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BEFORE THE
FEDERAL MARITIME COMMISSION
Washington, D.C.

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FEDERAL MARITIME COMMISSION

AMERICAN WAREHOUSING OF NEW YORK, INC, :

Complainant, :

v. :

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY :

Respondent. :

Docket No. 04-09
Docket No. 05-03

BRIEF OF PETITIONER

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March 13, 2006

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New Exhibits

- A. Map, Brooklyn Marine Terminal, Piers 1-12, PANYNJ 00516
- B. Telephone Log of Patricia Keough
- C. Pages from Tenant Alteration Application File, Fabric Tents
- D. Orders Dismissing Eviction Actions, dated February 6, 2006
- E. January 6, 2006 Letters from Van Tol to Scotto; from Van Tol to Capt. Skov-Nissen
- F. Port Authority Request For Expressions of Interest

Exhibits Admitted in Evidence at Trial

- 1. Affidavit of Chester Hopkins
- 2. Affidavit of Michael Scotto, 04-09
- 3. Nov. 19, 2001 letter from Respondent to Scotto
- 4. Affidavit of Michael Donahue, CPA
- 5. Affidavit of Joseph Bezeg
- 6. Copy of Check #18821 for \$210,000 dated December 9, 2003
- 7. Series of Checks from American warehousing to PA, dated
- 8. Affidavit of Karl Walk, 04-09
- 9. Affidavit of Matthew Yates, 04-09
- 10. Affidavit of Matthew Yates, 04-09, 05-03
- 11. Affidavit of Madsen
- 12. Affidavit of Gotwals
- 13. Affidavit of John McHugh (Paras. 6-12 admitted)

14. Prepared Testimony of Patricia Keough
15. Rebuttal Testimony of Patricia Keough
16. Lease Proposal by American Warehousing, Piers 5 and 7, May 8, 2004
17. Interrogatory Answers by the Port Authority dated Nov. 22, 2004
18. Bullet Style Memo written by Patricia Keough
19. Red Hook Proposal written by Patricia Keough
20. Red Hook Container Terminal/Brooklyn Piers Memo written by Patricia Keough
21. ASI/AW Outstanding Issues Memo written by Patricia Keough, Nov. 30, 2001
22. Brooklyn Waterfront white paper and accompany email dated
23. Amounts Due to ASI Memo
24. History of Payments by Respondent, BP 286
25. History of Payments by Respondent, BP 274
26. History of Payments by Respondent, BP 302 (Pier 7)
26. Emails from Jerri Raczynski to Walter Frank, Aug. 3 and 4, 2004*
27. Email from Arie Van Tol to Jordan Newman, Esq., Dec. 22, 2003
28. Letter from M. Scotto to Arie Van Tol, Sept. 12, 2000
29. Port Authority Financial Statement, Schedules E and F, Year ending Dec. 31, 2004
30. Email from Robert Evans to Dennis Lombardi, Aug. 11, 2004
31. Affidavit of Patricia Keough, New York City Civil Court (L/T matter), Apr. 22, 2005
32. Summary of Outstanding Rent, Exhibit 12 to P. Keough Affidavit of Apr. 22, 2005
33. Affidavit of John Hall, 04-09
34. Affidavit of John Hall, 04-09 and 05-03
35. Prepared Testimony of Richard Hacker

* duplicate number

36. Photo of Front of Pier 7 Warehouse, Dec. 1, 2005

37. Prepared testimony of Arie Van Tol

38. Rebuttal Testimony of Arie Van Tol

39. Email from Jordan Newman, Esq. to Arie Van Tol, Jan. 6, 2004 (MV Zapoteca)

40. Email from J. Newman, Esq. to R. Hacker, A. Van Tol, Aug. 10, 2004 (Safmarine)

43. Email from D. Lombardi to J. Raczynski (cc Yetka, Keough, Van Tol), Jan. 15, 2004

PROCEDURAL HISTORY

The Port Authority of New York and New Jersey ("PA") served American Warehousing, Inc. ("American") with a Notice of Termination on December 7, 2003, purporting to terminate the lease effective December 17, 2003. It also refused to allow a cocoa cargo ship to berth and unload, at which point American filed a Verified Article 78 Petition in New York State Supreme Court to force the PA to allow the ship, the UMIAVUT, to dock and unload, and to annul the notice of termination. The State Supreme Court Justice permitted the ship to unload and the PA withdrew its notice to terminate. American paid \$210,000 in back rent to the Port Authority (\$206,000 was due and owing), bringing it up to date through December 19, 2003.

For reasons detailed hereinafter, the situation thereafter began to destabilize again and seriously harm American's business. The PA served another notice to terminate on February 17, 2004, on March 31, 2004 and on June 8, 2004.¹ In August, 2004, the PA filed a summary eviction action in New York City Civil Court, Kings County, Housing Part, for the southern portion of Pier 7, as a "business holdover" and for eviction of American from the northern part of Pier 7 as a "squatter."

On August 5, 2004, American (as Petitioner) filed its Verified Complaint (Docket No. 04-09) before the Federal Maritime Commission under the Shipping Act. The PA (as Respondent) answered on August 31, 2004. Subsequently, American filed another Complaint on or about June 5, 2005, which the PA answered in due course (Docket No. 05-03). The cases

¹American removed the eviction proceedings to the United States District Court, Southern District of New York, based upon the Federal Maritime Commission's jurisdiction under the Shipping Act and for other reasons. The federal court found no jurisdiction and remanded the matter to the New York City Civil Court on November 10, 2004. On February 23, 2005, the New York City Civil Court stayed the eviction case to await the outcome of the Federal Maritime Commission case, which by then had been filed under the Shipping Act (this case).

were consolidated. Various procedural motions were made and decided. A motion for summary judgment by Respondent was denied.

Discovery was contentious, and in American's view, incomplete. There were several discovery motions, including objections, motions to compel and motions to quash subpoenas. A critical motion was decided by Administrative Law Judge Schroeder on July 20, 2005, cutting off discovery over American's protest.

Outstanding issues related to discovery include but are not limited to the following:

The PA's failure to turn over documents including emails that it was ordered to preserve in evidence after the case was initially filed. A key PA witness, Arie Van Tol, manager of the Brooklyn Marine Terminal, admitted that he deleted emails after being given notice to preserve same. A previous Order had been entered requiring the parties to preserve evidence.

Third party discovery showed that the PA's failure may have been more widespread than a single witness or two. Approximately 18,000 pages of third party produced just days before the deadline imposed by Judge Schroeder cutting off discovery showed a tremendous number of documents and emails by and between the PA's and the NYC Economic Development Corporation joint consultant team respecting a bogus "study" the team was hired to perform including public "outreach" meetings that were, in actuality, designed to influence the press, politicians and the public that the PA's desire to dispose of its Brooklyn property in favor of residential and other development was a better use of the Brooklyn waterfront than a working set of piers. The PA staff in charge of this "study" and public relations effort turned over little corresponding work, emails or documents compared to the consultants themselves. The NYC EDC turned over very little. The "study" was never released.

Finally, to assist in proving American's preference and prejudice claim, it sought discovery respecting the PA's disputes with other MTOs wherein those MTOs were late in rent payments and had other disputes with the PA that resulted in monetary disputes, including negotiations with other marine terminal operators relating to lease terms, price, abatements, investments made by the PA or the tenant, and evidence of any disputes between MTOs and the PA that had nevertheless eventuated in leases. In a letter dated January 13, 2005, the PA's counsel flatly refused to comply with this discovery request respecting negotiations, although it did represent at the trial that there were no other MTOs that were more than two months behind in rent.

The PA's conception of the case is that American paid its rent late and occupied space it did not lease. In order to limit the evidence to that theory, it had to avoid discovery on a much broader issue—the PA staff's pursuit of disposal of the Brooklyn piers. This was inappropriate because the PA's motivation for trying so hard to remove American from the Brooklyn Marine Terminal is at the heart of the animus, prejudice and discrimination claim by American against the PA, in other words, the unfair treatment the PA has shown toward American in its dealing respecting the more mundane issues of rent and space. These discovery issues were directly relevant to American's claims, or designed to lead to relevant and admissible evidence, and should not have been denied or prematurely terminated. That was error.

Counsel for American withdrew on or about October 13, 2005 and American substituted present counsel. Administrative Law Judge Krantz permitted the substitution over Respondent's protest. Petitioner's counsel moved for an extension of time to prepare for trial, which was scheduled on November 28, 2005 through December 5, 2005, beyond the month extension

granted when present counsel first came into the case in October 2005. The motion was denied, and exception taken. Petitioner indicated that it preserved its right to re-open the case.

On February 6, 2006, the Port Authority's summary eviction actions against American Warehousing as a holdover tenant on the south side and a "squatter" on the north side of Pier 7 were dismissed by the New York City Civil Court, Housing Part, for lack of subject matter jurisdiction (Exh. D hereto). Those matters had been stayed in the interests of comity by the City Court until the outcome of this case, but the PA had partially vacated the stay in order to try to collect "use and occupancy" charges during the pendency of the FMC case. The New York City Civil Court found itself without jurisdiction under the relevant case law because American proved that the PA had invoiced American for rent for the southern portion of Pier 7 after it had begun the eviction action, which rent American paid, and that the PA had not served it with adequate legal notice of the consequences of "squatting" on the northern part. As such, any orders issued by the New York City court are void *ab initio*. Any claims by the PA that the decisions of that court have collateral *estoppel* or *res judicata* effect in this action is now moot or incorrect.

STATEMENT OF THE CASE

At the center of this dispute is the PA's (1) unreasonable refusal to deal, i.e., refusal to offer or even entertain offering American a long-term lease for Pier 7; and (2) the PA's favoritism and preference toward other marine terminal operators ("MTOs") in lease terms, price and length; in capital investments; and in operational accommodations; and corresponding prejudice and animus toward American.

As regards American's refusal to deal claim, the PA admits that it "repeatedly refused to entertain any proposal for a long-term extension/renewal of the Agreement of Lease" (Answer to Complaint 04-09, ¶14). Having admitted its refusal to deal, the burden shifts to the PA to justify its action under Count I. As demonstrated below, the PA does not come close to positing credible explanations for its refusal to deal. And, to the extent that the PA's explanations could be construed as "credible," they are not reasonable as a matter of law.

As to Count II (discrimination and unlawful preference and prejudice), the PA simply denied that it had advantaged other MTOs, or prejudiced American. As demonstrated below, American has amply satisfied (and, indeed, exceeded) its burden of showing prejudice and disadvantage on Count II through its direct case (Aff.s), trial testimony and Exhs. The PA failed to adduce any evidence at trial to establish "legitimate transportation factors" for its preferences and other misconduct.

The PA has offered two affirmative defenses in this Proceeding: that American (i) failed to pay its rent and (ii) wrongfully squatted on the northern part of Pier 7 without compensating the Port Authority (Answer to Complaint 04-09, Second Affirmative Defense; same for Answer to Complaint 05-03; Exh. 17, Respondent Interrogatory Answer 19). As demonstrated below,

the record at trial fully controverts the PA's affirmative defenses which should be rejected out of hand.

STATEMENT OF FACTS

A. Marine Terminal Business Background.

Pier 7 is a finger pier on the Brooklyn waterfront in New York Harbor (Exh. A, PANYNJ 00516); it has a 269,000 square foot warehouse used to store food-grade cargo. It is certified for storage of bagged cocoa beans and cocoa-related products. American assumed the leased space from Commodity Storage Inc. ("CSI"), the prior tenant of Pier 7, when it acquired all of CSI's assets in 1999. When it assumed Commodity Storage's assets, American occupied and paid rent, including security guard fees on several piers. By 2000, it was renting Piers 2, 5, 6, 7, 9 and 12 from the Port Authority, and it had a subtenancy at Piers 8 and 11 from American Stevedoring.

The lease allowed American to receive, store and distribute cocoa beans and related cocoa products and other commodities at Pier 7 (Complaint, ¶6 (Agreement of Lease, p. 1, Exh. A thereto)). Ships dock at Pier 7 either on the north or the south side. The lease had an "accordion" provision whereby CSI was entitled to use the whole pier if it needed the space, on an "as needed" basis. An accordion lease is important in the food cargo business, especially cocoa, because the business is seasonal, with peaks and valleys. The cocoa crop arrives in New York and requires storage between October and March. During that period, American's needs for storage space are greater than during the remaining six months of the year, the "off season." It is common for MTOs and this Port Authority to allow tenants to use "swing space" on piers or elsewhere that are unoccupied or temporarily unused to store excess cargo to accommodate seasonal increases in cargo (Exh. 2, Scotto Aff., ¶7; Exh. 34, Hall Aff., ¶¶3, 6 and 7).

American is engaged in foreign commerce. Most of the cocoa stored at Pier 7 is grown on the Ivory Coast of Africa or Indonesia and arrives on foreign-flagged ships. Some comes from Ecuador. The ships are unloaded by longshoremen employed by American Stevedoring, Inc. and stored in the warehouse at Pier 7. American Stevedoring has some of the same principals as American Warehousing. However, the companies are separate and operate independently (Tr. 302, li. 9-10).²

Pier 7's warehouse meets New York Board of Trade specifications for cocoa storage. It is a New York Board of Trade licensed warehouse for cocoa in the New York harbor (including New Jersey). North America's largest chocolate supplier, Blommer Chocolate, serving major name brands including Nestle's, Mars and Hershey's, and other manufacturers and suppliers, receive and store their cocoa at Pier 7 (Exh. 31, Hall Aff., ¶¶4-6). These manufacturers require, as do their insurers and buyers, that the cocoa be stored in a N.Y. Board of Trade approved facility while it is inspected and graded, and before it is shipped out for grinding and processing (Exh. 8, Walk Aff., ¶4).

Board of Trade approved warehousing space for food commodities is rare in New York Harbor because, over time, the PA has torn down most of its enclosed piers used for break-bulk cargo storage and handling in favor of containerized operations. Ships carrying containerized cargo dock alongside large port-side cranes that unload the containers from the ships and place them on chassis to be drayed to a place for near term storage outside, or for direct shipment to their destination by truck or rail. The PA receives a fee per each container lifted off a ship. Brooklyn used to be a hub for coffee and cocoa, but coffee has ceased to exist there, and

²All references to the trial transcript shall be Tr. followed by a page number, *i.e.*, "Tr. _." Where appropriate, the Tr. and page number may be followed a reference to the line number, *i.e.*, "Tr. _, li. _."

American has the only cocoa operation left. New Jersey, where the lion's share of cargo is delivered, is almost completely containerized, except for automobiles.

Cocoa beans are fragile even when bagged. The product suffers handling, especially multiple transfers, badly. Cocoa cannot be trucked away from the arriving pier to a different place of storage without breakage resulting in damages, or costly and very time-consuming packaging measures to avoid breakage (Tr. 296-98). Some cocoa is shipped from overseas in containers (Tr. 282, li. 20-21, 25; 283, li. 1-4).

Because of the nature of cocoa cargo, American's Pier 7 operation is not only the *locus* of its business; it is the res, the business itself. American cannot, without great difficulty, substitute a non-pier warehouse location without major disruption and loss of business and customers. The PA controls all of the piers at the Brooklyn Marine Terminal, except those piers it has donated to a non-profit corporation as part of the Brooklyn Bridge Park construction (Piers 1-4 and 6), or leased to the New York City Economic Development Corporation (Piers 11-12). If the PA refuses to lease a pier to American, the PA will have put it out of business.

B. Unreasonable Disadvantage and Prejudice Toward American and Preference for Other MTOs

1. Accordion Provision in Lease

When American assumed the assets of CSI, it properly expected to get the benefit of CSI's bargain with the PA, i.e., including the accordion provision of the lease for Pier 7. American did not occupy or use the northern half of Pier 7 when it assumed the space in January 2000. It paid \$33,029.44 per month for the pier (including guard services at \$2945.87).

After Patricia Keough took over from Nick Houselog as the PA's property representative, in 2000, the PA maintained that the \$33,029.44 rental amount was for the southern side of the

pier, or half of it. The PA also tried to collect rent for the entire pier, including an extra \$30,000 for the “northern part,” basically doubling American’s rent. This became the subject of a dispute. As time wore on, the dispute involved a very significant sum. Doubling the rent for Pier 7 would affect America’s bottom line, especially if the space was not actually rented or used; American objected to that treatment. American explained to Ms. Keough that the space was not being used, to no avail. She continued to maintain that the rent was due, although not posted.

On April 1, 2001, Michael Scotto, American’s president, gave formal notice to the PA that it was “terminating” 50% of the space at Pier 7, since this was American’s best option given the circumstances, in order to try to resolve the issue and curtail further risk and damages (Exh. 14, Keough Testimony, attachment (Letter to Trish Keough from Michael Scotto, April 1, 2001, PANYNJ 00364). At that time, in 2001, American had space at Pier 6 to store excess cocoa during the peak season, and at Pier 11.

The PA “did not accept” the termination notice from Mr. Scotto. See Exh. 21. Ms. Keough continued to maintain that an extra \$30,000 per month was due.³ From January 2000 through November 2002, this amounted to \$1,030,566.45. In a memo to another PA employee, Dennis Lombardi, Ms. Keough seemed to mock the concept that the pier could be divided, and half terminated, there being no line of demarcation in the middle. In this regard, Ms. Keough wrote to Mr. Lombardi:

³ The PA’s position was that American could not terminate half of its pier leasehold—even though it was unused space— to stop rent from accruing, but that American must exercise its option to actually use the same half. Essentially, the PA tried to charge American for space it was not using for the first three years of its tenancy (Jan. 2000 – Nov. 2002), but later forbid American from using the space when it actually needed it, without having “exercised” the option to do so. American’s exercise of the option for seasonal cargo would have doubled the rent — even in the off-season. American refused to be caught up in this Catch-22. The PA’s irrational treatment demonstrates more than a desire to maximize revenue; it bespeaks unfair dealing and prejudice.

AW attempted to terminate ½ of Pier 7 on April 1, 2001 (effective May 1, 2001), which PA did not accept since the area to be vacated under the proposed lease would have been delineated by a line running east/west down the middle of the shed.

NYM[T] staff confirm that AW did not utilize the entire shed since its occupancy. In order to resolve these issues and move forward, PA should accept the \$675,694.18 that AW has agreed to pay— provided AW signs a lease and payment for the outstanding balance is received in full (Exh. 21, Nov. 2001, PANYNJ00526 (Ms. Keough's outline of "issues")).

American did not suggest that a line should run down the middle of the shed in an east-west direction. Such a line would make even less sense for unloading ships and storing cargo than the PA's insistence, later, in the six month lease, that the shed could be divided by a north-south line. There was and is, in fact, no line down the "middle," in any direction, and no reason to paint or imagine one.⁴

The rent aspect of the "northern half" dispute was settled as part of a November 9, 2002 lease deal. The PA finally recognized -- and "accepted" -- that it could not charge an extra \$30,000, or practically double the rent, for the northern part. The PA agreed to "credit" American with "rent" for the northern part of the pier for the months between January 2000 and October 2001, inclusive, in the six month lease. Of course, the "rent" was never owed, so the "credit" did not resolve any of American's outstanding issues. It was nothing but a paper credit on the PA's own books.

⁴ Depending on the year and the venue, the Port Authority uses Mr. Scotto's April 1, 2001 termination letter as either a sword or a shield. For instance, in her prepared testimony at p. 3, Ms. Keough discusses why the PA hesitated to allow a ship to dock for alleged lack of space to unload and states: "It must also be remembered that the lease contained a Special Endorsement (paragraph 10(a)) giving AWI the right to add the northern half of the Pier to its leasehold. AWI never sought to exercise that option while it occupied the northern half in violation of its lease and without paying rent." Of course, when Ms. Keough authored this prepared testimony for the instant case, the PA had also forced American off Piers 6 and 11, and it was years later.

The dispute over use of the whole pier would not have occurred had the PA recognized that a break-bulk cargo warehouseman needs to use that side of the pier at which the ships dock. That is particularly so where it is a public berth and controlled by the port itself. If a ship docks on the side not rented by the warehouseman, he would have to have a constructive, if not actual, easement over the other side of the pier to move the cargo. Indeed, PA employee Richard Hacker ("Hacker") admitted as much during his testimony at trial (Tr. 613, 631)

The northern part of Pier 7 has no value as leased space -- it could only have been used by American anyway, given the nature of cocoa cargo, including temperature, fragrance, and so forth. Even coffee and cocoa cannot be stored in the same warehouse. The PA is obviously aware of this. Indeed, one could only imagine the absurd security arrangement that would have been necessary to lease half a facility, with no common wall or other barrier to separate the two tenants. The entire arrangement would have been absurd.

Moreover, had American been limited to the southern "half," moving cargo from the northern side of the pier when a ship docks there, to the southern side would have interfered with the northern tenant's use and enjoyment of its space. This is a foreseeable conflict, and is the reason that accordion provisions exist in leases for bulk cargo finger pier warehouses, especially where cargo volume is seasonal. Realistically, the northern part was "dead" space, to be used for excess storage for seasonal cargo. It would have been impossible for the PA to rent the northern part to anyone.

Not surprisingly, the PA did not rent the northern part to anyone during the almost four years American did not use it. There is nothing in the record to suggest that the PA tried, or even considered, renting the northern part of the pier to any other tenant for those four years -- 2000,

2001, 2002 and most of 2003 when it was not used. Rather, the PA tried to collect bogus rent for the dead space.

