



WHAT RESPONSIBILITY SHOULD SHIPPERS BEAR FOR THE PORT CONGESTION ON THE WEST COAST?

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By now, most importers have felt the impact the port congestion on the West Coast over the past several months. And, almost everybody understands, at least in general, the causes of these congestion problems. There were, of course, the contentious negotiations between the PMA and ILWU accompanied, according to reports, by various actions of the ILWU to slow things down, presumably to show how important labor peace is. But this is not the only issue. The availability and location of chassis has also contributed to the congestion problems. When the vessel operators gave up their responsibility for providing chassis in the past few years, insufficient efforts were devoted to making sure chassis are efficiently distributed and available for use when needed. Further, the vessel operators themselves have contributed to the problem by using increasingly larger and larger vessels, all of which seem to show up at the port on the same day of the week. Add to that mix the potential shortage of drayage drivers who are leaving the business because they are frustrated about their inability to pick up more than one container a day, and the failure of the ports themselves to sufficiently prepare for the onslaught of giant container vessels and you have the present commercially unhealthy and frustrating predicament.

One class of major participants in the ocean transportation industry, however, does not appear to bear much, if any, responsibility for the congestion problems at the West Coast ports. That is, the shippers and consignees. And yet, those same shippers and consignees have been asked to bear significant costs arising from the congestion problems created by other people. They have been asked (demanded is probably a better word) to pay huge congestion surcharges, port storage fees and demurrage charges because they couldn't get their containers out of the ports. How can this be? And, more importantly, how much of the burden should shippers and consignees bear for these problems created by other parties?

These types of questions are governed largely by the Shipping Act of 1984, which regulates ocean transportation in the U.S. trades. And, at first glance, things don't look so good for shippers and consignees under the Act. The carriers are allowed to sit around the table and reach agreements

on virtually anything having to do with the ocean transportation business including rates, vessel capacity and services, and they are immune from the antitrust laws for these agreements. The Transpacific Stabilization Agreement (“TSA”), for example, contains 14 pages describing all of the subjects on which the members may reach agreement. Of course, these agreements are required to be voluntary and any carrier can refuse to carry them out. However, among the practices specifically authorized by the TSA agreement is the following:

Except with respect to particular individual service contracts, existing or proposed, the Parties, either directly or through the Agreements Secretariat, may communicate regarding, or seek clarification or explanation of, a Parties’ actual or apparent fulfillment or lack of fulfillment of an Agreement guideline or objective.

Can you imagine a scene where a carrier that refuses to follow a TSA guideline is taken into a small room, put under the spotlight and questioned about the reasons for its failure to play along? It is no wonder the port congestion surcharges are so uniform across the board.

Moreover, it appears from the Shipping Act that all carriers have to do is put these charges in their tariffs and the shippers are obligated to pay them. In fact, the Shipping Act explicitly prohibits a shipper from failing to pay the rates that appear in a carrier’s tariff or service contracts. Violation of this prohibition subjects shippers to potential penalties of as much as \$40,000 per bill of lading.

On closer analysis, however, there are a few protections for the shipper and consignee. One of these was demonstrated in the carriers’ failure to make the port congestion surcharges they attempted to impose last December stick. The Shipping Act requires that new or increased rates and surcharges may only be imposed with 30 days advance notice. In the case of the port congestion surcharges, many carriers had put a rule in their tariffs a year or two ago setting forth the congestion surcharges they would impose whenever, in their sole judgment, an incident of “labor problems” arose. At the time they actually attempted to impose the congestion surcharges in December, the carriers contended that they had more than met the 30 days advance notice requirement by having these congestion surcharges in their tariffs many months in advance. Many shippers - - and their lawyers - - complained to the Federal Maritime Commission that this wasn’t fair. The carriers couldn’t simply publish a charge in their tariffs and have it hanging out in the distance to be imposed whenever they determined they needed the extra money. Tariffs must not be vague and ambiguous and what could be more vague or more ambiguous than a charge that could be imposed solely at the carrier’s discretion at the time of its own choosing? It is apparent that the FMC consulted with the

carriers about these problems and, coincidentally or not, these congestion surcharges were soon withdrawn.

