

# History of the Bi-State Compact Creating the Port Authority of New York and New Jersey

Hugh H Welsh

The Port Authority of New York and New Jersey has been called the institution built by lawyers and the laws creating it and applying to it are vitally important. To fully appreciate the genesis of the agency though one has to remember the geography and history that resulted in the need for and creation of the agency.

Most great ports were located near the mouth of a river that usually provided access to the hinterlands that the port serves. However if one looks at a map of the northeastern part of the United States you will notice that the major rivers do not run east/west providing that access. Rather they tend to run in a north/south direction. For that reason New York was not a major port during the early history of the United States. That changed however with the opening of the Erie Canal in 1825 which opened a water route between New York and the Great Lakes and the developing Northwest Territory Soon New York became the commercial center and preeminent port in the country. But the Port was bordered by two states which had competed bitterly over the years for commerce.

Since most export cargo was transported via the Erie Canal to New York by barge there was no difficulty delivering it to the hundreds of finger piers that were built in New York City. New Jersey had some commercial development but for a number of reasons could not compare or compete with New York. As railroads came to replace the canal system major railroads companies built their tracks west from the western side of the New York harbor, i.e. New Jersey, to the Midwest and cargo had to be barged or lightered across the Hudson River to New York's existing facilities. Eventually eight major railroads served the area, seven having terminal facilities on the New Jersey shore for the transshipment of cargo. At one point half the export cargo in the country went through the Port of New York and 85% of that had to be floated across the river to New York.

The early part of the nineteenth century was marked by a history of bitter commercial competition between the two states. There were times when fishermen were known to shoot at each other over fishing rights and legal battles were not uncommon. In 1810 Robert Fulton began to provide steamboat ferry service across the Hudson River and New York granted him an exclusive license to maintain that service. New York law prohibited steamboats licensed by New Jersey from landing in New York. This resulted in the famous case of Gibbons v. Ogden, 22 U.S.1 (1824) in which John Marshall wrote a decision finding that New York had no power to grant a monopoly for interstate transportation and established federal power over interstate commerce.

The case did not end the controversy since New York continued to assert that it had complete jurisdiction and control over the harbor. In 1834 the two states negotiated the first compact between them establishing the border between the states and resolving many of the disputes. Many continued, including environmental issues related to sewerage disposal in the Hudson River and railroad service disputes.

The growing railroad traffic into the New York region provided tension between the two states that continued to grow as New Jersey saw most of the trade being diverted to New York. By 1914 only 7 shipping lines were based on the New Jersey side of the harbor while 70 were located on the New York side. There was growing pressure in New Jersey to take action to obtain more of the trade that it was felt was eluding them.

As early as 1905 recommendations were made for a bi-state study commission and in 1911 the governors of New York and New Jersey appointed a commission to study the port to make suggestions on how to increase its efficiency. Soon the participants' different perspectives became obvious, the New York commissioners making suggestions regarding further development of facilities on the New York side and the New Jersey commissioners recommending that it was obviously more efficient for cargo to be transferred from trains directly on to ships on the New Jersey side rather than transporting it across the river. This it was felt would eliminate the cost of lighterage and improve efficiency.

Most of the port facilities on the New Jersey side of the harbor were owned and operated by the railroads and used for floating cargo to New York. On the New York side the City of New York had made an enormous investment in port facilities and by 1914 it owned 230 piers. On the New Jersey side only 2 piers were owned by municipalities. In New York a combination of private investment in marine terminals and warehouses and municipal ownership of so many piers created extreme political pressure for New York to continue its commercial advantage.

The political pressure and commercial skirmishes broke out into legal war in 1916 when several New Jersey municipalities filed an action before the Interstate Commerce Commission demanding that the rail rates to the New Jersey side of the harbor be lower than New York's, recognizing that there was an increased cost to float cargo across the river. At that time the railroads quoted one price to the New York Harbor regardless which side of the harbor was the final destination. Soon the State of New Jersey joined the case. New York's interest was represented by the New York Chamber of Commerce, whose attorney, Julius Henry Cohen, eventually authored the Bi-State Compact and perhaps was the initial cause of the statement that the port Authority was an institution built by lawyers.

