

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
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SUBJECT

Intermodal marine terminals

DIGEST

This bill expands existing state prohibitions on the assessment of certain fees and charges by intermodal marine equipment providers and terminal operators by broadening the definition of prohibited charges, adding new entities on which those charges may not be levied, and adding specific conditions under which these prohibitions apply.

EXECUTIVE SUMMARY

The global shipping system is massively complex and relies on the coordination of myriad, separately related businesses and industries all working at more or less the same pace. The average consumer, however, did not have much cause to think about the global supply chain until the COVID-19 pandemic threw a wrench into the gears. For people within the system, however, COVID-19 merely compounded existing problems surrounding the apparatus for importing and exporting goods, particularly in the areas of agriculture and the structure of ports.

Current law imposes prohibitions on the types of fees, charges, and penalties an intermodal marine terminal operator or intermodal marine equipment provider – in plain terms, the port facilities that handle the loading and unloading of shipping containers and the entities that control the shipping containers used to transport goods – can impose on a motor carrier, i.e., the truck that is taking the goods to or from the port. The restrictions are intended to ensure that the truckers moving the imports and exports, who are merely carriers and do not contract directly with the port facilities and equipment providers, are not imposed excessive fees for delays or other issues outside of their control.

This bill modifies the existing regulatory framework. According to the author, changes in the operation of the intermodal shipping system and changes in practices, particularly in the aftermath of the COVID-19 pandemic, require expanding the scope of the bill in two ways. First, the bill expands the prohibition on what fees and charges may be imposed on the motor carriers by the terminal facilities and equipment providers. Second, the bill expands the prohibition to prohibit the facilities and providers from imposing specified charges and fees on the beneficial cargo owner or other intermediary (generally, the importer or exporter or their representative). To the author, sponsor, and supporters of the bill state that these changes are necessary to protect consumers, importers, and exported from unfair fees and, by extension, higher prices and loss of global market share. The author has agreed to accept amendments to mitigate the potential preemptive effect of federal law.

This bill is sponsored by the California Trucking Association and the Harbor Trucking Association, and is supported by nearly 60 state, regional, and national agricultural, industrial, retail, and transportation organizations. The bill is opposed by the Pacific Merchant Shipping Association. This bill passed out of the Senate Transportation Committee with a 15-0 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides that the Legislature finds and declares that unilateral termination, suspension, or restriction of equipment interchange rights of an intermodal motor carrier shall not result from intermodal marine terminal actions as specified in 2)-4). (Bus. & Prof. Code, § 22928(a).)
- 2) Defines the following relevant terms:
 - a) "Per diem," "detention," or "demurrage" means a charge imposed by an equipment provider or marine terminal operator for late return or pickup of an empty or a loaded intermodal container and chassis.
 - b) "Closed" means not open or available to receive equipment. The marine terminal shall have posted working hours, and "closed" shall mean that the terminal is not open to release or accept equipment during those posted working hours.
 - c) "Divert equipment" means the motor carrier has been directed to return the equipment to a location different from the location where the equipment was picked up by the motor carrier.
 - d) "Shall not impose per diem, detention, or demurrage charges on an intermodal carrier" applies to the day or days in question that an occurrence referenced in 3) took place.

- e) "Intermodal marine terminal" means a marine terminal location or facility that engages in discharging or receiving equipment owned, operated, or controlled by an equipment provider.
 - f) "Written or electronic notification" means any communication by postal letter, facsimile, electronic mail, or other electronic notification. (Bus. & Prof. Code, § 22928(d).)
- 3) Prohibits an intermodal marine equipment provider from imposing per diem, detention, or demurrage charges on an intermodal motor carrier relative to transactions involving cargo shipped by intermodal transport under any of the following circumstances:
- a) When the intermodal marine or terminal truck gate is closed during posted normal working hours; no per diem charges shall be imposed on a weekend or holiday, or during a labor disruption period, or during any other period involving an act of God or any other planned or unplanned action that closes the truck gate.
 - b) When the intermodal marine terminal decides to divert equipment without 48 hours' electronic or written notification to the motor carrier.
 - c) When the intermodal marine terminal is assessed a fine relating to excessive truck idling or queuing, as specified.
 - d) When the intermodal marine terminal is out of compliance for violations of the Vehicle Code, as specified, or the equipment is placed out of service.
 - e) When a loaded container is not available for pickup when the motor carrier arrives at the intermodal marine terminal.
 - f) When the intermodal marine terminal is too congested to accept the container and turns away the motor carrier. (Bus. & Prof. Code, § 22928(b).)
- 4) Prohibits an intermodal marine equipment provider from taking any of the following actions:
- a) Charge back, deduct, or offset per diem charges, maintenance and repair charges, or peak-hour pricing from a motor carrier's freight bill.
 - b) Unilaterally terminate, suspend, or restrict the equipment interchange rights of a motor carrier or driver that uses the dispute resolution process contained in the Uniform Intermodal Interchange and Facilities Access Agreement to contest a charge, fee, or fine, including a charge for maintenance and repairs imposed by the intermodal marine terminal, while the dispute resolution process is ongoing.
 - c) Unilaterally terminate, suspend, or restrict the equipment interchange rights of a motor carrier for late payment of an undisputed invoice from the intermodal marine terminal, provided that they payment is no more than 60 days late.
 - d) Unilaterally terminate, suspend, or restrict the equipment interchange rights of a motor carrier or driver for parking tickets issued by the marine terminal unless the tickets remain unpaid more than 60 days after being in receipt of

