

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

**FEDERAL MARINE TERMINALS,
INC.,**)
)
 PLAINTIFF)
)
v.)
)
WORCESTER PEAT COMPANY, INC.,)
)
 DEFENDANT)

CIVIL No. 99-0161-B-H

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case involves a stevedoring contract under which the plaintiff Federal Marine Terminals loaded the defendant Worcester Peat Company's bulk peat moss aboard a vessel for overseas shipment. The claims and counterclaims require this court to interpret the contract and review the manner in which Federal Marine Terminals performed its role as stevedore.

Following a bench trial on June 12-14, 2000, these are my findings of facts and conclusions of law.

I. FINDINGS OF FACT

1. Federal Marine Terminals, Inc. ("FMT"), operates a cargo terminal in Eastport, Maine. Under stevedoring contracts, FMT loads and unloads cargo brought into the terminal. Roland "Skip" Rogers was the general manager of FMT during all relevant periods of time.

2. Worcester Peat Company, Inc., (“Worcester Peat”), sells peat moss that it harvests from peat bogs in Dublois, Maine.

3. In the fall of 1998, Worcester Peat used a broker, Mikko Valli, of Biomix, Ltd. (“Biomix”) to obtain agreements to export bulk peat moss to Europe. As a result of an agreement with buyer Blumenerdenwerk Stender GmbH (“Stender”), Worcester Peat needed to find a terminal where its bulk peat could be loaded onto vessels chartered by Stender. See Pl. Exs. 3, 7 & 9.

4. On December 24, 1998, FMT and Worcester Peat entered into a contract under which FMT was to load bulk peat on a non-gearred vessel. The parties agreed that Worcester Peat would pay FMT “\$4.95 . . . per cubic meter handled through Eastport.” Pl. Ex. 16. This language was the culmination of a prolonged period of discussion.

5. Neither FMT nor Worcester Peat had any previous experience with loading bulk peat on a vessel for overseas shipment.

6. In the fall of 1998, while FMT and Worcester Peat were in preliminary negotiations, Valli of Biomix asked FMT’s general manager, Skip Rogers, how FMT would calculate the number of cubic meters it charged for stevedoring. Valli said that this amount could be calculated by the amount “handled” or by the vessel’s “box volume.” See Pl. Ex. 4. “Box volume” means the amount of cargo a vessel will hold.

7. At the time, Rogers did not realize that there could be a discrepancy between the number of cubic meters “handled” and the number of cubic meters contained in the vessel’s “box volume.” Therefore, on October 21,

1998, he initially told Valli, “The difficulty in determining the volume of cargo handled, I believe, dictates that we calculate using box volume.” Pl. Ex. 5. Worcester Peat was unaware of this correspondence between Valli and FMT.

8. Both Valli and Worcester Peat understood that the cubic meters of peat handled would be greater than the cubic meters of box volume because they anticipated that the peat would compress upon being loaded in the holds of the vessel. See December 13, 1999 Dep. of Dean Worcester (“Dep. I”) at 59 and April 14, 2000 Dep. of Dean Worcester (“Dep. II”) at 6. Worcester Peat also expected that some unspecified amounts of peat would be lost in the loading process. They did not pass any of this information on to FMT.

9. FMT’s original quote of \$4.95 per cubic meter was based on loading a geared vessel (*i.e.*, a vessel with its own means of loading the peat).

10. On December 11, 1998, FMT was informed for the first time that a non-geared vessel would be presented for loading at Eastport. See Pl. Exs. 14 & 15. On that same day, Worcester Peat began delivering truckloads of peat to stockpile at FMT for loading.

11. In preparation for the arrival of a non-geared vessel, Skip Rogers began searching for cranes and conveyors to be used in loading the bulk peat. See Pl. Ex. 15. Ultimately, FMT secured a crane and two conveyors to load the vessel.

12. FMT did not increase its per cubic meter quote for the extra cost incurred in renting the crane and conveyors, but Rogers did ask Worcester Peat to share in the cost of renting the equipment. As a result, the December 24th

agreement between FMT and Worcester Peat called for Worcester Peat to share the cost of “crane time . . . up to an amount of \$2100.00.” Pl. Ex. 16.

