

(S E R V E D)
August 15, 2001
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 94-01

CERES MARINE TERMINALS, INC.

v.

MARYLAND PORT ADMINISTRATION

The common law doctrines of waiver and estoppel may not be invoked to prohibit a party to an agreement subject to the Commission's jurisdiction from challenging that agreement in a complaint filed with the Commission alleging that one of the parties to the agreement violated a duty imposed on it by the Shipping Act of 1984.

Where a duty imposed by the Shipping Act is absolute and a competitive relationship is not necessary to prove undue or unreasonable preference or prejudice, the proper measure of damages is the difference between the rate charged and the rate that would have been charged but for the violation of the Shipping Act.

Robert T. Basseches, David B. Cook, and Eric C. Jeffrey for Complainant Ceres Marine Terminals, Inc.

Eugene D. Gulland, David W. Addis, Michael L. Rosenthal, Edward R. K. Hargadon, and M. Catherine Orleman for Respondent Maryland Port Administration.

Vern W. Hill and Martha S. Keane for Bureau of Enforcement.

ORDER ADDRESSING ISSUES ON REMAND FROM THE FOURTH CIRCUIT

BY THE COMMISSION: (Harold J. Creel, Jr., *Chairman*; Joseph E. Brennan, Antony M. Merck, John A. Moran and Delmond J.H. Won, *Commissioners*)

This case originated with the filing of a complaint by Ceres Marine Terminals, Inc. ("Ceres") against the Maryland Port Administration ("MPA"), alleging various violations of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. app. § 1701, et seq. The Commission ruled in favor of Ceres, and MPA appealed the order to the U.S. Court of Appeals for the Fourth Circuit. In that proceeding, Maryland Port Administration v. Federal Maritime Commission, No. 97-2418, slip op. (4th Cir. Oct. 13, 1998)¹, the Court affirmed in part, reversed in part and remanded, finding that the Commission had failed to adequately address MPA's argument that Ceres was estopped from challenging the validity of its lease with MPA because it had voluntarily entered into it. The Court also directed the Commission to more fully elucidate its rationale with respect to the proper measure of damages, in the event MPA's estoppel defense should be rejected. This Order addresses the issues remanded to the Commission by the Fourth Circuit.²

¹The Court's opinion is unofficially published at 28 S.R.R. 545 (1998).

²This proceeding was decided under the Shipping Act prior to its amendment by the Ocean Shipping Reform Act of 1998. All citations to the Shipping Act refer to the sections in effect at the time the complaint was filed. Although the original proceeding involved numerous allegations, this Order deals only with the discrete issues remanded by the Court. For further background, see

DECISION OF THE FOURTH CIRCUIT

A. Estoppel

The Fourth Circuit stated that the threshold question it must address before reviewing the merits of the Commission's decision pertaining to the findings that MPA violated the Shipping Act is whether the Commission adequately addressed MPA's argument that Ceres was estopped from challenging the validity of its lease with MPA because it had voluntarily entered into the agreement or because it had waited eighteen months before bringing a legal challenge. Slip op. at 5-6. The Court agreed with the Commission's disposition of the latter argument, that Ceres brought suit well within the three-year statute of limitations and that finding waiver on the basis of that delay would render the statute of limitations a nullity by penalizing a party waiting the full statutory period before bringing a claim. The Court further stated, however, that this conclusion did not address the first portion of MPA's argument. The Court recognized that the Commission's disposition of Ceres' claim on the merits acted as an implicit rejection of MPA's estoppel argument, but further found that the Commission did not give its complete rationale for rejecting that claim. Id. at 6. The Court noted the Commission's position on appeal, that it did not address the issue because the

the Commission's Report and Order, 27 S.R.R. 1251, October 10, 1997 ("Order").

argument is without legal merit and may never be a defense as a matter of law, and stated that "we are not deaf to this argument, and believe it would be a waste of judicial resources to remand to the FMC for its consideration of a claim completely lacking in merit." Id. at 6. However, the Court further stated "we are not absolutely convinced that there may never be factual issues that would permit the assertion of an estoppel claim, though such issues may well not exist in this case." Id. at 7.

The Court articulated another reason for preferring agency review in the first instance: that a central policy behind the Shipping Act -- that all shippers and carriers must be treated equally -- conflicts with the ability of ports, and shippers, to enter into leases with certain entities on preferential terms. Id. The Court opined that "the FMC has yet to give us the benefit of its expertise on estoppel in the terms of negotiated leases," except for the argument on appeal that the issue was without legal merit and could never be a defense as a matter of law, and therefore remanded to the Commission to consider the merits of MPA's estoppel claim. Id. at 7-8. The Commission was directed to consider "MPA's claim that Ceres was estopped from challenging the terms of its lease with MPA." Id. at 10.

The Court also directed the Commission to address an ancillary issue raised in the proceeding. Pointing to Ceres' argument that it was obligated to enter into the lease with MPA in order to

ensure that it could operate at the Port of Baltimore, the Court noted that "while signing a lease guaranteeing discounted rates may have been the only economically feasible means of doing business in the port, and may have been the only way to guarantee itself the space in which to operate," it prefers to have the Commission address that issue, given its expertise as to how ports are administered in practice. Id. at 8 n.1. The Court further opined that "[e]ven without a lease, Ceres could presumably have paid the full tariff rate promulgated by the MPA and continued to operate in the Baltimore port." Id. at 8.

B. Measure of Damages

With respect to the proper measure of damages for the violations found in this proceeding, the Court stated, "[i]n the event the FMC finds the MPA's estoppel challenge to be without merit, we encourage the agency to revisit its conclusion on the damages due to Ceres and to explain more fully its conclusion that Ceres should not have to prove the damages it actually suffered but that damages should equal the difference between the rates charged." Id. at 8 n.2. The Court cited Interstate Commerce Commission v. United States, 289 U.S. 385 (1933) ("I.C.C.") (when discrimination and that alone is the gist of the offense, difference between one rate and another is not the measure of damages suffered by the shipper), and Ballmill Lumber & Sales Corp. v. Port of New York, 11 F.M.C. 494, 508-11 (1968) (complainant must

prove pecuniary loss resulting from a violation of section 16 First of Shipping Act, 1916 (predecessor to 46 U.S.C. app. § 1709(b)(11)). However, the Court also noted, for comparison purposes, Valley Evaporating Co. v. Grace Line, Inc., 14 F.M.C. 16, 25 (1970) (if equality of treatment is absolute, effect of competition becomes irrelevant and the measure of damages simply becomes the difference between the rate charged and collected and the rate that would otherwise have applied).

POSITIONS OF THE PARTIES

In response to the Court's ruling, the Commission solicited additional briefing from the parties on the discrete issues identified by the Court. Set forth below are their respective positions.³

A. Ceres' Opening Brief

1. Estoppel Issue

Ceres posits that the Commission should reject MPA's estoppel defense on three grounds: that articulated by the Commission in its brief to the Fourth Circuit, as well as two alternative grounds. Ceres thus urges the Commission to adopt the rationale in its Fourth Circuit brief, but also maintains that the "responsible and efficient course" would be for the Commission to rule on the narrower alternatives so that this issue is resolved in the next

³The Commission has also considered all prior pleadings of the parties that address the specific issues remanded to it by the Court.

round of judicial review without the possibility of remand. Ceres' Opening Brief on Remand at 5-6. Further, Ceres, pointing to the Court's statement that the applicability of the estoppel defense to negotiated leases "is an important issue that will doubtless recur in the future," asserts that since this case arose prior to the OSRA amendments, it is the Commission's responsibility to base its determination here on the provisions and policies in effect prior to that time, and so indicate to avoid any ambiguity when the case returns to Court. Id. at 6.

a. Ceres' Basic Position on Estoppel

Ceres contends that the Commission should reject MPA's estoppel defense for the reason set forth in the Commission's brief to the Fourth Circuit: that an estoppel defense is irrelevant as a matter of law to a Shipping Act complaint alleging that a provision in an agreement between entities regulated under the Act violated a duty imposed by the Act on one of the entities. Ceres' Opening Brief on Remand at 12. Ceres notes that it does not read the Commission's brief as taking the broader position that the estoppel defense is legally irrelevant to all Shipping Act complaints, and sees no reason for the Commission to adopt such a position on remand. Id. at 12 n.8.

In prior filings, Ceres contends that MPA'S waiver and estoppel claims must be rejected in accordance with Commission precedent. Citing a number of cases, Ceres avers that the

Commission's case law provides several examples in which a maritime entity, including a marine terminal operator ("MTO"), has brought a complaint alleging Shipping Act violations in connection with a contract it previously signed. Ceres' Reply to Exceptions at 165. At the outset, Ceres points to Ballmill, 11 F.M.C. 494, where a complainant port lessee successfully challenged a provision in its lease after operating under the lease for six years, and where its competitor had signed a lease without the complained-of provision seven years prior to the complainant's renewal of its lease. Id. Further, Ceres cites River Plate and Brazil Conferences v. Pressed Steel Car Co., 124 F. Supp. 88 (S.D.N.Y. 1954), aff'd, 227 F.2d 60 (2d Cir. 1955), in which a party to an exclusive patronage contract that was the subject of a Shipping Act, 1916 complaint was relieved of any obligations under the contract even though it had agreed to the contract and operated under it for six years. Id. at 165-6. In addition, Ceres maintains that in U. S. Lines v. Maryland Port Administration, 23 F.M.C. 441 (1980), the respondent there, MPA, was unsuccessful in arguing that a challenged clause in its tariff should be enforced because the complaining carrier had essentially consented to the clause in its carrier agreement to operate at the port. The Commission rejected that argument, Ceres contends, stating

whatever applicability such a theory may have in the realm of [a] purely private contract, it has none here where the Commission has a continuing duty to ensure those subject to its jurisdiction [comply with section

17]. The right to challenge those regulations before the Commission cannot be barred by some vaguely expressed theory of consent or estoppel.

