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BEFORE THE
FEDERAL MARITIME COMMISSION
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INTERPRETIVE RULE ON DEMURRAGE AND DETENTION UNDER THE SHIPPING ACT

COMMENTS OF DAVID E. POWELL

I am David E. Powell, Treasurer of C. H. Powell Company. C. H. Powell Company is an Ocean Transportation Intermediary licensed as both an Ocean Freight Forwarder, and a Non-Vessel-Operating Common Carrier, under license number 000176NF. C. H. Powell Company is also a licensed Customs Broker, operating under CBP license number 1125. C.H. Powell Company operates 17 offices at major USA ports. In 2018, C. H. Powell Company forwarded approximately 25,000 ocean export shipments, representing approximately 50,000 containers. In 2018, C.H. Powell Company cleared approximately 50,000 ocean import shipments for its clients, representing approximately 80,000 containers. C. H. Powell Company operates as a freight or clearance intermediary for approximately 2,000 small or intermediate sized shippers. The following comments represent C. H. Powell Company's shared experience with numerous smaller shippers not likely commenting directly on this NPRM.

C. H. Powell Company welcomes the Commission's Fact Finding Investigation, and its notice of proposed rulemaking. In comparing the most recent five year period between 2014 and 2018, with the previous five year period between 2009 and 2013, with regard to import demurrage and/or detention paid by C.H. Powell Company on behalf of its customs clearance clients, a significant increase in the instance and cost of demurrage or detention is clearly quantifiable:

	2009-2013	2014-2018
Average demurrage cost per assessed container:	$ 410.53	$ 494.15
Average demurrage cost per assessed shipment:	$ 971.75	$ 1,452.14
Percent of all containers assessed demurrage:	1.3%	2.4%

While the change in these statistics may be attributable to numerous factors, some under the shippers' control, many not, the undersigned suspects that certain carriers and privately owned terminals have contributed to the increased assessments by shortening

free time allowances, and increasing fee levels, since 2014, for reasons inconsistent with the Commission's defined reasonable "incentive principle."

A recent client experience involving several topics referenced in the NPRM is representative of the disassociation between a reasonable application of incentives to facilitate efficient cargo flow and current practices with regard to demurrage and detention. A bullet point summary of events follows:

- 1 x 40' open top container and 1 x 20' dry van containing new machinery is booked and loaded at Genoa, Italy, on 8/13/2019, destined for Jacksonville, Fl.
- Containers are booked with Mediterranean Shipping Company, and are scheduled to transship at Freeport, Bahamas on or about 8/29/2019, and arrive in Jacksonville on 9/07/2019.
- Shipment intersects with Hurricane Dorian in the Bahamas, and the containers are grounded in Freeport for almost three weeks. Re-declaration of advanced manifesting with CBP is required, and the importer's delivery schedule is challenged. All parties are subsequently highly motivated for an expedited arrival and delivery experience.
- Containers finally arrive at SSA Atlantic Terminal in Jacksonville on Friday, 9/20/2019
- MSC Line starts equipment detention free time on Monday, 9/23/2019, granting 4 days, through 9/26/2019, and assessing $ 65/20DV and $ 200/40OT after that.
- SSA Atlantic Terminal starts pier demurrage free time on Monday, 9/23/2019, granting 5 days, through 9/27/2019, and assessing $ 165/20DV and $ 215/40OT after that.
- C.H. Powell submits and secures conditional customs release of the shipment on 9/18/2019 in advance of vessel arrival.
- CBP designates the containers for intensive examination, likely due to a significant increase in risk caused by the on-ground weather delay in Freeport, as the importer is otherwise regular and well known. Containers are pulled from the terminal and transferred to a Central Examination Site on 9/25/2019, and returned to the terminal after 3:00 pm on 9/26/2019. Importer pays an additional $ 2,055.00 for examination costs on both containers.
- Despite entry submission and examination, containers are still not released by CBP in MSC's manifest system when returned to the terminal on 9/26/2019. Somewhere in the initial advanced manifesting in Italy in early August, or after adjusted declarations in Freeport, a single digit in one of the container numbers is omitted, resulting in a manifest mismatch and "customs hold". C. H. Powell spends two full business days trying to identify and correct the "hold", MSC advises on 9/27/2019 that the mismatch is caused by an inaccurate voyage number for the revised transshipment vessel. After correcting the voyage number, the mismatch persists. Eventually, a Customs officer is able to clarify that one of the container numbers is

missing a digit. Once identified, the mismatch is simply and quickly corrected. Customs release is finally secured on 9/30/2019.

- Containers are collected from the terminal on 10/01/2019, only after arranging a wire payment of $ 3,225.00 to MSC, representing $ 1,900.00 in equipment detention charges due to MSC Line, and an additional $ 1,325 in pier demurrage charges due to SSA Terminal.
- The assessed demurrage and detention were applied:
    - After a three week weather related delay in the cargo arrival
    - After free time on 9/23 and 9/24 was utilized for a CBP exam hold
    - After free time was applied to the containers while they were at a separate examination site on 9/25 and 9/26
    - On 9/28 and 9/29 while the terminal was closed for the weekend.
    - On 9/27 and 9/30, while the carrier and the terminal could not identify let alone address the manifest hold.
    - With separate charges by the terminal and the carrier, for the same containers, under different free time schedules
    - At a combined daily rate of $ 230 for the 20' container and $ 415 for the 40' OT container.
    - Representing 60% of the total freight charges assessed by MSC for the entire 37 day journey port-to-port, to cover the 1.5 business days the containers remained on the pier beyond the free time allowance, all of which was caused by government hold and the carrier's inability to release the shipment.

