

2013 Port and Marine Terminal Policy and Legal 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
- Landlord and operating ports

The 1984 Act - Overview

- Section 10(d) and prohibited acts
- Agreement filings: the requirements of §535
 - Marine Terminal Facilities Agreements – exempt except when they are not
 - Anti-trust immunity - CWAs

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
 - Lack of just and reasonable regulations

What is unreasonable or undue

- The terms are given meaning by decisions dating back to the 1916 Shipping Act
- *Volkswagenwerk v. FMC*
 - M & M Fund – no benefit to Volkswagen so illegal to require it to contribute
 - Benefit/charge proportionality
 - Ongoing case - Carriers v. PANYNJ – ExpressRail infrastructure fee

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
- Fees funding other projects (*Bridgeport*)

Unreasonable Prejudice

- *Ceres v. MPA*
 - Must be a “legitimate transportation factor”
 - Port wanted to attract Maersk from NY so it gave Maersk a better deal for proprietary terminal – not for public terminal
 - Proprietary v. public is not a legitimate factor
- Triangular relations – how to price a terminal

Exclusive dealing arrangements

- Exclusive service arrangements
 - What was legal under a given set of facts in the past not necessarily legal now if the economic facts have changed
 - Very fact dependent analysis means that predictability and certainty are limited
 - Given this useful to know the history of the FMC's approach to this

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
 - Three year statute of limitation (but not for injunctions)
 - 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 only – 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

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
- Chassis issues

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

FCPA

- Covers “domestic concerns”
- Prohibits payment, gift or promise
- To employee of agency of foreign government
- To influence any act or decision
- To obtain or retain business
- State-owned carriers

Clean Truck Developments

- California rules: CARB
- Phase-in of ban up to 2007 models
- How it works – role of the terminals
- ATA case
 - FA4
 - Supreme Court decision on Market Participant
- Alliance of Teamsters and NRDC

Dormant Commerce Clause

- Applies *qua* government – not as market participant
- Prohibits discrimination against out-of-state businesses
- Undue burden test can apply to in-state businesses in transportation
- Federal court jury case

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