

Port and Marine Terminal Policy and Legal Issues

Marine Terminal Management Training Program

Philadelphia, Pennsylvania

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1984 Shipping Act Coverage

- Who is covered
 - Ocean Carriers
 - Marine Terminal Operators (“MTO”)
- 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

Not an MTO

- Must be Common Carrier
 - Not Contract Carriage
 - Not Tramp Service
 - Must be in Foreign Commerce
- Does not include some navigational issues
 - PRPA (the other one) and Lower Mississippi Tugs cases

MTO Prohibitions

- 41106 – 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
 - Failure to establish, observe, and enforce just and reasonable regulations (41102)

What is Unreasonable or Undue

- The terms are given meaning by FMC decisions dating back to the 1916 Shipping Act
- *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 base decisions on a “legitimate transportation factor”
 - Port wanted to attract Maersk from NY
 - Gave Maersk a better deal for proprietary terminal – but not for public terminal
 - Ceres (now NYK) won a ruling that the vessel operator or not distinction is not a legitimate factor (a surprise to many)

What Ports Can Do

- Business judgment of Port given considerable deference (Seattle Terminals)
- 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)

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

Port FMC Filings

1. Marine Terminal Facilities Agreement (MTFA):
 - Agreement that conveys rights to operate any marine terminal facility by means of lease, license, permit, assignment, land rental, or other similar arrangement
2. Marine Terminal Services Agreement (MTSA):
 - Agreement between MTO and ocean common carrier that applies to services provided to and paid for by the carrier
 - Includes dockage, free time, terminal storage, wharfage, wharf demurrage, etc.
3. Cooperative Working Agreements
 - Agreement that establishes exclusive, preferential, or cooperative working relationships that are subject to the Shipping Act, but fall outside the scope of other definitions

Filing Requirements for Agreements

1. MTFA:

- Exempt from filing
- Current agreement must be provided to “any requesting party”
- Potential anti-trust immunity for optional filing?

2. MTSA:

- Exempt from filing IF no discussion of rates, charges, rules and regulations determined through a marine terminal conference agreement
- Option to file for anti-trust immunity

3. Cooperative Working Agreement:

- Must be filed if between common carriers or MTOs, or both
- Past enforcement efforts have focused on unfiled “exclusivity” agreements

FMC Investigation: Scotia Prince Cruises

- Docking and lease agreement with Port of Portland
 - Portland agreed not to grant any other operator permission to use its terminal premises for passenger or vehicle service to or from Portland
 - Scotia Prince agreed not to operate any other service between any New England port and Nova Scotia
- Not considered a MTFA, because of exclusivity and non-compete provisions
- Instead, likely a cooperative working agreement (must be filed)
- Effect of agreement was to grant Scotia Prince a monopoly – therefore, high bar to prove reasonableness
- “The greater the degree of preference or monopoly, the greater the evidentiary burden of justification.”

Damages for Shipping Act Violations

- Reparations to a prevailing complainant
 - Up to three years to file
 - Includes all actual injuries and interest, and double damages in certain cases
 - Reasonable attorney's fees to prevailing complainant
 - Fees are not available to respondent – not a prevailing party provision (unfair to respondents)
- BOE penalties – up to \$45,000 **per day** (each day is a continuing violation) if knowing and willful (five year statute of limitations)

FMC Developments: *Maher Terminals*

- Maher alleged that PANYNJ violated Shipping Act by providing unreasonable preference to APM Terminals North America (Maersk)
- APM Lease had lower basic annual rent rate; and different investment and throughput requirements
- ALJ: Different treatment was justified by differences in transportation factors
- Maersk had threatened to relocate operations to Baltimore and Maher supported keeping Maersk in NYNJ
- Maersk was able to direct Maersk/Sea-Land traffic to the port, and therefore provided certain guarantees that Maher could not
- Maher has filed exceptions, which are pending

Seaport Alliance: Seattle and Tacoma

- Ports filed a “discussion agreement” with FMC in January
- October 7: Announced formation of Seaport Alliance
- Unified management of the ports’ integrated marine cargo terminal operations
- Equitable investment of assets from each port
- Two additional FMC filings:
 1. Framework Interlocal Agreement to provide authority to develop the Alliance (addendum to Discussion Agreement)
 2. Final Seaport Alliance Agreement (expected March 2015)
- John Wolfe, CEO of Port of Tacoma, expected to be hired as Seaport Alliance CEO

Developments Outside the FMC

- ILWU Negotiations
 - Impact on cargo
 - What the lack of a labor contract has meant to shippers
 - The calm is quite remarkable
 - Possible outcomes if the wheels come off
 - Taft-Hartley injunction
 - Secondary boycotts

FMC Congestion Fora

- Chassis Pools and Discussion Agreements
- DOJ Business Review Letter available at:
<http://www.justice.gov/atr/public/busreview/308829.pdf>
 - DOJ concludes that proposed “gray” chassis pool agreement will not produce anti-competitive effects
 - DOJ will not challenged the proposed agreement
- The landside reach of FMC jurisdiction and the impact on chassis issues
- Ongoing FMC public forums on congestion and chassis issues – Four hearings