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**Before the
Federal Maritime Commission**

AMERICAN WAREHOUSING OF NEW YORK, INC.,)

Complainant,)

v.)

THE PORT AUTHORITY OF NEW YORK AND)
NEW JERSEY,)

Respondent.)

) Docket No. 04-09
) and
) Docket No. 05-03

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	<i>Page</i>
I. INTRODUCTORY STATEMENT	1
Procedural Background.....	4
AWI Witness Credibility	6
II. PROPOSED FINDINGS OF FACT.....	12
III. PROPOSED CONCLUSIONS OF LAW ALLEGED PREFERENCE AND PREJUDICE.....	18
A. AWI Has Failed To Demonstrate That It Is Similarly Situated With Other Allegedly Preferred Marine Terminal Operators.	18
B. AWI Has Been Treated Differently By The Port Authority, But That Unequal Treatment Is Justified By Differences In Transportation Factors.	20
1. Non-Payment Of Rent.....	20
2. Squatting On The Northern Half of Pier 7.....	21
C. Alleged Unreasonable Refusal To Deal	22
D. Docket No. 05-03 Allegations.....	23
VI. CONCLUSION.....	25
CERTIFICATE OF SERVICE	26

TABLE OF AUTHORITIES

Page(s)

Cases

California Shipping Line, Inc. v. Yangming Marine Transport Corp.,
25 SRR 1213 (1990) 19

Ceres Marine Terminal, Inc. v. Maryland Port Administration,
27 SRR 1251(1997) 18, 19

Statutes, Rules and Regulations

46 U.S.C. app. § 1709(d)(1)..... 4

46 U.S.C. app. § 1709(d)(3)..... 4

46 U.S.C. app. § 1709(d)(4)..... 4

46 U.S.C. app. § 1709(b)(10)..... 4

46 U.S.C. app. § 1709(b)(13)..... 4

Shipping Act of 1984 §10(d)(1)..... 4

Shipping Act of 1984 § 10(d)(3)..... 4

Shipping Act of 1984 § 10(d)(4)..... 4

Shipping Act of 1984 §10(b)(10)..... 4

Shipping Act of 1984 §10(b)(13)..... 4

46 CFR 502.221(d) 1

Rule 221(d) of the Commission’s Rules of Practice..... 1

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RESPONDENT’S BRIEF

Comes now the Port Authority of New York and New Jersey (“the Port Authority”), and files this brief in the above-captioned consolidated proceedings. The brief will, in accordance with Rule 221(d) of the Commission’s Rules of Practice 46 CFR 502.221(d), consist of: (1) an introductory opening statement (2) proposed findings of fact; and (3) argument and proposed conclusions of law.

I. INTRODUCTORY STATEMENT

American Warehousing of New York, Inc., (“AWI”) alleges that the Port Authority’s refusal to enter into a “long-term” lease with AWI for warehouse facilities located on the Brooklyn waterfront violates the Shipping Act. The Port Authority denies that a violation of the Act has been committed and submits that based on the facts elicited in this matter, its refusal to enter into such a lease with AWI is completely appropriate.

AWI submits that it is entitled to a long-term lease given the fact that the Port Authority has entered into long-term arrangements with certain other “marine terminal

operators” located within the Port District. The Port Authority readily acknowledges that it has, and will continue to enter into such long-term relationships to the extent that it, in the exercise of its business judgment, determines that such arrangements are in the best interests of both the Port Authority and the commerce of the Port.

AWI also contends that the Port Authority’s refusal to enter into a long-term relationship with it constitutes an: (1) unreasonable refusal to deal with it; (2) unreasonable discrimination against it; and (3) unreasonable preference in favor of those companies that continue to lease property at Port Authority facilities. The Port Authority disputes these contentions.

According to the testimony of Mr. Michael Donohue, AWI’s Certified Public Accountant and financial advisor, AWI is and has been a perennially unprofitable company. (Tr. 210-212) AWI has had no profits, and has not distributed dividends to its stockholders for many years. (Tr. 211) AWI does not prepare audited financial statements. (Tr. 221) No landlord would be acting in a reasonable manner by committing itself to a long-term association with a privately owned company that produces no audited financial statements, fails to live up to its lease obligations, and by its own account is perennially unprofitable.

Further, the unchallenged testimony of Ms. Patricia Keough reflects the rental payment history of AWI since 1999. (Exhibit 14, Attachment 1) Under Lease No. BP-288 for Pier 5 for the period from January 1999 through April of 2003, AWI was late (30, 60 or 90 days) in paying its rent 87 percent of the time. Under Lease No. BP-294 for Pier 6 for the period from January 1999 through April 2003, AWI was late (30, 60 or 90 days) in paying its rent 85 percent of the time. Under Lease No. BP-302 for Pier 7, nothing had

been paid until February 2003 even though AWI took possession of the space in December of 1999, and for the months of January, February, March and April 2003, AWI paid each of these months over 30 days late. Beginning in May 2003, through December of 2003, AWI fell in arrears for Pier 7 rent in the amount of \$ 246,043.81.

