

FEDERAL MARITIME COMMISSION

46 CFR Part 545

Docket No. 19-05

Interpretive Rule on Demurrage and Detention under the Shipping Act

Bottom Line:

At its core, the objective of the Interpretive Rule is to discourage an ocean carrier or marine terminal from imposing demurrage or detention charges when delay in returning or picking up a container is not the fault of or within the control of the shipper or supply chain partner. It is difficult to imagine how such an obvious objective can be reasonably opposed by any fair-minded person, particularly since the delays are almost always caused by the actions of the carriers or marine terminals themselves.

Further, these delays and excessive expensive penalties undermine export competitiveness of US agriculture and forest products, and run contrary to current international trade policies of the President and Congress, to promote and assist the US agriculture sector. On behalf of our members, the US agriculture and forest products exporters and their export supply chain partners, the AgTC urges the Commission to adopt this Proposed Rule as published.

Note at the Outset:

The AgTC (and probably many others now rushing to complete their Comments) appreciates that the Commission granted the additional time we requested for all to submit comments. In terms of impact, offering a path to end punitive treatment of US agriculture exporters as well as all importers and exports at this sensitive time in international trade, is urgently needed. Thus, this initiative offers the potential for more benefit to the entire US commerce than any undertaken by the Commission, at least since 1998.

The AgTC appreciates the intensive outreach and commitment to understanding the complex international supply chain by Fact Finding Officer Commissioner Dye, without whom this proposed Interpretive Rule, and the relief it offers, would not be possible. The American shipping public and the full supply chain owes her a substantial debt of gratitude.

Statement of Interest: US Exporters

The Agriculture Transportation Coalition has been identified by the JOC as "the principal voice of agricultural exporters in US transportation policy." For 32 years, this has been our guide: "There is nothing we produce in agriculture and forest products here in the U.S. that can't be sourced somewhere else in the world; if we can't deliver our exports, affordably and

dependably, our overseas customers will go elsewhere. AgTC's mission is make the agriculture export supply chain affordable and dependable."

The AgTC's membership includes companies that represent virtually all agriculture products and many forest products both exported from, and imported into the United States, as well as trucking companies, warehouse and transload facilities, and freight forwarders. These products are grown, raised, processed, packaged and shipped from all regions of the US, to all markets worldwide, where they typically face competition from similar products sourced elsewhere.

Transportation constitutes a substantial component of the total landed cost of U.S. agriculture and forest products, and thus plays a critical role in determining the competitiveness of our U.S. products in foreign and domestic markets. US agriculture and forest products exporters depend on a network of properly functioning roads, bridges, rail, marine terminals, and particularly ports, in order to export their products.

Over the course of 3 years, Fact Finding Officer Commissioner Rebecca Dye interviewed, among many shippers, carriers, forwarders, NVO's, terminal operators, truckers, many AgTC members who shared many specific detailed examples of unfair demurrage and detention charges such as the above. In so doing, she gained insight into the broken 'dispute resolution' process, which is highly adversarial to shippers and truckers interests, if the carrier and terminal decide to engage at all.

AgTC pressed the Commission to deploy its CADRS staff to assist exporters, truckers and importers in disputing unfair demurrage/detention charges. AgTC members have sought and gained AgTC intervention directly with ocean carriers, in the form of waiver or mitigation of these fees. Through her investigation, Commissioner Dye was able to recognize that the carriers and terminals are frequently (usually?) unwilling to engage in timely, negotiated, fair resolution of complaints/challenges to the penalties, even when, as we frequently find, carrier representatives "on the ground" recognize how unfair these charges are to their exporter customers.

NOTE: AgTC members have provided over the past three years, confidentially, evidence of unfair demurrage and detention practices, on a confidential basis to the FMC. We intend to provide additional evidence, again on a strictly confidential basis, in this Docket.

