

# BENEDICT'S MARITIME BULLETIN

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## SEALED OFFERS AND PART 36 – THE ENGLISH LAW EXPERIENCE

Nik Ivanov and Julija Stukalina\*

Sealed offers are a perennial feature of English litigation and arbitration, yet are almost entirely absent from New York conflict resolution. This divergence is striking (and some would say anomalous): the sealed offer procedure is intuitive and confers significant benefits on litigants by facilitating settlement discussions and discouraging over-ambitious claims.

The below is an effort to set out the case in favor of their application to the world of New York Maritime Arbitration.

### A. What is a "Sealed Offer"?

A sealed offer is an offer to settle, with a sting in the tail: it attracts specific costs consequences in circumstances where the offeree does not accept the offer, and then fails to beat the offer in the final judgment or award.

"Sealed Offers" have different names (and slightly different consequences) in English courts vs in English arbitration.

- (1) In court, they are called "Part 36 Offers", because they must be made in a specific form which complies with the Part 36 of the Civil Procedure Rules (the regulations that govern English litigation, or "CPR").

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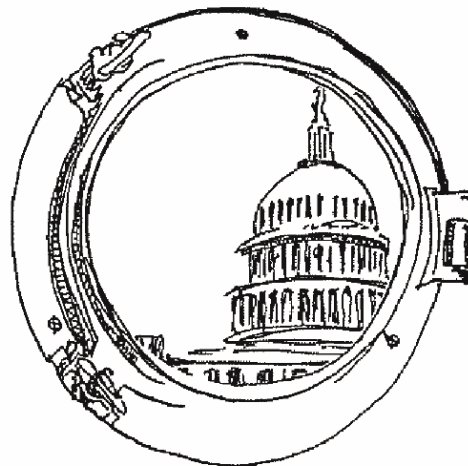
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Matthew Bender®

## WINDOW ON WASHINGTON



### *Charging Ahead?*

By Bryant E. Gardner\*

The aftershocks of the pandemic continue to work their way through America's ocean shipping supply chain. The Federal Maritime Commission (FMC) continues with its implementation of the Ocean Shipping Reform Act of 2022 (OSRA), which marked the first major overhaul of liner shipping in the United States in over a quarter of a century.<sup>1</sup> One of the key features of OSRA is the "charge complaint," which eased shipper access to the FMC's complaint process against ocean carriers.

Using charge complaints, shippers may submit information concerning charges assessed by common carriers, upon receipt of which the "Commission shall promptly investigate the charge" with respect to Shipping Act compliance.<sup>2</sup> In such case, the carrier will be afforded an opportunity to respond, but will bear the burden of establishing the reasonableness of the charges and their compliance with the Act.<sup>3</sup> If the Commission determines upon investigation that the charges were not

warranted, it will refund the charges to the shipper, and potentially issue a civil penalty as well.<sup>4</sup>

Under the FMC's interim guidance, charge complaints may be "perfected" with certain information, including the identity of the common carrier, a description or statement of how the charge or fee violated 46 U.S.C. §§ 41104(a) or 41102, and supporting documentation including invoices, bills of lading, and proof of payment for the charges or fees demanded.<sup>5</sup> Charge complaints can target a broad range of noncompliant charges assessed by a common carrier, including demurrage and detention charges.<sup>6</sup>

Upon receiving a complaint, FMC staff acknowledge receipt and proceed to investigate if sufficient information has been provided with the complaint, and request that the common carrier justify the charge.<sup>7</sup> Once the investigation is completed, FMC staff notify both parties and determine whether to refer the matter to the FMC Bureau of Enforcement, Investigations, and

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<sup>1</sup> Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, June 16, 2022, 136 Stat. 1272.

<sup>2</sup> 46 U.S.C. § 41310 (emphasis added).

<sup>3</sup> *Id.* § 41310(a) & (b)(2).

<sup>4</sup> *Id.* § 41310(c) & (d).

<sup>5</sup> FMC, Guidance on Charge Complaint Interim Procedure (Dec. 1, 2022), <https://www.fmc.gov/osra-2022-implementation/charge-complaint-interim-procedure/>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

Compliance (BEIC). BEIC will determine whether to recommend that the FMC issue an Order to Show Cause naming the specific carrier, the actions alleged to violate 46 U.S.C. § 41104 or 41102, and directing that the carrier “show cause” why it should not be ordered to refund the fees paid.<sup>8</sup> If the FMC orders a refund by the carrier, a separate penalty proceeding may be initiated and referred to the FMC Office of Administrative Law Judges.<sup>9</sup>

The charge complaint mechanism has proven popular. By December 2022, when the FMC announced the interim procedures for processing charge complaints, it had received over 175 charge complaints in just the first six months since the enactment of OSRA.<sup>10</sup> By September 28, 2023, approximately \$1.7 million in fees or surcharges had been voluntarily waived (since July 2022) through the filing of charge complaints, and the FMC anticipates establishing a permanent charge complaint process by the end of 2023.<sup>11</sup> Although the charge complaint process has been widely used to settle disputed charges, to date only one complaint has proceeded to a formal decision by the FMC.

