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May 4, 2020

BY FED EX AND EMAIL

Jeffrey F. Lawrence
Executive Director and General Counsel
Ocean Carrier Equipment Management Association
c/o Cozen O'Connor
1200 19th Street, NW, 3rd Floor
Washington, D.C. 20036

Dear Mr. Lawrence:

Our firm represents the Intermodal Motor Carriers Conference (“**IMCC**”) of the American Trucking Associations in connection with the matters addressed below. We have reviewed the regulations and practices of the Ocean Carrier Equipment Management Association (“**OCEMA**”), its members, its affiliated entities,¹ and non-OCEMA ocean carrier parties to the FMC Consolidated Chassis Management Pool Agreement² regarding the operation of chassis pools. Our assessment, based on our review of the facts and as summarized below, is that OCEMA members have violated and continue to violate the Shipping Act: (1) with respect to OCEMA affiliates’ regulations and practices concerning operation of chassis pools that restrict motor carrier chassis choice, and (2) with respect to members’ contracts with default chassis pool equipment providers that effectively mandate chassis providers overcharge motor carriers for chassis for merchant haulage container movements, giving rise to potential Shipping Act damage liability of \$1.8 billion for OCEMA members.

This letter constitutes notice that the IMCC will file a complaint before the Federal Maritime Commission for injunctive relief under the Shipping Act unless OCEMA, its members, and its affiliated entities comply with IMCC’s demands, as described herein. This letter also serves as a notice and demand that all relevant records in the possession, custody, and control of

¹ OCEMA-affiliated entities include Consolidated Chassis Enterprises, Consolidated Chassis Management, LLC (“**CCM**”) and Consolidated Chassis Management Pools, LLC (“**CCMP**”). These affiliates also include the CCMP regional sub-pools. Because OCEMA’s ocean carrier members control the management boards and relevant committees of each affiliate, their rules and practices are subject to 46 U.S.C. § 41102(c).

² Consolidated Chassis Management Pool Agreement, FMC Agreement No. 011962-015 (Dec. 2018), <https://www2.fmc.gov/FMC.Agreements.Web/Public/Document/30094>.

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OCEMA, its members, its affiliated entities, and their respective boards and committees must be preserved and retained until further written notice is provided.

These regulations and practices violate OCEMA members' statutory obligations under the Shipping Act "to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). Indeed, these regulations and practices stand in stark contrast to OCEMA's own stated objectives for just and reasonable regulations and practices for neutrally-managed, interoperable, and competitive chassis pools: that chassis pool regulations and practices must facilitate "open competition," provide "the freedom to use the chassis of [the motor carrier's] choice," and enable a motor carrier to "negotiate better terms and lower rates."³

In the first instance, we note that OCEMA, its members, and its affiliated entities enjoy no protections against liability for violations of the Shipping Act merely because the Commission allowed the OCEMA agreement to go into effect. Further, because this conduct occurs on a normal, customary, and continuous basis, it falls squarely within Commission Interpretive Statement for the filing of complaints under § 41102(c). 46 C.F.R. § 545.4. Indeed, OCEMA members could be found liable in a Commission complaint proceeding for \$1.8 billion in damages over the last three years as a result of the overcharges imposed on motor carriers for merchant haulage movements.

OCEMA members are violating § 41102(c) in at least two ways:

First, the CCMP Operations Manual gives ocean carriers veto power over motor carrier chassis choice and prevents motor carriers from exercising "the freedom to use the chassis of [their] choice." Section 5.7 of the Manual states: "under the Choice Program, Usage Days may be directed to another User when the Container Line Operator and the User for whom the Container Line Operator is a Customer authorize a deviation from the default assignment."⁴ This regulation forbids substitution of the default chassis provider without the consent of the ocean carrier or default chassis provider. OCEMA members and affiliated entities have engaged and are engaged in a pattern and practice of refusing motor carrier requests for "deviations" as a matter of course. IMCC members have received innumerable denials—often with identical boilerplate language—rejecting motor carrier requests to designate a chassis provider other than the default chassis provider. Such consent has been and is being systematically withheld, thus

³ CCM Presentation, *Interoperability Matters! The Interoperable Gray Pool Model, Enhancing Supply Chain Efficiencies*, <https://www.ccmpool.com/UploadedDocuments/Chassis%20Pools/Interoperability/Interoperability-Matters-FINAL.pdf>.

