

**SENATE COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION**

*Nominations Hearing: Federal Maritime Commission
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DEMOCRATIC QUESTIONS FOR THE RECORD
Daniel Maffei

COVER PAGE

SENATOR AMY KLOBUCHAR (D-MN)

Due to the unfair treatment by the foreign carriers, the *Ocean Shipping Reform Act* directed the Federal Maritime Commission to establish a process for shippers to file complaints against carriers and contest unfair charges. The law also shifts the burden of proof onto ocean carriers to prove that charges are reasonable.

- 1. In your testimony, you note that the Federal Maritime Commission has already received twice as many new cases in the first two months of 2024 as in the entire year of 2020. How has the *Ocean Shipping Reform Act* empowered shippers to file complaints against unreasonable practices by carriers?**

In the part of my testimony referenced by your question, I was referring to formal cases filed with FMC's Office of Administrative Law Judges, specifically that 19 formal cases have been initiated since January 2024. By demonstrating FMC's willingness to enforce cases even against some of the largest ocean carriers, the FMC assured aggrieved U.S. importers and exporters that they would not be wasting their time by filing an FMC case.

In addition to the formal cases I was referring to, the FMC has seen significant growth in the number of cases filed under the OSRA-mandated "charge complaint" process.¹ To implement OSRA's charge complaint provisions, the Commission quickly promulgated an interim procedure to process the new complaints efficiently and effectively. This process allows a person to submit to the Commission "information concerning complaints about charges assessed by a common carrier."² Upon receipt of any such information, the Commission must accept the information and "promptly investigate the charge with regard to compliance with section 41104(a) and section 41102" of the Shipping Act.³ Importantly, section 41310(c) requires the common carrier to refund any charge that the Commission determines to be violative of the Shipping Act.⁴ Moreover, section 41310(d) empowers the Commission with the discretion to assess civil penalties against a common carrier who assessed the illicit charge.⁵ Since OSRA's enactment, the charge complaint process has resulted in the refund of approximately \$2.3 million to aggrieved shippers.

Since the enactment of OSRA 2022, the FMC's Bureau of Enforcement, Investigations, and Compliance has investigated 202 detention and demurrage and/or carrier charge-related inquiries. Of those, 135 of the active investigations were resolved by the carrier after initial contact/notification from our investigators, with 41 investigations resulting in a finding of no violation and 10 complaints being referred to our Office of Enforcement. Furthermore, our consumer affairs office is available for consultations to help shippers determine how best to get assistance with their specific issues. The FMC website has various tools to assist shippers such as a webinar on how to utilize the charge complaint process. The webinar has more than 1,800 views online – an indication that the shipping public is using this resource to facilitate the surge

¹ See 46 U.S.C. § 41310.

² 46 U.S.C. § 41310(a).

³ 46 U.S.C. § 41310(b).

⁴ 46 U.S.C. § 41310(c).

⁵ 46 U.S.C. § 41310(d).

in charge complaint filings the FMC has seen since OSRA's enactment.⁶ The Commission also developed and posted written guidance on the interim charge complaint procedure, providing an additional resource for America's shippers to bring their claims before the Commission.⁷

Beyond these web-based resources, myself, along with each of my fellow Commissioners, have made a concerted effort to publicize FMC enforcement during public appearances and speaking engagements. I have worked to ensure that aggrieved shippers are well aware of the various avenues that the FMC can provide and, with specific regard to charge complaints, the speed and efficiency with which the process can bring resolution to their claims.

Global trade routes have been disrupted in recent months in attacks by Iran-backed Houthi militants on commercial shipping in the Red Sea, forcing vessels to go around the Cape of Good Hope. During this crisis, costs to some shippers have risen more sharply than during early months of the pandemic.⁸ Some shippers are concerned about the lack of transparency from ocean carriers regarding the duration of the emergency surcharges and fines, which cargo is subject to those surcharges, and what those surcharges specifically cover.

2. How is the Federal Maritime Commission facilitating communication between shippers and carriers about the reasons and duration of surcharges and fines?

The Commission is helping to facilitate communication between shippers and carriers, and we have the authority and responsibility to ensure that the carriers are not operating in a manner contrary to America's shipping laws.

