

**BEFORE THE
FEDERAL MARITIME COMMISSION**

FMC DOCKET NO. 22-19

**REQUEST FOR INFORMATION
OSRA 2022 – SECTION 18**

COMMENTS OF THE WEST COAST MTO AGREEMENT

The West Coast MTO Agreement and its members (“WCMTOA”) submit their comments in response to the Request for Information (“RFI”) issued by the Federal Maritime Commission (“FMC” or “Commission”) with respect to the possible issuance of an emergency order pursuant to Section 18 of the Ocean Shipping Reform Act of 2022 (“OSRA 2022”), which Request appeared in the *Federal Register* on August 15, 2022 (87 *Fed. Reg.* 50085).

For the reasons set forth below, WCMTOA opposes the issuance of an emergency order.

A.

Interest of WCMTOA

The members of WCMTOA are all marine terminal operators (“MTOs”). As such, they would be directly and substantially affected by any emergency order issued by the Commission applicable to ports in southern California.

B.

Summary of WCMTOA's Position

WCMTOA opposes the issuance of an emergency order. The questions posed by the RFI are vague and based on erroneous assumptions. Input on these questions cannot serve as a legally defensible basis for an emergency order. Moreover, an emergency order would not address supply chain congestion in any meaningful way.

C.

Response to Specific Questions

The RFI seeks input on three questions. WCMTOA's response to each is set forth below.

Question #1: Whether congestion of the carriage of goods has created an emergency situation of a magnitude such that there exists a substantial, adverse effect on the competitiveness and reliability of the international ocean transportation supply system. If so, please explain why and provide examples or data to support your view. If not, please explain why and provide examples or data to support your view.

Response: The foregoing question seeks input on the impact of congestion on the competitiveness and reliability of the international ocean transportation supply system. WCMTOA assumes that the portion of the question relating to competitiveness relates to competitiveness among

participants within the international ocean transportation supply system, rather than the competitiveness of the system itself.

The Commission has already answered this question. In the final report in FMC Fact Finding Investigation No. 29, which was adopted by the Commission, the Fact Finding Officer wrote:

Based on information and research gathered during this second phase, the Fact Finding Officer has concluded that, using established antitrust analytical tools also used by our sister competition agencies (the Department of Justice and the Federal Trade Commission) - and notwithstanding certain misconceptions - the current market for ocean liner services in the Trans-Pacific trade is not concentrated and the Trans-Atlantic trade is only minimally concentrated. Competition among ocean common carriers, among the three major alliances and among the members in each of these alliances, is vigorous. The market for ocean services remains highly contestable, particularly in the Trans-Pacific trade.

Final Report, p. 11 (footnotes admitted). There have been no suggestions anywhere that competition among marine terminal operators has been impacted by congestion. Accordingly, the only possible answer to this portion of the first question is that congestion has had no impact whatsoever on competitiveness in the international ocean transportation supply system.

With respect to the second portion of the question, the impact of congestion on the reliability of the international ocean transportation supply

system, the answer to the question depends on the aspect of reliability on which one chooses to focus.

There have undeniably been problems with congestion beginning at some point in 2020 and continuing in one degree or another to the present. These problems include congestion at marine terminals, warehouses, and other inland facilities; vessel delays; and a shortage of rail and truck power. These problems have decreased the “reliability” of the international ocean transportation supply chain in terms of the speed and predictability of cargo delivery.¹

However, in another sense, the pandemic has demonstrated the resiliency and reliability of the international ocean supply chain. At various points during the pandemic, crews were forced to remain on vessels far longer than normal due to Covid-related travel restrictions; marine terminals, warehouses, and other cargo handling facilities experienced decreased productivity due to worker illness and/or social distancing and

¹ Remarks of Daniel B. Maffei Chairman, Federal Maritime Commission To American Association of Port Authorities (March 30, 2022)(“In trying to process all the cargo, the ports set new records of productivity but quickly ran into blocks inland in the supply chain – shortages of workers, equipment, and warehouse space. Much of the reason why there are lines of ships is not due to ports not being able to unload the ships fast enough but that there is no place to put the cargo because it is not being picked up and moved out of the ports fast enough.”)

sanitation measures; and rail and motor carriers experienced worker shortages.² Despite all of these challenges, many of which were also experienced at the non-U.S. end of the international ocean supply chain, the supply chain was still able to move record volumes of cargo, owing in part to the fact that U.S. marine terminals remained open throughout the entirety of the pandemic to support the flow of cargo to meet consumer demand.

