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Update on New Regulations of the Federal Maritime Commission, New Bills Before Congress, and New Cases of Interest to Ports and Marine Terminal Operators

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I. Federal Maritime Commission

A. Background: Port Congestion Issues: Beginning in 2016, prior to Covid, the FMC became aware of complaints by cargo interests of bottlenecks and congestion in certain U.S. Ports (particularly LA/Long Beach) and authorized Commissioner Rebecca Dye to create "Innovation Teams," comprised of port stakeholders, to arrive at commercial solutions to these problems. A final report by Commissioner Dye on the work of the Innovation Teams was published in December 2017.

1. Fact Finding No. 29- Interim Recommendations (July 28, 2021) (Comm'r Dye)
   i. Minimize barriers to private party action, making it easier for shipper interests to complain to the FMC about potentially unlawful conduct and prohibiting retaliation by ocean carriers and marine terminal operators.
   ii. Authorize the FMC to award double reparations for violations of unreasonable conduct, particularly relating to detention and demurrage charges.
   iii. The FMC should issue a "policy statement" on retaliation, attorneys fees, and representational private party complaints by shippers' groups and trade associations. A private party that brings an unsuccessful complaint should not be required to pay the winning party's attorneys fees unless the complaint is frivolous, unreasonable, brought in bad faith or is otherwise vexatious.
   iv. The FMC should revise its website and/or hold a webinar to educate industry users.
   v. Issue an advanced notice of proposed rulemaking seeking industry views as to whether ocean common carriers and marine terminal operators should include certain minimal information on or with detention and demurrage billings regarding the timing of such billings.
   vi. Determine whether, in addition to civil penalties that go to the United States, the FMC can, in Commission-generated enforcement proceedings, order refunds, restitution or similar relief to injured parties for violations of the Shipping Act. If not, injured parties would have to file complaints in the FMC to seek reparations, and often the statute of limitations has run before the FMC completes its enforcement proceeding.

2. FMC Votes to Move Forward with Detention and Demurrage related initiatives proposed by Rebecca Dye as a part of Fact-Finding No. 29. (September 15, 2021):
   i. Issue a policy statement regarding the ability of cargo interests to obtain reparations for conduct that violates the Shipping Act, including conduct related to demurrage and detention: Prohibition of carrier retaliation; when attorneys' fees may be proposed on a non-prevailing party; and who has standing to file a complaint for unreasonable behavior.
   ii. Issue an Advance Notice of Proposed Rulemaking that will solicit public comment on whether carriers and MTO's must include certain minimum information on or with detention or demurrage billings and whether the Commission should require carriers and MTO's to adhere to certain practices regarding the timing of demurrage and detention billings.
   iii. Hire additional staff to provide export assistance to the public.

B. New FMC Initiatives Since December 2021

1. Statement of Guidelines for Filing Detention and Demurrage Complaints (Feb. 15, 2022): On this date, Commissioner Dye issued a statement intended to provide guidance on the different avenues that shippers have at the FMC to pursue demurrage and detention complaints. She referred complainants to the FMC's website for information on how to file complaints on a page entitled "Filing a Shipping Act Complaint." In it, Commissioner Dye explains the difference between a Smalls Claims Complaint and a Formal Complaint:
   i. Small Claims Complaint: For claims of $50,000 or less, a small claim alleging Shipping Act violations may be filed. The complaint will be resolved by a Settlement Officer using informal procedures outlined under 46 CFR Part 502, Subpart S.
   ii. Formal Complaint: A Formal Complaint may be filed with the FMC to allege specific violations of the Shipping Act, which must be sworn and verified. The complaint must be filed within three years of the alleged violation. Formal Complaints are heard by an Administrative Law Judge through a more formal trial process and are reviewed by the Commission.
   iii. Note: Commissioner Dye noted that a complainant also has the option of simply reporting an alleged Shipping Act violation to the FMC that might be investigated by the FMC's Bureau of Enforcement, rather than filing a complaint seeking damages.