Thus, it seems pretty clear that there will have to be more certainty in the carrier's tariff publications the next time they try to impose congestion surcharges on shippers and consignees. This does not mean the carriers may not impose congestion surcharges in the future if they do it properly under the tariff rules. There may, however, be other problems with such congestion surcharges, a subject discussed below.

There have also been reports of carriers attempting to assess shippers and consignees port storage and/or demurrage charges when the shippers' containers have been stuck in the ports past the free time allowed in the carrier's tariffs. If the consignee has not had a fair opportunity to pick up his shipments, however, these charges are also not proper. This is because the carriers have a legal duty to make proper delivery of cargo. At a minimum, the requirements for a proper delivery are (1) discharge of the cargo to a fit and customary wharf; (2) making the cargo available for retrieval; (3) notification to the consignee that the cargo is available for pickup; and (4) lapse of a reasonable time for the consignee to retrieve the cargo. While carriers on the West Coast may have issued proper arrival notices to their customers, thus fulfilling the notification requirement for a proper delivery, unless they could actually make the containers available to the consignees for pick up, they did not meet their delivery obligations. When congestion at the port requires extra time for the consignees to pick up the cargo, the carriers cannot charge storage or demurrage charges on that cargo, even if the free time has expired.

This was made clear by the FMC in a decision back in 1967 in a case in which a group of carriers had sued several port terminals for assessing storage charges against the carriers during a strike when union pickets prevented cargo from being picked up. The vessel operators filed a complaint with the Commission alleging that this was an unreasonable practice by the terminals because, according to the carriers, these storage charges should have been assessed against the cargo. The Commission decided that "it is essential, in considering whether a particular allocation or assessment is just and reasonable, to first determine for whom the service is performed." And, noting that the carriers have the obligation of delivery in which they would have to, among other things, make the cargo "accessible to the consignee and afford the consignee a reasonable opportunity to come and get it," the Commission decided that it was just and reasonable for the vessel to have to pay the storage charges until it had "discharged its full obligation to tender for delivery." Thus,

shippers or consignees who have had to pay these types of charges during periods when their cargo was inaccessible for them to pick up should be entitled to refunds from the carriers and/or the terminals.

Finally, there is also an argument to be made that the amount of congestion charges assessed shippers should bear a reasonable relationship to the costs actually being incurred by the carriers as a result of the congestion. This obligation arises from the requirement in the Shipping Act that carriers not engage in unjust and unreasonable practices in connection with handling the property of their customers. In a 1968 decision, the Supreme Court held that one component of just and reasonable charges is that “the charge levied is reasonably related to the service rendered.” Is a \$1,000 congestion charge per 40 foot container reasonably related to the costs incurred by the carrier for moving that container through a congested West Coast port? While neither the FMC nor the courts have explored the meaning of the Supreme Court’s decision as to the relationship between a charge and the service provided in any great detail, this issue could very well be raised the next time the carriers attempt to impose congestion surcharges. Clearly, a congestion surcharge of \$10,000 per 40 foot would be unreasonable on its face. And perhaps it could be said that a congestion surcharge of \$5 per 40 footer may not be compensatory at all. But if you look at a single 15,000 TEU vessel calling at the Port of Los Angeles during a period of congestion, imposition of a \$1,000 per 40 foot container congestion surcharge would result in total additional revenue for the entire vessel (assuming it was full) of \$7,500,000. Is it conceivable that a single vessel call at a congested port could result in additional costs of that magnitude to a carrier?

Note - This article does not constitute legal advice. If you need legal guidance on the issues discussed in this article arising in a specific factual context, please consult a legal professional with experience and expertise in this area of the law. For more information, contact Greg Marti with IHSA at gmarti@shippersassociation.org or 513-489-4743 ext. 171.