⁴ CCMP Operations Manual, Version 4.1 (April 1, 2020), <https://www.ccmpool.com/UploadedDocuments/Membership/Resources/CCMP-Operations-Manual-Version-41.pdf>.

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denying motor carriers chassis choice. Moreover, many OCEMA members expressly forbid motor carrier chassis choice as a matter of policy.⁵

Second, OCEMA members eliminate competition for merchant haulage chassis nationwide by awarding chassis leasing contracts on the basis of carrier haulage *alone* even though the winning contractor is designated as the default provider for *both* carrier haulage and merchant haulage chassis. This practice not only restrains competition for merchant haulage chassis but also forces chassis providers to overcharge for merchant haulage movements and undercharge for carrier haulage to obtain the contract award. Such merchant haulage chassis overcharges are paid by motor carriers. By artificially inflating merchant haulage chassis prices, OCEMA members and affiliated chassis management pools have caused tremendous financial harm to IMCC members.

Merchant haulage prices are **three to eight times higher** than carrier haulage prices, indicating a dramatic overcharge on merchant haulage movements above the average daily cost of chassis for chassis providers. These overcharges are a direct result of OCEMA member and affiliated entity conduct and are paid by IMCC members. OCEMA members are liable for these overcharges, which could amount to \$1.8 billion over the last three years.

Moreover, OCEMA members are undermining the “gray” chassis pools that they previously established by reinstating proprietary chassis pools, in which an ocean carrier’s default chassis provider is the only possible chassis provider for merchant haulage and carrier haulage movements, further undercutting motor carrier chassis choice.⁶ Proprietary chassis pools insulate OCEMA members and their leasing companies from price and service competition by competing chassis providers and raise shipping costs for merchants, manufacturers, and ultimately U.S. consumers.

These practices not only contradict OCEMA’s purported support for neutrally-managed gray pools but they also frustrate the policy consensus in favor of gray chassis pools, as articulated by the Memphis Supply Chain Team of the Commission’s Fact Finding Investigation No. 28. As noted by the Commission’s Fact Finding Officer in that Investigation, Commissioner Rebecca Dye:

The Memphis Team concluded that the essential qualities of a high performing gray chassis pool are: 1. Adequate supply of interoperable chassis; 2. Safe and good quality chassis; 3. Reasonable access to chassis: “choice on merchant

⁵ See Consolidated Chassis Management Provider Search, <https://www.ccmpool.com/Membership/Chassis-Providers/>.

⁶ For example, the Chicago and Ohio Valley Cooperative Chassis Pool and the Gulf Cooperative Chassis Pool are both in the process of closing down because ocean carrier lines have withdrawn from those pools.

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haulage;” and 4. Most critical, a pool manager, with authority and accountability for chassis supply. I am pleased to say that there is wide support for a gray chassis pool in Memphis. ... [OCEMA] members and executive leadership were present at the meeting and also supported the gray chassis pool initiative. The two major chassis providers were also represented at the December meeting.

Statement of Commissioner Rebecca Dye Before the Surface Transportation Board Oversight Hearing on Demurrage and Accessorial Charges (May 22, 2019), <https://www.fmc.gov/statement-of-dye-stb-demurrage/>.

As a result of this conduct, OCEMA members are violating the Shipping Act in the following ways:

- CCMP Operations Manual Section 5.7 is unlawful because it is unreasonable by going beyond what is necessary to achieve the requirements of gray pool management and undercuts OCEMA’s stated policy of chassis choice. *Distribution Services, Ltd. v. Transpacific Freight Conference of Japan*, 24 S.R.R. 714, 722 (1988) (“A regulation or practice may have a valid purpose and yet be unreasonable because it goes beyond what is necessary to achieve that purpose.”) (finding unlawful a rule of a conference operating under an in-effect Commission agreement).
- The systematic denials by OCEMA members and affiliated entities of motor carrier requests for non-default chassis usage are unlawful because they are unreasonable and unjust practices that are excessive and not appropriate to achieve the requirements of gray pool management and undercuts OCEMA’s stated policy of chassis choice. *Id.* at 721 (“[A]s applied to terminal practices, we think that ‘just and reasonable practice’ most appropriately means a practice otherwise lawful but not excessive and which is fit and appropriate to the end in view.”).
- OCEMA member practice of negotiating carrier haulage pricing but designating the winning chassis lessor as the default provider for both carrier and merchant haulage chassis is unlawful because it eliminates motor carriers’ ability to negotiate merchant haulage chassis rates and service terms among competing chassis providers, overcharges motor carriers on merchant haulage movements, and undermines the stability of gray pools, contrary to OCEMA policy. *Id.* (“The justness or reasonableness of a practice is not necessarily dependent upon the existence of actual preference, prejudice or discrimination. It may cause none of these but still be unreasonable.”)

