

AAPA PORT ADMINISTRATION AND LEGAL ISSUES SEMINAR

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**Recent Topics in Federal Regulation
of Marine Terminal Operators**

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I. Brief Overview of Applicable Law

A. Shipping Act of 1984

1. The Shipping Act of 1984 (“Shipping Act” or “Act”) imposes standards of conduct on marine terminal operators (“MTOs”) engaged in “the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to sub-chapter 11 of chapter 135 of title 49, US Code.”
2. An MTO may not
 - a. “fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” 46 U.S.C. § 41102(c) (former Section 10(d)(1)).
 - b. “give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.” 46 U.S.C. § 41106(2) (former Section 10(d)(4)).
 - c. “unreasonably refuse to deal or negotiate.” 46 U.S.C. § 41106(3) (former Sections 10(b)(10) and 10(d)(3)).
3. The Federal Maritime Commission (“FMC” or the “Commission”) enforces these provisions and also serves as a forum for the resolution of private complaints against MTOs. Resolution of claims under these general standards tends to be very fact bound, but there are certain general principles.
 - a. Discrimination.
 - i. To establish a claim of unreasonable preference it must be shown that (1) two parties are similarly situated or in a competitive relationship, (2) the parties were accorded different treatment, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury. The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors. *Ceres Marine Terminals, Inc. v. Maryland Port Administration*, 27 S.R.R. 1251, 1270-71 (FMC 1997).

ii. “The Commission is not required to tally and compare exactly what benefits were received by the relevant parties,” as only unreasonable preferences and prejudices are prohibited. *Seacon Terminals v. Port of Seattle*, 26 S.R.R. 886, 900 (FMC 1993).

b. Refusal to Deal

i. Leasing decisions need not be based on written regulations or on a competitive bidding basis. *Maryland Port Administration v. Premier Automotive Services (In re Premier Automotive Services)*, 492 F.3d 274, 284 n.2 (4th Cir. 2007); *Seacon*, 26 S.R.R. at 898.

ii. Compare e.g., *National Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692-96 (1978) (“[t]he Sherman Act does not require competitive bidding”); *Security Fire Door Co. v. County of Los Angeles*, 484 F.2d 1028, 1031 (9th Cir. 1973) (“[e]ven a direct contract ..., without any pretense of putting the job out to bid ... would not in itself have constituted a restraint of trade”).

B. Antitrust Exemption

1. Agreements filed with the FMC and effective under the Act or exempt from filing under the Act are exempt from the antitrust laws. 46 U.S.C. §§ 40307(a)(1), (2). The Shipping Act also exempts “an[y] activity or agreement within the scope of [the Act], whether permitted under or prohibited by [the Act], undertaken or entered into with a reasonable basis to conclude” that it is subject to an agreement filed or exempt from filing under the Act. *Id.* § 40307(a)(3); see *A&E Pac. Constr. Co. v. Saipan Stevedore Co.*, 888 F.2d 68, 72 n.6 (9th Cir. 1989) (“[A]ll activity permitted or prohibited by the Act enjoys immunity from antitrust coverage if undertaken with a reasonable belief that it was being done under an effective agreement filed with the FMC, at least until such immunity is set aside by an agency or court.”). The Act allows the filing of agreements only among or between marine terminal operators and ocean common carriers; agreements with shippers, non-vessel operating common carriers, or other entities do not come within the exemption.
2. Section 6(g) of the Shipping Act allows the FMC, but not private parties, to seek to enjoin an agreement that it finds “is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost.” 46 U.S.C. § 41307(b)(1).

