

FEDERAL MARITIME COMMISSION

MAHER TERMINALS, LLC

Complainant,

v.

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY,

Respondent.

Docket No. 08-03

Served: December 17, 2014

BY THE COMMISSION: Mario Cordero *Chairman*;
Rebecca F. Dye, Richard A. Lidinsky, Jr., Michael A. Khouri,
William P. Doyle, *Commissioners*.

Memorandum Opinion and Order

Before the Federal Maritime Commission (FMC or Commission) on exceptions is the April 25, 2014, Initial Decision of the Administrative Law Judge (ALJ). The ALJ found that Complainant Maher Terminals, LLC (Maher) did not establish that Respondent, the Port Authority of New York and New Jersey (PANYNJ or the Port), violated the Shipping Act of 1984, 46 U.S.C. § 40101 et seq. (the Shipping Act), and, consequently, the ALJ denied Maher's claims and Docket No. 07-01 counterclaims, dismissed Maher's complaint and counter-complaint with prejudice, and discontinued the proceeding. *Maher Terminals, LLC v.*

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PANYNJ, 33 S.R.R. 349, 354 (ALJ 2014) (hereinafter ALJ I.D. at 3).¹

For the reasons set forth below, we affirm the ALJ's decision. No party disputes that the Port gave non-party APM Terminals North America, Inc. (APM-Maersk)² preferential lease terms in part because ocean carriers Sea-Land and Maersk Line threatened to leave the Port. Likewise, no party disputes that the Port declined to give Maher the same lease terms. Maher has not, however, established that the Port's conduct constitutes an *unreasonable* preference or prejudice. Similarly, Maher has not met its burden of proving that the Port failed to establish, observe, and enforce just and reasonable regulations and practices; that the Port unreasonably refused to deal with Maher; or that the Port operated contrary to Maher's lease.

I. Background

A. Parties

The Port is a public port agency “charged with the responsibility of developing and operating marine terminals” and “under pressure to promote commerce, to generate jobs, [and] to stimulate the economy of a region, much like an economic development agency.” PAppx. Vol. II at 337.³ The Port owns the

¹ Throughout this opinion, we, like the parties, cite the ALJ's Initial Decision by its original pagination rather than the S.R.R. pagination.

² Because the Port and Maher referred to APM as “APM/Maersk” and “Maersk-APM, respectively, in their briefs, we refer to APM as “APM-Maersk.”

³ Although the parties complied with the Commission's order to submit a Joint Appendix, the ALJ's Initial Decision, Maher's Exceptions, and the Port's Reply all cite the record before the ALJ.

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Elizabeth-Port Authority Marine Terminal, which presently contains two privately operated marine terminals -- Maher Terminal and APM Terminal. PAppx. Vol. I at 2388-89, 2423. Maher Terminal is operated by Complainant Maher, a marine terminal operator as defined by the Shipping Act. Maher Compl. ¶ I.B; PAppx. Vol. I at 2391. Prior to 2000, Maher operated two container terminals at the Elizabeth-Port Authority Marine Terminal: the Tripoli Street Terminal and the Fleet Street Terminal. MAppx. Vol. 1C at 1148; MAppx. Vol. 5C at 769-770, 895-96; MAppx. Vol. 1D at 1913 (map).

APM Terminal is operated by non-party APM-Maersk, which provides marine terminal services to ocean common carriers at facilities throughout the United States. APM-Maersk Compl. ¶ I.A., *APM Terminals N.A., Inc. v. PANYNJ*, Docket No. 07-01 (Jan. 9, 2007). APM-Maersk was formerly known as Maersk Container Service Company, Inc. *Id.*; PAppx. Vol. II at 5-6. As of 2000, when the leases at issue were executed, APM-Maersk was wholly owned and controlled by Maersk, Inc., which was controlled by Aktieselskabet Dampskibsselskabet Svendborg and Dampskibsselskabet af 12, Asktieselskab (collectively, A.P. Møller-Maersk A/S). MAppx. Vol. 5A at 359. A.P. Møller-Maersk A/S is the parent company of the A.P. Møller-Maersk Group, which is a worldwide conglomerate that owns, among other things, the shipping company Maersk Line. MAppx. Vol. 1D at 1842, 1882. Maersk Line is the largest ocean carrier in the world. MAppx. Vol. 2B at 422; PAppx. Vol. II at 168. In 2000, Maersk, Inc. was the exclusive United States agent of A.P. Møller-Maersk A/S and handled Maersk Line's North American business. MAppx. Vol. 5A at 359; MAppx. Vol. 2B at 422. Prior to 2000, APM-Maersk's predecessors, affiliates, and related companies operated three container terminals on the Port property: the Sea-Land Terminal; the

We therefore cite to the record before the ALJ. We abbreviate the Port's Appendix as PAppx. Vol. ___ and Maher's Appendix as MAppx. Vol. ___.

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Maersk Port Newark Terminal, and the Universal Terminal. MAppx. Vol. 5C at 612, 662, 844.

B. Port Revitalization Plan and Negotiation of Terminal Leases

By the 1990s, the Port of New York and New Jersey faced shallow channels, high labor costs, and inadequate and outdated marine terminal infrastructure and configurations. PAppx. Vol. II at 14-15, 134. Moreover, West Coast ports were able to charge much higher rent than the Port could charge under its “legacy leases” from the 1970s. MAppx. Vol. 2A at 12; MAppx. Vol. 2B at 559. The Port began to address these problems in the late 1990s by upgrading the port and restructuring its leases, a number of which were set to expire in 1999 and 2000. PAppx. Vol. I at 19, 199, 260-61.

The Port’s modernization plan called for a standard set of improvements to all the terminals and restructured terminal leases that would encourage more efficient land use and “return a greater share of the PANYNJ investment” than it received in the past. PAppx. Vol. I at 199-200. The Port planned to negotiate throughput-based leases (wherein rent would be charged on a per-container basis) that would “set a level playing field for all of [the Port’s] New Jersey based terminal operators which would allow for competition based upon level of service, rather than on different lease rates.” MAppx. Vol. 1A at 224; PAppx. Vol. I at 73. In 1997, the Port reached a tentative agreement with Maher on a throughput-based lease for a reconfigured, consolidated terminal. MAppx. Vol. 1B at 696; PAppx. Vol. I at 203-04; PAppx. Vol. II at 155, 157. Although the parties expected that all the Port’s new leases would have similar terms, including the same lease rates, the Port informed Maher that it could not “represent to Maher that this approach will ultimately be followed, and no language to that effect will be included in a lease.” PAppx. Vol. I at 201.

The Port’s negotiations with Maher were placed temporarily on hold when the Port began negotiating with Sea-Land, at the time

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“the largest carrier in the U.S.” PAppx. Vol. II at 152, 167-68. At a kick-off meeting with Sea-Land in September 1997, the Port rejected Sea-Land’s request to extend its lease for an additional ten years and instead proposed a new throughput-based terminal lease that would have effectively increased Sea-Land’s rent by at least \$14 million annually compared to its existing lease. PAppx. Vol. I at 219, 272; PAppx. Vol. II at 170. Sea-Land rejected the proposed throughput lease and stated that it was only interested in a real-estate-based lease. PAppx. Vol. I at 273. Around this time, the Port learned that Sea-Land was exploring other port alternatives and was prepared to leave the Port unless the Port revised its proposal. PAppx. Vol. I at 273. Moreover, at some point in 1997, Sea-Land and Maersk entered into a joint operating arrangement and discussed consolidating their terminal operations. PAppx. Vol. I at 697; PAppx. Vol. II at 152, 168.

The Port recognized that if it acceded to Sea-Land’s requests for a real-estate-based lease, its negotiations with Maher would be affected, as the Port could not “have throughput-based leases with only some of [its] container terminal operators.” PAppx. Vol. I at 274. Instead, “[e]very lease would have to be converted to a real estate lease with a construction reimbursement arrangement. [The Port] would have to revise [its] investment/lease structure with each of the other New Jersey container terminal operators and revisit the financial underpinnings of the overall investment.” *Id.* Lillian Borrone, the Director of the Port Commerce Department at the Port at the time, informed Brian Maher, Maher’s then-CEO, in 1997 that if the Port had to change the proposed lease structure to retain Sea-Land and Maersk in the port, then Maher’s lease would need to be adjusted accordingly. PAppx. Vol. I at 240; PAppx. Vol. II at 277-78. Mr. Maher stated that he would approach his contacts and explore avenues to the New Jersey Governor’s Office regarding support for a change in lease policy. PAppx. Vol. I at 240.

The Port submitted a revised proposal to Sea-Land in March 1998. PAppx. Vol. I at 292; PAppx. Vol. II at 169, 399. The revised proposal provided for both real-estate-based rent and a lowered

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throughput rent. PAppx. Vol. I at 298. Sea-Land rejected the revised proposal later that month, pointing out that it would increase Sea-Land's rent from \$19,200 an acre to \$66,165 per acre, an increase of approximately 245%. PAppx. Vol. I at 292-93. Sea-Land further noted that the proposed rent was significantly higher than that at other ports. *Id.* at 294. Sea-Land informed the Port that "if we are not able to reach agreement on a much more modest level, we must refocus our negotiations on a short-term lease extension as we restructure our services to call at one or more alternate East Coast ports." *Id.*

On April 30, 1998, Sea-Land notified the Port that it and Maersk would jointly be issuing a request for proposal (RFP) to handle the companies' freight on the East Coast. PAppx. Vol. I at 307. Sea-Land and Maersk made good on their promise on May 13, 1998, when they issued a RFP for an "East Coast Hub Terminal" to various East Coast ports. MAppx. Vol. 1A at 309-71; PAppx. Vol. I at 378, 383. The RFP stated that Sea-Land's and Maersk's leases with the Port were to expire in 1999 and that the two companies were "looking to develop a joint terminal to service cargo in the Halifax to Norfolk range." MAppx. Vol. 1A at 310.

As a result of the RFP, the Port retained Paul F. Richardson Associates, Inc. (Richardson) to provide a Risk Analysis and Profile of Competing Ports. PAppx. Vol. I at 373. This report found that: (1) "[t]here is an extremely high risk of losing all of the Sea-Land/Maersk cargo and up to 55% of the Port of NY & NJ's (the Port's) entire containerized cargo base;" (2) "[t]he consequences of such a loss to the competitiveness of the Port and associated regional economic activity would be severe and irrevocable;" and (3) "[c]onversely, the potential benefits to be derived from the retention of this business are considerable and would constitute the cornerstone of the Port's Hub Port potential." PAppx. Vol. I at 374. Richardson concluded that losing Sea-Land and Maersk could also result in tens of thousands of lost jobs and billions in lost wages per year. PAppx. Vol. I at 375-76. As to the benefits of retaining Sea-Land and Maersk, Richardson estimated that if the Port became a

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hub port as envisioned in the RFP, port volume would increase by sixteen percent in the first year and tens of thousands of new jobs would be created in the region. PAppx. Vol. I at 376.

The Port's Board and staff believed that Sea-Land and Maersk's threat to leave the port was credible and that "retaining Maersk in the port was critical to the future of the port and to the economy of the region." PAppx. Vol. II at 244. According to Port Commissioner Philibosian, "the name of the organization was The Port Authority of New York and New Jersey. If Sea-Land/Maersk left, you might as well change the name to the Authority of New York and New Jersey." MAppx. Vol. 2B at 442. Nevertheless, some of the Port's Board members were concerned that meeting Sea-Land's and Maersk's demands would result in hundreds of millions of dollars of additional subsidies from the Port to its port operations. In addition, port officials were concerned about the Shipping Act implications of the Port's proposed response to the RFP. MAppx. Vol. 1A at 437, 442-45, 461.

On August 14, 1998, the Port responded to the RFP with a proposal for a joint Maersk/Sea-Land East Coast hub terminal comprising the Sea-Land Terminal and some adjacent property. PAppx. Vol. I at 2667, 3383-3467. The Port proposed annual base rent (real-estate rent) of \$36,000 per acre with a two percent escalator, plus throughput rent. PAppx. Vol. I at 3436-47. Maersk and Sea-Land rejected this proposal, finding that the proposed rates were unreasonable and noncompetitive. MAppx. Vol. 1A at 489. The Port submitted a revised proposal to Sea-Land and Maersk in September 1998, which, among other things, reduced the throughput rent rate. MAppx. Vol. 1A at 480-81, 484; MAppx. Vol. 1B at 534. In December 1998, Sea-Land and Maersk selected New York/New Jersey, Baltimore, and Halifax as finalists for the hub terminal. MAppx. Vol. 1B at 731.

In order to help keep Sea-Land and Maersk at the Port, Brian Maher sent a letter to New Jersey Governor Christine Todd Whitman in December 1998 urging her to do what she could to

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retain the carriers in the port. PAppx. Vol. I at 1043-46. He noted that “the current status of the negotiations with Sea-Land and Maersk is so dangerous and the risk to the Port and the State of New Jersey so grave that I want to be sure that you understand the situation.” *Id.* at 1043. He explained that if Sea-Land and Maersk were to leave the port: (1) employment payrolls in the area would be reduced by close to \$100 million; (2) the Port would lose 25-30% of its current volume; (3) the private sector would be unlikely to invest in port infrastructure and generate the revenue necessary to repay the Port’s infrastructure investments; and (4) any plans to expand or develop other terminals would be significantly delayed or abandoned. PAppx. Vol. I at 1045. Mr. Maher concluded that “to permit two major employers to leave the state is unthinkable.” PAppx. Vol. I at 1046. Other Maher officials echoed Mr. Maher’s concerns. PAppx. Vol. II at 91 (“It was our opinion that the port and Maher were better off with Maersk in the port, and that in our opinion the Port Authority should try and retain Maersk in the port.”); PAppx. Vol. II at 357; PAppx. Vol. I at 1157; PAppx. Vol. VII at 328-29, 332.

In February 1999, Sea-Land and Maersk informed the Port that without a cost reduction package of \$120 million, they would take the majority of their cargo to Baltimore and would therefore not need their own terminals in New York/New Jersey. PAppx. Vol. I at 1064, 1070-71. Port staff accordingly developed a proposal wherein Sea-Land and Maersk would receive their \$120 million via rent reduction and free capital. PAppx. Vol. I at 1081.

This scenario would provide the terminal “as is” for \$19,000 per acre fixed for the term (this is essentially Sea-Land’s current basic rental excluding capital); resulting in a \$90 million savings in rental off of our September 21 proposal (calculated at 9% over 30 years). In addition, we would provide \$30 million in free capital, which is comparable to what is already in the model for Maher, for a total package of \$120 million. Any additional capital required

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would be loaned to Sea-Land at self-sustaining rates. An important component of this offer is that we must insist that they make the \$200 million investment outlined in their RFP.

PAppx. Vol. I at 1081.

The Port staff also “developed a set of guarantees which [they] felt were essential to justify concessions of this magnitude.” MAppx. Vol. 1B at 731. These guarantees were that Sea-Land and Maersk would move a minimum amount of their own containers through the Port on their ships (the port guarantee), that APM-Maersk would handle a certain number of containers at the terminal (the terminal guarantee), and that APM-Maersk would invest in terminal infrastructure. MAppx. Vol. 1B at 731. The Port discussed this proposal with Sea-Land and Maersk in March 1999, but the port guarantee continued to be a major issue. PAppx. Vol. I at 1083; MAppx. Vol. 1B at 624. The Port believed that the port guarantee was necessary to “assure that the carriers do not preclude competition by tying up this terminal for third party business and divert their own business to Baltimore where they may have cheaper labor rates available” and to “assure that we are acquiring cargo they presently ship through other ports on the East Coast in addition to the port’s growth cargo.” MAppx. Vol. 1B at 585; PAppx. Vol. I at 1083; PAppx. Vol. II at 139.

Sea-Land and Maersk selected the Port in May 1999 and negotiations for a consolidated 350-acre marine terminal continued through the end of 1999. PAppx. Vol. I at 1162. The various proposals provided for a base rent of \$19,000 per acre, throughput rent, a port guarantee, and a terminal guarantee. PAppx. Vol. I at 1196-1208, 1215. In addition, at some point in 1999, Maersk and Sea Land consolidated their terminal operations, and in December 1999, Maersk acquired Sea-Land’s international container shipping business and related terminals. PAppx. Vol. I at 2689; PAppx. Vol. II at 5-6. At the same time, Maersk backed away from a “hub port”

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concept (all volumes in one port) and decided that it would continue to spread its cargo over several ports. PAppx. Vol. I at 2696-97.

