2013 AAPA Port Administration and Legal Issues Seminar

Surely, There's a Better Way:

A Critique of Current Federal Regulation of Marine Terminal Operators

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Federal Regulation of Ports

- Shipping Act of 1984, as amended
- Administered by Federal Maritime Commission
- Address competitive practices and economic concentration
- Applies late 19th railroad principles to 21st century port realities
- Not too soon for a radical overhaul

Federal Port Regulation in a Nutshell

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- Marine Terminal Operator ("MTO") derivatively defined as ". . . in connection with a common carrier"
- Two major implications:
  - Immunity from antitrust laws – agreement filing; must file agreements with other ports/common carriers
  - Prohibitions on "unreasonable" commercial behavior

Federal Port Regulation in a Nutshell

- Specific "reasonableness" prohibitions:
  - Preference or advantage/prejudice or disadvantage (any person)
  - Failure to observe reasonable practices/regulations regarding receipt, handling, delivery, storage of cargo
- Other prohibitions include:
  - Agreements to boycott vessel operators (whether liner or tramp)
  - Refusal to negotiate [full stop] (presumably with anyone – statute is not specific)

Additional Prohibitions
(Apply to other actors, not bound by reasonableness factors)

- Disclosing sensitive commercial information
- Operating contrary to agreement or pursuant to unfiled agreement

Agreements Must be Filed if . . .

- Agreement addresses joint rate setting and/or
- Agreement involves "exclusive, preferential or cooperative working arrangements"
  - Breadth of "cooperative working arrangements" creates difficulties
  - Has become a catch-all term that sweeps in virtually any joint port activity

Other Significant Provisions

- Complaints (3-year limitation period)
  - Anyone may file
  - FMC may investigate on own motion
- Reparations, up to double damages, for operating contrary to agreement
- Civil penalties ($5,000 to $25,000 per violation)

Other Significant Provisions

- Attorney fees
  - To prevailing plaintiff when reparations are sought
  - Defendant can recover only in connection with injunctive actions brought by private parties

What's Wrong With This System of Regulation?

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- Shipping Act of 1984 is essentially a liner operator-driven piece of legislation, addressing issues facing liner trade in late 1970's and early 1980's
- Ports are dealt with as appendages in the Act
  - Little thought was given to whether ports can/should be held to same commercial norms as vessel operators
  - Generally speaking, the fit is awkward

What's Wrong With This System of Regulation?

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- Liner industry, both in 1980's and currently, is far more homogeneous than is port/terminal operator community
- MTO definition does not distinguish between port authorities, whether landlord or operating, and commercial terminal businesses

What's Wrong With This System of Regulation?

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- Antitrust immunity is the major structural element of Shipping Act of 1984 agreement
  - Filing, rate publication and preference/prejudice provisions flow from grant of antitrust immunity to liner operators
- Do ports/terminals really need antitrust immunity? If so, what are appropriate controls?
  - 1984 rationale was that port/terminal antitrust immunity was necessary to offset liner carriers' antitrust immunity

What's Wrong With This System of Regulation?

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- Definitions are vague and imprecise
- Although "reasonableness" defenses are often ultimately effective, they are inherently fact based, case-by-case determinations that vary from terminal to terminal and that are not easily dealt with by summary motions
- The potential for long, expensive administrative litigation (followed by court appeals) is quite high

What's Wrong With This System of Regulation?

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- Emphasis on "like treatment" of terminal users is an artifact of common carrier obligations for antitrust-exempt vessel operators
  - It is unrealistic to hold modern ports/terminals to a standard in which every user is treated identically or even similarly
- FMC case law on "exclusivity" creates serious risks and uncertainties for port authorities attempting to plan for efficient provision of port/terminal services
  - Port assets/resources not fungible

What's Wrong With This System of Regulation?

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- FMC agreement standards derive from antitrust/merger standards
  - When applied to generic "cooperative working arrangements" between ports, they can stifle creative solutions to pressing environmental and infrastructure issues
- Plaintiff attorney fee provision was intended to encourage a kind of private AG function to monitor ocean carrier rate-setting conferences
  - It is irrational in a port context and has damaging side effect of discouraging settlements

Recent FMC MTO Agreement Activity

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2013

201220 Exclusive Stevedoring Arrangement

2012

201122 Cooperative Working Arrangement

201162 Assessment Agreement

201112 Lease/Operating Agreement

201218 Discussion Agreement

Recent FMC MTO Agreement Activity

201216	Truck Tracking
201217	Data Services
200163	Marine Terminal Conference*
201213	Marine Terminal Services
201214	Marine Terminal Services
201179	Lease/Operating Agreement
200860	Lease/Operating Agreement

FMC Action on Agreements

- "If . . . the Commission determines that the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation costs, the Commission, after notice to the person filing the agreement, may bring a civil action in the United States District Court for the District of Columbia to enjoin the operation of the agreement."

Possible Statutory Changes

- Redefine MTO
  - Make clear FMC jurisdiction only attaches to direct dealings with ocean common carriers or
  - Delete “common carrier” link
- Eliminate port/terminal antitrust immunity
  - Permit issue discussion agreements
  - Any joint rate-setting left to standard antitrust scrutiny
  - If agreement filing maintained for informational purposes only, consider publishing only requirement

Possible Statutory Changes

- Eliminate reparations/private complaint provisions in favor of FMC-initiated investigations and civil penalties
- Retain prohibition on agreements to boycott or unreasonably discriminate, but delete preference-advantage/prejudice-disadvantage provisions (46 U.S.C.§ 41106)

Possible Statutory Changes

- Delete reference to “cooperative working arrangements” in Chapter 403 of Shipping Act and corresponding regulations (46 U.S.C. § 40301(b)), (46 C.F.R. Part 535)
- Amend attorney fees provision (46 U.S.C. § 41305(b)) to permit prevailing party (whether plaintiff or defendant) to recover attorney fees

Thank you!

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