

**BEFORE THE
FEDERAL MARITIME COMMISSION**

**OCEAN COMMON CARRIER AND
MARINE TERMINAL OPERATOR
AGREEMENTS SUBJECT TO
THE SHIPPING ACT OF 1984**

**DOCKET NO.
16-04**

COMMENTS OF THE NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS

The National Association of Waterfront Employers and its members listed in Appendix A hereto (together, hereinafter “NAWE”), submit their comments in response to the Federal Maritime Commission’s Advance Notice of Proposed Rulemaking in the above-captioned proceeding, 81 *Fed. Reg.* 10188 (February 29, 2016) (the “ANPRM”).

I.

Interest of NAWE

Many of the members of NAWE are marine terminal operators. As such, they will be affected directly and substantially by some of the proposals contained in the ANPRM. These comments are limited to certain portions of the ANPRM of relevance to marine terminal operators (“MTOs”).

II.

The FMC Should Not Require Submission of MTSAs

NAWE is submitting these comments primarily for the purpose of opposing the proposal that MTOs which belong to a conference or discussion agreement be required to submit their marine terminal services agreements (“MTSAs”) to the FMC.¹ As explained further below, NAWE believes this requirement would serve no legitimate regulatory purpose and would be unduly burdensome.

As an initial matter, it is unclear to NAWE whether the proposal is intended to assist the Commission in monitoring marine terminal conferences and discussion agreements through an analysis of MTSAs, to monitor the market for the provision of marine terminal services, or both. However, regardless of the purpose, the proposal is ill-suited to the objective.

The proposal appears to be based on an assumption, which is at best supported by conclusory statements, that there is some link between marine terminal conferences and/or discussion agreements and MTSAs. NAWE does not believe this to be the case. While marine terminal conferences and/or discussion agreements may agree upon certain commercial terms (such as wharfage or free time and demurrage) or operational programs (such as late gate or clean truck programs), they are not involved in the negotiation of MTSAs between individual MTOs and their carrier customers.

Individual MTOs negotiate MTSAs with their carrier customers on an individual and confidential basis. In the vast majority of cases, those MTSAs do not contain matter agreed

¹ NAWE assumes that, if adopted, the requirement to submit “all” MTSAs would apply only to MTSAs within the geographic scope of the marine terminal conference or discussion agreement to which the MTO in question belongs. If the FMC proceeds with this proposal, it should clarify this point.

upon within a marine terminal conference, and are exempt from filing. The fact that the FMC has exempted from filing MTSAs which do not contain terms agreed upon within a marine conference is an acknowledgement that absent inclusion of terms agreed upon within a conference, marine terminal conferences and discussion agreements have little or no impact on the terms and conditions of MTSAs.

When an MTSA contains matter agreed upon within a marine terminal conference, that MTSA is required to be filed with the FMC. See, 46 C.F.R. §535.309(a) and (b). However, as noted above, very few if any MTSAs are on file with the FMC. Thus, the empirical evidence demonstrates that marine terminal conferences and discussion agreements do not impact the terms of MTSAs. As a result, there is no link between marine terminal conferences/discussion agreements on the one hand and MTSAs on the other hand. In the absence of such a link, the submission of MTSAs would not provide the Commission with any meaningful information about marine terminal conferences/discussion agreements or the impact of such agreements on the terms of MTSAs.²

To the extent the Commission wishes to monitor marine terminal conferences and discussion agreements, it already has more than adequate means of doing so. Such agreements and amendments thereto are filed with the FMC and are subject to the normal regulatory review process. Such agreements are also required to file minutes of their meeting with the FMC, and may be subject to monitoring report requirements imposed by the Commission. Requiring MTO members of marine terminal conferences and discussion

² The Commission is proposing to reverse its earlier finding that MTSAs should be exempt from filing except when they contain matter agreed upon in a marine terminal conference and replace it with a finding that MTSAs must be filed whenever the MTO party to the MTSA is a member of a marine terminal conference or discussion agreement, even when the MTSA contains no terms agreed upon in the conference or discussion agreement. The ANPRM contains no legitimate justification for such a radical and sweeping change to prior findings and existing regulations.

agreements also to submit their MTSA's is not going to tell the FMC anything about the conferences and discussion agreements beyond what it already knows.

To the extent the Commission wishes to monitor the terms and conditions of MTSA's, it also has a means of doing so – it can require production of those agreements under 46 C.F.R. §535.301(d). The fact that the Commission may have had some difficulty in obtaining certain agreements on one occasion (81 *Fed. Reg.* at 10193) does not warrant a drastic change to the regulations that would require submission of all manner of MTSA's, particularly when there is no link between marine terminal conferences/discussion agreements and MTSA's.

NAWE also questions whether the MTSA's which would be filed with the Commission under its proposal would serve any useful regulatory purpose. As noted above, MTSA's are negotiated between individual MTO's and their carrier customers. Each marine terminal is unique in its physical configuration and characteristics, its berthing and operating capabilities, its landside connections, its operating procedures, and the needs of its carrier customers. Individual MTSA's take all of these differences into considerations. Given the large number of different operational and commercial factors that determine the terms of each MTSA, NAWE believes the FMC is unlikely to be able to draw any meaningful conclusions about the overall marine terminal services market at a particular port based on a comparison of MTSA's. Even if it is possible to do so, any conclusions reached would shed no light on marine terminal conferences/discussion agreements.

