

cc: OS/068

ORIGINAL ALJ(2)

PUB

FEDERAL MARITIME COMMISSION

DOCKET NO. 12-03

THE AUCTION BLOCK COMPANY, an ALASKA CORPORATION, and HARBOR LEASING, LLC, an ALASKA LIMITED LIABILITY COMPANY

v.

THE CITY OF HOMER, a MUNICIPAL CORPORATION, and its PORT OF HOMER

SECOND AMENDED COMPLAINT

I. The Complainants The Auction Block Company is a for-profit corporation in good standing organized under the laws of State of Alaska. The Auction Block Company's principal shareholder is its President Kevin Hogan. The Auction Block Company is a seafood processing and logistics firm engaged in the primary purchase and processing of Alaskan seafood, the provision of fishing vessel services and the procurement and use of terminal services at and around the Port of Homer. In addition, The Auction Block Company receives, handles, stores, and delivers property.

Harbor Leasing, LLC is a for-profit limited liability company in good standing organized under the laws of State of Alaska. Harbor Leasing, LLC's members are Kevin Hogan and Bronwyn E. Kennedy. Harbor Leasing, LLC is a real estate management company that leases property from the City of Homer and leases property to The Auction Block Company. References to The Auction Block Company relate at times to its status as an approved subtenant of Harbor Leasing, LLC.

The principal place of business for both Complainants is 4501 Ice Dock Road, Homer, Alaska 99603. The Auction Block Company and Harbor Leasing, LLC are subject to the provisions and protections of the Shipping Act of 1984, as amended, each as a "person" as defined in the former 46 U.S.C. § 1702(18) and in 46 C.F.R. § 515.2(p) and other authority. The Auction Block Company is also a "common carrier" as defined by the United States Department of Transportation, USDOT common carrier number 1320081. Complainants allege that the matters complained of will continue in the future and will constitute violations of the Shipping Act of 1984, as amended, in the particulars and to the extent indicated and Complainants pray for reparations and damages for injuries

1 which are and will be sustained as a result of these continuing violations. Complainants
2 have done everything necessary to bring and maintain this Complaint before the
3 Commission.

4 **II. The Respondents** The City of Homer is a municipal corporation organized
5 under the laws of the State of Alaska. The City of Homer owns and operates the Port of
6 Homer in Homer, Alaska. The City Manager is Walt Wrede and the Harbormaster is
7 Brian Hawkins. The principal address is 491 East Pioneer Avenue, Homer, Alaska
8 99603. The City and Port are subject to the provisions and protections of the Shipping
9 Act of 1984, as amended, as a "marine terminal operator" as defined in 46 U.S.C. §
10 40102(14) and other authority and as a "person" as defined in the former 46 U.S.C. §
11 1702(18) and in 46 C.F.R. § 515.2(p) and other authority. The Respondents are at
12 times referred to as the "City" and/or the "Port" and/or the "Respondent."

13 **III. Jurisdiction** The City of Homer operates the Port of Homer and has filed the
14 "Port of Homer Terminal Tariff No. 600 Filed under ATFI Rules" which have been
15 adopted and ratified by the Homer City Council. The City and Port are subject to the
16 provisions of the Shipping Act of 1984, as amended, as a "marine terminal operator" as
17 defined in 46 U.S.C. § 40102(14) and other authority and as a "person" as defined in
18 the former 46 U.S.C. § 1702(18) and in 46 C.F.R. § 515.2(p) and other authority. The
19 Federal Maritime Commission has subject matter jurisdiction of this matter and personal
20 jurisdiction of the Respondents. 46 U.S.C. § 40301 and other authority.

21 **IV. History** The state of Alaska revenue sharing formula in its fish tax law provides
22 an incentive for a city to encourage a person to process fish inside the city limits and
23 thereby create local jobs and generate raw fish tax revenue for the city. The
24 Complainants' competitor, Icicle Seafoods, operated its seafood processing plant inside
25 the boundaries of the City of Homer and created additional jobs and generated tax
26 revenue for the City of Homer. However, in 1998, Icicle Seafoods' processing plant
27 burned down and was not rebuilt. The majority of the fish that Icicle Seafoods unloaded
28 in the City of Homer after 1998 was transported to and processed in the City of Seward
29 which received the job creation and tax benefits. In 2008, The Auction Block Company
30 built a processing plant on a parcel of property leased from the City of Homer by Harbor
31 Leasing, LLC. Although the Complainants were generating all the benefits to and for
32 the City of Homer that were previously generated by competitor Icicle Seafoods, the
33 City of Homer refused and continues to refuse to consider any relief or incentives to
34 Complainants or even to deal or negotiate while continuing to provide relief and
35 incentives to the competitor, Icicle Seafoods, for and with no benefit to Respondents. In
36 addition, Respondents previously entered into exclusive lease and other arrangements
37 with Complainants' competitor, Icicle Seafoods, that are in contravention and violation of
38 the Shipping Act of 1984, as amended, and the published Tariffs discussed below.
39 Respondents' actions and inactions do not serve any valid transportation purpose or

