BEFORE THE

FEDERAL MARITIME COMMISSION

Docket No. 22–24

Definition of Unreasonable Refusal to Deal or Negotiate With Respect to Vessel Space Accommodations

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COMMENTS OF

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE AND INSTITUTE OF SCRAP RECYCLING INDUSTRIES, INC.

By Its Attorneys

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The National Industrial Transportation League ("NITL" or the "League") and the Institute of Scrap Recycling Industries, Inc. ("ISRI"), collectively "Shippers' Organizations", hereby submit these comments addressing the issues raised in the Federal Maritime Commission's ("FMC" or the "Commission") rulemaking published in the Federal Register on September 21, 2022 concerning ocean carrier unreasonable refusals to deal or negotiate as to vessel space accommodations.[1] NITL and ISRI commend and support the Commission for taking expeditious actions to implement the recently adopted Ocean Shipping Reform Act of 2022 ("OSRA 2022")[2], including issuance of this rulemaking.

In OSRA 2022, Congress revised the protection against ocean carrier "unreasonable refusals to deal or negotiate" to specifically include refusals involving vessel space allocations. This change was in response to extreme challenges experienced by U.S. exporters and importers in securing vessel space from ocean common carriers during the Q4 2020 to Q2 2022 period, which caused substantial shipment delays, supply chain disruptions, and economic harm. NITL and ISRI appreciate the FMC's efforts to define this prohibited act and clarify the FMC's enforcement approach in this rulemaking. However, NITL and ISRI are concerned that the Commission's proposed definitions and enforcement criteria are too ambiguous, provide far too much discretion to ocean carriers to justify refusals to accept legitimate requests for cargo bookings, and are inconsistent with the intent of Congress in adopting OSRA 2022. Thus, NITL and ISRI recommend that the Commission substantially modify its proposed rules based on these comments.

[1] *Definition of Unreasonable Refusal To Deal or Negotiate With Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier*, 87 Fed. Reg. 57674 (Sept. 21, 2022) ("NPRM").
[2] Pub. L. 117-146 (June 16, 2022).

I. Statements of Interest.

NITL Founded in 1907, NITL has been a trade association representing The Voice of the Shipper across truck, rail, intermodal, ocean, and barge. NITL members represent a wide variety of commodities and businesses, who rely on efficient, competitive, and safe marine, rail, and highway transportation systems within the United States and beyond to meet their supply chain requirements and the needs of their customers. NITL's shipper members include those who move consumer goods, manufacturers, agriculture, chemicals, steel, forest products, fuels, food and more. NITL members spend billions in freight dollars annually and employ millions of people. Many League members are importers and exporters that use the services of VOCCs, NVOCCs, 3PLs, freight forwarders, and motor carriers, among others. The League was at the forefront of the efforts to develop and adopt OSRA 2022, as well as the OSRA 1998 reforms to the Shipping Act of 1984. The League supports an ocean transportation regulatory system that fosters competitive, dependable, and efficient ocean transportation that meets the commercial needs and demands of U.S. exporters and importers.

ISRI. ISRI is a non-profit trade association representing approximately 1,300 companies operating in nearly 4,000 locations in the United States, and 41 countries worldwide that process, broker, and consume scrap commodities, including metals, paper, plastics, glass, rubber, electronics, and textiles. In 2017, the U.S. scrap recycling industry generated $117 billion in domestic economic activity, manufacturing more than 130 million tons per year of highly valued commodities. It is estimated that the scrap recycling industry directly or indirectly supports more than 534,000 well-paying jobs, generating $13.2 billion in federal, state, and local tax revenue. The U.S. scrap recycling industry supplies the commodities that manufacturers use as raw material feedstock to make new products, with more than 70% being consumed in the

United States. In addition to providing raw materials to domestic manufacturers, the U.S. scrap recycling industry exports approximately one-third of its commodities worth over $16.5 billion annually to over 155 nations. ISRI members' export operations require an integrated transportation network vital to the global manufacturing supply chain. ISRI was part of the broad industry coalition advocating for passage of OSRA 2022.

