FEDERAL MARITIME COMMISSION

Statement of the Commission

On the Potential Use of an Investigatory Process
to Support Determinations Under 46 U.S.C. § 41307(b)

Docket No. 24-25

Issued July 30, 2024

After careful consideration, the Federal Maritime Commission (Commission or FMC) has determined that it is appropriate to issue a policy statement explaining the agency's potential future use of its administrative investigation process, under 46 U.S.C. §§ 41302-04 and applicable regulations, to enhance its determinations regarding filed agreements that may present the anticompetitive features described in 46 U.S.C. § 41307(b).

I. Background

Title 46 U.S.C. § 41307(b) provides that the Commission can seek injunctive relief from a federal court where an agreement among ocean common carriers, marine terminal operators, or marine terminal operators and ocean carriers has been filed with the FMC pursuant to Chapter 403 of the Shipping Act of 1984. If the FMC "determines that the agreement is likely, by a reduction in competition, to produce [1] an unreasonable reduction in transportation service or [2] an unreasonable increase in transportation cost or [3] to substantially lessen competition in the purchasing of certain covered services," the Commission may, after notice to the filer, ask the U.S. District Court for the District of Columbia to enjoin the agreement.[1] Such a suit may be filed any time after the filing or effective date of the agreement, but it is the only remedy available to the FMC with regard to an agreement that it determines is likely to have such an effect.[2] The district court may issue "a temporary restraining order or a preliminary injunction," and "a permanent injunction after a showing that the agreement is likely to have the effect described in paragraph (1)."[3] The Commission has the burden of proof in such an action.[4]

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[1] 46 U.S.C. § 41307(b)(1). We emphasize that for the agency to pursue an injunction, the statute requires a determination that it is likely that a "reduction in competition" will produce at least one of the effects described in section 41307(b)(1). The process explained in this policy statement is intended to assist the agency in making that determination. *Cf.* 15 U.S.C. §§ 1, 18.

[2] *Id*.

[3] 46 U.S.C. § 41307(b)(2).

[4] 46 U.S.C. § 41307(b)(3).

The core elements of section 41307(b) were part of the Shipping Act of 1984.[5] The Conference Report on the original 1984 language discussed the substantive elements in section 41307(b), in particular that subsection's "compromise general standard," which permits the enjoining of certain anticompetitive agreements even if they do not violate any specific prohibitions in the Shipping Act.[6] Significant additional commentary on that standard appeared in a 1997 Senate committee report regarding the proposed revision to the statute that became the Ocean Shipping Reform Act of 1998.[7] That Senate report also encouraged the agency to seek greater participation by interested parties and hold hearings prior to filing section 41307(b) lawsuits.[8] The committee "encourage[d] the agency to allow shippers or others to contribute to the process of determining whether an injunction should be sought."[9] It noted that at the time of the report, "notices of agreement filings [were] published in the Federal Register and comments of interested parties are solicited," but the FMC "could encourage even more participation by shippers and others potentially detrimentally affected by agreement authority by issuing notices of inquiry or conducting hearings on new agreement filings or existing agreements, the objective being to more fully apprise the agency of the likely or actual impact of the agreement prior to it seeking an injunction."[10]

In 2008, the Commission filed a section 41307(b) suit against the Ports of Los Angeles and Long Beach.[11] In the *City of Los Angeles* case, the Commission sought a preliminary injunction on the grounds that an agreement between the two marine terminal operators to potentially coordinate their Clean Truck Programs (CTPs) was likely, by reducing competition, to unreasonably increase costs and decrease services in violation of section 41307(b).[12]

The dispute in *City of Los Angeles* stemmed from an agreement, originally filed with the FMC in 2006, under which the ports later developed CTPs in order to reduce air pollution.[13] The FMC sought further information from the ports in May 2008, the ports filed an amended agreement in August 2008, and the FMC again sought further information in September and October 2008.[14] The ports began implementing the programs on October 1, 2008.[15] On October 29, the Commission determined that the agreement violated section 41307(b), and it filed suit on

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5 *See* Pub. L. 98-237, § 6(g)-(h), Mar. 20, 1984, 98 Stat. 72, 73.

6 *See* H.R. Conf. Rep. 98-600 (1984).

7 *See* S. Rep. 105-61 (1997) at 14-16.

8 *Id*. at 17.

9 *Id*.

10 *Id*.

11 *See Fed. Mar. Comm'n v. City of Los Angeles*, 607 F. Supp. 2d 192 (D.D.C. 2009).

12 *Id*. at 192-93.

13 *See* 607 F. Supp. 2d at 195.

14 *Id*.; Complaint at 9, *City of Los Angeles*, Civ. No. 08-1895 (D.D.C. Oct. 31, 2008), ECF No. 1.

15 607 F. Supp. 2d at 196.

