

## **Fact Finding Investigation No. 29**

### **Interim Recommendations**

The Fact Finding Officer proposes the following interim recommendations to the Commission. These recommendations are aimed at minimizing barriers to private party enforcement of the Shipping Act, clarifying Commission and industry processes, encouraging shippers, truckers, and other stakeholders to assist Commission enforcement efforts, and bolstering CADRS' ability to facilitate fair and fast dispute resolution. The Fact Finding Officer also fully supports the Commission's recently announced Vessel-Operating Common Carrier Audit Program and BOE's continuing investigations into unreasonable demurrage and detention practices. The Fact Finding Officer may, at an appropriate time, present additional, final recommendations.

#### **I. Minimizing Barriers to Private Party Action**

One way the Commission has traditionally enforced the prohibitions in Chapter 411 of Title 46 of the United States Code is by adjudicating private party complaints under 46 U.S.C. § 41301 and awarding reparations for violations. Despite criticism of carrier and terminal practices since Fact Finding No. 29 was initiated, few private parties have filed complaints seeking reparations. While there may be many reasons for the apparent disconnect, it appears that shipper (and trucker) concerns about retaliation, litigation costs (both in time and money), and attorney fee liability are important disincentives to private party enforcement of Chapter 411. The Fact Finding Officer recommends the following to minimize barriers to, or incentivize, private party efforts to deter unlawful conduct.

**Recommendation 1:** Amend 46 U.S.C. § 41104(a)(3) to broaden the anti-retaliation provision so that it applies to all regulated entities and protects anyone who complains about potentially unlawful conduct to the Commission.

There is reason to believe that shippers, their agents, and their contractors are disinclined to file private party complaints or provide information to Commission investigators due to fears of retaliation. Although 46 U.S.C. § 41104(a)(3) prohibits retaliation, it only applies to retaliation by carriers against “shippers.” It does not apply to retaliation by other regulated entities, and it does not apply to retaliation against non-shippers, such as truckers or others working on behalf of shippers. Additionally, the anti-retaliation provision appears to have been interpreted narrowly to focus on preventing carrier conferences from stifling competition from independent carriers. *See Fed. Mar. Bd. v. Isbrandsten*, 356 U.S. 481, 491, 495 (1958).

The Fact Finding Officer believes that Congress should amend the statute to better reflect the different types of entities in the supply chain who could be subject to retaliation for complaining to the Commission about unlawful practices. The Fact Finding Officer also urges Congress to make clear that 46 U.S.C. § 41104(a)(3) is not limited to protecting competition among carriers. Rather, the statute should be aimed at also protecting the ability of shippers and others to complain to the Commission about potentially unlawful conduct free from retaliatory fears. The Fact Finding Officer recommends presenting this amendment to Congress.

Current Language of 46 U.S.C. § 41104(a)(3)	New Language
A common carrier, either alone or in conjunction with any other person, directly or indirectly, may not – retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason.	Delete 46 U.S.C. § 41104(a)(3) and create new prohibition as 46 U.S.C. § 41102(d).  A common carrier, <u>marine terminal operator, or ocean transportation intermediary</u> , either alone or in conjunction with any other person, directly or indirectly, may not – retaliate against a shipper, <u>a shipper’s agent, or a motor carrier</u> by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly

	discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason.
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**Recommendation 2:** Amend 46 U.S.C. § 41305(c) to authorize the Commission to order double reparations for violations of 46 U.S.C. § 41102(c).

Another potential disincentive to private party complaints is the cost of litigating against carriers or marine terminal operators, especially as compared to the amount of “actual injury” at issue. It might not make sense for a shipper to file a private party complaint to recover hundreds or thousands of dollars of unlawful demurrage or detention if it will cost significantly more to obtain a reparations award. Congress can change these incentives, and deter unlawful demurrage and detention practices, by amending 46 U.S.C. § 41305(c) to add 46 U.S.C. § 41102(c) to the list of prohibitions for which double reparations are available. The Fact Finding Officer recommends presenting this amendment to Congress.