Id. at 166 (quoting 23 F.M.C. at 460). Similarly, Ceres maintains that the present case is like U.S. Lines in that both involve inequality of bargaining power and both complainants were required to choose between MPA's terms or forego operations at the Port. Id. at 167.

Refuting MPA's attempt to distinguish U.S. Lines because it involves a tariff rather than a lease, Ceres opines that the relevant distinction drawn by the case is between "purely private" contracts and contracts subject to the Commission's jurisdiction under the Shipping Act.⁴ Id. at 167. Ceres points out that the cases relied upon by the Commission in its brief to the Fourth Circuit concerned agreements or agreement provisions which were negotiated rather than unilaterally promulgated. Ceres' Opening Brief on Remand at 13. See Ballmill, 11 F.M.C. 494; River Plate, 124 F. Supp. 88; A/S Ivarans Rederi v. Comp. de Nav. Lloyd Brasileiro, 23 S.R.R. 1543, 1553 & n.8, (I.D. 1986), adopted, 24 S.R.R. 1468 (1988), rev'd on other grounds, 895 F.2d 1441 (D.C. Cir. 1990) (pooling agreement); Kuehne & Nagel, Inc. v. Barber B.S. Blue, 23 S.R.R. 94, 97 (1985) (agreement that a particular commodity classification applied); Prince Line, Ltd. v. American

⁴See also Perry's Crane Serv., Inc. v. Port of Houston Auth., 16 S.R.R. 1459, 1468 (I.D. 1976), adopted in relevant part, 19 F.M.C. 548 (1977).

Paper Exports, Inc., 55 F.2d 1053, 1055-56 (2d Cir. 1932) (agreement to charge non-tariff discount rate); American Transp. Lines v. Wrves, 985 F.2d 1065 (11th Cir. 1993) (same); Farr Co. v. Seatrain Lines, 20 F.M.C. 663 (1978) (same).⁵

Ceres maintains that MPA fails to identify a single precedent in which a claim of waiver or estoppel was held to bar a Shipping Act cause of action, and instead only vaguely asserts that these principles should apply. However, relying on the Commission's declaration in U.S. Lines that a "vaguely expressed theory of consent or estoppel" is unavailing under the Shipping Act, Ceres asserts that MPA effectively concedes that there is no such precedent. Ceres' Reply to Exceptions at 168. Ceres first points to Port Authority of New York & New Jersey v. New York Shipping Association, 22 S.R.R. 1329 (I.D. 1984), adopted, 23 S.R.R. 21 (1985), for the proposition that waiver and estoppel are not amorphous concepts, but rather, are specific doctrines with specific elements in which a respondent must prove "a firm factual basis" for the existence of "a voluntary, intentional

⁵Citing Compania Sud Americana de Vapores v. Inter-American Freight Conference, 27 S.R.R. 931, 941 (I.D. 1997), adopted in pertinent part, 28 S.R.R. 137, 143 (1998) (Petition for Reconsideration pending) ("CSAV"), Ceres contends that Ballmill, given its facts, is considered precedential on the inapplicability of an estoppel defense even though the issue was not explicitly addressed in the opinion. Further, Ceres asserts that CSAV, which was issued after the Commission filed its Court brief, rejected an estoppel defense in the context of a negotiated conference agreement. Ceres' Opening Brief on Remand at 13 n.9 and 14.

relinquishment of a known right or privilege manifested either by express statement or by conduct which can only reasonably be considered consistent with such relinquishment." Id. at 168 (quoting Port Authority of New York & New Jersey, 22 S.R.R. at 1341, 1346) (emphasis added by Ceres). Contending that MPA has not come close to proving its burden, but that MPA instead asks the Commission to infer a waiver from Ceres' conduct, Ceres maintains that its conduct, including its repeated demands for the Maersk rates and its acquiescence in MPA's "take it or leave it" ultimatum to avoid significant business harm, in no way indicates that Ceres intended to relinquish its Shipping Act rights. Ceres' Opening Brief on Remand at 9. Further, estoppel requires showings of misleading conduct and detrimental reliance, and, Ceres contends, MPA cannot reasonably claim that it was misled in view of its ultimatum and the fact that it told Ceres it would not sign a lease with Ceres if Ceres attempted to explicitly reserve its right to sue. Ceres' Reply to Exceptions at 37-40. Moreover, MPA failed to establish any detrimental reliance, Ceres maintains. Id. at 169.

Similarly, Ceres asserts that MPA's reliance on A/S Ivarans Rederi v. Companhia de Navegacao Lloyd Brasileiro, 23 S.R.R. 1543, 1553 n.8 (I.D. 1986), adopted, 24 S.R.R. 1468 (1988), is misplaced. In that case, complainant was held not to be barred from bringing a Shipping Act complaint by the principles of waiver and estoppel, even though it was a member of a pooling agreement which contained

an arbitration clause which stated that the decision of the arbitration panel was final and the complainant participated in arbitration initiated by respondents instead of suing immediately, because the elements of those doctrines were not proven and they are "not designed to destroy rights conferred by Congress." Id. at 170 (quoting 23 S.R.R. at 1553 & n.8). Finally, Ceres argues that MPA mischaracterizes New York Shipping Association v. Federal Maritime Commission, 571 F.2d 1231 (D.C. Cir. 1978) ("NYSA I"). See infra at 49-50.

Ceres contends that

the bottom line from which MPA cannot escape is that in the 83-year combined history of the 1916 and 1984 Acts there has never been a case in which a complaint was held to be barred by estoppel (or waiver), and in particular no case in which a complainant was held to be estopped by its conduct - specifically including entry into an agreement with the respondent containing the provisions alleged by the complaint.

Ceres' Opening Brief on Remand at 12. Rather, Ceres argues that the cases relied upon in the Commission's brief, as well as Ceres' briefs before the Commission, demonstrate that estoppel (and waiver) defenses have consistently been rejected by the Commission in complaint cases brought by parties challenging a wide variety of agreement provisions. Ceres further contends that the cases show that the only situations in which the FMC "has seriously considered the possibility" of an estoppel (or waiver) defense were those which involved a "separate written agreement" settling or waiving Shipping Act claims that allegedly included the claim asserted in

the complaint. Id. at 13.

Ceres refers to the Court's directive to the Commission to determine the applicability of the estoppel defense to negotiated leases. Ceres maintains that this obviously refers to MPA's argument, advanced for the first time in its reply brief to the Court, that the cases establish a distinction between "unilateral" tariffs (where MPA argues that an estoppel defense is not available) and "negotiated" agreements (where MPA claims that the defense is available). Ceres asserts that MPA's purported distinction is spurious. Id.

First, Ceres sets forth several cases involving agreements or agreement provisions that were negotiated, rather than unilaterally promulgated, which it contends demonstrate that MPA's purported distinction between tariffs and leases is a non sequitur. Id. at 13-14. See, e.g., Ivarans, 23 S.R.R. 1543; Ballmill, 11 F.M.C. 494; River Plate, 124 F. Supp. 88; Kuehne & Nagel, 23 S.R.R. 94; Prince Line, 55 F.2d 53; American Transp. Lines, 985 F.2d 1065; Farr v. Seatrain, 20 F.M.C. 663; CSAV, 28 S.R.R. 137.

In addition, Ceres argues that MPA's distinction crumbles in light of the fact that tariff rates themselves are negotiated, as reflected in the special docket procedure authorized by section 8(e) of the Shipping Act. Ceres asserts that provisions in port tariffs may well be negotiated, even further refuting MPA's claim that there is a bright-line distinction between "unilaterally"

promulgated tariffs and "negotiated" agreements. Id. at 14-15. Ceres further avers that it is aware of no case which suggests that a shipper who negotiates a tariff rate has any lesser rights or remedies under the Shipping Act and maintains that any such distinction would be unworkable and nonsensical. Finally, Ceres asserts that MPA's purported distinction

is a transparent attempt to use semantics to mask the fact that, in the shipping industry, "negotiated" agreements are often made between entities that differ greatly in their bargaining leverage - including lease agreements made by ports that have monopolies over terminal land and facilities at a given locale.

Id. at 15.

b. Ceres' First Alternative Rationale

Ceres also sets forth a narrower alternative basis upon which the Commission could decide the estoppel issue -- that the defense of estoppel is inapplicable to a complaint that a monopoly port authority violated a Shipping Act duty to enter into a lease with the complainant at non-discriminatory, lower rates. Ceres' Opening Brief on Remand at 16. Ceres contends that the facts of the instant case require the rejection of MPA's estoppel defense because MPA has a monopoly over the container berths, wharfs, cranes and adjacent lots at Baltimore. Id. at 7 (citing Teel ¶ 10; Teel Rebuttal ¶¶ 6, 10, 17; Heinlein ¶ 18; Brennan ¶ 18). Moreover, Ceres argues, once MPA entered into a lease with Maersk at the reduced rates based on defined criteria and Ceres offered to credibly satisfy those criteria, MPA was subject to a statutory

duty to enter into the same lease with Ceres. Id. at 17. Ceres cites to the Commission's Order holding that MPA was required, under sections 10(b)(11) and (12) of the Shipping Act, 46 U.S.C. app. §§ 1709(b)(11) and (12), to provide Ceres with the Maersk rates and avers that, by necessity, MPA was not free to refuse to enter into a lease with Ceres. Id. at 17 n.15. Further, in view of such a requirement, Ceres contends that by entering into its lease agreement with MPA, it could not have "induced" MPA to do anything that was not already within the umbrella of MPA's larger statutory duty. Id. at 17.

Finally, Ceres asserts that important Shipping Act policy considerations compel rejection of a defense that a lessee, by entering into a lease with the port, is estopped from thereafter challenging a lease term as violative of a duty imposed on the port by the Shipping Act. Id. at 18. Ceres contends that while ocean carriers have options to choose other ports through which to move their cargo, an MTO choosing to serve its container carrier clients at Baltimore must enter into an agreement with MPA. In such a situation, Ceres contends, the Port has enormous leverage, and could take unreasonable advantage of its bargaining power in negotiating leases with MTOs and others, secure in the knowledge that it could insulate itself from Shipping Act complaints if it is allowed to claim estoppel. Id. at 19.

