

# Ocean Transport and Supply Chain Regulatory Developments

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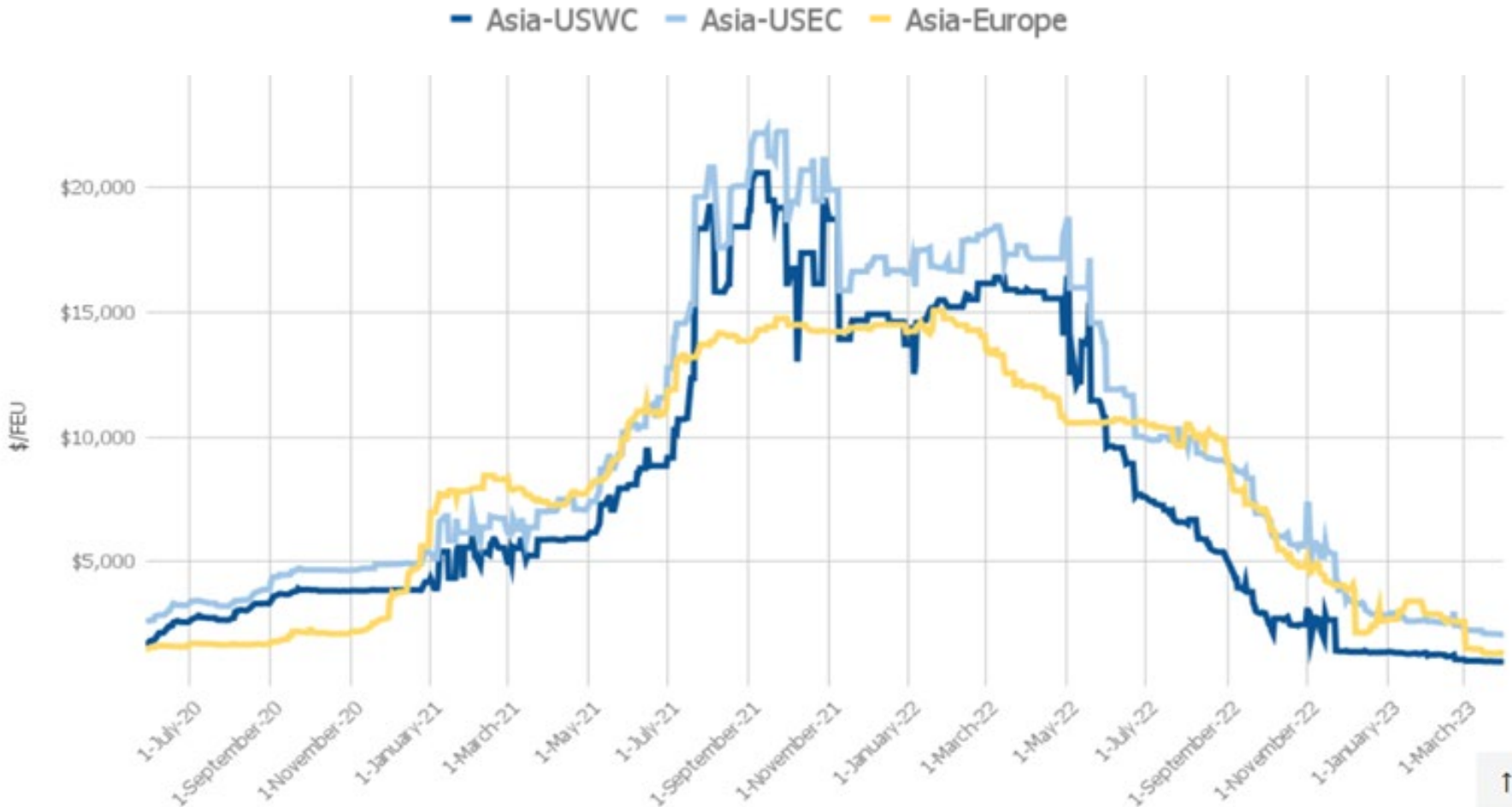
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# COVID and Ocean Transport Consequences

