

BEFORE THE
FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMMISSION

REPEAL OF MARINE TERMINAL)
AGREEMENT EXEMPTION)
Notice Of Proposed Rulemaking)
74 Fed. Reg. 31666 (July 2, 2009))

Docket No. 09-02

COMMENTS OF
THE PORTS OF LOS ANGELES AND LONG BEACH

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**BEFORE THE
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**COMMENTS OF
THE PORTS OF LOS ANGELES AND LONG BEACH**

The Ports of Los Angeles and Long Beach (“Ports”) provide the following comments objecting to the notice of proposed rulemaking that would eliminate the 45-day waiting period exemption for marine terminal agreements (“Proposed Rule”), as it is currently formulated¹. While the Ports support the objective of reviewing, updating and modernizing the Commission’s filing rules for marine terminal agreements, the Proposed Rule represents a flawed and incomplete approach which would reduce marine terminal operators’ operational flexibility and exacerbate existing confusion regarding what matters need to be filed with the Commission. Accordingly, we respectfully urge the Commission either to discontinue the instant rulemaking altogether, or use it as an opportunity to clarify and streamline the filing requirements and exemptions for marine terminal agreements, to minimize needless delay, burden and disruption for regulated entities.

In recent years, the Commission has used its rulemaking power to substantially refine and clarify what types of ocean common carrier agreement filings are required and at what level of

¹ *Repeal of Marine Terminal Agreement Exemption; Notice of proposed rulemaking, 74 Fed. Reg. 31666 (July 2, 2009).*

specificity, and it has adopted new exemptions from the 45-day waiting period for certain types of vessel operating carrier agreements. *See, e.g.*, Docket No. 03-15. In contrast, the standards for marine terminal operator (“MTOs”) agreements were left largely untouched in those clarifications and updates. For carrier agreements, there exist clear standards to allow carrier discussion agreements and other collaborations to operate with an appropriate degree of flexibility; such clarity and flexibility will not be afforded to MTOs like the Ports should the exemption provided in 46 C.F.R. § 535.308 be repealed.

In enacting the Ocean Shipping Reform Act (“OSRA”), Congress amended the Shipping Act of 1984 to include as one of its purposes the placing of “greater reliance on the marketplace.” Unfortunately, the proposed rule would layer on new delays and disruptions to ordinary marketplace-driven decisionmaking, for the purpose facilitating federal oversight. We would encourage the Commission to focus on strategies for collecting and analyzing information that do not necessitate commercial parties to interrupt and delay operational matters to accommodate the 45-day period, the application of which would be broadened by this rule.

I. Background

The Commission’s current efforts to eliminate the waiting period exemption arise largely out of the Commission’s efforts to delay and block the implementation of the agreements filed in connection with the Ports’ Clean Truck Programs. The impact of repealing the exemption is best shown in the context of our experience with the filing of those agreements.

Agreement No. 201196

The Shipping Act of 1984 requires the filing of agreements among MTOs, including all agreements to discuss, fix, or regulate rates or other conditions of service, or engage in exclusive, preferential, or cooperative working arrangements, to the extent that such agreements involve

ocean transportation in the foreign commerce of the United States. 46 U.S.C. § 40301. The Ports have expressed their position that environmental measures affecting truck operations in the ports are not subject to FMC jurisdiction. In spite of these reservations, the Ports cooperated fully with the FMC, filing agreements and providing additional information in accordance with the FMC staff requests, while preserving the Ports' position that much or all of the Ports' environmental, safety and security programs are outside the subject matter jurisdiction of the FMC.

As a result of the Ports' decision to work cooperatively with the Commission, the Ports filed the FMC Cooperative Working Agreement No. 201170, which became effective on August 10, 2006. Agreement No. 201170, as amended, is essentially a "discussion agreement;" it authorizes the Ports to discuss jointly and agree upon a broad range of infrastructure projects, environmental and safety and security programs.

