



May Legislative and Regulatory Report

LEGISLATIVE

No legislative updates for May 2022.

REGULATORY

FMC Issues Final Recommendations in Fact Finding 29 Investigation

In March 2020, shortly after the President declared a national emergency due to COVID-19, the Federal Maritime Commission launched its Fact Finding 29 investigation into “the Effects of COVID-19 on the U.S. International Ocean Transportation Supply Chain.” During the early phases of FF29, stakeholder identified three primary concerns: ocean shipping price increases; excessive demurrage and detention charges; and supply chain bottlenecks. To begin addressing these challenges, Commissioner Dye – in her role as Fact Finding Officer – presented eight interim recommendations in July 2021. All recommendations that did not require legislative action, such as guidance documents, educational outreach, and rulemaking proceedings, have already been implemented by the FMC.

Having completed the two-year investigation, Commissioner Dye released her final report and 12 additional recommendations in May 2022. Based on research and information collected during the investigation, the Fact Finding Officer concluded that competition among ocean carriers remains strong, noting that “the current market for ocean liner services in the Trans-Pacific trade is not concentrated and the Trans-Atlantic trade is only minimally concentrated.” Moreover, the investigation found that current ocean transportation prices are the product of supply and demand market forces. While these prices remain historically high, Commissioner Dye stated they have been exacerbated by the pandemic, an unexpected surge in consumer spending, and supply chain congestion. However, she expressed continued concerns regarding ocean carrier compliance with the incentive principle of the FMC’s interpretive rule on detention and demurrage, insufficient regulatory tools for the FMC to address new charges imposed through tariffs, and a lack of mutually enforceable and binding service contracts.

To better understand and address ocean supply chain challenges, Commissioner Dye recommended the FMC establish a dedicated Supply Chain Program office. Citing frustration among stakeholders regarding inconsistent empty container return practices, the report recommends the FMC initiate a rulemaking proceeding to ensure information



is shared in a timely, accurate, and reliable manner. Similarly, Commissioner Dye calls on the FMC to develop a rulemaking on communications and notification procedures for earliest return dates for containers.

The report further recommends: a new regulatory requirement that all ocean carriers and marine terminal operators designate an officer responsible for FMC compliance; increased collaboration with the U.S. Department of Agriculture to address agricultural exporters' access to shipping containers, among other issues; an FMC investigation into practices by carriers, MTOs, and seaports regarding charges assessed through tariffs; a rulemaking proceeding to define the terms "merchant haulage" and "carrier haulage;" establishing a new National Seaport, Marine Terminal, and Ocean Carrier Advisory Committee to complement the work of the existing National Shipper Advisory Committee; reestablishing a Rapid Response Team process involving ocean carrier CEOs to resolve emergency commercial disputes between exporters and ocean carriers. Additionally, Commissioner Dye recommends engaging Innovation Teams to identify solutions pertaining to blanked sailings as well as further collaboration between the Memphis Supply Innovation Team and the Surface Transportation Board to address equipment shortages in Memphis and other rail facilities across the country.

STB Requires New Reporting Metrics Following Hearing on Service Issues

Following concerns of rail service raised at the Surface Transportation Board's hearing on "Urgent Issues in Freight Rail Service," STB announced new reporting requirements for all Class I carriers to promote transparency, service improvements, and accountability.

The new requirements instruct all Class I carriers to submit weekly reports on rail service, performance, and employment for the next six months. Specific metrics required in these reports include average terminal dwell times and the number of train starts per day.

Four Class I carriers – BNSF, CSX, NS, and UP – will be required to submit service recovery plans outlining the specific actions that each carrier will take to improve service and metrics to evaluate their progress. The service recovery plans will include service performance indicators for the past three years, such as first-mile/last-mile and trip plan compliance performance, and strategies to address labor shortages. These four carriers will file bi-weekly progress reports and participate in bi-weekly conference calls with STB's Office of Public Assistance, Governmental Affairs and Compliance. STB noted that these requirements will help guide STB's assessment of the steps railroads are taking to address rail service issues and the need for further action.