Ceres points out that the Commission's Order in this

proceeding makes clear that a port authority has substantial latitude to consider a variety of factors in negotiating leases, subject to the long-established Shipping Act requirements that once the port establishes criteria on which it makes reduced rates available, it must apply those criteria in an even-handed manner to another entity who legitimately satisfies them. Id. at 18 (citing Order, 27 S.R.R. at 1273-1274). Further, Ceres notes that the Commission ruled that if an entity legitimately satisfies the criteria, it cannot be denied the reduced rates based on status. Id. at 19 (citing Order, 27 S.R.R. at 1272-1273).

c. Ceres' Second Alternative Rationale

Ceres urges the Commission to reject MPA's estoppel defense on another alternative ground, i.e., assuming arguendo that the Commission found that such a defense would be available in theory, it must be rejected here, where MPA, not Ceres, is the party who acted unfairly, inequitably, and contrary to the policies of the Shipping Act. Id. at 20. Ceres posits that whether there may be some fact situations in which an estoppel defense could defeat a Shipping Act complaint against a port concerning provisions in a marine terminal lease is a question which implicates central Shipping Act policy and must be answered by looking at the particular facts in light of the relevant policies.⁶

⁶Ceres asserts that this question involves a federal regulatory statute and is unlike a case involving an ordinary commercial contract. Further, Ceres maintains that MPA's suggestion that

Assuming that an estoppel defense were available in theory, Ceres urges the Commission to reject it in this case, arguing that the facts here do not present a situation where the Commission could seriously consider such a defense. At the outset, Ceres argues that MPA's repeated refusals to grant Ceres the Maersk rates, despite Ceres' offers to meet or exceed the Maersk guarantees, were patently inequitable because MPA was statutorily required to provide the lower rates, as the Commission held. Id. at 7-11, 21. In addition, Ceres notes that it put MPA on notice, in writing, that it might file an FMC complaint if it did not receive the Maersk rates, and further that MPA advised Ceres that it would be denied a lease if it attempted to sign subject to a "reservation of rights." Ceres contends that MPA cannot now claim that such a reservation was necessary. Id.

Ceres asserts that MPA knew it needed a lease to continue to operate as an MTO in Baltimore, and that its "take it or leave it" ultimatum, as well as its imposition of excessively higher rates, were patently unreasonable and an abuse of its monopoly bargaining leverage. Thus, Ceres contends that it acted reasonably when it signed the lease, given MPA's positions and statements and the fact

estoppel doctrine from ordinary commercial cases should apply was "implicitly but definitively" rejected by the Court's references to Shipping Act policy considerations, judicial deference, and agency expertise. Ceres asserts that MPA has failed, in any event, to show that the facts of this case would satisfy the elements of a commercial estoppel defense. Ceres' Opening Brief on Remand at 21 n.20.

that signing the lease was the only option Ceres had to continue to operate at the Port. Id. Asserting that the case law shows that an estoppel defense has never been successful in the history of the 1916 and 1984 Acts, Ceres argues that MPA would have a very heavy burden demonstrating, on the facts of record, that it would be manifestly inequitable and contrary to Shipping Act policies to allow Ceres to prosecute its complaint, which burden it has failed to satisfy. Id. at 22.

2. Measure of Reparations

Ceres refers to its prior briefs for a full explanation of why it believes the Commission was correct in deciding that Valley Evaporating, rather than I.C.C. v. United States and Ballmill, sets forth the proper measure of damages for the violations established in the Order.

a. Measure of Reparations According to Valley

Ceres contends that case law supports the principle relied on by the Commission in its Order that "when a respondent had a legal duty under the Shipping Act to make a certain rate available to complainant, but instead imposed a higher rate in violation of that duty, the excess is 'akin to' an unlawful overcharge, and accordingly the measure of injury -- and reparations -- is the difference between the two rates." Ceres' Reply to Exceptions at 184. Ceres maintains that Valley Evaporating explicates the appropriate measure of damages in this case, where MPA established

criteria for offering a lower rate and then failed to apply those criteria even-handedly in violation of sections 10(b)(11) and (12). Id. at 182-186.

Ceres suggests that MPA's reliance on cases which held that the measure of damages in discrimination claims is not the difference in the two rates is misplaced here.⁷ In those cases, Ceres argues, a competitive relationship was required for a statutory violation, a situation which is not applicable here. Id. at 187-189.

b. Alternative Reasons for the Rate Differential Measure of Damages

In addition, Ceres offers two alternative reasons to support the differential measure of damages.

First, Ceres avers that the rate differential is the proper measure of damages under Int'l Trading Corp. v. Fall River Line Pier, Inc., 8 F.M.C. 145 (1964), rev'd on other grounds, 399 F.2d 413 (1st Cir. 1968), because the Maersk rates effectively capped the rates Ceres could charge its customers. Ceres' Opening Brief on Remand at 24. Ceres maintains that, like the complainant in Fall River, it was constrained by competitive factors from passing the unlawful rate differential on to its customers and is therefore

⁷I.C.C., 289 U.S. 385; Gillen's Sons Lighterage, Inc. v. American Stevedores, Inc., 12 F.M.C. 328 (I.D.), adopted, 12 F.M.C. 325 (1969); 3M Company v. Interamerican Freight Conference, 24 S.R.R. 728, 737 (I.D. 1987) (dictum); and Nalco Chemical Co. v. Compania Sud Americana de Vapores, 23 S.R.R. 1202, 1211 (I.D. 1986).

entitled to rate differential reparations.⁸

Through its earlier filings, Ceres asserts that many of its liner carrier customers competed directly with Maersk. Further, Ceres contends that these carriers knew the rates Maersk paid for its terminal services at Baltimore, and would not pay higher rates. As a consequence, Ceres maintains that, in order to keep its customers, it was required to charge a lower competitive rate comparable to Maersk's and to absorb the difference. Ceres' Proposed Findings of Fact at 77, Ceres' Reply to Exceptions at 189-190. In support of its argument, Ceres explains difficulties it had with its customers as a result of its higher lease rates, pointing to a letter its customer Polish Ocean Lines sent to the MPA port director, which states "[f]or POL, it is essential to be on the same terms as Maersk, for obvious competitive reasons." Ex. CK-33. Ceres explains similar difficulties it had with its customers Atlantic Container Line, Croatia Line, Zim Line and United Arab Shipping Company of Saudi Arabia. See Ceres' Proposed Findings of Fact at 79-80. Further, Ceres asserts that MPA's own financial study reflected the losses Ceres suffered under the terms

⁸Ceres contends that, although Fall River was not judicially enforced, the First Circuit's decision was based on jurisdictional grounds and had no effect on its validity with respect to liability and damages. This is evidenced, Ceres maintains, by the fact that it continues to be cited for substantive issues, referring to Sidney-Williams Co. v. Maersk Line Agency, 20 F.M.C. 323, 325 (1977) and River Parishes Co. v. Ormet Primary Aluminum Corp., 27 S.R.R. 621, 632-33 (I.D. 1996).

of the lease. Id. at 80-81. See also, Ceres' Reply Brief at 57-58 and Ceres' Reply to Exceptions at 84-86 (refuting MPA's argument excepting to the administrative law judge's finding that the Maersk rates acted as a cap on what Ceres could charge by arguing that no one else was entitled to the Maersk rates and therefore they could not have acted as a cap). Ceres contends that MPA has failed to offer any evidence of its own and instead engages in linguistic games which ignore the evidence Ceres has presented.

Second, Ceres contends that the rate differential is the proper measure of reparations under Secretary of the Army v. Port of Seattle, 24 S.R.R. 595 (1987), in light of the facts relating to MPA's violation of section 10(d)(1) of the Shipping Act, 46 U.S.C. app. § 1709(d)(1), as set forth in the Commission's Order at 103-108. Id. at 24. In Secretary of the Army, the Commission found that the port violated section 10(d)(1) by charging a higher rate for transloading military cargo than for commercial cargo. The amount of reparations was the difference between the rate for the service in the military tariff and the rate in the commercial tariff. Ceres contends that here, as in that case, MPA defined the benchmark by stating that it would have made the Maersk rates available to any entity who could meet the criteria that the Port established for granting those rates; Ceres met those criteria, and therefore it contends that the rate differential is the proper measure of damages. Ceres' Reply to Exceptions at 191.

B. MPA's Opening Brief

1. Estoppel Issue

a. General Principles of Waiver and Estoppel

MPA relies on general principles of waiver and estoppel to argue that Ceres, by its words and conduct, induced MPA to enter into the lease agreement. MPA states that "the estoppel principle is that 'a person's act, conduct or silence when it is his duty to speak' . . . preclude[s] him from asserting a right he otherwise would have had against another who relied on that voluntary action.'" MPA's Opening Brief on Remand at 3 (quoting In re Varat Enterprises, Inc., 81 F.3d 1310, 1317 (4th Cir. 1996) (citations omitted)). MPA asserts that "the principle of waiver is that, by signing a contract or taking other action, 'a party [may] voluntarily or intentionally relinquish[] a known claim or right.'" Id. Further, MPA opines that waiver and estoppel "are applicable in actions arising under federal law," MPA's Opening Brief on Remand at 3 (quoting Hass v. Darigold Dairy Products, Co., 751 F.2d 1096, 1099 (7th Cir. 1985)), and they "generally apply to all legal actions" in the absence of an "exception to that general rule." Id. (quoting Black v. TIC Investment Corp., 900 F.2d 112, 115 (7th Cir. 1990)). As a consequence, MPA contends, unless there is a "special exception," Ceres may not recover damages because it induced MPA to enter into the lease agreement containing the rate terms that are the basis for Ceres' damages claims. Id. at 4.

b. MPA Claims that Ceres' Own Conduct Bars Its Claim for Reparations

The thrust of MPA's argument is that Ceres' claim for reparations must be barred by its own conduct: it was fully aware of the Maersk lease terms when it freely negotiated and signed its own lease with MPA, thus inducing MPA to sign and perform the agreement. Id. at 7. See also, MPA's Post-Hearing Memorandum of Law at 53-57, MPA's Exceptions at 69-70, and Order, 27 S.R.R. at 1263, for a complete discussion of the lease negotiations. MPA maintains that it is "undisputed" that Ceres' conduct induced MPA to sign the lease, which MPA contends it would not have done had Ceres given any indication that it would later sue for damages. Id. at 10. Further, MPA asserts that it is "critical" that Ceres neither reserved its rights to challenge the lease, nor gave MPA any other reason to believe it would challenge the terms of the negotiated lease. Id. See also, MPA's Exceptions at 22-23. Rather, MPA argues that Ceres should have pursued a Shipping Act claim instead of signing the lease, or signed it "under protest and with full reservation of its rights" as in Cargill, Inc. v. Federal Maritime Commission, 530 F.2d 1062, 1066 (D.C. Cir. 1976). Id. at 11.