On November 20, 2006, the Los Angeles and Long Beach Boards of Harbor Commissioners approved a Clean Air Action Plan ("CAAP"), a comprehensive set of strategies for reducing harmful airborne emissions within the Ports and areas around the Ports. Following the implementation of the CAAP (and based upon numerous meetings with stakeholders and extensive public hearings held under California's stringent open government laws), the Board of Harbor Commissioners of each Port adopted a Clean Truck Program ("CTP") as a component of each Port's CAAP. The CTP was designed to reduce dramatically the harmful diesel emissions produced by drayage, the hauling of cargo onto and off of the Ports' property via trucks, and close compliance gaps in transportation security and truck safety. The terms, rates and conditions relating to each Port's CTP were set forth in their corresponding tariffs.

While FMC Agreement No. 201170 provides broad authority for the Ports to cooperate and implement the CTPs, the Commission notified the Ports that a highly detailed agreement filing involving the implementation of the CTPs, providing a level of detail similar to that set forth in the Ports' tariffs, would have to be filed with the Commission. While the parties sought to meet the Commission's concerns by filing an amendment, No. 201170-001 on August 1, 2008, the Commission responded by using its power to seek additional information to block the agreement amendment from going into effect for over three months.

Given the urgency of achieving meaningful reductions in air pollution and the fact that the FMC staff itself indicated that a new agreement filing would be required to implement the CTPs, the Ports filed the FMC Agreement No. 201196, as an exempt Marine Terminal Agreement under 46 C.F.R. § 535.308, which became effective upon filing on September 30, 2008. The FMC Agreement No. 201196 sets forth certain rates, terms and conditions that are common to both Ports' CTPs.²

Agreement No. 201196 subsequently has been amended from time to time as the Ports have adjusted and fine-tuned the details of fee and exemption programs to ensure the optimal functioning of the Clean Truck Programs. The availability of the 45-day waiting period

² Section 535.308(a) provides that a "Marine terminal agreement means an agreement . . . that applies to future, prospective activities between or among the parties and that relates solely to marine terminal facilities and/or services among marine terminal operators . . . that completely sets forth the applicable rates, charges, terms and conditions agreed to by the parties for the facilities and/or services provided for under the agreement. The term does not include a joint venture arrangement among marine terminal operators to establish a separate, distinct entity that fixes its own rates and publishes its own tariff." Section 535.308(e) provides that "[a]ll marine terminal agreements . . . , with the exception of marine terminal conference, marine terminal interconference, and marine terminal discussion agreements . . . are exempt from the waiting period requirements of the Act . . . and will, accordingly, be effective on filing with the Commission."

exemption under 46 C.F.R. § 535.308 has enabled the Ports to make rapid on-the-fly adjustments to the Clean Truck Programs, affording the FMC the opportunity for oversight without incurring potentially harmful delays.

Agreement No. 201199

On November 3, 2008, the Ports, the individual marine terminal operator members of the West Coast MTO Agreement (FMC Agreement No. 201143), and PortCheck LLC (a joint venture formed by these MTOs, and collectively referred to herein as “WCMTOA”) filed the Port Fee Services Agreement (FMC Agreement No. 201199). The Port Fee Services Agreement authorizes the WCMTOA parties to collect truck fees and infrastructure fees and administer other aspects of the Ports’ Clean Truck Program in exchange for reimbursement of their incremental costs and other valuable consideration as set forth therein, and to establish PortCheck LLC to collect these fees for each of them. It was the Ports’ position that this agreement is a marine terminal agreement covered by the 45-day waiting period exemption set forth in Section 535.308(a).

In the week following the agreement’s filing, the parties were notified by the FMC’s Bureau of Trade Analysis that it was the staff’s position that the agreement did not qualify for the waiting period exemption. Subsequently, the parties to Agreement No. 201199 engaged in discussions with the FMC staff, in which staff raised a number of reasons why they believed the agreement was not covered by such exemption, the primary of which was that the agreement raised competitive concerns for the Commission.

On November 21, 2008, the WCMTOA parties filed a request for expedited review of Agreement No. 201199. On December 3, 2008, the Commission denied the parties’ request. Also on November 21, 2008, the WCMTOA parties filed a Petition for Commission Review of

Staff Action, Petition No. P2-08. In this petition, the WCMTOA parties requested a review of the staff action taken concerning the effective date of Agreement No. 201199, in which staff considered the agreement ineligible for the waiting period exemption. On November 26, 2008, the Commission issued notice of filing of the petition and requested comments. On December 15, 2008, the Ports filed comments supporting the WCMTOA parties' position.

