Madison, NJ – October 16, 2019

In response to the Commission's Notice of Proposed Rule Making dated September 13, 2019, please consider the following:

After decades in the industry, I retired earlier this year. Amongst other positions and countries of employment, during my 40 years in the US, I held a number of management positions in operations, trade, sales and general management for major container carriers. – This experience includes most, if not all, aspects of detention and demurrage management, billing and collection – and the related issues and disputes raised by shippers, truckers, and the carriers for which I worked.

As recognized by the Commission, your findings in some respects raise more questions than they answer. - By way of example, is it **reasonable** that circumstances beyond anyone's control (fx weather) preventing the pick-up of a full container or the return of an empty container AFTER the expiration of the allowed free time should preclude Ocean carriers and Marine terminals from collecting demurrage and detention since the principle of incentivizing movement no longer applies? – I think not.

During the extensive research undertaken by the Commission, you determined in your Summary that the underlying premise for the Rule making is what you determine to be **unjust or unreasonable**. – I will address in my comments what I consider **just** and **reasonable**. (46 U.S.C. 41102(c))

I have seen nothing in your Findings which addresses Detention and Demurrage (D&D) in the relation to Exports and demurrage for import moves on through-B/L charged by rail carriers at inland terminals. (Why?) Therefore, my comments below relate mainly to imports. –

You have determined that "Demurrage and detention are valuable charges when applied in ways that incentivize cargo interests to move cargo promptly from ports and marine terminals". – Yet, nothing in your findings address the level of D&D charged which you may find unjust or unreasonable. – This begs the question: While charging D&D is not unreasonable in order to incentivize the rapid movement of containers, what is a **just and reasonable** level of such charges? – I would NOT advocate that the Commission mandate certain charge levels, however, it would be interesting for the public to know what you have in mind; what do you see as the **reasonable** basis for the level of D&D charges?

Free time and availability:

A major point of contention recognized by the Commission is the matter of **'free time'** and how to apply such free time. – Marine terminals would certainly be justified in thinking that demurrage free time should count from the moment a container occupies marine terminal space. A consignee and trucker would be equally justified in claiming that such free time should count ONLY from the time a container is physically available for pick-up. Your research considered the matter of appointments and whether marine terminals should be expected to have containers available, essentially, with or without notice, and how this impacts free time.

Since container marine terminals in effect are Ocean carriers' agents and deliver containers to consignees on behalf of the Ocean carriers, the above difference in thinking should be left to Marine terminals and Ocean carriers to sort out between them. - What matters here is how free time applies to consignees and truckers.

What is reasonable?

a) Marine terminals without appointment systems should be willing and able to deliver containers on-demand during marine terminal working hours.
b) Marine terminals with appointment systems should accommodate max 48/72 hours booking notice before the expiration of free time.
c) Since ours is a 24/365 business, marine terminals could include regular night and weekend gates when considering 'availability'.
d) Whichever approach any given marine terminal has or adopts, it should be **clearly published** not only by the respective marine terminals, but also by the Ocean carriers in their arrival notices. In fact, in order to help streamline the industry, the Commission could publish guidelines which elements of information should be included in the Ocean carriers' Arrival Notices.

When D&D do not (cannot) incentivize container movement:

A) **Government and other inspections** due to the nature of the cargo:

As long as there have been government inspections, there have been arguments between Customers and Ocean carriers about how and when free time applies. – Everyone involved pronounce their innocence and that they are victims of matters which they do not control.

Here, again, it is the relationship between the Ocean carriers and their customers which must be addressed. -

If one clears the fog of the arguments, it can be objectively concluded that if there were no cargo in a container, there would be no need for any inspection. Hence, the burden of cargo inspections and associated costs including D&D, must be carried by the Consignee.

Therefore, as the Commission concludes, 'demurrage' becomes a charge ONLY for the use of marine terminal space and 'detention' a charge ONLY for the use of containers. Thus, unless inspections are performed on-marine-terminal, it would be **reasonable** that marine terminal free time and demurrage are NOT considered for the time a container is off-dock. Similarly, it would be entirely **reasonable** that equipment free time and detention **do apply** for the entire time, including inspections, a container is NOT available to the Ocean carriers. (In other words, from availability and until the time the empty container is returned to the Line's designated marine terminal).

B) Weather, marine terminal closures etc

The Commission recognizes that there will be times when consignees and truckers will not be able to pick up containers due to no fault of their own – or, in case of weather, the fault of no one. – The Commission also recognizes that "…its application will vary depending on the facts of a given case...". However, by determining that "regulations that do not provide for a suspension of charges when circumstances are such that demurrage and detention are incapable of serving their (incentive principle) purpose would likely be found unreasonable", the Commission has left the door **WIDE open for disputes** between consignees and Ocean carriers.

'Weather' is everyone's problem; why should marine terminals and Ocean carriers be the only ones to bear the cost of idle containers in such case? – What if a container were available for pick-up during the

free time period, but after the expiration of free time, circumstances beyond anyone's control made the container unavailable? – Would the free time and D&D clocks stop? **THAT would clearly be unreasonable**, but your finding that D&D would no longer incentivize cargo movement during such a period would require the free time and D&D clock to stop. – In this writer's opinion, the old adage, **"Once on demurrage, always on demurrage"**, should reasonably apply.

Arrival notification:

The Finding that "… cargo interests have persuasively explained the superior merits of "push notifications" related to cargo availability …" must be clarified. - The Ocean carriers have an unchallenged responsibility to "push notify" their customers of the arrivals of their vessels. However, given the many variables associated with actual availability, including customs clearance, payment of freight and surrender of the Original B/L which are under the complete control of Consignees, it seems **reasonable** that "availability" remains a collective responsibility between Ocean carriers, Marine terminals, consignees and their truckers. Otherwise, availability notification issues become convenient avenues of excuse to hide behind when delays in pick-up occur.

Billing:

It is impossible to discuss this issue without also discussion the Ocean carriers' bills of lading. – This can be a particular issue when **NVOCCs are involved. –** Therefore, it **must be made crystal clear** also in the context of the Commission's findings that when you say "Ocean carriers would bill cargo interests directly for use of containers", the "cargo interest" is the consignee on the Ocean carrier's B/L as opposed to truckers and ultimate consignees on an NVOCC B/L.

In conclusion, let me just say, as I'm sure many others must have done it before me, that a thorough discussion and guidance from the FMC is sorely overdue. My sense is that over the years, in the extreme, Ocean carriers have leaned on their tariffs and fear of FMC fines in order to justify some invoicing – while consignees and their truckers have leaned in the opposite direction citing reasonableness when refusing to pay. – By widely employing language in your findings such as "reasonable, unreasonable, and extenuating circumstances" the FMC has sent a clear and undoubtedly welcome signal to the industry that it acknowledges the area of D&D is one where reasonable flexibility may be exercised without fear of repercussions.

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