Exh. MM-46
Docket TP-220513
Witness: Michael Moore

BEFORE THE STATE OF WASHINGTON

UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. PUGET SOUND PILOTS, Respondent.	Docket No. TP-220513

EXHIBIT TO TESTIMONY OF

Captain Michael Moore

ON BEHALF OF

PACIFIC MERCHANT SHIPPING ASSOCIATION

Fact Finding 29 Final Report, Federal Maritime Commission

FEBRUARY 10, 2023

FEDERAL MARITIME COMMISSION

FACT FINDING INVESTIGATION 29
FINAL REPORT

EFFECTS OF THE COVID-19 PANDEMIC ON THE U.S. INTERNATIONAL OCEAN SUPPLY CHAIN: STAKEHOLDER ENGAGEMENT AND POSSIBLE VIOLATIONS OF 46 U.S.C. § 41102(c)

MAY 31, 2022

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I. EXECUTIVE SUMMARY

The Federal Maritime Commission (FMC or Commission) has a clear and compelling responsibility to actively respond to the challenges impacting the global supply chain and the American economy. Accordingly, on March 31, 2020, eighteen days after the President declared a national emergency concerning the coronavirus disease 2019 (COVID-19), the Commission launched Fact Finding 29 (FF29). The Commission's Fact Finding Order appointed Commissioner Rebecca F. Dye as the Fact Finding 29 Officer and directed her to engage supply chain stakeholders in public or non-public discussions to identify commercial solutions to certain unresolved supply chain issues that interfere with the smooth operation of the U.S. international ocean supply chain. In addition, it directed her to form one or more FMC International Ocean Supply Chain Innovation Teams (Innovation Teams), composed of leaders from commercial sectors of the U.S. international ocean supply chain, to develop commercial solutions to port congestion and related supply chain challenges.

Initially, the Fact Finding focused on convening new Innovation Teams to address the challenges facing the supply chain. As the challenges created by the COVID-19 pandemic evolved, Fact Finding 29 evolved, and over the course of the following two years, the Fact Finding 29 Investigation developed three distinct phases:

- Phase 1 – Supply Chain Innovation Teams;
- Phase 2 – Information and Research; and
- Phase 3 – Commission Action.

In the early stages of the COVID-19 pandemic, Fact Finding 29 focused on using Innovation Teams to understand the most pressing supply chain challenges the United States was facing to find commercial solutions and when possible, and to eliminate regulatory requirements that had become burdensome. The goal was to work with stakeholders to identify both commercial and regulatory solutions and to disseminate helpful information to mitigate the challenges faced by all affected parties.

During the first two phases, the Fact Finding Officer spoke to hundreds of U.S. importers, exporters, truckers, and others through virtual speeches, other virtual meetings, phone conversations, and emails. Three areas of most concern brought to the Fact Finding Officer's attention were: 1) the increase in the price of ocean shipping during the COVID-19 pandemic; 2) the ongoing unreasonable detention and demurrage charges and other charges imposed by ocean carriers, seaports, and marine terminals; and 3) the supply chain bottlenecks due to unresolved operational problems, including disruption of information concerning "blank sailings."

When it became clear that these issues were the primary concern of stakeholders, the Fact Finding Officer pivoted to focus on investigating the state of the market for ocean liner services and the assessment and billing of detention and demurrage charges. The Fact Finding Officer also focused on whether regulated entities were complying with their regulatory obligations. Additionally, the Fact Finding Officer began to gather information to assist in developing specific interim and final recommendations to inform further Commission action. During this second phase, the Fact Finding Officer examined market conditions based on industry data and Commission programmatic information. The Fact Finding Officer also issued information demands to carrier and marine terminal operators (MTOs) regarding their demurrage and detention practices and other issues.

In 2021, the Fact Finding Officer determined that, responsive to stakeholder concerns about the price of ocean services and problems with detention and demurrage charges, there were solutions that would address certain problems in the global ocean supply chain. These Interim Recommendations were organized around three principles:

- Minimizing Barriers to Private Party Action;
- Clarifying Commission and Industry Processes; and
- Encouraging Assistance with Commission Investigations.

The Fact Finding Officer recommended a series of guidance documents, advice to the trade, other educational outreach, and a rulemaking to clarify Commission processes and encourage stakeholders to bring claims when warranted.

Fact Finding Conclusions

Based on information and research gathered during this second phase, the Fact Finding Officer has concluded that, using established antitrust analytical tools also used by our sister competition agencies (the Department of Justice and the Federal Trade Commission) - and notwithstanding certain misconceptions - the current market for ocean liner services in the Trans-Pacific trade is *not* concentrated and the Trans-Atlantic trade is only *minimally* concentrated. Competition among ocean common carriers,[1] among the three major alliances and among the members in each of these alliances, is vigorous. The market for ocean services remains highly contestable, particularly in the Trans-Pacific trade. Finally, the Fact Finding Officer concludes that although certain ocean transportation prices, especially spot prices, are disturbingly high by historical measures, those prices are exacerbated by the pandemic, an unexpected and unprecedented surge in consumer spending, particularly in the United States, and supply chain congestion, and are the product of the market forces of supply and demand.

The Fact Finding Officer is concerned that certain ocean carriers, despite the actions of the new FMC Vessel-Operating Common Carrier Audit Program and recent compliance efforts are not in full compliance with the incentive principle of the Commission's Interpretive Rule on Demurrage and Detention. The Fact Finding Officer emphasizes that the Interpretive Rule on Detention and Demurrage promulgated by the Commission pursuant to Fact Finding 28 provides the shipping public with an enforceable principle that the Commission employs to assess the reasonableness of demurrage and detention practices and regulations under the Shipping Act of 1984, as amended.[2] The Interpretive Rule describes a non-exclusive list of factors the Commission may consider in evaluating claims and complaints that come before the agency under 46 U.S.C. § 41102(c) and 46 C.F.R. 545.4(d). The Incentive Principle of the Interpretive Rule developed pursuant to

[1] 46 C.F.R. § 535.104(u) ("Ocean common carrier means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.").

[2] The Shipping Act, the Foreign Shipping Practices Act, Section of the Merchant Marine Act, 1920, and sections 2 & 3 of P.L. 87-777 were repealed. The text of those Acts was codified in in Subtitle IV of Title 46, becoming positive law and they ceased to exist as freestanding statutes.

"notice and comment," is enforced through the Commission's consideration of complaints and enforcement actions under section 41102(c) of Title 46, United States Code.

The Fact Finding Officer is also concerned that the Commission lacks the regulatory tools to deal with the numerous new charges imposed on U.S. shippers and truckers by ocean carriers and marine terminals through tariffs and with other supply chain dislocations within the Commission's authority. Several final recommendations by the Fact Finding Officer address these concerns.

Finally, based on the information gathered, the Fact Finding Officer further believes that the most productive path forward for shippers and ocean carriers alike would be to enter mutually enforceable and binding service contracts-- true "meeting of the minds"-- that are enforceable commercial documents. For some time, the Fact Finding Officer has been concerned that the contracts negotiated by many U.S. importers and exporters lack this mutuality of understanding and obligation and are not enforceable. Without enforceable contracts, shippers are unable to protect themselves from volatile shipping rates and ocean carriers have few forecasting tools to provide the shipping capacity necessary to serve their customers.

As the Fact Finding Officer concludes Fact Finding 29, the Fact Finding Officer issues a series of Final Recommendations to further alleviate dislocations in the U.S. international ocean supply chain. These are:

1. A new Commission "International Ocean Shipping Supply Chain Program" with dedicated personnel.
2. A rulemaking to provide coherence and clarity on empty container return practices.
3. A rulemaking to provide coherence and clarity on earliest return date practices.
4. Continued Commission support for the new FMC "Vessel-Operating Common Carrier Audit Program" including developing a new requirement for ocean carriers, seaports, and marine terminals to employ an FMC Compliance Officer.

5. An FMC Outreach Initiative to provide more information to the shipping public about FMC competition enforcement, service contracts, shippers associations, and forecasting, among other topics.
6. Enhanced cooperation with the federal agency most experienced in agricultural export promotion, the Department of Agriculture, concerning container availability and other issues.
7. A Commission Investigation into practices relating to charges assessed by ocean common carriers, seaports, and marine terminals through tariffs.
8. A rulemaking to provide coherence and clarity on merchant haulage and carrier haulage.
9. A new "National Seaport, Marine Terminal, and Ocean Carrier Advisory Committee" to work cooperatively with the Commission's National Shipper Advisory Committee.
10. A revival of the Rapid Response Team program as agreed to by all ocean carrier alliance CEOs.
11. FMC International Ocean Supply Chain Innovation Teams engagement to discuss blank sailing coordination and other matters as needed to support recommendations.
12. A reinvigorated focus on the extreme problems at Memphis rail heads and around the country.

The Fact Finding Officer believes that the implementation of the Fact Finding 29 Interim Recommendations and the implementation of the Fact Finding 29 Final Recommendations will alleviate pressing problems experienced by Commission stakeholders and allow the Commission to achieve its objective of eliminating obstacles to a smooth and efficiently operating international ocean supply chain.

II. FACT FINDING 29

A. Background for Fact Finding 29

In December 2019, The People's Republic of China (China) first identified cases of what would later be called "COVID-19" in the central city of Wuhan. The following month, the World Health Organization (WHO) declared the outbreak a

public health emergency of international concern. Since then, the world has grappled with the many effects of the COVID-19 virus.

One early, but dynamic, consequence of the outbreak of COVID-19 was its effect on the global ocean supply chain.[3] Originally, as the presence of the virus was largely limited to China, the global supply chain effects were primarily reactive to the impact in China. In late January 2020, Chinese authorities extended the Lunar New Year holidays nationwide[4] and Chinese businesses told employees not to return to work.[5] The ensuing return to work delay, coupled with lack of personnel mobility and traffic restrictions led to an initial difficulty in recovering production.[6] However, despite the isolated nature of these initial impacts, China's role and importance to global trade and, in particular, Wuhan's global significance, meant that even these relatively isolated restrictions were felt on a global stage.

Responding to the outbreak in China, in the first 24 weeks of 2020, ship calls around the globe diminished by 8.7 percent.[7] As the virus spread, individuals outside of China began voluntarily staying home and governments began imposing lockdowns. As lockdowns were imposed globally and fewer people were engaging in the economy, vessel calls fell even further, so that in the second quarter, the number of calls fell by 17 percent.[8]

In May through August 2020, the three largest container shipping alliances (THE, 2M, and OCEAN) announced cancellation of 126 scheduled sailings

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[3] Julianne Dunn, *COVID-19 and Supply Chains: A Year of Evolving Disruption,* Federal Reserve Bank of Cleveland, Feb. 26, 2021 ("Supply chain disruptions have been ever-present since the onset of the COVID-19 pandemic, but they've been largely idiosyncratic, impacting different firms at different times for different reasons.").

[4] Reuters, *China's cabinet to extend Lunar New Year holidays: state broadcaster*, (Jan. 26, 2020), https://www.reuters.com/article/us-china-health-holidays/chinas-cabinet-to-extend-lunar-new-year-holidays-state-broadcaster-idUSKBN1ZP0PQ, (last visited May. 17, 2021).

[5] BBC Business, *Coronavirus: Companies tell workers 'stay at home'* (Jan. 27, 2020), https://www.bbc.com/news/business-51260149, (last visited May. 17, 2021).

[6] Kilpatrick J., and Barter L., *COVID-19: Managing supply chain risk and disruption*, Deloitte, https://www2.deloitte.com/content/dam/Deloitte/ca/Documents/finance/Supply-Chain_POV_EN_FINAL-AODA.pdf, (last visited May. 17, 2021).

[7] United Nations Conference on Trade and Development, *COVID-19 and maritime transport: Impact and responses*, Mar. 2021, https://unctad.org/webflyer/covid-19-and-maritime-transport-impact-and-responses, (last visited May. 17, 2021).

[8] *Id.*

between Asia and North America, and 94 sailings between Asia and Europe.[9] It is estimated that container lines ultimately canceled more than 1,000 voyages during the first six months of 2020.[10]

Coupled with the initial reduction in consumer demand was a dramatic increase in the demand for medical equipment, both for medical professionals and the general public. In February 2020, the World Health Organization assessed that demand for Personal Protective Equipment (PPE) increased 100 times higher than normal.[11] In early 2020, most of the world's face masks were made in China, but as the virus spread through China, the government forbade their export and China began importing masks.[12]

As the pandemic spread, the demand for PPE increased. Prior to 2020, the United States was importing more than 20% of its PPE.[13] Specialty PPE was even more dependent on imports with an estimated 90% of N95 masks being imported.[14] Thus, while consumer demand decreased for certain consumer goods, the need for PPE dramatically increased. Ports and marine terminals struggled with identifying which imports contained the necessary PPE and which containers contained consumer goods.

During the first half of 2020, there was a tremendous decrease in the demand for most goods, as countries worldwide went into lockdown. However, this decline did not last long. By summer 2020, demand for U.S. imports exploded. This was in

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[9] Greg Knowler, *Alliances outline extensive blank sailings for Q3*, (Jun. 3, 2020), https://www.joc.com/maritime-news/alliances-outline-extensive-blank-sailings-q3_20200603.html, (last visited May. 17, 2021).

[10] U.S. International Trade Commission, *The Impact of the COVID-19 Pandemic on Freight Transportation Services and U.S. Merchandise Imports*, https://www.usitc.gov/research_and_analysis/tradeshifts/2020/special_topic.html#_ftnref10.

