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TARIFF AUTHORITY FOR MAJOR PORTS

G. No. 25

New Delhi, 03 February, 2004

NOTIFICATION

In exercise of the powers conferred by Section 48 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the reference made by the Nhava Sheva International Container Terminal Limited (NSICT) regarding payment of dues by Jawaharlal Nehru Port Trust (JNPT) for the containers handled by NSICT for JNPT at the NSICT railside ICD facilities as in the order appended hereto.

(A.L. Bongirwar)
Chairman

Tariff Authority for Major Ports
No. TAMP/74/2003-JNPT

**The Nhava Sheva International Container
Terminal Pvt. Ltd. (NSICT)**

- - - Applicant

ORDER

(Passed on this 20th day of January 2004)

This case relates to a reference made by Nhava Sheva International Container Terminal Limited (NSICT) regarding payment of dues by Jawaharlal Nehru Port Trust (JNPT) for the containers handled by NSICT for JNPT at the NSICT railside ICD facilities.

2. The main points made by the NSICT are as follows:

- (i). TAMP has revised NSICT tariff by approximately 16% upwards vide its order dated 7 November 2000.
- (ii). We bill the JNPT at the revised tariffs in the same way as we bill the shipping lines.
- (iii). JNPT contests that the NSICT rates do not apply to the boxes handled by NSICT on behalf of Jawaharlal Nehru Port Trust.
- (iv). Revised tariffs approved by TAMP for NSICT applies to all our customers including JNPT boxes.

2.2. The NSICT has requested this Authority to confirm their interpretation.

3. A copy of the reference received from NSICT was forwarded to the JNPT for its comments. The comments of the JNPT thereon was forwarded to the NSICT as feed back information. The comments of JNPT and the further response of the NSICT on the comments of the JNPT are tabulated below:

| JNPT | NSICT |
|---|---------|
| 1. The commencement of terminal operation by NSICT was from April 1999 and joint ICD operation of NSICT/JNPT from the beginning has been started in respect of trains discharging/loading. Both the terminals handle ICD containers (Inbound as well as Out bound) belonging to each other at their rail sidings when a train is placed. | Agreed. |
| 2. Presently JNPT is having 6 rail tracks for ICD handling, out of which 1,2,6 and 8 are being handled by JNPT and rail track No.4 and 5 are being used by NSICT. | Agreed. |
| 3. Train from any ICD destination carrying inbound containers for JNP/NSICT is placed on the available tracks. When a train is placed at NSICT carrying export container for both the terminals, such export containers are discharged from the rakes by the RMGCs deployed by NSICT and the containers unloaded by the equipment are placed on Tractor Trailers deployed by NSICT/JNPT for transportation of containers belonging to respective terminals. Similarly for loading of trains, containers are fed by the respective terminals using their Tractor-Trailers up to the railhead, which are subsequently loaded on to the trains by using NSICT equipments. The process is reverse when a train is placed at JNPT. This practice has been followed for optimum use of railway tracks and rolling stocks. | Agreed. |

