marine terminals in the Port of Baltimore. There has, furthermore, never been a time since August 1993 when All Marine's men have been physically prevented from entering South Locust Point by I.T.O. in any way. Furthermore, All Marine's own figures appear to indicate that All Marine is currently doing about one-third of the line handling business at South Locust Point with I.T.O. doing the other two-thirds. (See record citations in I.T.O.'s Reply Brief at 14-15.) All Marine's percentage of the line handling business at South Locust Point could increase if MPA were to lease presently unoccupied space at South Locust Point to another terminal operator who could choose All Marine to do the line handling.

12. I.T.O. disputes the quality of line handling services provided by All Marine. Mr. Simmers testified that during the time that All Marine provided line handling services

at South Locust Point, I.T.O. experienced instances in which All Marine did not tie up a vessel at the correct berth. As a consequence, he testified that the vessels had to be moved, causing three labor gangs to be idled at a cost to I.T.O. of thousands of dollars, which cost I.T.O. attempted to pass onto the steamship lines and suffered blame from its customers and possibly from the lessor, MPA. However, Mr. Simmers could not recall any specific instances or provide any specific information about these alleged errors by All Marine, although he had requested I.T.O. personnel to supply such information. Nor could Mr. Simmers support his testimony about the incorrect tying up of a vessel, leaving three labor gangs idle, etc. His testimony appeared to be hypothetical.

Additional Findings of Fact

The following findings of fact are based upon facts proposed by I.T.O. in its Reply Brief, as altered or modified, if necessary, after consideration of All Marine's contrary contentions.

13. The Maryland Port Administration (MPA) is an agency of the State of Maryland within the Department of Transportation. It originated in 1956 as the Maryland Port Authority. The Authority became the MPA in 1970 and was made part of the Maryland Department of Transportation in 1971. The MPA has been charged by the Maryland General Assembly with the duty, among others, of improving the facilities and strengthening the workings of private marine terminal operators in the Port of Baltimore and assisting and encouraging the extension and improvement of privately operated port facilities. Md. Transp. Code Ann. § 6-102(d).

14. In order for the MPA to fulfill its duty, the Maryland General Assembly has given the MPA the power to construct, improve, maintain and lease, as lessor, port facilities within its territorial jurisdiction. Md. Transp. Code Ann. § 6-204(i). The MPA has also been given the power to designate the location and character of all port facilities that the MPA owns, and to regulate all matters related to the location and character of port facilities, Md. Transp. Code Ann. § 6-204(j), including the fixing of fees, rentals or other charges for the use of any facilities within its control. Md. Transp. Code Ann. § 6-204(1).

15. In order to foster and facilitate navigation and prevent injury to persons or property, the MPA has been given the power by the Maryland General Assembly to provide for the stationing, anchoring, and moving of vessels. Further, as to wharves, docks, piers, bulkheads or pilings the MPA owns or controls, it has the power to regulate their use, and lease or rent them. Md. Transp. Code Ann. § 6-206(a)(2) and (a)(5).

16. The MPA also has been given the power by the Maryland General Assembly to make any contract necessary for or incidental to the performance of the foregoing duties or the exercise of the foregoing powers. Md. Transp. Code Ann. § 6-208.

17. The MPA owns seven major marine terminal facilities in Baltimore: Seagirt Marine Terminal, North Locust Point Marine Terminal, South Locust Point Marine Terminal, Dundalk Marine Terminal, Hawkins Point Marine Terminal, Clinton Street Marine Terminal, and the Fairfield Auto Terminal. The MPA operates Seagirt Marine Terminal itself, through its quasi-private operating arm, Maryland International Terminals, Inc. ("MIT"), and through a terminal operating agreement with I.T.O. The remaining public terminals in the Port are leased by the MPA to private operators. In addition to the

seven public facilities, there are 29 other, privately-owned marine terminal facilities in the Port of Baltimore. All Marine provides line handling at nineteen marine terminals in Baltimore compared to the three terminals operated by I.T.O. at which I.T.O. provides line handling services.

18. The marine terminal facilities owned by the MPA include the cleats and bollards on the piers, normally used to tie up vessels, as well as the entranceways used to get into and out of the terminals. The facilities leased to I.T.O. by the MPA at South Locust Point include the bollards and cleats on the bulkheads.

19. At both Seagirt and Dundalk Marine Terminals, the MPA determines where the vessels calling at those terminals will berth, and MPA controls the wharves and assigns the cranes there. At South Locust Point Terminal, I.T.O. determines where the vessels will berth, controls the wharves and assigns the cranes there.

20. The Dundalk and North Locust Point Terminals are leased by the MPA to multiple private terminal operators. Seagirt Marine Terminal is operated by a single marine terminal operator, I.T.O., but stevedoring services there are performed by multiple providers. South Locust Point is the only MPA-owned marine terminal in Baltimore leased to a single entity (I.T.O.), which provides all stevedoring and marine terminal services at that facility. As such, the SLP Lease is unique in the Port of Baltimore. In essence, I.T.O. acts as if it is the owner of that facility. For example, I.T.O. collects and keeps all dockage and wharfage paid at MPA tariff rates by vessels calling at South Locust Point, whereas at other public terminals in the Port, the terminal operator lessee has to pay the MPA a certain portion of the dockage and wharfage it collects from the vessels calling there. Some

steamship lines prefer having all stevedoring and marine terminal services performed by a single operator at a marine terminal facility because they get just one bill for all services provided there. However, according to MPA's former Executive Director, Mr. Angelos, the benefits from having a single provider are conjectural.

21. The terms of the current South Locust Point Lease are essentially unchanged from those of previous leases between the MPA and I.T.O. or Atlantic & Gulf, except that the current lease provides that the MPA furnishes the demised terminal facilities and services to I.T.O. pursuant to the MPA's Terminal Services Tariff No. 14 and any subsequent tariffs promulgated by the MPA. (See SLP Lease, Section 1, attached to I.T.O.'s Answer to Amended Complaint as Exhibit A.) The current lease, as amended, requires I.T.O., in addition to paying the MPA a minimum of \$960,000.00 in annual rental charges, to assume all container crane maintenance expenses at the terminal, as well as to assume all security costs, and to pay the MPA \$1.00 per ton for each ton of cargo handled annually in excess of 850,000 tons. (SLP Lease, Section 3(2); Exhibit A, Simmers Affidavit.)

In exchange for the payment by I.T.O. of the aforesaid rent, I.T.O. is given the right under the lease to maintain and operate the demised premises as a waterborne cargo terminal and to berth in the berthing area all seagoing vessels for which I.T.O. acts as terminal operator. (SLP Lease, Section 5(2).) Part of the premises demised to I.T.O. under the lease is two-thirds of the marginal bulkhead at South Locust Point Marine Terminal. (SLP Lease, Section 1; Exhibit A, Simmers Affidavit.) I.T.O. is also given the right of ingress and egress over the roadways extending from the main entrance of South Locust Point Marine Terminal to the demised premises. (SLP Lease, General Lease Conditions,

Section 5.) This right of ingress and egress is exclusive to I.T.O., save only for the concurrent right of the MPA and others authorized by the MPA to enter and leave the premises. (*Id.*)

In connection with its operation of South Locust Point Marine Terminal, I.T.O. is required under its lease to indemnify, protect and hold the MPA harmless from all suits, claims, demands, damages, etc. to which the MPA might be subjected by reason of injury to or death of persons or damage to property of any person in any manner due to or in connection with the occupation and use of the leased premises by I.T.O., its subcontractors, invitees, or licensees. (SLP Lease, General Lease Conditions, Section 8.) I.T.O. is further required by the lease to procure and maintain, at its sole cost and expense, Workmen's Compensation Insurance, Longshore Act Insurance, Fire and Extended Coverage Insurance, Comprehensive General Liability Insurance, Stevedore's and Terminal Operator's Legal Liability Insurance and other property and vehicle insurance in connection with its lease and operation of South Locust Point Marine Terminal. (*Id.*) The current lease contemplates that the MPA will construct an automated gate facility for operation by, and financed in part by, I.T.O. (SLP Lease, Sections 5(1), 9, and 10.) Finally, the current lease requires I.T.O. to provide its customers with terminal and stevedoring services that meet or exceed the top quality standards recognized in the industry. (SLP Lease, Section 5(7).)

22. The lease between I.T.O. and the MPA for South Locust Point Marine Terminal, as amended (hereafter, "SLP Lease") conveys to I.T.O. not only a leasehold interest in the real property and appurtenances thereto described in the lease, but also the entire operation of the terminal including the right to provide all marine terminal services there, except as

otherwise stated in the lease. (See Lease Agreement for South Locust Point Marine Terminal appended to I.T.O.'s Answer to Amended Complaint as Exhibit A; Exhibit C, Simmers Depos. at 29.)

23. The SLP Lease was negotiated on behalf of the MPA primarily by Michael Angelos, the former Executive Director of the MPA, and Gregory Russell, the former Deputy Executive Director of the MPA. (Exhibit F, Angelos Depos. at 8.)

24. Besides I.T.O, there are currently nine other companies that provide stevedoring and/or marine terminal services in the Port of Baltimore (Balterm, Beacon Stevedoring, Ceres Marine Terminals, Chesapeake Bulk Stevedores, Cooper/T. Smith Stevedoring, Ramsay Scarlett Agencies, Tartan Terminals, Transcom, Ltd., and Universal Maritime Services Corp.). These companies, or most of them, are competitors of I.T.O.'s for the provision of stevedoring services in the Port of Baltimore. At South Locust Point Terminal, unlike Seagirt Marine Terminal, there is a requirement that steamship lines use I.T.O. for both stevedoring and/or terminal operations. If one of I.T.O.'s competitors wanted to perform stevedoring services at South Locust Point Marine Terminal, the terms of the SLP Lease, as interpreted by ITO and probably by MPA, would not require I.T.O. to allow its competitor onto that facility to compete against I.T.O. there.

25. The public cannot come and go at will at South Locust Point Marine Terminal or at other marine terminals owned by MPA. Security at that terminal is provided mainly by I.T.O., and, occasionally, by the MPA. I.T.O. mans the gates at the entranceways to South Locust Point Marine Terminal. Under the MPA's interpretation of the SLP Lease, only I.T.O. and the MPA have the right to control who comes into and out of South Locust

Point Terminal, although the MPA has generally left it up to I.T.O. to make the determination of who may enter and leave that terminal. As far as I.T.O. knows, All Marine has never gotten permission from the MPA to enter South Locust Point Marine Terminal.

26. MPA has no contract with All Marine Moorings, either orally or in writing, giving All Marine permission to enter South Locust Point Marine Terminal. (Exhibit F, Angelos Depos. at 39.) Acting as a landlord under leases, the MPA does have contracts with other kinds of vendors, such as maintenance and repair companies, which permit those companies to have access to South Locust Point Marine Terminal for the purpose of making certain inspections and/or repairs. (Exhibit F, Angelos Depos. at 37-38.)

27. At Seagirt Marine Terminal, the MPA allows anyone who wants to come onto that terminal to perform line handling services to do so. At South Locust Point Marine Terminal, however, the MPA takes the view that the provision of line handling services there is "up to the steamship line and I.T.O." MPA's witness Angelos testified that anyone with whom a steamship line contracts is permitted to perform line handling services.

28. As Mr. Angelos understands the SLP Lease, that lease holds I.T.O. liable for any personal injuries or property damages that occur within the South Locust Point Terminal, even if such injuries or damage were caused by a third party other than I.T.O. The MPA requires I.T.O. to provide certain types of insurance coverage, including workers compensation and Longshore Act coverage, in connection with I.T.O.'s operations at South Locust Point, protecting the MPA as an additional insured. The MPA does not require All Marine to provide any kind of insurance in connection with All Marine's operations at South Locust Point. The SLP Lease also requires I.T.O. to put up a \$500,000 bond in

connection with its South Locust Point operations. There is no bonding requirement imposed by the MPA upon All Marine.

