

**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.**

**BRIEF *AMICUS CURIAE* OF
AMERICAN ASSOCIATION OF PORT AUTHORITIES**

The Commission's Order of June 21, 2016, directed the parties to this proceeding, the Port Authority of New York and New Jersey ("Port Authority") and Maher Terminals, LLC ("Maher"), to file supplemental briefs addressing the court of appeals' decision in *Maher Terminals, LLC v. FMC*, 816 F.3d 888 (D.C. Cir. 2016), and discussing certain issues identified by the Commission. Two of these issues, "the extent to which a reasonable preference or prejudice must be based on 'transportation factors'" and "what factors, transportation-related or otherwise, bear on whether a preference or prejudice is reasonable in the context of port authority leasing decisions," are questions of law or policy that have the potential to significantly affect all public port authorities as they engage in terminal leasing and operating activities.

Accordingly, the American Association of Port Authorities, which represents virtually all of the nation's public port authorities, has moved with the consent of the parties pursuant to Rule 78 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.78, for leave to file

this *amicus* brief addressing these issues. The brief is filed conditionally within seven days of the filing of the Port Authority's brief, as required by Rule 78(c).

The AAPA does not intend to address the facts of Maher's dispute with the Port Authority, as that is a matter being litigated between the parties, and accordingly will not address all of the issues the Commission has assigned to the parties. The AAPA does have a strong interest, however, in the Commission's confirmation and reaffirmation of a standard that defers to a port's reasonable business judgments, and that allows for consideration of all factors relevant to the dynamic transportation environment in which modern ports must operate. The AAPA thus urges that, in addressing the third and fourth issues it has identified for the parties, quoted above, the Commission not consider itself or ports bound by the unduly limited concept of "relevant transportation factors" in assessing the reasonableness of a port's leasing decisions under the Shipping Act. The Commission has not done so in the past, and certainly should not do so now.

I. INTEREST OF AMICUS

The AAPA's members include governmental entities that own virtually all major commercial ports in the United States, with a charge to operate them in the public interest and often supported by public funds. Some port authorities operate marine terminals directly, but most also lease terminals to other marine terminal operators who provide terminal services directly to carriers. Ports' ability to make reasonable business judgments in these leasing activities is necessary to allow them to meet their public interest mandate and to properly manage public resources.

AAPA member ports have been involved in Shipping Act litigation at the Commission, and some in other forums as well. AAPA respectfully submits that this experience provides a

perspective that will be of assistance in resolving the remand from the court of appeals. The AAPA has been assisted on the brief by counsel who have been involved in most of the major port litigation before the Commission in the last several decades, including a former General Counsel of the Commission. The Commission has generally resolved these cases with the recognition that ports are required to have significant business discretion, within the confines of the Act, to undertake their mission.

The court of appeals remanded this issue back to the Commission for a further explanation of its decision and its policy, including whether the requirement that port actions be based on “legitimate transportation factors,” in the Commission’s parlance, in essence simply means that that ports must make reasonable decisions and distinctions in their leasing activities, as opposed to granting undue or unreasonable preferences or advantages, or imposing undue or unreasonable prejudice or disadvantages. *See* 816 F.3d at 892 (asking if “the term ‘transportation factor’ is simply a synonym for reasonable”). As the Commission’s June 21 Order notes, at 2, the court of appeals did not reverse or vacate the Commission’s ruling. The court also did not direct any different result on remand. *See Heartland Regional Medical Center v. Leavitt*, 415 F.3d 23, 29–30 (D.C. Cir. 2005)(“usual rule” is that “an agency that cures a problem identified by a court is free to reinstate the original result on remand.”); *NTEU v. FLRA*, 30 F.3d 1510, 1514 (D.C.Cir.1994) (noting that the court “frequently remand[s] matters to agencies while leaving open the possibility that the agencies can reach exactly the same result as long as they . . . explain themselves better or develop better evidence for their position”).