MPA maintains that, by inducing the Port to sign and perform the lease, Ceres has waived any claim and is estopped from seeking

reparations.⁹ Initially, MPA asserts that, by signing the lease with full knowledge, Ceres has engaged in "acts or conduct that naturally leads the other party to believe that the right [to sue] has been intentionally given up." Id. at 11 (quoting American Hardware Mutual Insurance Co. v. BIM, Inc., 885 F.2d 132, 138-139 (4th Cir. 1989)). See also, In re Varat Enterprises, 81 F.3d at 1317; Heller Int'l Corp. v. Sharp, 974 F.2d 850, 860-862 (7th Cir. 1992); Alliant Techsystems, Inc. v. U.S. Dept. of the Navy, 837 F. Supp. 730, 736-38 (E.D. Va. 1993). Further, MPA claims that "Ceres' acceptance of the benefits of the bargain 'constitute[s] clear, unequivocal, and decisive acts' sufficient to create a waiver of rights." Id. (quoting Young v. Amoco Prod. Co., 610 F. Supp. 1479, 1489 (C.D. Tex. 1985)).

MPA contends that Ceres' conduct meets all the recognized criteria for estoppel: (1) Ceres knew the relevant facts when it signed the lease, (2) MPA reasonably believed that the signed agreement resolved all disputes, and (3) MPA relied on Ceres' conduct by making concessions in the negotiations, and by signing and performing the lease, including making capital improvements. MPA maintains that this case is similar to Alliant Techsystems, 837

⁹MPA claims that once Ceres "induced" it to enter the lease, it was then bound by section 10(a)(3) to perform under the terms of the filed agreement, and that Ceres should be prevented from suing for "years of accumulated damages" on the theory that MPA's adherence to the negotiated lease is wrongful. MPA's Opening Brief on Remand at 12.

F. Supp. 730, in that Ceres could have filed a challenge with the Commission but instead "made a business decision" to sign the lease, upon which commitment MPA relied to its detriment. Id. at 12 (quoting 837 F. Supp. at 738).

MPA further contends that Ceres has failed to adequately show duress or coercion. First, MPA opines that in order to claim duress, a party must promptly repudiate the entire agreement and cannot, as Ceres did, perform and accept its benefits for eighteen months. Id. at 13 and MPA's Exceptions at 74-75, West Gulf Marine Ass'n v. Port of Houston Auth., 21 F.M.C. 244, 250 n.17 (1978), aff'd 610 F.2d 1001 (D.C. Cir. 1979), cert. denied, 449 U.S. 822 (1980) ("WGMA"); Palmetto Shipping & Stevedoring Co., Inc. v. Georgia Ports Auth., 24 S.R.R. 50, 88-89 (I.D. 1987), adopted, 24 S.R.R. 761, 765 (1988) ("Palmetto Shipping"); In re Boston Shipyard Corp., 886 F.2d 451, 455 (1st Cir. 1989); Sutter Home Winery, Inc. v. Vintage Selections Ltd., 971 F.2d 401, 409 n.7 (9th Cir. 1992).

Second, MPA avers that Ceres has failed to show extreme circumstances necessary to establish a claim of duress. Economic pressures resulting from Ceres' business circumstances do not qualify, according to MPA. Id. at 13-14, and MPA's Exceptions at 74 (citing WGMA and Palmetto Shipping).

c. There is No Special Exception Precluding the Application of Waiver and Estoppel Here

At the outset, MPA opines that "there is no reason why rules of waiver and estoppel should not apply in cases arising under the

Shipping Act[]." Id. at 14. Rather, MPA contends that

[t]he Commission has recognized that (i) a party may be estopped from asserting a Shipping Act claim by engaging in "misleading conduct" where there is "reliance on such conduct by respondents, and a detriment to respondents as a result of such reliance," and (ii) a party may waive a claim through a "voluntary, intentional relinquishment of a known right . . . manifested either by express statement or by conduct which can only be reasonably considered consistent with such relinquishment."

Id. at 14-15 (quoting A/S Ivarans Rederi v. Companhia de Navegacao Lloyd Brasileiro, 23 S.R.R. 1543, 1552 (I.D. 1986), adopted, 24 S.R.R. 1468 (1988), rev'd on other grounds, 895 F.2d 1441 (D.C. Cir. 1990)).¹⁰ Similarly, MPA relies on New York Shipping Association, 571 F.2d 1231, for the proposition that waiver and estoppel exist in Shipping Act cases, and further that an analysis of the facts shows that Ceres did not reserve its rights as required by that case. Id. at 15 and MPA's Exceptions at 70-72.

MPA maintains that the Commission and Ceres relied on tariff cases to argue in the Fourth Circuit that a "special exception" precluded MPA's waiver and estoppel defense here. However, MPA contends that a special exception does not apply to cases such as this one where contracts are freely negotiated by sophisticated parties. MPA asserts that

a rule that allows Ceres to claim damages based on the very lease terms it induced MPA to sign years earlier

¹⁰MPA contends that Ivarans expressly recognized that the rules of waiver and estoppel apply in Shipping Act cases even though the facts there did not establish either. MPA's Opening Brief on Remand at 15 n.8.

would undermine the purpose and benefits of negotiated contracts. It would make lease agreements binding only on the port authority and not the customer. . . . It would permit a customer to silently accumulate years of damage claims and then spring them without notice on the port authority.

Id. at 5.

Moreover, the distinction between tariffs and freely-negotiated lease agreements is crucial, avers MPA. MPA asserts that the reason a customer who operates under a tariff is free to challenge those rates is because they are not negotiated, but are "unilaterally promulgated and uniformly applicable." Id. at 16 (quoting WGMA). The rate published in the tariff becomes the legal rate, if and until it is determined not to be lawful by a Commission finding of discrimination or unreasonableness. Further, MPA points to Valley Evaporating, stating "waiver and estoppel cannot apply because 'to hold otherwise would be to make the mere establishment of rates by a carrier conclusive of their reasonableness and justness while in effect.'" Id. (quoting Valley Evaporating, 14 F.M.C. at 20).

In contrast, MPA asserts that this case does not involve the "mere establishment of rates" through a tariff, but is a lease agreement which came into effect by the mutual consent of the parties. Further, MPA asserts that it "had no statutory duty to give Ceres any long-term leasehold property or to make investments." Id. at 16. Rather, MPA maintains that its duty was to charge Ceres the tariff rate, unless the parties agreed

otherwise. Id. In sum, MPA asserts that

courts have recognized that estoppel defenses should be available so far as possible in cases involving federal transportation regulation except where such a defense would violate the bedrock rule that the tariff rate is the only lawful rate.

Id. at 17 (citing Consolidated Freightways Corp. v. Admiral Corp., 442 F.2d 56 (7th Cir. 1971), and General Electric Co. v. MV Nedlloyd, 817 F.2d 1022 (2d Cir. 1987), cert. denied, 484 U.S. 1011 (1988)).

d. Ports Rely on Terminal Leases to Provide Stability for Long-Term Investment and Planning

From a policy standpoint, MPA argues that acceptance of Ceres' argument would defeat a principal purpose of negotiated terminal lease agreements -- to enable port authorities and their customers to plan multi-year investments and business strategies. Id. at 2. Instead, MPA contends that allowing Ceres to proceed with its complaint would "create havoc" within the port industry, inviting a flood of litigation, with the result being that leases are binding only on ports. MPA's Exceptions at 35-37. Further, MPA claims that port authorities "could never safely rely on the terms of their agreements" because their customers could challenge them "years later." Port authorities would have the risk of "entirely unknown but accumulating liabilities" for claims that could be "sprung upon them without notice years into the lease," declares MPA. How, it contends, could it have known that Ceres was silently building such a case? MPA's Opening Brief on Remand at 18.

Finally, MPA maintains that accepting MPA's waiver and estoppel arguments in this case would not have a broad or adverse impact on port customers generally, because it would not prevent a port customer from objecting where concealed facts, unforeseen events or subsequently changed conditions make it unfair to hold the customer to the negotiated terms. Id. at 5. Rather, this flexible application of waiver and estoppel principles would, MPA suggests, encourage privately negotiated contracts and protect port customers from hardships and disadvantages that were not part of the bargaining process. Id. at 18.

2. Damages

MPA relies on I.C.C. to argue that "the difference between one rate and another is not the measure of damages suffered" in undue preference and prejudice cases. Id. at 19 (citing 289 U.S. at 389). Rather, MPA opines that in discrimination cases, "the question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less." MPA's Exceptions at 91 (quoting I.C.C., 289 U.S. at 390). Moreover, MPA contends that in accordance with the "actual injury" requirement of section 11(g) of the Act, a complainant must prove some sort of business harm resulting from the preference given to the favored party. Relying on I.C.C., MPA contends that the complainant must offer specific proof of (1) the amount of business diverted to the preferred

person, and the profits lost as a result of that diversion; or (2) the amount of loss suffered because the disfavored party was forced to sell at a lower price. If there is no traffic diversion or similar competitive harm, argues MPA, there can be no recovery. MPA's Opening Brief on Remand at 19-20 (citing I.C.C., 285 U.S. at 390-391).

