

AAPA PORT ADMINISTRATION AND LEGAL ISSUES SEMINAR

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**Recent Topics in Federal Preemption and
Federal Maritime Commission
Regulation of Marine Terminal Operators**

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The Shipping Act of 1984 (the “Shipping Act” or the “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.” An MTO may not

- i. “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. “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. “unreasonably refuse to deal or negotiate.” 46 U.S.C. § 41106(3) (former Sections 10(b)(10) and 10(d)(3)).

The Federal Maritime Commission (“FMC”) enforces these provisions and also serves as a forum for the resolution of private complaints against MTOs. At the time of the 2009 seminar several matters of interest to port authorities were pending that have since been decided.

1. Port of Los Angeles/Long Beach Clean Trucks Program

a. FMC challenge

As part of a comprehensive plan to reduce emissions, the ports of Los Angeles and Long Beach imposed several requirements on port users, most controversially a prohibition on the use of independent owner-operated truckers to dray containers to and from the ports. Charging that the ports had entered into an unlawful agreement that restricted competition, the FMC filed its first-ever action under Section 6(g) of the Shipping Act, which allows it 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). The Act does not allow the FMC to enjoin such an agreement on its own; rather it must seek a preliminary injunction in a federal district court.

In April, 2009, the federal district court in the District of Columbia denied the FMC’s request for preliminary injunction to prevent implementation of the owner-operator requirement and certain concessions provisions. *Fed. Maritime Comm’n v. City of Los Angeles*, 607 F. Supp. 2d 192 (D.D.C. 2009). The district court found that the FMC had not met the traditional test to obtain a preliminary injunction because even without independent truckers the drayage market would have abundant competition and low barriers to entry. 607 F. Supp. at 203. The court rejected the FMC’s alternate theory that competition between the ports was reduced, finding that the ports had not agreed on the employee-driver requirement and had implemented different fee incentives. *Id* at 203. The FMC did not appeal the decision and dismissed its challenge.

b. The ATA challenge in federal court.

Shortly after the FMC's challenge was rejected, a preliminary injunction against the independent trucker prohibition was entered in litigation brought by the American Trucking Associations. The injunction followed a decision by the Ninth Circuit federal appeals court that the ports were preempted by federal law from regulating trucking. *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009). Several provisions of the concession agreements were, however, held permissible under the motor vehicle safety exception to preemption. *See American Trucking Associations, Inc. v. City of Los Angeles*, 596 F.3d 602 (9th Cir. 2010).

In its final ruling, however, the district court upheld the employee driver requirement, and all other provisions of the plan that would otherwise have been preempted, under the "market participant" exception to preemption. *American Trucking Associations, Inc. v. City of Los Angeles*, 2010 WL 3386436 (C.D. Cal. Aug. 26, 2010), *appeal pending* No. 10-56465 (9th Cir.). Reversing its initial holding on the point, the district court held that the program was "essentially proprietary" because it was enacted "to sustain and promote port operations" by addressing environmental lawsuits that might otherwise impede port growth and thus harm port revenues. *Id.* at *45-47. On appeal, the ATA and others argue that this extends the exemption too broadly to include administrative and political interests rather than merely the efficient procurement of goods and services, and note the POLA does not procure drayage.

Briefing of the appeal has concluded and the case will soon be set for argument. A decision is unlikely before the end of the year.

2. Vessel fuel rules: *Pacific Merchant Shipping Ass'n v. Goldstene* (9th Cir. March 28, 2011).

Preemption issues involving emissions control efforts at POLA/POLB are also raised by a Ninth Circuit ruling from several weeks ago upholding clean fuel requirements for vessels operating off California waters. Several years ago a set of emission standards for ocean-going vessels was invalidated as preempted by the Clean Air Act. *PMSA v. Goldstene*, 517 F.3d 1108 (9th Cir. 2008). Accepting the court's hint that rules not setting numerical standards might be permissible, the California Air Resources Board then established requirements for the use of cleaner marine fuels in engines and auxiliary boilers on vessels operating within 24 nautical miles of the California coastline.

In upholding these new rules, the appeals court noted that they pushed the state's authority "to its very limits." The court noted the "historic presence of state law" in the area of air pollution, and thus applied the presumption against preemption applicable to a state's use of its historic police powers, rather than the presumption in favor of preemption applicable in fields historically occupied by the federal government (e.g., maritime commerce and conduct at sea outside of state boundaries, and the definition of state boundaries).