the driver or motor carrier. No parking tickets shall be issued by the marine terminal to a driver or motor carrier for a parking violation if the assigned spot was occupied and the trouble window or terminal administration was unable to immediately provide a place to park, or if the driver was instructed to park in a different spot by marine terminal personnel or security.

- e) Willfully attempt to circumvent any provision of this section or to fail, for any reason other than what is specified in the governing port tariff, to collect demurrage when due and payable and when consistent with 1)-4). An intermodal motor carrier shall not be liable for any portion of demurrage when an intermodal container is not picked up during free time, which is the time period before demurrage charges are to be applied. (Bus. & Prof. Code, § 22928(c).

This bill:

- 1) Replaces references to an “intermodal motor carrier” with references to a “motor carrier,” which has the same meaning as in Vehicle Code section 408.
- 2) Provides that the Legislature finds and declares that unilateral termination, suspension, or restriction of equipment interchange rights of a motor carrier shall not result from an intermodal marine equipment provider or from an intermodal marine terminal.
- 3) Modifies existing prohibitions on intermodal marine equipment providers or operators to prohibit an intermodal marine equipment provider or operator from commencing or continuing free time or imposing per diem, detention, demurrage, extended dwell, congestion charges or charges of a similar kind or character on a motor carrier, beneficial cargo owner, or other intermediary relative to transactions involving cargo shipped by intermodal transport.
- 4) Modifies the circumstances in which the charges in 2) may not be applied to include:
 - a) When the equipment provider decides to divert equipment from the original interchange location without 48 hours’ electronic or written notification to the motor carrier.
 - b) When the intermodal marine equipment is out of compliance under the Vehicle Code, as specified or the equipment is placed out of service.
 - c) When the intermodal carrier documents an unsuccessful attempt to make an appointment for either a loaded or an empty carrier, including unilaterally imposed transaction restrictions, such as single or dual transactions, chassis matching, or empty container requirements and failure to provide a return location or other conditions that impede the motor carrier’s ability to pick up or terminate intermodal marine equipment.

- d) When a booked vessel cancels, booking is moved to a later vessel, or when early return dates are otherwise unilaterally or otherwise advanced or delayed after equipment has been picked up.
 - e) When the obstacle to cargo retrieval or return of equipment is within the scope of responsibility of the carrier or their agent and beyond the control of the invoiced or contracting party.
- 5) Modifies the prohibitions on the actions that may be taken by an intermodal marine equipment provider, as follows:
- a) Prohibits an intermodal marine equipment provider from unilaterally terminating, suspending, or restricting the equipment interchange rights of a motor carrier or driver that uses the dispute resolution process contained in the Uniform Intermodal Interchange and Facilities Access Agreement to contest a charge, fee, or fine, including a charge for maintenance and repairs imposed by the intermodal marine equipment provider, while the dispute resolution process is ongoing.
 - b) Prohibits an intermodal marine equipment provider from unilaterally terminating, suspending, or restricting the equipment interchange rights of a motor carrier for late payment of an undisputed invoice from the intermodal marine equipment provider, provided that the payment is no more than 60 days late.
 - c) Prohibits an intermodal marine equipment provider from unilaterally terminating, suspending, or restricting the equipment interchange rights of a motor carrier or driver for parking tickets issued by the intermodal marine terminal unless the tickets remain unpaid more than 60 days after being in receipt of the driver or motor carrier. No parking tickets shall be issued by the intermodal marine terminal to a driver or motor carrier for a parking violation if the assigned spot was occupied and the trouble window or terminal administration was unable to immediately provide a place to park, or if the driver was instructed to park the equipment in a different spot by intermodal marine terminal personnel or security.
- 6) Redefines the period in which a motor carrier may be liable for any portion of demurrage when an intermodal container is not picked up during free time, to eliminate the provision that free time is the period before demurrage charges to be applied.
- 7) Adds a prohibition on an intermodal marine equipment provider to prohibit it from commencing or continuing free time if cargo is unavailable for retrieval and timely notice of cargo availability has not been provided.
- 8) Modifies the relevant definitions as follows:
- a) Redefines “closed” to mean that the terminal or the area within the marine terminal containing the cargo or equipment is not open or available to receive