2. Attempted Evictions for "Squatting"

In eviction actions beginning in 2004, and in the instant case, the PA claims that American is "squatting" on the northern half of Pier 7, and that that, plus untimely rent payments, were the reasons it refused to entertain granting a lease to American in January and February 2004. As discussed in Point II, infra, the PA's argument on this point is completely unsupported by the trial record. Indeed, the chronology of what transpired renders the PA's purported "explanation" for its refusal to deal physically impossible.

In or about February 2003, the PA's board of commissioners passed a resolution prohibiting its staff from entering into a lease with American. Accordingly, in May 2003, after American's six month lease expired -- the PA refused to offer American a long term lease, or any lease for that matter. Ms. Keough's telephone log confirms that, on October 8, 2003, while American was renting Pier 7 on a month-to-month basis, Ms. Keough expressed the PA's intention to terminate American's periodic (month-to-month) tenancy (Exh. B hereto). Ms. Keough's telephone log thereafter confirms that she contacted the PA's Law Department on October 15, 2003, requesting that the PA begin eviction proceedings to vacate American from the south-portion of Pier 7 (Id.). She personally served the notice to terminate on Mr. Scotto on December 8, 2003 (Exh. 14, Aff. of Service, Exh. 4 attached to Exh. 14, PANYNJ00328). Thus, the refusal to extend a lease and the decision to terminate American all occurred prior to December 9, 2003.

The trial record confirms that there is no evidence that American ever used the northern part of Pier 7 until, at worst from American's perspective, December 18, 2003, when Hacker first

claimed to have observed cocoa bags stored there (Hacker Dir., Exh. 35). How could the PA have refused to deal based upon alleged squatting which had not yet occurred? In any event, as discussed in Point II, *infra*, the photographs Hacker took to show American's purported use on December 18th actually depict the southern portion of Pier 7, not the northern portion (Exh. 1 to Exh. 35 (Hacker Direct) at p. 630-32). The first reliable evidence of use of the northern part of Pier 7 by American is reflected in photographs dated June 9, 2004, some 13 months after the PA initially refused to deal in May 2003, and four months after announcing in February 2004 that the only "proposal" the PA would consider was one by which American vacated within 60 days (*infra*). Thus, the decision not to deal and the action to evict American all predated American's use of the northern part of Pier 7. The "squatting" justification is not just a *post hoc* rationalization by the PA; it was simply false in the context in which it was offered— as a justification for the PA's refusal to deal.

3. Swing Space

The CSI lease allowed the tenant to receive, store and distribute cargo off-loaded from ships that docked at Pier 7. At the time American assumed the leasehold from CSI, it also leased and paid rent for other piers which were suitable for storage of cocoa. American had a subtenancy at Pier 11, which it used as "swing space" during the high season, and it also rented Pier 6, and Pier 5, where it also maintains an office. This combination of spaces allowed American sufficient room at the time, but an increase in cocoa volume quickly began to erode that situation. Almost immediately, American needed more storage space, and this drove the request to the PA in December 1999 for an expedited schedule for the fabric storage tents on the upland portion of Piers 6 and 7 in its "tenant alteration application." Exh. C.

The PA staff was well aware of the need for extra space during the peak season, and

which months constituted the peak season. In the tenant alteration application for the fabric tents, and the corresponding justifications written by the PA staff to its board of commissioners to gain approval for the project, the PA staff stated:

Over the past several years, ASI has attracted greater volumes of cocoa and other bulk commodities to this facility. However, ASI's storage buildings for cocoa are currently at capacity and additional storage facilities do not exist within Red Hook and are not available elsewhere at the Brooklyn-Port Authority Marine Terminal. To prevent cocoa from leaving the Port, ASI proposes to construct temporary storage buildings within Red Hook Container Terminal to accommodate the increased waterborne movements of cocoa. ASI has estimated the cost for these buildings to be \$6 million. [Exh. C, Executive Summary, Mar. 30, 2000].

The PA induced American to give up its needed storage space on Piers 6 and 11 within a short period of time in 2004 by creating an expectation that the parties were on the verge of an agreement on a long term lease, and that there were other immediate needs for Piers 6 and 11, thereby creating a shortage of space at Pier 7. The PA now seeks to take advantage of that by charging that American is "squatting" and "trespassing" on one of the only piers it has, and by simultaneously refusing to offer it swing space on the still unused piers. American has been disadvantaged and prejudiced by the PA's refusal to make swing space available at other vacant piers.

The PA knew that to deprive American of warehouse space, especially swing space it needed during the high season, was tantamount to shutting it down. When the PA's initial attempts to evict American from Pier 7 in 2003 did not achieve the desired result (the termination notice was rescinded following American's commencement of an Article 78 proceeding), the PA turned, from December 2003 through the present day, to depriving American of its swing space, boycotting ships, and spreading rumors amongst its clients about the instability of American's

space in Brooklyn. See Exh. 8, Walk Aff., ¶¶ 4-16; Exh. 2; Scotto Aff., ¶¶16, 19; Exh. 33, Hall Aff., ¶¶2-10.

4. Negotiating Tactics

a. Delayed Reimbursements for Fabric Tents

In 1999, American Warehousing requested and the PA agreed to allow American to construct 90,000 sq. ft of additional cargo storage space in the form of rubberized fabric tents, in order to meet current demand and to grow its business. The cost of the project was estimated at \$1.3 million. The tents were to be constructed in the upland areas of Piers 6 and 7. The PA consented to this construction, and encouraged it,⁵ having issued various approvals and engineering oversight as part of its regular “tenant alteration application” process. The PA authorized up to \$6 million for the project, and agreed to reimburse American, Exh. C, as an inducement to “prevent cocoa from leaving the port[.]” Exh. C, Executive Summary, March 30, 2000 (draft).⁶ The PA also withheld security, or “retainage,” amounting to 10% of the cost of the

⁵ American Warehousing was the applicant on the PA’s Tenant Alteration Application Review Request form, and the Tenant Construction form. At the PA’s New York Marine Terminals Operations Staff meeting dated Aug. 3, 2000, the minutes reflect that the PA’s approval was transmitted to American Warehousing on July 26, 2000 (“Pier 6-Cocoa Storage Tents”). The fact that the board of commissioners made the formal resolution in June 2000 in the name of American Stevedoring rather than American Warehousing is irrelevant to this case, except as noted infra, that the PA tried to use that as an excuse to delay payment. See also Exh. 28; Exh. C.

⁶ During the trial of this case, counsel for the PA asked Mr. Yates, respecting the PA giving American Warehousing permission to construct the fabric tents and pay for them, “Mr. Yates, I want to ask you to supply anything resembling a document. *** There is no document that the Port Authority ever gave you permission to building anything on that pier and in fact the provisions of lease paragraph 11 would seem to preclude it without some very explicit Port Authority permission.” Counsel for Petitioner, Ms. Bauer objected, and noted that the Port Authority had objected to turning over its tenant alteration application (“TAA”) file, but when it finally did, it showed voluminous correspondence not only negotiating and approving the tents in order to keep cocoa in Brooklyn, which it did via formal resolution of the Port Authority commissioners, but requiring inspections, insurance and so forth, and finally, ultimately, paying for them to some extent after considerable pressure by Petitioner and American Stevedoring. Yet counsel for PA went on to say that the tenant alteration file “has nothing to do with

project. For its part, American Warehousing agreed to build the tents, pay for them subject to reimbursement, and bear the risk of loss during construction and afterward. The benefit American got from the bargain was that it would have adequate space to store cocoa, recognizing that, at the time it made the bargain with the PA, it also had and used space in Piers 5, 6 and 11. Both construction and reimbursement were to be expedited.

American, through its contractor Big Top, began constructing the tents in the winter of 2000. The first tent was finished "just in time" to accommodate the unloading of a ship on April 2, 2000. Exh. C, Email from R. Larrabee to L. Borrone, Mar. 30, 2000. All five tents were constructed by June 2000.

American submitted an application for reimbursement to the PA on August 7, 2000 for \$683,034.50. The PA paid it on September 27, 2000. (The PA had rejected the first two earlier payment requests submitted by American.) Then, reimbursements for construction outlays by American Warehousing, as agent for American Stevedoring, were delayed by weeks and sometimes months, were often challenged, and amounted to hundreds of thousands of dollars in dispute.

Although fabric tents structures were finished by June 2000, the PA did not finish paying for three of them, Structures C, D, and E, until March 2002, with a final payment sometime in November 2002. Structures A and B are still in dispute and were never fully paid for. Retainage repayment was also delayed. The manager of capital programs in the PA's port commerce department recommended reducing retainage from 10% to 5% on Sept. 6, 2001 and issuing a check in the amount of \$102,240. The tenant alteration file also shows that at least \$50,000 in

American Stevedoring, nothing to do with American Warehousing." 11/28/05 334:10-12. To correct and complete the record, Petitioner moves to supplement the record with Exh. C.

retainage was still at stake in late 2004, when Dennis Lombardi recommended, as part of his “out in 60 days” proposal for American Warehousing at Pier 7, that the PA would “offer to release \$50k in retainage on the cocoa tents[.]” This offer was conditional—“even though it is a different company” and “[i]f Arie agrees.” As late as 2004, the PA was using retainage on the cocoa tents as leverage for other issues.

One excuse for non-payment by the PA was that American Stevedoring had not signed a lease for the upland area where the fabric tents were constructed. Of course, it makes no sense for the PA to tie a previously agreed-upon reimbursement arrangement for American Warehousing’s construction of fabric tents to American Stevedoring’s inking a lease for the upland area on which the tents were constructed. No rent was to be charged in the lease. Presumably the lease approved by the commissioners was desirable simply to cover property, insurance and risk issues. The PA board of commissioners’ approval did not condition reimbursement payments on an executed lease. The PA’s refusal to pay bespeaks prejudice. This is especially so because the lease had not been prepared by the PA law department or offered to American Stevedoring for execution at the time Ms. Keough used the lack of an executed lease as a reason to hold up the reimbursement payments. This is another example of Ms. Keough’s lack of credibility on a material issue, and evidence of prejudice. Another excuse was that the application to the PA was in the name of American Warehousing, while the PA commissioners’ resolution was in the name of American Stevedoring. This is discussed infra.

When American was finally paid on the first reimbursement request in the amount of \$683,034, it was not through its own calls or requests, but that of a third party. On July 5, 2000 the tent construction contractor, Big Top, wrote to Lillian Borrone, the port director, and explained that the principal of ASI and American Warehousing refused to pay Big Top any more

money (it had expended \$758,927 through July 2000) until the PA paid reimbursements due and owing. Tellingly, the demand by Big Top was faxed from Chris Jones, a PA senior engineer, who had been dealing with the technical aspects of the construction job, directly to Patricia Keough. After Ms. Borrone, the port director, stepped in, and demanded status reports, on July 26, 2000, American Warehousing received its “approval” letter from Mr. Van Tol for tent structures C, D and E. On August 10 and 17, Ms. Keough, who had tied the reimbursement payment to American Stevedoring’s signing a lease, wrote emails about the subject. Exh. C. Finally, on August 28, 2000, she indicated that staff would begin processing a purchase order “in anticipation of an executed lease.” (This would occur only after the PA law department could draft the lease— the lawyers were apparently busy with the P & O Ports/Port Newark Container Terminal lease). See Exh. C, Emails from Keough to Borrone, Larrabee and Harrison, dated Aug. 10, 17 and 28, 2000.

Another high-level PA employee suggested, during this same summer, that, “Not paying for [tents] A and B will be good incentive for Sal [Catucci, of the American companies] to get the necessary documentation in for approval.” Email from Myron Ronis to Lillian Borrone, July 24, 2000, Exh. C.⁷

It suffices to say that the untimely reimbursement for the fabric tents put extreme pressure on American Warehousing, and caused American, finally, to use both the unmet reimbursements as well as the retainage as offsets against rent owed, as a way to mitigate further

⁷ The PA refused to pay for tents A and B, and parsed the payment requests to deduct any amounts for those structures even though the construction job was a unitary job, and thus that was rather difficult. The PA would not issue approvals for tents A and B because they were located in such a way as to cause a code problem. The PA did not help resolve it. The code problem was a long-standing problem and known to both parties at the time the tents were constructed. A variance was to be sought— what happened now is lost to antiquity.

damages and risk. This was commercially reasonable behavior and does not equate with American being a "bad tenant." As explained by American's Matt Yates at trial:

"[I]t was clearly understood that American Warehousing was disbursing this money [for the tents] and when the Port Authority we contend had breached that agreement, we were left out with a huge disbursement without the corresponding refund. At that point we had a corporate decision to make, that type of financial bait and switch are exactly the types of things that can cripple a medium size company and again I say it was a huge issue (Tr. 335, li. 18-25).

In 2001, and again in 2003, after the six month lease expired and the PA had refused to negotiate a new lease, American offset against rent amounts owed for the tents and for other matters because the PA breached its duty to deal fairly with American by failing to timely reimburse it for the tent construction, and to return retainage, and various other issues.

b. Summary Eviction Attempts

Petitioner relies on the facts in John Hall's Aff., ¶¶21 to 72.

c. Ship Boycotts

On December 12, 2003, four days after Ms. Keough served a notice of termination on American, Arie Von Tol of the PA, during a telephone conversation with Matt Yates, informed American that the PA would refuse to allow a ship laden with cocoa to dock at Pier 7. This was confirmed by letter, dated December 12, 2003 (Exh. D to Yates Direct Testimony). In this regard, Yates wrote:

On Friday, 12/12, we were advised that the PA was refusing to allow cocoa cargo to be discharged at and/or be received at Pier 7 I asked that the PA reconsider it's position, as it is our view that you have no such authority to impede our use of the premises. Your response was that the decision was final and you cited the fact that a termination notice had been served as being the basis for your actions.

On December 17, 2003, not having been able to convince the PA to permit the ship to dock and with the ship still sitting in New York Harbor, American filed an Article 78 Petition in

the New York Supreme Court seeking a declaratory judgment annulling the December 8th notice of termination and seeking to allow the ship to dock at the public berth of Pier 7. Within a day, a settlement was reached that required the PA to allow the ship to dock at Pier 7 and unload. American paid \$210,000 by check (Exh. 6) for past rent⁸ it had withheld as an offset because of fabric tent reimbursement delays.

The ship boycotts have continued. In January 2004, the PA's Arie Van Tol sought advice from the PA's attorney, Jordan Newman, as to whether the PA had to allow the MV Zapoteca to dock at Pier 7 on January 17-19, 2004. Mr. Jordan responded, advising that the PA should grant these requests until "we have evicted American Warehousing." Exhibit 39. While Von Tol attempted to assert during trial that he asked Mr. Newman about this issue because the PA was "in court" and in "litigation" with American at the time (Tr. 675), he later acknowledged that he may have made a mistake on this issue (Tr. 683). In fact, the ship boycott issue in the litigation to which he referred, the Article 78 proceeding, had settled in a single day back in the preceding December. Accordingly, there was no excuse to address the prospect of turning away another ship other than the PA's desire to interfere with American's operations.

In yet another exchange on August 10, 2004, Mr. Newman again advised Van Tol and Richard Hacker that the PA should allow American to unload cargo at Pier 7 until the PA had obtained a judgment evicting American from Pier 7. Exh. 49. Mr. Van Tol had inquired about allowing the vessel Safmarine Doula to berth in Pier 7 south on August 12 to discharge cocoa.

On June 9, 2005, the PA prevented yet another ship, the UMIAVUT, laden with cocoa from discharging at Pier 7. The PA had placed a derelict ship that needed repair in Pier 7 instead.

⁸ The rent owed at that time was approximately \$206,000.

The PA has apparently now decided not to allow American to conduct its business until it obtains a judgment of eviction, because Mr. Van Tol has advised as of January 6, 2006 that further discharging of cocoa to Pier 7 will not be tolerated. Exhibit E.

Of course, the lack of space is the PA's own doing. Had the PA not forced American out of Pier 6 and out of swing space at Pier 11, there would be no storage space crisis in Brooklyn. Both Pier 6 and Pier 11 remain vacant to this day, giving the lie to supposed immediate rental prospects or other uses the PA had for those piers.

d. Arbitrary Code Enforcement

Petitioner relies on the facts stated in the Hall Aff., ¶¶10-15; Scotto Aff. ¶¶12-19.

5. Lease Terms

i. Length of Term

The PA entered into a three-year lease with American Stevedoring in 2001, and extended that lease for another three years until April 2003. The PA entered into a 25-year lease with Howland Hook Container Terminal, Inc. (25 years, beginning June 30, 1995). The PA entered into multi-year leases with New Jersey marine terminal operators, including Maher Terminals, Inc., Maersk Container Service Co., Inc. (30 years, beginning Jan. 6, 2000); Port Newark Container Terminal, LLC (30 years, beginning Dec. 1, 2000); and small marine terminal operators such as Carco, Inc, in Greenville, Jersey City (15 years, beginning on October 1, 1989) Albany Port District Commission (30 years, beginning on March 31, 2003) and others. Most of these leases are attached to the Supplemental Affidavit of Michael Scotto, dated July 6, 2005, Exhibits 1-5, and others are on file with the Federal Maritime Commission.

Tellingly, the PA offered American Stevedoring a three year lease in 2004, even though

American Stevedoring also had monetary disputes with the PA and had also offset rent pending resolution of outstanding issues, through 2002. See Exhibits 20, 21, 23. That was a renewal lease to the three year lease it offered American Stevedoring in 2001.

ii. Price Per Square Foot or Acre and Abatements

The PA not only entered into long term leases with other MTOs, but the PA rented to them in some cases for less money per acre or per square foot than it is currently charging American. (Answer to Complaint 04-09, ¶16; Leases, Exhs. 1-5 attached to Supplemental Affidavit of Michael Scotto, 05-03)

For instance, Howland Hook Container Terminal, Inc. ("HHCT") was given a lease to operate Howland Hook Marine Terminal for \$625,000 in the first year, \$1 million in the second year and \$7.7 million thereafter to the final year. As Howland Hook consists of 187 acres, and there are 43,560 square feet in one acre, the top rent that HHCT pays to the PA is 94.53 cents per square foot annually. The rents charged by the PA to the MTOs Maher and Maersk at Port Elizabeth, and Port Newark Container Terminal, Inc. at Port Newark Marine Terminal, are also quite low, ranging between \$0.67 cents per square foot (Maher) and \$1.47 per square foot (Port Newark CT), with the exception of one period in the Port Newark CT lease, from Dec. 1, 2010 to Nov. 30, 2020, where the rent to be charged is slightly higher.

By contrast, the PA charges American \$1.68 cents per square foot if American is considered to rent the whole pier (269,000 sq. ft) at \$33,029.44 per month (\$396,353 per year); \$2.68 per square foot if American is considered to rent just half of the pier (134,500 sq. ft) at \$33,029.44 per month (\$396,353 per year); and \$2.81 per square foot if the PA were to impose an additional \$30,000 charge for American's use of the northern half of Pier 7 (\$63,029.44 x 12 = 756,353.28 per year divided by 269,000 sq. ft (pier size) = \$2.81

per square foot. Amazingly, the PA is charging American Stevedoring a staggering \$3.05 per square foot for Pier 8 -- in most instances, more than three times the amount charged HHCT, Maher and Maersk.

The only reasonable charge to American for the entirety of Pier 7 (including the southern and northern parts), would be \$1.68 per sq. ft. (although that would still exceed every other MTO in the New York district other than Stevedoring, American's sister company.

iii. Capital Investments

The PA, during the relevant period, not only negotiated and issued leases to other marine terminal operators ("MTO") under its jurisdiction with whom it had, and settled, disputes of various kinds; it also invested large sums in other such facilities and gave offsets and abatements for improvements as part of renewal leases to other MTOs, while allowing its Brooklyn facilities, where American Warehousing operates, to become dilapidated. See also Scotto Supplemental Affidavit, Para. 5. Specifically, leases with terminals handling containerized cargo such as Maersk, Maher, Port Newark CT and Howland Hook CT reflect major investments that the PA will make, or has already made, over the lease term. Most of the leases described in the preceding section also come with "abatements"— discounts— that reflect concessions on the part of the PA often related to improvements that the tenant MTO will make to the property. So, for instance, Maersk has an abatement of .436 per square foot for a certain period. Port Newark CT has an abatement of \$1.49 per square foot for a certain period. Sometimes abatements are given in terms of security— letters of credit are accepted rather than actual monetary security. And so forth.

The PA itself made considerable investments in space leased to other marine terminal operators at Elizabeth, Newark and Staten Island. See Exhibit 29, Schedules F, Port Authority

Financial Statement, Port Commerce section, Capital Expenditures. These capital improvements include but are not limited to the items discussed *infra* respecting Howland Hook Marine Terminal. Those items do not include a huge investment in dredging the Arthur Kill and the Kill Van Kull, and deepening those channels— none of which improvement is required for Brooklyn, which is a naturally deepwater port.

