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THE FEDERAL REGULATION OF AMERICAN PORT ACTIVITIES

*Richard A. Lidinsky, Jr.**

*Deborah A. Colson***

I. INTRODUCTION

A crucial but often overlooked party in the transaction of international trade is the port. While American ports have much in common with their counterparts throughout the world, federal laws and regulations place U.S. ports in a unique posture. Unlike Canadian, Japanese, and European ports that are both owned and operated by their respective governments, American ports are merely regulated by the federal government. Specifically, there are over 2,400 port facilities throughout the United States that are owned by either state, local, or private entities. Federal laws and regulations control the operation of these ports, the activities of their serving vessels, and their competitive nature.

The primary focus of this article is on the Federal Maritime Commission (FMC),¹ which is the regulatory body charged with the supervision of

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1. H. MARCUS, T. SHORT, J. KYPER'S FEDERAL PORT POLICY, (Massachusetts Institute of Technology, 1976), [hereinafter Marcus], describes the functioning of the FMC at 58-59.

The Federal Maritime Commission was established by Reorganization Plan 7, effective August 12, 1961, as an independent agency to administer the regulatory responsibilities outlined under the Shipping Act of 1916, the Merchant Marine Act of 1920, the Intercoastal Shipping Act of 1933, and the Merchant Marine Act of 1936. These laws give the FMC jurisdiction over waterborne movements between the United States and foreign countries as well as to noncontiguous ports of the United States. Additionally, the Commission administers certain provisions of the Water Quality Improvement Act (WQIA) of 1970.

Shipping Act of 1916, 39 Stat. 728, Codified at 46 U.S.C. § 801 *et seq.*, the Merchant Marine Act of 1920, 41 Stat. 988, Codified at 46 U.S.C. § 861 *et seq.* Intercoastal Shipping Act of 1933, 47 Stat. 1425, Codified at 46 U.S.C. § 843 *et seq.* and the Merchant Marine Act of 1936, 49 Stat. 1985, Codified at 46 U.S.C. § 1101 *et seq.* In this article, since the Shipping Act of 1916 is the primary source of maritime law, it will be referred to as "the Act."

"common carriers"² in foreign commerce and of "other persons"³ subject to the various shipping acts. The regulatory powers of the FMC are widespread. For example, if a port handles cargo, or provides the facilities for the handling of cargo, a tariff schedule must be filed with the FMC.⁴ If a port is contemplating the creation or expansion of a terminal or cargo-handling area, the FMC can exercise jurisdiction over the possible environmental impact of such an action.⁵ If a port displays favoritism to a shipper or ocean carrier through terminal-regulated rates or lease agreements, the FMC can investigate such activities and impose civil fines upon the port.⁶ Thus, the role of the FMC during what has been labelled as an era of deregulation has essentially been one of re-regulation. New responsibilities have continued to be placed upon the Commission by Congress. The result is that there has been only a minimal decrease in the regulation of ports.⁷

In addition to the FMC, there are other areas of federal activity that directly or indirectly regulate American ports. Specifically, various other federal agencies such as the Coast Guard,⁸ the Maritime Administration,⁹ the Interstate Commerce Commission,¹⁰ the Department of Transportation,¹¹ and the Environmental Protection Agency.¹² The role of each of these agencies in

Prior to the establishment of the Federal Maritime Commission, the shipping industry was regulated by the U.S. Shipping Board (1919-33); the U.S. Shipping Board, Department of Commerce (1933-36); the U.S. Maritime Commission (1936-50); and the Federal Maritime Board (1950-61).

2. See 46 U.S.C. § 801. The term "common carrier by water in foreign commerce" means a common carrier, except ferry boats running on regular rates, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, that a cargo boat commonly called ocean-tramp shall not be deemed such "common carrier by water in foreign commerce."

3. The term "other person" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

4. See 46 U.S.C. § 817.

5. FMC General Order 45, 46 CFR Part 547, May 21, 1980.

6. See 46 U.S.C. § 831.

7. The 96th Congress enacted major deregulation measures in the area of rail (P.L. 96-448) and motor carriers (P.L. 96-296) activity; interestingly, the major legislative proposals dealing with ocean carriers and ports (H.R. 4769 and S. 2535), entitled Omnibus Bills, consolidated and somewhat increased existing FMC powers over them, rather than deregulating them.

8. January 28, 1915, Ch. 20, Sec. 1; 38 Stat. 800.

9. Merchant Marine Act of 1936; Act of June 29, 1936, Ch. 858; 49 Stat. 1985; 46 U.S.C. § 1101 (1958).

10. 24 Stat. 379, 383; 49 U.S.C. §§ 1-22.

11. 80 Stat. 931; 49 U.S.C. § 1651.

12. Public Law 91-190; 42 U.S.C. § 4321 *et seq.*; 83 Stat. 852, January 1, 1970.

the regulation of U.S. ports will be discussed in this article. However, in order to understand the general scope of federal regulation of port activity, FMC jurisdiction over vessels that call on regulated ports must first be examined.

