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Marine Terminal Operator Regulation Under the Shipping Act

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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." The Federal Maritime Commission ("FMC" or the "Commission") enforces the Act and also serves as a forum for the resolution of private complaints against MTOs. After a period with only two commissioners, the FMC is back to four (three Republicans and one Democrat) with one remaining vacancy.

   a. The FMC takes a broad view of its jurisdiction, and the amount of common carriage at a terminal need not be great for the Act to apply.

   b. The FMC looks to a number of factors to determine common carriage. *See, e.g.*, *Rose Int'l v. Overseas Moving Network Int'l,* 29 S.R.R. 119, 162 (F.M.C. 2001) ("The most essential factor is whether the carrier holds itself out to accept cargo from whoever offers to the extent of its ability to carry, and the other relevant factors include the variety and type of cargo carried, number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and the method of establishing and charging rates."); *Agreement Nos. 10293, 10295,* 26 F.M.C. 419, 421, 22 S.R.R. 965, 968 (F.M.C. 1984) ("[T]he term common carrier is not a rigid and unyielding dictionary definition but rather a flexible regulatory concept" and cannot be determined merely based on the presence or absence of a single factor.). *See also United States v. Stephen Bros. Line,* 384 F.2d 118, 124 n.16 (5th Cir. 1967)("("The fact that . . . vessels carried a variety of commodities for numerous shippers radically differentiates them from those coming within the definition [of an ocean tramp.]").

   c. A terminal is covered if it provides services or facilities for both foreign and domestic common carriage ("mixed" terminals) as well as to only foreign common carriers. 46 U.S.C. § 40102(14).

   d. The FMC determines jurisdiction on a terminal-by-terminal basis, not a port by port basis. *See Auction Block Co. v. City of Homer*, No. 12-03 (FMC 2014), *aff'd mem*. No. 14-72609 (9th Cir. May 29, 2015 (no jurisdiction where City of Homer provided terminal facilities to common carriers at two docks but the petitioners' FMC

complaint arose out of activities at a third dock where the city did not provide terminal facilities to any common carrier; court of appeals deferred to FMC's construction of the Act assessing MTO status terminal by terminal)

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)).

   d. "operate under an agreement required to be filed" under the Act "if — (1) the agreement has not become effective . . .or has been rejected, disapproved, or canceled; or (2) the operation is not in accordance with the terms of the agreement or any modifications" to it by the FMC. 46 U.S.C. § 41102(b) (former Sections 10(a)(2) and 10(a)(3)).

3. 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").

iii. Broad view of legitimate transportation concerns upheld in *New Orleans Stevedoring Co. v. Bd. of Comm'rs of the Port of New Orleans*, 29 S.R.R. 1066, 1071 (F.M.C. 2002), *aff'd mem.*, 30 S.R.R. 261, 262 (D.C. Cir. 2003) to include desire to maintain long-term relationships with lessees and avoid potential breach of contract liability.

iv. Exclusive franchises and restrictions on shipper and carrier freedom to select service providers presumptively suspect but permissible on a proper showing. *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); *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) *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; asserted justification that the application was submitted too late was not convincing).

c. The Commission's analysis is "informed by the deference it shows to public port authorities, especially in the context of their leasing decisions." *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). The FMC 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." *See* http://www.fmc.gov/assets/1/Documents/08-03_12-02_FNL_ORDR.pdf

d. Filing requirements

i. Unless exempted, filing is required of any agreement between or among MTOs, or between or among one or more MTOs and one or more ocean common carriers to "discuss, fix, or regulate rates or other conditions of service" or to "(2) engage in exclusive, preferential, or cooperative working arrangements, to the extent the agreement involves ocean transportation in the foreign commerce of the United States.'

ii. There are significant exemptions from filing, including "marine terminal facilities agreements," generally leases and contracts with shipping lines or other MTOs to operate a terminal facility, 46 CFR § 535.310, and "marine terminal services agreements," generally between operating ports and ocean common carriers for the provision of MTO services. 46 CFR § 535.309. MTO service agreements must be filed to obtain antitrust immunity, while MTOs must merely make facilities agreements available on request and need not file them to obtain immunity.

iii. The FMC has held that an otherwise exempt marine terminal facilities agreement granting docking and lease rights to a carrier must be filed as a "cooperative working agreement" when it contains exclusive use and noncompete provisions. *Agreement No. 201158*, 30 S.R.R. 377 (2004).

