

No. 61

New Delhi, the 9th March, 2001

## Tariff Authority for Major Ports

### NOTIFICATION

In exercise of the powers conferred by Section 49 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the representation submitted by M/s. Samrat Shipping & Transport System Private Limited relating to penal berth hire imposed by the Jawaharlal Nehru Port Trust for poor performance of their Tanker 'Themera', as in the Order appended hereto.

( S. Sathyam )

Chairman

### Case No.TAMP/82/2000-JNPT

**M/s. Samrat Shipping & Transport System Private Limited - - - Applicant**

**Vs**

**The Jawaharlal Nehru Port Trust (JNPT) - - - Respondent**

### ORDER

(Passed on this 14th day of February 2001)

M/s. Samrat Shipping & Transport System Private Limited has submitted a representation against penal berth hire imposed by the Jawaharlal Nehru Port Trust (JNPT) for poor performance of the Tanker 'Themera' during her stay at the JNPT from 26 April 2000 to 1 May 2000.

2.1. In their representation, M/s. Samrat Shipping have stated that the tanker 'Themera' called at the JNPT on 26 April 2000 to discharge 16,500 MT of Carbon Block Feed Stock (CBFS). During the operation, the discharge rate was found to be lower than that which has been achieved at the JNPT by other vessels of CBFS brought to the JNPT by them. Initially, it was assumed by the Applicant that the cargo temperature was below the required charter party temperature and, therefore, the discharge rate was low. Later, even when the charter party temperature was attained no perceptible increase in the discharge rate was noticed.

2.2. The shipper of the cargo informed the Applicant that all earlier cargoes shipped were of lesser viscosity, while cargo brought by the vessel in question was of higher viscosity. The Applicant was further informed by the Shipper that a higher discharge rate could not be attained unless the temperature was raised considerably higher; and, there was an inherent danger of explosion in raising the temperature of this cargo beyond a point. All these reasons were reportedly informed to the JNPT officials by the Applicant.

2.3. The JNPT tried to pull out the vessel from the berth, due to its poor performance. The Customs, however, did not give permission; and, therefore, the vessel had to complete her discharge at the going rate and sailed on 1 May 2000.

2.4. The Applicant had received a bill from the JNPT for Rs.25,10,541/- as penal berth hire for three days.

2.5. In this backdrop, the Applicant has made the following pleadings for consideration:

(i). The penal berth hire charge mentioned in the bill of the JNPT was not a tariff notified in the Gazette by the TAMP.

(ii). The provisions of the trade notice dated 7 March 2000 issued by the JNPT were applied wrongly. The Trade Notice only mentioned about penal berth hire on vessels for poor performance, if the vessels are not fitted with heating arrangements.

(iii). Penal berth hire has been demanded for three stoppage of cargo operation, even though this was done to eliminate the reasons for slow discharge.

(iv). The JNPT has billed for one stoppage of 15 minutes even though the JNPT's notified tariff states that Penal berth hire is charged when the stoppage has been of a duration of more than 2 hours.

(v). Billing for stoppage as well as for poor performance including the stoppage periods is a double punishment for a single or no fault.

3. The representation of the Samrat Shipping was forwarded to the JNPT for comments. The representation was also circulated to the Mumbai and Nhava-Sheva Ship-Intermodal Agents' Association (MANSA), Bombay Chamber of Commerce and Industry (BCCI) and Indian Merchant Chamber (IMC). The comments received from them are summarised below: \_

#### **Jawaharlal Nehru Port Trust (JNPT)**

(i). The JNPT has formulated certain performance parameters for vessels carrying liquid cargo in bulk in consultation and after deliberations with the concerned users of the Port. These were incorporated in a Trade Notice dated 7 March 2000. Such performance parameters are subject to review and revision from time to time depending on the cargo pattern, parcel size and type of the vessels.

(ii). If a liquid vessel does not achieve the performance level due to any fault on its part, the JNPT reserves the right to take out the vessel from berth and allow a waiting vessel to berth. Alternatively, penal berth hire charge as per notified tariff for the additional period of stay at berth is levied. This was decided in the overall interest of Port as well as of users by way of maintaining a minimum level of performance and for better utilisation of port facilities.

(iii). The users have the option to appeal to the Port for remission of penal berth hire charges if the failure to perform is for reasons beyond their control. The Board of Trustees is empowered to consider such cases under Section 53 of the MPT Act. In this case the vessel failed to achieve the discharge rate due to inadequacy of the heating system on board and hence attracted penal berth hire charges. The vessel agents had made written representation to the Port for remission of the penal berth hire charges and the Port had rejected their appeal for reasons stated above.

