



Complaint by JD Transport Services

Hearing Dates: September 27, 2018, December 7, 2018, January 7, 2019

Commissioners Present: Chairman: Ronald Burch-Smith, Commissioners: Rosalie Robertson, S.C. and Pradeepa Bholanath

1. On **8th May 2017**, Mahindranauth Jaikarran, the proprietor of an unincorporated business, JD Transportation Services, made a complaint to the Competition and Consumer Affairs Commission (CCAC) concerning certain action taken by the Shipping Association of Guyana (SAG). Commissioner Ramesh Seebarran did not participate in the hearings or the decision owing to a conflict of interest.
2. Mr. Jaikarran referred the CCAC to certain measures adopted by the SAG and its members which purported to fix rates for the haulage of containers from terminals operated by members of the SAG by its members and private entities. The members of the association include **5 terminal** operators which together control the vast majority of the market for the discharge of international containerized cargo. When a container was released to the consignee, it would make its own arrangements for the container to be hauled to its desired location for the unpacking of cargo and for the return of the empty container to the port. These services were sometimes provided by private haulers such as JD Transportation Services or by the terminals themselves.
3. Mr. Jaikarran's evidence was that he owned 8 trucks and 37 trailers for which he provides services for a range of local firms. He contacts a further 7 trucks and 15 trailers from other persons. His marketing and pricing are aggressive and he recently secured the trade of an

international line which was previously serviced by one of the larger terminals. This accounted for 25% of his revenue.

4. The measures initially complained of were that the SAG issued a memorandum which was dated **27th March 2017** and made effective **April 1, 2017** which set out a schedule of destinations and corresponding rates for hauling 20ft and 40 ft containers to destinations across the country. This was communicated to private haulers from the Secretary/Treasurer of the Shipping Association of Guyana and purportedly reflected an agreement reached at a meeting of the SAG Terminal Operators group held on March 21, 2017 and under the hand of I. D'Anjou, Secretary/Treasurer. There was evidence these matters were discussed extensively before the memorandum was issued. There was no suggestion of any dissent among the terminal operators.

5. The Shipping Association of Guyana was incorporated in 1995. It is still in existence, but purports to operate as a trusteeship. It existed prior to 1995, but was resuscitated then. It asks for parties involved in the shipping industry, including large shipping agents, terminal operators and other individuals. The active terminal-operator members are:
 - a. Demerara Shipping Limited,
 - b. Guyana National Industrial Company Inc.,
 - c. Guyana National Shipping Corporation,
 - d. John Fernandes Limited,
 - e. Muneshwers Limited.

6. We invited the terminal operators to respond to Mr. Jaikarran's complaint and they participated in the inquiry by attending in person through authorized representatives, they received copies of all

documentation submitted to the commission, save our internal work product which was treated as confidential. There are other terminal operator members of the SAG, namely Demerara Sugar Terminals Limited, Guyana Fertilizers Limited, Weiting and Richter Ltd and Didco Trading Company Ltd.) These additional operators are not engaged in international shipping.

7. The regime the SAG and its members agreed to implement had the following features:
 - i. all rates paid by consignees of cargo for haulage would be collected by the terminal regardless of whether the haulage service was being provided by the terminals or private haulers.
 - ii. The terminal would retain 15% of the transportation rates and 25% where trailers are provided by the terminal.
 - iii. Side loaders and rural trips (destinations not identified on the SAG's 1 April 2017 schedule) would be assessed a 10% deduction.
 - iv. Trucks and drivers were required to register with the SAG and carry a registration card.

