

October 21, 2022

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

Submitted by Email to:
secretary@fmc.gov

RE: Docket # 22-24
Definition of Unreasonable Refusal to Deal or Negotiate

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) proposed rulemaking 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 & Impact of Dairy Ocean Shipping Challenges

The international ocean freight system's challenges during the COVID pandemic and its aftermath brought about significant negative impacts on American dairy producers and exporters, in addition to many others in the American agricultural sector. As imports surged and ports became congested, dairy product exporters have faced extraordinary difficulties securing export

vessel accommodations. When those vessel bookings were achieved, it has often come at significant added cost. Most importantly, however those bookings have been quite unreliable, and our members' export cargo was frequently rolled to later vessel departures. In addition, other challenges have included obtaining necessary equipment (containers, reefers, chassis), inability to schedule terminal appointments and/or long drayage wait times.

According to many of our members, they were aware of the supply and demand challenges that ocean carriers were facing, and if the matter were simply having to pay more for their cargo space, then they understood the economic factors behind those increased costs. But rather than the ocean carrier market having the natural effect of increasing costs to secure finite space, dairy shippers have commonly faced situations where ocean carriers would tell them no space was available, or worse, that their outreach to carriers – who these shippers often had long-standing relationships with – was ignored or simply not responded to.

It became evident that the ocean carrier marketplace which the American dairy export industry had relied on for many years was no longer functioning effectively. Consequently, the U.S. dairy industry lost nearly \$1.5 billion in export value in 2021 due to international ocean freight challenges, including lost product value, lost customers and added shipping costs. Our members and these organizations advocated strongly for the Ocean Shipping Reform Act to ensure that the problems we've faced were sufficiently addressed by corrective regulations, and so that these problems did not recur. This rulemaking related to an ocean carrier's refusal to deal or negotiate is an important factor in addressing challenges that dairy exporters recently experienced.

Vessel Accommodations Challenges

As noted above, some of our dairy exporters found themselves unable to effectively communicate with representatives from the ocean carriers in negotiations to secure vessel accommodations. On some occasions there appeared to be intentional disregard for shipper efforts to secure vessel space, while on others the cause was unclear and may have been due to overwhelmed customer service staff rather than negligence or carelessness. Nonetheless, the outcome for the shipper was an inability to find someone at an ocean carrier to listen to the shipping needs and engage in negotiations to secure vessel space. There have also been instances where dairy shippers connected with ocean carrier personnel who indicated that there was not space available for the shipper's export needs or offered outrageous and unreasonable pricing. More often, while a dairy shipper may have secured vessel accommodations for their export shipments, the ocean carrier has been unable (or unwilling) to make available the containers, reefers, or chassis necessary to ship the goods to the port and to be loaded on a vessel.

Because of the unique nature of each export shipment in terms of destination, size, content, and timeframe, we agree with the FMC that determinations under the new regulations must be "factually driven and determined on a case-by-case basis." There is no way for this rule to be written in a general fashion and be adjudicated based on universal standards. To address this matter, the FMC has proposed that ocean carriers should be required to develop documented export strategies that outline their business plans for facilitating shipments of goods from the United States, and their general approaches to engaging with shippers to affect those exports. This may include procedures for shippers securing vessel accommodations, general pricing and

volume considerations, and the means and considerations for obtaining necessary shipping equipment, such as containers. Ocean carriers, as the FMC observes, have significant information advantages with respect to cargo capacity, shipping schedules and changes to schedules, and pricing dynamics. The export strategy could help balance some fundamental information and allow exporters to better understand carrier approaches to export shipping. However, an important consideration will be whether ocean carriers are required to make these export strategies public or allows carriers to keep them as business-confidential, and potentially only shared with the FMC, or even only shared in certain settings, such as during audits. A preferred approach would be for them to be public and for the shipping community to have access to the documents and use them as context in their efforts to negotiate with carriers. Furthermore, the FMC should not permit these strategies to serve as satisfactory demonstrations of a carrier's intent to negotiate or a baseline standard. The proof of a carrier's willingness to negotiate must be based on its actual practice and manner and level of engagement with shippers that are seeking vessel accommodations, and not a high-level strategy.

"Consistency" as a Pillar of Reasonable Negotiating

As the FMC develops these regulations, it's important that they emphasize consistency. Dairy shippers who had long-standing relationships with ocean carriers suddenly found themselves unable to maintain the same levels of communication with the ocean carriers during the COVID ocean freight congestion period as they had before. This deviation from prior practice jeopardized their ability to negotiate and secure vessel space. Even today we have reports of some dairy shippers who must call the carriers sales teams multiple times to get someone on the phone who is willing or able to offer a vessel accommodation and pricing for shipments.