3. “When a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits.” *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 555 U.S. 438, 459 (2009)(Breyer, J., concurring).
 4. Port authorities, and their officials and employees acting in official capacities, are protected from antitrust damages actions and from cost and attorney’s fee awards even in the absence of the exemption, pursuant to the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36.
- C. Dormant Commerce Clause/Federal Preemption (Miami and Los Angeles cases)

II. Recent Case Law Developments

- A. *Florida Transportation Services, Inc. v. Miami-Dade County*, 703 F.3d 1230 (11th Cir. 2012). Challenge to Port of Miami’s alleged refusal to deal with marine terminal operators other than the local incumbent.
1. A prior challenge at the FMC by another MTO was denied in *R.O. White and Ceres v. POMTOC and City of Miami*, 31 S.R.R. 783 (FMC 2009).
 - a. FMC rejected claim by Ceres Terminals, which had declined to join the Port of Miami Terminal Operating Company (POMTOC) joint venture or to lease terminal space from the Port, that it was entitled nonetheless to market itself to carriers calling at POMTOC, and that POMTOC was required to make its facilities available, at some measure of marginal cost, so that Ceres could serve vessels at the POMTOC terminal.
 - b. FMC Administrative Law Judge adopted an antitrust–type analysis and rejected the contention that the Port had created a “monopoly” public terminal and an “exclusive” franchise. Because Miami competed with Port Everglades, POMTOC could not be a “monopoly” terminal or a “monopoly” stevedore within a properly defined market, following *River Parishes Company, Inc. v. Ormet Primary Aluminum Corporation*, 28 S.R.R. 751, 766-67 (FMC 1999). ALJ also held, again following principles familiar from antitrust law, that a firm has no duty to help its competitors.
 - c. The ALJ did suggest, however, that if POMTOC had imposed unreasonable requirements on an application to join or had boycotted a membership application “the failure of the Port to intervene in such a situation could subject it to liability under the Act.” Slip op. at 44.
 2. Bypassing the FMC, the plaintiff in *Florida Transportation Services* brought a (dormant) Commerce Clause challenge in federal district court

seeking damages for its alleged exclusion from the port. The 11th Circuit federal court of appeals upheld a jury finding of liability and an award of \$3.55 million in damages to FTS for lost profits.

- a. The court found that “the County’s ordinance facially subjected new and renewal applications to the same competency, safety record, financial, and needs criteria,” but that “the Port Director in practice automatically renewed permits of existing permit holders and repeatedly denied permits to new applicants like FTS.” 703 F.3d at 1236. The court also found that the process was intended to “protect the economic interests of the existing stevedore permit holders” from “destructive competition,” and that “existing permits were renewed even though their holders were not doing any stevedore work at the Port.” *Id.* at 1239.
- b. The court held it did not need to consider whether the ordinance directly discriminated against interstate commerce by regulating participation in the interstate stevedore market on the basis of an applicant’s local versus out-of-state origin, because the permitting practices unduly burdened interstate commerce under the undue burden test applicable to facially nondiscriminatory actions. The burden resulted because “[n]ew entrants were effectively shut out, even if they could have provided better service, better equipment, or lower prices than the incumbent stevedores.” *Id.* at 1258. The automatic renewals of incumbents also did not rationally further any efficiency or safety purposes, and in the court’s view undermined them.
- c. The court took a “functional approach to the question of whether the challenged permitting practices favor ‘local’ companies and in turn burden ‘non-local’ business interests for the purpose of dormant Commerce Clause analysis. Though some of the permit holders were incorporated out-of-state, all of the permit holders were operating locally at the Port or were otherwise entrenched at the Port.” *Id.* at 1259.
- d. The court recognized that “when a state or local government enters the market as a participant it is not subject to the restraints of the [dormant] Commerce Clause.” *Id.* at 1262, quoting *White v. Mass. Council of Constr. Emp’rs, Inc.*, 460 U.S. 204, 208 (1983), but held the exception inapplicable because “neither the County nor the Port itself provides or purchases stevedore services. Rather, the County’s only relationship to the stevedore market is through permitting,” which it undertook for regulatory purposes, not commercial purposes. *Id.*