In October 1999, Maersk signed a final proposal from the Port. MAppx. Vol. 1B at 987; PAppx. Vol. I at 1300. The proposal listed Maersk Container Service Co., APM-Maersk's predecessor, as the lessee. MAppx. Vol. 1B at 987-1004. As described in more detail in the Discussion section, *infra*, the lease provided for base rent of \$19,000 per acre, throughput rent, a terminal guarantee, infrastructure investment, and a port guarantee. Under the port guarantee, APM-Maersk agreed that certain volumes of loaded, Maersk-affiliated containers would go through the Port (rather than any particular terminal) each year. MAppx. Vol. 5A at 347.⁴ If fewer than the required number of containers go through the Port during two consecutive years, APM-Maersk's basic annual rent would increase according to a sliding scale.⁵ The lease also provided that the Port would transfer to APM-Maersk an 84-acre parcel (the Added Premises) by the end of 2003. MAppx. Vol. 1D at 1614; MAppx. Vol. 5A at 262; PAppx. Vol. IV at 334. APM-Maersk

⁴ Specifically, APM-Maersk "agrees that the number of the Carrier's Containers transported to or from the Port shall not be less than" 365,000 per year during the First Port Guarantee Period; 440,000 per year during the Second Port Guarantee Period; and 515,000 per year during the Third Port Guarantee Period. *Id.* Qualifying containers are defined as "containers carrying cargo for which a disclosed principal of Maersk Inc. is acting as common carrier." *Id.* at 346. The "disclosed principals" of Maersk Inc. are A.P. Møller-Maersk A/S and its affiliates, subsidiaries, and related companies. *Id.* at 361.

⁵ If APM-Maersk does not meet the guarantee for two consecutive years, APM-Maersk's base rent will increase by \$1,900 per acre for every 10,000 containers below the guarantee in the First Port Guarantee Period and for every 12,500 containers below the guarantee in the Second and Third Port Guarantee Periods. *Id.* at 366.

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signed off on Lease No. EP-248 on December 15, 1999, and it became effective August 2, 2000. PAppx. Vol. I at 1350. PAppx. Vol. I at 1325-26, 1350; PAppx. Vol. II at 312, 352-53; MAppx. Vol. 5A at 256.

Although the Port's initial negotiations with Maher were placed on hold when Sea-Land and Maersk requested a reconfigured terminal, the parties continued to discuss a new terminal lease during the pendency of the Maersk negotiations. During these discussions, Maher was aware of the status of the Sea-Land and Maersk negotiations. PAppx. Vol. I at 1145, 3490; PAppx. Vol. II at 92, 113, 189, 258-59, 281, 291. Maher acknowledged that the Port intended to reconfigure the terminals to take into account the needs of Sea-Land and Maersk and an expanded rail facility, and, "in fact, believe[d] that it [was] the right thing to do." MAppx 1B at 573. During these discussions, Maher made clear that it wanted rental rates comparable to those paid by other terminal operators. MAppx. Vol. 1B at 573.

The Port and Maher resumed substantive negotiations for a reconfigured 445-acre terminal on May 13, 1999. PAppx. Vol. I at 1145. The Port explained that the rental structure would be a "real estate rent with a basic per acre component and a variable component." PAppx. Vol. I at 1145. When Maher asked to be treated the same as Sea-Land and Maersk, however, the Port responded that the Sea-Land/Maersk rates were "off the table." MAppx. Vol. 2A at 10; MAppx. Vol. 2B at 349-350. According to Mr. Maher, the Port told Maher that it was not being offered those rates because "Maersk provided a port guarantee" and "Maersk was going to make larger investments in their facility than we were." MAppx. Vol. 2B at 349-50; *see also* PAppx. Vol. II at 125 (According to Maher vice president Randall Mosca, there were two reasons for APM-Maersk's lower base rent: "One, they [APM-Maersk] had a larger investment in the terminal that they provided, and two, they were able to generate a port guarantee for volume, which we were unable to do, and therefore, the Maersk rates were off the table for us."); MAppx. Vol. 2B at 458.

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According to Ms. Borrone at the Port, the proposed rental rates were based on many factors. PAppx. Vol. II at 134-35; MAppx. Vol. 2A at 9. She testified that the Port could not give Maher the Sea-Land/Maersk rental rates because the \$19,000 per acre offered to Sea-Land/Maersk was a subsidized departure from the Port's intended rent:

So I couldn't offer the 19,000 because that was a – at the time, it was going to be a subsidized rate by the State of New Jersey, but it was comparable as a specific to the rate we had started out with – the rate were asking from Maher was comparable to what we had started out with and what we had offered to Sea-Land/Maersk.

We, however, also had many other factors that we were negotiating with Maher that they wanted and that we were willing to provide that we felt justified the differences in the rates that were going to be charged under the new arrangements in these leases.

PAppx. Vol. II at 136. These other factors included more capital investment than was offered Sea-Land/Maersk, better financing rates than Maher could have received in the open market, free investment capital, continued operation of ExpressRail, and specific kinds of investments that were different from what Sea-Land and Maersk had asked for. PAppx. Vol. VII at 16-17. Maher also avoided a bidding process for its new terminal. PAppx. Vol. II at 263.

The Port did not ask Maher to make a port guarantee. Ms. Borrone testified that the Port discussed a port guarantee with Maher but “never entered into any serious discussions about it, because they acknowledged, they could not commit their customers.” PAppx. Vol. II at 140; *see also* MAppx. Vol. 2A at 9 (“First of all,

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it's – the port guarantee is unique for carriers, terminal operators who were carriers. Maher Terminal is not a carrier and it couldn't commit to assuring that particular carrier's cargoes could come to the harbor as part of their negotiation with us.”). Mr. Maher testified that he did not recall discussing a port guarantee with Ms. Borrone, but she “would have known and did know that Maher was not in a position to commit its customers to volume levels in the Port of New York.” PAppx. Vol. II at 296.

Maher agreed to proposed terms on December 15, 1999. PAppx. Vol. I at 3490. Mr. Maher testified that it was clear to him that after the political wrangling over the APM-Maersk lease that Maher was not going to get the same deal, so he “accepted the lease that was given to me on the basis that – that the Maersk Sea-Land APM terms were not available to us.” MAppx. Vol. 2B at 334. Maher's lease, as discussed below, provided for base rent of \$39,750 per acre with a two percent escalator, throughput rent, a terminal guarantee, infrastructure investment, a security deposit, and a first point of rest for automobiles. The lease also required Maher to surrender certain property to the Port “by the date reasonably specified by the Port,” and it further provided that if Maher failed timely to surrender the property, Maher would indemnify and hold harmless the Port for any liability incurred by the Port for failing to timely transfer the Added Premises to APM-Maersk. MAppx. Vol. 5A at 6-8. The Port's Board approved the lease with Maher in June 2000. PAppx. Vol. I at 1338-39. Maher's Lease No. EP-249 was dated October 1, 2000.

C. Post-Lease Developments

After execution of the leases in 2000, the Port's share of Atlantic coast container volume increased, and Maher was generally profitable. PAppx. Vol. IV at 284-86; PAppx. Vol. II at 74-75, 271-73; PAppx. Vol. I at 1570. In 2005, the Port conveyed the Added Premises to APM-Maersk, albeit two years later than required by APM-Maersk's lease. MAppx. Vol. 1D at 1614. As a result of this

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delayed conveyance, APM-Maersk filed a Shipping Act complaint against the Port in *APM v. PANYNJ*, Docket No. 07-01.

Also in 2005, Maher's owners explored selling the closely held, family-owned company and engaged Greenhill & Co., LLC, to prepare a Confidential Offering Memorandum to assist potential purchasers in deciding whether to participate in the bidding process for Maher. PAppx. Vol. I at 1574, 1577; PAppx. Vol. II at 76; PAppx. Vol. III at 1016; MAppx. Vol. 2B at 353. The memorandum, which was reviewed by Maher officers, noted that Maher was the single largest terminal operator in the Port of New York and New Jersey, and that its facilities were approximately fifty percent larger than those of its closest direct competitor. PAppx. Vol. I at 1577; PAppx. Vol. II at 272. The memorandum also noted that "Maher is the only pure terminal operator and enjoys an advantageous location in terms of rail and highway access relative to most other operators." PAppx. Vol. I at 1577. The memorandum contrasted Maher with APM-Maersk, asserting that Maher's lack of a steamship affiliation was "a competitive advantage for Maher, as many steamship lines will not use a competitor's terminal facilities even if they are available." *Id.* at 1584.

On March 18, 2007, Deutsche Bank, through RREEF Alternative Investments, purchased Maher for approximately \$1.8 billion. PAppx. Vol. I at 1687, 1692, 2150. The Port approved this ownership change but increased Maher's security deposit as a result. PAppx. Vol. I at 1681; PAppx. Vol. III at 1016; PAppx. Vol. V at 239-353. Maher reaffirmed the material terms of the lease in July 2007, including the rent. PAppx. Vol. V at 246.

After the acquisition, Empire Valuation Consultants (Empire) prepared a report to assist Maher, Deutsche Bank, and RREEF America LLC "in allocating the purchase price paid for the identifiable intangible assets and goodwill of Maher" and in meeting financial reporting requirements. PAppx. Vol. I at 2136. Empire's report stated that

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[a]bove or below market lease arrangements were not included as an identifiable intangible asset for purposes of this analysis because: (1) management believed the Company's lease terms were neither materially above nor below market at the Valuation Date; (2) RREEF believed the Company's lease terms were neither materially above nor below the market at the Valuation Date; and (3) available comparable information indicated that the terms of the U.S. Lease Agreement⁶ were neither materially above nor below market at the Valuation Date.

PAppx. Vol. I at 2148. According to the Empire Report, “[m]anagement believed that the terms of U.S. Lease Agreement were on comparable terms to other terminal operators located within Port Elizabeth, with one exception (due to negotiating power and timing).” *Id.*

The Empire Report also stated that:

The notable difference between the terms of the U.S. Lease Agreement and the publicly available agreements relate to the basic annual rent amount. Management and RREEF attributed the differences in basic rental amount (and per acre rental amount) to Maher U.S.'s favorable infrastructure attributes, including: (1) depth of channel; (3) [sic] length of berth; (3) size of yard; and (4) intermodal access. Management and RREEF believe that the higher basic rental amount and per acre amount paid and to be paid by Maher U.S. reflects the superior nature of

⁶ The “U.S. Lease Agreement” referred to in the Empire Report is Maher's terminal lease with the Port, Lease No. EP-249. PAppx. Vol. I at 2138 (defining “U.S. Lease Agreement” as the lease between Maher and the Port dated October 1, 2000); *id.* at 2148-49 (describing the terms of the U.S. Lease Agreement).

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the Maher property, the additional flexibility in yard usage, and its infrastructure. RREEF and management believe that going forward, the maximum capacity constraints placed on the other terminal operators within Port Elizabeth by their infrastructure that are not applicable to Maher U.S. outweigh the marginally higher basic rental amount.

PAppx. Vol. I at 2149-50.

Both Maher and APM-Maersk experienced difficulties in 2008 and 2009, at least in part due to the global recession. MAppx. Vol. 1D at 1796; PAppx. Vol. VII at 348-49; PAppx. Vol. I at 2482. APM-Maersk tried unsuccessfully to renegotiate the port guarantee in 2009 and failed to meet it in 2008, 2009, and 2010, causing its rent to increase to \$34,200 per acre in 2010 and \$32,300 per acre in 2011 from the base rent of \$19,000 per acre. PAppx. Vol. I at 2659; PAppx. Vol. IV at 307; PAppx. Vol. V at 364; MAppx. Vol. 1D at 1864; MAppx. Vol. 4 at 313-14.

In November 2007, Maher met with the Port and discussed its belief that it potentially had an unreasonable preference claim against the Port based on the terms of the Maher and APM-Maersk leases. MAppx. Vol. 2A at 123-24; MAppx. Vol. 2B at 319-20. According to Maher officials, at a later meeting, the Port countered that because Maher signed the lease, there was nothing the Port could do. MAppx. Vol. 2A at 110. In January 2008, Maher sent the Port a letter “claiming damages from a higher rent structure than APM and requesting that the Port Authority ‘extend to Maher the same lease terms offered and obtained by APMT . . . and compensate Maher for past damages.’” MAppx. Vol. 1D at 1614. The Port refused Maher’s “proposed rental adjustments” and sought “to better understand what is driving Maher to pursue this now, in the eighth year of the lease.” MAppx. Vol. 1D at 1607. The Port stated that it would be “willing to meet and engage in a more detailed dialogue if [Maher] believe[s] that would be fruitful.” *Id.*

II. Procedural History

A. *APM v. PANYNJ*, Docket No. 07-01

On December 29, 2006, APM-Maersk filed a complaint with the Commission alleging that the Port violated the Shipping Act by failing to convey the Added Premises to APM-Maersk by December 31, 2003, as required by Lease No. EP-248. The Port filed a counterclaim alleging that APM-Maersk failed timely to perform some of its required infrastructure work. The Port also filed a third party complaint against Maher, alleging that the indemnity provisions in Lease No. EP-249 required Maher to indemnify and hold harmless the Port for any damages resulting from the Port's delay in turning over the Added Premises to APM-Maersk.

Maher denied liability and filed a third party counter-complaint against the Port alleging that the Port operated contrary to Lease No. EP-249 by failing to provide Maher with reasonably specific dates to vacate the Added Premises and by failing to make certain improvements to other property. Maher's Ans. to 3d Party Compl. & Countercl. ¶¶ 37-40, *APM Terminals North America, Inc. v. PANYNJ*, Docket No. 07-01. Maher also alleged that the Port "failed to establish, observe and enforce just and reasonable regulations and practices, unreasonably refused to deal or negotiate with Maher, and has imposed unjust and unreasonable prejudice or disadvantage with respect to Maher concerning the turnover of certain premises." *Id.* ¶ 40. In May 2008, the Port sued Maher in New Jersey state court, alleging claims similar to those raised in its third-party complaint.

APM-Maersk and the Port subsequently settled their claims and counterclaims in Docket No. 07-01 as well as other matters related to Lease No. EP-248. The settlement provided that APM-Maersk would dismiss its Shipping Act complaint against the Port and that the Port would dismiss its counterclaim against APM-Maersk, its third party complaint against Maher, and its New Jersey state court case against Maher. APM-Maersk and the Port jointly

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moved for approval of the settlement agreement in August 2008, but Maher opposed the motion. The ALJ granted it on October 24, 2008. *APM v. PANYNJ*, 31 S.R.R. 455 (ALJ 2008). Maher filed exceptions to the ALJ's Initial Decision approving the proposed settlement, which the Commission denied, although the Commission consolidated Maher's counterclaims from Docket No. 07-01 with the present case. *APM v. PANYNJ*, 31 S.R.R. 623, 626 n.2 (FMC 2009).

B. *Maher v. PANYNJ*, Docket No. 08-03 Pleadings and Summary Judgment

On June 3, 2008, while Docket No. 07-01 was pending, Maher filed the present Shipping Act case against the Port alleging violations of 42 U.S.C. §§ 41106(2), (3) and 41102(c). Maher alleged that the Port discriminated against it in favor of APM-Maersk by granting APM-Maersk "unduly and unreasonably more favorable lease terms than provided to Maher in EP-249, including but not limited to the base rental rates, investment requirements, throughput requirements, a first point of rest requirement for automobiles, and a security deposit requirement." Compl. ¶ IV.B. Maher further alleged that the Port refused to deal with it despite a request to be treated equally with APM-Maersk. *Id.* ¶ IV.J. Maher also alleged that the Port refused to negotiate about Maher's counterclaims in Docket No. 07-01. Additionally, Maher alleged that the Port "has and continues to fail to establish, observe, and enforce just and reasonable regulations and practices." *Id.* ¶ IV.A. Maher sought reparations "amounting to a sum of millions of dollars" and an order requiring the Port to cease and desist from violating the Shipping Act and "providing to Maher the preferences provided to APMT." *Id.* ¶¶ IV.A, VII.B.

In 2011, the Port moved for summary judgment, arguing that Maher's unreasonable preference claim was barred by the Shipping Act's three-year statute of limitations under 46 U.S.C. § 41301(a). The ALJ granted in part and denied in part the Port's motion, finding that the statute of limitations barred Maher's ability to recover

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reparations based on its unreasonable preference claim, but it did not preclude cease-and-desist relief. *Maher v. PANYNJ*, 32 S.R.R. 1, 19, 31-33 (ALJ 2011). The ALJ found that Maher knew of all facts necessary to plead a prima facie case of discrimination under *Ceres Marine Terminals Inc. v. Maryland Port Administration (Ceres I)*, 27 S.R.R. 1251 (FMC 1997) – *Ceres I* elements 1, 2, and 4 – as of October 1, 2000. *Id.* at 18. According to the ALJ, *Ceres I* element 3 was not relevant to claim accrual because it was an affirmative defense that the Port bore the burden of establishing. *Id.* Both Maher and the Port filed exceptions to the ALJ’s summary judgment decision, and the Commission heard oral argument on May 17, 2012.

The Commission reviewed the Port’s summary judgment motion *de novo* on appeal and granted it in part and denied it in part. *Maher v. PANYNJ*, 32 S.R.R. 1185 (FMC 2013). The Commission found that the Shipping Act’s statute of limitations did not bar Maher’s request for cease-and-desist relief, and it denied the Port’s motion with respect to such relief. *Id.* at 1190. As to reparations for the alleged unreasonable preference, the Commission disagreed with the ALJ’s determination that the claim accrued when Maher knew it had a prima facie case. The Commission found that “Maher’s claim accrued when it knew, or should have known, that it had a cause of action, that is, when it knew, or should have known, whether the four *Ceres* factors existed.” *Id.* at 1193. The Commission agreed, however, with the ALJ’s ultimate decision and granted the Port’s motion for summary judgment as to reparations for alleged discrimination in lease terms. Then-Commissioner Cordero dissented, arguing that genuine issues of material fact precluded summary judgment.