1 advance any genuine public policy concern. Respondents' actions and inactions
2 prejudice Complainants and caused and continue to cause damages to Complainants.

3 **V. Violations** Respondents City of Homer and Port of Homer failed and fail to
4 establish a nondiscriminatory and/or a reasonable regulatory process and failed and fail
5 to prevent the economic discrimination that is at the heart of the regulatory scheme
6 established by Congress in the Shipping Act of 1984, as amended. Respondents are in
7 violation of the Shipping Act of 1984, as amended, specifically 46 U.S.C. § 41102(b)
8 that states in pertinent part: "A person may not operate under an agreement required to
9 be filed under section 40302 or 40305 of this title if (1) the agreement has not become
10 effective under section 40304 of this title or has been rejected, disapproved, or
11 canceled; or (2) the operation is not in accordance with the terms of the agreement or
12 any modifications to the agreement made by the Federal Maritime Commission."
13 Respondents also are in violation of 46 U.S.C. § 41102(c) that states in pertinent part:
14 "A . . . marine terminal operator . . . may not fail to establish, observe, and enforce just
15 and reasonable regulations and practices relating to or connected with receiving,
16 handling, storing, or delivering property." Respondents also are in violation of 46 U.S.C.
17 § 41106(1) that states in pertinent part: "A marine terminal operator may not . . . (1)
18 agree with another marine terminal operator or with a common carrier to boycott, or
19 unreasonably discriminate in the provision of terminal services to, a common carrier or
20 ocean tramp." Respondents also are in violation of 46 U.S.C. § 41106(2) that states in
21 pertinent part: "A marine terminal operator may not . . . (2) give any undue or
22 unreasonable preference or advantage or impose any undue or unreasonable prejudice
23 or disadvantage with respect to any person." Respondents also are in violation of 46
24 U.S.C. § 41106(3) that states in pertinent part: "A marine terminal operator may not . . .
25 (3) unreasonably refuse to deal or negotiate." Respondents also may be in violation of
26 other provisions of the Shipping Act of 1984, as amended, that become known through
27 disclosure or discovery. Complainants reserve the right to assert and maintain those
28 causes of action.

29 **A.** Respondents' Treatment of Complainants. Respondents' "Terminal Tariff No.
30 600 Filed under ATFI Rules" effective January 1, 2009, Application Of Rule 34.30
31 regarding "Fish Dock" at Subsection 275 at page 53 sets the published rate for "Fish
32 Dock Crane" use at \$88.00 per hour for the years 2009 and 2010. Respondents' three
33 (3) "Terminal Tariff No. 600 Filed under ATFI Rules" effective January 1, 2011 and April
34 25, 2011 and July 25, 2011, Application Of Rule 34.30 regarding "Fish Dock" at
35 Subsections 275 at pages 53 set the published rate for "Fish Dock Crane" use at \$90.64
36 per hour for the year 2011 and continuing. Respondents unjustly overcharge The
37 Auction Block Company for the services received. Respondents required The Auction
38 Block Company to pay and The Auction Block Company paid the amount of \$98,488.05

1 in 2009, \$84,900.65 in 2010, \$74,452.65 in 2011 and an undetermined sum in 2012 for
2 total damages of at least \$257,841.35. Damages are continuing into the future.

