AAPA Leasing Workshop

Federal Regulation of Marine Terminal Operators - Overview

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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 Regulation of Ports

- Shipping Act of 1984, as amended
- Administered by Federal Maritime Commission
- Address competitive practices and economic concentration
- Applies late 19th railroad principles to 21st century port realities

Federal Port Regulation in a Nutshell

- Marine Terminal Operator ("MTO") 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. § 40102(14)
- No statutory distinction between Public Port Authorities, Landlord Ports, Operating Ports and Private Terminals/Stevedores: all are MTO's and subject to same limitations.

Federal Port Regulation in a Nutshell

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- 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

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- 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)

Other Significant Provisions Affecting Ports

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- 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

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)

FMC Injunction Authority

- 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

MTO/Port Exemptions

- Marine Terminal Facilities Agreements – agreement 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

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

The Ill-Fitting Garment

- Shipping Act of 1984 is essentially a liner operator-driven piece of legislation, addressing issues facing liner trade in late 1970's and early 1980's
- Ports are dealt with as appendages in the Act
  - Little thought was given to whether ports can/should be held to same commercial norms as vessel operators
  - Generally speaking, the fit is awkward

The Ill-Fitting Garment

- Liner industry, both in 1980's and currently, is far more homogeneous than is port/terminal operator community
- MTO definition does not distinguish between port authorities, whether landlord or operating, and commercial terminal businesses

The Ill-Fitting Garment

- Antitrust immunity is the major structural element of Shipping Act of 1984 agreement
  - Filing, rate publication and preference/prejudice provisions flow from grant of antitrust immunity to liner operators
- Do ports/terminals really need antitrust immunity? If so, what are appropriate controls?
  - 1984 rationale was that port/terminal antitrust immunity was necessary to offset liner carriers' antitrust immunity

The Ill-Fitting Garment

- Definitions are vague and imprecise
- Although "reasonableness" defenses are often ultimately effective, they are inherently fact based, case-by-case determinations that vary from terminal to terminal and that are not easily dealt with by summary motions
- The potential for long, expensive administrative litigation (followed by court appeals) is quite high

The Ill-Fitting Garment

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- Emphasis on “like treatment” of terminal users is an artifact of common carrier obligations for antitrust-exempt vessel operators
  - It is unrealistic to hold modern ports/terminals to a standard in which every user is treated identically or even similarly
- FMC case law on “exclusivity” creates serious risks and uncertainties for port authorities attempting to plan for efficient provision of port/terminal services
  - Port assets/resources not fungible

The Ill-Fitting Garment

- FMC agreement standards derive from antitrust/merger standards
  - When applied to generic “cooperative working arrangements” between ports, they can stifle creative solutions to pressing environmental and infrastructure issues

Thank you!

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