13. In the final contract, FMT set its price at the amount handled rather than the box volume because Rogers was dissatisfied with the information he was receiving and concluded that amount handled would be the safest measure inasmuch as it was the basis of FMT’s costs and expenses.

14. The chartered, non-g geared vessel, M/V BORIS LIVANOV, arrived at FMT for loading late on December 30, 1998.

15. Worcester Peat and Stender allotted 120 hours of laytime to load the vessel, an agreement in which FMT had no role. See Pl. Ex. 9.

16. FMT began loading the M/V BORIS LIVANOV on the morning of December 31, 1998, and completed the job twelve days later on January 10, 1999. During the loading, Morrill Worcester and Charles Renski were at the terminal representing Worcester Peat.

17. After the loading was underway, Worcester Peat offered a clamshell bucket as additional equipment to assist FMT with loading in the windy conditions. See Dep. II of Dean Worcester at 50-51. The clamshell bucket was attached to the crane and used to supplement the loading of the vessel by conveyors.

18. The weather during the loading period was extraordinarily cold and windy. An unusual amount of precipitation fell in the form of rain and snow. Vessel loading was repeatedly delayed by these weather conditions for multiple reasons. First, the vessel’s captain sometimes ordered that its hatches be

closed due to heavy precipitation and winds. Second, on a few occasions loading was stopped “at the request of the shipper” (Worcester Peat) to prevent cargo losses because the wind was exceptionally high. See Pl. Ex. 19.

19. More frequently, the weather affected FMT’s ability to operate the conveyors. The conveyors froze or became clogged with frozen peat, thereby requiring loading to stop while the conveyors were cleaned and repaired. See Pl. Ex. 19. Additionally, the freezing temperatures prevented the pitch of the conveyors from being adjusted to the ship as the tides changed.

20. These problems with the conveyors also contributed to peat being blown into the bay as it was being loaded. To prevent the peat from blowing off the conveyors, FMT attempted, with limited success, to enclose the conveyors with tarps. FMT encountered fewer weather-related problems with its use of the crane and clamshell bucket.

21. As the loading proceeded, peat was lost in the wind. At times there was so much peat in the air, FMT employees reported limited visibility.

22. The compressibility of the peat once it was in the holds of the vessel also affected FMT’s ability to complete the job. FMT would fill a hold with peat only to find that hours later the peat had compressed requiring FMT to return to the hold and refill it with peat. This happened repeatedly. Morrill Worcester estimated the compression of the peat in the vessel at 25 percent or more.

23. Finally, on January 10, 1999, approximately 220 hours after loading began, FMT completed loading the holds of the M/V BORIS LIVANOV with

Worcester Peat's bulk peat. To complete the loading, Worcester Peat had sent 434 truckloads of bulk peat to FMT with each truck carrying an average of 115 cubic yards. See Dep. II of Dean Worcester at 20-22; Pl. Ex. 36.

24. On January 15, 1999, FMT billed Worcester Peat for \$182,794.59. See Pl. Ex. 25. Rogers arrived at this amount by using information supplied to him by Worcester Peat that estimated the number of trucks sent to FMT at 425 and the average volume per truck at 115 cubic yards (86.89 cubic meters).¹ These figures yielded an estimate of 36,928.2 cubic meters handled.

25. Worcester Peat paid FMT \$111,720.89, which was \$71,073.70 less than FMT had billed. The amount paid by Worcester represented the \$4.95 rate multiplied by the box volume of the vessel (26,917.1 cubic meters).² Additionally, Worcester Peat allowed \$2,100 for crane time, yielding a total of \$135,339.65. It then deducted \$2,500 as a charge for the use of its clamshell

¹ The parties did not explicitly address the conversion of 115 cubic yards to cubic meters during the trial. Based on the evidence submitted, it appears that FMT calculated 115 cubic yards as equaling 86.89 cubic meters. On the other hand, the summary by Mikko Valli asserts that 115 cubic yards equals 88 cubic meters. Rather than use either of these figures, I will take judicial notice of the conversion factor listed in The World Fact Book 1999 Appendix E: Weights and Measures (Central Intelligence Agency 1999) (available at <http://www.odci.gov/cia/publications/factbook/appe.html>). The Fact Book lists the conversion factor for cubic yards to cubic meters as: 0.764554857984. See id. Using that conversion factor, 115 cubic yards equals 87.92380866816. For the purposes of this case, I will round that number to 87.9 cubic meters.