B. Antitrust Exemption

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 pre-empts state law claims as well as federal antitrust law claims. *In re Vehicle Carrier Services Antitrust Litigation*, 846 F. 3d 71 (3d Cir.), *cert. denied sub nom. Alban v. Nippon Yusen Kabushiki Kaisha*, 138 S. Ct. 114 (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 costs 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 common carriers in 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 tug operator, and may not negotiate with a non-ocean carrier or any group of non-ocean carriers (such as truck, rail, or air operators), or with an MTO, 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. The Lobiondo Coast Guard Authorization Act of 2018, Pub. L. 115-282, recently amended the Shipping Act to expand the FMC's enforcement powers and amend the prohibited acts provisions, including by limiting the ability of carriers to negotiate and contract jointly with MTOs The Act does not alter the current division of responsibility between the Department of Justice and the FMC for competition enforcement. *See* http://www.klgates.com/recent-amendments-to-the-shipping-act-a-course-correction-not-a-sea-change-12-20-2018/

   a. The legislation expands the current provision of the Shipping Act prohibiting joint negotiations with non-ocean carriers unless they comply with the antitrust laws and the purposes of the Shipping Act by adding a new paragraph that applies the same prohibition and exception to joint negotiations and agreements for the purchase of certain MTO services. 46 U.S.C. § 41105(c)(6). The covered MTO services are defined to include vessel berthing or bunkering, loading or unloading cargo to or from a vessel to or from a point on a wharf

or terminal, and positioning, removal, or replacement of buoys related to the movement of the vessel. A new paragraph prohibits, without exception, any joint negotiations for towing or tug services. 46 U.S.C. § 41105(c)(5).

b. The Commission is expressly given the power to reject an agreement "likely to substantially lessen competition in the purchasing of certain covered [MTO] services," and to consider any relevant competition factors in making that determination, including "the competitive effect of agreements other than the agreement under review. 46 U.S.C. § 41307(b). The Commission must also include in its annual report an analysis of any impacts on competition for the purchase of covered MTO services by carrier alliances, and a summary of any corrective actions taken. 46 U.S.C. § 306(b)(6).

c. These new provisions are intended to address a problem perceived by some tug operators and MTOs that increasingly large carrier alliances might exercise undue market power in negotiating agreements with them.

d. The Commission is given the express authority to require reports and records from MTOs and their officers and agents. 46 U.S.C. § 40104(a). The Commission is also directed, when publishing notice of any agreement filed with it for review, to ask that interested persons submit information and documents. 46 U.S.C. § 40304(a). Various transparency provisions are added for Commission meetings. 46 U.S.C. § 303.

e. The Commission is authorized to preclude a carrier from participating simultaneously in a rate discussion agreement and an agreement to share vessels in the same trade if that is likely by a reduction in competition to unreasonably reduce transportation service or increase transportation cost. 46 U.S.C. § 41104(13)). The practical effect of this change is limited because there are only a handful of remaining rate discussion agreements, and those that remain deal primarily with smaller trades or the carriage of military cargo.

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

a. In March, 2017 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 or made any allegations of wrongdoing.

c. The subpoenas raised concerns that Justice was investigating matters conducted under valid FMC agreements, which are outside its jurisdiction. Because Justice has not disclosed what it is investigating, it is not clear whether the investigation is encroaching on the FMC's jurisdiction.

B. Unreasonable practices rulemaking

1. The Commission issued an interpretive rule in December, 2018, rejecting a recent line of cases and confirming that that a regulated entity must engage in a practice or regulation on a normal, customary, and continuous basis in order for it to be considered an unjust or unreasonable practice or regulation under 46 U.S.C. § 41102(c)(previously Section 10(d)(1)). *See* 83 Fed. Reg. 64, 478. The Commission stated that the unreasonable practices provision "was never intended to be a method of resolving every dispute that arises in the receiving, handling, storing or delivering of cargo" and that restoring the scope of 46 USC 41102(c) to its prior interpretation was consistent with the statute and legislative history, judicial precedent and Commission case law, and accepted rules of statutory construction.

2. The new ruling would preclude so-called "one off" unreasonable practices claims from being brought to the Commission under 46 USC 41102(c). The Commission noted that some claims might fall under other provisions of the Shipping Act and that common law, state and federal statutory, and admiralty remedies are also available in appropriate cases.

3. The interpretive rule was supported by the AAPA and by ocean carriers, brokers, and forwarders. The FMC received no opposing comments.

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

1. A May, 2018 federal district court decision held that the City of Oakland breached a developer's "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. *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 48 ELR 20080. No. 16-cv-07014, (N.D. Cal. May 15, 2018). The court found that the "the record before the City Council does not contain substantial evidence that OBOT's proposed operations would pose a substantial danger to the health or safety of people in Oakland." The city lacked any information, for example as to how well emissions controls could mitigate the health and safety risks, and did not undertake an adequate air quality analysis. The court noted that a more careful and thorough evidentiary record and a more rigorous analysis

could perhaps have satisfied the standard the City imposed on itself in the development agreement, but that the record before it did not meet this standard.

