

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

*Nominations Hearing: Federal Maritime Commission
February 28, 2024*

REPUBLICAN QUESTIONS FOR THE RECORD
Daniel Maffei

COVER PAGE

SENATOR DEB FISCHER (R-NE)

- 1. We have seen a number of supply chain disruptions over the past several years, most recently as a result of attacks on ships in the Red Sea. These disruptions often have impacts on the cost of consumer goods in the U.S. and the ability for U.S. farmers to export their products. We must build a durable supply chain that can adapt to these disruptions and minimize their impacts. How can improving the availability of data on the movement of goods in the supply chain help build resilience against these disruptions?**

One of the purposes of the Shipping Act, 46 U.S.C. §§ 40101 – 46107, is to “ensure an efficient, competitive, and economical transportation system in the ocean commerce of the United States” and, thus, supply chain resilience is important to the FMC.¹

The sharing of data among carriers, terminals, and shippers throughout the ocean-linked supply chain would increase efficiency since it would better empower decision makers to make the choices best for them. For example, if an agricultural exporter in the middle of the country can know enough in advance that an ocean cargo service from the port closest to them will be cancelled this week, then that exporter can determine for itself whether it is worth it to inland transport to another port to get out that week or simply settle for delayed service from the original port. Being able to see these sorts of choices also would contribute to resilience since it allows an importer or exporter to see alternatives and therefore plan for what would happen if a particular route were cut off for some reason.

Since the ocean-linked supply chain system involves the entire world, a vast array of events – global, regional, local, and on board a single ship – that can affect one data point. Each unpredicted outcome can then affect many others. For example, a single storm could require several ships to detour and fall behind schedule. If they all come into a terminal at once, that can create congestion impacting other ships that never went anywhere near the storm. If there were uniform technological systems among industry stakeholders, it would allow clarity to track these compound effects. However, because ships come from different companies and countries and service ports all over the world, data systems are far from uniform.

There are some relatively straightforward steps that can be taken by carriers and shippers to share some limited data to achieve a more efficient system. For example, during my confirmation hearing, I testified that it is important for agricultural exporters to have access to the right kind of container, whether it be an appropriately sized container or a refrigerated container, to ensure the cargo can be loaded/unloaded easily and does not spoil during the voyage. Agricultural cargo is often heavy in comparison to other goods, such as electronics or clothing. As such, smaller, 20-foot containers are better suited to transport these commodities because the laden weight of the container is lighter and can be safely loaded/unloaded with the existing infrastructure at our ports. All too often, however, larger 40-foot containers are the only

¹ 46 U.S.C. § 40101.

equipment made available to agricultural exporters. Refrigerated containers are necessary for the safe transport of perishable agricultural exports but, again, the availability of this type of container is often sparse when and where it is needed most. One way to alleviate these issues is through the sharing of information between supply chain participants to preemptively position the appropriate equipment, i.e., the proper kind of container, to the location where it is needed. By sharing container location data, supply chain participants would be better positioned to ensure that the right container is available to meet the particular needs of the cargo being shipped by our Nation's agricultural exporters.

SENATOR TED BUDD (R-NC)

In *IMCC vs OCEMA* – Docket #20-14, the Federal Maritime Commission (FMC) suggests that they have the authority to prevent ocean carriers from withdrawing from interoperable gray chassis pools.

- 1. Please cite the specific authorizing language enacted by Congress that you believe grants the FMC authority to regulate ocean carrier's chassis procurement decisions, including not allowing them to pull out of certain pools or markets.**

The Shipping Act, codified as 46 U.S.C. §§ 40101 – 46108, is the primary federal statute that preserves the integrity of U.S. maritime trade and protects the American public from unfair practices by ocean transportation providers. The Commission has exclusive jurisdiction over alleged Shipping Act violations, which cannot be brought in federal district court or before another federal agency. If ocean common carriers are operating under an agreement filed with the Commission and in effect, actions authorized by that agreement are insulated from liability under the federal antitrust laws and would not be reviewed by the U.S. Department of Justice or the Federal Trade Commission.

At issue in *IMCC v. OCEMA*, Docket No. 20-14, and particularly germane to your question, are alleged violations of 46 U.S.C. § 41102(c). Section 41102(c) of the Shipping Act prohibits common carriers from “fail[ing] to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.”² The Commission also has statutory authority to monitor a carrier's activities authorized by an agreement filed with the Commission for compliance with the agreement's terms and for possible negative impacts on competition, as was the case in *IMCC v. OCEMA*.³ These statutory authorities empower the Commission to order ocean carriers to cease and desist withdrawing from interoperable chassis pools and (as part of the same practice) designating a single equipment provider-operated proprietary chassis pool if such withdrawals are determined to be unjust or unreasonable, as was the case in *IMCC v. OCEMA*.⁴ Importantly, the

² 46 U.S.C. § 41102(c).

³ 46 U.S.C. §§ 40301-07.

⁴ See 2023 WL 1963455 at *48 (F.M.C.)

Commission's Order did not make an ultimate ruling on this issue and instead merely affirmed the ALJ's finding that genuine issues of material fact precluded the determination of whether the specific withdrawals from interoperable gray chassis pools were violative of the Shipping Act.⁵

Broader questions about carriers' procurement decisions in general were not before the Commission in *IMCC v. OCEMA*. The Commission did not make any findings about procurement decisions that do not limit shippers' or motor carriers' chassis usage, or their freedom to choose among or negotiate with chassis providers.

2. How does prospective authority to regulate ocean carrier's involvement in certain chassis pools align with the ruling's statement that the FMC cannot direct non-regulated parties to act or refrain from acting in the marketplace?

The Commission is charged with enforcing restrictions and prohibitions on carrier practices and policies that are unreasonable and unjust.⁶ When the Commission finds that an ocean carrier has violated these prohibitions, we are required to award relief or take remedial action. Respondents in *IMCC v. OCEMA* were ocean common carriers who are required to operate under these restrictions and prohibitions against unreasonable or unjust behavior. The Commission's Order addressed the Respondents' practices and policies at issue in this case, *not* the legality of conduct by other parties, such as chassis providers, who deal with the carriers but are not regulated entities under the Shipping Act.

The Commission was also fulfilling its obligation to regulate activities carried out under ocean common carrier agreements. Two of the Respondents in *IMCC v. OCEMA* were associations of ocean common carriers who were acting under the authority of agreements filed with the Commission and subject to its ongoing review authority.⁷ When ocean common carriers are operating under an agreement filed with the Commission, actions authorized by that agreement are insulated from liability under the federal antitrust laws and would not be reviewed by the U.S. Department of Justice or the Federal Trade Commission.⁸ Instead, it is the responsibility of the FMC to review such practices.

⁵ See 2024 WL 641501 at *40-41 (F.M.C.)

⁶ See 46 U.S.C. § 41102(c).

⁷ 46 U.S.C. §§ 40301-07.

⁸ *In re Vehicle Carrier Services Antitrust Litigation*, 846 F.3d 71, 80-81 (3d Cir. 2017); *Mercedes-Benz USA, LLC v. Nippon Yusen Kabushiki Kaisha*, Civ. No. 18-13764, 2018 WL 6522487, at *4-5 (D.N.J. Dec. 12, 2018).