AAPA PORT ADMINISTRATION AND LEGAL ISSUES SEMINAR

Baltimore, Maryland

April 15, 2009

The Shipping Act and Federal Maritime Commission Regulation of Marine Terminal Operators

John Longstreth
K&L GATES LLP
1601 K Street NW
Washington, DC 20006
(202) 661-6271
john.longstreth@klgates.com

M. Catherine Orleman
Principal Counsel
MARYLAND PORT ADMINISTRATION
World Trade Center
Baltimore, MD 21202
(410) 385-4430
corleman@marylandports.com

Matthew J. Thomas
TROUTMAN SANDERS LLP
401 9th Street, N. W.
Washington, DC 20004
(202) 274-2862
matthew.thomas@troutmansanders.com

Under the Shipping Act of 1984 (the "Shipping Act" or the "Act"), the Federal Maritime Commission (the "FMC") regulates certain activities of 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." In a number of cases, the FMC and the courts have made clear that this category of MTOs has been construed to include public port authorities. Port tenants are generally also MTOs.

The Shipping Act and FMC rules provide for the regulation of various aspects of MTO operations. Specifically, with regard to MTOs, the Shipping Act provides for:

(a) Substantive standards of conduct for MTOs, barring MTOs from "prohibited acts" of engaging in unjust or unreasonable discrimination and other practices. *See* Sections 10(d)(1), (3) and (4) of the Act, codified at 46 U.S.C. §§ 41102(c), 41106 (2) and (3).

(b) Elective publication of MTO rates, regulations, and other practices in online "MTO schedules," (formerly mandatory "MTO tariffs"). Section 8(f) of the Act, codified at 46 U.S.C. §§ 40501(f).

(c) Mandatory filing and regulation of agreements among MTOs, or between MTOs and ocean carriers, to discuss or fix prices or to engage in cooperative working arrangements (with statutory antitrust immunity). *See* Sections 4(b) and 5(a) of the Act, codified at 46 U.S.C. §§ 40301(b), 40302(a).

I. "Prohibited Acts" and Reasonableness Standards

Former Section 10(d), as codified, outlines "prohibited acts" and substantive standards of conduct for MTOs. There are three primary prohibitions:

i. "A common carrier, marine terminal operator, or ocean transportation intermediary may not 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)).

ii. "A marine terminal operator may not . . . 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)).

iii. "A marine terminal operator may not . . . unreasonably refuse to deal or negotiate." 46 U.S.C. § 41106(3) (former Sections 10(b) (10) and 10(d)(3)).

While the statutory reasonableness and non-discrimination standards are worded very broadly, precedents of the FMC give some content to them. Some of the more common disputes involve the following areas.

A. Franchises and Exclusive Dealing

The Commission's general analytic approach is outlined in *Petchem, Inc. v. Canaveral Port Authority*, 23 S.R.R. 974, 990 (1986)(reviewing en exclusive tug franchise), *aff'd*, 853 F.2d 958 (D.C. Cir. 1988), in which the Commission stated:

> [Exclusive terminal] arrangements are generally undesirable and, in the absence of justification by their proponents, may be unlawful under the Shipping Acts. However, in certain circumstances, such arrangements may be necessary to provide adequate and consistent service to a port's carriers or shippers, to ensure attractive prices for such services and generally to advance the port's economic well-being.

Similarly, in *All Marine Moorings v. ITO Corp. of Baltimore*, 27 S.R.R. 539, 545 (1996) (approving an exclusive contract for line handling at a terminal), the Commission held that "monopolistic practices" are "*prima facie* unreasonable and violative of the Shipping Act standards," but "they pass muster if respondents can justify them." It noted that "the greater the degree of preference or monopoly, the greater the evidentiary burden of justification." If the practice creates a monopoly or near-monopoly, the MTO will have to justify its exclusionary practice, but if the complaining party does not make a showing of monopoly, "there is no automatic requirement of justification."

The Commission has also noted that:

> To analyze whether an exclusive arrangement is *prima facie* unreasonable under the 1984 Act, the Commission must first determine the market relevant to the practice in question, and then must determine the degree of actual harm or harm likely to be caused by the practice within that market.

River Parishes Company, Inc. ("RIVCO") v. Ormet Primary Aluminum Corporation, 28 S.R.R. 751, 766-67 (FMC 1999)(footnotes omitted).

