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OFFICE OF THE
FEDERAL MARITIME COMMISSION

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 09-08

**SSA TERMINALS, LLC
AND
SSA TERMINALS (OAKLAND), LLC**

COMPLAINANTS

v.

**THE CITY OF OAKLAND, ACTING BY AND THROUGH
ITS BOARD OF PORT COMMISSIONERS**

RESPONDENT

AMENDED COMPLAINT

Complainants, SSA Terminals, LLC and SSA Terminals (Oakland), LLC, (jointly referred to herein as "SSAT"), by and through the undersigned hereby files this Amended Complaint against the City of Oakland, acting by and through its Board of Port Commissioners ("Port") alleging violations of the Shipping Act of 1984, as amended (46 U.S.C. § 40101 *et seq.*) (the "Shipping Act").

I. Complainant

A. Complainant SSA Terminals, LLC is a Delaware limited liability company. Complainant SSA Terminals (Oakland), LLC is a California limited liability company.

B. The corporate offices of SSA Terminals, LLC and SSA Terminals (Oakland), LLC are located at 1131 SW Klickitat Way, Seattle, WA 98134. SSA

Terminals, LLC is the assignee under the Berths 57-59 Amended and Restated Non-Exclusive Preferential Assignment Agreement (“SSAT Assignment”). Certain of the rights and obligations of SSA Terminals, LLC under the SSAT Assignment were assigned to SSA Terminals (Oakland), LLC pursuant to a subassignment agreement effective January 30, 2009 (“Subassignment Agreement”).

II. Respondent

A. The Port is a municipal department established and existing under Article VII of the Charter of the City of Oakland and having offices at 530 Water Street, 6th Floor, Oakland, California 94607.

B. The Port owns marine terminal facilities in Oakland, California.

III. Jurisdiction

A. The Port is a marine terminal operator within the meaning of the Shipping Act, 46 U.S.C. § 40102(14).

B. The Port and SSA Terminals, LLC are parties to the SSAT Assignment. The Port consented to the Subassignment Agreement on January 27, 2009.

C. The Port and Ports America Outer Harbor Terminal, LLC (“PAOHT”) are parties to the Port of Oakland Concession and Lease Agreement for Berths 20-24 (“PAOHT Lease”). PAOHT is also the assignee of a Non-Exclusive Preferential Assignment Agreement (“NEPAA”) for Berths 25-26, formerly held by International Transportation Service, Inc. (“ITS”). ITS assigned adjacent Berths 25/26 to PAOHT on August 1, 2010, which assignment became effective on October 1, 2010 (the “ITS Assignment”).

D. The Commission has jurisdiction over this Complaint, which is filed pursuant to the Shipping Act, 46 U.S.C. § 41301, because the Port is a marine

terminal operator subject to the Act and the actions of the Port which are the subject of this Complaint constitute violations of the Shipping Act.

IV. Statement of Facts and Matters Complained of

A. SSAT seeks a cease and desist order and reparations for injuries caused to it by the Port's violations of the Shipping Act, 46 U.S.C. §§ 41106(2) and (3) and 41102(c), including the Port (a) having given and continuing to give an undue or unreasonable prejudice or disadvantage with respect to SSAT; (b) having given and continuing to give an undue or unreasonable preference or advantage with respect to PAOHT; (c) having refused and continuing unreasonably to refuse to deal or negotiate with SSAT; and (d) having failed and continuing to fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.

B. The Port's agreements with PAOHT violates the foregoing provisions of the Shipping Act by granting and continuing to grant PAOHT unduly and unreasonably more favorable terms for the rental and use of marine terminal facilities than those provided to SSAT.

C. In 2008, the Port issued a Request for Qualifications ("RfQ") for the lease of Berths 20 through 24 in the Outer Harbor Berth Area ("Concession Area").

D. The RfQ informed offerors that the historical volume throughput at Berths 20 through 24 was between 300,000 and 480,000 Twenty Foot Equivalent Units ("TEUs") per year.

E. An objective of the Port in issuing the RfQ was to "maximize the combined present values of an upfront fee, to the extent one is required, together with

the minimum annual guarantees (MAG) and reasonably expected variable volume payments that will be payable to the Port over the life of the concession.”

