CONTRIBUTED CONTENT & PRESENTATIONS

Regulatory Update for Marine Terminal Operators

SEPTEMBER 7, 2023

Authors: J. Philip Nester, Laura E. Kogan, Nicholas P. Lacey

Marine terminal operators (MTOs) and ocean common carriers became easy targets upon which to cast blame for the port congestion issues and supply chain weaknesses arising out of the COVID-19 pandemic. The U.S. Congress responded to certain of these issues by passing the Ocean Shipping Reform Act of 2022 (OSRA), which gave the Federal Maritime Commission (FMC) authority to further regulate and enforce the ocean transportation system, which seeks to increase supply chain transparency and refine certain detention, demurrage, dwell fees, and per diem (D&D) practices. In March of 2023, the FMC announced it is taking a hard look at MTO dwell fees and per diem charges to ensure these practices comply with OSRA and the FMC's "Incentive Principle" under the "Interpretive Rule on Demurrage and Detention Under the Shipping Act" at 46 C.F.R. Part 545 (Interpretive Rule). Prior to OSRA, MTOs had broad discretion to operate under their "schedules," which made the regulation of MTOs largely predictable. However, until the FMC's finalizes its post-OSRA rulemaking that it proposed in October 2022, the MTOs' forward-looking regulatory landscape and the use of their schedules will remain unsettled.

MTOs. MTOs are persons engaged in business in the U.S. providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier that is subject to the Surface Transportation Board. [49 U.S.C. § 40102(15)] MTOs include terminals owned or operated by governmental entities, railroads who perform port terminal services not covered by their line haul rates, ocean common carriers who perform port terminal services, and even warehousemen who operate port terminal facilities. [46 C.F.R. § 525.1(c)(13)]

MTO Schedules. MTOs can have actual contracts with their counterparties, but it has traditionally been the case that MTOs perform services in accordance with their "schedules," whereby they set forth rates, regulations, and practices for their services. [46 C.F.R. § 525.2(a)] MTOs establish their schedules by mere publication, such that those parties receiving MTO services are bound by "implied contract" even "without proof that such party has actual knowledge of the provisions." [46 C.F.R. § 525.2(a)(2)] Rates of general applicability published online consistent with the standards at 46 C.F.R. § 525.3 are deemed accepted by a party using the MTOs' services.

Historical Regulation. The Shipping Act grants authority to the FMC to regulate MTOs and their facilities that involve international ocean transportation. MTOs must establish, observe, and enforce their own regulations and practices related to receiving, handling, storing, or delivering property, which is generally accomplished through publication of the MTO's schedule. [46 U.S.C. § 41102] MTOs are prohibited from engaging in certain conduct, including: (1) unreasonable discrimination against persons in providing terminal services; (2) giving undue or unreasonable preference or advantage or imposing any undue or unreasonable prejudice or disadvantage with respect to any person; or (3) unreasonably refusing to deal or negotiate. [46 U.S.C. § 41106] The FMC oversees

MTO compliance with their schedules to identify and prevent unreasonable preference or prejudice and unjust discrimination that violate the Shipping Act and related regulations. [46 C.F.R. §§ 525.1(a)-(b)] Claims arising out of MTO practices and standards of conduct are fact specific, but the FMC tends to apply general principles to test whether an MTO's conduct violated the terms of its schedule or the Shipping Act.

Post-OSRA Regulation. Since the enactment of OSRA, the FMC's efforts have focused largely on steamship lines and their D&D practices. However, following the FMC's decision in the matter of *TWC, Inc. v. Evergreen Shipping Agency* (Docket No. 1996(I)) in December 2022, the Agency has turned its attention to MTO compliance with the Interpretive Rule, where the "Incentive Principle" is used to determine whether D&D practices and charges are serving their intended primary purposes as financial incentives to promote freight fluidity. Further, under the FMC's proposed rulemaking issued in October 2022, MTOs would be required to include specific minimum information on D&D invoices as set forth in 46 U.S.C. § 41104(d)(2). This means MTOs would have the same D&D invoicing compliance obligations that OSRA requires of ocean common carriers. Practically, MTOs would need to issue invoices for D&D to the billed party with whom they have a direct contractual relationship, which generally is not the case, as MTOs almost always operate and perform services under their schedules. The enactment of the FMC's proposed rulemaking would impact not only MTO contracting and invoicing practices, but other MTO operations, such as their ability to exercise possessory liens to withhold the release of cargoes on which scheduled rates remain due and owing. Until the FMC's finalizes and implements its post-OSRA rulemaking, the prospective regulatory landscape and historical MTO practices will remain unsettled.

The Path Forward. The FMC has yet to promulgate additional regulations or step up enforcement using its new authority under OSRA, but the contours of OSRA will continue to develop and have a significant impact on MTO practices and compliance obligations within the ocean transportation system. The evolution of OSRA has global public policy implications, and as such, forthcoming developments from the FMC will come with a continued focus on supply chain transparency and concerns about the impact that D&D charges will have on end consumers in light of economic instability and inflation.

The team at Benesch is well versed in all aspects of the ocean transportation market and global supply chains and are available to assist in developing pragmatic approaches to address the impact that the FMC's proposed rulemaking may have on OSRA-related issues across the spectrum of ocean market participants.

J. Philip Nester is an associate in the Transportation and Logistics Practice Group and may be reached at (216) 363-6240 and jpnester@beneschlaw.com.

Laura E. Kogan is a partner in Benesch's Litigation Group and may be reached at (216) 363-4518 and lkogan@beneschlaw.com.

Nicholas P. Lacey is an associate in the Litigation Group and may be reached at (614) 223-9384 and nlacey@beneschlaw.com.