8. This initial regime was modified by a revised order issued by the SAG and its members by a notice from the Secretary of the Association, Ian D'Anjou. It reads as follows:

SHIPPING ASSOCIATION OF GUYANA

NOTICE

Please be advised that a decision has been taken to review the system applied to the payment for handling services in relation to the delivery of containers at terminals. With effect from July 15, 2017, the following will be implemented:

1. Handling fees will be charged in the amount of \$7,000.00 per 20' and \$9,000.00 per 40" containers VAT inclusive.
2. The fees are being charged to facilitate the inspection of vehicles and approval for its entry to an ISPS compound, booking of vehicles, use of the roadway in the compound by vehicles, inspection of containers/cargo upon exit, booking same, follow up of status and location of containers and inspection of containers and verification of their condition upon re-entry to terminal compound.
3. The above charges will be levied on all transportation companies inclusive of private haulers and consignees/importers with their own haulers. Inter-terminal charges for the transfer of containers between terminals is contingent on agreement between the Terminals involved.
4. Fees must be paid to the cashiers at Terminals before delivery is facilitated or upon invoicing for those customers who have a credit facility.
5. The implementation date for the new fees is July 15, 2017.

SHIPPING ASSOCIATION OF GUYANA

By Order of the Secretary

9. The complaint against the SAG continued on the basis of this revised measure.

Competition Policy Unit Investigation and the CCAC's oral hearings

10. In the course of the inquiry and oral hearings we received correspondence issued by terminal operators to their customers, affirming the agreement of the terminals. We also received paper invoices reflecting the charges and evidence from George Bulkan, of Superior Shingles and Wood Products, a customer of JD Shipping. Mr. Laurie Lewis, another private hauler was present by invitation and although not called formally as a witness, was allowed to make representations.

11. In the course of oral hearings, the authenticity of both documents issued by the SAG were admitted by the SAG and Terminal Operators and that the contents reflected the agreement of the terminal operator members of the SAG. There is no doubt of the existence of the agreement and its fully implementation by the 5 terminal operators.

12. We also received memorandum from the Shipping Association of Guyana dated 14th November 2014 concerning agreement for unified handling charges for 20ft and 40 ft containers, agreement dated March 21, 2017 for unified rates for Admin fees, Security Surcharges (ISPS) and sealing containers.

13. ISPS is an international certification concerning the security and safety of ports required by the United States authorities which the terminals are required to implement. The cost of obtaining and maintaining this certification was also one of the reasons for the new haulage charges.

14. Since these were not part of the complaint, we did not consider them, save to note that the SAG has long assumed a responsibility unto itself to agree and fix rates and was satisfied that the members would hold to the agreement. Although there was some deviation by members,

particularly with large volume customers, the agreed rates had sufficient support among members to be an effective regime and agreement could be reached and deployed as the members considered necessary. These conclusions were supported by the oral evidence taken in the course of the inquiry.

15. On receipt of Mr. Jaikarran's complaint and notification of the modified measures being taken by the SAG, we invited the SAG to meet with the Competition Policy Unit of the CCAC on 21st July 2017. The SAG was represented by Desmond Sears, the President and Mr. Ian D'Anjou the Secretary/Treasurer. Mr. D'Anjou provided a copy of the regime which became effective 15th July 2017.

16. The Competition Policy Unit invited individual members, namely GNIC, Mueshwars, Demerara Shipping, John Fernandes and GNSC to a meeting on Thursday 3 August 2017, to further discuss the measures and their legitimacy under the Competition and Fair Trading Act No. 11 of 2006. They participated with remarkable candor.

17. The Commission conducted oral hearings on the matter. The SAG and Terminal Operators were present and had an opportunity to participate fully. They were able to hear the oral evidence of Mr. Jaikarran and Mr. Bulkan and to ask questions. Mr. Jaikarran was also able to ask questions of the SAG and operator representatives who gave evidence. We thank all parties for their cooperation and participation.

18. We were informed that the terminal operates when providing haulage services to persons who request them so to do generally charge a rate as set out in the 1st April 2017 measure but do not charge the additional fee that would be charged as per the later measure for so called

“handling fees”. This gives them a price advantage vis a vis the private hauler, to the extent of the handling fees.

19. Mr. Jaikarran’s evidence is that while he would usually charge a rate just below the Shipping Association’s 1 April 2017 rates for various destinations, he is forced to discount his rates further by the amount of the handling fees charged by the terminal per container. We expect that this holds true for all private haulers particularly for large volume customers who have an incentive and power to influence prices charged of them.