II. Comments.

In passing OSRA 2022, Congress revised the Shipping Act's prohibition against ocean carrier unreasonable refusals to deal or negotiate to make it a mandatory prohibition and expressly prohibit unreasonable refusals as to vessel space accommodations. This revision was a direct response to U.S. exporters and importers' significant concerns regarding the lack of access to reliable ocean transportation services to meet their business needs and customer requirements. The prohibition against "unreasonable refusals" has long been recognized as a fundamental obligation of ocean common carriers.[3] In OSRA 2022, Congress directed the FMC to define more clearly and enforce "unreasonable refusals to deal or negotiate as to vessel space" to ensure vessel space is offered and allocated to shippers in a fair and reasonable manner when vessel booking requests are reasonable and able to be accommodated.

As noted, exporters and importers faced extreme challenges securing adequate and reliable vessel space since the COVID pandemic which caused supply chains disruptions, loss of access to overseas markets, delivery delays, and other significant economic harms. As vessel space became scarce, vessel bookings were routinely delayed or cancelled, and ocean carriers ignored contractual service commitments forcing their contract shippers to purchase vessel capacity at substantially higher spot market rates. Ocean carrier processes used to allocate vessel

[3] NPRM at 57676 (citing *Orolugbagbe v. A.T.I. U.S.A. Inc.*, Informal Docket No. 1943(I) at 31-38).

space are not transparent and, in many cases, carriers fail to provide specific reasons justifying booking refusals and cancellations. The inability to secure vessel space over extended periods caused many shippers to believe that vessel space allocations were intended to maximize carrier profits instead of reasonably allocating vessel space to serve the commercial shipping needs of their customers.

As the FMC recognized in the NPRM, the U.S. trade imbalance was exacerbated during the pandemic, resulting in significant drops in the ratio of exports to imports.[4] This shift is explained primarily by "carrier operational decisions based on equipment availability and differential revenues from import and export transportation" and not other "safety concerns over ship loading" or "trade shocks."[5] Thus, the ocean carriers' vessel allocations amongst their shippers, while apparently based on commercial or operational considerations, may not necessarily have been made in the public interest.

OSRA 2022 was enacted in the backdrop of this significant shift in the balance of trade and the challenges expressed especially by U.S. exporters who were not able to obtain timely or adequate vessel space to ship their products to overseas customers.[6] The primary purposes of OSRA 2022 are "to promote growth and development of U.S. exports through an ocean transportation system that is competitive, efficient, and economical" and "to ensure an efficient, competitive, and economical transportation system in the ocean commerce of the United States."[7] Further, as the FMC recognized in its rulemaking notice, "the primary objective of the

[4] *Id.* at 57675.
[5] *Id*.
[6] *Id*. at 57674.
[7] 46 U.S.C. § 40101(2) and (4).

shipping laws administered by the FMC is to protect the shipping industry's customers, not members of the industry."[8] These principles should guide the Commission in this rulemaking.

Further, the general principles of common carriage require common carriers to provide transportation services on reasonable request.[9] It has long been understood that "A common carrier is one who holds himself out as being ready to carry goods for the public at large for hire."[10] In general, a common carrier may not "charge unreasonably high rates or … engage in unjust discrimination"[11] and "a common carrier must serve everyone who makes a lawful request for the services he offers, and common carriers "may not refuse to provide services merely because to do so would be inconvenient."[12] The Shipping Act's prohibition against unreasonable refusals to deal or negotiate for vessel space is, therefore, one of the main tools for the agency to ensure that Congress' mandates are accomplished and U.S. importers and exporters are adequately protected in obtaining vessel space accommodations.

