

## **Approaching a Lease Negotiation**

Exposure to the Shipping Act of 1984 -  
Port Leasing Practices and Leading Case Law at the Federal Maritime Commission

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### Exposure to the Shipping Act of 1984 - Port Leasing Practices and Leading Case Law at the Federal Maritime Commission

#### I. The Shipping Act of 1984 and Port Authorities

The Federal Maritime Commission regulates oceanborne transportation in the foreign commerce of the United States. The Commission is responsible for administering the Shipping Act of 1984, 46 App. U.S.C. 1701 et seq., as amended by the Ocean Shipping Reform Act of 1998. The Commission's regulations for the Shipping Act of 1984 are published at 46 C.F.R. Part 501 et seq.

Port Authorities are regulated by the Commission as marine terminal operators, defined as any person in the United States engaging in the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier [Section 3(14); 46 app. U.S.C. 1702(14)].

Shipping Act sections applicable to Ports that should be considered during lease negotiations and lease renewals;

Section 10(b)(10) [46 app. U.S.C. 1709(b)(10)]

No marine terminal operator may unreasonably refuse to deal or negotiate.

Section 10(d)(1) [46 app. U.S.C. 1709(d)(1)]

No marine terminal operator may fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.

Section 10(d)(2) [46 app. U.S.C. 1709(d)(2)]

No marine terminal operator may agree with another marine terminal operator (or common carrier) to boycott, or unreasonably discriminate in the provision of terminal services to any common carrier or ocean tramp.

Section 10(d)(4) [46 app. U.S.C. 1709(d)(4)]

No marine terminal operator may give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.

## II. Leading Case Law at the FMC

Petchem, Inc. v. Canaveral Port Authority, 23 S.R.R. 974, 987 (FMC 1986) aff'd sub. nom., Petchem, Inc. v. Federal Maritime Comm'n, 853 F. 2d 958 (D.C. Cir. 1988)

The Port did not violate the Shipping Act by granting an exclusive tug franchise where market conditions justified the situation.

With respect to determining a port's reasonable business decisions, the Commission will not substitute its own business judgment for that of an entity that is responsible for the daily operations of a port.

Seacon Terminals, Inc. v. Port of Seattle, 26 S.R.R. 886 (FMC, 1993)

The Port did not violate the Shipping Act when it did not renew a tenant's lease, subsequently allowed other tenants to use the property and treated current tenants more favorably than the complainant.

The Commission does not substitute its business judgment for that of a port, but rather exercises its responsibility to consider whether, through its decision-making, a port violated the Shipping Act.

The Shipping Act contemplates the existence of permissible preferences and prejudices, only undue or unreasonable preferences and prejudices violate the Shipping Act. It would be impossible for a port to insure that all tenants are identically situated, since each parcel and each tenant have geographical and commercial idiosyncracies.

All Marine Moorings, Inc. v. ITO Corp. of Baltimore and the Maryland Port Administration, 27 S.R.R. 539 (FMC, 1996)

The Port did not violate the Shipping Act in allowing a tenant marine terminal operator to perform its own mooring services to the exclusion of a company that only provided mooring services at the port. The tenant's lease allowed it to perform its own mooring services and the complaining company otherwise conducted 70% of the line handling business throughout the port.

"Reasonableness", in the context of either refusal to deal or alleged preference, is dependent upon specific facts rather than broad generalizations; the kinds of commercial situations and considerations which justify preferential or exclusive arrangements and those that do not - emphasizing various commercial, physical and competitive factors - will determine what is reasonable in each individual case.

Ceres Marine Terminal, Inc. v. Maryland Port Administration, 27 S.R.R. 1251 (FMC, Oct. 10,

1997), remanded at 1998 U.S. App. LEXIS 25733 (4<sup>th</sup> Cir. 1998), dismissed by the Commission on August 16, 2004, after finding that MPA is a state-run port.

The Port violated the Shipping Act where it refused to grant similar lease terms to a company that could meet the service requirements for the more favorable lease terms and the refusal was based solely on the tenant's status as a marine terminal operator.