The capital investments made at Brooklyn MT pale in comparison to the investments made by the PA in other areas of the port district to spaces leases by other MTOs. At Brooklyn, during the relevant period, the PA has expended well less than \$10 million. In 1998, the PA spent \$1.78 million wrapping piles and making concrete jacket repairs to Piers 6, 7 and 8. In 2000, the PA spent \$752,400 for Pier 7 upland paving and utilities. And in 2002, the PA expended \$2.65 million for bulkhead rehabilitation for Piers 6, 7 and 8. (Market Rental Study, BMT, Pier 7, prepared for Jordan Newman, Esq., PA, submitted to New York City Civil Court in the “use and occupancy” hearing, 2005)

C. Unreasonable Refusal to Deal

The PA executed a lease with American for Pier 7 on November 9, 2002. It unilaterally imposed a term of just six months. The PA used the six month lease⁹ to gain the benefit of the offset rent and anything else it could extract from American. At a mere six month term, the lease held little downside for the PA. Under duress, American agreed to the six month lease because it was misled to understand that it was a “stop gap” measure resolving certain issues, with the unresolved issues to be negotiated during that six month period. Patricia Keough represented to American that the PA would continue to negotiate in good faith during the six months to arrive at

⁹ The Port Authority insisted that the six month lease be back-dated to December 1, 1999 when American Warehousing took over the assets of Commodity Storage, Inc., although the six month lease was actually executed in November 2002.

a final lease. Exh. 33, Aff. of Hall, ¶¶19-21. Ms. Keough's representation was false. When the six months elapsed, on April 30, 2003, the PA refused to offer American another lease, for any period, on any terms, at any rent.

The refusal to deal was unreasonable. First, it was not predicated on untimely rent payments. The rent payments during the lease term (November 2002 through April 2003) were timely. Ms. Keough's carefully worded prepared testimony on this point (Exh. 14, at 2), is noteworthy. She states: "When the lease expired on April 30, 2004, AWI remained on the Pier as a holdover tenant, and almost immediately fell behind in the payment of its rent." Thus, even Ms. Keough admits that American timely and fully paid its rent through the end of its lease (Id.). And the "Summary of Outstanding Rent" identified within the attachments to her Direct testimony as Exh. 11 shows that, beginning in May 2003, there was no prior balance. In fact, the rent was timely paid during the lease period, as it has been throughout American's tenancy, except for two periods: in 2001 and beginning again in May 2003, when American, as discussed supra, determined to offset the PA's wrongful refusal to reimburse for construction of tent structures against the ongoing rent.

On or about December 19, 2003, American, after suing the PA, reached a settlement pursuant to which it received a substantial credit for its tent structures in consideration for American's agreement to pay \$210,000, more than resolving the rent then due (Exh. 6). American was thus current with rent payments through December 19, 2003. Nonetheless, by January 15, 2004, the PA had already decided to evict American within 60 days and refuse to negotiate a lease extension. This is confirmed by an email from Dennis Lombardi to Patricia Keough that in which he wrote that AW would have to be "out in 60 days." Exh. 43.

Even with its preconceived determination to require American to vacate, the PA “agreed” to meet on February 2, and 11, 2004 to discuss American’s supposed “future” at Piers 6, 7 and 8.

In her first day of testimony, Ms Keough testified that:

going into those negotiations in February 2004, March 2004, [the PA] had issued a termination notice at that point. American Warehousing was in arrears for \$120,000 with no intention of paying (Tr. 408).

Of course, as set forth above, American was not, and could not have been \$120,000 in arrears (having just paid \$210,000 in December), and, as discussed infra, no new termination notice had yet been sent.

On her second day of cross-examination, upon being confronted with documents confirming her prior day’s testimony to be false, Ms Keough became completely unglued, first testifying that American was only \$7,000 (not \$120,000) in “arrears” as of the start of negotiations (Tr. 509) and then testifying that \$120,000 might be correct, but that it would have included the rent for March -- one month after the date on which the PA announced that it would not extend any lease to American (Id.). Then, Ms. Keough testified that \$120,000 would also have included February’s rent (Tr. 511); then, amazingly, she testified that the amount might be \$88,000 or \$87,000 (Id.). Regardless of the version of the truth the PA attempts to present in opposition to this brief, it is clear that American’s rent was paid prior to negotiations and the PA’s “proof” submitted to undermine that point is, to say the least, self-conflicting, if not totally unsubstantiated.

At the first meeting convened to discuss the lease, on February 2, 2004, the PA’s only “offer” to American was to vacate Pier 7 by March 31, 2004 -- in other words, to get out in 60 days. Exh. 19. This was reiterated at a follow up meeting on February 11, 2004. Moreover, the

PA tried to cloak the "negotiations" in secrecy by requiring American to sign an onerous confidentiality agreement. Exh. 1, ¶25, Aff. of Chet Hopkins.

When no "agreement" was reached on February 2 or 11, 2004, the PA served a termination notice on February 17, 2004. Obviously, the PA had no intention of entering into a lease with American; the "negotiations" were a sham. Ms Keough admitted as much on cross-examination, as reflected below:

Q. Before you entered into negotiations with American Warehousing on February 2, 2004, you didn't have any intention of offering them a lease is that correct? [Objection overruled.]

A. We didn't consider entering into a long-term lease with American Warehousing for Pier 7, no.

Q. What was the point of the negotiation?

A. The point of the negotiation— because we were talking about a lease for Pier 5 at the time. There [sic] was monies that were due on Pier 6 at that time and we were talking about that. We were talking about Pier 7 and at that time there was a termination proceeding that was ongoing and it was out hope we could come to an agreement that perhaps was short term that would get us to the point where American would vacate the premises.

* * * * *

A. We would have considered a shot term arrangement that at the end of that arrangement would have ended in a warrant of eviction or some type of agreement that they agreed to vacate the premises (Tr. 421, 422).

LEGAL ARGUMENT

I

THE PA ENGAGED IN ABJECT DISCRIMINATION, CONFERRED PREFERENTIAL TREATMENT TO OTHER MTOs OVER AMERICAN, AND OTHERWISE VIOLATED §1709(d)(4) OF THE SHIPPING ACT

The Shipping Act of 1916 (the "Shipping Act"), 46 U.S.C. §§801-42, amended by 46 U.S.C. §§1701-1720 (Supp.1987) (the "Shipping Act of 1984"), regulates the common carriage

of goods by water in interstate and foreign commerce. Sea-Land Serv., Inc. v. Murrey & Son's Co., 824 F.2d 740, 741 (9th Cir. 1987). The Shipping Act's primary purpose is to eliminate discriminatory treatment of shippers and carriers. Logistics Management, Inc. v. One (1) Pyramid Tent Arena, 86 F.3d 908, 916, n. 13 (9th Cir. 1996); Sea Land, 824 F.2d at 741, citing Consolo v. Federal Maritime Comm'n., 383 U.S. 607, 622-23, 86 S. Ct. 1018, 1027-28, 16 L. Ed. 2d 131 (1966); Nepera Chem., Inc. v. Sea-Land Serv., Inc., 794 F.2d 688, 693 n. 34 (D.C. Cir. 1986).

In furtherance of its principal objective, the Shipping Act states in pertinent part:

No marine terminal operator may give undue prejudice or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.

46 U.S.C. §1709(d)(4). It is undisputed that the PA is an MTO and is thus covered by the prohibitions set forth in the Act. It is equally undisputed that American is also an MTO, protected by the provisions of the Act.

The elements of an unreasonable preference or prejudice analysis are: (A) two parties are similarly situated or in a competitive relationship; (B) the parties were accorded different treatment; (C) the unequal treatment is not justified by differences in transportation factors; and (D) the resulting prejudice or disadvantage is the proximate cause of injury. Ceres Marine Terminal, Inc. v. Maryland Port Administration, Docket No. 94-01 at 26 (10/10/97). In application, the analysis requires the complainant to show that it was similarly situated with another party, received disparate treatment and, as a consequence, sustained an injury. The considerable burden of proving that the different treatment was "based upon legitimate transportation factors" -- part (C) of the analysis -- rests with the respondent. Id., citing Cargill, Inc. v. Waterman Steamship Corp., 24 F.M.C. 442, 461-62 (1981).

As demonstrated below, American established at trial that the PA afforded preferential treatment to Howland Hook Container Terminal, Inc. ("HHCT") and other similarly situated marine terminal operators, causing substantial injury. And, as further discussed below, the PA will be unable to establish "legitimate transportation factors" to justify its discrimination.

A. AMERICAN AND HHCT ARE SIMILARLY SITUATED AND OPERATE WITHIN THE CONFINES OF A COMPETITIVE RELATIONSHIP

To be deemed competitors, marine terminal operators need not deal in precisely the same goods. See, e.g., National Assoc. Of Recycling Industries, Inc. v. Federal Maritime Comm'n., 658 F.2d 816 (D.C. Cir. 1980) (for purposes of the Shipping Act, businesses dealing in recycled paper deemed "competitors" of firms dealing in wood pulp and wood chips since all such materials result in consumable paper products). Nor need the goods which the parties handle enjoy "functional equivalence." Id. at 820, n. 14. Rather, to be deemed competitors under the Shipping Act, the parties in question must deal in goods which have "similarity." Id.

Of course, a complainant may also succeed on an unfair preference claim in the absence of a competitive relationship with the preferred party, so long as the latter is "similarly situated" with the complainant. 46 U.S.C. §1709(d)(4); New Orleans Stevedoring Co. v. Board of Comm'rs., 2001 WL 865692, *10 (F.M.C.); also see Ceres, supra citing Port of San Diego, 9 F.M.C. 525, 547 (1966) (where the Commission ruled that a competitive relationship was not necessary to establish the existence of a preference or prejudice with respect to free time practices, explaining that free time "bears no relationship to the character of the cargo -- it is extended to cargo on equal terms without regard to size, shape, or any other characteristic inherent in the particular cargo involved"); Berthing of Seatrains Vessels in San Juan, P.R., 21 F.M.C. 279 (1978), rev'd sub nom. Puerto Rico Ports Auth. v. F.M.C., 642 F.2d 471 (D.C. Cir.

1980), and Louis Dreyfus Corp. v. Plaquemines Port, Harbor and Terminal Dist., 25 F.M.C. 59 (1982)("Plaquemines").

The Commission has construed "similarly situated" as circumstances in which both the preferred party and complainant "both were seeking the benefit which was denied to the complainant." New Orleans Stevedoring, supra, 2001 WL 865692 at *10. Here, the record confirms that Howland Hook is both a competitor of, and similarly situated with, American.

At trial, it was undisputed that American receives, stores, warehouses and facilitates distribution of products, principally cocoa. Equally undisputed was the fact that the MTO at Howland Hook also receives, stores, warehouses and facilitates distribution of cocoa (Tr. 751; also see Von Tol Examination Before Trial ("EBT") at 126). Mr. Von Tol of the PA further testified at his deposition that the Howland Hook facility is also capable of handling break bulk cargo discharged directly from ships into the warehouse (Von Tol EBT at 135). And, of course, American also handles break bulk cargo.

Businesses that deal in the same goods, at the same time, and act independently can be presumed to be competitors within the meaning of the Shipping Act, even in the absence of a specific analysis so indicating. See, e.g., Flota Mercante Grancolombiana, S.a., V. Federal Maritime Comm'n., 302 F.2d 887, 895 (D.C. Cir. 1962) (two shippers deemed competitors given that they "were both dealing in exactly the same commodity at the same time, were both 'independents,' and both shipped extensively to many of the same seaports"). Since HHCT and American both deal in the same commodity (cocoa), at the same time, are capable of handling break-bulk cargo, and are independents, they are ipso facto situated in a competitive relationship. Id.

Although HHCT also receives the cocoa by means of container (Tr. 751; also see Von

Tol EBT 126), the shipping method does not transform cocoa into another product (particularly given Von Tol's admission that Howland Hook is also capable of handling break bulk cargo) (Von Tol EBT at 135). Nor does it render HHCT any less competitive with American. Any chocolatier desirous of shipping cocoa to New York can choose between HHCT and American. As more manufacturers select Howland Hook, American is forced to operate within the confines of a continuously shrinking universe of prospective clients. To suggest that HHCT and American are not competitive is to ignore the nature of the business in which both parties are involved.¹⁰

In addition, HHCT and American are similarly situated. Both parties desired long-term leases, capital improvements and promotion of their facilities. As demonstrated in Point C(1)-(3), *infra*, the PA granted HHCT substantial preferences over American with respect to each of these benefits.

B. AMERICAN, MAERSK AND MAHER ARE SIMILARLY SITUATED

As American, Maersk and Maher are also both MTOs, renting space from the PA. Like American, Maersk and Maher each requested long-term leases from the PA. And as with American, Maersk and Maher required capital improvements to their facilities. As such, American, Maersk and Maher are similarly situated within the meaning of the Shipping Act. New Orleans Stevedoring, 2001 WL 865692 at *10. As demonstrated in Point C(4), *infra*, the PA granted Maersk and Maher substantial preferences over American.

¹⁰In addition to being competitors, HHCT and American are also similarly situated. Both are MTOs that rent space from the PA; both requested long-term leases; and both required capital improvements to their facilities.

C. THE PA CONFERRED PREFERENTIAL TREATMENT TO HHCT, PORT NEWARK CONTAINER TERMINAL, MAERSK CONTAINER SERVICE, AND MAHER TERMINALS OVER AMERICAN

The evidence adduced at trial absolutely confirms the PA's record of rank preferential treatment of HHCT over and above American. Preferential treatment exists in multiple contexts including: (1) capital projects and funding; (2) marketing and promotion; and, most importantly, (3) lease terms.

1. The PA Conferred Preferential Treatment to Howland Hook With Respect to Capital Projects and Funding

Over the last several years, the PA has funded capital improvements and, overall, marshaled its resources to redevelop completely the Howland Hook Marine Terminal facility, whereas American at Pier 7 and Brooklyn Marine Terminal generally received almost nothing. Specifically, the PA funded a capital program for Howland Hook which included, *inter alia*, a 3,000 foot wharf expansion, designed to accommodate four 725 foot ships (Tr. 737-38); the creation of a direct rail link between Howland Hook and the nation's rail freight system (Tr. 738-39); and the construction of an "intermodal facility" (Tr. 739).¹¹ All totaled, the PA's investment in the capital project at Howland Hook exceeds \$350 Million (Tr. 739) ("What it says here [in the PA press release] is correct").¹² This does not include the huge cost of dredging the Arthur Kill and Kill van Kull which serve HHCT.

¹¹In addition, the PA committed to contributing funds to dredging the Arthur Kill and Kill van Kull at Howland Hook (Tr. 742).

¹²Later in his testimony, Mr. Von Tol, apparently aware of the consequences of his testimony, feigned an inability to attest to the \$350 Million figure he previously stated was accurate (Tr. 744).

By contrast, the PA's sole capital projects undertaken for development of the facilities operated by American were erection of several tension membrane structures (Tr. 745) and "infrastructure at Pier 7," all of which totaled a mere "several million dollars" (Tr. 748). Unlike the situation at Howland Hook, the PA did not provide the initial funding of the construction of the tension membrane structures at Pier 7; rather, American funded the construction, and the PA was to provide reimbursement (Exh. C hereto). And unfortunately, (again) unlike the situation for HHCT, where the PA was dispensing hundreds of millions of dollars, the PA refused to reimburse American, claiming that (i) American's sister company, American Stevedoring, was required to first sign a short-term lease with the PA -- even though it had not yet been drafted or presented to Stevedoring and even though the lease and the reimbursement were unrelated; and (ii) the PA "could only make the check out to American Stevedoring" (Tr. 747) -- this, even though both American and Stevedoring acknowledged that the payment should be made to American (Exh. 28). Thus, whereas the Howland Hook received \$350 Million earmarked for a massive reconstruction and renovation of its entire facility, the PA merely promised to provide only "several million" for Piers 6 and 7 occupied by American -- a promise as to which the PA ultimately reneged (Yates Direct ¶20).¹³

2. **The PA Conferred Preferential Treatment to Howland Hook with Respect to Marketing and Promotion**

In addition to the vast disparity in capital projects and funding, Howland Hook received the benefit of a marketing campaign wielded by the PA, whereas the facilities operated by American received no comparable promotions. For example, the PA introduced each new phase

¹³Only after "a lot of litigation and a lot of complicated things" did the PA finally issue American "a credit" for its construction of the tent structures (Tr. 754).

of the Howland Hook capital project with a press release publicizing the enhanced facilities (See, e.g., Tr. 730, 745). By contrast, the PA declined to provide any press releases for the few projects at the facilities operated by American (Tr. 750-51).

As Von Tol conceded during trial, the press releases attracted media attention for port facilities (Tr. 745, 758). And it is self-evident that promotional activities generating positive publicity enhance the prospects for client development and future business. Thus, while the PA made Howland Hook the subject of one press release after another, engendering prospective increases in good will and future business, American struggled to enforce the PA's promise to reimburse for improvements American made and received no positive press at all.

3. The PA Conferred Preferential Treatment to Howland Hook With Respect to Leasing and Lease Terms

Lastly, unlike HHCT, the PA has refused to grant American an extended lease, instead insisting initially upon a month to month arrangement (Yates Direct ¶28) and ultimately demanding that American vacate within 60 days (Exh. 43). By contrast, the PA extended HHCT a lease to 2019 (Scotto Supp. Aff.; Yates Direct ¶26; Hall Direct ¶45). As discussed *infra*, long-term leases are critical to continuance of an MTO's business operations and good will, inasmuch as shippers and other customers are unlikely to enter into and maintain relationships with pier cargo facilities without assurances that the latter will still be operating at the time of the shipments, many of which are received months after the initial contract, and even later when suppliers and manufacturers call for those shipments (Hall Direct 7-10).

4. **The PA Conferred Preferential Treatment to other MTOs With Respect to Leasing and Lease Terms**

In contrast to the eviction within 60 days demand imposed by the PA against American (the “60-Day Vacate Demand”), the PA offered generous lease durations to the other MTOs in the New York district (other than to American Stevedoring). It bears emphasis that these lease durations included: Maher Terminals, Inc. Maersk Container Service Co., Inc. (30 years, beginning Jan. 6, 2000); Port Newark Container Terminal, LLC (30 years, beginning Dec. 1, 2000); and small marine terminal operators such as Carco, Inc, in Greenville, Jersey City (15 years, beginning on October 1, 1989); Albany Port District Commission (30 years, beginning on March 31, 2003) and others. And, as set forth in Point C(3), Howland Hook received a lease to 2019. Simple arithmetic confirms the grossly preferential treatment received by the other MTOs that lease space from the PA.

Further, it is indisputable that these other MTOs also received grossly preferential treatment in terms of price per square foot and capital investments (See Statement of Facts, supra).

D. THE PA’S FAVORITISM OF HOWLAND HOOK AND OTHER MTOs CAUSED SUBSTANTIAL HARM TO AMERICAN

As should be evident, the massive disparities between capital projects, funding, marketing, and lease terms reflect clear favoritism toward HHCT and other MTOs over American. The consequences of the PA’s stilted and divergent treatment of these facilities have been staggering. The unchallenged testimony of John Hall confirmed that, despite its long-standing success in attracting the cocoa trade, American has suffered considerable losses in the face of the PA’s misconduct. Specifically, Mr. Hall explained that the absence of a long-term lease has grossly inhibited American’s business, relegating it today to being a “last resort”

among shippers and other customers (Hall Direct 7-11). Mr. Hall further confirmed that, without a long-term lease, American stands to lose another \$15 Million over and above the monies it has lost as a result of its diminished and dilapidated facilities, the preferential treatment accorded HHCT and other MTOs, and the customers lost by virtue of the PA's refusal to extend American's lease (Hall Direct 14).

E. THE PA HAS NO LEGITIMATE TRANSPORTATION REASONS FOR DISCRIMINATING AGAINST AMERICAN

During the course of the trial, the PA's attorney regarded the preferential treatment accorded other MTOs by the PA as "irrelevant anyway" (Tr. 740). Accordingly, the PA introduced no evidence, identifying "legitimate transportation factors" or otherwise purporting to justify its disparate treatment of HHCT, other MTOs and American. Inasmuch as the PA bears the burden of proof on this issue (Ceres, Docket No. 94-01 at 26 citing Cargill, supra), the absence of any evidence of "legitimate transportation factors" requires a finding of unreasonable preference and advantage, and judgment in American's favor under 46 U.S.C. §1709(d)(4).

F. THE PA'S GENERAL ANIMUS TOWARD AMERICAN, CAUSED AMERICAN TO SUFFER UNDUE PREJUDICE, CONSTITUTING A SEPARATE VIOLATION OF THE SHIPPING ACT UNDER 46 U.S.C. §1709(d)(4)

In addition to addressing unfair preferences, the Shipping Act also strictly prohibits the PA from "impos[ing] any undue or unreasonable prejudice" upon American. 46 U.S.C. §1709(d)(4). Yet, the evidence at trial confirmed that the PA has continuously imposed undue and unreasonable prejudice upon American, almost since inception of its relationship with the PA. This undue and unreasonable prejudice includes, inter alia, as discussed supra:

- granting more favorable lease terms to competitors, which makes them far more attractive to shippers and other customers (Point I(C)(3)-(4), supra);

- devoting hundreds of millions more in capital improvements to other MTO's facilities than to American's (Point I(C)(3)-(4); also see Statement of Facts, supra); and
- heavily promoting other MTO facilities and providing no corresponding marketing effort on behalf of American (Point I(C)(3), supra).