- equipment, and that the marine terminal shall have posted working hours, and “closed” shall mean that the terminal is not open to release or accept equipment during those posted working hours.
- b) Defines “free time” to mean the time period offered by the intermodal marine equipment provider free of charge, beyond which additional charges, including per diem, detention, demurrage, extended dwell, congestion charges, or charges of a similar kind or character, are to be applied.
 - c) Defines “intermodal marine equipment provider” to mean the entity authorizing delivery or receipt of physical possession of the container with a motor carrier, beneficial cargo owner, or other intermediary.
 - d) Redefines “intermodal marine terminal” to mean a marine terminal location or satellite facility, within the same local commercial territory that supports operations of an intermodal marine equipment provider, for the location from which equipment was originally received, that engages in discharging or receiving equipment owned, operated, or controlled by an equipment provider.
 - e) Redefines “per diem,” “detention,” or “demurrage” as a charge imposed by an intermodal equipment provider or marine terminal operator for late return or pickup of an empty or a loaded intermodal container and chassis.
 - f) Defines “shall not commence or continue free time or impose per diem detention, demurrage, extended dwell, congestion charges, or charges of a similar kind or character on an intermodal carrier, beneficial cargo owner, or other intermediary” to apply to the day or days in question that an occurrence took place.
- 9) Provides that where the provisions of the section are addressed by future federal law or regulation, the applicable provision shall conform to federal standards where the federal standard is more stringent.

COMMENTS

1. Author’s comment

According to the author:

Agricultural exporters are losing customers around the globe while absorbing unfair fees. California manufacturers and retailers are already facing unprecedented cost increases for imports on top of paying the highest detention and demurrage rates in the world. These unfair fees ultimately increase the price of goods and services for all Californians. This bill will protect California businesses from being charged excessive and unfair fees (detention/demurrage) by intermodal marine equipment providers (equipment providers) for reasons outside the control of the business by clarifying and modernizing the protections set by SB 45 (Alarcón, Ch., 244, Stats. 2005).

2. A primer on intermodal marine terminals and their role in the supply chain

California is an import/export powerhouse. In 2018, California exported \$178.2 billion in goods, which supported an estimated 684,000 jobs.¹ In 2020, California's agricultural exports alone totaled \$20.8 billion.² That same year, California imported over \$395 billion worth of goods.³ According to the California Association of Port Authorities, California's 11 deepwater port authorities handle 40 percent of all containerized imports and 30 percent of all exports in the United States.⁴

The form of containerized imports and exports relevant to this bill is through the use of intermodal equipment at intermodal terminals. Broadly speaking, this method of transport relies on standardized shipping containers being moved between cargo vessels and trucks or railcars in order to accomplish the task of moving goods; the containers are standardized and "intermodal" because they can be moved between a ship, a truck, or a train without requiring the goods to be unloaded. These intermodal containers are generally owned by a shipping line or a container leasing company, known as intermodal marine equipment providers. The exporter usually pays a fee to the intermodal marine equipment provider to use the container, but the fee often kicks in only after the container has been in use for three to five days. When the goods are being taken by truck, the container is placed on an intermodal chassis that will be available at the port or terminal.

The time an importer or exporter is in possession of a container is divided into two periods: demurrage and detention. Demurrage refers to the period when the importer or exporter has custody of the container within the port or terminal. Detention refers to the period when the importer or exporter has custody of the container outside of the port or terminal – to either bring the exported goods to their final destination, or loading the container with goods to be shipped across the world.

The intermodal demurrage and detainer system depends on a reasonably predictable pattern of ships and trucks/rail coming to and from the port to make sure the containers are available as needed. When this balance gets off, it can be disastrous – which is what happened in 2020-2021 and played a major factor in the supply chain congestion that shook the country.

¹ Office of the United States Trade Representative, California Trade Facts, <https://ustr.gov/map/state-benefits/ca> (last visited Jun. 7, 2022).

² California Department of Food and Agriculture, California Agricultural Statistics (2021), <https://www.cdfa.ca.gov/Statistics/> (last visited Jun. 7, 2022).

³ United States Department of Commerce, International Trade Administration, California NAICS-3 Imports by Product by Partner, <https://www.trade.gov/tradestats-express-national-and-state-trade-data> (last visited Jun. 7, 2022).

⁴ California Association of Port Authorities, About CAPA, <https://californiaports.org/about-capa/> (last visited Jun. 7, 2022).

