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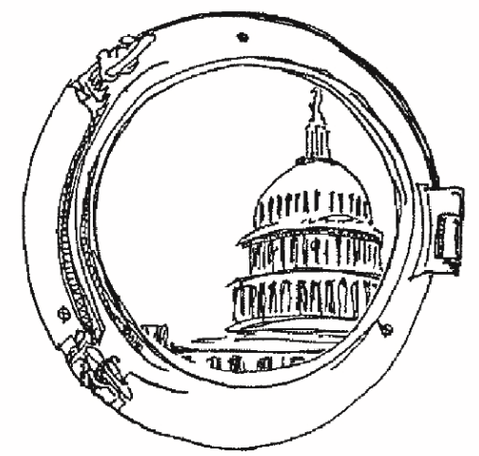

Dealing with Dr. OSRA

By Bryant E. Gardner*

The COVID-19 pandemic impacted the lives of Americans in so many ways, and brought to national attention the vulnerability of the maritime supply chain. Consumers confined to their homes pivoted from the purchase of services to durable goods and home improvements, straining "just in time" inventories, spiking demand for container and vessel space, and disrupting the normal ebb and flow of shipping containers and chassis. Long-simmering tension between agricultural exporters in U.S. farm states and international ocean carriers rose to a boil, fueled by reports that carriers were returning containers empty to Asian manufacturers to capture high eastbound transpacific rates, refusing to deal with agricultural exporters, and leaving American farmers without any way to get their products to Asian consumers. In response, Congress passed the Ocean Shipping Reform Act of 2022 ("OSRA"),[1] providing a new arsenal to the Federal Maritime Commission ("FMC"). Among other provisions, OSRA required the FMC to undertake a rulemaking defining unreasonable refusal, or refusal to deal or negotiate, with respect to vessel cargo space.[2]

On July 23, 2024, the FMC published its final rule implementing OSRA's prohibition against unreasonable refusals of cargo space accommodation when available and unreasonable refusals to deal or negotiation with respect to vessel space accommodations by

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1 Pub. L. No. 117-146, June 16, 2022, 136 Stat. 1272.

2 *Id*. § 7(d); *see also* Comment of Senators Thune, Hoeven, Klobuchar, and Baldwin, FMC Dkt. 22-24 (Dec. 8, 2022) ("The need to require such a clarification arose specifically from reports of ocean carriers refusing certain export cargo—particularly agricultural cargo—even when vessel space was readily available, opting to carry empty containers instead."); Comment of U.S. Department of Agriculture Secretary Vilsack, FMC Dkt. 22-24 (January 4, 2023) ("USDA believes this rulemaking is one step toward righting an unfair situation: Over the past 2 years, agricultural (and other) exporters have endured ocean carriers' systematic neglect of exports in favor of higher value import cargo.").

ocean carriers.[3] Effective September 23, 2024, the final rule applies only to vessel-operating common carriers ("VOCCs"), as opposed to non-vessel-operating common carriers ("NVOCCs") and only to containerized cargo "because the sorts of issues that arose around container availability during the pandemic do not appear to have been present, or at least not present to the same extent, for roll-on/roll-off cargo or bulk cargo."[4] However, the FMC leaves open the door to application of the rule to ro-ro or bulk cargoes, observing "it does not preclude refusal to deal cases arising in the context of roll-on/roll-off cargo or bulk cargo—the framework in this rule could be applied to such cases."[5] The FMC also noted that, although the rule applies only to VOCCs, the final rule does not limit the applicability of the underlying statutory authorities to NVOCCs, suggesting that NVOCCs may also be examined by analogy to the final rule implementing those authorities as to VOCCs.[6]

The final rule characterizes unreasonable refusals to provide cargo space accommodations under 46 U.S.C. § 41104(a)(3) and unreasonable refusals to deal or negotiate with respect to vessel space accommodations under 46 U.S.C. § 41104(a)(10). Pressing the distinction, the FMC explained "claims under 46 U.S.C. 41104(a)(10) will generally involve those actions occurring prior to a carrier providing a shipper with a booking confirmation to carry that shipper's cargo. When read in conjunction with this provision, to 'unreasonably refuse cargo space accommodations' under 46 U.S.C. 41104(a)(3) will involve a set of acts that occur after a booking has been confirmed."[7]

