

ATTACHMENT A

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BEFORE THE HEARINNG EXAMINER

CITY OF SEATTLE

In the Matter of the Appeal of)
FOSS MARITIME COMPANY,) No. S-15-001
) S-15-002
)
from an interpretation by the)
)
Department of Planning and)
)
Development.)

VERBATIM TRANSCRIPT OF PROCEEDINGS

OF

AN EXCERPTED PORTION OF DAY 1 OF A HEARING
BEFORE THE HONORABLE ANNE WATANABE, HEARING EXAMINER

8/13/2015

APPEARANCES

For Foss Maritime: David R. West & John C. McCullough
Port of Seattle: Traci Goodwin, Patrick J. Schneider and
Adrian Winston

For DPD: Eleanor S. Baxendale

For Puget Soundkeeper/Earth Justice: Patti Goldman & Matthew Baca

For T-5: Molly Barker

Transcribed at the Request of the Seattle City Attorney

Transcribed by Brian Killgore

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1 that this is a moorage category.

2 Is the word "moorage" used in this definition?

3 A. Hmmm -- not directly, no.

4 Q. Indirectly is it used?

5 Does the word "moorage" appear here?

6 A. No.

7 Q. Okay.

8 In fact this is a subcategory of transportation
9 facility, is it not?

10 A. Yes.

11 Q. All right.

12 So let's take a look at exhibit number 2, and this is a
13 draft of the interpretation, correct?

14 A. Yes.

15 Q. And this is the first draft that you prepared of the
16 interpretation; is that right?

17 A. I guess that would depend on what you would call a draft.

18 I think I may have done something initially, just
19 laying out what the issues were, and then this was a draft
20 for discussion purposes that fleshed out what the
21 interpretation would look like if we were going in one
22 particular direction with interpretations.

23 Q. The document says draft at the top?

24 A. Yes.

25 Q. And you prepared it?

1 assumption. I don't recall if there was something in the
2 materials submitted to me that said there was to be
3 container cargo. I must have missed it.

4 Q. Okay.

5 And let's look at the definition there of the word
6 goods.

7 Excuse me; I am trying to find my exhibit list here.

8 This is F25.

9 HEARING EXAMINER: And it has been marked as 13.

10 Q. (By Mr. West) Exhibit number 13, which is F25, is a copy, a
11 photocopy of a portion of Webster's New Collegiate
12 Dictionary, correct?

13 A. Yes.

14 Q. And the first three pages of this document were produced by
15 the department in response to our request for production,
16 and on the third page there is -- there are several
17 definitions of the word "good," correct?

18 A. Yes.

19 Q. And the second of the definitions there is good being used
20 as a noun, correct?

21 It is very hard to read, I realize.

22 A. Yes.

23 Q. And just for your convenience, if you get the next page of
24 the exhibit, we have blown that up for everyone's
25 convenience so we don't have to put our glasses on or take

1 our glasses off as the case may be, and that is the
2 definition you were using in construing the word "goods" as
3 it is used in the cargo terminal definition; is that right?

4 A. The one that's a noun, yes.

5 Q. The one that's a noun, correct.

6 And then you looked at -- there are several alternative
7 definitions here, and you were focused on the one that
8 begins with three, correct?

9 A. Yeah.

10 Q. 3A is "something that has economic utility or satisfies an
11 economic want"?

12 A. Yes.

13 Q. Do you see that?

14 A. Yes.

15 Q. And then there are additional definitions there below number
16 3, correct?

17 A. Yes.

18 Q. The second of them is "personal property having intrinsic
19 value, but usually excluding money, securities and
20 negotiable instruments"?

21 A. Yes.

22 Q. 3C is -- the plural is cloth (phonetic)?

23 A. Yes.

24 Q. 3B is the plural is "wares, commodities or merchandise"?

25 A. Yes.

1 Q. Correct?

2 So this three definition here of "good," is that what
3 you were using in interpreting the word "goods" --

4 A. Yes.

5 Q. -- in the cargo terminal?

6 A. Yes.

7 Q. Sorry.

8 A. That's all right.

9 Q. Try to finish my question before I ask you for an answer.

10 So going back then to exhibit number 2, which is your
11 draft, you cite one of those definitions here, right?

12 "Goods are something that has economic utility or satisfies
13 an economic want," correct?

14 I am on page 2 of Exhibit 2.

15 A. Yes.

16 Q. And you say, quote, "A broad range of items, including
17 exploratory drilling equipment can fall under the
18 definition of goods," correct?

19 A. Yes.

20 Q. And you say, "the definition of cargo terminal is broad
21 enough to include transportation of many different types of
22 freight in greatly differing quantities," correct?

23 A. Yes.

24 Q. And your conclusion at the last sentence: "The drilling rig
25 is within the range of items that might be managed at a

1 containers?