| JNPT | NSICT |
|---|---|
| <p>4. There is no specific provision available in the Port tariff for charging lift-on / lift-off activities carried out by RMGC/Reach Stackers. Hence to tide over the situation and also to honour the commitment for fast movement of ICD containers, the existing arrangement has been made on a fixed derived charge of Rs.400/- for 20' container and Rs.600/- for 40' container on a mutually agreed basis. It is also relevant to indicate that barring the initial period, JNPT has been handling more containers of NSICT on JNPT rail tracks. Even though, after the tariff revision, NSICT has been charging 16% more in respect of NSICT containers handled at both the terminal/tracks, the same has not been passed on to JNPT for containers handled at JNPT tracks. Giving an extra benefit to NSICT in respect of JNPT containers handled at their tracks without any additional service being rendered by them does not arise.</p> | <p>4. (i). It is correct that the joint handling of mixed trains commenced in 1999. Before November 2000 the tariffs of NSICT and JNPT were same and there was no question of any mutual agreement for settlement of dues of each other. The tariff considered for the activity was based on Section 1 – D (Truck to yard / Yard to truck, which in effect is lift on / lift off activity) of the schedule of rates specified under TAMP notification for NSICT tariff dated 18 December 1998 which was Rs.400 for 20' container and Rs.600 for 40' container and identical for NSICT and JNPT both. The issue has become relevant only since November 2000 when the tariff increase was granted to NSICT of 16%.</p> <p>(ii). We do not agree that there is no specific tariff for lift-on / lift-off activities carried out by RMGC / Reachstaker. The tariff set up by TAMP is not equipment specific. For example, ship to yard to ship could be done by Quay crane, Mobile Gottwald cranes, Straddle carrier, etc. These equipment are not specified in the tariff. The tariff for truck to yard considered by us is basically the lift on / lift off charge using any equipment</p> <p>(iii). The revised tariff effective 15 November 2000 for Section 1 – D (Truck to yard and Yard to truck which in effect is lift on / lift of activity) for NSICT is revised from Rs.400 to Rs.464 and Rs.600 to Rs.696 for 20' and 40' containers respectively. Hence the demand for differential charges of 16% for boxes handled by NSICT is as per TAMP order.</p> <p>(iv). TAMP has vide notification no. 19 February 2002 regarding the joint handling of transshipment boxes by NSICT and JNPT have already accepted the principle that tariff of NSICT for similar activity will be higher than JNPT. Even for the vessels handled by NSICT on behalf of JNPT in August 2001, we have invoiced JNPT with NSICT tariff and are still awaiting payment. Thus it is obvious that we have never agreed to charge JNPT at their rates for the services rendered by NSICT.</p> <p>(v). There is no question of passing on extra tariff earned by NSICT to JNPT as the NSICT tariff is set up higher after considering all the factors. If and when JNPT tariff is revised, we would gladly pay at the approved rates.</p> |
| <p>5. Since these charges of Rs.400/- for 20' and Rs.600/- for 40' containers are fixed based on a mutual agreement basis for same type of movements to be undertaken by both the terminals, the question additional payment of 16% is not at all relevant. Accordingly, it was informed to NSICT that the request of additional payment of 16% in respect of NSICT containers is not acceptable to JNPT.</p> | <p>5. We do not agree that the prices were set up on mutual agreement. In spite of our repeated reminders, JNPT has failed to produce any document to the effect that there is a separate agreement between the parties, on charging at lower rates.</p> |

| JNPT | NSICT |
|--|--|
| 6. Since JNPT has entered into an agreement with NSICT for establishing a separate container terminal by providing all infrastructure facilities, the treatment of NSICT towards JNPT on the same line of terminal-user relationship pattern is not appreciable. This point may kindly be taken into account while taking decision in this regard. | 6. The argument of JNPT that NSICT's tariff should not apply to JNPT since JNPT is the licensee is incorrect. In our opinion the TAMP tariff is applicable to all the users of the service including the Ports, which is strictly the matter under review and clarification with TAMP. |

4. A joint hearing in this case was held on 24 November 2003 at the office of the Authority. At the joint hearing, the following submissions were made.

Nhava Sheva International Container Terminal

- (i). We bill JNPT for ICD handling as per approved tariff. We charge JNPT as per truck / yard rate.
- (ii). JNPT is also bound by SOR notified by TAMP.
- (iii). We know TAMP cannot adjudicate on individual representations. That is why we have sought clarification.
- (iv). Whether the box is for NSICT or JNPT is not relevant. In a mixed train, we handle JNPT boxes also. Our cost of handling would not change. Therefore, JNPT should pay them the same tariff.
- (v). We have no mutual agreement with JNPT on the rate to be charged for this operation.
- (vi). Not claiming at a higher rate till Oct 2002 is a clerical error. We have our claim placed before JNPT. Since October 2002 we have sent supplementary bill based on 464/-.

Jawaharlal Nehru Port Trust

- (i). JNPT /NSICT does billing based on excess containers. When NSICT bills on excess containers, Rs.400/- per TEU was charged by them till October 2002.
- (ii). We charge users Rs.400/- as per our SOR. How can we pay Rs.464/- to NSICT for the same box?
- (iii). Let JNPT recover from customers and likewise NSICT recover directly for ICD operation irrespective of terminal to / from which the containers are booked.

5.1. As decided at the joint hearing, the JNPT was advised to submit written submission on the following points:

- (i) Confirmation whether the rate for operation yard to truck / truck to yard is only for lift on / lift of.
- (ii). Chronological details of billing for ICD handling between NSICT and JNPT. This should, inter alia, contain the number of containers handled by JNPT and NSICT for each other and the unit rate claimed and details regarding actual claim made by NSICT at higher rates.

5.2 In response, the JNPT has furnished the following details:

- (i). CONCOR brings mixed rakes to JN Port Trust. The activity of handling ICD containers by the JNPT and NSICT on behalf of each other is in existence since April 1999.
- (ii). NSICT made its first claim in January 2000 for handling ICD boxes of JNPT on NSICT rail lines 4 & 5 as per JNPT tariff for the period April 1999 to December 1999.

