FMC's Informal Public Hearing on Shipping Conditions in the Red Sea

On February 7, 2024, the Federal Maritime Commission ("FMC" or the "Commission") held an informal public hearing to examine the impacts to shipping and supply chains from current conditions in the Red Sea and Gulf of Aden regions. The hearing took place from 10AM through 4:30PM ET. The full hearing may be viewed at the link here: https://www.youtube.com/watch?v=e8kUde7brEM.

In anticipation of the informal public hearing, the Commission solicited written and oral testimony from industry stakeholders and received approximately twenty-one (21) responses, including from the National Customs Brokers & Forwarders Association of America, Inc. ("NCBFAA" or the "Association"). Please see below for a high-level summary of these submissions. For copies of these testimonies, please see the link here: https://www.regulations.gov/docket/FMC-2024-0003/comments.

I. Opening Statement from FMC Commissioner Carl Bentzel

Commissioner Bentzel stated that the informal public hearing would cover not only Red Sea shipping conditions but also the challenges posed by reduced service through the Panama Canal. These disruptions pose severe international economic disruptions. Moreover, the United States is still recovering from the aftermath of the COVID-19 pandemic, which resulted in a 30% increase of imported container shipping, congestion, and suppressed deliveries. Commission Bentzel recognized the importance of international shipping and how dependent retailers, manufacturers, exporters and other stakeholders are on ocean shipping. Notably, ocean shipping reductions cannot be overcome since alternatives like air freight are more costly and subject to volume limitations. In preparation for the hearing, Commissioner Bentzel met with executives from every major shipping line and plans to meet with shippers, ports and other stakeholders to get their perspectives and status. Despite the disruptions, cargo continues to move smoothly, there is additional capacity at marine terminals, and equipment providers and intermodal rail and trucking are anticipating potential challenges. Ocean carriers have also ordered new ships, which will increase shipping capacity as other vessels are diverted due to the issues surrounding the Panama and Suez Canals. In summarizing the responsibilities of the Commission, especially in the midst of these challenging trade disruptions, Commissioner Bentzel emphasized that the priority is the safety of the merchant marine personnel operating the vessels and the security of the ships. However, he recognized that the FMC has a duty to protect the public from unreasonable shipping practices. While there is a need for price increases due to these crises, the Commission may be called upon to scrutinize the legitimacy of new charges or other shipping practices and police potential market abuse.

Lastly, Commissioner Bentzel is considering whether section 19 of the Merchant Marine Act of 1920 or the Foreign Shipping Practices Act may be applied to determine whether the situation in Yemen causes "unfavorable conditions to shipping in the foreign commerce."

II. Overall Testimony

Speakers noted their concerns about increased rates, and particularly the lack of transparency associated with these rates. Specifically, shippers noted the confluence of "war surcharges" on certain lanes, and concern about increased congestion in the coming months. Speakers are concerned that in the medium-term, this increased congestion might also impact railcare chassis and terminal equipment availability.

III. Testimonies from Shippers

Tyson Foods, Inc.: As a shipper of perishable products, the shipping delays have undermined the safety of the shipped products and resulted in increased costs, including detention charges. In the company's experience, delays are up to several weeks and carrier schedule reliability has reduced. The shelf-life of these perishable products are reduced due to the longer voyages. While the company is making alternative plans to mitigate the risks of shipping through the Red Sea and Gulf of Aden, other trade disruptions are adding significant pressure to supply chains (*e.g.*, drought conditions at the Panama Canal, temporary closures of border crossings, reduced global vessel capacity, labor restrictions for unloading and moving containers, *etc*.). It is not clear to industry how the Commission and other partner agencies plan to address these supply chain challenges, which also include increased fuel consumption, more blank sailings, backlogs at the ports, and more.

OJ Commerce, LLC: The company called upon the Commission to address unused shipping capacity in the industry and artificially inflated shipping costs. The company drew parallels between the tactics it saw during the COVID-19 pandemic and the current disruptions due to the attacks in the Red Sea. Moreover, it specified that containers were not being moved pursuant to contractual agreements with the carriers and that blank sailings have increased.

International Federation of Freight Forwarders Associations (FIATA): FIATA stated that the disruptions caused by the ongoing attacks in the Red Sea have resulted in sharp increases in freight rates and increased freight times. These increased costs are further compounded by high additional surcharges imposed on both affected and unaffected routes. FIATA members voiced concerns over the lack of transparency on these surcharges, which are invoiced "all in" without further information. FIATA understands that these surcharges are higher than the additional costs incurred by vessel diversion from the Suez Canal. FIATA also called for vessel capacity to be flexibly and competitively managed to mitigate additional disruptions.