On January 16, 2009, the Commission issued an order in Petition 02-08 sustaining the staff's determination with respect to the effective date of FMC Agreement No. 201199, i.e., that it was not covered under the waiting period exemption, emphasizing, *inter alia*, that the exemption was not intended to cover agreements with which the Commission had competitive concerns. The Ports' experience with Agreement No. 201199 demonstrated for us the high level of uncertainty, unpredictability and intra-agency confusion and disagreement that characterizes the application of the existing agreement rules and exemptions in Part 535 to marine terminal operators.

II. Discussion

A. The Proposed Rule is Not Needed to Prevent Anticompetitive Conduct

In the NPRM, the Commission argues that the marine terminal agreement exemption should be repealed, in part because port agreements have evolved beyond simple landlord-tenant issues, and such agreements have the potential to incur the anticompetitive consequences. The Commission's reasoning in this regard does not appear to be well-founded.

As an initial matter, the exemption at issue here is not related to landlord-tenant issues. Leases and similar landlord-tenant instruments are exempted from filing entirely under a different exemption, § 535.310. The exemption in §535.308 serves more of a catch-all purpose, providing a way for marine terminals to enter into innovative operational arrangements that are

other than leases, service agreements, conference or discussion agreements. Under the exemption, the Commission is afforded full notice and transparency regarding such arrangements, but the parties are not subject to cumbersome operational delays.

The Proposed Rule contains no examples of what potentially anticompetitive conduct the Commission is trying to head off, and why those pending threats are so severe as to warrant saddling regulated parties with a new layer of administrative delay. To our knowledge, a marine terminal agreement under this exemption has never been adjudged to be violative of the Shipping Act of 1984, so we are concerned that the Proposed Rule is, at best, an overreaction to a not-well-defined problem.

B. The Marine Terminal Agreement Exemption Does Not Impede FMC Oversight

In the Proposed Rule, the Commission suggests that imposition of a waiting period on marine terminal agreements is needed for effective information collection and oversight of filed agreement. This is not consistent with either the statute or recent experience.

The Proposed Rule states: “Under current rule 535.308, marine terminal agreements become effective upon filing, depriving the Commission of pre-effectiveness opportunity to review the agreements during the statutory 45-day waiting period and the opportunity to seek access to additional information from the agreement parties necessary for the Commission to perform its statutory duties under section 6 of the Shipping Act, 46 U.S.C. 40304, 41307. The absence of any waiting period requirement for marine terminal agreements under section 535.308 may frustrate the Commission’s function of preventing a reduction in competition under section 6 of the Shipping Act, whether filed by public or private MTO parties. It therefore appears that section 535.308 may no longer be serving the original intent of the Commission’s rulemaking.”

The Commission does not explain how effective oversight might be frustrated by the lack of a 45-day delay, and cites no examples of how oversight has been hindered in the past.

Clearly, with or without a 45-day review period, the Commission has full authority to commence formal and informal investigations of any agreement, initiate proceedings to address potential violations, and seek injunctions from an appropriate court at any time. The Proposed Rule does not explain why such avenues are inadequate to protect the public.

To the extent the elimination of the marine terminal agreement exemption is a reaction to our filing of Agreement No. 201196, we would point out that the Commission had ample opportunity to review and study the subject matter of that agreement. The substance of the Ports' CTPs was scrutinized by the Commission staff in exacting detail over a period of several months prior to the implementation of the CTPs and the filing of the agreement with the FMC. These programs were developed in a public and transparent process, and the Commission has had full access to the records and recommendations on which the Ports' boards have relied. The Commission has been able to review recordings and documents from all the Board meetings in which these programs were considered, and has reviewed months of minutes and records from of executive- and staff-level meetings in connection with the development of these programs. The Commission has had multiple meetings with the Ports' representatives, program staff and officials regarding these programs, has submitted to the Ports scores of written questions, has reviewed an array of documents and studies related to these programs, and has interviewed and reviewed written submissions from an array of interested parties. Accordingly, there can be no argument that the Commission's ability to study the agreement was undermined by the current exception.

