BEFORE THE FEDERAL MARITIME COMMISSION

DOCKET NO. P4-16

REPLY OF THE

PORT OF HOUSTON AUTHORITY

TO THE PETITION OF THE "COALITION FOR FAIR PORT PRACTICES" FOR RULEMAKING

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The Port of Houston Authority ("PHA") submits this Reply and supporting affidavits in opposition to the Petition of the Coalition for Fair Port Practices ("Coalition") requesting the Federal Maritime Commission to institute a rulemaking to establish uniform rules for the charging of demurrage in all ports of the United States. As we show below, the rules suggested by the Coalition are unnecessary, unfair, and anticompetitive.

I. THE PORT OF HOUSTON AUTHORITY - OVERVIEW[1]

The Port of Houston is a 25 mile long complex of 150-plus private and public industrial terminals along the 52-mile-long Houston Ship Channel. The eight public terminals are owned and operated, managed, or leased by PHA and include the general cargo terminals at the Turning Basin, Care, Jacintoport, and Woodhouse and the container terminals at Barbours Cut and Bayport. Each year, more than 200 million tons of cargo move through the greater Port of Houston, carried by more than 8,000 vessels and 200,000 barges. The port is consistently ranked 1st in the United States in foreign waterborne tonnage, 1st in U.S imports, 1st in U.S. export tonnage, and 2nd in the U.S. in total tonnage. It is also the nation's leading breakbulk port, handling 41 percent of project cargo at Gulf Coast ports.

The Port of Houston has been instrumental in the City of Houston's development as a center of international trade. It is home to a multi-billion petrochemical complex, the largest

[1] The summary description of the PHA here is taken directly from the "Overview" section of PHA's website. Additional facts relating to all aspects of PHA's operations are available at www.porthouston.com.

in the nation and second largest in the world. Carrier services on all major trade lanes link Houston to international markets around the globe. The Houston Ship Channel also intersects a very busy barge traffic lane, the Gulf Intracoastal Waterway.

Centrally located on the Gulf Coast, Houston is a strategic gateway for cargo originating in or destined for the U.S. West and Midwest. Houston lies within close reach of one of the nation's largest concentration of consumers, 144 million within 1,000 miles. Ample truck, rail and air connections allow shippers to economically transport their goods between Houston and inland ports.

The Port of Houston is vital to the local, state and national economy, and the maintenance and improvements of the public facilities ensure its continued economic impacts. Keeping the port secure so that the business can flow freely is also an essential responsibility. As the local public sponsor of the Houston Ship Channel, PHA plays an important role in the management and environmental stewardship of this important waterway.

II. THE PORT OF HOUSTON AUTHORITY'S DEMURRAGE CHARGES

PHA's demurrage charges are set forth in three tariffs: Tariff 8, pertaining to the general cargo facilities, Tariff 14, pertaining to the Barbours Cut Container Terminal, and Tariff 15, pertaining to the Bayport Container Terminal. The last two tariffs contain identical provisions relating to demurrage, so references to container demurrage shall be cited only from Tariff 14.

With respect to general cargo, Subrule No. 137 in Tariff 8 defines very specifically when free time begins and ends, and establishes varying amounts of free time, i.e. 10, 15, 30, and 45 days, depending on the nature of the cargo, whether it is inbound or outbound, and how it arrives at or leaves PHA facilities. This subrule also sets forth a sliding scale for demurrage, based upon the number of days the cargo remains at PHA facilities after the expiration of free time.[2] Subrule No. 137 further provides that PHA has the option to move cargo to licensed public storage at the expiration of free time. Finally, Subrule No. 137, Section 7, provides that "If and only if wharf demurrage has not commenced and the cargo is in its free time period, the computation of free time shall be suspended during a general waterfront strike or work

[2] Subrule 137 also includes a specific rate per bale for cotton and cotton linters, which are currently very infrequently handled at PHA facilities.

stoppage in freight handling which prevents the removal of the cargo from Port Authority premises…"