II. THE FMC AND PORTS

A. THE SHIPPING ACT OF 1916

The crux of federal regulation of ports is contained in Section 1 of the Shipping Act of 1916.¹³ This section affects "any person not included in the term common carrier by water, carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water."¹⁴

In 1944 the Supreme Court rendered a decision that specifically interpreted the meaning of the phrase "other person" as employed by the Act.¹⁵ According to the Court, the circumstances that gave rise to the enactment of the Shipping Act must be given primary consideration in determining what "other person" is subject to the Act's jurisdiction.¹⁶ The Court ultimately determined that municipalities are included in the term "other person" since they are the public owners of wharves and piers that furnish the sort of facilities ordinarily subject to the jurisdiction of the Act.¹⁷ As the Court noted, to exempt such facilities from the jurisdiction of the Shipping Act "would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals . . . there can be no doubt that wharf storage facilities provided at shipside for cargo which has been unloaded from water carriers are subject to regulation by the Commission."¹⁸ FMC jurisdiction attaches to those facilities that create "links

13. 39 Stat. 728, Chapter 451, September 7, 1916. (Shipping Act repealed by Transportation Act of 1940.)

14. The regulations define *dockage* as "the charge assessed against a vessel for berthing at a wharf, pier, bulkhead structure, or bank, or for mooring to a vessel so berthed." 46 CFR § 533.6 (d)(1). *Wharfage* is defined as a "charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter or water), when berthed at wharf or when moored in slip adjacent to wharf." 46 CFR § 533.6 (d)(2). "Warehouse" is not explicitly defined, but the regulations speak of "covered and/or open storage space, cold storage plants . . ."

15. *State of California v. United States*, 320 U.S. 577 (1944).

16. *Id.* at 585.

17. *Id.* at 585-86.

18. *Id.* at 586.

in the same chain of maritime commerce as do wharfage, dockage and warehousing."¹⁹

Sections 15 through 17 of the Shipping Act of 1916 may be viewed as the Act's general jurisdictional sections.²⁰ Section 15 of the Act requires that agreements originated by ports, as well as terminal agreements made between vessel operators (or their agents) and the port, be filed with the Commission. After notice and hearing, the FMC has the power to:

[D]isapprove, cancel or modify any agreement, or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of the Act, and shall approve all other agreements, modifications or cancellations.²¹

When assessing terminal agreements, the FMC must take into consideration several factors. First, the Commission must determine if the arrangement unjustly discriminates between ocean carriers, or falls within the confines of a terminal agreement. It should be noted that some port authorities, rather than publishing tariff rates, operate strictly under terminal agreements. Second, the Commission must ensure that the arrangement does not work to the detriment of the United States. Finally, it must determine that the agreement does not violate the Shipping Act.²²

The filing of terminal lease agreements has always been troublesome both to ports and to the FMC itself. In order to clarify this area, the FMC has published "guidelines" to aid in the determination of what types of leases, licenses, assignments, or other contractual relationships are required to be filed with the FMC.²³

Generally, terminal agreements between persons subject to the Act covering the lease, license, or assignment of terminal facilities *must* be filed when they:

- (a) fix or regulate rates, rules, regulations, or charges;
- (b) give or receive special rates, accommodations, or privileges;

19. Todd Buchwald, "Federal Maritime Commission Jurisdiction Over Terminal Operators," *Journal of Maritime Law and Commerce*, Vol. 12, No. 2, January 1981, at n. 20.

20. See 46 U.S.C. § 814-16.

21. See 46 U.S.C. § 814.

22. See 46 U.S.C. § 815.

23. FMC informal rulemaking as published in 29 Fed. Reg. 5041, April 11, 1964.

- (c) control, regulate, prevent, or destroy competition;
- (d) provide for an exclusive, preferential, or cooperative working arrangement by agreeing to pool facilities, labor, or resources for terminal operations; and
- (e) provide that earnings or losses received from a marine terminal operation shall be divided between two or more persons subject to the Act, except that rental payments based directly upon the amount of cargo handled will not be considered an apportionment of earnings.

Terminal agreements need *not* be filed when they:

- (a) are between two persons either of whom is not subject to the Act;
- (b) do not include terminal facilities for the handling of cargo or passengers moving in foreign or interstate ocean commerce;
- (c) are not related to terminal facilities which handle, or hold themselves out to handle, common carrier vessels in foreign or interstate ocean commerce;
- (d) cover only lease of space to stevedores for offices and/or for storage of gear, provided that rental for such space is a fixed amount not in excess of \$10,000 annually;
- (e) concern routine day-to-day terminal operations involving the temporary assignment of berth, wharf, or pipe line, or the rental of equipment, when provided for in a tariff or by a license or permit form which has previously been determined to be not subject to Section 15;
- (f) concern terminal services, the charges for which appear in a tariff and are available to all applicants on equal terms.²⁴

Agreements filed under Section 15 of the Shipping Act of 1916, are not wholly exempt from antitrust laws. If a Section 15 arrangement violates antitrust laws, it must either fulfill a transportation necessity that benefits the public, or further the purpose of the Shipping Act, in order to remain in effect.²⁵ Essentially, free and open competition by independent carriers is encouraged while conferences (semi-cartels) are permitted subject to regulation.