F. On or about September 5, 2008, the Port issued a Request for Proposals (“RfP”). Although it deviated from the RfQ, the RfP was issued only to these proposers short listed by the Port based on the Port’s evaluation of the Statements of Qualifications received in response to the RfQ. The RfP was not issued to other persons or port tenants such as SSAT.

G. An addendum to the RfP was issued on January 9, 2009. Responses to the RfP were due on February 17, 2009.

H. The agenda report issued for the March 3, 2009 board meeting (“Agenda Report”), among other things, recommended that the Executive Director of the Port be authorized to execute the PAOHT Lease.

I. The PAOHT Lease has been signed by PAOHT, and, on information and belief, was signed by the Port on or about November 30, 2009.

J. Under the PAOHT Lease, PAOHT has leased approximately 175 acres at Berths 20 through 24 in the Outer Harbor Berth Area (“PAOHT Premises”). The Port now contends that the PAOHT Lease covers 166 acres.

K. The PAOHT Premises include a continuous 3,128 ft. series of berths that have been reconstructed and/or retrofitted to support post-Panamax vessels.

L. The PAOHT Premises have easy access to freeway connection for truck transports, including close proximity to I-580, and I-80 for east and west bound traffic and I-880 for north and south bound traffic. Additionally, the PAOHT Premises will have access to significant near-dock intermodal capacity and are located near the largest air cargo hub in Northern California (Oakland International Airport.)

M. Pursuant to Article 25.1 of the PAOHT Lease, PAOHT may, but is not required, to pursue or make capital improvements at the PAOHT Premises. The expansive scope of the PAOHT Premises permits construction while marine terminal operations continue.

N. The PAOHT Premises are fully operational today and can serve and are serving ocean common carriers. PAOHT can compete with SSAT without making any capital improvements to the PAOHT Premises.

O. The PAOHT Premises represent a quarter of the overall maritime area in the Port with berth depth of 50 feet.

P. Multiple maintenance and repair facilities, gates, refrigerated cargo handling areas and administrative areas are located throughout the PAOHT Premises.

Q. The initial term of the PAOHT Lease expires December 31, 2059.

R. SSAT or its predecessors have been a tenant of the Port since 1966.

S. Pursuant to the SSAT Assignment, the Port has granted to SSAT a non-exclusive preferential assignment of approximately 151 acres of improved land and water area referred to as "Berths 57-59" in the Middle Harbor Terminal Area, also known as the Oakland International Container Terminal ("SSAT Premises").

T. The initial term of the SSAT Assignment is 15 years, expiring October 18, 2017. This term extends beyond the forecast period utilized by the Port in evaluating the PAOHT lease. SSAT has two 5-year option periods to extend the SSAT Assignment.

U. The SSAT Assignment is for a non-exclusive preferential assignment, as opposed to the PAOHT Lease, which is a lease permitting the use by secondary users only in the event of "Major Events", i.e. natural disaster, national emergency, material

destruction of the Port Area (as defined in the Charter of the City of Oakland), war, Act of God, or other major event that substantially interferes with operation in the Port Area. In contrast, the SSAT Assignment allows for the Port or the Port's designees ("Secondary Users") to berth vessels or load and discharge cargoes on the SSAT Premises as long as such use does not unnecessarily interfere with SSAT's operations.

V. SSAT and PAOHT are similarly situated as they are both tenants of the Port, providing marine terminal services to ocean common carriers moving container cargo under similar transportation circumstances.

W. SSAT and PAOHT are competing for the same business of ocean common carriers at the PAOHT Premises and SSAT Premises, respectively.

X. The facilities provided to SSAT are comparable to facilities provided to PAOHT in that both are fully capable of providing similar services to ocean common carriers.

Y. SSAT and PAOHT have been accorded significantly different treatment. For example, PAOHT will pay in 2010 Basic Rent of \$19,500,000 for the 166 acres the Port alleges cover the PAOHT Premises. This rent is in lieu of charges that would otherwise apply under the Port's tariff for (i) dockage and (ii) wharfage, wharfage demurrage and wharf storage. When amortization of an upfront fee of \$60 million and the guaranty required by the PAOHT Lease are factored in, this results in 2010 rent of approximately \$148,249 per acre, which amount is based on the 166 acres the Port contends the PAOHT Lease covers and the ITS Assignment to PAOHT of the NEPAA for adjacent Berths 25/26, which was effective October 1, 2010.