29. The SLP Lease is also understood by the MPA as requiring I.T.O. to provide terminal or stevedoring services that meet or exceed top quality standards recognized in the industry. If I.T.O. fails to meet those top quality standards, then there is a provision in the lease whereunder the MPA can declare the lease to be in default. If vessels are tied up at the wrong location at South Locust Point and the steamship line gets upset about it, this could be a situation for which MPA would hold I.T.O. responsible under the SLP lease. The MPA has not heard any complaints, from steamship lines or others, about I.T.O.'s or anyone else's provision of line handling services at South Locust Point.

30. Prior to coming to work for the MPA, from 1980 to 1992, Michael Angelos was the Vice President of Operations for I.T.O. In the early eighties, I.T.O. was performing all of the chassis maintenance and repair work itself at South Locust Point. By the mid-eighties, I.T.O. determined that it was losing money on the chassis repair operation, and Mr. Angelos was involved with bringing Atlantic Technical Services ("ATS") into South Locust Point Marine Terminal to perform this work for I.T.O.'s steamship line customers there. The purpose for allowing ATS to come into the terminal to do this work was to get I.T.O. out of the business of doing the chassis maintenance work itself. Once I.T.O. brought in ATS to do the chassis repair work, steamship lines calling at South Locust Point were probably not allowed to bring in any other companies to perform chassis maintenance and repair work there. According to the MPA's interpretation of the SLP Lease, if I.T.O.

decided that it did not want ATS to do the chassis repair work anymore and that such work would be performed in the future solely by I.T.O., I.T.O. could do that.

31. At many terminals there can be a physical demarcation between what the stevedore does and what the terminal operator does. However, South Locust Point functions as one unit and all functions that relate to the terminal operation and to the stevedoring functions are virtually seamless.

32. If I.T.O. is providing stevedoring services at some other public marine terminal in the Port, operated by a party other than I.T.O., then I.T.O. either has to get the permission of the MPA or of the MPA's lessee in order to get onto those other terminal premises. Absent that permission, I.T.O. does not have a "God-given right" to enter someone else's leased terminal facility. All Marine admits that it needs I.T.O.'s permission to come into South Locust Point Marine Terminal to do work there.

33. At the time All Marine went into the line handling business in 1990, I.T.O. was concerned about the financial condition of All Marine, as it was a start-up enterprise. I.T.O. was also concerned that Mr. Ciociola, who had no prior experience in the line handling business, did not know the full extent of his liabilities under the Longshore and Harborworkers Act. In particular, Mr. Simmers was concerned that if All Marine were underinsured, or if it did not adequately supervise its labor force, or if it hired inexperienced line handlers, then I.T.O. could be held liable on a third party Longshore Act claim if one of All Marine's employees was injured at I.T.O.'s terminal. Soon after All Marine first went into business in 1990, I.T.O. asked All Marine, as a condition to allowing All Marine into the South Locust Point Terminal, to provide I.T.O. with proof of adequate insurance. All

Marine provided a certificate of insurance to I.T.O. in response to that request. I.T.O. has not claimed that All Marine's certificate of insurance is improper but I.T.O. believes that that certificate of insurance did not insulate I.T.O. from third party claims filed by employees of All Marine who happened to be injured while at South Locust Point Marine Terminal. I.T.O., however, is listed as an additional insured upon All Marine's general liability policy. When I.T.O. first told All Marine that I.T.O. would be doing all line handling at South Locust Point going forward, one reason offered to All Marine for this decision was that All Marine was a "liability" to I.T.O., in that I.T.O. could be held legally liable if one of All Marine's men was injured at I.T.O.'s terminal. Finally, I.T.O. was also concerned about rumors in the port community that All Maine was making "under the table" payments to steamship lines and/or their agents in exchange for business.

34. I.T.O. and All Marine are competitors in the line handling business. I.T.O.'s rates for its line handling services are market driven but are based on costs as well. Depending on the circumstances, I.T.O.'s rates for line handling services can be less than or equal to the rates offered by All Marine.

35. Soon after I.T.O. entered the line handling business in Baltimore in 1993, All Marine's President, Mr. Ciociola, met with Mr. Simmers of I.T.O. and offered some money to I.T.O. if I.T.O. would give All Marine all of the line handling business at South Locust Point. Mr. Simmers of I.T.O. testified that this amounted to a "bribe" and that it was offered to him personally, amounting to something like \$50,000 to \$60,000, based upon a percentage of expected revenues at SLP, and that Mr. Ciociola told him the conversation was just between the two of them. According to Mr. Ciociola, this offer was made to I.T.O.,

not Mr. Simmers personally, but that I.T.O. was not interested because it wanted to do the line handling itself.

36. In another conversation between Mr. Ciociola and Mr. Simmers occurring a few months later, in about the spring of 1994, Mr. Ciociola told Mr. Simmers that Mr. Ciociola's house was mortgaged to provide capital for All Marine's business and that one of All Marine's customers had gone out of business, owing All Marine \$13,000 in bad debts.

37. Most of All Marine's work comes through ship's agents, rather than actual steamship lines. Mr. Ciociola testified that All Marine has written line handling contracts with two customers for line handling services at South Locust Point: NOSAC and Wilhelmsen Line (a sister company of NOSAC). The last writing All Marine has from NOSAC is a letter dated December 14, 1993, confirming that All Marine would provide line handling for all NOSAC vessels calling at the Port of Baltimore for "another year under [the] same agreement as last year." All Marine has nothing in writing extending the NOSAC "contract" beyond December 14, 1994. The last writing All Marine has with Wilhelmsen Lines is a letter dated November 17, 1993, from All Marine to Captain Mannes of Wilhelmsen extending the present agreement "for an additional year." All Marine has nothing in writing, signed by Wilhelmsen, extending the Wilhelmsen "contract" beyond November 17, 1994.

38. All Marine offers different kinds of discounts to its customers in exchange for their line handling business. Some customers get no discount, while other customers get a discount ranging from 5% to 20%, depending on the volume of ships they have coming into the Port, or in order to attract the business. Wilhelmsen and NOSAC, who are two of All

Marine's largest customers, get a 5% discount while Containership Agency and Puerto Rico Marine Management each get a 15% discount. In addition to these discounts, all customers of All Marine get discounts for net thirty day payments.

39. Another of All Marine's biggest customers is Kerr Steamship Company, a ship's agent. Tim Kany is the Operations Manager for Kerr Steamship, and he handles "K" Line ships and the ships of United Arab Line. Tim Kany's wife is Patty Kany. In addition to the discounts outlined in Paragraph 31 above, on June 23, 1992, All Marine sent a fax letter to Tim Kany, enclosing a rate proposal for line handling and instructing Mr. Kany to deduct 10% for all straight time work and 20% for all overtime work, although Mr. Ciociola later claimed that this discount was never implemented.

40. Mr. Ciociola has denied that it is a practice of All Marine to make any payments to its customers in exchange for business. However, in 1993 and 1994, All Marine made 12 payments to Patty Kany, by company check, for alleged "commissions" for line handling business provided by Kerr Steamship to All Marine. The checks were made payable to Patty Kany rather than to Kerr Steamship or to Tim Kany because "That's the way it was wanted." However, Patty Kany did not personally render any service to All Marine in exchange for these "commissions." The payments to her, which represented 5% of the value of the work given to All Marine by Kerr Steamship, also were not based on any agreement between All Marine and Kerr; rather, they were allegedly the result of a "handshake deal" between Patty Kany and Mr. Ciociola on behalf of All Marine. Mr. Ciociola did not know whether the monies he paid to Patty Kany ever made their way back to Kerr Steamship.

41. Similarly, from 1992 to 1994, All Marine was invoiced for and paid "commissions" to Overseas Transfreight, Inc., an apparent "front"³ for Mediterranean Shipping Company. These "commissions" were for 20% of the value of the line handling work that Mediterranean Shipping gave to All Marine. These "commissions" were paid after Captain Casagrande, the Vice-President of Mediterranean Shipping Company, met with Mr. Ciociola three times and, at the last meeting, said, "for all the [line handling] work [from Mediterranean Shipping], give me 20%."

42. According to Mr. Ciociola's deposition testimony, the only "commissions" paid by All Marine from 1992 to 1994 were to Patty Kany and Overseas Transfreight. However, All Marine's profit and loss statements and tax returns for the same period show a total expense in a larger amount in "commissions." All Marine claims the discrepancy is due to different accounting methodologies with All Marine's books being kept on an accrual basis rather than a cash basis. (All Marine's Reply Brief at 11-12.) All Marine asserts on brief that all commissions paid by All Marine were duly reflected in information provided to the Internal Revenue Service. (*Id.* at 12, apparently incorrectly referring to commissions paid by "ITO" rather than by All Marine.) All Marine is not aware of any other line handling businesses in Baltimore that pay "commissions" to customers for business.

43. In connection with All Marine's use of ILA labor in Baltimore, All Marine is obligated to make certain payments to ILA pension and benefit funds administered by the Steamship Trade Association ("STA"), of which All Marine is a member. All Marine had

³There was no ship's agent named "Overseas Transfreight, Inc." listed in the Baltimore Shipping Services Directory for 1993-94. Mediterranean's agent in Baltimore has always been Containership Agency, and Mr. Ciociola testified that Overseas Transfreight was "the same as" or "part of" Containership Agency.

to post a thirty thousand dollar bond with the STA to guarantee these payments. In January 1995, the STA sued All Marine in the U.S. District Court for Maryland, alleging that All Marine was several months in arrears in its payments to the ILA pension and benefit funds (from October 1994 through March 15, 1995). If All Marine does not keep current on its STA account, the STA can call All Marine's bond and/or deny labor to All Marine, so that All Marine would be unable to provide line handling services to vessels. The reason All Marine fell behind on its STA payments in late 1994 and early 1995 was that All Marine was behind in collecting its accounts receivable. All Marine has since paid the delinquent contributions due to the STA and has filed an answer contesting the STA lawsuit. (Supplemental Affidavit of Salvatore Ciociola at 2, attached to All Marine's Reply Brief.)

44. In addition to falling behind in its STA payments, All Marine also fell behind in early 1995 in paying its Workers Compensation (including Longshore Act) insurance premiums. Mr. Ciociola admitted that his insurance "might have been a couple of weeks over." All Marine has never had any form of bank financing and was turned down for a loan by a bank in 1993. However, according to Mr. Ciociola, All Marine "does have a substantial line of credit from another financial institution." (*Id.*) All Marine does not own any real property in Maryland but rents a 640 square foot office in Baltimore City.

Contentions of the Parties

All Marine contends that I.T.O.'s practice of requiring carriers that call at South Locust Point to purchase line handling services from I.T.O. constitutes a failure by I.T.O. to establish, observe, and enforce just and reasonable regulations and practices

relating to or connected with receiving, handling, storing, or delivering property, and therefore violates section 10(d)(1) of the 1984 Shipping Act and Section 17 of the 1916 Shipping Act. All Marine also contends that I.T.O.'s practice of requiring that it perform line handling services for all vessels docking at South Locust Point Marine Terminal constitutes an unreasonable preference or advantage and refusing to permit All Marine to perform those services subjects All Marine to an unreasonable prejudice or disadvantage, in violation of section 10(d)(1) of the 1984 Act and section 16 of the 1916 Act.⁴

All Marine cites a number of Commission cases in which the Commission struck down monopolistic or exclusive dealing practices at various ports, although sometimes approving them, because they contravened the national philosophy favoring free and open competition and argues that such practices are prima facie unreasonable under the Shipping Acts and therefore require justification. In one of the cases cited, *Petchem, Inc. v. Canaveral*

⁴As applicable to marine terminal operators, pursuant to section 10(d)(3) of the 1984 Act, section 10(b) provides that no marine terminal operator may:

- (11) except for service contracts, make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever;
- (12) subject any particular person, locality, or description of traffic to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 10(d)(1) of the 1984 Act provides in pertinent part that:

- (1) No . . . marine terminal 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.

