

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. FMC-2023-0010

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

**COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

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Dated: July 31, 2023

The National Industrial Transportation League (“NITL” or the “League”) hereby submits its comments in response to the Federal Maritime Commission’s (“FMC” or the “Commission”) Supplemental Notice of Proposed Rulemaking (“SNPRM”) published in the Federal Register on June 14, 2023. The Commission is proposing to expand the scope of this proceeding to include ocean carrier unreasonable refusals to provide cargo space accommodations, when available, under § 41104(a)(3), and has revised certain proposals included in its prior notice of proposed rulemaking (“NPRM”) concerning ocean carrier unreasonable refusals to deal or negotiate vessel space accommodations under § 41104(a)(10).¹

NITL commends the FMC for revising certain aspects of the proposed rule issued on September 21, 2022 in response to the comments it received from many industry stakeholders,² especially its revisions to the definition of “transportation factors” that may support carriers’ denying access to vessel space, and its development of non-binding examples of unreasonable conduct. NITL also supports the Commission’s establishment of the elements and definitions it will apply to claims involving “unreasonable” refusals covered by 49 U.S.C. § 41104(a)(3). NITL makes the following comments and recommendations to the Commission regarding the proposed rules in the SNPRM.

I. STATEMENT OF INTEREST.

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

¹ *Definition of Unreasonable Refusal To Deal or Negotiate With Respect to Vessel Space Accommodations Provided by an Ocean Common Carrier*, 88 Fed. Reg. 38789 (June 14, 2023) (“SNPRM”).

² *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”).

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.

II. COMMENTS.

A. NITL Supports Many of The Proposed Revisions.

Inclusion of “Unreasonable Refusals” Under § 41104(a). As noted, NITL supports the Commission’s inclusion of two OSRA 2022 prohibitions, 49 U.S.C. § 41104(a)(3) & 41104(a)(10), into a single rulemaking. Both of those provisions address similar issues related to unreasonable refusals of access to vessel space. Combining them into a single rulemaking provides necessary clarifications as to their meaning and elements in the context of potential claims. It also expedites the Commission’s implementation of OSRA 2022, consistent with Congress’ intent.

Definition of Transportation Factors. NITL supports the Commission’s changes to the definition “Transportation Factors.” This definition is critical because “Transportation Factors” are among the non-binding considerations that the Commission will use to evaluate unreasonable conduct under both 41104(a)(3) and 41104(a)(10). Specifically, in the SNPRM, the Commission removed “genuine operational considerations” and the “effect of blank sailings” from the

definition which, as NITL pointed out in its NPRM comments, are broad and general terms that would not have required the carrier to specifically explain the basis of its vessel space refusals. The SNPRM significantly improves the meaning of this definition by specifying that “Transportation Factors” are those factors directly related to vessel operations, such as safety, stability, weather and “other factors related to vessel operation outside a vessel operators’ control.” NITL also supports these revisions because they address its concern that carriers may have used the prior definition to justify refusals to carry an entire class of cargo, such as hazardous materials, which the Commission has explained could not occur under the revised definition.

Definition of Vessel Space Accommodations. The Commission has revised its proposed definition of Vessel Space Accommodations to include “the services necessary to access or book vessel space accommodations.” NITL supports this revision which clarifies and broadens the definition to include adequate vessel booking systems and processes. This recognizes the importance of not only physical vessel capacity but the need for reasonable services to accommodate booking requests.

Claim Elements and Burden of Production. NITL supports the claim elements listed for unreasonable refusals under both § 41104(a)(3) and § 41104(a)(10), which are sufficiently clear and straightforward. The added “Burden of Production” provision is consistent with the Administrative Procedure Act³ and other regulatory and statutory schemes. NITL also supports the removal of the carrier certification as a mechanism to provide evidentiary support for the carrier’s conduct and decision-making. NITL expressed concern about carrier certifications in its initial comments due to the potential for such certifications to be unreliable and self-serving.

³ Pub. L. 79-404, 60 Stat. 237, enacted June 11, 1946.

B. Further Clarifications and Additions Are Needed.

Definition of Unreasonable. NITL generally supports the Commission's revised definition of "unreasonable" restated to mean "ocean common carrier conduct that unduly restricts the ability of shippers to meaningfully access ocean carriage services." This definition applies to both refusals to deal or negotiate as to vessel space accommodations under 41104(a)(10), and refusals of cargo space accommodations under 41104(a)(3). However, there remains some ambiguity as to how the Commission will interpret the terms "meaningfully access" to ocean carriage within the context of an unreasonable refusal. NITL recognizes that not every refusal of access to vessel space is unreasonable. Logically, the service commitment and volume commitment terms in a service contract would likely offer relevant guidance as to the interpretation of "meaningful access." However, NITL believes that further clarification of this somewhat ambiguous phrase would be helpful especially in the context of the spot market and common carriage arrangements. NITL also suggests including "from the ocean common carrier" at the end of the definition of "unreasonable" to clarify that a carrier cannot escape liability for an "unreasonable refusal" by asserting that alternative market choices and service options from other carriers were available.

