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BEFORE THE
FEDERAL MARITIME COMMISSION

Comments on the Supplemental Notice of Proposed Rulemaking Establishing the Definition of Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier

Docket No. FMC-2023-0010

NON-CONFIDENTIAL

July 31, 2023

I. Introductory Comments on the Commission’s Invitation for Comments

The American Cotton Shippers Association (“ACSA”) is pleased to submit the following comments to the Federal Maritime Commission (“Commission”) in response to its request for public comments concerning the definition of unreasonable refusal to deal or negotiate with respect to vessel space accommodations provided by an ocean common carrier, published in the Federal Register at 88 Fed. Reg. 38789 (June 14, 2023), in the context of the Commission’s Supplemental Notice of Proposed Rulemaking (“SNPRM”) in accordance with the Ocean Shipping Reform Act of 2022 (“OSRA”). These comments address the additional revisions proposed by the SNPRM and are offered in supplement to

public comments submitted by ACSA on October 21, 2022, in response to the Commission’s Notice of Proposed Rulemaking (“2022 NPRM”) published on September 1, 2022.

ACSA strongly supports the SNPR and welcomes the Commission’s objective of providing more directly a potential standard for unreasonable conduct by ocean common carriers that prevents shippers from obtaining space aboard vessels for their cargo. Further, ACSA applauds the Commission for its careful consideration of and response to public comments offered by stakeholders in response to the 2022 NPRM. ACSA believes the Commission’s efforts to develop clear, effective rules through both the 2022 NPRM and the SNPRM are faithful to the statutory purpose and Congressional intent of OSRA.

II. Background on ACSA

ACSA is a leading trade association, headquartered in Memphis, Tennessee, that provides a united voice for the cotton merchandising trade of the United States. ACSA’s member firms handle over 70% of the U.S. cotton sold in domestic and foreign markets and over 60% of the traded foreign cotton growths in the world. ACSA takes an active role in promoting the increased use of cotton in the United States and throughout the world, establishing with other cotton trade organizations national and international standards for trade, collaborating with producer organizations throughout the cotton belt in formulating farm programs, and cooperating with government agencies in the administration of such programs.

ACSA members purchase cotton from U.S. producers and sell to consumers all over the world. In addition to helping their customers manage risks from price, location, quality, capacity, cash flow, and currency value, ACSA members bear the responsibilities of managing supply chain logistics to fulfill their contractual obligations of timely and proper delivery of goods to their destination, throughout the globe. Since more than three-fourths of the U.S. raw cotton crop is exported, the maintenance of intermodal supply chain velocity and integrity is an absolute necessity for our industry.

ACSA members may collectively ship greater than 150,000 forty-foot containerized loads of cotton in a given year, dependent upon the U.S. crop size. Further, ACSA members have had a valuable and lasting relationship with ocean carriers shipping U.S. cotton that has endured more than three decades.

On behalf of the U.S. cotton shipping industry, and as an important stakeholder in the safe and efficient movement of U.S. cotton to export markets, ACSA appreciates the opportunity to offer these supplemental public comments.

III. A Broader Scope of Unreasonable Refusals to Deal or Negotiate is Warranted

ACSA applauds the Commission for broadening the scope of this rulemaking to define in tandem unreasonable refusals to deal or negotiate that occur both while negotiations are underway (what the SNPRM refers to as the “negotiation stage”) and after a deal has been reached (the “execution stage”). While there may be distinctions in the timing of certain actions of an ocean common carrier that variously constitute unreasonable conduct, the short-term costs and long-term harm to U.S. shippers, and to the producers of their goods, are essentially indistinguishable.

In both cases, the carrier’s unreasonable conduct injects more risk and uncertainty into export transactions, which mean higher costs and a slow deterioration in the crucial business relationships that U.S. exporters work to cultivate with their export buyers. Ultimately, the carrier’s unreasonable conduct means lost export market share for U.S. shippers and producers.

Unfortunately, this is the risk facing U.S. cotton shippers. In recent years, U.S. cotton shippers increasingly incurred significant costs due to unreasonable conduct by ocean common carriers during the execution stage – for example, through egregious cancellations of bookings; splitting of cargo between vessels; and rolling of cargo to subsequent sailings. These breakdowns in performance, in many instances, resulted from inadequate notice of schedule changes, unachievable procedures for cargo receiving and loading, and poor communication from carriers during periods when supply chains were under duress.

Similarly, U.S. cotton shippers have suffered considerably from the refusals or failures by carriers during the negotiation stage. Such conduct by the carrier often results in the same kinds of lengthy and unexpected delivery delays, higher costs, and ultimately lost export market share for U.S. exporters and producers of the excluded goods.

