July 28, 2023

Mr. William Cody
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573

RE: Docket No. FMC-2023-0010
Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier

Dear Mr. Cody:

Please accept these comments on behalf of the U.S. Dairy Export Council (USDEC) and the National Milk Producers Federation (NMPF) and their members with regards to the Federal Maritime Commission's (FMC) supplemental notice of proposed rulemaking (SNPRM) on the prohibition of an ocean common carrier from unreasonably refusing to deal or negotiate with respect to vessel space accommodations.

USDEC is a non-profit, independent membership organization representing the global trade interests of U.S. dairy farmers, dairy processors and cooperatives, dairy ingredient suppliers and export trading companies. Its mission is to enhance U.S. global competitiveness and assist the U.S. industry to increase its global dairy ingredient sales and exports of U.S. dairy products. USDEC and its 100-plus member companies are supported by staff in the United States and overseas in Mexico, South America, Asia, Middle East and Europe.

NMPF develops and carries out policies that advance the well-being of dairy producers and the cooperatives they own. The members of NMPF's cooperatives produce the majority of the U.S. milk supply, making NMPF the voice of dairy producers on Capitol Hill and with government agencies. NMPF provides a forum through which dairy farmers and their cooperatives formulate policy on national issues that affect milk production and marketing. NMPF's contribution to this policy is aimed at improving the economic interests of dairy farmers, thus assuring the nation's consumers an adequate supply of pure, wholesome and nutritious milk and dairy products.

Overview

We filed comments in response to the FMC's initial notice of proposed rulemaking regarding the requirement established in the Ocean Shipping Reform Act (OSRA) that prohibits ocean common carriers from unreasonably refusing to deal or negotiate with respect to vessel space services (Docket Number FMC-2022-24). In those comments, we outlined the struggles that dairy exporters had faced with respect to cargo space services and vessel accommodations during the supply chain crisis from 2020-2022. Through the lens of those recent experiences, we provided feedback with respect to the proposed rule. These views included stressing the relationship between negotiations and the provision of actual vessel accommodations, the breadth of cargo space services involved in negotiations and accommodations, and the need for a consistent baseline on which to determine whether negotiations and accommodations are "reasonable." We also shared our views and concerns with respect to the export strategy the proposed rule contemplates; the manner in which ocean carriers could justify their conduct based on broad business purpose rationale; the opportunity for ocean carriers to self-certify their conduct; matters related to the burden of proof for establishing claims under this rule; and how penalties and fines should be determined based on the intent and impact on a complainant-shipper.

In general, we are pleased with the FMC's revisions to its initial rule reflected in this SNPRM. It is apparent that the FMC gives due consideration to the comments it received from shippers. While we have some suggestions with respect to the scope and implementation of these rules, we are pleased to offer our broad support for the proposed regulation.

Refusal to Negotiate and Vessel Service Execution

Definitions
In the initial proposed rule, the FMC provided a proposed set of elements for what would constitute an "unreasonable refusal to deal or negotiate with respect to vessel accommodations," including definitions for what constitutes "unreasonable" and "vessel space accommodations."

In response, we commented on concerns about the scope of the negotiation including all related factors to moving container laden goods, including cost/fees, volumes, equipment, timeframes, origin/destination, and earliest return-dates, among other factors. A negotiation would not be reasonable if it only involved the question of "may a container be loaded on a vessel," since this would not effectively enable the carriage of goods. For this reason, we are pleased that the revisions in the SNPRM that expand the definition of *vessel space accommodations* to now include "the services necessary to access or book vessel space accommodations." We believe that this expansive concept of vessel space accommodations to include the functional services related to container exports will help assure more effective understanding of and utilization of this regulation. FMC should implement this in a broad manner that encompasses all aspects and services related to vessel accommodations, including the shipment's cost, volume, origin and location, provision of equipment, intermodal carriage, etc.

The FMC should also take into account the intermodal nature of some negotiations and cargo space accommodations. Some export shippers seek to contract with ocean carriers for rail carriage from an inland origin to a port (or vice versa, for importers), and subsequently on to a vessel for ocean carriage. The scope of the FMC's regulations under both negotiation and execution should include the intermodal rail movements contracted through the ocean carriers. While rail is generally outside the scope of the FMC's mandate, since these rail shipments are contracted through ocean carriers, it should be accommodated under this rule. This would help clarify which carrier is responsible for the performance of these cargo services, and provide shippers a method to seek relief if ocean carrier-contracted rail services are either subject to unreasonable refusal to negotiate, or an unreasonable refusal to provide cargo accommodations.

Negotiation and Execution of Vessel Space Accommodations
Many commenters, including USDEC and NMPF, indicated concerns about negotiations leading to actual vessel accommodations and service. We shared the experiences of many of our members where vessel accommodations were negotiated, but the execution of that service was impeded and not delivered as agreed upon. These experiences included vessel accommodations where equipment could not be delivered; where vessel bookings were cancelled or delayed/rolled; or when the earliest-return date was not feasible.

