CLIENT ALERTS & INSIGHTS

FMC Final Rule on "Refusal to Deal or Negotiate" Effective Sept. 23, 2024

JULY 29, 2024

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The Federal Maritime Commission (the "FMC") issued its Final Rule on July 22, 2024, establishing its approach to determining what constitutes an unreasonable refusal to deal or negotiate cargo space and vessel space accommodations under the Ocean Shipping Reform Act of 2022 ("OSRA 2022"). The Final Rule governing vessel-operating common carriers ("VOCCs") will be effective on Sept. 23, 2024, and applies to private party complaints and enforcement cases brought by the FMC. Non-vessel operating common carriers ("NVOCCs") are not subject to the Final Rule. The purpose of the Final Rule is to improve trade imbalances, transport delays and access to vessel capacity by establishing the necessary elements and definitions for terms that the FMC will use when analyzing the reasonableness of a VOCC's refusal to accommodate.

Here is a quick summary of the material components of the Final Rule and the definitions for new terms used under OSRA 2022:

1. **Refusal of Cargo Space Accommodations**

Elements. The FMC identified three required elements for a beneficial cargo owner to establish a *prima facie* case under OSRA 2022 at 46 U.S.C. 41104(a)(3). These elements must be met to assert that a VOCC's refusal to accommodate cargo space is prohibited:

- The respondent must be a VOCC (46 C.F.R. 542.1(c)(1));
- The respondent refuses or refused cargo space accommodations when such space is available (46 C.F.R. 542.1(c)(2)); and
- The VOCC's conduct is unreasonable (46 C.F.R. 542.1(c)(3)).

Once a beneficial cargo owner establishes its *prima facie* case, the burden shifts to the VOCC, which must demonstrate that its refusal was *not* unreasonable.

Evaluating Reasonableness. The FMC will consider the following factors on a case-by-case basis when evaluating the reasonableness of a carrier's conduct in connection with its refusal to provide cargo space accommodations:

- Whether the VOCC followed a documented export policy that enables the timely and efficient movement of export cargo (46 C.F.R. 542.1(d)(1);

- Whether the VOCC made a good faith effort to mitigate the impact of a refusal (46 C.F.R. 542.1(d)(2));
- Whether the refusal was based on legitimate transportation factors (46 C.F.R. 542.1(d)(3)); and;
- Any other relevant factors or conduct (46 C.F.R. 542.1(d)(4)).

Unreasonable Conduct. The FMC will consider the following non-exclusive list of conduct to constitute unreasonable refusals to provide cargo space accommodations:

- Blank sailings or schedule changes with no advance notice or with insufficient advance notice (46 C.F.R. 542.1(e)(1));
- Vessel capacity limitations not justified by legitimate transportation factors (46 C.F.R. 542.1(e)(2));
- Failing to alert or notify beneficial cargo owners with confirmed bookings of any other changes to the sailing that will affect when their cargo arrives at its destination port (46 C.F.R. 542.1(e)(3));
- Scheduling insufficient time for cargo tendering or vessel loading so that cargo is constructively refused (46 C.F.R. 542.1(e)(4));
- Providing inaccurate or unreliable vessel information (46 C.F.R. 542.1(e)(5)); or
- The de facto, absolute or systematic exclusion of exports in providing cargo space accommodations (46 C.F.R. 542.1(e)(6)).

2. Refusal to Deal or Negotiate Vessel Space Accommodations

Elements. Similarly, the FMC identified three required elements of a *prima face* case for claims brought under OSRA 2022 at 46 U.S.C. 41104(a)(10), alleging that a particular refusal to deal or negotiate with respect to vessel space accommodations is unreasonable:

- The respondent must be a VOCC (46 C.F.R. 542.1(f)(1));
- The respondent refuses or refused to deal or negotiate with respect to vessel space accommodations (46 C.F.R. 542.1(f)(2)); and
- The VOCC's conduct is unreasonable (46 C.F.R. 542.1(f)(3)).