Aside from those matters previously addressed, the PA has also:

- commenced multiple eviction proceedings against American, claiming in false Aff.s that the PA did not receive rent that it had, in fact, received (Tr. 497-500);
- sent multiple employees of the PA to spy on American and photograph its facilities under false pretenses for use in litigation not yet commenced (Tr. 578, 699, 700, 703, 721; and
- refused multiple ships from docking, preventing them from unloading at American's facilities, thereby leaving shippers and their customers unable to distribute and deliver products and materials and further harming American's reputation and business prospects (Exh. D to Yates Direct Testimony; Exhs. 39, 49; Tr. 675, 683).

Indeed, the PA's animus was further reflected in the testimony of its witnesses at trial.

As discussed in the Statement of Facts, PA witnesses, Patricia Keogh, testified falsely on material issues throughout her testimony, apparently operating under the premise that eviction of American was worth her mendacity under oath.

There can be no excuse for the PA's conduct; to excuse it would merely encourage others to follow suit. It is imperative that this tribunal issue an immediate order enjoining the PA from, not only discriminating against, but also abusing and prejudicing American on a going-forward basis.

II

THE PA VIOLATED THE SHIPPING ACT BY UNREASONABLY REFUSING TO DEAL

Section 1709(b)(10) of title 46 of the United States Code, made applicable to MTOs through §1709(d)(3), makes it unlawful to "unreasonably refuse to deal or negotiate." 46 U.S.C. §1709(b)(3); Docking and Lease Agreement by and Between Portland, Maine and Scotia Prince Cruises Ltd., 2004 WL 1895827, *1 (F.M.C.); Canaveral Port Auth., 2002 WL 418056, *1 (F.M.C.). Analyses under §1709(b)(10) ordinarily involve a two-part inquiry: whether there was a refusal to deal and, if so, was it unreasonable. Canaveral Port Auth., 2003 WL 723336, *15 (F.M.C.). However, the Commission has, at times, simplified the proof required as follows:

All that is required is that common carriers, ocean transportation intermediaries and marine terminal operators refrain from "shutting out" any person for reasons having no relation to legitimate transportation-related factors.

New Orleans Stevedoring, 2001 WL 865692 at *8.

As demonstrated below, whether evaluated as part of a one- or two-step inquiry, the record at trial confirms that the PA unreasonably refused to deal or negotiate with American.

A. THE PA REFUSED TO DEAL WITH AMERICAN

It is undisputed in this Proceeding that the PA refused to deal or negotiate a lease with American. Indeed, in ¶14 of its Answer, the PA acknowledged that:

During the course of the discussions, the PA repeatedly refused to entertain any proposal for a long-term extension/renewal of the Agreement of Lease.

Furthermore, as set forth supra, the only proposal by the PA to American required American to vacate Pier 7 within 60 days. The PA, by its own admission during trial and in the pleadings, never even considered American's proposals for a lease. The concession in PA's answer, coupled with the irrefutable fact that the PA refused even "to entertain any proposal for a long-term lease extension/renewal" shifts the burden to the PA to provide an adequate explanation for its conduct. As demonstrated below, the record at trial confirms that (A) the

PA's explanations for refusing to deal are utterly bogus, in addition to being unreasonable; and (B) the FMC's prior decisions confirm that the PA's conduct constitutes a clear violation of the Shipping Act.

B. THE PA'S EXPLANATIONS FOR REFUSING TO DEAL ARE BOGUS, IN ADDITION TO BEING UNREASONABLE

As set forth supra, the PA bears the burden of establishing its explanation for refusing to deal, whereas the complainant is required to show that it is unreasonable. Cavaneral, supra. What is and is not "unreasonable" in the context of refusal to deal or negotiate is often a fact-specific inquiry. Canaveral Port Auth., Docket 02-02 (F.M.C. 2/24/03). However, it is absolutely clear that "whether a marine terminal operator gave good faith consideration to an entity's proposal or efforts at negotiation is central to determining whether a refusal to deal or negotiate was reasonable." New Orleans Stevedoring, 2001 WL 865692 at *3, citing Seacon Terminals, Inc. v. Port of Seattle, 26 S.R.R 886 (1993). And, a port authority's abject refusal even to consider whether to grant a lease to a facility operator warrants a finding of unreasonableness. Canaveral Port Auth., supra.

Here, the PA has asserted two purported grounds for refusing to deal. According to the PA, at the time it decided not to extend a lease, January/February, 2004, American was (i) already more than \$120,000 in arrears in rent and (ii) squatting on the northern part of Pier 7's warehouse in violation of the Lease. As demonstrated below, neither of these purported justifications bears any resemblance to reality, confirming that the PA unreasonably refused even to consider a deal with American.

1. The PA's Story that American Was More than \$120,000 in Rental Arrears is Pure Bunk

As established supra, Ms. Keough, who testified for the PA on the issue of rental arrears, was forced to concede on cross-examination that, in January 2004, when the PA executed its earlier decision not to consider a lease extension, American could not possibly have been \$120,000 in arrears (Tr. 509). In fact, Ms. Keough admitted that \$120,000 could only have been accurate if American had not paid any rent from the end of December 2003 through the end of March 2004 (Tr. 511) — two rental months (February and March) after the refusal to deal at the February 2, 2004 meeting. Thus, the purported basis Ms. Keough cited for refusing to deal—a supposed \$120,000 rental arrearage on February 2, 2004—could not possibly have been accurate. In fact, as shown supra, the PA’s purported basis was unqualifiedly false.

2. **The Testimony at Trial Confirmed that the PA’s Allegation that American Was Violating its Lease at the time of the PA’s Refusal by Squatting on the Northern Part of Pier 7 Was Utterly Bogus**

The PA also asserted that it refused to deal because American had supposedly “occupied” part of the northern part of Pier 7 in violation of the Lease. For the reasons set forth below, the PA’s assertions with respect to the northern part of Pier 7 are just as insupportable as with regard to the alleged arrearages.

First, the trial record reflects that the PA dispatched Hacker to photograph and, for all intents and purposes, spy on American on three occasions prior to the decision not to consider a lease renewal to American: December 18, 2003, December 23, 2003 and January 6, 2004 (Hacker Dir. Test., Exh. 1 at 1). However, the documentary evidence confirms that American was not using the northern part of Pier 7’s warehouse at the time of any of these inspections. For example, on December 18th, Hacker took photographs which, he purported in his direct testimony, showed American’s partial use of the northern part of Pier 7 by American (Hacker

Exh. 1, p. 630-32). However, the photographs and Hacker's notes on them confirm the opposite. Specifically, after printing them, Hacker marked the photographs as depicting Pier 7S, referring to the southern part of Pier 7, not the northern part (Id.). Indeed, on the last page of Hacker's Exh. 1 (p. 630), the signs hanging from the ceiling of the warehouse clearly depict that the photograph taken on December 18th was taken of the south and central south sections -- not the northern part (Hacker, Exh. 1 at 630).¹⁴ Thus, Hacker's proof of American's use of the northern part of Pier 7 as of December 18, 2003, was non-existent.¹⁵

Hacker's schedule of visits to Pier 7, also attached as Exh. 1 to his testimony, reflects that he returned to American's facility twice more prior to the PA's decision to refuse to deal: December 23, 2003 and January 6, 2004 (Hacker Exh. 1 at 1). Hacker marked his schedule with respect to those two visits as "Tenant clean" (Hacker Exh. 1, p. 1). Although he purported at trial not to have remembered what he meant by that reference (Tr. 584-85), the photographs make plain that, during these two visits, there was no evidence that American was using any portion of the northern part of the warehouse. Specifically, the photographs of his December 23, 2003 visit show (again) that only the south and central south portions of the warehouse were being used (Hacker Exh. 1, p. 635-36; Tr. 589). The single photograph of the January 6, 2004 visit similarly reflects that only the south and central south portions of the warehouse were in use (Hacker, Exh. 1, p. 637).

¹⁴Hacker testified during the trial that the signs hanging from the ceiling accurately depict the various parts of the Pier 7 warehouse (Tr. 618).

¹⁵ Indeed, the evidence from the PA confirms that the PA knew that American had not been using the northern part of the warehouse (Exh. 21, Nov. 2001, PANYNJ00526 (Ms. Keough's outline of "issues") ("NYM[T] staff confirm that AW did not utilize the entire shed since its occupancy").

Hacker's spreadsheet further confirms that, after Hacker's January 6, 2004 visit, Hacker did not return until June 9, 2004, more than five months later (Hacker Exh. 1 at 1). Hacker also admitted that he could only testify as to the occupancy of Pier 7 as of the dates that were reflected on his spreadsheets (Tr. 583, 584). Thus, Hacker could not testify that cargo was present or not present on the northern or southern sides on any day other than those reflected on the spreadsheet (Id.), including from January 6 to June 9, 2004.¹⁶

In summary, Hacker visited the Pier 7 warehouse on three occasions prior to the PA's refusal to consider a lease extension, and, on two of them (December 23, 2003 and January 6, 2004), Hacker marked his sheet as "Tenant clean," with photographs depicting use of only the south part of the Pier 7 warehouse. And on the only other inspection date (December 18, 2003), Hacker marked his sheet "Tenant violation;" however, the photographs do not, in any way, depict that American was using the northern part of the Pier 7 warehouse (Hacker Exh. 1. at 630-32). Thus, there was no evidence at trial that American had wrongfully occupied the northern part of Pier 7's warehouse prior to the PA's long-standing decision, as reflected in the events from May 2003 through February 2004, to refuse any consideration of a lease extension, or at worst from American's perspective, its use was limited to a single instance as to which the documentary evidence reflects otherwise.¹⁷

¹⁶Van Tol testified that, following Hacker's three visits -- which, as shown above, do not reflect use of the northern part of Pier 7 -- the PA did not file any legal action to evict American from the northern part of Pier 7 (Tr. 710), warranting an inference that, either the PA was satisfied that American was not using the northern part of Pier 7 or that, if it was, its use was permissible.

¹⁷Although there are several photographs reflecting use of the northern parts of the warehouse during the summer of 2004 (see Hacker Exh. 1 at 761, 765), they are irrelevant as they were taken more than five months after the PA had already executed its earlier decision not to even consider granting American a lease extension. In other words, the PA could not have relied upon alleged squatting reflected in the late 2004 photographs because it had already made its decision well previously.

Second, even assuming that the photographs reflected repeated use of the northern part of the Pier 7 warehouse prior to the PA's refusal to consider a deal -- and the photographs show no such thing -- the PA failed to produce evidence that Hacker shared this information with the PA prior to their decision. To the contrary, when asked on cross-examination, Van Tol specifically testified that he could not recall whether Hacker had informed him of any use at the northern part of Pier 7 (Tr. 715). If the PA had been unaware of the purported squatting (and, again, there is no evidence in the record that American was illegally squatting in December 2003 and January 2004), it could not possibly have factored in the PA's refusal to deal. Therefore, this ground would constitute, at best, from the PA's perspective, an after-acquired, post hoc rationalization, not a reasonable basis to refuse to deal.

Third, the PA's contentions regarding squatting should properly be rejected outright under the doctrine of estoppel. The PA's witness, Arie Van Tol, admitted that the PA continuously received and accepted wharfage for all of the cocoa that was unloaded at Pier 7, including that which was purportedly stored on the northern part of Pier 7's warehouse (Tr. 654). Indeed, he could not think of a single vessel for which wharfage had not been paid in full (Tr. 656). Similarly, every ship that docked at Pier 7 paid full dockage fees, even those which unloaded cargo that purportedly encroached on the northern part of Pier 7 (Tr. 654).

It is well established that a party cannot accept the benefit for a transaction, but then later attempt to assert that the relationship between the parties which gave rise to the transaction did not exist or that the transaction was, somehow, non-consensual. Travellers Intern'l. AG v. Trans World Airlines, 722 F. Supp. 1087, 1098 (S.D.N.Y. 1989); Reda v. Love Taxi, Inc., 202 A.D.2d 275, 608 N.Y.S.2d 656, 658 (1st Dep't. 1994). Under such circumstances, the party that has accepted the benefit of the transactions at issue cannot deny the existence of the relationship. Id.

Lastly, it is particularly worthy of note that the landlord/tenant proceeding to evict American as a supposed "squatter" (as well as the other L&T proceeding) was dismissed for lack of subject matter jurisdiction (Exh. D).

C. THE FMC'S PRIOR DECISIONS CONFIRM THAT THE PA'S REFUSAL EVEN TO CONSIDER A DEAL VIOLATED THE SHIPPING ACT

Where a port authority refuses even to consider extending a lease to an MTO, such constitutes an unreasonable refusal to deal, particularly when the reasons offered by the port authority are inadequate. The decision in Canaveral Port Auth., supra, is instructive on this point. In Canaveral, the Canaveral Port Authority ("CPA") therein asserted that it had considered, but ultimately rejected, granting a franchise to a tug towing company. However, as in the present case, the two excuses offered by the CPA for refusing to grant a franchise were controverted by the evidence. Specifically, the CPA asserted that the application for the franchise was filed too late and that, in any event, the hearings that the CPA conducted confirmed that there was insufficient business at the port to justify an additional tug franchise.

The Commission properly ruled that:

Based on the totality of the circumstances, CPA's failure to consider Tugz's application is unreasonable, and its justifications (insufficient time, Petchem's objection, and insufficient business at the port) are inadequate. Therefore, we find that CPA violated section 10(b)(10).

Similarly, in the present case, the PA, by its own admission, never considered granting American a lease. And, as discussed above, the PA's explanations, just like the CPA's bogus excuses in Canaveral, do not even arise to the level of pretextual; rather, they are post hoc rationalizations manufactured to defeat viable Shipping Act claims.

III

THE PA'S VIOLATIONS OF THE SHIPPING ACT HAVE CAUSED INJURY TO COMMERCE AND THE PUBLIC

The PA controls the Brooklyn waterfront piers except for those it has already transferred to the City of New York or one of the City's agencies or authorities; there is no other certified pier/warehouse there for storage of cocoa. The PA is well aware of this fact. During the PA's approval of the fabric tents, in March 2000, in its own draft memorandum recommending the arrangement to its board of commissioners, the PA staff wrote:

storage buildings for cocoa are currently at capacity and additional storage buildings do not exist within Red Hook and are not available elsewhere at the Brooklyn - Port Authority Marine Terminal. To prevent cocoa from leaving the port, ASI proposes to construct temporary storage buildings within Red Hook to accommodate the increased waterborne movements of cocoa.¹⁸ (Exh. C)

In 2004, the PA forced American to vacate Pier 6 and Pier 11, which it was using for "swing space." Piers 1 through 4 and 6 will become part of a waterfront park, a non-maritime use. Initially, the PA intended to turn Piers 7 and 8 over to the City of New York, which fancied them for cruise ships. When that proved navigationally infeasible, the cruise ship plan was moved to Piers 11 and 12. To date, both of those piers remain vacant, as does Pier 6. Although those uses may eventuate some day in the distant future, the urgency that the PA imposed upon American to vacate those piers prevented the latter from gaining what it requested and desperately needed, e.g., a lease term that was of sufficient duration to allow for American's orderly transition to another location.

¹⁸ The resolution that was passed by the Port Authority board of commissioner approved the project in the name of ASI, but in fact, American Warehousing was the agent for ASI and did the work and was to be paid for it. See Exh. B. The discussions in December 1999 were with American Warehousing, the work was done by American Warehousing, and it was paid for by American Warehousing.

American is without sufficient space now to accommodate arriving cocoa. This is a crisis of the PA's own making, which the PA is using to its advantage and to American's disadvantage. Due to lack of storage space, and increased labor costs for moving cocoa around the pier to accommodate customer orders for shipment, its revenue has contracted significantly, and predictably, from 2004 to 2005 (Tr. 246, li. 20-25; 247; 249, li. 19-22). John Hall, American's warehouse manager, estimated that its losses amount to at least \$15 million. Hall Aff., ¶14.

An equally if not more important injury is the loss of well-paying jobs that American supplies for workers on the Brooklyn waterfront. American employs alone 75 men and women. If American is refused in its request for injunctive relief to get the PA to the bargaining table to work out a lease that will give the assurances it needed to retain its customers and go forward, these men and women (and their families) will be out on the street.

Public injury and injury to competition would result from the PA's eviction of American and the loss of this business. On a cargo specific level, these public injuries include reduced competition, the constriction of cocoa to just two ports, logistical problems for Blommer Chocolate, which handles 40% of America's chocolate, and a possible price increase in chocolate. Exh. 8, Aff. of Karl Walk, ¶¶4-13; Exh. 33, Hall Aff. ¶¶2, 4-12; Tr. 290-291, 294-295.

On a more general level, terminating maritime (non-cruise) cargo uses in Brooklyn would reduce the Port of New York and New Jersey to just one location: the Arthur Kill and Newark Bay. All of the PA's other facilities are located on this waterway in Newark, Elizabeth, and Staten Island, geographically a "stone's throw" from Port Elizabeth. It suffices to say, with the controversy that has occurred over the Dubai Ports World's near takeover of Port Newark

Marine Terminal's lease from P&O, to retain an alternate port location is imperative. That alternate location is Brooklyn.

Further, the PA has caused interference with foreign commerce. On several occasions, the PA has taken the unprecedented step of refusing to allow ships to dock at Pier 7, citing, ironically, space constraints in the warehouse. Space constraints at Pier 7 are the PA's own doing. Had it not demanded double the rent for Pier 7, forced American out of all available "swing space" at Pier 11 and storage space at Pier 6, and imposed other commercially unreasonable limitations on American's operations, American would have been able to accommodate more cargo as it has every intention of doing, and which is in its economic self-interest and the public interest.¹⁹

IV

ASSUMING THAT THE ALJ IS INCLINED TO RULE IN FAVOR OF THE PA, THE ALJ, RESPECTFULLY, COMMITTED MULTIPLE ERRORS PRIOR TO AND DURING THE TRIAL, WARRANTING RE-OPENING OF THE RECORD

It is American's position that the points and authorities outlined supra warrant the grant of a judgment, inter alia, declaring the PA in violation of the Shipping Act, and directing that the latter initiate immediate discussions to negotiate a long-term lease. To the extent, however, that the ALJ is inclined to render a determination in favor of the PA, especially to the extent that such a determination would be predicated upon findings of fact adverse to American, it is respectfully submitted that the ALJ should first re-open the record and schedule continued trial dates, at which time several witnesses would be recalled, several additional witnesses would be called, and further documents would be introduced. As demonstrated below, American would be

¹⁹Lastly, it is worthy of note that American is but one of three domestically operated port facilities in the United States.

entitled to this relief (assuming an otherwise adverse determination) because, respectfully: (A) the ALJ erred and abused his discretion in declining to grant American an adjournment of the trial; and (B) the ALJ wrongfully limited the cross-examination of witnesses, including, inter alia, Hacker. Each of these points is addressed in turn below.

A. THE ALJ ERRED IN DECLINING TO GRANT AN ADJOURNMENT

The decision whether to grant or deny an adjournment *within* rests with the sound discretion of the court. Guardian Assur. Co. of London v. Quintana, 227 U.S. 100, 104 (1913). Nonetheless, the courts “recognize that a continuance may be warranted when a party reasonably requests additional time to obtain counsel or to prepare for trial, because ‘a myopic insistence upon expeditiousness in the face of [a] justifiable request for delay can render the right to defend with counsel an empty formality.’” Matthews v. C.E.C. Indus. Corp., 202 F.3d 282, 283 (10th Cir. 1999) (table) (emphasis added) (quotation omitted). Accordingly, “[w]hen extenuating circumstances arise, a court should grant the parties a reasonable continuance to prepare.” Santa Maria v. Metro-North Commuter R.R., 81 F.3d 265 (2d Cir. 1996) (trial court’s denial of motion for a continuance following replacement of counsel, reversed); United States v. Tramunti, 513 F.2d 1087, 1116-17 (2d Cir.), cert. denied 423 U.S. 832 (1975) (failure to grant continuance following predecessor counsel’s death required reversal).

As explained by the Fifth Circuit in Smith-Weik Machinery Corp. v. Murdock Machine and Engineering Co., under Anglo-American law, “with trials based on the adversary system as the best means of arriving at a just and legal result,” the interests of justice require “that both parties be represented by able counsel well informed on the facts and the pertinent law.” 423 F.2d 842, 844 (5th Cir. 1970).

Here, American requested an adjournment of the trial after a conflict arose with its prior counsel, Thacher, Proffitt & Wood ("Prior Counsel"), requiring the latter's withdrawal in accordance with rules of professional responsibility. Prior Counsel was replaced by Janine Bauer, who was later joined by Michael Hiller of Weiss & Hiller (collectively, "Present Counsel"). Present Counsel requested an adjournment of the trial for several reasons, many of which were detailed in its application, dated November 23, 2005 (the "Adjournment Application"), including:

- the litigation file (the "File") provided to us [Present Counsel] by Prior Counsel consists of tens of thousands of pages, nearly all of which we have come to learn, were mixed together with litigation documents from unrelated matters; even had American [American] and its [Present Counsel] dedicated every day [from the date of substitution] (including nights, weekends and holidays) to preparing for trial, the amount of time necessary to complete the work would still have been insufficient;

- virtually all of the documents in the File were mislabeled and misidentified by coversheets, leading us [Present Counsel] to believe that the File was in serviceable condition, when, in fact, it was a disaster;

- we have only recently learned that many of the documents from which we have been working and upon which we based our trial preparation, were drafts rather than the final documents filed with the FMC; worse, we are now certain that the File lacks many critically-important documents that the Port Authority's attorneys possess, but which we have never seen.

(Adjournment Application, ¶2).