(iv). It is not understood why the Samrat Shipping have approached the TAMP on the subject matter which is covered under Section 53 of MPT Act and not a case for fixation of tariff. \_

#### **Mumbai and Nhava-Sheva Ship-Intermodal Agents' Association (MANSA)**

(i). The JNPT can not levy penal berth hire on the authority of a circular, as it will tantamount to change in tariff and any tariff amendment requires approval of TAMP, as per the Major Port Trusts Act, 1963.

(ii). The arguments put forth by the Samrat Shipping regarding inherent quality of the cargo resulting in slow discharge of the commodity can be accepted unless the Port has other facts on their record. Moreover, stoppages of work for 15 minutes have also been billed and the action of the Port seems arbitrary and iniquitous and beyond the scope of the Major Port Trusts Act.

(iii). The condition for charging penal berth hire is only in case of vessels not having heating arrangements. In the instant case, the vessel did have heating arrangements, hence, the condition prescribed in the trade circular for charging penal tariff hire has not been strictly followed.

**Bombay Chamber of Commerce and Industry (BCCI)**

(i). Penal berth hire on Themera shall not be charged for the following reasons:

(a). From the evidence provided, the ship did all that was humanly possible to improve the discharge rate. More importantly, it does not seem that the equipment on the vessel was unable to maintain cargo temperature or discharge pressure at the ships manifold. In fact all evidence shows that 'Themera' achieved the discharge parameters that any vessel of this type is expected to.

(b). It is evident that the slow discharge rate was due to the nature of the cargo. Small discharge lines and the efficiency of the booster pump may have been contributing factors. These factors are outside the Themera's control.

(c). Additional charges borne by the 'Themera' for the longer berth stay, pilotage and towage for berthing and re-berthing will have already imposed a considerable financial burden on the Themera.

(d). It is unclear from the evidence provided whether there was any opportunity loss for the port due to Themera's long berth stay.

(ii). Parties should be discouraged from bringing such cases for review to the TAMP. These are everyday occurrences in the port business and if this trend is allowed to continue TAMP will be inundated with work and will not be able to cope with it's other, more important duties.

4.1. A joint hearing in this case was held at the JNPT office in Mumbai on 21 November 2000. At the joint hearing following submissions were made: \_

**M/s. Samrat Shipping & Transport Systems Private Limited**

(i). The vessel "Themera" is a high cost chartering vessel.

(ii). At the time of berthing, a small vessel was ahead of us, which could go to the berth BB4. Dredging was stopped to enable that movement. We paid for dredger down time also. This shows our desire to speeding up the operation.

(iii). Maximum temperature was maintained at the tank. There was no let up.

- (iv). Since discharge did not pick up, we stopped the discharge for more than two hours to check up filters. No clogging was detected.
- (v). The JNPT faulted us for under performance. They wanted to pull us out.
- (vi). The JNPT anchorage could not take our large vessel. The option was to leave the Port. The discharge had to continue as we needed Customs clearance to leave the Port, which was not given.
- (vii). Another stoppage was made and the problem was traced to a booster pump in the tank farm.
- (viii). After a frantic consultation with shippers, the thicker viscosity factor was detected as the reason for poor performance. Shippers also advised against heating beyond a stipulated safety limit.
- (ix). The vessel had no defects. The slow discharge was not due to the vessel. The Vessel, therefore, should not be punished for cargo problems.
- (x). The trade notice is applicable only on vessels without heaters. We had heating arrangements.
- (xi). The JNPT Scale of Rates covers only stoppages of over 2 hours. Ours was less than 2 hours.
- (xii). The points made in the trade notice were not approved by the TAMP. Our principals refuse to accept the demand.
- (xiii). When the trade notice issued, we verbally protested about the lack of TAMP's approval. We did not, however, pursue it further.
- (xiv). We have been bringing this cargo since long. We therefore, did not go too much into cargo details. May be we should have.
- (xv). Heating 4° above safety limit was done with the permission of the consignee. (No permission was taken from the JNPT).
- (xvi). We have conformed to all technical parameters. The problem was with cargo.
- (xvii). The surveyor was of the consignee. We have not accepted their report. We have protested in writing.
- (xviii). From the time the pilot boarded to the time we berthed we could not operate the heaters. Hence the temperature was not 57°C at berthing.
- (xix). Since the extraordinary situation was not due to the vice of the vessel, in terms of clause 4 of the trade notice, the claim must be waived.
- (xx). At all times, other than the initial 10 hours after berthing, the temperature and pressure were above the 'Charter Party' norm.

**Jawaharlal Nehru Port Trust (JNPT)**

- (i). We have charged for idling. We have not charged anything new. There is a penal rate prescribed. The Trade Circular has been issued after due consultations.

