

LEONARD | CARDER

REPRESENTING UNIONS, WORKERS, AND BENEFIT PLANS

LEONARD CARDER, LLP
1188 Franklin St., Suite 201
San Francisco, CA 94109
Telephone: (415) 771-6400
Fax: (415) 771-7010
www.leonardcarder.com

August 26, 2016

Via Electronic & First-Class Mail (secretary@fmc.gov)

Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001

Re: Petition No. P2-16 Filed by Chassis Leasors for Order to Show Cause

Dear Commission:

The International Longshore and Warehouse Union ("ILWU") submits these comments in response to the above-referenced Petition.

**The Petition Has Been Rendered Moot Because the Challenged Chassis Service Fee
Has Been Withdrawn Before Implementation**

Events since the filing of the Petition have rendered it moot and not appropriate for any agency action at this time. Specifically, the Petition challenges on various grounds a proposed Chassis Service Fee to be imposed, starting September 1, 2016, by the members of the West Coast Marine Terminal Operators Agreement (WCMTOA), acting through their subsidiary, Pierpass. However, on August, 23, 2016, after the filing of the instant Petition and after the FMC's issuance of Notice re same, the WCMTOA members, acting through Pierpass, published a public notice withdrawing the Chassis Fee. The Notice states that "individual marine terminals [will] negotiate directly with chassis leasing companies over hosting agreements" and that most recently "negotiations between individual terminals and some of the leasing companies have moved forward." (A copy of the Aug 23, 2016 PierPass notice attached for your convenience.)

Now that the Chassis Fee has been withdrawn and individual terminal operators and leasing companies are negotiating their own individualized agreements on the matter, the Petition has become moot. This is underscored by the fact that the remedies proposed in the Petition, including a preliminary injunction and final cease and desist order against the Fee, are completely unnecessary because the new status quo now gives Petitioners exactly what they seek, namely avoidance of the proposed Fee, which was never implemented.

Moreover, the voluntary withdrawal of the proposed Fee removes any specific facts for review and analysis. If the Petition proceeds and an Order to Show Cause were issued on it, the parties, the general public and the Commission itself would be shadow boxing over a hypothetical, which would be a colossal waste of everyone's time, money and resources. While

the Pierpass notice of withdrawal states that “WCMTOA intends to vigorously defend its position in its response to the Petition,” this is an obvious and understandable “reservation” of a legal position with respect to a theoretical right to impose some kind of Fee in the future. Theoretical rights have little value or even form unless and until applied to specific facts and circumstances which are lacking here.

The Petition, on its face, does not invoke the Commission’s procedures for the development of policy, advice or guidance. Rather, it asserts specific legal claims of specific violations of specific sections of the Shipping Act based on the threatened but now-withdrawn “practice” of imposing a \$5 Chassis Fee. In particular, the Petition asserts that the Fee is an actual and ongoing “practice” that has been or will soon be “imposed” on Petitioners:

- 1) “WCMTOA and the terminal operators have violated 46 U.S.C. § 41101(b)(2) in that *they have imposed* the Chassis Services Fee without authority to do so under WCMTOA as filed and effective under the Act.” (Petition, at 7-8, items A and B)(Emphasis added).
- 2) “WCMTOA and the terminal operators have violated 46 U.S.C. § 41103 because the Chassis Services Fee *is an unjust and unreasonable practice....*” (Petition at 8, item C) (Emphasis added).
- 3) “WCMTOA and terminal operators have violated 46 U.S.C. § 41106(2) because *imposition* of the Chassis Services Fee *gives* an undue or unreasonable preference or advantage to chassis owned by ocean common carriers, motor carriers and others, and it *imposes* an undue or unreasonable prejudice or disadvantage to the chassis providers.” (Petition at 8, item D)(Emphasis added).

The Petition’s requested relief similarly rests on the claim or assumption that an unlawful “practice” under the Shipping Act – the Fee -- has occurred or will soon occur. Thus, it asks the Commission: a) to issue an Order to Show Cause (OSC) “directing WCMTOA and its marine terminal operator members to show cause why *they have not violated* the Shipping Act provisions and the Commission’s regulations as set forth above;” b) issue an Order directing them “*to cease and desist from the imposition* of the Chassis Services Fee; and c) “in accordance with 46 U.S.C. § 41307(a) *seek an injunction* of the Chassis Service Fee pending completion of the Order to Show Cause proceeding herein requested....” (Petition at 9)(Emphasis added).

