

FMC rejects claims it is using new container rule to regulate prices

Agency now has more power to prohibit 'unreasonable' refusals by carriers to load containers

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FMC tightens controls over carriers that refuse vessel space to customers. (Photo: Jim Allen/FreightWaves)

WASHINGTON — The Federal Maritime Commission has rejected arguments that it is trying to regulate rates in issuing a new rule largely prohibiting ocean carriers from refusing to provide vessel space for their customers' containers.

The [final rule](#), which also addresses instances in which carriers unreasonably refuse to deal or negotiate contract provisions with their customers

regarding container vessel space, was required under the Ocean Shipping Reform Act of 2022. It goes into effect Sept. 23.

“This rule establishes the necessary elements for the FMC to apply federal law with respect to refusals of cargo space accommodations when available,” states the rule’s preamble. “This rule applies to complaints brought before the FMC by a private party, as well as enforcement cases brought by the Commission.”

When the rule was going through the rulemaking process last year, carriers complained about a provision allowing the agency, in evaluating whether an ocean carrier’s refusal to deal or negotiate with customers on vessel space is reasonable, to consider when carriers quote rates so far above current market rates that they cannot be considered a good-faith effort to negotiate.

“There is no scenario under which an agency that does not have authority to regulate rates can permissibly use rate levels as a measure of reasonableness,” [contended the World Shipping Council](#), which represents container vessel operators.

“Clear law aside, the commission’s proposal cannot work as a practical matter. How high is too high, and on what basis is the commission to decide?”

In responding to complaints alleging rate regulation, the FMC said it is “simply providing a comparison point between rates a carrier offers in negotiation, and rates that the rest of the market is charging for that space,” the agency stated.

“Contrary to the commenters’ assertions, the commission is letting the market work here because it is allowing the market to set the rates and is

then examining whether the rates that any carrier puts forth in negotiations is so far above those market rates as to be unreasonable. Some leeway in prices offered during negotiations is permissible and even encouraged by the market itself. As such, the commission will retain this factor as written in the final rule.”

WSC and others also pointed to what they consider to be another dangerous revision proposed by the FMC: requiring carriers to file with the agency an annual export policy that includes the carriers’ pricing strategies, services they offer, strategies for providing container equipment and descriptions of the markets the carriers serve.

“Revealing intricate details of a company’s strategies to the greater public can put businesses at a significant competitive disadvantage,” complained container ship operator Hapag-Lloyd (America) LLC. “In the global market, companies must safeguard their trade secrets, market research, pricing structures, and supply chain information to maintain their edge over competitors.”

But the FMC again rejected the carriers’ argument, asserting that the export information it is requiring in the rule will help it determine whether an ocean carrier’s conduct in a specific matter aligns with their policies and thus whether the carrier acted reasonably.

“Requiring common carriers to submit this information does not involve the Commission in the day-to-day operations of ocean common carriers and does not impose unnecessary or unreasonable burdens on carriers.”

Sweeper–vessel repositioning

FMC did grant a request by WSC and MSC, the world’s largest container ship operator, to amend the regulatory text to include that nothing in the rule is meant to restrict the ability of ocean carriers to reposition empty

containers, which can be accomplished particularly through the use of "sweeper vessels."

However, the commission also noted that an ocean carrier carrying even a single container should meet the same regulatory standards as a vessel fully loaded with containerized cargo.

"Therefore, the commission has also amended the regulatory text to make it clear that the designation of a sweeper is subject to commission review to determine whether the designation results in an unreasonable refusal of ocean carriage services."