Current Language of 46 U.S.C. § 41305(c)	New Language
On a showing that the injury was caused by an activity prohibited by section 41102(b), 41104(3) or (6), or 41105(1) or (3) of this title, the Commission may order the payment of additional amounts, but the total recovery of a complainant may not exceed twice the amount of the actual injury.	On a showing that the injury was caused by an activity prohibited by section 41102(b), <u>41102(c)</u> , 41104(3) or (6), or 41105(1) or (3) of this title, the Commission may order the payment of additional amounts, but the total recovery of a complainant may not exceed twice the amount of the actual injury.

The Fact Finding Officer further notes that if this change is enacted, the Commission should then develop guidance about under what circumstances it would order “additional amounts” for violations of § 41102(c) [e.g., for certain types of cases (demurrage and detention only or other types of cases), or based on certain conduct (bad faith, willfulness)].

**Recommendation 3:** Issue a policy statement on retaliation, attorney fees, and representational complaints

The Fact Finding Officer also recommends that the Commission issue a policy statement on three areas related to private party complaints. First, the Commission should provide guidance on 46 U.S.C. § 41104(a)(3) – the current anti-retaliation prohibition. As noted above, the statute prohibits a common carrier from retaliating against a shipper by “refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or filed a complaint, *or for any other reason.*” (emphasis added). The Commission should interpret “any other reason” to include bringing a dispute to CADRS, commenting on a Commission rulemaking, or participating in Commission investigatory or enforcement efforts.

Second, the Commission should provide guidance on the standard for recovering attorney fees in private party complaints. The Howard Coble Coast Guard and Maritime Transportation Act of 2014, Public Law No. 113-281, removed the ability of successful private party complainants to automatically receive attorney fees along with reparations. Instead, it gave the Commission the discretion to award fees to either a prevailing complainant or a prevailing respondent. Since that time, shippers have expressed concern that if they file a private party complaint and are unsuccessful, they will be liable for a carrier’s or marine terminal operator’s attorney fees. The Commission should explain that a private party who brings an unsuccessful complaint is not automatically required to pay the attorney fees of a carrier or terminal respondent. Rather, the Commission has held that fees will generally only be awarded where cases are frivolous, arguments are objectively unreasonable, or parties engage in bad faith or other vexatious litigation behavior. *See, e.g., Logfret, Inc. v. Kirsha, B.V.*, 2 F.M.C.2d 110, 114 (FMC 2020).

Third, the Commission should reiterate that any person may file a complaint alleging a Shipping Act violation, including shippers' associations and trade associations. Although the nature of the complainant might affect the relief that is available, Article III's representational (or associational) standing requirements do not apply to complaints before the Commission and do not bar private party complaints by organizations to protect the interests of their members.

## **II. Clarifying Commission and Industry Processes**

Throughout the fact finding, stakeholders demonstrated difficulty differentiating between Commission processes for addressing their concerns. There was confusion, for instance, about the differences between small claims (informal) and non-small claims private party complaints, between private party complaints and "complaints" to BOE (i.e., allegations of potential violations) and "complaints" to CADRS (requests for dispute resolution assistance). The Fact Finding Officer recommends clarifying these processes by revising the Commission website, making more intuitive the methods for contacting BOE and CADRS, and holding a webinar explaining the differences between Commission processes.

**Recommendation 4:** Revise the Commission's website to: (a) more clearly distinguish between the processes for providing information to BOE, requesting assistance from CADRS, and filing a small claims for or non-small-claims complaint; and (b) make communications more intuitive for website visitors.

The Commission website should more clearly explain, in one place, the differences between private party complaints, BOE investigation and enforcement, and CADRS dispute resolution. It should also provide information on how to provide "tips" or leads" to BOE or the Area Representatives, including which email address to use or phone number to call (including, for instance, a dedicated "tip" line for relaying information to BOE), guidance on what information is most helpful to BOE, notice about what action from BOE might or might not take

and how the individual providing that information may be involved. CADRS-related contact information could also be displayed more prominently on the website. The Commission should align its dedicated email addresses and their names in a way that is more intuitive to the shipping public.

**Recommendation 5:** Hold a webinar to explain Commission processes.

To combat existing confusion about processes at the Commission, the Fact Finding Officer also recommends holding a webinar explaining the differences between contacting CADRS or BOE and filing a or small claims or non-small-claims complaint. The webinar could discuss the potential outcomes of each path, the timeframes associated with them, and how to start on each path.