- B. *American Trucking Associations, Inc. v. City of Los Angeles*, 596 F.3d 602 (9th Cir. 2010), *cert. granted*, No. 11-798 (U.S.) (to be argued April 16, 2013). Challenge to Port of Los Angeles “clean truck” regulations.
1. The FMC unsuccessfully challenged the Port’s prohibition on the use of independent owner-operated truckers in its first-ever action under Section 6(g) of the Shipping Act, 46 U.S.C. § 41307(b)(1), which allows it to seek to enjoin agreements it believes are anticompetitive. *See Fed. Maritime Comm’n v. City of Los Angeles*, 607 F. Supp. 2d 192 (D.D.C. 2009) (FMC had not met the traditional test to obtain a preliminary injunction because even without independent truckers the drayage market would have abundant competition and low barriers to entry; alternate theory that competition between the ports was reduced also rejected because the ports had not agreed on the employee-driver requirement and had implemented different fee incentives).
 2. Shortly after the FMC’s challenge was rejected, a preliminary injunction against the independent trucker prohibition was entered on the basis that the ports were preempted by federal law from regulating trucking. *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009). Several provisions of the concession agreements were, however, held permissible under the motor vehicle safety exception to preemption. *See American Trucking Associations, Inc. v. City of Los Angeles*, 596 F.3d 602 (9th Cir. 2010).
 - a. In its final ruling on the merits, the district court upheld the employee-driver provision and all other provisions of the Los Angeles program, including restrictions on off-street parking and placards and a financial-capability provision, under the “market participant” exception to preemption. The district court held that the program was “essentially proprietary” because it was enacted “to sustain and promote port operations” by addressing environmental lawsuits that might otherwise impede port growth and thus harm port revenues.
 - b. This decision was upheld on appeal except as to the employee-driver requirement, which was held preempted and not saved by the “market participant” exception. *American Trucking Associations, Inc. v. City of Los Angeles*, 660 F.3d 384 (9th Cir. 2011). The court held that the Port directly participates in the market as a manager of Port facilities, that it has a “direct financial interest in the unhindered and efficient flow of cargo through its terminals,” and that “[e]nhancing good-will in the community surrounding the Port is an important and, indeed, objectively reasonable business interest.” 660 F.3d at 401, 406-07.

3. The Supreme Court has taken the case to consider the scope of the “market participant” exception. The employee-driver and financial responsibility provisions are not before the Court, which is considering only the parking and placard provisions.
 - a. The ATA’s brief to the Supreme Court asserts among other things that the 9th Circuit’s view of the exception is inconsistent with the 11th Circuit’s holding in *Florida Transportation Services*. ATA also argues that the market participant doctrine should not be applicable at all to the motor carrier preemption statute.
 - b. The U.S., filing as *amicus*, states that the market participant doctrine can be useful in analyzing motor carrier preemption, but agrees with ATA that the 9th Circuit erred in holding that the parking and placard provisions are not preempted. The government argues broadly that a container port like POLA “is far more akin to publicly managed transportation infrastructure, like a highway or a bridge, than to an ordinary commercial operation.” Like POLA, “the largest container ports in the nation are owned and administered by public agencies,” and the agreements “resemble licenses more than ordinary arms-length commercial contracts.” The government also points out that POLA does not itself contract with drayage-service providers (apart from the concession agreements themselves) and that the requirements at issue are embodied in a tariff that is penally enforceable, and are more regulatory than commercial in character as provisions of general applicability that concern quintessential functions of local government (parking and vehicle identification).
 - c. POLA contends in response that the use of government owned property to conduct a business is proprietary activity even if the port is not buying or selling goods in the market. It dismisses the *Florida Transportation Services* holding as a brief discussion based on precedent that has been disagreed with by other courts, and distinguishes it because the port has in fact assisted in procuring clean trucks. POLA dismisses the various factors cited by the U.S. as unsupported by case law and inapplicable in any event. POLA also notes that it is self-sustaining, that the restrictions at issue are necessary to maintain goodwill of the business, and that they are consistent with the “green” initiatives adopted by many businesses.
 - d. If the Supreme Court adopts a narrow view of the “market participant” exception, ports may be limited in their ability to impose environmental, labor and other requirements in areas reserved to the federal government. Efforts have been undertaken to address this issue legislatively as well.