MPA asserts that the Commission has recognized the principle of actual injury measured by what the complainant has lost, and not by what the allegedly preferred party has gained, referring to California Shipping Line, Ltd. v. Yangming Marine Transport, 25 S.R.R. 1213, 1230 (1990); West Indies Fruit Co. v. Flota Mercante Grancolombiana S.A., 7 F.M.C. 66, 69-70 (1962); Waterman v. Stockholms Rederiaktiebolag Svea, 3 F.M.B. 248, 249-53 (1950); and Agreement No. 8905 - Port of Seattle - Alaska Steamship Co., 7 F.M.C. 792, 800 (1964). Further, MPA contends that Ballmill Lumber, a terminal leasing decision cited by the Fourth Circuit, is squarely contrary to any measure of damages based on rate differential; the Commission there denied reparations because Ballmill failed to prove actual damages and because there was no proof that the losses were the "proximate result of the violations." Id. at 21 (quoting Ballmill, 11 F.M.C. 494, 509-11 (1968)). See also, MPA's Exceptions at 91-94.

Ceres was unable to produce evidence of competitive harm and actual injury, MPA maintains, and therefore relied on tariff

overcharge cases, where a complainant has an absolute right to a lower rate, to argue that the rate differential is the proper measure of damages here. MPA seeks to distinguish the cases upon which Ceres relies, describing Valley Evaporating as the "proverbial 'hard case'" that states a rule of damages that is narrowly tailored to the exceptional circumstances presented therein. Id. Further, MPA contends that only Valley Evaporating and General Mills, Inc. v. Hawaii, 17 F.M.C. 1, 4 (1973), have applied such a rule, both of which are entirely different from this case. MPA further opines that States Marine Lines, Inc. v. Federal Maritime Commission, 313 F.2d 906 (D.C. Cir. 1963), cert. denied, 374 U.S. 831 (1963), is inapplicable because it dealt with the predecessor to section 10(b)(6) of the 1984 Act, which is not at issue in this proceeding. Id. at n.14. Rather, MPA submits that Congress made clear that such a special damages rule has a narrow scope and is applicable only to violations of sections 10(b)(6)(A) and (B). In all other cases, MPA contends, actual damages must be proven under the traditional rule. Id. at 22-23.

C. Ceres' Reply Brief

1. Estoppel

a. Policy Considerations

Initially, Ceres rebuts MPA's policy argument by contending that stability and efficiency in the port industry will be achieved through adherence to sensible, substantive rules for determining

whether a statutory violation exists. In fact, Ceres asserts that the Commission's Order, which MPA ignores, reflects this. Ceres points out that the Order makes clear that ports retain significant flexibility: to enter into lease arrangements for the use of port facilities, including discretion to decide whether to offer discount rates and to establish reasonable criteria for making such rates available; to exercise reasonable judgement as to whether an entity is capable of meeting those criteria, including undertaking an evaluation of a potential lessee's operational and business qualifications and financial condition; and, in the case of two competing potential lessees, to determine which is more qualified. Ceres' Reply Brief on Remand at 1-2 (citing to Order, 27 S.R.R. at 1273-1274).

Ceres further contends that Shipping Act policy considerations militate against upholding MPA's position. In its view, MPA's position boils down to the proposition that a port with monopoly control of essential terminal facilities can refuse, on "patently unreasonable" grounds and in violation of a Shipping Act duty, to grant an MTO discounted rates and instead impose rates that are "more than double," then refuse to allow the MTO to sign the lease subject to a reservation of rights to sue, thus forcing the MTO to cease business or sign the lease, and be forever estopped from seeking legal redress. Id. at 3 (quoting Order, 27 S.R.R. at 1272-1273).

Ceres further objects to MPA's assertion that Shipping Act policies are safeguarded as long as there is no showing of "duress" or "coercion" as those terms are defined by cases in which a party seeks to avoid an entire contract on such grounds. Ceres notes that it did not seek to void the entire lease, but only one provision (the rates) as violative of the Shipping Act. Moreover, noting that the Fourth Circuit has already agreed with the Commission's holding that finding waiver on the basis of waiting eighteen months before bringing suit would nullify the statute of limitations, Ceres rejects MPA's complaint against "silently-mounting damages." Id. at 4.

b. Case law

Ceres contends that MPA grossly mischaracterizes the cases upon which it relies to argue that estoppel applies in actions involving federal transportation law. Instead, Ceres asserts that those cases, Consolidated Freightways Corp v. Admiral and General Electric Co. v. MV Nedlloyd, were contract or common law actions which did not involve violations of a federal regulatory statute. Id. at 4-5. Further, Ceres contends that MPA's assertion that "waiver and estoppel generally apply in all actions under federal law unless some special exception applies" must similarly be rejected. Id. (quoting MPA's Opening Brief on Remand at 14). MPA's reliance on Black v. TIC Investment Corp., Hass v Darigold Dairy Prod. Co. and Alliant Techsystems is incorrect, according to

Ceres, because the first two cases did not involve estoppel as a defense to a complaint, and the third involved a separate written waiver in a specialized government procurement context. Id.

Ceres maintains that the "bottom line" is that MPA has failed to meaningfully support its position. Not only has MPA failed to cite a single case in which a complainant was held to be estopped from pursuing a complaint alleging violations of the Shipping Act, but, according to Ceres, MPA has also failed to cite a single case in which a plaintiff/complainant was estopped from pursuing a complaint alleging that defendant/respondent violated any federal regulatory statute. Id. at 5-6. Ceres further contends that MPA has misread the NYSA decisions and has neglected to note that even though estoppel was not found on the facts of A/S Ivarans Rederi, that decision also stated that even if the facts were established, complainant would not necessarily be barred from pursuing a complaint alleging violations of the Shipping Act. Id. at 6 (citing A/S Ivarans Rederi at 23 S.R.R. 1553 & n.8).

Finally, Ceres contends that MPA's reliance on estoppel cases involving unregulated entities is inapposite because they do not involve an evaluation of statutory policy considerations necessary to a determination of whether an estoppel defense can defeat a complaint alleging a violation of a federal regulatory statute, as the Fourth Circuit recognized. Id. at 6-7 (referring to Slip op. at 7-8). In any event, Ceres asserts, MPA has failed to establish

a defense even based on the ordinary commercial cases it cites. Id. at 7.

c. Distinction between tariffs and agreements

Ceres rejects MPA's argument that case law and the Shipping Act set forth a distinction between tariffs and "negotiated" agreements, maintaining that "negotiated" agreements, particularly those involving ports with monopoly bargaining power, can implicate important Shipping Act policies that could be as incompatible with an estoppel defense as in tariff cases. Further, Ceres rebuts MPA's assertion that "Ceres had substantial bargaining power in its negotiations with MPA" by asserting that Ceres could in no way match MPA's bargaining power "as a monopolist controlling facilities that Ceres needed to stay in business at the port," and opines that if it had such power, it would not have ended up with the rates it did. Id. at 8.

d. Factual record

Ceres complains that MPA attempts to re-invent the factual record on remand, most significantly shown by its failure to address the factual issue specifically raised by the Court -- whether signing the lease was the only feasible means for Ceres to continue in business as an MTO at the Port. Id. at 8 (citing Slip op. at 8 n.1). Therefore, Ceres asserts that since it did establish a need for a lease to continue in business at Baltimore, that issue is "effectively resolved." Id. See supra pp. 16-18.

Ceres next points out that MPA, for the first time in this proceeding, has suggested that when Ceres signed its lease, it "had withdrawn" its demand for the Maersk rates, instead characterizing that as an "initial" demand, and further claims that as a result, MPA believed that Ceres had abandoned any thoughts of challenging the lease. Id. (citing to MPA's Opening Brief on Remand at 8-11). Characterizing MPA's suggestions as "blatantly false," Ceres contends that the facts demonstrate otherwise: Ceres made repeated demands over many months for the Maersk rates, which MPA has acknowledged (Id. at 9 (citing to MPA's Proposed Findings of Fact, ¶ 70)); Ceres floated the proposal for the weighted average of the Maersk and Universal rates, in February 1992, under pressure from its customers when its initial demands were rejected, upon which MPA now relies (Ex. CK-22, Kritikos Tr. 102-04, Kritikos ¶ 51); when that proposal was rejected, Ceres made clear its entitlement to the Maersk rates and its right to take legal action, which MPA well understood, as evidenced by an April 1992 letter from Ceres' counsel to MPA, which MPA characterized as a "threat[] to file suit" and an "ultimatum" (Ex. Teel-13, Teel ¶ 33); the Maryland Secretary of Transportation indicated that MPA was in the process of retaining counsel "to respond to a legal threat" set forth in Ceres' April 1992 letter, which the Secretary described as a threat by Ceres to pursue legal action if the Maersk rates were not offered to Ceres (Ex. DK-31).

Therefore, Ceres contends that, when the lease was signed in May 1992, MPA was well aware that Ceres had neither withdrawn its entitlement to the Maersk rates, nor ruled out any lawsuit, especially in view of the fact that MPA had given Ceres a "take it or leave it" ultimatum. Further, MPA's reiteration of Kritikos' statement that he would not sue if the parties reached an agreement fails to mention, according to Ceres, that the condition was not "any" agreement, but an agreement on parity with Maersk. Ceres' Reply Brief on Remand at 10, Kritikos Tr. 110-112. Moreover, MPA has acknowledged that it would not have entered into a lease if Ceres had attempted to reserve its rights. Ultimately, Ceres opines, MPA's attempts to re-invent the record fail to overcome two realities -- first, that it would be irrational to conclude that Ceres relinquished its rights to sue by signing the lease, and second, that it was MPA, not Ceres, who acted unfairly and contrary to Shipping Act policies. Id.

