Tariff Authority for Major Ports

NOTIFICATION

In exercise of the powers conferred by Sections 48 and 49 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the petition of M/s. Adsteam Agency (India) Private Limited for refund of priority berthing charges levied by the Jawaharlal Nehru Port Trust as in the Order appended hereto.

(S. Sathyam)
Chairman

M/s. Adsteam Agency (India) Private Limited - - - Applicant

Vs.

The Jawaharlal Nehru Port Trust - - - Non-Applicant

ORDER

(Passed on this 21st day of March 2002)

This case relates to a representation from M/s. Adsteam Agency (India) Private Limited (AAPL) relating to refund of priority berthing charges levied by the Jawaharlal Nehru Port Trust (JNPT) for services allegedly not rendered by them.

2. The AAPL has made the following points in its representation:


(ii). Priority berthing charges were accordingly paid after confirming that the IOC vessel has not paid charges for priority berthing till the allowed time limit.

(iii). Subsequently, the JNPT had allowed the IOC vessel to avail of the priority berthing by adjusting the earlier pending dues and, therefore, M.T. Clipper venture was not given priority berthing.

(iv). The Shipowners refused to reimburse the priority berthing charges to the AAPL on the ground that the services were not rendered by the JNPT.

(v). In spite of its repeated requests and representations, the JNPT has refused to refund the additional berthing charges of Rs.1,76,296/-. 
(vi). As it had paid the priority berthing charges after ensuring that ‘M.T. Nand Prakarti’ was not willing to opt for priority berthing, the JNPT had not acted in good faith by allowing that vessel to avail priority berthing after the stipulated time limit.

(vii). The JNPT has levied priority berthing charges from it for a service not rendered; therefore, it is entitled to get a refund of the additional charges levied by the JNPT.

3.1 In accordance with the procedure prescribed, a copy of the representation of the AAPL was forwarded to the JNPT and also to the relevant representative bodies of port users for comments. The comments received from them are summarised below:

**Shipping Corporation of India Limited (SCI)**

If the port has failed to grant priority berthing to the vessel M.T. Clipper Venture; and, has instead berthed another vessel, then all additional charges so collected must be returned to the AAPL.

**Indian National Shipowners’ Association (INSA)**

(i). From the letter of the JNPT dated 4 July 2001 it appears that the forfeiture of priority berthing charges was discussed at the meeting. From the letter of the AAPL dated 24 May 2001, it appears that mere time limits were decided and in accordance with that understanding, they paid the charges by 3.00 p.m. when IOC had not paid the amount by 1.00 p.m. The priority berthing fees in fact need not have been accepted if the IOC had already paid the fees by 1.00 p.m.

(ii). From all evidences presented, it is clear that priority berthing fees must be refunded when no priority was given. The JNPT shall also explain how ‘Nand Prakarti’ received priority when it did not make the payment by the scheduled time.

3.2 The JNPT was requested to send its comments by 20 November 2001. Despite a reminder, the JNPT did not make any written submission.

3.3 A copy each of the comments received from the users was sent to the AAPL and the JNPT as feedback information.

4. A joint hearing in this case was held on 7 December 2001 in Mumbai. At the joint hearing, the following submissions were made:

**M/s. Adsteam Agency (India) Private Limited (AAPL)**

(i). The JNPT has refused in writing to refund. Our request for reconsideration also was rejected.

(ii). Justice is denied. If they wanted to give priority berthing to the IOC, they should not have accepted our money.

(iii). If the IOC gets priority as ‘oil sector’; ours was also an oil vessel.

(iv). Our principals have refused to pay us. We stand to lose for no fault of ours.

(v). The IOC did not pay. The JNPT adjusted a pending balance. How were we to know that IOC was paying?

(vi). We came to know that only when we applied for berthing. And, we immediately applied for refund.
(vii). Payment does not automatically get priority. The Port has still to ‘consider’ the request. Therefore, the mere act of payment should not be taken as an irreversible or irrevocable step.

(viii). The IOC paid by 2.45 p.m. We paid by 3 p.m. The JNPT should not have taken our payment.

(ix). There must be transparency in a Port Trust’s operations.

(x). The JNPT should not refuse to refund to us because they may then have to refund to the IOC also.

(xi). The JNPT should not be so rigid about the time limit for applying for refunds.

**Jawaharlal Nehru Port Trust (JNPT)**

(i). It is not correct to say that the IOC did not pay in time. There was no reference to 1 p.m. time limit at all. Both were given time till 3 p.m. The IOC paid at 2.45 p.m. This is recorded in our Finance Department’s records.

(ii). On the Adsteam Agency’s application also our Deputy TM had clearly recorded that this vessel will come after the IOC vessel.

(iii). The IOC vessel was ahead in the queue of the vessels as it arrived first.

(iv). In the Traffic Meeting, Adsteam Agency was clearly told that, if the IOC also paid, they might lose their deposit.

