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Shipping, Ports, and the Federal Maritime Commission

Since summer 2020, U.S. overseas containerized trade has risen to record levels as the Coronavirus Disease 2019 (COVID-19) pandemic led households to spend less on services such as vacation trips and restaurant meals and more on imported goods. The demand surge has resulted in transport delays, higher freight rates, and increased tension between shippers and ocean carriers over ancillary fees and the availability of containers. These controversies have drawn attention to the role of the Federal Maritime Commission (FMC), a federal agency with jurisdiction over ports and ocean shipping.

Background

The FMC's mission, essentially, is to protect U.S. shippers—the owners of cargo being transported—from unfair practices of ocean carriers, freight consolidators, and port terminal operators. It was created by Congress in 1961. The five FMC commissioners are appointed by the President and confirmed by the Senate for five-year terms, with no more than three from the same political party. The President designates one of the commissioners to serve as chair. The FMC has a staff of about 130, comprising lawyers, tariff and transportation specialists, and economists. It has an annual budget of about $30 million.

Before 1961, the functions now fulfilled by the FMC were handled by an agency that also was charged with promoting a domestic merchant marine industry. Under that arrangement, U.S. exporters and importers often perceived that their interests were subjugated to the interests of U.S. ship lines. The FMC was created as an independent agency, and responsibility for the domestic merchant marine industry was separated. It now rests with the Maritime Administration in the U.S. Department of Transportation.

The FMC is charged by law with protecting the interests of U.S. shippers in international trade. It oversees the practices of U.S. ports and marine terminal operators, licenses U.S. ocean freight consolidators, and investigates claims by U.S. liner carriers of unfair practices by their foreign counterparts (46 U.S.C. §42101-§42307). It also adjudicates among industry segments, as in cases of rate or service disputes between freight consolidators and liner carriers. It may enforce its decisions by issuing fines and binding orders, seeking court injunctions, awarding reparations, revoking licenses, and detaining vessels.

Regulation of Liner Shipping

The FMC focuses mostly on liner shipping services, which typically operate vessels such as containerships and car carriers on scheduled routes between U.S. and foreign ports. It administers an antitrust regime specific to these types of ship lines. The FMC's most recent major enforcement action, in 2016, led to large fines against car carriers that engaged in price fixing without filing an agreement with the FMC.

Such agreements are part of a longstanding federally authorized regime intended to address persistent overcapacity in the shipping industry (notwithstanding the recent capacity shortage). Maritime trading nations generally have sought to develop and support their own fleets of ships for national and economic security reasons and/or to signify their nation's development and global presence. To counteract this phenomenon, since the late 1800s liner carriers have been allowed to form cartels, known as conferences, to control available capacity. Carriers serving the United States have thus been given a certain amount of antitrust immunity, under the regulation of the FMC, that is not available to most other businesses (46 U.S.C. §40307). The intent is to prevent rate wars and foster a more stable market for ocean shipping. Although the United States has generally favored competition among transportation carriers in recent years, allowing regulated antitrust immunity for ocean carriers recognizes the global nature of shipping and thus the difficulty of pursuing U.S. policy preferences unilaterally. Whether this antitrust immunity unnecessarily boosts carrier market power relative to shippers underlies other disputes between the two parties. Some carriers, mainly Chinese, are owned or otherwise substantially controlled by their governments. The FMC determines which carriers have this characteristic and monitors their rates and practices more closely.

Types of Liner Agreements

Congress began limiting conferences' practices in 1916 (P.L. 64-260). Beginning in the 1980s, various deregulatory shipping acts have reduced the market power of shipping alliances. Tariffs (official ocean rates) are no longer required to be filed with the FMC, merely posted on a carrier's website or other publicly accessible venue. The vast majority of containerized cargo is carried at contracted rates specified in confidential agreements between carriers and importers and exporters rather than at the posted rates.

Carriers have traditionally effected their limited antitrust immunity by participating in two types of agreements with one another: rate discussion agreements (RDAs) and vessel sharing agreements (VSAs). The terms of RDAs must be nonbinding, so that each ocean carrier signing an RDA is making only a voluntarily commitment to abide by the pricing terms laid out in the agreement. A carrier may ignore an agreement if it is in its interest to reach other rate and service terms with a shipper. The nonbinding nature of the agreements is a key feature that has limited the carriers' ability to fix prices.

In 2008, the European Union disallowed RDAs, but continued to allow VSAs, which allow carriers to move cargo aboard one another's vessels and hence may reduce the pressure on each individual carrier to order new ships. Thus, only VSAs are now allowed among liner carriers providing service between Europe and North America. In 2018, Congress forbade carriers from simultaneously participating in a RDA and VSA if doing so reduced competition (46 U.S.C. §41104(a)(13)). VSAs or similar agreements, commonly called "alliances," rather than RDAs, cover most liner trade to and from the United States.