The COVID-19 pandemic set off a perfect supply chain storm. Producers' labor forces were hit hard by the virus, leading to reduced production, which caused shipping companies to reduce their schedules in anticipation of lower global demand.⁵ But demand went the other way – Americans used stimulus money, and the money they saved by not going out to socialize, to load up on stuff.⁶ Factories were swamped with orders and the system for transportation was overloaded.⁷ At the center of it all was a the humble shipping container shortage: the predictable system of containers coming and going had broken down, causing containers to pile up and sit empty in some places while being unavailable but desperately needed in others.⁸ As a result, the cost of shipping exploded: the cost to send a container from Shanghai to Los Angeles was around \$2,500 before the pandemic shot up to as high as \$25,000 during the pandemic.⁹ Cargo vessels also had to wait in line to reach the Ports of Los Angeles, Long Beach, and Oakland.¹⁰

In November 2021, the Senate and Assembly Select Committees on Ports and Goods Movement held an informational hearing on supply chain issues at California's ports. One witness reported that problems in California's ports were leading California's farmers to send goods via rail to be exported out of ports in Texas and Maryland and to other countries via air; these tactics are not profitable, but were made as emergency measures to avoid losing market share to other countries.¹¹ Other witnesses reported that, in California's ports, there was insufficient storage space for shipping containers and space for chassis.¹² All agreed that serious action was needed – not just to alleviate the current supply chain crisis, but to develop the necessary infrastructure and processes to prevent future crises.

⁵ Goodman, *How the Supply Chain Broke, and Why It Won't Be Fixed Anytime Soon*, N.Y. Times (Oct. 21, 2021; updated Oct. 31, 2021) available at <https://www.nytimes.com/2021/10/22/business/shortages-supply-chain.html> (last visited Jun. 7, 2022).

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Goodman, et al., *'I've Never Seen Anything Like This': Chaos Strikes Global Shipping*, N.Y. Times (Mar. 6, 2021; updated Oct. 18, 2021), available at <https://www.nytimes.com/2021/03/06/business/global-shipping.html> (last visited Jun. 7, 2021).

⁹ Goodman, *How the Supply Chain Broke, and Why It Won't Be Fixed Anytime Soon*, N.Y. Times (Oct. 21, 2021; updated Oct. 31, 2021) available at <https://www.nytimes.com/2021/10/22/business/shortages-supply-chain.html> (last visited Jun. 7, 2022).

¹⁰ *Ibid.*

¹¹ Sen. & Assem. Select Com. on Ports and Good Movement, Informational Hearing, Spiking Costs and Scare Containers: How the Backup is Impacting Business (Nov. 3, 2021), testimony of Roger Isom, video available at <https://www.assembly.ca.gov/media/joint-hearing-assembly-select-committee-ports-goods-movement-senate-select-committee-ports-goods-movement-20211103/video> (last visited Jun. 7, 2022).

¹² Sen. & Assem. Select Com. on Ports and Good Movement, Informational Hearing, Spiking Costs and Scare Containers: How the Backup is Impacting Business (Nov. 3, 2021), testimony of Roger Isom, video available at <https://www.assembly.ca.gov/media/joint-hearing-assembly-select-committee-ports-goods-movement-senate-select-committee-ports-goods-movement-20211103/video> (last visited Jun. 7, 2022).

In the time between the Senate Transportation Committee's hearing on this bill and the release of this analysis, the federal government took action: President Biden signed the Ocean Shipping Reform Act of 2022 (OSRA).¹³ OSRA increases the FMC's regulatory authority over some of the subject matter covered by the bill.¹⁴ The effect of OSRA on the matters covered in this bill is discussed further in Part 4 of this analysis.

3. This bill modifies California's law relating to fees and charges imposed by intermodal marine equipment providers and intermodal marine terminal operators

The specific policy questions posed by this bill, including the proper allocation of risk between importers and exporters and intermodal marine terminal operators and equipment providers, is outside the scope of this Committee's jurisdiction. The Senate Transportation Committee heard this bill and considered those policy questions, and that Committee's analysis of the bill is incorporated herein by reference.

In 2005, the Legislature SB 45 (Alarcón, Ch. 244, Stats. 2005) which implemented the State's current statutory limitations on the fees and charges that intermodal marine equipment providers and intermodal marine terminal operators could impose on the truckers picking up and delivering cargo.¹⁵ It was the second attempt at such regulation – in 2004, a similar bill was vetoed by Governor Schwarzenegger and another similar bill died on the Assembly inactive file.¹⁶ This bill is the first piece of legislation to propose amending the statute since its enactment.

SB 45 was enacted to prohibit intermodal marine equipment providers and intermodal marine terminal operators – who control the shipping containers and space in the ports and terminals that are essential for the movement of imports and exports – from using their monopoly over the containers and physical space to extract excessive payments from the truckers. While reasonable demurrage and detainer fees are useful to encourage efficiency in loading and unloading storage containers, excessive fees unfairly harm the State's agricultural exporters, retailing importers, and a wide array of other businesses. Moreover, the truckers – who are simply transporting the goods – often have little control over the circumstances surrounding their timing and ability to load or offload goods.