[11] Lisa Schnirring, *WHO warns of PPE shortage; COVID pace slows slightly in China,* (Feb. 7, 2020), https://www.cidrap.umn.edu/news-perspective/2020/02/who-warns-ppe-shortage-ncov-pace-slows-slightly-china, (last visited May. 17, 2021).

[12] Liz Alderman, *As Coronavirus Spreads, Face Mask Makers Go Into Overdrive*, New York Times, (Feb. 6, 2020), https://www.nytimes.com/2020/02/06/business/coronavirus-face-masks.html, (last visited May. 17, 2021).

[13] Dai, T., Bai, G. & Anderson, G.F. PPE Supply Chain Needs Data Transparency and Stress Testing. Journal of General Internal Medicine 35, 2748–2749 (Jun. 30, 2020), https://doi.org/10.1007/s11606-020-05987-9.

[14] *Id.*

part because businesses had the opportunity to adjust to new safety protocols, but also because of the rapid growth of e-commerce as consumers turned to online buying in record numbers.

The increased demand shocked the U.S. international ocean freight delivery system. By the fourth quarter of 2020, container lines were operating at nearly full capacity.[15] Blank sailings, which accounted for 21 percent of all voyages in May 2020, declined to 1 percent by October 2020.[16] The number of shipping containers in circulation during the second half of 2020 was insufficient to meet higher than anticipated consumer demand for imports.[17] Exporters, particularly agricultural exporters, suffered from a lack of container availability due to constrained capacity.

Soaring consumer demand for goods in the United States also led to record cargo volumes at major U.S. ports. The Port of Los Angeles, the Nation's largest port, reported the busiest September in its 114-year history.[18] Similarly, the Port of Virginia saw a dramatic increase in volumes with reported September 2020 volumes 4.4 percent higher than September 2019.[19]

Beginning in the fourth quarter of 2020, the United States and the world at-large was faced with increased challenges as the COVID-19 pandemic and its effects disrupted our global ocean supply chain. Increased demand exposed existing problems in the international ocean supply chain, leading to extreme supply chain port and marine terminal congestion.

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[15] Lazaro Gamio and Peter Goodman, *How the Supply Chain Crisis unfolded,* New York Times, (Dec. 5, 2021), https://www.nytimes.com/interactive/2021/12/05/business/economy/supply-chain.html, (last visited May. 17, 2021).

[16] *Id.*

[17] Gregory LaRocca, *Rising Maritime Freight Shipping Costs Impacted by Covid-19*, Office of Industries U.S. International Trade Commission, (Apr. 2021), https://www.usitc.gov/publications/332/executive_briefings/ebot_greg_larocca_freight_costs_weighing_covid_pdf.pdf.

[18] Anshu Siripurapu, *What Happened to Supply Chains in 2021?*, Council on Foreign Relations, (Dec. 13, 2021), https://www.cfr.org/article/what-happened-supply-chains-2021, (last visited May. 17, 2021).

[19] Ari Ashe, *Port of Virginia marks strong recovery with record September*, Journal of Commerce, (Oct. 1, 2020), https://www.joc.com/port-news/us-ports/port-virginia/port-virginia-marks-strong-recovery-record-september-volume_20201001.html, (last visited May. 17, 2021).

B. Initial Order of Investigation

During the first quarter of 2020, as the COVID-19 pandemic escalated in the United States and internationally, the Commission considered ways to respond to urgent cargo delivery dislocations in the U.S. international ocean freight delivery system.

In the earliest days of the pandemic, import cargo volumes dropped precipitously and ocean carriers "blanked" sailings. Imports that were delivered contributed to congestion at U.S. ports, particularly on the West Coast, because the import cargo was not being picked due to business shutdowns. The congestion was further exacerbated by empty containers.

On March 31, 2020, the Commission issued an Order authorizing Commissioner Rebecca F. Dye to identify operational solutions to cargo delivery system challenges related to the COVID-19 pandemic.[20] Among other things, that Order for Fact Finding 29, International Ocean Transportation Supply Chain Engagement, authorized the Fact Finding Officer to form multi-industry Innovation Teams to develop critical supply chain interventions.

C. Phase One – Innovation Teams

In a press release, also issued on March 31, 2020, the Fact Finding Officer announced the intent to engage key executives to participate on new Innovation Teams. The press release also invited individuals wishing to provide information to Commissioner Dye to email ff29@fmc.gov.[21]

The Commission's use of Innovation Teams was not a novel approach. The Fact Finding Officer had used similar authority in Fact Finding 28[22] and in the

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[20] Order: International Ocean Transportation Supply Chain Engagement, 85 Fed. Reg. 19146 (Apr. 6, 2020).

[21] FMC Press Release: *Commissioner Dye Leading FMC Initiative to Address Urgent COVID-19 Supply Chain Impacts,* (Mar. 31, 2020), https://www.fmc.gov/dye-leading-fmc-initiative-address-urgent-covid-19-supply-chain-impacts/.

[22] *See Fact Finding No. 28 Final Recommendation to the Commission*, (Aug. 27, 2019) https://www.fmc.gov/wp-content/uploads/2019/09/FF28FinalReportLetter.pdf.

2015 Supply Chain Innovation Teams Initiative.[23] When refining this approach, the Fact Finding Officer consulted a variety of academic and business resources and experts in supply chain management, process innovation, transportation research, and business teams. The FMC Supply Chain Innovation Teams initiative focuses on three concepts: teamwork, international ocean supply chain operations, and incremental process innovation.

The Innovation Teams consist of 5-12 members representing multiple industries who are committed to a shared goal — developing the best ways to improve international supply chain effectiveness, reliability, and resilience.[24] Effective Team participants are dynamic industry leaders with extensive experience, broad perspective, and collaboration skills that allow them to think beyond their immediate company or industry interests ("step out of their silos") and take an encompassing view of the entire ocean supply chain system.

In Fact Finding 28, after several months of information gathering, the Fact Finding Officer recommended that the Commission organize Innovation Teams composed of industry leaders who ultimately met on a limited, short-term basis to refine commercially viable demurrage and detention approaches. The valuable discussions with stakeholders during this phase of the investigation ensured that recommendations that resulted from Fact Finding 28 would be advantageous and workable.

As in previous Innovation Teams, the teams organized under Fact Finding 29 were composed of business leaders whose senior level positions included responsibility and influence over their companies' operations and who were positioned to implement recommendations developed by the Innovation Teams. As Fact Finding 29 was conducted during a period when travel and in-person group meetings were constrained by pandemic-related concerns, Fact Finding 29 Teams met virtually to focus on the changing dynamics that various ocean carriers, exporters, importers, shipping intermediaries, drayage operators, seaports, longshore labor, and marine terminals were experiencing.

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[23] *See FMC Supply Chain Innovation Team Initiative Final Report,* (Dec. 5, 2017), https://www.fmc.gov/wp-content/uploads/2018/08/SCITFinalReport-reduced.pdf.

[24] *Id.* at 5.

Initially, nine Innovation Team meetings with fifty-one participants were held. However, in the following months, the Fact Finding Officer would ultimately convene two additional groupings of teams. In sum, during this first phase, three types of teams met:

- Original Nine Supply Chain Innovation Teams;
- Ocean Common Carrier Teams; and
- Regional Teams.

1. Original Nine Supply Chain Innovation Teams

When the Fact Finding Officer began the Fact Finding 29 investigation, consumer demand was down, and ocean carriers were cancelling a significant number of sailings. At the same time, there was a dramatic increase of demand for PPE. It was in this context that teams began meeting to identify commercial solutions to problems facing the ocean supply chain.

The first nine multi-industry Innovation Teams met in mid-April 2020 and were presented with three basic questions[25]:

- What can the Federal Maritime Commission do to provide relief or assistance to mitigate negative impacts on the international ocean supply chain related to COVID-19?
- What can companies involved in ocean cargo delivery do to respond to existing supply chain challenges and bottlenecks?
- What can supply chain actors do to strengthen the overall performance of the American international ocean freight delivery system?

The goal of these initial meetings was to identify what actions could provide immediate relief to the most pressing challenges the American freight delivery system faces from COVID-19 related disruptions. The desire was not only to find actions the industry could take on a commercial level to mitigate problems, but also to identify what actions the Commission could take to provide relief. It was

[25] The Fact Finding Officer shared these three initial questions with the public in a press release and encouraged members of the public not participating on a team, but who nonetheless wished to provide advice, to email FF29@FMC.gov. FMC Press Release: *Fact Finding 29 Supply Chain Innovation Teams to Begin Work*, (Apr. 6, 2020), https://www.fmc.gov/Fact Finding-29-teams-to-begin-work/.

through these initial meetings that the Fact Finding Officer was able to identify and recommend Commission action in the form of service contract filing exemptions to alleviate the strain felt by shippers. The Fact Finding Officer was also able to work with carriers and terminals on their efforts to prioritize cargo. Additionally, through these meetings, the Fact Finding Officer was able to identify the four main issues that would become a focal point throughout the investigation.

2. Commission Action - Service Contract Exemptions

At that time, the Fact Finding was focused on identifying things the Commission could do to alleviate the challenges caused by the COVID-19 pandemic. The first Team meetings were focused on what the FMC could do to provide relief and FMC assistance.[26]

One of the early issues raised by shipper Team members was difficulty in filing service contracts. Many service contracts had May 1 or June 1 end dates, and some businesses were struggling to conduct contract negotiations while dealing with issues caused by COVID-19. Several Team members also indicated that stay-at-home orders had resulted in a growing number of businesses working remotely.

At the time, Commission regulations required that ocean common carriers file original service contracts with the Commission "before any cargo moves pursuant to that service contract."[27] In contrast, the Commission's regulations provided more flexibility to service contract amendments, which could be filed within 30 days after the amendment's effective date.[28]

Acting on the recommendation of the Fact Finding Officer, on April 27, 2020, the Commission issued a temporary blanket exemption extending the current filing flexibilities for service contract amendments to original service contracts.[29] This exemption allowed parties time to adapt to the increased pressures that have

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[26] *See id.*

[27] 46 C.F.R. §§ 530.8(a)(1), 530.14(a) (2019).

[28] *See id.* §§ 530.3(i), 530.8(a)(2), 530.8(b)(8)(i), 530.14(a).

[29] Order: *Temporary Exemption from Certain Service Contract Requirements*, 2 F.M.C.2d 65 (FMC 2020).

been placed upon them by COVID-19 and minimize disruptions to the contracting process.

The Commission Order granting the exemption issued on April 27, 2020, was set to expire on December 31, 2020. On October 1, 2020, based on additional information from the Fact Finding investigation and stakeholder interest, the Commission issued an Order extending the exemption until June 1, 2021.[30] Following the positive response of Commission stakeholders to the temporary service contract filing relief, the Commission considered permanently establishing this exemption by amending its regulations. The Commission issued a Notice of Proposed Rulemaking (NPRM) on January 19, 2021, to make the exemption permanent.[31] The Commission received eight comments on its proposed rule and on April 23, 2021, issued a final rule making the exemption permanent.[32]

3. Other Identified Challenges

Another challenge Innovation Team members identified was that the freight delivery system was struggling with prioritizing cargo so that urgently needed goods, especially personal protective equipment (PPE) and other medical equipment, would be given delivery priority. As noted previously, while general demand decreased in the first quarter of 2020, the demand for medical equipment dramatically increased. The challenge presented to the Teams was how to prioritize cargo that was urgently needed and what to do with cargo that was not currently in demand.

Marine terminals advised that they would be better able to manage cargo flows if they had specific, timely, and accurate information from shippers about which shipments contained PPE, which containers shippers were prepared to pick-up, and which containers shippers would not be able to pick-up and must be stored

[30] Order: *Temporary Exemption from Certain Service Contract Requirements*, Docket No. 20-06, 2020 FMC LEXIS 206 (FMC Oct. 1, 2020).

[31] NPRM: Service Contracts, Docket 20-22, 86 Fed. Reg. 5106 (Jan. 19, 2021).

[32] Final Rule: Service Contracts, Docket 20-22, 86 Fed. Reg. 21651 (Apr. 23, 2021).

in off-dock storage. Some terminals had already set up hotlines or points of contacts by which shippers could identify containers containing PPE.[33]

To foster the use of these methods of prioritization, on May 14, 2020, the Fact Finding Officer issued a press release that laid out steps shippers could take to mitigate COVID-19 impacts on the supply chain.[34] Specifically, the Fact Finding Officer informed shippers that MTOs could more effectively prioritize the movement of PPE cargo if they are better informed. The Fact Finding Officer encouraged shippers to share the following information with their MTOs:

- Identify shipments that contain Personal Protective Equipment. These commodities must move first and MTOs need to know which containers to prioritize.
- Identify containers that shippers want to accept and can be prepared to be picked-up. This cargo must be moved to make more space for incoming shipments.
- Identify containers that shippers are not able to accept or pick-up. Terminals can more effectively store cargo if they know a shipper is not expecting to pick it up.

Ocean common carriers also stepped up in the early phases of the pandemic with innovative solutions to cargo that was not urgently needed. To avoid nonurgent cargo piling up at ports and slowing down the retrieval of urgently needed medical equipment, carriers offered to detour cargo destined for U.S. ports to other ports with available land for storage. Instead of charging demurrage or detention rates at U.S. ports, a much lower storage charge could be instead issued.[35]

In the May 2020 press release, the Fact Finding Officer noted that there was a similarly short list of key steps ocean carriers could take related to increase the

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[33] *See* Press Release: *COVID-19 Critical Cargo Initiative*, (Apr. 17, 2020), https://www.apmterminals.com/en/los-angeles/practical-information/news-and-alerts/supplier-letter.