American Chemistry Council (ACC): ACC members rely on ocean shipping to move various chemicals, polymers and related products. The industry touches nearly all manufactured goods and supports over 25% of the US gross domestic product. While ACC understands the challenges faced by carriers, it requested that the FMC closely monitor carrier activities, including the imposition of the Red Sea-related surcharges, and ensure shippers are treated fairly. The ACC stated that carriers have not provided adequate justification for the level of Red Sea-related surcharges and asks that the levels be transparent and justified based on actual increased costs to the carrier. The surcharges should be lifted once the threats in the Red Sea are gone and should not apply retroactively. Current surcharges should be consistent and transparent with respect to naming and billing. ACC also requested the Commission monitor contract adherence. Carriers cannot unfairly leverage the situation to favor non-contracted cargo that may move at higher rates compared to contracted cargo.

Alliance for Chemical Distribution (ACD): The disruption to ocean shipping puts the U.S. at a higher risk of experiencing shortages of critical goods and contributes to greater emissions. The Red Sea-related trade disruptions are occurring while the Panama Canal is experiencing a historic drought so the impact on global supply chains is compounded. ACD requested the Commission consider the direct impact of the increased voyage times and rerouted vessels. Specifically, the risk of severe congestion at the west coast ports, delay in receiving vital goods and cost increases. ACD recommended collaboration between port authorities, intermodal providers and other stakeholders, as well as interagency collaboration to deter future attacks in the Red Sea. With respect to Red Sea-related surcharges, ACD strongly believes that the increased costs to routes not subject to disruption are unreasonable. ACD members have been subject to surcharges for cargo moving through routes such as from China to the west coast. Members are also concerned about increased contract rates and noted that current spot market rates are exceptionally high. Some carriers reportedly tried to raise the rates in current contracts, which ACD believes is an unreasonable practice. ACD members are also experiencing issues with insurance coverage, *e.g.*, increased premiums and refusal to cover cargo going into the Red Sea or upper Indian ocean. The cost of insurance riders is also high. ACD urged the FMC to closely examine rising rates and surcharges to make sure they are not unreasonably inflated. Surcharges should not be imposed on routes not impacted by the attacks in the Red Sea and should not be significantly beyond the legitimate cost increases incurred on ships that would typically utilize that region.

BassTech International: Access to vessel space has become more challenging and spot market rates have grown exponentially. Carriers are able to react quickly to trade disruptions by raising ocean freight rates at a moment's notice and without consistency through the individual spot rates, which the company understands to be enforced unilaterally and without the same restrictions of NVOCC Service Agreements or tariffs. Moreover, the newly introduced surcharges are ambiguous. Carriers do not make clear the criteria used to trigger the application of some surcharges and some carriers have sought out the Special Permission application to impose surcharges sooner than statutorily required in order to recover increased costs due to the attacks in the Red Sea. The company raised questions as to whether the Red Sea-related surcharges are reasonable.

The National Industrial Transportation League (NITL): The Commission's grant of Special Permission applications, which allows carriers to impose increases in rates or charges without waiting the requisite 30-day statutory period, places additional financial burdens on shippers of all sizes. It is difficult for shippers to absorb or pass these costs on to their customers. The surcharges also lack clarity regarding when the surcharges apply. NITL members are concerned about the reasonableness of these surcharges and other cost increases. The cost increases are significant and raises suspicions as to whether these costs are unreasonable and a means to increase carrier profits. In addition to increased costs, shippers are also experiencing significant shipment delays, which impact manufacturing, distribution and sales, as well as undermines the stability and predictability of global supply chains. As a result, shippers are experiencing cash flow issues and other stressors due to delayed deliveries. While vessels must be diverted, carriers should still be able to provide reliable schedules and stabilize costs by adjusting vessel capacity, sailing schedules, *etc*. Moreover, NITL members recognize the need for Red Sea-related surcharges but find the imposition of Peak Season Surcharges inappropriate since the conditions in the Red Sea are not seasonal issues and the diversion of vessels should not result in high freight demand.

Northwest Grains International, LLC (NWG): NWG commented on the Red Sea-related surcharge implemented by Maersk Steamship line, which applied retroactively, and the impact this surcharge has had on its business. NWG called upon the FMC to review the implementation and assessment of this surcharge given the impact such surcharges have on the global shipping market.

National Retail Federation (NRF)[1]: Red Sea-related supply chain challenges include increased shipping timelines, increased shipping costs and material and component availability issues. NRF outlined mitigation strategies deployed in response to these issues, which include transit via the Cape of Good Hope, shifting cargo to West Coast ports and using intermodal rail to move cargo, use of air cargo, and coordination with overseas vendors to ship cargo earlier to account for delays in shipping times. NRF anticipates additional challenges, including increased ocean freight rates in contracts, congestion at the west coast ports, rail car imbalances and limited equipment and vessel availability, including chassis and containers. These issues are further compounded by the ongoing drought conditions at the Panama Canal and possibly by labor disruptions at the east and gulf coast ports due to ongoing labor negotiations between the International Longshoremen's Association and the United States Maritime Alliance.

