B E F O R E T H E
FEDERAL MARITIME COMMISSION

Docket No. 09-08

SSA TERMINALS, LLC
A N D
SSA TERMINALS (OAKLAND), LLC
COMPLAINANTS

V.

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

RESPONDENT

ANSWER OF RESPONDENT TO AMENDED COMPLAINT

Respondent, named as The City of Oakland, acting by and through its Board of Port Commissioners (the "Port"), by the undersigned, hereby answers the above-captioned Amended Complaint filed by Complainants, SSA Terminals, LLC and SSA Terminals (Oakland), LLC (collectively, "SSAT"), as follows:

I. Complainant

A. On information and belief, Respondent admits the allegations contained in Paragraphs I.A.

B. On information and belief, Respondent admits the allegations contained in Paragraphs I.B.

II. Respondent

A. Respondent admits the allegations contained in Paragraph II.A. that its offices are located at 530 Water Street, Oakland, California, 94607. Since Respondent holds certain lands in trust for the State of California, it denies the remaining allegations in Paragraph II.A.

B. Respondent admits the allegations contained in Paragraph II.B.

III. Jurisdiction

A. Subject to, and without prejudice to, the defense available to the Port as an arm of the State of California under the Eleventh Amendment of the United States Constitution, the Port admits the allegations contained Paragraph III.A., in that it is otherwise a marine terminal operator with respect to the leasing of facilities and granting of preferential assignments. Respondent otherwise denies the allegations contained in Paragraph III.A.

B. Respondent admits the allegations contained in Paragraph III.B.

C. Respondent admits the allegations contained in Paragraph III.C.

D. Respondent denies the allegations contained in Paragraph III.D.

IV. Statement of Facts and Matters Complained of

A. Respondent denies the allegations contained in Paragraph IV.A Respondent did not act unfairly or with undue prejudice in leasing terminal space to Ports America Outer Harbor Terminal, LLC ("PAOHT"). Rather, SSAT had the opportunity to pursue the space on Berths 20-24 and affirmatively chose not to participate in the process. With regard to the refusal to deal allegations, the Port has maintained an open channel of dialogue with SSAT.

B. Respondent denies the allegations contained in Paragraph IV.B.

C. Respondent admits the allegations contained in Paragraph IV.C.

D. Respondent admits the allegations contained in Paragraph IV.D., subject to the qualification that this was a ten year average, and that the average in the preceding five years was lower.

E. Respondent admits the allegations contained in Paragraph IV.E.

F. Respondent admits that it sent the RfP only to those parties who responded to the RfQ and made the "short list." Complainants failed to respond to the RfQ and therefore were not considered "short list" by reason for their failure to respond. Respondent otherwise denies the allegations contained in Paragraph IV.F.

G. Respondent admits that on January 9, 2009, the Port issued its addendum, instructing each of the bidders to submit its best and final offer by February 17, 2009. Respondent otherwise denies the allegations contained in Paragraph IV.G.

H. Respondent admits the allegations in Paragraph IV.H.

I. Respondent admits the allegations contained in Paragraph IV.I. The Port and PAOHT entered into the Port of Oakland Concession and Lease Agreement [for] Berths 20-24 executed by the Port on November 30, 2009 (the "PAOHT Lease").

J. Respondent denies the allegations contained in Paragraph IV.J except to the extent that they properly allege that the PAOHT Lease covers 166 acres.

K. Respondent admits that the measurement of post-Panamax berth space at the PAOHT Premises is approximately the length alleged in Paragraph IV.K.

L. Respondent admits the allegations contained in Paragraph IV.L., except to the extent that Complainants allege that their access is materially worse, which Respondent denies.

M. Respondent denies the allegations contained in Paragraph IV.M., as running cargo operations in a construction site impairs both construction and cargo operations. Moreover, Respondent notes that SSAT concedes in the Complaint that the Agenda Report recommending

approval of the PAOHT Lease "included a business plan that would invest over $2.5 billion to improve the terminal over the life of the concession."

N. Respondent denies the allegations contained in Paragraph IV.N.

O. Respondent denies the allegations contained in Paragraph IV.O.

P. Respondent admits the allegations contained in Paragraph IV.P. to the extent that there are, amongst the areas needing extensive renovation in the PAOHT Terminal certain buildings, but denies that the space as turned over to PAOHT could function as a modern container terminal without substantial work. Respondent otherwise denies the allegations contained in Paragraph IV.P.

Q. Respondent admits the allegations contained in Paragraph IV.Q.

R. Respondent admits the allegations contained in Paragraph IV.R.

S. Respondent admits the allegations contained in Paragraph IV.S., subject to the condition that while the preferential assignment is contractually "non-exclusive," in practice SSAT has had exclusive use.

T. Respondent admits that the initial term of the preferential assignment is 15 years. Respondent denies the remaining allegations contained in Paragraph IV.T.

