

cc: OS
OGC
ALJ(z)
fob
BoE

RECEIVED ORIGINAL

BEFORE THE FEDERAL MARITIME COMMISSION
2009 JUL 29 PM 4:14
OFFICE OF THE SECRETARY
FEDERAL MARITIME COMMISSION

DOCKET NO. 08-05

CITY OF LOS ANGELES, CALIFORNIA, HARBOR DEPARTMENT OF THE CITY OF LOS ANGELES, BOARD OF HARBOR COMMISSIONERS OF THE CITY OF LOS ANGELES, CITY OF LONG BEACH, CALIFORNIA, HARBOR DEPARTMENT OF THE CITY OF LONG BEACH, AND THE BOARD OF HARBOR COMMISSIONERS OF THE CITY OF LONG BEACH ---POSSIBLE VIOLATIONS OF SECTIONS 10(B)(10), 10(D)(1) AND 10(D)(4) OF THE SHIPPING ACT OF 1984

MOTION OF THE BUREAU OF ENFORCEMENT FOR DISMISSAL OF PROCEEDING INCLUDING REQUEST FOR CERTIFICATION TO THE COMMISSION

The Bureau of Enforcement ("BOE") files this motion to dismiss the above proceeding. As more fully described herein, this request is based on substantial changes in the factual circumstances surrounding the matters under investigation since institution of this proceeding. In support thereof, BOE respectfully states as follows.

I. REQUEST FOR CERTIFICATION TO THE COMMISSION

BOE hereby requests that this motion be certified to the Commission for disposition. This proceeding was initiated on the Commission's own motion. An evidentiary record has yet to be developed and the underlying basis for commencement of the investigation as provided in the Order of Investigation is within the particular knowledge of the Commission. BOE submits that the

Commission is in the best position to consider and reflect upon the changed circumstances described herein in acting upon this request to discontinue the investigation.¹

II. RELEVANT BACKGROUND

On September 24, 2008, the Commission issued an Order of Investigation and Hearing (“Order of Investigation”) instituting this proceeding to determine whether specific elements of the Clean Truck Programs (“CTPs”) adopted by the Ports of Los Angeles (“POLA”) and Long Beach (“POLB”) violate Sections 10(b)(10), 10(d)(1), and 10(d)(4) of the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998, 46 U.S.C. 40101, et seq. (“Shipping Act”). The CTPs were adopted to address air pollution caused by short haul truckers that transport containers to and from the ports, i.e., the harbor drayage system. Central to each port’s CTP is a system to control truck access to the terminals through issuance of concessions to licensed motor carriers (“LMCs”). The CTPs, scheduled to be effective October 1, 2008, imposed various requirements on LMCs desiring to continue operating at the ports. Some requirements are common to both ports, while others differ in material respects.

The Commission’s September 24 Order instituted this proceeding to determine whether the following provisions in each port’s CTP violated Section 10 of the Shipping Act: (1) POLA’s prohibition against the use of owner-operator truck drivers in drayage service at the port and mandate that concessionaires use only company employee drivers (“employee mandate”); (2) POLA’s offer of payments to certain selected motor carriers as an incentive to provide drayage service at the port but not to other motor carriers (“incentive program”); (3) POLA’s requirement that drayage carriers have port-approved arrangements for off-street parking as a condition of access to port terminals (“off-street parking”); (4) the exemption by both ports from payment of their Clean Truck Fee (“CTF”) if the cargo is transported in 2007 compliant trucks, i.e, clean trucks,

¹ If the request for certification is denied, this motion may nevertheless be referred to the Commission for disposition pursuant to Rule 73(a) of the Commission’s Rules of Practice and Procedure. 46 C.F.R. §502.73(a).

that are privately financed, while imposing the fee on beneficial cargo owners whose cargo moves in publicly financed clean trucks and trucks manufactured between 1989 and 2006 (“CTF exemption”);² and (5) the failure of both ports to establish standards or criteria by which their respective applications for concessions would be considered for an award or denial of a concession (“application standards”). See Order of Investigation, pp. 7-8.