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Accordingly, these regulations and practices are unjust, unreasonable, and actionable under § 41102(c).⁷ As the Commission observed in interpreting the scope of § 41102(c):

The Commission believes that the interpretation and application of § 41102(c) should be properly aligned with the broader common carriage foundation and purposes of the Act. The interpretive rule is consistent with the purposes of the Shipping Act and focuses Commission activities on regulated entities who abuse the maritime shipping public by imposing unjust and unreasonable business methods, and who do so on a normal, customary, and continuous basis, and thereby negatively impact maritime transportation competition or inflict detrimental effect upon the commerce of the United States.

Commission Interpretative Statement, 83 Fed. Reg. 45367, 45372 (Sept. 7, 2018). As set above, the conduct of OCEMA members and its affiliated entities precisely constitute such abuses of the maritime shipping public.

Therefore, the IMCC demands that OCEMA, its members, and its affiliated entities:

1. Remove the requirement for ocean carrier and chassis provider consent for motor carrier designation of a chassis provider on merchant haulage container movements from CCMP Operations Manual Section 5.7;
2. Cease and desist enforcement of CCMP Operations Manual Section 5.7 regarding ocean carrier and chassis provider consent for motor carrier designation of a chassis provider on merchant haulage container movements;
3. Limit contracts for chassis provision and default provider designations only to carrier haulage container movements or other instances in which the ocean carrier bears the responsibility of payment for chassis and permit motor carriers independently to negotiate chassis prices for merchant haulage movements with the chassis provider of their choice; and

⁷ The interchange and assignment of motor carrier chassis relates to the “receiving, handling, storing, or delivery of property” under § 41102(c). Petition of the Association of Bi-State Motor Carriers, 30 S.R.R. 104 (2004) (“The truck detention rules promulgated by [the New York Terminal Conference] under its Tariff are integral to the loading and unloading of cargo from common carriers, the interchange of containers and chassis, and the ultimate delivery of property for shippers. As such, we conclude that the promulgation of truck detention rules at the relevant facilities is a terminal function related to ‘receiving, handling, storing or delivering property’ as provided in section 10(d)(1) of the Shipping Act.”).

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4. Eliminate all OCEMA member rules that promote, advantage, or require the exclusive use of OCEMA member default chassis providers for merchant haulage moves.

If OCEMA, its members, and its affiliated entities do not immediately comply with these demands, IMCC will file a complaint against you, your members, and your affiliated entities before the Commission pursuant to § 41102(c).

This letter also serves as a notice and demand that OCEMA, its members, and its affiliated entities, and their respective boards and committees are obligated to preserve and retain all records in their possession, custody, and control that pertain to the regulations, conduct, contentions, and claims described herein.

Please note that, under the Commission's rules, discovery is broad in scope. C.F.R. § 502.141(e)(1) ("Relevant information need not be admissible at hearing if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."). Relevant evidence that may be introduced into a Commission proceeding is subject to the evidentiary standards of the Administrative Procedure Act, which are more flexible than those of the Federal Rules of Evidence. *See* § 502.204(a).