[34] FMC Press Release: *Fact Finding 29 Innovation Teams Identify Information Helpful to Mitigating COVID-19 Impacts on Supply Chain*, (May 14, 2020), https://www.fmc.gov/Fact Finding-29-teams-covid-19-impacts-supply-chain/.

[35] Many carriers instituted programs like this under various names including, "Suspension of Transit," "Detention in Transit," or "Delay in Transshipment."

efficiencies of the freight delivery system.[36] These key steps involved four issues identified in the initial Team meetings that offered the best chance to mitigate the challenges faced, including:

- The impact of increased blanked sailings and skipped port calls;
- The impact of terminal closures and reduced hours;
- Confusion around ERDs and exporter cutoffs; and
- Increased difficulty in returning empty containers.

As noted previously, one of the first notable effects of COVID-19 on the supply chain was a dramatic decrease in cargo volume. Carriers responded to the decline in volume by blanking sailings or bypassing ports to keep vessel supply matched to demand. Responding to both the change in vessel calls and the decline in demand, some terminals determined that the reduced cargo volumes did not financially justify maintaining full gate hours. Marine terminals also noted a need to adjust to new safety protocols which also resulted in reduced hours or unexpected closures.

A concern grew among truckers and agricultural exporters that ocean carriers and marine terminals were not conveying vessel and terminal changes effectively. This was especially frustrating for agricultural exporters whose cargo must take several days to reach a port in a timely manner. Agricultural exporters cited examples of their cargo being loaded onto trucks or rail only to be informed that the vessel on which they booked cargo was not arriving at that port. Similarly, drayage operators and shippers were frustrated with receiving last minute notice of terminal closures, which did not allow them to properly adjust their operations.

Fluctuations in volumes impacted every aspect of the supply chain and subsequently nearly every aspect faced some level of disruption. Changes to terminal operating hours, vessel schedules, and reductions in available storage

[36] *Id.* ("Commissioner Dye believes there is a similarly short list of key steps ocean carriers can take related to customer communications, business processes, and equipment logistics that will increase the efficiencies of the freight delivery system").

space inevitably spilled over into conflicts with earliest return dates (ERDs) and exporter cutoffs.[37]

As vessel schedules fluctuated, the dates and times terminals would begin accepting containers for exports fluctuated. Unfortunately, if this information was not communicated clearly or promptly, it could lead to shippers dropping off cargo too early or too late. This was particularly an issue for agricultural shippers, whose cargo may take several days to arrive at a terminal. Some agricultural shippers reported that their cargo was already in transit to the port when they were notified of a delayed ERD. Some truckers had to turn around and return the container to the shipper, while others had no option but to deliver the cargo early. Many inland shippers transport their cargo via rail and there was little that a shipper could do with a container on a rail line to stop the delivery of their container to the terminal.

Furthering this frustration was a lack of clear guidance on where truckers and exporters could locate reliable ERD information. Exporters and truckers reported conflicting ERD information on marine terminal and ocean carrier websites. Without clear and accurate information, some frustrated exporters resorted to checking every available resource on vessel arrivals and were forced to predict cargo availability.

Additionally, exporters and drayage operators routinely expressed frustration with untimely notice when carriers' empty containers were not being accepted at one terminal and drayage operators were directed to an alternative terminal. The complexity of the process is increased because carrier alliance members may call at multiple terminals. Not knowing which terminal may be accepting a particular empty container on a given day led some drayage truckers to book multiple appointments to ensure they had an appointment, further exacerbating process confusion.

[37] The earliest return date is the first day a terminal will accept a container for export and an exporter cutoff is the last day a terminal will accept a container for export. If a container arrives too early, it may be subject to additional storage fees and if a container arrives to late, it may miss the vessel entirely and be rolled onto the next available vessel, incurring fees and penalties.

4. Ocean Common Carrier Innovation Team Meetings

The initial meetings with the nine Teams helped identify key areas that offered the best chance for action to mitigate the challenges faced because of the pandemic. At the end of April 2020, building on the information gathered in the initial Team meetings, the Fact Finding Officer reached out for insight and cooperation of the major ocean carriers. Prior to these meetings, carriers were instructed to consider the four topics identified by the previous Innovation Teams as areas that offer a reasonable prospect for mitigation of the challenges the industry is facing.

Four meetings were held between May 4, 2020, and May 7, 2020, during which all major ocean carriers participated.[38] Like all early Team meetings, these groups met virtually. During these meetings, the Fact Finding Officer discussed the four remaining issues identified by the initial nine teams:

- Confusion around ERDs and exporter cutoffs;
- The impact of terminal closures and reduced hours;
- The impact of increased blanked sailings and skipped port calls; and
- Enhanced difficulty in returning empty containers.

With respect to ERDs, the Teams discussed the need for proactive communication and to ensure shippers have access to correct and current information. It was noted that this will require that carriers work with terminals to ensure the correct information is shared. In the event the dates conflict, one idea proposed by Team members was that carriers could agree to abide by the information published by the terminal. This guarantee would eliminate confusion and give shippers confidence that the information they rely on is correct.

Team members also discussed how important it is that shippers have timely information about reduced terminal hours, terminal closures, blanked sailings, and bypassed ports. Due to the uncertainty present in the early stages of the pandemic, it was important that shippers and truckers were given sufficient notice of reduced terminal hours, terminal closures, blanked sailings, and bypassed ports so that they

[38] See Appendix for a list of team participants.

could prepare. Based on conversations with members of the industry, 7-day notice for blanked sailings or terminal closures and 48-hour notice for bypassed ports could mitigate some of the problems shippers and truckers faced. All agreed that commercial solutions to this issue require carriers to work with marine terminals to ensure that proper notice is given.

Lastly, during the meetings, Team members talked about the difficulties drayage operators and shippers have returning empty containers. Drayage operators expressed frustration about being denied access to terminals and being forced to travel to alternative locations to return empties. The group acknowledged that increased collaboration on this issue could result in improved clarity and efficiency.

Following these meetings, the Fact Finding Officer routinely contacted the carrier participants to encourage progress and remain up to date on steps being taken to mitigate adverse effects on the supply chain.

5. Regional Innovation Teams

As the volume and cargo handled at ports differ, so do terminal operations and local conditions. Conversations with team members during the first nine teams, and in the meetings with carriers, demonstrated a need for a regional approach to the next part of the Fact Finding investigation. The Innovation Teams recommended that the Fact Finding Officer create teams to discuss challenges by specific port range. That recommendation was adopted, and over the following months, the Fact Finding Officer conducted regional team meetings specific to challenges in Southern California, New York/New Jersey, and New Orleans.

a. Southern California Team

The regional team discussions and interviews focused on the same four areas of concern that were identified in the earlier team meetings and included: (1) terminal gate closure notifications, (2) blanked sailings and bypassed port notifications, (3) export cargo receiving timelines (ERD), and (4) empty container returns (dual moves and chassis availability). Teams discussed the intricacies of these supply chain challenges and proposed ways to address them.

Team members stressed that notice of terminal gate closures should be given no fewer than three days, and preferably seven days, before gate closings. At no time should a closure occur mid-shift. Advance notice of blank sailings should be given not only to beneficial cargo owners, but also be posted prominently on a carrier's website, at least seven days in advance. Notice of bypassed ports should be posted at least three days in advance. Finally, carriers and terminals should collaborate more closely regarding export cargo receiving timelines with the goal of eliminating conflicting or confusing information.

With respect to empty container return practices, most Team members agreed that the ideal approach would be to direct drayage operators to return empties to the terminal where they had picked up the loaded container. This would potentially allow the drayage operator to complete a dual move and reduce the number of chassis required. Other suggestions included:

- Terminals refraining from cutoffs of empty returns mid-shift;
- Terminals adopting a goal of 7 days advance notice, but no fewer than 24 hours, for empty cutoffs; and
- Terminals allowing appointment-free returns during low use periods (such as night gates).

The above actions by carriers and terminals could help, but Team members also acknowledged that there are actions shippers and truckers could also take to mitigate supply chain issues. First, shippers or truckers should promptly cancel any unused multiple bookings and terminal appointments to reduce "no show" rates and related inefficiencies.

Blank sailings, port bypasses, and cancelled services increase shipper uncertainty about space availability. Increased uncertainty can lead truckers to make multiple bookings and related terminal appointments that compound existing inefficiencies. Unused bookings and appointments thwart planning and result in under-utilization of scarce assets. As soon as a shipper or trucker is aware that its extra bookings or extra terminal appointments will not be used, they should immediately notify their lines and terminals so that others can take advantage of those opportunities.

The approach and recommendations developed by this Team were published on the Commission's website in the form of a press release.[39] This approach was used in future conversations with regional Teams and throughout the later stages in the Fact Finding. Following the close of these meetings, the Fact Finding Officer and staff assigned to Fact Finding 29, continued to engage key industry leaders in Southern California about the progress they made in implementing four approaches to immediately address these critical operational issues.

b. North Atlantic Team

Following the success of the Team meetings on the West Coast, the Fact Finding shifted to concentrate on issues related to operations at the Port Authority of New York & New Jersey (PANYNJ) and surrounding facilities. For the North Atlantic region, three Teams consisting of drayage operators, terminal operators, shippers, intermediaries, and other parties critical to the movement of intermodal ocean cargoes through the PANYNJ facilities met in July 2020. These Teams discussed what operational adjustments will prepare the bi-state port complex for dealing with increasing cargo volumes.

The Teams began their efforts by assessing which, if any, of the four operational challenges identified during the examination of the San Pedro Bay ports may be applicable in the port of New York and New Jersey. Team members were also tasked with identifying other operational challenges to efficient port and supply chain operations and developing commercial solutions to address them.

Interviews with port users revealed that New York/New Jersey Port Authority leadership had responded effectively to the initial challenges that arose. Port users reported that because of this effort, facilities in the two states were working well. Especially helpful was the early and active intervention of port leadership with local and state governments. Also cited was the effectiveness of stakeholder cooperation under the Council on Port Performance (CPP).

One common challenge identified was the need to make progress in returning containers in a manner that facilitates a "double move." Senior port

[39] FMC Press Release: *Commissioner Dye Announces Findings of San Pedro Bay Discussions*, (Jun. 17, 2020), https://www.fmc.gov/commissioner-dye-announces-findings-of-san-pedro-bay-discussions/.

executives advised that achieving that goal was a high priority and the CPP was working to improve the process.[40] The Fact Finding 29 team members recommended greater ocean carrier participation in port performance discussions as a step toward achieving better drayage outcomes, especially in returning containers.

In a press release dated August 4, 2020, the Fact Finding Officer revealed these findings and announced intent of shifting focus to the U.S. Gulf Coast.[41] The Fact Finding Officer and staff members supporting the Fact Finding effort continued to stay in touch with supply chain parties in the New York/New Jersey area to monitor and encourage improved efficiency and better communications.

c. Gulf Coast Ports Team

The third region incorporated into Fact Finding 29 was the U.S. Gulf Coast with a particular focus on the Port of New Orleans. Aside from challenges arising from disruptive hurricanes, users of the Gulf Coast ports expressed concerns with port channels, barge traffic, blanked sailings, and bypassed port calls. Stakeholders at Gulf Coast ports also raised issues with demurrage and detention charges and new charges for terminal appointments to return empty containers.

As rising cargo volumes increasingly put pressure on port and terminal performance, demurrage and detention charges increased. Shippers and trucking companies asserted that those increases often had little to do with creating effective incentives. They viewed such non-incentive charges as a forced subsidy for continued inefficiency. Again, as with the previous two regions, following the conclusion of the meetings, the Fact Finding Officer and staff remained in contact with stakeholders in the Gulf Coast region to monitor and encourage progress.

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[40] In May 2021, however, two of the largest trucking organizations in the Northeast suspended their participation in the CPP, citing lack of carrier action taken on CPP recommendations.

[41] FMC Press Release: *Commissioner Dye Completes Work in NY & NJ, Turns Attention to New Orleans,* (Aug. 4, 2020), https://www.fmc.gov/commissioner-dye-completes-work-in-ny-nj-turns-attention-to-new-orleans/.

6. Memphis Innovation Team

The FMC Memphis Supply Chain Innovation Team (Memphis Innovation Team) was first established following the FMC Fact Finding Investigation 28 meeting held in Memphis on May 15, 2018. This Team is comprised of shippers, ocean carriers, railroads, chassis pool contributors, and motor carriers, who volunteered to address the collective challenges in the Mid-South area in search of a better and more efficient supply chain process. Anything that is an unnecessary complicating factor adds confusion, delay, and unnecessary costs into the supply chain. Especially given extreme congestion involving ocean carrier haulage in rail heads during the pandemic, it is imperative that the Federal Maritime Commission and the Surface Transportation Board renew cooperation to alleviate this crisis.

On May 22, 2019, Commissioner Dye appeared before the Surface Transportation Board (STB), to discuss the recommendations of the Memphis Innovation Team. During this meeting, a white paper on the team's efforts to improve supply chain velocity and fluidity at the rail ramps in Memphis and the Mid-South was submitted to the STB.

