

WEST COAST MTO AGREEMENT
444 West Ocean Blvd, Suite 700
Long Beach, CA 90802

August 26, 2016

Karen V. Gregory
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573
secretary@fmc.gov

Re: West Coast MTO Agreement's Comments in Connection With Petition No. P2-16

Dear Ms. Gregory,

In Petition No. P2-16, Direct ChassisLink, Inc., Flexi-Van Leasing, Inc. and TRAC Intermodal ("Petitioners") challenge the West Coast MTO Agreement's ("WCMTOA") publication of Rule 15 in its MTO schedule, establishing a Chassis Services Fee (the "Fee") related to chassis operations in the ports of Los Angeles and Long Beach. The Commission has requested that interested parties submit comments in connection with the Petitioner's request that the Commission issue an order to show cause. WCMTOA welcomes the opportunity to do so and, for the reasons that follow, urges the Commission to deny the petition.

First, the issues raised in Petition No. P2-16 are mooted by WCMTOA's August 23, 2016, removal of Rule 15 from its MTO Schedule. Rather than proceeding under Rule 15, WCMTOA members intend to engage with the chassis leasing companies directly to negotiate hosting agreements related to chassis. Rule 15 never went into effect and no fees were assessed or collected, so there is no live controversy. WCMTOA's decision to withdraw Rule 15 is not a concession that any of the arguments in the Petition are meritorious or establish a violation of the Shipping Act (as set forth below they are not) but instead is a good faith attempt to resolve this issue. While negotiating individual hosting agreements may be the best solution, this individual approach does not change the fact that Petitioners should reimburse WCMTOA members for an appropriate amount to offset the land, labor, and technology costs that MTOs bear in dealing with Petitioners' chassis.

Notwithstanding the fact that the Petition is moot, WCMTOA believes it is still appropriate to address Petitioners' claims that: 1) Rule 15 was not authorized by the WCMTOA Agreement; and, 2) WCMTOA's adoption of the Fee was unreasonable and prejudicial. Petitioners' contentions are wrong. The Fee is an appropriate and reasonable way to address the significant costs MTOs incur on a daily basis related to the chassis services provided. These costs, which allow Petitioners to operate their businesses in the first place, include amounts related to the storage of chassis, the stacking and unstacking of chassis, and the provision of

electronic data interchange (“EDI”) information. Petitioners, not WCMTOA members, receive the primary benefits from the presence of chassis on terminals and it is only fair that MTOs recover a portion of their costs in supporting Petitioners’ business. Because WCMTOA’s Agreement grants WCMTOA authority to impose the Fee and the Fee is reasonable, the Petition provides no basis for an order to show cause.

The Authority for the Fee is Expressly Set Forth in WCMTOA’s Filed Agreement

WCMTOA operates pursuant to the authority granted to it under its Agreement on file with the Commission, FMC Agreement No. 201143. The Petition contends that the adoption of Rule 15 was not authorized by the terms of Agreement 201143. This contention is belied by the plain language of the Agreement. In an amendment filed with, and reviewed by, the Commission in 2014, WCMTOA added language to the Agreement that authorizes the Fee. There are two provisions relevant to Rule 15. First, Article II(b)(v) of the WCMTOA Agreement addresses what **entities** Rule 15 can cover, stating:

“[T]he parties are authorized to . . . agree upon and make available to the public the terms of a common marine terminal operator schedule . . . applicable to shippers and other cargo interest and their agents or contractors, inland carriers, **leasing companies or other equipment providers** . . . with respect to the authorities contained in Articles II(a)(i) – (vi) . . . [emphasis added]”

Second, Article II(a)(i) addresses what **subjects** Rule 15 can cover, stating:

“The parties are authorized to exchange information, discuss, agree upon, establish, revise, maintain, cancel and enforce terminal rates . . . charges, rules, regulations, procedures, practices, terms and conditions **relating to cargo moving in the foreign commerce of the United States** concerning . . . matters involving or affecting the interchange of cargo, **chassis** and containers with motor carriers and/or rail carriers including . . . **on terminal equipment use and/or storage . . . and costs relating to any of the above.**” [emphasis added]

WCMTOA members are thus authorized to discuss and agree on rates and charges applicable to “leasing companies or other equipment providers” relating to “on-terminal equipment use and/or storage” where the charges relate “to cargo moving in the foreign commerce of the United States.”

A review of the Petition and the Petitioners’ prior representations to the Commission discloses two primary arguments by Petitioners why, in their opinion, the imposition of Rule 15 exceeds the authority granted to WCMTOA under the filed agreement. Both of these arguments fail.

First, Petitioners contend that they are not the type of entity on whom WCMTOA is authorized to impose fees under II(b). They are not – they contend – sufficiently definitely identified by the terms “leasing companies or other equipment providers” in Article II(b)(v). (See July 18, 2016 letter from Neal Mayer at 2). Petitioners’ argument that the 2014 amendment

to WCMTOA adding “leasing companies or other equipment providers” to the scope of WCMTOA’s authority does not apply to them is meritless. The contention that unless the word “chassis” appeared in the amendment the Commission would not be appropriately informed of what was covered under the Agreement is specious. Petitioners fall within the definition of “leasing companies or other equipment providers” under the only sensible construction of that language. (See July 6, 2016 letter from Neal Mayer at 1 (describing Petitioners as “container- and chassis-owning companies that lease their equipment . . .”); July 6, 2016 letter from Steven Blust (describing Petitioners as “chassis leasing companies”)).

