

## Federal Maritime Commission

## § 545.4

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### PART 545—INTERPRETATIONS AND STATEMENTS OF POLICY

Sec.

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AUTHORITY: 5 U.S.C. 553; 46 U.S.C. 305, 40307, 40501–40503, 41101–41106, and 40901–40904; 46 CFR 515.23

#### § 545.1 Interpretation of Shipping Act of 1984—Refusal to negotiate with shippers' associations.

(a) 46 U.S.C. 40502 authorizes ocean common carriers and agreements between or among ocean common carriers to enter into a service contract with a shippers' association, subject to the requirements of the Shipping Act of 1984 ("Act"). 46 U.S.C. 41104(a)(10) prohibits carriers from unreasonably refusing to deal or negotiate. 46 U.S.C. 40307(a)(3) exempts from the antitrust laws any activity within the scope of the Act, undertaken with a reasonable basis to conclude that it is pursuant to a filed and effective agreement.

(b) The Federal Maritime Commission interprets these provisions to establish that a common carrier or conference may not require a shippers' association to obtain or apply for a Business Review Letter from the Department of Justice prior to or as part of a service contract negotiation process.

[53 FR 43698, Oct. 28, 1988. Redesignated and amended at 64 FR 7813, Feb. 17, 1999; 64 FR 9922, Mar. 1, 1999; 74 FR 50732, Oct. 1, 2009; 85 FR 9684, Feb. 20, 2020]

#### § 545.2 Interpretation of Shipping Act of 1984—Unpaid ocean freight charges.

Section 10(a)(1) of the Shipping Act of 1984 (46 U.S.C. 41102(a)) states that it is unlawful for any person to obtain or attempt to obtain transportation for property at less than the properly applicable rates, by any "unjust or unfair device or means." An essential element of the offense is use of an "unjust or unfair device or means." In the absence of evidence of bad faith or deceit, the Federal Maritime Commission will not infer an "unjust or unfair device or means" from the failure of a shipper to pay ocean freight. An "unjust or unfair device or means" could be inferred where a shipper, in bad faith, induced the carrier to relinquish its possessory lien on the cargo and to transport the cargo without prepayment by the shipper of the applicable freight charges.

[58 FR 7194, Feb. 5, 1993. Redesignated at 64 FR 7813, Feb. 17, 1999, as amended at 74 FR 50732, Oct. 1, 2009]

#### § 545.3 Interpretation of § 515.23(b) of this chapter—Payment pursuant to a claim against an ocean transportation intermediary.

A claimant seeking to settle a claim in accordance with § 515.23(b)(1) of this chapter should promptly provide to the financial responsibility provider all documents and information relating to and supporting its claim for the purpose of evaluating the validity and subject matter of the claim.

[65 FR 33480, May 24, 2000]

#### § 545.4 Interpretation of Shipping Act of 1984—Unjust and unreasonable practices.

46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:

(a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;

(b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;

(c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;

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(d) The practice or regulation is unjust or unreasonable; and

(e) The practice or regulation is the proximate cause of the claimed loss.

[83 FR 64480, Dec. 17, 2018]

### **§ 545.5 Interpretation of Shipping Act of 1984—Unjust and unreasonable practices with respect to demurrage and detention.**

(a) *Purpose.* The purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and § 545.4(d) in the context of demurrage and detention.

(b) *Applicability and scope.* This rule applies to practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, the terms demurrage and detention encompass any charges, including “per diem,” assessed by ocean common carriers, marine terminal operators, or ocean transportation intermediaries (“regulated entities”) related to the use of marine terminal space (e.g., land) or shipping containers, not including freight charges.

(c) *Incentive principle—(1) General.* In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.

(2) *Particular applications of incentive principle—(i) Cargo availability.* The Commission may consider in the reasonableness analysis the extent to which demurrage practices and regulations relate demurrage or free time to cargo availability for retrieval.

(ii) *Empty container return.* 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.

(iii) *Notice of cargo availability.* In assessing the reasonableness of demur-

rage practices and regulations, the Commission may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The Commission may consider the type of notice, to whom notice is provided, the format of notice, method of distribution of notice, the timing of notice, and the effect of the notice.

(iv) *Government inspections.* In assessing the reasonableness of demurrage and detention practices in the context of government inspections, the Commission may consider the extent to which demurrage and detention are serving their intended purposes and may also consider any extenuating circumstances.

(d) *Demurrage and detention policies.* The Commission may consider in the reasonableness analysis the existence, accessibility, content, and clarity of policies implementing demurrage and detention practices and regulations, including dispute resolution policies and practices and regulations regarding demurrage and detention billing. In assessing dispute resolution policies, the Commission may further consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements.

(e) *Transparent terminology.* The Commission may consider in the reasonableness analysis the extent to which regulated entities have clearly defined the terms used in demurrage and detention practices and regulations, the accessibility of definitions, and the extent to which the definitions differ from how the terms are used in other contexts.

(f) *Non-Preclusion.* Nothing in this rule precludes the Commission from considering factors, arguments, and evidence in addition to those specifically listed in this rule.

[85 FR 29665, May 18, 2020]