C. The NPRM Will Cause Operational Delays and Disruption in MTOs' Daily Operations

As indicated in Section I above, the FMC staff took an extremely strict view requiring the Ports to file detailed new agreement filing to implement the CTPs, despite the fact that the Ports already had a broad cooperative working agreement on file with the Commission and the CTPs were implemented in each of the Port's tariffs.

While it has been a burdensome process for the Ports to comply with those staff requirements, it has not been impossible. Since the filing of Agreement No. 201196, the Ports have filed three amendments thereto. These amendments improve and clarify the terms, rates and conditions of the CTP. For instance, Amendment No. 2 clarifies that Agreement No. 201196 does not authorize the Ports to adopt joint measures that: (i) require employee status for drivers of drayage trucks; or (ii) permit or exclude independent owner-operator drivers from providing or operating drayage trucks in either Port.

The Ports were able to improve on the CTP's terms, rates and conditions, and address the affected parties and the FMC's concerns by use of Section 308 marine terminal exemption. This exemption has allowed the Ports flexibility in filing amendments to an FMC filed-agreement without delays. We see no public interest to be served by eliminating the Section 308 exemption effectively making every change the CTP wait at least 45 days, and – if the above-described experience is a guide – often more.

D. Current Rules for Marine Terminal Agreement Exemptions Are Unclear

1. **The “Completeness” Standard for MTO Agreements is Ambiguous**

The Commission's marine terminal operator agreement rules, which have not been updated substantively for years, provide no guidance regarding the degree of specificity and

detail required to be set forth in filed agreements. As indicated above, in connection with the CTP, the FMC staff took the highly burdensome position that a detailed accounting of the terms, rates, and conditions relating to the Ports' CTPs needed to be on file with the FMC as an agreement, even when those terms were already set out in the Ports' tariffs. If the Commission plans, through the Proposed Rule, to impose a new 45-day waiting period on all marine terminal operator agreements, it becomes essential to resolve the issue of exactly what routine operational matters do, or do not, warrant an agreement filing. Otherwise, even the most trivial administrative matters will be potentially subject to weeks or months of regulatory delays.

The problem stems from the Commission's 2003 elimination of the exemption for "routine operational and administrative" matters, which were exempt from filing under the old 46 C.F.R. § 535.407(c) (2003). The Commission at that time adopted new rules for ocean carrier agreements that filled the gap left by the repeal of section 407(c), providing new clarity and guidance for shipping lines regarding what matters do, and do not, warrant filing. However, the rules left a void regarding the treatment of marine terminal operator agreements.

In 2003, the FMC finalized a rulemaking in Docket No. 03-15 amending its regulations regarding carrier agreements, eliminating the exception for "routine operational and administrative" agreements. In lieu thereof, the FMC set forth in section 535.408 a list of specific exemptions for certain types of carrier operations, and provided clearer standards for what sort of detail is not required to be included in carrier agreements. In Docket No. 03-15, the FMC recognized the need for flexibility in the carries' operations, and decided to "propose several new specific exemptions to replace the [then] current exemptions for 'routine operational

and administrative matters' and other operational matters which it finds have met the criteria for exemptions under Section 16.³

The FMC, however, did not address marine terminal operator agreements at all in Docket 03-15 when developing 46 C.F.R. § 535.408, depriving MTOs of the clarity and certainty that Docket 03-15 provided for carriers. As a result, the FMC staff appears to take the position that a terminal agreement must (because of the "completeness" requirement) include every minor detail of every arrangement between MTOs. Indeed, while Commission's rules specifically state that tariff rates, rules and regulations are exempt from the agreement filing requirements, the FMC staff informed us (arbitrarily, in our view) that this exemption for tariff rates, rules and regulations is for carriers only, and is not applicable to marine terminal operators. 46 C.F.R. § 535.408(b)(1). As a result, the staff has set the precedent for an unworkable definition of marine terminal agreement "completeness" going forward.

