

FEDERAL MARITIME COMMISSION

MAHER TERMINALS, LLC

Complainant,

v.

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY,

Respondent.

Docket No. 08-03

Docket No. 12-02

Served: October 26, 2016

BY THE COMMISSION: Mario CORDERO *Chairman*;
Rebecca F. DYE, Michael A. KHOURI, William P. DOYLE,
Daniel B. MAFFEI, *Commissioners.*

Order Granting Joint Motion for Approval of Settlement Agreement, Dismissal with Prejudice, and Stay

On September 30, 2016, Maher Terminals, LLC (Maher) and the Port Authority of New York and New Jersey (the Port Authority), jointly moved for approval of a Settlement Agreement, contingent on dismissal of FMC Docket No. 08-03 and FMC Docket No. 12-02 (including any potential claims for attorneys' fees and costs), and a temporary stay of those cases. For the reasons set forth below, the Commission grants the motion.

I. BACKGROUND

Maher leases a marine terminal from the Port Authority, and the 08-03 and 12-02 cases are part of a long-running series of disputes between the parties about the lease, terminal, and port. Their litigation includes three Commission proceedings, two federal district court cases,¹ four federal appellate court cases, and one state court case.

A. FMC Docket No. 08-03

In 2008, Maher filed a Shipping Act complaint alleging that the Port Authority: (a) violated 46 U.S.C. § 41106(2) by granting another terminal operator, APM Terminals North America, Inc. (APM) unduly and unreasonably more favorable lease terms than it granted Maher; (b) violated 46 U.S.C. § 41102(c) by failing to establish, observe, and enforce just and reasonable regulations regarding Maher's lease terms; and (c) violated 46 U.S.C. § 41106(3) by unreasonably refusing to deal with Maher regarding its request for parity with APM and its attempts to settle counterclaims from another case.² *See Maher Terminals, LLC v.*

¹ In addition to the Port Authority's efforts to enforce a subpoena in federal district court, discussed at *infra* note 3, in September 2012, Maher sued the Port Authority in federal district court in New Jersey alleging that certain fees assessed by the Port Authority, including throughput rent, violated the Tonnage Clause of the United States Constitution, art. I, § 10, and related statutes. *Maher Terminals, LLC v. Port Authority of N.Y. & N.J.*, Case No. 12-6090, 2014 U.S. Dist. LEXIS 98532, at *15 (D.N.J. July 21, 2014). The district court dismissed the complaint in July 2014, *id.* at *44, and the Third Circuit affirmed in October 2015, *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 805 F.3d 98, 102 (3d Cir. 2015)

² In *APM Terminals N. Am., Inc. v. Port Authority of N.Y. & N.J.*, FMC Docket No. 07-01, APM filed a complaint against the Port Authority alleging that it failed timely to deliver certain land to APM as required by its lease. *See Maher Terminals*, 33 S.R.R. at 836-37 (describing 07-01 case). The Port Authority filed a counterclaim alleging that APM failed timely to perform certain infrastructure work. *Id.* at 837. The Port Authority also filed a third party complaint, and a state court complaint, against Maher alleging that Maher was required to indemnify the Port Authority for any damages resulting from APM's complaint. *Id.* In response, Maher filed third party counterclaims against the Port Authority alleging several

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Port Authority of N.Y. & N.J., 33 S.R.R. 821, 837 (FMC 2014). The Commission consolidated these claims with Maher's counterclaims against the Port Authority from FMC Docket No. 07-01. *Id.*

The Commission granted partial summary judgment to the Port Authority on statute of limitations grounds. *See Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 32 S.R.R. 1185 (FMC 2013). Maher petitioned the D.C. Circuit for review of this decision and petitioned the Commission for reconsideration. The D.C. Circuit dismissed the petition summarily for lack of appellate jurisdiction, *Mahe Terminals, LLC v. Fed. Mar. Comm'n*, Case No. 13-1028, 2013 U.S. App. LEXIS 12462, at *1-*2 (D.C. Cir. June 18, 2013), and the Commission rejected the petition for reconsideration, *Mahe Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 303, 307 (FMC 2014). Maher then filed a petition for review of the summary judgment and reconsideration orders, which the D.C. Circuit again dismissed for lack of jurisdiction. *Mahe Terminals, LLC v. Fed. Mar. Comm'n*, Case No. 14-1051, 2014 U.S. App. LEXIS 13379, at *1-*2 (D.C. Cir. July 14, 2014).

As to the merits, after extensive discovery and motion practice, the ALJ denied Maher's claims and counterclaims and dismissed them with prejudice. *Mahe Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 349 (ALJ 2014).³ On December 17, 2014, the Commission affirmed the ALJ's decision. Maher petitioned the D.C. Circuit for review of the Commission's orders, challenging the Commission's denial of its unreasonable preference and unreasonable practice claims with respect to the difference between Maher's per-acre rent and APM's per-acre rent.