As might be expected given these broad standards, the FMC's decisions in this area are always heavily fact-driven, and often turn on a balancing of relative benefits and burdens of the contested practices. The Commission generally has been inclusive in considering a broad range of economic or public policy benefits and burdens when considering the reasonableness of MTO practices.

A good example of the differing outcomes possible under such a test is provided by the *Petchem* case itself. When the exclusive franchise for tug and towing services to one company was first challenged in the 1980's, the Commission found the decision of

the Canaveral Port Authority to award the franchise lawful. The Commission noted that: (1) there was a limited market for tug and towing services at the small port; (2) the complaining tugboat company lacked experience and equipment; and (3) the Port was concerned about its ability to promote reliable and continuous service. *See also Agreement No. 2598*, 17 FMC 285, 296 (1974) (upholding exclusive terminal franchise where evidence showed that a single operator handled all cargo using only 60-70% of its available time, and deferring to port's judgment that if a second operator were franchised one would be forced out, leading to higher rates and rate increases to "cushion impending losses").

Nearly 15 years later, Petchem renewed its application to operate at Port Canaveral. Although denied access by the Canaveral Port Authority, Petchem and another tug company benefited from an FMC investigation that found that the more recent exclusions were violative of the Shipping Act. As set out by an Administrative Law Judge, *Exclusive Tug Arrangements in Port Canaveral Florida*, 29 S.R.R. 1199 (I.D.), *dismissed on settlement*, 29 S.R.R. 1455 (2003), the factors that had supported the exclusive franchise in the 1980's no longer applied: (1) Petchem now had substantial experience and equipment because it had carried military equipment at the Port; (2) commercial vessel moves had increased from 188 in 1983 to 1445 in 1999; and (3) virtually all vessel operators at the Port were on record supporting Petchem's application. The ALJ also found evidence of irregular procedures and favoritism towards the incumbent, and found that the Port did not have legitimate procedures to assess applications. The matter was settled prior to final decision by the Commission, but the practical impact has been that Petchem gained competitive access to the Port's towing market.

B. Unreasonable Preference or Advantage or Unreasonable Prejudice or Disadvantage (Discrimination)

The Commission has set forth the factors of an unreasonable discrimination claim as follows:

> In order to establish an allegation of an unreasonable preference or prejudice, 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 (1997).

Again, the Commission's focus in deciding discrimination claims has been whether the challenged discrimination was reasonable based on the particular facts. As the Commission stated in *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 900 (1993):

> In *Petchem*, the D.C. Circuit noted that "the Act clearly contemplates the existence of permissible preferences and prejudices." 853 F.2d at 963. Only *undue* or *unreasonable* preferences or prejudices would be violative of the Prohibited Acts.

(emphasis in original). In *Seacon*, the Commission held that it would not "tally and compare exactly what benefits were received by the relevant parties," and that "it would be impossible for the Port to insure that all of its tenants are identically situated, since each parcel and each operator has geographical and commercial idiosyncrasies." *Id*.

The Commission has, however, made clear that a party may not be discriminated against simply because of its class or status, without regard to legitimate transportation factors. In *Ceres*, the Commission held that an independent terminal operator cannot be given less favorable lease terms than a carrier solely on the basis of its status, where it is willing to guarantee the same commitments, including vessel calls, as the carrier. It found that the Port had failed to show that the difference between a guarantee by a carrier, which controls cargo, and that of an independent terminal operator, which does not, constituted a "legitimate transportation factor." Similarly, in *Co-Loading Practices by NVOCCs*, 23 S.R.R. 123 (1985), the Commission held that class distinctions must be supported by specifically established transportation factors, and not generalities.

It is permissible for a Port to give preference to lessees to over non-lessees to account for lease obligations and its duty to mitigate potential breaches of lease. *New Orleans Stevedoring Company v. Port of New Orleans,* 29 S.R.R. 1066 (FMC 2002), *aff'd mem*., 30 SRR 261, 262 (D.C. Cir. 2003).

C. Unreasonable Refusal to Deal

Once again, the touchstone of refusal to deal claims is reasonableness. In *Seacon*, the Commission held it was reasonable for a port to negotiate a lease with other operators once Seacon had declined to renew its lease. Similarly, in *New Orleans Stevedoring*, the port had a valid reason not to lease a terminal to the complainant, even though it excluded the complainant from the Port, when it determined that leasing the terminal could interfere with a planned construction project.