Demurrage, Detention - Inconsistent with US Trade Policy and Shipping Act Purpose

For the Federal Maritime Commission to remain relevant, it has a responsibility to know "what's actually happening out there in the real world" of ocean shipping supply chain. In this case, how the demurrage and detention practices of the carriers and terminal operators are impacting our US agriculture and forest products exporters, particularly during this very challenging time. Are those practices, and the FMC's regulations and policies, consistent with, or are they undermining the President's trade policies vis-à-vis China and economic health of US agriculture?

US agriculture and forest products exporters are facing dramatically increased barriers to foreign markets, in the form of tariffs and non-tariff barriers, largely but not entirely the result of current trade policy disputes with China, European Union and elsewhere. These render the cost of many of our ag exports non-competitive in many of those markets. In many instances the US exporter must simply sell at a loss, in order to retain the foreign customer. In most cases their ability to

absorb such costs, has expired. In the midst of the ongoing trade disputes, the demurrage and detention penalties being imposed on our exporters and their truckers, by ocean carriers and terminal operators is adding hundreds of millions of dollars to the burdens of US agriculture. The FMC has the ability to relieve this burden, starting now by adopting the Proposed Rule.

Section 2 of the Shipping Act of 1984 (46 U.S.C. App. 1701) states, as a Purpose of the Act:

“(4) to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.”

For a handful of ocean carriers to create congestion which impede export cargo velocity, and marine terminal operators (who must grapple with the carrier container volumes) to create barriers to exports, to impose millions of dollars of penalties on US exporters, is contrary to the intent of the Shipping Act. The Act provides the Commission with the mandate to promote US exports, as stated above. It provides the tools, in the form of authority in the Act, for the Commission to determine “reasonable” practices. We urge the Commission to use this authority, as proposed in the Interpretive Rule and as mandated in Section 2 above.

Cause of Demurrage/Detention Crisis

AgTC members are grappling with massive demurrage and detention charges, with at least one of our members being assessed over \$15 million, others in the \$500,000 to \$800,000 range, and all our exporters, thousands of dollars. The Commission should always keep in mind the obvious underlying cause of the ‘late container pick up and return’: the congestion at the terminals.

That congestion and delay is caused by the carriers/terminals themselves (jamming massive ships into terminals not built for such volumes, by “box rules” that limit chassis access, and other actions described below). It is extraordinarily unfair for the Commission to allow those under its jurisdiction who cause the congestion and delay, to impose penalties on others. The exporters and truckers did not and do not cause the congestion and delay, but are suffering greatly from it. To pile on demurrage and detention charges, warrants the Commission’s attention.

Incentive or Revenue Stream? It is also clear that the penalties have now become a significant revenue source for the carriers. While there is no public statement by the carriers or their attorneys that this has become part of their business plan, it doesn’t require a public statement. In the real world, carrier sales people talk with customers – one carrier is believed to look to such ancillary charges (as detention) for 20 to 25% of total revenue. Other carriers are sufficiently honest to say that with freight rates so low, they need this revenue. It’s no secret.

Non-negotiable revenue: We believe carriers should generate their revenue from freight rates, either as published in their tariffs or as negotiated in service contracts. To generate revenue by these non-negotiated fees, ranging from \$125 to \$385 per container per day, is not sustainable for our nation’s ocean commerce, or for our US exporters. The opportunity to negotiate is a myth – the carrier/terminal is assessing these fees on the truckers – even though they have no contractual relationship with the trucker. And should the trucker question or contest the fees as unfair or inaccurate, they may be and often have been ‘locked out’ – the terminal won’t let them continue to operate. Faced with going out of business, the trucker has no choice but to pay up.

Do Carriers Really Need their containers back quickly?

The Commission also has the authority to examine the carriers' claims that they need the containers back quickly – by examining the contracts that carriers sign with champion accounts, many providing much more “free time”, than the 5 days typically required of most shippers. This is puzzling. This is not a violation of the Shipping Act, as it allows discrimination among shippers, such as in the terms offered under service contracts with larger volume shippers. However, it seems that free time limits, which in turn generate such massive penalties (typically more than the actual freight revenue for the shipment of that container), warrant careful review by the Commission. At the very least, this practice of offering larger shippers (with more containers) much longer free time, either in the contract or in practice (not billing the shipper for not timely returning the containers), undermines the carriers' arguments that they really have to have the containers back in very quickly days. If they need the containers back in 5 days, then require that of all shippers; exempting the shippers with the largest number of containers from the 5 day limit, suggests a lack of carrier commitment to rapid return of containers.

