

NITL Ocean Transportation Committee Meeting Highlights
Julie Alsup, International Paper, Chair
January 21, 2020

Featured Speakers:

The Honorable Louis Sola, Commissioner, Federal Maritime Commission

Updates from the FMC

Key takeaways:

- Commissioner Sola joined the FMC in January 2019 and has extensive [background](#) in the maritime industry.
- Commissioner Sola shared his expectations within his role as commissioner and priorities for the coming year.
- The Commission welcomed a new commissioner in December 2019, [Carl Bentzel](#). The Commission now has a full complement of five commissioners.
- Commissioner Sola appreciates the work that industry does to inform the Commission and seek workable solutions for all who participate toward efficient movement of goods via ocean freight transportation.
- He highlighted recent and forthcoming decisions by the Commission, including the proposed [Interpretive Rule](#) on Detention and Demurrage
 - The commission has been pleased by the number of comments received, and thanks NITL for submitting comments
 - The commission continues to review; a planned timeline for response wasn't known

Josh Lowell, ClipperData

IMO 2020: A View from Clipper Data

Key takeaways:

- IMO 2020 [Low Sulfur Rule](#) in effect as of January 1, 2020.
- Historically, one of the most significant regulatory challenges in front of the global maritime industry
- Short-term concerns and fears regarding compliance and costs are overblown...
- ...but that is expected to change as 2020 progresses
- He projects risks will be high as the new market figures itself out

Josh noted that he [blogs](#) extensively about this topic and others at www.ClipperData.com.

NITL General Counsel Karyn Booth and Senior Policy Advisor Randy Mullett
Legislative/Regulatory Updates

Key takeaways:

- Review of FMC’s proposed interpretive rule on detention and demurrage, which resulted from:
 - Petition for Rulemaking filed by the Coalition for Fair Port Practices (26 trade associations comprised of importers, exporters, draymen, 3PLs) in Dec. 2016
 - FMC Hearing, Fact-Finding Investigation, and Interim and Final Reports
 - FMC Innovation Team meetings comprised of industry leaders across all maritime stakeholders
- Proposal clarifies how FMC will assess unreasonable port demurrage and container detention practices under the Shipping Act
- Key Findings
 - Demurrage and detention charges should be applied to incentivize cargo interests to move cargo promptly from port terminals
 - Port and marine terminal operations should focus on consistent “notice of actual cargo availability”
 - Need for transparent, consistent, and reasonable demurrage/detention practices
- NITL filed comments on October 31
- Waiting for FMC decision; timetable unknown
- NITL and other members of the Coalition are active in educating Members of Congress on this proposal, holding meetings in December 2019 and January 2020.
- Review of FMC’s proposed interpretive rule on detention and demurrage, which resulted from:
 - World Shipping Council (WSC) petitioned the FMC to exempt ocean carriers from service contract filing and essential terms publication requirements
 - Exemptions would not be “detrimental to commerce” or “reduce competition”; would eliminate unnecessary regulatory burdens; and treat VOCC contracts the same as NVOCC contracts
 - NITL filed supporting comments but strongly encouraged oversight of service contracts through the agency’s recordkeeping and audit rules
 - On Dec. 20, FMC issued ruling in which the agency exempted ocean carriers from the essential terms publication requirement but declined to grant an exemption from service contract filing
- Review of new proposal from ports of Los Angeles and Long Beach regarding clean trucks
 - Trucks to meet emission reduction requirements to serve LA/LB Ports
 - Ports to impose a Clean Truck Fee on BCOs in Fall 2020 to assist with transition to cleaner trucks
 - Ports seeking public feedback
 - NITL will continue to monitor and respond

NITL Rail Transportation Committee Meeting Highlights
Ross Corthell, Packaging Corporation of America, Chair
January 22, 2020

Featured Speakers:

Tom Crowley, L.E. Peabody and Associates
Rail Rate Reform

Key takeaways:

- [Tom Crowley](#), economist, reviewed recent actions from the Surface Transportation Board on rate reform, including the Rate Reform Task Force [Report](#)
 - Rate reform categories include:
 - Small Rate Dispute Methodology
 - SAC Standardization and Streamlining
 - Incumbent Network Cost Analysis (“INCA”)
 - Revenue Adequacy
 - Three-Benchmark
 - Market Dominance
 - STB will address rate reform over a variety of ex parte proceedings
 - EP 385-8 – Waybill Sampling Rate Proposed Changes
 - EP 664-4 – Revisions to Calculation of Cost of Capital
 - EP 722 / EP 761 – Railroad Revenue Adequacy
 - EP 754 / EP 757 / EP 760 – Demurrage & Accessorial Charges
 - EP 755 / EP 665-2 – Final Offer Rate Review
 - EP 756 – Market Dominance Streamlined Approach
 - EP 759 – Demurrage Billing Requirements
 - STB Contract to Study URCS
 - ACC’s Benchmark Methodology (EP 722 / EP 761)
 - As captive shippers, how should we be thinking about the future and expectations?
 - STB is making strides to simplify maximum rate review procedures. Recommendations from task force a step in the right direction
 - Captive rail customers must continue to operate in the arena established by STB and evaluate options available to them
 - Some options are untried, and none are simple, but all can work in negotiation and litigation settings

NITL General Counsel Karyn Booth and Senior Policy Advisor Randy Mullett

Legislative/Regulatory Updates

Key takeaways:

- Overview of recent developments at the Surface Transportation Board and Industry Response
 - Rail Demurrage Practices
 - Concerns over changes to demurrage rules and practices, and accessorial charges, as part of PSR implementation
 - STB hearings attended by broad cross-section of rail customers
 - STB issued 3 separate proposals in Oct. 2019 (Policy Statement plus two rulemakings)
 - Comments on proposals submitted in Nov. and Dec.—Decisions are pending
 - Policy Statement
 - Clarifies principles STB will consider in evaluating the “reasonableness” of demurrage rules and practices
 - Demurrage Rulemakings
 - Outline billing requirements
 - Address exempt commodities
 - NITL Submitted Comments
 - Strong support for STB proposals
 - Request for action on “0 days” of free time for private cars
 - Demurrage charges and credits should be validated by railroads upfront
 - Commercial fairness requires opportunity to use credits and rules for dispute resolution
 - Proposals should apply to Class II and III railroads
 - STB Rate Reform Proposals
 - Final Offer Rate Review
 - New process for rate reasonableness review based on “final offer” decision-making
 - Procedural reforms to expedite and simplify rate cases
 - Flexible rate reasonableness standards can be developed by the parties to the case—no prescribed methodology
 - May require streamlined market dominance evidentiary showings
 - An expedited process; limited discovery, aggressive procedural schedule
 - Intended to provide greater access and faster, less costly rate review for smaller cases
 - Not a new rate reasonableness methodology
 - Not available to challenge local movements of Class II or III carriers
 - NITL and other associations submitted comments as *Joint Coalition of Shippers*
 - Alternative to Stand Alone Cost (SAC) cases is greatly needed



- Expressed support for the proposal with certain modifications
- FORR should apply to Class II and III local rates
- STB should adopt a rate bench-marking rate review methodology for revenue adequate railroads
- STB should also adopt enhancements to rail competition, such as EP 711 rule on competitive switching and bottleneck relief
- Streamlined Market Dominance
 - Market dominance is a statutory prerequisite to obtaining rate relief
 - *Quantitative market dominance*
 - *Qualitative market dominance*
 - Complainant has the burden to prove market dominance
 - Market Dominance is an exception to many class exemptions
 - Streamlined inquiry applies at complainant's option
 - Complainant must satisfy 6 *prima facie* factors
 - Factors to establish a heightened std., i.e. high likelihood of market dominance, not designed for cases "on the bubble"
 - If a shipper cannot meet any 1 of the 6 factors, it must proceed under the full market dominance procedures
 - NITL and other associations submitted comments as *Joint Shipper Coalition*
 - Shipper should be allowed to select prima facie factors on an "a la carte" basis, rather than "all or nothing"
 - 500-mile highway distance threshold should be decreased to 250 miles
 - Clarify that the 10% trucking threshold should apply to a volume percentage not the number of truck vs. rail movements
 - 10% threshold should be increased to 20% to account for service delays, force majeure, need to expedite shipments, etc.
 - Barge competition should not be found where the origin, destination or both is land-locked or lack barge facilities
 - Rail competition should be based on direct physical access to 2nd carrier
 - Board should allow an optional bifurcated procedure for use in all rate cases

- Revenue Adequacy Hearing
 - December 2019 hearing to receive input on when/how revenue adequacy (RA) should impact rate relief
 - By statute, Board must help carriers achieve RA
 - Board annually determines which railroads are RA: where return on net investment is equal or greater than cost of capital of the rail industry
 - NS, UP and BNSF have achieved RA
 - Feedback requested on Long-term Revenue Adequacy (LTRA)
 - STB Task Force: Once a railroad achieves LTRA there are limits on its ability to differentially price captive traffic.
 - LTRA Proposed Definition: The shortest time period not less than 5 yrs. inclusive of 1 yr. after a recession year
 - Rate increases by LTRA carriers would be constrained to rate of inflation
 - Caps future rate increases, but does not reduce rates
 - Task Force Recommendation: Consider suspending Bottleneck Rule¹ when carrier is LTRA
 - Allows captive shippers to obtain rate over the bottleneck segment from captive facility to the nearest interchange to create competition over non-bottleneck segment
 - Rate case may be required to challenge the rate over the bottleneck segment
 - Currently, parties must submit detailed evidence on road property investment (RPI) costs
 - Recommendation: Simplify RPI analysis in Simplified-SAC cases involving LTRA carriers by using costs from prior SAC cases
 - Unlikely to provide much benefit
 - Restores the status quo which was changed 5 years ago
 - Shippers will have no greater incentive to use S-SAC
 - NITL did not appear at hearing but filed comments with STB
 - Supporting LTRA Definition
 - Supporting the proposed Rate Increase Constraint
 - Supporting Bottleneck Relief & EP 711 Relief
 - Opposed changes to S-SAC, since this process is rarely used, no case has been litigated to finality & proposed changes does not fix the problems

¹ **Bottleneck Rule:** Shipper who is captive at one end of movement cannot require the railroad to hand off traffic to competitor at an interchange selected by shipper



- Other STB Proceedings NITL is actively following
 - EP 711
 - Remains an open proceeding
 - Board still allowing ex parte meetings with Board members
 - EP 704—Repeal of Commodity Exemptions
 - EP 752—AAR Petition for Rulemaking to require Cost/Benefit Analyses
 - EP 661—Fuel Surcharges (dismissed proceeding for lack of consensus)
 - EP 385 (Sub No. 8)—Waybill Sample Reporting
- NITL remains active with a strong presence on Capitol Hill
 - Lobbying effort led by Randy Mullett, NITL Senior Policy Advisor
 - Meeting with members of Congress on numerous freight rail transportation issues
 - Participating in coalitions to advance the voice of the shipper on freight issues
 - Participating in Rail Customer Congressional Roundtable
 - July 2019
 - Many NITL Rail Shippers represented
 - NITL Rail Committee Chair Ross Corthell spoke on behalf of the League
- The Rail Committee will meet quarterly via teleconference in 2020. Committee participation is open to those who are NITL members.