General Order 15,²⁶ issued by the FMC, complements Section 15 of the Shipping Act of 1916 in dealing with port terminal tariff rates.²⁷ The General

24. See § 15 of the Shipping Act of 1916, *supra* note 1.

25. *FMC v. Swedish American Line*, 390 U.S. 238 (1968).

26. FMC General Order 15, 46 CFR 533, October 5, 1965.

27. *Id.*

Order applies to common carriers by water, marine terminal operators, and "other persons" to whose practices these rules are directed. The order requires filing, but not approval, of rates, rules and regulations, and any changes thereto with the Commission on or before their effective dates.²⁸

General Order 15 also requires tariff rates, rules and regulations to be posted at places of business.²⁹ It requires that definitions be included in tariffs.³⁰ The essential purpose of General Order 15 is to provide notice to the Commission and to the public of the current rates and practices of marine terminal operators. It is hoped that this Order will provide the FMC with sufficient information to enforce relevant provisions of its enabling legislation, without unduly burdening ports.

It should be noted that the Commission's power to reject tariffs is limited to violations of its tariff-filing regulations that prescribe the form or manner of publishing or filing tariffs. The Commission does *not* have the authority to reject tariffs on any basis other than one specified in the Shipping Act.³¹ One recent development is that certain port authorities are publishing tariff/lease rates for month-to-month rental situations in their terminals — a practice which is encouraged by the Commission and obviates the necessity for individual Section 15 approvals.³² In recent months the Commission has closely examined this entire area and is continuing to explore the possibility of developing certain additional lease and tariff filing requirements.³³

Section 16 of the Shipping Act (the second general jurisdictional section of the Act), pertains to the prevention of undue or unreasonable preference or advantage. This section makes it unlawful for a shipper to unjustly obtain or attempt to obtain transportation by water at prices that would ordinarily be less than applicable.³⁴ It also prevents "common carriers" and those subject to the Act from giving undue preference or advantage to any particular person or locality or to subject the same to unreasonable prejudice or disadvantage.³⁵ Essentially, this section prohibits carriers from discriminating against particular ports through tariff rates or otherwise.³⁶

28. *Id.*

29. *Id.*

30. *Id.*

31. *Commonwealth of Pennsylvania v. FMC*, 392 F. Supp. 795, 802 (1975).

32. *See Maryland Port Administration Terminal Services Tariff No. 5, Section IX at 16.*

33. *See Exemptions from Provisions of Shipping Act, 1916, and Intercoastal Shipping Act, 1933, FMC 79-18 March 28, 1979, (discontinued); Proposed Exemption of Non-Exclusive Trans-shipment Agreements from Section 15 Approval Requirements FMC 80-34, July 24, 1980.*

34. *See* 46 U.S.C. § 814.

35. *Id.*

36. *Id.*

Section 17 (the Act's final general jurisdictional section) prohibits common carriers from charging discriminatory rates or rates that would be discriminatory to American exporters. It further provides that "common carriers" and "other persons" must observe "reasonable practices" in connection with the handling of freight.³⁷

B. GENERAL FMC JURISDICTION OVER VESSELS

In relation to domestic commerce (*i.e.*, waterborne movements between the coastal states, Puerto Rico, and U.S. territories and possessions), the Intercoastal Shipping Act of 1933,³⁸ and the Shipping Act of 1916³⁹ confer upon the FMC plenary rate-making powers. Currently, however, it is the Interstate Commerce Commission that regulates the majority of interstate shipping.

In contrast, the FMC's powers over foreign commerce are relatively restricted. The Commission must approve all ocean carrier agreements, formed by single carriers joining together in semi-cartels called "conferences", before they become effective. It may also disapprove unjustly discriminatory and unreasonably high or low rates under certain sets of circumstances.⁴⁰ The FMC retains only limited rate-making authority over foreign carriers, and may *not* suspend a proposed rate or set a "reasonable rate," as it can under the Intercoastal Shipping Act.⁴¹ Not only does the Commission lack the power to set a new rate pending the conclusion of a hearing, it cannot set a new rate even after determination that a challenged rate is unreasonably high or low. The Commission may only alter rates "to the extent necessary to correct . . . unjust discrimination or prejudice" toward shippers or ports as authorized by Section 17 of the Shipping Act of 1916.⁴²

The methods selected by Congress to regulate the shipping industry's practices are public disclosure and review of all inter-company agreements and tariff rates, regulations, and practices.⁴³ The policy underlying the requirement of public disclosure is to enable a shipper to easily discover his

37. See 46 U.S.C. § 816.

38. See P.L. 415, March 3, 1933.

39. See 46 U.S.C. § 801, *et seq.* (1970).

40. See 46 U.S.C. §§ 814-17. As a general rule, reasonable and nondiscriminatory rates should be no lower than the cost of service to the carrier plus a reasonable profit and no higher than the reasonable worth of the service to the shipper. *Gulf Westbound Intercoastal Soyo Bean Oil Meal Rates*, 1 U.S.S.B.B. 554 at 560.

41. See P.L. 415, March 3, 1933.

42. See 46 U.S.C. § 816.

43. See 46 U.S.C. § 815.

rights and obligations *vis-a-vis* common carriers and ports. Any deviation from public filings creates civil liability.⁴⁴ Modifications and cancellations of ocean carrier agreements, as well as oral agreements (which must be reduced to writing),⁴⁵ must be filed with the Commission.