In negotiating a lease and granting more favorable lease terms, vessel call guarantees may be a valid transportation factor by which a port can distinguish between lessees when offering favorable lease terms, but the differentiation must be based on a valid transportation factor, and reasonable based on the particular facts and circumstances. Status alone (e.g. a marine terminal operator compared with a vessel operator/marine terminal operator) is not a sufficient basis by which to distinguish between lessees.

Additionally, the Port violated the Shipping Act where the rates and charges assessed the complainant were excessive in relation to the benefit received and in comparison to the rates charged another tenant for the same services.

A port is not required to charge to same rates to all tenants, however, when a port establishes a policy and criteria to offer incentive rates or volume discounts, it must apply the policy and criteria in a reasonable, even-handed manner.

NPR, Inc. v. Board of Harbor Commissioners of the Port of New Orleans (Dkt. No. 98-23) (Initial Decision issued March 16, 2000, administratively final April 19, 2000)

The Port did not violate the Shipping Act when it allowed a tenant to terminate a lease early in exchange for the tenant agreeing to pay 50% of the remaining rent.

The original lease had a term calling for accelerated payments in event of early termination, as did leases the port had with other tenants.

The ALJ declined to declare the agreement in violation of the Shipping Act because to do so would contravene the statute's stated purposes for a "minimum of government intervention" and a "greater reliance on the marketplace," sections 2(1) and (4), respectively.

Federal Maritime Comm'n v. South Carolina State Ports Authority, 535 U.S. 743 (2002)

Under the 11<sup>th</sup> Amendment and state sovereign immunity, the Commission may not adjudicate a private complaint against a state-run port. However, the Commission has jurisdiction to ensure that state-run ports comply with the Shipping Act and is free to investigate alleged violations, either upon its own initiative or upon information provided by a private party and to initiate its own administrative proceedings against state-run ports.

New Orleans Stevedoring Co. v. Port of New Orleans, Dkt. No. 00-11 (Commission Order issued June 28, 2002) *aff'd* New Orleans Stevedoring Co. v. Federal Maritime Comm'n,

80 Fed. Appx. 681; 2003 U.S. App. LEXIS 20015 (D.C. Cir. 2003, unpublished)

The Port did not violate the Shipping Act when, after the expiration of tenant's lease, it refused to lease the same property to the tenant and applied its policy to not lease property planned for reconstruction (in order to avoid construction delays). The Port was also justified in its decision to lease the property (two adjoining wharf facilities) to a single tenant, rather than splitting the properties between two tenants.

Additionally, once the tenant's lease expired, the Port's decision to assign the property to other tenants in order to limit the impacts of the construction on their operations was not unreasonable or prejudicial. The Port had an obligation to its current tenants to compensate them for loss of space and to encourage the tenants to assume long term leases.

The Shipping Act only requires that port authorities do not "shut out" any person for reasons that have no relation to legitimate transportation-related factors. The Shipping Act does not guarantee the right to enter into a contract, nor does it guarantee a contract with any specific terms.

Canaveral Port Authority - Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate, Dkt. No. 02-02 (Commission Order issued February 24, 2003).

The Port had an exclusive franchise for providing tug services. The failure by the Port to consider the application of another company to provide tug services and not provide reasonable justification for failing to do so is in violation of Section 10(b)(10) of the Shipping Act for unreasonably refusing to deal or negotiate.

Exclusive Tug Arrangements in Port Canaveral, Florida, Dkt. No. 02-03 (ALJ Initial Decision issued March 4, 2003).

Where the Port had an exclusive tug service franchise with one company, it violated Section 10(d)(1) for failing to establish reasonable regulations for tug services and Section 10(d)(4) for giving undue preference or advantage to the company with the exclusive franchise.

### III. Additional Information

#### Request an Informal Legal Opinion

Send requests in writing to the FMC Office of the General Counsel. The OGC will reply with an opinion regarding the legality of requestor's actions under the Shipping Act, but will not provide an opinion regarding the legality of a third party's actions.

#### Request a Declaratory Order, see 46 CFR 502.68

Upon request, the Commission may issue a declaratory order to terminate a controversy or remove uncertainty regarding a matter in which the Commission has jurisdiction.

Visit <http://www.fmc.gov> for more information including office contact information, statute and regulations, public reading room and news updates.