As will be discussed below, by January 15, 2004 AWI had begun its continuing trespass on the Northern Half of Pier 7 without paying anything whatsoever for that space, and it had outstanding rent due for Piers 5, 6 and 7, for which the Port Authority was maintaining collection actions. To this day, as AWI's bookkeeper Mr. Joseph Bezeg testified, AWI has not paid some \$ 120,294.41 in back rent for the Southern Half of Pier 7 due for the second half of December 2003, and for the months of January, February and March 2004, and has paid nothing for its unauthorized occupation of the Northern Half of the Pier.

As of the filing of written testimony in this matter in September of 2005, the outstanding rent and fees with respect to the Southern Half of Pier 7 was \$ 450,588.80 and the outstanding amounts reflecting the unauthorized occupancy of the Northern Half of Pier 7 was \$ 661, 838.54. (Exhibit 14 p. 4 and Attachment 11)

In light of the rental arrearages that existed since at least 1999, the Port Authority was not merely justified in refusing to deal further with AWI, it is compelled by the Shipping Act to take all actions necessary to prevent AWI from remaining on marine terminal premises without paying the appropriate rent therefore. That is precisely what the Port Authority has done and is doing in this matter.

Procedural Background

The initial complaint filed in this proceeding by AWI alleges that the Port Authority has violated Sections 10(d)(3) and 10(d)(4) of the Shipping Act of 1984, U.S.C. app. §§ 1709(d)(3) and 1709(d)(4) by refusing to negotiate, and enter into a “long term” lease renewal with AWI, and by appearing to divert business away from AWI.¹ In its prayer for relief, AWI requests that the Commission order the Port Authority to : (1) cease all actions to terminate AWI’s leasehold relationship with the Port Authority; (2) recommence discussions with AWI in good faith for a long-term extension of the current expired lease; (3) establish other practices as the Commission deems appropriate; and (4) pay \$15,000,000 in reparations to AWI.

Although AWI failed to comply with the Commission’s Rules of Practice by filing its initial discovery requests with its complaint, it was permitted by Judge Schroeder to engage in discovery, and has received hundreds of pages of Port Authority documents, thousands of pages of third party documents, and has deposed five Port Authority employees. Following the lengthy discovery, AWI filed its case-in-chief in Docket No. 04-09.

After the close of discovery, and very shortly before the Port Authority was scheduled to file its motion for summary judgment in Docket No. 04-09, AWI filed another complaint against the Port Authority. This complaint alleged violations of various Sections of the Shipping Act of 1984 including Section 10(d)(1), 10(d)(3), 10(d)(4), 10(b)(10) and 10(b)(13). 46 U.S.C. app. §§ 1709(d)(1), 1709(d)(3), 1709(d)(4), 1709(b)(10) and 1709(b)(13). These alleged violations were based on claims that Port

¹ See Counts I and II of the complaint dated August 5, 2004.

Authority employees were harassing AWI and interfering with its business operations. These additional violations were alleged to have occurred after February 23, 2005, and were therefore outside the time frame of the original complaint.

With respect to this complaint, AWI sought extensive additional discovery. Since virtually the entire additional discovery related to events before the alleged violations began in February of 2005, and since other information regarding harassment was in the possession of AWI, Judge Krantz who had replaced Judge Schroeder denied further discovery.

The parties filed their cases-in-chief and the Port Authority filed rebuttal testimony during 2005, and oral hearing was conducted during December 2005. During the interim between the filing of prepared testimony, including the filing of prehearing statements, and the oral hearing, AWI changed counsel over the objection of the Port Authority. As a result of the change in counsel, Judge Krantz gave considerable leeway to new counsel during the oral hearing. AWI counsel was permitted to introduce considerable additional evidence and advance theories that were not mentioned in AWI prehearing statement that had been filed by prior counsel.

AWI filed in brief on March 13, 2006. Attached to this brief are several “new exhibits” that AWI simply attaches with no motion to reopen the record, no showing of relevancy, and no effort to authenticate the documents as to source or authorship. These documents will not be addressed by the Port Authority and may not properly be addressed by the Commission or the Administrative Law Judge during their respective deliberations.

The AWI brief is a mish-mash of unsupported factual allegations presented without the benefit of record citation, and suggested factual conclusions that similarly have no record reference or support. Many of the factual allegations are internally inconsistent. For example, AWI contends that it did not occupy the Northern Half of Pier 7 beginning on or about December 23, 2003, without paying anything for the space, and then argues that its occupation of that space was somehow authorized by a lease for the Southern Half of Pier 7 that provides AWI with an option to occupy the Northern Half only if it exercises the option and thereby becomes obligated to pay rent. Many of the other factual allegations of AWI are, as will be discussed below false.

