American Association of Port Authorities

Marine Terminal Training Program

Session XII: Current Legal Issues

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Wednesday, October 19, 2011

CURRENT LEGAL ISSUES RE TERMINAL OPERATORS

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I. THE SHIPPING ACT AND TERMINAL OPERATORS

A. Shipping Act of 1984

1. Design/Purpose :

a. Innovation and Competition: Amended the largely outdated Shipping Act of 1916, although some provisions of the 1916 Act still apply. Many provisions of the 1984 Act are designed to encourage innovation and competition. An important underlying policy to keep in mind.

b. Antitrust Immunity: Section 7 of the 1984 Act continues and broadens the antitrust exemption feature contained in section 15 of the 1916 Act.

2. <u>Regulation of Terminal Operators:</u> In 1984, Congress amended the Shipping Act of 1916 to address perceived defects in the 1916 Act. Change made by the 1984 Shipping Act include:

a. <u>Terminal Operators Expressly Included: Marine</u> terminal operators are expressly included by name for the first time in the 1984 Act. Excluded are shippers or consignees who furnish marine terminal facilities or services exclusively in connection with their own cargo.

b. Note that under the regulations a maritime terminal facility can include an off-dock container freight station at an inland location.

c. <u>Agreements Covered</u>: The 1984 Act expressly covers two basic kinds of agreements: To the extent that the foreign commerce is involved, it applies to agreements among maritime terminal operators and to agreements between marine terminal operators and ocean common carriers: (1) to discuss, fix, or regulate rates or other conditions of service, and/or (2) to engage in exclusive, preferential, or cooperative working arrangements. The Act grants marine terminal operators an "expedited" approval process for agreements that require antitrust immunity.

d. Terminal Tariffs: Generally, the Act requires the filing of tariffs with the FMC by marine terminal operators operating in the foreign or domestic offshore commerce of the United States. This includes state-owned or operated terminal facilities. The rules re this issue are relatively complex, and are handled by outside counsel or persons within the terminal organization who have experience with FMC filings.

e. FMC regulations do not require filing tariffs for sectors such as bulk cargo; negotiated services for water carriers and warehousing.

f. The kinds of charges generally covered by marine terminal tariffs and required to be shown in them include dockage, wharfage, free time and demurrage, storage, handling, loading and unloading, usage of terminal facilities, checking, and heavy lift.

g. **Marine Terminal Agreements Other than Tariffs:** Four kinds of marine terminal agreements other than tariffs must be filed/approved with the FMC. They are:

i. Lease & berthing agreements, as well as agreements involving preferential charges based on volume;
ii. Marine terminal conference agreements (shippers form a conference and operate a terminal for their lines);
iii. Marine terminal discussion agreements;
iv. and Marine terminal interconference agreements.
v. Agreements with anti competitive features also must be filed/approved
vi. Approval generally involves submission; rejection of non-compliant agreements by the FMC; if OK, publication; comment and objection period. There are exceptions to the approval process for routine or administrative type issues such as office facilities and equipment procurement.

h. <u>Fines for Failure to File Agreement:</u> If a marine terminal operator fails to file any agreement required to be filed, the operator could be liable for a civil penalty in an amount not to exceed $5,000 for each violation. (46 U.S.C. app. §§ 831(a), 1712(a).) Under the 1984 Act, if the violation was willful and knowing, a civil penalty may be assessed of up to $25,000 for each violation. (*See id.* at § 1712(a).) Each day of a continuing violation constitutes a separate offense. (*Id.*)

i. **<u>Agreements Excluded:</u>** Four specific types of agreements affecting terminal operators are expressly excluded from the scope of the 1984 Act, and for these, no filings need be made. The excluded agreements include:

   a. Mergers and acquisitions: Agreements involving the merger or acquisition of a marine terminal operator;
   b. Maritime labor agreements;
   c. Agreements between common carriers to establish, operate, or maintain a marine terminal in the United States; and
   d. Any agreement between terminal operators that exclusively or solely involves transportation in the interstate commerce of the United States. This type of agreement may nonetheless be covered under the1916 Act.

j. <u>Specified Prohibited Practices</u>:

a. Among other prohibitions, marine terminal operators are prohibited from agreeing among themselves, or with a common carrier, to boycott or unreasonably discriminate in the provision of terminal services to any ocean carrier or ocean tramp. (46 U.S.C. app. § 1709(d)(2) (Supp. IV 1986).)

