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Container shipping is in US regulatory crosshairs after mounting shipper frustration with service levels, record trans-Pacific freight rates, and rising storage fees spurred the Biden administration to issue an executive order on July 9. Photo credit: Shutterstock.com.

Bipartisan legislation introduced Tuesday seeks to strengthen US enforcement of container lines' common carriage responsibilities to serve exports, but the bill's authors say it will ultimately be left to maritime regulators to determine when it is "unreasonable" for carriers to not accept bookings.

In [introducing legislation](#) that would, if passed, update the Shipping Act of 1984 for the first time since 1998, Reps. John Garamendi, D-Calif., and Dusty Johnson, R-S.D., said container line consolidation has been detrimental to carriers meeting their common carriage responsibilities under US shipping law.

“If you are going to be a common carrier, if you are going to US ports to be part of the stream of commerce, you need to be willing to accept some very basic rules of the road, including not unduly discriminating against agricultural US exports,” Johnson said during a Monday media briefing.

Amid an unprecedented surge of Asia imports that began in spring 2020, ocean carriers have prioritized higher-paying import cargoes to free up capacity for import cargoes, leaving exporters struggling to get their shipments booked. Carriers have also pulled back from repositioning empty containers to inland ports to speed the circulation of containers back to Asia.

The World Shipping Council (WSC), representing major container lines, said the bill’s framework incorrectly blames container lines for congestion, is “infused with unfairness” to carriers, and ignores that carriers and other transportation providers are working together to address congestion and other challenges presented by the record volumes.

“For US consumers and businesses, today’s bill runs a serious risk of making transportation contracts less flexible, slowing cargo velocity, and making all imported and exported goods more expensive,” the WSC said in a statement. “This is because risks cannot be efficiently apportioned by parties if there are too many restraints on freedom of contract, and lack of efficiency translates into additional costs.”

WSC noted it has not yet seen the text of the bill, only the legislative framework.

Container shipping is in US regulatory crosshairs after mounting shipper frustration with service levels, record trans-Pacific freight rates, and rising storage fees spurred the Biden administration to issue an executive order on July 9 urging the Federal Maritime Commission (FMC) to step up its policing. Since then, the FMC on July 20 launched an audit of container lines’ billing practices and on Aug. 4 asked carriers to justify port congestion surcharges.

Agricultural exporters praised the bill, with 15 agricultural associations led by the Agricultural Transportation Coalition urging Congress on Tuesday to quickly enact the legislation to make exports more globally competitive. Citing a survey of its members, Peter Friedmann, executive director of AgTC, said carriers have turned away 22 percent of potential foreign sales.

“There is nothing we produce in agriculture and forest products in this country, that cannot be sourced in some other country. If we cannot deliver, affordably and dependably, our foreign customers will find — and are already finding — alternatives to US exports,” he said. AgTC lobbied for the legislation, outlining suggestions to Congress in a JOC commentary.

The National Retail Federation, the American Trucking Associations, and the National Industrial Transportation League were among the 50 trade associations that have endorsed the bill.

Shifting burden of proof

In addition to strengthening common carriage responsibilities, the bill would bar a carrier from invoicing any party for detention or demurrage charges, unless it is accompanied by an “accurate certification” that such charges comply with the findings of the May 2020 FMC interpretative rule. Among the key findings of that rule are that “importers, exporters, intermediaries, and truckers should not be penalized by demurrage and detention practices when circumstances are such that they cannot retrieve containers from, or return containers to, marine terminals.”

The WSC said requiring container lines to certify why customers did not return equipment on time cannot be known in most cases by carriers, and unfairly puts carriers under threat of penalty. The bill would unfairly put the burden on carriers to ensure that chassis, trucks, and railcars are available, even though they do not directly control those assets, the WSC said.

The bill would also beef up anti-retaliation measures, which an FMC taskforce recommended on July 28. The WSC has flatly rejected accusations that shippers are not filing formal complaints owing to fear of retaliation. A US home goods importer on July 30 filed a formal complaint against Cosco Shipping and Mediterranean Shipping Co., accusing the carriers of colluding together to renege on trans-Pacific service contracts.

The bill would also allow the FMC to self-initiate investigations, rather than have to wait for a formal complaint.

Pointing to record US agricultural exports, the WSC says the legislation ignores that export cargoes are still moving despite record trans-Pacific volumes. If the government wants to get involved in commercial matters of detention and demurrage, then it needs to assure fairness to all parties and address when shippers fail to deliver cargo as booked, which makes it harder for carriers to plan capacity, the group said. The bill would require carriers to report quarterly to the FMC total tonnage for US imports and exports, and loaded and empty TEU per vessel

“Finally, Congress should pause and reflect on the impacts on trade partners whom this legislation, if enacted, would incentivize to enact similar protective legislative and regulatory frameworks in their countries,” the WSC warned. “Starting a protectionist race to the bottom in the regulation of international ocean transportation is not a winning strategy for the US economy.”

Kicking the fine print to FMC

According to the legislation, a carrier “may not... fail to furnish or cause a contractor to fail to furnish the facilities and instrumentalities needed to perform the transportation services, including containers,” but Garamendi said it would be up to the FMC to determine what constitutes unreasonable denial of service.

While Garamendi acknowledged the challenges of exporters getting carriers to reposition containers at inland points where there is not a regular flow of import containers, he said the bill language seeks to ensure that lower-value goods near ports are loaded and that ships depart with more US exports.

Garamendi, who represents almond growers and other agricultural exporters in Northern California, said the US does not have a shot at balancing its trade deficit “because of the way in which the ocean carriers are handling or mishandling the trade.”

On whether the legislation would be considered unreasonable for a container line to not accept an export cargo booking because the shipment was not profitable, Johnson said the bill strengthens a “common sense” rule: when companies can carry freight, they should. Johnson added that carriers will still have a “wide latitude to set rates,” but carriers argue that just because they can carry freight does not mean the roundtrip economics of taking the booking makes sense for their network. Forcing them to take unprofitable cargo produces a less-efficient, more volatile shipping system, carriers tell JOC.com.

The US Coast Guard reauthorization, which could move in late 2021, is the most likely vehicle for the bill to be attached to, but there’s a possibility it could be passed on its own, Garamendi said. The effort to rewrite the Shipping Act has strong support on both sides of the aisle and should receive the support of the House Committee on Transportation and Infrastructure, he said, pointing to the 112 House members that urged the FMC in March to investigate shipper accusations that carriers were refusing export bookings.

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