(v). The IOC was No. 3 vessel. Adsteam was No. 4 vessel. But, by 24 May 2000, vessels at nos. 1 & 2 had been served in the normal course. In other words, on 24 May, the IOC vessel was the first vessel.

(vi). While paying, M/s. Adsteam Agency should have verified whether IOC had paid.

(vii). In case Adsteam Agency’s representation is allowed, the IOC should not be allowed also to claim refund. After all, they did get priority berthing. The TAMP must say so in this case itself.

**Mumbai and Nhava-Sheva Ship Agents’ Association (Mansa)**

(i). When there is congestion, a priority system can give scope for manipulation by the Terminal Operator.

(ii). When 2 or 3 vessels ask for priority, other vessels should be given an opportunity to withdraw.

5. At the joint hearing, the JNPT filed a statement showing the vessel position for the concerned berth during the period from 16 May 2000 to 29 May 2000.

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

(i). All the major port trusts have a system of priority / ousting priority berthing for additional charges. This arrangement is in vogue with reference to a Government instruction on this subject. While disposing of proposals for general revision of tariffs at many of the major port trusts, this Authority observed that in the context of limited availability of berthing facilities at present, there would always be any number of
vessels ready to pay additional charges; and, this would give scope for exploitation of (discretionary) powers. Since a final view on this issue has not yet been taken by this Authority, it was decided neither to approve nor to disapprove the priority berthing arrangement. The major port trusts have been allowed to continue to levy the charge as hitherto until this Authority takes a final view for common adoption by all the ports.

(ii). It is to be recognised that allotment of berths to vessels is an operational matter to be handled by the port trust. This Authority is, therefore, generally not inclined to scrutinise such berthing details. Nevertheless, in the instant case, the JNPT has furnished details required for an objective analysis of this case. Further, the issue emerging for consideration in this case is whether a port trust can levy a charge for the services not rendered by it. The action of the JNPT in the instant case definitely has given rise to tariff implications. This is settled in this case so that the propriety of continuance of the approach adopted by the JNPT can be decided.

(iii). In the instant case, the JNPT had received payment of priority berthing charges from all those vessels who requested priority berthing. Its advance warning given to the Petitioner about loss of priority berthing charges if the IOC vessel had paid such charges does not appear to be of any consequence. Likewise, its contention that the Petitioner must have verified whether the IOC had paid such charges also does not appear to be tenable. It is not reasonable to expect a shipping line / agent to find out from the cash office the berthing priorities accorded already by the JNPT. It is reasonable for the JNPT to require all those vessels requisitioning priority berthing to make advance payments of the concerned charges so that it can be ensured that such requisitions are made by genuine parties in right earnest. Nevertheless, once the actual berthing has taken place, it is not reasonable to treat as forfeited the advance deposits made by the other vessels in the priority-queue. Since the requisitioned service was not rendered in this case in the sense that priority was not accorded, the JNPT must refund the payment received therefore.

(iv). The JNPT apprehends a possible claim from the IOC for refund of the priority berthing charge paid by it, in the event of refund of such payment to the Petitioner. The basis of this apprehension is that such a refund, if made to the Petitioner will mean his vessel was not in the priority list at the material point of time; and, hence, the IOC vessel must be seen to have berthed at its normal turn.

If the IOC makes such an argument, it cannot be said to have any force. The fact is that two vessels were vying for priority at the material time and both had paid the priority charges. The benefit of berthing was given to the IOC vessel ahead of the Petitioner’s vessel. If the IOC vessel was treated as the one waiting in the normal queue, the Petitioner’s vessel would have been berthed ahead of it since it had opted for priority in berthing and complied with the requisite formalities. That being so, it cannot be denied that the IOC vessel enjoyed a priority in berthing.

The Petitioner has not argued that he did not opt for priority berthing and compelled to pay such charges. His contention is that his request for priority berthing was not granted and hence the charges levied must be refunded. The position faced by the Petitioner may not be true in the IOC’s case.

(v). It is clear in the instant case that priority berthing was not accorded to the Petitioner’s vessel. Significantly, the JNPT has also not disputed this position. When services are not rendered, levy of a charge therefor is not justified.

(vi). In order to avoid recurrence of the position obtaining in this case, it is reasonable to include a conditionality in the Scale of Rates of the JNPT stipulating that the fees for according ‘priority / ousting priority’ are refundable where such charges have been realised in advance along with the requisition for priority / ousting priority but berthing is allowed only in the normal course of the vessel’s arrival turn.
7.1. In the result, and for the reasons given above, and based on a collective application of mind, this Authority allows the petition of M/s. Adsteam Agency (India) Private Limited and directs the JNPT to refund the priority berthing charges levied by it on account of M.T. Clipper Venture.

7.2. The JNPT is directed to incorporate the following conditionality in its Scale of Rates appropriately:

“The fees for according ‘priority / ousting priority’ realised in advance alongwith the requisition for priority / ousting priority shall be refunded if berthing is allowed only in the normal course of the vessel's arrival turn”.

(S. Sathyam)

Chairman