

**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 WEST COAST MTO AGREEMENT**

The West Coast MTO Agreement and its marine terminal operator members (“WCMTOA”) hereby submit their comments in response to the Federal Maritime Commission’s Notice of Proposed Rulemaking in the above-captioned proceeding, 81 *Fed. Reg.* 53986 (August 15, 2016) (the “NPRM”).

While WCMTOA supports the NPRM’s proposed treatment of marine terminal services agreements, it believes that certain aspects of the proposed language of 46 C.F.R. §535.402(b) should be clarified.

**I.**

**Interest of WCMTOA**

As an agreement among marine terminal operators, WCMTOA will be directly and substantially affected by the proposals contained in the NPRM. In addition, other agreements to which its marine terminal operator members may be party will likewise be affected by the proposals contained in the NPRM.

**II.**

**Submission of Marine Terminal Services Agreements**

WCMTOA supports the Commission's decision not to require submission of marine terminal services agreements by marine terminal operators that belong to a conference or discussion agreement. For the reasons set forth in their comments on the ANPRM<sup>1</sup>, WCMTOA supports the Commission's proposal to continue the requirement that such agreements be submitted upon request, with the addition of a 15-day deadline for complying with the request.

**III.**

**Proposed 46 C.F.R. §535.402(b) Requires Clarification**

WCMTOA believes that the language of the proposed regulation requires clarification in order to avoid impractical and unduly burdensome results.

The NPRM proposes adding a new paragraph (b) to 46 C.F.R. §535.402, which would require that any understanding reached pursuant to existing agreement authority be "fully set forth" unless that understanding relates to a subject listed in §535.408. WCMTOA acknowledges the importance of FMC agreements setting forth the authority in reasonable detail so that it is clear to the Commission and the public what activities will be carried on under the agreement and what is being immunized from antitrust exposure. WCMTOA is committed to ensure that any of its own future filings are sufficiently detailed to meet this standard.

---

<sup>1</sup> Advance Notice of Proposed Rulemaking, 81 *Fed. Reg.* 10188 (February 29, 2016).

However, in light of the revisions and clarifications the Commission is proposing with respect to 46 C.F.R. §535.408(b), the proposed “fully set forth” requirement could be interpreted to require that marine terminal operators must file even the most minute details of any understandings reached pursuant to authority contained in their agreements, even when that authority lays out the activities contemplated in substantial detail. It could further be interpreted to require parties to amend the filed agreement each time one of those details is revised. Such a requirement would be impractical and unduly burdensome.

Before turning to the reasons why such an interpretation would be unduly burdensome, some context about the situation in which marine terminal operators currently find themselves may be helpful. Historically, marine terminal operators have not sought to make extensive use of the ability to work cooperatively afforded them by the Shipping Act. However, in recent years, this has begun to change. Marine terminal operators are required by carriers to handle larger vessels and larger volumes of cargo. They are being asked by labor to pay higher wages and to enhanced benefits. They are being encouraged by local governments and community groups to reduce the environmental impact of their operations and to reduce traffic on the local roads. They are being pressured by shippers and truckers to reduce turn times and improve efficiency at their terminal facilities.

All of these pressures have created both an incentive and a need for marine terminal operators to work cooperatively. Many of the issues listed above cannot be addressed by a single marine terminal operator working alone, or oftentimes, even by a small number of MTOs working together. The cooperation of most, if not all, marine

terminal operators in a particular port or region is often required to bring about the results being demanded of this segment of the industry.

Bearing in mind the foregoing pressures, the fact that cooperation among marine terminals is a relatively recent phenomenon, and the nature of marine terminal operations, it is necessary for marine terminal operators to have some operational flexibility in implementing their filed agreements. If the phrase "fully set forth" were to be read literally as described above, it would stifle the increased efficiency that can otherwise result from cooperation among marine terminal operators. In the Commission's application of the "fully set forth" requirement, there needs to be a reasonable balance between the requirement for agreement parties to describe in adequate detail the authority they intend to implement, on the one hand, and the need for parties to be able to implement authority that is already fully set forth in the agreement, on the other. This is illustrated by the following examples.

Suppose there is a marine terminal operator agreement among marine terminal operators at a particular port which authorizes the parties to:

discuss, agree upon, establish, revise, maintain, cancel and enforce rules, regulations, procedures, practices and terms and conditions concerning appointment systems to be used at the terminal facilities of some or all of the parties, such as the time periods in which appointment systems would apply, systems and methods to be used individually or jointly by the members for the booking of appointments at their terminals, negotiating and contracting with a vendor or vendors for individual or common systems for making, revising and/or canceling appointments, time segments for appointments, and consequences for motor carriers or others for failing to keep appointments.