According to the author and supporters of this bill, changes in the practices of ocean shipping lines, intermodal equipment providers, and the ports and terminal operators have given rise to a wave of new inequitable fees and charges on the trucker and on the importers and exporters. These issues include equipment providers failing to arrange

¹³ See White House, Press Release, Bill Signed: S. 3580 (Jun. 16, 2022), <https://www.whitehouse.gov/briefing-room/legislation/2022/06/16/bill-signed-s-3580/> (last visited Jun. 16, 2022); S. 3580 (117th Cong., 2021-2022).

¹⁴ *Ibid.*

¹⁵ See Bus. & Prof. Code, § 22928.

¹⁶ SB 348 (Alarcón, 2004); AB 1651 (Firebaugh, 2004).

alternative locations for container return when the terminals are congested, meaning trucks cannot timely return the containers and are charged late fees; and, because cargo vessels are opting to bypass the Port of Oakland, agricultural exporters' trucks are arriving at a port with no ship and have to pay fees on the container until a ship arrives. The author cites a report stating that the average demurrage and detention fees have doubled since 2020, and fees at the Port of Long Beach and Los Angeles are the highest in the world after two weeks.

There debate, however, over the reasons for the new fees and charges. At the Senate and Assembly Select Committees on Ports and Goods Movement's hearing in November, the Executive Director of the Port of Los Angeles stated that importers were electing to keep imported goods in shipping containers on Port property, and that when the Port instituted a penalty fee for demurrage delays (dwell time) in excess of nine days, the Port received requests to move 9,500 shipping containers into long-term storage.¹⁷ Some of the problems also arise from the choices of the shipping companies, who may bypass a port and cause problems out of the control of the terminal or equipment provider. The Pacific Marine Shipping Association, writing in opposition, also argues that the new fees are the result of delays caused by truckers, importers, and exporters, not the terminals and equipment providers. Notably, over the last two decades, shipping companies have consolidated to the point that a single alliance controls 80 percent of global container ship capacity and 95 percent of critical East-West trade lines, which gives them significant power to control prices and make choices that negatively affect individual importers or exporters.¹⁸

This bill addresses the current state of affairs in two ways. First, the bill adds to the list of prohibited fees and charges that may be imposed on a trucker by a terminal or equipment provider. Specifically, the bill:

- 1) Expand the prohibition on imposing specified per diem, detention, or demurrage charges to provide that an equipment provider or terminal shall not commence or continue free time, or impose per diem, detention, demurrage, extended dwell, congestion, or similar charges.
- 2) Modifies the prohibition on charges in 1) to include when the intermodal equipment provider decides to divert equipment from the original interchange location without 48 hours' written notice.

¹⁷ Sen. & Assem. Select Com. on Ports and Good Movement, Informational Hearing, Spiking Costs and Scare Containers: How the Backup is Impacting Business (Nov. 3, 2021), testimony of Gene Seroka, video available at <https://www.assembly.ca.gov/media/joint-hearing-assembly-select-committee-ports-goods-movement-senate-select-committee-ports-goods-movement-20211103/video> (last visited Jun. 7, 2022).

¹⁸ White House Fact Sheet: Lowering Prices and Leveling the Playing Field in Ocean Shipping (Feb. 28, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/28/fact-sheet-lowering-prices-and-leveling-the-playing-field-in-ocean-shipping/> (last visited Jun. 7, 2022). The Federal Maritime Commission estimated that, between July to September 2021, "eight of the largest carriers charged customers fees totaling \$2.2 billion – a 50 percent increase on the previous three-month period." (*Ibid.*)

- 3) Prohibits the charges in 1) from being charged when the motor carrier documents an unsuccessful attempt to make an appointment for either a loaded or empty container, including unilaterally imposed transaction restrictions, such as single or dual transaction, chassis matching, or empty container requirements and failure to provide a return location or other conditions that impede the motor carrier's ability to pick up or terminate intermodal marine equipment.
- 4) Prohibits the charges in 1) from being charged when booked vessel cancels, booking is moved to a later vessel, or when early return dates are otherwise unilaterally advanced or delayed after equipment has been picked up.
- 5) Prohibits the charges in 1) from being charged when the obstacle to the cargo retrieval or return of equipment is within the scope of responsibility of the carrier or their agent and beyond the control of the invoiced or contracting party.
- 6) Prohibits an equipment provider from taking specified actions that were previously prohibited from being taken by an intermodal marine terminal.
- 7) Prohibits a provider from commencing or continuing free time if cargo is unavailable for retrieval and timely notice of cargo availability has not been provided.

Second – and for the opposition, more significantly – the bill expands the bill's prohibition on charges and fees to be imposed on the motor carriers (truckers) to also prevent any of the same charges and fees from being imposed on the beneficial cargo owner or intermediary (the entity importing or exporting the goods). This represents a significant shift in the scope of the statute. While the truckers do not have direct contractual relationships with the terminal operators or equipment providers, the cargo owners nearly generally do. By expanding this bill's limitations on charges and fees to cargo owners, the bill would supersede contractual provisions relating to fines and fees for delays and other matters.