The court recognized the importance of uniformity and of the federal role in matters of foreign relations and international trade, and noted ongoing international efforts to control air pollution from ocean-going vessels, but observed that the federal statute implementing Annex VI

of MARPOL contains an express savings clause. *see* 33 U.S.C. § 1911, and that no federal (or international) environmental regime specifically prohibits California's rules. The rules were thus permissible given the state's "especially powerful interest in controlling the harmful effects of air pollution resulting from the fuel used by ocean-going vessels while they are within 24 miles of the state's coast," and given the absence of evidence that the rules impeded commerce or navigation. The court found that compliance was "not technically impossible or even especially difficult" and the increased cost was "relatively small in comparison with the overall cost of a trans-Pacific voyage (representing less than 1% of the cost of a typical trans-Pacific voyage and approximately a \$6.00 increase per 20-foot shipping container.)"

3. Ballast Water Regulation: State Requirements Proliferate.

States have also been given wide latitude to regulate in order to protect against threatened harm from invasive species. The Clean Water Act (CWA) and the two federal laws regulating invasive species, the National Invasive Species Act and the Nonindigenous Aquatic Nuisance Prevention and Control Act, both preserve a role for state regulation. *See also Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 493 (9th Cir. 1985)(upholding state regulation of ballast water discharges by oil tankers).

In response to a court decision, EPA must now regulate ballast water discharges under the CWA, and has established a vessel general permit program to do so. However, EPA has issued a final permitting rule that includes a large number of state-imposed requirements that in a number of cases are conflicting and potentially unlawful. Industry challenges to these requirements, which were imposed at the end of the rulemaking process without notice or opportunity for comment, are pending in the federal appeals court in Washington, D.C. *See Lake Carriers Ass'n v. EPA*, Nos. 09-1001 et al., (D.C. Cir.). The case will be argued May 9, 2011 and decided by August, 2011.

4. *R.O. White and Ceres v. POMTOC and City of Miami*, 31 SRR 783 (FMC 2009).

R.O. White/Ceres is the latest in a series of FMC decisions in cases against ports arising out of disputes with tenants. In the early 1990's, the Port of Miami undertook a study of terminal operations and determined that it needed to consolidate and upgrade its terminal facilities. All existing terminal operators and stevedores were offered the opportunity to buy into a joint venture known as the Port of Miami Terminal Operating Company (POMTOC). R.O. White, a stevedore at the Port, chose not to enter into the venture.

About ten years later, Ceres Terminals sought to enter the Port, applied for a stevedoring license, and then bought R.O. White which already had a license. Ceres did not wish to join POMTOC or lease terminal space from the Port. Instead, Ceres argued that carriers calling at POMTOC, including its parent company NYK, had the right to choose their own stevedore and that POMTOC was required to make its facilities available, at some measure of marginal cost, so that Ceres could serve vessels at the POMTOC terminal. POMTOC refused and Ceres sued POMTOC for alleged discrimination and refusal to deal. Ceres also sued the Port for allegedly creating a monopoly public terminal, and for not requiring POMTOC to make its facilities

available to any stevedore that wished to use them, thus creating a “de facto exclusive stevedoring franchise.”

An FMC Administrative Law Judge rejected Ceres’ claims, and his decision became the decision of the Commission when Ceres declined to file exceptions. As in all such cases, the decision turned largely on the particular facts; however, several points are of note:

(i) the ALJ adopted an antitrust –type analysis of Ceres’ contention that the Port had created a “monopoly” public terminal and an “exclusive” franchise. Following the approach of an earlier case involving tug franchises, the ALJ noted that such a case required him to first determine the market relevant to the practice in question, and then to determine the impact of the challenged practice within that market. Slip op. at 39, citing *River Parishes Company, Inc. v. Ormet Primary Aluminum Corporation*, 28 S.R.R. 751, 766-67 (FMC 1999). The ALJ found that because Miami competed with Port Everglades, POMTOC could not be a “monopoly” terminal or a “monopoly” stevedore. Absent a showing of a potential for anticompetitive effects, an MTO has no duty to justify its practices.

(ii) the ALJ also adopted the principle familiar from antitrust law that a firm has no duty to help its competitors. "There can be no doubt that in creating POMTOC its members (all of whom like the current members were stevedores or were affiliated with stevedores) were motivated by a desire to enhance their competitive positions over nonmembers. The members understandably felt no obligation to facilitate the operations of nonmembers; nor is such a duty imposed by the Act." Slip op. at 43.