2. Damages

Initially, Ceres rejects MPA's argument that reparations should be measured by traffic diversion or other competitive harm, pointing out that the Commission ruled that a competitive relationship between Maersk and Ceres was not a necessary element of MPA's statutory violation. Further, Ceres argues that MPA has not shown why its failure to even-handedly apply its own criteria for providing the Maersk rates to another entity is not analogous

to the failure of respondent in Valley Evaporating, nor why the same measure of damages should not apply here. Id. at 11-13.

Moreover, Ceres rejects MPA's reliance on I.C.C. v United States, asserting that that case is not controlling in Shipping Act cases, especially where a different approach to reparations is justified. Id. at 13 (citing States Marine Lines, Inc. v. Federal Maritime Comm'n, 313 F.2d 906, 908-09 & n.9 (D.C. Cir. 1963)). Ceres maintains that I.C.C. and the other competitive injury cases upon which MPA relies are not controlling here because they concerned situations where the Valley rationale was not applicable. Unlike the present case, MPA's cases involved neither situations where a statutory violation was found in the absence of a competitive relationship nor where respondent had failed to even-handedly apply its own criteria for granting lower rates, and, according to Ceres, they are not inconsistent with Valley. Id. See also North Atlantic Med. Frt. Conf., 11 F.M.C. 202 (1967); West Indies Fruit Co. v. Flota Mercante, 7 F.M.C. 66 (1962); Agreement No. 8905 - Port of Seattle, 7 F.M.C. 792 (1964), which were distinguished in Valley.¹¹

Finally, Ceres rebuts MPA's argument that Valley was repealed by the last sentence of section 11(g) of the Act, positing instead

¹¹Ceres distinguishes Ballmill, 11 F.M.C. 494 (1968), first because the Commission did not address rate differential reparations, opining that the complainant there did not seek such but asked for a larger award based on business losses, and also because it was decided two years before Valley.

that Congress agreed with the Valley rationale that rate differential reparations are appropriate when no competitive relationship is required for a violation. Id. at 14.

D. MPA's Reply Brief

1. Estoppel

MPA contends that Ceres does not dispute that, under what it calls "standard federal law principles of waiver and estoppel," Ceres' claims would be barred. Moreover, stating that both parties knew that MPA would not enter a lease if Ceres reserved its right to sue, MPA reiterates its argument that Ceres "induced" MPA to enter the lease and "deliberately" misled MPA. MPA's Reply Brief on Remand at 2-3.

Further, MPA opines that even though Ceres has disclaimed duress, it makes "duress-type arguments that play fast and loose with the undisputed evidence." Id. at 3. MPA rejects Ceres' arguments that it was under pressure to obtain a lease, and instead inquires why Ceres did not show MPA financial justification for rate relief and request modified lease terms. Id. at 4.

Recognizing that its claim would otherwise be barred, Ceres, according to MPA, seeks a special exception to the ordinary rules. Again, MPA rejects Ceres' proposed alternatives as meritless, and instead, relying on NYSA and Ivarans, asserts that the Commission and the courts have recognized that waiver and estoppel principles can bar Shipping Act claims. Id. at 5-6. Further, refuting Ceres'

argument that MPA is a monopolist, MPA contends that the record demonstrates the opposite, that MPA vigorously competes for business with many East Coast ports, and that this absence of a monopoly would have been demonstrated had Ceres raised this issue during the evidentiary phase of the proceeding. Id. at 6. Ceres has also failed, according to MPA, to cite any cases which suggest that a party can escape its contractual obligations by alleging the other party is a monopolist. Id. at 7.

MPA reiterates its argument that Ceres confuses the distinction between tariff and non-tariff cases and relies on irrelevant cases. Rather, MPA contends that the rationale behind not applying waiver and estoppel in tariff cases is not present in this case. Further, MPA dismisses Ceres' reliance on what it calls the dicta in CSAV, noting that it has not questioned Ceres' standing to file a complaint, which is different from the question of whether MPA has a valid waiver and estoppel defense, an issue that was not raised in CSAV. Id. at 8-9.

MPA rejects as a mischaracterization of the Commission's decision Ceres' argument that waiver and estoppel principles should not apply where there has been a violation of a Shipping Act duty to offer non-discriminatory rates. Instead, relying on Seacon Terminals, Inc. v. Port of Seattle, 26 S.R.R. 886, 899-900 (1993), MPA argues that "there is no legal basis for the theory that MPA was required" to enter into its lease with Ceres. Id. at 10. MPA

contends that this fictitious argument is a way to avoid the "undisputed facts" that Ceres "induced" MPA to make concessions during the lease negotiations. Id.

MPA also rebuts Ceres' "second alternative rationale" as either contrary to or unsupported by the record. First, MPA opines that Ceres makes a circular argument that the defense should be unavailable because the Commission found a violation without considering waiver and estoppel. Rather, MPA opines that "[t]his begs the question remanded by the Fourth Circuit: whether Ceres should be allowed to induce MPA to make concessions and agree on a package deal in return for compromises on rates, operate under the lease for 18 months, and later attack the agreed compromise." Id. at 11. Second, although Ceres "put MPA on notice" that it might file an FMC complaint initially, MPA contends that this was superseded by the later compromises and Ceres' negotiating stance that "if we do reach agreement, we're not going to sue." Id. Third, MPA rejects Ceres' claim that it needed a lease to operate, pointing out that Ceres had a lease through the course of negotiations, which MPA extended, and further, that there is no evidence of any "monopoly bargaining leverage." Id. at 12.

MPA also opines that there was nothing unfair about MPA's stance that it would not have signed a lease if Ceres had reserved its right to sue. Rather, MPA again refers to Ceres' unfairness in accepting MPA's concessions, enjoying the benefits of the bargain

for 18 months, and then selectively repudiating only the rate terms of the lease. Id. Finally, MPA acknowledges that Ceres' best option was to sign the lease, but disagrees that it was Ceres' only option, maintaining that MPA was keen on keeping Ceres at the port in order to offer the ocean carriers calling there the services of several competing MTOs. Id.

2. Damages

Initially, MPA rejects Ceres' reliance on Valley Evaporating, describing it as a narrow exception involving extraordinary circumstances, and not a new rule dispensing with the actual injury requirement. Moreover, MPA contends that Ceres has failed to address what it calls a "key point" -- that an allegedly undue preference to Maersk did not automatically cause any injury to Ceres. Id. at 13.

MPA also refutes Ceres' two alternative measure-of-damages arguments, asserting that the Commission refused to accept these arguments when Ceres first briefed them and should do so again. Id. First, MPA rejects Ceres' interpretation of Fall River, arguing instead that the case followed the traditional rule requiring a showing of actual competitive injury, which happened to be the rate disparity in that case. Id. Because Ceres did not compete with Maersk, MPA contends, the Maersk rates could not have acted as a cap on the Ceres rates, nor is there proof supporting Ceres' argument in this regard. Id. at 14.

Second, complaining that Ceres has "persistently mischaracterized" Secretary of the Army v. Port of Seattle, 24 S.R.R. 595 (1987), MPA opines that in that case the Commission found that the disparity between the rates was unreasonably excessive and then determined damages by calculating hypothetical rates that would have been reasonable based on the actual costs. Id. at 14-15. Ceres has failed to offer any evidence that its rates were excessive in relation to the costs of the services performed and facilities provided by MPA. Id.

DISCUSSION

A. Waiver and Estoppel

The fundamental question presented in this proceeding is whether the traditional common law doctrines of waiver and estoppel can preclude bringing a complaint under the Shipping Act. Never before has the Commission barred a complainant from challenging the terms of a lease agreement based on these principles, and we decline to do so in the instant case.

Among its purposes, the Shipping Act aims 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." 46 U.S.C. app. § 1701(1).¹² Through this statutory scheme, Congress set

¹²MPA contends that a "key goal [of the Shipping Act] is to foster 'competitive and efficient ocean transportation by placing a greater reliance on the marketplace.'" MPA's Opening Brief on

forth numerous prohibited acts and provided that "any person" may file a complaint with the Commission alleging a violation of the Shipping Act. 46 U.S.C. app. § 1710(a). The prohibited acts set forth in section 10 apply to agreements entered into under the Shipping Act, including the terminal lease agreement at issue in this proceeding. The Shipping Act does not prohibit the parties to those agreements from challenging them as violative of the Act. Rather, parties to agreements are granted a specific right under the Shipping Act to file a complaint with the Commission. Had Congress intended to prohibit the filing of such a complaint in the event the complained-about lease was entered into "voluntarily," it presumably would have done so.¹³ Instead, the Commission has entertained many complaints against agreements by their members and has never determined that simply by entering an agreement a party has waived its statutorily granted rights, nor that operating under an agreement should preclude a party from subsequently challenging that agreement as violative of the Shipping Act.

Remand at 1. However, the quoted language was actually enacted as an amendment to the purposes section of the Act in 1998 as part of the Ocean Shipping Reform Act, and not the 1984 Act as indicated.

¹³Indeed, Congress did so specifically with respect to service contracts, when it provided that the exclusive remedy for breach of a service contract entered into pursuant to section 8(c) of the Shipping Act, 46 U.S.C. app. § 1707(c), is an action in an appropriate court, unless the parties otherwise agree. Congress did not enact such a provision to bar complaints challenging agreements entered into in accordance with the Shipping Act.

The Court indicated that one of the reasons it remanded this case for agency review was that "a central policy behind the Shipping Act -- that all shippers and carriers must be treated equally -- conflicts with the ability of ports, and shippers, to enter into leases with certain entities on preferential terms." Slip op. at 7. This statement, however, does not accurately depict the Commission's functions under the Act. The Shipping Act permits, and indeed encourages, parties to enter into agreements tailored to their individual needs. What the Shipping Act prohibits is differentiation based on unreasonable or unjustly discriminatory factors. The Commission's role is not to ensure that all interested parties get the same deal or make a certain profit. Rather, the Commission's role is to ensure that parties are not precluded from obtaining preferential treatment due to unreasonable or unjustly discriminatory reasons.