Subsequent to the Adjournment Application, Present Counsel articulated additional reasons for an adjournment which only came to light shortly before trial. These include the revelation that the PA failed to produce certain documents which it previously represented it did not have or did not exist, but which, in fact, did exist and the PA did possess (Tr. 6).

The ALJ ruled that an adjournment was not warranted for several reasons. First, the ALJ ruled that the conflict had not been disclosed (Adjournment Decision). However, as Present

Counsel pointed out in response, it would be “improper to require [American] to bargain away the attorney-client privilege in exchange for an adjournment” (Tr. 5). And certainly the ALJ cited no decisional or other authority to support the proposition that a party is required to waive its privilege in exchange for an adjournment, especially under circumstances in which the subject matter was so significant that it required Prior Counsel’s withdrawal. In response to this concern, the ALJ stated that he had “tried to avoid the implication that [he] expected bargaining away the attorney-client privilege” (Tr. 11-12); however, despite his efforts at avoiding this implication, that is precisely what the ALJ’s ruling would have required -- a waiver of the privilege under circumstances which would have been severely prejudicial to American. Accordingly, the ALJ’s first ground for denying an adjournment was, respectfully, without merit.

The second reason offered by the ALJ was that the application was not received until shortly before the trial was scheduled to begin; however, as reflected in the Adjournment Application, the full extent of the prejudice -- and thus, the need for the adjournment -- was not known until Present Counsel discovered, only just before trial that: (i) many of the documents and testimonies upon which they intended to rely were merely drafts; and (ii) most of the files upon which they relied in preparing for trial were mislabeled (Adjournment Application at ¶¶3-6). The ALJ did not address Present Counsel’s argument on this issue.

The third ground upon which the ALJ relied in denying an adjournment was his presumption that a delay would be unfairly prejudicial to the PA because a related pair of landlord-tenant proceedings (“L&T Proceedings”) were, according to the ALJ, stayed pending the outcome of this Proceeding (Adjournment Decision at 2). According to the ALJ, since the PA sought to obtain “use and occupancy” charges against, plus eviction of, American by way of the L&T Proceedings, a delay of this Proceeding would unfairly inhibit the PA’s ability to obtain

the remedies to which it claimed to be entitled (Adjournment Decision at 2). Respectfully, the ALJ's reasoning on this ground had no merit either.

Specifically, the supposed prejudice upon which the ALJ relied was not raised by the PA in response to Present Counsel's request for an adjournment (Tr. 5). Accordingly, the ALJ was presuming prejudice which was, respectfully, inappropriate. Moreover, the reason the PA did not argue that an adjournment would prolong the supposed "stay" of the L&T Proceedings and prejudice the PA was that the stay had been partially vacated to afford the PA the opportunity to collect the "use and occupancy" charges (Id.). Accordingly, an adjournment would have had no effect on the PA's ability to recoup monies to which it claimed entitlement. Lastly, the L&T Proceedings were ultimately dismissed on subject-matter jurisdiction grounds (L&T Decisions, Exhibit D hereto). The L&T Court properly ruled that, because the PA continuously invoiced and collected rent from American throughout the entire period prior to, during and subsequent to the L&T Proceeding, the PA could not meet the statutory requisites for maintenance of such a proceeding (L&T Decision).

A brief adjournment would have afforded American and its Present Counsel the opportunity to prepare appropriately for the trial herein. Indeed, subsequent to the trial, Present Counsel uncovered a panoply of documents and other evidence which would have been relevant and as to which testimony could and should have been obtained. While the PA was represented by the same counsel continuously from the inception of this Proceeding, American was forced, based upon circumstances outside of its control, to change counsel just four weeks before trial.

Exacerbating the inherent unfairness of requiring incoming counsel to prepare for trial within such a short period, the documents and transcripts comprising the working file were immense. As explained in the Adjournment Application:

In addition, the immense size of the File has made the process of organizing it and preparing for trial even more onerous. For example, the File includes more than 15,000 pages of non-party discovery documents alone, plus documents produced by the parties, (at least) four deposition transcripts, two pre-hearing conference transcripts, Pre-hearing Memoranda from both parties, Direct and Rebuttal Testimony from Witnesses, legal research, and a panoply of motions and other documents relating to multiple litigations in addition to the instant proceedings. Assuming that we devoted two minutes to reading and digesting (in written form) each page of the File (and two minutes per page is an extraordinarily conservative assumption), the non-party documents alone would consume nearly 520 hours.²⁰ Devoting five hundred and twenty (520) hours from October 22nd (the day after the file was delivered) to preparation for the Hearing would require working on only this File for nearly 16 hours per day (without lunch), every day, including Saturdays, Sundays and Thanksgiving.²¹ And that amount of work would address only the non-party documents; it would not include the document discovery from parties, answers to interrogatories, depositions, general preparation for trial (including witness preparation and cross-examination), drafting of pertinent motions and analysis of legal issues. To be clear, the month-long postponement from October 20, 2005 was simply insufficient for purposes of affording American an adequate opportunity to prepare for trial (Adjournment Application at ¶6).

Given the substantial prejudice to American, the absence of any corresponding prejudice to the PA, the extenuating circumstances which precipitated Prior Counsel's withdrawal (namely, the conflict of interest), the ALJ's denial of an adjournment, without justification, constitutes (respectfully) an abuse of discretion. To the extent that the ALJ is inclined to render a determination adverse to American, the record should be re-opened and Present Counsel permitted to introduce additional evidence and adduce further testimony to remediate the error in forcing petitioner to proceed under the circumstances herein presented.

**B. THE ADMINISTRATIVE LAW JUDGE, RESPECTFULLY,
COMMITTED REVERSIBLE ERROR, BY BARRING**

²⁰15,394 pages of documents, multiplied times two minutes per page and divided by 60 minutes per hour equals 513 hours.

²¹This calculation also assumes that I work exclusively on this case and that we have no other client matters which require attention.

**PETITIONER'S COUNSEL FROM EXAMINING THE NOTES
USED BY RICHARD HACKER TO ASSIST HIM IN HIS
PREPARATION FOR TESTIMONY**

It is well established that a cross-examining attorney is entitled to inspect any documents shown to a witness prior to testimony for the purpose of refreshing recollection, even if the documents would otherwise be protected by the attorney-client privilege. James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 145 (D. Del. 1982) (binder prepared for witness to review prior to depositions deemed discoverable by cross-examining attorney, notwithstanding assertions of attorney-client privilege: "Those courts which have considered the issue have generally agreed that the use of protected documents to refresh a witness' memory prior to testifying constitutes a waiver of the protection"); Amerisure Ins. Co. v. Laserage Technology Corp., 1998 WL 310750, *2 (W.D.N.Y.) ("since Mr. Richards used the memo to refresh his recollection prior to his deposition, and testified as to the substance of the memo during his deposition, clearly, this would constitute a waiver of any privilege"); Marshall v. United States Postal Service, 88 F.R.D. 348, 350 (D.D.C. 1980) ("it is also apparent that once a document is used to refresh the recollection of a witness, privileges as to that document have been waived") (citation omitted); Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc., 81 F.R.D. 8, 9 (N.D. Ill. 1978) ("Here, as in Bailey, we find that plaintiff waived the attorney-client privilege as to the documents in question by allowing their use for the purpose of refreshing Mr. Flanders' recollection"), citing Bailey v. Meister Brau, Inc., 57 F.R.D. 11 (N.D. Ill. 1972).

During the course of the trial, Hacker testified that, in advance of his testimony, he had reviewed documents contained in a certain folder (the "Folder") provided by his attorney, to assist him in his testimony (Tr. 605-606). American's attorney demanded production of the Folder, but the PA's counsel interposed an objection, invoking the attorney-client privilege (Tr.

at 606). In response, American's counsel properly argued the principles of law sustained in the cases cited above, namely, that permitting a witness to examine privileged material prior to testimony results in waiver (Tr. at 606-8). The ALJ ultimately decided to review the documents in camera and, without providing any analysis, stated shortly thereafter that:

I've examined the documents in the folder. To the extent they go beyond copies of photographs, I find that they are matters -- that they are privileged matters, and within the -- and not relevant to cross-examination. So, it is not necessary to turn it over to counsel (Tr. at 607).

The ALJ's ruling was erroneous and highly prejudicial. As reflected in the case law cited supra, the PA waived the attorney-client privilege when its counsel voluntarily chose to share the material with his witness prior to his testimony. Permitting the PA to shield from disclosure privileged material, while simultaneously allowing the witness to refresh his recollection with those documents, is tantamount to using the privilege both as a sword and shield, conferring upon the PA an unfair advantage. Bailey v. Meister Brau, 57 F.R.D. 11, 13 (N.D. Ill. 1972). In describing the unfair advantage which would be conferred upon the party using privileged material to prepare witnesses, the Court in Bailey, the seminal decision on this issue, stated in pertinent part:

Defendants assert that even if the privilege is applicable, it was waived by plaintiff's use of the documents to refresh his recollection. In cases not involving the privilege, counsel is entitled to inspect any writing used by a witness to refresh his recollection for use on cross examination (internal citations omitted). Plaintiff cites no authority supporting his position that the rule is different where the writings are otherwise privileged. To adopt such an exception would be to ignore the unfair disadvantage which could be placed upon the cross-examiner by the simple expedient of using only privileged writings to refresh recollection. This factor, coupled with the intent to relinquish the privilege shown by their use for this purpose, convinces the Court that plaintiff should be held to have waived the attorney-client privilege as to the documents in question.

Bailey, 57 F.R.D. at 12.²²

American's counsel was deprived of the opportunity to examine the Folder Hacker reviewed in advance of his testimony. And it is unquestionable that Hacker's testimony was relevant to the issues presented. Hacker provided testimony on the extent to which American purportedly exceeded its leased space from December 2003 to June 2004. The PA has purported to have relied upon Hacker's observations in refusing to negotiate a lease extension. Having expressly relied upon Hacker's observations, and having called him as a witness before the ALJ

²²As of this writing, the Bailey decision has been cited 175 times over the years and is, obviously, authoritative on this issue.

for this purpose, the PA cannot simultaneously limit American's ability to challenge Hacker's testimony on this critical issue presented. To the extent that the privilege is invoked, the ALJ should have determined that it was waived or, alternatively, that the PA was precluded from introducing any testimony on the issue.²³

CONCLUSION

It is American's position that the points and authorities outlined supra warrant the grant of a judgment, inter alia, declaring the PA in violation of the Shipping Act, and directing that the latter initiate immediate discussions to negotiate a long-term lease. To the extent, however, that the ALJ might be inclined to render a determination in favor of the PA, especially to the extent that such a determination would be predicated upon findings of fact adverse to American, it is respectfully submitted that the ALJ should first re-open the record and schedule continued trial

²³ Another troubling issue, which American's attorneys only discovered following the close of evidence, was the revelation that the ALJ may have traveled with the opposing counsel on the lengthy train-ride from Washington, D.C. to New York Penn Station, on the way to trial, and back again to Washington after trial. In addition, on the last day of testimony, we have been able to confirm that the ALJ traveled from the train station in Manhattan to the trial in Brooklyn, not only with opposing counsel, but also with a witness, Arie Van Tol, who testified later that afternoon. While not intending to disparage the ALJ, these traveling arrangements raise substantial "appearance" issues which the parties did not have the opportunity to explore at the time (because, as indicated supra, the record was closed). The "appearance" issues became more disconcerting when American's counsel learned that the route taken by the ALJ and opposing counsel (and the witness) included a drive by Pier 7, the configuration of which, was vigorously disputed at trial. The location of the PA facility in which the trial was held did not require the drive-by of Pier 7. In other words, the drive-by of Pier 7 in its upland area was "out of the way." Mr. Van Tol, as the PA's manager of its Brooklyn Marine Terminal, of course, knew how to get to the site of the trial directly. Thus, opposing counsel and a witness had the opportunity to be present for, what was, in effect, an entirely gratuitous, ex parte view or inspection by the ALJ of a facility which pertained to a disputed trial issue.

Prior to this drive-by view or inspection, the ALJ had ruled that an inspection was unnecessary. After the inspection, neither the ALJ nor opposing counsel disclosed the inspection which was only discovered when a guard at the Pier 7 entrance, sometime later, informed an American employee that he had been directed by the PA not to disclose the drive-through.

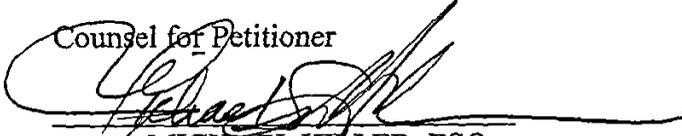
Again, the purpose of this footnote is not to disparage the ALJ, but to identify the issue and obtain a response. To that end, opposing counsel is called upon hereby to address these circumstances in the opposition brief to explain the PA's position on this issue, and make representations as to what transpired on his various travels with the ALJ before and after each trial day.

dates, at which time several witnesses would be recalled, several additional witnesses would be called, and further documents would be introduced.

Respectfully submitted,



JANINE G. BAUER, ESQ.

Counsel for Petitioner


MICHAEL HILLER, ESQ.

March 13, 2006
New York, New York

CERTIFICATE OF SERVICE

I, Michael Hiller, Counsel for Petitioner, electronically mailed to the federal Maritime Commission today, March 13, 2006 a full set of the Brief on behalf of Petitioner and Appendices containing Exh.s A-F, and on opposing counsel, Donald Burke, Esq. and Paul Donovan, Esq., and mailed on March 14, 2006 by overnight service, a full set of all papers to opposing counsel and the FMC.



MICHAEL HILLER, ESQ.

Counsel for Petitioner

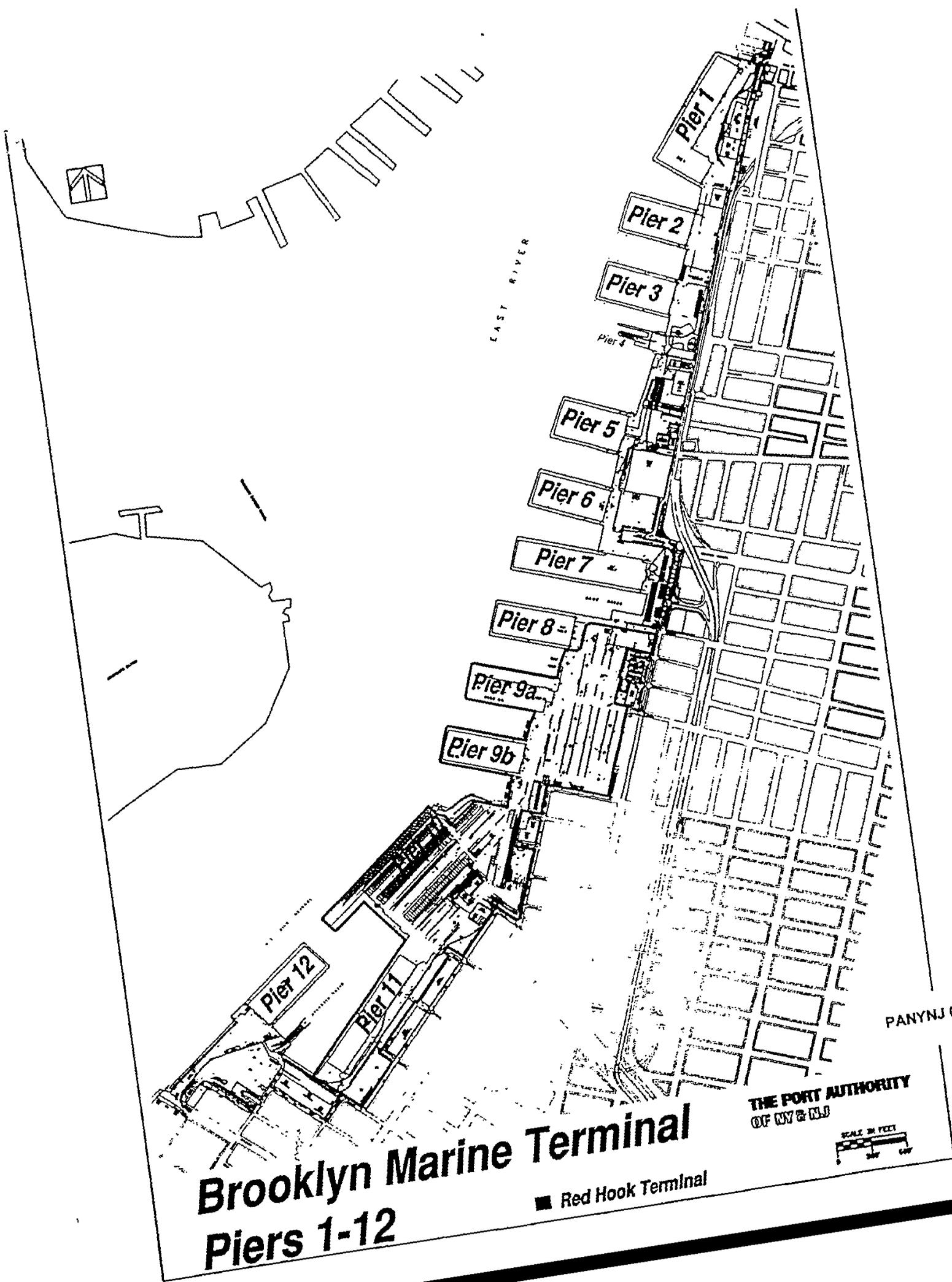
Brooklyn Marine Terminal Piers 1-12

■ Red Hook Terminal

THE PORT AUTHORITY
OF NY & NJ



PANYNJ 005



**PHONE LOG – PATRICIA KEOUGH
CALLS MADE TO AMERICAN WAREHOUSING**



- On or about August 11, 2003 Called Michael Scotto, AW, to remind him that no rent had been paid since May 2003. Mike advised that May rent had been paid and June rent would be paid by Friday, August 15, 2003.
- Payment of the May and June rent would have brought AW to within two months in arrears (July and August).
- On or about August 22, 2003 Spoke to Mike Scotto regarding ASI's rent for Pier 8 (which was typically paid by AW) and he advised that two months of rent had been paid. Still no rent received for May 2003 and June 2003.
- On or about September 8, 2003 AW advised again that May 2003 and June 2003 rents were paid.
- On or about September 15, 2003 Spoke to Mike Scotto.
- On or about September 25, 2003 Spoke to Mike Scotto.
- On September 30, 2003 Had lunch with Ron Catucci, ASI. Advised Ron that AW was in arrears since May 2003. Ron advised that he remembered signing rent checks from AW to the Port Authority. Ron called Mike Scotto while we were at lunch and Mike advised Ron that although Ron signed the checks Mike had never mailed them out to the Port Authority.
- I called Mike Scotto that same afternoon. It was about this same time that ASI and AW began using amounts being held by the Port Authority as retainage on a construction project with ASI as the reason that it was withholding the rent payments.
- On or about October 3, 2003 and/or
on or about October 6, 2003 Spoke to Mike Scotto and advised that the Port Authority planned to terminate the leases if the rent was not paid in full.
- October 8, 2003 Advised Port Authority Credit and Collection unit that we planned to terminate AW.
- October 15, 2003 Request sent to Port Authority Law Department requesting termination of AW leases.

On or about October 28, 2003

Spoke to Mike Scotto.

October 31, 2003

Received letter from Mike Scotto enclosing the June 2003 rent payment and advising that July and August 2003 would be sent by November 7, 2003. AW requested credit for September and October 2003 payments against retainage the Port Authority was holding on a construction project with ASI. AW advised that it would need a little time to pay the balance (May rent).

November 4, 2003

Port Authority sent letter to AW accepting its rent check for June 2003 and advising AW of its outstanding balance of \$531,412.07. Also advised that if the Port Authority did not receive payment in full by November 7, 2003 we would proceed with the Termination.

THE PORT AUTHORITY OF NEW YORK & NEW JERSEY
TENANT ALTERATION APPLICATION REVIEW REQUEST

| DISTRIBUTION | | |
|--------------|--------------------------|---------------------|
| No. | To | Facility |
| W/A | Engineering QAD | WTC PATC |
| | S. BHOL | WTC 73 |
| | Fac. Manager | PN |
| W/I | ... A. VANTOL | ... |
| | Port Commerce | WTC |
| | Planning Div. | 34N |
| W/I | Resident Eng. | PN |
| | J. ADAMS | #97 |
| W/I | Risk & Environ. | PATC |
| | D. Warren | #43 |
| | | |
| | | |
| | | |
| | | |

Facility BROOKLYN PIER TAA No. BP 285 Date 1/4/00

Application / Tenant AMERICAN WAREHOUSING OF NY INC.

Consultant Michael Carey

Estimated Cost \$ 1,300,000. Submittal No. 1
 (Includes Cost of Anchors).

Description of Work
Storage structures - Galvanized tubular steel framing
covered with vinyl fabric material - Total 4
Structures.

Please review the attached (revised) application and send comments to:

Name Leslie L. Clarke, Project Administrator 1/18/2000

Location 1 WTC - 34N Phone No. 435-8023 DUE DATE

- DESIGN DISCIPLINES
- Architectural
 - Egress Analysis
 - Structural
 - HVAC
 - Plumbing
 - Sprinklers
 - Electrical
 - Utility > 600 V
 - Civil
 - Geotechnical
 - Environmental
 - Fueling
 - Radio Freq. Coord.
 - Corrosion Protection
 - Elevator / Escalator
 - Other _____

- ATTACHMENTS
- Document List _____
 - Contract Drawing# No. S-1.
 - Contract Specifications In a bound cover.
 - Tenant Response _____
 - Computations _____
 - Reports _____
 - Catalog Cuts _____
 - Other Letter dated 12-28-99. (2 pages).