2. Advanced Notice of Proposed Rulemaking On Detention and Demurrage Billing Practices (February 15, 2022) (87 Fed. Reg. 8506): On this date, the FMC sought information regarding proposed new rules governing billing practices by ocean carriers and marine terminal operators for detention and demurrage charges. In particular, the FMC was interested in learning the following:

a. Should the FMC require by rule common carriers and MTO's (where MTO's impose charges directly upon cargo interests) to include certain minimum information on or with demurrage or detention billings? (Where "demurrage and detention" includes all charges having that effect, regardless of what they are called).

1) Types of "minimum information" the FMC is considering including:

a) Identifying information for container (B/L #, container No., etc.)
b) Payment due date
c) Start/end dates for free time
d) Start/end dates for detention/demurrage
e) Per diem rate and source of charge (tariff or schedule rule)
f) Availability of return locations and appointments
g) Any information on events that would "toll" or stop the running of detention and demurrage charges, such as container unavailability, lack of return appointments or Acts of God)
h) Should bills be sent out to multiple parties—anyone who might have an interest in the shipment as indicated on the B/L?

b. Should the FMC require common carriers or MTO's to adhere to certain practices regarding the timing of demurrage and detention bills and refunds?

1). The FMC is proposing 60 days for billing after the date on which demurrage or detention charges start to run. This is consistent with the Uniform Intermodal Interchange Agreement Rules.

c. Comment period on these proposed new rules ended on April 16, 2022. Comments can be read on-line on the FMC's website in its tab marked "Reading Room, under Proceeding 22-04. Expect a Proposed Rulemaking on this matter soon.

3. Minor Changes to Rules Regarding Marine Terminal Operator Schedules at 49 CFT Part 525 (March 17, 2022): On this date, the FMC published its Final Rule on these minor changes, effective April 18, 2022. Most of the changes are indeed minor and intended to correct references to archaic technology. A few of the more significant changes are as follows:

i. Bulk cargo: Definition clarified to include "containerized bulk cargo tendered by the shipper" as cargo within the scope of the regulations, as it is subject to mark and count.

ii. Marine Terminal Operator: Definition clarified to mean "a person engaged in the United States in the business of providing wharfage, dock, warehouse or other terminal facilities in connection with a[n] [ocean] common carrier," consistent with the language in the Shipping Act. The Rule also adds language that clarifies that shippers or consignees who exclusively provide their own marine terminal facilities/services for their own cargo are not MTO's. The definition also adds "docks, berths, piers, and aprons" to the list of structures comprising a marine terminal unit.

iii. The definition of "United States" is expanded to include commonwealths, territories or possessions" of the United States.

iv. The proposed rule clarifies, consistent with the Shipping Act, that if an MTO makes its Schedule available to the public, then any such schedule is enforceable by an appropriate court as an implied contract without proof of actual knowledge of its provisions. See 46 U.S.C. 40501(f).

4. Commissioner Dye Presented her Final Report on Fact-Finding No. 29 to the FMC (May 18, 2022). In it, she identified two major concerns of importers and exporters:

i. The high cost of shipping cargo: Commissioner Dye found that freight rates, although high, reflected market forces of supply and demand in a supply chain challenged by Covid 19 pandemic and unprecedented consumer demand.

ii. Excessive detention and demurrage charges: Commissioner Dye cited the FMC's interpretive rule on detention and demurrage, cited her

eight Interim Recommendations issued on July 28, 2021 (cited above), and proposed 12 new recommendations for the FMC to consider.

5. Commissioner Dye Released Final Report for Fact-Finding No. 29 to the public, containing her 12 new recommendations (May 31, 2022):
    i. A new Commission "International Ocean Shipping Supply Chain Program";
    ii. A rulemaking to provide coherence and clarity on Empty Container Return practices;
    iii. A rulemaking to provide coherence and clarity on Earliest Return Date practices;
    iv. Continued Commission support for the new FMC "Ocean Carrier Compliance Program" including a new requirement for ocean common carriers, seaports, and marine terminals to employ an FMC Compliance Officer;
    v. An FMC Outreach Initiative to provide more information to the shipping public about FMC competition enforcement, service contracts, forecasting, and shippers associations, among other topics;
    vi. Enhanced cooperation with the federal agency most experienced in agricultural export promotion, the Department of Agriculture, concerning container availability and other issues;
    vii. A Commission Investigation into practices relating to the numerous charges assessed by ocean common carriers and seaports and marine terminals through tariffs;
    viii. A rulemaking to provide coherence and clarity on merchant haulage and carrier haulage;
    ix. A new "National Seaport, Marine Terminal, and Ocean Carrier Advisory Committee" to work cooperatively with the Commission's National Shipper Advisory Committee;
    x. A revival of the Export Rapid Response Team program as agreed by all ocean carrier alliance CEOs;
    xi. An FMC Supply Chain Innovation Teams engagement to discuss blank sailing coordination and information availability; and
    xii. A reinvigorated focus on the extreme supply chain equipment dislocations in Memphis railheads, other rail facilities, and other facilities around the country.

