What the Shipping Act and Federal Maritime Commission Mean for Ports

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The 1984 Shipping Act & OSRA

1. Covers Ocean Common Carriers and Marine Terminal Operators (and OTIs)

2. International trade only

3. Even landlord ports are MTOs
   
   a. Someone providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier

   b. Terminal leases and practices

   c. But not domestic or non-common carrier
Organization of the FMC

1. Commissioners

2. Bureau of Enforcement (BOE)

3. Office of Administrative Law Judges

4. Bureau of Trade Analysis
   a. Office of Agreements
   b. Office of Service Contracts and Tariffs

5. General Counsel
Port Interactions with the FMC

1. Litigation Forum
   a. Private party complaints
   b. Exclusive jurisdiction
   c. How a Shipping Act complaint works

2. Regulation of Port Activities
   a. Bureau of Enforcement
   b. Investigations and fact-finding
Agreement Filing Requirements

1. Covered Activities for MTOs
   a. Discuss, fix or regulate rates or other conditions of service
   b. Exclusive, preferential or cooperative working arrangements

2. Dealing with non-regulated entities, such as tug operators
Agreement Filing Process

1. When an agreement has to be filed
2. What has to be in the filed agreement
   3. Filing process
   4. 45 day waiting period
   5. Minutes must be filed with FMC
   6. Amendments required
MTSA and MTFA Exemptions

1. What is a Marine Terminal Services Agreement
   a. Parties – Port and common carrier
   b. Does not include lease or assignment of terminal
   c. Antitrust immunity only if filed

2. What is a Marine Terminal Facilities Agreement
   a. Parties – Port and common carrier or other MTO
   b. Public access – must be made available on request
Bureau of Enforcement

1. Enforcement Process
   a. Shipping Act substantive claims
   b. Violations of agreement requirements

2. Penalties for willful violations – $58,562 Per Day
The FMC as Litigation Forum

1. Jurisdiction
   a. Common carriage – liner services and contract carriage
   b. International trade only
   c. 11th Amendment immunity for state port authorities
   d. Class action issue pending appeal
The FMC as Litigation Forum

2. Covered Claim Basics
   a. Just and reasonable regulations and practices - 41102(c) (and the pending NPRM)
   b. Unreasonable prejudice – 41106(b)
   c. Unreasonable refusal to deal – 41106(c)
   d. Agreement to boycott or unreasonably discriminate – 41106(a)
The FMC as Litigation Forum

3. What is Unreasonable?
   a. Appropriate charges – must be a service for the fee
   b. Dates back to *Volkswagenwerk* Supreme Court decision in 1968
      i. M&M fund contributions for containerization
      ii. No benefit for VW, so illegal to charge for M&M fund
   c. *Plaquemines* decision
   d. Treating like cases alike
The FMC as Litigation Forum

4. Ceres to Maher Terminals
5. Exclusive dealing arrangements
   a. Petchem
   b. Ormet
   c. Lower Mississippi Tugs
   d. R. O. White and more recent views
Damages

1. Reparations to a prevailing complainant
   a. Up to three years to file
   b. Includes all actual injuries and interest, and double damages in certain cases

2. Attorney’s fees may be awarded to a prevailing party
FMC Regulation in Other Areas

1. Terminal Congestion, Detention and Demurrage, and FF 28
2. FMC Attempts to Regulate Port Trucking
Related Issues

1. Port Trucking
   a. Misclassification issues
   b. Lawsuits
   c. State laws
Questions?