Special Instructions - REQUEST TO EXPEDITE
QAD: As discussed with Mr. S. BHOL, this submission is
for approval of super structure only. The manufacturer
may proceed to fabricate upon receiving approval.
Please make comments on anchoring system.
Please expedite.

- Copy To [] _____
 [] Patrick Coen
 [] Tim Lai
 [] Arvind Patel

Signature _____
 NOTE = Chris has 1 copy of 1. Package
 needed to review plus TAA

FOR: CHRIS JONES

PA 531 CA 91905
300

THE PORT AUTHORITY OF NY & NJ
One World Trade Center, New York, N.Y. 10048

| For Port Authority use only | |
|-----------------------------|------------------|
| FACILITY | APP. NO. |
| DATE | APPLICANT'S NAME |

TENANT CONSTRUCTION OR ALTERATION APPLICATION

APPLICANT MUST READ THE TERMS AND CONDITIONS PRINTED ON THE REVERSE HEREOF

The Applicant shall not commence performance of any of the said work prior to the receipt by Applicant of a copy of this application duly signed in Part Two hereof on behalf of The Port Authority of New York and New Jersey Upon receipt thereof, the Applicant agrees to perform said work in accordance with the following "Information to be Furnished by Applicant" and to comply with and be bound by all requirements and conditions set forth below under the remarks, if any, in Part Two hereof and the terms and conditions set forth on the reverse hereof.

Minimum Insurance Limits Unless Specified to be Greater—Bodily Injury \$500,000 each person; \$500,000 each occurrence; Property Damage \$500,000 each accident; \$500,000 aggregate.

PART ONE: Information to be furnished by Applicant (Refer to your lease or permit for required information)

Permission is hereby requested to perform the following described work on the space occupied by the Applicant

| | | |
|---|---|--|
| AT (FACILITY) <u>Brooklyn Terminal 6</u> | PURSUANT TO (LEASE, SPACE, PERMIT) NO. <u>America Warehousing of NY, Inc</u> | LOCATION (BUILDING # OR AREA) OF SPACE TO BE ALTERED <u>Pier 6, Upland Area</u> |
|---|---|--|

DESCRIPTION OF WORK AND REASON
90,000 SF Cocoa Storage Structures

| | | | |
|--|---|-----------------------------------|-------------------------------------|
| ESTIMATED COST OF WORK \$1,300,000 | ESTIMATED TIME TO COMPLETE (DAYS) 30 days | STARTING DATE 1/15/2000 | COMPLETION DATE 2/15/2000 |
|--|---|-----------------------------------|-------------------------------------|

Plans: Prints of each drawing must be submitted with copies of application. Include floor plan and show area affected by proposed work (size 8 1/2" x 11" or larger).

| TITLE OF DRAWING | DRAWING NO. | DATED |
|---|-------------|-----------------|
| <u>Cocoa Storage Tests Pier 6 Upland Brooklyn Marine Terminal</u> | <u>S-1</u> | <u>12-20-99</u> |

| | | |
|---|--|------------------------------|
| NAME & ADDRESS OF CONTRACTOR (IF NOT KNOWN, SUBMIT LATER) | NAME & ADDRESS OF ENGINEER OR ARCHITECT DMJM | TELEPHONE NO. LICENSE NO. |
|---|--|------------------------------|

SEND CORRESPONDENCE TO:
(NAME & ADDRESS OF EMPLOYEE IN CHARGE OF WORK)

Michael Carey
2001 Broadway
Riviera Beach, FL

TELEPHONE NO.
33404 561 835-0335

ENGINEER OR ARCHITECT CERTIFICATION

I have supervised the preparation of plans and specifications for the entire work represented herein and hereby certify that they conform to the requirements of the respective enactments, ordinances, resolutions and regulations of the City, town or municipality in regard to construction and maintenance of buildings and structures and in regard to health and fire protection which would be applicable if the Port Authority were a private corporation.

| | | | |
|--|--|---------------------------|-------------------------|
| APPLICANT'S NAME (AS IT APPEARS ON LEASE OR PERMIT) <u>America Warehousing of NY, Inc</u> | SIGNATURE OF LICENSED PROF. ENGINEER OR ARCHITECT <u>Michael Scatta</u> | TITLE <u>President</u> | DATE <u>12/28/99</u> |
|--|--|---------------------------|-------------------------|

PART TWO: Prepared by Port Authority and returned to applicant

The above Application is Approved Disapproved. Subject to the following conditions:

Continued on Rider "A" attached

Please advise the undersigned in writing, when this work has been Completed.

The Port Authority of New York and New Jersey

| |
|-------|
| By |
| TITLE |
| DATE |

| |
|--------------|
| INSPECTED BY |
| DATE |

Costello, Elaine

From: Larrabee, Richard
Sent: Thursday, March 30, 2000 5 42 PM
To: Borrone, Lillian
Cc: VanTol, Arie; Spahn, Kenneth, Harrison, Ed; Wakeman, Thomas; Ronis, Myron
Subject: Marine Operations Staff Meeting

Lillian, this afternoon, we held our first OPS Meeting since I arrived. I got the sense that there is a long history to these sessions and so I asked some opening questions about the normal agenda, whether it was used to make decisions or assignments and the meeting's over all value. I got positive reactions from everyone. I will continue to have these on a monthly basis and will try to report highlights to you following each meeting.

The following items are worth noting:

- The construction of the first Cocoa storage structure at BPAMT is progressing and will be done just in time to meet the arrival of a ship on Monday. As you might suspect, there are still lots of problems from an engineering stand point but our people are trying to make this happen.

- The HH "moon scope" work is being done for about 1/3 the cost by using our own work force vice a contractor. This item generated some discussion on our current study to look at options for doing maintenance at BPAMT. There is much interest in this effort and a strong desire to get facility manager review before the final report is submitted.

- We have gotten word through Chris Ragucci that the Staten Island Borough President's office made a request to the PA to take over the replacement of the Richmond Terrace Bridge. He contends that they are not satisfied with the ability of NYC DOT to do the work and would have the funds transferred to us to accomplish the work. I'll try to find out more about this.

- On the issue of the ASI Port Newark paving, Ken is waiting for some test results and once we get those, we will develop a recommendation as to how we will pay for the needed repairs. We will have an answer next week.

- We discussed the potential labor problem in New Jersey but this preceded the information you shared with us later.

All in all, it was a good opportunity to get the operations people in one room and kick around topics of current interest. I did ask them to give me their reaction to your request for thoughts on a PORT AWARDS PROGRAM. If I had to summarize the discussion, it would be that we not try to do this with everything that is going on now. I will give you more details in person.

Rick

Board/Committee Meeting: March 30, 2000
Submitting Department: Port Commerce Department
Author's Name: Patricia Keough, (973) 578-2125
Assistant To's Name: Catherine Bergamini, ext. 6545
Agenda Item Status: New
Original Distribution Date:
Revision Date:
Revision Number:
Assigned Attorney's Name:

**BROOKLYN-PORT AUTHORITY MARINE TERMINAL - RED HOOK
CONTAINER TERMINAL - AMERICAN STEVEDORING, INC. - LEASE
AMENDMENT AND AGREEMENT TO FUND TEMPORARY FABRIC
BUILDINGS**

EXECUTIVE SUMMARY

Recommendation: That the Board authorize the Executive Director to enter into an agreement with American Stevedoring, Inc. (ASI) for the letting of the upland areas of Piers 6 and 7 at the Brooklyn-Port Authority Marine Terminal under the terms of the Red Hook Container Terminal (Red Hook) lease to permit ASI's construction of temporary fabric buildings and for the Port Authority to reimburse ASI for work performed with respect to the construction of these buildings, estimated at \$6 million.

Purpose: To provide suitable space for the receipt, storage and distribution of cocoa beans/products

Discussion: ASI has operated Red Hook at the Brooklyn-Port Authority Marine Terminal since 1994. Over the past several years, ASI has attracted greater volumes of cocoa and other bulk commodities to this facility. However, ASI's storage buildings for cocoa are currently at capacity and additional storage facilities do not exist within Red Hook and are not available elsewhere at the Brooklyn-Port Authority Marine Terminal. To prevent cocoa from leaving the Port, ASI proposes to construct temporary storage buildings within the Red Hook Container Terminal to accommodate the increased waterborne movements of cocoa. ASI has estimated the cost for these buildings to be \$6 million.

Impacts: The temporary buildings will allow the tenant to continue to attract additional cocoa to Brooklyn, thereby generating additional revenue to the Port Authority. In addition, the handling of cocoa is labor intensive and an increase in jobs is expected.

Alternatives: No action, which will result in the loss of handling cocoa in the

Port.

**Confidential/
Sensitive
Information:**

None

Board/Committee Meeting: June 29, 2000
Submitting Department: Port Commerce Department
Author's Name: Patricia Keough, (973) 578-2125
Assistant To's Name: Catherine Bergamini, ext. 6545
Agenda Item Status: Resubmitted
Original Distribution Date: February 23, 2000
Revision Date: June 16, 2000
Revision Number: FINAL
Assigned Attorney's Name: John J. Berry

**BROOKLYN-PORT AUTHORITY MARINE TERMINAL – RED HOOK
CONTAINER TERMINAL -- AMERICAN STEVEDORING, INC. – NEW
LEASE AND AGREEMENT TO FUND TEMPORARY FABRIC
BUILDINGS**

Recommendation: That the Board authorize the Executive Director to enter into an agreement with American Stevedoring, Inc. (ASI) 1) to lease the upland area, and miscellaneous structures, of Pier 6 and the upland area of Pier 7 at the Brooklyn-Port Authority Marine Terminal to permit ASI's construction of temporary fabric buildings and 2) for the Port Authority to reimburse ASI for work performed with respect to the construction of these and any such buildings that are constructed at the Red Hook Container Terminal, in a total amount not to exceed \$6 million.

Reason for Action: To provide additional suitable space for the receipt, storage and distribution of cocoa beans/products.

Background: ASI has operated the Red Hook Container Terminal at the Brooklyn-Port Authority Marine Terminal since 1994. Over the past several years, ASI has attracted greater volumes of cocoa, primarily from Africa and Indonesia, and other bulk commodities to this facility. In 1999, 184,000 tons of cocoa was handled in the New York/New Jersey region. ASI's storage buildings for cocoa are currently at capacity and additional storage facilities do not exist within Red Hook and are not available elsewhere at the Brooklyn-Port Authority Marine Terminal. ASI proposes to construct approximately 400,000 square feet of temporary storage buildings in Brooklyn to accommodate the increased waterborne movements of cocoa. ASI has estimated the cost of these buildings to be \$6 million.

ASI's lease for Red Hook expires in August 2001. At the expiration of the lease, staff expects to negotiate a long-term extension of the lease, or an agreement will be entered into with a new terminal operator after a competitive process which, in either event, will provide for a rental component based upon these buildings.

Premises: Brooklyn-Port Authority Marine Terminal – upland area of Pier 6, including miscellaneous structures, and upland area of Pier 7.

Term: Commencing on or about June 14, 2000 and expiring on August 31, 2001.

Rental: No rental will be charged for the new premises through August 31, 2001.

Other Lease Provisions: The Port Authority will reimburse ASI for the cost to construct temporary fabric buildings at the new leasehold and at Red Hook, in an amount not to exceed \$6 million, subject to prior review and approval by the Port Authority.

Minority Participation: ASI will be required to make a good faith effort to ensure participation by minority and women-owned businesses in connection with the construction of the temporary fabric buildings.

History: January 29, 1998 – Board – Brooklyn-Port Authority Marine Terminal – American Stevedoring, Inc. – New Agreement and Lease Amendment

October 13, 1994 – Board – Brooklyn-Port Authority Marine Terminal – Red Hook Container Terminal – American Stevedoring, Inc. – Lease BP-286 – Lease Amendment

September 8, 1994 – Board – Brooklyn-Port Authority Marine Terminal – Red Hook Container Terminal – American Stevedoring, Inc. – Lease BP-286 – Lease Amendment

November 18, 1993 – Board – Brooklyn-Port Authority Marine Terminal – Red Hook Container Terminal – American Stevedoring, Inc. – Lease of Terminal and Cranes

Resolution for adoption.

FOR ADOPTION BY THE BOARD
(June 1, 2000)

Prepared by J. J. Berry
Approved as to form by R.T. Verrill
Approved for the Port Commerce
Department by L.C. Borrone
(Draft: May 31, 2000)

**BROOKLYN-PORT AUTHORITY MARINE TERMINAL – RED HOOK CONTAINER
TERMINAL - AMERICAN STEVEDORING, INC. - NEW LEASE AND AGREEMENT
TO FUND TEMPORARY FABRIC BUILDINGS**

It was recommended that the Board authorize the Executive Director to enter into an agreement with American Stevedoring, Inc. ("ASI") to (1) lease space to ASI for its construction of temporary fabric buildings for the storage of cocoa and (2) reimburse ASI for the unamortized cost of the purchase and construction of fabric buildings at the new leasehold and at the Red Hook Container Terminal in a total amount not to exceed \$6 million in the event that (x) ASI's lease for the Red Hook Container Terminal and the space on which the fabric buildings are constructed hereunder is extended for a period of not less than 10 years with a rental component covering such reimbursement or (y) ASI is replaced as the Lessee of the Terminal and such space after a competitive leasing process or otherwise. The lease will commence on or about June 14, 2000 and will expire on August 31, 2001. It will cover upland area, including miscellaneous structures, of Pier 6 and upland area of Pier 7 at the Brooklyn-Port Authority Marine Terminal. No rental will be charged for the new premises. The Port Authority will have the right to terminate, without cause, all or any portion of the premises at any time on 60 days' prior written notice to ASI.

Pursuant to the foregoing report, the following resolution was adopted with Commissioners _____ voting in favor; none against:

RESOLVED, that the Executive Director be and he hereby is authorized, for and on behalf of the Port Authority, to enter into an agreement with American Stevedoring, Inc. substantially in accordance with the terms and conditions outlined to the Board; the form of the agreement shall be subject to the approval of General Counsel or his authorized representative.

BROOKLYN-PORT AUTHORITY MARINE TERMINAL – RED HOOK CONTAINER
TERMINAL – AMERICAN STEVEDORING, INC. – LEASE AMENDMENT AND
AGREEMENT TO FUND TEMPORARY FABRIC BUILDINGS

Questions/Answers

- Q. Where are the shipments of cocoa coming from? Who are the major customers?
- A. The cocoa is primarily being shipped from Africa and Indonesia. ASI is also receiving smaller shipments of cocoa from Ecuador. Major customers include Hershey, M&M and Nestle.
- Q. What is the current volume of cocoa through Brooklyn? What is ASI projecting for the upcoming year?
- A. Mike Scotto, ASI, to provide tonnage estimates.
- Q. What are the benefits of this agreement?
- A. ASI is currently at capacity and requires additional warehouse space for the storage of cocoa. An increase in cocoa to Brooklyn, under the Red Hook lease, will generate additional dockage and wharfage and increase future throughput revenues at Red Hook. In addition, given that the handling of cocoa is labor intensive, an increase in warehouse and stevedoring labor is expected. ASI advises that since October 1999, it has doubled its warehousing manpower (from ____ to ____) and tripled its stevedores (from ____ to ____).
- Q. What is the source of the \$6 million construction estimate and what does it include?
- A. The estimate was prepared by ASI and includes the construction of various-sized buildings to be erected, in Phases as needed, on the upland areas of Pier 6, Pier 7 and/or between Piers 8 and 9. Specifications have been submitted to the Port Authority for Phase I, which includes the construction of three buildings on the upland of Pier 6 at an estimated cost of \$____ million. Engineering review of the specifications will include a review of the construction costs.
- Q. When will the Port Authority complete its review of Phase I?
- A. Rudy??

Q. What are the current dockage and wharfage rates?

A. Dockage – No dockage is collected for ships at the Red Hook terminal. At a public berth, ASI would pay, depending on the size of the vessel, an average of \$2,000 per day. Depending on volume, a ship could be docked for approximately 2 to 7 days.

Wharfage – ASI pays the Tariff rate of \$ 70 per ton for cocoa.

Q. What is the square footage of the Piers 6 and 7 premises?

A. Pier 6 – approximately 111,413 square feet of open area, approximately 3,000 square feet in Building 106, and approximately 210 square feet in the guardhouse.

Pier 7 – approximately 69,950 square feet of open area.

Q. What is the status of providing substitute space for the Watchtower and Long Island College Hospital parking areas?

A. Nick?? Currently, LICH has been relocated for a shot term period to Pier 12, but its is anticipated that that aprox. 25,000 sq.ft. permit will end by June 30, 2000. Should phase II of the fabric buildings take place, LICH will have to vacate the Pier 12 area and will no longer be a lessee or permittee at the NYMT. WT will occupy an area of aprox. 44,000 sq.ft. commencing around the construction start date of the fabric buildings at Pier 6.

EM
RL
AVT



TO : Ms. Lillian Berone
Fax #: 1-212-435-6030
From : G.W. Pridgeon
Date: July 5, 2000
Subject: Shelter Quote
Number of Pages 1 (Including this Cover sheet)

Good Afternoon.

The purpose of this letter is quite simple though the history might take a moment. We entered into a contract with a party to provide storage units at Pier 6 @ the Port. It consists of 5 shelters for the storage of Cocoa (primarily) The current user is American Warehousing with eventually the Port Authority being the final owner. Although the scope of our work was to provide the shelters, we were drawn into a much more complex situation than was presented. Those details taking much longer than this allows. However, the point is this, payment to Big Top was predicated upon shipment dates of the shelters. Currently, there are substantial funds left owing Big Top. How you have been drawn into this is Mr. Sabato Catucci who appears to be the person funding this project has advised me he has no intentions of paying any more funds to anyone until he is reimbursed from the Port. I certainly do not wish to act on his behalf and have no intentions of doing so, however, I am bound to protect Big Top's investment.

As an unpaid provider of services and product to the Port Authority of NY and NJ, I have made a formal demand to Mr. Catucci and/or Michael Carey to be paid current by 7/21/00 with the Port Authority wiring the funds directly to our account. Certainly Mr. Catucci has the same option as does any of the other parties involved in this transaction. Should that not occur a written statement from the Port must be provided to Big Top providing for how and when payment is to be made. If it is deemed unacceptable, we will be forced to take measures to secure our investment.

You may wish to talk with Mr. Catucci yourself in the morning as the deadline for Big Top has come to the end.

Cordially

 G.W. Pridgeon

| | | | | | |
|-------------------|----------------|---------|-------------|------------|---|
| Post-it® Fax Note | 7671 | Date | 7/21/00 | # of pages | 1 |
| To | TRISH KEOUGH | From | CHRIS JONES | | |
| Co./Dept. | | Co. | | | |
| Phone # | | Phone # | | | |
| Fax # | (973) 690-3498 | Fax # | | | |

Jones, Christopher

From: Jones, Christopher
Sent: Monday, July 31, 2000 12:05 PM
To: Babakitis, Arlene
Cc: VanTol, Arie
Subject: Big Top

Hi Arlene,

Arie is out on vacation today and will return tomorrow. In the meantime, please allow me to give you an update on the cocoa fabric buildings. I spoke with Joe Bezig of American Warehousing this morning who informed me that Mr. Catucci has thus far incurred \$758,927.00 (including legal fees) on the fabric buildings. He has made payments totaling \$751,352.00 to Brooklyn Liberty (Michael Carey). TAA BP-285 submittal #3 was forwarded to QAD's Design Standards (Tenant Construction Review) Unit on 6/28. The two previous TAA submittals (1 and 2) were incomplete and were not formally reviewed. QAD granted conditional approval to proceed with the construction of fabric buildings C, D and E, subject to compliance with comments generated from QAD's review. The approval letter was transmitted to AW on 7/26. AW has 20 days from the date of the letter to submit revised documents and provide responses to QAD's comments. A pre-construction meeting is also required to be scheduled with the Resident Engineer prior to the commencement of any construction. However, as of this date, all five fabric buildings have been erected although their construction is not complete (mechanical, electrical, and miscellaneous work remains). I hope this is helpful. Please call me if you need further information.

Chris Jones



July 26, 2000

Mr Michael Scotto
President
American Warehousing of New York
Furman Street, Port Authority Pier 5
Brooklyn, New York 11201

**SUBJECT: BROOKLYN PIER 6 - TAA NO. BP-285 – AMERICAN WAREHOUSING
OF NY INC. – COCOA STORAGE STRUCTURES – THIRD
SUBMISSION – CONDITIONAL APPROVAL**

Dear Mr. Scotto.