In this case, the Commission concluded, based on the evidence of record, that MPA's denial of the preferential lease terms to Ceres was based on Ceres' status as an MTO, and further that such denial was patently unreasonable given the container throughputs to which the parties agreed. Order, 27 S.R.R. at 1273. The Commission explained that its decision was neither designed nor intended to constrain the ability of ports to consider many relevant factors when negotiating a lease. Id. at 1273-1274. Rather, the Commission emphasized that its decision leaves to ports

a vast amount of discretion to structure deals as they see fit, within the limits of the Shipping Act. Id. (discussing California Shipping Line, where it was reasonable to deny access to service contract terms based on valid transportation factors, i.e., legitimate concerns over the ability to fulfill essential terms of the contracts, and Seacon Terminals, where the Commission supported a port's decision to grant a lease to one MTO instead of another based on legitimate business concerns).

Agreements entered into under the Shipping Act differ from contracts entered into in the ordinary commercial context. Unlike commercial contracts, parties to agreements entered into in accordance with the requirements of the Act are subject to various statutory and regulatory requirements. In this case, MPA entered into a lease agreement with Maersk, and indicated in the course of its negotiations with Ceres that it would grant preferential lease terms to entities who could make guarantees comparable to those in the Maersk lease. However, MPA was steadfast in its position that only steamship lines could meaningfully match the Maersk guarantees, and thus denied Ceres the preferential rates because of its status as an MTO, despite the fact that Ceres guaranteed significantly more cargo than Maersk. Teel Rebuttal ¶¶ 3, 29-33. See also, Order, 27 S.R.R. at 1272-1273.

MPA was not, as the Court suggested, required to grant a lease to every potential lessee. MPA is correct in its assertion that it

does not have a duty to grant a lease. See Seacon, 26 S.R.R. 886. But, as the Commission found in its Order, once MPA established its criteria and said it would grant preferential lease terms to entities who could match the specified terms, it then had a duty under the Shipping Act to apply those criteria in an even-handed, fair manner, and not differentiate based on invalid transportation factors, such as Ceres' status as an MTO. The Commission determined that MPA had violated sections 10(b)(11) and (12) and 10(d)(1) for failing to satisfy that duty. MPA's statutory duty arose when it set forth the criteria upon which it would grant preferential lease terms. To permit MPA to invoke the principles of waiver and estoppel in this situation would allow it to avoid responsibility for violating the Act and would contravene the statutory policy of curbing undue and unreasonable preference and prejudice and unjust discrimination.

Case law supports denying MPA's estoppel claim. In A/S Ivarans, supra, the complainant was not estopped from challenging an agreement provision even though the agreement contained an arbitration clause and the complainant had lost in arbitration, because, as the administrative law judge found, the elements of estoppel were not present, and even if complainant's conduct "could be considered to be inequitable and subject to estoppel or waiver, . . . that does not necessarily mean that [it] has lost its right to file a complaint with the Commission alleging violations of the

Shipping Act" because waiver and estoppel "are not designed to destroy rights conferred by Congress." 23 S.R.R. at 1553 n.8. Similarly, in Port Auth. of N.Y. and N.J., the Commission found that the administrative law judge had ruled correctly that the fact that complainant was a member of a collective bargaining unit and was required to adhere to its labor contract in accordance with labor law, "was not demonstrative of the existence of a waiver of rights under shipping law." 23 S.R.R. at 1341. Also, in River Plate, supra, a shipper was not prevented from challenging the validity of an unfiled agreement even though it had operated under it for six years. Most recently, the Commission addressed the application of waiver and estoppel in CSAV, supra, when it endorsed the administrative law judge's determinations as a "clear, concise and accurate description of [its] position on estoppel." 28 S.R.R. at 143. In that case, the judge determined that the complainant was not estopped from challenging a provision of an agreement despite adhering to it without protest or reservation of its right, because the "Commission has an independent duty to interpret agreements filed with it and any person, including a conference member, has standing to file a complaint and ask the Commission to interpret the authority contained in the . . . agreement." 27 S.R.R. at 941.¹⁴ Moreover, referring to Ballmill, Perry's Crane and

¹⁴The respondents in CSAV filed a petition for reconsideration on April 20, 1998. Although a decision on that petition is pending, the Commission's treatment of estoppel has not been called

U.S. Lines, the administrative law judge found that the "Commission's statutory duty with respect to agreements should not be thwarted by the inconsistent actions of the parties to the agreement." Id.

In Ballmill, the Commission found violations of sections 16 First and 17 of the Shipping Act, 1916, the predecessors of sections 10(b)(11) and (12) and 10(d)(1) respectively, where a port gave preferential lease terms to some lessees but not to the complainant. Although the estoppel defense was not raised in that case, the Commission nonetheless considers it precedent for the rule that a party to an agreement is not later precluded from challenging that agreement. See also, CSAV, 28 S.R.R. at 143. MPA's contention that Ballmill is inapposite on its facts because the complainant in Ballmill entered its lease before the preferred tenant commenced its lease agreement is erroneous. The respondents in Ballmill included three tenants as well as the port authority, at least one of whom signed its lease prior to the complainant's renewal of its lease.

In the New York Shipping Association cases, the court upheld the Commission's determination that a group of claimants who had failed to seek refunds for over-assessments required by labor employers' collective bargaining agreements had not waived its rights. In New York Shipping Association, Inc. v. Federal Maritime

into question.

Commission, 571 F.2d 1231 (D.C. Cir. 1978) ("NYSA I"), the Puerto Rico Group entered into a settlement agreement, but the States Marine Group did not consent to the settlement and reserved its rights to later challenge it. In New York Shipping Association, Inc. v. Federal Maritime Commission, 628 F.2d 253 (D.C. Cir. 1980) ("NYSA II"), the court upheld the Commission's determination that a third group had not waived its claims even though it had not pursued its claims prior to issuance of the Commission's report and order in that case. The court rejected NYSA's contention that this was a case involving basic contract law and instead, relying on the Commission's exercise of its expertise, found reasonable its decision that the claimants had not lost their rights. 628 F.2d 258. MPA's reliance solely on NYSA I fails to adequately address the issues presented here.

We find unpersuasive MPA's attempts to argue that waiver and estoppel should be applicable in all cases arising under federal law unless a special exception exists. See supra at 22-23. Hass v. Darigold involved a suit for a contractual violation between an employer and a labor organization representing the employees; Black v. TIC Investments involved application of estoppel principles to claims for benefits through unfunded single-employer welfare benefits plans under the Employee Retirement Income Security Act of 1974 (ERISA), but the court there specifically expressed no opinion as to the applicability of estoppel in other

situations. 900 F.2d at 115. In General Electric v. Nedlloyd, 817 F.2d 1022, a shipper was estopped from challenging an ocean carrier's limitation of liability in its bill of lading. Although the carrier was found liable for damages, the shipper was limited to the carrier's ad valorem rate because it did not declare a higher value for its goods. In Consolidated Freightways, 442 F.2d 56, a truck carrier was estopped from collecting unpaid freight bills from the consignee in an action in district court where the waybills stated that the freight was prepaid; the court of appeals discussed the distinction between liability under common and contract law and the impact of the statutory prohibition against discrimination and stated that requiring double payment would not further the statutory policy of the Interstate Commerce Act of preventing unjust discrimination or undue preference. 442 F.2d at 63. In contrast, estoppel was not permitted in Pittsburgh, Cincinnati, Chicago and St. Louis Ry. Co. v. Fink, 250 U.S. 577 (1919), another undercharge case, because, as the court stated, estoppel should not become the means by which to avoid the statutory prohibition against discrimination. Id. at 582-3.

These are common law cases and do not involve a regulated entity who had a statutorily granted right to file a complaint, independent of the rights contained in the contract, as is the case here. The Commission "does not exercise the authority of a court of law or of equity. We administer and enforce the requirements of

the Shipping Act." European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc., 16 S.R.R. 1031, 1035 (1976), aff'd per curiam, No. 79-1503 (D.C. Cir. June 3, 1980), cert. denied, 449 U.S. 1079 (1981). The Shipping Act provides that "any person" may file a complaint, and this right is independent of the terms and conditions set forth in the agreement. MPA should not be permitted to use estoppel as a shield by which to insulate itself from the legal consequences of its conduct which has been found to violate the Shipping Act.

Equally unpersuasive is MPA's argument that permitting a complainant such as Ceres to go forward with its claim would make lease agreements binding only on port authorities and allow their customers to "silently accumulate years of damage claims and then spring them without notice on the port authority." See supra at 27. Port authorities are regulated entities under the Shipping Act, and their conduct is governed by the prohibited acts provisions set forth therein. However, the parties are free to bring suit in state court for other causes of action that lie in contract or common law, as evidenced by Ceres' claim and MPA's counterclaim in the Circuit Court for Baltimore City. See Order, 27 S.R.R. at 1259 n.16. Moreover, any party seeking to file a complaint under the Shipping Act has three years to do so and should not be punished for waiting the full statutory period of limitation.

Agreements subject to the Commission's jurisdiction in accordance with section 4 of the Shipping Act, 46 U.S.C. app. § 1703, including the terminal lease agreement at issue in this proceeding, are always negotiated between the parties and entered into voluntarily. These agreements are filed with the Commission but are not "approved" by the Commission as MPA contends.¹⁵ Entering into such agreements, however, does not preclude the parties from later filing a complaint with the Commission challenging the terms of those agreements. Nor should a party be estopped from challenging its agreement.

