CONSUMER BRANDS ASSOCIATION

Re: Docket No. 22-24, Definition of Unreasonable Refusal to Deal or Negotiate

Industry Background and Overview

The Consumer Brands Association champions the industry whose products Americans depend on every day, representing more than 1,700 iconic brands. From household and personal care to food and beverage products, the consumer packaged goods industry plays a vital role in powering the U.S. economy, contributing $2 trillion to U.S. gross domestic product and supporting more than 20 million American jobs.

Consumer Brands appreciates the opportunity to provide comments to The Federal Maritime Commission on defining unreasonable refusal to deal or negotiate with respect to vessel space accommodations provided by an ocean common carrier. Accounting for one-fifth of total U.S. freight, the consumer packaged goods industry is a major user of all freight modes including maritime shipping for both import and export.

Swift and decisive implementation of the Ocean Shipping Reform Act's provisions will bolster supply chains and reduce current friction points that impede the flow of commerce. Consumer Brands and its member companies believe that the current lack of definition regarding unreasonable refusal negatively impacts overall performance, fairness and efficiency. Consumer Brands strongly supports the Commission's proposed rulemaking and attempts to level the playing field for all shippers.

Uniformity and consistency in the application of those regulations and promulgated definitions represents an opportunity to correct marketplace dysfunction and allow shipping services and supply chains to work as intended. The challenges associated with defining and identifying unreasonable refusal also stress the need for greater shared visibility across the supply chain, highlighting the need for information sharing to more accurately assess performance, carrier behavior and to lay a foundation for future data initiatives such as the creation of a national freight data portal.

Example of Unreasonable Refusal Challenges

Over the last several years, U.S. shippers frequently reported instances where ocean carriers rejected export containers in favor of sending empty containers to China or other shipping markets. The lack of shipping options, unreasonable refusal to deal and container scarcity imperiled U.S. shipping interests, especially for those sectors with perishable products. Agricultural producers were especially impacted, as well as adjacent industries like food, beverage, household and personal care manufacturing.

Member companies reported frequent and compelling challenges securing shipment bookings and working with ocean common carriers. Often, the challenges are not as obvious as sending ships back empty. In many cases, these problems stem from the lack of shared information and shippers being beholden to ocean carrier directives. "Following the implementation of OSRA and impacts of the pandemic, ocean common carriers require U.S. exporters to provide a 12-week shipment forecast to negotiate vessel space," said one member company executive. "Ocean common carriers will not negotiate with exporters that cannot ship 3+ FEU (forty-foot equivalent) per vessel string consistently every week. If allocation is secured by an exporter, and the exporter does not meet the allocated minimum, the ocean common carrier cancels the allocation. Ocean common carriers cancel bookings made by U.S. exporters if the exporter has not pulled an empty container for the booking within 48 hours of the cutoff. The problem is that the receiving windows are shifting so fast, exporters are missing the cutoff because they change within those 48 hours and the systems are not updated fast enough. These requirements are unreasonable for U.S. exporters because the ocean common carrier published vessel cutoffs and receiving windows fluctuate multiple times with little notice for exporters to react, often leading to rolled bookings or missed cutoffs. These conflicting requirements are making it impossible to negotiate in good faith."

Members further emphasized that the proposed rulemaking's success hinges on the criteria used and clarity for various terms and definitions. Some companies have never reviewed a comprehensive export strategy; they are concerned that an overly broad definition could limit the meaning and impact of such a strategy.

Definition Suggestions and Next Steps

In developing definitions as required under the Ocean Shipping Reform Act, Consumer Brands encourages the Commission to develop a framework approach to assessing what constitutes unreasonable refusal to deal or negotiate, as well as other unreasonable ocean carrier behaviors that hurt shippers and consumers. This framework should be based on a set of plain-language criteria or properties that allow shippers and carriers to easily assess what constitutes as "unreasonable." The goal in all regulation and definition should be to reduce instances of unfair practices while also reducing the volume of cases and filings brought before the Commission.

As most shippers do not have insight to real-time or first-hand information about whether space is or is not available on a ship, the burden of proof cannot fall on shippers in justifying claims of unfair treatment. Shippers "know it when they see it." First-hand narrative experience and patterns of observed behavior must serve as an adequate basis to make an initial determination under the criteria and to force carriers to submit detailed, data-based evidence in response to claims of unfairness. We also encourage the Commission to offer shippers and carriers instructions on how to utilize the criteria and how to take steps individually to settle disputes. Well-written definitions and rulemaking in this space should preserve Commission time and energy, making it easier – not harder – to determine whether violations occurred and their underlying basis.

Critically, the lack of direct information or data available to shippers to substantiate cases offers additional support for the creation of a national freight data portal or similar information technology infrastructure. Data sharing not only stands to enhance system performance but provide the basis for greater accountability between supply chain stakeholders and serve as the basis for regulatory enforcement.

While Consumer Brands believes that the requirement of meeting the elements proposed in the NPRM is the correct avenue to uniformity, the burden of proof cannot fall on shippers who do not truly know vessel availability. The current language is broad and ambiguous leaving a gray area for carriers to potentially avoid repercussion. In conjunction with meeting the three-element prima facie case for a complainant, we suggest that there be an addition of a time restrictive element for carriers to counter a complaint and to prove why their refusal was not unreasonable. Because many shippers are moving perishable products, it is essential for disputes to be resolved quickly. A dispute mechanism incentivizing participation in the process and rapid response would be well received by the shipping community and would be consistent with the goals of the NPRM and the Ocean Shipping Reform Act.

Consumer Brands appreciates the opportunity to provide the Commission with input on defining an unreasonable refusal to deal or negotiate. The consumer packaged goods industry believes strongly in the potential opportunities afforded through clear rule-making and we encourage the Commission to continue proper regulation and enforcement to promote a self-governing and consistently operating marketplace. Consumer Brands and its member companies look forward to working with the Commission to finalize its definition of unreasonable and its suggested set of criteria. We are encouraged by the Commission's work to date and willingness to hear from shipping stakeholders, and encourage the Commission to continue working with its peers across the Department of Transportation, Department of Commerce and other impacted agencies on the use of data and information sharing tools to enhance supply chain visibility and overall fluidity.

Sincerely,

Tom Madrecki
Vice President, Supply Chain and Logistics
Consumer Brands Association