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Legal And Regulatory Limitations On Leases: The Shipping Act And Other Considerations

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I. Brief Overview of Applicable Law

A. Shipping Act of 1984

1. The Shipping Act of 1984 ("Shipping Act" or "Act") imposes standards of conduct on marine terminal operators ("MTOs") engaged in "the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to sub-chapter 11 of chapter 135 of title 49, US Code."

2. An MTO may not

   a. "fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c) (former Section 10(d)(1)).

   b. "give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person." 46 U.S.C. § 41106(2) (former Section 10(d)(4)).

   c. "unreasonably refuse to deal or negotiate." 46 U.S.C. § 41106(3) (former Sections 10(b)(10) and 10(d)(3)).

3. The Federal Maritime Commission ("FMC" or the "Commission") enforces these provisions and also serves as a forum for the resolution of private complaints against MTOs. Resolution of claims under these general standards tends to be very fact bound, but there are certain general principles.

   a. Discrimination.

      i. To establish a claim of unreasonable preference it must be shown that (1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors. *Ceres Marine Terminals, Inc. v. Maryland Port Administration*, 27 S.R.R. 1251, 1270-71 (FMC 1997).

ii. "The Commission is not required to tally and compare exactly what benefits were received by the relevant parties," as only unreasonable preferences and prejudices are prohibited. *Seacon Terminals v. Port of Seattle,* 26 S.R.R. 886, 900 (FMC 1993).

iii. A port has no continuing duty to provide tenants with identical lease terms, or to "reevaluate lease terms during the life of the lease to make sure they serve their intended purpose." Where there are valid reasons to treat lessees differently, a port need not "renegotiate leases on demand" to assure that "all interested parties get the same deal." *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, 33 S.R.R. 349 (ALJ 2014)(case settled on appeal).

b. Refusal to Deal

i. Leasing decisions need not be based on written regulations or on a competitive bidding basis. *Maryland Port Administration v. Premier Automotive Services (In re Premier Automotive Services*), 492 F.3d 274, 284 n.2 (4th Cir. 2007); *Seacon,* 26 S.R.R. at 898.

ii. *Compare e.g., National Soc'y of Prof'l Eng'rs v. United States,* 435 U.S. 679, 692-96 (1978) ("[t]he Sherman Act does not require competitive bidding"); *Security Fire Door Co. v. County of Los Angeles*, 484 F.2d 1028, 1031 (9th Cir. 1973) ("[e]ven a direct contract ... without any pretense of putting the job out to bid … would not in itself have constituted a restraint of trade").

B. <u>Antitrust Exemption</u>

1. Scope of the Exemption

a. Agreements filed with the FMC and effective under the Act or exempt from filing under the Act are exempt from the antitrust laws. 46 U.S.C. §§ 40307(a)(1), (2). The Shipping Act also exempts "an[y] activity or agreement within the scope of [the Act], whether permitted under or prohibited by [the Act], undertaken or entered into with a reasonable basis to conclude" that it is subject to an agreement filed or exempt from filing under the Act. Id. § 40307(a)(3); *see A&E Pac. Constr. Co. v. Saipan Stevedore Co.*, 888 F.2d 68, 72 n.6 (9th Cir. 1989) ("[A]ll activity permitted or prohibited by the Act enjoys immunity from antitrust coverage if undertaken with a reasonable belief that it was being done under an effective agreement filed with the FMC, at least until such

immunity is set aside by an agency or court."). The Act allows the filing of agreements only among or between marine terminal operators and ocean common carriers. Agreements with shippers, non-vessel operating common carriers, or other entities do not come within the exemption.

b. A recent case confirms that the Shipping Act preempts state law claims as well as federal antitrust law claims. *In re Vehicle Carrier Services Antitrust Litigation,* 846 F. 3d 71 (3d Cir. 2017), *cert. denied,* No. 16-1415 (U.S. Oct. 2, 2017). *See* http://www.klgates.com/appeals-court-resoundingly-affirms-scope-and-breadth-of-shipping-act-antitrust-exemption-01-31-2017/

c. Section 6(g) of the Shipping Act allows the FMC, but not private parties, to seek to enjoin an agreement that it finds "is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost." 46 U.S.C. § 41307(b)(1).

d. "When a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits." *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 438, 459 (2009)(Breyer, J., concurring).

2. Port authorities, and their officials and employees acting in official capacities, are protected from antitrust damages actions and from cost and attorney's fee awards even in the absence of the exemption, pursuant to the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36.

3. Limitations on the exemption

a. Applies only to common carriage and to terminals that serve the foreign trades or mixed foreign and domestic terminals

b. Does not apply to agreements with or among air, rail, motor, or domestic water carriers

c. Does not apply to an agreement among ocean common carriers to establish, operate, or maintain a marine terminal in the U.S.

d. A group of carriers may not negotiate with a non-ocean carrier or any group of non-ocean carriers (such as truck, rail, or air operators) on any matter relating to rates or services provided to them within the United States unless the negotiations and resulting agreements do not violate the antitrust laws and are consistent with the purposes of the Shipping Act.