3. Exonerations from and Limitations on Liability for Loss of Cargo:

a. Terminal operators should confirm that the bills of lading used by ocean carriers and NVOCCs processing cargo through the terminal, have a specific extension of the $500 COGSA package limitation to the terminal operator, as well as for inland carriers hauling cargo out of the terminal facility.

b. Exonerations are generally unenforceable. (An exoneration completely eliminates, or “exonerates from” liability; whereas a limitation limits liability to a certain amount, such as the $500 COGSA limitation.

II. LEGAL/ENVIRONMENTAL ISSUES RELEVANT TO TERMINAL OPERATORS

A. <u>Federal Environmental Regulation of Marine Terminals</u>: There are two major federal pollution statutes that affect marine terminals in the United States: section 311 of the 1972 amendments to the Federal Water Pollution Control Act, now more popularly known as the Clean Water Act, and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, also know as CERCLA or Superfund.

B. It is assumed the attendees already have strong familiarity with the Clean Water Act & CERCLA, so they are not addressed in detail herein. A brief overview is available on request.

C. <u>State Environmental Regulation of Marine Terminals</u>: This subject is given more attention because it highlights the need for terminal operators (both private & public) to monitor state legislatures, for bills that may impact the port and/or terminal.

D. The *Askew* Case: The U.S. Supreme Court held that state and local governments, by virtue of their police powers, have the authority to impose additional liability on polluters of state waters, over and above the polluter's liability to the federal government, for clean-up costs and other damages actually incurred by the state. (*Askew v. American Waterways Operators, Inc.* (1973) 411 U.S. 325.) In *Askew*, the Court upheld a Florida statute that imposed strict liability on facilities or on any ship destined for or leaving such a facility for damage caused to state waters by a discharge of oil. In so holding, the Court stated that the Water Quality Improvement Act of 1970 (the predecessor of the Clean Water Act) did not preclude, but in fact allowed, state regulation of pollution in its own waters.

2. **Subsequent Decisions**: Decisions subsequent to the *Askew* case have shown that a polluter's liability to a state under the Clean Water Act is distinct from and cumulative to the polluters' liability to the federal government.

3. **Example:**

   a. **Recovery of State Costs:** The $50,000,000 limitation on a terminal facility's liability for wrongful discharge of pollutants contained in section 311(f)(2) of the Clean Water Act applies only to clean up costs incurred by the federal government. States are free to recover their own costs from the party responsible for the discharge, even if those costs exceed the federal limit. (*See, e.g.*, *Complaint of Steuart Transp. Co.*, 435 F.Supp. 798, 806-807, 1978 AMC 1906, 1915-1916 (E.D. Va. 1977), ***aff'd***, 596 F.3d 609, 1979 AMC 1187 (4th Cir. 1979).) However, no double recovery is possible. The federal government may recover only those costs it has actually incurred in clean-up operations. If the federal government incurs costs on a state's behalf, only the federal government, and not the state government, can recover those costs from the owner or operator of the facility from which the discharge occurred. (*See Complaint of Allied Towing Corp.*, 478 F.Supp. 398, 402 (E.D. Va. 1979.)

E. International Environmental Regulation of Marine Terminals:

1. **MARPOL Protocol:** The primary source of international environmental law affecting terminal operators in the United States is the International Convention for the Prevention of Pollution from Ships, also known as the MARPOL Protocol. (33 U.S.C. 1901-1911(1982 & Supp. IV 1986) and 33 C.F.R. 151 (1988).) With respect to marine terminal operators, the MARPOL Protocol establishes regulations governing the adequacy of facilities at ports or terminals for the receipt of oil, noxious substance residues, and mixtures from oceangoing ships.
2. **MARPOL Application:** Generally, the MARPOL Protocol applies to each onshore terminal facility in the United States that is used by oceangoing tankers for the loading, handling, or transfer of oil or mixtures containing oil (e.g., oily ballast or bilge water), or for the handling or transfer of noxious substance residues. The Protocol requires each terminal subject thereto to have a "Certificate of Adequacy" for its reception facilities for oil or noxious substance residues. If a terminal facility or other oceangoing ships carrying oil or noxious substance residues are prohibited from calling at that terminal.