In pursuit of these goals, the Commission recently held a public hearing on the threats to shipping caused by the current conditions in the Red Sea and Gulf of Aden regions. The Commission had the benefit of discussing the impacts of the Red Sea crisis with three panels, comprised of representatives of shippers, carriers, ports, and a maritime security expert. One of the primary takeaways from the hearing was the need for additional transparency from the ocean carriers to enable shippers to understand how the fees and surcharges related to specific operational adaptations to the Red Sea situation are calculated. Indeed, the shippers we heard from did not object to the assessment of such fees – geared to ensure the safe passage of mariners and cargo alike – but instead their objections were based on the inability to discern exactly what fees were being charged to meet those goals.

Following the hearing, I instructed Commission staff to begin reviewing the agency's process for granting "special permissions," which allow carriers to institute new fees under their filed tariffs without the usual 30-day notice.⁹ I believe that the circumstances surrounding the

⁶ <https://www.youtube.com/watch?v=Wf1jQAJdE9g>.

⁷ <https://www.fmc.gov/osra-2022-implementation/charge-complaint-interim-procedure/>.

⁸ <https://www.xeneta.com/blog/red-sea-crisis-newsfeed>.

⁹ 46 U.S.C. § 520.14.

Commission's granting of these special permissions was warranted. That said, I am committed to ensuring that the Commission's processes are geared to ensure fair and transparent dealings between the carriers and their customers. Moreover, as I emphasized during the hearing, the granting of the special permissions is not an approval of the fees themselves, which the Commission evaluates independently of any special permission request submitted. The FMC's VOCC Audit Program is gathering further information to help evaluate the reasonableness of these fees. The VOCC Audit team will seek clarity as to the internal processes that carriers use when calculating and instituting the charges. Where appropriate, the Commission will request the carriers be more transparent with such information. If a carrier that does not participate in this effort by the VOCC Audit Program, the FMC has several options to compel carriers to provide the Commission with its justification for the Red Sea-related charges. Furthermore, any specific complaint against a carrier alleging the carrier misused or misrepresented any Red Sea-related charge will be prioritized.

SENATOR RAPHAEL WARNOCK (D-GA)

Federal Maritime Commission's Detention and Demurrage Rule

Georgia's deepwater ports are critical to its economy. Storage fees are one way that Georgia's marine terminal operators incentivize shippers and importers to promptly remove their cargo and keep our ports efficient.¹⁰ The Federal Maritime Commission's new rule on Demurrage and Detention Billing Requirements institutes changes to this practice, and these changes may lead to confusion across the maritime industry, delays, and increased costs.¹¹

1. Are you concerned that the Federal Maritime Commission's new detention and demurrage rule – specifically its invoice and fee mitigation provision, and refund, or waiver requests provisions – may lead to delays in fee collection and ultimately congestion at America's ports?

The Commission's newly promulgated Demurrage and Detention Rule (D&D Rule or Rule), is designed to fulfill a requirement of the Ocean Shipping Reform Act of 2022 (OSRA):

Not later than 45 days after the date of enactment of this Act, the Federal Maritime Commission shall initiate a rulemaking further defining prohibited practices by common carriers, maritime terminal operators, shippers, and ocean transportation intermediaries under section 41102(c) of title 46, United States Code, regarding the assessment of demurrage or detention charges.¹²

In drafting the Rule, the Commission thoroughly considered the public comments submitted to write a workable and beneficial regulation to serve its intended purpose – ensure predictable and clear billing practices while minimizing negative unintended consequences such as confusion, delays, and increased costs.

As with any substantive regulatory change, this Rule will require regulated entities to conduct parts of their business in a different manner than they have in the past. While adjustments in operational practices are implemented, it is not impossible that there may be questions or confusion on the part of a terminal operator. The FMC stands ready to assist such terminals in finding the easiest way toward compliance. Furthermore, I commit to you that I will

¹⁰ *Report: Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Imports and Exports Moving Through Selected United States Ports*, Federal Maritime Commission (April 3, 2015), <https://www.fmc.gov/wp-content/uploads/2019/04/reportdemurrage.pdf> at 12 (“The primary goal of reduced free time and increased demurrage was to encourage shorter dwell times at the terminal and thereby increase the overall velocity of the equipment, which reduces the VOCC’s equipment inventory needs and its operational costs”).

¹¹ 46 CFR § 541.

¹² Ocean Shipping Reform Act of 2022, 136 Stat. 1272, 1275 (2022).

reach out to the senior leadership at the Georgia Ports Authority to ensure that the FMC is doing everything appropriate to inform it about the Rule.