Second, Petitioners claim that the jurisdictional provision of Article II(a) extending WCMTOA’s MTO schedule authority to matters “relating to cargo carried in the foreign commerce of the United States . . . concerning matters involving or affecting . . . chassis and containers with motor carriers and/or rail carriers including . . . on terminal equipment use and/or storage . . . and costs relating to any of the above ” is simultaneously both too narrow to cover Rule 15 and too broad to be legal. The argument that chassis do not relate to cargo is implausible. The sole purpose for the chassis is to carry containers that exist to move such cargo. The argument that “related to cargo” is too broad to be meaningful is equally meritless, particularly given the clear and undeniable relationship between chassis and containerized cargo.

WCMTOA has complied with all requirements imposed by the Shipping Act, and by the Commission, concerning WCMTOA’s discussion of chassis issues. The amendment authorizing this discussion has been in place since 2014, and there is no basis for a show cause order challenging WCMTOA’s authority to discuss the Fee.

Petitioners Receive Significant Benefits From the Presence of Chassis on Terminal Property at Substantial Cost to MTOs

Petitioners own and control the overwhelming majority of the chassis that are stored on and move throughout MTOs within LA/LB each day of terminal operations. Not only do MTOs provide a portion of their leased acreage within the terminals to store chassis while not in active use, they also use their own equipment and ILWU labor to stack and unstack chassis for the chassis providers. Despite MTOs incurring the primary costs associated with the presence of chassis on terminals, it is Petitioners who actually manage the chassis and derive substantial revenues through their use.

In the Petition, Petitioners assert that chassis “effectively enable the terminal to operate” and that without Petitioners’ chassis, “the terminal would have to shut down.” In fact, the inverse is true. Without the terminal space and related services provided by MTOs, Petitioners would be unable to operate their business on the terminals, thus impacting the entire supply chain.

Specifically, the Fee was designed to address three aspects of the cost the presence of chassis imposes on MTOs: storage of chassis; stacking and unstacking; and EDI services. WCMTOA considered all three of these significant cost factors when drafting Rule 15.

First, MTOs store thousands of chassis on terminals on a daily basis. As Petitioners note, over 31,000 chassis are located on terminals on any given day, many of which must be stored for a period of time while waiting to be picked up by Petitioners' customers. While Petitioners obtain free storage of their equipment, WCMTOA members are forced to devote significant, and expensive, portions of their limited terminal space for chassis. The space devoted to chassis use and storage has a tangible financial impact in terms of lease costs, taxes, and insurance, as well as an opportunity cost related to the devotion of finite terminal space that could be otherwise utilized to increase MTO revenues.

Next, chassis are stored on the terminals and must be stacked and unstacked when called for use. This benefits Petitioners and their customers by having the chassis readily available when needed and also helps minimize the amount of finite and costly terminal space required to house the chassis. The organization of chassis in this manner requires union labor and equipment, and it is hardly unfair to ask Petitioners to defray a fair share of the costs currently borne by MTOs. Petitioners nevertheless assert that the stacking and unstacking of chassis is "not requested by and is of no benefit to the chassis providers." In making this assertion, Petitioners pretend that they do not understand how a terminal operates – and indeed must operate – in order to provide timely and efficient service, which directly benefits Petitioners and their customers.

Finally, the MTOs provide EDI services to Petitioners and incur the full cost of the associated personnel, hardware, and software. The substantial data provided allows Petitioners to bill their customers, and includes information regarding what motor carriers haul chassis on or off the terminals. This information allows Petitioners to operate their business by billing truckers for daily rental charges. Collecting and providing EDI again comes at a cost, which, despite directly benefitting Petitioners, is currently borne solely by MTOs.

The Fee included in Rule 15 is a reasonable and just measure to address the tangible cost to MTOs of chassis on terminals. Petitioners complain that the Fee is uniform across all WCMTOA members. By creating a "grey" pool of chassis available across the port complex, the "Pool of Pools" has taken a port-wide approach in order to increase efficiency and ensure chassis availability. In light of this approach, WCMTOA's adoption of a similar consistent, port-wide system to compensate MTOs for chassis costs is reasonable, and the amount of the Fee is just and appropriate.

Petitioners Are Not Unduly Prejudiced or Disadvantaged by the Fee

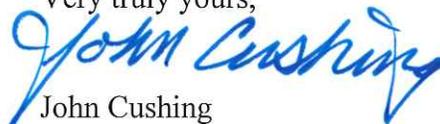
Petitioners' argument that imposition of the Fee would unduly prejudice or disadvantage them vis-à-vis ocean carriers and/or motor carriers fails as does the rest of its argument. Petitioners complain that the Fee would not be assessed against chassis owned by ocean common carriers, motor carriers, or others. This argument, however, continues to ignore the reality that Petitioners are the users of the services identified in Rule 15. Chassis that do not require the chassis services of storage, stacking and unstacking and EDI services are therefore not bound by the terms of Rule 15. Asking Petitioners to pay their fair share is not a Shipping Act violation and does not in any way prejudice or disadvantage them.

Conclusion

For the above reasons, the WCMTOA members had the authority to implement the Fee through their MTO schedule. The Fee proposed – and subsequently removed – was reasonable and just in light of the benefits Petitioners derive from storing chassis on terminals and the related services MTOs provide to them. However, WCMTOA's removal of the Fee from Rule 15 of its MTO schedule renders Petitioners' request for an order to show cause completely moot. For all of these reasons, there is no basis to issue an order to show cause and Petition No. P2-16 must be denied.

WCMTOA appreciates the Commission's consideration of these comments and looks forward to working with Petitioners and other stakeholders in order to continually improve service and increase supply chain efficiency.

Very truly yours,



John Cushing
President, PierPass, Inc.

cc: Neal M. Mayer, Esq.
Paul D. Coleman, Esq.