U. Respondent admits the allegations contained in Paragraph IV.U. to the extent it alleges the quoted words appear in the PAOHT lease and that there is a theoretical right for secondary users to berth vessels and load or discharge cargo, but deny that such secondary use has taken place. Respondent otherwise denies the allegations contained in Paragraph IV.U.

V. Respondent denies the allegations contained in Paragraph IV.V.

W. Respondent admits the allegations contained in Paragraph IV.W., subject to the condition that the SSAT facilities are in superior condition compared to the facilities as turned over to PAOHT. Respondent otherwise denies the allegations contained in Paragraph IV.W.

X. Respondent denies the allegations contained in Paragraph IV.X.

Y. Respondent denies the allegations contained in Paragraph IV.Y.

Z. Respondent denies the allegations contained in Paragraph IV.Z.

AA. Respondent denies the allegations contained in Paragraph IV.AA.

BB. Respondent denies the allegations contained in Paragraph IV.BB as stated. PAOHT initially indicated its intention to purchase new

cranes. Since that time, the Port has permitted PAOHT to use the older cranes at Berths 20-24 equipment (two from the 1980s and two from the 1990s), and there are three non-operable cranes at Berths 20-21. In addition, there are three cranes under the Berth 25-26 spaces whose cost is included in the NEPAA (MAG) assigned by ITS to PAOHT. PAOHT is solely responsible for the maintenance, repair and replacement of the cranes in the concession space. In contrast, Section 10 of the SSAT License provides that the Port is solely responsible for the replacement and repair of basic crane structures and major systems, and that the Port must provide SSAT with a proposed inventory of spare parts SSAT can use for crane maintenance.

CC. Respondent denies the allegations contained in Paragraph IV.CC.

DD. Respondent admits the allegations contained in Paragraph IV.DD.

EE. Respondent admits that with the assignment from ITS, PAOHT gained 44.3 acres and 3 cranes. The total length of Berths 25-26 is approximately 1050 feet. Respondent denies the remaining allegations contained in Paragraph IV.EE.

FF. Respondent denies the allegations contained in Paragraph IV.FF.

GG. Respondent denies the allegations contained in Paragraph IV.GG.

HH. Respondent denies the allegations contained in Paragraph IV.HH.

II. Respondent admits the allegations contained in Paragraph IV.EE to the extent that the certificate of consultants initially states "that some of the carriers using SSAT will switch to OHT [Berths 20-24], after this terminal is operational (in FY 2010)," and "also projected that SSAT will attract additional volumes from existing tenants to partially offset this loss." Respondent otherwise denies the allegations contained in Paragraph IV.II.

JJ. Respondent denies the allegations contained in Paragraph IV.JJ.

KK. Respondent denies the allegations contained in Paragraph IV.KK.

LL. Respondent denies the allegations contained in Paragraph IV.LL.

MM. Respondent denies the allegations contained in Paragraph IV.MM.

NN. Respondent denies the allegations contained in Paragraph IV.NN.

OO. Respondent denies the claims asserted in Paragraph IV.OO

PP. Respondent denies the allegations contained in Paragraph IV.PP.

QQ. Respondent denies the allegations contained in Paragraph IV.MM. as written, noting that while there might not have been a CEQA filing necessary at lease inception, PAOHT's obligations are set forth in and governed by the PAOHT Lease, not the Agenda Report. Section 16(a) of Exhibit A to the PAOHT Lease states "[PAOHT] shall comply with conditions related to Concessionaire Operations set forth in any environmental review documents completed pursuant to CEQA or any mitigation measures or requirements existing as part of a MMRP related to Concessionaire Operations existing as of the Commencement Date." Section 16(d) requires PAOHT to "pay for all costs of environmental review required under CEQA and NEPA (as reasonably determined by the Port in its sole discretion as the CEQA lead Governmental Authority) prior to any Authorization (including, but not limited to, Port building permit and other approvals...." Furthermore, Section 16(d) requires PAOHT, "at its sole cost and expense, fund, comply with, and implement all mitigation measures or conditions of Authorizations or permits, including those that are required under any document prepare pursuant to CEQA or NEPA, contained in any MMRP or in any Environmental Impact Report or Mitigated Negative Declaration or similar documents prepared pursuant to CEQA or NEPA related to Concessionaire Operations." As such, while the Port's entry into the PAOHT Lease was exempt from CEQA requirements, actions by PAOHT on the premises are covered by CEQA.

RR. Respondent denies the allegations contained in Paragraph IV.RR.

SS. Respondent denies the allegations contained in Paragraph IV.SS.

TT. Respondent denies the allegations contained in Paragraph IV.TT.

UU. Respondent admits the allegations contained in Paragraph IV.QQ. in the sense that the term "Minimum Annual Guarantee" does not appear in the PAOHT Lease given the totally different financial structure of the Lease. Respondent otherwise denies the allegations contained in Paragraph IV.UU.