FBX - Ocean Container Spot Rates During the Pandemic



# COVID and Ocean Freight Rates

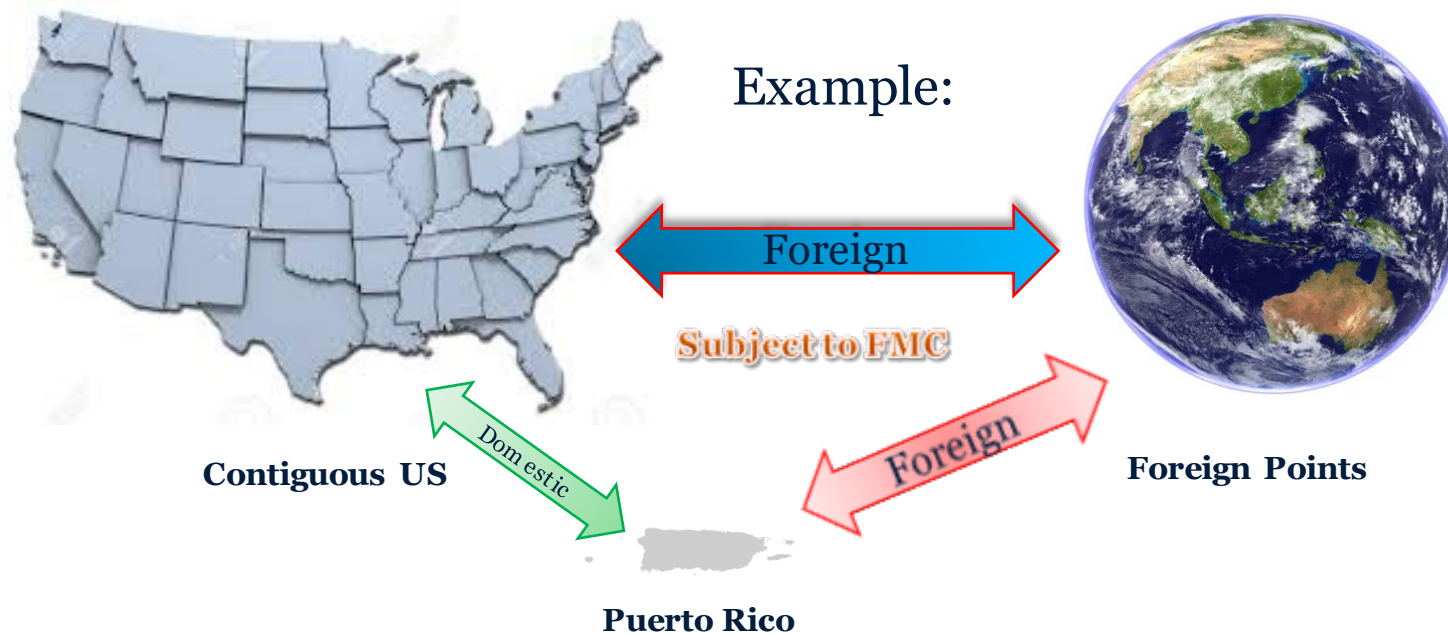
COVID-19 disrupted global supply chains and spiked ocean freight rates. For example, an FMC Fact Finding 29 report stated that the average spot market price for a 40FT container averaged around \$1,500 in early May 2020, reached a peak of \$11,019 in September 2021, and dropped to around \$9,000 in spring 2022.

The USITC, using rates published by Freightos, reported that:

- The average weekly ocean freight rate for East Asia to USWC for June 2019 to 2020 was around \$1,450
  - January was an average of \$1,515.
- The average weekly ocean freight rate for East Asia to USWC for June 2020 to 2021 was around \$2,167.
  - January was an average of \$4,261.

Recent news reports and publications for freight indices such as the World Container Index point to normalized ocean freight rates for U.S.-inbound shipments; however, U.S.-outbound shipment rates remain higher than pre-COVID levels.

# Federal Maritime Commission (FMC) Oversight



- Practically, what does this mean to me?
  - Any shipment between the United States and a foreign point is subject to FMC requirements.
  - “United States” includes all US commonwealths, territories and possessions.

# OSRA 2022 – Origins

- Catalyst: COVID supply chain challenges, rate instability, Congress passes the Ocean Shipping Reform Act of 2022 (OSRA 2022).
  - Biden Administration called out record profits by ocean carriers, the supply chain disruptions, port congestion and impact on Americans.
- OSRA 2022 is the most significant redo of US shipping laws since the Ocean Shipping Reform Act of 1998
  - Expands FMC's regulatory powers to address the practices of primarily non-US owned carriers, to mitigate ongoing supply chain backlogs and to protect US exporters/shippers.
  - For example, US agricultural exporters experienced difficulties with shipping their goods to global markets due to alleged ocean carrier practices and exorbitant freight costs.
- Enacted June 16, 2022, with certain provisions effective immediately.