The Cities of Los Angeles and Long Beach, California and their respective Harbor Departments and Boards of Harbor Commissioners were named as Respondents. BOE was named as a party. On October 24, the proceeding was assigned to the Administrative Law Judge (“ALJ”) for issuance of an Initial Decision. In a Memorandum and Order served January 22, 2009, the ALJ allowed the intervention of the Intermodal Motor Carriers Conference of the American Trucking Associations, Inc., the Owner Operator Independent Drivers Association, Inc., the Natural Resources Defense Council, Sierra Club, and Coalition for Clean Air (jointly), and the National Association of Waterfront Employers.³ BOE and Respondents are presently engaged in discovery pursuant to a joint procedural schedule submitted by the parties and adopted and issued by the ALJ on May 4, 2009.

III. THE CHANGES IN CIRCUMSTANCES

Since the initiation of this proceeding, several developments have occurred outside of the Commission’s control that significantly affect the matters under investigation and the basis for this proceeding. To put this request for dismissal in perspective, we explain these changes in some detail.

A. Circumstances At Time of Commencement of This Proceeding

The Commission explained in the Order of Investigation that it was concerned whether

² The terms “clean trucks” or “2007 compliant trucks” mean trucks equipped with engines that meet or exceed U.S. E.P.A. 2007 standards.

³ The Owner Operator Independent Drivers Association has since withdrawn its participation. See Order served May 22, 2009.

certain provisions of the ports' CTPs may violate the Shipping Act. Some of the same provisions of concern to the Commission, including the employee mandate, off-street parking requirement, and concession requirement, were subject to a pending challenge in federal court by the trucking industry under a different federal statute. In American Trucking Associations, Inc. v. City of Los Angeles, et al., No. 08-04920, C.D. Calif. ("ATA"), the trucking industry sought to enjoin the CTPs of both ports based on the federal preemption provisions of the Federal Aviation Administration Authorization Act of 1994, codified in the Interstate Commerce Act, 49 U.S.C. §14501(c)(1). However, in a ruling issued on September 9, 2008, the court denied the request for a preliminary injunction. As a result, the requirements of the CTPs would become effective October 1, as scheduled. ATA, supra, 577 F. Supp.2d 1110.

When this proceeding was initiated on September 24, the provisions of the CTPs at issue in this proceeding were not fully implemented. The concession applications, which required applicants to agree to the employee mandate and to provide off-street parking, were being submitted to the ports for consideration, but not acted upon; enrollment in POLA's incentive program by letters of intent was being logged in, but no payments were approved or made; and the Clean Truck Fees were not scheduled to be collected until Oct. 1. In fact, the requirement that LMCs hold a concession as a condition of access to terminals was not scheduled to commence until Oct. 1.

As noted, the Order of Investigation expressed concern over *possible* violations of the Shipping Act. Specifically, to determine whether the employee mandate and off-street parking requirement are excessive and/or not reasonably related to the announced environmental purposes of the CTPs; whether the CTF exemptions, incentive payments, and award or denial of concessions unreasonably preferred or discriminated against persons affected by the new requirements; whether the fee exemptions unreasonably favored some truck operators to the disadvantage of others; whether the incentive payments unreasonably preferred some companies but not others; and

whether concession applications arbitrarily limited access to port terminals. In view of these concerns, Commission's jurisdiction over the ports as marine terminal operators and its responsibilities to enforce Section 10 of the Shipping Act warranted further investigation.⁴

B. Developments Since Institution of This Proceeding

While this investigation proceeded, the ports gradually implemented their programs. During the period from commencement of this proceeding through the present, events have occurred outside of the Commission's control, the ports made various modifications to the CTPs, and facts have come to light that cast each issue differently than when the case began. Those developments are explained below.

1. The Employee Mandate and Off-Street Parking Requirement

The district court's September 9 denial of the preliminary injunction in ATA, supra, was immediately appealed by ATA. In a decision issued March 20, 2009, the 9th Circuit reversed and remanded the case to the district court for issuance of a preliminary injunction, finding in particular that the employee mandate and the off-street parking requirement are likely preempted and unconstitutional. 559 F.3d 1046, 1057– 1058. On April 28, 2009, the district court issued its order on remand enjoining, as pertinent, the employee mandate and the off-street parking requirement of POLA. 2009 WL 1160212. Consequently, those provisions are not in effect and, given the tone of the 9th Circuit's opinion, may never become effective. The pending action for a permanent injunction is currently set for trial to commence in December, 2009.