One of the Fact Finding 28 recommendations, adopted by the Commission on September 6, 2019, was that the Commission continue to support the Memphis Innovation Team in its efforts to improve the performance of the international ocean container freight delivery system.[42] As a result, additional meetings were held in Washington D.C. on December 20, 2019, and January 22, 2020. Another meeting was held virtually on August 11, 2021. A recording of the meeting can be viewed online at: https://www.dropbox.com/s/z7zhgoreh17ya1n/FMC_2021.wmv?dl=0.

The white paper authored by the Memphis Innovation Team articulates the essential qualities of a high performing grey chassis pool that is essential for efficient chassis provisioning in the rail heads in Memphis. The qualities articulated in the white paper not only are essential for chassis provisioning in rail heads in Memphis, but also in other rail facilities and seaports around the country.

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[42] *Fact Finding No. 28 Final Recommendation to the Commission*, (Aug. 27, 2019), https://www.fmc.gov/wp-content/uploads/2019/09/FF28FinalReportLetter.pdf.

A copy of the white paper can be viewed online at: https://www.fmc.gov/wp-content/uploads/2019/05/MemphisSupplyChainWhitepaper.pdf.

The expertise the Commission has developed surrounding the international ocean supply chain gives the Commission a unique perspective on the extreme equipment dislocations that occur in Memphis rail heads, other rail facilities, and seaports around the country. The problems that exist in Memphis are worsening. This is a matter of national significance and must be addressed for the United States to increase the performance of our international ocean supply chain. The Fact Finding Officer strongly recommends a reinvigorated focus on the critical equipment dislocations in Memphis and in other rail facilities and seaports around the country.

7. Other Approaches Considered

The Fact Finding Officer sought out ideas from the public and other organizations that presented ideas for alleviating challenges to the issues facing the international ocean supply chain. One such approach was developed by the Council on Port Performance (CPP). Established in June 2014 and led by the Port Department Director at The Port Authority of New York and New Jersey (PANYNJ) and the President of the New York Shipping Association (NYSA), the CPP provides guidance on programs and initiatives to improve efficiency and reliability at the Port of New York and New Jersey.[43]

At the request of the CPP, a working group of ocean carriers, trucking companies, marine terminal operators, shippers and third-party depot operators was formed to address growing concerns over empty container handling at the Port and to identify potential improvements to the current processes. The Empty Container Working Group's discussions centered on ways to increase efficiencies through enhanced communications and advanced notifications. The group's recommendations were presented to the CPP at their August 27, 2021, meeting and were overwhelmingly approved and endorsed by the Council.

[43] Council on Port Performance, Port of New York and New Jersey, https://www.panynj.gov/port/en/our-port/council-on-port-performance-.html, (last visited May 17, 2022).

The group recommended that dual transactions should be exploited as often as possible, and truckers should be directed to return empties to the terminal where they were picked up. If this is not possible, the Empty Container Working Group identified other steps that marine terminal operators and ocean common carriers can take to improve the empty container return process:

- All terminals, depots, and carriers should publish the next day's empty container return information no later than 1:00 PM daily; and
- If the return location changes overnight, truckers should not be turned away from a terminal or depot with an empty of the type that was identified as allowable on the return information published the day before.

There were additional suggestions that were presented to further achieve efficiency with empty container handling once the initial recommendations were addressed. These included:

- Terminal and carrier computer systems should be synchronized;
- Carrier customer service hours should be aligned to terminal and depot hours of operation;
- Terminals that typically require appointments should allow appointment-free empty returns during low use periods;
- Off terminal depots should limit the number of carriers directing empties to the same location in a single day;
- Off-hire boxes should automatically be given extra time (i.e., 10 days) to allow scheduling for delivery to locations outside of the port district; and
- Ocean carriers should hire a drayage trucker to reposition empties where their business needs direct them to be, rather than imposing this task, that was not contractually negotiated, onto the motor carrier.

This approach was presented to later Fact Finding 29 Team members and used to develop ideas for commercial solutions.

D. Phase Two – Information Gathering

Fact Finding 29 transitioned into its second phase in November 2020. During the first and second phases of Fact Finding 29, the Fact Finding Officer held over

20 team meetings with 80 different participants representing shippers, carriers, ports, terminal operators, ocean transportation intermediaries, drayage providers, and trade associations. The Fact Finding Officer also spoke to hundreds of stakeholders through virtual speeches, meetings, phone conversations, and emails. Throughout the process, both the Fact Finding Officer and Commission staff assigned to the Fact Finding routinely followed-up with Team participants and stakeholders in the areas reviewed above. These frequent check-ins with Team members located in key areas of the United States allowed the Fact Finding Officer to stay abreast of changes in the challenges and, on some occasions, to witness improvements.

While the industry continued to struggle with some issues, during the Fall of 2020, Team members noted improvement with some of the key issues identified early in the Fact Finding and two of the original four issues identified in the initial team meetings had greatly dissipated by the end of 2020.

In the early stages of the pandemic, blanked sailings were a significant issue on the west coast and in some southern Atlantic ports. As the months progressed, check-ins with Innovation Team members revealed improvement on this issue. However, the Fact Finding Officer remains concerned that blank sailings are interfering with customer service and recommends Innovation Team meetings to develop coherent blank sailing processes.

Similarly, in the early stages of the pandemic, there were significant issues with terminal closures and reduced hours. However, over the following months, issues with unexpected terminal closures also diminished, in part because the industry adjusted to new volumes and in part because safety and health procedures were standardized and normalized. In cases where there was still disruption to terminal schedules, shippers and drayage operators noted that timely conveyance of this information had improved.

Other issues, however, remained outstanding and, in some cases, deteriorated. Stakeholders using the Port of New York and New Jersey, the Port of Los Angeles, and the Port of Long Beach expressed growing concern with carrier practices regarding shifting ERDs, the return of empty containers, export cutoffs, and how these issues were leading to increased demurrage and detention invoices.

Some stakeholders also stated that increasingly, demurrage and detention charges were not being administered in a manner consistent with the Incentive Principle as articulated by the FMC's Interpretive Rule under section 41102(c) of Title 46, United States Code.

1. Supplemental Order

Based on information obtained in the Fact Finding and coverage in the trade press, the Commission began growing increasingly concerned that vessel-operating common carriers in alliances who call on the Port of New York and New Jersey, the Port of Long Beach, and the Port of Los Angeles may be employing practices and regulations that violate 46 U.S.C. § 41102(c).

Acting on this concern, on November 20, 2020, the Commission approved a Supplemental Order for Fact Finding 29.[44] The Supplemental Order emphasized the Commission's concern with reports coming out of the Port of Los Angeles, Port of Long Beach, and Port of New York and New Jersey, and endorsed the efforts by the Fact Finding Officer, under the authority existing in the March 31, 2020 Order, to investigate whether alliance carriers who call on those ports were employing practices or regulations in violation of § 41102(c).[45] The Supplemental Order identified three issues in particular that warranted additional scrutiny, especially given the rapid increase of trade volumes. These issues included:

- **Container return practices** – in particular, practices that impact the efficient drayage of empty containers to marine terminals for carrier pickup;
- **Demurrage and detention practices** – specifically whether carriers' policies, practices, and procedures align with the principle, central to the Commission's Interpretive Rule on demurrage and detention, that detention and demurrage charges and policies should serve the primary purpose of incentivizing the movement of cargo and promoting freight fluidity; and

[44] Order: International Ocean Transportation Supply Chain Engagement - Possible Violations of 46 U.S.C. § 41102(c), (Nov. 19, 2020).

[45] *Id.* at 2.

- **Practices related to container availability for U.S. exports** – in particular, reports that carriers were declining to ship U.S. agricultural commodity exports.

The Supplemental Order signaled a transition in the focus of the Fact Finding 29 investigation. The initial focus in Fact Finding 29 was on commercial solutions.[46] This Supplemental Order signaled a shift in focus and an intensified effort to gather information and act on violations of the Shipping Act of 1984, as amended. As noted in the Supplemental Order, "the Fact Finding Officer's authority includes the ability to issue…compulsory information demands under 46 U.S.C. § 40104."[47]

2. Fact Finding 29 Emails

In the first Fact Finding 29 press release, the Fact Finding Officer stated that "individuals wishing to provide information to Commissioner Dye may do so by writing to ff29@fmc.gov."[48] During the first phase of the Fact Finding, most of these emails were either individuals wishing to participate in teams or offering to share general news or information.

When the Commission issued its Supplemental Order announcing a focus on potential violations of the Shipping Act, individuals began using this email address to report potential violations. Commission staff assigned to Fact Finding 29 sorted through and categorized these emails.

The most common concern received in the FF29 email inbox involved demurrage or detention charges resulting from an inability to return containers. Issues involving confusion or problems with earliest return dates or export cutoffs also made up a significant number of emails received. These emails were ultimately forwarded to the FMC's Bureau of Enforcement (BOE) and the

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[46] 85 Fed. Reg. 19146 at 19147 (Apr. 6, 2020).

[47] *Id.*

[48] Press Release: *Commissioner Dye Leading FMC Initiative to Address Urgent COVID-19 Supply Chain Impacts,* (Mar. 31, 2020) https://www.fmc.gov/dye-leading-fmc-initiative-address-urgent-covid-19-supply-chain-impacts/.

Commission's area representatives where they were evaluated for potential enforcement action.

3. Advice to the Trade

In addition to the information demands issued in early 2021, the Fact Finding Officer also solicited information from the public regarding alleged violations. On December 17, 2020, shortly after the issuance of the Supplemental Order, the Fact Finding Officer issued a press release titled, "Fact Finding 29: Advice to the Trade." In this press release, the Fact Finding Officer advised shippers and drayage operators to contact the FMC's Bureau of Enforcement (BOE) with allegations of ocean carriers and marine terminal operators employing practices or regulations in violation of 46 U.S.C. § 41102(c).[49]

The Fact Finding Officer advised that shippers and truckers could contact the BOE with allegations of ocean carriers and marine terminal operators employing practices or regulations in violation of 46 U.S.C. § 41102(c) involving non-compliance with the Final Rule published earlier this year by the agency that addresses detention and demurrage. Reports of allegations should typically be directed to area representatives; however, to facilitate the immediate need and gain understanding of the issues, individuals with specific allegations of behavior that violates 46 U.S.C. § 41102(c) were instructed to submit their complaint and supporting evidence to the BOE by writing boe@fmc.gov.[50]

4. Information Demands

The Supplemental Order reemphasized that "the Fact Finding Officer's authority includes the ability to issue compulsory information demands under 46 U.S.C. § 40104."[51] On February 17, 2021, in an additional effort to gain information on the practices of carriers and terminals and to determine if legal obligations related to detention and demurrage practices were being met, the Fact

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[49] FMC Press Release: *Fact Finding 29: Advice to the Trade,* (Dec. 17, 2020), https://www.fmc.gov/Fact Finding-29-advice-to-the-trade/.

[50] This email address was provided in part to curb the ongoing emails being sent to ff29@fmc.gov. Despite this press release however, the FF29 inbox continued to receive email complaints which were forwarded to BOE.

[51] 85 Fed. Reg. 19146 at 19147.

Finding Officer announced that information demands would be issued to ocean carriers and marine terminal operators (MTOs).[52]

On March 8, 2021, the Fact Finding Officer served 26 Information Demand Orders.[53] The information demands sought additional information on a variety of subjects including empty container return and ERDs, two of the original four issues identified by the early work of the Innovation Teams. These information demands resulted in thousands of pages of answers and documents. Commission staff reviewed and categorized the information received and, on several occasions, sought clarifying information from carriers and MTOs.

The information demands covered a variety of subjects related to demurrage and detention and export procedures. For example, the information demands inquired on system changes in light of the Interpretive Rule on demurrage and detention charges, empty container return practices, earliest return date practices, and ideas for innovation and improvement. The information demands also requested information about export container availability and to ensure that the Fact Finding Officer was fully informed on agricultural export issues, a letter was also sent to the carriers providing them with the opportunity to respond to these complaints and media reports in May 2021.

a. Demurrage and Detention

The information demands asked questions on how carriers and MTOs changed their practices or policies on demurrage and detention since the issuance of 46 C.F.R. § 545.5. Many identified actions included clarifying terminology and procedures on websites, providing more information, simplifying dispute resolution policies, and making practices more consistent with the Interpretive Rule on Demurrage and Detention. Several others noted changes to their calculation metrics, such as, which days count toward free time.

The information demands also asked questions on how demurrage and detention was collected since the issuance of the Interpretive Rule. Unfortunately,

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[52] FMC Press Release: *Information Demand on Detention & Demurrage Practices to Be Issued,* (Feb. 17, 2021), https://www.fmc.gov/information-demand-on-detention-demurrage-practices-to-be-issued/.

[53] In total, 26 orders were served seeking information from 10 ocean common carriers and 16 MTOs.

evaluating the impact of the Interpretive Rule proved difficult in reviewing the information demands. The issuance of the Interpretive Rule on Demurrage and Detention coincided with the COVID-19 pandemic lockdown in the United States. This makes it challenging to disentangle the effects of the Interpretive Rule from the effects of the pandemic. Most carriers and MTOs do not track free time extensions granted, and thus, it was difficult to evaluate how carriers and MTOs mitigated demurrage and detention.

b. Empty Container Return

Commission concerns about empty container returns are not new. In the Commission's 2019 Notice of Proposed Rulemaking on demurrage and detention, the Commission stated that under the "incentive principle," if empty containers cannot be returned due to a lack of appointments, demurrage and detention cannot incentivize equipment return.[54] The Commission went on to propose that "[a]bsent extenuating circumstances, practices and regulations that result in detention being imposed when a container cannot be returned weigh heavily in favor of a finding of unreasonableness."[55] The Commission reiterated these principles in its final rule on demurrage and detention, which states that: "Absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable."[56]

However, trucker complaints about difficulties in timely returning empty containers persisted after the Commission published its Interpretive Rule and increased in light of supply chain disruptions associated with the COVID-19 pandemic. The information demands sought information from carriers and terminals on notification processes for empty container return and impediments to empty container return. Specifically, how much notice is given regarding return policies and what happens when inadequate notice is given. These two areas were

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[54] NPRM: Interpretive Rule on Demurrage and Detention Under the Shipping Act, 84 Fed. Reg. at 48852 (Sept. 17, 2019).