My company and the shippers it represents appreciate the value of demurrage and detention when they are applied to influence land and/or equipment usage within the control of the shipper. However, I find it hard to identify any valid incentive principle in the above application, which is only unusual in its breadth of inequities. Company billing records indicate that almost twice as many containers are caught up in the rigged incentive game in recent years than previously, at the same time that global supply chains are otherwise increasingly efficient, organized, and monitored.

I respectfully request that the Commission consider the following specific recommendations when finalizing its interpretive rule.

Demurrage and detention rates assessed by carriers and terminals should be validated against average cost factors, for land and equipment, based upon overall cargo flow. Average cost factors likely provide sufficient incentive to keep cargo moving. When demurrage and detention charges equate to 500% or more of the average cost for the land and equipment, Carriers' and Terminals' self-interest actually work counter to the

intended benefit of speedier flow, as well as the application of reasonable consideration for mitigation.

Demurrage and detention should only be applied for time during which containers are physically and systematically available. There should be no demurrage applied on weekends or holidays. Carriers can easily factor in the carrying cost for these inactive days into the rate, when the rate is based upon actual carrying cost, rather than profit opportunity. Carriers can also factor in to their average rates the dead time incurred for government holds, and remove such uncontrollable status from the moving clock.

Cargo availability and free time allowance should only be quantified in full day units. A container must be available at the start of the business day for that day to be on the clock. This is especially important for inland rail depots, where the standard allowance is only two working days, and container availability can happen at any time on short notice. Once into a demurrage situation, one minute into the next day incurs a full day's charge. A consistent rounding should happen at the beginning of the schedule, in favor of the shipper.

Historically, ocean terminals granted 5 working days of free time, which correlated well with the standard weekly calendar, and employment schedules for truckers, warehouses, importers, and exporters. Recently, some terminals have reduced their free time to 4, or even 3 days, which exacerbates the impact of weekends on demurrage risk, and scheduling challenges. Vessels themselves are often on fixed-day weekly schedules, but are subject to arrival/departure volatility, moving the targets for shippers and planners, who are generally managing to a weekly calendar. A "reasonable" opportunity should not be equated with an "optimal" opportunity. By giving shippers a little leeway in their planning, they can better work around pier congestion, road traffic, or variable weather. They can also optimize equipment return efforts. The Commission should consider defining a minimum amount of reasonable free time equating to five business days at ocean terminals, and three business days at rail terminals. Carriers concerned that shippers might be insufficiently motivated to improve upon a longer reasonable performance, can influence speed by means of positive incentives, for quicker shippers, rather than negative incentives for complex shippers.

For outbound moves, free time for equipment usage should be defined and fixed at time of booking confirmation. Currently, carriers have been known to release equipment for export loading based upon an earliest delivery date, and then, due to their own schedule delays, they defer the earliest delivery date, without extending the equipment free time. Shippers are left with an option of delivering loaded containers too early and incurring demurrage, or deferring their delivery, thus incurring equipment detention.

Carriers currently support shipment availability status as a “courtesy”, rather than an obligation. Some carriers often rely upon this declared limitation of responsibility to not only excuse their own errors, but also charge extra for the result of their errors. Carriers should be required to “push” container status updates to not only the parties identified on the carriage contract, but also to other interested parties, provided the interested parties “sign up” for such proactive notification. The technology is available and currently applied, and expected, in other sectors, such as passenger air transport, package delivery, and banking. A broad definition of “availability” and “status of availability” should be adopted, as referenced in the NPRM.

Carriers have traditionally exercised the right of collection for validly applied charges prior to cargo release. The undersigned believes it is still appropriate for carriers to require payment of demurrage and detention charges in advance of cargo release. However, additional methods for instant settlement should be encouraged, if not required. Under current conditions, even with electronic “guarantee” systems, there is a consistent one-day lag between release/availability resolution, and targeted pickup date, to allow for demurrage payment and recognition. This extra day is often costing hundreds of dollars per container. Carriers have to make means available by which demurrage charges can be immediately identified, documented, and settled. If unwilling or unable, an additional grace day should be granted after payment, for cargo pickup.

Current attempts by shippers to seek mitigation or challenges to assessed demurrage often have to go through sales organizations, with commercial considerations driving the process, rather than any inequity or factual inaccuracy. In fact, carriers have in the past declined to offer mitigation, hiding behind the veil of FMC regulation, and the necessity to apply all tariffed charges without exception. In some of the most egregious applications of demurrage for carriers’ own errors, C. H. Powell Company has had to rely in the past on compensating discounts on future shipments, properly filed, rather than refunds of prepaid demurrage paid under duress. C. H. Powell Company strongly supports the existence of a transparent, objective, and prompt dispute resolution process, including the possibility of a refund, as a condition of reasonableness.

Thank you for considering my views.

Submitted on October 31, 2019,

David E. Powell

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