1984 Shipping Act Coverage

- Who is covered
  - Ocean Carriers
  - Marine Terminal Operators

- What is an MTO
  - When is a Port an MTO
  - When is a Port not covered as an MTO
MTO Defined

• An MTO – someone providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier

• Landlord and operating ports
The 1984 Act - Overview

- Section 10(d) and prohibited acts
- Agreement filings: the requirements of §535
  - Marine Terminal Facilities Agreements – exempt except when they are not
  - Anti-trust immunity - CWAs
Section 10(d) claims

- 41106 (Old section 10(d)) - 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
  - Lack of just and reasonable regulations
What is unreasonable or undue

- The terms are given meaning by decisions dating back to the 1916 Shipping Act
- *Volkswagenwerk v. FMC*
  - M & M Fund – no benefit to Volkswagen so illegal to require it to contribute
  - Benefit/charge proportionality
  - Ongoing case - Carriers v. PANYNJ – ExpressRail infrastructure fee
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
- Fees funding other projects (*Bridgeport*)
Unreasonable Prejudice

- **Ceres v. MPA**
  - Must be a “legitimate transportation factor”
  - Port wanted to attract Maersk from NY so it gave Maersk a better deal for proprietary terminal – not for public terminal
    - Proprietary v. public is not a legitimate factor
- Triangular relations – how to price a terminal
Exclusive dealing arrangements

- Exclusive service arrangements
  - What was legal under a given set of facts in the past not necessarily legal now if the economic facts have changed
  - Very fact dependent analysis means that predictability and certainty are limited
  - Given this useful to know the history of the FMC’s approach to this
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 principals)
- **R. O. White** and newer cases
What Ports can do

- Business judgment of Port given considerable deference (Seattle Terminals case)
- OK to negotiate a good settlement on a lease termination (Navieras)
- OK to refuse to renew lease in order to build new terminal for a different MTO (New Orleans Stevedoring)
10(d) cases – damages

- Reparations to a prevailing complainant
  - Three year statute of limitation (but not for injunctions)
  - Includes all actual injuries and interest, and double damages in certain cases
  - Complainant does not have to pay costs (except for appeal)
  - Reasonable attorney’s fees to prevailing complainant only – not respondent
Truck Detention Issues

• Empire Trucking and the FMC’s first foray
• Truck delays revisited
  ▪ Bi-State Motor Carriers and the NY/NJ Port Authority
  ▪ Pier Pass
• Appointments/reservations when volumes return
Basic Rules of Labor Law

• Only covers employees, not independent contractors

• No-strike rules
  ▪ Must be in contract
  ▪ Must be arbitrable
  ▪ Does not apply to hand-billing *per se*

• Secondary boycotts

• Chassis issues
Organization of the FMC

• The Commissioners
• The Bureau of Enforcement (BOE)
• The Office of Administrative Law Judges
• The Bureau of Trade Analysis
  ▪ Office of Agreements
  ▪ Office of Service Contracts and Tariffs
• General Counsel
FMC Litigation

• Litigation basics
• The Initial Decision
• Exceptions to the Initial Decision
• Appeals to the U.S. Courts of Appeal
• Enforcement
FCPA

- Covers “domestic concerns”
- Prohibits payment, gift or promise
- To employee of agency of foreign government
- To influence any act or decision
- To obtain or retain business
- State-owned carriers
Clean Truck Developments

- California rules: CARB
- Phase-in of ban up to 2007 models
- How it works – role of the terminals
- ATA case
  - FA4
  - Supreme Court decision on Market Participant
- Alliance of Teamsters and NRDC
Dormant Commerce Clause

• Applies *qua* government – not as market participant
• Prohibits discrimination against out-of-state businesses
• Undue burden test can apply to in-state businesses in transportation
• Federal court jury case
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