AAPA American Association of Port Authorities

Alliance of the Ports of Canada, the Caribbean, Latin America and the United States

October 10, 2018

Via email: secretary@fmc.gov
Rachel A. Dickson
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001

Re: Docket No. 18-06, Interpretive Rule; Shipping Act of 1984
Comments of American Association of Port Authorities

Dear Ms. Dickon:

Pursuant to the Commission's *Notice of Proposed Rulemaking* issued September 6, 2018, and published at 83 Fed. Reg. 45,367 (Sept. 7, 2018), the American Association of Port Authorities (AAPA) hereby submits comments on behalf of its U.S. port members on the Commission's proposal to issue an interpretive rule that a regulated entity must engage in a practice or regulation on a normal, customary, and continuous basis in order for it to be considered an unjust or unreasonable practice or regulation under 46 U.S.C. § 41102(c), previously Section 10(d)(1) of the Shipping Act of 1984. AAPA supports the proposed rule.

AAPA's interest in the proposed rule

The AAPA's members include governmental entities that own nearly all major commercial ports in the United States, with a charge to operate them in the public interest and often supported by public funds. Some port authorities operate marine terminals directly, but most also lease terminals to other marine terminal operators who provide terminal services directly to carriers. AAPA member ports have been involved in Shipping Act litigation at the Commission, and some in other forums as well. AAPA members have a direct interest in the Commission's proposal to re-establish a proper standard of liability under the Shipping Act.

AAPA's position on the proposed rule

AAPA agrees that the Commission's proposal would re-establish Commission precedent as articulated in proceeding from the 1950s to the 2000s, and thus "restore the scope of § 41102(c) to prohibiting unjust and unreasonable *practices* and *regulations*." 83 Fed. Reg. at 45,368 (emphasis in original), rather than making it a catchall that would encompass virtually any commercial dispute or breach of contract claim. AAPA member ports have been subject for several decades to suits by large, well-financed private parties attempting to improve their bargaining position in commercial dealings with public port authorities by filing Shipping Act claims against them. These proceedings have included claims of unjust and unreasonable practices that have made no effort to allege that the purported unlawful "practice" was undertaken on a normal, customary, and continuous basis, as opposed simply being a non-systemic, one-off event or incident peculiar to the complainant's own dispute with a port, or other person subject to the Shipping Act. *See, e.g., Seacon Terminals, Inc., v. Port of Seattle*, 26 S.R.R. 886 (FMC 1993) (involving nonrenewal of a lease); *SSA Terminals LLC v. Port of Oakland*, Dkt. 09-08 (involving alleged favoritism to one terminal operator in lease pricing dispute).

Under the law as it was understood for many decades, these one-off unreasonable practice claims did not state a claim. However, several recent decisions that the proposed interpretive rule seeks to address threaten yet another means by which discrete commercial disputes can be morphed into alleged violations of the Shipping Act. Unless checked, this will add an additional layer of uncertainty and expense to the defense of these actions, further diverting ports' attention and resources away from their primary goal of encouraging the development and free flow of U.S. waterborne commerce.

The proposed rule would restore a proper interpretation of the Shipping Act's prohibition on unjust or unreasonable practices or regulations and overturn an interpretation that was beyond the agency's authority

Section 41102(c) requires VOCCs and MTOs to "establish, observe, and enforce just reasonable regulations and practices relating to or connected with receiving, handling, or delivering of property." The plain meaning of a "practice" is a "repeated or customary action" or "the usual way of doing something." *See* https://www.merriam-webster.com/dictionary/practice, visited Sept 27, 2018 (Merriam Webster definition of "practice"). This plain meaning directly contradicts any notion that a single occurrence or "one-off" dispute can constitute a "practice" that violates this provision of the Shipping Act. 41102(c) should not be misused as a catchall provision to create a Shipping Act claim in single incident disputes where no other provision of the Shipping Act applies.