[55] *Id.* at 48853 ("imposing detention in situations of uncommunicated or untimely communicated changes in container return location also weighs on the side of unreasonableness, as might doing so when there have been uncommunicated or untimely communicated notice of terminal closures for empties").

[56] 46 C.F.R. § 545.5(c)(2)(ii).

identified in both the Team meetings in 2020 and through follow up conversations with stakeholders.

i. Empty Container Return Notification

During the Team meetings, drayage operators and shippers raised concerns over the notice provided about where to return an empty container. Reported frustrations included receiving last minute notice of changes to which terminals were receiving empties and difficulty in determining where to return empties. Some even claimed that there were periods where no return location would be available at all.

Through the information demands, the Fact Finding Officer sought to determine whether carriers were operating under standard practices and what was preventing notice from reaching its intended audience. MTOs largely said that they were not in a good position to provide information about the processes of empty container return because containers are carrier equipment, not terminal equipment, and detention charges are imposed by carriers, not MTOs. Furthermore, they stated that carriers determined when to begin and when to stop receiving equipment.

Carriers generally acknowledged their responsibility, but the answers demonstrated regional approaches for dealing with notifying drayage operators and shippers of return locations. Operations on the east coast typically relied on the terminals to notify shippers and drayage operators of changes to return locations. On the west coast, carriers relied on processes like E-Modal or Pier PASS to notify shippers or drayage operators of return locations or changes to return location. In addition, west coast MTOs generally broadcast empty container return information on their website, terminal system, or through blast email notifications.

Every ocean carrier who received an information demand stated that it provides notice to the terminal[57] by at least 4:00 pm the day before and many claimed to provide even more notice, including giving several days' notice of return locations. This 4:00pm deadline is derived from the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA) which requires that carriers

[57] As noted above, the carrier then relies on the terminal to broadcast this information.

post container return locations by 4:00pm the day prior.[58] Additionally, the UIIA states that the default equipment return location is the location at which it was picked up, unless the carrier directs otherwise. If a carrier does not provide notice of return location by 4:00pm, the UIIA provides that a trucker is entitled to one extra business day to return equipment.[59]

ii. Empty Return Impediments

In their responses, carriers acknowledged that there are instances where they are unable to provide notice of empty container return information by 1:00pm or 4:00pm. They also acknowledged that there may be situations where there are no available empty container return locations, but universally stated that multiple days without return locations are rare. As noted above, in these cases, the UIIA would require the extension of free time. When this happens, carriers stated that additional free time is granted on a case-by-case basis.

Every carrier stated if a party wishes to dispute a detention charge incurred because no return locations were available, they do not need to pay that charge first. Every carrier also claimed to grant free time extension when return locations are unavailable on a case-by-case basis. This case-by-case language was common in answers regarding disputes and demonstrated that in terms of resolving issues, there is a wide range of approaches carriers take.

For example, MTOs were asked what would happen if a drayage operator is in line to return a container only to have the return location change. MTOs presented two different solutions. Some said they would issue a trouble ticket and the trucker would need to dispute any charges with the carrier. Others said they would honor the appointment regardless.[60] These responses not only demonstrated

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[58] Uniform Intermodal Interchange and Facilities Access Agreement, § E,1, b ("Whenever a return location is changed, Provider must notify the Motor Carrier by e-mail by 16:00 p.m. local time the business day prior to the change becoming effective.").

[59] *Id.* at § E.1.d ("Should the notification required under subsection 1.b. above not be made one (1) business day prior to the effective date of the change, and the late notification delayed the Interchange of Equipment, then the Motor Carrier would be entitled to one (1) additional business day to return the Equipment.").

[60] Still others avoided the question entirely and said such a situation never happens.

the variety of approaches operators take, but also provided insight into the need for greater coherence of operational processes concerning empty container return.

Most MTOs said that they have no control over container detention charges or free time extensions related to empty container returns. However, some of these MTOs indicated that they will accept an empty return if the trucker has a confirmed appointment. Others said they could only issue a trouble ticket so that the drayage operator had proof of the issue when disputing detention charges with a carrier.

The information demands also asked for policies and procedures regarding the use of dual moves. Commission stakeholders from all aspects of the industry have repeatedly spoke of merits of dual moves and they have been widely recognized as a solid method of alleviating congestion. In situations in which a drayage operator does not have a dual move and they are required, dual moves can be an impediment to the return of an empty container. Thus, the Commission has strongly encouraged the use of dual moves, while allowing flexibility for truckers to return an empty if a dual move is not possible.

While most MTOs allowed dual moves, few had programs or policies that actively encouraged or incentivized their use. Of the MTOs that did encourage dual moves, a common method of encouraging or incentivizing dual moves involved easing or removing appointment requirements for dual moves. One MTO said that it would accept empties even if was over a carrier's quota or it was part of a dual move. Nearly all MTOs stated that they recognized the benefits of dual moves.

In sum, the information demands shed some light on the frustration shippers and drayage operators noted regarding notice of where and when empty containers can be returned. It appears that there is a lack of consistency across the United States with respect to the return of empties and it is not always clear who is responsible for communicating return locations. While carriers are taking strides to communicate the information to shippers and drayage operators, there remains a disconnect over who is ultimately responsible for sharing the correct information and how timely the information is shared.

c. Earliest Return Dates

One enduring issue for exporters throughout the Fact Finding was with Earliest Return Dates (ERDs). The information demands asked how carriers provided notice to exporters/drayage truckers of blanked sailings, bypassed ports, or changes to earliest return dates, and how carriers mitigated the effects of those events to exporters and drayage truckers. MTOs were similarly asked whether they post information about earliest return dates and vessel schedules on their website. Though all carriers claimed that they communicated vessel schedule or ERD information to their customers, as with empty container return, responses indicated a large array of methods being employed to communicate information.

A relatively small number of carriers stated that they do not actively notify shippers of changes, instead, these carriers rely on shippers and drayage operators to check the carriers' websites to determine if any changes have taken place. Some carriers distinguished ERD issues from blanked sailing or bypassed port issues and said for ERD concerns, customers need to check with MTOs.

In contrast, other carriers send push notifications or other form of active notice to customers when there are changes to vessel schedules or ERDs. One carrier said, in addition to website updates and push notifications, it also sends emails describing and explaining any changes to ERDs. In addition to enhanced notification systems, two carriers also provide updated bookings in the event there is a blanked sailing or bypassed port. These carriers will automatically update bookings and make alternative plans for shipments already confirmed for the vessels impacted by blanked sailings or bypassed ports. MTOs uniformly stated that they post information about vessel schedules on their websites, but that this information comes from the carrier or is based on information provided by the carrier.

All carriers said that they would mitigate export demurrage or detention charges caused by changes in vessel schedules and ERDs. About half automatically account for vessel schedules or ERD changes in assessing demurrage and detention and will preemptively extend free time or waive demurrage or detention without issuing an invoice and without requiring additional action by the shipper or trucker. Other carriers said that they required the customer to act before

mitigating charges related to schedule changes. Most carriers will extend free time by the same number of days the vessel schedule is delayed.

These findings suggest a variety of methodologies being employed to communicate ERD information to shippers and truckers and supports the need for greater clarity in ERD practices.

d. Innovation Ideas

Finally, carriers were also asked what other solutions (*e.g.*, container depots, collapsible containers, or new carrier offerings) could improve the availability of containers for exports. Many carriers suggested the use of container depots which could mitigate some of the bottlenecks currently experienced. A few others discussed a need for increased supply, including increased container supply or increased rail capacity. Some also noted innovative ideas such as collapsible containers which would allow multiple empty containers to be loaded on a vessel.

Carriers also had suggestions for things that shippers, truckers, and MTOs could do to improve container flow. These included, for example, shippers pooling facilities to facilitate export loading; increasing the size and operating hours for distribution centers and terminals; and improving technology.

e. Container Availability

Questions about the availability of containers for export and, in particular, agricultural exports, were asked through the information demands and additional letters sent to carriers. Carriers emphasized that the driver of cargo from Asia to the U.S. is a demand surge from U.S. consumers. Consequently, carriers stated, they must reposition equipment from the U.S. to Asia to meet their contractual obligations to U.S. importers. Many carriers reported that exports increased from 2019 to 2022. Some carriers further suggested that because of exceptional conditions caused by the COVID pandemic, there were competing demands for the same empty container supply. One carrier noted the historically peak import season (August – October) does not coincide with peak agricultural export season (November – March). But in 2020 and the beginning of 2021, import peak volumes were sustained beyond traditional peak periods, which changed network calculations.

Carriers stated that they do not fill their ships entirely with loaded export containers on the backhaul voyage from the U.S. to Asia. This is in part due to safety considerations, commercial considerations, and congestion considerations. Many carriers noted that because agricultural exports are relatively heavy, they must be balanced with containers loaded with lighter cargo or with empty containers.

5. Supplemental Carrier and Marine Terminal Innovation Teams

There were four primary issues initially identified by the original nine Teams. Of these four, two were resolved in the first phase of the Fact Finding, but two others have persisted throughout, namely issues with the return of empty containers and issues with earliest return dates. Using the information gathered over the last two years, in late 2021 and early 2022, the Fact Finding Officer convened team meetings with carriers on an alliance-by-alliance basis, together with their terminal partners, to explore commercial solutions to these two outstanding issues.

These Teams met between November 2021 and February 2022 and discussed potential commercial solutions to lingering issues with ERDs and empty return. Teams explored some of the previous proposals on these issues identified by the Fact Finding and by the CPP. Ultimately through these meetings, a new framework was developed by the Fact Finding Officer that emphasized coherence at the ports. This framework was presented to the Teams for their thoughts on its feasibility.

With respect to container return, the emphasis was on creating a reliable container return process. Specifically, containers should always be allowed to be returned to the originating terminal, regardless of whether other locations are available, operations should emphasize and encourage the use of dual moves. When, in rare cases it is not possible to return a container to the terminal of original pickup, notice should be received by at least 1:00pm the day before and requirements for appointments at the new terminal should be waived.

With respect to ERDs, the emphasis was on improving certainty for exporters. Specifically, confirming that the carrier is responsible to communicate

the ERD to shippers, but MTOs and carriers will communicate to establish reliable ERD information for exporters. In rare cases in which a terminal cannot honor the original ocean common carrier's ERD or on occasions where a vessel is delayed after an export container is delivered to the terminal in accordance with the carrier's ERD, the carrier and terminal will not invoice or otherwise charge export demurrage to the shipper.

Like previous proposals from the Fact Finding and from outside, team members had mixed reactions to the effectiveness of these proposals. Some questioned the feasibility of incorporating these changes during this time of extreme congestion in seaports and terminals.

III. FACT FINDING OFFICER CONCLUSIONS FROM PHASE I AND PHASE II

A. International Ocean Freight Pricing and Market Analysis

1. Background

Over the course of Fact Finding 29, the focus of the investigation has shifted to meet new demands and respond to the interests and needs of stakeholders. One area of increased concern is the increased price of ocean shipping in the wake of the pandemic. Ocean shipping freight rates have risen dramatically in the last two years. The average spot market price of shipping a 40-foot container hovered around $1,500 in the first week of May 2020, reached a peak of $11,109 in September 2021, and in spring 2022, are near $9,000.[61] This average increase in prices has strained exporters and importers and the Fact Finding Officer is aware and acknowledges concerns that have been both raised by shippers and reported in the trade press.

[61] Figures were taken from the Freightos Baltic Index (FBX): Global Container Freight Index. Available online at: https://fbx.freightos.com/.

Freight rates for ocean shipping are subject to volatility.[62] Supply and demand fluctuates on an annual and seasonal basis, and due to external events. Notwithstanding the nature of freight rates, as discussed throughout this report, the effects of the COVID-19 pandemic were evident in the global supply chain quickly and intensely.

Consumer spending also was dramatically impacted by the change in circumstances.[63] As people stayed home and governments imposed lockdowns and restrictions, consumer spending on goods, particularly through e-commerce, rather than services, surged in the fall of 2020.[64] This increased demand overwhelmed limited supply, which was further affected by other COVID-19 impacts, such as government restrictions and decreased workforces because of illness.[65] Supply chain congestion globally further decreased the available supply of ship capacity and container availability for exporters and importers.

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[62] Fernando Leibovici and Jason Dunn, *The Dynamics of International Shipping Costs, Federal Reserve Bank of St. Louis,* (Jan. 3, 2022), https://www.stlouisfed.org/on-the-economy/2022/january/dynamics-international-shipping-costs#:~:text=A%20salient%20feature%20of%20the,in%20the%20week%20of%20Feb (last visited May. 17, 2021)("Our first observation is that international shipping costs are volatile. Their deviations from trend prior to COVID-19 range from -26.8% to 19.0%, with a standard deviation of 12.8%. Thus, even though recent changes of international shipping costs stand significantly above this range, it is important to note that seaborne shipments typically feature significant price swings even outside crisis episodes.").