Whether RDAs or VSAs, the participating carriers must file their agreements with the FMC, which solicits public comment. A proposed agreement goes into effect in 45 days unless the FMC requests more information or opposes it in federal court. Shippers are seeking a statutory change that would allow them to participate in these court proceedings.

In 2016, a downturn in global trade induced further VSAs and some mergers as carriers tried to rationalize their services. One major foreign carrier went bankrupt. At an April 2016 congressional hearing, one U.S. exporter, Tyson Foods, urged the FMC to undertake a more thorough review of what it called "mega-carrier alliances," stating that these arrangements complicate port operations because containers have to be trucked between different port terminals when the carriers exchange vessel space. In 2019, the top carrier serving the U.S. market had a market share of 13% and the top 10 carried 88% of U.S. overseas container traffic.

Small U.S.-Owned Liner Fleet

Since the 1980s, almost all U.S.-owned liner carriers have been sold to foreign companies. This development is significant to the FMC's mission because one of the four statutory purposes of U.S. regulation of international ocean shipping is to "encourage the development of an economically sound and efficient liner fleet of vessels of the United States capable of meeting national security needs" (46 U.S.C. §40101(3)). Sea-Land, the American company associated with the start of commercial container shipping in 1956, is now owned by Maersk, a Danish line. American President Lines was sold to a Singapore line, which in turn was acquired by the French liner company CMA CGM. Smaller U.S. liner carriers were also sold to foreign companies.

The fourth listed statutory goal of U.S. regulation of international ocean shipping is to "promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing greater reliance on the marketplace" (46 U.S.C. §40101(4)). When reauthorizing the FMC in 2021, Congress created a 24-member shipper advisory committee equally composed of U.S. importers and exporters to advise the FMC on "policies relating to the competitiveness, reliability, integrity, and fairness of the international ocean freight delivery system" (P.L. 116-283, §8604).

Related Areas of Industry Oversight

To counteract the negotiating power of carrier alliances, port terminal operators also have some immunity to discuss rates on a region-wide basis (46 U.S.C. §40301(b)). Many terminal operating companies are owned by or otherwise closely affiliated with liner carriers so the carriers can ensure their vessels are handled promptly. Terminal operating agreements must be filed with the FMC.

The FMC licenses and requires bonds of ocean freight forwarders, which are businesses that do not own vessels, but typically consolidate the cargo of smaller shippers in order to obtain more competitive rates from ocean carriers.

Port Congestion and Pier Diem Charges

In May 2020, the FMC issued a rule (85 *Federal Register* 29638) clarifying just and reasonable practices for ocean carriers charging daily fees for use of containers. Liner carriers own or lease almost all the containers used by shippers. To maximize container use and port storage space, carriers charge a daily fee to shippers who fail to pick up containers promptly. For example, an importer may have three to five "free" days to pick up an incoming container at the port before demurrage is charged. Similarly, an importer faces a detention charge if it fails to unload a container and return the empty box to the port within a given time period. Shippers complain that they often exceed the "free days" due to factors beyond their control, such as congestion that delays truck trips into and out of the port.

Congestion at the "landside gates" of port terminals, where trucks enter and exit to drop off and pick up containers, has been a persistent issue at some container ports. The FMC held a series of forums at ports around the country in 2014 examining the causes and proposed solutions to truck gate congestion, and later issued a report summarizing its findings. However, the FMC's ability to affect the situation for the benefit of U.S. shippers appears limited. The agency does not have jurisdiction over port management and labor relations. This means it does not oversee such matters as the operating hours of U.S. container terminals, which are typically much shorter than those of terminals abroad.

Container Supply Shortages

Two FMC commissioners recently reminded liner carriers about their "common carrier obligation," under which they may not "unreasonably refuse to deal or negotiate" (46 U.S.C. §41104(a)(10)). This reminder followed complaints by exporters of low-value agricultural goods that ocean carriers are not supplying them with enough empty containers to ship their goods. The exporters are seeking FMC's assistance in obtaining firmer commitments from carriers regarding container supply. Because the United States imports more containerized goods than it exports, the ocean rates for exports are much lower than for imports. In the number of days it takes for a U.S. exporter to load a container and for the purchaser of the goods in Asia to unload the container, a carrier could return the container empty to Asia and have the container start earning the much higher Asia-to-United States freight revenue. This may be a consideration when container supply becomes tight. Factory closures and the sudden downturn of container trade in spring 2020 due to the COVID-19 pandemic reduced the manufacturing of new containers. More recently, volume surges at ports and inland rail yards have slowed the circulatory flow of containers from importers to exporters.

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