This reality has been acknowledged by the FMC Commissioners. For example, the FMC Chairman said:

America's ports are NOT broken or, by any historical measure, inefficient. In fact, the ports are processing even more cargo than ever before. Coast to coast, almost every major port is breaking records. In Los Angeles alone, 2021 smashed its previous record for most containers handled by 13%. That translates into 1.5 million more containers than the biggest pre-COVID year and that does not include the neighboring port of Long Beach which has registered similar numbers meaning our largest port complex has processed close to three million containers MORE than ever before."

Thanks to our port authorities, terminal operators, and waterfront labor including the ILWU and ILA, America processed more cargo through its ports in 2021 than ever before in the nation's history and they did this despite the lack of many needed infrastructure improvements and during a global pandemic. That doesn't sound broken to me.

Remarks of Daniel B. Maffei Chairman, Federal Maritime Commission To American Association of Port Authorities (March 30, 2022).

² See, e.g., Final Report in FMC Fact Finding Investigation No. 29, p. 41, n. 65.

The FMC Chairman made a similar statement when testifying before Congress:

In fact, it would be wrong not to acknowledge the fact that it has been truly remarkable how productive our ports have been. From Southern California to the New York/New Jersey port complex; from Seattle to Savannah, Gulfport to Norfolk, Oakland to Miami, and so many more, America's ports have handled safely and efficiently millions more containers of cargo than ever before in U.S. history. The record numbers of throughput are a tribute to the companies and workers that have never stopped and instead have intensified their efforts, even in the worst days of COVID.

Statement of Daniel B. Maffei, Chairman, Federal Maritime Commission, Before the U.S. Senate Committee on Commerce, Science, and Transportation (March 3, 2022).

Without minimizing the problems that have occurred, any analysis of the performance of the international ocean transportation supply system should be balanced, and acknowledge the successes of the system rather than focusing solely on the difficulties it has experienced.

Question #2: Whether an emergency order pursuant to Section 18 of OSRA 2022 would alleviate or improve such an emergency situation – and if so, why, and if not, why not.

Response: WCMTOA believes that there is an insufficient basis to conclude that an emergency order would alleviate or improve congestion.

Accordingly, WCMTOA is of the view that an emergency order would not improve the situation.

As an initial matter, all the public knows about any emergency order is that it would require some or all ocean common carriers or marine terminal operators to share directly with relevant shippers, rail carriers, or motor carriers, information relating to cargo throughput and availability. The difficulty with this question is that the substance of any potential emergency order remains vague and undefined, and the following critical questions remain unanswered:

- What constitutes a “relevant” shipper, rail carrier or motor carrier?
- Exactly what data relating to cargo throughput and availability would have to be shared?
- When would the data have to be shared?
- How would the data be shared?
- To whom would the data be available?
- Could persons providing data be liable for violating 46 U.S.C. §41103?

Without the answers to the foregoing questions, it is not possible to conclude that a forced sharing of data would eliminate or alleviate congestion. Any person claiming that the sharing of undefined data with unknown persons on an unknown timetable via an unknown means would eliminate or alleviate congestion would appear to be making a number of unsupported assumptions.

In addition to a lack of clarity with respect to the issues identified above, OSRA 2022 and the RFI suffer from a fatal flaw in that they assume congestion is attributable to a lack of data sharing, and therefore can be remedied by forcing marine terminal operators and ocean carriers to share information. As explained below, this assumption is incorrect.

