

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

DOCKET NO. 08-03

MAHER TERMINALS, LLC

COMPLAINANT,

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

RESPONDENT.

**MAHER TERMINALS, LLC'S RESPONSE TO
THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY'S MOTION FOR A
CASE MANAGEMENT ORDER**

On May 23, 2016, the Port Authority of New York and New Jersey ("Port Authority") filed a Motion for Entry of a Case Management Order. Maher Terminals, LLC ("Maher") submits the following response.

Introduction

Maher agrees that a Case Management Order is needed to govern proceedings on remand from the United States Court of Appeals for the D.C. Circuit, but proposes an alternative briefing schedule that is tailored to the issues on remand, that will provide the Commission with a better understanding and presentation of the parties' respective positions, and that accommodates undersigned counsel's conflicting professional commitments. Instead of the open-ended, simultaneous briefing schedule suggested by the Port Authority, Maher proposes a traditional, staggered briefing schedule focused exclusively on the issues identified by the D.C. Circuit as

grounds for remand. Under this schedule, and as explained further below, the Port Authority would file its brief in response to the D.C. Circuit's decision within 30 days of issuance of the Case Management Order, and Maher would file a responsive brief 30 days thereafter.

Prior Proceedings

On March 22, 2016, the D.C. Circuit reversed the Commission's Order dismissing Maher's complaint. *See Maher Terminals, LLC v. Federal Maritime Commission*, 816 F.3d 888 (D.C. Cir. 2016). As the Commission will recall, Maher has alleged that the Port Authority violated the Shipping Act by giving an unreasonable leasing preference to a neighboring and competing marine terminal operator (APM Terminals North America, Inc. ("APM-Maersk")), thereby unreasonably prejudicing Maher, and by failing to maintain reasonable leasing practices. In its December 2014 Final Decision, the Commission agreed that there was differential treatment, but found that the difference was justified for three reasons: (i) APM-Maersk had threatened to leave the Port, and the Port Authority wanted to retain its business; (ii) APM-Maersk had made a port guarantee; and (iii) Maher's terminal was superior to APM-Maersk's. As particularly relevant here, the Commission declined to separately consider Maher's argument that the Port Authority could not justify its failure to give Maher the same favorable terms as it gave APM-Maersk. The Commission also rejected Maher's argument that Commission precedent (*Ceres Marine Terminal v. Maryland Port Administration*, 27 S.R.R. 1251 (FMC 1997) and *Ballmill Lumber v. Port of New York*, 10 S.R.R. 131 (FMC 1968)) establishes that a credible threat to leave the port does not qualify as a "transportation factor" and does not justify differential treatment under the Shipping Act. The Commission dismissed Maher's complaint, and Maher appealed.

On appeal, the D.C. Circuit began with the “common ground” that “differences between similar entities contracting with Port Authorities must be based on ‘transportation factors.’” 816 F.3d at 890. The court of appeals also noted (and accepted) the Commission’s concession that “neither the port guarantee nor Maersk’s supposed superior terminal quality would justify the lower rent.” *Id.* Thus, the court of appeals explained, “the Commission’s decision . . . rises or falls on APM-Maersk’s credible threat to leave the Port of New York and New Jersey.” *Id.*

Focusing on that narrow issue, the D.C. Circuit reversed and remanded to the Commission for two distinct reasons:

First, the D.C. Circuit held that the Commission failed to “adequately respond[] to [Maher’s] contention that the same rates should be extended to it.” *Id.* at 891. As the court of appeals explained, the most “obvious” question raised “is why the same rates were not offered to [Maher], which would avoid the issue of discrimination altogether.” *Id.* at 890. The court of appeals held that the Commission’s answer to that question—that “[t]he Port’s decision not to give Maher certain [the same] lease terms cannot be divorced from its decision to give those terms to APM-Maersk”—was “circular” and a “*non sequitur*.” *Id.* at 891. The court explained that, “[w]hatever the reason the port determined to give lower rates to APM-Maersk, it doesn’t at all follow that those same or similar rates should not be offered to [Maher].” *Id.* “After all,” the court continued, “the Commission has previously ordered that same remedy” in *Ballmill*, 10 S.R.R. 131.¹ *Id.*

Second, and independently, the D.C. Circuit held that the Commission also failed to adequately explain “why APM-Maersk’s preference was based on a ‘transportation factor.’” *Id.*

¹ The court of appeals further rejected the *Port Authority*’s contention that it would be “commercially irrational” to “extend the same terms to Maher” because, for one thing, the Port Authority cannot speak for the Commission and, for another, such a “terse comment is hardly adequate.” 816 F.3d at 891. Rather, “all sorts of factors . . . might bear” on the issue, “including economic conditions of the port and the competitive impact of the preference.” *Id.*

According to the court of appeals, the explanation given was “hopelessly convoluted, particularly in light of its precedent”—*i.e.*, *Ballmill* and *Ceres*. *Id.* The court noted that the Commission had not “overrule[d] these cases” but, instead, “offered rather lame distinctions” that the court found “utterly unpersuasive.” *Id.* at 892. Whether the Commission lawfully “could overrule or modify its previous decisions” holding that a threat to leave is not a transportation factor is something on which the court expressed no view. *Id.* But, the court emphasized, at a minimum if the Commission is going to take that extraordinary step “it must do so in a forthright manner.”² *Id.*

It is in the context of those two holdings that the D.C. Circuit remanded the case back to the Commission “for an adequate explanation of its decision and policy.” *Id.* And it is in that context that we respond to the Port Authority’s motion for a Case Management Order.

Proposed Schedule On Remand

As an initial matter, we agree with the Port Authority that further discovery is not needed and that the remand should proceed on the existing record. We also agree that it is to everyone’s benefit that the matter proceed expeditiously. We do, however, propose an alternative briefing schedule, in two respects.