Agreements that are anti-competitive in nature are prohibited by Sections 14(b) and 15 of the Act,⁴⁶ unless prior approval is obtained from the FMC. Even assuming such anti-trust immunity is granted, it is contingent upon the carrier's compliance with the statutory requirements — including the disclosure and nondiscrimination provisions found throughout the Act.⁴⁷ Dual-rate contracts⁴⁸ and any modifications or cancellations to them, must be filed with the FMC. Furthermore, third-party carriers that conform to agreements between other carriers are treated as though they were actually parties to those agreements.⁴⁹ Such third-party carriers are therefore subject to the Shipping Act of 1916.⁵⁰

In 1961, Congress added a public interest standard to Section 15 which was later upheld by the Supreme Court. In relation to anti-trust, this standard requires that

[T]he parties seeking exemption from the anti-trust laws for their agreement must demonstrate that the agreement is required by a serious transportation need, or in order to secure important public benefits. Otherwise it is our view that the public interest in the

44. Violation of 46 U.S.C. §§ 14(b), 15, 18(b) is punishable by a civil penalty of \$1,000 per day.

45. *Unapproved Section 15 Agreements — South African Trade*, 7 FMC 159, 184-191 (1962).

46. See 46 U.S.C. § 813(a).

47. See 46 U.S.C. §§ 813(a), 814.

48. 46 U.S.C. § 813(a) authorizes "dual rate contracts" that are formal arrangements between shippers and conferences in which the shipper agrees to use exclusively the services of the conference. In return for this exclusive patronage, the conference charges rates that are 15% less than the rates charged those who do not sign similar contracts. If the shipper breaks the contract and ships with some other carriers, he must pay liquidated damages to the conference.

The dual rate contract must be offered to all shippers. It is not applicable to bulk commodities except liquids in less than shipload lots. A shipper may withdraw from a dual rate contract only upon 90 days' notice; a conference may alter or cancel its entire dual rate system only after giving 90 days' notice. A conference may only raise or open its rates after 90 days, and if shipper objects to the raise, may give 30 days' notice of termination conditioned upon the conference's changing rate. The FMC may cancel such a system upon finding that it is contrary to public policy or detrimental to the commerce of the United States.

49. See U.S.C. § 814.

50. See 46 U.S.C. § 801, *et seq.* (1970).

preservation of competition where possible, even in regulated industries, is unduly offended . . . Disapproval of an agreement on this is not grounded on any necessary finding that it violates the anti-trust laws but rather because the anti-competitive activity under agreement invades the prohibitions of the anti-trust laws more than is necessary to serve the purpose of the Shipping Act and is therefore contrary to the public interest.⁵¹

Essentially, this standard is one that weighs public interest against strict adherence to the Shipping Act in matters of agreement, approval, general contract rates, and tariffs.⁵²

The FMC's general jurisdiction over vessels, as provided in the Shipping Act, essentially prohibits three types of discriminatory conduct: (1) behavior, the purpose of which is to injure competing carriers; (2) behavior which unfairly draws traffic from its natural routing; and (3) conduct that results in similarly situated shippers being treated differently. Such discriminatory conduct is prohibited throughout the Shipping Act in several ways. First, Sections 16 and 17 together make any degree of discrimination against ports, through tariff rates or otherwise, unlawful. An "unjustly discriminatory" rate may be corrected by the FMC in order to prevent the discrimination.⁵³

Second, there are several provisions within the Act that prohibit carriers from differentiating among shippers that operate under similar circumstances. Section 14 prohibits unjust discrimination against small shippers and any practices of carriers that involve "retaliation or resort to other discriminating or unfair methods (against any shipper) because such shipper has patronized any other carrier."⁵⁴ This section further prohibits the practice of awarding rebates to shippers who exclusively ship on conference lines and the employment of fighter ships to undercut non-conference carriers.⁵⁵ Along the same lines, Section 16 forbids shippers to procure transportation at less than published rates in order to gain an advantage over their competitors. Carriers may not charge a fraudulently contracted rate or give preference to

51. See 46 U.S.C. § 816.

52. It should be noted that the FMC has not limited its enforcement of the established public interest standard to anti-trust matters. This weighing process has, for example, been used in connection with Section 8 of the Merchant Marine Act of 1920 and Section 205 of the Merchant Marine Act of 1936, both of vital concern to ports. See 46 U.S.C. § 867.