By contrast, in *Canaveral Port Authority – Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, 29 S.R.R. 1436 (2003), the Commission found an unreasonable refusal to deal where the Port did not even consider a tug company's application for a tug franchise; and the Port's asserted justification that the application was submitted too late was not convincing. The refusal to deal violation was

held to have ended, however, when the Port sent out a notice inviting applications for an additional tug franchise.

II. Marine Terminal Schedule Publication

Under the Shipping Act, an MTO, at its discretion, may make available to the public a schedule of its rates, regulations, and practices. An MTO is not required to make a schedule available to the public, however. An MTO that elects to make its schedule available to the public must make it available in electronic form, in conformity with FMC rules, set forth at 46 CFR, Part 525.

Marine terminal operators often elect to publish these schedules because "[a]ny schedule that is made available to the public by the marine terminal operator shall be enforceable by an appropriate court as an implied contract between the marine terminal operator and the party receiving the services rendered by the marine terminal operator, without proof that such party has actual knowledge of the provisions of the applicable terminal schedule." 46 CFR 525.2(a)(2).

However, if an MTO has an actual contract (such as a lease or services agreement) with a party covering the services rendered to that party, an existing terminal schedule covering those same services shall not be enforceable as an implied contract. 46 CFR 525.2(a)(3). Accordingly, MTO schedule provision cannot be used automatically to trump or negate existing lease or other contract terms.

Some older FMC precedent appears to indicate that MTO rules and requirements addressing truck access and operations are within the FMC's subject matter jurisdiction, and therefore appropriate for inclusion in MTO schedules. In *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Comm'n*, 444 F.2d 824, 829 (D.C. Cir. 1970), the court of appeals upheld the Commission's authority to order New York terminals to include provisions in their tariffs addressing truck congestion and delays. Decades later, the Commission confirmed that it believes it still has jurisdiction over those same MTOs truck policies. In Petition P3-02 *Petition of the Association of Bi-State Motor Carriers, Inc. to Investigate Truck Detention Practices of the New York Terminal Conference at the New York/New Jersey Port District (*February 20, 2004 Order), the Commission explained:

> As for subject matter jurisdiction, the Commission must determine whether the truck detention rules promulgated by NYTC relate to or are connected with "receiving, handling, storing or delivering property" under section 10(d)(1) of the Shipping Act. . . . [T]he Commission finds that it has subject matter jurisdiction over this matter. The truck detention rules promulgated by NYTC under its Tariff are integral to the loading and unloading of cargo from common carriers, the interchange of containers and chassis, and the ultimate delivery of property for shippers. As such, we conclude that the promulgation of truck detention rules at the relevant facilities is a terminal function related to "receiving,

handling, storing or delivering property" as provided in section 10(d)(1) of the Shipping Act.

The extent of the FMC's jurisdiction over truck-related policies of ports is currently at issue in litigation brought by the FMC against the Ports of Los Angeles and Long Beach in connection with their Clean Truck Program.

III. Agreement Filing – Antitrust Immunity

A. Agreements that need to be filed

In general, the Shipping Act requires the filing of a broad range of agreements among MTOs, and between MTOs and shipping lines, including all agreements to discuss, fix, or regulate rates or other conditions of service, or engage in exclusive, preferential, or cooperative working arrangements, to the extent that such agreements involve ocean transportation in the foreign commerce of the United States. Under Sections 4-6 of the Shipping Act, 46 U.S.C. §§ 40301-04, filed agreements are reviewed by the FMC for conformity with the Shipping Act and FMC rules, and generally take effect automatically within 45 days. Examples include an agreement to discuss possible multi-port security fees, or to promote consistent labor practices at ports. The Commission has recently taken an expansive view of the limits of its jurisdiction, which is being challenged in litigation involving an agreement between the Ports of Los Angeles and Long Beach regarding their combined effort to reduce truck pollution.

B. Agreements that do not need to be filed

The FMC's rules contain a number of broad exemptions from filing, which relieve MTOs from having to file most leases and contracts with shipping lines. For example, under 46 CFR § 535.310, "marine terminal facilities agreements" are exempt from filing. These are generally leases and any other agreements that convey rights to operate any marine terminal *facility* by means of lease, license, permit, assignment, land rental, or other similar arrangement for the use of marine terminal facilities or property. (Parties to exempt marine terminal facilities agreements receive antitrust immunity, but must provide copies of that agreement to any requesting party for a reasonable copying and mailing fee.)