Z. SSAT, on the other hand, for its 151 acres, has a minimum annual guarantee ("MAG") and Standard Breakpoint Level ("BPL") in 2010 of 2,400 TEU per

acre. After application of the basic and overage all inclusive throughput rates, the per acre charge for 2010 was approximately \$268,765.

AA. On information and belief, the variance between the assignment of the SSAT Premises and the lease of the PAOHT Premises and Berths 25/26 (including 166 acres the Port claims the PAOHT Lease covers and the acreage covered by the ITS Assignment) in 2010 was approximately \$120,516 per acre or over \$18.2 million for 2010 alone. This variance decreases with the loss of volume from the SSAT Premises and then increases again in subsequent years.

BB. In addition, the Port has given or leased nine (9) port cranes to PAOHT without any additional rent. PAOHT pays rent for one (1) crane at Berths 25/26.

CC. SSAT has already lost substantial business, over 124,700 containers a year, because of PAOHT's significantly lower land lease cost. The initial loss of 51,000 containers resulted from the movement of three services to Berth 24, previously utilized by ITS. ITS took over Berth 24 on or about July 1, 2008 pursuant to a Port of Oakland Tariff No. 2A Standard Space Assignment: Wharf/Space. This was modified by an Amended and Partially Restated Space Assignment Agreement in September 2009. ITS's per acre rate for its space assignment at Berth 24 was comparable to the favorable lease terms provided to PAOHT. Berth 24 was released to PAOHT pursuant to the PAOHT Lease on January 1, 2010. On information and belief, arrangements were made for these services to remain at Berth 24 after January 1, 2010, taking advantage of the preferred rates in the PAOHT Lease.

DD. When PAOHT took over Berths 20-24 on January 1, 2010, it permitted ITS to continue to operate Berth 24 pursuant to a Berth 24 License Agreement, which agreement expired on August 31, 2010.

EE. The August 2, 2010 ITS Assignment of the NEPAA for adjacent Berths 25/26 to PAOHT became effective on October 1, 2010. The Port consented to this assignment, which increased PAOHT's facilities by approximately 44.3 acres and crane capacity by three (3) cranes. Berths 25 and 26 are fully operational today and their inclusion has increased the facilities used by PAOHT to include over 5,500 feet of berth length.

FF. The PAOHT Lease provided PAOHT with expansion rights into Berths 25 and 26 upon payment of an Expansion Upfront Fee of \$19,000,000. By consenting to the ITS Assignment, the Port further unduly favored PAOHT by permitting it to avoid this fee. If all options are exercised under the assignment by PAOHT, the ITS Assignment will expire on or about June 30, 2023.

GG. The loss of container volume from the SSAT Premises and the addition of Berths 25 and 26 to the premises occupied by PAOHT decreases the per acre variance between what SSAT pays and what PAOHT pays for about one year, and then the variance steadily increases.

HH. The business lost by SSAT and the rate concessions that SSAT has been forced to grant its existing customers will result in a loss of gross revenues to SSAT of over \$46.9 million per year. If the unreasonable preference to PAOHT is not remedied, additional SSAT business of approximately 146,041 containers a year could move to the PAOHT Premises and Berths 25/26 as a result of the lower rates PAOHT is able to offer due to its significantly more favorable lease terms. This would result in a total loss of approximately 274,644 containers and \$95.5 million in revenue per year to SSAT.

II. The movement of cargo from SSAT to the PAOHT Premises was wholly anticipated and foreseen by the Port. In evaluating the PAOHT Lease, the Port's consultants warned that some of the carriers utilizing the SSAT Premises would switch to the PAOHT Premises beginning in 2010.

JJ. Lower rates are the only reason offered by SSAT's customers for leaving or threatening to leave the SSAT Premises for the PAOHT Premises and Berths 25/26. PAOHT is able to offer lower rates due to the undue and unreasonable preferences favoring PAOHT in the rent it pays the Port.

KK. The Port's actions are the proximate cause of damage to SSAT.

LL. Despite SSAT's request that the Port take action to remedy the extremely unfair and prejudicial treatment of SSAT so that it can compete for business on a more equal footing with PAOHT, the Port refuses to deal with SSAT and continues to refuse to deal with SSAT and has continued the foregoing undue and unreasonable preferences favoring PAOHT and prejudices disadvantaging SSAT.

