

What the Shipping Act and Federal Maritime Commission Mean for Ports

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The 1984 Shipping Act & OSRA

1. Covers Ocean Common Carriers and Marine Terminal Operators (and OTIs)
2. International trade only
3. Even landlord ports are MTOs
 - a. Someone providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier
 - b. Terminal leases and practices
 - c. But not domestic or non-common carrier



Organization of the FMC

1. Commissioners
2. Bureau of Enforcement (BOE)
3. Office of Administrative Law Judges
4. Bureau of Trade Analysis
 - a. Office of Agreements
 - b. Office of Service Contracts and Tariffs
5. General Counsel

Port Interactions with the FMC

1. Litigation Forum
 - a. Private party complaints
 - b. Exclusive jurisdiction
 - c. How a Shipping Act complaint works
2. Regulation of Port Activities
 - a. Bureau of Enforcement
 - b. Investigations and fact-finding

Agreement Filing Requirements



1. Covered Activities for MTOs
 - a. Discuss, fix or regulate rates or other conditions of service
 - b. Exclusive, preferential or cooperative working arrangements
2. Dealing with non-regulated entities, such as tug operators

Agreement Filing Process

1. When an agreement has to be filed
- ↓
2. What has to be in the filed agreement
- ↓
3. Filing process
- ↓
4. 45 day waiting period
- ↓
5. Minutes must be filed with FMC
- ↓
6. Amendments required

MTSA and MTFA Exemptions

1. What is a Marine Terminal Services Agreement
 - a. Parties – Port and common carrier
 - b. Does not include lease or assignment of terminal
 - c. Antitrust immunity only if filed
2. What is a Marine Terminal Facilities Agreement
 - a. Parties – Port and common carrier or other MTO
 - b. Public access – must be made available on request

Bureau of Enforcement

1. Enforcement Process
 - a. Shipping Act substantive claims
 - b. Violations of agreement requirements
2. Penalties for willful violations –
\$58,562 Per Day



The FMC as Litigation Forum

1. Jurisdiction
 - a. Common carriage – liner services and contract carriage
 - b. International trade only
 - c. 11th Amendment immunity for state port authorities
 - d. Class action issue pending appeal

The FMC as Litigation Forum

2. Covered Claim Basics



- a. Just and reasonable regulations and practices - 41102(c) (and the pending NPRM)
- b. Unreasonable prejudice – 41106(b)
- c. Unreasonable refusal to deal – 41106(c)
- d. Agreement to boycott or unreasonably discriminate – 41106(a)

The FMC as Litigation Forum

3. What is Unreasonable?
 - a. Appropriate charges – must be a service for the fee
 - b. Dates back to *Volkswagenwerk* Supreme Court decision in 1968
 - i. M&M fund contributions for containerization
 - ii. No benefit for VW, so illegal to charge for M&M fund
 - c. *Plaquemines* decision
 - d. Treating like cases alike

The FMC as Litigation Forum



4. Ceres to Maher Terminals
5. Exclusive dealing arrangements
 - a. Petchem
 - b. Ormet
 - c. Lower Mississippi Tugs
 - d. R. O. White and more recent views

Damages

1. Reparations to a prevailing complainant
 - a. Up to three years to file
 - b. Includes all actual injuries and interest, and double damages in certain cases
2. Attorney's fees may be awarded to a prevailing party

FMC Regulation in Other Areas

1. Terminal Congestion, Detention and Demurrage, and FF 28
2. FMC Attempts to Regulate Port Trucking



Related Issues

1. Port Trucking
 - a. Misclassification issues
 - b. Lawsuits
 - c. State laws

Questions?

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