In response to these comments, the FMC has proposed an expansion of the proposed rule to include another section of the Ocean Shipping Reform Act. The initial rule was focused on the 46 USC 41104(a)(10) prohibition on unreasonable refusals to deal or negotiate, and in the SNPRM the FMC expands the rule to include a portion of 46 USC 41104(a)(3), specifically its prohibition on a common carrier from unreasonably refusing cargo space accommodations. As the FMC notes, "[t]he distinction between the conduct covered by these two provisions is timing, more specifically whether the refusal occurred while the parties were still negotiating and attempting to reach a deal on service terms and conditions (negotiation stage) or after a deal was reached (execution stage)."

Consistent with our members experience, where at times negotiations led to a shipping agreement but which was not satisfactorily fulfilled: "[r]estricting this rulemaking to refusals to deal or negotiate … will not address the reliability issues that commenters identified as a critical and driving factor impeding their ability to ship cargo overseas." We commend the FMC for its creative approach to implementing these regulations in a holistic fashion that integrate both the negotiation and execution aspects of vessel space accommodations into one unified rulemaking.

Business Decision Justification
In the initial proposed rule, the FMC indicated that it had "previously found reasonable those decisions that are connected to a legitimate business decision." Along with other commenters, we expressed concern about this apparent authority for ocean carriers to justify a refusal to negotiate based on broad 'business factors,' which presumably could include revenue and profit considerations. In our comments, we stated that "there should be limits that only permit discrete and actionable needs by carriers to defer a shipper's vessel space accommodations, related to specific vessel or lane availability or services, and

not addressed by broader and less well-defined claims of 'profitability' or 'strategic' justifications to deny negotiations." Furthermore, it was apparent that during the supply chain crisis period of 2020-2022 that many of the ocean freight service challenges our members faced were due to business decisions made by ocean carriers that disadvantaged American export loads. That business purpose discretion was at the heart of our shipping challenges and should not be permitted in the future.

The FMC has revised the definition of *unreasonable* in the SNPRM to remove "business decisions" as a consideration in its evaluation of carrier behavior. Rather, the FMC proposes to more narrowly focus on "transportation factors" as potential justification for carriers to refuse to negotiate or provide cargo space accommodations. We commend this move, as it will clarify shippers' expectations of what ocean carrier must offer with respect to negotiations.

Export Policy

The initial rule suggested that ocean carriers should have a documented export strategy, and the FMC outlined that assessing a complaint in the context of such a strategy would allow for the evaluation of whether a refusal to negotiate or provide cargo space accommodations was reasonable. While in our comments we indicated that requiring an ocean carrier to develop and submit to the FMC an export strategy could have value in understanding its policies with respect to export shipments and how it will resolve conflicts, we suggested that such a document should be public so that shippers have awareness of these polices, and that it should not be permitted to serve as a demonstration of a carrier's willingness to negotiate.

In the revised rule, the FMC clarifies that the export policy it now requires on an annual basis will provide to the Commission an understanding of a carrier's baseline policies, procedures and conduct with respect to export cargo, and will not be used to generally justify or excuse behavior. "An export policy can shed light on what an individual ocean carrier's best business practices would generally be and whether it was adhere to in an individual case." We did comment that finding a means to establish a consistency baseline will be important for the Commission to determine what "reasonable" export practices are, and we agree that this is a suitable means for achieving that awareness.

The FMC intends to allow carriers to submit their export policies as business confidential information. We do still believe that there would be utility in shippers and other members of the public having awareness of the ocean carriers' export policies. At a minimum, a public version of the export policy filed with the FMC could be released broadly if there is legitimate confidential information in the export policy. As shippers engage in negotiations and export cargo shipments, and when challenges occur that may lead to complaints, it would benefit both the shippers and the carriers, as well as third parties, to be able to compare their experience against the export policies to evaluate whether the carrier behavior was "reasonable" relative to the export policy.

Certification

The initial rule contemplated requiring ocean carriers to make certifications to justify their actions or decisions in a specific matter. As outlined, a carrier's representative would issue a certification following a complaint filed by a shipper and would allow the carrier to attest that its actions were reasonable. The FMC has opted to exclude this self-certification from the revised rule.

We opposed the proposal to allow self-certification, as we had concerns that certification could allow a carrier to seek to have a complaint dismissed simply based on this self-attestation that justified the carrier's action. While we have confidence in the FMC's approach to investigating complaints on a case-by-case basis, the establishment of a certification process could have given weight to a carrier's justifications apart from any investigative effort and underlying evidence. This would have led to confusion among parties to complaints about what the purpose and utility of carrier certifications were intended to be.

Conclusion

We commend the FMC for taking its rulemaking responsibilities required by OSRA seriously and its efforts to implement these new prohibitions expeditiously and to be responsive to comments and feedback. The revised rule in the SNPRM makes significant improvements to the initial rule, and we applaud these revisions.

Point of Contact

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