MM. There is no valid transportation factor for the foregoing undue or unreasonable prejudices against SSAT and undue or unreasonable preferences advantaging PAOHT or for the Port's refusal to deal with SSAT.

NN. The projected movement of containers cargo from the SSAT Premises to the PAOHT could result in cumulative revenue losses to the Port from the SSAT Assignment of over \$123,000,000 prior to the expiration of the initial term of such assignment.

OO. PAOHT has made no commitment in the PAOHT Lease or the ITS Assignment to bring substantial new business to the Port.

PP. PAOHT has made no commitment in the PAOHT Lease to make substantial capital improvements to the PAOHT Premises.

QQ. Although the Agenda Report stated that the PAOHT proposal “included a business plan that would invest over \$2.5 billion to improve the terminal over the life of the concession,” it claimed that the PAOHT Lease is “categorically exempt from requirements of the California Environmental Quality Act (“CEQA”) pursuant to the Port CEQA Guidelines, Section 15301(p), which exempts renewals, extensions or amendments to leases or license and concession agreements where the premises or licensed activity was previously leased or licensed to the same or another person, and involving negligible or no expansion of use beyond that previously existing.”

RR. SSAT and PAOHT are not inherently different, do not operate under different transportation circumstances, have no difference in cargo characteristics handled at the terminals, and are equally creditworthy.

SS. SSAT is not receiving benefits proportionate to the charges allocated to it, while PAOHT is receiving equal or greater benefits but does not pay as much as SSAT.

TT. The differences between (1) the PAOHT Lease and the ITS Assignment, and (2) the SSAT Assignment unjustly and excessively disfavor SSAT, although SSAT is contractually committed to moving a substantially higher volume of cargo through the Port than is PAOHT.

UU. Unlike SSAT which has a Minimum Annual Guarantee per acre, PAOHT does not have a Minimum Annual Guarantee under the PAOHT Lease.

VV. PAOHT has 15 years to meet its aggregate Interior Point Intermodal (“IPI”) Cargo minimum of 250,000 TEU under the PAOHT Lease. This is approximately 16,666 TEU per year.

WW. SSAT, by contrast, has a 2010 minimum of 74,880 TEUs of IPI cargo. This amount is subject to additional increases.

XX. The difference in payments made by SSAT and PAOHT are unjustly and unreasonably excessive.

V. Violations of the Shipping Act

A. As a result of the foregoing, the Port has violated and continues to violate the Shipping Act, 46 U.S.C. §§ 41106(2) and (3) and 41102(c).

VI. Injury to SSAT

A. As a result of the Port's aforementioned violations of the Shipping Act, SSAT has sustained and continues to sustain injuries and damages, including but not limited to lost business and higher rents, costs, and other undue and unreasonable payments and obligations to the Port. SSAT believes its damages are in the millions of dollars. A more precise amount will be determined at hearing.

VII. Prayer for Relief

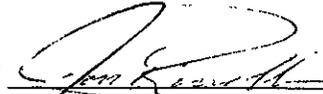
A. Statement regarding alternative dispute resolution procedures: SSAT has met directly with Port officials in an attempt to resolve this dispute, but the Port has rebuffed SSAT's requests. Therefore, SSAT does not believe that alternative dispute resolution procedures would be productive and SSAT has not consulted with the Commission's dispute resolution specialist.

B. **WHEREFORE**, Complainant SSAT prays that the Port be required to answer the charges in this Complaint; that after due hearing in Washington, D.C. an order be made commanding the Port to cease and desist from engaging in the aforementioned violations of the Shipping Act, putting in force such practices as the Commission determines to be lawful and reasonable; and that an order be made

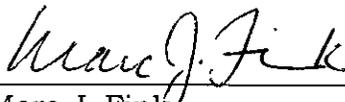
commanding the Port to pay SSAT reparations for violations of the Shipping Act, including the amount of the actual injury, plus interest, costs and attorneys fees, and any other damages to be determined; and that the Commission order any such other relief as it determines appropriate.

Date: June 7, 2012

Respectfully submitted,



Jon E. Rosselle
Vice President
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