The Association of American Railroads submitted a letter to STB expressing concern about the relevance and legality of the reporting requirements. The letter pointed out that STB did not explain how the information will assist in monitoring service or why the current reporting rules are insufficient. Additionally, AAR noted that the reporting



requirement was issued on an expedited basis without a notice or a comment period. This process did not allow feedback from stakeholders on the associated costs and burden the reporting requirements impose or whether the requested data is relevant and appropriate. Should STB decide to collect any similar data permanently, AAR requested STB follow the rulemaking procedures required by law. Despite these concerns, AAR stated its Class I members will comply with the new reporting requirements to the best of their ability.

USTR Initiates Review of Existing Tariffs on Chinese Imports

In May, the U.S. Trade Representative announced it would begin a statutory four-year review of all tariffs imposed since 2018 under its Section 301 investigation into goods manufactured in China.

The proceeding began in August 2017 when President Trump directed USTR to investigate whether China's laws, policies, practices, or actions may be unreasonable or discriminatory to American intellectual property rights, innovation, or technological development. USTR conducted its investigation under Section 301 of the Trade Act of 1974 and deemed China's behavior to be a "burden to U.S. commerce."

In response to the investigation's findings, USTR imposed an additional ad valorem duty of 25 percent on a variety of goods produced in China. The tariffs were divided into four separate product lists, totaling approximately \$550 billion. Intermodal chassis manufactured in China were included as a product subject to an additional duty on List 3, also known as the \$200 billion list.

Now, USTR is conducting a four-year review of the 2018 tariffs, including the tariff imposed on chassis. The review will begin by notifying representatives of domestic industries that benefit from the duties of the possible termination of these tariffs.

USTR is accepting requests for the continuation of individual tariffs per product list. Requests for products on List 1 will be accepted from May 7 – July 5 and requests for List 2 from June 24 – August 22. To ensure a comprehensive review, requests pertaining to products on Lists 3 and 4, which include chassis, may be submitted during either submission timeframe. This initial submission period is limited to domestic industry representatives.

Subsequently, USTR will publish a notice in the Federal Register compiling any submitted requests for continuation. The next phase of the review would then proceed by soliciting comments from all interested industry stakeholders.



U.S. Solicitor General Recommends Supreme Court Deny CTA Petition

In April 2021, the 9th U.S. Circuit Court of Appeals ruled that California's Assembly Bill 5, which established the ABC test to determine a worker's status as an employee or independent contractor, was not preempted by the Federal Aviation Administration Authorization Act and could be enforced. Following the decision, the California Trucking Association was denied a rehearing by the court and petitioned the U.S. Supreme Court for review.

Since its establishment, the ABC test has been the subject of several legal challenges. For the trucking industry specifically, opponents of AB 5 assert the ABC test would essentially eliminate the independent contractor model, which remains the most prevalent business model for intermodal motor carriers. CTA's petition states that the 9th Circuit Court's ruling conflicts with other circuit court decisions in similar cases and departs from the statutory language of the FAAAA, which prohibits states from imposing laws on motor carrier prices, routes, and services. Furthermore, CTA states that the implementation of AB 5 would disrupt motor carrier operations as a substantial portion of the services provided by motor carriers nationwide are offered through owner-operators, and a significant number of carriers provide services in California only through owner-operators.

On May 24, 2022, the U.S. Solicitor General filed a brief to the U.S. Supreme Court recommending it deny CTA's petition for review. The brief argues the 9th U.S. Circuit Court of Appeals correctly determined that CTA would be unlikely to succeed on its claim that the FAAAA preempts the ABC classification test as applied to owner-operators. The brief also states that while courts have issued conflicting decisions regarding the preemption of the ABC test, "those case-specific decisions do not create a conflict warranting this Court's review."

A preliminary injunction has been in place since January 2020, prohibiting the enforcement of AB 5 on the trucking industry. Should the Supreme Court deny CTA's petition for review, the injunction would be removed and AB 5 would take effect immediately.

The State of California and CTA have 14 days from the date of the Solicitor General's filing to submit a supplemental brief. Given the timeframe for response, it is possible the Supreme Court will not consider CTA's petition for review before it enters its summer recess at the end of June. If the case is not considered before the summer recess, the review would remain pending until after October 6.