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Before the Federal Maritime Commission

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The Auction Block Company, an Alaska corporation,)
v.)
The City of Homer, a municipal corporation, and its)
Port of Homer.)
Docket No. 12-03)

APR -2 2012
OFFICE OF THE
FEDERAL MARITIME

Complaint



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I. The Complainant The Auction Block Company is a for-profit corporation in good standing organized under the laws of State of Alaska. The Corporation's principal shareholder is its President Kevin Hogan. The Auction Block Company is a seafood processing and logistics firm engaged in the primary purchase and processing of Alaskan seafood and providing fishing vessel services at the Port of Homer. The principal place of business is 4501 Ice Dock Road, Homer, Alaska 99603. The Auction Block Company is subject to the provisions and protections of the Shipping Act of 1984, as amended, as a "person" as defined in 46 U.S.C. § 1702(18). Complainant has done everything necessary to bring and maintain this Complaint.

II. The Respondents The City of Homer is a municipal corporation organized under the laws of the State of Alaska. The City of Homer owns and operates the Port of Homer in Homer, Alaska. The City Manager is Walt Wrede and the Harbormaster is Brian Hawkins. The principal address is 491 East Pioneer Avenue Homer, Alaska 99603. The City is subject to the provisions and protections of the Shipping Act of 1984, as amended, as a "marine terminal operator" as defined in 46 U.S.C. § 1702(14). The Respondents are at times referred to as the "City" and/or the "Port" and/or the "Respondent."

III. Jurisdiction The City operates the Port of Homer and has filed the "Port of Homer Terminal Tariff No. 600 Filed under ATFI Rules" which have been adopted and ratified by the Homer City Council. The City and Port are subject to the provisions of the Shipping Act of 1984, as amended, as a "marine terminal operator" as defined in 46 U.S.C. § 1702(14). The Federal Maritime Commission has jurisdiction of this matter.

IV. Violations That the Respondents City of Homer and the Port of Homer are in violation of the Shipping Act of 1984, as amended, specifically 46 U.S.C. §§ 41106(2) and (3) that state in pertinent part: "A marine terminal operator may not . . . (2) give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or (3) unreasonably refuse to deal or negotiate."

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\$ 271.00
K. Douglas

1 **V. History** The state of Alaska fish tax law revenue sharing formula provides an
2 incentive for a city to encourage an entity to process fish inside the city limits and
3 thereby create local jobs and generate raw fish tax revenue for the city. Icicle Seafood's
4 operation of its seafood processing plant inside the boundaries of the City of Homer
5 created additional jobs and generated tax revenue for the City of Homer. However, in
6 2001, Icicle Seafood's processing plant burned down and was not rebuilt. The majority
7 of the fish that Icicle Seafoods unloaded in the City of Homer after 2001 was
8 transported to and processed in the City of Seward which received the job creation and
9 tax benefits. In 2008, Complainant built a processing plant on a parcel of property
10 leased from the City of Homer. Although Complainant was generating all the benefits to
11 and for the City of Homer that were previously generated by competitor Icicle Seafoods,
12 the City of Homer refused and continues to refuse to consider any relief or incentives to
13 Complainant while continuing to provide relief and incentives to the competitor, Icicle
14 Seafoods, for and with no benefit to the Respondent. In addition, Respondent
15 previously entered into lease arrangements with Complainant's competitor, Icicle
16 Seafoods, that are in contravention and violation of the Shipping Act of 1984, as
17 amended, and the published Tariffs and result in prejudice and damage to Complainant.

18 **A. Respondent's Treatment of Complainant.** Respondent's "Terminal Tariff No. 600
19 Filed under ATFI Rules" effective January 1, 2009, Application Of Rule 34.30 regarding
20 "Fish Dock" at Subsection 275 at page 53 sets the published rate for "Fish Dock Crane"
21 at \$88.00 per hour for the years 2009 and 2010. Respondent's "Terminal Tariff No. 600
22 Filed under ATFI Rules" effective January 1, 2011 and April 25, 2011 and July 25, 2011,
23 Application Of Rule 34.30 regarding "Fish Dock" at Subsection 275 at page 53 the
24 published rate for "Fish Dock Crane" is \$90.64 per hour for the year 2011. Respondent
25 has required Complainant to pay and Complainant has paid the amount of \$98,488.05
26 in 2009, \$84,900.65 in 2010, \$74,452.65 in 2011 and an undetermined sum in 2012 for
27 a total of at least \$257,841.35.