2. The complaint also contained allegations that the City's actions violated the Shipping Act and the dormant commerce clause, and were preempted by federal laws governing rail and hazardous materials transportation. The court did not need to reach these other claims, and an appeal is pending and in the middle of briefing, Nos. 18-16105, 18-16141 (9th Cir.).

D. *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

1. The Commission held that a port authority was not required to justify alleged unequal treatment of a parking facility operator that claimed its shuttle buses were overcharged in comparison with other courtesy vehicles driven onto the port, since the operator had not shown that the charges it paid, and that it had agreed to, caused it injury.

2. The FMC's decision was vacated in a very brief decision of the court of appeals in May, 2018, holding that the complaining operator was "plainly injured" when charged more than other commercial passenger vehicles, and that the differential treatment of Santa Fe's shuttle buses must therefore be justified by legitimate transportation factors. *Santa Fe Disc. Cruise Parking, Inc. v. FMC,* 889 F.3d 795, 797 (D.C. Cir. 2018).

3. On remand, the ALJ dismissed again, finding complainants had not proved that the unequal treatment was unjustified by differences in transportation factors, and that they in fact benefited from the flat rate they were charged per parking place per month, as opposed to the per trip rate others were charged. Taxicabs and limousines are also differently situated because they do not have parking facilities, and thus could not be charged on the same basis as the parking facility operators.

4. The ALJ analyzed legitimate transportation factors using the broad standards set out by the Commission in its statement accompanying it approval of the *Maher* settlement. For example, the ALJ noted the deference the Commission shows to public port authorities in crediting the port's testimony that charging taxicabs for access would harm the efficiency of cruise ship passenger transportation. The case is now back on appeal to the Commission.

E. *Port Elizabeth Terminal & Warehouse Corp. v. The Port Authority of New York and New Jersey*, No. 17-07

1. Complainant PETW provides and warehousing services and claims that the Port Authority gave undue or unreasonable preference to another terminal operator (Port Newark Container Terminal) by giving it property that Complainant had occupied and thus providing PNCT with an undue advantage.

2. An April, 2018 ALJ decision held that PETW's reparations claims based on discriminatory lease terms were time-barred because it entered into its lease in 2009 and the Port Authority's lease with PNCT was signed and in the public realm in 2011. PETW did not file its complaint until 6 years later, four days before the trial date of the Port Authority's landlord/tenant action to have PETW evicted from two buildings.

3. The ALJ noted that the statute of limitations also appeared to bar the claims for unreasonable refusal to deal and failing to establish, observe, and enforce just and reasonable regulations and practices, and that those failed to state a claim in any event because they merely alleged different lease terms, and the Shipping Act does not require "that all interested parties get the same deal." The ALJ also referenced the finding of a New Jersey court that PETW's FMC filing was an inappropriate tactic to delay eviction proceedings. (A similar scenario played out in *In re Premier Auto. Servs.*, 492 F.3d 274 (4th Cir. 2007) and *Premier Auto. Servs. v. Flanagan*, 73 Fed. Reg. 34,017, 34,019-20 (F.M.C. June 16, 2008)).

4. The case is proceeding under amended claims alleging an ongoing refusal to deal pursuant to the Port's alleged longstanding practice to negotiate "regarding alternative suitable marine terminal facilities at reasonable rates" even with parties that owe the Port Authority money.

F. Digital Container Shipping Association Agreement (comments due Feb. 17, 2019; proposed effective date March 14, 2019).

1. Agreement purpose is to allow the parties discuss and adopt common or compatible nonbinding information technology standards for the transmission and storage of information and documents related to the receipt, handling, delivery, and/or storage of property between participants in the international ocean transportation supply chain.

2. The agreement covers all U.S. and foreign ports and points.

3. The initial members are large container lines: Maersk, CMA, Hapag, MSC, and the ONE consortium. They seek authorization to meet with MTOs and others to discuss the information technology standards for the movement of containers or services ancillary thereto that they plan to develop and adopt.

4. The proposed agreement states the parties' intent to limit their discussions and agreements to operational matters, and to the extent commercial terms are affected there is to be no discussion or agreement as to freight rates or other terms and conditions of carriage "other than those incidentally impacted by the discussions/agreements authorized hereunder." The agreement language also recognizes the prohibition on unauthorized exchange of certain confidential business information relating to shippers, consignees, and common carriers.