The rules for demurrage for the container terminals are altogether different, but again not so easily summarized. There are two sections in Tariff 14 that apply: Subrule No. 093 of Tariff 14 applies to loaded import and export containers and Subrule No. 101 of Tariff 14 applies to breakbulk cargo. In the first situation, the free time is 7 days, plus 3 days if either U.S. Customs and Border Protection or other federal agency inspections are required, and in the second situation, the free time is generally 30 days. There are very specific conditions that apply to each situation. Additionally, Subrule No. 093 provides that PHA will give demurrage credits, on a daily basis and upon application, in the event of "[a]ny occurrence which results in the Port Authority's inability to provide container services for 24 consecutive hours or more…." The demurrage rates for containers depend on the length of the container and whether it is import or export cargo; the demurrage rate for breakbulk cargo is based on per ton, per day.

This summary necessarily omits a recitation of the very particular and detailed tariff provisions relating to demurrage but does show how the rules are tailored to the shipping characteristics as they are presented at PHA facilities.

III. THE RULE REQUESTED BY THE COALITION

The rule requested by the Coalition has three parts, which are operative in different circumstances. First, if prior to the expiration of free time an event occurs that prevents a party from accepting or delivering cargo, then the period of free time is suspended until receipt or tender of the cargo can be made. Second, when an event preventing a party from accepting or delivering cargo occurs after the expiration of free time and demurrage charges have already commenced, the demurrage charges are suspended until the event has ended. Third, if after the expiration of free time, a party cannot access its cargo due to "circumstances beyond their control affecting a substantial part of the port area," demurrage is limited to a "compensatory" rate in lieu of a "penalty" rate. This third provision is intended to apply when congestion occurs in a "substantial" portion of a port.

PHA believes that the rules proposed by the Coalition are (i) unnecessary for PHA and other Gulf ports, (ii) unfair and thus unjust and unreasonable; and (iii) anti-competitive.

IV. THE RULE REQUESTED IS UNNECESSARY FOR HOUSTON AND OTHER GULF PORTS

In the very lengthy petition filed by the Coalition, one searches in vain for any reference to problems in the operation of demurrage rules at the Port of Houston, or indeed any other Gulf port. The overwhelming number of situations complained of by the Coalition arise on the east and west coasts, in particular the Port of New York/New Jersey and the Port of Los Angeles, and not on the Gulf coast. PHA's tariff rules regarding demurrage and the circumstances under which demurrage is excused have worked well. They are tailored to the cargo and ship traffic at PHA facilities and set forth appropriate procedures for excusing demurrage when circumstances warrant. Thus, at PHA facilities, free time is longer for breakbulk cargo than for container cargo and may also vary depending on the nature of the cargo; additional free time is given for federal agency inspections; and demurrage credits are afforded in particular circumstances when PHA has caused the delay.

If rules are needed in other ports—and for the reasons shown below, we believe that the rules proposed by the Coalition clearly are not the appropriate rules—there is no justification whatsoever for making such rules applicable throughout the United States.

V. THE RULE REQUESTED IS UNFAIR, HENCE UNJUST AND UNREASONABLE

The Shipping Act requires marine terminal operators to establish, observe, and enforce just and reasonable regulations and practices. Shipping Act 1984, 46 U.S.C. 41102. The rule proposed by the Coalition is unfair and thus unjust and unreasonable under the Shipping Act. The purpose of the Coalition's proposed rule is to deprive terminal operators of compensation, almost always in circumstances over which they have no control, for the very asset from which they earn their compensation. Furthermore, in PHA's experience, and in spite of the Coalition's protests to the contrary, the carriers, shippers and/or truckers, in the vast majority of cases, are responsible for failures to observe free time allotments. In essence, the rule seeks to put the costs of various aspects of the shipping transaction wholly upon the one party who is not a party to the shipping contract.