6. FMC Maritime Data Initiative: (Nov. 15, 2021): FMC Commissioner Carl Bentzel was appointed to propose recommendations for streamlined common data standards to be used by the International Ocean Shipping Supply Chain. The first public meeting was held Dec. 7, 2021 in Wash., D.C. with planned speakers from across government and industry. Weekly meetings were held through April 2022, with a final Summit meeting on June 1, 2022 with 18 stakeholder participants. All meetings are available for view by the public on the FMC's YouTube channel.
    a. Goal: Streamline how industry communicates and shares data to make cargo movement more efficient, including harmonizing definitions, standardizing data reporting, sharing date timely, and making other recommendations on how the data supply chain can be more efficient.
    b. Outcome: A report is currently being prepared on the Summit meeting and that report and its recommendations will be presented to the FMC at its July 13, 2022 meeting. Expect further guidance or proposed rulemaking from the FMC on data sharing after this meeting.

7. Fact Finding No. 30: Effect of Covid 19 on the Cruise Industry:
    a. On or about April 30, 2020, the FMC ordered Fact-Finding No. 30, to be led by Commissioner Louis Sola, to investigate the effect of Covid 19 on the cruise industry, including:
        i. Engaging the cruise industry to identify commercial solutions to Covid-related issues interfering with the operations of the industry.
        ii. Interact with maritime-related Covid task forces to gather information regarding impact of Covid on the cruise industry.
        iii. Establish a team of leaders in the cruise industry, as well as other stakeholders, to develop commercial solutions to the challenges created by the Covid pandemic.
    b. On January 14, 2022, Commissioner Sola released his Final Report on Fact Finding No. 30.
        1. Temporary relief to small passenger vessels: All Passenger Vessel Operators are required by FMC Rule to submit a financial instrument (e.g., bond) equal to 110% of the greatest amount of unearned passenger revenue held by the carrier over the past 2 years.
        2. On July 23, 2021, the FMC voted unanimously to allow small PVO's to reduce their required bond amount, thus saving

costs on premiums and/or to submit alternative forms of financial responsibility.

8. PVO Financial Responsibility Rule (Refunds): Proposed Rule on Cruise Line Non-Performance and Refunds (Docket 20-15. Proposed rule would allow passengers of non-performing cruises (cruises canceling or delaying a voyage by three or more days) to have certain remedies IF the passenger elects NOT to embark on the delayed or substituted voyage.

   a. Passengers can make direct claims against the cruise lines financial security bonds if unable to secure a refund directly from the cruise line.

   b. Passengers must submit claims within 180 days of nonperformance, unless the cruise line permits a longer period.

   c. Ancillary fees paid by passengers should be included in the refund.

   d. Cruise lines websites must provide clear instructions as to how passengers may obtain refunds.

9. Note: CDC 's "Conditional Sail Order" for cruise ships expired January 15, 2022 and is unlikely to be extended. CDC currently recommends, but cannot require, that cruise ships operating in U.S. waters voluntarily participate in CDC's Covid 19 program for cruise ships. It appears that all 92 cruise ships operating in U.S. waters have opted in to the program and 90 of them have "highly vaccinated" status, with 90% of their travelers being fully vaccinated. CDC uses a color coding system (green, yellow, orange, red) to identify levels of Covid reported on specific cruise ships by name. Green (no reported Covid), Yellow (reported Covid cases but below threshold for CDC investigation); Orange (Covid cases above threshold for CDC investigation; Red (Serious level of Covid infections). Out of the 92 participating vessels, 86 ships are at the Orange level—above the threshold for CDC investigation.

