RECENT DEVELOPMENTS IN THE RE-REGULATION OF THE MARINE TERMINAL INDUSTRY BY THE FEDERAL MARITIME COMMISSION

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I. HISTORY OF REGULATION OF THE U.S. MARINE TERMINAL INDUSTRY BY THE FEDERAL MARITIME COMMISSION AND ITS PREDECESSOR AGENCIES

A. Shipping Act of 1916 and the U.S. Shipping Board: After a two year study into the competitiveness of the ocean transportation industry lead by Rep. Joshua W. Alexander, Congress passed the Shipping Act of 1916, signed into law by President Woodrow Wilson on September 7, 1916. The 1916 Act created the U.S. Shipping Board (predecessor to today's Federal Maritime Commission (FMC)) , which consisted of five Commissioners appointed by the President and charged with regulating foreign and domestic shipping. *See* www.fmc.gov. At that time, the industry was rife with monopolistic ocean shipping cartels, and the 1916 Act was designed to encourage competition and limit abuses. *See* 1984 U.S. CODE CONG. & ADMIN NEWS 167, 170-171.

B. Parties subject to the 1916 Act were common carriers by water and "other persons subject to this chapter." The term "other persons" was not defined in the 1916 Act itself, although freight forwarders, brokers, shippers, consignors and consignees were specifically singled out for regulation under Section 16 of that Act.

C. In 1933, President Franklin Roosevelt signed an executive order, transferring the U.S. Shipping Board's functions to the U.S. Shipping Board Bureau in the Department of Commerce. In 1936, Congress separated the Board from the Commerce Department and created the U.S. Maritime Commission.

D. Although marine terminal operators were not mentioned by name in the 1916 Act, by the late 1930's, the U.S. Maritime Commission began using the 1916 Act to extend its regulation of ocean common carriers inland to encompass marine terminal operators. *See* Transportation of Lumber Through the Panama Canal, 2 Dec. U.S. Mar. Comm'n 143 (1939); Philadelphia Ocean Traffic Bureau v. Philadelphia Piers, Inc., 1 Dec. U.S. Mar. Comm'n 701(1938).

E. By 1940, the U.S. Maritime Commission, in the exercise of its rulemaking powers under the 1916 Act, had established that marine terminals were "other persons" subject to the Act. *See* Wharfage Charges & Practices at Boston, Mass, 1940 AMC 325, 2 Dec. U.S. Mar. Comm'n 245 (1940). This meant that marine terminals had to file their agreements with

the U.S. Maritime Commission for approval, which often resulted in lengthy delays, particularly where there was opposition.

F. In 1950, the regulatory programs of the U.S. Maritime Commission were transferred back to a Board within the Department of Congress until 1961, when President Kennedy and Congress created the F.MC. This event coincided with the explosion in the containerization revolution.

G. The Arab oil embargo of the 1970's, which marked a period of intense competition in the shipping industry for a dwindling supply of business, sparked a renewed interest by Congress in the mid-1970's in the regulation of the ocean shipping industry, including marine terminal operators. As a consequence of the re-examination of the 1916 Act by Congress during this period, the Shipping Act of 1984 was enacted to make it easier for U.S. flag liner operators to compete in the cutthroat world of international shipping. The 1984 Act was the first statute of its kind to include "marine terminal operators" by name.

H. In the exercise of its rulemaking powers under the 1984 Act, the FMC created definitions of "marine terminal operator" and "marine terminal facility". The 1984 Act created the concept of "service contracts" and "intermodal pricing", allowing for through carriage of cargo under a single bill of lading at rates other than tariff rates. The 1984 Act also did away with the marine terminal agreement approval process and replaced it with a "waiting period" before such agreements and changes to marine terminal tariffs could become effective.

I. In the early 1990's, the 1984 Act became the subject of further study by a high level advisory commission. U.S. liner operators were in decline and were no longer a target for FMC "protection" from foreign competition, while major U.S. exporters and importers exerted growing influence over ocean shipping rates.

J. In 1998, Congress enacted the Ocean Shipping Reform Act, or OSRA, to amend the Shipping Act of 1984. OSRA was signed into law by President Bill Clinton. It went into effect May 1, 1999. The primary objective of the new law was to provide the ocean shipping industry with further flexibility by encouraging confidential rate agreements and liner and marine terminal conferences to regulate their members' rules and practices. However, the trade-off for this further flexibility was that OSRA also strengthened the oversight role and authority of the FMC to address restrictive or discriminatory practices.

K. Today, the FMC sees its role as "regulating the nation's international ocean transportation for the benefit of exporters, importers, and the American consumer." www.fmc.gov/history This is a big change from its original mission and explains, at least in part, the forward role taken by the FMC in the modern era in regulating and deciding challenges to alleged anti-competitive conduct in the marine terminal industry.