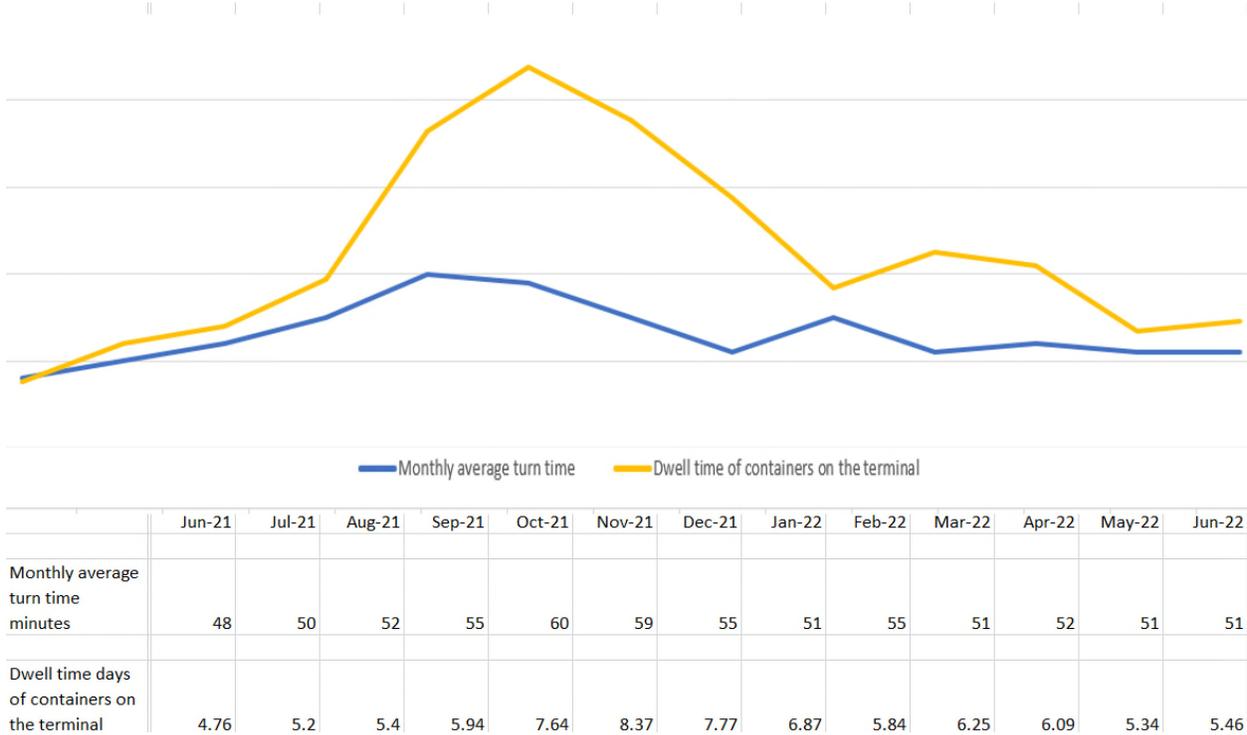
Much of the congestion is attributable not to a lack of data, but to a lack of warehouse space, warehouse workers, trucks, truck drivers, rail cars, and chassis:

Our seaports are being much more productive and handling much more cargo volumes. The biggest challenge is not to get the ocean carriers and seaports to carry and process more cargo, but how to address and resolve issues in the U.S. domestic networks and infrastructure that are even more severe limitations on the supply chain's capacity. The availability of intermodal equipment, warehouse space, intermodal train service, trucking, and enough workers in each of those sectors, remain challenges to getting more cargo off our ports and to destination with more certainty and reliability.

Testimony of Daniel B. Maffei, Chairman, Federal Maritime Commission
Before the Subcommittee on Coast Guard & Maritime Transportation, House
Committee on Transportation & Infrastructure (April 27, 2022).

The nature of the problem is also demonstrated by an analysis WCMTOA performed using the Pacific Merchant Shipping Association's San Pedro Bay Dwell Time Report (which can be found at www.pmsaship.com).