3. **MARPOL Fines and Penalties:** A knowing violator of the MARPOL Protocol regulations can be subject to criminal penalties of up to $50,000,000, or imprisonment for not more than five years, or both. In addition, civil penalties of up to $25,000 per violation can be imposed upon violators of the MARPOL Protocol by the Secretary of Transportation. The MARPOL Protocol regulations also authorize the institution of private citizen suits against violators.

F. What is Coming: What to Do When the NRDC Comes Knocking

1. Suits for Injunctive Relief and Damages for Violation of Statutes/Standards Related to Diesel Particulate Emissions:

a. Port operators and terminals will often learn about a threat of pending litigation via a notice/demand letter from a private citizen's group such as the Natural Resources Defense Council. NRDC claims to act on behalf of local populations (particularly those living within a close radius of the port).

b. These persons are allegedly subjected to elevated levels of pollutants and statistically increased rates of cancer and other physical injury as a result of pollutants emitted in association with port and terminal operations.

c. The pollution targeted by such suits are emissions by ships in bound, outbound and while at berth, as well as emissions from hostlers/UTRs used to haul cargo within a terminal, and inbound/ outbound drayage via truck from terminal facilities.

2. **Government entities** are a primary target of NRDC type suits, regardless of whether the entity itself operates the terminal, or leases port facilities to private operators. NRDC type suits often target government entities because of the broader public duties they owe and in order to obtain widespread/port wide changes, and because of the political responsiveness port agencies owe the general population.

3. **Basis for Suit:** NRDC may rely on the **Resource Conservation & Recovery Act (RCRA) 42 USC Sec. 6901 et seq.** The RCRA allows a private citizen suit against any person or entity that has "contributed to or is contributing to" the transportation, disposal of "solid or hazardous waste" that presents "an imminent and substantial endangerment to the health or the environment."

4. NRDC then cites various federal, state, county and local **studies of air quality and diesel particulate emissions** (or its own studies) in and around ports to establish a basis for suing to seek injunctions enforcing dramatic reductions in diesel particulates arising from port associated trucks and vessels. (An injunction is a court order for reduction; bars against expansion; remediation costs)

5. Such studies are referenced to establish **particulate levels in excess** of applicable EPA or state/local particulate standards. Example of diesel particulate levels targeted: Lead; arsenic; cadmium; nickel; antimony, mercury, etc.

6. NRDC seeks injunctive orders that vehicles/engines associated with terminal operations meet the following standards:

a. General equipment with engines **greater than 25 hp** be equipped with Best Available Control Technology **(BACT)** (Equivalent of EPA Tier III to Tier IV standards); or use an alternative fuel such as natural gas or biodiesel

b. **Hostlers/UTRs:** Immediate compliance with 2007 EPA standards for on road trucks or EPA Tier IV for off road.

c. All other terminal handling equipment such as **forklifts, top & side picks,** etc. meet current BACT standards or use alternative such as natural gas or bio diesel

d. **Convert** all diesel powered **RTG** (rubber tire gantry) cranes to hybrid systems including flywheel, battery, etc.

e. **Older drayage tractor/trucks** hauling cargo into and out of the port/terminals required to be replaced, eliminating tractors built before **2003** and/or which are not retrofitted to meet EPA's 2007 emission standards for trucks;

f. Require **terminal operators** to **bar** trucks that are non-compliant;

g. Reduction of up to **45%** of port/terminal/truck associated diesel particulate emissions within 6 years

h. As of **2015,** all drayage trucks visiting harbor meeting 2010 EPA standards or zero polluting

i. **Rail operations** into terminal and/or port: Locomotives must meet EPA Tier III **within 4 years** & be equipped with diesel particulate filters;

j. Similar aggressive standards for harbor craft operating for port related purposes

7. Economics: Potential economic impacts include:

a. **Terminal operators** required to impose fees against containers that are transported on non-compliant trucks, in order to "incentivize" prompt conversion to compliant trucks prior to deadlines

b. Clean truck programs. Although shippers tend to hire the drayage motor carriers - - ports to implement/fund programs for motor carriers' financing of new/retrofitted EPA compliant vehicles; funding scrap truck program to scrap trucks built prior to 1990s date; etc.