II. HOW THE FMC REGULATES MARINE TERMINAL OPERATORS CURRENTLY

A. Rulemakings

1. Who is regulated? The FMC regulates both private marine terminal operators, as well as public and quasi-public port authorities that own and maintain the docks and other facilities used by ocean common carriers. Note that the FMC does not have authority over pure stevedoring operations or over marine terminal facilities that do not serve ocean common carriers.

2. Covered Agreements Subject to FMC Rules
   a. Agreements among two or more marine terminal operators or between marine terminal operator(s) and ocean common carrier(s) involving ocean transportation in the foreign commerce of the United States are required to be filed with the FMC pursuant to 46 U.S.C. §§ 40301-40302, IF the agreement authorizes the parties to

      1) Discuss, fix or regulate rates
      2) Regulate other conditions of se3rvice
      3) Engage in exclusive, preferential or cooperative working arrangements

   The FMC will conduct a preliminary review of the filed agreement to determine if it is in compliance with 46 U.S.C. Chapter 403 and will conduct ongoing monitoring of activities once the agreement becomes effective.

   b. Agreements exempted from mandatory filing (but optional filing is permitted in some cases)

      1) Pure maritime labor agreements 46 U.S.C. § 40301(d)
      2) Agreements related to transportation within or between foreign countries, 46 U.S.C. § 40302 (b)(1), or agreements among marine terminal operators that involve transportation solely and exclusively in interstate commerce. 46 CFR §535.202(e)
      3) Agreements among ocean common carriers to establish, operate or maintain a marine terminal in the United States 46 U.S.C. § 40302(b)(2)
      4) Non-substantive modifications of existing agreements. 46 CFR §535.302(a)-(b)
      5) Husbanding or agency agreements between an ocean carrier and marine terminal operator. 46 CFR §535.303-§535.304
      6) Agreements between wholly owned subsidiaries and their parents: 46 CFR §535.307.
      7) Marine terminal service contracts between an ocean carrier and marine terminal operator that apply to marine terminal services provided by that marine terminal to that carrier, but NOT any right by the carrier to operate the facility. 46 CFR §535.309. NOTE: This exemption only applies if the rates charged in the contract are NOT part of a Schedule (formerly known as a Tariff) filed by a marine terminal conference.

8) Marine terminal facilities agreements between marine terminal operators or between marine terminal operators and ocean common carriers that convey the right to operate, by lease or otherwise, a marine terminal in the foreign commerce of the United States; HOWEVER, any such agreements not voluntarily filed must be made available to anyone upon request to the contracting parties for a reasonable copying and mailing fee. 46 CFR §535.310.
9) Any other agreements for which an exemption is sought and obtained from the FMC under 46 CFR §535.301.

c. Minutes of meetings of all parties to a filed agreement must be filed with the FMC if the agreement allows parties to discuss or establish rates or charges. 46 CFR §535.704.

3. Schedules

a. A single marine terminal operator MAY make available to the public on the internet a Schedule (formerly called a "tariff") of its rates, regulations and practices. 46 CFR §525.2. A conference of marine terminal operators that discusses rates and charges MUST publish a Schedule. See 46 CFR §525.2 (c) and 46 CFR §535.201(b).
b. If a Schedule is published that contains limitation of liability terms, those Schedule terms shall be enforceable in court as an implied contract between the marine terminal operator and the third party receiving the services without proof of actual knowledge of the same, so long as there is no actual contract between those parties covering the same services. 46 CFR §525.2(a)(1)-(3).
c. Schedules do not have to (but may) cover certain cargo types: bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper and paper waste.

B. Proceedings

1. The Shipping Act contains several prohibitions for marine terminal operators. Under 46 U.S.C. § 41106, marine terminal operators may not

a. Agree with another marine terminal operator or with an ocean common carrier to boycott or unreasonably discriminate in the provision of terminal services to a common carrier or ocean tramp;
b. Give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or
c. Unreasonably refuse to deal or negotiate.

NOTE: That the key word here is "unreasonable." Parties can discriminate against or give preferences to another person as long as there is a legitimate business reason to do so and the action isn't driven by a deliberate intent to drive another person out of the market.