2 A. To the -- they are consistent with my understanding of
3 containers, yes.

4 Q. How about on page 15? Is that consistent with your
5 understanding of what constitutes a container?

6 A. Yes.

7 Q. And 16, is that consistent with what you understand to be a
8 container?

9 A. Yes.

10 Q. Looking at photograph -- page 1 shows pipe, right?

11 A. Yes, there's a lot of long tubular items --

12 Q. Okay.

13 A. -- I assume to be pipe.

14 Q. And would you agree that all of those tubular items qualify
15 as goods as that term is used in the definition of a cargo
16 terminal?

17 A. I would have to go back. I don't remember which exhibit the
18 definition was.

19 HEARING EXAMINER: Well our Exhibit 13. I
20 don't --

21 Q. (By Mr. West) 25. It is on tab 25.

22 (Brief Pause in Proceedings)

23 A. Yes, to the extent that they could be wares, commodities or
24 merchandise. They are at least something that has economic
25 utility.

1 Q. You would agree they are all personal property having
2 intrinsic value, correct?

3 A. They are that, yes.

4 Q. And that is actually the definition you used in the
5 interpretation, isn't it?

6 A. Was that what I used?

7 Q. 3B, "personal property having intrinsic value"?

8 (Brief Pause in Proceedings)

9 A. Yes.

10 Q. (By Mr. West) So again, all of the tubular items you see
11 there would qualify as goods under that definition?

12 A. Yes.

13 Q. And do you know whether or not any of the containers that
14 you have seen in this exhibit were actually loaded onto the
15 Polar Pioneer?

16 A. I don't know.

17 Q. I would like you to assume that a number of those items were
18 in fact loaded; that is the items in the containers, and I
19 would like you to assume that a number of the tubular items
20 were loaded on the containers.

21 Would you agree that if that was so that the Polar
22 Pioneer was loaded with goods and container cargo?

23 A. I would agree that they would qualify as goods under a
24 certain -- under one of those definitions, yes, and that
25 they were items in containers, as well, yes.

1 A. Again the -- the reason -- the purpose is like in order
2 to -- it is in order to conduct a particular operation as
3 opposed to being in order to move the equipment, so I would
4 say no.

5 Q. I'm sorry, isn't the purpose of it coming here and loading
6 the material to transfer it up to the Arctic?

7 A. It is to -- to take it up there in order to use it there.

8 Q. And to -- and to transfer it into the ground, correct?

9 A. I would say that it is not a delivery as opposed -- I would
10 say it is a use rather than a delivery, so I wouldn't regard
11 that as a transfer, no.

12 Q. But you agree it is left there in the other location,
13 correct?

14 A. I again don't know.

15 Q. And the distinction between the operations of the OSV's and
16 the barges, the offshore supply vehicles and the barges, and
17 the rig itself, both of which contain -- carry the exact
18 same items, and both of which were loading those exact same
19 items at terminal 5, the only distinction is that the OSV's
20 and the barges put them onto the oil rig first? That makes
21 them qualify whereas the oil rig doesn't qualify?

22 A. That's correct.

23 Q. That is the only distinction?

24 A. Yes.

25 Q. So that all takes place 2000 miles away from terminal 5?

1 Q. And let's just finish off on this example of the fishing
2 boat.

3 So the Polar Pioneer, it took tubulars and other
4 materials, loaded them at terminal 5, went up to Alaska and
5 is leaving those items in the ground under the ocean floor,
6 correct?

7 A. I --

8 Q. That is your understanding?

9 A. That is my understanding.

10 Q. That is the basis of your analysis, correct?

11 A. Correct.

12 Q. A fishing boat goes to Alaska, takes stuff out of the ocean,
13 brings it back here to Washington and delivers it over the
14 dock.

15 Aren't those two situations exactly the same?

16 A. Again we -- the issue of the fishing vessels is something
17 that we would have to provide to do more analysis on.

18 Again, I don't have a good understanding about how
19 fishing vessels operate, either.

20 Q. Okay, let's talk about the particular vessels at terminal 5.

21 Do you have any information about what other vessels
22 were there besides the Polar Pioneer, what the specific
23 vessels were?

24 A. Currently, recently, over the years?

25 Q. No, I meant in connection with Foss's work there in May and

1 June?

2 A. Oh, no.

3 Q. So there was a vessel there called the Aiviq.

4 Have you ever heard of the Aiviq?

5 A. When I looked through the exhibits, I saw pictures of it,

6 but I -- otherwise, no.