2. POLA's Incentive Program

POLA publicly announced its incentive program open to all in a press release on August 21, 2008, and simultaneously proclaimed that two national carriers had already signed up. Shortly

⁴ In addition to this proceeding, the Commission also challenged the ports' CTPs under Section 6 of the Act by filing a complaint for an injunction in the U.S. District Court for the District of Columbia on October 31, 2008, in Federal Maritime Commission v. City of Los Angeles, et al., No. 1:08-cv-1895. The Court denied the Commission's request for a preliminary injunction and the matter has been voluntarily dismissed by stipulation.

thereafter in an announcement posted on its website on September 11, 2008, POLA established a deadline of September 19, 2008, for LMCs to submit a letters of intent to participate in the incentive payment program and specifying the number of clean trucks that they would commit to drayage service at the ports. On September 23, 2008, POLA posted a list on its website identifying over 100 companies that submitted letters of intent. However, no payments had been approved and no there was no indication as to how or when incentive payments would be approved or made.

On November 6, 2008, however, the Los Angeles Board of Harbor Commissioners approved an Incentive Addendum to its Concession Agreement and authorized the collective payment of incentive awards for 2,200 trucks in 2008 and provided the details for eligibility and the requirements for participation. It also provided a schedule for the processing of payment awards. On December 23, 2008, the port announced that it had begun the process of distributing approximately \$44 million in incentive checks and would continue to do so over the coming weeks. In its June 5, 2009, response to BOE's discovery in this proceeding, POLA identified the recipients of approved payments, the amounts of awards, and for each, the number of vehicles committed to and placed in port service.

3. The CTF Exemptions

Collection of the Clean Truck Fee and application of the exemptions were initially scheduled to commence on Oct. 1, with implementation of the CTPs. However, due to startup problems with the identification of qualifying equipment and the concessionaires eligible for the exemptions, coupled with technical difficulties related to assessment of the CTF, collection was postponed to November 17, 2008. However, on November 13, the ports announced that assessment of the fee would not commence on November 17 and gave no indication as to when collection would start. On January 21, 2009, it was announced that collection would commence on February 18, 2009, and it finally did.

Between the initiation of this proceeding and May, 2009, the ports modified their CTF programs on several occasions and expanded the categories of clean trucks eligible for the exemption. At POLA, 2007 compliant Alternative Fuel Trucks purchased with CTP funds were originally exempt only if a truck was turned in for scrappage. The scrappage requirement has now been removed.⁵ At POLB, 2007 compliant diesels purchased with private funds were exempt only if purchased prior to October 1, 2008. If purchased after that date, only a 50 percent exemption applied. Originally, clean diesels purchased with public funds were not exempt. Now, all privately funded 2007 compliant diesels and those purchased with public funds prior to May 4, 2009 are exempt. Originally, 2007 compliant alternative fuel trucks purchased with public funds were not exempt. Now they are exempt. Those purchased with private financing were exempt only if purchased before October 1, 2008, and 50 percent exempt if purchased afterward. Now, all 2007 compliant alternative fuel trucks are exempt whether purchased with public or private funds.

4. Application Standards

At the time this proceeding was commenced, the ports were just beginning to accept and process concession applications. It was not known who or how many applicants would receive concessions or on what basis grants and denials would be made. However, since institution of this investigation both ports have posted on their websites a log of concession applications, updated daily, identifying the applicant, and showing the status and disposition of the application. It appears from these public logs, and from information furnished in response to BOE discovery, that all applications furnishing the required information have been granted.⁶

⁵ The elimination of the scrappage requirement allows the trucker to retain the vehicle. This allows him either to generate additional revenues to purchase a clean truck or sell a vehicle with sufficient equity in it to apply to the purchase of a clean truck.

⁶ The American Trucking Associations has taken a second appeal to the 9th Circuit challenging the ports' concession requirement as a whole. Appeal filed May 14, 2009 in Docket No. 09-55749.