Essentially the same language appears in section 16 First and section 17 of the 1916 Act. See *50 Mile Container Rules*, 24 SRR 411, 460 n. 53, and 466 (1987). However, there is an added provision in section 17 of the 1916 Act, which authorizes the Commission to prescribe and order enforced just and reasonable regulations or practices.

Port Authority, 23 SRR 974, 987 (1986), affirmed as *Petchem, Inc. v. F.M.C.*, 853 F.2d 958 (D.C. Cir. 1988), the Commission approved an exclusive franchise for commercial tug and towing services at Port Canaveral, Florida. In so doing, however, the Commission reiterated its earlier views on exclusive arrangements at ports as follows:

In sum, the appropriate standard for judging exclusive terminal arrangements under the Shipping Acts is a synthesis of the St. Philip and Agreement No. T-2598 decisions. Such arrangements are generally undesirable and, in the absence of justifications by their proponents, may be unlawful under the Shipping Acts.

In another case cited by All Marine, *Seacon Terminals, Inc. v. Port of Seattle*, 26 SRR 886, 898 (1993), the Commission again reviewed its doctrine and reconfirmed that proponents of exclusive or monopolistic arrangements at ports had to justify them, although the ultimate burden of proof remained with parties complaining about the arrangement. However, as All Marine notes, in *Seacon*, the Commission found that there was no monopoly or inadequate competition at the port and therefore, no prima facie case of a violation of the Shipping Act, so that no burden of justification was cast on the respondent port.

All Marine then argues that I.T.O. has admitted that its purpose in excluding All Marine from the South Locust Point Terminal was its desire to perform all of the line handling services there, which All Marine claims to be "no more and no less than an attempt at monopolization," with the burden now shifting to I.T.O. to justify. All Marine contends further that I.T.O.'s vice president frankly stated that I.T.O.'s motivation was based on its

desire to increase its profit and contends that no deference is due to I.T.O. because I.T.O. is not a public port authority, as was the port authority in *Petchem*.

In its reply brief, I.T.O. first argues that All Marine lacks the capacity to bring this case because its corporate charter was forfeited on October 8, 1993. I.T.O. argues that All Marine has made no attempt to correct the loss of its charter and cites Maryland law to the effect that this loss disables a Maryland corporation from its powers. More relevant, however, as far as the merits of the substantive Shipping Act issues are concerned, I.T.O. argues that All Marine has not shown that I.T.O. has a monopoly over line handling services either at the Port of Baltimore or at South Locust Point, and even if such a showing had been made, I.T.O.'s conduct is permissible and reasonable under all the circumstances. I.T.O. argues, citing court decisions under antitrust law, that the relevant market for the subject line handling service is the entire Port of Baltimore, not just South Locust Point, and that All Marine provides services at 19 different terminals in Baltimore with I.T.O. only serving three terminals, but with the potential to serve other terminals in the Port as well. Also, argues I.T.O., since All Marine first went into business, some 90% or more of its revenues have come from terminals in Baltimore other than South Locust Point, and All Marine has admitted that it handles some 70% of all line handling in the Port, with I.T.O. handling only 20%. Again, citing an antitrust case, I.T.O. argues that a 75 or 80% market share is necessary to make out a successful monopolization case. Even at South Locust Point, I.T.O. argues that it had only about 33% of the line handling business and that All Marine continues to perform there under one written contract. Furthermore, there is remaining space at South Locust Point, which the MPA may lease to another terminal

operator who could choose to have All Marine do the line handling. I.T.O. argues therefore that "based on All Marine's own numbers, it is clear that no such monopoly can exist." (I.T.O.'s reply brief at 46.)

Because All Marine has not shown that I.T.O. has a monopoly, I.T.O. argues next that the burden remains on All Marine to show with evidence that I.T.O.'s practice was unjust, unreasonable, or unlawfully preferential. I.T.O. cites Commission cases in which the granting of special or exclusive privileges to one company over another was not found to be unlawful under the Shipping Acts. I.T.O. argues that the Commission does not automatically disfavor exclusive arrangements but has held a number of such arrangements to be reasonable when it was shown that they were necessary to advance economic efficiency or produce other benefits. I.T.O. cites *Petchem* and *Seacon* as examples of cases in which the Commission approved exclusive leases or franchises after considering complainants' financial situation, among other things, and in which the Commission deferred to the respondent ports' discretionary decisions. In *Petchem*, furthermore, it is argued, the Commission found that increased competition would not necessarily benefit the Port because any increase in complainant towing company's business could cause financial problems for the favored company. I.T.O. cites two other marine terminal cases in which the Commission approved exclusive arrangements between the Ports and single marine terminal operators, even in monopoly situations, on the basis of peculiar local situations at the ports concerned,

and when it appeared that allowing more than one operator at the relatively small ports would cause inefficiencies and deterioration in the quality of existing service.⁵

I.T.O. argues, furthermore, that even if in the future I.T.O. achieved a monopoly over line handling services under its lease, the lease would not be unreasonable per se but would have to be examined in light of all relevant circumstances. I.T.O. cites *Palmetto Shipping & Stevedoring Co. Inc. v. Georgia Ports Authority*, 24 SRR 50 (1987), as well as *Petchem*. I.T.O. argues that there are benefits flowing from having I.T.O. providing stevedoring, terminal, and line handling services itself and that when Cataneo, which had had a monopoly of unionized line handling for many years, left the Port, its departure meant that All Marine would be the only unionized line handler in the entire Port of Baltimore. Therefore, it is argued, I.T.O.'s entry into the business created at least some competition for these services. Moreover, it is argued, I.T.O. reasonably believed that it was granted an exclusive right to provide all marine terminal services and line handling under its lease from the MPA. Also, because some steamship line customers like to have single, all-inclusive services and billing for marine terminal plus line handling services and the only place that is now possible in the Port of Baltimore is at South Locust Point, "the current arrangement at South Locust Point should be preserved so as to give the shipping public a full and fair choice of terminal service options in Baltimore." (I.T.O.'s reply brief at 57-58.)

I.T.O. argues that it acted reasonably in excluding All Marine from South Locust Point except regarding All Marine's contracts with two steamship lines because I.T.O. was

⁵The cases are *Agreements T-3310 and T-3311*, 20 SRR 712 (1980); and *Agreement - Port Canaveral and Luckenbach S.S.*, 17 F.M.C. 286 (1974). I.T.O. argues that in each of the four cases it cited (*Seacon*, *Petchem*, *Agreements T-3310*, and *Luckenbach S.S.*), the Commission upheld an exclusive lease or contract given by the Port to one operator even when the preferred operator was thereby given a monopoly.

concerned about All Marine's financial condition and competency. I.T.O. claims that it was concerned that All Marine might be denied labor because of its delinquent payments to STA or for insurance and that I.T.O. might be exposed to liability should any of All Marine's workers be injured while working at South Locust Point, and also I.T.O. was concerned about the alleged unethical and perhaps illegal business practices of All Marine. Any default by All Marine, it is argued, could also cause I.T.O. to default under the terms of its lease with the MPA. I.T.O. cites one final case, *D.J. Roach, Inc. v. Albany Port District*, 5 F.M.B. 333 (1957), in which the Commission found nothing unlawful about an arrangement whereby the Port authorized one stevedore (Cargill) to subcontract with the only stevedore that could provide modern grain trimming machines (J.W. McGrath Corporation), although competing stevedores had been working at the grain terminal facility on a rotating basis in the past. I.T.O. argues that, like Cargill, it is merely subcontracting to itself the provision of line handling services as part of its overall operations at South Locust Point where line handling is an auxiliary terminal operator function.

Finally, on the question of alleged violations of law, I.T.O. discusses the cases on which All Marine relies and distinguishes them from the instant case, pointing out particular facts in this case that did not exist in the cases cited by All Marine.

In rebuttal, All Marine argues that its corporate charter has been revived, that the corporation is now in good standing, and that under Maryland law, the revival of a corporate charter validates a corporation's capacity to sue during the period the charter was revoked, citing two cases. On the merits of its allegations, All Marine argues that concerning the question whether I.T.O. has a monopoly, antitrust principles do not override Shipping Act

standards and that proof of an exclusive arrangement or attempt to exclude competition will suffice to show unreasonableness and to require I.T.O. to justify its conduct under Shipping Act standards. In this regard, All Marine argues that I.T.O. has the power to exclude competition from an essential facility, South Locust Point, and that this fact indicates monopoly power and an unfair advantage for I.T.O. All Marine cites court decisions under antitrust laws defining relevant markets to support its argument that I.T.O. is excluding competition as a monopolist at the critical market, South Locust Point, and argues that other terminals at the Port of Baltimore serve different types of trades and are not "fungible." All Marine answers I.T.O.'s argument that, even at south Locust Point, I.T.O. has no monopoly because All Marine continues to work there under contracts. All Marine argues that that situation is so only because All Marine is allowed to work there "at the sufferance of ITO" and that I.T.O. has already acted to prevent All Marine from handling business at the South Locust Point terminal. All Marine contends that "given ITO's conduct in the past, a clear and present danger of such exclusion exists, and All Marine is entitled to an adjudication protecting it from illegal conduct." (All Marine's Reply Brief at 22.) All Marine argues also that "All Marine has been completely foreclosed from competing for any new business because it is limited to existing customers. Thus, the market share is not the result of unrestrained market forces, but is rigidly dictated by ITO." (*Id.*)

Discussion and Conclusions

Both All Marine and I.T.O. cite many of the same cases and correctly recite the principles of law enunciated therein. However, as in all cases, the burden of proof rests with

the complainant, All Marine, and I find that on balance All Marine has not persuaded that I.T.O. has violated the reasonableness standards of the Shipping Acts in seeking to perform line handling services at or adjacent to its marine terminal premises where I.T.O. has an exclusive lease. As I discuss below, there are two lines of Commission cases, those striking down exclusive or monopolistic practices at various ports, and those finding them reasonable and lawful under the circumstances. In the instant case, I find that the facts of record show that I.T.O. is entitled under its lease with MPA to provide line handling services as necessary, auxiliary services to stevedoring and marine terminal services at South Locust Point and that there is insufficient reason in law or in fact to require I.T.O. to open these premises to competition with All Marine. Therefore, although one line of cases requires respondents like I.T.O. to justify exclusive practices once they are shown to exist, the complainant parties must first show that such practices exist before the ports are required to justify them. However, if no monopolistic practices are shown to exist, the burden of justifying the port's conduct does not exist or, if it does, it is minimal.

The instant case presents unique facts that require a careful analysis of the two lines of cases. It illustrates the wisdom of the following statement of the Supreme Court, which the Commission has quoted in several of its own cases:

Cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation. *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 498.⁶

⁶The Supreme Court also used this language in *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, 360 U.S. 411, 416 (1959). The Commission quoted the same language in *West Gulf Maritime Ass'n v. Port of Houston Authority*, 22 F.M.C. 420, 454 (1980); and again in *Palmetto Shipping and Stevedoring Co., Inc. v. Georgia Ports Authority*, 24 SRR 50, 75 (I.D.), adopted, 24 SRR 761 (1988).

Before discussing the two lines of cases, I first rule upon I.T.O.'s argument that All Marine does not have legal capacity to file and pursue its complaint because at one time it lost its corporate charter.