No purpose would be served by trying to rebut this confused, unnumbered and totally disingenuous set of facts and conclusions. The Port Authority will therefore set forth its proposed findings of fact and conclusions of law with reference to the AWI factual allegations only as necessary to remove confusion, or to point out glaring misstatements, and to highlight the total lack of credibility of AWI witnesses.

AWI Witness Credibility

The first, and most obvious, incredible allegation presented by AWI forms the very basis for this complaint. AWI stoutly maintains that the Port Authority, at virtually every level from the Board of Commissioners through the staff dealing with AWI, harbors some unspecified hostility and animosity toward AWI, while at the same time heaping favored treatment on American Stevedoring Inc., a company commonly owned and essentially commonly operated with AWI². AWI presents no reason whatever for

² While AWI selectively maintains that the two companies are separately operated, several of the employees of AWI, most notably Matthew Yates, work for ASI as well. Further AWI President Michael Scotto candidly testified that major policy decisions such

why the Port Authority would harbor such a selective animosity especially since both companies are owned and controlled by the same family. AWI does not present a credible reason, or any reason whatsoever.

Mr. Matthew Yates, a principal witness for AWI, testified in both of the consolidated cases, and assisted counsel at the hearing. Mr. Yates presented testimony concerning material facts, which is grossly inaccurate and lacks credibility. This testimony was offered under examination by AWI counsel Mr. Michael Hiller³ and occurred at the very beginning of Mr. Yates' redirect testimony.

More specifically, Mr. Yates sought to convince the Administrative Law Judge that it was essentially impossible to enter the Pier 7 Warehouse without using both the Southern and Northern halves of the Warehouse. Mr. Yates redirect examination went as follows:

Q. Now turning to Exhibit A which is referenced in that paragraph, that's the Exhibit A to Exhibit A [to Exhibit 9, Mr. Yates written testimony] the premises that are described are generally shown in Exhibit A, we'll get to the specifics in a minute. Is that accurate?

A. Yes.

Q. Let's be more specific. The southern part which is what we've been talking about from time to time during the hearing, is that located in the same building as the northern part of the shed on Pier 7?

A. Yes.

Q. Is it part of the same structure?

A. Yes.

Q. Is it part of the same property?

as whether to pay rent on AWI occupied space, were made not by him but by the ASI Chief Executive Officer, Mr. Sabato Catucci.

³ Mr. Hiller has since withdrawn from the case.

A. Yes.

Q. Now I want you to focus if you would on again Exhibit A to Exhibit A, if you notice the word Pier 7 appears right in the middle of that rectangle. Do you see that?

A. Yes.

Q. And there's sort of a diagonal horizontal line going across the middle. Do you see that? The one that goes right under Per 7, it's a line that goes from the left side of the page downward, sloped to the right.

A. Yes.

Q. And then at the end of the right-hand portion of Exhibit A to Exhibit A right in the middle there of that downward sloping line it cuts into or is about to go into a double line that goes north, sort of up and down. Do you see that?

A. Sorry, can I see that.

JUDGE KRANTZ: Go right ahead.

BY.MR. HILLER:

Q. The line goes from the left side of the page down sloping to the right side and then at the bottom there there's a double line. Do you see that?

A. Yes.

Q. What does that double line represent?

A. It's a door.

Q. It's an opening to the shed?

A. Yes.

Q. What's the door used for, what's that opening used for?

A. Access to the pier, it's actually a ramp for equipment.

Q. Equipment and forklifts.

A. Yes.

Q. Are materials brought in through that door or opening?

A. Yes, I think that – we have hi-los, we have flatbed trucks that will transport cocoa. It's a door that equipment runs cargo through in and out.

Q. Is it possible for American Warehousing to conduct business by only entering in on the part of this opening that's below the downward sloping line going across from left to right?

A. No, I doubt that.

Q. Why is that?

A. It would be very narrow.
(Tr. 359-360)

Obviously Mr. Yates was contending that it was not reasonably possible to enter the Southern Half of Pier 7 where AWI had a lease, without trespassing on the Northern Half of Pier 7 where it had not exercised its option to occupy that space. A dubious legal argument, but clearly one that AWI found factually attractive. The problem with the testimony is that it was a complete falsehood, and is an example of the way AWI conducts itself in its dealings with the Port Authority.

The Port Authority presented the testimony of Mr. Richard Hacker to rebut the claims of Mr. Yates. Inasmuch as Mr. Yates' testimony quoted above was offered after the submission of his written testimony, and was in the nature of additional direct testimony, the Port Authority sought, and was permitted to supplement Mr. Hacker's direct written testimony as follows:

Q. Mr. Hacker, Mr. Yates was asked to look at the diagram of the north and southern half of Pier 7 that you see before you listed as AWNY-000034 attached to his testimony.
Do you see the diagram?