The Supreme Court has repeatedly counselled that "the starting point in any case involving the meaning of a statute [ ] is the language of the statute itself." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979). In the absence of a statutory definition, courts and agencies should "construe a statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). Such ordinary and natural meaning is determined with reference to dictionary definitions unless there is an indication that Congress intended some specialized meaning. *See, e.g., Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (dictionary definition of "marketing"); *MCI Telecomm. Corp. v. American Tel. & Tel. Co.,* 512 U.S. 218, 229 (1994) (dictionary definition of "modify"); *Commissioner v. Soliman*, 506 U.S. 168, 174 (1993) (dictionary definition of "principal"); *Exxonmobil v. FERC*, 487 F.3d 945, 959 (D.C. Cir. 2007) (dictionary definition of "circumstances").

In addition, if Congress "has directly spoken to the precise question at issue [and] the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984). An agency may not adopt a statutory interpretation that contravenes the plain meaning of the statute it is purporting to interpret. *See, e.g., Landstar Express America, Inc. v. FMC,* 569 F.3d 493, 498 (D.C. Cir. 2009) (rejecting agency interpretation contrary to the "plain language of § 19 of the Shipping Act"). *See also Abbott Labs. v. Young*, 920 F.2d 984, 985 (D.C. Cir. 1990) (rejecting agency interpretation of a statutory provision as ""linguistically infeasible").

The interpretation advanced in the *Notice* is not only sound policy, it is, for the reasons stated in the *Notice* and discussed below, required by the statute. If the Commission does not restore the proper interpretation of the statute on its own, a reviewing court surely will do so if presented with the issue.
As set out in the *Notice,* for decades the Commission held that to violate the Shipping Act a practice cannot be "an isolated or 'one shot' occurrence," but rather must be "habitually performed and impl[y] continuity," and be "positively established" by the regulated entity and imposed on the passenger/cargo

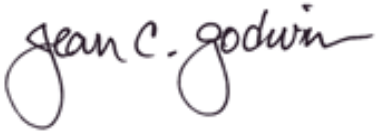
interest in a "normal, customary, often repeated, systematic, uniform, habitual, continuous manner." 83 Fed. Reg.at 45,369 (quoting cases). These holdings were consistent with the ordinary meaning of the word "practice," which as noted above, refers to "repeated or customary action" or "the usual way of doing something." In *Kobel v. Hapag-Lloyd*, A.G., 32 S.R.R. 1720 (2013), however, the Commission affirmed a initial decision holding that discrete conduct with respect to a particular shipment, if determined to be unjust or unreasonable, could be a violation of §41102(c) regardless of whether that conduct represents a respondent's practice or regulation.

Kobel was issued over a dissent, elaborated on in *Bimsha International v. Chief Cargo Services, Inc.*, 32 S.R.R. 1861 (2013), pointing out that this result is inconsistent with the statutory language, the legislative history, and Commission precedent. As noted above, the result in *Kobel*, which the proposed rule seeks to overturn, was improper as a matter of law because it is inconsistent with the plain meaning of the statute. Moreover, even if it were a permissible construction of the statute, which it is not, there are sound policy reasons that would counsel rejection of the result. As the proposal notes, interpreting 41102(c) to mean that a single failure to fulfil a legal obligation could constitute a violation of the provision would make the Act "duplicative of every other statutory and common law maritime remedy" and "would frustrate Congressional intent in enacting different statutory schemes." 83 Fed. Reg. at 45,371. COGSA, for example, provides a one-year period to file suit for cargo damage, but allowing a single violation to constitute an unreasonable practice would provide an additional two years to file with the FMC, and allow the possibility of attorney's fees. Cases like *Kobel* and *Bimsha* severely distort liability assessments at the complaint stage of proceedings and embolden potential complainants to bring claims at the FMC that, absent the notion that a one-off event could be found to be an unlawful practice. would likely be settled commercially.

Reaffirming the Commission's prior position on this issue will not leave claimants without remedies. As the proposal notes, they will have access to "full and adequate remedies under numerous legal proscriptions including common law, state statutes, admiralty law, and other federal statutes." *Id.* at 45,372. This result is again consistent with the Shipping Act itself, which directs simple breach of contract claims to the courts, not the Commission. The *Kobel* precedent, by contrast, invites complainants to dress up simple a breach of contract action as an unjust and unreasonable practice in order to evade the requirement that they proceed in the courts.

We appreciate the Commission's consideration of these comments.

Respectfully submitted,



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