c. Ports operating terminals will impose this cost on cargo; ports with private terminals will impose this cost on terminals who ultimately pass same to cargo

8. Responding to NRDC Demands:

a. **Potential Pre-Emption by Clean Air Act or Submerged Lands Act (both federal statutes)**

b. **Seek EPA intervention if demands of private litigant like the NRDC exceed standards/goals likely to be imposed by EPA.** 42 USC Sect. 4972 gives EPA unlimited right to intervene.

c. **Test Science Relied on by NRDC, particularly their own commissioned studies**

d. **Establish particulate levels compliant with applicable environmental standards**

e. **Focus on Balance of Equities:** Are the "detriments" of increased particulate emissions as a result of port activities outweighed by the economic benefits arising from ports (jobs, distribution of goods to huge populations, etc.

f. **Seek support of regional & state air quality agencies**

g. **Consider potential economic consequences of litigation:** (As noted per recent caselaw settlements can involve payments by ports in excess of $80 million, where the state in particular has adopted a strong environmental quality act (ATA v. City of Los Angeles 9th Circuit Sept 26, 2011 @ pg. 18202)

h. **Attorney Fee costs of litigation.** In environmental quality suits where lawyers can potentially obtain multi million dollar settlements, lawyers and public interest groups will devote massive resources and years of work that will trigger massive defense and expert attorney fees

i. Always consider whether any insurance policy may assist, or potentially assist with defending such a suit

j. **Develop Clean Air Action Plans that will produce compliance with applicable clean air standards, in order to blunt NRDC suit. Reality is that if environmental suits are supported by applicable clean air standards or goals, there is an "inevitable" involved, and money is sometimes better spent on compliance with applicable goals.**

k. **Crucial issue is determination whether particulate emissions that can be associated with port/terminals violate applicable standards.**

III. ATA CASE – EMPLOYEE REQUIREMENT FOR DRAYAGE PORT TRUCK DRIVERS OVERTURNED

A. **Citation:** *American Trucking Associations, Inc. v. The City of Los Angeles, et al.* (9th Cir. 2011) __ F.3d____; 2011 WL 4 436256; 11 Cal. Daily Op. Serv.12,294, 2011 Daily Journal D.A.R. 14, 583.

B. **Facts and Procedural History:** Starting in 2008, the Port of Los Angeles prohibited motor carriers from operating drayage trucks on Port property unless the motor carriers entered into concession agreements with the Port. The agreements covered fourteen specific requirements covering, among other things, truck driver employment. The agreements required concessionaires to transition over five years to using 100 percent employee drivers rather than using independent contractor owner-operators. The agreements were adopted as part of the Port's "Clean Truck Program."

C. As part of the Clean Truck Program, terminal operators were required to collect fees for trucks not in compliance with the agreement.

D. Plaintiff American Trucking Associations, Inc. sued to block the concession agreements. ATA argued that the agreements were preempted by the Federal Aviation Administration Authorization Act. ATA challenged several provisions of the concession agreements. This discussion is limited to the validity of the truck driver employment provision.

E. **Holding:** The Court of Appeals for the Ninth Circuit reversed the trial court's decision that the employee-driver provision was permissible. For purposes of the discussion today, the Court held that a port which leases to private terminal operators may not require that only employee drivers handle drayage into and out of the port. The Court left open the issue of whether a port that privately operates terminals may require motor carriers to use employee drivers.

F. The decision has a strong implication that ports which operate terminal facilities themselves are "market participants" that can in fact dictate employee status. Market participant is explained below. (The third judge on the 3 judge panel strongly dissented to this point.)