The court of appeals noted that the term “transportation factors . . . goes back to the Interstate Commerce Act and was extended into the earliest Shipping Act.” 816 F.3d at 890. This does not mean, however, that the Commission should take a narrow view of the

considerations that ports may take into account in their leasing activities based on constructions of the (repealed) Interstate Commerce Act or of other acts that address very different problems in very different circumstances. Such an unduly cramped construction of the factors that ports may permissibly consider in their leasing decisions would harm maritime commerce and the public interest that ports are charged to protect, by limiting the ability to consider economic and competitive conditions, and other relevant matters, in leasing decisions. The Commission should instead affirm its prior recognition of a broad standard of deference to a port's reasonable business judgments, allowing consideration of the full range of factors relevant to the operation of port resources in the public interest.

II. THE COMMISSION SHOULD CONFIRM ITS BROAD STANDARD OF DEFERENCE TO A PORT'S REASONABLE BUSINESS JUDGMENTS RATHER THAN ALLOWING CONSIDERATION OF ONLY A NARROWLY CONSTRAINED RANGE OF "TRANSPORTATION FACTORS"

A. Commission Precedent Allows Ports To Consider A Wide Range Of Competitive And Commercial Factors In Making Reasonable Business Judgments

The Commission's leading precedents addressing claims of Shipping Act violations by lessees against public port authorities recognize a broad principle of deference to a port's reasonable business judgments. The Commission has allowed a broad scope of reasonableness, and has not required that they fit within some artificially limited definition of "transportation factors," whether based on Interstate Commerce Act precedent or otherwise.

Over three decades ago the Commission stated the principle that that a public port authority is "familiar with business circumstances at [the port] and entitled to a presumption that it is concerned with public and not private interest," and the courts have affirmed this principle. *Petchem, Inc. v. Canaveral Port Auth.*, 23 S.R.R. 974, 993 (1986), *aff'd*, 853 F.2d 958 (D.C. Cir. 1988). *Petchem* likewise noted that in assessing whether asserted preferences or prejudices are

unreasonable, the Commission should assess whether “such arrangements may be justified as necessary to advance economic efficiencies or produce other benefits.” 23 S.R.R. at 988.

Petchem did not subject a port’s actions to a narrow analysis of whether certain “transportation factors” were present.

The Commission has also recognized that its duty is to protect against violations of the Shipping Act, not to second-guess the business judgments of ports. As the Commission has also noted, this time over four decades ago,

the duly authorized Port Authority is the proper body to weigh and evaluate business risks related to that Port's efficiency in the first instance. It is not our function to gainsay the day-to-day economic decisions of the Port, nor would it be appropriate for us to do so. Given our continuing surveillance of the Agreement under which Port Canaveral and its operator must conduct their terminal operations, we see no danger in leaving the fiscal and business determinations in the first instance with the duly authorized Port Authority. Clearly, it is not the function of this agency to substitute its judgment for that of the Port.

Agreement No. 2598, 17 FMC 286, 297 (1974). The standard is not toothless; for example in revisiting the *Petchem* issue many years later under different factual circumstances the Commission found potential Shipping Act violations where the port did not even consider a franchise application, the asserted justification that the application was submitted too late was pretextual, and the port had accordingly not attempted to adequately justify the maintenance of an exclusive franchise for an incumbent operator. *Canaveral Port Authority—Possible Violations of Section 10(b)(10)*, 29 S.R.R. 1436, 1448-51 (F.M.C. 2003). But in the ordinary course, the Commission has given broad deference to ports’ business judgments.

The Commission has consistently followed this precedent that defers to a port’s reasonable exercise of business discretion and allows consideration a range of commercial and competitive factors rather than a narrowly defined construction of “transportation factors.”

In *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 899 (1993), the Commission cited and followed *Petchem* and *Agreement No. 2598*, holding that the port's negotiation of and eventual agreement to a lease with another company after the existing tenant failed to renew its lease was a reasonable exercise of its business discretion. The Commission reaffirmed the presumption in *Petchem* that public port authorities are presumed to act in the public interest, and rejected the complaining tenant's assertion that the port acted with a corrupt motive so as to rebut that presumption. *Id.* at 899 & n.32. The Commission also noted that the port's actions were consistent with its financial interests and its "long term development strategy." *Id.* at 899. Finally, the Commission held that the port was able to take account of different circumstances between tenants in distinguishing between them, including higher degrees of commitment to the port and higher volumes of usage. *Id.* at 900-01. The Commission again assessed the overall reasonableness of the port's actions without reference to specific "transportation factors."

