

**BEFORE THE
FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.**

DOCKET NO. 08-03

MAHER TERMINALS, LLC

COMPLAINANT,

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT

**MAHER TERMINALS, LLC'S APPLICATION FOR AN
ENLARGEMENT OF THE PAGE LIMIT FOR ITS
EXCEPTIONS TO THE PRESIDING OFFICER'S INITIAL DECISION**

Complainant Maher Terminals, LLC ("Maher"), by and through undersigned counsel, hereby applies pursuant to Rule 227(e) of the Federal Maritime Commission ("Commission" or "FMC") Rules of Practice and Procedure (the "Rules") for the Commission to permit additional pages for Maher's exceptions to the April 25, 2014 Initial Decision ("I.D.") in this proceeding. The Commission permits parties to exceed the 50-page limit for exceptions "for good cause shown." 46 C.F.R. § 502.227(e).

This application follows the Commission order of June 4, 2014, denying Maher's application of June 3, 2014 without prejudice to re-file after "conferring or attempting to confer with the opposing party. . . ."¹ Following receipt of the order, counsel for Maher conferred with

¹ The order references 46 C.F.R § 502.71 which applies to non-dispositive motions the subject of Rule 69 which expressly excludes an application otherwise specifically provided for in this part

counsel for the opposing party as required by the order and requested consent to the application which had been served on opposing counsel the day before. Opposing counsel responded that his client would agree to 75 pages, but not 175 pages. Therefore, Maher hereby resubmits the application as provided by the order to comply with the order and the requirement that the application be submitted by today.

SUMMARY

Good cause exists here for an extension of the page limits for many reasons, including because of the I.D.'s fundamental legal errors, its failure entirely to consider certain of Maher's claims, its failure to even consider the mountain of evidence establishing the claims, its failure to make material findings of fact based upon a reasoned analysis, and its failure to articulate reasoning and conclusions of law as required by well-established Commission authority. In these circumstances, Maher seeks *de novo* review which necessarily requires an enlargement of the page limits to present its exceptions and establish the Shipping Act violations before the Commission. Granting Maher's application will allow it to more fully brief the important issues at stake in this consolidated proceeding, thereby enabling the Commission to rule on Maher's claims efficiently.

FACTUAL BACKGROUND

Regarding this discrete application, the following factual background is pertinent with respect to the proceeding and the I.D.

[Part 502]" e.g., an application pursuant to 46 C.F.R. § 502.227. Therefore, notwithstanding the order, the application is not subject to the Rule 71 duty to confer, nor does the response time period of the Rule 71 (seven days) make any sense for an application that must be filed five days before the exceptions are due to be filed.

The Proceeding

The proceeding is actually a consolidation of *two* separate complaint proceedings, Dkt. 07-01 and Dkt. 08-03, which each involve allegations of separate multiple violations of the Shipping Act, and had they proceeded separately under normal circumstances would *each* have been subject to separate 50-page limits per the Rules. For the merits briefing of the consolidated proceedings, the Presiding Officer enlarged the page limits per the Rules for the parties' initial briefs to 100 pages each. Subsequently in 2012 and 2013, the Presiding Officer ordered further supplemental merits briefings totaling 42 pages for Maher.

Likewise, the scope and number of the claims at issue and the size of the evidentiary record in the proceeding far exceed the typical garden-variety complaint proceeding before the agency for which Rule 227(e)'s 50-page limit was envisioned. In addition to the more than 300 pages of merits briefing, here the parties submitted over 1100 proposed findings of fact: (1) Maher submitted 560; and (2) PANYNJ submitted 587 (including subparts); totaling hundreds of additional pages of submissions.

Furthermore, acknowledging the "importance of the issues and the large scope of the merits record in" this proceeding, along with certain other considerations, on May 1, 2014, the Commission granted Maher a time extension to file its exceptions. Procedural Order, Dkt. 08-03 (F.M.C. May 1, 2014).