F. Analysis:

1. **FAAA Preemption Generally:** Congress enacted the FAAA in 1994 to prevent states from undermining federal deregulation of interstate trucking. The FAAA provides as a general rule that "a State [or] political subdivision of a State…may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier…with respect to the transportation of property." (49 U.S.C. 14501(c)(1).) If state regulation undermines, then the regulation is **"pre-empted"** and effectively **voided.**

2. **FAAA Preemption Test:** In determining whether the FAAA preempts State action, a number of considerations arise.

   a. First, does the provision at issue **"relate to a price, route, or service of a motor carrier?"** If the answer is no, the provision is not preempted and the regulation stands. Here the employee requirement was determined to impact price and service.

   b. If the provision impacts price, route or service **then it is pre-empted** unless the port in taking its action was acting as a **"market participant"** and not a regulator. Effectively, a port can be a market participant if its requirement amounts to the port behaving like a **private business** purchasing goods or **services** on the open market, as opposed to a **regulatory agency**, imposing regulations on **private parties.**

c. Even if it appears that there is a potential pre-emption there are **exceptions** to pre-emption (most notably safety). Under exemptions for safety regulations, states may impact price or routes. However, it was determined previously in the case that there was no “safety” basis for an employee requirement.

d. **Market Participant:** The 9th Circuit held that in fact the Port of LA was a market participant in enacting its Clean Truck Program and upheld other aspects of the Program. However, with respect the employee requirement, the 9th Circuit held that the **employee driver requirement** was too **“remote and attenuated”** from the Port’s market participant activities, and that the employee driver requirement should be “pre-empted” and voided.

e. Reasons the **“attenuation”** was found: The port did not contract **directly with motor carriers** or the independent contractor drivers to provide the transportation; the port had no basis to interfere with **private contracts** between motor carriers and the shipping lines/NVOCCs which hired the motor carriers; **and/or** the relationship **between** motor carriers and the **independent contractor** drivers they hired. Effectively, the port went too far. The employee requirement was “tantamount to a regulation” and not a market participant’s acceptable business requirement for a service it was acquiring. Rather it was interference in the contractual relations between shippers, motor carriers and their independent drivers.

f. Leaving open the idea that a port authority operating terminals could require employee drivers, the 9th Circuit noted that if the Port itself **"paid"** drivers compensation or "benefits" and/or contracted **directly** with motor carriers for drayage services, there may be a "relationship with drayage drivers justifying interference with the drivers' employment relationships."

3. **Practical Impact:** Ports that operate terminals may be able to impose an employee requirement *if* in its capacity as terminal operator, the port contracts with motor carriers and/or drivers. (But be ready for years of extremely expensive litigation from groups that rely heavily on independent contractor drivers; i.e., the American Trucking Associations. Also consider whether more moderate/conservative Circuits (other than the 9th Circuit) might reach a different result and conclude Ports are not "market participants" for purposes of an employee driver requirement (and thus such would be pre-empted and voided for ports which in fact operate terminals and/or contract directly with motor carriers).

A. Question for Audience:

Did the 9th Circuit miss a key fact? Isn't it mostly ocean carriers and/or NVOCCs that contract with motor carriers, not port authorities operating terminals? **If so,** it would seem ports would still be barred from requiring employee drivers, as the same interference with third party contracts issue would be in play.

IV. MANAGING LAW FIRMS

A. **Expertise: Appointment of Special Counsel**: Counsel selected should be familiar with the area to be litigated, often t his involves hiring an outside firm with experience in the issue.

B. **Staffing Profile**: The client and counsel should agree on a staffing profile that identifies the partners, associates, and paralegals who are authorized to work on the matter, including their respective billing rates. Individuals whose names are not included in the staffing profile may not work on the matter without the client's prior approval. Controlling the number of lawyers authorized to work on a matter is a major means of controlling fee costs.

C. **Set Reasonable Limits on Billing Procedure:** Discourage block billing which is billing for large blocks of time without detailed entries of how time was spent. Set expectations for details re how time was spent and breaking work down into discrete tasks, and identifying time spent on each task. This helps assess efficiency and makes analyzing invoices much easier. **Insurance:** The selected law firm should provide evidence of adequate professional liability coverage from a sound insurer (i.e., require insurance certificate and/or copy of declarations page). Set minimum coverage limits.

D. **Fee Estimate and Timeline:** Request an estimate for fees that Client approves, and a timeline for action/conclusion of certain events on the case. Set a precedent that the fee estimate may only be diverted from with approval from Client.

E. **Establish a set of Billing Guidelines the Port routinely uses that Counsel is Expected to Abide By**

i. Incorporate the above considerations (and others) into a standard set of "billing guidelines" firms are to follow.

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