Would a further amendment be required before the parties to that agreement could agree on and implement the necessary elements of a port-wide appointment system, such as agreeing on the duration of the appointment window in which the trucker

could arrive, the consequences for failing to keep an appointment for the trucker and/or terminal, and the methods for making appointments (such as a common portal)? If so, what would have to be filed? Would the agreement need to specify each element of the program on which the parties could agree? If so, would it also need to specify the agreement reached with respect to each element, e.g., that the length of an appointment window is two hours? If, based on feedback from stakeholders, as well as experience and subsequent developments, the parties later determine that the two-hour period should be shortened or extended, must they file another amendment and wait 45 days before making the adjustment? What if the parties establish a \$50 charge for failure to keep an appointment and subsequently decide to reduce that charge to \$25 at the request of motor carriers? Would an amendment, subject to a 45-day waiting period, be required?

Consider also the case of two adjacent marine terminals that decide to jointly purchase some environmentally friendly cargo handling equipment (e.g., five top picks). This environmentally friendly equipment (electric or natural gas powered) is more expensive than traditional equipment. By purchasing the equipment jointly and sharing it after it is purchased, the terminals can afford the equipment necessary to reduce emissions from terminal operations while keeping pace with cargo demand. This would not be the case if each were required to act individually. The marine terminal operators file an agreement with the FMC which authorizes them to:

jointly solicit bids, agree on the terms for such bids, contract for, and purchase top picks or other cargo handling equipment and thereafter to share use of the equipment on such terms and conditions as they may agree from time to time.

WCMTOA assumes language of this type would permit the marine terminal operators to actually purchase the equipment without a further filing. If not, what would have to be filed? The precise equipment to be purchased? The seller? The price?

WCMTOA also assumes this language would be sufficient to permit the terminal operators to share the equipment. If not, what would have to be filed? An amendment saying Terminal A gets two top picks, Terminal B gets two top picks, and they share the use of a 5th, with Terminal A getting it Monday through Wednesday and Terminal B getting it Thursday through Saturday? If that has to be filed, what if Terminal A is congested and Terminal B has a customer who cancels a sailing, and Terminal A needs the 5th top pick on Thursday and Friday? If an amendment were required, the parties would not have the flexibility to utilize the clear agreement authority to adapt to conditions and serve their customers and terminal users most effectively. A 45 day filing of such details would be unduly burdensome on the parties and would seriously prejudice shippers, truckers, and other stakeholders who would have to wait 45 days for service improvements that were responsive to their input.

WCMTOA acknowledges that the FMC has regulatory responsibilities to carry out, and that in order to do so the agency must have an understanding of how marine terminal operators are using the authority contained in their filed agreements.

However, both the FMC and the courts have long recognized that interpreting the law in a manner that requires the filing of "every" agreement leads to harsh results.

*Interpool Ltd., et al. v. Federal Maritime Commission*, 663 F.2d 142, 147-48 (D.C. Cir. 1980). As long ago as 1927, the Commission's predecessor held that it would interpret the requirement to file "every" agreement in a manner that would not require the filing

of routine operations relating to current rate changes and other day-to-day transactions. *Id.* at 148. This is the approach that led to the adoption of the exemption presently found in 46 C.F.R. §535.408(b)(1).

In light of the foregoing considerations and the agency's experience with carrier agreements, the Commission should strike a reasonable balance between a requirement to "fully set forth" the terms of an agreement and an appropriate level of operational flexibility. This could be done by including a statement in the supplemental information which accompanies any final rule in this proceeding that the Commission interprets the phrase "fully set forth" in a manner which does not require a further agreement filing with respect to each specific instance in which existing agreement authority is exercised. In other words, an agreement which authorizes the joint acquisition of widgets would not need to be amended to include the details of the acquisition prior to each occasion on which the parties jointly acquire widgets. Similarly, an agreement which authorizes marine terminal operators to agree on free time and demurrage charges would not need to reflect the actual free time and demurrage charges agreed upon, and would not need to be amended each time the amount of free time or the amount of the demurrage charge is revised.

Absent a statement along the lines of the foregoing, the phrase "fully set forth" could be interpreted in a manner that would require marine terminal operators that are cooperating with respect to operational matters to continually file a large number of amendments in order to address the needs of their stakeholders. Such a clarification would avoid this burdensome result without compromising the

requirement that agreements set forth their authority in sufficient detail to allow the Commission to carry out its regulatory functions.

**IV.**

**Requests for Additional Information/Public Information**

For the reasons set forth in their comments on the ANPRM, WCMTOA supports the Commission's proposed revisions to 46 C.F.R. §§501.24 and 535.603.

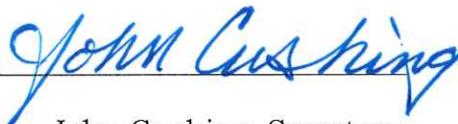
**V.**

**Conclusion**

For the reasons set forth above, WCMTOA urges the Commission to adopt final regulations which reflect the revisions described in these comments.

Respectfully submitted,

WEST COAST MTO AGREEMENT

By:   
John Cushing, Secretary

October 17, 2016