[63] *Id.* ("These sharp changes in international shipping costs are partially in response to the COVID-19 economic environment. Unprecedented levels of fiscal stimulus, combined with a sharp reallocation of demand from services into durable goods, have been straining supply chains, leading to the resurgence of inflation across developed economies. Given that durable goods are particularly likely to be traded internationally, these developments have led to the increased demand for international shipping services and, thus, to the rise of international shipping costs.").

[64] *See* United Nations Conference on Trade and Development, *Review of Maritime Transport 2021,* https://unctad.org/system/files/official-document/rmt2021_en_0.pdf.

[65] United Nations Conference on Trade and Development, *High freight rates cast a shadow over economic recovery,* (Nov. 18, 2021), https://unctad.org/news/high-freight-rates-cast-shadow-over-economic-recovery ("This large swing in containerized trade flows was met with supply-side capacity constraints, including container ship carrying capacity, container shortages, labour shortages, continued on and off COVID-19 restrictions across port regions and congestion at ports. This mismatch between surging demand and de facto reduced supply capacity then led to record container freight rates on practically all container trade routes.").

Even as COVID-19 cases dropped, vaccines became available, and the impact of the pandemic was less pronounced at ports and with supply chain actors, the supply remained outmatched by the demand.[66]

2. Commission Competition Enforcement and Shipping Act 6(g) Standard

The number of major carriers in the U.S. transpacific and Atlantic trades has decreased from 20 in 2015 to 11 by 2022, due to ocean carrier mergers and the bankruptcy of one major carrier.[67] The Federal Maritime Commission and the Department of Justice have a statutory division of competition authority over international liner shipping in the U.S. trades. The Department of Justice reviews and approves *mergers* of ocean carriers.[68] The Federal Maritime Commission analyzes the competitive market effects of collaborative agreements among competitors, such as vessel sharing agreements (alliances are vessel sharing agreements that operate globally) or joint ventures. It is noted that market concentration results from mergers, not from the market effects of collaborative agreements among competitors.

While it is characterized as an "exemption," the Shipping Act of 1984 is not an exemption from the antitrust laws, but an *alternative competition regime* put in place by Congress in recognition of the multinational nature of international ocean

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[66] In response, ocean carriers are responding to the imbalance between supply and demand by ordering of new vessels. Through this investment, carriers are responding to the lack of supply. While ultimately these orders will increase supply, it will be sometime before their effects are felt due in part to the time necessary to produce new vessels and the time it will take for the market to feel their effect.

[67] The ocean carrier consolidation and bankruptcy since 2014 include:

CSAV and Hapag-Lloyd merger (2014);
COSCO and China Shipping merger (2016, announced in 2015 but not completed until Feb. 2016);
Hanjin bankruptcy (2016);
CMA CGM purchase of APL through acquisition of NOL (2016);
Maersk purchase of Hamburg Sud (2017);
COSCO purchase of OOCL (completed 2018, announced 2017);
Hapag-Lloyd/UASC merger (2017); and
MOL/K Line/NYK joint venture as ONE (2017/2018).

[68] The Fact Finding Officer believes that the most wholistic approach would be to include ocean carrier merger activity under the FMC, similar to railroad merger activity which is overseen by the Surface Transportation Board.

shipping and importance of working with our international trading partners in this arena. The Federal Maritime Commission, with its specialized knowledge and expertise, is the agency responsible for administering this alternative competition law. The competition standard in the Shipping Act of 1984, as amended, 46 U.S.C. § 41307(b)(1), is modeled on the same laws administered by the Department of Justice.[69] The basic framework for initial analysis aligns with established guidelines used for evaluating collaboration among competitors and is performed by economists and industry analysts who are experts in the ocean transportation system.[70]

Agreements that may pose competitive concerns are subject to continuous monitoring by Commission staff. The Commission validates the data and information collected through our monitoring with external sources of information on ship schedules, capacity, and measures of cargo moved. The FMC also regularly reviews and revises monitoring data to ensure that the data collected aligns with the realities of the industry. During the pandemic, "blank sailings" were a particular concern because of their potential to be used for anti-competitive purposes. Our monitoring, however, indicated that this reduced service by ocean carriers was driven by port congestion rather than a desire to reduce capacity, and delays and skipped ports have been a frequent occurrence. The Commission staff have adjusted the data collected on blank sailings to provide additional detail on the factors driving schedule delays and blanked sailings.

There are three global alliance agreements on file with the Commission: 2M, OCEAN, and THE. These agreements contain authority for the carriers to share vessels, exchange space, and coordinate scheduling and utilization, among other provisions. These are the most heavily monitored carrier agreements, due to the potential anticompetitive impacts from their authority to efficiently use their

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[69] Section 6(g) of the Shipping Act of 1984, 46 U.S.C. § 41307(b)(1), is modeled on the Hart-Scott-Rodino Antitrust Improvements Act of 1976 which amended the Clayton Act to require companies to file premerger notifications with the Federal Trade Commission and the Antitrust Division of the Justice Department for certain mergers and acquisitions.

[70] Federal Trade Commission and Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, (April 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

resources. As of May 5, 2022, the three global ocean carrier alliances and each of their member companies will now be required to provide enhanced pricing and capacity information. Additional agreement changes may be required by the Commission to alleviate competition concerns as warranted.

3. Market Analysis

Though there have been charges of illegal activity or concerns of market concentration driving increased ocean freight costs, the Fact Finding Officer's assessment is that our transpacific market is not concentrated and that the increased rates in that market are a result of an extreme spike of consumer demand in the United States that overwhelmed the supply of ship capacity. Similarly, the U.S. Atlantic market for ocean shipping is barely concentrated, and increased rates in that market are also a result of overwhelming U.S. demand.[71] Furthermore, a reassuring data trend indicates that the individual ocean carriers within each alliance continue to compete on pricing and marketing independently and vigorously. Individual ocean carriers within alliances continue to add and withdraw vessels from trades both inside and outside the alliances in which they participate and, particularly in the transpacific, new entrants have been entering the trade. The transpacific is a highly contestable market.

Using the Herfindahl–Hirschman Index (HHI) the Commission's Bureau of Trade Analysis has found that the transpacific markets are competitive and have been for some time. In fact, moving beyond HHI, the fact that the non-alliance share in the transpacific increased throughout 2021 provides further evidence of competition in that market. The transatlantic numbers are slightly higher in terms of HHI, indicating a moderately concentrated market over the past year, but is at the very bottom of that range.

The Commission has ongoing contact with our international ocean liner competition partners. Competition officials of the European Union, China, and the

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[71] Similar conclusions have been reached by European counterparts. *See* Peter Thomsen, *EU rejects cartel charges against carriers*, ShippingWatch, (Feb. 2, 2022), https://shippingwatch.com/regulation/article13757511.ece#:~:text=The%20European%20Commission%20denies%20allegations,alliances%2C%20states%20spokesperson%20to%20ShippingWatch, (last visited May 17, 2022) ("It was concluded that so far no evidence of anti-competitive behavior from shipping alliances aimed at increasing freight rates has been identified").

Federal Maritime Commission regularly discuss our ocean shipping markets and we have, to date, observed no indication that the current prices for liner shipping are a result of collusive or illegal conduct on the part of the major ocean carriers in our markets.

B. Detention and Demurrage

1. Interpretive Rule

The second category of concern that the Fact Finding Officer heard about from stakeholders during the Fact Finding was detention and demurrage charges and other new charges by carriers and marine terminals. Many have charged that empty container return practices, and other carrier practices, have not only resulted in increased operating costs, but in many cases, resulted in demurrage and detention charges due to terminals unwillingness to accept empty containers.

Issuing the Interpretive Rule on Demurrage and Detention Under the Shipping Act in May 2020, was one of the biggest challenges the Commission has ever undertaken. Demurrage and detention charges are controversial internationally. The United States is the first nation to take steps to confine the charges to the purpose for which they are intended: to incentivize shippers to pick up cargo and return equipment during allotted time periods. Central to the Commission's Interpretive Rule on Demurrage and Detention is the principle that detention and demurrage charges and policies should serve the primary purpose of incentivizing the movement of cargo and promoting freight fluidity.

The Commission employed an Interpretive Rule to provide a standard – the incentive principle – to govern analysis of detention and demurrage charges. This standard is issued under the existing statutory requirements of 46 U.S.C. § 41102(c) that ocean carrier and marine terminal operators "may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." The Interpretive Rule is based on the incentive principle – that detention and demurrage fees must facilitate freight fluidity. In effect, this principle allocates the risk of congestion to those in the best position to address the issues – ocean common carriers, seaports, marine terminal operators, and in some cases, shippers.

The Commission is enforcing the Interpretive Rule to define and address "unreasonable" detention and demurrage charges. Cases have been filed, giving the Commission the opportunity to clarify unreasonable charges. Based on information developed as part of our "Vessel-Operating Common Carrier Audit Program," the Commission is moving forward to investigate situations that may violate 46 U.S.C. § 41102(c) in the case of demurrage and detention.

2. Information Demands

Due to concerns that carriers were not following the Commission's rule on detention and demurrage practices, the Fact Finding Officer issued information demands to ocean carriers about their detention and demurrage practices. The Fact Finding also solicited information and evidence from shippers, truckers, intermediaries, and their trade associations and required carriers and marine terminal operators to provide information and evidence on demurrage and detention, empty container return, and export container availability.

3. Enforcement of Interpretive Rule

A major misunderstanding surrounds the nature of the Demurrage and Detention Interpretive Rule. The Interpretive Rule is ***not*** merely guidance. We have issued several "guidance statements" as part of Fact Finding 29, and they are useful regulatory tools. But the Interpretive Rule acts as the "interpretation" of demurrage and detention charges as potential "unreasonable practices" under section 41102(c) of Title 46, United States Code.[72] The Interpretive Rule is the basis for Commission investigations of potential violations of section 41102(c) against ocean carriers for unreasonable practices regarding demurrage and detention. This law enforcement aspect of Fact Finding 29 is aimed at potential unreasonable demurrage and detention charges and is currently underway, and it may result in civil penalty proceedings or other formal enforcement actions.

Based on the Interpretive Rule, the Commission has completely reoriented our resources to focus on demurrage and detention, including beginning a new

[72] Without the Interpretive Rule, it would take years of investigations and complaints for the Commission to develop a coherent approach to "unreasonable" demurrage and detention charges case-by-case.

program to reach out to ocean carriers and audit their demurrage and detention compliance.

4. Need for Information on Which to Base Enforcement Actions

One final point regarding a violation of any law or regulation: to enforce the Interpretive Rule, the Commission must be made aware of the facts surrounding a potential violation to pursue an investigation. Whether it is through a complaint or a notice to the Commission's Bureau of Enforcement, the Commission needs facts to pursue demurrage and detention violations.

IV. COMMISSION ACTION: INTERM AND SUPPLEMENTAL RECOMMENDATIONS

A. Interim Recommendations

On July 28, 2021, during the open session of a Federal Maritime Commission meeting, the Fact Finding Officer provided the Commission with Interim Recommendations to address current conditions contributing to inefficiencies and congestion in the freight delivery system exacerbated by impacts associated with the ongoing COVID-19 pandemic.[73] The recommendations aimed at minimizing barriers to private party enforcement of the Shipping Act, clarifying Commission and industry processes, encouraging shippers, drayage operators, and other stakeholders to assist Commission enforcement actions, and support the ability of our Office of Consumer Affairs and Dispute Resolution Services to facilitate prompt and fair dispute resolution and assist shippers in emergency situations.

In sum, eight interim recommendations were submitted to and approved by the Commission to address the three goals:

- Minimizing Barriers to Private Party Action;
- Clarifying Commission and Industry Processes; and

[73] FMC Press Release: *Remarks of Commissioner Rebecca Dye on Fact Finding 29 Interim Recommendations*, (Jul. 28, 2021), https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-on-Fact Finding-29-interim-recommendations/.

- Encouraging Assistance with Commission Investigation.

The Commission voted to implement the four recommendations that do not require legislative action in September 2021. As of the writing of this report, all these recommendations have either been accomplished or are underway at the Commission.

1. Minimizing Barriers to Private Party Action

Despite persistent criticism of carrier and terminal practices since the very beginning of Fact Finding 29, few private parties have filed complaints seeking reparations. This apparent disconnect fueled discussions with stakeholders and an internal review of Commission policies. It appears that shipper and trucker concerns about retaliation, litigation costs, and attorney fees are important disincentives to private party enforcement of 46 U.S.C. § 41102(c). The Fact Finding Officer recommended three actions to address these concerns:

- Amend section 41104(a)(3) of title 46, United States Code, to broaden the anti-retaliation provision in the Shipping Act to respond the concerns raised by shippers, especially exporters;
- Amend section 41305(c) of title 46 to authorize the Commission to order double reparations for violations of section 41102(c), with Commission guidance focusing this provision on demurrage and detention violations and other types of cases or behavior; and
- Issue a Commission policy statement regarding three areas related to private party complaints: retaliation, attorney fees, and representational complaints, including trade associations.