"Documents" includes, for purposes of this letter, both hard copy and electronically stored information ("ESI") and all emails, voicemails, text messages, communications, files and databases, video and other recordings that refer to or relate to the above-described claims. Examples of documents that are subject to this preservation notice and that must be maintained by OCEMA, its members, its affiliated entities, and their respective boards and committees are as follows:

1. Any and all documents relating to the current and historic membership of the OCEMA Senior Steering Committee and Executive Committee, and the current and historic membership of the governing boards of each OCEMA-affiliated entity;
2. Any and all documents relating to the establishment and operation of CCMP Operations Manual Section 5.7, predecessor sections, and equivalent regional pool Operations Manuals, including documents relating to any discussion or proposals for the modification thereof;
3. Any and all documents relating to the merits, costs, and advantages and disadvantages of establishing gray chassis pools, whether or not operated by a neutral chassis provider, and any and all communications related to the merits, costs and disadvantages of the use of proprietary chassis pools;

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4. Any and all documents relating to the merits, costs, and advantages and disadvantages of utilizing the services of OCEMA-affiliated entities as neutral gray chassis pool administrators;
5. Any and all communications relating to the drafting and approval of the CCM presentation *Interoperability Matters! The Interoperable Gray Pool Model, Enhancing Supply Chain Efficiencies*, including comments by OCEMA members;
6. Any and all communications relating to the Commission's Memphis Supply Chain Innovation Team in Fact Finding Investigation No. 28, including OCEMA and its members' positions related thereto;
7. Any and all documents relating to a request by a motor carrier to an OCEMA-affiliated entity to reassign a chassis on a merchant haulage movement to a chassis provider other than an ocean carrier's default chassis provider;
8. Any and all documents relating to a request by a motor carrier to an OCEMA member for concurrence in the assignment of a chassis on a merchant haulage movement from the ocean carrier's default chassis provider to another chassis provider designated by the motor carrier;
9. Any and all requests for proposals issued by OCEMA members for the provision of chassis and any and all documents relating thereto, including relating to the criteria by which such proposals were evaluated and the contracts that were entered into;
10. Any and all documents relating to the difference in price in OCEMA members' contracts for the provision of chassis between the price to be charged for carrier haulage movements and merchant haulage movements, including relating to the costs incurred by the chassis provider for such movements;
11. Any and all documents relating to the volume of carrier haulage versus merchant haulage movements by OCEMA members and by regional chassis pools;
12. Any and all documents relating to the replacement of gray chassis pool providers as an ocean carrier's default chassis provider with a proprietary chassis pool provider whether by OCEMA members or not, including documents relating to the cost impact of such replacement on an OCEMA member; and

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13. Any and all documents relating to the cost of providing a chassis for carrier and merchant haulage movements prior to an OCEMA member's divestiture of chassis ownership.

To fulfill your preservation obligations, you must take reasonable steps to preserve all relevant hard copy documents and ESI, including, but not limited to:

- a. Suspending each recipient's data destruction and backup tape recycling policies;
- b. preserving relevant software, including legacy software (unless an exact copy or mirror image is made and stored) and hardware that is no longer in service but was in service during the relevant time period;
- c. retaining and preserving necessary information to access, review, and reconstruct (if necessary) relevant electronic data, including identification codes and passwords, decryption applications, decompression software, reconstruction software, network access codes, manuals, and user instructions;
- d. retaining and preserving all relevant backup tapes or other storage media; and
- e. any other reasonable steps necessary to prevent the destruction, loss, override, or modification of relevant data, either intentionally or inadvertently, such as through modification of each recipient's document retention policy and systems.

All electronically stored information must be preserved intact and without modification.

Preservation of ESI includes preservation not only of the electronic information itself, but also of relevant related data, including:

- a. active, archived, and deleted copies of electronic information, such as emails, voicemails, text messages, instant messages (IMs), calendars, diaries, word processing files, spreadsheets, PDFs, JPEGs, PowerPoint presentations, temporary internet files, cookies, and .ZIP files, among others;
- b. databases and computer logs; and
- c. metadata about the information, including the date it was created, the date it was last modified, and the name of the individual who created;

whether stored online, offline, in a cloud-based server or in other electronic storage, or on any computers, handheld devices, tablets, cell phones, or other devices. The above lists of Document categories and preservation obligations are not exhaustive.

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Please reply back to the undersigned by May 25, 2020 that you will comply with the demands and with the document preservation obligations described above.

Nothing in this letter is intended or should be construed as an admission or waiver of any rights or remedies that the IMCC has, all of which are hereby expressly reserved. In this letter, the IMCC has not endeavored to set forth each and every fact, argument, and legal claim it has or may have against OCEMA, its members, and its affiliated entities, and expressly reserves the right to raise any additional or different facts or legal theories.

Sincerely,



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