First, the Commission should tailor the parties’ briefing to the two questions that the D.C. Circuit directed the Commission to address on remand: (1) Whether the Port Authority has justified its failure to offer the same rates to Maher that it offered to APM-Maersk; and (2) Whether, *if* the Port Authority can make that necessary showing, the Commission should adhere to or instead overrule its established precedent in *Ceres* and *Ballmill* that a threat to leave is not a valid transportation factor. If the Port Authority cannot make the first showing, then Maher should prevail under the D.C. Circuit’s mandate, and the Commission should have no

² As the Port Authority highlights, the D.C. Circuit also expressed confusion regarding the relationship between the acknowledged and longstanding requirement that any differential treatment be based on a “transportation factor” and the Commission’s discussion of whether the discrimination was “reasonable” under the Act. *Id.* at 892.

need to consider whether to overrule its prior precedent. Nonetheless, in the interest of an efficient resolution of this case, Maher believes it makes sense to brief both questions together. Briefing these relatively straightforward questions should permit the Commission to resolve the principal liability issues in this matter; it is unnecessary and would be inefficient to allow the Port Authority to introduce additional issues at this stage of the proceedings.

Second, a traditional briefing schedule—rather than the simultaneous briefing proposed by the Port Authority—would be more efficient, consistent with the Commission’s Rules, and in keeping with the case history. As a general matter, simultaneous briefing often results in the parties talking past one another and leaves the Commission with a less cohesive understanding of the parties’ respective positions. In part for that reason, the Commission’s Rules traditionally call for staggered briefing. *See* Federal Maritime Commission Rule of Practice and Procedure 71. The parties followed that customary approach in prior briefing to the Commission, and the Port Authority offers no reason to alter that course on remand.

The risk that the parties’ briefs would talk past each other if submitted simultaneously is, moreover, especially high in this case. Maher has always argued that, whatever its reasons for giving APM-Maersk a lease on favorable terms, the Port Authority was at least required to give Maher the same deal. The Port Authority bears the burden of proving why it could not do so. Until the Port Authority puts forward that argument, Maher will not be in a position to respond.

Similarly, Maher has always argued that *Ballmill* and *Ceres* require a ruling in its favor; the Port Authority has always argued that they do not. The D.C. Circuit has now conclusively rejected the Commission’s attempts to distinguish those cases, and agreed with Maher that those precedents require a ruling in its favor. To the extent the argument has not been waived, the Port Authority likely will argue that those precedents—one of which rejected preferential rates for the

very same carrier only two years before the leases in this case were signed—should be retroactively modified or overruled. Such a course would require justifications of a high order, and Maher cannot predict what arguments the Port Authority might advance.

For these reasons, Maher proposes a standard, staggered briefing schedule:

- **Port Authority's Brief**: A brief of no more than 25 pages, filed 30 days after the Commission enters the Case Management Order;
- **Maher's Response Brief**: A brief of no more than 25 pages, filed 30 days after the Port Authority's Brief.

Assuming the Case Management Order is issued in short order, the proposed alternative schedule will ensure that briefing is complete by the end of Summer 2016.

Finally, if the Commission nevertheless decides that a simultaneous briefing schedule is appropriate, Maher respectfully asks that the Commission make the parties' opening briefs due 60 days after the issuance of its scheduling order, rather than 30. The undersigned attorney will be Maher's principal attorney on remand, and has a number of intervening professional obligations that would make it difficult to adequately brief this matter on the Port Authority's proposed schedule.³ In particular, on June 15, 2016, the undersigned is scheduled to present oral argument in two cases before the Ninth Circuit (*Robert Ito Farm, Inc. v. County of Maui*, No. 15-15246 and *Alika Atay v. County of Maui*, Nos. 15-16466 and 15-16552) and is likely to argue a third, related case the same day (*Hawai'i Papaya Indus. Assn. v. County of Hawaii*, No. 14-17538). Additionally, the undersigned represents the American Beverage Association in a consolidated First Amendment challenge to compelled soft-drink labeling requirements adopted

³ The Port Authority did not meet and confer with Maher regarding its motion as required by the Commission's Rules. See Federal Maritime Commission Rules of Practice and Procedure 71(a). If it had, the parties could potentially have reached an agreement on the remand procedures and proposed a joint briefing schedule to the Commission.

by the City and County of San Francisco, which are scheduled to go into effect on July 25, 2016. *See American Beverage Ass'n v. City & Cnty. of San Francisco*, No. 3:15-cv-03415-EMC (N.D. Cal.). The undersigned anticipates that extensive expedited briefing and argument may be necessary throughout June and July in that case. Finally, the undersigned currently has a brief due in the Sixth Circuit on June 27, 2016 in *Wilmington Trust Co. v. AEP Generating Co.*, No. 16-3496.⁴

Conclusion

For the foregoing reasons, the Port Authority's motion for a case management order should be granted in part and denied in part, and the Commission should establish the alternative briefing schedule described above.

Dated: May 31, 2016

Respectfully submitted,



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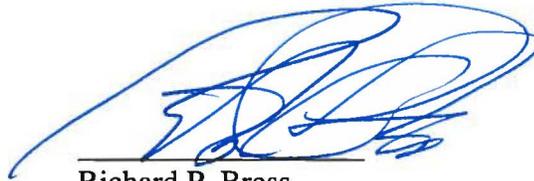
⁴ In light of the other obligations discussed above, the undersigned is seeking an extension of the briefing schedule in that case as well, but no extension has yet been granted.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of May, 2016, a copy of the foregoing was served by e-mail and Federal Express on the following:

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