**Recommendation 6:** Issue an ANPRM seeking industry views on whether the Commission should require common carriers and marine terminal operators to include certain minimum information on or with demurrage and detention billings and adhere to certain practices regarding the timing of demurrage and detention billings.

The Fact Finding Officer has continuously expressed concerns about demurrage and detention billing practices. Although the Commission declined to prescribe specific billing practices in the interpretive rule on demurrage and detention, 85 Fed. Reg. at 29661, it nonetheless referred to the content and clarity of practices and regulations regarding demurrage and detention billing in the final rule, 46 C.F.R. § 545.5(d). Since that time, the Surface Transportation Board adopted a final rule requiring Class 1 rail carriers to include “certain minimum information on or with demurrage invoices and provide machine-readable access to the minimum information.” Final Rule: Demurrage Billing Requirements, 86 Fed. Reg. 17735 (Apr. 6, 2021). The Fact Finding Officer recommends that the Commission issue an Advanced Notice of Proposed Rulemaking to assess whether a similar rule is appropriate in the ocean shipping

context, because, as a commenter noted in response to a previous Commission rulemaking, to understand a charge, it must be clear “what is being billed and by whom.” 85 Fed. Reg. at 29661 n.373 (quoting comments by National Customs Broker & Forwarders Ass’n of Am., Inc.).

### **III. Encouraging Assistance with Commission Investigation**

The Commission directly enforces the prohibitions in Chapter 411 of Title 46 by bringing enforcement actions (orders of investigation) under 46 U.S.C. § 41302(a) and assessing civil penalties for violations. For the Commission to exercise its prosecutorial powers, however, it needs stakeholders to participate in all stages of the enforcement process. On the front end, this means providing Commission investigatory staff with specific, accurate, and verifiable factual allegations, tips, and leads about potentially unreasonable practices or other violations. On the back end, the Commission needs stakeholders who are willing to support enforcement actions by signing sworn statements, and, if necessary, testifying in Commission proceedings. As noted above, one way to encourage this participation is to bolster and clarify statutory anti-retaliation protections.

Additionally, Congress can make enforcement more effective for stakeholders, encourage them to participate in investigatory efforts, and deter unlawful conduct by:

<p><b>Recommendation 7:</b> Amend 46 U.S.C. §§ 41109 and 41309 to authorize the Commission to order refund relief in addition to civil penalties in enforcement proceedings.</p>
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Under the current statutory framework, in an enforcement proceeding, the Commission can assess a civil penalty for a violation of a prohibited act. 46 U.S.C. §§ 41107(a), 41109. The penalty goes to the United States Government, not injured parties. § 41107(a). The Commission does not have the authority in an enforcement proceeding to issue refunds or restitution or similar remedies. At most, an injured party could file a private party complaint and seek

reparations based on the Commission already having found a violation in the enforcement proceeding, if the statute of limitations has not run out. The statute of limitations for private - party reparations is three years; the statute of limitations for a civil penalty is five years. *See* 46 U.S.C. §§ 41301(a), 41109(e).

In sum, an injured shipper or trucker who works with Commission to investigate and prosecute unlawful conduct is not guaranteed any recovery for injury it may have suffered from the conduct. The Fact Finding Officer believes that granting the Commission the discretionary authority to order refunds in enforcement proceedings in addition to civil penalties, or in lieu of civil penalties, would incentivize parties to work with Commission investigatory staff. The potential language provided below is one option for reaching this result and permits private parties to enforce refund orders on their own, as they can with reparation orders in private party cases. Civil penalties would still be collected by the Attorney General under § 41109(g).

The Fact Finding Officer recommends presenting this amendment to Congress.