On February 11, 2013, Maher filed a petition for review of the Commission’s summary judgment order with the United States Court of Appeals for the District of Columbia Circuit. While the appeal was pending, Maher filed a petition for reconsideration of the summary judgment order with the Commission. The D.C. Circuit dismissed the petition for lack of appellate jurisdiction. *Maher*

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Terminals, LLC v. Fed. Mar. Comm'n, No. 13-1028, 2013 U.S. App. LEXIS 12462, at *1-2 (D.C. Cir. June 18, 2013). The Commission subsequently rejected Maher's petition for reconsideration. *Maher v. PANYNJ*, 33 S.R.R. 303, 307 (FMC 2014). On April 7, 2014, Maher again petitioned the D.C. Circuit for review of the both the Commission's order on reconsideration and its earlier summary judgment order. The D.C. Circuit dismissed the petition on July 14, 2014, for lack of appellate jurisdiction. *Maher Terminals, LLC v. Fed. Mar. Comm'n*, No. 14-1051, 2014 U.S. App. LEXIS 13379, at *1-2 (D.C. Cir. July 14, 2014).

C. ALJ Initial Decision on the Merits

On April 25, 2014, the ALJ issued an Initial Decision finding that the Port did not violate the Shipping Act, denying Maher's claims, dismissing with prejudice the complaint in Docket No. 08-03 and the consolidated counterclaims from Docket No. 07-01, and discontinuing the proceeding. ALJ I.D. at 61; Errata to Initial Decision, Docket No. 08-03 (ALJ May 5, 2014). The ALJ made 180 specific findings of fact before addressing Maher's claims in turn. ALJ I.D. at 9-34.

1. Docket No. 08-03 Claims

As to Maher's claim that the Port gave unreasonably preferential lease terms to APM-Maersk, the ALJ acknowledged that the leading case is *Ceres I*, which set forth four elements a complainant must establish to prove an unreasonable preference or prejudice claim where the complainant is a tenant terminal operator and the respondent is a landlord port authority.⁷ The ALJ found that

⁷ According to the Commission in *Ceres I*, a complainant proves an unreasonable preference or prejudice by showing: (1) "two parties are similarly situated or in a competitive relationship;" (2) "the parties were accorded different treatment;" (3) "the unequal treatment is not justified by differences in transportation factors;" and (4) "the resulting prejudice or disadvantage is the proximate

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Maher and APM-Maersk were in a relationship sufficient to the statute to apply, though it was important that Maher is solely a terminal operator whereas APM-Maersk is a terminal operator and an ocean carrier:

The difference between being a terminal operator and an ocean carrier impacts the lease negotiation process because these different entities pose different risks and received different benefits. The differences are not based on status alone, but, as will be discussed later, status did have real and tangible impact on the Port's negotiations with these particular entities.

ALJ I.D. at 39-40.

As to the second *Ceres I* element – whether the parties were accorded different treatment – the ALJ stated that “[a] preference or prejudice is established by showing that a port ‘charges a different rate to different users for an identical service.’” *Id.* (quoting *Lake Charles Harbor & Terminal Dist. v. Port of Beaumont Navigation Dist.*, 10 S.R.R. 037, 1042 (FMC 1969)). The ALJ pointed out that the parties agreed that Maher and APM-Maersk were treated differently in that their leases with the Port have different terms. *Id.* The ALJ also noted, however, that Maher and APM-Maersk were not provided an “identical service” because the leased properties were significantly different: “[n]ot surprisingly for a maritime lease, the leased properties differ in size, depth, berthing options, buildings, and access to transportation infrastructure.” *Id.* The real question, the ALJ concluded, was “whether the differences in lease terms are reasonable and based on valid transportation factors.” *Id.*

cause of injury.” *Ceres I*, 27 S.R.R. at 1270. The Commission further held that “[t]he complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors.” *Id.* at 1270-71.

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The ALJ concluded that the differences in lease terms were reasonable. *Id.* at 48. The ALJ found APM-Maersk's lower base rent was justified because Maersk made a credible threat to leave the port, which the evidence showed would have a negative impact on the region, the port, and other port tenants, including Maher. In making this finding, the ALJ relied in part on the letter written by Brian Maher to the Governor of New Jersey in 1999. ALJ I.D. at 48. Because of this threat, the ALJ found, Maher did not present the same risk as APM-Maersk. *Id.* In sum:

There is no suggestion that Maher threatened to leave the region. Even if Maher had threatened to leave, it is likely that the freight carried by Maher would have been handled by another terminal operator in the port and would not have had the same overall economic impact on the port as the threatened departure of Maersk-APM. There is no evidence supporting a finding that if Maher moved to another port, ocean common carriers would follow.

Because of the credible threat made by Maersk-APM, the Port provided the rent concessions necessary to retain Maersk-APM in the port. The rent concessions are balanced against the port guarantee and the commitment to stay in the port. Given the circumstances at the time, the Port's decision to provide lower rent to Maersk-APM, a decision supported by Maher, in order to keep Maersk-APM in the port was based upon the particular facts and situation presented. Accordingly, the evidence does not support a finding that the rent provisions of the leases were unjustified.

Id. at 48.

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The ALJ further found that Maher did not prove that the differences in non-rent lease terms were unjustified. According to the ALJ, it was “not clear whether either Maher or Maersk-APM received more favorable financing or a more onerous investment requirement and this factor does not weigh in favor of either entity.” *Id.* at 50. Moreover, the ALJ determined that it was not unreasonable for the Port to impose a higher infrastructure investment finance rate on Maher than on APM-Maersk, and to require Maher to provide a security deposit, because the Port considered Maher a greater credit risk than APM-Maersk. *Id.* at 50, 52. In this regard, the ALJ noted that during the parties’ lease negotiations, Maher’s Fleet Street rent was in arrears, and, additionally, APM-Maersk’s lease, unlike Maher’s, was backed by a corporate guarantee from its parent company. *Id.* at 50, 52. The ALJ also found that “[w]hile the [throughput] rent guarantee and terminal guarantees are different, the evidence does not compel a finding that those differences are unreasonable or undue;” “[r]ather, given the similarities in the requirements, the sophistication of the parties to the leases, and the extensive negotiations between the parties, the throughput requirements appear justified.” *Id.* at 51. Additionally, the ALJ found that the evidence did not support a finding that the first point of rest requirement in Maher’s lease was unjustified. *Id.* at 53.

The ALJ also rejected Maher’s claims that the Port: (1) failed to establish, observe, and enforce just and reasonable regulations and practices regarding lease terms; and (2) unreasonably refused to deal with Maher. As to the former, the ALJ found that although Maher argued that the Port assessed its lease rates that did not correspond with the benefit Maher received, “Maher negotiated a long-term lease of a large property convenient to express rail and other services” and benefitted by not having the property competitively bid. *Id.* at 54. As to the latter, the ALJ concluded that the Port did not unreasonably refuse to deal with Maher in negotiating lease No. EP-249, but rather engaged in extensive negotiations over a five-year time frame. *Id.* at 55. The ALJ further found that “once the Port signed the lease with Maher, it was not required to continually renegotiate the lease with Maher.” *Id.* at 55.

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The ALJ reasoned that “[i]f a port authority were required to continually renegotiate every lease every time a different lease provision was offered, it would impede the port’s ability to function effectively.” *Id.* at 55.

2. Docket No. 07-01 Counterclaims

Additionally, the ALJ found Maher’s counterclaims from Docket No. 07-01 unmeritorious. The ALJ rejected Maher’s counterclaims regarding the turnover of the Added Premises, finding that because APM-Maersk’s claim against the Port had settled: (1) it was no longer necessary to determine who was at fault for failing timely to deliver the Added Premises; and (2) Maher was relieved from any potential liability regarding the turnover of the Added Premises. *Id.* at 58. Accordingly, the ALJ found, “the evidence does not support a finding that the indemnity provision violates the Shipping Act.” *Id.* The ALJ also found that the Port did not fail to establish, observe, or enforce just and reasonable regulations, and it did not impose an unreasonable preference or undue prejudice, by including an indemnity provision in Maher’s lease related to the Added Premises or by seeking to enforce this provision. The ALJ reasoned that there was no requirement that leases for different properties contain identical provisions. *Id.* According to the ALJ, “[t]he indemnity issue is moot as the claims between the Port and Maher have been resolved,” and “[e]ven if the inclusion of this indemnity provision violated the Shipping Act, Maher has not established any actual injury.” *Id.* at 60.

Finally, the ALJ rejected Maher’s argument that the Port was precluded from contesting Maher’s counterclaims because the Port neglected to answer them with a responsive pleading and failed to raise the statute of limitations as an affirmative defense to them. The ALJ noted that Maher did not raise the issue until its reply brief and that the Port did not have an opportunity to address it. The ALJ further noted that extreme sanctions are disfavored, especially where lesser sanctions could have resolved the issue, had it been

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raiser earlier and where there was no evidence of contumacious conduct. *Id.* at 60.

III. Discussion

Maher timely filed its exceptions to the ALJ's Initial Decision, and the Port responded. Maher's exceptions mirror its claims and focus on alleged similarities between the present case and *Ceres I*, where the Commission found that a port authority violated the Shipping Act by giving more favorable lease terms to an ocean-carrier affiliated terminal than it did to terminal lacking such affiliation. According to Maher, the Port likewise gave APM-Maersk preferential rent terms because it is affiliated with an ocean carrier, whereas Maher is not, and the ALJ erred by not following *Ceres I* and finding a Shipping Act violation. Maher Exceptions at 7-8, 19. Maher also argues, among numerous other things, that the ALJ erred in finding that Sea-Land and Maersk's threat to leave the Port, APM-Maersk's port guarantee, and the differences between the two terminals justified the different rent paid by Maher and APM-Maersk. As to Maher's § 41102(c) claim, Maher asserts that the ALJ did not correctly apply the legal standard and that the large disparity in rent constitutes a prima facie violation of the statute. *Id.* at 56. Maher contends that the ALJ also gave short shrift to its unreasonable refusal to deal claims under 46 U.S.C. § 41106(3). Finally, Maher asserts that although the ALJ acknowledged that the counterclaims from Docket No. 07-01 survived the settlement between APM-Maersk and the Port, the ALJ failed meaningfully to address the counterclaims. *Id.* at 64-65.

The Port counters that the Commission should affirm the ALJ and that Maher's arguments are based on a misreading of the Shipping Act and *Ceres I*. Because Maher's exceptions are largely without merit, and because it has not met its burden of showing that the Port violated the Shipping Act, we affirm the ALJ's Initial Decision.

A. Standard of Review and Burden of Proof⁸

Under the Commission's rules of practice and procedure, where exceptions are filed to an ALJ's initial decision, the Commission has "all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). The Commission therefore reviews the ALJ's Initial Decision *de novo* and may enter its own findings. The ALJ made 188 findings of fact. ALJ I.D. at 9-34. With one exception, these findings are supported by the record, and we adopt the ALJ's findings except for Finding of Fact No. 161⁹ and reject as meritless Maher's arguments that the ALJ "disregard[ed] the mountain of material evidence establishing Maher's claims," "fail[ed] to make detailed findings of fact and conclusions of law," and "entirely ignor[ed] certain of Maher's claims." Maher Exceptions at 7.

⁸ The parties do not dispute that the Commission has statutory jurisdiction, and the evidence shows that Maher alleges numerous Shipping Act violations and that the parties are marine terminal operators within the meaning of 46 U.S.C. § 40102(14). PANYNJ ¶ III.A; PAppx. Vol. I at 2391-92.

⁹ In Finding of Fact No. 161, the ALJ states that APM-Maersk's terminal guarantee provides that it "can only have a portion of its facility reclaimed for a shortfall of two consecutive years and the entire facility only after the shortfall exceeds certain levels for an additional two years." ALJ I.D. at 30. The inclusion of the word "additional" appears to be an incorrect interpretation of the terminal guarantee. As noted above, APM-Maersk, unlike Maher, has a two-tiered terminal guarantee. If APM-Maersk's throughput fails to meet the "high" threshold for two consecutive years, the Port may reclaim a part of APM-Maersk's terminal. If APM-Maersk's throughput fails to meet the "low" threshold for two consecutive years, the Port may reclaim APM-Maersk's entire terminal. MAppx. Vol. 5A at 349-355.

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Under the Administrative Procedure Act (APA), Maher has the burden of proving, by a preponderance of the evidence, that the Port violated the Shipping Act, and this burden of persuasion does not shift. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Revocation of Ocean Transportation Intermediary License No. 022025 Cargologic USA LLC*, Docket No. 14-01, 2014 FMC LEXIS 18, at *8 (FMC Aug. 28, 2014); *DSW Int'l, Inc. v. Commonwealth Shipping, Inc.*, 32 S.R.R. 763, 765 (FMC 2012).

The burden of *production*, however, shifts in two relevant respects. First, with respect to Maher's unreasonable preference or prejudice claim, the "complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors." *Ceres I*, 27 S.R.R. 1251, 1270-71 (FMC 1997). Second, with respect to a claim under 46 U.S.C § 41102(c) (section 10(d)(1) of the Shipping Act of 1984), the complainant has the burden of persuading the Commission that a practice is unreasonable, and if that burden is met, the burden of refuting that conclusion is on the respondent. *See River Parishes Co. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751, 765 (FMC 1999); *Exclusive Tug Arrangements in Port Canaveral, Fla.*, 29 S.R.R. 1199, 1222 (ALJ 2003). In both contexts, however, it is the burden of production that shifts, not the burden of persuasion, meaning that although the Port may in some circumstances bear the burden of adducing evidence justifying its conduct, Maher bears the ultimate burden of proving that the Port acted unreasonably. ALJ I.D. at 38 (citing *Maher v. PANYNJ*, 32 S.R.R. 1185, 1193 (FMC 2013)); *West Gulf Maritime Assoc. v. Port of Houston*, 18 S.R.R. 783, 791 (FMC 1978) (noting that "the burden of establishing the unreasonableness of a practice is squarely upon [the complainant]"); *see also* 5 U.S.C. § 556(d) (stating that "the proponent of a rule or order has the burden of proof"); *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994) (holding that "the APA's unadorned reference to 'burden of proof'" refers to the burden of persuasion).

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B. Docket No. 08-03 Claims

1. Unreasonable preference

Maher's primary claim is that the Port gave an unreasonable preference to APM-Maersk, and imposed an unreasonable prejudice on Maher, when the Port failed to provide Maher with the same lease terms it provided APM-Maersk.¹⁰ The Shipping Act provides that "[a] marine terminal operator may not . . . give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person." 46 U.S.C. § 41106(2). The elements of an unreasonable preference claim are that "(1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury." *Ceres I*, 27 S.R.R. at 1270. It is only undue or unreasonable preferential or prejudicial treatment that violates the Shipping Act. *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 900 (FMC 1993); *Petchem, Inc. v. Canaveral Port Authority*, 23 S.R.R. 974, 988 (FMC 1986). Moreover, ports need not apply the same rate to all customers and may consider many factors relevant to negotiating a lease. *Ceres I*, 27 S.R.R. 1273, 1274; *Ceres Marine Terminals, Inc. v. Maryland Port Admin. (Ceres II)*, 29 S.R.R. 356, 369, 372 (FMC 2001) ("The Commission 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 to the first element, the ALJ found that "[t]he evidence demonstrates that Maher and Maersk-APM are in a competitive relationship to the extent required for section 41106(2) to apply," and neither party challenges this conclusion. ALJ I.D. at 39. As to the second *Ceres I* element – whether the parties were accorded

¹⁰ For convenience, we refer to Maher's claim as an "unreasonable preference" claim.

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different treatment – Maher argues as an initial matter that the ALJ invoked an erroneous “identical service” standard. Maher Exceptions at 12, 39. According to Maher, “[t]here is simply no requirement for the complainant to establish that the service was ‘identical’ to establish a violation” and the Port, in fact, provided Maher and APM-Maersk the same service, land rental. *Id.* Maher’s argument is unpersuasive, however, because the ALJ did not apply an incorrect standard. Rather, the ALJ merely quoted *Lake Charles Harbor & Terminal Dist. v. Port of Beaumont Navigation Dist.*, 10 S.R.R. 037, 1042 (FMC 1969), which held that a preference or prejudice is established by showing that a port “charges a different rate to different users for an identical service.” ALJ I.D. at 40. The ALJ then pointed out the undisputed fact that Maher and APM-Maersk’s properties were different, and, therefore, they were not provided an identical service. The ALJ noted that “maritime leases are rarely for identical property and some variation in rental terms is to be expected,” and determined that the question is “whether the differences in lease terms are reasonable and based on valid transportation factors.” *Id.*

The analysis of the second and third *Ceres I* elements depends on the particular lease terms at issue. The lease terms relevant to Maher’s unreasonable preference claim are: (1) base (per acre) rent; (2) minimum throughput requirements; (3) terminal guarantees; (4) investment requirements; (5) financing rate and security deposit requirements; and (6) first point of rest requirements.

a. Base rent

The ALJ found that “[a]lthough it is impossible to conduct an exact, apples-to-apples comparison because of the multiple factors impacting rent, the evidence demonstrates that reviewing the leases as a whole, Maersk-APM received lower rental rates than Maher.” ALJ I.D. at 47. Neither party meaningfully challenges this conclusion. The parties agree that APM-Maersk’s lease is a 30-year lease for 350-acre marine terminal. MAppx. Vol. 5A at 257, 263;

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MAppx. Vol. 4 at 13. Under this lease, APM-Maersk pays base rent of \$19,000 per acre for the term of the lease. MAppx. Vol. 5A at 263; MAppx. Vol. 4 at 13. In contrast, Maher's lease is a 30-year lease for a 445-acre marine terminal. MAppx. Vol. 5A at 1, 8; MAppx. Vol. 4 at 13. Maher's rent began at \$39,750 per acre with a two percent per year escalator. MAppx. Vol. 5A at 8-9; MAppx. Vol. 4 at 13. Over the course of the lease, Maher's rent will average \$53,753 per acre, and it will increase to \$70,590 per acre by the end of the lease. MAppx. Vol. 4 at 13-14. A draft memorandum from 2008 indicated that Maher paid \$12 million more a year than APM-Maersk in rent. MAppx. Vol. 1D at 1621. According to Maher's expert, APM-Maersk is obligated to pay \$193 million over the life of the lease in base rent, whereas Maher is obligated to pay \$703 million. MAppx. Vol. 4 at 14. Given this evidence, Maher has satisfied its burden of showing that the Port treated APM-Maersk and Maher differently with respect to base rent.