II. **Recent Developments**

A. Scope of the Act and Immunity

1. Legislation has advanced to amend the Shipping Act to address joint carrier negotiations with tug operators, and with marine terminal operators for the purchase of certain port services.

   a. The current proposal, which is generally agreed to and is looking for a vehicle, would extend the current requirement that joint carrier agreements with non-ocean carriers comply with the antitrust laws and be consistent with the purposes of the Shipping Act (the old 10(c)(4), now 46 USC 41105(4)) to cover negotiations and agreements with marine terminal operators for the purchase of port services.

   b. The covered MTO services are vessel berthing or bunkering, loading or unloading from vessel to or from a point on a wharf or terminal, positioning, and removal and replacement of buoys related to the movement of such a vessel. Agreements on other matters, such as port congestion and environmental matters would not be covered.

   c. Agreements may also be enjoined by the Commission if they would unreasonably reduce competition for the provision of covered MTO services, and the Commission may consider the competitive effect of agreements other than the agreement under review.

   d. MTOs would also be required to file certain reports when requested by the Commission.

   e. Joint negotiations with towing service providers are prohibited altogether.

   f. The FMC had previously approved the major ocean alliance agreements on the condition that the parties negotiate independently with and enter into separate individual contracts with MTOs except where the MTO agrees to a joint contract. Joint discussions of operational matters such as port schedules and berthing windows; availability of port facilities, equipment and services; adequacy of throughput; and the procedures of the interchange of operational data were permitted.

2. *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC No. 08-03 (FMC October 26, 2016, on remand from *Maher Terminals v. FMC*, 816 F.3d 888 (D.C. Cir 2016). FMC confirms that it will "continue to consider all the relevant factors in its unreasonable preference analysis,

including" "the situation and circumstances of the respective customers, as competitive or otherwise." In the case of marine terminal leases it will look to "market conditions, available locations and facilities, and the nature and character of potential lessees, and "the need to assure adequate and consistent service to a port's carriers or shippers, to ensure attractive prices for such services, and generally to advance a port's economic well-being." The Commission also confirmed that its analysis "will be informed by the deference it shows to public port authorities, especially in the context of their leasing decisions," and noted that it "will not assume that competition between ports is a problem in need of a regulatory fix, as among the purposes of the Shipping Act is promoting competitive and efficient ocean transportation and placing a greater reliance on the marketplace." *See* http://www.fmc.gov/assets/1/Documents/08-03_12-02_FNL_ORDR.pdf

3. Justice Department Investigation of Carrier Agreements: Blurring the Immunity Lines?

    a. Last year the Justice Department served subpoenas on ocean carrier executives gathered for a series of industry meetings in San Francisco, and later served the U.S. offices of other carriers.

    b. Carriers stated that the subpoenas did not specify allegations of misconduct and Justice has not announced what it is investigating.

    c. The meetings were being conducted under valid FMC agreements, and Justice is on record as opposing the scope of some FMC approved alliance agreements.

B. <u>Demurrage and detention</u>

1. After several years of calls for action by shippers, the Commission held public hearings and had a private session to discuss a shipper petition asking for protection from certain detention and demurrage practices claimed to violate the broad Shipping Act prohibition on failing to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. 41102(c).

2. At the hearings shippers presented instances of cargo not being available for tender within the demurrage period and argued that even the largest shippers, such as Wal-Mart, lacked the bargaining power to address such issues contractually. Noting that shippers sought, and obtained, a provision in the Shipping Act that "the exclusive remedy for a breach of a service contract is an action in an appropriate court," 46 U.S.C. 40502(f), unless otherwise agreed, shippers argued a litigation remedy was often too expensive. Carriers generally argued that the existing scheme was

sufficiently protective of shippers and that imposition of one size fits all rules by the Commission would be unwise as a matter of policy even if it were assumed the Commission had the authority to do so.

3. Ports and other terminal operators have argued that they cannot be deprived of compensation for the use of their assets when factors such as weather, labor issues, government inspections, the bankruptcy of steamship lines, and the burdens of increasingly large vessels tie up their terminals.

4. The Commission is expected to announce next steps on the petition within then next several weeks. These may include a suggestion that ports and beneficial cargo owners consider more direct relationships to address some of these issues.

C. Environmental activism issues -- the *Oakland* case

1. The City of Oakland was sued in federal court by the developer of a new bulk handling terminal on city land next to the port. The suit alleges that the operator is being prevented for political reasons (not legitimate transportation factors) from developing the terminal to export coal. The complaint claims that the City's activities violate the Shipping Act and the dormant commerce clause, and are preempted by federal laws governing rail and hazardous materials transportation.