3 Respondents' Treatment of Competitor. Respondents required The Auction
4 Block Company to pay and The Auction Block Company paid the rates published in the
5 Tariff and discussed above. However, Respondents do not require Complainants'
6 major competitor, Icicle Seafoods, Inc. d/b/a Seward Fisheries ("Icicle Seafoods") to pay
7 and Icicle Seafoods does not pay the rates published in the Tariff. Respondents charge
8 Icicle Seafoods for "Fish Dock Crane" use and also for the use and enjoyment of
9 multiple defined "PREMISES" based on rates in a series of exclusive lease agreements,
10 addenda and amendments executed by Respondents and Icicle Seafoods. The LEASE
11 AGREEMENT dated September 14, 1979 recorded at Book 111, Pages 884 through
12 902A in the Homer Recording District at Paragraph 3 ("USE OF PREMISES") describes
13 the real property subject to the "Land Lease" at Page 885. The AMENDMENT OF
14 LEASE AGREEMENT dated July 1, 1986 recorded at Book 172, Pages 673 through
15 678 in the Homer Recording District at Paragraph 5 ("USE OF PREMISES") at Page
16 675 leases the following premises:

- 17 (a) Lessee shall have the use of the covered structure at the Fish Dock.
18 (b) Lessee may continue to operate its ice dispensing equipment at its present
19 location on the Fish Dock.
20 (c) Lessee shall have the use of loading cranes No. 7 and 8 to a maximum of
21 1,858 hours per year. Use of the cranes by Lessee in excess of that time
22 shall be at the rate of Fifteen Dollars (\$15.00) per hour.
23 (d) Seafood wharfage charges are included within the rental given above.
24 (e) Lessee shall have the use of one fish buying shed. Lessor shall have the
25 right to select the shed for Lessee's use.

26 The SECOND AMENDMENT OF LEASE AGREEMENT dated January 25, 1988 with
27 an effective date of September 14, 1987 recorded at Book 0181, Pages 383 through
28 386 in the Homer Recording District at Paragraph 4 ("USE OF PREMISES") at Page
29 384 leases the following additional premises:

- 30 (f) The existing camping area shall be relocated to a [sic] area reasonably close
31 to Lessee's processing operations in order to facilitate placement of fill
32 material on the West side of the Homer Spit.
33 (g) The existing parking arrangements will be re-evaluated and amended to
34 reflect changes resulting from the Interim Spit Plan at the next scheduled
35 review of the lease.

36 DOCK AND CRANE USE described in (c) above is amended at Page 384 as follows:

1 Dock use includes crane use up to 1300 hour maximum. All hours of use
2 above the 1300 hour maximum shall be charged at the rate of \$15 per
3 hour. Crane use is no longer limited to cranes No. 7 and 8.

4 The Tariff at page 53 describes the "Ice Plant Bin Storage (roofed-over, open-sided
5 Storage bins at west end of ice plant building sixteen feet by twelve feet)." This 192
6 square foot structure is assessed the rental rate of \$2400 per year ("200/month"
7 multiplied by 12 months) which is a rate of \$12.50 per square foot pursuant to the Tariff.
8 Pursuant to the provisions in (a) through (g) in the USE OF PREMISES paragraphs in
9 the last two LEASE AGREEMENTS set forth above, Respondents allow Icicle Seafoods
10 to use and enjoy for commercial purposes an additional approximately 2750 square feet
11 of Respondents' property. At the annual rate of \$12.50 per square foot calculated
12 pursuant to the provisions in the Tariff, Icicle Seafoods is commercially using and
13 enjoying premises valued at \$34,375.00 (2750 square feet x \$12.50 per square foot).
14 The "Dock Use" charge stated in Paragraph 2 "RENTAL" in the SECOND
15 AMENDMENT at page 384 is \$30,900.00. The amount of \$34,375.00 is the total
16 calculated "USE OF PREMISES" benefit to competitor Icicle Seafoods which exceeds
17 the "Dock Use" charge before the calculation of Icicle Seafoods' "Fish Dock Crane" use.
18 Thus, the Respondents provide at least an annual benefit of \$3,475.00 (\$34,375.00 -
19 \$30,900.00) to Icicle Seafoods that is not provided to The Auction Block Company. In
20 addition, Respondents provide Icicle Seafoods the 1300 hours of Crane Use at no cost
21 and only charge the rate of \$15 per hour for use above 1300 hours as stated in
22 Paragraph 3 "DOCK AND CRANE USE" in the SECOND AMENDMENT at Page 384.
23 However, Respondents charge The Auction Block Company for crane use discussed
24 below. Respondents have damaged Complainants in the sum of at least \$10,425.00
25 (\$3,475.00 x 3 years). Damages are continuing into the future.