In response, the Port came forward with evidence that difference in base rent was justified by: (1) "the exigent need to retain Maersk and Sea-Land, including at the urging of Maher's CEO, and the concomitant Port-wide benefits of their retention;" (2) "an enforceable Port Guarantee provided by APM/Maersk that directly tied the APM/Maersk rental rate about which Maher complains to Maersk's fulfillment of its commitment, one that Brian Maher testified Maher never offered and could not provide;" and (3) "Maher's successful negotiation for a larger, superior terminal, with a unique potential for increased capacity, along with other key concessions not received by APM/Maersk." PANYNJ Reply at 39. The evidence shows that Maersk and Sea-Land presented a credible threat to leave the Port for Baltimore if the Port did not provide it with \$120 million in concessions. *See Part.I.B., supra.* APM-Maersk's rent was part of these concessions, which were necessary to match the offer from Baltimore.¹¹ PAppx. Vol. II at 29. The

¹¹ There is no evidence that these concessions went beyond what was necessary to keep Maersk and Sea-Land in the Port, as Maher suggests.

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Port's staff and commissioners and consultant, and Maher's then-CEO, agreed that losing Maersk and Sea-Land would be a major blow to the Port and could cause it to lose cargo from carriers other than Sea-Land/Maersk. PAppx. Vol. I at 375-76, 1043-46; PAppx. Vol. II at 91, 244; MAppx. Vol. 1A at 433; MAppx. Vol. 2B at 442. In Brian Maher's letter to the New Jersey Governor, he stated that the risk to the Port and New Jersey of Maersk and Sea-Land leaving was "grave" and "the successful conclusion of the leases currently under negotiation for Port Elizabeth will stabilize the Port facilities for the next twenty-five years and thus secure and maximize the significant economic benefits derived from the investments the state and the federal government are already making in the channels and the transportation infrastructure." PAppx. Vol. I at 1043-46. As the ALJ noted, there is no evidence that Maher posed a comparable risk to leave the port.

The evidence also shows that the Port negotiated the port guarantee to induce Maersk and Sea-Land to become a hub or anchor tenant. MAppx. Vol. 1B at 731 (noting that the Port staff developed guarantees that they felt were essential to justify "concessions of this magnitude"); *see also* MAppx. Vol. 1B at 585; PAppx. Vol. I at 1083; PAppx. Vol. II at 139. If APM-Maersk failed to satisfy the port guarantee, its rent would increase. MAppx. Vol. 5A at 348, 366. It was also limited to loaded, Maersk-affiliated containers. *Id.* at 346, 361.

The evidence further shows that Maher's higher rent was based in part on the characteristics of its terminal. Maher's reconfigured terminal was the largest at Port Elizabeth. PAppx. Vol. I at 2140. The Empire Report stated that management and RREEF believed, and available comparable information indicated, that Maher's lease terms "were neither materially above nor below market at the Valuation Date." PAppx. Vol. I at 2148. The report also stated that Empire compared Maher's lease with "publicly available agreements for other terminal operators in Port Elizabeth" and that "[m]anagement and RREEF attributed the differences in basic rental amount (and per acre rental amount) to Maher U.S.'s

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favorable infrastructure attributes, including: (1) depth of channel; (2) [sic] length of berth; (3) size of yard; and (4) intermodal access.” *Id.* at 2149-50. Moreover, “[m]anagement and RREE believe that the higher basic rental amount and per acre amount paid and to be paid by Maher U.S. reflects the superior nature of the Maher property, the additional flexibility in yard usage, and its infrastructure.” *Id.* at 2150.

In its Exceptions, Maher argues that the threat to leave the Port, the port guarantee, and the terminal characteristics are not legitimate transportation factors that can justify difference in rent paid by Maher and APM-Maersk. Maher has not, however, met its burden of showing that the Port’s reasons for charging APM-Maersk lower rent are unreasonable. Maher argues that because the ALJ noted that “status did have a real and tangible impact on the Port’s negotiations” with APM-Maersk and Maher, ALJ. I.D. at 40, and because the ALJ otherwise pointed out that ocean-carrier-affiliated terminals and non-affiliated terminals present different risks and benefits, *Ceres I* requires the Commission to find a Shipping Act violation. Maher Exceptions at 7-8, 19. Maher similarly argues that the Port “confessed” in its brief that it discriminated against Maher based on status. *Id.* at 5, 5 n.14.

The present case is not, however, *Ceres I*. Most importantly, the Commission found in *Ceres I* that “MPA offered *no reason* other than *Ceres’* status as an MTO as justification for refusing *Ceres* the Maersk lease terms.” 27 S.R.R. at 1273 (emphasis added). Here, the Port did not refuse Maher’s request for parity merely because it was not affiliated with an ocean carrier. Rather, the evidence shows that the Port gave APM-Maersk preferential rental rates because it was affiliated with an ocean carrier who made a credible threat to leave the Port if its demands were not met and whose retention in the Port would benefit the Port and other tenants. The ALJ’s use of the word “status” does not turn this case into *Ceres I*, which, unlike here, involved a generic class-based distinction.

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Likewise, the ALJ's recognition that APM-Maersk and Maher presented different risks and benefits to the Port is not, as Maher asserts, status discrimination by proxy. Maher Exceptions at 8-9, 20. According to Maher, the Commission in *Ceres I* rejected arguments similar to the ALJ's "risks and benefits" analysis. In support, Maher provides a chart purporting to compare rejected arguments made by MPA in *Ceres I* with supposedly similar statements in the ALJ's Initial Decision. *Id.* at 9, 20, 21-22. As noted above, however, *Ceres I* does not require a port authority to ignore differences between terminals, even if those differences flow from carrier-affiliated status. *Ceres I*, 27 S.R.R. at 1274 (noting that the decision preserved ports' ability to consider the many factors relevant to negotiating a lease). Rather, the Commission said that a port authority cannot impose a prejudice on a marine terminal operator simply because it is not affiliated with an ocean carrier. Further, as the Port points out, the passages cited in Maher's chart do not contain the Commission's actual rulings in *Ceres I*.

This is not to say that a port could legally discriminate in favor of carriers and their affiliated terminals simply by arguing that there is a risk that the carriers might leave the port otherwise. MPA argued in *Ceres I*, for instance, that its preferential treatment of Maersk Line was necessary to keep it in the port. The Commission did not, however, address, let alone reject, this argument in *Ceres I*. Further, here, unlike in *Ceres I*, there is evidence that Maersk's and Sea-Land's threats were credible and potentially devastating to the Port.

Maher further mischaracterizes the Initial Decision by arguing that the ALJ "rescued" the Port's status-based discrimination by finding additional justifications for Maher's higher rent. Maher Exceptions at 8, 19.¹² Maher latches on to the ALJ's statement that:

¹² Maher also cites *Ceres I* and *Ceres II* for the proposition that a port has an "absolute" and "continuing "duty to provide a preference provided to one tenant to other tenants. Maher

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The difference between being a terminal operator and an ocean carrier impacts the lease negotiation process because these different entities pose different risks and received different benefits. The differences are not based on status alone, but, as will be discussed later, status did have real and tangible impact on PANYNJ's negotiations with these particular entities.

ALJ I.D. at 40. Maher asserts that any discrimination based on status is unreasonable and a Shipping Act violation, regardless of whether other reasons for the discrimination exist, and it cites cases regarding proximate cause. This proximate cause argument is unavailing, however, because it takes the ALJ's statement out of context and ignores the rest of the Initial Decision, in which the ALJ found that the Port did not rely on APM-Maersk's carrier-affiliated status in treating Maher differently, but rather based its conduct on Maersk's and Sea-Land's threat to leave and the potential consequences thereof.

Maher also argues that a carrier's threat to leave a port is not a legitimate justification under Commission case law because "[a] valid transportation purpose pertains only to differences in the nature or cost of the services provided." Maher Exceptions at 9-10, 20. The Port counters that "none of these cases even involved alleged lease-term discrimination, much less said anything about a port's consideration of either the proven devastating consequences – for the vitality of the port and its MTOs and other constituents –

Exceptions at 16. As the Port notes, however, neither *Ceres I* nor *Ceres II* states that a port has an absolute continuing duty to provide all lessees with identical lease terms. The term "absolute" in *Ceres II* was used in a discussion about damages. 29 S.R.R. at 372. Similarly, the phrase "continuing" comes from the damages discussion in *Ceres I*. 27 S.R.R. at 1277.

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of a credible threat of a critical tenant to leave the port, or the countervailing benefits of retention.” PANYNJ Reply at 55-56.

There is little Commission precedent relevant to whether a port authority may take into account a carrier’s threat to leave a port in determining how to treat carrier-affiliated terminals vis-à-vis non-affiliated terminals. Maher relies on two cases from 1968 for the principle that “preferential treatment is not justified to keep one entity from leaving a port.” Maher Exceptions at 20-21. In *Ballmill Lumber & Sales Corp. v. Port of New York Authority*, 10 S.R.R. 131 (FMC 1968) the port authority argued, among other things, that it was permissible to give a tenant preferential lease terms because of its heavy investment in the port and because it had built up “decisive equity.” *Id.* at 138. The port authority also noted that the tenant “was ready to leave Port Newark if it did not retain their rights.” *Id.* The Commission rejected these arguments but, like the Commission in *Ceres I*, did not specifically address the argument that the tenant was ready to leave the port. *Id.* It is therefore not clear whether the Commission in *Ballmill* and *Ceres I* determined that a threat to leave the port can never be a valid transportation justification or whether the alleged threats in those cases were not substantiated by the evidence. In *In the Matter of Agreements No. T-2108 & T-2108-A*, 10 S.R.R. 556, 559 (ALJ 1968), the ALJ disapproved of ports offering services to carriers at less than cost because it would lead to a “race to the bottom” among competing ports and require some customers of a port to subsidize the preferential terms given to preferred customers. This case is inapposite because it does not involve discrimination among terminals. In contrast, the Commission noted in *Petchem, Inc. v. Canaveral Port Authority*, 23 S.R.R. 974, 994 (FMC 1986), that on the facts presented, “the Port Authority cannot regard as a mere bluff Hvide’s statements that it will consider withdrawing from Port Canaveral if it must share commercial business with Petchem” and that “[i]f that happened, the record indicates that Petchem would have its hands full with its military work and would not be able to provide adequate commercial service.” This case is of limited relevance, however,

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because it did not discuss the risk of losing Hvide (a tug operator) in the context of § 41106(2).

The other cases cited by Maher are of limited relevance because: (1) they stand for the proposition that one cannot discriminate based on the mere identity of a shipper; and (2) they do not involve rent found in extensively negotiated marine terminal leases. See *50 Mile Container Rules Implementation by Ocean Common Carriers Serving U.S. Atlantic & Gulf Coast Ports*, 24 S.R.R. 411, 464-65 (FMC 1987) (finding “rules on containers” incorporated in carriers’ tariffs unjustly discriminatory and noting that shippers and consignees were treated unequally for reasons that “do not have any relation to the type of cargo being moved,” “solely on the basis of their identity,” and “not transportation circumstances properly cognizable under the Shipping Act”); *Co-Loading Practices by NVOCCs*, 23 S.R.R. 123, 131-32 (FMC 1985) (declining to “recognize NVOCCs as a distinct class of shippers for the purpose of allowing special co-loading rates which are applicable only for the account of another NVOCC” and finding that “[i]t is well settled that the identity of a shipper is not a legitimate transportation factor”); *Rates Which Exclude Certain Classes of Shippers*, Circular Letter No. I-85, 23 S.R.R. 460, 461 (FMC 1985) (requiring carriers and conferences to cancel “any rate item, the application of which is dependent solely on the identity of the shipper rather than on recognized transportation conditions”); *Puerto Rico Mar. Shipping Authority – Rates on Government Cargo*, 18 S.R.R. 830, 835-37 (FMC 1978) (finding tariff setting a “separate commodity classification for government cargo” must be based on “legitimate transportation factors and not solely upon the identity of the shipper”); *Dep’t of Defense v. Matson Navigation Co.*, 17 S.R.R. 1, 5 (FMC 1977) (holding that “the rates for the carriage of government cargoes be established on the same basis as commercial rates”).

Additionally, Maher argues that the Port is precluded by judicial estoppel from arguing that the different risks and benefits posed by APM-Maersk and Maher justify their different rent. Maher

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Exceptions at 23. Maher argues that, on one hand, the Port asserted in its summary judgment briefing that Maher knew or should have known of its unreasonable preference claim from the face of the lease, but, on the other hand, argued before the ALJ that Brian Maher did not believe that there was an unreasonable preference claim. *Id.* at 23-25. Maher's judicial estoppel argument is meritless because, as the Port notes, there is nothing contradictory about arguing that a claim is both meritless and time barred. *Id.* at 64. More specifically, in its summary judgment briefs, the Port argued that Maher knew or should have known of facts giving rise to its unreasonable prejudice claim when it signed its lease. In its merits briefs, the Port argued that, despite being aware of these facts, Brian Maher did not believe that Maher had a Shipping Act claim. These positions are not inconsistent.

Maher further argues that the ALJ improperly found that Maher was "effectively estopped" from alleging a Shipping Act violation because the ALJ referred to Brian Maher's letter to the New Jersey Governor in which he urged the Governor to retain the carriers at the Port. Maher Exceptions at 37. This argument is unavailing because the ALJ did not find that Maher was estopped from bringing any claims. Rather, the ALJ properly relied on Mr. Maher's letter as evidence that Maher viewed Maersk's and Sea-Land's threats to leave the Port as credible and the consequences dire.

Maher also makes two arguments related to timing. First, Maher argues that because the Port executed APM-Maersk's lease and thus retained Maersk in the Port before it executed Maher's lease, Sea-Land and Maersk's threat to the Port is irrelevant to Maher's subsequent requests for lease parity. Maher Exceptions at 9, 25-26, 38.¹³ The question, however, is not whether, in a vacuum,

¹³ Maher also argues that the ALJ erred when it stated that the lease differences should be evaluated in the context of all the "gives and takes." Maher Exceptions at 38 (citing ALJ. I.D. at 47.) Maher argues that the Commission rejected a "gives and takes" argument

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the Port had a legitimate reason to refuse Maher's request for rent of \$19,000 per acre. Rather, the question for the purposes of an unreasonable preference claim is "whether the unequal treatment is not justified by differences in transportation factors." *Ceres I*, 27 S.R.R. at 270. The terms "unequal," "differences," and "discrimination" all suggest that the Commission must compare APM-Maersk's and Maher's situations. The Port's decision not to give Maher certain lease terms cannot be divorced from its decision to give those terms to APM-Maersk as Maher proposes.

Second, Maher argues repeatedly that the Port's proffered justifications for the differences between the leases are unreasonable because the Port did not express these justifications to Maher during the lease negotiations or when it requested lease parity in 2007 and thereafter. According to Maher, "a port cannot rely on post hoc rationalizations, but must instead point to reasons that were relied on and given at the time the underlying events occurred." *Id.* at 15; *see also id.* at 9, 12-13, 20, 39, 41, 48. Although there is language in *Ceres I* that supports this position, the Commission did not intend to create a rule that a party is precluded from justifying preferential treatment unless there is evidence that it expressed those justifications to the complainant at the time a decision is made. In *Ceres I*, the Commission rejected certain MPA arguments because "MPA's only expressed reason for denying Ceres the Maersk lease terms was Ceres' status as an MTO." *Ceres I*, 27 S.R.R. at 1272. The Commission appeared concerned, however, that MPA's arguments did not reflect its actual course of conduct, but rather constituted post-hoc litigation driven justifications. *See, e.g., id.* at 1273 n.52 (noting that MPA raised new arguments at oral argument). Further, the Port persuasively points out that imposing such a rule would hinder a port's ability to negotiate with its tenants and force it to anticipate Shipping Act arguments, and articulate reasons rebutting those anticipated arguments, or risk being

in *Ceres I*, 27 S.R.R. at 1263, 1273. *Id.* at 38. The language Maher cites, however, is taken from MPA's unrelated estoppel argument in *Ceres I*.