Again, upon a beneficial cargo owner's establishing a *prima facie* case, the burden shifts to the VOCC to demonstrate why its conduct was not unreasonable.

Evaluating Reasonableness. The FMC will consider the following factors on a case-by-case basis when evaluating the reasonableness of a VOCC's conduct in connection with its refusal to deal or negotiate vessel space accommodations:

- Whether the VOCC followed a documented export policy that enables the timely and efficient movement of export cargo (46 C.F.R. 542.1(g)(1));

- Whether the VOCC engaged in good faith negotiations (46 C.F.R. 542.1(g)(2));
- Whether the refusal was based on legitimate transportation factors (46 C.F.R. 542.1(g)(3)); and
- Any other relevant factors or conduct (46 C.F.R. 542.1(g)(4)).

Unreasonable Conduct. The FMC will consider the following non-exclusive list of conduct to constitute unreasonable refusals to deal or negotiate vessel space accommodations:

- Quoting rates that are so far above current market rates they cannot be considered a good faith offer or an attempt at engaging in good faith negotiations (46 C.F.R. 542.1(h)(1)); or
- The de facto, absolute or systematic exclusion of exports in providing cargo space accommodations (46 C.F.R. 542.1(h)(2).

3. Definitions for New Terms Used Under OSRA 2022

The Final Rule also provides new definitions for terms material to the refusal analyses that were not previously defined under the Shipping Act or OSRA 2022 (or which now have new, bespoke meaning for purposes of the Final Rule), including:

- Blank Sailing - A sailing is skipping one or more specific port(s) while traversing the rest of the scheduled route or the entire sailing being canceled.
- Cargo Space Accommodations - A space that has been negotiated for or confirmed aboard the vessel of a VOCC for laden containers being imported to or exported from the United States. Cargo space accommodations include the services necessary to access and load or unload cargo from a vessel calling at a U.S. port.
- Documented Export Policy - A written report produced by an ocean common carrier that details the VOCC's practices and procedures for U.S. outbound services.
- Transportation Factors - Factors that encompass the vessel operation considerations underlying a VOCC’s ability to accommodate laden cargo for import or export, which can include, but are not limited to, vessel safety and stability, weather-related scheduling considerations and other factors related to vessel operation outside the vessel operator’s control and not reasonably foreseeable.
- Unreasonable - VOCC conduct that unduly restricts the ability of beneficial cargo owners to meaningfully access ocean carriage services from that VOCC.
- Vessel Space Accommodations - Space available aboard a vessel of a VOCC for laden containers being imported to or exported from the U.S. Vessel space accommodations also include the services necessary to book or access vessel space accommodations.

4. Practical Takeaways

This long-awaited Final Rule establishes the FMC's playbook for evaluating whether a VOCC's refusal of cargo space accommodations or its refusal to deal or negotiate vessel space accommodations constitutes a violation of OSRA 2022. As a result, certain changes in commercial practices, as well as claims and defense strategies, are likely to follow. For instance, VOCCs will presumably begin developing "documented export policies" in order to defend against a claim for refusing to deal. For their part, beneficial cargo owners now have visibility into FMC expectations for VOCC practices on this issue, which has received widespread attention since the COVID-19 pandemic. This perspective will be valuable during ocean contract bid negotiations and even production or inventory planning.

On the other hand, the introduction of new claims and definitions under the Final Rule is certain to invite questions and litigation regarding their meaning. While multi-factor balancing tests provide a tribunal with the flexibility to evaluate every case on its merits, such tests can also fall short of providing the type of predictable, "bright-line" guidance often desired by commercial interests. Even precise requirements themselves, such as the "documented export policies" element of the Final Rule, may be subject to vigorous challenges after the fall of *Chevron* deference. As with almost any new regulation, only time will tell whether the application of this Final Rule will yield greater visibility and predictability for market participants in the U.S. trades.

Benesch's Transportation & Logistics Practice Group has a longstanding history of counseling and representing clients in maritime matters. They are available to assist in developing pragmatic approaches to address the business and regulatory impacts this Final Rule may have on stakeholders.

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