53. See 46 U.S.C. §§ 815, 816.

54. See 46 U.S.C. § 812.

55. See 46 U.S.C. § 815.

or discriminate against particular persons⁵⁶ or shippers.⁵⁷ In addition, Section 18(b) prohibits carriers from charging rates other than those published.⁵⁸

C. THE MERCHANT MARINE ACT OF 1936

The FMC administers Section 205 of the Merchant Marine Act of 1936,⁵⁹ that regulates the practice of common carriers and was intended to protect ports. This section makes it unlawful for a common carrier to prevent another

[F]rom serving any port designed for the accommodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government lying within the continental limits of the United States, at the same rates which it charges at the nearest port already regularly served by it.⁶⁰

The underlying purpose of Section 205 was to prohibit conferences from imposing restrictions on member lines which would interfere with the free exercise of the lines' discretion in determining which ports to serve.⁶¹

The FMC has continually expanded its enforcement regulation of Section 205 of the Merchant Marine Act of 1936.⁶² For example, in July 1977, the Far East Conference (FEC) filed a revised tariff that directed specific port wharfage charges to be passed on to the owner, shipper, or consignee of the cargo, instead of being included in ocean tariffs. In June 1978, the FMC unanimously voted to block the move by the FEC. The FMC held that the FEC's action to pass on the wharfage charges to the shipper violated the established shipping and maritime practices inherent in Section 205 of the Merchant Marine Act of 1936.⁶³ These violations were deemed flagrant by the FMC since Section 205 prohibits a conference from requiring or preventing different rates from applying at neighboring ports. The FMC stated that "where the facts indicate that particular activity contravenes Section 205 of the Merchant Marine Act of 1936, the Commission applying the public interest standard of Section 15 of the Shipping Act of 1916, has no alternative but to disapprove such activity."⁶⁴

56. See 46 U.S.C. § 815.

57. See 46 U.S.C. § 816.

58. See 46 U.S.C. § 817(b)(3).

59. See 46 U.S.C. § 1115.

60. See 46 U.S.C. § 1115.

61. See 46 U.S.C. § 1115.

62. Far East Conference Amended Tariff Rule Regarding Assessment of Wharfage and Other Accessorial Charges, 20 FMC 772 (1978).

63. *Id.* at 776.

64. *Id.* at 777.

D. THE FMC AND THE ASSESSMENT OF CHARGES AT PORTS

"Free time" and "demurrage practices" have always been difficult and controversial areas for the FMC. "Free time" is defined as that period during which cargo is permitted to rest on a wharf without charge. In other words, the allowance of free time establishes a specific amount of time that cargo may remain on a pier without charge.⁶⁵ Regulation of free time practices falls under Section 17 of the Shipping Act of 1916, which provides that common carriers in foreign commerce shall *not* charge discriminatory or prejudicial rates to American exporters. Section 17 further provides that carriers must observe reasonable practices in connection with the handling of freight.

Generally, the length of time that is permissible as free time is that period which is deemed "reasonably necessary for a shipper to assemble or to remove his goods and for the ship to load or to discharge."⁶⁶ When cargo is left on the wharf beyond what is determined to be the reasonable free time, a penalty or "demurrage charge" is assessed.

The duty to provide free time, in addition to reasonable terminal facilities, is part of an ocean carrier's responsibility. The determination of a reasonable time must take into account the rights of all parties involved, including the rights of carriers, importers, and the public interest.⁶⁷ The determination of a reasonable period for free time is reached through a process of balancing. It has been noted that:

[T]he best index to the adequacy of free time is evidence relative to the frequency and amount of demurrage assessments. If demurrage were assessed with great frequency, or in large amounts, it would suggest that free time is inadequate for delivery. If, on the other hand, demurrage is the exception rather than the rule, and the amounts of demurrage are small, we must infer that cargo is normally deliverable and delivered within free time and that free time is adequate.⁶⁸

When the Commission determines that various practices are unjust or unreasonable, a cease and desist order may be issued.

There are certain limitations on the allowance of free time. First, the period allowed for free time is strictly limited to that amount of time required for a shipper to assemble, or for a consignee to remove his cargo.⁶⁹ Second, a

65. See 46 U.S.C. § 816 and FMC General Order 15, 46 CFR 533, October 5, 1965.

66. *State of California v. United States*, 320 U.S. 577 at 580 (1944).

67. *Free Time and Demurrage Charges at New York*, 3 USMC 89, 93 (1948).

68. *Id.* at 101.

69. *Id.* at 93.

carrier has no obligation to provide a shipper with any time beyond that which is reasonable and necessary for assemblage or pick-up.⁷⁰

In 1976, the FMC issued a "circular letter" to all marine terminal operators, the purpose of which was to survey free time practices on an informal basis. The letter was necessitated by the many complaints the Commission had received concerning the excessive amount of free time being allowed by various ports and terminal operators. In this letter, the FMC requested "all ports and terminals who have tariffs on file with this Commission to review their tariffs and where a terminal or port is allowing free time in *excess of 15 days*, that immediate consideration be given to adjusting such free time periods not to exceed 15 days" (emphasis supplied).⁷¹ The Commission also requested that those ports and terminals whose free time provisions exceed 15 days give notification and rationale for such practice. The Commission warned that failure to respond to its request could result in the institution of formal action by the Commission to determine the justification and reasonableness of free time practices. The response to this informal request was minimal, however, there was no further action taken by the FMC.