Clearly if New Jersey succeeded in obtaining lower railroad rates to its side of the harbor it would have an advantage and could look forward to an expansion of trade and commerce. New York, with its huge investment in terminal facilities had much to lose and faced its most serious challenge to its economic dominance.

It's not necessary for our purposes here to review all of the legal contentions in that case except to summarize the position of the parties. New Jersey argued that logic and efficiency favored its position and that New Jersey was being unfairly discriminated against by the railroads charging rates the same as New York despite the fact that it was obviously cheaper to ship to there. New York on the other hand argued that traditionally the New York region was considered one commercial area and that to now split that area into two zones for rate purposes would disrupt rates and shipping patterns.

A vital lesson to be learned from the New York Harbor case is that when both sides see some mutual benefit in reaching an accommodation the circumstances exist where even the fiercest competition can be laid aside and an agreement reached that meets the needs

of both parties. This case provided the opportunity and incentive to negotiate and enter in to the Bi-State Compact that created the Port Authority of New York and New Jersey.

As the case progressed before the ICC it became obvious that each side had much to lose. New York obviously stood to lose its economic advantage if New Jersey was granted lower rates. New Jersey realized that it could end up the victim of its own legal success since while lower rates would increase the demand for terminal facilities on the New Jersey side of the river, not enough marine terminal capacity currently existed and there were no immediate plans to build any. If New York rates were raised and there were inadequate facilities in New Jersey, freight might be diverted to either Philadelphia or Baltimore and both New York and New Jersey would then lose.

Cohen met with the governors of the two States and they were convinced to appoint a commission to study the entire Port of New York and make recommendations on how to better organize and make more efficient operations in the port. Thereafter Cohen filed his final papers with the ICC in which he continued to oppose a two tiered rate system for the port but acknowledged that there were certain inefficiencies in the operations there. He was also careful to bring to the attention of the Commission the actions of the two governors appointing a study commission.

In its decision the ICC declined to grant the relief that New Jersey sought. But the Commission in language that would turn out to be very significant agreed with a contention in New York's brief and concluded that "historically, geographically, commercially" New York City and industrial New Jersey "constitute a single community" and that New Jersey has prospered from its close association with New York. New York Harbor Case, 47 ICC 643 (1917). The Commission also agreed that the current freight distribution system was inefficient and should be drastically altered. Significantly the Commission noted that the two States were now cooperating in studying how to modernize the rail and pier system but anticipated that this apparent victory might result in future inaction by New York. The ICC went on to find that the current system of lighterage was inefficient and New Jersey's argument was justified from an economic viewpoint. In a not too veiled threat the ICC said that if the two states did not resolve their differences and address the port's problems it might reopen the case.

The stage was now set to obtain the cooperation of the two States with the incentive being delivered by the ICC.

Fortunately for the region at that time there were two progressive governors in office who favored a cooperative approach to resolving the regional port problems. Money was appropriated to continue the study commission's work and Cohen began the legal work that resulted in the first draft of a proposed compact. Cohen eventually proposed to create a "Port of New York Authority" as an agency of the two States using the Compact Clause of the Constitution, U.S Constitution, Art.1 Sec. 10 clause 3. This alone represented an imaginative use of that provision which up until that time was utilized primarily to resolve border disputes between states. It had never before been used to create a new entity. The Compact clause had until that time been viewed as a Constitutional provision restricting the power of states not as a device to be used for states to collaborate. He proposed that the new authority, which was inspired by Port Authorities in London and Liverpool, would be governed by six commissioners, three from each state who would serve for overlapping terms. The commissioners would receive no salary or other payments for their service. The commissioners would make all decisions regarding the

duties and salaries of staff. The new authority would have the power and authority to operate terminals, charge rents and tolls, modernize piers, float bonds and generally operate as an independent agency. The new Port Authority would not have the power to tax but would hopefully be financially independent surviving on the revenues that it generated. Cohen provided though that the agency could ask the states to guarantee its bonds if necessary.