I.T.O. has contended that All Marine's "corporate charter was forfeited on October 8, 1993, and remains forfeited to this date." (I.T.O.'s Reply Brief at 6; 40-42.) This appears to be incorrect in fact. According to All Marine's president, Mr. Ciociola, the charter had been revoked because All Marine had failed to pay a 1992 tax timely, although it paid subsequent taxes properly. However, the State of Maryland revived the charter as of September 7, 1995. (See Supplemental Affidavit of Salvatore Ciociola, attached to All Marine's Reply Brief, and attached certificate from the Maryland State Department of Assessments and Taxation.) The proper standard to apply regarding a person's standing to file a complaint is federal law, here, the Shipping Act of 1984 (and corresponding sections of the 1916 Act). Under section 11(a) of the 1984 Act (and section 22(a) of the 1916 Act), "any person may file with the Commission a sworn complaint" In section 3(20) of the 1984 Act (and section 1 of the 1916 Act), "person" is defined to include "individuals, corporations, partnerships, and associations existing under or authorized by the laws of the United States" The Commission does not administer state laws governing the standing of corporations, and even if All Marine had never revived its charter, conceivably its complaint could be amended to name Mr. Ciociola as an individual complainant. However, that technical problem need not be addressed in view of the revival of the charter by the State of Maryland. As All Marine points out, the revival of its charter and restoration of All Marine to good standing with the State validates its power under state law to sue during

the period the charter was revoked. (See All Marine's Reply Brief at 13, citing *Chrysler Credit Corp. v. Superior Dodge, Inc.*, 538 F.2d 616 (4th Cir. 1976), cert. denied, 429 U.S. 1042 (1977).)

The more important matter to consider is what principles of law govern situations when a marine terminal operator or port attempts to operate under exclusive, preferential, or monopolistic privileges and whether such operators or ports must justify such practices. As All Marine correctly contends, the Commission has in past cases disapproved exclusive or monopolistic practices and has required their proponents to justify them with convincing evidence. A series of earlier cases under the 1916 Act establishes this doctrine. See *Agreements Nos. 8225 and 8225-1*, 5 F.M.B. 648 (1959), affirmed as *Greater Baton Rouge Port Commission v. United States*, 287 F.2d 86 (5th Cir. 1961); *California Stevedore & Ballast Co. v. Stockton Port District*, 7 F.M.C. 75 (1962); *A.P. St. Philip, Inc. v. Atlantic Land and Improvement Co.*, 13 F.M.C. 166 (1969); and *Perry's Crane Service v. Port of Houston Authority*, 16 SRR 1459 (I.D.), adopted with modifications, 19 F.M.C. 548 (1977). In these cases, the Commission found unlawful exclusive or monopolistic practices by the ports or terminal operators who had granted exclusive franchises of one type or another to companies working at the port or who had preferred themselves over their competitors. The Commission summarized the prevailing principles disfavoring monopolistic-type practices and requiring justification in *A.P. St. Philip, Inc.*, as follows (13 F.M.C. at 173):

The principle announced in the *Stockton Port* case, supra, applies with equal force to a situation where a vessel owner's right to select a tugboat operator is denied by exclusive contract. The arrangement before us now also eliminates competition and is prima facie unjust and unreasonable, not only to tugboat companies seeking to render service to vessels docking and

undocking at the phosphate elevators, but also to the carriers that they might serve. Thus, unless justified, the arrangement must be struck down, and it is incumbent upon respondents to furnish the justification. Moreover, as we stated in the *Stockton Port* case, however, "the burden of sustaining such practices as just and reasonable is a heavy one."

In the *Stockton Port* case, cited by the Commission, the Commission had found that the grant of an exclusive right to perform stevedoring services at a grain elevator was unlawful under the 1916 Shipping Act. The Commission explained its feeling about such practices as follows (7 F.M.C. at 82-83):

Such a practice runs counter to the anti-monopoly tradition of the United States, upsets the long-established custom by which carriers pick their own stevedoring companies, deprives complainants and other stevedoring companies of an opportunity to contract for stevedoring work on ships using Elevators' facilities, and opens the door to evils which are likely to accompany monopoly, such as poor service and excessive costs. Such a practice is *prima facie* unjust, not only to stevedoring companies seeking work, but to carriers they might serve, and the general public which is entitled to have the benefit of competition among stevedoring companies serving ships carrying goods in which the public is interested as shipper or consumer; for the same reasons it is *prima facie* unreasonable.

In later decisions, under the 1984 Act, the Commission modified the traditional doctrine. Thus, in *Petchem, Inc. v. Canaveral Port Authority*, 23 SRR 974 (1986), affirmed as *Petchem, Inc. v. Federal Maritime Commission*, 853 F.2d 958 (D.C. Cir. 1988), a case in which the Commission approved an exclusive franchise granted to a commercial tug and towing service at Port Canaveral, the Commission stated (23 SRR at 990):

Such arrangements are generally undesirable and, in the absence of justification by their proponents, may be unlawful under the Shipping Acts. However, in certain circumstances, such arrangements may be necessary to provide adequate and consistent service to a port's carriers or shippers, to

ensure attractive prices for such services and generally to advance the port's economic well-being. The burden of adducing evidence of such circumstances falls upon the port and the other parties to the exclusive arrangement, both because they are the arrangement's proponents and because evidence of that nature usually lies within their control. Nevertheless, the ultimate burden of proof in any Shipping Act challenge to an exclusive terminal arrangement or franchise rests with the party wishing to overturn the franchise.

The Commission provided further modifications or clarifications to the doctrine requiring respondent ports or terminal operators to justify monopoly-type practices in *Perry's Crane Service v. Port of Houston Authority*, cited above, in which the Commission, in adopting language from the Initial Decision, held that the lesser the degree of invasion of antitrust philosophy the less stringent was the requirement for justification. (See 16 SRR at 1476.) In *Perry's Crane*, the Commission found unlawful the Port's practice of "bumping" private crane operators from jobs already begun at various terminals in the Port of Houston in favor of the Port's own cranes, calling the practice a "mini-monopoly," which, though disfavored, did not require the same quantum of justification as would an exclusion or monopoly.

Finally, in *Seacon Terminals, Inc. v. Port of Seattle*, 26 SRR 886 (1993), in which the Commission found nothing unlawful when the respondent Port leased terminal facilities to a certain operator in preference to a previous lessee operator, the Commission held that complainant had not shown that a monopoly had existed at the Port and therefore no prima facie case of unlawfulness under the Shipping Acts and no consequent shifting of the burden of going forward with justification to the respondent Port. (26 SRR at 898.) The Commission found that "substantial evidence supports the ALJ's finding that there is an adequate level of competition at the Port." (26 SRR at 898 n. 28.)

It appears, therefore, that although monopolistic practices have been deemed to be prima facie unreasonable and violative of Shipping Act standards, they pass muster if respondents justify them. However, if there is no showing in the first place of a monopoly or something akin to a monopoly or an inadequate level of competition, there is no automatic requirement of justification, and a less restrictive practice that does not constitute a monopoly but only a lesser degree of invasion of the national philosophy favoring free and open competition requires less justification. A few of the Commission cases approving or finding lawful restrictive practices notwithstanding the national philosophy illustrate the doctrine further. I discuss six such cases: *Petchem, Inc. v. Canaveral Port Authority*, cited above, 23 SRR 974; *Seacon Terminals, Inc. v. Port of Seattle*, cited above, 26 SRR 886; *Agreements T-3310 and T-3311*, 20 SRR 712 (ALJ, F.M.C. notice of finality, January 28, 1981); *Agreement--Port Canaveral and Luckenbach S.S.*, 17 F.M.C. 286 (1974); *Perry's Crane Service v. Port of Houston Authority*, cited above, 19 F.M.C. 548 (1977); and *D.J. Roach, Inc. v. Albany Port District*, 5 F.M.B. 333 (1957).

In *Petchem*, the Commission found lawful a decision of the Canaveral Port Authority to award an exclusive franchise for tug and towing services as regards commercial, non-military cargo to one tugboat company to the exclusion of a competing company that still enjoyed military cargo business at the Port. The Commission noted that the Port's decision was based on the fact that there was a limited market for tug and towing services at the small port, that the complaining tugboat company lacked experience and equipment, and the Port was concerned about its ability to promote reliable and continuous service.

In *Seacon*, the Port had given a lease to a terminal operator to the exclusion of a competing operator, who had once held the lease. However, the Commission found the arrangement to be lawful and, as mentioned above, found that there was an adequate level of competition at the Port. The Commission noted that the Port had been concerned over the complaining operator's unprofitable situation and was impressed with the successful lessee, Matson's, finances, and deferred to the Port's discretionary business decision. The Commission also reiterated the principle that not every preference or prejudice is unlawful under the Shipping Acts but only those that are undue or unreasonable.

In *Agreements T-3310 and T-3311*, the Commission found lawful an exclusive contract between a relatively small port and a stevedore/marine terminal operator (Ceres). The Commission found that the agreement was reasonable and pro-competitive and would help the small port compete with the Port of Chicago. As I.T.O. argues, the Commission found that the Port's economic reasons for the exclusive arrangement justified it. (20 SRR at 719, cited in I.T.O.'s Reply Brief at 50-51.)

In *Agreement--Port Canaveral and Luckenbach S.S.*, the Commission found lawful an exclusive franchise agreement given by the small port to a marine terminal operator (Eller). In the case, the disappointed complaining operator, Luckenbach, which had requested permission to perform terminal services at the Port on a non-exclusive basis with Eller, was denied permission. The Port did this because it believed there was insufficient business to support two operators and believed that a division between two operators would cause inefficiencies and deterioration in the quality of existing service. The Commission deferred

to the managerial decision of the Port, a public authority and stated in this regard (17 F.M.C. at 297):

We are of the opinion that under such circumstances as currently prevail at Port Canaveral, the duly authorized Port Authority is the proper body to weigh and evaluate business risks related to that Port's efficiency in the first instance. It is not our function to gainsay the day-to-day economic decisions of this Port, nor would it be appropriate for us to do so. . . . Clearly it is not the function of this agency to substitute its judgment for that of the Port. It is, however, our duty to direct appropriate changes upon finding that the Port's action or inaction based on its own judgment is contrary to the statutes we administer.