Several ports have created special free time and demurrage provisions in their tariffs. For example, one terminal tariff in the Port of New York states that "on project cargo an assembly period, not to exceed forty-five (45) consecutive calendar days, may be granted for consignments of cargo being assembled for shipments in large lots . . . Such assembly time shall be granted at the discretion of the management of the marine terminal."⁷² The Port of Hampton Roads (Virginia) has a similar provision in its terminal tariff.⁷³

Wharfage charges are assessments that are made by a pier owner or operator against shippers or consignees for the use of a wharf and for the moving of freight between a ship and its place of rest on the wharf.⁷⁴ This charge is levied upon every pound of cargo that is loaded or off-loaded from a vessel for the account of the vessel or shipper.⁷⁵ Wharfage rates are based upon the type of commodity that is being moved. These charges are

70. Assembly Time — Port of San Diego, 13 FMC 1, 11 (1969).

71. FMC Circular Letter No. 5-76-T, Excessive Free Time.

72. New York Terminal Conference Tariff, FMC — T No. 16, effective December 11, 1978.

73. Port of Hampton Roads, Terminal Tariff No. 1, effective October 1, 1979.

74. Terminal Rates and Charges at Seattle of Alaska S.S. Co., 2 CFR 533, October 5, 1965.

75. FMC General Order 15, 46 CFR 533, October 5, 1965.

transportation rates within the meaning of Section 15 of the Shipping Act⁷⁶ and must be published in a tariff.⁷⁷

Dockage is the charge assessed by a pier owner or operator for the furnishing of berthing facilities.⁷⁸ More specifically, this charge is assessed against a vessel for the use of berthing space at a wharf or alongside other vessels at a wharf.⁷⁹ This charge is for the space occupied by the vessel and has no direct relation to service rendered.⁸⁰ Dockage charges fall within Sections 15, 16 and 17 of the Shipping Act of 1916.⁸¹

The impact of the Shipping Acts on vessels and ports can best be gauged by their flexibility and the record of port growth since 1916. From an era of wooden freight piers owned by railroads or ocean carriers, we have witnessed the development of a port industry with sophisticated equipment and technological innovations estimated to be worth \$40.4 billion.⁸² One could safely state that if the federal regulatory scheme over ports did not foster their growth, it certainly did not stifle it.

III. MISCELLANEOUS AGENCIES AND PORTS

In addition to the FMC and the various Shipping Acts, six federal agencies also regulate the daily functioning of American ports.

A. THE U.S. ARMY CORPS OF ENGINEERS

The U.S. Army Corps of Engineers has been charged by Congress with a major federal role in water resources development that encompasses both ocean ports and inland waterways.⁸³ Although the Corps of Engineers was initially delegated the broad responsibility of public works, it currently deals with many issues arising from technological and environmental changes. The setting of federal and state standards for the disposal of dredged spoils has altered the Corps' traditional role in the area of port responsibility.

The dredging operations of the Corps of Engineers have been a major factor in the development of the U.S. port industry. The Federal Water

76. See 46 U.S.C. § 814.

77. Agreement No. 8905 — Port of Seattle and Alaska S.S. Co., 7 FMC 792 (1964) at 797.

78. Contract Rates — Port of Redwood City, 2 USMC 727 at 743.

79. Terminal Rate Increases — Puget Sound Ports, 3 USMC 21 at 25.

80. *Id.*

81. West Gulf Maritime Assn. v. Port of Houston Authority, et al., No. 74-15, September 26, 1979.

82. U.S. Maritime Administration, The National Port Assessment, 1980-1990, issues July 1980.

83. See 33 U.S.C. §1284.

Pollution Control Act,⁸⁴ as amended by the Clean Water Act of 1977 (Sections 403(c) and 404(b)),⁸⁵ the Marine Protection, Research, and Sanctuaries Act of 1972,⁸⁶ the National Environmental Policy Act of 1969,⁸⁷ and various other federal laws have charged the Environmental Protection Agency (EPA), in coordination with the Secretary of the Army, to develop regulations to control dredging and filling activities in inland waters of the United States and adjacent wetlands, and the disposal of dredged material in ocean waters. These regulations require evaluation and assessment of the probable impact dredging and filling operations will have on the marine environment, wildlife, habitats, and the overall environment, including the probable impact on the well-being of man. They are applicable not only to projects of the Corps of Engineers, but to other projects in the public and private sectors as well.⁸⁸

B. ENVIRONMENTAL PROTECTION AGENCY (EPA)

As stated above, the EPA has a direct impact on the daily operations of the ports of the United States. Through the National Environmental Policy Act of 1969 (NEPA),⁸⁹ the EPA directs all agencies of the federal government to employ a "systematic, interdisciplinary approach which will ensure the integrated use of the material and social sciences and the environmental design arts in planning and decision-making which may have an impact on man's environment."⁹⁰ More specifically, Section 102(2) of the Act requires all agencies to include in their recommendations affecting the environment a detailed statement including:

- (1) the environmental impact;
 - (2) any adverse environmental effects which cannot be avoided should the proposal be implemented;
 - (3) alternatives to the proposed action;
 - (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity;
- and

84. See P.L. 92-500; 86 Stat. 816, October 18, 1972.

85. Clean Air Act of 1977; P.L. 95-95; 91 Stat. 685, August 7, 1977.

86. See P.L. 92-532, October 23, 1972.

87. See P.L. 91-190; 42 U.S.C. § 4321 *et seq.*; 83 Stat. 852, January 1, 1970.

88. "Current Dredging Concerns of the American Association of Port Authorities," Remarks by Herbert R. Haar, Jr., Annual Meeting of the North Atlantic Port Association, Inc., December 6, 1979.