- C. *Minto Explorations Ltd. v. Pacific and Arctic Railway and Navigation Co.*, No. 11-21; *Citgo Refining & Chemicals Co. v. Port of Corpus Christi Authority*, No. 11-15: Claims of discriminatory and unreasonable port fees. Both cases settled Summer 2012.
1. Whether a charge is reasonable depends on “whether the charge levied is reasonably related to the service rendered.” *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 282 (1968). *See also* *Plaquemines Port, Harbor and Terminal Dist. v. FMC*, 838 F.2d 536, 548 (D.C. Cir. 1988) (“Application of the *Volkswagenwerk* standard requires matching costs assessed to the benefits received.”); *Baton Rouge Marine Contractors, Inc. v. FMC*, 655 F.2d 1210, 1217 (D.C. Cir. 1981) (allocation of terminal charges among the users of terminal services is unreasonable “if the challenger pays more than other parties pay, for fewer benefits than other parties receive”).
 2. Defense that a claim of discrimination cannot be maintained between different types of vessels (i.e. bulk-ore vs. passenger vessels in *Minto*) depends on a showing that the parties are not similarly situated. Differential treatment may not be based on class or status without regard to legitimate transportation factors. *See Ceres Marine Terminals Inc. v. Maryland Port Admin.*, 27 S.R.R. at 1270-72 (discrimination between independent terminal operators and carrier owned terminal operators); *Co-Loading Practices by NVOCCs*, 23 S.R.R. 123 (FMC 1985) (discrimination between vessel operating and non-vessel operating carriers).
 3. Parties need not be in a competitive relationship in marine terminal cases, where the services are supplied universally and do not vary according to cargo characteristics; rather, there must merely be a “triangular relationship” between “the port, the preferred party or parties and the less favorably treated party or parties.” *NPR, Inc. v. Board of Comm. of the Port of New Orleans*, 28 S.R.R. 1512, 1528 (FMC 2000). *See also In re Credit Practices of Sea-Land Service, Inc. and Nedlloyd Lijnen, B.V.*, 25 S.R.R. 1308, 1315 (FMC 1990) (“a competitive relationship between shippers is not necessary to establish an unlawful preference . . . where such preference does not involve a commodity rate and, on its face, is advantageous to a particular group or class of shippers or description of traffic without any justification based on the transportation characteristics of a particular commodity.”). *Accord, Valley Evaporating Co. v. Grace Lines, Inc.*, 14 F.M.C. 16, 22 [11 S.R.R. 873] (1970) (Where services are not dependent on a particular commodity carried, “the equality of treatment required . . . is ‘absolute and not conditioned on such things as competition,’” quoting *Investigation of Free Time Practices, Port of San Diego*, 9 F.M.C. 525, 547 [7 S.R.R. 307] (1966)); *Ceres*, 27 S.R.R. at 1271 (wharfage and dockage charges of a marine terminal operator “apply universally and do not vary according to cargo characteristics.”).

D. *Marine Repair Services v. Ports America Chesapeake*, No. 11-11 (Initial Decision Jan. 10, 2013), *notice not to review upon withdrawal of exceptions* (March 20, 2013). Complainant MRS alleged discrimination and refusal to deal because PAC refused to grant it access to the Port of Baltimore's Seagirt terminal, which PAC leases from the Port, so that MRS could perform maintenance and repair services on-terminal to vessels calling at the terminal.

1. Jurisdiction found because maintenance and repair of containers and chassis has a direct and close relationship to the cargo operations of oceangoing vessels, and thus practices relating to maintenance and repair relate to or are connected with receiving, handling, storing, or delivering property. Slip op. at 24-25.
2. Claims of an illegal exclusive arrangement require identification of a relevant market and assessment of effects on competition in that market, but not a strict antitrust analysis, in determining reasonableness. Relevant market is the Port of Baltimore, including off-dock repair facilities there, but not other ports, since "economic realities" do not indicate that carriers would accept the delay of having repairs undertaken at another port. PAC does not have a monopoly at the Port because MRS still competes even though its off-dock status puts it at a disadvantage. Slip op. at 38-40.
3. Neither Shipping Act nor antitrust precedent makes it unreasonable for PAC to refuse to allow MRS to use its leased premises to facilitate competition with PAC. MRS does not challenge the reasonableness of the Seagirt lease, only PAC's enforcement of its rights under the lease. Slip op. at 41-43.
4. Bundled discounts for carriers that use PAC for both stevedoring and M&R work also not unlawful as they do not force carriers to use PAC, some carriers still use MRS, and bundled discounts generally benefit buyers. Slip op. at 43-45 (looking to antitrust tying cases).

