

AAPA PORT ADMINISTRATION AND LEGAL ISSUES SEMINAR

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The Shipping Act and Federal Maritime Commission Regulation

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I. Brief Overview of Applicable Law

A. Shipping Act of 1984

1. The Shipping Act of 1984 (“Shipping Act” or “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.”
2. An MTO may not
 - a. “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)).
 - b. “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)).
 - c. “unreasonably refuse to deal or negotiate.” 46 U.S.C. § 41106(3) (former Sections 10(b)(10) and 10(d)(3)).
3. The Federal Maritime Commission (“FMC” or the “Commission”) enforces these provisions and also serves as a forum for the resolution of private complaints against MTOs. Resolution of claims under these general standards tends to be very fact bound, but there are certain general principles.
 - a. Discrimination.
 - i. To establish a claim of unreasonable preference it must be shown that (1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors. *Ceres Marine Terminals, Inc. v. Maryland Port Administration*, 27 S.R.R. 1251, 1270-71 (FMC 1997).

- ii. “The Commission is not required to tally and compare exactly what benefits were received by the relevant parties,” as only unreasonable preferences and prejudices are prohibited. *Seacon Terminals v. Port of Seattle*, 26 S.R.R. 886, 900 (FMC 1993).
- b. Refusal to Deal
- i. Leasing decisions need not be based on written regulations or on a competitive bidding basis. *Maryland Port Administration v. Premier Automotive Services (In re Premier Automotive Services)*, 492 F.3d 274, 284 n.2 (4th Cir. 2007); *Seacon*, 26 S.R.R. at 898.
 - ii. Compare e.g., *National Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692-96 (1978) (“[t]he Sherman Act does not require competitive bidding”); *Security Fire Door Co. v. County of Los Angeles*, 484 F.2d 1028, 1031 (9th Cir. 1973) (“[e]ven a direct contract ... without any pretense of putting the job out to bid ... would not in itself have constituted a restraint of trade”).

B. Antitrust Exemption

1. Agreements filed with the FMC and effective under the Act or exempt from filing under the Act are exempt from the antitrust laws. 46 U.S.C. §§ 40307(a)(1), (2). The Shipping Act also exempts “an[y] activity or agreement within the scope of [the Act], whether permitted under or prohibited by [the Act], undertaken or entered into with a reasonable basis to conclude” that it is subject to an agreement filed or exempt from filing under the Act. Id. § 40307(a)(3); see *A&E Pac. Constr. Co. v. Saipan Stevedore Co.*, 888 F.2d 68, 72 n.6 (9th Cir. 1989) (“[A]ll activity permitted or prohibited by the Act enjoys immunity from antitrust coverage if undertaken with a reasonable belief that it was being done under an effective agreement filed with the FMC, at least until such immunity is set aside by an agency or court.”). The Act allows the filing of agreements only among or between marine terminal operators and ocean common carriers. Agreements with shippers, non-vessel operating common carriers, or other entities do not come within the exemption.
2. Section 6(g) of the Shipping Act allows the FMC, but not private parties, 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).

3. “When a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits.” *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 438, 459 (2009)(Breyer, J., concurring).
4. Port authorities, and their officials and employees acting in official capacities, are protected from antitrust damages actions and from cost and attorney’s fee awards even in the absence of the exemption, pursuant to the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36.

II. Recent Developments

A. Port congestion issues. Commission likely to announce initiatives after closed meeting April 13, 2015.

1. Alliance reporting on congestion management (M2/G6/Ocean 3/CKYHE)
2. Pacific Ports Operational Improvements Agreement (West Coast Marine Terminal Operators Agreement/Ocean Carrier Equipment Management Association)
 - a. “discuss and agree upon policies, actions and procedures relating to their operations, facilities, services and other matters” in order to address issues such as congestion, fluidity, and equipment safety and reliability.
 - b. Specific areas include cargo-handling at marine terminals, vessel loading and discharge processes, the interchange of equipment, marine terminal gate rules and operating hours, the use, storage, inspection and repositioning of intermodal equipment, measures to promote the availability, inspection, maintenance, repair and efficient use of chassis, port-related transportation infrastructure and environmental and security issues.
 - c. IICL comments:
 - i. “FMC does not have jurisdiction to determine the legality of this kind of labor agreement, much less a provision that concerns chassis owned by chassis lessors that are not subject to FMC jurisdiction and who are not party to the collective bargaining process between the PMA and the ILWU.”
 - ii. “At LA/Long Beach, the Pool of Pools was implemented after the parties received a favorable Business Review letter from the DOJ Antitrust Division. This experience indicates that sweeping antitrust immunity is not a necessary prerequisite to the establishment of collaborative, pro-

competitive measures aimed at reducing congestion and improving efficiency at the nation's ports.”