89. See P.L. 91-190; 42 U.S.C. § 4321 *et seq.*; 83 Stat. 852, January 1, 1970.

90. *Id.*

- (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.⁹¹

In May 1980, the FMC issued General Order 45. In this General Order, final procedural rules were enacted to implement NEPA in compliance with the regulations of the Council on Environmental Quality. These procedures were made applicable to all Commission actions except those requiring environmental analysis.⁹²

C. MARITIME ADMINISTRATION

The Maritime Administration (MARAD) falls under the auspices of the Department of Commerce and is charged with the responsibility of promoting and developing federal policies and goals regarding ocean ports.⁹³ The central role of MARAD is the administration of the merchant marine subsidy program. This program provides for the construction and operation of differential subsidies to the U.S. Merchant Marine. It is also responsible for the promotion and development of waterborne transportation for the domestic and foreign commerce of the United States.⁹⁴

The specific functions of MARAD are administrative and developmental in nature. They include:

- (1) the administration of maritime laws pertaining to construction-differential and operating-differential subsidies to the American merchant marine;⁹⁵
- (2) maintaining national defense reserve fleets or government-owned merchant ships;⁹⁶
- (3) determining ocean services necessary for the development and maintenance of U.S. foreign commerce;⁹⁷
- (4) the investigation of foreign and U.S. vessel construction and operating costs; and
- (5) the training of merchant marine officers.⁹⁸

91. FMC General Order 45; 46 CFR 547, May 21, 1980.

92. *Id.* See also, 45 Fed. Reg. 163, August 20, 1980.

93. See Re-organization Plan 7 of 1961; 75 Stat. 840 as amended by P.L. 91-469, 84 Stat. 1036.

94. Marcus, *supra* note 1 at 126.

95. See 46 U.S.C. § 867.

96. *Id.*

97. *Id.*

98. *Id.*

Section 8 of the Merchant Marine Act of 1920⁹⁹ provides that it is part of MARAD's duty to function as a formal organizational component of port development. Among some of its duties in this area are the formulation and execution of programs to promote integrated transportation systems, the development of plans for coordinated efforts among agencies of the federal government, and the conduct of emergency preparation plans for ports and port facilities under national mobilization conditions.¹⁰⁰ In 1969, the Office of Ports and Intermodal Systems was created in order to expand these sorts of activities.¹⁰¹

It should be noted that the FMC and MARAD are currently different agencies, although prior to 1961 they were a single entity. MARAD has the responsibility of developing, promoting, and assisting the daily functioning of ports. The FMC, on the other hand, functions as a regulatory and policing agency.

D. THE U.S. COAST GUARD

The primary duties and responsibilities of the Coast Guard are set forth in Title 14 of the United States Code.

The Coast Guard shall enforce or assist in the enforcement of all applicable federal laws on or under the high seas and waters subject to the jurisdiction of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain, and operate, with due regard to the requirements of a national defense, aids to maritime navigation, icebreaking facilities, and rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States; shall engage in oceanographic research of the high seas and in waters subject to the jurisdiction of the United States; and shall maintain a state of readiness or function as a specialized service in the Navy in time of war.¹⁰²

99. See 46 U.S.C. § 867.

100. Marcus, *supra* note 1 at 130-32.

101. See 14 U.S.C. § 2.

102. 63 Stat. 496, Ch. 393, August 4, 1969; P.L. 87-396, 75 Stat. 827, sec. 1, October 5, 1961; P.L. 91-278, 84 Stat. 304, sec. 1(1), June 12, 1970.

The Coast Guard has always had a major role in the operation of U.S. ports and harbors. Legislative enactments of recent years have altered and expanded the Guard's responsibilities.¹⁰³ Especially important is the Guard's role in domestic port development, which requires the agency to enforce regulations and standards pertaining to the safety of port and vessel operations, the safe transport of dangerous or hazardous cargoes, the control and abatement of marine pollution, and a number of other maritime regulatory tasks.¹⁰⁴ The Port and Waterways Safety Act of 1970¹⁰⁵ emphasizes this responsibility of the Coast Guard. It provides that it is the duty of the agency to "promote safe and efficient maritime transportation and to promote the safety environmental quality of the ports, harbors, and navigable waters of the United States."¹⁰⁶

E. THE U.S. DEPARTMENT OF TRANSPORTATION

Since its creation in 1966, the Department of Transportation (DOT) has not been directly involved in maritime activities. In recent years, DOT has displayed an interest in this area, but Congress has confined its role to the provisions of the Deep Water Port Act of 1974.¹⁰⁷ The Secretary of DOT was charged under the Act with the overall licensing authority for the development of super-port terminal facilities.¹⁰⁸ The Coast Guard, in turn, was assigned the task of regulating the operation of these facilities. The major provisions of the Act are as follows:

- (1) DOT is given licensing authority for the development and operation of deepwater port facilities;
- (2) Coastal states bordering the proposed development of a deepwater port have the power to veto such proposals;
- (3) A timetable for administrative action is established;

103. Institutional changes in the traditional port development scenario have engendered new policy challenges and different administrative roles for the Coast Guard in its port and harbor affairs. New environmental legislation has added many policy and program responsibilities to traditional Coast Guard operations, while advances in maritime technology have placed administrative pressures on many traditional regulatory duties as well as requiring new policy approaches.