II. Congressional Action Affecting Ports and Marine Terminal Operators:

A. H.R.4996: Ocean Shipping Reform Act of 2021 (Introduced 8/10/21 by Rep. John Garamendi (D. CA), passed by the House (364-60) on December 8, 2021, received by the Senate on December 9, 2021, read twice, and referred to the Senate Committee on Commerce, Science & Transportation.)

1. Summary: Aimed at trying to fix supply chain problems, the Act is pro-shipper and has encountered a lot of push back from ocean carriers. In Summary: Act would impose minimum requirements on ocean carrier service contracts and shift the burden of proof in regulatory proceedings from shippers to ocean carriers.

Would mandate that ocean carriers not decline export cargo if it can be safely loaded and delivered within a reasonable time frame.

2. Specific provisions:

a. Requires ocean carriers to incorporate best practices in the industry

b. Requires ocean carriers and MTO's to certify that any detention or demurrage charges comply with FMC regulations, or face penalties, EXCEPT if MTO's detention and demurrage charges are based on public port tariffs established under state law.

c. Effectively codifies the FMC's Interpretive Rule on Demurrage and Detention under the Shipping Act. Requires the FMC to enact rules that:

1). Require uniform definitions of demurrage, free time, and cargo availability—accounting for government inspections.

2). Prohibit detention and demurrage charges from being independent revenue sources—they can only be incentives to speed cargo through terminals and to return equipment.

3). Prohibit detention and demurrage charges where delay is either under control of the carrier or MTO or if delay is NOT within the control of the cargo interest.

4). Prohibit commencement of free time unless cargo is available for retrieval and timely notice of cargo availability has been provided.

5). Prohibit consumption of free time or collection of detention or demurrage when marine terminal appointments for trucks are not available during free time or when the marine terminal itself is closed or not otherwise available for container return,

6). Require ocean common carriers to provide timely notice of cargo availability after vessel discharge, container return locations, and advance notice of container early return dates.

7). Require minimum billing requirements for demurrage and detention, including supporting documentation.

8). Require ocean carriers and MTO's to establish reasonable dispute resolution policies and procedures by shippers.

9). Establish responsibilities of cargo interests and draymen with respect to cargo retrieval and equipment return.

10). Examine invoices for detention and demurrage to parties other than the shipper, including determining if the party should be billed at all.

3. FMC Powers: Gives FMC broad powers to investigate alleged anticompetitive practices in detention and demurrage and to allow third parties to file detention and demurrage complaints with the FMC.

4. Prognosis for Act Passage: Passage appears likely, in reconciliation with the Senate Bill S 3580 below. AAPA is lobbying for port-friendly changes during the reconciliation process.

B. S. 3580: Ocean Shipping Reform Act of 2022 (Introduced by Sen. Klobuchar, passed Senate 3/31/2022; held at House desk 4/4/2022)

1. Summary: Related to HR 5359. Purpose is to strengthen rights of exporters under the Shipping Act and to protect them from discrimination by ocean carriers, MTO's and ocean transportation intermediaries.

2. Specific Provisions:

a. Increases authority of FMC to promote growth and development of U.S. exporters

b. Prohibits ocean common carriers, MTO's and OTI's from unreasonably refusing cargo space, when available, to exporters

c. Requires registry with FMC of any "shipping exchange," defined as a platform (mainly digital) that connects shippers with common carriers for purposes of entering into underlying contracts for the transport of cargo

d. Sets forth detailed requirements for contents of demurrage and detention invoices.

e. Requires FMC to define prohibited practices in connection with demurrage and detention

f. Requires FMC to define who can be billed for demurrage

g. Requires FMC to define unfair or unjustly discriminatory methods under the Shipping Act.

h. Requires FMC to create rule on unreasonable refusal to deal or negotiate with respect to vessel space availability.

i. Prohibits common carriers, MTO's and OTI's from individually or in concert from retaliating against any shipper, its agent, its OTI or its trucker by refusing or threatening to refuse any otherwise unavailable cargo space.