According to the author, sponsor, and supporters, these added prohibitions on the fees and charges that may be imposed by terminal operators and intermodal equipment providers will prevent California's importers and exporters from unfair fees.

4. Constitutional issues

This Committee is considering this bill not to weigh in on transportation policy, but to address the constitutional issues underlying the bill. Specifically, this bill raises questions about preemption and interference with the right to contract.

The author has agreed to certain amendments to clarify the bill's position with respect to federal law, set forth further in Part 5.

a. Preemption

Federal preemption of state laws stems from the Supremacy Clause, which provides that the laws of the United States take precedence over state laws.¹⁹ Preemption comes in three flavors: express, field, and conflict.²⁰ In determining whether Congress intended to preempt state law in a particular area, “ ‘the purpose of Congress is the ultimate touchstone in every pre-emption case.’ ”²¹

As this bill has worked its way through the Legislature, Congress has also taken its own steps to address the supply chain crisis. On June 16, 2022, President Joseph R. Biden signed OSRA into law.²² OSRA expands existing laws giving the Federal Maritime Commission (FMC) the authority to assess the reasonableness of demurrage detention practices and regulations, including “per diem” charges, related to the use of marine terminal space or shipping containers.²³

Even before the passage of OSRA, there was overlap between federal law and the subject matter addressed by AB 2406 with respect to the relationship between terminals, equipment providers (who are often the ocean carriers), and the cargo owners (importers and exporters). Federal law prohibits a common carrier, marine terminal operator, or ocean transportation intermediary from failing to “establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.”²⁴ In 2019, the FMC issued an interpretive rule relating to the reasonableness of demurrage and detention fees that would gauge the reasonableness of fees based on the “incentive principle,” which holds that fees should be used to promote freight fluidity by incentivizing the prompt movement of cargo and return of shipping containers.²⁵ The interpretive rule was adopted and took effect in May 2020.²⁶ In 2021, the FMC announced the creation of a new audit program and dedicated team to determine whether carriers complying with the regulations relating to detention and demurrage and to provide better information

¹⁹ U.S. Const., art. VI, cl. 2.

²⁰ *E.g., Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 372.

²¹ *Id.* at p. 163.

²² See White House, Press Release, Bill Signed: S. 3580 (Jun. 16, 2022), <https://www.whitehouse.gov/briefing-room/legislation/2022/06/16/bill-signed-s-3580/> (last visited Jun. 16, 2022).

²³ 46 C.F.R. §§ 545.4, 545.5.

²⁴ 46 U.S.C. § 41102(c).

²⁵ FMC, Notice of Proposed Rulemaking, Interpretive Rule on Demurrage and Detention Under the Shipping Act, 84 Fed. Reg. 49950 (Sept. 17, 2019).

²⁶ FMC, Final Rule, 85 Fed. Reg. 29638 (May 18, 2020). The FMC referred to the issuance of the interpretive rule as “one of the biggest challenges the [FMC] has ever undertaken,” in part because the “United States is the first nation to confine the charges to the purpose for which they are intended: to incentivize shippers to pick up cargo and return equipment for allotted time periods.” (FMC, Fact Finding Investigation 29, Final Report, Effects of the COVID-19 Pandemic on the U.S. International Ocean Supply Chain: Stakeholder Engagement and Possible Violations of 46 U.S.C. § 41102(c) (May 31, 2022), at p. 45 (FMC Final Report).)

to individuals in the ocean cargo marketplace.²⁷ And in May 2022, the FMC released a thorough report addressing the state of the market for ocean liner services and the assessment and billing of detention and demurrer charges.²⁸ The report notes that there is “a lack of consistency across the United States with respect to the return of empties [empty shipping containers] and it is not always clear who is responsible for communicating return locations.”²⁹ The report recommended that the FMC begin a rulemaking process to bring coherence and consistency to the practices surrounding the return of empty carriers and earliest return dates.³⁰

Under OSRA, the FMC will delve even more deeply in the field of demurrage and detention fees. OSRA adds statutory limitations on what charges may be assessed against a cargo owner, including detention and demurrage charges.³¹ requires the FMC to initiate rulemaking procedures to “defin[e] prohibited practices by common carriers, marine terminal operators, shippers, and ocean transportation intermediaries...regarding the assessment of demurrage or detention charges,” “defin[e] unfair or unjustly discriminatory methods” constituting discrimination against cargo owners, and to “defin[e] unreasonable refusal to deal or negotiate with respect to vessel space.”³² OSRA also codifies certain regulations, such as the presumption that detention charges are not reasonable when, e.g., empty containers cannot be returned.³³

All of the above gives rise to a very real question about whether AB 2406 is preempted. OSRA does not contain a preemption clause, and Committee staff is not aware of, and no party has argued, that this bill is expressly preempted. The question is therefore whether existing federal laws so thoroughly occupy the field as to render any state legislation in this space improper, or whether the state’s law creates a conflict with an existing federal scheme.³⁴ Given the scope of regulations the FMC is entitled to adopt, it is entirely possible that passage of OSRA could give rise to a finding that OSRA reflects an intent to occupy the field – which would make sense, given the extent to which the movement of goods through ports is a matter of international concern. It is also possible that the FMC will adopt regulations that directly conflict with the provisions of this bill, giving rise to a conflicts preemption problem.