Regarding concerns about delays in fee collection and the risk of congestion, I would note that prior to this Rule, there was no time limit for invoice issuance and fee mitigation, refund, or waiver requests. This led to unpredictable situations for terminals and shippers alike. The 30-day requirement provisions will result in predictable practices and serve to protect American importer and exporters. No longer will billing parties be allowed to delay in calculating the fees imposed or sending an accurate invoice to the appropriate party. The billing party will have to give 30-days in case the shipper wants to dispute the charge but will benefit from not having charges be challenged later than that.

With limited time windows, the connection between the charge and moving the cargo will be fully conveyed, deterring congestion. Detention and demurrage invoices must also be issued to the company that contracted for the freight service or the company who is actually receiving the cargo to ensure that the billed party has the most interest and control over picking up the container. Previously, terminals would sometimes bill trucking companies with which they had no contractual relationship – these truckers did not necessarily have any control over when their clients would hire them to pick up the cargo. If these trucking companies did not pay, often a terminal operator would lock them out and prevent them from picking up other cargo, thus creating more congestion. In this and other areas, the new D&D Rule requires carriers and marine terminal operators to adjust the way they conduct business in order to ensure a system promoting cargo fluidity in America’s ocean-linked supply chains.

Port Congestion Mitigation

Georgia’s deepwater ports are an economic engine for the entire state.

1. As Chairman of the Federal Maritime Commission, what actions have you taken or supported to protect against future supply chain bottlenecks at our nation’s ports?

During COVID, ocean carriers and terminals often charged detention and demurrage fees in cases when it was impossible for American shippers to move their full or empty containers more quickly due to congestion or other issues beyond their control. Many of the invoices were confusing, lacked key information, or were issued many months later after the fact. So many invoices were sent out by ocean carriers and terminals that many American companies just threw up their hands and paid the fees, feeling they had no choice and that they would get charged even if they were responsible about moving their cargo and returning their empties. In this way, the system of detention and demurrage lost credibility as it was no longer an incentive to American shippers to move cargo or return empties timely.

To address these issues and restore credibility to the system of detention and demurrage, the FMC under my leadership has:

- Implemented the fast-track charge complaints process;
- Reorganized FMC's enforcement and priorities;
- Added staff to FMC enforcement and compliance including a senior executive level supervisor;
- Started the VOCC Audit Program that conducts one-on-one meetings with carriers and MTOs to promote compliance; and
- Created a Supply Chain Monitoring program to enable the FMC to forecast future supply chain disruptions, and to engage with the ocean shipping industry on solutions to challenges before problems arise.

In addition to these commission-wide efforts I, as Chairman, will get involved if there is a way I can help reduce congestion. To be effective in these efforts, it is important to be in touch with and, if possible, visit our Nation's major ports, and this includes the Georgia Ports in Savannah, which I visited in 2022. Given this first-hand appreciation for the challenges faced by our major ports, I advise and consult with other Federal officials, such as the President's Port Envoy housed in the Department of Transportation, to assist that office's efforts to relieve port congestion. In that capacity, I can be helpful in drawing public or industry attention to a matter. In short, I have and will continue to personally engage with our Nation's ports to proactively address congestion concerns.

2. What more would you like to see the Commission do to ease congestion and promote supply chain resiliency and efficiency at our nation's ports?

Since the FMC is a regulatory agency which has no authority to direct federal investments, the best way to promote supply chain resiliency and efficiency is to ensure American shippers are empowered to diversify their supply chains.

In 2021, I initiated the Supply Chain Monitoring Program to enable the FMC to forecast future supply chain disruptions, and to engage with the ocean shipping industry on solutions before problems arise. We will continue to build this program with a goal to harness the Commission's relevant industry data collections to create useful informational tools concerning the supply chain for the Commission and the ocean shipping industry.

I also aim to build on the Commission's successes in our newly reorganized enforcement program and continue my focus on unlawful practices that negatively impact American shippers trying to make informed decisions about their supply chains. This new focus for the FMC places a strong emphasis on complex and substantive cases that have a larger and more meaningful impact on dissuading improper conduct by companies providing ocean transportation and related services. This was a shift from previous enforcement cases which involved primarily small ocean transportation intermediaries (OTIs). The deterrence impact on the ocean shipping industry through increased enforcement on substantive transportation matters ultimately keeps cargo moving and benefits the supply chain greatly.

The ongoing work of all Commission programs will continue to make a difference in easing port congestion and building supply chain efficiencies and resiliency. We appreciate the Congressional support provided to the Commission to increase and manage these important programs.