² Actually, the box volume of the M/V BORIS LIVANOV was 27,017.1 cubic meters. Because some areas within the cargo holds could not be reached and, therefore, were not loaded, all parties agreed to subtract 100 cubic meters from the box volume of the vessel to arrive at 26, 917.1 cubic meters box volume of bulk peat. See Pl. Ex. 24.

bucket and a demurrage³ charge of \$21,118.75 that it had paid to Stender. See Pl. Ex. 29.

II. CONCLUSIONS OF LAW

A. JURISDICTION

This lawsuit arises under the admiralty jurisdiction of the Court. 28 U.S.C. § 1333.

B. FEDERAL MARINE TERMINAL'S CONTRACT CLAIM (COUNT I) AND *QUANTUM MERUIT* CLAIM (COUNT II)

(1) QUANTITY OF PEAT MOSS

The language of the contract unambiguously called for Worcester Peat to pay FMT \$4.95 per cubic meter handled. Use of the term “handled” rather than “box volume” was a deliberate choice on the part of FMT; Worcester Peat was aware of the difference and its implications. Therefore, I conclude that the contract unambiguously rejected box volume as the means for measuring the amount FMT would receive for its services.

Worcester Peat argues that FMT agreed to box volume in other shipping documents, such as the mate's receipt and bill of lading, which explicitly refer to the “box volume, as agreed by all parties.” But the shipping documents refer to box volume, because the shipping documents necessarily measure what is on the vessel. They have nothing to do with stevedoring contracts.

³ Demurrage is “a reparation paid to the shipowner to compensate for vessel time lost.” Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 11-15 at 201 (2d ed. 1994).

Although the contract clearly calls for Worcester Peat to pay FMT based on the amount handled, determining the amount handled requires me to choose between contradictory evidence. Specifically, I heard different estimates on the numbers of trucks that delivered peat to the terminal as well as various estimates on the amount each truck held. First, there is some evidence suggesting that 425 trucks were sent to FMT while other evidence suggests that 434 trucks were sent FMT. I conclude that the testimony of Dean Worcester along with the summary by Valli credibly proves by a preponderance of the evidence that 434 trucks were sent to FMT. To the extent the trucking documents suggest that only 425 trucks were sent, I accept Dean Worcester's explanation that these documents may not be accurate. Additionally, I am convinced, after weighing the credibility of all of the evidence presented, that 115 cubic yards or 87.9 cubic meters, is a reliable estimate of the average volume per truck.⁴

Furthermore, by basing the calculation of the amount handled on the number of trucks sent to FMT and the estimated cubic volume per truck, Worcester Peat is not charged for any "fluffing" of the peat that may have occurred due to FMT's repeated handling, nor is it charged for the changing moisture content caused by the peat's exposure to rain while it was stored outside at the terminal. To the extent that this figure includes amounts of peat eventually lost to the wind, I am unable to quantify and subtract this loss

⁴ See Dep. II of Dean Worcester at 21-22 (explaining that 115 cubic meters was the average since Worcester Peat has three 100-yard trailers and three 128-130-yard trailers).

because Worcester Peat did not establish by a preponderance of the evidence either the amount of peat lost or the amount of such loss that was in excess of what Worcester Peat anticipated.

Therefore, using the numbers discussed above, I find that FMT handled 38,148.6 cubic meters of peat (434 trucks multiplied by 87.9 cubic meters per truck).⁵ Under the contract, FMT was entitled to a total of \$ 190,935.57, which represents \$4.95 for each cubic meter handled plus \$2,100 for crane time. It is also entitled to interest under the contract for the amount unpaid.