NITL and ISRI appreciate and agree that violations of 46 U.S.C. § 41104(a)(10) will be fact-specific and evaluated on a case-by-case basis. However, the organizations are concerned that the Commission's proposal fails to clearly define the types of conduct constituting unreasonable refusals to deal or negotiate as to vessel space or clearly provide the criteria that will be used to assess unreasonable refusal to deal claims. The proposed rules would provide significant discretion and deference to carrier decision-making based on general operational considerations which renders them ineffective in influencing ocean carrier conduct to be

[8] *Id*. at n. 20, citing, *New York Shipping Ass'n, Inc. v. Fed. Mar. Comm'n,* 854 F.2d 1338, 1374, (D.C. Cir. 1988) (quoting *Boston Shipping Ass'n v. FMC,* 706 F.2d 1231, 1238 (1st Cir. 1983).
[9] *See e.g.*, 49 U.S.C. § 11101.
[10] Carriage of goods - Characteristics of carriage | Britannica available at https://www.britannica.com/topic/carriage-of-goods/Characteristics-of-carriage (last visited October 20, 2022).
[11] *Id*.
[12] *G.S. Roofing Prods. Co. v. Surface Transp. Bd*., 143 F.3d 387, 391 (8th Cir. 1998).

consistent with the purposes of OSRA 2022. Further, the proposal allows significant leeway for ocean carriers to refuse to deal or negotiate based on general business strategies or the desire to increase profitability, which is contrary to the agency's mission to "protect the shipping industry's customers, not members of the industry."

NITL and ISRI urge the Commission to promulgate final rules that define more clearly the obligations of ocean common carriers to respond to shippers' reasonable requests for vessel space, and the types of conduct that would render a refusal to provide vessel space as unreasonable. Without more clarity and stricter limits on carriers' refusals of vessel space accommodations, NITL and ISRI believe that the Commission's proposal fails to adhere to the intent of Congress to provide meaningful protections against unreasonable ocean carrier actions that deny shippers access to vessel services.

A. Proposed Definitions for "Transportation Factors" and "Unreasonableness" of Ocean Carrier Refusals to Deal or Negotiate.

The core of this rulemaking involves the criteria to be applied by the Commission in determining conduct that constitutes "refusals to deal or negotiate" and "unreasonableness." NITL and ISRI generally agree with the Commission's statement that these elements will require evaluation on a case-by-case basis, recognizing that such claims will involve fact-specific inquiries. NITL and ISRI also understand that § 41104(a)(10) does not guarantee a shipper a right to a service contract.[13]

In the NPRM, the Commission explained that the agency has previously determined that carrier refusals that are "connected to a legitimate business decision" or "motivated by legitimate transportation factors" were considered reasonable.[14] But these concepts are vague and lacking

[13] NPRM at 57677, citing, *Ceres Marine Terminals v. Maryland Port Administration*, 29 S.R.R. 356, 369 (F.M.C. 2001).
[14] *Id*. at 57676, citing, *Docking & Lease Agreement By & Between City of Portland, ME & Scotia Princess Cruises, Ltd*., Order of Investigation & Hearing, 30 S.R.R. 377, 379 (F.M.C. 2004).

clear criteria to be applied by the Commission. Based on these concepts and precedent, the Commission has proposed to define "transportation factors" to mean "genuine operational considerations underlying an ocean common carrier's practical ability to accommodate laden cargo for import or export, which can include, without limitation, vessel safety and stability, scheduling considerations, and the effect of blank sailings."[15] Then, the Commission defined the term "unreasonable" to require an assessment of several factors it would consider in evaluating the reasonableness of a refusal to deal or negotiate, including "whether the ocean common carrier follows a documented export strategy that enables the efficient movement of export cargo", "the existence of legitimate transportation factors," and whether the ocean carrier engaged in "good-faith negotiations."[16]

