Port and Marine Terminal Policy and Legal Issues

Marine Terminal Management Training Program
Philadelphia, Pennsylvania
October 9, 2014

Paul Heylman
Saul Ewing LLP
Washington, DC
pheyllman@saul.com
202-342-3422
1984 Shipping Act Coverage

• Who is covered
  – Ocean Carriers
  – Marine Terminal Operators (“MTO”)

• 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
Not an MTO

• Must be Common Carrier
  – Not Contract Carriage
  – Not Tramp Service
  – Must be in Foreign Commerce

• Does not include some navigational issues
  – PRPA (the other one) and Lower Mississippi Tugs cases
MTO Prohibitions

- 41106 – 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
  - Failure to establish, observe, and enforce just and reasonable regulations (41102)
What is Unreasonable or Undue

• The terms are given meaning by FMC decisions dating back to the 1916 Shipping Act
• *Volkwagenwerk v. FMC*
  – U. S. Supreme Court decision
  – M & M Fund contributions
  – No benefit to Volkswagen so illegal to require it to contribute to M & M Fund
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
Ceres v. MPA

- Must base decisions on a “legitimate transportation factor”
- Port wanted to attract Maersk from NY
- Gave Maersk a better deal for proprietary terminal – but not for public terminal
- Ceres (now NYK) won a ruling that the vessel operator or not distinction is not a legitimate factor (a surprise to many)
WhatPortsCanDo

• Business judgment of Port given considerable deference (Seattle Terminals)
• 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)
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
Port FMC Filings

1. Marine Terminal Facilities Agreement (MTFA):
   - Agreement that conveys rights to operate any marine terminal facility by means of lease, license, permit, assignment, land rental, or other similar arrangement

   - Agreement between MTO and ocean common carrier that applies to services provided to and paid for by the carrier
   - Includes dockage, free time, terminal storage, wharfage, wharf demurrage, etc.

3. Cooperative Working Agreements
   - Agreement that establishes exclusive, preferential, or cooperative working relationships that are subject to the Shipping Act, but fall outside the scope of other definitions
Filing Requirements for Agreements

1. MTFA:
   - Exempt from filing
   - Current agreement must be provided to “any requesting party”
   - Potential anti-trust immunity for optional filing?

2. MTSA:
   - Exempt from filing IF no discussion of rates, charges, rules and regulations determined through a marine terminal conference agreement
   - Option to file for anti-trust immunity

3. Cooperative Working Agreement:
   - Must be filed if between common carriers or MTOs, or both
   - Past enforcement efforts have focused on unfiled “exclusivity” agreements
FMC Investigation: Scotia Prince Cruises

• Docking and lease agreement with Port of Portland
  ▪ Portland agreed not to grant any other operator permission to use its terminal premises for passenger or vehicle service to or from Portland
  ▪ Scotia Prince agreed not to operate any other service between any New England port and Nova Scotia

• Not considered a MTFA, because of exclusivity and non-compete provisions

• Instead, likely a cooperative working agreement (must be filed)

• Effect of agreement was to grant Scotia Prince a monopoly – therefore, high bar to prove reasonableness

• “The greater the degree of preference or monopoly, the greater the evidentiary burden of justification.”
Damages for Shipping Act Violations

• Reparations to a prevailing complainant
  ▪ Up to three years to file
  ▪ Includes all actual injuries and interest, and double damages in certain cases
  ▪ Reasonable attorney’s fees to prevailing complainant
    ▪ Fees are not available to respondent – not a prevailing party provision (unfair to respondents)

• BOE penalties – up to $45,000 per day (each day is a continuing violation) if knowing and willful (five year statute of limitations)
FMC Developments: *Maher Terminals*

- Maher alleged that PANYNJ violated Shipping Act by providing unreasonable preference to APM Terminals North America (Maersk)
- APM Lease had lower basic annual rent rate; and different investment and throughput requirements
- ALJ: Different treatment was justified by differences in transportation factors
- Maersk had threatened to relocate operations to Baltimore and Maher supported keeping Maersk in NYNJ
- Maersk was able to direct Maersk/Sea-Land traffic to the port, and therefore provided certain guarantees that Maher could not
- Maher has filed exceptions, which are pending
Seaport Alliance: Seattle and Tacoma

- Ports filed a “discussion agreement” with FMC in January
- October 7: Announced formation of Seaport Alliance
- Unified management of the ports’ integrated marine cargo terminal operations
- Equitable investment of assets from each port
- Two additional FMC filings:
  1. Framework Interlocal Agreement to provide authority to develop the Alliance (addendum to Discussion Agreement)
  2. Final Seaport Alliance Agreement (expected March 2015)
- John Wolfe, CEO of Port of Tacoma, expected to be hired as Seaport Alliance CEO
Developments Outside the FMC

• ILWU Negotiations
  ▪ Impact on cargo
    • What the lack of a labor contract has meant to shippers
    • The calm is quite remarkable
  ▪ Possible outcomes if the wheels come off
    • Taft-Hartley injunction
    • Secondary boycotts
FMC Congestion Fora

- Chassis Pools and Discussion Agreements
  - DOJ concludes that proposed “gray” chassis pool agreement will not produce anti-competitive effects
  - DOJ will not challenged the proposed agreement
- The landside reach of FMC jurisdiction and the impact on chassis issues
- Ongoing FMC public forums on congestion and chassis issues – Four hearings