

2015 AAPA Port
Administration and Legal
Issues Seminar



Review of Federal Regulation of Marine Terminal Operators

Jonathan Benner

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Since We Last Met

- Important FMC decision in the Maher/PONY-NJ case
- Statutory change concerning attorneys' fees – directly related to discussions that began at our last meeting in Boston
- Supreme Court decides American Trucking Associations, Inc. v. City of Los Angeles

Federal Regulation of Ports

- Shipping Act of 1984, as amended
- Administered by Federal Maritime Commission
- Addresses competitive practices and economic concentration

Federal Port Regulation in a Nutshell

- Marine Terminals have been deemed subject to federal regulation of the type now administered by the FMC since the 1940's
 - California v. United States, 320 U.S. 577 (1944)
- “Other Person Subject to the Act”

Federal Port Regulation in a Nutshell

- Marine Terminal Operator (“MTO”) derivatively defined as “. . . a person providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier”
- Includes both public and private entities
46 U.S.C. § 4012(14)
- No statutory distinction between Public Port Authorities, Landlord Ports, Operating Ports and Private Terminals/Stevedores

Federal Port Regulation in a Nutshell

- Two major implications:
 - Immunity from antitrust laws – agreement filing; must file and adhere to agreements with other ports/common carriers
46 U.S.C. §§ 40301, 41102
 - Prohibitions on “unreasonable” commercial behavior
46 U.S.C. §§ 41102(c); 41106

Federal Port Regulation in a Nutshell

- Specific “reasonableness” prohibitions:
 - Preference or advantage/prejudice or disadvantage (any person)
46 U.S.C. § 41106(2)
 - Failure to observe reasonable practices/regulations regarding receipt, handling, delivery, storage of cargo
46 U.S.C. § 41102(c)
- Other prohibitions include:
 - Agreements to boycott vessel operators (whether liner or tramp)
46 U.S.C. § 41106(1)
 - Refusal to negotiate [full stop] (presumably with anyone – statute is not specific)
46 U.S.C. § 41106(3)

Additional Prohibitions

(Apply to other actors, not bound by reasonableness factors)

- Disclosing sensitive commercial information
46 U.S.C. § 41103
- Operating contrary to agreement or pursuant to unfiled agreement
46 U.S.C. § 41102(b)

Additional FMC Functions

- FMC also acts as forum in private complaint actions (46 U.S.C. § 41301) and as enforcement body pursuant to informal complaints or following issuance of formal orders of investigation
46 U.S.C. § 41302(a)

- Complaints (3-year limitation period)
46 U.S.C. § 41301
 - Anyone may file
 - FMC may investigate on own motion
46 U.S.C. § 41302
- Reparations, up to double damages, for operating contrary to agreement
46 U.S.C. § 41305
- Civil penalties (\$5,000 to \$25,000 per violation)
46 U.S.C. § 41107(a)

Agreements

- Antitrust immunity is the major structural element of Shipping Act of 1984 agreement provisions
 - Filing, rate publication and preference/prejudice provisions flow from grant of antitrust immunity to liner operators

Agreements Must be Filed if . . .

- Agreement addresses joint rate setting and/or
- Agreement involves “exclusive, preferential or cooperative working arrangements”

46 U.S.C. § 40301(b)

46 U.S.C. § 40302

FMC Action on Agreements

- “If . . . the Commission determines that the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation costs, the Commission, after notice to the person filing the agreement, may bring a civil action in the United States District Court for the District of Columbia to enjoin the operation of the agreement”
46 U.S.C. § 41307(b)(1)

- Injunctive Authority only sought once since 1984 – to halt implementation of POLA/POLB Clean Truck Agreements
- District Court finds that . . . it must balance generally applicable injunctive standards when reviewing FMC-initiated injunctive requests

- Marine Terminal Facilities Agreements – agreements between MTOs and/or between an MTO or MTOs and ocean carriers that is in nature of lease, permit, assignment, land rental, etc., for use of marine terminal/property
46 C.F.R. § 535.310
- Marine Terminal Services Agreements – MTO/Ocean Carrier agreement to provide services to ocean carrier
46 C.F.R. § 535.309
- If not filed, no antitrust immunity

Prohibited Acts

- Difficult statute to apply consistently given myriad fact patterns in different ports
- There are guidepost cases, however, that mark the development of FMC's thinking about discrimination/preference cases

Key Cases Leading to *Maher Terminals v. Port Authority of New York and New Jersey*

- Petchem I and II (1984, 2001)
- *Ceres Marine Terminals, Inc. v. MPA* (1997)
- Seacon Terminals v. Port of Seattle (1993)
- R.O. White et al. v. POMTOC (2009)

Conclusion

- Enough experience to understand that 1984 Act is an awkward fit for ports
- Continuing structural issue of whether Antitrust Immunity and Preference Provisions make sense in a port context
- Mega-carriers, mega-ships, carrier agreement provisions, environmental and infrastructure development are key issues

Thank you!



C. Jonathan Benner
Thompson Coburn LLP
1909 K Street, N.W., Suite 600
Washington, D.C. 20006
202.585.6985
jbenner@thompsoncoburn.com