28
29 Respondent's Treatment of Competitor. Complainant pays the rates published in
30 the Tariff and noted above, yet its major competitor, Icicle Seafoods, Inc. d/b/a Seward
31 Fisheries ("Icicle Seafoods"), is not assessed and does not pay the rates published in
32 the Tariff. Respondent charges for "Fish Dock Crane" use and also for the use of
33 multiple defined "PREMISES" based on rates in a series of lease agreements, addenda
34 and amendments executed by Respondent and Icicle Seafoods. The LEASE
35 AGREEMENT dated September 14, 1979 recorded at Book 111, Pages 884 through
36 902A in the Homer Recording District at Paragraph 3 ("USE OF PREMISES") describes
37 the real property subject to the "Land Lease" at Page 885. The AMENDMENT OF
38 LEASE AGREEMENT dated July 1, 1986 recorded at Book 172, Pages 673 through
39 678 in the Homer Recording District at Paragraph 5 ("USE OF PREMISES") at Page
40 675 states:

- 1 (a) Lessee shall have the use of the covered structure at the Fish Dock.
2 (b) Lessee may continue to operate its ice dispensing equipment at its present
3 location on the fish Dock.
4 (c) Lessee shall have the use of loading cranes No. 7 and 8 to a maximum of
5 1,858 hours per year. Use of the cranes by Lessee in excess of that time
6 shall be at the rate of Fifteen Dollars (\$15.00) per hour.
7 (d) Seafood wharfage charges are included within the rental given above.
8 (e) Lessee shall have the use of one fish buying shed. Lessor shall have the
9 right to select the shed for Lessee's use.

10 The SECOND AMENDMENT OF LEASE AGREEMENT dated January 25, 1988 with
11 an effective date of September 14, 1987 recorded at Book 0181, Pages 383 through
12 386 in the Homer Recording District at Paragraph 4 ("USE OF PREMISES") at Page
13 384 states:

- 14 (f) The existing camping are shall be relocated to a area reasonably close to
15 Lessee's processing operations in order to facilitate placement of fill material
16 on the West side of the Homer Spit.
17 (g) The existing parking arrangement will be re-evaluated and amended to
18 reflect changes resulting from the Interim Spit Plan at the next scheduled
19 review of the lease.
20

21 DOCK AND CRANE USE described on (c) above is amended at Page 384 as follows:
22

23 Dock use includes use up to a maximum 1300 hour maximum. All hours
24 of use above the 1300 hour maximum shall be charged at the rate of \$15
25 per hour. Crane use is no longer limited to cranes No. 7 and 8.
26

27 The Tariff at page 53 describes the "Ice Plant Bin Storage (roofed-over, open-sided
28 Storage bins at west end of ice plant building sixteen feet by twelve feet)." This 192
29 square foot structure is assessed the rental rate of \$2400 per year ("200/month"
30 multiplied by 12 months) which is a rate of \$12.50 per square foot pursuant to the Tariff.
31 Pursuant to the provisions in (a) through (g) in the USE OF PREMISES paragraphs in
32 the last two LEASE AGREEMENTS set forth above, Respondent allows Icicle Seafoods
33 to use and enjoy for commercial purposes an additional approximately 2750 square feet
34 of Respondent's property. At the annual rate of \$12.50 per square foot calculated
35 pursuant to the provisions in the Tariff, Icicle Seafoods is commercially using and
36 enjoying premises valued at \$34,375.00 (2750 square feet x \$12.50 per square foot).
37 The "Dock Use" charge stated in Paragraph 2 "RENTAL" in the SECOND
38 AMENDMENT at page 384 is \$30,900.00. The amount of \$34,375.00 is the total
39 calculated "USE OF PREMISES" benefit to competitor Icicle Seafoods which exceeds

1 the "Dock Use" charge before the calculation of "Fish Dock Crane" use. Thus, the
2 Respondent provides at least an annual benefit of \$3,475.00 (\$34,375.00 - \$30,900.00)
3 to Icicle Seafoods that is not provided to and prejudices Complainant. In addition,
4 Respondent provides Icicle Seafoods the 1300 hours of Crane Use for free and only
5 charges the rate of \$15 per hour for use above 1300 hours as stated in Paragraph 3
6 "DOCK AND CRANE USE" in the SECOND AMENDMENT at Page 384. However,
7 Respondent charges Complainant for crane use discussed below. Respondent has
8 damaged Complainant in the sum of at least \$10,425.00 (\$3,475.00 x 3).

9 **B.** The Tariff dated July 25, 2011 at page 53 states: "Minimum charge per hour for
10 crane" [is] "Fifteen minutes." In application, Respondent City of Homer applies the rates
11 in 15 minute increments, so 16 minutes of use is charged at 30 minutes, 31 minutes is
12 charged at 45 minutes, and 46 minutes is charged at 60 minutes. Respondent City of
13 Homer assesses an automatic overcharge of \$1.51 to \$21.14 on average for each
14 transaction. Respondent City of Homer has represented that this rate structure has
15 been set forth in the Tariff, although this rate structure is not set forth in the Tariff.
16 Respondent does not apply these calculations to the Fish Dock Crane use assessed to
17 Icicle Seafoods. Respondent overcharged Complainant a total of at least \$16,902.14
18 for the years 2009 to 2011 and an as yet undetermined sum in 2012 based on the rate
19 published in the Tariff. In addition, applying the minimum charge outlined in the Tariff
20 results in a crane charge for a 1 minute use of \$24.36. For example, Respondent billed
21 and Complainant paid \$487.20 for 20 crane charges totaling 1 hour. In addition,
22 Respondent billed and Complainant paid \$419.22 for 17 crane charges that totaled 13
23 minutes, an effective hourly rate of \$1,934.86 per hour. These charges are not applied
24 to Icicle Seafoods which also is not subject to a per use sales tax.