²⁷ FMC, Press Release, FMC Establishes Ocean Carriers Audit Program (Jul. 20, 2021), <https://www.fmc.gov/fmc-establishes-ocean-carriers-audit-program/> (last visited Jun. 8, 2022).

²⁸ FMC Final Report, *supra*, fn. __.

²⁹ *Id.* at p. 36.

³⁰ *Id.* at pp. 56-57.

³¹ S. 3580 (117th Cong., 2021-2022), § 7.

³² *Ibid.*

³³ *Ibid.*; see 46 C.F.R. § 545.5.

³⁴ See *Hughes v. Talen Energy Marketing, LLC* (2016) 578 U.S. 150, 162-163.

b. Right to contract

The Contracts Clause of the United States Constitutions prohibits a state from passing a law “impairing the Obligation of Contracts.”³⁵ As with many provisions in the Constitution, courts have interpreted the facially absolute language to allow for some wiggle room.³⁶ “The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from the state regulation by making private contractual arrangements.”³⁷ Moreover, “the Contracts Clause does not operate to obliterate the police power of the states.”³⁸

According to the sponsors of the bill, the unequal bargaining power between the parties warrants the limitations on fees and charges in AB 2406. They argue that there is unequal bargaining power between importers/exporters and the carriers and terminals that leaves them unable to bargain for reasonable fees and charges. At least one federal court has noted the unequal bargaining power between these parties.³⁹ PSMA argues that the contractual terms are not the product of unequal power, nor are they new; instead, the increase in charges and fees resulted from the unique circumstances surrounding the state of global shipping during the pandemic and, in many cases, importers’/exporters’ own delays. They note that many of the contracts in this area are executed pursuant to the Uniform Intermodal Exchange and Facilities Act Agreement (UIIA) and argue that it would unreasonably impair their right to contract to pass a state law that limits the UIIA’s effectiveness.

This bill does appear to impede contracts to an extent, insofar as it prohibits certain charges that appear to be addressed in the contracts between importers/exporters and the terminals and equipment providers. The fact that some contracts arise under the UIIA is a less compelling point; as the FMC notes, not all parties involved are parties to the UIIA, and standard UIIA terms are modified by addenda agreed to by the parties.⁴⁰ It may be a close call as to whether AB 2406’s regulations fall within the state’s police power, but the better argument seems to be that the state is capable of regulating in this space. The bill’s rationale of preventing importers and exporters from being held hostage by circumstances out of their control is more comparable to anti-usury laws or minimum wage laws than to the types of impediments contemplated by the Contracts Clause.

³⁵ U.S. Const., art. I, § 10, cl. 1. The same clause prohibits a state from granting any title of nobility; that prohibition is not at issue here.

³⁶ *E.g., Home Bldg. & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, 428 (it is “beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula”).

³⁷ *U.S. Trust Co. of New York v. New Jersey* (1977) 431 U.S. 1, 22.

³⁸ *Allied Structural Steel Co. v. Spannus* (1978) 438 U.S. 234, 242.

³⁹ *See Unimax Express, Inc. v. Cosco* (C.D.Cal., Nov. 28, 2011) Case No. CV 11-02947, 2011 WL 5909811.

⁴⁰ FMC, Final Rule, 85 Fed.Reg. 29638 (May 18, 2020).

5. Amendments

As noted above, this bill is not currently preempted by federal law, but future federal action in this space could render some or all of the state statute preempted. To help a complete invalidation of the state statute if a court finds that only parts of it preempted, the author has agreed to add a severance clause to the bill. Additionally, the author has agreed to amend the portion of the bill relating to preemption to clarify the interplay between a potential federal law and the state law's requirements. The amendments are as follows, subject to any nonsubstantive changes Legislative Counsel may make:

Amendment 1

On page 5, in line 40, strike out "the applicable provision shall conform", strike out page 6, and insert:

and the federal law or regulation permits states to exceed the requirements set forth in the federal law or regulation, the more stringent provision shall govern.

(f) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

6. Arguments in support

According to a coalition of state, regional, and national agricultural, industrial, retail, and transportation organizations, writing in support:

Under ordinary circumstances, [demurrage and detention] fees are designed to encourage the efficient use of containers. However, during our recent and ongoing port congestion crisis, late charges have been imposed on California businesses by international ocean carriers even when containers cannot be returned due to circumstances not within the control of the importer, exporter or trucker. While detention and demurrage fees have increased across the globe, ocean carriers are charging two to ten times the fees in Los Angeles and Long Beach versus other major ports worldwide.