The Initial Decision

The I.D. erroneously dismissed Maher's claims for PANYNJ's multiple violations of the Shipping Act, including 46 U.S.C. §§ 41106(2) & (3), 41102(b)(2) & (c), and 41103(c)

(Shipping Act §§ 10(b)(11), 10(b)(12), 10(b)(1), 10(d)(1), 10(d)(4), and 10(a)(3)) and rejected Maher's requests for reparations and injunctive relief.

The I.D. misapplied key legal authorities, including but not limited to seminal Shipping Act authorities as set forth in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968); *Ceres Marine Terminal, Inc. v. Md. Port Admin.*, 27 S.R.R. 1251 (F.M.C. 1997); *Ceres Marine Terminal, Inc. v. Md. Port Admin.*, 29 S.R.R. 356 (F.M.C. 2001) (collectively "Ceres"); *Secretary of the Army v. Port of Seattle*, 24 S.R.R. 595 (F.M.C. 1987); and *Ivarans v. Companhia de Navegacao Lloyd Brasileiro*, 23 S.R.R. 1543 (F.M.C. 1986).

Having misapplied the law at the outset, including seminal Commission precedent, the I.D. then eschewed the mountain of material evidence establishing the claims and failed to analyze and explain the proper application of the Commission's authorities to the material evidence ignored. The I.D. erroneously asserted that the eschewed evidence was "not dispositive or material to the determination of the allegations of the complaint or the defenses thereto." I.D. at 8. Consequently, the I.D. failed to address both the proper legal standards for the multiple violations and the mountain of evidence establishing the violations.

The I.D. also ignored certain of Maher's claims entirely and failed to make detailed findings of fact and conclusions of law as required by Commission authority regarding many of Maher's claims for relief for Shipping Act violations, summarily rejecting all of these claims in a wholly inadequate, conclusory, and legally erroneous fashion.

LEGAL STANDARD

Pursuant to Rule 227(e), the Commission has discretion to allow the parties to exceed the 50-page limit for exceptions for "good cause shown." 46 C.F.R. § 502.227(e); *see also Gov't of*

the Terr. of Guam v. Sea-Land Serv., Inc., 30 S.R.R. 49, 49 (F.M.C. 2004) (extending page limit for exceptions to 75 pages); *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, 28 S.R.R. 1128, 1129 (F.M.C. 1999) (same). The Commission has interpreted the “good cause” standard under Rule 227(e) to mean “[s]ubstantial reason, one that affords a legal excuse,” which exists in “those extraordinary cases in which a 50-page brief would be insufficient to address the relevant issues.” *Rose Int'l*, 28 S.R.R. at 1129.

The Commission reviews initial decisions *de novo*. And, the Commission “has all the powers which it would have in making the initial decision.” 5 U.S.C. § 557(b); 46 C.F.R. § 502.227(a)(6) (“Where exceptions are filed to . . . an initial decision, the Commission . . . will have all the powers which it would have in making the initial decision.”). *De novo* review is especially necessary where the initial decision fails to consider arguments, ignores material evidence, and makes errors on key issues of law and governing standards which incurably infect the subsequent consideration of the facts. See *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, 29 S.R.R. 119, 123-24 (F.M.C. 2001) (Commission reviewing *de novo* since initial decision “failed to consider numerous facts and makes various legal conclusions contrary to Commission precedent” and was “not fully supported by the record or complete”); *Ceres*, 27 S.R.R. at 1270 (“The ALJ failed to consider and address the evidence of record and the I.D. is devoid of any discussion of the foundational requirements that must be satisfied in order to demonstrate a violation. . . . Moreover, there is no reference to any relevant cases governing the legal issues in dispute in this proceeding. Instead, the ALJ makes only conclusory statements. . . . As a consequence, the I.D. does not provide a sufficient basis for review. Therefore, we have vacated the I.D. and decided the merits of this proceeding on the record *de novo*.”); *Pet. of S.C. State Ports Auth. for Declaratory Order*, 27 S.R.R. 1137, 1158 n.21 (F.M.C. 1997) (where the initial

decision “fail[s] to provide an adequate basis for Commission review in [the] initial decision . . . the Commission can . . . vacate the initial decision and decide the case *de novo* on the basis of the existing record”).