E. Other active FMC cases involving ports

1. Eleventh Amendment: *Stevedoring Services of America v. Port of Oakland* (09-08)

SSA alleges discrimination on the basis that its competitor Ports America receives better lease terms for better facilities, while SSA pays more for a shorter lease at poorer premises. Oakland's answer asserts in part that the Public-Private Partnership arrangement with Ports America is so different from a preferential use arrangement that the two tenants are not similarly situated.

The case is now before the D.C. Circuit on interlocutory appeal of the Commission's December 2011 denial of the Port's claim that it is an arm of the State of California entitled to Eleventh Amendment immunity. The

Port's claim of immunity is based on its role as trustee of California tidelands. The Commission ruled that the most salient factor was the "vulnerability of the State's purse," and that a judgment against the Port would come from tidelands trust revenues, not the State's treasury. The Commission also found that the State lacks any meaningful, day-to-day control over the Port. There was no indication of intent to create an arm of the State, rather than a trust, when the port premises were conveyed to the City, or that the Port is subject to laws that apply to state instrumentalities and would not otherwise apply to a municipality.

Oral argument was held April 9, 2013 and a decision is expected by August, 2013.

2. *Maier Terminals v. Port Authority of NY and NJ* (Nos. 08-03, 12-02)

Case No. 08-03 claims reparations for unreasonable discrimination in the terms of a lease Maier entered into in 2000. In a ruling on January 31, 2013 the Commission held that the three-year statute of limitations in the Shipping Act does not apply to claims for cease and desist relief, but only to reparations claims. Even after the remedy of reparations is no longer available, the remedy of a cease and desist order is available to a complainant who is able to prove a violation of the Act and show that unlawful conduct is ongoing or likely to resume.

As to Maier's reparations claim, the Commission held that the claim accrued when Maier knew, or should have known, that it had a cause of action, i.e. whether each of the four *Ceres* factors existed. Although Maier knew of the terms of both leases when it entered into its own lease (the allegedly more favorable lease had been filed with the Commission), it argued that it did not know that the different lease terms violated the Act until May 2008, when it allegedly learned that a guarantee in the other lease was a sham because it was not specifically enforceable. However, the Commission ruled that Maier knew, or should have known, the remedy for failure to meet the port guarantee no later than three years after it signed its lease and thus could have determined within that time whether those terms were or were not justified by valid transportation factors.

Case No. 12-02 claims discrimination because the Port undertook terminal renovations for Maier's former customer MSC that it did not undertake for Maier, and deferred certain capital expenditure obligations for another tenant, Maersk. Maier also claims that the Port has an unreasonable practice of requiring compensation to consent to lease transfers, and that it refused to deal with Maier for a terminal leased to another operator. Discovery is ongoing and an initial decision is due by April 2014.

III. Other FMC Developments

A. New FMC Commissioner and Chairman

Commissioner William Doyle was confirmed and sworn in on January 10, 2013 to replace Commissioner Joseph Brennan.

On April 2, 2013 Commissioner Cordero was designated to replace Richard Lidinsky as Chairman of the Commission. Chairman Cordero served eight years on the Board of Harbor Commissioners for the Port of Long Beach.

B. Cargo Diversion

The FMC issued a report in July 2012 in response to its Notice of Inquiry on the relationship between the Harbor Maintenance Tax and cargo diversion to Canada or Mexico. The vote was 3-2 to issue the report, with Commissioners Dye and Khouri opposing the release saying that the study's methodology and conclusions were flawed. The report found that many factors affect cargo flows but that the tax seemed to be costing Seattle and Tacoma some cargo. However, it also found that "U.S. shippers violate no FMC law or regulation by using Canadian or Mexican ports," and its recommendations were rather general. The FMC does not appear to have taken any further action on the NOI.

For convenience, a link to the Shipping Act as recodified is here:

http://www.fmc.gov/UserFiles/pages/File/The_Shipping_Act_of_1984_Re-Codification.pdf