SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

Nominations Hearing: Federal Maritime Commission
February 28, 2024

REPUBLICAN QUESTIONS FOR THE RECORD
Responses of Rebecca Dye

COVER PAGE

SENATOR DEB FISCHER (R-NE)

1. **We have seen a number of supply chain disruptions over the past several years, most recently as a result of attacks on ships in the Red Sea. These disruptions often have impacts on the cost of consumer goods in the U.S. and the ability for U.S. farmers to export their products. We must build a durable supply chain that can adapt to these disruptions and minimize their impacts. How can improving the availability of data on the movement of goods in the supply chain help build resilience against these disruptions?**

The focus for data availability should be on the critical pieces of information necessary to harmonize smooth supply chain operations. This may best be summed up in a question to seaport users, "what do you need to know, and when do you need to know it?" A good example of this for importers and truckers may be found in a container "notice of availability" from a seaport or marine terminal.

An exporter, importer or trucker does not need a laundry list of "shared" ocean carrier data, but rather specific pieces of information containing actionable knowledge. Seaport users do not routinely need to know everything tracked by a vessel operator, but rather whether their container shipment is available for pickup from a seaport or marine terminal.

Seaport digitization is most effective in mitigating supply chain bottlenecks when underlying operational processes are clear and predictable. I encourage seaport and marine terminals to institute operational processes that contribute most to the performance of the U.S. international ocean supply chain: specifically, container return, earliest return date, and notice of container availability. The goal should be to make these processes that are critical to systemic success of our freight delivery system clear and predictable, so port users can receive actionable information and plan their businesses accordingly. Information provided to marine terminal users concerning operational processes that are clear and predictable will further mitigate supply chain bottlenecks.

I have been working with marine terminal operators at the Ports of Los Angeles and Long Beach, and the Port of New York and New Jersey on programs to address container return, earliest return date, and notice of availability. I plan to convene and lead FMC Supply Chain Innovation Teams and marine terminal operational process pilots to consider how these marine terminal processes might be improved and share the results with other ports and marine terminals so that they may benefit from the lessons learned in these efforts. (https://www.fmc.gov/commissioner-dye-proposes-reforms-to-international-ocean-supply-chain-practices/).

SENATOR TED BUDD (R-NC)

In IMCC vs OCEMA – Docket #20-14, the Federal Maritime Commission (FMC) suggests that they have the authority to prevent ocean carriers from withdrawing from interoperable gray chassis pools.

1. **Please cite the specific authorizing language enacted by Congress that you believe grants the FMC authority to regulate ocean carrier's chassis procurement decisions, including not allowing them to pull out of certain pools or markets.**

The Shipping Act is the primary federal statute that preserves the integrity of U.S. maritime trade and protects the American public from unfair practices by ocean transportation providers. The Commission has exclusive jurisdiction over alleged Shipping Act violations, which cannot be brought in federal district court or before another federal agency. If ocean common carriers are operating under an agreement filed with the Commission, then actions authorized by that agreement are insulated from liability under the federal antitrust laws and would not be reviewed by the U.S. Department of Justice or the Federal Trade Commission.

The Commission is charged with enforcing restrictions and prohibitions on carrier practices and policies that are unreasonable and unjust. *See* 46 U.S.C. § 41102(c). In addition, when carriers may be engaged in activities authorized by an agreement filed with the Commission, as was the case in *Intermodal v. OCEMA*, Docket No. 20-14, the Commission has statutory authority to monitor those practices for compliance with the agreement's terms and for possible negative impacts on competition. 46 U.S.C. §§ 40301-40307. Federal courts have held that "activities described in § 40301 that are undertaken pursuant to agreements filed with the FMC are immune from federal antitrust laws." *In re Vehicle Carrier Services Antitrust Litigation*, 846 F.3d 71, 80-81 (3d Cir. 2017); *Mercedes -Benz USA, LLC v. Nippon Yusen Kabushiki Kaisha*, Civ. No. 18-13764, 2018 WL 6522487, at *4-5 (D.N.J. Dec. 12, 2018). This statutory immunity extends even to activities that the parties reasonably believe are covered by an agreement filed with the Commission and in effect or exempt from filing. 46 U.S.C. § 40307(a)(3). Two of the respondents in *Intermodal* were associations of ocean common carriers acting under the authority of agreements filed with the Commission and subject to its ongoing review. The individual carriers who collectively agreed to abide by the Rules adopted by one of the respondent organizations were only able to do so without risking a violation of federal antitrust law because they were acting under the authority of an agreement filed with the Commission.

The narrow issue that was before the Commission in *Intermodal Motor Carriers Conference v. OCEMA*, Docket No. 20-14, was that multiple individual ocean common carriers and two ocean carrier associations violated Shipping Act restrictions against unjust and unreasonable practices by withdrawing from interoperable pools and (as part of the same move or practice) designating proprietary chassis pools (operated by a single equipment provider) as the chassis supplier for that carrier's containers. It was in that context that the Commission found that it has jurisdiction to examine the reasonableness of carriers' decisions to withdraw from an interoperable chassis pool and designate as its replacement a single proprietary pool. That

withdrawal decision directly impacts motor carriers and shippers, constrains their choices, and determines the rules they must follow and charges they incur for daily usage of the chassis.

What was not before the Commission in *Intermodal* were broader questions about carriers' procurement decisions in general. The Commission did not make any findings about procurement decisions that do not limit shippers' or motor carriers' chassis usage, or their freedom to choose among or negotiate with chassis providers.

2. How does prospective authority to regulate ocean carrier's involvement in certain chassis pools align with the ruling's statement that the FMC cannot direct non-regulated parties to act or refrain from acting in the marketplace?

All the respondents in the *Intermodal* case were ocean common carriers who operate under rules mandated by the Shipping Act. The Commission is charged with enforcing restrictions and prohibitions on carrier practices and policies that are unreasonable and unjust. *See* 46 U.S.C. § 41102(c).

The Commission has a duty to adjudicate allegations of Shipping Act violations and award relief or take remedial action if violations are found. That is all that the Commission acted on and determined in this case. The Commission did not rule on the legality of conduct by other parties who deal with the carriers but are not regulated entities under the Shipping Act and were not respondents in the proceeding.

The Commission was also fulfilling its obligation to regulate activities carried out under ocean common carrier agreements. Two of the respondents in *Intermodal* were associations of ocean common carriers who were acting under the authority of agreements filed with the Commission and subject to its ongoing review authority. When ocean common carriers are operating under an agreement filed with the Commission, actions authorized by that agreement are insulated from liability under the federal antitrust laws and would not be reviewed by the U.S. Department of Justice or the Federal Trade Commission.