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**Mark Szakonyi, Executive Editor** | Aug 04, 2022 10:25AM EDT

Agriculture exporters of soybeans to specialty grains have successfully turned regulators' attention to container lines' loadings. Photo credit: Shutterstock.com.

US maritime regulators are beginning to wrestle with the toughest mandates from Congress in the Ocean Shipping Reform Act of 2022 (OSRA-22), with little guidance from legislators for how to navigate the perilous path of enforcing the law without tipping the scales of competition in the market.

Under OSRA-22, the US Federal Maritime Commission (FMC) must deliver a rulemaking clarifying when it is "unreasonable" for ocean carriers to refuse to serve shippers by mid-November. And within a year, the agency will have to figure out how to determine when a container line has adequate vessel space, and under what terms the carrier will be legally allowed to refuse a booking for that space. In other words, regulators have their work cut out for them.

JOC Column

Over the last nearly three years or so, Congress has heard from small and medium-sized US agricultural exporters that their cargo wasn't being loaded during the COVID-19 pandemic. With US consumer spending booming, carriers prioritized the repositioning of empties to cater to higher-paying imports and often quoted higher rates to reposition empty containers than exporters could accept. Carriers were also loath to lose days repositioning containers when they could improve circulatory flow by sending them directly back to Asia.

But in its attempt to respond to agriculture shippers' frustration within OSRA-22, Congress provided the FMC with little guidance on how to determine what qualifies as "unreasonable" behavior. The House legislators who started Congress down the road to OSRA-22 were clear from the onset that they'd be punting on the details. When introducing the first version of the bill on Aug. 10, Rep. John Garamendi, D-Calif., said Congress would defer to regulators to set definitions for unreasonable denial of service under the Shipping Act of 1984.

The FMC has little legislative record from which to draw. The House debated for no more than an hour before overwhelmingly passing its version of OSRA-22. The Senate had more debate, but ultimately passed its version within three months of the introduction of the bill and without a single committee report, a set of documents addressing legislative and policy issues to which regulators refer for guidance.

## Much to clarify

Nevertheless, the agency on July 27 began discussing how to respond to OSRA-22's addendum to rules forbidding carriers from unreasonably denying equipment or bookings. Presumably, Congress added the phrase "including with respect to vessel space accommodation by an ocean carrier" to toughen up existing language. The original House version had language requiring container lines to prioritize exports over imports, but that wasn't included in the final OSRA-22 bill signed into law by President Joe Biden on June 16.

While carriers may not accept bookings, it is rare for them to foreswear all commercial transactions with a given customer. And private companies have a constitutional right to refuse service, with exceptions made if a competitor has a monopoly on a critical-to-business service or component.

To complete its rulemaking, the FMC will likely need to clarify how to define when cargo space is available and under what circumstances carriers could reject bookings if the space is available.

These are murky waters, as carriers' decisions to reject bookings could be due to a scarcity of equipment or the need to reposition an empty container at a loss in pursuit of greater efficiency of the larger network. In clarifying detention and demurrage rules, the FMC walked a similarly fine line by focusing on the spirit of the law.

This is the first commission since 1984 that has been willing to take a more interpretive approach to the Shipping Act, according to Peter Friedman, executive director of the Agriculture Transport Coalition (AgTC). AgTC, which spearheaded the lobbying effort behind OSRA-22, thinks the agency's approach to its interpretive rulemaking on detention and demurrage shows that the FMC is up to the challenge.

The FMC's interpretive rules, which took effect May 2020, stated that storage fees were reasonable if they sought to improve terminal fluidity by encouraging the timely pick-up of cargo and return equipment — when port conditions made such a move possible.

Under the interpretive rule, fees would be unreasonable if they were punitive, in that severe weather, labor actions, or other factors made it impossible for shippers and consignees to pick up cargo and return equipment. OSRA-22 requires the agency to further clarify the detention and demurrage rule, and even before passage, the FMC began advanced rulemaking what information needs to be in invoices by seeking public comment. A proposed rule could come as soon as this fall.

Amid the agency's rulemaking, the FMC will be watching closely just how many exports, in addition to imports, container lines are loading. The FMC on Aug. 2 sought public comment on how to collect information to publish a quarterly report.

To give a sense of what trend they might find, containerized exports to Asia plunged 10.1 percent in 2021 from the prior year, following year-over-year declines of 3.1 percent in 2020 and 0.7 percent in 2019, according to PIERS, a sister product of JOC.com within IHS Markit, now part of S&P Global. More specifically, containerized agriculture export growth had been shrinking since 2020, but fully retracted in 2021, plunging 10.4 percent to 1.5 million TEU.

What the PIERS data does not show — nor will the information collected by the FMC — is just how much of the decline was due to refused booking and how much was due to a stronger dollar, which hit a 20-year high, and increased competition in the global market.

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