The basic premise of the petition filed by the Coalition is that, since the shipper, consignee, receiver, or drayage provider is not responsible for the factors that may prevent timely delivery and/or tender of cargo, Coalition members should not have to pay demurrage for the continued use of the terminal operators' premises. While we do not concede the premise (see below), it is in fact

largely irrelevant to the conclusion: demurrage is not a charge meant to punish, but is a charge intended to incentivize and compensate.

We cannot do better than to quote extensively from a judicial opinion, which explains with great clarity the function of demurrage charges in the maritime context:

> Defendants' appeal to the impossibility of performance doctrine misconceives the purpose of a demurrage charge. Because of its distinctive nature, '[f]requently demurrage is assessed and liability attaches although the delay is not caused by the assessed party.' Port Terminal Ry. Assn v. Connell Rice & Sugar Co., 387 F.2d 355 at 357 (5th Cir. 1967).
>
> Free time is a reasonable period during which it is contemplated that removal of the cargo will take place. As the charge for cargo which remains beyond the free time, demurrage, by definition, accrues when performance cannot be accomplished as contemplated. This failure of performance may be the fault of the vessel's agent or of other parties. It may result from equipment failure, weather, or governmental action. Many of the delaying events cannot be anticipated when the cargo is placed on the wharf. Accordingly, by its nature, demurrage is usually charged when an unforeseen event prevents performance, that is, removal of cargo within the free time. Demurrage is the rental charge made for occupation of the facility until performance can be completed.
>
> It is therefore irrelevant to the imposition of demurrage that it is impossible to avoid incurring the expense, or that some other party caused the delay. Absence of fault will not excuse the liability. Pennsylvania R.R. v. Moore-McCormack Lines, Inc., 370 F.2d 430 (2nd Cir. 1966). By use of the facility, a party must accept the potential liability for these expenses as imposed by the tariff. Houston Belt & Terminal R.R, v. Connell Rice & Sugar Co., 411 F.2d 1220 (5th Cir. 1969).
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> Obviously the party seeking to impose the charge may not be responsible for the delay. Port Terminal R.R. Ass'n v. Connell Rice & Sugar Co., 387 F. 2d 355 (5th Cir. 1967). This exception does not apply here because the City of Galveston clearly had no control over the strike.
>
> Although defendants' liability is not dependent upon their responsibility for the strike, if either party is to be considered responsible, it is the defendants. As members of the West Gulf Maritime Association, they are signatories to the contract with the International Longshoremen Association which was the subject of the strike. It is more equitable that pier demurrage, as an expense of the strike, should be borne by a party to the collective bargaining, such as defendants, than by an entity completely powerless to prevent or terminate the strike, such as Galveston Wharves.[3]

The Coalition cites five factors which it says cause port congestion and are beyond the control of shippers, consignees and drayage providers: weather, labor issues, government

[3] *City of Galveston v. Kerr Steamship Co., Inc.* 362 F. Supp. 289, 294 (S.D. Tex. 1973), affirmed (without opinion) 503 F.2d 1401 (5th Cir. 1974), cert. denied 420 U.S. 975 (1975) referred to hereinafter as "City of Galveston ."

inspections, bankruptcy of steamship lines, and large vessels. Not one of these factors is the responsibility of terminal operators. Clearly, the larger size of vessels, the bankruptcy of steamship lines, the weather, and delays caused by government inspections cannot be the fault of terminal operators. While it is possible that a terminal operator may be a party to a collective bargaining agreement, as pointed out by the court in the *City of Galveston*, it is usually the vessel operator who is a party to that agreement. Fault is not the issue here. The issue is who should bear the costs of delays which, while not fully predictable, are likely to occur in a given percentage of transportation contracts. Clearly, the parties who should bear these costs and negotiate the allocation of these costs should be the parties to the transportation contracts; that is, the carrier and the shipper. They are in the unique position of being able to negotiate under what circumstances and in what proportion either one pays demurrage costs should they occur. Further, in evaluating the vessels and ports that best meet its needs, the shipper always has the option of choosing vessels and destinations that are less likely to incur these costs.