In *Rose Int’l*, the Commission found good cause to extend the page limits of the exceptions by an additional 25 pages, to 75 pages total. 28 S.R.R. at 1129-30. The Commission declined to extend further the page limit beyond 75 pages, to the 150 page limit that the complainant sought. *Id.* at 1129. It highlighted the “ALJ’s 210-page decision (177 pages of which are the Findings of Fact and recitation of the arguments of the parties, and only 32 of which are the Discussion and Conclusions)” as a major reason for declining to further enlarge the page limit because “the Commission will have a comprehensive record upon which to base its decision.” *Id.*

In *Gov’t of the Territory of Guam*, the Commission likewise found good cause to extend the page limit of the exceptions to 75 pages. 30 S.R.R. at 49. It explained that the “request of an additional 25 pages is appropriate given this case’s extensive history and the size of the record.” *Id.*

Additionally, in *Ceres*, the FMC proceeding most directly parallel to the present proceeding in terms of the subjects, factual background, claims, governing law, and the nature of the issues, the parties filed papers on exceptions to the initial decision far greater in length than 50 pages.² Respondent Maryland Port Administration’s (“MPA”) exceptions filing was 96 pages in length, and complainant Ceres Marine Terminals’ reply was 213 pages.

² The parties’ exceptions and reply in *Ceres* were filed prior to the enactment of Rule 227(e)’s 50-page limit for exceptions, but the length of the filings in that important and similar proceeding illustrates the necessity of enlarged exceptions filings where the I.D. failed to provide a comprehensive record upon which to base the decision.

More recently, in *Auction Block Co. & Harbor Leasing, LLC v. City of Homer & Port of Homer*, Dkt. 12-03, the Commission recognized the utility of enlarged page limits, and it ordered the parties to provide additional briefs of up to 30 pages, beyond the exceptions subject to the 50-page limit previously submitted, and provided complainant the opportunity to file a 15-page reply brief to aid the Commission’s understanding of the issues before oral argument, which also was allowed. Order Granting Request for Oral Argument, *Auction Block Co. & Harbor Leasing, LLC v. City of Homer & Port of Homer*, Dkt. 12-03 (F.M.C. Dec. 18, 2013). Following a motion to extend the page limitations further, the Commission enlarged the page limits for the supplemental briefs to 40 pages for the complainant’s brief and respondent’s response, and also provided 20 pages for the complainant’s reply brief. Order on Complainant’s Unopposed Motion for Leave to File Longer Briefs, Dkt. 12-03 (F.M.C. Jan. 16, 2014). Therefore, as a practical matter, in that much smaller and less complicated proceeding presenting only a *single* issue about jurisdiction, the Commission enlarged the page limits for the complainant filing exceptions to 110 pages and also permitted complainant a right to file a reply.

DISCUSSION

In these circumstances, pursuant to Rule 227(e) and the standard for good cause as it has been applied in other proceedings, there is good cause here to submit exceptions in excess of 50 pages. As an initial matter, because this is a consolidated proceeding of two separate complaint proceedings which separately would normally be subject to a presumptive 50-page limit for exceptions, the “good cause” standard is obviously satisfied to enlarge the page limit for Maher’s exceptions to at least 100 pages.

Additionally, as in *Rose Int’l* and *Gov’t of the Terr. of Guam*, this proceeding’s “extensive history and the size of the record” warrant an enlargement of the page limit.

Likewise, the exceptions briefs submitted by the parties in *Ceres* support the existence of “good cause” for an enlargement of the page limit for exceptions in the present proceeding, which deals with similar factual and legal issues in key respects as that proceeding. The complainant in *Ceres* filed 213 pages to advocate its ultimately-successful arguments that the port authority had engaged in unlawful discrimination and unreasonable practices based on ocean-carrier *status* violating the Shipping Act and injuring the complaining marine terminal operator. Here, Maher requests fewer pages than complainant *Ceres Marine Terminal* filed in that case.