In addition to the lack of any legitimate regulatory value, the Commission's proposal would result in an inordinate burden on the marine terminal industry. MTSA's are commercial and operational documents that are regularly amended or adjusted to take into account operating conditions, equipment variations, competitive factors, labor issues, the requirements of carriers and cargo interests, environmental laws, port requirements, inland transport issues,

and numerous other factors. If MTOs are required to make a submission to the FMC every time there is a permanent or temporary adjustment to the terms of a MTSA, the burden on the industry and the Commission would be considerable. Such burden would certainly outweigh any benefit to the Commission of such filings. As the Commission is aware, pursuant to the recent FAST Act, 49 U.S.C. §6314, the U.S. Department of Transportation's Bureau of Transportation Statistics is establishing a Port Performance Freight Statistics Working Group to make recommendations on reporting of port performance statistics by December 4, 2016. 81 FR 9078 (February 23, 2016). Additional substantial reporting requirements will likely be imposed on MTOs from this process. NAWA cautions against the possibility of the imposition of simultaneous overlapping regulatory burdens on MTOs at a time when all parties should be focused on the operational challenges of supply chain innovation, congestion from larger vessels, SOLAS, ocean carrier consolidation, and the other "game changing" developments in the container shipping market identified by Chairman Cordero in his recent testimony to Congress. See, <http://www.fmc.gov/NR16-05/>

The proposed requirement could also have a chilling effect on the operation of marine terminal conferences and discussion agreements. MTOs may be reluctant to join such agreements if membership means that they must provide their MTSA's to the FMC. However, marine terminal conferences and discussion agreements are lawful agreements authorized and permitted by the Shipping Act. Such agreements have played a critical role in implementing programs beneficial to the environment (such as a clean truck programs) and can also play a central role in industry efforts to address port congestion and its causes. The Commission should not hinder the operation of such agreements and the benefits they provide by creating a disincentive for MTOs to join them.

NAWE and its members are also concerned about preserving the confidentiality of MTSAAs. Such agreements contain extremely sensitive and competitively significant information (e.g., rates, volume commitments, and other terms). If these terms were to become available to non-parties (e.g., through subpoena, FOIA request, Congressional inquiry or otherwise), the parties to the disclosed agreement(s) would suffer serious commercial harm, as would any marine terminal operator that was forced to adjust the terms it offers to its customers as a result of the disclosure. If the FMCs database were hacked, the entire industry could be disrupted.

The Commission should not adopt a requirement that MTOs submit MTSAAs to the Commission.

III.

The FMC Should Not Revise 46 C.F.R. §535.408(b)

NAWE opposes the proposal to replace the existing filing exemption in section 535.408(b)(3) of the Commission's regulations (which permits further agreements with respect to stevedoring, terminal and related services to be reached and implemented pursuant to existing authority without a further agreement filing) with a more detailed list of exempt activities.

NAWE questions the need for this proposal, as it is not aware of problems with respect to the interpretation and application of existing 46 C.F.R. §408(b)(3). Any concerns the FMC may have with respect to this issue appear to be speculative and do not warrant an intrusive and burdensome expansion of its regulations.

Aside from its questions about the need for this revision, NAWE is concerned that the proposal, if adopted, would create more problems than it would solve. If the existing exemption is replaced by a list, then any service omitted from the list would require a further filing, even if

the omitted service was a routine, operational matter with little or no competitive impact. It would be an extremely difficult task to make a comprehensive list of all services that would be exempt from filing, and any omission would require the filing of an amendment to an agreement, and a 45-day waiting period, before the parties could proceed.

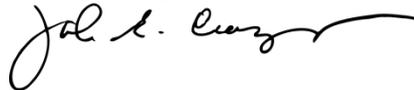
To the extent any services are omitted from the list, the burden on the parties of filing amendments, and the burden on the Commission and its staff of reviewing such amendments, would be increased and could be significant. Even if an appropriate and exhaustive list of services could be developed now, elements of that list could very well be rendered obsolete as future developments (e.g., technology, labor practices, work rules, terminal and transportation infrastructure, environmental rules) impact the provision of terminal and stevedoring services. Rather than risk the problems that would result from replacing the current exemption with a list of services, the Commission should retain the existing exemption.

Conclusion

For the reasons set forth above, the Commission should not require submission of MTSAAs or revise Section 535.408(b)(3) of its regulations.

Respectfully submitted,

NATIONAL ASSOCIATION OF WATERFRONT
EMPLOYERS



By: John E. Crowley, Jr.
Executive Director
1200 19th Street, NW, 3rd Floor
Washington, D.C. 20036
(202) 587-4800

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Appendix A – Members of NAWE

APM Terminals North America, Inc.
Ceres Terminals
Cooper/T. Smith Stevedoring
Federal Marine Terminals
Global Container Terminals Inc.
International Shipping Agency
Lambert's Point Docks
Long Beach Container Terminal
Luis A. Ayala Colón Sucrs.
Maher Terminals
Pacific Maritime Association
Ports America Group
Rogers Terminal & Shipping
Shippers Stevedoring Company
SSA Marine
United States Maritime Alliance, Ltd.
Virginia International Terminals, LLC
Wallenius Wilhelmsen Logistics

ASSOCIATE MEMBER: Signal Administration