The Law

20. The **Competition and Fair Trading Act, No. 11 of 2016** creates a regime to regulate anti-competitive behavior within Guyana and to provide for regional and international cooperation. It proscribes anti-competitive agreements among enterprises. The measures adopted with effect from 15th July 2017 by the Shipping Association of Guyana and the terminal operators fall within the definition of agreement in section 2 of the Act. The measure is an agreement among enterprises within the meaning of the same section.

21. We are satisfied that the measures are not an agreement excluded from consideration under **section 4** of the Act. It may well be in the future that the measure is approved by the Commission or by the Minister with the Commission’s agreement, but that is not the case at this time.

22. **Section 20 of the Act** provides, *inter alia*:

(1) Subject to the relevant provisions of this section –

- a. All agreements between enterprises; and*
- b. Concerted practices of enterprises or decisions of, associations of enterprises,*

Which have or are likely to have the effect of preventing, restricting, or distorting competition in a market are prohibited and void.

(2) Without prejudice to the generality of subsection (1), agreements referred to in that subsection include agreements containing provisions that –

- a. Directly or indirectly fix purchase or selling prices or determine other trading conditions’;*
- b. Limit or control production, markets, technical production or investment;*
- c. Provide for artificial dividing up of markets or sources of supply’*
- d. Affect tenders to be submitted in response to a request for bids;*
- e. Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- f. Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of such contracts.*

(3).....

(4) No person shall give effect to any agreements of enterprises or concerted practices or decisions of associations of enterprises that have the object or effect mentioned in subsection (1).

23. Sections 39 and 40 provide:

39.1) An enterprise that is engaged in the business of producing or supplying goods or services shall not, directly or indirectly –

(a) by agreement, threat or promise or any like means, attempt to influence upward or discourage the reduction of, the price at which any other enterprise supplies or offers to supply or advertise goods or services;

(b) refuse to supply goods or services to or otherwise discriminate against any other enterprise engaged in business;

(c) refuse to supply goods or services to or otherwise discriminate against any other person engaged in business because of the low pricing policy of that other person.

(3) For the purpose of this section, the publication by a supplier of goods or services other than a retailer of an advertisement that mentions a resale price for the goods or service is an attempt to influence upward the selling price of any enterprise into the hands of which goods or services come for resale unless the price is so expressed as to make it clear to any person who becomes aware of the advertisement that the goods or services may be sold at a lower price, or is clearly marked as being a suggested retail price.

40. (1) No enterprise shall conspire, combine, agree or arrange with another person to-

(a) limit unduly the facilities for transporting, producing, manufacturing, storing or dealing in any goods or supplying any service;

(b) prevent, limit or lessen unduly, the manufacture or production of any goods or the provision of services or to enhance unreasonably the price thereof;

(c) lessen unduly, competition in the production, manufacture, purchase, barter, sale, supply, rental or transportation of any goods or services or in the price of insurance on persons or property;

(d) otherwise unduly restrain or injure competition

Findings and reasons

24. We are satisfied that the 15th July 2017 decision of the Shipping Association and adopted by the 5 terminal operators was an agreement within the meaning of section 20. It distorted a competitive environment among terminals for the services provided by them to consumers generally, that is to the shipping lines and agents, importers of goods and any other person or entity which had the option to exercise choice or influence where their goods were shipped. The private haulers had little choice in this matter, but by imposing the agreed rate on private haulers in a concerted manner distorted competition and gave themselves an unfair and unlawfully implemented advantage.

25. We were also informed that the terminals sub-contract private haulers from time to time. The haulage fees agreed by the measure adopted by them are not applied in this instance.

26. While we consider the horizontal agreement among the parties in the trade to be anti-competitive per se, we have considered whether there is any economic benefit to it in the context of section 20(3), and 40(2). We are not satisfied that these exist.

27. We have considered the justification suggested by the association and the terminal operators. These included the need to recover the cost of

monitoring the location of containers, providing roads, guards and other personnel to inspect trucks and containers entering and returning to the terminal.