Thus, the effect of repealing Section 308 exemption will be to cause 45, 90-day or longer delays for every minor and trivial amendment to any arrangement between marine terminals covered by that rule.

Accordingly, we would urge the Commission, before eliminating any waiting period exemption, to revisit the issue of "routine operational and administrative" agreement filings, and promulgate clear and predictable standards for what matters do and do not have to be filed in MTO agreements, similar to the carrier standards in § 535.408.

³ *Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984; Notice of proposed rulemaking*, 68 Fed. Reg. 67510, 67518 (Dec. 2, 2003).

2. The Other Cited MTO Exemptions Are Ambiguous

The Proposed Rule actually sows addition confusion and uncertainty on the application of two other filing exemptions, § 535.309 and 310. It states:

Even with respect to the three agreements that claimed application of the section 535.308 exemption (FMC Agreement Nos. 201176, 201196 and 201199), it remains subject to some dispute whether those agreements were in fact qualified for the exemption. It appears that the agreements may be ineligible for the waiting period exemption, or could more appropriately be characterized as a marine terminal services agreement subject to an existing exemption at §535.309 or a marine terminal facilities agreement subject to an exemption at §535.310. These provisions exempt marine terminal services agreements and marine terminal facilities agreements from both the filing and waiting period requirements of the Shipping Act. 46 CFR 535.309 and 535.310.

To be conferred antitrust immunity, the parties may file such marine terminal services agreements pursuant to § 535.301(b) as an “optional filing.” Repeal of §535.308 thus may benefit the industry by clarifying and streamlining the application of the Commission’s regulations and by directing the industry to utilize the exemptions available under § 535.309 or §535.310.

From this quotation, it is clear that the Commission itself is unclear as to when its existing exemptions apply to particular agreements. The Commission indicates that the application of the exemption is “subject to some dispute”; apparently, the dispute is an intra-FMC one. The Commission then goes on to offer the view that the subject agreements “could” possibly be characterized as a marine terminal services agreement subject to an existing exemption at §535.309 or a marine terminal facilities agreement subject to an exemption at §535.310; however, the Commission does not explain how these agreements might (or might not) be exempt from filing under those sections. This uncertainty and ambiguity regarding the classification of agreements, even at the level of the Commission, strongly suggests the need to

update, clarify, and broaden the existing exemptions in § 535.309 and 310, so that they can be applied in a coherent and predictable way by the staff and the industry.

III. Conclusion

In light of the foregoing, we would urge the Commission either to discontinue the instant flawed rulemaking, or to undertake a more thorough effort to clarify and update the Commission's agreement rules as applicable to MTOs. Any resultant changes should place a premium on facilitating innovative and cooperative ways for terminals to better serve ocean commerce (and meet the pressing imperatives of safety, security and environmental responsibility that all port facilities face) with a minimum of regulatory cost, delay and burden.

To that end we would urge the Commission to abandon its troubling practice of policymaking in secret, and open its regulatory processes up to the sort of transparency and public participation that occurs in the Ports and the vast majority of other public agencies. Virtually all of the formulation of the FMC's misguided opposition to the Ports' CTPs was undertaken behind closed doors. Similarly, the Proposed Rule was promulgated in a secretive closed-session meeting, and a request for the meeting transcript (which is required to be made public under the Government in the Sunshine Act) was effectively denied, in defiance of the Sunshine Act.⁴ This pointless shielding of FMC decisionmaking from public accountability is

⁴ In an August 28th letter, the Secretary declined to produce those sections of the transcript in which the Commission deliberated the policy change, claiming *inter alia* that they were covered by "deliberative process privilege." This response flouts the text and purpose of the Sunshine Act, which contains no "deliberative process" exclusion. That Act exists specifically to bar agencies from deliberating in secret. "Congress enacted the Sunshine Act to open the deliberations of multi-member federal agencies to public view." *Common Cause v. NRC*, 674 F.2d 921, 928 (D.C. Cir. 1982). Congress intended the Sunshine Act to "greatly enhance" public access to and understanding of government decision-making above and beyond that offered by FOIA. S. Rep. No. 94-354, at 5 (1976).