Further, shippers do not always have a contract with the carrier whose vessel will eventually transport the cargo. Rather, shippers often contract with a carrier who belongs to a consortium or alliance and the cargo may be transported on the vessel operated by another member of the alliance. Thus, a shipper could have a contract with one member of the alliance, but ultimately is refused access to vessel space by another alliance member. The Commission should clarify that unreasonable refusals to deal or negotiate, or refuses to provide cargo space

accommodations, are specific to the contracting ocean common carrier even if the refusal is made by the contracting carrier's subcontractor/alliance partner.

Definition of Cargo Space Accommodations. NITL supports the Commission's added definition of "Cargo Space Accommodations" in the SNPRM but suggest revising the definition to "space which has been negotiated for *and/or confirmed* aboard the vessel" Including "or confirmed" to the definition of Cargo Space Accommodations would broaden the definition to instances where, as explained above, space has not been "negotiated" between a carrier and a shipper as demonstrated by "back and forth" communications but may simply involve a shipper's request for vessel space under an existing service contract or other arrangements, and a responsive vessel booking confirmation from the carrier. In other words, vessel space is not always "negotiated" under that term's typical meaning. The current definition, as the Commission points out, includes situations where the parties may have an existing relationship and/or already mutually agreed on terms and conditions via a booking confirmation. Still, shippers sometimes purchase vessel space *without* negotiating when they review an ocean carrier's tariff and pay the rate quoted in the tariff. There is no back-and-forth (i.e., negotiation) between the parties. Instead, there is an offer to purchase vessel space and an acceptance by the ocean carrier resulting in a booking confirmation. The current definition of Cargo Space Accommodations does not *explicitly* contemplate such a situation. Adding the proposed language will encompass situations where there may not be a typical "negotiation" between the parties.

The Commission has specifically asked for comments on whether space onboard a vessel has been agreed to at the time of issuance of a booking confirmation. Generally, NITL believes that a booking confirmation does represent the carrier's commitment and agreement to provide

access to vessel space as reflected in the confirmation, since such confirmations are issued after the carrier evaluates the specific request for services.

Documented Export Policy. The SNPRM defines “Documented Export Policy” as “a written report produced by an ocean common carrier that details the ocean common carrier’s practices and procedures for U.S. outbound services.” In order to enhance the Commission’s oversight of exports under OSRA 2022, the export policy must include “pricing strategies, services offered, strategies for equipment provision, and descriptions of markets services.” The SNPRM will require the ocean carrier to follow its Documented Export Policy “that enables the efficient movement of export cargo” and submit that policy to the Commission once per calendar year. Moreover, under the SNPRM, the Commission will consider whether the ocean carrier followed its Documented Export Policy when evaluating unreasonable refusals to provide cargo space or unreasonable refusals to deal or negotiate.

NITL supports the proposed Documented Export Policy requirements in SNPRM, which will require ocean carriers to develop specific practices to enable the efficient movement of U.S. exports. NITL believes that the carriers’ export policies should address and improve exporters’ timely access to equipment and vessel space and agrees that impacts of schedule disruptions and potential mitigation strategies to address unreliable access to vessel space are proper issues to be addressed in the export policies. Notwithstanding its support, NITL is concerned that without access to the ocean carriers’ Documented Export Policies, it will be significantly harder for shippers to evaluate whether the carriers’ policies are reasonable and whether carriers are following the policies. This, in turn, will have a chilling effect on shippers filing complaints with the Commission. And without these complaints, the Commission will be hindered in “monitoring

the industry for unreasonable behavior vis-à-vis exports in an effort to address those concerns.”⁴ Accordingly, NITL requests the Commission to make the Documented Export Policies public, after the carriers submit the policies to the Commission, except to the extent they include specific proprietary information.

Non-Binding Considerations When Evaluating Unreasonable Conduct. In the SNPRM, the Commission has identified non-binding factors that are relevant to evaluating a carrier’s unreasonable refusal to provide cargo space accommodations under § 41104(a)(3) and vessel space accommodations under § 41104(a)(10). The factors are non-binding and are not exclusive in recognition that determinations of “unreasonableness” under both provisions will require a case-by-case assessment and factual analysis.