Agricultural exporters are losing global market share while absorbing unfair fees. California manufacturers and retailers are already facing unprecedented cost increases for imports on top of paying the highest detention/demurrage rates in the world. All of these costs ultimately increase the price of goods and services for Californians.

In 2005, California adopted SB 45 (Alarcón, Ch. 244, Stats. 2005) which prohibited levying these fees against truckers when the delayed pickup or return of a container is not within the control of California businesses. However, the industry has evolved since this law was adopted and it needs to be modernized. AB 2406 would update existing law to fit today's operating environment and continue the existing policy of protecting California trade from unfair fees.

7. Arguments in opposition

According to the Pacific Merchant Shipping Association, writing in opposition:

The OSRA – which was passed by the House of Representatives on Monday of this week and being presented to President Biden for his signature today – is specifically designed to shift the burden of proof when there are controversies regarding the reasonableness of detention or demurrage charges from cargo owners to ocean carriers. California law should not be used to supplant and substitute for the federal system which is being reformed now and which provides the basis for commercial parties to contract for services. AB 2406 should be revised in a manner which does not conflict with federal law and which provides for the rights of parties to continue to contract with each other.

Our international and interstate intermodal supply chain rests upon interchange agreements and commercial services contracts applicable to cargo owners and to equipment providers – parties that have direct contracts with one another regarding these transactions. It is particularly important to maintain a uniform regulatory scheme for all carriers across the intermodal spectrum, so that states and local governments do not create a patchwork of laws and regulations that make interstate and international commerce difficult and inefficient. Now that the OSRA has been adopted, parties will then need to be able to negotiate contracts which might better reflect the new marketplace as approved by Congress.

SUPPORT

California Trucking Association (co-sponsor)

Harbor Trucking Association (co-sponsor)

African American Farmers of California

Agricultural Food Transporters Conference and Intermodal Motor Carrier Conference

Agriculture Transportation Coalition

Air-Conditioning, Heating and Refrigeration Institute

Almond Alliance of California

American Chemistry Council

American Forest & Paper Association

American Home Furnishings Alliance

American Lighting Association
American Pistachio Growers
American Trucking Associations
Association of Food Industries
Association of Home Appliance Manufacturers
Auto Care Association
California Apple Commission
California Blueberry Association
California Blueberry Commission
California Citrus Mutual
California Cotton Growers and Ginners Association
California Farm Bureau
California Fresh Fruit Association
California Manufacturers and Technology Association
California Olive Oil Council
California Retailers Association
California Rice Commission
California Walnut Commission
Capay Canyon Ranch
CAWA
Far West Equipment Dealers Association
Fashion Accessories Shippers Association
Fashion Jewelry and Accessories Trade Association
Foreign Trade Association
Gemini Shippers Association
Green Coffee Association
International Housewares Association
International Warehouse Logistics Association
Leather and Hide Council of America
Los Angeles Customs Brokers and Freight Forwarders Association
Meat Import Council of America
National Confectioners Association
National Hay Association
National Milk Producers Federation
National Onion Association
Nisei Farmers League
North American Meat Institute
Northern California Customs Brokers and Freight Forwarders Association
Olive Growers Council of California
Pacific Coast Council of Customs Brokers and Freight Forwarders Association
Pet Food Institute
Plumbing Manufacturers International
Promotional Products Association International
Retail Industry Leaders Association

San Diego Customs Brokers and Forwarders Association
Truck & Engine Manufacturers Association
U.S. Dairy Export Council
U.S. Forage Export Council
Western Agricultural Processors Association
Western Growers Association
Western Plant Health Association
Western States Trucking Association

OPPOSITION

Pacific Merchant Shipping Association

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

SB 45 (Alarcón, Ch. 244, Stats. 2005) implemented the current statute regulating the fees charged and practices permitted by intermodal marine terminals and intermodal marine equipment providers.

SB 348 (Alarcón, 2004) would have implemented a regulatory scheme for the fees charged and practices permitted by intermodal marine terminals and intermodal marine equipment providers very similar to the one in SB 45 (Alarcón, Ch. 244, Stats. 2005). SB 348 was vetoed by Governor Arnold Schwarzenegger.

AB 1651 (Firebaugh, 2004) would have implemented a regulatory scheme for the fees charged and practices permitted by intermodal marine terminals and intermodal marine equipment providers very similar to the one in SB 45 (Alarcón, Ch. 244, Stats. 2005). AB 11651 died on the Assembly inactive file.

PRIOR VOTES:

Senate Transportation Committee (Ayes 15, Noes 0)
Assembly Floor (Ayes 63, Noes 1)
Assembly Transportation Committee (Ayes 14, Noes 1)