Demurrage/Detention – Carriers, Not Exporters, are Slowing Cargo and Equipment Velocity

Again, for the Federal Maritime Commission to remain relevant, it has a responsibility to understand “what’s actually happening out there in the real world” of ocean shipping supply chain. Should it do so, it will reject the defense of demurrage and detention as a means is to incentivize the shippers and truckers to move their containers more quickly through the supply chain.

In fact the carriers' argument that they need an incentive for shippers to move their cargo/containers faster, is backwards. It's almost laughable, if it weren't so painful for US exporters and importers. Thus far, no one has been able to identify an exporter who wants his/her cargo to move more slowly. On the contrary, exporters and importers, with contractual delivery deadlines and perishable condition time limits, are always pushing the carriers and the terminals to move the containers more quickly, never more so than recently as the ships have become larger, sailings less frequent and more tardy. It is the carriers which are not moving as quickly as necessary, whose business practices are slowing the process and delaying efficient container turnaround. Examples follow here:

A. Ocean Carrier– Macro-Causes of Congestion leading to slower container velocity.

Exporters chafe against the carriers' actions causing congestion and delay. [Note, these are not intended to delay and slow cargo velocity, but they do have that impact.]

- Carriers operating ships with massive volumes of containers overwhelming the terminals (perhaps the primary cause of congestion, slowed cargo and container velocity leading to demurrage and detention charges),
- Multiple carriers on large vessels causing havoc at the terminals
- carriers' “box rules” limiting the availability of containers,
- carriers' chronic schedule deviation - late arrivals and departures from the terminals,
- carriers' blank sailings causing cargo/containers to pile up
- carriers' VGM demands (which the US Coast Guard has repeatedly stated is unnecessary),

- carriers' refusal to participate in port data portals, that would facilitate efficient truck access to terminals

All of these actions complicate and slow the system, running against the interests and needs of the exporter (and importer). These carrier actions make it impossible for the exporter and trucker to turn the container in 5 days. Again, it should be obvious to the Commission that it is patently unfair for the carriers who are slowing and otherwise injuring the exporters (and truckers), to be allowed to generate for themselves massive revenue by imposing penalties on those injured exporters. The Commission has the authority under the Shipping Act, and should use it.

B. Ocean Carrier and Terminals– Specific Causes of Congestion leading to slower container velocity

The Fact-Finding Officer in Fact Finding Investigation 28 is lauded for recognizing that In many, if not most cases, failure to pick up or return a container within the allowed "free time" (usually, but not always, 5 days) is often **not the fault of, or even with the control of, the trucker, exporter, importer.**

For examples:

- 5 day clock is started when the container is still on the ship at dock or just off-loaded in a stack, inaccessible,
- 5 day clock starts when the terminal is closed,
- 5 day clock starts container is in a closed area of the terminal,
- The truck lines outside the gate, to get into the terminal, are so many hours long as to render the trucker in violation of HOS,
- The container is being held by a government agency for examination,
- No terminal gate appointment was available within the 5 days or reasonably in advance of the request
- Terminal does not provide reasonable notice to the trucker as to when the terminal will accept a container, or when trucker can come to terminal to pick up loaded container,
- terminal closed early, no notice.
- the ship and terminal do not reasonably communicate when the container can be picked up or returned,
- carrier and terminal refuse to accept empty container returns,
- carriers' "box rules" limit availability of chassis, forcing trucker to "hunt" for a container brand designated by the carrier, and cannot use other containers more conveniently located.
- Terminal refuses to participate in a port-wide data portal, which would aggregate all relevant information, so trucker/shipper can efficiently access all information necessary for efficient deployment of truck, chassis and driver, including, but not limited to:
 - location of chassis,
 - terminal gate appointment time,
 - terminal turn time, outside the gate
 - wait time,
 - location of container in terminal,
 - changes in container location and availability,

- yard closures,
- empty container return restrictions,
- labor or other actions,
- government inspections or other actions,
- etc.

