

DC Circ. Rejects ‘Convoluting’ NY/NJ Port Lease Discount

By **Patrick Boyle**

Law360, Washington (March 22, 2016, 8:48 PM ET) -- The D.C. Circuit ordered the Federal Maritime Commission on Tuesday to reconsider its “hopelessly convoluted” decision to let the Port Authority of New York and New Jersey give a \$120 million lease discount to one terminal operator while rejecting a similar deal for others.

The commission failed to justify why it contradicted its own precedents in approving the Port Authority’s discount on its lease of space to APM Terminals, a division of Maersk, while rejecting a request by Maher Terminals LLC for the same rate, the three-judge panel said.

“The commission’s explanation as to why APM-Maersk’s preference was based on a ‘transportation factor’ was hopelessly convoluted,” said the decision written by Judge Laurence H. Silberman.

The dispute grew out of 30-year leases Maher and APM signed in 2000, in which APM received rates about \$120 million lower than the going market rate, according to Maher. Maher pushed to receive the same rate as APM and launched its case with the commission after the Port Authority refused.

The circuit court rejected the commission’s reasoning that Maersk’s threat to move its shipping justified the discounted deal for its terminal operator, APM, because the threat was credible and the loss of that shipping would have devastated the port. Maher didn’t carry the same control over the port’s business, the commission said in explaining its decision to the court last month.

The court noted that in two previous decisions, referred to as Ceres and Ballmill, the commission did not consider threats to leave the ports as sufficient “transportation factors” to justify a preferential rate for a company. The Ceres case was particularly similar to his one, the court said: The commission rejected preferential rates the Maryland Port Authority granted Maersk at the Port of Baltimore for dockage, crane rental and land rental, saying the cargo guarantees that Maersk offered and its size did not justify lower terms than those offered to another company, Ceres.

The court rejected the commission’s contention that the APM case was different because the level of fact-finding was more extensive than in those previous cases.

The commission, Silberman wrote, “offered rather lame distinctions we find quite unpersuasive.”

The commission also failed to show why APM’s threat to leave was a “transportation factor,” reverting instead to a contention that the Port Authority’s decision was not unreasonable.

“Does that mean the term ‘transportation factor’ is simply a synonym for reasonable?” the court asked. “If so, how does the commission distinguish between reasonable and unreasonable preferences?”

If the commission decides to again uphold the discount give to APM, the court said, it must better justify why the Port Authority doesn’t have to offer the same discount to Maher and other operators, and align its decision with those in previous cases or overrule those decisions.

“We express no views on whether the commission could overrule or modify its previous decisions,” the court said, “but it must do so in a forthright manner.”

Chief D.C. Circuit Judge Merrick B. Garland and D.C. Circuit Judges David S. Tatel and Laurence H. Silberman sat on the panel.

An attorney for Maher declined to comment and the commission and attorneys for the Port Authority did not respond to requests for comment.

Maher is represented by Richard Paul Bress, Melissa Arbus Sherry and Benjamin William Snyder of Latham & Watkins LLP.

The commission is represented by William J. Baer of the U.S. Department of Justice and in-house counsel Joel Frederick Graham and Tyler James Wood.

The case is Maher Terminals, LLC v. FMC, et al, case number 15-1035, in the United States Court of Appeals for the District of Columbia Circuit.

--Additional reporting by Michael Macagnone. Editing by Patricia K. Cole.

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