Shipping Act violations. *Id.* at 837, 854. In 2008, APM and the Port Authority settled. *Id.* at 837. The ALJ approved the settlement over Maher's objections, and the Commission denied Maher's exceptions thereto. *Id.* As part of the settlement, the Port Authority dismissed its state court case against Maher. *Id.*

³ While the 08-03 case was before the ALJ, the Port Authority successfully moved to enforce an administrative subpoena in federal district court. *See Order, In re Subpoena of David G. Eidman*, Case No. 12-mc-6008 (W.D.N.Y. July 11, 2012), ECF No. 17.

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On March 22, 2016, the court issued an opinion granting Maher's petition and remanding the case to the Commission for further explanation of its decision and policy. *Maher Terminals, LLC v. Fed. Mar. Comm'n*, 816 F.3d 888, 892 (D.C. Cir. 2016). The Commission subsequently ordered the parties to file supplemental briefs addressing the court's opinion and directed them to address seven specific questions. The Port Authority complied and filed its initial supplemental brief on July 15, 2016.

B. FMC Docket No. 12-02

In 2012, while the 08-03 case was pending, Maher filed another Shipping Act complaint against the Port Authority. *See Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 12-02, 2015 FMC LEXIS 43, at *9-*10 (FMC Dec. 18, 2015). Maher alleged numerous violations of 46 U.S.C. §§ 41102(c), 41106(1), 41106(2), 41106(3) involving the Port Authority's change-of-control practices, preferential treatment of ocean-carrier-affiliated terminals, lease terms (i.e. releases/waivers, liquidated damages, and lease renewals/extensions), letting of a parcel adjoining the Global terminal, and preferential treatment of APM. *Id.* at *4-*6. On January 30, 2015, the ALJ granted the Port Authority's motion to dismiss the complaint for failure to state a claim. The Commission affirmed the ALJ's dismissal of ten of the counts and reversed the ALJ as to four counts, which the Commission remanded for further proceedings on December 18, 2015. *Id.* at *1. After the remand, the parties engaged in vigorous discovery-related motion practice.

C. Stays and Settlement

On July 29, 2016, after the Port Authority filed its initial supplemental brief in the 08-03 case, the parties jointly moved to stay all proceedings for five weeks pending the outcome of settlement negotiations. The Commission granted the motion with

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respect to the 08-03 case,⁴ and the ALJ granted the motion with respect to the 12-02 case. At the parties' requests, the stays were continued through October 31, 2016.

On September 30, 2016, the parties jointly moved for: (a) approval of an attached Settlement Agreement; (b) contingent dismissal with prejudice of Maher's 08-03 and 12-02 complaints (including any claims for attorneys' fees and costs); and (c) a stay of the 08-03 and 12-02 cases pending notice from the parties that the conditions on which dismissal is premised have or have not occurred. *Jt. Mot. Settlement Approval* at 1-2. Although the motion was filed in both the 08-03 and 12-02 cases, the ALJ referred the 12-02 case to the Commission under 46 C.F.R. § 502.69(a).

II. DISCUSSION

A. Approval of Proposed Settlement

The Commission's regulations permit settlement. 46 C.F.R. § 502.91 (a)-(b). When a settlement contemplates dismissal of a pending case, "the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). As part of this analysis, "the Commission looks to see if the settlement has a reasonable basis and reflects the careful consideration by the parties of such factors as the relative strengths of their positions weighted against the risks and costs of continued litigation." *APM Terminals N. Am., Inc. v. Port Auth. of N.Y. & N.J.*, 31 S.R.R. 623, 626 (FMC 2009) (quoting *Delhi Petroleum Pty. Ltd. v. U.S. Atl. & Gulf/Australia – New Zealand Conference & Columbus Line, Inc.*, 24 S.R.R. 1129,

⁴ The Commission also granted the American Association of Port Authorities' motion for leave to file an amicus brief. *Order Granting Motion to Participate as Amicus Curiae and Joint Motion to Stay Proceedings Pending the Outcome of Settlement Discussions, Maher Terminals, LLC v. Port Authority of N.Y. & N.J.*, FMC Docket No. 08-03 (FMC Aug. 10, 2016).

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1134 (ALJ 1988)). The Commission's inquiry is informed, however, by its "strong and consistent policy of encouraging settlements and engaging in every presumption which favors a finding that they are fair, correct, and valid." *APM Terminals*, 31 S.R.R. at 625 (quoting *Inlet Fish Producers, Inc. v. Sea-Land Service, Inc.*, 29 S.R.R. 975, 978 (ALJ 2002)) (internal quotation marks omitted).