A. Yes, I do.

Q. Mr. Hacker, the double line on the east end of the warehouse, in the approximate center of the northern and southern half –

A. Yes.

Q. -- so approximately in the center of the combined warehouse?

A. Yes.

Q. Mr. Yates testified that was a doorway. Is that a doorway?

A. No. That's an office building.

Q. Mr. Yates also testified that in order to access the southern half of Pier 7 you had to, essentially trespass on the northern half of Pier 7, to get through that doorway, to get to the southern half of Pier 7.

Is that accurate?

A. Not really. There's a doorway on -- there's a truck ramp on the north and south side. So you can access both sides by both -- by either door.

Q. So where --

A. On the truck ramp.

Q. -- where would the truck ramp be on the northern half?

A. On the northern half of the building, in the front.

Q. Okay. And on the southern half, there's a separate truck ramp?

A. Yeah. It's a mirror image, only on the southern half. It's the same thing.

Q. And there's a ramp leading up to that?

A. Yes, there is, on both sides.

Q. Are there truck unloading bays of any kind?

A. Yes, on both the south and the north side. They're a mirror image of the piers, with an office building in the middle. Those double lines are the office building.

Q. Mr. Hacker, I want to show you what's been marked for identification as Exhibit 36.
Do you recognize that?

A. Yes, I do.

Q. What is it?

A. It's a photograph of the front of Pier 7 office building, on the left side of the -- that was the -- equivalent to this drawing, that would be the double lines. And those are the -- on the left side of the photo is pier south -- 7 south, which is the truck ramp I was describing. And on the right side of the office building is 7 north, which is the right side of ramp that I was-

Q. And when --

A. -- talking about.

Q. -- did you take this photo, Mr. Hacker?

A. On December 1st

(Tr. 569-572)

Remembering that Mr. Yates' office is within sight of Pier 7, and remembering that he obviously spends a good deal of time at the Pier, of course, makes Mr. Yates's inaccurate claims with respect to Pier 7 facility all the more incredible. Accordingly, employing the well-established legal doctrine of *falsus in uno, falsus in omnibus*, the Administrative Law Judge would be justified in finding that Mr. Yates' testimony is not credible on any issue, and that is precisely what the Port Authority contends would be appropriate under the circumstances.

The AWI case is made up of a fabric of false and misleading statements designed to cover up the fact that AWI habitually failed to pay rent in a timely manner, and often not at all, on several Piers that it leased from the Port Authority, trespassed on unleased property, and systematically violated its leases with the Port Authority. As will be discussed below, this case should be summarily dismissed.

II. PROPOSED FINDINGS OF FACT

1. In 1999, AWI is alleged to have purchased the assets of Commodities Storage, Inc. which had occupied Pier 7 at the Brooklyn Marine Terminals in Brooklyn, New York.⁴ As a result of this alleged purchase, AWI began occupying all of Pier 7, and at the expiration of the prior lease in December, 1999 remained in possession of the Pier as a holdover tenant. On April 1, 2001, AWI's President, Michael Scotto, notified the Port Authority that it no longer wanted to occupy all of Pier 7, and it was terminating fifty percent of that leasehold effective May 1, 2001. (Exhibit 14, Attachment 5). In October and November of 2002, AWI and the Port Authority entered into a lease for Pier 7 (the "lease"). That lease applied retroactively from December 1999, and was to terminate April 30, 2003.(Exhibit 9, Exhibit A)

2. The lease contained several provisions, some standard, and some tailored specifically to the leasing of Pier 7. At page two of the lease there is the following language:

ARTICLE VI. The within, together with the said Terms and Conditions, endorsements and attachments, constitutes the entire agreement of the Port Authority and the Lessee on the subject matter, and may not be changed, modified, discharged or extended except by written instrument duly executed by the Port Authority and the Lessee. The Lessee agrees that no representations or warranties shall be binding upon the Port Authority unless expressed in writing in this Agreement.

Section 16 of the lease provides in relevant part:

Section 16. Termination

⁴ AWI claims to have purchased the assets of Commodities Storage, Inc. The Port Authority cannot confirm that allegation, but for the purposes of this proceeding it will accept the allegation.

(a) If any one or more of the following events shall occur, that is to say:

* * *

(10) The lessee shall fail duly and punctually to pay the rental or to make any other payment required hereunder when due to the Port Authority; or

* * *

then upon the occurrence of any such event or at any time thereafter during the continuance thereof, the Port Authority may by five (5) days' notice terminate the letting and the Lessee's rights hereunder, such termination to be effective upon the date specified in such notice. Such right of termination and the exercise thereof shall be and operate as a conditional limitation. (Exhibit 9, Exhibit A)

3. The lease also contains the Port Authority's Standard Endorsement No.

L1.1 regarding thirty-day termination which provides:

In addition to all other rights under this Agreement, the Port Authority shall have the right to terminate the letting under this Agreement without cause, at any time, on thirty (30) days' notice to the Lessee in advance. Termination under the provisions of this Standard Endorsement shall have the same effect as if the effective date of termination stated in the notice were the date of expiration of the letting. (Exhibit 9, Exhibit A)