28. We are not convinced that the fee charged is a bona fide cost recovery effort. Although there is an undoubted cost to the services the terminal operators claim is not recovered by any other fee they charge, we had no evidence of any significant additional expenditure, including additional personnel employed. The process of creating logs, visual inspection of containers, calling errant customers about the location of containers, etc. was largely clerical in nature. Since the fees charged for \$7,000 and \$9,000 for haulage in Georgetown of 20 and 40 foot containers, respectively, are always waived for haulage provided by the terminals, the recovery of the fee appeared to be largely a pretext to level what the terminals considered unfair competition by JD Transportation Services and similar actors.

29. We find the requirement for a process of registration, collecting identification of drivers and other similar security processes to be perfectly legitimate. As regards whether there should be any fee charged by individual terminals, we wish to emphasize that we have no authority to regulate fees charged by the individual terminals, but the existence of concerted fee structures has been unlawful and must cease.

30. We note that the 5 terminal operators together are responsible for almost all the imports of containerized imports into Guyana. The trade via other Georgetown or West Demerara wharves is minimal. There is trade into ports in Berbice (mainly New Amsterdam), Parika, Charity and other small authorized or illegal ports. These are minimal.

31. We have not considered whether the 5 terminals have acted in abuse of their dominance under sections 23 and 24 of the Act and make no finding in this regard. The cessation of the haulage charges would provide no guarantee of fair competition of reasonable pricing by the terminal operators and we anticipate the need for further inquiry.

32. We are satisfied that the agreement by the terminal operators is a violation of section 20(1), 39 and 40(1)(c) of the Competition and Fair Trading Act. In relation to the latter two sections, the agreement amongst the terminal operators is an offence under the Act.

Orders

33. We have considered the provisions of Sections 22, 47, 48 and 49 of the Act in relation to the issue of appropriate remedies.

34. **Section 22** provides that *“where the Commission determines that any agreement or trade practice referred to in section 20 and 21 is anti-competitive it shall serve an order on the parties stating the reasons for the determination and requiring them (a) to cease the practice; or (b) to terminate the agreement”*.

35. We therefore order that the Demerara Shipping Limited, Guyana National Industrial Company Inc., Guyana National Shipping Corporation, John Fernandes Limited and Muneshwers Limited and the Shipping Association of Guyana terminate **with immediate effect** the agreement reflected in the Secretary’s memorandum set out in **paragraph 8** above which came into effect on **15 July 2017**.

36. **Section 49** provides that

(1) The Commission may, with the approval of the Director of Public Prosecutions give to any person who has committed an offence specified in this Act, a notice in the prescribed form offering that person immunity from prosecution for that offence on payment of a fixed penalty to the Commission.

37. We have considered that as at the date of this decision, the agreement would have been in existence for approximately 549 days. The rate charged per 20-foot container was \$7,000. We think a reasonable fixed penalty would be \$7000 per day the agreement has been in existence, that is **\$3,843,000** to be paid by each of the 5 terminal operators and we so order. We order this to be paid within 6 weeks of the date of this order.

38. The actions of the members of the association were unlawful. They have inflicted severe harm on the complainant and despite doing so, have persisted in their arrangement to their own benefit.

39. We are satisfied that the Shipping Association acted only on the instructions of its terminal operator members. It has no independent interest, income and received no benefit other than the sustained unfair advantage of the terminal operators. No financial order is made against it notwithstanding its conspiracy and participation in the unlawful agreement.

40. We instruct the Director of the Competition and Consumer Affairs Commission to forward this decision and copies papers collected in the investigation, the audio recordings and such other material and she considers relevant to the Director of Public Prosecutions to obtain her approval for the immunity from prosecution to which the 5 terminal

operators would be entitled on payment of the fixed penalty imposed by us.

41. We wish to record our thanks for the efforts of Lusiean Chapman, Competition Policy Officer and the other staff of the Commission who assisted in the investigation and the hearing. Mrs. Chapman's scholarly work has been invaluable.

Dated 31st January 2019

Ronald Burch-Smith, Chairman

Rosalie Robertson, S.C., Commissioner

Pradeepa Bholanath, Commissioner