Having reviewed the proposed settlement, the Commission finds that it does not appear to violate any law or policy, it is fair, adequate, and reasonable, and is free of fraud, duress, undue influence, mistake or other defect that might make it unapprovable. The parties' proposed settlement is part of MIP III Yellowtail Holdings LLC's planned acquisition of Maher from Deutsche Bank Americas Holding Corp. In exchange for the Port Authority's consent to the acquisition, Maher has agreed to make certain payments to the Port Authority and to seek dismissal of the pending 08-03 and 12-02 cases. The parties have also agreed to mutual releases of liability and amendments to various leases and permits.

The proposed settlement does not appear to violate any law or policy. The terms of the Settlement Agreement do not appear to give rise to unreasonable preferences, and Commission policy favors settlements. The proposed settlement is also fair, adequate, and reasonable. It ends years of expensive and burdensome litigation, and the parties stipulate that the concessions constitute adequate consideration for their agreement to relinquish the claims at issue. Although the Commission does not rubber stamp settlements, it also does not second-guess such valuations. *APM Terminals*, 31 S.R.R. at 626. Finally, there is no evidence that the proposed settlement is infected with fraud, duress, undue influence, or mistake. Maher and the Port Authority are sophisticated entities, and the proposed settlement was reached after months of negotiations by their legal counsel.

B. Unreasonable Preference Factors

The proposed settlement was also reached, however, in the midst of briefing on issues raised by the D.C. Circuit's opinion in the 08-03 case. In light of the settlement, the Commission need not address at this time the D.C. Circuit's comments on "transportation factors" and the appropriate analysis of what constitutes an undue or unreasonable preference or prejudice under 46 U.S.C. § 41106(2). *Maher Terminals*, 816 F.3d at 892. By the same token, the Commission will defer the related questions raised in its June 21, 2016 Order to File Supplemental Briefs.

Nevertheless, to reduce potential confusion, the Commission first notes that it will continue to consider all the relevant factors in its unreasonable preference analysis, including:

(a) the "transportation characteristics of a particular commodity," such as size, weight, or need for special handling, see *Credit Practices of Sea-Land Serv. Inc.*, 25 S.R.R. 1308, 1315 (FMC 1990);

(b) competition from other carriers, the fair interest of carriers, relative quantities of traffic moved, relative costs of services and profit, the convenience of the public, "and the situation and circumstances of the respective customers, as competitive or otherwise," see *N. Atl. Mediterranean Freight Conference – Rates of Household Goods*, 9 S.R.R. 775, 784 (FMC 1967) and "50 Mile Container Rules" *Implementation by Ocean Common Carriers Serving U.S. Atl. & Gulf Coast Ports*, 24 S.R.R. 411, 455 (FMC 1987);

(c) in the case of marine terminal leases -- market conditions, available locations and facilities, and the nature and character of potential lessees, see *Ceres Marine Terminal, Inc. v. Md. Port Admin.*, 27 S.R.R. 1251, 1273-74 (FMC 1997); *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 900 (FMC 1993); and

(d) the need to assure adequate and consistent service to a port's carriers or shippers, to ensure attractive prices for such services, and generally to advance a port's economic well-being, *see Petchem, Inc. v. Canaveral Port Auth.*, 23 S.R.R. 974, 990, 994 (FMC 1986).

Second, the Commission's analysis will be informed by the deference it shows to public port authorities, especially in the context of their leasing decisions. *See Seacon Terminals*, 26 S.R.R. at 899; *Petchem*, 23 S.R.R. at 993 (noting that the Commission's conclusion "is partially based on appropriate deference to the Port Authority, an entity familiar with business circumstances at Port Canaveral and entitled to a presumption that it is concerned with public and not private interest"). And, third, the Commission will not assume that competition between ports is a problem in need of a regulatory fix, as among the purposes of the Shipping Act is promoting competitive and efficient ocean transportation and placing a greater reliance on the marketplace.

III. CONCLUSION

The Commission **GRANTS** the parties' motion and **ORDERS** that: (1) the Settlement Agreement, including all of the terms and conditions set forth therein, is **APPROVED**; (2) the above captioned actions shall be **DISMISSED WITH PREJUDICE** effective immediately upon the Effective Date, as set forth in the Settlement Agreement, and any one of the parties shall notify the Commission when the Effective Date has occurred; (3) all proceedings in these actions are hereby and shall remain **STAYED** until the Commission either (i) receives notification that the Effective Date has occurred, or (ii) receives notice that the requirements under the Consent Agreement have not been satisfied in accordance with the terms thereof and that the anticipated closing has been canceled; and (4) if the Commission is notified that the conditions required under the Consent Agreement have not been satisfied in accordance with the terms thereof and that the anticipated closing has been canceled, this Order shall be deemed

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vacated, and of no further force or effect, and the parties shall be restored to their positions in the respective litigations as they existed immediately prior to entry of this Order.

By the Commission.

Rachel E. Dickon
Assistant Secretary