2. The City's motion to dismiss was denied in June, 2017 on the basis that even if the developer had "no vested right to develop a coal terminal, it still has a contractual right to pursue development of a coal terminal to the extent allowed under the municipal code as it existed" at the time of the agreement, subject to a "health and safety" exception. The court did not reach the issue whether the action was untimely if the city's action was considered a zoning regulation rather than a regulation of health and safety. Two environmental groups were permitted to intervene as defendants (but not to bring their own claims).

3. The breach of contract claim was tried to the court in January, 2018 and post trial briefing will be completed in March. The constitutional and federal preemption claims "remain under submission and will be decided, if necessary, after the breach of contract claim is adjudicated."

D. Attorney's Fees Issues

1. Legislation enacted with the AAPA's support in 2014 now allows ports, MTOs, and other parties that successfully defend Shipping Act claims to recover attorney's fees as a prevailing party. *See* Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. 113-281. The Commission issued a final implementing rule in March, 2016. See 81

Fed. Reg. 10508 (Mar. 1, 2016). Previously only successful complainants could get a fee award, and successful respondents could not. The rule provides that "prevailing complainants and prevailing respondents should be treated in an even-handed manner in determining whether to award attorney fees." *Id.* at 10513.

2. In *Edaf Antilles, Inc. v. Crowley Caribbean Logistics, LLC,* No. 14-04, the Commission made its first award to a respondent under the new law, finding that the respondents prevailed when they obtained full dismissal of a complaint against them. The Commission noted that fees will not be awarded as a matter of course, but instead based on consideration of factors including "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." Slip op. at 9, citing *Fogerty v. Fantasy, Inc*., 510 U.S. 517, 534 n.19 (1994)(*quoting Lieb v. Topstone Industries, Inc*., 788 F.2d 151, 156 (3d Cir. 1986) (internal quotations omitted). In *Edaf* the Commission found fees appropriate where the complainant "failed to substantiate the legal and factual components of its case, knowingly disregarded the ALJ's orders on numerous occasions, abandoned its claim, forced multiple respondents to expend significant resources of both time and money in their defense and, perhaps most egregiously, failed to terminate the claim when it could have limited the expense of the Respondents." *Id.* The Commission held it would award fees only for work done after the new law was passed on December 18, 2014. *Id.* at 13-14.

3. In *Santa Fe Discount Cruise Parking, Inc. dba EZ Cruise Parking, et al v. The Board of Trustees of the Galveston Wharves and the Galveston Port Facilities Corp*., No. 14-06, the Commission held that a port authority was not required to justify alleged unequal treatment of a parking facility operator who claimed it was overcharged in comparison with others who drove courtesy vehicles onto the port, since the operator had not shown that the charges it paid, which it had agreed to, caused it injury. The Commission deferred decision as to whether fees should be awarded to the port. The port filed a fee petition alleging that circumstances including the need to provide voluminous discovery despite the absence of any evidence of injury justified an award. The petition has not been responded to or acted upon.

E. Recurrent fact patterns:

1. Exclusive arrangements for provision of services at a terminal (stevedoring/ tugs/ cranes).

See Petition of South Carolina State Ports Authority for Declaratory Order, 27 S.R.R. 1137, 1169 (FMC 1997)(restrictions on choice of a stevedore depend on "specific facts regarding local conditions.").

A.P. St. Philip, Inc., 13 FMC 166 (1969)(MTO that purported to condition vessel access to its facilities upon exclusive use of a designated tug operator had engaged in an unjust and unreasonable practice);

California Stevedore & Ballast Co. v. Stockton Port District, 7 FMC 75, 83-84 [1 SRR 563] (1962)(carriers should have the freedom to pick their own stevedoring companies as this freedom encourages efficient and safe service as well as competitive pricing;

Perry's Crane Service v. Port of Houston Authority, 16 SRR 1459, 1473-77 (FMC ALJ 1976) (requirement to use port's crane services created "mini-monopoly" that "opens the door to evils which are likely to accompany monopoly, such as poor service and excessive costs).

Compare Petchem, Inc. v. Canaveral Port Auth., 28 F.M.C. 281, 307, 23 S.R.R. 975, 995 (F.M.C. 1986), *aff'd*, 853 F.2d 958, 963 (D.C. Cir. 1988) (upholding an exclusive tug franchise as justified by competitive factors, but stating that a port issuing an exclusive franchise "should consider carefully whether periodic competitive bidding for that franchise would be beneficial") *with Canaveral Port Authority—Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate,* 29 S.R.R. 1436, 1448-51 (F.M.C. 2003) (finding unreasonable refusal to deal where the port did not consider application for tug franchise; and that asserted justification that the application was submitted too late was not convincing; violation ended when the port sent out a notice inviting applications for an additional franchise) and *Exclusive Tug Arrangements in Port Canaveral, Fla.*, 29 S.R.R. 1199, 1223 (A.L.J.) (finding "relevant market is Port Canaveral" and changed circumstances since exclusive franchise had been upheld 15 years earlier), *dismissed on settlement,* 29 S.R.R. 1455 (F.M.C. 2003).