26 **B.** The Tariff dated July 25, 2011 at page 53 states: "Minimum charge per hour for
27 crane" [is] "Fifteen minutes." In application, Respondent City of Homer applies the rates
28 in 15 minute increments, so 16 minutes of use is charged at 30 minutes, 31 minutes is
29 charged at 45 minutes, and 46 minutes is charged at 60 minutes. Respondent City of
30 Homer assesses an automatic overcharge of \$1.51 to \$21.14 on average for each
31 transaction. Respondents

32 City of Homer has represented that this rate structure is set forth in the Tariff, although
33 this rate structure is not set forth in the Tariff. Respondents do not apply these
34 calculations to the Fish Dock Crane charges or use assessed to Icicle Seafoods.
35 Respondents overcharged The Auction Block Company a total of at least \$16,902.14 for
36 the years 2009 to 2011 and an as yet undetermined sum in 2012 based on the rate
37 published in the Tariff. In addition, applying the minimum charge outlined in the Tariff
38 results in a crane charge for a 1 minute use of \$24.36. For example, Respondents
39 billed and The Auction Block Company paid \$487.20 for 20 crane charges totaling 1

1 hour. In addition, Respondents billed and The Auction Block Company paid \$419.22 for
2 17 crane charges that totaled 13 minutes, an effective hourly rate of \$1,934.86 per hour.
3 These charges are not applied to Icicle Seafoods which also is not subject to a per use
4 sales tax. Damages are continuing into the future.

5 C. The Tariff at page 53 states a wharfage rate of \$4.62 per ton for the years 2009
6 and 2010 and a rate of \$4.76 per ton for the year 2011 on fish products handled by The
7 Auction Block Company. Respondents exempt Icicle Seafoods from these charges and
8 assessments. Respondents bill at \$.00231 per pound for the years 2009 and 2010 and
9 at \$.00238 for the year 2011. The Auction Block Company handled 8,026,896 pounds
10 of fish in 2009 which results in a differential and damages to The Auction Block
11 Company of \$18,542.13 in 2009. The Auction Block Company handled 6,588,169
12 pounds of fish in 2010 which results in a differential and damages to The Auction Block
13 Company of \$15,218.67 in 2010. The Auction Block Company handled 5,540,143
14 pounds of fish in 2011 which results in a differential and damages to The Auction Block
15 Company of \$13,185.54 in 2011. The Auction Block Company handled an as yet
16 undetermined poundage of fish in 2012 with a differential and damages to The Auction
17 Block Company of an undetermined sum in 2012. The total damages are at least
18 \$46,946.34 for the years from 2009 until 2012. Damages are continuing into the future.

19 D. Respondents charge and The Auction Block Company pays an additional
20 wharfage fee for ice used on fish offloaded at the fish dock of \$14.00 per ton in the
21 years 2009 and 2010 and \$14.50 per ton in the year 2011 unless the ice is purchased
22 from the City. Respondents do not assess this fee to and do not receive the fee from
23 Icicle Seafoods. The City and Icicle Seafoods executed an exclusive reciprocal rate
24 arrangement for ice that prejudices and disadvantages and thus damages The Auction
25 Block Company. Respondents have damaged The Auction Block Company in an
26 amount to be determined. Damages are continuing into the future.

27 E. The Auction Block Company and competitor Icicle Seafoods compete to
28 purchase fish in the City of Homer and at the Port of Homer and in Alaska in these
29 markets. Respondents' failure to establish, observe, and enforce just and reasonable
30 regulations and practices relating to or connected with receiving, handling, storing, or
31 delivering property damaged Complainants' ability to compete with Icicle Seafoods. If
32 Respondents had not unduly and/or unreasonably preferred and/or advantaged Icicle
33 Seafoods and/or unduly and/or unreasonably prejudiced and/or disadvantaged
34 Complainants, The Auction Block Company could have purchased more fish and
35 realized net revenues of up to \$350,000.00. Respondents unreasonably refused and
36 refuse to deal and/or negotiate with Complainants and thus damaged Complainants.
37 Damages are continuing into the future.

1 F. On information and belief, Respondents discussed and/or agreed with another
2 marine terminal operator, the City of Seward, or with a common carrier to boycott, or
3 unreasonably discriminate in the provision of terminal services to, Complainants. The
4 City of Seward is subject to the provisions and protections of the Shipping Act of 1984,
5 as amended, as a "marine terminal operator" as defined in 46 U.S.C. § 40102(14) and
6 other authority and as a "person" as defined in the former 46 U.S.C. § 1702(18) and in
7 46 C.F.R. § 515.2(p) and other authority. Respondents' actions, inactions, agreements,
8 boycotts and/or discrimination damaged Complainants. Respondents have damaged
9 Complainants in an amount to be determined. Damages are continuing into the future.