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precluded from advancing those arguments years later. Finally, there is no evidence here that the Port has repeatedly altered its arguments during the course of litigation such that those arguments should be rejected.

In response to the Port's evidence that the base rent difference was justified by APM-Maersk's port guarantee, Maher contends that: (1) it is analogous to the vessel cargo guarantee in *Ceres I*, which the Commission held did not justify the lease differences in that case; (2) the Port designed the port guarantee to be unique to Maersk and is thus a proxy for status; (3) Maher's throughput requirements and terminal guarantees are so high that Maher could necessarily have satisfied a similar loaded container port guarantee in exchange for lower rent; (4) the port guarantee was illusory and the Port did not enforce it because the Port merely increased APM-Maersk's rent when it did not satisfy the guarantee; and (5) the ALJ failed to analyze whether the port guarantee "remained and remains today fit to the aim in view, i.e., proportionate to the Port's goals." Maher Exceptions at 2, 11-12, 26-34.¹⁴

Despite these arguments, Maher has not established that the ALJ erred in concluding that APM-Maersk's port guarantee was one factor justifying the lease differences. ALJ I.D. at 46-47. Unlike the vessel call guarantee in *Ceres I*, which was a volume guarantee, the port guarantee requires fully loaded containers filled with Maersk cargo. There is no evidence that the Port designed this guarantee so that Maher or other terminal operators could not meet it. Rather, the evidence shows that it was designed to obtain Maersk's discretionary cargo and to incentivize APM-Maersk to act like an anchor tenant. Maher did not offer to match the guarantee. PAppx.

¹⁴ Maher asserts that the ALJ erred by concluding "that Maersk-APM's *failure* to meet its port guarantee requirement *justifies* the Port's refusal to provide Maher with a similar guarantee." Maher Exceptions at 33. The ALJ did not so conclude. ALJ I.D. at 46.

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Vol. II at 288 (Maher Dep.) (“My interpretation of a port guarantee is cargo controlled by – by an individual entity that they can direct to the port. We were not in a position to do that.”). Further, although Maher guarantees significantly more throughput than APM-Maersk, this does not mean it could necessarily have satisfied the port guarantee because Maher has not linked its general throughput obligations to the fully loaded Maersk containers required by the port guarantee. This distinguishes the present case from *Ceres I*, where the complainant, based on its guarantees, necessarily would have met the vessel call guarantee had it been offered. 27 S.R.R. at 1272. Moreover, unlike the vessel call guarantee in *Ceres I*, APM-Maersk’s port guarantee contains a shortfall penalty that the Port enforced by raising APM-Maersk’s rent. Maher’s suggestion that the port guarantee is illusory because it results in a rent increase is unsupported. Maher does not explain why an injunction is the only “true” penalty that would serve to distinguish the port guarantee from the vessel call guarantee in *Ceres I*. Finally, Maher cites no authority for the proposition that the Shipping Act requires a port authority to reevaluate lease provisions during the life of the lease to make sure they serve their intended purpose.

Maher further argues that the differences between its terminal and APM-Maersk’s terminal do not justify the base rent discrepancy. Maher Exceptions at 12. Maher argues that the Port “made no effort to show that it expressed this reason at the time it denied Maher parity on September 23, 1999, or justified the lease term disparities on the basis of a contemporaneous particularized analysis of differing terminal characteristics, which is the standard.” Maher Exceptions at 13, 39. According to Maher, the Port’s own contemporaneous evidence establishes that the APM-Maersk terminal was more desirable. *Id.* at 13.

Maher has not met its burden of showing that the differences between the terminals are illegitimate reasons for the difference in rent paid by Maher and APM-Maersk. As noted above, there is no requirement that the Port explain to Maher its reasoning during lease negotiations or create a written contemporaneous analysis of

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terminal differences. Further, Ms. Borrone testified that the Port staff engaged in conversations about “the fact, you know, there were different aspects of these leases, because there were different terminal sizes, there were different terminal arrangements, different natures of operation at these terminals.” PAppx. Vol. VII at 17-18. Moreover, Maher’s evidence that APM-Maersk’s terminal was more valuable than Maher’s arises from documents from 1997 and 1998 and do not reflect the terminals as described in the leases. In contrast, the Empire Report indicates that Maher’s rent was justified, at least in part, by the characteristics of its terminal. PAppx. Vol. I at 2149-50.

Finally, Maher argues that the Port violated the Shipping Act by levying on Maher a class subsidy based on status, relying on *Freight Forwarder Bids on Government Shipments at U.S. Ports – Possible Violations of the Shipping Act, 1916 & General Ord. 4 (Freight Forwarder)*, 17 S.R.R. 284-293-95 (FMC 1977). Maher Exceptions at 2, 9, 34-37. Maher asserts that the Port discriminated against Maher for its own commercial convenience by charging Maher higher rents that the Port then used to subsidize the concessions it provided APM-Maersk. *Id.* at 12. The Port counters that Maher did not plead a class subsidy claim, there is no independent statutory basis for a class subsidy claim, and, as factual matter, Maher’s lease does not subsidize APM-Maersk’s. PANYNJ Reply at 62.

The ALJ did not address the class subsidy argument other than to note it in passing. ALJ I.D. at 41. Although Maher refers to its class subsidy argument as a “claim,” it makes the argument under § 41106(2) as part of its unreasonable preference cause of action, and it was not required to separately plead it. The argument fails, however, because even if the Port charged Maher higher rent to recoup the concessions it gave APM-Maersk, this does not constitute an unreasonable preference or prejudice. In *Freight Forwarders*, the Commission found that respondent violated Section 16 of the Shipping Act of 1916 by charging commercial clients a substantially greater amount than it charged the

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Government Services Administration “with no apparent transportation justification for the disparity.” *Freight Forwarders*, 17 S.R.R. at 292. The Commission did not say that requiring one customer effectively to subsidize rates given another constituted an unreasonable preference. Rather, the Commission rejected the argument that the practice at issue did not cause injury, finding that “[i]f a commercial shipper is called upon to subsidize any costs of processing GSA shipments it follows that such shipper has been financially injured to some degree.” *Id.* at 295. Further, unlike in *Freight Forwarders*, the Port has proffered transportation justifications for the disparity in rent terms.

Further, although forcing one entity to subsidize a discount given to another could potentially be a violation of § 41102(c), i.e., a failure to establish, observe, and enforce just and reasonable regulations and practices, Maher’s argument fails here because, as described below, Maher has not established that its lease terms are not reasonably related to the services rendered. Although there is evidence that a Port Commissioner directed Port staff to recoup the APM-Maersk concession “even if it is through other tenants,” there is no evidence that the Port actually charged Maher higher rent to subsidize the APM-Maersk concessions. MAppx. Vol. 1A at 444. The deposition testimony cited by Maher establishes simply that as the Port’s revenues from other port tenants increased, its deficit related to the APM-Maersk concessions would decrease, as a matter of arithmetic. MAppx. Vol. 2B at 363 (McClafferty Dep.), 480 (Shiftan Dep.), 514 (Ward Dep.); MAppx. Vol. 2A at 71 (Borrone Dep.).¹⁵

¹⁵ The Port’s argument that Maher’s rent does not fully compensate the Port for Maher’s own leasehold and that the Port subsidizes all of the terminal leases is not supported by evidence it cites. Rather, this evidence shows that in the 1990s the Port subsidized port operations with revenue from other sources and expected port operations to operate at a loss going forward.

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b. Minimum throughput requirements

APM-Maersk and Maher are also subject to different minimum throughput rent guarantees. MAppx. Vol. 5A at 349-50; PAppx. Vol. V at 99-99.1. For years occurring during APM-Maersk's First Terminal Guarantee Period, it must pay throughput rent on at least 220,000 containers; for years occurring during its Second Terminal Guarantee Period, it must pay throughput rent on at least 320,000 containers; and for years occurring during its Third Terminal Guarantee Period, it must pay throughput rent on at least 420,000 containers. MAppx. Vol. 5A at 349-50. As to Maher, for years occurring during its First Terminal Guarantee Period, it must pay throughput rent on at least 650,000 containers; for years occurring during its Second and Third Terminal Guarantee Periods, it must pay throughput rent on at least 775,000 containers. PAppx. Vol. V at 99-99.1. Maher's terminal guarantee periods are substantially the same as APM-Maersk's, except that Maher's rent guarantee of 775,000 containers (i.e., the Third Terminal Guarantee Period) will not apply "so long as the Fifty Foot Dredging [of the Kill van Kull] shall not have been completed." PAppx. Vol. V at 99.1

Maher argues in its exceptions that the Port imposed a more demanding minimum throughput rent requirement on it than on APM-Maersk because its minimum rent exceeds APM-Maersk's by 150,000 containers in the First Terminal Guarantee Period, 175,000 containers in the Second Terminal Guarantee Period, and 75,000 containers in the Third Terminal Guarantee Period. Maher further argues that the ALJ erred in giving any significance to the fact that APM-Maersk's Third Terminal Guarantee Period begins January 1, 2015, regardless of any dredging, whereas Maher's Third Terminal Guarantee Period will not start unless the dredging has been completed. According to Maher, the fifty foot dredging is scheduled to begin prior to the start of APM-Maersk's third guarantee period, and thus, as a practical matter, Maher's seemingly more flexible third guarantee start date will not be meaningfully different from APM-Maersk's hard January 2015 third terminal guarantee start

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date. Maher Exceptions at 52-54.

The chart included in the ALJ's Initial Decision, copied in part below, indicates that although Maher had a greater gross minimum rent requirement, on a per-acre basis, APM-Maersk and Maher had insignificantly different minimum rent requirements during the first and second guarantee periods, and APM-Maersk had the greater minimum rent requirement during the Third Terminal Guarantee Period. Further, despite Maher's contention that the fifty-foot dredging is on schedule to be completed before 2015, Maher's Third Terminal Guarantee Period is contingent on the dredging occurring, whereas APM-Maersk faces a deadline of January 1, 2015 *regardless* of whether the dredging is complete. Consequently, APM-Maersk's minimum rent requirement may be increased before the dredging necessary to allow larger vessels access to the terminal is completed.

<i>Period</i>	<i>Rent guarantee</i>	<i>Rent guarantee per acre</i>
1st	650,000 (Maher) 500,000 (M-APM)	1,461 (Maher) 1,429 (M-APM)
2nd	775,000 (Maher) 600,000 (M-APM)	1,742 (Maher) 1,714 (M-APM)
3rd	775,000 (Maher) 700,000 (M-APM)	1,742 (Maher) 2,000 (M-APM)

ALJ I.D. at 51.¹⁶

¹⁶ The ALJ adjusted Maersk-APM's rent guarantee numbers upward to take into account that Maher's minimum rent requirement is subject to an "Exemption Number" in Section 4(a)(6) of its lease, thus allowing for an "apples-to-apples" comparison. PAppx. Vol. V at 99.

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As the ALJ pointed out, the minimum throughput rent requirements (also referred to as the “rent guarantees”) were difficult to compare because of different time periods, penalties, and other details. ALJ I.D. at 51. Although Maher has shown that the minimum rent requirements are different, it has not shown that the differences are meaningful, i.e., that APM-Maersk received a preference or that Maher suffered prejudice. Further, Maher has not shown that the differences are unreasonable or that “resulting prejudice or disadvantage is the proximate cause of injury.” *Ceres I*, 27 S.R.R. at 1270, 1274.

c. Terminal guarantees

Similarly, Maher has not established that the terminal guarantees in the leases constitute an unreasonable preference or prejudice. Maher and APM-Maersk are subject to different terminal guarantees. MAppx. Vol. 5A at 349-55; PAppx. Vol. V at 99-200. APM-Maersk’s terminal guarantee requires it to handle a certain number of containers (loaded or empty) at its terminal each year or potentially forfeit part or all of its leasehold. MAppx. Vol. 5A at 349-355. During APM-Maersk’s First Terminal Guarantee Period, if for two consecutive years it handles fewer than 270,000 containers at its terminal, the Port has the option of terminating the lease as to a portion of the terminal. *Id.* at 350-51. If APM-Maersk handles fewer than 171,430 containers during two consecutive years during this period, the Port has the right to terminate the entire lease. *Id.* at 352. Similarly, if for two consecutive years during the Second Terminal Guarantee Period APM-Maersk handles fewer than 330,000 or 205,715 containers at its terminal, then the Port has the right to terminate part or all of the leasehold, respectively. *Id.* at 349-50, 352-53. If for two consecutive years during the Third Terminal Guarantee Period APM-Maersk handles fewer than 390,000 containers, then the Port has the right to terminate the lease as to a portion of its terminal. *Id.* at 350, 353. The Port obtains the right to terminate the lease as to APM-Maersk’s entire terminal if APM-Maersk handles fewer than 240,000 containers for two consecutive years during the third period. *Id.* at 355.

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Maher's terminal guarantee differs from APM-Maersk's in that it does not provide for a partial forfeiture of Maher's terminal. Rather, if: (1) during any two consecutive years during the First Terminal Guarantee Period Maher handles fewer than 340,000 containers; (2) during any two consecutive years during the Second Terminal Guarantee Maher handles fewer than 420,000 containers; or (3) during any three consecutive years during the Third Terminal Guarantee Period Maher handles fewer than 900,000 containers, then the Port has the right to terminate the lease. PAppx. Vol. V at 99.1-100. The terminal guarantee of 900,000 containers, however, "shall not apply and shall remain at 340,000 Qualified Containers so long as the Fifty Foot Dredging [of the Kill van Kull] shall not have been completed." *Id.* at 100.

Maher argues that its terminal guarantee requirements are higher than APM-Maersk's, especially during the Third Terminal Guarantee Period, when it guarantees 510,000 more containers than APM-Maersk. Maher also argues that it "guarantees almost twice as many containers on a per acre basis" for the Third Terminal Guarantee Period, and that if it does not meet the terminal guarantee for two consecutive years during the first two terminal guarantee periods, or for three consecutive years during the Third Terminal Guarantee Period, the Port would be able to terminate Maher's entire lease. According to Maher, if APM-Maersk misses its terminal guarantee for two years, it will only risk losing a portion of its terminal, and that to lose its entire terminal it would have to fail to satisfy the guarantee for four years. Maher Exceptions at 52-53. The Port acknowledges that Maher guarantees more containers during the Third Terminal Guarantee Period than APM-Maersk but asserts that this is offset by APM-Maersk's "more onerous, date-certain trigger" for the Third Terminal Guarantee Period. PANYNJ Reply at 59. The Port further argues Maher's "third period target level, while the higher of the two, is only a small fraction of Maher's anticipated throughput capacity and is not realistically burdensome." *Id.*

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The chart included in the ALJ's Initial Decision, copied in part below, indicates that on a per-acre basis, Maher and APM-Maersk have similar terminal guarantees, differing by just one container during the Second Terminal Guarantee Period. During the third period, Maher's requirement is almost twice as high as APM-Maersk's. The penalties do not differ as much as Maher maintains. If Maher misses its guarantee for two (or in the final period, three) consecutive years, it risks losing its entire terminal. APM-Maersk had a two-tier obligation: if it misses its higher guarantee (shown in the chart) for two consecutive years, it risks losing part of its terminal. If it misses its lower guarantee (not shown in the chart), it risks losing its entire terminal. As noted above, APM-Maersk has the more onerous start date for the Third Terminal Guarantee Period.

<i>Period</i>	<i>Terminal guarantee</i>	<i>Terminal guarantee per acre</i>
1st	340,000 (Maher) 270,000 (M-APM)	764 (Maher) 771 (M-APM)
2nd	420,000 (Maher) 330,000 (M-APM)	944 (Maher) 943 (M-APM)
3rd	900,000 (Maher) 390,000 (M-APM)	2,022 (Maher) 1,114 (M-APM)

ALJ I.D. at 51.

Maher has not shown that it was treated differently such that APM-Maersk received a preference or that Maher suffered prejudice. Moreover, Maher has not met its burden of showing that any differences were unreasonable. Further, as the Commission found in *Ceres I*, it "is not required to tally and compare exactly what benefits were received by the relevant parties." 27 S.R.R. at 1274. "[W]hile the parties may have been treated differently, Ceres has not shown that it suffered injury solely as a result of these day-

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to-day operation deficiencies, and thus there is not sufficient evidence to find a violation of the 1984 Act on these grounds.” *Id.* The terminal guarantees here are analogous to the day-to-day operational deficiencies in *Ceres I*. Moreover, Maher has not shown that any prejudice or disadvantage is the proximate cause of any injury.

d. Investment requirements

Maher also failed to establish that it suffered prejudice, or that APM-Maersk received a preference, with respect to the investment requirements in Maher’s and APM-Maersk’s leases. Lease No. EP-248 requires APM-Maersk to perform construction and installation work at its terminal, which it describes as Class A Work and Class B Work. MAppx. Vol. 5A at 270. The lease further provides that the Port is to reimburse APM-Maersk \$30.4 million for costs APM-Maersk incurs performing Class A Work. MAppx. Vol. 5A at 270-74. This “free capital” is part of the \$120 million in concessions the Port provided to Sea-Land/Maersk during the lease negotiations. MAppx. Vol. 1B at 615.¹⁷ APM-Maersk also has the option of obtaining up to \$143.6 million in construction financing from the Port to perform the Class A and Class B Work. MAppx. Vol. 5A at 271-74. The finance rate is an index plus 150 basis points. MAppx. Vol. 5A at 269.