4. The lease designates the leasehold as that space shown in diagonal hatching on the sketch attached to the lease and marked as "Exhibit A". Exhibit A identifies the southern half of Pier 7. (Exhibit 9, Exhibit A)

5. The lease also contains a Special Endorsement that provides:

10. (a) The Lessee shall have the right at any time during the term of the letting from and after August 1, 2002 to add to the premises under this Agreement the enclosed space shown in diagonal hatching on the sketch attached hereto, hereby made a part hereof and marked "Exhibit A-1" (which enclosed space is sometimes hereinafter call "the option space"). The option space shall be added to the

premises under this Agreement upon sixty (60) days' notice given by the Lessee to the Port Authority, with the letting thereof to be in accordance with the terms and conditions set forth below in this Special Endorsement.

(g) In addition to all other rentals payable under this Agreement, the Lessee shall pay a basic rental for the additional premises according to the following schedule commencing on the Additional Premises Commencement Date: (i) during the period from August 1, 2002 through November 30, 2002, both dates inclusive, at the annual rate of Three Hundred Forty-eight Thousand Seven Hundred Ninety-five Dollars and No Cents (\$348,795.00) payable in advance in equal monthly installments of Twenty-nine Thousand Sixty-six Dollars and Twenty-five Cents (\$29,066.25) on August 1, 2002 and on the first day of each calendar month thereafter during such period, and (ii) during the period from December 1, 2002 through April 30, 2003, both dates inclusive, at the annual rate of Three Hundred Sixty-one Thousand Two Dollars and Eight-three Cents (\$361,002.83) payable in advance in equal monthly installments of Thirty Thousand Eighty-three Dollars and Fifty Seven Cents (\$30,083.57) on December 1, 2002 and on the first day of each calendar month thereafter during such period. (Exhibit 9, Exhibit A)

6. By its terms, the lease expired on April 30, 2003. AWI remained on Pier 7 as a holdover tenant. Almost immediately, AWI fell behind in the payment of its rent. As can be seen from Exhibit 14, Attachment 2, a letter from Michael Scotto to Patricia Keough of the Port Authority dated October 31, 2003, AWI's June rent was not paid until October 31, 2003, and AWI's July and August rents were promised for November 7, 2003. On November 19, 2003, the Port Authority served a Rent Demand on AWI claiming that it was in arrears in the amount of \$206,134.11. (Exhibit 14, Attachment 3)

7. On December 8, 2003, the Port Authority personally served upon AWI President Michael Scotto a Notice of Termination pursuant to Section 16 of the lease. Such Notice listed unpaid rent and other charges in the amount of \$246,043.81. The

Notice provided that AWI's right to possession of the southern half of Pier 7 would terminate as of midnight on December 17, 2003. (Exhibit 14, Attachment 4)

8. Rather than comply with the Notice of Termination and vacate the southern half of Pier 7, AWI requested on December 15, 2003 that it be permitted to unload yet another cocoa ship onto Pier 7. The Port Authority acceded to this request by letter of December 17, 2003. (Exhibit 9, Exhibit E). In allowing the cocoa ship to call at Pier 7, however, the Port Authority expressed obvious concern that AWI not unlawfully use the northern half of the Pier to store this additional cocoa. Thus, the letter attached to Mathew Yates' affidavit specifically provides that "cocoa may be received at the portion of Pier 7 leased to American Warehousing, Inc. as shown in Exhibit A to the lease. I request that you confirm in writing to my office that the cocoa can be stored within those premises. The Port Authority of New York & New Jersey intends to inspect the premises to ensure compliance to this requirement." AWI did indeed unload the cocoa ship, but began using the northern half of Pier 7 in direct violation of its lease provisions and in direct violation of the Port Authority's instructions to the contrary.⁵ (Exhibit 37; Tr. 61; Tr. 151)

9. On February 17, 2004, the Port Authority personally served AWI President Michael Scotto with a Notice Terminating Tenancy giving AWI until March 31, 2004 to vacate the southern half of Pier 7. (PANYNJ-5) Again, AWI chose to ignore

⁵ The AWI contention that notwithstanding the Michael Scotto letter indicating that it did not want to occupy the northern half of the Pier (Exhibit 14, Attachment 5), the unexercised option provisions of the lease dealing with the northern half of the Pier, and the Port Authority's specific instructions in its December 17, 2003 letter, the Port Authority gave its tacit approval to use the northern half of the Pier will be discussed below.

the Notice of Termination, and remained in possession of all of Pier 7. (Exhibit 37; Tr. 153)

10. On May 8, 2004, AWI submitted a Lease Proposal to the Port Authority. (Exhibit 9, Exhibit M) With respect to Pier 7, AWI stated:

Rental Rates

The existing lease provides for a rate of \$2.67 per ft² (annualized- \$361,002.84) with American Warehousing leasing approximately 50% of the cargo shed.

