

Shipping Act and Labor Law Issues

Paul Heylman
Saul Ewing LLP
Washington, D.C.
202-342-3422
pheyman@saul.com

1984 Shipping Act Coverage

- Who is covered
 - Ocean Carriers
 - Marine Terminal Operators
- What is an MTO
 - When is a Port an MTO
 - When is a Port not covered as an MTO

MTO Defined

- **An MTO – someone providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier**

The 1984 Act - Overview

- Covered Conduct
- Section 10(d) and prohibited acts
- Agreement filings: the requirements of §535

Section 10(d) claims

- 41106 (Old section 10(d)) - prohibits
 - Agreement to boycott or discriminate in providing terminal services
 - Undue or unreasonable preference or undue or unreasonable prejudice
 - Unreasonable refusal to deal or negotiate

What is unreasonable or undue

- The terms are given meaning by FMC decisions dating back to the 1916 Shipping Act (repealed in 1995)
- *Volkswagenwerk v. FMC*
 - U. S. Supreme Court decision
 - M & M Fund contributions
 - No benefit to Volkswagen so illegal to require it to contribute to M & M Fund

Unreasonable and Undue

- Charges and benefits
- Mississippi River Fire Boat decision
 - OK to charge for standby for services, but
 - The charge must bear a reasonable relation to the benefit

Treating like cases alike

- Ceres v. MPA
 - Must be a “legitimate transportation factor”
 - Port wanted to attract Maersk from NY
 - Gave Maersk a better deal for proprietary terminal – not for public terminal
 - Ceres (now NYK) won a ruling that the proprietary v. public IS NOT A LEGITIMATE FACTOR (a surprise to many)

Exclusive dealing arrangements

- Exclusive service arrangements
 - Several cases involving the same Port
 - Former rule – OK if a legitimate basis for concluding that only one service economically justified
 - What was legal under a given set of facts in the past held not necessarily legal now if the economic facts have changed

Exclusive dealing arrangements

- SCSPA
 - Petitioned for FMC approval of stevedore licensing procedure
 - FMC rejected because no showing of necessity (and FMC is hostile to such arrangements)
- Lower Mississippi Tugs cases
 - Initial *Ormet* decision
 - Over-reading the case (antitrust principals)

What Ports can do

- Business judgment of Port given considerable deference (Seattle Terminals case)
- OK to negotiate a good settlement on a lease termination (Navieras)
- OK to refuse to renew lease in order to build new terminal for a different MTO (New Orleans Stevedoring)

10(d) cases – damages

- Reparations to a prevailing complainant
 - Up to three years to file
 - Includes all actual injuries and interest, and double damages in certain cases
 - Complainant does not have to pay costs (except for appeal)
 - Reasonable attorney's fees to prevailing complainant – not respondent

Truck Detention Issues

- Empire Trucking and the FMC's first foray
- Truck delays revisited
 - Bi-State Motor Carriers and the NY/NJ Port Authority
 - Pier Pass
 - Appointments

Clean Trucks

- POLA and POLB filed agreement (antitrust immunity)
- FMC objected
 - Issued an Order of Investigation (Docket 08-05)
 - Filed suit to enjoin, but preliminary injunction denied
 - However FAAA action continues

Clean Trucks and ATA

- **ATA filed suit to enjoin POLA and POLB concession programs**
- **Claimed program violated FAAAA because**
 - **Regulation**
 - **(As opposed to market participant)**
 - **By state or local government**
 - **Not related to motor carrier safety**

More Clean Trucks and ATA

- Judge Snyder found regulatory, but concession program covered by motor carrier safety exemption
- 9th Circuit reversed and ordered parts enjoined
 - Employee requirement
 - Other items not relating to motor carrier safety

Ongoing litigation in ATA case

- 9th Circuit reversed – held clean trucks program not safety issue
- Judge Snyder after trial held Port could limit to employee driven trucks as a market participant
- ATA has appealed
- Judge may keep an injunction in effect pending appeal to 9th Circuit (3rd time up)

Clean Truck Developments

- Nadler hearings summer 2010
- California rules: CARB
- Ban on oldest trucks (1989, 2003)
- Phase in of ban up to 2007 models
- How it works – role of the terminals
- Community issues
- Alliance of Teamsters and NRDC

Shore-power: Cold Iron

- For now only California Ports
- Basic requirements
 - 50% of vessels calls – by carrier
 - Requirement effective in 2014
- Approaches
 - Plug into the grid
 - Shore side site generation
- Future – once the ships are fitted out?

Basic Rules of Labor Law

- Only covers employees, not independent contractors
- No-strike rules
 - Must be in contract
 - Must be arbitrable
 - Does not apply to hand-billing *per se*
- Secondary boycotts

Organization of the FMC

- The Commissioners
- The Bureau of Enforcement (BOE)
- The Office of Administrative Law Judges
- The Bureau of Trade Analysis
 - Office of Agreements
 - Office of Service Contracts and Tariffs
- General Counsel

Litigation before ALJ

- Private party v. BOE litigation
- ADR before the FMC
- *SCSPA v. FMC* (11th Amendment immunity issues) and private party litigation
- Discovery in FMC proceedings
- Paper record and live testimony

Decision and Review

- **The Initial Decision**
- **Exceptions to the Initial Decision**
- **Appeals to the U.S. Courts of Appeal**
- **Enforcement**

Baltimore

Lockwood Place
500 East Pratt Street, Suite 900
Baltimore, MD 21202-3171
(tel) 410.332.8600
(fax) 410.332.8862

Chesterbrook

1200 Liberty Ridge Drive, Suite 200
Wayne, PA 19087-5569
(tel) 610.251.5050
(fax) 610.651.5930

Harrisburg

Penn National Insurance Plaza
2 North Second Street, 7th Floor
Harrisburg, PA 17101-1619
(tel) 717.257.7500
(fax) 717.238.4622

New York

245 Park Avenue, 24th Floor
New York, NY 10167
(tel) 212.672.1995
(fax) 212.372.8798

Newark

One Riverfront Plaza
Newark, NJ 07102
(tel) 973.286.6700
(fax) 973.286.6800

Philadelphia

Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA 19102-2186
(tel) 215.972.7777
(fax) 215.972.7725

Princeton

750 College Road East, Suite 100
Princeton, NJ 08540-6617
(tel) 609.452.3100
(fax) 609.452.3122

Washington

2600 Virginia Avenue, N.W.
Suite 1000 – The Watergate
Washington, DC 20037-1922
(tel) 202.333.8800
(fax) 202.337.6065

Wilmington

222 Delaware Avenue, Suite 1200
P.O. Box 1266
Wilmington, DE 19899
(tel) 302.421.6800
(fax) 302.421.6813