

FEDERAL MARITIME COMMISSION

MAHER TERMINALS, LLC

Complainant,

v.

THE PORT AUTHORITY OF NEW YORK
AND NEW JERSEY,

Respondent.

Docket No. 08-03

Served: June 21, 2016

BY THE COMMISSION: Mario CORDERO, *Chairman*;
Rebecca F. DYE, Richard A. LIDINSKY, Jr., Michael A.
KHOURI, William P. DOYLE, *Commissioners*.

Order to File Supplemental Briefs

On March 22, 2016, the United States Court of Appeals for the District of Columbia Circuit granted Maher Terminals, LLC's (Maher) petition for review of the Commission's December 17, 2014, order denying Maher's claims. The court remanded the order

MAHER TERMINALS v. PORT AUTHORITY OF NY & NJ 2

to the Commission for further explanation with respect to the claims on appeal, but the court did not reverse or vacate the order.¹

In light of the remand, the Port Authority filed a motion for a case management order providing for two rounds of simultaneous briefing. Maher subsequently proposed staggered briefing tailored to two questions it believed should be addressed on remand. The Port Authority then filed a consent motion that superseded its previous motion and Maher's objections thereto. In that motion, the parties proposed a brief – response – reply schedule.

Given the significance of the issues on remand, we grant in part and deny in part the Port Authority's consent motion and ORDER the parties to file supplemental briefs addressing the court's opinion. At a minimum, the parties shall discuss:

1. the Port Authority's reasons for not offering Maher the APM rental rates;
2. the extent to which the Port Authority's reasons for not offering Maher the APM rental rates are relevant to the unreasonable preference/prejudice analysis;
3. the extent to which a reasonable preference or prejudice must be based on "transportation factors;"
4. what factors, transportation-related or otherwise, bear on whether a preference or prejudice is reasonable in the context of port authority leasing decisions;
5. whether the Commission's holdings in *Ballmill Lumber v. Port of N.Y.*, 10 S.R.R. 131 (FMC 1968), and *Ceres Marine*

¹ Although Maher alleged numerous claims and counterclaims, it challenged on appeal only the denial of its claims that the "rent disparity" violated 46 U.S.C. §§ 41106(2) and 41102(c) and the scope of the Commission's summary judgment decision.

MAHER TERMINALS v. PORT AUTHORITY OF NY & NJ 3

Terminal v. Md. Port Admin., 27 S.R.R. 1251 (FMC 1997) -
- that the threat of a port tenant to leave for a competing port is not a factor that may justify a preference or prejudice -- should be modified or overruled. In addressing this question, the parties should consider the relevance of principles of "Ramsey pricing," which (in a general sense) allows differential pricing based on demand elasticity;

6. whether, in the absence of the Shipping Act, the rental rates at issue would violate other federal antitrust laws; and
7. the policies animating the Shipping Act.

The Port Authority's initial brief is due July 15, 2016, Maher's response brief is due August 19, 2016, and the Port Authority's reply brief is due September 16, 2016. The initial and response briefs shall each not exceed thirty pages, the reply brief shall not exceed fifteen pages, and all briefs shall comply with 46 C.F.R. § 502.2(j).

By the Commission.

Rachel E. Dickon
Assistant Secretary