

# Port and Marine Terminal Policy and Legal Issues

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## *Marine Terminal Management Training Program*

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# 1984 Shipping Act - Ports

- An MTO – someone providing wharfage, dock, warehouse, or other terminal facilities **in connection with** a common carrier
- When is a Port an MTO
- When is a Port not covered as an MTO



# Not an MTO

- Must be Common Carrier
  - Not Contract Carriage
  - Not Tramp Service
- Must be in Foreign Commerce – Jones Act not covered
- Does not include issues like navigation
- State port authorities not subject to private party complaints but still regulated by FMC



# MTO Prohibitions

- 46 U.S.C. § 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 whether MTO is a vessel operator is not a legitimate factor (a surprise to many)



# FMC Developments: *Maher Terminals*

- Maher alleged PANYNJ violated Shipping Act by providing unreasonable preference to APM Terminals (Maersk)
- While APM Lease had lower basic annual rent rate; and different investment and throughput requirements, 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
- Now in Court of Appeals – most important FMC port case in two decades



# 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 principles)
- *R. O. White* and newer cases



# Shipping Act Private Party Claims

- Sometimes viewed as lease negotiations by other means
- Reparations to a prevailing complainant
  - Up to three years to file
  - Includes all actual injuries and interest, and double damages in certain cases
- Attorney's fees now discretionary



# 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 (Maine)
  - 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.”

# Developments Outside the FMC

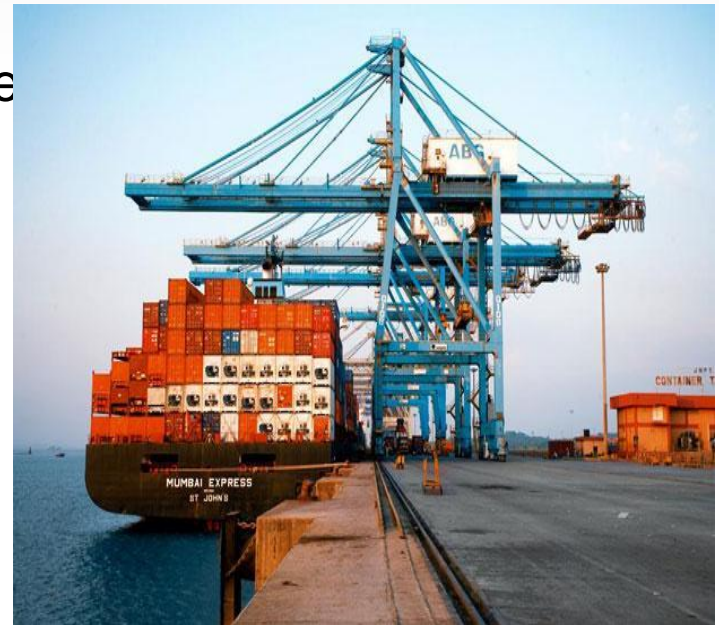
- Congressional proposals after the PMA-ILWU Negotiations
  - Productivity measurement
  - Longshore workers under RLA
    - Taft-Hartley injunction
    - Secondary boycotts
- State officials intervening in longshore labor disputes



# Developments Outside the FMC

(cont'd)

- Detention and demurrage restrictions
- Truckers: independent contractors or employees
  - State and private party suits
  - Spillover from NLRB
  - Driver shortage/Hours of Service
  - Chassis pools



# Developments Outside the FMC

*(cont'd)*

- Congestion issues
  - Appointment systems
  - First off the pile
  - Big data solutions for congestion
  - Congestion forums