(iii) the ALJ did suggest, however, that had POMTOC imposed unreasonable requirements on an application to join or boycotted a membership application “the failure of the Port to intervene in such a situation could subject it to liability under the Act.” *Id.* at 44.

Finally, the ALJ rejected Ceres’ argument that the Port’s actions in requiring another terminal to accept third party business demonstrated its awareness that the prior situation was anticompetitive: “The Complainants have offered no authority in support of the proposition that a party accused of stifling competition takes action to increase competition at its peril.” *Id.* at 43.

5. Other active FMC cases involving ports

a. Eleventh Amendment: *Stevedoring Services of America v. Port of Oakland* (09-08)

SSA brought a discrimination claim arguing that its competitor Ports America received better lease terms for better facilities, while SSA pays more for a shorter lease at poorer premises. SSA also claims \$80 million a year in lost business due to its higher rates. Oakland’s answer asserts in part that the Public-Private Partnership arrangement with Ports America is so different from a preferential use arrangement that the two tenants are not similarly situated.

The case is now before the Commission on an interlocutory appeal of the “novel Eleventh Amendment issue whether the Port of Oakland role as trustee of California tidelands is sufficient

to extend California Eleventh Amendment immunity to the Port.” Although the ALJ ruled against the Port on this issue, she noted that “this area of the law is evolving.”

Two other recent decisions have extended Eleventh Amendment immunity to ports. In *Puerto Rico Ports Authority v. Federal Maritime Commission*, 531 F.3d 868 (D.C. Cir. 2008) the appeals court reversed the Commission and held that the port authority was an “arm of the state” entitled to immunity from claims by several terminal operators arising out of a redevelopment project. And in *Premier Automotive Services v. Flanagan*, 73 Fed. Reg. 34,017 (FMC June 11, 2008), the Commission held that a port authority’s leasing decisions fall within an area of discretion that removes them from the exception to state sovereign immunity for actions seeking prospective injunctive relief. In a companion federal court case, the Fourth Circuit ruled that the Shipping Act does not require that leasing decisions be based on written regulations. *Maryland Port Administration v. Premier Automotive Services (In re Premier Automotive Services)*, 492 F.3d 274, 284 n.2 (4th Cir. 2007).

- b. *APM Terminals v Port Authority of NY and NJ* (No. 07-01)/
Maier Terminals v. Port Authority of NY and NJ (No. 08-03)

Maersk sued the Port Authority claiming delay in turning over a terminal; the port claimed Maier had refused to vacate and filed a third party complaint against Maier. After the Maersk suit settled Maier filed its own complaint against the port and the two cases were consolidated. In approving the settlement the Commission held that the value of the concessions to Maersk need not be determined, as that would require litigating the very issues to be settled, and that Maier could argue in its own suit that they created a discrimination in Maersk’s favor.

Ruling on the Port’s motion to dismiss, the ALJ found jurisdiction over the discrimination claim even though the lease agreement was exempt from filing. The ALJ criticized the port’s argument as having “little regard for the Commission’s intent in exempting” lease agreements from filing. In the course of the litigation the port produced 460,000 documents totaling 1.7 million pages and there were numerous electronic discovery issues. A motion by the port for partial summary judgment is pending.

- c. *American Stevedoring v. Port Authority of NY and NJ* (No. 10-05).

This suit is a follow-on to earlier litigation between the Port and a tenant that claims discrimination because the port funds improvements for other tenants but not for it. The earlier case was settled while an ALJ ruling in favor of the port was on appeal to the Commission. A motion to dismiss based on the earlier settlement agreement was denied, and a motion for summary judgment on the discrimination claims is pending.

6. Exclusive Tug Franchises

A series of cases from the last decade concerning exclusive franchises for tug services at terminals on the lower Mississippi River emphasize the fact-based nature of determinations under the Shipping Act. Several FMC investigations have invalidated exclusive tug franchises where claims of “destructive competition” were not supported by specific evidence for that

particular port that new entry would drive rates down to unsustainable levels. Ports can exclude applicants if the exclusion is supported on grounds such as inexperience, or insufficient financial strength.

The ALJ decision in the *RO White* case points to the tug cases as evidence of the fact-intensive inquiry needed. Judge Lang noted that in one case the Commission found a relevant market had not been established, but that in another the market was a single terminal. In each case, the determination depended on the alternatives realistically available to users. The pervasiveness of a practice can also be relevant to its reasonableness.

Similarly, an exclusive franchise at Port Canaveral upheld under a factual record created in the 1980's was invalidated 20 years later based on changed circumstances.

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