- (ii). The norm of 300 MT per hour is well below their achievements.
- (iii). The trade notice states all this conditions.
- (iv). They say, they have been bringing earlier with 'high class vessels'. That means this time, the vessel lacks the capability.
- (v). If there are errors in billing like penalty for less than 2 hours of stoppage, we will correct.
- (vi). In our written submission we have explained the method of calculations.
- (vii). We take 20 hours per day as the operating time.
- (viii). The JNPT is not concerned with the ship and tank farm transfer as it is an independent arrangement.
- (ix). The claim of temperature being less for 10 hours after berthing is wrong. It was for over 30 hours.
- (x). There cannot be double charge, we will examine details and eliminate overlaps, if any.

**Indian Merchant Chamber (IMC)**

- (i). Trade notices covers procedural/operational issues. Should they go to TAMP for approval?
- (ii). Thousands of such issues are settled through trade notices. How can TAMP be bothered about them? Even the Board of Trustees of the JNPT is not bothered by such cases.

4.2. At the joint hearing, the JNPT made a written submission. The salient points made by the JNPT therein are as follows:

- (i). Prior to issue of the Trade Circular, 13 vessels were brought to the JNPT for discharge of CBFS. The average flow rate in respect of these vessels was in excess of 300 MT per hour, which was considered to be reasonable for fixing the norm prescribed in the Trade Circular.
- (ii). Samrat Shipping was asked to intimate ideal temperature at which the flow would be maximum and also the heating instructions from the load port and the temperature range in which the cargo can be heated. Samrat Shipping has informed that there is no document to show the temperature at which the flow rate will be maximum. The certificate of analysis issued at the load port indicates that cargo can be heated upto 155° F(68.33° C) to achieve good flow rate.
- (iii). The Charter Party stipulates that vessel tank temperature is to be maintained at 57° C (134.6° F) prior to berthing to ensure smooth discharge of cargo. The consignee had requested the Samrat Shipping to convey to the Master of the vessel to maintain this temperature, which Samrat Shipping had done. The vessel, however, failed to maintain the temperature at 57° C, inspite of the prior request.
- (iv). The failure to maintain the charter party temperature and heat the cargo to the required temperature as specified by the load port has lead to the poor discharge rate.

- (v). Subsequent to the implementation of the trade notice, the JNPT has imposed penal berth hire on 6 vessels carrying different types of cargo.
- (vi). The levy of penal berth hire charges on MT Themera for poor discharge rate in accordance with the trade notice is correct and justified.

5. With reference to the totality of information collected during the processing of this case, and based on the records available, and taking into account the arguments advanced at the joint hearing, the following position emerges:

- (i). The JNPT has raised a preliminary objection that the dispute is seen to be covered by Section 53 of the MPT Act under which its Board of Trustees is the competent authority to decide the matter.

The representation made before this Authority is not for remission/waiver of the penal berth hire. The Applicant has questioned the legality of application of the tariff. In other words, the issue to decide is whether the JNPT can prescribe such a conditionality governing the tariff through a trade circular.

This issue raised being a tariff related one, it cannot be left to the Board of Trustees to decide.

- (ii). The BCCI has made a suggestion that parties should be discouraged from bringing cases of this nature before this Authority since the resultant workload will make it difficult for this Authority to cope up with its other important functions.

This Authority is well aware of the increasing workload as a result of entertaining such representations from individual port users. This Authority being entrusted with the statutory responsibility of regulating port tariffs cannot ignore a representation about wrong application of tariffs by a Port Trust. Further, it is totally baseless to believe that the Authority has not engaged its attention to more important matters just because representations of this type are being entertained.

- (iii). From the arguments advanced and records submitted by the Applicant and the JNPT, it becomes crystal clear that the Applicant was well aware of the discharge rate his vessel had to maintain and the temperature at which such discharge could take place. Even with this prior knowledge, the vessel did not maintain the required temperature, which is the root cause of poor performance. The arguments made by the Applicant about the technical features of the cargo, the vessel, etc., for not maintaining the temperature may be valid; but, there is no reason why a Port Trust having prescribed a condition for performance at berth and notified such conditions well in advance should accept such arguments and relax the performance conditions.

The Applicant's argument that the slow discharge was not due to the vessel and hence the vessel should not be punished for cargo problems is devoid of merit. The Applicant has brought the cargo knowing well the performance conditions imposed by the JNPT. It is the responsibility of the vessel to comply with the performance conditions prescribed by the discharge port since it has brought the cargo. If such conditions are not fulfilled, it is reasonable for the Port to invoke penal provisions.

- (iv). The Applicant has also alleged that the JNPT had claimed penal berth hire for poor performance as well as for stoppage of work. The Applicant's argument is that it is a double penalty since stoppage of work was made to rectify the possible technical problems, which caused poor performance.