# Status of OSRA 2022 Rulemakings

- **Rulemaking on Demurrage or Detention.** The rule will clarify reasonable rules and practices with respect to the assessment of detention and demurrage charges.
  - NPRM published on October 14, 2022.
  - Final rule no later than 1 year from June 16, 2022.
- **Rulemaking on Unfair or Unjustly Discriminatory Methods.** Must be initiated no later than 60 days after June 16, 2022; NPRM scheduled for August 2023
  - Final rule no later than 1 year after June 16, 2022
- **Rulemaking on Unreasonable Refusal to Deal or Negotiate with Respect to Vessel Space Accommodations.**
  - NPRM published on September 21, 2022
  - SNPRM published on June 14, 2023.
  - Final rule no later than 6 months after June 16, 2022.

# Prohibited Common Carrier Activities Post-OSRA 2022

- Common Carriers (VOCCs and NVOCCs) may not:
  - Unreasonably refuse cargo space accommodations (VOCCs) when available.
  - Engage in any unfair or unjustly discriminatory practices pursuant to a service contract against any commodity group or type of shipment (VOCCs).
  - Unreasonably refuse to deal or negotiate, including with respect to vessel space accommodations (VOCCs).
  - Assess any party for a charge inconsistent or non-compliant with all applicable laws and regulations.
  - Invoice any party for demurrage or detention charges without the required data points/information.
  - Give undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage against any commodity group or type of shipment.
  - Retaliate against any party for filing a complaint against the common carrier.

# New Detention/Demurrage Invoice Requirements

Required thirteen (13) data points for invoices:

1. Date that container is made available.
2. The port of discharge.
3. The container number or numbers.
4. For exported shipments, the earliest return date.
5. The allowed free time in days.
6. The start date of free time.
7. The end date of free time.
8. The applicable detention or demurrage rule on which the daily rate is based.
9. The applicable rate or rates per the applicable rule.
10. The total amount due.
11. The email, telephone number, or other appropriate contact information for questions or requests for mitigation of fees.
12. A statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage.
13. A statement that the common carrier's performance did not cause or contribute to the underlying invoiced charges.

- A safe harbor available for NVOCCs passing through the invoice originated from the VOCC.
  - If the FMC determines that the NVOCC is not otherwise responsible for the detention and demurrage charge, only the VOCC will be subject to the refunds or penalties.
- **Failure to include the required information shall eliminate any obligation of the charged party to pay the detention and demurrage charge at issue.**
- **Invoice can be corrected and reissued.**



# Possible Additional D&D Invoicing Requirements

- Clarifying invoices should be issued to the party with the contractual/genuine commercial relationship with the common carrier or marine terminal operator and responsible for the payment.
  - Common carriers and marine terminal operators would be prohibited from invoicing any party other than this appropriate billing party.
- Adding new required data elements for demurrage and detention invoices:
  - Rationale for why an invoiced party is the appropriate party liable for the underlying charges
  - Billing date and bill due dates
  - Specific dates for which the demurrage or detention was charged
  - Information sufficient for the billed party to ascertain how the charges were calculated
  - Specific URLs linking billed parties to the portion of the common carrier's or marine terminal operator's website with detailed information on how to request fee mitigations, refunds or waivers
- Implementing timeframes for billing (*e.g.*, common carriers and marine terminal operators to issue invoices within 30 days of the date that charges stop accruing).

# Practical Considerations on Invoicing

- All invoices issued on or after June 16, 2022, must contain the thirteen (13) data elements. Be prepared to add more once the final rule is issued.
- Common carriers can cure an insufficient demurrage and detention invoice. Common carriers are encouraged to proactively cure invoices to mitigate risk of disputes.
- The certification statements may be drafted as simple and concise statements or be more robust. The FMC does not currently impose any formatting requirements.
- Common carriers are encouraged to print the required data elements on the invoice itself and in a manner that is obviously visible and clear to shipper-customers to mitigate the risk of disputes.
- If utilizing the safe harbor provision, NVOCCs should attach the underlying VOCC invoice or otherwise indicate that the underlying invoice is included in the invoice packet, so the customer is aware.
- Keep detailed records to be able to establish reasonableness of actions if challenged.

# New Resolution Process: Charge Complaints

- New informal and streamlined process for persons to submit information to the FMC regarding charges assessed by a common carrier.
  - The common carrier is provided an opportunity to submit additional information related to the charge in question and bears the burden of establishing the reasonableness of any demurrage or detention charges pursuant 46 C.F.R. § 545.5
  - FMC investigators make initial determination and refer to BEIC if violation found
  - BEIC referral to Commission for potential issuance of Show Cause Order – initiates formal legal process
- Non-compliant charges shall be subject to a refund order for the charges paid and may be subject to a civil penalty
- Where the common carrier is acting in the capacity of an NVOCC, the FMC will consider:
  - Whether the NVOCC is responsible for the non-compliant assessment of the charge, in whole or in part; and
  - Whether another party is ultimately responsible in whole or in part and potentially subject to refund order and civil penalties.