The final rule establishes a three-part test for establishing a claim under 46 U.S.C. § 41103(a)(3) with respect to refusals to provide cargo space accommodations when available:

(1) The respondent must be an ocean common carrier as defined in 46 U.S.C. 40102;

(2) The respondent refused or refuses cargo space accommodations when available; and

(3) The ocean common carrier's conduct is unreasonable.[8]

In determining the reasonableness of an ocean common carrier's refusal to provide cargo space accommodations, the final rule states the FMC will look to:

(1) Whether the ocean common carrier followed a documented export policy that enables the timely and efficient movement of export cargo;

(2) Whether the ocean common carrier made a good faith effort to mitigate the impact of a refusal;

(3) Whether the refusal was based on legitimate transportation factors; and

(4) Any other relevant factors or conduct.[9]

Furthermore, the final rule offers the following examples of unreasonable conduct in connection with a refusal to provide cargo space accommodations:

(1) Blank sailings or schedule changes with no advance notice or with insufficient advance notice;

(2) Vessel capacity limitations not justified by legitimate transportation factors;

(3) Failing to alert or notify shippers with confirmed bookings of any other changes to the sailing that will affect when their cargo arrives at its destination port;

(4) Scheduling insufficient time for cargo tendering or vessel loading so that cargo is constructively refused;

(5) Providing inaccurate or unreliable vessel information; or

(6) The de facto, absolute, or systematic exclusion of exports in providing cargo space accommodations.[10]

The elements of a claim for unreasonable refusal to deal or negotiate with respect to vessel space are similar:

(1) The respondent must be an ocean common carrier as defined in 46 U.S.C. 40102;

(2) The respondent refuses or refused to deal or negotiate with respect to vessel space accommodations; and

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3 FMC, Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Carrier, 89 Fed. Reg. 59,648 (July 23, 2024) (hereinafter, "Final Rule").

4 *Id*. at 59,649 & 59,651. Additionally, the FMC notes that OSRA § 7(d) applies to 46 U.S.C. § 41104(a)(10), which is statutorily limited to VOCCs.

5 *Id*.

6 *Id* at 59,668.

7 *Id*. at 59,652.

8 *Id*. at 59,671; *see also* 46 C.F.R. § 542.1.

9 Final Rule at 59,671-72.

10 *Id*. at 59,672.

(3) The ocean common carrier's conduct is unreasonable.[11]

In evaluating claims of refusal to deal or negotiate, the FMC will consider:

(1) Whether the ocean common carrier followed a documented export policy that enables the timely and efficient movement of export cargo;

(2) Whether the ocean common carrier engaged in good faith negotiations;

(3) Whether the refusal was based on legitimate transportation factors; and

(4) Any other relevant factors or conduct.[12]

Lastly, the final rule lays out the following examples of unreasonable conduct when linked to a refusal to deal or negotiate:

(1) Quoting rates that are so far above current market rates they cannot be considered a good faith offer or an attempt at engaging in good faith negotiations; or

(2) The de facto, absolute, or systematic exclusion of exports in providing vessel space accommodations.[13]

Moreover, the final rule expressly states that carriers are not precluded from using sweeper vessels "previously designated for the propose to reposition empty containers" subject to FMC review of whether such designation results in an unreasonable refusal of service.[14] Consistent with other provisions of the Shipping Act, the initial burden of proof to establish a prima facie case rests upon the complainant, after which the burden shifts to the carrier to justify the reasonableness of its actions, with the ultimate burden of persuading the FMC always remaining on the complainant.[15]