- (a) With an extension/renewal of only three years or less American proposes the standard 3.5% CPI increases. AW is willing to occupy the total building, but would like clarification as to what PA's position is on the cost per square foot for a whole-building arrangement versus partial-was there any weighting of the rate in respect of the partial rental?
- (b) On the longer term arrangement American would be able to propose a variety of other benefits and inducements to the Authority, but thus far the PA has been unwilling to enter into such discussions. Accordingly, we find ourselves not fully able to finalize the specifics of such proposal at this time as it would require both the Authority and ourselves to work collaboratively on a wide variety of issues in order to reach final resolution.

11. On June 8, 2004, the Port Authority personally served on AWI President Michael Scotto, a Notice Terminating Tenancy requiring AWI to vacate the southern half of Pier 7 by July 31, 2004. (Exhibit 14, Attachment 7) On June 16, 2004, the Port Authority personally served on AWI President Michael Scotto a Notice to Quit Premises by June 30, 2004, with respect to the northern half of Pier 7. (Exhibit 14, Attachment 8)

12. AWI's bookkeeper, Mr. Joseph Bezeg testified that as of the date of hearing herein, AWI was still in arrears for \$ 120,294.41 for rent for the months of December 2003 and January through March 2004.

13. On July 6, 2004, the Port Authority filed a Petition and a Notice of Petition with the Civil Court of the City of New York, County of Kings to have AWI evicted from the northern half of Pier 7, and those documents were served on AWI President Michael Scotto on July 12, 2004. (Exhibit 14, Attachment 9) On August 3, 2004, the Port Authority filed a Petition and a Notice of Petition in the same New York City Court to have AWI evicted from the southern half of Pier 7, and those documents were served on AWI President Michael Scotto on August 10, 2004. (Exhibit 14, Attachment 10) AWI's response to these lawsuits was to this action, initially remove the actions to federal court, and then take all possible federal and state court actions to stay the eviction proceedings pending disposition of this proceeding.

14. The on-dock storage of cocoa is not the common practice in the United States. As pointed out by Mr. Karl Walk of Blomer Chocolate, in Philadelphia, the largest cocoa port in the nation: "Pier 84 which is Philadelphia port is a strong pier, it currently can take on one vessel for discharge and most of the cocoa from that point is moved inland, either to southern New Jersey or to other points in Philadelphia. So it is a large pier but it is used often as a transit point." (Tr. 280) Mr. Walk also testified, "I do some business with Camden as well...They have a large facility directly outside the port of Beckett Street which is the primary port for the cocoa operation in Camden and then they have satellite warehouses where they again move the cargo or shuttle cargo out to satellite warehouses for longer term storage." (Tr. 280)

15. Successful cocoa storage operations need not be on-dock and warehouse facilities serving the cocoa trade are typically located off the receiving piers. AWI has made no effort to secure additional off pier storage for the cocoa even though it insists

that it does not have sufficient space and suffers from the ability to have long-term storage capacity. (Tr. 125)

III. PROPOSED CONCLUSIONS OF LAW ALLEGED PREFERENCE AND PREJUDICE

In Ceres Marine Terminal, Inc. v. Maryland Port Administration, 27 SRR 1251,

1270-1 (1997) the Commission outlined the basic requirements that a complaining marine terminal operator must fulfill to sustain a claim of unreasonable preference or prejudice. The complainant must show: (1) that the allegedly preferred and prejudiced parties are similarly situated or in a competitive relationship⁶; (2) that the parties were accorded different treatment; (3) that the unequal treatment is not justified by differences in transportation factors; and (4) the resulting prejudice or disadvantage is the proximate cause of injury. The Port Authority readily concedes that it has treated AWI differently than those marine terminal operators that pay their rent in a timely manner and do not trespass on Port Authority property without permission and without paying for the privilege. With respect to the other three requirements, AWI has failed to meet its burden of proof.

A. AWI Has Failed To Demonstrate That It Is Similarly Situated With Other Allegedly Preferred Marine Terminal Operators.

AWI has consistently contended, without any factual support, that the Port Authority has conferred favored treatment on Howland Hook Container Terminal, (now known as New York Container Terminal) (“NYCT”), Port Newark Container Terminal (“PNCT”), Maersk Container Service (“Maersk”), and Maher Terminals (“Maher”).

AWI then attempts to show that these large terminal operations consisting of hundreds of

⁶ The Commission added a footnote regarding this point: “In essence, if the cargo moves in substantially similar transportation circumstances, it is not necessary for the purpose of meeting this criterion that the parties be in direct competition with one another.”

acres of land designed for the receipt, storage and distribution of containers are similarly situated with a 296,000 square foot warehouse designed for the storage of breakbulk cargo. The transportation circumstances surrounding these wholly disparate operations are manifestly dissimilar. On the one hand are container marine terminal operations with on-dock rail services and literally millions of containers per year, and on the other a single warehouse along side two public berths that can accommodate, at most, two small vessels discharging bulk cargo.