Similarly, *New Orleans Stevedoring Company v. Port of New Orleans*, 29 S.R.R. 345, 352 (I.D. 2001), *adopted* 29 S.R.R. 1066, 1071 (FMC 2002), *aff'd mem.*, 80 Fed. App'x 681 (D.C. Cir. 2003), stated that the "determination of reasonableness, in the context either of an alleged refusal to deal or negotiate or of an alleged preference or disadvantage, is largely dependent on specific facts rather than broad generalizations." Relevant factors "include such considerations as maintenance of consistent service and the economic well-being of the port." *Id.* (citing *All Marine Moorings, Inc., v. ITO Corp. of Baltimore*, 27 S.R.R. 539, 545 (1996)). The Commission and the court of appeals accordingly upheld preferences in favor of lessees that had made long term commitments to the Port over a company that had declined to renew its lease due to a lack of business.

In affirming the findings in *New Orleans Stevedoring Company* that the port's actions were reasonable, neither the Commission nor the court of appeals applied a restrictive test of legitimate transportation-related factors that limited the port's ability to exercise its business judgment reasonably under the circumstances. Indeed, the Commission did not focus on a "transportation factors" test at all, and the court affirmed after stating that it was "reasonable for the Port to give preference to lessees" under the circumstances, and that a preference to lessees who made a "greater commitment to the Port" was easily justifiable as "related to valid transportation concerns." 80 Fed. App'x at 683-84. *See also R.O. White & Co. v. Port of Miami Terminal Operating Co.*, 31 S.R.R. 783 (A.L.J. 2009), *adopted as administratively final*, 31 S.R.R. 783 (F.M.C. Oct. 6, 2009) (reasonable for terminal operator joint venture members to take actions to enhance their competitive position over nonmembers; court also looks to antitrust precedents); *Marine Repair Services v. Ports America Chesapeake*, No. 11-11 (Initial Decision Jan. 10, 2013), *notice not to review upon withdrawal of exceptions* (FMC March 20, 2013) (challenge to alleged discrimination and refusal to deal by tenant of Port of Baltimore's Seagirt terminal under long term Public-Private Partnership lease analyzed by identifying a relevant market and assessing effects on competition in that market); *All Marine Moorings*, 27 S.R.R. at 545 ("common theme of the cases was the decisional importance of each individual set of facts"); *Petition of South Carolina State Ports Authority for Declaratory Order*, 27 S.R.R. 1137, 1169 (FMC 1997)(restrictions on choice of a stevedore depend on "specific facts regarding local conditions.").

In light of these decades of consistent precedent, the answer to the court of appeals' question whether the term "based on legitimate transportation factors" has been used essentially as a synonym for a reasonable decision is undoubtedly yes, and the Commission should so

conclude in addressing the third issue it has presented to the parties. The court of appeals itself noted that in the *Ceres Terminals* case, on which Maher has heavily relied, the Commission first described the governing law as permitting discrimination based on “transportation factors,” but then in its following discussion “only asked whether the discrimination was ‘reasonable.’” 816 F.3d at 892. And in assessing reasonableness the Commission has allowed ports to take into account a wide range of commercial and competitive factors, including “long term development strategy” and the “economic well-being of the port,” and the Commission should so conclude in addressing the fourth issue it has presented to the parties. Neither the Commission’s precedent nor the Shipping Act itself precludes a port from responding to commercial and competitive realities in an economically rational manner.

B. The Commission should reject the unduly narrow approach advocated by Maher as unworkable and inconsistent with its precedent.

