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Demurrage-detention regulatory relief for BCOs slow coming

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Aside from complexity and little middle ground seen by opposing sides, there are other reasons for shippers to be skeptical of any dramatic FMC action. Photo credit: Shutterstock.

After four years of behind-the-scenes work, US shippers, [truckers](#), and intermediaries last month finally secured the federal regulatory hearing on their campaign to make it easier for them to challenge port congestion-related fees for which they aren't at fault. They shouldn't expect speedy relief from the [Federal Maritime Commission](#) (FMC).

On the surface, the argument to the FMC by the Coalition for Fair Port Practices, a group of 26 organizations, [seems simple](#): Guidelines are needed to help determine whether demurrage and detention charges are unfairly applied. The coalition argued on Jan. 16, the first day of a two-day hearing, that they aren't against paying late fees, as they realize they are needed to improve terminal fluidity and equipment utilization, but that commercial solutions have failed, requiring the FMC to step in.

The petition isn't seeking new regulation, nor is it looking to add new costs for the FMC or custodial ocean carriers, said Cameron Roberts, a trade attorney who works with the Transportation Intermediaries Association, and other coalition members. "We are simply looking for a statement of

policy that would provide a guardrail,” he said. “The supply chain is bigger than custodial ocean carriers, and they are making a weak link in the terminal because of the choices they make.”

It’s hardly that cut-and-dry, carriers and marine terminal operators (MTOs) told FMC commissioners on Jan. 17. Such guidelines would create more problems than they solve, and by using a “not-my-fault standard,” the risk would just be shifted to terminal operators, carriers and MTOs argued. In effect, the granting of the petition would “transform carriers and MTOs into guarantors or insurance providers for weather events, labor disruptions, equipment shortages, and government cargo inspections,” said John Butler, CEO of the World Shipping Council, whose members control roughly 90 percent of global container capacity.

Aside from the issue complexity and little middle ground seen by opposing sides, there are other reasons for shippers to be skeptical of any dramatic action from the FMC. According to three people familiar with the matter, the FMC was not planning on holding a hearing on the petition until a House subcommittee grilled Acting Chairman Michael Khouri on May 2 and US Senate Commerce Committee John Thune, R-S.D., on the behalf of shippers, pressured the agency to act on the petition. Before Thune’s Sept. 4 letter to the agency, Khouri had said the commission has more pressing priorities than clarifying its stance on detention and demurrage.

While the FMC had since made efforts to show it’s responding to industry concerns, Khouri has also hinted to the immensity of the task of setting a general rule for the 255 terminals across the country. Privately, according to three sources close to the matter, the agency has questioned whether it has the authority to do so even if it chooses that path.

The coalition argues the agency has the authority and that this is their time to act after the 2014-2015 West Coast port crisis brought the issue to the forefront. Pointedly, AgTC Executive Director Peter Friedmann told commissioners that they had the authority to help the industry meet the International Maritime Organization’s container weighing rule last year, only to pass the buck to the US Coast Guard and Congress.

“I think this agency has the authority to self-initiate. The industry is depending on you, this agency, to do what the shipping act calls you to do,” Friedmann said. “You need to protect the shipping public. That’s the purpose of this agency — to protect the American shipping public.”

The commission is stuck in a hard place. On one hand, it’s wary of being seen as doing anything that smacks of overreach or unnecessary regulation, especially when two of the commission’s five seats are vacant, with no sign the Trump administration plans to fill them soon. But the FMC can’t be seen as ignoring the complaints of shippers, intermediaries, and truckers without drawing the ire of Congress. Some lawmakers aren’t convinced the FMC is needed. In addition, claims that the agency favors foreign ocean carriers over US-based companies could resonate on Capitol Hill. After the Justice Department subpoenaed carriers last March in a reported antitrust investigation, two high-ranking US House members said carriers’ antitrust immunity should be reviewed — a suggestion that led the FMC to suggest that Congress require carriers to choose between membership in rate discussions and ocean carrier alliances.

Khouri appeared interested in how other countries handle demurrage and detention, so creating a study of that would allow the agency to show it’s responding. Such measured responses to congestion have become the norm at the FMC, from industry listening sessions to a report promoting the creation of a privately funded portal for supply chain information. If the FMC’s response doesn’t satisfy shipper-pressured members of Congress, then the commission may see two responses from the Hill: “You’re no longer needed, a la the Interstate Commerce Commission,” or “Here’s more power to regulate via an update of the Shipping Act.” In the current political climate, the former seems more likely.

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