10 V. By reason of the facts stated in the foregoing paragraphs and other facts,
11 Complainants have been and are being subject to injury as a direct and proximate result
12 of and caused by the violations by Respondents of the Shipping Act of 1984, as
13 amended, specifically 46 U.S.C. § 41102(b) because Respondents operated under an
14 agreement required to be filed under section 40302 or 40305 of this title and (1) the
15 agreement has not become effective under section 40304 of this title or has been
16 rejected, disapproved, or canceled, or (2) the operation is not in accordance with the
17 terms of the agreement or any modifications to the agreement made by the Federal
18 Maritime Commission; 46 U.S.C. § 41102(c) because Respondents failed to establish,
19 observe, and enforce just and reasonable regulations and practices relating to or
20 connected with receiving, handling, storing, or delivering property; 46 U.S.C. § 41106(1)
21 because Respondents agreed with another marine terminal operator or with a common
22 carrier to boycott, or unreasonably discriminate in the provision of terminal services to, a
23 common carrier or ocean tramp; 46 U.S.C. § 41106(2) because Respondents have
24 given undue and/or unreasonable preference and/or advantage and/or imposed undue
25 and/or unreasonable prejudice and/or disadvantage with respect to Complainants; and
26 46 U.S.C. § 41106(3) because Respondents have unreasonably refused and continue
27 to refuse to deal and/or negotiate with Complainants.

28 VI. Respondents' actions and inactions proximately and legally damaged and
29 continue to damage Complainants in the following manners: Respondents damaged
30 Complainants in the sum of at least \$332,114.83 (at least \$257,841.35, \$10,425.00,
31 \$16,902.14 and \$46,946.34). In addition, Respondents placed the Complainants in a
32 competitive disadvantage in the marketplace and further prejudiced and damaged
33 Complainants in the sum of at least \$350,000.00 or in an amount to be determined after
34 further disclosures and discovery. Damages are continuing into the future.

35 VII. Wherefore Complainants pray that Respondents be required to answer the
36 charges herein; that the Complainants and Respondents have not engaged in informal
37 dispute resolution and should be directed to consider informal resolution of the dispute
38 and claims; that if informal dispute resolution is not possible or is unsuccessful, after
39 due hearing in Washington, D.C, an order be made commanding said Respondents: to

1 cease and desist from the aforesaid violations of said acts; to establish and put in force
 2 such practices as the Commission determines to be lawful and reasonable; to pay to
 3 said Complainants by way of reparations and damages for the unlawful conduct
 4 hereinabove described the sum of at least \$682,114.83, with interest and attorney's fees
 5 or such other sum as the Commission may determine to be proper as an award of
 6 reparations and damages; to assess a civil penalty or penalties as authorized under 46
 7 U.S.C. § 41107(a) for each violation, and to enter such other and further order or orders
 8 as the Commission determines to be just and proper in the premises.

9 Dated at Homer, Alaska, this 21st day of May, 2012.

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 Kevin Hogan
 President
 The Auction Block Company
 4501 Ice Dock Road
 Homer, Alaska 99603

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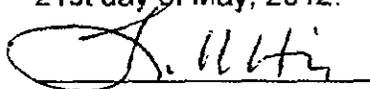
Verification

19 State of Alaska)
 20 Third Judicial District) ss

21 Kevin Hogan being first duly sworn on oath deposes and says that he is the President of
 22 The Auction Block Company, a corporation organized under the laws of the State of
 23 Alaska, and is also a member of Harbor Leasing, LLC, a limited liability company
 24 organized under the laws of the State of Alaska, and is authorized to handle business
 25 matters for both entities and is the person who signed the foregoing Second Amended
 26 Complaint on behalf of the Complainants, that he has read the Second Amended
 27 Complaint and that the facts stated therein, upon information received from others,
 28 affiant believes to be true.

29 Subscribed and sworn to before me, a notary public in and for the State of Alaska, this
 30 21st day of May, 2012.

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32 Notary Public in and for the State of Alaska

33 My Commission expires: 3-27-14

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Certificate of Service

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I hereby certify that I have this day served a copy of the Second Amended Complaint and Unopposed Motion And Memorandum To Amend Complaint upon Thomas F. Klinkner, Birch Horton Bittner & Cherof, 1127 West 7th Avenue Anchorage, Alaska 99501 by sending a copy by e-mail attachment to tklinkner@bhb.com and a copy to Holly C. Wells at hwells@bhb.com.

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Dated at Homer, Alaska, this 21st day of May, 2012.

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Kevin Hogan
For Complainant

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