In *Perry's Crane*, a case in which the undersigned was the presiding judge, Perry, a private crane operator who rented his crane to stevedores needing his services at various locations in the Port of Houston, alleged that the Port of Houston's practice of giving itself first call on jobs at the various locations and of "bumping" his cranes even when his jobs were still underway at particular locations was unreasonable and unlawfully preferential and prejudicial to his business. As discussed earlier, the Commission found the "bumping" practice to be unlawful as an unjustified invasion of the national philosophy favoring free competition and forbade its continuation. However, the Port's other practice, namely, giving its own cranes a first-call preference for new jobs anywhere in the Port if it could provide a suitable crane from the Port's own fleet, was found to be lawful. The Commission found that the Port's investment in cranes and its desire to use them profitably did not justify "bumping" but did justify a limited preference to itself for new jobs. The record in the case showed furthermore that there were stevedore/terminal operators at the Port who had purchased their own cranes and therefore did not always need to rent cranes from either

the Port or from the private crane operators like Perry. These stevedores, having their own cranes, were left alone by the Port, which amended its tariff to permit them to have first call on any jobs at their piers. (See 16 SRR 1459, 1462, 1468, 1469, findings nos. 18 and 28; 19 F.M.C. at 556-557 (concurring and dissenting opinion of Commissioner Morse).) Finally, the Initial Decision, adopted in pertinent part by the Commission, found that cases dealing with exclusive rights or privileges were not completely apposite because the respondent Port of Houston was losing out in its competition with private crane renters who were competing vigorously with the Port and the Port was not able to exclude all competition from the Port. (16 SRR at 1476.) Nevertheless, because the Port's preferential, restrictive anticompetitive practices did contravene the national philosophy favoring free competition and did not give the Port a certain degree of exclusivity, as noted earlier, it had to be justified, albeit under a less stringent standard. (*Id.*)

Finally, the last of the six cases is *D.J. Roach, Inc. v. Albany Port District*, 5 F.M.B. 333 (1957). In *D.J. Roach*, a small port agreed to employ only one stevedore (Cargill) to operate certain grain handling procedures at a public grain terminal and furthermore to allow the stevedore to select a company owning modern grain trimming machines (J.W. McGrath) as a subcontractor who would enable the stevedore Cargill to carry out its functions efficiently. Roach, the company competing with McGrath, contended that the exclusive subcontract with McGrath created an unreasonable monopoly. The Port and Cargill had argued that the exclusive arrangement between Cargill and McGrath was necessary in order to improve Albany's competitive position. The Commission agreed with the Port and Cargill and stated as follows (5 F.M.B. at 335):

This record reflects a situation in which Cargill held itself out to perform and through contracts with vessels agreed to perform, stevedoring services, and merely subcontracted certain stevedoring operations to other stevedoring contractors who, in turn, performed the work for Cargill and not for the vessel or the cargo. We are unable to find, therefore, that the refusal to employ complainant was a violation of section 16 First of the Act. Likewise, on this record, we are unable to find the employment of one stevedoring subcontractor to the exclusion of complainant, an unreasonable regulation or practice in connection with the receiving, handling, or storing of property, under section 17 of the Act.

In considering the many cases in which the Commission has sometimes struck down restrictive, anticompetitive practices in the shipping industry, it is well to bear in mind that despite the use of antitrust terminology, such as "monopoly," the Commission is not the Department of Justice nor the Federal Trade Commission but instead an agency that applies Shipping Act standards, not those of the antitrust laws. In recent years the Commission has confirmed this principle and resisted being drawn into complex antitrust analyses which the Commission was not set up to handle by Congress. Thus, in *Gulf Container Line v. Port of Houston Authority*, 25 SRR 1454 (1991), the Commission found unreasonable the respondent Port's practice of requiring carriers to use the Port's reefer monitoring services which the complaining carrier did not want and of refusing to supply electrical power unless the carrier accepted a related plug-in service and reefer monitoring services. The Commission rejected the idea that the reasonableness of the practices, which were apparently tying devices violative of antitrust laws, should be determined by reference to antitrust standards. Instead, the Commission confirmed that it applied Shipping Act standards, not those of the antitrust laws, and in this regard stated (25 SRR at 1459):

In any event, the question of the putative lawfulness of the Port's practices under antitrust principles is not necessary to the ALJ's ruling or the Commission's consideration of the reasonableness of these practices under the 1984 Act. Because neither the ALJ's misstatement of fact nor his analogy to the antitrust laws is necessary to his disposition of this case under the Shipping Act precedent cited, neither is adopted by the Commission. We find, however, ample justification for the ALJ's conclusion that Respondent's practices are unlawful under the 1984 Act because they fail to meet the test for reasonableness under the WGMA case cited by the Port itself. . . . The Commission has in the past found unreasonable various terminal practices involving requirements that terminal users purchase related services from certain providers granted exclusive status (case citations omitted) or from terminal operators themselves (case citations omitted) without reliance on the antitrust laws. We do so again here. (Emphasis added.)

In another recent case, *Military Sealift Command v. Sea-Land Service, Inc.*, 27 SRR 89 (ALJ 1995), supplemental Initial Decision, 27 SRR 227 (1995), pending Commission decision, the presiding judge explained that the shipping industry was subject to Shipping Act standards, not those of the antitrust laws as follows:

Congress believed that a departure from the application of antitrust laws to the international shipping industry was justified by the distinctive characteristics of that industry (legislative history citation omitted). . . . An antitrust analysis is not shown to be required in this proceeding to determine the issues presented. As Intervenor APL noted in commenting on the Prohibited Acts, "[a]ntitrust principles may be of use in making sense of these provisions, but they do not get one very far."

After careful consideration of the facts in this case, I find that the situation falls more within the six cases finding lawful various restrictive practices rather than within the line of cases finding exclusive practices to be unreasonable and unlawful under Shipping Act standards. In this case, although the purported justifications for I.T.O.'s practice of discouraging its competitor, All Marine, from doing business at South Locust Point do not

always withstand careful analysis, in the final analysis, I.T.O., a lessee at South Locust Point, having a right under its lease to provide for line handling services in addition to acknowledged stevedoring and terminal services, wishes to perform those line handling services itself rather than allow its competitor onto the premises to perform the same services, likewise with ILA line-handling personnel. On this record, I find that I.T.O. is justified in offering the services itself rather than relinquishing them to an outside competitor, All Marine, or having to compete with All Marine at its own leased premises at South Locust Point.

The record shows that since it began doing business in 1990, All Marine's share of the line handling business in the Port of Baltimore has steadily increased and that by the end of 1994, All Marine had about 70% of this business at the Port compared to I.T.O.'s share of about 20%. The record also shows that All Marine provides line handling at 19 marine terminals in Baltimore compared to three terminals operated by I.T.O., at which I.T.O. provides line handling services. It is only at one location in the entire Port, South Locust Point, that I.T.O., believing that its exclusive lease with the MPA so entitles it, excludes or restricts competition in the line handling business, and even there, All Marine has been serving one or two customers. Also, I.T.O. has no control over other parts of South Locust Point where a new stevedore tenant could begin business and select All Marine to do the line handling. The argument about whether the relevant market is the entire Port or merely South Locust Point, an argument relevant under antitrust law, is not determinative under Shipping Act standards, and, in fact, it appears that I.T.O. is actually the David while All Marine is the Goliath as far as line handling is concerned at the Port.

Because of such a relatively minor impact on the entire Port, the quantum of evidence justifying I.T.O.'s anticompetitive practices is considerably lessened. In fact, under the particular facts of this case, considering that I.T.O. has nowhere near a monopoly at the Port, All Marine has probably not made out a prima facie case of unreasonableness and has not shifted the burden onto I.T.O. to justify I.T.O.'s decision to enter the line handling business in the Port. See *Seacon*, cited above. Moreover, the fact that I.T.O. decided to enter the line handling business at South Locust Point under its lease is not prima facie unreasonable. I.T.O. needs no permission under the Shipping Acts to make such a business decision.

I.T.O.'s Three Justifications

Even though, as a lessee at South Locust Point, I.T.O. need not justify its decision to perform line handling services at South Locust Point under the Shipping Acts, the fact that the result of this decision is or will be total exclusion of All Marine from performing those services there has prompted I.T.O. to proffer three justifications: 1) that I.T.O. reasonably believed that it was granted the right to perform line handling services exclusively at South Locust Point; 2) that I.T.O. reasonably believed that it could operate more efficiently and best serve its customers by providing them with one-stop, full-service shopping; and 3) that it was reasonably concerned about All Marine's financial situation and competency. All Marine argues that each of these three defenses is without merit. (All Marine's Reply Brief at 23.) I find the first reason alone enough to justify I.T.O.'s decision to enter into the line handling business at South Locust Point, even if justification for such

decision were necessary under Shipping Act standards. The second and third reasons, however, are less persuasive in terms of evidentiary support with the third the least persuasive of all. However, as to the question of whether I.T.O. acted unreasonably, in violation of Shipping Act standards, in deciding to restrict or even exclude its competitor, All Marine, from South Locust Point, after considering the facts and analogous Commission cases, I find that I.T.O. did not act unreasonably and did not therefore violate the Shipping Acts.

1. I.T.O.'s Authority Under Its Lease

The first justification is that I.T.O.'s lease from the MPA gives it the right to perform line handling services exclusively at its leased premises at South Locust Point. It is undisputed that the terms of the current lease at South Locust Point are essentially unchanged from those of previous leases and that MPA's Terminal Services Tariff No. 14 and any subsequent tariffs are incorporated into the lease by reference. (The current lease is attached to MPA's Answer to Amended Complaint.) It is also undisputed that the lease gives I.T.O. the right to maintain and operate the leased premises as a waterborne cargo terminal and to berth in the berthing area all seagoing vessels for which I.T.O. acts as terminal operator. (SLP Lease, Section 5(2).) It is also undisputed that part of the leased premises is two-thirds of the marginal bulkhead at South Locust Point Marine Terminal and that I.T.O. is given the right of ingress and egress over the roadways extending from the main entrance of South Locust Point Marine Terminal to the leased premises and that this right is exclusive to I.T.O. save only for the concurrent right of the MPA and others

authorized by the MPA to enter and leave the premises. (See Finding of Fact No. 21 above.) It is also undisputed that the marine terminal facilities owned and leased by the MPA include the cleats and bollards on the piers, normally used to tie up vessels, as well as the entranceways used to get into and out of the terminals and that the facilities leased to I.T.O. by the MPA at South Locust Point include the bollards and cleats on the bulkheads. (Angelos Deposition at 20-21; 31.) According to the testimony of Mr. Angelos, MPA's former Executive Director, furthermore, at South Locust Point, unlike the MPA's other terminals, I.T.O. determines where vessels will berth and collects and keeps all dockage and wharfage charges paid by vessels calling at South Locust Point. MPA's Tariff No. 15, furthermore, defines "dockage" (on page 8) as "the privilege of berthing or making fast to the wharf." (This filed tariff is officially noticed pursuant to 46 CFR 502.226(a).) According to Mr. Angelos, one of the MPA's negotiators of the lease, MPA interprets the terms of the lease as not requiring I.T.O. to allow a competing stevedore to come onto South Locust Point and provide stevedoring services. Similarly, he testified that I.T.O. could oust an outside company doing chassis repair work from South Locust Point and do the work itself, under MPA's interpretation of the lease. However, Mr. Angelos also testified that MPA left it up to I.T.O. to decide who may enter and leave the South Locust Point terminal and that the question of who will provide line handling services there is "up to the steamship line and I.T.O." (Angelos Deposition at 45.)

As All Marine argues, the second strain of I.T.O.'s defense is that the MPA has implicitly endorsed I.T.O.'s decision to exclude or restrict All Marine from doing business at South Locust Point. However, as All Marine points out on brief (Reply Brief at 24),

Mr. Angelos, one of MPA's negotiators of the lease, does not support I.T.O.'s position. When asked whether the fact that the current lease gives I.T.O. the right to berth vessels at South Locust Point also gives I.T.O. the right to provide line handling services, Mr. Angelos replied, "I have no idea." (Angelos Deposition at 51.) Furthermore, All Marine argues that the previous 1979 lease, which is virtually the same as the 1993 lease, was executed at a time when line handling services were provided mainly by the Cataneo company as well as by All Marine, when I.T.O. did not perform line handling services at all at South Locust Point. Therefore, as All Marine contends, "it is impossible to conclude that the lease embodied any intent to provide for one stop shopping or to permit ITO to exclude other vendors." (All Marine's Reply Brief at 24.)