On September 29, 2023, the FMC issued its first decision pursuant to a charge complaint in *Mediterranean Shipping Co. – Investigation for Compliance with §§ 41104(a) and 41102 of Demurrage or Detention Charges under the Charge Complaint Procedures of 46 U.S.C. § 41310*.<sup>12</sup> The FMC’s decision dismissing the charge complaint provides important insights into how the charge complaint process will function going forward, even though brought pursuant to the interim charge complaint procedures outlined above.

The FMC issued its initial Order to Show Cause to respondent Mediterranean Shipping Company (MSC) on February 3, 2023.<sup>13</sup> The Order states that the FMC received a complaint from SOFi Paper Products (SOFi) regarding a \$1,000 “congestion surcharge,” which MSC had not justified as of the Order, and further waived numerous FMC procedural rules found at 46 C.F.R. Part 502, “except as consistent with this Order,” which proved significant when MSC later moved to dismiss the charge complaint pursuant to 46 C.F.R. § 502.69. BEIC argued, and the FMC agreed, that the motion to dismiss was improper under the charge complaint governed by 46 C.F.R. § 502.91, holding “[i]f a respondent is permitted to file disallowed substantive pleadings, it may hinder the commission from ‘promptly investigat[ing] the charge with regard to compliance with section 41104(a) and section 41102’ as required by the Shipping Act’s charge complaints provision at 46 U.S.C. § 41310.”<sup>14</sup> Citing the same provisions, the FMC also denied MSC’s petition to file a sur-reply.<sup>15</sup>

MSC also argued that it was not the proper party because “MSC did not bill SOFi for the congestion surcharge in the amount of \$1,000.” MSC’s customer was a non-vessel operating common carrier (NVOCC) not party to the proceeding, and that “while [the NVOCC] had the contractual obligation to pay certain rates to MSC, [the NVOCC] had its own discretion and contractual arrangement to charge its customers, including SOFi.”<sup>16</sup> Citing to 46 U.S.C. § 41301(e),<sup>17</sup> the FMC held “when the common carrier assessing the charge is an NVOCC, the Commission must consider whether another party, such as an ocean common carrier, is ultimately responsible. The facts demonstrate that MSC acted

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> FMC, FMC Announces Interim Procedures for Processing Charge Complaints (Dec. 1, 2022), <https://www.fmc.gov/fmc-announces-interim-procedures-for-processing-charge-complaints/>.

<sup>11</sup> FMC, FMC Discusses OSRA Implementation, Consumer Assistance Accomplishments (Sept. 28, 2023), <https://www.fmc.gov/fmc-discusses-osra-implementation-consumer-assistance-accomplishments/>.

<sup>12</sup> Dkt. No. CC-001 (Sept. 29, 2023), <https://www2.fmc.gov/readingroom/proceeding/CC-001/> (hereinafter, MSC Decision).

<sup>13</sup> FMC, Order Directing Mediterranean Shipping Company, S.A. To Show Cause: Mediterranean Shipping Company – Investigation for Compliance with Demurrage and Detention Charges Under the Charge Complaint Procedures, 88 Fed. Reg. 8284 (Feb. 8, 2023).

<sup>14</sup> MSC Decision at 4.

<sup>15</sup> *Id.* at 6.

<sup>16</sup> *Id.* at 3.

<sup>17</sup> “If the common carrier assessing the charge is acting in the capacity of a non-vessel-operating common carrier, the Commission shall, while conducting an investigation under subsection (b), consider—(1) whether the non-vessel-operating common carrier is responsible for the noncompliant assessment of the charge, in whole or in part; and (2) whether another party is ultimately responsible in whole or in part and potentially subject to action under subsections (c) and (d).” 46 U.S.C. § 41301(e).

as the ocean common carrier with respect to SOFi's shipment. As the ocean common carrier with respect to the shipment in question, MSC is the proper party in this charge complaint proceeding."<sup>18</sup>

A peculiar feature of the proceeding is that it arose out of only a \$1,000 charge—seemingly not enough money to warrant the extensive litigation that ensued. The nature of the charge complaint process, which requires BEIC to prosecute the matter rather than it be funded by the complainant and shifts the burden of proof to the respondent carrier, was likely a significant factor. Prior to issuance of the MSC Decision, but after issuance of the Show Cause Order, MSC issued a full refund of the charge.<sup>19</sup> Accordingly, the FMC found that SOFi's charge complaint for refund to be moot and dismissed it.<sup>20</sup> However, that did not end the inquiry, because the FMC thereafter considered whether there had been a violation of the Shipping Act and whether a civil penalty was appropriate.