This report measures the length of time an import container remains on the ocean terminal after discharge from the vessel. When the dwell time of import containers is compared to ports-wide trucker turn times, it suggests that the failure of consignees to pick up containers in a timely manner is a significant cause of congestion in the San Pedro Bay Ports.



The correlation between dwell times and turn times is significant because trucker turn times can be used as a measure of terminal productivity. What

the foregoing graph demonstrates is that as container dwell time increases on the terminal, terminal productivity decreases.

If containers are not picked-up, there is nothing the container terminal operators can do to mitigate the consequences of containers remaining on the terminal – they cannot add land to their terminals, they cannot stack containers to unsafe heights, and they cannot tell ocean carriers that ships cannot call at the terminal. In short, the productivity of a critical link in the supply chain – the marine terminal – is dependent on the performance of other links in the supply chain (e.g., the rail carrier, the motor carrier, and the receiving facility of the importer). Requiring marine terminal operators to share additional data will not create more rail cars, more truck drivers, more chassis, or more warehouses/warehouse workers. Any meaningful approach to resolving supply chain congestion must include these other elements of the supply chain. Efforts to “fix” the supply chain that are aimed solely at marine terminals and ocean carriers ignore critical links in the supply chain and will be of limited effectiveness at best.

The third fatal flaw in the question posed by the RFI is that it assumes a lack of data is the cause of supply chain congestion. Nothing could be further from the truth. In this regard, container terminal operator members of WCMTOA currently provide a vast amount of data and information to the

various participants in the supply chain. It is typical for a container terminal operator to provide U.S. importers and exporters ("BCOs") and the motor carriers picking up and delivering their cargo with data such as:

- Container number
- Availability Status
- Hold Information such as:
 - Demurrage Due
 - Demurrage Amount
 - CBP status
 - Inspection Fees Due
 - Ocean carrier holds/Freight Due
 - CTF Hold
 - TMF Hold
- Unload date
- Last Free Day
- Appointment system information and detail
- Yard spot/location
- Discharge Time
- Position – Wheeled or Grounded
- Container size/type
- Vessel/voyage
- Vessel discharge
- In Gate
- Out Gate
- Gate Schedules
- Booking number
- Booking Inquiry
 - Quantity
 - Dispatched
 - Received
 - Loaded
- Vessel cut offs
- Chassis inventory
- Empty Receiving Details
- Export First Receiving Information
- Gate Schedules

Hazardous detail
Seal no.
Trucker SCAC

The foregoing information is made available through the marine terminal operators' websites and/or application programming interfaces ("APIs").

In addition to the foregoing information, additional information that can be found on terminal websites includes:

Chassis status (Low/Sufficient/etc.)
Gate Hours/Schedule
Import Appointment Capacity
Booked Appointments
Appointment fulfillment
Terminal Map
Terminal Rules and Procedures
Turn times
Vessel Schedules
Vessel ETA
Vessel ATA
Vessel ETD
Vessel ATD

On top of the information made available to BCOs and motor carriers, the marine terminal operator members of WCMTOA also send the railroads information and data that includes load list detail with associated container detail.³

³ In addition to the data made available to BCOs, motor carriers, and railroads, the marine terminal operators also make operational information available to their landlord port authorities and to the Commission.

Given the amount of data already being provided to those categories of entities that would apparently receive any data mandated by an emergency order, it is not clear what additional data the Commission would have marine terminal operators provide. Even more importantly, it is far from clear that requiring marine terminal operators to provide unidentified additional data on an unknown timetable via an unknown means to an unknown audience would address supply chain congestion in any meaningful

way. In light of this, WCMTOA submits that there is an insufficient basis for the Commission to issue an emergency order.

Question #3: The appropriate scope (duration and geographic) of such an emergency order, if the Commission were to issue such an order and the basis for that scope.

Response: For the reasons set forth above, WCMTOA opposes the issuance of an emergency order. Accordingly, it does not believe that any order should be issued and does not address this question.

Conclusion

For the reasons set forth above, the Commission should not issue an emergency order.

Respectfully submitted,

WEST COAST MTO AGREEMENT

By: 
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September 14, 2022