American Association of Port Authorities
Alliance of the Ports of Canada, the Caribbean, Latin America and the United States

Seaports Deliver Prosperity

October 31, 2019

Ms. Rachel E. Dickon
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.,
Washington, D.C. 20573-0001

Re: Docket 19-05, Interpretative Rule on Demurrage and Detention Under the Shipping Act

Dear Ms. Dickon,

The American Association of Port Authorities ("AAPA") is filing these comments on the above-referenced interpretative rule. AAPA represents public port agencies throughout the Western Hemisphere, and these comments are filed on behalf of AAPA's U.S. port members, which include both landlord and operating ports.

We appreciate the fact that the Commission has spent a considerable amount of time and resources examining the issues around the collection of demurrage and detention charges. Legitimate concerns about the assessment of these charges have been raised, and we agree with many of the Federal Maritime Commission's (FMC) stated goals, including transparent, standardized language and clear, simplified, and accessible billing practices and dispute resolution processes. We are concerned, however, that the notice of proposed rulemaking (NPRM), as drafted, ignores some FMC precedents and would inappropriately dictate certain business operation standards.

AAPA requests that the Commission amend the proposal based on our comments.

Demurrage and detention charges are an important mechanism to facilitate the efficient movement of cargo through our nation's ports and serve multiple purposes. The Commission's interpretative rule relies exclusively on the "incentive principle," i.e., that detention and demurrage charges incentivize cargo movement. However, detention and demurrage are also appropriate as a means to pay for the use of assets (whether containers or terminal space).

The NPRM provides that "absent extenuating circumstances" detention and demurrage are likely to be found unreasonable unless the charges serve their purpose, and the only purpose that the Commission recognizes as appropriate is the incentive principle.

One of the main purposes of these charges is to ensure that shippers don't use marine terminals as free warehouse space. The Commission has long recognized that these charges are appropriate to compensate terminal operators for the use of terminal space. See, e.g., Free Time and Demurrage Charges – New York, 3 F.M.C. at 93, citing Practices of San Francisco Bay Area Terminals, 2 U.S.M.C. 588, aff'd., California v U.S., 320 U.S. 577 (1944). The Commission's decision to rely exclusively on the "incentive principle" in the proposed NPRM is not consistent with its existing rulings.

While AAPA recognizes that detention and demurrage charges should be used for their intended purposes, we acknowledge that fairness issues arise when a cargo owner cannot pick up cargo due to circumstances beyond their control. If the terminal operator is responsible for the container being unavailable, we agree that the Commission would be justified in providing relief. However, the proposed rule would effectively prohibit private parties from negotiating over how the risk of events **beyond either's control** (such as a weather event or actions of a third party) are to be allocated, putting all the burden completely on the terminal operator and/or carrier. The NPRM seems to provide that not extending free time is presumptively unreasonable unless there are extenuating circumstances where the BCO was actually at fault (and suggests that the burden is on the MTO to prove that the BCO was at fault).

Regarding delays caused by government inspections of cargo, the cargo owner is in the best position to prevent those delays. While carriers and terminals often extend free time in the case of government inspections, the FMC has previously found that they are not required to do so. Free Time and Demurrage Charges – New York, 3 FMC 89 (1948). We do not believe that the rationale behind that long-standing policy has changed, and we believe that the parties should have the ability to negotiate in these circumstances.

The NPRM would place new and significant responsibilities on marine terminal operators. As the National Association of Waterfront Employers (NAWE) indicates, although MTOs generally do not have a direct contractual relationship with cargo interests, MTOs would have the burden of providing the real-time information about container eligibility that the NPRM seems to expect, altering existing carrier-terminal relationships and, for some terminals, requiring significant investments in technology.

We do not support the Commission's suggestion that marine terminal operators directly bill cargo interests, with whom they have no direct contractual relationship, for the use of terminal land. The suggestion would require revamping the commercial relationships that have existed in the industry for decades. Marine terminal operators do not have contractual relationships with the numerous cargo owners that may utilize their facilities and expecting MTOs to bill them all directly would not facilitate the efficient flow of cargo.

We urge that the Commission amend the proposed interpretative rule to address the issues raised in these comments.

Sincerely,

Christopher J. Connor
President and CEO
American Association of Port Authorities