This letter confirms the transmittal of our comments to your consultant via fax on 7/25/00, and responds to his transmittal forwarding for review the documents listed below:

| <u>Drawing No.</u> | <u>Title</u> | <u>Date</u> |
|--------------------|--|-------------|
| S1 | Plot Plan | 5/22/00 |
| E-1 | Electrical Plot Plan | 6/19/00 |
| E-2 | Electrical Floor Plans-Lighting & Power | 6/19/00 |
| E-3 | Electrical Floor Plans-Fire Alarm | 6/19/00 |
| E-4 | Electrical Riser Diagrams & Schedules | 6/19/00 |
| E-5 | Electrical Legend, Specs & Schedules | 6/19/00 |
| E-6 | Electrical Fire Alarm Specifications | 6/19/00 |
| Sheet 1 | Service Door (McKeon Rolling Steel Door Co.) Big Top Mfg. | 5/2/00 |
| | Tensioned Membrane Structures. Table of Contents | 5/5/00 |
| | Big Top Mfg. Pages 1 to 17 | 5/5/00 |

Be advised that we have reviewed these documents and they are hereby approved for Structures C, D and E, subject to compliance to comments listed on the attachment. All requirements listed therewith, particularly those that are design issues, must be resolved prior to implementation in the field. The conditional approval to proceed with construction does not apply to Structures A and B. These structures shall not receive approval until Comment 2 is resolved.

Please incorporate these requirements in your documents and respond to all the comments in writing in the order they are listed on the attachment. Indicate the latest revision number on each drawing in the title box and circle each revision on the drawings with the latest revision number inside a triangle.



Submit to Christopher Jones, Senior Engineer, New York Marine Terminals, the required information including seven (7) sets of revised documents, with two (2) sets signed and sealed by the responsible PE licensed to practice in the State of New York for further review, within 20 days of the date of this letter. Failure to submit the revised documents accordingly may result in the revocation of approval to proceed with this construction. This conditional approval will become invalid if the work is not started within twelve (12) months from the date of this letter.

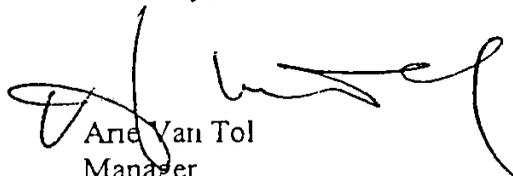
It is required, prior to the commencement of construction for this phase of the work, that a pre-construction meeting be scheduled by each prime contractor accordingly, with Mr. James Adams, Resident Engineer, who can be reached at (973) 589-5010. At this meeting, each prime contractor will be required to submit a valid Certificate of Insurance. Failure to request a pre-construction meeting will result in the revocation of this approval. Please note that all outstanding comments must be resolved and so reflected on the contract documents and a full approval granted, before a Certificate of Completion of Construction will be issued by the Port Authority.

Upon completion of construction and final inspection by the Port Authority, it is required that a certificate be submitted to this office signed by the Engineer of Record, certifying that the work has been performed in accordance with the NYC Building Code and the finalized approved plans and specifications.

A set of "As Built" reproducible mylars and two sets of prints must be submitted together with the Certificate of Completion of Construction before a Permit to Occupy or Use will be issued by the Port Authority. "As Built" shall be clearly stamped or otherwise prominently printed on each drawing, dated and signed, by the Architect or Engineer of Record. By copy of this letter, the Resident Engineer is requested to receive the "As Built" documents, which shall be turned over to the Facility Manager's office, for our records.

Should any clarification be necessary, please contact Christopher Jones at (718) 330-2971.

Sincerely,


Arië Van Tol
Manager
New York Marine Terminals

CC Mr Michael Carey.
Carey Company, Inc.
2001 Broadway Blvd.
Riviera Beach, FL 33404

BCC. Adams, Bhol, Clyne, Jones, Panicali, Patel, Ronis, Wallace,
Warren

Jones, Christopher

From: Keough, Patricia A.
Sent: Thursday, August 10, 2000 11:16 AM
To: Borrone, Lillian; Larrabee, Richard; Harrison, Ed
Cc: Clyne, Thomas; Duemig, Patricia; Houselog, Nicolas; Jones, Christopher; Ronis, Myron; VanTol, Arie
Subject: ASI - Status of Lease and Reimbursement for Fabric Buildings

The following is an update on the status of the ASI lease and reimbursement for the fabric buildings...

Lease document

Law is currently working on the P&O lease document, which they anticipate will be completed early next week. Upon completion of the P&O lease, Law will commence work on the ASI lease.

Tenant Alteration Application

On July 26, conditional approval of the TAA was given to ASI for building structures "C", "D" and "E". Approval has not been given on building structures "A" and "B", primarily due to NYC building code issues with respect to the separation distance between the structures and the existing garage. PA engineering staff is working with ASI and its contractor, Carey Management, to resolve this issue.

Payment Application

Staff are assisting ASI with the preparation of a Payment Application request for reimbursement of monies spent to date. ASI has been advised that the payment application should include only those payments made with respect to structures "C", "D" and "E" (A reimbursement for structures "A" and "B" cannot be made without TAA approval.) ASI is awaiting additional information from Carey Management to complete the application.

I will follow up with the Law Dept. on the status of the lease early next week and an update will be provided at that time. If the status changes on any of the above items prior to early next week, an interim update will be provided.

Trish Keough

Jones, Christopher

From: Keough, Patricia A.
Sent: Thursday, August 17, 2000 4:31 PM
To: Borrone, Lillian; Larrabee, Richard; Harrison, Ed
Cc: Clyne, Thomas; Duemig, Patricia; Houselog, Nicolas; Jones, Christopher; Ronis, Myron; VanTol, Arie
Subject: ASI - Status of Lease and Reimbursement for Fabric Buildings

The following is an update on the status of the ASI lease and reimbursement for the fabric buildings...

Lease Document

The Law Department completed the P&O lease today and has started work on the ASI lease. I will follow up with Law tomorrow -- when we will have a better sense of the estimated timeframe for completion of the document.

Tenant Alteration Application

On August 9, ASI requested a two-week extension to respond to Port Authority comments on the TAA.

Payment Application

On August 15, ASI submitted a Payment Application request for reimbursement for monies spent to date in the amount of \$758,927 (10 percent will be deducted as retainage). Staff are currently reviewing the documents and, if approved, will begin processing a voucher check request in anticipation of an executed lease document.

Trish Keough
8/17/00

Jones, Christopher

From: Keough, Patricia A.
Sent: Wednesday, August 23, 2000 10:39 AM
To: Borrone, Lillian; Larrabee, Richard; Harrison, Ed
Cc: Clyne, Thomas; Duemig, Patricia; Houselog, Nicolas; Jones, Christopher; Ronis, Myron; VanTol, Arie
Subject: ASI - Status of Lease and Reimbursement for Fabric Buildings

The following is an update on the status of the ASI lease and reimbursement for the fabric buildings...

Lease Document

Law anticipates completion of the ASI lease documents late today. The documents will be picked up from Law and delivered to ASI (Brooklyn) in the morning.

Tenant Alteration Application

A response to Port Authority comments on the TAA (for all building structures) is due from ASI by August 28.

A meeting was held recently with Port Commerce and Quality Assurance Division staff regarding violations of the NYC Building Code on building structures "A" and "B". Staff are preparing alternatives, as well as cost estimates, to review with Port Authority executive staff. Following Port Authority review, a meeting will be scheduled with ASI to discuss these alternatives.

Payment Application

ASI's Payment Application has been approved by Port Commerce staff. Staff will begin processing a Purchase Order in anticipation of an executed lease.

Trish Keough
8/23/00

THE PORT AUTHORITY OF NY & NJ

MEMORANDUM

PORT COMMERCE DEPARTMENT

01 SEP 10 PM 2 36

TO: Thomas Tully
FROM: Thomas F. Clyne
DATE: September 6, 2001
SUBJECT: ASI BP-285 – PAYMENT APPLICATION NO. 6

COPY TO: C. Jones, A. Patel, R. Pisapia, M. Ronis, T. Trimarchi, A. Van Tol

As discussed on the telephone on 9/4/01 regarding the subject payment application, the work associated with tent structures C, D and E has been substantially completed and are in use. As a result, the tenant is requesting a reduction in the retainage from 10% to 5%. Please take the necessary steps to reduce the retainage accordingly in SAP and issue a check in the amount of \$102,240.82.

If you have any questions please call me on Ext. 6590.



Thomas F. Clyne
Manager, Planning & Engineering
Capital Programs
Port Commerce Department

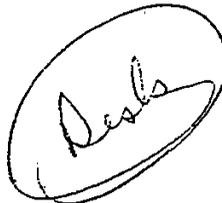
Lombardi, Dennis

From: Yetka, Cheryl
Sent: Friday, January 16, 2004 8:36 AM
To: Raczynski, Jerri; Lombardi, Dennis; Keough, Patricia A.
Cc: Van Tol, Arie
Subject: RE. Pier 7 AW Court Date 1-22-04

See below

-----Original Message-----

From: Raczynski, Jerri
Sent: Friday, January 16, 2004 8:29 AM
To: Lombardi, Dennis; Keough, Patricia A.
Cc: Van Tol, Arie; Yetka, Cheryl
Subject: RE. Pier 7 AW Court Date 1-22-04



Our comments in parenthesis

-----Original Message-----

From: Lombardi, Dennis
Sent: Thursday, January 15, 2004 5:47 PM
To: Keough, Patricia A.; Raczynski, Jerri
Cc: Van Tol, Arie; Yetka, Cheryl
Subject: Fw: Pier 7 AW Court Date 1-22-04

Steve Borrelli indicated that he would / could work with us on late charges with AW. I propose that we offer

Allow AW to remain in Pier 5 if they pay up. (Only as a holdover tenant or need Board auth)

Offer to release \$50k in retainage on the cocoa tents (even though its a different company). (If Arie agrees)

Offer to forego all late charges on Pier 7.

What we want in return is comittment for AW to be out in 60 days. (Would we stop rent for last 60 days?)[Can we, without Board authorization?]

Sound reasonable? (YES)

I think we can do it all w/o Board involvement.

Pls let me know your thoughts asap.

Thanks,

DL

Sent from my BlackBerry Wireless Handheld (www.BlackBerry.net)

**NEW YORK MARINE TERMINALS
MARINE OPERATIONS STAFF MEETING
WEDNESDAY, AUGUST 3, 2000**

BROOKLYN PIERS - Rehabilitation of Low Level Relieving Platforms – Piers 1, 2 and 3 -- At the present time, this project is significantly behind schedule and a breach of contract is imminent with KMT Construction Corporation (KMT). The original completion date of June 1, 2001 is in jeopardy. Due to the resulting large open areas at Piers 2 and 3, the LDC Development Proposal and any future plans for the transfer of the property may be affected. To date, the relieving platforms at Piers 2 and 3 have been demolished and further excavation for the installation of steel piles was delayed due to major obstructions being unearthed. On July 11, a pending breach of contract letter was sent to the contractor. KMT must provide an alternative method to install piles at Piers 2 and 3, provide an updated progress schedule, and provide a written response to correspondence concerning payments to contractors, vendors and suppliers. At best, a breach of contract would imply a new completion date by either negotiating with the bond company for additional payments, and/or hiring another contractor to complete the job.

Piers 5 and 6 Concrete Cell and Pile Repairs -- A pre-construction meeting is scheduled for August 3rd. Seven bids were received, with Spearin, Preston & Burrows being the low bidder. This rehabilitation work is required to repair the piles that were noted to be in poor condition due to severe marine borer infestation. The concrete cells of the bulkhead were also noted to have experienced severe spalling. More recently, further deterioration of the timber portions of these structures has resulted in the formation of several sinkholes in the area. The estimated completion date is February 2, 2001.

Pier 6 Fendering Survey – Bouchard Transportation -- Engineering has completed a final report on the analysis and conceptual design for Pier 6 fendering that will allow safe docking and berthing of barges. The genesis of this review was created by Bouchard Transportation's President, Morton Bouchard. Staff had communicated with Bouchard's concerns regarding the structural integrity of the fendering system in the berthing of their barges. Mr. Bouchard did not accept the NYMT Manager's decision and copied Ms. Borrone, Mr. Boyle and Senator D'Amato on his correspondence.

Staff prepared a response to Mr. Boyle with the support of Engineering regarding the structural capabilities of our fendering system. A consultant was selected to develop a solution for docking barges at Pier 6.

Mr. Bouchard was advised about the Port Authority's decision to identify an Engineering solution for the docking of barges and the Port Authority would provide him with a response by the end May. The results have been forwarded to Mr. Bouchard and we are awaiting a decision by Bouchard Transportation regarding the \$1 million investment that will be required to handle multiple berthing of barges.

Pier 6 – Cocoa Storage Tents -- A progress meeting was held in mid-July. The Tenant Alteration Application was submitted to QAD's Design Standards (Tenant Construction Review) Unit on June 28th and a conditional approval was granted by QAD to proceed with the construction of Fabric Buildings C, D and E, subject to compliance to the comments generated from QAD's review. The approval letter was transmitted to American Warehousing (AW) on July 26th. AW has 20 days from the date of the letter to submit revised documents and provide responses to QAD's comments, or the conditional approval may be withdrawn. A pre-construction meeting is also required to be scheduled with AW's contractors and the NJMT Resident Engineer prior to the commencement of any construction. However, as of this date, all five fabric buildings have been erected, although their construction is not complete (mechanical, electrical and miscellaneous work remains). The lease agreement is being prepared by the Law Department. Once the lease agreement has been executed by all parties, then ASI can begin to be reimbursed for the fabric buildings. In the meantime, ASI is preparing to submit Payment Applications.

Pier 8 – Roof and Sprinkler Rehabilitation -- A Memorandum of Authorization for the required electrical work has been prepared by the Engineering Department. A supplemental lease agreement will be developed for the fire alarm rehabilitation. Changes have been made to the fire alarm drawings and the scope of work which originally did not include heaters and air compressors. A new breaker panel will be needed. The fire protection work should be completed in August 2000. The roof work has been completed, although some punch list items remain.

Piers 9A and 9B Bulkhead Rehabilitation -- A temporary contractor's use area and separate stockpile area have been identified for this project. The work, to be performed by Phoenix Marine, will involve the excavation of the areas behind the bulkhead walls, and will be backfilled with lightweight fill. This project is scheduled for completion in May 2001.

Cold Storage Building Repairs -- Structural Engineering had requested exposing the existing tie-back anchors to establish that the north brick wall structures were sufficiently held in place to negate the use of additional tie-back bracing. After a survey conducted by the Quality Assurance Division, the downspouts and scuppers were repaired and cracks were sealed. The tie-back rods were determined to be in satisfactory condition.

OpSail 2000 International Naval Review & July 4th Fireworks Display -- Brooklyn Piers was one of three docking sites for the U.S. and foreign naval vessels that participated in the July 4th International Naval Review. The USN vessels Mount Whitney, John Hancock, McFaul, USCG vessel Harriet Lane, Mysore (India), Luigi DeLaPenne (Italy), Aris (Greece) and Slavutich (Ukraine) were in port from July 4th to July 9th and open for public viewing and tours. The Brooklyn Chamber of Commerce provided a variety of activities, events and refreshments for crew and officers.

Concurrent with OpSail activities, the annual Macy's July 4th fireworks display provided many of our tenants and Port Authority employees with a spectacular backdrop for an evening of fun and relaxation on the waterfront.

Public Safety estimated that approximately 50,000 people passed through the Brooklyn Piers for the period July 4th through July 9th. Most importantly, there were no incidents and a good time was had by all.

RED HOOK CONTAINER TERMINAL - Pier 10 Electrification -- A construction/reimbursement agreement was executed by American Stevedoring and the Port Authority. Two separate Tenant Alteration Applications will be issued for this project: one for the stow pin design and one for the electrical distribution system. Preliminary invoices were submitted for the electrical distribution system work. In addition, Con Edison will require more detailed information on the electrical work. A third Tenant Alteration Application for the placement of electrical conduit will be issued while company proposals for the electrical system will be compiled for Con Edison.

Piers 9A, 9B and 11 Pavement and Utility Rehabilitation -- The Phase I paving at Pier 11 and Building 185 has been completed. Guard rails, fence posts and fabric have been installed at Pier 11. At Pier 9A, the drainage gutter, paving and electrical work has been completed. The Phase II railroad track and timber tie removals north of Pier 11 has begun and the catch basins are currently being raised in this area. This project is scheduled for completion in January 2001.

HOWLAND HOOK -- The temporary bollard installation project was substantially completed and the concrete is curing. This will satisfy the Howland Hook Container Terminal (HHCTI) need for utilizing its entire 2,500 foot berth, with the two new bollards being located at the north and south ends of the berth.

The wetlands mitigation project has been successfully completed for this season. This is the third year of a 5-year effort to satisfy a Consent Order between the Port Authority and New York State Department of Environmental Conservation. The most recent work involved the transplantation of approximately 200 spartina plants from areas near the Goethals Bridge to the mitigation site situated north of Richmond Terrace. Our efforts were aided by the cooler and wetter weather conditions during the last several weeks, and upon recent inspections, the wetlands vegetation continues to flourish.

Site preparation for the Howland Hook moonscape paving project is scheduled to begin on August 1st. It is anticipated that by August 14th, the contractor will require one-third of the moonscape area to be vacated by the tenant, with all of the remaining area to be vacated by the end of August. The tenant, HHCTI, has requested the temporary use of the Proctor & Gamble (P&G) facility. However, the Port Authority has not yet completed acquisition negotiations with P&G, and thus, the area is not yet available for the tenant's use. As a result, the tenant has identified an off-terminal site for its operations.

VanTol, Arie

From: Ronis, Myron
Sent: Wednesday, August 09, 2000 12:09 PM
To: Borrone, Lillian
Cc: Larrabee, Richard, VanTol, Arie, Harrison, Ed
Subject: FW: Tent Structure Payments

The status of structures A and B remain unchanged from what was noted in my message below (not approved). As Arie pointed out this morning, the issue is the fire separation rating due to the fact that these structures are so close to the Watchtower building. However, this was identified as an issue all along - not just recently - and remains outstanding.

I have pressed my staff to meet with Engineering QAD to see just how much leeway we can get in interpreting the code requirements. This may need to go to Frank for a variance since the traditional solution (fire shutters on windows) may be very expensive.

I have not seen the payment agreement on these structures, but if the language specifically refers to the structures being "approved" by Engineering prior to payment there may be a problem with the other structures since they have only received "conditional approval", meaning that there are still minor comments outstanding.

-----Original Message-----

From: Ronis, Myron
Sent: Monday, July 24, 2000 3:33 PM
To: Borrone, Lillian
Cc: Harrison, Ed; Larrabee, Richard
Subject: Tent Structure Payments

At Coordination today you asked for an update on the Tent Structures.

From the perspective of Engineering's approval process, three of the structures (C, D, & E) have received conditional approval. A and B are still not approved.

The approved structures represent 60,450 s.f. of a total 73,970 s.f. When the other obstacles are resolved, you might want to consider a pro-rated payment until the remaining structures are approved. Not paying for A and B will be a good incentive for Sal to get the necessary documentation in for approval.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART 52

-----X
THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY,

Petitioner,

Index No. 020153/04
Motion Sequence No. 009

-against-

DECISION AND ORDER

AMERICAN WAREHOUSING OF NEW YORK,
INC.,

Respondent.
-----X

GEORGE J. SILVER, J.

Recitation, as required by CPLR § 2219 [a], of the papers considered in review of this motion:

| <u>Papers</u> | <u>Numbered</u> |
|---|-----------------|
| Notice of Motion/Order to Show Cause | 1 |
| Affidavit/Affirmation & Exhibits | 2, 3, 4 |
| Answering Affidavit/Affirmation & Exhibits, Memorandum of Law | 5, 6, 7, 8 |
| Replying Affidavits/Affirmation & Exhibits | 9, 10 |

In this commercial holdover proceeding, respondent American Warehousing of New York, Inc. ("AWNY") moves for a order, pursuant to CPLR § 3211 [a] [1], [2] and [7] and CPLR § 409 [b], dismissing the proceeding for lack of subject matter jurisdiction.

I. Procedural Posture

This case arises out of a dispute between the Port Authority and AWNY over a marine terminal lease of Pier 7 at the Brooklyn Marine Terminal. On July 6, 2004, the Port Authority filed a Petition for Business Holdover seeking to evict AWNY from the northern half of Pier 7. In response, on August 5, 2004 AWNY filed a complaint with the Federal Maritime Commission ("FMC") alleging various discriminatory practices by the Port Authority in violation of the

Shipping Act of 1984. Simultaneously, AWPY removed the Port Authority's holdover action to the United States District Court for the Southern District of New York. However, in an order dated November 10, 2004, the District Court held that it lacked jurisdiction over the case and remanded it to this court. Thereafter, in an order dated February 23, 2005, the Port Authority's motion to restore the holdover proceeding to the Civil Court's calendar was granted, as was AWPY's cross-motion to stay the proceeding pending a determination by the FMC.

II. AWPY's Motion to Dismiss

In moving to dismiss the instant proceeding for lack of subject matter jurisdiction, AWPY argues that the Port Authority's notice to quit failed to threaten AWPY with eviction from the northern half of Pier 7 through the commencement of a special proceeding. AWPY contends that the Port Authority's failure to apprise it that its refusal to vacate the subject premises would result in the commence of an eviction proceeding constitutes a jurisdictional defect and requires the immediate dismissal of the instant proceeding.

In opposition, the Port Authority contends that its notice to quit fully complies with section 713 of the Real Property Actions and Proceedings Law. The Port Authority argues that the statute does not contain a requirement that the notice to quit state that a proceeding will be commenced unless the respondent vacates the premises and argues that the case law cited by AWPY creates a jurisdictional requirement that has no basis in the Real Property Actions and Proceedings Law. The Port Authority also cites a "form" notice to quit which, according to the Port Authority, does not contain any statement that a legal proceeding will be commenced unless the respondent vacates the premises.