Maher is likewise obligated to perform construction and installation work at its terminal, which its lease also calls Class A Work and Class B Work. MAppx. Vol. 5A at 20. This work is similar but not identical to the Class A and Class B Work described in APM-Maersk’s lease. Unlike APM-Maersk, Maher has the option of performing Class C Work. MAppx. Vol. 5A at 20-21. The Port must provide Maher \$46 million in free capital to be used on Class A, B, or C work. MAppx. Vol. 5A at 21. This free capital is credit

¹⁷ The free capital is just that: the Port must reimburse APM-Maersk and Maher for costs incurred performing required work up to the free capital amount.

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for investments that Maher made in its Tripoli Street terminal, which it lost to APM-Maersk due to the terminal reconfiguration and consolidation. PAppx. Vol. 2B at 344, 462-63. Maher may obtain up to \$204 million in financing from the Port for the construction work. MAppx. Vol. 5A at 21. The finance rate is an index (the same used with respect to APM-Maersk's financing) plus 175 basis points. *Id.* at 16.

Maher argues that the ALJ erred by ignoring that the free capital it received from the Port was different from that received by APM-Maersk and by finding that its investment requirements were more flexible than APM-Maersk's. Maher Exceptions at 51-52. Maher asserts that APM-Maersk provided fewer reinvestment funds per acre than Maher and that this disparity was exacerbated by the settlement of Docket No. 07-01, which allowed APM-Maersk to defer certain work.¹⁸ Maher also argues that the Commission should ignore that Maher received more free capital from the Port than APM-Maersk did because Maher received its free capital as compensation for improvements it made to the Tripoli Street Terminal, whereas, APM-Maersk received the free capital as a result of "status," that is, as part of the deal to keep Maersk and Sea-Land in the port. *Id.* at 51. Finally, Maher argues that the ALJ mischaracterized Maher's Class C work as optional. Practically speaking, Maher argues, the Class C work was no different from

¹⁸ Maher also argues that because the Port justified denying Maher base rent parity because APM-Maersk had a greater investment requirement, and because in fact Maher had a greater investment requirement, Maher, by the Port's own reasoning, should pay less in base rent than APM-Maersk. Maher Exceptions at 50. This argument is meritless for several reasons, as it assumes that the only valid reason for denying Maher parity was the investment amount, which, as described above, was not the only reason that APM-Maersk received different lease terms. Moreover, it assumes that Maher had a greater investment requirement than APM-Maersk, which is not supported by the leases.

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APM-Maersk's Class A and B work, which APM-Maersk allegedly did not perform.

Maier has not established that the Port gave APM-Maersk more favorable financing than it gave Maier or that it imposed more onerous investment requirements on Maier. The parties dispute who actually invested more, Maier or APM-Maersk, but the alleged discrimination turns on the lease provisions. According to the leases, APM-Maersk was able to obtain up to \$30.4 million in free capital and \$143.6 million in the Port financing, and Maier could obtain up to \$46 million in free capital and \$204 million in the Port financing. That the Port provided APM-Maersk the free capital as part of the concessions to retain Sea-Land and Maersk in the Port is not relevant to the analysis because, as noted above, there is nothing unlawful about those concessions. Additionally, contrary to Maier's assertion, its financing was more flexible than APM-Maersk's because Maier could use its financing for Class C work but APM-Maersk could not. That APM-Maersk was able to defer some of its Class A Work via the Docket No. 07-01 settlement and that Maier did not actually purchase some optional cranes does not change that Maier had more flexibility. As the ALJ found, it is not clear whether Maier or APM-Maersk received more favorable investment requirements, and thus Maier has not met its burden of proof.¹⁹

¹⁹ The documents cited by Maier do not establish that APM-Maersk had more competitive investment requirements. The "competitive advantage" referred to in MAppx. 1D at 1629 is the Port's competitive advantage vis-à-vis other ports, not APM-Maersk's competitive advantage versus Maier. Further, the "disparity" mentioned in MAppx. 1D at 1621 refers to "the alleged financial disparity between the two leases," not a disparity in investment requirements. Further, it is not clear whether the statement in MAppx. 1D at 1613 that "APM provided less \$ acre" refers to the amounts APM-Maersk actually invested, which are irrelevant, or the amounts the lease required it to invest.

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- e. Financing rate and security deposit requirements

Maher has not established that the ALJ erred in finding that the higher financing rate in Maher's lease, and the requirement that Maher provide a security deposit, did not constitute unreasonable preferences or prejudices. The Port agreed to provide APM-Maersk financing at an index plus 150 basis points, whereas it agreed to provide Maher financing at the index plus 175 basis points. MAppx. Vol. 5A at 16, 269. Moreover, the Port did not require APM-Maersk to post a security deposit but instead required Maersk, Inc. to guarantee "the full, faithful and prompt performance of and compliance with, on the part of [APM-Maersk], all of the terms, provisions, covenants and conditions of" the lease. MAppx. Vol. 5A at 362, 383-85. Maersk, Inc. executed a Contract of Guaranty on June 2, 2000. *Id.* at 385. In contrast, the Port required Maher to post a \$1.5 million security deposit, which Maher satisfied with a letter of credit. MAppx. Vol. 5A at 96-97; PAppx. Vol. III at 332, 1016. The ALJ found that the differences in financing rate and security were justified because during the lease negotiations, Maher's Fleet Street rent was in arrears and subject to a repayment plan, and thus it was not unreasonable for the Port to consider Maher a greater credit risk. ALJ I.D. at 50, 52. The ALJ also noted that Maersk-APM's lease was supported by guarantee from a parent corporation, something that Maher, as a closely-held company, could not provide. *Id.*

Maher argues that it was not a greater credit risk and that the ALJ ignored that APM-Maersk was in arrears on a lease in 2000. Maher also argues that "as a practical matter" it provided a corporate guarantee of lease performance and had substantial assets at the time it entered the lease agreement that far exceeded the amount of the security deposit in the lease. Maher Exceptions at 44. Maher further argues that APM-Maersk's "parental guarantee" is a "chimera" because Maersk, Inc. was not a "shipping giant" and is no longer the parent of Maersk-APM. Maher further argues that the ALJ's reliance on the "untimely" Borelli Declaration was error because:

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(1) the declarant did not profess personal knowledge and did not personally perform any creditworthiness analysis; (2) there is no evidence of any written analysis comparing Maher's and Maersk-APM's creditworthiness; and (3) the declaration misstated the amount of the arrearage. *Id.* at 46. According to Maher, its arrearage was not the result of lesser creditworthiness, but the Port's unrealistic volume predictions. Further, Maher argues, "the declarant failed to disclose his view that the Port was 'materially worse off with only the guarantee from Maersk, Inc.'" *Id.* at 47.

Maher's arguments are unpersuasive. The evidence indicates that Maher was delinquent in its Fleet Street rent for two years and negotiated a payment plan with the Port. PAppx. Vol. II at 109. Moreover, Maher previously owed approximately \$3 million in arrearages to the Port to be paid off from 1991 to 2000. PAppx. Vol. I at 100. In contrast, the alleged \$3.3 million that Maersk owed the Port resulted from an invoicing problem that arose when Maersk took over Sea-Land's terminal. Joint Appx. at 690. Further, although an unsigned letter cited by Maher indicates that APM-Maersk was behind on three months' rent, this arrearage was roughly one-third of Maher's undisputed arrearage. Joint Appx. Vol. at 710. The ALJ therefore did not err in finding that the differences in finance rate and security deposit requirements were justified by APM-Maersk's and Maher's different credit risks.

Nor did the ALJ err in relying on the Borelli Declaration. Stephen Borrelli, a manager in PANYN's credit collections division, averred that: (1) the Port analyzed both Maher's and APM-Maersk's creditworthiness in connection with their leases; (2) in some circumstances the Port will allow a tenant to provide a third-party corporate guarantee rather than a security deposit, so long as the guarantor has extensive assets separate from the lessee's; (3) one of the Port's primary considerations is whether the lessee has paid on time; and (4) the Port does not allow a terminal operator to guarantee its own lease, and Maher, as a closely-held, family-owned company did not have a parent organization to provide a guarantee. PAppx. Vol. III at 1013-1017. Maher is correct that Borrelli did not

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make his declaration on personal knowledge, but he instead stated that he was familiar with the credit analysis and review that the Port performed with respect to Maher and APM-Maersk. *Id.* at 1013-14. The employee who performed the review is deceased, and his documents were lost during the terrorist attacks on September 11, 2001. *Id.* at 1014 Although Maher complains that the declaration was filed late, Maher had ample opportunity to move to strike the declaration and there is no indication that it did so.

Maher's remaining arguments are similarly unavailing. Mr. Borelli did not state that the Port was worse off with only the Maersk guarantee – the document cited actually states that “the Port Authority is materially worse off with only the guarantee from Maersk, Inc, and no longer having the separate guarantee from Sea-Land.” Joint Appx. Vol. at 691. That two guarantees would have been better than one does not make the remaining guarantee illusory or improper. Further, that Maersk, Inc. is no longer APM-Maersk's parent does not change that APM-Maersk provided a corporate guarantee from an entity with assets separate from APM-Maersk's that was affiliated with the Maersk group of companies. Further Maher's argument that it “guaranteed” its own lease is meritless – that the lease can be terminated if Maher does not meet its obligations and that those obligations survive lease termination are not the same as the corporate guarantee provided by APM-Maersk. *See* Maher Initial Br. at 62 n. 124 (citing sections 25(a)(10)-(11) & (d), and 28(a) & (b) of Maher's lease in support of argument that “as a practical matter Maher already provided a corporate guarantee of the lease performance”).

f. First point of rest requirements

Maher's lease requires it to reserve a berth and 10-acre portion of its terminal as a first point of rest for use in off-loading automobiles, and Maher must make the space available on forty-eight hours notice. MAppx. Vol. 5A at 113. If Maher breaches the first point of rest provision, the Port has the option of terminating the lease as to the first rest space. *Id.* APM-Maersk's lease does not

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include such a provision. The ALJ found that the first-point-of-rest requirement in Maher's lease did not give rise to a Shipping Act violation, stating that "[w]hile there has been some dispute between the parties about the current status of the requirement, the evidence does not suggest that the first point of rest for automobiles provision [was] not justified under the Shipping Act." ALJ I.D. at 53.

Maher argues that it did not need the first point of rest provision and asserts that the Port imposed it to benefit its customer, Nissan. According to Maher, the requirement unnecessarily restricts its use of its terminal. *Id.* at 54. Maher points out that in 2008, the Port sought to enforce the requirement and threatened to terminate the lease as to the first point of rest berth and acreage. The Port contends that "[s]ince APM/Maersk never intended to stevedore automobiles, which Maher does not dispute, a first point of rest was simply irrelevant to APM/Maersk." PANYNJ Reply at 61.

We affirm the ALJ's conclusion that the first point of rest requirement in Maher's lease does not give rise a Shipping Act violation. There is some evidence that Maher, as a public terminal, was in the business of soliciting and stevedoring automobiles, and that Maher wanted to continue as a general stevedore with the flexibility to handle a broad range of products once it received its reconfigured terminal. PAppx. Vol. I at 170; PAppx. Vol. II at 194. APM-Maersk, however, did not solicit cars at its terminal. *Id.* at 195. Given these facts, Maher has not shown that it was unreasonable for the Port to require Maher, but not APM-Maersk, to provide a first point of rest.

2. Failure to establish, observe, and enforce just and reasonable regulations

In addition to claiming that the Port unreasonably discriminated against it, Maher claims that the Port failed to establish, observe, and enforce just and reasonable regulations in violation of 46 U.S.C. § 41102(c) because it allegedly "assessed Maher lease rates and other requirements much higher than Maersk-

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APM for the same services.” Maher Initial Br. at 57-71. Under 46 U.S.C. § 41102(c) (section 10(d)(1) of the Shipping Act of 1984), a marine terminal operator “may not fail to establish, observe, and enforce just and reasonable regulations and practices.” The inquiry is whether the “charge levied is reasonably related to the service rendered.” *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm’n*, 390 U.S. 261, 282 (1968). “Just and reasonable” as applied to terminal practices means “a practice otherwise lawful but not excessive and which is fit and appropriate to the end in view.” *Distribution Servs. Ltd. v. Trans-Pac. Freight Conf. of Japan & Its Member Lines*, 24 S.R.R. 714, 721 (FMC 1988) (quoting *Investigation of Free Time Practices – Port of San Diego*, 9 FMC 525 (1966)). “One measures the impact on the payer compared to other payers as well as the relative benefits received.” *NPR, Inc. v. Bd. of Comm’rs of the Port of New Orleans*, 28 S.R.R. 1512, 1531 (FMC 2000). Although a practice that is unjustly discriminatory is unreasonable, *50 Mile Container Rules*, 24 S.R.R. at 466, “[t]he justness or reasonableness of a practice is not necessarily dependent upon the existence of actual preference, prejudice, or discrimination,” *Port of San Diego*, 7 S.R.R. at 329 (FMC 1966).

The ALJ found that Maher’s rent corresponds with the benefit it received because Maher: (1) negotiated a long-term lease of a large property convenient to express rail and other services; and (2) the property was not competitively bid. ALJ I.D. at 54. Maher argues that the ALJ neither analyzed the large difference between it and APM-Maersk’s rent under § 41102(c), nor determined whether its lease terms were excessive and fit and appropriate to the end in view. According to Maher, the ALJ ignored that both Maher and APM-Maersk received large properties convenient to ExpressRail that were not competitively bid. Maher Exceptions at 56. Maher further complains that the Port did not “put pen-to-paper” and calculate the relative economic values and costs of the two terminals in a written analysis. Maher also reiterates that the port guarantee cannot provide a reasonable basis for APM-Maersk’s lower rent because the port guarantee was illusory and ineffective, as Maersk

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sent much of its cargo elsewhere and abandoned the hub port concept. *Id.* at 58-60.

Maher has not met its burden of establishing a § 41102(c) violation because it has not shown that its rent is not commensurate with the benefits it received from its lease. Instead, Maher asserts that APM-Maersk paid lower rent for comparable property. Although APM-Maersk's rent is relevant, the primary consideration is whether Maher's rent matches what it received. The evidence shows that the Port charged Maher the rate that it intended to charge all terminals before Sea-Land and Maersk threatened to leave the Port. PAppx. Vol. II at 136 (noting that the Port offered rent "comparable to what we had started out with and what we had offered to Sea-Land/Maersk"). The Port's expert, John Vickerman, opined that "Maher terminal, as compared to APM Terminal, had substantially greater commercial and strategic value and offers greater potential terminal capacity both currently and in the future." PAppx. Vol. IV at 317.²⁰ Further, the Greenhill Memorandum states that within the Port, Maher "is the only pure terminal operator and enjoys an advantageous location in terms of rail and highway access relative to most other operators." PAppx. Vol. I at 1577. Similarly, the Empire Report indicates that Maher's lease was at a competitive market rate and its higher rent reflected "the superior nature of the Maher property, the additional flexibility in yard usage, and its infrastructure." PAppx. Vol. IV at 326. Further, Maher's rent is less than that of Port Newark Container Terminal, which pays \$65,100 with a minimum 2.5 percent escalator. PAppx. Vol. at 3507.

²⁰ The Port asserts that Mr. Vickerman is "an expert in marine terminal logistics with more than 35 years of experience." PANYNJ Reply at 24 n. 32. Although Maher's expert found "no such differences in the physical or economic value of the properties that explain the differences in the leases," PAppx. Vol. Vol. II at 27, the Port points out that Maher's expert claimed to be an expert on economics, not logistics, and has spent most of his time during the last ten years analyzing intellectual property damages. PAppx. Vol. VII at 33.

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Although Maher cites evidence purporting to show that APM-Maersk received the better terminal, this evidence compares the terminals at Port Elizabeth as they existed in 1997, before they were reconfigured and consolidated, as part of the port modernization plan. MAppx. Vol. 1A-43, 65. Similarly, whether the Port succeeded in inducing Maersk to send its discretionary cargo to the Port is not relevant to whether Maher's rent is reasonably related to the benefits it received from its lease. Moreover, Maher cites no support for its requirement that the Port create contemporaneous, written, comparative economic analyses of its leases. And, unlike in *Ceres I*, Maher has not established that its rent or other lease terms are excessive. 27 S.R.R. at 1275.