NITL and ISRI believe that the agency's definitions require greater clarity and specificity to offer a meaningful interpretation of §41104(a)(10). For example, while NITL and ISRI agree that ocean carriers should be encouraged to document export strategies as a best practice, it is unclear what types of strategies would "enable the efficient movement of export cargo."[17] Additionally, it is possible that a documented strategy may not be effective in practice or may facilitate the movement of some exports at the expense of other exports, even when the ocean common carrier holds itself out to perform transportation for both. Thus, the mere existence of a documented strategy should not justify as reasonable refusals to deal or negotiate as to "other exports" that may not be favored by the carrier for purely commercial reasons. Further, it is unclear how the documented export strategy factor relates to other reasonableness

[15] *Id*. at 57678.
[16] *Id*.
[17] *Id*. at 57678.

considerations, such as refusals based on the "existence of legitimate transportation factors" or business decisions that were applied unfairly or inconsistently.[18]

The definition of "transportation factors" includes broad and general categories that could justify ocean carrier refusals to deal or negotiate without requiring the carrier to specifically explain the basis of the denial. The phrase "genuine operational considerations," for example, implies that a carrier could cite any general operational issue as a basis for refusing vessel space accommodations and it would be viewed as reasonable by the agency. Again, requiring the carrier to identify in detail the specific issue should be required to evaluate reasonableness. Further, by defining genuine operational considerations as encompassing the characteristics of the cargo would seem to permit categorical vessel space refusals based simply on the cargo's hazardous nature, its weight, or other classifications that could foreclose access to vessel space. If an ocean common carrier holds out to accept hazardous materials, and the hazmat is tendered consistent with dangerous goods safety laws, then a refusal based solely on the hazardous nature of the cargo should not be reasonable, absent another valid operational factor that would justify refusal of the shipment. And such other factor should be specified by the carrier.

Additionally, the Commission explained in the NPRM that "[a]n ocean common carrier may be viewed as having acted reasonably in exercising its business discretion to proceed with a certain arrangement over another by taking into account such factors as profitability and compatibility with business development strategy."[19] The agency's inclusion of profitability as a factor that legitimizes the reasonableness of a carrier's refusal to deal or negotiate with a shipper may lead to unintended consequences. During the deliberations over OSRA 2022, exporters expressed concerns that commercial incentives to maximize ocean carrier profits caused the

[18] *Compare* Proposed 46 C.F.R. § 542.1(b)(2)(a), (b) and (c).
[19] *Id*. at 57677.

carriers to unreasonably decline export bookings and favor back-haul shipments to Asia comprised of significantly higher ratios of empty boxes. Taken to the extreme, the agency's deference to profitability would allow ocean carriers to accept only the most profitable cargo shipments and to categorically refuse vessel space for lower-rated shipments, particularly when capacity is constrained.

NITL and ISRI agree that ocean carriers need to earn profits on the shipments they carry, and the rates quoted by the carrier should address this. But using profitability to justify service limits on certain types of U.S. exports and/or imports that eliminates or reduces access to vessel space for certain types of commodities despite reasonable requests for service should be viewed as unreasonable and contrary to the obligations of ocean common carriers. This should especially be the case where refusals grounded on maximizing profitability would foreclose access to overseas markets undermining the growth of US exports.

Notwithstanding this view, NITL and ISRI want to make clear that they are not advocating for a return to the prior "me too" regulatory regime where there was a requirement for ocean common carriers to offer "similarly-situated" shippers the exact same rates and terms.

The agency also included "the effect of blank sailings" as one of the transportation factors that would likely render a carrier's decision refusing to deal or negotiate as reasonable. NITL and ISRI note, however, that the Commission should recognize in the final rule that a blank sailing decision itself must be reasonable to justify refusals to deal or negotiate. For example, such decision must be based on a legitimate need to right-size supply based on demand rather than an action to reduce capacity to artificially inflate prices.

