

AAPA PORT ADMINISTRATION AND LEGAL ISSUES SEMINAR
Miami, FL February 12, 2007

ADDRESSING PORT DEVELOPMENT CHALLENGES – HYPOTHETICALS

Three hypotheticals are presented as background for a discussion of a variety of issues facing ports with regard to the use and development of their facilities. The hypotheticals do not represent actual situations, but were created to foster group discussion. Any similarity, real or imagined, to actual situations is inadvertent and disclaimed.

Please read all three hypotheticals and raise issues that you recognize. Panel members will respond to the issues you raise and elaborate on them. Issues include matters within the regulation of the Federal Maritime Commission, ethics, procurement, bankruptcy, pricing, risk management, port schedules vs. leases, termination, and assignment. Please feel free to ask questions.

BACKGROUND

Port Blackwater is, for the most part, a landlord port. It has ten marine terminals:

five are leased to individual marine terminal operators;

three are leased to a variety of marine terminal operators for a variety of uses;

two container terminals, Milkyway and Jellybean, are operated by Port Blackwater through competitively procured contracts with two stevedoring companies, A&P Ports and Y&Z Stevedoring.

Port Blackwater has two nearby competitors: Port Greenwater and Port Whitewater.

I. Chablis, Inc.

Port Blackwater has begun requiring tenants to provide a cargo throughput commitment as part of the lease agreement. Chablis, Inc. is a long-time tenant at Gooden Plenty Marine Terminal, one of Port Blackwater's three mixed-use facilities. Chablis had originally leased property 15 years ago, before the port began requiring cargo throughput guarantees. It has been unwilling to enter into a new lease that includes a cargo guarantee. Chablis' lease expired and it has been holding over pursuant to the Schedule pending discussions of a new lease.

Marketing Director Guy Givaway, who never liked Chablis' president, has been talking with another potential tenant, Merlot, Inc., currently leasing space from Port Greenwater, a strong competitor. Givaway suggests that Port Blackwater offer the land that Chablis had been leasing to Merlot. To induce Merlot to move from Greenwater to Blackwater, Givaway proposes that the port waive Merlot's cargo guarantee for the first three years and charge a rental fee 20% less than what Chablis had been paying. Finance Director Mark Makempay complains. He thinks that there are other companies out there who would be willing to offer more than what Givaway is proposing for Merlot.

Property Manager Laura Landlord informally tells Chablis that the port is in negotiations with someone else for the property, and that if Chablis won't enter into a lease with a cargo guarantee within 30 days, it will have to vacate. Chablis, who had been making monthly payments under the Schedule, files Chapter 11 bankruptcy. Customers tell the Port Blackwater officials that they expect the port to get their cargo released for them.

II. A & P Ports

A&P Ports, like Chablis, is a tenant at Gooden Plenty Marine Terminal. In addition, A&P provides stevedoring services on behalf of Port Blackwater at Milkyway Marine Terminal, one of the two container terminals operated by the Port. The other container terminal, Jellybean, is operated by A&P's competitor, Y&Z Stevedoring.

A&P's parent company just recently announced that it (the parent company) is going to be sold to SPW, Ltd., partially owned and controlled by the country of Sbara. Sbara is a country with whom the U.S. has always had good relations, although some question its connections to fundamentalist dietary groups that promote vegetarianism (and Port Blackwater has limited vegetable business).

Operations Director Tommy Tonnage immediately discusses this news with A&P. A&P tells Tonnage that Port Blackwater has nothing to worry about. If for some reason A&P won't be continuing to function as it does now, it will just assign its contracts and leases to Y&Z, a successful and well respected stevedore at Port Whitewater. Tonnage, who has long had a very close relationship with A&P, tells A&P he's fine with that plan.

Meanwhile, as soon as he hears the news about A&P, the Chair of Port Blackwater's Board of Commissioners calls Port Director Bill B. Boss and tells him to terminate all contracts and leases with A&P immediately. Boss promptly contacts Port Counsel Tara Trustworthy and tells her to draft the necessary documents.

III. Cherry Garcia

As noted above, five of Port Blackwater's marine terminals are leased to individual tenants, all of whom compete for business with each other. Although the leases are not identical, the rental rates are similar. All five of the leases expire in the foreseeable future: Vanilla, Inc. and Chocolate, Inc.'s leases expire in two years; Strawberry Inc's lease expires in four years; Rocky Road, Inc.'s lease expires in five years; Cherry Garcia, Inc.'s lease expires in ten years.

As space is at a premium, Finance Director Makempay wants to increase rental payments as soon as possible for all terminals. He suggests that the Port establish in its Schedule an across-the-board rate increase for all tenants, along with a surcharge to recoup security costs incurred since 9/11, as well as those going forward. Risk Manager Noak Cident supports the idea and suggests further additions to the Schedule: (1) place liability for all damages and consequential losses on the tenants; and (2) require tenants to include the Port as a named additional assured on all their insurance policies. Givaway predicts that all tenants will immediately leave Port Blackwater for Greenwater or Whitewater if the Port does any of that.

Property Manager Landlord reports that her counterparts at neighboring ports Greenwater and Whitewater have stated that they, too, are thinking of increasing their rates and volunteers to have some off-line conversations about the insurance/indemnification issues. Bill B. Boss notes that Port Greenwater recently submitted a FOIA request for all of Port Blackwater's leases, suggesting to him that the two ports meet to discuss ways they could work together, rather than competitively, to increase rates. He questions whether raising rates for Vanilla and Chocolate in two years above the rates charged to other tenants leave others, particularly Cherry Garcia, with too sweet a deal.