- (iii). With the approval of the competent authority, a mutual agreement came into force and accordingly it was decided to charge Rs.400/- for 20' containers and Rs.600 for 40' containers by NSICT and JNPT for the boxes handled at their respective rail lines.
- (iv). The tariff for providing the service at JNPT and NSICT was identical till October 2000. TAMP notified in November 2000 a separate tariff for NSICT with 16% increase as compared to JNPT tariff. Accordingly, the lift on / lift off rates as per NSICT tariff for ICD handling became applicable at the rate of Rs.464/- for 20 containers and Rs.696 for 40 containers.
- (v). NSICT paid for all bills raised by JNPT for handling ICD containers from April 1999 to October 2002 without adjustments for increased tariff. The NSICT paid for bills raised by JNPT for handling ICD containers from November 2002 to October 2003 after withholding amount towards differential tariff. This unilateral adjustment is without the consent of JNPT. The withheld amount is Rs.40.40 lakhs.
- (vi). NSICT raised the dispute for first time only in October 2002. It has also raised a debit note for Rs.23.54 lakh towards 16% differential tariff for the period April 2001 to September 2002.
- (vii). The dispute is against the spirit of agreement and 16% increase sought is not acceptable to JNPT. NSICT has been requested to take up the matter with CONCOR for replacement of dedicated rakes. NSICT has stated that it would charge JNPT at 16% higher rates as per their tariff and JNPT might advise CONCOR not to place boxes pertaining to JNPT at NSICT. CONCOR has expressed in various forums that it would be difficult for them to place dedicated trains.
- (viii). The agreement which was in force can be revised only with the consent of both the parties. There is no revised agreement yet in force to accommodate 16% increase. The fact that NSICT has continued to handle JNPT boxes confirms that they have not terminated the agreement. Even if they wanted to charge JNPT 16% higher rates they would have referred the matter to TAMP in October 2002, which they have referred now.
- (ix). The NSICT has made payments to JNPT as per the existing rates for the months of February 2003, August 2003 and September 2003.
- (x). JNPT is recovering from shipping lines at Rs.400 for 20' container and Rs.600 for 40' containers as part of composite tariff applicable for "from Container yard to railway flat or vice versa (ICD containers rail only Rs.1300 TEU), and it will be highly unfair if JNPT has to pay NSICT at Rs.464 for 20' containers and Rs.696 for 40' containers for similar services rendered.
- (xi). The NSICT has charged from shipping lines at Rs.464 for 20' container and Rs.696 for 40' container since November 2000 whereas they have paid JNPT at Rs.400 and Rs.600 for 20' & 40' containers respectively on rail lines operated by JNPT.
- (xii). The mutually agreed arrangement to charge at Rs.400 and Rs.600 for 20' & 40' container respectively for ICD handling is to be made binding on NSICT. It would be unfair for JNPT to pay NSICT more than what JNPT recovers from Shipping lines for boxes handled at rail lines 4 & 5.
- (xiii). If TAMP allows NSICT to charge 16% more from JNPT as per NSICT tariff, it may be allowed only with prospective effect. In such case, the differential tariff on account of ICD containers pertaining to JNPT handled on NSICT line No: 4 & 5 needs to be recovered by JNPT from respective shipping lines.

6.1 Likewise, the NSICT, as decided at the joint hearing, was advised to furnish clarification explaining the estimates for ICD handling furnished by them and whether receipts on account of handling of JNPT containers on rail was calculated at the rate now being claimed by the NSICT in their tariff proposal submitted to this Authority which was disposed of through the tariff order dated 7 November 2000.

- 6.2. The NSICT has made the following points:
- (i). NSICT had considered additional revenue arising from lift on / lift off and transportation at rail head while submitting the revenue projections.
 - (ii). The unescalated financial projections indicating the revenue analysis by container type and activity were submitted on 9 July 1999 and this is the basis on which TAMP deliberated and passed the order for revised tariff of NSICT, effective from 15 November 2000.