Moreover, as the Commission suggests, it is not always easy in practice for a shipper to discern and pinpoint the exact moment of a carrier's refusal, regardless of the duration of communications between the carrier and shipper. Often, the shipper can only be certain of the costs it has incurred from the carrier's refusal.

In its comments submitted in responses to the 2022 NPRM, ACSA documented the costs incurred by U.S. cotton shippers from 2019-2021 due to the exclusion of U.S. cotton cargo from vessels bound for export markets and the related costs due to the resulting delays. These documented costs flowed from a pattern of conduct by carriers that encompassed unreasonable refusals at both the negotiation stage and execution stage. They also do not reflect the longer-term costs U.S. shippers now face, which include the challenge of rebuilding dependable, export sales relationships with foreign buyers and regaining export market access for U.S. cotton at globally competitive prices. These costs and the challenge of resolving them compel a comprehensive reassessment of the ways the ocean common carriers engage with U.S. shippers.

It is therefore sensible for the Commission to address in the same rulemaking the standards by which unreasonable behavior by a carrier may be judged, whether it occurs during the negotiation stage or the execution stage. The additional guidance provided by the SNPRM should help encourage greater conformity by carriers of their conduct and their practices with the letter and spirit of OSRA. ACSA expects the Commission's additional guidance will also improve the ability of shippers to seek more effective enforcement.

Finally, ACSA acknowledges and appreciates that the Commission plans to initiate at a later time a rulemaking defining “unfair or unjustly discriminatory methods” that are employed by an ocean common carrier after a deal has been reached with a shipper, *i.e.* in the “execution stage,” subject to OSRA 2022 Section 7(c). ACSA also appreciates the Commission’s clear statement, in explaining its agreement with the view expressed by various Members of Congress, that a categorical refusal to accommodate U.S. exports, without demonstrating that the refusal is reasonable, would violate the statute. Nevertheless, ACSA respectfully takes the opportunity of these comments to urge, again, that the Commission recognize expressly that excluding certain classes or types of cargo, such as specific *type* of agricultural commodity, in the absence of a demonstration that such refusal is reasonable, even where other U.S. exports may be accepted by the carrier, may similarly constitute an unreasonable refusal to deal or negotiate, whether such unreasonable conduct by the ocean common carrier occurs at the negotiation stage or the execution stage. Further, ACSA urges the Commission to consider whether such categorical exclusions also constitute “unfair or unjustly discriminatory methods.”

IV. Carriers Should be Required to Submit Documented Export Policies Annually for Public Availability

ACSA supports the Commission’s proposal to require the annual submission by each ocean common carrier of a documented export policy. Together with new reporting requirements for cargo volumes by category, these annual submissions and their publication would assure better transparency in the marketplace, enabling shippers to make better informed and more reliable marketing decisions. In turn, this would lower financial risks and marketing costs, and eventually lead to a more streamlined pattern of shipping.

Annual submissions of documented export policies would also improve the Commission’s ability to monitor marketplace conduct and ensure compliance by ocean common carriers.

V. A Carrier Should Not Be Able to Refuse or Fail to Load Cargo for Purely Business Considerations

ACSA supports the Commission’s proposed provisions regarding an ocean common carrier’s refusal or failure to load cargo due to business considerations. Generally, these provisions would establish clear guardrails to guide the conduct of ocean common carriers and provide an assurance of reasonable service to U.S. shippers.

Moreover, by placing a greater reliance on the marketplace, these provisions would satisfy the purpose and objectives of OSRA, and the Commission’s directive, to promote the growth and development of U.S. exports through competitive and efficient ocean transportation.

VI. A Clear Framework on Burden of Proof Is Warranted

ACSA appreciates and supports the Commission’s clarification regarding the framework for burden of proof in cases where a complaint has been lodged. Legal and regulatory uncertainty among market participants merely leads to higher costs and greater risks, which ultimately discourage investment, erodes trust in the marketplace, and reduces the competitiveness of U.S. exports.

VII. Conclusion

ACSA applauds the Commission’s diligent and dedicated efforts to implement OSRA faithfully, as the SNPRM reflects. Together with the 2022 NPRM, the SNPRM would significantly improve legal certainty, enhance market transparency, strengthen regulatory effectiveness, and carry out the Commission’s mission of assuring reasonable service to U.S. exporters by ocean common carriers.

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Thank you again for the opportunity to submit these comments on this very important topic. ACSA is grateful for the Commission's dedicated efforts to implement OSRA in a way that is consistent with both the letter and spirit of the law.

Respectfully submitted,

William H. Allen

President and CEO

American Cotton Shippers Association