Note, however, that the Commission has held that a marine terminal facilities agreement granting docking and lease rights to a carrier, which would otherwise have been exempt from filing, did have to be filed when it contained exclusive use and non-compete provisions which caused it to become a "cooperative working agreement." *Agreement No. 201158*, 30 S.R.R. 377 (2004).

Similarly, under 46 CFR § 535.309, "marine terminal services agreements," generally applicable to operating rather than landlord ports, are exempt from the filing and waiting period requirements of the Act. These agreements include any contract or arrangement between an MTO and an ocean common carrier that applies to marine terminal *services* that are provided to and paid for by an ocean common carrier, including

loading and unloading, terminal storage, wharfage, demurrage, and various other services. (No antitrust immunity is conferred for services agreements that are not filed, however.)

The Shipping Act does not require MTOs to file with the FMC agreements with motor carriers, rail lines, or other inland transportation providers.

C. Application of antitrust immunity

As noted above, any agreement filed with the Commission under Section 5 of the Shipping Act and effective under Section 6 of the Act, or exempt from filing under Section 16 of the Act, is granted antitrust immunity. This would include agreements between ports such as terminal conference or terminal assessment agreements and agreements between ports and carriers that restrict the port or the carrier from entering into other agreements.

Any activity or agreement undertaken with a reasonable basis to conclude it is pursuant to a filed and effective, or exempt, agreement is also exempt from the antitrust laws. *See A&E Pacific Construction Co. v. Saipan Stevedore Co.,* 888 F.2d 68, 72 n.6 (9th Cir. 1989)("all 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 antitrust laws also do not apply to any agreement, which provides wharfage, dock, warehouse or other terminal facilities outside the Unites States.

The antitrust laws **do** apply to:

- agreements with or among air, rail, motor, or domestic water carriers relating to transportation within the U.S.;

- transportation that does not involve a U.S. port, and thus is not "common carriage" within the meaning of the Shipping Act. *See American Ass'n of Cruise Passengers v. Carnival Cruise Lines Inc.,* 911 F.2d 786 (D.C Cir. 1990) (Clayton Act applicable to cruises that call only at foreign ports, which otherwise had the required effect on U.S. commerce to support jurisdiction, but not to cruises that call at U.S. ports because the Shipping Act exemption applies to those), *appeal after remand*, 31 F.3d 1184 (D.C. Cir. 1994). The FMC does not accept for filing agreements to the extent they cover foreign-to-foreign movements that do not involve a U.S. port. *Transpacific Westbound Rate Agreement v. FMC*, 951 F.2d 950 (9th Cir. 1991); and

- an agreement among common carriers to establish, operate, or maintain a marine terminal in the Unites States.

No person may recover damages under Section 4 of the Clayton Act or obtain injunctive relief under Section 16 of the Clayton Act for conduct prohibited by the

Shipping Act. *See* Section 7(c)(2), *A&E Pacific Construction Co.*, 888 F.2d at 71 ("no private party may sue for damages or for injunctive relief under the antitrust laws for conduct falling within the purview of the Act.")

In addition, it should be noted that state- (and in some cases, local-) controlled ports may enjoy a separate "state action" exemption from the antitrust laws, depending on the type of action and whether acting under color of state law.

IV. Relationship of State and Local Regulation to the Shipping Act

FMC Regulation And Other Federal Law

Shipping Act Preemption

In a broad range of cases involving FMC regulation of MTOs, the FMC has avoided taking the position that the Shipping Act or FMC rules or decisions have the effect of preempting state law. Often, the FMC has recognized that state and local law and regulation exist alongside federal Shipping Act regulation of terminal operations.

The Commission addressed the issue of preemption in *Canaveral Port Authority - Possible Violations of Section 10(b)(10)*, 29 S.R.R. at 1454. In that case, the Canaveral Port Authority argued that the FMC had no authority to regulate the port's tug franchise system, because the FMC could not "preempt" the port's "local" system for regulating tugs. The Commission rejected that argument, explaining:

> We need not even reach this question. CPA argues that the Shipping Act cannot preempt CPA's decision to control the tug and towing operations at Port Canaveral by requiring franchise agreements. However, that is not what the Commission has done in this case. Rather, we have determined that CPA violated section 10(b)(10) by refusing to deal or negotiate with Tugz regarding its application for a tug and towing franchise. By finding that CPA violated section 10(b)(10), we have not found concurrently that the franchise system is a *per se* violation of the Shipping Act, nor could we. All we have found is that based on the totality of the circumstances in this case, CPA unreasonably refused to deal or negotiate with Tugz.