Marcus, *supra* note 1 at 139.

104. Port and Waterways Safety Act of 1972, 46 U.S.C. § 391a.

105. Ports and Waterways Safety Act of 1970: Hearings Before the Subcomm. on Coast Guard, Coast & Geodetic Survey & Navigation on H.R. 17830, 92d CONG., 1ST Sess. (July 24, 30; August 10, 11; September 15, 16, 26, 1970).

106. *Id.*

107. *See* 33 U.S.C. § 1501.

108. *Id.* *See also* Marcus, *supra* note 1 at 172.

- (4) A criteria for environmental review for the evaluation of applications for construction of deepwater port facilities is established;
- (5) Anti-trust review of facility applications is provided for in Section 7 of the Act;
- (6) DOT is authorized by the Act to establish navigable safety regulations and to designate safety zones with permissible uses; and
- (7) DOT is authorized to make a comparison of economic benefits arising from dredging an onshore deepwater port with the economic benefits of an offshore terminal facility.¹⁰⁹

F. THE NATIONAL OCEANOGRAPHIC AND ATMOSPHERIC ADMINISTRATION

The Coastal Zone Management Act of 1974¹¹⁰ established a "national policy providing for the management, beneficial use, protection, and development of the land and water resources of the nation's coastal zones, and for other purposes."¹¹¹ The National Oceanographic and Atmospheric Administration (NOAA) was established to administer the Coastal Zone Management Act of 1974. Its key functions are to:

- (1) Provide incentives to states to develop management programs;
- (2) Facilitate the harmonization of local and state programs with national objectives;
- (3) Function as a clearinghouse for technical information relating to coastal zones; and
- (4) Assist state programs by suggesting aids for evaluating the best economic and social use of coastal zones.¹¹²

NOAA has the authority to grant money to individual states for programs aimed at developing coastal zone programs.¹¹³ To those coastal states with approved plans, NOAA may make annual grants.¹¹⁴

IV CONCLUSION

From a legal viewpoint, the FMC is currently an anomaly among federal regulatory agencies. During the five-year period from 1976-80, the trend among federal agencies was one of deregulation. The Interstate Commerce

109. Marcus, *supra* note 1 at 190-91.

110. *See*, 16 U.S.C. § 1451.

111. Marcus, *supra* note 1 at 63.

112. Marcus, *supra* note 1 at 63-64.

113. Marcus, *supra* note 1 at 64.

114. *Id.*

Commission, for example, drastically reduced federal regulation in the areas of motor carrier and rail transportation through the enactment of legislation and decreased rulemaking. Similarly, the Civil Aeronautics Board fully deregulated commercial airlines and partially deregulated routes of entry. The FMC, however, has continued to increase and redefine its regulatory arsenal¹¹⁵ rather than deregulate any sector of its jurisdiction.

The fact that the FMC has resisted the trend toward deregulation can be attributed in large part to the nature of the parties it controls. As has been seen, the FMC controls U.S. and foreign flag carriers in addition to competitive U.S. ports. The extensive framework which establishes the concurrent foreign and U.S. jurisdiction of the FMC is one that cannot easily have portions dismantled without causing the total destruction of the framework. Perhaps it is for this reason that Congress has, thus far, not attempted to legislatively deregulate the FMC.

What will the 1980's bring for the FMC? The Heritage Foundation Report¹¹⁶ has offered three scenarios depicting the possible future of the FMC:

- (1) A complete re-organization of the Commission by transferring its functions to the U.S. Departments of Commerce and Transportation;
- (2) The appointment of a Republican commissioner who would undertake the process of deregulation within the present structure of the FMC; or
- (3) The abolition of the FMC.¹¹⁷

To date, it appears that the Reagan Administration will not abolish or even de-emphasize the role of the FMC. Rather, the Administration has partially adopted the course contained in the Heritage Foundation's second option.¹¹⁸ The full implementation of this option has not been followed to date, although Republican Richard J. Daschbach has been appointed as FMC Chairman by the Reagan Administration.

It is the authors' opinion that this decade will see little alteration in FMC regulatory authority or procedure. From time to time, one may expect refinement or a gradual lessening of the regulatory stronghold over common

115. See Controlled Carrier Act, P.L. 95-483, 92 Stat. 1607, effective November 18, 1978; FMC General Order 45, 46 CFR 547, May 20, 1980; Japan/Korea — Atlantic and Gulf Freight Rules Pertaining to Chassis Availability and Demurrage Charges that result when chassis are not available, FMC Docket No. 79-86 (1980).

116. The Heritage Foundation — Transportation 2000, January — February 1981, 50-52.

117. *Id.* at 50.

118. *Journal of Commerce*, March 5-6, 1981.

carriers and ports. In final analysis, however, it is likely that these entities will continue to be regulated — as they have been for 65 years — under one of the most archaic statutory and regulatory frameworks that has existed in American legislative history.