The bulk of the FMC's 24-page final rule is dedicated to a discussion of comments submitted in response to the notice of proposed rulemaking and the FMC's responses, which provide helpful gloss for interpreting the final rule. Commenters include the World Shipping Council on behalf of liner carriers, numerous cargo and shipper interests, freight forwarders and non-vessel-owning common carrier organizations, members of Congress, the U.S. Department of Agriculture, the U.S. Department of Justice, and the U.S. Transportation Command.[16] One carrier broadly opined that "the final rule should not transform the Shipping Act into a loaded gun pointed at carriers for each difficult negotiation with individual customers about vessel space in a tight market."[17] In response, the FMC stated the rule addresses "a problem that had become chronic, systematic, and widespread," and that it has adjusted the final rule so that it is narrowly tailored, rejecting the suggestion that the rule is a "a broadly construed attack on ocean common carriers."[18]

Carrier and shipper comments diverged upon whether "transportation factors" excusing justifying refusals to deal or accommodate should include factors outside a carrier's control. The FMC largely sided with the shippers, amending the definition to include only those factors outside the carrier's control which are "not reasonably foreseeable."[19] In so amending the definition, the FMC agreed that "[i]f a transportation factor is reasonably foreseeable by the carrier, then the carrier has a responsibility to its customers to find alternative pathways to deliver the cargo and otherwise mitigate the negative impacts of that factor."[20]

Carrier commenters also requested that the FMC define "when available" as applied to refusals to provided vessel space accommodations under 46 U.S.C. § 41104(a)(3), arguing that when a vessel call is canceled or delayed, there is no space available on that vessel, and that Congress intended only to address the situation that arises when the vessel is at port and has useable space. However, the FMC declined to add such a definition, stating that determinations of "when [space is] available" will be made on a case-by-case basis.[21]

The FMC removed "business decisions" as a factor it would consider in deciding whether there was an unreasonable refusal to deal, prompting objections from carriers who asserted that the failure to include them

11 *Id*.
12 *Id*.
13 *Id*.
14 *Id*.
15 *Id*.

16 FMC, Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodation Provided by an Ocean Common Carrier, Dkt. No. FMC-2023-0010, https://www.regulations.gov/docket/FMC-2023-0010.
17 Final Rule at 59,667.
18 *Id*.
19 *Id*. at 59,653-54.
20 *Id*. at 59,654.
21 *Id*. at 59,655.

as a factor runs afoul of FMC assurances that business factors would be considered in making unreasonableness determinations and FMC precedent recognizing "legitimate business decisions" in making such determinations.[22] Although the Commission declined to reinsert business decisions into the regulatory text, it underscored the rule allows the FMC to consider any relevant factor, including "non-transportation factors, such as business decisions (which includes profit considerations)."[23]

The FMC also fielded concerns about specific types of cargo. Perishable food interests asserted that the unique nature of such cargo should be considered in determining the reasonableness of refusing or delaying vessel space. The FMC declined to make a change expressly requiring consideration of cargo perishability, but indicated the time pressure associated with perishable goods is a factor it will consider in determining reasonable refusals to deal.[24] Carriers also expressed concerns regarding requirements to take cargoes of hazardous materials, or cargoes that interfere with vessel stability.[25] In response, the FMC noted that the transportation factors it will consider include "vessel safety".[26] The FMC also responded to carrier concerns about their ability to fulfill minimum quantity commitments ("MQCs") under service contracts, stating that the rulemaking is not intended to interfere with contractual obligations, and that such commitments will be factored into the reasonableness analysis.[27] Lastly, the U.S.-flag coalition USA Maritime and the U.S. Transportation Command encouraged the exemption of U.S.-flag carriers refusing commercial cargoes in order to accommodate government-impelled cargoes; however, the FMC countered that although it acknowledges the importance of these cargoes, it cannot exempt such cargoes from the rule absent a formal petition filed with the FMC pursuant to 46 C.F.R. § 502.92.[28]

Turning to the rule's examples of unreasonable conduct, carriers asserted that the rule's inclusion of blank sailings or schedule changes without sufficient advance notice runs contrary to industry practice and existing service contracts, which do not guarantee that a booking will be loaded on a particular ship or sailing.[29] Declining to remove blank sailings from the list of unreasonable conduct, the FMC emphasized that blank sailings and schedule changes are not per se unreasonable—what makes them unreasonable is insufficient notice, stating "Carriers' ability to communicate with its [sic] customers is not hindered by the type of events that might cause a blank sailing or a schedule change. Shippers are impacted by these changes and deserve notice when they take place in order to make their own business decisions regarding their cargo."[30]