7. The Jawaharlal Nehru Port Trust has subsequently furnished the following additional comments:

- (i). In the approved tariff of the NSICT no rate has been specified for ICD rail handling from truck to rail flat or vice versa. The approved rate is for total ICD operation consisting of the rail flat to truck, transportation up to yard and truck to yard for export containers and vice versa for import containers at Rs.1508 for 20' container and Rs.2262 for 40' container. This consolidated rate is described in the NSICT tariff as 'yard to rail / rail to yard for ICDs only.'
- (ii). As per the cost statements submitted by NSICT, as a part of their application to TAMP for tariff revision, there is no separate income indicated for ICD rail handling for 'rail flat to truck or vice versa.'
- (iii). No tariff has been separately notified by TAMP either for JNPT or for NSICT for the activity 'rail flat to truck or vice versa.'
- (iv). The approved rate specified in NSICT tariff for the activity 'yard to truck / truck to yard' is Rs.464/- for 20' container and Rs.696 for 40' container. This rate is not applicable for the activity 'rail flat to truck or vice versa.'
- (v). The mutually agreed rate of Rs.400 for 20' container and Rs.600 for 40' container for the activity 'rail flat to truck or vice versa' should be levied by JNPT and NSICT for the ICD boxes handled by them on behalf of each other.
- (vi). The Authority may kindly concur with the existing mutually agreed rates of Rs.400/- for 20' container and Rs.600 for 40' container.

8. In the meanwhile, the Mumbai and Nhava-Sheva Ship-Agents' Association (MANSA) has requested to consider the application of NSICT only after consulting the users since users will have to pay more to JNPT if NSICT's claim is admitted by this Authority.

9. With reference to the totality of the information collected during the processing of the case, the following position emerges:

- (i). This case is initiated based on a reference made by the NSICT about the applicability of a rate reportedly derived from its Scale of Rates to JNPT when the relevant service is availed by JNPT. As explained by the NSICT, this reference is from a port operator and cannot be treated as representation from individual parties.
- (ii). The existing Scale of Rates of the NSICT was fixed by this Authority vide its Order dated 7 November 2000 relying on an analysis of the estimated cost and financial position for the year 2000-01 and 2001-02 as represented by the NSICT. Following the usual tariff validity cycle of two years adopted, the existing tariff at the NSICT had fallen due for review in November 2002. NSICT has not responded in this regard so far. In this backdrop, considering the reference made by the NSICT about its Scale of Rates which has lost its initial validity, cannot be taken to be an incidental approval of this Authority to the continuance of the said Scale of Rates. This case is limited to the reference now made by the NSICT.

- (iii). The request of MANSA to consult various port users before deciding the reference made by the NSICT does not appear very relevant. It is relevant here to mention that all concerned users were consulted by this Authority before prescribing the revised Scale of Rates of NSICT in November 2000. The limited issue now is whether a rate derived based on the revised Scale of Rates will govern the transaction between JNPT and NSICT. For argument sake, if the contention of the NSICT is accepted by this Authority, the JNPT may have to pay to NSICT more than what is being paid now. If JNPT decides to recover such additional costs from its users, the existing tariff of JNPT needs to be adjusted which will be a separate tariff case. If such a proposal is submitted by JNPT then all users will be consulted following the usual consultation process adopted by this Authority. For the purpose of present case, the JNPT is the only relevant party and they have been consulted.
- (iv). The operation in reference is handling of ICD containers at the rail yard. The JNPT has emphatically pointed out that no separate rate has been notified either in JNPT Scale of Rate or NSICT Scale of Rate for the activity 'rail flat to truck or vice versa'. Even though the NSICT has argued that rate prescribed in its Scale of Rate for 'truck to yard' is applicable for the operation at the rail yard, it could not show that a separate rate for the operation in reference is prescribed in the Scale of Rates. It is a fact that the rate for ICD containers prescribed in the NSICT Scale of Rate is for a composite service covering the operations from container yard to rail / rail to container yard. It is also true that a separate rate for yard to truck / truck to yard is available in the SOR but this rate is not prescribed to be applicable for ICD containers. In any case, both NSICT and JNPT have conceded that the rate for ICD container handling at the rail yard is a derived one.

The NSICT has correctly pointed out that tariff prescribed by TAMP is not equipment specific. The tariff at the NSICT are prescribed for different activities without any explicit reference to the equipment used. But, it has to be recognized that the capital and operation cost of the equipment envisaged to be deployed in operation by the NSICT had formed the basis for prescribing the tariff. As such, the type of equipment deployed will influence the cost factor and, hence, the tariff. As a matter of fact, this Authority has been revising handling charges / hire charges at different port trusts when the port trusts replace equipment of different nature / higher capacity.

Be that as it may, it is very clear that no separate rate for handling of ICD containers at the rail yard is prescribed by this Authority in the Scale of Rate of NSICT.