NITL and ISRI believe that the agency should clarify the definition of "transportation factors" by changing "genuine operational considerations" to "valid operational considerations,"

and should require the carrier to detail to the shipper the specific safety, infrastructure, space availability, or other operational justification for refusing vessel space accommodations that exists *at the time of the shipper's request*. A refusal based on a general operational or safety issue, without detailing the specific nature of the issue, should be unreasonable.

The Commission's reasonableness analysis should also account for the impacts and/or harms to the shipper because of a carrier's decision to refuse to deal or negotiate as to vessel space. As recognized by the agency, concerns over ocean carriers' decisions to refuse or significantly reduce the carriage of U.S. exports during the pandemic were among the factors that led Congress to enact OSRA 2022.[20] Congress enacted OSRA 2022 to ensure "an efficient, competitive, and economical transportation system" and to "promote growth and development of United States exports."[21] As the agency noted, the primary objective of shipping laws is "to protect the shipping industry's customers, not members of the industry."[22] Thus, the agency's evaluation of the reasonableness of a decision to refuse to provide vessel space should necessarily include an analysis of the impact of such decision on the carrier's customers. The greater the impacts of the refusal to deal, in terms of value or the number of customers affected by the decision, the more likely that the refusal is unreasonable.

NITL and ISRI recommend that the Commission consider the concepts in the Interstate Commerce Act defining the common carrier obligation of railroads which requires the rail carrier to provide service on reasonable request, when defining the reasonableness of an ocean carrier's conduct in refusing to deal or negotiate. 49 U.S.C. § 11101(a) and (b) protect rail shippers

[20] *Id*. at 57674 ("One basis, but not the only one, for some of the OSRA 2022 provisions were the challenges expressed by U.S. exporters trying to obtain vessel space to ship their products."); *See also, id*. at 57675 (explaining the impact of the pandemic on trade imbalance, including on specific lanes).
[21] OSRA 2022 at Section 2.
[22] NPRM at n. 20.

against unreasonable refusals to accept shipments, while also balancing contract and common carrier service requests. For example, section 11101(a), requires rail carriers to "provide the transportation or service on reasonable request."[23] Similarly, section 11101(b) requires rail carriers to promptly provide rates and other service terms upon a shipper's reasonable request.

As noted previously, courts have ruled that the Interstate Commerce Act and the Shipping Act should have similar interpretations.[24] While the Shipping Act does not contain a provision identical to 49 U.S.C. § 11101, the prohibition against unreasonable refusals to deal or negotiate is founded on common carrier principles and, thus, is comparable to a rail carrier's obligation to provide service upon reasonable request. NITL and ISRI believe that a rail carrier's common obligation, which is interpreted by the courts as to prohibit carriers from providing service "merely because to do so would be inconvenient,"[25] should be viewed as a model for the agency in promulgating the final rules regarding ocean carriers' unreasonable refusals to deal or negotiate.

[23] 49 U.S.C. § 11101(a).
[24] *See e.g., United States Navigation Co. v. Cunard S.S. Co*., 284 U.S. 474, 481 (1932) ("we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application, and effect. It follows that the settled construction in respect of the earlier act must be applied to the later one, unless, in particular instances, there be something peculiar in the question under consideration, or dissimilarity in the terms of the act relating thereto, requiring a different conclusion"); *China Ocean Shipping Company v. DMV Ridgeview, Inc - China Ocean Shipping Company v. DMV Ridgeview, Inc- Motion to Dismiss Granted*, FMC Docket No. 91-37 (Nov. 19, 1991) ("Of course, numerous cases hold that the 1916 Act and the Interstate Commerce Act are analogous and that Congress intended that both Acts should have similar interpretations."), *Crowley Liner Services, Inc. And Trailer Bridge, Inc. V. Puerto Rico Ports Authority*, 2001 FMC LEXIS 7, n. 11 ("As a general matter it has been held that the Shipping Act should be construed in the light of similar provisions of the old Interstate Commerce Act where dissimilarities in the respective modes of transportation do not warrant a different construction.").
[25] *G.S. Roofing Prods. Co. v. Surface Transp. Bd*., 143 F.3d 387, 391 (8th Cir. 1998).