The withdrawal of the Fee before its implementation negates all such claims and renders unnecessary any such relief. Review of the statutory provisions invoked by the Petition confirms this. Thus, 46 U.S.C. § 41102(b)(2) specifies that “a person *may not operate* under an agreement required to be filed under [the Act]” where “*the operation* is not in accordance with the terms of the agreement....” Likewise, 46 USC § 41102(c) requires “just and reasonable *regulations and practices* relating to or connected with receiving, handling, storing, or delivering property; 46 U.S.C. § 41106(2) penalizes a marine terminal operator who “give[s]” or “impose[s]” “any undue or unreasonable preference or advantage;” and 46 U.S.C. § 41307(a) authorizes the Commission to seek a preliminary injunction “bring a civil action to *enjoin conduct* in violation of [the Act].” Here, the withdrawal of a fee that was never implemented in the first place does

not, by any reasonable measure, constitute “operating” contrary to a filed agreement under § 41102(b)(2), or a “regulation and practice” under § 41102(c), or an action that “gives” or “imposes” “any undue or unreasonable preference or advantage” to anyone. In short, there is no “conduct” to be enjoined under § 41307(a).

The U.S. Supreme Court has “repeatedly held that an ‘actual controversy’ must exist not only ‘at the time the complaint is filed,’ but through ‘all stages’ of the litigation.” *Already, LLC v. Nike, Inc.*, --U.S.--, 133 S.Ct. 721, 726-27 (2013), quoting *Alvarez v. Smith*, 558 U.S. 87, 92 (2009). “A case becomes moot—and therefore no longer a ‘Case’ or “Controversy” for purposes of [legal jurisdiction]—‘when the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome.’” *Id.* “No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute ‘is no longer embedded in any actual controversy about the plaintiffs’ particular legal rights.” *Id.*; see also, e.g., *Arizonans for Official English v. Arizona*, 520 US 43, 72 (1997)(holding that an employee’s resignation from disputed employment render her claims moot and all prior rulings subject to vacatur).

Now that the Fee here has been rescinded before its imposition, any continuing argument Petitioners and WCMTOA members may wish to undertake with the Commission about the Fee’s legality is simply “an abstract dispute about the law, unlikely to affect these [parties] any more than it affects other... citizens.” *Alvarez v. Smith*, 558 U.S. at 93. “And a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope” of a “Case or Controversy” for adjudication. *Id.* Federal law limits an adjudication process to only “‘real and substantial controversies admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.’” *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990), quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

Here, the Fee has not only been withdrawn, it has been replaced by the ongoing negotiation of individualized fees specific to the special conditions of each marine terminal operator and each of the Petitioners, as stated in the withdrawal notice. Consequently, any intention by these parties to adjudicate the legality of the withdrawn and never-imposed Fee would merely be “a request for advice as to ‘what the law would be upon a hypothetical state of facts’ or with respect to ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’ ” *Lewis v. Continental Bank Corp.*, 494 U.S. at 479-80 (internal citations omitted). The adjudicatory procedures invoked by the Petition are not designed or appropriate for issuance of Commission advice or policy.

While it is true that the law allows for adjudication of withdrawn or rescinded acts where there is a threat of repetition, this applies “only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality.” *Alvarez v. Smith*, 558 U.S. at 93-94, quoting *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). Because the Fee has not only been withdrawn but replaced by individualized fees negotiated by the parties, the current Petition is not “ripe” as to any future fees that may be levied. “Ripeness is peculiarly a question of timing [and] its basic rationale is to prevent the

courts [or administrative agencies], through premature adjudication, from entangling themselves in abstract disagreements.” *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 580-81, (1985), quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). The Commission should not attempt to adjudicate such “contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. at 580-81, quoting 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3532 (1984). While the WCMTOA continues to proclaim its legal right to impose a Chassis Service Fee at some future time and circumstance, “[s]uch ‘some day’ intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the ‘actual or imminent injury’ that [the law] requires” for proper adjudication. *Lujan v. Defenders of Wildlife*, 504 US 555, 564 (1992). Accordingly, no Order to Show Cause or other relief should be granted and the Petition should be dismissed without further agency action.

If the Commission Decides to Issue an Order to Show Cause, Then Such Order Should Require WCMTOA and Its Members to Provide Certain Information About Pierpass

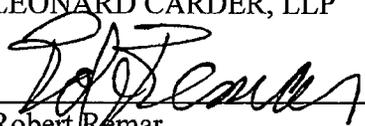
The financial practices and operations of Pierpass have been controversial and the subject of broad suspicion and critique since its start. Any investigation concerning a Chassis Service Fee, whether past or future, should cover the following issues, which Pierpass should be called upon to address:

- 1) How is the Chassis Fee calculated?
- 2) How are the revenues from the Chassis Fee to be used and distributed?
- 3) Is the Chassis Fee essentially a demurrage fee for storage of chassis on the terminals? If something else, explain in detail.
- 4) Have there been any independent audits of Pierpass finances? If so, they should be produced to the Commission and subject to review by affected parties and the general public.