3. Unreasonable refusal to deal

Maher argues that the Port unreasonably refused to deal with it by refusing Maher's "repeated requests for parity." Under 46 U.S.C. § 41106(3), "[a] marine terminal operator may not – unreasonably refuse to deal or negotiate." "Refusals to deal or negotiate are factually driven and determined on a case-by-case basis." *Canaveral Port Authority – Possible Violations of Section 10(b)(10)*, 29 S.R.R. 1436, 1449 (FMC 2003). The Commission engages in a two-part inquiry: whether an entity refused to deal or negotiate, and, if so, whether the refusal was unreasonable. *Id.* at 1448. "[W]hether a marine terminal operator gave good faith consideration to an entity's proposal or efforts at negotiation is central to determining whether a refusal to deal or negotiate was reasonable." *Docking & Lease Agreement By & Between City of Portland, ME & Scotia Prince Cruises, Ltd.*, 30 S.R.R. 377, 379 (FMC 2004) (citing *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886 (1993)). A refusal is not unreasonable where it is "justified by particular circumstances in effect." *Docking & Lease Agreement*, 30 S.R.R. at 379. Moreover, the Commission may defer to a port's reasonable, discretionary business decisions regarding negotiations. *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 899 (FMC 1993).

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The ALJ found that the Port “did not refuse to deal in the negotiations that resulted in Maher Lease EP-249,” but rather the evidence showed that “extensive negotiations spanned a five-year time frame.” ALJ I.D. at 55. The ALJ also concluded that although Maher’s requests were not all granted, they were given due consideration. *Id.* According to the ALJ, “once the Port signed the lease with Maher, it was not required to continually renegotiate the lease with Maher” because “[i]f a port authority were required to continually renegotiate every lease every time a different lease provision was offered, it would impede the port’s ability to function effectively.” *Id.*

With respect to the negotiations leading to Lease No. EP-249, Maher argues that the Port “repeatedly refused to even consider Maher’s requests for parity based on status and commercial convenience.” Maher Exceptions at 60. According to Maher, “Lillian Borrone informed Maher that the SeaLand/Maersk terms were ‘off the table’ for Maher and the Port presented Maher with a ‘take it or leave it’ offer.” *Id.* Maher also finds fault with the ALJ’s statement that a “port authority is ‘not required to continually renegotiate the lease’ as ‘it would impede the port’s ability to function effectively.’” Maher Exceptions at 61. According to Maher, the ALJ “as a practical matter . . . invoked contractual theories of waiver and estoppel and deference to the business decisions of a port to trump its continuing and absolute statutory duties to deal reasonably with Maher.” *Id.* Maher further contends that the Port’s stated reason for not renegotiating the lease in 2007 – that Maher knowingly signed the lease – is unreasonable because *Ceres II* held that the doctrines of waiver and estoppel do not immunize a Shipping Act violation. The Port counters that “[t]he notion that the Port Authority was compelled, at the threat of litigation, to accede to Maher’s demand that it [renegotiate] an extensively negotiated and ongoing lease that the parties had been performing for seven years, and which the Port Authority correctly believed did not violate the Shipping Act, is specious and finds no basis in law, logic or equity.” PANYNJ Reply at 68-69.

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The ALJ correctly concluded that Maher has not established that the Port engaged in a refusal to deal during the negotiations leading to Lease No. EP-249. Although Ms. Borrone believed she told Maher that APM-Maersk's terms were off the table, MAppx. Vol. 2A at 10, the Port and Maher negotiated for several years regarding the lease, during which time Maher was aware of the negotiations between the Port and Sea-Land/Maersk. *See* Part II.B, *supra*. Despite the Port's ultimate decision not to give Maher the APM-Maersk rental rate, the parties met several times to discuss the issue. MAppx. Vol. 2B at 388. Nor was the Port silent in the face of Maher's requests for parity; the Port gave Maher reasons why APM-Maersk's lease terms were different. PAppx. Vol. II at 125, 136, MAppx. Vol. 2B at 393. The Port's business decision to conclude lease negotiations after years of effort was not unreasonable.

Similarly, it was not unreasonable for the Port to reject Maher's subsequent requests for lease parity, which Maher initiated in 2007. The evidence establishes that the Port gave good faith consideration to Maher's subsequent requests for parity and that its refusal to accede to Maher's demands was not unreasonable. The evidence, and Maher's Exceptions, indicate that the Port and Maher discussed the Port's unreasonable preference concerns on multiple occasions in person, in writing, and telephonically. Maher Exceptions at 61-64. For instance, on January 17, 2008, John Buckley, Maher's then-CEO wrote a letter to the Port regarding settlement at Richard Larrabee's (a Port official) suggestion. MAppx. Vol. 1D at 1587. Mr. Buckley requested that the Port extend to Maher the same lease terms offered to APM-Maersk and threatened litigation. *Id.* 1587-88. Although Mr. Larrabee noted that the Port did not agree to Maher's proposed rental adjustments, he said that he and his staff were "certainly willing to meet and engage in a more detailed dialogue if you believe that would be fruitful." MAppx. Vol. 1D at 1607. The Port requested that subsequent discussions be subject to a confidentiality agreement and later requested a stay of litigation to enhance settlement efforts. MAppx. Vol. 1D at 1656.

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Further, Maher has not shown that any refusal to deal by the Port would be unreasonable. As set forth above, the Port had valid reasons for treating Maher differently than APM-Maersk. That Port officials might have given the wrong rationale for not acceding to Maher's demands does not make the Port's decision to deny Maher lease parity unreasonable. Finally, although Maher objects to the ALJ's statement that a port authority is not required continually to renegotiate a lease after it is signed, the ALJ was not effectively applying the doctrines of waiver and estoppel. Rather, the ALJ correctly stated that as a policy matter it would be unduly burdensome for a port authority to have to renegotiate its leases on demand.

C. Docket No. 07-01 Counterclaims

In addition to its claims from Docket No. 08-03, Maher alleges in its consolidated Docket No. 07-01 counterclaims that: (1) an indemnity provision in its lease (and lack of a similar provision in APM-Maersk's lease) violates 46 U.S.C. § 41106(2); (2) the Port's assertion of indemnity provisions against Maher in Docket No. 07-01 and in New Jersey state court violates 46 U.S.C. § 41102(c); (3) the Port's failure to settle the Docket No. 07-01 counterclaims violates 46 U.S.C. § 41106(3); and (4) the Port operated contrary to Maher's lease in violation of 46 U.S.C. § 41102(b)(2). The ALJ rejected these claims without lengthy analysis. Although the ALJ erred in some respects, we affirm the ALJ's dismissal of Maher's counterclaims.

1. Failure to answer the counterclaims

As an initial matter, Maher argues that the Port is precluded from defending against the Docket No. 07-01 counterclaims because the Port did not file an answer or plead its statute of limitations affirmative defense in response to Maher's counterclaims. Maher Exceptions at 73-75. The ALJ rejected this argument because "[i]t has been clear throughout these protracted proceedings, however, that [the Port] intends to contest the allegations in the counter-

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complaint.” ALJ I.D. at 60. The ALJ also pointed out that the Port’s alleged “default” was not raised until Maher’s reply brief and thus the Port did not have an opportunity to respond to the argument. *Id.*

In its exceptions, Maher argues that the ALJ erred because: (1) the ALJ “disregarded Commission authority that ‘failure of a respondent or defendant to answer the well-pleaded allegations of a complainant can result in issue of a default judgment;” (2) the Port did not address Maher’s “default” arguments in its January 9, 2012 “sur-reply” and other filings and thus “effectively conceded that its affirmative defense was barred by its failure to answer Maher’s Counter-Complaint and plead the affirmative defense, and it also effectively conceded waiver of any argument that Maher should have highlighted the Port’s default earlier and that the Port did not default;” and (3) “barring affirmative defenses as a result of a party’s failure to answer is not a drastic remedy and courts do not hesitate to impose it.” Maher Exceptions at 74.

The ALJ did not commit an abuse of discretion in rejecting Maher’s failure to answer or plead argument. As Maher points out, the Port did not file an answer to Maher’s Docket No. 07-01 counterclaims and did not plead any affirmative defenses to them. Under 46 C.F.R. § 502.62(b)(6)(i), “[f]ailure of a party to file an answer to a . . . counterclaim . . . within the time provided will be deemed to constitute a waiver of that party’s right to appear and contest the allegations of the . . . counterclaim . . . to which it has not filed and to authorize the presiding officer to enter an initial decision on default as provided for in 46 CFR 502.65.” The rule further states that “[w]ell pleaded factual allegations in the complaint not answered or addressed will be deemed to be admitted.” 46 C.F.R. § 502.62(b)(6)(i). Under the Commission’s default judgment rules, a party “may be deemed to be in default” for failing to answer, and the Commission or presiding officer “may issue a decision on default upon consideration of the record, including the complaint or Order of Investigation and Hearing.” 46 C.F.R. § 502.65(a), (b).

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Because the Port failed to answer Maher’s counterclaims, it has admitted the factual allegations therein. As explained below, however, none of these factual allegations, taken as true, establish a Shipping Act violation.²¹ A non-responsive party is not deemed to have admitted legal allegations or conclusions. *Century Metal Recycling Pvt. Ld. v. Dacon Logistics, LLC*, 33 S.R.R. 17, 19 (FMC 2013) (finding that respondent was deemed to have admitted factual allegations and assessing whether those allegations established a Shipping Act violation); *cf. City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 137 (2d Cir. 2011) (“It is an ‘ancient common law axiom’ that a defendant who defaults thereby admits all ‘well-pleaded’ factual allegations contained in the complaint. However, it is also true that a district court ‘need not agree that the alleged facts constitute a valid cause of action.’”) (internal citations omitted); *DirectTV v. Pepe*, 431 F.3d 162, 164 (3d Cir. 2005). Maher’s reliance on *Safmarine Container Lines N.V. v. Garden State Spices, Inc.*, 28 S.R.R. 1619, 1620 (FMC 2008) is unavailing; there the Commission noted that “the failure of a respondent or defendant to answer the well-pleaded allegations of a complaint can result in issuance of a default judgment against the non-answering respondent.” The Commission did not hold that it *must* enter default judgment. *Id.*

Moreover, the circumstances make default judgment inappropriate. In the analogous situation where a court considers whether to set aside entry of default, it considers: (1) whether the default was willful; (2) whether setting aside default would prejudice the plaintiff; and (3) whether the alleged defenses are meritorious. *Keegel v. Key West & Caribbean Trading Co.*, 627 F.2d 373-74 (D.C. Cir. 1980). Here, there is no evidence that the Port intentionally failed to answer the counterclaim for strategic purposes, there is no evidence that Maher would be prejudiced by allowing the Port to contest the counterclaims, and the Port’s denials

²¹ Maher’s Counter-Complaint in Docket No. 07-01 contains nine paragraphs, five of which can be considered factual (¶¶ 34, 35, 37, 38, and 39). MAppx. Vol. 3A at 125-26.

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and defenses are meritorious. *See Keegel*, 627 F.2d at 374. Additionally, Maher did not raise its failure-to-answer argument until its reply brief on the merits, and, contrary to Maher's argument, the Port did not have an opportunity to respond to this argument in a sur-reply because the Port did not file a sur-reply.²²

Finally, we need not address whether the Port's failure to plead the statute of limitations defense is excusable. As described below, Maher has not met its burden of proof on its counterclaims, and thus we do not address the Port's statute of limitations defense.

2. Unreasonable preference

Maher argues that the Port gave APM-Maersk an unreasonable preference, and imposed an unreasonable preference on Maher, in violation 46 U.S.C. § 41106(2) by including an unlawful indemnity provision in Maher's lease that it did not include in APM-Maersk's lease. Maher's Initial Brief at 90. Maher's counterclaims implicate two types of indemnity provisions. Both Maher's and APM-Maersk's leases contain general indemnity provisions. MAppx. 5A at 56 (Section 15 of Lease No. EP-249); MAppx. 5A at 308-09 (Section 15 of Lease No. EP-248). Maher's lease, however, also contains an indemnity provision related to its obligation to surrender certain property to the Port:

It is understood and agreed that in the event the Lessee fails to deliver the Partial Surrender in a timely manner, the Lessee shall be responsible to the Port Authority, shall hold the Port Authority harmless and shall make such payments as shall be necessary to compensate fully the Port Authority for all additional costs for delay of construction of the ExpressRail Facility (as hereinafter defined) and/or

²² Although Maher asserts that the Port filed a sur-reply on January 9, 2012, the Port actually filed other documents that Maher unilaterally characterizes as sur-replies.

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any damages or losses to the Port Authority arising out of that certain lease dated as of January 6, 2000 bearing Port Authority File Number EP-248 between the Port Authority and Maersk Container Service Company, Inc.

MAppx. Vol. 5A at 7. There is no corresponding provision in APM-Maersk's lease.

The ALJ rejected Maher's argument that the presence of the transfer-related indemnity provision in its lease constituted unlawful discrimination, finding that "there is no requirement that leases for different properties contain identical provisions nor that this particular provision shows an unreasonable preference or undue preference." ALJ I.D. at 58. In its exceptions, Maher argues that the ALJ failed to conduct a particularized analysis of this counterclaim and contends that "[h]aving already granted Maersk-APM preferential terms in EP-248, wherein Maersk-APM was not required to indemnify [the Port] for [the Port]'s own actions causing the delay in the transfer of the 84 acres, [the Port] refused to grant those terms to Maher despite Maher's repeated requests for the same terms." Maher Exceptions at 67. The Port counters that "[t]here is no comparable obligation in the APM/Maersk lease to which a comparable indemnity obligation could apply because APM/Maersk, unlike Maher, had not contracted to deliver any land to the Port Authority." PANYNJ Reply at 70.

Maher has not established that the transfer-related indemnity provision violates § 41106(2). Maher's lease requires it to deliver certain premises to the Port so that the Port can deliver the premises to APM-Maersk. MAppx. Vol. 5A at 6-8. APM-Maersk's lease does not require it to deliver any comparable property to the Port. MAppx. Vol. 5A at 261-62 (Section 1 of Lease No. EP-248). Because Maher has a property-transfer obligation that APM-Maersk does not, Maher has not shown that it is unreasonable for its lease to contain an indemnity provision related to that obligation or that it is unreasonable for APM-Maersk's lease to lack such a provision.

3. Failure to establish, observe, and enforce just and reasonable regulations

Maher further alleges that the Port failed to establish, observe, and enforce just and reasonable regulations and practices by filing a third party counterclaim against Maher in Docket No. 07-01, and by filing a New Jersey state court case, based on indemnity provisions in Maher's lease. Maher Initial Brief at 57-71, 80-89. In those actions, the Port argued that if it was liable to APM-Maersk for delivering the Added Premises too late, then Maher was required to indemnify it and hold it harmless. The ALJ found that because the Commission's approval of the settlement agreement extinguished the Port's third-party claim against Maher, "accordingly, the evidence does not support a finding that the indemnity provision violates the Shipping Act." ALJ I.D. at 58. The ALJ also found in the context of Maher's operating-contrary-to-agreement claim that "[t]he indemnity issue is moot as the claims between the Port and Maher have been resolved" and that "[e]ven if the inclusion of this indemnity provision violated the Shipping Act, Maher has not established any actual injury." *Id.* at 60.

Maher argues that the ALJ failed meaningfully to address its § 41102(c) counterclaim. According to Maher, the indemnity provisions at issue are unlawful because they are broad enough to exculpate the Port for its own negligence for the delay in transferring the Added Premises. According to Maher, it "did not receive any 'offsetting benefit' in exchange for the indemnity requirement, because it never agreed to indemnify the Port for the Port's own failures." Maher Exceptions at 66. Maher also contends that the ALJ ignored that it incurred \$1,354,268.25 in attorney's fees and litigation costs defending itself from claims brought pursuant to the allegedly unlawful indemnity provisions and "incorrectly inferred that because [the Port]'s settlement 'reliev[ed] Maher of potential liability,' Maher suffered no harm." *Id.* at 57 (quoting ALJ I.D. at 58).

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The Port acknowledges that it sued Maher based on the indemnity provisions but asserts that it did not violate the Shipping Act because it did not seek to exculpate itself from its own responsibility for the delay in the transfer of the Added Premises. PANYNJ Reply at 70. Rather, the Port argues, it sought only to hold Maher responsible for Maher's share of fault for the delay. According to the Port, "[t]he entire litigation between Maher and the Port Authority in 07-01, while it lasted, concerned whether it was Maher, the Port Authority, or some combination that was at fault for the Port Authority's failure to deliver the eighty-four acres to APM/Maersk by the date set forth in the APM/Maersk lease." *Id.*

The ALJ correctly found that the inclusion of the indemnity provisions in Maher's lease is moot to the extent it is alleged to be an independent Shipping Act violation because the Port dropped its indemnity-related claims against Maher with prejudice. Further, the indemnity provision in Section 1(d) of Maher's lease will not raise any issues going forward because it is tied to a property transfer that occurred in 2005. MAppx. Vol. 5A at 7. Moreover, because the lawfulness of the indemnity provision itself is not a separate claim, Maher's argument that it "did not receive any 'offsetting benefit' in return for the indemnity requirement, because it never agreed to indemnify the Port for the Port's own failures" is irrelevant. Maher Exceptions at 66.

The ALJ erred, however, by not addressing Maher's argument that the Port's assertion of the indemnity provisions in litigation also constituted a Shipping Act violation that led to Maher incurring approximately \$1.3 million in damages. Maher's argument raises three issues: (1) whether the indemnity provisions violate the Shipping Act and are thus unlawful; (2) if so, whether the assertion of unlawful indemnity provisions is itself a Shipping Act violation; and (3) if so, whether Maher has shown that it suffered damages as a result.