Instead of the broad standard of deference to a port’s reasonable business judgments that the Commission has applied in prior cases, Maher has argued for a very narrow standard cobbled together from cases involving the common carriage of cargo, many of which are grounded in Interstate Commerce Act cases a century old and more. These cases discuss considerations having to do with the “physical movement of cargo,” such as “size, weight, need for refrigeration, [or] special handling,” “tangible characteristics of the transportation service being regulated or charged,” and differences that “inhere in the goods or in the cost of the service rendered in transporting them.” *See* Maher opening brief, *Maher Terminals, LLC v. FMC*, No. 15-1035, at 30-38 (D.C. Cir., filed July 6, 2015). Maher thus suggests that reasonable preferences must be limited to a narrow range of “transportation factors” such as whether a terminal operator “handles cargo that is more disruptive to port operations than another terminal.” *Id.*

Maher does not cite any case in which the Commission has adopted the narrow construction of “transportation factors” it advocates, or rejected a broad standard of reasonableness in favor of a narrower inquiry. Indeed, as the court of appeals noted, the *Ballmill* case on which Maher relies heavily did not use the term “transportation factors” at all. 816 F.3d at 891. Where the Commission has used that phrase, it has not suggested that it was intending to do so in order to prevent ports from considering all factors relevant to the reasonableness of the port’s decision. At most the phrase has been used to hold that a party’s status alone cannot be the basis of discrimination. *See, e.g., Ceres Marine Terminal v. Maryland Port Administration*, 27 S.R.R. 1251 (FMC 1997)(mere status as an independent rather than a carrier-owned terminal); *Co-Loading Practices by NVOCCs*, 27 F.M.C. 818, 828, 23 S.R.R. 123, 131-32 (FMC 1985) (identity of a shipper as a non vessel operating common carrier as opposed to an ocean common carrier). Discrimination has also been proscribed when based on the requirements of a collective bargaining agreement rather than on an assessment of actual transportation-based realities. *See “50 Mile Container Rules,”* 24 S.R.R. 411 (1987), *aff’d sub nom. N.Y. Shipping Ass’n, Inc. v. FMC*, 854 F.2d 1338, 1376 (D.C. Cir. 1988).

None of the Commission’s precedent offers any support for the contention that the Shipping Act precludes a port from, for example, responding in an economically rational manner to carrier relocations and developments that threaten the port itself, thus putting all of its transportation related activities at risk. The court of appeals noted in *New Orleans Stevedoring Company*, quoting the Commission’s Administrative Law Judge in the case, that it “cannot seriously be contended” that a motive to maintain long-term relationships with lessees and avoid breach of contract liability “is not related to transportation concerns,” and further noted that this result was fully consistent with the Commission’s precedents in *Ceres* and *Co-Loading*

Practices. 80 Fed. App'x at 683-84. It is even less plausible to assert or conclude that economically rational actions taken to preserve the business of a key port tenant are proscribed by the Shipping Act.

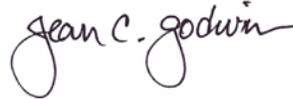
Adoption of the narrow approach advocated by Maher would graft the standards of discrimination cases developed in an entirely different context (e.g. cargo characteristics that might justify different charges between shippers moving goods under tariff) onto the regulatory system that should properly apply to highly complex and individualized lease negotiations for large terminals. Whatever the wisdom of applying the Interstate Commerce Act precedents advanced by Maher to the carriage of goods by ocean carriers, there is no policy reason to apply a system of regulation that had its roots in the regulation of rail and motor common carriers in the 19th Century to 21st Century port realities. The Commission should instead continue to develop its precedent to allow ports to consider a variety of commercial and competitive factors in exercising reasonable business judgment.

III. CONCLUSION

Ports have long been supporters of the Shipping Act and the elements of regulatory stability it provides. While Commission oversight of certain port activities with respect to common carriers is part of the bargain, ports never contemplated that the Act would be construed to prevent them from taking steps necessary in the exercise of their reasonable business judgment to protect their business and investments and to further their public mission. Justice Jackson said famously that unless doctrinaire logic is tempered with practical wisdom, the Bill of Rights could become a "suicide pact." *Terminiello v. Chicago*, 337 U.S. 1, 37 (1947) (Jackson, J., dissenting). Adopting a rigid construction of the Shipping Act that prevents ports from taking

the steps necessary to fully improve and develop their assets, and to protect their core businesses and tenants where necessary, would risk turning the Act into just such a pact.

Respectfully submitted,

A handwritten signature in black ink that reads "Jean C. Godwin". The signature is written in a cursive style with a large, looped initial "J".

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