**Fact patterns of past cases – when have ports been sued?**

Decisions must be based on "legitimate transportation factors." Question raised in *Maher* appeal: is the term "transportation factor" simply a synonym for "reasonable" or is it limited to specific cost-related factors similar to size, weight and bulk or other "tangible characteristics" that "inhere in the goods or in the cost of the service rendered in transporting them." *See also New Orleans Stevedoring Company v. Port of New Orleans*, 29 S.R.R. 345, 352 (I.D. 2001), adopted 29 S.R.R. 1066, 1071 (FMC 2002), aff'd mem., 80 Fed. App'x 681 (D.C. Cir. 2003) ("determination of reasonableness, in the context either of an alleged refusal to deal or negotiate or of an alleged preference or disadvantage, is largely dependent on specific facts rather than broad generalizations;" relevant factors "include such considerations as maintenance of consistent service and the economic well-being of the port.")

**Individual fact patterns:**

1. **Exclusive arrangements for provision of services at a terminal (stevedoring/ tugs/ cranes)**. *See Petition of South Carolina State Ports Authority for Declaratory Order*, 27 S.R.R. 1137, 1169 (FMC 1997)(restrictions on choice of a stevedore depend on "specific facts regarding local conditions.").

   *A.P. St. Philip, Inc*., 13 FMC 166 (1969)(MTO that purported to condition vessel access to its facilities upon exclusive use of a designated tug operator had engaged in an unjust and unreasonable practice);

   *California Stevedore & Ballast Co. v. Stockton Port District,* 7 FMC 75, 83-84 [1 SRR 563] (1962)(carriers should have the freedom to pick their own stevedoring companies as this freedom encourages efficient and safe service as well as competitive pricing;

   *Perry's Crane Service v. Port of Houston Authority*, 16 SRR 1459, 1473-77 (FMC ALJ 1976) (requirement to use port's crane services created "mini-monopoly" that "opens the door to evils which are likely to accompany monopoly, such as poor service and excessive costs).

   *Compare Petchem, Inc. v. Canaveral Port Auth.*, 28 F.M.C. 281, 307, 23 S.R.R. 975, 995 (F.M.C. 1986), *aff'd*, 853 F.2d 958, 963 (D.C. Cir. 1988) (upholding an exclusive tug franchise as justified by competitive factors, but stating that a port issuing an exclusive franchise "should consider carefully whether periodic competitive bidding for that franchise would be beneficial") *with Canaveral Port Authority—Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate,* 29 S.R.R. 1436, 1448-51 (F.M.C. 2003) (finding unreasonable refusal to deal where the port did not consider application for tug franchise; and that asserted justification that the application was submitted too late was not convincing; violation ended when the port sent out a notice

inviting applications for an additional franchise) and *Exclusive Tug Arrangements in Port Canaveral, Fla.*, 29 S.R.R. 1199, 1223 (A.L.J.) (finding "relevant market is Port Canaveral" and changed circumstances since exclusive franchise had been upheld 15 years earlier), *dismissed on settlement,* 29 S.R.R. 1455 (F.M.C. 2003).

2. **Right of lessee to control premises and access to premises**.

*Marine Repair Services v. Ports America Chesapeake*, FMC 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. Lease gave lessee exclusive right under the Lease to perform chassis repair at the Premises; lessee stated it also had the right to decline access to the premises to a competitive maintenance and repair provider to pick up chassis for repair offsite.

FMC judge analyzed the case by identifying a relevant market and assessing effects on competition in that market. Found that competitor was not fully excluded from the market (carriers could take their own chassis offsite) , and applied the general antitrust principle that parties generally do not have a duty to assist their competitors. Port was not sued and did not intervene in the dispute.

*R.O. White & Co. v. Port of Miami Terminal Operating Co*., 31 S.R.R. 783 (A.L.J. 2009), adopted as administratively final, 31 S.R.R. 783 (F.M.C. Oct. 6, 2009)(reasonable for terminal operator joint venture members to take actions to enhance their competitive position over non-members; venture not required to provide access on a marginal cost basis to competitor; port sued along with terminal operating company)

*T. Parker Host v Kinder Morgan Liquid Terminals,* FMC No. 16-14 (filed June 2016, settlement approved Aug. 2016). Plaintiff provider of agency services denied access to Kinder Morgan terminals in alleged retaliation for providing competitive services.

**3. Need to meet commitments to lessees.**

*New Orleans Stevedoring Company:* court quotes Commission's Administrative Law Judge that it "cannot seriously be contended" that a motive to maintain long-term relationships with lessees and avoid breach of contract liability "is not related to transportation concerns;" result held fully consistent with the Commission's precedents.

4. **Lease renewals**.

*Seacon Terminals v. Port of Seattle*, FMC No. 90-16, 26 S.R.R. 883 (1992). Plaintiff declined to review lease when renewal period came up during time of business slow down; port went ahead to lease terminal to a carrier subsidiary MTO; plaintiff claimed later it had found a tenant and wanted to lease the terminal, but the port was declined to break off its existing negotiations. Plaintiff claimed a refusal to deal that (a) created a "monopoly" at the port for "independent" terminal operators not affiliated with a carrier and (b) was tainted by a conflict of interest because one of the Commissioners later became affiliated with a law firm that represents the allegedly favored competitor.

*Premier Auto. Servs. v. Flanagan*, 73 Fed. Reg. 34,017, 34,019-20 (F.M.C. June 16, 2008)(lessee did not renew lease and filed for bankruptcy and then filed Shipping Act claim when port tried to recover the premises); *In re Premier Auto. Servs*., 492 F.3d 274, 284 n.2 (4th Cir. 2007)(summarily rejecting Shipping Act claims).

5. **Incentives to keep a major tenant at the port through lease concessions.** *Compare Ceres Marine Terminal v. Maryland Port Administration*, 27 S.R.R. 1251 (FMC 1997) with the ongoing and perhaps soon to be settled *Maher* case, FMC No. 08-03.

**6. Discrimination based on factors allegedly extraneous to transportation.**

*"50 Mile Container Rules,"* 24 S.R.R. 411 (1987), *aff'd sub nom. N.Y. Shipping Ass'n, Inc. v. FMC*, 854 F.2d 1338, 1376 (D.C. Cir. 1988)(Discrimination proscribed when based on the requirements of a collective bargaining agreement rather than on an assessment of actual transportation-based realities.)

*Cornell v. FMC*, No. 14-1208 (D.C. Cir. Dec. 2, 2015) cruise passenger sued claiming refusal to deal when Princess wouldn't carry her after she had sued Carnival three times over a $600 dispute over some returned art. Court deferred to the FMC's determination "that the prohibition against an 'unreasonabl[e] refus[al] to deal' under 46 U.S.C. § 41104(10) does not apply to discretionary business decisions." It found "no plausible basis for concluding that Princess's refusal to deal was for reasons other than business considerations related to the costs of past and potential future litigations."

Court however expressed no view on "whether the FMC engaged in reasoned decision-making by giving deference to 'discretionary business decisions' without assessing whether there are 'legitimate transportation-related factors' for the refusal to deal or

whether the FMC's position was otherwise an unexplained departure from precedent and past practice," finding that the plaintiff had waived that argument.

John Longstreth
K&L Gates LLP
1601 K Street, N.W.
Washington, D.C. 20006
(202) 778-9000
john.longstreth@klgates.com

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