3. Commission action to “help resolve congestion issues” includes its grant of a request by the Ports of Los Angeles and Long Beach “for expedited review of an amendment to their cooperative working agreement permitting them to address the systemic causes of port congestion.” The agreement allows, among other things, the ports to discuss and agree on projects and programs that address transportation infrastructure needs and reduce pollution, with addressing port congestion a particular focus, including establishing initiatives to increase terminal productivity, facilitate chassis availability and usage, and improve drayage truck turn times. “Cooperative agreements among ports who serve a common region are now paramount in order to improve port-related transportation infrastructure and facilitate cargo movement.”
4. Potential regulation of delay, demurrage, and free time charges.
 - a. Shipping Act contains a broad prohibition against failing 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).
 - b. However, “[u]nless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court.” 46 U.S.C. 40502(f).
 - c. The FMC has set out the general test as follows: "allegations essentially comprising contract law claims should be dismissed unless the party alleging the violation successfully rebuts the presumption that the claim is no more than a simple contract breach claim. In contrast, where the alleged violation raises issues beyond contractual obligations, the [FMC] will likely presume, unless the facts as proven do not support such a claim, that the matter is appropriately before the agency." *Cargo One v COSCO Containers*, 28 SRR 1635, 1645 (FMC 1998) (“we find it inappropriate and contrary to the intent of the statute [to] bar any Shipping Act claim which bears some similarity to, overlaps with, or is couched in terms of” a breach of contract action). *See Anchor Shipping v Alianca*, 30 SRR 991 (FMC 2006) (independent Shipping Act claims can be brought even if related breach of contract claims are arbitrable and have been arbitrated).
 - d. FMC guidance on the application of Shipping Act principles to liquidated damages clauses in service contracts. FMC “lacks the authority to directly regulate the use of liquidated damages provisions.” *See Circular Letter No. 1-89*, 54 Fed. Reg. 15256

(1989) (quoting *Service Contracts -- Most Favored Shipper Provisions*, Docket No. 88-07 (FMC 1988). However, the FMC will assess if liquidated damages are set too low, as an indication that the service contract is not a real contract and is simply a “device to evade the carrier's tariff rates.” *Id. See Anera v. Pacific Champion Service Corp*, 864 F. Supp. 195 (D.D.C. 1994) (validity of liquidated damages provision in service contracts is a matter for judicial decision and not for the Commission.)

- e. The Commission has exercised jurisdiction over claims that unreasonable free time or demurrage practices violated the Act. *See, e.g., Free Time and Demurrage Practices at New York*, 11 FMC 238 (1967) (requiring free time to be extended for a period equal to the time in which a carrier is unable to or refuses to tender cargo for delivery); *Midland Metals Corp. v. MOL*, 15 FMC 193 (1972) (unreasonable practice to charge demurrage unless delay is shipper’s fault, construing all circumstances in favor of the shipper).

B. Alliances and Agreements

1. P3/M2

- a. FMC cleared P3 without much difficulty by 4-1 vote. 2M even less difficulty. Only public comment was received from the European Shippers Council. Commission relies on reporting requirements to monitor activity under the agreement.
- b. After the Chinese action scuttling P3, several Commissioners were unhappy about the decision, which they felt would deprive US importers and exporters of “lower costs and higher service integrity.” Speculation that the action was taken to protect Chinese ports, which were at overcapacity.
- c. Commission generally acts on agreements through negotiation, not litigation under Section 6(g).

2. Pacific Ports Agreement currently under review.

3. Los Angeles/ Long Beach cooperative working arrangement

4. Port of Seattle/Port of Tacoma discussions

C. Recent tenant/ lessee litigation

1. *Maher Terminals v. Port Authority of New York and New Jersey*, FMC No. 08-03 (FMC Dec. 17, 2014), *appeal pending* No. 15-1035 (D.C. Cir.).
 - a. Commission granted Port Authority's motion for summary judgment on statute of limitations grounds as to reparations claims but not for a cease and desist order.
 - b. On the merits, the Commission affirmed an ALJ order denying relief. ALJ found that the “complex thirty-year maritime leases” at issue resulted from years of negotiation between sophisticated parties on the particular facts and circumstances presented, and that the differences between the leases the port had with Maher and with another tenant (APM/Maersk) were justified and not discriminatory. The Commission found it undisputed that these favorable terms were given as necessary to keep APM's owner Maersk from leaving the port. The Port also acted pursuant to a plan to address shallow channels, high labor costs, inadequate and outdated marine terminal infrastructure and configurations, and low rents due to legacy leases, through a standard set of improvements to all the terminals and restructured terminal leases.
 - c. The rent concessions to Maersk were necessary to match an offer from Baltimore, and there was no evidence that these concessions went beyond what was necessary to keep the carrier in the port. The credible threats to leave distinguished the case from *Ceres*, where the discrimination was based solely on status. *Ceres* “does not require a port authority to ignore differences between terminals, even if those differences flow from carrier-affiliated status.” Moreover, there was “no evidence that the Port designed this guarantee so that Maher or other terminal operators could not meet it,” and it was actually enforced against Maersk.
 - d. Maher failed to show that its rent payments were not commensurate with the benefits from its lease. Maher’s higher rent was based in part on the characteristics of its reconfigured terminal, which was the largest at Port Elizabeth and had had locational advantages.
 - e. A port has no continuing duty to provide tenants with identical lease terms, or to “reevaluate lease terms during the life of the lease to make sure they serve their intended purpose.” Where there are valid reasons to treat lessees differently, a port need not “renegotiate leases on demand” to assure that “all interested parties get the same deal.”