III. New Case Decisions of Interest to Ports and Marine Terminal Operators

A. Vargas v. APL, Ltd., ___F. Supp. 3d___, 2022 WL 757082 (E.D.N.Y. March 1, 2022). (Case under the Longshore Act, section 905(b))

1. Under Section 905(b) of the Longshore Act, an injured longshoreman can file a claim against the vessel owner for injuries caused in part by the vessel's negligence—in addition to the worker's compensation claim that the longshoreman can file against his employer. But there are traps for the unwary marine terminal operator or operating port in the case of injured longshoremen employed by a third party—such as an on-dock chassis repair company, lashing company, or line company. The Vargas case illustrates this.
2. In Vargas, the stevedore/marine terminal operator Maher had a written contract for stevedoring and marine terminal services with APL for its container vessels calling in Elizabeth, NJ. Maher did not do its own lashing of containers, but subcontracted that work to American Maritime Services (AMS). Maher did not supervise the lashing work, but only coordinated with the AMS lashing foreman.
3. On the date of the accident, Vargas was working for AMS as a lasher on the APL Pearl. A mate on the vessel directed him to lash a container located on top of a pedestal. Vargas protested that he could not reach that spot, but the mate persisted, so Vargas got a ladder. About ¾ of the way up the ladder, it slipped and Vargas fell and was seriously injured.
4. Vargas sued APL under Section 905(b) of the Longshore Act, claiming that the vessel owner was responsible for his injuries. APL, in turn, brought a third party suit against Maher under the written stevedore/marine terminal agreement for indemnification, claiming that Maher owed indemnification to APL under the written stevedoring agreement.
5. Maher moved for summary judgment on the third party complaint, Maher argued that the stevedoring agreement did NOT contain any express indemnification clause covering this kind of situation. APL pointed to a "notice clause" in the contract that stated that Maher would use reasonable efforts to notify APL of any personal injury, but the failure to give such notice would not bar any subsequent claim by APL against Maher for indemnity, contribution or otherwise."
6. HELD: Summary Judgment in favor of Maher granted. The clause relied on by APL in the contract was only a notice clause. It said only that if notice of a personal injury is not given to APL, then such lack of

notice would not affect APL's right to indemnity, should such a right exist otherwhere in the contract. The Court found that while there were other express indemnity clauses in the contract, there was no express indemnity agreement by Maher to APL for this type of injury. The "Notice Clause" could not create any new rights that did not already exist.

7. The Court also held that APL also could not recover indemnity or contribution under general maritime law against Maher, because in order to do that, the original plaintiff, Vargas, must have asserted his claim as an "admiralty and maritime claim" under Rule 9(h) of the Federal Rules of Civil Procedure. However, not only did Vargas NOT plead a maritime claim under Rule 9(h), but he and his wife also demanded a jury trial, which is inconsistent with a Rule 9(h) admiralty/maritime claim.
8. TAKEAWAY: Terminal Operators should review the indemnity terms of their contracts with ocean carriers to determine if they might have liability for Longshore Act 905(b) claims. If so, terminals should ensure that they have insurance coverage for such potential claims.

B. Buckeye Partners v. GT USA Wilmington, 2022 WL 906521 (DE Ct. of Chancery, Mar. 29, 2022)
    1. Defendant GT USA Wilmington (as successor to Diamond State Port Corporation) operates the marine terminal at the Port of Wilmington, DE. Since 2008, Buckeye has leased a dock at the Terminal and storage space at the marine terminal under a written lease agreement with the port to store and transload liquid petroleum products. The lease agreement contained a term recognizing that additional payments could be due under the Terminal's tariff, for activities and services not covered by the lease. When a vessel carrying liquid petroleum arrives at the terminal, a Buckeye employee helps connect the vessel's hose to a shoreside manifold, the vessel's pump is turned on, and the vessel then pumps the liquid fuel from its tanks into the hold, through the manifold and ultimately to pipes that run under the terminal and connect to storage tanks. Once the fuel is in the tanks, Buckeye's customers would send trucks down two terminal roads (the disputed roads) to pick up fuel from the tanks.
    2. In 2018, GT obtained the right to operate the Wilmington marine terminal under a concession agreement with Diamond State, under which GT stepped into the shoes of Diamond State under the Buckeye Lease. Upon entering the concession agreement, GT created a

"Terminal Usage Fee" in its Terminal Tariff in an attempt to cover the costs of the concession fee it had to pay to Diamond State. The "Usage Fee" was a fee assessed against parties engaging in stevedoring. The fee was volume based, determined by the number of containers or quantity of cargo that passed "over the quay." The tariff provided that if usage fees were not paid, GT could deny the user a berth.