The argument that the MPA supports I.T.O.'s position or interpretation of the lease regarding I.T.O.'s apparent belief that the lease authorizes it to exclude All Marine or sanctions such a practice is further undermined by the MPA, which has filed a motion for summary judgment, seeking dismissal from the case. As mentioned earlier, the MPA has from early in the proceeding contended that the instant dispute is a private one between All Marine and I.T.O. and that MPA had done nothing to warrant its retention in the case. Citing testimony of its witness Angelos, the MPA argues that it is the practice of the MPA to allow anyone to perform line handling at marine terminals in the Port of Baltimore who can negotiate a contract with a shipowner and that the witnesses for both All Marine and I.T.O. admit that the MPA has never become a participant in determining who should or should not do line handling work at South Locust Point. MPA, citing an affidavit of its Director of Operations, Mr. James White, argues, furthermore, that it is the MPA's custom

and practice to allow the private sector to arrange for line handling with no involvement by the MPA and that the MPA believes that it should not interfere with the traditional practice of private entrepreneurs to select whom they wished to do their work. MPA states that "[i]n the case now before the Commission the MPA has not and does not wish to decide who should do line handling work in the Port of Baltimore. It believes that such decisions should be left to the private sector in conformity with past and current practice and custom." (MPA's Memorandum in Support of Motion for Summary Judgment at 3.)

As to the question whether the lease at South Locust Point authorizes I.T.O.'s line handling practices or exclusion of All Marine, MPA points out that the text of the lease nowhere even mentions "line handling" and that is so "because such work was never discussed or even considered by ITO or the MPA when the lease was negotiated." (*Id.* at 3, citing testimony of Mr. Simmers, I.T.O.'s Vice President.) Therefore, the MPA argues that the Commission should not rewrite the lease in the name of interpretation so as to include something that was left out by the parties to the lease. (*Id.* at 3-4.) MPA cites a state court decision which it contends so held, namely, *Weber v. Crown Central Petroleum Corp.*, 214 Md. 115 (1956). (*Id.*)⁷ The MPA also argues that no mention of line handling was made in an amendment to I.T.O.'s current lease on June 19, 1995. Finally, the MPA argues that the MPA tariff is irrelevant because the tariff likewise makes no mention of line handling and its reference to berthing relates only to the MPA's right to prohibit vessels from being berthed at MPA pier facilities where such berthing could prove hazardous to the facility or be otherwise detrimental to the MPA. (*Id.* at 4.) The fact that the MPA's tariff

⁷A copy of the full text of this court decision is attached to the MPA's Motion for Summary Judgment as Exhibit 5.

refers to "dockage," the MPA contends, does not mean that the tariff has any relevance to the question whether I.T.O. can provide line handling services at South Locust Point under the lease. According to Mr. David J. Ziolkowski, MPA's Manager, Intermodal Pricing and Tariffs, the MPA "does not provide nor does it price, regulate or control the service of handling lines . . . of vessels berthing at its facilities. That service has been, is presently and will continue to be provided by the private sector, preferably on a competitive basis." (Affidavit of David J. Ziolkowski at para. 3, attached to MPA's Memorandum in Support of Motion for Summary Judgment.) As regards the MPA's tariff reference to "dockage" Mr. Ziolkowski swears that the dockage rules and regulations only "provide MPA with the legal vehicle to order vessels off of MPA's piers if they constitute a hazard to property or personnel." (*Id.*) He concedes that the MPA tariff defines "dockage" to mean "the privilege of berthing or making fast to the wharf" However, he says "dockage" is only "a parking charge assessed against a vessel for use of MPA's dockage space." (*Id.*) He therefore concludes that "[a]ny contention that MPA's tariff or specifically, MPA's dockage provisions of its Terminal Services Tariff have any relevance or application, actual or implied, to vessel line handling is incorrect." (*Id.* at para. 4.)

In reply to the MPA's Motion for Summary Judgment, All Marine agrees with the MPA and argues that "the motion demonstrates that the lease and tariff are utterly irrelevant to ITO's position and to this dispute. (footnote omitted.) Accordingly, a finding should be made that ITO's practice is not justified, sanctioned or compelled by the lease or by the tariff, and MPA should therefore be dismissed as a party." (AMM's Reply to Motion

at 2.) All Marine adds that this proposition is apparent from the plain words of the lease and tariff.

I.T.O., however, opposes the MPA's motion. I.T.O. argues that there are factual disputes that would preclude granting a motion for summary judgment. However, as to the question whether MPA's lease to I.T.O. gives I.T.O. the right to perform line handling services at South Locust Point or, if so, to provide them exclusively, I.T.O. argues that the MPA should remain in the case unless the Commission rules that the lease in question gives I.T.O. a broad grant of powers, including the power to provide line handling services. (I.T.O.'s Memorandum in Opposition to MPA's Motion at 13.) I.T.O. argues that the MPA entered into an exclusive lease with I.T.O., which lease incorporates by reference MPA's tariff and that the lease and tariff give I.T.O. the legal right to perform all marine terminal services, including line handling, at South Locust Point. I.T.O. describes the issue as follows (*Id.* at 3.):

The key issues in this case are whether the lease and Tariff convey the broad right to I.T.O. to perform all terminal operations, including line handling, at South Locust Point, and, if so, whether that grant of rights violates the Shipping Acts.

The issue here obviously involves a question of contract interpretation and determination of the intention of the parties. That question becomes more difficult to answer when one of the contract signatories disagrees with the other contract signatory as to their intentions. Of course, even if the lease should be interpreted to allow I.T.O. to perform line handling services at South Locust Point, private parties cannot authorize violations of law, and every person is presumed to enter into a contract with no intention

of violating law. In other words, if I.T.O. has exceeded reasonableness in excluding All Marine from the line handling business at South Locust Point so as to violate the 1984 or 1916 Shipping Acts, such conduct cannot be authorized by a lease agreement.

Marine terminal lease agreements, such as the instant one between the MPA and I.T.O., have been regarded as being subject to section 15 of the 1916 Act, the predecessor to section 5 of the 1984 Act.⁸ The Commission has regarded them not as mere private agreements but as agreements impressed with a public interest. In interpreting their scope, the Commission has used principles of contract construction and has sometimes construed the meaning of such agreements even if the parties contend that their intention was otherwise. The Commission has found agreements to authorize certain practices based on consideration of the history of past practices in the trades concerned and a reasonable interpretation of agreement language even if a party to the agreement disagreed with the interpretation. However, when it was argued that the agreements authorized new practices having widespread adverse effects on persons outside the agreement, the Commission has rejected such arguments and has required agreement parties to file amendments with specific authorizing language. See, e.g., *Cancellation-Consolidation Allowance Rule*, 20 F.M.C. 858 (1978); *Pacific Coast European Conference Rules 10 and 12*, 14 F.M.C. 266 (1971); *Persian Gulf Agreement 7700--Establishment of a Rate Structure*, 10 F.M.C. 61 (1966), affirmed as *Persian Gulf Outward Freight Conference v. F.M.C.*, 375 F.2d 335 (D.C. Cir. 1967).

⁸The subject lease is attached to the MPA's Answer to the Amended Complaint. It is entitled "Agreement & Lease Between the Maryland Port Administration and ITO Corporation of Baltimore." On the title page it states "Federal Maritime Agreement No.: _____." I am advised that this agreement has been exempted from the normal filing requirements by the Commission. See 46 CFR 572.311.

A consideration of the following cases illustrates the fact that the Commission has used principles of contract construction when the language of agreements was not specific. The Commission has further held that agreement interpretation can be a question of law under some circumstances and that the intention of the parties to such agreements is "only one relevant factor." See discussion in *The Brazil Agreements*, 25 SRR 1, 15-16 (I.D.) adopted with clarifications, 25 SRR 755 (1990), affirmed as *A/S Ivarans Rederi v. United States*, 938 F.2d 1365 (D.C. Cir. 1991). In adopting and clarifying certain portions of the Initial Decision, furthermore, the Commission emphasized that the interpretation of the scope of authority in the subject agreement was made "by objective reference to the language in the Agreement and the practices in the trade at the time of [the Commission's] approval." (25 SRR at 766.)

In *Investigation of Overland/OCP Rates and Absorptions*, 12 F.M.C. 184 (1969), affirmed as *Port of New York Authority v. F.M.C.*, 429 F.2d 663 (5th Cir. 1970), the Commission found requisite authority in several West Coast conference agreements for the member lines to engage in a certain type of ratemaking despite objections from a number of competing carriers and despite the absence of express language in the conference agreements. The Commission considered the particular circumstances and the history of previous practices. More specifically, the Commission was asked to determine if the conference agreements authorized the members to establish certain types of proportional ocean rates known as "overland/OCP" rates, whose purpose was to compete with East and Gulf Coast carriers serving shippers located in the central part of the United States. Also, the Commission had to determine whether the conference agreements authorized the

members to enter into agreements with rail carriers to absorb a portion of terminal charges at Pacific Coast ports on interior movements. Although there was no mention of these practices in the conference agreements, the Commission found that they were authorized by those agreements as incidental to routine ratemaking and, regarding the rates, as having been practiced for many years before the agreements were filed and approved by the Commission. The Commission also found that these practices were not anticompetitive but pro-competitive and necessary to enable the West Coast carriers to enjoy their right to compete.

Certain remarks of the Commission bear considering in the instant case in view of I.T.O.'s contentions that its entering into line handling at South Locust Point increases competition and its desire to compete with All Marine and with other stevedore/marine terminal operators in Baltimore. Thus, the Commission stated (12 F.M.C. at 206):

It is a cardinal regulatory principle that a common carrier may compete for traffic. . . . There is manifestly no provision of the Shipping Act which can be construed to forbid a carrier to meet competition or to enlarge the scope of its patronage and its volume of business if it can do so without unfairness to those whom it serves. . . . Reductions to meet competition are proper if they do not result in unremunerative or unlawful rates or go beyond the limits of competition which rest within the managerial discretion of the carrier. (Case citation omitted.) (Emphasis added.)

As to the routine nature of the overland/OCP ratemaking, which the Commission found to be authorized by the conference agreements despite the total lack of language in those agreements referring to such ratemaking, the Commission stated (*Id.*):

We have decided that respondent conferences have general ratemaking authority under approved section 15 agreements which authority extends to

the issuance of tariff rates, rules, and regulations provided that such tariffs are agreed upon pursuant to normal, recognized ratemaking factors. The overland/OCP tariffs have been established pursuant to normal, recognized ratemaking factors, and, therefore, they constitute ratemaking duly authorized by the respective conference agreements.

However, in order to "avoid any confusion and to avoid lengthy litigation in the future, as in this case," the Commission ordered the respondent conferences to file amending, clarifying language to their basic agreements. (12 F.M.C. at 208-209.)

The Commission explained its decision in the *Overland/OCP* case in *Pacific Coast European Conference Rules 10 and 12*, cited above, 14 F.M.C. 266. In commenting on the *Overland/OCP* decision, the Commission explained as follows (14 F.M.C. at 278):

The determination that the particular rate structure there in question was authorized by the basic agreements of the conferences employing the rates did not depend upon the length of time those rates had been in effect. Rather, it was concluded that the rate-fixing authority expressly spelled out in the the agreement (sic) could reasonably be construed to include the authority to fix rates, and further that since the rates in question had been widely used continuously from a time preceding approval of the agreements, the approval when granted could be naturally interpreted to allow a continuation of the activity. It is not the "newness" of an activity which determines whether that activity is within the scope of an approved agreement. Only the language of the agreement and its reasonable interpretation can do that. (Case citation omitted.) (Emphasis added.)

It is apparent, however, that parties cannot give themselves authority that would violate law and that the Commission would never approve such an agreement. Thus, in *Pacific Coast European Conference*, cited above, a conference rule (Tariff Rule 10) by which the carriers would limit the number of calls at various port locations was disapproved as being "contrary to the public interest" because it contravened another federal statute

(section 205, Merchant Marine Act, 1936). In *Persian Gulf Agreement 7700--Establishment of a Rate Structure*, cited above, 10 F.M.C. 61, the conference wanted to implement a discriminatory rate structure by which they would fix higher rates on American-flag ships than on foreign-flag and claimed authority under their basic conference agreement, which authorized concerted ratemaking. However, the Commission found the proposed discriminatory rate system to be entirely new and outside the scope of authority conferred in the conference agreement.