Current Language of 46 U.S.C. §§ 41109 and 41309	New Language
<p>41109(a) General authority. Until a matter is referred to the Attorney General, the Federal Maritime Commission may, after notice and opportunity for a hearing, assess a civil penalty provided for in this part. The Commission may compromise, modify, or remit, with or without conditions, a civil penalty.</p> <p>...</p> <p>(c) Exception. A civil penalty may not be imposed for conspiracy to violate section 41102(a) or 41104(1) or (2) of this title [46 USCS § 41102(a) or 41104(1) or (2)] or to</p>	<p>(a) General authority. Until a matter is referred to the Attorney General, the Federal Maritime Commission may, after notice and opportunity for a hearing, assess a civil penalty provided for in this part <u>or, in addition to or lieu of a civil penalty, order the refund of money</u>. The Commission may compromise, modify, or remit, with or without conditions, a civil penalty <u>or refund of money</u>.</p> <p>...</p> <p>(c) Exception. A civil penalty <u>or refund of money</u> may not be imposed for conspiracy to violate section 41102(a) or 41104(1) or (2) of</p>

<p>defraud the Commission by concealing such a violation.</p> <p>...</p> <p>(e) Time limit. A proceeding to assess a civil penalty under this section must be commenced within 5 years after the date of the violation.</p> <p>(f) Review of civil penalty. A person against whom a civil penalty is assessed under this section may obtain review under chapter 158 of title 28.</p> <p>****</p> <p>§ 41309(a) Civil action. If a person does not comply with an order of the Federal Maritime Commission for the payment of reparation, the person to whom the award was made may seek enforcement of the order in a district court of the United States having jurisdiction over the parties.</p> <p>(b) Parties and service of process. All parties in whose favor the Commission has made an award of reparation by a single order may be joined as plaintiffs, and all other parties in the order may be joined as defendants, in a single action in a judicial district in which any one plaintiff could maintain an action against any one defendant. Service of process against a defendant not found in that district may be made in a district in which any office of that defendant is located or in which any port of call on a regular route operated by that defendant is located. Judgment may be entered for any plaintiff against the defendant liable to that plaintiff.</p> <p>....</p>	<p>this title [46 USCS § 41102(a) or 41104(1) or (2)] or to defraud the Commission by concealing such a violation.</p> <p>...</p> <p>(e) Time limit. A proceeding to assess a civil penalty <u>or order a refund of money</u> under this section must be commenced within 5 years after the date of the violation.</p> <p>(f) Review of civil penalty. A person against whom a civil penalty is assessed <u>or who is ordered to refund money</u> under this section may obtain review under chapter 158 of title 28.</p> <p>****</p> <p>§ 41309(a) Civil action. If a person does not comply with an order of the Federal Maritime Commission for the payment of reparation <u>or refund of money</u>, the person to whom the award was made <u>or to whom the refund of money was ordered</u> may seek enforcement of the order in a district court of the United States having jurisdiction over the parties.</p> <p>(b) Parties and service of process. All parties in whose favor the Commission has made an award of reparation <u>or refund of money</u> by a single order may be joined as plaintiffs, and all other parties in the order may be joined as defendants, in a single action in a judicial district in which any one plaintiff could maintain an action against any one defendant. Service of process against a defendant not found in that district may be made in a district in which any office of that defendant is located or in which any port of call on a regular route operated by that defendant is located. Judgment may be entered for any plaintiff against the defendant liable to that plaintiff.</p> <p>....</p>
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The Fact Finding Officer further notes that if these changes are enacted, the Commission should then develop guidance about under what circumstances it would order a refund of money in an enforcement proceeding [e.g., for certain types of cases, based on the amount of injury suffered, the relative size or number of victims, etc.].

#### **IV. Bolstering CADRS**

Finally, CADRS plays a vital role in assisting stakeholders resolve disputes without resort to litigation. In doing so, CADRS serves as a liaison between different groups and educates them about their responsibilities. The Fact Finding Officer believes it is important to ensure that CADRS has sufficient resources to perform these functions. Further, the Fact Finding Officer supports the Chairman's efforts to address export challenges, including enhancing Commission engagement with export-related issues.

<b>Recommendation 8:</b> Designate an Export Expert in CADRS.
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To that end, the Fact Finding Officer recommends dedicating staff to export-related issues, which are similar, but not identical, to issues faced by U.S. importers. Not only would this export-focus allow CADRS to better handle exporter issues, but an export expert could help, as Chairman Maffei has explained, along with the National Shipper Advisory Board, to keep other parts of the Commission apprised of issues particular to exports. Additionally, the Fact Finding Officer will continue to advocate that carrier executives work with directly CADRS to solve problems.