The first recommendation is a request from the Fact Finding Officer to Congress to amend the statute to remove a potential barrier to private party action. This recommendation was based on perceived fears from the industry that they will face retaliation when filing a complaint. The Shipping Act does prohibit retaliation,[74] but it only applies to retaliation by carriers against "shippers," it does not apply to retaliation by other regulated entities or to retaliation against non-shippers, such as drayage operators or others working on behalf of shippers. Thus,

[74] 46 U.S.C. § 41104(a)(3).

the Fact Finding Officer recommended amending the statue to reflect the different types of entities who could be subject to retaliation and to make clear that 46 U.S.C. § 41104(a)(3) is not limited to protecting competition among carriers, but also protects the ability to complain to the Commission about potentially unlawful conduct free from retaliatory fears.

The second recommendation is also for a statutory change and again asks Congress to remove a potential barrier to private party action. One potential disincentive to private party complaints is the cost of litigating against carriers or marine terminal operators, especially when the amount in dispute may be comparatively small. The Fact Finding Officer recommended that Congress change these incentives, and deter unlawful demurrage and detention practices, by amending 46 U.S.C. § 41305(c) to add 46 U.S.C. § 41102(c) to the list of prohibitions for which double reparations are available.

The third recommendation was to create Commission guidance or "policy statements" on three areas related to private party complaints: (1) the current anti-retaliation prohibition, (2) attorney fees, and (3) who may file a complaint. All three policy statements were issued on December 28, 2021 and were announced via press release[75] and through the Federal Register.[76]

In the first policy statement (Docket No. 21-13), the Commission reiterated that shippers' associations and trade associations may file a complaint alleging a prohibited act violation under 46 U.S.C. Chapter 411. This allows these organizations to protect the interests of their members while also providing shippers with a degree of separation and insulation from potential retaliation.[77] The second statement (Docket No. 21-14) explained the Commission's approach on attorney fees and reiterates that a party who brings an unsuccessful complaint is not automatically required to pay the other party's attorney fees.[78] The

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[75] *See* Press Release: FMC Policy Statements Provide Guidance on Complaints Process, (Dec. 18, 2021), https://www.fmc.gov/fmc-policy-statements-provide-guidance-on-complaints-process/.

[76] 87 Fed. Reg. 13292.

[77] Docket No. 21-13: *Statement on Representative Complaints,* (Dec. 28, 2021), https://www2.fmc.gov/readingroom/docs/21-13/21-13_Representative_Complaints.pdf/.

[78] Docket No. 21-14: *Statement on Attorney Fees,* (Dec. 28, 2021), https://www2.fmc.gov/ReadingRoom/docs/21-14/21-14_Policy_Atty_Fees.pdf/.

Commission will look favorably upon complainants who raise non-frivolous claims in good faith, who litigate zealously but within the rules and for proper purposes, and who comply with Commission Orders. Finally, in the third statement on retaliation (Docket No. 21-15), the Commission emphasized that it broadly defined both who can bring a retaliation complaint, as well as the types of shipper activity that is protected under the existing retaliation prohibitions. This policy statement also addresses the proof necessary for certain retaliation complaints.[79]

2. Clarifying Commission and Industry Processes

Throughout the Fact Finding, stakeholders repeatedly demonstrated confusion with the processes currently available at the Commission. There was misunderstanding, for example, about the differences between small claims and formal private party complaints, and between private party complaints and "complaints" to the Commission alleging potential violations of the Shipping Act for investigation or "complaints" to the Office of Consumer Affairs and Dispute Resolution Services (CADRS) for requests for dispute resolution services. To remedy this confusion and to generate more interest in using the preexisting Commission processes, the Fact Finding Officer recommended:

- Revising the Commission's website to provide clarity regarding the Commission's existing processes to bring factual allegations to the Commission for resolution; and
- Holding a webinar to explain Commission processes.

The first two recommendations were aimed at accomplishing the same objective, clarifying Commission processes. The Fact Finding Officer recommended that the Commission's website should more clearly explain the differences between private party complaints, the Bureau of Enforcement's investigation and enforcement process, and dispute resolution services provided by CADRS. While all this information is currently on the Commission's website, housing it on the same page will allow stakeholders to discern the differences more clearly. Similarly, holding a webinar that discusses all three options and compares them could help dispel confusion and may aid the public as they choose a process.

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[79] Docket No. 21-15: *Statement on Retaliation*, (Dec. 28, 2021), https://www2.fmc.gov/ReadingRoom/docs/21-15/21-15_Policy_Retaliation.pdf/.

This webinar was released on April 25, 2022.[80] To further aid the public on February 15, 2022, the Fact Finding Officer issued a press release explaining options for filing complaints at the FMC.[81]

In addition to clarifying Commission practices, the Fact Finding Officer also recommended action to clarify industry practices, specifically with respect to billing. Throughout the Fact Finding, industry members reported confusion about the information contained in invoices. Although the Commission declined to prescribe specific billing practices in the Interpretive Rule on Demurrage and Detention,[82] it nonetheless referred to the content and clarity of practices and regulations regarding demurrage and detention billing in the final rule, 46 C.F.R. § 545.5(d). To evaluate whether further action should be taken to clarify billing practices, the Fact Finding Officer recommended:

- Issuing a rulemaking concerning information on demurrage and detention billings.

Since the close of Fact Finding 28 and the issuance of the Interpretive Rule, the Surface Transportation Board adopted a rule requiring certain rail carriers to include "certain minimum information on or with demurrage invoices and provide machine-readable access to the minimum information."[83] The Fact Finding Officer recommended that the Commission issue an Advanced Notice of Proposed Rulemaking (ANPRM) to assess whether a similar rule is appropriate in the ocean shipping context.

The Commission recently moved forward on this Interim Recommendation. On February 4, 2022, the Commission voted unanimously to issue an ANPRM seeking information from the public on whether a new rule governing demurrage and detention billing practices would benefit the trade.

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[80] FMC Press Release: *FMC Launches Instructional Video on How to File Complaints,* (Apr.25, 2022), https://www.fmc.gov/fmc-launches-instructional-video-on-how-to-file-complaints/.

[81] FMC Press Release: *Commissioner Dye Explains Options for Filing Complaints at FMC*, (Feb. 15, 2022), https://www.fmc.gov/commissioner-dye-explains-options-for-filing-complaints-at-fmc/.

[82] 85 Fed. Reg. at 29661.

[83] Final Rule: Demurrage Billing Requirements, 86 Fed. Reg. 17735 (Apr. 6, 2021).

The ANPRM requested comments on five areas related to demurrage and detention billing and whether they should be subject to future regulation. These include what data should be included on bills, reasonable timeframes for billing and response, and whether other charges should be included in billing regulation. The ANPRM noted the Commission is considering the merits of establishing regulations mandating certain minimum information be included in bills issued for demurrage and detention. Through the ANPRM, the Commission is also considering prescribing a maximum period in which an invoice can be sent. The ANPRM also inquired whether this rule should apply to marine terminal operators and non-vessel-operating common carriers in addition to vessel-operating common carriers. The ANRPM was published in the Federal Register on February 25, 2022, with comments due on March 17, 2022.[84] This comment period was later extended to April 16, 2022[85] and the Commission received eighty-one comments.

3. Encouraging Assistance with Commission Investigation

Though the Commission brings enforcement actions under 46 U.S.C. § 41302(a), the Commission needs stakeholders to participate in all stages of the enforcement process. Not only does the Commission use information provided by stakeholders to inform the Commission of violations, but as noted above, the Commission also needs stakeholders who are willing to support enforcement actions. To encourage members of the shipping community to aid the Commission in its enforcement actions, the Fact Finding Officer recommended:

- Amending 46 U.S.C. §§ 41109 and 41309 to authorize the Commission to order refund relief in addition to civil penalties in enforcement proceedings.

Under the current statutory framework, in an enforcement proceeding, the Commission can assess a civil penalty for a violation of a prohibited act,[86] but that penalty goes to the United States Government, not injured parties.[87] The Fact Finding Officer believes that granting the Commission the discretionary authority

[84] ANPRM: Demurrage and Detention Billing Requirements, 87 Fed. Reg 8506, (Feb 25, 2022).
[85] Extension of Comment Period, 87 Fed. Reg. 15179, (Mar. 11, 2022).
[86] 46 U.S.C. §§ 41107(a), 41109.
[87] *Id.* at § 41107(a).

to order refunds in enforcement proceedings in addition to civil penalties, or in lieu of civil penalties, would incentivize parties to work with Commission investigatory staff.

4. Bolstering CADRS

Throughout the Fact Finding, stakeholders repeatedly mentioned the benefits of the Office of Consumer Affairs and Dispute Resolution Services (CADRS) and the vital role it plays in assisting stakeholders resolve disputes without litigation. In doing so, CADRS serves as a liaison between different groups and educates them about their responsibilities. Export-related issues are similar but not identical to import-related issues. Due to the rise in export-related issues, the Fact Finding Officer recommended:

- Designating an Export Expert in CADRS.

On December 18, 2021, a Commission staff member was detailed to this position to begin assisting stakeholders encountering export issues. The experienced staff member has been permanently reassigned to assist CADRS as the export advocate to promptly address export matters. In addition, the Commission is actively recruiting and hiring positions to provide further resources for CADRS.

Through later work with carriers, the Fact Finding Officer also worked to revitalize the "Rapid Response" program housed in CADRS. The Commission established Rapid Response Teams in 2010 to provide prompt solutions for commercial disputes between shippers and carriers. The Fact Finding Officer was able to secure a recommitment from carriers to commit Chief Operating Officers to this program for resolving the most urgent emergencies.

B. Final Recommendations

The last two years have demonstrated that the Commission is uniquely positioned to handle the challenges facing our global supply chain. While the primary focus of this investigation has been seeking commercial solutions, there have been moments where direct Commission action was warranted. In the Supplemental Order issued in November 2020, the Commission endorsed the Fact Finding Officer to investigate: (1) practices and regulations related to demurrage

and detention, (2) empty container return in light of 46 C.F.R. § 545.5, and (3) practices related to the carriage of U.S. exports.

Much time has been spent in this report documenting efforts and actions taken by the Fact Finding Officer to investigate and provide relief to demurrage and detention issues, including initiating a rulemaking earlier this year to bring clarity to demurrage and detention billing practices. With respect to the issues of empty container return and U.S. exports, the Fact Finding Officer also believes the industry could benefit through additional recommendations, collaboration, and new rulemakings to similarly bring coherence and clarity to these sectors of the industry. The Fact Finding Officer, therefore, recommends the following additional recommendations:

- A new Commission "International Ocean Shipping Supply Chain Program" with dedicated personnel;
- A rulemaking to provide coherence and clarity on empty container return practices;
- A rulemaking to provide coherence and clarity on earliest return date practices;
- Continued Commission support for the new FMC "Vessel-Operating Common Carrier Audit Program" including developing a new requirement for ocean common carriers, seaports, and marine terminals to employ an FMC Compliance Officer;
- An FMC outreach initiative to provide more information to the shipping public about FMC competition enforcement, service contracts, forecasting, and shippers associations, among other topics;
- An enhanced cooperation with the federal agency most experienced in agricultural export promotion, the Department of Agriculture, concerning container availability and other issues;
- A Commission Investigation into practices relating to charges assessed by ocean common carriers and seaports and marine terminals through tariffs;
- A rulemaking to provide coherence and clarity on merchant haulage and carrier haulage;
- A new "National Seaport, Marine Terminal, and Ocean Carrier Advisory Committee" to work cooperatively with the Commission's National Shipper Advisory Committee;

- A revival of the Rapid Response Team program as agreed by all ocean carrier alliance CEOs;
- A FMC Supply Chain Innovation Teams engagement to discuss blank sailing coordination and information availability; and
- A reinvigorated focus on the extreme supply chain equipment dislocations in Memphis railheads, other rail facilities and other facilities around the country.

These recommendations are discussed more fully below.

1. New FMC Supply Chain Program

Over the last five years, the Commission has supported three investigations to explore and remedy challenges in our international ocean supply chain. In the Supply Chain Innovation Initiative, the focus was on enhancing supply chain reliability and resilience. In Fact Finding 28, the focus was on the effects of demurrage and detention charges. In Fact Finding 29, the emphasis has been on ocean supply chain issues exacerbated by the COVID-19 pandemic.

Throughout each of these investigations, the Fact Finding Officer has dealt with international ocean supply chain disruptions. The reasons that these problems persist despite great strides made by the industry and the Commission, resides in the nature of the supply chain. The United States international ocean supply chain is a complex system, and the operational interdependence of the actors within it make it difficult to develop solutions to individual supply chain challenges.

Fortunately, the Commission stands in a unique place to understand and address the issues facing the U.S. international ocean freight delivery system. Therefore, the Fact Finding Officer strongly supports a dedicated program office for studying and addressing the growing needs in our Nation's supply chain. This dedicated program office should study the issues facing our supply chain and propose solutions to challenges.

2. Rulemaking on Empty Container Return

In the November 2020 Supplemental Order, the Commission endorsed the Fact Finding Officer's efforts to investigate, among other things, empty container

return in light of 46 C.F.R. § 545.5 in our major gateways. Over the last two years, teams have explored three approaches to dealing with these issues and dozens of meetings were conducted exploring potential solutions. The Fact Finding Officer also obtained information on the practices of carriers and terminals on these issues through the use of information demands. The data collected emphasized the need for the Commission to regulate the communication of vital information to shippers.