B. Proposed Elements of Unreasonable Refusal to Deal or Negotiate Claims

In the NPRM, the Commission proposes that, in order to establish a successful claim under 46 U.S.C. 41104(a)(10), a party should demonstrate, *inter alia*, that the carrier has refused to deal or negotiate, including with respect to vessel space accommodations. The Commission further explains that, although the term "refusal to deal or negotiate" does not lend itself to a general definition and must be evaluated on a case-by-case basis, a party must show that it has "attempted in good faith to engage in discussions with an ocean common carrier for the purposes of obtaining vessel space accommodations."[26] The agency describes a good faith attempt as "something more than one communication with no response or reply."[27] According to the Commission, a party must prove "an actual refusal to even entertain the proposal or to engage in good faith discussions."

NITL and ISRI believe that the Commission should clarify in the final rule that ocean carriers are required to timely respond to reasonable requests for vessel space. The NPRM implies that there needs to be an "actual refusal" by the ocean carrier. Nevertheless, there may be situations where an ocean carrier does not provide any response to a customer, or the response is significantly delayed. Additionally, the Commission should recognize that certain actions by ocean carriers, such as repeated booking cancellations over an extended period, or quoting a rate that is so far above market levels that it is obviously designed to deny access to vessel space, also may constitute unreasonable refusals.

NITL and ISRI recommend that the Commission provide additional clarity as to its assessment of "good faith consideration to a party's efforts at negotiation" by requiring an ocean common carrier to affirmatively respond to a shipper's reasonable request to book space on a

[26] NPRM at 57676.
[27] *Id.*

vessel. The ocean carrier's response to a shipper's request would presumably need to include a rate quote and space on a specific vessel connected to a scheduled sailing. NITL and ISRI understand that the Shipping Act of 1984 does not obligate ocean carriers to offer shippers a service contract and that a shipper may not agree to quoted common carrier rates and terms which would cause the shipper to decline the proposal. However, a claim under 46 U.S.C. § 41104(a)(10) should not fail simply because a claimant could not demonstrate that the ocean carrier expressly denied a shipper's request for vessel service. The Commission should explicitly recognize in the final rules that a factor in determining unreasonableness is an ocean carrier's failure to respond to reasonable booking requests for an extended period.

C. Proposed Rebuttable Presumption and the Shift in the Burden of Production

NITL and ISRI support the Commission's "rebuttable presumption of unreasonableness for those situations where an ocean common carrier categorically excludes U.S. exports from its backhaul trips from the U.S."[28] However, such rebuttable presumption should be included in the text of the final rule to ensure clarity for the public.

Further, the Commission proposes to shift the burden of production to the carriers to show why the refusal was reasonable once a complainant establishes a *prima facie* case. NITL and ISRI support this approach and agree with the Commission that the carriers will typically possess the operational and other information needed to evaluate reasonableness. The proposed rules, however, also include a mechanism for carriers to justify their actions with a certification by an appropriate representative of a carrier attesting that "the decision and supporting evidence is correct and complete." While NITL and ISRI strongly support the proposed shift in the burden of production, they believe that the proposed certification would provide undue weight to

[28] NPRM at 57677.

carrier decisions when evaluating reasonableness. A certification by a carrier that its own decisions were justified, and its furnished evidence is correct, is no substitute for an independent evaluation of the specific facts, documents, records, and impacts of the carrier's refusal. Thus, NITL and ISRI recommend that the Commission delete the proposed certification.

III. Conclusion

For the foregoing reasons, NITL and ISRI greatly appreciate the opportunity to submit these comments and respectfully request that the Commission promulgate a final rule defining and clarifying the prohibition against unreasonable refusals to deal or negotiate as to vessel space based on these comments.

Respectfully submitted,

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