Retail Industry Leaders Association (RILA): RILA called upon the FMC to continue monitoring the situation and ensure that carriers do not unduly penalize retailers. Carriers have increasingly provided greater visibility and transparency with respect to vessel routes, departures and other scheduling decisions; however, the schedules are not stabilized so retailers are forced to continuously adapt to new developments such as rerouting shipments to the west coast ports. Notably, ocean shipping rates have surged, and shippers are subject to these elevated costs. RILA is concerned about the impact on longer-term contract rates. The new Red Sea-related surcharges should also be monitored closely by the FMC as there is a lack of transparency on the correlation to the tangible costs associated with avoiding the Red Sea. In addition to these surcharges, shippers are subject to other shipping costs, including Peak Season Surcharges and additional insurance costs. Some shippers also experienced carriers refusing their cargo after the shippers had asked about the new surcharges.

Vishnu Chemicals Ltd.: The company detailed the increased costs for shipments from Houston and stated that carriers are raising rates and adding fees to cover longer voyages and increased security costs unilaterally and without notice.

Texan Mineral and Chemicals LLC: The company stated that it experienced significant ocean freight increases, which is causing significant distress for its small business. In addition to impacting the company's financial viability, the company would be forced to purchase lower quality products, thereby compromising the integrity of its offerings to the oil and gas industry.

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1 NRF also submitted oral testimony regarding same.

Agriculture Transportation Coalition (AgTC): AgTC requested insight on how and why the FMC waived the statutory 30-day notice requirement for rate increases and surcharges within hours of receiving the Special Permission applications from carriers for Red Sea-related surcharges. It also called upon the Commission to develop and implement a process to prevent such prompt grant of special permission applications. Separately, AgTC requested the Commission to finalize its rulemaking for detention and demurrage billing. AgTC compiled member experiences with respect to the Red Sea and Suez Canal disruptions, which include increased costs, lack of carrier transparency on costs and services, diversion of cargo, shipment delays, and chaotic changes to vessel routes and increased transshipments.

USA Dry Pea & Lentil Council (USADPLC): USADPLC represents small and family-owned businesses especially vulnerable to the unexpected expenses caused by shipping costs. The testimony outlined the challenges faced by its members, including increased costs, which change weekly, uncertainty in shipping schedules (*e.g.*, schedule changes, little notice of cancellations), and limited avenues available for exporters. In some cases, exporters are simply forced to accept increased costs. USADPLC stated that the COVID-19 disruptions resulted in the close or re-organization of some processors and the disruptions due to the attacks in the Red Sea will further injure a recovering industry.

IV. Testimonies from Common Carriers

World Shipping Council (WSC): [*NB: WSC submitted a request for public participation in the informal hearing and provided a summary of statements to be provided by Mr. Joe Kramek, Director of U.S. Government Relations.*] In short, WSC proposed to discuss the significant threat to seafarers, carriers and the global supply chain, the decision of many major carriers to divert vessels due to security concerns, the impacts on ocean carrier service and supply chains as well as operational challenges faced by carriers, and operational adjustments made by the industry to ensure shippers have access to international ocean shipping transportation and global markets.

MSC Mediterranean Shipping Company (MSC)[2]: The security situation in the Red Sea and Gulf of Aden remains dire and all commercial vessels transiting through the region are at risk of being attacked by the Houthis. Even with the launch of Operation Prosperity Guardian, a defensive operation led by the United States and its coalition partners, the danger of Houthi attacks remains. MSC assessed the security situation and determined that it is not safe enough in the region to protect seafarers and cargo. In addition to the Red Sea disruptions, MSC and other carriers must also avoid the Suez Canal, which is a vital trade route supporting 10 to 15% of world trade and 30% of global shipping volumes. As a result, voyage lengths have increased substantially and in many cases, these increases are up to thousands of nautical miles. While MSC seeks to provide consistent service, these vessel diversions and disruptions require significant adjustments to the MSC global network, including additional vessel capacity, schedule changes, equipment repositioning and more. These adjustments have resulted in increased costs, including fuel costs. MSC has made substantial and unprecedented investments in its new vessel capacity and continues to provide service to its customers. The present challenges are unique and distinct from the

[2] Mr. Bud Darr made two submissions on behalf of MSC, but one submission was withdrawn. This high-level summary reflects the testimony still available online.

COVID-19 pandemic where congestion was due to US land-based logistics being overwhelmed by unprecedented import demand.

V. Testimonies from Third Parties

Port of Long Beach: The Port of Long Beach continues to closely monitor the conditions in the Red Sea and Guld of Aden for impacts to commercial shipping and any potential surge in cargo at the west coast ports. The diverted vessels have resulted in nominal increases in container volume thus far. The Port of Long Beach will continue to make significant investments in infrastructure and information-sharing and other updates to enhance its ability to handle surges in volume. It is well-positioned to handle shifts in volume due to the ongoing trade disruptions.

Dr. Ian Ralby[3]: Dr. Ralby outlined the implications of the Houthi attacks in the Red Sea for maritime law, policy and practice, including impact on freedom of navigation. The written testimony stated that the Houthis are emboldened and may escalate their attacks and inspire others to join them in disrupting ocean shipping. The testimony outlined recommended approaches to countering the Houthis, including a complete closure of the Red Sea.

[3] Dr. Ralby is a nonresident senior fellow with the Atlantic Council's Global Energy Center.