The FMC may want to consider establishing a consistency test with respect to its rulemaking. For instance: what has been the carrier's practice in the past with respect to negotiating for vessel accommodations, and do they adhere to it in any specific situation? This baseline determination will help both the carriers and shippers alike understand when a deviation has occurred and inform them both about adherence to any new regulations. The FMC rightly notes that a single unreturned call or email would not suffice as a "failure to negotiate", but that does invite the question of how many calls or emails must a shipper make before that threshold is triggered? What qualifies as good faith efforts by shippers to negotiate, or receive an accommodation quote, and at what point does that carrier practice become "unreasonable"? To what extent would the economic impact of the carrier's failure to respond or negotiate have some bearing on the FMC's determination on an infraction? An understanding of what information should be retained by a shipper in order to substantiate a violation of this regulation should also be a consideration the FMC addresses in this rulemaking. This should not, however, permit a complacency with consistently poor service. The FMC's regulations should seek to assure that the outcome of these rules is to increase a shipper's ability to effectively seek and secure vessel space accommodations in a competitive marketplace.

Broad Scope of Reasonable Negotiating

Another important consideration for the FMC as it develops these rules is the scope of any negotiation for vessel space. This is not a simple binary question of "may a container be loaded".

Rather, it involves matters related to the cost of the shipment, the volume of the shipment (both in terms of total TEU containers as well as weight), the timing of vessel accommodations, origin and location of shipments, whether the shipment involves any intermodal carriage, the inclusion of equipment (containers, reefers, chassis), among other details. This will also pivot on issues related to the negotiation for spot rates or contracted rates for accommodations. It will be important for the FMC to outline whether negotiation can occur on only limited aspects of this scope, or if it must encompass all the aspects of a vessel accommodation.

Ocean Carrier Burden to Demonstrate Business Purpose

By addressing these matters in its regulation, the FMC will empower shippers to understand what qualifies as an “unreasonable refusal” to deal or negotiate for vessel space accommodations, and what evidence they would need to substantiate a claim. That, in turn, will enable shippers to make informed decisions as to whether to file complaints with the Commission to adjudicate the vessel accommodation challenges it may have experienced. The FMC then may proceed with an investigation, under which the *prima facie* case of a violation must be rebutted by the ocean carrier. There should then be a substantiated basis, based on a reasonable business purpose, for the carrier to have refused to negotiate with the shipper, and if not, then it will likely be a presumptive violation.

It will be important for the FMC to contemplate what may qualify as a reasonable business purpose. There should be limits that only permit discrete and actionable needs by carrier 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. The common carrier obligations that ocean carrier must meet should be a guiding criterion with respect to any basis for them to deny negotiations or vessel space accommodations.

Anti-Backsliding Considerations

It will also be important for the FMC to consider anti-backsliding rules in this regulation. Negotiations between shippers and carriers are functionally intended to facilitate the international carriage of goods on an ocean vessel. The rule should not permit carriers to negotiate for vessel accommodations, only to have those bookings get rolled, delayed or cancelled. Disruptions to vessel schedules are understandable, but should a pattern emerge where negotiated vessel space accommodations are regularly unreliable, that should raise questions at the FMC about the intent and purpose of the negotiations. Compliance on negotiating for vessel space should be done in good faith and not solely as a means of achieving compliance without affording the service.

Penalties and Enforcement

The FMC should consider, among other factors, the economic impacts to shippers from the failure to negotiate on vessel accommodations when evaluating its approach to enforcement and penalties for violations. In the current market, there may be other carriers through which a shipper can alternatively schedule an accommodation if a primary carrier fails to negotiate. In

that instance, the primary carrier should not be relieved of their burden to have negotiated, and the FMC should consider a “but for” standard that considers the economic and administrative costs to a shipper if that alternate carrier did not exist. Considerations of penalties should include the potential of lost sales, diminished product values, additional shipping costs, increased administrative costs from having to spend additional time contacting carriers, as well as punitive penalties related to willful or negligent violations of this regulation. The FMC should apply its new rules under OSRA to afford disaffected shippers refunds for losses or additional costs, as well as collecting civil penalties. Ultimately, penalties should serve as a deterrent to these practices, so they should be sizable enough to encourage corrective action within the carrier’s operations and staffing arrangements.

The dairy export community is grateful to the FMC for its expeditious action on the Ocean Shipping Reform Act regulations. It is our hope that the FMC’s rules will further assure that ocean carriers offer timely and reasonable rates and accommodations for their published services, and to increase the efficiency with which shippers may secure their services.

We appreciate your consideration of these views and appreciate the work of the Commission, its leadership and staff to expeditiously proceed with these important regulations and the implementation of the Ocean Shipping Reform Act.

Sincerely,

A handwritten signature in black ink, appearing to read "Jaime Castaneda".

Jaime Castaneda
Executive Vice President for Policy Development and Strategy