Port and Marine Terminal Policy and Legal Issues

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

   - 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