Maher requires more pages for its exceptions than did the complainant in *Rose Int’l*, where the Commission observed that only 75 pages were needed because of the “comprehensive record” already available from the “ALJ’s 210-page decision.” *Rose Int’l*, 28 S.R.R. at 1129. Here, the Commission cannot rely on the I.D. as it did in *Rose Int’l*, as the I.D. here lacks such a “comprehensive record.” Instead of a detailed, 210-page decision, the I.D. here is only 61 pages.

Furthermore, the I.D. fundamentally misapplied seminal Commission authorities, including *Ceres* and the foundational authorities upon which it relied, in analyzing the Shipping Act violations at issue. Thereby, the I.D. erroneously determined that material evidence and facts vital to a proper analysis were “not dispositive or material to the determination of the allegations of the complaint or the defenses thereto,” and thus ignored them. I.D. at 8. In these circumstances where the proceeding has been underway for almost *seven* years, the I.D.’s misapplication of Commission authority and disregard of the mountain of evidence establishing the violations mandates that the Commission perform a complete *de novo* review of Maher’s claims. To present all of the evidence necessary for the Commission to properly consider these claims, Maher must now provide a more detailed and lengthy presentation and analysis of the facts and the law than it otherwise would have if the I.D. had properly applied Commission

authorities, made the relevant findings of fact, and analyzed the material facts in light of the properly-applied Commission authority.

Additionally, for many of Maher's claims, e.g., those claims from Dkt. 08-03 based on PANYNJ's failure to establish, observe, and enforce just and reasonable regulations and practices, and PANYNJ's refusal to deal with Maher, as well as *all* of Maher's claims from Dkt. 07-01, the I.D. rejects them summarily without meaningful analysis of the evidence, findings of fact, discussion of the proper legal standard, and application of the relevant legal standard to these facts. I.D. at 54-60. The I.D. record is not only not "comprehensive," but also nonexistent in key respects. Absent the page enlargement requested, as a practical matter Maher will be barred from meaningfully addressing the I.D.'s errors and presenting its case for *de novo* review and, therefore, will be unlawfully prejudiced.

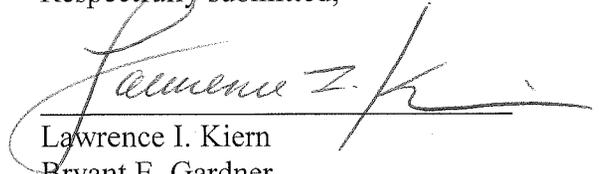
Enlarging the page limit for Maher's exceptions as requested here will also foster the "efficiency of the Commission's adjudicative process" by ensuring that the applicable arguments are before the FMC at the outset through the exceptions, thereby avoiding the need for another round of briefing as occurred in the *Auction Block* proceeding. *Rose Int'l*, 28 S.R.R. at 1129. In that proceeding, the Commission ordered substantial additional briefing. See Order on Complainant's Unopposed Motion for Leave to File Longer Briefs, Dkt. 12-03 (F.M.C. Jan. 16, 2014). This circumstance can be avoided by allowing Maher the additional pages requested herein for its exceptions in the first instance.

CONCLUSION & PRAYER FOR RELIEF

For the foregoing reasons, Maher respectfully requests an order that the page limit for Maher's exceptions to the I. D. be enlarged so as not to exceed one hundred seventy-five (175) pages.

Dated: June 4, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lawrence I. Kiern", written over a horizontal line.

Lawrence I. Kiern

Bryant E. Gardner

Gerald A. Morrissey III

Andrew G. Smith

Rand K. Brothers

WINSTON & STRAWN LLP

1700 K Street, NW

Washington, DC 20006

Counsel for Maher Terminals, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 2014, a copy of the foregoing was served by electronic mail on the following:

Peter D. Isakoff
Holly E. Loiseau
WEIL, GOTSHAL & MANGES LLP
1300 Eye Street, NW
Suite 900
Washington, DC 20005

Richard A. Rothman
Kevin F. Meade
Robert S. Berezin
Kristen M. Echemendia
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153

Ashley W. Craig
Elizabeth K. Lowe
Sarah Choi
VENABLE LLP
575 7th Street, NW
Washington, DC 20004



Rand K. Brothers