



The Case for Port Antitrust Immunity – Has Its Time Finally Come?

An Introduction to the the Shipping Act of 1984 and
Antitrust Immunity for Port Authorities

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The Federal Maritime Commission

- Independent federal regulatory agency
- Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998
(46 U.S.C. §§ 40101 – 41309, new codification of Title 46 by H.R. 1442, signed into law October 6, 2006)
- <http://www.fmc.gov>



Policy Goals of the Shipping Act of 1984

- Establish and promote a nondiscriminatory regulatory process for carriage of goods by water;
- Provide an efficient and economic shipping transportation system;
- Encourage development of a U.S.-flag liner fleet capable of meeting national security needs; and
- Promote the growth and development of U.S. exports through competitive and efficient ocean transportation.

46 U.S.C. § 40101



A Port Authority Is A Marine Terminal Operator Under the Shipping Act

- The term marine terminal operator means an entity “engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier”
46 U.S.C. § 40102(14)
- The term marine terminal operator includes terminals owned or operated by states and their political subdivisions. 46 C.F.R. § 525.1(13)



U.S. Antitrust Laws Covered Under the Shipping Act of 1984

- The Sherman Act
- The Wilson Tariff Act, Sections 73 and 74
- The Clayton Act
- The Act of June 19, 1936
- The Federal Trade Commission Act
- The Antitrust Civil Process Act

46 U.S.C. § 40102(2)



Marine Terminal Operator Agreements

- An Agreement between or among marine terminal operators, or between or among one or more marine terminal operators and one or more ocean common carriers to -
 - (1) Discuss, fix or regulate rates or other conditions of service; or
 - (2) Engage in exclusive, preferential or cooperative working arrangements, to the extent the agreement involves ocean transportation in the foreign commerce of the United States.

46 U.S.C. § 40301(b)(1) and (2)



Types of Marine Terminal Operator Agreements

- Assessment Agreements
 - Parties can discuss and agree upon surcharges relating to collective bargaining of fringe benefits
- Conference Agreements
 - Parties can agree upon rates and set terms of service to be offered
- Cooperative Working Agreements
 - Parties are allowed to create a framework for working together on shared interests
- Discussion Agreements
 - Parties can discuss and voluntarily agree upon rates and terms of service to be offered



Types of Marine Terminal Operator Agreements

- Facilities Agreements
 - Port leases for space and facilities
- Joint Venture Agreements
 - Parties allowed to create a new entity and share in control, revenue, expenses and equity in the endeavor
- Services and Cruise Agreements
 - Agreements between a marine terminal operator and a common carrier for marine terminal services



Agreement Filing Procedures

- Agreement prepared with appropriate information (parties, purpose, scope, etc.), and signed by the parties.
- File the agreement with the Bureau of Trade Analysis (46 U.S.C. § 40302)
 - Published in Federal Register for public review and comment



FMC Bureau of Trade Analysis Review

- 45 day review period before agreement becomes effective.
- 3 options in reviewing an agreement:
 - Reject the agreement for failure to comply with filing and content requirements (46 U.S.C. § 40304(b)).
 - Request additional information (46 U.S.C. § 40304(d)).
 - Seek injunctive relief to stop agreement from becoming effective (46 U.S.C. § 41307(b)).



FMC Agreement Monitoring

- Filing Meeting Minutes (46 C.F.R. § 535.704)
 - A meeting is defined as all discussions at which any agreement is reached among the parties regarding any business of the filed agreement and all other discussions among three or more members of the agreement (or all members if fewer than three) relating to the business of the agreement.
 - Contents of Minutes must include date/time/place, list of participants, description of discussions and a copy of any materials distributed at the meeting.
 - File minutes within 21 days of the meeting.



FMC Enforcement Authority

- Commission Investigations (46 U.S.C. § 41302).
 - Agreement remains in effect during investigation.
 - Authority to subpoena witnesses and evidence.
 - Written report required when hearings are held.
- Injunctive Relief in U.S. district court (46 U.S.C. § 41307(b)).
 - Only available remedy where Commission shows that an agreement will reduce competition through unreasonable reduction in transportation service or increase in transportation costs.



FMC Enforcement Authority

- Commission Proceedings for Various Shipping Act Violations by Marine Terminal Operators;
 - Acting without a filed and effective agreement or acting not in accordance with terms of an existing agreement (46 U.S.C. § 41102(b))
 - Agreeing with another MTO to unreasonably discriminate in the provision of services to an ocean common carrier (46 U.S.C. § 41106(1))
 - Giving any undue preference or advantage or undue prejudice or disadvantage to any person (46 U.S.C. § 41106(2))
 - Unreasonably refusing to deal or negotiate (46 U.S.C. § 41106(3))



When to File an Agreement?

- Contact the Federal Maritime Commission for an informal opinion regarding your particular situation:
 - Bureau of Trade Analysis
 - 202-523-5796
 - tradeanalysis@fmc.gov
 - Office of the General Counsel
 - 202-523-5740
 - generalcounsel@fmc.gov