The non-binding considerations are similar for both § 41104(a)(3) and § 41104(a)(10) and include whether the carrier followed its documented export policy, whether the refusal was based on legitimate transportation factors, and any other relevant factors as determined by the Commission. One difference between the non-binding factors is that the Commission will evaluate whether the ocean carrier engaged in good-faith negotiations under § 41104(a)(10) because unreasonable refusals to deal or negotiate occur in the “negotiation” or vessel space request phase prior to issuance of the vessel booking confirmations. Also, because refusals to provide cargo space accommodations occur after issuance of the vessel booking confirmation, the Commission will evaluate whether the ocean carrier made a good faith effort to mitigate the impact of a refusal under § 41104(a)(3). NITL supports the non-binding considerations identified by the Commission as relevant and appropriate to evaluating the “reasonableness” of carrier refusals. It also strongly supports the removal of “carrier business decisions” as a § 41104(a)(10)

⁴ SNPRM, 88 Fed. Reg. 38789, 38796.

consideration because such consideration is far too broad and vague, and lacks adequate specificity, to potentially justify refusals of vessel space.

Regarding the Commission's consideration of carrier export policies, NITL believes that the mere following of a documented export policy by a carrier should not justify the carrier's refusal to accept cargo on a vessel. Rather, what is most important is determining whether the policy itself includes any unreasonable practices and procedures, or if application of the policy to a transaction is not reasonable under the particular facts and circumstances. NITL also believes that the text of the export policy considerations could be clarified by requiring "the *timely* and efficient movement of export cargo."

Non-Binding Examples of Unreasonable Conduct. The SNPRM identifies non-binding examples of unreasonable conduct that are linked to refusals to provide cargo space accommodations under § 41104(a)(3) and refusals to provide vessel space accommodations under § 41104(a)(10). The Commission specifically identified "Failing to alert or notify shippers with confirmed bookings" as one of the non-binding examples of unreasonable conduct under 46 U.S.C. § 41104(a)(3). A shipper that receives a booking confirmation one day before the vessel sails is akin to a constructive refusal to provide cargo space. Shippers need adequate notice from ocean carriers, so they can ship on time. Without such confirmation, the shipper will have no way of knowing whether its cargo will be accepted for transport by the ocean carrier. Because of this, NITL suggests the Commission include "timely" before "alert or notify shippers."

Another non-binding example of unreasonable conduct under 46 U.S.C. § 41104(a)(3) is "Scheduling insufficient time for vessel loading so that cargo is constructively refused." NITL is concerned that this example is seeking to address "vessel loading" rather than "container loading." Vessel loading occurs when the ocean carrier loads the vessel. Container loading, on

the other hand, is when shippers load the container at their facility and then tender the container to the carrier. Shippers need sufficient time to load and transport containers to the port where they will be loaded onto the vessels. NITL suggests the Commission replace the words “vessel loading” with “container loading and tender of the cargo” in the SNPRM. NITL also believes that the Commission should expand the list of non-binding examples of unreasonable refusals to provide cargo space accommodations to include repeated cancellations or repeated cargo rolling of confirmed vessel bookings.

Regarding the non-binding examples of unreasonable refusals to deal or negotiate as to vessel space accommodations, NITL supports the examples identified by the Commission and commends the Commission for stating that unreasonable conduct occurs when an ocean carrier quotes rates so far above market that it renders the quote not a serious negotiation. This conduct is an unreasonable “de-marketing” tactic that is inconsistent with the carriers’ status as common carriers. Although categorical refusals to carry exports would likely be very rare, systemic refusals would appear to demonstrate a pattern of conduct that would be unreasonable. Finally, NITL believes that the Commission could expand its list of examples to include “repeated refusals to timely respond to booking requests.”

Service Contract Considerations. In the SNPRM, the Commission asked for comments regarding how the prohibition of refusals to deal or negotiate as to vessel space accommodations may relate to service contracts when the contract is silent as to any remedy for such conduct. As the Commission is aware, during the pandemic, many carriers failed to fulfill booking requests under service contracts despite having made service commitments to carry the cargo. Although the Shipping Act reserves contract breaches for the courts, NITL believes that a carrier should not be able to operate contrary to the Shipping Act notwithstanding the existence of a service

contract. In other words, a shipper should not lose access to claims arising under the Shipping Act if a carrier may be in violation of the Act simply because it negotiated a contract with the carrier.

III. CONCLUSION

For the foregoing reasons, NITL greatly appreciates the opportunity to submit these comments and respectfully requests that the Commission promulgate a final rule clarifying certain aspects of the proposals in the SNPRM based on these comments.

Respectfully submitted,

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