

Port and Marine Terminal Government Policy and Legal Issues

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Recent Developments

- Potential ILA strike
 - Issues – September 30
 - Automation
 - Royalties
 - Negotiations back on, but work rules?
 - Possible outcomes if strike/lockout
 - Taft-Hartley injunction?
 - Secondary boycotts

Recent Developments (cont'd)

- Unionization of truckers
 - ATA case
 - Making drivers employees
 - State level activities
 - Union efforts
- Chassis issues
 - Carriers not supplying
 - ILA jurisdiction issues – M&R

Recent Developments (cont'd)

- Environmental issues
 - Shore power
 - Clean trucks (newfound reliance on CNG)
- Shipping Act Claims
 - Who is the FMC and what do they do
 - Recent challenges
 - Maher and PANYNJ
 - P3s, Exclusive access/free-riders

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
 - Just and reasonable regulations

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- The terms are given meaning by FMC decisions dating back to the 1916 Shipping Act (repealed in 1995)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
- *Plaquemines* and MTSA issues

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
- Lower Mississippi Tugs cases
 - Initial *Ormet* decision
 - Over-reading the case (antitrust principals)
- *R. O. White* and newer cases

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/reservations when volumes return

Clean Truck Developments

- Nadler hearings summer 2010
- California rules: CARB
- Phase-in of ban up to 2007 models
- How it works – role of the terminals
- ATA case
- Community issues
- Alliance of Teamsters and NRDC

Shore-power: Cold Iron

- 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

FMC Litigation

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

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