(2) USE OF THE CLAMSHELL BUCKET

Additionally, I conclude that Worcester Peat was not entitled to deduct \$2500 for the use of its clamshell bucket. There was no agreement that FMT would pay Worcester Peat \$2,500 for the use of its clamshell bucket. Given the circumstances under which Dean Worcester offered the clamshell bucket to Rogers of FMT, there was no mutual assent to a contract. Rather, FMT reasonably perceived Worcester Peat as offering the use of the clamshell bucket free of charge. See Restatement (Second) of Contract § 3.

(3) DEMURRAGE

I reject Worcester Peat's subtraction of demurrage for the reasons set forth below in my treatment of its counterclaims.

⁵ FMT originally billed Worcester Peat for handling 36, 928.2 cubic meters of peat. However, I find that FMT, in fact, handled 38,148.6 cubic meters of peat. This figure represents 1220.4 cubic meters in excess of the amount FMT originally billed Worcester Peat. See Pl. Ex. 25. FMT based its bill on the fact that Worcester Peat told it that there were only 425 trucks. Additionally, FMT calculated 115 cubic yards as equaling 86.89 cubic meters. Since Worcester Peat did not pay the bill there was no accord and satisfaction and FMT is not precluded from recovering on the correct numbers.

(4) QUANTUM MERUIT

Because I find that the contract expressly dictates the above result, FMT is not entitled to any award based on *quantum meruit*. See Luce v. Corinna Seed Potato Farms, Inc., 134 A. 198, 199 (Me. 1926) (explaining that “where an express contract exists there can be no implied contract”).

C. WORCESTER PEAT’S COUNTERCLAIMS FOR FAILURE TO LOAD VESSEL WITHIN LAYTIME

Worcester Peat claims that FMT, by failing to load the vessel in the allotted laytime, breached its contract (Count III) and breached its implied warranty to perform the loading in a workmanlike manner (Count IV).

At trial, none of the evidence or testimony suggested that the pace at which FMT loaded the vessel was unreasonable under the circumstances. Rather, all of the evidence painted a picture of FMT simply doing the best it could to load the peat under the unexpectedly harsh conditions. Although FMT may not have foreseen the problems posed by using conveyors in the weather conditions that existed, FMT attempted to address the problems as they arose and implemented the suggestions of Worcester Peat’s representatives to the extent possible.

Although Worcester Peat argues that FMT breached the contract and its implied warranty to perform in workmanlike manner by not loading the vessel within 120 hours, FMT never agreed to a specific length of time for the loading. Therefore, it was required to load the vessel within a reasonable time and the evidence shows that the time here was reasonable under the circumstances. See F.J. Walker, Ltd. v. Motor Vessel “Lemoncore”, 561 F.2d 1138, 1148 (5th

Cir.1977) (explaining that under the warranty for workmanlike performance “the stevedore owes the vessel a duty to use such care and diligence as an ordinary prudent and skillful person would use in the same circumstances”). See also Thomas J. Schoenbaum, Admiralty and Maritime Law § 5-8 at 190 (2d ed. 1994) (explaining the history and maritime application of the warranty of workmanlike performance).

For these same reasons, I conclude that FMT is not responsible to pay Worcester Peat for any demurrage Worcester Peat incurred from the delay in loading the M/V BORIS LIVANOV.

Additionally, the First Circuit has noted that “courts have been reluctant to impose demurrage liability on a party that is neither a signatory, successor nor possessor of a document that expressly or by incorporation refers to demurrage.” Trans-Asiatic Oil Ltd. v. Apex Oil Co., 804 F.2d 773, 781 (1st Cir. 1986). In this case, Worcester Peat has not introduced any evidence showing that FMT was party to, knew about, or was in possession of a document referring to demurrage. (In fact, even Worcester Peat’s agreement with Stender—to which FMT was not a party—does not specifically mention demurrage although it does refer to specific amounts of time for loading.⁶)

Moreover, although demurrage represents the liquidated damages for delay stipulated in the charter party, the First Circuit has said that demurrage “can only be claimed if the shipowner can demonstrate that he has suffered