2. **Right of lessee to control premises and access to premises**.

Marine Repair Services v. Ports America Chesapeake, FMC No. 11-11 (Initial Decision Jan. 10, 2013), *notice not to review upon withdrawal of exceptions* (FMC March 20, 2013)

Challenge to alleged discrimination and refusal to deal by tenant of Port of Baltimore's Seagirt terminal under long term Public-Private Partnership lease. Lease gave lessee exclusive right under the Lease to perform chassis repair at the Premises; lessee stated it also had the right to decline access to the premises to a competitive maintenance and repair provider to pick up chassis for repair offsite.
FMC judge analyzed the case by identifying a relevant market and assessing effects on competition in that market. Found that competitor was not fully excluded from the market (carriers could take their own chassis offsite) and applied the general antitrust principle that parties generally do not have a duty to assist their competitors. Port was not sued and did not intervene in the dispute.

R.O. White & Co. v. Port of Miami Terminal Operating Co., 31 S.R.R. 783 (A.L.J. 2009), adopted as administratively final, 31 S.R.R. 783 (F.M.C. Oct. 6, 2009) (reasonable for terminal operator joint venture members to take actions to enhance their competitive position over non-members; venture not required to provide access on a marginal cost basis to competitor; port sued along with terminal operating company)

T. Parker Host v Kinder Morgan Liquid Terminals, FMC No. 16-14 (filed June 2016, settlement approved Aug. 2016). Plaintiff provider of agency services denied access to Kinder Morgan terminals in alleged retaliation for providing competitive services.

3. Need to meet commitments to lessees.

New Orleans Stevedoring Company: court quotes Commission's Administrative Law Judge that it "cannot seriously be contended" that a motive to maintain long-term relationships with lessees and avoid breach of contract liability "is not related to transportation concerns;" result held fully consistent with the Commission's precedents.

4. Lease renewals.

Seacon Terminals v. Port of Seattle, FMC No. 90-16, 26 S.R.R. 883 (1992). Plaintiff declined to review lease when renewal period came up during time of business slow down; port went ahead to lease terminal to a carrier subsidiary MTO; plaintiff claimed later it had found a tenant and wanted to lease the terminal, but the port was declined to break off its existing negotiations. Plaintiff claimed a refusal to deal that (a) created a "monopoly" at the port for "independent" terminal operators not affiliated with a carrier and (b) was tainted by a conflict of interest because one of the Commissioners later became affiliated with a law firm that represents the allegedly favored competitor.

Premier Auto. Servs. v. Flanagan, 73 Fed. Reg. 34,017, 34,019-20 (F.M.C. June 16, 2008)(lessee did not renew lease and filed for bankruptcy and then filed Shipping Act claim when port tried to recover the premises); *In re Premier Auto. Servs*., 492 F.3d 274, 284 n.2 (4th Cir. 2007)(summarily rejecting Shipping Act claims).

5. **Incentives to keep a major tenant at the port through lease concessions.**

Compare Ceres Marine Terminal v. Maryland Port Administration, 27 S.R.R. 1251 (FMC 1997) with the Commission's rulings in the *Maher* case, FMC No. 08-03.

6. Discrimination based on factors allegedly extraneous to transportation.

"50 Mile Container Rules," 24 S.R.R. 411 (1987), *aff'd sub nom. N.Y. Shipping Ass'n, Inc. v. FMC*, 854 F.2d 1338, 1376 (D.C. Cir. 1988)(Discrimination proscribed when based on the requirements of a collective bargaining agreement rather than on an assessment of actual transportation-based realities.)

Cornell v. FMC, No. 14-1208 (D.C. Cir. Dec. 2, 2015) cruise passenger sued claiming refusal to deal when Princess wouldn't carry her after she had sued Carnival three times over a $600 dispute over some returned art. Court deferred to the FMC's determination "that the prohibition against an 'unreasonabl[e] refus[al] to deal' under 46 U.S.C. § 41104(10) does not apply to discretionary business decisions." It found "no plausible basis for concluding that Princess's refusal to deal was for reasons other than business considerations related to the costs of past and potential future litigations."

Court however expressed no view on "whether the FMC engaged in reasoned decision-making by giving deference to 'discretionary business decisions' without assessing whether there are 'legitimate transportation-related factors' for the refusal to deal or whether the FMC's position was otherwise an unexplained departure from precedent and past practice," finding that the plaintiff had waived that argument.