Thank you for your consideration.

Very truly yours,

LEONARD CARDER, LLP

By: 

Robert Bemar

Attorneys for

International Longshore and Warehouse Union (ILWU)

Encl.



- [Home](#)
- [About](#)
- [Pay TMF](#)
- [Appointment Systems](#)
- [OffPeak Info](#)
- [Productivity](#)
- [TruckTag](#)
- [Live Gate Images](#)
- [News & Videos](#)

West Coast Terminals Shelve Chassis Fee but Affirm Right to Compensation for Services

Posted on August 23, 2016 by admin



Dear OffPeak Users,

The West Coast MTO Agreement (WCMTOA) today issued the following press release:

West Coast Terminals Shelve Chassis Fee but Affirm Right to Compensation for Services

LONG BEACH, Calif., Aug. 23, 2016 – The West Coast MTO Agreement (WCMTOA) today announced it has shelved plans to introduce a chassis services fee, as individual marine terminals negotiate directly with chassis leasing companies over hosting agreements.

WCMTOA's member terminals affirm their right to seek compensation for the costly services they provide to chassis leasing companies at the Ports of Los Angeles and Long Beach. It costs terminals more than \$200,000 per acre per year to lease land from the ports, and the terminals each have many acres stacked with chassis. This land could otherwise generate income for terminals by letting them process more containers, and would also let them manage containers more efficiently. Terminals have also been covering the cost of ILWU labor needed to stack, unstack

[Search](#)
[Search](#)

Important Links

- [OffPeak Gate Schedule](#)
- [Flex Gate Schedule](#)
- [TMF Login/Registration](#)
- [Container Availability Information / Pre-Dispatch Checklist](#)

Latest PierPass Video

and move the chassis, and the cost of the personnel, hardware and software needed to provide chassis usage data to the leasing companies.

In June, after two years of providing chassis management and storage to the leasing companies without reimbursement, WCMTOA announced a chassis services fee applying to chassis owners that receive services from WCMTOA's marine terminal members. Since then, negotiations between individual terminals and some of the leasing companies have moved forward.

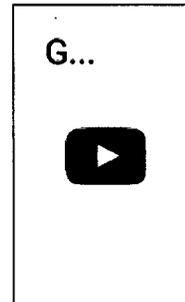
The leasing companies on Aug. 9 filed a Petition for an Order to Show Cause with the Federal Maritime Commission, seeking to avoid paying for the services they receive. The FMC on Aug. 16 asked interested parties to submit their views or arguments related to the Petition by Aug. 26. While it has shelved plans for the fee, WCMTOA intends to vigorously defend its position in its response to the Petition. WCMTOA members strongly believe the chassis owners must be responsible for covering the land, labor and technology costs the terminals incur on their behalf.

The West Coast MTO Agreement is filed with the Federal Maritime Commission, and comprises the 13 marine terminal operators serving the Los Angeles and Long Beach ports.

###

This entry was posted in News and tagged Federal Maritime Commission, Logistics, notify, PierPass, Port of Long Beach, Port of Los Angeles, Shipping, transportation, Trucking. Bookmark the permalink.

← Terminals in Ports of Los Angeles and Long Beach Move Start of Chassis Rule to September 1

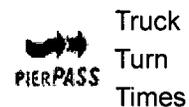


Subscribe for Updates

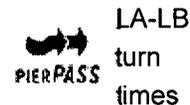
Receive PierPass and terminal news

Email [Subscribe](#)

Last Tweets



in Q2 were Fastest in Two Years at Ports of Los Angeles and Long Beach
<https://t.co/jA1hGV4WSx>, Jul 13



inside terminals best since fall 2014
JOC_Updates
<https://t.co/ptolXIL8do> via @JOC_Updates, Nov 24



PierPass Briefs
Washington
Regulators and
Shipper
Associations
<https://t.co/1iKfPqIBLw>,
Nov 23



Revised Port of
Los Angeles
and Long
Beach Truck
Gate Schedule
for Veterans
Day <https://t.co/m8fcQAVjCJ>,
Nov 10
See me on
Twitter
Follow @pierpa

Archives

Archives
Select Month

Proudly powered by WordPress | Theme: Able by WordPress.com.