25 **C.** The Tariff at page 53 states a wharfage rate of \$4.62 per ton for the years 2009
26 and 2010 and a rate of \$4.76 per ton for the year 2011 on fish products handled by the
27 Complainant. Respondent exempts Icicle Seafoods from these charges and
28 assessments. Respondent bills at \$.00231 per pound for the years 2009 and 2010 and
29 \$.00238 for the year 2011. Complainant handled 8,026,896 pounds of fish in 2009
30 which results in a differential and damages to Complainant of \$18,542.13 in 2009.
31 Complainant handled 6,588,169 pounds of fish in 2010 which results in a differential
32 and damages to Complainant of \$15,218.67 in 2010. Complainant handled 5,540,143
33 pounds of fish in 2011 which results in a differential and damages to Complainant of
34 \$13,185.54 in 2011. Complainant handled an as yet undetermined poundage of fish in
35 2012 with a differential and damages to Complainant of an as yet undetermined sum in
36 2012. The total damages are at least \$46,946.34 for the years from 2009 until 2012.

37 **D.** Respondent has compelled Complainant to pay and Complainant has paid to
38 Respondent the sum of about \$332,114.83 (\$257,841.35, \$10,425.00, \$16,902.14 and

1 \$46,946.34) in charges in contravention and in violation of the Shipping Act of 1984, as
2 amended, specifically 46 U.S.C. §§ 41106(2) and (3).

3 **E.** Complainant and Icicle Seafoods compete to purchase fish in the City of Homer
4 and the Port of Homer. If Respondent had not treated Complainant differently than
5 Icicle Seafoods, Complainant could have purchased more fish and realized net
6 revenues of up to \$350,000.00.

7 **F.** Respondent charges an additional wharfage fee for ice used on fish offloaded at
8 the fish dock of \$14.00 per ton in the years 2009 and 2010 and \$14.50 in the year 2011
9 unless the ice is purchased from the City. Respondent does not assess this fee to Icicle
10 Seafoods. The City and Icicle executed a reciprocal rate arrangement for ice that
11 prejudices and damages Complainant. Respondent has damaged Complainant in an
12 amount to be determined.

13 **V.** That by reason of the facts stated in the foregoing paragraphs, Complainant has
14 been and is being subject to injury as a direct result of the violations by Respondent of
15 the Shipping Act of 1984, as amended, specifically 46 U.S.C. §§ 41106(2) and (3).
16 Respondent has given undue and/or unreasonable preference and/or advantage and/or
17 imposed undue or unreasonable prejudice and/or disadvantage with respect to
18 Complainant. In addition, Respondent has unreasonably refused to deal and/or
19 negotiate with Complainant.

20 **VI.** That Complainant has been injured and damaged and continues to be injured
21 and damaged in the following manners: Respondent damaged Complainant in the sum
22 of \$332,114.83, representing the difference between the amount paid by the
23 Complainant and the amount paid by competitor Icicle Seafoods. In addition,
24 Respondent placed the Complainant in a competitive disadvantage in the marketplace
25 and further damaged Complainant in the sum of \$350,000.00 or in an amount to be
26 determined after further disclosures and discovery.

27 **VII.** Wherefore Complainant prays that Respondent be required to answer the
28 charges herein; that the Complainant and Respondent have not engaged in informal
29 dispute resolution and should be directed to consider informal resolution of the dispute
30 and claims; that if informal dispute resolution is not possible, after due hearing in
31 Washington, D.C, an order be made commanding said Respondents (and each of
32 them): to cease and desist from the aforesaid violations of said acts; to establish and
33 put in force such practices as the Commission determines to be lawful and reasonable;
34 to pay to said Complainant by way of reparations and damages for the unlawful conduct
35 hereinabove described the sum of \$682,114.83, with interest and attorney's fees or
36 such other sum as the Commission may determine to be proper as an award of
37 reparation and damages; and that such other and further order or orders be made as
38 the Commission determines to be just and proper in the premises.

1 Dated at Homer, Alaska, this 29th day of March, 2012.

2 

3 Kevin Hogan
4 President
5 The Auction Block Company
6 4501 Ice Dock Road
7 Homer, Alaska 99603

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10 _____
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13 Verification

14 State of Alaska)

15 Third Judicial District) ss

16 Kevin Hogan being first duly sworn on oath deposes and says that he is the President of
17 the Complainant, a corporation organized under the laws of the State of Alaska, and is
18 the person who signed the foregoing Complaint on behalf of the Complainant; that he
19 has read the Complaint and that the facts stated therein, upon information received from
20 others, affiant believes to be true.

21 Subscribed and sworn to before me, a notary public in and for the State of Alaska, this
22 29th day of March A.D. 2012.

23 [Seal]
24 

25 Notary Public in and for the State of Alaska

26 My Commission expires: 01/01/2016