- (v). The next question arises is whether the rate derived by NSICT, or for that matter JNPT, is reasonable and if so, whether it can be ratified now. The NSICT has indicated that it has furnished revenue analysis by container type and activity in July 1999. Our records show that the proceedings which culminated in revision of NSICT tariff in November 2000 was initiated in March 2000 when the NSICT filed its application for tariff revision. That being so, reference made by the NSICT to a communication stated to have been sent in July 1999 does not appear correct. The traffic forecast furnished by the NSICT alongwith its proposal included only an estimate of ship to yard / yard to rail containers. It did not furnish separately the traffic forecast and, hence, income forecast of ICD containers expected to be handled by it on behalf of JNPT. Further, there was no sub-activity wise costing furnished at that time to assess whether rates for individual activities were cost based. The general increase of 16% in tariff was allowed based on the cost / financial position for the terminal as a whole and not based on any analysis of individual sub-activity-wise costing. Since all the services envisaged were provided by the NSICT, prescription of composite rate covering various sub-activities was not found totally unjustified. Nevertheless, in the operation in reference, containers are partly handled by NSICT at the rail yard and the balance of the composite service is provided by JNPT. From the point of view of users, they pay to the JNPT for the entire operation. In such a case, sub-activity wise costing assumes significance. No such detail is furnished by JNPT and NSICT to justify the derived rate in question. In this backdrop, this Authority is not in a position to assess the reasonableness of the derived rate and, therefore, agree to that.

- (vi). Referring to an Order about fixing charges for inter terminal handling of the transshipment containers at JNPT and NSICT, the NSICT has argued that this Authority has already accepted the principle that tariff of NSICT for similar activity will be higher than the JNPT. It is true that separate rates for JNPT and NSICT for a joint operation were prescribed in that case. Further, that case was slightly different from the instant one because some extra services were to be performed by the terminal operators in addition to the composite services originally envisaged in case of the relevant transshipment containers. If an existing tariff for a composite service is to be split due to joint operation methodology evolved subsequently, then such a bifurcation should be made commensurate with the extent of services provided by the respective terminal operators. In this context, the argument made by JNPT about NSICT collecting higher composite box rate as per its Scale of Rates even in case of ICD boxes handled by JNPT on behalf of NSICT at the rail yard cannot be brushed aside lightly. This important issue needs to be frontally addressed and cannot be kept pending to be sorted out later on the ground that this proceedings relate only to offer clarification on the question raised by NSICT.
- (vii). The JNPT's claim of mutual agreement has been totally refuted by the NSICT. The JNPT could not provide any evidence to show that a written mutual agreement exists. But, it has produced copies of the bills raised by the NSICT to show that billing continued at the original level upto September 2002 even though the tariff increase of 16% was allowed to NSICT in November 2000. The NSICT has, however, pointed out that it was a lapse due to the clerical error and it has already raised its demand for arrears. The actions taken by both NSICT and JNPT give only confusing signals and do not prove or disprove conclusively whether any mutual arrangement existed between them.
- (viii). The JNPT has mentioned that the mutually agreed rate has been introduced with the approval of the competent authority. In the matter relating to port tariff, the competent authority is TAMP. No approval of this Authority has been sought by the JNPT before introducing the rate in reference. We do not know why a Statutory Authority like JNPT has not followed the tariff setting arrangement prescribed in the relevant Statute before introducing any new rate even if such rate is a derived one. As a matter of fact, it is of great regulatory concern when two dominant service providers enter into an agreement among themselves and pass on the resultant cost effect through tariff to their users. The JNPT has casually requested this Authority to concur with the existing mutually agreed rates. For the reasons explained in this analysis, this request cannot be accepted in the absence of any justification provided by either side.
- (ix). From the points made by both the parties, it appears that joint operation at rail yard may be a regular feature since CONCOR has reportedly expressed its inability to place dedicated trains. In view of the position emerging in this case as explained above, it is appropriate for both the terminals to take immediate action to formulate their proposals for prescribing rate for ICD containers handling activity at the rail yard and adjust the consolidated box rate suitably. It is needless to mention that the proposed rates should be justified with reference to cost of providing the service.

10. 1. In the result, and for the reasons given above, and based on a collective application of mind, this Authority is not in a position to confirm the contention of the NSICT about the rate derived by them for the containers handled by them for JNPT at the NSICT railside ICD facilities

10.2. The NSICT and JNPT are advised to come up with their proposals for fixing separate rate for the operation at the rail yard with suitable adjustments in the box rates for ICD containers.

(A.L. Bongirwar)
Chairman