Therefore, we hold that, as a matter of law, the common law doctrines of waiver and estoppel may not be invoked to prohibit a party to an agreement subject to the Commission's jurisdiction from later challenging the agreement in a complaint filed with the Commission alleging that one of the parties to the agreement violated a duty imposed on it by the Shipping Act. We further find that Ceres neither waived its rights under the Shipping Act by entering into an agreement under the Shipping Act, nor is estopped from challenging the terms of its agreement because it waited 18

¹⁵Agreements generally become effective on the 45th day after filing with the Commission, unless rejected by the Commission for failure to comply with the requirements of the Shipping Act. 46 U.S.C. app. § 1705. Marine terminal agreements, like the one at issue in this proceeding, are exempted from the waiting period and become effective upon filing. 46 C.F.R. § 535.307.

months before filing its complaint with the Commission.¹⁶ To hold otherwise would abrogate the Commission's statutory duty to promote a transportation and marine terminal system free from undue and unreasonable discrimination.

Ceres requests that the Commission rule that the estoppel defense is inapplicable on two alternative grounds, first, that the defense does not apply where a complaint alleges that a monopoly port authority violated a Shipping Act duty to enter into a lease at non-discriminatory lower rates, and second, that if the Commission were to determine that the estoppel defense could be available in some situations, it would be inapplicable on the facts of this case. Because we believe that our disposition of the fundamental issue remanded by the Court is sufficient, we decline to address these ancillary issues, as they are unnecessary to the outcome of the proceeding.

The Court also sought the Commission's view on Ceres' assertion that it was required to enter into a lease with MPA in order to continue operating at the Port of Baltimore. Slip op. at 8 n.1. While we recognize that it certainly is far more competitive for a tenant using a port's facilities to have a lease with preferential rates than be assessed the full tariff rates, we cannot fully support Ceres' position on this issue. The Commission

¹⁶The Court agreed with the Commission's disposition of this latter point, that to rule otherwise would nullify the statute of limitations. Slip op. at 6.

is not responsible for ensuring that everybody makes a good deal -- just that the commercial environment is not hampered by unreasonable or unjustly discriminatory practices. As previously discussed, MPA was not required to give every potential lessee a lease; it was required to apply its stated criteria for granting the preferential lease terms in a fair and even-handed manner.

B. Damages

The Court suggested that the Commission further explain its determination of the appropriate measure of damages due Ceres should it rule that waiver and estoppel are not applicable. The Commission had found that MPA had violated sections 10(b)(11) and (12) and (d)(1) of the Shipping Act and remanded the proceeding to the office of administrative law judges for a determination of the amount of damages based on the measure set forth in Valley Evaporating, 14 F.M.C. 16. In Valley, the Commission ruled that once the respondent set forth the criteria upon which it would grant lower rates, it had a statutory duty to apply the criteria in an even-handed manner. The Commission further held that where the duty is "absolute" and a competitive relationship is not necessary to prove undue or unreasonable preference or prejudice, the proper measure of damages is the amount of unlawful excess exacted, which is akin to an overcharge. The measure of damages is the difference between the rate charged and the rate that would have applied but for the unlawful discrimination or prejudice. 14 F.M.C. at 25.

See also General Mills, Inc. v. Hawaii, 17 F.M.C. 1 (1973) (finding that proof of competitive injury was unnecessary for a section 16 violation of the 1916 Act because of a carrier's duty to apply its criteria fairly and impartially, and awarding rate differential reparations). In this proceeding, we relied on Valley and its progeny in finding that MPA had violated its statutory duty by failing to apply its stated criteria in a fair manner.

MPA argued to the Court and on remand that the measure of damages should be determined in accordance with I.C.C., 289 U.S. 385 (1933), and not Valley. In I.C.C., complainant lumber company brought an action against rail carriers engaged in interstate commerce alleging that rates maintained by the carriers were unduly prejudicial to complainant and unduly preferential to its competitors. The alleged violations were found, but the I.C.C. held that the record would not support an award of damages. The Supreme Court agreed, stating "when discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of damages suffered by the shipper." 289 U.S. at 389. Further, the Supreme Court stated "[t]he question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less." Id. at 390.

The Commission previously found that Valley Evaporating and not I.C.C. set forth the proper measure of damages for the facts

present in this case. The critical element in this case, and in Valley and the cases following it, is that a competitive relationship is not necessary to find a violation. MPA's duty to apply its own criteria in a non-discriminatory manner is not predicated on any competitive factors. Thus, when the Supreme Court in I.C.C. noted that in order to establish damages, "there must be full disclosure of the conditions of the business, or of those affecting competition," it was speaking of a situation where a competitive relationship was an essential element of the violation, which is not the case here.¹⁷ Id. at 393. On this basis, we distinguish I.C.C. and find that Valley is applicable to this case.¹⁸ Similarly, Ballmill can be distinguished because it was decided before Valley and the Commission did not address rate differential reparations in that case.

The Commission also ruled that MPA had violated section 10(d)(1) of the Shipping Act. Order, 27 S.R.R. at 1274-1275. Believing that Valley enunciated the proper measure of damages for the section 10(b)(11) and (12) violations, we did not find it

¹⁷For a complete discussion of when a competitive relationship is necessary, and why it is not here, see Order, 27 S.R.R. at 1270-1271.

¹⁸Consistent with our findings in the Order, 27 S.R.R. at 1270-1271, our decision here does not suggest that a competitive relationship is never necessary, nor does it mean that the I.C.C. rule would never be the proper measure of damages. However, in situations where competition is not necessary, the I.C.C. rule is not appropriate.

necessary or appropriate to set forth additional damages for the section 10(d)(1) violation, since the violations arose from the same set of circumstances. However, in view of the Court's directive, we will take this opportunity to explain the measure of damages for the section 10(d)(1) violation.

The Commission relied on Secretary of the Army v. Port of Seattle, 24 S.R.R. 595 (1987), in analyzing whether MPA violated section 10(d)(1). In that case, it was found to be an unreasonable practice where the port charged complainant a tariff rate five times higher for military cargo than for non-military cargo for substantially similar cargo and services. The measure of damages was the difference between the military and commercial rates, because that was the amount found to be excessive. Similarly, the Commission stated in the pending case that

even though MPA's practice of offering more favorable rates to lessees who make vessel call commitments could be reasonably related to its stated end of securing vessel calls to the Port, the degree of disparity in this case is disproportionate to MPA's goals.

Order, 27 S.R.R. at 1275. We compared cargo throughputs, container rates, crane rental charges and crane usage, and specifically noted that MPA's reliance on the vessel call guarantee was not proportional to the difference in rates, "particularly where the difference so greatly disfavors the party committed to moving the substantially higher volume of cargo." Id. Therefore, we find that the rate differential as applied in Secretary of the Army is

the proper measure of damages for the section 10(d)(1) violation in this case.

Ceres also sought to have the Commission rule on its argument that the Maersk rates acted as a cap on what it could charge its customers and that therefore the rate differential was the proper measure of damages for that reason as well. However, we find no basis for ruling on this issue, as such a ruling would be unnecessary and duplicative.

C. Sovereign Immunity

On March 12, 2001, the Fourth Circuit ruled in South Carolina State Ports Authority v. Federal Maritime Commission and United States of America, 243 F.3d 165 (4th Cir. 2001) ("SCSPA"), that the doctrine of state sovereign immunity from suit prohibits the Commission's adjudication of complaints brought by private parties against state-run ports. The Court denied the Commission's motion to stay issuance of the mandate, and the mandate was issued on May 4, 2001. On July 10, 2001, the Commission filed a petition for writ of certiorari in the Supreme Court of the United States seeking review of this decision. Like the South Carolina State Ports Authority, MPA claims to be an arm of the state and therefore immune from the Commission's jurisdiction. Earlier in this proceeding, Ceres and MPA stipulated that they would preserve the issue of whether Ceres' claims for damages are barred by the Eleventh Amendment and principles of sovereign immunity for

resolution in a federal court proceeding in the event of an award of reparations. See Order Granting Joint Motion to Approve Stipulation, 28 S.R.R. 806 (1999).

In view of the ruling in SCSPA and the pending petition for certiorari, we believe it appropriate at this time to seek additional comments from the parties regarding these issues. First, the parties are directed to address whether the stipulation is still valid in view of the ruling in SCSPA. In addition, the parties should discuss the merits of the sovereign immunity defense, including MPA's status as an arm of the state. Opening briefs shall be no more than thirty (30) pages in length and shall be filed within forty five (45) days from the date of issuance of this order; reply briefs of no more than twenty (20) pages shall be filed within 30 days thereafter.

CONCLUSION

The Commission finds that the common law doctrines of waiver and estoppel may not be invoked to prohibit a party to an agreement subject to the Commission's jurisdiction from later challenging the agreement in a complaint filed with the Commission, alleging that one of the parties to the agreement violated a duty imposed on it by the Shipping Act. We further find it unnecessary to rule on Ceres' alternative grounds for liability.

We find the appropriate measure of damages for a violation of sections 10(b)(11) and (12), where a party has breached a duty to

apply its criteria for granting lower rates in a fair and even-handed manner, is the difference between the rate that was charged and collected, and the rate that would have been charged but for the undue preference and prejudice.

We further find that the appropriate measure of damages for a violation of section 10(d)(1) is the degree to which the rates charged are excessive, which, based on the facts of this case, is the difference between the rates charged Maersk and Ceres.

THEREFORE, IT IS ORDERED, That MPA's affirmative defenses of waiver and estoppel are denied; and

IT IS FURTHER ORDERED, That the appropriate measure of damages for a violation of sections 10(b)(11) and (12), where a party has breached a duty to apply its criteria for granting lower rates in a fair and even-handed manner, is the difference between the rate that was charged and collected, and the rate that would have been charged but for the undue preference and prejudice; and

IT IS FURTHER ORDERED, That Ceres and MPA file additional briefs addressing whether the stipulation entered into by the parties on September 9, 1999, is still valid in view of the ruling in SCSPA. In addition, the parties shall discuss the merits of the sovereign immunity defense, including MPA's status as an arm of the state; and

IT IS FURTHER ORDERED, That opening briefs shall be no more than 30 pages in length and shall be filed within 45 days from the

date of issuance of this order; reply briefs of no more than 20 pages shall be filed within 30 days thereafter.

By the Commission.



Bryant L. VanBrakle
Secretary