The JNPT Scale of Rates prescribes levy of penal berth hire charges for stoppage of cargo handling operations continuously for more than two hours. The Applicant has

also mentioned that the JNPT has levied penal berth hire for stoppage of operations even for a period of less than 15 minutes. At the joint hearing, the JNPT agreed to correct the errors in billing relating to levy of penal berth hire for stoppage of work for less than two hours.

The Applicant arguments about imposing double penalty for the same offence merits consideration. The stoppage of work, as pointed out by the Applicant, arises in the context of rectifying the problems relating to poor discharge rate.

Since the JNPT has levied penal berth hire for the entire period of vessel's stay at berth when the discharge rate was below the prescribed norm, it cannot levy a separate penal berth hire for the stoppages of work occurred during the same period. Here, again, the JNPT agreed at the joint hearing that there could not be double charge; they would examine details to eliminate overlaps, if any.

- (v). The Applicant has also challenged the levy of penal berth hire for poor performance since this levy is not a tariff item notified by the competent authority.

The existing Scale of Rates of the JNPT prescribes penal berth hire if a vessel does not commence cargo operations within a stipulated time after berthing or if it idles at berth. Idling is defined as suspension / stoppage of cargo handling operation continuously for more than two hours. The Scale of Rates does not prescribe any performance conditions, non fulfillment of which will attract penal berth hire. The JNPT has introduced certain performance norms for vessels carrying different types of cargo and stipulated levy of penal berth hire, as per the Scale of Rates, if the performance norm is not achieved.

The JNPT has maintained that the norms prescribed in the Trade Notice were fixed on the average discharge rates of similar type of cargo in the past and after a detailed consultation with the users.

- (vi). It is recognised that the Trade Notice has been issued by the JNPT to require a vessel not achieving the predetermined performance level to vacate the berth so that a waiting vessel can be brought to the berth. When such vessels continue to occupy the berth, a scarce resource is restricted in its usage, which is not in the interest of the economy. Penal charges are prescribed to act as a deterrent measure. This Authority's stated policy is to improve operational efficiency using the tariff leverage. In this respect, tariffs can also be used to discourage under performance and for maximizing utilization of scarce resources.
- (vii). The prescription made by the JNPT in the Trade Notice is, however, seen to arise due to operational requirements. But, it is linked to levy of penal berth hire and hence it assumes the nature of a conditionality governing the levy of berth hire charges. The JNPT should have sought ratification of this conditionality from the competent authority and included it in its Scale of Rates.

In the absence of such approval from the competent authority, the conditionality introduced by the JNPT may appear to qualify for being declared as null and void. It is relevant here to mention that Note 6 of Schedule 1, Section 1(a) Berth Hire in the existing Scale of Rates of the JNPT stipulates that "for all other items or services not covered under the above schedule, the rates will be as fixed by the Chairman". Even though this prescription is not in line with the general scheme of things envisaged in the MPT Act for approval of port tariffs, this Authority cannot ignore the fact that this delegation of power was available to the Chairman, JNPT at the material point of time at which the Trade Notice was issued. It is, therefore, reasonable to hold that the Trade Notice issued by the JNPT has legal force by virtue of the delegated powers available to its Chairman.

In view of the circumstances explained above, the Applicant's allegation that the billing done by the JNPT was not based on a tariff approved by the competent authority is not sustainable.

- (viii). Notwithstanding the above position emerging in this case, it is relevant to examine whether the power delegated to the Chairman (JNPT) to fix rates for services not mentioned under the schedule of 'Berth Hire', can be allowed to continue. As has been mentioned earlier, this delegation of power is not consistent with the provisions of the MPT Act relating to tariff fixation. It is noteworthy that this clause was approved by the Government of India for inclusion in the Scale of Rates in the JNPT before this Authority was created. When the MPT Act specifically empowers this Authority to frame the Scale of Rates, there cannot be any further delegation of this power to any of the functionaries in the regulated entities. Viewed from this perspective, the clause in the Scale of Rates of the JNPT permitting the Chairman to fix rates for items not specifically mentioned deserves to be deleted with immediate effect.

6. In the result, and for the reasons given above, and based on a collective application of mind, this Authority hereby decides as follows:

- (i). The representation made by M/s. Samrat Shipping & Transport Systems Private Limited is rejected.
- (ii). JNPT Scale of Rates is amended by deleting Clause 6 of Schedule 1 Section 1(a) – Berth Hire Charges with immediate effect.
- (iii). The JNPT is directed to correct its bills to remove errors (i.e. inclusion of stoppages of cargo handling operations of less than two hours) and eliminate overlap (e.g., double charging for stoppage of work and overstaying).
- (iv). The JNPT shall submit a proposal for prospective inclusion of the performance norms of vessels in its Scale of Rates after taking into account performances achieved by vessels carrying different categories of liquid cargo.

( **S. Sathyam** )

**Chairman**