2. Persons who believe that they have been the subject of unreasonable discrimination or similar conduct at the hands of marine terminal operators can file a complaint with the FMC, which proceeds along a similar path as civil litigation, with discovery, motions practice, briefs and occasionally hearings and the presentation of evidence therein, under the FMC's own Rules of Procedure: 46 CFR Part 502. An administrative law judge reaches an "initial decision" in the case and the losing party has the right to appeal that decision to the full Commission by taking "exceptions" to it within 22 days after service of that decision. If no exceptions are filed to an initial decision, then that initial decision becomes the final decision of the full Commission within 30 days after the date of service of the initial decision. 46 CFR §502.227. Decisions of the FMC in its Proceedings are published on www.fmc.gov. The FMC has the authority to issue orders governing future conduct, as well as award "reparations", which are monetary damages for past injurious conduct. *See* 46 U.S.C. §41305. If reparations or a cease and desist order are awarded, the FMC also has the power to award reasonable attorneys fees to the successful party. 46 U.S.C. 41305(e); 46 CFR § 502.254.

   a. Appeals from an unfavorable decision of the FMC are made to the U.S. Courts of Appeal. 28 U.S.C. § 2343(3)(B).

   b. Civil claims that fall under the jurisdiction of the FMC MUST be filed first with the FMC (rather than in a civil court) under the federal pre-emption doctrine, *see* In Re Vehicle Carrier Services Antitrust Litigation, 2015 WL 5095134 (D.N.J Aug. 28, 2015), although parties frequently file their suit with the FMC together with a suit in federal court seeking a TRO/preliminary injunction pending the outcome of the FMC decision. *See* Marine Repair Services of Maryland, Inc. v. Ports America Chesapeake, LLC, 2011 WL 9363660 9D.Md. Dec. 19, 2011).

   c. However, this is not true of criminal claims, which may be filed by the U.S. Justice Department directly in federal court. *See* United States of America v. Wallenius Wilhelmsen Logistics AS, U.S. District Court for Maryland, Criminal No. GLR-16-0362 (Filed 7/13/16)(Alleging that WWL and un-named co-conspirators conspired to suppress and eliminate competition by allocating customers and routes, rigging bids and fixing prices for international cargo shipping services for ro-ro cargo, in violation of the Sherman Act, 15 USC §1.

3. Examples of recent FMC Decisions affecting marine terminal operators:

   a. Maher Terminals, LLC v. Ports Authority of New York and New Jersey, 2015 WL 9426189 (FMC Docket 08-03), December 18, 2014, remanded back to FMC for further explanation, Maher Terminals, LLC v. Federal Maritime Comm'n, 816 F.3d 888 (D.C.Cir. 2016) (Commission ruling that Port did not violate Shipping Act by offering more favorable terminal lease terms to APM/Maersk than to Maher Terminals given threat by APM/Maersk to leave the Port.)

b. T. Parker Host, Inc. v. Kinder Morgan Liquid Terminals, LLC, 2016 WL 4560105 (FMC Docket 16-14), Initial Decision, August 26, 2016 (Ship agent sued marine terminal for "black-listing" it and banning it from serving vessels calling at the terminal. Following filing of the complaint, the parties entered into a settlement agreement, which the FMC approved.)

c. Marine Repair Services of Maryland v. Ports America Chesapeake, 2013 WL 980672 (FMC Docket 11-11) Final Decision, (Jan 10, 2013)(Marine terminal that had entered into long term public-private partnership with the state giving terminal the exclusive right to perform all terminal services at state-owned container terminal did not violate Shipping Act by refusing to allow chassis/container repair company to come onto leased terminal premises to perform services there; marine terminal preferring itself and its own subcontractor over repair company was not "unreasonable" under the circumstances.)

C. Investigations and Industry Studies: In addition to hearing and deciding complaints filed by others, the FMC has the authority to launch its own investigations into practices that it feels may violate the Shipping Acts, *see* City of Los Angeles, et al—Possible Violations of Section 10 of Shipping Act of 1984, 2009 WL 2579663 (Docket 08-05)(Initiating investigation into whether the Port of Los Angeles and other ports on the San Pedro Bay violated Section 10 of the Shipping Act when they jointly implemented a Clean Truck Program for the ports), and to conduct industry-wide studies affecting marine terminal operators and others it regulates. *See* Supply Chain Innovation Project for Los Angeles/Long Beach (2016) at www.fmc.gov.