⁶ See Dep. II of Dean Worcester at 44-45 (explaining that Dean Worcester was not aware of Worcester Peat’s responsibility for demurrage until January 1999, after the loading of the vessel was completed.)

actual damage as a result of the charter's delay." *Id.* at 782 (quoting 2B Benedict on Admiralty, § 31, at 2-1, 2-2 (1986)). In this case, although Worcester Peat may have paid Stender's bill, Worcester Peat has not presented any evidence that the shipowner or charterer suffered actual damage through a lost freight opportunity or otherwise because the M/V BORIS LIVANOV was delayed a hundred hours beyond the allotted laytime.⁷

**D. WORCESTER PEAT'S COUNTERCLAIMS FOR
DAMAGES DUE TO LOST PEAT**

Worcester Peat claims that FMT is liable for the loss of peat during the loading due to FMT's negligence (Counts I & II).⁸ Additionally, Worcester Peat claims FMT breached its contract (Count III) and its implied warranty of workmanlike performance (Count IV) when peat was lost during the loading process.

⁷ Seguros "Illimani" S.A. v. M/V POPI P, 929 F.2d 89 (2d Cir. 1991), cited by the defendant during its closing argument, does not warrant a different holding. In Segorus, the Court held that the stevedore who had unloaded the arriving cargo was required to indemnify a carrier after the carrier was sued when a number of cargo containers were empty upon delivery. *See id.* at 91.

⁸ Through Count II of its Counterclaim, Worcester Peat also claims that it was entitled to a presumption of negligence based on the fact that FMT was the bailee of the peat delivered to Eastport terminal. Assuming that the relationship between Worcester Peat and FMT could be described as a bailment because FMT stored the peat prior to loading it on the vessel, Worcester Peat has failed to establish by a preponderance of the evidence that FMT did not load all of the peat less the amount Worcester Peat anticipated losing during the loading process. *See Goudy & Stevens, Inc. v. Cable Marine, Inc.*, 924 F.2d 16, 18 (1st Cir. 1991) (explaining how bailor may establish a prima facie case of negligence by showing "delivery to a bailee and the bailee's failure to return the thing bailed" and thereby shift the burden to bailee to establish why it is not liable for the damage). Therefore, I conclude that Worcester Peat is not entitled to a presumption of negligence. Even if Worcester Peat had made a prima facie case for bailee negligence, the facts and circumstances discussed above exonerate FMT and prove by a preponderance of the evidence that FMT did not breach its duty of care thereby causing the loss of the bailed peat. *See id.* (citations omitted).

Although the evidence established that some unquantified amount of peat was airborne at the terminal and that some smaller unquantified amount of peat actually was blown into the water, Worcester Peat failed to provide any reliable evidence of how much peat was lost. Moreover, Worcester Peat expected to lose some peat during the loading process. Worcester Peat failed to establish that the amount lost was beyond what it anticipated. This failure makes it impossible to calculate damages.

Additionally, Worcester Peat failed to establish that the loss of peat occurred through a breach of FMT's duty of care. The loss occurred as a result of weather conditions during the loading process. The port log establishes that Worcester Peat, as the shipper, had the ability, when it chose, to stop loading so as to prevent cargo losses due to high winds. Clearly, however, Worcester Peat wanted loading to proceed expeditiously, notwithstanding the weather. In continuing to load, FMT did not breach its duty of care, its contract, or its implied warranty to load the vessel in a workmanlike manner.

IV. JUDGMENT

Federal Marine Terminals shall recover Seventy-Nine Thousand Two Hundred Fourteen Dollars and Sixty-Eight Cents (\$79,214.68), representing the amount that remains due under the contract (\$190,935.57 minus \$111,720.89). Worcester Peat shall also pay contractual interest at the rate of one and one-half per cent (1.5%) per month on this amount beginning on February 15, 1999, thirty (30) days after FMT issued the original invoice.

Worcester Peat shall recover nothing on its counterclaims.

SO ORDERED.

DATED THIS 28TH DAY OF JULY, 2000.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

U.S. District Court
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Civil Docket for Case #: 99-CV-161

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