3. GT billed Buckeye for the "Terminal Usage Fee" under its 2018 Schedule, but Buckeye refused to pay the Fee, claiming first that it was not a stevedore and did not do any stevedoring work. Buckeye also asserted that it had a written lease for the space, binding on GT, for which it paid rent, and that GT could not impose additional "rent" upon it by tariff for the same activities that Buckeye had always engaged in under the lease. The parties began to negotiate a business solution.
4. While negotiations were still ongoing, in January 1, 2020, GT issued an updated marine terminal tariff, redefining the "Terminal Usage Fee" as "a separate charge assessed against the stevedore," where "stevedore" was defined as "the entity hired to unload the vessel." In the 2020 Tariff, GT also provided for the first time that if user fees were not paid, GT could block any delinquent "stevedore" from accessing any part of the terminal.
5. Buckeye continued to refuse to pay the "User Fee" and its alleged outstanding balance, according to GT, rose to over a million dollars.
6. On April 1, 2020, GT sent a letter to Buckeye, threatening to cut off Buckeye's access to the terminal by April 6, 2020, if Buckeye did not pay its outstanding balance, and also notified Buckeye's customers of the upcoming blockade. In particular, GT was threatening to block the access of Buckeye's customers to the two disputed roads, which were the only ways that Buckeye's customers could get to the fuel storage tanks to pick up fuel. One of Buckeye's major customers was WAWA, which was concerned that the blockade could threaten the "critical petroleum infrastructure" in the mid-Atlantic region.
7. On April 6, 2020, the day of GT's blockade, Buckeye filed suit against GT to stop the blockade, seeking a TRO to stop GT from blocking the disputed roads during the pendency of the litigation. The Court granted Buckeye's TRO and a trial on the merits was held.
8. The Court considered two questions during the trial: (a) Whether Buckeye was a stevedore and owed any terminal usage fees and (b) whether GT could block the access of Buckeye and its customers to the

disputed roads for failure to pay the "access fee." The court found in favor of Buckeye on both issues.

9. On the first issue, Buckeye did not owe any terminal usage fees, because it was not a "stevedore." GT was the sole drafter of the Tariff terms, and any ambiguities in its definition would be construed against GT. The Court found the definition of "stevedore" ambiguous, as it was unclear whether the simple job of connecting a ship's pipe to a manifold constituted "stevedoring," when it was the vessel itself whose pumps actually "unloaded" the vessel. Moreover, under the Shipping Act (46 C.F.R. 525.2(a)(3)) rates in a marine terminal tariff will only apply if the parties do NOT have a written agreement covering the same item. Here, the Court found that the Buckeye lease gave Buckeye the right to engage in the services necessary to conduct its business on the terminal, and that Buckeye paid rent in exchange for that right. Because the lease already encompassed Buckeye's provision of services to its customers at the terminal, the lease constituted a specific written agreement that precluded application of the "Terminal Usage Fees" in the tariff for the same services and activities. GT provided no new or additional services to Buckeye in exchange for the user fees.
10. On the issue of whether GT could block Buckeye's access to the two disputed roads by Tariff, the Court found that GT could not do this, because the roads were essential to Buckeye's right under the lease to provide fuel from the tanks to its customers. There was no other access to the tanks other than via the disputed roads. To be able to block Buckeye's access to the roads would destroy Buckeye's business.
11. TAKEAWAY: Marine Terminal Operators can't seek to impose new terms and conditions on their lessees by Tariff or Schedule, in an attempt to do an end-run around the terms and charges in a lease. Either wait for the lease to renew or add new services to the tenant, not already in the lease, to justify new Tariff charges. Penalties for nonpayment of charges in Tariff or Schedule can't be such as would put the lessee out of business.