III. IMPACT OF CHANGED CIRCUMSTANCES ON INVESTIGATION

The developments discussed above directly impact the issues addressed in the Order of Investigation. The operation of the employee mandate and the off-street parking requirement has been eliminated at least temporarily and perhaps permanently. Continuation of this proceeding with respect to these suspended elements of the CTPs would require development of a record based solely on hypothetical facts in an effort to establish the unreasonableness of requirements that do not and may never exist. Moreover, if the issue is pursued on appeal, it is unlikely that there will be a final resolution for years.

The concerns originally raised by the CTF exemptions, the concession applications, and POLA's incentive program now appear in a different light after the actual implementation of those programs and the modifications and adjustments to them by the ports. The Commission's Order of Investigation expressly acknowledged the significant environmental and public health benefits sought to be achieved by the ports but was concerned about potential violations of the Shipping Act. Those concerns have not been borne out after several months of experience in the administration of the ports' CTPs.

Given the present posture of those provisions of the CTPs subject to this investigation, there is no longer a regulatory objective to be furthered by pursuing this matter. It is unlikely that litigation could achieve different results. Yet, the major portion of litigating this proceeding lies ahead. BOE and Respondents are currently engaged in the exchange of discovery documents. Extensive discovery and development of an evidentiary record are scheduled to consume the rest of this year and most of next. In view of the substantially changed circumstances with respect to the matters under investigation, the additional expenditure of resources to continue this proceeding is not warranted. BOE submits that the proceeding should be dismissed.

IV. CONCLUSION

For all of the foregoing reasons, BOE respectfully requests that this proceeding be dismissed.

Respectfully submitted,

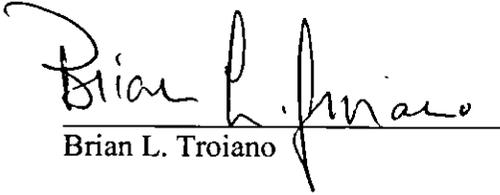
A handwritten signature in black ink, appearing to read 'G. Quadrino', is written over a horizontal line.

July 29, 2009

George A. Quadrino, Deputy Director
Elisa P. Holland, Trial Attorney
Brian L. Troiano, Trial Attorney
Tara E. Nielsen, Trial Attorney
Colin T. Keohan, Trial Attorney
Bureau of Enforcement
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573
(202) 523-5783
Fax: (202) 523-5785

CERTIFICATE OF SERVICE

I hereby certify that on this **29th** day of July, 2009, a copy of the foregoing **MOTION OF THE BUREAU OF ENFORCEMENT FOR DISMISSAL OF PROCEEDING** has been served upon all the parties of record as follows.


Brian L. Troiano

BY ELECTRONIC MAIL

C. Jonathan Benner, Esq.
Matthew J. Thomas, Esq.
Troutman Sanders LLP
401 9th Street, N.W. Suite 1000
Washington, D.C. 20004-2134
jonathan.benner@troutmansanders.com
Matthew.Thomas@troutmansanders.com
Counsel for City of Long Beach, California;
Harbor Department of the City of Long Beach;
and the Board of Harbor Commissioners of the
City of Long Beach

Steven S. Rosenthal, Esq.
Alan K. Palmer, Esq.
Tiffany R. Moseley, Esq.
Kaye Scholer LLP
901 Fifteenth Street, N.W.
Washington D.C. 20005
srosenthal@kayescholer.com
apalmer@kayescholer.com
tmoseley@kayescholer.com
Counsel for City of Los Angeles, California;
Harbor Department of the City of Los Angeles;
and the Board of Harbor Commissioners for the
City of Los Angeles

Richard O. Levine
Constantine Cannon LLP
1627 Eye St., N.W.
Suite 1000
Washington D.C. 20006
rlevine@constantinecannon.com
Counsel for Intermodal Motor Carriers Conference, American Trucking Associations

F. Edwin Froelich
Carroll & Froelich, PLLC
919 18th St., N.W.
Suite 901
Washington D.C. 20006
win@cflaw.us
Counsel for National Association of Waterfront Employers

David Pettit
Natural Resources Defense Council
1314 Second Street
Santa Monica, CA 90405
dpettit@nrdc.org
Counsel for Natural Resources Defense Council, et al.