7 Q. So do you know what the function of the Aiviq is?

8 A. No.

9 Q. Does the department know what the function of the Aiviq is?

10 A. I don't know if others in the department know or not.

11 Q. Do you know that the department issued a notice of violation
12 to the Aiviq directing it to leave the terminal?

13 MS. BAXENDALE: Objection, relevance.

14 HEARING EXAMINER: Mr. West?

15 MR. WEST: This all goes to exactly what the
16 interpretation means.

17 I will link it up here shortly.

18 HEARING EXAMINER: No, I'm going to sustain the
19 objection.

20 For one thing it sounds like he doesn't even -- it is
21 not -- it sounds like he is not familiar with the case,
22 so --

23 Q. If the Aiviq is an offshore supply vessel, you would agree
24 there would be no reason for it not to be able to load and
25 unload at terminal 5, correct?

1 A. Correct.

2 Q. And so far as you know, you don't know whether the Aiviq is
3 an offshore supply vessel?

4 A. I don't know.

5 Q. You don't know whether it carries cargo that it is going to
6 deliver to the Polar Pioneer in Alaska?

7 A. I don't know.

8 Q. Could you please look at F105?

9 MS. BAXENDALE: I have an objection to that
10 exhibit. It is a notice of violation. It has nothing to do
11 with the case. Relevance.

12 Q. (By Mr. West) Mr. McKim?

13 HEARING EXAMINER: So Mr. West, I have got an
14 objection to this --

15 MR. WEST: I haven't moved to admit the exhibit
16 yet.

17 Is the motion that I can't even ask questions about it?

18 HEARING EXAMINER: Okay.

19 Well I guess what I'm wondering is where are we going
20 with this testimony?

21 MR. WEST: Where we are going is that the
22 department has agreed that the result of this proceeding
23 will determine whether or not we proceed forward with the
24 notice of violation.

25 The notice of violation itself is against the Aiviq,

1 A. Not in so many words.

2 Q. In any way?

3 A. Well yes, we regulate principal uses of sites, and so to the
4 extent that we are looking at the principal use of the site,
5 I would say that, you know, that might equate to the primary
6 function of what is going on at the site.

7 Q. Well that is all pretty hypothetical. I am talking about
8 whether or not you had actually heard of the primary
9 function test as you articulated it in the interpretation;
10 that is the test applicable to cargo terminals?

11 A. Not in so many words.

12 Q. Have you ever applied that test?

13 A. To cargo terminals? No.

14 Q. It is only applicable to cargo terminals, correct?

15 A. As I was just saying, we look at the principal use of what
16 is going on at the property, so principal use, primary
17 function, I think that that is basically what we are getting
18 at when we are looking at how to categorize a use in the
19 code, which we routinely and regularly do; we are looking at
20 the main thing that is going on.

21 We have to decide what use is dominant in extent and
22 purpose on the property, so it makes -- it is consistent
23 with the way that we regularly routinely evaluate uses of
24 property.

25 Q. I was asking -- I was trying to use a narrower definition,

1 just a general understanding.

2 Q. And in order to find out how they actually operate, you
3 would have to ask people who know about it, people like
4 Foss, correct?

5 A. That's correct.

6 Q. And you didn't ask Foss?

7 A. I don't believe I asked that specifically, no.

8 MR. WEST: That's all the questions I have now,
9 but will reserve the right to re-call him on rebuttal.

10 HEARING EXAMINER: I don't know if -- if --

11 MR. SCHNEIDER: I have just a few.

12 HEARING EXAMINER: Okay.

13 * * * * *

14 C R O S S - E X A M I N A T I O N

15 BY MR. SCHNEIDER:

16 Q. Andy, the interpretation Foss -- I guess Exhibit 1 for the
17 hearing, it doesn't mention the primary function test,
18 correct?

19 (Brief Pause in Proceedings)

20 A. No, I don't think I used those words in the interpretation.

21 Q. (By Mr. Schneider) So why not? If that is the test, why
22 isn't it in the interpretation?

23 A. I think that the wording of primary function was more --
24 elaborated at my deposition -- as an explanation about how
25 we would differentiate between the activities at different

1 sorts of vessels, so it is one of those things in terms of
2 that particular wording. It was meant as explanatory --
3 when pressed in detail for six hours in my deposition.

4 Q. So does that mean the primary function test -- that
5 articulation of the test did not exist until after the
6 interpretation was issued?

7 A. I don't believe that we used that in so many words, but I
8 believe it is consistent with the interpretation.

9 Q. So that is your explanation provided after the
10 interpretation was issued in response to questions at the
11 deposition?

12 A. Yes.

13 Q. And but that is the test that the port should use going
14 forward in determining which vessels can and cannot moor at
15 cargo terminals?

16 A. I would say yes, which vessels would require -- could --
17 what activities would be permitted in association with
18 vessels moored at cargo terminals versus moored at -- or at
19 locations with additional or other permits established, yes.

20 Q. So if Greg Englin, who will testify after you, and is
21 responsible for moorage at T91 and a host of other places,
22 including portions of T5 not under lease to Foss, if he gets
23 a call from an agent saying a vessel is coming, and they
24 want to moor at a cargo terminal -- not to load and unload
25 cargo, but to lay berth or to do some minor repairs or