Finally, in *Cancellation-Consolidation Allowance Rule*, 20 F.M.C. 858 (1978), the Commission interpreted several conference agreements to determine if they authorized payments of consolidation allowances to off-pier cargo consolidators, and, if so, if they authorized conferences to suspend such payments. The Commission found the conference agreements to authorize the system of payments, although the agreements' language did not mention consolidation allowances in those terms but held that discontinuance of such payments was a new course of conduct and a new means of regulating and controlling competition, and was not limited to pure regulation of intraconference competition. (20 F.M.C. at 867.) Such new practice was found not to be authorized by the conference agreements and to be prima facie contrary to the public interest and to require amendments to the conference agreements to be filed and approved. (20 F.M.C. at 868.) In *Cancellation-Consolidation Allowance Rule*, furthermore, the Commission stated that section 15 agreements were "something more than a mere meeting of the minds of the parties signatory (footnote citation omitted)." The Commission, however, likened such agreements to private contracts regarding "the set of general principles of construction by

which they are to be interpreted. A section 15 agreement, like any contract, is to be construed insofar as possible by interpretation of the language contained within the four corners of the document." (20 F.M.C. at 866.) However, even if language in an agreement could be broadly construed to authorize certain conduct, the Commission held that such language is "not conclusive of the scope of the agreement. This must be done by a consideration of external circumstances which may be relevant to the scope of the" [particular relevant agreement language]. (*Id.*) Interestingly, although the Commission found that the conference agreements authorized the consolidation allowance system and that the Commission had acquiesced in such system's implementation over the years, it refused to find that the agreements authorized termination of the payment system, which termination would have had adverse effects on cargo consolidators who had grown dependent on the payments over the years. (20 F.M.C. at 867.)

I now apply the foregoing principles of contract interpretation to the subject lease agreement.

When attempting to interpret an agreement in an effort to ascertain the intention of the signatory parties, one first turns to the language used, as the cases, cited above, indicate, and interprets the language as would a reasonable person in the position of the signatory party. There is specific language in the lease agreement which, by a fair reading, any reasonable person in the position of the MPA or I.T.O. would interpret to mean that I.T.O. was given the right to perform line handling services at South Locust Point as a necessary auxiliary to I.T.O.'s main business of stevedoring and operating a marine terminal.

In the very first section of the lease agreement (Section 1), it is stated that:

ITO agrees to use MPA's terminal facilities and services at South Locust Point . . . for loading, discharging, and storage of cargoes and for operations supplemental thereto. (Emphasis added.)

Elsewhere in the lease agreement (Section 5, para. 2), it is stated that:

ITO shall have the right to berth in the berthing area all vessels, including barges for which ITO acts as terminal operator for loading or discharging waterborne cargo. ITO may berth other vessels at South Locust Point Marine Terminal with MPA's permission and such permission shall not be unreasonably withheld. (Emphasis added.)

Furthermore, in Section 3, para. 2(a), of the lease agreement, according to the MPA's own witness, Mr. Angelos, I.T.O. is authorized to collect all "dockage." "Dockage" is defined in the MPA's Tariff No. 15, Rule 34-080, as the "privilege of berthing or making fast to the wharf." "Fast" is defined in DeKerchove's International Maritime Dictionary (2d ed. 1961) at 276 as:

A rope or chain by which a vessel is secured to a wharf, pier, quay, etc. It is named according to its position: bow fast, head fast, quarter fast or stern fast. Also called a mooring line.

There is other specific language in the lease agreement which helps explain what a reasonable lessor and lessee intended by the above language. Thus, the lease agreement (in Section 5, para. 7) requires that I.T.O. provide its customers with "terminal and stevedoring services which meet or exceed the top quality standards recognized in the industry," and provides for the MPA to hear complaints from I.T.O.'s customers about the quality of I.T.O.'s services, and even provides for a "default" in the lease "[i]f a pattern of

repeated valid complaints about ITO's services develops and these complaints are not resolved to the customer's satisfaction. . . ."

Although there is some disagreement about whether line handling can be considered to be a part of stevedoring, a marine terminal service, both, or neither, there is evidence that it is considered to be part of stevedoring, a marine terminal service, or both. A report published by the Maritime Administration states "services typically common to all terminals include: vessel berthing and line handling . . ." (See *The U.S. Stevedoring and Marine Terminal Industry (MarAd 1993)* at 6-7, Exhibit D, attached to I.T.O.'s Reply Brief). Another report showed that most persons in the shipping industry who were surveyed believed that line handling was part of stevedoring or marine terminal services or both. (See Finding of Fact No. 3.) In one previous Commission decision, the Commission found that even a tug and towing operation was a "terminal function intimately related to the receiving, handling . . . of property." (See *A.P. St. Philip v. Atlantic Land and Improvement Co.*, cited above, 13 F.M.C. at 172.)

When one considers that any stevedore/marine terminal operator cannot reasonably be expected to perform stevedoring or marine terminal services if the customers' ships are not first tied up properly to a pier, it is apparent that line handling is a necessary auxiliary service, at least as much as towing ships to their berths. Furthermore, it is not likely that the MPA would expect its lessee, I.T.O. to perform stevedoring and marine terminal services "which meet or exceed the top quality standards recognized in the industry," as the lease expressly provides, and have no interest in the necessary, auxiliary services, such as tying up ships properly. One wonders what the MPA would do under the lease if I.T.O. made no

arrangements for proper mooring of vessels, and such negligence caused carrier customers to suffer costly delays and to make "repeated valid complaints about ITO's services," which, if unsatisfied, could result in a "default," according to the language of the lease agreement. When one also considers that the lease premises cover the particular locations and fixtures that are used to tie up ships, it is reasonable to conclude that a reasonable lessor, such as the MPA, did not intend to bar I.T.O. from doing line handling work at South Locust Point, but, as the MPA contends, left the matter of who would do the work up to its lessee, I.T.O., and I.T.O.'s carrier customers.

As I.T.O. argues, the fact that the lease nowhere specifically refers to the words "line handling" is irrelevant. (I.T.O. Memorandum in Opposition to MPA's Motion for Summary Judgment at 6.) The lease agreement also makes no mention whatsoever of other functions involved in operating a waterborne cargo terminal, such as stripping and stuffing containers, weighing cargo, processing documentation, moving cargo on and off of chassis, etc. Yet these are functions normally involved in operating a waterborne cargo terminal. (See *The U.S. Stevedoring and Marine Terminal Industry* (MarAd 1993) at 7-8, attached to I.T.O.'s brief as Exhibit D.)

At the time the current and previous lease agreements were negotiated, the custom at the Port was for outside companies, such as Cataneo and All Marine, to do the line handling work at the various marine terminal locations throughout the Port, and the subject of line handling never came up during the lease negotiations. Also, there is no evidence that there had been problems at the Port with line handling companies but there is evidence that line handling is not the factor that persuades carriers to choose a particular stevedore.

Rather the carriers are concerned about who is doing the stevedoring and marine terminal operations. Consequently, there is no specific language in the lease agreement referring to "line handling." However, line handling is a necessary auxiliary service before stevedore/marine terminal operators can begin to perform their main functions or to release vessels. Consequently, a fair reading of the lease agreement and the specific language in the lease agreement authorizing I.T.O. to perform "operations supplemental thereto" and to "berth" vessels indicates that a reasonable lessor would intend its lessee, I.T.O., to perform all services necessary and auxiliary to stevedoring and marine terminal operations, such as line handling, or to have such services performed at South Locust Point by an outside company, if I.T.O. so chose, as had been the previous custom, in order to fulfill I.T.O.'s obligations under the lease.

The above conclusion does not mean that the lease authorizes I.T.O. to violate law, in this case, the Shipping Acts, or that the broad authority for I.T.O. to decide how it wishes to have line handling services performed at its leased premises answers the question of whether I.T.O.'s practice in restricting or excluding its competitor, All Marine, from South Locust Point, violates the Shipping Acts. To determine that question, it is necessary to consider the various Commission cases discussed earlier relating to exclusive or preferential practices at various ports. I find no evidence on this record that the MPA is anything more than a neutral bystander to a dispute between its lessee, I.T.O., and a third party, All Marine, as regards the reasonableness of I.T.O.'s competitive decision under Shipping Act standards. Consequently, I agree with the MPA and All Marine that the MPA should be dismissed from the proceeding. It is so ordered.

2. The Benefits of One-Stop Shopping

The second defense offered by I.T.O. is its belief that its practice of offering one-stop shopping is efficient for itself and desirable for its carrier customers. The basis for I.T.O.'s belief that its one-stop shopping is desirable and beneficial is the testimony of Mr. Simmers, its vice president, in his deposition and in his later affidavit (Exhibit A to I.T.O.'s Reply Brief). He testified and swore in his affidavit that when he came to I.T.O. in Baltimore, he had already had almost 20 years of prior experience in the line handling business, which he had acquired at other ports where I.T.O. and another company had furnished line handling services. He testified, furthermore, that I.T.O. and its sister and parent companies had provided line handling services historically at other ports, including New York, New Orleans, and several others, for decades, and that I.T.O. had considered line handling to be part of its marine terminal services at those ports. Based on his experience, when Mr. Simmers arrived at Baltimore, he believed that offering a "seamless" complete service would be more efficient and cost effective for I.T.O., and when the previous dominant line handling company at Baltimore, Cataneo, went out of business in mid-1993, I.T.O. began offering line handling service at South Locust Point. Although initially confining I.T.O.'s line handling at South Locust Point, carrier customers calling at two other locations in Baltimore where I.T.O. operated, but not exclusively, asked I.T.O. to perform line handling at those locations when they discovered that I.T.O. had picked up Cataneo's labor force. Thereafter I.T.O. began offering line handling services at those other two locations as well.

Mr. Simmers also testified that carriers select a stevedore/terminal operator because of the stevedoring/terminal operation, not line handling, which is only auxiliary to the

stevedoring, and there is no testimony that the actual physical operations of line handling services are better when performed by union line handlers working for I.T.O. rather than when they work for All Marine. Nor is there any testimony from carriers' agents or other customers that I.T.O.'s one-stop shopping is more desirable from the customers' point of view than the alternative practice which prevails over most of the Port, namely, an outside company like All Marine servicing and billing customers separately from the stevedore/marine terminal operator. As All Marine comments on brief, the thrust of Mr. Simmers's testimony was that the one-stop system would enable I.T.O. to compete better and increase its profits. However, there is nothing wrong with a company attempting to increase its profits so long as its methods of competition do not run afoul of law. See *Overland/OCP Rates*, cited above, 12 F.M.C. at 206. In the final analysis, the argument that I.T.O.'s one-stop shopping is a better and more efficient way to run a marine terminal business rests on Mr. Simmers's experience of almost 20 years at other ports. It would have been helpful for I.T.O. to produce evidence from its customers who previously used Cataneo and the alternative multiple billing system to show that the carrier customers preferred I.T.O.'s new system. However, given that I.T.O. has nothing near a monopoly throughout the Port and not even all the line handling work at South Locust Point, at least at the time this record was developed, the quantum of evidence to justify its business decision is lessened or perhaps non-existent. At the least, the new I.T.O. system should not harm its carrier customers nor cause inefficiencies at its terminals, and I.T.O. was entitled to rely on the opinion of its experienced vice-president, that it was a better way to run I.T.O.'s business.