Again, issues with empty container return are not new. In its Final Rule on demurrage and detention the Commission stated that, "Absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable."[88] However, trucker complaints about difficulties in timely returning empty containers persisted after the Commission published its interpretive rule and increased in light of supply chain disruptions associated with the COVID-19 pandemic. The information demands served in the Fact Finding sought information from carriers and terminals on notification processes for empty container return and impediments to empty container return. Specifically, how much notice is given regarding return policies and what happens when inadequate notice is given. These two areas were identified as problematic issues in both the team meetings in 2020 and through follow up conversations with stakeholders.

As noted in the earlier discussion, the information demands shed some light on the frustration shippers and drayage operators noted regarding notice of where and when empty containers can be returned. It appears that there is a lack of consistency across the United States with respect to the return of empties and it is not always clear who is responsible for communicating return locations. While carriers are taking strides to communicate the information to shippers and drayage operators, there remains a disconnect over who is ultimately responsible for sharing the correct information and how timely the information is shared.

The Fact Finding Officer therefore recommends that the Commission begin a rulemaking to bring coherence and consistency to practices surrounding the return of empty containers. Relying on the approaches examined in the

[88] 46 C.F.R. § 545.5(c)(2)(ii).

investigation, the rulemaking should focus on ensuring information is communicated timely and that shippers can rely on the information provided to them.

3. Rulemaking on Earliest Return Dates

The Fact Finding Officer is pleased that American agricultural exporters enjoyed record breaking trade levels in 2021.[89] However, American exporters have still endured hardships over the last two years. One enduring issue for stakeholders throughout the Fact Finding was with earliest return dates (ERDs) for containers. As discussed earlier, the information demands asked how carriers provided notice to beneficial cargo owners/drayage operators of blanked sailings, bypassed ports, or changes to ERDs, and how carriers mitigated the effects of those events to drayage operators and shippers. MTOs were similarly asked whether they post information about ERDs and vessel schedules on their website. Though all carriers stated that they communicated vessel-schedule and/or ERD information to their customers, as with empty container return, responses indicated a large array of methods being employed to communicate information.

Confusion over where to locate reliable information on ERDs and who is ultimately responsible for determining ERDs has frustrated the shipping public. Stakeholders have continued to express frustration regarding poor notice of where and when empty containers can be returned. Others mentioned instances of terminals refusing to receive empty containers, requiring dual transactions, or not having appointments for the return of empty containers. Many further charged that empty container return practices, ERD issues, and other carrier practices, have not only resulted in increased operating costs, but in demurrage and detention charges.

Again, in sum, the information demands and conversations with stakeholders suggest there is a variety of methodologies being employed to communicate ERD information to shippers. The Fact Finding Officer recommends launching an additional rulemaking to bring coherence and consistency to practices surrounding the issuance of ERDs. As with the rulemaking on empty container return, this

[89] USDA Press Release: *American Agricultural Exports Shattered Records in 2021*, (Feb. 8, 2022), https://www.usda.gov/media/press-releases/2022/02/08/american-agricultural-exports-shattered-records-2021 ("the American agricultural industry posted its highest annual export levels ever recorded in 2021").

rulemaking should rely on the approaches discussed and generated during the Fact Finding and should primarily focus on removing confusion about responsibility and notification procedures.

4. Ocean Carrier and Marine Terminal Compliance Officers

The Supplemental Order directed the Fact Finding Officer to investigate whether carriers' policies, practices and procedures align with the principle, central to the Commission's Interpretive Rule, that detention and demurrage charges and policies should serve the primary purpose of incentivizing the movement of cargo and promoting freight fluidity.

The Commission currently focuses resources on industry-wide compliance with the demurrage and detention Interpretive Rule and underlying statutory authorization. This includes actions taken by the new Commission audit teams, and the Commission's compliance program to ensure conformity with the Commission's regulations.

To aid in compliance operations, the Fact Finding Officer further recommends a new regulatory requirement that all ocean carriers and MTOs designate a Commission compliance officer who reports directly to the Chief Executive Officer (USA). Having designated officials responsible for FMC compliance will aid in ensuring industry-wide observance of the law and Commission regulations.

5. Outreach Initiatives to Stakeholders

One of the first findings of Fact Finding 29 was a lack of awareness in the industry of how the Commission can serve stakeholders. Over the last two years, the Fact Finding Officer has shared information and advice to the shipping public. In the Interim Recommendations, the Fact Finding Officer provided information to the public on filing complaints through the issuance of three policy statements and the publication of an instructional video. The Fact Finding Officer recommends the Commission continue to focus and support outreach initiatives to continue engaging the shipping public on ways the Commission can assist them.

6. Enhanced Interagency Cooperation for Agricultural Exporters

The Fact Finding Officer encourages increased Commission engagement with the U.S. Department of Agriculture, whose experience and expertise in handling the needs of exporters could be of great value to the Commission. One of the most important issues to be addressed for agricultural exporters involves access to ocean shipping containers. Container availability is a chronic challenge for agricultural exporters and the Commission should engage with the U.S. Department of Agriculture to assist U.S. exporters in this and other vital matters.

7. Commission Investigation into Tariff Surcharges and Other Charges

There are currently only limited Commission regulations to evaluate charges by ocean common carriers, MTOs, and seaports, contained in tariffs. Specifically, with any tariff change or rate increase, ocean common carriers are required to provide a 30-day notice to shippers and ensure that published tariffs are clear and definite. Recently, stakeholders have raised concerns about new charges appearing in their invoices. The Fact Finding Officer recommends the Commission launch an investigation into practices by carriers, MTOs, and seaports relating to charges assessed through tariffs.

8. Rulemaking to Define Merchant Haulage and Carrier Haulage

Throughout the course of the Fact Finding, a number of stakeholders have expressed a lack of clarity among the parties regarding the differences between merchant haulage and carrier haulage. Having a clear definition of these terms will provide coherence and definition for the responsibilities of parties. The Fact Finding Officer recommends a rulemaking that defines these terms for the shipping public.

9. New National Seaport, Marine Terminal, and Ocean Carrier Advisory Committee

One of the recommendations of the Fact Finding 28 investigation was the development of a Commission shipper advisory committee. The charter for the National Shipper Advisory Committee (NSAC) was issued on June 7, 2021, and

the committee has been meeting regularly since then. The Committee provides information, insight, and expertise pertaining to conditions in the ocean freight delivery system to the Commission. The Fact Finding Officer believes the Commission and the National Shipper Advisory Committee would equally benefit with the creation of an ocean carrier, seaport, and marine terminal advisory committee. This was identified early in the Fact Finding 29 investigation[90] and could serve the Commission as it continues to deal with issues pertaining to the industry.

10. Rapid Response Team in Office of Consumer Affairs and Dispute Resolution Services

The Commission has successfully used Rapid Response Teams (RRTs) in CADRS to provide a prompt solution for emergency commercial disputes between exporters and ocean carriers. In the past, the success of this program depended on carrier CEO level participation in this process. The involvement of high-level company leadership ensured that concerns were addressed and resolved quickly. Unfortunately, over the years, carrier CEO level participation with the Commission RRTs has diminished.

The Commission should reestablish a RRT process that involves ocean carrier CEOs. Through meetings with the CEOs of the U.S.-based subsidiaries of all major ocean carriers, the Fact Finding Officer has obtained their commitment to the program. This program will ensure that the most serious and time-sensitive issues are addressed and resolved promptly.

11. FMC Supply Chain Innovation Teams on Blank Sailings

Early in the pandemic, shippers struggled with remaining informed on blanked sailings and bypassed ports. Recently, stakeholders have raised concerns about information availability and coordination with respect to blanked sailings. The Fact Finding Officer recommends engaging Innovation Teams to identify commercial solutions to lingering issues with blanked sailings and other issues.

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[90] *See* FMC Press Release: *Commissioner Dye Announces Findings of San Pedro Bay Discussions*, (Jun. 17, 2020), https://www.fmc.gov/commissioner-dye-announces-findings-of-san-pedro-bay-discussions/.

12. Memphis Supply Innovation Team

The Fact Finding Officer strongly recommends a reinvigorated focus with the Surface Transportation Board on the critical equipment dislocations in Memphis and in other rail facilities around the country. Unfortunately, the situation in Memphis and in railheads around the country has deteriorated. The Fact Finding Officer strongly encourages a renewed effort to resolve the challenges faced by stakeholders in Memphis.

V. PATH FORWARD – MUTUALLY ENFORCEABLE CONTRACTS

For the last two years, the international ocean supply chain has weathered effects of the COVID-19 pandemic, exacerbated by an unprecedented surge in consumer demand created in part by COVID-19 lockdowns and facilitated by e-commerce. Whether high consumer demand and the resulting congestion is the "new normal," time will tell. The Fact Finding Officer believes that the actions taken pursuant to the Interim Recommendations, and the approval and implementation of the Final Recommendations, will address a number of the challenges experienced in the international ocean supply chain as a result of COVID-19.

The Fact Finding Officer also believes that to address bottlenecks in the supply chain and make the ocean supply chain more efficient, it is crucial that shippers and ocean carriers move beyond vague and unenforceable rate agreements. One important thing for shippers and carriers alike would be for service contracts to entail a "meeting of the minds" with mutual obligations and commitments that are part of enforceable commercial documents. This is what was anticipated in the Ocean Shipping Reform Act of 1998. Mutual commercial commitments and understanding will provide protection for exporters and importers from volatile shipping rates and the forecasting that ocean carriers need to provide capacity to serve the needs of their customers.

ACKNOWLEDGEMENTS

This has been the fourth Fact Finding Investigation for which I have served as Fact Finding Officer during my tenure at the Commission. Of the three, I have found this one, launched to respond to a global pandemic, to be the most challenging – and the most rewarding. First, I wish to thank my fellow Commissioners for placing their confidence and trust in me to examine these issues and make recommendations to eliminate bottlenecks in the U.S. international ocean supply chain caused or exacerbated by the COVID-19 pandemic. I wish to thank former Chairman Michael A. Khouri, and current Chairman Daniel B. Maffei, for their unfailing support for this effort.

Second, I wish to thank all the stakeholders that met and communicated with me over the last two years and actively participated in the Innovation Teams that contributed to the work of this Fact Finding. The recommendations flowing from this Fact Finding would not have been nearly as well thought out and beneficial without the participation of those who contributed to this effort. I also wish to acknowledge several on whose work I relied: Bjorn Jensen of Sea Intelligence, Drewry Maritime Research, and the Federal Reserve Banks of St. Louis and Cleveland.

Finally, I wish to thank those here at the Federal Maritime Commission who helped me with this work. I could not have done it without the experienced staff at the Federal Maritime Commission.

Thank you all!

Rebecca F. Dye

APPENDIX

Team Participants

Original Team Members
April 2020

Amazon Global Logistics
Maersk
American Coffee Corporation
Mohawk Global Logistics
APM Terminals
MOL America
ASF Global
MSC
Atlantic Container Line
North American Chassis Pool Cooperative
BassTech International
Northwest Seaport Alliance
Best Transportation
Oliver Wyman
Cal Cartage Transportation
OOCL
Cargill Inc.
Port Authority of New York and New Jersey
CMA CGM America
Port of Long Beach
ContainerPort Group
Port of New Orleans
Fenix Marine Services
Port of Olympia
Flexport
Ports America
Gap, Inc.
Scoular
Gemini Shippers Association
Seaboard Marine
Georgia Ports
SeaCube Container Leasing
Global Container Terminals
South Carolina Ports Authority
Hapag-Lloyd
T.G.S. Transportation
IMC Companies
Target
International Longshore and Warehouse Union
Total Terminals International
ITS Terminals
Walmart
Louis Dreyfus Company
Yusen Terminals
Amazon Global Logistics
ZIM

Carrier Team Participants
May 2020

CMA CGM	Ocean Network Express
Maersk	Hapag Lloyd
COSCO	OOCL
MSC	HMM
Evergreen Line	Yang Ming

Southern California Team
June 2020

Fenix Marine Terminals	Ports America
Total Terminals International	Yusen Terminals

North Atlantic Teams
July 2020

American Coffee Corporation	NJ Motor Truck Association
Gemini Shippers	Best Transit
Association of Bi-State Motor Carriers	Port of New York and New Jersey
IMC Companies	Consolidated Chassis Management
Atlantic Container Line	Seaboard Marine
	Container Port Group

Gulf Coast Teams
September and October 2020

American Coffee Corporation	IPaper.com
Pacorini Group	Rooms To Go
Ceres Global Ag	J.W. Allen
Ports America	The Dupuy Group
DOW Corporation	New Orleans Terminal
ResinTech	Triple G Express

Memphis Team
August 2021

Ashley Furniture Industries
Louis Dreyfus Company Cotton
AutoZone, Inc.
IMC Companies
BNSF Railway
International Paper
CMA CGM
Maersk
CN Railroad
Mallory Alexander International Logistics
COFCO International
Mohawk Global Logistics
Cornerstone Systems
Nike
Delta Strategy Group
Olam International
Dunavant Logistics Group
Port of Memphis
ECOM USA
Protective Industrial Products
FedEx Logistics
Pyramex Safety Products
Greater Memphis Chamber
TCW
IMC Companies
The Mitchell Group
International Paper
Wayfair

Additional Terminal and Carrier Meetings
November 2021 - February 2022

APL
Long Beach Container Terminal
APM Terminals
Maersk
CMA-CGM
Maher Terminals
COSCO
MSC
Evergreen Line
ONE
Everport Terminals
OOCL
Fenix Marine Services
SSA Marine Terminals
Global Container Terminals
Total Terminals International
Hapag Lloyd
Yang Ming
HMM
Yusen Terminals
ITS Terminals