# Recent Charge Complaint Trends

- On May 3, 2023, the FMC announced that approximately \$1,045,953 in disputed charges have been waived or refunded through the Charge Complaint process.
- As of September 21, 2023, the statistics for Charge Complaints are as follows:
  - **402** Charge Complaints submitted to the Commission
  - **167** Charge Complaints assigned to Commission staff for investigation
  - **104** Charge Complaints resolved by the Common Carrier
  - **43** Charge Complaint Investigations Completed
    - **36** No violation(s) determined by FMC Investigator
    - **7** Charge Complaints referred to the FMC Bureau of Enforcement, Investigations, and Compliance (BEIC), specifically the office of enforcement
  - **1** Order to Show Cause Issued
    - On October 3, 2023, the FMC dismissed the Charge Complaint against Mediterranean Shipping Company because the record did not establish a violation of the Shipping Act.

# Practical Considerations for Charge Complaints

- Anyone can submit a Charge Complaint
- The Commission may address a variety of noncompliant charges assessed by a common carrier, including demurrage and detention.
- Charge Complaints cannot be used for:
  - Carrier actions unrelated to charge disputes.
  - Charges invoiced, assessed or incurred prior to June 16, 2022, and charges not yet invoiced or assessed.
  - Charges assessed by a marine terminal operator or other party unless done so on **behalf of the common carrier**.
- Common carriers may voluntarily refund or waive a disputed charge during an active Charge Complaint proceeding. Doing so results in the closing of the charge complaint.
- If the Commission ultimately orders a refund order, a separate penalty proceeding may be initiated and referred to the Administrative Law Judge.
- If the Commission determines a Charge Complaint is inappropriate, a party may pursue alternative remedies such as small claims, a formal FMC complaint, or alternative dispute resolution services.

# Personnel Updates

- John G. Crews, II appointed as the Director of BEIC
  - Director of the Office of Enforcement – Julie Berestov
  - Acting Director of the Office of Compliance – Julie Berestov
  - Director of the Office of Investigations – Robert Borden
- Number of personnel increased from 149 to 180 full-time positions from FY 2022 to FY 2023 – 20% increase
  - Additional attorneys to strengthen the Commission’s enforcement actions and improve the efficiency of legal actions
  - New investigators and supervisors to ensure the appropriate investigatory resources are available
  - New Administrative Law Judges – totaling 3 for the first time in years

# Antitrust and Anticompetitive Probes: US and Abroad

U.S. government agencies and counterparts in different jurisdictions continue to investigate common carrier activities in the ocean shipping sector for market collusion, antitrust violations and anticompetitive behaviors. In recent news:

- On June 9, 2022, the South Korean Fair Trade Commission fined 15 steamship lines for approximately \$63 million for collusion and price fixing for routes between South Korea, Japan and China.
- On August 17, 2023, the Ontario Superior Court fined NYK and “K” Line a total of C\$2 million due to market collusion. The fines were mitigated due to the carriers’ cooperation with the Canadian Competition Bureau’s investigation.
- On September 1, 2023, an Icelandic Competition Authority found that Samskip and Eimskip violated competition laws and levied a \$31.7 million fine as the collusion occurred over a 13-year period.
- Other enforcement activities in Europe, the US, China, India, South Korea, Australia, and Chile.

# Potential Additional Legislative Action

## **1. Ocean Shipping Reform Implementation Act of 2023 (H.R. 1836)**

Prohibits U.S. ports from using logistics software linked to the Chinese Communist Party, proposes a new complaint process to report misconduct by registered shipping exchanges, and directs the FMC to publish an advance notice of proposed rulemaking on price indexes for containerized ocean freight for US shippers, which would be published by a registered shipping exchange.

## **2. Ocean Shipping Antitrust Enforcement Act (H.R. 1696)**

Repeals the antitrust exemptions provided for foreign ocean carriers in section 40307 of the Shipping Act. The FMC will also be required to analyze and submit its views on merger, acquisitions and other transactions between common carriers and marine terminal operators from an antitrust perspective.

## **3. Ocean Shipping Competition Enforcement Act (H.R. 2710)**

Revises section 41307 of the Shipping Act and allows the FMC to block an anti-competitive ocean carrier and/or marine terminal operator agreement without the need to obtain a federal court order. The FMC would be able to provide injunctive relief.

*NB: Draft legislation regarding the FMC's authority/jurisdiction over rail container storage fees may still be in the works given the outcry from shipper's regarding demurrage challenges. BCOs cannot presently challenge rail storage fees since the STB does not have jurisdiction and the FMC is limited to cargo moved on through bills of lading.*



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