The experience of PHA, as shown in the attached Affidavits of its Terminal Directors, is most instructive here. Demurrage is not a major problem with respect to breakbulk cargo traffic, as inbound breakbulk cargo is 80% direct discharge cargo; when demurrage does occur, it is usually because of a breakdown in the contract between the seller and purchaser of the commodity involved. With respect to container cargo, demurrage is most often caused either by failures on the part of the carrier (e.g., overbooking the vessel; failure to pay the terminal operator), the shipper (e.g., failure to pay the ocean carrier) and/or the trucker (e.g. shortage of trucks or truck drivers or the trucking company is behind schedule). None of these parties wants to admit fault, and consequently may blame the port or marine terminal operator, or seek a dispensation from paying demurrage.

Notwithstanding the above discussion and the necessity for ports to earn income from the use of their property, PHA does grant dispensations for the payment of demurrage in strike situations at its general cargo piers, and at its container terminals, "in any occurrence which results in the Port Authority's inability to provide container services for 24 consecutive hours of more...." Thus, considerations of the market and of good customer relations, rather than of regulation, have resulted in a simple, cost-efficient manner of dealing with demurrage issues.

One final point should be made with respect to the "fairness" argument. The second aspect of the rule requested by the Coalition seeks the suspension of demurrage charges *after* free time

has expired in the event there are delays in obtaining or tendering cargo at a port's premises due to the factors cited, viz., weather, strikes etc. But, by definition of the suggested rule, these factors were not present during free time, when there was no impediment to the shipper, receiver, etc. doing its business at the port. In what sense is it "fair" to deprive the port of revenue from the use of its premises or the availability of same because of the failure of the shipper or consignee to pick up or deliver cargo within the time allotted?[4] This aspect of the Coalition's petition betrays its pretension to seek only just and reasonable provisions for the community of persons involved in maritime commerce and makes obvious that the petition is only self-serving.

VI. THE RULE REQUESTED IS ANTI-COMPETITIVE

Finally, the rule suggested is clearly anti-competitive: the one-rule for all deprives ports of the opportunity of competing for maritime transportation by offering their unique facilities with flexibility to provide different accommodations for different contingencies. In seeking to impose uniform terms and conditions in maritime commerce throughout every port in the United States under the guise of "fairness," the petition would have the effect of stifling competition among ports. Obviously, ports and marine terminal operators compete by facilities, price, and terms and conditions of use. Whether and to what extent ports are willing or able to extend free use of their premises can be a significant factor in determining a shipper's choice of carrier and route. By seeking a standardization of these rules, the Coalition would lessen competition among ports in order to improve their own bottom lines. The suggested rule thus flies in the face of the statement of Purposes of the Shipping Act, 1984, 46 U.S.C. 40101:

"The purposes of this part are to—

(1) Establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States *with a minimum of government intervention and regulatory costs* [emphasis added]...

(4) promote the growth and development of United States exports *through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.* [emphasis added].

Grant of the Coalition's petition would accomplish just the opposite consequences.

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[4] The same point may apply also to the case in which an event that occurs during free time delays delivery or tender, viz., if the shipper or receiver waits until the end of the free time period when the event of congestion occurs, as opposed to making early delivery or pickup when there may be easy access.

VII. SUMMARY

In summary, the rules proposed by the Coalition in its Petition (i) if found to be advisable for east and west coast ports, would certainly not be advisable or necessary for PHA; (2) would be unfair and thus unjust and unreasonable under the Shipping Act; and (3) would be anti-competitive, in clear contradiction of the stated purposes of the Shipping Act.

We appreciate your consideration of our Reply to the Petition of the "Coalition for Fair Port Practices" for Rulemaking and urge that the Petition be denied.

Respectfully submitted,

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Dated: February 22, 2017

Attachments: Affidavit of Randy Stiefel
Affidavit of Ryan Mariacher

CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of February, 2017, served a copy of this Reply upon Karyn A. Booth, Thompson Hine LLP, 1919 M Street, N.W., Suite 700, Washington D.C. 20036-3537, by first class mail, postage prepaid.

Linda Henry, Esq.