Cohen originally designed the Port Authority with extensive powers, many of which would not survive the legislative process, that were intended to establish it as an independent planning agency that would operate above the local and state political pressures. As an example it was proposed that once the state legislatures approved a plan proposed by the Port Authority it could not be changed except with the Port Authority's approval. The proposed compact also restricted the states from making grants of state property along the waterfront without the approval of the Port Authority. There was also proposed an involved scheme under which the Port Authority could adopt regulations that were controlling on local governments unless governments representing one-third of the regions total population voted in 90 days to reject them. The draft compact would create an agency that was free from political control and could exercise unprecedented independent power. The plan was then subjected to the legislative process by submitting the draft compact to a bi-state legislative commission.

Kelmens von Metternich once observed that making laws was like making sausage and neither one was pleasant to watch. Such was the case with the proposed compact. Once submitted to review by the elected officials from two States the draft compact underwent radical changes. The regulatory powers in Cohen's draft were stripped from the authority. The power was flipped and instead no changes could be made in the plan without the approval of the legislatures. The revised compact provided that all terminal and railroad activities of the new authority would be under the jurisdiction of the utility commissions of both states. Essentially the new public agency was changed into an authority that would be treated the same as any private corporation. Also the new agency was barred from exercising any powers until the legislatures approved a comprehensive plan that the agency was to prepare.

The struggle to have the compact approved by the two State Legislatures could provide a study of 20<sup>th</sup> Century politics. Al Smith, the governor of New York who would later run for president, was a strong supporter of the compact. But not so the Mayor of New York City who feared that an independent agency would not be responsive to the needs of elected politicians. The Democratic Governor of New Jersey opposed the compact. Eventually Smith's successor Governor Nathan Miller would succeed in having the compact approved by the New York Legislature. The New Jersey legislature overrode the Governor's veto and approved it. The Compact was signed on April 30, 1921. The Governor of New Jersey and the mayor of New York declined to attend the ceremony.

The agency that survived the political process was much different then the one that was envisioned in the first draft of the Compact. The Port Authority had no power to create regulations within the Port District, the statutorily defined area within which it was authorized to act. It lacked the power to veto any local plans, no power to tax, and no power of eminent domain. Many powers such as the power of eminent domain would later be given to the agency by concurrent bi-state legislation relating to various projects but it was not contained in the Compact.

There are many lessons that can be learned from the history of the Interstate Compact creating the Port Authority of New York and New Jersey. Sixteen years elapsed between the time in 1905 when a bi-state study commission was first proposed and the date when the legislation authorizing a bi-state agency was adopted. The work resolving conflicts and disputes was slow and tedious. There was a great deal of suspicion concerning the new authority and strong opposition from local politicians who saw the independence of the new agency as a threat to their prerogatives. A natural distrust between the two states had to be overcome and only when there was recognition that bi-state co-operation was mutually beneficial was any progress made. Compromises and concessions made during the legislative process dramatically changed the authority of the agency and limited its power and ability to fulfill its mission. Over the years many legislative battles were fought to restore those powers and establish the independence of the Port Authority. There is a natural tension that exists between local municipal governments and a regional autonomous agency like the Port Authority and this was obvious from its earliest days. The tension that existed in 1920 during the process to gain legislative approval did not abate over the years and there have been numerous law suits regarding the independence of the Port Authority from municipal control and involvement. The advantage to having quality, relatively nonpolitical commissioners was recognized from the very beginning of the Port Authority and is still recognized as one of the most important factors in the success of the agency. This is not to suggest that during its history the Agency hasn't from time to time had very prominent and active political figures on its board. The Compact was amended in 1930 to provide for 12 commissioners instead of the original 6 but the importance of the board membership is no less significant. The States were authorized by the Compact to pass legislation granting the Port Authority additional powers and duties. The use of this authority has been necessary many times over the years as the States requested the Port Authority to take on more responsibility and develop and operate more facilities. At the present time there are more than 350 pages of statutes in the law books pertaining to the Port Authority.