AWPY argues in reply that the case law relied upon by the Port Authority for the

proposition that the notice to quit does not have to state that an eviction proceeding will be commenced in the event AWCNY fails to vacate the pier is distinguishable from the facts of the instant case because said case law holds that the absence of a landlord-tenant relationship between the parties excuses the failure to include in the notice a statement threatening commencement of legal proceedings. According to AWCNY, a landlord-tenant relationship, or its equivalent, existed between it and the Port Authority with respect to the northern half of Pier 7 and the notice to quit is, therefore, defective.

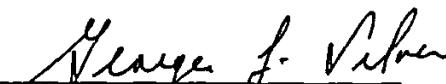
III. Analysis

Real Property Actions and Proceedings Law section 713 provides that where no landlord-tenant relationship exists, a special proceeding may be maintained “after a ten-day notice to quit has been served upon the respondent. . . .” The section does not specify what information the notice to quit must contain (*Helping Out People Everywhere v Deich*, 160 Misc2d 1052, 1054, [App Term, 2d Dept 1994] citing *Katz v Grifa*, 156 Misc2d 203, 205 [Civil Ct, New York County 1992]). However, as respondent correctly points out, the majority of courts called upon to interpret the statute have done so in a manner that requires a notice to quit to inform the respondent tenant of the legal consequences of its failure to vacate the premises within the ten-day period (*Katz*, 156 Misc2d at 205; *A & Z Realty Co. v Murphy*, NYLJ, June 19, 1991 at 25, col. 2 [Civil Ct, Richmond County] [finding the notice to quit adequate to apprise respondent that if she did not vacate the premises within 10 days the landlord would commence a summary proceeding]; *First Fed. Sav. & Loan v Souto*, 162 Misc2d 224, 227 [Civil Ct, New York County 1994] [finding a notice to quit which stated the petitioner’s ownership interest in the subject premises and informed the occupants that should they fail to vacate the premises, a legal suit to

evict them may be commenced fully satisfied all of the elements mandated by RPAPL § 713]; *Citibank v Pang*, NYLJ, July 11, 1994 at 27, col. 4 [Appellate Term, 1st Dept] [notice to quit which failed to advise a tenant of a building acquired at a foreclosure sale of the consequences of the tenant's failure to vacate and which did not properly identify the petitioner's status as the purchaser or describe the premises with specificity deemed defective]; *City of New York v Quinones*, NYLJ, July 5, 1994 at 36, col. 1 [notice to quit served upon a licensee which identified the subject premises, stated that the landlord had elected to terminate the license, specified the date by which the licensee was required to vacate the premises, and advised the licensee that a summary proceeding would be commenced upon the licensee's failure to vacate deemed sufficient]). The instant notice to quit is defective because it fails to inform AWNY that a summary proceeding will be commenced in the event AWNY fails to vacate the northern half of Pier 7 on or before June 30, 2004. As a valid notice to quit is necessary to invoke this court's subject matter jurisdiction (*Katz*, 156 Misc2d at 206), AWNY's motion to dismiss to holdover proceeding for lack of subject matter jurisdiction is granted. The court has considered the lone case relied upon by the Port Authority, *Reifeld Thompson & Riverside, Inc v Ho*, NYLJ, August 14, 1995 at 28, col. 5 [Appellate Term, 1st Dept], and finds it unpersuasive in light of the authority cited *supra*.

This constitutes the decision and order of the Court.

Dated: February 6, 2006


George J. Silver, J.C.C.

HON. GEORGE J. SILVER

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: PART 52

-----X
THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY,

Petitioner,

-against-

AMERICAN WAREHOUSING OF NEW YORK,
INC.,

Respondent.
-----X

GEORGE J. SILVER, J.

Recitation, as required by CPLR § 2219 [a], of the papers considered in review of this motion:

| <u>Papers</u> | <u>Numbered</u> |
|---|-----------------|
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| Affidavit/Affirmation & Exhibits, Memorandum of Law | 2-16 |
| Answering Affidavit/Affirmation & Exhibits, Memorandum of Law | 17-20 |
| Replying Affidavits/Affirmation & Exhibits, Memorandum of Law | 21-22 |

In this commercial holdover proceeding, respondent American Warehousing of New York, Inc. ("AWNY") moves for a order, pursuant to CPLR § 3211 [a] [1], [2] and [7] and CPLR § 409 [b], dismissing the proceeding for lack of subject matter jurisdiction.

I. Procedural Posture

This case arises out of a dispute between the Port Authority of New York and New Jersey ("Port Authority") and AWNY over a marine terminal lease of Pier 7 at the Brooklyn Marine Terminal. On August 3, 2004, the Port Authority filed a Petition for Business Holdover seeking to evict AWNY from the southern half of Pier 7. In response, on August 5, 2004 AWNY filed a complaint with the Federal Maritime Commission ("FMC") alleging various discriminatory

practices by the Port Authority in violation of the Shipping Act of 1984. On September 2, 2004, AWPY removed the Port Authority's holdover proceeding to the United States District Court for the Eastern District of New York. On October 14, 2004 the action was transferred to the United States District Court for the Southern District of New York pursuant to a stipulation entered into by the parties and Judge Lynch of the Southern District. However, in an Order dated December 3, 2004, the District Court held that it lacked jurisdiction over the action and remanded it to this Court. By motion dated December 10, 2004, the Port Authority moved to restore the proceeding to the Civil Court's calendar. On December 14, 2004, AWPY cross-moved to stay the proceeding pending the resolution of the action commenced before the FMC. By way of a decision and order dated February 23, 2005, this court granted both the Port Authority's motion to restore and AWPY's cross-motion to stay.

II. AWPY's Motion to Dismiss

In moving to dismiss the instant holdover proceeding, AWPY argues that after serving AWPY with a notice of termination on June 8, 2004 which indicated that AWPY's tenancy at Pier 7 was to expire on July 31, 2004, the Port Authority sent monthly rent invoices to AWPY for the months of July, August, September and October 2004 and thereafter accepted and deposited AWPY's payment of rent for those months. According to AWPY, the Port Authority's practice of invoicing and accepting payment of rent from AWPY during the period after the termination of AWPY's tenancy vitiates the notice of termination and requires the immediate dismissal of the holdover proceeding.

In opposition, the Port Authority contends that pursuant to section 711 [1] of the Real Property Actions and Proceedings Law, it was authorized to invoice and deposit AWPY's rent

checks after the commencement of the holdover proceeding on August 10, 2004 and that such invoicing and depositing are not grounds for the dismissal of the proceeding. With respect to August 2004 rent, the Port Authority admits that it billed AWNY for the August 2004 rent but claims that it did so inadvertently. The Port Authority also contends that its bank acted contrary to its instructions by depositing the August 2004 rent check. Moreover, the Port Authority argues that it refunded the August 2004 rent to AWNY on August 12, 2004 and sent a letter to AWNY reaffirming that the lease had been terminated as of July 31, 2004. According to the Port Authority, its inadvertent billing and acceptance of one month's rent following the lease termination does not amount to a relinquishment of its known right to maintain this proceeding and, therefore, does not warrant dismissal of the proceeding.

In reply, AWNY argues that the case law relied upon by the Port Authority is distinguishable from the facts of the instant proceeding and, if anything, confirms AWNY's entitlement to a dismissal.

III. Analysis

Real Property Actions and Proceedings Law section 711 [1] provides that a special proceeding may be maintained on the ground the "tenant continues in possession of any portion of the premises after the expiration of his term without the permission of the landlord" The section further provides that "[a]cceptance of rent after commencement of the special proceeding upon this ground shall not terminate such proceeding nor effect any award of possession to the new landlord" As the instant proceeding was commenced by the Port Authority on August 10, 2004, the only issue to be resolved is whether the Port Authority's admitted invoicing and depositing of rent from AWNY for the month of August 2004, i.e., the window period between

the termination of AWNY's tenancy and the commencement of the holdover proceeding, constitutes a waiver of the Port Authority's right to maintain this proceeding. It is well settled that acceptance of rent after a tenancy is purportedly terminated and before the commencement of an eviction proceeding vitiates the notice of termination and entitles the tenant to a dismissal of the proceeding (*Top Value Homes, Inc. v Cont'l Petroleum Co.*, 2004 NY Slip Op 50169[U] [Dist Ct, Nassau County]). As explained in *Roxborough Apt. Corp. v Becker*, 176 Misc2d 503, 505-06 [Civil Ct, New York County 1998], a landlord's mere receipt of rent checks does not alone constitute acceptance, especially where the landlord promptly returns the checks uncashed, or where the rent checks, although cashed, were accepted inadvertently and the landlord promptly explains the inadvertence to the tenant. Thus, courts have refused to find that a landlord "accepted" rent checks sufficient to vitiate the predicate notice where the rent is unknowingly received through a lock box (*see e.g., Metropolitan Life Ins. Co v Sucdad*, NYLJ, Aug. 6, 1985, at 6, col 1 [App Term, 1st Dept]), or where the rent is accepted inadvertently and the landlord returns the checks uncashed to the tenant without unreasonable delay (*see e.g., Pacer Realty Assocs. v Bishop*, NYLJ, Dec. 12, 1996, at 29, col 1 [App Term, 1st Dept]). Where a landlord receives rent checks, however, and does not immediately return them or claim and explain any inadvertence, courts have not hesitated to find that the retention of the checks constitutes acceptance sufficient to vitiate the predicate notice (*see e.g. 205 E. 78th St. Assocs. v Cassidy*, 192 AD2d 479, *revg on dissent of McCooe, J.*, NYLJ, Sept. 27, 1991, at 21, cols 4, 5 [App Term, 1st Dept][acceptance found where the landlord, having claimed to have deposited the tenant's check inadvertently, did not make any attempt to explain the inadvertence or return the rent to the tenant]; *Mannino v Figueroa*, NYLJ, Nov. 22, 1995, at 31, cols 1, 2 [Civ Ct, Kings County]

[acceptance found where the landlord received rent check and retained it for two weeks, without “putting forward facts which explain” the landlord's retention of the check]; *St. Luke's/Roosevelt Hosp Ctr v Taft Pharmacy*, NYLJ, May 10, 1995, at 31, col 5 [Civ Ct, New York County]

[acceptance found where the landlord initiated attempt to collect rent and then retained the rent check for 24 days before returning it to the tenant uncashed]; *Dulac v Moy*, NYLJ, Nov. 4, 1992, at 28, col 1 [Civ Ct, New York County]

[acceptance found where the landlord received and retained 10 monthly rent checks, even though the landlord never cashed the checks]; *Shulen Realty Corp. v R & R House of Lites*, NYLJ, May 1, 1989, at 25, col 2 [Civ Ct, New York County]

[acceptance found where the landlord, without explanation, initiated collection of rent and then retained the checks until after the institution of the proceeding]). The rationale for the waiver rule is that “[t]he acceptance of rent for a period after expiration of the notice sends the tenant a message contrary to that contained in the notice On the one hand landlord requires tenant to leave, and on the other, accepts rent for a period after surrender is demanded. This can easily imply to tenant that [it] need not surrender the premises, but may continue in possession. By such acceptance of rent for the period between the expiration of the notice and commencement of the proceeding, landlord therefore nullified the effect of the notice” (*Associated Realities v Brown*, 146 Misc2d 1069, 1070-71 [Civ Ct, New York County 1990]).

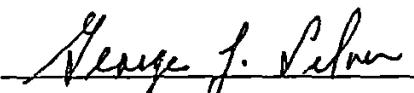
Moreover, “[t]he doctrine of waiver was not conceived as a trap for the unwary or to elevate gamesmanship, but rather its underpinnings emanate from considerations of justifiable reliance a tenant may place upon actions taken by a landlord that are contrary to its prior position causing the tenant to believe he/she need no longer surrender the premises (*Metro. Insurance/Annuity Co. v Rowinski*, 2004 NY Slip Op 24566 [Civil Ct, New York County]).

The Port Authority, through the affidavit of its Manager of the Credit, Collections and Accounts Receivable Division, who avers that the Port Authority instructed its bank not to accept AWNY's August 2004 rent check but that the bank was unable to isolate said check, has offered a credible explanation for its claim that the deposit of said rent check was inadvertent. The Port Authority has also adequately established that it both promptly refunded the rent money to AWNY on August 12, 2004 and explained to AWNY in writing the reason for the inadvertent deposit of the August 2004 rent (*see 184 West 10th Corp. v Westcott*, 2005 NY Slip Op 51150[U] [App Term, 1st Dept] *citing IBM v Joseph Stevens & Co., L.P.*, 300 AD2d 222, 223 [1st Dept 2002]). The Port Authority has not, however, offered any credible factual support to explain its "inadvertent" invoicing of AWNY (*compare PCV/St LLC v Finn*, 2003 NY Slip Op 50897[U] [App Term, 1st Dept] [landlord's acceptance of rent for three months following termination of the tenancy and prior to the commencement of the holdover petition did not require a finding that the landlord vitiated its notice of nonrenewal where there was credible evidence that the landlord's housing complex continued to bill the tenants because of a computer malfunction]). The Port Authority's invoicing of AWNY for the August 2004 rent was an affirmative act which militates toward the finding a finding of waiver on the part of the landlord (*Metro. Insurance/Annuity Co. v Rowinski*, 2004 NY Slip Op 24566 [Civil Ct, New York County]). "Unlike the situation where a tenant subsequent to the termination date sends a rent check to the landlord hoping to "sneak one through" and claim the landlord has accepted rent waiving the termination notice, here respondent was billed for August 2004 rent" (*id.*). "Although a landlord

may not be able to control what gets sent into its lockbox, it certainly can control rent bills which emanate from its office or agent” (*id.*). Thus, in light of the Port Authority’s unexplained invoicing of AWCNY for the August 2004 rent, the court finds that a waiver has occurred and that the notice of termination was vitiated. Accordingly, the holdover proceeding is dismissed.

This constitutes the decision and order of the Court.

Dated: February 6, 2006


George J. Silver, J.C.C.

HON. GEORGE J. SILVER



January 6, 2006

Captain Soren Skov-Nissen
American Stevedoring, Inc.
Red Hook Container Terminal
70 Hamilton Avenue
Brooklyn, NY 11231

Dear Captain Nissen:

The Port Authority received an arrival schedule for vessels loaded with cocoa to be discharged at Pier 7 for the period of December 20, 2005 through March 15, 2006. The estimated tonnage set forth on this schedule proposes the discharge of over 70,000 tons. Since the end of November 2005, an additional 20,000 long tons of cocoa has been discharged onto Pier 7. The discharge from the end of November 2005 to date covers the total square footage of the pier, and is outside the area that is leased by American Warehousing. The last vessel D.F. FIESTA that discharged 16,000 tons during the period from December 20 thru December 28 severely compromised the safety lanes that are required for access and egress to the pier in the event of an emergency. The leasehold of American Warehousing, as well as the capacity of the pier for storage of the cocoa has been exceeded without the consent of the Port Authority and will not be tolerated. Further, the vessel ELIZ BOLTON anticipated to arrive on January 4 was diverted to Pier 8 because it arrived on December 27 and neither the vessel nor its cargo could be accommodated; as there was no space within the pier. Over 6,000 tons from the ELIZ BOLTON were discharged into Pier 8, which also compromised the safe access and egress for emergency vehicles at that pier.

In addition to using areas beyond AW's leasehold, Port Authority Rules and Regulations with respect to operations at the piers have been violated including the following:

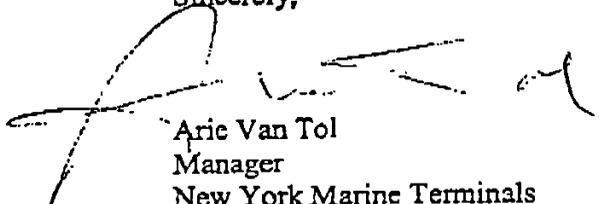
| <u>Subrule Number</u> | <u>Title</u> |
|-----------------------|--|
| 34-090 | Condition for Use of Marine Terminals |
| 34-105 | Compliance with Governmental Regulations |
| 34-135 | Unleased Space |
| 34-140 | Sanitation |
| 34-155 | Refuse Removal |
| 34-145 | Cargo Movements: Improper Handling Prohibited |
| 34-205 | Responsibility for Injuries and Damage |
| 34-230 | Individuals Prohibited from Endangering Others at Terminal |



The Port Authority demands that you remove all cocoa that presently is being stored in areas outside AW's leasehold. With respect to future discharges, they will only be permitted after you confirm, in writing, to my office that the scheduled vessels for cocoa discharge into Port Authority Pier 7 will meet the footprint of the area leased by American Warehousing and will allow for the appropriate fire lanes to provide access in case of emergencies into the pier. Should you seek future discharges you must set forth the specific areas where the cocoa will be stored.

The next vessel on the schedule is expected to arrive on January 17, 2006. Until American Stevedoring satisfies the request for this information and can demonstrate that it will not exceed the leasehold and access requirements, no vessel will be authorized to discharge cocoa into the pier. All berth applications for vessels to discharge cocoa into Pier 7 will be denied until Port Authority requirements are satisfied.

Sincerely,



Aric Van Tol
Manager
New York Marine Terminals

cc: S. Catucci
M. Scotto



January 6, 2006

Via DHL Express Mail

Mr. Michael Scotto, President
American Warehousing, Inc.
Pier 5-Furman Street
Brooklyn, New York 11201

**Re: American Warehousing, Inc.
Violations of Port Authority Regulations**

Dear Mr. Scotto:

As you are no doubt aware, American Warehousing has, for the past two years, been trespassing on the northern half of Pier 7 as well as the southern half of the Pier. In addition, as you are also well aware, the health and safety aspect of American Warehousing's management of its space at Pier 7 has, for some time, been a matter of considerable concern to the Port Authority. Not only is American Warehousing occupying the entire 270,000 square feet of warehouse space, together with areas outside the warehouse on the northern half of the Pier, it is doing so in a manner that creates serious and ongoing threats to the health and safety of those on the Pier and those in nearby locations. Thus, the Port Authority has no option but to address these concerns immediately and forcefully.

This letter constitutes formal notice that American Warehousing's unlawful occupation of the northern half of Pier 7, together with its continuing health and safety violations contrary to the Port Authority's regulations, constitutes an ongoing trespass.

In addition to American Warehousing's unlawful trespass on the northern half of the Pier, the Port Authority has documented the following violations of its regulations at Pier 7:

- 1) Pallet storage is taking place on the stringpieces. Many pallets are also being stored behind the Tent Buildings, Building 106, and the unclashed upland area of Pier 7;



- 2) The cargo is stored in such a manner as to compromise safe access. Emergency vehicles cannot safely enter the premises because of the storage density of the cargo;
- 3) Empty burlap bags that are left for disposal are piled to such an extent that they form a fire and safety hazard. The flammability of burlap is well known and this waste commodity should be stored in a very controlled condition.

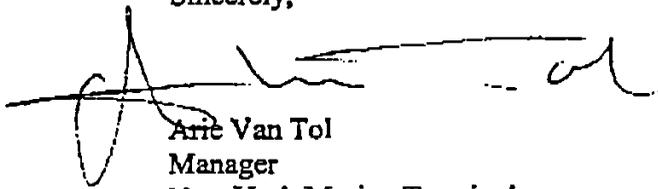
These conditions constitute ongoing violations of the following Port Authority regulations, as set forth in the Port Tariff:

| Subrule Number | Title |
|----------------|--|
| 34-090 | Condition for Use of Marine Terminals |
| 34-105 | Compliance with Governmental Regulations |
| 34-135 | Unleased Space |
| 34-140 | Sanitation |
| 34-155 | Refuse Removal |
| 34-145 | Cargo Movements: Improper Handling Prohibited |
| 34-205 | Responsibility for Injuries and Damage |
| 34-230 | Individuals Prohibited from Endangering Others at Terminal |

Regulation 34-090, Condition for Use of Marine Terminals, conditions the right of entry by vessels and others upon compliance with the Regulations. New York Penal Law 140.00 et seq. makes it an act of criminal trespass in varying degrees for a person to enter or remain upon property illegally.

Should the conditions cited above not be promptly corrected, the Port Authority will have no choice but to take all appropriate actions to prevent further criminal trespass.

Sincerely,



Arie Van Tol
 Manager
 New York Marine Terminals

cc: S. Catucci



**REQUEST FOR EXPRESSION OF INTEREST
RED HOOK CONTAINER TERMINAL
BROOKLYN, NEW YORK**

The Port Authority of NY & NJ is seeking maritime uses for the Red Hook Container Terminal. The terminal would be available for lease for a minimum of 5 years commencing May 1, 2004. The terminal consists of 80 acres in Red Hook, Brooklyn and a 20-acre site in Port Newark, New Jersey. Proposals will be considered on both sites or the Red Hook property alone. The Port Authority is interested in businesses that have demonstrated sufficient experience in operating maritime facilities and the financial capacity to undertake the obligations of a lease agreement.

Interested parties may request documents via fax to (973) 690-3498 or email to 'pakeough@panynj.gov' with their name, address, telephone and fax numbers. Site visits will be scheduled and dates will be posted on the RFEI package. Responses are due on or before Friday, August 29, 2003.

Job # 24396
PAUTH
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MAE
pg 1