Chassis.

We support adoption of this Proposed Rule as is, meaning limited to containers. However, we see no reason why, after the public and Commission become comfortable with application of this Rule, that the Commission should not request public input into whether it should apply as well to chassis. As mentioned above, “box rules” are the cause of congestion, delay and significant additional cost at many ocean terminals. There are many parallels to the container demurrage and detention problems. Some, but not all, chassis providers are acting in a manner which has created the environment leading to excess and costly demurrage and detention. They actively oppose solutions, such as interoperable chassis grey pools being proposed at and around ports. And their record in dispute resolution is equally unacceptable. We hope those chassis providers pay attention to the container demurrage and detention rule, if and when adopted, and reform their practices according.

Government Inspections

Agriculture exporters and importers and their forwarders, customs brokers, truckers have extensive experience and expertise in marine terminal inspections by CBP, FDA, USDA and other agencies. Several AgTC members currently sit on the Commercial Operations Advisory Committee of the Bureau of Customs and Border Protection, Dept. of Homeland Security. We are acutely aware of the processes and the costs of such inspections, both on terminal or a CES facilities off terminal. In all cases of such inspections, the actual cost of the inspection is borne by the shipper and it can be significant.

- inspections can include removal of some or all the contents, resulting in damage to the contents.
- As the value of the contents is at a minimum, tens of thousands of dollars, that cost is significant, and again borne by the shipper.
- Finally, the delivery is delayed beyond promised date, which often generates a significant penalty by the US importer and loss of future business, at the least.
- CBP or USDA may impose a penalty, often thousands of dollars, again borne by the shipper
- the cargo in the container can be as much as 100% of the total product which the shipper is selling that season. But for carrier, that container is only one of hundreds of thousands that carrier may owns/operates.

It is thus apparent that the cost to the shipper (importer or exporter) of a government inspection far exceeds the day(s) of lost use of that container to the carrier. For this reason, and in light of the costs already borne by the shipper, but not the carrier, in case of government ‘hold’ or inspection: no demurrage or detention should be charged for the period of the govt hold and the free time clock should be restarted from zero, upon release of the hold.

Dispute Resolution

Bullying isn't supposed to be in vogue anymore. So why does the Commission allow it here?

In fact, terminal operators and ocean carriers do not have contractual relationships with the truckers. Many truckers own one truck, are immigrants in their first job in this country, may not have command of the English. They have no way to defend themselves from being locked out – it's bullying. The carriers should impose detention and/or demurrage on the actual exporter or importer customer with whom the carrier has a contractual relationship. Even for large corporate trucking companies, lock outs, practically speaking, deny any trucker from questioning or contesting a penalty.

So, we hope that this Proposed Rule would establish a path by which the following actions by carrier or terminal would be found to be unreasonable:

- Retaliating or locking out a trucker who questions a demurrage/detention bill
- Establish a dispute resolution process that requires retention of an attorney
- Making it difficult for a layperson shipper or trucker to know how to dispute a charge
- Imposing a charge on a party (trucker) with whom the carrier has no contractual relationship
- Making it difficult for a layperson shipper or trucker to actually dispute a charge (such as requiring the exporter or trucker to provide information that the terminal or carrier already has, or should have)
- Establishing a process which is not expeditious.

We recognize many of these are subjective terms. However, the Fact Finding Officer in this Proceeding has demonstrated that the Commission has the ability, if it wishes, to become personally familiar with actual practices between the parties. It need not depend on the explanations of such practices by the terminal and carrier attorneys in Washington DC.

Conclusion

The AgTC fully supports the Proposal as published, and will work to help all Commissioners, as well as Members of Congress, understand the urgency of its adoption.

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