- f. Minimum throughput rent requirements were different, but no meaningful difference or discrimination was shown given the difficulty of comparison due to different time periods, penalties, and other details.
 - g. Commission found that Maher failed as matter of fact to show it made greater investments than Maersk or received less favorable financing.
2. *Maier Terminals v. Port Authority of New York and New Jersey*, FMC No. 12-02 (I.D. Jan. 30, 2015), *appeal to Commission pending*. Tenant under 30 year marine terminal lease claimed discrimination because the Port undertook terminal renovations for Maher's former customer MSC that it did not undertake for Maher, and deferred certain capital expenditure obligations for another tenant, Maersk. Maher also claimed that the Port has an unreasonable practice of requiring compensation to consent to lease transfers, and that it refused to deal with Maher for a terminal leased to another operator.
- a. Transfer payment challenge did not state a claim because no allegation that lack of uniformity in payments was unrelated to variations in risk and benefits across transactions.
 - b. Allegations also insufficient to show favoritism to carrier-controlled terminals because no allegation that differences not justified or that Maher sought similar concessions.
 - c. Port not required to competitively bid terminals or to offer other tenants a right to bid on other terminals as they become available.
 - d. Other allegations likewise unsupported by sufficient facts to show that Maher was disadvantaged in a way not justified by legitimate business justifications. Conclusory allegations that differences are not supported by legitimate transportation factors are not enough.
 - e. Decision makes clear that the *Twombly/Iqbal* standard that is applied in the federal courts to assure that allegations are sufficiently supported to warrant the costs of discovery is applicable to Commission complaints as well.
3. *Maier Terminals v. Port Authority of New York and New Jersey*, 2014 WL 3590142 (D.N.J. July 21, 2014), *appeal pending* No. 14-3626 (3d Cir.).
- a. Maher challenge to rental fees and guarantee payments as an indirect tonnage duty on vessels and cargo, in violation of the Tonnage Clause, Section 208 of the Water Resources Development Act of 1984 (WRDA), 33 U.S.C. § 2236; and the Rivers and

Harbors Appropriation Act of 1884 (RHA), as amended, 33 U.S.C. § 5(b). Maher's claim is that the cost or level of services provided by Port Authority, or available to vessels and cargo upon which throughput rent charges are based, do not increase as the number of containers increases or as the throughput rent charges increase, and therefore the payments are not protected as valid user charges under these provisions.

- b. Court holds Tonnage Clause not implicated because Maher "is not a vessel or other protected entity under the Tonnage Clause, and Maher has not alleged facts sufficient to show that the charges amounted to an indirect tonnage duty on vessels and cargo."
 - c. RHA claim dismissed because likewise no allegation that the charges and fees assessed against Maher are actually paid by vessels, watercraft, or their passengers, and allegations that they "operate" as charges on a vessel or cargo are insufficient. Similar result under WRDA, which also does not prevent the Port Authority (or any non-Federal entity) from using funds it has obtained from other sources of revenue-such as rent or other fees from Port tenants-to pay WRDA costs
4. *Marine Repair Services v. Ports America Chesapeake*, No. 11-11 (Initial Decision Jan. 10, 2013), *notice not to review upon withdrawal of exceptions* (FMC March 20, 2013). Challenge to alleged discrimination and refusal to deal by tenant of Port of Baltimore's Seagirt terminal under long term Public-Private Partnership lease. Challenge to an exclusive arrangement requires identification of a relevant market and assessment of effects on competition in that market, but not a strict antitrust analysis, in determining reasonableness. Neither the Shipping Act nor antitrust precedent makes it unreasonable for the tenant to refuse to allow competitor to use its leased premises to facilitate competition. Bundled discounts for carriers that use the tenant for both stevedoring and repair work not unlawful as they do not force carriers to use the tenant, and bundled discounts generally benefit consumers, (citing antitrust tying cases).