III. RECENT FMC PROPOSALS FOR FURTHER REGULATION OF THE MARINE TERMINAL INDUSTRY

A. Docket 16-04: Proposed Rulemaking on Ocean Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984 (46 CFR Parts 501 and 535)

1. Advanced Notice of Proposed Rulemaking of February 23, 2016 (comments were due April 4, 2016) (found at www.fmc.gov): Clear from the Advance Notice that the proposed changes, below, to the FMC's marine terminal operator regulations were being driven, in great part, by actions taken and developments occurring at West Coast Ports.

   a. Marine Terminal Services Agreements (Service Contracts): Contained proposal to amend 46 CFR § 535.309 to require individual marine terminal operators that belong to a conference of terminal operators to file their (now confidential) marine terminal services agreements with ocean carriers with the FMC as a "Monitoring Report" that would be retained by the FMC as confidential under 46 CFR 535.701(i). This proposal was based on a finding that, within the past decade, marine terminal operators at major ports have become more active in cooperating through agreements to implement new programs addressing security and safety measures, environmental standards, and port operations and congestion, which

could affect competition, services and costs in the terminal services market for such items as free-time, detention and demurrage.

b. Changes to Already Effective Stevedoring and Marine Terminal Agreements Contained proposal to replace current filing exemption in 46 CFR 535.408(b)(3) for certain changes to an effective marine terminal agreement that affect stevedoring, terminal and related services, such as the operation of joint tonnage centers or other joint container marshaling facilities, with a more specific list of exempt activities. The FMC stated that this new rule was needed to clarify the extent to which marine terminal parties to filed agreements could engage in further agreements without filing them with the FMC.

c. Formatting Changes for Modifications to Filed Agreements: Contained proposal to impose formatting requirements on filed modifications to marine terminal agreements—currently, marine terminal agreements are exempt from these formatting requirements. (Affecting 46 CFR §535.406) This change would, in essence, require marine terminal operators to file modifications to their agreements showing "red-lining" type changes and with modified pages shown with an alpha subscript, such as p. 7a, for example.

2. Many parties, both ocean carriers and marine terminal operators, including the National Association of Waterfront Employers ("NAWE"), submitted comments to the Advanced Notice of Proposed Rulemaking to indicate displeasure with many of the proposed changes as too burdensome on the regulated parties and not providing the FMC with meaningful additional information.

3. Notice of Proposed Rulemaking of August 15, 2016 on Ocean Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984 (46 CFR Parts 501 and 535) (81 FR 53986) (Comments due October 17, 2016)

a. Marine Terminal Services Agreements (Service Contracts): The FMC points out that these service contracts are the type of agreement required by statute to be filed by the FMC but that they were exempted from filing requirements by the FMC in 1992, and the FMC can amend its exemption or revoke it at any time. Terminal services contracts between individual terminal operators and ocean carriers directly reveal the extent to which marine terminal conference agreements have been implemented in the market, the FMC argues. The service contracts show the extent to which terminal operators are competing on price and terms that would help the FMC to understand whether there is a lack of competition in ports and the extent to which any further FMC action may be necessary. Although minutes of meetings of marine terminal discussion groups are filed, the FMC feels it needs actual market data to determine the competitive impact of service contracts between marine terminals and ocean carriers. However, the FMC also concluded that it has the power under 46 CFR §535.301 to order particular marine terminals to produce their service contracts, and as long

as 535.301(d) is strengthened to require such production within 15 days of a written request by the FMC, it is willing to forgo instituting standard Monitoring Reports on all terminal operators—for now. The FMC seeks further comment on this compromise proposal.

b. Changes to Already Effective Stevedoring and Marine Terminal Agreements: The FMC responds by pointing out that 46 CFR § 535.408(b), by its history, was intended to apply only to the implementation of ocean carrier agreements—not to marine terminal agreements. However, in light of the comments by marine terminal operators to this proposed change, the FMC is now troubled that marine terminal operators may seize upon this broad exemption to engage in activities that raise competitive concerns. The FMC is proposing to make clear that this exemption in 46 CFR § 535.408(b) does NOT apply to marine terminal agreements. However, the FMC is seeking further comment on whether there are any types of marine terminal agreements in furtherance of existing agreements that would have little or no competitive effect and therefore might be proper for an exemption from filing—such as routine or operational matters that require day to day flexibility.

c. Formatting Changes for Modifications to Filed Agreements: The FMC notes that only carriers commented on these technical proposals, so it is likely that this formatting requirement for marine terminal agreement modifications will be adopted in a final rule.

B. Docket 16-09: Direct Final Rule (Effective June 13, 2016) Regarding Optional Method of Filing Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984. (81 F.R. 38109)

1. The FMC has created a new electronic agreement filing system and plans to make this technology available on an optional basis to file agreements and supporting documents, although parties may still continue to file in paper format. The system would be accessed through the FMC's website at www.fmc.gov under "Public FMC Databases/Agreement Notices and Library."

2. Prospective filers would register for a login and password.

3. The pubic would have the ability to view all agreements online in the FMC's electronic "Library"; however, the public would not be able to see the filer's letter of transmittal and Information Form, if any.

4. The FMC is removing the former requirement for original signatures on all agreements and will begin accepting scanned electronic copies of the parties' original signatures on agreements and transmittal letters.