As to the first issue, the indemnity provisions at issue here arguably violate § 41102(c) of the Shipping Act under Commission

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precedent because they are broad enough to exculpate the Port for its own negligence.²³ The indemnity provisions require Maher to indemnify and defend the Port without reference to either party's relative fault. MAppx. Vol. 5A at 7, 56. Several Commission decisions have held that exculpatory tariff provisions constitute an unjust and unreasonable practice under Section 17 of the Shipping Act of 1916, and the Commission has cancelled such provisions or ordered the relevant party to delete or amend such provisions to make clear that they do not exculpate parties from consequences of their own negligence. *See Stevens Shipping & Terminal Co. v. South Carolina State Ports Auth.*, 22 S.R.R. 1030, 1031 (ALJ 1984); *Cent. Nat'l Corp. v. Port of Houston Auth.*, 22 S.R.R. 795 (FMC 1984); *United States Lines, Inc. v. Maryland Port Admin.*, 20 S.R.R. 646, 649, 650 (FMC 1980) (finding exculpatory tariff provisions unreasonable under Section 17 of the Shipping Act in light of precedent holding that such tariff provisions are unreasonable "to the extent they relieve the terminal operators from liability for their own negligence" and noting that a public terminal operator is "clearly in a position" such that the provisions would be unreasonable); *West Gulf Mar. Ass'n v. City of Galveston*, 19 S.R.R. 779, 781, 782-83 (FMC 1979) (finding that it was "well-established that exculpatory clauses are invalid as a matter of law in common

²³ The lease provides that it is governed by New Jersey law. MAppx. Vol. Vol. 5A at 91. Maher's argument that the indemnity provisions "fail to comply with New Jersey law" is not entirely accurate. The cases cited by Maher indicate that New Jersey law permits a fully exculpatory indemnity provision, so long as it specifically refers to the negligence or fault of the party seeking indemnification. *See, e.g., Taylor v. Port Auth. of N.Y. & N.J.*, Case No. 1-2004-06T3, 2008 N.J. Super. Unpub. LEXIS 971, at *10 (N.J. Sup. Ct. App. Div. July 1, 2008). An indemnity provision that lacks such language is not unlawful. Rather, a party seeking to enforce such a provision can only seek indemnification for the other party's share of the fault, not its own. *Id.* at *15-*16.

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carrier and public utility relationships”); *Lucidi v. Stockton Port District*, 19 S.R.R. 441, 441 (ALJ 1979).²⁴

The Commission has reasoned that such provisions can be “against public policy insofar as such policy requires businesses affected with a public interest to be precluded from taking unfair advantage of those who by necessity must use the facilities of such businesses.” *Lucidi*, 19 S.R.R. at 449. Further, the Commission has rejected the argument that the reasonableness of exculpatory tariff provisions turns on the manner in which those provisions are enforced. In *Central National Corp.*, for instance, the respondent argued that although its tariff was broadly exculpatory, it consistently paid claims based on its own negligence. *Cent. Nat’l Corp. v. Port of Houston Auth.*, 22 S.R.R. 521, 524 (ALJ 1983). The Commission found that this did not save the tariff provisions, as the respondents’ “practices in implementation of those provisions cannot validate tariff provisions which are otherwise unlawful.” *Cent. Nat’l*, 22 S.R.R. at 797. The “fact that the Port’s practices do not comport with the description set forth in its tariff is . . . not evidence of the reasonableness of the tariff provisions, but might well be taken as an indication of their unreasonableness.” *Id.*; *Stevens Shipping*, 22 S.R.R. at 1033, 34 (“[E]ven if a terminal operator shows that in fact it does not, in practice, impose liability upon users when the terminal operator is itself at fault, the Commission nevertheless holds that the tariff provision is unreasonable and must be revised.”). Although these cases involve indemnity or exculpatory provisions in tariffs rather than contractual indemnity provisions in extensively negotiated leases between sophisticated parties, this precedent suggests that indemnity

²⁴ As Maher points out, the Commission’s regulations are consistent with these precedents. Under 46 C.F.R. § 525.2(a)(1), a marine terminal operator schedule “cannot contain provisions that exculpate or relieve marine terminal operators from liability for their own negligence, or that impose upon others the obligation to indemnify or hold-harmless the terminals from liability for their own negligence.”

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provisions in Maher's lease are unlawful, in that they constitute failures to establish, observe, and enforce just and reasonable regulations.

Maher's claim is not, however, that the indemnity provisions are unlawful, but that the Port violated the Shipping Act by bringing a third party Shipping Act complaint and state court civil suit based on the indemnity provisions. According to the Port, "[t]he entire litigation between Maher and the Port Authority in 07-01, while it lasted, concerned whether it was Maher, the Port Authority, or some combination that was at fault for the Port Authority's failure to deliver the eighty-four acres to APM/Maersk by the date set forth in the APM/Maersk lease." PANYNJ Reply at 70. The Port implies that if its position was wholly exculpatory, i.e., that Maher was required to indemnify it, regardless of who was at fault for the delay in the delivery of the Added Premises, then it would not have taken discovery about Maher's negligence or lack thereof because it would have been irrelevant.

The Port's arguments are belied by the evidence before the Commission, which does not indicate that the Port limited its indemnification lawsuits to Maher's share of any fault. The Port averred in its third party complaint that Maher was required to indemnify it for its liability to APM-Maersk, and the Port did not cabin the scope of the indemnification it sought to Maher's share of the fault. Similarly, the Port did not state in its New Jersey complaint that it was only seeking indemnification for Maher's share of fault for the untimely delivery of the Added Premises. MAppx. Vol. 3A at 70, 160-69. Further, a 2007 deposition preparation memorandum drafted by a Port attorney stated that "Maher will contend that the failure to transfer the added premises to Maersk (APMT) was the result of the Port Authority's own negligence for which Maher cannot be held liable. *The indemnification provisions are, however, very broad and demonstrate an intent to pass on to Maher Terminals the risk of not being able to transfer the added premises on or before December 31, 2003.*" MAppx. Vol. 1D at 1572 (emphasis added). Counsel also stated that "[w]ith regard to the risks shifted to Maher

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Terminals from the Port Authority, the agreement specifically provides that the risk of all damaged [sic] were shifted by the words used above ‘any damages or losses to the Port Authority arising out of that certain lease.’” *Id.* Moreover, in a 2008 response to a Maher interrogatory in Docket No. 07-01, the Port stated that it “took reasonable steps to ensure that Maher Terminals would not act in a way that was detrimental to Maersk (APMT) by providing that any damages resulting from the failure to comply with the Maersk-Port Authority lease would be borne by Maher Terminals, LLC.”

Nevertheless, Maher does not cite any precedent for the proposition that bringing litigation based on an overbroad indemnity provision is itself a Shipping Act violation, such that the party bringing the litigation must pay reparations. In the cases cited above, the Commission either found the exculpatory provisions at issue unenforceable or ordered that the tariffs be revised. It does not appear that the Commission further found that the act of asserting the provisions violated the Shipping Act and warranted reparations. Moreover, in other areas of law, bringing an ultimately unsuccessful claim is not itself a tort absent indicia of bad faith. *See* W. Page Keeton, et al., *Prosser & Keeton on the Law of Torts* § 119 (5th ed. 1984) (noting that “the accuser must be given a large degree of freedom to make mistakes and misjudgments without being subjected to liability”). For instance, the tort of malicious prosecution requires an absence of probable cause and malice, and the tort of abuse of process requires an improper purpose amounting to extortion. *Id.* §§ 119-20. As the Port pointed out in its Reply to Maher’s Initial Brief, “Maher cannot show that PA[NYNJ]’s claim was in any way improper, much less the kind of abuse of process that gives rise to a damages claim based on attorney’s fees, as in the cases on which Maher relies.” PANYNJ Reply to Initial Br. at 94 n.93.

We decline to find that the Port’s assertion of the indemnity provisions (by claims it later dismissed with prejudice) constitutes an independent Shipping Act violation. To find otherwise would result in de facto fee shifting and would increase the scope of §

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41102(c) in way not contemplated by the Commission (let alone, Congress), in the prior exculpatory tariff cases. Moreover, it could chill parties from asserting their contractual rights out of fear that they would have to pay the attorney's fees of more litigious respondents.²⁵ In this case, there is no suggestion that the Port knew when it filed the third party complaint that indemnity provisions could violate the Shipping Act. Prior to this case, the Commission had not addressed the lawfulness of exculpatory indemnity provisions in marine terminal leases.²⁶

Because there is no Commission precedent establishing that merely asserting a potentially unlawful exculpatory indemnity provision is itself a Shipping Act violation, we find that Maher has not proved its § 41102(c) counterclaim. Moreover, it is not clear that Maher has established that it was damaged by the overbreadth of the indemnity provisions. Maher has not shown that it incurred more attorney's fees and costs defending against the Port's indemnity provisions than it would have incurred had the Port asserted permissible non-exculpatory indemnity provisions.

²⁵ Although in *Bloomers of California, Inc. v. Ariel Maritime Group* the Commission allowed a complainant to recover attorneys' fees as damages flowing from respondent's unlawful practice, which "was in part to demand the payment of unjustly discriminatory charges by means of a lawsuit to collect such charges," that case involved violations of section 10(b)(1), which forbids a carrier from demanding, charging or collecting unlawful rates or charges. 26 S.R.R. 183, 183 (FMC 1992). This case does not involve that section.

²⁶ Because the lawfulness of the indemnity provisions themselves under § 41102(c) is not at issue and has not adequately been briefed, we need not definitively decide this issue in now.

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4. Unreasonable refusal to deal

Maher also brought an unreasonable refusal to deal counterclaim in Docket No. 07-01, alleging that the Port refused to settle Maher's counterclaims, while at the same time settling the litigation between itself and APM-Maersk. The ALJ rejected this counterclaim and reiterated that "[i]t would paralyze a port authority's ability to renegotiate leases as may be required by changed conditions for fear of being inundated with demands from other marine terminal operators seeking unrelated changes to their leases." ALJ I.D. at 59.

Maher complains in its exceptions that the Port "unlawfully refused to deal or negotiate with Maher with respect to the issues presented in [Docket No.] 07-01 while actively negotiating with Maersk-APM and providing Maersk-APM unreasonable preferences that prejudice Maher." Maher Exceptions at 68. Maher argues that the Port improperly conditioned settlement negotiations on "concrete, written settlement offers or proposals" and a stay of litigation. Maher points out that the Port did not condition its settlement negotiations with APM-Maersk and that their settlement discussions went beyond the Docket No. 07-01 claims. Maher relies on evidence indicating that during a series of meetings between Maher and the Port in 2008 regarding Maher's requests for parity, Port staff refused to discuss the Docket No. 07-01 counterclaims because they were part of "an active legal action." MAppx. Vol. 2A at 136-37 (Crane Dep.), 264 (Larrabee Dep.). Maher also cites a letter from Mr. Larrabee wherein he "reiterate[d] his offer to engage in settlement discussions," and stated that "[a]s a condition of engaging in these negotiations [about Docket No. 07-01], however, the Port Authority requires a stay of all litigation" because "simultaneously litigating and negotiation is inconsistent with good business practice and is counterproductive." MAppx. Vol. 1D at 1656.

Maher has not established that the Port unreasonably refused to deal with Maher regarding the Docket No. 07-01 litigation. The

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Port's counsel raised the possibility of settlement with Maher's counsel in November 2007, and Mr. Larrabee offered to engage in settlement negotiations in 2008. MAppx. Vol. 1D at 1581, 1656. That the Port officials indicated in a meeting that they could not talk about active litigation does not amount to a Shipping Act violation. MAppx. Vol. 2A at 136-37. In addition, Maher cites no authority for the notion that it is unreasonable to require written settlement proposals or a stay of litigation. Given the contentious history between the parties, such measures are within the Port's reasonable business discretion. Further, to the extent Maher is arguing that it was improper for the Port and APM-Maersk to consider issues beyond the claims of Docket No. 07-01 during their settlement discussions, it fails to explain how this would be unreasonable. In sum, Maher's arguments presume that if the Port settles its claims with one party to a dispute, it must also settle claims with other parties. As the ALJ noted, however, "[t]o the extent that Maher's claim is based upon a duty to negotiate issues in litigation, they have presented no legal authority demonstrating such a requirement and no facts supporting such a finding." ALJ I.D. at 59.

5. Operating contrary to agreement

Maher alleges that the Port operated contrary to Lease No. EP-249 by failing to improve and deliver certain premises to Maher before December 31, 2003, by asserting the indemnity provisions in the lease against Maher, and by acting contrary to the force majeure provision of the lease. Maher Exceptions at 69-73. Under the Shipping Act, "[a] person may not operate under an agreement required to be filed under section 40302 or 40305 of this title if . . . the operation is not in accordance with the terms of the agreement or any modifications to the agreement made by the Federal Maritime Commission." 46 U.S.C. § 41102(b)(2). Lease No. EP-249 was filed with the Commission, and the Port does not dispute that the lease falls within the ambit of § 41102. The ALJ found that the evidence did not support finding a Shipping Act violation. ALJ I.D. at 60.

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a. Land-swap delay counterclaim

Maher argues that the Port failed to operate according to Lease No. EP-259 by failing: (1) “to provide the certain premises required by EP-249 before December 31, 2003,” (2) “to improve premises before providing Maher dates reasonable specified to vacate the 84 acres before December 31, 2003,” and (3) “to make and to provide Maher improvements before December 31, 2003” (collectively, the land-swap delay claim). Maher Exceptions at 72. According to Maher, the Port admitted that it did not provide the improved property by December 31, 2003. Maher further argues that the land-swap delay counterclaim is not barred by the statute of limitations because the statute of limitations in the Commission’s regulations applies only to a complaint, not a responsive pleading like a counterclaim. Maher also argues that the filing of the original complaint in Docket No. 07-01 tolled the running of the statute of limitations with respect to its counterclaim.

The Port responds that Maher did not plead the land-swap delay claim in Docket No. 07-01, and first raised it in a June 2011 expert report. PANYNJ Reply at 72. The Port further contends that Lease No. EP-249 does not require it to do anything by December 31, 2003. The Port also maintains that the land-swap delay counterclaim is barred by the statute of limitations. *Id.* at 72-74.

Maher has not met its burden of showing that the Port failed to operate in accordance with Lease No. EP-249 with regard to the land-swap delay counterclaim. Maher does not cite any lease provision requiring the Port to improve property or transfer it to Maher by December 31, 2003. Rather, the lease provides that Maher, not the Port, must surrender certain premises by dates reasonably specified by the Port. MAppx. Vol. 5A at 6-8. The lease does not require the Port to transfer property by any certain date. At most, the Port was obligated to transfer property to Maher before Maher was required to transfer other property to the Port. The Port’s alleged failure to satisfy this condition does not constitute the breach of any independent requirement that it transfer property by

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December 31, 2003. PANYNJ Reply at 72 n.87 (“A condition (e.g., receipt of improved premises from the Port Authority) to be fulfilled before Maher has an obligation (e.g., to tender the 84 acres to the Port Authority) is totally distinct from a lease term by which the parties agree that the Port Authority must perform a certain act by a date certain (which can be found nowhere in Maher’s lease.”)).

b. Indemnity provisions and force majeure

Maher also argues that the Port failed to operate consistently with the indemnity provisions in its lease when it filed a third-party complaint for indemnification in Docket No. 07-01 and a complaint for indemnification in New Jersey state court. According to Maher, the indemnity provisions, as a matter of law, do not require Maher to indemnify the Port for its own negligence, and that by seeking indemnification regardless of fault, the Port acted contrary to the provisions. Maher Exceptions at 71. Similarly, Maher asserts that because the force majeure provision provides that Maher is not liable for breaching lease obligations due to factors outside its control, the Port’s alleged attempt to recover for delay, caused in part by the Port’s actions (which are presumably outside of Maher’s control), is inconsistent with the force majeure provision. *Id.* at 71-72. Maher also reiterates that that the ALJ erred in applying the statute of limitations to Maher’s counterclaims. *Id.* at 70.

We need not address the statute of limitations because Maher has not established that the Port operated contrary to the indemnity or force majeure provisions of the lease. These lease provisions do not impose any obligation on the Port to do, or not do, anything. The indemnity provisions concern when Maher must indemnify the Port – they do not prohibit the Port from bringing suit against Maher. MAppx. Vol. 5A at 7, 56. Likewise, the force majeure provision provides that “[n]either the Port Authority nor the Lessee [Maher] shall be liable for any failure, delay or interruption in performing its obligations hereunder due to causes or conditions beyond its control.” MAppx. Vol. 5A at 93. This provision establishes limits on both parties’ liability, but does not immunize them from suit. The

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Port's filing of a third-party complaint and state court complaint therefore did not breach these provisions.

IV. Conclusion

THEREFORE, IT IS ORDERED, that the Initial Decision of the ALJ is, except as to Finding of Fact No. 161, affirmed, Maher's claims and counterclaims are denied, Maher's complaint and counter-complaint are dismissed with prejudice, and this proceeding is discontinued.

By the Commission.

Karen V. Gregory
Secretary