Further, while claiming that AWI has been discriminated against, and these large container terminals have been preferred, AWI makes no showing that it is prepared to enter into lease arrangements that in any way compare with those involving the allegedly preferred terminal operators. To the extent that AWI would show preference and prejudice, it must be prepared to show that it could meet the obligations undertaken by the allegedly preferred marine terminal operators. *Ceres Marine Terminal, Inc. v. Maryland Port Administration* at 1273 relying upon *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 SRR 1213, 1226-8 (1990) (Yangming did not violate the Act by “refusing to grant complainant access to terms of service contracts with other shippers, finding that the difference in treatment was based on valid transportation factors, namely Yangming’s legitimate concerns about California Shipping’s ability to fulfill the essential terms of each contract....Specifically, the Commission found reasonable Yangming’s concern about complainant’s ability to pay liquidated damages, that it may have ‘developed a reputation in the trade for contracts that were not fulfilled and other problems with carriers.’”)

Not only did AWI not offer to enter into the same lease terms as other allegedly preferred marine terminal operators, any suggestion that it could fulfill the terms of those lease arrangements would be absurd. As previously noted, AWI was perpetually in breach of its lease obligations, and did not have the financial capacity to show a profit for the past several years. Commission precedent will not permit AWI to claim that it is similarly situated with the major container terminal operators with which it seeks to be compared.

B. AWI Has Been Treated Differently By The Port Authority, But That Unequal Treatment Is Justified By Differences In Transportation Factors.

The fact that AWI has not been offered a long-term agreement by the Port Authority while certain other marine terminal operators have does not establish a violation of the Shipping Act. Quite simply, the alleged disparate treatment is more than justified by the transportation factors described in the proposed findings of fact and conceded by AWI during trial.

1. Non-Payment Of Rent

The un rebutted testimony of Patricia Keough demonstrates beyond question that AWI had historically and habitually failed to pay rent in a timely manner. With respect to Pier 5 for the period January 1999 through April 2003 (52 months), AWI was over 30 days late 13 times, over 60 days late 8 times and over 90 days late 24 times with only 7 timely payments. With respect to Pier 6 for the same 52 month period, AWI was over 30 days late 12 times, over 60 days late 8 times and over 90 days late 24 times, with only 8 timely payments. On Pier 7 no rent was paid from December 1999 through February 2003. As

noted above, after May 2003, the Pier 7 rent essentially stopped altogether until the notice of termination was served in December 2003. (Exhibit 14, Attachment 1)

2. Squatting On The Northern Half of Pier 7

At the same time, as the testimony of Mr. Chester Hopkins the General Manager of American Stevedoring, and Mr. Michael Scotto, the President of AWI, demonstrates, AWI began occupying the Northern Half of Pier 7 without paying anything and without any Port Authority permission in December 2003, and has remained there to date. (Tr. 61-62; Tr. 153-164) The Port Authority did not have to rely on the reputation of AWI within the industry to determine that they were not the kind of company with which the Port Authority should deal. The Port Authority's own first hand knowledge was such that it could not, as a reasonable landlord, or as a reasonable marine terminal operator allow this type of conduct to continue.

AWI has sought to defend its unlawful trespassing on the Northern Half of Pier 7 with two mutually exclusive arguments. First, is the wholly untenable argument that it did not occupy the Northern Half of Pier 7, as least not until after the Port Authority determined not to deal further with AWI. This argument falls apart when one examines the testimony of the AWI witnesses described above. The ASI General Manager, Mr. Hopkins and the AWI President, Mr. Scotto freely admitted that when there was more cocoa than AWI could store on the Southern Half of the Pier, it willingly went onto the Northern Half without the benefit of Port Authority permission, and without offering to pay anything whatsoever for the additional space. This is particularly troubling since there is a provision in the AWI lease that would permit it to use that Northern Half provided that it pay the rent specified therein.

The second, equally untenable argument is that somehow the Port Authority acquiesced in the use by renting only half of the undivided building to AWI, and then expecting AWI to use the other half as it saw fit. This argument has two basic flaws. First, the plain language of the lease provides under what conditions, and for what rent AWI can use the Northern Half. Second, AWI has previously acknowledged the separate nature of the Northern and Southern halves when Mr. Scotto, in May of 2001, wrote to Ms. Keough seeking to terminate AWI's occupancy of the Northern Half. As noted in Exhibit 16, a lease proposal from Mr. Matthew Yates to the Port Authority, AWI further recognizes the distinction between the Northern and Southern Halves of the Pier by offering to lease only the latter for \$ 2.67 per square foot.

The failure to pay rent in a timely manner, the squatting on Port Authority property without paying for it, and the perennial unprofitability of AWI each constitute a transportation factor that more than justifies the unwillingness of the Port Authority to enter into a long-term business relationship with AWI.