October 31, requesting a preliminary injunction on November 17.[16] The Commission alleged that certain elements of the CTPs, in particular the Port of Los Angeles requirement that all licensed motor carriers (LMCs) serving it eventually use only employee truck drivers rather than independent owner-operators, as well certain differences between the two ports in related exemptions and incentives, would result in a less competitive market in which surviving LMCs would be able to raise prices and offer inferior services.[17] In support, the FMC relied mainly on analysis in a declaration by an economist from the agency's Bureau of Trade Analysis, as well as information submitted by the ports in the agreement review process, declarations from trucking industry representatives and others, academic works, and public comments.[18]

In April 2009, the *City of Los Angeles* court denied the preliminary injunction. First, the Court rejected the FMC's argument for a more relaxed preliminary injunction standard under section 41307(b) and found that the traditional four-part equitable test applies.[19] In applying that test to the agreement, the court found that the FMC had failed to show a likelihood of success or irreparable harm.[20] Finally, the balance of equities and the public interest weighed against a preliminary injunction, the court found, in light of the environmental and safety interests served by the CTPs.[21] In discussing the balance of equities and public interest, the court stated that "it is important to note that the CTPs represent the judgment of the cities' elected and appointed officials based on multi-year deliberative processes that involved innumerable public meetings and the receipt and review of comments from a wide range of stakeholders."[22] The FMC later dismissed the case, noting that later events had obviated the need to pursue it further.[23]

II. Policy

In light of the above, the Commission deems it appropriate to explain its potential future use of its administrative investigation process, under 46 U.S.C. §§ 41302-04 and applicable regulations, to enhance determinations regarding filed agreements that may present the anticompetitive features described in 46 U.S.C. § 41307(b). In an appropriate case, such an administrative process can aid in the agency's competition analysis and enable it to present a more comprehensive, well-supported determination in any later section 41307(b) court proceeding.

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[16] *Id*.

[17] *Id*.

[18] *Id*.; Complaint at 9-10, 24-26; FMC's Motion for Preliminary Injunction at 23-44, *City of Los Angeles*, Civ. No. 08-1895 (D.D.C. Nov. 17, 2008), ECF No. 3-1.

[19] 607 F. Supp. 2d at 196-99.

[20] *Id*. at 200-03.

[21] *Id*. at 203-04.

[22] *Id*. at 203.

[23] *See* Motion to Dismiss at 1-2, *City of Los Angeles*, Civ. No. 08-1895 (D.D.C. June 16, 2009), ECF No. 59; Stipulation of Dismissal (D.D.C. July 24, 2009), ECF No. 63.

In undertaking such a proceeding, the agency would initiate an investigation under the authority in 46 U.S.C. § 41302(a) to investigate any agreement "that it believes may be in violation of this part." Agreements that are inconsistent with section 41307(b) are Shipping Act violations, as explained in the legislative history discussed above. An investigation can be started through the general authority the Commission has under 46 C.F.R. § 502.91 to open a proceeding through an order to show cause. In addition, 46 C.F.R. § 502.282 authorizes the Commission to initiate nonadjudicatory investigations through an order of investigation issued under 46 C.F.R. § 502.283. Subsection 502.282 provides that an investigation may be opened if the FMC determines that information would be "helpful in the determination of its policies or the carrying out of its duties, including whether to institute formal proceedings directed toward determining whether any of the laws which the Commission administers have been violated."

Once an investigation is opened, the Commission has authority to gather evidence from interested parties, subpoena witnesses and documents, and hold hearings under 46 U.S.C., Chapter 413, and 46 C.F.R., Subpart R. Title 46 U.S.C. § 41303(a)(1) authorizes the Commission to subpoena witnesses and evidence in such investigations. In particular, 46 C.F.R. § 502.286 authorizes the agency to issue orders or subpoenas directing persons to testify or provide documentary evidence related to such investigations, and section 502.287 provides that the Commission may order testimony to be taken by deposition. Section 502.288 states that the Commission may order a person to file a report or written answers to specific questions relating to any matter under investigation. Title 46 U.S.C. § 41304(a) provides that the Commission shall provide an opportunity for a hearing before issuing an order relating to a violation. In addition, 46 C.F.R. § 502.285 authorizes the agency to conduct investigational hearings in the course of any investigation to hear the testimony of witnesses and receive documents and other data.

At the end of such an investigatory process, the FMC would evaluate the evidence. If appropriate, the agency could reach a "determination" within the meaning of section 41307(b) that an agreement is likely to have anticompetitive effects and issue a written report. That report would then be "competent evidence in a court of the United States" under 46 U.S.C. § 41302(e), and it could be submitted to the district court in a section 41307(b) action to help meet the Commission's burden of proof under 46 U.S.C. § 41307(b)(3). Such a report would also serve as strong evidence in support of the agency's determination in the matter. On the other hand, at the end of the investigation the Commission may also determine that, based on the available evidence, an agreement does not appear likely to have anticompetitive effects under section 41307(b), subject to later reconsideration should circumstances change.

It is important to note that the report described above would be consistent with the provision in section 41307(b) that the Commission's "sole remedy" is to seek an injunction, because the report would not include civil penalties, a cease-and-desist order, or any punitive measure. Rather, the report would be an agency "determination," after the investigation described above, that the agreement under review is likely to have anticompetitive effects, along with an explanation of the agency's reasoning and evidence in support of that determination.

It is also important to note that the section 41307(b) investigatory process described above is distinct from the agreement review and potential judicial-review processes described in 46 U.S.C. §§ 40304(d) and 41307(c) in connection with requests for additional information.

Finally, although this policy statement explains aspects of the Commission's procedures and practices relevant to 46 U.S.C. § 41307(b), it does not create binding rights or obligations, does not affect the rights or obligations of private parties, and does not limit the discretion of the Commission or its staff in any way. In particular, the discussion of administrative procedures in this policy statement does not create any obligation by the Commission to use any such procedures in any future matter. Future agency decisions and practices will continue to require discretion and judgment in accord with specific circumstances and the applicable law.

By the Commission.

David Eng
Secretary