VV. Respondent admits that Section 4.5 of the PAOHT Lease imposes an Interior Point Intermodal ("IPI") Cargo Penalty if "the imported loaded aggregate IPI Cargo for Concession Years 1 through Year 15 is less than the Aggregate IPI Cargo Minimum. The total IPI Cargo Penalty shall be calculated by multiplying (i) the total shortfall between [PAOHT's] actual aggregate IPI Cargo performance for Concession Years 1 through 15 and the Aggregate IPI Cargo Minimum, and (ii) the IPI Cargo Penalty." Respondent otherwise denies the allegations contained in Paragraph IV.VV.

WW. Respondent admits that SSAT has a 2010 Minimum of 74,880 of IPI cargo, and that there are provision for increasing this.

Respondent otherwise denies the allegations contained in Paragraph IV.WW.

XX. Respondent denies the allegations contained in Paragraph IV.XX.

V. Violations of the Shipping Act

A. Respondent denies the allegations contained in Paragraph V.A.

VI. Injury to SSAT

A. Respondent denies the allegations contained in Paragraph VI.A.

VII. Prayer for Relief

A. Respondent admits that allegations in Paragraph VII.A. that it has met with SSA officials, but denies that it "rebuffed" SSAT's requests, or that the Port's position was unreasonable. Respondent will address the remaining allegation contained in Paragraph VII.A. as required by the Scheduling Order entered herein.

WHEREFORE, Respondent requests that the Complaint be dismissed in its entirety with costs and attorneys' fees awarded to the Port.

DEFENSES

1. Complainants have failed to state a claim upon which relief can be granted.

2. Complainants' allegations are too conclusory to state a claim for relief.

3. Complainants' claim under the Shipping Act, 46 U.S.C. §§ 41106(2) and (3) and 441102(c) fails because the Shipping Act only prohibits unreasonable preferences or prejudices. It does not preclude a port from making reasonable business decisions based on the facts and circumstances of each particular situation. Complainants were not subjected to wrongful differential treatment, and their comparison of the SSAT Preferential Assignment with the PAOHT Lease fails to account for the fundamentally different structure of a public-private partnership agreement. By way of example, and not limitation, the Complaint fails to properly account for the fact that PAOHT paid the Port $60,000,000 before it even took possession of the premises, and that PAOHT paid approximately $10,000,000 in Gate improvements before taking possession of the premises.

4. Respondent is an arm of the State of California for purposes of the Eleventh Amendment of the United States Constitution and thus the Commission does not have jurisdiction over private party claims.

5. The allegations on which the Complaint rests are time-barred.

6. Complainants are estopped from asserting the claims in the Complaint because Complainants failed to pursue the terminal space covered by the PAOHT Lease.

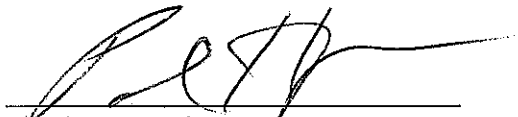
7. As a matter of law, the Port is entitled to use and rely on an open bid process.

8. A Public-Private Partnership is so inherently different from a Preferential Assignment that the comparison presented by Complainants is inherently flawed, and any supposed difference is justified by legitimate transportation factors.

9. Complainant SSAT Terminals, LLC is no longer a party to any agreement with the Port and therefore has no standing to bring this claim.

Respectfully submitted,

Jean Banker
Deputy Executive Director
Port of Oakland



Paul M. Heylman
Saul Ewing LLP
1919 Pennsylvania Avenue, NW
Suite 550,
Washington, D.C. 2006
Telephone: (202) 342-3422
Fax: (202) 295-6723
Email: pheylman@saul.com

Attorneys for Respondent
The City of Oakland, acting by and through Its Board of Port Commissioners

Dated: August 13, 2012

VERIFICATION

Jean Banker, being first duly sworn on oath, deposes and says that she is the Deputy Executive Director for the Port of Oakland and the person who signed the foregoing Answer; that she has read the foregoing Answer and that the facts stated therein, upon information received from others, she believes to be true.

Jean Banker

Subscribed and sworn to before me by Jean Banker, proved to me on the basis of satisfactory evidence to be the person who appeared before me, in Oakland, California, this 13th day of August, 2012.

J. BETTERTON
COMM. # 1980580
NOTARY PUBLIC - CALIFORNIA
ALAMEDA COUNTY
My Comm. Exp. Jun. 2, 2016

Notary Public
For the State of California,
County of Alameda

My Commission expires: June 2, 2017

Certificate of Service

I hereby certify that a true and correct copy of the foregoing **Answer of Respondent** was emailed to the Commission and served on the below-mentioned counsel by email on this 13th day of August, 2012. In addition, I certify that the appropriate number of hard copies will be hand delivered to the Commission and served on the following counsel by first class mail postage prepaid on the 14th day of August, 2012:

Marc J. Fink
Anne E. Mickey
Heather M. Spring
Cozen O'Connor
The Army and Navy Club Building
Suite 1100
1627 I Street, NW
Washington, DC 20006-4007

Joseph N. Mirkovich
Russell, Mirkovich & Morrow
One World Trade Center, Suite 1280
Long Beach, CA 90831

Nicholas Stewart