Based on this reasoning, it appears that the FMC does not view the Shipping Act as preempting local authority to establish franchises for port-related services. Rather, the FMC will review those local franchise systems for "reasonableness" under the Shipping Act when they are administered by an FMC-regulated MTO.

Express preemption for regulation of other transportation modes

Although the FMC has not found the Shipping Act itself to impliedly preempt state law, other express provisions of law may restrict states and local entities from regulating other modes of transportation. In *American Trucking Ass'ns v. City of Los Angeles*, No. 08-56503 (9th Cir. March 20, 2009), the court held that some provisions of the ports' mandatory concession programs for drayage trucking services were likely to be preempted by the 49 U.S.C. § 14501(c)(1), which prohibits state regulation of the "price, route or service of any motor carrier," remanding the matter back to the district court for further proceedings. The preemption also applies to any "motor private carrier, broker, or freight forwarder with respect to the transportation of property." Similarly, state regulation of intrastate "rates, routes, or services of freight forwarders and transportation brokers" is generally preempted by 49 U.S.C. § 14501(b). A number of exceptions (including special provisions for safety measures) apply in this area as well.

Dormant Commerce Clause

Exclusive franchise arrangements have also been challenged under the dormant commerce clause. In *Petchem, Inc. v. Canaveral Port Authority,* 368 F. Supp. 2d 1292 (M.D. Fla. 2005), the plaintiff first obtained a ruling at the FMC that the Port's grant of an exclusive towing franchise violated the Shipping Act, and then settled its claims at the Commission. Plaintiff then brought a Section 1983 damages action against the Port alleging that the franchise violated the dormant Commerce Clause. The court held this claim did not come within the settlement and was not barred. In *Florida Transportation Service v. Miami-Dade County*, No. 05-22637 (S.D. Fla. 2008), the court in that ongoing case has held that the dormant commerce clause invalidated the Port of Miami's practice of granting renewals of permits to existing stevedores at the port and denying them to new applicants as long as adequate service was provided. The practice was held to constitute an "undue burden" on interstate commerce by improperly protecting incumbent stevedores.

Simultaneous Jurisdiction

In many other cases involving MTOs, the FMC has recognized that state law causes of action and Shipping Act claims often apply to the same set of facts and circumstances. Indeed, it is not unusual for cases involving MTOs to proceed in state court under state law theories, while the FMC reviews the same set of facts for compliance with the Shipping Act. For example, in *International Trading Corporation of Virginia, Inc. v. Fall River Line Pier, Inc.*, 3 S.R.R. 1043, 1049 (1964), the complainant in an FMC case had also begun suit in a Massachusetts state court. The Commission recognized that the two cases could run in parallel, finding that pendency of a state court suit does not impact FMC jurisdiction." See also *TAK Consulting Engineers v. Sam Bustani, et al.,* 28 S.R.R. 584 (ALJ 1998), (denying motion to stay FMC case because of a parallel state court proceeding involving the same transaction); *Lucidi Packing Co. v. Stockton Port District*, 19 S.R.R. 441 (I.D.), *finalized*, 22 F.M.C. 19 (1979) (state court referred matter of lawfulness of terminal tariff provision under the Shipping Act to the

Commission while staying the damages action pending Commission decision). Accordingly, it is unlikely that the FMC would embrace arguments that the Shipping Act should be read to clear the field of state or local authority over port operations.

For convenience, a link to the Shipping Act as recodified is here: http://www.fmc.gov/UserFiles/pages/File/The_Shipping_Act_of_1984_Re-Codification.pdf

John Longstreth
K&L GATES LLP
1601 K Street NW
Washington, DC 20006
(202) 661-6271
john.longstreth@klgates.com

M. Catherine Orleman
Principal Counsel
MARYLAND PORT ADMINISTRATION
World Trade Center
Baltimore, MD 21202
(410) 385-4430
corleman@marylandports.com

Matthew J. Thomas
TROUTMAN SANDERS LLP
401 9th Street, N. W.
Washington, DC 20004
(202) 274-2862
matthew.thomas@troutmansanders.com