The FMC also addressed concerns about the rule's inclusion of insufficient loading time as a constructive refusal of vessel space. Carrier interests argued that they do not control vessel loading times, but that the ports do. The FMC concluded the carrier determines the initial schedule of ports and time in port, and the carrier will be responsible to schedule sufficient load time.[31] Cargo interests opined that the rule should not consider only the sufficiency of the time to place a loaded container on the vessel, but also the time for loading the container at the shipper facility and then tendering the container to the carrier. The FMC agreed, and amended the rule to require consideration of "insufficient time for *cargo tendering* or vessel loading" in determining a constructive refusal of vessel space.[32]

Carriers objected to the FMC's inclusion of carrier quotes above market rates as an example of unreasonable conduct, arguing the FMC does not regulate rates, interference with the carrier's and shipper's freedom to negotiate, and the operation of the free market. The FMC rejected carriers' concerns, noting there is no bright-line rule, but simply a comparison point between market and offered rates to determine if the quotation is so far above markets as to be an unreasonable refusal to deal or negotiate.[33]

Numerous comments focused upon the proposed rule's requirement that common carriers must follow a documented export policy filed with the FMC annually, on a confidential basis, to include pricing strategies, services offered, strategies for equipment provision, and descriptions of markets served.[34] The FMC rejected carrier arguments that it lacks the authority to require

22 *Id*. at 59,656-57.
23 *Id*.
24 *Id.* at 59,658.
25 *Id*.
26 *Id*.
27 *Id*.
28 *Id*. at 59,667-68.
29 *Id*. at 59,659-60.
30 *Id*. at 59,660.
31 *Id*. at 59,660-61.
32 *Id*. at 59,661 (emphasis added).
33 *Id*. at 59,662.
34 *Id*. at 59,663-65.

the development and submission of such a policy, and rejected shipper suggestions the policy be made public or include an import policy. Additionally, the FMC clarified that deviation from the policy is not necessarily a violation of the Shipping Act, nor is adherence to the policy necessarily a defense. Rather, adherence to the policy is one nonbinding factor the FMC will consider in determining the reasonableness of carrier conduct.

Commenters also focused on the relationship between the final rule and service contracts. Carriers opined that the exclusive remedy for breach of a service contract, including refusal to provide vessel space as required under such a contract, is an appropriate action in court, as provided under 46 U.S.C. § 40502(f). On the other hand, shippers asserted that oftentimes the liquidated damages provisions of a service contract afford scant relief to shippers unable to access vessel space in violation of an existing service agreement. In response, the FMC stated that nothing in the rule prevents parties from entering into service contracts, but that:

> Given that it seems possible for contracts to remain silent on remedies for refusal to deal, and that there are some situations where a contract's specified remedies do not have the intended effects of remedying the breach or deterring behavior, the Commission reiterates its position that regardless of contract status, an ocean common carrier may not effectively bar a shipper, including one without a service contract, from having direct access to ocean common carriage by unreasonably refusing to deal or negotiate the terms of such carriage.[35]

Accordingly, the FMC has left open the door to Shipping Act actions for unreasonable refusals to deal or negotiate, or provide vessel space, irrespective of whether there is a service contract in place, potentially subject to carrier challenge under 46 U.S.C. § 40502(f).

The FMC's final rule on unreasonable refusals to deal or negotiate in response to OSRA provides helpful guideposts for the carrier and shipper communities. Consistent with past FMC practice, the FMC reserves to itself wide latitude to determine complaints on a fact-specific, case-by-case basis. Although there exists a body of precedent regarding the underlying statutory prohibitions on unreasonable refusals, it bears watching how disputes unfold and are decided under the new guidance. Lastly, the FMC notes in the final rule that it will be undertaking a separate rulemaking defining unfair or unjustly discriminatory methods pursuant to Section 7(c) of OSRA.[36]

[35] *Id*. at 59,667.

[36] *Id*. at 59,659.

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