3. All Marine's Financial Situation and Competency

The third reason which I.T.O. offers to justify its exclusionary practice at South Locust Point is its purported concern about All Marine's financial situation and competency. As All Marine points out on brief (Reply Brief at 25-26), Mr. Simmers testified at his deposition that I.T.O. was concerned about All Marine when All Marine began doing business, which happened in 1990. However, as All Marine notes, All Marine was permitted to continue performing line handling at South Locust Point until 1993. It was not until 1993, when Cataneo went out of business, that I.T.O. began to perform line handling itself and to exclude or restrict All Marine, and Mr. Simmers's deposition testimony indicates that it was more probable than not that I.T.O. decided to enter the business of line handling after Cataneo's departure to earn new profits because of Cataneo's withdrawal. There is no testimony in the Simmers deposition that shows that in mid-1993 I.T.O. decided to exclude or restrict All Marine from South Locust Point because of I.T.O.'s concern about All Marine's delinquent tax payments to the State or to the STA funds. Even if I.T.O. were concerned about these matters, furthermore, there is no evidence that All Marine was ever prevented from providing its line handling services at any location in Baltimore where it was doing business because of troubles with the ILA or because of its financial problems with bad debts or difficulties in getting loans from banks. As All Marine also points out on brief, Mr. Simmers admitted that All Marine's financial condition was not the reason for I.T.O.'s original decision, and indeed the decision was made "long before Cataneo opted out of it" (i.e., the line handling business). (Simmers deposition at 87-88.) Similarly, there is no evidence of specific instances in which All Marine fouled up by failing to tie a ship to the

correct berth despite the fact that Mr. Simmers was asked to provide specifics, and some eight months later in an affidavit, did not do so. Also, his sworn statements in the later affidavit were not tested by cross-examination, unlike those made in his earlier deposition. All Marine argues that between the earlier deposition and the later affidavit, in which Mr. Simmers claims that I.T.O.'s concerns about All Marine's finances and competency led to its decision to enter the line handling business, the earlier deposition is more reliable. I agree. See *Darnell v. Target Stores*, 16 F.3d 174, 176 (7th Cir. 1994); *Jenkins & Associates Inc. v. U.S. Industries, Inc.*, 736 F.2d 656 (11th Cir. 1984). There is similarly no evidence in this record that All Marine has provided line handling services throughout the Port (at 19 locations) incompetently or that its financial problems impeded its performance throughout the Port. Nor does the testimony to the effect that Mr. Ciociola offered payments to potential customers in mid-1993 and later in an effort to obtain business seem relevant to I.T.O.'s original decision made long before Cataneo left Baltimore in mid-1993. At best such evidence, some it based on rumors, might help justify a decision to exclude All Marine from I.T.O.'s premises if the information had been known to I.T.O. before it made its decision. Under the circumstances, the justification appears to be mainly a post-hoc rationalization and not the real reason why I.T.O. decided to do line handling at South Locust Point exclusively.

I now address the main question, namely, was I.T.O.'s decision to restrict or even totally exclude its competitor, All Marine, from performing line handling services at South Locust Point reasonable and lawful under Shipping Act standards. I conclude that it was.

Earlier in this decision I discussed six cases in which the Commission found lawful restrictive or monopolistic practices at various ports and held that the facts in this case show that this case is more similar to these six cases than to other cases in which the Commission has struck down restrictive practices at ports. As discussed, the Commission found the restrictive practices to be lawful and reasonable for a variety of reasons, e.g., that there was not enough work for more than one operator at the small port, that the port's decision was necessary to enable it to compete with larger nearby ports, that the disadvantaged complainant was not financially strong, that the port's decision was necessary to enable the terminals to offer efficient service of quality, etc. In five of these cases the Commission deferred to the managerial discretion of the port involved. In one (*Perry's Crane Service v. Port of Houston Authority*), the Commission did not so defer. However, in that case the Commission permitted the Port to enjoy a limited self-preference for new jobs when it was competing with private crane operators. Further consideration of three of these cases in particular supports the conclusion that I.T.O.'s decision to commence line handling services at its own location in South Locust Point and to exclude or restrict its competitor, All Marine, at that location was not unreasonable. The three particular cases are *Petchem*, *Perry's Crane*, and *D.J. Roach*.

In *Petchem v. Canaveral Port Authority*, 23 SRR 974, as mentioned earlier, the Commission found lawful the Port's decision to award an exclusive franchise to a tug and towing company (Hvide) for the commercial cargo business at the small Port. The disadvantaged, complaining company, Petchem, was, however, doing business with military cargo at the Port. The Port was concerned that there was insufficient business for both

companies as well as Petchem's lack of equipment and experience. What is also interesting about this case is that the presiding judge had recommended a system of competitive bidding in the Initial Decision (See 23 SRR 480, 499 (I.D.)), and had ordered that the Port allow Petchem to perform towing services for commercial cargo together with the preferred company (Hvide or "PCT" as it was also called) until the Port had established the need for an exclusive franchise after an open bidding system. The Commission rejected the suggestion. In the instant case, All Marine's president, Mr. Ciociola, who already enjoys some 70% of the line handling business at the Port, has asked for an opportunity to compete at South Locust Point. As the Commission did in *Petchem*, however, I find no reason to establish a competitive system at I.T.O.'s leased premises and also find no deterioration of service at South Locust Point if I.T.O. performs the line handling itself.

In *Perry's Crane Service v. Port of Houston Authority*, 19 F.M.C. 548, as discussed earlier, the Commission found unreasonable the Port's practice of "bumping" private crane operators, with whom the Port was competing, from jobs that were not yet completed at various locations in the Port. However, the Commission did permit the Port to give itself a limited preference ("first call") on new jobs if the Port had available a crane that was suitable for the ship at the location concerned. What is of particular interest in the case is the fact that there were stevedores at the Port of Houston who had purchased their own cranes and did not always need to rent cranes from either the Port or the private operators like Perry. These stevedores were left alone and were not required to submit to the Port's first-call preference, and, indeed, the Port had amended its tariff to free these stevedores from being forced to take a Port crane on new jobs if the Port had a suitable crane

available. In the instant case, I.T.O. seems capable of doing all the line handling work itself at its own location at South Locust Point. I see no reason to force I.T.O. to allow a competitor to work at I.T.O.'s leased premises any more than the Port of Houston thought it necessary to require stevedores owning their own cranes to use the Port's cranes on new jobs if the Port had suitable cranes available.

The third case in particular is *D.J. Roach v. Albany Port District*, 5 F.M.B. 333. In that case a small Port agreed to allow one stevedore (Cargill) to perform grain handling and to subcontract with a company owning modern equipment to carry out the stevedore's functions efficiently.⁹ The Commission refused to find that the Port and Cargill had acted unreasonably, in violation of sections 16 and 17 of the Shipping Act, 1916, when Cargill selected one company (McGrath) to the exclusion of the complaining company, D.J. Roach, to help Cargill perform its functions. In the instant case, I.T.O. has chosen itself to employ line handlers and do the work at South Locust Point just as Cargill selected McGrath to do the specialized grain-handling operation. I find no reason to disturb I.T.O.'s managerial decision that such is the best way to run its business efficiently.

Ultimate Conclusions

All Marine Moorings, Inc., an employer of line handlers doing business at 19 locations throughout the Port of Baltimore and, as of record, enjoying some 70% of the

⁹The Commission accepted the Recommended Decision of C.B. Gray, Examiner in the case. That Recommended Decision contains detailed findings of fact enabling the reader to understand better the Commission's decision. The Recommended Decision, however, is not reported. I have furnished the parties with copies of it as well as furnishing one for the Commission's official docket record.

line handling business at the Port, complains that it has been unlawfully excluded from competing with the lessee, I.T.O., at one location, South Locust Point, where I.T.O. wants to offer complete full services itself without using an outside, competing employer. The service in question, line handling or mooring, consists of tying up vessels at the terminal prior to unloading and untying them after loading and is a necessary auxiliary service to stevedoring and marine terminal services. I.T.O. offers this service itself, together with its stevedoring and terminal operations, at several other ports. I.T.O. contends that offering this service is authorized by its lease with the Maryland Port Administration, that it is a more efficient way to run its business, and that All Marine has had financial difficulties and other difficulties in the past.

All Marine contends that I.T.O. has established a monopoly at South Locust Point and that such monopoly has to be justified, which justification I.T.O. has failed to show. The MPA contends that it has done nothing, that the present dispute is a private one between its lessee, I.T.O., and a third party, All Marine, and that the lease between the MPA and I.T.O. nowhere mentions line handling and does not cover it. Therefore, the MPA asks to be dismissed from the proceeding.

The Commission has gone both ways in previous marine terminal cases involving restrictive, exclusive, or monopolistic practices depending on the facts. In one line of cases, the Commission has disapproved such practices because of failure to justify the contravention of the national philosophy favoring free and open competition. In another line of cases, however, the Commission has found such practices to be reasonable because of the particular facts at the ports involved. When there has been no showing of

monopolistic practices or elimination of adequate competition, the Commission has not required justification or, if so, less justification than when such practices were shown to exist by complainants. In the instant case, on the facts of record, I find that the situation more closely resembles those cases in which the practices were found to be reasonable. I conclude also that I.T.O. needs no justification for its decision to offer line handling services at its leased location at South Locust Point. I find that the lease between I.T.O. and the MPA specifically refers to vessel "berthing" and "dockage" and leases the premises to I.T.O. for the purpose of "loading, discharging, and storage of cargoes and for operations supplemental thereto." I find that it can reasonably be read to authorize I.T.O. to perform supplemental auxiliary services, such as the mooring of vessels. The lease, however, cannot authorize unlawful practices and does not therefore determine whether I.T.O.'s exclusive or restrictive practice is lawful under the Shipping Acts. In any event the MPA, which has consistently asked to be dismissed from the proceeding, is essentially a neutral bystander and is accordingly dismissed, as it requests.

There are at least six previous Commission cases in which the Commission has found certain exclusive or restrictive competitive practices at various ports to be reasonable and lawful under the Shipping Acts, although in one of those cases the Commission permitted one practice only under certain conditions and outlawed the other. The Commission permitted these restrictive practices for several reasons, for example, when the ports were too small to support more than one operator, where it was necessary to give exclusive operating privileges to one company for competitive or efficiency purposes, and for other reasons. In the instant case, I.T.O. has made a business decision to offer line handling

services itself at its leased premises without the need to allow a competing company to employ the same or similar union line handlers to do the work. This is I.T.O.'s practice at several other ports, and I conclude that there is no valid reason to interfere with this decision for the sake of a competitor which has by far the largest share of line handling work throughout the Port. In one of the six cases cited, the Commission rejected the suggestion of the presiding judge that the Port establish a system of open competition between tugboat companies for the limited work available at the Port. In another case, the Port itself had respected the right of stevedores owning their own cranes to be left alone and to be allowed to do their own stevedoring work without being forced to use the Port's cranes because the Port had cranes available. In still another case, the Commission found reasonable an arrangement by which the stevedore was allowed to select a company as subcontractor to enable the stevedore to fulfill its stevedoring function, although a complaining company had contended that the arrangement was an unlawful restriction on competition.

When enacting the Shipping Act of 1984, the Congress announced a declaration of policy in Section 2(1), namely, that:

The purposes of this Act are--(1) to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs. . . . (Emphasis added.)

The record in the instant case provides an example of a case in which there should be a "minimum of government intervention" in I.T.O.'s managerial decision to do its own line handling work at its own leased premises without being forced to allow an outside

competitor to employ the same or similar union to do the work when I.T.O. operates in such fashion at other ports and its carrier customers have not complained about the quality of its service.

I conclude, therefore, that I.T.O.'s decision to restrict or eliminate its competitor, All Marine, from I.T.O.'s leased premises at South Locust Point is not unreasonable or unlawful under the Shipping Acts. The complaint is therefore dismissed, and there is consequently no need to conduct further proceedings to hear All Marine's evidence on the question of its alleged damages and claim for reparations.

Norman D. Kline

Norman D. Kline
Administrative Law Judge

Washington, D.C.
October 6, 1995