MSC argued that its issuance of a voluntary refund in full for the charges at issue prevented the FMC from taking any further action on the charge complaint, including the imposition of a penalty. The FMC disagreed, citing 46 U.S.C. § 41107(a) (“[a] person that violates this part or a regulation or order of the Federal Maritime Commission issued under this part is liable to the United States Government for a civil penalty or, in addition to or in lieu of a civil penalty, is liable for the refund of a charge”) and 46 U.S.C. § 41109(a) (“the Commission may ‘assess a civil penalty’ or ‘in addition to, or in lieu of, assessing a civil penalty ... , order a refund of money’”).<sup>21</sup> In so holding, the FMC reasoned that, otherwise, a violator of the Shipping Act could nullify the charge complaint penalty provision by simply refunding or waiving the charge in question, even though the Shipping Act had been violated.<sup>22</sup>

Turning to the merits, the FMC considered BEIC's allegation that the congestion surcharge violated the FMC's new interpretive rule regarding the assessment of demurrage and detention charges, 46 C.F.R. § 545.5. The FMC held that the congestion surcharge did not fall within the definition of demurrage and detention charges, which are generally assessed after

the expiration of free time. The congestion surcharge was found to apply without regard to the period of use and was assessed equally to all customers regardless of land or container use time, and therefore the surcharge did not violate the rule.

The FMC next considered whether the congestion surcharge constituted an unreasonable practice in violation of 46 U.S.C. § 41102(c), which provides, “A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices related to or connected with receiving, handling, storing, or delivering property.”<sup>23</sup> BEIC argued that the congestion surcharge presented a larger issue for the shipping public, beyond simply the SOFi movement at hand: “The Commission has held that a charge is unreasonable if it is not reasonably related, either to an actual service performed for, or a benefit conferred upon, the person being charged,” “tariff terms must be clear and definite,” and that “[a] common carrier leaving the shipping public to guess as to when and how a surcharge will apply renders that charge neither clear nor definite.”<sup>24</sup> The FMC held that in charge complaint proceedings it will only determine whether there is a violation with respect to specific charges assessed or paid, rather than with respect to a common carrier's entire practice, and discontinued the proceeding against MFC, finding that “the record is insufficient to establish that a violation of 41102(c) occurred.”

Commissioner Sola concurred and Commissioner Vekich concurred in part and dissented in part. Although concurring, Commissioner Sola stated that “it is imperative to consider multifaceted concerns regarding auxiliary charges ... [t]he growing frequency of auxiliary charges is an issue we must be prepared to address and set forth frameworks to ensure these fees best serve the interests of the shipping industry.”<sup>25</sup> Commissioner Vekich disagreed with the majority finding that the record is insufficient to establish a violation of Section 41102(a), stating that the congestion surcharge was assessed pursuant to a tariff that was neither clear nor definite, in violation of 46 C.F.R. § 520.7.<sup>26</sup> Further, he opined:

I don't believe a tariff rule that allows implementation of a congestion charge without sufficiently identifying the degree of congestion

<sup>18</sup> MSC Decision at 3.

<sup>19</sup> *Id.* at 7.

<sup>20</sup> *Id.* at 8.

<sup>21</sup> *Id.* at 8.

<sup>22</sup> *Id.* at 9.

<sup>23</sup> *Id.* at 10.

<sup>24</sup> *Id.* at 11.

<sup>25</sup> *Id.* at 14.

<sup>26</sup> *Id.*

warranting the charge is clear and definite, or, for that matter, reasonable. On its face, MSC's tariff rule requires assessment of the charge even for voyages that did not incur congestion and does not include any indication of when the congestion charge would cease to be assessed. If the charge is assessed in the absence of congestion, then I believe that is an unreasonable practice. Further, there is no additional service provided to justify the charge; quite the opposite, the charge is assessed when the cargo cannot be delivered as scheduled . . . . I would initiate a separate penalty proceeding to be referred to the Commission's Administrative Law Judge for consideration of penalties.<sup>27</sup>

Lastly, Commissioner Vekich disagreed with the majority holding that a charge complaint proceeding cannot determine whether there is a violation of "a common carrier's entire practice."<sup>28</sup>

The *Mediterranean Shipping* charge complaint is likely just the first of many to come before the FMC. Later this year, the FMC intends to finalize its rules, providing further structure and clarity for the process. With hundreds of these complaint proceedings filed annually, and close to \$2 million in claims settled during the first year, surely more will make their way before the FMC.

The decision serves as a cautionary take for carriers facing the decision to settle. The *Mediterranean Shipping* charge complaint was for a small sum, and yet MSC found itself caught up in lengthy litigation. Even though MSC refunded the whole charge, it did so too late by waiting until after the Show Cause Order issued—finding itself facing the threat of additional civil penalties and challenges to its "entire practice," with ramifications potentially far beyond the small claim at issue. The decision also makes clear that the FMC will look past NVOCCs in direct privity with disgruntled shippers to hold vessel operating common carriers responsible for charges passed through the NVOCC. Lastly, the case demonstrates that the FMC will not abide dispositive motions or requests for sur-replies by respondent carriers in charge complaint proceedings.

Carriers would be well-advised to consider carefully how to respond to charge complaints raised against them, and to do so in a timely manner, before escalation to the Show Cause Order stage of the proceeding.

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<sup>27</sup> *Id.* at 15.

<sup>28</sup> *Id.*

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