C. ALLEGED UNREASONABLE REFUSAL TO DEAL

AWI has also contended that the Port Authority has unreasonably refused to deal with it in that the Port Authority has refused to offer a "long-term" lease agreement of the type and kind that it offers to other marine terminal operators, to wit, those container terminal operators previously discussed. While this contention is essentially the same unreasonable discrimination argument that is discussed above, and presents a separate statutory allegation, the reasons for the Port Authority's refusal to enter into a long-term relationship with AWI are the same as those discussed above.

In November 2002, when the Port Authority and AWI, along with ASI, entered into a “global settlement” of their rents and related disputes, AWI/ASI had outstanding obligations to the Port Authority in excess of \$ 6 million. In an effort to secure as much of this back rent and charges as possible, the Port Authority Board of Commissioners authorized the Port Authority to enter into a lease with AWI running retroactively from December 1999 to expire April 30, 2003, and enter into a lease with ASI running retroactively from 2001 to expire on April 30, 2004. Tr. 410-420) The global settlement also provided for the forgiveness of \$ 1.4 million for the benefit of AWI and ASI. (Tr. 43, Mr. Chester Hopkins testimony) However, due to the payment history of AWI, the Board also instructed the Port Authority staff not to extend the AWI lease beyond its expiration date. Given the AWI payment, or non-payment history, that decision was entirely reasonable.

D. DOCKET NO. 05-03 ALLEGATIONS

The second complaint filed by AWI in this matter deals with alleged misconduct by the Port Authority beginning in February 2005, and continuing until submission of evidence in September of 2005. The testimony bearing on this alleged misconduct is presented in vague and conclusory terms without factual support, and consists almost entirely of argument.

Mr. Yates states that in June of 2005, the Port Authority prevented a ship loaded with cocoa from landing at the public berth located on the Southern Half of Pier 7. What Mr. Yates does not mention is that: (1) there was a ship already located at that berth; (2) the ship located at the Southern Half public berth was too long to be located at other berths, and was there for repairs; and (3) when approached, the Port Authority noted that

the berth at the Northern Half of Pier 7 was available as was the berth at Pier 8 which is operated by ASI. The Pier 8 location is where the ship actually berthed. Exhibit 38. p. 2) Even though the request for a berth was made without regard for the Coast Guard requirement that berthing requests be made more than 96 hours before the arrival of the ship, the Port Authority sought to assist AWI to find a location for the ship. As with the Yates testimony discussed above, Mr. Yates plainly sought to mislead the Commission with fanciful tales of Port Authority obstructionism when in fact the Port Authority went out of its way to assist AWI notwithstanding AWI's continuing misconduct.

John Hall also testified that the Port Authority impeded the business of AWI by insisting that AWI comply with Coast Guard security regulations. As Mr. Van Tol points out in his compelling and essentially unchallenged testimony, it was the conduct of AWI in failing to comply with Coast Guard regulations and local fire code requirements that may have caused any operating difficulties for AWI, if in fact such difficulties did occur.

In short, there is no credible evidence whatever that the Port Authority has sought to interfere in any way in the business of AWI other than trying to evict this non-paying tenant from property it previously leased and now refuses to relinquish, and to evict it from property it never leased but since December of 2003 has trespassed upon without making any payments for it.

VI. CONCLUSION

AWI has failed to demonstrate that any of the Port Authority's actions involved in this proceeding constitute anything other than the reasonable actions of a public entity seeking to protect its appropriate business interests and those interests of all concerned in the commerce of the Port of New York and New Jersey. AWI has repeatedly violated the most basic provisions of its lease by failing to pay rent in a timely manner, has failed to vacate property on the expiration of its lease as required by the lease, and has squatted on property that it has no right to occupy. In addition, AWI has abused the processes of the Commission by engaging in dilatory tactics designed solely for the purpose of allowing it to remain on Port Authority property without compensation, and has submitted false and misleading testimony under oath throughout this proceeding. In view of these factors, the complaints filed by AWI should be dismissed, and the Commission should take such other steps as it deems appropriate to protect the integrity of its processes.

Respectfully submitted,



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**BEFORE THE
FEDERAL MARITIME COMMISSION**

AMERICAN WAREHOUSING OF NEW YORK, INC.,)		
))	
))	
Complainant,)	
))	Nos. 04-09 and 05-03
v.)	
))	
THE PORT AUTHORITY OF NEW YORK AND))	
NEW JERSEY,)	
))	
Respondent.)	
-----)	

CERTIFICATE OF SERVICE

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by LAROE, WINN, MOERMAN & DONOVAN, P.L.C., Attorneys for Respondent, the Port Authority of New York and New Jersey.

That on the **24th day of April, 2006**, I caused 2 copies of the within Brief for Respondent in the above captioned matter to be served upon:

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Unless otherwise noted, an original and 15 copies have been sent to the commission via hand delivery on the same date.

April 24, 2006


John C. Kruesi, Jr.
Counsel Press, LLC